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DIVIDED OWNERSHIP IN LEGISLATION AND LEGAL PRACTICE OF THE DUCHY OF WARSAW AND THE CONGRESS POLAND

Abstract

The article concerns the history of divided property in the Duchy of Warsaw and then in the Congress Kingdom of Poland until the agrarian reforms of the 1860s. An essential feature of divided (feudal) ownership was the division of ownership attributes between the superior owner (senior) and the lower owner (vassal, peasant).

This text describes the most important legal acts regulating divided property during the period under discussion, the circumstances of their promulgation, and the legislative process. Drawing on archival sources, it discusses selected issues related to the interpretation of these legal acts. One of the main theses of the work is that, contrary to views expressed in the literature, the introduction of the Napoleonic Code to the Duchy of Warsaw did not mean the abolition of divided property in rural areas.

KEYWORDS

real rights, divided property, Duchy of Warsaw, Congress Poland

SŁOWA KLUCZOWE

prawa rzeczowe, majątek podzielony, Księstwo Warszawskie, Królestwo Polskie

A crucial feature of feudal ownership was the division of ownership attributes between the superior owner (senior) and the lower owner (vassal, peasant). In the case of the relationship between the landlord and the peasants who held lower property, this usually meant that the peasant physically owned the property (farmstead and field), while the attribute of using the property and drawing benefits from it was divided in such a way that the peasant harvested the crops but had to share them with the lord through the payment of a feudal rent (labor, cash rent, or payment in kind). At the same time, both the lord's and the peasant's rights were permanent and effective against third parties. Both were hereditary and essentially transferable.[1]

Moreover, lower owners were obliged to purchase alcoholic beverages only from the superior owner, which was often a source of significant income (*propination right*[2]). There was also a monopoly requiring the exclusive use of the manor mill.[3] The lower owner often also had certain obligations related to the transfer of their rights to the property (sale, donation, inheritance). The most typical obligations included obtaining the superior owner's prior consent for such a transaction (*consensus*) and paying a special fee (*laudemium*). It is worth noting that restrictions on the division of real estate belonging to the lower owner were common.

Various types of divided ownership existed in the Polish-Lithuanian Commonwealth. Knights sometimes received land grants from monarchs under principles that could be described as lower ownership (emphyteusis, fiefs). Ownership of plots of land in towns also often exhibited characteristics of lower ownership. *Dominium utile* was also enjoyed by various categories of the peasant population (e.g., *Olendrzy*, *sołtysi*, *wybrańcy*). The nature of peasants' land rights in the Old Polish period is vastly complex, and it is difficult to generalize in this regard to the entire peasantry.

*

In 1807, Napoleon created the Duchy of Warsaw out of most of the Prussian partition. Prussian law (especially criminal and administrative) continued to be

[1] Soviet civil scientist Anatoliĭ V Venediktov believes that in order to speak of lower ownership, the lower owner must have a certain minimum of economic independence; АВ Венедиктов, *Государственная социалистическая собственность, Москва* 1948, 207–223.

[2] Piotr Burzyński, *Prawo polskie prywatne,* vol II (Kraków 1871) 407ff.

[3] Ibid 420ff.

applied to some extent in the Duchy of Warsaw, but the Napoleonic Code was to be the primary instrument regulating civil law.

This code had a distinctly capitalist and anti-feudal character. It did not regulate feudal property at all.[4] The definition of ownership in Article 544 of the Code is purely unitary. Divided ownership was contrary to the *numerus clausus* principle of property rights adopted by the Code. The Code did not provide a legal basis for establishing new legal relationships of this type.[5]

The provisions introducing the code in the Duchy of Warsaw did not mean the extinction of existing property rights, even those unknown to the code.[6] In France, the status of property rights unknown to the code (but established before the revolution) sparked heated debate. According to the overwhelming majority of authors, it was impossible to establish new property rights which were not regulated in the code (*numerus clausus* of property rights). It should be remembered that feudal obligations were essentially abolished in France in August 1789. Nevertheless, the question of which peasant obligations were feudal in nature and subject to abolition, and which were to be maintained under the new legal order, was often unclear.[7]

Article 530 of the Napoleonic Code stated:

> Every annuity granted in perpetuity as the price of the sale of immoveable property, or as the condition of ceding an immoveable fund by free or chargeable title, is in its nature redeemable.

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[4] Jan K Wołowski, *Kurs kodexu cywilnego,* vol II (Warszawa 1868) 97; Piotr Kapuściński (ed), *Jurysprudencja Senatu z lat dwudziestu sześciu (1842–1867)* (Warszawa 1869) 445.

[5] Roman Wierzchlejski, 'Zasady prawa cywilnego w Królestwie Polskiem. Napisał prof. Antoni Okolski' (1886) 37 Gazeta Sądowa Warszawska 590.

[6] Dorota Wiśniewska, *Własność prefabrykancka w Łodzi w latach 1820–1866* (Łódź 2019) 50; Henryk Konic, *Prawo rzeczowe. Wykład ustaw obowiązujących w b. Królestwie Kongresowem z uwzględnieniem przepisów innych dzielnic oraz Kodeksu Szwajcarskiego* (Warszawa 1927) 32.

[7] Murray Raff, Anna Taitslin, 'A Comparative Perspective on the Concept of Ownership in Russian Law: From the Svod Zakonov to the 1994 Civil Code' 41 Review of Central and East European Law 271–280; Paul Ourliac, Jehan de Malafosse, *Histoire du Droit privé*: *vol. 2.* (Paris: Les Biens 1971) 168–179; Jean Joseph Delsol, *Explication élémentaire du Code Napoléon, mise en rapport avec la doctrine et la jurisprudence*, vol 1 (Paris 1867) 417–418; Edward Drozd, *'Numerus clausus' praw rzeczowych*, in Stanisław Sołtysiński (ed) *Problemy kodyfikacji prawa cywilnego (studia i rozprawy). Księga pamiątkowa ku czci profesora Zbigniewa Radwańskiego* (Poznań 1990) 257–269; Magdalena Ossowska, 'The numerus clausus issue in property law – European private law and the Polish perspective' (2019) 82 Studia Iuridica 217; *Powody do projektu tytułu III. księgi II. Kodexu Cywilnego Królestwa Polskiego : o własności (Franciszek Grabowski)*, sign. BUW 4.15.1.9, 78; Józef Mazurkiewicz, Władysław Ćwik, 'Własność w miastach prywatnych Lubelszczyzny doby Księstwa Warszawskiego i Królestwa Kongresowego (1809–1866)' (1957) 1 Annales UMCS 3; Kazimierz Mejer *O wieczystej dzierżawie* (Warszawa 1873) 72.

> It is nevertheless allowed to the creditor to regulate the provisions and conditions of redemption.
>
> It is also permitted for him to stipulate that such annuity shall not be redeemed until after a certain term, which shall in no case exceed thirty years; every stipulation to the contrary is void.[8]

Taking into account that the Napoleonic Code defined ownership exclusively in a capitalist way (omitting divided ownership), one must come to the conclusion that the previous superior owners were treated at most as persons entitled to rent, while the pre-revolutionary lower owners generally became owners in the new capitalist sense.[9]

Nevertheless, the interpretation of the discussed provisions in the Duchy of Warsaw went in a fundamentally different direction, although initially it was not obvious how events would develop.[10] After some controversy within the Duchy's government, the proposal of Feliks Łubieński, the Minister of Justice, who was responsible for introducing the Napoleonic Code in Polish lands, prevailed.

Łubieński's project was signed by the monarch and published in the Journal of Laws on 21 December 1807.[11] It became known as the December Decree. On the one hand, the decree confirmed the abolition of serfdom (*poddaństwo*) stipulated in the constitution, declaring that every villager could leave their current place of residence and move to any new location within the Duchy of Warsaw. On the other hand, it significantly worsened the legal status of all peasants who did not have contracts. The concluded contracts were to remain in force. However, peasants who did not have contracts (on both private and national estates) could be evicted from their land after one year by their heirs (lessees of national estates).[12] They

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[8] *The Code Napoleon or the French Civil Code. Literally Translated from the Original and Official Edition Published at Paris in 1804* (London 1827).

[9] Delsol, *Explication élémentaire du Code Napoléon, mise en rapport avec la doctrine et la jurisprudence,* vol 1 (Paris 1867) 408–412; Mazurkiewicz and Ćwik estimate that divided ownership was not common in the countryside (n 7); Until 1828, 24.5% of the villages on government lands were fully rented (Zbigniew Stankiewicz, *Reformy czynszowe dóbr skarbowych w Królestwie Polskim* (Łódź 1968) 40–42); In the opinion of the Second Legislative Deputation: 'In our country, a significantly larger proportion of divided property is found in villages, where individual rural estates, mills, etc., are granted by emphiteutic law or by perpetual rent' (95). Therefore, the members of the deputation did not recognize majority of peasants as lower owners (*Powody do projektu tytułu III. księgi II. Kodexu Cywilnego Królestwa Polskiego: o własności*, sign. BUW: 4.15.1.9).

[10] S. Markiewicz, 'Uwagi nad własnością podzieloną' (1866) Ekonomista 127.

[11] *Dziennik Praw [Księstwa Warszawskiego]*, vol 1, no 1, 10–12.

[12] Tadeusz Mencel believes that the decree did not apply to government-owned land ('Zniesienie poddaństwa w Księstwie Warszawskim na tle porównawczym' (1983) 13 Acta Universitatis Lodziensis. Folia Historica 29).

were no longer protected by the prohibitions on ousting or transferring land from better to worse, which were present in Prussian law.[13]

At the same time, the judicial reforms introduced by Łubieński (adopting the French systems) meant that all the disputes between peasants and manors were to be resolved by State courts (Courts of the Peace and Civil Tribunals of first instance). The new judicial systems meant the abolition of court servitude. Nevertheless, it must be remembered that in practice, in the Duchy of Warsaw, village owners usually became mayors of communes. This entailed some judicial powers (exercised, however, in the name of the King, not the landlord), namely, mayors adjudicated, among others, the most minor offenses (misdemeanors). The new judicial institutions involved the abolition of patrimonial jurisdiction.

On 31 January 1810, the King of Saxony and Duke of Warsaw, Frederick Augustus, issued a decree on the perpetual lease of smaller national estates.[14] Referring to Article 1712 of the CC, one could argue that the issuance of this decree did not violate the provisions of the Napoleonic Code. However, given the fact that the decree created new property rights, in my opinion, such a thesis does not stand up to criticism.

The decree defined lower ownership as *Erbpacht*. Real estate was to be leased out by auction (§ 2). The decree specified the rules for calculating rent (*canon*) (§ 4). The amount of the rent was independent of the auction. Nevertheless, the redemption fee was determined by auction (§ 7). Maintaining the property in an unsuitable condition and arrears in paying the rent installments could result in sequestration and eviction of the perpetual lessee (§ 14). Division of real estate into lots was possible only with the government's consent. Perpetual leasehold property could be sold without the consent of the administrative authorities; however, they had the right of preemption (§ 15). Upon each sale of real estate or change of ownership due to inheritance, the government was entitled to a *laudemium* (§ 16–17).

In the Duchy of Warsaw, broader reforms of civil law were not possible due to Napoleon's attitude.[15] The situation changed after most of the Duchy's lands fell under Russian influence and the Congress Kingdom was established. The need for a broad reform of civil and criminal law, including property law, was widely recognized. According to the Constitution of the Kingdom, changes in civil law required the consent of the Sejm (Article 90). The Kingdom authorities appointed

[13] Marcin Konarski, 'Legal Reforms of Agrarian Relations in the Duchy of Warsaw between 1807 and 1809' (2022) 31(1) Studia Iuridica Lublinensia.

[14] *Dziennik Praw [Księstwa Warszawskiego]*, vol II (16), 131–142.

[15] *Correspondance de Napoléon Ier,* vol 16 (Paris 1858–1870) 161.

subsequent commissions to prepare projects, and their work usually intensified before subsequent sessions of the Parliament (in the constitutional period, the Sejm met 4 times: 1818, 1820, 1825 and 1830 (V–VI) – the insurrectionary Sejm (1830–1831) should be considered separately). This work also covered property law – including issues related to divided property.

During the formation of the Congress Kingdom, the Civil Reform Committee played a significant role. It was established by Alexander I on 19 May 1814.[16] On 20 November 1814, at the meeting of the Committee, Antoni Bieńkowski presented a plan for a new code. Bieńkowski planned to regulate complete and incomplete ownership separately.[17] This work probably ended at the initial conceptual stage.

On 4 October 1817, in connection with the planned convening of the Sejm, the Viceroy of the Kingdom, Józef Zajączek, appointed the Legislative Commission. The Legislative Committee consisted of three deputies: 1) for changes in certain provisions of the Civil Code, 2) for the development of court procedure, and 3) for the development of the Penal Code.[18]

The most important bills prepared by the Legislative Commission deputies included the Mortgage Act, the Penal Code, and the Marriage Law. These bills were submitted by Alexander I to the Sejm of 1818 (March–April). The Marriage Law project was rejected by the Chamber of Deputies (*Izba Poselska*). However, the Mortgage Act and the Penal Code were passed.

Reforming the institution of mortgage, which is a part of property law, was one of the most pressing issues at the dawn of the Congress Kingdom. The Napoleonic Code, still considered as one of the greatest legislative achievements in history, regulated the institution of mortgage in a way that left much to be desired. Numerous important pieces of information regarding real estate did not have to be entered in mortgage registers, and worse still, mortgage entries were not perpetual. After 10 years, they had to be renewed; otherwise, they expired. These solutions were inferior to the principles of the Prussian Mortgage Ordinance of 1783, well-known in Poland (as they were also in force in the Prussian parti-

[16] Michał Gałędek, Anna Klimaszewska, Piotr Pomianowski, 'Prace Komitetu Cywilnego Reformy nad przygotowaniem narodowej kodyfikacji prawa cywilnego i procedury cywilnej w przededniu utworzenia Królestwa Polskiego (1814–1815) : edycja źródłowa'. Cz. 1 (2019) 12(2) Krakowskie Studia z Historii Państwa i Prawa 239–275.

[17] Gałędek, Klimaszewska, Pomianowski, 'Plan kodeksu cywilnego i projekt utworzenia komisji kodyfikacyjnej w pracach Komitetu Cywilnego Reformy (1814–1815)'. Edycja źródłowa (2020) 13(3) Krakowskie Studia z Historii Państwa i Prawa, 2020 345–387; Similarly, another version of the plan presented by Bieńkowski in 1819. *Plan do projektu kodexu cywilnego Królestwa Polskiego*, AGAD, *[Pierwsza] Rada Stanu Królestwa Polskiego,* vol 193, 13ff.

[18] Anna Zarzycka, 'Próby zmian prawa rzeczowego z Kodeksu Napoleona w Królestwie Polskim w latach 1815–1818' (2008) 2 Krakowskie Studia z Historii Państwa i Prawa.

tion), and even to Polish pre-partition practice.[19] Thus, already at the first Sejm of the Congress Kingdom, in place of Title XVIII, Book III of the Napoleonic Code, a Polish mortgage law was adopted, largely modeled on the Prussian law – clearly closer to the Polish tradition than the French solutions. From that time on, separate mortgage registers were established for individual landed estates. The most important element of each register is the mortgage register, consisting of four sections: 1) description of the property, 2) owner details, 3) restrictions on ownership rights, and 4) mortgage debts. The principles of perpetuity, openness, particularity, and public credibility of mortgage registers were adopted. Modern mortgage law enabled the widespread use of credit, which was crucial to the economic development of the Kingdom.

The Polish mortgage law of 1818 applied to landed and urban estates – but only those located in capitals of voivodeships (Article 162). The limitation in establishing mortgage registers for landed properties (and municipal properties in capitals of voivodeships) was justified primarily by the costs.[20]

Under Article 52 of the Polish mortgage law of 1818, only privately owned immovable property could have mortgage registers. This provision was not always observed. There were instances of mortgage registers being established for government-owned property.

The issue was negatively determined (at least to some extent) by the General Assembly of the Council of State of the Kingdom of Poland in its ruling of 21 December 1821, which ruled that mortgage registers could only be established for private property. In the factual circumstances that formed the basis for the aforementioned ruling, a private individual, the lower owner of a large acreage (*wójtostwo* and a former monastery farm in Tyniec near Kalisz), over which the Kingdom Treasury was the superior owner, sought to open a mortgage register for this property. The Mortgage Commission of the Kalisz Voivodeship complied with these expectations, which was met with opposition from the Government Commission for Revenue and Treasury (*Komisja Rządowa Przychodów i Skarbu*). The General Assembly of the Council of State agreed with the latter's position.[21]

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[19] French law was not fully observed when maintaining land and mortgage registers in the Duchy of Warsaw. See Władysław Sobociński, 'Studia z dziejów miast Królestwa Polskiego w XIX w. (1866-1869)', in Jan Skarbek and Jan Ziółek (eds), *Kościół − Państwo − Niepodległość* (Lublin 1980) 299.

[20] AGAD, *[Pierwsza] Rada Stanu Królestwa Polskiego*, vol 469, protocol of 22 April 1825; See also Mścisław Godlewski (ed), *Zbiór prac przygotowawczych do ustaw hypotecznych w Królestwie Polskiém obowiązujących oraz tekst tychże ustaw z pierwotną ich redakcyą i dyskusyami zestawiony: na podstawie źródeł urzędowych* (Warszawa 1876) 300−301.

[21] State Archives in Kalisz, *Księgi i akta hipoteczne sądów w Kaliszu* (11/1201/0), vol 3183, 60ff.

The question of whether a mortgage register can be established for a lower property has been controversial.[22] One of the prominent Polish lawyers of the time, August Heylman, believed that under the Polish mortgage law of 1818, mortgage registers could only be established for properties whose owners were not obligated to pay rent – thus, only for properties that were fully owned. Real estate properties that were lower property could not have separate mortgage registers.[23]

The Polish mortgage law of 1818 recognized lower property as a limitation of ownership rights. It rejected the concept of divided ownership as such and recognized the superior owner as the full owner, while simultaneously recognizing the lower owner as a person entitled to a very broad, limited property right. In mortgage registers, annotations regarding the rights of lower owners were made in Section III (limitations of ownership rights). During research at the State Archives in Kalisz, while reviewing 19th-century mortgage registers, I found a significant number of such references. For example, in the mortgage register concerning the Iwanowice estate, Section III, under Item 2, we find the following annotation:

> the right of perpetual lease of twenty-one Chełmno *włókas* of land in these estates under the nomenclature Joanka is granted to the colonists under the obligations of the notarial agreement concluded on 2 January 1809, between Daniel Wężyk and the colonists covered by it, which was recorded here as a result of the granting of a guardianship representative for minor owners of the estates in the protocol of the new regulation of 21 October 1820.[24]

When establishing mortgage registers for individual landed estates, it was often omitted to enter information on lower owners into the mortgage registers, which could lead to the extinction of the rights of lower owners after the sale of the estates (Articles 19, 31, 43, 45 of the Polish mortgage law of 1818).[25]

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[22] AGAD, *[Pierwsza] Rada Stanu Królestwa Polskiego*, vol 469, protocol of 22 April 1825; Survey queries suggest that the district mortgage operated under the same principles as before the reform of 1825 (i.e., under the principles from the times of the Duchy of Warsaw). This follows from the beginning of the instruction issued by the Government Commission of Justice on 22 December 1825, under No 15,054. It was published by Walenty Szepietowski (*Zbiór praw, urządzeń i instrukcji hipotecznych w Królestwie Polskiem*, Suwałki 1840); State Archives in Lublin – Radzyń Podlaski Branch: *Konserwator Hipoteki Powiatu Bialskiego*, (38/539/0); State Archives in Lublin, *Księgi konserwatora Hipotek Powiatu Krasnostawskiego*, vol 4.

[23] August Heylman, *Rozbiór wykazu hipotecznego* (Warszawa 1858) 141; Heylman, *O stosunku hipoteki gubernialnej do okręgowej* Biblioteka Warszawska; *Instrukcja dla władz sądowych i konserwatorów hipotek z 31 sierpnia 1809 r.* (sign. BUW 4.18.1.311); Sobociński, *Historia ustroju i prawa Księstwa Warszawskiego* (Toruń 1964) 256; Jan Wąsicki, *Ziemie polskie pod zaborem pruskim: Prusy Południowe 1793−1806 : studium historycznoprawne* (Wrocław 1957) 307.

[24] State Archives in Kalisz, *Księgi i akta hipoteczne sądów w Kaliszu* (11/1201/0), vol 2475. See also State Archives in Warszawa, *Hipoteka Warszawska*, vol 442 (section III, entry 11, 14).

[25] Mejer, *O wieczystej dzierżawie* (Warszawa 1873) 82; Włodzimierz Wójcikiewicz, *Prawo hipoteczne Królestwa Polskiego* (Wrocław 1967) 99.

The introduction of mortgage law, following the enactment of the Napoleonic Code and the December Decree, was the next stage in the transformation of ownership relations in the Polish countryside – a shift away from feudal rules and towards capitalism. As with the December Decree, this generally meant making superior ownership more like full ownership and weakening the legal position of lower owners (thus, this process proceeded in the opposite direction from that in France or Prussia).

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After the conclusion of the 1818 spring Sejm session, legislative work naturally had to continue. On 20 October 1818, Viceroy Józef Zajączek appointed three editors of future codes:

- Antoni Bieńkowski (civil code)
- Franciszek Ksawery Potocki (criminal procedure)
- Jan Nepomucen Wolicki (civil procedure)[26]

In 1819, Bieńkowski presented another plan for the Civil Code – similar to the one from 1814. Here, a distinction was made between complete and incomplete ownership too.[27] All three editors fulfilled their mandate by preparing appropriate drafts. However, Bieńkowski's draft of civil law reform was not submitted to the Sejm at all. Drafts for both procedures were submitted to the Sejm of 1820, but they were not passed. Only relatively detailed laws were passed, not touching on the issue of divided ownership.

After the failure of the Sejm of 1820, by the appeal of the Minister-Secretary of State, the First Legislative Deputation was established, which prepared a draft of the first book of the Polish Civil Code (to replace the first book of the Napoleonic Code).

The main results of the deputation's work were the adoption by the Sejm of 1825 of Book I of the Civil Code, a new mortgage law, and an act repealing Article 530 of the Napoleonic Code. From the perspective of the subject of this study, the most significant was the act modifying Article 530 of the Code of Napoleon in 1825, which permitted the redemption of rents.[28]

The law was likely motivated by the fear that lower owners would purchase rents, thus depriving the superior owners (the landed gentry) of income from

[26] Hipolit Grynwaser, *Pisma* (Wrocław 1951) vol I, 118.
[27] *Plan do projektu kodexu cywilnego Królestwa Polskiego*, AGAD, *[Pierwsza] Rada Stanu Królestwa Polskiego*, vol 193, 13ff.
[28] *Dziennik Praw [Królestwa Polskiego]*, vol IX, 352.

rents and from *propination*. According to the official justification, restricting the application of Article 530 CC was intended to contribute to the popularization of perpetual leases (the landed gentry were said to be afraid of entering into such contracts due to the fear that perpetual leaseholders would invoke Article 530 CC).[29] This provision, however, was not often applied in practice. According to some historians, the minister for Revenue and Treasury, Franciszek Ksawery Drucki-Lubecki, who planned to sell some crown lands, feared that the continued existence of Article 530 CC could negatively impact interest in auctions.[30]

Despite some resistance and arguments that it was not in the interest of economic development to perpetuate feudal institutions, but rather to make farmers owners of the land they cultivate, in this case, the interests of the landed gentry prevailed (and this was understood rather short-sightedly). Nevertheless, it should be noted that the bill passed the Chamber of Deputies with a narrow majority.[31]

In 1825, the principles of mortgage law were significantly modified.[32] In the context of our discussion, it is particularly important that it became possible to establish mortgage files (simplified mortgage registers) for smaller properties, which were often subject to lower ownership. Previously, such properties did not have separate mortgage files and the entries concerning them were placed in the collective books for individual districts or in the mortgage books of individual estates.[33]

The costs and the level of legal awareness of the population were the reasons why the establishment of mortgage files under the so-called district mortgage was not very popular before agrarian reforms.[34]

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[29] Jan J Litauer, *Własność podzielona w oświetleniu źródeł urzędowych polskich* (Warszawa 1916) 395.

[30] Zofia Kirkor-Kiedroniowa, *Włościanie ich sprawa w dobie organizacyjnej i konstytucyjnej Królestwa Polskiego* (Kraków 1912) 348–349; Zbigniew Filipiak, *Prawo własności nieruchomości w działalności legislacyjnej Księstwa Warszawskiego i Królestwa Kongresowego (1807–1830)* (Toruń 2020) 406–407.

[31] Wiśniewska, 'Uwagi nad problemami inkulturacji Kodeksu Napoleona w Królestwie Polskim – wątpliwości na tle art. 530' (2019) 3948 Acta Universitatis Wratislaviensis 97–108; A. Zarzycka, 'Próby zmian prawa rzeczowego z Kodeksu Napoleona w Królestwie Polskim w latach 1815–1830' (PhD thesis: Jagiellonian University Archivess) 303–305; Filipiak, ibid 405ff; Ryszard Przelaskowski, *Sejm warszawski roku 1825* (Warszawa 1829) 127ff; Stanisław Barzykowski, *Historia powstania listopadowego*, vol I (Poznań 1883) 120; Kirkor-Kiedroniowa, ibid 348; Fryderyk Skarbek, *Dzieje Polski*, vol II (Poznań 1877) 193–194.

[32] 'Prawo o Przywileiach i Hypotekach', 9 Dziennik Praw [Królestwa Polskiego].

[33] State Archives in Lublin, *Księgi konserwatora Hipotek Powiatu Krasnostawskiego*, vol 4, deed no 3, 12, 18, 21, 25, 29, 31, 35, 36, 38, 39, 40, 41, 42, 43.

[34] See *Wstęp do inwentarza zespołu*: *AP w Zamościu, Akta hipoteczne Ordynacji Zamojskiej i dóbr wydzielonych z Ordynacji*. Jerzy Szumski, *Akta hipoteczne i notarialne do 1939 r. z terenu*

While in the provincial (voivodeship) mortgage registers, the information on the divided nature of ownership can be found primarily in sections III of the mortgage registers (these registers were established for estates belonging to superior owners), in the district mortgage registers, this type of information can be found both in sections II and III.[35] The district mortgage (*hipoteka powiatowa*) register in the period before the agrarian reforms mostly concerned real estate belonging to lower owners.

During my research at the State Archives in Kalisz, I reviewed 7 sets of mortgage records relating to the village of Dobrzec Wielki.[36] In each case, Section II contained the phrase: 'As for buildings, by right of ownership, and as for land, by right of perpetual lease' or a similar one which clearly indicates the lower nature of ownership. The entries in Section III also had similar content in each case. Each time, the article mentions rent, *laudemium* and *propination*, and the superior owner's rights regarding hunting.[37] In one case, there is also a mention of fishing.[38]

Among smaller rural estates, mills require separate consideration, as they were relatively often subject to mortgages. The Kalisz Archives include a collection of mortgage records relating to a mill and approximately half a *łan* of land.[39] In Section II, we find the typical formula: 'as to buildings, by right of ownership, and as to land, by right of perpetual lease'. In Section III, in addition to provisions concerning rent, *laudemium*, and the obligation to pay church dues, we find the following provisions: '3. The owner is obligated to supervise that no strangers catch fish or shoot wild birds in the pond without the Demesne's knowledge. 4. The owner is obligated to maintain the mill's repairs and maintenance at his own expense, and is only to contribute to the repair of the Demesne's dike. 5. The owner is obligated to *Dominii Directi* (for the Manor Distillery) to grind 20 pieces and 40 drills of grain annually for the larder, without any measure or monetary compensation'.[40]

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województwa łomżyńskiego, 104; Tadeusz Mencel, *Chłopska własność i posiadanie ziemi przed uwłaszczeniem w Królestwie Polskim*, RDSG, vol 48, 1987, 58; State Archives in Lublin – Chełm Branch, Akta notariusza Aleksandra Dąbrowskiego w Chełmie (36/120/0): 1821 , deed no 241.

[35] See Mazurkiewicz, Ćwik (n 9) 56.

[36] *Dobrzec Mały*, *D[obrzec] Wielki* in: *Słownik Geograficzny Królestwa Polskiego*, vol II (Warszawa 1881).

[37] State Archives in Kalisz, *Księgi i akta hipoteczne sądów w Kaliszu*, sign.: 84, 94, 101, 105, 114, 239, 403.

[38] Ibid, sign. 105.

[39] See Agnieszka Galczak-Froch, *Problemy z usystematyzowaniem wewnętrznego rozwarstwienia chłopstwa* (2013) 18 Krakowskie Studia Małopolskie.

[40] State Archives in Kalisz, *Księgi i akta hipoteczne sądów w Kaliszu*, sign. 1635.

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On the last day of the session of the third Sejm of the Kingdom of Poland (13 June 1825), Alexander I established another (second) Legislative Deputation. Within 4 years, the Second Legislative Deputation prepared a draft of Book II of the Civil Code, which, although largely referring to Book II of the Napoleonic Code, differed significantly from the original.[41] In the context of this study, Title III of the project deserves special attention, as it includes, among others, provisions on divided ownership (Part III).[42]

The essence of divided ownership is defined in Article 54 of the draft:

> When one person has a part of the right to dispose of the substance of a thing, and another person has a part of the same right and the exclusive right to use it, ownership is divided for that time, and both owners, both the substantial owner and the lower owner, are each entitled to dispose of and use their incomplete property, provided that they do not infringe upon each other's rights. The relations between them, unless regulated by contracts, third-party decrees, or by law regarding specific types of divided ownership, are subject to the following rules.[43]

This definition was clearly inspired by the content of § 357 ABGB.[44] Whether a given right is a form of divided ownership was to be determined not by its name but by its content.[45] The project also included provisions concerning, among other matters, the so-called *iura bannaria*: *ius patronatus*, *propination* rights, mill monopoly, and hunting rights. It was proposed to adopt a presumption that all these rights belonged to the superior owner (Article 57). The limits within which the lower owner could transform the property were defined (Article 58). The lower owner was obliged to maintain the property in a non-deteriorated condition (Article 59) and to pay public charges (Article 60).

Article 61 of the draft prohibited unilateral changes to rents and other performances. This regulation was made primarily to benefit lower owners. In the past, it was generally accepted that rents and other performances could rise with inflation. In accordance with the proposed regulation, this would only be possible if there was an express contractual stipulation. On the other hand, the provision severely limited the possibility of requesting a reduction in rents due to extraor-

[41] Grynwaser (n 26) 146–148.
[42] Zarzycka (n 31) 303ff.
[43] *Projekt do tytułu III Księgi II Kodeksu Cywilnego o własności*, The projects of individual titles and their justifications were printed as separate leaflets. Sign. BUW: 4.18.1.23
[44] Zarzycka (n 31) 317.
[45] *Powody do projektu tytułu III. księgi II. Kodexu Cywilnego Królestwa Polskiego: o własności*; sign. BUW: 4.15.1.9, 86.

dinary events. Natural disasters (drought, flood, etc.) did not constitute grounds for such a request.

Articles 62 and 63 concerned the payment of *laudemium*. There was no presumption of *laudemium*. Therefore, this fee was payable only if it was expressly stipulated in the contract. If the contract stipulated the obligation to pay *laudemium* but did not specify its amount, it was assumed that 5% of the annual rent was due. There was also a presumption that *laudemium* did not burden the heirs. Furthermore, the obligation to pay *laudemium* in the event of division of the inheritance was excluded.

The project deliberately refrains from regulating the institution of *konsens*, which is justified as follows:

> 1. Assessing whether a new acquirer of lower property is capable of properly managing it is a difficult and highly subjective matter, and can open the door to litigiousness, often devoid of any principle and resulting solely from personal relationships or passions. If the transfer to an unfit person significantly impairs the rights of the actual owner, the latter will already have the right to oppose such a disposition under Article 658. […]
>
> 2. By leaving the superior owner the possibility of refusing to give a *konsens*, and thereby making the transfer dependent on this confirmation, the superior owner would be given the possibility, even by delaying the declaration or by refusing to confirm, even if it were later found unjustified by the Court, to force the lower owner to retain his property, and this would indeed be a kind of serfdom, i.e. *globe adscriptionis*.[46]

The regulation of pre-emption and the distinction between different types of divided ownership were abandoned (with the exception of the *superficies*, which is devoted to Article 56).

Title VI (*On exclusive-district rights arising from land ownership*) of the draft book II of the code also dealt largely with divided ownership. Article 1 of the draft stipulated that:

> Exclusive-district rights resulting from land ownership, such as the propination right and mill monopoly, consist in the legal force of prohibiting anyone from providing such needs within the area of the landed estate except the owner of the land or the person to whom the owner of the land transferred this right for a [fixed] period or forever.

[46] *Powody do projektu tytułu III. księgi II. Kodexu Cywilnego Królestwa Polskiego: o własności*, sign. BUW: 4.15.1.9, 103.

Therefore, in individual landed estates (in accordance with generally existing practice), the manor was to have a monopoly on *propination*, milling, and so on. This monopoly applied to both permanent residents and those temporarily staying on the estate. Provisions concerning *propination*, mill monopoly and other monopolies can be found in numerous 19th-century notarial deeds and mortgage entries concerning lower property.

As the Second Legislative Deputation states in the justification of the project in question:

> It is common knowledge that in our country, from time immemorial, the landowners (*domini directi*) have been exclusively responsible for the production and sale of alcoholic beverages, and that they have the power to prohibit anyone from producing or selling alcoholic beverages on their land, or importing them, even for their own home use.[47]

The landlord's monopoly on alcohol and milling was accompanied by the obligation to produce alcoholic beverages and maintain the mill. Failure to fulfill these obligations resulted in the monopolies being terminated.

On 4 December 1829, the General Assembly of the Council of State adjourned the debate on the entire project until the opinions of judges and other lawyers had been received and instructed the Second Legislative Deputation to extract smaller sections from the project:

1. On divided property
2. On navigable rivers and public roads
3. On forest and pasture servitudes
4. On exclusive-district rights
5. On acts of legitimation
6. On changing the inheritance procedure [48]

In connection with the subject of this study, we are particularly interested in the drafts of points 1, 3, and 4. The draft law on divided property was based on Title III, Book II of the national code draft. It was rejected by the General Assembly of the Council of State.[49]

The General Assembly of the Council of State in December 1829, after analyzing the project on exclusive-district rights, decided that there was only a need to

[47] *Powody do projektu tytułu III. księgi II. Kodexu Cywilnego Królestwa Polskiego: o własności*, sign. BUW: 4.15.1.9, 1.
[48] Litauer (n 29) first footnote; Grynwaser (n 26) 158.
[49] Grynwaser (n 26) 160.

regulate the *propination*, while there was no such necessity as regards the mill monopoly.[50] The project was presented to the monarch. However, due to opposition from the Minister of the Treasury, Franciszek Ksawery Drucki-Lubecki, it did not gain the King's approval and was not included on the agenda of the June Sejm of 1830.[51]

The only project touching upon the issue of divided ownership (and only indirectly) that was presented to the June Sejm of 1830 was the project concerning the servitude of pasture and felling.

According to Antoni Wyczechowski, State Counsellor, who spoke in the Chamber of Deputies, the main goal of the project was to regulate the possibility of abolishing servitudes.[52]

While this may seem puzzling, in 1830, during the Chamber of Deputies' session, voices were raised that the draft 'law on pasture and felling servitude' was of little importance. The Council of State was even accused of disregarding the Sejm by submitting such insignificant bills.[53] Contrary to this opinion, the parliamentary committees (all three of them discussed together) approached the project with great attention and introduced a number of changes to it.[54] After introducing the changes, the committees approved the project by a narrow majority.[55] At this stage, the possibility of purchasing a servitude at the request of the entitled person was removed from the project.[56] The Act was adopted on 18 June 1830, with 82 votes in favor and 30 against.[57] It received the monarch's approval on 28 June 1830.[58]

The parliamentary law on servitudes of pasture and felling uses the institution of servitude. However, it does so in a manner inconsistent with the definition in the Napoleonic Code. The Code defined servitude in Article 637 as follows:

> A servitude is a charge imposed upon an estate for the use and benefit of an estate belonging to another proprietor.[59]

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[50] Grynwaser (n 26) 159; *Projekt do ustawy sejmowej o prawie propinacji z własności gruntowej wynikającym*: AGAD, *[Pierwsza] Rada Stanu Królestwa Polskiego*, sign. 202, 9ff.
[51] Grynwaser (n 26) 161.
[52] *Protokół posiedzeń Izby Poselskiej z roku 1830*, 107.
[53] Skarbek, *Dzieje Polski*, vol II (Poznań 1877) 283; *Protokół posiedzeń Izby Poselskiej z roku 1830*, 112.
[54] Ibid 109.
[55] Ibid 111.
[56] Ibid 109–110.
[57] Ibid 121.
[58] *Dziennik Praw [Królestwa Polskiego]*, vol XIII, 122–129.
[59] *The Code Napoleon or the French Civil Code* (n 8).

If we agree that the parliamentary law was correctly incorporated into the code's framework of concepts, then it must be assumed that those entitled to the servitudes of pasture and felling had to be the owners of the real estate,[60] because the land servitude could only be established for the benefit of the real estate. In practice, if the entitled parties had property rights to land at all, they were often lower owners. It can, therefore, be said that by adopting the law on serivitudes, the Sejm, in a sense, once again confirmed the existence of divided ownership.

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The first major agrarian reform in the Kingdom of Poland, implemented by the Tsarist government, took place in 1846, in connection with the planned national uprising across the three partitions organized by the Polish Democratic Society. Although the uprising manifestos stipulated that peasant plots would become the full property of their holders (without compensation for the landlords), Austrian officials managed to incite the Galician peasants against the insurgents, resulting in numerous attacks on manors and murders that went down in history as *rabacja*. The scale of conspiratorial and insurrectionary activity was the smallest in the Russian Partition among the three partitions. There were no major peasant disturbances in Congress Poland, although there were noteworthy instances of peasants capturing and handing over conspirators to the occupying powers, as well as instances of peasants refusing to perform their duties to the manor (e.g., in Miechów district).[61]

Due to the tense situation in the Kingdom, Emperor and King Nicholas I arrived in Warsaw on 18 May. The monarch established a secret committee to improve the lives of peasants. The committee's work resulted in the Supreme *Ukaz* (the so-called June *Ukaz*), signed by the monarch on 26 May (7 June) 1846.[62]

The most important provision of this act is the inviolability of farms of peasants of at least 3 *morga* of land (approx. 1.5 hectares), provided that the peasants fulfill their obligations. At the same time, the landlords were prohibited from increasing the obligations of this category of peasants (Article 1). Since the entry into force of this act, there has been no doubt that the farms covered by it were subject to divided ownership.[63] If a farm was vacated, the landlord was obligated to install a new peasant within two years (the annexation of vacant lands to manors was

[60] Arts 8–9.

[61] Sample information about the peasants' understanding of two 'Rokoszans': AGAD, *Rada Administracyjna Królestwa Polskiego*, vol 98, 423–424.

[62] AGAD, *Rada Administracyjna Królestwa Polskiego*, vol 98, 374.

[63] Jan K Wołowski, *Kurs kodeksu cywilnego*, Warszawa 1868, vol II, 104; Władysław Grabski, *Historia wsi w Polsce* (Warszawa 1929) 344.

prohibited – Article 2). Furthermore, peasant obligations that were not based on legal titles were abolished (Article 3). The practical significance of this provision was limited due to the often precisely defined scope of peasant obligations. However, the Administrative Council issued a resolution on 14/26 November 1846, clarifying the content of Article 3. In principle, obligations defined by working days or the amount of work were retained, while the remaining obligations were abolished.[64] Nevertheless, determining which obligations were abolished was the subject of much dispute.

In connection with the implementation of the reform, tables of duties (*tabele prestacyjne*) were prepared on landed estates throughout the Kingdom. They indicated the plots of land to individual peasants and their obligations. The tables were prepared by the landlords (without the involvement of the peasants) and submitted to the administrative authorities.[65]

The June *Ukaz* is a very short act (only seven articles) and quite general. Many important issues were not regulated. It was supplemented, to some extent, by later acts of the Viceroy and the Administrative Council. The fundamental interpretative problem was – as with the December decree – the scope of application of the regulations. Initially, Viceroy Ivan Paskevich stated that the decree did not apply to colonists who had leased lands based on written, temporary contracts.[66] The resolution of the Administrative Council of 18/30 November 1858 determined that the decree should also apply to tenants and farmers holding land on the basis of long-term contracts.[67] The *ukaz* itself did not stipulate anything about the transferability of peasant grounds. According to established practice, they could be sold and be subject to inheritance.[68]

The provisions of the June *Ukaz* were intended to be temporary. However, the development of definitive regulations dragged on. The authorities probably hoped that the problem would be solved – at least to some extent – without their involvement, through the conclusion of agreements between the manors and the peasants. This process undoubtedly progressed, but slowly. Both the landlords and the peasants often believed that maintaining the current state of 'undefinedness' was more advantageous to them than concluding an agreement. On the one hand, the manors did not want to be bound by long-term contracts, which would hinder the

[64] *Dziennik Praw [Królestwa Polskiego]*, vol XXXVIII.
[65] Stankiewicz, *Tabele prestacyjne jako źródło wiadomości o przemianach wsi Królestwa Polskiego w połowie XIX wieku* 53(2) Przegląd Historyczny 311–331.
[66] Grynwaser (n 26) 152.
[67] *Dziennik Praw [Królestwa Polskiego]*, vol LII, 39ff.
[68] Grynwaser (n 26) 150 (footnote).

future modernization of their landed estates, while on the other hand, the peasants hoped for a governmental agrarian reform, which ultimately occurred in 1864.

On 16 (28) December 1858, the Administrative Council issued a resolution intended to regulate the future renting process on private landed estates. This act contained relatively few guarantees for peasants and left virtually all important issues related with this process to the parties. Therefore, it changed little and did not significantly accelerate the renting process. Importantly, the rules adopted in the contracts were to be perpetual.

The Administrative Council's resolution stipulated that, after concluding a new lease agreement, the peasants were to become owners of the buildings (even if they had previously belonged to the landlord). The primary benefit to the landlord was to be monetary rent. Labor could be retained under perpetual lease agreements for a maximum of six years. The rent could be perpetual or subject to indexation every 20 years (by reference to the price of rye). The agreements were to be approved by the provincial committees, then notarized and entered into the mortgage registers of the relevant landed estates.

The Russian agrarian reform of March 1861 caused a major stir in the Kingdom. Although it did not extend to the Kingdom, the news of it quickly reached Polish peasants. Various disturbances occurred, including significant evasion of labor.[69] However, there were no acts of violence directed against the landlords and their officials.

In this situation, Aleksander Wielopolski decided to take the next stage of the agrarian reform and persuaded Tsar Alexander II to sign the decree on the ransom of forced labor.[70] The basic premise of this decree was to replace forced labor with monetary payments. However, it applied only to those farmers who were not bound by any contract with the manor (neither written nor oral, neither perpetual nor temporary – Article 3).

The peasants' attitudes towards the decree varied. The economic consequences of its implementation were also mixed. In some regions, ransom rates were relatively low compared to the value of previous obligations, but generally they should be assessed as high. The peasants viewed the new law with distrust. About twenty percent of village heads (*sołtysi*) refused to sign the protocols announcing the decree.[71]

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[69] Grynwaser (n 26) 29.

[70] *Ukaz co do oczynszowania włościan w Królestwie Polskim 4(16) maja 1861 r.* 57 Dziennik Praw [Królestwa Polskiego] 378ff.

[71] Tomasz Szczechura, *Ukaz o okupie pańszczyzny z dnia 16 maja 1861 r.* (1949) XL Przegląd Historyczny; Grynwaser (n 26) 61.

By the summer of 1861, the level of peasant resistance had diminished compared to the spring. Nevertheless, the prevailing mood in the countryside, including the continuing numerous acts of mostly passive resistance, prompted Wielopolski to begin work on the next stage of the reform: renting process *ex officio*. The drafting of the relevant decree sparked considerable controversy, including an open conflict between Wielopolski and Viceroy Nikolai Sukhozanet. Ultimately, on 24 May (5 June) 1862, Alexander II signed the decree. It was a comprehensive and detailed legal act (147 articles). It differed from the decree on the ransom of forced labor, which had been issued a year earlier, in the method of calculating the fees paid by the peasants. The decree of 1861 used the number of days of compulsory work and the quality of the land as the basis for calculating the ransom, while the decree of 1862 linked the rent amount to the quality of the land and the price of grain. Rents could be periodically indexed due to changes in grain prices (Article 27). The assumptions of the 1862 decree were similar to those underlying the resolution of the Administrative Council of 16 (28) December 1858. The most significant difference is that the 1858 resolution left the final rent amount to the discretion of the parties (requiring agreement between them), while the 1862 decree allowed for the possibility of setting rent amounts by special rent delegations. Servitudes (such as the right of peasants to use manor meadows and forests) were to be abolished, but their abolition was linked to a reduction in rents (Article 23). Perpetual rents could be redeemed by peasants (Article 45 repealed the Sejm Act of 1/13 June 1825, which abolished the right of those obligated to pay perpetual rents to redeem them).

The decree on the renting process *ex officio* explicitly stated that 'in perpetual-rent farms, ownership rights are divided. The ownership of the substance, or the principal property (*dominium directum*), belongs to the landlord, while the lower ownership (*dominium utile*) belongs to the peasant' (Article 46). 'The right to hunt and fish, and also *propination* belongs exclusively to the principal owner, unless the peasants acquired these rights by privilege, grant, or contract' (Article 47). The peasant was the owner of all buildings and other attachments (Article 47). A peasant's change of purpose of the plot of land required the *konsens* of the superior owner (Article 48). A sale required the *konsens* of the landlord, as did taking possession of the peasant's land by a testamentary heir (Article 49). 'The principal owner may refuse permission only if the applicant for the farm is of bad conduct or lacks the means to properly develop the land' (Article 50). In the absence of a will, the right to a peasant's land was subject to inheritance, but only one heir could inherit it. If the heirs could not agree on who would inherit the land, it was subject to auction (Article 52). Peasants' farms were to be indivisible, and their area could not exceed 33 hectares (Article 51). Peasants' farms were not allowed to be indebted (Article 56).

The practical application of the decree on renting process *ex officio* of 1862 was very limited. It was solemnly announced to the peasants in August and September 1862. By the end of 1862, rent delegations were in the process of being organized. In January 1863, an uprising in the Kingdom broke out.[72]

Similarly to the National Uprising of 1846, conspirators in the 1860s hoped to win over the peasantry by announcing the agrarian reform. The Central National Committee's appeal to the Polish nation, dated 22 January 1863, containing a call for an uprising, included an announcement of agrarian reform: 'The land that the peasants have held so far on rent or other rights shall from now on become their unconditional property, their perpetual inheritance'.[73] Simultaneously with the proclamation, a decree was promulgated concerning the agrarian reform, which specified: 'Any plot of land that any farmer has previously held through rent, or any other title, together with the gardens, residential and farm buildings, as well as the rights and privileges attached thereto, from the date of this Decree shall become the exclusive and hereditary property of the previous possessor, […]' (Article 1). At the same time, compensation for landlords was announced from the State treasury (Article 2). A separate decree stated that every peasant who joined the uprising would receive a plot of land (at least 3 *morges*) from the national property. In the event of the death of the entitled person during the fight, the share was to go to his wife and children.

The January Uprising had no chance of success. Pacifying the Kingdom and the Stolen Lands, however, took the Russians a long time and required considerable effort. The relatively liberal Tsar, Alexander II, began to realize that consolidating Russian power on the western frontiers of the empire required relying on the peasants rather than the nobility after the conciliatory policies of Alexander Wielopolski (supported by the monarch) ended in failure. From the Tsar's perspective, it was obvious that another agrarian reform was necessary and that it should be initiated by St Petersburg, not the insurgent authorities. On 31 August 1863, the Tsar received an audience with Nikolai Milyutin, whom he wished to entrust with the work of reform in the Kingdom. Milyutin and his companions then embarked on a tour of the Kingdom to learn about local agrarian relations. At the end of December 1863, the Tsar appointed a special committee to prepare the reform. It consisted of approximately 10 people, including Milyutin, that were Russians who typically held high government offices. As a result, four principal decrees were drafted, signed by the Tsar on 19 February (2 March) 1864. Among them was the decree on a huge agrarian reform.[74]

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[72] Grynwaser (n 26) 106.

[73] *Wydawnictwo materjałów do historii powstania 1863–1864* vol I (Lwów 1894) 32.

[74] Józef Targowski, *Komitet urządzający i jego ludzie* 34(1) Przegląd Historyczny.

According to Article 1 of the decree on agrarian reform, 'The lands remaining in the possession of the peasants (i.e., peasant farms), both in private and donated estates, as well as in foundations and government estates, shall become the full property of the peasants in possession of these lands'.

The decree transformed the existing peasant lower ownership into full ownership. However, it did not abolish divided ownership as such. The concept of a peasant (*włościanin*) was not defined in the legislation in force in the Kingdom until then. In practice, who was subject to the decree and who was not was often controversial. The decree undoubtedly did not cover, among others, innkeepers, millers, and farmers from private towns (many towns were still agricultural in nature). The *ukaz* abolished all obligations to the manor (labor, rents, benefits in kind).

The decree stipulated that lands would become the full property of peasants. Nevertheless, certain detailed regulations meant that peasant ownership under the decree differed significantly from that described by the Napoleonic Code. In particular, specific regulations were introduced for mortgage entries concerning decree farms, while a resolution of the Organizing Committee of 30 December 1866 (11 January 1867) prohibited the division of farms into parts smaller than 6 morges. Hunting and fishing rights, previously held by landlords, were granted to communities, not to the owners of individual farms (Article 16). The decree maintained servitudes (Articles 11 and 12).

The agrarian reform entailed the payment of compensation to landlords. However, these were paid by the State treasury, not individual peasants. Repayments were spread over 42 years. The State maintained the *propination* (the State treasury, not individual landlords, was entitled to this income) and imposed a land tax on peasant farms. By the outbreak of the First World War, revenues from these sources exceeded the costs of compensation.[75]

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My archival research and 19th-century legal studies – in contrast to publications from the Polish People's Republic period – lead to the conclusion that divided ownership was widespread in the Polish countryside, although it took very different forms and is found in the sources under numerous names (*dzierżawa wieczysta, Erbpacht, prawo powierzchni, umowa wieczystoczynszowa, emfiteuza, prawo czynszowo-własne*).[76] In my opinion – contrary to the views appearing in the

[75] Krzysztof Groniowski, *Uwłaszczenie chłopów w Polsce*, Warszawa 1976, 128ff; Konstanty Grzybowski, Juliusz Bardach (eds), *Historia państwa i prawa Polski*, vol IV (Warszawa 1982) 98ff.

