



## THE LEGAL SITUATION OF A CHILD IN MEDIATION IN LIGHT OF THE REGULATIONS OF INTERNATIONAL LAW

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**Abstract.** In light of international law, children should be participants in family mediation. International law creates a basis for the extensive use of mediation in resolving conflicts to which children are party. These include not only family mediations, but also civil mediations and those that take place in connection with the use of educational measures, as a reaction to prohibited acts committed by children or in the event of conflicts in educational institutions in which children participate. The participation of children in mediation may take the form of direct participation in mediation sessions, but it may also take the form of various types of direct and indirect consultations in which the child expresses their opinion on the proposed decisions.

Mediation enables children to obtain appropriate information on their legal and factual situation, adjusted to their cognitive resources. Mediation in which children participate is of considerable educational importance as a result of the fact that, in conditions of personal experience, children learn non-confrontational methods of resolving conflicts in social relations.

The accession by a state to an international agreement, which within the scope of its regulation also covers the procedural rights of children or specific legal solutions applicable in mediation, means that the state is obliged to apply legislative solutions that will ensure the application of the standards provided for in these agreements with regard to the legal and factual situation of a child who is a party to mediation or in relation to a child whose interests are affected by mediation between other persons.

**Keywords:** child, mediation, international law, children's rights, self-determination, parental responsibility

### Introduction

The development of the concept of children's rights is a natural consequence of the recognition of its subjectivity and its recognition in the field of legal relations. In practical terms, the implementation of the standard of respecting children's rights is materialized by granting them a number of rights and procedural options in legal proceedings to which the child is party or which concern their legal or factual interests. Mediation should be a tool for the implementation of children's rights during these proceedings. Mediation should also be considered as an independent out-of-court method of dealing with conflicts in which the child is a party or which concern the interests of the child. It should be used in disputes within the territories of certain countries, but also in cross-border disputes – especially in cases where, in practice, there are doubts as to the jurisdiction of the judiciary or other public authorities, and in situations where there are difficulties with respecting the cross-border judgments of national authorities. Mediation should be used as a tool for resolving conflicts in which children participate, which should also apply to peer mediation, school mediation, and mediation in proceedings in which a child has the status of a minor perpetrator of a criminal act.

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The provisions of international law are able to set a universal standard for the use of mediation as a legal tool for the protection of children's rights. Firstly, international law should define a specific axiology of a child's participation in mediation. The fundamental value is, of course, respect for the child's right to express an opinion on matters of their life, and respect for their reasonable and realizable wishes as expressed in conflict management procedures – of which the child is an essential element. The subject of this article is, therefore, an examination of the scope of international law regulations regarding the participation of children in mediation, and the determination of the potential scope of their impact on the child's situation in legal proceedings concerning them, their rights, obligations, legal situation, and factual situation. Indicating the scope of the impact of international law is particularly important in a globalized world where human affairs have long since grown beyond the local dimension. The family matters of migrant people are subject to judicial review in various countries, and the rapid development of IT communication tools has created a situation where interpersonal conflicts may take on a cross-border nature. Mediation is widely recognized as one of the most effective methods of seeking agreement in conflicts, which are visible in the legal and social spheres of human functioning. Therefore, it is also worth learning about the scope of regulation on mediation in international law.

### **1. The axiology of a child's participation in mediation**

In individual contemporary state systems, respecting the possibility of self-determination and a person's right to decide on their own affairs is usually related to the legal recognition of the age limit, exceeding which means acquiring full legal capacity. This not only means the possibility of disposing of one's rights within the meaning of civil law and the possibility of incurring legally effective obligations, but also the obligation to bear the criminal-law consequences of one's own actions. Thus, the law delimits the boundary between adulthood and childhood, setting it in principle – according to the regulations of national legislation and international law – at 18 years of age, pursuant to Art. 1 of the Convention on the Rights of the Child, adopted by the United Nations General Assembly on November 20, 1989 (hereinafter: the Convention on the Rights of the Child). For the purposes of this convention, "child" means any human being under the age of eighteen, unless the law applicable to the child attains an early age of majority. The European Convention on the Exercise of the Rights of Children, drawn up in Strasbourg on January 25, 1996, applies to persons under the age of 18 (hereinafter as: European Convention on the Exercise of Children's Rights).<sup>2</sup> The same age determining the application of the provisions of the Convention is provided for in Art. 2 of the Hague Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement, and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children (hereinafter – the 1996 Hague Convention).

The division between adults and children is not strict.<sup>3</sup> The age limit at which adulthood begins is determined by cultural and psychological factors that justify the recognition of individual aspects of a person's life as signifying whether they are capable of deciding on certain issues or capable of responsibility. Therefore, the age limit of 18 may be modified in specific individual cases on the basis of an act by a public authority in recognizing the age of majority of a younger person or extending the privileges of a child over the age of eighteen – although the provisions of international law may explicitly limit their application to children of a certain age. For example,

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<sup>2</sup> However, this convention finds, in accordance with Art. 1, that clauses 2 and 3 apply to proceedings before a judicial authority which, within the meaning of this Convention, means proceedings in family matters, in particular relating to the exercise of parental responsibility, such as the place of residence of the child and the right to contact the child.

