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Mediation and Fairness of the Decision to Resolve the Dispute

Mediacja a sprawiedliwość decyzji rozwiązującej spór

SUMMARY

The article discusses the issue of fairness of the decision to resolve a dispute in mediation. The discussion concerns mediation in civil cases. In civil law relations, referring to Aristotle's classical distinction of distributive justice (*iustitia distributiva*) and corrective justice (*iustitia commutativa*), which is the starting point of any serious discussion of justice, it is corrective justice (*iustitia commutativa*) that is meant here. The author indicates the obstacles to the fairness of the decision to resolve a dispute in mediation, which are mainly the problems involving the findings of fact and the substance of the settlement. Moreover, the article discusses the issue of procedural justice whose norms (rules) are not implemented in mediation proceedings. In conclusion, the author claims that the essence of mediation in civil cases is not the pursuit of justice. Mediation does not assume that the resolution is to be fair, that is not the point here. It is emphasized, however, that the institution of mediation is necessary and has its advantages, but currently the practical importance of this form of dispute resolution in the Polish legal system is little.

Keywords: mediation; mediation in civil cases; justice; corrective justice; procedural justice

I.

Justice is one of the fundamental universal human values. According to many, it is the most important value attributed to law[1]. It is worth recalling that D. Ulpianus

[1] This applies both to fairness of law as such and the fair application thereof.

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derived the concept of law from justice[2]. G. Radbruch wrote: "The idea of law may only be justice"[3], while for J. Rawls "justice is the first virtue of social institutions"[4]. The literature on justice is enormous, as we have tens of thousands of studies on it. The number of studies on mediation is slightly less but still they are numerous enough to fill many libraries. However, despite the abundance of studies, or even maybe because of that, the matter of justice – including the very understanding of the notion – is a difficult, complex, multi-faceted and sometimes confusing matter, more complicated than issues concerning the institution of mediation. In literature, we find various concepts, perspectives, and theories of justice.

As a starting point, we adopt the classic meaning of justice, namely the idea to 'render each his own' (*suum cuique tribuere*)[5]. The concise definition formulated by Ulpian is widely known: *Iustitia est constans et perpetua voluntas ius suum cuique tribuendi*[6].

An ordering and introductory remark needs to be made here. The considerations will concern mediation in civil matters – and it must be stressed that mediation corresponds more to the nature of private law[7]. Thus, it will be about disputes in civil matters, even in civil matters in a strict sense[8], these considerations do not concern mediation in family and guardianship matters, which are distinguished by their specificity, or in the field of labour law.

Referring to the classical Aristotelian distinction, which is the starting point of all serious reflections on justice[9], it is civil law relations that involve commu-

[2] When explaining the meaning of the word *ius*, Ulpian derives the concept of law from justice. *Iuri operam daturum prius nosse oportet, unde nomen iuris descendat*. *– Est autem a iustitia appellatum* ("A law student at the outset of his studies ought first to know the derivation of the word *ius*. Its derivation is from *iustitia*"). See D. Ulpianus, D. 1, 1, 1 pr. Let us also recall the principles of law (*praecepta iuris*) defined by Ulpian: *honeste vivere* ("to live honourably"), *alterum non laedere* ("not to harm any other person"), *suum cuique tribuere* ("to render each his own"). Cf. D. Ulpianus, D. 1, 1, 10, 1.

[3] G. Radbruch, *Filozofia prawa*, Warszawa 2009, p. 37. In the considerations about the notion of law, we read: „[…] *law is the reality the meaning of which is to serve a specific value* (*dem Rechtswerte*) […]. We are also entitled to assume that justice is the ultimate and unbridgeable point of departure by the fact that anything which is just […] has an absolute value that cannot be inferred from any other value" (*ibidem*).

[4] J. Rawls, *Teoria sprawiedliwości*, Warszawa 1994, p. 13. As Rawls wrote: "[…] laws and institutions no matter how efficient and well-arranged must be reformed or abolished if they are unjust" (*ibidem*). Cf. also R.A. Tokarczyk, *Sprawiedliwość jako naczelna wartość prawa*, „Państwo i Prawo" 1997, z. 6, pp. 3–20.

[5] The formula "justice is the constant and perpetual will to render to every man his due" was also known to Plato and Aristotle. As an example, cf. Platon, *Państwo*, Kęty 2009, Księga I, 332 C, p. 19.

