Chapter 3.

VICTIM–OFFENDER MEDIATION IN POLISH CRIMINAL JUSTICE

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Victim–offender mediation has been present in the Polish system of criminal justice for more than 15 years, that is since the new Penal Code[2], the Code of Criminal Procedure[3] and the Code of Execution of Penalties[4] entered into force on 1 September 1998. Such temporal perspective allows to trace the development of this institution and evaluate its operation. The ccrp., which contains most of the provisions relating to mediation (some references to it are also found in the pc. and the c.e.p.), among dozens of fragmentary amendments was subject to two comprehensive amendments having an effect on the model of criminal proceedings. The first of them was passed on 10 January 2003[5] and the other was adopted on 27 September 2013[6], five and fifteen years respectively after the ccrp. entered into force. It is characteristic that the provisions on mediation changed only twice just as a result of the above–mentioned amending laws. Despite the possibility of making changes before, when other provisions of the ccrp. were modified due to the criticism and proposals for changes from the theoreticians and practitioners of restorative justice, the legislator delayed it. The last amending law finally brought the amendments on mediation and

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2 Act of 6 June 1997 – Penal Code (Journal of Laws 1997, No. 88, item 553, as amended), hereinafter referred to as pc.

3 Act of 6 June 1997 – Code of Criminal Procedure (Journal of Laws 1997, No. 89, item 555, as amended), hereinafter referred to as ccrp.

4 Act of 6 June 1997 – Code of Execution of Penalties (Journal of Laws 1997, No. 90, item 557, as amended), hereinafter referred to as c.e.p.

5 Journal of Laws 2003, No. 17, item. 155.

6 Journal of Laws 2013, item. 1247.

its use in criminal proceedings, which were called for a long time, however, it surprises that as distant period of *vacatio legis* as in the case of the overwhelming majority of other changes was appointed (up to 1 July 2015). In most cases the last amendments on mediation just do not impinge on and interact with the amendments in particular concerning the evolution of the present model of criminal trial towards more adversarial and non–formalized model. It seems that there was no reason why the amendments should not enter into force together with a few other provisions 14 days after the announcement of the Act in the Journal of Laws of the Republic of Poland. The above–mentioned changes do not require such an extended period of preparation by the judicial authorities and other participants of criminal proceedings as the legislator intended.

The two previous revisions of regulations on victim–offender mediation were aimed at the removal of obvious defects as far as promotion of this institution to become a real alternative to the formal criminal proceedings is concerned. In the case of the amending law of 10 January 2003, the assessment of whether the objectives have been achieved is possible after keeping trace of statistical data concerning the use of mediation by public prosecutors and judges. The effects of the changes which are entailed by the Act of 27 September 2013 may be in turn considered at present only in the realm of a hypothesis. The real importance of mediation in criminal proceedings is mainly evidenced by the number of criminal proceedings in which victim–offender mediation was used in comparison with the total number of cases dealt with by the criminal courts of first instance each year as far as by the rate of settlements concluded, as illustrated in the following tables.

Table 1. Cases ended by way of mediation proceedings by the public prosecutor's offices and courts compared to cases brought to court in the years 1998–2012[7]

Year	Number of cases brought into courts*		Number of cases ended by way of mediation proceedings					
			by public prosecutor's offices			by courts		
	in absolute numbers	dynamics (previous year = 100)	in absolute numbers	dynamics (previous year = 100)	compared with the number of cases brought into courts (in %)	in absolute numbers	dynamics (previous year = 100)	compared with the number of cases brought into courts (in %)
1998	no data	–	2	–	–	10	–	–
1999	no data	–	40	2000,0	–	366	3660,0	–
2000	324718	–	51	127,5	0,02	771	210,7	0,24
2001	474824	146,23	38	74,5	0,01	786	101,9	0,17
2002	489507	103,09	34	89,5	0,01	1021	129,9	0,21
2003	533310	108,95	60	176,5	0,01	1858	182,0	0,35
2004	548136	102,78	325	541,7	0,06	3569	192,1	0,65
2005	555085	101,27	699	215,1	0,13	4440	124,4	0,80
2006	560539	100,98	1376	196,9	0,25	5052	113,8	0,90
2007	521786	93,09	1919	139,5	0,37	4178	82,7	0,80
2008	496641	95,18	1612	84,0	0,32	3891	93,1	0,78
2009	517431	104,19	1390	86,2	0,27	3714	95,5	0,72
2010	529814	102,39	1326	95,4	0,25	3480	93,7	0,66
2011	483029	91,17	1417	106,9	0,29	3251	93,4	0,67
2012	479774	99,33	1290	91,0	0,27	3252	100,0	0,68
Total	6514594	–	11579	–	0,18	39639	–	0,61

