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Mediation and the Judicial Type of the Application of Law. Context of the 'Opening up' of Decision-Making Processes

Mediacja a sądowy typ stosowania prawa. Kontekst „otwierania" procesów decyzyjnych

SUMMARY

Paper's aim deals with the analysis of the features of mediation (treated as a way of solving the legal problems) in the light of properties of the judicial implementation of the law in the context of both the decisional process and the legal reasoning within the operational interpretation of the law. The mediation, being an instrument of the opening of the legal order should be treated as a separate subtype of application of law, differentiated from judicial and administrative types. The indication of the actors operating in it, type of their competence, initiation and the course of the process as well as a way of the building of the decision through the using of axiological and functional rules of legal interpretation and the way in which the decision is justified allow to create an image of the basic elements of mediation in their decisional perspective.

Keywords: mediation; judicial application of law; axiology and legal interpretation; opening of the legal order

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INTRODUCTION

This study[1] compares the properties of mediation as a method of resolving disputes with the features of the judicial type of application of law in the context of decision-making process and interpretative reasoning as part of so-called operative interpretation.

In order to assume that both decision-making process types are law application processes, an appropriate comparative perspective must be taken, valid in the light of unquestionable 'procedural' distinctive features regarding the very course of action in the process. This assumption seems to be valid when we assume that both decision-making processes exert legal effects, i.e. result in the formulation and issuance of a legal decision and are aimed at solving the legal problem of relevance to its addressees by reaching this decision.

These two properties allow us to find several similarities and differences in the context of properties of both these types of decision-making process. They can be attributed to types and characteristics of bodies 'responsible' for issuing the decision, the manner of initiating and procedure of action in these processes, or to the forms and content of the decisions themselves and the methods of their revision. They also allow for comparing actions and reasoning carried out by the decision maker (whether independently or with the participation of parties to the proceedings) during fact-finding and establishing the applicable law as necessary components of making a decision which have the features (individual and specific nature) of an individual decision similar to a judicial decision.

This paper, when comparing mediation with the judicial type of application of law, goes in line with the Polish tradition of legal theory that has developed since the early 1990s and to some extent based on the analysis of the US practice[2], while discussed in more detail further on provides more direct analysis of various forms and contemplation of the usefulness of mediation in the Polish legal order[3].

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[1] This study was developed under the research project entitled "Axiological Judicial Discretion. Between Legislator's Intentions and Autonomy of the Judiciary", funded by the National Science Centre (UMO-2016/21/B/HS5/00139).

[2] Cf. A. Korybski, *Alternatywne rozwiązywanie sporów w USA. Studium teoretycznoprawne*, Lublin 1993, *passim*.

[3] Cf. J. Jabłońska-Bonca, *Prawnik a sztuka negocjacji i retoryki*, Warszawa 2002; J. Jabłońska-Bonca, K. Zeidler, *Prawnik a sztuka retoryki i negocjacji*, Warszawa 2016; J. Stelmach, B. Brożek, *Sztuka negocjacji prawniczych*, Warszawa 2011. The research carried out at the Chair of Theory and Philosophy of Law at the Maria Curie-Skłodowska University in Lublin (or that directly linked to it) is of significance in this respect. Its outcome on mediation in the theoretical perspective comprises such works as: A. Zienkiewicz, *Studium mediacji. Od teorii ku praktyce*, Warszawa 2007; A. Kalisz, A. Zienkiewicz, *Mediacja sądowa i pozasądowa*, Warszawa 2014; A. Kalisz, A. Zienkiewicz, *Polubowne rozwiązywanie konfliktów w pomocy społecznej. Komunikacja, psychologia konfliktów, negocjacje i mediacje socjalne*, Sosnowiec 2015; A. Kalisz, *Mediacja jako forma dialogu w stoso-*

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MEDIATION AS AN OPENING UP OF THE LEGAL SYSTEM

Mediation is a part of the tradition of dispute resolution referring to open criteria located, as a rule, outside the legal system (*stricti iuris* regulations), rooted in equity rules in the sense of a strong link between their content and axiology (even if some of these criteria include customary rules, they are most often combined with certain axiological assumptions).

