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The Position of the Accused as a Party in Mediation Proceedings

Pozycja oskarżonego jako strony w postępowaniu mediacyjnym

ABSTRACT

Mediation, as a form of amicable dispute resolution, is also permitted in criminal proceedings. Reaching an agreement between the perpetrator (accused) and the victim is intended to enable a swifter conclusion of the case and to resolve it in a manner acceptable to both parties. The purpose of this article is to analyse the current legal framework and to assess whether the accused's position in mediation is adequately protected. The analysis focuses on whether, by agreeing to certain concessions, the accused may legitimately expect that this will bring about tangible benefits in the decision ultimately rendered in his case.

Keywords: mediation; criminal proceedings; accused; position of the accused

INTRODUCTION

The possibility of conducting mediation in criminal proceedings is not a new solution. In the currently binding Code of Criminal Procedure,¹ it has been functioning since the moment of its entry into force. However, as a mechanism grounded in the voluntary participation of the parties, mediation can fulfil its objectives only if a legal instruments are provided to motivate the parties to resort to this solution.

¹ Act of 6 June 1997 – Code of Criminal Procedure (consolidated text: Journal of Laws 2025, item 46, as amended; hereinafter also: “CCP” or “the Code”).

In the literature, considerable attention² is paid to the position of the victim as a party of mediation proceedings. This is not surprising, as the victim, being the person directly harmed by the offence,³ should receive all assistance enabling redress for the harm suffered. Nevertheless, it is also worth devoting more attention to the accused⁴ as a party to mediation proceedings. Bearing in mind that for mediation to achieve its goal – leading the parties to reach an agreement – it is necessary that its participants have a genuine willingness to cooperate and to make reciprocal concessions within a reasonable scope. This, in the Author's view, is significantly easier to achieve when there are provided legal instruments that offer real and predictable benefits for participants in mediation proceedings from engaging in this form of dispute resolution.

The purpose of this study is to analyse the position of the accused in mediation proceedings in terms of whether he can expect objective benefits resulting from participating in this form of dispute resolution. The discussion will attempt to answer whether the currently binding provisions offer the accused any real and objective benefit, understood as mitigation of the penalty or avoidance of other criminal-law measures. In the Author's view – which will be discussed in detail – nowadays the accused has no guarantee (based on legal provisions) that reconciliation with the victim in the course of mediation will improve his procedural situation. There are no mandatory mechanisms guaranteeing that the position of an accused who participated in mediation and reconciled with the victim will be better than if he had not undertaken such actions. Moreover, one may hypothesise that the present form of the Code of Criminal Procedure in no way rewards mediation (whether ordered by a court or prosecutor, or conducted entirely outside the process on the parties' own initiative) compared to other methods of resolving the conflict (e.g., consensual conviction or conciliation hearings in private prosecution cases).

It should be emphasised that all psychological and emotional factors which may motivate the accused to consent to mediation are excluded from consideration. This study focuses on answering whether, from a strictly pragmatic perspective, participation in mediation – and therefore the willingness to make certain statements or concessions – is advantageous for the accused; whether the current legal framework allows him to conclude that, from the standpoint of protecting his own

² Cf., e.g.: K. Oleksy, *Funkcja kompensacyjna procesu karnego*, Warszawa 2024, pp. 289–293; and A. Lach, *Prewencja indywidualna w procesie karnym*, Warszawa 2020, pp. 230–232.

³ For a broader discussion of the concept of “victim,” see, e.g.: Supreme Court Resolution of 21 December 1999, I KZP 43/99, LEX no. 585234.

⁴ Under the term “accused,” for the purposes of this study, the concept of “victim” must also be included (Article 71 § 3 CCP). The transfer of the provisions on mediation to Title I of the Code (“General Provisions”) unequivocally confirms the possibility of using this instrument also at the preparatory stage (cf. G.A. Skrobotowicz, *Zalety mediacji karnej*, “Prokuratura i Prawo” 2012, no. 2, p. 138).

interests, it is safer and more beneficial to use mediation than to rely solely on defence within standard criminal proceedings. The answer to this question will also help assess whether the legislator undertakes legislative actions promoting mediation by regulating it in a way that encourages the use of this tool because it offers predictable benefits. It will also allow for the formulation of possible *de lege ferenda* proposals for solutions that could serve as remedies to problems identified in this study.

Regarding the applied methodology – this study is theoretical in nature. The Author focuses on dogmatic analysis of legal acts, jurisprudential and doctrinal views. This methodology is typical for legal studies and makes it possible to formulate conclusions and proposals for desirable legislative changes.