[76] *Powody do projektu tytułu III. księgi II. Kodexu Cywilnego Królestwa Polskiego: o własności*, sign. BUW: 4.15.1.9, 86; Sobociński, 'Studia z dziejów miast Królestwa Polskiego w XIX w.

literature – it is difficult to distinguish the types of divided ownership corresponding to the specific names found in the archival sources and in the 19th-century literature. As Walenty Dutkiewicz rightly noted: 'In Polish law, to understand it thoroughly, one should not consider the name so much as the property itself'.[77]

The relationships between superior owners and lower owners were very diverse. Nevertheless, we can find many typical elements (which in individual cases appeared in different configurations – sometimes all of them, often selected ones). Therefore, in addition to the basic right to possess a plot of land and derive benefits from it, the lower owner often had the opportunity to exercise servitudes (collecting timber from the manor forest, grazing cattle on the manor pasture). In turn, the manor, in addition to collecting what we traditionally call feudal rent (labor, rents, benefits in kind), held *iura bannaria* (exclusive district rights), such as *propination*, the mill monopoly, and the right to hunt in peasant fields after the harvest. In the event of the sale (and sometimes in the case of any transfer of rights) of lower property, the manor was entitled to *laudemium*. Often, the *konsens* of the manor was required for the validity of transactions involving subordinate property.

The form of divided ownership (the rights and obligations of the superior and lower owners) was determined primarily by the granting act (the agreement establishing divided ownership), and to a lesser extent by general legal principles, which, moreover, were unwritten – the Napoleonic Code recognized only full (capitalist) ownership. Furthermore, it was governed by the *numerus clausus* principle of property rights. This means that, according to standard rules of interpretation, while it is possible to conclude that property rights created before the Code came into force (such as the rights of the *Olenders*) remained in force, the creation of new forms of divided ownership was legally prohibited. A specific exception to this principle was established by Frederick Augustus's decree of 31 January 1810 on the hereditary lease of smaller national estates. However, as the title suggests, this decree did not apply to private properties. Despite this, notarial deeds and mortgage registers contain numerous agreements establishing various forms of divided ownership (under various names) in private properties. While divided ownership was common in that period, the cases of peasants obtaining full ownership were exceptional.[78]

(1866−1869)' in Jan Skarbek i Jan Ziółek (eds), *Kościół − Państwo – Niepodległość* (Lublin 1980) 300; Waldemar Dutkiewicz, *Program do egzaminu z historyi praw, które w Polsce przed wprowadzeniem Kodexu Napoleona obowiązywały* (Warszawa 1866) 240; Mazurkiewicz, Ćwik (n 9) 57.

[77] Dutkiewicz ibid 241.

[78] State Archives in Płock – Łęczyca Branch, *Hipoteka w Łęczycy 1801–1947* [1989], vol 220 'Księga hipoteczna Dobra Kałów Okręg Zgierski Nr. Re 275 1801–1947', 99–101; State Archives in Łódź, *Akta notariusza Józefa Stokowskiego w Zgierzu* (39/438/0), deed no 3950.

The introduction of the capitalist French code caused a discord between the letter of the law and practice – particularly in rural relations. This problem was noted during the works on legal reforms, but for decades it remained unregulated in the existing legal system (although a relevant draft was prepared before the session of parliament in 1830). The existence of divided property was recognized (albeit somewhat peripherally) by mortgage laws. The existence of divided property on a very large scale (and simultaneously a significant expansion of the number of farms covered by lower ownership) was confirmed by the June *Ukaz* of 1846. The reform initiated by Aleksander Wielopolski (the *Ukaz* on the renting process *ex officio* of 1862) could have consolidated the functioning of divided property on a large scale and simultaneously transferred many aspects of its operation from customary law to the written law. However, it never entered into force. In turn, the agrarian reforms of the 1860s brought about a significant reduction in the number of real estates subject to lower ownership, making farmers (previously lower owners) owners of farms in the capitalist sense.

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REFERENCES

AGAD, *[Pierwsza] Rada Stanu Królestwa Polskiego*, vol 193, v 469

AGAD, *Rada Administracyjna Królestwa Polskiego*, vol 98

Archiwum Państwowe w Kaliszu (State Archives in Kalisz), *Księgi i akta hipoteczne sądów w Kaliszu* (11/1201/0), 84, 94, 101, 105, 114, 239, 403, 1635, 2475, 3183

Archiwum Państwowe w Lublinie – Oddział w Chełmie (State Archives in Lublin – Chełm Branch), 'Akta notariusza Aleksandra Dąbrowskiego w Chełmie (36/120/0)'

Archiwum Państwowe w Lublinie (State Archives in Lublin), *Księgi konserwatora Hipotek Powiatu Krasnostawskiego*, vol 4, deed no 3, 12, 18, 21, 25, 29, 31, 35, 36, 38, 39, 40, 41, 42, 43

Archiwum Państwowe w Lublinie (State Archives in Lublin – Radzyń Podlaski Branch), *Księgi konserwatora Hipotek Powiatu Krasnostawskiego*, vol 4

Archiwum Państwowe w Lublinie. Oddział w Radzyniu Podlaskim (State Archives in Lublin – Radzyń Podlaski Branch), *Konserwator Hipoteki Powiatu Bialskiego* (38/539/0)

Archiwum Państwowe w Łodzi (State Archives in Łódź), 'Akta notariusza Józefa Stokowskiego w Zgierzu (39/438/0), deed no 3950'

Archiwum Państwowe w Płocku Oddział w Łęczycy (State Archives in Płock – Łęczyca Branch), *Hipoteka w Łęczycy 1801–1947[1989]*, vol 220, *Księga hipoteczna Dobra Kałów Okręg Zgierski Nr. Re 275 1801–1947*, 99–101

Archiwum Państwowe w Warszawie (State Archives in Warsaw), *Hipoteka Warszawska*, vol 442

Barzykowski S, *Historia powstania listopadowego*, vol I (Poznań 1883)

Burzyński P, *Prawo polskie prywatne*, vol II (Kraków 1871)

Correspondance de Napoléon Ier, vol 16 (Paris 1858–1870)

Delsol JJ, *Explication élémentaire du Code Napoléon, mise en rapport avec la doctrine et la jurisprudence*, vol 1 (Paris 1867)

'Dobrzec Mały, D[obrzec] Wielki' in *Słownik Geograficzny Królestwa Polskiego*, vol II (Warszawa 1881)

Drozd E, *'Numerus clausus' praw rzeczowych*, in *Problemy kodyfikacji prawa cywilnego (studia i rozprawy). Księga pamiątkowa ku czci profesora Zbigniewa Radwańskiego*, (S Sołtysiński ed, Poznań 1990) 257–269

Dutkiewicz W, *Program do egzaminu z historyi praw, które w Polsce przed wprowadzeniem Kodexu Napoleona obowiązywały* (Warszawa 1866)

Dziennik Praw [Królestwa Polskiego], vol 9, 13, 38, 52

Dziennik Praw [Księstwa Warszawskiego], vol 1, 2

Filipiak Z, *Prawo własności nieruchomości w działalności legislacyjnej Księstwa Warszawskiego i Królestwa Kongresowego (1807–1830)* (Toruń 2020)

Galczak-Froch A, 'Problemy z usystematyzowaniem wewnętrznego rozwarstwienia chłopstwa' (2013) 18 Krakowskie Studia Małopolskie

Gałędek M, Klimaszewska A, Pomianowski P, 'Plan kodeksu cywilnego i projekt utworzenia komisji kodyfikacyjnej w pracach Komitetu Cywilnego Reformy (1814–1815)'. Edycja źródłowa (2020) 13(3) Krakowskie Studia z Historii Państwa i Prawa

– –, 'Prace Komitetu Cywilnego Reformy nad przygotowaniem narodowej kodyfikacji prawa cywilnego i procedury cywilnej w przededniu utworzenia Królestwa Polskiego (1814-1815) : edycja źródłowa'. Cz. 1 (2019) 12(2) Krakowskie Studia z Historii Państwa i Prawa

Godlewski M (ed), *Zbiór prac przygotowawczych do ustaw hypotecznych w Królestwie Polskiém obowiązujących oraz tekst tychże ustaw z pierwotną ich redakcyą i dyskusyami zestawiony: na podstawie źródeł urzędowych* (Warszawa 1876)

Grabski W, *Historia wsi w Polsce* (Warszawa 1929)

Groniowski K, *Uwłaszczenie chłopów w Polsce* (Warszawa 1976)

Grynwaser H, *Pisma*, vol I–III (Wrocław 1951)

Grzybowski K, J Bardach (eds), *Historia państwa i prawa Polski*, vol IV (Warszawa 1982)

Heylman A, *O stosunku hipoteki gubernialnej do okręgowej*, Biblioteka Warszawska

– –, *Rozbiór wykazu hipotecznego* (Warszawa 1858)

Instrukcja dla władz sądowych i konserwatorów hipotek z 31 sierpnia 1809 r. (sign. BUW 4.18.1.311)

Kapuściński P (ed), *Jurysprudencja Senatu z lat dwudziestu sześciu (1842–1867)* (Warszawa 1869) 445

Kirkor-Kiedroniowa Z, *Włościanie ich sprawa w dobie organizacyjnej i konstytucyjnej Królestwa Polskiego* (Kraków 1912)

Konarski K, 'Legal Reforms of Agrarian Relations in the Duchy of Warsaw between 1807 and 1809' (2022) 31(1) Studia Iuridica Lublinensia

Konic H, *Prawo rzeczowe. Wykład ustaw obowiązujących w b. Królestwie Kongresowem z uwzględnieniem przepisów innych dzielnic oraz Kodeksu Szwajcarskiego* (Warszawa 1927)

Litauer JJ, *Własność podzielona w oświetleniu źródeł urzędowych polskich* (Warszawa 1916)

Markiewicz S, 'Uwagi nad własnością podzieloną' (1866) Ekonomista

Mazurkiewicz J, W Ćwik, 'Własność w miastach prywatnych Lubelszczyzny doby Księstwa Warszawskiego i Królestwa Kongresowego (1809–1866)' (1957) 1 Annales UMCS

Mejer K, *O wieczystej dzierżawie* (Warszawa 1873)

Mencel T, 'Chłopska własność i posiadanie ziemi przed uwłaszczeniem w Królestwie Polskim' (1987) 48 Roczniki Dziejów Społecznych i Gospodarczych

– –, 'Zniesienie poddaństwa w Księstwie Warszawskim na tle porównawczym' (1983) 13 Acta Universitatis Lodziensis. Folia Historica

Ossowska M, 'The numerus clausus issue in property law – European private law and the Polish perspective' (2019) 82 Studia Iuridica

Ourliac P, J de Malafosse, *Histoire du Droit privé*: vol 2 (Paris: Les Biens 1971)

Plan do projektu kodexu cywilnego Królestwa Polskiego, AGAD, *[Pierwsza] Rada Stanu Królestwa Polskiego*, vol 193

Powody do projektu tytułu III. księgi II. Kodexu Cywilnego Królestwa Polskiego: o własności (Franciszek Grabowski), sign. BUW 4.15.1.9 'Prawo o Przywileiach i Hypotekach' 9 Dziennik Praw [Królestwa Polskiego]

Projekt do tytułu III Księgi II Kodeksu Cywilnego o własności, The projects of individual titles and their justifications were printed as separate leaflets. Signature BUW: 4.18.1.23

‘Projekt do ustawy sejmowej o prawie propinacji z własności gruntowej wynikającym: AGAD’, *I [Pierwsza] Rada Stanu Królestwa Polskiego*, sign. 202, 9ff

Protokół posiedzeń Izby Poselskiej z roku 1830 (Warszawa 1831)

Przelaskowski R, *Sejm warszawski roku 1825* (Warszawa 1829)

Raff M, Taitslin A, ‘A Comparative Perspective on the Concept of Ownership in Russian Law: From the Svod Zakonov to the 1994 Civil Code’ 41 Review of Central and East European Law

Skarbek F, *Dzieje Polski*, vol II, (Poznań 1877)

Sobociński W, *Historia ustroju i prawa Księstwa Warszawskiego* (Toruń 1964)

– –, ‘Studia z dziejów miast Królestwa Polskiego w XIX w. (1866-1869)’ in Jan Skarbek i Jan Ziółek (eds), *Kościół − Państwo – Niepodległość* (Lublin 1980)

Stankiewicz Z, *Reformy czynszowe dóbr skarbowych w Królestwie Polskim* (Łódź 1968) 40−42

– –, ‘Tabele prestacyjne jako źródło wiadomości o przemianach wsi Królestwa Polskiego w połowie XIX wieku’ 53(2) Przegląd Historyczny 311–331

Szczechura T, ‘Ukaz o okupie pańszczyzny z dnia 16 maja 1861 r’ (1949) XL Przegląd Historyczny

Szepietowski W, *Zbiór praw, urządzeń i instrukcji hipotecznych w Królestwie Polskiem* (Suwałki 1840)

Szumski J, *Akta hipoteczne i notarialne do 1939 r. z terenu województwa łomżyńskiego*

Targowski J, ‘Komitet urządzający i jego ludzie’ 34(1) Przegląd Historyczny

The Code Napoleon or the French Civil Code. Literally Translated from the Original and Official Edition Published in Paris in 1804 (London 1827)

‘Ukaz co do oczynszowania włościan w Królestwie Polskim 4(16) maja 1861 r.’ 57 Dziennik Praw [Królestwa Polskiego]

Venediktov AV, *Государственная социалистическая собственность* (Москва 1948) 207−223

Wąsicki J, *Ziemie polskie pod zaborem pruskim: Prusy Południowe 1793–1806 : studium historycznoprawne* (Wrocław 1957)

Wierzchlejski R, ‘Zasady prawa cywilnego w Królestwie Polskiem. Napisał prof. Antoni Okolski’ (recenzja) (1886) 37 Gazeta Sądowa Warszawska

Wiśniewska D, ‘Uwagi nad problemami inkulturacji Kodeksu Napoleona w Królestwie Polskim – wątpliwości na tle art. 530’ (2019) 3948 Acta Universitatis Wratislaviensis

– –, *Własność prefabrykancka w Łodzi w latach 1820–1866* (Łódź 2019)

Wołowski JK, *Kurs kodeksu cywilnego,* vol II (Warszawa 1868)

Wójcikiewicz W, *Prawo hipoteczne Królestwa Polskiego* (Wrocław 1967)

Wstęp do inwentarza zespołu: Archiwum Państwowe w Zamościu, *Akta hipoteczne Ordynacji Zamojskiej i dóbr wydzielonych z Ordynacji*

Wydawnictwo materjałów do historii powstania 1863–1864, vol I, Lwów 1894

Zarzycka A, 'Próby zmian prawa rzeczowego z Kodeksu Napoleona w Królestwie Polskim w latach 1815–1818' (2008) 2 Krakowskie Studia z Historii Państwa i Prawa

– –, 'Próby zmian prawa rzeczowego z Kodeksu Napoleona w Królestwie Polskim w latach 1815–1830' (PhD thesis: Jagiellonian University Archivess) 303ff

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AT THE CROSSROADS OF PEACE AND DENIAL: SREBRENICA THIRTY YEARS LATER

Abstract

The article examines the enduring tensions between law, politics, and collective memory in Bosnia and Herzegovina, thirty years after the Srebrenica genocide. While the atrocity has been firmly established by international courts, its domestic remembrance remains fractured, shaped by the institutional design of the Dayton Peace Agreement and the persistence of ethno-nationalist narratives. The paper explores how Dayton's power-sharing system entrenched competing identities and enabled the politicization of memory, contributing to the normalization of genocide denial in Republika Srpska and Serbia. It further analyses the emergence, forms, and political functions of denialism, as well as its impact on reconciliation and social cohesion. Finally, the article assesses the 2021 Memory Law imposed by the High Representative, evaluating its potential and limitations in countering denial and promoting accountability. The study argues that without firm legal and political protection of historical truth, prospects for genuine reconciliation remain constrained.

KEYWORDS

genocide, Srebrenica, memory law, reconciliation, denial

SŁOWA KLUCZOWE

ludobójstwo, Srebrenica, ustawa o pamięci historycznej, pojednanie, zaprzeczanie

I. INTRODUCTION

On 11 July 2025, the world marked the 30th anniversary of the Srebrenica genocide, one of the gravest crimes committed in Europe since World War II. A year earlier, on 30 May 2024, the United Nations General Assembly (UN GA) adopted Resolution A/RES/78/282,[1] designating 11 July as the International Day of Reflection and Commemoration of the 1995 Genocide in Srebrenica. The document underscored the international community's duty to uphold truth, justice, and non-recurrence, calling on States to counter denial and to integrate the lessons of Srebrenica into education. Resolution 78/282, although of great significance, did not pass unanimously – 84 States voted in favour (e.g., the US, Rwanda, Germany, France and Bosnia and Herzegovina), 68 abstained and 19 voted against (e.g., Serbia, Russia and China). The adoption triggered strong opposition from Republika Srpska (RS), Serbia and allied States, reigniting longstanding disputes over memory politics in Bosnia and Herzegovina (BiH) and the wider region. It also revealed that the international commemoration of Srebrenica stands in contrast to the fractured memory landscape within BiH.

Despite extensive judicial findings regarding the Srebrenica genocide, denial and relativization remain deeply embedded in the political discourse. Surveys consistently show divergent interpretations: while Bosniaks overwhelmingly recognize the atrocities as genocide, many Bosnian Serbs (and their supporters) reject the qualification. Memory has thus become a site of political contestation, shaping collective identity and complicating prospects for reconciliation. Lack of unanimity regarding the Resolution's adoption echoes earlier disputes over the genocide denial and historical relativisation caused by the 2021 amendment to the Bosnian Criminal Code (2021 Memory Law),[2] introduced unilaterally by the High Representative of Bosnia and Herzegovina, Valentin Inzko (HR). Rather than resolving disagreements over the past, both the law and the Resolution illustrate that international and national efforts appear less as closing the chapter on

[1] United Nations General Assembly, Resolution A/RES/78/282: International Day of Reflection and Commemoration of the 1995 Genocide in Srebrenica, 30 May 2024.

[2] Office of the High Representative, Decision Enacting the Law on Amendments to the Criminal Code of Bosnia and Herzegovina, 23 July 2021.

the qualification of the genocide and more as reaffirming how deeply contested such memory remains.

Against this backdrop, this paper examines the intersection of law, politics, and memory in post-conflict BiH, with particular attention to the legacy of the Srebrenica genocide, to assess the possibilities and limits of reconciliation three decades after the atrocity. It first critically analyses the impact of the Dayton Peace Agreement (Dayton Agreement)[3] on the BiH's fragmented memory landscape, focusing on how institutional design has shaped competing narratives and hindered reconciliation. Second, it explores the denial of the Srebrenica genocide and its role in perpetuating ethno-political divisions and obstructing trust-building within BiH and the wider region. Finally, the paper evaluates the effectiveness and limitations of the 2021 Memory Law in countering denialism, preserving historical truth, and fostering reconciliation. To achieve the research objectives, both doctrinal and functional approaches are employed. The doctrinal approach enables the analysis of international and domestic legal frameworks, as well as the reconstruction and interpretation of existing norms. The functional approach, in turn, allows for an examination of how these norms are implemented in the BiH's socio-political reality and facilitates an assessment of their effectiveness. By situating legal developments within their broader political and societal context, the paper seeks to capture how memory is constructed, contested, and instrumentalized in post-conflict settings.

(COMPLEX) RECONCILIATION AND MEMORY LANDSCAPE IN 'POST-DAYTON' BOSNIA AND HERZEGOVINA

The conflict in BiH ended with the Dayton Agreement, initiated on 21 November 1995 in Dayton, the US, and signed in Paris on 14 December 1995. Comprising a unique and complex set of instruments, the Agreement reflects the intricacy of the negotiations that led to its adoption.[4] While widely credited with ending the armed conflict, the document has also generated substantial debate due to its establishment of an ethnically based power-sharing system. Some scholars regard this framework as a pragmatic and necessary means of halting violence. In contrast, others argue that it has created enduring obstacles to political cohesion and democratic governance in BiH.[5] Given the length constraints and article's

[3] General Framework Agreement for Peace in Bosnia and Herzegovina, 14 December 1995.

[4] Paul Szasz, 'The Dayton Accord: The Balkan Peace Agreement' (1997) 30(3) Cornell International Law Journal 759–768, at 759.

[5] See, e.g., Annika Björkdahl, 'A Gender Just Peace? Exploring the Post-Dayton Peace Process in Bosnia' (2012) 37(2) Peace & Change 286–312; Beth K Dougherty, 'Letting Nature Swallow the

thematic focus, a detailed analysis of each provision is not possible; instead, the discussion briefly highlights those aspects of the Agreement most relevant to reconciliation and the post-genocide memory landscape in BiH.

The Dayton Agreement established a complex legal and institutional framework composed of the General Framework Agreement for Peace in Bosnia and Herzegovina between Croatia, the Federal Republic of Yugoslavia and the Republic of Bosnia and Herzegovina, together with numerous Annexes and accompanying arrangements. While preserving BiH's internationally recognised borders, it reorganised the State into two entities: the Federation of Bosnia and Herzegovina (51% of the territory), Republika Srpska (49%) and the Brčko District. This arrangement created a highly decentralised and ethnically structured power-sharing system, with most competences vested in the entities. Although conceived as a peace-preserving compromise, the rigid ethnic framework of political representation entrenched ethnic divisions and enabled competing elites to promote divergent collective memories through selective remembrance and denial. The Agreement also institutionalised significant international oversight, most notably through the establishment of the Office of the High Representative, which was responsible for supervising the civilian implementation of the peace settlement.

Given the above, it is evident that BiH's institutional framework is highly complex. Although designed to secure through power-sharing among Bosniaks, Serbs, and Croats,[6] its multilayered structure has, in practice, largely paralyzed political processes and continues to shape prospects for reconciliation and the recognition of collective narratives about the conflict.[7] The territorial arrangements of the Dayton Agreement disregarded demographic disparities[8] and, while deemed necessary for stability and reconstruction,[9] effectively cemented wartime territorial gains[10]

Past: Politics, Memory, and Abandoned Monuments in Postwar Bosnia and Herzegovina' (2019) 47(2) Nationalities Papers 248–263, at 251.

[6] Ludovica Benedizione and Valentina Rita Scotti (eds), *Twenty Years after Dayton: The Constitutional Transition of Bosnia and Herzegovina* (Rome: Luiss University Press 2016) 18.

[7] Roland Kostić, 'Transitional Justice and Reconciliation in Bosnia and Herzegovina: Whose Memories, Whose Justice?' (2012) 54(4) Sociologija 649–666, at 653.

[8] Stathis Kalyvas and Nicholas Sambanis, 'Bosnia's Civil War' in Paul Collier and Nicholas Sambanis (eds), *Understanding Civil War: Evidence and Analysis*, vol 2 (Washington DC: World Bank 2005) 191–229, at 197.

[9] Jens Woelk, 'The Constitutional Transition of Bosnia and Herzegovina between Nationalism and European Conditionality' in Ludovica Benedizione and Valentina Rita Scotti (eds), *Twenty Years after Dayton: The Constitutional Transition of Bosnia and Herzegovina* (Rome: Luiss University Press 2016) 25–48, at 26.

[10] Patrice C McMahon and Jon Western, 'The Death of Dayton: How to Stop Bosnia from Falling Apart' (2009) 88 Foreign Affairs 69–83, at 69.

and reinforced nationalist ideologies.[11] Rather than dismantling ethno-national divisions, Dayton entrenched fragmentation and enabled the instrumentalization of memory in identity politics.[12] Its 'no winners or losers' [13] and forward-looking approach[14] avoided explicit engagement with past atrocities and victims, including those of the Srebrenica genocide. By failing to acknowledge responsibility clearly, the Agreement enabled competing, antagonistic war narratives, providing fertile ground for denial and ongoing memory conflicts rather than reconciliation.

The ethnic divisions reinforced by the Dayton Agreement, along with unresolved issues of remembrance and reconciliation, have fuelled heated debates on memory and memory law.[15] Both immediately after the conflict and today, narratives of past events and crimes reflect competing political strategies and rival human emotions, producing a fractured memory regime in BiH in which at least three versions of the past coexist and clash in political and social discourses.[16] The memory wars centre on the nature of the Bosnian War, responsibility for its conduct, the number and identities of victims, and, most prominently, the Srebrenica genocide. Although the crime remains one of the most explored and well-documented international atrocities, it is still a focal point of contemporary genocide debates.[17] Despite the International Criminal Tribunal for the former Yugoslavia (ICTY) establishing beyond a reasonable doubt in numerous cases

[11] Rob Aitken, 'Cementing Divisions? An Assessment of the Impact of International Intervention and Peace-Building Policies on Ethnic Identities and Divisions' (2007) 28(3) Policy Studies 247–67.

[12] Tajma Kapic, 'The Dayton Peace Agreement in Bosnia and Herzegovina and Lessons from the Design of Political Institutions for a United Ireland' (2022) 33(2) Irish Studies in International Affairs 1–17, at 2.

[13] Paul Williams and Michael Schafer, *Peace with Justice? War Crimes and Accountability in the Former Yugoslavia* (Oxford: Rowman & Littlefield Publishers 2002) 160–161.

[14] Gro Nystuen, *Achieving Peace or Protecting Human Rights? Conflict Between Norms Regarding Ethnic Discrimination in the Dayton Peace Agreement* (Leiden: Martinus Nijhoff Publishers 2005) 239–251; James O'Brien, 'The Dayton Agreement in Bosnia: Durable Cease-Fire, Permanent Negotiations,' in William Zartman and Victor Kremenyuk (eds), *Peace versus Justice: Negotiations, Forward- and Backward-Looking Outcomes* (Oxford: Rowman & Littlefield Publishers 2005) 93–116, at 108–109.

[15] Melina Sadiković, 'Narrating the War Experience: The Politics of War Memory and Commemoration within the Framed Peace Process in Bosnia and Herzegovina' (PhD diss., University of Brighton 2019) 13.

[16] Jessie Barton Hronešova and Jasmina Hasić, 'The 2021 Memory Law in Bosnia and Herzegovina – Reconciliation or Polarization?' (2023) 26(4) Journal of Genocide Research 399–417.

[17] Janine Natalya Clark, 'Judging the ICTY: Has It Achieved Its Objectives?' (2009) 9(1–2) Southeast European and Black Sea Studies 123–142.

(e.g., R Karadžić and R Mladić,[18] R Krstić,[19] V Popović,[20] Z Tolimir[21]) that genocide was committed, the crime continues to be subject to relativization and denial, tailoring the 'post-Dayton' memory landscape in BiH.

RELATIVISATION AND DENIAL OF THE SREBRENICA GENOCIDE AND ITS IMPACT ON THE CURRENT SITUATION IN BOSNIA AND HERZEGOVINA

Given the contested reconciliation landscape and the ongoing memory wars between Bosniaks and Serbs, both in Republika Srpska and in Serbia, the core dispute lies in the divergent legal and societal interpretations of the Srebrenica genocide. Shortly after the Dayton Agreement, the genocide was politicized and instrumentalized by the different ethnic groups as a contested site of memory and identity. Serbian actors initially pursued outright denial and later shifted toward disputing the legal classification of Srebrenica as genocide, while continuing to relativize and downplay the crime. This ongoing denialism is reinforced by systematic distortions of the historical truth, including conspiracy narratives portraying Serbs as victims of an alleged anti-Serb alliance[22] and international bias.[23] A key example is the 2002 so-called 'Report about Case Srebrenica', published by the Documentation Center of Republika of Srpska for War Crimes Research, in cooperation with the RS Bureau for Relations with the ICTY. The document described the genocide as an 'alleged massacre', and minimalized the number and status of victims, establishing an early framework of distortion.[24]

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[18] *Prosecutor v R Karadzic and R Mladic*, Case no IT-95-5/18, ICTY, Judgment, Trail Chamber III, 24 March 2016.

[19] *Prosecutor v R Krstic,* Case no IT-98-33, ICTY, Judgment, Trial Chamber I, 02 August 2001.

[20] *Prosecutor v V Popović et al,* Case no IT-05-88, ICTY, Judgment, Trial Chamber II, 10 June 2010.

[21] *Prosecutor v Z Tolimir,* Case no IT-05-88/2, ICTY, Judgment, Trial Chamber II, 12 December 2012.

[22] Klejda Mulaj, 'Genocide and Ending of War: Meaning, Remembrance and Denial in Srebrenica, Bosnia' (2017) 68 Crime, Law, and Social Change 123–143, at 138.

[23] Jovana Mihajlović Trbovc, 'Public Narratives of the Past in the Framework of Transitional Justice Processes: The Case of Bosnia and Herzegovina,' (PhD diss., University of Ljubljana 2014) 90–94; Filip Rudić, 'Bosnian Serb War Commissions Seeking to Revise Truth: Academics' (2019) Balkan Insight.

[24] For more about the report see: Jelena Subotić, 'Holocaust and the Meaning of the Srebrenica Genocide: A Reflection on a Controversy' (2022) 24(1) Journal of Genocide Research 71–82;

Since 2010, the denial of the Srebrenica genocide and other crimes has become increasingly institutionalised and systematic in both the RS and Serbia.[25] A key example is the 2010 Serbian parliamentary resolution, which formally condemned the killings in Srebrenica but deliberately avoided the term 'genocide', instead referring to a 'crime' or 'tragedy', and thus rejecting the internationally recognized legal qualification.[26] Serbian politicians consistently resisted the 'genocidaire' label, often invoking Serbian victimhood during the World War II to deny the perpetrator status.[27] This pattern of historical manipulation was further illustrated in 2015, when then-Prime Minister of Serbia, Aleksandar Vučić,[28] attended the 20th anniversary commemoration at the Srebrenica Memorial[29] but again spoke only of a 'crime', prompting anger among victims and their families and resulting in violent reactions during the ceremony. The episode demonstrates that genocide denial extends beyond reinterpretation of legal and historical facts, as it risks recreating the conditions for destructive behaviour and renewed violence.[30]

The current situation in BiH shows that the denial of the Srebrenica genocide has not diminished over the years; rather, the distortions and reinterpretations of established historical facts continue to circulate widely in the public sphere. A particularly alarming aspect is the glorification of convicted war criminals as national heroes.[31] This phenomenon is systematically monitored by the Srebrenica Memorial, which documents not only the persistence of genocide denial but also

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Monica Hanson Green, *Srebrenica Genocide Denial Report 2020*, Srebrenica-Potočari Memorial and Cemetery for the Victims of the 1995 Genocide (2020).

[25] Hikmet Karčić, 'Srebrenica Genocide Denial: From Dodik to TikTok' in Sead Turčalo and Hikmet Karčić (eds), *Bosnian Genocide Denial and Triumphalism: Origins, Impact and Prevention* (Sarajevo: University of Sarajevo 2021) 60–61.

[26] Michel-André Horelt, 'Serbia-Croatia, Bosnia and Herzegovina: Different Apology Packages, Different Successes' in Christopher Daase (ed), *Apology and Reconciliation in International Relations: The Importance of Being Sorry* (New York: Routledge 2016) 164–195.

[27] Dubravka Stojanović, 'Memory Laws: The Continuation of Yugoslav Wars by Other Means' in Elazar Barkan and Ariella Lang (eds), *Memory Laws and Historical Justice: The Politics of Criminalizing the Past,* (Switzerland: McMillan 2022) 225–250.

[28] Aleksandar Vučić has served as President of Serbia since 2017. From April 2014 till 31 May 2017 he served as Prime Minister of Serbia.

[29] The Srebrenica-Potocari Memorial Center for the Victims of the 1995 Genocide was established in 2000 by the decision of the High Representative for Bosnia and Herzegovina. It is a place of remembrance for the victims of the genocide in Srebrenica, and as such, it is dedicated to preserving history and combatting the forces of ignorance and hatred which make genocide possible.

[30] Genevieve Parent, 'Genocidal Denial: Perpetuating Victimization and the Cycle of Violence in Bosnia and Herzegovina' (2016) 10(2) Genocide Studies and Prevention: An International Journal 38–58, at 54.

[31] Hariz Hlišović, '25 Years after Srebrenica: Local Genocide', in Hikmet Karcić (ed), *Bosnian Genocide Denial and Triumphalism: Origins, Impact and Prevention* (Sarajevo: Univeristy of Sarajevo 2021) 115–125.

its normalization in political and social discourse. Its '2022 Srebrenica Genocide Denial Report'[32] documented 693 instances of genocide denial recorded between 1 May 2021 and 30 April 2022, primarily in Serbia (476) and the RS (176). These took the form of outright denial, relativization, support for perpetrators, or acknowledgment of crimes without recognizing them as genocide, including, alarmingly, calls for a new genocide. The report also identified 69 media outlets that either promoted or facilitated genocide denial, most of them based in Serbia (43) and Republika Srpska (18), with the most frequent individual deniers being BiH Presidency Member Milorad Dodik (31), Serbian Minister of Internal Affairs Aleksandar Vulin (17) and Member of the National Assembly of Serbia Miodrag Linta (15).

According to the Srebrenica Memorial, genocide denial intensifies following key decisions of international bodies. For example, after the Ratko Mladić verdict,[33] numerous officials in the RS and Serbia publicly denied the Srebrenica genocide and expressed support for Mladić. As documented in the 'Srebrenica Genocide Denial Report', such reactions illustrate a clear correlation between international judicial decisions and spikes in the denial narratives. Serbian politicians characterized the ICTY's decision as 'anti-Serb' and 'unjust',[34] with Milorad Dodik[35] and Željka Cvijanović[36] openly rejecting the legitimacy of the verdict and disputing the existence of the genocide. Serbian officials likewise instrumentalized the appeal decision to deny the genocide and endorse Mladić, with Prime Minister Ana Brnabić characterizing the ICTY as a political body that failed to promote reconciliation.[37] These examples illustrate the persistent reluctance of certain officials in the RS and in Serbia to acknowledge the established historical and legal facts concerning Srebrenica. Instead, they promote counterfactual narra-

[32] Green (n 24) at 14.

[33] Ratko Mladić is a former Bosnian Serb military officer who led the Army of Republika Srpska during the Yugoslav Wars. In 2017, he was found guilty of committing war crimes, crimes against humanity, and genocide by the International Criminal Tribunal for the former Yugoslavia. He is serving a life sentence for these crimes in The Hague. In 2021, Mladić's final appeal was rejected.

[34] 'Reakcije iz Republike Srpske: Mladić pozitivna ličnost, Tribunal antisrpski' [Reactions from Republika Srpska: Mladić a positive personality, anti-Serbian tribunal], N1, 8 June 2021, <https://n1info.ba/vijesti/reakci-je-iz-republike-srpske-mladic-pozitivna-licnost-tribunal-antisrpski/> accessed 1 August 2025.

[35] 'Dodik o presudi zločincu Mladiću: Ne može se povezati s voljom naroda da formira RS'[Dodik on the verdict of the criminal Mladić: It cannot be connected with the will of the people to form the RS], Klix, 8 June 2021, <https://www.klix.ba/vijesti/bih/dodik-o-presudi-zlocincu-mladicu-ne-moze-se-povezati-s-voljom-naroda-daformira-rs/21060815> accessed 1 August 2025.

[36] Ibid.

[37] 'Brnabić nakon presude Mladiću: Haški sud je politički sud' [Brnabić after the Mladić verdict: The Hague Court is a political court], Tportal, 8 June 2021, <https://www.tportal.hr/vijesti/clanak/brnabic-nakon-presude-mlad-icu-haski-sud-je-politicki-sud-foto-20210608> accessed 1 August 2025.

tives that invert the roles of victims and perpetrators,[38] constituting a further form of denial. Such practices have tangible political and social consequences, shaping public opinion and affecting social cohesion. A 2018 survey showed that 76.1% of Bosnian Serbs in Republika Srpska viewed Ratko Mladić as a war hero, and in case of Radovan Karadžić[39] it was 73.6%, despite their genocide convictions by the ICTY. In contrast, a 2021 poll indicated that 82.7% of young Bosniaks and 52.7% of young Croats perceived Mladić as a war criminal.[40] While most Bosniaks recognize Srebrenica as genocide, only 20.1% of Serbs in the RS shared this view. This stark divergence in collective memory reflects decades of nationalist rhetoric, reinforced by genocide denial and the absence of accountability, particularly in Serbia.[41] In post-conflict societies, such denial poses a serious obstacle to reconciliation and regional stability.

A study of the memory narratives related to the Srebrenica genocide would remain incomplete without reference to the position adopted by the Bosniaks themselves. For them, the genocide has become an intrinsic part of their collective identity, shaping interpretations of the past and present and influencing approaches to reconciliation.[42] The centrality of Srebrenica within the broader context of the Bosnian War is such that the two are almost inseparable; to reflect on the conflict without reference to the genocide is, for Bosniaks, virtually inconceivable.[43] In this sense, the Bosniak cultural heritage and national identity remain incomplete without the memory of persecution and suffering.[44] At the same time, however, this identity of victimhood is not only a source of collective mourning and resilience but also a resource mobilized in political struggles by Bosniak nationalist actors to advance claims, often exacerbating polarization.[45] Consequently, the

[38] Sabrina Ramet, 'The Denial Syndrome and Its Consequences: Serbian Political Culture since 2000' (2017) 40(1) Communist and Post-Communist Studies 41–58, at 44.

[39] Jessie Barton Hronešová and Jasmin Hasić, 'The 2021 Memory Law in Bosnia and Herzegovina Reconciliation or Polarization?' (2024) 26(4) Journal of Genocide Research 399–417. See also 'Istraživanje: Kako građani RS-a gledaju na genocid u Srebrenici', Aljazeera, July 2018 <https://balkans.aljazeera.net/videos/2018/7/11/istrazivanje-kako-gradani-rs-gledaju-na-genocid-usrebrenici> accessed 11 August 2025.

[40] Srdjan Puhalo and Marijana Toma, *Kako Mladi u Bosni i Hercegovini Opazaju Protekli Rat?* (Banja Luka: Art Print 2022) 65.

[41] Hronešová and Hasić (n 39) at 408.

[42] Mulaj (n 22) at 136.

[43] David Campbell, *National Deconstruction: Violence, Identity, and Justice in Bosnia* (Minneapolis: University of Minnesota Press 1998) 65.

[44] McMahon and Western (n 10) at 72.

[45] Elissa Helms, *Innocence and Victimhood: Gender, Nation, and Women's Activism in Postwar Bosnia and Herzegovina* (Madison: University of Wisconsin Press 2013) 21–39; Christian Axboe Nielsen, 'Surmounting the Myopic Focus on Genocide: The Case of the War in Bosnia and Herzegovina' (2013) 15(1) Journal of Genocide Research 21–39.

Bosniak narrative is sometimes criticized for the perceived 'srebrenization'[46] of political discourse and for the strategic expansion of the concept of genocide beyond Srebrenica for political ends.

THE 2021 MEMORY LAW IN BOSNIA AND HERZEGOVINA: THE SPARK THAT COULD LIGHT A FIRESTORM?

Given the complex and polarized memory landscape in BiH, it is evident that the memory governance is inherently contentious. Legal or political efforts to regulate collective remembrance risk not only resistance but also the aggravation of existing societal divisions, as they inevitably engage with competing identities, grievances, and historical narratives. This dynamic is particularly visible in the sphere of memory laws, where attempts to legislate remembrance have generated acute legal, political, and social tensions. Accordingly, the changes imposed in 2021 by the outgoing High Representative, Valentin Inzko, immediately intensified public polarization and societal fragmentation. In July 2021, exercising his extensive executive powers, the HR introduced amendments to the Criminal Code criminalizing genocide denial and the relativization of war crimes.[47] Article 145a was amended to provide prison sentences of three months to three years for public incitement to violence or hatred against protected groups (paragraph 2). More significantly, paragraph 3 of Article 145a introduced penalties of six months to five years of imprisonment for publicly approving, denying, trivializing, or justifying genocide, crimes against humanity, or war crimes, where such crimes have been established by a final judgment of an international or domestic court, the conduct targets protected groups, and it is likely to provoke violence or hatred. The law further mandates a minimum one-year sentence for disseminating related materials (paragraph 4), increasing to a minimum of three years where the act disrupts public peace and order, is threatening or insulting (paragraph 5), or is committed by a public official (paragraph 7). The same penalty applies to the glorification of convicted perpetrators, including through awards, memorials, or the naming of public spaces and institutions after them.

The HR's initiative was unexpected, particularly given his prolonged passivity during his twelve-year tenure in office. He justified his decision by pointing to the growing denial of genocide in the RS (and the region) as a serious obstacle

[46] Hronešová and Hasić (n 39) at 411.

[47] US Embassy in BiH, 'Statement on High Representative's Decision on Enacting the Law on Amendment to the Criminal Code of BiH' 23 July 2021 <https://ba.usembassy.gov/statement-on-high-representatives-decision-on-enactingthe-law-on-amendment-to-the-criminal-code-of-bih/> accessed 1 August 2025.

to peace, reconciliation, and trust-building.[48] His actions nonetheless provoked highly divergent reactions in BiH. Associations of Bosniak victims, especially Srebrenica survivors, regarded it as long overdue but ultimately a positive step,[49] reflecting their ongoing demands for truth[50] and accountability regarding the fate of the missing.[51] The HR's decision was also welcomed by non-Serb members of the State-level institutions, who described it as a 'civilizational act' and a prerequisite for BiH's European aspirations.[52] Supporters viewed the law as complementing bottom-up commemorative efforts with legal measures against denial.[53]

By contrast, the amendments provoked strong opposition in the RS and Serbia. Milorad Dodik immediately rejected the law, declaring that Serbs would not accept it and describing it as the 'last nail in the coffin of Bosnia and Herzegovina'.[54] Similar views were expressed by Božica Živković Rajilić, the president of the RS Female War Victim Association, who portrayed the decision as an attempt to institutionalize a fabricated narrative of the Srebrenica genocide and to stigmatize (in original, 'satanize') the Serb population.[55] Both Dodik and Rajilić openly denied that genocide had ever happened. Vojin Pavlović, president of the Bratunac association 'Eastern Alternative', likewise disputed the genocide and the

[48] Ibid.

[49] Nermina Kuloglija and Azra Husaric, 'Bosnian Genocide Denial Ban Pleases Survivors, Angers Serbs', Balkan Insight, 23 July 2021.

[50] Małgorzata Myl-Chojnacka, 'Association "Mothers of Srebrenica": The Fight with Injustice and Uncertainty' in Marilisa D'Amico, Tania Groppi, and Costanza Nardocci (eds), *Women and Peace: The Role of Women and Women's Civil Society Organizations in Peace Processes* (Milano: FrancoAngeli 2024) 149–163; Lara Nettelfield, *Courting Democracy in Bosnia and Herzegovina: The Hague Tribunal's Impact in a Postwar State* (Cambridge: Cambridge University Press, 2010) 102.

[51] Isabelle Delpla, 'In the Midst of Injustice: The ICTY from the Perspective of Some Victim Associations' in Xavier Bougarel, Elissa Helms, Ger Duijzings (eds), *The New Bosnian Mosaic: Identities, Memories and Moral Claims in a Post-War Society* (Farnham: Ashgate Publishing 2007) 211–234; Lara Nettelfield, *Courting Democracy in Bosnia and Herzegovina: The Hague Tribunal's Impact in a Postwar State* (Cambridge: Cambridge University Press 2010) 105.

[52] Predrag Zvijerac, 'Top International Official in Bosnia Criminalizes Genocide Denial', Radio Free Europe/Radio Liberty, 23 July 2021, sec. Bosnia-Herzegovina <https://www.rferl.org/a/russia-bosnia-high-representative/31373163.html> acessed 15 August 2025.

[53] Sadiković (n 15) at 221; Ger Duijzings, 'Commemorating Srebrenica: Histories of Violence and the Politics of Memory in Eastern Bosnia' in Xavier Bougarel, Elissa Helms, and Ger Duijzings (eds), *The New Bosnian Mosaic: Identities, Memories and Moral Claims in a Post-War Society,* (Farnham: Ashgate Publishing 2007) 141–166, at 157.

[54] 'Sarajevo, Dodik names Inzko's Decision on Genocide Denial the "Last Nail in BiH's Coffin"' N1, 23 July 2021, 102 accessed 15 February 2023, <https://ba.n1info.com/english/news/dodik-names-inzkos-decision-on-genocide-denialthe-last-nail-in-bihs-coffin/> accessed 1 August 2025.

[55] 'Oštra reagovanja iz Srpske na odluku Incka [Harsh reactions from Srpska to Inzko's decision]' RTRS, 23 July 2021 <https://lat.rtrs.tv/vijesti/vijest.php?id=439455&fbclid=IwAR0bxImzvR0R-puikKj9INHlFwYF4pLm3rob Mcv8fllXQ56nUdrB_4j0zkrg> accessed 1 August 2025.

legitimacy of the 2021 Memory Law, arguing that externally imposed legislation undermines the authority of the HR and risks further conflict.[56] These reactions illustrate that, while Bosnians broadly welcomed the HR's internvention, it was met with deep hostility among many Bosnian Serb actors. The 2021 Memory Law thus triggered one of the most severe crises in post-conflict Bosnia and Herzegovina, the consequences of which persist.[57]

At the end of 2021, the National Assembly of the RS adopted a resolution to withdraw from key State-level structures, including the armed forces, border management, judicial institutions, and the tax administration, while announcing the creation of separate structures.[58] Although Serb representatives returned to the State institutions in February 2022, they continued to challenge the HR's decision, further destabilizing BiH's fragile institutional framework.[59] Milorad Dodik and other Bosnian Serbs have repeatedly refused to comply with the 2021 Memory Law and have persisted in actions glorifying convicted war criminals, including a January 2022 parade marking an outlawed RS holiday linked to the outbreak of the war.[60] In response, the Prosecutor's Office of BiH initiated proceedings against RS representatives. In August 2023, Milorad Dodik and Milos Lukic were charged with violating the 2021 Memory Law and, thus, defying the HR's decisions, offenses punishable by up to five years' imprisonment. Dodik rejected the charges as politically motivated, claiming he acted in accordance with the RS Constitution. Despite these objections, he was indicted in February 2024, sentenced in August 2025 to one year's imprisonment and a six-year ban from political office, with the prison term later commuted to a fine. Following the rejection of his appeal and the termination of his mandate as RS president, the RS authorities dismissed the ruling, further deepening BiH's institutional and political crisis.

The adoption of the 2021 Memory Law, together with its broader legal and political implications, attracted significant international attention. International reactions,

[56] Nermina Kuloglija and Azra Husarić, 'Žrtve očekuju da se zabrana negiranja genocida počne sankcionisati odmah [The victims expect the ban on denial of genocide to be sanctioned immediately]' BIRN, 23 July 2021 <https://detektor.ba/2021/07/23/zrtve-ocekuju-da-se-zabrana-negiranja-genocida-pocne-sankcionisati-odmah/> accessed 1 August 2025.

[57] Hronešová and Hasić (n 3) at 401.

[58] Omer Karabeg, 'Most: Da li će Dodik ovog puta ići do kraja?' Radio Slobodna Evropa, 31 October 2021 <https://www.slobodnaevropa.org/a/most-dodik-prijetnje/31537058.html> accessed 15 August 2025.

[59] Majda Ruge, 'The Past and the Furious: How Russia's Revisionism Threatens Bosnia – European Council on Foreign Relations', ECFR, 13 September 2022, <https://ecfr.eu/publication/the-past-and-the-furious-how-russias-revisionism-threatens-bosnia/> accessed 2 October 2025.

[60] OSCE Warns Against Hate Incidents Destabilising Bosnia, Reuters, US News, 12 January 2022 <https://www.usnews.com/news/world/articles/2022-01-12/osce-warns-against-hate-incidents-destabilising-bosnia> accessed 2 October 2025.

however, have been far from uniform and can broadly be grouped into three categories: normative support for countering genocide denial, procedural criticism concerning the manner of the law's enactment, and systemic opposition challenging both its substance and the authority of the High Representative. While many actors endorsed the objective of combating denial and revisionism, concerns were raised – particularly within the European Union – about the imposition of the law by the High Representative at the end of his mandate.[61] From this perspective, externally imposed measures risk undermining local ownership. They may hinder the long-term internalization of the norms they seek to promote, reflecting a broader tension within the EU accession framework between normative commitments and procedural legitimacy. At the same time, several Western States adopted concrete measures against actors perceived as undermining BiH's constitutional order. In April 2022, the United Kingdom imposed sanctions on Milorad Dodik and Željka Cvijanović for their destabilizing activities,[62] while the United States introduced similar measures against Dodik for violations of the Dayton Agreement.[63] Regional responses also followed, including Slovenia's 2025 decision to bar Dodik from entering the country after he refused to comply with a domestic court ruling.

A markedly more critical stance has been adopted by the Russian Federation, which has consistently rejected both the legitimacy of the High Representative and the legality of measures imposed under his executive powers.[64] Russia's opposition to the 2021 Memory Law should be understood within a broader geopolitical context, as part of its ongoing challenge to the post-Dayton institutional order and to the Western influence in the Balkans. In this regard, Moscow's position aligns with its political support for actors in Republika Srpska advocating increased autonomy and resisting central State authority.[65] Symbolic gestures, such as the high-level reception of Milorad Dodik in Moscow, further reinforce this alignment and help embed external geopolitical dynamics into BiH's internal political landscape.[66]

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[61] Julian Borger, 'EU Working to Amend Genocide Denial Law That Is Blamed for Bosnia Crisis', The Guardian, 22 December 2021, <https://www.theguardian.com/world/2021/dec/22/eu-working-to-amend-law-on-srebrenica-genocide-denial-to-blame-for-bosnia-crisis> accessed 10 October 2025.

[62] <https://www.gov.uk/government/news/uk-announces-sanctions-under-bosnia-and-herzegovina-sanctions-regime-11-april-2021> accessed 11 October 2025.

[63] <https://ba.usembassy.gov/u-s-treasury-sanctions-members-of-milorad-dodiks-family-and-patronage-network/> accessed 11 October 2025.

[64] Hronešová and Hasić (n 39) at 408.

[65] Ruge (n 59).

[66] 'Putin Receives Bosnia's Wanted Serb Leader Dodik in Kremlin', The Moscow Times, 1 April 2025 <https://www.themoscowtimes.com/2025/04/01/putin-receives-bosnias-wanted-serb-leader-dodik-in-kremlin-a88572> accessed 22 March 2026.

Taken together, these divergent reactions demonstrate that the 2021 Memory Law has evolved beyond a legal instrument addressing genocide denial and has become a focal point for broader debates concerning international authority, domestic legitimacy, and geopolitical alignment in Bosnia and Herzegovina.

CONCLUSIONS

The 30th anniversary of the Srebrenica genocide underscored the enduring fragmentation of memory in BiH. Much of this division can be traced back to the Dayton Agreement, which, although instrumental in ending the conflict, entrenched ethnic divisions into the State's constitutional framework. Its rigid power-sharing system and its avoidance of explicit references to the wartime atrocities created fertile ground for antagonistic narratives to flourish. By institutionalizing wartime territorial gains, the Dayton Agreement secured peace but froze divisions within Bosnia's political system. In this way, memory became a political weapon, shaping identity and obstructing reconciliation.

Within the context, denial of the Srebrenica genocide emerged as a central obstacle to reconciliation. Since the post-Dayton period, denial has become increasingly institutionalized. The avoidance of the term genocide in official documents and speeches, the glorification of convicted war criminals, and the systematic relativization of atrocities have all contributed to a political culture in which denial is normalised. Such denial and glorification cannot be understood merely as alternative interpretations of history; rather, they constitute an assault on legally established truth that perpetuates conditions conducive to renewed conflict.

