JOURNAL OF LAW

TSU FACULTY OF LAW SPECIAL EDITION 2025, №1

CONTENTS

Ivane Javakhishvili Tbilisi State University
Faculty of Law

Journal of Law

2025

Special Edition

უნივერსიტეტის გამომცემლობა

UDC(uak) 34(051.2)
s-216

Published by the decision of Ivane Javakhishvili Tbilisi State University Publishing Board

P-ISSN 2233-3746
E-ISSN 2720-782X

Online Edition of the Journal is available on the website: www.jlaw.tsu.ge

Table of Contents

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.1.2025.9519

Dariusz Szpoper*

Oskar Kanecki**

Crown of the Kingdom of Poland at the time of the establishment of diplomatic relations between the Grand Duchy of Lithuania and the Kingdom of Kartli

Upon the arrival of King Constantine II of Kartli's envoys in Vilnius in the end of the XV century, the Grand Duchy of Lithuania, under the rule of Alexander Jagiellon (1461-1506), was no longer bound to the Crown of the Polish Kingdom by a personal union. The unifying factor among these states was the threat posed by a common external enemy – Turkey. However, a military expedition to the south led by the Polish king John I Albert (1459-1501) in 1497 ended in defeat, leaving the Polish people with the saying "Under the Albert king, the nobility became extinct". This well-educated, ambitious and courageous ruler has been judged by history in the harshest terms. Even the Polish nobility remembered him critically, although it was during his reign that a chamber of parliament was established within the Sejm, which significantly strengthened the status of this privileged state. The monarch's untimely demise precluded any opportunity for him to reclaim his reputation.

***Keywords**: Grand Duchy of Lithuania, king John I Albert, Crown of the Kingdom of Poland, Georgia, Kingdom of Kartli*

For centuries, Georgia maintained contacts with European countries through Catholic missionaries and travelers who reached the country. Relations were also developed through the regular sending of legations to Europe[1]. By the time of the arrival of the diplomatic mission of the Kartlian King Constantine II at the court of the Lithuanian Grand Duke Alexander Jagiellon (Polish: Aleksander Jagiellończyk) in the end of the XV century, Lithuania no longer had any formal relationship with the Crown of the Polish Kingdom. In fact, the personal union between the two states was severed after the death of Casimir IV, known as Casimir IV Jagiellon (Polish: Kazimierz IV Jagiellończyk), in 1492, when John I Albert (Polish: Jan I Olbracht, Jan Albrycht[2]), ascended the

* Professor of law, Doctor honoris causa, Director of the Institute of Law and Administration at the Pomeranian University in Słupsk (Poland), ORCID (0000-0002-8593-2821).

** Doctor of Law, Head of the Department of Administration, Institute of Law and Administration, Pomeranian University in Słupsk (Poland), ORCID (0000-0001-9025-2970).

1 *Hensel W., Tabgua I.,* Gruzja wczoraj i dziś, Warszawa, 1976, 127-128, as early as the mid-13th century, for example, the Flemish Franciscan missionary William of Rubruck, sent east by King Louis IX of France, travelled through Georgian territory.

2 *Rogalski L.,* Dzieje księstw nad-dunajskich to jest: Multan i Wołoszczyzny podług dzieł Cogalniceana, Vaillanta, Ubiciniego i Palauzowa, vol. I, Warszawa, 1861, 696.

Polish throne and Alexander Jagiellon became Grand Duke of Lithuania[3]. It was not until the year 1499 that formal relations were once again established[4]. Regardless, the main task of the Kartli newcomers was to form a coalition against Turkey, which remained a threat to both the Grand Duchy of Lithuania and the Kingdom of Poland[5].

In 1484, commanded by Sultan Bayezid II, the Ottoman Turks conquered Kilia and Białogród, which were important for Polish and Hungarian trade interests[6]. The first fortress allowed them to control the mouth of the Danube on the Black Sea, while the second fortress allowed them to control the mouth of the Dniester River. The importance of these acquisitions is demonstrated by the fact that the Turkish Sultan himself described Kilia as the key to Moldavia and Hungary, while Białogród as the gateway to Polish, Ruthenian and Tatar lands. Most likely, King Constantine sent his representative, the monk Cornelius, to the Sultan of Egypt to form an anti-Turkish alliance. Returning from his mission, the cleric met in Jerusalem the envoys of Isabella I of Castile, Queen of Spain, whom he had invited to Georgia. They had probably agreed to make the long journey to establish a coalition against Turkey. After their visit, Constantine, interested in cooperation, decided to send Cornelius to Spain. Georgian legation on its way to Queen Isabella decided to travel along the Dnieper River through the Grand Duchy of Lithuania and the Polish lands. As it would appear, this choice was a very deliberate one, and was not dictated solely by the distance involved. The Georgian envoys were probably seeking political cooperation with Lithuania that would focus on the threat posed by a common enemy – Turkey. Such an action would have been in line with the policy already adopted by the King of Kartli. The Georgian envoys who came to Lithuania were received by Grand Duke Alexander Jagiellon. At that time, the hospodar had to learn the contents of a letter from Constantine II, King of Kartli, to the Spanish monarch Queen Isabella[7]. This document, after being translated into the official language of the Grand Duchy of Lithuania (Ruthenian), was submitted to the Lithuanian Metrica[8]. There is no record of the existence of a letter to Alexander Jagiellon. However, the Georgian envoys may have had their king's will proclaimed on their own[9]. According to Bohdan and Krzysztof Baranowski, their mission to the Grand Duchy of Lithuania was doomed from the start, and their attempt to forge closer ties ended in failure. It is not clear whether the envoys of Constantine II continued their journey via Kraków or whether they passed over the capital of the Kingdom of Poland at that time[10]. A visit to the court of John I Albert seems justified in view of the military expedition

---

3 *Gołębiowski Ł.,* Dzieje Polski za panowania Kaźmirza, Jana Olbrachta i Alexandra, Warszawa, 1848, 358.

4 *Kutrzeba S.,* Semkowicz W., Akta unji Polski z Litwą 1385-1791, Kraków, 1932, 126-130.

5 *Furier A.*, Działania dyplomatyczne II Rzeczypospolitej na Kaukazie. Z historii kontaktów dyplomatycznych Polski z Kaukazem, Przegląd Wschodni, vol. V, No. 3 (19), 1998, 463; *Włodarczyk M.*, Stosunki polsko-gruzińskie w latach 1918-1921, Świat Idei i Polityki, vol. 15, 2016, 444-445.

6 *Baczkowski K.*, Państwa Europy środkowo-wschodniej wobec antytureckich projektów Innocentego VIII (1484-1492), Nasza Przeszłość, vol. 74, 1990, 208.

7 *Cincadze I.*, Stosunki polsko-gruzińskie w XV-XVII w., Przegląd Orientalistyczny, 1960, 5-6, 10-12.

8 *Джавахишвили Н.,* Очерки истории грузино-балтийских взаимоотношений, Riga, 2015, 463-465 (in Russian).

9 Ibid, 19-20.

10 *Baranowski B.,* Baranowski K., Historia Gruzji, Wrocław-Warszawa-Kraków-Gdańsk-Łódź, 1987, 93, the first possibility seemed more likely to the authors of the study.

southwards contemplated in Poland since the capture of the Black Sea ports by the Turks[11]. Suffice it to say that, at the end of the 15th century, the Kingdom of Poland, together with the Grand Duchy of Lithuania, remained major players on the European continent, second only to the Grand Duchy of Moscow and the Ottoman Empire in terms of territory[12]. In 1497, the Polish ruler was already convinced of the need for war. When he asked the Gdańsk city council for financial support, he justified the military action by the need to defend Christianity, which was threatened by the Turks and Tatars[13]. The Bishop of Kuyavia (Polish: Kujawy) and the Grand Chancellor of the Crown, Krzesław Kurozwęcki, tried in vain to dissuade the king from war. In fact, John I Albert is said to have severely reprimanded him for these efforts, saying "that priest at mass, it is not proper to look at war". Neither the exhortations of the landowner Srobski, who predicted failure for the Poles, nor a series of unexpected and disturbing events dissuaded the monarch from carrying out his plans – his favourite horse fell and drowned under the monarch while he was fording a stream, a thunderstorm killed a nobleman and 12 horses, and a priest celebrating mass accidentally knocked the consecrated bread off the altar[14]. Military success may have brought the interests of Poland and Georgia closer together, but the expedition ended in 1497 with a defeat at the Battle of Cosmin Forest (Polish: bitwa pod Koźminem) that forever overshadowed the Polish king's achievements. In the end, however, even the defeat of John I Albert, which had become part of the Polish collective consciousness, did not prevent the Crown of the Kingdom of Poland from establishing trade relations with Georgia. In fact, they were revived at the turn of the 16th and 17th centuries[15].

The turn of the 15th and 16th centuries marked an important caesura in history, dividing two great epochs – the Middle Ages and the early modern period. This period was also crucial for the Kingdom of Poland. Unlike other European states, however, it did not succeed in establishing absolute rule. This process was prevented in the first place by the many privileges granted to the nobility, which meant that state interests began to dominate public affairs[16]. This was the reality in which John I Albert, born in the castle of Kraków on 27 December 1459, had to rule. He was given his first name in honour of John the Apostle – the patron saint of the birthday – and his second name in honour of his ancestor – the Queen's father and also the King of Bohemia and Hungary – Albrecht II Habsburg. Although the young prince was the third born son of the Polish King and Grand Duke of Lithuania Casimir IV Jagiellon and Elisabeth *de domo* Habsburg, he was considered his mother's favourite child.

---

11 Papée F., Jan Olbracht, Kraków, 2006, 18.

12 *Dziubiński A.,* Stosunki dyplomatyczne polsko-tureckie w latach 1500-1572 w kontekście międzynarodowym, Wrocław, 2005, 11; *Furier A.,* Polacy w Gruzji, Warszawa, 2009, 7.

13 *Szybkowski S.,* Katalog dokumentów i listów królów polskich z Archiwum Państwowego w Gdańsku (Jan Olbracht i Aleksander Jagiellończyk), Gdańsk, 2016, 97.

14 *Rogalski L.,* Dzieje księstw nad-dunajskich to jest: Multan i Wołoszczyzny podług dzieł Cogalniceana, Vaillanta, Ubiciniego i Palauzowa, vol. I, Warszawa, 1861, 696, 699; *Besala J.,* Tajemnice historii Polski, Poznań, 2003, 184.

15 *Woźniak A.*, Polacy w Gruzji w pierwszej połowie XIX wieku, Niepodległość i Pamięć, No. 11, 1998, 29; *Cincadze I.*, Stosunki polsko-gruzińskie w XV-XVII w., Przegląd Orientalistyczny, 1960, 12-13; a different view is taken: *Furier A.,* Polacy w Gruzji, Warszawa, 2009, 7, according to the author, 16th and 17th century Polish-Georgian contacts "were rare and limited to diplomacy".

16 *Czerny F.,* Panowanie Jana Olbrachta i Aleksandra Jagiellończyków (1492-1506), Kraków, 1871, 9, 11-12.

At the age of eight, John I Albert began to study at the school of Jan Długosz (1415-1480), a clergyman, chronicler of Polish history and one of the most important intellectuals of his time. It was then that he acquired a knowledge of Latin. He also spoke German. The chronicler Maciej Stryjkowski wrote of the now adult Jagiellon that "he was a great verbalist in Latin and German"[17]. It is not known whether he spoke Hungarian like the Queen. In parallel with the knowledge he acquired, thanks to the chatelain Stanisław Szydłowiecki the prince became skilled in the use of weapons[18]. For a time (between 1472 and 1473), John I Albert may also have been influenced by the Italian humanist Filippo Buonaccorsi, known as Callimachus (1437-1496). His role at this stage in the education of the sovereign's offspring should not be overestimated, however, as Callimachus did not appear at the royal court until the prince had already completed his education[19]. To a greater extent, the influence of the Italian newcomer on his attitude would become apparent in later years. Marcin Bielski goes so far as to note in his chronicle that John I Albert "in all his matters" took the advice of Callimachus, who was both learned and cunning[20]. Although this was the influence of a courtier, not a teacher, it could prove significant and, as it was soon to be seen, fatal to the king's fate at key moments. In fact, there is much evidence that Callimachus urged Albert to fight for the Hungarian crown, in which the prince suffered a complete defeat, losing the Battle of Eperjes (now Prešov, Slovakia; Polish: bitwa pod Preszowem) in 1492. The Italian was then an ardent supporter of the ruler's unsuccessful expedition to Bukovina in 1497. After being educated at the school of Jan Długosz, the young John I Albert began to prepare for power at his father's side[21]. However, he became a natural candidate for the Polish and Hungarian crown after the death of his elder brother Casimir (1458-1484). In 1487, the prince won a glorious victory over the Tatars and made a name for himself as an effective military commander[22]. In 1490, Casimir IV Jagiellon sought to have John I Albert succeed the late Matthias Corvinus (Hun. Hunyadi Mátyás), King of Hungary. On the field of Rakos on 7 June 1490, part of the Hungarian nobility even proclaimed John I Albert king, but in the end, thanks to the magnate Stefan Zápolya, the balance of power tipped in favour of John I Albert's brother, Vladislaus II (Polish: Władysław II Jagiellończyk), King of Bohemia, (1456-1516)[23]. It was probably hoped that this would lead to an alliance and settle the long dispute with Bohemia over Silesia, Moravia, and Lusatia. The Hungarian magnates also saw an advantage in Vladislaus's pliant nature, which earned him the not-so-glorious nickname "King of Good, Good" (*rex bene bene*). Thus, the plans of Casimir Jagiellon and his wife Elisabeth to have one of their sons sit on each of the thrones of Central Europe – John I Albert in Hungary, Sigismund (Polish: Zygmunt) in Poland, Alexander in Lithuania, Vladislaus in Bohemia, while in Prussia, the clergy consecrated Frederick (Polish: Fryderyk) as Grand Master of the Teutonic

17 *Stryjkowski M.,* Kronika polska, litewska, żmódzka i wszystkiej Rusi, vol. II, Warszawa, 1846, 313.

18 *Papée F.,* Jan Olbracht, Kraków, 2006, 8, 11-13.

19 John I Albert studied with Jan Długosz from October 1467 to December 1474.

20 *Bielski M.,* Kronika polska Marcina Bielskiego nowo przez Joach. Bielskiego syna jego wydana, Kraków, 1597, 483.

21 *Garbacik J.,* Kallimach jako dyplomata i polityk, Kraków, 1948, 33-34, 39, 138, 145; *Papée F.,* Jan Olbracht, Kraków, 2006, 15, 200-201, 210.

22 *Papée F.,* Jan Olbracht, Kraków, 2006, 18-19.

23 *Czerny F.,* Panowanie Jana Olbrachta i Aleksandra Jagiellończyków (1492-1506), Kraków, 17-18; *Papée F.,* Jan Olbracht, Kraków, 2006, 23.

Knights – did not come true[24]. The brothers clashed, and their quarrel exposed the weakness of the policies pursued by the Jagiellonian Dynasty[25]. Despite his unsuccessful bid for the Hungarian crown, John I Albert still used the title of King Elect of Hungary in December 1490[26], and in June 1491 – the rightfully elected King of Hungary[27], in violation of the terms of the Koszyce Agreement, concluded on 20 February 1491. It was intended to end the rivalry between John I Albert and Vladislaus for the Crown of Saint Stephen. On this basis, the prince renounced the title he had received on 7 June 1490 on the field of Rakos and recognised Vladislaus as the monarch of Hungary. In return, he was to succeed to the throne in the event of his brother's heirless death. However, the weighting of this provision with additional caveats made the resulting gains uncertain, to say the least. Finally, it did not matter much because John I Albert was not going to wait for developments. Perhaps the impatience of the prince, to whom Callimachus was close at the time, made itself felt. It is difficult to say whether the decision to resume fighting would not have been taken without the influence of this important adviser. It is certain that Callimachus held a significant position in the Prince's Council and was at the same time one of the strongest supporters of John I Albert's accession to the Hungarian throne. Regardless of the circumstances, however, the fratricidal war for power flared up again. Time was against the prince, his troops were dwindling, while Stefan Zápolya, sent against him by King Vladislaus, was growing in strength. On the eve of the Battle of Eperjes, he already had several times as many troops as John I Albert. Attempts to surprise the enemy with an evening attack proved futile. John I Albert suffered the ultimate defeat in his fight for the Hungarian crown. Not even his bravery helped. As the chronicler Marcin Bielski wrote, "Olbracht defended himself so well that two horses under him were killed and the third wounded"[28]. Before the battle, King Vladislaus generously asked his chieftains to ensure his brother's safety, while after the battle he allowed John I Albert to maintain his honour by agreeing to uphold the terms of the Koszyce Agreement. Still, it must have been humiliating for the ambitious prince to be escorted to the Polish border by his conqueror, Stefan Zápolya[29].

At the time of the death of the Polish king Casimir IV Jagiellon in Grodno on 7 June 1492, his son John I Albert was in Radom, some 300 kilometres away. However, the road to power in Poland was not entirely straightforward, as the prince was only to stand as a candidate for the throne at the

---

24 *Baczkowski K.,* Polska i jej sąsiedzi za Jagiellonów, Kraków, 2012, 162-163; *Felczak W.,* Historia Węgier, Wrocław-Warszawa-Kraków-Gdańsk-Łódź, 1983, 107; *Borzemski A.,* Siły zbrojne w wołoskiej wojnie Jana Olbrachta, Oświęcim, 2019, 12; *Romsics I.,* Historia Węgier, Poznań, 2018, 140.

25 *Dróżdż P.,* Orsza 1514, Warszawa, 2000, 23, although the Kingdom of Poland, the Grand Duchy of Lithuania, Bohemia with Silesia and Lusatia, and Hungary with Croatia remained under the rule of the family. However, these territories were very diverse economically and culturally and lacked an internal community of interests.

26 *Szybkowski S.,* Katalog dokumentów i listów królów polskich z Archiwum Państwowego w Gdańsku (Jan Olbracht i Aleksander Jagiellończyk), Gdańsk, 2016, 32.

27 Ibid, 33.

28 *Bielski M.,* Kronika polska Marcina Bielskiego nowo przez Joach. Bielskiego syna jego wydana, Kraków, 1597, 477.

29 *Baczkowski K.,* Habsburgowie i Jagiellonowie w walce o Węgry w latach 1490-1492, Oświęcim, 2014, 126-127, 146-147, 164-166; *Garbacik J.,* Kallimach jako dyplomata i polityk, Kraków, 1948, 120.

election scheduled for 15 August 1492, not as the successor to the deceased monarch[30]. While still in Radom, John I Albert sent a letter asking for support to the city council of Gdańsk. In it, he promised to respect the privileges and to rule fairly[31]. King Casimir, in his last will and testament, also recommended to his subjects that John I Albert be elected King of Poland. His intentions were realised unanimously at a roll-call vote of the electors in Piotrków on 27 August 1492. The Crown of the Kingdom of Poland had a new ruler[32]. A little earlier, on 30 July 1492, the Lords of Lithuania elected Alexander Jagiellon as Grand Duke of Lithuania[33].

Soon, John I Albert had to face the greatest challenge of his reign – an approaching threat from the south, which strongly affected the consciousness of at least some of his subjects. Old people even repeated the prediction of the monk John of Capistrano that the Turks would place their camels in Kraków's Market Square. In the year of his coronation, Venetian envoys urged the monarch to launch a joint expedition of Christian rulers against Turkey[34]. Shortly after his accession to the Polish throne, on 5 December 1492, John I Albert, through his envoys, concluded an alliance with his brother, King Vladislaus of Bohemia and Hungary, which provided for an alliance against common enemies, in particular the Turks[35]. In February 1494, the King of Poland received a letter from Vladislaus expressing the need for an urgent meeting on matters influencing both kingdoms and Christianity as a whole. The meeting was held in Levoča. Together with John I Albert, his younger brothers Sigismund and Frederick went to see him. It is said that when Vladislaus saw his retinue approaching, he set off to meet his relatives and then, despite earlier quarrels, embraced them warmly[36]. The reaction of Stefan Zápolya, the conqueror of Olbracht from Prešov, must have been quite different. Even before the congress, he asked for and received a letter assuring him of a peaceful passage through the Spiš starosty, which was dependent on Poland. On the other hand, according to another, albeit less likely, account, Zápolya left the town when he heard that the Polish king was approaching Levoča. Fearing retaliation, he asked for a letter guaranteeing his safety. John I Albert refused, explaining his decision by saying that there was no such custom. According to the monarch, his ancestors had vouched for inviolability with their words. In the end, however, at Vladislaus request, the King of Poland agreed to respect the guarantees of safety he had given Zápolya[37]. Whatever the course of the first phase of the

30 *Papée F.,* Jan Olbracht, Kraków, 2006, 29.

31 *Szybkowski S.,* Katalog dokumentów i listów królów polskich z Archiwum Państwowego w Gdańsku (Jan Olbracht i Aleksander Jagiellończyk), Gdańsk, 2016, 35.

32 *Papée F.,* Jan Olbracht, Kraków, 2006, 30, 38.

33 *Błaszczyk G.,* Litwa na przełomie średniowiecza i nowożytności 1492-1569, Poznań, 2002, 13.

34 *Bielski M.,* Kronika polska Marcina Bielskiego nowo przez Joach. Bielskiego syna jego wydana, Kraków, 1597, 481-482.

35 *Finkel L.,* Zjazd Jagiellonów w Lewoczy r. 1494, Lwów, 1914, 19.

36 *Papée F.,* Jan Olbracht, Kraków, 2006, 63-64; *Felczak W.,* Historia Węgier, Wrocław-Warszawa-Kraków-Gdańsk-Łódź, 1983, 108, this reaction may come as a surprise not only because of Vladislaus' rivalry with John I Albert for the Hungarian succession, but also because the Bohemian monarch had concluded a humiliating peace with Maximilian I Habsburg, King of Germany, based on which Vladislaus was obliged to pay him 100,000 forints in compensation and also to renounce the Austrian territorial gains made by his predecessor on the Hungarian throne, Matthias Corvinus.

37 *Finkel L.,* Zjazd Jagiellonów w Lewoczy r. 1494, Lwów, 1914, 8-9; Baczkowski K., Habsburgowie i Jagiellonowie w walce o Węgry w latach 1490-1492, Oświęcim, 2014, 167.

congress, the question of war with Turkey remained its central theme. Although the need for defence was undisputed, the debaters differed in their plans for the details of the operation. The Hungarians were trying to avoid allying with Poland, and Stefan Zápolya was even personally interested in not doing this. The reason for this was his fear of John I Albert's rise to prominence and his desire to have a member of his own family on the Hungarian throne. John I Albert, on the other hand, attempted to reclaim Moldavia, bordering on Turkey, from Stephen III, commonly known as Stephen the Great (1433–1504), against Hungarian interests, to entrust it to his brother Sigismund (1467–1548). Although these aspirations were never realised, they alienated the Polish ruler from the Moldavian hospodar and later became one of the reasons for the failure of his expedition against Turkey[38]. Interestingly, the prediction of John of Capistrano came true later that year, although not in the way that had been feared. This is because a Turkish envoy, who arrived in Kraków in 1494, was to be hosted in one of Kraków's townhouses and therefore left sixteen of his camels at the local town hall[39].

According to Marcin Bielski, the king used a ploy to encourage the nobility to support the southern expedition. He was to instruct his trusted subjects to spread the news that the Turks were advancing towards Podolia (Polish: Podole), which belonged to Poland[40]. According to one chronicler, however, it was widely believed that the expedition against Turkey was merely a pretext for John I Albert to invade Moldavia at the head of an army and replace its ruler Stephen III with his brother Sigismund[41]. This would be evidence of the Polish king's unsuccessful attempt to conceal his dynastic ambitions by a military expedition[42]. Formally, the hospodar of Moldavia remained the atenant-in-chief of the crown of the Polish kingdom, but he refused to join John I Albert's campaign immediately. It was only after the arrival of the Polish ruler in Kilia that he declared his willingness to help. The encounter between the royal forces and Stephen III's troops came much earlier, however, as the faithless ally joined the Turkish-Tatar forces already present in Moldavia. In response, John I Albert laid siege to Suceava. After an ineffective siege, a ceasefire was agreed. John I Albert's troops, retreating to Poland, were attacked in one of the ravines and suffered heavy casualties, despite the calm of the ruler, who was ill with fever at the time[43]. This defeat left in the memory of posterity the saying that "under the Albert king, the nobility became extinct" (Polish: "za króla Olbrachta wyginęła szlachta"*)*. In fact, this assessment seems unfair and the extent of the failure has been exaggerated over the years. As a result of the Bukovina expedition, however, the king was to suffer a mental breakdown. He also started getting sick a lot and for a long time[44].

The difficult situation in which Poland and Lithuania found themselves as a result of John I Albert's failure brought their positions closer together, leading to the Vilnius Agreement in 1499[45]. The document provided for concerted cooperation, mutual military assistance and joint participation in

---

38 *Papée F.,* Jan Olbracht, Kraków, 2006, 65-67.

39 *Bielski M.,* Kronika polska Marcina Bielskiego nowo przez Joach. Bielskiego syna jego wydana, Kraków, 1597, 482.

40 Ibid, 484.

41 *Stryjkowski M.,* Kronika polska, litewska, żmódzka i wszystkiej Rusi, vol. II, Warszawa, 1846, 299.

42 *Borzemski A.,* Siły zbrojne w wołoskiej wojnie Jana Olbrachta, Oświęcim, 2019, 15.

43 *Papée F.,* Jan Olbracht, Kraków, 2006, 126, 129, 131.

44 Ibid, 209.

45 *Błaszczyk G.,* Litwa na przełomie średniowiecza i nowożytności 1492-1569, Poznań, 2002, 36.

the election of rulers. However, it is difficult to describe this act as a union, as the two states retained separate rulers. John I Albert's use of the title Grand Duke of Lithuania (*supremus dux Lithuaniae*) had a more symbolic significance[46]. This state of affairs did not change until after the death of the ruler in 1501, when his brother and actual ruler of Lithuania, Alexander Jagiellon (1461–1506), ascended the Polish throne[47]. Even before 1499, however, the relationship between the two brothers was at least a correct one[48].

In 1501, the ambitious John I Albert was still planning a final showdown with the Teutonic Order, whose new Grand Master Frederick of Saxony was refusing to pay tribute and make peace. Perhaps the king's victory in Prussia was an attempt to make up for his failure in the war with Turkey. But this time, too, the ruler was unable to see things through to the end. Although on 8 May 1501 he arrived with his army and cannons in Toruń, from where he sent letters ordering war preparations[49], the cruel fate of John I Albert once again became known. Despite the good chances of success of his well-prepared campaign in Prussia, the king died unexpectedly on 17 June 1501. He was only 41 years old[50].

John I Albert has been the subject of some very harsh judgement by history. The Kraków chronicler Maciej Miechowita (1457-1523), who observed the course of events in which he was involved, even wrote of the fate that weighed on the king at times when he was pursuing his most ambitious goals. A similar assessment was made in the 16th century by Maciej Stryjkowski, who saw John I Albert as a ruler who, despite his boldness and generosity, was not well treated by fate[51]. Even Friedrich Papée, who is reluctant to formulate clear-cut judgements, has noted that the figure of the Polish king is "very difficult to judge". On the one hand, he showed "a sense of preparation and eagerness to act", and the author described him as a "refined warrior", while on the other, he found the ruler "swaying with premature ambition"[52]. The much more critical Franciszek Czerny had already written of John I Albert and his brother Alexander that, as people of "weak character and little energy, […] they failed to improve the lot of a nation threatened by enemies"[53]. Olgierd Górka also offered a less than charitable assessment of the Polish king[54]. In contrast, Henryk Łowmiański emphasised the absence of a realistic perception of the ruler[55].

---

46 *Kolankowski L.,* Jagiellonowie i unja, Lwów, 1936, 20.

47 *Kutrzeba S., Semkowicz W.,* Akta unji Polski z Litwą 1385-1791, Kraków, 1932, 126-130; Kutrzeba S., Historia ustroju Polski w zarysie, vol. II: Litwa, Lwów, 1914, 31-32; a different view is taken: Błaszczyk G., Litwa na przełomie średniowiecza i nowożytności 1492-1569, Poznań, 2002, 36, according to the author, it's possible to speak of the Vilnius Union having been concluded in 1499.

48 *Błaszczyk G.,* Litwa na przełomie średniowiecza i nowożytności 1492-1569, Poznań, 2002, 35.

49 *Szybkowski S.,* Katalog dokumentów i listów królów polskich z Archiwum Państwowego w Gdańsku (Jan Olbracht i Aleksander Jagiellończyk), Gdańsk, 2016, 133.

50 *Papée F.,* Jan Olbracht, Kraków, 2006, 179-180, 207-208.

51 *Stryjkowski M.,* Kronika polska, litewska, żmódzka i wszystkiej Rusi, vol. II, Warszawa, 1846, 313.

52 *Papée F.*, Zagadnienia Olbrachtowej wyprawy z r. 1497, Kwartalnik Historyczny, year XLVII, vol. 1, 1933, 21; Papée F., Jan Olbracht, Kraków, 2006, 199-200.

53 Czerny F., Panowanie Jana Olbrachta i Aleksandra Jagiellończyków (1492-1506), Kraków, 1871, 15.

54 *Górka O.*, Z powodu p. dyr. Fr. Papéego: „Zagadnienie Olbrachtowej wyprawy r. 1497", Kwartalnik Historyczny, year XLVII, vol. 1, 1933, 317.

55 *Łowmiański H.,* Polityka Jagiellonów, Poznań, 1999, 332.

Following the demise of John I Albert, the adage pertaining to his decimation of the nobility was perpetuated for centuries within the collective consciousness of the Polish people. Nevertheless, it was during the tenure of this monarch that its significance was reinforced due to the partitioning of the chamber of parliament, which permitted the local nobility to exert influence over central politics[56]. The king's impetuousness, his willingness to undertake daring challenges and his lack of moderation in everyday life were frequently recalled. However, it was seldom acknowledged that the highly educated John I Albert was a skilled diplomat[57], a capable leader and an energetic and ambitious ruler with an imperialist vision. Furthermore, the monarch enjoyed a cordial relationship with Jagiellonian University and was particularly interested in books, paintings, and music[58]. The efforts to obtain the Crown of Saint Stephen, which ended in defeat at the Battle of Eperjes, or the defeat at the Battle of Cosmin Forest during the Bukovina expedition, are remembered, but the considerable disparity of forces and the prince's courage in the first case and his illness in the second have been forgotten. In the final analysis, the King's premature demise thwarted the realisation of his ambitious designs and precluded his rehabilitation. Had it not been for his death, the fate of the monarch and the state under his rule might have been very different indeed. His dreams of avenging Władysław III of Poland, also known as Ladislaus of Varna, (Polish: Władysław III Warneńczyk), who had been killed by the Turks, had to wait for more favourable times. Miechowita might have been correct in his assertion regarding the misfortune that befell the monarch.

Bibliography:

1. *Baczkowski K.,* Habsburgowie i Jagiellonowie w walce o Węgry w latach 1490-1492, Oświęcim, 2014.
2. *Baczkowski K.,* Państwa Europy środkowo-wschodniej wobec antytureckich projektów Innocentego VIII (1484-1492), Nasza Przeszłość, vol. 74, 1990.
3. *Baczkowski K.,* Polska i jej sąsiedzi za Jagiellonów, Kraków, 2012.
4. *Baranowski B.,* Baranowski K., Historia Gruzji, Wrocław-Warszawa-Kraków-Gdańsk-Łódź, 1987.
5. *Bardach J.,* Ukształtowanie się reprezentacji: posłowie ziemscy, [w:] Historia sejmu polskiego, vol. I: Do schyłku szlacheckiej Rzczypospolitej, editor Michalski J., Warszawa, 1984.
6. *Besala J.,* Tajemnice historii Polski, Poznań, 2003.
1. *Bielski M.,* Kronika polska Marcina Bielskiego nowo przez Joach. Bielskiego syna jego wydana, Kraków, 1597.
7. *Błaszczyk G.,* Litwa na przełomie średniowiecza i nowożytności 1492-1569, Poznań, 2002.
8. *Borzemski A.,* Siły zbrojne w wołoskiej wojnie Jana Olbrachta, Oświęcim, 2019.
9. *Cincadze I.,* Stosunki polsko-gruzińskie w XV-XVII w., Przegląd Orientalistyczny, 1960.
10. *Czerny F.,* Panowanie Jana Olbrachta i Aleksandra Jagiellończyków (1492-1506), Kraków, 1871.

[56] *Bardach J.*, Ukształtowanie się reprezentacji: posłowie ziemscy, Historia sejmu polskiego, vol. I: Do schyłku szlacheckiej Rzczypospolitej, editor Michalski J., Warszawa, 1984, 47-49; *Kaczmarczyk Z.*, Sejmiki ziemskie, Historia państwa i prawa Polski, vol. II: Od połowy XV wieku do r. 1795, *Bardach J. (ed.),* Warszawa, 1966, 119.

[57] A different view is taken: *Borzemski A.,* Siły zbrojne w wołoskiej wojnie Jana Olbrachta, Oświęcim, 2019, 15, 18.

[58] *Papée F.,* Jan Olbracht, Kraków, 2006, 8, 211-212; *Borzemski A.,* Siły zbrojne w wołoskiej wojnie Jana Olbrachta, Oświęcim, 2019, 9.

11. *Dróżdż P.,* Orsza 1514, Warszawa, 2000.
12. *Dziubiński A.,* Stosunki dyplomatyczne polsko-tureckie w latach 1500-1572 w kontekście międzynarodowym, Wrocław, 2005.
13. *Felczak W.,* Historia Węgier, Wrocław-Warszawa-Kraków-Gdańsk-Łódź, 1983.
14. *Finkel L.,* Zjazd Jagiellonów w Lewoczy r. 1494, Lwów, 1914.
15. *Furier A.,* Działania dyplomatyczne II Rzeczypospolitej na Kaukazie. Z historii kontaktów dyplomatycznych Polski z Kaukazem, Przegląd Wschodni, vol. V, No. 3 (19), 1998.
16. *Garbacik J.,* Kallimach jako dyplomata i polityk, Kraków, 1948.
17. *Gołębiowski Ł.,* Dzieje Polski za panowania Kaźmirza, Jana Olbrachta i Alexandra, Warszawa, 1848.
18. *Górka O.,* Z powodu p. dyr. Fr. Papéego: "Zagadnienie Olbrachtowej wyprawy r. 1497", Kwartalnik Historyczny, year XLVII, vol. 1, 1933.
19. *Hensel W., Tabgua I.,* Gruzja wczoraj i dziś, Warszawa, 1976.
20. *Kaczmarczyk Z.,* Sejmiki ziemskie, Historia państwa i prawa Polski, vol. II: Od połowy XV wieku do r. 1795, editor Bardach J., Warszawa, 1966.
21. *Kolankowski L.,* Jagiellonowie i unja, Lwów, 1936.
22. *Kutrzeba S.,* Historia ustroju Polski w zarysie, vol. II: Litwa, Lwów, 1914.
2. *Kutrzeba S., Semkowicz W.,* Akta unji Polski z Litwą 1385-1791, Kraków, 1932.
23. *Łowmiański H.,* Polityka Jagiellonów, Poznań, 1999.
24. *Papée F.,* Jan Olbracht, Kraków, 2006.
25. *Papée F.,* Zagadnienia Olbrachtowej wyprawy z r. 1497, Kwartalnik Historyczny, year XLVII, vol. 1, 1933.
26. *Rogalski L.,* Dzieje księstw nad-dunajskich to jest: Multan i Wołoszczyzny podług dzieł Cogalniceana, Vaillanta, Ubiciniego i Palauzowa, vol. I, Warszawa, 1861.
27. *Romsics I.,* Historia Węgier, Poznań, 2018.
3. *Stryjkowski M.,* Kronika polska, litewska, żmódzka i wszystkiej Rusi, vol. II, Warszawa 1846.
4. *Szybkowski S.,* Katalog dokumentów i listów królów polskich z Archiwum Państwowego w Gdańsku (Jan Olbracht i Aleksander Jagiellończyk), Gdańsk, 2016.
28. *Włodarczyk M.,* Stosunki polsko-gruzińskie w latach 1918-1921, Świat Idei i Polityki, vol. 15, 2016.
29. *Woźniak A.,* Polacy w Gruzji w pierwszej połowie XIX wieku, Niepodległość i Pamięć, No. 11, 1998.
30. *Джавахишвили Н.,* Очерки истории грузино-балтийских взаимоотношений, Riga, 2015 (in Russian).

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.1.2025.9522

Ivaylo Staykov*

Ethics in the activities of the mediator – the legal framework in the Republic of Bulgaria

The scientific study analyzes the provisions of the Bulgarian Mediation Act of 2004 and the Ordinance adopted in 2007 by the Minister of Justice on the procedural and ethical rules governing mediator's conduct. The relevant legal conclusions are made regarding the ethical rules of conduct of the mediator during and after the completion of the mediation procedure, as well as some proposals de lege ferenda.

Keywords: *mediation, mediator, ethical rules, Code of ethics, legal framework, Bulgarian law*

1. Introduction

At the end of 2004, the Mediation Act was adopted (promulgated, State Gazette, Issue 110 of 2004, as amended and supplemented). It is a law on the organization and procedure of mediation, which regulates the matters related to mediation as an alternative out-of-court dispute resolution method, as well as the mediation procedure itself (see Article 1(1)). Article 2 of the law defines mediation (legal definition) as a voluntary and confidential procedure for out-of-court dispute resolution in which a third person – a mediator – assists the disputing parties in reaching an agreement. Pursuant to the statutory delegation under Article 8(4), second sentence of the Act, the Minister of Justice adopted Ordinance No. 2 of 15 March 2007 on the conditions and procedures for approving organisations that train mediators; the requirements for mediator training; the procedures for the entering, de-registering, and removal of mediators from the Unified Register of Mediators and on the procedural and ethical rules governing mediator's conduct (promulgated, State Gazette, Issue 26 of 2007, as amended). Hereinafter, this bylaw will be shirtly referred to as the Ordinance of the Minister of Justice.

Chapter Two and other provisions of the Mediation Act set out the principles of mediation. These are legally enshrined basic guiding principles that convey the most important concepts on which the legal framework of mediation is built. They largely reflect an emanation of the very essence of the mediation procedure and form part of the regulatory framework of this out-of-court method of dispute resolution[1].

The procedural and ethical rules governing the conduct of the mediator, which aim to safeguard their independence, neutrality and impartiality, and thereby ensuring an equal and fair mediation process, are explicitly set out in Chapter IV of the Ordinance of the Minister of Justice. In addition to

---

* Associate Professor, D.Sc. (Legal sciences), New Bulgarian University (Sofia, Bulgaria), Department of Law. ORCID: (0000-0002-0994-0280).

1 See in detail *Стайков Ив.,* Принципи на медиацията. – Правен преглед, 2008, № 1, 91-100.

their nature as ethical conduct rules, they also constitute legal obligations of the mediator, as they are regulated in legal norms.

2. European Code of Conduct for Mediators and European Code of Conduct for Mediation Providers

A European Code of Conduct for Mediators (EECM) has been adopted within the framework of the Council of Europe and endorsed by the European Union. It applies to all types of mediation in civil and commercial matters (§ 1, recital II of the preamble).

This act is not normative in nature; however, it largely reiterates the normative requirements set out in the relevant legislative acts of the member states of the Council of Europe and the European Union. Paragraph 1 of the preamble to the Code explicitly states that it establishes a set of principles that mediators can voluntarily decide to commit themselves, under their own responsibility. Organizations that provide mediation services may also adopt the Code by requiring their mediators to adhere to it. These organizations can also inform others about the measures they take to promote compliance with the Code, such as through training, evaluations and monitoring (§ 2 of the preamble).

The Code of ethics sets out requirements such as: the mediator must be competent and continuously update their theoretical and practical skills in mediation; maintain independence, objectivity and impartiality throughout the mediation procedure; ensure the fairness of the procedure; clarify the mode of remuneration for the mediator's activities and establish the determination of their remuneration.

Paragraph 28 of the Basic guidelines for improving the implementation of the existing Recommendation (99)19 on mediation in criminal matters, adopted by the European Commission for the Efficiency of Justice of the Council of Europe (Strasbourg, 7 December 2007, CEPEJ (2007) 13PROV2) states that, given the growing recognition of the EECM in civil and commercial mediation throughout Europe, it is recommended to draw up a special Code of Conduct, tailored to specifics of mediation in criminal cases. This strong endorsement clearly demonstrates the importance of this code in the effective unctioning of mediation as an alternative, out-of-court dispute resolution method.

In some member states of the Council of Europe and the European Union, practical guides and codes of good conduct for mediators have been adopted (Austria, Great Britain, Hungary, Romania). However, such self-regulation practices for mediators are not yet widespread across all EU member states. Directive 2008/52/EC of the European Parliament and of the Council of the European Union, on certain aspects of mediation in civil and commercial matters, which entered into force on 21 May 2008 (see Art. 4, item 1), recommends that member states adopt appropriate legislative measures to ensure consistency in the concepts, scope, and fundamental principles of mediation (such as confidentiality). It also calls for the development and implementation of voluntary codes of conduct for mediators, as well as other effective mechanisms for overseeing the quality of mediation services. The Directive further stipulates that mediators must be informed about the existence of the EECM, which must be made publicly accessible online (§ 17, in fine of the preamble).

The EECM states that organisations providing mediation services may wish to develop more detailed codes adapted to the specific contexts or the types of mediation services they offer, as well as to specific areas such as family mediation or consumer mediation (§ 5 of the preamble).

The 31st plenary session of the European Commission for the Efficiency of Justice of the Council of Europe (Strasbourg, 3-4 December 2018, CEPEJ (2018) 24) adopted the European Code of Conduct for Mediation Providers. As stated in the preamble to the Code, it is coherent and may be used in conjuction with the European Code of Conduct for Mediators developed in 2004 under the auspices of the European Union, as well as the Council of Europe and the European Commission for the Efficiency of Justice reccommendations, guidelines and other instruments on mediation and alternative dispute resolution methods.

According to the definition in Art. 1 of the Code "Mediation Provider" means any public or private entity (including court-related mediation schemes) which manages or administers a mediation process conducted by a third party neutral mediator regardless of their denomination or profession, who provides service under its auspicies in assisting parties to amicably resolve their dispute.

Article 4 of the Code, titled "Rules and ethics of mediation", states that mediation providers should ensure that they apply the European Code of Conduct for Mediators as a minimum standard in the provision of mediation services. Mediation providers shall abide by the rules and procedures governing their performance and the provision of mediation services, as established by national legislation.

Other provisions of the European Code of Conduct for Mediation Providers also include rules that, to varying degrees, are relevant to the ethical conduct of the mediator.

Like the 2004 European Code of Ethics for Mediators, the 2018 European Code of Conduct for Mediation Providers is not normative in nature. The Legislators of the Council of Europe member states may choose to incorporate the rules of this Code into the relevant national mediation legislation as a basic standard for mediation providers (see § 5 of the preamble).

3. Legal Framework in Current Bulgarian Law

As the mediator is a central figure in the mediation procedure, the procedural and ethical rules for their conduct actually are principles of mediation, shaping the legal characteristics of this alternative dispute resolution method[2]. In carrying out their duties, the mediator is guided by the principles of confidentiality of the information received, neutrality, and impartiality in their interactions with the disputing parties, as well as the voluntariness and equality of the parties throughout the mediation procedure.

a. Mediation is a voluntary procedure, as it begins with mutual consent of the parties, can be terminated at any time by either party and aims to reach a mutually acceptable agreement, the content of which is determined entirely by the parties and cannot be imposed by the mediator. This is an

[2] See in detail *Стайков Ив.,* Медиация по трудови спорове. София: Издателство „Авангард Прима", 2009, 241 с.; *Борисов Б.,* Медиацията в българския граждански процес. *Търново В.:* УИ „Св. св. Кирил и Методий", 2018, 242.

important and fundamental principle that manifests itself from the very beginning to the end of the mediation procedure, taking different dimensions at each stage.

b. Another essential principle and specific feature of mediation is the equality of the parties to the dispute. The principle of equality means that the parties have equal opportunities to participate in the mediation procedure at all stages of its development (Art. 5, first sentence, of the Mediation Act). This principle also has another crucial dimension, related to the legal status of the mediator as a participant in the procedure. Through their conduct during the procedure, the mediator must ensure equality between the disputing parties. In line with this principle, several essential obligations arise for the mediator, most important of all is the obligation of independence, neutrality and impartiality. This is also explicitly stated in principle IV, item 2, clause first of Recommendation No. R (2002) 10 of 18.09.2002 of the Committee of Ministers of the Council of Europe on mediation in civil matters – "mediators should act independently and impartially and ensure respect for equality during the mediation process".

The mediator is neither a judge nor an arbitrator in the dispute. He is a third independent and neutral person in relation to the disputing parties. The mediator's independence and neutrality are most apparent when they manage to remain impartial in relation to the disputing parties and their dispute. The mediator must not demonstrate bias towards any of the parties and must not impose a decision on the dispute (Art. 6, para. 1 of the Mediation Act). This legal position is also fully consistent with principle IV, item 2, second sentence of Recommendation No. R (2002) 10 of 2002, which states that the mediator does not have the right to impose a resolution of the dispute on the parties. The mediator is obliged to create a conducive environment for the parties to the dispute to communicate freely in order for them to improve their relations and reach an agreement (Art. 25 of the Ordinance of the Minister of Justice).

The mediator is obliged to take into account and respect the opinion and requests of each of the parties to the dispute (Art. 10, para. 2 of the Mediation Act and Art. 28 of the Ordinance of the Minister of Justice). None of the participants in the procedure holds a dominant position over the others. A kind of continuation of this idea is the right of the mediator to demand respect from each of the disputing parties. Throughout the procedure, the mediator must do his/her best to ensure that the parties do not feel neglected when discussing the disputed issues. The mediator is obliged not to exert pressure on the parties, as his role is not to judge or arbitrate, but to create an environment conducive to free communication, based on mutual respect for their interests. He can only assist the parties in identifying mutually acceptable options for resolving their dispute and help them reach an agreement that satisfies both of them. For the same reason, he does not have the right to provide legal advice and express an opinion on the dispute (Art. 10, para. 1 of the Mediation Act and Art. 27 of the Ordinance of the Minister of Justice)[3].

[3] Here a very important difference between the mediation procedure and the civil court claim proceeding is revealed. With the adoption of the new Code of Civil Procedure (in force from 01.03.2008), the legislator restored the ex officio principle (principle of judicial activity) as one of the basic principles of the civil process. The ex officio principle, with this content, is inapplicable and inadmissible in the mediation procedure.

The mediator has both the right and the obligation to withdraw and terminate the mediation if, based on his own judgment and ethical considerations, he believes that the procedure is not being conducted in a fair and equitable manner for both disputing parties (Art. 10, para. 3 of the Mediation Act). This is especially true if circumstances arise that cast doubt on the mediator's independence, impartiality, or neutrality. When the procedure is fair and equitable, it is both legal and ethical (see Art. 29 of the Ordinance of the Minister of Justice and Art. 3.2 of the EECM). The possibility for the mediator to withdraw, as provided by law, serves as an important legal guarantee for upholding and effectively applying this fundamental principle of mediation. In such cases, the mediation procedure is suspended under Art. 14, para. 1, item 3 of the Mediation Act, until the disputing parties select a new mediator.

Article 3.2 of the EECM states that the mediator must ensure that all parties have the opportunity to effectively participate in the procedure. The mediator must notify the disputing parties and may terminate the mediation if he considers that the continuation of the mediation procedure is unlikely to lead to a resolution of the dispute or if the agreement to be concluded appears to him to be unenforceable or illegal. Only by respecting the equal rights to participate in the procedure, the mediator may also hold separate meetings with them, which in certain cases are particularly important (Art. 13, para. 4 of the Mediation Act). The mediator holds separate meetings with each of the parties when the conversation between them stalls and there is a serious risk that the procedure will fail. Certain rules must be followed during these meetings. The duration and number of meetings with each party must be the same. The mediator is not permitted to share with the participants information obtained in individual meetings with the parties unless he has the explicit consent of the person who provided it (Art. 10, para. 4 of the Mediation Act).

c. The equality of the parties in a mediation procedure can only be ensured if it is conducted by an impartial mediator. Firstly, the mediator can accept to mediate, provided only he can remain neutral and impartial throughout his participation in the settlement of a given dispute (Art. 30, first sentence of the Ordinance of the Minister of Justice). This is an essential ethical rule of conduct for every mediator and he is obliged to withdraw from the procedure if he shows bias (Art. 10, para. 3 of the Mediation Act). The mediator is not impartial in cases where there are circumstances that could be perceived as a conflict of interest. Therefore, at the very beginning of the procedure – when h introduces himself to the parties, the mediator is obliged to disclose any circumstance that can be perceived as such and may subsequently lead to a conflict of interest (Article 31 of the Ordinance of the Minister of Justice). The obligation to disclose these circumstances also exists throughout the mediation procedure. A conflict of interest exists when the mediator has personal or business (professional) relationship with any of the parties, when there is any direct or indirect material, financial or other interest related to the outcome of the mediation, or when the mediator or a member of his organization has acted in a capacity other than that of a mediator, for the benefit of one of the parties to the dispute (lawyer, legal advisor, business partner, etc.) – see also Art. 2.1 of the EECM.

In the event of a conflict of interest, the mediator may proceed with the procedure only with the express consent of the parties. However, he can withdraw even if there is the slightest doubt about the impartiality of the procedure and considers that, under these circumstances, the mediation would not

proceed in a fair and equitable manner. In order to maintain impartiality during the procedure, the mediator must avoid behavior that would give reason to either of the parties to perceive it as sympathy or antipathy. He must refrain from and should not show prejudice and bias based on the personal qualities of the parties such as ethnic origin or sex, education, social and material status, sexual orientation and others, their past or their behavior during the procedure and other similar circumstances (Art. 30, second sentence of the Ordinance of the Minister of Justice). This is both an ethical rule and an explicit normative prohibition of discrimination of one party to the dispute against the other. This provision is a specific manifestation in the mediation procedure of the general prohibition of discrimination (direct and indirect) under Article 4 of the Protection from Discrimination Act of 2003 (in force from 01.01.2004)[4].

d. According to Article 7, para. 1, first sentence of the Mediation Act, the discussions related to the dispute are confidential. This is a key feature of the mediation procedure and it is no coincidence that it is provided for in Article 2 of the Mediation Act as well.

All international treaties on mediation also set out this important principle. Principle IV, item 3 of Recommendation No. R (2002) 10 of 2002 stated that the information about the mediation process is confidential and cannot be subsequently used, unless with the express consent of the parties or national legislation allows it.

Directive 2008/52/EC of the European Parliament and of the Council of the European Union of 2008, by stating that confidentiality in mediation proceedings is of particular importance, obliges Member States to provide in their national law for a minimum degree of compatibility of civil procedural rules with regard to how to protect the confidentiality of mediation in any subsequent judicial proceedings or arbitration (paragraph 23 of the preamble). Article 7 of the Directive provides that, unless the parties agree otherwise, neither mediators nor those involved in the administration of the mediation process shall be compelled to give evidence in civil and commercial judicial proceedings or arbitration regarding information arising out of or in connection with a mediation process. The Directive enables Member States to enact in their national legislation stricter measures to protect the confidentiality of mediation.

