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The judge as a promoter of peace

1. Introduction

This paper highlights the singular role of a "peace promoter" or "peacemaker", which nowadays may be assumed not only by a lawyer acting professionally as a attorney, negotiator or mediator but also by a judge who engages in various, legally admissible modalities of amicable resolution of disputes (especially civil ones)[1]. This echoes the idea of "first to conciliate, not judge"[2] and aligns with a more holistic understanding of administering justice.[3] A judge may undertake efforts aimed primarily at a more sustainable, multifaceted management of interpersonal and group conflicts, thus minimizing their negative aftermath and possibly eliminating their causes, improving communication relations and promoting grounds for potential future cooperation

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1 On the role of the lawyer as peacemaker as well as the nature and application of peacemaking in legal dispute management, see: A. Zienkiewicz, *Prawnik jako peacemaker – przeprosiny, przebaczenie, pojednanie w opanowywaniu sporów prawnych* [Eng. *Lawyer as peacemaker – apology, forgiveness, reconciliation in dispute resolution*], "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2019, no. 4, pp. 43–57. For more, see, e.g., J.K. Wright, *Lawyers as peacemakers. Practicing holistic, problem-solving law*, American Bar Association, Chicago 2010; *cf.* also: P. Banasik, *Sąd zaangażowany społecznie – pożądany kierunek zmian* [Eng. *A socially engaged court – the desired direction of change*], Wydawnictwo C.H. Beck, Warszawa 2017.

2 On the idea of "first to conciliate, not judge", see, e.g., O. Jauering, *Kilka uwag o celu procesu cywilnego* [Eng. *Some remarks on the purpose of the civil process*], "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1984, no. 3, pp. 61–72.

3 On the holistic approach to the judiciary and the administration of justice, see: A. Zienkiewicz, *Holizm prawniczy z perspektywy Comprehensive Law Movement. Studium teoretycznoprawne* [Eng. *Legal holism from the perspective of Comprehensive Law Movement. A theory of law approach*], Difin, Warszawa 2018, pp. 309–402.

between the parties to the disputes. In a situation where the parties are affected by psychological, relational, social or living standard-related issues, especially serious ones, the traditional court proceedings do not offer any certainty of permanent elimination of the causes of their problems and disputes, formation of peaceful interpersonal relations or positive personal transformation, which ensure no relapse into negative attitudes and behaviours that violate the law or other social norms.[4]

In the 1990s, Polish scholar Andrzej Korybski observed that the crisis of the institution of the state court as a peculiar state office, which proceeds based on the contention of the parties and detached from social life, prompted (under the influence of social needs) a transformation of the traditional structure and functioning of the court, which would lead to a gradual blurring of the – still distinct – boundary between court proceedings and other, more peaceful ways of managing disputes. These transformations are linked to a return to the idea of the "court of public peace" and the lawyer as the "creator and guardian of public peace".[5] A similar conclusion was advanced by Lech Morawski, who, when discussing the most important changes in the procedures of application of law (in the light of functional and social differentiation, the increasing complexity of social systems, and their unpredictability), mentioned the increased activism of courts, the transition from the classical (substantive, subsumptive) to the post-classical (procedural, argumentative) conception of the judicial process, and the development of forms of justice which were alternative to court proceedings.[6] Jolanta Jabłońska-Bonca also noted the rising importance of methods of resolving legal conflicts differently than by way of classical court proceedings, from conciliation and settlement as part of judicial procedures (internal alternative) to out-of-court modalities: negotiations, moderation, mediation and arbitration, i.e., an agreement "freed" to a large extent from the straitjacket of formal organizational rules (external alternative).[7]

The various alternatives to the traditional adjudicative mode of dispute management, both basic (negotiation, mediation or arbitration) as well as hybrid and phased

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[4] *Cf.* K. Płeszka, J. Czapska, M. Araszkiewicz, M. Pękala, *Mediacja. Teoria, normy, praktyka* [Eng. *Mediation. Theory, norms, practice*], Wolters Kluwer, Warszawa 2017, p. 96; A. Rękas, *Mediacja w Polsce w prawie karnym* [Eng. *Mediation in Poland in criminal law*], Ministerstwo Sprawiedliwości, Warszawa 2011, p. 18.

[5] A. Korybski, *Alternatywne rozwiązywanie sporów w USA – studium teoretycznoprawne* [Eng. *Alternative Dispute resolution in the USA – A theory of law approach*], Wydawnictwo UMCS, Lublin 1993, pp. 60–61, 184, 188–189, 192–193; *cf.* A. Bieliński, *Prawnik i jego misja w ramach procedur alternatywnego rozwiązywania sporów w warunkach kryzysu klasycznego wymiaru sprawiedliwości* [Eng. *Lawyers and their mission in the framework of Alternative Dispute Resolution procedures in the conditions of crisis of the classical justice system*], "Kwartalnik ADR. Arbitraż i Mediacja" 2013, no. 2(22), pp. 25–34.

[6] L. Morawski, *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian* [Eng. *Main problems of contemporary philosophy of law. Law in the process of change*], Wydawnictwo Prawnicze LexisNexis, Warszawa 1999, pp. 152–153.

[7] J. Jabłońska-Bonca, *Prawnik a sztuka negocjacji i retoryki* [Eng. *Lawyers and the art of negotiation and rhetoric*], Wydawnictwo Prawnicze LexisNexis, Warszawa 2002, p. 15; *cf.* also: *eadem*, *Prawnik jako negocjator – z problematyki retoryki interpersonalnej* [Eng. *Lawyers as negotiators – from the problems of interpersonal rhetoric*], "Studia Prawnicze" 2001, no. 3–4, p. 140.