GENERAL CHARACTER OF MEDIATION IN CRIMINAL CASES

Mediation in criminal cases is similar to mediation in civil procedure but it also exhibits significant differences. While the primary aim continues to be the parties' development of an agreement, the consequences of achieving such an agreement for the ongoing proceedings differ substantially. Describing in detail the essence of mediation in criminal cases, Piotr Zięba indicates that it consists in the voluntary efforts of the perpetrator of the act and the victim to shape, through negotiation, their mutual relations in a way that enables the attainment of a consensual resolution satisfactory to each party.⁵

As already mentioned, in the existing literature the question of the position of the accused as a party in mediation proceedings has not been addressed very frequently. Among the more significant publications on this issue, it is worth mentioning the work of Cezary Kulesza and Dariusz Kuźelewski. They note that the accused in mediation proceedings occupies a position equal to that of the victim in every respect. The very nature of mediation prevents treating him as if he were the perpetrator of the act. The authors also draw attention to the agency afforded to the accused by participating in mediation (the parties themselves shape the resolution of their dispute) as well as to the confidentiality of mediation, which they see as an additional incentive for the accused to participate in the process.⁶ The similar position is expressed by Karol Sułkowski. He points out that the incentive for the accused to participate in mediation is the prospect of a more lenient penalty, as

⁵ P. Zięba, [in:] *Mediacja w praktyce mediatora i pełnomocnika*, eds. C. Roguła, A. Zemke-Górecka, Warszawa 2021, p. 355.

⁶ C. Kulesza, D. Kuźelewski, *Victim-offender Mediation as an Alternative to the Criminal Justice System in Poland*, "Temida" 2018, no. 21, pp. 3–22.

well as image rehabilitation. Similarly to Kulesza and Kuźelewski, Sułkowski also emphasises the importance of the influence the accused has on the content of the agreement reached, as well as the benefits resulting from the confidentiality of mediation.⁷

MEDIATION SUITABILITY IN CRIMINAL CASES

First of all, it is worth beginning with the notion of so-called “mediation suitability” (*zdadność mediacyjna*), understood as the admissibility of conducting mediation in a given type of case. In Article 10 of the Code of Civil Procedure,⁸ the legislator indicates that the civil court, among other things, encourages the parties to make use of mediation in cases “in which the conclusion of a settlement is permissible.” No such explicit distinction appears in Article 23a of CCP. A literal reading of that provision could therefore lead to the conclusion that mediation is permissible in every criminal case. This conclusion is, of course, incorrect. The key issue is how to distinguish between cases in which the parties may be referred to mediation.

First, since referring a case to mediation requires the consent of both the victim and the accused, mediation will be inadmissible in all cases where no victim exists,⁹ or in cases where the victim is not a person capable of participating in mediation proceedings and negotiating redress for the harm suffered.¹⁰ As noted by, for example, Dobrośława Tomzik, mediation is inadmissible in cases offence infringing goods of a largely abstract nature, which are characterised by the absence of a victim.¹¹

However, doctrine and case law also indicate other situations in which, despite the presence of both a victim and an accused, mediation will be inadmissible.¹² Examples typically include cases involving domestic violence or violence against

⁷ K. Sułkowski, *Mediation in Polish Criminal Law*, “Studenckie Zeszyty Naukowe” 2017, no. 35, pp. 83–96.

⁸ Act of 17 November 1964 – Code of Civil Procedure (consolidated text: Journal of Laws 2024, item 1568, as amended). About cases in which settlement is “permissible,” cf., e.g.: P. Fik, [in:] *Mediacja w praktyce...*, pp. 371–373, and the literature cited therein; and T. Ereciński, [in:] P. Grzegorzczuk, J. Gudowski, H. Pietrkowski, K. Weitz, T. Ereciński, *Kodeks postępowania cywilnego. Komentarz*. Vol. I: *Postępowanie rozpoznawcze. Artykuły 1–124*, 6th ed., Warszawa 2023, Article 10, thesis 2.

⁹ For example: Article 270 of the Criminal Code – material forgery.

¹⁰ These include all offences which, by their harmfulness, infringe public order and the broader public interest, e.g.: espionage (Article 130 of the Criminal Code).

¹¹ D. Tomzik, *Mediacje w sprawie o ochronę danych osobowych*, “Palestra” 2025, no. 4, p. 95.

¹² “Inadmissibility” should be understood here broadly – not as a formal legal prohibition on referring a case to mediation, but rather as a refusal by the authority conducting the proceedings to issue the relevant order, which will be discussed in more detail later in this study.

women (due to the need to protect the victim, also from re-victimisation¹³). However, such a view – although sometimes undoubtedly justified – has no basis in the law. Article 23a of CCP introduces no distinctions regarding categories of cases suitable for mediation. Moreover, in a judgment of 11 September 2011, the Court of Justice of the European Union held that the EU law permits to prohibit mediation in all criminal cases involving certain types of offences committed within the family.¹⁴ Since the jurisprudence of an international court allows for the exclusion of certain categories of cases from the scope of Article 23a CCP, the absence of such legislative action in Polish law should be interpreted as the legislator's decision that mediation in such cases is permissible.¹⁵

Despite this, doctrine has developed two fundamentally different positions, each departing from the view described above, namely that no limitations should be introduced for cases in which a victim (an identifiable harmed party) exists.

The first position – represented, among others, by Lidia Mazowiecka – assumes that in certain particular categories of cases, the procedural authority should thoroughly assess whether mediation may contribute to reaching an agreement and securing the legitimate interests of the victim. Although Izabela Pączek notes that the CCP introduces no explicit limitations on referring cases to mediation, she ultimately concludes that a case may be referred to mediation only after the authority verifies its suitability, excluding situations involving organised crime, repeat or highly antisocial offenders, or victims whose attitudes make constructive dialogue impossible.¹⁶

¹³ Cf. L. Mazowiecka, *Mediacja w sprawach karnych*, "Wojskowy Przegląd Prawniczy" 2016, no. 2, pp. 148–150, where the author notes that Polish law does not *de lege lata* exclude any category of cases from the possibility of conducting mediation. She emphasises, however, that in cases involving domestic violence, a high degree of caution on the part of procedural authorities is advisable when deciding whether to refer the case to mediation.

