

THE IMPACT OF INTERNATIONAL REGULATIONS ON MEDIATION IN POLISH CRIMINAL PROCEEDINGS

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In Polish criminal procedure, mediation is a relatively new institution. It is still developing after being introduced into the Code of Criminal Procedure (CCP) in 1997¹⁶. Initially, mediation was not independent as its application was tied to other consensual trial options. In Polish professional literature, mediation is defined as “a voluntary agreement reached by the victim and offender to repair material and moral harm done through the help of an impartial and neutral person known as mediator”.¹⁷

The beginnings of mediation, or more broadly, consensual measures in Polish criminal trial, are closely tied to the emergence of this option in the United States and Western Europe. It is believed that the modern concept of mediation emerged in the United States.¹⁸ Initially, it concerned mostly labour disputes, but in the 1960s and 1970s, mediation witnessed dynamic growth, owing to the commitment of public administration and courts of law to its promotion. The growth of the idea of mediation in the United States made it popular in Europe, too. Appreciating the many advantages of mediation as an alternative measure to resolve conflicts between an offender and the victim of crime, the Council of Europe made a Recommendation in this matter in 1999.¹⁹ The significance of this Act for the prevailing opinion in Poland whether it was possible to hold mediation in penal matters can hardly be overestimated. It is true that, as mentioned above, at the time when the Recommendation was issued, mediation was already known to the Polish legal system as a criminal procedure option but its significance was rather low due to how it was legally framed. However, it drew attention to the potential of mediation as a special measure implementing the idea of restorative justice. Thus, an opinion may be ventured that any further growth of mediation in Polish criminal procedure law will be closely related to the support for, and understanding of, the need for another way to resolve conflicts created by the commission of an offence, taking into account all (corporeal and incorporeal) interests of the victim, and protecting them against the consequences of pending criminal proceedings. The last-mentioned aspect is strongly emphasized in the Recommendation.

The Recommendation lays great emphasis on the promotion of restorative justice and the education of society.²⁰ It finds it necessary to introduce and improve mediation in penal matters as “a flexible, comprehensive, problem-solving, participatory option complementary or alternative to traditional criminal proceedings”. In the Recommendation, the Council of Europe

¹⁶ Dz. U. 1997, nr 89, poz.555.

¹⁷ A. Rękas, *Mediacje w polskim prawie karnym*, Warszawa 2004, p. 3.

¹⁸ S. Kordasiewicz, ‘*Historyczna i międzynarodowa perspektywa mediacji*,’ [in:] E. Gmurzyńska, R. Morek, *Mediacje. Teoria i praktyka*, Warszawa 2009, pp. 31-51.

¹⁹ Recommendation No. R (99) 19 of the Committee of Ministers to Member States concerning mediation in penal matters.

²⁰ A. Rękas, *Mediacja w polskim prawie karnym*, Warszawa 2011, p. 6.

also set out the principles according to which mediation was to be held. The separate rules governing the process of mediation are highly important and are to be made specific and recognizable, and should be closely adhered to, while mediators must have specific skills and follow ethical rules. For this purpose mediators should be suitably trained in both theory and practice.²¹ Already when the Recommendation was in force, Polish criminal procedure law saw a major normative modification boding well for the future development potential of mediation. The major 2003 amendment of the CCP greatly accelerated the integration of mediation with criminal trial. Although the changes were meant to make mediation an autonomous trial option, with respect to the course of a criminal trial, the amended provisions on mediation made it applicable at any stage of criminal trial (preliminary, jurisdictional, or even executory) and in any mode of criminal proceedings, provided there are conditions facilitating reconciliation between the victim and offender, and reparation of harm done by the offence in question.

The Recommendation defines mediation as “any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party (mediator)”.²² Thus, the Recommendation specified clearly what mediation is essentially about. For the aim of mediation is the active and informed participation of the parties in the resolution of a conflict arisen due to the breach of legal norms binding on society or in relation to such a breach. After all, in many cases the commission of an offence is not a ‘one-off incident’ but rather an effect of a long-standing argument, continuing sometimes for many weeks or months, between the offender and victim.

