Studia Iuridica 108
ISSN 0137-4346; e-ISSN 2544-3135
Copyright © by Adam Zienkiewicz, 2025
Creative Commons: Uznanie Autorstwa (CC BY) 4.0
https://creativecommons.org/licenses/by/4.0/
https://doi.org/10.31338/2544-3135.si.2025-108.1

Adam Zienkiewicz
University of Warmia and Mazury in Olsztyn, Poland
e-mail: adam.zienkiewicz@uwm.edu.pl
ORCID: 0000-0002-2824-7123

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

Abstract

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

KEYWORDS

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

SŁOWA KLUCZOWE

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

I. INTRODUCTION

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

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

---

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

1) Establishing the facts of the case;

2) Determining the state of law pertinent to the case (including interpretation);

3) Retrospective subsumption: bringing the accomplished (usually past or persisting) facts that have been ascertained under an appropriate legal norm (the so-called legal qualification of the factual situation);[17]

4) Final decision, i.e., determining and selecting legal consequences – determining the content of a fair adjudication (stage I in the general model of administration of justice);

5) Issuing and justifying the decision – administering justice in the strict sense through a conventional act (stage II in the general model of administration of justice).[18]

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

[16] For more on the comparison of the decision-making process in litigation and mediation, see e.g.: Zienkiewicz (n 3) 243–245; Kalisz, Zienkiewicz (n 3) 263–274; Kalisz (n 3) 124–163.
[17] On the subject of subsumption in legal practice, including in the context of a broad view of clients' problems beyond legal issues, see: Ewa Gmurzyńska, *Rola prawników w alternatywnych metodach rozwiązywania sporów*, Warsaw 2014, 60–64, 325–326.
[18] More on the model of decision-making in judicial application of the law, see e.g.: Leszczyński (n 4) 62–106.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

---

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

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

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

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

---

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

[26] Araszkiewicz, Płeszka (n 2) 125–126.

[27] Cf ibid.

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

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

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

[28] Cf ibid.

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

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

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

---

[29] Ibid, 127.

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

[31] Ibid.

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

V. CONCLUSION

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

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

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

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

REFERENCES

Araszkiewicz M, Płeszka K, 'Pojęcie alternatywnego rozwiązywania sporów', in Płeszka K and others (eds), *Mediacja. Teoria. Normy. Praktyka*, Warsaw 2017

Chauvin T, Stawecki T, Winczorek P, *Wstęp do prawoznawstwa*, Warsaw 2013

Daicoff S, *Comprehensive law practice: Law as a healing profession*, Durham 2011

Fisher R, Ury WL, *Getting to Yes: Negotiating Agreement Without Giving In*, London 1981

Garlicki L, *Polskie prawo konstytucyjne. Zarys wykładu*, Warsaw 2014

Gmurzyńska E, Morek R (eds), *Mediacje. Teoria i praktyka*, Warsaw 2014

--, *Rola prawników w alternatywnych metodach rozwiązywania sporów*, Warsaw 2014

Kalisz A, Zienkiewicz A, 'Wymiar sprawiedliwości a mediacja', in Wojciechowski B, Golecki M (eds), *Rozdroża sprawiedliwości we współczesnej myśli filozoficznoprawnej*, Toruń 2008

--, *Mediacja sądowa i pozasądowa. Zarys wykładu. Wydanie II uzupełnione i poprawione*, Warsaw 2014

Kalisz A, *Mediacja jako forma dialogu w stosowaniu prawa*, Warsaw 2016

Korybski A, *Alternatywne rozstrzyganie sporów w USA – studium teoretycznoprawne,* Lublin 1993

Kovach K, *Mediation, Principles and Practice*, Third Edition, Saint Paul, 2004

Kucner A, 'Teorie prawdy', in Opara S, Kucner A, Zielewska B (eds), *Podstawy filozofii*, Olsztyn 2003

Leszczyński L, *Zagadnienia teorii stosowania prawa. Doktryna i tezy orzecznictwa*, Kraków 2001

Morawski L*, Argumentacje, racjonalność prawa i postępowanie dowodowe,* Toruń 1988

Myślińska M, *Mediator w polskim porządku prawnym*, Warsaw 2018

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

Oniszczuk J, *Konstytucja Rzeczypospolitej Polskiej w orzecznictwie Trybunału Konstytucyjnego*, Kraków 2000

Rau A, Sherman E, Peppet S*, Processes of Dispute Resolution. The Role of Lawyers*, New York 2002

Rawls J, *Teoria sprawiedliwości*, Warsaw 1994

Stelmach J, Sarkowicz R, *Współczesna filozofia interpretacji prawniczej*, Kraków 1999

Waldman E, 'Identifying Role of Social Norms in Mediation: A Multiple Model Approach' (1997) Hastings Law Journal, Vol 48, issue 4, 703–769

Wróblewski J, *Sądowe stosowanie prawa*, Warsaw 1988

Zajadło J, Zeidler K (eds), *Wstęp do prawoznawstwa*, Gdańsk 2023

Ziembiński Z, *O pojmowaniu sprawiedliwości*, Lublin 1992

--, *Sprawiedliwość społeczna jako pojęcie prawne*, Warsaw 1996

Zienkiewicz A, *Studium mediacji. Od teorii ku praktyce*, Warsaw 2007

--, 'Koncepcja sądu otwartego – wzmocnienie pluralizmu form wymiaru sprawiedliwości', in Rękas A, *Mediacja – nowa droga rozwiązywania sporów*, Warsaw 2011

--, 'Standardy prowadzenia mediacji i postępowania mediatora – uchwalone przez Społeczną Radę ADR przy Ministrze Sprawiedliwości' (2012) Studia Prawnoustrojowe, No 18, 185–200

--, *Holizm prawniczy z perspektywy Comprehensive Law Movement. Studium teoretycznoprawne*, Warsaw 2018

--, 'Prawnik jako peacemaker – przeprosiny, przebaczenie, pojednanie w opanowywaniu sporów prawnych*,* (2019) Ruch Prawniczy, Ekonomiczny i Socjologiczny, No 4, 43–57

--, 'Objectives of Mediation and Selection and Implementation of Mediation Strategies and Techniques by Mediators in Civil Disputes – Study Report (Part I), (2021) Studia Iuridica Lublinensia, Vol 30, No 5, 601–618

--, 'Objectives of Mediation and Selection and Implementation of Mediation Strategies and Techniques by Mediators in Civil Disputes Study Report (Part II Survey Questionnaires)' (2022) Studia Iuridica Lublinensia, Vol 31, No 1, 213-236

--, 'Objectives of Mediation and Selection and Implementation of Mediation Strategies and Techniques by Mediators in Civil Disputes – Study Report (Part III – Interviews)' (2023) Studia Iuridica Lublinensia, Vol 32, No 2, 303–332