The confidentiality of mediation as a form of dispute resolution gives mediation an advantage over court proceedings. This is a key and fundamental difference between the mediation procedure

[4] See about this problem *Стайков Ив.,* Защита от дискриминация при наемане на работа. – В: Актуални проблеми на трудовото и осигурителното право. Том I. Сборник в памет на доц. Елисавета Христова. София: УИ „Св. Кл. Охридски“, 2004, 128-149; Понятие за дискриминация в трудовите отношения. – Правен преглед, 2005, № 1, 22-42; Забраната за дискриминация и задължението на работодателя да осигурява равни условия на труд (чл. 13, ал. 1 от Закона за защита срещу дискриминацията). – Правата на човека, 2005, № 4, 30-49; Национална правна уредба на забраната за дискриминация в трудовите отношения. – В: Scientific Researches of the Union of Scientists – Plovdiv. Series B. Natural Sciences and the Humanities, Vol. VI – Balkan Conference of Young Scientists, 16-18 June 2005. Plovdiv: Union of Scientists in Bulgaria – Plovdiv, 2006, 203-210; Защита от дискриминация при реализация на дисциплинарната отговорност. – В: Сборник трудове от Юбилейната научна конференция по повод 10 години от създаването на НВУ „Васил Левски“, 14-15 юни 2012 г. Том 5 – Научно направление „Социални, стопански и правни науки“. В. Търново: Издателски комплекс на НВУ „Васил Левски“, 2012, 163-170.

and judicial proceedings. Generally, no minutes are kept during meetings with a mediator. Therefore, when a mediator is replaced with another mediator at the request of the parties, the replaced mediator is obliged to provide his successor with information about the progress of the mediation procedure. However, this does not apply to information received during general and private meetings, unless the parties to the dispute have expressly agreed to this. Mediation sessions are not public (they are held behind closed doors) and generally, the presence of third parties is not allowed. Besides the parties to the dispute and the mediator, third parties may be invited to attend the meeting only if both disputing parties agree so. Article 7, para. 1, second sentence of the Mediation Act explicitly required that participants in the mediation procedure keep secret all circumstances, facts and documents that have become known to them during the procedure, i.e. this obligation refers all possible participants in the procedure.

This principle is the reason for the existence of another important obligation of the mediator – to keep professional secrecy regarding the information received during the procedure. This obligation is enshrined in Article 32 of the Ordinance of the Minister of Justice and in Article 4 of the EECM. The mediator is obliged to keep secret all circumstances, facts and documents that have been entrusted to him or have become known to him in the mediation procedure, including the fact that the mediation will take place or that it has already taken place. In addition, the mediator cannot communicate to the other participants in the procedure circumstances that concern only one of the parties to the dispute, without the express consent of the latter (Art. 10, para. 4 of the Mediation Act). He is also obliged to carefully store the documentation on the cases, taking the necessary measures to protect them from loss, theft, destruction, etc. The same obligation also applies to the mediator's assistants, as well as to the persons he trains. The mediator may not disclose the information he has obtained during the procedure, unless a special law or public order considerations oblige him to do so.

The mediator's obligation to keep professional secrecy continues indefinitely after the termination of his functions as a mediator (Art. 33 of the Ordinance of the Minister of Justice). This obligation goes beyond the specific mediation procedure itself and the legislation takes this into account. As an example, during an inspection or audit by a revenue authority under the Tax-insurance Procedure Code (in force from 2006), the mediator, as a third party, may refuse to provide written explanations regarding facts and circumstances that have come to his knowledge in relation to his activities as a mediator, as he is obliged by law to keep them as a professional secret (see Art. 58, para. 2 of the Tax-insurance Procedure Code). This is also provided for the obligation to testify, or the refusal to testify, in civil court proceeding. According to Article 166, para. 1, item 1, second sentence of the Civil Procedure Code, those who were mediators in the same pending legal dispute can refuse to give testimony. An exception to the confidential nature of mediation is also provided for in the cases given in Article 7, para. 3 of the Mediation Act.

In many European countries, generally, the mediator's obligation of confidentiality is almost absolute. This obligation is of a statutory nature (see the relevant legislation of Germany, Austria, Romania, Slovenia, Sweden, Great Britain). In some cases, after the mediation procedure is completed, the confidentiality obligation becomes relative for public interest reasons. The nature of the subject matter of the mediation – civil or criminal, is of importance for this as well. Here are some

examples from foreign legislations, where the mediator's obligation of confidentiality falls away and the law obliges him to perform certain actions: an obligation to submit a report on the outcome of the mediation to the judge/prosecutor in charge of the case (Germany, Austria, Hungary, Romania); an obligation to inform the judicial authorities if one of the parties fails to perform the final agreement (Sweden); an obligation to testify in court on a crime, attempted crime or preparation for a crime, when these acts are revealed during mediation (Slovenia, Great Britain, Germany).

e. According to Article 13, para. 1 of the Mediation Act, prior to commencing the substantive procedure, the mediator shall inform the parties of the nature of the mediation, the basic rules and principles to be applied in the procedure and its consequences. The mediator must fulfil the obligation to inform the parties at the beginning of the first meeting between him and the parties to the dispute. The mediator shall require the disputing parties to express their consent to participate in the procedure in writing or orally, after having established that they have understood the nature and consequences of the mediation. These obligations of the mediator are also mandated by Article 23 and Article 24 of the Ordinance of the Minister of Justice. The legislation ensures the parties' right to information about the nature of the mediation and their legal rights before they agree to act in the procedure and subsequently to be bound by an agreement reached through mediation. As the role and conduct of the mediator are critically important for the implementation of this principle, it is on him that the law imposes the obligation to inform the disputing parties. Such obligations are provided for in Article 3.1 of the EECM.

4. Good Faith in the Mediator's Activities

Article 9, para. 1 of the Mediation Act mandates that the mediator perform his activity in good faith, in compliance with the law, good morals, proceedings and ethic rules of behaviour of the mediator. The concept of "good faith" in law has two different meanings, both of which originate from Roman law[5].

First, there is the concept of ethical good faith. It serves as a standard for the diligent, honest and fair fulfilment of obligations according to customs, the reasonable man's standard of care and the requirements of the law. This form of good faith reflects social ethics in the performance of contractual and, more bradly, legal obligations. It can be traced back to the concept of "bona fides" in Roman law.

Second, there is the concept of legal good faith, which refers to the subjective belief that a particular claim, possession, behavior or similar act is due and legally valid. Article 9, para. 1 of the Mediation Act pertains to the ethical good faith. Acting in good faith means that the mediator must perform his rights and obligations in good faith, earnestly, honestly, diligently and conscientiously,

[5] See *Андреевv М.,* Римско частно право. 5. изд. София: ДИ „Наука и изкуство", 1975, 47, 119-120, 249-271 и др.; *Schermaier J. M.,* Bona fides in Roman contract law. – In: Good Faith in European Contract Law. Edited by Reinhard Zimmermann and Simon Whittaker, Cambridge University Press, 2000, 63-92; *Дождев Д.В.,* Добросовестность (bona fides) как правовой принцип. – В: Политико-правовые ценности: история и современность. Под. ред. В. С. Нерсесянца. Москва: Эдиториал УРСС, 2000, 96-128.

applying the standard of the care of reasonable man. The mediator must remain impartial, avoid showing bias toward any party, and refrain from imposing a resolution on the dispute. Throughout the mediation procedure, the mediator must preserve the independence inherent to the role and carry out his activities "in compliance with the law". This means to perform his obligations properly: stricltly, timely and in due quantity and quality.

Good morals require that the mediator show due respect to each party, safeguard their dignity and honor, and refrain from discriminating against either side. This understanding of the law is embedded in the mediator's obligation to take into consideration and to respect the view of each party to the dispute (Art. 10, para. 2 of the Mediation Act and Art. 28 of the Ordinance of the Minister of Justice). Another essential rule ensuring that the mediator adheres to good morals is that he must agree to mediate a given dispute only if he has the qualifications necessary to help him facilitate a successful mediation process. Therefore, from the outset, the mediator is obliged to clearly communicate to the disputing parties his qualifications, professional knowledge relevant skills, and his prior experience in mediating similar disputes. In line with this, Article 1.2 of the EECM states that the mediator must ensure that he has the appropriate background and competence to handle mediation in a given case before accepting the appointment. At the request of either party, he must disclose information regarding his background and professional experience. If the mediator lacks the necessary knowledge or skills or they are insufficient or if he lacks professional experience in resolving the given type of dispute, not only the unsuccessful outcome of the mediation seems largely predetermined, but the conflict between the parties is likely to exacerabate.

The mediator must accepts to handle the process only if he can ensure his independence, objectivity, impartiality and neutrality (Art. 9, para. 2 of the Mediation Act and Art. 30, first sentence of the Ordinance of the Minister of Justice). When introducing himself to the parties, the mediator must disclose all circumstances that can be seen as a conflict of interest (Art. 31 of the Ordinance of the Minister of Justice, as well as Art. 2 of the EECM). The existence of circumstances that could give rise to reasonable doubts about the mediator's independence, impartiality and neutrality constitutes valid ground for him to recuse himself and, accordingly, to be recused at the request of the parties.

5. Other Rights and Obligations of the Mediator in his Professional Activities

Finally, it is important to highlight some additional rights and obligations of the mediator established by the law, which although not directly linked to a specific mediation procedure, help outline the broader framework the mediator's professional conduct.

a. The mediator may promote his activity in an appropriate way, but is obliged to refrain from using means that give a false impression of the mediation (see Art. 35 of the Ordinance of the Minister of Justice). According to Article 1.4 of EECM mediators may promote their practice provided that they do so in a professional, truthful and dignified way. It is apparent that along with the rights confered, the legal framework also imposes certain legal obligations on the mediator.

b. According to Article 4, second sentence of the Mediation Act, mediators may form associations for the purpose of carrying out their activities. This provision further develops and specifies the constitutional right to freedom of association of the citizens (Art. 44, para. 1 of the

Constitution of the Republic of Bulgaria). Such associations of mediators aim to protect and promote their common professional interests and to support their activities (see Art. 12, para. 1 of the Constitution of the Republic of Bulgaria). These associations must be properly registered and carry out their activities in accordance with Non-Profit Legal Entities Act (in force from 01.01.2001). Importantly, the exercise of this constitutional right to associate must not result in any conflict of interest among mediators or harm the interests of individuals seeking professional mediation services or those already involved in an ongoing mediation procedure.

c. Every mediator, regardless of having undergone and successfully completed the necessary mediation training, holding the relevant certification and being listed in the unified register of mediators, is obligated to continuously improve his theoretical and practical qualifications in the field of mediation. This duty reflects and expands upon the mediator's fundamental responsibility to remain competent and well-informed about mediation procedures. The obligation for mediators to continuously update their theoretical and practical mediation skills is set out in Article 1.1 of the EECM. This obligation stems from the rules of ethics and good faith, as well as from the requirements for competitiveness in carrying out this responsible activity. Article 11a, para. 1 of the Ordinance of the Minister of Justice provides that mediators can periodically improve their knowledge by undergoing additional theoretical and practical training in specialized mediation. While the legal framework grants the mediator the right to improve his qualifications, it does not impose a legal obligation to do so. In my view, this situation should be reversed, and as a proposal de lege ferenda, the relevant provision should be amended to make such professional development mandatory.

6. Conclusion

Since the adoption of the Bulgarian Mediation Act 20 years ago, it has been amended several times. Two years ago, an unsuccessful attempt was made to introduce mandatory judicial mediation in certain types of disputes. The analysis of the mediator's activity has proven that the ethical aspects of this specific professional activity continue to be relevant and are a constant subject of scientific research.

Bibliography:

1. *Андреев М.*, Римско частно право. 5. изд. София: ДИ „Наука и изкуство“, 1975.
2. *Борисов Б.*, Медиацията в българския граждански процес. Велико Търново: УИ „Св. св. Кирил и Методий“, 2018, 242.
3. *Дождев Д. В.*, Добросовестность (bona fides) как правовой принцип. – В: Политико-правовые ценности: история и современность, под ред. В. С. Нерсесянца. Москва: Эдиториал УРСС, 2000, 96-128.
4. *Стайков Ив.,* Принципи на медиацията. – Правен преглед, 2008, № 1, 91-100.
5. *Стайков Ив.,* Медиация по трудови спорове. София: Издателство „Авангард Прима“, 2009, 241.
6. *Стайков Ив.,* Защита от дискриминация при наемане на работа. – В: Актуални проблеми на трудовото и осигурителното право. Т. I. Сборник в памет на доц. Елисавета Христова. София: УИ „Св. Кл. Охридски“, 2004, 128-149.

7. *Стайков Ив.,* Понятие за дискриминация в трудовите отношения. – Правен преглед, 2005, № 1, 22-42.
8. *Стайков Ив.,* Забраната за дискриминация и задължението на работодателя да осигурява равни условия на труд (чл. 13, ал. 1 от Закона за защита срещу дискриминацията). – Правата на човека, 2005, № 4, 30-49.
9. *Стайков Ив.,* Национална правна уредба на забраната за дискриминация в трудовите отношения. – В: Scientific Researches of the Union of Scientists – Plovdiv. Series B. Natural Sciences and the Humanities, Vol. VI – Balkan Conference of Young Scientists, 16-18 June 2005. Plovdiv: Union of Scientists in Bulgaria – Plovdiv, 2006, 203-210.
10. *Стайков Ив.,* Защита от дискриминация при реализация на дисциплинарната отговорност. – В: Сборник трудове от Юбилейната научна конференция по повод 10 години от създаването на НВУ „Васил Левски“, 14-15 юни 2012 г. Т. 5 – Научно направление „Социални, стопански и правни науки“. Велико Търново: ИК на НВУ „Васил Левски“, 2012, 163-170.
11. *Schermaier M. J.*, Bona fides in Roman contract law. In: Good Faith in European Contract Law, eds. *Zimmermann R., Whittaker S.,* Cambridge: Cambridge University Press, 2000, 63-92.

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.1.2025.9523

Anna Korzeniewska-Lasota*

The Right to Claim Compensation as a Result of Leaving Property beyond the Current Borders of the Poland Republic

The article outlines the issue of financial settlements with citizens of the Polish state, the so-called people from beyond the Bug River, who, as a result of the change in the eastern border that took place after World War II, were forced to leave their homes and resettle. Despite the promise of obtaining equivalent compensation for the property left behind in the new place of settlement, most of those entitled to it did not receive it at all or in an incomplete amount. The process of settling these obligations, initiated in 1944 by the so-called republican agreements, despite the passage of over 80 years, still persists.

***Key words**: Republican Agreements, right to compensation, the Bug River Act*

17 сентября 1939 года, во время обороны от немецкого наступления, начавшегося 1 сентября, Красная Армия вступила на территорию Польши[1]. Взятие восточных территорий Польши[2] привело к ряду событий, которые впоследствии повлекли за собой новое формирование восточной границы польского государства[3]. На основании Договора о польско-советской государственной границе[4], заключенного 27 июля 1944 года, определившего

* Dr. hab. prof. UP, Institute of Law and Administration Pomeranian University in Slupsk.

1 17 сентября 1939 года Красная Армия без предварительного объявления войны вошла на территорию Республики Польша. Нападение на Польшу было частью секретного пакта Риббентропа-Молотова, подписанного 23 августа 1939 года, который Германия и Россия заключили перед началом Второй мировой войны. Białe plamy. ZSRR – Niemcy. 1939–1941. Dokumenty i materiały dotyczące stosunków radziecko-niemieckich w okresie od kwietnia 1939 r. do lipca 1941 r., Вильнюс 1990, 58-59; *Narinskij M.M.,* Przyczyny II wojny światowej. Polska, Związek Sowiecki i kryzys systemu wersalskiego [в:] Białe plamy – czarne plamy. Sprawy trudne w relacjach polsko-rosyjskich (1918-2008), ред. A. D. Rotfeld, A.W. Torkunow, Варшава 2010, 212. См. также: J. Łojek, Agresja 17 września 1939 r., Warszawa 1990 и Zmowa – IV rozbiór Polski, введение и изд. A.L. Szcześniak, Варшава 1990.

2 Шесть воеводств находились под советской оккупацией: Вильнюсское, Новгородское, Полесское, Волынское, Тарнопольское и Станиславовское. Демаркационная линия пересекала три воеводства: Львовское, Варшавское и Белостокское. Однако все Поморское, Познаньское, Лодзинское, Кельцкое, Силезское, Краковское и Люблинское воеводства были включены в немецкую зону. По территории демаркационная линия делила Польское государство более или менее поровну, а по численности населения, поскольку восточные регионы Речи Посполитой были менее заселены, примерно 38% жителей Польши попали под советскую сферу влияния.

3 Об образовании польской восточной границы см. P. Eberhardt, Jak kształtowała się wschodnia granica PRL, „Zeszyty Historyczne" 1989, № 90. Idem, Linia Curzona jako wschodnia granica Polski – geneza i uwarunkowania polityczne, „Studia z Dziejów Rosji i Europy Środkowo-Wschodniej", т. 46. Idem, Polska granica wschodnia 1939-1945, Варшава 1983.

4 Это соглашение не было опубликовано, и его действительность была под вопросом, поскольку созданный в Москве Польский комитет национального освобождения (PKWN) не имел международно-правового статуса для подписания пограничного соглашения от имени польского государства.

прохождение восточной границы государства вдоль так называемой линии Керзона, Польша утратила значительную часть своей территории в пользу бывших советских республик: Украины, Белоруссии и Литвы[5].

Одним из последствий такого расположения границы было переселение польских жителей, правовой основой чего были так называемые республиканские соглашения[6], заключенные в сентябре 1944 года, в частности, 9 сентября – с Украинской[7] и Белорусской[8] республиками, а 22 сентября – Литовской[9].

Эти соглашения, помимо принципов, определяющих порядок и способ переселения, определяли имущественные отношения переселявшегося населения. Оставленное недвижимое имущество должно было „перейти под опеку Советского государства", а возмещение его стоимости должно было осуществляться согласно „страховой цене и законам" польского государства, что означало предоставление решения этого вопроса в рамках польского внутреннего законодательства.

Переселение населения с территорий, вошедших в состав Советского Союза, происходило не только на основании вышеуказанных республиканских соглашений. Эвакуация населения предусматривалась также другими актами, заключенными с советским правительством. К ним относятся:

– Соглашение от 6 июля 1945 года о выходе из советского гражданства лиц польской и еврейской национальности, проживающих в СССР, и их эвакуации в Польшу[10];
– Протокол № 28 заседания смешанной польско-советской комиссии по делимитации границы от 10 апреля 1948 года[11];

См. L. Antonowicz, Status prawnomiędzynarodowy Rzeczypospolitej Ludowej, „Annales Universitatis Mariae Curie-Skłodowska" 2000, sectio G (prawo), т. XLVII, 11.

5 *Eberhardt См. P., Linia* Curzona jako wschodnia granica Polski – geneza i uwarunkowania polityczne, „Studia z Dziejów Rosji i Europy Środkowo-Wschodniej", т. 46, 146-148.

6 О происхождении республиканских систем см. A. Korzeniewska-Lasota, Советско-польские договоры от сентября 1944 г. – начало и заключения обстоятельств, „Miscellanea Historico-Iuridica" 2017, т. XVI, з. 1, 223-240.

7 Архив новых актов, [Archiwum Akt Nowych], МИД в Варшаве, № 610/9, Соглашение между ПКНО (Польским комитетом национального освобождения) и Правительством Украинской ССР об эвакуации польского населения с территории Украинской ССР и украинского населения с территории Польши от 9 сентября 1944 г., 12-19.

8 Ibidem, Соглашение между ПКНО и Правительством Белорусской ССР об эвакуации польского населения с территории Белорусской ССР и белорусского населения с территории Польши от 9 сентября 1944 г., 1–9.

9 Ibidem, Соглашение между ПКНО и Правительством Литовской ССР об эвакуации польского населения с территории Литовской ССР, от 17 сентября 1944 г., 44-52.

10 Архив новых актов, Генеральный Полномочный Представитель Правительства Республики Польша по репатриации [Generalny Pełnomocnik Rządu RP do Spraw Repatriacji], № 522/1, к. 16–17. Соглашение о праве изменения советского гражданства лиц польской и еврейской национальности, проживающих в СССР, и об их эвакуации в Польшу и о праве изменения польского гражданства лиц русской, украинской, белорусской, русинской и литовской национальности, проживающих на территории Польши и об их эвакуации в СССР. О причинах заключения договора см. W. Marciniak, O genezie polsko-radzieckiej umowy repatriacyjnej z 6 lipca 1945 r., „Acta Universitatis Lodziensis. Folia historica" 2013, № 91.

– Соглашение о смене границ, заключенное между Польшей и СССР 15 февраля 1951 года[12];
– Соглашение от 25 марта 1957 года о сроках и порядке дальнейшей репатриации из СССР лиц польской национальности[13].

Как так называемые республиканские соглашения, так и последующие международные акты, указанные выше, создавали обязательства польских властей урегулировать на основе внутреннего законодательства расчеты с польскими гражданами, лишившимися недвижимого имущества в результате изменения восточной границы государства. В договоренностях содержались первые положения, определяющие рамки помощи, которая должна была быть оказана переселенцам. Договоренности гарантировали получение эквивалентной компенсации[14].

Выполняя данное обязательство, польские власти пытались урегулировать этот вопрос в послевоенный период. Первоначально переселившиеся из-за восточной границы граждане, называемые забужанами, получали жилье или сельскохозяйственные участки, правда, не всегда полностью компенсирующие оставленное имущество[15]. Однако за принятием положений не последовало реализации. Получение компенсации в виде приобретения какой-либо недвижимости было достаточно сложным и чаще всего не соответствовало стоимости оставленного

---

11 Архив новых актов, Архив Болеслава Берута [Archiwum Bolesława Bieruta], № 254/ IV–22, 151. Протокол № 28 заседания Смешанной комиссии Польши и СССР по делимитации государственной границы между Республикой Польша и СССР, Москва, 10 апреля 1948 г.,

12 Соглашение от 15 февраля 1951 г. между Республикой Польша и СССР об обмене участками государственных территорий. – Dz. U. [Законодательный вестник] 1951 г., № 11, п. 63. О переселениях, осуществленных в результате заключения соглашения см. A. Wawryniuk, Korekta polsko-ukraińskiej granicy państwowej w 1951 r., Устшики Дольне, „Збірник наукових праць" 1994, № 438; A. Wawryniuk, Wymiana terytoriów przygranicznych Polski i ZSRR w 1951 r., „Krakowskie Pismo Kresowe" 2012, № 4; K. Żabierek, Korekta granicy w 1951 r., „Kwartalnik Stowarzyszenia Łagierników Żołnierzy AK" 2016, № 1.

13 Соглашение между правительством Польской Народной Республики и правительством Союза Советских Социалистических Республик о сроках и порядке дальнейшей репатриации из СССР лиц польской национальности (Dz.U. 1957, № 47, ст. 222). О переселении людей по этому договору см. M. Ruchniewicz, Repatriacja ludności polskiej z ZSRR w latach 1955–59, Варшава 2000, 136–154.

14 С точки зрения возможности получения компенсации за имущество, оставленное за границей, важными положениями были положения ст. 3 раздел 5 и 6 системы.

15 Начиная с 1946 года, законодатель регламентировал вопрос расселения недвижимого имущества за Бугом через так называемый право регистрации, которое позволяет включать стоимость недвижимости, оставленной за пределами восточной границы Польши, в стоимость недвижимости, полученной в стране, чаще всего в цену продажи или плату за бессрочное узуфрукт. Различные варианты этого решения включали: декрет от 6 сентября 1946 г. о системе земледелия и расселения на территории Восстановленных территорий и бывшего Вольного города Гданьска (Dz. U № 49, поз. 279, с изменениями); декрет от 6 декабря 1946 г. о передаче несельскохозяйственной собственности государству на территории Восстановленных территорий и бывшего Вольного города Гданьска (Dz. U. № 71, поз. 389, с изменениями); постановление от 10 декабря 1952 года о передаче государством несельскохозяйственного недвижимого имущества для жилищных целей и для строительства индивидуальных частных домов (Dz. U. № 49, ст. 326).

за границей имущества[16]. В связи с чем лишь небольшой процент лиц, имеющих право на компенсацию, был полностью удовлетворен.

В итоге на протяжении 40 лет существования Польской Народной Республики коммунистическая власть не компенсировала переселившимся лицам потерю имущества в результате изменения восточной границы страны. С течением времени проблема усугублялась, и по мере ослабления коммунистической власти требования забужан звучали все громче и громче. Небольшой перелом наступил в 1985 году, когда был принят Закон об управлении землями и экспроприации[17]. В связи с установленным в нем правом на зачет, заключающимся в зачете стоимости оставленного имущества в счет стоимости купли сельхозугодий или жилья в стране, стали приниматься судебные решения, открывающие большие перспективы для возмещения оставленного за восточной границей имущества. Однако это было только начало долгого пути к окончательному решению проблемы так называемого забужанского имущества.

По сути, трансформация политической системы в Польше, имевшая начало в 1989 году, не привела к каким-либо существенным изменениям. Во-первых, законодатель, несмотря на многочисленные попытки, на протяжении многих лет не мог принять закон, регулирующий вопрос компенсации[18]. Более того, забужанские требования пытались совместить с обязательствами по реприватизации. Законодатель хотел в одном акте урегулировать вопрос имущественных обязательств госказны перед гражданами. Однако эти попытки потерпели фиаско. Из числа множества законопроектов, рассмотренных парламентом после 1989 года, только один был принят. Это произошло в 2003 году, но законопроект не вступил в силу из-за вето, наложенного Президентом.

Во-вторых, право на зачет было сформировано законодательными органами таким образом, что создавало препятствия, делая его иллюзорным. Объем недвижимости, предназначенной для урегулирования для удовлетворения забужанских требований, было настолько ограничено, что государство не смогло выполнить своих обязательств, поскольку не располагало достаточным количеством объектов.

В конечном итоге, первый комплексный закон, регулирующий забужанские права, был принят лишь 12 декабря 2003 года[19]. Закон вызвал недовольство правообладателей, поскольку отходил от принципа полной эквивалентности в пользу компенсации, ограничивающей

---

16 Причины этого были разные: разбросанные и противоречивые нормативные акты, отсутствие имущества, соответствующего оставленному на предыдущем месте жительства, а также требования документально подтвердить факт владения утраченным имуществом.

17 Закон от 29 апреля 1985 г. о землеустройстве и экспроприации недвижимости. – Dz. U.1985, № 22, поз. 99.

18 Начиная с 1990 года в Сейм было подано 15 проектов реприватизации, 12 из них предусматривали реализацию претензий на имущество, оставленное за пределами восточных границ страны. Более подробно: A. Korzeniewska-Lasota, Legislacyjne próby rozwiązania kwestii rozliczenia się za tzw. mienie zabużańskie w latach 1989-2003, „Prawo i Więź" 2020 № 4, 231-251.

19 Закон от 12 декабря 2003 г. о включении стоимости недвижимого имущества, оставленного за пределами нынешних границ Польского государства, в цену продажи или плату за бессрочное пользование недвижимым имуществом, принадлежащим Государственной казне. Он действовал всего 20 месяцев: с 30 января 2004 года по 7 октября 2005 года.

проценты и сумму. Бенефициары закона имели «право на зачет» в размере 15% стоимости оставленной недвижимости, но не более 50 тысяч злотых. В связи с тем, что Конституционный трибунал признал ограничение суммы неконституционным и, следовательно, отменил его, 8 июля 2005 года был принят новый забужанский закон[20]. На этот раз законодатель решил, что сумма возмещения за оставленное имущество составит 20% стоимости утраченного вследствие переселения имущества.

В качестве альтернативы для «права на зачет» закон о компенсации ввел возможность получить денежную компенсацию за забужанскую недвижимость. Данная форма компенсации пользуется достаточно большим интересом. Денежную компенсацию выбирают 99,9 процента всех, кто имеет на это право.

Действующий закон направлен на окончательное завершение процесса урегулирования расчетов, связанных с имуществом, оставшимся за пределами нынешних границ Республики Польша**.** Для достижения этой цели служит решение**,** предполагающее, что положения закона применяются не только к новым делам, а содержащиеся в нем принципы реализации права на компенсацию также распространяются на ситуации, в которых лицо, имеющее свидетельство или решение, подтверждающее право на компенсацию, выданное на основании ранее действовавших постановлений, не реализовало это право или реализовало его частично.

К сожалению, исполнение закона с самого начала сталкивалось с проблемами. Они были разнообразными, часто возникали в связи с упущениями предыдущих лет, а нередко и по причине значительного количества времени, прошедшего с момента событий, послуживших основанием для требования компенсации.

Наиболее весомыми факторами, которые повлияли или продолжают влиять на затягивание процесса выплаты компенсаций, являются: отсутствие оценки масштаба требований, увеличение количества бенефициаров, проблемы, связанные с толкованием положений закона и длительность разбирательств[21].

Одной из кардинальных ошибок, допущенных с самого начала процесса реализации забужанских требований, было отсутствие оценки их масштаба и ведения учета лиц, которые уже удовлетворили свои требования. До 90-х годов не было никакого учета забужанских прав.

Обязанность по созданию центральных и воеводских баз данных по зачету стоимости недвижимости, оставленной за нынешними границами польского государства, было введено законом только 2003 году. К сожалению, информационная система не была создана вовремя, а появилась лишь несколько лет спустя.

Окончательное решение вопроса о забужанских требованиях откладывается также по причине увеличения числа лиц, имеющих право на компенсацию, которое происходит как вследствие изменений в законодательстве, так и в результате судебных решений. В настоящее время на компенсацию имеют право владельцы недвижимости, которые 1 сентября 1939 года

---

[20] Закон от 8 июля 2005 г. об осуществлении права на компенсацию за оставление недвижимого имущества за пределами нынешних границ Республики Польша – Dz. U. 2017 г., поз. 2097. Закон вступил в силу 7 октября 2005 года.

[21] Для получения дополнительной информации см. A. Korzeniewska-Lasota, 15 lat realizacji ustawy zabużańskiej. Próba podsumowania. „Nieruchomości@” 2021, т. I, № 1, 29-45.

были гражданами Польши и проживали на восточной территории Республики Польша, а затем покинули эту территорию и имеют польское гражданство, а также их наследники, обладающие польским гражданством. Наслдниками, имеющими право на компенсацию, могут быть только физические лица – наследники по закону или по завещанию[22].

Немалые трудности в применении закона вызывает также толкование его положений. Это особенно заметно в случае использование закона воеводами как органами первой инстанции.

Однако самой большой проблемой этого процесса является продолжительность разбирательств. Это связано с тем, что они касаются юридических и фактических событий многолетней давности, поэтому, они, как правило, сложные и многоэтапные. Документирование обоснованности претензий требует сбора доказательного материала, находящегося в польских и зарубежных архивах. Получение таких документов – процесс сложный и длительный, а зачастую и невозможный. Значительный промежуток времени, прошедший с момента окончания Второй мировой войны, также затрудняет использование такого средства доказывания, как свидетельские показания, поскольку большинства очевидцев уже нет в живых[23].

Все вышеперечисленные трудности означают, что спустя почти 90 лет после подписания республиканских соглашений и по истечении 19 лет действия забужанского закона, остается группа лиц, все еще ожидающих компенсацию. Можно лишь надеяться, что забужанский закон приведёт к завершению этого процесса. По прогнозам Министерства внутренних дел и администрации, окончательное завершение процесса возмещения должно произойти в 2030 году. А это уже не столь отдаленное время.

Однако уже сейчас можно утверждать, что выбранная в законе модель компенсации в виде денежного возмещения оправдывает себя. И хотя установленный законодателем размер эквивалента в 20% не удовлетворяет забужан, он безопасен для государственного бюджета, а это позволяет постепенно выплачивать компенсации лицам, имеющим на это право.

С момента начала выплат и до конца мая 2024 года было признано в общей сложности более 84 тысяч компенсаций на сумму более 5 миллиардов злотых.

Тем не менее, остается группа лиц, всё ещё ожидающих получения[24]. Если намеченный срок реализации закона, а именно 2030 год, будет соблюден[25], то спустя почти 90 лет после переселения в связи с изменением восточной государственной границы польские граждане, а

---

22 *Korzeniewska-Lasota A.,* Zakres podmiotowy prawa do rekompensaty z tytułu pozostawienia nieruchomości poza obecnymi granicami Rzeczypospolitej. Rekompensata dla osób prawnych?, „Nieruchomości@" 2022, № 4, 97-115.

23 *Korzeniewska-Lasota A.,* Państwo, właściciele i ich spadkobiercy wobec mienia pozostawionego przez obywateli polskich w województwach wschodnich międzywojennej Rzeczypospolitej. Studium historyczno-prawne, Гданьск 2018, 403-435.

24 По состоянию на 30 июня 2024 года воеводам осталось принять решение по 29 188 заявлениям (информацию о заявлениях, которые еще предстоит рассмотреть, воеводы предоставляют дважды в год: 31 декабря и 30 июня). – Информация от 26 августа 2024 г. получена от Министерства внутренних дел и администрации посредством доступа к публичной информации, ссылка на письмо: DBI WODO.06770.2.103.2024.EJ.

25 Министерство внутренних дел и администрации по-прежнему утверждает, что ожидаемой датой завершения разбирательства, подтверждающего право на компенсацию, является 2030 год.

вернее, в связи с истечением времени, их законные наследники получат компенсацию за утраченное тогда имущество.

Резюмируя, Польское государство, понесшее в результате Второй мировой войны достаточно большие потери, было обязано в связи с заключением „республиканских соглашений", подписанных несуверенной государственной властью, нести материальные обязательства, связанные с изменением границ и утратой имущества своих граждан. Это бремя несут по сей день[26]. Признанные законом о реализации от 8 июля 2005 года права на компенсацию за недвижимое имущество, оставленное за пределами нынешних границ Республики Польша (так называемый „забужанский закон"), право на получение 20% стоимости утраченного имущества является свидетельством выполнения обязательств, взятых на себя польским государством в 1944 году в так называемых республиканских договоренностях, гарантирующих польским гражданам возмещение потерь за недвижимое имущество, понесенных в результате переселений, связанных с изменением восточной границы Польши.

Библиография:

1. Закон от 8 июля 2005 г. об осуществлении права на компенсацию за оставление недвижимого имущества за пределами нынешних границ Республики Польша – Законодательный вестник 2017 г., поз. 2097 (Ustawa z 8 lipca 2005 r. o realizacji prawa do rekompensaty z tytułu pozostawienia nieruchomości poza obecnymi granicami Rzeczypospolitej Polskiej – Dz.U. z 2017 r. poz. 2097).
2. Закон от 29 апреля 1985 г. о землеустройстве и экспроприации недвижимости – Законодательный вестник 1985 г., № 22, поз. 99 (Ustawa z 29 kwietnia 1985 r. o gospodarce gruntami i wywłaszczaniu nieruchomości – Dz.U. 1985 r., nr 22, poz. 99).
3. Указ от 10 декабря 1952 года о передаче государством несельскохозяйственного недвижимого имущества для жилищных нужд и строительства индивидуальных индивидуальных домов – Законодательный вестник № 49, поз. 326 (Dekret z 10 grudnia 1952 r. o odstępowaniu przez Państwo nieruchomego mienia nierol- niczego na cele mieszkaniowe oraz na cele budownictwa indywidualnych domów jednorodzinnych – Dz. U. Nr 49, poz. 326).
4. Соглашение от 15 февраля 1951 года между Республикой Польша и СССР об обмене участками государственных территорий – Законодательный вестник 1951, № 11, поз. 63 (Umowa z 15 lutego 1951 r. pomiędzy Rzecząpospolitą Polską a ZSRR o zamianie odcinków terytoriów państwowych – Dz.U. 1951, nr 11, poz. 63).
5. Указ от 6 декабря 1946 г. о передаче государством несельскохозяйственной собственности на территории Восстановленных территорий и бывшего Вольного города Гданьска. – Законодательный вестник № 71, поз. 389, с изменениями (Dekret z 6 grudnia 1946 r. o przekazywaniu przez Państwo mienia nierolniczego na obszarze Ziem Odzyskanych i b. Wolnego Miasta Gdańska – Dz. U. Nr 71, poz. 389 ze zm.)
6. Указ от 6 сентября 1946 г. о системе земледелия и расселения на территории Восстановленных территорий и бывшего Вольного города Гданьска – Законодательный вестник № 49, поз. 279, с

[26] По данным Министерства внутренних дел и администрации, оценочная стоимость остальных претензий по реке Буг составляет около 4 миллиардов злотых.

изменениями (Dekret z 6 września 1946 r. o ustroju rolnym i osadnictwie na obszarze Ziem Odzyskanych i byłego Wolnego Miasta Gdańska (Dz. U. Nr 49, poz. 279 ze zm.)

7. Соглашение между правительством Польской Народной Республики и правительством Союза Советских Социалистических Республик о сроках и порядке дальнейшей репатриации из СССР лиц польской национальности – Dz.U. 1957, № 47, поз. 222). Umowa między rządem Polskiej Rzeczypospolitej Ludowej a rządem Związku Socjalistycznych Republik Radzieckich w sprawie terminu i trybu dalszej repatriacji z ZSRR osób narodowości polskiej (Dz.U. 1957, nr 47, poz. 222).
8. *Антонович Л.*, Международно-правовой статус Польской Народной Республики, «Annales Universitatis Mariae Curie-Skłodowska, 2000, раздел G (закон), том XLVII (Antonowicz L., Status prawnomiędzynarodowy Rzeczypospolitej Ludowej, "Annales Universitatis Mariae Curie-Skłodowska" 2000, sectio G (prawo), t. XLVII).
9. *Белые пятна*, СССР – Германия. 1939–1941. Документы и материалы о советско-германских отношениях в период с апреля 1939 по июль 1941 года, Вильнюс 1990 (Białe plamy. ZSRR – Niemcy. 1939–1941. Dokumenty i materiały dotyczące stosunków radziecko-niemieckich w okresie od kwietnia 1939 r. do lipca 1941 r., Wilno 1990).
10. *Ваврынюк А.*, Исправление польско-украинской государственной границы в 1951 году, Устшики Дольне, «Збірник наукових праць» 1994, № 438 (Wawryniuk A., Korekta polsko-ukraińskiej granicy państwowej w 1951 r., Устшики Дольне, "Збірник наукових праць" 1994, nr 438).
11. *Ваврынюк А.*, Обмен приграничными территориями Польши и СССР в 1951 году, «Краковские письма Кресове» 2012, № 4 (Wawryniuk A., Wymiana terytoriów przygranicznych Polski i ZSRR w 1951 r., "Krakowskie Pismo Kresowe" 2012, nr 4).
12. *Жаберек К.*, Исправление границы в 1951 году, «Ежеквартальный журнал Лагерникской ассоциации солдат Армии Крайовой», 2016, № 1 (Żabierek K., Korekta granicy w 1951 r., "Kwartalnik Stowarzyszenia Łagierników Żołnierzy AK" 2016, nr 1).
13. *Корженевская-Ласота А.*, 15 лет реализации Закона о реке Буг. Попытка подвести итог. «Нерухомось@», 2021, т. 2. Я, № 1 (Korzeniewska-Lasota A., 15 lat realizacji ustawy zabużańskiej. Próba podsumowania. "Nieruchomości@" 2021, t. I, nr 1).
14. *Корженевская-Ласота А.*, Советско-польские договоры от сентября 1944 г. – начало и заключение обстоятельств, "Miscellanea Historico-Juridica" 2017, т. XVI, з. 1 (Korzeniewska-Lasota A., Советско-польские договоры от сентября 1944 г. – начало и заключения обстоятельств, "Miscellanea Historico-Iuridica" 2017, t. XVI, z. 1).
15. *Корженевска-Ласота А.*, Законодательные попытки решения проблему урегулирования так называемого забужанскго имущества в 1989-2003 годах, «Право и Вена» 2020 № 4 (Korzeniewska-Lasota A., Legislacyjne próby rozwiązania kwestii rozliczenia się za tzw. mienie zabużańskie w latach 1989-2003, "Prawo i Więź" 2020 nr 4).
16. *Корженевская-Ласота А.*, Государство, собственники и их наследники имущества, оставленного польскими гражданами в восточных воеводствах межвоенной Республики Польша. Историко-правовое исследование, Гданьск 2018 (Korzeniewska-Lasota A., Państwo, właściciele i ich spadkobiercy wobec mienia pozostawionego przez obywateli polskich w województwach wschodnich międzywojennej Rzeczypospolitej. Studium historyczno-prawne, Gdańsk 2018).

17. *Корженевска-Ласота А.*, Субъективный объем права на компенсацию за оставление недвижимости за пределами нынешних границ Республики Польша. Компенсация юридическим лицам?, «Неручомость@», 2022, № 4 (Korzeniewska-Lasota A., Zakres podmiotowy prawa do rekompensaty z tytułu pozostawienia nieruchomości poza obecnymi granicami Rzeczypospolitej. Rekompensata dla osób prawnych?, "Nieruchomości@" 2022, nr 4).
18. *Лоек Я.*, Агреся 17 сентября 1939 г., Варшава 1990 г. (Łojek J., Agresja 17 września 1939 r., Warszawa 1990).
19. *Марчиняк В.*, О происхождении польско-советского соглашения о репатриации от 6 июля 1945 г., «Acta Universitatis Lodziensis. Folia Historicala», 2013, № 91 (Marciniak W., O genezie polsko-radzieckiej umowy repatriacyjnej z 6 lipca 1945 r., "Acta Universitatis Lodziensis. Folia historica" 2013, nr 91).
20. *Наринский М.М.*, Причины Второй мировой войны. Польша, Советский Союз и кризис Версальской системы [в:] Белые пятна – чёрные пятна. Сложные вопросы в польско-российских отношениях (1918–2008 гг.), ред. А.Д. Ротфельд и А.В. Торкунов, Варшава 2010 (Narinskij M.M., Przyczyny II wojny światowej. Polska, Związek Sowiecki i kryzys systemu wersalskiego [в:] Białe plamy – czarne plamy. Sprawy trudne w relacjach polsko-rosyjskich (1918–2008), ред. A.D. Rotfeld i A.W. Torkunow, Warszawa 2010).
21. *Ручневич М.*, Репатриация польского населения из СССР в 1955-59 гг., Варшава 2000 (Ruchniewicz M., Repatriacja ludności polskiej z ZSRR w latach 1955-59, Warszawa 2000).
22. *Щесняк А.Л.*, Сговор – 4-й раздел Польши, информация и информация, Варшава 1990 (*Szcześniak A.L.,* Zmowa – IV rozbiór Polski, введение и изд. Warszawa 1990).
23. *Эберхардт П.*, Как формировалась восточная граница Польской Народной Республики, «Zeszyty Historyczne», 1989, № 90 (Eberhardt P., Jak kształtowała się wschodnia granica PRL, "Zeszyty Historyczne" 1989, nr 90).
24. *Эберхардт П.*, Линия Керзона как восточная граница Польши – генезис и политические условия, «Очерки по истории России и Центральной и Восточной Европы», т. 46 (Eberhardt P., Linia Curzona jako wschodnia granica Polski – geneza i uwarunkowania polityczne, "Studia z Dziejów Rosji i Europy Środkowo-Wschodniej", t. 46).
25. *Эберхардт П.*, Восточная граница Польши 1939-1945 гг., Варшава, 1983 г. (Eberhardt P., Polska granica wschodnia 1939-1945, Warszawa 1983).

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.1.2025.9524

Łukasz Mirocha*

Mediation and Truth – the Polish Legal Perspective (and beyond)

The article discusses the issue of tensions between the core values of traditional legal proceedings and mediation. The values under study are represented, respectively, by the principle of truth and the principle of amicable dispute resolution. To deepen the considerations regarding these tensions, crucial philosophical concepts of truth are presented. Their usefulness in the fields of law and mediation is analyzed, leading to the conclusion that the classical correspondence theory of truth is suitable for the model of traditional legal proceedings, whereas the pragmatic theory and consensual theory of truth are more easily reconciled with the axiology of mediation. Both theoretical and practical models for addressing the mentioned tension are discussed.

Key words: *mediation, truth, correspondence theory, legal proceeding, conflict of values*

1. Introduction

The classical pattern of legal reasoning consists of three elements. Firstly, we need to establish the facts. Next, it is necessary to choose an accurate legal norm. The third step involves deriving a conclusion from the two previous premises (factual and normative). The scheme can be developed by subdividing each element into more detailed components. For example, establishing a legal premise requires choosing an accurate legal norm, interpreting it, and checking if it is in force[1]. Nevertheless, the three-step pattern constitutes a universal tool for lawyers resolving legal disputes. What is essential to notice is that during a legal proceeding, both parties and the court apply this pattern. Lawyers representing conflicted parties are bonded by their interests, and the court should be unbiased. However, all these agents are interested in establishing the facts. In doing so, they appeal to the truth. Perspectives presented by lawyers representing parties differ, but what is common for them is that they attempt to portray their claims as true, compliant with real events[2]. In the case of mediation, the scheme of legal reasoning can play some role, as one of the arguments in negotiation, but it does not reflect its essence. Mediation does not concentrate on settling facts or norms governing the case. It aims at reaching an agreement between the parties and concluding a settlement. Suppose we wanted to put the essence of mediation into a three-step scheme. In that case, we should recall the established

* PhD, Assistant Professor at the Institute of Law and Administration, Head of Mediation Center in Pomeranian University in Słupsk, Attorney at Law. https://orcid.org/0000-0002-1498-2960.

1 See *Lewandowski S., Malinowski A.,* Logika w procesie tworzenia i stosowania prawa, in: Lewandowski S. (ed.), Logika dla prawników, Wolters Kluwer, Warszawa 2024, 241-248; *Morawski L.,* Wstęp do prawoznawstwa, TNOiK, Toruń 2011, 127-132.

2 I follow the view that only declarative sentences concerning factual findings can be perceived as true or false, not the norms. Norms can be evaluated as right or wrong, binding or not, enforceable or not, but not as true or false.

stances of the parties (their requests), get to their deeper interests, and dig even deeper into their real needs. Reaching the deepest level: real needs can result in finding a solution acceptable for both parties.

Classical legal proceedings focus on establishing the truth. Specific regulations may differ in this field – the common law process of law strongly relies on the parties' activism. In contrast, continental solutions, in general, are less adversarial and encourage courts' activism. In contrast, mediation seems less interested in finding the truth. Nevertheless, nowadays mediation is included in the process of law, which, in my opinion, can result in some tensions, if not to say contradictions, between the principle of truth and the principle of amicable settlement of disputes[3]. In the article, I study the fields of potential tensions and discuss what results can bring about the omission of the truth in dispute resolution.

Firstly, I discuss the concept of truth. I attempt to reconcile fundamental philosophical theories of the truth with the idea of mediation. Secondly, I present the meaning of truth and its role in Polish procedural law. Thirdly, I inquire if there is a real contradiction between the demand of the process of law and mediation. Next, I ask if the regulations concerning legal proceedings provide us with tools limiting mediation's truth indifference.

The reservation that should be expressed here is that I am aware that the claim of "mediation's truth indifference" constitutes a strong thesis. Both mediation practitioners and scholars dealing with the issue usually appreciate the role of truth in the mediation process. The "principle of truth" can be considered part of *bona fide* principle; however, from my perspective, mediation is not targeted at reaching the truth, but at reaching an agreement. It can be said that in mediation, truth plays an instrumental role, whereas in the classical process of law, the role of truth is essential[4].

2. What is "Truth"? Selected Theories of Truth

The concept of truth has been a subject of study since humans began systematic studies, which gave birth to philosophy and subsequently science. Ancient Greek philosophers have paid considerable attention to truth, and Socrates paid the highest price when defending his views on truth. Everyone knows the famous saying "*amicus Plato, sed magis amica veritas*", which means "Plato is my friend, but truth is a greater friend." The saying reflects an approach to truth characteristic of many ancient thinkers (excluding, e.g., sophists, who held a pragmatic and relativist approach to the truth). Philosophy is usually divided into five branches: ontology, epistemology, logic, ethics, and aesthetics. Claiming that each branch of philosophy somehow refers to truth is risk-free. Concepts of truth developed on the ground of philosophy have been adopted by other branches of knowledge, including law.

---

[3] See *Schlee G.*, Mediation and Truth, in: *Härter K.*, *Hillemanns C.*, *Schlee G.* (eds.), On Mediation: Historical, Legal, Anthropological and International Perspectives, Berghahn Books 2020, 116-117; *Dziedziak W.*, Mediation and Fairness of the Decision to Resolve the Dispute, Studia Iuridica Lublinensia vol. XXVII, 3, 2018, 53-54.

[4] See *Załuski W.*, Spór o wartość prawdy w procesie sądowym, Przegląd Filozoficzny – Nowa Seria r. 33: 2024, nr 2 (130), 123-124. Załuski calls this stance "dominant" and contrasts it with the stance presented by the Law & Economics proponents.

Lawyers usually refer to the classical concept of true, so-called correspondence theory, which originates from Aristotle. In other sciences, the theory prevailed over the ages, until the nineteenth and twentieth centuries, when American pragmatists and European logicians started questioning it[5]. In law, the correspondence theory of truth still seems to be the best suited, so that Susan Haack claims that:

> Truth is the property of being true, what it is to be true. Of the umpteen competing philosophical theories of truth, the most plausible are, in intent or in effect, generalizations of the Aristotelian Insight that "to say of what is that it is, or of what is not that it is not, is true." These theories explain truth without reference to what you or I or anyone believes, without reference to culture, paradigm, or perspective.[6]

In brief, the correspondence theory of truth states that a judgement or proposition is true when it corresponds to the facts. Medieval scholastics studying Aristotle put it in a simple maxim: "*veritas est adaequatio rei et intellectus*", which expresses that "truth is the conformity of the thing and the intellect.". Such wording avoids problems of defining concepts like "facts", "reality", "correspond-dence", and also the issue of what is a truth-bearer: belief, judgement, sentence, or proposition. These problems were widely discussed among modern philosophers, which resulted in reforms of the concept of truth.

The pragmatist theory of truth, often identified with William James, Charles Pierce, and John Dewey, claims that truth is what works, is useful, and pays off. It is clearly an oversimplified view of pragmatists' stance; however, it reflects the crucial point of their theory – utilitarian inclination. Another modern theory of truth, which still "believes" in truth, is the coherence theory. According to its proponents, truth is what stays coherent with other beliefs. Cohesion among the set of beliefs constitutes the criteria of truth. The coherence theory seems adequate for evaluating normative systems, which are expected to be consistent; however, it was also applied to claims that *prima facie* are of an empirical nature. The pragmatist stance and coherence theory can play a complementary role to correspondence theory; each theory's results can support the other one's results. Beliefs that are evaluated based on their coherence can be built upon empirical data, which passes the test of *adaequatio rei et intellectus*; correspondence and cohesion can enhance usefulness. Contemporary logic provides us with other theories that seem less fitted to the field of legal discourse. For instance, the redundancy theory refrains from investigating what the truth is, and concentrates on the question of what the meaning of the words "is true" is[7].

---

5 *Dobrzeniecki K.*, "Prawo do prawdy" w perspektywie filozoficznoprawnej. Przyczynek do dyskusji, Przegląd Prawa i Administracji 122, 2020, 78.

6 *Haack S.*, Truth, Truths, "Truth", and "Truths" in the Law, Harvard Journal of Law & Public Policy vol. 26, no. 1, 2003, 17.

7 See *Walker R. S.*, Theories of Truth, in: *Hale B.*, *Wright C.*, *Miller A.* (eds.), A Companion to the Philosophy of Language, Second Edition, John Wiley & Sons Ltd, 2017; *Raatikainen P.*, Truth and Theories of Truth, in: *Stalmaszczyk P.*(ed.), The Cambridge Handbook of the Philosophy of Language, Cambridge University Press, 2021.

Beyond the five main theories of truth (the correspondence theory, the coherence theory, and the pragmatic, redundancy, and semantic theories), the so-called consensual theory of truth exists. Proponents of it (e.g., Jürgen Habermas) argue that what is true is what could potentially be agreed upon by the participants of an ideal, free communication, guided by principles of reason and argumentation. The truth does not rely upon an individual's conviction or correspondence between the facts and claims about them. It results from a hypothetical discussion conducted in specific conditions designed by proponents of this theory. The consensual theory of truth seems better suited to normative, social controversies than theoretical, descriptive discourse. It is easy to imagine applying this deliberative mechanism when social disputes appear. However, it does not fit into scientific queries, in which correspondence theory has a significant advantage.