The 2021 Memory Law, imposed by HR Valentin Inzko, sought to confront this reality directly by criminalizing genocide denial, the relativization of war crimes, and the glorification of perpetrators. Victims' associations, particularly Bosniak survivors, welcomed the law as a long-overdue recognition of their pursuit of truth and justice. However, the manner of its adoption proved as controversial as its substance, exposing the structural fragility of BiH's governance system. The subsequent backlash – including the temporary withdrawal of RS representatives from State institutions and the open defiance of Milorad Dodik – demonstrates that efforts to regulate memory in a deeply divided society are likely to provoke sustained political resistance. These tensions were further exacerbated by UN Resolution 78/282. While the Resolution strengthened the international normative framework against denialism, it also intensified domestic contestation. In the RS,

both the law and the Resolution have been framed as externally imposed measures that delegitimize Serb political identity, thereby linking resistance to memory governance with broader claims for autonomy and, increasingly, secession.

In this context, secessionist aspirations in Republika Srpska are best understood not as a coherent or imminent project of independence, but rather as a gradual, strategic process aimed at weakening State-level institutions and contesting the authority of international actors. Opposition to the 2021 Memory Law forms part of this broader political logic, as it enables elites to portray the central State and external actors as biased and incompatible with Serb interests. Denialist and revisionist narratives play a key role in sustaining this dynamic. By rejecting internationally established judicial findings and disputing the legal qualification of the Srebrenica genocide, political actors in RS construct an alternative narrative in which RS is positioned as a victim of selective justice and external interference. This reinterpretation of the past provides an important source of political legitimacy, reinforcing claims that the existing constitutional framework is fundamentally unjust. These dynamics are further reinforced by selective external support, which amplifies secessionist rhetoric and raises the political costs of compromise. At the same time, the feasibility of full secession remains limited due to constraints imposed by international law, the continued presence of international actors, and economic interdependence within BiH. As such, secessionist discourse functions less as a concrete political program and more as a tool of mobilization, negotiation, and internal legitimation.

This controversy underscores a central paradox in Bosnia's memory governance: while legal measures are essential to protect truth and confront denial, their imposition in a politically fragmented context may exacerbate divisions. Nevertheless, resistance cannot justify inaction; it underscores the need for legal mechanisms to challenge entrenched nationalist myths. Thirty years after Srebrenica, Bosnia remains marked by a paradox: the peace preserved through the Dayton Agreement continues to coexist with deep structural divisions. The 2021 Memory Law, though imperfect in form and timing, represents a crucial step toward confronting denial and aligning Bosnia with international standards of truth and justice. Its success will depend on sustained enforcement and continued international engagement. Without firm protection of truth, reconciliation remains impossible – demonstrating that peace built on denial is not peace, but merely a postponement of future conflict. In this sense, memory politics in BiH is not merely a struggle over the interpretation of the past, but a central mechanism through which contemporary political divisions are reproduced and the State's territorial integrity is implicitly contested.

REFERENCES

Aitken R, 'Cementing Divisions? An Assessment of the Impact of International Intervention and Peace-Building Policies on Ethnic Identities and Divisions' (2007) 28(3) Policy Studies 247–267

Benedizione L and Scotti VR (eds), *Twenty Years after Dayton: The Constitutional Transition of Bosnia and Herzegovina* (Rome: Luiss University Press 2016)

Björkdahl A, 'A Gender Just Peace? Exploring the Post-Dayton Peace Process in Bosnia' (2012) 37(2) Peace & Change 286–312

Borger J, 'EU Working to Amend Genocide Denial Law That Is Blamed for Bosnia Crisis', The Guardian, 22 December 2021 <https://www.theguardian.com/world/2021/dec/22/eu-working-to-amend-law-on-srebrenica-genocide-denial-to-blame-for-bosnia-crisis> accessed 10 October 2025

Campbell D, *National Deconstruction: Violence, Identity, and Justice in Bosnia* (Minneapolis: University of Minnesota Press 1998)

Clark JN, 'Judging the ICTY: Has It Achieved Its Objectives?' (2009) 9(1–2) Southeast European and Black Sea Studies 123–142

Delpla I, 'In the Midst of Injustice: The ICTY from the Perspective of Some Victim Associations' in X Bougarel, E Helms, and G Duijzings (eds), *The New Bosnian Mosaic: Identities, Memories and Moral Claims in a Post-War Society* (Farnham: Ashgate Publishing 2007) 211–234

Dougherty BK, 'Letting Nature Swallow the Past: Politics, Memory, and Abandoned Monuments in Postwar Bosnia and Herzegovina' (2019) 47(2) Nationalities Papers 248–263

Duijzings G, 'Commemorating Srebrenica: Histories of Violence and the Politics of Memory in Eastern Bosnia' in X Bougarel, E Helms, and G Duijzings (eds), *The New Bosnian Mosaic: Identities, Memories and Moral Claims in a Post-War Society* (Farnham: Ashgate Publishing 2007) 141–166

Green MH, *Srebrenica Genocide Denial Report 2020*, Srebrenica-Potočari Memorial and Cemetery for the Victims of the 1995 Genocide (2020)

Helms E, *Innocence and Victimhood: Gender, Nation, and Women's Activism in Postwar Bosnia and Herzegovina* (Madison: University of Wisconsin Press 2013)

Hlišović H, '25 Years after Srebrenica: Local Genocide' in H Karcić (ed), *Bosnian Genocide Denial and Triumphalism: Origins, Impact and Prevention* (Sarajevo: University of Sarajevo 2021)

Horelt MA, 'Serbia-Croatia, Bosnia and Herzegovina: Different Apology Packages, Different Successes' in Ch Daase (ed), *Apology and Reconciliation in International Relations: The Importance of Being Sorry* (New York: Routledge 2016)

Hronešová JB and Hasić J, 'The 2021 Memory Law in Bosnia and Herzegovina Reconciliation or Polarization?' (2024) 26(4) Journal of Genocide Research 399–417

Kalyvas S and Sambanis N, 'Bosnia's Civil War,' in P Collier and N Sambanis (eds), *Understanding Civil War: Evidence and Analysis* (Washington, DC: World Bank 2005), vol 2, 191–229

Kapic T, 'The Dayton Peace Agreement in Bosnia and Herzegovina and Lessons from the Design of Political Institutions for a United Ireland' (2022) 33(2) Irish Studies in International Affairs 1–17

Karabeg O, 'Most: Da li će Dodik ovog puta ići do kraja?', Radio Slobodna Evropa, 31 October 2021 <https://www.slobodnaevropa.org/a/most-dodik-prijetnje/31537058.html> accessed 15 August 2025

Karčić H, 'Srebrenica Genocide Denial: From Dodik to TikTok' in S Turčalo and H Karčić (eds), *Bosnian Genocide Denial and Triumphalism: Origins, Impact and Prevention* (Sarajevo: University of Sarajevo 2021)

Kostić R, 'Transitional Justice and Reconciliation in Bosnia and Herzegovina: Whose Memories, Whose Justice?' (2012) 54(4) Sociologija 649–666

Kuloglija N and Husarić A, 'Bosnian Genocide Denial Ban Pleases Survivors, Angers Serbs', Balkan Insight, 23 July 2021

– –, 'Žrtve očekuju da se zabrana negiranja genocida počne sankcionisati odmah [The victims expect the ban on denial of genocide to be sanctioned immediately]' BIRN, 23 July 2021 <https://detektor.ba/2021/07/23/zrtve-ocekuju-da-se-zabrana-negiranja-genocida-pocne-sankcionisati-odmah/> accessed 1 August 2025

McMahon P and Western J, 'The Death of Dayton: How to Stop Bosnia from Falling Apart' (2009) 88(5) Foreign Affairs 69–83

Mulaj K, 'Genocide and Ending of War: Meaning, Remembrance and Denial in Srebrenica, Bosnia' (2017) 68 Crime, Law, and Social Change 123–143

Myl-Chojnacka M, 'Association "Mothers of Srebrenica": The Fight with Injustice and Uncertainty' in Marilisa D'Amico, Tania Groppi, and Costanza Nardocci (eds), *Women and Peace: The Role of Women and Women's Civil Society Organizations in Peace Processes* (Milano: FrancoAngeli 2024) 149–163

Nettelfield L, *Courting Democracy in Bosnia and Herzegovina: The Hague Tribunal's Impact in a Postwar State* (Cambridge: Cambridge University Press 2010)

Nielsen ChA, 'Surmounting the Myopic Focus on Genocide: The Case of the War in Bosnia and Herzegovina' (2013) 15(1) Journal of Genocide Research 21–39

Nystuen G, *Achieving Peace or Protecting Human Rights? Conflict Between Norms Regarding Ethnic Discrimination in the Dayton Peace Agreement* (Leiden: Martinus Nijhoff Publishers 2005)

O'Brien J, 'The Dayton Agreement in Bosnia: Durable Cease-Fire, Permanent Negotiations' in William Zartman and Victor Kremenyuk (eds), *Peace versus Justice: Negotiations, Forward- and Backward-Looking Outcomes* (Oxford: Rowman & Littlefield Publishers 2005) 93–116

OSCE Warns Against Hate Incidents Destabilising Bosnia, Reuters, US News, 12 January 2022 <https://www.usnews.com/news/world/articles/2022-01-12/osce-warns-against-hate-incidents-destabilising-bosnia> accessed 2 October 2025

Parent G, 'Genocidal Denial: Perpetuating Victimization and the Cycle of Violence in Bosnia and Herzegovina' (2016) 10(2) Genocide Studies and Prevention: An International Journal 38–58

Puhalo S and Toma M, *Kako Mladi u Bosni i Hercegovini Opazaju Protekli Rat?* (Banja Luka: Art Print 2022)

Ramet S, 'The Denial Syndrome and Its Consequences: Serbian Political Culture since 2000' (2017) 40(1) Communist and Post-Communist Studies 41–58

Rudić F, 'Bosnian Serb War Commissions 'Seeking to Revise Truth: Academics' (2019) Balkan Insight

Ruge M, 'The Past and the Furious: How Russia's Revisionism Threatens Bosnia– European Council on Foreign Relations' ECFR, 13 September 2022 <https://ecfr.eu/publication/the-past-and-the-furious-how-russias-revisionism-threatens-bosnia/> accessed 2 October 2025

Sadiković M, 'Narrating the War Experience: The Politics of War Memory and Commemoration within the Framed Peace Process in Bosnia and Herzegovina' (PhD diss., University of Brighton 2019)

Stojanović D, 'Memory Laws: The Continuation of Yugoslav Wars by Other Means' in Elazar Barkan and Ariella Lang (eds), *Memory Laws and Historical Justice: The Politics of Criminalizing the Past* (Switzerland: MacMillan 2022)

Subotić J, 'Holocaust and the Meaning of the Srebrenica Genocide: A Reflection on a Controversy' (2022) 24(1) Journal of Genocide Research 71–82

Szasz P, 'The Dayton Accord: The Balkan Peace Agreement' (1997) 30(3) Cornell International Law Journal 759–768

Trbovc JM, 'Public Narratives of the Past in the Framework of Transitional Justice Processes: The Case of Bosnia and Herzegovina,' (PhD diss., University of Ljubljana 2014)

Williams P and Schafer M, *Peace with Justice? War Crimes and Accountability in the Former Yugoslavia* (Oxford: Rowman & Littlefield Publishers 2002)

Woelk J, 'The Constitutional Transition of Bosnia and Herzegovina between Nationalism and European Conditionality' in Ludovica Benedizione and Valentina Rita Scotti (eds), *Twenty Years after Dayton: The Constitutional Transition of Bosnia and Herzegovina* (Rome: Luiss University Press 2016) 25–48

Zvijerac P, 'Top International Official in Bosnia Criminalizes Genocide Denial' Radio Free Europe/Radio Liberty, 23 July 2021, sec. Bosnia-Herzegovina. <https://www.rferl.org/a/russia-bosnia-high-representative/31373163.html> accessed 15 August 2025

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LOST IN DEFINITION: THE LEGAL STATUS OF PHARMACEUTICAL WASTE IN EU LAW

Abstract

The article demonstrates the increasing environmental risks associated with active pharmaceutical ingredients (APIs) and argues that current EU law lacks a coherent concept of pharmaceutical waste capable of addressing these risks. Existing practice often equates pharmaceutical waste with unused or expired medicinal products or subsumes it under medical waste, a broad category that fails to capture the diverse sources, decentralised generation, and specific chemical characteristics of APIs. As a result, legal obligations concerning waste collection, classification, and liability remain unclear. A distinct legal category of pharmaceutical waste is necessary to enable targeted regulatory measures and improve environmental and health protection. The article analyses the legal status of pharmaceutical waste in EU legislation, soft law, and academic literature, and explores its relationship to medical waste. It then develops two approaches to defining pharmaceutical waste: one based on enlisting source products and another based on the properties of source products (presence of APIs or API-like substances). The first approach mirrors current usage but poses the risk of excluding environmentally relevant products and importing long-standing classification ambiguities. A composition-based approach better reflects scientific insights from the pharmaceuticals in the environment (PiE) field, capturing contaminated materials and immediate packaging where appropriate. The paper concludes with a proposal for a definition of pharmaceutical waste.

KEYWORDS

pharmaceuticals in the environment (PiE), EU law, pharmaceutical law, environmental protection, waste law

SŁOWA KLUCZOWE

farmaceutyki w środowisku (PiE), prawo UE, prawo farmaceutyczne, ochrona środowiska, prawo odpadów

I. INTRODUCTION[1]

Active pharmaceutical ingredients (APIs), the main components of medicinal products, pose an increasing threat to the environment. Scholars from the biological, chemical, and environmental sciences are examining the presence of these substances in the environment, the risks they entail, and possible measures to prevent or mitigate their impact.[2] These scientific findings should be integrated into legal research.

At present, legal and policy discourse at international and EU level increasingly acknowledges the presence of pharmaceuticals in the environment as an issue requiring regulatory attention, while responses have thus far been developed primarily through soft law instruments (e.g., best practices) and policy initiatives.[3]

[1] The article derives from a fragment of the author's doctoral dissertation entitled 'Gospodarowanie odpadami farmaceutycznymi w prawie Unii Europejskiej' (Pharmaceutical waste management in the European Union Law), prepared in Polish and defended at the University of Silesia in 2024.
[2] Klaus Kümmerer (ed), *Pharmaceuticals in the Environment: Sources, Fate, Effects and Risks* (Springer Science & Business Media 2008); Magda Caban and Piotr Stepnowski, 'How to Decrease Pharmaceuticals in the Environment? A Review' (2021) 19 Environmental Chemistry Letters 3115; Christian G Daughton, 'Cradle-to-Cradle Stewardship of Drugs for Minimizing Their Environmental Disposition While Promoting Human Health. I. Rationale for and Avenues toward a Green Pharmacy' (2003) 111(5) Environmental Health Perspectives 757; Aib Haithem and others, 'Pharmaceuticals and Microplastics in Aquatic Environments: A Comprehensive Review of Pathways and Distribution, Toxicological and Ecological Effects' (2025) 22(5) International Journal of Environmental Research and Public Health 799 – in this last paper juxtaposed with microplastics.
[3] Various reports and best practices like: WHO, 'Safe management of pharmaceutical waste from health care facilities: global best practices' (WHO 2025); UNEP, 'An Assessment Report on Issues of Concern: Chemicals and Waste Issues Posing Risks to Human Health and the Environment' (UNEP 2020). Policies like One Health: UNEP, 'Safe disposal of unused medicines – A One Health Approach for National Systems' (UNEP 2026); Irene Cristini and others, 'A narrative review on the environmental impact of medicines: from water analysis and in vivo studies to

While ongoing discussions on amendments to Directive 2001/83/EC reflect a growing awareness of environmental concerns within pharmaceutical regulation, they have not yet resulted in measures specifically addressing pharmaceutical waste (rather focused on strengthening environmental risk assessment).[4]

However, pharmaceutical waste is rarely distinguished from the broader category of medical waste, and the concept itself is inconsistently understood. The first issue results in the marginalisation of dedicated management of pharmaceutical waste, which should account for its specific chemical characteristics, such as ecotoxicity, biodegradability, persistence, and mobility. The second issue concerns the acceptance of waste at designated collection points (e.g., liquid pharmaceuticals, pharmaceutical packaging, or syringes) and the allocation of liability, particularly under the extended producer responsibility mechanism.

Against this background, this article aims to establish a basis for distinguishing pharmaceutical waste as a distinct waste category and to propose a corresponding legal definition.

This article deliberately focuses on medicinal products intended for human use and the waste generated from them. It is acknowledged that the agri-food sector and veterinary practice also contribute to environmental pollution by APIs. However, APIs originating from veterinary medicinal products and plant protection products raise distinct and complex issues that warrant separate and more detailed analysis. These areas fall outside the scope of the present study, primarily due to their regulation under separate legal frameworks within EU law. The analysis undertaken, therefore, reflects the specific characteristics of the EU pharmaceutical market for humans, mentioning also closely related product categories such as dietary supplements.

II. LEGAL STATUS OF PHARMACEUTICAL WASTE

1. EU LAW

The principal legal instrument governing waste management in the EU is the Waste Framework Directive (WFD).[5] The WFD does not contain provisions

prescribing appropriateness, based on European and Italian legal frameworks' (2025) 5 Frontiers in Drug Safety and Regulation 1681648.

[4] Proposal for a Directive on the Union code relating to medicinal products for human use, COM/2023/192 final.

[5] Directive 2008/98/EC of the European Parliament and of the Council of 19 November 2008 on waste and repealing certain Directives [2008] OJ L312/3.

directly addressing waste originating from pharmaceuticals. Nor does it regulate a broader category perceived as encompassing pharmaceutical waste – medical waste. References to pharmaceuticals appear in a delegated act that establishes the EU waste classification system, known as the European Waste Catalogue (EWC).[6] Under this act, waste from medicine is typically classified as waste generated by healthcare or households. While Article 20 of the WFD refers to hazardous waste produced by households, which may include pharmaceutical waste, this reference remains general and does not cover the fact that, according to the EWC, most unused medicines do not qualify as hazardous waste.

For interpretive guidance, it is possible to refer to the EU regulatory framework on medicinal products, specifically Directive 2001/83/EC.[7] This Directive mentions: the disposal of unused medicinal products, waste derived from medicinal products (Article 54(j)), and medicinal products that are unused or have expired (Article 127b). Furthermore, the Directive obliges Member States to ensure the operation of appropriate collection systems for unused or expired medicinal products (also in Article 127b). Again, the provisions concern unused or expired medicines but do not explicitly classify them as pharmaceutical waste.

Pharmaceutical waste is, however, expressly addressed in international law. The Basel Convention (1989) – the provisions of which have been adopted by the EU – recognises waste pharmaceuticals, drugs, and medicines as distinct waste streams.[8] These terms, which the Convention treats as synonymous, can collectively be understood as referring to waste originating from pharmaceuticals.

2. SOFT LAW

EU institutions have made limited use of the term *pharmaceutical waste*, or even the broader concept of *medical waste*. The expression *household medical waste* appears, inter alia, in the European Commission's Notice on the Separate

[6] Commission Decision 2014/955/EU of 18 December 2014 amending Decision 2000/532/EC on the list of waste pursuant to Directive 2008/98/EC of the European Parliament and of the Council [2014] OJ L370/44.

[7] Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use [2001] OJ L311/67.

[8] Annex I in United Nations Environment Programme, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Secretariat of the Basel Convention 1992); applied in the EU by: Council Decision of 1 February 1993 on the conclusion, on behalf of the Community, of the Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (Basel Convention) [1993] OJ L39/1.

Collection of Household Waste.[9] Within this category, waste from pharmaceutical products is distinguished, limited to the obligatory take-back schemes. In a recently published document by the Health and Food Safety Directorate-General of the Commission, adopted in response to the 'EU Strategic Approach to Pharmaceuticals in the Environment',[10] pharmaceutical waste finally makes a visible appearance, although it still lacks a coherent approach, including a definition of the term.[11]

Among EU agencies, the most relevant actors in this context should be the European Medicines Agency (EMA) and the European Environment Agency (EEA). Both, however, rarely use the term *pharmaceutical waste*. A notable exception is an EEA technical report addressing the presence of pharmaceuticals in the environment, in which the authors refer to pharmaceutical waste and also mention unused or expired medicines, albeit without categorising them within a specific waste stream.[12] Interestingly, the report observes that not only unused pharmaceuticals but also *used pharmaceuticals* may be relevant to waste management – an observation that could open a discussion on waste arising from used drugs.[13] The report, however, does not clarify whether this refers to partially used medicines, their packaging, or the excretion of APIs in their original form or as active metabolites. As for the EMA, despite its efforts to address medicinal products at every stage of their life cycle, it does not address waste.[14] Instead, it supports the development of instruments such as environmental risk assessment.[15]

Beyond the EU framework, the term *pharmaceutical waste* is employed by international organisations such as the World Health Organisation (WHO), the Organisation for Economic Co-operation and Development (OECD), and the International Committee of the Red Cross (ICRC). The WHO defines pharmaceutical waste as expired, unused, and contaminated drugs and vaccines, treating it as a subset of healthcare waste.[16] Notably, the WHO distinguishes between drugs and vaccines. The concept of pharmaceutical waste has been used in WHO

[9] Commission Notice 'Separate Collection of Household Hazardous Waste' [2020] OJ C375/1.
[10] Communication from the Commission, 'European Union Strategic Approach to Pharmaceuticals in the Environment' COM (2019) 128 final.
[11] European Commission Health and Food Safety Directorate-General, 'Pharmaceuticals in the Environment: Implement the EU Strategic Approach – Compilation of Recommendations and Best Practices' (2025).
[12] EEA, 'Pharmaceuticals in the Environment: Results of an EEA Workshop' (EEA 2010) 10.
[13] Ibid 5.
[14] EMA, What we do <https://www.ema.europa.eu/en/about-us/what-we-do#monitor-the-safety-of-medicines-across-their-lifecycle-12356> accessed 20 November 2025.
[15] EMA, 'Environmental Risk Assessment of medicines' (EMA 2015).
[16] WHO, Healthcare Waste: Fact Sheet <https://www.who.int/en/news-room/fact-sheets/detail/health-care-waste> accessed 16 November 2025.

guidelines for the safe disposal of unwanted pharmaceuticals during and after emergencies.[17] The OECD has addressed the issue of environmental pollution from APIs by issuing guidance on the management of municipal pharmaceutical waste, although the document appears to focus primarily on waste originating from households.[18] Similarly, in its work on medical waste management, the ICRC provides a definition of pharmaceutical waste that explicitly includes drug packaging as well as spilt pharmaceuticals.[19]

3. LITERATURE

The concept of pharmaceutical waste also appears in publications, primarily within the field of Pharmaceuticals in the Environment (PiE) research. In the volume edited by K Kümmerer on PiE – addressing sources, fate, effects, and risks – a dedicated chapter by S Castensson focuses on pharmaceutical waste.[20] Castensson includes within this category waste from expired medicines, partially used test tubes and drug containers, unused intermediate products, and unfinished pharmaceutical preparations. He also classifies as pharmaceutical waste the devices used for administering and storing medicines, as well as waste resulting from the breakage or spillage of drugs, including materials that have come into sufficient contact with APIs to be considered contaminated.[21]

Similarly, Lynn Kornfeld and Ann Prouty define pharmaceutical waste through examples of source products, including unused or expired medicines, intravenous preparations and partially used intravenous lines, vials, and syringes.[22] Muhammed Jaseem and others provide one of the most comprehensive classifications, encompassing expired medicines, unwanted or discarded personal medications, residual drugs in syringes, intravenous lines, tubes, and vials, waste containing residues of cytotoxic or anticancer drugs, opened but unusable drug packaging, containers holding hazardous pharmaceutical waste characterised by acute toxicity, and contaminated clothing or materials used for cleaning up

[17] WHO, 'Guidelines for Safe Disposal of Unwanted Pharmaceuticals in and after Emergencies' (WHO 1999).
[18] OECD, *Management of Pharmaceutical Household Waste: Limiting Environmental Impacts of Unused and Expired Medicine* (OECD Publishing 2022).
[19] ICRC, *Medical Waste Management* (ICRC 2011).
[20] Staffan Castensson, 'Pharmaceutical Waste' in Klaus Kümmerer (ed), *Pharmaceuticals in the Environment: Sources, Fate, Effects and Risks* (Springer Science & Business Media 2008) 489.
[21] Ibid 490.
[22] Lynn Kornfeld and Ann Prouty, 'The War on Drugs: Pharmaceutical Waste Management Challenges and Emerging Issues' (2014) 28 Natural Resources & Environment 27.

spills.[23] Verica Jovanović and others understand pharmaceutical waste to include expired, unused, damaged, and contaminated pharmaceuticals, as well as vaccines and sera that are no longer required.[24] The authors also include items used in the administration or handling of pharmaceuticals, such as bottles, boxes with drug residues, gloves, masks, tubing, and vials, within the scope of pharmaceutical waste. A narrower understanding of pharmaceutical waste, focusing on the drugs themselves, is used by, among others, Sabine Vogler and others, as well as Atum Kadam and others.[25] Eydie Pines and others also provide an extensive analysis of both the scope and management of pharmaceutical waste.[26] Justyna Rogowska and others employ the term *pharmaceutical household waste*, which not only identifies pharmaceuticals as the source of the waste but also indicates its place of origin – households.[27] Similarly, Shan-shan Chung and Bryan W Brooks refer to *municipal pharmaceutical waste*.[28] This terminology enables the conceptual differentiation of subcategories within the broader category of pharmaceutical waste, including pharmaceutical household waste, pharmaceutical industrial waste, and pharmaceutical hospital or healthcare waste.

III. RELATION TO MEDICAL WASTE

Pharmaceutical waste is classified within the broader category of medical waste. It is, therefore, necessary to examine whether this classification is appropriate or whether pharmaceutical waste should be treated as a distinct waste stream.

Medical waste, sometimes referred to also as *clinical waste* or *healthcare waste,* generally refers to waste generated through healthcare activities conducted in

[23] Muhammed Jaseem and others, 'An Overview of Waste Management in Pharmaceutical Industry' (2017) 6(3) The Pharma Innovation Journal 158.

[24] Verica Jovanović and others, 'Management of Pharmaceutical Waste in Hospitals in Serbia – Challenges and the Potential for Improvement' (2016) 50(4) Indian Journal of Pharmaceutical Education and Research 700 (probably cited after: WHO, 'Safe Management of Wastes from Healthcare Activities' (WHO 1999) 3).

[25] Sabine Vogler and others, 'Medicines Discarded in Household Garbage: Analysis of a Pharmaceutical Waste Sample in Vienna' (2014) 7 Journal of Pharmaceutical Policy and Practice 6; and: Atul Kadam and others, 'Pharmaceutical Waste Management: An Overview' (2016) 9(1) Indian Journal of Pharmacy Practice 2.

[26] Eydie Pines and Charlotte Smith, 'A 10-Step Blueprint for Managing Pharmaceutical Waste in US Healthcare Facilities' 2022 Edition (US EPA 2022).

[27] Justyna Rogowska and others, 'Pharmaceutical Household Waste Practices: Preliminary Findings from a Case Study in Poland' (2019) 64 Environmental Management 97.

[28] Shan-shan Chung and Bryan W Brooks, 'Identifying Household Pharmaceutical Waste Characteristics and Population Behaviors in One of the Most Densely Populated Global Cities' (2019) 140 Resources, Conservation & Recycling 267.

hospitals, clinics, pharmacies, laboratories, and similar facilities.[29] S Chartier and others define medical waste as encompassing all waste arising from healthcare institutions, research centres, and laboratories related to medical procedures. They further emphasise that this category also includes similar waste generated from smaller and more dispersed sources, such as waste produced during home healthcare.[30] *Medical waste* is typically distinguished by reference to the activity during which it is generated.

The classification of pharmaceutical waste within the broader category of medical waste may raise several concerns.

First, there is the issue of the dispersion of pharmaceutical waste sources. Classifying pharmaceutical waste as medical waste primarily associates its generation with healthcare facilities. Within this group, hospitals and pharmacies are the principal generators. However, pharmaceutical waste is also generated in households.[31] Similar waste arises from entities that neither provide healthcare services nor are directly related to medical practice but manage pharmaceuticals, such as shops, petrol stations, and online platforms. Comparative empirical data on pharmaceutical waste from households and healthcare facilities remain limited, though national examples offer some insight. In France, households disposed of approximately 17,600 tonnes of unused or expired medicinal products in 2018 (around 260 g per capita).[32] By contrast, a study of 210 hospitals reported that over two tonnes of medicinal products were discarded within a single week.[33] These figures suggest a notable disparity. However, they should be interpreted with caution, as healthcare waste is subject to strict regulatory controls, whereas household pharmaceutical waste remains more diffuse and less systematically managed.

Second, comes the issue of the dispersion of pharmaceutical distribution channels. Historically, pharmaceuticals were dispensed primarily by specialised entities such as pharmacies and hospitals. However, market liberalisation has led to the widespread availability of medicines in supermarkets, beauty supply stores, petrol stations, and through online sales.[34] The growing availability of over-the-counter (OTC) pharmaceuticals has decoupled the acquisition of medicine

[29] WHO (n 16).
[30] WHO, 'Safe management of wastes from health-care activities 2nd edition' (WHO 2014).
[31] Rogowska (n 27) 102 and WHO (n 30) 3.
[32] OECD (n 18) 4.
[33] Résomédit, C2DS, 'Médicaments à l'hôpital : [ré]agir pour moins jeter', 2026. With approx. 52 weeks in a year, it adds up to 104 tonnes. The study does not include all of the facilities.
[34] Rogowska (n 27).

from healthcare services.[35] As a result, basing waste classification on the source of generation – namely, healthcare provision – is increasingly inadequate. The COVID-19 pandemic has further accelerated this trend, as remote healthcare and online medical consultations have expanded access to medicines beyond traditional medical institutions.

Third, the category of medical waste fails to account for the specific characteristics of pharmaceutical waste. Effective waste management policies must reflect the specific environmental and health risks associated with different waste types. Medical waste encompasses a broad range of materials that share only the common feature of being associated with healthcare-related activities. This link is insufficiently precise to support uniform regulatory treatment.

Under subcategory 18 01 of the EWC,[36] corresponding to medical waste, the following are included:

- Medicines, with a distinction of cytostatic and cytotoxic medicines;
- Sharps;
- Body parts and organs, including blood bags and blood preserves;
- Infectious waste;
- Waste not subject to special requirements in order to prevent infection (e.g. dressings, plaster casts, linen, disposable clothing, diapers);
- Amalgam waste from dental care;
- Chemicals.

This extensive and heterogeneous catalogue makes it challenging to design coherent and specialised procedures for medical waste management. Generalised approaches risk regulating fundamentally different waste types under the same framework, without accounting for their distinct properties. Referring to pharmaceutical waste as medical waste thus obscures its specific chemical and environmental characteristics. The COVID-19 pandemic has further shifted attention within the context of medical waste management toward personal protective equipment (PPE), such as masks and gloves. For example, the WHO's Global Analysis of Healthcare Waste in the Context of COVID-19 focuses predominantly on PPE-related waste.[37]

[35] Colin P Bradley and Christine M Bond, 'Increasing the Number of Drugs Available over the Counter: Arguments for and against' (1995) 45(399) British Journal of General Practice 553.
[36] Commission Decision (n 6).
[37] WHO, 'Global analysis of healthcare waste in the context of COVID-19: status, impacts and recommendations' (WHO 2022) 6.

IV. HOW TO DEFINE PHARMACEUTICAL WASTE?

1. APPROACH

Legal definitions fulfil two principal functions: they reduce ambiguity and prevent unnecessary repetition (as in Directive 2001/83/EC).[38] By proposing a definition of pharmaceutical waste, one implicitly identifies a new category of waste. This category will encompass several sub-streams, as pharmaceutical waste does not constitute a homogeneous stream but rather comprises multiple sub-streams that reflect the diversity and complexity of the chemical substances contained in pharmaceutical products.[39] Frequently cited examples include waste from anticancer medicines (identified by their high toxicity), waste from liquid formulations (classified by physical state), waste from antibiotics (classified by the associated risk of antimicrobial resistance), and waste from syringe preparations (distinguished by the route of administration). Nonetheless, these substreams remain part of the overarching pharmaceutical waste category.

In WFD, individual waste streams are typically distinguished by:

1. the source product of the waste, i.e. the object or substance from which the waste originates – like food waste (Article 3(4a));
2. the physicochemical properties of the source product – like bio-waste and its biodegradability) (Article 3(4));
3. the activity or process generating the waste, like construction and demolition waste (Article 3(2c));
4. the suitability or unsuitability of the product for its initially intended purpose, like waste oils (Article 3(8)).

These criteria can guide the development of a definition for pharmaceutical waste. The first conceptual approach is to rely on a catalogue of source products through delineating the product categories covered by the definition. Existing definitions of pharmaceutical waste typically rely on its generation from medicines. Analogous to the definition of food waste, pharmaceutical waste could be defined by reference to the legal definition of a medicinal product contained in Directive 2001/83/EC. However, this approach is limited in scope, as it excludes other product categories capable of generating similar contaminants, such as medical devices, dietary supplements, and cosmetic products, and it imports interpretive

[38] Mario Hernández Ramos and Volker Heydt, 'Legislative Language and Style' in U Karpen, H Xanthaki (eds), *Legislation in Europe: A Comprehensive Guide for Scholars and Practitioners* (Hart Publishing 2017) 134.
[39] Pines (n 26) 31.

challenges associated with the EU concept of a medicinal product into the definition of pharmaceutical waste.

A second approach is to focus on the properties of the source product rather than on the product category itself. This method better reflects the primary concern in preventing environmental pollution: the presence of APIs (in chemical, not legal, meaning) in both medicinal and non-medicinal products.

A third approach is to identify the activities or processes that generate pharmaceutical waste. Currently, pharmaceutical waste is implicitly included within medical waste, which is defined primarily by its origin. As discussed earlier, defining pharmaceutical waste through these processes is problematic because it obscures its distinct environmental significance and ties it too closely to healthcare delivery.

The fourth criterion employed by the EU legislator pertains to the loss of suitability for the originally intended purpose. In the context of pharmaceutical waste, however, this approach is difficult to justify given the specific nature of APIs. One conceivable approach would be to draw on the definition of a medicinal product and classify waste as material that has lost its pharmacological, immunological, or metabolic activity. Yet determining the precise point at which such activity ceases remains highly complex. While expiry dates may serve as a proxy, it is well established that many medicinal products retain effectiveness beyond the indicated date.[40] Moreover, reliance on the expiration date as the decisive criterion would fail to capture medicinal products arising from unfinished or discontinued therapies, before expiration.

Under WFD, the EU legislator provides criteria operating in the opposite direction – namely, from waste to product – through the concept of end-of-waste status (Article 6). A substance may cease to be waste where it is intended for specific use, meets technical and regulatory standards, has a market or demand, and does not pose adverse environmental or health impacts. By analogy, reverse criteria may be constructed to assess the transition from product to waste. In the pharmaceutical context, this could include situations where: (1) the API can no longer be used for its primary purpose; (2) the product fails to meet relevant technical or regulatory standards; and (3) its use may pose risks to human health. In practice, however, such determinations are frequently made by consumers, who, lacking specialised knowledge, are generally unable to identify these transitional thresholds.

[40] Gurmeet S Sarla, 'Efficacy and disposal of drugs after the expiry date' (2019) 31(4) The Egyptian Journal of Internal Medicine 431–434.

2. DEFINITION BASED ON THE WASTE SOURCE PRODUCT

Defining pharmaceutical waste by reference to the source product (which becomes waste when meeting the conditions under WFD) requires not only a precise understanding of the legal concept of a medicinal product (as defined in Article 1(2) of Directive 2001/83/EC) but also an assessment of other product categories that may fall within the scope of the definition. The characteristics of medicinal products and their relationship to other regulated product groups have been analysed extensively in the literature.[41] Given that APIs posing environmental risks are predominantly found in medicinal products, treating medicines as the core source product of pharmaceutical waste is an intuitive and commonly applied approach.

A source product-based definition of pharmaceutical waste could be formulated as follows: 'pharmaceutical waste means medicinal products, as defined in Article 1 of Directive 2001/83/EC of the European Parliament and of the Council, that have become waste'. Such a definition would offer a clear, legally anchored criterion that consumers and waste management entities should easily identify.

It is essential to ensure that consumers can readily determine whether a product, once discarded, constitutes pharmaceutical waste, as this classification shapes subsequent disposal behaviour. The possibility of purchasing medicinal products in non-pharmacy settings, such as petrol stations or supermarkets, may weaken consumers' perception of these products as belonging to the healthcare domain. As a consequence, consumers may treat waste arising from such products similarly to ordinary household waste, including food waste, rather than as a separate, environmentally relevant waste stream. Conversely, purchasing a product in a pharmacy – including not only medicines but also dietary supplements or cosmetics – may lead consumers to assume automatically that the resulting waste falls within the category of pharmaceutical waste.

Within a definition constructed around the medicinal product as the source product, several sub-categories require particular attention due to their environmental or regulatory significance. These include cytostatic and cytotoxic medicinal products, controlled substances, vaccines and serums, and medicinal products administered in pre-filled syringes.

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[41] Joanna Haberko (ed), *System Prawa Medycznego. Tom 4: Prawo farmaceutyczne* (CH Beck; Institute of Legal Sciences, Polish Academy of Sciences 2019) 345; Jarosław Kocot, *Prawo Unii Europejskiej wobec procederu fałszowania produktów leczniczych* (Instytut Wydawniczy Euro-Prawo 2018) 40; Magdalena Krekora and others, *Prawo farmaceutyczne* (Wolters Kluwer Polska 2020) 31.

A further question is whether products similar to medicinal products may pose comparable environmental risks. Dietary supplements and specific medical devices can serve as an example. Dietary supplements often contain substances identical to those present in medicinal products, albeit at lower doses; in some cases, empirical findings indicate that supplements may contain even higher levels of such substances.[42] Regarding medical devices, manufacturers typically indicate whether their product falls within this regulatory category.[43] Some products are on the borderline, such as eye drops.[44] Although regulatory authorities may verify and correct misclassifications, such control is selective and, therefore, not comprehensive.

The principal advantage of defining waste through reference to specific products or product groups is transparency.[45] On the other hand, defining pharmaceutical waste by enumerating its source products risks transferring the classification and interpretative uncertainties associated with these products directly into the definition of pharmaceutical waste. Mainly, when attempts include non-medicinal products that may contain substances identical, in physicochemical terms, to APIs, this approach may lead to creating an overly expansive definition. In categories such as medical devices or dietary supplements, only some products contain such substances; therefore, only those specific items should potentially fall within the scope of pharmaceutical waste. Furthermore, the rigidity of product lists renders them susceptible to obsolescence, particularly in rapidly evolving markets.[46]

3. DEFINITION BASED ON THE PROPERTIES OF THE WASTE

Focusing on products rather than the materials from which they are made can hinder the effective regulation of waste streams.[47] This critique is especially rel-

[42] Małgorzata Korzycka and others, 'Suplementy diety i żywność specjalnego przeznaczenia medycznego' in J Haberko (ed), *System Prawa Medycznego. Tom 4: Prawo farmaceutyczne* (CH Beck; Institute of Legal Sciences, Polish Academy of Sciences 2019) 409; also Katarzyna Stoś, 'Suplementy diety czy leki?' Narodowe Centrum Edukacji Żywieniowej <https://ncez.pzh.gov.pl/abc-zywienia/suplementy-diety-czy-leki/> accessed 20 November 2025.

[43] Case C-219/11 *Brain Products GmbH v BioSemi VOF and Others* ECLI:EU:C:2012:742, para 33.

[44] Medical Device Coordination Group, 'Manual on Borderline and Classification for Medical Devices under Regulation (EU) 2017/745 on Medical Devices and Regulation (EU) 2017/746 on In Vitro Diagnostic Medical Devices', Version 2 (2022) 37.

[45] Ilona Cheyne, 'The Definition of Waste in EC Law' (2002) 14(1) Journal of Environmental Law 63.

[46] Ibid.

[47] Based on the Commission actions: Geert Van Calster and Leonie Reins, *EU Environmental Law* (Edward Elgar Publishing 2017) 267.

evant in the context of pharmaceutical waste, where environmental harm arises from the chemical properties of APIs and similar compounds rather than from the formal regulatory status of the products containing them.[48]

A second approach worth considering is to define pharmaceutical waste based on the properties of the waste itself, in particular the presence of APIs, which in Directive 2001/83/EC should be matched with *active substance*, since there is no separate definition of *active pharmaceutical ingredient*.[49] Such an approach shifts the focus away from the legal classification of the source product and towards the substances responsible for environmental risk. This does not necessarily require amending Directive 2001/83/EC. A parallel definition could be introduced in environmental (in case of choosing a separate legal instrument to regulate the matter) or particularly waste law, capturing substances based on their chemical identity and environmental relevance. This would allow pharmaceutical and environmental law to operate in a complementary manner: the former remains product-centred, while the latter addresses substance-related risks at the waste stage.

Basing the definition on the substance rather than the product also ensures a more coherent response to environmental concerns identified in PiE research. It would be incorrect to say that APIs are present in products other than medicinal products, but it is correct that some products contain substances with the same chemical structure and, therefore, properties as APIs. Substances identical to APIs may occur in products classified as non-medicinal, such as dietary supplements, medical devices, or cosmetic products, often due to regulatory or market distinctions rather than chemical differences. In some cases, the distinction depends on dosage rather than substance identity.[50] A composition-based approach avoids overlooking such cases. The assessment of environmental relevance should remain evidence-based, and differentiated waste management measures may be introduced, for example, to ease handling requirements for environmentally benign substances. Extending regulatory coverage to such cases does not require redefining *active substance* in pharmaceutical law. It can instead be achieved through a series of references made in the regimes regulating the above-mentioned products, together with an indication of the conditions under which waste from such products should be considered pharmaceutical waste. At the same time,

[48] Cheyne (n 45).

[49] Article 1(3a): *any substance or mixture of substances intended to be used in the manufacture of a medicinal product and that, when used in its production, becomes an active ingredient of that product intended to exert a pharmacological, immunological or metabolic action with a view to restoring, correcting or modifying physiological functions or to make a medical diagnosis.*

[50] E.g., for dietary supplements: Małgorzata Korzycka and others (n 42).

classifying waste from non-medicinal products as pharmaceutical waste should remain exceptional and contingent on the presence of relevant substances.

Building on the above, it must be acknowledged that clearly delineating the boundaries between environmental law – particularly waste law – and product-specific regulation, such as that governing medicinal products, is difficult in practice. The increasing reliance on a life-cycle approach means that regulatory frameworks addressing products cannot avoid engaging with their end-of-life stage, including waste. As a result, a degree of overlap is inevitable. General principles of waste management are laid down in WFD, while more specific rules concerning the handling of waste derived from particular product categories remain embedded in sectoral legislation, including Directive 2001/83/EC. Rather than constituting a contradiction, this dual structure enables the integration of product-specific characteristics into waste management regimes, thereby, in author's opinion, enhancing their effectiveness. Moreover, such an approach is consistent with the principle of integration enshrined in Article 11 TFEU.

A crucial issue arises when defining pharmaceutical waste by reference to APIs content: whether items contaminated by APIs should fall within the definition. Personal protective equipment, cleaning agents, absorbent materials used to manage spills, and similar items may become contaminated through contact with broken, spilt, or improperly handled medicinal products.[51] Equipment used in administering medications may likewise acquire APIs residue. S Castensson extends this logic further, noting that materials contaminated during pharmaceutical manufacture should also be regarded as pharmaceutical waste.[52]

The EU legislator can draw guidance for addressing this issue from Y Chartier and others, who classify discarded items *heavily contaminated* during the handling of pharmaceuticals – such as bottles, vials, boxes containing pharmaceutical residues, gloves, masks, and connecting tubes – as pharmaceutical waste.[53] The key element is the qualifier *heavily*, which introduces a threshold concerning the degree of contamination sufficient to justify classification as pharmaceutical waste. Incorporating a contamination-based criterion would allow for a more nuanced regulatory approach. In opting for the flexible yet inherently indeterminate notion of *heavily* as a threshold criterion, it is appropriate to briefly consider an alternative approach based on the use of quantitative benchmarks. EU chemical legislation provides a relevant point of reference in this regard, among others in Regulation (EC) No 1272/2008 (CLP), where numerical thresholds – such as

[51] Castensson (n 20) 489.
[52] Ibid.
[53] WHO (n 30) 5.

0.1% and 1% – are employed to assess the health hazards posed by substances and mixtures.[54] These thresholds effectively operationalise the graduality by translating it into measurable criteria. However, the transposition of such an approach into the present context raises important feasibility concerns. First, within the chemicals regulatory framework, manufacturers typically possess the technical capacity and procedural infrastructure necessary to determine substance concentrations at the production stage. By contrast, any threshold adopted here would need to be ascertainable not only by professional healthcare operators but also, at least in principle, by end-users such as households, thereby introducing practical limitations on measurement and verification. Secondly, the determination of contamination levels may be complicated by the heterogeneity of contaminated items (here, it is not the substance that is 'contaminated', like in chemical legislation). The relative proportion of a contaminant may vary considerably depending on the nature and scale of the object in question – for example, between small-volume pharmaceutical applicators, such as tubes, and larger items such as contaminated garments. These factors suggest that, while numerical thresholds offer conceptual clarity, their practical implementation in this domain may prove significantly more complex.

A definition centred on APIs content evokes parallels with the EU's chemicals regulatory regime, which focuses on the properties and hazards of substances rather than on the specific products containing them. Such an approach would shift attention from the category of source products to the chemical characteristics of the waste, treating pharmaceutical waste as a stream defined by the presence of environmentally relevant compounds.

4. PACKAGING

Packaging may be regarded as an integral part of the medicinal product;[55] this is reflected, among others, in the legal definition of an excipient, which presupposes the existence of packaging material alongside the excipient and the APIs (Article 1(3b) of the Directive 2001/83/EC). Two categories of packaging are generally distinguished: immediate packaging and outer packaging. *Immediate packaging* refers to the container or other form of packaging immediately in contact with the

[54] Annex 1, OJ L 353 of 31 December 2008.

[55] Noticeable in Annex to the Regulation of the Minister of the Environment of 22 October 2013 on the Exemplary List of Products that Are or Are Not Considered Packaging [2013] Journal of Laws 2013 item 1274 (PL) – in which packaging is expressly considered to be an integral part of the product and necessary for storing, maintaining or protecting the product throughout its entire cycle and period of operation.

medicinal product (Article 1(23) of the Directive 2001/83/EC). In contrast, *outer packaging* refers to the packaging that contains the immediate packaging (Article 1(24) of the Directive 2001/83/EC). Immediate packaging can correspond with the *pharmaceutical packaging* sometimes used in literature.[56]

From the perspective of defining pharmaceutical waste, packaging should be included only to the extent that it has come into contact with APIs. On this basis, the inclusion of immediate packaging within the scope of pharmaceutical waste appears intuitive, as direct contact with APIs increases the likelihood of contamination. However, immediate packaging should not automatically be classified as pharmaceutical waste; rather, it should be considered as such only when it is heavily contaminated with APIs. Outer packaging, by contrast, generally lacks direct contact with APIs and should be treated as pharmaceutical waste only in exceptional circumstances – namely, where heavy contamination has occurred.

V. CONCLUSIONS: PROPOSAL OF DEFINITION

Although the term pharmaceutical waste does not appear in EU legislation, it is increasingly used in academic and policy documents. The current, implicitly applied understanding of pharmaceutical waste tends to focus on unused or expired medicinal products. This approach is too narrow to address environmental pollution caused by active pharmaceutical ingredients (APIs). Moreover, the classification of pharmaceutical waste under the broader category of medical waste is insufficient, as it fails to account for the dispersed sources of pharmaceutical waste generation, the decentralised distribution of products that become such waste, and the specific environmental characteristics of APIs.

Is the definition of pharmaceutical waste necessary? Establishing pharmaceutical waste as a distinct category would enable the development of targeted strategies, policies, and legal instruments tailored to its unique characteristics and needs. It would also draw greater regulatory attention to this waste stream than is possible when it is subsumed under the broad and diffuse category of medical waste, often equated with waste from protective equipment or healthcare consumables. These factors demonstrate the need to develop a distinct and coherent concept of pharmaceutical waste.

Regarding the shape of the definition, the approach based on enlisting products that later fall into the category of pharmaceutical waste naturally leads to an emphasis

[56] Castensson (n 20) 494.

on medicinal products. However, other products containing substances of the same environmental significance should not be excluded from the scope. Moreover, a definition based on a list of source products would import the interpretative difficulties associated with distinguishing between medicinal products, dietary supplements, cosmetics, and medical devices into the category of pharmaceutical waste.

To avoid these problems, pharmaceutical waste can instead be defined by reference to the composition of the source product – namely, the presence of APIs or substances with API-like characteristics (second approach). This approach requires introducing, or extending, the definition of APIs so that it also encompasses substances found in products other than medicinal products. A composition-based approach would capture all environmentally relevant products and substances that contribute to environmental pollution, as described by researchers from the PiE area. Materials containing high levels of APIs as a result of contact with pharmaceutical products would also be considered pharmaceutical waste, for example, items contaminated through spillage or during handling. Immediate packaging should likewise be included within the definition if contaminated. The treatment of outer packaging depends on the design of pharmaceutical waste collection systems; however, generally, such packaging should be excluded and managed according to paper, plastic, or glass waste streams.

A final proposal for the definition of pharmaceutical waste can, therefore, be formulated as follows: *Pharmaceutical waste means waste from products containing an active pharmaceutical ingredient.* Given that Directive 2001/83/EC contains a definition of active substance, two options are available. Option one – introducing a separate definition of APIs for environmental protection purposes, or option two – treating active substance and active pharmaceutical ingredient as equivalent terms, and broadening the scope of its understanding through references made in the regimes regulating similar products that contain substances with a chemical structure equivalent to APIs. The first approach is viable where the definitions are placed in separate legislative acts; otherwise, clarity and transparency may suffer. The second approach supports legal coherence and recognisability, particularly given the centrality of APIs to the discourse on PiE.

To facilitate the application of the definition and reflect both scientific knowledge and societal understanding, the following clarification may be added: *Waste from a medicinal product as defined in Article 1 of Directive 2001/83/EC of the European Parliament and of the Council is presumed to be pharmaceutical waste.* As the definition applies only to products that have become waste, it remains consistent with the general EU concept of waste, which concerns substances or objects that the holder discards, intends to discard, or is required to discard (as in Article 3(1) of the WFD).

In light of the considerations regarding packaging, it may be appropriate to add: […] *along with packaging in direct contact with the substance* or […] *along with immediate packaging.*

Finally, to address the inclusion of items contaminated by APIs, the following provision may be considered: *A product containing an active pharmaceutical ingredient also means an object or substance that, through contact with a product originally containing an active pharmaceutical ingredient, has been heavily contaminated by it.* Although the term heavily introduces a degree of vagueness, it is the most reasonable threshold for capturing contamination levels relevant to environmental and health protection. This addition would address concerns raised in the literature regarding materials contaminated with APIs during manufacturing, handling, clinical use, or accidental damage.