¹⁴ Judgment of the Court of Justice of the European Union of 15 September 2011, C-483/09, *Criminal proceedings against M. Gueye and V. Salmerón Sánchez*, "Zbiór Orzecznictwa Trybunału Sprawiedliwości I Sądu" 2011, no. 8–9B, item I-8263.

¹⁵ For the sake of clarity, it should be noted that the above reasoning is not entirely free from certain risks. The Polish legislator has not excluded from the scope of Article 23a CCP those offences which, as discussed earlier, involve no identifiable victim, and in such cases mediation indeed appears impossible. However, the distinction between such situations and offences involving domestic violence is significant: in the former, it is the very nature of the alleged act that renders mediation impossible (there is no person with whom the accused can reach an agreement), whereas in the latter, the decision to refuse mediation lies entirely with the procedural authority. Therefore, notwithstanding this reservation, the view that mediation is inadmissible in domestic violence cases must be rejected as unfounded.

¹⁶ I. Pączek, *Postępowanie mediacyjne jako konsensualne zakończenie postępowania karnego*, "Ius Novum" 2016, no. 4, p. 105, 108.

The second view is even more radical. It rejects the possibility of mediation in certain categories of cases, without any reference to an individualised assessment by the procedural authority.¹⁷

Both of these positions must, however, be regarded as incorrect and – from the perspective of the accused – unfair. There are at least two important safeguards against the dangers highlighted by the above authors concerning the attitudes and characteristics of the accused or the victim.

First, the course of mediation is supervised by the mediator – a person external to the dispute, equipped with appropriate substantive preparation, knowledge, and experience in negotiating and managing conflict. Trust in the professionalism of mediators is sufficient to assume that they will be capable of identifying cases where the parties' attitude prevents the achievement of an agreement. Conversely, it is not excluded that even in the case of a demoralised perpetrator, under appropriate circumstances, a skilled mediator may persuade the parties to make concessions and reach a settlement. Leaving the decision to exclude mediation to the procedural authority – based on its judgment about the characteristics or mutual relations of the parties – appears to be an unjustified expression of distrust toward mediators' competence.

Second, an even earlier safeguard appears at the stage where the parties decide whether to participate in mediation: the requirement of voluntariness. It must be remembered that mediation continues only for as long as both parties are willing to participate. Withdrawal by either of them terminates the process. Therefore, if individuals decide that they intend to seek an amicable resolution of their dispute, the procedural authority should not obstruct them.¹⁸

DECISION OF REFERRING THE CASE TO MEDIATION

The above considerations lead directly to another feature of mediation proceedings in criminal cases which – in the Author's view – is disadvantageous to the accused, namely the complete discretion of the prosecutor or the court in deciding

¹⁷ Jerzy Niñołajew emphasises that mediation is not allowed, e.g.: when the accused is strongly demoralised of links to prison subculture (J. Niñołajew, *Kapelan więzienny jako mediator w postępowaniu karnym wykonawczym*, "Studia Prawnicze KUL" 2012, no. 3, p. 70).

¹⁸ Of course, this does not change the fact that there may be cases in which the victim's dependence on the perpetrator is so strong that the victim agrees to mediation out of fear, a sense of necessity, or for other reasons that cannot be considered voluntary consent. In such cases, the procedural authority and the mediator must conduct an *ad casum* assessment and, if such circumstances are revealed, terminate the mediation or refuse to refer the case to mediation – but on the basis not of the nature of the case, but of the absence of a free and genuine declaration of will by the parties. Although this approach is considerably more demanding than excluding certain categories of cases on the basis of their legal qualification, it offers far stronger guarantees of respecting the rights of the parties and far more effectively promotes the idea of mediation.

whether to refer the parties to mediation. As case law indicates, there is no obligation for the court or prosecutor to conduct mediation proceedings.¹⁹

This view is widespread and well-established in case law.²⁰ Moreover, in the cited decision of 12 April 2018, the Supreme Court indicated that a violation of Article 23a CCP, consisting in the failure to refer the parties to mediation despite their joint request, cannot constitute a ground for a cassation appeal, as such conduct does not amount to a flagrant infringement of procedural law.

Legal scholarship likewise recognises that Article 23a CCP is discretionary in nature, and a joint request by the parties does not bind the procedural authority. This practice – combined with the selection of cases that are, in the assessment of the authority, suitable for mediation – leads to an unacceptable state of affairs in which, despite the parties' will, the authority conducting the proceedings refuses to refer them to mediation, while no remedy is available to challenge such a decision.²¹

THE POSITION OF THE ACCUSED IN MEDIATION PROCEEDINGS

When analysing the accused's position, it is necessary to consider what real benefits mediation may offer him. Once again, it should be emphasised that the purpose of this study is exclusively to analyse and evaluate the existing legal regulations from the perspective of the direct impact of the accused's participation in mediation on the improvement of his procedural situation.