* *Number of criminal cases brought into regional and district courts as the first instance (with an indictment act, a motion for conditional discontinuation of the proceedings or a motion for unconditional discontinuation of the proceedings and application of precautionary measures if it is found that the suspect committed an act in the state of non–accountability).*

7 Prepared by the Author based on the data obtained from the Department of Courts, Organization and Analysis of Justice of the Ministry of Justice, www.ms.gov.pl/pl/dzialalnosc/mediacje/publikacje–akty–prawne–statystyki (15 May 2013).

Even a superficial analysis of the data in Table 1 leads to the conclusion that the number of mediation proceedings in Poland is still insignificant in relation to the number of preparatory proceedings or cases brought to courts. Far too low efficiency in the quantitative relief of justice system is a major shortcoming of mediation. It does not constitute a serious alternative to the traditional justice system which remains the only source of cases to mediation. How elusive that source is can be indicated by the number of cases led to mediation in relation to the total cases brought annually to the court, amounting to about 0,2–0,4% in preliminary proceedings and about 0,6–0,9% in judicial proceedings.

A worrying phenomenon is visible as after the short–term dynamic increase in the number of mediation proceedings which took place between 2003 and 2007 due to the entry into force of the amendment to the ccrp. of 2003 there was a significant stagnation. Since 2006 in judicial proceedings and since 2007 in preparatory proceedings, the number of cases referred annually to the mediation proceedings, with few exceptions, has been constantly decreasing. The above decrease cannot be explained by changes in the legal and organizational conditions as they did not occur after 2003.

Another worrying phenomenon is connected with the dynamics of decline of mediation proceedings in preliminary proceedings, which is definitely higher than in judicial proceedings. Victim–offender mediation should be used primarily in preliminary proceedings. Much more frequent application of mediation in judicial proceedings as it takes place in Poland stands in contradiction to the main assumptions of mediation as resolution of criminal conflicts at the earliest possible stage and avoidance of unnecessary procedures before courts as well as shortening the criminal proceedings and reduction of its costs. In most cases mediation should be initiated by the prosecutors, the police and other agencies of preparatory proceedings. The start of criminal proceedings is the best moment to shorten a criminal trial.

The possibility to convict the accused without trial[8], which could be alternative and less time–consuming than mediation could be perceived

8 Article 335 ccrp.

from the perspective of prosecutors as the main reason for rare referrals to mediation proceedings. The motion of a prosecutor specified in Article 335 ccrp. has similar effects as mediation and is more reliable in achieving the objectives because the injured person cannot file the objection to this motion and it is impossible to conduct the mediation without his consent. From the viewpoint of a public prosecutor, the referral of the case to mediation proceedings could be regarded as more risky and less profitable than the proposal of conviction of the accused without trial. There is hope that such an approach will change after the entry into force of the amending law of 27 September 2013, when in case of the injured party's objection the judge may not take into consideration the motion specified in Article 335 ccrp.

Table 2. Cases ended by way of mediation proceedings by the public prosecutor's offices in the years 1998–2012[9]

Year	Total		To conclude with an agreement		
	in absolute numbers	dynamics (previous year = 100)	in absolute numbers	dynamics (previous year = 100)	in %, compared to the total number of ended cases
1998	2	–	1	–	50,0
1999	40	2000,0	32	3200,0	80,0
2000	51	127,5	43	134,4	84,3
2001	38	74,5	30	69,8	78,9
2002	34	89,5	30	100,0	88,2
2003	60	176,5	46	153,3	76,7
2004	325	541,7	230	500,0	70,8
2005	699	215,1	522	227,0	74,7
2006	1376	196,9	1074	205,7	78,1
2007	1919	139,5	1438	133,9	74,9

9 Prepared by the Author based on the data obtained from the Department of Courts, Organization and Analysis of Justice of the Ministry of Justice, www.ms.gov.pl/pl/dzialalnosc/mediacje/publikacje–akty–prawne–statystyki (15 May 2013).

