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Legal and Non-Legal Justifications for ‘Administrative Mediation’ – Remarks on Polish Administrative Praxis

Abstract: In recent years lawmakers were obliged to harmonise the Polish legal system with the so-called *ius commune proceduralis*. This ongoing process is vital for both sustainable development, market stability and effective dialog amongst the various actors involved in field of public affairs. In the new era of the administrative state, the so-called ‘classic’ model of administrative proceedings became an obstacle for administrative actions. Effective dialog between public authorities and individuals was hard to achieve. The lack of instruments to ensure effective communication between decision-makers and an individual created a crisis of confidence in public administration bodies and intensified the trend of challenging administrative decisions. In order to reverse these negative phenomena, administrative mediation was implemented into the Polish Code of Administrative Procedure. Apart from the benefits related to making the procedure more ‘flexible’, the implementation of ADR methods also brought with it some negative phenomena. Therefore, the authors of this paper have attempted to present justifications for the implementation of mediation into administrative proceedings. Our analysis also includes comments on the prospects of the application of mediation by public administration authorities.

Keywords: mediation, administrative proceedings, participatory formulas, third generation of administrative procedures

1. Introduction

The constantly changing social and economic environment in which public administration functions causes a number of Code solutions to become outdated¹. The classic, inquisitorial (court-like) administrative proceeding model based on the command and control scheme² is not conducive to ensuring real participation of an individual in the decision-making process concerning his/her rights and obligations. The lack of instruments to ensure effective communication between decision-makers and an individual created a crisis of confidence in public administration bodies and intensified the trend of challenging administrative decisions. The negative phenomenon of abusing the right to appeal³ by parties stems not so much from dysfunctional social attitudes⁴ but rather from the obsolete nature of the procedural regulations.

The reasoning behind the majority of amendments introduced over the years to the Act of 14 June 1960 – Code of Administrative Procedure (CAP)⁵, was based on an attempt to realise the postulate of streamlining the procedure and increasing its effectiveness by issuing administrative acts which would meet the requirements expressed in the primary rules of the proceeding while at the same time increasing the level of their acceptability by the addressees. One of the mechanisms for the realisation of this postulate is to create a basis for real participation of an individual in the process of actualisation of his/her rights and obligations. A form of its realisation may include, among other things, mediation, which is generally a type of negotiations between the parties in a conflict involving an impartial and independent third party called a mediator⁶. The fundamental aim of mediation is to reach a compromise by making concessions to one another so that the prospect of redress proceedings being launched (both internal and external) will be avoided⁷. The final result of mediation should satisfy the participants of the proceedings and may take the form of either

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- 1 J. Parkin, *Adaptable due process*, "University of Pennsylvania Law Review" 2012, vol. 160, no. 5, p. 1309; Z. Kmieciak, *Dylematy reformy prawa o postępowaniu administracyjnym*, "Państwo i Prawo" 2016, z. 1, p. 4; A. Szpor, *Mediacja w prawie administracyjnym*, (in:) E. Gmurzyńska, R. Morek (eds.), *Mediacje. Teoria i praktyka*, Warszawa 2014, p. 397.
 - 2 J. Barnes, *Reform and Innovation in Administrative Procedure*, (in:) J. Barnes (ed.), *Transforming Administrative Procedure*, Sevilla 2015, pp. 25-26.
 - 3 M. Szwaś, M. Szwed, *Nadużycie prawa do sądu w postępowaniu sądowniczym*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2016, no. 6.
 - 4 W. Chróścielewski, *Czy potrzebny jest nowy kodeks postępowania administracyjnego?*, (in:) L. Zacharko, A. Matan, D. Gregorczyk, *Administracja publiczna – aktualne wyzwania*, Katowice 2015, pp. 50-51.
 - 5 Consolidated text *Journal of Laws* 2017, item 1257.
 - 6 K.A. Lambert, *Fundamentals of Alternative Dispute Resolution*, "Franchise Law Journal" 1992, vol. 11, p. 100.
 - 7 J. Wegner-Kowalska, *Koncepcja włączenia instytucji mediacji do kodeksu postępowania administracyjnego*, "Przegląd Prawa Publicznego" 2016, no. 11, p. 56.

a settlement or issuance of an act towards which the addressees will not trigger any legal remedies (the so-called negotiated decision).