From the standpoint of mediation's influence on the course of proceedings, the accused may find himself in three different situations, depending on whether the case is prosecuted *ex officio* (public prosecution *sensu stricto*), prosecuted publicly but upon the victim's request, or prosecuted by private accusation. Depending on which of these configurations applies, the consequences of the parties' conclusion of a settlement in mediation – as well as the possible scope of reciprocal concessions that may positively affect the accused's situation – will differ significantly.

¹⁹ Supreme Court Decision of 25 February 2022, II KK 527/21, LEX no. 3404669.

²⁰ Cf., *inter alia*: Court of Appeal in Katowice Judgment of 4 August 2022, II AKa 206/22, "Biuletyn Sądów Apelacji Katowickiej" 2023, no. 3, item 15; Supreme Court Decision of 12 April 2018, III KK 562/17, LEX no. 2496263; Court of Appeal in Warsaw Judgment of 4 June 2014, II AKa 136/14, LEX no. 1483853.

²¹ Argument *ex* Article 459 §§ 1–2 CCP.

THE POSITION OF THE ACCUSED IN MEDIATION IN PUBLIC PROSECUTION CASES

In criminal proceedings (with the exception of private prosecution cases, discussed below), unlike in civil proceedings, the conclusion of a settlement by the parties during mediation does **not** end the process. In public prosecution criminal cases, the agreement reached by the parties and the settlement they conclude is relevant essentially only from the perspective of sentencing.²²

Thus, by participating in mediation, the accused has no certainty as to the ultimate effect that agreeing to certain concessions towards the victim will have on his procedural situation. The content of the settlement cannot include any determination regarding the accused's criminal liability, including the type or measure of any penalty potentially to be imposed.

An additional complication is that, at the judicial stage, there is a divergence in the understanding of the term "party." It should be noted that, pursuant to Article 299 § 1 CCP, the parties in preparatory proceedings are the victim and the suspect. At this stage, therefore, the notion of "party to the proceedings" refers to the same entities in both the mediation and the criminal process itself. The situation differs at the court stage. The victim may never become a party to judicial proceedings if he or she does not submit, within the prescribed time limit, a declaration of acting as an auxiliary prosecutor (Article 54 § 1 of the Code). Even then, he or she acts alongside the public prosecutor. Meanwhile, the prosecutor – the party who submits the indictment and determines the type of penal response sought – is **not** a party to the mediation proceedings. As a result, even reconciliation between the accused and the victim and the accused's redress of the harm caused does not automatically lead the prosecutor to withdraw the charge. This is, of course, justified by the rules governing criminal procedure, in particular the principle of legality expressed in Article 10 of the Code, but it significantly complicates the situation of the accused.

In the Author's view, it is naturally undesirable to shape the legal regulations so that the success of mediation would *ex lege* terminate the proceedings. However, even the theoretical possibility that the prosecutor may request the same penalty despite the settlement reached by the accused and the victim makes mediation considerably less attractive for the accused.

As already noted, in this type of case the success of mediation will affect only the measure of the penalty. According to Article 53 § 2 CC:²³ "When imposing

²² As Pączek rightly observes, the court is not bound by the mediation agreement and considers it only as one of the sentencing factors under Article 53 § 3 of the Criminal Code, with the ultimate decision on its impact resting entirely with the court (I. Pączek, *op. cit.*, pp. 112–113).

²³ Act of 6 June 1997 – Criminal Code (consolidated text: Journal of Laws 2025, item 383, as amended), hereinafter also: "CC," "Criminal Code."

a penalty, the court shall take into account in particular (...) the behaviour of the offender after the commission of the act, especially efforts to repair the damage or compensate the harm in another form corresponding to the public sense of justice (...).” Furthermore, pursuant to Article 53 § 2b(5) CC: “Mitigating circumstances include in particular: (...) reconciliation with the victim (...)” Already at this stage, it must be noted – an issue discussed more extensively later in relation to private prosecution – that Article 53 § 2b(5) does **not** distinguish between reconciliation reached outside the proceedings and reconciliation achieved as the result of mediation.²⁴

Nevertheless, mediation does appear expressly in Article 53 CC. According to § 3 of that provision: “When imposing a penalty, the court shall also take into account the positive results of mediation conducted between the victim and the perpetrator, or a settlement reached between them in proceedings before the court or the prosecutor.” Article 53 § 3 CC predates the regulation contained in Article 53 § 2b CC. The legislative decision according to which reconciliation constitutes a mitigating circumstance, while the positive result of mediation²⁵ is merely “taken into account,” must be considered unfounded. Mediation, as a “qualified form of reaching agreement” (involving a professional third party), should arguably constitute for the court a more significant circumstance than reconciliation reached outside the process. The present form of the regulation does not reward mediation in any meaningful way.

In summary, in public prosecution proceedings, the positive outcome of mediation may influence only the measure of the penalty, and there is no other certain benefit for the accused guaranteed directly by law.