Mediation, as a kind of equity-based opening up of the law, is also a kind of holistic opening up. This is manifested in two aspects, especially in relation to judicial decision-making.

Firstly, in contrast to opening up the law by creating and application of general reference clauses, mediation does not generate a 'targeted' authorization for the law-applying entity to base its decision on open criteria in the context of specific facts or a specific legal institution. However, it creates a way of resolving disputes that is 'competitive' in relation to the judicial one, actually excluding action by the court in a particular case (although sometimes certain forms of 'judicial supervision' of such procedure may remain) and thus restricting the general role of the judicial type of application of law in resolving legal disputes.

Secondly, unlike general reference clauses which are either of strongly substantive (e.g. Article 5 of the Civil Code) or strongly procedural (e.g. Article 7 of the Code of Administrative Procedure) nature, mediation is both a substantive and procedural element of the decision-making process. This is so because is covers substantive grounds on which the decision is based, but also the procedural rules underlying the decision-making process. Both types of rules, as not being determined by the legislature in the *stricti iuris* form, either depend autonomously on the mediator or are agreed between the mediator and the parties to the decision-making process.

However, there is yet another reference point that distinguishes mediation. It is a kind of agreement of a dual nature. As it is concluded, on the one hand, between the opposing parties, and on the other, between these parties and the mediator, it additionally sets out (apart from substantive and procedural rules) a competence rule, entrusting a specific entity or a given type of decision-making entity (mediator) to take the decision. Such an agreement potentially concerns various important components of the mediation, starting with the consent to mediation and entrusting a given mediator with the dispute, agreeing a method of proceeding (including procedural rules), through the consent to a decision to be made in a given process and its execution, regardless of acceptance thereof. Naturally, various mediation

waniu prawa, Warszawa 2016. In addition, two doctoral dissertations were prepared: J. Harczuk, *Uzgadnianie w stosowaniu krajowego prawa publicznego*, Lublin 2009; M. Myślińska, *Rola mediatora w porządku prawnym – analiza teoretycznoprawna*, Lublin 2015. Currently, three dissertations are under development as part of doctoral studies carried out at the Chair (K. Hanas, P. Kłos, N. Kurek).

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processes involve the above elements in a different way and to a different extent but, especially as compared to the judicial type, also in the context of deciding based on general reference clauses, the mediation model of the decision-making process is intrinsically associated with an extensive role of the will of the parties, who then become the addressees of the decision.

HISTORICAL ROLE OF MEDIATION

The role of mediation should be perceived in the context of validity of the thesis that measures to 'open up' the *stricti iuris* criteria should be in place in every legal order. Otherwise, the proportion would be disturbed between legality (rule of law) and the certainty and flexibility of application of the law that allows for taking into account equity criteria (especially in terms of social axiology).

This thesis is valid in view of the history of legal systems in which we can easily find the opening-up measures that are fundamentally associated with mediation as a way of action leading to the decision on resolving a legal dispute. This applies to Roman law, in which the alternative function was played by precedents of praetorian law based on *ius aequitas*[4], and to English law, in which the case law of the Court of chancery gave rise to *equity law*[5] developed in subsequent centuries in England and transferred to American soil[6]. Once this method of resolving disputes was incorporated in the tradition of Western legal culture, it gave impetus to the development of the movement of Alternative Dispute Resolution[7] in the 20th century, first in the US and then in other countries, and basically regardless of whether countries accepting these forms of decision-making are relying more on statutory law or on *case law*. This is also regardless of the fact that attitude of lawyers operating in these legal cultures, especially in *common law* systems, is 'litigation-oriented', aimed at resolving the dispute or even 'winning the case'. However, it seems that the pragmatic perspective on the important role of the effectiveness of the law, and the need for an effective and sustainable solution to a specific legal problem, requires in these legal systems to pay due attention to agreeing on the content of the decision by mediation.

However, associating these alternatives to court trial only with the European and American legal systems would be a significant limitation of the scale of the issue.

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[4] Cf. R. Taubenschlag, *Rzymskie prawo prywatne*, Warszawa 1969, p. 28; H. Kupiszewski, *Prawo rzymskie*, Warszawa 1988, p. 178 ff., 227 ff.; M. Kuryłowicz, *Prawo i obyczaje w starożytnym Rzymie*, Lublin 1994, pp. 14–21.