[6] D. Ulpianus, D. 1, 1, 10 pr.

[7] Cf. A. Kalisz, *Mediacja jako forma dialogu w stosowaniu prawa*, Warszawa 2016, p. 165.

[8] Naturally, the subject of the dispute must remain at the disposal of the parties. For the admissibility of the amicable resolution of the case, see: K. Antolak-Szymanski, O.M. Piaskowska, *Mediacja w postępowaniu cywilnym. Komentarz*, Warszawa 2017, pp. 43–46.

[9] As H. Kelsen wrote: "[…] it is no exaggeration to say that everything that has been said about the essence of justice in writings by philosophers or lawyers can be found in the Plato and Aristotle's

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tative justice (*iustitia commutativa*)[10]. The criterion of it is equality. It should be emphasized that the characteristics of commutative justice found in the literature are very similar – they refer to Aristotelian thought[11] and often do not go beyond what Aristotle said[12], also the Polish Constitutional Tribunal uses the term *sprawiedliwość wyrównawcza* ('corrective justice') and follows the directives thereof when deciding cases[13].

Again, corrective justice is based on the criterion of equality. Equal means fair[14]. This is about strict equality between the parties of a given relationship.

In the fifth book of *Nicomachean Ethics*, Aristotle writes:

> But the justice in transactions between man and man is a sort of equality indeed, and the injustice a sort of inequality; not according to that kind of proportion[15], however, but according to arithmetical proportion. For it makes no difference whether a good man has defrauded a bad man or a bad man a good one, nor whether it is a good or a bad man that has committed adultery; the law looks only to the distinctive character of the injury, and treats the parties as equal, if one is in the wrong and the other is being wronged, and if one inflicted injury and the other has received it. Therefore, this kind of injustice being an inequality, the judge tries to equalize it […][16].

works" (as cited in: S. Tkacz, *Rozumienie sprawiedliwości w orzecznictwie Trybunału Konstytucyjnego*, Katowice 2003, p. 9). Stelmach stresses that: "Starting from Plato and Aristotle, the theory of justice becomes one of the most fundamental ethical and legal philosophical theories" (J. Stelmach, *Współczesna filozofia interpretacji prawniczej*, Kraków 1995, p. 135). The Aristotelian thought and distinctions was referred to by Saint Thomas Aquinas. G. Radbruch also referred to it, let us quote what he wrote about it: "Both of these distinctions [regarding corrective justice and distributive justice – W.D.] we can find in a famous teaching of Aristotle, who called *absolute* equality between *goods*, e.g. work and remuneration, damage and redress, the *corrective justice* (*ausgleichende Gerechtigkeit*); and on the other hand, he called *equal treatment* of different *people* – for example, by taxing them in proportion to their financial capabilities or by assisting them as needed, rewarding on a merit basis, and punishing them according to guilt, *the distributive justice* (*austeilende Gerechtigkeit*). Corrective justice requires participation of at least two people, while distributive justice – at least three of them. […] Corrective justice is the domain of civil law [literally private law, *des Privatrechts*], while distributive justice is the domain of public law" (G. Radbruch, *op. cit.*, pp. 38–39). Cf. also W. Sadurski, *Teoria sprawiedliwści. Podstawowe zagadnienia*, Warszawa 1988, pp. 70–78.

[10] From the time of Aristotle, the division of the dual justice, the distributive justice (*iustitia distributiva*) and corrective justice (*iustitia commutativa*) has widely been accepted in European philosophy and therefore in law and legal sciences. The Aristotle's approach still constitutes a canon and is deemed a model. On distributive justice (*dikaion dianemetikon*), cf. Arystoteles, *Etyka nikomachejska*, Warszawa 2008, 1131a–b. Corrective justice is also referred to as "commutative justice", "exchange justice", "retributive justice".

[11] This applies to e.g. Saint Thomas Aquinas, G. Radbruch, A. Kaufmann, K. Ajdukiewicz, M. Ossowska, and W. Sadurski.

[12] Cf. S. Tkacz, *op. cit*., p. 124.

[13] Cf. *ibidem*, pp. 132–141.

[14] Each justice is related to equality but the latter is differently understood and implemented.

[15] Aristotle refers here to distributive justice.

[16] Arystoteles, *op. cit*., 1132a.

