

Łukasz Mirocha

Pomeranian University in Słupsk

ORCID: 0000-0002-1498-2960

lukasz.mirocha@upsl.edu.pl

Mediation and Paternalism

Mediacja a paternalizm

ABSTRACT

The article addresses the issue of paternalistic notions in mediation. It focuses on the theoretical aspects of the problem and does not discuss the practice of mediation. The study presents some current views on paternalism, including the so-called new paternalism developed in modern economics. Then, three key styles of mediation are analyzed with particular reference to the concept of paternalism. The study demonstrates that the theoretical assumptions underlying mediation can be seen as paternalistic, which, however, does not mean that the parties involved in mediation are coerced into specific decisions. A mediator is a figure of epistemic superiority who acts for the benefit of the parties. He affects the circumstances of the parties' choices, considering their good and the fairness of the process. To limit possible risks of harmful paternalism, the informative duty should be satisfied.

Keywords: paternalism; mediation models; mediation ethics; principles of mediation; autonomy; self-determination

INTRODUCTION

John Stuart Mill, one of the fathers of contemporary liberalism and individualism, is also the author who has shaped the modern approach to paternalistic acts. His principle of liberty was aimed at preventing society, or the individuals that compose it, from undertaking actions that, despite their good intentions, limit the freedom of others. Mill's hostile approach to paternalism was not absolute. His perspective on human individuality, variety, originality, and pluralism supported the condemnation of paternalism; however, he acknowledged that paternalism is justified when applied to less developed societies or to children. Moreover, the freedom he defended was a kind of reasonable freedom – preventing a person from

hurting or putting herself in danger was accepted by Mill.¹ Principles of the individuals' autonomy and self-determination, rooted in early liberal thought, echo in mediation's axiology. It provokes the question of whether mediation, as grounded in such values, is resistant to paternalism.

The traditional set of principles of mediation encompasses confidentiality, impartiality, its voluntary character, and the autonomy and self-determination of the parties.² Whereas the duty to act in a neutral and unbiased way burdens the mediator, autonomy and self-determination describe features that should characterize the parties in mediation. This set of principles appears to prevent mediation as a process from exposing parties to the risk of undertaking acts that would limit their freedom in the name of their good, welfare, interest, and so on. Actions that are conducted in such a way are described as paternalistic, and – at first glance – mediation does not fall into the trap of paternalism. However, as I will claim in the article, some features characteristic of mediation can be perceived as paternalistic.

The work proceeds as follows. The first part provides an overview of contemporary conceptions regarding paternalism, demonstrating that the discussion on this topic remains current and has evolved significantly since Mill's pronouncements. In the second part of the article, I attempt to apply notions concerning paternalism to the three basic styles of mediation: facilitative, evaluative, and transformative. I demonstrate that, at first glance, the risk of paternalism is most pronounced in the case of the evaluative model. Nevertheless, assumptions foundational to all three mediation styles entail paternalistic tendencies, and, contrary to initial intuitions, the transformative model is at the greatest risk of being paternalistic. When discussing each style of mediation, I first outline my understanding of it. I rely on the most basic and hopefully uncontroversial assumptions describing them. Then I analyze whether the crucial principles or assumptions underlying the model under study do not rely on paternalism. In the article, I examine the fundamental ideas, assumptions, and principles that underpin mediation, rather than the practice itself. It is evident that each proceeding can be paternalistic if the person governing it wishes it to be so; thus, I focus on the theoretical aspects of the problem. The paternalism of the court order appointing parties to mediation or of provisions concerning compulsory mediation is also beyond the scope of this article.

¹ G. Claey's, *Mill and Paternalism*, Cambridge 2013, pp. 42–58.

² D.A. Hoffman, *Ten Principles of Mediation Ethics*, [in:] *Mediation: Approaches and Insights*, ed. R. Bleemer, New York 2005, pp. 55–58; P.K. Sowiński, *Convergence of the Basic Principles of Mediation in Criminal, Civil, Administrative and Judicial-Administrative Matters*, "Ius Novum" 2022, vol. 2, pp. 103–123.

PATERNALISM. A BRIEF OVERVIEW OF CONTEMPORARY APPROACHES

Mill, when discussing the threat of paternalism, primarily had in mind the actions of government. Modern scholars have tried to explain Mill's stance in various ways. Gregory Claeys enumerates at least eight definitions of paternalism inspired by Mill, which were composed by such revered authors as Gerald Dworkin, Herbert Hart, and John Gray. What links all definitions is that they refer to actions undertaken in the best interest of an individual, aimed at preventing harm to her. The second element of definitions, which, however, appears less frequently, is that the given actions somehow limit an individual's liberty.³ In this light, the most apparent, crucial feature of paternalistic action is that it is conducted by another person in the interest of an individual. Coercion or infringement of freedom does not constitute a necessary element of paternalism. It seems, then, that the sufficient condition for perceiving an action as paternalistic is that it was not undertaken by the patient herself, but rather done by another person for the benefit of the patient.⁴ From the perspective of paternalism opponents, the lack of an individual's will to act is perceived as an expression that she is not interested in reaching specific aims. In turn, from the perspective of a paternalist, the lack of action may be viewed as grounded in the individual's low capacities. Mill linked paternalism with freedom violation, but contemporary scholars tend to perceive that even the action that does not infringe an individual's freedom, when undertaken in the interest of the individual, can be called paternalistic, as it undermines her autonomy, and as performed from the position of superiority, expresses disrespect to the individual.