Anticipating the subsequent discussion, it is worth noting that in proceedings involving private prosecution, pursuant to Article 492 § 1 CCP, reconciliation between the perpetrator and the victim (regardless of whether it occurs during mediation or entirely outside the proceedings) results in the discontinuance of the proceedings. However, this regulation cannot be applied in cases prosecuted by public accusation, which follows unequivocally from systemic interpretation, specifically the placement of Article 492 CCP within the chapter concerning private

²⁴ Cf. M. Budyn-Kulik, [in:] *Kodeks karny. Komentarz aktualizowany*, ed. M. Mozgawa, LEX/el. 2025, Article 53, thesis 26.

²⁵ The very notion of a “positive result” raises doubts in the literature. Magdalena Budyn-Kulik argues that it should be understood as the conclusion of a settlement between the perpetrator and the victim, and that it is not necessary for the settlement to be executed in practice. The author also notes that, *a contrario*, a negative result of mediation (understood as the absence of a settlement) cannot constitute an aggravating circumstance for the perpetrator (M. Budyn-Kulik, *op. cit.*, Article 53, thesis 27).

prosecution, whereas Article 23a CCP is located in the general provisions of the Code. This has also been confirmed by the Supreme Court.²⁶

THE POSITION OF THE ACCUSED IN MEDIATION IN OFFENCES PROSECUTED UPON THE VICTIM'S REQUEST

Mediation may have a slightly greater impact on the accused's situation in cases involving offences prosecuted by public accusation, but only upon the victim's request.²⁷ This constitutes a specific category of prohibited acts in which the legislator has made prosecution contingent upon a request submitted by the victim. Obtaining such a request generally lies with the prosecutor (Article 12 § 1a CCP), whereas its absence or withdrawal constitutes a negative procedural prerequisite and results in the discontinuance of the proceedings (or refusal to initiate them), in accordance with Article 17 § 1 point 10 CCP.

Very important is the fact that withdrawal of the request for prosecution by the victim is possible in preparatory proceedings with the consent of the prosecutor, and at the judicial stage – with the consent of the court, but no later than the conclusion of the evidentiary proceedings at the first main hearing (Article 12 § 3, first sentence, CCP). At first glance, this seems to give the victim a relatively strong position. This would be very beneficial in the context under discussion, as – in theory – reaching an agreement between the accused and the victim during mediation could include, in exchange for concessions made by the accused, withdrawal of the request for prosecution, which would generally lead to the discontinuance of the proceedings. The prosecutor's or court's consent, depending on the stage of the proceedings, would safeguard the victim from the effects of any impermissible pressure exerted by the accused.

However, a problem arises once the further wording of Article 12 § 3 CCP is taken into account. At the judicial stage withdrawal of the request, even with the court's consent, is inadmissible if the prosecutor who brought the indictment objects to it (Article 12 § 3, second sentence, CCP). This regulation was introduced on 5 October 2019.²⁸ As a consequence, withdrawal of the request for prosecution

²⁶ Supreme Court Decision of 4 November 2004, V KK 261/04, LEX no. 141329.

²⁷ Such offences include, for example: stalking (Article 190a CC), violation of the privacy of the home (Article 193 CC), performing a medical procedure without the consent of an entitled person (Article 192 CC), non-payment of maintenance (Article 209 CC), or damage to property (Article 288 CC). The offence of making criminal threats is regulated in a specific manner, as it takes the form of an offence prosecuted publicly only in certain situations (cf. Article 190 CC in conjunction with Article 12 § 4 CCP).

²⁸ Article 1 point 2 letter (b) of the Act of 19 July 2019 amending the Code of Criminal Procedure and certain other acts (Journal of Laws, item 1694).

(provided the court consents) is independent of the prosecutor's will only in small number of cases. Although the amendment rightly extended the time limit for submitting a statement on withdrawal (prior to the amendment, it was possible only until the commencement of the evidentiary proceedings at the first main hearing), conditioning the effectiveness of this action cumulatively on the consent of the court *and* the absence of objection from the public prosecutor is highly flawed. The justification to the bill stated that after evidence has begun, withdrawing the request requires the prosecutor's lack of objection to prevent abuse of the procedure, and this change supports the aim of making minor cases more consensual.²⁹ This reasoning is misguided. Since the court's consent is required, it is the **court** that guarantees that the institution of withdrawal of the request for prosecution will not be used instrumentally.

This legislative solution must therefore be assessed negatively. It is one of many examples of granting prosecutors extraordinary powers that allow them to override even the court's will. This is clearly inconsistent with the principle of equality of arms, and in the context under discussion further reduces the attractiveness of mediation from the perspective of the accused.

THE POSITION OF THE ACCUSED IN MEDIATION IN PRIVATE PROSECUTION CASES

In the context of the above considerations, from the perspective of the accused, mediation is the most attractive when it comes to offences prosecuted by private accusation. In such proceedings, the participation of the public prosecutor is marginal, which significantly increases the procedural powers of the victim. As follows from the already cited Article 492 § 1 CCP: "In the event of reconciliation between the parties, the proceedings shall be discontinued." Section 2 of this provision clearly indicates that this provision also covers reconciliation achieved as a result of mediation. What is important, the legislator does not differentiate between the consequences produced by reconciliation achieved through mediation and those produced by reconciliation resulting from the conciliation hearing referred to in Article 490 § 1 CCP, or reconciliation reached entirely outside the proceedings.