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Aristotle writes that corrective justice is the centre between profit and loss. In such cases, the judge restores equality:

> […] it is as though there were a line divided into unequal parts, and he took away that by which the greater segment exceeds the half, and added it to the smaller segment. And when the whole has been equally divided (*dicha*), then they say they have 'their own', when they have got what is equal. The equal is intermediate between the greater and the lesser line according to arithmetical proportion. It is for this reason also that it is called just (*dikaion*), because it is a division into two equal parts (*dicha*), just as if one were to call it (*dichaion*); and the judge (*dikastes*) is one who bisects (*dichastes*)[17].

As a development, in a sense, and perhaps also to make Aristotle's thought more precise, two varieties of corrective justice will be important to us: 1) fairness of return, 2) fairness of requital[18].

Re. 1. When we talk about corrective justice in contractual relations (it is about 'the field of voluntary exchange of goods', contracts, transactions), the guiding principle is the rule of 'equal return'. "For to have more than one's own is called 'gaining', and to have less than one's original share is called 'losing' […]", writes Aristotle[19].

Regarding fairness of return, it should be noted that it is the domain of private relations (it concerns relationships that are voluntarily established by the parties), therefore the source of civil law relationships is contracts. In such cases, both in many studies[20] and the case-law of the Constitutional Tribunal[21], corrective justice

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[17] *Ibidem*. However, as D. Gromska (the translator of *Nicomachean Ethics*) underlines, the etymology given in the final sentence of the quoted quotation is incorrect.

[18] The principle of equal return and requital, which we encounter in Aristotle's thought, was mentioned by K. Ajdukiewicz but he emphasizes the vagueness of this principle. Cf. K. Ajdukiewicz, *O sprawiedliwości*, [in:] *Język i poznanie*, t. 1, Warszawa 1985, p. 371. This author writes: "Nevertheless, due to the vagueness of a number of terms that occur in the principle of equal return and requital, this principle itself becomes unclear, as it quite suits our concept of moral correctness, which is also very vague and unstable though" (*ibidem*, p. 372). Cf. also Z. Ziembiński, *Sprawiedliwość społeczna jako pojęcie prawne*, Warszawa 1996, p. 37.

[19] Arystoteles, *op. cit*., 1132b.

[20] Cf. S. Tkacz, *op. cit*., p. 130. „The essence of the contractual equilibrium of interests consists in accurate execution of the contract" (*ibidem*, p. 131). "In many studies, corrective justice is associated with the rule that if one party agreed under the contract to fulfill a certain performance for a performance promised by the other party, then the former party should give to the other party neither less nor more than the performance under the contract" (*ibidem*, p. 138). The essence of commutative justice, as pointed out by L. Morawski, is to render everyone his due according to the commitments which he voluntarily assumed. Cf. L. Morawski, *Podstawy filozofii prawa*, Toruń 2014, p. 273.

[21] As S. Tkacz writes in the concluding remarks of *Rozumienie sprawiedliwości w orzecznictwie Trybunału Konstytucyjnego*: "Corrective justice is recognized by the Tribunal […] in civil law contracts (it is understood as 'fairness of return'), according to the rule that the measure of equality is in this case commitments which each party to the contract knowingly and voluntarily assumed" (S. Tkacz, *op. cit*., p. 178). This author, when analysing one of the judgements of the Constitutional Tribunal, concludes: "[…] the Tribunal expressed the view that the contracting party should adhere to the obligations voluntarily assumed by that party, following the rule that by virtue of the signed contract the performance

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boils down to the obligation of parties to comply with the provisions of agreements concluded by them. Corrective justice requires that each party to the contract accept and keep, willingly and knowingly, the commitments that constitute (or are supposed to constitute) a 'benchmark of equality'.

However, it should be added that the contract is to be lawful, within the law.

Re. 2. When we talk about corrective justice, in cases where the damage done entails the obligation relationship and thus the compensation for damage (or injury) caused, the 'equal requital' rule is the guiding principle of corrective justice[22]. Thus, the requital for causing a damage (injury) is a compensation (redress), which is to restore the raw equality, that is to remedy the damage.

Naturally, our deliberations do not cover punitive justice, which involves punishment, i.e. requital for a crime.

In the conclusion of this part of our deliberations, it is worth noting that the justice referred to here is based on equality (is equality-oriented), and in the situation of a dispute is based on remedying which leads (or is supposed to lead) to the restoration of equality. Justice instructs to give what is due and in due amount, neither less nor more.

