Victim-offender Mediation as an Alternative to the Criminal Justice System in Poland

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The aim of the paper is to present the views of the doctrine on the mediation and the benefits it brings to the victim, the perpetrator and society. The paper analyses the significance of implementation of the European Parliament and Council Directive 2012/29. This document, devoted to victims’ rights protection, has had significant impact on introducing restorative justice provisions into the Polish Code of Criminal Procedure of 1997. The paper discusses effectiveness of mediation in the Polish criminal procedure. It also examines statistical data collected from Polish courts regarding mediation. The conclusion is that mediation does not constitute a competitive institution towards the traditional judicial system which still remains the only “supplier” of cases for mediation in criminal matters in Poland.

Key words: victim-offender mediation, criminal justice system, restorative justice, effectiveness, Poland.

Introduction

Mediation is undoubtedly a form of restorative justice, which must be distinguished from classical retributive justice. Restorative justice can be defined as a process where all parties involved in crime meet together in order to make a joint decision on how to solve the consequences of the crime and its

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implications for the future (Marshall, 1996: 37). As indicated in the literature, defining this concept poses a lot of trouble. Restorative justice is not what is commonly understood as criminal justice. It does not impose a penalty, it has nothing to do with the attribution of guilt, it must be clearly distinguished from the classical concept, according to which the harm done by the perpetrator can be compensated by another harm imposed in the form of punishment (Meier, 1999: 39-41). An important problem often discussed in the literature is the relationship between retributive and restorative justice. There are two main concepts in this regard: the co-creation of one system of justice and the parallel coexistence of both models. Advocates of the first concept believe that restorative justice should be included in the criminal justice system (Meier, 1999: 45-47). In their opinion, an approach that completely isolates both models does not sufficiently take into account the danger hidden in all restorative justice programs, i.e. the imbalance of the effective enforcement of divergent interests of parties. Especially victims, whose position in criminal cases is usually weaker, could be threatened by secondary victimization. The need to integrate restorative justice with the criminal justice system also results from the ability of staff employed in the judicial institutions to make decisions on contentious criminal issues between the parties to the conflict and public interest, as well as to use coercive measures to protect members of society. The problem may be to determine to what extent a given case should be the subject of the restorative process and where is the line, beyond which it is necessary to use repressive measures.

As indicated in the victimological literature (Shapland, 2003: 213), including restorative justice in the mainstream of justice would require adherence to the principles of fair trial and human rights standards. Only such a shaping of relations is able to give restorative justice, including mediation between the victim and the perpetrator, more importance and ensure its proper development. The reason for this is prosaic: in principle, the state has a monopoly on the transfer of cases to be examined, and so the appropriate flow of affairs to the institution of restorative justice depends on the decision of its organs.

Some authors advocate the treatment of restorative justice as a complementary system that exists next to the criminal justice system (Wright, 1992; Wright, 1996: 236; Walgrave, 1998: 11-13; von Hirsch, Ashworth, Shearing, 2003: 35-38; Walgrave, 2003: 71). Proponents of this concept broadly understand the concept of restorative justice, claiming that this concept is based
on three pillars: a) victim’s right to compensation; b) commitment of the perpetrator to responsibility and repairing the harm done; c) the participation of parties and the local community in the process leading to the restitution of damage caused to the victim by the perpetrator (Platek, 2005: 77).

Mediation is considered the basic form of restorative justice in Poland. This paper presents minimum standards on the rights, support and protection of victims rights under restorative justice services set out in the Article 12 of the European Parliament and Council Directive 2012/29/EU as well as how they were implemented in the Polish Code of Criminal Procedure of 1997. In the further part of the study the views of the doctrine indicating the purposes of mediation and the benefits it brings to the victim, the perpetrator and society are presented and an attempt was made to define mediation in the micro scale and in its statistical dimension in the Polish criminal procedure.


