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Mediation as One of the Forms of Resolving Conflicts in Offence Cases

Mediacja jako jedna z form rozwiązania konfliktu w sprawie o przestępstwo

SUMMARY

The paper discusses the issue of mediation as one of the forms of solving criminal conflicts. The author presents, among others, the problem of mediation in connection with the principles of restorative justice, the issue of the mediation models accepted in criminal proceedings and also makes an attempt of indicating other forms of conflict solving based on negotiations. The author also makes a brief description of the shaping of lawmaker's motives in the case of mediation and then refers to contemporary issues of mediation proceedings.

Keywords: mediation; restorative justice; conflict; mediation proceedings

As A. Murzynowski aptly put it:

[…] the response of judicial bodies to a committed offence may take different forms and these can not necessarily include repression in the form of a traditional and unconditionally executed sentence of imprisonment. Sometimes, the fundamental reason for the choice of the type and length of the sentence, or even renouncing the imposition of the penalty, may be the intention to mitigate the conflict between the offender and the injured by requiring the offender to remedy the wrong done to the injured person (to compensate the injured person for the injury and moral harm suffered by the latter); which has quite recently been referred to in theoretical studies as restorative justice[1].

[1] A. Murzynowski, *Mediacja w toku postępowania przygotowawczego*, [in:] *Współczesny polski proces karny. Księga ofiarowana Profesorowi Tadeuszowi Nowakowi*, red. S. Stachowiak, Poznań

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According to J. Consedine, it is a philosophy that actually integrates a number of emotions related to human mentality, and this includes redress, compassion, forgiveness, grace and understanding and, naturally, sanctions as appropriate[2].

Restorative justice offers a process that grants those affected by an offence an opportunity to participate in solving problems arising from the offence[3], and thus allows us to fight crime not by unilateral methods of making the law excessively harsh, but by consistently implementing rationally defined criminal law norms aimed at diversified and civilized methods of work of the justice system[4]. Restorative justice is a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of that offence and its implications for the future[5].

The literature stresses the need to distinguish two elements in the definition of restorative justice[6]. The first one is that this justice means such an approach within the criminal justice system whereby the offender voluntarily and independently distances himself/herself from the criminal act, instead of being subject to punishment externally imposed by the court[7]. The second aspect of restorative justice involves an approach according to which the injured becomes a full-fledged partner in the proceedings[8]. This also means that even the most serious disputes can be settled, not decided by the court[9], provided that the opponents themselves strive to achieve

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2002, p. 243. It is worth noting that the principal assumption shared by the authors of the new Polish penal codes of 1997 was to "shift the centre of gravity of the criminal policy from punishing to resolving the social conflict, notably by remedying the injury, reasonableness of injury prevention, and treating the injured person as a party to the penal proceedings on a par with the defendant". *Uzasadnienie rządowego projektu Kodeksu karnego*, [in:] *Nowe Kodeksy karne z 1997 r. z uzasadnieniami*, red. I. Fredrich-Michalska, B. Stachurska-Marcińczak, Warszawa 1997, p. 15.

[2] J. Consedine, *Sprawiedliwość naprawcza – kompensacyjna praktyka prawa karnego*, [in:] *Zapobieganie i zwalczanie przestępczości w Polsce przy zastosowaniu probacyjnych środków karania. Materiały z konferencji zorganizowanej przez Komisję Ustawodawstwa i Praworządności pod patronatem Marszałka Senatu RP Longina Pastusiaka 1–2 grudnia 2003*, red. M. Lipińska, R. Stawicki, Warszawa 2004, p. 95.

[3] *Ibidem*.

[4] A. Murzynowski, *Mediacja w toku postępowania…*, p. 243.

[5] T. Marshall, *The Evolution of Restorative Justice in Britain*, Strasbourg 1996, p. 22, quoted by: B.D. Meier, *Sprawiedliwość naprawcza – zarys koncepcji*, [in:] *Mediacja. Nieletni sprawcy przestępstw i ich ofiary*, red. B. Czarnecka-Dzialuk, D. Wójcik, Warszawa 1999, p. 39. Cf. also J. Waluk, *Mediacja jako forma sprawiedliwości naprawczej – korzyści dla stron*, „Archiwum Kryminologii" 2007–2008, t. 29–30, p. 871.

[6] B.D. Meier, *op. cit.*, p. 40.

[7] *Ibidem*.

[8] *Ibidem*.

[9] More on the topic in J. Waluk, *op. cit.*, p. 871 ff.

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the settlement. The procedural aspect of restorative justice is commonly associated with the concept of mediation[10].

The Polish legislature has decided to introduce institutional solutions with elements of restorative justice integrated. These include mediation. As regards the criminal law system, regulations referring to principles of mediation were formulated in the provisions of the Code of Criminal Procedure[11], while the significance of this institution in deciding on the legal consequences of an offence was defined in the Penal Code[12]. The primary legislation provisions was followed by the first Regulation of the Minister of Justice of 14 August 1998 on the conditions to be met by institutions and persons authorized to mediate, the scope and conditions of access to case files and the principles and procedure for preparing the report on the course and results of the mediation proceedings[13].

The assumptions of the mediation procedure have evolved since mediation was introduced to the criminal law system. Initially, they were formulated by Article 320 of the Code of Criminal Procedure. According to this provision, "if it was relevant for the submission of an appropriate request, the prosecutor could, on the initiative or with the consent of the parties, remit the case to a trustworthy institution or person to carry out a mediation procedure between the suspect and the injured". It was widely accepted that submitting the 'appropriate request' should refer to conviction without conducting a trial (Article 335 of the Code of Criminal Procedure) and to issue a judgment to conditionally discontinue the criminal proceedings (Article 336 of the Code of Criminal Procedure)[14]. Referring the case to mediation in the preparatory proceedings was within the prosecutor's exclusive discretion, whereas during trial proceedings it was basically admissible when the above-mentioned prosecutor's requests were received by the court, which, however, did not choose the mediation procedure (Article 339 § 4 of the Code of Criminal Procedure)[15].