<sup>3</sup> For example, in the Polish legal system there is a category of "nieletni" – a minor (literally: underage) – on the basis of the provisions governing conduct in relation to this category of persons who have committed a prohibited act under penalty of a penalty. Provision 1 § 1 of the Act of October 26 1982, on proceedings in juvenile cases (Journal of Laws of 2018, item 969), provides for educational impact measures in the field of preventing and combating demoralization in relation to people under 18 years of age, but at the same time provides for special educational measures for people over the age of 13 but under the age of 17, which in certain circumstances may be extended to the age of 21 if educational or corrective measures have been issued against them. In addition, under civil law, the provisions use the concept of "małoletni" – which, in accordance with Art. 10 § 1 of the Act of April 23, 1964 Civil Code (Journal of Laws of 2020, item 1740) – represents a person under 18 years of age.

according to Art. 4 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction in accordance with Art. 14, this convention ceases to apply when a child reaches the age of 16. On the other hand, Art. 2 of the Hague Convention of 23 November 2007 on the International Recovery of Child Support and Other Forms of Family Maintenance (hereinafter – the 2007 Hague Maintenance Convention), indicates that this applies to maintenance obligations arising from a relationship between parents and children towards a person under the age of 21, although States Parties may, pursuant to Art. 2 clause 3, extend the scope of application of this convention to dependent persons.

Regardless of recognizing a specific person as an adult, an expression of the development of civilization in modern societies is the capacity to grant people who are still formally children procedural rights and to respect the subjectivity of such people, as well as respecting their right to active participation in the process of their upbringing and to active participation in family and social life.

One example of this being provided to children is the legal guarantee of the opportunity to participate in proceedings before public authorities, including court proceedings concerning their interests, and the possibility of expressing their opinions on matters that are important to them. Firstly, this concerns the legal obligation to hear the child, but also the legally guaranteed possibility for the child to participate in conciliation processes during or outside court proceedings or other proceedings before state authorities, which also applies to participation in mediation. It is particularly important to guarantee the child's participation in family matters in which their fate is decided – that is, who will look after the child and how, what contact with parents and other family members will look like, where the child will live, and in matters where it is decided to provide material security for children. In cases where a child has committed legally prohibited acts under penalty of punishment, an expression of respect for the child's subjectivity is indicated in the use of educational measures that are a reaction to such acts or other legal measures, including mediation, under conditions of non-arbitrary application of punishment – i.e., under conditions of the active participation of the child in determining compensation and hearing their opinion on events. It should be remembered that mediation is used to resolve conflicts in which the child may also be an active party to the dispute.

The participation of a child in mediation concerning their rights is an expression of respect for their right to self-determination, because – as D. Kuznicka (2016, pp. 185–188) noted while analysing Art. 16 of the International Covenant on Civil and Political Rights (1996), according to which everyone has the right to have their legal subjectivity recognized everywhere – today it is recognized that the right of everyone to legal subjectivity is a permanent attribute of the individual, an immanent feature of every human being that constitutes an indispensable element of human dignity and has a legal and natural character (Kuznicka, 2016, pp. 185–188).

The basic value of a child's participation in mediation is the educational value of such a process. The aim of raising a child is to prepare a young person to function independently within the network of social norms. This is a long-term process that involves the gradual shaping of attitudes of responsibility for one's own actions and an active ability to express one's own needs. The preamble to the Convention on the Rights of the Child indicates the direction of educational activities that should be carried out to prepare the child for a responsible and appropriate – for the development of an understanding of human rights – existence in society. Universal values are cited there, stating that a child should be fully prepared to live in society as an individually formed person, brought up in the spirit of the ideals contained in the United Nations Charter (1945) – in particular in the spirit of peace, dignity, tolerance, freedom, equality, and solidarity. Mediation can therefore be an educational tool that teaches the child these values using the practical example of their own life in relation to the real needs manifested in the child's life. This corresponds to principle 10 of the Declaration of the Rights of the Child (1959), according to which a child should be protected from practices that may lead to racial, religious, or any other form of discrimination. They should be educated in the spirit of understanding others, tolerance, friendship between peoples, peace, and universal brotherhood. They should be instilled with the conviction that they should devote their energy and their talents to the good of others. This declaration therefore introduces a standard of conciliation in the actions of the state and the family, whose addressees are children.

Therefore, another important value of the participation of children in mediation is the establishment of a standard of interpersonal contacts during mediations carried out in order to control a specific conflict, which will mean exercise of the law that, in specific cases, will lead to the satisfaction of the child's needs.<sup>4</sup> Therefore, the child should participate in mediation in matters to which they are party (for example, in civil law disputes or in cases resulting from the child's commission of a prohibited act) and in matters relating to their interests (both in civil law matters concerning the child's property and family cases), and this should also take place before the case is formally brought to court or submitted to the jurisdiction of a state authority. This standard is based on family matters in Art. 13 of the European Convention on the Exercise of the Rights of Children, which states that, in order to prevent and settle disputes and to avoid legal proceedings concerning children, States Parties should encourage the introduction of mediation, other forms of dispute resolution, and the use of these methods in reaching a settlement in the appropriate types of cases as determined by the parties.