Although definitions and forms of paternalism evolve, the set of arguments against paternalism remains relatively well-known and stable. Critics of paternalism argue that it often conveys a sense of superiority on the part of the agent undertaking paternalistic actions.⁵ Apparently, it does not mean that the agent is superior in any dimension to the patient; however, the sense of superiority itself, which gives grounds for paternalism, could be perceived as insulting from the patient's perspective.⁶ As Jonathan Turner claims when discussing one of the contemporary concepts of paternalism: "The expressive theory of paternalism holds that an action is paternalistic because it expresses the idea that the actor knows better than the

³ G. Claeys, *op. cit.*, pp. 51–52.

⁴ In the article, I refer to "patient" as the recipient of the action, the passive side of the relationship.

⁵ D. Husby, *From Paternalism to Mutuality*, "The Covenant Quarterly" 2020, vol. 78(1–2), p. 41; Ch. Andreou, *Paternalism and Presumed Superiority*, "Analysis" 2023, vol. 83(1), p. 22 and following.

⁶ See: J. Turner, *On the Expressive Theory of Paternalism*, "Jurisprudence" 2024, vol. 15(3), p. 310.

person acted upon.”⁷ What is worth noticing is that the definition mentioned above does not contain a word about the purpose of the action: that it is undertaken in the best interest of the patient.⁸ It shows the evolution of the concept of paternalism and its various faces. At least since Mill, the Western liberal tradition has rejected paternalism because it violates an individual’s freedom, autonomy, and dignity. Each of the values could be derived from different sources, and the discussion on paternalism encompasses both secular and religious arguments. For example, the claim that human dignity is God-given means that an assault on it constitutes an act against God Himself. Being non-paternalistic is a matter of respect.⁹

Contemporary defenses of paternalism rely on the claim that it is not a sense of superiority, but rather actual observations concerning the patient’s lower cognitive abilities, which justify a paternalistic approach. If such an observation is accurate, then it is reasonable to protect the patient (or a group or society as a whole) from the consequences of these incapacities. This stance is known as epistemic paternalism. Kirk Loughheed and Joshua Lee Harris present this sort of paternalism as follows: “If agent X is going to make a doxastic decision concerning question Q, and agent Y has control over the evidence that is provided to X, then there are instances when Y need not make available to X all of the evidence relevant to Q if doing so will make X more likely to believe the truth about Q.”¹⁰ Recently, epistemic paternalism has been discussed, for instance, in the context of the COVID-19 pandemic as a tool for countering misinformation in this field.¹¹

Medicine is indeed the context of a prolific study on paternalism, during which three main stances have been developed. According to the traditional view, a physician can and should act in a paternalistic way because of their superior knowledge of medical issues. Medical paternalism allows a physician to undertake a patient’s treatment even without the patient’s consent. The modern, autonomy-based stance contradicts this view. The third view encompasses shared decision-making models that attempt to reconcile the concern for patients’ welfare with their autonomy.¹²

⁷ *Ibidem*, p. 307.

⁸ Another example of moving away from the traditional view of the concept is so-called self-paternalism, which dismisses the idea of an external agent acting paternalistically. Odysseus, who attaches himself to the pole to resist the Sirens, presents self-paternalistic behavior; see: Ch. Andreou, *op. cit.*, p. 24.

⁹ See: E.W. Matson, *The New Paternalism Does Not Replace Older Wisdom*, “Economic Affairs” 2024, vol. 44(2), p. 386; J. Turner, *op. cit.*, p. 308, 319.

¹⁰ K. Loughheed, J.L. Harris, *Epistemic Paternalism, Averroes, and Religious Knowledge*, “Philosophy East & West” 2022, vol. 72(4), p. 960.

¹¹ See: R. Aird, *A Puzzle of Epistemic Paternalism*, “Philosophical Psychology” 2023, vol. 36(5).

¹² See: N. Alexander, K. Haugen, *Medical Paternalism vs Patient Autonomy*, “Radiologic Technology” 2023, vol. 95(1).