II.

What obstacles must occur to conclude that we deal with the fairness of the decision to resolve a dispute in mediation?

1. The first issue is the problem of factual findings.

Corrective justice should be understood as substantive justice that takes facts into consideration (correctly established facts). A fair resolution of the dispute must be based on factual findings, consistent with the actual state of affairs, namely true findings.

However, there is no evidence-taking proceedings during mediation, no truth is being examined, no truth is ever sought. And if the literature refers to truth as 'mediation truth' of a discursive character, it is so-called truth accepted by the parties to the dispute[23]. And it is not truth in the classic sense. One of the two main variants thereof

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of one of the parties was deemed by it to be equivalent to the other party's obligation, there can be no doubt that, by issuing the ruling, the Tribunal was guided by corrective justice" (*ibidem*, pp. 137–138). Having analysed other judgements, S. Tkacz formulated a conclusion that: "[…] the Tribunal, although not using the term 'corrective justice', covers with the 'justice' clause also the rule according to which, in the case of civil law contracts, it is necessary to pay one's voluntary and informed commitments, which in this situation constitute a 'benchmark of equality'" (*ibidem*, p. 139).

[22] Cf. *ibidem*, p. 124; K. Ajdukiewicz, *op. cit*., p. 371.

[23] Cf. A. Zienkiewicz, *Studium mediacji. Od teorii ku praktyce*, Warszawa 2007, p. 238. So-called mediation truth, i.e. the 'truth acceptable' by the parties to the dispute, "may be in a specific case much

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is: "[…] true statement is a statement accepted by the parties as true, even though they are not convinced of its truth – but accept them for certain 'higher' purposes/reasons (e.g. for reaching a settlement or restoring positive relations between them)"[24].

This is the consensual concept of truth. Truth is made relative and boils down to a convention, agreement, arrangement, and consent. This is a radically different approach from the classical understanding of truth.

The literature on the subject discusses the contradictions between alternative dispute resolution methods (ADR), including mediation referred to as "the queen of ADR"[25], and the search for objective truth by the court[26]. This is important as it is factual findings, true factual findings which matter with regard to justice. On the other hand, in mediation, the basis for making a dispute-solving decision is facts that have not been objectively established. Mediation focuses on goals, interests, and expectations of the parties[27], not the retrospective 'search for the reason'[28]. Instead of establishing the factual state, we have the stage of identification of interests and needs of the parties[29].

However, the marginalization of factual findings[30] does not exclude speaking about fairness of the decision to resolve the dispute, because the amicable settlement can be based on facts the parties are aware of, not challenged, not contested, simply obvious facts, even if not subject to examination.

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further than absolute truth (substantive/objective truth) than the court-established truth – even only due to marginalizing the facts. Therefore, truth in mediation is achieved through an argumentative process of obtaining acceptance for certain findings and reaching a situation of mutual recognition" (A. Kalisz, *op. cit*., p. 159).

[24] A. Zienkiewicz, *op. cit*., p. 238.

[25] Cf. K. Antolak-Szymanski, O.M. Piaskowska, *op. cit*., p. 20.

[26] A. Kalisz, *op. cit*., p. 79. A. Korybski writes as follows: "An important feature which distinguishes mediation from arbitration is also less careful examination (or even ignoring) of the evidence submitted by the parties to support their claims" (A. Korybski, *Alternatywne rozwiązywanie sporów w USA. Studium teoretycznoprawne*, Lublin 1993, p. 116).

[27] A. Kalisz and A. Zienkiewicz write as follows: "[…] in contrast to judicial settlement of disputes – the final decision is not so much based on the facts implying a specific classification of the situation, but on expectations of the parties" (A. Kalisz, A. Zienkiewicz, *Mediacja sądowa i pozasądowa. Zarys wykładu*, Warszawa 2014, p. 122).

[28] The literature on the subject defines it as constructing a common version of events, which does not entail the reconstruction of the objective state of affairs, but the 'vision of the facts' shared by both parties to the dispute. Cf. M. Araszkiewicz, K. Płeszka, *Pojęcie alternatywnego rozwiązywania sporów*, [in:] *Mediacja. Teoria, normy, praktyka*, red. K. Płeszka, J. Czapska, M. Araszkiewicz, M. Pękala, Warszawa 2017, p. 125.