[5] Cf. C.K. Allen, *Law in the Making*, Oxford 1964, pp. 366–371, 382 ff.; W.M. Bartel, *Z dziejów angielskiej equity*, „Czasopismo Prawno-Historyczne" 1964, t. 16(1), p. 342.

[6] Cf. R. Pound, *The Formative Era of American Law*, New Haven 1960, *passim*.

[7] Cf. A. Korybski, *op. cit.*, pp. 83–102.

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Therefore, the general role of mediation in Far Eastern legal cultures must also be not only noted but also emphasized. The example of the Japanese legal order can serve as a certain model here. The out-of-court conciliation, which during the *Edo* period (17th–19th centuries) had the character of a compulsory attempt to resolve the dispute, has become, since the *Meiji* period (1869), voluntary and guided by the principle of free choice of the arbitrator[8]. This practice was even strengthened i.a. by the institution of *jori*[9] introduced into the Japanese legal order (Article 3 of the Decree of the State Council of 1875 on the Application of Law), which authorised the judge to use in classical dispute resolution the guidelines of natural reason, general principles of law, natural law, customary law or common understanding of justice and fairness[10]. The role of the negotiation and mediation methods of resolving legal disputes, based on traditional cultural traits of this society (consensual and hierarchical[11]), was by no means undermined by the reception of German legal solutions during the *Meiji* period and American solutions after the Second World War. This can be observed i.a. in statistics on the role of mediation initiated in pending court proceedings, particularly in the area of private law where only about one-third of cases are concluded with a classic judicial decision, 'experiencing' some form of amicable settlement, both at the initial (pre-trial) stages of proceedings as well as during the proper court procedure. The value of consensus and harmony turned out to be much more important than the 'imported' forms of authoritative judicial decision-making.

As a result of comparison of the properties of these two above-mentioned different types of legal orders in the context of cultural traits of the social environment of law, we can conclude that the development of mediation forms is equally possible in collectivist and consensus-oriented societies (which is a natural strengthening factor) as well as and in individualistic and 'litigious' societies (which could be a weakening factor).

As compared to the above, the practice within the Polish legal system is still at the initial stages of formation both in terms of its size and depth of influence on the resolution of legal disputes. The efforts of the academia, quite dispersed (if measured for legal sciences as a whole), are not accompanied by adequate interest

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[8] Cf. R. Ishii, *Legal Philosophy*, "Japan Annual of Law and Politics" 1985, Vol. 33, p. 199; H. Oda, *Japanese Law*, Oxford 2009, DOI: https://doi.org/10.1093/acprof:oso/9780199232185.001.1, pp. 66–68.

[9] A somewhat similar category, referring to the Confucian idea of harmony, also occurs in the Chinese and Korean laws. Cf. C. Choi, *Ancient and New Sources of Law: An East-Asian Perspective*, [in:] *Challenges to Law at the End of the 20th Century*, ed. E. Pattaro, Vol. 2, Bolonia 1995, pp. 80–89.

[10] Cf. M. Yokota, *Japanese Judicial System under the New Constitution*, "The Japanese Annual of Law and Politics" 1959, Vol. 7, p. 121 ff.; M.K. Young, *The Japanese Legal System. History and Structure*, [in:] *Doing Business in Japan*, ed. Z. Kitagawa, Vol. 2, New York 1986, p. 28.

[11] Cf. C. Nakane, *Nihonteki Shakai-Kozo no Hakken*, Tokio 1967, *passim*; T. Doi, *The Anatomy of Self: The Individual versus Society*, Tokio–New York 1988, *passim*.

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of the legislature which seems to deem mediation at most a licensed remedy serving to relieve the judiciary of excessive work. In this case, the legislative policy has failed to employ a deep and comprehensive approach to mediation in the context of creating optimal conditions for its functioning as it used to do before, which in turn has restricted the effectiveness of efforts to promote various forms of mediation undertaken by the justice system itself.