Considerations regarding paternalism arise in the context of philosophy of religion¹³ or in discussions of intercultural relations.¹⁴

The field in which reflection on paternalism develops most dynamically is, however, the economy. The traditional economy used to identify choices as those actually made with rational choices. In brief, the rationale was what the people really chose. Such a perspective leaves no room for paternalism, as it is devoid of any external criteria for choice. If customers' choice constituted the only indicator of what is desired, there was no need to refer to someone's welfare (only an individual knew what was good for her), or objective good.¹⁵ Such a stance was confronted with the Humean perspective, according to which reason is, and should only be, a slave of passions.¹⁶ David Hume's notion allowed us to gain awareness that individual choices are often far from rational, as emotions drive them. Reason plays an instrumental role, and consequently, individual choices cannot be perceived as trustworthy criteria for what is desired, and even more so, what is good.

The aforementioned criticism of the traditional perspective on rational choice has inspired the development of behavioral economics, which is linked to cognitive psychology. Research conducted in these fields led to the emergence of the concept of so-called new paternalism. This sort of paternalism, as Erik W. Matson claims, "proposes to use knowledge of our decision-making processes to steer us towards what we ourselves judge to be good. Part of the steering involves the regulation of 'choice architecture'."¹⁷ What the new paternalists have in mind when speaking about "choice architecture" is shaping the circumstances of individuals' choices in such a way that they would be made in more informed and aware conditions. The set of classical, newly paternalistic solutions includes, for instance, information displayed on the wrapping of tobacco or alcohol concerning their harmfulness. These solutions are not paternalistic in the sense that they ban or order something, but rather shape the background circumstances of choice to ensure that it is made in specific conditions. The new paternalism is then a form of epistemic paternalism, as it assumes that choice-makers lack the required knowledge, which should be improved. It is also a soft form of paternalism. It is claimed that new paternalism is the paternalism of means, not of ends, as it does not impose a specific direction on individuals' decisions. The discussed kind of paternalism distinguishes itself from traditional takes on paternalism, as it does not rely on substantial, moral or religious judgements, but is instead attached to procedural aspects of choice. The

¹³ K. Loughheed, J.L. Harris, *op. cit.*

¹⁴ D. Husby, *op. cit.*, p. 41 and following.

¹⁵ See: K. Leportier, *Paternalism for Rational Agents*, "Journal of Economic Methodology" 2024, vol. 31(2), p. 80.

¹⁶ *Ibidem*, p. 82.

¹⁷ E.W. Matson, *op. cit.*, p. 387.

new paternalism may appear as asymmetrical, as it inflicts only individuals who lack rationality and/or information concerning their own decisions.¹⁸

A brief overview of contemporary stances on paternalism reveals that the concept is understood in a significantly different manner today compared to its roots in Millian philosophy. Some stances on paternalism have disentangled it from the best interest of the patient. Some have even taken self-referential actions that are perceived as paternalistic. Violation of freedom is no longer perceived as a necessary condition for referring to an action as paternalistic. It is sufficient to infringe on an individual's autonomy or dignity to see an action as paternalistic. Contemporary defenses of paternalism stress the cognitive limits of a patient and build the rationale for soft paternalism upon this notion, rather than substantial views of someone's good.

The problem of paternalistic aspects of mediation has received little attention in the literature;¹⁹ therefore, the following sections of the article aim to fill this gap by applying the aforementioned concepts in the field of mediation.

MEDIATION STYLES AND PATERNALISM

General Remarks

The initial point to make is that there are few opportunities to find patterns typical of traditional paternalism in mediation. It is evident that mediation is conducted for the benefit of the parties, but at this stage, the similarities end. We will not find coercion in mediation, at least if it is conducted in accordance with the basic principles of mediation. The mediation process will not limit the parties' freedom. These notions simply rely on the fact that participation in mediation is, in general, voluntary, which limits the risks of coercion and freedom violation.

In turn, I argue that elements characteristic of the new, soft paternalism can be found in all three basic mediation models. The very notion of mediation suggests that individuals in dispute have difficulties communicating with each other, which very often stems from emotional engagement, and they require professional support to resolve their issue. Parties encounter cognitive and epistemic problems, which necessitate support. What mediators do is create "architecture of choice," like new paternalists want to define it. They improve conditions that foster good

¹⁸ K. Leportier, *op. cit.*, pp. 78–79, 81–83; E.W. Matson, *op. cit.*, p. 388. The most comprehensive contemporary work on new paternalism is perhaps M.J. Rizzo and G. Whitman's *Escaping Paternalism: Rationality, Behavioral Economics, and Public Policy*, Cambridge 2020; see its review by M. Dold in "Behavioural Public Policy" 2025, vol. 9.

¹⁹ Antonio Sandu (*Mediation – Communicative Action and Philosophical Practice*, "Revista Romaneasca pentru Educatie Multidimensionala" 2014, vol. 6(1), p. 41, 47), who notices the paternalistic nature of evaluative mediation, is an exception.

decision-making for the parties. In the following remarks, I examine this problem in greater detail by referring to each of the basic mediation models. I understand that it can be challenging to identify clear models in mediation practice, and that methods typical of one style are often used during processes that primarily rely on another style, for example, to break deadlock.²⁰ A study on the presence of paternalism, however, requires distinguishing between models, as each has its own specific characteristics from the perspective of paternalism.