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[10] B.D. Meier, *op. cit.*, p. 40. See also the remarks on the origins of the term 'mediation' in colloquial and legal languages: R. Kmiecik, *Mediacja jako procesowa forma kształtowania podstaw rozstrzygnięć probacyjnych*, [in:] *Zapobieganie i zwalczanie przestępczości w Polsce*…, pp. 364–367.

[11] The Act of 6 June 1997 – Code of Criminal Procedure (Journal of Laws, No. 89, Item 555 as amended).

[12] The Act of 6 June 1997 – Penal Code (Journal of Laws, No. 88, Item 553 as amended). See A. Murzynowski, *Rola mediacji w osiąganiu sprawiedliwości w procesie karnym*, [in:] *Sprawiedliwość naprawcza. Idea. Teoria. Praktyka*, red. M. Płatek, M. Fajst, Warszawa 2005, p. 62.

[13] Journal of Laws, 1998, No. 111, Item 701. See D. Bek, *Podstawowe informacje o mediacji w sprawach karnych, podstawy prawne*, [in:] *Metodyka pracy mediatora w sprawach karnych*, red. O. Sitarz, Warszawa 2015, pp. 41–42.

[14] A wider interpretation of this regulation was proposed by P. Hofmański, E. Sadzik, K. Zgryzek (*Kodeks postępowania karnego. Komentarz*, t. 2, Warszawa 1999, p. 111) and A. Murzynowski (*Mediacja w toku postępowania*..., p. 246).

[15] E. Bieńkowska, *Istota i znaczenie mediacji w prawie karnym*, [in:] *U progu nowych kodyfikacji karnych. Księga pamiątkowa ofiarowana Profesorowi Leonowi Tyszkiewiczowi*, red. O. Górniok, Katowice 1999, p. 19.

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The Act did not allow the parties to appeal (Article 459 in conjunction with Article 465 of the Code of Criminal Procedure), probably because this was an optional institution which could also be available at a later stage of the proceedings[16]. Mediation was also provided for as an alternative to an obligatory conciliation session in cases of offences prosecuted by way of a private charge[17].

Scholars soon pointed to weaknesses of the regulation of Article 320 of the Code of Criminal Procedure[18]. First of all, they stressed that mediation in such a form meant that it could only be applied to a limited extent[19]. Secondly, they pointed out that the lawmakers had unreasonably reduced the option of referring a case to mediation proceedings virtually to the preparatory and possibly transitional stages[20]. The very location of Article 320 of the Code of Criminal Procedure in the provisions on pre-trial proceedings was also criticised, as it could have decided about the possibility of the use of mediation by the court at the preliminary stage with regard to the procedure before the hearing pursuant to Article 339 § 4 and Article 489 of the Code of Criminal Procedure, i.e. under the procedure of private charge[21]. A significant legal gap was also noted regarding amicable settlements made before mediator[22]. It was pointed out that the Regulation of the Minister of Justice of 14 August 1998 does not refer much to amicable settlement, while the provisions of the codes do not mention at all settlements concluded before mediator, but only before the judicial body[23]. The nature of settlement concluded before mediator also raised doubts[24]. There were arguments that the positive result of mediation should mean a way to resolve the conflict as defined by the parties, not the further consequences such as fulfilment of any obligations assumed by the offender[25]. In view of this code regulation, the conflict could essentially be resolved *via* mediation when there were legal grounds for the use of consensual instruments (Articles 335 and 387 of the Code of Criminal Procedure) and a sort of agreement was concluded between the judicial body and the accused or the judicial body – the accused – the injured party. Doubts were raised as to whether the 'understanding' between the accused and the injured party could have affected the measures "related to subjecting the offender to probation"

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[16] *Eadem*, *Mediacja i porozumienie się oskarżonego z pokrzywdzonym w nowej kodyfikacji karnej*, „Jurysta" 1998, nr 1, p. 1.

[17] *Eadem*, *Istota i znaczenie mediacji…*, p. 19.

[18] D. Szumiło-Kulczycka, *Proces karny a idea sprawiedliwości naprawczej*, [in:] *System Prawa Karnego Procesowego*, t. 1, cz. 2: *Zagadnienia ogólne*, red. P. Hofmański, Warszawa 2013, p. 393.

[19] A. Rękas, *Mediacja w polskim prawie karnym*, Warszawa 2004, p. 8.

[20] D. Szumiło-Kulczycka, *op. cit*., p. 393.

[21] T. Grzegorczyk, *Kodeks postępowania karnego. Komentarz*, Warszawa 2005, p. 130.

[22] E. Bieńkowska, *Poradnik mediatora*, Warszawa 1999, p. 64.

[23] *Ibidem*; *eadem*, *Istota i znaczenie mediacji…*, p. 19.

[24] D. Szumiło-Kulczycka, *op. cit*., p. 393.

[25] E. Bieńkowska, *Mediacja w polskim prawie. Charakterystyka regulacji prawnej*, „Przegląd Prawa Karnego" 1998, nr 18, p. 23.

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(Chapter XIII of the Penal Code) whether mediation before mediator at the trial stage was admissible at all, of course except for a clearly determined situation when the initiative to mediate was taken by the president of the court himself/herself (Article 339 § 4 of the Code of Criminal Procedure)[26].

A significant change in the application of this institution during trial was made by the Act of 10 January 2003 on the amendment of certain laws[27]. The institution of mediation was moved from Section VII entitled *Pre-trial proceedings* to Section I entitled *Preliminary provisions* as Article 23a of the Code of Criminal Procedure. The new wording of the provision of Article 23a of the Code of Criminal Procedure resulted in that the case was referred to mediation not only by the prosecutor like before but also by the court, while in the pre-trial proceedings by the prosecutor and the investigation authority, pursuant to Article 325i § 2 of the Code of Criminal Procedure[28]. At the inquiry stage, other investigation bodies than prosecutor, including the police, were authorized to resort to mediation (Article 325i § 2 of the Code of Criminal Procedure)[29].