MEDIATION AS A TYPE OF LAW APPLICATION

The mediation method of decision making aimed at resolution of a legal dispute has become part of the practice of applying the law, taking a specific place in the classification of types of this decision-making process.

Distinguishing between the judicial and administrative types of application of law[12] as part of legal theory studies by no means defines the place of mediation. Only when we go to the level of derivative types or subtypes of law application, we will be able to distinguish also the mediation subtype, apart from the managerial one. However, while the managerial subtype, associated with the governance, management or administration of a certain entity or sphere of activity, is usually associated with the administrative type, the mediation subtype is a kind of decision-making process that is derivative, in a sense, from the judicial type. Admittedly, if we take into account the diversity of mediation forms and if, for example, we perceive negotiation as an activity related to mediation in the strict sense[13], it will turn out that there may be elements of 'management of the bargaining process', but it is 'moderation' rather than management in the strict sense.

The mediation subtype is related to the judicial type in terms of both genealogy and basic properties. Although the mediation subtype constitutes, in a sense, competition for the judicial one in the field of dispute resolution by limiting its role on the one hand, but on the other hand supporting it and allowing the courts to focus on matters of more gravity (juridically more difficult) or not 'suitable' for mediation, it takes its essential features, while giving them a modified or completely separate character in a particular scope.

Hence, mediation procedures are provided for by legislation in the Polish legal system primarily as an alternative for judicial proceedings. This statement is

[12] Cf. W. Lang, J. Wróblewski, S. Zawadzki, *Teoria państwa i prawa*, Warszawa 1979, pp. 411–414; W. Dawidowicz, *O stosowaniu prawa przez organy administracji państwowej*, „Zeszyty Naukowe Wydziału Prawa i Administracji Uniwersytetu Gdańskiego. Prawo" 1981, nr 9, *passim*; L. Leszczyński, *Zagadnienia teorii stosowania prawa. Doktryna i tezy orzecznictwa*, Kraków 2000, pp. 19–28.

[13] For types and forms of mediation in the broad sense, cf. A. Kalisz, A. Zienkiewicz, *Mediacja sądowa i pozasądowa...,* p. 25 ff.

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valid irrespective of the fact that the institution of amicable settlement is present in administrative procedure[14] or the fact that public-private partnership, which is an institution of administrative law, is deemed a form of mediation[15]. Mediation in the judicial type of application of law primarily is present in civil procedure, where mediation forms are provided for as part of amicable proceedings. They can also be used in e.g. labour law, commercial law or family and guardianship law[16], but also in the area of penal law where arrangements on voluntary submission to a punishment are deemed a kind of mediation[17]. Finally, this also concerns proceedings before administrative courts, where the reform of 2002 introduced mediation proceedings conducted by a judge or court referendary[18].

PROPERTIES OF THE MEDIATION DECISION-MAKING PROCESS

The properties of the mediation subtype of decision-making process become evident when presented against the classic judicial type. The comparisons, within functioning of the rule of law, concern, in particular, the characteristics of the subjective side of both processes, the fact initiating the proceedings, the procedure or the dispute resolving decision itself.

The subjective side of the judicial type, focusing on the institutional and procedural guarantees, independence of the court and independence of the judge deemed as a representative of the third power within the tripartite separation of powers is

[14] Cf. Z. Kmieciak, *Mediacja i koncyliacja w prawie administracyjnym*, Kraków 2004. Cf. also Articles 114–122 of the Polish Administrative Procedure Code. Some importance in this context has the regulation of administrative mediation, though obviously still unverified practically, in the amendment of the Administrative Procedure Code, dated 2017 (Article 1 Point 20 of the Act of 7 April 2017 amending the Act – Code of Administrative Procedure and some other acts, Journal of Laws 2017, Item 935) which added Chapter 5a: *Mediation* (Articles 96a–96n).

[15] This is discussed in this volume by B. Liżewski and M. Liżewski.

[16] Articles 695–715 of the Civil Procedure Code. Cf. also R. Zygadło, *Mediacja w toku postępowania cywilnego – uwagi na tle projektu Komisji Kodyfikacyjnej Prawa Cywilnego*, [in:] *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana*, red. L. Ogiełło, W. Popiołek, M. Szpunar, Kraków 2005, p. 1533 ff.