2008	1612	84,0	1225	85,2	76,0
2009	1390	86,2	1042	85,1	75,0
2010	1326	95,4	960	92,1	72,4
2011	1417	106,9	1022	106,5	72,1
2012	1290	91,0	898	87,9	69,6
Total	11579	–	8593	–	74,2

The rate of the amount of mediation proceedings ending with an agreement, compared to the total number of mediation proceedings is another important indicator useful in assessing the effectiveness of mediation. In the case of preliminary proceedings it reaches quite a satisfactory result between 69,6% and 88,2% (not taking into account the year 1998) with an average of 15 years of 74,2%. This means that three out of four mediation proceedings ended with an agreement and thus affected the outcome of the criminal proceedings.

Table 3. Cases ended by way of mediation proceedings by courts in the years 1998–2012[10]

Year	Total		To include with an agreement		
	in absolute numbers	dynamics (previous year = 100)	in absolute numbers	dynamics (previous year = 100)	in %, compared to the total number of ended cases
1998	10	–	7	–	70,0
1999	366	3660,0	232	3314,3	63,4
2000	771	210,7	481	207,3	62,3
2001	786	101,9	471	97,9	60,0
2002	1021	129,9	597	126,8	58,5
2003	1858	182,0	1108	185,6	59,6
2004	3569	192,1	2123	191,6	59,5
2005	4440	124,4	2755	129,8	62,0

10 Prepared by the Author based on the data obtained from the Department of Courts, Organization and Analysis of Justice of the Ministry of Justice, www.ms.gov.pl/pl/dzialalnosc/mediacje/publikacje–akty–prawne–statystyki (15 May 2013).

2006	5052	113,8	3062	111,1	60,6
2007	4178	82,7	2753	89,9	65,9
2008	3891	93,1	2551	92,7	65,6
2009	3714	95,5	2505	98,2	67,4
2010	3480	93,7	2274	90,8	65,3
2011	3251	93,4	2071	91,1	63,7
2012	3252	100,0	2251	108,7	69,2
Total	39639	–	25241	–	63,7

Statistics on the amount of settlements reached in the course of mediation in the judiciary proceedings are somewhat less optimistic. In the individual years the percentage ranged from 58,5% to 69,2% of all mediation proceedings at this stage of the criminal proceedings with an average of 15 years of 63,7% (almost two thirds of mediation proceedings ended with success). The difference between the average rates for the last fifteen years is 10,5% in favor of mediation used in the preliminary proceedings, which proves that the earlier the stage of the proceedings, the more effective the mediation.

Table 4. Cases directed for mediation proceedings and ended by way of mediation proceedings by the public prosecutor's offices in the years 1998–2012 (in total in Poland and in the Appellate Division of Białystok)[11]

Year	Number of cases directed for mediation proceedings			Number of cases ended by way of mediation proceedings					
				Total			To include with an agreement		
	Poland	Appellate Division of Białystok	in %, compared to the whole country	Poland	Appellate Division of Białystok	in %, compared to the whole country	Poland	Appellate Division of Białystok	in %, compared to the whole country
1998	2	0	0,0	2	0	0,0	1	0	0,0
1999	42	24	57,1	40	24	60,0	32	21	65,6

11 Prepared by the Author based on the data obtained from the Department of Courts, Organization and Analysis of Justice of the Ministry of Justice, www.ms.gov.pl/pl/dzialalnosc/mediacje/publikacje–akty–prawne–statystyki (15 May 2013).

2000	53	26	49,1	51	26	51,0	43	24	55,8
2001	40	24	60,0	38	23	60,5	30	20	66,7
2002	35	29	82,9	34	29	85,3	30	27	90,0
2003	71	32	45,1	60	29	48,3	46	24	52,2
2004	211	108	51,2	325	84	25,8	230	57	24,8
2005	721	485	67,3	699	476	68,1	522	347	66,5
2006	1447	1053	72,8	1376	1006	73,1	1074	774	72,1
2007	1912	1563	81,7	1919	1583	82,5	1438	1173	81,6
2008	1506	1294	85,9	1612	1329	82,4	1225	990	80,8
2009	1347	1029	76,4	1390	1084	78,0	1042	810	77,7
2010	1261	877	69,5	1326	956	72,1	960	675	70,3
2011	1414	813	57,5	1417	836	59,0	1022	586	57,3
2012	1290	775	60,1	1290	782	60,6	898	521	58,0
Total	11352	8132	71,6	11579	8267	71,4	8593	6049	70,4

The above table indicates drastic quantitative differences between various appellate divisions in Poland in terms of cases concluded through mediation in preliminary proceedings. The uneven territorial distribution of the application of mediation in Poland is a very negative phenomenon. The prosecutors of the appellate division of Białystok annually carry out between 60% and even more than 80% of all mediation proceedings at the stage of preparatory proceedings in Poland. In relation to the courts, large disparities in the number of mediation proceedings between some appellate divisions are not as serious as in the case of public prosecutors.