The group of entities authorized to refer cases to mediation was expanded in Article 23a § 1 of the Code of Criminal Procedure as a result of another amendment, dated 27 September 2013[30]. The wording of the provision of § 1 was supplemented with pointing out that the referral of the case to an institution or a person authorized to carry out mediation proceedings is also vested in a court referendary, and when in the course of pre-trial proceedings – to 'another body' conducting those proceedings[31]. This amendment resulted in the repeal of Article 325i § 2 of the Code of Criminal Procedure[32]. The provision of § 4 was also introduced, stressing the principle of voluntary mediation and the obligation to instruct the accused and the injured party about the possibility of referring the case to mediation. As noted in the grounds for the draft Code of Criminal Procedure of 27 September 2013, the provision of § 4 of Article 23a:

> […] develops the matter of providing the parties with necessary knowledge about the essence and rules of the mediation procedure, pursuant to which they can give their informed consent to participate in mediation. The practice of instructing about the option of withdrawal of consent

[26] R. Kmiecik, *op. cit.*, p. 368.

[27] The Act of 10 January 2003 amending the Act – Code of Criminal Procedure, the Act – Provisions introducing the Code of Criminal Procedure, the Act on the Crown Witness and the Act on the Protection of Classified Information (Journal of Laws, 2003, No. 17, Item 155).

[28] Cf. T. Grzegorczyk, *op. cit*., pp. 130–131.

[29] *Ibidem*, p. 131.

[30] The Act of 27 September 2013 amending the act – Code of Criminal Procedure and some other acts (Journal of Laws, 2015, Item 1247). It entered into force on 1 July 2015.

[31] See K. Dąbkiewicz, *Kodeks postępowania karnego. Komentarz do zmian z 2015*, Warszawa 2015, p. 51.

[32] *Ibidem*.

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until the end of mediation proceedings is emphasized. This provision governs the important issue of receiving the consent to participate in mediation, including also the mediator, apart from the prosecutor, police, and court[33].

Also, the guarantee for entities participating in mediation was secured by introducing instruments to ensure confidentiality of the proceedings (inadmissibility in evidence) as well as by adding mediation, as a possible method of reconciliation[34], to the preconditions for the use of some criminal-law institutions, which was to be governed by newly introduced Article 59 of the Criminal Code (repealed by the Act of 11 March 2016).

The provisions on mediation set out in the above-mentioned Act were incorporated in the amendment of 11 March 2016[35], which continues the assumptions of mediation proceedings in the provisions of Article 23a of the Code of Criminal Procedure.

This evolution of mediation proceedings is an occasion to discuss the essence of the change in the mediation regulations made in 2003 in terms of its position within the system of statutory laws. The literature has noted that since mediation was placed amongst general provisions alongside procedural rules and conditions but in the concluding part of these norms, it became of a more general nature, being almost a procedural directive[36]. It was also noted that such regulation of mediation may indicate the importance the Polish legislature is willing to attach to this institution[37].

These views have been commented on in more depth by S. Steinborn. According to this author,

> […] the provisions contained in Section I can be divided into three main groups: provisions governing basic procedural rules (directives) and certain exceptions from them, a provision concerning procedural conditions, and provisions regulating institutions applicable essentially to the entire criminal procedure. The provision of Article 23a should be included in the latter group as these are regulations intended by the legislature to refer not only to one of the stages of the proceedings, but due to the subject of their regulation they were essentially not suitable for being classified as further provisions of the so-called general part of the code (Articles 24–296), because they were not congruent with the matter regulated therein. Therefore, location of the provision of Article 23a at the end of the introductory provisions should be read only as giving this regulation the general character of a norm applicable throughout the whole course of criminal proceedings[38].

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[33] Grounds for the draft Code of 2013, Sejm Paper No. 870, p. 17.

[34] M. Kurowski, [in:] *Kodeks postępowania karnego. Komentarz*, red. D. Świecki, Warszawa 2015, p. 158.

[35] Journal of Laws, 2016, Item 437.

[36] T. Grzegorczyk, *op. cit*., p. 130.

[37] A. Gorczyńska, *Mediacja w postępowaniu przygotowawczym*, „Prokuratura i Prawo" 2007, nr 6, p. 116.

[38] S. Steinborn, *Komentarz do art. 23(a) Kodeksu postępowania karnego*, stan prawny 30.01.2016, LEX 2017.

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S. Steinborn's position deserves full approval. The assumptions of the mediation procedure provided for in Article 23a of the Code of Criminal Procedure do not go in line with the area of the fundamental procedural principles defined in Chapter I of the Code of Criminal Procedure. The institution of mediation in criminal cases remains in opposition to many of the fundamental procedural principles[39], including the principle of substantive truth. Adoption of the view that mediation can be a general directive of criminal procedural law raises doubt in the context of addressee of this norm. The addressees of procedural directives (procedural principles) in criminal proceedings are procedural bodies.

Certainly, the above changes related to mediation proceedings were designed, on the one hand, to facilitate the use of mediation in practice, and on the other hand to introduce the necessary guarantees ensuring their best functioning from the perspective of the participants to the proceedings[40]. Equal treatment of the participants to the proceedings was guaranteed by the principle of voluntary participation in mediation, the option of withdrawing from it at any time, voluntary acceptance of the terms of the settlement concluding the mediation proceedings and the requirement that the course of proceedings be supervised by an impartial and neutral mediator[41]. Mediation was covered by the requirement of confidentiality.

The legislature also ruled on the possibility of using mediation both at the stage of pre-trial and transitional proceedings, as well as at the judicial stage, until the final conclusion of criminal proceedings[42]. An attempt to mediate is possible not only where there is a possibility of conditional discontinuance of criminal proceedings, conviction without hearing or voluntary submission to a punishment or an amicable settlement in proceedings initiated under private charge, but in any case when the competent authority considers it advisable due to circumstances of the specific case[43]. However, it is still a subject of debate among scholars of criminal procedure which moment of mediation is the 'most favorable'. I support the A. Murzynowski's view that there is much in favour of the preparatory proceedings being that main stage of criminal proceedings[44]. The sooner an attempt is made to resolve the conflict, the more benefits not only for the parties but also for the justice system.

