STUDIA PRAWNICZE

2021 nr 2 (224), s. 57-98
ISSN 0039-3312 • ISSN 2719-4302
doi doi 10.37232/sp.2021h

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A Realistic View of Mediation in Penal Matters – the Reasons for the Failure and Remedial Measures

Rzeczywisty obraz mediacji w sprawach karnych – Przyczyny klęski i środki zaradcze

Abstract
The article undertakes research on the low interest for victim-offender mediation in the practice of Polish justice. It presents the results of the research for reasons both in imperfect legal solutions and in attitudes of lawyers and parties. The authors, being mediators in penal matters and at the same time involved in scientific research in criminal law and criminology, conducted a series of in-depth interviews with practitioners: prosecutors, judges, an advocate and mediator with psychological education. The article presents several postulates for the legislator, which may be valuable also outside the Polish legal system, as well as to mediators, judges and prosecutors, especially those operating in the area of continental criminal law.

Keywords: victim-offender mediation, criminal courts, restorative justice, law in action

Abstrakt
Artykuł podejmuje tematykę niskiego zainteresowana mediacją w sprawach karnych w praktyce polskiego wymiaru sprawiedliwości. Prezentuje badania nad przyczynami tego stanu rzeczy, tkwiącymi zarówno w niedoskonałych rozwiązaniach prawnych, jak i w postawach prawników i stron postępowania. Autorki, będąc mediatorkami w sprawach karnych, a równocześnie naukowo zajmując się prawem karnym i kryminologią, przeprowadziły serię pogłębionych wywiadów z praktykami: prokuratorami, sędziami, adwokatem i mediatorem z wykształceniem psychologicznym. W artykule sformułowano kilka postulatów dla ustawodawcy, które mogą okazać się cenne również poza polskim systemem prawnym, również dla mediatorów, sędziów i prokuratorów, zwłaszcza tych działających w obszarze kontynentalnego prawa karnego.

Słowa kluczowe: mediacja w sprawach karnych, sądy karne, sprawiedliwość naprawcza, prawo w działaniu

1. Introduction

Hardly anyone questions the assumptions of restorative justice, and mediation is its most popular tool in theory. Indeed, it seems very difficult to reject the need to remedy the damage resulting from a criminal offense and resolve the conflict related to it.[1] Opinions questioning the compensatory function of criminal law are also limited in number nowadays.[2] It has even been claimed that "there are no fundamental reasons which would stand against the inclusion of the ideals of restorative justice within the function of criminal law. Satisfying

[1] The idea of restorative justice is further explored in: P. Zawiejski, *Idea sprawiedliwości naprawczej*, [in:] T. Dukiet-Nagórska (ed.), *Idea sprawiedliwości naprawczej a zasady kontynentalnego prawa karnego*, Poltext, Warsaw 2016, pp. 11-24; W. Zalewski [in:] T. Kaczmarek (ed.), *Nauka o karze. Sądowy wymiar kary*, System Prawa Karnego, vol. 5, C.H. Beck, Warsaw 2017, Legalis.

[2] A cautious approach to this function is taken by, for instance, L. Tyszkiewicz, *Ogólne wiadomości o prawie karnym*, [in:] T. Dukiet-Nagórska (ed.), *Prawo karne. Część ogólna, szczególna i wojskowa*, Wolters Kluwer Polska, Warsaw 2018, p. 30. A somewhat skeptical opinion on the possibility of satisfying the needs of the victim by way of criminal law is also expressed by M. Filar, *Pokrzywdzony (ofiara przestępstwa) w polskim prawie karnym materialnym*, „Czasopismo Prawa Karnego i Nauk Penalnych" 2002, no 2, p. 28. The compensatory function is further discussed by A. Marek [in:] A. Marek (ed.), *Zagadnienia ogólne*, System Prawa Karnego, vol. 1, C.H. Beck, Warsaw 2010, Legalis

the needs of victims of crime, providing compensation, delivering social rehabilitation for the perpetrator, and ensuring a preventive and integrative impact on society are nothing new in criminal law."[3] Reconciling these assumptions with the principles of criminal law is by no means easy.[4] However, it cannot be denied that modern criminal law – not only in Poland – is moving in that direction.[5] On the institution of mediation itself, it is more common to hear enthusiastic rather than critical voices.[6]

In the Polish criminal law system, the institution of mediation has existed since 1997, but – as politicians point out – it has not taken root in the Polish justice system.[7] Available data, presented in section 2 below, reflect the moderate use of mediation in criminal matters. The situation is surprising for several reasons. First, the benefits of mediation are widely acknowledged. Mediation benefits not only the perpetrator and the victim, but also the justice system and society as a whole.[8] Conducting mediation facilitates the reintegration of the perpetrator into society, which is also expected to reduce recidivism rates.[9] Second, the authorities in Poland have undertaken a wide range of initiatives to popularize mediation in penal matters, and those projects, at least seemingly, had the potential to produce the expected effect. They included both legislative solutions, as explained below, as well as broadly understood marketing or promotional endeavors. One such example is the projects that, until 2015, the Public Prosecutor General organized to mark the International Mediation Day.[10] It is also worth noting that in 2004 the Senate of the Republic of Poland clearly decreed its willingness to shape criminal law giving consid-

3 W. Zalewski [in:] T. Kaczmarek (ed.), *Nauka o karze…,* Legalis.

4 Cf. T. Dukiet-Nagórska (ed.), *Idea sprawiedliwości naprawczej…,* loc.cit.; W. Zalewski [in:] T. Kaczmarek (ed.), *Nauka o karze…,* Legalis.

5 Cf. D. Sullivan, L. Tifft (ed.), *Handbook of Restorative Justice. A Global Perspective,* Routledge, London–New York 2006.

6 Cf. O. Sitarz, D. Lorek, *Spotkanie sceptyka i entuzjasty mediacji*, part I, „Edukacja Prawnicza" 2013, no 5, pp. 24-27.

7 Cf. speech – contribution to the discussion made by Deputy Head of the Department of Common Courts in the Ministry of Justice W. Dziuban, [statement during the discussion], [in:] *Konferencja naukowa „Mediacja w polskiej rzeczywistości (11 września 2002 r.)*, Biuro Rzecznika Praw Obywatelskich, Warsaw 2003, p. 110.

8 Cf. e.g. O. Sitarz, *O mediacji w ogólności,* [in:] O. Sitarz (ed.), *Metodyka pracy mediatora w sprawach karnych*, Difin, Warsaw 2015, pp. 34-38.

9 D. Szumiło-Kulczycka [in:] P. Hofmański (ed.), *Zagadnienia ogólne*, System Prawa Karnego, vol. I, part 2, C.H. Beck, Warsaw 2013, p. 385.

10 *Aktualności Prokuratury Krajowej*, https://pk.gov.pl/aktualnosci/aktualnosci-prokuratury-krajowej/ [accessed: 15.11.2021].

eration to the paradigms of restorative justice.[11] Against this background, the main scientific problem that appears in this area is to find reasons for such a pessimistic view of mediation and its limited use in penal matters, as well as to propose specific solutions to change this situation.

The article presents the results of the research, which aimed at addressing the causes of the failure of mediation in penal matters in a comprehensive manner – using a variety of research methods: first, analysis of the legal texts and literature; second, analysis of the available empirical studies and developing a new empirical study based on interviews with practitioners. For the purpose of the present research, interviews in the form of an expert panel were conducted with: two judges, three prosecutors (including one prosecutor's trainee), an advocate, and experienced mediator with psychological education. This research tool has become a platform for discussion and an opportunity to exchange views between representatives of various legal professions, all of whom are participants and observers of the criminal process from different perspectives. Such an approach enabled confrontation of the scientists' views on the importance, place and role of mediation in criminal justice with the statements of practitioners. This also made it possible to assume high credibility and authority of the research results obtained, and above all, to provide a competent answer to the question of how to increase the number of criminal cases effectively referred to mediation.

In order to achieve the assumed effect, the considerations will be conducted according to a scheme that allows for a clear presentation of the entire issue. The substantive part will be opened by data illustrating the state of minimal use of the mediation institution in criminal trials. In search of an answer to the reasons for this state of affairs, first of all, the provisions of substantive and procedural criminal law relating to mediation will be analyzed. Later, the allegations raised in the literature regarding this institution will be presented, as well as assessing the legitimacy of the indicated reservations. The central element of the study is the statements of experts – entities actively participating in the criminal trial at its various stages – judges, prosecutors, advocate, and mediator. The complete study will be summarized by conclusions resulting from expert opinions and our proposals for changes in five areas: substantive criminal law, procedural law, so-called systemic law, executive law, and the area of non-legal measures.

11 Uchwała Senatu Rzeczypospolitej Polskiej z dnia 3 czerwca 2004 r. w sprawie polityki karnej w Polsce [Resolution of the Senate of the Republic of Poland of 3 June 2004 in the Matter of Criminal Policy in Poland], M.P. 2004 No 26, item 431.

2. State of play: available data on the use of mediation in criminal trials

The available data on the use of mediation in criminal matters come from several sources, including: data gathered by the Ministry of Justice (1998–2018);[12] the final report on the study titled "Diagnosis of the State of Application of Mediation and the Reasons for its Low Popularity as Compared to that Expected",[13] research studies conducted in 2006 by T. Cielecki[14] and in 2010 by L. Mazowiecka,[15] also the authors own research from 2010,[16] as well as from expert interviews presented in more detail in point 5.[17]

12 See about mediation in criminal matters in 1998–2018: *Mediacje karne w latach 1998–2020*, https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/ [accessed: 15.11.2021]; judgments (including convictions) in district and regional courts of first instance in 1997–2020 – *Osądzenia (w tym skazania) w I instancji w sądach rejonowych i w sądach okręgowych w latach 1997–2020*, https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/ [accessed: 15.11.2021].

13 A. Rudolf, M. Cichowicz-Major, M. Matysiak, S. Pałka, W. Pieniążek, C. Przybył, *Diagnoza stanu stosowania mediacji oraz przyczyn zbyt niskiej w stosunku do oczekiwanej popularności mediacj*i, Ministerstwo Sprawiedliwości, [Warsaw] 2015, p. 5, https://www.gov.pl/web/sprawiedliwosc/inne [accessed: 15.11.2021].

14 T. Cielecki, *Zarządzanie zmianą – refleksje o polityce kryminalnej w Polsce na tle wprowadzenia mediacji w prawie karnym*, „Mediator" 2006, no 1, p. 52-74.

15 L. Mazowiecka, *Opinie prokuratorów na temat mediacji na podstawie ankiety przeprowadzonej w 2010 r*., [in:] L. Mazowiecka (ed.), *Mediacja karna jako instytucja ważna dla pokrzywdzonego*, Wolters Kluwer Polska, Warsaw 2013, p. 125.