Accordingly, one must conclude that although reconciliation with the victim is very favourable for the accused in private prosecution proceedings (as it definitively ends the proceedings), it makes no difference whether it is achieved during mediation or outside it. This is particularly problematic given that participation in mediation guarantees the fairness of the agreement developed by the parties.

²⁹ Justification of the draft amending act of 19 July 2019, pp. 4–5, Sejm Paper no. 3251 of 21 February 2019.

Meanwhile, the legislator appears to disregard this circumstance by treating in the same manner agreements resulting from extra-procedural or even procedural arrangements made by the parties during the hearing and those developed under the guidance of a mediator. Such an approach is highly inconsistent. On the one hand, Article 492 § 1 CCP does not differentiate whether, in a given private prosecution case, any circumstances influence the possibility of achieving reconciliation. Thus – unlike the situation under Article 23a CCP – regardless of the mutual relations between the accused and the victim, the nature of their interactions, or their personal characteristics, achieving reconciliation terminates the proceedings.

Referring, for example, to the earlier cited view of Jerzy Nikołajew concerning the personality traits of the perpetrator which – in that author's view – should exclude the possibility of conducting mediation, it must be recognised that adopting such a view leads to a paradoxical conclusion: if such a perpetrator commits, for example, an offence under Article 286 § 1 CC, then, due to his demoralisation, mediation with the victim would be impossible. However, if the same perpetrator insults or slanders that same victim, violates his bodily integrity, or causes minor bodily harm, then not only is mediation permissible, but even reconciliation reached without mediation will lead to the discontinuance of the proceedings. This contradiction demonstrates that differentiating cases eligible for mediation under Article 23a CCP based on the personal characteristics of the parties has no justification.

The previously cited Mazowiecka referred to the strong emotional attachment of the victim to the perpetrator or the victim's dependence on him, which sometimes occurs in cases involving domestic violence. These considerations confirm that it is unjustified to differentiate between the situation of the parties depending on whether the proceedings are public prosecution or private prosecution. The inconsistency described above between the interpretation of Article 23a CCP and the literal wording of Article 492 § 1 CCP results in mediation being significantly less attractive from the perspective of the accused.

Finally, it should be noted that even in private prosecution proceedings, it may occur that the prosecutor joins the case (Article 60 § 1 CCP). The proceedings then continue under the rules applicable to public prosecution. The circumstances justifying such intervention are the protection of the rule of law or the public interest. These are typical general clauses, which makes it reasonable to conclude that the decision whether to join proceedings initiated by a private indictment is entirely at the discretion of the prosecutor.³⁰ Importantly, the prosecutor's joining the case results in the transformation of the victim's procedural role from private prosecutor to auxiliary (subsidiary) prosecutor (Article 60 § 2 CCP). This regulation means

³⁰ Cf. J. Zagrodnik, M. Burdzik, [in:] S. Głogowska, J. Karaźniewicz, M. Klejnowska, N. Majda, I. Palka, K. Sychta, K. Żyła, J. Zagrodnik, M. Burdzik, *Kodeks postępowania karnego. Komentarz*, Warszawa 2024, Article 60, thesis 4, and the literature and case law cited therein.

that once the prosecutor joins the case, Article 492 § 1 CCP no longer applies. The proceedings are then conducted under the rules applicable to public prosecution, and once again, the positive effects of mediation may only be taken into account by the court when determining the penalty.

RESTITUTIVE DISCONTINUANCE

After making the above comments, it is necessary to indicate several *de lege ferenda* proposals which – in the Author’s view – would not only make mediation a valuable tool from the perspective of the accused (but also the victim), but would also encourage its wider application, including on the initiative of the parties themselves.

First of all, it appears justified to restore the institution of the so-called “restitutive discontinuance,” which was in force from 1 July 2015 to 17 March 2016. This institution was provided for in Article 59a CC and was introduced by the Act of 27 September 2013.³¹ It was abolished by the amendment of 11 March 2016,³² meaning that the provision was in force for 261 days. This fact is significant in the context of the motives that guided the drafters when removing Article 59a CC, which will be discussed below.

Article 59a § 1 CC provided that:

If, before the commencement of the evidentiary proceedings at the first instance hearing, the perpetrator, who has not previously been convicted of an intentional offence involving violence, reconciles with the victim, in particular as a result of mediation, and repairs the damage or compensates the harm, the criminal proceedings concerning a misdemeanour punishable by no more than 3 years’ imprisonment, as well as a property offence punishable by no more than 5 years’ imprisonment, and an offence under Article 157 § 1, shall be discontinued upon the victim’s request.

This solution was intended as a mechanism “rewarding” amicable resolution of a dispute. From the standpoint of the earlier arguments, several criticisms may be raised: the provision did not clearly differentiate between the consequences of reaching an agreement through mediation and those of an agreement reached without mediation (despite the phrase “in particular,” the drafting did not introduce any differences in effects depending on whether a settlement was reached). A further limitation was that this mechanism applied only to perpetrators not previously convicted of intentional violent offences, and only in cases involving offences of lesser

³¹ Act of 27 September 2013 amending the Code of Criminal Procedure and certain other acts (Journal of Laws, item 1247, as amended).