From 1 June 2017 on, mediation became part of the Polish jurisdictional administrative proceedings model. As a manifestation of the implementation of Alternative Dispute Resolution (ADR) methods into public law, it should promote the acceptability of administrative decisions, both on an individual and collective level, without prejudice to the realisation of the rule of law in public administration activity. At the same time, it is a manifestation of the "Europeanisation of administrative law", understood as a process of influencing national legal systems, including administrative law, by EU legislation⁸, or a soft-law enacted by the Council of Europe⁹. Mediation is also a result of 'borrowings' from foreign¹⁰ legal systems¹¹ and is in line with the trend towards the voluntary harmonisation of procedural solutions in European countries.

It seems that the incorporation of mediation into administrative proceedings in Poland was mainly inspired by the form of an administrative agreement¹² which functions in German¹³ law and is classified as a public-law contract (*öffentlich-rechtlicher Vertrag*) that was introduced under the provisions of the Federal Act on Administrative Proceedings of 25 May 1976 (which entered into force on 1

8 M. Cherka, Doskonalenie procedur administracyjnych jako wyzwanie dla administracji, (in:) J. Osiński (ed.), *Administracja publiczna na progu XXI wieku. Wyzwania i oczekiwania*, Warszawa 2011, p. 321.

9 Recommendation Rec (2001)9 of the Committee of Ministers to member states on alternatives to litigation between administrative authorities and private parties.

10 J. Wegner-Kowalska, *Mediacja w sprawach administracyjnych – pytania i wątpliwości*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2017, no. 6, p. 41.

11 The ADR formulas are widespread and highly popularized not only in common law states (e.g. the United Kingdom, Australia, U.S.A.) but also in Asian countries (e.g. Hong Kong, Japan) or in European states with an established culture of administration (e.g. the Netherlands, France); K.J. de Graaf, A.T. Marseille, H.D. Tolsma, *Mediation in Administrative Proceedings: A Comparative Perspective*, (in:) D.C. Dragos, B. Neamtu (eds.), *Alternative Dispute Resolution in European Administrative Law*, Springer-Verlag, Berlin-Heidelberg 2014, pp. 591-592. By way of example in Asian praxis creation of bilateral communication plate as well as pursuit of political centers to create a friendly investment environment resulted in development of forms of administrative process that are more flexible including ADR formulas; S. Kakiuchi, *Regulating Mediation in Japan: Latest Development and Its Background*, (in:) C. Esplugues, L. Marquis (eds.), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, Springer Verlag, Switzerland 2015, pp. 371-372.

12 B. Dolnicki, *Umowa publicznoprawna w prawie niemieckim*, "Państwo i Prawo" 2001, z. 3, pp. 81 ff.

13 It is symptomatic that besides the fact that the administrative agreement (settlement) seems to be characteristic factor of German's public law and administrative praxis the other ADR formulas and informal redress are slightly popular; U. Stelkens, *Administrative Appeals in Germany*, (in:) D.C. Dragos, B. Neamtu (eds.), *Alternative Dispute...*, *op. cit.*, pp. 33, 45-48.

January 1977)¹⁴. This act distinguishes two main types of agreements: subordination and coordination¹⁵. The former is concluded between entities whose relation is characterised by the state of subordination of one to another while the latter occurs in situations of equivalence¹⁶. These agreements include, among other things, a settlement (*Vergleichsvertrag*) – § 55 VwVfg, which is used to remove, by way of bilateral concessions, the uncertainty concerning an actual state relevant from the viewpoint of the application of the law¹⁷. By way of example, these concessions may consist in the form of a commitment to reduce the burden on an individual, refrain from issuing an administrative act with a specified content, revoke an act already issued, withdraw a complaint or provide benefits¹⁸. The scope of application in certain types of administrative matters is very wide, and contract forms are even used in some cases¹⁹.