Unfavourable trends in the use of victim–offender mediation which appeared in recent years in Poland may be overcome through the amendment of 27 September 2013. The new provisions aim, among others, at streamlining and expediting proceedings through the creation of legal framework for a wider use of consensual methods of termination of criminal proceedings as well as for a wider use of the idea of restorative justice, also by the new approach to victim–offender mediation[12].

12 Justification of the Governmental bill of law amending the Act – The Code of Criminal Procedure, the Act – Penal Code and certain other acts of 8 November 2012, print No. 870, VII term of office, p. 2.

The legislator has made several significant adjustments to the regulations of mediation. First of all, the circle of entities entitled to refer the case to mediation proceedings has been extended with court referendary and the other agency conducting preliminary proceedings different from prosecutor[13]. Court referendary known hitherto in civil proceedings will be a new agency of criminal proceedings. Its role is to relieve the president of the court, heads of court departments and other judges of taking decisions on procedural and technical matters, as well as on minor substantive decisions. There is hope that referendary will thoroughly examine criminal cases for possible use of mediation and inform the parties with greater involvement about the purposes and principles of mediation proceedings than judges burdened currently with too many responsibilities. As regards the other agencies conducting preliminary proceedings different from prosecutor (usually the police), they may currently refer a case to mediation under Article 325i § 2 ccrp. only in the inquiry. The amendment extends this possibility also to the investigation and in this way may shorten the decision process omitting the prosecutor level. The legislator did not take into consideration proposals to inform the victim on mediation only when the accused agreed with it before, which would protect the victim against so–called secondary victimization.

Entrusting the mediator with the obligation to clarify the purpose and principles of the mediation proceedings and obtain the consent of the accused and the injured party to participate in mediation is also of great practical importance[14]. It is expected that the mediator would be more efficient in such cases than agencies conducting criminal proceedings

13 The text of the new Article 23a § 1 ccrp. is as follows: "The court or the referendary, and in the preparatory proceedings the state prosecutor or other agency conducting the prosecution, may on his own initiative, or with the consent of the injured and the accused, refer the case to a trustworthy institution or person in order to conduct a mediation procedure between the injured and the accused, of which they must be instructed with information about the purposes and principles of the mediation proceedings, including the contents of Article 178a ccrp."

14 The text of the new Article 23a § 4 ccrp. as follows: "Participation of the accused and the injured person in the mediation proceedings is voluntary. The agency which refers the case to the mediation proceedings or the mediator obtains the consent to participate in the mediation proceedings after explaining the accused and the injured person the objectives and principles of mediation proceedings and informing them about the possibility of the withdrawal of the consent until the end of the mediation proceedings".

not only due to his skills and knowledge, but also because of the greater confidence of the parties in him as he is unrelated to judiciary agencies.

Another change that may result in more frequent use of mediation is to equate the effects of mediation settlement with settlement reached before the court[15]. Such a settlement will constitute the executory title after the executory clause is granted by the judge or referendary. The enacting, in turn, a new ban on evidence in Article 178a ccrp., which was called for by the doctrine for a long time, i.e. a ban on hearing the mediator as a witness as to the facts he learned from the accused or the injured person in the course of mediation proceedings with the exception of information on the offences referred to in Article 240 § 1 pc., may encourage the accused to participate in mediation. In such a situation the accused will no longer have to fear that the content of statements and discussions in the course of the mediation proceedings will be used in a criminal trial against him.