At first glance, the consensual theory of truth appears coherent with mediation's value hierarchy, as agreement is prioritized above other issues. Nevertheless, it should be stressed that real-world mediation does not resemble the artificial communicative situation described by Habermas. An ideal communicative situation is a hypothetical model with a normative character – it shows how communication should look, not how it actually occurs. Principles of *bona fide* negotiation, possession of complete and adequate information, rationality of agents, and other positive factors are desired in mediation; however, this desire has only a normative foundation and does not necessarily reflect real-world circumstances. Furthermore, mediation typically involves the discussion between two individuals, sometimes represented by professional proxies, under the guidance of a mediator, rather than a discourse with an unlimited number of participants. These differences should make us cautious when identifying mediation with the consensual theory of truth. An agreement-oriented inclination in mediation draws our attention to the pragmatic theory of truth. If the agreement is effective, why should anyone care about the correspondence between claims and reality?

Before an attempt to answer this question, it is worth mentioning the so-called post-truth problem and looking closer at the concept of truth represented in the legal sphere.

The classical liberal view of truth as a value of social life claimed that truth can defend itself. The free market of ideas was considered a better mechanism for truth's protection than the state's involvement, so censorship was condemned by classical liberals like John S. Mill. Criminalization of hate speech and propaganda of totalitarian or authoritarian views, as significant exemptions from the free speech principle, was perceived as a necessary instrument for maintaining the liberal order. Technological development, particularly in the field of new internet media, challenges the abovementioned stance, and provokes the question of whether truth deserves greater concern than before. Law is considered a tool supporting stricter protection of the truth in public discourse, especially in the face of the fact that new media can spread fake news at a speed never seen before[8]. Considering how easily an agreement or claim about usefulness can be built upon a false basis, the

[8] See Rosemary Overell, Brett Nicholls, *Introduction: Post-truth and the Mediation of Reality*, in: Rosemary Overell, Brett Nicholls (eds.), *Post-Truth and the Mediation of Reality. New Conjunctures*, Palgrave Macmillan 2019; *Dobrzeniecki K.*, "Prawo do prawdy" w perspektywie filozoficznoprawnej. Przyczynek do dyskusji, Przegląd Prawa i Administracji 122, 2020, 79-84. Fake news can significantly affect public discourse and private life matters, e.g., an individual's approach to vaccination.

question of correspondence between things and judgements has growing importance. In consequence, the classical theory of truth deserves its revival.

3. Truth (and other values) in Polish Legal Proceedings

Even the brief discussion on the significance of truth in modern social life indicates that procedural law, despite its clear connection to truth, is not the sole branch of law that addresses and ought to address this value. In its preamble, the Polish Constitution of 1997[9] mentions truth as the first item in the catalogue that also includes justice, good, and beauty. These four values are the first mentioned in the Polish Constitution. The truth also plays an essential role in branches of law dealing with the past, e.g., cases of war crimes, but the right to true information is also guaranteed in many other contexts[10].

Still, procedural law is the branch where truth plays the most significant role, stemming from the fundamental assumption that decisions regarding the parties in the proceedings should be based on accurate factual findings.

All three basic branches of Polish procedural law, civil, criminal, and administrative, incorporate mediation into their processes. Additionally, all three branches uphold the principle of truth. Significantly, none of the legal acts dealing with procedural law directly mentions the principle of truth. The Polish Code of Criminal Procedure[11] appears to be the closest to naming the principle and indicating it directly; its article 2 section 2 states: "The basis of all decisions should be accurate factual findings." The Polish Code of Civil Procedure[12] states in article 3 that: "The parties and participants in the proceedings are required to perform procedural acts in accordance with good practice, to provide explanations regarding the circumstances of the case truthfully and without concealing anything, and to present evidence." Paper editions of the Code, as well as publishers of electronic legal systems, mistakenly refer to this provision as "the principle of material truth." However, it is clear that the provision is addressed only to the parties of the proceedings, not to the court. Therefore, it can only be a part of the mentioned principle. The Code of Administrative Procedure[13] does not even use the words "truth" or "true". Article 7 of this act, which is perceived as wording the principle of truth states "In the course of proceedings, public administration authorities shall uphold the rule of law and, ex officio or at the request of the parties, undertake all actions necessary to thoroughly clarify the facts of the case and to resolve the matter, taking into account the public interest and the legitimate interests of citizens." The principle of truth is regarded as essential for all legal procedures in Poland. However, it

---

9 Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r., Dz.U.1997.78.483 z dnia 1997.07.16.

10 *Dobrzeniecki K., "Prawo do prawdy" w perspektywie filozoficznoprawnej. Przyczynek do dyskusji, Przegląd Prawa i Administracji 122, 2020, 74-77; Synoradzki M.*, Cztery rozumienia prawdy w polskich tekstach prawnych, Journal of Modern Science 4/19/2013, 457-464.

11 Ustawa z dnia 6 czerwca 1997 r. Kodeks postępowania karnego, Dz.U.2025.46 t.j. z dnia 2025.01.15.

12 Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego, Dz.U.2024.1568 t.j. z dnia 2024.10.23.

13 Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego, Dz.U.2024.572 t.j. z dnia 2024.04.15.

arises from the entire body of regulations governing these areas, not from a single specific provision. It is decoded from the shape of many different clauses[14].

Polish legal doctrine differentiates between three concepts of truth: objective, formal, and material truth[15]. The concept of objective truth characterizes Polish administrative procedure; both civil and criminal procedures nowadays recall material truth as the desired ideal[16]. The principle of material truth places a burden on the court to investigate the truth. In contrast, the formal truth principle coexists with the legal process's adversarial model. It assumes that the court should rely on the evidence provided by the parties, accepting what stems from that evidence as true[17]. Despite the legal reforms aimed at making both civil and criminal procedures more adversarial, the principle of material truth remains recognized as prevailing in Poland.

It should be emphasized that the principle of truth, however understood, is not the only principle underpinning Polish law procedures and is not an absolute principle. Provisions of civil and administrative procedures require the court to encourage parties to reach an amicable settlement (article 10 and article 13, respectively). Many trade-offs outline the shape of procedural laws[18]. The tension between the principle of truth and the principle of amicable dispute resolution is one of them.

4. How to Resolve the Controversy? Theoretical Stances

Assuming there is tension between the principle of truth governing legal proceedings and the principle of amicable dispute resolution that reflects the nature of mediation, we should analyze possible solutions to this problem. We can imagine the following solutions: 1) introducing truth into the mediation process and admitting that facts should not be negotiated (facts inclusive stance), 2) abandoning any claims about facts (past events) and focusing on the pragmatic solution to the problem (facts excluding stance).

In their book on negotiation, Polish scholars Jerzy Stelmach and Bartosz Brożek argue that parties in negotiations should respect factual findings. This suggestion is founded on the distinction

---

14 See Tadeusz Zembrzuski, *Prawda jako wartość sprawiedliwego procesu*, Przegląd Sądowy 7–8/2023, 7-9.

15 The concept of "material truth" is also present in German legal doctrine, see *Schlee G.*, Mediation and Truth, in: *Härter K.*, *Hillemanns C.*, *Schlee G.* (eds.), On Mediation: Historical, Legal, Anthropological and International Perspectives, Berghahn Books 2020, 116.

16 See *Synoradzki M.*, Cztery rozumienia prawdy w polskich tekstach prawnych, Journal of Modern Science 4/19/2013, 454-456; Tadeusz Zembrzuski, *Prawda jako wartość sprawiedliwego procesu*, Przegląd Sądowy 7–8/2023, 9-10.

17 *Andrzej Marciniak,* referring clearly to Aristotelian definition of truth elucidates, that: "In proceedings based on the principle of substantive truth, *the court's findings regarding the factual and legal state of the case should correspond to reality*. In proceedings based on the principle of formal truth (also referred to as judicial truth), the court's findings regarding the factual and legal state of the case should correspond only to the factual and evidentiary material presented by the participants in the proceedings.", *Marciniak A.*, Zasady postępowania cywilnego, in: *Broniewicz W.*, *Marciniak A.*, *Kunicki I.*, Postępowanie cywilne w zarysie, Wolters Kluwer, Warszawa 2023, 72.

18 See *Załuski W.*, Spór o wartość prawdy w procesie sądowym, Przegląd Filozoficzny – Nowa Seria r. 33: 2024, nr 2 (130), 124-125.

between theoretical (descriptive) discourse, which can be assessed with criteria of truth, and practical (normative) discourse, which can be evaluated using other criteria such as rightfulness, usefulness, or economic effectiveness. The boundary between the two discourses should remain distinct; negotiations should be confined to practical discourse; facts are not to be negotiated but settled[19]. The view presented by Stelmach and Brożek has a normative nature itself; it does not reflect the picture of real-world negotiations, but expresses how they understand negotiations and distinguish them from other forms of communication. Günther Schlee claims that:

> Mediation takes place in the context of negotiation. Two or more parties who are involved in a conflict ask a mediator to help them reach an agreement. The mediator then has to reconcile their perceptions of what is at stake, to assess the interests of the parties and to find a compromise. Truth, on the other hand, has a definite ring of non-negotiability and hostility to compromise. The 'truth' that is negotiated is not credible; the truth that is based on a compromise is compromised.[20]

Both Stelmach, Brożek, and Schlee appear to share the stance indicated above as the primary solution to the discussed tension issue. They advocate for incorporating truth into the mediation process and acknowledge that facts should not be subject to negotiation.

The second stance assumes that the facts are merely another factor that can disrupt the process of reaching consensus. Mediation parties can quarrel over facts, values, norms, and solutions. Eliminating one area of disagreement should facilitate reaching a solution. Furthermore, establishing the facts is the most costly part of legal proceedings, so forgoing factual findings equates to fulfilling one of mediation's most significant promises – its cost-effectiveness. The "facts excluding stance" focuses on the future, forgetting the past, while the "facts inclusive stance" tends to build the future on the past, where the past must be settled according to truth.

The second stance appears tempting: it eliminates areas of dispute, it is cheaper, and is future-oriented. What are its weaknesses, then? Why are facts and truth so crucial?

Literature offers numerous examples that demonstrate the importance of taking truth seriously in the process of mediation. These examples include individual disputes as well as extensive political conflicts.

Blake Quinney, Michael Wenzel, and Lydia Woodyatt examined the role of truth in victim-offender mediation. Their study included an empirical investigation concerning the issue. They conducted three independent studies, one of which relied on actual victim of crime surveys, while in the other two, participants were asked to imagine that they were victims of a crime. They concluded that a comprehensive understanding of the facts surrounding a crime had a significant influence on victims:

---

19 *Stelmach J.*, *Brożek B.*, Negocjacje, Copernicus Center Press, Kraków 2022, 30.

20 *Schlee G.*, Mediation and Truth, in: *Härter K.*, *Hillemanns C.*, *Schlee G.* (eds.), On Mediation: Historical, Legal, Anthropological and International Perspectives, Berghahn Books 2020, 116.

> The offer and acceptance of an apology are among the most important outcomes of victim–offender mediation. The present research found that focusing on the completeness (vs. incomepleteness) of knowledge caused participants who imagined crime to report greater apology readiness, apology completeness, and apology satisfaction. When participants were actual crime victims, focusing on the completeness (vs. incompleteness) of knowledge caused them to report significantly greater apology completeness (but not apology readiness or apology satisfaction). These findings point to the importance of bringing the full truth to light in victim–offender mediation for achieving effective justice restoration after wrongdoing.[21]

Günther Schlee analyzes instructive examples of non-truth-based mediation in African countries, concluding that: "Different as the cases we have examined may be, the logic of mediation plays a role in all of them, and is detrimental to truth. The pacifying effect of mediation, which sacrifices truth, is often short lived."[22] His concern is based on the observation that abandoning the truth can lead only to a *modus vivendi*, but not to a lasting solution to the problem. Many cases concerning transitional justice reveal similar conclusions about the importance of truth in mediation and the dangers of creating temporary solutions[23].

5. How to Resolve the Controversy? The Approach of Polish Law

As already mentioned, the principle of truth is not the only one in Polish proceedings and has no absolute character. It is sometimes portrayed as an ingredient of other principles, e.g., in its deep connections with justice[24]. Polish lawmaker applies many different methods of balancing principles in tension. There are two main instruments of their conciliation when it comes to the principle of truth and the principle of amicable dispute resolution.

Firstly, the mediation process is voluntary. Article 183(1) section 1 of the Code of Civil Procedure states explicitly: "Mediation is voluntary." The court can refer the parties to mediation at any stage of the proceedings; however, under article 183(8): "Mediation is not conducted if a party does not consent to mediation within one week from the date the decision referring the parties to mediation is announced or delivered to them." The mediation participant is also entitled to resign from the mediation at any stage. Similar regulation is placed in the Code of Criminal Procedure; its article

---

21 *Quinney B.*, *Wenzel M.*, *Woodyatt L.*, The Role of Truth in Victim-Offender Mediation: Victims of Crime Who Feel They Know the "Whole" Truth Are More Receptive to Apologies, Law and Human Behavior, Vol. 48, No. 3, 2024, 243.

22 *Schlee G.*, Mediation and Truth, in: *Härter K.*, *Hillemanns C.*, *Schlee G.* (eds.), On Mediation: Historical, Legal, Anthropological and International Perspectives, Berghahn Books 2020, 129.

23 See *Dobrzeniecki K., "*Prawo do prawdy" w perspektywie filozoficznoprawnej. Przyczynek do dyskusji, Przegląd Prawa i Administracji 122, 2020, 74; *Quinney B.*, *Wenzel M.*, *Woodyatt L.*, The Role of Truth in Victim-Offender Mediation: Victims of Crime Who Feel They Know the "Whole" Truth Are More Receptive to Apologies, Law and Human Behavior, Vol. 48, No. 3, 2024, 230-231.

24 See *Dziedziak W.*, Mediation and Fairness of the Decision to Resolve the Dispute, Studia Iuridica Lublinensia vol. XXVII, 3, 2018, 50-53.

23a section 4 states: "The participation of the accused and the victim in mediation proceedings is voluntary. Consent to participate in the mediation process is obtained by the authority referring the case to mediation or by the mediator, after explaining to the accused and the victim the objectives and principles of the mediation process and informing them of their right to withdraw consent at any time until the mediation proceedings are concluded." Voluntary character of mediation is also emphasized by the Code of Administrative Procedure (article 96a section 2).

There are provisions in Polish law that aim to encourage parties in proceedings to utilize mediation; however, it remains voluntary. This means that everyone has the ability to decide whether to participate in mediation or not. *Volenti non fit iniuria* is the principle upon which mediation's participation is based. If someone values truth more than agreement, or for other reasons expects that a truth-based proceeding better suits his needs, he is entitled to go through traditional court proceedings. This method of resolving the truth–agreement controversy does not resemble a genuine trade-off; rather, it depends on the free choice of the parties involved. At this point, there is no situation where truth benefits at the expense of amicable dispute resolution, or *vice versa*.

The second solution works in a more "trade-off manner." Under article 183(14) of the Code of Civil Procedure, the enforceability of the settlement agreed upon before the mediator depends on its confirmation by the court. By virtue of section 3 "The court refuses to grant an enforcement clause or to approve a settlement concluded before a mediator, in whole or in part, if the settlement is contrary to the law or to principles of community life, or if it aims to circumvent the law, as well as when it is unclear or contains contradictions." There are four premises allowing the court to refuse its approval: 1) contrary to the law, 2) contrary to principles of community life, 3) the law's circumvention aim, and 4) technical aspects of the settlement that make it impossible to enforce.

The premise of "contrary to the law" should not be interpreted in such a way that the proceeding concerning settlement approval is equivalent to deciding the case. As one of the Polish courts asserted: "The review of the admissibility of a settlement concluded before a mediator may not consist of a substantive examination of the case."[25] The proceeding conducted under article 183(14) of the Code of Civil Procedure should not be regarded as replacing a substantive proceeding. However, it is easy to imagine a situation in which the court, based on substantial facts of the case, refuses to confirm the settlement. Such a decision could be based on obviously false factual findings agreed upon by the participants of the mediation.

What should be emphasized is that the court may act as a guardian of truth and public interest when refusing to approve the settlement. A settlement agreed upon before mediation is the most cost-effective and quickest way to obtain an executive title in the Polish legal context. For instance, it serves as an easy tool for incurring false debts to initiate execution proceedings merely to evade the claims of actual creditors. In such a situation, if discovered, the court is permitted to deny its confirmation of the settlement. The court upholds truth and public interest. The risk of detecting fraudulent intentions is higher in court-ordered mediations because the court has access to the case documents; it is much lower in private mediations, where the settlement and motion to approve it may be the only documents reviewed by the court.

[25] Decision of the Court of Appeal in Poznań dated 14 January 2014, I ACz 2163/13, LEX nr 1416238.

6. Conclusions

Traditional legal proceedings are truth-oriented enterprises. This claim should not be understood as equating truth with the only absolute value of the process. Procedural regulations balance various values, including truth. In contrast, mediation appears to be an agreement-oriented activity, where truth can play a role, but it is predominantly instrumental. Contemporary legal proceedings incorporate mediation into their framework, which may create tensions between the principle of truth and the principle of amicable dispute resolution.

Polish procedural regulations seldom refer directly to truth. However, it is uncontroversial to claim that the principle of truth is one of the fundamental principles in legal processes. When seeking a philosophical basis for the principle of truth, we should consider the classical correspondence theory of truth, according to which a claim is true when it corresponds to the facts. Legal doctrine distinguishes between objective, material, and formal truth, but these distinctions are based on the methods leading to truth and the competencies of subjects involved in legal proceedings, rather than the ontological status of truth. A closer look at the theories of truth reveals that there are some philosophical stances on the concept of truth that seem to comply with the axiology of mediation. Pragmatic and consensual theories of truth are the best candidates for definitions of truth that are compatible with mediation. These theories are, however, not particularly useful in the area of traditional legal proceedings.

From a theoretical standpoint, there are two polar solutions to the problem of tension between the contradictory demands of the processes of law and mediation. The first, which I call the truth-including stance, states that we should take facts and truth into account when mediating. According to this stance, facts cannot be negotiated; factual findings must be settled, not agreed upon. The second, the truth-excluding stance, treats facts as another area of dispute that should be marginalized and omitted during negotiations of pragmatic solutions. Facts and truth are not necessary in the process of reaching an agreement.

The Polish law legislator addresses the issue of the aforementioned tension in a different manner. Firstly, Polish regulations do not mandate mediation. This means that parties involved in the proceedings can choose whether or not to participate in mediation, during which the truth may not be considered a primary value. Secondly, Polish courts have the authority to examine whether a settlement proposed by a mediator is not contrary to the law, aims at circumventing the law, or violates the principles of community life. This means that the outcome of mediation must at least pass a basic test of truth.

Bibliography:

1. Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r., Dz.U.1997.78.483 z dnia 1997.07.16.
2. Ustawa z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego, Dz.U.2024.572 t.j. z dnia 2024.04.15.
3. Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego, Dz.U.2024.1568 t.j. z dnia 2024.10.23.
4. Ustawa z dnia 6 czerwca 1997 r. Kodeks postępowania karnego, Dz.U.2025.46 t.j. z dnia 2025.01.15.

5. *Dobrzeniecki K.*, "Prawo do prawdy" w perspektywie filozoficznoprawnej. Przyczynek do dyskusji, Przegląd Prawa i Administracji 122, 2020.
6. *Dziedziak W.*, Mediation and Fairness of the Decision to Resolve the Dispute, Studia Iuridica Lublinensia vol. XXVII, 3, 2018.
7. *Haack S.*, Truth, Truths, "Truth", and "Truths" in the Law, Harvard Journal of Law & Public Policy vol. 26, no. 1, 2003.
8. *Lewandowski S.*, *Malinowski A.*, Logika w procesie tworzenia i stosowania prawa, in: *Lewandowski S.* (ed.), Logika dla prawników, Wolters Kluwer, Warszawa 2024.
9. *Marciniak A.*, Zasady postępowania cywilnego, in: *Broniewicz W.*, *Marciniak A.*, *Kunicki I.*, Postępowanie cywilne w zarysie, Wolters Kluwer, Warszawa 2023.
10. *Morawski L.*, Wstęp do prawoznawstwa, TNOiK, Toruń 2011.
11. *Overell R.*, *Nicholls B.*, Introduction: Post-truth and the Mediation of Reality, in: *Overell R.*, *Nicholls B.* (eds.), Post-Truth and the Mediation of Reality. New Conjunctures, Palgrave Macmillan 2019.
12. *Quinney B.*, *Wenzel M.*, *Woodyatt L.*, The Role of Truth in Victim-Offender Mediation: Victims of Crime Who Feel They Know the "Whole" Truth Are More Receptive to Apologies, Law and Human Behavior, Vol. 48, No. 3, 2024.
13. *Raatikainen P.*, Truth and Theories of Truth, in: *Stalmaszczyk P.* (ed.), The Cambridge Handbook of the Philosophy of Language, Cambridge University Press, 2021.
14. *Schlee G.*, Mediation and Truth, in: *Härter K.*, *Hillemanns C.*, *Schlee G.* (eds.), On Mediation: Historical, Legal, Anthropological and International Perspectives, Berghahn Books 2020.
15. *Stelmach J.*, *Brożek B.*, Negocjacje, Copernicus Center Press, Kraków 2022.
16. *Synoradzki M.*, Cztery rozumienia prawdy w polskich tekstach prawnych, Journal of Modern Science 4/19/2013.
17. *Walker R. S.*, Theories of Truth, in: *Hale B.*, *Wright C.*, *Miller A.* (eds.), A Companion to the Philosophy of Language, Second Edition, John Wiley & Sons Ltd, 2017.
18. *Załuski W.*, Spór o wartość prawdy w procesie sądowym, Przegląd Filozoficzny – Nowa Seria r. 33: 2024, nr 2 (130).
19. *Zembrzuski T.*, Prawda jako wartość sprawiedliwego procesu, Przegląd Sądowy 7-8/2023.

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.1.2025.9525

Natia Chitashvili*

Safeguarding Self-Determination in Family Mediation: Ethical Challenges of Power Imbalance and Violence**

The paper explores the ethical dilemmas in family mediation with particular focus on issues of power imbalance and domestic violence. Mediation is presented as a voluntary process grounded in party autonomy and self-determination, yet the study reveals that disparities in resources, knowledge, cultural background, and emotional capacity often undermine these foundational principles. The scope of analysis is broad, examining both structural imbalances – such as financial inequality, legal representation, and informational asymmetry – and personal dynamics, including fear, persuasion, or moral superiority, that may distort the exercise of free will. The discussion situates these challenges within comparative ethical frameworks, referencing the Georgian Law on Mediation, the Code of Ethics for Mediators, and the U.S. Model Standards of Conduct.

A central conclusion is that not every imbalance of power justifies the termination of mediation. Instead, termination should remain an ultima ratio, employed only when the mediator's strategic interventions cannot restore equality of conditions. The study highlights various tools available to mediators, including private caucuses, involvement of independent professionals, and structured questioning, which may help mitigate imbalances and preserve informed decision-making. However, the presence of violence introduces a distinct and non-negotiable ethical threshold. The research emphasizes that mediation cannot proceed when fear, intimidation, or abuse deprive a party of genuine autonomy. In such contexts, confidentiality is limited by overriding duties to protect health, life, and the best interests of the child.

Ultimately, the paper argues that mediators are not passive facilitators but bear a dual responsibility: to uphold neutrality and impartiality, while also safeguarding the ethical integrity of the process. By balancing these obligations, mediation can remain both a credible and ethically defensible alternative to adjudication.

Key words: *Mediation, Family mediation, Ethics, Power imbalance, Domestic violence, Self-determination, Neutrality, Confidentiality*

1. Introduction

Mediation has become a widely recognized method of alternative dispute resolution, valued for its flexibility, confidentiality, and emphasis on consensual outcomes. Unlike adjudicative processes,

* Doctor of Law, Associate Professor at Ivane Javakhishvili Tbilisi State University Faculty of Law, Executive Director of National Centre of Alternative Dispute Resoluion, member of Executive Council of Mediators Association of Georgia, member of Contemporary Private Law, Member of Georgian Bar Association Ethic Committee, Mediator. ORCID: (0000-0002-5050-0711).

** The work is based on the monograph: *Chitashvili N.,* Foundations of Mediation Ethics, (Tbilisi: Meridiani Press), 2024, 1-599 (in Georgian).

which impose binding judgments, mediation rests upon the principles of voluntariness, party self-determination, and autonomy. These features render mediation particularly suitable for disputes of a personal or relational nature, such as those arising in the context of family law, where the preservation of ongoing relationships and the protection of children's welfare are often of paramount concern. However, precisely because mediation relies so heavily on the free will of participants, the process is uniquely vulnerable to ethical dilemmas when an imbalance of power between the parties or the presence of domestic violence undermines the possibility of meaningful self-determination.

The concept of power imbalance in mediation extends far beyond mere economic inequality. Disparities may stem from differences in legal knowledge, rhetorical ability, social standing, or cultural authority, and in many cases they manifest as asymmetries in psychological resilience or emotional stability. In family law disputes, these disparities often acquire acute significance, since one party's ability to dominate negotiations may directly affect not only the interests of the weaker party but also those of children and other dependents.[1] Where coercion, intimidation, or fear are present, voluntariness is compromised, and mediation risks devolving into a forum of capitulation rather than genuine consensus. This raises the critical ethical question of whether, under such conditions, mediation can or should proceed.

Particularly complex dilemmas emerge when mediators encounter circumstances of domestic violence. While mediation practice standards emphasize the mediator's neutrality regarding the substantive outcomes of disputes, neutrality does not extend to the safety of participants or the protection of children. The recognition of domestic violence – defined not only as physical abuse but also as patterns of control and intimidation – triggers obligations of training,[2] screening, safety planning, and in many jurisdictions, mandatory reporting. The challenge for mediators lies in balancing the principle of confidentiality, which constitutes a cornerstone of mediation, with the imperative to prevent harm and safeguard vulnerable parties.

Legal frameworks across jurisdictions adopt varied approaches to these dilemmas.[3] In some systems, such as Georgian law, mediation is expressly prohibited in cases involving domestic violence, while in others, participation is permitted provided that mediators are specially trained and appropriate safeguards are in place. The United States Model Standards of Conduct for Mediators, for instance, authorize mediators to withdraw from the process when continuation would jeopardize fairness, safety, or the integrity of the process. These divergent approaches highlight a broader tension

---

1 On power imbalance in family law disputes see: *Ribot J.,* Mediated and Non-mediated Separation Agreements, Some Comments on the Spanish Regional Laws on Family Mediation, in: *Martin-Casals M.,* The Role of Self-determination in the Modernisation of Family Law in Europe, International Society on Family Law, Peticio, 2006, 177; *Parkinson L.,* Family Mediation, Appropriate Dispute Resolution in a New Family Justice System, 2nd ed., 2011, 264-271.

2 On this issue see: *Irving H.H., Benjamin M.,* Family Mediation, Contemporary Issues, Sage Publications, United States of America, 1995, 205.

3 *Kuźmicz M.M.,* Equilibrating the Scales: Balancing and Power Relations in the Age of AI, AI & Society, Springer, 2024, 1-18 <https://doi.org/10.1007/s00146-025-02300-2> [16.05.2025]. The paper explores how legal tools can address power asymmetries to preserve autonomy- and when more drastic measures may be necessary. It discusses mechanisms like financial support, information obligations, rights, participatory design, and law enforcement to counterbalance dominance

between the autonomy of mediation as a process and the public interest in preventing coercion and violence.

This paper examines these dilemmas in depth, focusing particularly on family mediation. It considers the nature and consequences of power imbalance, the principle of party self-determination, the limits of mediator intervention in providing information, and the ethical challenges surrounding confidentiality and disclosure in cases of suspected domestic violence. By situating these issues within both domestic legislation and international standards of practice, the study seeks to illuminate the extent to which mediation can remain an ethically viable forum for dispute resolution under conditions of inequality and potential harm. Ultimately, the analysis underscores that while mediation aspires to embody autonomy and voluntariness, its legitimacy depends upon careful safeguards to ensure fairness, safety, and genuine consent.

2. Challenges Related to Power Imbalance

Power imbalances is an unavoidable part of life, and hence an unavoidable part of mediation.[4] Generally, power is the ability to achieve specific desired outcomes and derives from control over resources or events.[5] Mediation, by its very nature, is a voluntary process founded upon personal recognition, party self-determination, and autonomy.[6] Consequently, situations that involve an imbalance of power between the parties may present the mediator with serious ethical challenges. The divergence of power (asymmetry) may in certain instances be so radical that achieving procedural fairness, equality, or the aim of informed decision-making by the parties becomes unattainable. In such circumstances, even the voluntariness of participation in mediation may be called into question. At such moments, mediation may prove unequivocally detrimental to one of the parties and to the practice of mediation as a whole. This gives rise to the critical question of whether the mediation process can be continued and, if so, to what extent.[7]

---

4 *Dunlop N.,* Mediation Power Imbalances: Weighing the Arguments, October 12, 2018, <https://mediate.com/mediation-power-imbalances-weighing-the-arguments/?utm_source=chatgpt.com> [16.05.2025].

5 *Kuźmicz M.M.,* Equilibrating the Scales: Balancing and Power Relations in the Age of AI, AI & Society, Springer, 2024, 15 <https://doi.org/10.1007/s00146-025-02300-2> [16.05.2025].

6 *Nolan-Haley J.M.,* Court Mediation and the Search for Justice through Law, Washington University Law Quarterly, Vol. 74-47, 1996, 57; *Boyle A.,* Self-determination, Empowerment and Empathy in Mediation: Rehumanising Mediation's Effectiveness, The Newcastle Law Review, Vol.15, January 2020, 38; Joint Committee of Delegates, 1994, Standard 1; American Bar Association, 2001, Standard 1; *Kovach, K.K., Love, L.P.,* "Evaluative" Mediation is an Oxymoron. Alternatives, CPR Institute for Conflict Resolution. Vol.14, Iss. 3, 1996; *Folberg J., Milne A. L., Salem P.,* Divorce and Family Mediation, Models, Techniques and Applications, The Guilford Press, New York, London, 2004, 429; *Capulong E.R.C.,* Mediation and the Neocolonial Legal Order: Access to Justice and Self-Determination in the Philippines, Ohio State Journal of Dispute Resolution, Vol. 27:3, 2012, 641-682, <https://scholarworks.umt.edu/cgi/viewcontent.cgi?article=1084&context=faculty_lawreviews> [25.08.2025].

7 For the discussion on this issue see: *Brandon M., Field R.,* An Analysis of the Complexity of Power in Facilitative Mediation and Practical Strategies for Ensuring a Fair Process, The Arbitrator & Mediator, 39(1), 2020, 33 and the following.

Conversely, under conditions of asymmetrical power, mediation may, in certain respects, prove especially beneficial, insofar as it provides an environment that supports the autonomy of the parties and the expression of free will, thus operating as both a facilitating and encouraging mechanism.[8] At the same time, it must be acknowledged that power asymmetry, in many cases, inherently and naturally characterizes human relations. Therefore, not every imbalance of power can be considered as constituting an unconditional ground for termination of the mediation process. Termination of mediation represents the ultimate recourse (*ultima ratio*), which is to be employed only where, notwithstanding procedural fairness and the mediator's strategic and tactical interventions, ensuring equal conditions for self-determination remains unattainable.[9] Where the imbalance of power is manageable and the ethical integrity of the process is preservable, safeguarding the mediation process must remain the paramount objective.[10]

2.1. The Nature of Power Imbalance

In family law disputes, disparities of power between the parties merit particular consideration, as the consequences of such matters often extend beyond the parties themselves and directly affect the well-being of others. *"In such a case, it must be assessed how fundamental the power imbalance is, and the comparative risks and advantages of considering the matter in mediation as opposed to other dispute resolution processes must be weighed."*[11]

For purposes of assessing the mediability of a case, it is of primary importance to identify the source of power advantage.[12] Such advantage may derive from lacking good-faith, strength of legal case, financial resources, property,[13] or the ability to obtain costly expert or legal services, including for the purposes of litigation.[14] A party deprived of such resources – for instance, where one party is represented by a qualified attorney,[15] while the other is limited to a single free legal consultation from

---

8 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 98.

9 On the Prerequisites for the Termination of Mediation see: *Davis A. M., Salem R. A.,* Dealing With Power Imbalances in the Mediation of Interpersonal Disputes, Mediation Quarterly Issue: 6 Dated: December 1984, 17-26.

10 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 87.

11 Ibid, 94.

12 For a detailed discussion on this issue, see: Gewurz I.G., (Re)Designing Mediation to Address the Nuances of Power Imbalance, 19 Conflict Resol.Q. 2001, 135-162.

13 How power imbalance can affect the divorce mediation process, On Behalf of Canfield Madow Law Group, PLLC | Jan 9, 2025. Article is focused on divorce mediation and underscores how financial disparity can pressure weaker parties into unfavorable terms – highlighting the need for mediator assistance before outcomes become unjust.

14 About other sources of power imbalance see: *Dunlop N.,* Mediation Power Imbalances: Weighing the Arguments, October 12, 2018, <https://mediate.com/mediation-power-imbalances-weighing-the-arguments/?utm_source=chatgpt.com> [16.05.2025].

15 On the ethical dilemmas arising from a party's participation in mediation without legal representation, see: Nolan-Haley J.M., *Court Mediation and the Search for Justice through Law*, Washington University Law Quarterly, Vol. 74-47, 1996, 69.

a public service center – will be less likely to experience negotiations under conditions of equality or within a secure environment. The sense of vulnerability is further aggravated in adversarial proceedings, where the presentation and evaluation of legal evidence determine the outcome of the case. In such circumstances, the party may become motivated to avoid the financial burden of litigation and thereby be "compelled" to reach compromise through mediation.[16]

Mediators must be aware of a lack of good faith by any participant which can also be seen as a power imbalance. This can constitute a reason to terminate the mediation. Name calling during the mediation and/or in private session needs careful intervention to make sure the receiver of such language or putdown is not unnecessarily impacted by such behaviour and use of language. The impact of language on each party in the communication exchange needs to be something that is constantly monitored and assessed by the mediator.[17]

The imbalance may also arise from a lack of time or other resources. Where a party, fearing the absence of sufficient time or alternatives,[18] adopts an unconsidered decision,[19] mediation cannot tolerate such an outcome.

Similarly, an imbalance may emerge from disparities in knowledge, intelligence[20] information, or precise data. A party with expert knowledge or business experience in the field relevant to the dispute naturally enjoys an advantage in negotiation and in anticipating the outcomes of litigation.

In addition, one party may possess an advantage owing to a stronger legal position that is reinforced by statutory law and consistent judicial practice, thereby ensuring greater prospects of success in litigation. This factor may compel the weaker party to reach compromise during mediation, while the stronger party may exploit this position to demand substantial concessions.

Another source of imbalance may be the conviction of moral or legal superiority. A party firmly persuaded of its own correctness and moral advantage is more inclined to persuade the other side and exert influence by moral arguments, perceiving agreement on particular terms as a matter of principle. Such a party is more inclined toward inflexibility and regards the compromise of the opposing party as a moral imperative. Similarly, personal qualities and skills in negotiation and argumentation may create imbalance.[21] Eloquence, logical reasoning, empathy, analytical capacity, and determination may obscure the weakness of one's legal position. A persuasive negotiator or a representative with advanced advocacy skills may gain advantage over a less perceptive counterpart, while a negotiator lacking rhetorical ability may surrender genuine interests when confronted with a party possessing

---

16 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 94.

17 *Brandon M., Rachael Field R*., An Analysis of the Complexity of Power in Facilitative Mediation and Practical Strategies for Ensuring a Fair Process, Resolution Institute, March, 2020, 47.

18 On this issue see: *Picard C.A.,* Mediating Interpersonal and Small Group Conflict, The Golden Dog Press, Ottawa Canada, 2002, 131.

19 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 97.

20 *Spencer D., Brogan M.,* Mediation Law and Practice, Cambridge University Press, 2007, 233.

21 *Davis A. M., Salem R. A.,* Dealing With Power Imbalances in the Mediation of Interpersonal Disputes, Mediation Quarterly Issue: 6 Dated: December 1984, 17.

debate-level rhetorical skill. Such an outcome cannot be regarded as an expression of genuine autonomy.

The factor of fear also deserves emphasis. It is unacceptable for a woman, in divorce proceedings, to take destructive decisions concerning property or custody under fear of an abusive spouse. A compromise under such conditions is not genuine settlement but capitulation induced by fear, which would not occur absent violence or fear of retribution. Similarly, the ability to inflict pain or irritation may shape the dynamics of negotiation. A party threatening to prolong proceedings in a harmful or unpleasant litigation process may provoke the other side to avoid court in light of its negative consequences.[22] Yet, long adversarial proceedings may bring grave harm even to the party with the stronger legal position, including breaches of confidentiality, reputational damage, discrediting of professional standing, deterioration in quality of life, and emotional trauma.

Even where a party lacks a strong legal position, considerable resources, or the real capacity to cause harm, that party may attempt to create the perception of advantage by convincing the other that it enjoys such benefits and could wield its power effectively.[23] Finally, informational imbalance must be addressed. Where one or both parties are unable to comprehend the consequences of agreement or non-agreement, this stands in contradiction with the very aims of mediation. If the mediator, within the scope of ethical competence, is unable to ensure party self-determination, termination of the mediation process becomes the necessary recourse. The mediator cannot personally ensure or guarantee self-determination. Code of Ethics of Mediators of Georgia only reinforce the mediator's duty to promote self-determination through competent, proper, and conscientious conduct of the process, which implies the use of various strategic-tactical and procedural-methodological mechanisms for the purpose of encouraging self-determination.[24]

In this broader context, religious and cultural considerations assume particular significance. In certain cultures, for example, consent to divorce is granted by the husband.[25] The mediator must be acutely aware of their own cultural foundations as well as those of the parties, and of the divergences between them, without adopting the role of judge in such matters.[26] Equally pressing is the question of how a mediator should act when parties from, for instance, an Asian cultural background reach an agreement that is troublingly vague, or how the mediator should respond when presented with a manifestly one-sided settlement, such as when an unemployed woman renounces her entitlement to financial benefits in favor of her husband during divorce proceedings.[27]

Scholarly discourse has raised concerns that mediation does not always serve the best interests of women, who typically possess fewer economic resources and are more inclined than men to reach

---

22 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 94.

23 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 94-95.

24 Article 4 of the Code of Ethics of Mediators of Georgia – Promotion of Self-Determination.

25 *Abramson H.,* Crossing Bor ossing Borders int ders into New Ethical T o New Ethical Territory: Ethical Challenges y: Ethical Challenges When Mediating Cross-Culturally, S. Tex. L. Rev., Vol. 49, 921, 2008, 924.

26 Ibid.

27 Ibid.

compromise for the sake of their children, thereby becoming more vulnerable to opportunistic manipulation.[28] Some commentators argue that women are exploited in mediation, just as there are cases in which women and men alike have suffered harm at the hands of courts or unscrupulous attorneys. Yet, there exists little empirical evidence suggesting that women perform worse in mediation than in adversarial litigation. On the contrary, the majority of studies indicate that men and women alike express comparable satisfaction with mediation as a dispute resolution process. Moreover, women frequently report that mediation is beneficial, as the opportunity to confront their spouse within this framework enhances their sense of agency and knowledge.[29]

2.2. Party Self-Determination

The essence of mediation lies in the fact that it is not a process binding the will of parties in conflict, but rather one that grants them the opportunity to adopt, of their own accord, the most appropriate resolution to their conflictual situation. In this context, party self-determination must be ensured in order to safeguard against any illegitimate influence upon their free will, whether from the mediator or from the opposing party involved in the process.[30] The parties must be guaranteed a free environment within mediation, one in which they are able, independently and without fear or undue influence, to reach a decision based upon their own volition and through the process of negotiation.[31]

Party self-determination (*self-determination*) has been recognized as a fundamental principle of mediation.[32] Although this principle has long been acknowledged as one of the foundational values of mediation, to this day there is no universal consensus regarding the precise scope and substance of the principle itself.[33] Where a decision is adopted on the basis of relevant information and with an understanding of its content, such a decision may be deemed an informed decision, and the

---

28 *Schepard A.,* An Introduction to the Model Standards of Practice for Family and Divorce Mediation, Fam. L. Q. a, Vol. 35, 2001, 16.

29 Ibid, 17.

30 On defining the ethical limits of acceptable deception in mediation, see: *Cooley J. W., Defining the Ethical Limits of Acceptable Deception in Mediation*, Pepp. Disp. Resol. L.J., Vol. 4, Iss. 2, 2004, <https://digitalcommons.pepperdine.edu/drlj/vol4/iss2/8> [15.06.2025]. In this source, deception is generally defined as 'a persuasive activity in which the art of selective presentation is used,' and it is influenced by two main behaviors: concealing the real and presenting the false.

31 *Kandashvili I.,* Judicial and Non-Judicial Forms of Alternative Dispute Resolution on the Example of Mediation in Georgia, Tbilisi, 2018, 72, (in Georgian) <http://press.tsu.ge/data/image_db_innova/Kandashvili%20Irakli.pdf> [15.06.2025].

32 *Bartlett F., Mortensen R., Tranter K.,* Alternative Perspectives on Lawyers and Legal Ethics, Reimagining the Profession, Routledge Research in legal Ethics, London and New-York, 2011, 207; *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass, A Wiley Imprint, United States of America, 2011, 12; Model Standards of Conduct for Mediators, 2005, Standard I (1); *Shin C.P.,* Drafting Agreements as an Attorney-Mediator: Revisiting Washington State Bar Association Advisory Opinion 2223, Wash. L. Rev., 2014, 1040; *Kakoishvili D.,* Ethical Obligations of a Mediator in the Mediation Process, Tbilisi, 2020, 9 (in Georgian) <http://www.library.court.ge/upload/46302020-12-01.pdf> [15.06.2025].

33 *Kakoishvili D.,* Ethical Obligations of a Mediator in the Mediation Process, Tbilisi, 2020, 10 (in Georgian) <http://www.library.court.ge/upload/46302020-12-01.pdf> [15.06.2025].

manifestation of will by the party may be considered an informed expression of will.[34] Critics, however, question the use of mandatory mediation, particularly in disputes where the parties are unrepresented by counsel. In such circumstances, the concern arises as to whether these parties, without legal representation, are able to make an informed choice with respect to the proposed conditions and whether they are sufficiently shielded from the influence of the opposing party.[35]

Since, in court-annexed mediation, the achievement of agreement by the parties is from the outset an expectation of the judiciary, such expectation often extends to the mediator as well. This institutional "pressure" creates risks for the autonomy of the parties' will and the full realization of their right to self-determination, and it undermines the mediator's central obligation – namely, to encourage and safeguard the process of party self-determination.[36] In family disputes, the mediator bears obligations both toward the parties and toward the quality of the process. Any external pressure existing outside the mediation process must not influence the mediator or compel them to persuade the parties to settle.[37]

Party self-determination, mediator neutrality, and the mediator's limitation in providing professional advice are interdependent elements, which often shape the boundaries of the mediator's role and involvement in the mediation process.[38] Any interference by the mediator in the right of self-determination must remain strictly limited and be duly justified. The principle of self-determination must extend to all aspects of mediation, and any intervention in this right can be legitimate only where justified by a legitimate purpose.[39]

The principle of party self-determination is also recognized in the Law of Georgia on Mediation, Article 3[40] of which declares that mediation is founded, inter alia, upon the principle of self-determination of the parties.[41] The provision is declaratory in character and does not specify the concrete forms in which such self-determination may be expressed. Nonetheless, the principle finds reflection throughout various articles of the law. Article 8 of the Law of Georgia on Mediation establishes the rules governing the conduct of mediation. The article provides that the mediator may conduct mediation through both joint sessions with the parties and through individual communication. This arrangement serves precisely to ensure that the party, whether in joint or separate meetings with the mediator, is able to engage in self-determination and to reach a decision in accordance with their

---

34 Ibid, 12.

35 Ibid, 4.

36 Ibid, 10.

37 Model Standards of Practice for Family and Divorce Mediation, Association of Family and Conciliation Courts (AFCC), 2000, Standard I (A) and (E).

38 *Chitashvili N.,* The Scope of Regulation of Mediation Ethics and the Addressees Bound by Ethical Standards, Journal of Law, №1, 2016, 30 (in Georgian) https://tsu.ge/assets/media/files/8/Publications/Sam-Journ-N1-2016G.pdf [16.05.2025].

39 *Kakoishvili D.,* Ethical Obligations of a Mediator in the Mediation Process, Tbilisi, 2020, 11-12 (in Georgian) <http://www.library.court.ge/upload/46302020-12-01.pdf> [15.06.2025].

40 Law of Georgia on Mediation, Legislative Herald of Georgia, No. 4954-Iს, 18/09/2019, Article 3.

41 For a more comprehensive discussion of these principles, see: *Chitashvili N., Bichia M., Barnabishvili G., Gatserelia A., Egnatashvili D.* in: *Kandashvili I. (ed.), Commentary on the Law of Georgia on Mediation*, "Universali", Tbilisi, 2024, 56-96 (in Georgian).

own interests. The same article also states that, for the purpose of conducting effective mediation, the mediator is authorized to request the parties to provide any additional information during the process. This rule constitutes another practical means of ensuring party self-determination under conditions in which the mediator lacks the authority to offer advice or express personal opinions. The principle of self-determination obliges the mediator to invite the parties to present additional information, thereby strengthening their ability to adopt decisions that are free, independent, and informed.[42]

The principle of self-determination is likewise reflected in the first standard of the 2005 Model Standards of Conduct for Mediators of the United States.[43] This standard defines self-determination as the act of reaching a voluntary and coercion-free decision, in which each party exercises free and informed choice with respect to both the process and its outcome.[44]

Within doctrine, it is widely accepted that the right of party self-determination is considerably broader than the principle of freedom of contract existing within civil law. Satisfaction derived from a mediated settlement, from the opportunity to express and understand emotions, and from the exercise of self-determination itself reflects the parties' gratitude toward the neutral third person who has assisted them in reaching a decision that embodies their free will. Thus, the promotion of party self-determination by the mediator entails not merely securing the parties' consent to the terms of the agreement, but also ensuring that they are able to identify and realize their authentic will.[45]

Since the substantive aim of mediation is to provide the parties with the possibility of a free, genuine, and value-reflective choice, the existential foundation of mediation lies in ensuring that party agreements are grounded in deeply understood values and preferences and remain unimpeded by external factors that may restrict or obstruct the free manifestation of will.[46] Among such external obstacles is the imbalance of power, the identification and neutralization of which constitutes a core responsibility of the mediator. In family cases, the principle of party self-determination assumes particular importance. The prevention of uninformed decision-making represents one of the mediator's foremost duties.

2.3. The Scope of the Mediator's Duty to Inform the Parties

Where a party lacks adequate knowledge concerning the subject matter under mediation, to what extent is the mediator authorized to provide that party with relevant legal, financial, or technical

---

42 *Kakoishvili D.,* Ethical Obligations of a Mediator in the Mediation Process, Tbilisi, 2020, 14 (in Georgian) <http://www.library.court.ge/upload/46302020-12-01.pdf> [15.06.2025].

43 Model Standards of Conduct for Mediators, American Arbitration Association, American Bar Association, and the Association for Conflict Resolution, adopted in 1994, revised in 2005, https://www.adr.org/sites/default/files/document_repository/AAA-Mediators-Model-Standards-of-Conduct-10-14-2010.pdf [16.06.2025].

44 *Kakoishvili D.,* Ethical Obligations of a Mediator in the Mediation Process, Tbilisi, 2020, 10 (in Georgian) <http://www.library.court.ge/upload/46302020-12-01.pdf> [15.06.2025].

45 *Chitashvili N.,* Specific Features of Certain Ethical Obligations of the Lawyer-Mediator and the Necessity of Regulation, Journal of Law, №2, 2016, 50 (in Georgian).

46 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 96.

information, or even to offer advice?[47] In such circumstances, the mediator's duty of neutrality and impartiality[48] stands in tension with the duty to facilitate informed decision-making by the parties.[49]

If the imbalance between the parties is generated by informational deficiency, the mediator must indicate the necessity of obtaining additional consultation[50] and of involving independent specialists in the process.[51] Alternatively, and upon the request of the parties, the mediator may, within the scope of their knowledge and competence, provide relevant information while respecting the principle of impartiality and professional ethics.[52] For instance, *"if in a divorce case a parent refuses to pay child*

---

47 The standards distinguish between advice individually provided by the mediator (whether legal or therapeutic in nature) and the provision of general information to the participants. *"In accordance with the standards of impartiality and the preservation of party self-determination, a mediator may provide participants with information for which the mediator is qualified by training or experience."* Accordingly, a mediator who is also a lawyer may provide legal information to the participants, while a mediator whose professional background is in mental health may provide information within their field of qualification. In all such cases, impartiality and neutrality must be maintained.See: *Schepard A.*, *An Introduction to the Model Standards of Practice for Family and Divorce Mediation, Family Law Quarterly,* Vol. 35, 2001, 14-15.

48 *What is neutrality, and how does it change depending on the context? To what extent should the parties control the structure of mediation or the role of the mediator? How transparent should the mediator be in relation to how they are perceived by the parties and the likelihood of reaching a settlement? Can a mediator deceive the disputing parties or distort information if such distortion may increase the chances of reaching an agreement? Each of these questions relates to the ethics of the mediator's role and serves as an example of how complex and responsible this field of work is. See: Peppet S. R., ADR Ethics, Journal of Legal Education, Vol. 54, 2004, 77, <https://scholar.law.colorado.edu/articles/501> [15.06.2025]; Smith-son J., Barlow A., Hunter R.,* Ewing J., *The Moral Order in Family Mediation: Negotiating Competing Values, Conflict Resolution Quarterly, Vol. 35, No. 2, 2017, 174,* <https://onlinelibrary.wiley.com/doi/epdf/10.1002/crq.21195> *[15.06.2025].*

49 *Chitashvili N., The Scope of Regulation of Mediation Ethics and the Subjects Bound by Ethical Standards, Journal of Law, No. 1, 2016, 31* (in Georgian) <https://tsu.ge/assets/media/files/8/Publications/Sam-Journ-N1-2016G.pdf> *[16.05.2025].*

50 Mediation Council of Illinois, Standards of Practice for Mediators, 1999, Standard I Competence, (F) <https://www.mediationcouncilofillinois.org/sites/default/files/MCI%20Professional%20Standards%20of%20Practice_0.pdf> [16.05.2025].

51 Article 4, Paragraph 5 of the Code of Ethics for Mediators of Georgia**:** The mediator is authorized, when necessary, to encourage a party participating in the process to seek additional advice, including from another independent professional; Article 8, Paragraph 8 of the Law on Mediation**:** In order to conduct the m during the mediation process. The Standards of Ethics of Professional Responsibility for Certified Mediators **of the** State of Virginia consider the involvement of both legal and non-legal qualified experts, such as accountants, financial specialists, child psychologists: the mediator should encourage the mediation party to obtain independent expert consultation or information when necessary for making an informed decision or for the protection of the party's rights. *Standards of Ethics of Professional Responsibility for Certified Mediators*, § F(1) (Judicial Council of Virginia, 2005), <http://www.courts.state.va.us/soe/soe.htm> [1.06.2025]. For the obligation to inform about the possibility of obtaining qualified consultation from various specialists, see: *Model Standards of Practice for Family and Divorce Mediation*, 2000, Association of Family and Conciliation Courts, Standard III A (4). On the involvement of "private third parties" and independent specialists (accountant, real estate agent, lawyer, etc.), see: *Irving H.H., Benjamin M., Therapeutic Family Mediation: Helping Families Resolve Conflict*, Sage Publications, London, 2002, 149.