The fact that the rational lawmakers allow for mediation also in each of the prosecution procedures provided for in the Penal Code and in the proceedings

[39] See more in: R. Kmiecik, *op. cit.*, p. 370.

[40] S. Steinborn, *op. cit.*

[41] D. Kużelewski, K. Szczęsny, *Konsensualizm a kontradyktoryjność procesu karnego. Uwagi na temat mediacji w świetle projektu nowelizacji k.p.k.*, [in:] *Kontradyktoryjność w polskim procesie karnym*, red. P. Wiliński, Warszawa 2013, p. 405.

[42] D. Szumiło-Kulczycka, *op. cit*., p. 394.

[43] A. Sakowicz, [in:] K. Boratyńska, A. Górski, M. Królikowski, A. Sakowicz, M. Warchoł, A. Ważny, *Kodeks postępowania karnego. Komentarz*, red. A. Sakowicz, Warszawa 2016, p. 116.

[44] A. Murzynowski, *Mediacja w toku postępowania…*, p. 245 ff.

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at each of its stages without additional requirements as to the category of crime, gravity, and type of penalty range, may be demonstrated by the failure to specify the subjective and objective criteria of mediation in the provision[45]. The legislature also refrained from defining substantive conditions determining the admissibility of using this institution[46]. This does not mean that in any case it will be possible to implement the mediation procedure. The literature points out that there are circumstances which restrict or even render inadmissible the referral of the case to the mediation proceedings[47]. A detailed analysis of them was carried out by D. Szumiło-Kulczycka. The author divides the circumstances restricting the referral of the case to mediation into three groups related to: 1) the expectation of achieving mediation goals, 2) the nature of the prohibited act, 3) subjective limitation on the part of people who would take part in mediation[48].

The solutions adopted in the provisions of Article 23a of the Code of Criminal Procedure indicate the importance attached by the legislature to forms of negotiation in the aspect of the final outcome of the criminal trial[49]. Mediation regarding criminal conflicts is defined as negotiations between the victim and the criminal, with the participation of a professionally prepared mediator who supports the course of the negotiations, but who does not impose decisions on the parties and keeps a neutral attitude towards them[50]. These negotiations are aimed at giving the parties an opportunity to express their feelings and emotions, to understand each other, to resolve the conflict or to agree on the issue of remedying the damage[51].

W. Zalewski distinguishes two models of implementation of the idea of mediation. The first model considers mediation, in accordance with its idea, as a process of resolving the conflict between the offender and the injured party (or between the

[45] See D. Szumiło-Kulczycka, *op. cit*., p. 395 and the literature cited therein. Unfortunately, the currently applicable Article 23a of the Code of Criminal Procedure ignores the postulate on the necessity to define the objective scope of mediation, raised by D. Kużelewski after the 2003 amendment. This author proposed to precede the wording of Article 23a of the Code of Criminal Procedure with the following words: "if reconciliation and conclusion of a settlement between the injured party and the accused affects the ruling concluding the proceedings, the court or court referendary (currently), and the prosecutor or other body conducting the proceedings in the pre-trial proceedings, may, on the initiative or with the consent of the accused and the injured party, refer the case to an authorised institution or person in order to carry out mediation proceedings" – D. Kużelewski, *Wpływ prawa karnego materialnego na mediacje między pokrzywdzonym i oskarżonym – wybrane aspekty*, [in:] *Współzależność prawa karnego materialnego i procesowego*, red. Z. Ćwiąkalski, G. Artymiak, Warszawa 2009, p. 342.

[46] M. Kurowski, *op. cit*., p. 159.

[47] D. Szumiło-Kulczycka, *op. cit*., pp. 395–396. For more cf. D. Kużelewski, *Wpływ prawa karnego…*, p. 343, 345 ff.

[48] See more D. Szumiło-Kulczycka, *op. cit*., pp. 395–396 and the literature cited therein.

[49] K. Marszał, *Proces karny. Zagadnienia ogólne*, Katowice 2008, pp. 42–43.

[50] E. Bieńkowska, *Istota i znaczenie mediacji…*, pp. 22–23.

[51] *Ibidem*.

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offender and the society). The second model considers mediation as an addition to the formal justice system[52], and thus focuses on formal and legal consequences of conflict resolution, especially on the possibility of establishing findings in terms of guilt and the possibility of obtaining compensation by the injured party[53]. It seems that the criminal law system adopted the second model. Mediation is one of the forms whereby the parties negotiate and agree on positions voluntarily before a neutral mediator to put an end to the conflict.

It should be noted that penal law uses also other forms of negotiation to resolve disputes between the parties. One of them is reconciliation. Until 1998, this institution was applied only in private prosecution cases, while currently is also based on the provisions of criminal law (Article 60 § 2 of the Penal Code) concerning offences prosecuted in public-charge proceedings[54]. The lack of a legal definition or determination of the form of achieving reconciliation allows us to assume that it is an act of rapprochement involving the abolition of mutual animosities, guilt, and explanation of the case[55]. It is also emphasized that reconciliation can be connected with remedying the damage, setting the conditions for its rectification, and even it can be made dependant on such redress[56]. The Act does not directly regulate how the reconciliation is to be carried out or the damage be remedied, which allows us to assume that this can take place not only as a result of mediation or agreement between the parties, but also without the intervention of the procedural bodies[57]. Certainly, this includes also negotiation or other restorative justice mechanism[58].