Apart from the benefits related to making the procedure more flexible, the implementation of foreign procedural institutions into the CAP also brought with it some negative phenomena. The evaluation of the idea of “Europeanisation” implemented in this way and the analysis of the related risks and opportunities require taking into account a number of nationally located factors. Other countries’ experiences show that the formula of ‘copying’ (‘borrowing’) procedural solutions does not always bring the desired effects²⁰. Therefore, the authors of this paper have attempted to present reasons for the implementation of mediation into the administrative proceedings. Our analysis also includes comments on the prospects of the application of mediation by public administration authorities.

2. The essence of administrative mediation

For the purposes of the paper, it was assumed that administrative mediation introduced into the CAP by the ‘April’s Amendment’²¹ (Article 13, Articles 96a-96n of the CAP) is an optional stage of advanced investigation proceedings allowing to

14 Verwaltungsverfahrensgesetz vom 25. Mai 1976 in der Fassung der Bekanntmachung vom 23. Januar 2003 (BGBl. I S. 102), das zuletzt durch Artikel 20 des Gesetzes vom 18. Juli 2016 (BGBl. I S. 1679) geändert worden ist (hereinafter: VwVfg).

15 M.P. Singh, *German Administrative Law*, Springer-Verlag, Berlin-Heidelberg 1985, pp. 50-51.

16 H. Maurer, *Ogólne prawo administracyjne*, K. Nowacki (ed.), Wrocław 2003, p. 196.

17 Z. Cieślak, *Umowa administracyjna w państwie prawa*, Kraków 2004, p. 45.

18 *Ibidem*, pp. 54–58.

19 H. Maurer, *Ogólne...*, *op. cit.*, p. 204.

20 P. Bystranowski, *Ekonomiczna analiza prawa wobec problem optymalnej precyzji dyrektyw prawnych*, “Państwo i Prawo” 2016, z. 5, pp. 31-32.

21 The Act of 7 April 2017 amending the act – Code of Administrative Procedure and some other acts (Journal of Laws 2017, item 935).

conclude it – alternatively – in the form of a settlement, a decision without triggering their verification or withdrawal of the application by a party or a combination of these forms of procedural activities, assuming the possibility of dividing the case. In model terms, the mediation introduced into the CAP makes it possible to adopt two variants of completing the proceedings. In the first one, mediation participants establish mutual arrangements under the guidance of a mediator, whose adoption renders unnecessary the issuance of an administrative decision. In the other variant, which incorporates the obligation to issue an administrative decision, the dialogue between the party and the authority only delays the adjudication; mediation will constitute merely an instrument for improving communication and clarifying the legal or factual controversies revealed in the course of the proceedings (dialogue-oriented mediation)²². The aim of the latter formula is solely to provide greater acceptability of an administrative act and lower the prospect of triggering internal or external redress by the party.

3. Legal and non-legal justifications for the introduction of mediation within administrative procedure in Poland

The authors of this paper limit themselves to the reconstruction of typologies of non-legal and legal justifications, supplemented by an analysis of the existing or planned (proposed) normative solutions, in order to determine the positive and negative effects of administrative mediation.

Firstly, administrative mediation can foster the transformation²³ of relations between the administration and the individual. It should be noted that in the 21st century, individuals in relation to the actions taken by the state apparatus ceases to be merely a “supplicant”, “subordinate” or “party” and their subjectivity is strengthened by expressions such as “partner” or “client”²⁴. Establishing a dialogue, which takes the form of a bargain, strengthens the sense of a relatively equal positioning of both actors taking part in the proceedings. This is particularly important for administrative proceedings concerning the issues of social assistance and welfare benefits. As

22 J.G. Firlus, K. Klonowski, *Mediacja w ogólnym postępowaniu administracyjnym*, “Casus” 2017, no. 3 (87) pp. 16-17.

23 About the so-called ‘transformative mediation’ H. Zillesen, The transformative effect of mediation in the public area, “ADR Bulletin” 2004, no. 5, vol. 7, p. 79 ff. Some scholars strongly believed that mediation as a procedural tool is capable of transforming the structure and attitude of public authorities; A. Szpor, *Mediacja...*, *op. cit.*, p. 400.

