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Decision-Making Approach in the Process of Mediation

Podejście decyzyjne w procesie mediacji

ABSTRACT

Mediation is a legal institution used in international, supranational, and state disputes. A wide range of legal cases in disputes arise include economic, civil, labour or family matters and it is not a closed catalogue. Mediation can be seen as a set of decision-making processes, of which the mediator's decision-making process is essential for the outcome of mediation. I propose a study to be carried out on the institution of mediation using a decision-making approach in the light of an interdisciplinary review of the results of research that may be relevant to the project, for example from the perspectives of logic, psychology, sociology, and neuroscience. The research will also include elements related to computer-aided decision making and artificial intelligence, and the issues of confidence and emotion will also be included in order to balance the participation of artificial processes. As a result of the research, an SSM (support, stimulate, manage) strategy will be proposed, taking into account the model course of decision-making in mediation with a focus on the mediator's decision-making processes. The article provides a preliminary reflection and announcement of the start of work on the topic of decision-making approaches in mediation, with a call for discussion, addressed to the academic and professional community. The research is conducted in the Academic Mediation Centre operating at the Faculty of Law and Administration of the Maria Curie-Skłodowska University (Lublin) and within the research group – Central & Eastern Mediation Research Group.

Keywords: mediation; mediator; decision-making approach; artificial intelligence; psychological decision theory; organizational game theory

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INTRODUCTION

It is as early as Aristotle who claimed that man is a social unit, and that living alone is not in our nature. In spite of being part of society, we are constantly realizing our desires within ourselves and striving to fulfil them, thus pursuing our interests. Interests are individual and sometimes bundled with the interests of others. From time to time, we meet individuals whose interests cannot be fulfilled without interfering with the interests of others.[1] This is how the dispute arises. This mechanism is typical of all legal orders. Disputes do not always need to be heard by court, as many cases can be resolved by non-coercive means of interference. Negotiations are an extremely effective way of working, but in the event of more fervent disputes it is the participation of an impartial third party that ensures a settlement which is fair to the parties. A mediator cannot and should not justify his or her actions by the authority of the State. It is the principles accepted and then adhered to by the parties to the proceedings which guarantee that mediation is properly carried out. Some of the principles have legal legitimacy due to their incorporation into normative acts (e.g. the principles of voluntariness, impartiality or confidentiality), but some fall outside the existing legal order, sometimes being incorporated through internally applicable law into the legal order (e.g. the principle of respect). As a mediator with long-standing practice, while also professionally dealing with the theory of law, I continuously find problems in mediation, which after a short elaboration become topics for scientific reflection. In this article, I propose a general plan of research on decision-making processes in mediation, in particular those of the mediator, and to inspire a scholarly discussion, because the subject, despite having been already addressed by scholars across the world, certainly needs to be redefined with a new perspective adapted to changing social conditions.

MEDIATION – LAW – DECISION-MAKING PROCESS

Mediation is a visible and significant normative phenomenon in various legal cultures, although in the area of continental positive law we should be cautious when speaking of its significant impact on managing disputes in real terms.[2] Year by year, however, this form of response to a dispute seems to become more and more popular and is likely to gain in importance. This situation is due to several factors usually occurring together. Undoubtedly, we will find elements that justify

[1] See the tenets of the Harvard Negotiation School: R. Fisher, W. Ury, B. Patton, *Dochodząc do tak. Negocjowanie bez poddawania się*, Warszawa 2016, chapters I and II.

[2] The Internet is full of information about the quantitative or percentage indication of the use of mediation in various legal systems.

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the decision to enter mediation based on immersion of the individual in society and his or her pro-social attitude.[3] The primary character may be given to the conciliatory nature of mediation, and therefore the resolution rather than settlement of a legal dispute. The benefits of conciliatory dispute resolution occur not only for the individuals directly involved in the dispute but also for the social environment, both in a narrower sense and broader sense. The positive consequences of perceiving mediation as a method of non-coercive dispute resolution in society can be psychological, economic, sociological and philosophical/axiological. We can treat dispute resolution as an individual good that is a component of the common good, therefore a valuable initiative in itself as well as for ourselves. We must not overlook that it is not only these factors that determine the choice of mediation. No less important is the growing importance of material truth, which is very different from the concept of formal truth typical of formalised legal processes. The assimilability of the institution of mediation is also influenced by its considerable adaptability in currently applicable law, as a result of the small number of provisions and their uncomplicated nature. In the course of actual legal disputes, the use of mediation is decisively influenced by factors that may form the background but which are extremely important, i.e. low time intensity and low costs.[4]

Research on mediation is carried out by scholars of many disciplines, such as law, sociology, psychology. The research results have a measurable impact on the knowledge and understanding of the process that is part of ADR, and through them we learn about the implications of mediation in different social arrangements. For legal practitioners, mediation may be one of special institutional-normative mechanisms for the deliberate fulfilment of obligations or rights by participants in mediation proceedings.[5] It is a legal proceeding with a normatively regulated basis, where the decisions taken during the proceeding have legal significance, either directly or indirectly, for those involved in the proceeding. At the same time, mediation is one of the possible ways to reliably and correctly understand and clarify one's own legal situation in relation to that of others. The need to understand one's own legal situation requires the use of heuristics in addition to the logical reasoning in the strict sense inherent

[3] I refer at this point to pro-social behaviour in the broad sense, sometimes referred to as altruist behaviour, although one must be cautious about treating these concepts as synonymous. See D.T. Kenrick, S.L. Neuberg, R.B. Cialdini, *Psychologia społeczna*, Gdańsk 2002, p. 438; J. Śliwak, *Altruizm i jego pomiar*, "Roczniki Psychologiczne" 2005, vol. 8(1), pp. 121–138.

[4] Costs of a material nature (e.g. financial) and immaterial nature (e.g. emotional commitment).

[5] This issue has been addressed in my doctoral dissertation titled *Poufność mediacji* (*Confidentiality of Mediation*) prepared at the Department of Theory and Philosophy of Law in the Faculty of Law and Administration of the Maria Curie-Skłodowska University (2020). The dissertation was supervised by Professor Andrzej Korybski. Not entirely published.

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in professional entities.[6] Obviously, the conclusions of such reasoning are rooted in practical knowledge and related intuitions and experience and, although heuristics do not guarantee the correctness of the findings made, they will be an extremely useful way of action, especially in the first stage of mediation.[7]

Referring to continental positive law,[8] one of the main drivers of the institutional development of mediation in the European area is the position of the European Union, implemented using the formal-legal instruments within the competence of this organisation.[9] Mediation is seen as a legal institution through which the individual participates in a decision concerning him or her.[10] The supranational European structure has for many years promoted the development of alternative dispute resolution (ADR) methods, particularly mediation, considering this way of resolving legal disputes as adequate in terms of its positive consequences for the participants in the dispute and the community as a whole.[11] Undoubtedly, an element strengthening the pro-mediation attitude in EU member states is the 'harmonisation' of law at the level of the community members and teleological interpretation when reconstructing the legal norms established by the EU bodies. The phenomenon of 'harmonisation' of law can be observed not only within the EU, but more widely as a result of growing globalisation at the economic and social levels, resulting from increased migration across the globe. This situation may accelerate in the decades to come.