D. Wójcik rightly points out that mediation may lead to reconciliation, but not necessarily[59]. One should support the author's position that

> […] reconciliation is more than an understanding, it is based on the assumption that the injured party forgave the offender, the former reconciled with the latter, that a deep psychological process took place, and that there was a radical change in attitudes of the offender and the injured party. However, mediation can play its role and be assessed positively even where 'genuine' reconciliation was not achieved and the parties only came to an agreement on compensation for damage and harm caused by the offence and the offender performed his/her commitment[60].

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[52] W. Zalewski, *Sprawiedliwość naprawcza. Początek ewolucji prawa karnego?*, Gdańsk 2006, p. 292.

[53] *Ibidem*.

[54] R. Kmiecik, E. Skrętowicz, *Proces karny. Część ogólna*, Warszawa 2009, p. 80.

[55] D. Kużelewski, *Wpływ prawa karnego…*, pp. 353–354.

[56] *Ibidem*, p. 354 and the literature cited therein.

[57] *Ibidem*.

[58] *Ibidem*.

[59] D. Wójcik, *Mediacja – nowa instytucja w procesie karnym. Idea i problemy praktyczne*, [in:] *U progu nowych kodyfikacji…*, p. 329.

[60] *Ibidem*, pp. 329–330.

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There is also nothing that would prevent the conciliation proceedings being carried out before the procedural body at the initial stage of the proceedings in the *in personam* phase of the pre-trial proceedings or as part of the preliminary meeting (Article 339 of the Code of Criminal Procedure), if the parties appear at the meeting and consent to such conciliation procedure; the reconciliation may also take place at every stage preceding the rendering of the judgment at the main hearing. The only problem lies in the fact that the conciliation meeting is held before the judicial body, with keeping the rules of officiality and adhering to formalism. Mediation eliminates such circumstances. The parties do not conduct talks via the prosecutor or other body or the judge, but they do so privately to some extent, in more informal circumstances and directly with each other[61].

Mediation is carried out as part of the criminal proceedings, and at the same time, in a sense, beyond these proceedings, as the court or other body conducting proceedings (e.g. prosecutor) is not and never can be a mediator[62]. R. Kmiecik is right, stating that it is difficult not to consider mediation as a "criminal-procedural institution since its effects affect the course of the criminal proceedings and the method of substantive resolution with regard to punishment"[63]. Mediation remains – as aptly put by C. Kulesza – in symbiosis with trial proceedings[64].

It should also be recalled that until quite recently, due to the already repealed Article 59a of the Penal Code, one could even suppose that the intention of the legislature was to make mediation an instrument to replace the criminal proceedings[65]. This provision allowed the so-called restitution discontinuance of criminal proceedings as a result of positive conclusion of mediation. However, this provision provided a real chance to replace court proceedings with mediation.

Private prosecution proceedings have the similar significance of mediation procedure in terms of effects. Mediation is an alternative form for reconciliation at a court hearing. Choosing mediation as a form of conflict resolution and achieving a positive result will always eliminate the court proceedings. It should be noted, however, that a case of criminal offence prosecutable by a private charge is not always initiated by a private charge of the injured person. A different form of initiation of proceedings in a case of criminal offence prosecutable under private charge is the institution of prosecutor's intervention when the public interest so requires (Article 60 of the Code of Criminal Procedure). The prosecutor's intervention has far-reaching procedural consequences, manifested basically in either the ex-officio

[61] D. Szumiło-Kulczycka, *op. cit*., p. 381.

[62] K. Dudka, H. Paluszkiewicz, *Postępowanie karne*, Warszawa 2016, p. 34.

[63] R. Kmiecik, *op. cit.*, p. 370.

[64] C. Kulesza, *Za i przeciw mediacji w sprawach karnych na gruncie aktualnej regulacji prawnej*, [in:] *Mediacja jako forma sprawiedliwości naprawczej*, red. L. Mazowiecka, Warszawa 2011, p. 24.

[65] Article 59 of the Penal Code was repealed with the Act of 11 March 2016, Article 59a of the Penal Code (it was in force from 1 July 2015 through 15 April 2016).

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initiation of pre-trial proceedings or taking over of privately initiated court proceedings by the prosecutor, so then the private-charge procedure is replaced by the public-charge one. The intervention of the prosecutor by 'initiation' will always lead to the elimination of obligatory conciliation proceedings (Article 60 § 2 of the Code of Criminal Procedure), while in criminal proceedings – regardless of their stage – there is still always an option of the use of mediation, especially when such a proposal is made by the parties or when such an initiative is proposed ex officio by the procedural body and accepted by the parties. In such a situation, the positive result of mediation – regardless of the stage – will always have an impact on the punishment (Article 53 of the Penal Code).

Mediation in cases of offences prosecutable *ex officio*, like other forms such as reconciliation, understanding, redress or remedy for damage caused by the offence, is this type of solution in criminal law, which results in combining the penal function with the compensatory function. This is closely related to their meaning given by the provisions of substantive criminal law. Article 53 § 3 of the Penal Code also included mediation and understanding of the parties in the general directives for imposing penalties and penal measures. S. Waltoś rightly states that due to the content of Article 53 of the Penal Code, which instructs the court to take into account the results of mediation regardless of the type of punishment and penal measure, the significance of mediation for the resolution of the case can never be ruled out in advance[66]. Each time the court, when mediation or understanding between the parties was used, it has to take into account their positive outcome when choosing and developing the criminal-law response[67]. Even though this provision does not explicitly point to the mitigation effect of mediation on the penalty, this is the actual sense of this provision[68]. However, pursuant to Article 60 § 2 Points 1–3 of the Penal Code,

> The court may also apply an extraordinary mitigation of the penalty in particularly justified cases when even the lowest penalty stipulated for the offence in question would be incommensurate, and particularly: 1) if the injured person and the offender have been reconciled, the damage incurred has been repaired, or the injured person and the offender have agreed as to the manner of reparation for the damage; 2) taking into consideration the attitude of the offender, particularly if he attempted to repair the damage or prevent the damage from occurring; 3) if an offender of an unintentional offence or someone close to him has suffered a major detriment in connection with the offence committed.