24 Proper example of new attitude and approach towards individuals might be seen in wording of Hungarian Code of Administrative Procedure (Act CL of 2016 on General Public Administrative Procedure); Z. Kmiecik, *Węgierska ustawa o ogólnych zasadach postępowania w sprawach administracyjnych – koegzystencja dwóch wizji porządku prawnego*, “Państwo i Prawo” 2017, z. 4, p. 18 ff.

shown by the conducted studies, the acceptability of an administrative decision by an individual is directly proportional to the experience gained from mutual communication on the official-citizen line²⁵. Undoubtedly, mediation strengthens and organises the dialogue. Further, it strengthens the individual's feeling that their case has a unique and "individual"²⁶ character and the public administration has given it due attention.

Secondly, ADR formulas in proceedings before public administration bodies may facilitate conflict management in policy-making proceedings especially at local and regional level²⁷. The decisions whose scope covers a larger group of stakeholders require a balanced approach and an active attitude on the part of the public administration. At the threshold of the implementation of the model of third-generation administrative procedures²⁸, mediation and the formula of community negotiations seem to be their inherent components. The need to adopt proper solutions enhancing dialog between stakeholders in local communities²⁹ is also recognised by the legislator. In the discussed context, attention should be drawn to the proposed solution in the draft of the Architectural and Construction Code, i.e. planning mediation³⁰.

Thirdly, mediation can fulfil an educational function and enhance the confidence of an individual in the public authorities' actions; both factors are not of separating character. In view of the above-mentioned tendency to abuse procedural rights by parties, officials' pro-individual attitude and openness to dialogue may reduce the willingness to question administrative decisions in the long run. This is how the reductive function of mediation is implemented. Of significance is also the question of the voluntary performance of obligations by third parties. While the primary importance should be attached in this respect to the justification of the administrative

25 D. Cowan, S. Halliday, *The Appel of Internal Review. Law, Administrative Justice and the (non-) emergence of disputes*, Hart 2003, pp. 124-125.

26 Undoubtedly every administrative case has in model approach its individual character; yet in order to define the role of mediation in public law one have to distinguish normative description (e.g. Article 1 CAP) of administrative case and the way in which proceedings are conducted. This is to say in administrative praxis, especially when authorities are adjudicating in repeatedly manner, the case and proceedings are lacking *de facto* individual character. In such cases mediation seems to be optimal tool for restoration an individual approach (attitude) of public authorities in each and every case despite its repetitive characteristics esp. in social and welfare benefits cases.

27 S.B. Goldberg, F.E.A. Sander, N.H. Rogers, S.R. Cole, *Dispute Resolution. Negotiation, Mediation and Other Processes*, Austin-Boston-Chicago-New York-The Netherlands 2007, pp. 513 ff.

28 J. Barnes, *Towards A Third Generation of Administrative Procedures*, p. 10 https://law.yale.edu/system/files/area/conference/compadmin/compadmin16_barnes_towards.pdf (access: 5.11.2017).

29 F. Cardona, *The Delegation Of Administrative Decision-Making Powers: A Tool For Better Public Performance* <https://pdfs.semanticscholar.org/a77f/0f71b61afe9c8947f255206eb13b62fab572.pdf> (access: 5.11.2017).

30 Section IX of Code; <http://www.konsultacje.gov.pl/node/4354> (access: 5.11.2017).

decision and the conduct of the proceedings in a manner that gives the individual confidence, the bilateral dialogue during the proceedings seems to make it possible to present the motives of a given decision in a manner that is more transparent to the individual.

The perspective of the realisation of the socially desirable effects of the implementation of mediation in the CAP depends mainly on the procedural tools established in the law and put at the disposal of both the authorities and the parties in the proceedings. Undoubtedly, the statutory framework of administrative mediation is a 'measure' of its practical effectiveness; yet solutions adopted in the CAP may reduce the tendency of those involved in the proceedings to resort to the available instrument of conflict resolution and elimination of misunderstandings.