forms (multi-step ADR), that now exist in the legal and social reality and undergo continual improvements, as well as the development of amicable procedures available as part of a broader concept of court (implemented with success especially in common law countries through problem-solving courts or multidoor courthouse), validate the accuracy of the positions and predictions formulated by the aforementioned Polish theorists and philosophers of law at the turn of the 21st century.[8] At present, it would also appear that the holistic approach to legal disputes is less and less an idealistic academic postulation, as it also gradually becomes a realistic perspective for the Polish judiciary. Furthermore, the scope of the notion of "justice" in subject-related and object-related/functional terms is undoubtedly expanding (e.g., in the inclusion of court mediators in the system of ordinary courts[9]).[10] Following the example of the US legal culture, it may – in addition to the classic judiciary – also encompass the so-called Complementary Forms of Justice, which constitute the essential forms of Alternative Dispute Resolution, having a specific *iunctim* with the court mode.[11] At the same time, such a complement to the traditional judicial functions remains without prejudice to the constitutionally guaranteed right of access to court (which is also multicentrically safeguarded by European and international regulations) and preserves the court's superior position, expressed in its capacity to verify whether the decision of an out-of-court body or the autonomous decision of the parties to the dispute contained in a settlement agreement is lawful and complies with the principles of social co-existence.[12]

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[8] The institutions of Problem Solving-Courts and Multidoor Courthouse and their corresponding orientations: Therapeutic Jurisprudence, Restorative Justice, Procedural Justice, and Holistic Justice are discussed more broadly in: A. Zienkiewicz, *Holizm prawniczy*…, pp. 62–100, 339–402 and the literature cited therein.

[9] For more, see: A. Kalisz, *Mediator jako zawód włączony w ustrój sądów powszechnych – praktyka zmian dotyczących mediacji cywilnej* [Eng. *Mediator as a profession incorporated into the system of common courts – the practice of changes concerning civil mediation*], "Studia Iuridica Lublinensia" 2018, vol. 27, no. 3, pp. 129–142.

[10] On the holistic approach to the judiciary and the administration of justice, see: A. Zienkiewicz, *Holizm prawniczy*…, pp. 310–339 and the literature cited therein.

[11] For more on the nature of Complementary Forms of Justice, see: A. Zienkiewicz, *Studium mediacji. Od teorii ku praktyce* [Eng. *A study on mediation. From theory to practice*], Difin, Warszawa 2007, pp. 227–231; *cf*. A. Zienkiewicz, *Koncepcja sądu otwartego – wzmocnienie pluralizmu form wymiaru sprawiedliwości* [Eng. *The concept of open court – strengthening the pluralism of forms of justice*], in: *Mediacja – nowa droga rozwiązywania sporów* [Eng. *Mediation – a new way of resolving disputes*], ed. A. Rękas, Wolters Kluwer, Warszawa 2011, pp. 29–47; A. Zienkiewicz, *Mediation als eine Form der Justiz* [Eng. *Mediation as a form of justice*], in: *Mediation als Verfahren konsensualer Streitbeilegung. Die deutsche, polnische und ukrainische Perspektive* [Eng. *Mediation as a method of consensual dispute resolution. The German, Polish and Ukrainian perspective*], ed. T. de Vries, Peter Lang, Frankfurt am Main 2012, pp. 3–22. For more on the specific *iunctim* of Complementary Forms of Justice (especially mediation and arbitration) and litigation, see: A. Zienkiewicz, *Holizm prawniczy*…, pp. 334–336.

[12] See: L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu* [Eng. *Polish constitutional law. Lecture outline*], Wolters Kluwer, Warszawa 2014, p. 354. The legal means for the court to verify the correctness (lawfulness or compliance with the principles of social co-existence) of a dispute management decision made in out-of-court proceedings, include, e.g., endorsement of a settlement concluded before a mediator by the court in civil proceedings (Article 183^{14} CCP), or the recognition and declaration of enforceability of a judgment issued by a court of conciliation or a settlement concluded before it (Articles 1212–1217 CCP).

Being part of a broader approach to the administration of justice and amicable resolution of court disputes, the chief aim of this text is to draw attention to the singular role of a "promoter of peace", which nowadays may be fulfilled both by a lawyer who provides legal assistance to a client and by a judge. Discussing the matter from the standpoint of legal theory, the study will first examine the difference between judicial adjudication of disputes and their resolution, including modes based on the practice of peacemaking, which promotes peaceful interpersonal relations and positive personal transformation of the parties to establish between them a state known as positive peace. Subsequently, dogmatic-legal analysis will identify applicable regulations that offer the possibility of implementing, on the initiative or with the assistance of a judge, amicable modes of resolving legal disputes pending before the Polish civil court. In the final part of the study, the domestic normative perspective of civil law will be supplemented with major model assumptions and objectives of a special type of court, the so-called problem-solving courts (developing especially in the USA), where the perpetrator of an offence in conventional court proceedings is given an additional opportunity to effectively counter the causes of lawbreaking and conflicts with members of their community (e.g., stemming from substance abuse or mental disorders), using an individually tailored problem-solving programme, which is coordinated by the judge and implemented by an interdisciplinary team of experts.[13]

2. Participation of the judge in amicable resolution of legal disputes – fostering peaceful interpersonal relations (positive peace)

It should be stressed that there are fundamental differences between adjudicating (issuing a ruling) in a dispute and dispute resolution, which Polish legal theorists interested in the broader category of dispute management have long underscored.[14] When adjudicating a dispute, an impartial and neutral third party (judge, arbitrator) issues a ruling that is binding on the parties whilst relying on heteronomous normative grounds and an established (after an evidentiary hearing) state of affairs (thus, a retrospective approach predominates). On the other hand, the resolution of a dispute consists in its amicable, voluntary settlement through negotiations conducted by the parties themselves

[13] For more, see, e.g., G. Berman, J. Feinblatt, *Judges and problem-solving courts*, Center for Court Innovation, New York 2002; *Problem solving courts. Social science and legal perspectives*, eds. R. Wiener, E. Brank, Springer, New York – Heidelberg – Dordrecht 2013.