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[6] Heuristics is an unreliable rule of procedure justified by experience and affecting the evaluation process. See A. Holska, *Teoria podejmowania decyzji*, [in:] *Zarządzanie, organizacje i organizowanie – przegląd perspektyw teoretycznych*, ed. K. Klincewicz, Warszawa 2016, p. 243.

[7] Note the creative thinking method of 'synectics' developed by W.J.J. Gordon of the Cambridge University (1955). See W. Limont, *Synektyka a zdolności twórcze. Eksperymentalne badania stymulowania zdolności twórczych z wykorzystaniem aktywności plastycznej*, Toruń 1994, p. 15.

[8] The paper has been written from the perspective of positive law due to the place of origin and residence of the author hereof, but it should be admitted that the manner of generalisation of conclusions gives the possibility to use them in various legal cultures.

[9] I refer not only to the formal sources of EU law, but also to the so-called soft law, e.g. Green Paper on ADR of 2002.

[10] Even in the preamble of the Charter of Fundamental Rights of the European Union (OJ C 202/389, 7.6.2016) we can see an emphasis on the individual, support for sustainable development and the conclusion that rights have their respective counterpart obligations. On mediation as a legal institution forming part of the contemporary European legal culture, see A. Kalisz, *Mediacja jako forma dialogu w stosowaniu prawa*, Warszawa 2016, p. 13 ff.

[11] See Commission of the European Communities, Green Paper on Alternative Dispute Resolution in Civil and Commercial Law, Brussels, 19.04.2002, COM(2002) 196 final; 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 136/3, 24.5.2008); Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (OJ L 186/57, 11.7.2019); Regulation (EU) No. 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No. 2006/2004 and Directive 2009/22/EC (OJ L 165/1, 18.6.2013).

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I define law as a human creation, a system of norms and legal institutions, the intrinsic characteristic of which is the existence of the right and obligation,[12] created as a result of communication action of members of society.[13] The way of understanding the law is always the result of logical thinking, in terms of so-called colloquial logic, and emotions.[14] However, law is changing all the time, not necessarily as a matter of lawmaking activity, but as a result of changes in cognitive processes, often in a form far from understanding.[15] Law is therefore a mental creation, experienced and realised in the context of social life. It occurs as a real psycho-social phenomenon occurring in connection with situations occurring in many social systems, taking into account the vertical and horizontal social structures. Law should be studied at many levels, taking into account various aspects of its social existence. It is also a dynamic relationship and we should therefore see it as a phenomenon in action. Such understanding of law results in embedding it in the context of communication relations between members of society, where the course of communication processes and their quality are essential. Essential is the structure of the communication process together with the psychophysical capabilities of the subjects, characterised by the realisation of the importance of message in the sender-addressee relationship. The proper course of the communication process makes it possible to understand the message and thus creates an opportunity for agreement.[16] This notion of law leads us to assume that the most important for understanding law is perceiving it in a given social system. When examining law, we should always enclose it within a social, territorial and temporal framework. The dynamics of understanding law varies with regard to the factors covered.

The advent of the era of information society[17] has led to rapid changes in the understanding of law and even a well-functioning legislative machine, along with

[12] J. Lande, *Nauka o normie prawnej*, "Annales UMCS sectio G (Ius)" 1956, vol. 3(1).

[13] I refer here to J. Habermas' theory of communicative action. See J. Habermas, *Pojęcie działania komunikacyjnego*, "Kultura i Społeczeństwo" 1986, vol. 30(3), pp. 21–31.

[14] K. Kosacka, *Język i parajęzyk wypowiedzi o emocjach. Podmiotowe uwarunkowania*, Lublin 2019, p. 17 ff. See also the correlation between emotions and rational thinking in decision-making: D. Hess, A.C. Bacigalupo, *Enhancing Decisions and Decision-Making Processes through the Application of Emotional Intelligence Skills*, "Management Decision" 2011, vol. 49(5), pp. 710–721. The definition of emotion has been subject to significant change since the announcement of L. Petrażycki's psychological theory of law. See K. Imbir, *Odmienność emocji automatycznych i refleksyjnych: poszukiwanie zróżnicowania neurobiologicznego i psychologicznego*, Warszawa 2012 (doctoral dissertation), https://depotuw.ceon.pl/bitstream/handle/item/67/Kamil_Imbir_interdyscyplinarna_rozprawa_dokrorska.pdf?sequence=1 (access: 10.11.2023).

[15] The issue relates to the semantic change of a word or expression as a lexeme, taking place at the level of speaking. See S. Dubisz, *Nauka o języku dla polonistów*, Warszawa 1998.

[16] Other perspective on the terms of 'comprehension' and 'understanding' is proposed by M. Zieliński (*Wykładnia prawa. Zasady, reguły, wskazówki*, Warszawa 2002, p. 49 ff.).

[17] See the concept of information society and implication of the phenomenon: A.P. Wierzbicki, *Teoria i praktyka wspomagania decyzji*, Warszawa 2018, pp. 9–86. See the concepts of post-truth, soft and

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adjusting the directives of interpretations in the application of law, have not kept pace with the dynamics of social changes translating into the understanding of law. The results of three phenomena seem to have a significant impact on the understanding of law in the surrounding reality. The first will be the need for the external integration of legal sciences, especially with psychology, sociology and IT science.[18] Research in the field of neuroscience that explains the biological-chemical action of the brain in terms of decision making, including biased choice, is crucial.[19] The second phenomenon that determines our understanding of law is that research results can be applied immediately to society and the economy. This is related to the perception of reality as rapidly changing. Last but not least, scientific reflection on law will allow us to adapt to the requirement of sustainable development in society.[20]

The question of decision is at the level of research in the so-called decision theory. Although the phenomenon related with decision-making processes has been noticed for thousands of years, both terminology and research on decision-making processes are an achievement of the 20th century.[21] Many sciences, in which the decision of the individual can be adopted as a focal point of action (e.g. law, economics, political science, psychology), employ the decision-making approach. The decision-making approach can also be used as a scientific method, with, of course, adaptation of the criterion of the type of reasoning as inductive, deductive, axiological or mixed.[22]

"The decision-making process comprises a logically related group of thought operations, arranged in an appropriate order, allowing for the assessment of the decision-making situation and the choice of the most advantageous option. The triggering factor of decision-making processes is a problematic situation"[23] – that is, it will be an orderly set of cause-and-effect links occurring inside the decision-making centre. The problem may be well-structured or unstructured,[24] and the division

improved truth: J. Balcewicz, *Społeczeństwo informacyjne w czasach cyfrowej rewolucji – o zjawisku bańki informacyjnej i jego następstwach*, 4.10.2019, https://cyberpolicy.nask.pl/spoleczenstwo-informacyjne-w-czasach-cyfrowej-rewolucji-o-zjawisku-banki-informacyjnej-i-jego-nastepstwach/# (access: 14.2.2023).