The educational role of children's participation in mediation is, therefore, to introduce children to the standard of amicable conflict resolution at the earliest possible stage in the existence of these conflicts, and to negotiate solutions that will allow for the development of a mutually or universally accepted compromise. Mediation is generally considered to be the form of conflict management that produces lasting results as quickly as possible. In the case of family conflicts or other conflicts to which children are parties, efforts should be made to resolve them as soon as possible, so that a long-lasting conflict does not leave its mark on the child's psyche. The recommendation in the preamble to the European Convention on the Exercise of Children's Rights justifies the use of mediation as soon as possible, the moment a family conflict arises. In line with the preamble to that act, "in cases of conflict, it is desirable to try to reach an agreement within the family before bringing the matter before a judicial authority".

## **2. Mediation and the self-determination of a child**

The provision of Art. 16 of the Convention on the Rights of the Child introduces a standard for the protection of the subjectivity of the child, which should be respected in intra-family relations and in relations between the state and the child – and which, of course, also applies to mediation in both of these aspects. As provided in paragraph 1 of said article, no child shall be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence, nor to unlawful attacks on their honour or reputation. This was additionally reinforced by the guarantee specified in paragraph 2 of said regulation, according to which the child is entitled to the protection of the law against such interference or attacks. The tools of legal protection are not limited to proceedings before state authorities aimed at bringing legal liability to persons violating the honour, reputation, or private sphere of a child's life, but also extend to mediation – whether taking place within or outside of the framework of such proceedings.

When it comes to family matters, especially those related to care and contact, the child's self-determination is particularly desirable due to the fact that, during the separation of the "founders" of the family, the existing family structure undergoes a serious transformation.<sup>5</sup> This requires negotiation to develop new rules for the coexistence

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<sup>4</sup> For this reason, mediation is an excellent method of resolving peer conflicts in educational institutions in which children participate. The results of the analyses conducted by Fulya Turk (2018) show that conflict resolution, peace education, and peer mediation education are widely effective in strengthening the constructive conflict resolution skills of the students. The results of these studies show that school-based educations such as these may be an important part of preventing violence at school. The author also notes that these results indicate that providing these skills to students at all education levels will contribute to their academic success while also enabling them to acquire new life skills.

<sup>5</sup> Empirical research on mediation in cases of parental breakups carried out with the participation of children and without their involvement in the process of establishing the framework and rules for the functioning of the family after the breakup of partners has clearly proven that the participation of children in mediation and respect for their position positively affect the well-being and realization of the rights of all those involved in the separation. One year after mediation with the child, the

of parents and children in all configurations. Articulating the child's expectations regarding contact helps to avoid the trap of wishful thinking into which conflicted parents fall, who might expect the child to play the role of a "witness to their harm". The child's presentation of their expectations as to the shape of the family after the parents break up allows the family to avoid a situation where the parent who wants to continue taking care of the child is treated by the other parent as the attacking party. Thanks to the fact that the child had the opportunity to present their point of view, it is then possible for parents to build new relationships. Parents will also be aware that they are acting in the best interests of the child. Therefore, the European Convention on the Exercise of Children's Rights introduces a principle that should be applied in proceedings concerning the position of children in the family, including mediation. The provision of Article 1, paragraph 2 of the Convention states that its purpose is, in the best interests of children, to promote their rights, to grant them procedural rights, and to facilitate the exercise of these rights by ensuring that children are, themselves or through other persons or bodies, informed and allowed to participate in proceedings affecting them before a judicial authority. Therefore, it should be noted that recognizing the subjectivity of children enables the actual fulfilment of human needs and rights, even in the dimension of such a small social system as the family. To put it bluntly: all family members (including the child themselves) should have no doubt that the child is the subject and not the object of care and educational interactions, regardless of the situation in which the family finds itself.

The effect of family mediation, in which the issues of childcare and the scope of parent-child contacts are negotiated, should be to create conditions for the child to live well. This quality is important, regardless of whether these conditions are created in a full or incomplete family, or one that has been joined by the new partners of parents. Providing a child with optimal living conditions that will be adapted to their needs and the capabilities of the family will not be possible if the child and their affairs are "managed" authoritatively. It should be remembered that children will find a way to affirm their own will and relieve their suffering. This may take the form of speaking out against parents or attendants, may take the form of self-destructive actions, or may have a negative effect on the child's somatic condition. Only by including the child in the decision-making process, for example during mediation, can family relationships be re-established in post-conflict conditions in a non-violent way.