[14] The notion of dispute management (including their adjudication, settlement or resolution) was defined and popularized in Polish legal theory by A. Korybski, who maintained that dispute management performs a vital role within the framework of social reality construed as a domain of interlinking phenomena of cooperation, conflict and neutrality. As one of the primary social functions of law, dispute management determines its "substantive characteristics and social significance"– see: A. Korybski, *Alternatywne rozwiązywanie sporów*…, pp. 8, 168–169, 193.

or with the participation of an impartial and neutral third party (mediator, facilitator) who, without imposing a binding decision, in various ways helps them to arrive at an autonomous agreement that takes into account the interests and needs of both parties, creates opportunities for improving their communication or relations, and rebuilding the foundations for future cooperation (prospective approach).[15] It seems that the difference between adjudicating and resolving legal disputes is also becoming ever clearer for the Polish legislator and legal practice, including judicial dispute management. The analysed conceptual distinction is reflected, for instance, in the institution of pre-trial hearings introduced by the lawmakers (by way of the 2019 amendment to the Code of Civil Procedure, hereafter the "CCP"). According to Article 205^5(1)(1) CCP, this instrument resolves a dispute without further hearings, especially a trial.[16] Subsequently, Article 205^6 CCP provides that, at the pre-trial hearing, the judge establishes with the parties the subject-matter of the dispute and clarifies the positions of the parties, also concerning the legal aspects of the dispute; moreover, they should encourage the parties to reconcile and strive for an amicable resolution of the dispute, particularly through mediation. To this end, the judge may seek amicable ways of resolving the dispute with the parties, assist them in formulating settlement proposals and indicate ways and consequences of dispute resolution, including financial corollaries.[17]

At this point, it should be noted that dispute resolution may be pursued through various institutions or forms of amicable dispute management, ranging from court settlement, through classic negotiations or problem-solving mediation, to practices characteristic of the so-called peacemaking, the objective of which is not only to bring about an agreement between the conflicting parties but also to improve their relationship in a way which leads to reconciliation and the establishment of a state known as positive peace between them.[18] A lawyer assuming the role of a peacemaker focuses primarily on effectively preventing the emergence, resurgence and escalation of conflicts, as well as aims to achieve actual and lasting resolution of legal problems and disputes, given the various aspects of human life in which they may take advantage of non-legal sciences (notably psychology and sociology) and collaborate with experts in other fields as part of the so-called collaborative team (e.g., therapists, doctors, mediators or social workers).[19] Peacemaking is based on a positive understanding of the

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[15] For more, see: A. Kalisz, A. Zienkiewicz, *Mediacja sądowa i pozasądowa. Zarys wykładu* [Eng. *Mediation in court and out of court. Lecture outline*], Wolters Kluwer, Warszawa 2014, pp. 21–23.

[16] See: the Act of 4 July 2019 – On amending the Act – Code of Civil Procedure and some other acts (Journal of Laws of 2019, item 1469).

[17] See: the Act of 17 November 1964 – Code of Civil Procedure (consolidated text: Journal of Laws of 2023, item 1550).

[18] For more, see: D. Noll, *What is peacemaking?*, Mediate.com, 17 May 2001, http://www.mediate.com/articles/noll4.cfm (accessed: 10.07.2024); *Conflict resolution and peace education: Transformations across disciplines*, ed. C. Carter, Palgrave Macmillan, New York 2010; J.K. Wright, *Lawyers as peacemakers*…, *passim.*

[19] For a broader discussion concerning the cooperation between the lawyer and the collaborative team in different types of cases and branches of the law, see, e.g., S. Gutterman, *Collaborative law: A new model of dispute resolution*, Bradford Publishing Company, Denver 2004.

term "peace" (positive peace), according to which a conflict situation may be overcome by the parties working together to reach an agreement that, as far as possible and needed in a given case, may be preceded by mutual understanding, apology, forgiveness, and reconciliation.[20] Positive peace is distinct from the so-called negative peace, which consists merely of neutralizing negative communication between the parties to the dispute (who remain hostile towards each other) and causing acts of violence or other negative behaviours to stop. It is usually achieved through coercion, mutual dependence, restrictions, control, or the authoritative intervention of third parties empowered to impose sanctions. The essence of positive peace, on the other hand, lies in eliminating the causes of conflict, restoring friendly relations, and building a foundation for future cooperation between the conflicting parties, as well as in their lasting positive behavioural and personal (including moral) transformation.[21] Positive peace is attained mainly through various forms of amicable dispute management based on the win-win solution paradigm, with due regard for the interests of the social environment and heteronomous or autonomous sources and formulas of justice.[22]

Thus, as may be seen, judicial adjudication in legal disputes is substantially different from their resolution by peaceful, amicable forms (e.g., court settlement, out-of-court negotiations or mediation), particularly when it is additionally underpinned by or results in acts of apology, forgiveness or even reconciliation between the parties, which usually go beyond the legal-economic dimension of agreeing on the financial provisions and concluding a settlement.[23]

The current Polish civil procedure law admits adjudication (which is essential to classic judicial proceedings) and affirms the resolution of civil disputes with active participation of the judge. This is consistent with a more holistic understanding of the judiciary and the administration of justice, which is oriented primarily towards permanent, multifaceted conflict management, seeking to minimise the negative effects of conflicts and eliminate their causes (object-related/functional approach). The analysed distinction between adjudication and resolution of legal disputes corresponds with the increasingly underscored range of desirable competences of the judge, also in terms of conflict diagnosis (including determination of its potential for settlement or mediation potential) and use of negotiation and mediation strategies and techniques.[24] It is also reflected in the possibility for the judge to initiate an amicable resolution of a dispute pending before the court (e.g., mediation) or to become directly

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[20] A. Zienkiewicz, *Prawnik jako peacemaker*…, p. 45.

[21] *Ibidem*, p. 45.

[22] *Ibidem*.

[23] The essence and application of reconciliation, apology, and forgiveness are discussed more broadly in: *ibidem*, pp. 47–52.