52 *See Article 3, Paragraph 3 of the Code of Ethics for Mediators of Georgia.*

support on the grounds that the other spouse initiated the divorce, the mediator is entitled to inform the parties that the initiation of divorce proceedings is not, as a matter of law, a significant circumstance on the basis of which a judge may release a parent from the obligation to pay child support."[53]

The U.S. Model Standards of Practice for Family and Divorce Mediation consider it permissible for a mediator to provide information[54] within the limits of knowledge acquired through training and experience, but only with the qualification that such information must not constitute legal advice.[55] These standards empower the mediator to withdraw from the process if the parties intend to adopt an uninformed decision, or if one party seeks to misuse mediation in order to gain unfair advantage over the other. In contrast, the Alabama Code of Ethics anticipates that *"the mediator shall discuss with the parties the possible and likely judicial outcomes concerning property division in divorce cases."*[56] At first glance, it may seem that the mediator should be able to decline to endorse a mediated settlement where its formulation disregards the law.[57] Mediators are obligated to conduct the process in such a manner that all parties are treated with respect and are afforded the opportunity to reach agreement without coercion. The debate, however, centers on whether the mediator also bears responsibility for the substantive fairness of the outcome.[58]

If the mediator is to encourage a process grounded in party autonomy and self-determination, it follows that the mediator must ensure that decisions are reached under conditions of sufficient

---

53 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 101.

54 According to the Model Standards of Conduct for Mediators in the United States, a mediator is not personally responsible for ensuring that each party makes a free and informed choice regarding specific decisions. However, when necessary, mediators are obligated to remind the parties of the importance of consulting other professionals to enable them to make an informed decision. Similarly, under the Code of Ethics for Mediators of Georgia (Article 4.3), the promotion of the principle of self-determination entails that the parties must be provided with the opportunity to voluntarily and knowledgeably make decisions consistent with their interests, both in relation to the substantive issues of the dispute and the procedural aspects of mediation. Moreover, the mediator is not required to guarantee the voluntary and informed decision-making of the parties, nor to continue the process if they consider that proceeding with mediation would be unreasonable or unjustified (Article 4.5). The mediator is authorized, as necessary, to encourage the parties involved in the process to seek additional advice, including from other independent professionals.

55 *Schepard A.,* An Introduction to the Model Standards of Practice for Family and Divorce Mediation, Fam. L. Q., Vol. 35, 2001, 8: The standards neither require nor prohibit mediators from providing any specific type of information, such as a lawyer-mediator's assessment of the likely outcome of a claim or a therapist's evaluation of the potential emotional benefits or harms to a child. The standards leave such practical matters, on which the mediation community has not yet reached consensus, open to the marketplace, where consumers choose mediators reasonably and with information about their approach to mediation. When consensus is reached, the old standards may be revised and new ones developed.

56 *Chitashvili N.,* The Scope of Regulation of Mediation Ethics and the Addressees of Ethical Standards Enforcement. *Journal* of Law, No. 1, 2016, 24-47 (in Georgia) <https://tsu.ge/assets/media/files/8/Publications/Sam-Jurn-N1-2016G.pdf> [15.06.2025],

57 *Kakoishvili D.,* Ethical Obligations of a Mediator in the Mediation Process, Tbilisi, 2020, 6 (in Georgian) <http://www.library.court.ge/upload/46302020-12-01.pdf> [15.06.2025].

58 Ibid, 5.

knowledge and awareness. Frequently, the need for legal information within mediation is considerable. If the expectation arises that such information be provided by the mediator, then *the mediator's role may become significantly closer to the professional obligation of legal representation. In such cases, the roles of mediator and representative overlap, giving rise to serious ethical dilemmas.*[59] While the mediator is indeed under an obligation to encourage the parties to seek objective consultation from other professionals (including lawyers), the dilemma becomes acute where the parties explicitly decline to exercise their procedural opportunity to obtain informed advice. In such circumstances, the question arises as to whether the mediator has either the right or the duty to provide the relevant information directly.

The mediator's role must be confined to encouraging and facilitating the parties in obtaining independent and qualified legal advice regarding the matters under discussion from attorneys or other specialists. According to the U.S. Model Standards of Conduct for Mediators,[60] the mediator cannot personally guarantee that each party will make free and informed choices with respect to particular decisions. However, when necessary, mediators must remind the parties of the importance of consulting other professionals in order to make informed choices. Similarly, under the Code of Ethics for Mediators of Georgia (Article 4.3), the promotion of self-determination requires that the parties be afforded the opportunity to make voluntary and informed decisions in accordance with their interests, both regarding the substantive issues in dispute and the procedural aspects of mediation. At the same time, the mediator is neither obliged to guarantee such voluntary and informed decision-making nor to continue the process where they consider continuation to be unreasonable or unjustified (Article 4.5). The mediator is, however, authorized, where necessary, to encourage a party to seek additional advice, including from another independent professional.

In international practice, the question also arises as to whether mediators who assist parties in obtaining neutral and impartial legal information or advice from attorneys – helping them to analyze alternative dispute resolution options outside mediation, such as litigation or arbitration, to assess the strengths and weaknesses of their legal positions and factual circumstances, to make an informed, mutually agreed, and voluntary decision, and to formulate a clear, detailed, and enforceable mediation agreement – may thereby be regarded as engaging in the practice of law. In response to this question, the American Bar Association, through resolution, has declared that mediation does not constitute the practice of law.[61]

---

59 New York County Lawyers Association Ethics Opinion 685-1991, <https://www.nycla.org/resource/ethics-opinion/ethics-opinion-685-1991-dual-practice-conflict-of-interest/?utm_source=chatgpt.com> [16.05.2025]; CPR-Georgetown Model Rule for the Lawyer as Third-Party Neutral (2002); Virginia Legal Ethics Opinion 1759, <https://www.vacle.org/opinions/1759.htm?utm_source=chatgpt.com> [16.05.2025]; JAMS Mediator Ethics Guidelines, <https://www.jamsadr.com/mediators-ethics/?utm_source=chatgpt.com> [16.05.2025].

60 The Model Standards of Conduct for Mediators, issued by the AAA, ABA, and ACR in 1994 and revised in 2005, Standard I A (2). This document was originally adopted in 1994 by the three U.S. organizations involved in arbitration, law, and conflict resolution. In September 2005, the same organizations made amendments to the document to align it with contemporary mediation practice.

61 *Chitashvili N.,* The Specificity and Necessity of Regulation of Certain Ethical Obligations of Lawyer-Mediators, *Journal of Law,* No. 2, 2016, 32 (in Georgian) <https://tsu.ge/assets/media/files/8/Publications/

Article 3, paragraph 3.3 of the Georgian Code of Ethics for Mediators[62] sets forth the boundaries of information-sharing. Specifically, the mediator must facilitate the parties in making maximum use of their own resources and in formulating settlement terms independently. At the same time, the mediator is prohibited from providing legal or other professional advice beyond the scope of their competence, or from evaluating alternative outcomes of the dispute or the circumstances of the case, except where explicitly requested by the parties. Even in such instances, the mediator is authorized to share knowledge and information relevant to the case, but strictly in accordance with the principle of impartiality.

2.4. Mediator's Impartiality

In cases where there is an evident disparity between a strong and a weak party, the mediator may face the risk of unconscious bias. If one party employs manipulative tactics in order to pressure the other into hastily signing a mediated settlement, the mediator must not abandon impartiality by attempting to defend the weaker party's rights. Rather, the mediator should explain to the pressuring party that making decisions without proper consultation and adequate consideration contradicts the fundamental principles of the process itself.[63] Consequently, the mediator's strategy should not assume the effect of protecting one party's rights, but instead must be justified by the rationale of respecting the process and ensuring its proper and fair conduct. By doing so, the mediator upholds the principle of impartiality while simultaneously fulfilling the duty to promote self-determination and informed decision-making.[64]

The standards of conduct further imply that the mediator must refrain from using language, phrases, or suggestions – especially in the form of advice or instruction – that may be perceived as

---

Sam-Journ-N2-2016G.pdf> [16. 05.2025]. Contrary to this view, there are differing opinions in the doctrine, for example, see *Kandashvili I.,* Court and Non-Court Forms of Alternative Dispute Resolution in Georgia Based on Mediation, Tbilisi, 2018, 248, (in Georgian) <http://press.tsu.ge/data/image_db_innova/Kandashvili%20Irakli.pdf≥ [23.05.2025]: "Great importance is attached to whether mediation generally constitutes a legal activity or is an ordinary service, because if mediation is classified as a legal service, then the ethics applicable to lawyers should apply to mediators. In this regard, it is preferable to classify mediation as a legal activity, since ultimately, through mediation, an enforceable act subject to legal norms is created. However, this is a complex issue that, in addition to requiring separate scientific research, necessitates open discussions within the legal profession, which currently do not take place in Georgia, and the issue is not on the agenda of representatives of the legal profession at all. Nevertheless, alongside the introduction of mediation, it is imperative to have discussions on this matter."

62 Professional Ethics Code for Mediators of the LEPL "Georgian Association of Mediators," approved by the General Assembly on April 24, 2021, Article 3, Clause 3.3, <https://mediators.ge/uploads/files/60a4d7fd3f27f.pdf> [20.05.2025].

63 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 107, (comments of Bill Eddy).

64 According to Article 1875 (1) of the Civil Procedure Code of Georgia, the duration of court mediation is 45 days, but no fewer than 2 sessions. The requirement of at least two sessions is explained by various reasons, including the fact that even if the parties wish to settle during the first session, attendance at a second session will be necessary to allow them time to fully understand and consider the terms of the agreement before the final signing of the mediation settlement.

favoring one party, indicating a preference, or creating the impression of conferring an advantageous position on one party at the expense of the other.[65]

The Model Standards of Conduct for Mediators grant the mediator the authority to decline participation or to withdraw from the process at any stage, if they find themselves unable to maintain impartiality. The Joint Commission for the Reform of the Model Standards considered whether it would be prudent to add a condition to this right of withdrawal, namely, that "withdrawal should be permissible only on the condition that it does not cause harm to the interests of either party." Ultimately, the Commission determined that it was not advisable to impose such a precondition.[66]

The principle of impartiality is reinforced in Rule 2 of the Model Standards, which stipulates that the mediator must conduct the mediation impartially and avoid any conduct that might create an appearance of bias. This means that the mediator must not act with prejudice or allow preconceived beliefs – whether based on personal characteristics, background, values, convictions, behaviors demonstrated during mediation, or any other factor – to influence the process.[67] According to the Model Standards, a mediator who, for personal or other reasons, cannot remain impartial has the option to decline or cease to perform the role of mediator. At the same time, partiality or the perception of bias may arise at any stage of the mediation, in which case the parties have the right to request the mediator's recusal, and the mediator has the right to withdraw voluntarily.[68]

2.5. Addressing Power Imbalances Between the Parties

Private caucuses represent the most effective format for screening issues of domestic violence and power imbalance, for examining the history of the parties' relationship and the causes of conflict, for conducting reality testing, and for developing proposals tailored to the parties' interests. Accordingly, individual meetings serve as one of the most effective instruments for both assessing the negotiation capacities of the parties and balancing disparities in their respective power.[69]

Given that in some cultures the emphasis is placed more on maintaining relationships than on regulating contractual details, the mediator must frame questions in such a way as to highlight the importance of ensuring that the parties are aware of potential ambiguities. Nonetheless, if the mediator considers that the quality of the process is jeopardized, particularly in relation to self-determination, they retain the right to refuse to accept such agreements. The mediator, however, must remain vigilant to the risk of becoming culturally imperialistic. Mediators must avoid accusations of cultural imperialism, except in those rare instances where the mediator consciously decides to adopt such a stance.[70]

---

65 *Kakoishvili D.,* Ethical Obligations of a Mediator in the Mediation Process, Tbilisi, 2020, 16 (in Georgian) <http://www.library.court.ge/upload/46302020-12-01.pdf> [15.06.2025].

66 *Chitashvili N., The Scope of Regulation of Mediation Ethics and the Subjects Bound by Ethical Standards, Journal of Law, No. 1, 2016, 32-33 (in Georgian)* <https://tsu.ge/assets/media/files/8/Publications/Sam-Journ-N1-2016G.pdf> *[16.05.2025].*

67 *Kakoishvili D.,* Ethical Obligations of a Mediator in the Mediation Process, Tbilisi, 2020, 15 (in Georgian) <http://www.library.court.ge/upload/46302020-12-01.pdf> [15.06.2025].

68 Ibid, 16.

69 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 104.

70 A critically important strategic tool for the mediator is identifying the circle of relevant individuals to be involved in the process and ensuring their participation. Third parties and personal representatives of the

"Invite every good fairy and every wicked witch to the mediation!" Why did Sleeping Beauty sleep for one hundred years? Because she pricked her finger on a spindle. This was the curse imposed by the offended wicked witch, whom the princess's parents failed to invite to their daughter's grand celebration.[71]

One of the mediator's most critical strategic tools is determining the relevant circle of persons to be invited into the process and ensuring their appropriate involvement. Third parties and personal representatives of the parties are considered one of the most significant and active elements of family mediation. Consequently, it is often necessary, for a variety of strategic reasons, to invite to the mediation all those individuals whose involvement – whether constructive or disruptive – may play a role in reaching a settlement. Among these participants may be specialists capable of facilitating self-determination and informed decision-making, such as lawyers, psychologists, financial experts, or real estate agents. These individuals may be engaged either as party representatives or as independent specialists in the capacity of third parties.

The Model Standards, of course, cannot guarantee that any given mediator will meet these ideals. Nor can they resolve entrenched structural inequalities between participants. Such responsibilities ultimately fall to legislative bodies or the courts.[72] What the Model Standards can provide, however, is assurance to both the public and the legal community that the profession of family mediation accepts the responsibility to foster conditions of equal opportunity within mediation, and thus to contribute to the prevention of fundamental injustices in negotiated settlements. By preserving the mediator's neutral role, the standards promote good practice in mediation, thereby reducing (though not eliminating) the risk of abuse of the process by parties acting in bad faith.[73]

2.6. Termination of Mediation

"Any imbalance harms not only the parties but also the ethical integrity of the process itself."[74] As a rule, if the principle of proportionality of power between the parties is fundamentally undermined, mediation is deemed incapable of providing equal opportunities for the exercise of self-

parties are considered one of the most essential and active components in family mediation processes. Therefore, for various strategic purposes, it is necessary to invite all individuals to the mediation process who may play a certain role – positive or negative – in reaching an agreement. Among these individuals, on the one hand, may be specialists who can facilitate self-determination and informed decision-making (such as a lawyer, psychologist, financial advisor, or real estate agent). These individuals may be invited either as party representatives or as independent experts – third parties. Abramson H., Crossing Bor ossing Borders int ders into New Ethical T o New Ethical Territory: Ethical Challenges: Ethical Challenges When Mediating Cross-Culturally, S. Tex. L. Rev. 921, 2008, 941-942.

71 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 105, with further reference to: *Mosten F.S.,* Collaborative Divorce Handbook, Toolbox of Strategies for Collaborative Afreement, Jossey-Bass, 2009, 77-104.

72 *Schepard A.,* An Introduction to the Model Standards of Practice for Family and Divorce Mediation, Fam. L. Q. a, Vol. 35, 2001, 16.

73 Ibid, 17.

74 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 107, (comments of Bill Eddy).

determination, and continuation of the process departs from its essential purpose. In such circumstances, the leading recommendation among commentators on ethics is for the mediator to terminate the process on their own initiative.[75]

Termination of mediation constitutes the ultimate measure (*ultima ratio*), employed only where procedural fairness, together with the mediator's strategic and tactical interventions, cannot secure equal conditions for the parties' self-determination. If, however, the imbalance of power remains manageable and the ethical integrity of the process can be preserved, then rescuing the mediation remains the primary objective.[76]

Where various forms of imbalance exist, the mediator must evaluate whether the risks of continuing negotiations outweigh the potential benefits of a mediated settlement.[77] If, within the scope of the mediator's ethical competence, self-determination of the parties cannot be assured,[78] termination becomes the necessary course of action. Article 2, paragraph 6 of the Georgian Code of Ethics for Mediators enumerates specific grounds for potential bias, including stereotypical assumptions, which extend to attitudes arising from the asymmetry of power between parties. Such attitudes may manifest in excessive pity or empathy toward the so-called weaker party or victim, or conversely in hostility or a punitive attitude toward the so-called stronger party or aggressor. Either stance undermines or casts doubt on the mediator's impartiality and neutrality.[79]

It must further be recognized that court litigation may often exacerbate existing disparities of power between the parties.[80] The addition of lawyers and court procedures simply exacerbates the power imbalance. Formal procedures and technical language increase parents' fear and anger, and leave them feeling alienated and less capable of full participation.[81]

Accordingly, determining the substantive and procedural advantages of each dispute-resolution process requires a deep contextual analysis of the conflict itself, in order to identify which procedural mechanism within the dispute-resolution continuum best aligns with the multifaceted needs of the

---

75 Ibid, 87.

76 Ibid.

77 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 95-96.

78 A mediator cannot independently ensure or guarantee party self-determination; ethics codes merely reinforce the duty to support self-determination through competent, proper, and conscientious conduct of the process. This involves the use of various strategic-tactical and procedural-methodological mechanisms aimed at encouraging self-determination. See: Professional Ethics Code for Mediators of the LEPL "Georgian Association of Mediators," approved by the General Assembly on April 24, 2021, Article 4 – Party Self-Determination, https://mediators.ge/uploads/files/60a4d7fd3f27f.pdf [16.05.2025].

79 A mediator must decline to conduct a mediation if they believe that, due to preconceived notions (stereotypes) related to a participant's race, skin color, gender, origin, ethnicity, language, religion, aesthetic perception, political or other beliefs, social status, property or class status, place of residence, or any other characteristic, they are unable to conduct the process impartially. See: Professional Ethics Code for Mediators of the LEPL "Georgian Association of Mediators," approved by the General Assembly on April 24, 2021, Article 2, Clause 2.6, https://mediators.ge/uploads/files/60a4d7fd3f27f.pdf [16.05.2025].

80 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 98.

81 *Irving H.H., Benjamin M.,* Family Mediation, Contemporary Issues, Sage Publications, United States of America, 1995, 380.

parties. For parties with autonomy and a stable, self-sustaining capacity for voluntary choice, mediation is often regarded as "the most ethically viable process."[82] One study reported that compared to couples that used attorney negotiation to reach agreements, mediation made a greater contribution toward reducing couples' postdivorce verbal and physical abuse.[83]

3. Dilemmas Concerning Issues of Violence

A particularly complex scenario arises when, in the course of negotiations, the mediator discovers circumstances that give rise to reasonable suspicion of past or ongoing violence against women or minors. Such discoveries confront the mediator with profound dilemmas regarding the extent to which continuation of the process is permissible, and if so, where the appropriate limits lie.

3.1. Scope of Confidentiality

Confidentiality is one of the most fundamental principles of mediation, and its "closed nature" distinguishes it from other forms of formal proceedings.[84] This principle is especially attractive in

---

82 Ibid, 100.

83 *Ellis D.,* Family mediation pilot project. North York, Ontario, Canada: Hamilton Uni- fied Family Court, 1995; *Ellis D., Stuckless N.,* Mediating and negotiating marital conflicts. Thousand Oaks, CA: Sage, 1996 cited in: *Folberg J., Milne A.l., Salem P.,* Divorce and Family Mediation, Models, Techniques, and Applications, The Guilford Press, 2004, 93.

84 See: *Kandashvili I., Court and Non-Court Forms of Alternative Dispute Resolution in Georgia Based on the Example of Mediation,* Tbilisi, 2018, 77–78 (in Georgian) <http://press.tsu.ge/data/image_db_innova/Kandashvili%20Irakli.pdf> [16.05.2025]. In mediation doctrine, the privilege of confidentiality is not considered an absolute right. When a case proceeds to court, the applicable standard is that any evidence relevant to the case and potentially influential on the outcome must be admissible and accessible, as there is a public interest in achieving true justice – a goal that, in certain instances, depends on the court being fully informed. In mediation, the standard holds that the confidentiality privilege protects information disclosed or evidence exchanged during the process. However, there are certain exceptions where the disclosure of confidential information becomes mandatory. In such cases, it is essential to maintain a balance between two major interests: the privilege of confidentiality in mediation, and the public interest. It is important to distinguish between the concepts of privilege and confidentiality – although they are often mistakenly conflated. Mediation participants must clearly understand where the boundary between these two concepts lies: specifically, not all confidential communication is protected by privilege, but all privileged communication is confidential. Attention should also be paid to the fact that even if parties exchange information under a confidentiality clause, circumstances may still arise that require them to disclose such information before a court.
See: *Kandashvili I., Court and Non-Court Forms of Alternative Dispute Resolution in Georgia Based on the Example of Mediation*, Tbilisi, 2018, fn. 427 (in Georgian) with further reference to: *Nelson M.R., Nelson on ADR,* Thomson Carswell, 2003, 27. Disclosure of information protected by confidentiality during the mediation process is possible if the specific case falls under exceptions that make disclosure mandatory. These include: a) Where such an obligation is prescribed by a specific law related to the mediation process (e.g., any information concerning the best interests of a minor cannot remain confidential, as the minor's legal interests are protected by law); b) Where the disclosure of confidential information is directly related to the realization of a party's legal interests (e.g., if a party suffers harm during the mediation process due to specific actions of the mediator or an attorney, the party is free to disclose confidential information obtained during mediation for the purpose of protecting their rights); c) According to Section 6(4) of the *Uniform*

disputes of a personal nature (family relations, disputes between business partners, individual employment conflicts, and similar matters) or in disputes involving trade secrets, reputational risks, or other sensitive issues, where it may be in the interests of the parties to prevent publicity or disclosure of information.[85]

Within the context of the mediator's ethical duties, this principle encompasses two dimensions: first, the mediator must maintain the confidentiality of the mediation process vis-à-vis third parties; second, when meeting parties separately, the mediator must preserve as confidential any information disclosed in caucus that the disclosing party wishes to keep private. Moreover, the mediator is obliged to inform the parties of any limitations to confidentiality, such as mandatory disclosure obligations concerning child abuse or disclosure of plans to commit a crime.[86]

The duty of confidentiality ceases to apply if information has been made public, if the parties waive its confidentiality, if disclosure is necessary to protect the mediator from liability for ethical violations, or if it relates to preventing imminent death, serious bodily harm, or significant financial loss through criminal or fraudulent acts. Many national mediation laws recognize such exceptions, thereby prioritizing the protection of public interest through statutory limitations.[87]

If, during mediation, it becomes evident that the process is being used to plan future criminal conduct, the mediator is obliged to persuade the participant to desist, or to adjourn or terminate the mediation. Under the Model Standards of Conduct for Mediators, however, there is no obligation to report disclosed criminal intent to law enforcement authorities. The rationale lies in the fact that, in some jurisdictions, neither law nor party agreement explicitly defines such exceptions to confidentiality; in those contexts, the mediator would be deemed in breach of confidentiality by reporting without consent. Consequently, under these standards, disclosure by the mediator to investigative authorities of such information constitutes a violation of confidentiality, absent the party's consent. Nonetheless, this is not universally regulated across all codes of conduct, mediation rules, or domestic laws. For instance, under the Law of Georgia on Mediation, a mediator's notification of relevant authorities regarding impending serious crimes is not considered a breach of confidentiality.[88]

Within Europe, an important instrument governing the nature and scope of confidentiality in mediation is Directive 2008/52/EC of the European Parliament and the Council. The Directive

---

Mediation Act, the following types of information are subject to disclosure: Information contained in a mediation agreement signed by both parties; Information that is public under applicable legislation; Information involving threats, violence, or criminal conduct; Information that prevents a crime; Information confirming misconduct by the mediator; Information confirming criminal conduct or professional misconduct by a party, their representative, or a third party.

85 *Orjonikidze E., Mediation Guide,* Tbilisi, 2021, 33 (in Georgian), <https://www.ge.undp.org/content/georgia/ka/home/library/democratic_governance/mediation-guide.html> [16.05.2026].

86 *Kakoishvili D.,* Ethical Obligations of a Mediator in the Mediation Process, Tbilisi, 2020, 22 (in Georgian), <http://www.library.court.ge/upload/46302020-12-01.pdf> [15.06.2025].

87 *Chitashvili N.,* Specific Features of Certain Ethical Obligations of the Lawyer-Mediator and the Necessity of Regulation, Journal of Law, №2, 2016, 41 (in Georgian).

88 *Kakoishvili D.,* Ethical Obligations of a Mediator in the Mediation Process, Tbilisi, 2020, 28-29 (in Georgian), <http://www.library.court.ge/upload/46302020-12-01.pdf> [15.06.2025].

requires that mediation remain confidential both during its proceedings and thereafter. Accordingly, courts may not compel mediators to testify in civil or commercial disputes concerning information obtained in mediation. The Directive, however, also provides for exceptions. Notably, while the initial draft contained no exceptions, the final adopted version includes Article 7, which enumerates specific exceptions, namely, where: (a) there is a need to protect public interest; (b) enforcement of a mediated settlement requires disclosure; (c) disclosure would prevent wrongdoing or criminal conduct; (d) the protection of the interests of a minor requires disclosure; or (e) both parties consent to disclosure.[89]

3.2. Disclosure of Domestic Violence

Instances of participant abuse and threats to children present significant challenges for the mediator in safeguarding the process and ensuring the security of those involved. Standards of practice rest on the general principle that mediators remain neutral with respect to the substantive outcome of any agreement reached, provided that such agreement is voluntary. However, mediators are not neutral regarding the safety of clients and their children.[90] The standards define "domestic violence" more broadly than merely physical violence, extending also to "issues of control and intimidation," and explicitly state that certain cases are inappropriate for mediation due to safety risks, coercive control, or intimidation. What the standards require is a fourfold approach to domestic violence: training, screening, safety planning, and reporting.[91]

According to the standards of family and divorce mediation practice in the United States,[92] the mediator must be capable of recognizing possible signs of domestic violence in family law matters, in order to guide the process accordingly. Participation of a mediator in family law cases involving domestic violence is permissible only if the mediator has received appropriate, specialized training.[93] The standards acknowledge that not all cases are suitable for mediation when factors of safety, control, or intimidation are present. They impose a clear obligation upon the mediator to undertake all reasonable measures to screen for and assess domestic violence before any settlement is signed.[94]

Under Georgian legislation, [court-annexed] mediation is not permitted in cases involving violence against women and/or domestic violence.[95] Furthermore, Article 10(4)(a) of the Law of

---

89 Ibid, 23.

90 *Schepard A.,* An Introduction to the Model Standards of Practice for Family and Divorce Mediation, Fam. L. Q. a, 2001, Vol. 35, 20.

91 Ibid 20-21.

92 Model Standards of Practice for Family and Divorce Mediation, Association of Family and Conciliation Courts, 2000, Standard IX – The Mediator's Responsibility Regarding Child Abuse or Neglect**.** A. As used in these Standards, *child abuse or neglect* is defined by the applicable state law. B. A mediator should not undertake or continue mediation in cases where the family situation includes child abuse or neglect, unless the mediator has appropriate and adequate training. **C.** If the mediator has a reasonable basis to believe that a child is abused or neglected within the meaning of the child abuse and neglect laws of the jurisdiction, the mediator should adhere to the applicable child protection laws. 1.The mediator should encourage the participants to explore appropriate services for the family. 2. The mediator should consider the appropriateness of suspending or terminating the mediation process in light of the allegations.

93 Ibid, Standard X (B).

94 Ibid, Standard X (C).

95 Law of Georgia "Civil Procedure Code of Georgia", Legislative Herald of Georgia, No. 1106, 14/11/1997, Article 1873 (1)(a), <https://matsne.gov.ge/ka/document/view/29962?publication=149> [20.05.2016].

Georgia on Mediation[96] stipulates that the duty of confidentiality does not apply when disclosure of information is necessary to protect a person's life or health, ensure liberty, or safeguard the best interests of a minor. Similarly, under Article 91 of the Law of Georgia on the Elimination of Violence Against Women and/or Domestic Violence, Protection and Assistance of Victims of Violence,[97] the detection of domestic violence and appropriate response are entrusted to law enforcement agencies, judicial bodies, and victim identification groups established under the law. The obligation of first-line identification and reporting of domestic violence also rests with medical institutions, and in the case of minors, with educational and childcare institutions, guardianship and custody authorities, and other entities designated under Georgian law.

A systematic analysis of these legal provisions indicates that the mediator is under an obligation to terminate the mediation process and notify the court of any established fact or reasonable suspicion of ongoing or past violence. It is important to emphasize that the mediator may not personally witness an act of violence during the mediation; rather, they may become aware of it only through the confidential disclosure of a party. The critical question, therefore, is whether the duty of notification extends to such situations as well. Given that exceptions to confidentiality apply to information whose disclosure has preventive value for the protection of a person's health or the best interests of a minor, information concerning a reasonable suspicion of violence must also be subject to disclosure.

The mediation of family law disputes in which a history of violence has been revealed must be deemed impermissible, as the vulnerable party – the victim – will be deprived of the ability to engage in free negotiation and exercise self-determination, given the asymmetry of power and the unequal psycho-emotional conditions in which the victim stands vis-à-vis the abuser.[98] Of particular significance here is the factor of fear. It is unacceptable for a woman in divorce proceedings to make detrimental decisions regarding property or child custody under the influence of fear of her abusive

---

96 Law of Georgia "On Mediation", Legislative Herald of Georgia, No. 4954-Iს, 18/09/2019, Article 10 outlines the exceptions under which participants in mediation, including mediators, are permitted to disclose information. According to this Article, disclosure is allowed if: a) It is necessary to protect a person's life or health, ensure their freedom, or safeguard the best interests of a minor; b) The information is disclosed to prove the fact of reaching a mediation settlement when the other party disputes or denies this fact; c) A party is obligated to fulfill a legal duty undertaken before the commencement of mediation and must disclose information that became known during the mediation process to the other party, provided that the disclosed information is limited to the minimum necessary; d) Disclosure of the information is required by a court decision or another decision with binding legal force;e) Disclosure of the information is necessary for the investigation of a particularly serious crime. In such cases, the information shall be disclosed in the most limited scope possible, and the relevant party shall be notified in advance; f) Disclosure of the content of the mediation settlement is necessary for its voluntary or enforced execution; g) A legal or disciplinary dispute is brought against the person who discloses the information, and the dispute arises from the mediation process, and disclosure of the information is necessary to protect that person's legal interests; h) The information disclosed under confidentiality during the mediation process was already known to the party before the mediation, was obtained through other lawful means, or has otherwise become public.

97 Law of Georgia on the Elimination of Violence Against Women and/or Domestic Violence, Protection and Assistance to Victims of Violence, Legislative Herald of Georgia, No. 3143, 09/06/2006, Article 91, https://matsne.gov.ge/ka/document/view/26422?publication=21 [15.06.2025].

98 Further discussion on this issue can be found in: *Steegh N.V.,* Yes, No, and Maybe: Informed Decision Making about Divorce Mediation in the Presence of Domestic Violence, Wm. & Mary J. Women & L., Vol. 9, 2003, 145-206.

spouse. In such circumstances, a compromise reached during mediation may in reality amount to nothing more than a capitulation born of fear – fear of further violence or anticipated retribution – that would not otherwise occur in the absence of such coercion.[99]

3.3. Addressing Domestic Violence Revealed in Mediation

When domestic violence is uncovered during mediation, the mediator is obliged to take all necessary measures to ensure the safety of the parties and of the mediator personally. In such cases, it is justified – even absent the consent of all parties – to conduct individual sessions, to permit the presence of a victim's friend, representative, attorney, or legal advisor during sessions, to encourage the involvement of legal counsel in the mediation process, and to connect the parties with appropriate community services. The mediator also retains the discretion to adjourn or terminate sessions to ensure safety. It is the mediator's responsibility to facilitate agreements between parents that allocate parental responsibilities in a manner conducive to the physical safety and psychological well-being of both parents and children.[100]

"If violence is perpetrated by both parties against one another, and no clear power imbalance exists, and the case does not involve minors, then the parties may equally possess the capacity for free negotiation and autonomous decision-making. If, however, one party exhibits fear, self-denial, submissive behavior, or patterns of obedience, mediation cannot proceed under such conditions of inequality, and the matter must be referred back to judicial proceedings."[101]

For the purposes of examining the nature, character, and severity of the violence, the mediator's ability to frame appropriate questions is of paramount importance. The aim is to assess whether the alleged victim possesses sufficient emotional resources to negotiate independently and effectively, and whether continuation of mediation is admissible at all.[102] If, in the mediator's judgment, the alleged victim demonstrates these capacities, then mediation may provide both parties with the resources for free and autonomous decision-making. The mediator, however, must be certain that any agreement reached in mediation is not so unjust as to be alarming – whether because it was made under the threat of physical violence or because its substantive terms are so egregiously unfair that no reasonable person would consent to them.[103]

An expert opinion from a competent authority or psychologist may be considered supplementary information assisting the mediator in evaluating the existence of violence and the psycho-emotional state of the parties.

---

99 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 94.

100 Model Standards of Practice for Family and Divorce Mediation, Association of Family and Conciliation Courts, 2000, Standard X (D, 1-6).

101 *Waldman E.,* Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 91.

102 *Girdner L. K.,* Mediation triage: Screening for Spouse abuse in Divorce Mediation, *Mediation Quarterly,* Vol. 7(4), 1990, 374.

103 *Schepard A.,* An Introduction to the Model Standards of Practice for Family and Divorce Mediation, Fam. L. Q. a, Vol. 35, 2001, 15.

The mediator's recommendation to involve an authorized representative of the State Care and Assistance Agency for Victims of Trafficking, or a psychologist, in the mediation process may be grounded in Article 8(8) of the Law of Georgia on Mediation, which authorizes the mediator to request from the parties any additional information necessary for the effective conduct of mediation. An expert conclusion may thus assist the mediator in assessing both the existence of violence and the psychological state of the parties. Such measures may prove indispensable, as mediators may lack the requisite knowledge and competence to evaluate correctly the existence of violence, the reality of risks to the best interests of the child, or threats to the health and vital interests of the alleged victim.

In this regard, particular relevance attaches to Rule IV(B) of the U.S. Model Standards of Conduct for Mediators, which provides that if, in the course of mediation, it becomes apparent that the mediator is unable to conduct the process competently, the mediator must promptly raise the issue with the parties and take appropriate measures, including seeking assistance or withdrawing from the process.[104] If the parties refuse the mediator's proposal to involve such professionals, this furnishes the mediator with strong grounds for terminating the process, on the basis that in court proceedings the judiciary itself would be obliged to ensure that all necessary measures are taken to protect the best interests of the child.

3.4. Termination of Mediation

Article 3(5) of the Georgian Code of Ethics for Mediators permits termination of the process by the mediator where a valid reason exists. The impossibility of ensuring the best interests of the child, or of safeguarding the health and safety of one or both parties, constitutes a legitimate interest that undoubtedly justifies deeming continuation of mediation unreasonable under Article 9(1)(e) of the Law of Georgia on Mediation. The protection of the child's best interests, as well as the safeguarding of personal liberty, health, or life, are also expressly recognized under the Law of Georgia on Mediation as legitimate exceptions to the principle of confidentiality.[105]

Under Standard VI(B) of the U.S. Model Standards of Conduct for Mediators, where a mediator becomes aware of domestic violence or harassment between the parties, the mediator must take appropriate measures, which may include postponing, withdrawing from, or terminating the mediation.

Similarly, Article 5(5.2) of the Georgian Code of Ethics for Mediators provides that the mediator must refuse to facilitate or endorse any mediated settlement that is manifestly unlawful or contrary to moral norms. This provision extends equally to family law disputes in which the existence of violence renders it impossible for one party to exercise free will.

An important and unresolved issue concerns situations where the mediator fails to detect such violence, and a settlement is nonetheless confirmed. Would the victim thereafter possess the right to annul such an agreement under the Civil Code on the grounds of invalidity of contracts entered into

---

104 It may involve the invitation of a specialist or competent person as a third party in the process.

105 Law of Georgia on Mediation, Legislative Herald of Georgia, No. 4954-Iს, 18/09/2019, Article 10, Paragraph 4, Subparagraph "a", <https://matsne.gov.ge/ka/document/view/4646868?publication=2> [16.05.2025].

under duress?[106] While the resolution of this question lies beyond the scope of the present work, it constitutes a fertile subject for future scholarly inquiry.

4. Conclusion

The analysis of ethical dilemmas in family mediation reveals that power imbalance and domestic violence represent some of the most significant challenges to the legitimacy of mediation as a dispute resolution mechanism. Mediation is normatively premised upon party autonomy, voluntariness, and self-determination. Yet these values, while foundational, are not immune to erosion when parties enter the process with unequal capacities, whether material, informational, emotional, or cultural. If left unaddressed, such disparities may distort genuine decision-making, reduce the weaker party to mere compliance, and compromise both the fairness and credibility of the process.

The findings suggest that not all forms of imbalance necessarily undermine mediation to the point of requiring termination. In fact, mediation may sometimes provide a more balanced and secure environment than adversarial litigation, precisely because the process is less formalistic, more flexible, and designed to empower parties to articulate their own interests. Minor or manageable asymmetries – such as differences in rhetorical skills or confidence – can often be mitigated through the mediator's procedural strategies, including private caucuses,[107] reframing, the involvement of external experts, and reality testing. In such cases, mediation can serve as a constructive platform for negotiation, enhancing agency and promoting fair settlements even where inequalities exist.

Nevertheless, a clear ethical boundary emerges when imbalance reaches a level that precludes the genuine exercise of self-determination. If one party acts under duress, misinformation, or psychological pressure that cannot be neutralized by the mediator's interventions, continuation of mediation no longer serves its fundamental purpose. At this juncture, termination of the process becomes not merely an option but an ethical obligation. The principle of ultima ratio applies here: termination should be reserved for cases where the mediator, despite employing all available procedural tools, cannot safeguard voluntary and informed, full participation.

In contrast, the presence of violence – whether actual, threatened, or perceived – constitutes an irreducible barrier to ethically sound mediation. Domestic violence and intimidation fundamentally alter the relational dynamics between the parties, engendering fear and compliance rather than free consent. In such situations, the very foundations of mediation – voluntariness, equality, and respect for human dignity – are undermined. Agreements reached under such conditions cannot be characterized as authentic settlements but rather as capitulations born of coercion. Consequently, mediators are ethically and, in many jurisdictions, legally required to terminate mediation where violence is

---

106 Law of Georgia "Civil Code of Georgia", Legislative Herald of Georgia, 786, 24/07/1997, Article 85, <https://matsne.gov.ge/ka/document/view/31702?publication=117> [16.05.2025].

107 *Folberg J., Milne A.l., Salem P.,* Divorce and Family Mediation, Models, Techniques, and Applications, The Guilford Press, 2004, 315. See also, Handling Power Imbalances in Mediation, Schreiber ADR, July 17, 2025, <https://www.schreiberadr.com/handling-power-imbalances-in-mediation?utm_source=chatgpt.com> [16.05.2025].

discovered or reasonably suspected. Exceptions to confidentiality, particularly where the safety of children or vulnerable parties is at stake, further reinforce this duty.

The comparative framework examined – drawing on Georgian legislation, the Georgian Code of Ethics for Mediators, and the U.S. Model Standards of Conduct – underscores a shared recognition of the delicate balance between neutrality and intervention. On the one hand, mediators are prohibited from assuming the role of legal representatives, offering binding advice, or dictating outcomes. On the other hand, they are entrusted with safeguarding the procedural integrity of mediation by preventing manipulation, ensuring access to relevant information, and encouraging parties to obtain independent professional consultation. This dual responsibility challenges simplistic conceptions of mediator neutrality, highlighting instead a more complex role that blends facilitation with ethical vigilance. "Ideally, ethical choices, made by mediators, need to be evaluated through reflective practice in and on action in the best interest of their clients. This is a lifelong learning process. As advances are made over time in terms of the knowledge and skills that inform mediation practice, it is likely that deeper ethical understandings will inform the management of power in the facilitative mediation process."[108]

Moreover, the study illustrates that mediators are not merely process managers but guardians of ethical legitimacy. Their responsibilities extend to preventing uninformed or coerced decision-making, upholding the principle of self-determination, and ensuring that the outcomes of mediation respect both individual autonomy and the best interests of children. This re-conceptualization of the mediator's role challenges the conventional dichotomy between facilitation and evaluation, suggesting that effective mediation requires a more nuanced appreciation of the mediator's duty to intervene where fairness and justice are imperiled.

The broader implications of these findings are twofold. First, they call for the continued refinement of ethical codes and legislative frameworks to provide mediators with clear guidance when confronting dilemmas of imbalance and violence. The absence of such clarity risks inconsistent practice and potential harm to vulnerable parties. Second, they highlight the importance of specialized training for mediators, particularly in identifying and responding to domestic violence, recognizing subtle forms of coercion, and employing culturally sensitive strategies that respect diversity without tolerating injustice.

Ultimately, mediation can retain its status as a credible and ethically defensible dispute resolution mechanism only if it remains uncompromisingly committed to its foundational principles while adapting to the complex realities of family disputes. Neutrality, impartiality, and party self-determination cannot be treated as abstract ideals detached from context; rather, they must be operationalized through vigilant practice, continuous ethical reflection, and a readiness to terminate the process when fairness becomes unattainable.

In sum, the conclusion affirms that power imbalance, while often a natural characteristic of human relationships, becomes problematic when it undermines informed consent and authentic autonomy. Where manageable, such imbalances should be addressed through mediation's procedural tools; where unmanageable, they necessitate termination. Violence, however, remains a categorical exclusion,

[108] *Brandon M., Rachael Field R.,* An Analysis of the Complexity of Power in Facilitative Mediation and Practical Strategies for Ensuring a Fair Process, Resolution Institute, March, 2020, 48.

demanding immediate cessation of mediation and referral to protective mechanisms. By acknowledging these distinctions and embracing their dual role as neutral facilitators and ethical guardians, mediators contribute not only to the resolution of individual disputes but also to the preservation of mediation's integrity as a practice grounded in justice, dignity, and respect for human rights.

Bibliography:

1. *Law of Georgia "Civil Procedure Code of Georgia"*, Legislative Herald of Georgia, No. 1106, 14/11/1997, Article 1873 (1)(a); Article 1875 (1).
2. *Law of Georgia "On Mediation"*, Legislative Herald of Georgia, No. 4954-Ib, 18/09/2019, Article 3; Article 10; Article 10, Paragraph 4, Subparagraph "a".
3. *Law of Georgia on the Elimination of Violence Against Women and/or Domestic Violence*, Legislative Herald of Georgia, No. 3143, 09/06/2006, Article 91.
4. *Model Standards of Conduct for Mediators*, AAA, ABA, and ACR, adopted 1994, revised 2005, Standard I A (2).
5. *Professional Ethics Code for Mediators of the LEPL "Georgian Association of Mediators"*, approved by the General Assembly April 24, 2021, Article 3 Clause 3.3; Article 4 – Party Self-Determination; Article 2 Clause 2.6.
6. *Standards of Ethics of Professional Responsibility for Certified Mediators of the State of Virginia*, § F(1) (Judicial Council of Virginia, 2005).
7. *Mediation Council of Illinois*, Standards of Practice for Mediators, 1999, Standard I Competence (F).
8. *American Bar Association*, Standard 1, 2001.
9. *Article 4 of the Code of Ethics of Mediators of Georgia* – Promotion of Self-Determination.
10. *Association of Family and Conciliation Courts*, Model Standards of Practice for Family and Divorce Mediation, 2000, Standard I (A) and (E).
11. *Abramson H.*, Crossing Borders into New Ethical Territory: Ethical Challenges When Mediating Cross-Culturally, S. Tex. L. Rev., Vol. 49, 921, 2008, 924.
12. *Barrett F., Mortensen R., Tranter K.*, Alternative Perspectives on Lawyers and Legal Ethics, Reimagining the Profession, Routledge Research in Legal Ethics, London and New-York, 2011, 207.
13. *Boyle A.*, Self-determination, Empowerment and Empathy in Mediation: Rehumanising Mediation's Effectiveness, The Newcastle Law Review, Vol.15, January 2020, 38.
14. *Brandon M., Field R.*, An Analysis of the Complexity of Power in Facilitative Mediation and Practical Strategies for Ensuring a Fair Process, The Arbitrator & Mediator, 39(1), 2020, 33 and the following.
15. *Capulong E.R.C.*, Mediation and the Neocolonial Legal Order: Access to Justice and Self-Determination in the Philippines, Ohio State Journal of Dispute Resolution, Vol. 27:3, 2012, 641-682.
16. *Chitashvili N.*, The Scope of Regulation of Mediation Ethics and the Addressees Bound by Ethical Standards, Journal of Law, № 1, 2016, 24-47; 30; 31; 32-33 (in Georgian).
17. *Chitashvili N.,* Specific Features of Certain Ethical Obligations of the Lawyer-Mediator and the Necessity of Regulation, Journal of Law, № 2, 2016, 41 (in Georgian).
18. *Cooley J. W.*, Defining the Ethical Limits of Acceptable Deception in Mediation, Pepp. Disp. Resol. L.J., Vol. 4, Iss. 2, 2004.

19. *Davis A. M., Salem R. A.*, Dealing With Power Imbalances in the Mediation of Interpersonal Disputes, Mediation Quarterly Issue: 6, December 1984, 17-26.
20. *Dunlop N.*, Mediation Power Imbalances: Weighing the Arguments, October 12, 2018.
21. *Folberg J., Milne A. L., Salem P.*, Divorce and Family Mediation, Models, Techniques and Applications, The Guilford Press, New York, London, 2004, 429.
22. *Gewurz I.G.*, (Re)Designing Mediation to Address the Nuances of Power Imbalance, 19 Conflict Resol.Q. 2001, 135-162.
23. *Girdner L.K.*, Mediation triage: Screening for Spouse abuse in Divorce Mediation, Mediation Quarterly, Vol. 7(4), 1990, 374.
24. Handling Power Imbalances in Mediation, Schreiber ADR, July 17, 2025.
25. *Irving H.H., Benjamin M.*, Family Mediation, Contemporary Issues, Sage Publications, United States of America, 1995, 205.
26. *Kakoishvili D.*, Ethical Obligations of a Mediator in the Mediation Process, Tbilisi, 2020, 4, 6, 9-12, 14-16, 22, 28-29 (in Georgian).
27. *Kandashvili I.*, Judicial and Non-Judicial Forms of Alternative Dispute Resolution on the Example of Mediation in Georgia, Tbilisi, 2018, 72; 77–78; 248 (in Georgian).
28. *Kandashvili I. (ed.)*, Commentary on the Law of Georgia on Mediation, "Universali", Tbilisi, 2024, 56-96 (in Georgian).
29. *Kovach K.K., Love L.P.*, "Evaluative" Mediation is an Oxymoron, Alternatives, CPR Institute for Conflict Resolution, Vol.14, Iss. 3, 1996.
30. *Kuźmicz M.M.*, Equilibrating the Scales: Balancing and Power Relations in the Age of AI, AI & Society, Springer, 2024, 1-18; 15.
31. *Nolan-Haley J.M.*, Court Mediation and the Search for Justice through Law, Washington University Law Quarterly, Vol. 74-47, 1996, 57; 69.
32. *Orjonikidze E.*, Mediation Guide, Tbilisi, 2021, 33 (in Georgian).
33. *Parkinson L.*, Family Mediation, Appropriate Dispute Resolution in a New Family Justice System, 2nd ed., 2011, 264-271.
34. *Peppet S.R.*, ADR Ethics, Journal of Legal Education, Vol. 54, 2004, 77.
35. *Picard C.A.*, Mediating Interpersonal and Small Group Conflict, The Golden Dog Press, Ottawa Canada, 2002, 131.
36. *Schepard A.*, An Introduction to the Model Standards of Practice for Family and Divorce Mediation, Fam. L. Q., Vol. 35, 2001, 8-17; 20-21.
37. *Shin C.P.*, Drafting Agreements as an Attorney-Mediator: Revisiting Washington State Bar Association Advisory Opinion 2223, Wash. L. Rev., 2014, 1040.
38. *Smithson J., Barlow A., Hunter R., Ewing J.*, The Moral Order in Family Mediation: Negotiating Competing Values, Conflict Resolution Quarterly, Vol. 35, No. 2, 2017, 174.
39. *Spencer D., Brogan M.*, Mediation Law and Practice, Cambridge University Press, 2007, 233.
40. *Steegh N.V.*, Yes, No, and Maybe: Informed Decision Making about Divorce Mediation in the Presence of Domestic Violence, Wm. & Mary J. Women & L., Vol. 9, 2003, 145-206.
41. *Waldman E.*, Mediation Ethics, Cases and Commentaries, Jossey-Bass A Wiley Imprint, San Francisco, 2010, 87, 94, 94-95, 96, 98, 101, 104, 105, 107.

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.1.2025.9527

Bartłomiej Nałęcz*

Durability of the Polish Supreme Court positions in criminal cases in the perspective of the influence of Soviet law on Polish criminal law (on the example of the Polish Penal Code of 1969)

The aim of the this article is to provide a synthetical study on the stability of the Supreme Court's jurisprudence in criminal cases. The discussed concept of stability is a circumstance in which the views of a certain period from the past are related to the contemporary criminal law regulations. Given an intention to sustain the analysis within a capacity appropriate for the standards of a scientific paper, the elaborations were limited to positions relatable to applicable legal order: particularly those existing within the present context of Polish criminal law via the influence of Soviet legislation.

Keywords: *criminal law, penal code, polish law, supreme court, jurisprudence*

1. Introduction

Spanning over a century, the history of Poland's Supreme Court has gone through a multitude of revisions in the functioning of judicature. Among the factors contributing to them, were the transformations of the state's political system. Interestingly, 20th-century Polish courts began functioning even before the reclamation of the country's independence[1]. Nevertheless, historical factors are not the sole argument that makes their activity worth exploring. The motivation also lies in the peculiar significance of statements provided by the Supreme Court. They would often constitute a source of multi-faceted inspiration for the broadly understood legal community in Poland. Since the very beginning, the contents of these statements have been used, and continue to be utilized, as source material for theorists interested in the dogmatic application of particular judicial branches.

The purpose of the following paper is to synthetically elaborate on the stability of the Supreme Court's jurisprudence in criminal cases. In the context of the titular issue, stability is understood as a circumstance in which the views presented in the past are related to the currently applicable criminal law regulations. In order to keep the analysis within a reasonable capacity appropriate for the standards of a scientific article, further elaborations were limited to selected positions expressed in

* PhD, Assistant professor at the Institute of Law and Administration, Pomeranian University in Słupsk, Poland, attorney at law, ORCID: 0000-0002-6974-1435.

1 The beginning of the Polish judiciary falls a year before the Polish state regained independence after the period of partitions – *Pietrzak M.*, Sąd Najwyższy w II Rzeczypospolitej, Czasopismo Prawno-Historyczne, Vol. XXXIII, №. 1, 1981, 101 (in Polish). It is also worth adding that the moment of the rebirth of Polish statehood falls on 11 November 1918, while on 1 September 1917 the Polish justice system formally passed into the hands of the temporary "royal-Polish" authorities, and the inaugural session of the Supreme Court took place on 14 December 1917 – *Izdebski H.*, U progu odrodzonego sądownictwa II Rzeczypospolitej, Zeszyty Naukowe Sądownictwa Administracyjnego, №. 2, 2019, 13 (in Polish).

relation to the currently applicable legal order as those existing in the context of Polish criminal law via the influence of Soviet legislation[2].

The aforementioned limitation establishes the research as sufficiently attractive. It is worth noting that the legal standards currently in force in Poland are radically separated from the ideas of Soviet law. Thus, the validity of the Supreme Court's positions expressed in judgments issued under an outdated and inactive legal and political regime may seem confusing. Especially since they concern an undoubtedly crucial issue that is the matter of criminal law: a branch of law whose interference is final.

Selecting exemplary positions from the period when the Supreme Court's activity was influenced by Soviet criminal law, the focus was centered on the 1969 regulations of the Criminal Code of 1969[3]. This is due to the adequacy of this act in regard to the title issue. The approach to crime adopted in this code is in line with the socialist interpretation of crime that originated in the doctrine of criminal law following the Soviet Revolution. From this perspective, crime is a manifestation of class society and constitutes an attack on the interests of the ruling worker-peasant class[4].

2. The Influence of Soviet Law on Polish Criminal Law – an Outline

Assuming that the Soviet teaching of criminal law is fundamentally different from the legal standards currently prevailing in Poland is far from groundbreaking. To preserve the reliability of this study, it is necessary to state several important remarks that will allow us to outline the general features of this law as well as its fundamental assumptions.