[29] Cf. A. Zienkiewicz, *op. cit.*, p. 244; A. Kalisz, *op. cit.*, pp. 140–142.

[30] As regards court mediation, it should be noted that following the changes introduced by the Act of 10 September 2015 amending certain acts to support amicable dispute resolution methods (Journal of Laws, Item 1595), which entered into force on 1 January 2016, the parties may be referred to mediation at any stage of judicial proceedings (new wording of Article 10 of the Code of Civil Procedure), thus also after the evidence has been taken.

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2. The second issue. Amicable settlement.

The main purpose of mediation in civil matters is to reach an amicable settlement between the parties to the dispute. Bringing about a settlement[31] to put an end to the dispute[32] is the task of the mediator.

And what is amicable settlement? The essence of amicable settlement, as stressed in the literature and judicature, is to make each other concessions in terms of the expected results of the legal relationship. The mutual concessions of the parties are understood in the broad sense. According to Z. Radwański, they mean "any abandonment of the position previously taken by the party" with respect to the legal relationship existing between the parties[33]. Article 917 of the Polish Civil Code, basically applicable here[34], states that "by mutual agreement, the parties make mutual concessions […]". If only one party makes concessions, this cannot be referred to as a settlement within the meaning of Article 917 of the Polish Civil Code.

It is worth emphasizing that in a mediation settlement (amicable settlement concluded before a mediator) the parties make mutual concessions as to the legal relationship between them in order to resolve the dispute[35].

So, how can one talk about the fairness of return, which, based on equality determined by commitments assumed knowingly, voluntarily and freely by the parties, obliges to render the other party (either party) not more not less but just precisely what is due according to the contract.

How can one talk about the fairness of requital governed by the rule of 'equal requital' when injustice arose – a damage (harm) was caused – which is an inequality giving rise to an obligation relationship, and must be compensated (as traditionally takes place *via* a court judgment).

Where this equality, strict and ruthless equality occurs, some of the contemporaries write about absolute equality, the raw one, associated by Aristotle with the mathematical operations of addition and subtraction.

It would be so, which is still very doubtful if amicable settlement involved only some psychological concessions, not claims, not what is actually due. Assuming that concessions do not refer to the actual content of the legal relationship, but to some merely subjective beliefs, ideas about the dispute, subjective understanding of the number of claims – projections (imaginations) inconsistent with realities,

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[31] A. Zienkiewicz, *op. cit*., p. 277.

[32] Both contractual mediation and court mediation can be concluded in two ways: the parties, as a result of mediation proceedings, reach a settlement or not. Of course, for our deliberations only the first case is important.

[33] Z. Radwański, *Prawo zobowiązań*, Warszawa 1986, p. 245.

[34] Some consider settlements concluded before a mediator as an institution placed between settlement agreement under Article 917 of the Civil Code, and court settlement. Cf. K. Antolak-Szymanski, O.M. Piaskowska, *op. cit*., p. 41.

[35] Mediation is about agreeing upon expectations, not about who is right. Cf. A. Kalisz, *op. cit*., p. 62.

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or assuming that they only concern e.g. the costs of proceedings, and perhaps also interest rates – then the resolution of the dispute would be fair.

However, other arguments can also be raised against fairness of amicable settlement. This may include the problem of equality or rather inequality between the parties[36] who make concessions to each other. The assumption of real equality between the opponents and their good faith is an idealization. And this can have consequences for the matter discussed. Unfortunately, during mediation, the parties involved may manipulate the other ones (the weaker party may be manipulated by the stronger one)[37] and the parties may manipulate the mediator[38].

3. The third issue. Procedural fairness.

Let us consider the issue from another perspective: procedural fairness, so important today. Procedural fairness must be ensured in correct judicial proceedings. It is often argued that fair procedure is a *sine qua non* condition for deeming a judicial ruling a fair decision[39]. Some even claim that fairness applied to law is of a purely procedural and not substantive character[40].

However, as far as mediation is concerned, it is difficult to claim that procedural fairness is ensured, it is difficult to speak of procedural fairness at all.