The main caveat to my viewpoint, which should be discussed here, is that mediation – even if it includes some paternalistic elements – remains a less paternalistic undertaking than traditional adversarial proceedings.

Such an allegation is not convincing. The right to a court is indeed meant to serve the well-being of citizens. It is also true that during mediation, the mediator focuses on guiding the process, while the parties are responsible for the outcome; however, they may lose control in traditional adversarial proceedings.²¹ This may give the impression that parties lose their influence, leading someone to act in a paternalistic manner. However, court proceedings are not primarily designed to benefit the parties involved, but rather to uphold commonly shared legal principles, such as justice. The court proceeding is not meant to result in a win-win outcome, which is in the best interest of both parties. Evidently, certain types of cases are focused on benefiting the party, such as those involving the welfare of children or individuals with mental illnesses. These specific proceedings create an exception to the generally contradictory, non-paternalistic nature of court proceedings. What is worth noting is that Mill accepted the paternalistic approach to children or mentally disabled people, but he generally rejected such actions when directed at adults. Mediation is mainly addressed to adults, who can be recipients of paternalistic actions; however, as mentioned above, these are not paternalistic in the traditional, Millian sense.

²⁰ See: D. Quek, *Facilitative versus Evaluative Mediation. Is There Necessarily a Dichotomy?*, “Asian Journal on Mediation” 2013, p. 66, 73; M.S. Levin, *The Propriety of Evaluative Mediation: Concerns about the Nature and Quality of an Evaluative Opinion*, “Ohio State Journal on Dispute Resolution” 2001, vol. 16(2), pp. 269–270; N.K. Levy, *Comparing the 3 Major Styles of Mediation*, “Mediation” 2018, October 14; N. Chitashvili, I. Burduli, *Paradigmatic Models of Mediation, Mandatory Eclectics or a Direct Decision*, “Prawo i Więź” 2024, vol. 4(47), p. 28, 55.

²¹ L.P. Gaynier, *Transformative Mediation: In Search of a Theory of Practice*, “Conflict Resolution Quarterly” 2005, vol. 22(3), p. 397.

Facilitative Model

The facilitative style of mediation is, at least in Western countries, historically the oldest model of mediation, which serves as a kind of paradigm upon which later styles are developed.²² The significant contribution to this style was granted by Roger Fisher and William Ury, who, when discussing negotiation theory, developed the distinction between rights-based and interest-based approaches. An interest-based approach is typically associated with facilitative mediation, whereas a rights-based approach is often linked with an evaluative style. The former relies on the assumption that parties should broaden the scope of the conflict's background and gain a deeper insight into its origins. This should result in broadening the scope of solutions that can be applied to the conflict.²³ A useful tool for describing the interest-based approach is the so-called iceberg metaphor, in which the iceberg's tip represents the parties' positions, and what is hidden beneath the water's surface are their needs and interests. The metaphor effectively explains the communication difficulties faced by mediation parties, who are often entrenched in their positions.

There are a few fundamental principles of facilitative mediation, including parties' self-determination and the mediator's neutrality, which are essential. Early legal acts regarding facilitative mediation referenced these principles.²⁴ Proponents of the facilitative style often argue that evaluative mediation contradicts their approach regarding these principles. They claim that parties' autonomy can never be violated and that no coercive means should be applied in mediation.²⁵ From a different perspective, the principles of facilitative mediation encompass parties' autonomy, procedural fairness, and substantive fairness.²⁶ The emphasis on self-determination or autonomy comes from the fact that a facilitative approach trusts in parties' intellectual abilities and believes they will act in their own best interests.²⁷

A facilitative mediator takes a "hands-off" stance²⁸ and acts in a non-directive way.²⁹ His primary role is to facilitate communication between parties and make

²² A. Sandu, *op. cit.*, p. 43; N.K. Levy, *op. cit.*; M.S. Levin, *op. cit.*, pp. 268–270. For mediation traditions in other cultures, see: J.A. Chowdhury, *Gender Power and Mediation: Evaluative Mediation to Challenge the Power of Social Discourses*, Newcastle upon Tyne 2012, pp. 19–20, 26–41.

²³ C.J. Brown, *Facilitative Mediation: The Classic Approach Retains Its Appeal*, "Pepperdine Dispute Resolution Law Journal" 2004, vol. 4(2), pp. 280–281, 290–291; J.A. Chowdhury, *op. cit.*, p. 22; J. Lack, *A Mindful Approach to Evaluative Mediation*, "Mfn Tijdschrift Conflicthantering" 2014, no. 3, p. 18.

²⁴ See: M.S. Levin, *op. cit.*, pp. 274–277.

²⁵ D. Quek, *op. cit.*, p. 70.