Turning to the legislation of the European Union, it should be noted that the concept of restorative justice has been broadly defined in art. 1 letter d. of the Directive 2012/29/EU of the European Parliament and Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime (hereinafter referred to as the Directive) and the superseded Council Framework Decision 2001/220/JHA. According to this regulation, it includes all procedures by which the victim and the perpetrator are allowed, if they voluntarily agree, to take an active part in resolving the issues resulting from the offense with the help of an impartial third party. Thus, restorative justice is a concept broader than the concept of mediation, since restorative justice services include mediation between the victim and the perpetrator, conferences of family groups and declaratory assemblies.

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(see paragraph 46 of the preamble of the Directive). This enumeration has an exemplary character.

Recital 46 of the preamble to the Directive states clearly that the benefit must be given in the first place to the victim’s interests and needs, to repair the damage caused to the victim and to prevent further damage. This statement can also be found in article 12 (1) of the Directive. An essential element of the above-mentioned restorative justice services is the meeting of the perpetrator and the victim of the crime. Therefore provisions implementing them should ensure guarantees which would prevent victim from secondary and repeat victimization, intimidation and retaliation.

In this context, the issue of the promotion of restorative justice services by the Directive arises. As mentioned earlier, it uses a broad concept of restorative justice services, which may suggest an extension of the scope of restorative justice programs that could be an alternative to the classic, reactive system of justice. In addition, article 12 (2) provides that Member States shall facilitate the referral of cases, where appropriate, to the services delivering restorative justice, including by laying down procedures or guidelines on the conditions for such targeting.

However, attention should also be paid to the content of article 12 paragraph 1 of the Directive: “In order to protect the victim from secondary victimization, intimidation and retaliation, Member States shall take measures to be applied when providing restorative justice services. Such measures shall ensure that victims who decide to use restorative justice services have access to secure and satisfactory services...”. In the further part of this regulation, the European legislator formulates a number of conditions that must be met by restorative justice services, on the basis of which an attempt can be made to define the basic principles of restorative procedures. All of them concern the victim, and some of them both participants in the restorative procedure:

1) The rule of voluntariness and guidance of the good of the victim at the initiation of the procedure (applying restorative justice services only when they are in the interest of the victim, ensuring its safety, with its conscious and voluntary consent, which can be withdrawn);

2) The principle of information (before giving consent the victim should be provided with full and objective information about the procedure, potential outcomes and the supervision of the implementation of the agreement);
3) The principle of confirmation by the perpetrator – the offender must acknowledge the basic facts related to the case before starting the procedure. It should be noted that according to Preamble 12 the term ‘offender’ means a person convicted of a crime, but for the purposes of the Directive this term also applies to the suspect or accused person before any guilt or conviction and does not violate the presumption of innocence;

4) The principle of voluntary agreement and respect for settlement – each settlement must be the result of a voluntary agreement and may be taken into account in any further criminal proceedings. Interestingly, the legislator used here the term ‘may be’ and not, for example, ‘should be’;

5) Confidentiality of conversations – if the conversations held as part of the restorative procedures are non-public, then they are confidential and their content is not subsequently disclosed. However, it is envisaged to disclose the content of these conversations with the consent of the parties, or if required by national law due to the overriding public interest.

The principles of victim-offender mediation in Poland

In the Polish criminal process, mediation services are the only ones that meet the basic requirements of the restorative justice program. Only in the case of mediation, there is a meeting between the victim and the perpetrator of the crime in the presence of an impartial third party, unrelated to the system of justice, which is a mediator. On the other hand, victim-offender mediation in Polish system of criminal law is a universal measure, as it can be applied at all stages of the criminal proceedings: both in preparatory, court and executive proceedings, in proceedings against adult offenders as well as minors. In general, mediation can be used in any case for any crime, if there is an individualized victim and a suspect or accused person. There are no restrictions in the law on the type of act or punishment regarding the use of mediation.