[18] As part of the contemporary reflection on law, one should analyse the consistency of the theoretical and research model characterised by multiple sources of scientific knowledge crossing the classification of disciplines. Cf. K. Kosacka, *op. cit*., p. 14.

[19] One of the research activities will require keeping track of the achievements of neurosciences to adapt them, if applicable, to the research on decision-making processes in mediation. See R. Cecchi, F. Vinckier, J. Hammer et al., *Intracerebral Mechanisms Explaining the Impact of Incidental Feedback on Mood State and Risky Choice*, "e-Life" 2022.

[20] For more, see P. Kłos, *Perspektywy badawcze mediacji*, [in:] *Teoria i dogmatyka prawnicza. Księga jubileuszowa dedykowana Profesorowi Leszkowi Leszczyńskiemu*, eds. A. Korybski, B. Liżewski, Lublin 2023, pp. 247–254.

[21] L. Buchanan, A. O'Connell, *A Brief History of Decision Making*, 2006, https://hbr.org/2006/01/a-brief-history-of-decision-making (access: 14.2.2023).

[22] In more detail, see Z.J. Pietraś, *Decydowanie polityczne*, Warszawa–Kraków 1998, pp. 22–26.

[23] A. Holska, *op. cit.*, p. 239.

[24] *Ibidem*, pp. 229–240.

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is based on the non-measurability of unstructured problems. The decision-making centre may be single-actor or multi-actor.

In the terms of jurisprudence, the decision-making process will continue to be the same process, but is considered at the level of execution of law. The constituent elements of the process will entail adopted assumptions, including a set of events described using the conceptual grid already developed.[25] The possibility of analysing legal phenomena in the context of the decision-making approach gives the possibility to take a different look at law and extract the 'situational' aspect of law.[26] The decision-making process is now a significant element of reflection on law, although the application in mediation proceedings will involve significant changes in its structure and content. I propose using the decision-making process to explain the phenomena in occurring in the mediation process as steps that lead to making legally relevant decisions.[27] Naturally, when working on a decision-making approach in mediation, one should review the set of instruments already developed and adapt part of the conceptual grid. The use of the phase nature of the decision-making process, legal decision, etc. will have to be subject to considerable transformation due to the distinction of the legal process of mediation.[28]

METHODOLOGICAL OVERVIEW[29]

The research problem to be discussed is a developed theoretical and legal analysis of the decision-making approach in mediation proceedings, the elements of which in a well-structured system may constitute a set of instructions for a mediator, having a model nature, and their application makes it possible to achieve the

[25] The issue of decision-making approach is contributed by the Lublin centre of theory of law, in which both the application and making of law have been presented in the light of decision-making processes. See A. Korybski, L. Leszczyński, *Stanowienie i stosowanie prawa*, Warszawa 2021, pp. 51–54.

[26] *Ibidem*, p. 52.

[27] A legally relevant decision is any decision that directly or indirectly affect the legal situation of persons covered by the field of operation of the decision.

[28] I found in the world literature several studies on the decision-making approach in mediation. However, their content by no means goes in line with my approach to the problem. For example, see L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System*, "Notre Dame Law Review" 2003, vol. 79(1); O. Shapira, *A Theory of Sharing Decision-Making in Mediation*, "McGeorge Law Review" 2013, vol. 44(923), pp. 923–960.

[29] Taking into account the acceptable length of the text proposed and the desire to present the basic assumptions of research work in the field of decision-making in mediation, I have decided not to present in the paper the current state of research and the conceptual apparatus. The research field is also not presented, although it has its subjective and objective boundaries. In the current state of research, the spatial framework of research is blurred, so this issue is not discussed either. These elements will be complemented in the monograph on decision-making processes in mediation which is currently under elaboration.

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main goal of mediation while maintaining praxeology, as part of real-life mediation proceedings.

The research problem concerns the mediator and other entities participating in the mediation process, and the basis for the application of the institution of mediation is a legal dispute. Nevertheless, the research problem thus formulated is of a general nature, which is why clarification is required in the form of detailed research questions I will try to answer.[30]

A question of initial importance for further analysis is: **Can the decision-making approach be applied to the mediation process?**

I hypothetically assumed that the decision-making approach can be used in mediation, and with the appropriate use of the tools developed and in accordance with the adopted work procedure, the mediator has the opportunity to use decision-making processes towards achieving the main goal of mediation.

A question of fundamental importance from the point of view of explaining the research problem is: **What is the extent of use of the decision-making approach by the mediator and parties?**

I consider decision-making processes as a system typical of a given situation due to the entities involved, and thus dependent on mutual influence. I have assumed that the main actor in an analysis of decision-making processes in mediation is the mediator. It is the mediator who supports, stimulates and manages his and participants' decision-making processes. Moreover, he is the driver element, which means that the modelling of decision-making processes in mediation will be encumbered with some generality, which increases when one wants to get closer to reality.

The decision-making processes of the entities participating in mediation are aimed at explaining and understanding norms of an obligation-entitlement nature, and their content results from a logical analysis of the situation and emotions, therefore the conducted research is cognitively and interpretatively oriented.

The issue of examining decision-making processes, including praxeology, aimed at achieving the main goal of mediation, is a difficult issue to explore. Access to the research material is limited due to the structural principle of mediation confidentiality, which often means that mediators and mediation participants are unwilling to deliberate on the details of mediation work and discuss the course of mediation outside the group of people directly involved. This is justified by the topics discussed during mediation, during which the negotiation covers issues which, according to its participants, should remain confidential.[31] Regardless of the type of mediation (economic, family, labour, penal, etc.) the confidentiality of mediation is one of the

[30] The order in which the questions are asked (and the resulting order of answers) is important, since only obtaining the first of the questions asked will allow answers to subsequent ones.

[31] See the general conditions that justify the structural principle of confidentiality of mediation: P. Kłos, *Poufność mediacji. Analiza teoretycznoprawna*, Lublin 2021, pp. 33–35.