Norms (rules) of the judicial procedure being (or supposed to be) a manifestation of procedural fairness are not implemented in mediation proceedings, as they are simply impossible to be implemented therein. Therefore, it would be necessary to specify any other procedural rules, i.e. rules operating as a benchmark of fairness, having only a formal meaning, observed (applied) in mediation proceedings. These procedures (rules) should provide appropriate guarantees of honest and fair procedure and effective protection of rights. It is worth adding that essentially procedural fairness requires the institutionalization of its rules.

The point, however, is that mediation is basically an informal institution[41], not restrained by rigid rules. Its course has an informalized and flexible structure[42],

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[36] The literature on the subject points to a relative balance between the parties. Cf. *ibidem*, p. 213.

[37] A mediator may be not skilled enough to prevent such situations.

[38] This may entail exerting pressure on the parties during mediation, or allowing for manipulation, for example, by the stronger party, in order to achieve the goal of effectiveness by reaching a settlement.

[39] Cf. A. Korybski, M. Myślińska, *Słuszność postępowania mediacyjnego* (*w świetle teorii dyskursu*), „Studia Iuridica Lublinensia" 2011, t. 15, p. 69.

[40] Cf. W. Sadurski, *op. cit.*, p. 69.

[41] K. Antolak-Szymanski, O.M. Piaskowska, *op. cit.*, p. 97. The legislation basically does not interfere in the course of mediation, it is only limited to articulating the general principles in the Code of Civil Procedure, i.e. the principles of voluntary mediation, confidentiality and impartiality of the mediator.

[42] Cf. A. Kalisz, *op. cit.*, p. 97. According to A. Zienkiewicz, mediation proceedings have "an informalized and flexible character, adaptable to the needs of a specific case and facilitating unhindered communication between the parties, without having to focus on secondary, complicated formal aspects which often considerably slow down the pace of proceedings, including strict time limits or cumbersome linguistic precision" (A. Zienkiewicz, *op. cit*., p. 238).

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which especially concerns mediation in civil matters. The course of mediation cannot be predetermined and predicted[43]. There are various variants of rules or stages of mediation[44]. The form of a particular mediation case depends on the parties to the dispute and the mediator[45].

Attempts to discussion about procedural fairness in mediation are undertaken in the literature; for example by A. Zienkiewicz, and also by A. Kalisz who nonetheless redirected her reflection to the notion of dialogue in her later works[46]; the authors try to transpose the theory of discourse by writing about mediation discourse being a part of implementation of the communication-based vision of law, state, and society[47]. This discourse is supposed to be based on the principles of speech ethics and ideal speech situation[48] – it is to be procedural fairness[49], but this is a very idealizing, wishful-thinking approach. It may be doubtful whether a specific transition or rather the implementation of these principles to mediation proceedings are justified. According to Ch. Perelman, the objective of any conceivable or formulatable theory of discourse is to persuade or strengthen recognition by the public, or simply to 'win the dispute'[50]. It is doubtful whether it is realistic to implement these requirements in mediation. The ideal speech situation as defined by J. Habermas is criticised in the literature for impossibility of its implementation, to which the author of this approach responds with assuming the contrafactual character thereof[51]. Some argue that the entire Habermas' theory is a classic example of an 'unrealistic utopia'[52]. One could also ask a question how many mediators are

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[43] K. Antolak-Szymanski, O.M. Piaskowska, *op. cit.*, pp. 205–206. Cf. R. Flejszar, K. Gajda-Roszczynialska, *Alternatywne metody rozwiązywania sporów ze szczególnym uwzględnieniem mediacji – postępowanie cywilne*, [in:] *Mediacja. Teoria…*, p. 176.

[44] Mediation in civil matters is characterized (and distinguished) by a very high flexibility and autonomy of the participants to the proceedings in terms of detailed rules, selection and chronology of the stages, and the possibility of affecting the course of the proceedings. A. Zienkiewicz, *op. cit*., p. 292.

[45] Cf. A. Kalisz, *op. cit*., p. 109.

[46] *Ibidem*. About an optimistic model of mediation discourse see more in: A. Zienkiewicz, *op. cit*., pp. 71–156.

[47] A. Kalisz, A. Zienkiewicz, *Wymiar sprawiedliwości a mediacja*, [in:] *Rozdroża sprawiedliwości we współczesnej myśli filozoficznoprawnej*, red. B. Wojciechowski, M.J. Golecki, Toruń 2008, pp. 272–273.

[48] Cf. A. Korybski, M. Myślińska, *op. cit*., pp. 61–62.