However, it seems that the most revolutionary and important factor which would cause an increase in importance of mediation is not the last amendment to the ccrp., but the addition of the new Article 59a to the Penal Code. It states that at the request of the injured person the criminal proceedings for a misdemeanor punishable by not more than 3 years of imprisonment as well as misdemeanor against property punishable by not more than 5 years of imprisonment or a misdemeanor specified in Article 157 § 1 pc. shall be discontinued if prior to the commencement of the judicial examination in the first instance, a perpetrator who has not previously been convicted of an intentional offence committed with the use of violence, redressed the damage or harm. This provision does not apply if there is a special circumstance justifying that the discontinuance of the proceedings would be contrary to the need to attain the objectives of the penalty. The unconditional discontinuance of criminal proceedings as a result of the mediation agreement has no basis in the current ccrp. Victim–offender mediation may only indirectly influence on such a decision. It can occur if the victim of an offence which is prosecuted only after the motion for prosecution by the victim, withdraws the request for prosecution. It therefore wholly depends on

15 Article 107 § 3 ccrp.

the will of the victim and the consent of the public prosecutor in the course of preliminary proceedings and the judge in the course of judicial proceedings[16]. The successful withdrawal of the motion for prosecution leads to discontinuance of criminal proceedings[17]. In practice, public prosecutors and judges sometimes decide to discontinue criminal proceedings as a result of the mediation agreement citing the regulation of Article 17 § 1 item 3 ccrp., i.e. the occurrence of insignificant social consequences of the act. It should be noted, however, that the agreement between the injured party and the accused does not affect the assessment of the level of social consequences of an act[18].

After the entry into force of Article 59a pc. both the injured person and the accused as well as the agencies conducting criminal proceedings should be more willing to apply mediation and make settlements that could lead to quicker conclusion of the criminal proceedings without adjudicating on the criminal responsibility of the accused. Not only the accused, but also the injured person would benefit – the latter would have a solemn guarantee of the fulfillment of a mediation agreement in terms of redress of the damage or harm by the accused before the conclusion of criminal proceedings. A significant drawback of the above mechanism is the necessity to redress the damage or harm completely before the prosecutor or judge take a decision on conclusion of the criminal procedure. The lack of possibility to redress the damage or harm gradually even after the conclusion of the proceedings, for example to pay in instalments, might lead to inequalities due to the financial status of the accused.

The legislator has also introduced to ccrp. the rules of voluntariness[19], confidentiality and impartiality of the mediator[20] which were unwritten so far. This step was less important from a practical point of view

16 Article 12 § 3 ccrp.
17 Art. 17 § 1 point 10 ccrp.
18 Article 115 § 2 pc.; see D. Kużelewski, *Importance of mediation in criminal cases in Poland (discussion on the background of the fair trial guarantees)*, [in:] C. Kulesza (ed.), *Criminal plea bargains in the English and the Polish administration of justice systems in the context of the fair trial guarantees*, Białystok 2011, p. 189–192.
19 The text of the new Article 23a § 4 ccrp. *in principio* is as follows: "Participation of the accused and the injured person in the mediation proceedings is voluntary".
20 The text of the new Article 23a § 7 ccrp. is as follows: "Mediation proceedings are conducted in an impartial and confidential way".

because the above rules actually exist in the mediation proceedings and are possible to be interpreted with the current rules. It is to be hoped, however, that clear articulation of these guarantees in the ccrp. would overcome the accused and injured person's mistrust of mediation and encourage them to express their consent to participate in the mediation. Being aware of the possibility to withdraw without suffering any consequences at any time, they should be willing to join mediation proceedings.

The amending law of 27 September 2013 has also modified the array of posts that cannot serve as a mediator. Article 23a § 3 ccrp. in the new wording disqualifies the following entities: a professionally active judge, prosecutor and assessor prosecutor, and also a trainee in these professions, juror, referendary, assistant judge, assistant prosecutor and an official of any other authority which prosecutes offences. Lawyers and legal advisers who are not in fact the agencies of criminal proceedings have disappeared from the above list. The array of posts was supplemented with jurors. Despite the social and episodic nature of their function, they, however, sit in a judging panel and their neutrality is questionable.

To sum up, it should be concluded that the amendments to the ccrp. and other acts of 27 September 2013 represent a further step towards the adaptation of victim–offender mediation to European standards expressed in Recommendation No. R (99) 19 of the Council of Europe of 15 September 1999 on mediation in criminal cases, as well as give hope to increase its practical significance and impact on the criminal proceedings. It is a pity that we have to wait so long for the entry into force of new regulations. With the exception of provisions concerning referendary, which will be the new authority in criminal proceedings, the new regulations could have successfully entered into force much earlier.