16 O. Sitarz, A. Jaworska-Wieloch, D. Lorek, A. Sołtysiak-Blachnik, P. Zawiejski, *Mediacje karne w opiniach stron postępowania oraz sędziów i prokuratorów – wyniki badań ankietowych*. part I, „Czasopismo Prawa Karnego i Nauk Penalnych" 2012, no 3, p. 144, https://czpk.pl/dokumenty/zeszyty/2012/zeszyt3/Sitarz_O.,_Jaworska-Wieloch_A.,_Lorek_D._Mediacje_karne_w_opiniach_stron_postepowania_oraz_sedziow_i_prokuratorow-CZPKiNP-2012-z.3.pdf [accessed: 15.11.2021]; O. Sitarz, A. Jaworska-Wieloch, D. Lorek, A. Sołtysiak-Blachnik, P. Zawiejski, *Mediacje karne w opiniach stron postępowania oraz sędziów i prokuratorów – wyniki badań ankietowych*. part II, „Czasopismo Prawa Karnego i Nauk Penalnych" 2012, no 4, p. 140, https://www.czpk.pl/dokumenty/zeszyty/2012/zeszyt4/Sitarz_O.,_Jaworska-Wieloch_A.,_Lorek_D._Mediacje_karne_w_opiniach_stron_postepowania_oraz_sedziow_i_prokuratorow-CZPKiNP-2012-z.4.pdf [accessed: 15.11.2021].

17 A panel of experts convened at different times (June, July and September 2019) consisting of Judge Artur Kot of the District Court in Pszczyna, Judge of the Regional Court in Katowice, Advocate Łukasz Baj, Prosecutor Urszula Noras-Cema of the District Prosecutor's Office in Pszczyna, Prosecutor Jakub Cema of the Regional Prosecutor's Office in Katowice, Assessor Magdalena Dubas of the District Prosecutor's Office in Tychy, as well as mediator, Ms. Aleksandra Skwara.

2.1. Data on the number of cases where mediation is used

The statistical data on mediation in criminal matters in 1998-2018 published by the Ministry of Justice[18] makes for interesting reading, as it covers the entire period from the entry into force of the current Criminal Code[19] (hereinafter abbreviated as CC), the Code of Criminal Procedure (hereinafter abbreviated as CCP[20]) and the Criminal Executive Code[21]. The data show that from 1998 until 2006, the number of cases in common courts concluded as a result of mediation grew steadily, finally reach 5,052 proceedings per year in 2006. In view of the number of adults tried in 2006 in district and regional courts of first instance (543,580),[22] 5,000 mediations only constitutes a very small percentage. Notably, since that point the number of mediations has never exceeded the magical level of 5,000 cases a year. In 2018, the number of cases in common courts concluded as a result of mediation was 3,859 against an overall number of judgments of 327,752. The number of cases closed by way of mediation in a given year therefore oscillates around 1% of adults brought to trial. It is difficult to consider this number a significant amount.

As a reference, one can consider the situation in Germany, where mediation has been conducted in penal matters since the early 1990s, and is more popular solution in penal cases than in other types of cases.[23] The German Ministry of Justice does not keep official statistics on mediation in penal matters, but collects voluntary reports from institutions dealing with victim – offender mediation.[24] The data thus collected are remarkably similar to the

18 *Mediacje karne w latach 1998–2020,* loc.cit.*;* also: E. Zielińska, J. Klimczak, *Zakres stosowania mediacji w sprawach karnych w praktyce wymiary sprawiedliwości*, IWS, Warsaw 2020, https://iws.gov.pl/wp-content/uploads/2020/04/IWS_Zieli%C5%84ska-E.-Klimczak-J-Zakres-stosowania-mediacji-w-sprawach-karnych-w-praktyce-wymiaru-sprawiedliwo%C5%9Bci.pdf [accessed: 15.11.2021].

19 Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny, Dz.U. 1997 No 88, item 553, as amended.

20 Ustawa z dnia 6 czerwca 1997 r. – Kodeks postępowania karnego, Dz.U. 1997 No 89, item 555, as amended.

21 Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny wykonawczy, Dz.U. 1997 No 90, item 557, as amended.

22 *Osądzenia (w tym skazania),* loc.cit.

23 T. Trenczek, *Victim-Offender Mediation in Germany – ADR Under the Shadow of the Criminal Law?*, „Bond Law Review" 2001, vol. 13, no 2, p. 1. More about mediation in Germany in P. Tochtermann, *Mediation in Germany. The German Mediation Act – Alternative Dispute Resolution at the Crossroads,* [in:] K.J. Hopt, F. Steffek (eds.), *Mediation. Principles and Regulation in Comparative Perspective*, Oxford Scholarship, Oxford 2013, p. 521-584.

24 J.-M. Jehle, *Criminal Justice in Germany. Facts and Figures*, Federal Ministry of Justice, Berlin 2009, p. 39, https://www.bmjv.de/SharedDocs/Downloads/EN/Studien

Polish statistics. "In 2002 the development reached its peak with 4,381 reported cases. Since the first collection round in 1993 the caseload of procedures considered suitable for conflict resolution has risen from 1,066 to 3,227 in 2005, i.e. it has tripled."[25] In turn, Thomas Trenczek concludes on the basis of other research conducted in 1999 as follows:

> During the last few years the total number of restitutive discontinuance of proceedings by public prosecutors and courts which may include restorative elements has risen from about 7,000 (6,798) in 1993 to 11,000 (10,865) in 1997 and maybe 15,000 today [2001]. Altogether this does not extend to more than five percent of all cases. Therefore, the practical use of restorative justice elements in German criminal proceedings, is correctly described as «stagnation on a low level».[26]

Studies on mediation covering the years 2015–2016 show that the number of mediations reported (7,672) doubled in comparison with 2005, but this number still does not exceed a few percentage points of penal cases in Germany.[27] Poland is thus not the only country facing the problem of the low percentage of penal cases referred to mediation.

2.2. Data on the distribution of mediation in Poland

The research conducted by Tadeusz Cielecki in 2006[28] as well as our own study of 2010 revealed the unequal (island-like) pattern of distribution of mediation in penal matters within the country.[29] This may be further corroborated with the report prepared by Agnieszka Rudolf with the research team:

UntersuchungenFachbuecher/Criminal_Justice_in_Germany_Numbers_and_Facts.pdf?__blob=publicationFile&v=3 [accessed: 15.11.2021].

25 Ibid.

26 T. Trenczek, *Victim-Offender Mediation…*, p. 5.

27 A. Hartmann, M. Schmidt, H.-J. Kerner, *Täter-Opfer-Ausgleich in Deutschland Auswertung der bundesweiten Täter-Opfer-Ausgleich-Statistik für die Jahrgänge 2015 und 2016*, Bundesministerium der Justiz und für Verbraucherschutz, Bremen 2018, p. 8, https://www.bmjv.de/SharedDocs/Downloads/DE/PDF/Berichte/TOA_in_Deutschland_2015_2016.pdf?__blob=publicationFile&v=1 [accessed: 15.11.2021].

28 T. Cielecki, *Zarządzanie zmianą…*, p. 52.

29 O. Sitarz, A. Jaworska-Wieloch, D. Lorek, A. Sołtysiak-Blachnik, P. Zawiejski, *Mediacje karne w opiniach stron postępowania oraz sędziów i prokuratorów – wyniki badań ankietowych*, part I…, pp. 133-152; O. Sitarz, A. Jaworska-Wieloch, D. Lorek, A. Sołtysiak-Blachnik, P. Zawiejski, *Mediacje karne w opiniach stron postępowania oraz sędziów i prokuratorów – wyniki badań ankietowych*, part II…, pp. 123-148.

Attention should be drawn to the uneven distribution of values in particular regions. The popularity of mediation in the southern parts of the country may be noted, with the exception of commercial law proceedings where mediation is more often used in districts located in the northwest of the country.[30]

2.3. Data on individual attitudes

On the basis of the survey conducted in 2009-2012, it was concluded that there are judges, prosecutors, and sometimes entire criminal court divisions or public prosecutor's offices quite willing and able to refer cases to mediation, whereas others never make use of it. Regrettably, the latter predominate.[31]

Similarly, whilst some of the practitioners we interviewed in 2019 were enthusiastically inclined to consensual solutions (including mediation), others did not see the need to refer cases to a mediator. Even the judge interviewed, who held a particularly consensual attitude, had referred only 6-7 cases to mediation in his entire professional career. Those were mainly partner conflicts, such as threat, stalking, abuse, which could generate further criminal and civil cases if not resolved. He initiated mediation in all such cases he could recall. At the same time, the district court he represents belongs to those which quite willingly make use of the services of a mediator in penal matters, and in 2017, the judges of that court referred as many as 30 criminal cases to mediation out of around 2,000 across the division. One year later, in 2018, it was only 14 cases. The judge attributed the relatively high popularity of mediation in his court to the efficiency of the mediator to whom the cases are referred. That is not the case with the appeals divisions. Although there are no formal obstacles to referring cases to mediation in the courts of second instance, the judges from the division represented by the interviewed judge do not make use of it at all. In her view, the parties are also focused on the judgment under appeal, and not on the crime itself and its consequences. This view is consistent with the A. Rudolf's report cited above, according to which "in 2014, regional courts

30 A. Rudolf, M. Cichowicz-Major, M. Matysiak, S. Pałka, W. Pieniążek, C. Przybył, *Diagnoza stanu stosowania*…, p. 5.

31 This may be illustrated by the findings of the study conducted by L. Mazowiecka. In the years 2009-2012, 70% of all the cases referred to mediation at the level of preparatory proceedings came from the prosecutors of the Appellate Public Prosecutor's Office in Białystok – L. Mazowiecka, *Opinie*…, pp. 124-125.

referred parties to mediation only 7 times. Mediation was used in the regional court in Krakow (5 proceedings), in Białystok (1 case) and in Płock (1 case)."[32]

The prosecutors interviewed in 2019 encounter mediation in their own or their colleagues' practice even less frequently than the judges. The assessor from the public prosecutor's office interviewed 10 colleagues and the maximum number of cases referred to mediation by one prosecutor was 3, which was an isolated case; most of her colleagues never referred any case to mediation. The greater inclination of judges to refer cases to mediation in comparison with prosecutors can also be observed in mediation practice – both in our own and the interviewed mediator's. Nevertheless, the number of such cases still remains very low. This may again indicate that the situation in the environment of our interlocutors representing the public prosecutor's office is not unique. According to the Rudolf's report

> The reporting data collected by the Public Prosecutor General's Office confirmed the low use of mediation in criminal law cases. The rate of the cases referred to mediation in 2011-2014 by public prosecutors at all levels ranged from 0,11% to 0,12%. The highest use of mediation was recorded in 2011 – that is 0,12% of cases went to mediation. Within four years, 5,056 cases were referred to mediation, of which 4,843 by a public prosecutor. Thus, authorities other than the public prosecutor, e.g. the police, used mediation only 213 times in 4 years. Over the years, a downward trend in the use of mediation can therefore be observed. In 2014, nearly 20% fewer cases went to mediation than in 2011; although it should be acknowledged that the total number of cases conducted during this time by public prosecutors also declined. Mediation was by far most frequently used at the level of district prosecutor's offices. In contrast, prosecutors at regional prosecutor's offices only sporadically referred cases to mediation– in the years 2010-2014, they only made use of this option four times (2011 – 1, 2012 – 2, 2014 – 1). Within the period under analysis, none of the appellate prosecutors had referred any case to mediation.[33]

The disturbing statistics above indicate the need to critically examine the legal solutions that create conditions for mediation in penal cases. There is no

32 A. Rudolf, M. Cichowicz-Major, M. Matysiak, S. Pałka, W. Pieniążek, C. Przybył, *Diagnoza stanu stosowania…*, p. 17.

33 Ibid.

doubt that some of the reasons for the low popularity of mediation in criminal cases can be found in defective legal solutions (procedural and substantive).