³² Act of 11 March 2016 amending the Code of Criminal Procedure and certain other acts (Journal of Laws, item 437, as amended).

social harmfulness. The temporal limitation – allowing the use of this institution only before the commencement of evidentiary proceedings – also seems problematic, as it made mediation at the judicial stage considerably less valuable for the accused.

Nevertheless, this institution was highly desirable and its reinstatement appears justified. It was the victim who was the holder of the request for discontinuance, which, when submitted, was generally binding for the court. Article 59a CC did not provide the prosecutor with the possibility of objecting to the victim's request, which should be assessed very positively. At the same time, Article 59 § 3 CC gave the court the power to refuse restitutive discontinuance where “a special circumstance justified that discontinuance would be contrary to the need to fulfil the objectives of punishment.” The legislator therefore introduced a mechanism to protect against the abuse of this institution and entrusted its application to the court, as the authority responsible for proceedings after the indictment has been filed.

When justifying the introduction of restitutive discontinuance into the legal system, the drafters pointed out that it would strengthen the role and position of the victim in the process and will be useful in this cases in which the victim was no longer interested in continuing the dispute.³³

Much more interesting, however, are the reasons cited by the drafters for the repeal of Article 59a CC. As stated in the explanatory memorandum to the amendment, the changes made before go too far, because although such conduct may influence sentencing, it should not independently justify excessively lenient penalties.³⁴ Quoting this passage extensively is deliberate, as it shows that the repeal of restitutive discontinuance was not motivated by arguments arising from difficulties in applying the institution, but instead by reasons resembling penal populism.

It therefore appears that the decision to repeal Article 59a CC was not based on substantive arguments, and its consequence was depriving the accused of an instrument that gave him the possibility of exerting real influence over the course of the proceedings. Restoring this institution would significantly strengthen the status of mediation settlements in criminal proceedings.

THE IMPACT OF MEDIATION ON SENTENCING

With regard to the impact of mediation on the judgment and the measure of the penalty, the amendments to Article 53 CC would also be justified. Magdalena Budyn-Kulik, already cited, argues that, given the introduction on 7 July 2022 of

³³ Justification of the draft amending act of 27 September 2013, pp. 133–134, Sejm Paper no. 870 of 8 November 2012.

³⁴ Justification of the draft amending act of 11 March 2016, pp. 17–18, Sejm Paper no. 207 of 27 January 2016.

reconciliation between the perpetrator and the victim as a mitigating circumstance, Article 53 § 3 CC has become redundant.³⁵ In the Author's view, this position is not entirely correct. It seems possible to maintain both regulations, with the reservation that a reversal of their roles would be proper. It is the positive result of mediation that should constitute a mitigating circumstance included in the catalogue under Article 53 § 2b CC, whereas § 3 of this provision should specify that the court takes into account other forms of reconciliation between the accused and the victim (without mediation). Such a regulation has two fundamental advantages.

First, mediation would be explicitly indicated as a solution that is more favourable – from the procedural perspective of the accused – than an attempt to reach an agreement by other means. A settlement concluded with the victim would constitute a guarantee of the existence of a mitigating circumstance. This would also elevate the standing of mediation itself and acknowledge the role of the mediator as a professional entity.

Second, such a solution would better protect the victim's interests, as the victim would not be vulnerable to pressure aimed at securing an extra-procedural agreement. As described earlier, in an ideal model the mediator should recognise situations in which the victim does not find himself or herself in a position equal to that of the accused and should take measures to equalise their positions or terminate the mediation if circumstances arise that contradict its essence. The possibility that the mediation procedure may be discontinued could motivate the accused to soften his position. In summary, this part of the discussion leads to the conclusion that Article 53 § 3 CC is not redundant, although amendments to its wording and to Article 53 § 2b CC would be desirable.

Regardless of the above, in the Author's view the factor that would truly enhance the importance of mediation would be the shaping of legal provisions so that its positive outcome constitutes a basis for obligatory extraordinary mitigation of the penalty. Although Articles 53 § 2a and § 2b CC have been introduced, they contain only a catalogue of circumstances that the court considers within the framework of its sentencing discretion. If the legislator wished mediation to be, from the perspective of the accused, something more than a vague prospect of a more lenient penalty – without any guarantees in this respect and without the possibility of review³⁶ – it appears justified to link the positive result of mediation with obligatory extraordinary mitigation.

³⁵ M. Budyn-Kulik, *op. cit.*, thesis 27.

³⁶ From the perspective of appellate review, an allegation of infringement of Article 53 CC would generally be inadmissible, since this provision neither establishes an obligation for the procedural authority nor confers a right on the parties; its violation is therefore, as a rule, impossible to demonstrate.