First and foremost, the foundations of the Soviet criminal law model are based on the Marxist-Leninist approach to the issue of criminal liability. In this approach, criminal law serves to protect and empower the socialist state of workers and peasants. What is quite specific here, is the transparent partisanship and social classism that imposes the postulate of an open condemnation of different penal philosophies. It is even claimed that Soviet criminal was intended to serve as a tool for ruthless criticism of trends opposing the idea of Marxism-Leninism. The idea of punishment was thus permeated by militant Bolshevik partisanship and its principle of maintaining the Soviet legal regime[5]. Likewise, worth noting is the fact that in Bolshevik Russia criminal law was recognized as the fundamental field of law, which is why it was sometimes unambiguously associated with the entire legal system[6].

Like any other legal system, Soviet criminal law also went through various periods. The years between 1917 and 1939 deserve special attention as they brought upon numerous changes. They were

---

2 It should be clearly stated that this text does not pretend to be exhaustive. It is intended to highlight observations that may contribute to deepening the topic.

3 Act of 19 April 1969 – Polish Penal Code (Journal of Laws №. 13, item 94, as amended).

4 *Królikowski M.*, *Zabłocki R.*, Prawo karne, Warsaw, 2020, 143 (in Polish).

5 *Giercenzon A.A.*, Prawo karne. Część ogólna. Wydanie czwarte, przerobione (przekład z rosyjskiego), Warsaw, 1952, 15-17 (in Polish); also *Wyszynskij A.*, Teoria dowodów sądowych w prawie radzieckim, (trans.) *Litwin J., Schaff L.*, Warsaw, 1949, 27 (in Polish).

6 *Maciejewski T.*, Historia powszechna ustroju i prawa, Warsaw, 2007, 818 (in Polish).

the consequence of natural evolutionary processes that translated into ideological modifications. Moreover, they were a product of a ruthless pursuit of the socio-political reconstruction of the Soviet state by the revolutionary dictatorship of the proletariat[7]. Over time, the rigors associated with it slightly weakened, and the law itself began to liberalize[8]. After World War II, there was a noticeable shift that moved it further away from the Stalinist system of penal repression. Noticeably, public discussions on the shape of criminal law were allowed[9], and the death penalty was abolished, although only temporarily for periods of peacetime[10].

Concurrently, the beginnings of the transformation of Polish substantive criminal law coincided with the activity of the Polish Committee of National Liberation. Although the Committee existed for only half a year in 1944, it managed to create a political structure that was completely subordinated to the Soviet Union. This structure, including modifications that would not affect its foundations, would endure until 1989[11]. Polish criminal law was also shaped by this politicization: one of its main functions was to "suppress the resistance of the class enemy" following the blueprint set by Soviet criminal law[12].

Likewise, following the Soviet model, Polish criminal law was associated with a strict criminal policy. This applies to the entire period before 1989. The 1960s and 1970s were a particularly outstanding period that brought about a clear tendency to use criminal law as a means of repression. This is clearly demonstrated by statistical data on the frequency of imposing medium-term and long-term prison sentences, which would systematically increase until the first half of the 1970s, and continue to sustain this high level[13]. What is important for the title issue is that at that time, specifically on January 1, 1970, the Polish Penal Code of 1969 came into effect. This date and event

---

7 *Mohyluk M.*, Wacław Makowski o radzieckim prawie karnym, Miscellanea Historico-Iuridica, Vol. VII, 2009, 86 (in Polish).

8 *Lityński A.*, Prawo Rosji i ZSRR 1917–1991 czyli historia wszechzwiązkowego komunistycznego prawa (bolszewików). Krótki kurs, Warsaw, 2017, 185-204 (in Polish).

9 *Lityński A.*, O Podstawach ustawodawstwa karnego ZSRR z 1958 r. oraz o kodeksie karnym RSFRR z 1960 r., Miscellanea Historico-Iuridica, Vol. VII, 2009, 175, (in Polish).

10 The death penalty in times of peace was abolished on May 26, 1947, and reinstated on January 12, 1950, with subsequent consequences extending the list of crimes punishable by death – *Laskowska K.*, Podstawowe zagadnienia instytucji kary śmierci w świetle prawa i praktyki wymiaru sprawiedliwości w dziejach Rosji, Miscellanea Historico-Iuridica, Vol. VII, 2009, 57 (in Polish).

11 *Lityński A.*, Prawo karne Polski "lubelskiej" (1944), Studia Iuridica Toruniensia, Vol. 31, №. 2, 2023, 129-144 (in Polish).

12 *Andrejew I., Lernell L., Sawicki J.*, Prawo karne Polski Ludowej. Wiadomości ogólne, Warsaw, 1954, 220 (in Polish).

13 Lech Gardocki's analyses are useful here. They show that convictions for sentences exceeding 2 to 5 years were as follows: in 1963 – 4,303, in 1966 – 6,408, in 1968 – 7,770, in 1970 – 8,297 (6.6%), and in 1975 – 12,543 (10.5%). It is easy to see that since 1963 the number of convictions for sentences of imprisonment in the above-mentioned lengths has increased almost three-fold. In turn, sentences of 5 to 15 years of imprisonment were imposed: in 1970 – 899, in 1971 – 993, in 1972 – 1,147 and in 1975 – 2,045, which constitutes a more than two-fold increase in the ratio of convictions in the period between 1970 and 1975 – *Gardocki L.*, Prawo karne lat osiemdziesiątych, Reforma praw karnego propozycje i komnetarze. Księga pamiątkowa Profesor Barbary Kunickiej-Michalskiej, *Jakubowska-Hara J., Nowak C., Skupiński J.* (*eds.*), Warsaw, 2008, 65 (in Polish).

serve as a mark that undeniably set this act as a certain symbol of the tendencies prevailing in criminal law during that period[14].

The Polish Penal Code of 1969 was intended to implement the legacy of socialist doctrine in this field. The Code was also intended to become a legal act of a new socio-political nature. At multiple points, it would call for a departure from the prior interpretations of similar regulations[15]. According to the creators' intentions, this code was set to correspond with the ideas of socialist humanism, take into account both the socio-political and economic conditions, as well as consider the structure of crime in Poland. The implementation of the idea of humanism – according to the justification of the draft Polish Penal Code of 1969 – materializes as the protection of the socialist state as a body that ensures the conditions for the cultural and economic development of the society. It also serves to protect social property that constitutes the economic basis of this state, maintain the rights and interests of every citizen, and preserve the rule of law and its effectiveness[16].

Despite the noticeable emphasis on the protection of values that are important within the modern legal standards of European culture, such as the rule of law and the interests of the individual, the Soviet idea of criminal law – through the political structure of the state – continued to permeate into the doctrine of Polish criminal law. Of course, Soviet law also had its aspirations, which, although idealistic, would even appear rational to a certain extent. Indeed, by definition, the public interest should harmonize with the state interest. Any counterweight within this area was not advisable. However, it is difficult to talk about securing the interests of an individual in the context of currently existing standards. The very theory of socialist law denies this: Soviet dogma, for instance, does not believe that the division into public and private law should apply to socialist law. The argument is that such a division is justified when the means of production are under private ownership[17]. Within that particular model of an ideal socialist state, that form of ownership would not exist.

At this point, it is worth emphasizing the important role that judicial decisions play in reading the law. For the purposes of the study presented here, it is sufficient to point out that the judicial understanding of specific legal regulations, especially when developed in the jurisprudence of higher instances, may serve functions similar to those of an act[18]. In other words, court decisions can in some sense shape the law, moving them closer to precedents: this issue will be covered in more detail later in the study. Assuming this view is correct, there is no need to argue further about the importance of a properly conducted process of interpretation, the aim of which is to properly read the content of the law. In this context, it is worth noting that despite Poland remaining in the sphere of influence of the

---

14 It should be noted, however, that the criminal policy of the state is not exhausted in statistics. It also includes legislative processes aimed at expanding criminal law protection (criminalization) and narrowing it (decriminalization). During the existence of the Soviet Union, the ease of criminalizing various social phenomena periodically decreased. This applies to periods in which life was liberalized and democratized. In Poland, such periods occurred after 1955 and in the years 1980-1981 – *Gardocki L.*, Zagadnienia teorii kryminalizacji, Warsaw, 1990, 39 (in Polish).

15 *Bafia J., Mioduski K., Siewierski M.*, Kodeks karny. Komentarz, Warsaw, 1971, 3 (in Polish).

16 *Andrejew I., Świda W., Wolter W.*, Kodeks karny z komentarzem, Warsaw, 1973, 7 (in Polish).

17 *Seidler G.L., Groszyk H., Malarczyk J.*, Wstęp do teorii państwa i prawa, Lublin, 1963, 355, 357 (in Polish).

18 *Wiatrowski P.*, Dyrektywy wykładni prawa karnego materialnego w judykaturze Sądu Najwyższego, Warsaw, 2013, XLVIII (in Polish).

USSR, Polish jurisprudence retained a significant degree of autonomy when it came to methodological concepts in the interpretation of legal provisions. Despite the strong impact of the so-called Marxist legal theory on individual legal disciplines, the work of Polish legal theorists was never completely ideologically dependent on Soviet law. This allowed those theorists to develop various concepts of legal interpretation that remain applicable to this day[19]. Therefore, one may reach a bold, but not unfounded conclusion that during the time of Soviet law's influence on Polish criminal law, interpretative tools could serve as channels through which divergent values could be smuggled. The only condition was that they should be based on a legal text.

For obvious reasons, the preparation of the exegetes themselves, i.e. the people interpreting the law, was of key importance. The correct use of developed, frequently very complex concepts of legal interpretation requires substantive competencies. While Polish jurisprudence retained a certain degree of autonomy in the post-war period, the availability of properly qualified individuals was an issue. In retrospect, it is estimated that until 1989 the courts in Poland did not indulge in deeper self-reflections, often supplementing or even replacing rational reasoning with political arguments. This is what Tomasz Kaczmarek sees as a pathological circumstance: seeing the source of judges' self-justification in the form of following political directives in the practice of justice[20]. On the other hand, according to Lech Gardocki, the main reason for the constant tightening of criminal policies during the Polish People's Republic, especially in the 1960s and 1970s, were the incorrect assumptions made by those who were shaping them. These individuals are said to have assumed that negative social phenomena could be eliminated by harsh courts. This comes down to equating the strengthening of legal rights protection with increasing criminal penalties for violating them[21].

In light of the remarks made above, several general conclusions can be already drawn. First and foremost, there is no doubt that connections between Polish criminal law and Soviet law existed throughout the pre-1989 period. These influences were intended to be implemented based on the Polish Penal Code of 1969: its entry into effect coincided with the tendencies to tighten criminal policies in Poland. In light of this comparison, it is easy to notice the conjunction between the functions of Polish criminal law and the implementation of the postulates shaping the idea of Soviet criminal law. Naturally, the effects of this unification had to be visible in the activities of the Polish judiciary system. Particularly noteworthy in this respect is the activity of the Supreme Court, bearing significant importance regardless of the given period in time.

3. The importance of the jurisprudence of the Supreme Court in Poland

The activities of the Supreme Court functioning in Poland can be discussed from various angles. Methodologically, each discussion requires an emphasis on different issues, depending on the goals

[19] *Kotowski A.*, Wykładania orientacyjna. Teorie wykładni prawa i teoria orientacyjnego badania wykładni prawa, Warsaw, 2018, 141-149 (in Polish).

[20] *Kaczmarek T.*, Materialna treść przestępstwa jako problem kodyfikacyjny, Rozważania o prawie karnym. Księga pamiątkowa z okazji siedemdziesięciolecia urodzin Profesora Aleksandra Ratajczaka, *Szwarc A.J.* (*ed.*), Poznań, 1999, 172-173 (in Polish).

[21] *Gardocki L.*, Prawo karne lat osiemdziesiątych, Reforma praw karnego propozycje i komnetarze. Księga pamiątkowa Profesor Barbary Kunickiej-Michalskiej, *Jakubowska-Hara J., Nowak C., Skupiński J.* (*eds.*), Warsaw, 2008, 67 (in Polish).

that are being set. For the title issue, it is important to illustrate the role that the jurisprudence of the Supreme Court played during the period in which the Polish Penal Code of 1969 was in force, while also presenting the role it plays now. This will serve to extend the analysis undertaken in this article. Moreover, it provides grounds for a clearer presentation of the ambiguous validity of the Supreme Court's positions expressed in judgments issued at a time when Polish criminal legislation was influenced by Soviet thought.

At this juncture, one should start by pointing out that in the period from February 22, 1964, to October 2, 1984, one of the competencies of the Supreme Court was to establish guidelines for the administration of justice and judicial practice[22]. When it comes to creating an image of law in society, the importance of these guidelines has to be appreciated as they were binding all courts and legal bodies where jurisprudence was subject to the supervision of the Supreme Court[23]. These guidelines not only followed the trend of intensifying criminal law repressions: having come as far as even navigating judicial practice in a direction favouring more severe punishment. Some acts even explicitly stated the need to toughen criminal policy[24].

By abolishing the competence to establish guidelines, the Polish legislator slightly modified the function and role of the Supreme Court's activity. Nevertheless, it still directed it towards the practice of lower courts. However, this influence has been extended to involve practices of interpreting criminal law provisions. The Supreme Court began to gain competence to issue resolutions containing guidelines on the interpretation of law and judicial practice in order to standardize the case law of all courts. Obviously, this concerned case law that was subject to the supervision of the Supreme Court. The statutory purpose of this competence was to clarify provisions that raised doubts in practice, as well as situations where their application resulted in discrepancies in case law[25]. The discrepancy in case law, which was tackled by the Supreme Court, occurred when courts adjudicating in specific cases issued different decisions, or even the same decisions: but based on different interpretations of the same provisions. Therefore, the requirement for meeting this condition was the character of the interpreted provisions[26]. The Supreme Court lost this competence on December 29, 1989.[27]

---

22 Article 24 point c of the Act of 15 February 1962 on the Supreme Court (Journal of Laws №. 11, item 54, as amended).

23 *Wróbel W.*, Zmiana normatywna i zasady intertemporalne w prawie karnym, Kraków, 2003, 162 (in Polish).

24 A characteristic example is the announcement of the First President of the Supreme Court of 28 April 1967 on the guidelines of the justice system and court practice in the matter of procedure and sentencing of recidivists (M. P. of 1967, №. 27, item 125), which openly questioned the previous judicial practice, indicating that: "The analysis of court decisions leads to the conclusion that the reaction of the courts to the phenomenon of growing recidivism does not always correspond to the principles of proper application of the law and the postulates of criminal policy. In many cases, the courts show leniency towards recidivists, not taking into sufficient consideration the social danger resulting from the fact that they repeat attacks on the people's legal order. This state of case law requires improvement."

25 Article 13 item 3 of the Act of 20 September 1984 on the Supreme Court (Journal of Laws №. 45, item 241, as amended).

26 *Iwulski J.*, Podejmowanie przez Sąd Najwyższy uchwał na podstawie art. 13 pkt 3 ustawy o Sądzie Najwyższym, Przegląd Sejmowy, № 11-12, 1994, 35 (in Polish).

27 Article 3 item 9 of the Act of 20 December 1989 amending the Acts – the Law on the Organization of Common Courts, on the Supreme Court, on the Supreme Administrative Court, on the Constitutional Tribunal, on the Organization of Military Courts and the Law on Notaries (Journal of Laws №. 73, item 436).

It comes as a surprise that during the period when these guidelines were in effect, the Supreme Court would sometimes express judicial positions that conveyed the message about the need to rationalize criminal policy. Nevertheless, they were not given much attention in practice. This predominantly concerns views in which similarities can be drawn in comparison to the current standards of criminal policy in Poland. Examples include the idea of confiscation of property, which was introduced into the catalog of additional penalties via the Polish Penal Code of 1969.[28] The jurisprudence of the Supreme Court indicated that the entire confiscation of property should be ordered for committing the most serious crimes and when, concerning the circumstances of the case, it can be assumed that a significant part of the perpetrator's property was obtained through this offense[29]. The Supreme Court also indicated that when adjudicating confiscation, courts should maintain reasonable proportions between the value of the seized property, and the value of the property subject to confiscation. The amount of monetary compensation was also taken into consideration[30].

In principle, the above-mentioned views cannot have their correctness denied in the context of rationalizing criminal policy. By referring to proportions, they may even appear comparable to current European legislative standards and interpretations[31]. Yet, the legal reality turned out to be different. Confiscation began to gain importance over time, and by the 1980s it served as an important instrument of criminal policy aimed at eliminating private property[32]. Dismissal of the positions of the Supreme Court that aimed to rationalize the use of property confiscation was facilitated by situations when the legislator would not link confiscation to the amount of damage caused by the crime. Thus, there was no textual basis for relativizing the value of confiscation to the size of the crime committed. As a result, the basis for assessing the validity of the confiscation order was the perpetrator of the crime: especially their financial status[33]. Given the other positions of the Supreme Court, even the lack of assets was not an obstacle when confiscation was being ordered[34].

---

28 The penalty of confiscation of property was abolished only by virtue of Article 2 of the Act of 23 February 1990 amending the Penal Code and certain other acts (Journal of Laws №. 14, item 84), which entered into force on 28 March 1990.

29 Judgment of October 3, 1972, V KRN 339/72 of the Supreme Court in Poland.

30 Judgment of March 29, 1977, VI KRN 395/76 of the Supreme Court in Poland.

31 In the cited positions, one can see a certain kind of weighing of goods, and thus the implementation of the postulates arising from the principle of proportionality of the current legal system, which is a directive that meets the requirement of axiological rationality of law. In particular, to the extent to which an element of necessity is derived from the principle of proportionality, which is the basis for the principle of subsidiarity of criminal law, which requires treating criminalization as the *ultima ratio* – *Wojtyczek K.*, Zasada proporcjonalności jako granica prawa karania, Racjonalna reforma prawa karnego, *Zoll A.* (*ed.*), Warsaw 2001, 301-303 (in Polish).

32 Interesting analyses supported by statistics – *Rzeplińska I.*, Polityka stosowania kary konfiskaty mienia w PRL, Archiwum Kryminologii, Vol. XVIII, 1992, 154-167 (in Polish); also *Czechowska M.*, Konfiskata mienia obowiązująca na gruncie kodeksu karnego PRL jako instrument totalitarnego systemu komunistycznej dyktatury, Studia nad Autorytaryzmem i Totalitaryzmem, Vol. 43, № 4, 2021, 41-50 (in Polish).

33 *Spotowski A.*, Konfiskata mienia i przepadek rzeczy (uwagi de lege ferenda), Państwo i Prawo, № 3, 1989, 102 (in Polish).

34 This position was expressed by the Supreme Court. As it stated, if the provision states that the imposition of an additional penalty (e.g. confiscation) is obligatory, then the statement that the accused has no assets, in

The Supreme Court's positions postulating rationalization of confiscation had no practical significance; despite the undoubted theoretical importance of the judgments themselves. Therefore, one can point to another irregularity of this period, namely the pretense of thought oriented towards the rationalization of criminal law repression, which was supposed to favor the individual interest of the perpetrator. One can also risk hypothesizing that the stability of the Supreme Court's positions was selective in the sense that the activity of the Polish judiciary consistently implemented a policy of harsh repressions. In other words, the views of common courts used the views of the Supreme Court when they constituted the basis for more severe treatment of the criminal perpetrator.

Nowadays, the function of the Supreme Court is vastly different. But that does not signify its futility. On the contrary, the importance of this court's positions is vital for the perception of the law. At this juncture, this issue should be discussed further.

Firstly, it is necessary to emphasize that the judgments of the Polish Supreme Court are not a source of generally applicable law. Basically, no law is created as a result of the activities of any court in Poland[35]. In any case, they do not create it in the sense in which the setting of precedents is related to the law-making process. This is about precedents in their traditional understanding, i.e. as court decisions that have binding force in relation to future judgments issued in similar cases. The fact that the jurisprudence of the Supreme Court does not constitute traditional precedents results from the characteristics of the continental legal system, in which statutory law (written in legal acts) is the only source of law. This is contrary to countries with a common law system[36]. Yet, is worth noting that there are justifiable doubts as to whether all positions expressed in legislative decisions constitute precedents[37].

Nevertheless, case law is an important argument in the process of decoding the proper content of the law. Sometimes this involves a need to make a certain addition: in some situations, this will not have a clear textual basis. In other, it may even display features going beyond the textual meaning or those that will break the textual meaning. The judgments of the Supreme Court thus become important

---

the light of the provisions of the Penal Code, does not provide a basis for departing from its imposition – Judgment of February 22, 1978, IV KR 33/78 of the Supreme Court in Poland.

35 This remark does not apply to those rulings of adjudicating bodies that are of a constitutive nature. An example of such a ruling is a divorce ruling, by virtue of which a marriage is dissolved, which shapes the legal relationship between spouses. Another thing is the activity of the Constitutional Tribunal, which, however, conceptually does not overlap with courts (Article 173 and 174 of the Constitution of the Republic of Poland) and whose activity is not related to the administration of justice (Article 175 of the Constitution of the Republic of Poland).

36 In *common law* systems, precedent is a form of creating law through judicial practice. They are therefore not a product of the legislative process, but a product of practice. In this version, precedent is a principle of resolution contained in a judicial decision. At the same time, it constitutes a formal binding of courts when making future decisions in the same type of matter as the one in which the decision was made based on the precedent – *Kmieciak Z.*, Precedens sądowy – Istota i znaczenie. Zeszyty Naukowe Sądownictwa Administracyjnego, № 5, 2011, 9-10 (in Polish).

37 The doubts raised here concern primarily precedents created through the precedent-setting procedure. This procedure displays many similarities to legislative procedures. For this reason, they are often treated on a par with legislative acts in terms of the method of their creation – *Morawski L.*, Czy precedens powinien być źródłem prawa?, W kręgu problematyki władzy, państwa i sądownictwa. Księga Jubileuszowa w 70-lecie urodzin Profesora Henryka Groszyka, *Malarczyk J.* (*ed.*), Lublin, 1996, 188-189 (in Polish).

tools that can be used to support the results of interpretations with such features. Their importance stems from the authority of the body that shapes the sense of recognition of the accuracy of its decisions. In this sense, it is even assumed that the Supreme Court's ruling is something more than just a "reading of the norm[38]. From this perspective, the Supreme Court basically explains the legal text in different. Such a role of this court, in turn, justifies the above-mentioned statement that the Supreme Court's activity is given a function similar to a statute in its traditional sense: as a source of generally applicable law.

It should be emphasized that these analyses are in no way intended to give the judgments of the Supreme Court binding legal force. Nor do they attempt to convince anyone to believe that they should have such force. The point is rather to notice certain interpretative arguments existing within them: ones that are difficult to refute as they serve to read the content of the law. This also applies to legal principles established by the Supreme Court. The Polish legal system lacks regulations from which the obligation of common courts to respect these principles can be derived. Therefore, the resolutions adopted by the Supreme Court do not automatically influence the jurisprudence of common courts. In this case, the influence of the Supreme Court on the Polish judiciary is supposed to stem either from the respect for the position in the structure of the justice system or via a specific positive attitude towards the considerations carried out in the Supreme Court's judgments. Therefore, invoking the resolutions of the Supreme Court is based on the same principles as in the case of invoking the established jurisprudence of the Supreme Court. It is still up to the adjudicating panel of the Polish common court to decide whether they will accept the view presented therein or not. Positions from resolutions may therefore be used in judicial practice, just as any view expressed in literature or other judgments can be used, as long as the interpretation of the law is consistent with the principles of a democratic state of law[39]. In other words, a common court may depart from the position of the Supreme Court expressed in the resolution if the interpretative process does not contain any shortcomings that would take effect[40] outside the standard framework of contemporary legalistic principles.

Both models of the reception of Supreme Court positions presented above, i.e. the reception taking place before 1989 and the one currently, serve as means to unify judicial practice. However, it should be noted that they are vastly different. It is very apt to base this division on the criterion of the nature of the impact on jurisprudence. The former are based on the "argument of force" because they are formally binding; as were the guidelines issued until 1989. The latter model of the impact of the Supreme Court's positions works on the principle of the "force of arguments", which so far only aims

---

38 More extensively and interestingly on this topic – *Wiącek M., Żółtek S.*, Niekonstytucyjność normy ustalonej w drodze orzecznictwa Sądu Najwyższego, Jednolitość orzecznictwa. Standard – instrumenty – praktyka. Materiały z konferencji naukowej Warszawa, Sąd Najwyższy, 21 listopada 2013 r., Studia i Analizy Sądu Najwyższego Materiały Naukowy, Vol. I, *Grochowski M., Raczkowski M., Żółtek S.* (*eds.*), Warsaw, 2015, 50-53 in Polish).

39 Resolution of May 5, 1992, KwPr 5/92 of the Supreme Court of the Republic of Poland.

40 In the case of criminal courts, it is a decision made in the form of a procedural decision (orders and judgments, including judgments and resolutions).

to convince people to accept these positions. This, in turn, it is closely associated with the current legal system in Poland[41].

From this perspective, it is reasonable to conclude that common courts, since they do not have to refer to the positions of the Supreme Court currently referred to, should not look for solutions to interpretation problems in positions that the Supreme Court expressed during the period of the pre-1989 legal regime. As indicated, it was based on a different axiological system, as well as completely different ideological assumptions. It also remained prone to irregularities, which sometimes were the results of errors in the reasoning of the adjudicators themselves.

4. On the treatment of the material element of a crime by the Supreme Court

There is no doubt that jurisprudence in general, and therefore also the positions derived from the jurisprudence of the Supreme Court, are products of the interpretation of law from legal provisions. Therefore, within the system of law and legal provisions, one should be a reflection of the other.

Among the fundamental conditions for assigning criminal liability under the Polish Penal Code of 1969 was the statement regarding behavior meeting the characteristics of a socially dangerous act[42]. This, in turn, enriches the concept of crime with the so-called material element. It is worth emphasizing that in European countries where Soviet law did not exert its influence, criminal laws do not provide for the material element of a crime. This justifies the presumption of the connotation of the aspect of "social danger" with the political conditions characteristic of systems in totalitarian states[43]. This, in essence, is undeniable, and Igor Andreev's explanation could be brought up a this point. The author points out that in the doctrine of criminal law in socialist countries, the material approach to a crime treated as a socially dangerous act has two meanings, namely: theoretical-cognitive and practical. The first approach emphasizes the relationship between crime and social life but is understood within the bounds of the concept of the principles of historical materialism regarding the class structure of society. Seeing crime as a socially dangerous act, the science of criminal law is opposed to metaphysical concepts of crime, such as seeing it as a violation of the laws of nature, a disregard of God's will, or perceiving it through the lens of ethical considerations. Social danger, as a structural element of a crime, means that it is a threat to social relations. These relations are connected with the interests of the ruling class, which decides what acts are socially dangerous and, as a result,

---

41 *Leszczyński L.*, Jednolitość orzecznictwa jako wartość stosowania prawa, Jednolitość orzecznictwa. Standard – instrumenty – praktyka, Materiały z konferencji naukowej Warszawa, Sąd Najwyższy, 21 listopada 2013 r., Studia i Analizy Sądu Najwyższego Materiały Naukowy, Vol. I, *Grochowski M., Raczkowski M., Żółtek S.* (*eds.*), Warsaw, 2015, 14-16 (in Polish).

42 According to Article 1 of the Polish Penal Code of 1969: "Only a person who commits a socially dangerous act, prohibited under penalty by a statute in force at the time of its commission, shall be subject to criminal liability."

43 *Zoll A.*, Materialne określenie przestępstwa, Prokuratura i Prawo, № 2, 1997, 8 (in Polish). Similarly, Lech Gardocki points out that: "The material nature of the definition of a crime was raised in the science of criminal law in socialist countries, especially in the USSR, to the rank of a fundamental feature of socialist criminal law" – *Gardocki L.*, Pojęcie przestępstwa i podziały przestępstw w polskim prawie karnym, Annales Universitatis Mariae Curie-Skłodowska, sectio G (Ius), Vol. 60, № 2, 2013, 32 (in Polish).

punishable. It was claimed that crime was a class phenomenon that fit into the framework of historical ideas of Soviet law[44]. This went to a point where the element of danger was decisive in deciding the punishment of the perpetrator, and not during the reasoning of the court[45].

As a consequence of the political change in Poland in 1989, the idea of creating a new penal codification based on axiological assumptions different than the previously accepted ones was a natural outcome. This, in turn, remains tantamount to taking a new direction in the state's criminal policy. Departure from the connotations that characterize totalitarian states was strongly advocated in the literature[46]. Interestingly enough, the material element of the crime was retained despite the obvious negative connotations. However, there was a change with "social danger" being replaced by "social harmfulness"[47]. Naturally, in the present legal system, Polish courts (the Supreme Court included) rely on the second definition. This, in turn, means that the considerations conducted in them are intended to differ from those based on the previous approach to the material element of the crime.

At this point, it should be noted that Marxism, on which Soviet law was based, in regard to its program for society, was not a productive condition. It projected nothing, serving only as an ideology based on generalities and a tool in the hands of an anti-bourgeois government[48]. On top of this, until 1989, Polish criminal law continued to adopt a simplified version of Marxism. Especially during the 1950s, when most authors referred not so much to the essence of the philosophical or methodological assumptions of Marxism, but only to its phraseology[49]. Thus, it should not be surprising that the contemporary program deficiencies in the functioning of the practice of criminal law were being patched with the discretion of the ruling class, i.e. socialist policy. This was how demands for pursuing interests far different from those currently in force would enter the Polish judiciary. This, in turn, explains more than the acceptance of the politicization of court rulings: including the Supreme Court, as formulated on the basis of the 1969 Polish Penal Code. Frequently, as a result of intellectually poor arguments, the decisions they contained took extremely inhumane directions. The politicization of the Supreme Court's rulings also explains the fundamental difficulty in recognizing the current concept of "social harmfulness" concerning the concept of "social danger". If the programmatic power of the doctrine is negligible, it must constitute a gateway for smuggling in less-than-well-thought-out relationships of private interest and public interest.

However, it seems that determining the social danger of an act manifests certain flexible features. This is corroborated by the positions taken by the Supreme Court after the process of changes

---

44 *Andrejew I.*, Zarys prawa karnego państw socjalistycznych, Warszawa, 1979, 79-80 (in Polish).

45 *Szerer M.*, Karanie a humanizm, Warsaw, 1964, 29 (in Polish).

46 E.g. *Filar M.*, O niektórych ogólnych zasadach odpowiedzialności karnej w projekcie kodeksu karnego z sierpnia 1990 r. – polemicznie, Państwo i Prawo, № 4, 1991, 84 (in Polish).

47 Article 1 § 2 of the Polish Penal Code of 1997 states that: "A prohibited act whose social harmfulness is insignificant shall not constitute an offence."

48 The reasons for this state of affairs include the programmatic moderation of Karl Marx and Friedrich Engels, who propagated exclusively "utopian socialism" that was incompatible with the scientific nature of their own theory – *Nowak L.*, Marksizm versus liberalizm: pewien paradoks, Marksizm, liberalizm, próby wyjścia, Poznańskie studia z filozofii humanistyki, Vol. 4, Poznań, 1997, 14-15 (in Polish).

49 Interesting comments by Tomasz Kaczmarek – *Kaczmarek T.*, Stan polskiej dogmatyki prawa karnego w okresie zmian ustrojowych, Państwo i Prawo, № 1, 2018, 17-18 (in Polish).

in the political system and the verification of its representatives. In this case, modeling via the concept of "social danger" takes a different form than that which could result from the otherwise desirable reorientation of the penal policy of the Polish state. In fact, in one of the judgments issued after the political reform, the Supreme Court stated that: "the social danger of an act cannot be assessed from the point of view of the political interests of the group in power and thus considered 'dangerous' in such an aspect." When the danger relates to the political interests of a group and not society, it is not a social danger as referred to in Article 1 Penal Code [from 1969 – B.N.][50] It seems impossible to find any pejorative connotations in these words. In light of this position, social danger turns out to be a concept with still unclear boundaries, but one that unequivocally distances itself from the politicization of court decisions. It is easy to see the separation of Polish criminal law of 1969 from the Soviet criminal law thought.

On the one hand, it is not surprising that the presented position distances itself from the postulates of Marxism, thus abandoning Soviet ideas of criminal law in favor of an ideology adequate to the current system. A line of interpretation that favors this reasoning seems quite desirable, and may even appear natural. However, although this view was presented after the political change, it was within the framework of the same provisions and regulations that were in force during the years prior to 1989. The assumptions underlying the introduction of the 1969 Polish Penal Code have therefore not changed. In such a case, it should be considered whether this position expresses an interpretative result in the form of a departure from the result of teleological interpretations[51]. If so, the question should be asked: whether in this case, the Supreme Court has not gone too far, meaning that it has not fallen into the trap of politicization in favor of a new system. Certainly, the justification for this state of affairs, if it actually occurred, is the lack of regulations allowing for other principles of criminal liability to be used as foundations[52].

Following the aforementioned argumentation, it can therefore be assumed that the consistency of the Supreme Court's rulings in the example presented is rooted in a certain inconsistency. This inconsistency is treated here as a failure to be bound by the letter of the law as it was supposed to apply according to the goals of the creators of the act. The stability of regulations is a certain basis for promoting a variety of views. Since the Supreme Court is moving away from the positions presented earlier in favor of a fresh approach, it is completely obvious that it is modifying its views. Therefore, at this point, we are unable to recognize the stability of case law. The progressiveness manifesting itself in this, however, allows us to formulate the thesis, which is important for the title issue: that the Supreme Court, when it comes to its activity in the field of expressing views, is invariably characterized by autonomy in resolving interpretative problems.

---

50 Judgment of January 10, 1994, II KRN 377/93 of the Supreme Court of the Republic of Poland. The court repeated this position in Judgment of November 26, 2001, III KKN 421/99.

51 In the context of the interpretation adopted here, referring solely to the purposes for which the Act was enacted in 1969.

52 This concerns both the lack of a new Penal Code, which entered into force on 1 September 1998, and the lack of a Constitution of the Republic of Poland adequate to the time, which in its current version has been in force since 17 October 1997.

Looking more broadly at the status quo, seeing it as a certain state in which no changes occur, we can talk about a certain stability in the specific sense that the Supreme Court, regardless of the analysed period of activity, has the opportunity to express its views in a peculiarly liberated way. One may even risk stating that from the perspective adopted here, autonomy is not limited by the legal text, given that the same provision is interpreted differently at various times. The legal text is definitely not restrictive in an excessive manner. It is, in fact, difficult to imagine a situation in which the Supreme Court strictly adheres to the provisions of law, giving particular predominance to the legislator's assumptions and intentions that guided the introduction of the interpreted regulation. Especially in situations when it is related to the acceptance of the view of "social danger" by the judiciary presented before the political reform in Poland. This attitude constitutes a blatant and unacceptable affirmation of the socialist view of criminal law from the perspective of the system adopted after the year 1989.

5. Current positions developed under the Polish Penal Code of 1969 – other selected examples

The analysis of the judgments of the Supreme Court during its activity within the realm of views expressed under the Polish Penal Code of 1969 and contemporarily allows us to conclude that the stability of the positions expressed therein can be observed in a more direct expression. There are at least several reasons for this state of affairs.

The reason why the views of the Supreme Court expressed under the previous system remain seemingly exact is the constant approach to certain institutions of criminal law. This shouldn't be too surprising. Since the views on theoretical issues of criminal law remain the same as today, it is naturally reflected in the case law from both periods. A clear example illustrating this dynamic emerges when looking into the issue of the relativity of a criminal statute from the perspective of the conflict of criminal statutes over time. In the judgment of the Supreme Court of January 14, 1970, issued in the case with reference number III KR 185/69, it was indicated that a more relative law should be understood as the one which, when applied in a specific case, provides for the most favorable legal consequences for the perpetrator. This choice, it says, should take into account all the consequences resulting from contradicting acts. Direct references to this particular ruling can be currently observed both in the jurisprudence of the Supreme Court itself[53] and in common courts[54].

When it comes to factors favorable for maintaining the validity of this particular position, it is certainly worth noting that over time the basic regulation on the conflict of criminal laws remained literally the same in the Polish Penal Code of 1969 as well as in the currently applicable Polish Penal Code of 1997[55] Yet, an expression of the same view is not entirely obvious. A broader perspective

[53] Judgment of November 16, 2000, II KKN 381/00 of the Supreme Court of the Republic of Poland.

[54] Decision of December 9, 2019, № II Akz 875/19 of the Court of Appeal in Wrocław; Decision of December 23, 1998, № II AKa 228/98 of the Court of Appeal in Katowice.

[55] Both Article 2 § 1 of the Penal Code of 1969 and Article 4 § 1 of the Penal Code of 1997 read as follows: "If at the time of sentencing a different law is in force than at the time of the commission of the offence, the new law shall apply; however, the previously in force law shall be applied if it is more lenient for the perpetrator."

certainly appears to be more humane, as it allows for the consideration of a greater number of criteria for examining the relativity of a criminal statute. As a result, it expands the scope of searching for solutions favorable to the perpetrator. However, on the other hand, the narrow perspective expressed via limiting itself to the procedure of comparing the dimensions of penalties in the old and new criminal acts constitutes an interpretation of the law that allows for the imposition of more severe penalties. Most notably when it comes to perpetrators of crimes that in the past were particularly socially dangerous. Such an interpretation would certainly correspond with the trend of tightening the criminal policy that took place in the 1960s and 1970s.

Another example of duplicating views on dogmatic issues is the position contained in the judgment of the Supreme Court of September 22, 1971, issued in the case with reference number II KR 171/71. It presents the difference between preparing to commit a prohibited act and attempting it, while also emphasizing the reality of the threat to interests protected by law in the case of an attempt. It also recognizes that such cases "concern the perpetrator taking the final action aimed directly at the implementation of the crime. Preparatory activities are only intended to create the conditions for undertaking this final activity." The position mentioned is currently quoted directly[56] while exceptions to this view can still be noted[57].

However, the Supreme Court expressed a less controversial position when discussing the essence of an unsuccessful attempt under the Polish Penal Code of 1969[58], as indicated by its frequent referencing and its durability[59]

---

[56] E.g. Judgment of August 8, 2018, № VIII KK 2/18 of the Supreme Court of the Republic of Poland; Judgment of April 18, 1999, № II AKa 55/99 of the Court of Appeal in Łódź.

[57] Judgment of April 15, 2013, № II AKa 36/13 of the Court of Appeal in Szczecin.

[58] The Supreme Court pointed out that: "One cannot speak of an unsuccessful attempt when at the time the perpetrator initiated the action, committing the crime was objectively possible (even if the chances of realizing the perpetrator's intention were small), and only later – as a result of the intervention of unfavourable circumstances – the realization of the perpetrator's intention turned out to be impossible due to the lack of an object suitable for committing the crime or because it turned out that the perpetrator used a means not suitable for causing the intended effect" – Judgment of November 29, 1976, I KR 196/76 of the Supreme Court in Poland.

[59] This can be observed in the activities of the Supreme Court (e.g. Resolution of January 19, 2017, № I KZP 16/16 of the Supreme Court of the Republic of Poland; Decision of July 13, 2022, № III KK 293/22 of the Supreme Court of the Republic of Poland) and common pleas (e.g. Judgment of May 23, 2014, № II K 169/14 of the Regional Court in Legionowo; Judgment of April 26, 2016, № XIV K 1188/13 of the District Court for Warsaw-Mokotow in Warsaw; Judgment of June 9, 2014, № III K 8/14 of the Regional Court in Białystok; Judgment of August 13, 2014, № II Ka 93/14 of the Regional Court in Sieradz; Judgment of September 9, 2014, № III K 90/14 of the Regional Court in Poznań; Judgment of April 14, 2016, № VI Ka 136/16 of the Regional Court in Słupsk; Judgment of August 2, 2018, № III K 44/18 of the Regional Court in Bydgoszcz; Judgment of September 15, 2020, № II IX Ka 457/20 of the Regional Court in Warsaw; Judgment of December 20, 2012, № II Aka 215/12 of the Court of Appeal in Szczecin; Judgment of May 22, 2013, № II AKa 133/13 of the Court of Appeal in Wrocław; Judgment of September 11, 2013, № II AKa 249/13 of the Court of Appeal in Wrocław; Judgment of May 23, 2014, № II AKa 116/14 of the Court of Appeal in Katowice; Judgment of July 8, 2014, № II AKa 108/14 of the Court of Appeal in Łódź; Judgment of November 27, 2014, № II AKa 217/14 of the Court of Appeal in Szczecin; Judgment of September 30, 2015, № II AKa 256/15 of the Court of Appeal in Warsaw; Judgment of October 26, 2017, № II AKa 419/15 of the Court of Appeal in Warsaw; Judgment of June 18, 2020, № II AKa 44/20 of the

The reason behind the clarification of stable judgments lies in the semantics of individual phrases. The view has long been expressed in the Polish literature on legal theory that in determining the meaning of phrases in a legal text, the interpretation made by the Supreme Court is often taken into account[60]. This applies to cases where the meaning of the word contained in the interpreted provision has not changed significantly. It is thus obvious that its recognition in the Supreme Court's jurisprudence should not undergo any major changes in meaning. The word "burglary" could be provided as an example. The Supreme Court, following the guidelines of the administration of justice and judicial practice on criminal liability for crimes specified in Article 208 Polish Penal Code, expressed the view that: "The scope of the concept of burglary, which is referred to in Article 208 Penal Code [from 1969 – B.N] includes not only the destruction or damage of a material obstacle that is part of the structure or a special closure of a room, making access to the interior of this room difficult but also any removal of such an obstacle by physically affecting it in any way"[61]. This position has been invoked many times in the context of the currently applicable Article 279 § 1 of the Polish Penal Code both by the Supreme Court[62], as well as the common courts[63].

It is necessary to consider whether the stable positions mentioned in the title did not also occur in a somewhat reverse manner. This concerns the jurisprudential positions of the Supreme Court that have been sustained despite significant semantic changes that have occurred; regardless of the processes of creating and applying law. In other words, these are situations where the common meaning of a given phrase has changed, but not its criminal law meaning. An example, and at the same time the basis for these considerations, are cases of reference in judicial decisions[64] made by the Supreme Court that were taken while determining the meaning of the phrase "rape on a person" in the context of the current definition of the crime of robbery[65]. This is concerning the position according to which "a rape of a person is only a means to an end, which is the seizure of property."[66]

Unquestionably, currently the word "rape" is commonly seen as connoting a crime of a sexual nature. At the same time, in comparison to the Polish Penal Code of 1969, the current legislator has abandoned the word "rape" in the definition of robbery and replaced it with the word "violence", which in the common understanding refers to a broader matter. This, in turn, allows us to assume that

Court of Appeal in Szczecin; Judgment of February 2, 2022, № II AKa 523/21 of the Court of Appeal in Katowice).

60 *Opałek K., Wróblewski J.*, Zagadnienia teorii prawa, Warsaw, 1969, 41 (in Polish).

61 Resolution of June 25, 1980, № VII KZP 48/78 of the Polish Supreme Court.

62 E.g. Judgment of September 9, 2004, № V KK 144/04 of the Supreme Court of the Republic of Poland; Decision of December 6, 2006, № III KK 358/06 of the Supreme Court of the Republic of Poland; Decision of October 29, 2012, № I KZP 11/12 of the Supreme Court of the Republic of Poland; Judgment of March 22, 2017, № V KK III KK 349/16 of the Supreme Court of the Republic of Poland.

63 E.g. Judgment of October 11, 2013, № II AKa 152/13 of the Court of Appeal in Białystok; Judgment of June 4, 2014, № II AKa 80/14 of the Court of Appeal in Lublin.

64 E.g. Judgment of October 27, 2021, № II AKa 89/21 of the Court of Appeal in Poznań; Judgment od March 31, 2022, № IV K 306/21 of the District Court in Bydgoszcz.

65 According to Article 280 § 1 of the Polish Penal Code of 1997, the features of robbery are fulfilled by someone who steals by using violence against a person or threatening to use it immediately or by causing a person to become unconscious or defenceless.

66 Judgment of June 14, 1989, № V KRN 99/89 of the Supreme Court in Poland.

the legislator noticed the connotations indicated above. However, what is confusing is the perspective of the Supreme Court, according to which, in the comparison of the current Polish Penal Code of 1997 with the now outdated Polish Penal Code of 1969, the difference in a robbery is based, among others, on the fact that the term "violence" replaced "rape", which is why they should be considered synonymous[67]. In criminal law literature, it is noted that associating meanings of various linguistic expressions is an expression of an interpretation of law that is unacceptable in generally accepted theories – the homonymous interpretation[68], which states that the same legal phrases should not be given different meanings within a given field of law[69]. In light of this, accepting the notion that "violence" and "rape" constitute identical meanings is unacceptable.

It is worth noting, however, that, contrary to the Supreme Court's claims, "violence" and "rape" were not the same terms under the previously applicable Penal Code, although their meanings overlapped to some extent. One should be reminded that the Polish Penal Code of 1969 also differentiated between "violence" and "rape on a person"[70]. This would also translate into differences in the jurisprudence of the Supreme Court regarding the interpretation of the meanings of the phrases "rape" and "violence". This has been mentioned by the Supreme Court itself in more recent jurisprudence[71]. At the same time, over 25 years ago the Supreme Court stated that "rape" is a particular form of "violence", and some cases of violence may involve rape of a person[72].

A rational approach is to assume that when currently referring to the Supreme Court's comments based on the word "rape" in the context of the crime of robbery, it is a reference to the highest level of consideration. Namely, it is not about the verbal structure, but about capturing the essence of this crime. From this point of view, we can talk about the stability of the Supreme Court's positions regardless of the semantic changes taking place outside the process of creating and applying law[73]. However, this requires prior identification of these changes in order to maintain clarity of considerations conducted in this area.

---

67 Judgment of June 30, 2004, № II KK 354/03 of the Supreme Court of the Republic of Poland.

68 This is what Sławomir Żółtek rightly claims, arguing that if the phrases "violence against a person" from Article 280 § 1 of the Polish Penal Code of 1997 and "rape against a person" contained in Article 130 § 3 of the Penal Code constitute protection of the same good, then a different meaning should be assumed for each of them. Sławomir Żółtek also cites specific Supreme Court rulings in which the Supreme Court established such identity – *Żółtek S.*, Znaczenie normatywne ustawowych znamion typu czynu zabronionego Z zagadnień semantycznej strony zakazu karnego, Warsaw, 2017, 402 note 1293 (in Polish); also *Bielski M.*, Wyładnia art. 280 § 1 k.k. oraz art. 130 § 3 k.w. Glosa do uchwały SN z dnia 17 grudnia 2008 r., I KZP 27/08, Państwo i Prawo, № 3, 2010, 136-141 (in Polish).

69 *Morawski L.*, Zasady wykładni prawa, Toruń, 2006, 103-104 (in Polish).

70 Such a distinction also appears in the Polish Penal Code of 1997, which refers to both "rape against a person" (Article 163 § 1 of the Polish Penal Code) and "violence" (Article 280 § 1 of the Polish Penal Code).

71 Decision of January 7, 2008, № II KK 252/07 of the Supreme Court of the Republic of Poland.

72 Decision of March 16, 1991, № I KZP 32/98 of the Supreme Court of the Republic of Poland.

73 On the side-lines, it is worth noting the need to conduct separate research into the evolution of the Polish language regarding whether the word "rape" is currently commonly understood to have clear connotations of a sexual crime or not.

6. Conclusions

The stability of Poland's Supreme Court positions expressed in criminal law can be recognized from many different perspectives. They are not always clearly obvious. Examples of duplicating positions developed on the basis of the regulations of the Polish Penal Code of 1969 lead to the conclusion that invoking them in the context of current judicial activity has its basis. Therefore, it is not the case that the severance of the connections between Polish criminal law and elements from Soviet law automatically made the then Supreme Court's positions obsolete. Taking into consideration the particular importance of the content of these positions, we should not completely turn our backs on them. Likewise, it is still advisable to approach them with great precaution. While these judgments may contain enlightened views that are also useful in practice today, we should remember about the flaws of that period's legal system during which the previous code was in effect. The existence of these defects affected the quality of the views presented by the Supreme Court. Loss of vigilance may, in turn, lead to the smuggling of content that is undesirable from the point of view of current legal standards in Poland, undoubtedly disturbing the authority of the Supreme Court.

Bibliography:

1. Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws №. 78, item 483, as amended).
2. Act of 19 April 1969 – the Penal Code (Journal of Laws №. 13, item 94, as amended).
3. Act of 20 September 1984 on the Supreme Court (consolidated text: Journal of Laws of 2002, №. 101, item 924, as amended).
4. Act of 20 December 1989 amending the Acts – the Law on the Organization of Common Courts, on the Supreme Court, on the Supreme Administrative Court, on the Constitutional Tribunal, on the Organization of Military Courts and the Law on Notaries (Journal of Laws №. 73, item 436).
5. Act of 23 February 1990 amending the Penal Code and certain other acts (Journal of Laws №. 14, item 84).
6. Act of 6 June 1997 – the Penal Code (consolidated text: Journal of Laws of 2024, item 17, as amended).
7. Announcement of the First President of the Supreme Court of 28 April 1967 on the guidelines of the justice system and court practice in the matter of procedure and sentencing of recidivists (M. P. of 1967, №. 27, item 125).
8. *Andrejew I.*, Zarys prawa karnego państw socjalistycznych, Warszawa, 1979, 79-80 (in Polish).
9. *Andrejew I., Lernell L., Sawicki J.*, Prawo karne Polski Ludowej. Wiadomości ogólne, Warsaw, 1954, 220 (in Polish).
10. *Andrejew I., Świda W., Wolter W.*, Kodeks karny z komentarzem, Warsaw, 1973, 7 (in Polish).
11. *Bafia J., Mioduski K., Siewierski M.*, Kodeks karny. Komentarz, Warsaw, 1971, 3 (in Polish).
12. *Bielski M.*, Wyładnia art. 280 § 1 k.k. oraz art. 130 § 3 k.w. Glosa do uchwały SN z dnia 17 grudnia 2008 r., I KZP 27/08, Państwo i Prawo, № 3, 2010, 136-141 (in Polish).
13. *Czechowska M.*, Konfiskata mienia obowiązująca na gruncie kodeksu karnego PRL jako instrument totalitarnego systemu komunistycznej dyktatury, Studia nad Autorytaryzmem i Totalitaryzmem, Vol. 43, № 4, 2021, 41-50 (in Polish).