Of course, arbitrary actions by parents or public authorities may, in fact, be in line with a child's interests. However, as J. Ignaczewski (2019) notes, the interests of parents cannot be decisive for the resolution of the case in such a situation when failure to take these interests into account is a *sine qua non* condition for ensuring the protection of the minor's interests. On the other hand, if the protection of the child's best interests can be reconciled – even on the assumption that the decision will result in some temporary negative consequences for the child – with the interests of the parents, the court cannot disregard their interests. Ultimately, however, the parents' interests are relegated to the background when they cannot be reconciled with the child's legitimate interests (Ignaczewski, 2019, p. 68). Nevertheless, in the context of a specific family, mediation should be treated as a specific negotiating platform for reaching a compromise between the interests of parents or other adults and children. As Christine Hallett notes: In the ECHR, the rights of children are not expressed as paramount or privileged over those of adults; adults and children have equal rights as individuals. According to the Hallett, the Act has the potential to protect children and young people from intervention in their lives which they regard as unhelpful or unwanted, but it also has the potential to allow adults to claim rights and freedom from intervention which may conflict with children's wishes and interests (Hallett, 2000, p. 390).

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fathers that participated in the study stated that there had been both a reduction in acrimony with their former spouse and improvement in their parental alliance. Children were more likely to report the improved emotional availability of their fathers and a greater feeling of closeness to them. Mothers had the opportunity to analyze their relationship with their child from both perspectives. Both parents and children recognized that they achieved greater contentment with care and contact arrangements and less inclination to want to change these arrangements. The general conclusion of the study was that, as a result of the child's inclusion in mediation, families achieved greater stability of care and contact patterns over time and between parents (McIntosh et al., 2008, p. 111).

In the case of family mediation, especially in the case of the separation of partners who are parents, it should be remembered that the mediation session is a forum where more than one relationship is negotiated on various levels: parent–child, but also child–child, and both parents in configuration with all children if there are more than one in a family. The point of reference is the legal category of the best interests of the child, but, as Melissa J. Schoffer (2005, p. 334) notes, the determination of what is in one child’s best interest does not necessarily coincide with what is in another child’s best interest.

The possibility of a child’s self-determination thanks to their participation in mediation is not in opposition to parental responsibility, which in some legal systems – for example in Poland<sup>6</sup> – is called parental authority. Under international law, the concept of parental responsibility is defined in Article 1, paragraph 2 of the 1996 Hague Convention. According to this provision, the term ‘parental responsibility’ includes parental authority, or any analogous relationship of authority determining the rights, powers, and responsibilities of parents, guardians, or other legal representatives in relation to the person or the property of a child. The provision of Art. 2 of the European Convention on the Exercise of Children’s Rights, in Art. 3 point b, directly indicates the catalogue of persons who bear parental responsibility. According to this regulation, these are: parents or other persons or institutions authorized to exercise some or all parental responsibility.

Exercising custody of a child as part of parental responsibility during mediation involves, *inter alia*, the fact that parents should be sensitive to signals of the child’s real intentions. In the case of mediation used during parental breakup, the practice shows a decrease in parental competences, therefore in such mediations – but also in others in which children participate – the mediator plays a special educational role towards parents. The observations made by Ernest A. Sanchez and Sherrie Kibler-Sanchez are significant here, according to which it is important to educate parents regarding the difficulties that children face in any personal expression of preference, even in intact families. This paper agrees with the authors’ opinion that the term “preference of a child” oversimplifies a child’s attachment to their parents and their often complex feelings and needs, which require great sensitivity and attention from the mediator. Most children try not to hurt their parents’ feelings, instead telling them what they believe they want to hear for fear of punishment or abandonment (Sanchez & Kibler-Sanchez, 2004, p. 560).

The standard of respect for a child’s right to self-determination requires that both parties to the mediation (in the case of family mediation, parents or attendants), the mediator, and the public authority approving the outcome of the mediation respect the child’s right to express their own position. This right correlates with the regulations governing the child’s participation in proceedings before a court or other competent authority in matters of contact and custody. The European Convention on the Exercise of Children’s Rights sets out in Art. 3 a number of obligations for judicial authorities to enable the child to affirm their views. Point b of said article sets out the obligation to allow the child to present their views. Further guarantees for the child can be found in Art. 6 of this Convention, which sets out that, in accordance with these provisions in proceedings affecting a child, before making a decision the judicial authority shall: consider whether it has sufficient information at its disposal in order to make a decision in the best interests of the child and, where necessary, obtain further information, in particular from the holders of parental responsibilities; in a case where the child is considered by internal law as having sufficient understanding, ensure that the child has received all relevant information; consult the child in person in

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<sup>6</sup> The Polish legal system uses the concept of parental authority, however, Art. 95 § 3 of the Family and Guardianship Code (2020) establishes the best interests of the child and the social interest as premises limiting the exercise of parental authority. Both of these concepts are vague, offer a wide field for assessing specific actions in individual cases, and may also be in conflict with each other, but they exclude the arbitrariness of parents in deciding on matters that are important for the child. Moreover, § 4 of this article stipulates explicitly that, before making decisions on more important matters concerning the child’s person or property, they should hear them out – if the child’s mental development, health, and maturity allow it – and take into account their reasonable wishes as far as possible. This obligation to take into account the child’s reasonable wishes, despite the fact that their assessment as reasonable or unreasonable may depend on the ethnocentric conditions of the functioning of parents in society, *de facto* determines the obligation to also take into account the views and expectations of the child in mediation regarding this matter.

appropriate cases, if necessary privately, itself or through other persons or bodies, in a manner appropriate to their understanding, unless this would be manifestly contrary to the best interests of the child; allow the child to express their views; and give due weight to the views expressed by the child.