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main reasons behind mediation proposal or submission to the resolution of the case with the help of this legal institution. The method that allows us to avoid the problem of the accuracy of examining mediation is the introspective experience recognized in the sociology of law, owing to which I can use my own experience and that of people practising the profession of mediator in my research work.[32]

Identification of the research problem allowed for the initial selection of research methods that could be used in the research to be conducted. Despite the interdisciplinary nature of the phenomenon in question, I treat the decision-making process basically as a legal issue, which is why I considered the following methods to be appropriate: legal-dogmatic method extended by researching substantive legal sources and enriched with selected elements of the 'socio-legal' method;[33] comparative legal method; method of analysis and logical construction.[34] The method also adopted, but which performs a binding and selective function, recognized in the sociology of law, is the aforementioned introspective experience.[35]

[32] I use in my research work the approach of mediators from different legal areas, including positive law and common law. My participation in the German Mediation Research Group (ForMed) and resulting scientific and practical contacts, establishing and operation of the C&EEMRG and my research work at the Department of Theory and Philosophy of Law in the Faculty of Law and Administration of the Maria Curie-Skłodowska University, where ADR is one of research areas, all were a helpful experience in the elaboration of decision-making approach.

[33] R. Banakar, M. Travers (eds.), *Theory and Method in Social-Legal Research*, Oxford 2005; ADCO Law, *Legal Research Methods in Legal Problem Solving*, 7.3.2022, https://adcolaw.com/blog/legal-research-methods-in-legal-problem-solving (access: 11.2.2023). See also W. Jedlecka, *O metodzie socjologicznej w badaniu prawa*, "Studia Erasmiana Wratislaviensia" 2014, vol. 8, pp. 181–197.

[34] I use this method taking into account two activities, i.e. analytical work on the research material, with a reduction to simple components, and a holistic view of the phenomenon examined, while maintaining a logical sequence of events from initiation to the intended goal. Such assumptions of the research method allow conclusions showing the link between input data and the course of the phenomenon and the intended goal.

[35] In research into the decision-making process, I will use methods from other social sciences taking into account the psychological orientation of the interpreter. See M. Marody, *Sens teoretyczny a sens empiryczny pojęcia postawy. Analiza metodologiczna zasad doboru wskaźników w badaniach nad postawami*, Warszawa 1976, pp. 11–12, 14; S. Nowak, *Metodologia badań społecznych*, Warszawa 2007, pp. 80–84. I consider using a decision-making approach method where I take an inductive decision-making analysis as a criterion for the type of reasoning. The use of this method is facilitated by my experience of many years of work as a mediator and broad contacts in the community of mediators. I have the possibility to incorporate my own and other mediators' experiences into the programme in order to formulate general conclusions based on behavioural analysis. In more detail, see Z.J. Pietraś, *op. cit*., pp. 22–26. I consider using the conceptual analysis known as the 'Canberra style'. See M. Johnston, S.-J. Leslie, *Concepts, Analysis, Generics and the Canberra Plan*, "Philosophical Perspectives: Philosophy of Mind" 2012, vol. 26(1), pp. 151–152.

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DECISION-MAKING APPROACH IN THE PROCESS OF MEDIATION – SELECTED GENERAL PROBLEMS[36]

1. Initial remarks

The research concerns the course of the mediation process, taking into account the role of the mediator in guiding the decision-making processes of the participants in the proceedings. Thus, the focus of the research is on the subject of the organisation of mediation with the intention of achieving the intended goal. The overarching value, i.e. the possibility to look at mediation through decision-making situations, as a kind of arrangement of actors occurring in the proceedings, is preserved. With the assumptions thus set, praxeology will be of primary significance, and the decision-making situations taking place in the decision-making processes will be of a both determined and random nature.[37] The model course of decision-making processes presented in the article will be normative in nature, so the examination of decision-making processes will not consist of a description of the behaviour of mediation participants. The aim of the research includes the formulation of a structured set of behavioural directives for the mediator. In the course of the research, I will seek to limit the evaluative point of view (my own) by drawing on discussions among academics and practitioners.

In building a toolkit for use in mediation work, the focus will be on the dynamics of decision-making processes in mediation, taking into account the interdependence of applicable law and 'real-life' law, together with the impact on the situation of mediation participants. This brings the approach to the topic closer to the so-called objective theories of legal interpretation, postulating that legal norm should be understood taking into account the specific social situation, where it seems difficult to establish the meaning of the norm.[38] Nevertheless, the applicable law is only one of many determinants of decision-making processes in mediation. Unlike law-making processes, mediation is a legal procedure in which the role of

[36] This paper presents selected general problems. The entirety of the research contains much broader material, including such problems as: the role of time in decision making as a factor restricting emotions in favour of logic; the workload associated with understanding the problem related to a legally-relevant decision; biological and artificial memory; control of information, including the possibility of replicating information without human involvement; predicting future consequences of one's actions in the long term.

[37] Cf. the division of decision-making situations proposed by A. Korybski, Z. Szeliga, M. Żmigrodzki: H. Komarnicki, *Decyzje polityczne i proces decyzyjny*, [in:] *Wprowadzenie do nauki o państwie i polityce*, eds. B. Szmulik, M. Żmigrodzki, Lublin 2007, p. 293.

[38] Where legal interpretive problems arise, a party to the mediation may consult a legal professional, who will concretise the norm by reducing its meaning to the needs of specific facts of the case. See K. Opałek, J. Wróblewski, *Zagadnienia teorii prawa*, Warszawa 1969; L. Leszczyński, *Zagadnienia teorii stosowania prawa. Doktryna i tezy orzecznictwa*, Kraków 2004, p. 75.

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the applicable law is secondary. Nevertheless, this background cannot be ignored because nowadays the functioning of the individual is largely determined by the applicable law. The fulfilment of most of the major tasks of man as a subject in society involves the direct or indirect use of applicable law, whether in the form of the performance of obligations or the exercise of rights. In mediation, a bottom-up function of education about law is implemented because all agreed arrangements should be compliant with the applicable legal order.

An important element is the initiation of decision-making processes. In the case of mediation, this will be two events to take place cumulatively: a) the occurrence of a legal dispute, i.e. a certain event resulting from the juxtaposition of the law in force in a given community and the factual state. The rights and obligations arising from a legal dispute thus understood are perceived differently by at least two of the participants in the dispute; b) the initiation of the mediation procedure as a formalised response to the dispute. In real terms, the mediation will be initiated through a request for mediation under a mediation agreement or a referral by a competent entity.[39]

2. A look at mediation from the perspective of decision-making processes

I define making a decision as expressing a position on a given case. It may be assumed that there is a right to take a decision as the competence of a specific entity under the normative basis.[40] Within the area of the research carried out, I extend the subjective scope of the right to persons involved in the decision-making process but who do not have a formal authority to make a decision. The identification of such entities is possible by establishing their actual influence on the wording of the decision.[41] The consequence is to assume that the mediator's declaration of will results from multiple determinants taking place during the course of the decision-making process.[42] This is so because there is a phenomenon in mediation, which I define as *decision-making participation*. It is the result of the interpermeation of decision-making processes and the results of decision-making processes of

[39] In the Polish legal order, I understand the concept of 'initiation of mediation' as a formal beginning of the mediation process. It occurs upon submission of a request for mediation based on a mediation agreement or due to the issuance of a relevant decision during a trial or administrative proceeding.

[40] By legal basis for decision-making, I mean a competence-setting legal norm arising from universally or internally applicable legal regulations.