[24] For more, see: A. Kalisz, A. Zienkiewicz, *Kompetencje mediacyjne sędziego w zakresie polubownego rozwiązywania spraw cywilnych (uwagi na tle nowelizacji k.p.c.)* [Eng. *Mediation competences of a judge in the scope of amicable settlement of civil cases (comments in the context of the amendment to the Code of Civil Procedure)*], "Państwo i Prawo" 2021, no. 10, pp. 90–105.

involved as a peacemaker (whether as a conciliator in conciliation proceeding or by supporting the making of a settlement in the course of a trial).[25] Although the rule expressed in Article 183^2(2) CCP – according to which a professionally active judge cannot be a mediator – still applies, the 2019 amendment to the Code of Civil Procedure, especially the provisions introducing the so-called pre-trial hearing, offers an opportunity to significantly supplement the competence to adjudicate civil disputes with a peaceful resolution, including the pursuit of reconciliation between the conflicting parties, which is either initiated by judges or involves them to an adequate degree. It follows from the explanatory memorandum to the amending bill (hereafter the "Memorandum") that, during pre-trial hearings with the parties or their attorneys, the judge may play the role of a conciliator and apply negotiation and mediation techniques, thus supporting possible future actions of the mediator appointed in the case. Indeed, the bill promoter explicitly stated:

> In the course of such a conversation with the parties, the judge learns how they view the manner in which the dispute may be resolved, which enables them to determine the appropriate way to proceed with the case. Above all, emphasis should be placed on the mediation value of such a meeting with the conflicting parties. The judge should take on the role of a peacemaker, trying to find and highlight to the parties those elements that can put an end to the conflict, while simultaneously containing and suppressing the sources of conflict. It is a matter of seeking ways for the parties to agree, find points of commonality and discover the resulting benefits (…). It will be crucial to use appropriate negotiation techniques in order to achieve the essential outcome, i.e., avoid a lengthy trial. This will undoubtedly result in the need to train judges in that respect (…). At that stage, the judge's activity will complement the actions of the mediators (which, incidentally, may be carried out in subsequent stages of handling of the case).[26]

The judge may promote peaceful forms of dispute resolution in various ways throughout the civil proceedings.[27] At present, legal grounds for the implementation of the idea of "first to conciliate, not judge" may be found primarily in Articles 10 and 223 of the Code of Civil Procedure. Article 10 CCP, one of the general provisions, states that in cases in which conciliation is admissible, the court shall, at any stage of the proceedings, seek to have them amicably resolved, particularly by inviting the parties to mediation. The substance of the Article and its place in the Code leaves no doubt that the civil judge should not only support but also prioritise and actively seek an amicable resolution of a civil case, relying on the institution of court settlement (Article 223 CCP) or, possibly, an out-of-court settlement (Article 917 CCP), urging the parties to enter into mediation (Article 10 CCP, *in fine*). Moreover, under Article 183^8(1), (3) and

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[25] For more, see: *ibidem*, pp. 90–105.

[26] See the Memorandum, pp. 11–12, *Sejm* of the 8th Term, *Sejm* print no. 3137, https://www.sejm.gov.pl/sejm8.nsf/PrzebiegProc.xsp?nr=3137 (accessed: 19.07.2021).

[27] *Cf.* A. Kalisz, A. Zienkiewicz, *Kompetencje mediacyjne sędziego*…, pp. 90–105.

(4) CCP, the court may refer the parties to mediation at any stage of the proceedings, inviting them beforehand to participate in an information meeting concerning the essence and advantages of mediation. Also, prior to the first trial hearing, the court should always assess whether to refer the parties to mediation, having earlier heard the parties in this regard at a closed hearing.

In addition, one cannot fail to note that the judge may promote amicable resolution of a civil dispute through conciliation proceedings, regulated in Articles 184–186 CCP. Article 185 (1^1) CCP, introduced under the 2019 amendment, stipulates that in the request for a conciliation attempt, one should briefly state the case as well as outline the settlement proposals. As the requesting party presents the provisions of the agreement or at least the scope of concessions, the recipient of the request and the court should be reassured that the actual purpose of initiating the conciliation procedure is not only to interrupt the limitation period of the claim. Consequently, this may encourage the other party to enter into negotiations and prompt the judge to at least assume the role of a facilitator who appropriately moderates the parties' communication or assists with correctly drafting the settlement agreement. In the Memorandum, the promoter asserted that the advantage of conciliation actions undertaken at court is that judges are endowed with the authority of the office, which may prove crucial for early resolution of a dispute.[28]

A new regulation pertaining to the pre-trial hearing, provided for specifically in Articles 205^2(1)(1), 205^5(1) and (2), and 205^6(1) and (2) CCP, gives amicable dispute resolution high potential. Pursuant to Article 205^6(1) and (2) CCP, the judge presiding over the pre-trial hearing determines the subject-matter of the dispute and clarifies the positions of the parties, "also concerning the legal aspects of the dispute", which implies not only legal but also non-legal aspects, thus introducing a more holistic approach. At the same time, the judge should encourage the parties to reconcile and strive to resolve the dispute amicably, notably through mediation.[29] To this end, the judge may seek amicable ways to resolve the dispute with the parties, support them in formulating settlement proposals, and indicate the modes and consequences of resolving the dispute, including the financial corollaries. Furthermore, the judge is currently permitted to

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[28] See the Memorandum, p. 11, *Sejm* of the 8th Term, *Sejm* print no. 3137, https://www.sejm.gov.pl/sejm8.nsf/PrzebiegProc.xsp?nr=3137 (accessed: 19.07.2021). It seems that the position of the promoter is too categorical. Practice demonstrates that the presence of a judge may help in its amicable resolution; it may be indifferent, but it may also have a negative impact, thus hampering constructive integration negotiations. If the consistent presence of the judge, who represents the authority of the judiciary, was conducive to the reconciliation of the parties and the conclusion of a settlement, conciliation proceedings would have long proved to be far more successful.