REFERENCES

Bradley CP and Bond ChM, 'Increasing the number of drugs available over the counter: arguments for and against' (1995) 45(399) British Journal of General Practice 553–556

Caban M and Stepnowski P, 'How to Decrease Pharmaceuticals in the Environment? A Review' (2021) 19 Environmental Chemistry Letters 3115

Castensson S, 'Pharmaceutical Waste' in K Kümmerer (ed), *Pharmaceuticals in the Environment: Sources, Fate, Effects and Risks* (Springer Science & Business Media 2008) 489

Cheyne I, 'The Definition of Waste in EC Law' (2002) 14(1) Journal of Environmental Law 63

Chung S and Brooks BW, 'Identifying Household Pharmaceutical Waste Characteristics and Population Behaviors in One of the Most Densely Populated Global Cities' (2019) 140 Resources, Conservation & Recycling 267

Commission Notice 'Separate Collection of Household Hazardous Waste' [2020] OJ C375/1

Communication from the Commission, 'European Union Strategic Approach to Pharmaceuticals in the Environment' COM (2019) 128 final

Cristini I and others, 'A narrative review on the environmental impact of medicines: from water analysis and in vivo studies to prescribing appropriateness, based on European and Italian legal frameworks' (2025) 5 Frontiers in Drug Safety and Regulation 1681648

Daughton CG, 'Cradle-to-Cradle Stewardship of Drugs for Minimizing Their Environmental Disposition While Promoting Human Health. I. Rationale for and Avenues toward a Green Pharmacy' (2003) 111(5) Environmental Health Perspectives 757

EEA, 'Pharmaceuticals in the Environment: Results of an EEA Workshop' (EEA 2010) 10

European Commission Health and Food Safety Directorate-General, 'Pharmaceuticals in the Environment: Implement the EU Strategic Approach – Compilation of Recommendations and Best Practices' (2025)

EMA, 'Environmental Risk Assessment of medicines' (EMA 2015)

– –, What we do <https://www.ema.europa.eu/en/about-us/what-we-do#monitor-the-safety-of-medicines-across-their-lifecycle-12356> accessed 20 November 2025

Haberko J (ed), *System Prawa Medycznego. Tom 4: Prawo farmaceutyczne* (CH Beck; Institute of Legal Sciences, Polish Academy of Sciences 2019) 345

Haithem A, Parvez MS, Czedli HM, 'Pharmaceuticals and Microplastics in Aquatic Environments: A Comprehensive Review of Pathways and Distribution, Toxicological and Ecological Effects' (2025) 22(5) International Journal of Environmental Research and Public Health 799

Hernández Ramos M and Heydt V, 'Legislative Language and Style' in U Karpen, H Xanthaki (eds), Legislation in Europe: A Comprehensive Guide for Scholars and Practitioners (Hart Publishing 2017) 134

ICRC, 'Medical Waste Management' (ICRC 2011)

Jaseem M, Kumar P and John RM, 'An Overview of Waste Management in Pharmaceutical Industry' (2017) 6(3) The Pharma Innovation Journal 158

Jovanović V and others, 'Management of Pharmaceutical Waste in Hospitals in Serbia – Challenges and the Potential for Improvement' (2016) 50(4) Indian Journal of Pharmaceutical Education and Research 700

Kadam A and others, 'Pharmaceutical Waste Management: An Overview' (2016) 9(1) Indian Journal of Pharmacy Practice 2

Krekora M, Świerczyński M and Traple E, *Prawo farmaceutyczne* (Wolters Kluwer Polska 2020) 31

Kocot J, *Prawo Unii Europejskiej wobec procederu fałszowania produktów leczniczych* (Instytut Wydawniczy EuroPrawo 2018) 40

Kornfeld L and Prouty A, 'The War on Drugs: Pharmaceutical Waste Management Challenges and Emerging Issues' (2014) 28 Natural Resources & Environment 27

Korzycka M, Zboralska M and Wojciechowski P, 'Suplementy diety i żywność specjalnego przeznaczenia medycznego' in J Haberko (ed), *System Prawa Medycznego. Tom 4: Prawo farmaceutyczne* (CH Beck; Institute of Legal Sciences, Polish Academy of Sciences 2019)

Kümmerer K (ed), *Pharmaceuticals in the Environment: Sources, Fate, Effects and Risks* (Springer Science & Business Media 2008)

Medical Device Coordination Group, 'Manual on Borderline and Classification for Medical Devices under Regulation (EU) 2017/745 on Medical Devices and Regulation (EU) 2017/746 on In Vitro Diagnostic Medical Devices', Version 2 (2022) 37

OECD, *Management of Pharmaceutical Household Waste: Limiting Environmental Impacts of Unused and Expired Medicine* (OECD Publishing 2022)

Pines E and Smith Ch, 'A 10-Step Blueprint for Managing Pharmaceutical Waste in US Healthcare Facilities' 2022 Edition (US EPA 2022)

Résomédit, C2DS, 'Médicaments à l'hôpital : [ré]agir pour moins jeter' 2026

Rogowska J and others, 'Pharmaceutical Household Waste Practices: Preliminary Findings from a Case Study in Poland' (2019) 64 Environmental Management 97

Sarla GS, 'Efficacy and disposal of drugs after the expiry date' (2019) 31(4) The Egyptian Journal of Internal Medicine 431

Stoś K, 'Suplementy diety czy leki?' Narodowe Centrum Edukacji Żywieniowej <https://ncez.pzh.gov.pl/abc-zywienia/suplementy-diety-czy-leki/> accessed 20 November 2025

UNEP, An Assessment Report on Issues of Concern: Chemicals and Waste Issues Posing Risks to Human Health and the Environment (UNEP 2020)

UNEP, 'Safe disposal of unused medicines – A One Health approach for national systems' (UNEP 2026)

Van Calster G and Reins L, *EU Environmental Law* (Edward Elgar Publishing 2017) 267

Vogler S and others, 'Medicines Discarded in Household Garbage: Analysis of a Pharmaceutical Waste Sample in

Vienna' (2014) 7 Journal of Pharmaceutical Policy and Practice 6

WHO, 'Guidelines for Safe Disposal of Unwanted Pharmaceuticals in and after Emergencies' (WHO 1999)

– –, 'Safe Management of Wastes from Healthcare Activities' (WHO 1999)

– –, 'Safe Management of Wastes from Healthcare Activities 2nd edition' (WHO 2014)

– –, 'Global analysis of healthcare waste in the context of COVID-19: status, impacts and recommendations' (WHO 2022) 6

– –, Health-care Waste: Fact Sheet <https://www.who.int/en/news-room/fact-sheets/detail/health-care-waste> accessed 16 November 2025

– –, 'Safe management of pharmaceutical waste from health care facilities: global best practices' (WHO 2025)

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ENFORCEMENT OF NEGOTIATED AND MEDIATED SETTLEMENTS IN THE EU AND IN THE ANGLOSPHERE: A COMPARATIVE APPROACH

Abstract

This article compares enforcement of negotiated and mediated settlements across members of the EU and the 'Anglosphere'. While both EU and Anglosphere jurisdictions tend to treat a negotiated settlement as a contract the parties can, jointly with the court, transform into an enforceable court order, a practice in Anglo but not civil law is a court order permanently dismissing a case pursuant to a settlement the court does not see. Moreover, EU and Anglo countries tend to have greater differences in relation to mediated settlements. Anglo courts tend to treat them similarly to negotiated settlements, while some EU countries make it easier for parties to obtain court approval of a mediated settlement than a negotiated settlement.

The article begins with the enforceability of negotiated settlements as contracts and then compares methods of making negotiated settlements as enforceable as court orders are. It then compares Anglo treatment of mediated settlements largely as negotiated settlements

with EU jurisdictions that provide a separate right to enforce mediated settlements. Finally, it shows how contrasting Anglo and EU approaches to mediated settlements emerged in Brexit and the Singapore Convention.

KEYWORDS

Alternative Dispute Resolution, negotiation, mediation, release, negotiated settlement, mediated settlement, enforcement of negotiated settlement, enforcement of mediated settlement, approval of negotiated settlement, approval of mediation settlement, settlement, amicable settlement, court settlement

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alternatywne metody rozwiązywania sporów, negocjacje, mediacja, zwolnienie z długu, ugoda wynegocjowana, ugoda mediacyjna, wykonalność ugody wynegocjowanej, wykonalność ugody mediacyjnej, zatwierdzenie ugody mediacyjnej, ugoda, ugoda polubowna, ugoda sądowa

I. INTRODUCTION

Law throughout the EU and large 'Anglosphere' jurisdictions (the US, England, Canada, and Australia) permits parties to civil litigation to end their cases by agreement, whether the agreement is concluded in negotiation or mediation. And both EU and Anglo jurisdictions tend to treat a negotiated settlement like a contract the parties can, jointly with the court, convert into an enforceable title or a consent judgment. However, Anglo and EU jurisdictions tend to diverge more with respect to mediated settlements, which Anglos tend to treat more similarly to negotiated settlements, but which the EU and civil law nations within it tend to treat more differently from negotiated settlements.

These differences in law may be accentuated by differences in legal costs and culture. In Anglo jurisdictions, discovery-intensive litigation is expensive and negotiated settlements have long been the usual way litigation is resolved.[1] So mediated settlements are often just a slightly different way of doing something

[1] Yun-chien Chang, Daniel Klerman, 'Settlement Around the World: Settlement Rates in the Largest Economies' (2022) 14(1) Journal of Legal Analysis 80–175 <https://doi.org/10.1093/jla/laac006> accessed 11 April 2023 ('Common law countries, such as the US, UK, and Australia, tend to have the highest settlement rates. Countries with legal systems based on French civil law, such as France and Belgium, tend to have the lowest settlement rates. Countries with legal systems

lawyers often do, which is settle. In the civil law systems of EU nations, by contrast, discovery is more limited, lawyers and litigation are not so expensive, and negotiated settlements are less common.[2] So mediated settlements are quite different from what lawyers usually do, which is litigate to the end. In such a nation, mediated settlements may look more similar to arbitration awards than to negotiated settlements because both mediators and arbitrators are third-party neutrals whose professional credibility may increase courts' willingness to enforce outcomes to which they contributed.

Part II of this article shows the enforceability of negotiated settlements as ordinary contracts in both the Anglo and EU jurisdictions noted above. Part III compares methods for making negotiated settlements more readily enforced than ordinary contracts. Part IV contrasts Anglo jurisdictions, which largely treat mediated settlements like negotiated settlements, with EU jurisdictions, which provide separate law – including separate grounds to deny enforcement – for mediated settlements.

II. ENFORCEABILITY OF NEGOTIATED SETTLEMENTS AS CONTRACTS

We define a 'settlement' (much as some people would define an 'amicable settlement') as an agreement resolving a dispute and thus preventing or ending litigation or arbitration. Some settlements address multiple claims each party has against the other, or many parties' claims, but for simplicity this article speaks of settling one claim a plaintiff or potential plaintiff (P) has against the defendant or potential defendant (D). In that context, a settlement is the sale of a claim by P to D, and the sales price is whatever D pays or promises to pay P, which is typically but not necessarily money.[3]

If a claim has not yet been asserted in court, a potential P who could sue D may instead accept some negotiated amount of money from D in exchange for whatever (then-unknown) remedy P would win from suing. Generally, across the

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in the German or Nordic civil law families, such as Germany, China, and Sweden, tend to have middling settlement rates'.).

[2] Ibid (n 1) ('For some countries, such as Russia, Poland, France, and Turkey, even the highest estimate of the settlement rate is under 20%, indicating that the true settlement rate is clearly very low'.).

[3] Stephen J Ware, *Principles of Alternative Dispute Resolution* (4th edn, West Academic Publishing 2023) § 3.3; Keith N Hylton, 'Selling Out: An Instrumentalist Theory of Legal Ethics' (2021) 34(19) The Georgetown Journal of Legal Ethics 54 ('A settlement occurs when the defendant, the violator of the plaintiff's right, purchases the claim from the plaintiff'.).

Anglosphere and EU nations, D's performance of P's settlement – even though the settlement was concluded privately, with no involvement by a court – typically precludes P from further recovery on the claim P sold to D. So, if after accepting the full settlement payment from D, P nevertheless sues D on that claim, D will present the court with proof of the settlement (typically a document at least P signed) and D's payments required by the settlement, which will prompt the court to dismiss P's suit permanently, unless P can show that the settlement is unenforceable under a ground that would make any contract unenforceable.

For example, France's Civil Code states that 'a settlement is a contract by which the parties resolve an existing dispute or prevent a dispute from arising'.[4] The settlement prevents the parties from instituting or continuing legal proceedings with the same subject matter'.[5] Similarly, the German Civil Code defines a settlement as 'a contract by which a dispute or uncertainty of the parties with regard to a legal relationship is removed by way of mutual concession'.[6]

Anglosphere nations also treat settlements like other contracts and thus permanently dismiss claims covered by them.[7] 'Since a settlement is merely an agreement or contract to end a dispute', its formation,[8] interpretation,[9] and defences[10] are all

[4] Article 2044 of French CC ('La transaction est un contrat par lequel les parties, par des concessions réciproques, terminent une contestation née, ou préviennent une contestation à naître. Ce contrat doit être rédigé par écrit'. [A settlement is a contract by which the parties, through mutual concessions, terminate a dispute which has arisen, or prevent a dispute which is about to arise. This contract must be reduced to writing].

[5] Article 2052 of French CC ('La transaction fait obstacle à l'introduction ou à la poursuite entre les parties d'une action en justice ayant le même objet' [The transaction precludes the initiation or continuation of legal proceedings between the parties concerning the same subject matter]).

[6] Section 779 (1) BGB.

[7] Ware (n 3) § 3.39(a). E.g., N.Y. Civil Practice Law and Rule 3211(a)(5) ('A party may move for judgment dismissing one or more causes of action asserted against him on the ground that … the cause of action may not be maintained because of … [a] release'); Cal. Civ. Code § 1541 ('An obligation is extinguished by a release therefrom given to the debtor or the released party by the creditor or releasing party, upon a new consideration, or in writing, with or without new consideration'.).

[8] Philip Chong, Elizabeth Tout, *United Kingdom in John Fellas, Transnational Litigation* (2024) § 29:86 (formation of a settlement is by 'the general requirements of English contract law (offer, acceptance, consideration, due capacity, and an intention to create legal relations).').

[9] Chitty on Contracts, ch. 26–109 (35th edn, Sweet & Maxwell 2025) ('The general principles applicable to the interpretation of contracts are applicable to a release'.). *BCCI v Ali* [2001] UKHL 8 [9–10]. As 'determining the scope of the release is a matter of interpretation', courts often face the challenge of allocating the risk of claims that are unknown to the parties at the time the release is signed. Daniele Bertolini, 'Releasing the Unknown: Theoretical and Evidentiary Challenges in Interpreting the Release of Unanticipated Claims' (2023) 48(2) Queen's Law Journal <https://canlii.ca/t/7n6jl> accessed 29 April 2025, 61–100, at 63.

[10] "As a settlement agreement is a contract, it can be challenged as any other contract. Thus, it could be found to be void on grounds of concepts such as mistake, frustration, fraud and illegality.

generally governed by ordinary contract law in England, the US, and Canada.[11] If Anglosphere courts treat settlements differently from other contracts, it may be by making them easier to enforce, such as by applying defences more narrowly to settlements than they do to other contracts. For instance, several courts have held that even if a unilateral mistake is sometimes a defence to other contracts, only a mutual mistake suffices against a settlement.[12] Similarly, civil codes across EU nations generally make defences to settlement agreements the same as defences to other contracts, with some exceptions. For example, as in the Anglosphere, the defence of a mistake may be applied more narrowly to settlements than it is to other contracts.[13]

Much as ordinary contract law generally governs enforcement of settlements to permanently dismiss P's claims, contract law similarly governs in both EU and Anglo jurisdictions if D does not make the payments required by a settlement because P may then generally enforce the settlement in a breach of contract suit governed by ordinary contract law.

III. MAKING A NEGOTIATED SETTLEMENT MORE THAN A CONTRACT

In both the Anglosphere and the nations of the EU, P enforcing a settlement by suing for its breach can be slow and expensive because it takes two steps. First, P starts a new suit (presumably last in line on the court's docket) for breach of

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It could also be set aside on grounds of misrepresentation, duress and undue influence'. Donald Lambert, 'Mediation in United Kingdom' (9 September 2019) Lexology <https://www.lexology.com/library/detail.aspx?g=02ee5416-79ba-484b-bd62-eb26318d330b> accessed 30 June 2025. *Watson v Sadiq* [2013] EWCA Civ 822 at [49] ('The customary basis upon which such a contract compromising litigation can be set aside are those upon which any ordinary contract can be set aside, i.e. for misrepresentation, fraud, undue influence, duress and the like'.).

[11] Ware (n 3) § 3.39(b) (quoting US cases); Daniele Bertolini (n 9) 61–100, at fn.1 (referring to duress, unconscionability, and mistake as 'grounds upon which the validity of a release can be challenged').

[12] *Brown v Cnty. of Genesee*, 872 F.2d 169, 174 (6th Cir. 1989).

[13] Art 918 § 1 Polish Civil Code ('The evasion of the legal effects of a settlement concluded by mistake shall be admissible only if the mistake pertains to a state of fact which, in accordance with the contents of the settlement, both parties considered undisputable, and the dispute or uncertainty would not have arisen if at the time of concluding the settlement the parties knew the true state of things. § 2. It shall not be possible to evade the legal effects of a settlement following the discovery of evidence concerning the claims to which the settlement persists unless the settlement was concluded in bad faith'.). See Daniel Dulęba, *Settlement in Polish Civil Law* (Ugoda w polskim prawie cywilnym) (1st edn, LexisNexis 2012) 18–30.

the settlement, which can take years. This action seeks a court order that D do what D promised in the settlement. Only if P wins that order and D still does not comply, can P use government officers to enforce the settlement.[14]

In contrast to the slow two-step contract-enforcement process just explained, a settlement negotiated after the parties have begun litigation can, in both Anglo and EU jurisdictions, be made more enforceable by P than a mere contract. In the Anglosphere, parties jointly ask the court to convert their settlement into some form of an 'agreed judgment',[15] 'consent judgment',[16] or 'consent decree' of the court.[17] In Canada[18] and the US, parties may ask a court to 'enter judgment' on a settlement and retain jurisdiction over the case, so P can enforce the agreement on motion (a simple, expedited procedure) without need for a new suit.[19] Similarly, England has various forms of consent judgments,[20] including consent orders for simple money judgments and 'Tomlin orders' for more complex settlements,[21]

[14] Anthony DiSarro, 'Six Decrees of Separation: Settlement Agreements and Consent Orders in Federal Civil Litigation' (2010) 60(2) American University Law Review 275, 282–83. In US, 'Where they are part of a contract, settlement terms can only be enforced via the breach-of-contract route. This entails a two-step process. First, the party seeking enforcement will have to commence a plenary action to obtain a decree of specific performance. Then, the party can enforce the specific performance decree through a contempt proceeding. The two-step enforcement process is lengthier and consumes more judicial resources than contempt of a settlement which has been entered as a court order'). In England, as in the US, '[i]f litigation has not commenced, the settlement agreement usually operates as a contract between the parties, thereby requiring fresh proceedings to be issued [a new suit] for any breach'; Shahla F Ali, 'Court Mediation Reform: Efficiency, Confidence and Perceptions of Justice' (2018) 021 University of Hong Kong Faculty of Law Legal Studies Research Paper Series 76 (England). See Stefan Rützel and others, Commercial Dispute Resolution in Germany (2nd edn, CH Beck 2016) 66–67.

[15] *Palavan v McCulley*, 498 S.W.3d 134, 137 (Tex. App. 2016).

[16] Legal Aid (New South Wales), Consent judgment or order: Step by step guide <https://www.legalaid.nsw.gov.au/my-problem-is-about/my-money/making-a-claim/step-by-step-guide-consent-judgment-or-order-plaintiff#accordion-9195955f49-item-36904a6feb> accessed 30 June 2025 ('If you and the defendant come to an agreement about your case, you can ask the court to make orders based on your agreement. This is called a consent judgment or order... Once you have a consent judgment or order, if the defendant does not do what the judgment or order says they must do, you can take steps to enforce the judgment or order').

[17] Charles Alan Wright, Mary Kay Kane, Law of Federal Courts (8th edn., West Academic Publishing 2017) § 98 n. 1851.

[18] *Ayr Hardwood Flooring Inc. v Korczmarczyk*, 2015 CarswellOnt 104 (granting Plaintiff's motion for judgment on settlement).

[19] Cal. Civ. Proc. Code § 664.6; Ingrid M Evans, Holding Defendants to Their Word, Trial, April 2020, at 20, 22.

[20] Civil Procedure Rule 40.6 (Consent judgments and orders).

[21] Paul Britton, 'Tomlin Orders: When Are They Used?' (2 February 2022) <https://brittontime.com/insights/tomlin-orders/> accessed 30 June 2025.

that may be enforced without having to commence new proceedings.[22] In keeping with the Anglo culture of settlement, courts in the Anglosphere are generally willing to grant parties' joint request to enter judgment on a settlement without inquiring about the fairness of its terms, unless they bind parties who may not be adequately represented, such as children or absent members of a class action.[23] And a court in the Anglosphere would refuse to enter judgment on the presumably rare settlement that violates public policy, such as a collusive settlement among firms in the same industry that violates competition law by fixing prices.

Much as courts in Anglo jurisdictions often expedite the enforceability of settlements by entering judgment on them or otherwise converting them into court orders, litigating parties in the EU can, with court approval, make 'court settlements'. This process, typically governed by the nation's Code of Civil Procedure, makes the agreement an enforceable title.[24] In some EU nations, the court merely records the parties' written settlement,[25] while in others, a party must apply for approval (such as homologation) on which the judge rules.[26] Grounds for courts to deny this are roughly similar across EU nations but vary somewhat. For example, Germany's Civil Code voids settlements, including court settlements, like other transactions if contrary to public policy or exploitative and disproportionate.[27] A French court does not homologate a settlement that violates public policy, the

[22] Chitty on Contracts (n 9) ch 26–026.

[23] Ware (n 3) 436–437; Judicial College (England & Wales) Family Court Bench Book 90 (January 2018) ('Consent Orders: Child Arrangements'; 'Any proposed order, whether to be made by agreement or not, must be scrutinised by the court ... to consider all the evidence and information available to help it decide if there is any risk of harm to the child'.).

[24] Section 794(1) no 1 ZPO; Article 777 § 1 no 1 of the Polish CCP ('the following shall be considered an enforcement order: … a settlement agreement made before the court'); see Philipp Anzenberger, 'The European Dimension of Court Settlements: Open Issues and Regulatory Needs' in Vesna Rijavec and others (eds), *Diversity of Enforcement Titles in EU* (Springer 2023) 333 ('Court settlements are one of the core instruments for amicable dispute resolution before court in many European countries'); id at 340–41 ('in every Member State is the necessity of some sort of involvement of a court when concluding the court settlement. Again, there are various possibilities on how a court can be involved (for example, already before an action was brought in or during proceedings; in the presence of the parties or by a mere written contract submitted to the court; or regarding the mediatory role of the court)'); 344 ('Probably the most important (procedural) function of a court settlement in practice is its role as an enforcement title'.).

[25] '[I]f the action is still pending, the parties may submit their out-of-court settlement agreement to the court. The court will render an order, thereby converting it into an execution title (§ 278(6) ZPO), which normally does not require more than a few days'. Rützel (n 14) 66–67.

[26] '[T]he judge hearing a request for approval of a settlement cannot proceed to examine the substantive validity of that agreement'. Case 17-21.879 3 Octobre 2018 Cour de cassation, civile, Chambre civile 1, https://www.legifrance.gouv.fr/juri/id/JURITEXT000037495439.

[27] Section 138 BGB.

law, or was concluded by a party lacking capacity.[28] In Poland, the court will not homologate a court settlement if it is contrary to the law or principles of community life or seeks to circumvent the law.[29] While an out-of-court settlement by litigating parties typically leads to withdrawal of the case, P may nevertheless re-assert the withdrawn claim until D performs the settlement. In contrast, if litigating parties make a court settlement, then P may not re-assert the settled claim unless P proves that the court settlement was invalid, which is very unlikely.

Going beyond cases in which litigation has already begun, many EU nations have procedures to make enforceable titles even out of settlements in which no case has been filed. In Germany, for example, a settlement reached by attorneys on behalf of the parties they represent may be filed with a court,[30] which shall declare it enforceable unless it is invalid or its recognition would violate public order.[31] Germany similarly empowers a notary, with the parties' consent, to declare enforceable a settlement the parties have filed with the notary.[32] Some other civil law nations in Europe – such as Austria, Italy, France, and Spain – similarly empower notaries, with the parties' consent, to convert settlements and other contracts into enforceable titles, often called 'notarial deeds'.[33] As a notary does not require even the expedited approval process (homologation) of a court, leaving aside notary fees, it is generally easier, in these EU nations for a creditor outside of litigation to get an enforceable settlement from a notary than for a creditor in litigation to get an enforceable settlement because making a settlement concluded during litigation enforceable requires not only the debtor's consent, but also the court's

[28] Articles 12, 117, 1565–1567 of the French CCP.

[29] Article 203 § 4 in connection with Article 223 § 2 of the Polish CCP.

[30] § 796a (1) ZPO. See Rützel (n 14) 66–67, 209 ('if the settlement agreement is signed by the attorneys of record for the parties and if the respective debtor expressly submits to immediate execution, the document may be converted into an execution title as well. The settlement agreement has to be filed with the local court where one of the parties is domiciled, or with a notary public'; Krzysztof Bokwa, 'Anwaltsvergleich – niemiecka ugoda adwokacka jako wzór dla polskiego ustawodawcy?' (2018) 3 Kwartalnik ADR. Arbitraż i Mediacja 13–20.

[31] § 796a (3) ZPO.

[32] Section 794(1) 5 and 796c ZPO.

[33] E.g., Austria, Section 1(17) of the Enforcement Act (includes 'notarial deeds' (*Notariatsakten*) as enforceable titles, provided the debtor submits to immediate execution within the document); Italy, Article 474(2), no 3 of the Code of Civil Procedure (states that 'acts received by a notary or other public official authorized by law to receive them' are enforceable titles (*titoli esecutivi*). Additionally, Article 474(2), no 2 includes 'authenticated private writings' (*scritture private autenticate*) as enforceable titles, though specifically for obligations involving sums of money contained within them); France, Article L. 111-3, 4° of the Code of Civil Enforcement Procedures (settlement agreement becomes an enforceable title (*titre exécutoir*e) when it is formalized as a notarial act (*acte notarié*) bearing the executory formula, allowing for direct enforcement by a bailiff without a court judgment); Spain, Civil Procedure Act Article 517(2)(4º) (a settlement agreement becomes an enforceable title if it is formalized as a 'public deed' (*escritura pública*) before a notary).

approval. In contrast, notaries in the Anglosphere lack the power to make a settlement enforceable. So, in these common law systems, it is easier for a creditor in litigation than outside of litigation to get an enforceable settlement, as a creditor must start litigation to then get court approval of the settlement, which makes it enforceable by the sheriff, bailiff, or other enforcement officer.

On the other hand, a practice in Anglo but not civil law is a court order permanently dismissing a case pursuant to a settlement not submitted to the court. The norm in the US is settling civil and commercial litigation with two documents: (1) a one-paragraph Stipulation of Dismissal filed in court, and (2) a settlement agreement that remains confidential with the parties unless one of them sues for its breach.[34] English courts similarly dismiss cases permanently even though the court does not see the terms of settlement.[35] So if D breaches the settlement, P can sue for breach of the settlement contract but cannot revive P's original claim, which was permanently dismissed. In contrast, courts in EU Member States generally do not dismiss cases permanently (with binding preclusive effect) unless the court examines the settlement to convert it into an enforceable title. So, a court ruling issued based on a settlement kept confidential from the court typically merely withdraws the claim, which does not have preclusive (res judicata) status. Therefore, if D breaches the confidential settlement, P may reinstate or resubmit P's original claim.

IV. ENFORCEMENT OF MEDIATED SETTLEMENTS, INCLUDING GROUNDS TO DENY ENFORCEMENT

As noted above, negotiated settlements have long been common in the Anglosphere. So, integrating mediation into these jurisdictions was relatively easy because mediating a settlement tends to be just a slightly different way of doing what has

[34] Judith Resnik, 'The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure' (2014) 162 U. Pa. L. Rev. 1793, 1818 ('stipulations of dismissal need not include underlying agreements'); Dustin B Benham, 'Foundational and Contemporary Court Confidentiality' (2021) 86 Mo. L. Rev. 211, 229 ('In most circumstances, courts dismiss cases upon the agreed request of the parties. The agreement is not filed and only put before the court in the event of a breach as part of a contract action'.).

[35] Civ. Pro. Rule 40.6(3)(b)(i); David Foskett & John Sorabji, *Foskett on Compromise* 43 (Sweet & Maxwell, 10th edn 2024); § 10–17ff. *Zenith Logistics Services (UK) Ltd and others v Coury* [2020] EWHC 774 paras 50–74 (QB) (reaffirming previously established principle that, upon parties' joint request, courts use 'Tomlin orders' to stay and then dismiss cases with prejudice without inspecting the terms of settlement unless an issue is raised upon an application to enforce the order, but in this case, one of the orders the parties sought would have the court do more than merely dismiss and required immediate enforcement, and thus was not a true Tomlin order but instead a consent order entitling the court to inspect the terms of settlement).

long been routine, negotiating a settlement. Consequently, in the Anglosphere, law on mediated settlements largely follows the precedents of law on negotiated settlements, which mostly just apply ordinary contract law.[36] For example, it is telling that when an English lawyer was asked, 'In what circumstances can the mediation settlement agreement be challenged in court?', the lawyer responded about settlements generally – because it does not matter whether a settlement was made in mediation or negotiation: 'As a settlement agreement is a contract, it can be challenged as any other contract. Thus, it could be found to be void on grounds of concepts such as mistake, frustration, fraud and illegality. It could also be set aside on grounds of misrepresentation, duress and undue influence'.[37]

Part III explains that Anglosphere courts routinely dismiss civil and commercial cases with prejudice against refiling – so the court's dismissal has res judicata effect – even though the court does not see the settlement agreement that prompted the parties to agree to dismiss the case. This is also true, at least in the US, of mediated settlements. The court does not need to see them, but only the stipulation of dismissal, to dismiss the case permanently.[38] Part III also explains that parties to Anglosphere litigation can add to the enforceability of their negotiated settlement by jointly asking the court to convert it into some form of a consent judgment. The same is true of mediated settlements.[39] Unlike the law in some EU countries discussed below, parties in the Anglosphere jointly asking the court to convert their settlement into a consent judgment or other court order largely trigger the same judicial standards, whether the settlement was negotiated or mediated.

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[36] Sarah R Cole and others, *Mediation: Law, Policy, & Practice* (Thomson Reuters 2024) § 7:2 ('most disputes involving enforcement of mediated settlement agreements are resolved based on traditional contract principles'.); Lambert (n 10) ('Settlement agreements entered into as a result of mediation are enforceable in the same way as any other legally binding contract, on the normal principles of English contract law'.).

[37] Lambert (n 10).

[38] E.g., Caroline Harris Crowne, 'The Alternative Dispute Resolution Act of 1998: Implementing A New Paradigm of Justice' (2001) 76 N.Y.U. L. Rev. 1768, 1811 n. 29 ('The federal courts in New York that have mediation programs only require the parties to file a stipulation of dismissal upon reaching a settlement; their written agreement need not be filed with the court'.); Markus B Zimmer & Laura M Gray, 'Alternative Dispute Resolution in the U.S. District Court' Utah B.J., Nov. 1994, at 12, 14 ('In a successful mediation, after the parties reach agreement on how to settle their dispute, they submit a stipulation for dismissal to the court'.).

[39] In England, 'When successful, mediation may result in a Tomlin order'. Allison Bull, 'Family property: lawyer-assisted mediation' (2018)5 Private Client Business 180–185. In the US, 'The best practice is to reduce any mediation settlement agreement (MSA) to a stipulated or consent judgment and have it entered as an order of the court'. Thomas H Oehmke, *Commercial Arbitration* § 26:48. In US eviction mediation, 'If a settlement is reached, a mediator will create a stipulated judgment, and the judge will sign it'. Rachel Elliott, 'The Eviction Crisis is Rampaging' (2025) 1 Journal of Dispute Resolution 77.

Anglo jurisdictions generally do not provide any method to enforce a mediated settlement that is not also available to enforce a negotiated settlement. To the contrary, it can be harder to enforce a mediated settlement than a negotiated settlement. For example, some states' statutes in the US say that a mediated settlement agreement is not legally binding unless it contains a provision stating that it is,[40] although no law imposes an analogous requirement on negotiated settlements. In addition, to preserve the confidentiality of mediation, 'privilege rules preclude testimony about oral settlements reached through mediation, but do not preclude oral settlements reached through negotiations without a mediator'.[41] So in at least these two respects, a mediated settlement can be *less* enforceable than a negotiated settlement. These are, however, minor exceptions to the Anglosphere's general rule that the same law governs negotiated and mediated settlements, so they are equally enforceable.

Much as Anglo jurisdictions generally treat negotiated and mediated settlements similarly, several EU nations treat negotiated and mediated settlements similarly in important respects. For example, Part III explains that nations such as Germany, Austria, Italy, France, and Spain empower notaries, with the parties' consent, to convert negotiated settlements and other contracts into enforceable titles. These nations (Germany,[42] Austria,[43] France,[44] Italy,[45] and Spain[46]) also empower notaries, with the parties' consent, to convert mediated settlements into

[40] Cal. Evid. Code § 1123; Tex. Fam. Code. Ann. § 6.602(b)(1)–(3); Minn. Stat. Ann. § 572.35.

[41] Cole (n 36) § 7:19.

[42] Section 796c ZPO.

[43] See Agnieszka Okońska, 'Mediacja – Austria, Niemcy, Szwajcaria', in Andrzej Torbus (ed), *Mediacja w sprawach gospodarczych. Praktyka – teoria – perspektywy* (Ministerstwo Gospodarki 2015) 66–67.

[44] Article L. 111-3, 4° of the Code of Civil Enforcement Procedures.

[45] Article 12 (1) of Legislative Decree 28/10: 1. Ove tutte le parti aderenti alla mediazione siano assistite dagli avvocati, l'accordo che sia stato sottoscritto dalle parti e dagli stessi avvocati, (…), costituisce titolo esecutivo per l'espropriazione forzata, l'esecuzione per consegna e rilascio, l'esecuzione degli obblighi di fare e non fare, nonché per l'iscrizione di ipoteca giudiziale. Gli avvocati attestano e certificano la conformità dell'accordo alle norme imperative e all'ordine pubblico. See Ivan Smanio, 'Obowiązkowa mediacja we Włoszech' (2020) 3 Kwartalnik ADR. Arbitraż i Mediacja 74; Luigi Majoli, 'L'esecuzione dell'accordo in mediazione' (ADR Intesa 2021) <https://www.adrintesa.it/esecuzione-accordo-in-mediazione> accessed 2 May 2025.

[46] Article 23(3) and 25(1) of the Spanish Civil and Commercial Mediation Act. The enforcement of agreements resulting from mediation initiated while a proceeding is underway shall be brought before the court that approved the agreement. Article 26 of the Spanish Civil and Commercial Mediation Act; see José Luis Iglesias Buhigues, Guillermo Palao Moreno, Rosario Espinosa Calabuig, Carmen Azcárraga Monzonís, 'Spain', in Carlos Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*. Volume II (Intersentia 2014), 437–438; Carmen Azcárraga Monzonís, Pablo Quinzá Redondo, 'Mediation in Spain: Novelties Derived from the Boost of the European Legislator', in Carlos Esplugues, Louis Marquis (eds), *New Developments in Civil and Commercial Mediation. Global Comparative Perspectives* (Springer 2015) 701–702.

enforceable titles. And much as some EU nations have court approval procedures to make a negotiated settlement an enforceable title ('court settlement'), so they tend to have court approval procedures (discussed below) to make a mediated settlement an enforceable title. Some EU nations' laws even specifically state that a mediated settlement approved by the court shall have the same legal effect as a negotiated settlement concluded before the court.[47] Moreover, an EU regulation on the cross-border enforcement of judgments generally includes cross-border enforcement of 'court settlements', which it defines as 'settlement[s] which ha[ve] been approved by a court of a Member State or concluded before a court of a Member State in the course of proceedings'.[48] This broad definition includes not just negotiated court settlements but also mediated settlements subject to the court approval procedures discussed next. So, in all those respects, law in the EU and many of its members treats negotiated and mediated settlements similarly; and thus, at that high level of generality, resembles Anglo law, which generally treats negotiated and mediated settlements similarly.

On the other hand, when parties jointly ask a court to convert their settlement into an enforceable title, this court's approval of a mediated settlement is, in most EU nations, unlike the Anglosphere, governed by a different law than court approval of a negotiated settlement. This difference between mediated and negotiated settlements is consistent with Directive 2008/52/EC, which introduces general rules for the enforceability of mediated settlements, in cross-border disputes, but not negotiated settlements. And in contrast to the Anglosphere, but perhaps in the spirit of the Directive, some EU nations make it easier for parties to obtain court approval of a mediated settlement than a negotiated settlement. As Part III noted, EU nations divide over what it takes to make a negotiated settlement an enforceable title: in some the court merely records the settlement, while in others a party must apply for approval (homologation) on which the judge rules. Mediated settlements divide the same way – some nations provide a simplified approval procedure,[49] others a fuller judicial examination.[50] The sharper contrast, however, is

[47] Article 18 (1) of Bulgarian Mediaton Act: Споразумение по правен спор по смисъла на чл. 1, ал. 1 от закона, постигнато в процедура по медиация, има силата на съдебна спогодба и подлежи на одобрение от районните съдилища в страната. See: Sevdalina Aleksandrova, 'Bulgaria', in Giuseppe de Palo, Mary B Trevor (eds), *EU Mediation. Law and Practice* (Oxford University Press 2012) 36–37. Article 183[15] § 1 Sentence 1 of Polish CCP: 'Ugoda zawarta przed mediatorem, po jej zatwierdzeniu przez sąd, ma moc prawną ugody zawartej przed sądem. Podobnie w prawie bułgarskim ugoda mediacyjna ma moc ugody sądowej'.

[48] Article 2(b) of Regulation (EU) No 1215/2012 of 12 December 2012.

[49] See Jean-Georges Betto, Adrien Canivet, 'France', in Giuseppe de Palo, Mary B Trevor (eds), *EU Mediation. Law and Practice* (Oxford University Press 2012) 119.

[50] See Urs P Gruber, Ivo Bach, 'Germany', in Carlos Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*. Volume II (Intersentia 2014), 175–176. See also <https://

between settlements reached outside litigation. A negotiated settlement concluded out of court generally has no court-approval route at all, leaving the creditor to a notary, whereas a mediated settlement may be submitted to a court for approval even though no case was ever filed. Poland is an example: a settlement reached before a mediator may be approved by the court, which gives it the character of an enforcement title.[51]

The conditions for court approval (homologation) of a mediated settlement differ significantly in the legal systems of individual EU countries. Although Directive 2008/52/EC introduces general rules for the enforceability of mediated settlements in cross-border disputes, variation among EU Member States remains. The examples provided below indicate legal provisions of EU countries that contain clear provisions specifying the grounds for approval (or refusal to approve) mediated settlements. However, in some countries, such rules are not expressly stated, making it difficult to unequivocally assume that all EU countries have adopted a separate model for approval (a simplified procedure for approving mediated settlements), e.g., the Netherlands.

A narrow scope of examination of the mediated settlement is provided for in Hungarian law. The only condition for approval of a mediated settlement is its legality. If the settlement complies with the law, it shall be approved by a court order.[52] Similarly, in Malta, the mediated settlement agreement shall be enforceable unless the content of that agreement is contrary to national law.[53]

A mediated settlement in Italy shall be enforceable after a court verifies its formal correctness and compliance with the law and public policy.[54] Analogous premises

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ezine.eversheds-sutherland.com/global-guide-to-alternative-dispute-resolution/netherlands>; Pim Albers, 'The Netherlands' in Giuseppe de Palo, Mary B Trevor (eds), *EU Mediation. Law and Practice* (Oxford University Press 2012) 363.

[51] Maciej Zachariasiewicz, 'Poland' in Carlos Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*. Volume II (Intersentia 2014) 296–297. On the legal nature of a mediated settlement in Polish law see Ewa Gmurzyńska, Rafał Morek, 'Poland', in Giuseppe de Palo, Mary B Trevor (eds), *EU Mediation. Law and Practice* (Oxford University Press 2012) 261.

[52] Section 239 (1) of Hungarian CCP: Ha az egyezség – ideértve a 238. § (2) bekezdésében meghatározott megállapodást is – megfelel a jogszabályoknak, a bíróság azt végzéssel jóváhagyja, ellenkező esetben a jóváhagyást megtagadja, és az eljárást folytatja.

[53] Section 17B(1)(b) of Maltese Mediation Act: l-kontenut tal-ftehim għandu jkun eżegwibblisakemm, f'dak il-każ fil-kwistjoni, il-kontenut majkunx kontra l-liġi nazzjonali. See Lauren R Keller, 'Malta', in Giuseppe de Palo, Mary B Trevor (eds), *EU Mediation. Law and Practice* (Oxford University Press 2012) 248.

[54] Article 12 paragraph 1-bis of Legislative Decree 28/10: Quando le parti aderenti alla mediazione non sono tutte assistite dagli avvocati, l'accordo allegato al verbale è omologato, su istanza di parte, con decreto del presidente del tribunale del luogo dove ha sede l'organismo di mediazione avanti al quale l'accordo è stato raggiunto, previo accertamento della regolarità formale e del rispetto

are subject to examination in the case of a mediated settlement concluded under Romanian law.[55]

In contrast, a broader list of grounds for refusing to approve a mediated settlement is provided for in many EU nations. The French regulation provides for a relatively broad scope of court review of the mediation agreement, as the court assesses whether the agreement was concluded in good faith, whether the written agreement still reflects the parties' understanding, whether it was formulated in such a way that it can be submitted to enforcement and does not create difficulties in interpretation, whether it does not infringe the rights of third parties and whether it does not infringe the principles of social coexistence.[56]

Under Cypriot law, the court may reject an application for enforcement of a mediated settlement agreement if it finds that the content of the agreement is illegal or unenforceable or that the dispute cannot be resolved through mediation.[57] In Finland, a mediated settlement may not be confirmed as enforceable if it is unlawful or manifestly unreasonable, or if it violates the rights of a third party. A mediated settlement may also not be confirmed unless it can be enforced in accordance with the provisions of the Enforcement Act (705/2007).[58] The Belgian Judicial

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delle norme imperative e dell'ordine pubblico. See Marcello Marinari, 'Italy', in Giuseppe de Palo, Mary B Trevor (eds), *EU Mediation. Law and Practice* (Oxford University Press 2012) 192; Ilaria Queirolo, Chiara Gambino, 'Italy', in Carlos Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*. Volume II (Intersentia 2014) 242; Alessandra De Luca, 'Mediation in Italy: Feature and Trends', in Carlos Esplugues, Louis Marquis (eds), *New Developments in Civil and Commercial Mediation. Global Comparative Perspectives* (Springer 2015) 360.

[55] Article 58 (2) of Romanian Act on Mediation and the Organization of the Mediator Profession: Înţelegerea părţilor nu trebuie să cuprindă prevederi care aduc atingere legii şi ordinii publice, dispoziţiile art. 2 fiind aplicabile. See Anca-Elisabeta Ciucă, Constantin-Adi Gavrilă, 'Romania', in Giuseppe de Palo, Mary B Trevor (eds), *EU Mediation. Law and Practice* (Oxford University Press 2012), 294; Ramona Gratiela Milu, Mihai Taus, 'Romania', in Carlos Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*. Volume II (Intersentia 2014), 354; Daniel-Mihail Şandru, Dragoş-Alin Călin, 'La Médiation en Roumanie la Médiation entre l'Habitude d'Avoir Recours au Système Traditionnel de Justice et le Remboursement de l'Intégralité des Frais de Justice' in Carlos Esplugues, Louis Marquis (eds), *New Developments in Civil and Commercial Mediation. Global Comparative Perspectives* (Springer 2015) 622.

[56] Joanna Kolber, 'Mediacja – Francja, Belgia', in Andrzej Torbus (ed), *Mediacja w sprawach gospodarczych. Praktyka – teoria – perspektywy* (Ministerstwo Gospodarki 2015) 111–112.

[57] Section 32 (3)(β) of Cypriot Mediation Act in Civil Disputes: Μετά από αίτηση που κατατίθεται δυνάμει του εδαφίου (1), το δικαστήριο δύναται να- (β) απορρίψει την αίτηση για εκτέλεση της συμφωνίας συμβιβασμού, αν κρίνει ότι το περιεχόμενο της συμφωνίας αντίκειται στο νόμο ή δεν είναι εκτελεστό ή αν η διαφορά δεν μπορεί να επιλυθεί με διαμεσολάβηση. See Achilles C Emilianides, Natalia Charalampidou, 'Cyprus', in Carlos Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*. Volume II (Intersentia 2014) 122.

[58] § 23 of Finnish Mediation Act: Sovintoa ei saa vahvistaa täytäntöönpanokelpoiseksi, jos se on lain vastainen tai selvästi kohtuuton taikka jos se loukkaa sivullisen oikeutta. Sovintoa ei myöskään

Code provides for the possibility of refusing to approve a mediated settlement if it is contrary to public order or if the agreement reached following family mediation is contrary to the interests of the minor children.[59] Luxembourg law provides for a broader list of grounds for refusing approval of a mediated settlement. The judge shall refuse approval if it is contrary to public order or to the interests of the children; if it cannot be made enforceable under a specific provision; or if the dispute cannot be settled through mediation.[60]

Under Polish law, the court shall refuse to make the settlement agreement enforceable or to approve all or part of the settlement agreement concluded before the mediator if the agreement is contrary to the law or principles of community life, or if it seeks to circumvent the law, or if it is incomprehensible or contradictory.[61]

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saa vahvistaa, ellei sitä voida panna täytäntöön siten kuin ulosottokaaressa (705/2007) säädetään. See Petri Taivalkoski, 'Finland', in Giuseppe de Palo, Mary B Trevor (eds), *EU Mediation. Law and Practice* (Oxford University Press 2012) 103–104; Liisa Sippel, 'Scandinavian Countries', in Carlos Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*. Volume II (Intersentia 2014) 382; Petri Taivalkoski, Annika Pynnä, 'The Courts and Bar Association as Drivers for Mediation in Finland' in Carlos Esplugues, Louis Marquis (eds), *New Developments in Civil and Commercial Mediation. Global Comparative Perspectives* (Springer 2015) 286.

[59] Article 1733 (out-of-court mediation): Le juge ne peut refuser l'homologation de l'accord que si celui-ci est contraire à l'ordre public ou si l'accord obtenu à l'issue d'une médiation familiale est contraire à l'intérêt des enfants mineurs. Article 1736 (court mediation): Le juge ne peut refuser l'homologation de l'accord que si celui-ci est contraire à l'ordre public ou si l'accord obtenu à l'issue d'une médiation familiale est contraire à l'intérêt des enfants mineur. See Ivan Verougstraete, 'Belgium', in Giuseppe de Palo, Mary B Trevor (eds), *EU Mediation. Law and Practice* (Oxford University Press 2012) 25–26; Michael Traest, 'Belgium', in Carlos Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*. Volume II (Intersentia 2014), 49; Piet Taelman, Stefaan Voet, 'Mediation in Belgium: A Long and Winding Road' in Carlos Esplugues, Louis Marquis (eds), *New Developments in Civil and Commercial Mediation. Global Comparative Perspectives* (Springer 2015) 103–104.

[60] Article 1251–22 (2) of New Luxembourg CCP: Le juge refuse l'homologation de cet accord de médiation: Le juge refuse l'homologation de cet accord de médiation: - si celui-ci est contraire à l'ordre public; - si celui-ci est contraire à l'intérêt des enfants; - si en vertu d'une disposition spécifique il n'est pas possible de le rendre exécutoire; ou - si le litige n'est pas susceptible d'être réglé par voie de médiation. See also: Article 1251–23 (2) of New Luxembourg CCP. See Séverine Menétrey, 'Luxembourg', in Carlos Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*. Volume II (Intersentia 2014), 268; Séverine Menétrey, 'La Médiation à la Croisée des Frontières: Le cas Luxembourgeois' in Carlos Esplugues, Louis Marquis (eds), *New Developments in Civil and Commercial Mediation. Global Comparative Perspectives* (Springer 2015) 466.

[61] Article 183^{14} § 3 of Polish CCP: Sąd odmawia nadania klauzuli wykonalności albo zatwierdzenia ugody zawartej przed mediatorem, w całości lub części, jeżeli ugoda jest sprzeczna z prawem lub zasadami współżycia społecznego albo zmierza do obejścia prawa, a także gdy jest niezrozumiała lub zawiera sprzeczności. See Mariusz Maciejewski, 'Polish Regulation Model of Civil Court Mediation and Assessment of Its Effectiveness' (2024) 16(4) Krytyka Prawa. Niezależne studia nad prawem 363.

A still broader list of grounds for refusing to approve a mediated settlement appears in legal systems which, in addition to compliance with the law, require the mediated settlement to account for the principles of morality. Under Bulgarian law, the competent court shall approve the agreement, once acknowledged by the parties, if it does not contradict the law and good morals.[62] Estonian law also contains – among others – premises referring to moral principles. The court refuses to declare an agreement enforceable if: 1) the agreement goes beyond the limits established in subsection 14 (1) of the Conciliation Act; 2) the agreement is contrary to good morals or the law, or if this violates a significant public interest; 3) the agreement cannot be complied with.[63] Under Portugal Law, the judicial approval of the agreement reached in pre-judicial mediation is intended to verify whether it concerns a dispute that may be subject to mediation, the capacity of the parties to enter into it, whether it complies with the general principles of law, whether it complies with good faith, whether it does not constitute an abuse of rights and whether its content does not violate public order.[64] It should be recalled that one of the grounds for refusing to approve a mediated settlement under Polish law is its inconsistency with the principles of community life.

This comparison of grounds to deny enforcement of mediated settlements among EU nations shows variety among those nations. It also typically shows a separateness from the grounds to deny a negotiated court settlement, which is a difference from the typical approach of Anglo jurisdictions. As noted above, courts in the Anglosphere tend to follow the same procedures and use the same criteria when entering judgment on mediated settlements as they do when entering judgment on negotiated settlements. In contrast, this survey of EU nations shows that the procedures (which are regulated by sections of the Code of Civil Procedure) for making a negotiated settlement an enforceable title tend to differ from the proce-

[62] Article 18 (3) of Bulgarian Mediation Act: Съдът одобрява споразумението след потвърждаването му от страните, ако не противоречи на закона и добрите нрави. See Aleksandrova (n 47) 36.

[63] Article 627[1] (3) of Estonian CCP: Kohus ei tunnista kokkulepet täidetavaks juhul, kui: 1) kokkulepe väljub lepitusseaduse § 14 lõikes 1 kehtestatud piiridest; 2) kokkulepe on vastuolus heade kommetega või seadusega või rikub olulist avalikku huvi; 3) kokkulepet ei ole võimalik täita. See Carri Ginter, 'Estonia', in Giuseppe de Palo, Mary B Trevor (eds), *EU Mediation. Law and Practice* (Oxford University Press 2012) 88–89.