14. *Filar M.*, O niektórych ogólnych zasadach odpowiedzialności karnej w projekcie kodeksu karnego z sierpnia 1990 r. – polemicznie, Państwo i Prawo, № 4, 1991, 84 (in Polish).
15. *Gardocki L.*, Pojęcie przestępstwa i podziały przestępstw w polskim prawie karnym, Annales Universitatis Mariae Curie-Skłodowska, sectio G (Ius), Vol. 60, № 2, 2013, 32 (in Polish).
16. *Gardocki L.*, Prawo karne lat osiemdziesiątych, Reforma praw karnego propozycje i komnetarze. Księga pamiątkowa Profesor Barbary Kunickiej-Michalskiej, *Jakubowska-Hara J., Nowak C., Skupiński J.* (*eds.*), Warsaw, 2008, 65, 67 (in Polish).
17. *Gardocki L.*, Zagadnienia teorii kryminalizacji, Warsaw, 1990, 39 (in Polish).
18. *Giercenzon A.A.*, Prawo karne. Część ogólna. Wydanie czwarte, przerobione (przekład z rosyjskiego), Warsaw, 1952, 15-17 (in Polish).
19. *Iwulski J.*, Podejmowanie przez Sąd Najwyższy uchwał na podstawie art. 13 pkt 3 ustawy o Sądzie Najwyższym, Przegląd Sejmowy, № 11-12, 1994, 35 (in Polish).
20. *Izdebski H.*, U progu odrodzonego sądownictwa II Rzeczypospolitej, Zeszyty Naukowe Sądownictwa Administracyjnego, №. 2, 2019, 13 (in Polish).
21. *Kaczmarek T.*, Materialna treść przestępstwa jako problem kodyfikacyjny, Rozważania o prawie karnym. Księga pamiątkowa z okazji siedemdziesięciolecia urodzin Profesora Aleksandra Ratajczaka, *Szwarc A.J.* (*ed.*), Poznań, 1999, 172-173 (in Polish).
22. *Kaczmarek T.*, Stan polskiej dogmatyki prawa karnego w okresie zmian ustrojowych, Państwo i Prawo, № 1, 2018, 17-18 (in Polish).
23. *Kmieciak Z.*, Precedens sądowy – Istota i znaczenie. Zeszyty Naukowe Sądownictwa Administracyjnego, № 5, 2011, 9-10 (in Polish).
24. *Kotowski A.*, Wykładania orientacyjna. Teorie wykładni prawa i teoria orientacyjnego badania wykładni prawa, Warsaw, 2018, 141-149 (in Polish).
25. *Królikowski M.*, *Zabłocki R.*, Prawo karne, Warsaw, 2020, 143 (in Polish).
26. *Laskowska K.*, Podstawowe zagadnienia instytucji kary śmierci w świetle prawa i praktyki wymiaru sprawiedliwości w dziejach Rosji, Miscellanea Historico-Iuridica, Vol. VII, 2009, 57 (in Polish).
27. *Leszczyński L.*, Jednolitość orzecznictwa jako wartość stosowania prawa, Jednolitość orzecznictwa. Standard – instrumenty – praktyka, Materiały z konferencji naukowej Warszawa, Sąd Najwyższy, 21 listopada 2013 r., Studia i Analizy Sądu Najwyższego Materiały Naukowy, Vol. I, *Grochowski M., Raczkowski M., Żółtek S.* (*eds.*), Warsaw, 2015, 14-16 (in Polish).
28. *Lityński A.*, O Podstawach ustawodawstwa karnego ZSRR z 1958 r. oraz o kodeksie karnym RSFRR z 1960 r., Miscellanea Historico-Iuridica, Vol. VII, 2009, 175, (in Polish).
29. *Lityński A.*, Prawo karne Polski "lubelskiej" (1944), Studia Iuridica Toruniensia, Vol. 31, №. 2, 2023, 129-144 (in Polish).
30. *Lityński A.*, Prawo Rosji i ZSRR 1917–1991 czyli historia wszechzwiązkowego komunistycznego prawa (bolszewików). Krótki kurs, Warsaw, 2017, 185-204 (in Polish).
31. *Maciejewski T.*, Historia powszechna ustroju i prawa, Warsaw, 2007, 818 (in Polish);
32. *Mohyluk M.*, Wacław Makowski o radzieckim prawie karnym, Miscellanea Historico-Iuridica, Vol. VII, 2009, 86 (in Polish).
33. *Morawski L.*, Czy precedens powinien być źródłem prawa?, W kręgu problematyki władzy, państwa i sądownictwa. Księga Jubileuszowa w 70-lecie urodzin Profesora Henryka Groszyka, *Malarczyk J.* (*ed.*), Lublin, 1996, 188-189 (in Polish).
34. *Morawski L.*, Zasady wykładni prawa, Toruń, 2006, 103-104 (in Polish).

35. *Nowak L.*, Marksizm versus liberalizm: pewien paradoks, Marksizm, liberalizm, próby wyjścia, Poznańskie studia z filozofii humanistyki, Vol. 4, Poznań, 1997, 14-15 (in Polish);
36. *Opałek K., Wróblewski J.*, Zagadnienia teorii prawa, Warsaw, 1969, 41 (in Polish);
37. *Pietrzak M.*, Sąd Najwyższy w II Rzeczypospolitej, Czasopismo Prawno-Historyczne, Vol. XXXIII, №. 1, 1981, 101 (in Polish).
38. *Rzeplińska I.*, Polityka stosowania kary konfiskaty mienia w PRL, Archiwum Kryminologii, Vol. XVIII, 1992, 154-167 (in Polish).
39. *Seidler G.L., Groszyk H., Malarczyk J.*, Wstęp do teorii państwa i prawa, Lublin, 1963, 355, 357 (in Polish).
40. *Spotowski A.*, Konfiskata mienia i przepadek rzeczy (uwagi de lege ferenda), Państwo i Prawo, № 3, 1989, 102 (in Polish).
41. *Szerer M.*, Karanie a humanizm, Warsaw, 1964, 29 (in Polish).
42. *Wiatrowski P.*, Dyrektywy wykładni prawa karnego materialnego w judykaturze Sądu Najwyższego, Warsaw, 2013, XLVIII (in Polish).
43. *Wiącek M., Żółtek S.*, Niekonstytucyjność normy ustalonej w drodze orzecznictwa Sądu Najwyższego, Jednolitość orzecznictwa. Standard – instrumenty – praktyka. Materiały z konferencji naukowej Warszawa, Sąd Najwyższy, 21 listopada 2013 r., Studia i Analizy Sądu Najwyższego Materiały Naukowy, Vol. I, *Grochowski M., Raczkowski M., Żółtek S.* (*eds.*), Warsaw, 2015, 50-53 (in Polish).
44. *Wojtyczek K.*, Zasada proporcjonalności jako granica prawa karania, Racjonalna reforma prawa karnego, *Zoll A.* (*ed.*), Warsaw 2001, 301-303.
45. *Wróbel W.*, Zmiana normatywna i zasady intertemporalne w prawie karnym, Kraków, 2003, 162 (in Polish).
46. *Wyszynskij A.*, Teoria dowodów sądowych w prawie radzieckim, (trans.) *Litwin J., Schaff L.*, Warsaw, 1949, 27 (in Polish).
47. *Zoll A.*, Materialne określenie przestępstwa, Prokuratura i Prawo, № 2, 1997, 8 (in Polish).
48. *Żółtek S.*, Znaczenie normatywne ustawowych znamion typu czynu zabronionego Z zagadnień semantycznej strony zakazu karnego, Warsaw, 2017, 402 note 1293 (in Polish).
49. Decision of March 16, 1991, № I KZP 32/98 of the Supreme Court of the Republic of Poland.
50. Decision of December 6, 2006, № III KK 358/06 of the Supreme Court of the Republic of Poland.
51. Decision of January 7, 2008, № II KK 252/07 of the Supreme Court of the Republic of Poland.
52. Decision of October 29, 2012, № I KZP 11/12 of the Supreme Court of the Republic of Poland.
53. Decision of July 13, 2022, № III KK 293/22 of the Supreme Court of the Republic of Poland.
54. Decision of December 23, 1998, № II AKa 228/98 of the Court of Appeal in Katowice.
55. Judgment of October 3, 1972, V KRN 339/72 of the Supreme Court in Poland.
56. Judgment of November 29, 1976, I KR 196/76 of the Supreme Court in Poland
57. Judgment of March 29, 1977, VI KRN 395/76 of the Supreme Court in Poland.
58. Judgment of February 22, 1978, IV KR 33/78 of the Supreme Court in Poland.
59. Judgment of June 14, 1989, № V KRN 99/89 of the Supreme Court in Poland.
60. Judgment of January 10, 1994, II KRN 377/93 of the Supreme Court of the Republic of Poland.
61. Judgment of November 16, 2000, II KKN 381/00 of the Supreme Court of the Republic of Poland.
62. Judgment of November 26, 2001, III KKN 421/99 of the Supreme Court of the Republic of Poland.
63. Judgment of June 30, 2004, № II KK 354/03 of the Supreme Court of the Republic of Poland.
64. Judgment of September 9, 2004, № V KK 144/04 of the Supreme Court of the Republic of Poland.

65. Judgment of March 22, 2017, № V KK III KK 349/16 of the Supreme Court of the Republic of Poland.
66. Judgment of August 8, 2018, № VIII KK 2/18 of the Supreme Court of the Republic of Poland.
67. Judgment of April 18, 1999, № II AKa 55/99 of the Court of Appeal in Łódź.
68. Judgment of December 20, 2012, № II Aka 215/12 of the Court of Appeal in Szczecin.
69. Judgment of April 15, 2013, № II AKa 36/13 of the Court of Appeal in Szczecin.
70. Judgment of May 22, 2013, № II AKa 133/13 of the Court of Appeal in Wrocław;
71. Judgment of September 11, 2013, № II AKa 249/13 of the Court of Appeal in Wrocław.
72. Judgment of October 11, 2013, № II AKa 152/13 of the Court of Appeal in Białystok.
73. Judgment of May 23, 2014, № II AKa 116/14 of the Court of Appeal in Katowice.
74. Judgment of June 4, 2014, № II AKa 80/14 of the Court of Appeal in Lublin.
75. Judgment of July 8, 2014, № II AKa 108/14 of the Court of Appeal in Łódź.
76. Judgment of November 27, 2014, № II AKa 217/14 of the Court of Appeal in Szczecin.
77. Judgment of September 30, 2015, № II AKa 256/15 of the Court of Appeal in Warsaw.
78. Judgment of October 26, 2017, № II AKa 419/15 of the Court of Appeal in Warsaw.
79. Decision of December 9, 2019, № II Akz 875/19 of the Court of Appeal in Wrocław.
80. Judgment of June 18, 2020, № II AKa 44/20 of the Court of Appeal in Szczecin.
81. Judgment of October 27, 2021, № II AKa 89/21 of the Court of Appeal in Poznań.
82. Judgment of February 2, 2022, № II AKa 523/21 of the Court of Appeal in Katowice.
83. Judgment od March 31, 2022, № IV K 306/21 of the District Court in Bydgoszcz.
84. Judgment of August 13, 2014, № II Ka 93/14 of the Regional Court in Sieradz.
85. Judgment of May 23, 2014, № II K 169/14 of the Regional Court in Legionowo.
86. Judgment of June 9, 2014, № III K 8/14 of the Regional Court in Białystok.
87. Judgment of September 9, 2014, № III K 90/14 of the Regional Court in Poznań.
88. Judgment of April 14, 2016, № VI Ka 136/16 of the Regional Court in Słupsk.
89. Judgment of April 26, 2016, № XIV K 1188/13 of the District Court for Warsaw-Mokotow in Warsaw.
90. Judgment of August 2, 2018, № III K 44/18 of the Regional Court in Bydgoszcz.
91. Judgment of September 15, 2020, № II IX Ka 457/20 of the Regional Court in Warsaw.
92. Judgment of April 26, 2016, № XIV K 1188/13 of the District Court for Warsaw-Mokotow in Warsaw.
93. Resolution of June 25, 1980, № VII KZP 48/78 of the Polish Supreme Court.
94. Resolution of May 5, 1992, KwPr 5/92 of the Supreme Court of the Republic of Poland.
95. Resolution of January 19, 2017, № I KZP 16/16 of the Supreme Court of the Republic of Poland.

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.1.2025.9528

Irina Batiashvili*

Mediation as "Ariadne's Thread" and The Art of Convergence of Interests

Mediation and negotiation between the parties begin with speech, conversation, debate, asserting one's truth, and instinct for the best outcome of victory. Mediation is an alive phenomenon, and the mediator maintains the balance of this phenomenon, and in this vivid process, the mediator is the one who keeps balance. Two poles need a balance, which will be discussed from the perspective of the art of debate. Mediation, as an art of convergence of interests, should be considered from the point of view of debates and confrontation of ideas. There are markers in human consciousness and culture that influence mediation and negotiation processes. For example, dialectic in the debates can be similar to fencing of the mind, which aims to prove one's truth. Also, the Homo Ludens play marker adds new layers to the mediation process and these layers create new obstacles to removing the emotional background of the dispute. A clear manifestation of the philosophical-religious foundations of mediation is the famous treatise "The City of God" by Saint Augustine.

In the 21st century, mediation and negotiations returned in a modernized form as the best mechanism for resolving disputes and disagreements. In the process of finding a point of intersection of interests by the parties, the art of mediation of the mediator plays an important role. During the whole process, the parties should think about the best outcome, the acceptable outcome, and the absolutely unacceptable outcome. It is important to select the type of mediation opening meeting: general joint meeting or individual. A case-by-case review by the mediator before scheduling the opening mediation meeting may be a useful mechanism. As a result, the following process of negotiations will be adapted to the parties and become effective.

To the author's opinion, the mediator is the "Ariadne's thread" a pathfinder through the labyrinth of disputes that arise in mediation.

How the labyrinth of mediation will be twisted and what layers will be added to it depends on how much one simple truth will intensify in the minds of the parties:

"From birth, every man has the desire to be right" – Arthur Schopenhauer.

Keywords: *the art of negotiation, the influence of dialectics, and the characteristics of mediation*

1. Introduction

What can be the beginning and essential elements of mediation?

Mediation and negotiation between the parties begin with speech, conversation, debate, asserting one's truth, and instinct for the best outcome of victory. The mediation process includes a

* Ph.D. in Law, Licensed Mediator of Mediators Association of Georgia.

mediator (a neutral third party) and the parties. The process affects everything and influences it to the extent that the parties that compose the whole allow it to do so. The broad autonomy of mediation creates a free field for debate, and in this process of vibration (the confrontation of ideas), faith in one's personality and abilities becomes stronger. "A person is a human entity that makes his own choices in the plane of intersection with other Egos. This choice is born from the vital (alive) element of relationship, or unity with others, and this decision must determine one's fate". [1] Mediation is an alive phenomenon, and in this vivid process, the mediator is the one who keeps balance. Two poles need a balance: 1. A person's absolute belief in his power; and 2. devaluation of a person's beliefs, degradation (decrease) of self-action[2], sterilization of his/her visions concerning a specific issue and finally subordinating own view to the opinion that emerged in the mediation process. The aforementioned two poles are correlative concepts. Accordingly, the imbalance between them becomes part of a single process and a catalyst for the creation of a single governing pole. Based on this paradigm, it can be concluded that mediation, as an art of converging interests, should be examined in this article through the lens of debates and confrontations of ideas.

2. The Art of Negotiation and the Influence of Dialectic

In the fifth century AD, sophists[3] (wise people, orators, cleaver people), such as Protagoras, Hippias, Thrasymachus, Euthymides, and Gorgias, made a man the axis and center of their philosophy and "measure of all things"[4]. Eristic was the art of debate developed by them, which can be equivalent concept to skill, talent, cleverness, and wisdom.[5]

In the 19th century, Schopenhauer (1788-1860) published a work whose relevance is not lost even in the 21st century. [6] "Eristische Dialektik: Die Kunst, Recht zu behalten"[7]- This is the name of his masterpiece. According to Schopenhauer's work, the main goal of a debate is victory. And, to achieve the goal, the author gives us specific recommendations.[8] At the very beginning, Schopenhauer divides two concepts: He defines logic as a science that emerged from thinking and self-observation (discipline of thought) and calls it a means of thinking (thinking, judging, inferencing, etc.). Logic, as

---

1 *Batiashvili I. (Irakli),* Totalitarianism and Individualism, book "Irakli Batiashvili", Ministry of Education and Science of Georgia, Ivane Javakhishvili Tbilisi State University, Tbilisi, 2021, 267 (in Georgian).

2 I determine and decide how to act and it is not influenced by any circumstances.

3 "Wise man", clever, skilled, such were called Protagoras, Hippias, Thrasymachus, Euthymides, and Gorgias.

4 The words of Protagoras – Vaulker, Aashish, Markets and measurements in nineteenth-century Britain, Cambridge: Cambridge University Press, 2012, 218-228.

5 *Schopenhauer A.,* The Art of Winning Arguments (collection), Translator: *Aikhenvald Y.I., Chernigovets F., Kresin R., L. d'Andre N.,* Copyright Holder: Eksmo, February 20, 2015, (Date of writing: 1900), Chapter I. Eristics.

6 *Schopenhauer A.,* The Art of Winning Arguments (collection), Translator: *Aikhenvald Y.I., Chernigovets F., Kresin R., L. d'Andre N.,* Copyright Holder: Eksmo, February 20, 2015, (Date of writing: 1900),

7 The Art of Winning an Argument/ The Art of Being Right.

8 *Schopenhauer A.,* The Art of Winning Arguments (collection), Translator: *Aikhenvald Y.I., Chernigovets F., Kresin R., L. d'Andre N.,* Copyright Holder: Eksmo, February 20, 2015, (Date of writing: 1900), Chapter II.

a science, has theoretical and analytical value.[9] Logic leads a person only to formal, not material, truth. The means of logic can be considered: perception, understanding, self-awareness, and the ability to conclude.[10] The second concept is dialectic, which the philosopher equates[11] with the art of debate, which includes the art of negotiation, conversation, the art of verbal combat, and the art of persuasion.[12] In dialectics, the spiritual struggle takes place between exactly two persons.[13]

2.1. Dialectics and Variations of Thesis Refutation

Significantly, the characteristic of eristic dialectic is per fas et nefas. It means to use tactics and arguments in such a manner that the person always appears right and can win a debate. Dialectics should be driven by the desire to gain an advantage and remain right in the eyes of the other party and listeners, which does not include the determination of objective[14] truth.[15]

The famous advice of Machiavelli, which Schopenhauer relies on in his work, is also important for defining the essence of the art of debates and established dogmas. According to the advice of the philosopher Machiavelli, it is better to take advantage of the other party's momentary weakness, because if the person does not do so, the other party may take advantage of his momentary weakness. Schopenhauer notes: that if sincerity and justice reigned[16] in the world, the struggle by such methods would become unnecessary. [17] In Schopenhauer's reasoning, it is important how the two factors are divided:The first is the aspiration to objective truth, which is linked to judgment, reasoning, perception, and experience; and the second, is related to dialectics and can be studied as an art. . In this case, a person tries to convince the public of the truth of his opinion and to create the impression that he generally has fair views. Both participants of the debates often believe that they are totally right, which may not correspond to reality at all. Dialectic in debates can also be equated with fencing of the mind, the purpose of which is to assert one's truth.

Also, for the art of convergence of interests, it is necessary to consider certain foundations of dialectics, which may appear during the debates of the parties in the mediation process. For example,

---

9 Ibid 11-12.

10 Ibid.

11 regard as identical to.

12 *Schopenhauer A.,* The Art of Winning Arguments (collection), Translator: *Aikhenvald Y.I., Chernigovets F., Kresin R., L. d'Andre N.,* Copyright Holder: Eksmo, February 20, 2015, (Date of writing: 1900), <https://www.litres.ru/book/artur-shopengauer/iskusstvo-pobezhdat-v-sporah-8952636/chitat-onlayn/#idm140537390896208> [02.12.2024].

13 *Schopenhauer A.,* The Art of Winning Arguments, (Translated from German by N. L. d'Andre 1900), Litera Nova, Kharkov, 2018, 11-12.

14 Objektive Gerechtigkeit.

15 *Schopenhauer A.,* The Art of Winning Arguments, (Translated from German by N. L. d'Andre 1900), Litera Nova, Kharkov, 2018, 42.

16 German: Herrschen.

17 *Schopenhauer A.,* The Art of Winning Arguments (collection), Translator: *Aikhenvald Y.I., Chernigovets F., Kresin R., L. d'Andre N.,* Copyright Holder: Eksmo, February 20, 2015, (Date of writing: 1900), <https://www.litres.ru/book/artur-shopengauer/iskusstvo-pobezhdat-v-sporah-8952636/chitat-onlayn/#idm140537390896208> [02.12.2024].

Schopenhauer mentions in his work one of the ways of rejecting the thesis: *ad rem and ad hominem*. through the first, we deny the absolute or objective truth of the thesis, by proving discrepancies with the real features that distinguish the subject of dispute from the thesis. With the help of the second way, we compare the thesis with other views and judgments of the other party, thus proving that this thesis contradicts the views of the disputing party. Or, ultimately, the arguments of the disputing party in this way become unreasonable, and the objective truth of the matter remains undetermined.[18] Schopenhauer distinguishes two method of achieving the goal: direct and indirect. Direct method – includes the assertion of the injustice of the thesis by a person.[19] Indirect method – means an attempt by a person to reject the entire thesis by asserting the inaccuracy, incorrectness, and improbability of the consequences of the thesis.[20]

2.2. The Subjective World and the New Marker

For modernism, as a cultural movement, the main matter is not the material world, but the subjective world of the individual (subjectivity) and irrational vision of human beings.[21] Arthur Schopenhauer's (1788-1860) formula expresses this: "The world is my representation". [22] Later, Schopenhauer's idea – "The world is my representation" – changes its face in postmodernism and is presented to society with a new marker. Instead of "representation" we see a new definition and a modernized key element – "play". "Man is caught up in the play with his representations, material events, time-space, and most importantly, language". [23] Johan Huizinga (1872 – 1945), the author of play theory and the main work in this direction, "Homo Ludens", says that the element of play represents an essential role in people's consciousness and culture. Play marker adds new layers to the mediation process. These layers create new obstacles that obstruct the removal of the emotional background of the dispute. According to Aristotle, debate can be honest and not merely an attempt to convert a person to one's own opinion.[24] Mediation, negotiation, and conciliation were developed in

---

18 *Schopenhauer A.,* The Art of Winning Arguments, (Translated from German by N. L. d'Andre 1900), Litera Nova, Kharkov, 2018, 43-45.

19 nego maiorem, nego minorem, nego consequentiam.

20 *Schopenhauer A.,* The Art of Winning Arguments, (Translated from German by N. L. d'Andre 1900), Litera Nova, Kharkov, 2018, 46-48.

21 Modernism is usually described as a system of thought and behavior characterized by self-reference and self-awareness: <https://www.britannica.com/art/Modernism-art> [02.12.2024; <https://en.wikipedia.org/wiki/Modernism#cite_note-Everdell-15_> [02.12.2024], (Everdell W., The First Moderns: Profiles in the Origins of Twentieth Century Thought, University of Chicago Press). <https://en.wikipedia.org/wiki/Modernism#cite_note-Everdell-17> [02.12.2024].
Nowadays, the term "experience" is part of the description of modernity and the subjective world: <https://www.upress.virginia.edu/title/2099/> [02.12.2024].

22 *Nemsadze A.,* Philosophical-Aesthetic Trends and Theories of the Twentieth Century, Ivane Javakhishvili Tbilisi State University, Course Syllabus, Appendix 3, Lecture 1, 8.

23 *Nemsadze A.,* Philosophical-Aesthetic Trends and Theories of the Twentieth Century, Ivane Javakhishvili Tbilisi State University, Course Syllabus, Appendix 3, Lecture 14, 4.

24 <https://www.litres.ru/book/artur-shopengauer/iskusstvo-pobezhdat-v-sporah-8952636/chitat-onlayn/#idm140537390896208> [02.12.2024].

China, Japan, Georgia, and the United States many years ago and have gained importance in the 21st century as effective mechanisms for resolving disputes, debates, and disagreements.[25]

3. The Importance of the Agreement

3.1. About the Issue of the Possibility of a Fair Settlement Between the "Parties" in the European Court of Human Rights

In civil disputes, it is common for the disputing parties to settle the case in the presence of a judge. The judge himself also helps the disputing parties reach an agreement during the court process (in a civil dispute). In the case of the European Court of Human Rights, parties are allowed to reach a friendly settlement. In this process, the state acknowledges (through a confession statement) its violation of the European Convention on Human Rights. The court then confirms this acknowledgment with its decision. Examples of this are: the case of Sulkhan Molashvili against Georgia,[26] The case of Mariam and Irina Batiashvili against Georgia and the case of David Mirtskhulava against Georgia.[27] In the Sulkhan Molashvili case, the government of Georgia acknowledged that torture had occurred (they admitted violations in Sulkhan Molashvili's case), the applicant accepted the amount of compensation offered and did not request more. Most importantly, the European Court of Human Rights recognized the government's statement as valid and agreed to this settlement.

Justice is the best way to maintain the balance of interests since mediation allows the parties to make a joint voluntary and desirable decision in terms of fairness seen from their perspective.[28] The differing perceptions of justice among the parties can negatively impact the party that is acting in good faith. For example, one party may perceive justice as achieving victory by any means necessary. As a result, the party acting in good faith won't be able to use the information shared during the mediation process to prove its assumption. "There is a correlative[29] relationship between the mediation process and the outcome".[30] "A fair agreement is one that: a) is at least acceptable or fair to the parties performing the agreement; b) restores harmony or a balance of interests between the participants in the mediation; c) Increases the possibility of mutual understanding and better relations; d) approaches the limit that the parties considered to be adequate compensation for their damages; e) It saves money and time at both the individual and institutional levels; f) It reduces stress and irritation; g) Improves communication between members of society (in the neighborhood, in the business world, in the

---

25 *Tsuladze A.,* Comparative Analysis of Georgian Judicial Mediation, Publishing world of lawyers, Tbilisi, 2017, 176-177 (in Georgian).

26 Human Rights Center of the Supreme Court of Georgia, Sulkhan Molashvili v. Georgia, Application No. 39726/04, removed from the list of cases, 30/09/2014. <https://catalog.supremecourt.ge/blog/index.php/2014-05-22-16-39-43/508-2015-05-27-13-54-29> [08.09.2025].

27 Resolution CM/ResDH (2016)1, Execution of the decisions of the European Court of Human Rights in Two cases against Georgia.

28 Chitashvili N., Fair Settlement as Basis for Ethical Integrity of Mediation, "Alternative Dispute Resolution-Yearbook", special edition, 2016, 9.

29 Reciprocal.

30 Chitashvili N., Fundamentals of Mediation Ethics, Meridian, Tbilisi, 2024, 351.

workplace, etc.); h) creates social precedents for better regulation of relations".[31] Confidentiality is also a kind of hybrid in the legal-philosophical sense. Under national law, protection of information for an indefinite period reminds us of the category of absolute rights, however, the specifics of the relationship of the mediation and the accompanying process (allows individuals to demand from each other to protect information under the principle of confidentiality) are clearly relativistic.[32]

3.2. The Philosophical-Religious Significance of the Mediator

A prominent example of the philosophical and religious foundations of mediation is Blessed Augustine's renowned treatise "The City of God".[33] For Saint Augustine, the mediator has both a rhetorical and a theological function. This is the way in which Platonic thought and Christianity are divided and become the embodiment of the world in which Jesus Christ appears to the world as a mediator. According to Platonic demonology, demons appear as mediators between gods and humans, albeit with a completely different demonic body, devoid of spirit and far removed from human nature.[34] In the view of Saint Augustine, the existence of good demons is ultimately denied. According to Blessed Augustine, the mediator is the uncreated Word of God, through Whom all things were made, and by participating in Whom we are blessed. And still who is this Mediator? It is the "Lord" who is not only the Word, but also the bearer of human nature, a God Who has become a sharer in our humanity, and so has furnished us with all that we need to share in His divinity. For in redeeming us from our morality and misery, He does not lead us to the immortal and blessed angels so, that, by participating in them, we may ourselves also become immortal and blessed. Rather, he leads us to the trinity by participating in whom the angels themselves are blessed.[35]

From the philosophical-emotional worldview of Saint Augustine it can be seen what skills of the mediator were developed in the collective unconscious of people:

1. Mediator – a sharer of the problems of the parties and their life at that moment;
2. Mediator – the so-called "mediation sharer" for the parties;
3. Mediator – pointer[36] of only the best and most favorable path for the parties in the mediation process.[37]

---

31 *Hyman J.M., Love L.P.,* If Portia Were a Mediator: An Inquiry into Justice in Mediation, Clinical L.Rev., Vol. 9, 2002, 186, mentioned in: *Chitashvili N.,* Fundamentals of Mediation Ethics, Meridian, Tbilisi, 2024, 350 (in Georgian).

32 *Batiashvili I.,* Confidentiality in Mediation in Resolving Property Disputes: Reality and Challenges, Law and World, #8, 2022, 76-116 (in Georgian).

33 *Аврелий А.,* О граде Божьем, Электронная библиотека Гражданская Общество в России, Кн. VI-XI, ст. 122-125, <http://www.civisbook.ru/files/File/Avgustin_6-11.pdf> [02.12.2024].

34 *Аврелий А.,* О граде Божьем, Электронная библиотека Гражданская Общество в России, Кн. VI-XI, ст. Глава XIII, Глава XV, 120-122, <http://www.civisbook.ru/files/File/Avgustin_6-11.pdf> [02.12.2024].

35 *Guretzki D.,* The Function of "Mediator" in St. Augustine's De civitate Dei, Book IX, Hirundo: "The McGill Journal of Classical Studies", Vol. I, 2001, 66-67, <https://www.mcgill.ca/classics/files/classics/2001-07.PDF> [02.12.2024].

36 person who shows way favorable for both parties.

When we mention the introduction and establishment of a culture of mediation in Georgia, the role of Ilia Chavchavadze is essential in creating a modern concept of a mediator – a conciliator.[38] First of all, Ilia Chavchavadze connects the need for conciliation judges in modern language with the development of life, globalization and capitalization (the relationship between people, which is related to giving and receiving), the alternative of unloading the justice system, economic existence, and, finally, it is related to resolving the disputed issue quickly and easily.[39]

4. A Key Aspect of Successful Interest-Based Mediation

Of course, the modernist and eclectic world adds to mediation new functionalities, renews, and prepares for new challenges.[40] The parties become the main participants in the process, trying to find out what their main interests are, so mediation is based on the interests of the parties and not on their rights.[41] One of the key functions of a mediator to successfully mediate business disputes is to focus on the interests of the parties and be able to separate them from the positions of the parties.[42]

The goal of mediation is to reach a compromise, not establish victory. To create a space for interest-based debate and discussion, the mediator should start a realistic evaluation of the case and design a flexible environment; for example, parties should sit in each other's chairs (metaphorically, not in a direct sense). They should try to view the picture from a different angle (different perspective). The mediator can use the mirror effect. Throughout the entire process, the parties should think about the best outcome, the acceptable outcome, and the absolutely unacceptable outcome. Finally, progress can occur when the parties understand that an intersection point exists.[43]

The initiation and conduct of the mediation process depend on the voluntariness of the disputing parties.[44] The voluntary involvement of the parties in the process increases the chances of reaching an agreement, while the forced participation of the parties in the process does the opposite.

As for confidentiality, negotiations are a free space, and if there is no written agreement on the rules of the game, then both duties and responsibilities arising from it are less. To some extent,

---

37 *Batiashvili I.,* The Mediation Process, its Principles and Challenges in Georgia, Alternative Dispute Resolution Yearbook, 11(1), 2022, 25-38, (in Georgian), <https://doi.org/10.60131/adr.1.2022.6162> [02.12.2024].

38 Ibid.

39 *Tsuladze A.,* Comparative Analysis of Georgian Judicial Mediation, Tb., Publishing world of lawyers, 2017, 176-177 (in Georgian).

40 *Batiashvili, I.,* The Mediation Process, its Principles and Challenges in Georgia, Alternative Dispute Resolution Yearbook, 11(1), 2022, 25-38, <https://doi.org/10.60131/adr.1.2022.6162> > [02.12.2024].

41 *Bichia M.,* The Importance of Using Mediation in Business Disputes During a Pandemic, Herald of Law, #3, 2021, 12 (in Georgian).

42 *Batiashvili I.,* Mediation – The Often-missed Opportunity!, Law and World, 10(30), 2024, 184–192 (in Georgian).

43 *Batiashvili I.,* International Mediation – the oftenmissed opportunity – World Factoring Yearbook (WFY) Edition, BCR Publishing, 2024 (in Georgian).

44 *Batiashvili I.,* The Mediation Process, its Principles and Challenges in Georgia, Alternative Dispute Resolution Yearbook, 11(1), 2022, 25-38, (in Georgian), <https://doi.org/10.60131/adr.1.2022.6162> [02.12.2024].

mediation is also subject to a legal framework, unless, of course, the parties agree on a different procedure. One of the cornerstones of mediation is the principle of confidentiality. Although mediation is advertised as protecting the privacy of the parties, it does not give absolute immunity.[45] If the majority of the parties prefer that everything that is revealed in the mediation process be kept secret, then the mediator should inform them about the exceptional cases that the law requires the mediator to disclose information.[46]

During the negotiation process, it is essential for both parties to feel a sense of equality. Even in the negotiation process, the parties must see their real positions and separate them from desires or anger. In a negotiation, both sides can argue for a long time. They may have an intense discussion, but if they don't let go of their emotions and focus on their underlying interests, they won't find a point of intersection. During negotiations, both sides must recognize what potential compromise can be made and what is of principle to them (non-negotiable issue). Let them decide (separate) what they want: the core of the apple, the peel, or both. This is part of the self-determination of the parties. In general, mediation provides a free space for parties where they enter and operate voluntarily; where they get rid of fears, where they analyze their own priorities; where they identify real problems; where they get free from anger and bad feelings (resentments).[47]

In this regard, it is worth noting the first ten psychological traps given in the book "Negotiation: Theory, Practice and Law".[48] From the first ten psychological traps, in the context of the art of convergence of interests, we can group several interconnected psychological aspects and biases (whether conscious or subconscious):[49]

1. Overconfidence bias – Overestimation of one's abilities. Hope for luck and chance. Expecting to achieve what is desired through oratory and profitable analysis, rather than perceiving reality. Excessive illusion, not a real analysis of what the equivalent useful outcome of this case could be.
2. Selective perception – The belief in our truth and positions acts as a filter that submits any different actions or suggestions from the other side to your personal vision and negative attitude. This creates a hostile environment, and all positive attempts to bring the interests of the parties closer are viewed as treachery and manipulation. This trap is related to the hope of prediction and false stigmas.
3. Self-serving bias – This specific psychological aspect is related to the constant self-justification, even though the reason for justification is not considered normal in our value system. A simple

---

45 *Batiashvili I.,* Confidentiality in Mediation in Resolving Property Disputes: Reality and Challenges, Law and World, #8, 2022, 76-116 (in Georgian).

46 *Oberman S.,* Confidentiality in Mediation: an application of the right to privacy, Ohio state journal on dispute resolution, Vol 27:3, 2012, 550-551.

47 *Batiashvili I.,* The Mediation Process, its Principles and Challenges in Georgia, Alternative Dispute Resolution Yearbook, 11(1), 2022, 25-38, (in Georgian), <https://doi.org/10.60131/adr.1.2022.6162> [02.12.2024].

48 *Folberg J., Golan D., Tsuladze A.,* Negotiation: Theory, Practice and Law, Tbilisi Open University, UNDP, 2018, 29-32 <https://issuu.com/aleksandretsuladze/docs/molaparakeba__4_/1> [02.12.2024].

49 *Folberg J., Golan D., Tsuladze A.,* Negotiation: Theory, Practice and Law, Tbilisi Open University, UNDP, 2018, 29-32.

example: behavior that, if committed by me, could be subject to some excusing circumstance, but if committed by another person, there would be no objective reason for justification.

4. Confirmation bias – Expressing trust in information that confirms only one's views and opinions. All other questionable information is rejected.
5. Anchoring[50] – This aspect is related to the collective visions and established standards that have been established within society. My assessments, expectations, and predictions are based on results from similar cases in society. In this case, the party often fails to identify similarities of the dispute, causing its demand and reality to remain on different planes (remain misaligned).

In the negotiation process initiated during mediation, the mentioned aspects (traps) obstruct a party from seeing to what extent it is better to back down or what modified counter-demand to make.

5. Conclusion

The mediator should individually analyze every case before a mediation meeting is planned. This includes: case information, the emotional background, predicted sensitive issues, the roots of the problem, and the main aspects of the dispute. Afterwards, the mediator should decide whether to start with a general joint meeting or conduct individual meetings.[51] Obtaining information about the factual and psychological circumstances related to the dispute serves only the purpose of properly opening the mediation meeting. Psychological factors and established beliefs of parties have a powerful impact on the initiation process of mediation. In addition, these psychological beliefs have a great impact on future processes and results of mediation. Accordingly, such planning by the mediator for the opening of mediation may be considered a useful and effective mechanism in the subsequent negotiation process on the path to agreement.

Ultimately, if mediation ends with consensus, the principle of parties' self-determination has a positive effect on their future relationship.[52] The parties then develop a relationship tailored to each other's interests and obtain skills to avoid or defuse conflict situations.[53] It is also worth noting that the mediation process and the outcome depend on the goal you want to reach: winning at any cost or reaching an agreement. The mediator is the "Ariadne's thread" a pathfinder through the labyrinth of disputes that arise in mediation. How the labyrinth of mediation will be twisted and what layers will be added to it depends on how much one simple truth will intensify in the minds of the parties: "From birth, every man has the desire to be right" – Arthur Schopenhauer.[54]

---

50 *Folberg J., Golan D., Tsuladze A., Negotiation*: Theory, Practice and Law, Tbilisi Open University, UNDP, 2018, 29-32.

51 *Batiashvili I.,* International mediation – the often missed opportunity – World Factoring Yearbook (WFY), BCR Publishing, 2024 Edition, (in Georgian).

52 *Kandashvili I.,* Judicial and non-judicial forms of alternative dispute resolutions in Georgia on the example of mediation, Tbilisi, 2019, 94-95 (in Georgian).

53 *Batiashvili I.,* The Mediation Process, its Principles and Challenges in Georgia, Alternative Dispute Resolution Yearbook, 11(1), 2022, 25-38, (in Georgian) <https://doi.org/10.60131/adr.1.2022.6162> [24.12.2024].

54 *Schopenhauer A.,* The Art of Winning Arguments (collection), Translator: *Aikhenvald Y.I., Chernigovets F., Kresin R., L. d'Andre N.,* Copyright Holder: Eksmo, February 20, 2015, (Date of writing: 1900).

Bibliography:

1. Human Rights Center of the Supreme Court of Georgia, Sulkhan Molashvili v. Georgia, Application No. 39726/04, removed from the list of cases, 30/09/2014.
2. *Batiashvili I. (Irakli),* Totalitarianism and Individualism, book "Irakli Batiashvili", Ministry of Education and Science of Georgia, Ivane Javakhishvili Tbilisi State University, Tbilisi, 2021, 267 (In Georgian).
3. *Batiashvili I. (Irina),* Confidentiality in Mediation in Resolving Property Disputes: Reality and Challenges, Law and World, #8, 2022, 76-116.
4. *Batiashvili I. (Irina),* International Mediation – the often missed opportunity" – World Factoring Yearbook (WFY), BCR Publishing, 2024 Edition.
5. *Batiashvili I.,* Mediation – The Often-missed Opportunity!, Law and World, 10(30), 2024, 184-192.
6. *Batiashvili, I. (Irina),* The Mediation Process, its Principles and Challenges in Georgia, Alternative Dispute Resolution Yearbook, 11(1), 2022, 25-38, <https://doi.org/10.60131/adr.1.2022.6162> [02.12.2024].
7. *Bichia M.,* The Importance of Using Mediation in Business Disputes During a Pandemic, Herald of Law, N3, 2021,12 (In Georgian).
8. *Chitashvili N.,* Fair Settlement as Basis for Ethical Integrity of Mediation, "Alternative Dispute Resolution-Yearbook", special edition, 2016, 9 (in Georgian).
9. *Chitashvili N.,* Fundamentals of Mediation Ethics, Meridian, Tbilisi, 2024, 350-351 (In Georgian).
10. *Folberg J., Golan D., Tsuladze A.,* Negotiation: Theory, Practice and Law, Tbilisi Open University, UNDP, 2018, 29-32 (In Georgian).
11. *Guretzki D.,* The Function of "Mediator" in St. Augustine's De civitate Dei, Book IX, Hirundo: "The McGill Journal of Classical Studies", Vol. I, 2001, 66-67, <https://www.mcgill.ca/classics/files/classics/2001-07.PDF> [02.12.2024].
12. *Hyman J.M., Love L.P.,* If Portia Were a Mediator: An Inquiry into Justice in Mediation, Clinical L.Rev., Vol. 9, 2002, 186.
13. *Kandashvili I.,* Judicial and non-judicial forms of alternative dispute resolutions in Georgia on the example of mediation, Tb.,2019, 94-95 (In Georgian).
14. *Nemsadze A.,* Philosophical-Aesthetic Trends and Theories of the Twentieth Century, Ivane Javakhishvili Tbilisi State University, Course Syllabus, Appendix 3, Lecture 1, 8, 14, 4 (In Georgian).
15. *Oberman S.,* Confidentiality in Mediation: an application of the right to privacy, Ohio State Journal on Dispute Resolution, Vol 27:3, 2012, 550-551.
16. Resolution CM/ResDH(2016)1, Execution of the decisions of the European Court of Human Rights in Two cases against Georgia.
17. *Schopenhauer A.,* The Art of Winning Arguments (collection), Translator: *Aikhenvald Y.I., Chernigovets F., Kresin R., L. d'Andre N.,* Copyright Holder: Eksmo, February 20, 2015, (Date of writing: 1900), <https://www.litres.ru/book/artur-shopengauer/iskusstvo-pobezhdat-v-sporah-8952636/chitat-onlayn/#idm140537390896208> [02.12.2024].
18. *Schopenhauer A.,* The Art of Winning Arguments, (Translated from German by N. L. d'Andre 1900), Litera Nova, Kharkov, 2018, (Шопенгауэр А., Искусство побеждать в спорах, (Перевод с немецкого Н. Л. д'Андре 1900), Литера Нова, Харьков, 2018, 11-12, 42-45, 135-137, Глава II уловки, Глава I. Эристика).

19. *Tsuladze A.,* Comparative Analysis of Georgian Judicial Mediation, Tb., Publishing world of lawyers, 2017, 176-177 (In Georgian).
20. *Velkar A.,* Markets and measurements in nineteenth-century Britain, Cambridge: Cambridge University Press, 2012, 218-228.
21. *Аврелий А.,* О граде Божьем, Электронная библиотека Гражданская Общество в России, Кн. VI-XI, 120-125, <http://www.civisbook.ru/files/File/Avgustin_6-11.pdf> [02.12.2024].

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.1.2025.9529

Julia Synak*

Civil Liability of the Mediator Towards the Parties to the Proceedings – the Polish Perspective

The article addresses the issue of civil liability of mediators in the context of the lack of mandatory civil liability insurance. The analysis takes into account the basic premises of tort liability, such as illegality, guilt, damage and adequate causal relationship, referring them to the specificity of mediation activity. It indicates the consequences of the lack of institutional protection in the form of mandatory third party liability insurance, both for the parties to mediation proceedings and the mediators themselves, who may bear personal financial liability. It also emphasizes the growing popularity of mediation among legal practitioners and parties to the conflict, which increases the need to regulate professional liability standards in this area. In conclusion, the postulate of introducing mandatory third-party liability insurance for mediators is formulated as a tool to increase the professionalization of the profession and to provide real legal protection to mediation participants.

Key words: *mediator, civil liability, damage, mediation, professionalization of the profession*

1. Introduction

Mediation in civil cases in Polish legislation is a relatively new institution enabling the parties to resolve their dispute in an alternative way. The institution of mediation has been gaining popularity over time in an attempt to reduce litigation. Its success, however, depends not only on the voluntariness and commitment of the parties, but above all on the professionalism and ethical behaviour of the mediator. Although the mediator plays the role of a neutral third party to the dialogue, his or her actions or omissions can realistically affect the legal and personal situation of the participants in the proceedings. In this context, the mediator's civil liability vis-à-vis the parties becomes a key issue, especially in case of a breach of the basic principles of mediation: confidentiality, impartiality, diligence and voluntariness. This text attempts to analyse the standards of diligence required of the mediator, the legal basis for his civil liability and the practical consequences of their violation.

2. Principles of civil liability in Polish law

Civil liability is an element of civil law that involves having to compensate for damage caused to another person as a result of a specific act or omission. It provides a basis for claiming compensation or damages in a civil court. The principles of this liability are set out in the Civil Code,

* Research Assistant at the Institute of Law and Administration, Pomeranian University in Słupsk, Poland.

in Book III, Titles I and VI. These provisions establish the general rule of tort liability, which is based on the principle of fault. For tort liability to exist, three conditions must be met: the occurrence of a tortious act (understood as an unlawful and culpable act), the occurrence of damage and the existence of a causal link between the act and the damage.[1] The general prerequisites for liability for damages derive from the interpretation of Article 361 of the Civil Code and include: a legal event that legally results in the liability of a specific entity, the occurrence of damage and the existence of an adequate causal link between the event and the damage. In the specific tort provisions, these general prerequisites are supplemented by additional, specific requirements that define the specific type of tort and are linked to the liability principle specific to the case. It is also important to note that damage has a dual role – not only as a condition for liability for damages, but also as a necessary element for an event to be considered a tort. Without the occurrence of damage, even an unlawful and culpable act cannot qualify as a tort.[2]

The first premise of civil liability is the conduct of the perpetrator that leads to the occurrence of damage. According to the provisions discussed, the damage must result from human action, which includes both active conduct and omission. Action is understood as conscious activity of a psychophysical nature. On the other hand, omission is a situation in which a given person did not take specific actions, even though in the given circumstances they should have done so. In other words, omission consists in not taking actions for which there was both an obligation and the possibility of performing them, taking into account specific relationships and factual conditions.[3]

Another element is "illegality", or "objective irregularity of the perpetrator's conduct". The dominant position in literature and case law should be considered to be the one adopting a broad understanding of illegality, encompassing not only the inconsistency of a given entity's conduct with the applicable legal order (in particular the norms of civil, criminal, administrative, labor, financial, etc. law), but also with the principles of social coexistence or good customs. In other words, illegality means the relationship between behavior and the norm of conduct, and it is not only about legal norms, but also about norms of an axiological nature, determined by the principles of social coexistence or good customs.[4]

---

1 *Jantowski L.* [w:] Kodeks cywilny. Komentarz aktualizowany, red. M. Balwicka-Szczyrba, A. Sylwestrzak, LEX/el. 2025, art. 415.

2 Karaszewski G. [w:] Kodeks cywilny. Komentarz aktualizowany, red. P. Nazaruk, LEX/el. 2024, art. 415.

3 Machnikowski P. [w:] System Prawa Prywatnego, t. 6, red. A. Olejniczak, 2009, s. 369–372.

4 Machnikowski P. [w:] System Prawa Prywatnego, t. 6, red. A. Olejniczak, 2009, s. 377–382; see also Kuźmicka-Sulikowska J., Zasady odpowiedzialności deliktowej w świetle nowych tendencji w ustawodawstwie polskim, Warszawa 2011, s. 77–82; Jędrzejewski Z., Bezprawność w prawie cywilnym i karnym a zasada jedności porządku prawnego (jednolitego ujęcia bezprawności), „Ius Novum" 2008/1, s. 74–91; Czech T., Zasady współżycia społecznego a odpowiedzialność deliktowa, PiP 2008/12, 39–49; E. Bagińska, Glosa do wyroku SN z 29.10.2003 r., III CK 34/02, OSP 2005/4, s. 54–57; see also judgement of SN z 10.02.2010 r., V CSK 287/09, LEX nr 786561; judgements SN: z 6.02.2018 r., IV CSK 72/17, LEX nr 2510949; z 9.06.2021 r., I CSKP 190/21, LEX nr 3212618; differenty: K. Pietrzykowski, Bezprawność jako przesłanka odpowiedzialności deliktowej a zasady współżycia społecznego i dobre obyczaje [w:] Odpowiedzialność cywilna. Księga pamiątkowa ku czci profesora Adama Szpunara, red. M. Pyziak-Szafnicka, Kraków 2004, 176–179, which emphasizes that conduct contrary to the principles of social coexistence or good morals cannot, in itself, be considered unlawful from the standpoint of liability under

In order for a human act to be considered a tort, it must be both unlawful and culpable. First, it is necessary to assess whether the perpetrator's conduct was unlawful, because the lack of this feature excludes further analysis in terms of guilt. Although the provisions do not contain an unambiguous definition of unlawfulness, this issue has been and is the subject of discussion in the doctrine. The prevailing position indicates that unlawfulness is not only a contradiction with the provisions of the law, but also with the principles of social coexistence. There are also views that limit the concept of unlawfulness only to a violation of the law, as well as those that identify it with a violation of a norm protecting a specific good. The first of these concepts seems to be the most justified, considered to be dominant both in legal science and in case law. The claim that including the principles of social coexistence in the concept of unlawfulness is without a normative basis is misguided – since, in accordance with Article 5 and Article 58 § 2 of the Civil Code, even legal acts and the exercise of rights are subject to assessment through the prism of these principles, all the more so should they be applied to conduct that does not take the form of legal acts or constitute a direct exercise of the right. The tort provided for in Article 415 may result from purely factual actions, as well as from legal acts or from the exercise of the right itself – and all these situations should be subject to a uniform legal assessment.[5] Illegality is a negative assessment of a given behavior from the perspective of the legal order. This means that the perpetrator's act is contrary to the applicable legal system as a whole – regardless of whether it is accompanied by guilt or not. In other words, behavior is considered illegal if it violates the law, even if the person performing it did not act out of guilt or was not aware of its impropriety. Illegality is therefore an objective assessment, independent of the subjective attitude of the perpetrator.[6] Guilt, as a complement to the premise of unlawfulness, is a subjective element of tortious liability – its existence determines the possibility of attributing liability to the perpetrator of the damage. While unlawfulness is an objective assessment, guilt refers to the internal attitude of the perpetrator and their ability to properly assess the situation and direct their conduct. However, in the Civil Code, especially in Article 415, we will not find a legal definition of guilt. This concept was developed by doctrine and case law. Guilt is most often understood as the possibility of accusing the perpetrator of violating applicable norms, and it may take the form of intentional (when the perpetrator acts with the intention of causing damage) or unintentional (e.g. due to negligence). The ability of the perpetrator to bear responsibility is also of key importance here – that is, the ability to recognize the significance of their act and direct their conduct in accordance with the requirements of the law.[7]

In the doctrine and case law of civil law, in the absence of a definition of legal guilt, its understanding has been shaped by analogy to criminal law. In this context, intentional guilt is distinguished, which can take two forms, i.e. direct intent (dolus directus) occurs when the perpetrator foresees the consequences of their action, consisting in the infringement of protected goods, and consciously strives for their occurrence, i.e. wants to cause damage, and eventual intent (dolus eventualis) occurs when the perpetrator does not directly seek to cause damage, but foresees its

Article 415 of the Civil Code, unless it also constitutes a violation of a mandatory provision of law; compare judgement SN z 19.10.2012 r., V CSK 501/11, LEX nr 1243100.

5 Karaszewski G. [w:] Kodeks cywilny. Komentarz aktualizowany, red. P. Nazaruk, LEX/el. 2024, art. 415.

6 Karaszewski G. [w:] Kodeks cywilny. Komentarz aktualizowany, red. P. Nazaruk, LEX/el. 2024, art. 415.

7 See judgement SN z 26.09.2003 r., IV CK 32/02, LEX nr 146462.

possibility and agrees to its occurrence as a result of their action. Such an approach allows for a better assessment of the degree of reprehensibility of the perpetrator's conduct in the context of tortious liability, constituting the basis for assigning intentional guilt in civil law.[8]

In civil law, unintentional guilt is commonly understood as failure to exercise due diligence. This means that although the perpetrator did not intend to cause damage, it was caused by his improper action or omission. In such cases, the perpetrator either foresees the possibility of causing damage but baselessly assumes that he will be able to avoid it, or does not foresee such a possibility at all, even though – if he had exercised due diligence – he should have done so. In civil law, there is no criminal distinction made between the concept of "recklessness". Instead, the term "recklessness" is treated broadly as negligence and also includes behavior that would be considered recklessness in criminal law.[9] Thus, unintentional guilt in civil law covers various degrees of negligence – from the lightest (culpa levissima), through ordinary negligence (culpa levis), to gross negligence (culpa lata), which consists in violating the basic principles of caution and the principles of proper conduct in a given situation.[10] In turn, the causal relationship, which is also a premise for civil liability, is objective in nature and depends on the specific circumstances of a given case. Here we are talking about an adequate causal relationship, i.e. one in which the effect – in the form of damage – was foreseeable in the normal course of events as a result of a specific event. The greater the probability that a given behavior could lead to a specific damage, the stronger the causal relationship that justifies liability for damages.[11]

The causal link referred to in Article 361 § 1 plays a dual role in shaping the liability for damages. On the one hand, it constitutes a premise for such liability[12], and on the other hand, it determines the scope of the obligation (the extent of the damage and the amount of compensation) of the entity responsible for redressing the damage.[13]

In order to establish causality, a two-step test is used. First, it is necessary to check whether a given event constitutes a necessary condition for the occurrence of damage (test conditio sine qua non), and then to assess whether the damage is a normal consequence of this event (selection of consequences).[14]

---

8 Jantowski L. [w:] Kodeks cywilny. Komentarz aktualizowany, red. M. Balwicka-Szczyrba, A. Sylwestrzak, LEX/el. 2025, art. 415.

