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

### **Abstract**

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

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

### KEYWORDS

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

### SŁOWA KLUCZOWE

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

## 1. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### 3. MEDIATION AS A MANIFESTATION OF DEMOCRATIC PRINCIPLES

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

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

<sup>8</sup> Janusz Węgrzecki, 'Przyszłość demokracji deliberatywnej' (2009) 22 *Athenaeum*. *Polskie Studia Politologiczne*, 27.

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

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

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

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

<sup>11</sup> *Ibid.*

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

<sup>13</sup> *Ibid.*

<sup>14</sup> Zienkiewicz (n 13) 116–117.

<sup>15</sup> Zienkiewicz (n 16) 55.

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

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

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

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

<sup>17</sup> Zienkiewicz (n 13) 120.

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

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

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

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

#### 4. PHILOSOPHICAL INTERPRETATIONS OF MEDIATION AND DEMOCRACY

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

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

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

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

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

<sup>23</sup> Jerzy Stelmach, *Kodeks argumentacyjny dla prawników* (Zakamycze 2004) 15.

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

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

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

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

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<sup>25</sup> Stelmach (n 23).

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

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

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

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

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

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

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

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

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

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

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

<sup>35</sup> Rawls (n 29) 12.

<sup>36</sup> *Ibid* 75.

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

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

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

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

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

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

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<sup>39</sup> Ilya Dworkin, ‘Philosophy of Dialogue: A Historical and Systematic Introduction’, *Judaica Petropolitana Scholarly Journal* 13 (2020) 6–24.

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

<sup>41</sup> *Ibid* 76.

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

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

## 6. INTEGRATING DISCURSIVE AND DIALOGICAL INTERPRETATIONS

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

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

<sup>43</sup> Józef Tischner, *Filozofia dramatu* (Znak 1990) 10.

<sup>44</sup> Ibid 27.

<sup>45</sup> Zienkiewicz (n 13) 116–117.

<sup>46</sup> Ibid 117.

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

## 6.1 MEDIATION AND THE PHILOSOPHY OF DIALOGUE

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

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

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

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

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<sup>47</sup> Tischner (n 34) 272.

<sup>48</sup> Ibid 63.

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

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

## 6.2 MEDIATION AND PHILOSOPHY OF DISCOURSE

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

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

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

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

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

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

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

## 7. DEMOCRATIC PRINCIPLES IMPLEMENTED IN MEDIATION

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

### 7.1 PARTICIPATION

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

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

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<sup>52</sup> Gmurzyńska (n 45) 1684.

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

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

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

## 7.2 EQUALITY

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

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

<sup>55</sup> Summers (n 29) 25.

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

### 7.3 COMMON GOOD

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

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

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

<sup>58</sup> *Stanford Encyclopedia of Philosophy*, <[https://plato.stanford.edu/archives/sum2025/entries/common-good/?utm\\_source=chatgpt.com](https://plato.stanford.edu/archives/sum2025/entries/common-good/?utm_source=chatgpt.com)> accessed 30 November 2025.

<sup>59</sup> *Ibid.*

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

#### 7.4 AUTONOMY OF THE PARTIES

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

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

<sup>61</sup> *Ibid* 86.

<sup>62</sup> *Ibid* 87.

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

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

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

## 7.5 HUMANISTIC NATURE OF MEDIATION

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

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

<sup>65</sup> Welsh (n 65) 733.

<sup>66</sup> Ibid 759.

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

<sup>68</sup> Morek (n 13) 23.

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

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

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

## 7. CONCLUSION

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

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<sup>70</sup> Ibid 36.

<sup>71</sup> Ibid 31.

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

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

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