3. Polish legal regulations

Before moving forward to a short outline of the views expressed in the legal science on mediation, let us start with an analysis of the procedural and substantive criminal law in this respect.

3.1. Provisions of criminal procedure concerning mediation

Let us start with analysis of the procedural provisions concerning mediation in penal cases – with Art. 23a CCP, which seems to be of utmost importance. As of 1 July 2003, this provision replaced the repealed regulation of Art. 320 CCP, which associated mediation only with preparatory proceedings. Given the statistics cited, the amendment turned out to be revolutionary. Shortly after its entry into force,[34] a vast increase in the number of cases completed as a result of mediation was reported. The number of cases completed as a result of mediation in 2004 (3,569 cases) almost doubled in comparison to 2003 (1,858 cases) and more than tripled in relation to 2002 (1,021 cases).[35] It must be noted that the number of adults being tried by courts of first instance during those years did not increase as rapidly.[36] No other subsequent legislative measures produced such an effect; and the increase in the number of mediations came to an end in 2006, although still at a very low level as given above.

Currently the wording of Art. 23a CCP[37] reflects many postulates of theoreticians and practitioners involved in mediation. Together with the Regulation

34 Ustawa z dnia 10 stycznia 2003 r. o zmianie ustawy – Kodeks postępowania karnego, ustawy – Przepisy wprowadzające Kodeks postępowania karnego, ustawy o świadku koronnym oraz ustawy o ochronie informacji niejawnych [Act of 10 January 2003 r. on the amendment to the Act – Code of Criminal Procedure, Act – Introductory Provisions of the Code of Criminal Procedure, Act on the Crown Witness and Act on the Protection of Classified Information], Dz.U. 2003 No 17, item 155.

35 Data from *Mediacje karne w latach 1998–2018*, loc.cit.

36 From 439,953 judgments in 2002 to 579,911 judgements in 2004 – *Osądzenia (w tym skazania)…,* loc.cit.

37 „Art. 23a.

§ 1. The court or court clerk, or prosecutor in the preparatory proceedings or other organ conducting the proceedings may on the initiative or with consent of the accused person and the victim refer the case to an institution or an authorized person to conduct a mediation procedure between the victim and the accused person of which it instructs them providing

of the Minister of Justice of 7 May 2015 on Mediation in Penal Matters,[38] it creates a procedural framework for mediation which, despite its certain drawbacks, seems to be fairly functional and not overregulated.[39] Moreover, the practitioners reviewed during the panel of experts also expressed a positive opinion of that provision. It must be admitted that the provision does not raise doubts of a fundamental nature. Successful mediation proceedings may lead to a situation where the perpetrator will not be held criminally responsible. Moreover, the mediation agreements violate the principle of material truth.[40]

Such an argument may be seen as a legal drawback, which may have impact on the use of mediation.

The analysis of the normative basis of mediation in penal matters as a whole revealed one major drawback. Pursuant to Art. 23a § 7, "mediation proceedings shall be conducted in an impartial and confidential manner." Insofar as the issue of impartiality concerns above all the attitude of the

information regarding the aim and rules of mediation procedure, including the contents of Art. 178a.

§ 2. The mediation procedure shall not take longer than one month and its period is not counted towards the duration of the preparatory proceedings.

§ 3. The mediation procedure may not be conducted by a person to whom in a given case circumstances defined in Art. 40 and Art. 41 § 1 arise, or by a professionally active judge, prosecutor, assessor from a prosecutor's office, trainee in these professions, lay judge, court clerk, assistant of a judge or a prosecutor or officer of an institution authorized to prosecute offenses. Provision of Art. 42 shall apply accordingly.

§ 4. The participation of the accused person and the victim in mediation proceedings is voluntary. The consent to participate in mediation proceedings is received by the body referring the matter to mediation or the mediator, after explaining to the accused person and the victim the aims and principles of mediation proceedings and instructing them on the possibility of withdrawing that consent until the end of mediation procedure.

§ 5. The mediator shall have access to the case file to the extent necessary to conduct the mediation procedure.

§ 6. After the conclusion of mediation procedure, the institution or an authorized person shall draw up a report on its results. The report shall be accompanied by the settlement agreement signed by the accused person, the victim and the mediator, if it is concluded.

§ 7. The mediation procedure shall be conducted in an impartial and confidential manner."

38 Rozporządzenie Ministra Sprawiedliwości z dnia 7 maja 2015 r. w sprawie postępowania mediacyjnego w sprawach karnych, Dz.U. 2015, item 716.

39 Cf. D. Bek, O. Sitarz, *Uwagi do rozporządzenia Ministra Sprawiedliwości z dnia 7 maja 2015 r. w sprawie postępowania mediacyjnego w sprawach karnych*, „Prokuratura i Prawo" 2016, no 4, pp. 144-158.

40 K. Pachnik, *Instytucja mediacji karnej w prawie polskim*, „Zeszyty Prawnicze" 2012, no 3, p. 153, https://bazhum.muzhp.pl/media/files/Zeszyty_Prawnicze/Zeszyty_Prawnicze-r2012-t12-n3/Zeszyty_Prawnicze-r2012-t12-n3-s151-163/Zeszyty_Prawnicze-r2012-t12-n3-s151-163.pdf [accessed: 15.11.2021].

mediator, and is safeguarded by properly applied provisions on exemptions (Art. 23a § 3 CCP in connection with Art. 40-42 CCP), the principle of confidentiality is not so adequately protected. Assuming that only the mediator is obliged to maintain confidentiality, it can then not be said that the protection is adequate. First, the mediator is to guarantee the proper performance of his/her duties (§ 4 point 7 of the Regulation of the Minister of Justice on mediation proceedings in penal matters), and improper performance of duties may result in removal from the list of mediators (§ 7 item 3). Second, pursuant to Art. 178a CCP, "a mediator shall not be heard as a witness as to the facts which s/he learned from the accused person or the victim whilst conducting mediation proceedings." The exception is particularly serious crimes covered by the general denunciation obligation provided for in Art. 240 CC. Such a narrow understanding of the principle of confidentiality is dysfunctional and runs contrary to the essence of mediation. Given that only the mediator is obliged to preserve confidentiality, nothing prevents the parties, on their own initiative or upon request of the authority conducting the proceedings, from disclosing the details of mediation. This risk in particular occurs in the absence of a settlement agreement. A victim who did not receive satisfactory compensation may in subsequent proceedings make use of the declarations made by the accused person in the course of mediation talks. Worse still, the victim may disclose (and even record) that, e.g. the accused person who refused to give evidence in the courtroom openly admitted their guilt during a mediation meeting. The accused person may also be interested in disclosing the contents of the talks if the victim admits to having significantly contributed to the offense or the extent of the damage.

The practitioners interviewed in the present panel mentioned several doubts. The interviewed advocate – although they stated that this situation is not the main problem discouraging the parties from mediation, and were backed up by the judge, who declared that testimony and even a victim's recordings regarding the course of mediation would constitute "weak evidence" for him – claimed that it also cannot be ruled out that such evidence would be significant in the course of proceedings. The assessor from the public prosecutor's office admitted that prosecutors would make use of such evidence. It can therefore be postulated that the prohibition on admitting evidence should also cover forms of determining the course of mediation beyond the mediation hearing, apart from the contents of the report and possible settlement agreement.

Despite the identified shortcomings, it can be concluded that the procedural shape of mediation does not raise a great many concerns. The reasons for its low popularity are possibly attributable to substantive legal regulations. In any event, any discussion of those shortcomings should be preceded by an examination of the criminal law institutions that promote mediation in general.

3.2. Substantive criminal law provisions on the use of mediation

The Criminal Code mentions mediation only once – in Art. 53 § 3. Pursuant to this provision, "when imposing a penalty, the court shall also take into account the positive results of mediation between the victim and the perpetrator or the settlement agreement between them in proceedings before the court or the prosecutor." The court is not bound by the settlement agreement, but this cannot be considered a defect of the regulation. Satisfying the will of the victim is not, and in many cases cannot be, the main objective of criminal justice. The court should not undermine the agreement of the parties in its judgment,[41] and assuming the good will of the judge, such a guarantee can be considered sufficient.

Considering the wish of the parties expressed in the settlement agreement, the court may resort to the obligation to remedy the damage or compensate for the harm suffered. This obligation may be imposed on several legal grounds; however, the greatest importance is attached to the compensation obligation under Art. 46 § 1 CC. The reference to civil law included in Art. 46 § 1 allows the judge to use all the possibilities provided in the Civil Code for the injured party. However, the wording of the reference is so vague that it is difficult to determine what provisions of civil law are in fact applicable (only the provisions on pensions are explicitly excluded), which will be referred to further below. Moreover, it is difficult to determine precisely the nature of the compensatory measure. Although the legislator requires that the provisions of civil law be applied and, pursuant to Art. 56 CC, removes the compensatory obligation from the rules of imposing the penalty; it is hard to deny that a compensatory measure can be a reaction to a crime, sometimes the only one (the provision of Art. 59 CC allows for refraining from imposing a penalty in the case of minor offenses if simultaneously, for instance, a compensatory measure is applied). As regards the issue under analysis, it is worth emphasizing that the measure under Art. 46 § 1 CC is imposed upon request of the victim or ex officio. It can

41 The subject is discussed in more detail in D. Bek, *Wpływ ugody mediacyjnej na kształt reakcji prawnokarnej,* [in:] T. Dukiet-Nagórska (ed.), *Idea sprawiedliwości naprawczej…*, pp. 87-88.

therefore be used in connection with the contents of the mediation settlement agreement or totally independently in a case where the parties did not enter mediation or conclude a settlement agreement, and even when the victim did not express the will to obtain indemnity or compensation. The compensatory measure can thus become an instrument of restorative justice,[42] but it is independent of mediation and does not give an incentive for its use.