Regarding the main principles of mediation, the rules of voluntariness, confidentiality and impartiality of the mediator which were unwritten so far were explicitly introduced into the Code of Criminal Procedure and entered into force on 1 July 2015.³

According to the new article 23a § 4 and § 7, participation of the accused and the injured in the mediation proceedings is voluntary. The consent for participation in mediation proceedings is taken by the agency (court, court referendary, prosecutor or the other agency conducting preliminary proceedings) referring the case to mediation or by the mediator, after the accused and the injured have been informed about the objectives and principles of mediation proceedings and instructed about the possibility of withdrawing their consent until the conclusion of the mediation proceedings. Mediation proceedings are conducted in an impartial and confidential way. It should be noted that the above principles have existed so far in the mediation proceedings as a result of interpretation with the current regulations of the Code of Criminal Procedure. New regulation properly entrusts the mediator, alternatively apart from the judicial or prosecuting authority, with the obligation to clarify the purpose and principles of the mediation proceedings. Mediator in such cases is more effective than state prosecutor or judge not only due to its skills and knowledge, but also due to greater trust of the parties towards him as not related to law enforcement and justice.

The principle of information emphasizes the obligation to explain the purpose and principles of mediation proceedings established in Article 23a § 1 of the Code of Criminal Procedure and repeated in § 4. According to Article 23a § 1 the court or the court referendary, and in the preparatory proceedings the state prosecutor or other agency conducting the prosecution, may on his own initiative, or with the consent of the injured and the accused, refer the case to a trustworthy institution or person in order to conduct a mediation procedure between the injured and the accused. Both parties must be informed about the purposes and principles of the mediation proceedings, including the contents of Article 178a of the Code of Criminal Procedure.4

The Act of 27 September 2013 has also expanded the circle of entities authorized to refer the case to mediation proceedings with court referendary and the other agency conducting preliminary proceedings different from prosecutor. Court referendary is a new body of criminal proceedings. Its role is to relieve the president of the court, heads of court departments and other judges of taking decisions on procedural and technical matters, as well as on

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4 Article 178a of the Code of Criminal Procedure: It is not permitted to examine as a witness a mediator with regard to fact learnt from the accused or the injured while conducting mediation proceedings, except for the information about offences referred to in article 240 § 1 of the Criminal Code.
minor substantive decisions. There is hope that referendary will thoroughly examine criminal cases for possible use of mediation and inform the parties with greater involvement about the purposes and principles of mediation proceedings than judges burdened currently with too many responsibilities.

The principle of voluntary agreement and respect for settlement has been guaranteed in article 23a § 6 of the Code of Criminal Procedure. After the mediation proceedings are concluded, a report of its course and results is drawn up by an authorised institution or person. Settlement voluntarily signed by the accused, the injured and the mediator is enclosed to the report. Another amendment has equated the effects of the mediation settlement with the settlement concluded before the court, which according to article 107 § 3 of the Code of Criminal Procedure will be the executory title after being made enforceable by the judge or referendary.

The principle of confidentiality of conversations results from the content of several provisions. In addition to the general rule of the above-mentioned article 23a § 7 of the Code of Criminal Procedure which states that mediation proceedings are conducted in an impartial and confidential way, the Polish legislator has established in article 178a a ban on hearing the mediator as a witness as to the facts he learned from the accused or the injured in the course of mediation proceedings, with the exception of information on over a dozen of the most serious crimes referred to in article 240 § 1 of the Criminal Code. This new ban on evidence aims to guarantee that the content of statements and discussions in the course of the mediation proceedings will not be used in a criminal trial against him and in that way to encourage the accused to participate in mediation proceedings.

Mediation proceedings should not take more than one month, and its period is not included in the duration of the investigation (article 23a § 2 of the Code of Criminal Procedure). The Act of 27 September 2013 has also modified the list of posts that cannot serve as mediators. According to article 23a § 3 a professionally active judge, prosecutor and assessor prosecutor, and also a trainee in these professions, juror, referendary, assistant judge, assistant prosecutor and an official of any other authority which prosecutes offences are disqualified. Additionally, mediation proceedings cannot be conducted by a person to whom the restrictions specified in article 40 and 41 § 1 of the Code

of Criminal Procedure apply in a given case. The restrictions listed in article 40 refer to a judge disqualified by virtue of law from participation in a case (a judge so-called iudex inhabilis). Article 41 § 1 refers to a judge disqualified where such circumstances arise that might give rise to justified doubts as to his impartiality in a case (a judge so-called iudex suspectus). Both provisions apply accordingly to a mediator.