[29] It is observed in civil law scholarship that the competences of the presiding officer concerning amicable dispute resolution have been broadly defined, which means that various modalities are acceptable, from a court settlement and settlement concluded before a mediator to negotiations conducted directly at a pre-trial hearing – see: A. Zieliński, *Uwaga 2 do art. 2056 k.p.c.* [Eng. *Note 2 about Article 205⁶ of the Code of Civil Procedure*], in: *Komentarz do kodeksu postępowania cywilnego* [Eng. *Commentary on the Code of Civil Procedure*], eds. A. Zieliński, D. Flaga-Gieruszyńska, Legalis 2019.

provide the parties with a preliminary opinion on the case, also concerning the possible outcome of the proceedings, which, as envisaged in the Memorandum, is intended to incentivise the parties to reach a reasonable compromise (Article 156[1] CCP).[30]

Bearing the above in mind, it may be concluded that within the framework of the Polish civil procedure, judges have been granted a broader scope to act, not only as regards adjudicating disputes, but also resolving them peacefully and actively as peacemakers (using negotiation or mediation techniques) or initiators of mediation proceedings, as well as persons who prepare the parties to actively engage in the mediation process (e.g., by diagnosing the suitability of the case for mediation, holding information meetings on mediation, or by explaining the legal position of the parties in terms of the possibility and essence of using various forms of amicable dispute resolution).

3. Main assumptions and objectives of problem-solving courts

To complement the normative perspective of domestic civil law, which allows a judge to actively promote amicable dispute resolution and the restoration of peaceful interpersonal relations between the conflicting parties, the following will outline the central assumptions and objectives of a special type of court known as a problem-solving court (developing especially in the USA), in which the offender in conventional court proceedings is additionally allowed to function more peacefully in their social environment by undertaking an effective fight against the causes of their lawbreaking or legal disputes through an individually tailored problem-solving programme, which is coordinated by the judge and implemented by an interdisciplinary team of experts.[31]

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[30] See the Memorandum. P. Rodziewicz notes that the analysed "instruction from the court may motivate the parties' attempt to end the dispute amicably and conclude a settlement. By way of example, if the court indicates that there are grounds for awarding a claim asserted through a complaint, but it is doubtful that the full amount will be awarded, such a message addressed by the court to the parties may make them more inclined to undertake settlement negotiations."– P. Rodziewicz, *Uwaga 3 do art. 156[1] k.p.c.* [Eng. *Note 3 about Article 156[1] of the Code of Civil Procedure*], in: *Kodeks postępowania cywilnego: komentarz* [Eng. *The Code of Civil Procedure: A commentary*], ed. E. Marszałkowska-Krześ, Legalis 2021. The introduction of Article 156[1] into the Code of Civil Procedure also raises concerns about whether the principles of equality and the judge's impartiality will be unaffected. Furthermore, it is argued in the civil law scholarship that suggesting a settlement too early may generate pressure and undermine the implementation of certain procedural guarantees, notably those associated with the principles of adversarialism and availability; see: A. Machnikowska, *Uwagi 12, 14 i 15 do art. 2055 k.p.c.* [Eng. *Notes 12, 14 and 15 about Article 205[5] of the Code of Civil Procedure*], in: *Kodeks postępowania cywilnego. Komentarz do zmian 2019* [Eng. *Code of Civil Procedure. Commentary on the 2019 amendments*], vol. I, ed. T. Zembrzuski, Wolters Kluwer, Warszawa 2019, pp. 149–151, with the jurisprudential and scholarship positions cited therein.

[31] For more, see, e.g., G. Berman, J. Feinblatt, *Judges and problem-solving*…; *Problem solving courts. Social science*…, eds. R. Wiener, E. Brank; A. Zienkiewicz, *Cele Problem-Solving Courts a transformatywny potencjał mediacji w sprawach karnych – kilka uwag z perspektywy idei Comprehensive Law Movement* [Eng. *The objectives of Problem-Solving Courts and the transformative potential of mediation in criminal cases – some remarks from the perspective of the Comprehensive Law Movement*], "Probacja" 2022, no. 4, pp. 91–128.

This novel type of court, referred to as a problem-solving court (hereafter, also as "PSC"), is an increasingly versatile and popular institution which has functioned for years within the common law culture, especially in the US legal system, and is also more and more visible in Australia, the United Kingdom, Canada, and New Zealand.[32] The concept of problem-solving courts was first implemented in the United States, in Miami, Florida, where the first so-called drug treatment court was created in 1989. Several thousand such institutions operate in the US, while the three basic types, i.e. drug treatment court, domestic violence court, and mental health court, have become well established. Each type has its unique characteristics, but all share the goal of applying a more therapeutic and transformative approach to the functioning of the judiciary.[33]

Problem-solving courts represent an attempt to create a specialized institution dedicated to a particular category of cases (e.g., involving drug abuse, domestic violence, mental disorders or illnesses) which, in addition to traditional tasks such as identifying and penalizing the offenders or obliging them to provide redress to the victim, offers two further services as part of a broader approach to administering justice.

First, a party may be assisted in diagnosing the main causes of their issues or disputes (including lawbreaking) arising in their psychological, family, professional or other personal or social sphere of life. Second, they are given access to support in order to eliminate their psychosocial issues through an optimal court programme, e.g., education, treatment, therapy or occupational activation. Support is provided by a dedicated team of various specialists, headed by the judge. The so-called multi-disciplinary team, apart from the judge, may include, e.g., a psychologist, a psychiatrist, an educator, a social worker, a mediator, a police officer, the employer or a family therapist, and even persons close to the party concerned.[34]

The main goals of PSCs are to identify, understand, and eliminate the underlying causes of the parties' issues or disputes and achieve a particular result – the so-called therapeutic or well-being outcome. Ultimately, this is expected to curtail revolving door justice (recidivism), mitigate addictions or symptoms of mental disorders and illnesses, prompt re-socialization, and positive changes in attitudes and behaviours (e.g., enhancing self-direction, self-control, or the ability to refrain from domestic violence) as well as help perpetrators and victims or injured parties in civil cases to function peacefully (also through apology, forgiveness and reconciliation), safely, and responsibly in the family or work environment and society.[35] The goals of the proceedings before the PSCs are usually correlated with appropriate problem-solving tasks selected for the participants, in which the participation of the respondent or defendant

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[32] M. King, A. Freiberg, B. Batagol, R. Hymas, *Non-adversarial justice*, Federation Press, Sydney 2009, p. 14.

[33] M. King, *Solution-focused judging bench book*, Australasian Institute of Judicial Administration Incorporated, Melbourne 2009, p. 18.