²⁶ J. Lack, *op. cit.*, p. 22.

²⁷ C.J. Brown, *op. cit.*, p. 282; D. Quek, *op. cit.*, pp. 67–68; J.A. Chowdhury, *op. cit.*, p. 14.

²⁸ N.K. Levy, *op. cit.*

²⁹ A. Sandu, *op. cit.*, p. 43.

their agreement easier. He should protect the formal equality of the parties during the process, but cannot judge the possible outcomes or the parties' claims.³⁰

At first glance, there is little room for paternalism in a facilitative, interests-based mediation style. Declared principles: self-determination, party autonomy, and mediator neutrality are intended to protect the facilitative mediation model from paternalism. There are, however, two issues that require closer examination.

Firstly, facilitative mediation is designed to ensure a "fair" resolution of the dispute.³¹ Another formulation of this ideal refers to procedural and substantive fairness. This means that the process of reaching an agreement is a matter of evaluation from the perspective of values that are external to bare agreement, which the mediator should secure. In consequence, parties are bound by values that would not necessarily be applied if they tried to resolve their dispute themselves, and that are imposed by the mediator. I am not arguing that the fairness of the process is not a valuable consideration. What I am saying is that such an approach introduces values into the dispute that may not be of primary importance to the parties, and introducing them is done for the benefit of the parties. This interpretation allows us to call the facilitative style of mediation paternalistic.

Secondly, we should draw attention to the interest-based approach and the iceberg metaphor. The assumptions underlying these concepts may contradict the declared trust in parties' intellectual abilities. On the one hand, facilitative mediation assumes that the parties "know best" and are intelligent, capable agents; on the other hand, parties face the claim that they cannot see the primary sources of their conflict and should follow the mediator's advice to resolve it. Such an approach assumes that parties are unable to notice certain things (their underlying interests behind their positions) and, moreover, stresses that these things are especially valuable in reaching an agreement. This view overlooks the possibility that parties may choose not to reveal or express their needs, interests, or other underlying factors for various reasons. A party that refuses to reveal its needs or interests might be accused of conducting "strategic negotiations" or of acting in bad faith.

Obviously, an interest-based approach is used to benefit the parties; the techniques employed during this process aim to reach an agreement and also to increase the parties' awareness of their needs. These values deserve approval, which, however, does not change the fact that the above-mentioned elements of facilitative mediation may be considered paternalistic. Parties are perceived as less capable subjects who require professional help. In facilitative mediation, as in other types, there is a professional agent who is expected to possess superior knowledge compared to the parties, which evokes paternalistic notions.

³⁰ J.A. Chowdhury, *op. cit.*, pp. 13–14.

³¹ See: C.J. Brown, *op. cit.*, p. 285.

Evaluative Model

The person usually associated with the origins of the evaluative style of mediation is Leonard L. Riskin. The diagram he proposed – the “Riskin grid” – contains two axes: one ranging from a narrow definition of the problem to a broad one, and the other between the mediator’s influence on the process and the parties’ impact.³² Riskin was a proponent of a highly involved mediator and, unlike the facilitative model linked to interest-based approaches, he is considered an advocate of the rights-based approach. The advent and development of evaluative mediation have sparked discussions about the boundaries of mediation, how to define it, and ultimately whether the evaluative model aligns with mediation at all.³³ Some authors have argued that the term “evaluative mediation” is an “oxymoron”³⁴ or a “contradiction in terms”³⁵ because of its specific approach to the principles of the mediator’s neutrality and the parties’ self-determination. Some authors argue, however, that it is not that proponents of evaluative mediation criticize the facilitative model of mediation – they recognize that the facilitative model is the foundation on which they build – but rather that proponents of facilitation attack those who advocate evaluation.³⁶

Whereas the facilitative model of mediation tends to broaden the scope of the problem under discussion, the evaluative style does the opposite – it emphasizes the narrow character of the dispute. It is a rights-based approach.³⁷ This does not mean that the settlement reached through mediation should take the form of a coerced compromise, but in this type of mediation, such an outcome is more likely to occur than in a facilitative model.³⁸ Adversaries of this model argue that the mediator’s involvement violates his neutrality and the parties’ autonomy. In turn, proponents of this model claim that when applying this style of mediation, the mediator should remain objective³⁹ and that evaluation is naturally grounded in our minds, as supported by recent neurobiological research.⁴⁰ As a result of narrowing the scope of the dispute and the mediator’s role, evaluative mediation yields much more predictable results than facilitative mediation.⁴¹

³² *Ibidem*, pp. 281–282; D. Quek, *op. cit.*, p. 66; A. Sandu, *op. cit.*, p. 47; N. Chitashvili, I. Burduli, *op. cit.*, p. 29.

³³ J. Lack, *op. cit.*, p. 20; M.S. Levin, *op. cit.*, p. 267; L.P. Gaynier, *op. cit.*, p. 400.