More detailed provisions on mediation are contained in the Ordinance of Minister of Justice of 7 May 2015 on mediation in criminal matters. The Ordinance issued on the basis of statutory delegation in article 23a § 8 of the Code of Criminal Procedure specifies the conditions that must be met by an institution or persons authorized to conduct mediation proceedings, the way in which such institutions or persons are appointed and dismissed, the scope and conditions of granting them access to case files, as well as the scope of a report on the results of mediation proceedings, bearing in mind the need for the efficiency of these proceedings.

The main stages of the mediation proceedings are set out in § 14 of the Ordinance. The mediator immediately after receiving the order to refer the case to mediation: 1) makes contact with the injured and the suspect or the accused, setting the date and place of meeting with each of them; 2) conducts individual meetings with the suspect or the accused and the injured, informing them about the nature and principles of the mediation proceedings and the rights of the parties; 3) conducts the mediation meeting with the participation of the suspect or the accused and the injured; 4) assists in the formulation of the content of a settlement between the suspect or the accused and the injured; and 5) verifies the implementation of the obligations.

The Ordinance allows by virtue of § 15 indirect mediation. If the direct meeting of the suspect or the accused and the injured is not possible, the mediator may conduct the mediation proceedings in an indirect way, giving the information and proposals on the settlement to both parties.

Positive outcomes of the mediation proceedings may influence one of the following decisions:
- Conditional discontinuance of criminal proceedings (article 63 of the Criminal Code) or conditional suspension of the execution of the penalty of deprivation of liberty against the accused (article 69 § 2 of the Criminal Code);

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6 Journal of Laws 2015, item 716.
• Imposing on the accused a milder sentence, a punitive or probationary measure (article 53 § 3 Criminal Code) or extraordinary mitigation of punishment (article 60 § 2 of the Criminal Code);
• No objection of the accused to the accused's conviction without trial (Article 335 and 338a of the Code of Criminal Procedure) and to voluntary submission to punishment (article 387 of the Code of Criminal Procedure);
• Obligatory unconditional discontinuance of criminal proceeding as a result of reconciliation of the parties in the proceedings in private prosecution cases (Article 492 § 1 of the Code of Criminal Procedure);
• Judgment upholding terms of a settlement between the suspect or the accused and the injured (e.g. reparation of damages, financial restitution, compensation of moral injury, personal or community service, obligation of the accused to change his behaviour, to undertake anti-drug or anti-alcohol therapy, to apologize to the victim).

The most important change from the point of view of increasing the importance of mediation in the criminal process was adding to the Criminal Code the new provision of article 59a. According to this article, at the request of the victim, criminal proceedings shall be discontinued for offense punishable by a penalty not exceeding three years imprisonment, as well as for offense against property punished with a penalty not exceeding five years imprisonment, as well as for the offense specified in article 157 § 1 of the Criminal Code,7 if before the commencement of legal proceedings in the first instance, the accused repaired the damage or atoned for the harm done, unless there is a special justification that discontinuation would be contrary to the need to achieve the objectives of punishment. The provision does not apply if the accused was previously convicted of intentional crime with violence.

In this way, the possibility of unconditional discontinuation of criminal proceedings as a result of a successful mediation was opened, which until now was basically impossible. It was assumed that the injured and the

7 Article 157 § 1 of the Criminal Code: Anyone who causes a bodily injury or an impairment to health other than as specified in Article 156 § 1 (grievous bodily harm in a form of: deprivation of a person of their sight, hearing, speech or the ability to procreate, or inflicting on another person a serious crippling injury, an incurable or prolonged illness, a potentially fatal illness, a permanent mental illness, a permanent total or significant incapacity to perform a profession, or a permanent serious bodily disfigurement or deformation) is liable to imprisonment for between three months and five years.
accused, as well as the judicial and prosecuting authorities, should more willingly seek mediation and an agreement that could lead to faster termination of criminal proceedings without indicating the criminal responsibility of the accused. The disadvantage of the above solution was the requirement to completely repair the damage or compensation without the possibility of only agreeing how to repair the damage, and then a gradual or one-time fulfillment of this obligation.