[17] Article 23a of the Criminal Procedure Code, Article 489 § 2 of the Criminal Procedure Code or Article 162 § 1 of the Corrections Code. These regulations are a sort of analogue of the US institution of *plea bargaining* (cf. M.E. Vogel, *Coercion to Compromise: Plea Bargaining, the Courts and the Making of Political Authority*, Oxford 2007, *passim*) or the Italian institution of *patteggiamento* under Article 444 of the Italian Penal Procedure Code.

[18] Article 116–118 of the Act of 30 August 2002 – Law on procedure before administrative courts (Dz.U. No. 153, Item 1270 as amended), hereinafter as: PAC. More for its effectiveness cf. J. Harczuk, *op. cit.*, *passim*.

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only partially implemented in mediation (unless the mediator is a judge[19]). While it is difficult to imagine a mediator acting as not being independent, there is no guarantee of independence of mediator as mentioned (although these guarantees can be essentially attributed to him/her) also because mediator is not deemed a 'participant' in the system of separated powers. The fact that mediator is not considered a governmental body is associated with a less potential for the politicization of mediation (which may occur in relation to the judicial type). However, it grants mediator unions more important role than in the case of judges, as these mediator unions operate on a corporate basis to a certain extent.

The rule of competence for mediator is also more open, in contrast to the completely formalized and highly detailed judicial type. A detailed competence is defined (usually along with procedural rules) where mediation forms are provided for by normative regulations, but remain vague or sometimes completely open (also in terms of procedure) where parties bring 'their own dispute' to mediation by a mediator of their choice, somewhat 'independently' of legislative intervention.

There is a significant difference with regard to the method of initiating the decision-making process. In the judicial type, complaint-based action prevails (though clearly) over ex-officio action, while requests submitted by a party (the parties) in mediation are practically the only type of facts initiating the mediator's involvement in resolving the case.

A similar situation occurs as regards the rules of procedure. The judicial type, as a principle, covers adversarial procedure having a stronger or weaker adversarial nature, but it may also cover a non-adversarial method when the court proceedings concern the determination of a right in the broad sense (title, interest, powers, etc.) or obligation (this does not change the fact that the failure to determine the right or obligation may turn into a dispute resolution by way of a trial). In comparison, the mediation subtype is completely homogeneous, as only the dispute and the resolution thereof shape both the decision-making situation and the procedure and purpose of the proceedings.

The mediation type of legal dispute resolution is characterized, like the judicial one, by the task of dispute resolution, which, admittedly, is based on other criteria (non-legal criteria, although some legal criteria are not excluded in mediation), nevertheless is intended to 'administer the justice', not to achieve a specific goal or fulfil a specific task. Thus, a feature of mediation proceedings is the essential lack of direct implementation of any policy or direct managing of a politically-sensitive sphere, and this occurs on a scale even larger than in the judicial type (wherein e.g. clauses referring to political criteria introduce certain politically-oriented values,

[19] According to Article 699 § 2 of the Civil Procedure Code, a judge may not be an arbitrator, while pursuant to Article 116 § 1 of the PAC the mediation proceedings carried out as part of the judicial review of administrative decisions may be conducted by a judge.

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especially in the application of constitutional law or, more generally, public law). Therefore, the possibility of politicizing mediation or even the implementation of the 'policy of mediation-based application of law' is more difficult than it is in judicial application of law.

The set of properties of the mediation-based decision-making process, distinguishing it from the judicial type, has also a few other features: first, the deformalized nature of the procedure, which not only makes the procedure dependent on the will of the parties, but also gives the mediator more discretion (the scale of any possible 'formalization', especially procedural, depends on the extent to which the procedure is linked with normative regulation); second, effective implementation of the principle of promptness of the proceedings; and third, the fact of conducting the proceedings without transparency of their course (and even, however rarely, of their outcome). The feature of secrecy, despite the fact that it is not deprived of exceptions, undoubtedly distinguishes mediation from the judicial type, giving it a character of 'procedural privacy' (especially in the absence of related normative regulation).