[41] In the research perspective, the issue of decision-making right, the question of the actual rather than the formal decision-making centre of a party in mediation, is one of the key ones.

[42] The adopted position of understanding the right to decide results in the distribution of legal responsibility for decisions made. With this way of understanding the right, an example of the legal possibility to react under the Polish legal order, will be the possibility to use recourse claims.

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all mediation participants. The *decision-making participation* will consist of a real collective effect on the outcome of decisions made during mediation. Any decision, except for the first one which initiates the mediation process, will be a consequence of previous decisions (see Figure 1). I accept that competent to make decisions in mediation are 'actors', i.e. the mediators, parties, attorneys, and other persons involved in mediation (e.g. experts).[43] The mediator plays an essential role in the process, enabling mutual communication[44] and organising the resulting information system. This perception of decision-making processes in mediation entails that we focus on the actual course of decision-making and not on the formal powers to make a decision. At the same time, the course of decision-making processes takes into account the interaction of decision-making processes and actions of all people involved in mediation, taking into account the strong interconnection.[45]

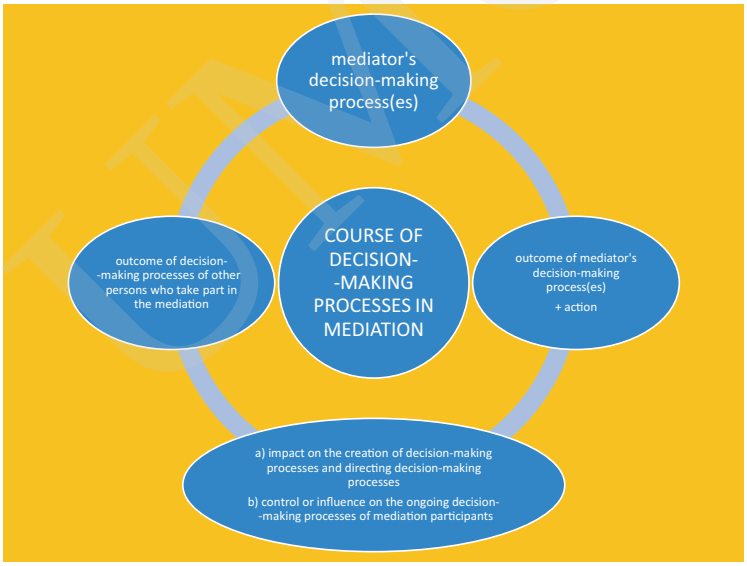


Figure 1. Course of decision-making processes in mediation

Source: own elaboration.

[43] A. Bluj, M. Jagaciak, M. Perchuć-Żółtowska, K. Pliszczyńska, *ABC partycypacji obywatelskiej – poradnik dla organizatorów procesów partycypacyjnych*, 2018, https://partycypacjaobywatelska.pl/strefa-wiedzy/biblioteka/publikacje/abc-partycypacji-obywatelskiej-poradnik-dla-organizatorow-procesow-partycypacyjnych (access: 18.2.2023).

[44] Bringing about a state of effective decision-making with the correct application of communication entails consideration of three elements: persuasion, emotion, and cultural background. See D. El Habel, *Rola mediatora w tworzeniu środowiska sprzyjającego efektywnej komunikacji*, 19.5.2022, https://im-campus.com/pl/role-of-the-mediator-in-creating-an-environment-conducive-to-effective-communication (access: 19.2.2023).

[45] D.W. Miller, M.K. Starr, *Praktyka i teoria decyzji*, Warszawa 1971, p. 23.

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3. Information for the purposes of decision

This is a general feature that undoubtedly determines the entire decision-making process. The core framework of information, content, method of presentation, time of presentation, tools used for its management and processing will affect partial and final decisions. Thus, information is a tool with which we achieve the goals set in the mediation process. Properly prepared and served, it helps in proposing new solutions, supports and stimulates the parties and the mediator in their decision-making processes. The 'circulation' of information to achieve the main objective of mediation is an extremely difficult task, but nonetheless possible, and as such should be focused on the process of intersubjectivisation. Information is intersubjectivised when the information provided by the participants in the mediation is collected and generalised.

4. Aim of the research and aims of mediation

The aim of the study will not be the same as the aim of mediation, which may vary depending on the mediation strategy adopted.[46] We should dedicate a few sentences to the legally relevant objectives associated with the performance of mediation. The formulation of the objective will result from a specific need, with consequences in the form of the exercise of rights or legal obligations. The number of objectives to be achieved by participants in mediation may vary. Their implementation may not be directly aimed at producing legal effects but at carrying out a specific task they have chosen by giving their consent to participation in mediation. In the case of participants in a mediation procedure, the aim will be the information of subjective value (utility) that the person intends to achieve.[47]

The mediator adopts the main goal of the mediation and the objectives to achieve it. The main goal of mediation is often complex, as clarification of one's own situation in relation to other participants in mediation may include less general statements, e.g. making a decision on the continuation of the judicial case or waiving a claim. I distinguish the intended goal or goals of mediation from the intentional[48]

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[46] The aim of the mediation discourse is to understand one's own situation in relation to other dispute participants. See P. Kłos, *Poufność mediacji…*, p. 34. J. Stelmach and B. Brożek (*Optymalizacyjny model dyskursu mediacyjnego*, [in:] J. Stelmach, B. Brożek, *Metody prawnicze. Logika, analiza, argumentacja, hermeneutyka*, Kraków 2006, pp. 79–80) propose otherwise, pointing out that the main aim of the discourse is to find the right, rational solution. .

[47] Definition adopted from J. Kozielecki (*Psychologiczna teoria decyzji*, Warszawa 1977, pp. 40–41).

[48] It will always be geared towards achieving a specific objective, i.e. it will be: a) a directional system; b) related to the selection of resources; c) retaining the criterion of return; d) avoiding repetition; e) achieving the consumption criterion (obtaining subjective usefulness with the intended objective). *Ibidem*, pp. 42–44.

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behaviour of the mediator, burdened with the possibility of allocating the partial objectives to be achieved, which is dependent on the dynamics of phenomena in the mediation process.[49]

5. Mediation as emanation of human decision-making processes with elements of artificial decision-making process

The decision-making process, as a phenomenon occurring in the human mind, is gradually hybridized with the artificial process, which prompts the analysis of the decision-making process with the participation of decision-making support cybernetic systems. It seems obvious that at the level of modern development, we can talk about the involvement of artificial processes in human decision-making[50] and we can associate artificial processes with both artificial intelligence (AI)[51] and cybernetic decision support. And it is the cybernetic decision support that is characteristic of the current level of development. The operation of cyber-organisms has been on the offensive in legal practice and concerns a growing number of entities with a direct or indirect legal link, e.g. CaseCrunch.[52] The use of AI and cybernetic decision support in law is already obvious, while the scope of the use of artificial forms remains in still the sphere of discussion. The use of artificial processes will provoke the greatest discussion in the area of judicial application of law.[53] The hybridization of artificial and human thought processes in mediation has occurred, as well as in other forms of human action. Of course, an artificial process only supports

[49] *Ibidem*, p. 42.