However, the procedural solutions adopted in April 2017 to the CAP do not give cause for optimism. Despite the unquestionable added value of ADR in public law, the normative environment of the institution in question will lead to the intensification of negative attitudes in administrative proceedings. As an example, it is worth pointing out that mediation may constitute an important element of procedural tactics of both the authority and the parties aimed at the prolonged conduct of the proceedings, without the risk of the consequences provided for in Article 37 of the CAP³¹. As a rule, mediation is only a stage of proceedings preceding the authoritative activity of public administration. When making reciprocal concessions, the participants of the mediation proceedings do not have a guarantee of their future realisation. On the one hand, paradoxically, contrary to Article 96n (1) of the CAP, in the absence of sanctions for 'disloyal behaviour', the public authorities are not obliged to issue the so-called administrative decision corresponding to the content of the arrangements recorded in the post-mediation protocol³². On the other hand, another participant (namely party) of the proceedings may seemingly show an interest in the ADR formula only in order to prolong the duration of the proceedings. For example, a party may communicate to the authority an intention to waive its right of appeal³³ in the course of mediation on condition that the body makes a decision with a content determined during the mediation proceedings. Although recorded in the contents of the protocol, the party's statement does not have any independent procedural effect. Moreover, pursuant to Article 127a of the CAP, a party may make use of its procedural right at the earliest on the date of publication or service of the administrative decision.

31 Under Article 37 of the CAP special remedy against administrative inaction is prescribed (*ponaglenie*).

32 J.G. Firlus, K. Klonowski, *Mediacja...*, *op. cit.*, p. 21.

33 As the authors of a draft amendment stated in its rationales; <http://orka.sejm.gov.pl/Druki8ka.nsf/0/F3388D1AB00B1313C125809D004C3C8E/%24File/1183.pdf>, p. 41 (access: 5.11.2017).

The above-described case further highlights the shortcomings of the adopted solution. Firstly, the legislator has not correlated the legal form of the conclusion of the proceedings with the subject matter of the mediation proceedings on the normative level. The original concept of supplementing the CAP with the ADR formula was based on the implementation of an administrative agreement (contract) in addition to the mediation proceedings³⁴. Both procedural institutions were thus of complementary nature. The above-mentioned relation is seen by the authors of the draft amendment of the new Tax Ordinance Act, as expressed in the contents of Article 375 (1)³⁵. Secondly, the institution of mediation will not favour expediting proceedings in each and every case. The fiasco of bilateral dialogue may paradoxically lead to an intensification of the actual conflict, instead of mitigation, as a result of which the perspective of challenging the decision and obstruction at the stage of enforcement proceedings seem very real.

Despite a number of practical imperfections of the adopted solution, attention should be paid to those elements of the legal nature of mediation that underline its usefulness for judicial administrative proceedings. One should emphasise the attribute of coherence of mediation with some of the assumptions of the proceedings model set out in its principles. As has already been pointed out, this is certainly true of the principle of speedy proceedings, but it is much more important that it be compatible with the rule of law, the substantive truth and the active participation of a party (right to be heard) in proceedings and the right to information. Generally speaking, it can be stated that administrative mediation fits well into the general model of administrative proceedings and allows for its effective implementation. At the same time, these features fit into the model of a “negotiated” administration in a legal state.

From the viewpoint of the realisation of the legality criteria, an important element is the solution contained in Article 96 (3) of the CAP which stipulates the purpose of mediation to clarify and consider the factual and legal circumstances of the case and make arrangements for its settlement, emphasising that they must be within the limits of the applicable law, including by issuing a decision or reaching a settlement. Thus, mediation may not be considered as an attempt to compromise between the rule of law and flexibility of administrative actions. This indicated directive defining the manner in which mediation be conducted is consistent with the primacy of the rule of law and the substantive truth over the quickness of proceedings, as coded in Chapter II, Section I of the CAP. A failure to comply with this requirement will have important implications for the effectiveness of mediation.

34 J. Wegner-Kowalska, *Mediacja...*, *op. cit.*, pp. 43-44.

35 The draft bill of 6 October 2017 – Tax Ordinance Act; <http://www.mf.gov.pl/ministerstwo-finansow/dzialalnosc/ciala-kolegialne/komisja-kodyfikacyjna-ogolnego-prawa-podatkowego/prace-komisji> (access 5.11.2017).

