Studia Iuridica 111
ISSN 0137-4346; e-ISSN 2544-3135
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https://doi.org/10.31338/2544-3135.si.2026-111.5

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

Abstract

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

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

KEYWORDS

judicial mediation, JDR, judicial dispute resolution, judicial settlement

SŁOWA KLUCZOWE

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

I. INTRODUCTION

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

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

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

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

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

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

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

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[2] Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24 May 2008, 3–8.

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

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

JUDICIAL DISPUTE RESOLUTION (JDR)

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

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

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

[6] Ibid 2.

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

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

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

JUDICIAL SETTLEMENT

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

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

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

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

[11] Ibid.

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

PRETRIAL CONFERENCES

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

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

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

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

JUDICIAL CONCILIATION

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

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

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

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

[14] Alexander (n 8).

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

[16] Ibid.

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

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

FACILITATIVE JUDGING

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

BJDR (BINDING JUDICIAL DISPUTE RESOLUTION)

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

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

[18] Alexander (n 8).

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

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

LAY JUDICIAL BODIES

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

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

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

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

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

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

JUDICIAL MEDIATION

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

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

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

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

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

[27] Susskind, Tilleman (n 5) 9–18.

ORIGINS AND DEVELOPMENT OF JUDICIAL MEDIATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUDICIAL MEDIATION – DEFINITION AND KEY FEATURES

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

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

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

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

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

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

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

CHALLENGES AND BENEFITS OF JUDICIAL MEDIATION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[48] Ibid 11.

[49] Ibid.

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

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

[52] Ibid.

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

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

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

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

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

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

[56] Ibid 46.

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

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

[59] Ibid 14.

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

CONCLUDING REMARKS

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

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