[50] I perceive as an artificial process the making of partial or final decisions exclusively by cyber-organism. The issue of both AI and cyber forms of decision support have been present in law for several decades, but we have seen drastic developments in this area in the last few years. See H. Surden, *Artificial Intelligence and Law: An Overview*, "Georgia State University Law Review" 2019, vol. 35(201), passim; S. Bokota, *Artificial Intelligence w prawie. Teraźniejszość i przyszłość*, [in:] *Prawo a nowe technologie*, eds. S. Tkacz, Z. Tobor, Katowice 2019, passim; K. Różanowski, *Sztuczna inteligencja: rozwój, szanse i zagrożenia*, "Zeszyty Naukowe Warszawskiej Wyższej Szkoły Informatyki" 2007, vol. 2(2), passim.

[51] The concept of intelligence should be distinguished from self-consciousness.

[52] S. Bokota, *op. cit.*, pp. 68–69. Information on the participation of cybernetic decision support systems in the legal market is widely available on the Internet.

[53] The rejection of a non-human decision-maker in judicial cases at the moment has psychological and sociological causes. However, it seems that we can say that the situation may change in few decades. The forms of socialization, and therefore the way of interaction, can change. See M. Juza, *Wpływ komputerów i Internetu na sposób zaspokajania ludzkich potrzeb afiliacyjnych*, [in:] *Technologiczno-społeczne oblicza XXI wieku*, eds. D. Gałuszka, G. Ptaszek, D. Żuchowska-Skiba, Kraków 2016, pp. 81–88; D. Gałuszka, G. Ptaszek, D. Żuchowska-Skiba, *Uspołecznianie technologii u progu czwartej rewolucji przemysłowej*, [in:] *Technologiczno-społeczne oblicza XXI wieku…*, p. 15 ff. – here, in particular, it is worth paying attention to the trend of scientific reflection known as Actor-Network Theory (ANT) and to the comments on technological solutionism and techno-optimism.

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the decision-making process, primarily in the form of providing an information resource that would not be possible to collect without cybernetic decision support. For a significant part of decisions, we need a certain information resource, which is important for the mediator as well as for the parties or their representatives. It is important to have access to legal information and to computer decision support systems for resolving legally relevant situations.

For the moment, AI as a mediator in a dispute remains in the futuristic sphere. In addition to the problems associated with the current resistance of the human being to decisions taken by a cyber organism, there is also the issue of the degree of complication of conversation topics, behaviours, partial decisions or the combination of the effects of verbal and non-verbal communication. The cyber-organism at the moment is not able to process all the nuances of the case, all the more the mediator is required to master the entire package of the so-called soft competences, which is a necessary element of the mediator's skills. Hypothetically, considering the operation of the AI mediator, the most temporally appropriate solution seems to be a not fully autonomous artificial system similar to the solution in the project 'a human in the loop'. The artificial system decides on its own until it encounters a decision going beyond its capabilities or where a decision made in an artificial process is socially inappropriate.[54] It is worth mentioning that in the near future, with the development of cyber-organisms, the dematerialisation of work will take place, including in the profession of mediator.[55]

6. The relationship between quality of decision-making processes in mediation and the degree of trust

What makes modern mediation a legal institution that does not fit into the rules of judicial procedure is the way it is conducted, characterised by the requirement of trust.[56] Not only is the mediation procedure confidential, but it also requires a certain degree of trust, not so much between the parties, but of the party to the mediator and, more specific, to the way in which the mediator conducts the mediation. Indeed, it is not a matter of the party trusting the mediator unreservedly but trusting the mediator procedurally. The mediator is there to ensure the cooperation of the parties, therefore to be a form of catalyst for the information exchanged

[54] See H. Surden, *op. cit.*, pp. 1320–1321.

[55] The dematerialisation of work, or the automation of work, gives rise and will continue to give rise to many conflicts, the most serious of which are conflicts over the right to work, access to information and knowledge, and the interpretation of democracy. See A.P. Wierzbicki, *op. cit.*, pp. 18–22.

[56] See the definitions and elements regarding the theory of trust: M.J. Stern, K.J. Coleman, *The Multidimensionality of Trust: Applications in Collaborative Natural Resource Management*, "Society and Natural Resources" 2015, vol. 28(2), pp. 118–119. Most theories focus on defining trust as a psychological phenomenon, in which entity A trusts entity B to perform correctly C. See *ibidem*, p. 119.

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between the parties, while at the same time giving them time and opportunity to analyse it. It is therefore necessary for the parties to be able to trust the mediator about the quality of the legal proceedings conducted by him, as a procedure that is lawful, transparent and binding on the parties to the proceedings. There is a move towards cooperation and not towards forcing compliance with legal procedures.[57] By reaching a common agreement, the parties also place more trust in the voluntary fulfilment of their obligations without the need for coercive enforcement.

7. The role of logic in mediation as an aid to guiding decision-making processes

The conduct of mediation requires certain linguistic competences and the ability to describe reality correctly in a way that matches the cognitive capacities of the parties. Knowledge of the principles of logical semiotics and, more specifically, the mediator's skills in the subject of logical semantics and logical pragmatics, are helpful. Knowing the principles of logical semiotics, the mediator can assume the role of a 'translator' of the ideas in statements for the parties to the proceedings. Furthermore, the mediator must be aware of the usually direct relationship with the background of the applicable law and use this knowledge in the translation of the parties' messages. A correct understanding of the subject matter concerned is required for the possible preparation and acceptance of a settlement agreement, as well as for the decision to pursue the dispute further with judicial means.[58]

A new branch of logic related to question sentences, the so-called erotetic logic, has emerged and been developed in the last few decades. Mediation is the art of asking questions as well as the ability to assess the correctness of statements. It seems that knowledge of communication is not sufficient for a quick and effective mediation, and the educational material for mediators should be supplemented with elements of erotetic logic.[59] The use of the rules of erotetic logic in the construction of questions in mediation is illustrated in Figure 2.

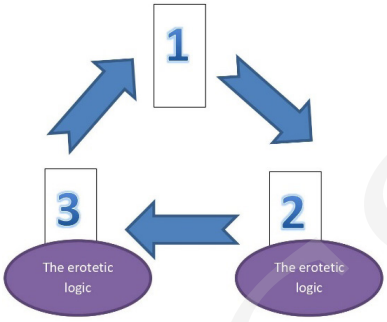
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[57] *Ibidem*, p. 125. See also the concept of transaction trust in three dimensions (contractual, communication, competence), which can also take place in mediation in the context of negotiation activities: Agile PMO, *Zaufanie fundamentem współpracy w zespole (projektowym) (3/3)*, https://agilepmo.pl/w-kolejnej-i-ostatniej-juz-czesci (access: 2.3.2023).