In the context of a mediation settlement agreement, a comparable role is given to probationary obligations for years associated with restorative justice. When imposing a probation measure, the court may and, in certain cases, must impose on the perpetrator at least one of the obligations under Art. 72 § 1 CC. Some of these obligations may correspond to the contents of the settlement agreement. Note should also be taken of the possibility of imposing "other appropriate actions during the trial period that may prevent a repeat offense" provided for in point 8. Such an open, flexible formula creates conditions for taking into account an offender's unusual obligations undertaken during mediation. However, the court has the option of individualizing the obligations even where the case does not go to mediation or no settlement agreement has been reached. Provided that the court pays interest to the profile of the accused person and the victim's needs, it is able to select the obligations in such a manner as to promote the social rehabilitation of the perpetrator and facilitate relations with the victim. The contents of a settlement agreement may thus potentially make it easier for the judge to select probationary obligations. This relation was emphasized by the interviewed judge.

One institution that explicitly refers to the agreement of the parties is the extraordinary mitigation of penalty. Pursuant to Art. 60 § 2 CC, the court may reach for this institution, among others,

> in particularly justified cases, where even the lowest penalty provided for an offense would be disproportionately severe, in particular: 1) if the victim reconciled with the perpetrator, the damage was repaired or the victim and the perpetrator agreed on a method of repairing the damage, 2) on the grounds of the perpetrator's attitude, in particular where he made efforts to repair or prevent damage.

A mediation settlement agreement may therefore serve as a pretext for an extraordinary mitigation of penalty.[43] Again, however, the court has the option of applying this mechanism also in other situations when it considers that

42 Cf. D. Bek, *Wpływ…*, pp. 113-117.

43 Cf. ibid, pp. 110-113

"a penalty for an offense would be disproportionately severe", for instance, when reconciliation and redress occurred without the use of mediation.

When discussing the substantive conditions for the functioning of mediation, mention should also be made of those provisions which showed a strong connection with restorative justice, but which were repealed. The most important of these is the provision of Art. 59a CC[44] referred to in the literature as compensatory or restitutive discontinuance, or alternatively, consensual discontinuance.[45] This institution under Art. 59a CC was indicated by virtually all participants of the expert panel discussion as a solution that is currently missing in the Polish criminal law system, and as one which would increase the number of criminal cases referred to mediation.[46]

The second provision related to mediation was Art. 66 § 3 CC, repealed on 1 July 2015.[47] Whereas currently conditional discontinuance may formally apply to proceedings on any offense punishable with a penalty of a maximum of 5 years of imprisonment, before the amendment, such a possibility existed only "in the case where the victim reconciled with the perpetrator, the latter redressed the damage or the victim and perpetrator agreed on a method of redressing the damage." In the absence of reconciliation, it was only possi-

44 „Art. 59a

§ 1. If before the commencement of the trial in the first instance, the perpetrator who had not previously been convicted of an intentional crime with the use of violence reconciled with the victim, in particular as a result of mediation, and repaired the damage or compensated for the harm suffered, criminal proceedings for an offense punishable with a penalty of a maximum of 3 years of imprisonment, as well as for an offense against property punishable with a penalty of a maximum of 5 years of imprisonment, and for the offense specified in art. 157 § 1 shall be discontinued upon request of the victim.

§ 2. If the act was committed to the detriment of more than one victim, a pre-requisite for the application of § 1 is reconciliation, redress of the damage by the perpetrator and compensation for the harm caused to all victims.

§ 3. The provision of § 1 shall not apply in the case where a special circumstance justifying that discontinuance of the proceedings would be contrary to the need to achieve the purposes of the penalty arises."

45 Cf. A. Lach, *Umorzenie postępowania karnego na podstawie art. 59a k.k.*, „Prokuratura i Prawo" 2015, no 1-2, p. 137. The term „restitutive discontinuance" is not successful due to the unjustified narrowing of the corrective nature of that institution solely to the restoration of the state prior to the damage.

46 This was pointed out equally by the judge, the second prosecutor and advocate. Even the first prosecutor participating in the expert panel discussion, although somewhat cautious about Art. 59a CC, eventually admitted that it was a sensible solution.

47 Ustawa z dnia 27 września 2013 r. o zmianie ustawy – Kodeks postępowania karnego oraz niektórych innych ustaw [Act of 27 September 2013 on the amendment to the Act – Code of Criminal Procedure and some other acts], Dz.U. 2013, item 1247, as amended.

ble to discontinue proceedings for an offense punishable with a penalty of a maximum of 3 years of imprisonment. Although reconciliation and redress could be achieved without the mediator's participation,[48] conditional discontinuance is an institution that significantly reduces the severity of the criminal law response, and a successful mediation reinforced the court's belief that the perpetrator deserved such relief. The strong link between that solution and mediation was repeatedly pointed out by the district court judge during the expert panel discussion. Deletion of Art. 66 § 3 CC combined with an amendment to Art. 66 § 2 CC obviously did not exclude the possibility of applying conditional discontinuance as a result of the conclusion of a mediation settlement agreement by the parties; however, it led to the situation where mediation became a "neutral institution" as regards conditional discontinuance.[49] That legislative amendment had a strong connection with the introduction of the aforementioned compensatory discontinuance. However, when Art. 59a CC was repealed a few months later, Art. 66 § 3 CC was not reintroduced.

Solutions that can make mediation attractive to those involved in the proceedings can also be sought on the border between substantive and procedural issues. It has long been known that these issues have become intertwined. In this area, special modes of prosecution (upon request and private prosecution) and consensual modes come to the fore.

Both private prosecutions and prosecution upon request are exceptions to the rule of prosecuting crimes ex officio. The uniqueness of such exceptions lies in the fact that to a large extent they leave the victim to decide on whether prosecution and punishment of the offender are necessary. More importantly, in both cases, though to a different extent, the victim may also make a decision to terminate the proceedings. Under the private prosecution procedure, Art. 489 § 2 CCP provides for the option of replacing conciliatory proceedings with mediation. Reconciliation of the parties, also within the framework of mediation, leads to a discontinuance of the proceedings (Art. 492 CCP). Mediation completed with a settlement agreement is therefore formally one of the methods of ending criminal proceedings in private prosecutions. Mediation does not feature so prominently under the public prosecution procedure upon request. Nonetheless, reconciliation of the parties and redress of the damage increase the likelihood that the victim will decide to withdraw the request. Cases where the withdrawal of the request is preceded by fruitful mediation

48 Cf. D. Bek, O. Sitarz, *Mediacja w sprawach karnych – krok po kroku,* [in:] O. Sitarz (ed.), *Metodyka pracy mediatora w sprawach karnych*, Difin, Warsaw 2015, pp. 142-143.

49 The subject is discussed in more detail in D. Bek, *Wpływ*…, pp. 103-107.

also increase the likelihood that the authority conducting the proceedings will not exercise its right of refusal of permission to withdraw the request (Art. 12 § 3 CCP).[50]

The interviewed judges and prosecutors interviewed in the present survey panel emphasized that private prosecutions and prosecutions upon request provide incentives for using mediation. However, there can be no denying that cases prosecuted ex officio tend to prevail in the Criminal Code and also in the practice of the police, prosecutor's offices and courts.

Procedural agreements such as those provided in Art. 335 CCP (so-called conviction without conducting a trial), Art. 338a CCP and Art. 387 CCP (so-called voluntary submission to criminal liability) tend to be associated with mediation. These institutions allow for a much simpler and faster completion of criminal proceedings with a conviction often more lenient than in the normal course. They primarily assume the conclusion of an agreement of the accused person with the public prosecutor[51] and are subject to court approval. Notably, all of them also take into account the interest of the victim[52] and none of them is available to perpetrators of serious crimes.

As regards the mode envisaged in Art. 335 CCP, the penalties and other criminal measures requested by the prosecutor are to be agreed with the accused person and must also take into account the "legally protected interests of the victim" (Art. 335 § 1 i 2 CCP). Verification of this premise requires agreement with the victim, but does not require mediation. Moreover, the prosecutor can act as an intermediary between the perpetrator and the victim and offer the accused person such criminal and compensatory measures as are in line with the expectations of the victim of the crime. Therefore, it may be that before submitting the request envisaged in Art. 335 CCP, the perpetrator and the victim have concluded a settlement agreement in mediation proceedings and the request takes that into account or, conversely, they did not in fact directly talk to each other, and only the prosecutor took heed of the victim's interest. In practice, the latter situation clearly prevails. It is also important that pursuant to Art. 343 CCP, "the court may make the granting of the request referred to

50 Cf. for more detail D. Bek, O. Sitarz, *Mediacja*…, pp. 141-142.

51 Cf. e.g. S. Waltoś, *Dopuszczalność porozumiewania się i uzgadniania rozstrzygnięć przez uczestników postępowania karnego w świetle polskiej procedury karnej*, [in:] A. Szwarc (ed.), *Porozumiewanie się i uzgadnianie rozstrzygnięć przez uczestników postępowania karnego*, Polski Dom Wydawniczy Ławica, Warsaw–Poznań 1993, pp. 50-51; K. Girdwoyń, *Konsensualny wymiar kary. Instytucje powszechnego procesu karnego*, Liber, Warsaw 2006, p. 22.

52 Cf. for more detail D. Bek, A. Jaworska-Wieloch, O. Sitarz, *Kształtowanie środków penalnych a prawo pokrzywdzonego i sprawcy do samostanowienia*, C.H. Beck, Warsaw 2019.

in Art. 335 dependent on redressing the damage in whole or in part, or the compensation for the harm suffered", whilst simultaneously it must reject the request if the victim opposes it. Thus the victim's interest is again secured, but without the need for involving a mediator. The interviewed prosecutor even pointed out that thanks to the institution of conviction without conducting a trial, she did not see a need to make use of mediation.