As the party hosting the proceedings and the spokesman of the public interest, the public administration body is obliged to supervise the course of the mediation proceedings and verify its results. The lawfulness of the administrative actions cannot give in to the needs of the moment. Therefore, the arrangements of the participants of mediation made in violation of the law can result in the application of sanctions in redress proceedings both judicial (external) and administrative, or possibly of triggering extraordinary (*ex officio*) administrative proceedings, i.e. annulment³⁶ or revocation of final administrative decision³⁷. This is because the legislator does not give an administrative decision negotiated in mediation any attribute of irreproachability or "exceptional binding force". The jurisprudence of the countries with developed ADR formulas rightly states that negotiated administrative acts "(...) shall not be accorded any greater deference by court (...)"³⁸. Securing the lawfulness of the proceedings in which administrative mediation has taken place is also ensured by the prosecutor's independent entitlement to participate in court proceedings. Even if the party waived its right of appeal, the prosecutor's remedies are available both in internal and external review³⁹.

The vital rationale for the introduction of mediation into administrative praxis is to provide the authorities with additional possibilities for realising the principle of the substantive truth. This is justified in any event, even despite the assumption that mediation is launched at an advanced stage of the investigation proceedings. Mediation can, thus, be used when the authority's capacity to conduct investigation proceedings has been exhausted, but all the circumstances relevant from the viewpoint of the hypothesis of the norm of the substantive law have not been established yet. Since factual background of the case must be established it is vital to foster the parties' engagement in proceeding. Lacking information and knowledge may be then gathered by authorities during administrative mediation in order to fulfil the requirements arising from the abovementioned principle. This effect is realised in the first and second variant of mediation (see item 2). At the same time, it creates grounds for the resolution of the dispute over the facts without limiting the duties of the body to investigate the substantive truth in the formula of the *ex officio*, inquisitorial proceedings. If a mediator is established and the authority enters the mediation as a participant, it informally transfers some of the competence to conduct the proceedings to the mediator only within the scope of investigation proceedings⁴⁰, and the mediator is also bound by the principles of the proceedings arising from the

36 Article 156 CAP.

37 Article 145 ff. CAP.

38 S.B. Goldberg, F.E.A. Sander, N.H. Rogers, S.R. Cole, *Dispute...*, *op. cit.*, p. 526. For further reading W. Funk, *Bargain toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, "Duke Law Journal" 1997, vol. 46, no. 6.

39 A. Gołęba, (in:) T. Woś (ed.), *Postępowanie administracyjne*, Warszawa 2017, p. 473.

40 J.G. Firlus, K. Klonowski, *Mediacja*, *op. cit.*, p. 22.

principles of substantive truth, officiality and others. On this level, one can consider the adoption of an assumption that the mediator has some autonomy in relation to the decision-maker for the realisation of the substantive truth. This remark does not apply to procedural institutions that define the course of the whole proceeding which are exclusively assigned to the authority conducting the 'main' proceedings.

At the same time, the legislator assumed that the participants of mediation are obliged to keep secret all the facts they became aware of in connection with the mediation process unless they decide otherwise (Article 96j (2) of the CAP). Thus, in the absence of their consent, the obligation to realise the substantive truth in the scope covered by the above-mentioned factor which can be described as the confidentiality of mediation, is also to be excluded in relation to the body after the failure of mediation. It is important to recognise that this safeguard is essential to create the conditions for conducting mediation, regardless how much in conflict with the principle of the substantive truth it is. Without it, the parties were not interested in participating in mediation, providing the body or mediator with the knowledge of the relevant circumstances of the case since it could be used against them. In this way, the safeguard referred to as the 'confidentiality of mediation' is also consistent with the principle of individual's trust in the public administration as a whole.

The principle of active participation of the parties (right to be heard) in the proceedings, contained in Article 10 of the CAP, sets out the duties of the body in the form of notifying the parties, which are not participants of mediation within the meaning of Article 96a (4) of the CAP, of the date and place of the mediation meeting and its subject matter. On the other hand, the party already involved in mediation should be given an opportunity to participate freely and actively. This increases the activity of individuals. The above-mentioned safeguard contained in Article 96j (2) of the CAP should also intensify this phenomenon.