Unfortunately, the experiment with article 59a of the Criminal Code lasted very briefly, as this provision was repealed on 16 April 2016\(^8\) by a new parliamentary majority, which prefers a greater penalisation of criminal law and is reluctant to democratizing the criminal process. The short period of validity therefore does not allow for conclusions to be drawn as to its actual effectiveness.

**The purposes and effectiveness of victim-offender mediation in Poland**

The Polish legislator does not indicate the explicit purpose of mediation in a criminal process. Regulations on article 23a of the Code of Criminal Procedure establish general rules on mediation and regulate the link between the criminal process and the non-procedural mediation process, however, it is not possible to read from them what should be achieved by means of mediation. As pointed out in the Polish literature, when evaluating this institution, one should focus on its practical dimension, i.e. on the benefits that are brought to the victim, perpetrators of the crime and to the society (Waluk, 2002: 80-82; Klarman, 2005: 169-178; Suchorska, 2008: 172-173; Bieńkowska, 2011: 60-61; Grudziecka, Książek, 2013: 66-68; Grudziecka, Książek, 2017: 395-397). These benefits should be treated as a serious argument in the discussion whether mediation is an alternative to formal justice.

Mediation enables the victims of a crime, above all, to be the subject of the conflict, guarantees hearing and releasing anger and other emotions, getting answers to why he/she was the victim of a crime and whether such a situation can be repeated. The victim can directly make the perpetrator aware of the harm caused by the crime, present his/her needs related to compensation,

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and at the same time get a quicker reparation of the damage without the need
to take additional steps. The undoubted benefits are also: knowledge on how
to protect from re-victimization, protection against secondary victimization
and avoiding excessive publicity around the matter. The benefits of the per-
petrator include participation in solving his/her own case, the possibility of a
fuller understanding of the consequences of his/her own deed and the need
to correct its consequences, the opportunity to express regret and remorse.
Conclusion of a voluntary settlement with the victim helps to avoid publicity,
stigmatization and more severe penal sanctions, and at the same time facili-
tates reintegration into society, including the local community. The benefits
that the society can derive from mediation are associated primarily with the
extinction of the conflict between the perpetrator and the victim of crime, and
thus restoration of trust in social relations, increasing the social sense of secu-
rity, tolerance of people towards each other, discharging local conflicts, inclu-
sion in preventive and resocialization activities. The second aspect of the ben-
efits for society results from an improvement on the functioning of the justice
system. Thanks to mediation, the law enforcement authorities and courts are
relieved of minor matters, and thus the possibility of focusing on more seri-
ous matters, limiting the length of criminal proceedings, reducing the costs of
justice and, as a result, restoring confidence in the justice system (Wright, 1989:
5-8; Joseph, 1996: 212-213; Wynne, 1996: 448-449; Bieńkowska, Czarnecka-Dzi-

Mediation is obviously not free of drawbacks. In addition to the general
objections related to being in opposition to the traditional justice system, lack
of procedural guarantees and criminal-law protection of the individual and
trivialization of the crime by reducing the process following the act, meeting
and talking, the importance of mediation in the criminal process is marginal.
A small number of cases resolved with the use of mediation has little effect
on the relief of the judiciary, and at the same time there is a threat of violation
of the principle of voluntary mediation by mediators and representatives of