9 Jantowski L. [w:] Kodeks cywilny. Komentarz aktualizowany, red. M. Balwicka-Szczyrba, A. Sylwestrzak, LEX/el. 2025, art. 415.

10 See judgement SN z 10.10.1975 r., I CR 656/75, LEX nr 7759.

11 *Czub K.* [w:] Kodeks cywilny. Komentarz, wyd. II, red. M. Balwicka-Szczyrba, A. Sylwestrzak, Warszawa 2024, art. 361.

12 *Nesterowicz Por. M.* [w:] Prawo prywatne czasu przemian. Księga pamiątkowa dedykowana Profesorowi Stanisławowi Sołtysińskiemu, red. A Nowicka, Poznań 2005, 189 i n.

13 *Kaliński Por. M.* [w:] System Prawa Prywatnego, t. 6, Prawo zobowiązań – część ogólna, red. A. Olejniczak, Warszawa 2009, 11. Por. też wyrok SN z 20.01.2015 r., I PK 148/14, OSNP 2016/12, poz. 150; wyrok SN z 15.11.2012 r., V CSK 541/11, LEX nr 1276235; wyrok SA w Łodzi z 16.02.2022 r., I ACa 944/21, LEX nr 3423541.

14 *Czub K.* [w:] Kodeks cywilny. Komentarz, wyd. II, red. M. Balwicka-Szczyrba, A. Sylwestrzak, Warszawa 2024, art. 361.

The source of contractual liability is the breach of a previously existing obligation between the parties, while liability ex delicto is independent of the existence of an obligation relationship. Hence, in the case of the ex contractu liability regime, the performance consisting in redressing the damage is consequential in nature and results from the failure to perform or improper performance of an obligation previously existing between the parties. On the other hand, in the ex delicto liability regime, the compensation benefit is primary in nature, existing from the beginning of the obligation relationship, which is the result of causing damage by an unlawful act. The fact that the action or omission from which the damage resulted constituted the failure to perform or improper performance of a previously existing obligation does not generally exclude the claim for redress of damage resulting from an unlawful act. However, not every failure to perform or improper performance of an obligation constitutes an unlawful act. If the commission of an unlawful act simultaneously constituted a breach of an obligation between the parties to the relationship, tortious and contractual liability coincide. The circumstances that condition the obligation to redress damage under the provisions of Title VI of the Third Book of the Civil Code on torts are the causing of damage, an event (fact) with the occurrence of which the Act links the creation of liability for damages on the part of specific entities, the existence of an adequate causal relationship between the damage and the event (fact) that occurred.

3. Mediator's standard of diligence

One of the key tasks of the mediator, resulting from the established principles of mediation, is the effective implementation of both auxiliary and main goals that define the context of the mediation discussion. The mediator, as a neutral third party to the parties to the dispute, plays a supporting and mediating role, enabling the participants of the conflict to reach agreement in an atmosphere of impartiality, while maintaining autonomy in the decisions they make.[15]

The standard of care of a mediator when performing their duties in Polish civil law is based mainly on the general principle of due diligence, specified in Article 355 § 2 of the Civil Code. Due to their profession, a mediator is treated as a professional performing public trust activity, and therefore they are subject to a higher standard of care similar to that which applies to legal professions (e.g. legal advisers, advocates). This means that their actions will be assessed from the perspective of whether they behaved as a diligent, ethical mediator should behave in the given circumstances. This standard means thorough preparation for mediation, i.e., familiarization with documents, checking for conflicts of interest, proper determination of the conditions of mediation (place, time, form). Maintaining the impartiality and neutrality of the mediator towards the parties to the proceedings in such behaviors as the lack of suggestions as to the solution, equal treatment of the parties, avoiding evaluations and emotional involvement. The mediator as a professional should inspire trust in the parties, therefore the information he learns during mediation should remain confidential, and therefore not disclosed without the consent of the parties, and the documents in his possession should be properly secured. When finalizing mediation, documents such as the settlement must be consistent

[15] *Zienkiewicz A.,* Studium mediacji. Od teorii ku praktyce, Warszawa 2007, str. 143.

with the arrangements, while the mediator should refuse to draw up the settlement if it is contrary to the law or the principles of social coexistence.[16]

For breach of his or her duties, a mediator may be held civil, disciplinary and professionally liable.

4. Civil liability of the mediator along with examples of violation of the rules

The mediator's actions or omissions that may lead to his tortious liability may take various forms. For example, the literature on the subject indicates that the mediator may not in any way exert pressure on the mediation participants in order to persuade them to conclude a settlement or impose the content of individual settlement provisions. It is also inadmissible for him to use any forms of coercion, threats or attempts to influence the position of the parties by presenting his own assessments or lecturing. As the representatives of the doctrine correctly point out, such improper conduct of the mediator may constitute a justified basis for the parties to question the legal effects of the declarations of intent made by them, and in the case of permanent mediators, which may lead to their removal from the official list of mediators due to a gross violation of ethical and professional standards.[17] It is worth noting that the content of the mediation agreement concluded between the parties may contain provisions excluding the mediator's liability for tort, limiting it solely to the contractual regime.[18] However, such a provision cannot exclude the mediator's liability for damage caused by his/her wilful misconduct. Such clauses would be contrary to the generally applicable principles of social coexistence, as they would lead to the legitimization of intentional action to the detriment of the other party, which cannot be considered permissible under civil law.[19]

At the time of damage, two basic elements must be present at the same time, i.e. the event itself causing the damage and the damage as such, which justifies the obligation to repair it. As indicated earlier, damage is understood as damage to the assets or interests of an individual, which are protected by law, and which damage occurred against the will of the injured person.[20] This damage is manifested in the difference between the current state of these goods, shaped as a result of the occurrence of a specific damage event, and the hypothetical state that would exist if this event had not occurred.[21] On the basis of the provisions of the Civil Code, within the broadly understood concept of damage, two basic types can be distinguished – property damage and non-property damage. Property damage refers

---

16 Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego (Dz.U. Nr 43 poz. 296 ze zm.), art. 183^{12} § 1.

17 *Kuźmicka-Sulikowska J.,* Podstawa prawna odpowiedzialności cywilnej mediatora, "Kwartalnik ADR" 2008/3, str. 22.

18 *Malinowska A.,* Uwagi w przedmiocie umownego ograniczenia odpowiedzialności deliktowej, "Rysunek – Społeczeństwo – Kultura" 2017/26, numer specjalny, 106.

19 *Malinowska A.,* Uwagi w przedmiocie umownego ograniczenia odpowiedzialności deliktowej, "Rysunek – Społeczeństwo – Kultura" 2017/26, numer specjalny, 108.

20 *Indan-Pykno L., Indan-Pykno M.,* Metodyka pracy i odpowiedzialność zawodowa mediatora w postępowaniu mediacyjnym, Warszawa 2022, str. 60.

21 *Dybowski T.* [w:] System prawa cywilnego, t. 3, cz. 1, Prawo zobowiązań – część ogólna, red. *Radwański Z.,* Ossolineum 1981, 213.

to damage to goods or interests that have a measurable economic value and can be expressed in monetary terms.[22] In turn, non-pecuniary damage, relating to the negative experiences of the injured person, manifested in both physical and mental suffering, is defined in the statutory provisions as harm. In order to compensate for this type of damage, the possibility of awarding a monetary benefit in the form of compensation has been provided for.[23] It is worth emphasizing that, unlike compensation for pecuniary damage, which may take various forms, compensation for non-pecuniary damage always takes the form of payment of a specified sum of money.[24] Legal literature also further divides damage into personal damage and property damage.[25] Personal damage occurs in the event of a violation of the injured party's personal rights and may include both a property element and a non-property element – in particular harm. On the other hand, property damage concerns only the injured party's property and is always of a property nature.[26] The causal link between the event leading to the damage in the case of a mediator, i.e. failure to perform or improper performance of the duties entrusted to him, and the damage itself should be assessed on the basis of the criterion of due diligence.[27] Scientific literature clearly indicates that a person acting as a mediator should be subject to standards resulting from the professional nature of their activity. In particular, this refers to compliance with principles such as professionalism, impartiality, neutrality and lack of self-interest. These principles should be supplemented by basic rules of mediation proceedings, which include voluntary participation of the parties and maintaining confidentiality at every stage of mediation.[28] Examples of such violations include the following events: A mediator conducting divorce mediation provides a person outside the proceedings (e.g. a friend's lawyer) with confidential information regarding the assets of one of the parties, obtained during the mediation. This information is later used against that party in separate court proceedings. This will result in a violation of Article 183^4 § 1 of the Code of Civil Procedure and the personal rights of the party.[29] The mediator may be liable for pecuniary damage (e.g. lost profits, costs of proceedings) and non-pecuniary damage, i.e. infringement of privacy and dignity. Another example is when the mediator suggests to the party that if they do not sign the settlement, the court may consider this as unwillingness to cooperate and draw negative consequences. The party, under pressure, agrees to terms that they would not accept in full freedom.

---

22 *Dybowski T.* [w:] System prawa cywilnego, t. 3, cz. 1, Prawo zobowiązań – część ogólna, red. *Radwański Z.,* Ossolineum 1981, 227.

23 Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (Dz.U. 1964 Nr 16, poz. 93 ze zm.), art. 417^2, art. 445, art. 448.

24 *Kaliński M.* [w:] Prawo zobowiązań – część ogólna, red. A. Olejniczak, Warszawa 2009, 91.

25 *Kawałko A.,* Witczak H., Prawo cywilne, Warszawa 2008, str. 419.

26 *Indan-Pykno L., Indan-Pykno M.,* Metodyka pracy i odpowiedzialność zawodowa mediatora w postępowaniu mediacyjnym, Warszawa 2022, str. 61.

27 *Indan-Pykno L., Indan-Pykno M.,* Metodyka pracy i odpowiedzialność zawodowa mediatora w postępowaniu mediacyjnym, Warszawa 2022, str. 74.

28 *Kuźmicka-Sulikowska J.,* Podstawa prawna odpowiedzialności cywilnej mediatora, "Kwartalnik ADR" 2008/3, str. 18.

29 Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (Dz.U. Nr 16 poz. 93 ze zm.), art. 23, art. 24.

This results in a violation of the principle of voluntary mediation[30], as well as an action contrary to the principles of social coexistence. The settlement agreement may be challenged as having been concluded under the influence of error or duress[31] and the mediator may be liable for the consequences of such manipulation, including lost profits.

5. Conclusion

In light of the applicable legal regulations, mediators are not required to have civil liability insurance for damages caused in connection with the performance of their function. This state of affairs has significant consequences both from the point of view of protecting participants in mediation proceedings and from the perspective of the mediator himself, who is exposed to personal financial liability in the event of a tort. The lack of mandatory third party liability insurance for mediators may lead to a situation in which the injured party, despite finding grounds for the mediator's civil liability, such as culpable breach of due diligence, unlawfulness of action or an adequate causal relationship between the mediator's conduct and the damage, will not be able to obtain real compensation for the damage. In this context, the civil liability of the mediator appears to be a mechanism with limited protective effectiveness. The lack of institutional security in the form of mandatory insurance weakens the potential guarantees of compensation for injured participants in mediation and may undermine trust in this form of alternative dispute resolution. Meanwhile, mediation is gaining in importance and is increasingly becoming a real alternative to traditional court proceedings in the eyes of both professional attorneys and the parties to the conflict themselves. The growing interest in mediation as a faster, cheaper and more flexible form of dispute resolution emphasizes the need for further professionalization of this area, including strengthening the mechanisms of mediators' liability.

In connection with the above, it seems reasonable to postulate the introduction of appropriate legal regulations that would establish the obligation for mediators to take out civil liability insurance, similarly to other professions of public trust. Such a solution would increase both the legal security of the parties to mediation and the professionalization of the mediator profession, constituting a significant step towards raising the standards of mediation services provided and further strengthening public trust in this institution.

Bibliography:

1. Ustawa z dnia 23 kwietnia 1964 r. – Kodeks cywilny (Dz.U. 1964 Nr 16, poz. 93 ze zm.).
2. Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego (Dz.U. Nr 43, poz. 296 ze zm.).
3. *Bagińska E.*, Glosa do wyroku SN z 29.10.2003 r., III CK 34/02, "Orzecznictwo Sądów Polskich" 2005, nr 4.
4. *Czech T.*, Zasady współżycia społecznego a odpowiedzialność deliktowa, "Państwo i Prawo" 2008, nr 12.

[30] Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego (Dz.U. Nr 43 poz. 296 ze zm.), art. 183^1 § 1.

[31] Ustawa z dnia 23 kwietnia 1964 r. Kodeks cywilny (Dz.U. Nr 16 poz. 93 ze zm.), art. 86-88.

5. *Czub K.*, [w:] Kodeks cywilny. Komentarz, wyd. II, red. M. Balwicka-Szczyrba, A. Sylwestrzak, Warszawa 2024, art. 361.
6. *Dybowski T.*, [w:] System prawa cywilnego, t. 3, cz. 1, Prawo zobowiązań – część ogólna, red. Z. Radwański, Ossolineum 1981.
7. *Indan-Pykno L., Indan-Pykno M.*, Metodyka pracy i odpowiedzialność zawodowa mediatora w postępowaniu mediacyjnym, Warszawa 2022.
8. *Jantowski L.*, [w:] Kodeks cywilny. Komentarz aktualizowany, red. M. Balwicka-Szczyrba, A. Sylwestrzak, LEX/el. 2025, art. 415.
9. *Jędrzejewski Z.*, Bezprawność w prawie cywilnym i karnym a zasada jedności porządku prawnego (jednolitego ujęcia bezprawności), "Ius Novum" 2008, nr 1.
10. *Kaliński M.*, [w:] Prawo zobowiązań – część ogólna, red. A. Olejniczak, Warszawa 2009.
11. *Karaszewski G.*, [w:] Kodeks cywilny. Komentarz aktualizowany, red. P. Nazaruk, LEX/el. 2024, art. 415.
12. *Kuźmicka-Sulikowska J.*, Podstawa prawna odpowiedzialności cywilnej mediatora, "Kwartalnik ADR" 2008, nr 3.
13. *Kuźmicka-Sulikowska J.*, Zasady odpowiedzialności deliktowej w świetle nowych tendencji w ustawodawstwie polskim, Warszawa 2011.
14. *Machnikowski P.*, [w:] System Prawa Prywatnego, t. 6: Prawo zobowiązań – część ogólna, red. A. Olejniczak, Warszawa 2009.
15. *Malinowska A.*, Uwagi w przedmiocie umownego ograniczenia odpowiedzialności deliktowej, "Rysunek – Społeczeństwo – Kultura" 2017, nr 26 (numer specjalny).
16. *Nesterowicz M.*, [w:] Prawo prywatne czasu przemian. Księga pamiątkowa dedykowana Profesorowi Stanisławowi Sołtysińskiemu, red. A. Nowicka, Poznań 2005.
17. *Pietrzykowski K.*, Bezprawność jako przesłanka odpowiedzialności deliktowej a zasady współżycia społecznego i dobre obyczaje, [w:] Odpowiedzialność cywilna. Księga pamiątkowa ku czci profesora Adama Szpunara, red. M. Pyziak-Szafnicka, Kraków 2004.
18. *Zienkiewicz A.*, Studium mediacji. Od teorii ku praktyce, Warszawa 2007.
19. *Kawałko A., Witczak H.*, Prawo cywilne, Warszawa 2008.
20. Judgement of SN z 10.02.2010 r., V CSK 287/09, LEX nr 786561.
21. Judgement of SN z 19.10.2012 r., V CSK 501/11, LEX nr 1243100.
22. Judgement of SN z 06.02.2018 r., IV CSK 72/17, LEX nr 2510949.
23. Judgement of SN z 09.06.2021 r., I CSKP 190/21, LEX nr 3212618.
24. Judgement of SN z 10.10.1975 r., I CR 656/75, LEX nr 7759.
25. Judgement of SN z 26.09.2003 r., IV CK 32/02, LEX nr 146462.
26. Judgement of SN z 20.01.2015 r., I PK 148/14, OSNP 2016/12, poz. 150.
27. Judgement of SN z 15.11.2012 r., V CSK 541/11, LEX nr 1276235.
28. Judgement of SA w Łodzi z 16.02.2022 r., I ACa 944/21, LEX nr 3423541.

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.1.2025.9530

Mateusz Rubaj*

Mediation Settlement as an Enforceable Title in Polish Civil Proceedings

This article explores the legal nature and procedural framework of mediation settlements within the Polish civil justice system, with particular emphasis on their transformation into enforceable titles. The study examines the dual character of a mediation settlement as both a manifestation of party autonomy and a procedural instrument requiring judicial validation to acquire enforceability. Drawing on a detailed analysis of the provisions of the Polish Code of Civil Procedure, the article delineates the formal prerequisites for judicial approval, the role of the mediator, and the evidentiary significance of the mediation protocol. Special attention is given to the conditions under which a settlement may be granted an enforcement clause and thereby become a legally binding enforcement title. The paper also discusses the limits of judicial discretion, emphasizing the need to verify compliance with public policy, social norms, and legal coherence. Comparative references to court settlements and arbitral awards further contextualize the enforceability of mediation agreements. The analysis highlights both the legal benefits and systemic challenges of integrating consensual dispute resolution mechanisms into formal enforcement structures. Ultimately, the article underscores mediation's evolving role in modern civil litigation as a bridge between voluntary resolution and state-sanctioned enforcement.

Key words: *mediation, enforcement, enforceable title, enforcement title, mediation settlement*

1. Introduction

A settlement is the principal objective of mediation proceedings, at least in principle. This does not mean, however, that the termination of mediation without concluding an agreement should be considered unsuccessful, as this process may also bring other significant benefits. In common terms, a settlement is perceived as an agreement reached as a result of resolving a dispute through a compromise that satisfies both parties to the conflict. From the legal perspective, however, a settlement is a legal act, specifically an agreement concluded between the parties in the course of mediation proceedings[1].

In order to illustrate the issues presented in the following part of this study, it is justified to first refer to the normative constructions functioning in civil procedure. Pursuant to Article 10 of the Code of Civil Procedure (hereinafter referred to as the "Code of Civil Procedure"), [2]in each case in which a

* PhD Candidate, Institute of Law and Administration, Pomeranian University in Słupsk, Poland.

1 *Bieliński A.,* Ugoda mediacyjna na gruncie KPC a ugoda z art. 162 K.K.W. zagadnienia wybrane, [in:] "Probacja", No. 1 (2023), 182.

2 Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego (Dz.U. 2024. poz. 1568).

settlement is admissible, the court is obliged to take – at each stage of the proceedings – actions aimed at amicable settlement of the dispute, in particular by initiating mediation and persuading the parties to undertake it. In the light of this regulation, unless specific norms provide for different outcomes, or if the nature of the case does not preclude it, concluding a mediation settlement remains a legally permissible solution. In view of the above, it should be emphasized that the jurisdiction of civil courts extends not only to disputes arising from substantive civil law in the strict sense of the word, but also to cases in the field of family law, guardianship law, labor law, social security law and other cases in which special statutes require the application of civil procedure provisions (Art. 1 of the Civil Procedure Code). Without entering into an in-depth definitional analysis of the concept of "civil case", it should be noted that the essence of civil law relations is the equality and autonomy of the parties' will. As a consequence, it is the participants of a given legal relationship who have the competence to independently determine the content, scope and form of the mediation settlement[3].

The normative regulation of mediation proceedings, contained in the Code of Civil Procedure, is complete and systemically coherent. The regulations contained in Articles 183^1–183^{15} of the Code of Civil Procedure[4] construct a comprehensive model of civil mediation, including both procedural issues related to its course and formal requirements relating to the mediator, his qualifications and standards of impartiality and independence. These provisions also specify the substantive legal prerequisites that must be met by a mediation settlement in order to be considered an effectively concluded legal transaction producing the intended legal effects in the sphere of civil law relations. On the basis of the current legal status, within civil law relations, two basic modes of initiating mediation proceedings are distinguished. The first of these is the so-called contractual (voluntary) mediation, initiated on the basis of a prior consensual agreement of the parties – in the form of a separate mediation agreement or by including a mediation clause in the agreement regulating the basic obligation relationship. The second mode is court (directed) mediation, initiated on the basis of a decision issued by the court on the merits, which – when considering a dispute – considers it advisable to refer the parties to mediation in order to settle the proceedings amicably[5].

In the context of the considerations presented in this study, it is also justified to distinguish between the concept of an enforceable title and an enforceable title, which – although often identified in everyday language – have a separate normative meaning in the light of the provisions of the Civil Procedure Code.

An enforcement title is an official document in which the existence and scope of the obligation to perform a financial or non-material performance that can be compulsorily performed is stated. In court practice, it most often takes the form of a final court decision or other equivalent act, such as a settlement concluded before a court or a mediator – provided that it meets the statutory conditions. On the other hand, an enforcement title is a procedural instrument enabling the initiation of enforcement proceedings, constituting a formal basis for court enforcement. In the light of Article 776 of the Civil

---

3 *Bieliński A.,* op. cit. cit., p. 184.

4 Dz.U. 2024. poz. 1568.

5 *Falkiewicz K., Romatowska M.,* Ugoda w postępowaniu mediacyjnym w sprawach cywilnych, [in:] "Temidium", No. 5 (2012), 23.

Procedure Code, an enforceable title is an enforceable title with an enforcement clause, unless the statute provides otherwise. This clause is declaratory in nature and confirms the possibility of compulsory performance of the obligation resulting from the enforcement title. Only when it is granted does the document acquire the characteristics of an enforceable title in the strict sense, and thus becomes an effective means of initiating enforcement[6].

2. Characteristics of a Mediation Settlement

The institutionalisation of mediation in civil proceedings has been shaped by the legislator as a formalised procedure, which is reflected, m.in in the obligation to draw up a protocol documenting its course. Pursuant to Civil Procedure Code Art. 183^{12}, this action is not only the formal termination of mediation proceedings, but also a prerequisite for their further procedural effectiveness – especially in the context of possible approval of the settlement by the court. Pursuant to § 1 of the above-mentioned provision, the mediator is obliged to draw up a protocol on the course of the mediation[7], which should include the place and time of its conduct, the parties' identification data (name, surname or business name and addresses), as well as identical information about the mediator. The key element of the protocol is to indicate the outcome of the mediation, i.e. whether it ended with a settlement or did not lead to a consensual resolution of the dispute. The protocol is signed by the mediator, giving the document official value[8].

If a settlement has been reached in the course of mediation, its content may be incorporated directly into the minutes or attached to them as a separate document (§ 2). In both cases, it is necessary to sign the settlement with the signatures of the parties, which is an expression of their will to conclude an agreement with a specific content[9]. In a situation where any of the parties is unable to sign the settlement, the mediator is obliged to record this circumstance in the content of the protocol, which is of evidentiary and procedural importance. The legislator has also introduced a presumption of the parties' consent to apply to the court for approval of the settlement by the mere fact of signing it (§ 2^{1}). The mediator is obliged to inform the parties of this legal effect, which safeguards the correctness of the procedure and protects the autonomy of the will of the participants in the mediation. The culmination of the mediator's activities in this respect is the delivery of a copy of the minutes of each of the parties to the mediation proceedings (§ 3). This action not only implements the principle of transparency and informational protection of the parties, but is also of a guarantee nature – it enables the parties to take further procedural steps, including initiating the procedure of judicial approval of the settlement[10].

---

6 Dz. U. z 2024 r. poz. 1568, Article 776 and Article 777.

7 *Gajda-Roszczynialska K., Flejszar R.,* Alternatywne metody rozwiązywania sporów ze szczególnym uwzględnieniem mediacji – postępowanie cywilne, Warszawa 2017, 20-25.

8 *Ereciński T. [in:] Grzegorczyk P., Gudowski J., Markiewicz K., Walasik M., Weitz K., Ereciński T.,* Kodeks postępowania cywilnego. Komentarz. Tom II. Postępowanie rozpoznawcze, LEX/el. 2022, art. 183(12).

9 *Stefańska E. [in:]* Kodeks postępowania cywilnego. Komentarz aktualizowany. Vol. I. Art. 1-477(16), red. *Manowska M.,* LEX/el. 2022, art. 183(12).

10 *Rutkowska A.* [in:] Kodeks postępowania cywilnego. Komentarz. Art. 1–505(39). Vol. I, red. O. M. Piaskowska, Warszawa 2024, art. 183(12).

With the exception of settlements concluded before a mediator, it should be noted that in the case of settlements concluded during a conciliation meeting (Civil Procedure Code Art. 185 §3) and during a hearing (Civil Procedure Code Art. 223 §1), their content – in accordance with the statutory directive – is disclosed in the court report or in a separate document constituting its integral annex. In order to maintain the validity of the settlement act, it is required to confirm it with the signatures of both parties, and if it is impossible for any of the parties to sign it, this fact should be clearly recorded in the protocol. However, a different regulation applies to the conclusion of a settlement as part of a preparatory hearing (Civil Procedure Code Art. 205^{8} §2) and in the course of proceedings conducted under appeal against decisions of market regulators (cf. Civil Procedure Code Art. 479^{80}a §§ 1 and 2, Art. 479^{52}a §^{2}a §§ 1 and 2, and Art. 479^{85}a §§ 1 and 2). In these cases, the legislator has not provided for an alternative consisting in the possibility of concluding a settlement without the parties signing – which means that the lack of a signature excludes the effective conclusion of a settlement under the above procedures[11].

In a situation where the settlement was concluded in the form of contractual mediation, i.e. conducted on the basis of an agreement concluded between the parties, and one of them applies for its approval, the mediator is obliged to submit a report on the course of mediation to the competent court[12]. According to settled case law, in the case of a settlement concluded before a mediator in the course of proceedings conducted on the basis of a mediation agreement (contractual mediation), the jurisdiction to approve it is vested in a common court with material and territorial jurisdiction in accordance with the general or exclusive rules of jurisdiction specified in the provisions of the Code of Civil Procedure. In other words, the court competent to consider the application for approval of such a settlement is the court that would have jurisdiction to consider the merits of the case covered by the settlement if it had not been previously resolved by consensual agreement of the parties[13]. On the other hand, in the case of court mediation (i.e. initiated by a court decision), the protocol should be filed with the court conducting the main proceedings, and it should be indicated whether the court was previously designated by the parties pursuant to Civil Procedure Code Art. 183^{14} § 2^{1}. Importantly, the parties may also include claims not yet included in the statement of claim as part of the settlement, which increases the material scope of the possible settlement of the dispute[14].

3. Mediation Settlement Approval

The procedure for approving a settlement concluded before a mediator is optional and is initiated at the request of one of the parties. This application must meet the general conditions of a

[11] *Miczek Z.,* Zawieranie ugód sądowych w trakcie tzw. rozpraw zdalnych, [in:] "Palestra", No. 5, 2024, 50-51; *Gudowski J.,* O kilku naczelnych zasadach procesu cywilnego – wczoraj, dziś, jutro (in:) Prawo prywatne czasu przemian. Księga pamiątkowa ku czci Profesora Stanisława Sołtysińskiego, red. A. Nowicka, Poznań 2005, 1033.

[12] *Dziurda M.,* Kodeks postępowania cywilnego. Praktyczny komentarz do nowelizacji z 2023 roku, Warszawa 2023, 166-172.

[13] Postanowienie SA w Katowicach z 14.09.2023 r., I ACz 661/23, LEX nr 3690224.

[14] *Dziurda M.,* op. cit., 166-172.

pleading[15]. The court having jurisdiction within the meaning of Article 183[13] shall, upon submission of such an application, immediately take steps to approve the settlement. If the settlement is to be the basis for enforcement, approval is made by granting it an enforcement clause. Otherwise, the court limits itself to issuing a decision on its approval (§ 2).[16] It is justified to emphasize that the proceedings for approval of a settlement concluded before a mediator, as opposed to the mediation proceedings themselves, are of a judicial nature and are qualified as exploratory proceedings in the broad sense. Its basic function is to incorporate a mediation settlement into the legal order in such a way that it produces legal effects identical to those provided by the Act for settlements concluded directly before the court – in particular with respect to enforcement effects and enforceability (vide Art. 183[14] and Art. 183[15] §1 of the Civil Procedure Code).[17]

At the same time, the legislator has provided for a mechanism for reviewing the legality of a settlement – the court obligatorily refuses to approve the settlement or grant it an enforcement clause (in whole or in part) if its content is contrary to the law, the principles of social coexistence, aims to circumvent the provisions of law or contains incomprehensible or contradictory elements. This kind of preventive control is a guarantee that the settlement act concluded before the mediator will be consistent with the axiology of the legal system and will not violate the fundamental principles of the legal order[18]**.** The concept of illegality of a settlement should be interpreted broadly as covering not only the violation of mandatory norms (jus cogens), but also the inadmissible shaping of the legal situation of the parties without regard to provisions of a semi-imperative nature, in particular with regard to the minimum standards of protection established by the legislator. On the other hand, a settlement aimed at circumventing the law will seemingly be consistent with the literal wording of the provisions, but in essence it will lead to prohibited effects – violating statutory orders or prohibitions or interfering with the sphere of rights of third parties. In particular, this applies to situations in which, as a result of the settlement, there are transfers of assets limiting the possibility of satisfying the claims of creditors of one of the parties. The review carried out by the court should therefore cover all the relevant factual and legal circumstances of a particular case, taking into account the nature of the legal relationship that the settlement is intended to shape or modify[19].

A settlement may be contrary to the principles of social coexistence when its provisions grossly violate the contractual balance of the parties, favouring one of them in a manner contrary to the

---

15 *Gajda-Roszczynialska K.,* Flejszar R., op. cit., 24-27.

16 *Morek R.,* Mediacja i arbitraż (art. 1831–18315, 1154–1217 KPC) Komentarz, Warszawa 2006.

17 *Mendrek A.,* Jurysdykcja krajowa w sprawach o zatwierdzenie ugody zawartej przed mediatorem, [in:] "Polski Proces Cywilny", No. 3 (2022), 477-478; *Ereciński T.,* Kodeks postępowania cywilnego. Komentarz. Tom II. Postępowanie rozpoznawcze, red. *Ereciński T.,* Warszawa 2016, komentarz do art. 18314, teza 6; J. Jagieła, Jurysdykcja krajowa w postępowaniu egzekucyjnym [in:] Aurea praxis. Aurea theoria. Księga pamiątkowa ku czci Profesora Tadeusza Erecińskiego. Tom I, red. *Gudowski J., Weitz K.,* Warszawa 2011, 1107; Błaszczak Ł., Postępowanie sądowe w sprawach mediacyjnych [in:] Mediacja w sprawach gospodarczych. Praktyka – teoria – perspektywy, red. A. Torbus, Warszawa 2015, 284-285.

18 *Ereciński T.,* Kodeks postępowania…, art. 183(14).

19 *Dolniak P.,* Ugoda mediacyjna w zakresie roszczeń nieobjętych przedmiotem sporu – uwagi na tle nowelizacji kodeksu postępowania cywilnego z 9 marca 2023 r., [in:] "Roczniki Administracji i Prawa", No. 2, vol. 23 (2023), 213-114.

elementary principles of contractual honesty and loyalty. Circumvention of the law should also be said when the parties, under the cover of seemingly legal provisions, aim to achieve hidden illegal goals. On the other hand, an internal contradiction in a settlement occurs when its individual provisions are in conflict with each other, making it impossible to perform them simultaneously. On the other hand, an incomprehensible settlement is one whose content is ambiguous, imprecise or so ambiguous that it makes it impossible to determine the will of the parties and its effective implementation[20].

It should be emphasized that the above grounds for refusal to approve a settlement do not directly relate to the issue of the parties exceeding the objective scope of the court dispute in the settlement. Nevertheless, it is impossible to ignore the doubts raised by the practice of courts approving settlements that cover claims that go beyond the subject matter of consideration in a given proceeding. This is because it may – in certain factual and legal configurations – bear the hallmarks of circumvention of procedural law, in particular those norms that limit the limits of adjudication and the admissibility of a court ruling[21]. Moreover, it should be pointed out that the court is obliged to refuse to approve a settlement concluded before a mediator in a situation where the subject matter of the case still remains an area of a significant, unresolved dispute between the parties, and the concluded settlement does not lead to the actual end of the conflict. It is inadmissible to approve an agreement that does not reflect the consensual will of the parties, especially if one of them expresses a clear, unambiguous and consistently maintained objection to the content of the settlement – also at further stages of instance control, including in cassation proceedings. In order for a settlement to be approved, it must demonstrate not only formal correctness, but also factual consensual character, constituting a manifestation of an authentic procedural agreement between the parties[22].

A settlement concluded before a mediator, after its approval by the court, acquires a special legal character, going beyond an ordinary civil law contract. Pursuant to Civil Procedure Code Art. 183^{15} §1, an approved mediation settlement acquires legal force equal to the settlement concluded before the court. Thus, mediation is not only an alternative method of resolving a dispute, but also allows to achieve a formal result equivalent to a court ruling. In this approach, it should be noted that even in a situation where approval is made by granting an enforcement clause to the settlement, the proceedings do not take on a merely formal character. Unlike in classic clause proceedings, the court does not limit itself to examining formal premises, but also performs a substantive verification of the content of the settlement – including its compliance with the applicable legal order, principles of social coexistence, as well as in terms of internal consistency and unambiguity of provisions. For this reason, these proceedings cannot be reduced to the status of a purely technical act initiating enforcement, but should be seen as a separate form of judicial approval of consensual dispute resolution, which is part of the broader context of alternative dispute resolution[23]. It is worth noting, however, that the above regulations do not prejudice the provisions concerning the specific form of legal transactions. This means that if in a given case the provisions of civil law require a specific form for a given legal

---

20 *Flaga-Gieruszyńska K., Zieliński A.,* Kodeks postępowania cywilnego. Komentarz, Warszawa 2022, Legalis, art. 183^{14}.

21 *Dolniak P.,* op.cit., 214-215.

22 Postanowienie SN z 1.12.2022 r. I CSK 1717/22, LEX nr 3437896.

23 *Mendrek A.,* op. cit., 478.

transaction (e.g. the form of a notarial deed), the mediation settlement will also have to be concluded in this form in order to have the desired legal effects[24].

4. Settlement as an Enforceable Title

The basic prerequisite for initiating enforcement proceedings in the Polish legal system is the existence of an enforceable title, which authoritatively constitutes the existence of a specific obligation of the debtor – most often the obligation to pay a specified amount of money to the creditor. Pursuant to Article 776 of the Civil Procedure Code, an enforceable title is an enforcement title with an enforcement clause. The concept of an enforcement title refers to an official document that confirms both the existence and scope of the creditor's due claim and the corresponding legal obligation on the part of the debtor. Only when such a document is provided with an enforcement clause does it have the character of an enforceable title, which in turn entitles the creditor to initiate compulsory enforcement proceedings. In this context, the source of the document is important – only acts enumerated in the provisions of the Act, issued by authorized bodies or approved in the manner provided for by law, may serve as an enforcement title. As a consequence, only documents of appropriate formal and material rank, meeting the criteria of legality and authenticity, may constitute the basis for effective enforcement of claims[25].

Pursuant to Article 777 § 1 of the Code of Civil Procedure, the legislator establishes an enumerative catalogue of documents to which it grants the status of writs of enforcement, i.e. those which, after being provided with an enforcement clause, become enforceable titles and constitute the basis for initiating enforcement proceedings. This catalogue includes in particular: (1) court decisions having the value of finality or subject to immediate enforcement, as well as settlements concluded before the court; (11) decisions of the court referendary corresponding to the same characteristics of effectiveness; (3) other acts, settlements and judgments which are enforceable by the courts in force of applicable law; (4–6) and a special type of private documents, such as notarial deeds, in which the debtor, by submitting an appropriate declaration of intent, submits to enforcement within the scope of a specific obligation[26].

The postulate to declare the catalogue of writs of execution specified in Art. 777 of the Civil Procedure Code closed is justified only with respect to official documents issued or approved by national public authorities. In this context, the position of the settlement concluded before the mediator requires a special analysis, the significance of which in the enforcement proceedings is actualized only when it is approved by the court by granting it an enforcement clause. A mediation settlement, although after approval by the court acquires legal force equivalent to a settlement concluded before the court (cf. Civil Procedure Code Art. 183^{15} §1), cannot be equated with a "settlement concluded before the court" within the meaning of Civil Procedure Code Art. 777 §1(1). which excludes the possibility of extending the scope to settlements concluded out of court, even if they have been

[24] *Piaskowska O.,* Kodeks postępowania cywilnego. Komentarz. Art. 1–505(39). Tom I, Warszawa 2024, pp. 483.

[25] *Sikorski G.,* Egzekucja z rachunków bankowych, Sopot 2011, 115-130.

[26] *Gudowski J.,* art. 777. [tytuły egzekucyjne] [in:] Kodeks postępowania cywilnego. Orzecznictwo. Piśmiennictwo. Vol. 5, Warszawa 2025.

approved by the court pursuant to Civil Procedure Code Art. 183[14] §3. This means that it is only when the settlement is granted an enforcement clause that it becomes possible to recognize it as an enforceable title, in accordance with Civil Procedure Code Art. 776.[27]

Therefore, it should be assumed that due to its initial nature, a settlement concluded before a mediator is a private document, devoid of independent enforcement power. Only after its judicial approval – provided that the content of the settlement is suitable for enforcement by state coercion – does it acquire the value of an enforceable title within the meaning of Civil Procedure Code Art. 776, which allows for the enforcement of the benefits specified therein. Thus, unlike in the case of a court settlement, which takes the form of an enforcement title upon conclusion and becomes an enforceable title after it has been provided with an enforcement clause, a mediation settlement acquires full enforcement effect, so to speak, "ex post" – as a result of approval by the court, which is associated with making it enforceable. This difference highlights the different formal and legal regimes applicable to these two categories of settlements, although they may ultimately lead to analogous effects in the area of judicial enforcement[28].

5. Enforceability of a Court Settlement as an Enforcement Title in Practice

A sine qua non condition for granting an enforcement clause to a court decision or a settlement concluded in civil proceedings is their substantive enforceability – understood as the ability of a given act to forcibly perform the obligation to perform by means of enforcement measures. It is a well-established view in the case law that the court may grant an enforcement clause only to a judgment or settlement which, due to its content, is enforceable by way of enforcement. A settlement in which the creditor releases the debtor from the debt in exchange for the transfer of ownership of an item to the debtor – for example, a motor vehicle – does not meet this requirement, as it does not specify a compulsory obligation[29].

In the light of Civil Procedure Code Art. 777 §1(1), a settlement concluded before a state court may also be an enforceable title, but – importantly – only if it has been formally entered into the minutes of the hearing (Civil Procedure Code Art. 223 §1) or attached thereto as a separate document bearing the signatures of the parties. Only such a settlement may be considered a "settlement concluded before the court" within the meaning of the provision and thus constitute the basis for granting an enforcement clause. Constructions providing for the incorporation of agreements concluded outside the protocol into the content of a court settlement – with the proviso that they will constitute an integral part of the protocol and the basis for enforcement – should be considered unlawful. Such objections are invalid, and the court conducting the conciliation proceedings is obliged to refuse to take them into account in the content of the settlement[30].

---

27 *Sławicki P.,* Charakter prawny ugody zawartej przed mediatorem w świetle nowelizacji k.p.c. z dnia 16 września 2011 roku, [in:] "Studia Prawnicze KUL". No. 4, 2016, 127-144.

28 *Dominowska J.,* Ugoda zawarta przed mediatorem a ugoda sądowa, [in:] "Przegląd prawa handlowego", No. 6, 2018, 38; *Sieńko M. [in:]* Kodeks postępowania cywilnego. Komentarz, t. 2, Art. 506–1217, red. *Manowska M.,* Warszawa 2015, komentarz do art. 777 k.p.c.

29 Orzeczenie SN z 27 maja 1958 r., 1 CR 354/58.

30 Orzeczenie SN z 29.11.1960 r., 3 CZ 128/60, OSNC 1962, nr 1, poz. 28.

A settlement concluded before a common court may also constitute an enforcement title in the case of periodic performance, the maturity of which occurs successively over time. An example may be a settlement in which a person occupying a residential unit without a legal title undertakes to pay a certain amount of money to the owner of the premises as compensation, payable by a specific day of each month. Such a settlement – if it was concluded before the court and properly entered in the record – constitutes an enforcement title within the meaning of Civil Procedure Code Art. 777 §1(3) with respect to benefits that became due due on the expiry of the payment deadlines provided for therein[31].

In the context of concluding a mediation settlement in maintenance proceedings concerning the issue of the amount of the current maintenance pension (ex Art. 445^2 of the Civil Procedure Code), the prevailing view in the civil law doctrine is that it is a legal act admissible in the light of the applicable procedural regulations. Nevertheless, it should be unequivocally emphasized that a consensual solution of this type is inadmissible both with regard to the very existence of the maintenance obligation and future periodic payments, which results from the imperative norms of family law. In the context of maintenance enforcement, the doctrine does not question the admissibility of submitting by the maintenance debtor a declaration of intent to submit to enforcement in the form of a notarial deed, because this type of legal actions are admissible in the case of civil law obligations, for which the Act provides for both judicial and enforcement ways of pursuing claims[32].

The Supreme Court's view on settlements concluded before an arbitration court can be applied by analogy to mediation settlements. It should be noted that they obtain effectiveness comparable to a ruling of a state court only to the extent that they are suitable for enforcement under the enforcement procedure. It should be emphasized that the mere conclusion of a settlement before the arbitration court is not sufficient to make it enforceable – it requires approval by the state court in accordance with the procedure provided for in the provisions on civil procedure. Only after this condition is met can it be considered an enforcement title in the strict sense[33].

It is also apparent from the case-law that an enforceable title, whether in the form of a judgment or a settlement, which covers several obligations of the debtor, may be enforced only in the part relating to obligations that can be enforced. Even if the material scope of the enforcement clause has not been directly limited (contrary to the principle under Civil Procedure Code Art. 783 §1), the unenforceable elements of such an act do not have legal effects. Consequently, the enforceable title may be partially deprived of enforceability on the basis of an action under Civil Procedure Code Art. 840 §1(2^{34}).

It should be noted that not every form of settlement concluded outside of formal court proceedings generates effects in the enforcement area. For example, a settlement concluded before a social conciliation committee – although it may express a consensus of the parties and the end of the dispute – is not an act to which the law grants the character of an enforcement order. Consequently, it cannot be the basis for initiating enforcement proceedings or for granting an enforcement clause[35].

---

31 Postanowienie SN z 24.09.1986 r., III CRN 178/86, OSPiKA 1989.

32 *Urbańska S.,* 5. Ugoda sądowa i pozasądowa [in:] Prawo alimentacyjne. Zagadnienia systemowe i proceduralne, red. *Łukasiewicz J. M.,* I. Ramus, Toruń 2015.

33 Orzeczenie SN z 26.10.1936 r., II C 1371/36, OSN 1937, nr 4, poz. 160.

34 Wyrok SN z 23.06.1980 r., III CRN 43/80, OSNC 1981, nr 2-3, poz. 34.

35 Postanowienie SN z 24.04.1978 r., IV CZ 157/77, OSNC 1979, nr 3, poz. 53.

6. Conclusion

The institution of a mediation settlement as an enforceable title in Polish civil proceedings is an example of a harmonious combination of the autonomy of the parties' will with the guarantees of enforcement effectiveness provided by the state. As shown in this study, a settlement concluded before a mediator, after meeting the requirements set out in Civil Procedure Code Art. 183^{1}–183^{15} and after its approval by the court, acquires the value of an enforceable title, which allows for the initiation of enforcement proceedings. This process reflects the evolution of the Polish legal system towards strengthening alternative dispute resolution methods, while maintaining legal protection standards.

The key aspect of the analysed issue is the dualism of the nature of the mediation settlement – on the one hand, it is a manifestation of the freedom to shape legal relations by the parties, and on the other hand, in order to function as an enforceable title, it requires legitimacy by a public authority. Granting an enforceability clause to a settlement is not only a formal act, but also includes a review of its compliance with jus cogens standards, principles of social coexistence and the requirements of internal cohesion. In this context, the court acts as a guarantor of the rule of law, eliminating from legal circulation settlements aimed at circumventing the law or violating the interests of third parties.

In the light of the case law and doctrine, a mediation settlement, although it derives from an out-of-court mediation process, is equated with a court settlement after approval. There is no doubt, however, that differences in the procedure for its conclusion and approval result in a different legal regime, which requires practitioners to pay special attention when constructing its provisions. It is worth noting that extending the scope of the settlement beyond litigation, although admissible, may not lead to a violation of procedural rules, in particular those concerning the jurisdiction of the court and the admissibility of claims.

The prospect of further development of the institution of mediation in Poland should take into account the need to increase its procedural efficiency, e.g. by introducing simplified mechanisms for approving settlements in cases of low value of the subject of the dispute, while maintaining due judicial review. At the same time, it is necessary to deepen the reflection on the limits of admissibility of mediation settlements in cases related to family law or alimony law, where the imperative to protect the weaker party may limit the freedom to shape the content of the agreements.

Bibliography:

1. *Bieliński A.*, Ugoda mediacyjna na gruncie KPC a ugoda z art. 162 K.K.W. zagadnienia wybrane, “Probacja” 2023, nr 1.
2. *Błaszczak Ł.*, Postępowanie sądowe w sprawach mediacyjnych [w:] Mediacja w sprawach gospodarczych. Praktyka – teoria – perspektywy, red. Torbus A., Warszawa 2015.
3. *Dolniak P.*, Ugoda mediacyjna w zakresie roszczeń nieobjętych przedmiotem sporu – uwagi na tle nowelizacji kodeksu postępowania cywilnego z 9 marca 2023 r., “Roczniki Administracji i Prawa” 2023, nr 2, t. 23.
4. *Dominowska J.*, Ugoda zawarta przed mediatorem a ugoda sądowa, “Przegląd prawa handlowego” 2018, nr 6.

5. *Dziurda M.*, Kodeks postępowania cywilnego. Praktyczny komentarz do nowelizacji z 2023 roku, Warszawa 2023.
6. *Ereciński T.* [w:] *Grzegorczyk P.*, *Gudowski J.*, *Markiewicz K.*, *Walasik M.*, *Weitz K.*, *Ereciński T.*, Kodeks postępowania cywilnego. Komentarz. Tom II. Postępowanie rozpoznawcze, LEX/el. 2022.
7. *Falkiewicz K.*, *Romatowska M.*, Ugoda w postępowaniu mediacyjnym w sprawach cywilnych, "Temidium" 2012, nr 5.
8. *Flaga-Gieruszyńska K.*, *Zieliński A.*, Kodeks postępowania cywilnego. Komentarz, Warszawa 2022, Legalis.
9. *Gajda-Roszczynialska K.*, *Flejszar R.*, Alternatywne metody rozwiązywania sporów ze szczególnym uwzględnieniem mediacji – postępowanie cywilne, Warszawa 2017.
10. *Gudowski J.*, O kilku naczelnych zasadach procesu cywilnego – wczoraj, dziś, jutro [w:] Prawo prywatne czasu przemian. Księga pamiątkowa ku czci Profesora Stanisława Sołtysińskiego, red. Nowicka A., Poznań 2005.
11. *Jagieła J.*, Jurysdykcja krajowa w postępowaniu egzekucyjnym [w:] Aurea praxis. Aurea theoria. Księga pamiątkowa ku czci Profesora Tadeusza Erecińskiego. Tom I, red. *Gudowski J.*, *Weitz K.*, Warszawa 2011.
12. *Mendrek A.*, Jurysdykcja krajowa w sprawach o zatwierdzenie ugody zawartej przed mediatorem, "Polski Proces Cywilny" 2022, nr 3.
13. *Miczek Z.*, Zawieranie ugód sądowych w trakcie tzw. rozpraw zdalnych, "Palestra" 2024, nr 5.
14. *Morek R.*, Mediacja i arbitraż (art. 1831–18315, 1154–1217 KPC). Komentarz, Warszawa 2006.
15. *Rutkowska A.* [w:] Kodeks postępowania cywilnego. Komentarz. Art. 1–505(39). Tom I, red. *Piaskowska O. M.*, Warszawa 2024.
16. *Sieńko M.* [w:] Kodeks postępowania cywilnego. Komentarz, t. 2, Art. 506–1217, red. *Manowska M.*, Warszawa 2015.
17. *Sikorski G.*, Egzekucja z rachunków bankowych, Sopot 2011.
18. *Sławicki P.*, Charakter prawny ugody zawartej przed mediatorem w świetle nowelizacji k.p.c. z dnia 16 września 2011 roku, "Studia Prawnicze KUL" 2016, nr 4.
19. *Stefańska E.* [w:] Kodeks postępowania cywilnego. Komentarz aktualizowany. Tom I. Art. 1-477(16), red. *Manowska M.*, LEX/el. 2022.
20. *Urbańska S.*, 5. Ugoda sądowa i pozasądowa [w:] Prawo alimentacyjne. Zagadnienia systemowe i proceduralne, red. *Łukasiewicz J. M.*, *Ramus I.*, Toruń 2015.
21. Ustawa z dnia 17 listopada 1964 r. – Kodeks postępowania cywilnego (Dz.U. 2024, poz. 1568).
22. Postanowienie SA w Katowicach z 14.09.2023 r., I ACz 661/23, LEX nr 3690224.
23. Postanowienie SN z 1.12.2022 r., I CSK 1717/22, LEX nr 3437896.
24. Orzeczenie SN z 27 maja 1958 r., 1 CR 354/58.
25. Orzeczenie SN z 29.11.1960 r., 3 CZ 128/60, OSNC 1962, nr 1, poz. 28.
26. Postanowienie SN z 24.09.1986 r., III CRN 178/86, OSPiKA 1989, nr 3.
27. Orzeczenie SN z 26.10.1936 r., II C 1371/36, OSN 1937, nr 4, poz. 160.
28. Wyrok SN z 23.06.1980 r., III CRN 43/80, OSNC 1981, nr 2-3, poz. 34.
29. Postanowienie SN z 24.04.1978 r., IV CZ 157/77, OSNC 1979, nr 3, poz. 53.

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.1.2025.9531

Giorgi Chavleishvili*

Forms of Succession in the Kingdom of Georgia and Castile: A Comparative Analysis of Medieval Law

This article offers a comparative analysis of medieval inheritance law in the Kingdom of Georgia and Castile from the 10th to 15th centuries. By employing a legal-comparative approach, it examines basic aspects of two forms of succession: testamentary (ex testamento) and intestate (ab intestato). The study highlights both commonalities and differences in how each region adopted these forms, based on various medieval sources and scientific literature. Key aspects discussed include the influence of Roman law on the local legislations, the formal requirements for a will, the scope of testamentary freedom, intestate inheritance rules, degrees (priority order) of succession, gender issues, the inheritance rights of illegitimate children, widows and so on.

Keywords: *inheritance in the Siete Partidas, medieval Georgian inheritance law, gender and inheritance in medieval law, reception of Roman law, intestate and testamentary inheritance in the Middle Ages*

1. Introduction

The Middle Ages were a long historical period lasting from the fifth to the fifteenth centuries in the Western Europe, including the kingdom of Castile, but in Georgia it is basically considered to cover a period from the fourth to the eighteenth centuries. For the present article we have chosen a common framework for the research period – from the tenth to the fifteenth centuries (also the beginning of the sixteenth century) in the scope of which we well revise and analyze, based on the legal-comparative method, a fundamental aspect of inheritance law in the named countries – the forms of succession, by emphasizing common and different signs of their regulations and their basic peculiarities.

The Ancient Roman law recognized both universal succession (lat. *in universium ius, per universitatem*) and singular succession (lat. *singularis, in singulas res*). In the case of universal succession, the property was fully transferred to the heir, and in the case of singular – only its separate part. The main type of the universal succession is *mortis causa* succession – i.e. succession due to a person's death.[1] In this case, we are interested in the forms of inheritance, that is, in what ways the inheritance was transferred to the heir as a result of a person´s death. In ancient Rome, also in late medieval Castile and Georgia, there were two forms – testamentary inheritance (lat. *ex testamento*) and intestate inheritance (lat. *ab intestate, successio legitima*). Exactly these two aspects will be the

* PhD candidate in law, Ivane Javakhishvili Tbilisi State University, University of Granada, ORCID: (0009-0000-8575-4335).