³⁴ D. Quek, *op. cit.*, p. 68.

³⁵ J. Lack, *op. cit.*, p. 18.

³⁶ L.P. Gaynier, *op. cit.*, pp. 399–400.

³⁷ J.A. Chowdhury, *op. cit.*, p. 14.

³⁸ *Ibidem*, pp. 44–45.

³⁹ M.S. Levin, *op. cit.*, p. 269.

⁴⁰ J. Lack, *op. cit.*, pp. 18–19.

⁴¹ D. Quek, *op. cit.*, pp. 70–72.

Following the principles of evaluative mediation outlined above, the mediator's role differs in this model from that in facilitative mediation. The mediator assesses and evaluates the facts, evidence, and arguments presented by the parties.⁴² He goes far beyond merely facilitating communication between the parties, which, however, remains his main role. An evaluative mediator can also suggest solutions, not just facilitate.⁴³ All this suggests a more "hands-on" approach than in facilitative mediation.⁴⁴ Because of his role in the process, in the evaluative style of mediation, the mediator is required to be an expert not only in mediation but also in the branch of law relevant to the dispute. The way parties are perceived in the process differs between the evaluative and facilitative models of mediation: in the former, they are seen as requiring professional support and guidance, whereas in the latter, they are viewed as self-reliant and capable.⁴⁵ What is worth noting is that in facilitative mediation, the mediator's epistemic superiority concerns only procedural aspects of mediation, such as communication issues. In the evaluative model, this superiority extends to the substantive side of the dispute. Nevertheless, the "hands-on" approach of the mediator is applied in the best interests of the parties to protect them from their own unwise decisions. Parties can benefit from the mediator's expertise and knowledge.⁴⁶

It is obvious that the evaluative model of mediation is much more prone to paternalism than its facilitative cousin. The mediator's neutrality is replaced by the requirement of objectivity, which opens the door to asymmetrical suggestions addressed to the parties. As a result, the mediator can act in a manner such as "if I were you, I would..." or "it is wise to follow this line," which should be subordinate to the best interests of the party. Such advice is directive, and if it is not yet coercive, it comes closer to infringing on autonomy than any facilitative activity does. A mediator's role is not limited to communication issues but also extends to significant aspects of decision-making, which broadens the potential for paternalism.

Jeff Kichaven, when discussing the evaluative model of mediation, claims that it can "prevent clients from suffering more than they must" by giving them awareness of the force of their arguments before they are expressed in court. He also states that evaluative mediation "will prevent the strong from doing more than they can, and the weak from suffering more than they must."⁴⁷ Such an approach is clearly paternalistic.

⁴² C.J. Brown, *op. cit.*, p. 283.

⁴³ J.A. Chowdhury, *op. cit.*, p. 14; A. Sandu, *op. cit.*, p. 47.

⁴⁴ N.K. Levy, *op. cit.*

⁴⁵ C.J. Brown, *op. cit.*, p. 282.

⁴⁶ M.S. Levin, *op. cit.*, p. 269.

⁴⁷ J. Kichaven, *Adding Value: Making the Strongest Case for Evaluation*, [in:] *Mediation: Approaches and Insights*, ed. R. Bleemer, New York, pp. 214–216.

Transformative Model

The most recent model of mediation, being developed since the 1980s and finally constituted by Robert Baruch Bush and Joseph Folger,⁴⁸ at first glance, does not seem to be at risk of harboring paternalistic ideas. On the one hand, transformative mediation claims to offer empowerment and liberation for the parties and depends mainly on the mediator's passive role. On the other hand, however, it rests on the most substantial moral assumptions when compared to facilitative and evaluative models.

The transformative model is grounded in significant philosophical ideas. Its core belief is that social life exists and should exist as a relational universe, meaning people are constantly interconnected and mutually dependent. This communitarian perspective contrasts with liberal views that see individuals as independent and fully autonomous.⁴⁹ Such a stance is sometimes called "postmodern,"⁵⁰ however, the importance of relationality is characteristic of postmodern philosophers and conservative thinkers like Alasdair MacIntyre, who are challenging to categorize as postmodern. The simple name of the mediation model indicates that it emphasizes transformation. This can relate to the relationships between the dispute's parties or the conflict itself, but also to the transformation of society as a whole. Bush and Folger acknowledged the former.⁵¹

The philosophical grounds of transformative mediation are deeply linked to its aims. What is characteristic of this style of mediation is that it is not targeted at reaching an agreement or even any other tangible result.⁵² What is, then, the aim of transformative mediation? Advocates of the transformative model see mediation as an opportunity for the moral development of individuals and society as a whole. They want to use mediation to teach individuals new relational skills and pass on wisdom linked to the relational nature of society.⁵³ Transformative mediation is designed to offer moral growth, empowerment, and acknowledgment

⁴⁸ C.M. Manning, *Transformative and Facilitative Mediation Case Studies: Improving Relationships and Providing Solutions to Interpersonal Workplace Conflict*, "The Arbitrator & Mediator" 2006, December, p. 82; A. Sandu, *op. cit.*, p. 48; P.L. Franz, *Habits of a Highly Effective Transformative Mediation Program*, "Ohio State Journal on Dispute Resolution" 1998, vol. 13(3), p. 1039; R.J. Condlin, *The Curious Case of Transformative Dispute Resolution: An Unfortunate Marriage of Intransigence, Exclusivity, and Hype*, "Cardozo Journal of Conflict Resolution" 2013, vol. 14, p. 623.