[34] S. Daicoff, *Comprehensive law practice. Law as a healing profession*, Carolina Academic Press, Durham 2011, p. 241; M. King, A. Freiberg, B. Batagol, R. Hymas, *Non-adversarial justice*…, p. 82.

[35] S. Daicoff, *Comprehensive law practice*…, p. 35, 254.

is voluntary and often involves a formal behavioural contract made between the judge and the party, as well as a protective (preventive) scheme to preclude repeat offences, known as a relapse plan or rehabilitation plan.[36] Simultaneously, the implemented programmes are geared towards the welfare of the participant (offender) and the interests of the victims (including, if advisable, the establishment of a positive relationship between the victim and the offender), their relatives and the social environment. A proceeding before the problem-solving court, which may be (depending on specific laws, PSC type or nature of the case) instituted before, during, after or even instead of the traditional judicial proceedings, should be offered to persons who have been deemed eligible for such an interdisciplinary mode. Such persons include especially perpetrators of minor offences, persons not yet strongly demoralized, and persons affected by psychosocial issues of which they are aware and which they are willing to overcome.[37] In a PSC proceeding, the parties must learn about and understand the causes of their issues and accept responsibility for the effectiveness of the proceedings which seek to resolve them, while the judge and the multi-disciplinary team play an important but only ancillary role.[38] It should be noted that a party's (e.g., the defendant's) compliance with their behavioural contract obligations is subject to periodic review by the court, and, depending on the person's conduct, they may be incentivized by the judge through a system of rewards and penalties. If the defendant blatantly or persistently ignores the rules, they may be excluded from the programme and have their case referred to a traditional criminal trial.[39] S. Goldberg stresses that PSCs aim to achieve more than the traditional judicial process does (as it focuses primarily on adjudicating the case), i.e., to bring about a positive, visible difference in the lives of the parties, including the offenders and their victims, e.g., by countering recidivism, increasing the safety of victims of domestic violence, reducing aggressive behaviours of perpetrators, promoting sobriety among persons with substance abuse, particularly through their participation in treatment and therapeutic programmes, court supervision, or a system of rewards and sanctions for compliance with or failure to adhere to problem-solving programmes.[40]

The programmes implemented by the PSC are guided by the concepts of both positive human transformation and a more holistic judicial practice. Indeed, the

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[36] See, e.g., B. Winick, *How judge can use behavioral contracting,* in: *Judging in a therapeutic key*…, pp. 227–230; see also: D. Wexler, *Robes and rehabilitation: How judges can help offenders "make good"*, "Court Review" 2001, vol. 38, no. 1, pp. 18–23; *idem*, *Problem solving and relapse prevention in juvenile court*, in: *Judging in a therapeutic key*…, pp. 189–199.

[37] *Cf*., e.g., S. Daicoff, *Comprehensive law practice*…, p. 254.

[38] S. Goldberg, *Judging for the 21st century: A problem-solving approach*, National Judicial Institute, Ottawa 2005, p. 15.

[39] S. Daicoff, *Comprehensive law practice*…, p. 254.

[40] S. Goldberg, *Judging for the 21st century*…, pp. 6–7; for more, *cf*. also: G. Berman, J. Feinblatt, *Judges and problem-solving*…; P. Casey, D. Rottman, *Problem-solving courts: models and trends*, "Justice System Journal" 2005, vol. 26, no. 1, pp. 35–56.

transformation of one's attitude or conduct should involve actions addressed to the "person as a whole" (the holistic notion of approaching legal issues only as a fragment of the entire life situation of a subject of law) and the participation of a multi-disciplinary team or even social actors in a broader sense (e.g., representatives of NGOs or the local community). Here, the goal is to help the party to a problem-solving court proceeding to diagnose their strengths and weaknesses adequately, define their family, professional and social context, and solve their major issues (depending on the type of problem-solving court), which involve deficits in various areas of life: problems with addiction, depression, stress control, lack of education, unemployment, homelessness, financial planning and management, rapport with spouses, children or peaceful formation of interpersonal relationships.[41]

As M. King observes, PSC proceedings based on the so-called 'problem-solving programmes' are multifaceted, as they simultaneously seek to accomplish the fairly difficult task of promoting positive behavioural change in the participants, their well-being, responsibility for their actions, diligent implementation of the court programme, cooperation with the judicial team, and compliance with the applicable legal norms. The ambitious aim of the proceedings is to have the participants personally committed to becoming better people, to a social rehabilitation understood more broadly than just stopping offenders from committing crimes. It is envisioned that the individuals concerned will develop an ability to live constructively and happily while respecting the legal norms of living in a society.[42]

The individual-oriented, all-encompassing nature of problem-solving courts warrants the conclusion that they constitute a new type of court developing in practice. This court is therapeutic and transformative rather than just another specialization of a judicial institution within the traditional structure and functional premises framework.[43] PSCs represent an attempt to inspire reform of the justice system in which the administration of justice endeavours to effectively address crime or public safety issues, while considering the offenders' psychosocial background. In doing so, one relies on dedicated problem-solving programmes that involve a team of experts led by a judge, whose role goes well beyond the traditional courtroom activities or drafting reasons for judgments.[44]

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41 M. King, A. Freiberg, B. Batagol, R. Hymas, *Non-adversarial justice*…, pp. 82–83.

42 M. King, *Solution-focused judging*…, pp. 1–2.

43 M. King, A. Freiberg, B. Batagol, R. Hymas (*Non-adversarial justice*…, p. 142) emphasize that every Problem-Solving Court is a court of specific specialization, while not every court specializing in a particular type of case is a problem-oriented court.

44 *Cf.* observations concerning the holistic approach to the administration of justice in: A. Zienkiewicz, *Holizm prawniczy*…, pp. 309–339.