Evaluation whether mediation between the victim and the perpetrator
may become a viable alternative to the justice system can be formulated after
analyzing the effectiveness of the institution. The effectiveness of mediation
is a complex issue and requires the formulation of its appropriate measures.
It can be considered in two aspects: 1) as an efficiency on a micro (individual)
scale, perceived from the perspective of its participants as a degree of achieving the main goals of mediation (that is, resolution of the conflict, reconciliation, compensation and redress of the victim), determined by measures (indicators) possible for quantitative formulation; and 2) as efficiency on the macro (statistical) scale, assessed from the point of view of interests of the justice system (as its element), which involves the issue of efficiency of proceedings expressed by the speed of dealing with matters and minimizing the costs of action, as well as the importance of mediation for the criminal process. The following should be considered as measures of effectiveness in the micro scale: 1) satisfaction of victims and perpetrators after participation in mediation proceedings and its results; 2) acceptance of mediation by judicial authorities, mediators and society; and 3) concluding and enforceability of agreements (settlements). Macro-efficiency measures include: 1) return of perpetrators to crime; 2) speed and cost of procedures; 3) quantitative relief of judicial authorities as a result of mediation measured in the statistical share of effective mediation in the overall number of criminal cases. From the point of view of implementing the idea of restorative justice, the efficiency indicators at the micro scale are more important, but in the face of the traditional justice system, statistical efficiency is more important (Kulesza, Kużelewski, 2009: 118-119).

Therefore, it will be appropriate to cite the statistical results of the use of mediation in the Polish criminal process (see Table 1, Table 2).

Table 1: Cases ended by way of mediation proceedings by the public prosecutor’s offices in the years 1998–2014

<table>
<thead>
<tr>
<th>Year</th>
<th>Total</th>
<th>To conclude with an agreement</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>In absolute numbers</td>
<td>Dynamics (previous year = 100)</td>
</tr>
<tr>
<td>1998</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>1999</td>
<td>40</td>
<td>32</td>
</tr>
<tr>
<td>2000</td>
<td>51</td>
<td>43</td>
</tr>
<tr>
<td>2001</td>
<td>38</td>
<td>30</td>
</tr>
<tr>
<td>2002</td>
<td>34</td>
<td>30</td>
</tr>
<tr>
<td>2003</td>
<td>60</td>
<td>46</td>
</tr>
<tr>
<td>2004</td>
<td>325</td>
<td>230</td>
</tr>
<tr>
<td>2005</td>
<td>699</td>
<td>522</td>
</tr>
<tr>
<td>2006</td>
<td>1376</td>
<td>1074</td>
</tr>
<tr>
<td>2007</td>
<td>1919</td>
<td>1438</td>
</tr>
<tr>
<td>2008</td>
<td>1612</td>
<td>1225</td>
</tr>
<tr>
<td>2009</td>
<td>1390</td>
<td>1042</td>
</tr>
</tbody>
</table>
Table 2: **Cases ended by way of mediation proceedings by courts in the years 1998–2016**