⁴⁹ R.A.B. Bush, S.G. Pope, *Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation*, "Pepperdine Dispute Resolution Law Journal" 2002, vol. 3(67), pp. 71–74; R.J. Condlin, *op. cit.*, pp. 625, 645–656; P.L. Franz, *op. cit.*, p. 1039, 1046, 1062.

⁵⁰ A. Sandu, *op. cit.*, p. 48.

⁵¹ N.K. Levy, *op. cit.*; R.J. Condlin, *op. cit.*, p. 622; R.A.B. Bush, S.G. Pope, *op. cit.*, pp. 77–80.

⁵² J.A. Chowdhury, *op. cit.*, p. 15; L.P. Gaynier, *op. cit.*, p. 402.

⁵³ J.R. Seul, *How Transformative Is Transformative Mediation?: A Constructive Developmental Assessment*, "Ohio State Journal on Dispute Resolution" 1999, vol. 15(1), p. 135; P.L. Franz, *op. cit.*, p. 1042, 1056.

to an individual from her own perspective and in the eyes of others. It is aimed at shaping positive character traits in an individual, enabling them to benefit beyond the mediation process.⁵⁴ Because of that, transformative mediation is often called “therapeutic.”⁵⁵ As Bush states, “[t]he transformative model does not ignore the significance of resolving specific issues, but it assumes that, if mediators do the job just described, the parties themselves will very likely make positive changes in their interaction and find acceptable terms of resolution for themselves where such terms genuinely exist.”⁵⁶

In the transformative style, the mediator has specific responsibilities. While it is clear that he facilitates communication between the parties, his primary role is to highlight moments when they achieve mutual understanding.⁵⁷ Other key points the mediator should emphasize are when individuals involved in the mediation experience breakthroughs in their relationships.

The mediator should present a nondirective style; they concentrate on the process, not on the result.⁵⁸ Bush sums it up saying that “[t]he mediator supports, but never supplants, party decision-making. He assists the parties with their decisions by helping to identify choice points throughout the conversation, and by restraining himself from making any decisions for the parties about the process itself or the substantive results. He respects the parties and their choices. He trusts the parties.”⁵⁹

Transformative mediation breaks with the two mediation dogmas: the assumption that the mediator controls the process and the assumption that mediation is primarily designed to resolve the dispute.⁶⁰ Consequently, it is often argued that this type of mediation cannot be regarded as a form of mediation in the traditional sense.⁶¹ Furthermore, some scholars argue that, despite its strong basis in psychological assumptions about human nature (interdependent and relational), transformative mediation still conflicts with psychological claims about human moral development.⁶² Proponents of the transformative style argue that it can be particularly helpful in cases of power imbalance between parties, especially in family law disputes.⁶³

As with facilitative mediation and its evaluative model, the transformative model also relies on the belief that “the mediator knows better.” This assumption,

⁵⁴ R.J. Condlin, *op. cit.*, p. 628, 645.

⁵⁵ J.A. Chowdhury, *op. cit.*, pp. 14–15. The therapeutic mediation is sometimes treated as a distinct model of mediation; see: N. Chitashvili, I. Burduli, *op. cit.*, p. 25, 27.

⁵⁶ R.A.B. Bush, S.G. Pope, *op. cit.*, p. 84.

⁵⁷ A. Sandu, *op. cit.*, p. 51; L.P. Gaynier, *op. cit.*, p. 401.

⁵⁸ P.L. Franz, *op. cit.*, p. 1043, 1055.

⁵⁹ R.A.B. Bush, S.G. Pope, *op. cit.*, p. 93.

⁶⁰ L.P. Gaynier, *op. cit.*, p. 398.

⁶¹ C.M. Manning, *op. cit.*, p. 84.

⁶² J.R. Seul, *op. cit.*, p. 138 and following.

⁶³ N.K. Levy, *op. cit.*; P.L. Franz, *op. cit.*, p. 1060.

however, is often hidden under references to self-determination, empowerment, and other values. In facilitative mediation, the mediator is presumed to know better the “know-how” of dispute resolution. The mediator is seen as a figure with technical knowledge of the general causes of conflicts and ways to resolve them. When it comes to transformative mediation, his kind of knowledge is also connected to much broader wisdom about “proper” human morality, precious human values, or even the meaningful shape of human society. As Lisa P. Gaynier notices when discussing advocates of transformative mediation, “[t]heir position is provocative: moral growth as the ultimate objective of mediation.”⁶⁴ Moral development, whether it applies to an individual or a society, is a significant and substantial goal. If we argue that someone needs it, we acknowledge that they have certain shortcomings in this area, which can be both offensive and, on the other hand, reveal our own hubris.