Art. 343a CCP, specifying the consequences of submitting the request under Art. 338a CCP, requires in § 2 that the provision of Art. 343 should apply accordingly. Although the "appropriate" application always leaves certain doubts, it seems that the absence of any objections of the victim and the possibility of making the acceptance of the request dependent on redressing the damage will also apply to the request provided in Art. 338a CCP.[53] In contrast, pursuant to Art. 387 § 2 CCP concerning the request from Art. 387 § 1 CCP, "the request can only be granted where the prosecutor as well as the victim duly notified of the date of the trial and advised of the possibility of the accused person submitting that request do not object thereto." Thus, consensual modes related to the voluntary submission to a penalty include a mechanism which protects the victim. The absence of objections by the victim will become most firmly established if the conflict with the perpetrator has already been resolved, e.g. by way of mediation. Yet again the necessity to conduct mediation is not foreseen.

A review of generally applicable law regulations related to mediation in penal matters shows that many of them are in fact open to mediation, although they do not require it. [54] Thus they should not be viewed as the main obstacles to the use of the mediation in the penal matters. It is therefore necessary to examine other arguments from the literature and survey of practitioners concerning those features of mediation, mediation proceedings or other legal and organizational solutions, which could hamper the use of mediation in a larger number.

53 Cf. W. Jasiński [in:] J. Skorupka (ed.), *Kodeks postępowania karnego. Komentarz*, C.H. Beck, Warsaw 2018, Legalis; M. Królikowski, A. Sakowicz [in:] A. Sakowicz (ed.), *Kodeks postępowania karnego. Komentarz*, C.H. Beck, Warsaw 2015, Legalis.

54 Positive assessment of material and process solutions: E. Kruk, *Mediation as One of the Forms of Resolving Conflicts in Offence Cases*, „Studia Iuridica Lublinensia" 2018, vol. 27, no 3, pp. 89-108.

4. Critical views on mediation in criminal cases

The search for reasons of non-use of mediation in criminal matters – other than stemming from its legal framework – should start with arguments of systemic character, including the allegation that mediation undermines the foundations of traditional justice. In the view of Monika Płatek, ten centuries of the ruler's command over conflict exercised in his particular interest (understood as respect for the law established by the entity exercising power) "explain the resistance that victims and their interests encounter in the courtroom". As Płatek claims, in Poland this effect is reinforced by the period of socialist realism which disregarded the individual.[55] Another argument is that mediation "privatizes" the justice system and that private agreements may weaken the impact of legislation, which is imbued with the same spirit.[56] A further allegation is that mediation trivializes the crime by reducing the process that follows after the commission of an act to a meeting and conversation between the parties and the arrangements made, which removes all the evil that has occurred from the whole matter and turns a crime into a problem. As Monika Płatek recalls, critics see mediation as a form of decriminalizing violence committed by men, returning it to the sphere of private affairs.[57]

An important argument is also the thesis that the assumptions of the mediation procedure provided for in Art. 23a of the Code of Criminal Procedure do not harmonize with the guiding principles of the process defined in Section I of the Code of Criminal Procedure. In a criminal case, the institution of mediation is in opposition to many guiding procedural principles, including the direction of material truth. R. Kmiecik argues that mediation cannot be a procedural instrument that destroys the criminal trial's objectives.[58] Successful mediation proceedings may lead to a situation where the perpetrator will not be held criminally responsible. Moreover, the agreements violate the principle of material truth.[59]

55 M. Płatek, *Mediacja w postępowaniu wykonawczym. Argumenty zgłoszone na rzecz i przeciw mediacji na tle doświadczeń międzynarodowych*, [in:] *Konferencja naukowa…*, p. 53.

56 M. Skibińska, *Zalety i wady mediacji jako sposobu rozwiązywania sporów cywilnych*, „ADR Arbitraż i Mediacja" 2010, no 3(11), p. 109.

57 M. Płatek, *Mediacja...*, pp. 58-59.

58 R. Kmiecik, *Mediacja jako procesowa forma kształtowania podstaw rozstrzygnięć probacyjnych*, [in:] M. Lipińska, R. Stawicki (ed.), *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 1–2.12.2003*, Senat RP, Warsaw 2004, p. 370.

59 K. Pachnik, *Instytucja mediacji karnej…*, p. 153.

The concern over whether mediation efficiently prevents secondary victimization is also invoked. In this context, the position of the Council of Europe expressed in Recommendation No R (99) 19 of the Committee of Ministers was recalled, pursuant to which:

> the reference to the European Convention on Human Rights in the preamble underlines the need to protect the fundamental rights. Mediation introduces more flexibility to criminal justice. In some cases, this entails the risk of overlooking or disregarding some of the common principles that protect individual rights. Mediation should therefore be combined with the guarantees listed in the European Convention on Human Rights.[60]

Therefore, the Council of Europe is concerned that the increased autonomy of the parties may expose the aggrieved party to further harm on the part of the perpetrator.

Attention has also been drawn to a systemic problem with the management of change, concluding that there was no procedure for introducing mediation into law enforcement and the justice system. It was noted that the process is conducted in a completely arbitrary manner, supported mainly by social institutions, the scientific community and a handful of enthusiastically inclined judges and prosecutors. The research carried out provided a basis for assessing the control of the process of change as extremely weak, in nature more adaptive than planned.[61]

As far back as 2003, the lack of popularization of mediation at the time both among judges, prosecutors and society at large was the main reason given for the low number of mediations in penal matters.[62] Meanwhile, on the basis of his research, Grzegorz Skrobotowicz pointed to routines and an aversion to new legal solutions in the context of the "problem of full use of mediation institutions".[63]

60 L. Mazowiecka, *Prawa człowieka i praworządność: mediacja a prokurator*, [in:] L. Mazowiecka (ed.), Mediacja. *Księga dedykowana pamięci Pani dr Janiny Waluk,* Wolters Kluwer, Warsaw 2009, p. 164.

61 T. Cielecki, *Bezdroża mediacji III*, [in:] P. Malinowski, H. Duszka-Jakimko, A. Suchorska (ed.), *Wokół praktycznych i teoretycznych aspektów mediacji*, AT Wydawnictwo, Kraków 2015, pp. 138-143.

62 A. Rękas, *Mediacja w praktyce wymiaru sprawiedliwości – szanse i zagrożenia*, [in:] *Konferencja naukowa*…, pp. 24-25. See also the opinions of the other speakers at the conference.

63 G.A. Skrobotowicz, *Mediacja karna w świetle badań*, Katolicki Uniwersytet Lubelski, Lublin 2017, p. 295.

As an argument against mediation in penal matters, it is occasionally pointed out that reconciliation of the perpetrator with the victim does not need to be formalized,[64] which should be understood as there being no requirement to conduct mediation in the manner provided for by law.

A peculiar kind of obstacle to referring cases to mediation certainly includes the very criteria for referral to mediation, given that they must necessarily be of a restrictive nature. Since the criteria are not normative, the list is created based on scant available publications or limited personal experience and practice. Ireneusz Dziugieł presented a fairly precise list of criteria with reasons stated. He identified factual complexity (being related within the material or personal scope) as an obstacle, in addition to situations where one or several offenses involve different victims. The belief that essentially only simple cases ("uncomplicated in fact or in law, and cases not involving several persons") are suitable for mediation is probably quite common in prosecutor's offices.[65] Paradoxically, Ireneusz Dziugieł also expressed his reservations regarding whether simple cases should be referred to mediation, due to the length of time required for conducting mediation proceedings.[66] Another highly intriguing limitation indicated by Dziugieł is the criterion of evidence, which should be closely related to the stage of preparatory proceedings. In his view, the early phase of the *in personam* proceedings does not allow for the consideration of a possible request from the parties to refer the case to mediation, or for the prosecutor to take such an initiative on the grounds of only "probable perpetration", which does not in itself imply that the case will be referred to the court for judgement. In the opinion of Ireneusz Dziugieł, the decision to refer a case to mediation can only be made where, in the light of the collected evidence, the circumstances of the case do not raise any doubts. Finally, it is worth mentioning the final criterion specified by the author – the receptivity of the parties to the conflict to mediation. Referring to research, the author pointed out that little or no receptivity to mediation is displayed by primitive suspects with a low level of empathy, showing antagonism to victims and characterized by a high level of aggression, as well as by

64 T. Bulenda, *Problem mediacji w wykonywaniu kar kryminalnych i środków karnych*, [in:] *Konferencja naukowa*…, p. 104.

65 C. Kąkol, *Dlaczego kieruję sprawy do postępowania mediacyjnego?*, „Prokuratura i Prawo" 2011, no 1, p. 143. The author is a prosecutor from the District Public Prosecutor's Office in Żary and won the competition launched by the Public Prosecutor General for a publication on mediation.

66 I. Dziugieł, *Mediacja w postępowaniu przygotowawczym*, Wydawnictwo Wyższej Szkoły Policji, Szczytno 2004, pp. 30-34.

intolerant and uncompromising victims who adopt a demanding attitude.[67] Likewise, Wojciech Dziuban developed a specific list of matters unsuitable for mediation, indicating that the group includes traffic offenses (in most cases there are no victims), crimes against property, crimes related to failure to meet maintenance obligations (the offender either has no financial means or does not intend to make payments at all). Wojciech Dziuban sees the greatest potential for mediation in cases of abuse, stating that in such cases too, the victim's resistance is justified. On the whole, in his opinion, there is relatively little scope for mediation and it can only be used in approximately 5% of the cases that reach courts.[68]

Obstacles of a legal nature lead to the allegation that in the case of prosecutions upon request of the victim, there is also no possibility to suspend criminal proceedings until the settlement agreement provisions are implemented. The lack of any instruments to enforce them, as well as the fact that discontinued proceedings cannot be resumed, mean that victims may fear that their harm will not be remedied.[69]

Teodor Bulenda drew attention to the risks linked to the possibility of abuse of the law in the event of mediation at the stage of enforcement proceedings, recommending that the relevant provisions be set out in such a manner as to minimize or eliminate such risks.[70] Similar concerns were raised by the provision of Art. 59a CC, which entailed the risk of pressure being put on the victim.[71] It is the weaker position of the victim that may pose a threat to mediation through secondary victimization. More specifically, while defining the weaker position, Magdalena Skibińska refers to the economic aspect and also mentions a lower level of knowledge of the law, psychological and tactical preparation to conduct negotiations and exert pressure, due to personality or understanding of facts. She even recalls the postulate of a new mediation model, the so-called *feminist-informed model*,[72] constructed on the basis of the postulates of feminist movements.

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67 Ibid.