[64] Art 14 (3) Portugal Law No 29/2013: A homologação judicial do acordo obtido em mediação pré-judicial tem por finalidade verificar se o mesmo respeita a litígio que possa ser objeto de mediação, a capacidade das partes para a sua celebração, se respeita os princípios gerais de direito, se respeita a boa-fé, se não constitui um abuso do direito e o seu conteúdo não viola a ordem pública. See Dulce Lopes, 'Portugal', in Carlos Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*. Volume II (Intersentia 2014) 335–336; Maria José Capelo, 'La Médiation, une Autre Voie de Justice au Portugal?' in Carlos Esplugues, Louis Marquis (eds), *New Developments in Civil and Commercial Mediation. Global Comparative Perspectives* (Springer 2015) 553.

dures for making a mediated settlement an enforceable title. And the grounds for a court to deny a negotiated court settlement tend to differ from the grounds to deny making a mediated settlement an enforceable title.

These differences in the treatment by EU nations of mediated from negotiated settlements may relate to Directive 2008/52/EC 'encouraging the use of mediation'[65] 'in cross-border disputes, to civil and commercial matters'.[66] It says:

> Member States shall ensure that it is possible for the parties, or for one of them with the explicit consent of the others, to request that the content of a written agreement resulting from mediation be made enforceable. The content of such an agreement shall be made enforceable unless, in the case in question, either the content of that agreement is contrary to the law of the Member State where the request is made or the law of that Member State does not provide for its enforceability.[67]

This Directive's focus on mediated settlements, with no mention of negotiated settlements, may have contributed to EU jurisdictions enacting procedures for making mediated settlements enforceable titles wholly apart from the jurisdiction's pre-existing procedures for making negotiated court settlements enforceable titles,[68] and in some nations making it easier for parties to obtain court approval of a mediated settlement than a negotiated settlement. These differences in the treatment of negotiated and mediated settlements contrast with the usual approach of courts in the Anglosphere, which is to follow the same procedures and criteria when entering judgment on mediated settlements as they do when entering judgment on negotiated settlements. And this contrast may reflect differing views of mediators, with Anglosphere mediators primarily facilitators of the parties' communication toward a settlement resting on parties' consent and European mediators with a more quasi-judicial responsibility to look after the parties to ensure the quality of their settlement so those courts feel less need to.

These contrasting approaches to mediated settlements intersected in the UK's former membership in the EU. 'In England and Wales, prior to the enactment of the 2008 Directive, recourse to mediation was fostered by the legislator and by case law', as well as by '[c]osts of litigation, which are extremely high in the country', and '[t]he long-lasting tradition of high levels of pre-trial settle-

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[65] Art 1(1) of Directive 2008/52/EC.

[66] Art 1(2) of Directive 2008/52/EC.

[67] Art 6(1) of Directive 2008/52/EC.

[68] Carlos Esplugues, 'Mediation in the EU After the Transposition of the Directive 2008/52/EC on Mediation in Civil and Commercial Matters', in Carlos Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*. Volume II (Intersentia 2014), 19 ('Prior to the enactment of the 2008 Directive, some countries that support mediation have coexisted with many other States in which mediation was not recognised or where the institution was blended or confused with other ADR tools').

ments'.[69] As explained in 2014 by London mediator, Tony Allen, Directive 2008/52/EC 'required a route to swift court enforcement of mediated settlements. This has always been possible in English procedure where mediation settles a claim after issue of proceedings, by using the highly flexible Tomlin Order, enabling swift access to enforcement even of terms that a court could not order, so long as made by consent'.[70] That is, the EU Directive essentially directed England to do what it had already been doing. To comply, in 2011, England enacted regulations including adding a procedure to 'allow parties (by consent) to have cross-border mediated settlement agreements converted to a court order'.[71] This procedure required only that 'each of the parties to the mediation settlement agreement has given explicit consent to the application for the order' making the mediated settlement enforceable.[72] It did not have any of the limitations or defences Part IV discusses with respect to other EU nations. In 2021, due to Brexit, this procedure (along with other 2011 regulations) was repealed,[73] and English courts have apparently continued providing swift court enforcement of mediated settlements by converting them into 'Tomlin' and other consent orders.[74]

The contrasting EU and Anglo approaches to mediated settlements also appeared in the UNCITRAL Working Group that produced the Convention on International Settlement Agreements Resulting from Mediation.[75] The basic idea of this 'Singapore Convention' is to treat mediated settlements like arbitration awards, so it provides a framework for enforcing mediated settlement agreements 'akin to the framework that the 1958 New York Convention provides for arbitral awards'.[76] Throughout the course of the deliberations on the Singapore Convention, how-

[69] Carlos Esplugues (n 68) 20.

[70] Tony Allen, 'The Place of Mediation in England and Wales' (2014) 25(4) European Business Law Review 517, 522.

[71] The Law Society, Alternative dispute resolution after Brexit (13 January 2021) <https://www.lawsociety.org.uk/topics/brexit/alternative-dispute-resolution-after-brexit> accessed 30 June 2025.

[72] Civil Procedure Rule 78.24(6).

[73] Ibid.

[74] E.g., *O'Leary v Daniel*, In the High Court of Justice Chancery Division Business and Property Courts of England and Wales, BL-2021-000401, 8 July 2024. See also a form consent order for a mediated settlement https://www.nwmediationsolutions.co.uk/tomlin-order; Caroline Bowden, Financial Consent Orders in Mediation (17 January 2022) <https://anthonygold.co.uk/insight/financial-consent-orders-mediation/> accessed 30 June 2025.

[75] UN Convention on International Settlement Agreements Resulting from Mediation, 20 December 2018 (adopted), 7 August 2019 (signed), 12 September 2020 (effective), 3369 U.N.T.S. 154.2019 [hereinafter Singapore Convention] <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/EN/Texts/UNCITRAL/Arbitration/mediation_convention_v1900316_eng.pdf> accessed 30 June 2025.

[76] See Timothy Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements' (2019) 19 Pepperdine Dispute Resolution Law Journal 1.

ever, 'some delegations repeatedly suggested expanding enforcement to include negotiated settlements'.[77] According to one leading mediation scholar in the US, 'It is a fair question to ask why a mediated settlement agreement should be treated more favorably than a negotiated settlement agreement. The theoretical case for a distinction is weak'.[78] Nonetheless, the UNCITRAL Working Group's 'decision to cover only settlements reached in mediation was never changed', in part because 'if negotiated agreements were included, an enforcing authority would need to determine that a negotiated agreement was actually a settlement (i.e., resolved a dispute), which would complicate the procedure. There was also a general feeling that a more restrained instrument would garner more support from States and that a limited Convention could serve as a building block, toward greater international acceptance of consensual methods for resolving disputes'.[79]

V. CONCLUSIONS

This article contrasts Anglo and EU approaches to negotiated and mediated settlements. It shows that both Anglo and EU nations generally treat negotiated settlements like other contracts and permit the parties, jointly with the court, to transform their negotiated settlement into an enforceable court order. However, this article identifies a practice in Anglo but not civil law which may contribute to the abundance of negotiated settlements in the Anglosphere – the willingness of courts to dismiss a case permanently pursuant to a settlement the court does not see.

This article notes how the abundance of negotiated settlements in the Anglosphere facilitated the spread of mediated settlements and the tendency of Anglo courts to treat mediated settlements as they treat negotiated settlements. In contrast, this article explains, EU nations tend to follow different procedures and apply different criteria for making a mediated settlement an enforceable title than for making a negotiated settlement an enforceable title. These differences, which tend to make it easier for parties to obtain court approval of a mediated settlement than a negotiated settlement in some Member States, may relate to EU Directive 2008/52/EC, which strengthened the enforcement of mediated, but not negotiated, settlements in cross-border disputes.

Finally, this article shows that the European approach , reflected in the Directive, of strengthening enforcement of mediated but not negotiated settlements,

[77] Ellen E Deason, 'What's in A Name? The Terms "Commercial" and "Mediation" in the Singapore Convention on Mediation' (2019) 20 Cardozo Journal of Conflict Resolution 1149, 1170.
[78] Ibid.
[79] Ibid.

rather than the Anglo approach of treating them similarly, prevailed in the Singapore Convention, which increased cross-border enforcement of mediated but not negotiated settlements. This article leaves readers with the thought that the Convention's treatment of mediated but not negotiated settlements like arbitration awards may to some extent reject an Anglo conception of mediators as primarily facilitators of the parties' communication toward a settlement resting on parties' consent in favor of a European (or broader civil law) conception of mediators with a more quasi-judicial responsibility to look after the parties to ensure the quality of their settlement.

REFERENCES

Albers P, 'The Netherlands', in G de Palo, Mary B Trevor (eds), *EU Mediation. Law and Practice* (Oxford University Press 2012)

Aleksandrova S, 'Bulgaria', in G de Palo, Mary B Trevor (eds), *EU Mediation. Law and Practice* (Oxford University Press 2012)

Ali SF, 'Court Mediation Reform: Efficiency, Confidence and Perceptions of Justice' (2018) 021 University of Hong Kong Faculty of Law Legal Studies Research Paper Series

Allen T, 'The Place of Mediation in England and Wales' (2014) 25(4) European Business Law Review

Anzenberger Ph, 'The European Dimension of Court Settlements: Open Issues and Regulatory Needs' in V Rijavec and others (eds), *Diversity of Enforcement Titles in EU* (Springer 2023)

Benham DB, 'Foundational and Contemporary Court Confidentiality' (2021) 86 Mo. L. Rev.

Betto JG, Canivet A, 'France', in G de Palo, MB Trevor (eds), *EU Mediation. Law and Practice* (Oxford University Press 2012)

Bertolini D, 'Releasing the Unknown: Theoretical and Evidentiary Challenges in Interpreting the Release of Unanticipated Claims' (2023) 48(2) Queen's Law Journal <https://canlii.ca/t/7n6jl> accessed 29 April 2025

Bokwa K, 'Anwaltsvergleich – niemiecka ugoda adwokacka jako wzór dla polskiego ustawodawcy?' (2018) 3 Kwartalnik ADR. Arbitraż i Mediacja

Bowden C, Financial Consent Orders in Mediation (17 January 2022) <https://anthony-gold.co.uk/insight/financial-consent-orders-mediation/> accessed 30 June 2025

Britton P, 'Tomlin Orders: When Are They Used?' (2 February 2022) <https://britton-time.com/insights/tomlin-orders/> accessed 30 June 2025

Buhigues JLI, Moreno GP, Calabuig RE, Monzonís CA, 'Spain', in C Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*. Volume II (Intersentia 2014)

Capelo MJ, 'La Médiation, une Autre Voie de Justice au Portugal?' in C Esplugues, L Marquis (eds), *New Developments in Civil and Commercial Mediation. Global Comparative Perspectives* (Springer 2015)

Chang YC, Klerman D, 'Settlement Around the World: Settlement Rates in the Largest Economies' (2022) 14(1) Journal of Legal Analysis 80–175 <https://doi.org/10.1093/jla/laac006>

Chitty on Contracts, ch 26–109 (35th edn, Sweet & Maxwell 2025)

Chong Ph, Tout E, *United Kingdom in John Fellas, Transnational Litigation* (2024)

Ciucă AE, Gavrilă CA, 'Romania', in G de Palo, MB Trevor (eds), *EU Mediation. Law and Practice* (Oxford University Press 2012)

Cole SR and others, *Mediation: Law, Policy, & Practice* (Thomson Reuters 2024)

Deason EE, 'What's in A Name? The Terms "Commercial" and "Mediation" in the Singapore Convention on Mediation' (2019) 20 Cardozo Journal of Conflict Resolution

DiSarro A, 'Six Decrees of Separation: Settlement Agreements and Consent Orders in Federal Civil Litigation' (2010) 60(2) American University Law Review

Dulęba D, *Ugoda w polskim prawie cywilnym* (1st edn, LexisNexis 2012)

Elliott R, 'The Eviction Crisis is Rampaging' (2025) 1 Journal of Dispute Resolution

Emilianides AC, Charalampidou N, 'Cyprus', in C Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*, Volume II (Intersentia 2014)

Esplugues C, 'Mediation in the EU After the Transposition of the Directive 2008/52/EC on Mediation in Civil and Commercial Matters', in C Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*, Volume II (Intersentia 2014)

Ginter C, 'Estonia', in G de Palo, MB Trevor (eds), *EU Mediation. Law and Practice* (Oxford University Press 2012)

Gmurzyńska E, Morek R, 'Poland', in G de Palo, MB Trevor (eds), *EU Mediation. Law and Practice* (Oxford University Press 2012)

Gruber UP, Bach I, 'Germany', in C Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*, Volume II (Intersentia 2014)

Hylton KN, 'Selling Out: An Instrumentalist Theory of Legal Ethics' (2021) 34(19) The Georgetown Journal of Legal Ethics

Keller LR, 'Malta', in G de Palo, M B Trevor (eds), *EU Mediation. Law and Practice* (Oxford University Press 2012)

Kolber J, 'Mediacja – Francja, Belgia', in Andrzej Torbus (ed), *Mediacja w sprawach gospodarczych. Praktyka – teoria – perspektywy* (Ministerstwo Gospodarki 2015)

Lambert D, 'Mediation in United Kingdom' (9 September 2019) *Lexology* <https://www.lexology.com/library/detail.aspx?g=02ee5416-79ba-484b-bd62-eb26318d330b> accessed 30 June 2025

Lopes D, 'Portugal', in Carlos Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation,* Volume II (Intersentia 2014)

Luca De A, 'Mediation in Italy: Features and Trends', in C Esplugues, L Marquis (eds), *New Developments in Civil and Commercial Mediation. Global Comparative Perspectives* (Springer 2015)

Maciejewski M, 'Polish Regulation Model of Civil Court Mediation and Assessment of Its Effectiveness' (2024) 16(4) *Krytyka Prawa. Niezależne studia nad prawem*

Majoli L, 'L'esecuzione dell'accordo in mediazione' (ADR Intesa 2021) <https://www.adrintesa.it/esecuzione-accordo-in-mediazione> accessed 2 May 2025

Marinari M, 'Italy', in G de Palo, MB Trevor (eds), *EU Mediation. Law and Practice* (Oxford University Press 2012)

Menétrey S, 'La Médiation à la Croisée des Frontières: Le cas Luxembourgeois' in C Esplugues, L Marquis (eds), *New Developments in Civil and Commercial Mediation. Global Comparative Perspectives* (Springer 2015)

Menétrey S, 'Luxembourg', in C Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*, Volume II (Intersentia 2014)

Milu RG, Taus M, 'Romania', in Carlos Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*, Volume II (Intersentia 2014)

Monzonís CA, Redondo PQ, 'Mediation in Spain: Novelties Derived from the Boost of the European Legislator', in C Esplugues, L Marquis (eds), *New Developments in Civil and Commercial Mediation. Global Comparative Perspectives* (Springer 2015)

Okońska A, 'Mediacja – Austria, Niemcy, Szwajcaria', in A Torbus (ed), *Mediacja w sprawach gospodarczych. Praktyka – teoria – perspektywy* (Ministerstwo Gospodarki 2015)

Queirolo I, Gambino Ch, 'Italy', in C Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*, Volume II (Intersentia 2014)

Resnik J, 'The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure' (2014) 162 U. Pa. L. Rev.

Rützel S and others, *Commercial Dispute Resolution in Germany* (2nd edn, CH Beck 2016)

Schnabel T, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements' (2019) 19 Pepperdine Dispute Resolution Law Journal

Șandru DM, Călin DA, 'La Médiation en Roumanie la Médiation entre l'Habitude d'Avoir Recours au Système Traditionnel de Justice et le Remboursement de l'Intégralité des Frais de Justice' in C Esplugues, L Marquis (eds), *New Developments in Civil and Commercial Mediation. Global Comparative Perspectives* (Springer 2015)

Sippel L, 'Scandinavian Countries', in C Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*, Volume II (Intersentia 2014)

Smanio I, 'Obowiązkowa mediacja we Włoszech' (2020) 3 Kwartalnik ADR. Arbitraż i Mediacja

Taelman P, Voet S, 'Mediation in Belgium: A Long and Winding Road' in C Esplugues, L Marquis (eds), *New Developments in Civil and Commercial Mediation. Global Comparative Perspectives* (Springer 2015)

Taivalkoski P, 'Finland', in G de Palo, MB Trevor (eds), *EU Mediation. Law and Practice* (Oxford University Press 2012)

Taivalkoski P, Pynnä A, 'The Courts and Bar Association as Drivers for Mediation in Finland' in Carlos Esplugues, Louis Marquis (eds), *New Developments in Civil and Commercial Mediation. Global Comparative Perspectives* (Springer 2015)

The Law Society, Alternative dispute resolution after Brexit (13 January 2021) <https://www.lawsociety.org.uk/topics/brexit/alternative-dispute-resolution-after-brexit> accessed 30 June 2025

Traest M, 'Belgium', in C Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation*, Volume II (Intersentia 2014)

Ware SJ, *Principles of Alternative Dispute Resolution* (4th edn, West Academic Publishing 2023)

Verougstraete I, 'Belgium', in G de Palo, MB Trevor (eds), *EU Mediation. Law and Practice* (Oxford University Press 2012)

Wright CA, Kane MK, *Law of Federal Courts* (8th edn, West Academic Publishing 2017)

Zachariasiewicz M, 'Poland', in C Esplugues (ed), *Civil and Commercial Mediation in Europe. Cross-Border Mediation,* Volume II (Intersentia 2014)

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FROM THE BENCH TO THE TABLE: EXPLORING THE BENEFITS OF JUDICIAL DISPUTE RESOLUTION AND JUDICIAL MEDIATION

Abstract

Judicial mediation, a form of Judicial Dispute Resolution (JDR), has gained prominence as legal systems worldwide seek to enhance access to justice, reduce court delays, and improve procedural fairness. Judicial mediation involves active judges facilitating settlements between parties, distinct from their traditional adjudicative role. While this approach can increase the efficiency of dispute resolution, foster trust in the process, and provide pragmatic guidance based on judicial expertise, it also raises significant constitutional and functional concerns. Despite ongoing debates, judicial mediation is increasingly recognized as a valuable supplement to traditional mediation, particularly in addressing court overload and enhancing user-centric justice. This article explores the development, benefits, and challenges of judicial mediation, with a particular focus on the Polish context and comparative insights from other jurisdictions. The article presents a discussion of the definition and context of Judicial Dispute Resolution (JDR) and judicial mediation, and explores the pros and cons of conflict resolution involving active judges. The article concludes that while judicial mediation offers significant promise,

its successful integration requires careful attention to legal, ethical, and procedural safeguards, as well as a shift in judicial culture and institutional support.

KEYWORDS

judicial mediation, JDR, judicial dispute resolution, judicial settlement

SŁOWA KLUCZOWE

mediacja sądowa, *JDR*, sądowe rozstrzyganie sporów, ugoda sądowa

I. INTRODUCTION

A broader inclusion of sitting judges in settlement-oriented roles has recently emerged as a general trend, particularly in countries where mediation has long been an integral part of the legal culture. Judicial mediation – along with other forms of Judicial Dispute Resolution (JDR) – can now be found both in legislation and in judicial practice in many countries, regardless of their underlying legal traditions. The move toward allowing active judges to serve as mediators and facilitators is most visible in jurisdictions where mediation is already well-established. Judicial mediation represents a further step in enhancing parties' access to justice, which is not necessarily limited to receiving a decision issued by a judge. It may also include mediation conducted by a judge, which embodies the principle of *having one's day in court*.

Despite several benefits, the introduction of judicial mediation, or more broadly JDR, has also met with some skepticism. The controversies surrounding the role of sitting judges as mediators can be broadly divided into constitutional and functional objections. It is often argued that a judge's role is to adjudicate, not to mediate. Combining these functions, especially in the same case, would violate fundamental principles of neutrality applicable to both the judiciary and mediators. On the other hand, the advantages of judicial mediation are increasingly emphasized – particularly its effectiveness.

Sitting judges are not allowed to conduct mediation in Poland. According to Article 183^2 §2 of the Polish Code of Civil Procedure, a judge may not act as a mediator; however, this restriction does not apply to judges who are retired.[1]

[1] Code of Civil Procedure, Act of 17 November 1964 (Journal of Laws 1964 No 43, item 296, as amended) Art 183^2(2).

The position of Polish law on judicial mediation is not aligned with EU law. The EU Mediation Directive 2008/52/EC of 21 May 2008, in point 12 of its Preamble,[2] provides that the Directive also applies to judges, if under national law a judge may act as a mediator. It further stipulates that a judge who conducts mediation must not take part in any judicial proceedings relating to the subject matter of that mediation.

Due to the ban on judges serving as mediators in Poland, there has been limited discussion on the topic of judicial mediation in Poland. However, in recent years, some authors started to analyze and address this issue, examining the role of judges not only as adjudicators but also their potential active involvement in dispute resolution.[3] Recent developments in several countries, along with emerging proposals in Poland to involve judges in the dispute resolution process more actively, have revived interest in this area. One such initiative was launched by the Polish section of the European Judges Group for Mediation (GEMME).[4] The proposal to introduce judicial conciliators, judges who would effectively act as mediators, stems from several observations: court overload, reluctance among some judges to refer cases to mediation (often due to a lack of trust in mediators), a low settlement rate, the need to streamline procedures, and the growing number of judges who not only support mediation but are also qualified to be active in settlement procedures.

This article aims to initiate a discussion on Judicial Dispute Resolution (JDR) in Poland and introduce some preliminary issues related to the topic. Its purpose is to present the definition and context of judicial mediation and JDR in a broader perspective and offer a concise overview of the arguments for and against incorporating judicial mediation into the legal system. Due to the limited scope of this paper, a more in-depth discussion of the challenges related to judicial mediation – particularly those of a constitutional nature, as well as a comparative perspective on JDR, will be addressed in future works.

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[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, 24 May 2008, 3–8.

[3] Anna Kalisz, Adam Zienkiewicz, 'Kompetencje mediacyjne sędziego w zakresie polubownego rozwiązywania spraw cywilnych (uwagi na tle nowelizacji k.p.c.)' 2021 (10) Państwo i Prawo, 90–105; Adam Zienkiewicz, 'The judge as a promoter of peace' 2025 (2) Archiwum Filozofii Prawa i Filozofii Społecznej 120–135; Jarosław Szymanek, *Sędziowie jako mediatorzy (mechanizmy mediacji w rozstrzyganiu sporów prawnych)* (Warszawa: Instytut Wymiaru Sprawiedliwości 2025) <https://iws.gov.pl/wp-content/uploads/2025/09/2025-Prawa-Podstawowe-Sedziowie-jako-mediatorzy-mechanizmy-Szymanek.pdf>. The study discusses also the role of the judge in dispute resolution and analyses the legal provisions that constitute the basis for such activities of judges in Polish civil proceedings, 31–41.

[4] <https://www.gemmeeurope.org/en/>.

JUDICIAL DISPUTE RESOLUTION (JDR)

Judicial mediation is rooted in the concept of Judicial Dispute Resolution, which encompasses various settlement-oriented judicial activities. It emerged first in Canada, in the province of Alberta, and then spread into Ontario, British Columbia and other jurisdictions when judges began stepping down from their primary adjudicative functions to help parties resolve their disputes rather than adjudicate them.[5] L Susskind and W Tilleman define JDR as a 'dispute resolution process in which a judge adopts the role of mediator to facilitate problem-solving conversation between disputing parties'.[6] Other definitions underline the active role of judges in the settlement process; the objective of resolving disputes at the earliest stage; define judges as facilitators of settlement, and underline JDR as a part of case management.[7] Although that idea has been adopted in various countries, often under different names, it consistently describes activities of judges assisting parties to resolve differences through dispute resolution processes, including judicial mediation, settlement conferences or pretrial conferences.

JDR is based on the idea that judges are well-suited to be part of judicial mediation. In civil-law systems, there is a long tradition of facilitating settlements by judges. The interest of common-law judges derives from the high application and acceptance of mediation and other ADR in the legal system. The argument is made that judges make effective mediators and conflict solvers due to their experience in traditional judicial settlement roles embedded in those systems. This background has significantly influenced legal and cultural acceptance of judicial mediation

[5] Lawrence Susskind, William Tilleman, *Judicial Dispute Resolution: New Roles for Judges in Ensuring Justice* (London 2023) 1.

[6] Ibid 2.

[7] There are several definitions of JDR. For example, in Alberta (Canada), JDR is defined as a confidential pre-trial settlement conference led by a Justice of the Court of King's Bench. The objective of JDR is to resolve the dispute so a trial will be either unnecessary, or at most limited to those issues on which the parties do not agree <https://www.lawcentralalberta.ca/en/judicial-dispute-resolution-court-king%E2%80%99s-bench>. Another definition underlines that the process involves judges as settlement facilitators (see Joanne Goss, Judicial Dispute Resolution. Program Set up and Evaluation in Edmonton <https://onlinelibrary.wiley.com/doi/epdf/10.1111/j.174-1617.2004.tb00666.x>). In the Philippines JDR is defined as a court-supervised settlement process where the trial judge takes an active role as a neutral facilitator in exploring possibilities for amicable settlement <https://www.respicio.ph/bar/2025/remedial-law-legal-ethics-legal-forms/civil-procedure/pre-trial-rule-18/judicial-dispute-resolution-jdr>. In Australia, it is defined as a process actively integrated within case management system to encourage appropriate dispute resolution (ADR) and early case resolution. County Report on Judicial Dispute Resolution in the County Court in Victoria <https://www.int-jdrn.org/files/JDRN_Country_Report___County_Court_of_Victoria.pdf>.

across some civil-law jurisdictions and common-law courts.[8] It is also argued that although mediation is not a judge's core task, their experience, authority, and the skills acquired through specialized mediation training fill a particular gap in the justice system – especially in situations where an evaluative and more directive approach in settlement is required.[9] Originally, each jurisdiction tended to favour a specific model of dispute resolution. However, current trends indicate a movement towards integrating multiple approaches by combining the judicial model along with the marketplace model. This hybrid approach aims to enhance the effectiveness and flexibility of dispute resolution processes, adapting to the diverse needs of parties involved.

There are several forms of judicial activities and involvement that may be classified as *Judicial Dispute Resolution*, depending on the jurisdiction, which are discussed below.[10]

JUDICIAL SETTLEMENT

The judicial settlement function is directly aimed at amicable settlement of the dispute. It takes place in court and is conducted by the judge who will hear the case if no settlement is reached, i.e. the trial judge. Therefore, the same judge is involved in both consensus-based and determinative processes relating to the same matter. Although practices may vary across jurisdictions, this approach is frequent in many common law countries, including: the US, Australia, New Zealand and Canada. The judicial settlement function is also present in many countries with civil law traditions, for example, Germany and Switzerland.[11]

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[8] Nadja Alexander, 'Judges Mediate and Do Other Things – Whether We Like It or Not' (2011) 12 Singapore Management University Institutional Knowledge at Singapore Management University Research Collection Yong Pung How School of Law <https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=5303&context=sol> accessed 1 July 2025.

[9] Alexander introduces two models of mediation: the justice model and the marketplace model. The first is closely connected to courts and includes settlement activities conducted by judges. One benefit of judicial mediation is that the parties often do not have to cover the costs of the mediation process. Alexander, 'Mediation on trial: Ten verdicts on court-related ADR', Singapore Management University Institutional Knowledge at Singapore Management University Research Collection School Of Law School of Law 13 <https://www.academia.edu/84602558/Mediation_on_Trial_Ten_Verdicts_On_Court_Related_ADR_2004> accessed 1 July 2025.

[10] This list is inspired and partially based on Alexander's division in 'Judges mediate and do other things – whether we like it or not' (n 8).

[11] Ibid.

In Poland, such a judicial settlement function is reflected, e.g., in Article 223 § 1 CCP providing that 'the presiding judge should encourage the parties to reach a settlement at the appropriate time, especially at the first hearing, after an initial clarification of the parties' positions'. Article 223 CCP implements the principle of amicable settlement of disputes expressed in Article 10 CCP. It stipulates the court's obligation to seek a settlement at every stage of the proceedings. This obligation is incumbent not only on the presiding judge (i.e., trial judge), but also on the court as a whole. The minutes of the hearing should include a mention of whether the parties were encouraged to reach a settlement.[12] Whereas the judicial settlement is required at the 'first hearing', it is not necessary to precede it with evidentiary proceedings.[13]

PRETRIAL CONFERENCES

In certain jurisdictions, judges use pretrial conferences to meet with the attorneys to manage the case, discuss matters of evidence, and narrow the issues, but also to explore the possibility of settlement. While they typically do not act as formal mediators, they may encourage parties to negotiate, evaluate the strengths and weaknesses of each side's position, and suggest to resolve conflict or apply ADR. For example, under the Federal Rules of Civil Procedure (FRCP) Rule 16, magistrate judges in the US conduct pretrial conferences and settlement conferences, which may involve mediation-like functions, and later on, they are excluded from adjudication in the same case.

In Poland, the concept of the pretrial conference is known as the 'preparatory session'. The purpose of the preparatory session is to establish the subject of the dispute with the parties and clarify the positions of the parties, also with regard to the legal aspects of the dispute. Article 205[6] § 2 CCP explicitly requires the presiding judge 'to encourage the parties to reconcile and seek to resolve the dispute amicably, in particular through mediation [which would need to be conducted by a non-judge mediator]. To this end, the presiding judge may seek amicable ways of resolving the dispute with the parties, assist them in formulating settlement proposals, and identify ways and consequences of resolving the dispute, including financial consequences'.

[12] Regulation of the Minister of Justice – Rules of Procedure for Common Courts (18 June 2019, as amended) (Journal of Laws 2024, item 867) § 173(1).

[13] See e.g. Supreme Court ruling of 6 July 1999, I PKN 200/99, OSNP 2000, No 19, item 721.

JUDICIAL CONCILIATION

Judicial conciliation is known by a number of labels. They comprise a wide range of techniques of different nature – including investigative, directive, advisory, managerial, conciliatory, informative or other – that may at least indirectly encourage the parties to reach an amicable settlement. The examples of judicial conciliation and moderation include such institutions as: conferencing at the Australian Administrative Appeals Tribunal, the *Güterichter* in Germany and Austria, and JDR practices in courts in Calgary, Canada.[14] Terminology in this context is somewhat complex and confusing. For example, the institution of the *Güterichter* was introduced into German civil procedure under § 278 of the *Zivilprozessordnung* (ZPO). According to this provision, a court may refer a case to another judge for the purpose of conducting conciliation proceedings (*Güteverhandlung*).[15] Although the legal framework suggests that the *Güterichter* acts more as a conciliator, in practice, the *Güterichter* often engages in what can be defined as judicial mediation. Moreover, Austrian civil procedure encourages judges to promote amicable settlements during the litigation process. Although the provisions do not explicitly regulate judicial conciliation as a distinct procedure, judges have the discretion to facilitate settlement and hold 'conciliation hearings' (*Vergleichsverhandlungen*) and usually do not serve later as the trial judges in the same case.[16]

Under Polish law, the main proceeding in this category is based on a call for settlement request referred to in Article 184 CCP. However, it offers no features typical for mediation, such as confidentiality, evidentiary privileges, or caucusing. It does not guarantee that a judge will be excluded in case of future litigation. For these and other reasons, such as a lack of appropriate training of judges, conciliatory proceedings rarely lead to amicable settlements.

The broad category of judicial conciliation also includes other legal institutions of the Polish procedural law – which judges may effectively use to promote settlement-oriented activities – such as:

- an information meeting about amicable dispute resolution methods, in particular mediation, which may be conducted in a courthouse by

[14] Alexander (n 8).

[15] Ruth Moltmann-Wilisch, 'Judges in Mediation in Germany. How Would a Judge Become an Excellent Mediator?' (2018) ADR in Europe <https://adreurope.uni-miskolc.hu/files/90/ADR-2018-2_Moltmann.pdf> 78; Sascha Ferz, 'Amicable Dispute Resolution at Court Conciliation Hearings: The Austrian and German Perspectives' (2022) 8(1) International Comparative Jurisprudence 107 <http://dx.doi.org/10.13165/j.icj.2022.06.008>.

[16] Ibid.

a judge, judicial clerk, judicial officer, assistant judge or permanent mediator (Article 183[8] § 4 CCP). That provision was used by GEMME to introduce the initiative of judicial conciliation, conducted by a conciliation judge, who is not the reporting judge in the case, but serves at the court where the case is being heard,[17]

- the judge advising the parties about the likely outcome of the case in light of the arguments and evidence presented (Article 156[1] CCP), or
- inspection (including a site visit), which may have to be combined with witness examination (Article 292 CCP).

FACILITATIVE JUDGING

Facilitative judging involves consciously integrating communication and facilitation skills into adjudication proceedings. Techniques like active listening help calm parties and improve perceptions of procedural justice. Judges can use emotional intelligence and communication skills to convey their decisions in a sensitive and appropriate manner. This may increase acceptance of and compliance with their decisions by the parties involved. Such practices are found in Australia, Canada, and the US justice system, especially in therapeutic justice models, problem-solving courts, and courts that incorporate indigenous dispute resolution (e.g., Murri courts in Australia).[18]

BJDR (BINDING JUDICIAL DISPUTE RESOLUTION)

According to some authors, JDR may take a hybrid form – combining non-compelled dispute resolution in the form of mediation or a mediation-like process with a binding decision, if no settlement is reached. During the first, non-binding part, the parties are trying to resolve the case with the help of the judge playing the role of mediator. Since the parties typically also seek the judge's assessment of the likely outcome of the case, if no settlement occurs they may decide to authorize that judge (or another judge) to issue a binding decision.[19]

[17] Currently, the Polish civil procedure does not explicitly provide for judicial conciliation. However, a basis for conducting judicial conciliation can be found in the regulation concerning the informational hearing (Article 183[8] § 4 CCP. The Polish Section GEMME initiative: Koncyliacja FAQ – Informacja dla pełnomocników, received from GEMME).

[18] Alexander (n 8).

[19] Susskind, Tilleman (n 5) 2.

Under Polish law, certain similarities to this concept may be found in Article 1161[1] CCP, according to which in any case pending before a court, the parties may submit the dispute to an arbitration court until the case is decided in a final and non-revisable way by the court.[20] Judicial settlement or other JDR methods may lead to a situation in which the parties agree, e.g., to narrow down the scope of their dispute and 'transfer' it to arbitration.

LAY JUDICIAL BODIES

This term refers to a legal institution rooted in the idea of resolving usually minor disputes outside the formal court system by representatives chosen by the community.[21] Although the members of these institutions typically do not have formal legal education, they are part of the justice system, and their decisions are often binding and enforceable – similar to those issued by professional judges.

In some jurisdictions, the main purpose of such bodies is to resolve minor disputes through informal proceedings, including conciliation or mediation. These institutions typically focus on minor civil and criminal matters such as neighbourhood disagreements, minor property issues, or small claims, where the emphasis is on reaching a mutually acceptable solution rather than enforcing a strict legal judgment. Their role is to facilitate dialogue and negotiation between the parties, encouraging compromise and mutual understanding. However, when an agreement cannot be reached, in some jurisdictions, they also have the authority to adjudicate. One of the examples of such institutions in various countries is the 'justice of the peace' in common law countries,[22] also known as *Friedensrichter*

[20] Article 1161[1] CCP § 2 provides that the court shall discontinue the proceedings at the unanimous request of the parties, filed after the parties have entered into the arbitration clause, unless it appears from the content of the arbitration clause and the circumstances of the case that it would be contrary to the law, the principles of social co-existence or seeks to circumvent the law, or the arbitration clause is invalid or ineffective. The limitation period for claims covered by the arbitration clause starts to run anew from the date on which the decision to discontinue the proceedings becomes final and non-revisable.

[21] Bryan A Garner, 'Black's Law Dictionary' (9th edn, West 2010, 326) 743; Emanuel van Dongen, 'The History of the Justice of the Peace' <https://blog.montaignecentre.com/en/the-history-of-the-justice-of-the-peace-discussed-at-the-university-of-lis>, on A Short History of Justices of the Peace <https://actjpa.org.au/wp-content/uploads/2016/02/A-Short-History-of-Justices-of-the-Peace.pdf>.

[22] Ewa Gmurzyńska, 'Evolution of the Institution of Justices of the Peace in the United States' (2019) XXVIII(1) Studia Iuridica Lublinensia.

in Germany,[23] *juge de paix /Vredegerecht* in Belgium[24] or *juízes de paz* in Portugal.[25] In some countries, such bodies have different names and may also have a collective character. One of the most well-known examples are the conciliation boards (*forliksråd*) in Norway, which handle a wide range of civil cases, including small claims, contract disputes, neighbour conflicts, and certain family law matters. If the parties do not reach an agreement, the board can issue a conciliation judgment (*forliksdom*), which is legally binding and enforceable.[26] Although the role of lay judicial bodies is diminishing in modern times, they remain important institutions for the amicable resolution of minor disputes in countries where they have a long-standing tradition.

JUDICIAL MEDIATION

Last but not least, in several jurisdictions, the cornerstone of JDR is judicial mediation. Judicial mediation is mediation in *strict sense*, carrying all its legal features and consequences. It typically occurs when the trial judge (or the president of a court or president of the chamber) refers the case to a different judge who acts exclusively as a neutral mediator. A defining feature of this JDR is that the mediating judge, similarly to judicial settlement, plays no role in adjudicating the case if mediation fails. Should the mediation not lead to a resolution, the matter is returned to the original trial judge for further proceedings. Judicial mediation is widespread across the world, including China, India, the Philippines, the United States, Canada, Australia, New Zealand, Germany, Austria, Norway, and Finland, where legal frameworks support this separation of roles.[27] Although all judicial activities within JDR are worthy of detailed discussion, due to the scope of this article, the authors will limit their analysis to judicial mediation as the dominant part of JDR.

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[23] Isabella Mai, 'Mediation als Mittel kultureller Integration? – Ein Vergleich zwischen Mediatoren und Friedensrichtern' (2020). Frank Schreiber, *Praxishandbuch Güterichterverfahren: Recht - Methoden – Techniken* (2022). In Wittenberg (Saxony-Anhalt), there is not a distinct office titled JP, but you may find local *Friedensrichter* who help mediate neighborhood disputes or small civil claims under Saxony's municipal law.

[24] Stefaan Voet, 'Relief in Small and Simple Matters in Belgium' (2015) 8(4) Erasmus Law Review 137.

[25] Filipe Lobo d'Avila, 'A look into Portuguese Alternative Dispute Resolution Mechanisms'| (6 July 2018) Rödl & Partner <https://www.roedl.com/insights/portuguese-alternative-dispute-resolution-mechanisms-ad>.

[26] Anna Nylund, 'Alternative dispute resolution, justice and accountability in Norwegian civil justice' in Xandra Kramer and others (eds), *Frontiers in Civil Justice: Privatisation, Monetisation and Digitisatio*n (Intersentia 2022) 82–101.

[27] Susskind, Tilleman (n 5) 9–18.

ORIGINS AND DEVELOPMENT OF JUDICIAL MEDIATION

The origin of judicial mediation can be traced to transformations within justice systems related to a significant increase in the number of cases submitted to courts, as well as the growing complexity of those cases, an outcome partly driven by the development of new technologies and changing socio-economic relationships.[28] The origins of judicial mediation lie in several interconnected trends in the evolution of justice systems: the development of the ADR movement, the recognition of ADR methods as an integral part of the justice system and as tools that improve access to justice for citizens, and shift in the role of judges from traditional only adjudicative role to an active case manager and the emphasis of individual needs in the access to justice.[29]

The ADR movement, which gained momentum in the US in the 1970s, emerged as a response to the inefficiency of judicial systems. Traditional court proceedings were often lengthy, costly, and unsatisfactory for the parties involved. Many litigants felt excluded and powerless in shaping the course and outcome of their own cases. Moreover, the adversarial nature of judicial proceedings often made them emotionally stressful, and they proved inadequate in addressing complex, multifaceted disputes. In an age increasingly focused on individual rights and empowerment, the court process appeared too rigid and disconnected from the real needs of the parties.

The introduction of ADR into justice systems was part of the 'multidoor courthouse' concept – i.e., a court in which justice can be achieved not only through formal rulings, but also through amicable dispute resolution facilitated by a neutral and impartial mediator.[30] Gradually, mediation and other ADR methods came to be seen not as private-sector alternatives to public justice, but as fully integrated mechanism within the judicial system. In some countries, this idea evolved beyond court-annexed or court-referred mediation. It developed into the idea of including judges and court officials (e.g., judicial assistants) acting as mediators themselves. Judges in civil and common law jurisdictions worldwide have been increasingly involved in settlement and case management activities.[31]

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[28] Judith Resnik, 'Managerial Judges: The Potential Costs' (1985) 45 Public Administration Review, Special Issue: Law and Public Affairs 686, 690.

[29] Susskind, Tilleman (n 5) 31.

[30] Frank EA Sander, 'Varieties of Dispute Resolution' (Address delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, The Pound Conference, 7–9 April 1976) (1976) 70 FRD 111, 130–131.

[31] Jean-François Roberge and Dorcas Quek Anderson, 'Judicial mediation: from debates to renewal' (2019) 19(3) Cardozo J Conflict Resol 613 <https://ink.library.smu.edu.sg/sol_research/2773>.

Additionally, in several countries, an emerging trend reflects what is known as the normative individualism perspective. This approach places the user's vision and experience at the center of dispute resolution. It shifts the focus of access to justice toward meeting the individual needs of users and ensuring that their perspectives are fully considered throughout the process.[32] In this regard, many jurisdictions have emphasized how mediation enhances individual participation in the justice process, making it more accessible and capable of producing outcomes that better reflect and satisfy the specific needs of the individuals involved.[33]

In light of ongoing systemic challenges, many began to rethink the role of the courts in modern society, asking whether it should be limited to adjudication or whether courts, in response to current challenges, should assume a more proactive role in managing cases. Since delays caused by overloaded court dockets became a serious issue, it was argued that judges should take a more active role in ensuring that disputes are resolved efficiently and fairly. The goal was not just to accelerate formal proceedings but to introduce a broad range of tools and solutions into the justice system, using the mechanisms available to judges during the civil proceedings, such as pretrial conferences, settlement proceedings and ADR methods, which have already been strongly rooted in the justice system.[34] This led to the development of the concept of 'managerial judging' – a judicial philosophy and practice where judges actively manage cases rather than simply rule on them.[35] This model stands in contrast to the traditional passive role of judges, who were seen as responsible only for adjudicating legal disputes.[36] This new vision of the judiciary raised both hopes and controversies, particularly around the extent to which judges should engage in facilitative, non-adjudicative roles.

See also Laura Ervo and Anna Nylund (eds), *The Future of Civil Litigation: Access to Courts and Court-Annexed Mediation in Nordic Countries* (Springer 2014); Machteld W de Hoon and Suzan Verberk, 'Towards a More Responsive Judge: Challenges and Opportunities' (2014) 27 Utrecht L Rev; Jean-François Roberge, 'Could Judicial Mediation Deliver a Better Justice? Supposing we TRAINed judges as EXPATS?' (2010–2011) 1 J Arbitration and Mediation <https://www.researchgate.net/publication/315760720>.

[32] Felix Steffek and Hannes Unberath, 'Principled Regulation of Dispute Resolution: Taxonomy, Policy, Topic' in Felix Steffek and Hannes Unberath (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (2013) 33, 43.

[33] Jean-François Roberge and Dorcas Quek Anderson, 'Judicial Mediation: From Debates to Renewal' (2018) 19(3) Cardozo J Conflict Resol 613.

[34] Susskind, Tilleman (n 5) 14.

[35] Judith Resnik, 'Managerial Judges: The Potential Costs' (1985) 45 (Special Issue: Law and Public Affairs) Public Administration Review 686–690.

[36] Marilyn Warren, 'Should Judges Be Mediators?' (2010) 21 ADRJ 77, 81 <https://docslib.org/doc/1501127/should-judges-be-mediators-the-hon-marilyn-warren-ac>.

JUDICIAL MEDIATION – DEFINITION AND KEY FEATURES

The definition of judicial mediation is rooted in the idea of traditional mediation in which mediators assist parties in resolving their disputes without coercion, allowing the parties to influence the mediation process and reach their own solutions – thus exercising their autonomy. Mediation is governed by the principle of confidentiality, which is a key principle of the process. It ensures the free exchange of information between the parties, thereby increasing the chances of reaching a settlement. The mediation is separate from the judicial proceedings, and both mediators and parties are typically excluded from being called as witnesses concerning information disclosed during mediation, unless all parties agree to waive that privilege. Another guiding principle of mediation is the impartiality and neutrality of the mediator. This is usually demonstrated by treating both parties equally, avoiding any bias or favoritism, having no interest in the outcome of the case, and maintaining no involvement in the dispute in any other capacity.[37] To meet the standards of judicial mediation, the criteria presented in the following paragraphs must be satisfied. Although judicial mediation conducted by judges preserves the core principles of mediation – including voluntariness, party autonomy, confidentiality, and impartiality – it differs from mediation conducted by independent mediators in several important respects. These differences arise primarily from the institutional role of the judge, the relationship between mediation and the judicial process, and the procedural framework within which judicial mediation takes place. Four characteristics, in particular, distinguish judicial mediation from mediation conducted by non-judicial mediators.

First, judicial mediation refers to mediation conducted by active judges. It is a specific form of mediation closely integrated into the judicial system. Mediation is conducted in the court, usually referred by the trial judge to another judge, who plays the role of mediator. The strong connection of judicial mediation to the justice system relates to the fact that the mediator, who is an active judge, plays a particular role that differs from the traditional role of a mediator in the private setting, although the basic principles of mediation remain the same.

Second, the essence of judicial mediation is that judges mediate cases not assigned to them. Hence, if no settlement is reached, another judge will adjudicate the case.

[37] See generally Ewa Gmurzyńska, Rafał Morek (eds), *Mediacje. Teoria i praktyka* (Wolters Kluwer 2024); Anna Kalisz, Adam Zienkiewicz, *Mediacja sądowa i pozasądowa. Zarys wykładu* (Wolters Kluwer 2013); Christopher W Moore, *Mediacje. Praktyczne strategie rozwiązywania konfliktów* (Wolters Kluwer 2009); Adam Zienkiewicz, *Studium Mediacji. Od teorii ku praktyce* (Dilfin 2019).

These rules ensure adherence to norms concerning judicial impartiality and independence, as well as mediation principles – especially confidentiality, neutrality, and impartiality. Wherever judicial mediation is expressly provided by law or follows from broader empowerment to settle cases early, judges are usually excluded from adjudicating any case which they have mediated. Sometimes, however, not regulations but court practice ensures that these functions are not combined.[38]

Third, judicial mediation may occur at different stages of court proceedings. It can be an explicitly regulated method authorizing judges to conduct mediation or it may be applied during settlement proceedings and conferences, without separate authorization. While these processes may not be formally labelled as mediation, in practice, judges often conduct them similarly to mediation. They are, in effect, judicial mediations carried out under another procedural name. This second approach is often applied in common law countries, where judges hold a strong position and explicit legal authorization to conduct mediation is not required.

Fourth, the main principles of judicial mediation are the same as those of classical mediation. The mediator has no coercive power, assists the parties in resolving conflicts, ensures confidentiality, and does not impose a solution. Although judges tend to use evaluative techniques, mediation remains non-binding for the parties, even if the judge-mediator suggests solutions. However, the mere fact that mediation is conducted by a judge within the same court where the case may be decided, if not settled, can significantly impact the process of mediation and parties' autonomy. When the evaluation comes from the judge, parties are likely to give serious consideration to that opinion.[39]

CHALLENGES AND BENEFITS OF JUDICIAL MEDIATION

Opinions about judicial mediation remain divided. Many scholars highlight various challenges and limitations of judge-led mediation, while also acknowledging

[38] For example, according to 28 U.S.C. § 636(b)(2)(B), magistrate judges are authorized to perform 'additional duties' as assigned by district judges, which courts have interpreted to include ADR such as mediation. Under the Federal Rules of Civil Procedure (FRCP) Rule 16, magistrate judges often conduct pretrial conferences and settlement conferences, which may involve mediation-like functions. In Norway, Sections 8–3 to 8–7 of the Norwegian Dispute Act provide that the judge responsible for case management can mediate the case personally or refer it to another judge. If a judge mediates a case and mediation does not result in a full resolution, that judge cannot preside over the trial of the same case. https://lovdata.no/dokument/NLE/lov/2005-06-17-90.

[39] Susskind, Tilleman (n 5) 1.

its potential benefits. Judicial involvement is valued for bringing legal authority and credibility to the process, which can enhance parties' trust and confidence. Parties perceive judge-mediators as particularly well-suited to guide realistic and pragmatic settlements, largely due to their judicial authority and experience. Judges are trained to become familiar with the facts and legal issues. This enables them to offer informed and credible guidance during mediation.[40] Additionally, a judge-led settlement can make going to court a positive experience for clients.[41] Judicial mediation has consistently been shown to cut down delay and expense, reducing caseloads and shortening resolution time.[42] Research shows that judicial mediation ranks highly in terms of procedural justice: parties often report feeling heard, respected, and treated fairly, and many indicate they would recommend the process to others.[43] Notably, it appears to particularly benefit self-represented or vulnerable parties, as the presence of a judge can help ensure a fair and balanced process.[44] This observation aligns with research findings that trained judge-mediators, who receive dedicated training in mediation, tend to conduct the process more effectively than those relying solely on traditional judicial experience.[45]

One of the earliest and most influential critiques of judges' active involvement outside their traditional role as neutral decision-makers was offered by J Resnik over 50 years ago, although her arguments are still valid. While she acknowledged the efficiency gains that such judicial efforts can bring to dispute resolution, her primary concern was that these activities may pose risks to fairness, transparency, and the adversarial balance within the justice system. Resnik was the first scholar to systematically critique the emerging role of judges as active case managers rather than passive adjudicators. Chief Justice Warren (Australia), another loud critic of judicial mediation, argued that mediation involves an abuse of the judicial

[40] Catherine Morris, 'How legal culture and traditions shape systems, practices of mediation and conciliation: Lessons from Canada's judicial system. Seminar for judges and mediators of the Intellectual Property and International Trade Court Bangkok', 4, Thailand, 12 November 2015 <https://www.academia.edu/28269262/>.

[41] Ibid 11. See also James A Wall, Jr, Dale E Rude, 'Judicial Mediation: Techniques, Strategies, and Situational Effects' (1985) 41(2) Journal of Social Issue 47–63, 49.

[42] Morton Denlow, 'Magistrate Judges' Important Role in Settling Case' One authors indicate that settlement by the magistrate judge in US take 3–4 hours and the summary judgment would take much longer for example preparation of the report and recommendation for summary judgement may take several day.

[43] Ibid 11. See also Wall, Rude, 'Judicial Mediation: Techniques, Strategies, and Situational Effects' (1985) 41(2) Journal of Social Issue 47–63, 49.

[44] Susskind, Tilleman (n 5) 51.

[45] Roberge, Anderson (n 33) 28.

role, which should remain pure and not be diluted with other functions.[46] She agreed, however, that judicial mediation is possible, only with certain safeguards and procedures.[47] The central concern regarding judicial mediation, also today, is not whether judges should be actively involved in mediation and settlement proceedings, but rather what safeguards must be implemented to minimize risks and preserve judicial integrity.