The facilitative model of mediation assumes that the parties are capable, while the evaluative model recognizes this but also considers that the parties may lack specific knowledge about the dispute or may not be sufficiently skilled in law to make an informed decision. The transformative model goes a step further and argues that there are some moral shortcomings in the parties’ moral abilities (and more broadly, in society). These shortcomings are not related to communication and do not involve technical knowledge of the parties. Proponents of transformative mediation argue that they know what is best for the parties involved in a dispute (even if they do not impose this view on the parties). When we view human relations (or any other thing or value) as a key value in the mediation process, we shift from paternalism of means to paternalism of ends. This suggests that the transformative model of mediation is paternalistic in an even stronger sense than the styles discussed so far.

CONCLUSIONS

There are some assumptions underlying mediation that suggest all its models are not free from paternalism. The figure of the mediator, although not as distinguished in the process as the judge in a classical, adversarial proceeding, still does not have equality with the parties.⁶⁵ The mediator is the one who “knows better” and uses this knowledge to benefit the parties. The “know better” notion may refer to procedural aspects of the dispute (its psychological causes or the ways of its resolution) or to much more substantive issues, such as the parties’ moral shortcomings. Considering that, transformative mediation, because of its philosophical grounds and despite the strongly nondirective role of the mediator, seems to be the most paternalistic model of all analyzed in the article. The study above shows,

⁶⁴ L.P. Gaynier, *op. cit.*, p. 406.

⁶⁵ A. Sandu, *op. cit.*, p. 41.

then, that the right question regarding links between mediation and paternalism is not “whether mediation is paternalistic,” but “what kind of paternalism can we associate with mediation.” The answer is that mediation can be associated with a form of soft, epistemic paternalism, suggesting that, in some cases, we need professional support in decision-making. What is apparent is that the parties in the mediation are not forced to make specific decisions, but the process aims to create circumstances that shape their decisions in a particular way, thereby influencing their choices indirectly. David Hume argued that “reason is, and ought only to be, the slave of the passions,” which served as a starting point for modern economists in developing ideas about paternalism. Hume’s insights can also be applied to the field of mediation, providing a basis for mediation’s paternalism.

There are a few caveats that can be raised against the perspective presented in the paper. Without further elaboration, it is worth mentioning them. First, as mentioned above, we can question whether classical, adversarial proceedings are not more paternalistic than mediation. Second, we can ask whether any other professional activity is not at least as paternalistic as the one in question. Third, we can ask whether the voluntary nature of mediation excludes allegations concerning mediation’s paternalism. It seems that all caveats are somehow linked to the issue of mediators’ duty to provide comprehensive information about mediation before the process begins. Ensuring that the party is accurately informed not only about the goals of mediation but also about the techniques used and the underlying assumptions can help limit potential harm to the parties’ autonomy or self-determination.

A more challenging question than whether there is paternalism in mediation is whether there is something wrong with that. Regarding this issue, we should consider the following problems. First, if a significant power disparity between the parties in mediation may justify a paternalistic approach.⁶⁶ Second, whether epistemic paternalism could have adverse effects on fully informed parties, these problems, however, require examination beyond the scope of this paper.

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⁶⁶ J.A. Chowdhury, *op. cit.*, pp. 43, 47–48.

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ABSTRAKT

Artykuł podejmuje problem obecności paternalizmu w mediacji. Koncentruje się on na teoretycznych aspektach zagadnienia i nie odnosi się do praktyki mediacyjnej. Opracowanie prezentuje współczesne poglądy na paternalizm, włączając w to teorię tzw. nowego paternalizmu, rozwiniętą we współczesnej ekonomii. Trzy podstawowe style mediacji są analizowane z uwzględnieniem współczesnych poglądów na paternalizm. Opracowanie pokazuje, że teoretyczne założenia stojące u podstaw mediacji mogą być postrzegane jako paternalistyczne, co nie oznacza, że strony procesu mediacyjnego są przymuszane do podjęcia określonych decyzji. Mediator jest podmiotem cechującym się wyższością epistemiczną, który działa dla dobra stron postępowania. Wpływa on na kontekst wyborów podejmowanych przez strony, zważając na ich dobro oraz sprawiedliwość procesu. Obowiązek informacyjny mediatora powinien być nakierowany na minimalizowanie ryzyka związanego z paternalizmem.

Słowa kluczowe: paternalizm; modele mediacji; etyka mediacji; zasady mediacji; autonomia; samostanowienie