It is the will of the Council of Europe that the fundamental principle of the mediation process be informed and free consent of the parties given after being provided with full and exhaustive information by a competent authority. Mediation cannot exist – and bring effects – if it is not preceded by reliable and detailed information on its course and impact on the criminal proceedings. Although the CCP provisions, as they stand now, do not provide explicitly for this principle in any specific unit of text, there is no doubt that it is incorporated into the Polish legal system. Upon closer scrutiny, the CCP is seen to contain not only an obligation to inform trial participants of their trial rights (CCP, s. 16), but also – already in the provisions on mediation – a rule that a matter may be referred to mediation proceedings only upon the request and consent of the parties concerned (CCP, s. 23a).

Furthermore, the Recommendation holds that there should be no “obvious disparities” between the parties with respect to age, maturity or intellectual capacity. Such disparities may be hard to divine, especially when a matter is referred to mediation in the course of judicial proceedings. It appears that it may be far easier to notice such disparities for an authority conducting preliminary proceedings in direct contact with the parties. The practice of mediation

²¹ E. Gmurzyńska, *Mediacja w sprawach cywilnych w amerykańskim systemie prawnym – zastosowanie w Europie i w Polsce*, Warszawa 2007, p. 261.

²² Recommendation No. R (99) 19 of the Committee of Ministers to Member States concerning mediation in penal matters. Appendix I.

and its use was the object of a nationwide study carried out by the Chair of Criminal Procedure, Faculty of Law, Białystok University.²³ The results show that not only were matters referred to mediation more willingly at the stage of preliminary proceedings but also there was greater approval for the idea of combining reconciliation in the course of mediation with the possibility of discontinuing criminal proceedings. It must be noted, however, that CCP provisions as they stand now, do not explicitly provide for such a possibility, but the Codification Commission²⁴ at a certain stage of their work in 2009-2013, planned to introduce it to the CCP (so-called mediation discontinuance). Finally, this plan was dropped and all that was legislated were other options no less important for the strengthening of mediation.

It must be stressed that the Recommendation clearly indicates that mediation is to be confidential. The Council of Europe maintains that “participation in mediation may not be held against the accused when the matter is referred back to criminal justice authorities after mediation. What is more, the acknowledgement of facts or even ‘confession of guilt’ by the accused in the mediation process cannot be used as evidence in subsequent criminal proceedings with respect to the same act”.²⁵ This is a clear indication that the role of a mediator is not gathering information or collecting evidence but rather one of a comprehensive approach to the conflict between the parties concerned and due assistance in its resolution. The recommendation provides for setting aside confidentiality in the case of especially grave offences, either committed or planned. However, there is no doubt that the confidentiality of mediation is a fundamental principle without which any attempt at reconciliation and conflict resolution is pointless.

Without going into a detailed discussion of individual aspects of the confidentiality principle, it must be observed that its principal purpose is to ensure the participants of mediation have faith that everything that is said and done in mediation meetings will be kept in confidence by the mediator and subsequently will not be held against the parties in criminal proceedings. Bearing in mind the special character of mediation, the present author believes that the principle is justified and fully acceptable. The purpose of mediation is an agreement between the accused and victim, the parties, therefore, must be certain that they can speak freely and – which is equally important – give voice to their emotions, even if very strong. Currently, Polish law does not extend protection to communications in the course of mediation that would be modelled on the attorney-client privilege. However, notice must be taken of an amendment to the CCP suggested in September 2013 that would make it illegal to place the mediator on the witness stand. The amendment will enter into force on 1 July 2015.

The Recommendation leaves it to individual countries as to how to regulate mediation and indicates only certain areas which need to be defined and the principles that must be followed in the course of mediation. Above all, the Council of Europe encourages countries to

²³ D. Kuźelewski, *‘Mediacja w procesie karnym w opinii sędziów i prokuratorów – wybrane zagadnienia’* [in:] (ed.) C. Kulesza, *Ocena funkcjonowania porozumień procesowych w praktyce wymiaru sprawiedliwości*, Warszawa 2009, p. 242 ff.

²⁴ <http://www.sejm.gov.pl/Sejm7.nsf/druk.xsp?documentId=96832B0ED113D8FBC1257AB4004F3B04>.