On the other hand, the general clause concerning the obligation to respect the right of children to present their position is provided for in the Convention on the Rights of the Child. The provision of Art. 12 also relates to the situation of the child in mediation. Pursuant to paragraph 1 of said provision, States Parties must ensure that a child who is capable of forming their own views has the right to express their views freely on all matters concerning them. This provision specifies the obligation to adopt this position with due weight, according to the age and maturity of the child. The means to achieve this goal is, in particular, the provision of the possibility for the child to speak in any judicial and administrative proceedings relating to the child, as indicated in paragraph 2 of said article, directly or through a representative or appropriate body, in accordance with the procedural rules of domestic law. Moreover, Art. 13 of this convention guarantees freedom of expression for children, which should be understood broadly to include cases in which decisions are made regarding the child's property and person.

Detailed regulations on hearing a child can be found in Art. 9 of the Convention on the Rights of the Child. In par. 2, this regulation requires that all interested parties – including children, of course – are able to participate in proceedings which would result in the separation of the child from their parents, and to express their views in these proceedings.

A specific sanction in the event of the child's right to be heard is provided for in Art. 23 of the 1996 Hague Convention. The provision of para. 2, point b of this article introduces an exception to the principle of recognition of a measure taken in a given state. This exception occurs if the measure was taken without the child being given the opportunity to hear it, which thus violated the essential rules of conduct of the state in the context of judicial or administrative proceedings, except in urgent cases.

Mediation can be a form of protecting a child's identity, which is a necessary condition for actual self-determination. The right to identity is one of the fundamental human rights and, with regard to the legal situation of children, it is guaranteed by Art. 8 of the Convention on the Rights of the Child, which in its first paragraph imposes on States Parties the obligation to take measures aimed at respecting the child's right to preserve their identity, including nationality, surname, and lawful family relations, excluding unlawful interference. The second paragraph of Article 8 of this Convention requires States Parties to provide the child with appropriate assistance and protection in order to restore the child's identity as soon as possible.

Mediation can also be a platform on which ideological conflicts between parents and children or between parents are resolved with regard to their influence on the shaping of ideological attitudes important for the child's identity, and the most reasonable decision is to respect the child's free choice in this regard. The provisions of international law establish the rules of conduct in this respect. Peculiar guarantees are included in Art. 14 of the Convention on the Rights of the Child. The first paragraph of this regulation is straightforward: States Parties shall respect the right of the child to freedom of thought, conscience, and religion. However, the second paragraph stipulates that States Parties shall respect the rights and obligations of parents or, where applicable, legal guardians to guide the child in exercising their right in a manner consistent with the child's developing abilities. The regulation of the third paragraph, on the other hand, contains a general clause that should be treated as an interpretative guideline with regard to the application of the previous two provisions. Pursuant to this provision, freedom of expression of one's religion or belief may be subject only to such limitations as are provided for by law and are necessary for the protection of national security and public order, health or social morals, or the fundamental rights and freedoms of others, the provision of which is the setting of standards resulting from the principle of proportionality in this substantive scope. These provisions repeat the declarations contained in Art. 9, paragraph 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), according to which: everyone has the right to freedom of thought, conscience, and religion; this right includes freedom to change religion or belief and freedom,

either alone or in community with others and in public or private, to manifest religion or belief in worship, teaching, practice, and observance.<sup>7</sup>

International law also provides for special protection of the identity of children belonging to ethnic and national minorities, which is extremely important in the context of the tragic experiences of institutionalized violence. These experiences have resulted not only in the disappearance of cultures of specific communities, but in some cases in the physical extermination of ethnic or national groups – both in the past and on an ongoing basis. According to Art. 30 of the Convention on the Rights of the Child: in those states in which ethnic, religious, or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language. This is a regulation that determines both the relationship between the child and state authorities and the relationship between the child and their family members, which in such cases should also be expressed in mediation.

Because a conflict of worldviews can occur – as practice shows, it often occurs in the case of attitudes affirmed by parents and their efforts to socialize children in the cultural influence of a specific religion or philosophical current – mediation seems to be one of the most appropriate instruments for dealing with conflicts of interests or conflicts of values. Mediation can also prevent a conflict of interest from turning into a conflict of values.<sup>8</sup>

During mediation involving children, in cases where mediation requires an intercultural perspective, or when mediation will have to come to an agreement in terms of an ideological conflict, it is worth using the experiences described by Marilou Giovannucci and Karen Largent. This will avoid the problem of collision between competing cultural norms concerning the communication and education of children. As said authors note, the mediation process – essentially a formal decision-making meeting – can be alienating to individuals and families from some cultures and ethnic groups for whom the process is not a familiar or common practice. Efforts to establish cultural resonance are very important, and can be facilitated by a thoughtful approach to who acts as a mediator, how the process is conducted, how parents are prepared, who is invited to participate, the setting and time, and the inclusion of cultural rituals (Giovannucci & Largent, 2009, p. 47).