68 Speech – contribution to the discussion by W. Dziuban [in:] *Konferencja naukowa…..*, pp. 110-112.

69 A. Rudolf, M. Cichowicz-Major, M. Matysiak, S. Pałka, W. Pieniążek, C. Przybył, *Diagnoza stanu stosowania…*, p. 29.

70 T. Bulenda, *Problem mediacji…,* pp. 101-102.

71 Cf. i.a.: M.T. Białek, *Mediacja w praktyce prokuratorskiej,* [in:] P. Malinowski, H. Duszka-Jakimko, A. Suchorska (ed.), *Wokół praktycznych i teoretycznych aspektów mediacji*, AT Wydawnictwo, Kraków 2015, pp. 122-123.

72 M. Skibińska, *Zalety i wady...*, p. 107.

Possible explanations for the small number of cases referred to mediation also include the low substantive level of the concluded settlement agreements and, though indirectly linked to the indicated cause, the insufficient requirements regarding the qualifications of mediators.[73]

As can be seen from the above the literature offers an important indication that will be extensively discussed here in the section on the expert practitioner panel discussion and which has been referred to above. As Lidia Mazowiecka noted, although the legislator mentions mediation as a possible mode of reaching an agreement between the parties, at the same time it permits other means to this goal which are beyond anyone's control. Lidia Mazowiecka therefore assumes that, as has been the case so far, the use of mediation will not be in the interest of the procedural body.[74] Surely, this should not be regarded as a disadvantage of mediation itself, although in anticipation of future comments it needs to be noted that this may partially explain the small number of cases referred to mediation. Similarly, the results of the research conducted by the Ministry of Justice as part of the project "Diagnosis of the State of Application of Mediation and the Reasons for its Low Popularity as Compared to that Expected" indicate that the barrier to referring cases to mediation is the belief of judges and prosecutors in their own conciliatory abilities as well as their fixed patterns of thinking and conducting proceedings, which are not very conducive to referring cases to mediation. Moreover, as shown by the aforementioned research, judges are mainly decision-oriented and focus on delivering a judgment and not on resolving a conflict for the future,[75] which implies a lack of recognition for mediation as such. In the light of the cited research, representatives of the parties have not show much interest in mediation either.[76] The above data correspond to the results of the research conducted by Wojciech Zalewski, who found that in the opinion of 77% of the mediators under survey, judges and prosecutors did not show an understanding of the importance of mediation.[77]

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73 A. Rudolf, M. Cichowicz-Major, M. Matysiak, S. Pałka, W. Pieniążek, C. Przybył, *Diagnoza stanu stosowania*…, p. 23.

74 L. Mazowiecka, *Szanse na mediację w postępowaniu przygotowawczym*, „Prokuratura i Prawo" 2015, nr 10, p. 95.

75 A. Rudolf, M. Cichowicz-Major, M. Matysiak, S. Pałka, W. Pieniążek, C. Przybył, *Diagnoza stanu stosowania*…, p. 20.

76 Ibid, pp. 36-37.

77 W. Zalewski, *Mediacja w polskim prawie karnym – teoria i praktyka*, „Przegląd Sądowy" 2003, no 6, p. 92

The above information indicating the weaknesses of mediation should be complemented with opinions expressed by the "participants" in mediation proceedings obtained as part of the previously mentioned research conducted in 2010. From the perspective of the victims (real and potential) and perpetrators, the only problem preventing them from participating in mediation was a general lack of information on mediation. In the 2010 research, as many as 81% of convicts said they did not know about the possibility of mediation at all. The results concerning judges and prosecutors were even more worrying – as many as 64% admitted that they had not referred any case to mediation in the last 3 years. The reasons provided for this state of affairs are extremely important: most often (29% of responses) it was stated that the cases in their division "were not suitable",[78] whereas as much as 21% of respondents indicated negative procedural / functional effects of mediation – lengthy proceedings, increase in costs. The third important reason indicated by the respondents turned out to be deficiencies in law – no possibility of discontinuance or refraining from imposing a penalty (19% of responses). When invited to submit their own proposals for amendments to the existing law in this regard, the respondents brought forward several proposals, including the possibility to discontinue proceedings at the pre-trial stage, not reporting cases referred to mediation in statistics as "in progress", enhancing the influence of the victim on the contents of the judgment, rewarding the perpetrator after reaching a settlement agreement through the possibility of applying the extraordinary mitigation of penalty, mandatory mediation in cases of private prosecution and infractions, an obligation imposed on police to inform the parties of the possibility of mediation at the first procedural stage. At the same time, removing mediation from criminal law institutions was also proposed.

Similar studies were carried out in 2009–2012 by Lidia Mazowiecka. She asked prosecutors to assess the usefulness of mediation. In short, prosecutors recognized that mediation is an institution primarily useful for the accused person (47% of prosecutors), the victim (44% of prosecutors) and the public (40% of prosecutors). In the opinion of 30% of the prosecutors, it is least useful for the justice system.[79] This means that even at the declaratory level, more than half of prosecutors do not recognize the real strengths of mediation. The

78 In a study conducted by Tadeusz Cielecki, as many as 65% of respondents expressed the opinion that they handle cases unsuitable for mediation – T. Cielecki, *Zarządzanie zmianą*…, pp. 62-63.

79 L. Mazowiecka, *Opinie prokuratorów na temat mediacji na podstawie ankiety przeprowadzonej w 2010 r.,* [in:] L. Mazowiecka (ed.), *Mediacja karna jako instytucja ważna dla pokrzywdzonego*, Wolters Kluwer Polska, Warsaw 2013, p. 125

lack of faith in the efficiency of mediation was confirmed by the surveyed prosecutors in their responses to the question concerning the reasons for not referring cases to mediation. To be specific, 32% of respondents said that the reason lies in the low efficiency of mediation, its inappropriateness, as well as in the lack of relevant cases in their division. It is worth noting that in the cited studies, among the reasons for not referring cases to mediation, accounting for almost 12% in total, the prosecutors pointed to: lack of time, excessive work, lack of private prosecution cases, existence of the principle of legalism, absence of that practice, unpreparedness of society as a whole for that institution and lack of an appropriate policy of directors of the prosecutor's offices.[80]

Undoubtedly, it is challenging to refute many of the allegations presented. Sharing some of the opinions quoted above, we will propose our interpretation of the problem and appropriate remedial measures in the last part of the text.

5. Expert opinions

5.1. Methodology

During the research, a goal was to supplement and update the research conducted in 2010[81] with other types of research, i.e. the aforementioned interviews from the expert panel. The direct discussion of those involved in the justice mechanism was intended to extract information otherwise undetectable in surveys. The debate was based on a list of questions and problems that the participants received one month prior to the meeting. In addition, the participants were asked to take account of the aspects of the functioning of certain sections of the justice system which are non-conducive to mediation. Each debate was recorded and then sent to the participants for specific authorization before publication. Below we present the slightly reorganized statements from representatives of legal and para-legal professions, constituting an attempt to diagnose the cause of the lack of criminal mediation in the Polish system.

80 Ibid, pp. 127-128.

81 O. Sitarz, A. Jaworska-Wieloch, D. Lorek, A. Sołtysiak-Blachnik, P. Zawiejski, *Mediacje karne w opiniach stron postępowania oraz sędziów i prokuratorów – wyniki badań ankietowych*. part I…, p. 144; O. Sitarz, A. Jaworska-Wieloch, D. Lorek, A. Sołtysiak-Blachnik, P. Zawiejski, *Mediacje karne w opiniach stron postępowania oraz sędziów i prokuratorów – wyniki badań ankietowych*, part II…, p. 140.

5.2. Opinion of the District Court Judge in criminal cases

In the opinion of the District Court Judge, who showed a highly consensual attitude and had referred 6-7 cases to mediation himself, the reason for the small number of mediations is simple – in the Polish criminal law system there are numerous procedural instruments based on the agreement of the parties. They are to a large extent employed in judicial practice instead of mediation. They primarily concern using the mode envisaged in Art. 335 CCP on voluntary submission to penalty. According to the judge, a similar function is in a sense performed by the prescriptive mode, which is essentially a specific type of negotiations with an accused person, who has 7 days to consider whether to "accept" such a judgment. Only cases that cannot be heard in the aforementioned modes and which are likely to result in resolution of the conflict are referred to mediation. Another important criterion for referring a case to mediation is a chance that a further offense resulting from an escalation of the conflict (e.g. family matters) will be prevented. In the view of the judge, only abuse cases are in essence suitable for mediation, since they are marked by a conflict that mediation can resolve. In his practice the judge makes use of reports prepared by probation officers in order to correctly select cases referred to mediation. All referrals to mediation took place at the initiative of the judge, or at the suggestion of a probation officer. In the judge's opinion, other cases suitable for mediation include stalking or unlawful threats. Moreover, the judge observed that referring a case to mediation does not always guarantee the conclusion of a settlement agreement, and its end result is that in the event where there is little evidence to be taken (e.g. enough for one sitting), proceedings without mediation will end faster. In other words, mediation prolongs proceedings and it is appropriate to resort to it only when it is possible to settle a family conflict. According to the judge, the above correlates with the most serious problem related to the lack of criminal mediation, i.e. there are no legal incentives for judges in the existing legal situation to motivate them to make use of mediation. Art. 66 § 3 CC, which allowed for conditional discontinuance of proceedings in a wider number of cases, provided that mediation was carried out, and Art. 59a CC, permitting unconditional discontinuance in the event of mediation, are no longer in force. These rules were important given that judges will differ as regards their focus on the resolution of the conflict. As a remedy for this state of affairs, the interviewed judge felt the need to introduce special incentives for judges and parties alike in the form of, for instance, exemption from procedural costs or bringing a case before a court on a priority basis in the event of concluding a settlement

agreement. During the interview, the judge confirmed that the problem also lies in the interpretation of the wording that the provisions of civil law are applicable to the redress of damage (Art. 46 CC) – for instance, whether the rules and restrictions provided for in labor law apply, which is ultimately not conducive to mediation either.

5.3. Opinion of the Regional Court Judge in criminal cases

A separate meeting was held with the Regional Court Judge, and was preceded by a written statement prepared by the judge. As she noted, no one in her department had referred a case to mediation at the appeal stage. It seems to her that this is due to placing the focus on the provisions governing the appeal procedure, which are aimed at determining what features an appeal must have (allegations) and what to do with them (consider all the allegations, etc.). This may also stem from the former model of appeal proceedings, which effectively limited evidentiary proceedings at the stage of appeal proceedings, and in which two types of rulings mostly prevailed: upholding the judgment or annulling it and referring the case back to the court of first instance for re-examination. The new rules are slowly gaining prevalence, since they apply only to cases where the indictment was brought after June 2015. In her opinion, at the appeal stage the parties are also focused on the judgment pronounced, and not on conducting mediation proceedings.