[49] Cf. A. Zienkiewicz, *op. cit*., pp. 139–140. It is worth quoting the footnote on this work: "In some cases of communication based on the principles of speech ethics, it is possible to allow in the mediation discourse so-called social lies, 'white lies', which are generally used to implement the directive of tactfulness and politeness and can lead to the management of conflicts in mediation – if this is, however, consistent with the will of both sides of the mediation discourse and does not distort the essence (nature) of that discourse" (*ibidem*, p. 139).

[50] J. Stelmach, *op. cit*., p. 121.

[51] K. Opałek, *Studia z teorii i filozofii prawa*, Kraków 1997, p. 36.

[52] Cf. L. Morawski, *op. cit*., p. 84.

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aware of these rules, and how many of those aware apply them, and in how many cases of use we can be sure that these rules have not been infringed. This applies to e.g. equality of parties (equal opportunities for discourse participants)[53]; truthfulness (propositional truthfulness), and honesty; moreover, doubts may concern the principles of (normative) correctness, strength of a better argument, or freedom from coercion (internal, external)[54]. It should also be stressed that the language (communication) skills of the parties (a party) can be generally low and poor[55]. It should be added that as regards communication skills, the legislation provides for that a mediation settlement may be incomprehensible[56] or may contain contradictions[57]. Furthermore, a problem of the lack of professionalism of mediators, as some surveys indicate, may occur.

To sum up, procedural fairness is hardly present in mediation, but we maintain that the rules of procedural fairness are only a means leading to substantive fairness[58], the compliance with requirements of procedural fairness does not guarantee substantive fairness of a decision to resolve the dispute, whose implementation in mediation is extremely problematic due to the other issues as presented above.

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To conclude all the considerations, it must be stated that mediation is not for striving for justice. It is not assumed in mediation that the resolution is to be fair, it is not the point.

And one more remark: we think that the institution of mediation is necessary, it has a number of advantages and is important, nonetheless the current practical significance of this form of dispute resolution is very small, even marginal. Also, it needs to be pointed out that this study presents only an outline of the problem.

[53] The literature on the subject notes that "there is no real equality of parties in the vast majority of disputes". Cf. A. Korybski, *op. cit*., p. 154.

[54] Cf. A. Kalisz, *op. cit*., p. 148.

[55] There is no requirement for consistency of expression in the mediation discourse.

[56] Thus, difficulties may also occur at the level of mutual intelligibility between actors of the discourse.

[57] Article 183^{14} § 3 of the Polish Code of Civil Procedure.

[58] Therefore, the absence of procedural fairness (failure to adhere to its rules) does not exclude, in theory, the fairness of the decision concluding (resolving) the dispute. It does not exclude a fair settlement (resolution) in the sense of substantive fairness.

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STRESZCZENIE

W artykule podjęto zagadnienie sprawiedliwości decyzji rozwiązującej spór w mediacji. Rozważania dotyczą mediacji w sprawach cywilnych. W stosunkach cywilnoprawnych, nawiązując do klasycznego rozróżnienia Arystotelesa, które jest punktem wyjścia wszelkich poważnych rozważań o sprawiedliwości, na sprawiedliwość rozdzielczą (*iustitia distributiva*) i sprawiedliwość wyrównawczą, chodzi o sprawiedliwość wyrównawczą (*iustitia commutativa*). Autor wskazuje przeszkody, jakie pojawiają się, by można było mówić o sprawiedliwości decyzji rozwiązującej spór w mediacji. Dotyczą one w szczególności problemu ustaleń faktycznych oraz istoty ugody. W artykule podjęto ponadto zagadnienie sprawiedliwości proceduralnej, której normy (reguły) w postępowaniu mediacyjnym nie są realizowane. W konkluzji autor stwierdza, że istotą mediacji w sprawach cywilnych nie jest dążenie do sprawiedliwości; w mediacji nie zakłada się, że rozwiązanie ma być sprawiedliwe,

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nie o to chodzi. Podkreślono jednakże, iż instytucja mediacji jest potrzebna, ma zalety, jest ważna – niemniej aktualnie praktyczne znaczenie tej formy rozwiązywania sporów w polskim systemie prawnym jest niewielkie.

Słowa kluczowe: mediacja; mediacja w sprawach cywilnych; sprawiedliwość; sprawiedliwość wyrównawcza; sprawiedliwość proceduralna

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