4. Conclusions

Attempting to determine the nature of mediation based on its comparison with the standard ADR model, one can classify it as a proper alternative method of conducting administrative proceedings. From the viewpoint of the relation to the proceedings, it is an internal alternative that is primarily of a reductive nature.

Implementation of mediation to the Polish CAP by lawmakers in 2017, seems to be the first step for the further application of the participatory formulas within public law. What is more the reorientation of the legislator's approach on the admissibility and advisability of the implementation of mediation and the related consensual legal forms of the functioning of public administration seems to take the form of a certain trend. This is exemplified by the above-mentioned proposals for the implementation of the ADR methods in tax proceedings and – to a certain extent – in the investment

and construction process. One may even consider a hypothesis whether, over the years, new, specialised forms of mediation would be adopted into the legal system. A specific 'decodification' would make to greater extent adaptable certain features of given administrative cases with basic elements of so-called administrative mediation. As it seems, this legislative approach is necessary, taking various functions of mediation formulas. For example, the principle of confidentiality of mediation applicable to administrative or tax proceedings could not be applied in relation to the negotiated formulas of local policy-making.

Comparing the above-mentioned rationales, one can generally conclude that the administrative mediation is to be crucial element of administrative praxis because of both: the procedural position of an individual but also from the viewpoint of the duties of the authority in the proceedings; yet, clearly, it should have a positive effect only in certain categories of administrative matters. It seems that ADR formulas can play a significant role in the cases where the legislator uses some form of discretion in administrative law. One can also ask why the legislator has only now decided to introduce mediation into the legal system despite the fact that it had been functioning for years in foreign legal systems? It seems to have been clear for some time now that the mere effect of expediting proceedings by imposing disciplinary measures can only apply to cases where the adjudication and decision-making process depends solely on the activity of the authority or its staff members. In a situation where the outcome of the proceedings is dependent on the individual's involvement and active participation, these mechanisms did not have to work. In this case, it was necessary to create a framework for a new type of dialogue between the decision-makers and the individual with a system of "incentives" and procedural safeguards. As has been shown, the praxis of foreign legal systems has been used for this purpose. However, is the Polish administration prepared to use this form of proceedings? In the authors view, the key obstacle may be the lack of trust⁴¹ between the authorities and the parties involved in the proceedings and the lack or incompleteness of the knowledge of the institution of mediation⁴².

The problem of mediation can also be seen in the context of the stability of the legal order. There seems to be a relationship between the discussed institution and the indicated value. The less stable the legal system, the more difficult it is to implement the basic factors of mediation formula. Being aware of the instability of the legal system, both the individuals and the administrative decision-makers will not be interested in conducting mediation. The uncertainty of the body in relation to

41 J. Wegner-Kowalska, *Mediacja...*, *op. cit.*, p. 41.

42 Despite certain procedural obligations which flow from Article 13 A.P.C. By the wording of mentioned provision authorities are obliged to inform parties about possibilities of and benefits from the administrative mediation.

the legal framework and the individual's lack of knowledge of the rules that provide the framework for mediation will hinder its application.

It seems that mediation will not fulfil the hopes associated with it, among other things, because of the lack of coherence of the attributed "flexibility" to authoritativeness, inquisitiveness and extreme legalism⁴³ imposed in the general principles of the proceedings which determine the method of actualisation of norms of substantive administrative law in administrative proceedings, regardless of the fact that it is incorporated into the formula of the principles of procedure.

In order to create better conditions for the use of this form of proceedings, it is necessary to make a change in the basic assumptions of the administrative process system which involves the introduction, to a greater extent, of the indefiniteness and discretion in competence norms, the limitation of the burden of proof imposed on the authorities with simultaneous shifting it to the parties. One could also consider the assumption – in reference to the solutions applicable in the Federal Republic of Germany – that ADR formulas should be conducted only within proceedings composed of two actors: one party of the proceedings and one decision-maker ('one-on-one scheme'). Furthermore, the analysis of foreign praxis provides⁴⁴ the basis for the conclusion that it is the administrative agreement, which functions in Germany, that is the solution that could best serve the purposes of administrative mediation in administrative proceedings.