### **3. Support and care for the child during mediation**

A child is not a fully formed individual. They also do not have full legal capacity and, consequently, are not legally independent. They need support even when regulations provide for their active participation in decision-making.

The need to provide children with special care during mediation is part of the general obligation to provide support and care to children.<sup>9</sup> This right has been declared in a number of international human rights acts, in particular in:

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<sup>7</sup> See Tabernacka, 2018, for a broader analysis of the issue of the treatment of freedom of religion and the worldview of children as human rights. It is worth noting that the mediator should be particularly sensitive when it comes to the influence of their personal views on the process of agreement. The mediator should be aware of their own views on non-denominational religion in order to be able to maintain their neutrality and not to subjectively judge the parties to the mediation or the child that the mediation concerns, as this could disrupt the process of reaching an agreement.

<sup>8</sup> See Tabernacka, 2010, for more on this. The essence of the conflict of values is the dispute concerning the realization or recognition of values that are significant due to the tradition or moral system adopted in a given community or professed by a given person. A value conflict, however, is different from a value collision. Value collisions are not a source of conflict if there is a culture of tolerance in a given social group or if, for some (most often economic) reason, involvement in a conflict is not beneficial.

<sup>9</sup> In some circumstances, such support may require the involvement of a large number of adequately educated actors. It is worth taking advantage of experience gained during the implementation of programs for the protection of children in mediation. M. Giovannucci and K. Largent presented the conclusions of running such programs in California, Colorado, and Connecticut. The authors noted that the programs introduced in these States were targeted at the following stakeholders: child



the General Declaration of Human Rights; the International Covenant on Civil and Political Rights (in particular in Articles 23 and 24); the International Covenant on Economic, Social, and Cultural Rights (in particular in Article 10); and in acts developed to provide a basis for regulating the position of the child in the family, the state, and in cross-border relations. In particular, these include: the Geneva Declaration of the Rights of the Child of 1924; and the Declaration of the Rights of the Child, adopted by the General Assembly on November 20, 1959, which indicates that “a child, due to its physical and mental immaturity, requires special care and care, including appropriate legal protection, both before and after birth”.

As a rule, such support should be provided by parents or other persons entitled to care, but this is not always possible, which results in certain obligations on the part of the state. Article 4 of the European Convention on the Exercise of Children’s Rights introduces an obligation to provide such support. Pursuant to this provision, in proceedings relating to a child before a judicial authority, where, under domestic law, persons with parental responsibility cannot represent the child due to a conflict of interest between them and the child, the child has the right – either personally or through other persons or institutions – to request the appointment of a special representative to represent them in these proceedings, although, as stipulated in the second paragraph of said article, States Parties to the Convention may limit this entitlement to children who are considered under domestic law to have sufficient knowledge.

Moreover, Art. 9 of this convention recommends that in such situations judicial authorities have the right to appoint a separate representative to represent the child in these proceedings, and in justified cases – a lawyer. In addition, Art. 5 of this convention stipulates that in proceedings concerning children before a judicial authority, States Parties should also consider granting additional rights to children, in particular: to request the assistance of persons designated by them who could facilitate their expression of position; to request, in person or through other persons or institutions, the appointment of a separate representative; or to appoint their own representative.

These regulations should, of course, be assessed very positively. The participation in mediation of a child’s representative who would look after their interests plays an important educational role for the whole family, including for parents. The appropriate action of the child’s representative – often combined with the suitably neutral attitude of the mediator – may factor into breaking the barrier of parents’ ethnocentrism when assessing whether individual arrangements developed during mediation are in the best interests of the child or not.

#### **4. Reliable information as a condition of adequate decisions made by the child during mediation**

A child can make a specific decision and communicate it during the mediation process only if they have reliable and complete information on their legal and factual situation. However, due to the emotional immaturity of children, the lack of in-depth life experience that characterizes them, and their often limited amount of knowledge, the process of informing the child should compensate for these deficiencies and correspond to the psychological determinants of the child’s perception of information. Nevertheless, mediation, as a non-formalized negotiation process, is an excellent opportunity to provide the child with information and explain its meaning, so that the child can adapt their expectations in light of the social and legal realities.

The European Convention on the Exercise of Children’s Rights expressly grants children the right to be informed. As stated in Article 3, a child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting them, shall be granted, and shall be entitled to request, the following rights: to receive all relevant information; to be consulted and to express their views; and to be informed of the possible consequences of compliance with these views and the possible consequences of any decision.

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protection workers and their legal counsel, guardians ad litem (GALs), Court Appointed Special Advocates (CASAs), public and private attorneys representing family members and other parties, tribal representatives, mediators, and the judiciary. Other possible stakeholders – or perhaps consultants to the group – might include representatives from the fields of domestic violence, mental health, substance abuse, or developmental disabilities (Giovannucci & Largent, 2009, p. 39).

This convention defines, in Art. 2 under section d, the term “relevant information” which, according to this regulation, means information which is appropriate to the age and understanding of the child, and which will be given to enable the child to exercise their rights fully unless the provision of such information would be contrary to the welfare of the child.