²⁵ Komentarz, *Archiwum Kryminologii*, Warszawa 1999-2000, Tom XXV, pp. 228-243.

disseminate knowledge on mediation. In Poland, information on mediation has been disseminated already for several years through, for instance, holding Weeks of Mediation or distributing brochures published by the Ministry of Justice. In this context, Council for Crime Victims has been affiliated to the Prosecutor General. Much success is enjoyed by projects undertaken by non-governmental organizations, including the Polish Mediation Centre, which organizes the celebration of mediation days in October each year. The celebrations feature educational sessions, conferences and promotional actions.

The Recommendation by the Council of Europe was the first act of international law devoted entirely to mediation in criminal proceedings. Later, the question of consensual conflict resolution in a criminal trial was taken up by the European Union by issuing Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings.²⁶ The Decision has been replaced now by 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. When the former was in force it played a significant role in promoting the institution of mediation and, by the imperative of a pro-EU interpretation, it had an impact on the formation of attitudes favourable to the idea of mediation and its use in proceedings in the everyday administration of justice in Poland.

The EU Council Decision reflects the importance the European Union has always attached to restorative justice and consensual conflict resolution. One of the aims of the Decision was to promote mediation in Member States and regulate the question of honouring any agreements, reached in the course of mediation, by criminal justice authorities.²⁷ Upon closer scrutiny of CCP provisions and the amendments made to it in recent years, especially those referring to victims, it becomes apparent that the Polish legislator has to a large extent taken into account these aims of the Decision. It is worth mentioning that in the Decision, mediation was included among the means and tasks whose purpose was to protect victims and help them return to normal life. The EU Council stressed that on each occasion the needs of victims of criminal offences had to be taken into account and consequently restorative and protective measures should be afforded to them. This understanding of mediation is particularly important. Following the Decision, successive CCP amendments²⁸ reflected the idea of protection of and assistance to victims, especially vulnerable victims. From the point of view of mediation, it appears particularly important that Article 2 of the Decision mentioned the right of a victim to respect and recognition. Therefore the dignity of the victim of a criminal offence is a fundamental value to be protected in criminal proceedings. Special protection should be afforded to vulnerable victims and those exposed to long-term consequences of the offender's act, in particular women, children, the elderly, and people with physical or mental conditions.²⁹ It is true that the CCP does not carry an imperative to take this value into account with respect to a victim (i.e. an

²⁶ OJ L 82, 22.3.2001, p. 1.

²⁷ A. Siedlecka-Andrychowicz, *'Mediacja w polskim postępowaniu karnym,'* [in:] E. Gmurzyńska, R. Morka, *Mediacje. Teoria i praktyka*, Warszawa 2009, p. 205.

²⁸ Dz. U. 2013, nr 849.

²⁹ A. Rękas, *'Mediacja w Polsce na tle doświadczeń państw Unii Europejskiej'* [in:] *Konferencje i Seminaria. Mediacja w krajach Unii Europejskiej i w Polsce*, no. 4(48)03, Warszawa 2003, p. 18.

aggrieved person in the context of a criminal trial) but there is no doubt that it can be derived by way of interpretation from both CCP, s. 2, and other provisions referring to aggrieved persons (e.g. CCP, s. 185a).

Article 9 of the Framework Decision obligated all EU Member States to ensure that the victims of criminal acts were entitled to obtain a decision, in the course of criminal proceedings, on compensation for harm sustained. Moreover, EU Member States were obligated to take appropriate measures to encourage the offender to redress the damage done. It is worth mentioning that the Decision defined mediation as follows: “the search, prior to or during criminal proceedings, for a negotiated solution between the victim and the author of the offence, mediated by a competent person”. These guidelines are mirrored in Polish law by the provisions on mediation, which not only may involve apologizing to the victim, but also – which is not doubt more important to them – redressing the physical harm done by the criminal act. For mediation may result in an agreement carrying representations of the parties on the manner and time limit for redressing the harm done by the criminal act. Such an agreement is enforceable after it is given a *fieri facias* and thus offers a real chance to the victim to have the harm sustained by them redressed.

It was already mentioned that one of the aims of the Decision was the promotion of mediation. It committed Member States to supporting and developing mediation with respect to those offences in the case of which they considered mediation appropriate. Actually therefore, the Decision gave considerable leeway to individual countries with respect to matters referred to mediation. What counted most, however, was to ensure – by suitable legislation and law enforcement – that agreements reached by the offender and victim are implemented.