The judge also referred to her experience obtained in the court of first instance, in which she had adjudicated for approximately 13 years. During that period she referred nearly 20 cases to mediation and admitted that although statistically this was a lot, in fact it was not large when compared to the overall number of cases in the division (50-300). She stated that, in principle, she had not referred to mediation abuse cases or other cases in which she saw the perpetrator's evident superiority over the victim. She also concluded that mediation is contraindicated for accused persons whose attitude indicates that they would fail to appreciate the opportunity given to them. Further, she confirmed that she would likely not refer to mediation a case that is simple in terms of evidence, in which the perpetrator pleads guilty, which raises no doubt, and where the victim did not suffer trauma, as in her opinion, there is no problem to "work through" in mediation.

The judge also drew attention to the special role played by the court in private prosecution proceedings. A mandatory conciliatory sitting puts judges in a role similar to a mediator. In such circumstances, judges gain confidence

in their competence to reconcile the parties and may apply it in other types of proceedings as well. In the opinion of the interviewed judge, it is worth considering whether conciliatory proceedings should also be mandatory in cases other than private prosecutions. Still, this might further strengthen the judges' belief that mediation is unnecessary. Nowadays numerous judges, if they see the likelihood of the parties reaching an agreement, tend to adopt the practice of preceding the hearing with an incentive for them to do so and, in an attempt to influence the convict, they incorporate the educational aspect into the oral justification of the pronounced judgment. Having a certain sense that conflict can also be resolved in the courtroom, judges are unwilling to make use of the services of a mediator.

In the opinion of the interviewed judge, judges are generally aware of the existence of mediation, but they do not always have real knowledge on how exactly it works, or what benefits it may bring. A key point in favor of mediation is the greater likelihood of full acceptance of the judgment by the parties in the event where they conclude a settlement agreement and it is upheld by the court. Such a decision does not require justification and will almost certainly not be appealed by either party. In the view of the judge, belief in mediation among judges could be strengthened if a simulation of model mediation was presented to judges during training sessions.

5.4. Opinion of the advocate

The advocate participating in the debate paid attention to a dual responsibility he has during a criminal trial – defensive (as the defense lawyer for the accused persons) and quasi-prosecutorial (as the victim's representative). This dual perspective can after all lead to different conclusions, and indeed does. The advocate noted at the outset of his speech that not every case is suitable for mediation, at least as far as the attitude of the perpetrator is concerned. Mediation may serve as a stalling strategy for a perpetrator acting willfully, perhaps not for the first time. There are obviously perpetrators who seek settlement agreements, but their number is small. They are not so much concerned with resolving the conflict, but instead with having impact on the ruling. For this reason, mediation is not in the interest of a defense lawyer, an advocate knows when the perpetrator is to confess and when not. Paradoxically, the presumption of innocence may also hinder participation in mediation, in particular when acquittal is likely. A particularly shocking conclusion is that the advocate perceives mediation as an attempt to minimize the legal conse-

quences of tricks tried at the time of divorce. In other words, participation in mediation can reduce the effects of many criminal, civil and family cases brought or initiated to improve a party's procedural situation in planned or pending divorce cases.

The systemic cause of the lack of mediation is also the withdrawal of the adversarial procedure from the Polish justice system. In the view of the advocate, if there is no dispute and the judge is functionally similar to the prosecutor, there is no place for mediation in such a model. As the advocate infers from his own practice, judges seek to close cases as soon as possible in penal matters and do not refer them to mediation. Moreover, judges appear to be distrustful of requests for mediation submitted by defense lawyers and perceive such requests as a form of procedural obstruction. In the advocate's opinion, judges tend to have preconceived convictions based on the case file as regards guilt and the penalty that should be imposed. In such situations, mediation challenges their preconceived view.

The legislative flaws that the advocate indicated include the erroneous formulation of Art. 23a CCP, with the result in practice that there is no chance for mediation in preparatory proceedings. In fact, at this stage the parties do not meet during legal proceedings, thus there is no opportunity to obtain consent or a request to refer the case to mediation. Another shortcoming relates to the deletion of Art. 59a CC, which should either be reintroduced or a separate negative procedural premise be introduced into the provision of Art. 17 CCP. Moreover, in his view, a broad understanding of the obligation to remedy the damage represents a good solution.

In the opinion of the advocate, some of the indicated defects and weaknesses resulting from the judges' lack of belief in mediation can be corrected by imposing a normative obligation on the policeman who is the first person at the scene of the event to inform the victim and take a statement from them as to their consent or refusal to participate in mediation, during the first procedural step. Lack of consent at that stage would not release the authorities from the obligation to seek consent at each subsequent stage of the criminal process. According to the advocate, the cause lies in too much formalism, which does not allow mediation to be initiated in this manner, even before the formal initiation of proceedings.

Moreover, the advocate admitted that professional training as an advocate does not offer any classes on mediation. The whole program included only one class in the field, but devoted exclusively to the interpretation of Art. 23a CCP.

5.5. Opinion of the mediator in criminal cases

As regards the interviewed mediator, she also recognized the problem of the small number of mediations in penal matters, however, in her opinion, it is difficult to indicate specific reasons. In her view, one can certainly sense a poor climate for mediation in penal matters. She noticed that referring cases to mediation typically occurs when the judge gets tired of the parties. The mediator expressed her doubt as to whether a negative premise should be laid down for referring a case to mediation when dealing with a demoralized offender, but finally concluded that such an assessment should be carried out each time by a competent body and there is no need for a normative change. Furthermore, she noted with concern that the pressure exerted on mediators by judges or prosecutors to demonstrate efficiency, understood as the number of concluded settlement agreements may encourage unethical practices (e.g. in the form of a mediator pressuring the parties to conclude a settlement agreement).

The mediator emphasized the importance of training and promotion of mediation even in primary schools. She pointed out that even if prosecutor's offices and courts do not show much interest in mediation, the state should shape the legal system in such a manner that conflicts are resolved with due respect for the autonomy of the victim.

5.6. Opinion of the assessor from the public prosecutor's office

An assessor from the public prosecutor's office attended the first expert debate. She pointed out the risks affecting the institution of mediation which may slightly reduce number of cases referred to mediation. First, she pointed to the possibility of misusing the former provision of Art. 59a CC as well as other obligatory criminal law institutions related to the settlement agreement. Further, she drew attention to the demoralizing impact of criminal law benefits derived from a settlement agreement on the future of the perpetrator. She emphasized that the state is entitled to *ius puniendi* and it should determine in what circumstances penalties are imposed.

Bearing in mind the seriousness of some acts, the prosecutor's office representative noted however, that too many offenses are prosecuted ex officio, which appears to be completely unnecessary. She also explained the illusive nature of the provision that mediation time is not included in the duration of the preparatory proceedings. It is true that the duration of the proceedings does not run then, but the case is still shown in statistics at the end of the

reporting period. Thus there is pressure on prosecutors not to refer cases to mediation "for the sake of time of pre-trial proceedings". Furthermore, in her view, the discontinuation of proceedings at the *in personam* stage does not go unnoticed by supervisors. This means that after making criminal charges against somebody, it is better to submit an indictment to the court rather than discontinue proceedings at that stage. Even acquittal by the court is seen more favorably by superiors than discontinuance of proceedings by the prosecutor in the *in personam* phase. The assessor believed that the possibility of mediation even before making charges would be the best solution – as a result of a settlement agreement made during mediation proceedings, the prosecutor would not press charges.

5.7. Opinion of prosecutors

Two other prosecutors participated in the second expert debate. To a large extent, they confirmed the weaknesses of and allegations against mediation, as well as the systemic solutions unconducive to mediation.

At the outset the first prosecutor emphasized the risk of an apparent settlement or even a fictitious settlement agreement. In her opinion, the parties may agree that they will declare during the mediation procedure that the damage has been remedied, which does not have to be the case. The prosecutor also believes that the institution of mediation may be misused by the perpetrator and the victim may be subject to manipulation. Notably, the most important part of the prosecutor's statement is conveyed by the sentence: "I do not need mediation for anything that I want to achieve in the proceedings". In her opinion, the prosecutor can reconcile the parties on his/her own when the parties so desire, without resorting to mediation, and then apply the provision of Art. 335 CCP or others of a similar nature. The prosecutor noted that mediation may not be conducted in abuse cases (where manipulation on the part of the perpetrator is possible), although mediation is admissible in one-time family conflicts. In her view, it does not make sense to use mediation in cases of crimes against property, as in such cases there is no conflict that needs to be resolved and the prosecutor can enforce the remedy of the damage by other means. In contrast, in the opinion of the prosecutor, mediation is ultimately inefficient in real conflicts.

The prosecutor highlighted two previously mentioned negative aspects of mediation – it increases time and costs. The provision requiring that mediation time should not be considered as falling within the duration of preparatory

proceedings (Art. 23a CCP) is illusive. Each expiry of a statutory period and referral of a case to mediation triggers (or would trigger) the obligation to prolong the formal preparatory proceedings. Moreover, the costs of mediation at the stage of preparatory proceedings are borne by the prosecutor's office and must be accounted for. Hence the superior prosecutor is likely to say "if you do not have to increase the costs related to expert witnesses and mediation, you have to save money" (costs could be borne as a last resort).

In the prosecutor's view, the provision of Art. 59a CC would be useful, as prosecutors would then be able to close proceedings on their own; although before any possible referral of a case to mediation, she would attempt to conduct mediation herself. Therefore, in her opinion, the provision of Art. 59a CC should provide for a relatively broad basis for discontinuance, taking into consideration not only a settlement agreement concluded before the mediator, but also before the prosecutor. A useful alternative would be to extend the list of offenses prosecuted on request.

Another prosecutor taking part in the second expert panel openly admitted that he had never seen the need to refer a case to mediation; he could not identify any purpose of mediation that could facilitate criminal proceedings. In his opinion, the repealed provision of Art. 59a CC would surely encourage the adoption of the decision to refer a case to mediation. Nonetheless, he revealed that during the period of several months when that provision was in force, he harbored doubts as to whether that provision mostly served to benefit rich perpetrators who could afford to remedy the damage.

In the opinion of the prosecutor, good solutions conducive to mediation would involve allowing for the possibility of the victim withdrawing their complaint, not only in the case of crimes prosecuted on request (although a similar effect can be obtained by extending the list of crimes prosecuted on request), and providing for a new form of conditional discontinuance with the possibility of monitoring the implementation of a settlement agreement during the trial period. As the prosecutor indicated, the list of crimes suitable for mediation in this way is broader than the previous speaker had pointed out and would certainly include crimes against property.