4. Conclusions

If Polish judges more extensively initiated or became engaged in various modes of amicable dispute resolution (especially in civil cases), it might, in the near or more distant future, contribute to overcoming the traditional perception of the judge, whose sole task is to adjudicate disputes. In effect, their essential judicial competence would be augmented with the role of a peacemaker or conciliator who assists the parties as they resolve their conflicts in a more propitiatory, peaceful manner. The Memorandum aptly underlines that:

> it is important for the judge to be able to draw attention of the parties to the points where their positions might be concurrent, to be active in helping the parties find such circumstances which will bring them closer to an amicable conclusion of the dispute. At the same time, they should be able to tone down those elements of the dispute that strongly antagonise the parties. The administration of justice by judges is not confined to issuing a ruling. From the social standpoint, the conciliation function of the courts appears to be more effective, which the legislator has so far strongly emphasized.[45]

The various conciliatory or transformative roles of the judge are particularly evident in the interdisciplinary institution of the problem-solving court, which relies on the so-called 'holistic' approach to justice (which, in the main, adopts the premises of therapeutic jurisprudence). In this approach the judge, besides their traditional judicial role, often acts in a capacity of the so-called therapeutic agent, behaviour change agent, social worker, peacemaker or motivator.[46] Even though problem-solving courts developed within the common law culture, there are no significant contraindications for this type of holistic dispute resolution institution (appropriately adapted to the realities of a particular state) to be established and function more widely in continental Europe. Although an observable development trend in Poland presumes a multidimensional approach to assistance in or handling of certain cases, speaking of this phenomenon concerning the judiciary would certainly be an overstatement. Nevertheless, Polish courts cooperate with mediation centres, and the police refer individuals to various specialized facilities (including those run by non-governmental organizations) where it is possible to obtain psychological, therapeutic, psychiatric, living, and legal support or enter into mediation. Specializing particularly in offences linked to domestic issues, mental health or addictions, problem-solving courts may also be an inspiration for interdisciplinary expert centres run in Poland in collaboration with representatives of

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[45] See the Memorandum, p. 12, *Sejm* of the 8th Term, *Sejm* print no. 3137, https://www.sejm.gov.pl/sejm8.nsf/PrzebiegProc.xsp?nr=3137 (accessed: 19.07.2021).

[46] B. Winick, *Problem solving courts: Therapeutic Jurisprudence in Practice*, in: *Problem solving courts. Social Science*…, pp. 211–212, 217–228, 231–232.

the authorities and the non-governmental sector.[47] It remains uncertain whether, in the near future, Polish judges, parties to disputes, and their attorneys will actually want to make more frequent use of the amicable resolution possibilities provided in the existing and new legal regulations. However, it should be noted that the catalogue of legislative solutions in this respect is gradually expanding, creating a real opportunity to choose and apply various conciliatory methods of managing legal disputes, also on the initiative or with the active participation of the judge, who promotes the restoration of peaceful social relations.

References

Banasik P., *Sąd zaangażowany społecznie – pożądany kierunek zmian*, Wydawnictwo C.H. Beck, Warszawa 2017.

Berman G., Feinblatt J., *Judges and problem-solving courts*, Center for Court Innovation, New York 2002.

Berman G., Feinblatt J., *Problem-solving courts: A brief primer*, in: *Judging in a therapeutic key: Therapeutic jurisprudence and the courts*, eds. B. Winick, D. Wexler, Carolina Academic Press, Durham 2003, pp. 78–86.

Bieliński A., *Prawnik i jego misja w ramach procedur alternatywnego rozwiązywania sporów w warunkach kryzysu klasycznego wymiaru sprawiedliwości*, "Kwartalnik ADR. Arbitraż i Mediacja" 2013, no. 2(22), pp. 25–34.

Carter C. (ed.), *Conflict resolution and peace education: Transformations across disciplines*, Palgrave Macmillan, New York 2010.

Casey P., Rottman D., *Problem-solving courts: models and trends*, "Justice System Journal" 2005, vol. 26, no. 1, pp. 35–56.

Daicoff S., *Comprehensive law practice: Law as a healing profession*, Carolina Academic Press, Durham 2011.

Garlicki L., *Polskie prawo konstytucyjne. Zarys wykładu*, Wolters Kluwer, Warszawa 2014.

Goldberg S., *Judging for the 21st century: A problem-solving approach*, National Judicial Institute, Ottawa 2005.

Gutterman S., *Collaborative law: A new model of dispute resolution*, Bradford Publishing Company, Denver 2004.

Jabłońska-Bonca J., *Prawnik a sztuka negocjacji i retoryki*, Wydawnictwo Prawnicze LexisNexis, Warszawa 2002.

Jabłońska-Bonca J., *Prawnik jako negocjator – z problematyki retoryki interpersonalnej*, "Studia Prawnicze" 2001, no. 3–4, pp. 135–155.

[47] Problem-solving courts are characterized by openness to collaboration with public institutions and community organizations, through which they engage local support and increase the effectiveness of problem-solving programmes, see, e.g., B. Winick, *Problem solving courts*…, pp. 212–213; G. Berman, J. Feinblatt, *Problem-solving courts*…, pp. 78–86; M. King, A. Freiberg, B. Batagol, R. Hymas, *Non-adversarial Justice*…, pp. 139–140; R. Wiener, L. Georges, *Social psychology and problem-solving courts: Judicial role and decision making*, in: *Problem solving courts. Social science*…, p. 6.

Jauering O., *Kilka uwag o celu procesu cywilnego*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1984, no. 3, pp. 61–72.

Kalisz A., *Mediator jako zawód włączony w ustrój sądów powszechnych – praktyka zmian dotyczących mediacji cywilnej*, "Studia Iuridica Lublinensia" 2018, vol. 27, no. 3, pp. 129–142.

Kalisz A., Zienkiewicz A., *Kompetencje mediacyjne sędziego w zakresie polubownego rozwiązywania spraw cywilnych (uwagi na tle nowelizacji k.p.c.)*,„Państwo i Prawo" 2021, no. 10, pp. 90–105.

Kalisz A., Zienkiewicz A., *Mediacja sądowa i pozasądowa. Zarys wykładu*, Wolters Kluwer, Warszawa 2014.

King M., *Solution-focused judging bench book,* Australasian Institute of Judicial Administration Incorporated, Melbourne 2009.

King M., Freiberg A., Batagol B., Hymas R., *Non-adversarial justice,* Federation Press, Sydney 2009.