Some authors indicate that 'judges are not mediators even when they are conducting judicial mediation; they are judges, and the different processes of dispute resolution risk confusion'.[48] Interviews with several judges also indicate that becoming involved in settlement negotiations may prejudice judges, especially if their mediation attempts are unsuccessful. Such prejudices are dysfunctional if judges are subsequently to try the case.[49] Research has shown that in judge-led mediations, a judge's evaluative skills – such as assessing the strengths and weaknesses of a case – are often considered more valuable than process management or facilitation skills.[50] Some authors claim that the knowledge, experience and skills in adjudication are scarce and there are plenty of professional mediators, so why involve judges and their precious time to mediate.[51] However, the same authors argue that reaching a settlement in judicial mediation saves time and money, introduces a 'culture of mediation' in the courts, allowing courts to embody the concept of a 'multi-door courthouse', and introduces variation in the role of a judge, making the work of a judge more interesting. The respect that parties have for a judge enhances cooperation and allows for a faster settlement.[52]

Some authors raise concerns whether judicial mediation and combining the roles of judges and mediators are compatible with the constitutional perspective. For example, Tucker argued that 'there was an impermissible incompatibility between a judge acting as mediator and the judicial function'. He suggested that the judicial process is constitutionally protected, in the sense that a judge should not participate in dispute resolution methods that do not adhere to formal judicial

[46] Marylin Warren, 'Should Judges Be Mediators?' (2010) 21 ADRJ 77, 81 <https://docslib.org/doc/1501127/should-judges-be-mediators-the-hon-marilyn-warren-ac>.

[47] Ibid. Warren lists several safeguards such as clear separation of adjudicative and mediative functions, presence of the judge's associate, recording the proceedings, presence of lawyers during mediation.

[48] Ibid 11.

[49] Ibid.

[50] Stephen B Goldberg, ML Shaw & JM Brett, 'What Difference Does a Robe Make? Comparing Mediators with and without Prior Judicial Experience' (2009) 25(3) Negotiation Journal 277–305.

[51] Steve Lancken and Ashna Taneja, 'Judging mediation' (11 December 2012) Lawyers Weekly <https://www.lawyersweekly.com.au/sme-law/11179-judging-mediation>.

[52] Ibid.

procedures.[53] On the other hand, it is questionable whether constitutional law requires defining judicial powers in an exclusive and exhaustive manner.[54]

C Menkel-Meadow expressed concern that judges involved in mediation may prioritize efficient resolution over ensuring the quality of the process.[55] Good settlement practices could be compromised by an overzealous desire to close cases.[56] M Galanter voiced similar concerns, criticizing how managerial approaches can exacerbate inequalities, particularly when judges prioritize efficiency over due process.[57] Judges during the settlements may put too much pressure on the parties and thus create coercion.[58] On the other hand, judicial promotion of settlements, along with interest in arbitration, mediation, and various alternatives, is a response to concerns coming from costly and lengthy trials. Galanter claims that 'openness to these processual variations marks a salutary shift of focus from the smaller world of adjudication, to the big world of litigotiation'.[59]

Despite criticism, the arguments in favor of judicial mediation – particularly those based on efficiency, procedural justice, and superior outcomes compared to the absence of judicial involvement – continue to prevail. Most of the critical arguments about judicial mediation were expressed several decades ago, when this form of judicial activity was still novel. Today, judicial mediation, along with settlement proceedings, pretrial conferences, and neutral evaluations, is well established in many jurisdictions, with appropriate safeguards in place to ensure the separation of judicial activism and impartiality.[60]

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[53] Philipe Tucker, 'Judges as Mediators: A Chapter III Prohibition?' (2000) 11 Australian Dispute Resolution Journal, Issue May 2000, 84, 94 <https://search.informit.org/doi/10.3316/agispt.20002424>.

[54] Michael Moore, *Judges as Mediators: a Chapter III prohibition or accommodation?* FCA, 2003, FEDJSCHOL, Speeches, 14 March 2003 <https://classic.austlii.edu.au/au/journals/FedJSchol/toc-F.html>.

[55] Carrie Menkel-Meadow, 'Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"' (1991) 7(3) Negotiation Journal 217–246 <https://doi.org/10.1111/j.1571-9979.1991.tb00638.x> 22.

[56] Ibid 46.

[57] Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9(1) Law & Society Review' 95–160, 98.

[58] Marc Galanter, 'A Settlement Judge Is Not a Trial Judge: Judicial Mediation in the United States' (1985) 12(1) Journal of Law and Society 1–18, 6 <https://repository.law.wisc.edu/s/uwlaw/media/37829>.

[59] Ibid 14.

[60] For example, e.g., in Great Britain within employment disputes Peter Urwin, Valeriya Karuk, Paul Latreille and others, 'Evaluating the use of judicial mediation in Employment Tribunals Ministry of Justice', 7 Research Series, 10 March 2010 <https://www.employment-studies.co.uk/resource/evaluating-use-judicial-mediation-employment-tribunals-processes-outcomes-and-costs>; Clara Fulton, 'Judicial Assessment and Mediation Launched in Northern Ireland', 23 March 2023 <https://

CONCLUDING REMARKS

While there are some controversies surrounding JDR, it can serve as a valuable supplement to mediation conducted by professional mediators. Nevertheless, a comprehensive and systematic introduction of JDR into the justice system necessitates a substantial change in judicial mindset and institutional support. Also, one thing is inevitable: whether it is judicial mediation, judicial conciliation, settlement conference, or another form of judicial involvement in settlement, judges must be properly trained. This is essential because settlement processes require a very different set of skills compared to traditional adjudication in court. JDR exists in several forms. Variations in civil procedures across jurisdictions create different frameworks for implementing judicial settlement mechanisms. This brief article demonstrates that there is no clear and universally accepted definition of different JDR methods. In some jurisdictions, judicial conciliation and settlement conferences share features with judicial mediation. In others, they are considered distinct judicial settlement interventions, lacking the characteristics of judicial mediation. As indicated, although in Poland judges may not be mediators, Polish law creates a solid legal framework for the development of JDR in the form of preparatory sessions, settlement conferences, and the recent initiative concerning judicial conciliation. Further research and discussion are necessary, particularly concerning the axiological and constitutional foundations of JDR. Additional comparative studies will provide valuable insights into the involvement of judges in settlement, which may inspire Polish judges, who seem increasingly interested and prepared to transition from the bench to the mediation table.

REFERENCES

Alexander N, 'Judges Mediate and Do Other Things – Whether We Like It or Not' (2011) Singapore Management University Institutional Knowledge at Singapore Management University Research Collection, Yong Pung How School of Law <https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=5303&context=sol> accessed 1 July 2025

– –, Mediation on Trial: Ten Verdicts on Court-Related ADR (Singapore Management University School of Law 2004) <https://www.academia.edu/84602558/Mediation_on_Trial_Ten_Verdicts_On_Court_Related_ADR_2004> accessed 1 July 2025

Bryan A, Garner BA, *Black's Law Dictionary* (9th edn, West 2010) 326

www.lewissilkin.com/insights/2023/03/23/judicial-assessment-and-mediation-launched-in-northern-ireland>.

d'Avila FL, 'A Look into Portuguese Alternative Dispute Resolution Mechanisms' (6 July 2018) Rödl & Partner <https://www.roedl.com/insights/portuguese-alternative-dispute-resolution-mechanisms-ad>

Denlow M, 'Magistrate Judges' Important Role in Settling Cases' (2014) 101 The Federal Lawyer

de Hoon MW and Verberk S, 'Towards a More Responsive Judge: Challenges and Opportunities' (2014) 27 Utrecht Law Review

Dongen E van, 'The History of the Justice of the Peace' *Montaigne Centre Blog* <https://blog.montaignecentre.com/en/the-history-of-the-justice-of-the-peace-discussed-at-the-university-of-lisb>

Dongen E van, 'A Short History of Justices of the Peace' <https://actjpa.org.au/wp-content/uploads/2016/02/A-Short-History-of-Justices-of-the-Peace.pdf>

Ervo L and Nylund A (eds), *The Future of Civil Litigation: Access to Courts and Court-Annexed Mediation in Nordic Countries* (Springer 2014)

Ferz S, 'Amicable Dispute Resolution at Court Conciliation Hearings: The Austrian and German Perspectives' (2022) 8(1) International Comparative Jurisprudence

Fulton C, 'Judicial Assessment and Mediation Launched in Northern Ireland', 23 March 2023 <https://www.lewissilkin.com/insights/2023/03/23/judicial-assessment-and-mediation-launched-in-northern-ireland>

Galanter M, 'A Settlement Judge Is Not a Trial Judge: Judicial Mediation in the United States' (1985) 12(1) Journal of Law and Society

– –, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9(1) Law & Society Review

Gmurzyńska E, 'Evolution of the Institution of Justices of the Peace in the United States' (2019) 28(1) Studia Iuridica Lublinensia

Gmurzyńska E and Morek R (eds), *Mediacje. Teoria i praktyka* (Wolters Kluwer 2024)

Goldberg SB, Shaw ML and Brett JM, 'What Difference Does a Robe Make? Comparing Mediators with and without Prior Judicial Experience' (2009) 25(3) Negotiation Journal

Kalisz A and Zienkiewicz A, 'Kompetencje mediacyjne sędziego w zakresie polubownego rozwiązywania spraw cywilnych (uwagi na tle nowelizacji k.p.c.)' (2021) 10 Państwo i Prawo

– –, *Mediacja sądowa i pozasądowa. Zarys wykładu* (Wolters Kluwer 2013)

Lanken S and Taneja A, 'Judging Mediation', Lawyers Weekly (11 December 2012) <https://www.lawyersweekly.com.au/sme-law/11179-judging-mediation>

Mai I, *Mediation als Mittel kultureller Integration? – Ein Vergleich zwischen Mediatoren und Friedensrichtern* (2020)

Menkel-Meadow C, 'Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-Opted or "The Law of ADR"' (1991) 7(3) Negotiation Journal

Moltmann-Wilisch R, 'Judges in Mediation in Germany. How Would a Judge Become an Excellent Mediator?' (2018) ADR in Europe

Moore CB, *Mediacje. Praktyczne strategie rozwiązywania konfliktów* (Wolters Kluwer 2009)

Moore M, *Judges as Mediators: A Chapter III Prohibition or Accommodation?* (Federal Court of Australia, Speech, 14 March 2003) <https://classic.austlii.edu.au/au/journals/FedJSchol/toc-F.html>

Morris C, 'How Legal Culture and Traditions Shape Systems, Practices of Mediation and Conciliation: Lessons from Canada's Judicial System' (Seminar for Judges and Mediators of the Intellectual Property and International Trade Court, Bangkok, 12 November 2015 <https://www.academia.edu/28269262/>

Nylund A, 'Alternative Dispute Resolution, Justice and Accountability in Norwegian Civil Justice' in X Kramer and others (eds), *Frontiers in Civil Justice: Privatisation, Monetisation and Digitisation* (Intersentia 2022)

Peters E, 'Evaluating the Use of Judicial Mediation in Employment Tribunals: Processes, Outcomes and Costs' (Ministry of Justice Research Series, 2010) <https://www.employment-studies.co.uk/resource/evaluating-use-judicial-mediation-employment-tribunals-processes-outcomes-and-costs>

Resnik J, 'Managerial Judges: The Potential Costs' (1985) 45 (Special Issue: Law and Public Affairs) Public Administration Review

Roberge J-F, 'Could Judicial Mediation Deliver a Better Justice? Supposing We TRAINed Judges as EXPATS?' (2010–2011) 1 Journal of Arbitration and Mediation <https://www.researchgate.net/publication/315760720>

Roberge J-F and Quek Anderson D, 'Judicial Mediation: From Debates to Renewal' (2019) 19(3) Cardozo Journal of Conflict Resolution

Sander FEA, 'Varieties of Dispute Resolution' (Address delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Pound Conference), St Paul, Minnesota, 7–9 April 1976) (1976) 70 Federal Rules Decisions 111–134

Schreiber F, *Praxishandbuch Güterichterverfahren: Recht – Methoden – Techniken* (2022)

Steffek F and Unberath H, 'Principled Regulation of Dispute Resolution: Taxonomy, Policy, Topics' in F Steffek and H Unberath (eds), *Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads* (Hart Publishing 2013)

Susskind L and Tilleman W, *Judicial Dispute Resolution: New Roles for Judges in Ensuring Justice* (London 2023)

Szymanek J, *Sędziowie jako mediatorzy (mechanizmy mediacji w rozstrzyganiu sporów prawnych)* (Instytut Wymiaru Sprawiedliwości, Warszawa 2025) <https://iws.gov.pl/wp-content/uploads/2025/09/2025-Prawa-Podstawowe-Sedziowie-jako-mediatorzy-mechanizmy-Szymanek.pdf>

– –, 'The Judge as a Promoter of Peace' (2025) 2 Archiwum Filozofii Prawa i Filozofii Społecznej

Tucker P, 'Judges as Mediators: A Chapter III Prohibition?' (2000) 11 Australian Dispute Resolution Journal <https://search.informit.org/doi/10.3316/agispt.20002424>

Urwin P, Valeriya Karuk V, Latreilleand P, 'Evaluating the use of judicial mediation in Employment Tribunals Ministry of Justice', 7 Research Series, 10 March 2010 <https://www.employment-studies.co.uk/resource/evaluating-use-judicial-mediation-employment-tribunals-processes-outcomes-and-costs>

Voet S, 'Relief in Small and Simple Matters in Belgium' (2015) 8(4) Erasmus Law Review

Wall JA Jr and Rude DE, 'Judicial Mediation: Techniques, Strategies, and Situational Effects' (1985) 41(2) Journal of Social Issues

Warren M, 'Should Judges Be Mediators?' (2010) 21 Australian Dispute Resolution Journal

Zienkiewicz A, 'The Judge as a Promoter of Peace' (2025) 2 Archiwum Filozofii Prawa i Filozofii Społecznej

– –, *Studium Mediacji. Od teorii ku praktyce* (Difin 2019)

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LAWYERS IN MEDIATION: INSIGHTS FROM A PILOT EMPIRICAL STUDY

Abstract

The article explores the current and multi-layered issue of lawyers' roles in mediation, focusing in particular on cases where lawyers act as mediators. Drawing on a pilot empirical study of 161 respondents from various professional groups involved in mediation, the authors look at how legal training influences the effectiveness of mediation. The pilot study highlights both positive and negative determinants affecting a mediator's performance from the perspective of legal training. Consequently, the authors attempt to assess how far legal education can help – or, conversely, complicate – a lawyer's work as a mediator. The findings reveal a dual picture. On the one hand, respondents recognize the advantages of legal background, such as legal expertise and the ability to draft mediation settlement agreements effectively. On the other hand, they also highlight related risks, most notably the tendency to carry over litigation-oriented habits typical of legal counsel into mediation, which may undermine the neutrality required for an effective mediation process. Moreover, the authors advance a *de lege ferenda* proposal calling for the introduction of mandatory instruction in mediation, negotiation, and conflict management into law degree programmes as well as professional legal training. This

approach could tangibly enhance the quality of mediation practice in Poland, contribute to a more nuanced and favourable perception of lawyers in the role of mediators, and ultimately support the wider adoption of consensual dispute resolution as an alternative to court proceedings.

KEYWORDS

dispute resolution, mediation, lawyer in mediation, conflict manager

SŁOWA KLUCZOWE

rozstrzyganie sporów, mediacja, prawnik zajmujący się mediacją, menadżer ds. zarządzania konfliktami

I. LAWYERS AMID THE TRANSFORMATION OF DISPUTE RESOLUTION MECHANISMS

The transformation of dispute resolution mechanisms has become one of the central challenges for modern justice systems. Legal actors increasingly seek solutions to resolve disputes more efficiently, particularly in light of their perceived dissatisfaction with the operation of the judicial system.[1] At the same time, the rising appeal of alternative dispute resolution methods likewise reflects the expectations of those actors to exercise a meaningful degree of autonomy over the decisions taken in their own cases. Mediation is one of the key forms of alternative dispute resolution and is widely regarded in legal scholarship as playing a leading role.[2] By blending legal and social elements, mediation seeks outcomes that all parties can accept, with particular emphasis placed on enabling future cooperation through the reconfiguration of the communicative aspects of the parties' relationship.[3]

Legal scholarship proposes a variety of definitions of mediation, typically emphasizing the characteristics that set it apart from other mechanisms employed to

[1] Marco Giacalone, Seyedeh Sajedeh Salehi, 'An empirical study on mediation in civil and commercial disputes in Europe: the mediation service providers perspective' (2022) Revista Ítalo-Española de Derecho Procesa 12, DOI: 10.37417/rivitsproc/802.

[2] Rafał Świeżak, Maciej Tański, 'Alternatywne metody rozwiązywania sporów. Przegląd zagadnień' (2003) 3; Hazel Genn, 'What Is Civil Justice for? Reform, ADR, and Access to Justice' (2012) 24(1) Yale Journal of Law & the Humanities 397, 411.

[3] Ewa Gmurzyńska, Rafał Morek, *Mediacje. Teoria i praktyka* (Wolters Kluwer 2024) 24–25.

assist parties in resolving a conflict. Most commonly, mediation is understood as a process in which a neutral third party assists in negotiations between the disputing parties with a view to reaching an agreement on the contested matter, without having to issue a binding or formal decision.[4] A mediator may, therefore, be defined as a party who, by enhancing communication between the disputing parties, assists them in reaching a mutually acceptable agreement. The effectiveness and perceived 'quality' of mediation are shaped both by the mediator's personal qualities – such as commitment and creativity – and by their professional background and substantive preparation for the role.[5]

Owing to its interdisciplinary character, mediation has found wide application in practice and is employed across numerous spheres of social life. Its potential as a tool for managing conflict has been noted not only by legal actors, but also by lawmakers, who have enabled the use of mediation in fields such as civil, commercial, family, criminal, and administrative law.[6] Among the core features of mediation, as derived from generally binding legal regulations, are the voluntary participation of the parties, the confidentiality of the process, and the mediator's neutrality and impartiality. Within legal practice, mediation operates both in a private form (out-of-court or extrajudicial mediation), where it arises from private-law agreements between the parties, and within judicial proceedings (court-ordered mediation), thereby giving effect to the concept of the multi-door courthouse.[7]

Legislatures have introduced a number of measures designed to promote greater use of mediation, a trend visible at both the national and EU levels. By way of illustration, reference may be made to the EU's activity in this field, pursued with a view to harmonizing domestic legal frameworks.[8] Developing stable and effective mechanisms for mediation within both the legal regime and society at large is crucial, as it supports wider uptake of mediation and helps build confidence in this form of dispute resolution.[9]

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[4] Jethro K Lieberman and James F Henry, 'Lessons from the Alternative Dispute Resolution Movement' (1986) 53 The University of Chicago Law Review 424.

[5] Agnieszka Siedlecka-Andrychowicz, Anna Cybulko in Ewa Gmurzyńska, Rafał Morek (eds) *Mediacje. Teoria i praktyka* (Wolters Kluwer 2024) 277.

[6] Włodzimierz Broński and others, 'Readiness to Use Mediation – Judges' and Entrepreneurs' Perspective', (2024) 20 Utrecht Law Review 21 < https://utrechtlawreview.org/articles/10.36633/ulr.1020> accessed 25 June 2025.

[7] Cezary Rogula, Agnieszka Zemke-Górecka, *Mediacja w praktyce mediatora i pełnomocnika* (Wolters Kluwer 2021) 27.

[8] 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.

[9] 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

Given the mediator's central role in successful mediation, the question of the mediator's educational background has become both significant and current. This prompts a number of key questions. First of all, is legal training the most desirable pathway for mediators? Can a lawyer – whether an advocate, legal adviser – be, in practice, a more effective mediator than one without any legal background? Finally, to what extent can legal training and the practice of a legal profession facilitate or impede a lawyer's performance of the mediator's role? These questions appear all the more pressing in light of the ongoing debate within both doctrine and practice concerning the figure of the lawyer as a mediator.

The developments taking place in dispute resolution also require the lawyer's role in today's legal environment to be revisited.[10] Lawyers are no longer confined to acting solely as courtroom representatives for their clients. Instead, their role is evolving to encompass conflict management, the recognition of the parties' emotional needs, and the creation of conditions conducive to final agreement.[11] These competencies come most clearly to the fore when lawyers take part in mediation proceedings as mediators. In this sense, mediation constitutes 'a tool for effective and constructive conflict management'.[12]

II. THE PILOT STUDY

To address the questions outlined above, a pilot qualitative and quantitative study was carried out to collect relevant data. Combining these two approaches made it possible to gain a broader and more nuanced understanding of the issues in question.[13] The study aimed to establish whether legal training is the most desirable background for serving as a mediator. It also sought to identify the potential advantages and risks that legal training might pose to mediation practice and, ultimately, to evaluate whether lawyers can perform effectively as mediators.

For the purposes of the pilot study, a lawyer is defined as a person holding a degree in law awarded upon completion of a university legal programme in Poland and

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Catholic University of Lublin 2021) 17, 56–58 < https://krm.gov.pl/materialy-do-pobrania> accessed 25 June 2025.

[10] Julie Macfarlane, *Prawnik jutra: jak polubowne rozwiązywanie sporów zmienia kształt praktyki prawa* (Krajowa Rada Radców Prawnych 2012) 18–21.

[11] Roland Fritz, Julia Lefèvre, 'The Lawyer as Conflict Manager: Exploring the Lawyer's Role in ADR, Especially as an Advisor in Mediation and as Lawyer-Mediator in Germany' (2025) 1 Studia Prawa Publicznego 9, 10–16.

[12] Ewa Gmurzyńska, Rafał Morek, *Mediacje. Teoria i praktyka* (Wolters Kluwer 2024) 37.

[13] See Stanisław Sudoł, *Nauki o zarządzaniu. Dylematy i wyzwania* (Warszawa: PWN 2019).

the conferral of the master's degree, or upon completion of legal studies abroad recognized in Poland. By contrast, a professional legal representative is understood to mean an advocate or a legal adviser.

The qualitative part of the study relies on interviews, one of the most commonly used methods of data collection in qualitative research.[14] Between December 2024 and January 2025, 15 individual in-depth interviews (IDIs) were conducted as part of the pilot project. The participants included nine legal professionals (three judges, three advocates, and three legal advisers) and six mediators without legal training. The interviews followed a prepared discussion guide and were conducted by three trained interviewers – two with a legal background and expertise in mediation and one experienced mediator. Each interview involved a single respondent, and full anonymity was assured. Consistent with the methodological premises of qualitative inquiry, the study drew upon empirical material derived from the interviewees' life experience.[15]

Based on the findings obtained from the qualitative phase, a survey questionnaire was designed for the quantitative study. The quantitative study aimed to detect recurring patterns, test the hypotheses formulated on the basis of the qualitative findings, and evaluate their consistency.[16] The survey was intended for advocates and legal advisers, who also serve as mediators, for judges, and for mediators without legal training. The questionnaire comprised 19 questions. The questions in the questionnaire, which were tailored to the respective respondent groups, focused primarily on the impact of educational background on the performance of the mediator's role and on whether lawyers are well-suited to act as mediators. Particular attention was devoted to the potential advantages and challenges arising from the legal background and professional legal practice, the cooperation between professional legal representatives and mediators (and vice-versa) during mediation proceedings. The questionnaire also examined the desirability of co-mediation in specific types of mediation conducted by individuals with differing educational backgrounds.

The quantitative phase was carried out online via the LimeSurvey platform between February and March 2025. Invitations to complete the questionnaire were circulated in Poland to 200 individuals employing a snowball sampling

[14] Chand, Satish Prakash, 'Methods of Data Collection in Qualitative Research: Interviews, Focus Groups, Observations, and Document Analysis' (2025) 6(1) Advances in Educational Research and Evaluation 303–317 <https://doi.org/10.25082/AERE.2025.01.001> 304.

[15] Hamed Taherdoost, 'What are Different Research Approaches? Comprehensive Review of Qualitative, Quantitative, and Mixed Method Research, Their Applications, Types, and Limitations' (2022) Journal of Management Science & Engineering Research 5, 54.

[16] Cf Andrzej Boczkowski, 'Badania ilościowe i jakościowe w socjologii. Między separacją epistemologiczną a praktyczną komplementarnością' (2018) 10 Roczniki Nauk Społecznych 4, 66.

method, resulting in 161 responses and yielding a response rate of 80.5%. The sample included 51 advocates and legal advisers acting as mediators, 49 judges, and 61 mediators. A more detailed breakdown of respondent profiles is provided in Table 1.

Participants in the pilot study were informed that the process would remain confidential and anonymous, and that they were free to withdraw at any time. The questionnaire did not address intimate or socially sensitive issues. Prior to commencing the study, respondents were duly advised of the processing and protection of their personal data. They were then requested to acknowledge having read this information and to provide their voluntary consent to participate.

STUDY GROUPS

Three groups of respondents were involved: judges (n = 49), legal advisers and advocates, (n = 51) and mediators (n = 61). A total of 161 individuals were surveyed. A detailed respondent profile is presented in Table 1.

Table 1. Sociodemographic respondent profile

Variables		Judges	Legal advisers and advocates	Mediators
Age		30-62	35-71	28-74
Gender	Female	25	30	41
	Male	24	21	20
Place of residence	City/town below 50 thou.	15	12	21
	City/town 50-200 thou.	10	17	10
	City/town over 200 thou.	24	22	30

Labels: n – frequency

Next to demographic variables, the study also measured several other variables essential to the achievement of the assumed research objective. These included responses to the following questions:

Legal training as the most desirable pathway for mediators. This variable was measured using the following question: In your view, which field of education is most useful for serving as a mediator? A follow-up open-ended question invited participants to explain the reasoning behind their choice.

Legal training and the practice of a legal profession facilitate or impede a lawyer's performance of the mediator's role. This variable was measured using the following questions: Which skills and qualifications of a practising lawyer (legal adviser or advocate) make them well-suited to serve as a mediator? In your view, can the active practice of a legal profession (legal adviser or advocate) hinder the performance of the mediator's role?

Cooperation between professional legal representatives and mediators, and between mediators and professional legal representatives during mediation proceedings. This variable was measured using two questions: How do you assess your cooperation with mediators when acting as a party's legal representative? How would you assess your cooperation with parties' legal representatives during mediation?

Co-mediation is necessary. This variable was measured using the following questions: In your view, is cooperation between two mediators with different educational backgrounds desirable in certain types of mediation proceedings? How do you assess your cooperation with mediators when acting as a party's legal representative? How would you assess your cooperation with parties' legal representatives during mediation?

The pilot study revealed both positive and negative determinants affecting a mediator's performance from the perspective of the education obtained. It also enabled an assessment of the extent to which legal training may facilitate or hinder a lawyer's performance as a mediator.

III. MEDIATOR'S EDUCATIONAL BACKGROUND

The starting point is the mediator's educational background, a pivotal point in the ongoing debate surrounding the professionalization of mediation. Education is perceived not merely as a set of formal qualifications, but also as a vehicle of specific professional habits acquired during college or university training – habits that shape the manner of conducting mediation sessions, the manner in which conflict is interpreted, and the mediator's relationship with the parties. Examining this issue, therefore, feeds into a broader question: does diversity in mediators' educational backgrounds enhance the flexibility and effectiveness of mediation, or can it also create practical challenges?

Under the legal framework currently in force in Poland, mediators are not required to hold a degree in any specific field of education. For instance, Article 183^2 § 1 of the Act of 17 November 1964 – Code of Civil Procedure merely provides that

a mediator may be a natural person enjoying full legal capacity and full public rights.[17] Furthermore, within Article 157a of the Act of 27 July 2001 – Law on the Organization of Common Courts, a permanent court mediator may be a natural person who: 1) meets the requirements set out in Article 183² §§ 1 and 2 of the Act of 17 November 1964 – Code of Civil Procedure; 2) has appropriate knowledge and skills in conducting mediation; 3) has attained the age of 26; 4) has a command of the Polish language; 5) has not been finally convicted of an intentional criminal or fiscal offence; 6) has been entered on the list of permanent mediators maintained by the president of the regional court. Comparable provisions to those found in civil procedure have been adopted in Article 96f § 1 of the Act of 14 June 1960 – Code of Administrative Procedure.[18] More detailed requirements – particularly with regard to the mediator's skills and expertise – are set out in § 4 of the Regulation of the Minister of Justice of 7 May 2015 on Mediation Proceedings in Criminal Cases, which provides that mediation proceedings may be conducted by a person who: 1) holds Polish citizenship, citizenship of another Member State of the European Union, a Member State of the European Free Trade Association (EFTA) that is a party to the Agreement on the European Economic Area, or the Swiss Confederation, or the citizenship of another State, provided that, under the provisions of European Union law, the person is entitled to take up employment or self-employment within the territory of the Republic of Poland under the conditions laid down in those provisions, 2) enjoys full public rights and has full legal capacity, 3) has attained the age of 26, 4) has a command of the Polish language in speech and writing, 5) has not been finally convicted of an intentional criminal or fiscal offence, 6) possesses knowledge and skills in conducting mediation proceedings, resolving conflicts, and establishing interpersonal communication, 7) guarantees the proper discharge of duties, 8) has been entered on the relevant register.[19]

The pilot study indicates that as many as 82% of advocates and legal advisers who also serve as mediators, as well as 74% of judges, consider legal education to be a desirable attribute in case of a mediator. By contrast, among mediators without any legal training, only 41% endorse this view, while 55% express a preference for a background in psychology. Irrespective of their professional affiliation, respondents frequently emphasized the legitimacy of a hybrid competence model, premised on combining legal training with skills and knowledge typically associated with psychological education. Notably, 94% of professional legal representatives (advocates and legal advisers) who act as mediators stated that mediators should display both legal and psychological competencies.

[17] Code of Civil Procedure of 17 November 1964 [2024] Journal of Laws 1568.

[18] Code of Administrative Procedure of 16 June 1960 [2025] Journal of Laws 1691.

[19] Regulation of the Minister of Justice of 7 May 2015 on mediation proceedings in criminal cases [2015] Journal of Laws 716.

Respondents also stressed that the suitability of a mediator's educational background should not be assessed in isolation, but rather in context, with due regard to the nature and subject matter of the dispute, as these factors shape the dynamics of the interaction, the choice of mediation techniques, and the overall conduct of the process. A similar approach is reflected in Polish law. Under Article 183^9 § 1 of the Code of Civil Procedure, if the parties have not elected a mediator themselves, the court appoints a mediator with appropriate knowledge and skills relevant to the type of case at hand, giving priority to permanent mediators.

The pilot study results suggest that respondents see the key to effective mediation primarily in mediators' soft skills – such as experience, strong communication abilities, and the capacity to understand and empathize with the parties to a dispute. It is also noteworthy that 26% of respondents who were judges and 12% of mediators indicated that educational background is of no relevance to the quality of a mediator's performance. What ultimately matters, in their view, are the concrete skills and competencies that individual mediators bring to the process. These factors are perceived as fundamental determinants of the effectiveness of the mediation process, influencing both the quality of communication between the parties and the chances of achieving a durable agreement. In this context, the mediator's formal education – while acknowledged by advocates and legal advisers as conducive to navigating legal mechanisms effectively – emerges as only one of many factors contributing to the overall process of dispute resolution.

With regard to the responses of advocates, legal advisers, and judges who indicated in the survey that mediators should possess legal training, the pilot findings suggest that this position is rested upon the conviction that a mediator with a legal background is better equipped to identify and properly interpret the normative dimensions of a dispute, as well as drafting the provisions of a mediated settlement agreement in a manner consistent with formal requirements. As reflected in the survey responses, these competencies are regarded as especially important at the institutional review stage of the settlement, particularly when court approval is required. This apparently enhances the participants' sense of legal certainty and reinforces the perception of the overall effectiveness of the mediation process.

IV. LAWYERS AS EFFECTIVE MEDIATORS: POSITIVE DETERMINANTS

The pilot study results demonstrate that lawyers serving in the capacity of mediators contribute a distinct set of competencies that may materially enhance the effectiveness of mediation as a conflict-resolution process. Respondents

consistently underscored the importance of familiarity with the applicable legal framework, the capacity to undertake a precise assessment of the parties' legal standing, and fluency in the procedural dimensions of disputes. For these reasons, lawyers are often regarded by the public as particularly well equipped to handle mediation proceedings.

That said, the assessment of these positive competencies – and their influence on a mediator's effectiveness – is far from uniform. It varies depending on the professional background of the respondent. Judges, legal advisers, and mediators without legal training highlight different aspects when evaluating lawyers in the mediators' role. These differences stem from their respective professional experiences, their expectations regarding mediation, and their understanding of process objectives. Accordingly, any analysis of lawyers' competencies as mediators therefore needs to consider these differing viewpoints.

It is noteworthy that, in the pilot study, judges identified a range of advantages associated with mediators possessing a degree in law. They stressed, above all, that lawyers acting as mediators are in a position to draft settlement agreements in line with applicable legal provisions. In the respondents' view, this reflects lawyers' professional preparation in assessing the legal implications of solutions discussed and proposed to the parties during mediation. This competence is of considerable importance for the subsequent effectiveness and enforceability of mediation agreements. This circumstance further contributes to strengthening the parties' sense of legal certainty and the stability of the outcomes achieved within mediation. Judges involved in the study further noted that legally trained mediators are often skilled at pinpointing the underlying nature of the conflict and display strong interpersonal skills, including effective communication and effective management of the parties' emotions. Their professional experience allows them to approach disputes from a broader, more strategic angle, taking into account not only the legal framework but also the practical implications of entering into a mediated settlement.

A similar line of argument was advanced by the advocates and legal advisers participating in the study. They pointed to the added value of lawyers serving as mediators, arguing that courtroom experience strengthens a mediator's effectiveness, especially in identifying the real source of the dispute, anticipating likely judicial outcomes, and assessing the legal soundness of the proposed mediated settlement.

Speaking of the study findings among mediators without legal training, it should be noted that 63% of respondents considered legal education to be potentially beneficial in the performance of the mediator's role. In their view, this can be attributed

to a combination of several core competencies, including those developed during legal studies – foremost among these being familiar with the law. Additionally, respondents pointed to interpersonal skills, such as effective communication and active listening. Analytical abilities and the capacity to adopt a broad perspective on the dispute are likewise regarded as key strengths, particularly in the case of lawyers acting as mediators. Apparently, respondents suggested that a lawyer-mediator is well positioned to pinpoint the roots of the dispute, anticipate possible judicial decisions, and incorporate these insights into the mediation process, thus ultimately increasing the likelihood of achieving a durable agreement.

V. LAWYERS AS EFFECTIVE MEDIATORS: NEGATIVE DETERMINANTS

Although lawyers exhibit many strengths and qualities when handling mediation, their role as mediators is not viewed uniformly positively. Respondents pointed to certain characteristics acquired during legal education and reinforced throughout professional practice that may constrain the effectiveness of the mediation process. These concerns primarily relate to a tendency to focus predominantly on legal aspects at the expense of the parties' emotional and communicative needs, as well as an inclination toward evaluating or steering the parties toward particular solutions. At the same time, each of the surveyed professional groups identified different risks linked to lawyers acting as mediators, which paves the way for a more interdisciplinary perspective on the issue.

The judges participating in the study most frequently highlighted, among the negative determinants, factors related to the individual's attitude toward the mediation process. The risks most commonly indicated by this group included perceiving mediation merely as a formal component of judicial procedure, rather than as a genuine instrument for conflict resolution, as well as adopting a 'win-oriented' mindset of either of the parties, mostly seen in legal representatives, which may conflict with the principle of mediator impartiality. Another constraint identified by the surveyed judges was lawyers' tendency to confine disputes exclusively to a legal framework. According to respondents, this approach may impede the due consideration of the broader, non-legal aspects of the dispute, such as the parties' emotional, social, and relational needs. Notably, around 10% of the judges expressed firm opposition to appointing in the role of a mediator a lawyer actively practising as a courtroom representative. In substantiating this position, respondents pointed, among others, to the risk of conflating mediation with judicial proceedings, which might result in transforming mediation into a mere

courtroom tool. They also referred to deficits in collaborative competencies and to an insufficiently developed understanding of the psychological underpinnings of conflict. The judges representing this view emphasized that legal representatives not infrequently reduce mediation to a function ancillary to litigation, focusing primarily on achieving settlement as a means of expediting proceedings rather than as a genuine effort to resolve the parties' original problem.

This line of reasoning aligns with the opinion expressed by approximately 37% of the surveyed mediators without legal training. This position is justified by reference to the distinct professional role of the lawyer, an allegedly insufficient level of empathy, or a schematic approach to conflict. An analysis of the mediators' responses reveals a clear emphasis on the distinctiveness of the mediator's profession vis-à-vis that of the lawyer. At the same time, respondents underscored that effective mediation requires specific interpersonal competencies, which do not necessarily derive from legal education.

Mediators participating in the study who were simultaneously professional legal representatives (advocates and legal advisers) likewise acknowledged the risks associated with lawyers assuming the role of mediator. Respondents noted that being accustomed to representing one party may result in an unconscious tendency to side with the party seen as inferior in mediation. Some responses further indicated that assessments should not be made in abstract terms but rather require contextual specification. In this regard, respondents pointed especially to litigation lawyers – advocates and legal advisers focused on courtroom practice – who are typically motivated by a 'win-oriented' mindset, which may impede their full adoption of the mediator's role as a neutral and impartial facilitator of the process. At the same time, participants stressed that the effectiveness of a professional legal representative acting as mediator largely depends on their personal traits, a view echoed across the other respondent groups.

VI. COOPERATION BETWEEN PROFESSIONAL LEGAL REPRESENTATIVES AND MEDIATORS DURING MEDIATION

The study further examined experiences of cooperation between professional legal representatives and mediators. Owing to the diversity of respondents' feedback, three levels of cooperation were ultimately defined. The assessment of mutual relations was thus divided into three categories: positive (as defined by 71% of respondents), moderate (18% of respondents), and negative (12% of respondents).

Respondents who rated the cooperation positively most often pointed to the mediator's interpersonal skills, which helped lower tensions and made the parties

more open to dialogue and settlement. Where cooperation was assessed as only moderate, respondents raised concerns about the working style of some mediators, especially a tendency to pursue settlement at any price. According to the respondents, some mediators tend to sideline professional legal representatives or to challenge their role in the mediation process. Negative experiences were most commonly linked to situations where the mediator refused to adequately address the substance of the dispute or displayed prejudice toward lawyers.

Mediators participating in the pilot study likewise indicated, in the majority of cases, that cooperation with professional legal representatives proceeded appropriately, that is, positively or at least moderately. In this group, 40% rated the cooperation positively. Respondents noted that legal representatives often contribute to lasting solutions, support the drafting of settlement terms, improve communication, ensure stability of the mediation process, and offer psychological reassurance to the parties. 25% of respondents stated that the quality of cooperation depends largely on the individual lawyer involved. However, based on their experience, they noted that many legal representatives remain strongly attached to the ambition of winning the case. At the same time, 35% of those surveyed assessed cooperation with professional representatives negatively. The advanced arguments focused primarily on adverse attitudes toward mediation or those based on misunderstanding.

VII. COOPERATION OF MEDIATORS WITH DIFFERENT EDUCATIONAL BACKGROUNDS: A REMEDY?

The findings of the pilot study reveal an intriguing tendency, namely that the effectiveness of mediation proceedings may be substantially enhanced through the cooperation of mediators representing diverse educational backgrounds and professional experience. Particular attention should be given to configurations in which one mediator possesses legal training while the other has a background in psychology. An interdisciplinary pairing of this kind can offer a more balanced understanding of both the legal framework and the emotional and social dynamics of the conflict. That said, views on co-mediation – meaning mediation conducted jointly by two mediators – vary markedly across the respondent groups.

In the pilot study, as many as 88% of advocates and legal advisers who concurrently serve as mediators said that cooperation between mediators with different educational backgrounds (e.g., legal and psychological) was particularly valuable in industry-specific and complex cases. Such collaboration is perceived as streamlining the process and facilitating the achievement of outcomes that satisfy the

parties, owing to the integration of distinct professional perspectives within the mediation process. The high level of endorsement for this model suggests a growing recognition that modern disputes are multidimensional and require attention not only to legal issues but also to psychological, social, and even technical factors. Only 12% of professional representatives viewed co-mediation negatively, pointing to the risk that differing approaches between mediators could create difficulties during the process. Even so, the criticism was not absolute, as those respondents generally accepted co-mediation in particularly demanding cases.

A substantial majority of judges (79%) supported cooperation between mediators with different educational backgrounds, arguing that this approach can increase the likelihood of reaching a more advantageous agreement. Conversely, 21% of the surveyed judges emphasized that co-mediation may give rise to misunderstandings and procedural complications. Judges expressing this view suggested that it may sometimes be preferable to seek input from an external expert when needed. In their opinion, co-mediation should be reserved for exceptional cases where the nature of the dispute clearly justifies it.

Among the mediators participating in the study, as many as 60% opt for cooperation between mediators with different educational backgrounds. The arguments advanced in favour of this model emphasized, in particular, the possibility of achieving a more comprehensive understanding of both the context and the underlying nature of the dispute, as well as the practical benefits of combining complementary areas of expertise to ensure that the mediation is conducted properly. Respondents underscored that such an approach may prove especially beneficial in disputes of a particular complexity, including cases involving multiple parties. At the same time, 40% of mediators expressed a negative view of cooperation between mediators with dissimilar educational profiles. Concerns were raised regarding potential communication issues, the risk of distracting the parties, and the possibility of disrupting mediation dynamics. Respondents also noted that each mediator often has their own preferred mediation style, and that involving more than one mediator may generate inconsistencies in how the process is conducted. Respondents further observed that, in complex cases, it remains possible to seek consultation from a suitably qualified expert.

VIII. CONCLUSIONS

The pilot study allowed for an assessment of both the advantages and potential risks associated with lawyers acting as mediators. The findings indicate that the formal education of mediators constitutes but one of many components of the

broader dispute resolution process. Nevertheless, a person holding legal qualifications brings to mediation a distinct set of competencies, including the capacity for legal analysis of the dispute, an understanding of the legal consequences of the parties' decisions, and the ability to draft a settlement agreement free from legal defects. Taken together, these attributes may significantly enhance the overall effectiveness of the mediation process.

The study also reveals that for lawyers to succeed as mediators, they must rethink their professional role, moving beyond a purely legal mindset toward that of a 'conflict manager'. Such a transformation presupposes the integration of legal expertise with soft skills, including the capacity for effective communication, the management of the parties' emotions, and the de-escalation of tensions, all exercised within a flexible approach to the dispute. In practice, this means that a lawyer serving as a mediator should focus first and foremost on resolving the conflict, balancing formal legal aspects with the process of facilitating agreement between the parties. The pilot study suggests that legal training can be a significant asset in mediation, so long as it goes hand in hand with well-developed interpersonal skills.

Given these findings, it seems reasonable to put forward a *de lege ferenda* proposal to advocate mandatory training in mediation, negotiation, and conflict management both at law degree programmes and within professional apprenticeship programmes for advocates and legal advisers. Including these components in judicial training could also increase the practical use of mediation, especially the court-ordered one. From a long-term perspective, such measures may translate into greater public trust in mediation, foster its broader adoption, and reduce the burden on ordinary courts through the more effective application of consensual dispute resolution mechanisms.

The integration of legal expertise with interpersonal competencies related to conflict management may enhance the quality of mediation proceedings and enhance the perception of lawyers as effective mediators – professionals who, beyond their command of legal norms, are capable of managing conflict in a constructive manner. Over time, this may increase public trust in mediation, support its wider adoption, and reduce the caseload at courts through more effective deployment of consensual dispute resolution mechanisms.

REFERENCES

Boczkowski A, 'Badania ilościowe i jakościowe w socjologii. Między separacją epistemologiczną a praktyczną komplementarnością' (2018) 10 Roczniki Nauk Społecznych 4, 66, DOI: <http://dx.doi.org/10.18290/rns.2018.46.4-4>

Broński W and others, 'Readiness to Use Mediation – Judges' and Entrepreneurs' Perspective' (2024) 20 Utrecht Law Review 21 <https://utrechtlawreview.org/articles/10.36633/ulr.1020> accessed 25 June 2025

– –, '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) <https://krm.gov.pl/materialy-do-pobrania> accessed 25 June 2025

Chand SP, 'Methods of Data Collection in Qualitative Research: Interviews, Focus Groups, Observations, and Document Analysis' (2025) 6(1) Advances in Educational Research and Evaluation <https://doi.org/10.25082/AERE.2025.01.001> accessed 25 June 2025

Fritz R, Lefèvre J, 'The Lawyer as Conflict Manager: Exploring the Lawyer's Role in ADR, Especially as an Advisor in Mediation and as Lawyer-Mediator in Germany' (2025) 1 Studia Prawa Publicznego

Giacalone M, Salehi S, 'An empirical study on mediation in civil and commercial disputes in Europe: the mediation service providers perspective' (2022) Revista Ítalo-Española de Derecho Procesa 12, DOI: 10.37417/rivitsproc/802

Gmurzyńska E, Morek R, *Mediacje. Teoria i praktyka* (Wolters Kluwer 2024)

Lieberman JK and Henry JF, 'Lessons from the Alternative Dispute Resolution Movement' (1986) 53 The University of Chicago Law Review

Macfarlane J, *Prawnik jutra: jak polubowne rozwiązywanie sporów zmienia kształt praktyki prawa* (Krajowa Rada Radców Prawnych 2012)

Rogula C, Zemke-Górecka A, *Mediacja w praktyce mediatora i pełnomocnika* (Wolters Kluwer 2021)

Siedlecka-Andrychowicz A, Cybulko A in E Gmurzyńska, R Morek (eds), *Mediacje. Teoria i praktyka* (Wolters Kluwer 2024)

Sudoł S, *Nauki o zarządzaniu. Dylematy i wyzwania* (Warszawa: PWN 2019)

Świeżak R, Tański M, *Alternatywne metody rozwiązywania sporów. Przegląd zagadnień* (2003)

Taherdoost H, 'What are Different Research Approaches? Comprehensive Review of Qualitative, Quantitative, and Mixed Method Research, Their Applications, Types, and Limitations' (2022) Journal of Management Science & Engineering Research 5

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THE EVOLUTION OF THE DEATH PENALTY IN KAZAKHSTAN[1]

Abstract

This paper presents the evolution of the death penalty in Kazakhstan in its both legal and social aspects. The legal aspect includes analyses of the development and transformation of its regulations provided for in constitutions and criminal codes in the period from 1991 (i.e., the country's independence) to 2022 (i.e., the year of the abolition of the death penalty). The paper also presents the laws governing the execution of the death penalty while it was in effect. The social aspect, on the other hand, includes an analysis of the evolution of the Kazakh society's attitude toward the death penalty. The analyzed materials were the aforementioned legal acts and legal literature. They were obtained, among other things, during a study visit to the library of the Law Faculty of Kazakhstan State Law University in Astana.

KEYWORDS

death penalty, sentencing, Criminal Code of the Republic of Kazakhstan, Executive Penal Code of the Republic of Kazakhstan

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kara śmierci, skazanie, kodeks karny Republiki Kazachstan, kodeks karny wykonawczy Republiki Kazachstan

I. INTRODUCTION

'The death penalty counts the years of its existence in millennia and its victims in millions'.[2] It is the most severe, cruel, and irreversible punishment.[3] It involves depriving the convicted person of his or her life. It is controversial, gives rise to disputes in the countries where it is in force, and leads to pressure from the international community. Until recently, such a situation was in place in the Republic of Kazakhstan. It was not until 2022 that this punishment was removed from the catalog of penalties specified in the criminal code.

The purpose of this paper is to show the evolution of the death penalty in Kazakhstan's law (since 1991, i.e., since the country's independence), its scope, and the circumstances of its abolition. The analysis will cover legal acts (the Constitution and criminal codes) and legal literature.

For the purpose of the analyses, the following research hypothesis was formulated: 'The evolution of the death penalty leading to its abolition in Kazakhstan's criminal law was a multi-stage process forced by pressure from the international community'.

II. THE EVOLUTION OF THE REGULATIONS GOVERNING THE DEATH PENALTY IN THE CONSTITUTIONS OF THE REPUBLIC OF KAZAKHSTAN

In the Foundations of the Constitutional System, the 1993 Constitution of the Republic of Kazakhstan[4] (RK) stated that: 'The Republic of Kazakhstan recog-

[2] Mikhail N Gernet in Dinara A Satenova, *Primeneniye smertnoy kazni v Yugo-Vostochnoy Azii,* <https://repo.kspi.kz/bitstream/handle/123456789/4825/2010-3_93-95.pdf?sequence=1&isAllowed=y> accessed 4 June 2025.

[3] AB Bekmagambetov, VP Revin, *Ugolovnoye pravo Respubliki Kazakhstan. Obshchaya chast'. Uchebnik,* (Almaty 2015) 294.

[4] *Konstitutsiya Respubliki Kazakhstan ot 28 yanvarya 1993 goda* <https://adilet.zan.kz/rus/docs/K930001000> accessed 4 June 2025.

nizes the human being, his or her life, freedom, and inalienable rights as the highest value and functions in the interest of citizens and society' (third foundation). In Chapter 3 titled 'The Rights and Freedoms of Citizens', in Article 8, it also confirmed the protection of life: 'The right to life is a natural and inalienable right of every human being. No one can be arbitrarily deprived of life' (sentences 1 and 2). However, in sentence 3, the Constitution allowed the use of the death penalty, stipulating that it could only be imposed in exceptional cases by court judgment. It allowed anyone sentenced to it to apply for clemency (sentence 4). Thus, the 1993 Constitution of the RK, i.e., the first in the independent State, provided for the death penalty.

Likewise, the 1995 Constitution of the Republic of Kazakhstan[5], for many years thereafter contained analogous legal arrangements for this penalty.

As a result of the 2007 amendment to the Constitution,[6] its Article 15(2) once again stipulated that it is prohibited to deprive another person of life. It allowed the use of the death penalty, treating it as an exceptional punishment established by law. It stipulated that this penalty is adjudicated for terrorist crimes resulting in the death of people, as well as for particularly grave crimes committed during wartime. It granted the convict the right to apply for clemency. Thus, the amendment indicated the scope of application of this penalty.

In December 2019, the President of the Republic of Kazakhstan instructed the Ministry of Foreign Affairs to start the procedure of accession to the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, adopted by the UN General Assembly on 15 December 1989. In September 2020, Kazakhstan's representative to the UN signed it, but with the exception of Article 2 (the right to use the death penalty for particularly serious crimes of a military nature committed during wartime).[7]

In December 2020, in response to questions from the President of the Republic of Kazakhstan to the Constitutional Council regarding the death penalty, the latter stated that Kazakhstan's Constitution and international acts recognize the right to life as a fundamental value of a democratic society, define its dominant status, and establish the State's obligations to ensure this right for all people regardless of

[5] *Konstitutsiya Respubliki Kazakhstan ot 30 avgusta 1995 goda* <https://adilet.zan.kz/rus/docs/K950001000> accessed 5 June 2025.

[6] *Zakon Respubliki Kazakhstan ot 21 maya 2007 goda N 254 'O vnesenii izmeneniy i dopolneniy v Konstitutsiyu Respubliki Kazakhstan'* <https://adilet.zan.kz/rus/docs/Z070000254_#z0> accessed 5 June 2025.