The Penal Code also provides for compensatory measures, i.e. an obligation to redress the damage and compensate for the injury incurred (Article 46 of the Penal Code). This measure is based on the assumption that one of the objectives of crimi-

[66] S. Waltoś, *Główne nurty nowelizacji procedury karnej*, „Państwo i Prawo" 2003, z. 4, p. 5.
[67] E. Bieńkowska, *Mediacja i porozumienie się oskarżonego…*, p. 1.
[68] T. Bojarski, [in:] *Kodeks karny. Komentarz*, red. T. Bojarski, Warszawa 2012, p. 159.

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nal proceedings is to put an end to the conflict between the offender and the injured person, and the method to resolve or mitigate this conflict is, among other things, remedying the damage caused by the offence (compensatory function of criminal law)[69]. On the other hand, as part of the obligations attached to the conditional suspension of execution of the penalty, the court may order, .a., the obligation to remedy the damage caused by the offence (Article 72 § 2 of the Penal Code *in fine*).

Mediation in criminal proceedings plays an accessory role, and thus is dependent on the procedural objectives[70]. One should support the view that mediation cannot be a procedural instrument that undermines these objectives[71]. In the light of Article 2 § 1 of the Code of Criminal Procedure, the provisions of the Code are aimed at shaping criminal proceedings so as to accomplish objectives of the criminal proceedings not only in terms of combating crimes but also in preventing them and in strengthening the law and principles of social coexistence (§ 1 Point 2), securing the injured party's legally protected interests (§ 1 Point 3) and resolution of the case within reasonable time (§ 1 Point 4). This issue is aptly addressed by M. Płatek by recalling the important statement of J. Waluk that restorative justice is not rooted in abstraction, but results from the practical need to address the shortcomings of the court[72]. According to M. Płatek, the provision of Article 2 of the Code of Criminal Procedure provides the basis and meaning to all those activities that can be undertaken as part of the criminal procedure[73]. It gives an answer to the question why, at all, do we undertake any activities that lead to criminal proceedings?[74] This provision covers the issue of liability and expressly refers to protected interests of the injured party[75].

Pursuant to Article 23a of the Code of Criminal Procedure,

> […] the judge or court referendary, and in the pre-trial proceedings the prosecutor or other body conducting the proceedings as part of the criminal case, may refer the case, on the initiative or with the consent of the defendant or the injured person, to the authorised institution or person in order to conduct mediation proceedings between the injured person and the defendant, of which they are instructed when being informed of the content of Article 178a of the Code of Criminal Procedure[76].

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[69] P. Kozłowska-Kalisz, [in:] *Kodeks karny. Komentarz*, red. M. Mozgawa, Warszawa 2015, p. 169 and the literature cited therein.

[70] D. Kużelewski, *Mediacja po nowelizacji kodeksu postępowania karnego – krok ku zwiększeniu roli konsensualizmu w polskim procesie karnym?*, [in:] *Problemy znowelizowanej procedury karnej*, red. Z. Sobolewski, G. Artymiak, C.P. Kłak, Kraków 2004, p. 269.

[71] R. Kmiecik, *op. cit.*, p. 370.

[72] M. Płatek, *Dlaczego w Kazachstanie nie rosną banany – czyli o mediacji w Polsce*, [in:] *Mediacja*, red. L. Mazowiecka, Warszawa 2009, p. 179.

[73] *Ibidem*.

[74] *Ibidem*.

[75] *Ibidem*.

[76] Article 178a of the Code of Criminal Procedure provides for as follows: "A mediator may not be examined in the capacity of witnesses as to the facts that he learned from the accused or the injured

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For both the pre-trial and trial proceedings, the legislature provided for two separate ways of obtaining legitimacy by the procedural bodies[77]. The first one is the initiative of the entitled (both the accused and the injured party)[78], while the second is the initiative by the procedural body, and then the approval of authorized entities is required[79].

In pre-trial proceedings regardless of their form, it is the body conducting the pre-trial proceedings who is authorized to make the decision on mediation. Such powers are also vested in the police to whom the prosecutor entrusted the investigation in whole or in part, unless the referral of the case to mediation goes beyond the scope of that delegation (Article 311 § 2 of the Code of Criminal Procedure) or has been reserved for personal execution by the prosecutor (Article 311 § 6 of the Code of Criminal Procedure)[80]. It was a good thing that all the bodies conducting pre-trial proceedings obtained the right to refer the case to mediation. They have direct contact with the conflicted parties and have at their disposal a more convenient form of communication with the injured person, suspect and mediator during the activities being conducted.

Without going into much detail about the issue of 'consent to participate in mediation' and 'consent to being a party to mediation', it should only be mentioned that it is quite a controversial solution in the context of the obligation and scope of instructing the parties about the objectives and principles of mediation proceedings resulting from the content of Article 23a §§ 1 and 4 of the Code of Criminal Procedure and Article 300 § 1 of the Code of Criminal Procedure[81]. The sequence of agreeing to participate in mediation is also questionable[82]. In my opinion, the consent regarding the referral of a case to the mediation proceedings given before the procedural body should also imply that the consent to participate in the mediation was given before that body. The consent to refer the case to mediation, obtained by the procedural body does not result in the actual will to participate in the mediation. "The consent to participate in the mediation proceedings shall be received by the body referring the case to mediation or the mediator, after instructing the accused and the injured party on the purposes and principles of mediation proceedings and

person when conducting mediation proceedings, with the exception of information on the offences referred to in Article 240 § 1 of the Penal Code" (Journal of Laws, 2016, Item 1749 as amended).

[77] M. Kurowski, *op. cit.*, p. 159.

[78] *Ibidem*.

[79] *Ibidem*.

[80] S. Steinborn, *op. cit.*, thesis 15.

[81] More in: P. Karlik, *Rola i znaczenie mediacji w sprawach karnych po nowelizacji kodeksu postępowania karnego*, [in:] *Obrońca i pełnomocnik w procesie karnym po 1 lipca 2015. Przewodnik po zmianach*, red. P. Wiliński, Warszawa 2015, pp. 162–164 and the literature cited therein.