Korybski A., *Alternatywne rozwiązywanie sporów w USA – studium teoretycznoprawne,* Wydawnictwo UMCS, Lublin 1993.

Machnikowska A., *Uwagi 12, 14 i 15 do art. 205[5] k.p.c.*, in: *Kodeks postępowania cywilnego. Komentarz do zmian 2019*, vol. I, ed. T. Zembrzuski, Wolters Kluwer, Warszawa 2019, pp. 149–151.

Morawski L., *Główne problemy współczesnej filozofii prawa. Prawo w toku przemian*, Wydawnictwo Prawnicze LexisNexis, Warszawa 1999.

Noll D., *What is peacemaking?*, Mediate.com, 17 May 2001, http://www.mediate.com/articles/noll4.cfm (accessed: 10.07.2024).

Płeszka K., Czapska J., Araszkiewicz M., Pękala M., *Mediacja. Teoria, normy, praktyka*, Wolters Kluwer, Warszawa 2017.

Rękas A., *Mediacja w Polsce w prawie karnym*, Ministerstwo Sprawiedliwości, Warszawa 2011.

Rodziewicz P., *Uwaga 3 do art. 156[1] k.p.c.*, in: *Kodeks postępowania cywilnego: komentarz*, ed. E. Marszałkowska-Krześ, Legalis 2021.

Wexler D., *Robes and rehabilitation: How judges can help offenders "make good"*, "Court Review" 2001, vol. 38, no. 1, pp. 8–23.

Wexler D., *Problem solving and relapse prevention in juvenile court*, in: *Judging in a therapeutic key: Therapeutic jurisprudence and the courts*, eds. B. Winick, D. Wexler, Carolina Academic Press, Durham 2003, pp. 189–199.

Wiener R., Brank E. (eds.), *Problem solving courts. Social science and legal perspectives*, Springer, New York – Heidelberg – Dordrecht 2013.

Wiener R., Georges L., *Social psychology and Problem-Solving Courts: Judicial role and decision making*, in: *Problem solving courts. Social science and legal perspectives*, eds. R. Wiener, E. Brank, Springer, New York – Heidelberg – Dordrecht 2013.

Winick B., *How judge can use behavioral contracting,* in: *Judging in a therapeutic key: Therapeutic jurisprudence and the courts,* eds. B. Winick, D. Wexler, Carolina Academic Press, Durham 2003, pp. 227–230.

Winick B., *Problem solving courts: Therapeutic jurisprudence in practice*, in: *Problem solving courts. Social science and legal perspectives*, eds. R. Wiener, E. Brank, Springer, New York – Heidelberg – Dordrecht 2013, pp. 211–232.

Winick B., Wexler D. (eds), *Judging in a therapeutic key: Therapeutic jurisprudence and the courts*, Carolina Academic Press, Durham 2003.

Wright J.K., *Lawyers as peacemakers. Practicing holistic, problem-solving law*, American Bar Association, Chicago 2010.

Zieliński A., *Uwaga 2 do art. 205[6] k.p.c.*, in: *Komentarz do kodeksu postępowania cywilnego*, eds. A. Zieliński, D. Flaga-Gieruszyńska, Legalis 2019.

Zienkiewicz A., *Cele Problem-Solving Courts a transformatywny potencjał mediacji w sprawach karnych – kilka uwag z perspektywy idei Comprehensive Law Movement*, "Probacja" 2022, no. 4, pp. 91–128.

Zienkiewicz A., *Holizm prawniczy z perspektywy Comprehensive Law Movement. Studium teoretycznoprawne*, Difin, Warszawa 2018.

Zienkiewicz A., *Koncepcja sądu otwartego – wzmocnienie pluralizmu form wymiaru sprawiedliwości*, in: *Mediacja – nowa droga rozwiązywania sporów*, ed. A. Rękas, Wolters Kluwer, Warszawa 2011, pp. 29–47.

Zienkiewicz A., *Mediation als eine Form der Justiz*, in: *Mediation als Verfahren konsensualer Streitbeilegung. Die deutsche, polnische und ukrainische Perspektive*, ed. T. de Vries, Peter Lang, Frankfurt am Main 2012, pp. 3–22.

Zienkiewicz A., *Prawnik jako peacemaker – przeprosiny, przebaczenie, pojednanie w opanowywaniu sporów prawnych*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2019, no. 4, pp. 43–57.

Zienkiewicz A., *Studium mediacji. Od teorii ku praktyce*, Difin, Warszawa 2007.

Abstract

Adam Zienkiewicz

The Judge as a Promoter of Peace

The principal aim of this text is to draw attention to the singular role of a "promoter of peace", which may be fulfilled nowadays both by a lawyer who provides legal assistance to a client and a judge. Discussing the matter from the standpoint of legal theory, the study will thus first examine the difference between judicial adjudication of disputes and their resolution, including methods based on the practice of peacemaking, which promotes peaceful interpersonal relations and positive personal transformation of the parties to disputes to establish between them a state known as positive peace. Subsequently, a dogmatic-legal analysis will seek to identify selected applicable regulations which offer the possibility of implementing, on the initiative or with the assistance of a judge, amicable modes of resolving legal disputes pending before a Polish civil court. In the final part of the study, the domestic normative perspective in the field of civil law will be supplemented with major model assumptions and objectives of a special type of court, a so-called Problem-Solving Court (developing especially in the USA), where the perpetrator of an offence who is subject to conventional court proceedings, is given an additional opportunity to effectively counter the causes of lawbreaking and conflicts with members of the community (e.g., ones stemming from drug or alcohol addiction abuse or mental disorders), based on the so-called problem-solving program tailored to the individual, which is coordinated by the judge and implemented by an interdisciplinary team of experts. These deliberations lead to the conclusion that the catalogue of legislative solutions in this respect is gradually expanding, creating a real opportunity to choose and apply various conciliatory methods of managing legal disputes, also on the initiative or with the active participation of the judge, who promotes the restoration of peaceful social relations.

Keywords: judge, peacemaker, Alternative Dispute Resolution, problem-solving court