Additionally, Art. 6 of this Convention imposes an obligation on the judicial authority to ensure that the child has received all relevant information before deciding in proceedings relating to children who, according to domestic law, are considered to have sufficient knowledge. It should be noted that this information could be passed on to the child during mediation.

Information relevant to the child, both during and before mediation, should be provided either by parents or by authorities having the status of the child’s representative. According to Art. 10 of the Convention on the Exercise of Children’s Rights, unless it is obviously contrary to the best interests of the child, in proceedings relating to the child before a judicial authority, the representative should:

- a) provide all relevant information to the child, if the child is considered by internal law as having sufficient understanding;
- b) provide explanations to the child if the child is considered by internal law as having sufficient understanding, concerning the possible consequences of compliance with their views and the possible consequences of any action by the representative;
- c) determine the views of the child and present these views to the judicial authority.

The content of the above-mentioned provision is a detailed description of the general regulation of the Convention on the Rights of the Child in relation to family matters, where Art. 13 is determined by the child’s right to freely seek, receive, and impart information and ideas of all kinds, regardless of the boundaries and the form that they might take. This right may be limited only by regulations established with the necessity of respecting the rights or reputation of other persons, or to protect national security or public order, health, or social morality.

## **5. Counteracting the threat to the child’s welfare in mediation**

The necessity of taking care of a child and providing them with protection suited to their age and maturity level determines the form of their participation in mediation. This applies to issues such as determining how many mediation sessions can be attended by a child and what their substantive scope should be – which is important, for example, in the case of family mediation in which the child’s parents are participating. This entails the obligation to provide the child with appropriate emotional and legal support in mediation, which has already been discussed above.

The child may participate in mediation sessions directly, and the scope of this participation should be limited by the child’s best interests, which should be assessed in each specific case taking into account the child’s social maturity and their mental and substantive preparation for confrontation with the situation.

Agata Gojska, on the basis of the analysis of a number of views expressed in the doctrine, proposes forms of involving children in mediation so that their participation is adjusted to their individual situation. These methods include: joint consultation of parents and the child in the presence of a mediator as to the concluded agreement, which not only enables the transfer of information to the child, but also results in positive emotional outcomes and allows for possible corrections to be considered; interviews with the child, especially at the beginning of mediation, which may be conducted with the participation of a psychologist; consultation with the child throughout the mediation process; the presence of the child throughout the process; and the participation of the child in decision making (Gojska, 2014, p. 212). Regardless of these methods, as noted by Giovannoucci and Largent, the primary way to involve a child in mediation is by the mediator interviewing the child and bringing their interests to the table. The child can also write or dictate something to be read in mediation (Giovannoucci & Largent, 2009, p.

43). The child may therefore participate directly in mediation, but may also offer proposals for future arrangements. According to A. Cybulko, techniques that do not require the child's personal involvement in mediation are based on verbally directing parents to the child's perspective and needs. In this regard, the mediator may refer to the child's perspective directly – e.g., by asking the parents appropriate questions such as: What do you think your child would want? Alternatively, some mediators use symbolic tools. For example, one method involves an empty chair or chairs “intended” for children being placed at the negotiating table, or a child's picture being placed on the table (Cybulko, 2018, p. 309).

A child taking responsibility for a family may take the form of parentification syndrome. This is a factor that must be taken into account by the mediator when helping the parties to the family conflict to resolve their dispute. Parentification is defined as a reversed role in the family, and concerns the change of roles between parent and child. It occurs when a parent partially or completely gives up their parental duties and responsibilities (Zarczynska-Hyla & Piechnik-Borusowska, 2018, p. 289). Parentification may take two forms: instrumental parentification, which occurs when assigning duties and practical matters to children; and emotional parentification, which is considered by most researchers to be more destructive for the development of the parentified individual, and concerns meeting the parent's emotional needs. A child with this syndrome can act as an advisor, confidant, therapist, controller, partner, scapegoat, buffer, mediator, or judge in parental conflicts (p. 292).

Article 18 of the Convention on the Rights of the Child can be read as an expression of the declaration of the equal rights of parents in bringing up children, but it can also be treated as a kind of barrier against parentification. The regulation of paragraph 1 of this article stipulates that States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of a child. Parents or legal guardians, as the case may be, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

Children can therefore participate in mediation sessions, although the child's involvement in the mediation process cannot mean that the child takes responsibility for the actions of their parents, because the parents are responsible for the conflict in which the child is also involved.

## **Conclusions**

The international standard of respecting the possibility of children's participation in mediation in relation to individual aspects of their factual and legal situation is an expression of respect for their legal subjectivity. Of course, the child, as a dependent being, should be able to use, in the field of non-confrontational methods of reaching a compromise, the support provided by relatives, and when the child's problems are related to family conflict, this support should be offered by public authorities. International law applies without state coercion, which is a security for the implementation of individual resolutions. The obligations of states to guarantee the possibility of children's participation in mediation at the level of inter-state obligations are part of the global culture of respecting the individual. More precisely, these obligations represent a culture of taking into account the needs of individuals, which should be guaranteed by states; they are an expression of the development of culture and respect for human rights.