[82] E. Bieńkowska, *Mediacja w projekcie nowelizacji kodeksu postępowania karnego*, „Prokuratura i Prawo" 2012, nr 11, pp. 51–52.

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the possibility of withdrawal of this consent before the mediation proceedings are completed" (Article 23 § 4 of the Penal Code).

In the light of this regulation, the question of granting mediators the right to receive from the parties their consent to participate in mediation proceedings raises certain doubts. Before the appointment of the first date of the mediation session, the mediator is obliged to request, first the accused and then the injured party, to give their consent to participate in mediation. This practice faced legitimate criticism in the literature. Authors point i.a. to the risk of secondary victimization when a criminal case was referred to mediation proceedings without the injured party's knowledge[83]

Referral of a case to mediation by a procedural body always need to be carried out in the form of a decision. This decision may not be appealed against. Where the decision on mediation is taken by an investigation body, the decision does not need to be approved by the prosecutor. However, Article 326 § 1 point 4 of the Code of Criminal Procedure reserves the prosecutor's right to repeal such a decision. Certainly, in this case it is related to the rationalization of the decision on referral to mediation based on the rules governing the mediation proceedings and securing the guarantee of interests of the injured party set out in Article 2 § 1 Point 3 of the Code of Criminal Procedure and in Article 12 of the Directive 2012/29/EU of the European Parliament and of the Council establishing minimum standards on the rights, support, and protection of victims of crime. For example, the above decision may be repealed when in the prosecutor's opinion the mediation rules have been violated at the outset by the body referring the case to mediation (such as e.g. a lack of consent) or when the consent of one of the parties raises objective doubt as to the 'noble' intention to resolve the conflict. The annulment of the decision may also be caused by the attitude of the offender in relation to the injured person before presenting him/her the charges or the suspect's attitude to the harm caused to the injured person, expressed in the suspect's testimony. A reason for repeal may also be the lack of consent of one of the parties or acceptance of the consent by the investigation body based on so-called implied consent. The repeal of the decision on mediation may be justified by the sequence of negative circumstances resulting from the files of the case, which clearly and obviously leave no doubt that the consent of the offender to mediation results only from his/her tactics of obstructing the proceedings without a genuine will to quash the conflict.

Pursuant to Article 23a § 1 sentence 1 of the Code of Criminal Procedure the case is referred to mediation in trial proceedings by the court or a court referendary. The authorization of a court referendary to refer cases to mediation is based on Article 489 § 1 of the Code of Criminal Procedure and the power indicated therein to conduct a conciliation session in private prosecution cases.

[83] *Ibidem*, p. 54.

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As rightly noted by E. Bieńkowska about the then proposed changes in Article 23a § 1 of the Code of Criminal Procedure:

> […] court referendary is not in direct contact with the parties to the conflict. He/she does not participate in court proceedings and can only have an insight into the case files. However, based on these files it is difficult to find out who the parties to the conflict really are, what expectations they have, and especially if they are willing to participate in mediation[84].

Among other things, this set of negative legal circumstances excludes the possibility of the court referendary taking a decision on referring the matter to mediation in public-prosecution proceedings.

However, it should be noted that granting the court referendary the power to refer cases to mediation in private prosecution proceedings does not raise such doubts. It is evident in the light of this regulation that there is a negative precondition in the form of the absence of direct contact between the court referendary and the parties to the proceedings at the conciliation session. The court referendary who conducts a meeting prior the trial hearing must keep direct contact (both visual and verbal) with the injured person and the accused, provided that the parties attend the meeting personally. On the other hand, there is still the issue whether it was reasonable to introduce the 'duality' of powers of particular entities, consisting in that the court referendary may be authorized to conduct the meeting while the court is to hear the case at the hearing. According to the legislative tradition, when talking about private-prosecution procedure, it is assumed that the conciliation session is incorporated into the private-prosecution proceedings. This 'doubling' of powers of judicial bodies depending on the place (meeting or hearing) and stage of proceedings (a conciliation session may be conducted by a court referendary, while the trial hearing by the court) is can be justified only by relieving the judges from overburdening in cases that may be carried out and resolved by a court referendary. Appropriate authorisation for court referendary (Article 489 § 1 of the Code of Criminal Procedure in conjunction with Articles 23a § 1 and 107 § 1 of the Code of Criminal Procedure) does not constitute a violation of the provisions of Article 45 of the Constitution of the Republic of Poland in conjunction with Article 175 of the Constitution of the Republic of Poland. The amicable settlement concluded between the parties leads to the discontinuation of the judicial proceedings. But this procedure is rarely associated with the conclusion of a conciliation session in the form of reconciliation or settlement. It is rightly stated by H. Paluszkiewicz that calling for reconciliation at the beginning of the session, when the conflict between the parties is so severe that one of these parties has decided to bring the case before court, is doomed to fail if deprived of the opportunity to present one's

[84] E. Bieńkowska, *O unormowaniu mediacji w sprawach karnych*, „Prokuratura i Prawo" 2012, nr 1, p. 29.

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own position and try to understand each other's reasons. In such a case, it should be assumed that the role of the person conducting the conciliation session boils down to organizational matters regarding the issue of the discontinuance decision as a result of reconciliation, or to drawing up a decision on referring the case to mediation, which is not rare due to the nature of this type of affairs and related emotions.

There is still a problematic issue of contact between the court and the parties where the meeting was held by a court referendary and then the proceedings were taken over by court. Such a situation should be associated with the psychological aspect, or more specifically, with the nature of the defendant's behavior towards the injured party at both fora and the issue of noticeable change of the defendant's approach to the dispute. In trial proceedings, the referral of the case to mediation depends on whether the court is convinced that there is a chance that the defendant will repair the damage caused by the offence, reconcile with the injured party or at least attempt reconciliation[85]. Achieving this (initially subjectively and then objectively) is possible only by continued observation in direct contact between the court with the parties to the proceedings.