According to Article 60 § 6 CC: “Extraordinary mitigation of the penalty consists in the imposition of a penalty below the lower threshold of the statutory range, a penalty of a lesser type, or refraining from imposing a penalty and imposing a penal measure, a compensatory measure, or forfeiture (...)” Extraordinary mitigation in cases where a settlement has been reached during mediation appears permissible and consistent with Article 60 CC. As follows from Article 60 § 2 CC: “The court may also apply extraordinary mitigation of the penalty in particularly justified cases (...) in particular: if the victim reconciled with the perpetrator, the damage has been repaired, or the victim and the perpetrator have agreed on the method of repairing the damage, due to the perpetrator’s attitude, especially when he made efforts to repair the damage or prevent it.” Reconciliation and redress therefore constitute facultative grounds for extraordinary mitigation. It appears desirable, first to distinguish between reconciliation achieved outside mediation and that achieved through mediation, and second, to make a settlement concluded before a mediator a circumstance obliging the court to apply extraordinary mitigation. The question of the specific rule that should guide sentencing in such cases (Article 60 § 6 points 1–5 CC) may remain open. Given the assumption that mediation should be permissible in every case in which an accused and a victim are present, it would be appropriate to formulate the directive in very general terms. One possible solution would be to stipulate that, when a settlement is concluded during mediation, the court imposes a penalty below the lower statutory threshold or a penalty of a lesser type.

CONCLUSIONS

In the Author’s view, the current shape of substantive and procedural criminal law does not allow for fully utilising the potential that mediation offers. From the perspective of the accused, who would like the concessions he makes to result in a specific improvement in his procedural situation, it is currently entirely irrelevant whether reconciliation with the victim occurs during mediation, during the trial, or entirely outside the proceedings. In every case, this circumstance has exactly the same impact on the outcome of the proceedings.

First, therefore, it must be stated that it is inappropriate for the legislator to ignore whether the agreement was reached through mediation or outside it. Participation in mediation, with the involvement of a professional third party – the mediator – increases the likelihood of reaching an agreement, and the settlement achieved is more likely to take into account the interests of both parties equally. The presence of the mediator also eliminates the possibility of one party forcing the other to accept certain terms of the settlement.

Second, it is inappropriate that Article 23a CCP completely omits specifying categories of cases in which mediation is admissible. This omission has led to the

emergence of a view according to which the procedural authority independently and arbitrarily decides in this respect and is not bound even by the parties' will. At the same time, the Author maintains that no other subjective or objective circumstances should determine the admissibility of mediation.³⁷ If the nature of the case, the relationship between the parties, or other circumstances make mediation impossible, the mediator should recognise that and terminate the mediation.

Third, the strong procedural position of the public prosecutor appears to further diminish the attractiveness of mediation. If the accused is aware that any arrangements reached during negotiations may be nullified by the prosecutor's decision, this will significantly reduce his willingness to participate in such proceedings. Private prosecution proceedings offer some advantage in this respect, but in such cases the obligation to discontinue the proceedings, regardless of how reconciliation was achieved, must be assessed negatively.

Fourth, the accused is not encouraged to participate in mediation by its limited impact on sentencing. Under the current legal framework, a positive result of mediation in no way obliges the court to impose a more lenient penalty on the accused. Although reconciliation is of course a mitigating circumstance, it is only one of many factors the court considers when determining the nature and measure of the penalty.

Therefore, it would be far more desirable to introduce institutions that would provide the accused with certainty that participation in mediation in good faith and the effort to conclude an agreement will indeed grant him a procedural benefit. Regardless of the opportunistic dimension of such an approach, it must be emphasised that motivation and outcome are distinct concepts. Since one of the aims of criminal proceedings is to satisfy the legitimate interests of the victim (e.g., through repairing the damage), it is of secondary importance whether the accused repairs the damage out of remorse or in order to secure a more lenient penalty. Restoring the institution of restitutive discontinuance appears justified. This would strengthen the role of the victim, and additionally it would highlight the unique nature of mediation and promote its wider use.

The development of mediation is justified by several factors, such as easing the burden on the justice system and demonstrating to the parties that they have real influence over the course of the dispute. A sense of agency significantly changes perspective and allows individuals to move beyond their comfort zones, which often results in resolving the dispute. The absence of legal regulations that would reflect the special significance of mediation makes this solution less attractive, particularly

³⁷ This naturally refers to situations in which both the accused and the victim are capable of expressing their will consciously. Any form of insanity or legal incapacitation would generally preclude the possibility of conducting mediation, although this would occur *a priori*, before the procedural authority even proceeds to assess the admissibility of mediation.

from the perspective of the accused. One must conclude that, under the current legal framework, the rights of the accused in mediation proceedings are in no way secured – as though the mere possibility of reconciliation with the victim were in itself a sufficient value for the accused. Without devaluing the importance of reconciliation, it must be remembered that many individuals, including many offenders, are guided by opportunism in their decisions. If this can be used to encourage the accused to reconcile with the victim, repair the damage, and compensate the harm, then such an opportunity should be utilised.

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ABSTRAKT

Mediacja, jako forma polubownego rozwiązywania sporów dopuszczalna jest także w postępowaniu karnym. Wypracowanie porozumienia między sprawcą (oskarżonym) a pokrzywdzonym ma umożliwić szybsze zakończenie sprawy oraz rozwiązanie jej w sposób, który dla każdej ze stron będzie akceptowalny. Celem artykułu jest analiza obecnych rozwiązań prawnych i ocena, czy pozycja oskarżonego w mediacji jest odpowiednio zabezpieczona; czy godząc się na określone ustępstwa, ma prawo oczekiwać, że spowoduje to dla niego realne korzyści w zakresie wydawanego w jego sprawie rozstrzygnięcia.

Słowa kluczowe: mediacja; postępowanie karne; oskarżony; pozycja oskarżonego