States Parties to international agreements should therefore make every effort to ensure that the standards of international agreements in the field of enabling children to participate directly in mediation are implemented in their territory. Depending on the legal and systemic standards adopted in a country, this requires either the ratification of the agreement or another way (via the introduction of appropriate legislative solutions) to guarantee the application of the standards to which the country has committed itself by signing an international agreement.

## References

- Cybulko, A. (2014). Dziecko w mediacji. In E. Gmurzynska & R. Morek, *Mediacje. Teoria i Praktyka*. Warsaw: Wolters Kluwer.
- Giovannucci, M., & Largent, K. (2009). A guide to effective child protection mediation: Lessons from 25 years of practice. *Family Court Review*, 47(1), 38–52. <https://doi.org/10.1111/j.1744-1617.2009.00238.x>
- Gojska, A. (2014). *Mediacje rodzinne*. Warsaw: University of Warsaw.
- Hallett, C. (2000). Children's rights. *Child Abuse Review*, 9(6), 389–393.
- Ignaczewski, J. (2019). Interes rodziców. In A. Bodnar, et al., *Władza rodzicielska i kontakty z dzieckiem. Komentarz*. Warsaw: C. H. Beck.
- Kuznicka, D. (2016). Prawo do tożsamości jako prawo dziecka – wybrane zagadnienia [The right to identity as a child's right – selected issues]. *Folia Iuridica Universitatis Wratislaviensis*, 5(2), 181–198.
- McIntosh J. E., Wells, Y. D., Smyth, B. M., & Long, C. M. (2008). Child-focused and child-inclusive divorce mediation: Comparative outcomes from a prospective study of postseparation adjustment. *Family Court Review*, 46(1), 105–124. <https://doi.org/10.1111/j.1744-1617.2007.00186.x>
- Polish Family and Guardianship Code (1964). *Journal of Laws of 2017*, item 682. Retrieved from: [https://www.ksiegarnia.beck.pl/media/product\\_custom\\_files/1/7/17364-kodeks-rodzinny-i-opiekunczy-the-family-and-guardianship-code-nicholas-faulkner-fragment.pdf](https://www.ksiegarnia.beck.pl/media/product_custom_files/1/7/17364-kodeks-rodzinny-i-opiekunczy-the-family-and-guardianship-code-nicholas-faulkner-fragment.pdf)
- Sanchez, E. A., & Kibler-Sanchez, S. (2004). Empowering children in mediation. An intervention model. *Family Court Review*, 42(3), 554–575. <https://doi.org/10.1111/j.174-1617.2004.tb00669.x>
- Schoffer, M. J. (2005). Bringing children to the mediation table: Defining a child's best interest in divorce mediation. *Family Court Review*, 43(2), 323–338. <https://doi.org/10.1111/j.1744-1617.2005.00032.x>
- Tabernacka, M. (2010). Problem konfliktów wartości. In M. Tabernacka & R. Raszewska-Skałeczka, *Płaszczyzny konfliktów w administracji publicznej*, Warsaw: Wolters Kluwer.
- Tabernacka, M. (2018). The human right to freedom of religion in the Polish education system. *Nordicum-Mediterraneum*, 13(2). Retrieved from: <https://nome.unak.is/wordpress/volume-13-no-2-2018/conference-proceeding-volume-13-no-2-2018/the-human-right-to-freedom-of-religion-in-the-polish-education-system/>
- The Convention for the Protection of Human Rights and Fundamental Freedoms (1950). Available at: [https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf)
- The Convention on the Rights of the Child (1989). United Nations. Available at: <https://www.ohchr.org/en/professionalinterest/pages/crc.aspx>
- The Declaration of the Rights of the Child (1959). Retrieved from: <http://www.cirp.org/library/ethics/UN-declaration/>
- The European Convention on the Exercise of the Rights of Children (1996). Retrieved from: <https://rm.coe.int/168007cdaf>
- The Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures of the Protection of Children (1996). Retrieved from: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=70>
- The Hague Convention on the Civil Aspects of International Child Abduction (1980). Retrieved from: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=24>
- The Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance (2007). Retrieved from: <https://www.hcch.net/en/instruments/conventions/full-text/?cid=131>
- The International Covenant on Civil and Political Rights (1966). Retrieved from: <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>
- The United Nations Charter (1945). Retrieved from: <https://www.un.org/en/about-us/un-charter>
- Turk, F. (2018). Evaluation of the effects of conflict resolution, peace education and peer mediation: A meta-analysis study. *International Education Studies*, 11(1), 25-43. <https://doi.org/10.5539/IES.V11N1P25>
- Zarczynska-Hyla, J. and Piechnik-Borusowska, J. (2018). Dziecko w roli rodzica – pomylone role rodzinne. O parentyfikacji w doniesieniach światowych i polskich [Child in a parental role – confused family roles. World and Polish reports on parentification]. *Wychowanie w Rodzinie*, 17(1/2018), 289–303. <https://doi.org/10.23734/wwr20181.289.303>

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