It should be noted that Article 12 Item 1a of the Directive 2012/29/EU[86] requires that restorative justice services, including mediation, should only be employed if it is in the interest of the injured party and on condition that the method is secure. The provision of Article 12 Item 1 reads as follows:

> The Member States shall take measures to safeguard the victim from secondary and repeat victimization, from intimidation and from retaliation, to be applied when providing any restorative justice services. Such measures shall ensure that victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services, subject to at least the following conditions: (a) the restorative justice services are used only if they are in the interest of the victim, subject to any safety considerations, and are based on the victim's free and informed consent, which may be withdrawn at any time; (b) before agreeing to participate in the restorative justice process, the victim is provided with full and unbiased information about that process and the potential outcomes as well as information about the procedures for supervising the implementation of any agreement; (c) the offender has acknowledged the basic facts of the case; (d) any agreement is arrived at voluntarily and may be taken into account in any further criminal proceedings.

This provision does not apply to and does not differentiate between the court proceedings as to the procedure and the form (ordinary or special).

[85] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz*, t. 1, Warszawa 2012, p. 237.

[86] The Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support, and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA (OJ EU L 315 of 14.11.2012, p. 57).

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Once the decision is served, the mediator, pursuant to § 14 Point 1 of the Regulation of the Minister of Justice[87], undertakes the following preliminary activities: promptly contacts the accused and the injured party and agrees on the date and place of the meeting with each of them (Point 1); conducts individual and joint preliminary meetings at which he/she explains to the accused and the injured party the purpose and principles of mediation proceedings, and instructs them about their right of withdrawal from the mediation proceedings until the completion thereof and receives the consent of the accused and the injured party to participate in the mediation proceedings, if the organ that referred the case to mediation did not receive it (Point 2).

CONCLUSIONS

In conclusion, it should be noted the question of resolving the dispute between the parties. Once the mediation session and the negotiations are concluded successfully, the mediator assists the parties in formulating the content of the settlement between the accused and the injured person, primarily by informing them about the content of Article 107 §§ 3 and 4 of the Code of Criminal Procedure, as stipulated in § 14 Point 4 of the Regulation cited above. A settlement concluded before mediator always requires to be signed by the parties involved in the mediation and the mediator. The settlement may cover the issue of remedying the damage caused by the crime, compensation for the harm suffered, including the manner of remedying or compensating the damage or redress and the date to perform these obligations[88]. The mediator is obliged to verify the performance of obligations resulting from the settlement concluded (Point 5). According to Article 107 § 1 of the Code of Criminal Procedure, "a court which has decided on claims for property damage, upon the request of an authorized person, shall append an enforcement clause to a decision to be executed by enforcement". The enforcement clause covers property claims and obligations that can be enforced in accordance with the provisions of the Code of Civil Procedure resulting from a settlement concluded before a court or court referendary, as well as from a settlement concluded in mediation proceedings (see Article107 §§ 2 and 3 of the Code of Criminal Procedure). Due to the possibility of appending an enforcement clause also to a settlement concluded outside criminal proceedings during the mediation, the legislature introduced controls in the form of the right to examine it by the court[89], which stems from the fact that the mediator

[87] The Regulation of the Minister of Justice of 7 May 2015 on mediation proceedings in criminal matters (Journal of Laws, 25 May 2015).

[88] S. Steinborn, *op. cit.*, thesis 30.

[89] M. Kurowski, *op. cit.*, p. 443.

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may not always be an entity having adequate knowledge of law[90]. The court or court referendary must refuse to append an enforcement clause to the settlement concluded before the mediator in whole or in part, if the settlement is contrary to the law or principles of social coexistence or seeks to circumvent the law (§ 4). For the refusal, the form of decision is required. The decision issued by the court may be appealed against by an interlocutory appeal (Article 795 of the Code of Civil Procedure), while the parties may object to the decision issued by the court referendary (Article 93a § 3 of the Code of Criminal Procedure). It seems that the solution adopted in Article 107 of the Code of Criminal Procedure will become an effective instrument for securing the injured party's enforcement claim.

The currently applicable solutions allow us to formulate the conclusion that the rational legislature has appreciated the concept of restorative justice in the aspect of alternative dispute resolution in criminal matters. They are a manifestation of adherence to human rights, especially the respect for human dignity[91], and their function boils down mostly to remedying the harm caused by crime and attempting to arrange between the conflicted parties, through negotiation, agreement or reconciliation, their correct future relationships acceptable for both parties. Although some authors rightly criticize the too casuistic regulation of Article 23a of the Code of Criminal Procedure and instead propose to regulate the issue of detailed regulation of mediation in the secondary legislation provisions referred to in Article 23 § 7 of the Code of Criminal Procedure[92], it is difficult to underestimate the fact that the statutory solution is conducive to the use of the institution of mediation in practice.

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[90] K. Dąbkiewicz, *op. cit.*, p. 168.

[91] See more in: L. Mazowiecka, *Prawa człowieka i praworządność: mediacja a prokurator*, [in:] *Mediacja*, red. L. Mazowiecka, Warszawa 2009, pp. 146–147.

[92] P. Karlik, *op. cit.*, pp. 164–165.

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STRESZCZENIE

Artykuł obejmuje problematykę mediacji jako jednej z form rozwiązania konfliktu karnego. Autorka przedstawia m.in. kwestię mediacji w odniesieniu do założeń sprawiedliwości naprawczej, kwestię przyjętych modeli mediacji w postępowaniu karnym, a także podejmuje próbę wskazania innych form rozwiązania konfliktu, opartych na negocjacjach. Krótko opisuje historyczny proces kształtowania się założeń ustawodawczych mediacji, by następnie odnieść się do aktualnych, wybranych zagadnień postępowania mediacyjnego.

Słowa kluczowe: mediacja; sprawiedliwość naprawcza; konflikt; postępowanie mediacyjne