[7] Igor V Sleptsov, 'Smertnaya kazn' po zakonodatel'stvu Respubliki Kazakhstan' (2021) 16(2) Ugolovno-ispolnitel'noye prawo 213.

differences (Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, Convention on the Rights of the Child, and others). The Council stressed that according to Article 1(1) of the Constitution of the RK, man, as well as his or her life, rights, and freedoms are the highest values to the State, and Article 15(2) of the Constitution provides for the prohibition of depriving a person of life.[8] In doing so, it pointed to the international legal basis for the protection of life as a reference point for future amendments to the law regarding the death penalty in Kazakhstan.

In January 2021, the country's president decided to ratify the Second Optional Protocol to the International Covenant on Civil and Political Rights, aiming at the abolition of the death penalty, drawn up in New York on 15 December 1989.[9] This provided the impetus for the next major decision regarding the death penalty.

It was materialized in another amendment to the Constitution of the RK, made on 8 June 2022,[10] which shaped the modern legal status of the penalty in question. As a result, Article 15(1) stipulates that everyone has the right to life, and paragraph 2 of that Article stipulates that no one has the right to arbitrarily deprive a person of life. It has been accepted that the death penalty is prohibited. This meant the abolition of this penalty in Kazakhstan. Eventually, it was deemed contrary to the principle of the right to life.[11]

The actions presented above showed Kazakhstan's phased departure from the death penalty manifested in limiting its scope and minimizing its legal consequences.[12]

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[8] *Normativnoye postanovleniye Konstitutsionnogo Soveta Respubliki Kazakhstan ot 15 dekabrya 2020 goda № 4 'Ob ofitsial'nom tolkovanii punkta 2 stat'i 15 Konstitutsii Respubliki Kazakhstan'* <https://adilet.zan.kz/rus/docs/S2000000004> accessed 5 June 2025.

[9] *Zakon Respubliki Kazakhstan ot 2 yanvarya 2021 goda № 404-VI 'O ratifikatsii Vtorogo Fakul'tativnogo protokola k Mezhdunarodnomu paktu o grazhdanskikh i politicheskikh pravakh, napravlennogo na otmenu smertnoy kazni'* <https://online.zakon.kz/Document/?doc_id=Z34469292&pos=2;-106#pos=2;-106&sel_link=1008524051> accessed 5 June 2025.

[10] *Zakon Respubliki Kazakhstan ot 8 iyunya 2022 goda 'O vnesenii izmeneniy i dopolneniy v Konstitutsiyu Respubliki Kazakhstan'* <https://adilet.zan.kz/rus/docs/Z220000001K#z8> accessed 6 June 2025.

[11] SR Yusubova, *Mezhdunarodno-pravovyye aspekty otmeny smertnoy kazni v Respublike Kazakhstan* in *Sbornik materialov XIII Mezhdunarodnoy nauchnoy konferentsii studentov i molodykh uchenykh 'Nauka i obrazovaniye – 2018'* (Astana 2018) 2050.

[12] ISh Borchashvili, *Kommentariy k ugolovnomu kodeksu Respubliki Kazakhstan, Obshchaya chast',* vol 1 (Almaty 2021) 492.

III. THE EVOLUTION OF THE REGULATIONS GOVERNING THE DEATH PENALTY IN THE CRIMINAL CODES OF THE REPUBLIC OF KAZAKHSTAN

As a result of the collapse of the Soviet Union in 1991, Kazakhstan faced a new geopolitical and socioeconomic situation that required radical changes, including in the field of law. It should be recalled that the 1959 Criminal Code of the Kazakh Soviet Socialist Republic was still in effect at the time,[13] in which, as in other criminal codes of the Soviet republics, the death penalty was provided for as an exceptional measure.[14] The new situation of the country did not cause an immediate cessation of its use.[15]

It was only from 1994 that the Kazakh authorities' efforts began to focus on internationalizing cooperation with other countries, which meant, among other things, pursuing a policy of gradually abolishing the death penalty.[16] Thus, they implemented a State law reform program aimed at reducing the number of crimes punishable by the death penalty.[17] In practice, this has not been done properly, as according to *Amnesty International,* in 1995, Kazakhstan was among the world 'leaders' in the use of the death penalty, ranking 4th after China, Saudi Arabia, and Nigeria. In that year, 101 people were executed in Kazakhstan. In addition, at that time, up to 100 applications for pardon of persons sentenced to death annu-

[13] *Ugolovnyy Kodeks Kazakhskoy SSR ot 22 iyulya 1959 g. (s izmeneniyami i dopolneniyami),* <https://online.zakon.kz/Document/?doc_id=1004273&pos=3;-102#pos=3;-102> accessed 4 June 2025.

[14] Article 22: 'As an exceptional measure of punishment, until it is completely abolished, the death penalty – shooting – is permitted for State crimes in cases provided for in the law of the USSR 'On Criminal Responsibility for State Crimes', for premeditated murder under aggravating circumstances specified in the articles of the criminal laws of the Union of the SSR and the Kazakh SSR, establishing responsibility for premeditated murder, and in some cases specifically provided for by the legislation of the USSR, also for other particularly serious crimes. Persons under the age of eighteen before committing a crime and women who were pregnant at the time of the crime or at the time of the sentencing cannot be sentenced to death. The death penalty cannot be applied to a woman who is pregnant at the time of execution'.

[15] Sleptsov (n 7) 210.

[16] B Bermukhambetova, A Karipova, G Baydalina, 'Smertnaya kazn'. Za ili protiv' in *Aktual'nyye voprosy prava, ekonomiki i upravleniya* (Penza 2016) 20.

[17] SN Isayeva, *Suzheniye sfery primeneniya smertnoy kazni v Respublike Kazakhstan* [in:] *Obespecheniye verkhovenstva prava: novyye vozmozhnosti v svete global'nykh izmeneniy: Mater. mezhdunar. nauch.-prakt. Konferentsii (15 iyunya 2018 goda), posvyashchennaya pamyati vydayushchegosya uchenogo-yurista, eks-ministra Yustitsii Respubliki Kazakhstan N.A. Shaykenova ('Shaykenovskiye chteniya'), priurochennaya k 25-letiyu Instituta zakonodatel'stva Respubliki Kazakhstan* (Astana 2018) 286.

ally were considered by the Commission for Pardons under the President of the Republic of Kazakhstan.[18]

The first stage of the legal reform involved the adoption of the 1997 Criminal Code of the Republic of Kazakhstan (CCRK),[19] which regulated the death penalty in Article 49 (as amended in 2004[20] and 2009[21]).

Based on Article 49(1) of the CCRK, the death penalty was envisaged as an exceptional punishment, carried out by shooting. It was established for terrorist crimes resulting in people's death, as well as for particularly serious crimes committed during wartime. The convict's right to ask for clemency was assured. Paragraph 2 of that Article stipulates that the death penalty must not apply to women, as well as to persons who committed the crime under the age of eighteen, and men who have reached the age of sixty-five by the date the court pronounces the sentence. Paragraph 3 establishes that in the event the President of the Republic of Kazakhstan imposes a moratorium on the execution of the death penalty, its execution will be suspended for the duration of the moratorium. Paragraph 4 regulates the time limits for its execution. It was stipulated that it should be carried out no earlier than one year after the conviction became final, and no earlier than one year after the moratorium on the death penalty was lifted. Paragraph 5 provides that the death penalty may be replaced, by way of pardon, by life imprisonment or twenty-five years' imprisonment, served in a penal colony of special rigor. It has been accepted that persons sentenced to death, in the event that the moratorium on the death penalty is lifted, are entitled to apply for clemency, whether or not they have applied for it before the moratorium was imposed.

Unlike the 1959 Criminal Code of the Kazakh SSR, the scope of the death penalty has been significantly narrowed down. First, the group of those subject to this penalty has been limited (to exclude not only minors and pregnant women, but also all women, as well as men who are over 65 at the time of sentencing). Secondly, the scope of the crimes for which the death penalty is provided was severely reduced. The number of crimes for which the death penalty was prescribed was reduced by almost half.[22] It was abolished as a penalty for theft, forgery, foreign

[18] Sleptsov (n 7) 211.

[19] *Ugolovnyy kodeks Respubliki Kazakhstan ot 16 iyulya 1997 goda N 167,* <https://adilet.zan.kz/rus/docs/K970000167> accessed 4 June 2025.

[20] *Zakon Respubliki Kazakhstan ot 10 marta 2004 goda N 529 'O vnesenii izmeneniy i dopolneniy v Ugolovnyy, Ugolovno-protsessual'nyy i Ugolovno-ispolnitel'nyy kodeksy Respubliki Kazakhstan v svyazi s vvedeniyem moratoriya na ispolneniye smertnoy kazni'* <https://adilet.zan.kz/rus/docs/Z040000529_#z0> accessed 6 June 2025.

[21] *Zakon Respubliki Kazakhstan ot 10 iyulya 2009 goda № 175-IV 'O vnesenii izmeneniy i dopolneniy v nekotoryye zakonodatel'nyye akty Respubliki Kazakhstan po voprosam smertnoy kazni'* <https://adilet.zan.kz/rus/docs/Z090000175_#z4> accessed 6 June 2025.

[22] Bermukhambetova, Karipova, Baydalina (n 16) 20.

exchange violations, banditry, disruptive activities in correctional facilities, rape, and bribery.[23] It is envisaged as a punishment for particularly serious crimes that endanger human life, as well as those committed in wartime or combat situations, treason, crimes against peace and the security of humanity, and serious military crimes. As a result, compared to the Criminal Code of the Kazakh SSR, which contained 27 articles providing for the possibility of the death penalty, the 1997 Criminal Code of the RK provided for it in 18 articles.[24]

In the years that followed, Kazakhstan continued to gradually reduce the scope of the death penalty. This resulted, among other things, from the 2002 Concept of Legal Policy of the Republic of Kazakhstan. By presidential decree of 17 December 2003 'On the Introduction of a moratorium on the execution of the death penalty in the Republic of Kazakhstan',[25] an indefinite moratorium on its execution was introduced. According to the decree, the moratorium was in effect from 1 January 2004, until the death penalty was completely abolished. The execution of the penalty for those who were sentenced to it before the moratorium was adopted was suspended for the duration of the moratorium.[26]

In reality, the decree did not abolish the death penalty, but suspended its execution. This decision was dictated by the results of an analysis of numerous sociological studies, which indicated the reluctance of Kazakh society to completely abolish this punishment. Such a decision was considered premature.[27] At the same time, the moratorium was put in place until the resolution of the issue of the complete abolition of the death penalty. The decree also referred to the need to resolve the issue of implementing, as of 1 January 2004, the provisions of the 1997 Criminal Code of the Republic of Kazakhstan on life imprisonment, which was done by the Act of 31 December 2003.[28] This penalty became an alternative to the death penalty.

Subsequently, the Act of 10 March 2004 established the legal status of convicts covered by the moratorium. In November 2005, Kazakhstan ratified the International Covenant on Civil and Political Rights, which stipulates that the right

[23] AA Benke, 'Smertnaya kazn' (2012) 1–2 Khabarshy – Vestnik Karagandinskoy akademii MVD Respubliki Kazakhstan 51.
[24] Sleptsov (n 7) 211.
[25] *Ukaz Prezidenta Respubliki Kazakhstan ot 17 dekabrya 2003 goda N 1251 'O vvedenii v Respublike Kazakhstan moratoriya na smertnuyu kazn'* <https://adilet.zan.kz/rus/docs/U030001251> accessed 6 June 2025.
[26] NA Abdikanov, KZh Baltabayev, 'Glava 15' in II Rogov, KZh Baltabayev (eds), *Ugolovnoye pravo Respubliki Kazakhstan. Obshchaya chast'. Uchebnik dlya vuzov* (Astana 2015) 268.
[27] Sleptsov (n 7) 211.
[28] *Zakon Respubliki Kazakhstan ot 31 dekabrya 2003 goda N 514 'O vnesenii izmeneniy i dopolneniy v nekotoryye zakonodatel'nyye akty Respubliki Kazakhstan po voprosam nakazaniya v vide aresta, a takzhe vvedeniya v deystviye pozhiznennogo lisheniya svobody'* <https://zakon.uchet.kz/rus/docs/Z030000514> accessed 6 June 2025.

to life is an inalienable right of every human being and is protected by law. In pursuit of its policy of abolishing the death penalty, Kazakhstan acceded to the Declaration of the European Union on the Abolition of the Death Penalty, adopted at the 61st session of the UN General Assembly on 19 December 2006. In 2007, as one of 104 countries, Kazakhstan supported the resolution adopted at the 62nd session of the UN General Assembly on a 'Moratorium on the Death Penalty with Further Consideration of the Abolition of the Death Penalty'.[29] The continuation of the course towards a gradual reduction of the scope of the death penalty was also indicated by the Concept of Legal Policy of the Republic of Kazakhstan for 2010–2020.[30] In 2010, the country joined the founders of the International Commission against the Death Penalty. In 2012–2014, during work on the preparation of the draft of the new Criminal Code, the need to completely abandon the death penalty was indicated;[31] however, this did not happen in the 2014 Criminal Code.

The death penalty is regulated in Article 47 of the 2014 CCRK, which introduced several changes to the 1997 CCRK.

Based on Article 47(1) of the CCRK, as an exceptional punishment, the death penalty was carried out by a firing squad, and adjudicated for terrorist crimes resulting in the death of individuals and for particularly grave crimes committed during wartime. The convict had the right to apply for clemency. Article 47(2) of the CCRK indicated categories of persons who were not subject to the death penalty. They were people who committed crimes under the age of eighteen, women, and men who were sixty-three or older. According to Article 47(3) of the CCRK, an introduction by the President of the Republic of Kazakhstan of a moratorium on the execution of the death penalty would suspend its execution for the duration of the moratorium. According to Article 47(4) of the CCRK, the death penalty was to be carried out no earlier than one year after the relevant judgment became final, and no earlier than one year after the moratorium on the death penalty was lifted. Based on Article 47(5) of the CCRK, life imprisonment or a fixed-term prison sentence could be substituted for the death penalty by way of clemency. Its execution should take place in a penitentiary institution providing extraordinary security measures. In the event that the moratorium on the death penalty was lifted, the persons sentenced to death were entitled to apply for clemency, whether or not they had applied for it before the moratorium was imposed.

It should be noted that the execution of the death penalty by shooting, as provided for in this regulation, was a copy of Soviet and Russian solutions. The same method of execution was adopted for both civilians and soldiers.

[29] Isayeva (n 17) 287.
[30] Bermukhambetova, Karipova, Baydalina (n 16) 20.
[31] Sleptsov (n 7) 212.

In connection with the basis for adjudication being 'terrorist crimes resulting in the death of individuals and for particularly serious crimes committed during wartime', the 2014 CCRK provides for this penalty in 17 articles:

- in Chapter 4, 'Crimes against peace and security of humanity', 5 Articles: planning, preparing, launching or waging a war of aggression (Article 160(2)); using prohibited means and methods of warfare (Article 163(2)); violating the laws and customs of war (Article 164(2)); genocide (Article 168(2)); mercenary activities (Article 170(4));
- in Chapter 5, 'Crimes against the foundations of constitutional order and State security' – 4 Articles: treason committed in time of war (Article 175 (3)); attempt on the life of the First President of the Republic of Kazakhstan – Leader of the Nation (Article 177); attempt on the life of the President of the Republic of Kazakhstan (Article 178); sabotage (Article 184);
- in Chapter 10, 'Crimes against public security and order' - 1 article: Act of terrorism (Article 255(4));
- in Chapter 18 'Military Crimes' – 7 articles: disobedience or other failure to perform an order committed in time of war (Article 437(4)); defying a commander or forcing him to violate his official duties committed in time of war (Article 438(4)); violent actions against a commander committed in time of war (Article 439(4)); desertion committed in time of war (Article 442(4)); evasion or refusal to perform military service committed in time of war (Article 443(3)); violation of the principles of combat readiness committed in time of war (Article 444(3)); surrendering or leaving the means of warfare to the enemy (Article 455).

An analysis of this catalog raises doubts about certain military crimes committed in wartime (Articles 437, 438, 439, 442, 443, and 444). Some researchers stressed that while these acts 'violate the established order of military service, the most important foundations of soldiers' activities, cause chaos and disorganization in the conduct of combat tasks, and generally weaken the defense capabilities of the State', they do not cause the death of a person. They noted that Kazakhstan has not been at war with any country for years, and there are no armed activities on its territory. Consequently, they saw no need to maintain the death penalty in the criminal law for the military crimes indicated. They asked about the proportionality of the punishments, 'because completely different penalties were provided for the same act committed at different times'.[32] Other researchers, however, were convinced of the need to impose the death penalty for the above-mentioned crimes.[33]

[32] Isayeva (n 17) 288.

[33] SS Karzhaubayev, NI Verchenko, 'K voprosu o primenenii smertnoy kazni' in *Razvitiye ugolovno-ispolnitel'noy sistemy: organizatsionnyye, pravovyye i ekonomicheskiye aspekty. Sbornik*

As mentioned earlier, the convict had the right to apply for clemency. According to Article 44(15) of the Constitution of the Republic of Kazakhstan[34] and Article 78(3) of the CCRK, the only person who could grant clemency was the President of the Republic of Kazakhstan.

The group of persons not subject to this penalty that was indicated was determined taking into account the criterion of gender and age. As explained, the death penalty was not imposed on persons under 18 years of age because of an incompletely formed psyche, little life experience, succumbing to the influence of others, the difficulty of assessing their behavior; against women (as well as older men) – because of the need to apply the principle of humanism and because of the need to 'take into account the complexity of their psyche (significant emotionality)'.[35]

As the information presented above shows, the death penalty could be imposed only in exceptional cases. An alternative to it was life imprisonment. In the list of sanctions, the death penalty was not in the first place, but in the second. Because of clemency, it might not have been carried out[36].

IV. EXECUTION OF THE DEATH PENALTY IN THE REPUBLIC OF KAZAKHSTAN

The procedure and conditions for the execution of the death penalty are regulated in Part 5 in Chapter 25 of the Executive Penal Code of the Republic of Kazakhstan of 5 July 2014 (EPCRK).[37] Article 158 of the General Provisions of the EPCRK guarantees enhanced security and solitary confinement for a person sentenced to death (paragraph 1). If the convict applies for clemency, provision is made for the suspension of the execution of the penalty until a decision is made by the President of the Republic of Kazakhstan (paragraph 2). A refusal to apply for clemency imposes on the administration of the institution where the convicted person is

materialov mezhdunarodnoy nauchno-prakticheskoy konferentsii, v ramkakh mezhdunarodnogo yuridicheskogo foruma 'Pravo i ekonomika: natsional'nyy opyt i strategii razvitiya' (Novokuznetsk 2021) 81.

[34] *Konstitutsiya Respubliki Kazakhstan prinyata na respublikanskom referendume 30 avgusta 1995 goda (s izmeneniyami i dopolneniyami po sostoyaniyu na 19.09.2022 g.)* <https://online.zakon.kz/Document/?doc_id=1005029&pos=420;-50#pos=420;-50> accessed 6 June 2025.

[35] Borchashvili (n 12) 494.

[36] Ibid 492.

[37] *Ugolovno-ispolnitel'nyy kodeks Respubliki Kazakhstan ot 5 iyulya 2014 goda № 234-V ZRK (Arkhivnaya versiya)* <https://adilet.zan.kz/rus/archive/docs/K1400000234/05.07.2014> accessed 6 June 2025.

kept the obligation to draw up an appropriate document with the participation of a prosecutor (paragraph 3). The basis for the execution of the death penalty was a final court verdict, a decision of the Prosecutor General of the Republic of Kazakhstan that there were no grounds for an appeal against the court verdict, a decision of the President of the Supreme Court of the Republic of Kazakhstan that there were no grounds for hearing the case, as well as a notice of rejection of the request for clemency or a statement of the convict's refusal to apply for clemency (paragraph 4). A death penalty was to be carried out no earlier than one year after the relevant judgment became final, and no earlier than one year after the moratorium on the death penalty was lifted (paragraph 5).

The legal status of a person sentenced to death was regulated by Article 159 of the EPCRK, which provided for the right to apply for clemency under the appropriate procedure within a year of the sentence becoming final. It stipulated that if the President of the Republic of Kazakhstan imposes a moratorium on the death penalty, the convicted person also has the right, within one year of the lifting of the moratorium, to apply for clemency, whether or not he or she has applied for it before or during the moratorium (paragraph 1). While awaiting clemency or execution of the penalty, the convicted person was entitled to:

1) formalize civil and marital relations (as provided by law);
2) receive specialized legal assistance and hold private meetings with a lawyer, without limitation of their duration and number, under conditions ensuring their confidentiality;
3) receive the necessary medical care;
4) receive and send letters without restrictions;
5) make one monthly short-term visit to a spouse or close relatives;
6) hold meetings with a clergyman;
7) take daily thirty-minute walks;
8) spend money each month to purchase food and necessities in the amount provided for convicts residing in a full-security institution (paragraph 2).

It was assumed that those sentenced to death for whom the court's verdict had become final, but the issue of clemency had not been resolved, or whose request for clemency had been granted, were housed under the conditions provided for in Article 141 of the CCRK (guaranteeing extraordinary security measures) before being sent to an institution to continue serving their sentences (paragraph 3). On the other hand, those sentenced to death whose request for clemency was rejected were held under the conditions provided for Article 145(4) of the CCRK (i.e., particularly harsh) before being transferred to the relevant institutions for the execution of the penalty (paragraph 4).

The procedure for executing the death penalty was regulated by Article 160 of the EPCRK. It was carried out non-publicly by a firing squad. In the case of several convicts, the execution was carried out separately for each of them and in the absence of the others (paragraph 1). Those present at the execution of the death penalty were to be a prosecutor, a representative of the institution where the death penalty was carried out, and a physician (paragraph 2). The death of the convict was confirmed by a physician. The persons present during the execution then drew up and signed a report on the execution of the court verdict (paragraph 3). The administration of the institution that carried out the penalty notified the court which issued the sentence, as well as the spouse or one of the convicted person's relatives, that the death penalty had been carried out. It notified the spouse or relatives of the place of burial of the remains two years after the date of the burial (paragraph 4). It also sent information on an established form to the registry office and informed the spouse or relatives of the place where they could obtain a death certificate (paragraph 5).

As can be seen from the above information, since 2022, the death penalty in Kazakhstan has not been adjudicated or carried out, but the people who lost their lives during the period when it was in force must not be forgotten. However, it is difficult to determine reliable and complete statistics on the death sentences and the number of sentences enforced. According to information provided by researchers, 61 people were sentenced to death in Kazakhstan in 1997, 63 in 1998, 63 in 1999, 40 in 2000, and 39 in 2001. During that period, a total of 266 people were sentenced to death, of which 150 were executed, 27 were granted clemency, and the fate of the remaining 89 people is unknown,[38] indicating that not all verdicts were enforced.[39] In subsequent years, the death penalty was carried out in Kazakhstan in the following numbers: 22 in 2002, 17 in 2003, 1 in 2004, 2 in 2005, and 3 in 2006. The basis for all death sentences was the perpetration of aggravated murder: the murder of two or more people.[40] According to other data, the number of people sentenced to this punishment in the period from 1998 to 2017 was 251, of which 112 people were executed. The last death sentence was carried out in relation to 12 people before the moratorium was adopted in 2003.[41] According to other data, 536 death sentences were carried out in Kazakhstan from 1991 until the adoption of the moratorium. At the time of the adoption of the moratorium, 26 people were on death row. The courts stopped issuing death sentences only in 2007.[42] It is difficult

[38] Aibolato T Yeshengaliyev, 'Smertnaya kazn' v Respublike Kazakhstan kak vid nakazaniya za sovershenіye terroristicheskikhi drugikh vidov prestupleniy' (2017) 1 Vestnik Karagandinskoy akademii Ministerstva vnutrennikh del Respubliki Kazakhstan 55.

[39] Bekmagambetov, Revin (n 3) 294.

[40] Abdikanov, Baltabayev (n 26) 268–269.

[41] Isayeva (n 17) 286.

[42] Sleptsov (n 7) 212.

to consider the figures reported as true and complete. The determination of reliable data is hindered by the long (developed in Soviet times) practice of concealing/hiding such information, as well as the lack of precision in the reported numbers of convictions and the numbers of death penalties carried out.

V. EVOLUTION OF THE SOCIETY'S ATTITUDE TOWARD THE DEATH PENALTY IN THE REPUBLIC OF KAZAKHSTAN

The attitude toward the death penalty is a question of each person's morality, while the society's attitude to it is 'an indicator of its morality and mentality, the depth of its understanding of the ideas of justice, humanism and civilization. Therefore, it should be recognized that the death penalty is not only a tool of criminal policy, but also a socio-cultural phenomenon'.[43]

The proposal to abolish the death penalty in Kazakhstan, which has been present in the public forum for years, has generated widespread discussion. The arguments both for and against the death penalty were multifaceted: political, socio-economic, and criminological.[44]

The following arguments were raised against the death penalty:

1. Failure to achieve the goal of the punishment – improvement of the convict.[45]
2. The possibility of judicial errors due to the imperfect justice system. This meant that innocent people can be executed,[46] and the loss is irreversible.[47]
3. Lack of possibility of rehabilitation of the perpetrator and reconciliation with the victim of the crime.[48]
4. No effect of the death penalty on the level of crime, including a reduction of the phenomenon;[49] no correlation between changes in crime and the abolition of the death penalty.[50]

[43] Satenova (n 2).
[44] VN Zhamul'dinov, 'Smertnaya kazn': istoriko-pravovyye aspekty' (2014) 8 Problemy sovremennoy nauki i obrazovaniya 2.
[45] Borchashvili (n 12) 492.
[46] Yeshengaliyev (n 38) 54.
[47] Yusubova (n 11) 2050.
[48] Karzhaubayev, Verchenko (n 33) 77.
[49] Yeshengaliyev (n 38) 54; Bekmagambetov, Revin (n 3) 294.
[50] II Rogov, KZh Baltabayev (eds), *Ugolovnoye Pravo Respubliki Kazakhstan. Obshchaya chast'* (Astana 2015) 271.

5. No effect of the death penalty on the social factors that cause crime.[51]
6. The use of the death penalty as an example of a tool for solving complex social problems in a primitive way. 'It is a sign of a culture of violence, not a way to get away from it. It violates the dignity of man'.[52] The death penalty, having no preventive potential, in fact serves only a retaliatory purpose (a primitive revenge), which in a veiled form is referred to as 'restoration of social order' and 'justice'.[53]
7. The occurrence of pressure from European countries indicating the need to humanize and liberalize criminal law.[54]

For years, many Kazakh scholars expressed the view that the death penalty should be abolished, but taking into account the opinion of the public. Some believed that 'the right conditions are needed for the abolition of the death penalty: a reduction in the increase in crime, a stabilized situation in the country, and the willingness of the majority of the population to accept the abolition of the death penalty'. In this regard, the need to educate the public in civilized ways to respond to crime and humanize criminal law was emphasized.[55] The need to take infrastructural (preparation of places for those sentenced to life imprisonment), legal (adaptation to this law), and financial measures was noted.[56]

Arguments in favor of the death penalty were also presented:

1. High cost of keeping prisoners sentenced to life imprisonment as an alternative to the death penalty.[57] Some researchers noted that as of 1 January 2018, the Chernyi Berkut correctional colony for life prisoners housed more than 100 people, on whose upkeep the State spent more than on teachers' salaries. They considered it an economic injustice.[58]
2. The low cost of carrying out the death penalty.[59]
3. The right to just revenge by the victims and their families, for whom the death penalty is the realization of the right to just punishment.[60]

[51] Yeshengaliyev (n 38) 54.
[52] Karzhaubayev, Verchenko (n 33) 77.
[53] Yusubova (n 11) 2053.
[54] Zhamul'dinov (n 44) 2.
[55] Karzhaubayev, Verchenko (n 33) 77.
[56] KA Mami, 'Smertnaya kazn': aspekty pravovogo analiza' (2003) 2 Pravo i gosudarstvo 55.
[57] Yeshengaliyev (n 38) 54.
[58] TK Bekishev, *Sovremennoye zakonodatel'stvo Kazakhstana. Smertnaya kazn'. Problemy i yeye resheniya* in *Nauka i praktika v reshenii strategicheskikh i takticheskikh zadach ustoychivogo razvitiya Rossii. Sbornik nauchnykh statey po itogam Natsional'noy nauchno-prakticheskoy konferentsii* (Sankt Petersburg 2019) 200.
[59] AT Yeshengaliyev (n 38) 54.
[60] Ibid 54.

4. Threats to security, including from terrorism, resulting in the need to maintain an appropriate legal response.[61]
5. The usefulness and effectiveness of the death penalty in the prevention of crime. Its necessity is related to the previous ineffectiveness of the influence of norms that prevent crime, both moral and religious, on the convict.[62]

Over the years, the majority of Kazakhstan's public opinion surveyed was in favor of the death penalty as an exceptional punitive measure.[63] It viewed it as legitimate revenge against the perpetrator, and its use as a manifestation of the provision of security for the society.[64] That is why for many years, the Kazakh society considered the complete abolition of the death penalty premature.[65] This position was also supported by some lawyers, who believed that no matter how inhumane the death penalty may seem, its abolition in Kazakhstan is inappropriate, while pointing out its necessity in certain cases.[66]

Others have proposed modifications to the adjudication and carrying out of the penalty that would involve limiting it to cases of murder, treason, acts of terrorism and sabotage, as well as 'corruption causing significant damage to society and the State'. They proposed that the court-imposed death penalty should be carried out no sooner than after 3 years, thus allowing the full civil rights of the convict to be exercised. They stressed that the death penalty should be carried out in such a way that it does not cause additional suffering to the convict and is not public.[67]

Thus, despite the State's efforts, the results of many public opinion polls showed ambiguity in the public's attitudes toward the death penalty in Kazakhstan.

VI. CONCLUSION

The research hypothesis formulated at the beginning of the analyses, which assumed that 'The evolution of the death penalty leading to its abolition in

[61] Zhamul'dinov (n 44) 2.
[62] AN Agybayev, 'Smertnaya kazn' - isklyuchitel'naya mera nakazaniya' (2018) 1 Femida 2018 14.
[63] E.g., Bermukhambetova, Karipova, Baydalina (n 16) 22.
[64] NV Belorukov, 'Pravo na zhizn' i poetapnaya otmena smertnoy kazni: kazakhstanskiy put' (2015) 2 Preduprezhdeniye prestupnosti 35.
[65] Benke (n 23) 51.
[66] Yeshengaliyev (n 38) 55.
[67] AB Skakov, *K voprosu o sokhranenii smertnoy kazni v sisteme nakazaniy*, 242 <https://rep.barsu.by/server/api/core/bitstreams/5326d22a-2e6c-4d00-a0ed-b4fd69e1c5bc/content> accessed 4 June 2025.

Kazakhstan's criminal law was a multi-stage process forced by pressure from the international community' was confirmed in the course of the research.

It should be stated that the criminal codes in force in Kazakhstan for many years broadly regulated the scope of this penalty. They covered from ten to several dozen crimes, the catalog of which was reduced rather slowly. The criminal codes indicated the groups of people excluded from the death penalty. They took into account age (minors and elderly men) and gender (women), which they also modified in favor of convicts. All of them, however, pointed to the military method of carrying out the penalty (execution by a firing squad) and provided for the possibility of applying the institution of clemency.

In general, the successive laws somewhat eased the scope of the death penalty. The changes introduced were the result of the intentional action of the State authorities, which, especially since the early 1990s, have tried to adopt a different philosophy of governance than before. Therefore, they did not do it so fast, justifying this slow pace by the need to listen to the voice of public opinion and the will of the society, much of which was raised in the Kazakh Soviet Socialist Republic, i.e., in the spirit of restrictive and casuistic laws, and harsh penal policies. This attitude of the public, which suited those in power, determined the slow changes. However, the real driver of the changes was pressure from institutions and the international community indicating the need to make democratic changes in Kazakhstan, striving for liberalization and humanization of criminal legislation. It was they who, admittedly not very quickly, effectively required the adaptation of national criminal legislation to international regulations.

REFERENCES

Abdikanov NA, Baltabayev KZh, 'Glava 15' in II Rogov, KZh Baltabayev (eds), *Ugolovnoye pravo Respubliki Kazakhstan. Obshchaya chast'. Uchebnik dlya vuzov* (Astana 2015)

Agybayev AN, 'Smertnaya kazn' – isklyuchitel'naya mera nakazaniya' (2018) 1 Femida

Bekmagambetov AB, Revin VP, *Ugolovnoye pravo Respubliki Kazakhstan. Obshchaya chast'. Uchebnik* (Almaty 2015)

Bekishev TK, 'Sovremennoye zakonodatel'stvo Kazakhstana. Smertnaya kazn'. Problemy i yeye resheniya' in *Nauka i praktika v reshenii strategicheskikh i takticheskikh zadach ustoychivogo razvitiya Rossii. Sbornik nauchnykh statey po itogam Natsional'noy nauchno-prakticheskoy konferentsii* (Sankt Petersburg 2019)

Belorukov NV, 'Pravo na zhizn' i poetapnaya otmena smertnoy kazni: kazakhstanskiy put'' (2015) 2 Preduprezhdeniye prestupnosti

Benke AA, 'Smertnaya kazn'' (2012) 1–2 Khabarshy – Vestnik Karagandinskoy akademii MVD Respubliki Kazakhstan 2012

Bermukhambetova B, Karipova A, Baydalina G, 'Smertnaya kazn'. Za ili protiv' in *Aktual'nyye voprosy prava, ekonomiki i upravleniya* (Penza 2016)

Borchashvili ISh, *Kommentariy k ugolovnomu kodeksu Respubliki Kazakhstan, Obshchaya chast',* vol 1 (Almaty 2021)

Gernet MN in DA Satenova, *Primeneniye smertnoy kazni v Yugo-Vostochnoy Azii,* <https://repo.kspi.kz/bitstream/handle/123456789/4825/2010-3_93-95.pdf?sequence=1&isAllowed=y>

Isayeva SN, 'Suzheniye sfery primeneniya smertnoy kazni v Respublike Kazakhstan' in *Obespecheniye verkhovenstva prava: novyye vozmozhnosti v svete global'nykh izmeneniy: Mater. mezhdunar. nauch.-prakt. Konferentsii (15 iyunya 2018 goda), posvyashchennaya pamyati vydayushchegosya uchenogo-yurista, eks-ministra Yustitsii Respubliki Kazakhstan N.A. Shaykenova ('Shaykenovskiye chteniya'), priurochennaya k 25-letiyu Instituta zakonodatel'stva Respubliki Kazakhstan* (Astana 2018)

Karzhaubayev SS, Verchenko NI, 'K voprosu o primenenii smertnoy kazni' in *Razvitiye ugolovno-ispolnitel'noy sistemy: organizatsionnyye, pravovyye i ekonomicheskiye aspekty. Sbornik materialov mezhdunarodnoy nauchno-prakticheskoy konferentsii, v ramkakh mezhdunarodnogo yuridicheskogo foruma 'Pravo i ekonomika: natsional'nyy opyt i strategii razvitiya'* (Novokuznetsk 2021)

Mami KA, 'Smertnaya kazn': aspekty pravovogo analiza' (2003) 2 Pravo i gosudarstvo

Rogov II, Baltabayev KZh (eds), *Ugolovnoye Pravo Respubliki Kazakhstan. Obshchaya chast'* (Astana 2015)

Skakov AB, *K voprosu o sokhranenii smertnoy kazni v sisteme nakazaniy* <https://rep.barsu.by/server/api/core/bitstreams/5326d22a-2e6c-4d00-a0ed-b4fd69e1c5bc/content>

Sleptsov IV, 'Smertnaya kazn' po zakonodatel'stvu Respubliki Kazakhstan' (2021) 16(2) Ugolovno-ispolnitel'noye prawo

Yeshengaliyev AT, 'Smertnaya kazn' v Respublike Kazakhstan kak vid nakazaniya za sovershenie terroristicheskikhi drugikh vidov prestupleniy' (2017) 1 Vestnik Karagandinskoy akademii Ministerstva vnutrennikh del Respubliki Kazakhstan

Yusubova SR, 'Mezhdunarodno-pravovyye aspekty otmeny smertnoy kazni v Respublike Kazakhstan' in *Sbornik materialov XIII Mezhdunarodnoy nauchnoy konferentsii studentov i molodykh uchenykh 'Nauka i obrazovaniye – 2018'* (Astana 2018)

Zhamul'dinov VN, 'Smertnaya kazn': istoriko-pravovyye aspekty' (2014) 8 Problemy sovremennoy nauki i obrazovaniya

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INFORMED CONSENT TO ALGORITHMIC DIAGNOSIS IN MEDICINE UNDER SCHUFA AND ARTICLE 22 GDPR

Abstract

The CJEU judgment in SCHUFA (C-634/21) redefines the 'decision' of Article 22 GDPR: if a score generated by one entity effectively determines another entity's decision, the data subject is entitled to the protections of Article 22, regardless of whether a human formally signs off. This article asks what that reasoning means for medicine: when an algorithm's output shapes a physician's clinical judgment, does the patient have a right to know, and what must they be told? The discussion confronts the SCHUFA doctrine with informed consent requirements under Polish law and the new Article 12 of the Code of Medical Ethics, situates it against the international debate, distinguishes diagnostic from cognitive uses of AI through operational criteria, examines liability for algorithmic harm after Directive (EU) 2024/2853, and addresses the problem of large language models – tools physicians already use but which cannot be meaningfully certified.

KEYWORDS

artificial intelligence, automated decision-making, GDPR, informed consent, patient autonomy, AI Act, Code of Medical Ethics, large language models, medical liability

SŁOWA KLUCZOWE

sztuczna inteligencja, zautomatyzowane podejmowanie decyzji, RODO, świadoma zgoda, autonomia pacjenta, ustawa o sztucznej inteligencji, Kodeks Etyki Lekarskiej, duże modele językowe, odpowiedzialność medyczna

I. INTRODUCTION

Artificial intelligence is entering clinical practice faster than the law can keep up. Diagnostic algorithms now assist – and sometimes effectively determine – medical decisions, yet the legal framework for patient rights was built for an era of purely human judgment. The CJEU ruling of 7 December 2023 in SCHUFA (C-634/21)[1] marks a shift in how courts read the GDPR's automated decision-making provisions, with implications well beyond credit scoring.

The patient's right to information underpins modern medical law as the precondition for valid consent and patient autonomy; without it, the patient cannot make an informed choice.[2] Fulfilling the statutory duty to inform gives the patient a real share in the therapeutic process and a conscious part in choosing the method of treatment.[3]

AI inserts a third actor into what was once a dyadic relationship. The algorithm – opaque, probabilistic, and in some sense autonomous – now sits between physician and patient.[4] Can the doctrine of informed consent, developed for human medicine, work when algorithms do the diagnosing?

That question is contested internationally. In the American debate, I Glenn Cohen has shown that the common law of informed consent, as it stands, would, in general, not require disclosure of the physician's reliance on AI, save for a few narrow fact patterns.[5] In the bioethics literature, Joshua Hatherley attacks the 'disclosure thesis' head-on, arguing that none of the standard arguments for a duty to disclose

[1] Case C-634/21 *OQ v Land Hessen*, joined party: SCHUFA Holding AG [2023] ECLI:EU:C:2023: 957 (SCHUFA).

[2] Dorota Karkowska, comments 1 and 2.2 to Art 9 in Karkowska (ed), *Prawa pacjenta i Rzecznik Praw Pacjenta. Komentarz*, LEX/el. (Warszawa 2021).

[3] Karkowska, comments 1 and 4 to art 9 in Karkowska (n 2).

[4] Mirosława Malczewska, comment 1 to Art 31 in Eleonora Zielińska (ed), *Ustawa o zawodach lekarza i lekarza dentysty. Komentarz*, LEX/el. (Warszawa 2022).

[5] I Glenn Cohen, 'Informed Consent and Medical Artificial Intelligence: What to Tell the Patient?' (2020) 108 Georgetown Law Journal 1425.

machine learning use survives scrutiny.[6] Ploug and his co-authors, by contrast, complain that the EU's risk-based regulatory architecture protects patients only in the aggregate and, as they put it, 'fundamentally disempowers' the individual patient.[7] Against that background, the Polish solution – a binding deontological norm conditioning the use of AI on the patient's informed consent – is anything but obvious.

This article reads SCHUFA through the lens of medical law. If the Court's functional approach applies in healthcare, AI-assisted diagnoses may trigger Article 22 even where a physician retains nominal authority. A separate section examines Article 12 of the Code of Medical Ethics – the first Polish deontological norm on physicians' use of AI. Both point in the same direction: patients are entitled to know when algorithms play a role in their care. The closing sections turn to liability and to proposals de lege ferenda.

II. FACTS OF THE CASE AND THE RULING OF THE COURT

The case concerned a German credit information bureau which generated, by automated processing, credit scoring – a probability value for the borrower's future behaviour – and transmitted it to financial institutions, which made lending decisions on its basis. The applicant, who had been refused credit due to an unfavourable score, challenged this practice under Article 22 GDPR.[8]

The preliminary question was whether a score calculated by one entity is a 'decision' under Article 22(1) GDPR when another entity relies heavily on it.[9] Advocate General Pikamäe advocated a broad interpretation, covering also third-party processing results that decisively influence the final outcome.[10]

In its judgment, the Court adopted a functional understanding of a decision based solely on automated processing: the automated establishment by a credit information agency of a probability value concerning a person's ability to service a loan

[6] Joshua Hatherley, 'Are clinicians ethically obligated to disclose their use of medical machine learning systems to patients?' (2025) 51 Journal of Medical Ethics 567.

[7] Thomas Ploug and others, 'The need for patient rights in AI-driven healthcare – risk-based regulation is not enough' (2025) Journal of the Royal Society of Medicine (online first) 2–3, doi 10.1177/01410768251344707.

[8] SCHUFA (n 1), paras 14–16.

[9] SCHUFA (n 1), paras 27 and 40.

[10] Opinion of AG Pikamäe in SCHUFA, ECLI:EU:C:2023:220, points 38 and 48, referred to in the judgment (n 1), paras 46 and 63.

is itself such a decision where it produces legal effects or similarly significantly affects that person.[11]

The Court emphasised that a restrictive reading of Article 22 GDPR would risk circumvention, and with it a gap in legal protection, where the decision-making process is divided between several entities; the broad concept of decision strengthens the provision's effective protection and must cover the element of the process that determines the final result.[12]

III. AUTOMATED DECISION-MAKING AND ITS RATIO LEGIS

Under Article 22 GDPR, individuals may object to decisions based solely on automated processing – including profiling – where such decisions produce legal effects or comparably affect them.[13]

The ratio legis is to protect the individual against the risks of delegating significant decisions to algorithms operating without human oversight.[14]

In Polish literature, M Kupiec finds this interpretation controversial: the functional understanding of 'decision' blurs the boundary between stages of the decision-making process.[15] The criticism, though worth attention dogmatically, does not fully account for the teleological premises of the ruling.[16]

Medical AI sharpens the stakes. As G Sibiga observes, Article 22 covers not just final decisions but any step in the process that effectively determines the outcome.[17] In medical diagnostics, the algorithmic result – formally only a recommendation – may de facto determine further clinical proceedings.

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[11] SCHUFA (n 1), operative part, point 1.
[12] SCHUFA (n 1), paras 60–62.
[13] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data [2016] OJ L119/1 (GDPR), Art 22(1).
[14] Grzegorz Sibiga, 'Zautomatyzowane podejmowanie decyzji na podstawie RODO' (2022) 21 Monitor Prawniczy 1143.
[15] Mateusz Kupiec, 'Nowe spojrzenie na zautomatyzowane podejmowanie decyzji w rozumieniu art 22 RODO – glosa do wyroku TS z 7.12.2023 r, C-634/21' (2024) 3 Europejski Przegląd Sądowy 33.
[16] Kupiec (n 15) 35.
[17] Sibiga (n 14) 1144.

Automation bias – the well-documented tendency to defer to computer outputs without scrutiny – makes this worse.[18] A physician who formally retains authority may in practice simply accept what the algorithm says; the nominal two-step process collapses into one – precisely the scenario Article 22 was designed to address.

IV. IMPLICATIONS OF THE SCHUFA JUDGMENT FOR MEDICAL LAW

1. THE PATIENT'S RIGHT TO INFORMATION IN ALGORITHMIC MEDICINE

The right to information, regulated in Article 9 of the Patient Rights and Patient Ombudsman Act[19] and Article 31 of the Act on the Professions of Physician and Dentist,[20] is a precondition for valid consent. As D Karkowska puts it, information typically comes first – only after receiving it can the patient give meaningful consent;[21] consent without prior information is not valid.[22]

Under Article 31(1) of the Medical Professions Act, a physician must provide comprehensible information about the patient's state of health, diagnosis, proposed and possible diagnostic and therapeutic methods, foreseeable consequences of their application or non-application, treatment results, and prognosis. M Malczewska is right that meeting this duty lets the patient exercise self-determination and take an active part in treatment.[23] The duty is not only legal but also ethical, now expressed in Article 14(2) of the Code of Medical Ethics.[24] [25]

After SCHUFA, must physicians also inform patients when AI is involved in diagnosis or treatment? There are good reasons to think so. First, AI use counts as a diagnostic method within the meaning of Article 31(1), about which the patient

[18] Linda J Skitka, Kathleen L Mosier and Mark Burdick, 'Does automation bias decision-making?' (1999) 51 International Journal of Human-Computer Studies 991.
[19] Patient Rights and Patient Ombudsman Act of 6 November 2008 [2024] JoL 581, consolidated text (Ustawa o prawach pacjenta i Rzeczniku Praw Pacjenta).
[20] Act of 5 December 1996 on the Professions of Physician and Dentist [2024] JoL 1287, consolidated text (Ustawa o zawodach lekarza i lekarza dentysty).
[21] Karkowska (n 2).
[22] Karkowska (n 2).
[23] Malczewska (n 4).
[24] Malczewska (n 4).
[25] Polish Code of Medical Ethics (Kodeks Etyki Lekarskiej), as amended from 1 January 2025, Art 14(2) <https://nil.org.pl/uploaded_images/1723037323_kel-2305.pdf> accessed 20 January 2026.

should be informed.[26] Second, AI systems work probabilistically and often opaquely (the 'black box' problem) – facts a patient may well want to know before consenting.

L Caban indicates that information must be adapted in form and content to the perceptual capabilities of the given patient;[27] a uniform, objective standard would be unjustified, since the abilities of patients differ.[28] With algorithms, comprehensibility matters even more: the patient needs some grasp of the AI's role in their care.

2. MODELS OF INFORMING THE PATIENT

Scholarship recognizes three models of the information owed:[29] the reasonable physician model, under which the physician decides according to professional standards; the reasonable patient model, an objective standard of what a reasonable person in the patient's situation would need; and the subjectivist model, focused on individual needs[30]. Polish law mixes them: the fixed catalogue of Article 31(1), supplemented by information owed at the patient's request.[31] As M Guzowska indicates, information must be comprehensible – adapted to the patient's intellectual capabilities.[32]

The reasonable patient model needs updating for AI. A contemporary patient, aware that healthcare is increasingly digital, may well expect to be told whether algorithms are used, how they work, and what can go wrong. This finds support in case law,[33] which ties the scope of the duty to what a reasonable person in the patient's situation objectively needs in order to take an informed and prudent decision.[34]

The comparative argument points the same way. In *Montgomery v Lanarkshire Health Board*, the UK Supreme Court rebuilt the duty of disclosure around the reasonable patient: 'The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that

[26] Malczewska, comment 12 to Art 31 in Zielińska (n 4).
[27] Łukasz Caban, comment 10 to art 31 in Marcin Kopeć (ed), *Ustawa o zawodach lekarza i lekarza dentysty. Komentarz*, LEX/el. (Warszawa 2016).
[28] Caban (n 27).
[29] Mariola Guzowska, 'Prawo pacjenta do informacji o stanie zdrowia jako jedno z praw przysługujących w procesie leczenia' (2009) 9 Przegląd Sądowy 93.
[30] Guzowska (n 29) 94–95.
[31] Guzowska (n 29) 95.
[32] Guzowska (n 29) 97.
[33] Case I ACa 236/05 29 September 2005 Court of Appeal in Poznań (Sąd Apelacyjny w Poznaniu).
[34] Case II CSK 117/10 8 July 2010 Supreme Court of Poland (Sąd Najwyższy).

the particular patient would be likely to attach significance to it'.[35] Materiality cannot be reduced to percentages.[36] On that test, the involvement of an opaque algorithm in a diagnosis is hard to dismiss as immaterial: it bears on the character of the recommendation, its error profile, and the patient's ability to question it.

3. INFORMED CONSENT IN THE ERA OF ALGORITHMIC MEDICINE

Informed consent is bedrock medical law – the legal expression of respect for patient autonomy. Information must be prior, individualised, and understandable.[37]

SCHUFA's core lesson is that Article 22 cannot be evaded by splitting decisions across entities.[38] Transposed to medical law, consent to the use of AI in the diagnostic and therapeutic process must be informed in the sense that the patient knows the algorithm's role in decisions concerning their health.

This departs markedly from the position taken elsewhere. Cohen concludes that under American law, in general, liability will not lie for failing to inform the patient that an AI/ML system helped formulate the treatment recommendation: the disclosure duty, tied to the risks of the proposed treatment itself, does not reach the process by which the recommendation was generated.[39] Cohen and Slottje likewise treat judgments about an AI system's reliability as the kind of trust that the patient places in the physician's hands.[40] Hatherley presses the normative point: the four standard arguments for disclosure – from risk, from rights, from materiality, from autonomy – all fail, and mandatory disclosure could even harm patients by giving stakeholders a way to avoid accountability for harm from improper uses of these systems.[41]

These objections deserve an answer, and three can be given. First, the statutory text differs: Article 31(1) expressly lists 'proposed and possible diagnostic and therapeutic methods' among the mandatory items of information, and a diagnostic

[35] *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 [87].
[36] *Montgomery v Lanarkshire Health Board* (n 35) [89].
[37] Jolanta Budzowska, comment 5 to art 14 in Radosław Tymiński (ed), *Kodeks Etyki Lekarskiej. Komentarz, LEX/el.* (Warszawa 2025).
[38] SCHUFA (n 1) paras 60–62.
[39] Cohen (n 5) 1428 and 1434.
[40] Cohen and Andrew Slottje, 'Artificial Intelligence and the Law of Informed Consent' in B Solaiman and IG Cohen (eds), *Research Handbook on Health, AI and the Law* (Cheltenham 2024) 181.
[41] Hatherley (n 6).

method includes the pathway by which the diagnosis is reached. The interpretive space that lets American courts treat AI as an invisible input does not exist here. Secondly, Hatherley's rebuttal of the autonomy argument treats the algorithm as one more assistive input, like a journal article or a colleague's advice; under Polish law, and after SCHUFA under EU law as well, the information serves the patient's self-determination, which extends to the decision-making process itself – including who, or what, is doing the deciding. Thirdly, materiality is an empirical question, and the record speaks against the sceptics: in a 2025 radiology survey, 91.1% of patients wanted to be informed about AI use in their imaging and as many wanted the right to opt out.[42] A circumstance that nine patients out of ten declare significant is material on any reasonable-patient standard.