<table>
<thead>
<tr>
<th>Year</th>
<th>Total</th>
<th>Dynamics (previous year = 100)</th>
<th>To conclude with an agreement</th>
<th>Dynamics (previous year = 100)</th>
<th>In %, compared to the total number of ended cases</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>In absolute numbers</td>
<td></td>
<td>In absolute numbers</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1998</td>
<td>10</td>
<td>-</td>
<td>7</td>
<td>-</td>
<td>70,0</td>
</tr>
<tr>
<td>1999</td>
<td>366</td>
<td>3660,0</td>
<td>232</td>
<td>3314,3</td>
<td>63,4</td>
</tr>
<tr>
<td>2000</td>
<td>771</td>
<td>210,7</td>
<td>481</td>
<td>207,3</td>
<td>62,3</td>
</tr>
<tr>
<td>2001</td>
<td>786</td>
<td>101,9</td>
<td>471</td>
<td>97,9</td>
<td>60,0</td>
</tr>
<tr>
<td>2002</td>
<td>1021</td>
<td>129,9</td>
<td>597</td>
<td>126,8</td>
<td>58,5</td>
</tr>
<tr>
<td>2003</td>
<td>1858</td>
<td>182,0</td>
<td>1108</td>
<td>185,6</td>
<td>59,6</td>
</tr>
<tr>
<td>2004</td>
<td>3569</td>
<td>192,1</td>
<td>2123</td>
<td>191,6</td>
<td>59,5</td>
</tr>
<tr>
<td>2005</td>
<td>4440</td>
<td>124,4</td>
<td>2755</td>
<td>129,8</td>
<td>62,0</td>
</tr>
<tr>
<td>2006</td>
<td>5052</td>
<td>113,8</td>
<td>3062</td>
<td>111,1</td>
<td>60,6</td>
</tr>
<tr>
<td>2007</td>
<td>4178</td>
<td>82,7</td>
<td>2753</td>
<td>89,9</td>
<td>65,9</td>
</tr>
<tr>
<td>2008</td>
<td>3892</td>
<td>93,1</td>
<td>2551</td>
<td>92,7</td>
<td>65,6</td>
</tr>
<tr>
<td>2009</td>
<td>3714</td>
<td>95,5</td>
<td>2506</td>
<td>98,2</td>
<td>67,4</td>
</tr>
<tr>
<td>2010</td>
<td>3480</td>
<td>93,7</td>
<td>2274</td>
<td>90,8</td>
<td>65,3</td>
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<tr>
<td>2011</td>
<td>3254</td>
<td>93,4</td>
<td>2074</td>
<td>91,1</td>
<td>63,7</td>
</tr>
<tr>
<td>2012</td>
<td>3254</td>
<td>100,0</td>
<td>2253</td>
<td>108,7</td>
<td>69,2</td>
</tr>
<tr>
<td>2013</td>
<td>3696</td>
<td>113,6</td>
<td>2332</td>
<td>103,5</td>
<td>63,1</td>
</tr>
<tr>
<td>2014</td>
<td>3770</td>
<td>102,1</td>
<td>2403</td>
<td>103,0</td>
<td>63,7</td>
</tr>
<tr>
<td>2015</td>
<td>4046</td>
<td>107,3</td>
<td>2530</td>
<td>105,3</td>
<td>62,5</td>
</tr>
<tr>
<td>2016</td>
<td>3696</td>
<td>91,3</td>
<td>2227</td>
<td>88,0</td>
<td>60,3</td>
</tr>
<tr>
<td>Total</td>
<td>54853</td>
<td>-</td>
<td>34732</td>
<td>-</td>
<td>63,3</td>
</tr>
</tbody>
</table>

Source: Own elaboration based on the data obtained from the Department of Courts, Organization and Analysis of Justice of the Ministry of Justice and from the Department of Strategy and European Funds of the Ministry of Justice.


Analysis of statistical data indicates unfavorable phenomena. From 2006 and 2007, the number of cases submitted annually to the mediation proceedings (a small amount considering the number of criminal proceedings conducted annually in Poland) began to decrease from year to year in relation to the pre-trial and judicial proceedings. At that time, there were no changes to the regulations of criminal proceedings, especially those concerning mediation proceedings that could lead to such a regress (Table 1, Table 2).

The proportions in the use of mediation in preparatory and court proceedings are also unfavorable. It is not the courts, but the prosecutor’s office that should be the leader in referring cases to mediation and in this way much more efficiently to solve criminal proceedings and lower its costs, because in many cases there is still a chance for an amicable resolution of the criminal conflict before escalation to a fight between the parties for the best outcome of the proceedings before the court. This phenomenon is continually deepening due to the greater dynamics of the drop in the number of mediations in the preparatory proceedings.