Equally important for the development and reinforcement of mediation, the Recommendation of the Committee of Ministers was issued in 2006 by the Council of Europe and concerned assistance to crime victims.³⁰ Its preamble not only noted the issuing of over a dozen other recommendations after 1987 but also and more importantly observed “that significant developments have occurred in the field of assistance to victims including developments in national legislation and practice, a better understanding of the victims’ needs and new research”.³¹ The reasons behind the issuing of this legal act should be looked for in the growing – year by year – need to protect the rights of victims of criminal offences and prevent successive victimization. It is worth noting that the Recommendation defined the concept of victim as a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, caused by acts or omissions that are in violation of the criminal law of a Member State.

The term victim also includes, where appropriate, the immediate family or dependants of the direct victim. The same document defined two other important concepts closely related to the

³⁰ Recommendation Rec (2006) 8 of the Committee of Ministers to Member States on assistance to crime victims (Adopted by the Committee of Ministers on 14 June 2006).

³¹ *Ibidem*.

subject of mediation: 'repeat victimization' and 'secondary victimization'. The former means a situation when the same person suffers from more than one criminal incident over a specific period of time. Mediation, however, is meant above all to prevent secondary victimization that is the stigmatization of a victim that occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim. Michałowska claims that "in many instances it entails much greater bitterness and disappointment than primary victimization".³² Speaking of the situation of women subjected to domestic violence, she believes that secondary victimization has many negative mental consequences such as passivity, feeling of loneliness, anger or a desire for revenge. Also Rękas, defining the aims of mediation, mentions protection against secondary victimization as one such.

The Recommendation, in item 13 of the Appendix, gives guidelines on the very mediation process. The Council of Europe recommends that, owing to the potential benefits of mediation for victims, statutory agencies should consider its offering in conformity with Committee of Ministers' Recommendation R (99) 19. It is stressed, however, that the interests of the victim should be fully and carefully considered when deciding upon and during a mediation process. It must not be forgotten that not in all cases will mediation be helpful to the victims. It must be kept in mind that mediation must not be recommended when instead of preventing secondary victimization, it could contribute to the breach of interests of the victim yet again.

The Recommendation advocates the adoption of clear criteria and standards to support the interests of victims, especially as regards confidentiality, the ability of the parties to give free consent or to withdraw from mediation, or the competence of mediators. Basically, in all the legal acts discussed, it is stressed what rules should govern mediators' conduct and the level of competencies and professional skills they ought to possess.

The last legal act of significance to mediation issued by EU institutions is 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. It defines the concept of 'restorative justice services' and gives mediation as an example of such a service. The definition emphasizes the conditions that must be met to make availing oneself of such services possible and above all advantageous to victims. The Directive specifies that factors that determine if using mediation is warranted include the character of criminal offence, the severity of harm sustained, whether the bodily integrity of the victim was violated, and disparity in terms of age or intellectual capacity between the offender and victim.

Thus, the definition ultimately holds that mediation is not always the most favourable solution to be used in the first instance. On each occasion, it must be assessed if, in a given situation defined by factors concerning the people involved and the matter at hand, mediation will represent a proper and adequate solution. Article 12 of the Directive defines also conditions to be applied in performing acts of restorative justice. Upon closer scrutiny these conditions can be

³² A. Michałowska, *Podwójne cierpienie*, Published on the following webpage: <http://www.szkolenia.niebieskalinia.pl/edukacyjne.html>.

seen to be the principles of mediation: voluntariness, impartiality, and confidentiality that were already named in the acts of international law discussed earlier.³³

The CCP will witness major changes as of 1 July 2015, owing, *inter alia*, to the implementation of Directive 2012/29/EU. The amendments to criminal procedure will make questioning a mediator as a witness illegal and will incorporate the principles of mediation – voluntariness, impartiality and confidentiality – into the CCP, making them thereby absolutely binding. Certainly, this will make the institution of mediation develop further in Poland in emulation of other European countries.

³³ E. Bieńkowska, 'O unormowaniu mediacji w sprawach karnych', *Prokuratura i Prawo*, no. 1/2012.