Does a general consent to treatment cover AI use, or must AI be disclosed separately? The better view is that disclosure is required. First, AI changes the risk profile: these systems make distinctive kinds of errors (algorithmic bias, for example).[43] Second, the patient may hold justified worldview beliefs about the role of humans in medical decisions. Third, SCHUFA requires that data subjects be aware of the algorithm's role in decisions concerning them.[44]

M Nesterowicz, commenting on the judgment of the Court of Appeal in Szczecin of 11 August 2016, stressed that the right to information ranks among the most important patient rights.[45] Damages were awarded there, although no physical harm was shown: losing the chance to direct one's own treatment is itself a cognizable harm.[46] The same logic applies to AI – withholding the information violates the patient's rights, even if the algorithm got the diagnosis right.

V. DAMAGES FOR VIOLATION OF PATIENT RIGHTS

Under Article 4(1) of the Patient Rights Act, damages may be awarded for breach of patient rights even without proof of physical injury;[47] the basis is Article 448 of

[42] Kennedye N McGhee and others, 'Patient Preferences for Artificial Intelligence in Medical Imaging: A Single-Center Cross-Sectional Survey' (2025) Journal of Imaging Informatics in Medicine 1, doi 10.1007/s10278-025-01629-w.

[43] Ziad Obermeyer and others, 'Dissecting racial bias in an algorithm used to manage the health of populations' (2019) 366 Science 447.

[44] SCHUFA (n 1), paras 56 and 63.

[45] Mirosław Nesterowicz, 'Prawo pacjenta do informacji – glosa do wyroku SA z 11.08.2016 r, I ACa 300/16' (2020) 2 Orzecznictwo Sądów Polskich, item 11.

[46] Ibid.

[47] Patient Rights and Patient Ombudsman Act (n 19), Art 4(1).

the Civil Code.[48] Case law confirms that the provider's liability turns solely on the violation of a patient's right specified in the Act and fault;[49] the Court of Appeal in Katowice (judgment of 10 March 2021) awarded PLN 40,000 for violation of the right to information.[50]

For AI-assisted medicine, the upshot is clear: failing to tell the patient about the algorithm can ground liability on its own, regardless of whether the diagnosis was correct. As D Karkowska indicates, the patient has the right to the full spectrum of knowledge about their state of health.[51]

VI. THE REGULATORY FRAMEWORK FOR ALGORITHMIC MEDICINE

1. THE AI ACT, MDR, AND GDPR

Regulation (EU) 2024/1689 (AI Act)[52] places diagnostic AI in healthcare in the high-risk category,[53] with stricter requirements for risk management, documentation, transparency, and human oversight. Under Article 14, high-risk systems must be designed so that effective human oversight is possible[54] – a design requirement addressed to providers, not an operational duty of supervision; in Polish law, that duty rests on the physician under Article 12(4) of the Code. Under Article 13(1), such systems must be transparent enough for deployers to interpret the output and use it appropriately.[55] That is transparency of use, not of mechanism; the residual opacity – why a particular output was produced – is what matters for consent and proof. Software using AI algorithms for diagnostic purposes is also a medical device under the Medical Devices Regulation,[56] and its placing on the market requires an appropriate conformity assessment procedure.[57]

[48] Case V ACa 683/13 5 February 2014 Court of Appeal in Katowice (Sąd Apelacyjny w Katowicach).
[49] Malczewska, comment 25 to Art 31 in Zielińska (n 4).
[50] Case I ACa 1009/19 10 March 2021 Court of Appeal in Katowice (Sąd Apelacyjny w Katowicach).
[51] Karkowska, comment 4 to Art 9 in Karkowska (n 2).
[52] Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence [2024] OJ L 2024/1689 (AI Act).
[53] AI Act (n 52), Art 6(1) in conjunction with Annex III, point 1.
[54] AI Act (n 52), Art 14.
[55] AI Act (n 52), Art 13(1).
[56] Regulation (EU) 2017/745 of the European Parliament and of the Council of 5 April 2017 on medical devices [2017] OJ L117/1 (MDR).
[57] See MDCG 2019-11, Guidance on Qualification and Classification of Software in Regulation (EU) 2017/745 and Regulation (EU) 2017/746.

2. ARTICLE 12 OF THE CODE OF MEDICAL ETHICS AS A BREAKTHROUGH IN POLISH MEDICAL DEONTOLOGY

The key provision for Polish physicians is Article 12 of the Code of Medical Ethics, effective 1 January 2025[58] – the first provision of Polish medical ethics to deal with AI. A physician may use artificial intelligence algorithms in diagnostic, therapeutic, or preventive procedures provided that: (1) the patient is informed that artificial intelligence will be used in making the diagnosis or in the therapeutic process; (2) the patient's informed consent to its application is obtained; (3) the algorithms used are approved for medical use and possess appropriate certificates; (4) the final diagnostic and therapeutic decision is always made by the physician.

Article 12(4), requiring that the final clinical decision always rests with the physician,[59] restates basic medical ethics and gives operational content to the design-level oversight requirement of Article 14 of the AI Act. But formal human oversight does not eliminate automation bias – which is why informed consent matters. J Budzowska is blunt: the duties in Article 12(1)–(3) may be impossible, pointless, or counterproductive to satisfy, and there is a risk of disciplinary proceedings based on them being abusive.[60]

3. CRITICAL ANALYSIS OF ARTICLE 12(3) OF THE CODE AND PRACTICAL ENFORCEABILITY

Article 12(3) requires that the physician use only artificial intelligence algorithms that are 'approved for medical use' and possess 'appropriate certificates'. The intention – protecting patients from untested tools – is sound, but the rule raises serious enforceability problems. As J Budzowska notes, for lack of a definition of 'appropriate' this duty may be perceived as both unenforceable and unexecutable;[61] likewise, the requirement of algorithms 'approved for medical use' is impossible to fulfil, because the legal concept of such approval is unknown.[62] She is not alone: J Pawlikowski finds the restrictions of Article 12 difficult to apply in practice and potentially over-restrictive,[63] and Pilśniak and co-authors observe

[58] Polish Code of Medical Ethics (n 25), Art 12.
[59] Polish Code of Medical Ethics (n 25), Art 12(4).
[60] Budzowska, comment 3 to Art 12 in Tymiński (n 37).
[61] Budzowska, comment 5.3 to Art 12 in Tymiński (n 37).
[62] Ibid.
[63] Jakub Pawlikowski, 'Znowelizowany Kodeks etyki lekarskiej. Komentarz' (2025) Medycyna Praktyczna 7–8 (supplement).

that no standardised procedures exist by which AI tools could obtain uniform, officially approved certificates.[64]

The problem is acute for large language models – ChatGPT, Claude, Gemini. They are not certified as medical devices, yet physicians already use them to think through cases, look up information, or draft patient-friendly explanations; in the American Medical Association's 2026 survey, 81% of physicians reported awareness or use of AI in their practice.[65] Read literally, Article 12(3) would make it unethical ever to consult an uncertified chatbot in the course of patient care.

That cannot be right: using a chatbot to check drug interactions is no more unethical than using a search engine or phoning a colleague. What matters is not whether AI is used, but how.

This critique is convincing, but it stops at the diagnosis: the provision, as drafted, is unworkable. The more interesting question – answered here on the article's own account – is whether Article 12(3) can be given a workable meaning de lege lata. It can, provided one accepts that the provision regulates the manner in which the physician uses artificial intelligence, not the tool as such: certification attaches to a mode of use, not to a class of software.

On this reading, the distinction between diagnostic AI and cognitive AI does real doctrinal work, and it can be operationalised. Three criteria mark the boundary. The first is directness of influence: does the output feed into a decision concerning an identified patient, or merely inform the physician's general understanding of a problem? The second concerns the data: has the physician passed the patient's data to the system in an identifiable form, or is the query abstract? The third turns on the form of the output: a recommendation for the case at hand, or general knowledge that the physician must still apply on her own responsibility?

The official commentary of the Ethics Committee of the Supreme Medical Council reads Article 12 the same way: where the algorithm is of key importance for the health service provided, informing the patient and obtaining consent are required; where the system merely supports the physician's work, consent is not required and disclosure is only recommended.[66] The mode of use, not the technology, carries the duties.

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[64] Joanna A Pilśniak and others, 'Zastosowanie algorytmów sztucznej inteligencji w praktyce lekarskiej w świetle nowelizacji Kodeksu Etyki Lekarskiej' (2025) 31(3) Medycyna Ogólna i Nauki o Zdrowiu 156, 158.

[65] American Medical Association, 2026 Physician Survey on Augmented Intelligence (AMA Center for Digital Health and AI, March 2026) 5.

[66] Komentarz Komisji Etyki Lekarskiej Naczelnej Rady Lekarskiej do art 12 znowelizowanego Kodeksu Etyki Lekarskiej. Sztuczna inteligencja (Naczelna Izba Lekarska 2024) 2.

Where all three point the first way, the physician uses AI in the diagnostic and therapeutic process within the meaning of Article 12, and all four of its conditions apply: disclosure, consent, certification, and the final human decision. An algorithm reading a CT scan is the paradigm case; certification there maps onto the conformity assessment that the MDR and the AI Act already demand. Where all three point the second way – a general question, stripped of identifying detail, verified against transparent sources, decided alone – the tool functions as a textbook, a search engine, or a colleague consulted by telephone. Article 12 does not reach this knowledge mode; it is governed by the ordinary duties of professional diligence and secrecy. Requiring certification here would make as much sense as certifying textbooks.

Between the two lies a grey zone, and it is the dangerous one: feeding a general-purpose chatbot the data of a concrete patient and acting on its answer. That use combines the defects of both modes – no certification of the tool, no detachment of the physician – and on the reading proposed here, it is impermissible without qualification. The outer boundary of the knowledge mode is data protection law: the patient's data must be anonymised, not merely pseudonymised, before any fragment of the case reaches a third-party model.[67] A physician who submits identifiable data has left the knowledge mode and very probably breached professional secrecy.

The distinction also settles the scope of the duty to inform. In the decisional mode, AI use must be disclosed and consented to: it is a feature of the diagnostic method under Article 31(1), and after SCHUFA, its concealment cannot be cured by the physician's formal signature. In the knowledge mode, no disclosure duty arises: a physician does not inform the patient about the textbooks she has read or the colleagues she has consulted, and an anonymised query to a language model belongs to the same class. Requiring disclosure there would trivialise the information right and weaken the one disclosure that matters.

Budzowska herself concedes that Article 12 needs rewriting – to clear up terminological confusion, clarify physician duties, and define terms properly.[68] The three criteria proposed above could serve as its starting point; until then, they allow the provision to be applied sensibly rather than suspended in practice.

[67] GDPR (n 13), recital 26, Arts 4(1) and (5).
[68] Budzowska, comment 6 to Art 12 in Tymiński (n 37).

4. THE GDPR AND THE PROCESSING OF HEALTH DATA BY AI SYSTEMS

The GDPR applies in full to AI processing of health data. Health data are a special category (Article 9),[69] processing of which is in principle prohibited, subject to the exceptions of Article 9(2). As P Fajgielski indicates, data concerning health encompasses all information about the past, present, or future state of a person's physical or mental health.[70] Does consent to treatment imply consent to automated processing? SCHUFA suggests not: the data subject must know when decisions are made algorithmically,[71] which supports separate consent.

4.1 THE RIGHT TO HUMAN CONTACT AS THE LIMIT OF ALGORITHMISATION

SCHUFA, the AI Act's human oversight requirements, and Article 12(4) of the Code together support a distinct patient right to human contact in algorithmic medicine: the right to receive a diagnosis from a human physician rather than solely from an algorithm, to speak with a physician in case of doubts, and to request a second human opinion.

The idea has support in the literature, with a telling difference. Ploug and Holm argue for a right to a second opinion on AI-supported diagnosis – but would allow it to be satisfied by another, independent AI system.[72] That may suffice where the worry is accuracy; where it is the absence of a human interlocutor, only a human answers it. Ploug and his co-authors have since argued that risk-based regulation must be supplemented by specific individual patient rights;[73] the right to human contact proposed here is such a right.

Patients leave little doubt. In a survey of 13,806 patients from 74 hospitals in 43 countries, 72.9% preferred the physician to make the final diagnostic decision, and 70.2% preferred explainable AI even at some cost to accuracy;[74] in the radiology survey already cited, 91.1% wanted disclosure and as many the right to opt out.[75] Patients accept AI as an instrument and refuse it as a counterpart.

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[69] GDPR (n 13), Art 9(2).

[70] Paweł Fajgielski, comment 12 to art 9 in Paweł Fajgielski, *Ogólne rozporządzenie o ochronie danych. Komentarz*, LEX/el. (Warszawa 2022).

[71] SCHUFA (n 1), paras 56 and 63.

[72] Thomas Ploug and Søren Holm, 'The right to a second opinion on Artificial Intelligence diagnosis – Remedying the inadequacy of a risk-based regulation' (2023) 37 Bioethics 303.

[73] Ploug and others (n 7) 1–2.

[74] Felix Busch and others, 'Multinational Attitudes Toward AI in Health Care and Diagnostics Among Hospital Patients' (2025) 8(6) JAMA Network Open e2514452, 1.

[75] McGhee and others (n 42) 1.

The patient, an autonomous subject, has the right to a relationship with another autonomous subject – a human physician – not merely to being an object of processing by an algorithm.

Such a right finds support in the constitutional guarantee of human dignity (Article 30 of the Polish Constitution)[76] and in Article 22 GDPR. Dignity, in the Kantian formula behind both provisions, means being treated always as an end and never merely as a means[77] – not as raw material for an algorithm.

4.2 LIABILITY FOR HARM IN ALGORITHMIC MEDICINE

The duty to inform is one half of patient protection; liability for harm is the other. De lege lata, Polish law offers three routes: fault-based liability of the physician (Article 415 of the Civil Code), liability of the healthcare entity (Article 430), and product liability directed at the producer.[78] Independently, Article 4(1) of the Patient Rights Act compensates for the very violation of the right to information, without proof of bodily harm (section IV.4).

Each route is strained by the same feature of the technology: opacity. As Duffourc and Gerke observe, black-box systems 'operate without transparency, making it difficult or even impossible to understand how they arrive at a particular result'.[79] A claimant who must prove fault or causation faces an evidentiary wall: what makes the algorithm clinically useful makes its failure forensically invisible.

The physician's position turns on the standard of care, and that standard is a moving target. 'Malpractice law is at base conservative', Price, Gerke and Cohen observe: it 'typically will find no liability for following the standard of care';[80] that conservatism today shields the physician who ignores an AI recommendation. But the same authors note that 'as AI systems become more prevalent, following AI advice may itself be incorporated into the standard of care, such that ignoring the advice would render a physician liable for resulting injury'.[81] Legal risk can, therefore, reverse direction over time.

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[76] Constitution of the Republic of Poland, Art 30.

[77] Immanuel Kant, *Groundwork of the Metaphysics of Morals* (first published 1785, M Gregor (tr), CUP 1998) 38.

[78] Act of 23 April 1964 – Civil Code [2025] JoL 1071, consolidated text (kodeks cywilny), Arts 415, 430, 449(1)– 449(11).

[79] Mindy Duffourc and Sara Gerke, 'Decoding U.S. Tort Liability in Healthcare's Black-Box AI Era: Lessons from the European Union' (2024) 27 Stanford Technology Law Review 1, 2.

[80] W Nicholson Price II, Gerke and Cohen, 'Liability for Use of Artificial Intelligence in Medicine' in B Solaiman and IG Cohen (eds), *Research Handbook on Health, AI and the Law* (Cheltenham 2024) 153.

[81] Ibid 153.

The EU legislature has answered half of the problem. Directive (EU) 2024/2853 states in terms that software, including AI systems, is a product for the purposes of no-fault liability,[82] and gives claimants two instruments aimed at the black-box difficulty: disclosure of evidence held by the defendant (Article 9) and rebuttable presumptions of defectiveness and causation where proof would be excessively difficult for technical or scientific complexity (Article 10).[83] Transposition is due by 9 December 2026.[84]

The other half did not survive: the proposed AI Liability Directive, which would have eased fault-based claims, was withdrawn by the Commission in October 2025 for lack of foreseeable agreement.[85] What remains is an asymmetry: harmonised, claimant-friendly rules against the producer; unharmonised national rules, with the full burden of proving fault and causation, against the physician and the hospital – although harm from medical AI typically materialises through a clinical decision, not a manufacturing defect.

Liability and consent are not separate compartments. Non-disclosure of AI involvement grounds a claim under Article 4(1) of the Patient Rights Act on its own; in a harm action, a patient who proves he/she would have refused the algorithmic pathway if properly informed converts the omitted disclosure into the first link of the causal chain.

VII. PROPOSALS DE LEGE FERENDA

Several reforms follow from this analysis.

First, it is proposed to amend Article 31 of the Medical Professions Act by expressly indicating that the information duty includes information about AI use in the diagnostic and therapeutic process; the amendment would codify the interpretation defended in section IV.

Second, it is proposed to introduce into the Patient Rights Act a provision establishing the right to human contact in algorithmic medicine, comprising: (1) the

[82] Directive (EU) 2024/2853 of the European Parliament and of the Council of 23 October 2024 on liability for defective products and repealing Council Directive 85/374/EEC [2024] OJ L, 2024/2853, recital 13 and Art 4(1).
[83] Directive (EU) 2024/2853 (n 82), Arts 9 and 10.
[84] Directive (EU) 2024/2853 (n 82), Art 22(1).
[85] Withdrawal of Commission proposals [2025] OJ C, C/2025/5423; the withdrawn proposal: COM(2022) 496 final (AI Liability Directive); reasons in COM(2025) 45 final.

right to receive an explanation of the algorithmic diagnosis from a physician; (2) the right to request verification of the diagnosis by a human physician; (3) the right to object to the use of AI in certain aspects of the treatment process.

The right to verification may seem redundant: health services may be provided only by authorised professionals, and Article 12(4) reserves the final decision to the physician. But a systemic guarantee is not an individual claim: given automation bias, formal authorship does not ensure substantive re-examination, and the proposed right lets the patient demand genuine verification, backed by Article 4(1) of the Patient Rights Act.

The last of these elements – the right to object – invites an obvious objection: is this not a licence to demand medicine without algorithms, much as a patient might demand bloodletting? The analogy fails but in an instructive way. A patient who objects to AI does not ask for an obsolete treatment; he/she asks for the same service in its human variant – today the professional standard, not a museum piece. As long as a lege artis human-performed alternative exists, honouring the objection demands nothing that medicine is entitled to refuse.

The right cannot, however, be absolute, and the analogy becomes apt precisely where it stops being rhetorical: when a validated algorithmic method has become the standard of care and the human-only variant has fallen below it – the trajectory described by Price, Gerke and Cohen.[86] A physician asked to bypass the algorithm is then being asked to provide substandard care, which the patient cannot demand and the physician must refuse. The protection changes form rather than disappears: the veto gives way to human verification and explanation of the algorithmic output and, at the limit, to the general right to refuse treatment. Between those poles, the weight of the objection should track the stakes: strongest where the decision is irreversible or existential, weakest where it is routine and reversible. So construed, the right to object is not a brake on algorithmic medicine; it is the price of its legitimacy.

Third, it is proposed to clarify the prerequisites of liability for damage caused by medical AI. Transposition of Directive (EU) 2024/2853 will modernise the claim against the producer; the asymmetry described in section VII argues for a parallel easing of the claimant's evidentiary position against healthcare providers, for instance by extending disclosure duties and presumptions analogous to Articles 9 and 10 to claims arising from the clinical use of AI. Otherwise, the injured patient will be procedurally better armed against a distant software house than against the hospital that treated him.

[86] Price, Gerke and Cohen (n 80) 153.

Fourth, it is proposed to redraft Article 12 of the Code of Medical Ethics, distinguishing between AI used directly in the diagnostic and therapeutic process, and AI used as a cognitive tool of the physician – the three criteria proposed in section V.3 offer a drafting template. Otherwise, the provision remains unworkable or produces absurd results.

VIII. CONCLUSIONS

SCHUFA is now a reference point for any discussion of AI and law in medicine: AI used in diagnosis or treatment may fall under Article 22 even where the physician nominally retains authority, so long as the algorithm's output effectively determines the outcome.

The ruling matters in three ways. On information duties, it supports including AI use among the facts patients must be told. On consent, it makes plain that patients should know when algorithms shape their care. On liability, it favours a broad view of causation between AI output and harm – a view the new Product Liability Directive backs with presumptions, even as the withdrawal of the AI Liability Directive leaves claims against physicians to national law.

Polish law is ahead of the comparative field rather than behind it. Where American doctrine would tolerate silent AI, and part of the bioethics literature would justify that silence, Article 12 of the Code of Medical Ethics expressly requires disclosure and consent. The certification requirement, as drafted, may be unworkable; the distinction between diagnostic AI and cognitive AI, operationalised through three criteria, allows it to be applied de lege lata and offers a template for reform.

The Supreme Court has grounded the duty to disclose treatment risks in Article 31(1) of the Medical Professions Act;[87] extending it to AI risks will take effort from lawmakers and the profession alike. SCHUFA and Article 12 are steps in that direction.

REFERENCES

American Medical Association, *2026 Physician Survey on Augmented Intelligence* (AMA Center for Digital Health and AI, March 2026)

[87] Case II CSK 259/08 7 November 2008 Supreme Court of Poland (Sąd Najwyższy).

Budzowska J, comments to Art 12 and Art 14 in R Tymiński (ed), *Kodeks Etyki Lekarskiej. Komentarz*, LEX/el. (Warszawa 2025)

Busch F and others, 'Multinational Attitudes Toward AI in Health Care and Diagnostics Among Hospital Patients' (2025) 8(6) JAMA Network Open e2514452

Caban Ł, comment to Art 31 in M Kopeć (ed), *Ustawa o zawodach lekarza i lekarza dentysty. Komentarz*, LEX/el. (Warszawa 2016)

Cohen IG, 'Informed Consent and Medical Artificial Intelligence: What to Tell the Patient?' (2020) 108 Georgetown Law Journal 1425

Cohen IG, Slottje A, 'Artificial Intelligence and the Law of Informed Consent' in B Solaiman and IG Cohen (eds), *Research Handbook on Health, AI and the Law* (Cheltenham 2024)

Duffourc M, Gerke S, 'Decoding U.S. Tort Liability in Healthcare's Black-Box AI Era: Lessons from the European Union' (2024) 27 Stanford Technology Law Review 1

Fajgielski P, *Ogólne rozporządzenie o ochronie danych. Komentarz*, LEX/el. (Warszawa 2022)

Guzowska M, 'Prawo pacjenta do informacji o stanie zdrowia jako jedno z praw przysługujących w procesie leczenia' (2009) 9 Przegląd Sądowy 91

Hatherley J, 'Are clinicians ethically obligated to disclose their use of medical machine learning systems to patients?' (2025) 51 Journal of Medical Ethics 567

Kant I, *Groundwork of the Metaphysics of Morals* (first published 1785, M Gregor (tr), CUP 1998)

Karkowska D, comments to Art 9 in D Karkowska (ed), *Prawa pacjenta i Rzecznik Praw Pacjenta. Komentarz*, LEX/el. (Warszawa 2021)

Komentarz Komisji Etyki Lekarskiej Naczelnej Rady Lekarskiej do art 12 znowelizowanego Kodeksu Etyki Lekarskiej. Sztuczna inteligencja (Naczelna Izba Lekarska 2024)

Kupiec M, 'Nowe spojrzenie na zautomatyzowane podejmowanie decyzji w rozumieniu art 22 RODO - glosa do wyroku TS z 7.12.2023 r, C-634/21' (2024) 3 Europejski Przegląd Sądowy 33

Malczewska M, comments to Art 31 in E Zielińska (ed), *Ustawa o zawodach lekarza i lekarza dentysty. Komentarz*, LEX/el. (Warszawa 2022)

McGhee KN and others, 'Patient Preferences for Artificial Intelligence in Medical Imaging: A Single-Center Cross-Sectional Survey' (2025) Journal of Imaging Informatics in Medicine, doi 10.1007/s10278-025-01629-w

Nesterowicz M, 'Prawo pacjenta do informacji – glosa do wyroku SA z 11.08.2016 r, I ACa 300/16' (2020) 2 Orzecznictwo Sądów Polskich, item 11

Obermeyer Z and others, 'Dissecting racial bias in an algorithm used to manage the health of populations' (2019) 366 Science 447

Pawlikowski J, 'Znowelizowany Kodeks etyki lekarskiej. Komentarz' (2025) 7-8 Medycyna Praktyczna (supplement)

Pilśniak JA and others, ‘Zastosowanie algorytmów sztucznej inteligencji w praktyce lekarskiej w świetle nowelizacji Kodeksu Etyki Lekarskiej’ (2025) 31(3) Medycyna Ogólna i Nauki o Zdrowiu 156

Ploug T, Holm S, ‘The right to a second opinion on Artificial Intelligence diagnosis – Remedying the inadequacy of a risk-based regulation’ (2023) 37 Bioethics 303

Ploug T and others, ‘The need for patient rights in AI-driven healthcare – risk-based regulation is not enough’ (2025) Journal of the Royal Society of Medicine (online first), doi 10.1177/01410768251344707

Price WN II, Gerke S, Cohen IG, ‘Liability for Use of Artificial Intelligence in Medicine’ in B Solaiman and IG Cohen (eds), *Research Handbook on Health, AI and the Law* (Cheltenham 2024)

Sibiga G, ‘Zautomatyzowane podejmowanie decyzji na podstawie RODO’ (2022) 21 Monitor Prawniczy 1143

Skitka LJ, Mosier KL, Burdick M, ‘Does automation bias decision-making?’ (1999) 51 International Journal of Human-Computer Studies 991

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AMENDMENT TO ARTICLE 59 OF THE MEDICAL ACTIVITY ACT – SOME REMARKS ON THE FINANCIAL RESPONSIBILITY OF LOCAL GOVERNMENT UNITS FOR THE NET LOSS OF INDEPENDENT PUBLIC HEALTHCARE INSTITUTIONS

Abstract

The article analyses the amendment to Article 59 of the Medical Activities Act, introduced in 2021 following a ruling by the Constitutional Tribunal. As a result of the amendment, the obligation of local government units (LGUs) to cover the net losses of independent public healthcare institutions (SPZOZ) was replaced with an option to do so. The authors highlight systemic issues in the financing of healthcare in Poland, emphasizing that the amendment did not resolve the growing debt problem of SPZOZ. While the reform formally reduced the financial responsibility of LGUs, Article 61 of the Medical Activities Act still holds them accountable for the debts of liquidated SPZOZ. The amendment introduced into the Polish law system was, in fact, fictitious. The legal status did not actually change. The article presents three potential solutions:

transferring the obligation to cover SPZOZ losses to the National Health Fund (NFZ), shifting financial responsibility for liquidated institutions to the State, or legislatively clarifying the role of LGUs in financing healthcare. The analysis concludes that the lack of a comprehensive reform in healthcare financing continues to exacerbate SPZOZ debt accumulation and economic instability.

KEYWORDS

independent public healthcare institution, local government units, healthcare system, public finance

SŁOWA KLUCZOWE

samodzielne publiczne zakłady opieki zdrowotnej, jednostki samorządu terytorialnego, system ochrony zdrowia, finanse publiczne

I. INTRODUCTION

The task of the State, acting through public administration[1] (executive authority), is to assume certain responsibilities and fulfil them – this is, in other words, called 'meeting the needs of citizens'.[2] The reasons behind selecting specific tasks for realization by the State are highly diverse and may be economic, political, social, etc. The most common consequence of such a 'State takeover' is making the resulting services available to citizens free of charge or at prices lower than market rates. However, this gratuity does not mean that the given task or service has been provided 'for free', meaning without covering the costs of its fulfilment. The realization of public tasks requires public funds, which the State acquires in ways specified by legal regulations. In other words, what is free from the citizen's perspective is not free in its essence – it is paid for with public funds. This forms the foundation of the State's functioning, and the management of public funds, their collection and expenditure – what is referred to as public finance.[3] Moreover,

[1] By which the authors of the article understand both government and local administration.

[2] Jan Boć, 'Pojęcie administracji' in Boć (ed), *Prawo administracyjne* (11th edn, Wrocław 2005) 16–17.

[3] Joanna Małgorzata Salachna, 'Finanse publiczne oraz prawo finansów publicznych – podstawowe pojęcia i zasady' in Salachna (ed), *Podstawy prawa finansów publicznych* (Warszawa 2024) 21–23; Krystyna Sawicka, 'Pojęcie i zakres prawa finansów publicznych' in Wiesław Miemiec, Patrycja Zawadzka (eds) *Prawo finansów publicznych z kazusami i pytaniami* (Warszawa 2023) 22–24; Article 3 of Public Finance Act of 27 August 2009 [2024] JoL [Journal of Laws] 1530 with following changes.

the Public Finance Act of 27 of August 2009 specifies in Article 9,[4] a catalogue of entities managing public funds, referred to as public finance sector units.

The above issue also applies to the public task of healthcare protection. This task has been anchored in the very Constitution of the Republic of Poland, particularly in Article 68, which states in paragraph 1: 'Everyone has the right to healthcare protection'. This provision creates a universal entitlement for every person,[5] not just Polish citizens. However, the essence of healthcare protection as a public task of the State is defined in paragraph 2, which states: 'Public authorities shall ensure equal access to healthcare services financed from public funds for citizens, regardless of their financial situation. The conditions and scope of the provision of services shall be specified by statute'.[6]

It is, therefore, beyond doubt that the State is obliged to fulfil this task, which implicitly means an obligation to finance it. This study does not aim to analyse the entirety of the complex issue of financing healthcare tasks, as discussing the entirety of this problem would go far beyond the scope of a single article. The authors analyse the amendment to a crucial provision in this area that took place in 2021, concerning the responsibility of local government units (hereinafter interchangeably: LGUs) for the debt of independent public healthcare institutions (hereinafter interchangeably: SPZOZ – Polish: *samodzielny publiczny zakład opieki zdrowotnej*). The cause of this amendment itself is of interest (though only briefly mentioned), but the primary focus is on the consequences of the new normative solution (or perhaps its lack?).

II. THE LEGAL POSITION OF SPZOZ IN THE HEALTHCARE SYSTEM

The discussion should begin with a brief indication of the role of entities involved in the realization of healthcare services. The first entity is the National Health Fund (hereinafter interchangeably: NFZ). Its role is to manage public funds allocated for the purpose of providing healthcare services. Its primary task is to govern the public finances by financing these services,[7] thus fulfilling the constitutional

[4] See Article 9 of Public Finance Act.

[5] What the use of the quantifier 'every' indicates.

[6] Article 68 of The Constitution of the Republic of Poland of 2 April 1997 [1997] JoL [Journal of Laws] 78 483 with following amendments.

[7] The term 'health care service' is a collective category, which, according to Article 38, paragraph 1 of the Healthcare Services Funded from Public Sources Act of 27 August 2004 [2024] JoL [Journal

duty of the State to ensure access to healthcare services financed with public funds.[8] It is evident that the NFZ does not directly or indirectly provide healthcare services, as in accordance with Article 97 paragraph 6 of the Healthcare Services Funded from Public Sources Act, it cannot own an entity that performs medical activities. The provision of healthcare services is the responsibility of entities engaged in medical activities, among which the main category are independent public healthcare institutions.

The provisions of the Medical Activity Act of 15th of April 2011 regulate, among other things: the establishment, financing, and liquidation of SPZOZs.[9] Particular attention should be paid to articles 114–117a of this Act, as they regulate issues related to the financing of SPZOZ activities from public funds.[10] These provisions (especially Article 114) are directly correlated with the provisions of the Healthcare Services Funded from Public Sources Act.

The transfer of financial resources for the implementation of tasks by this category of healthcare entities takes place both through the NFZ and the founding entities, in accordance with the regulations of the Medical Activity Act. The creating entity may be the State Treasury, a local government authority, or a medical university.[11] Although the founding entities of independent public healthcare institutions form a heterogeneous category, the competences defined in the Medical Activity Act are identical for all entities in this group.[12] From the perspective of this article, the legal institution regulated in Article 59 paragraph 2 of the Medical Activity Act is important, concerning the loss of a healthcare entity that cannot be covered from its own resources.

III. JUDGMENT OF THE CONSTITUTIONAL TRIBUNAL K 4/17

Since 14 October 2021, Article 59 paragraph 2 of the Medical Activity Act was amended pursuant to the Act on the amendment of the Act on healthcare services

of Laws] 146 with following amendments, includes: health services, material health services, and accompanying services.

[8] See Art 97, 116 and 117 Healthcare Services Funded from Public Sources Act.

[9] Article 2 paragraph 1 point 5 and 10, article 3, article 4 point 2, article 50a–82 Medical Activity Act of 15 April 2011 [2024] JoL [Journal of Laws] 799 with following amendments.

[10] See Arts 114–117a of Medical Activity Act.

[11] Article 2 paragraph 1 point 6 and article 6 of Medical Activity Act.

[12] See more Jan Ciechorski, 'Jednostka samorządu terytorialnego jako podmiot tworzący zakład opieki zdrowotnej' in Joanna Podgórska-Rykała, Maciej Borski (eds), *Modele administracji samorządowej w wybranych państwach europejskich* (Sosnowiec 2017) 161–185.

financed with public funds and certain other acts.[13] This change is a consequence of the Judgment of the Constitutional Tribunal,[14] which found part of this provision to be inconsistent with the Constitution of the Republic of Poland. The provision before its amendment stated that 'The founding entity is obliged, within: 1) 9 months from the deadline for approving the financial report of an independent public healthcare institution, to cover the net loss for the financial year of the institution, to the extent that cannot be covered in accordance with paragraph 1, but not exceeding the sum of the net loss and depreciation costs, or 2) 12 months from the deadline specified in point 1, to issue a regulation, order, or pass a resolution on the liquidation of the independent public healthcare institution – if the net loss for the financial year cannot be covered as specified in paragraph 1, and after adding depreciation costs, has a negative value'[15]; whereas the current version reads: 'The founding entity may cover the net loss for the financial year of an independent public healthcare institution, to the extent that cannot be covered in accordance with paragraph 1, but not exceeding the sum of the net loss and depreciation costs'.[16] The Constitutional Tribunal, in the cited judgment, examined the constitutionality of imposing on local government units (LGUs), as founding entities, the obligation to cover losses generated by a medical entity. The Tribunal found Article 59 paragraph 2 of the Medical Activity Act to be inconsistent with Article 167 paragraph 4 in conjunction with Article 68 paragraph 2 of the Polish Constitution. The Tribunal indicated that the declared unconstitutionality of the provision in question concerned the failure to classify the obligation to cover the net loss generated by an independent public healthcare institution as a task delegated by the State to local government units, and, consequently, the failure to ensure financial resources from the State budget compensating the founding entity for the expenditures incurred in this respect.

The aim of this article is not a detailed analysis and description of the mentioned judgment, but it is important to point out a few key issues arising from it. The first major conclusion from reading both the content of the judgment itself and the commentary on it is the existence of a systemic problem concerning the broadly understood financing of healthcare tasks, and more specifically, the role of local

[13] Act on the Amendment of the Healthcare Services Funded from Public Sources Act and some other Acts of 11 August 2021 [2021] JoL [Journal of Laws] 1773.

[14] Judgment of the Constitutional Tribunal of 20 November 2019 – K 4/17.

[15] Article 59 paragraph 2 Medical Activity Act in the wording prior to 14 October 2021 [2021] JoL [Journal of Laws] 711 with following amendments. The literature has emphasized the mandatory nature of the obligation imposed on local government units to cover the net loss of an SPZOZ. Maciej Dercz, 'Art. 59' in Maciej Dercz, Tomasz Rek, *Ustawa o działalności leczniczej. Komentarz*, 3rd edn (Warszawa 2019) 350–362.

[16] See Article 59 paragraph 2 Medical Activity Act.

government units in this process.[17] In general, the ruling declaring the unconstitutionality of the provision imposing an obligation on local government units (LGUs) to cover the net loss of SPZOZs was based on the premise that LGUs do not have the competence to finance healthcare services (lack of naming it as their own task). There is no provision that imposes such an obligation. If, however, this necessity were considered as a liability to perform a commissioned task, the absence of funds allocated to carry out this task would be pointed out.

The issue of participation of the local government units in financing healthcare tasks is broad and complex. Many aspects of the broadly understood financing of tasks could be raised in the context of LGUs as entities establishing SPZOZs.[18] However, focusing on the issue at hand, while one may agree with the judgment and some of the arguments raised, it is a fact that declaring the unconstitutionality of these two provisions does not eliminate the essence of the problem, as it is much deeper and systemic in nature. One judgment of the Constitutional Tribunal cannot regulate such a broad issue – due to the obvious lack of legislative competence. After the ruling in case K 4/17, the most important question was what action the legislator would take, since, as of the date specified in the judgment, the provision imposing the obligation to cover the net loss by the founding entity of the SPZOZ lost binding force, but the losses did not disappear.

IV. SIGNIFICANCE OF ARTICLE 59 PARAGRAPH 2 OF MEDICAL ACTIVITY ACT IN ITS NEW WORDING AFTER 14 OCTOBER 2021

The change adopted by the legislator is the transformation of the obligation of covering the loss of an independent public healthcare institution (SPZOZ) by the local government unit (LGU) into an option, i.e., the amendment converted the duty of the LGU into the possibility of covering the loss of the healthcare entity. There are at least a few issues in this change that require commentary. First, it should be noted and emphasized that the change introduced by the legislator does not really solve the systemic problem described above. M Muszyński decided

[17] See more Judgment K4/17; and Zbigniew Gromek, 'Glosa do wyroku TK z dnia 20 listopada 2019 r., K 4/17' [2021] Przegląd Sejmowy 267.

[18] Paulina Gaudyn, 'Przekształcenia samodzielnych publicznych zakładów opieki zdrowotnej a sytuacja finansowa samorządów' [2015] Finanse Komunalne 50; Aneta Gęsiarz-Krasucka, Marcin Wielgolaski, 'Wybrane zagadnienia dotyczące miejsca i roli jednostek samorządu terytorialnego w obszarze ochrony zdrowia w świetle wyroku Trybunału Konstytucyjnego z 20 listopada 2019 r. (K 4/17)' [2020] Samorząd Terytorialny 32.

to give his separate opinion within the judgment's explanation, stating that the legislator, 'by creating a new mechanism, will easily be able to reconstruct the solution bypassing the constitutional barriers established in the judgment due to their general (Article 167 paragraph 4 in conjunction with Article 166 paragraph 2, Article 68 paragraph 2) or limited scope (Article 2). Therefore, the Tribunal issued a judgment that only seemingly resolves the problems raised in the application'.[19] The Tribunal raised many issues regarding the financing of the task of healthcare protection by public authorities, particularly discussing the role of LGUs in this process (which, parenthetically, should not exist at all).[20] This judgment could have been an interesting impetus for intensifying work on systemic change, but as we can see, that has not happened.

The narrow issue considered by the Tribunal was the problem of covering the net loss of SPZOZ, however, the amendment to Article 59 paragraph 2 of the Medical Activity Act has certainly not solved this problem. The optionality of covering the loss is certainly a positive change in the context of LGU finances, as it allows the non-coverage of net losses. In fact, this also seems justified from the perspective of the duty to finance healthcare, which, as already mentioned, clearly falls within the scope of the entity at the State level, which is the National Health Fund (NFZ). Nevertheless, the problem of the existence of losses has not been resolved; neither a new method of covering them nor an alternative entity responsible for this obligation has been indicated. The new wording of the discussed provision does not in any way resolve the issue of what to do with the accumulating annual losses, which can be considered as systematic sui generis.

The introduced change only seemingly removes the financial responsibility of LGUs for the economic situation of SPZOZ. It is essential to recall Article 61 of the Medical Activity Act, which remains unchanged. According to the meaning of this provision, the founding entity of SPZOZ is responsible for its financial obligations upon its liquidation. Ultimately, the financial connection, or rather the financial responsibility of the founding entity for the debt of SPZOZ, still exists. Only its timing has changed. In practice, therefore, in the absence of financing for the annual net losses, this debt will continue to grow (which actually happens), the formal responsibility for the negative financial result of SPZOZ still rests

[19] Mariusz Muszyński, 'Zdanie odrębne sędziego TK Mariusza Muszyńskiego do wyroku Trybunału Konstytucyjnego z dnia 20 listopada 2019 r., K 4/17', OTK-A 2019/67.

[20] See more Judgement K 4/17 and Zbigniew Gromek, 'Glosa do wyroku TK z dnia 20 listopada 2019 r., K 4/17' [2021] Przegląd Sejmowy 267; Jan Ciechorski, 'Art. 61' in J Ciechorski, *Ustawa o działalności leczniczej. Komentarz do wybranych przepisów* (LEX/el. 2024); Tomasz Sroka, 'Wybrane problemy dotyczące finansowania przez władze publiczne świadczeń opieki zdrowotnej ze środków publicznych w świetle Konstytucji' [2021] Państwo i Prawo 76.

with the local government unit as the founding entity. If this loss were not tied, in the event of liquidation, to the LGU under Article 61, one could agree that the change introduced by the legislator as of 14 October 2021, at least resolved this one problem. However, due to the lack of any change to this regulation, in the event of the liquidation of a local government healthcare entity, its loss will still burden its founding entity. It thus seems that the legislator made only a superficial effort to 'comply' with the Constitutional Tribunal's judgment – without a deeper consideration of the problem and finding its solution.

It should be noted that Article 59 of the Medical Activity Act introduces a solution intended to prevent situations resulting in the necessity for a local government unit to cover the net loss of SPZOZ. This objective is pursued through the obligation imposed on the head of the medical entity to prepare a recovery program in cases where the financial loss of the institution exceeds 1% of the net revenues indicated in the financial statements (Article 59 paragraph 4 of the Medical Activity Act). The provisions of this article also specify, among others, the deadline for preparing the recovery program (paragraph 4), the actions preceding its preparation (paragraph 5), as well as the mandatory minimum content of the recovery program (paragraph 6).

Another aspect that needs to be addressed is the necessity for a high level of precision in public finance law. The regulation of the Medical Activity Act discussed in this article clearly concerns the management of public funds by a local government unit, which is a public sector entity.[21] More precisely, Article 59 paragraph 2, after its amendment, introduced the possibility of covering the net loss of SPZOZ, a matter that reflects the quasi-financial responsibility of the LGU as the founding entity of SPZOZ. As indicated earlier, the principle is to strive for the greatest possible legal precision in matters related to public finances, which is their characteristic feature (one might say inherent), especially in contrast to the functioning of the private sector.[22] Of course, it is not possible to eliminate all discretionary aspects – and that is a good thing. However, introducing a change that, in essence, allows for the unlimited growth of debt in public sector entities without indicating a procedure for their debt relief is not introducing discretion but rather creating a gap in public finances that will eventually have to be filled somehow.

The final issue that requires addressing is the importance of the public task of healthcare protection. It is difficult to classify public tasks as more or less impor-

[21] Article 9 paragraph 2 of the Public Finance Act expressly lists the local government unit as an entity of the public finance sector.

[22] See more Krystyna Sawicka, 'Finanse publiczne a finanse prywatne' in Wiesława Miemiec, Patrycja Zawadzka (eds), *Prawo finansów publicznych z kazusami i pytaniami* (Warszawa 2023) 35–37.

tant, but in the case of some tasks in comparison with healthcare, the issue does not seem to be that much complicated. Performed analysis of some various public tasks from within the State budget raises the reflection that spending public funds on various advertising campaigns, 'communication' expenses, and training for employees (not necessarily from poorer social groups) seems undoubtedly far less important than expenditures on healthcare. If the legislator (including the constitutional one) has decided to take on the task of healthcare protection, then it is their duty to perform it. In other words, there cannot be a situation in which such an important issue as health – which is critical for every citizen – is treated worse than other tasks with clearly lower priority. The growing debt of SPZOZ certainly impacts the functioning of these entities, particularly their ability to provide healthcare services, which is their purpose and reason for existence. The managers of these entities should lead operations in such a way as to prevent the increase in debt, as it could result in the paralysis of their tasks, especially in a situation where there is currently no statutory entity that would be obligated to cover the debt generated by SPZOZ.

V. SUMMARY AND PROPOSALS FOR POTENTIAL CHANGES

Upon analysing the changes introduced in the Medical Activity Act, it should be noted that the problem of financing healthcare services is clearly systemic. As aptly indicated by M Florczak-Wątor, with reference to the judgment of the Constitutional Tribunal of 7 January 2004,[23] the proper functioning of the healthcare system crucially depends on the legislature's appropriate delineation of the competences conferred upon institutions performing public tasks in the field of health protection.[24] However, the question arises whether it is possible to improve the situation we are dealing with without changing the entire system. No specific or advanced works are taking place regarding system changes, and entities such as SPZOZ have to function somehow. Below, three paths will be presented that the authors believe could solve or at least minimize the described legal problem. The authors are aware that these proposals are not without flaws, but they may play an important role in opening the discussion on the subject matter.

The first proposal that clearly solves both problems (the link between LGUs and financing healthcare and the problem of covering losses and the debt of SPZOZ) is to include the National Health Fund (NFZ) in Article 59 paragraph 2, instead

[23] Judgment of the Constitutional Tribunal of 7 January 2004 – K 14/03.

[24] Monika Florczak-Wątor 'Art. 68' in P Tuleja, *Konstytucja Rzeczypospolitej Polskiej. Komentarz* (2nd edn, Warszawa 2023) 250–251.

of other creating entities. Moreover, this change would require restoring the mandatory nature of covering the loss generated by the creating entity. Indicating in this place the main financing entity for the entire healthcare task seems to be a natural consequence of the currently functioning healthcare system in Poland. This would then identify the entity responsible for covering the debt, and, secondly, the involvement of LGUs in this process would be avoided, which has been identified as problematic. Article 61 of the Medical Activity Act would become irrelevant in this case. However, this solution has a fundamental flaw: in such a case, the National Health Fund would not only finance the costs of providing healthcare services, as required by the Healthcare Services Financed from Public Funds Act, but also the losses of SPZOZ. It should not be controversial to state that this loss could be caused by various factors, with one of them (often the primary one) being the provision of healthcare services beyond the limit specified in the contract between the NFZ and the service provider, which could justify the proposed solution to the problem. However, the financial deficit of SPZOZ could be caused by other reasons not directly related to the so-called over-limit services, in which case it would be difficult to justify its coverage by the NFZ. In the current legal state, the NFZ is a public payer responsible for the healthcare services provided. Its task is not to provide financial support for the functioning of a service provider but only to pay, in accordance with the contract for healthcare services financed from public funds, for the services provided by the service provider. Consequently, such a legislative solution would introduce a systemic change because it would affect the entire healthcare insurance system.

Another possibility that would change the situation of SPZOZ would be amending Article 61 of the Medical Activity Act. If the legislator wanted to leave the optional nature of financing the net loss by LGUs, the real problem, as demonstrated, is the final financial responsibility, which, according to the current wording of this provision, burdens the LGU. Changing the wording of this provision and indicating that financial responsibility in the event of liquidation falls on the State Treasury would be at least a partial solution to the problem. An argument in favour of this proposal is that, through the functioning of this group of service providers, the State fulfils its constitutional obligation to ensure access to healthcare services financed from public funds. The special role of SPZOZ in the healthcare system was emphasized in the justification of the Judgment of the Constitutional Tribunal of 18 December 2002.[25]

[25] The Judgment of the Constitutional Tribunal of 18 December 2002 – K 43/01. In the justification of this judgment, it was stated: 'The fundamental constitutional rules relating to public healthcare are contained in Article 68 of the Constitution, particularly in paragraphs 2, 3, and 4. These provisions impose duties on public authorities regarding ensuring citizens' access to healthcare services financed from public funds. Recognizing that the public healthcare system, being the fundamental

It is worth noting that these two proposals, in a slightly more developed form, were proposed by the Senate as amendments to the discussed Act. However, the Sejm rejected the amendments without justification.[26]

The third solution takes into account the legislator's decision to introduce and maintain the institution of the creating entity and its financial link to the implementation of the constitutionally guaranteed task of healthcare protection. However, this would require certain changes in the relevant local government laws. Not only would the regulations indicating the participation of LGUs in the implementation of the task need to be introduced, but also appropriate changes ensuring funds for covering its costs. The question here is whether this change would be too far-reaching and overly burdensome for local government units. A variant of this proposal is the stance of the Constitutional Tribunal in its judgment of 20 November 2019, in which it considered covering the net loss of SPZOZ to be an entrusted task of the local government units. It seems that this concept definitely requires further analysis, but the authors indicate this possibility as one of the ways that could, in some sense, organize the system in the discussed area.

REFERENCES

Boć J (ed), *Prawo administracyjne* (Wrocław 2005)

Ciechorski J, 'Jednostka samorządu terytorialnego jako podmiot tworzący zakład opieki zdrowotnej' in Podgórska-Rykała J, Borski M (eds), *Modele administracji samorządowej w wybranych państwach europejskich* (Sosnowiec 2017)

– –, 'Art. 61', in J Ciechorski, *Ustawa o działalności leczniczej. Komentarz do wybranych przepisów* (LEX/el. 2024)

Dercz M, 'Art. 59' in M Dercz, T Rek, *Ustawa o działalności leczniczej. Komentarz, wyd. III.* Warszawa 2019)

Florczak-Wątor M, 'Art. 68' in P Tuleja, *Konstytucja Rzeczypospolitej Polskiej. Komentarz* (2nd edn, Warszawa 2023)

Gaudyn P, 'Przekształcenia samodzielnych publicznych zakładów opieki zdrowotnej a sytuacja finansowa samorządów' (2015) 3 Finanse Komunalne 50–60

element in fulfilling the constitutional duties of public authorities to ensure access to healthcare services, should be built on the principle of economic rationality, it is impossible to ignore the fact that there are insurmountable barriers to the economization of this system'.

[26] Resolution of the Senate of the Republic of Poland on the Act amending the Healthcare Services Financed from Public Funds and certain other Acts (Sejm Paper No 1540 with its justification); Report of the Health Committee on the Senate's Resolution regarding the Act amending the Act on Healthcare Services Financed from Public Funds and certain other acts (Sejm Paper No 1581).

Gęsiarz-Krasucka A, Wielgolaski M, 'Wybrane zagadnienia dotyczące miejsca i roli jednostek samorządu terytorialnego w obszarze ochrony zdrowia w świetle wyroku Trybunału Konstytucyjnego z 20 listopada 2019 r.' (K 4/17) (2020) 1–2 Samorząd Terytorialny 32–48

Gromek Z, 'Glosa do wyroku TK z dnia 20 listopada 2019 r., K 4/17' (2021) 2 Przegląd Sejmowy 267–280

Sawicka K, 'Finanse publiczne a finanse prywatne' in Miemiec W , Zawadzka P (eds) *Prawo finansów publicznych z kazusami i pytaniami* (Warszawa 2023)

Salachna JM, 'Finanse publiczne oraz prawo finansów publicznych – podstawowe pojęcia i zasady' in JM Salachna (ed), *Podstawy prawa finansów publicznych* (Warszawa 2024)

Sroka T, 'Wybrane problemy dotyczące finansowania przez władze publiczne świadczeń opieki zdrowotnej ze środków publicznych w świetle Konstytucji' (2021) 11 Państwo i Prawo 76–91

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