1 *García Garrido M. J.,* Derecho Privado Romano: casos, acciones, instituciones, Madrid 2015, 239-240.

subject of study of the present research. The article covers the basic and general characteristics of the issue, mainly outlining the fundamental principles and key aspects of succession in each region (excluding, for example, the throne succession, object of inheritance, testament execution, feudal inheritance, singular succession, etc.).

It should be noted that Castilian law, in this case, is reviewed in terms of the reception of Roman law and, accordingly, the formation of *Ius Commune*, which is the main peculiarity of the Spanish law of the late Middle Ages, based on the legislation of Alfonso X Sabio (in the XIII century). *Las Siete Partidas* was practically the main regulatory source of inheritance law in this era.[2] Norms of inheritance law are also envisaged in Alfonso's *Fuero Real*, as well as in the *Fuero Viejo de Castilla* (a systematized edition was compiled in the 14th century), the *Ordenamiento de Alcalá* of 1348, the laws of Toro (*Las Leyes de Toro,* 1505) of so-called Catholic Monarchs – Isabella and Ferdinand, and so on. Medieval Castilian wills are have also preserved, which provide us with valuable infomation about testamentary inheritance. We find significant details about the Spanish inheritance law of the late Middle Ages in works of J. A. López Nevot, R. Morán Martín, F. J. Díaz González, F. L. Pacheco Caballero, M. C. Fernández, A. M. Alemán Monterreal, J. M. Pérez Prendes Muñoz-Arraco, A. Murillo Villar, etc.

Information about the inheritance law during the period of the Georgian Kingdom is provided by The Law of Bagrat Curopalate (the identity of king Bagrat and, accordingly, the creation time of the code are still questioned, but it definitely belongs to the middle ages), Book of Law of Beka and Aghbugha (XIII-XIV centuries), Dzeglisdeba of Giorgi Brtskinvale (XIV century), as well as preserved wills and literary sources. The issue was studied by Ivane Javakhishvili, Ivane Surguladze, Isidore Dolidze, Giorgi Nadareishvili and other great Georgian scientists, however, Besarion Zoidze's work – Ancient Georgian Inheritance Law, stands out for its deep and exhaustive research.

By examining the inheritance regulations in these two medieval societies of Castile and Georgia, with the help of a large scope of historical, legal and scientific sources, we can gain a deeper understanding of how legal systems reflected cultural and social influences in these two countries.

2. Testamentary Inheritance

As Iv. Javakhishvili points out, a will (testament) was a declaration of a wish made in writing or orally by a person awaiting tribulation or death, which was to be fulfilled after death.[3] In Castile, a will, according to *Las Siete Partidas*, was a form of expression of the testator's wish that outlined how their property was to be distributed after their death and determined the heir.[4] We can say that the definitions mostly coincide with each other. Due to the influence of Roman law, it is not surprising that the word *testamento* (from Latin *testamentum*) was used (and is still used) to denote a will (testament) in Castile, whereas, according to Ivane Javakhishvili, initially the word *aghtkumai* was

[2] *Pestalardo A., Berasategui I.,* La legítima hereditaria en el Proyecto de Código Civil y Comercial, "Revista Derecho Privado" 2013, Año II, N° 6, 241.

[3] *Javakhishvili Iv.*, History of Georgian Law, vol. 2, part II, Tbilisi 1929, 380 (in Georgian).

[4] P.6.1.1., *López G.*, Las Siete Partidas del Sabio Rey Don Alonso el Nono, Salamanca 1555, 2 (obv.).

used in the Georgian language for a testament and only later appears *anderdzi*, becoming the basic term, from the Persian word *andraz*, *andrez* (in Persian: advice, counsel, plea, testament), although the influence of Roman-Byzantine law can also be felt in the Georgian testamentary rule.[5] Unlike the Castilian law, which extensively deals with our topic (primarily, a huge part of the Sixth *Partida*, which describes in detail the issues related to a will), medieval Georgian legislation is not distinguished by abundance of regulation of the issue of wills.[6]

According to the definition presented in the Sixth *Partida*, we think it becomes obvious that the appointment of the heir (lat. *haeredem instituere*, as the Sixth *Partida* states) was a necessary element for the validity of the will,[7] similar to the provisions of Roman law.[8] Ivane Javakhishvili, based on the studied sources, does not single out the mentioned criterion among the mandatory content components of the will, [9] however, we consider it less likely that the uncertainty of the heir did not affect the validity of the document, since the main idea of the will is to determine to whom the property remains. It was perfectly recognized by the Castilian legislation: "the foundation and the base of any will, no matter what kind it is, is the appointment of an heir in it" – we read in The Sixth *Partida*.[10] We think that there should have been a similar approach in Georgia, for example, if we look at the king Davit IV Aghmashenebeli's will of 1125, he specifically names to whom he will transfer the property (for example, "the drahkans – to Kostanti Tsuata and my rubies and precious stones will be donated to the Mother of God of Khakhuli").[11] As to Castile, notwithstanding the above, it is noteworthy that the *Ordenamiento de Alcalá* of 1348 expressly stated that even if a heir was not appointed, this could not be a ground for invalidating the will.[12] According to R. Morán Martín, it was a sign of legal flexibility, establishing a possibility to make a "secret will" when the heir was not named and the testator retained the right to define the heir late by another document.[13]

Iv. Javakhishvili, based on a Georgian nobleman Grigol Surameli's will (XIII century), concludes that in order to draw up a testament, it was mandatory to indicate the name of the testator in full and to emphasize that it had been written "with his own will" and "being fully aware", which obviously showed the soundness of mind and absence of any pressure. [14] It is interesting that similar wording can be found, for example, in the will of Benito Fernández de Villaverde (1409, Paredes de

---

5 *Javakhishvili Iv.*, History of Georgian Law, vol. 2, part II, Tbilisi 1929, 383 (in Georgian) .

6 *Zoidze B.*, Ancient Georgian Hereditary Law (legal-comparative research), Tbilisi 2000, 296 (in Georgian).

7 P.6.3.1., *López G.*, Las Siete Partidas del Sabio Rey Don Alonso el Nono, Salamanca 1555, 13 (obv.).

8 *Garishvili M., Khoperia M.*, Roman Law, Tbilisi 2013, 352 (in Georgian).

9 *Javakhishvili Iv.*, History of Georgian Law, vol. 2, part II, Tbilisi 1929, 381-382 (in Georgian) .

10 P.6.3. (pról.), *López G.*, Las Siete Partidas del Sabio Rey Don Alonso el Nono, Salamanca 1555, 13 (obv.).

11 *Dolidze I.*, Monuments of Georgian Law, II, Secular Legislative Monuments (10th-19th Centuries), Tbilisi 1965, 19 (in Georgian).

12 OA. 19.1., *Asso y del Río I. J., de Manuel y Rodríguez M.*, El Ordenamiento de Leyes que D. Alfonso XI hizo en las Cortes de Alcalá de Henares el año de mil trescientos y quarenta y ocho, Madrid 1847, 32.

13 *Morán Martín R.*, Historia del derecho privado, penal y procesal, Tomo I: parte teórica, Madrid 2002, 398-399.

14 *Javakhishvili Iv.*, History of Georgian Law, vol. 2, part II, Tbilisi 1929, 381 (in Georgian); *Dolidze I.,* Monuments of Georgian Law, II, Secular Legislative Monuments (10th-19th Centuries), Tbilisi 1965, 38 (in Georgian).

Nava), a person from the lower class, which, first of all, fully defines the identity of the testator and emphasizes in the introduction that the will was made with "sound mind" (*en mi sano entendimiento*) and on the basis of "clear memory" (*en mi sana memoria*), [15] which corresponds to the requirement of the Sixth *Partida*. [16] Focusing on the memory is quite interesting, which we believe must be due to the simple truth that even a person with proper thinking (sound mind), if he does not remember events well, may make an inadequate decision. By the way, a similar wording can be observed in Georgian wills, although not in our research period – in Shahkuliani's "Firm will", that dates back to the 19th century, it is emphasized that the testator was "fully aware and with clear memory" when drawing up the document.[17] In general, we can say that in both comparable countries a sane will was required to write a testament.

At least 14 years old man and a 12 years old woman were legally allowed to make a will in Castile, as they were considered to be mentally mature enough.[18] Undoubtfully, this was also related to the marriageable age, which was defined in this way since the ancient Rome.[19] In Georgia, the regulation was alike in one way or another – the male testator had to be 14-15 years old, the female – 12 years old. [20] Accordingly, from a legal point of view, both in Georgia and Castile, a woman had the right to make a will.

It is clear from the sources that if the testator was able to write, he should have written the will himself, which was also noted in the wills by them. For instance, in the will of Grigol Surameli we read (in the section of the witnesses´ notes) that "he wrote with his own hand". [21] Likewise, according to Castilian law, the testator indicated that he had drawn up the will themselves under the conditions described above, however, the Sixth *Partida* adds that if a person could not (or did not know how) to write, someone else could do so at his will.[22] A similar approach should have existed in Georgia as well. For example, Davit Aghmashenebeli could not write the will himself due to its volume and lack of time, although he started writing it personally, which he specifically noted in the will of 1123, at the end of the text, along with his signature. If the testator was able to write, according to Iv. Javakhishvili, the text should have been written personally at least partially.[23] In extreme cases, when other person wrote the will, the testator had to sign it or put a cross. In general, it seems that

---

15 *Martín Cea J. C.*, El modelo testamentario bajomedieval castellano y su reflejo en los diferentes grupos sociales, "Edad Media: revista de historia" 2003-2004, № 6, 146.

16 P.6.1.13., *López G.*, Las Siete Partidas del Sabio Rey Don Alonso el Nono, Salamanca 1555, 5 (rev.), 6 (obv.).

17 *Zoidze B.*, Ancient Georgian Hereditary Law (legal-comparative research), Tbilisi 2000, 323 (in Georgian).

18 6.1.13., *López G.*, Las Siete Partidas del Sabio Rey Don Alonso el Nono, Salamanca 1555, 5 (rev.).

19 P.4.1.6., ibidem, 4 (rev.); Inst. Iust. 1.10. (prol.) and 1.22. (prol.), *Surguladze N.*, Monuments of Roman Law. Institutions of Justinian, translated from Latin, Tbilisi 2002, 24, 42-43 (in Georgian).

20 *Zoidze B.*, Ancient Georgian Hereditary Law (legal-comparative research), Tbilisi 2000, 305 (in Georgian).

21 *Javakhishvili Iv.*, History of Georgian Law, vol. 2, part II, Tbilisi 1929, 381 (in Georgian); *Dolidze I.*, Monuments of Georgian Law, II, Secular Legislative Monuments (10th-19th Centuries), Tbilisi 1965, 41 (in Georgian).

22 P.6.1.1., *López G.*, Las Siete Partidas del Sabio Rey Don Alonso el Nono, Salamanca 1555, 3 (obv.).

23 *Javakhishvili Iv.*, History of Georgian Law, vol. 2, part II, Tbilisi 1929, 381-382 (in Georgian); *Dolidze I.,* Monuments of Georgian Law, II, Secular Legislative Monuments (10th-19th Centuries), Tbilisi 1965, 12, 18 (in Georgian).

clergymen took care of writing the will.[24] Overall, it is clear to us that the law of both countries attached great importance for testament to be personally written for the validity purposes (to whatever extent possible).

We will also discuss the form of the will. In both Georgia[25] and Castile, a will could be either oral or written. In Castile, the oral will practically disappeared in the early Middle Ages, although it was revived with the reception of Roman law[26] (moreover, in the named era, before the reception, the dominant form of inheritance was the intestate inheritance, and inheritance by will was not even considered inheritance at all[27]). *Las Siete Partidas* distinguishes between two types of will: 1*) testamentum nuncupativum* – public will, executed in writing or orally, in the presence of seven witnesses; 2*) testamentum in scriptis* – will, executed only in writing, also before seven witnesses.[28] *Las Leyes de Toro* calls the first one an open will, and the second one a closed one.[29] The first was signed before a notary.[30] In Georgia, as B. Zoidze notes, it seems that the functions of notary were carried out by clergy (on one hand, as we mentioned, they were often the ones who wrote wills) and on many occasions they also preserved the wills.[31]

The principle of seven witnesses had obviously been taken from Roman law, which also established the identical number of witnesses,[32] although according to the *Ordenamiento de Alcalá*, this number was reduced to 3 for public wills.[33] Georgian law also took into account the need for witnesses, and usually their quantity was close to that determined by Roman law, however, it seems that there was no fixed number and sometimes it even exceeded 7.[34]

Alteration of wills seems to have been allowed in Castile, as it is clearly indicated by The Sixth *Partida*[35] (we should note, in this regard, one interesting norm: if a person revoked the first will by the subsequent will since he thought the named heir was dead and wanted to define a new one, although it turned out that he was alive, the second will would be considered invalid and the property would be

---

24 *Zoidze B.*, Ancient Georgian Hereditary Law (legal-comparative research), Tbilisi 2000, 329-330 (in Georgian).

25 *Javakhishvili Iv.*, History of Georgian Law, vol. 2, part II, Tbilisi 1929, 380-381 (in Georgian).

26 *Morán Martín R.*, Historia del derecho privado, penal y procesal, Tomo I: parte teórica, Madrid 2002, 402.

27 *Pestalardo A., Berasategui I.*, La legítima hereditaria en el Proyecto de Código Civil y Comercial, "Revista Derecho Privado" 2013, Año II, N° 6, 247.

28 P.6.1.1., *López G.*, Las Siete Partidas del Sabio Rey Don Alonso el Nono, Salamanca 1555, 2 (rev.).

29 LT. 3., LEYES DE TORO, Madrid 1977, 49.

30 *Morán Martín R.*, Historia del derecho privado, penal y procesal, Tomo I: parte teórica, Madrid 2002, 401.

31 *Zoidze B.*, Ancient Georgian Hereditary Law (legal-comparative research), Tbilisi 2000, 330-331 (in Georgian); *Javakhishvili Iv.*, History of Georgian Law, vol. 2, part II, Tbilisi 1929, 382 (in Georgian).

32 Inst. Iust., 2.10.3., *Surguladze N.*, Monuments of Roman Law. Institutions of Justinian, translated from Latin, Tbilisi 2002, 84 (in Georgian).

33 OA. 19.1., *Asso y del Río, I. J., de Manuel y Rodríguez, M.*, El Ordenamiento de Leyes que D. Alfonso XI hizo en las Cortes de Alcalá de Henares el año de mil trescientos y quarenta y ocho, Madrid 1847, 32; *Martín Cea J. C.*, El modelo testamentario bajomedieval castellano y su reflejo en los diferentes grupos sociales, "Edad Media: revista de historia" 2003-2004, № 6, 108.

34 *Zoidze B.*, Ancient Georgian Hereditary Law (legal-comparative research), Tbilisi 2000, 332-334 (in Georgian).

35 P.6.1.25., *López G.*, Las Siete Partidas del Sabio Rey Don Alonso el Nono, Salamanca 1555, 9 (rev.).

received by the first heir[36]). From the sources of Georgian law, it can be seen that in Georgia there was no restriction on changing and canceling the will either, which is also evidenced by the article 57 of the Book of the Law of Beka and Aghbugha.[37]

A testamentary heir, under Castilian law, could be virtually anyone,[38] with specific exceptions, such as apostates, outcasts, etc.[39] Furthermore, according to the Sixth *Partida* (later it was canceled by Enrique III (1390-1406)[40]), a women who remarried within 1 year of widowhood could not be an heir under a "stranger´s" will (the law explains this for two reasons: to avoid any doubt regarding whichever husband she actually had a child with, and so that her second husband did not have suspicions about her, for the reason that she wanted to marry him so soon). [41] The law adds that the heir could not be a child born as a result of a "forbidden union" (lat. *natus ex dannato coito*), for example as a result of an incest or a relationship with a nun.[42] Accordingly, the testator was somewhat limited and there was no absolute freedom of will.

Due to the scarcity of sources, it is difficult to talk about the freedom of will in Georgia. B. Zoidze believes that the freedom of the will was usually limited by the circle of heirs at law, however, there was still a certain level of freedom.[43]

One of the most visible limiting mechanisms of the freedom of will is the existence of a forced heir and, therefore, a compulsory share. Castilian legislation envisaged the case of preterition (lat. *praeteritio*) – when the testator omitted an heir at law in the will (an heir of the descending line, in case of its exclusion – the descendants), without determining their disherison. Such a will was void[44] (as it was according to the norms of Roman law).[45] Unfortunately, we do not see any evidence in Georgian sources about the existence of a compulsory share, however, we will share B. Zoidze's opinion that, considering the limited nature of wills in Georgia, this institution would probably have existed here as well. [46]

---

36 P.6.1.21., ibidem, 8.

37 *Zoidze B.*, Ancient Georgian Hereditary Law (legal-comparative research), Tbilisi 2000, 334 (in Georgian); The Book of Law of Beka-Aghbugha, article 57, *Dolidze I.*, Ancient Georgian Law, Tbilisi 1953, 312 (in Georgian).

38 P.6.3.2., *López G.*, Las Siete Partidas del Sabio Rey Don Alonso el Nono, Salamanca 1555, 13.

39 P.6.3.4., ibidem, 13 (rev.), 14 (obv.).

40 *Díaz González F. J.*, El Derecho de sucesiones en los primeros manuales de Derecho español. El caso de la Ilustración del Derecho real de España de don Juan Sala Bañuls (I), "Anuario de la Facultad de Derecho (Universidad de Alcalá)" 2011, № 4, 306.

41 P.6.3.5., *López G.*, Las Siete Partidas del Sabio Rey Don Alonso el Nono, Salamanca 1555, 14 (obv.).

42 P.6.3.4., ibidem, 14 (rev.).

43 *Zoidze B*., Ancient Georgian Hereditary Law (legal-comparative research), Tbilisi 2000, 293-294 (in Georgian).

44 *Díaz González F. J.*, El Derecho de sucesiones en los primeros manuales de Derecho español. El caso de la Ilustración del Derecho real de España de don Juan Sala Bañuls (I), "Anuario de la Facultad de Derecho (Universidad de Alcalá)" 2011, № 4, 319; P. 6.7.10 and 6.8.1., *López G.*, Las Siete Partidas del Sabio Rey Don Alonso el Nono, Salamanca 1555, 48 (rev.), 49 (obv.), 53 (rev.).

45 *Bartošek M.*, Roman law (Concepts, terms, definitions), Moscow 1989, 256.

46 *Zoidze B.*, Ancient Georgian Hereditary Law (legal-comparative research), Tbilisi 2000, 304 (in Georgian).

3. Intestate Inheritance

In the case of the absence or invalidity of the will, as well as the refusal of the heirs to accept the inheritance, since the ancient Rome, the regime of intestate inheritance (*ab intestato*) had been in effect, which established the order of priority in a succession (heir degrees).[47] Georgian legislation of the Middle Ages, in this regard, is characterized by disorder, first of all, during the period of the unified Georgian kingdom, since we cannot find a systematic regulation of this issue and determination of the grades.[48] In Georgia, in Basil Zarzmeli's work "The Life of Serapion Zarzmeli" (which dates back to the 10th century), the rule of intestate inheritance is referred to as a "world rule".[49]

Castilian law clearly defined the grades of heirs: 1) relatives in the descending line (for example, sons, grandsons and their descendants); 2) relatives of the ascending line (for example, father, grandfather and their respective line ancestors); 3) relatives of the lateral line (for example, brothers, uncles and their descendants). [50] In Georgia, by researching the sources, it can be seen that the order also started with the relatives of the descending line (even though the grades are not directly provided in the legislation), which can be confirmed by an episode of Giorgi Merchule's "Life of Grigol Khandzteli" (10th century), in which after the parents´s death the inheritance remains for Zeno and his sister, who "was at home with him". This, in addition, indicates that a daughter was also an heir, although she was "at home", that is, unmarried. [51] And, according to the sources, a married woman had to rely on her dowry only, when her parents died[52] (according to "The Life of Serapion Zarzmeli", the desire of Giorgi Chorchaneli's sister's son-in-law to demand a share in Giorgi's estate from her brothers ended in his murder[53]), although in the case of so called *zedsidze* (son-in-law that moves to the wife´s house), which is reflected in both the Book of Law of Beka and Aghbugha and the Law of Bagrat Curopalate, the son-in-law became the heir of the father-in-law (however, this issue is more clearly defined not by the legislation of the time of the Kingdom of Georgia, but by the later, 18th century legal source – The king Vakhtang VI´s Law Book specifying that if a man had no son as an heir, whoever married his daughter would get the entire estate). [54]

In the case of Castile, The Sixth *Partida* explicitly states that it did not matter whether the heir was male or female (e.g. daughter or son, mother or father), without specifying marital status, which

---

47 *García Garrido M. J.*, Derecho Privado Romano: casos, acciones, instituciones, Madrid 2015, 249.

48 *Zoidze B.*, Ancient Georgian Hereditary Law (legal-comparative research), Tbilisi 2000, 112 (in Georgian) .

49 *Surguladze I.,* Essays on the History of Georgian Law, I, Tbilisi 2000, 20 (in Georgian); Life of Serapion Zarzmeli, III.10., *Vachnadze N.*, The life of Serapion Zarzmeli as a historical source, Tbilisi 1975, 154 (in Georgian).

50 P.6.13.2., *López G.*, Las Siete Partidas del Sabio Rey Don Alonso el Nono, Salamanca 1555, 87 (rev.).

51 *Zoidze B.*, Ancient Georgian Hereditary Law (legal-comparative research), Tbilisi 2000, 111, 112 (in Georgian).

52 Ibidem, 186-187.

53 *Surguladze I.,* Essays on the History of Georgian Law, I, Tbilisi 2000, 21 (in Georgian).

54 *Zoidze B.*, Ancient Georgian Hereditary Law (legal-comparative research), Tbilisi 2000, 96, 191-193 (in Georgian); The Book of Law of Beka-Aghbugha, articles 72 and 73, also The Law of Bagrat Curopalate, articles 157 and 158, *Dolidze I.*, Ancient Georgian Law, Tbilisi 1953, 321, 322, 341. The Law Book of Vakhtang VI, articles 145 and 257, *Dolidze I.*, Monuments of Georgian Law, I, Vakhtang VI Law Books Collection, Tbilisi 1963, 517, 546 (in Georgian).

makes us think that women of any status could inherit. The reception of inheritance by the next grade was only allowed when the previous grade was excluded, and the entire property was distributed equally among the heirs. [55] Therefore, in general, discrimination based on gender or age, as we can see, was not allowed by law. Unlike Castile, in the Kingdom of Georgia, although, as we discussed above, a woman could be an heir, but still sons were preferred, probably as the ones who were believed to continue the lineage. [56] In addition, conceptually, the property was divided equally among the sons, although in fact there was a "senior" share (*sauproso*, *saukhutseso*) for the elder brother, and a "junior" share (*saumtsroso*) – for the younger one. [57]

Adopted children could also be heirs in Castilian law, but it is important to emphasize that just like in Roman law, there were two types of adoption – *adrogatio (arrogatio)* and *adoptio*,[58] with certain modifications. In Castile, *arrogatio* required the king's consent, *adoptio* needed to be approved by a judge.[59] The Sixth *Partida* unequally treats these adopted persons, depending on the type of the adoption, granting hereditary rights to one and not to the other, except some *ab intestato* rights. [60] In particular, besides other details, in case of *arrogatio* we see a full protection of the person's hereditary rights, but even though a person adopted through *adoptio* could inherit from the adopter and share equal rights with the biological children (which is clearly stated by the law), if the adopter belonged to the ascendant line of the adopted person, the rights of the latter were placed on the same level as those of an illegitimate child.[61] In Georgia, adoption was quite common and was recorded in a so-called adoption book/deed, which was frequently approved by the king. The hereditary rights of an adopted child were equal to those of biological children,[62] but we only meet detailed information in the later period of the history of Georgia (first of all, in the Law Book of Vakhtang VI).[63]

---

55 P.6.13.2-5., *López G.*, Las Siete Partidas del Sabio Rey Don Alonso el Nono, Salamanca 1555, 87 (rev.) – 91 (obv.).

56 *Zoidze B.*, Ancient Georgian Hereditary Law (legal-comparative research), Tbilisi 2000, 123-124 (in Georgian).

57 Ibidem, 131; The Book of Law of Beka-Aghbugha, articles 48 and 49, also The Law of Bagrat Curopalate, articles 153-155 and 157, *Dolidze I.*, Ancient Georgian Law, Tbilisi 1953, 341 (in Georgian).

58 In ancient Rome, arrogatio was an adoption of a sui iuris (independent) person, while adoptio was the adoption of a *persona alieni iuris* (a person who was already under the power of the head of other family – paterfamilias). The first type of adoption was conducted before a comitia curiata assembly and required its approval. The second one could only be authorized by Roman magistrates. *Garishvili M., Khoperia M.*, Roman Law, Tbilisi 2013, 252 (in Georgian).

59 P. 4.16.8., *López G.*, Las Siete Partidas del Sabio Rey Don Alonso el Nono, Salamanca 1555, 46 (obv.).

60 *Alemán Monterreal A. M.*, Los derechos sucesorios del hijo adoptado, in: Fundamentos romanísticos del derecho contemporáneo, vol. 2 (Derecho de personas), coord. S. Castán Pérez-Gómez, Madrid 2021, 21-22 (683-684). <https://boe.es/biblioteca_juridica/anuarios_derecho/abrir_pdf.php?id=ANU-R-2021-20067500696> (27.07.2024).

61 P. 4.16.8-10., *López G.*, Las Siete Partidas del Sabio Rey Don Alonso el Nono, Salamanca 1555, 46; *Alemán Monterreal A. M.*, Los derechos sucesorios del hijo adoptado, in: Fundamentos romanísticos del derecho contemporáneo, vol. 2 (Derecho de personas), coord. S. Castán Pérez-Gómez, Madrid 2021, 21 (683). <https://boe.es/biblioteca_juridica/anuarios_derecho/abrir_pdf.php?id=ANU-R-2021-20067500696> (27.07.2024).

62 *Nadareishvili G.*, From the History of Georgian Family Law, Tbilisi 1965, 192 (in Georgian).

63 *Zoidze B.*, Ancient Georgian Hereditary Law (legal-comparative research), Tbilisi 2000, 205-206 (in Georgian).

In Georgia, they were also familiar with the heritage of the lateral line, which is can be seen, for example, in the "Rkoni inscription" of the 13th century. According to the document, if a man had no children, his heir was his brother. There is little information on the inheritance of the ascending line in the Georgian legislation and historical sources, however, ethnographically, its existence is confirmed.[64]

According to The Sixth *Partida*, a widowed person (both female and male – widow or widower) became the heir of the spouse only in extreme cases – when the ascending and descending lines were excluded, and no one was found in the lateral line, within ten generations. In such a case, the widow or a widower would receive the entire property of the deceased. [65] If a widow was married without a dowry and, after widowhood, she had no property remained, even if she had children, she could claim a quarter of the estate left by her rich husband (although this quarter also had an upper limit on the amount). [66] In Georgia, according to the Book of Law of Beka and Aghbugha, if a widow did not have a child from her husband, she was left with only her dowry, and in the case of having a child, she received some movable property, *sasakonlo* (and, apparently, not a land, which is transferred to the children).[67] Accordingly, we consider her situation to be partially better than that of a Castilian widow (except for the case when a Castilian widow was the last heir, since she would get all the estate), and in Georgia, a widower was considered the heir of his wife, although we meet this regulation formulated more perspicuously later – in the Law Book of Vakhtang VI.[68]

As for illegitimate children (*fijos naturales*), under Castilian law, their right to inherit existed, but in a limited form: on the father's side, an illegitimate child could claim a small share of the inheritance if the man had no legitimate children left (regardless of the existence of a legitimate wife at the time of his death), provided that this child was born when neither parent had a lawful spouse. [69] In the case of a woman, with certain exceptions, the child was always her heir, regardless of legitimacy, and it was not required for the woman to have no legitimate children[70] (although we would add that later *Las Leyes de Toro* significantly limited the intestate inheritance for illegitimate children from the mother's side as well[71]).

Apparently, the Georgian legislation was not well-disposed towards an illegitimate child (*nabichvari, bichi, bushi*) either.[72] It should be noted that, like the Castilian law, according to the Law Book of Beka and Aghbugha, we can suppose that there was no distinction between legitimate and

---

64 Ibidem, 112.

65 P.6.13.6., *López G.*, Las Siete Partidas del Sabio Rey Don Alonso el Nono, Salamanca 1555, 91 (rev.).

66 P.6.13.7., ibidem, 92.

67 *Zoidze B.,* Ancient Georgian Hereditary Law (legal-comparative research), Tbilisi 2000, 246, 255 (in Georgian); The Book of Law of Beka-Aghbugha, article 81, *Dolidze I.*, Ancient Georgian Law, Tbilisi 1953, 325 (in Georgian).

68 *Zoidze B.,* Ancient Georgian Hereditary Law (legal-comparative research), Tbilisi 2000, 251; The Law Book of Vakhtang VI, article 224, *Dolidze I.*, Monuments of Georgian Law, I, Vakhtang VI Law Books Collection, Tbilisi 1963, 539 (in Georgian).

69 P.6.13.8-9., *López G.*, Las Siete Partidas del Sabio Rey Don Alonso el Nono, Salamanca 1555, 92 (rev.) – 93 (rev.).

70 P.6.13.11., ibidem, 94.

71 LT. 9., LEYES DE TORO, Madrid 1977, 50.

72 *Zoidze B.*, Ancient Georgian Hereditary Law (legal-comparative research), Tbilisi 2000, 214 (in Georgian).

illegitimate children from the mother's side ("the bastard is his mother´s"). [73] From the father's side, it seems that an illegitimate child could not enjoy equal rights with his father's legitimate children (the Law Book of Vakhtang VI gives a very specific indication that "there is no bastard's share in the land").[74]

Finally, when the grades of intestate heirs were completely exhausted, both in Castilian[75] and Georgian law, [76] the property usually remained with the king, the treasury (state).

4. Conclusion

As a result of the comparative analysis of the basic characteristics of the inheritance forms in Georgia and Castile from the 10th to the 15th century, we can conclude that, in spite of some differences, the norms of these two countries share many common signs based on legal principles. We can emphasize some basic issues:

1. Both legislations emphasized the importance of a clear expression of the testator's will and the role of witnesses. Also, Castile and Georgia had quite similar provisions regarding the testator's age;
2. In the absence/invalidity of a will, the descendant line was prioritized in succession in both countries;
3. In both countries, women could be heirs just like men, but Castilian law directly established gender equality, while in Georgia a woman's inheritance rights strictly depended on her marital status and, in general, sons were clearly prioritized as heirs. Georgian law did not establish equal shares for brothers;
4. Generally, in Castile and Georgia an adopted child had inheritance rights along with biological children, with some exceptions specified in Castilian law. Illegitimate children´s inheritance rights were limited in a specific way in both cases;
5. As for a widow or a widower, they could be heirs, but with certain limitations (under the Castilian legislation, they could usually be heirs in extreme cases);
6. In both legal systems, when all potential heirs were excluded, the property was often transferred to the crown (state).

Furthermore, we can say that both Georgian and Castilian legislations were influenced by Roman law to a certain extent (primarily the Castilian law, while in the case of Georgia a slight influence can be observed). Furthermore, it is clear that Castilian inheritance law is much more extensive and comprehensive than Georgian law, making it difficult to study details of some aspects of the latter.

---

[73] Ibidem, 221; The Book of Law of Beka-Aghbugha, article 31, *Dolidze I.*, Ancient Georgian Law, Tbilisi 1953, 298 (in Georgian).

[74] *Zoidze B.*, Ancient Georgian Hereditary Law (legal-comparative research), Tbilisi 2000, 221 (in Georgian); The Law Book of Vakhtang VI, article 100, *Dolidze I.*, Monuments of Georgian Law, I, Vakhtang VI Law Books Collection, Tbilisi 1963, 511 (in Georgian).

[75] P.6.13.6., *López G.*, Las Siete Partidas del Sabio Rey Don Alonso el Nono, Salamanca 1555, 91 (rev.).

[76] *Zoidze B.,* Ancient Georgian Hereditary Law (legal-comparative research), Tbilisi 2000, 274 (in Georgian).

Bibliography:

1. *Alemán Monterreal A. M.*, Los derechos sucesorios del hijo adoptado, in: Fundamentos romanísticos del derecho contemporáneo, vol. 2 (Derecho de personas), coord. S. Castán Pérez-Gómez, Madrid 2021. <https://boe.es/biblioteca_juridica/anuarios_derecho/abrir_pdf.php?id=ANU-R-2021-20067500696> [27.07.2025].
2. *Pestalardo A.*, *Berasategui I.*, La legítima hereditaria en el Proyecto de Código Civil y Comercial, "Revista Derecho Privado" 2013, Año II, № 6.
3. *Zoidze B.*, Ancient Georgian Hereditary Law (legal-comparative research), Tbilisi, 2000 (in Georgian).
4. *Asso y del Río I. J., de Manuel y Rodríguez M.*, El Ordenamiento de Leyes que D. Alfonso XI hizo en las Cortes de Alcalá de Henares el año de mil trescientos y quarenta y ocho, Madrid 1847.
5. *Díaz González F. J.*, El Derecho de sucesiones en los primeros manuales de Derecho español. El caso de la Ilustración del Derecho real de España de don Juan Sala Bañuls (I), "Anuario de la Facultad de Derecho (Universidad de Alcalá)" 2011, N° 4.
6. *Nadareishvili G.*, From the History of Georgian Family Law, Tbilisi 1965 (in Georgian).
7. *Dolidze I.*, Ancient Georgian Law, Tbilisi 1953 (in Georgian).
8. *Surguladze I.*, Essays on the History of Georgian Law, I, Tbilisi 2000 (in Georgian).
9. *Javakhishvili Iv.*, History of Georgian Law, vol. 2, part II, Tbilisi 1929 (in Georgian).
10. *Martín Cea J. C.*, El modelo testamentario bajomedieval castellano y su reflejo en los diferentes grupos sociales, "Edad Media: revista de historia" 2003-2004, № 6.
11. *López G.*, Las Siete Partidas del Sabio Rey Don Alonso el Nono, Salamanca 1555.
12. *Leyes de Toro*, Madrid 1977.
13. *Bartošek M.*, Roman law (Concepts, terms, definitions), Moscow, 1989.
14. *Garishvili M.*, *Khoperia M.*, Roman Law, Tbilisi, 2013 (in Georgian).
15. *García Garrido M. J.*, Derecho Privado Romano: casos, acciones, instituciones, Madrid 2015.
16. *Dolidze I.*, Monuments of Georgian Law, I, Vakhtang VI Law Books Collection, Tbilisi 1963 (in Georgian).
17. *Dolidze I.*, Monuments of Georgian Law, II, Secular Legislative Monuments (10th–19th Centuries), Tbilisi 1965 (in Georgian).
18. *Surguladze N.*, Monuments of Roman Law. Institutions of Justinian, translated from Latin, Tbilisi 2002 (in Georgian).
19. *Vachnadze N.*, The life of Serapion Zarzmeli as a historical source, Tbilisi, 1975 (in Georgian).
20. *Morán Martín R.*, Historia del derecho privado, penal y procesal, Tomo I: parte teórica, Madrid, 2002.

P-ISSN 2233-3746 / E-ISSN 2720-782X
https://doi.org/10.60131/jlaw.1.2025.9533

Sophiko Gogelia*

National Freedom as a Cornerstone of Georgian Anarchismin Varlam Cherkezishvili's Philosophical Concept

This paper explores the philosophical and ideological legacy of Georgian anarchist Varlam Cherkezishvili, emphasizing the synthesis of his anarchist convictions with his deep-rooted patriotism. It challenges prevailing interpretations that view nationalism as a tool for anarchist propagation, arguing instead that Cherkezishvili encountered significant resistance to ideas of autonomy and national revival among his compatriots. Drawing from the insights of contemporary scholars such as Tamar Gvianishvili and contrasting them with those of Paata Gergaia, the paper revisits Cherkezishvili's emotional and intellectual struggle to reconcile anarcho-communist ideals with his fervent support for Georgian statehood. A close associate of Peter Kropotkin and a major figure in international anarchism, Cherkezishvili sharply criticized Marxist socialism, advocating for decentralized, cooperative societies based on social justice, equality, and direct democracy. His unwavering support for Georgian independence, especially through the legal lens of the Treaty of Georgievsky, marks him as a unique thinker who harmonized internationalist anarchism with national liberation. The article ultimately positions Cherkezishvili as a rare figure capable of balancing the tension between personal liberty and national identity, offering a nuanced philosophical approach to the relationship between anarchism and patriotism.

Key Words: *Varlam Cherkezishvili, Georgian anarchism, anarcho-communism, patriotism, national freedom, autonomy, Kropotkin, anti-Marxism, Georgian independence, political philosophy.*

1. Introduction

(Biographical notices about Varlam Cherkezishvili, historiography of the issue)

This article aims modestly to highlight the name of the Georgian anarchist Varlam Cherkezishvili once again and briefly touch upon his works within a limited time and format. We acknowledge Mr. Gocha Peradze for his significant efforts, which sparked and continue to foster interest in the Georgian thinker, and Mr. Dimitri Shvelidze for his extraordinary monograph "This is Who Varlam Cherkezishvili Was, Georgians!"[1] Additionally, we extend our gratitude to all

* Master of philosophy, PhD candidate in law, Ivane Javakhishvili Tbilisi State University.
1 *Shvelidze D.,* This is Who Varlam Cherkezishvili Was, Georgians!, "Inteleqti", Tbilisi, 2001, 446 (in Georgian). ORCID: (0009-0007-8901-3703).

participants of the first interdisciplinary scientific conference[2] dedicated to Varlam Cherkezishvili for collecting, searching, and analyzing interesting and fruitful material. However, we must note our partial disagreement with Mr. Paata Gergaia[3], a participant of said conference, regarding his assertion: "When Varlam Cherkezishvili, an excellent connoisseur of European culture and political thought, came to Georgia to preach anarchism, we must assume that he wanted to understand how anarchism resonated with Georgian nature and psychology, and therefore, its potential popularity among the masses. It seems he considered this feasible and started this activity with great enthusiasm alongside his associates. However, as a Georgian anarchist, he possessed one significant advantage, which he timely put into action. I mean nationality, national issue. The Georgian anarchist, driven by his strong convictions, aligned himself with the "national party," or at least with a faction advocating for the country's independence. In Georgia, gaining influence and popularity among the populace with this idea was never a challenge. The concept of freedom intertwined with the national cause was already ingrained among the people"[4]. Contrasting Mr. Gergaia's viewpoint, we find alignment with the arguments put forth by another participant in the conference, Ms. Tamar Gvianishvili: "Cherkezishvili's deepest concern lies in the lack of popularity of the autonomy concept among Georgians. Furthermore, it is often subject to ridicule. Cherkezishvili attributes this to a breach in national consciousness and a loss of national pride. He criticizes Georgian figures who doubt the nation's ability to sustain autonomous governance."[5] Reflecting on Ms. Gvianishvili's insights, we observe Cherkezishvili's emotional turmoil and disappointment with his compatriots, particularly in their support for restoring statehood. Regarding the concept of nationality, which a patriotic anarchist might leverage to promote anarchist ideals, it was unfortunately unpopular in Cherkezishvili's contemporary Georgia and thus couldn't serve as a catalyst for broader ideological dissemination.

2. Varlam Cherkezishvili: As an Anarchist and as a patriot

(Varlam Cherkezishvili: The Anarchist)

Varlam Cherkezishvili is an internationally recognized Georgian anarchist, born on September 16, 1846, in the village of Tokhliauri in Sagarejo district. "Sent from his native Tokhliauri to Russia for studies at the young age of ten, he returned from Europe at sixty"[6]. During this time, he was a convicted and wanted progressive public figure, intellectual, anarchist, and patriot. However, within the scope of this report, we will focus solely on his roles as a Georgian anarchist and patriot, examining the philosophical aspects of his actions, thoughts, and contributions.

---

2 The First Interdisciplinary Scientific Conference Dedicated to Warlam Tcherkezishvili, Agenda and Reports; Ivane Javakhishvili Tbilisi State University, 2021 (In Georgian).

3 Ibid. *Gergaia P.,* Warlam Tcherkezishvili-Peculiarities of Georgian Anarchism, Tbilisi, 2021, 35-36 (in Georgian).

4 Ibid.

5 Ibid. *Gvianishvili T.,* The Conceptual Anaiysis of a National Question in the Thought of Warlam Tcherkezishvili, Tbilisi, 2021, 47-48 (in Georgian).

6 Ibid. *Turashvili D.,* "Georgia's Chief Lawyer", Tbilisi, 2021, 94 (in Georgian).

Cherkezishvili, a contemporary and associate of Petre Kropotkin, belonged to the elite of anarchism. According to Akaki Chkhenkeli's memoirs, they (Kropotkin and Cherkezishvili) were referred to by the British as "two noble anarchists". [7] Cherkezishvili, better known as Cherkezov, was frequently involved in organizing international congresses and conferences of the Anarchist International in the early 20th century. He founded magazines and publications, and his works were widely published in French, English, Italian, Spanish, Russian, Chinese, and even Japanese languages. Notable among his works are "Pages from the History of Socialism" and "Predecessors of the International".[8]

Cherkezishvili, like Kropotkin, belongs to the branch of anarchists known as anarcho-communists. To clarify, we will briefly touch on this distinction within anarchism without delving too deeply and losing sight of the main point. Anarcho-communists, like other anarchists, advocate for the abolition of the state. However, they also promote the concept of forming small, self-governing societies akin to medieval cities and peasant communities, where each community member can fully satisfy their own needs. Anarcho-communists hold an optimistic belief in humans' innate ability to cooperate and assist one another. They argue that accountability and solidarity replace greed and selfishness among members of the commune, and the absence of private property minimizes conflicts. Decision-making in anarcho-communist societies is done through direct democracy, ensuring political equality and popular self-government. To anarcho-communists, the commune structure represents a small public unit enabling individuals to direct their activities through direct interaction with one another.[9]

For Cherkezishvili himself, he advocates for the abolition of all forms of exploitation, the socialization of land, buildings, and factories, and the provision of equal and free living conditions for the vulnerable, elderly, and sick.[10] A Georgian anarchist dreaming of such "pure socialism"[11] managed to escape exile in 1876 and arrived in London. At this time, the Russian Gendarmerie describes Cherkezishvili as follows: "about 30 years old, of medium build, with chestnut-colored eyes, thinning black hair, a small beard, and mustache,"[12] Cherkezishvili joined the Anarchist International the following year. He collaborated with the Geneva-published magazine "Obshchina" and first anarchist newspaper – "Le Revolte."[13] In 1882, following a terrorist incident in Lyon, persecution of anarchists

---

7 The First Interdisciplinary Scientific Conference Dedicated to Warlam Tcherkezishvili, Agenda and Reports; Ivane Javakhishvili Tbilisi State University, 2021*; BubulaSvili E.,* "Warlam Tcherkezishvili and Georgian Reality", Tbilisi, 2021, 17 (in Georgian).

8 *Cherkezishvili V.,* "Txzulebani", National Academy of Sciences of Georgia, Vol. I, Tbilisi, 2011, 2 (in Georgian).

9 *Heywood A.,* "Political Ideologies", An Introduction, Third edition, Logos Press Publishing House, Tbilisi, Georgian translation 2004, Reprint 2005, p 233-234. – in Georgian.

10 The First Interdisciplinary Scientific Conference Dedicated to Warlam Tcherkezishvili, Agenda and Reports; Ivane Javakhishvili Tbilisi State University, 2021; *Davlasheridze N.,* "Some aspects of the anarchist movement in Georgia in the Early 20th century", Tbilisi, 2021, 61-62 (in Georgian).

11 Ibid.

12 *Cherkezishvili V.,* "Txzulebani", National Academy of Sciences of Georgia, Vol. I, Tbilisi, 2011, 4 (in Georgian).

13 Ibid.

intensified. Despite frequent mention of his name during the Lyon trial, Cherkezishvili managed to avoid capture.[14]

From Cherkezishvili's intellectual legacy, we should briefly mention the work already cited, "Pages from the History of Socialism".[15] This work stands out as a prominent critique of the Marxist direction of socialism. In it, the Georgian anarchist criticizes the teachings of Marx and Engels, considering their creation a deformation of the ideas of the "true fathers of modern socialism" (followers of Saint-Simon, Fourier, and Proudhon are implied). Cherkezishvili worries that Marx and Engels have effectively equated the social, anti-state doctrine with statism, branding opponents of the state and revolutionaries as enemies of socialism. Additionally, he exposes Marxists for advocating the impoverishment of peasants for the supposed greater good of humanity, the loss of their lands, and the selling of labor by workers for the benefit of capitalists. Instead of promoting liberty, fraternity, and autonomy, Cherkezishvili argues that Marxists introduced a doctrine of individual discipline and submission to an all-powerful state.[16]

It is fair to acknowledge that Cherkezishvili's assessment was ahead of its time, foreseeing the dangers that would later emerge in the name of socialism – specifically, fascism and communism.

(Cherkezishvili as a Patriot)

Within the confines of this format, we will shift our focus from Cherkezishvili's anarchist activities to his distinctly opposite role as a patriot towards his homeland. Patriotism in in Cherkezishvili"s contemporary world manifests as a renewed, impassioned wave, marked by an intensified, possessive sentiment towards one's homeland. This stance competes uncompromisingly with other forms of anarchism, which often view national symbols as "cumbersome and impractical"[17] for their goals.

Cherkezishvili, operating on the international stage as a Georgian anarchist, exemplifies this patriotism and strongly support for his motherland. At that time, Georgia had lost its independence to Russian imperialism, resulting in the persecution of Georgian language, traditions, and culture. Such circumstances deeply troubled the patriotic anarchist. He consistently wrote letters about Georgia in foreign and local publications, ardently advocating for its independence both in print and through personal interactions. Whenever possible, he sought to raise awareness among the Georgian people. In Georgia itself, Cherkezishvili delivered lectures on autonomy and self-government, emphasizing their benefits. He argued that these forms of social organization empowered people to manage their own affairs and shape their destiny within their own territory. His efforts extended to the "Iveria"

---

14 Ibid, 5.

15 *Tcherkesoff W.,* Pages of Socialist History, New York, 1902, 125.

16 Forerunners of the International, Doctrines of Marxism, No. 11. ed. 3, stereotype, *Cherkezov V.N*. URSS. 2020, 206 <https://urss.ru/cgi-bin/db.pl?lang=Ru&blang=ru&page=Book&id=258994> [16.05.2025].

17 The First Interdisciplinary Scientific Conference Dedicated to Warlam Tcherkezishvili, Agenda and Reports; Ivane Javakhishvili Tbilisi State University, 2021; *Gergaia P.,*Warlam Tcherkezishvili-Peculiarities of Georgian Anarchism, Tbilisi, 2021, 34 (in Georgian).

newspaper, where he published letters urging his compatriots to embrace the fight for Georgia's autonomy and the significance of federalism.[18]

The Georgian anarchist believed that the restoration of Georgia's statehood could be achieved based on the Treaty of Georgievsky concluded in 1783 between Russia and Georgia. In his view, this treaty represented a pathway to restore the historical rights of the Georgian nation, remaining valid since it had not been annulled by Russia. Moreover, its signing by "Catherine the Great" added significant importance to it. Relying on this treaty, the patriotic anarchist considered it the strongest legal basis for Georgia's claims. This belief became so entrenched that Cherkezishvili was often referred to ironically as a "fanatic of the treaty".[19]

In 1904, during a conference of Georgian revolutionaries in Geneva, Cherkezishvili addressed the delegates with a statement: "When I was invited to this conference, I had to decide whether I would participate as a member of my party or as a representative of a certain nation... as an anarchist or as a Georgian? I realized that my place was solely here, among my compatriots, as a Georgian"[20]

3. Conclusion

Many similar examples could be provided, but we will focus on the fact that for a renowned anarchist, the national cause often grows to such vast and comprehensive dimensions that it encompasses personal, boundless freedom, – whether one seeks to be its precursor or sees it as a stepping stone toward individual liberation. This is where the uniqueness of Varlam Cherkezishvili's philosophy shines through: his ability to reconcile diverse and competing interests, directing them for the benefit of both his compatriots and humanity as a whole.

Bibliography:

1. *Gergaia P.*, Warlam Tcherkezishvili-Peculiarities of Georgian Anarchism, Tbilisi, 2021, 35-36 – The First Interdisciplinary Scientific Conference Dedicated to Warlam Tcherkezishvili, Agenda and Reports; Ivane Javakhishvili Tbilisi State University, 2021 (in Georgian).
2. *Gvianishvili T.*, The Conceptual Anaiysis of a National Question in the Thought of Warlam Tcherkezishvili, Tbilisi, 2021, 47-48 – The First Interdisciplinary Scientific Conference Dedicated to Warlam Tcherkezishvili, Agenda and Reports; Ivane Javakhishvili Tbilisi State University, 2021 (in Georgian).
3. *Turashvili D.*, "Georgia's Chief Lawyer", Tbilisi, 2021, p.94 – The First Interdisciplinary Scientific Conference Dedicated to Warlam Tcherkezishvili, Agenda and Reports; Ivane Javakhishvili Tbilisi State University, 2021 (in Georgian).

[18] Ibid, 35-36.

[19] The First Interdisciplinary Scientific Conference Dedicated to Warlam Tcherkezishvili, Agenda and Reports; Ivane Javakhishvili Tbilisi State University, 2021; *Bubulashvili E.,* "Warlam Tcherkezishvili and Georgian Reality", Tbilisi, 2021, 16-19 (in Georgian).

[20] *Cherkezishvili V.,* Georgia's Petition to the International Conference in The Hague, "Promete", 1907, 15 (in Georgian).

4. *BubulaSvili E.*, "Warlam Tcherkezishvili and Georgian Reality", Tbilisi, 2021, 17 – The First Interdisciplinary Scientific Conference Dedicated to Warlam Tcherkezishvili, Agenda and Reports; Ivane Javakhishvili Tbilisi State University, 2021 (in Georgian).
5. *Davlasheridze N.*, "Some aspects of the anarchist movement in Georgia in the Early 20th century", Tbilisi, 2021, 61-62 – The First Interdisciplinary Scientific Conference Dedicated to Warlam Tcherkezishvili, Agenda and Reports; Ivane Javakhishvili Tbilisi State University, 2021 (in Georgian).
6. *Cherkezishvili V.*, , "Txzulebani", National Academy of Sciences of Georgia, Vol. I, Tbilisi, 2011(in Georgian).
7. *Shvelidze D.*, "This is Who Varlam Cherkezishvili Was, Georgians!", Tbilisi, Inteleqti, 2001 (in Georgian).
8. *Heywood A.*, "Political Ideologies", An Introduction, Third edition, Logos Press Publishing House, Tbilisi, Georgian translation 2004, Reprint 2005 (in Georgian).
9. *Tcherkesoff W.*, "Pages of Socialist History", New York, 1902.
10. *Cherkezov V.N.*, Forerunners of the International, Doctrines of Marxism, No. 11. Ed. 3, stereotype, URSS. 2020, <https://urss.ru/cgi-bin/db.pl?lang=Ru&blang=ru&page=Book&id=258994> [30.05.2024].
11. *Cherkezishvili V.,* Georgia's Petition to the International Conference in The Hague, "Promete", 1907 (in Georgian).

Cover Designer:

Mariam Ebralidze

Compositor:

Nino Vacheishvili

Technical Editorial Group:

Natia Chitashvili

Ana Mghvdeladze

Printed in Ivane Javakhishvili Tbilisi State University Press

---

1, Ilia Tchavtchavadze Ave., Tbilisi 0128

Tel 995(32) 225 04 84, 6284/6279

https://www.tsu.ge/ka/publishing-house