Summarizing these considerations, it can be concluded that statistically evaluated mediation does not constitute a competitive institution towards the traditional judicial system (Kulesza, 1995b: 201-234). In recent years, the number of cases referred to mediation in preparatory proceedings is no more than 0.5%, while in court proceedings less than 1% of all cases are brought annually to court with indictment or motion for conditional discontinuance of proceedings. On the other hand, the positive aspect is the relatively high rate of settlement in mediation proceedings compared to data from other countries. At the level of preparatory proceedings, it amounts to approximately 70-80%, while in court proceedings it is lower by approximately 10% each year. Similar conclusions were obtained as a result of statistical analysis for the years 2011-2014. The share of mediation referrals in criminal law proceedings in district courts was on average 0.16% of all proceedings. The percentage of cases referred to mediation at prosecutor’s offices ranged between 0.11% and 0.12%. However, the percentage of mediations concluded with a conciliation agreement was high and ranged between 69.6% and 72.6%. It means that the effectiveness of mediation should be assessed as very high (Rudolf et al., 2015: 17-18). For comparison, studies conducted in the United Kingdom and the USA showed rates exceeding 90%, while in Germany and Austria only over 70%, and sometimes below 60% (Mesaros, 1985: 337; Hartmann, 1992: ...)
The main reasons for low popularity of mediation in Poland include among others: 1) the procedural barriers, which prevent development of the institution of mediation in preparatory proceedings; 2) focus on statistical effectiveness of the prosecutors; 3) lack of a uniform approach of persons referring cases to mediation; 4) insufficient effectiveness of training of judges and prosecutors; 5) lack of uniform standards of the mediator profession, and 6) low level of social awareness with regard to mediation (Rudolf et al., 2015: 20-45).

Conclusion

The Polish judicial system still remains the only ‘supplier’ of cases for mediation in criminal matters. Statistical measure of the prosecutor’s work evaluation, i.e. law enforcement efficiency ratio indicates that on average over 80% of initiated preparatory proceedings each year end with bringing an indictment to court. However, it should not be forgotten that mediation based on the concept of subjective rights of its participants (the accused and the victim) is an element of a fair trial (Kuczyńska, 2009: 172-174), and therefore has a unique quality, that does not undergo any statistical measurement. Regarding the analogy with the rights of the accused in the criminal trial, it should be pointed out that just as the share of acquittal in the total number of court judgments (about 5%) does not deny the presumption of innocence and defense rights, even the relatively few cases where mediation occurred and, following it, the real extinction of the conflict between the victim and the perpetrator of the crime, testify to the validity and future of this institution.

There is hope that the amendments in the field of victim-offender mediation, which entered into force in 2015, will revive this institution and increase the percentage of cases referred to mediation. It is regrettable that the legislator overturned very quickly article 59a of the Criminal Code instead of improving this provision. The possibility of discontinuation of court proceedings due to the positive conclusion of mediation and lack of purpose of continuation of the proceedings, as the objectives of punishment have been achieved should be recommended. The provision which will allow for suspension of the proceedings until the actual performance of the settlement should be also considered.
In addition to legislative changes it is necessary to conduct trainings (especially in the area of the eligibility of cases for mediation) which should be provided for judges, prosecutors, police officers, mediators and social welfare workers.

References


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Posredovanje između žrtve i učinioca kao alternativa krivičnom postupku u Poljskoj

Rad ima za cilj da prikaže teorijsko razumevanje posredovanja između žrtve i učinioca i koristi koje od ovog procesa imaju žrtva, učinilac krivičnog dela i društvo u celini. U radu se analizira značaj implementacije Direktive Evropskog parlamenta i Saveta Evrope 2012/29 o uspostavljanju minimalnih standarda o pravima, podršci i zaštiti žrtava kriminaliteta i uticaj koji je ovaj dokument imao na uvođenje odredaba restorativne pravde u poljski Zakon o krivičnom postupku iz 1997. godine. U radu se ukazuje na efektivnost posredovanja u krivično-pravnom sistemu Poljske. Takođe, prikazani su podaci pravosudne statistike koji se odnose na primenu posredovanja. Zaključak je da posredovanje ne predstavlja konkurentni institut tradicionalnom pravosudnom sistemu, koji i dalje ostaje jedini koji upućuje krivične slučajeve na posredovanje u Poljskoj.

_Ključne reči:_ posredovanje između žrtve i učinioca, krivično-pravni sistem, restorativna pravda, efektivnost, Poljska.