The prosecutor also further clarified the issue of not formally including mediation time in the duration of the proceedings. Despite the wording of the provision of Art. 23a CCP, the mediation time is taken into account when a criminal case is classified as old, that is a case lasting longer than 6 months, thus the potential mediation time of one to two months constitutes a significant proportion of the six-month period. In other words, in the event where

a case has been handled for 5 months and everything is set to prepare an indictment and submit it to the court, no prosecutor will take the alternative option of mediation under such circumstances. The prosecutor also made a comment on the assessor's words regarding the reluctance of prosecutor's offices to discontinue cases in the *in personam* phase. He clearly explained that prosecutor's office supervisors in fact do not view discontinuing proceedings at the *in personam* phase in a very positive manner, as it negatively affects the efficiency indicator of prosecuting criminal cases calculated as a ratio of suspected to accused persons. This ultimately results in the lack of promotion of mediation solutions.

6. Research conclusions and proposals for changes

6.1. Research conclusions

At this point, on the basis of the collected materials and analyses of the issue, an assessment of the reasons for the lack of mediation and the weak points of the Polish regulations regarding this matter will be effectuated.

It seems that a real problem lies in the total lack of belief in the idea of resolving conflicts through mediation held by most persons conducting criminal proceedings. This can be confirmed through the statistics cited above, illustrating the unequal (island-like) pattern of distribution of mediation. Prosecutors and judges alike either do not see the need to strive for reconciliation of the parties at all, or are convinced that they can lead the parties to conclude an agreement without a mediator. Certainly, some of the positive effects attributed to mediation (remedy of damage, shortening the length of proceedings or reduction of the costs) can be achieved by other means, even by way of penalty order, and they require less effort from the persons conducting proceedings.

It seems that the introduction of Art. 59a CC was a certain remedy for the pragmatic, otherwise quite understandable, approach of prosecutors and judges, providing for a possibility of discontinuation of proceedings as early as at the preparatory stage, as a result of, among others, successful mediation. At the judicial stage, linking the possibility of conditional discontinuance of proceedings regarding an offense punishable with a penalty of a maximum of 5 years of imprisonment with reconciliation of the parties (Art. 66 § 3 CC) had a similar effect. In this context, abandoning such measures certainly did not contribute to an increase in the popularity of mediation in penal mat-

ters. Moreover, the arbitrariness of the decision of the body conducting the proceedings as to its refusal to refer a case to mediation represents a further obstacle. Even the parties' strong will to go to a mediator can theoretically be ignored by the prosecutor or judge.

On the other hand, treating mediation as an opportunity for the parties to reach an agreement in difficult cases in terms of evidence certainly does not promote the development of mediation. Cases in which a judge or prosecutor refers a case to mediation not to resolve the conflict but with an aim of breaking a deadlock in the hearing of evidence distort the whole idea of mediation. Moreover, where the above-mentioned impasse results from the fact that the accused person does not admit to committing the illegal act ascribed thereto and denies the basic facts reported by the victim, then such a case should not go to mediation at all, and the chances of concluding a sensible settlement agreement good for both parties are slim. A mediation case that does not end in a settlement agreement is wrongly perceived as a failure by the mediator, and further weakens the popularity of mediation.

Problems of a different nature arise from the narrow definition of the victim, in particular in the light of the Supreme Court judicial decisions, which does not recognize a natural person who suffered damage or harm as the victim when the subject of protection is an abstract interest, e.g. justice system, credibility of documents. Pursuant to Art. 23a CCP, the lack of a victim in formal terms prevents mediation even where there is a person who suffered harm and wishes to hold discussions.

Another impediment to mediation is insufficient knowledge by the parties of the proceedings of mediation and possible criminal law decisions. The present survey shows that knowledge of mediation is statistically significant for adopting conciliatory attitude.[82] The lack of knowledge of the substantive consequences of various decisions and their significance, e.g. entry into the National Criminal Register or deletion of penalty in criminal records, makes it difficult for the parties to recognize the merits of mediation and settlement agreements.

The parties' lack of interest in mediation may also stem from the fear that acceptance of a settlement agreement or even consent to participate in mediation may be deemed to constitute a confession of "guilt". Oddly enough, this problem may affect both parties to the conflict. In many cases also the

82 O. Sitarz, A. Jaworska-Wieloch, D. Lorek, A. Sołtysiak-Blachnik, P. Zawiejski, *Mediacje karne w opiniach stron postępowania oraz sędziów i prokuratorów – wyniki badań ankietowych*. part I…, 150-151.

victim has no interest in having his / her contribution to the crime disclosed during the criminal trial.

In brief, the authors are of the opinion that referring a case to mediation requires the judge or prosecutor to abandon the standard patterns they are used to. Neither substantive nor procedural law provisions promote going off the beaten path. On the contrary, numerous regulations, including systemic ones, discourage resorting to mediation, all the more so since similar effects may be obtained in a different manner by those conducting criminal proceedings. The accused persons and victims do not show much initiative in that regard either, as for various reasons they do not perceive the benefits that mediation can bring them.

6.2. Proposals

In the belief that the resolution of a conflict which would be the cause of subsequent crime has immense social significance, and understanding that the different participants in criminal proceedings pursue different, sometimes no less important, goals at different stages of proceedings, some remedial and reorganizational measures are proposed below. While respecting the autonomy of the parties, the *ius puniendi* of the state and the objective of the administration of justice, the postulates of restorative justice can be more effectively implemented with some adaptations, at least in the form of mediation in penal matters. Below is a list of postulates for changes in five areas: substantive criminal law, procedural law, the so-called systemic law, executive law and in the area of non-legal measures.

In the area of substantive law the proposals are as follows:

- reintroduction of compensatory discontinuance (the solution envisaged in Art. 59a CC);
- linking the conclusion of a settlement agreement with the possibility of no entry in the National Criminal Register upon conviction (in the case of minor and medium-gravity crimes); it should be noted that in such a legal and procedural system, the interests of the victim (remedy of damage and, nonetheless, punishment of the perpetrator) and the convict (clean records as a priority) are not contradictory;
- linking the conclusion of a settlement agreement with an obligatory reduction to 2/3rds of the statutory upper limit of length of the sentence;
- amendment to the provisions such as Art. 295 and Art. 309 CC (so-called active repentance after perpetration of the act) by the introduction of a

mechanism of, for instance, refraining from the imposition of penalty upon remedy of damage within a defined reasonable period of time in the case of crimes against property and economic crimes; a similar regulation should be in place as regards road traffic offenses, provided that the perpetrator was not under the influence of alcohol or illicit substances;
- introducing more flexibility as regards criminal measures and making their use more dependent on the will of the victim – in particular of those measures that are imposed against perpetrators using violence;
- taking into account the possibility of compensation in a broad sense, not only as mere compensation or restitution, but also as other conduct bringing (material) benefits to the victim – "substitutive compensation".

In the area of procedural law we propose:
- extending the list of offenses prosecuted upon request. This proposal was also put forward by Andrzej Murzynowski, who suggested including within this category the offenses defined in the provisions of Art. 193, Art. 196, Art. 222, Art. 278 § 3, Art. 284 § 3, Art. 286 §3, with the caveat that his list is still insufficient[83], the introduction of the possibility of suspending proceedings until the conclusion of a settlement agreement could also be envisaged;
- introduction of the obligation to inform the parties at each successive phase of proceedings of the institution of mediation and the legal benefits to be obtained from it;
- introduction of a relative requirement to refer a case to mediation upon the joint request of the parties, with rejection of such a request subject to appeal (the argument of "its worthiness in terms of time" – in respect of the time needed to consider the complaint – would be of lesser importance);
- strengthening the confidentiality principle – imposition of a ban on hearing from the parties as to the course of mediation, as well as on listening to recordings from mediation meetings;[84]
- introduction of the obligation to instruct the parties as to the effects of non-compliance with the provisions of the settlement agreement;

83 A. Murzynowski, *Kontynuacja refleksji na temat instytucji mediacji w procesie karnym,* [in:] L. Mazowiecka (ed.), *Mediacja. Księga dedykowana…,* pp. 169-170.

84 Cf. also: D. Szumiło-Kulczycka [in:] P. Hofmański (ed.), *Zagadnienia ogólne…*, pp. 402-403.

- consider introducing compulsory information meetings separately for each party;[85]

In the area of systemic law we propose as follows:

- abandoning the fiction of not counting mediation time towards the duration of criminal proceedings (modification of the IT registration system of the Association for Legal Intervention);[86]
- genuine consent to the discontinuance of preparatory proceedings in the *in personam* phase;
- increasing the professionalism of mediators to raise the level of trust in mediators and mediation (compulsory professional training);
- increasing the remuneration of mediators (adequate to the costs incurred and the work put in,[87] taking into account the number of sittings[88]).

As regards the area of executive law it is proposed to introduce the possibility of an assessment of compliance with the provisions of the settlement agreement by a probation officer (e.g. on request by the parties).

Moreover, there is also the need for the state and its organs, as well as NGOs, to take other non-legal measures in the form of:

- training lawyers, not only in the field of legal aspects of mediation, but also in the very essence of conflict, its destructive significance and the danger of its escalation;
- permanent programme of social education in the field of alternative methods of resolving conflicts.

It is worth referring to the comment made by Adam Zienkiewicz, that the goals of mediation as a legal and social institution are generally convergent with those of the law itself, which are often thought to focus on four areas, i.e. the implementation of justice, the introduction of peace and order (legal

85 Slovenia may serve as an example of a country where the first meeting with a mediator is mandatory. The use of mediation is voluntary there, although in the event where the parties do not take the initiative to refer the case for amicable resolution, the court may direct them to an obligatory information session, on pain of a financial sanction for their absence. Moreover, in the event where a party unreasonably refuses to enter mediation, a Slovenian court may impose additional financial penalties on them. A similar solution was adopted in Italy. A. Rudolf, M. Cichowicz-Major, M. Matysiak, S. Pałka, W. Pieniążek, C. Przybył, *Diagnoza stanu stosowania*…, pp. 21-22.

86 Cf. ibid, pp. 28-29.

87 Cf. G.A. Skrobotowicz, *Mediacja w zmienionym modelu postępowania karnego zagadnienia wybrane*, „Roczniki Nauk Prawnych" 2016, vol. XXVI, no 1, pp. 65-66.

88 A. Rudolf, M. Cichowicz-Major, M. Matysiak, S. Pałka, W. Pieniążek, C. Przybył, *Diagnoza stanu stosowania*…, p. 35.

security), assistance in the implementation of moral values, and the individual and common good.[89]

On one hand, the proposed changes increase the parties' autonomy in the criminal process (especially in less serious crimes). On the other, they make it possible to respond adequately to a settlement. In addition, the changes will also provide greater access to information on mediation. Additionally, the proposed organizational changes should improve the process of referring cases to mediation.

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