Both the decision-making process itself and the concluding decision are subject to deformalization in the situation of a 'lack of normative regulation'. This is essentially manifested in the lack of form but also the lack of a determined normative basis for such a decision. The decision-making process involves some bargaining about the content of the decision, which translates into the participation of the parties, which in turn is a factor limiting its scope, even though essentially extends the discretion resulting from the lack of regulation of its basis. Therefore, it is a freedom from the *stricti iuris* criteria, but not arbitrariness in forming its content. This is particularly true since the latter is in a sense 'controlled' by the parties and the very decision should be substantiated as to merits. Thus, the decision loses the character of a solely authoritative decision.

On the other hand, the bargaining about the mediation decision with the participation of the parties to this proceeding means that the sphere of implementation of the decision, which is implicit or is covered by a separate 'agreement', is more effective than in the judicial type, despite the lack of its authoritative character mentioned above.

Like any other decision, a decision made as a result of mediation is subject to revision. Relations with the judicial type are formalized if there is consent for mediation or some form of revision of a 'mediated' decision by a court or administrative authority, although there is no classical instance judicial revision within the 'mediation system'. The mediation decision is rather subject to social control, but due to limited transparency of mediation, the interest in them by the public may not match the interest in court or even administrative proceedings. However, there is no basis for political control of mediation, as it is in the judicial type under the terms of the rule of law.

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THE DECISION MODEL AND THE RULES OF OPERATIVE INTERPRETATION IN THE MEDIATION PROCESS

The deeper structure of the decision-making model of mediation and the interpretive reasoning under that model leading to the decision may be better seen when presented in contrast to the judicial type to which, as mentioned earlier, they are genealogically and functionally related.

The decision-making model itself can be constructed based on the stage system comprising the preparatory (pre-selection) stage, including fact-finding and determination of the law applicable, and the decision-making stage covering decision-making qualifying the facts and stating the consequences of this qualification.

One of crucial issues of the characteristics of reasoning and activities in a mediation process is the question about the possibility of mediating about the facts, i.e. in terms of establishing the factual state. Adoption of the assumption, analogically to judicial proceedings, that it is a cognitive process leading to the determination of occurrence of certain facts, excludes, in principle, mediating about their very occurrence (mediation would be acceptable only after the facts are established). However, like in judicial proceedings, the presence of evaluative elements in this cognitive process, resulting even from the principle of free assessment of evidence forming the basis for factual findings or referring to facts in an evaluative way (e.g. 'important reasons') seems to result in a certain 'leeway' with the determination so defined (especially in the context of the normative qualification of facts). And if this assumption is combined with the argument that the mediator and the parties are obliged to seek to effectively resolve the dispute, the use of this leeway becomes more real than the properties of the decision-making process only would suggest.

Determining the status of applicable law, i.e. the operative interpretation, does not generate such doubts, although one cannot exclude that also the interpretation itself should only lead to one single right result[20], therefore it is not reasonable to mediate regarding this interpretation. Taking such a position (already difficult to support, e.g. because of the role of axiological rules in the interpretation of law, not fitting into the pure concept of a single right application of them) on the mediation process seems difficult as, firstly, mediation is carried out with a more active participation of the parties than in the judicial type, which generates a variety of interpretative arguments, and secondly, that mediation is not based, as in the case of judicial application of law, on formalized sources of behavioral patterns, but on informal sources (e.g. moral or customary). Thus, without applying precise linguistic (semantic and syntactic) and systemic (especially systemic-structural) rules of interpretation, it generates a strong position for more substantively open

[20] Based on the concept of one right decision in a case. Cf. J. Wróblewski, *Sądowe stosowanie prawa*, Warszawa 1988, pp. 330–333.

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and functional in terms of outcome (and therefore more prone to agreeing on) rules of interpretation (both pragmatic and axiological).

At the stage of validation arrangements, this is manifested by the reversal of the proportion of use of individual sources. With the admissible, but rather supplementary, application of the criteria set out in legal provisions, the focus at this stage of interpretation is shifting to the identification of non-systemic (non-legal) open criteria which form a complementary source in the judicial type, while here they can become the sole source for the decision. Thus the systemic-structural rules related to the application of statutory provisions lose their fundamental role for the benefit of functional and axiological rules. However, it is open to discussion whether it is possible to use other previous 'mediation decisions' to construct grounds for the decision currently being made (mediated).