[58] See K. Ajdukiewicz, *Logika pragmatyczna*, Warszawa 1965, part 1 (*Słowa, myśli i przedmioty*) and part 2 (*O wnioskowaniu*); O. Nawrot, *Wprowadzenie logiki dla prawników*, Warszawa 2014, chapters I–V i IX; K. Pawłowski, *Podstawy logiki ogólnej. Skrypt dla studentów kierunków humanistycznych*, Warszawa 2016, chapters II–V i XII.

[59] See A. Wiśniewski, *Questions and Inferences*, "Logique and Analyse" 2001, vol. 173–175, pp. 5–43.

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Note: 1. The mediator knows what topic he is supposed to get an answer on. He must have a reason for asking questions → this is not erotetic logic; 2. The mediator must construct a question about exactly what the aim of the question is → we are interested not so much in the aim of the question, but in the form and content of the question – application of erotetic logic; 3. The mediator receives an answer → he must compare the question asked with the answer received in light of the aim of the question – application of erotetic logic.

Figure 2. Structure of mediator's work in mediation with the use of questions – principles of erotetic logic

Source: own elaboration.

MODEL REPRESENTATION OF DECISION-MAKING PROCESSES IN MEDIATION (IN ORDER TO ACHIEVE THE INTENDED GOAL OF MEDIATION)

As part of discussing detailed research questions, in particular the second one, I intend to develop for the mediator an SSM strategy (support, stimulate, manage), which contains an overview of the actions that the mediator can and should perform in order to achieve the main goal of mediation. The model will be prepared taking into account the degree of generality that allows the mediator to perform cognitive and interpretative activities, corresponding to the cultural conditions and solutions of the law in force in different legal orders. The model will refer to the mediation process, taking into account the interaction between all actors involved in the proceedings. The interactions fall within a defined field of activity (the course of mediation) and their occurrence and consequences are expected to bring closer the objective of mediation. The mediator is in charge of the occurrence and course of the interaction. The field of action is characterised by dynamism,[60] limited number of actors and short occurrence of the phenomenon.

[60] The dynamic perspective on legal phenomena in mediation allows the decision-making approach. See C. Olaya, M. Ruess, *The Sociological Theory of Crozier and Friedberg on Organized Action Seen through a Simulation Model*, 2004, https://citeseerx.ist.psu.edu/viewdoc/download;jsessionid=2EBB41D1CB9A86820E3B5AD742790417?doi=10.1.1.120.4180&rep=rep1&type=pdf (access: 19.3.2023), passim.

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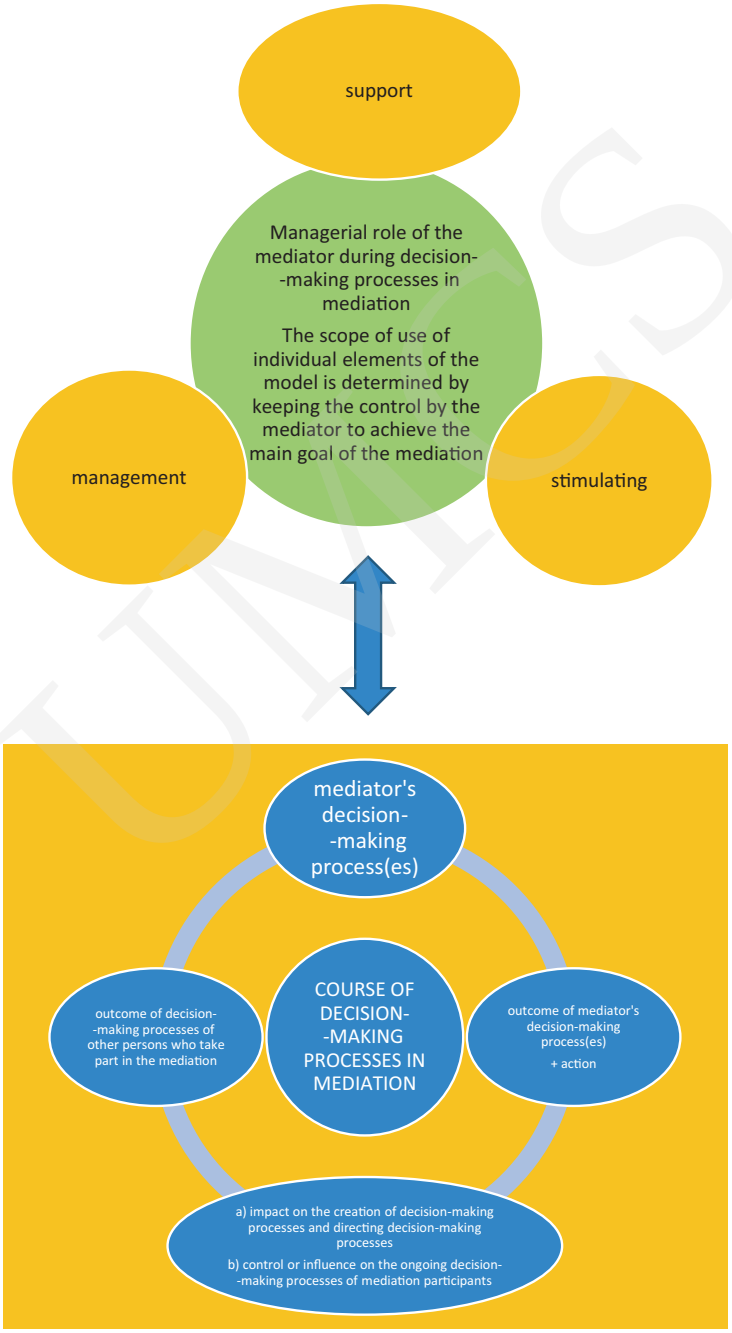


Figure 3. The SSM strategy structure. Course of decision-making processes with intentional moderator's activities taken into account

Source: own elaboration.

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The model also aims to provide a set of concepts to distinguish and guide different decision-making processes that occur in mediation. The model will be a tool for taking an appropriate argumentative path in mediation; and this, combined with rhetorical skills, logical reasoning and factual justification of assumptions, maximizes the effectiveness of the mediator's actions. The simplicity of the model is to allow its immediate application to society and the economy.[61]

In order to ensure the correctness of the process and the information collected, the mediator should pay attention to the sequence of actions. First, he should examine whether a particular action affects the decision-making situation of the parties, then collect information on the prospective change in subsequent decisions of the parties and consider the question of a possible reward for the parties to the proceedings for the efforts made. Thus, the mediator aims to maximize the positive effects of the model, focusing not so much on the final results, but on variables that significantly affect the behaviour of the participants in the mediation.