Such an arrangement of validation arguments affects the very reconstruction of behavioral patterns. This reconstruction, by using the linguistic-syntactic rules in order to establish the content of behavioral patterns and linguistic-semantic rules to determine the meanings of expressions, is not based on a formalized text, which requires consideration of functional and axiological rules in parallel with linguistic ones. It is similar to the reconstruction of the content of the criteria (moral, customary, organizational, economic, technical, etc.) expressed in general reference clauses.

The method of construction of the normative basis for the mediation-concluding decision, which involves combining the previously reconstructed patterns in terms of elaborating the grounds for a decision qualifying the facts and determining the consequences of this qualification, also employs functional and axiological rules, depending on whether the pragmatic or axiological perspective prevails in the decision-making process. In this context, any possible use of legal provisions requires that systemic rules be incorporated into the process of constructing the grounds for the decision, but not in the capacity of basic rules.

Similar relationships also apply to the decision forming stage, resulting in the transformation of the basis of the decision into the decision itself. This is so because, logically, the former should comprise the latter.

The characteristics of inferences and argumentation in the mediation process cannot work without expressing the essence of substantiation for the mediation decision. This decision, like any other decision that resolves a dispute important to the parties, should not only be justifiable but also reasonably substantiated. Although active participation of the parties in mediation makes the arguments leading to the formulation of the decision not only known to the parties but largely established with their participation, it does not seem to relieve the mediator from 'collective' argumentation, which would eristically convince the parties about the validity of their decisions. It remains an open question whether a written substantiation is necessary here. On the other hand, when it comes to the style of substantiation, it seems possible to essentially define its several features (differing from those of the judicial type): informal

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argumentation (despite elements that are similar to judicial substantiation), arguments more comprehensible by the parties (who are treated in fact as only addressees of the decision), more direct reference to the disputed issues (as there is no need to make the arguments more theoretical or general) and focusing not on the course of the reasoning process but on the essence of the decision (as a resolution of the dispute). Importantly, it would not be dysfunctional, also for this type of decision-making, to strengthen the above features of substantiation in the judicial application of law, especially in terms of the public perception of the judiciary.

CONCLUSIONS

The above properties of mediation as a kind of law application process (process of resolving a legal dispute) strengthen the role of mediation both in the context of relieving overburdened courts of excessive work (which usually justifies the introduction of various forms of mediation into the Polish legal order), but also, apart from the importance of this relieving, may lead to the formation of a separate way of resolving and settlement of disputes, competitive, in a sense, with the classical judiciary but consistent with the rule of democratic social system, taking into account the autonomous forms of social organization for a specific purpose and essentially immune to politicization by the executive power (even if the relationship between particular powers is disturbed). If these properties are combined with the features of functionality, promptness, and effectiveness of this method of decision-making, even if some inconveniences of mediation are considered, it is fully valid and reasonable to deem mediation a remedy to a number of flaws of the judicial type. Therefore, if we agree on the above conclusions, it should be assumed that the legal community, both the academia and the judiciary, should intensify actions aimed at implementation of this reality in the Polish legal order.

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STRESZCZENIE

Celem artykułu jest analiza cech mediacji (traktowanej jako sposób rozwiązywania problemów prawnych) w świetle właściwości sądowego stosowania prawa w kontekście zarówno procesu decyzyjnego, jak i rozumowania prawnego w ramach wykładni operacyjnej prawa. Mediacja, będąca

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instrumentem otwarcia porządku prawnego, powinna być traktowana jako odrębny podtyp stosowania prawa – odmienny od sądowego i administracyjnego. Ponadto w opracowaniu wskazano działające w niej podmioty, rodzaj ich kompetencji, opisano inicjację i przebieg procesu oraz sposób budowania decyzji poprzez zastosowanie aksjologicznych i funkcjonalnych zasad wykładni prawa. Zobrazowano również podstawowe elementy mediacji w ich perspektywie decyzyjnej.

Słowa kluczowe: mediacja; sądowe stosowanie prawa; aksjologia i wykładnia prawa; otwarcie porządku prawnego

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