The SSM strategy, justified by the instrumental mediator's approach, consists of three key elements. Their application, in whole or in part, will not be sequenced, and will depend on the starting level in the decision-making situations of the parties to the proceedings.[62] The graphical form of the model is shown in Figure 3.

Three components of the model:

1. *Support* will consist in the selection and practical use of mediation and communication techniques, as well as of modified negotiation techniques, and will aim to enable the parties to understand their own legal situation in relation to the other participants in the mediation. The argumentation process should be equipped with a linguistic structure and skilful use of language functions as an informative function. Furthermore, impressive, factual and quasi-expressive functions help to properly embed the argumentation process in a party-friendly environment. Proving should be left to the parties.
2. *Stimulation* – an activity aimed at stimulating the mental processes of participants in mediation in order to find targeted ways to resolve a dispute with legal elements. Theories of decision, in particular psychological ones, will be used for this stage. When stimulating the parties, the mediator must bear in mind

[61] In the work on the model, theories of motivation will be used, with particular emphasis on V. Vorm's expectancy theory, extended with L.W. Poter's and E.E. Lawler's guidelines and the equity theory proposed by J.S. Adams. In more detail, see R. Karaś, *Teorie motywacji w zarządzaniu*, Poznań 2003, passim. This results from the attempt to capture the subjective approach of mediation participants and the dynamic character of the process.

[62] As an initial level, I understand the situation of selecting the tools available to the mediator on the basis of indicators relating to the parties to the proceedings (knowledge, competence, emotional attitude, ability to understand the subject of the dispute).

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that the essential characteristic of the parties is their interdependence and that action to achieve positive effects should be stabilised and structured.[63]

3. *Management* – the final component of the model will be the strategic management of the results of partial objectives. The mediator focuses on understanding how the actors involved in the mediation work, as well as the organisation, and decides on the transfer of information provided to participants in time and on the reformulation of the information provided. This determines the order of the problems addressed and the quality of the approach to the problems under consideration. The core of this part is the ability to select specific information and to abstract from less relevant information, which results in the mediator encumbered with a large part of the responsibility for the sum of the decisions taken in the mediation and their quality.[64]

CONCLUSIONS

As a consequence of the dynamic nature of the modern world, in order to carry out scientific research, the results of which would be applied to society and the economy, it is necessary to use an interdisciplinary approach and research methods enabling to grasp the phenomenon of change. And this is what I'm trying to do with my research methods and the achievements of other sciences.[65] Mediation, as a legal institution, does not constitute a significant set of rules contained in law. Its adaptability to different legal orders is astounding, likewise the effectiveness of mediation. In positive-law countries, it still does not have a proper place in the hierarchy of legal institutions used in disputes, but this situation may change. In this article, I proposed the direction of research into the institution of mediation, with the use of the decision-making approach as central.

Mediation is fundamentally different from judicial, administrative or arbitration proceedings. It is not only a question of the scope of the procedure, which is broad in the cases in question, but of the decision-making processes during the proceedings and their impact on the final outcome of the proceedings. In judicial proceedings, we can speak of a single decision-making process, sometimes involving several people depending on the type of procedure and the instance in which the case is decided. Similarly in administrative proceedings or administrative judicial proceedings. In the case of mediation, there are at least three decision-making processes, and at least one is aimed at guiding the results of other decision-making processes.

[63] See C. Olaya, M. Ruess, *op. cit.*, passim.

[64] D.W. Miller, M.K. Starr, *op. cit.*, p. 23.

[65] This does not mean that conducting interdisciplinary studies in social sciences is compulsory, but it is still necessary for achieving correct results.

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At the same time, enriching research that is essentially theoretical with the results achieved in other sciences, including neurosciences, is to lead to the relativisation of results and the possibility of their application in the most effective way possible.

I cannot ignore in my research the computer decision support systems and the development of AI that permeate our functioning.[66] As I mentioned earlier in this paper, the process of hybridisation has already taken place in the decision-making process and will probably continue to grow. The negative effects of hybridisation can be limited as discussed in the part of concerning procedural trust. While logical thinking will be an argument for increasing the contribution of cyberorganisms to the procedure, including mediation, the issue of trust and communication skills, as well as emotions inherent in every person, will be a natural barrier to too extensive use of cyberorganisms.

In this paper, I had to include information about work on the SSM model. It seems that the results of the research on the issues presented in the article will be the basis for the model being developed. Such a model seems to be necessary to preserve the proper implementation of mediation institutions and there are no more substantial requirements for mediators in most legal orders already studied. Knowing the difficulties faced by mediators today, i.e. legal, communication, logical, psychological issues, etc., it seems at least practical to be able to acquire through education a model designed to make work easier.

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[66] For the time being, AI occurs in a weak version, as it solves the problems to which it is intended, i.e. it cannot analyse and solve every problem presented by man. See A. von Bonin, S. Malhi, *The Use of Artificial Intelligence in the Future of Competition Law Enforcement*, "Journal of European Competition Law and Practice" 2020, vol. 11(8), pp. 468–471; H. Surden, *op. cit.*, pp. 1306–1337.

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ABSTRAKT

Mediacja to instytucja prawna mająca zastosowanie w sporach międzynarodowych, ponadnarodowych i państwowych. Szeroki wachlarz spraw prawnych, w których występuje spór, obejmuje sprawy gospodarcze, cywilne, pracownicze czy rodzinne i nie jest to katalog zamknięty. Mediacja może być postrzegana jako zespół procesów decyzyjnych, z których zasadnicze znaczenie dla wyniku mediacji ma proces decyzyjny mediatora. Proponuję przeprowadzenie badań nad instytucją mediacji z zastosowaniem podejścia decyzyjnego w świetle interdyscyplinarnego przeglądu wyników badań mogących mieć znaczenie dla projektu, np. z płaszczyzny logiki, psychologii, socjologii i neuronauki. Do badań zostaną włączone również elementy dotyczące komputerowego wspomagania decyzji oraz sztucznej inteligencji, a celem zrównoważenia udziału procesów sztucznych włączone będą zagadnienia związane z zaufaniem i emocjami. W wyniku przeprowadzonych badań zaproponowana zostanie strategia SSM (*support*, *stimulate*, *manage*), z uwzględnieniem modelowego przebiegu procesów decyzyjnych w mediacji i z naciskiem na procesy decyzyjne mediatora. Artykuł zawiera wstępne rozważania na ten temat oraz stanowi zapowiedź dla środowiska naukowego i praktycznego, z wnioskiem o dyskusję i rozpoczęcie prac w tematyce podejścia decyzyjnego w mediacji. Badania prowadzone są w Akademickim Centrum Mediacji działającym przy Wydziale Prawa i Administracji Uniwersytetu Marii Curie-Skłodowskiej w Lublinie oraz w ramach grupy badawczej Central & Eastern Mediation Research Group.

Słowa kluczowe: mediacja; mediator; podejście decyzyjne; sztuczna inteligencja; psychologiczna teoria decyzji; teoria gry organizacyjnej