BIBLIOGRAPHY

- Barnes J., Reform and Innovation in Administrative Procedure, (in:) Barnes J. (ed.), *Transforming Administrative Procedure*, Sevilla 2015.
- Barnes J., Towards A Third Generation of Administrative Procedures, https://law.yale.edu/system/files/area/conference/compadmin/compadmin16_barnes_towards.pdf (access 5.11.2017).
- Bystranowski P., Ekonomiczna analiza prawa wobec problem optymalnej precyzji dyrektyw prawnych, "Państwo i Prawo" 2016, z. 5.

43 So-called *hyperpositivism* seems to be differential criterion for post-socialist legal culture including Polish administrative praxis; R. Mańko, Weeds in the Gardens of Justice? The Survival of Hyperpositivism in Polish Legal Culture as a Symptom/Sinthome, "Pólemos – Journal of Law, Literature and Culture" 2013, vol. 7, no 2.

44 The ADR formulas in public law are becoming immanent element of public administration day-to-day praxis. As evidenced in literature both in countries with well develop administrative culture (e.g. Germany, the United Kingdom), post-socialist states (e.g. Hungary, Poland) or western Balkan states (e.g. Slovenia) proper tools for greater participation and bipartisan communication are included within administrative procedure scheme; K.J. de Graaf, A.T. Marseille, H.D. Tolsma, *Mediation...*, *op. cit.*, p. 592; P. Kovač, *Mediation and Settlement in Administrative Matters in Slovenia*, "Hrvatska Javna Uprava" 2010, no. 10, p. 744 ff.

- Cardona F., The Delegation Of Administrative Decision-Making Powers: A Tool For Better Public Performance, <https://pdfs.semanticscholar.org/a77f/0f71b61afe9c8947f255206eb13b62fab572.pdf> (access 5.11.2017).
- Cherka M., Doskonalenie procedur administracyjnych jako wyzwanie dla administracji, (in:) Osiński J. (ed.), *Administracja publiczna na progu XXI wieku. Wyzwania i oczekiwania*, Warszawa 2011.
- Chróścielewski W., Czy potrzebny jest nowy kodeks postępowania administracyjnego?, (in:) Zacharko L., Matan A., Gregorczyk D., *Administracja publiczna – aktualne wyzwania*, Katowice 2015.
- Cowan D., Halliday S., *The Appel of Internal Review. Law, Administrative Justice and the (non-) emergence of disputes*, Hart 2003.
- De Graaf K.J., Marseille A.T., Tolsma H.D., *Mediation in Administrative Proceedings: A Comparative Perspective*, (in:) Dragos D.C., Neamtu B. (eds.), *Alternative Dispute Resolution in European Administrative Law*, Springer-Verlag, Berlin-Heidelberg 2014.
- Dolnicki B., Umowa publicznoprawna w prawie niemieckim, "Państwo i Prawo" 2001, z. 3.
- Firlus J.G., Klonowski K., Mediacja w ogólnym postępowaniu administracyjnym, "Casus" 2017, no. 3 (87).
- Funk W., Bargain toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest, "Duke Law Journal" 1997, vol. 46, no. 6.
- Goldberg S.B., Sander F.E.A., Rogers N.H., Cole S.R., *Dispute Resolution. Negotiation, Mediation and Other Processes*, Austin-Boston-Chicago-New York-The Netherlands 2007.
- Kakiuchi S., Regulating Mediation in Japan: Latest Development and Its Background, (in:) Esplugues C., Marquis L. (eds.), *New Developments in Civil and Commercial Mediation: Global Comparative Perspectives*, Springer Verlag, Switzerland 2015.
- Kmiecik Z., Dylematy reformy prawa o postępowaniu administracyjnym, "Państwo i Prawo" 2016, z. 1.
- Kmiecik Z., Węgierska ustawa o ogólnych zasadach postępowania w sprawach administracyjnych – koegzystencja dwóch wizji porządku prawnego, "Państwo i Prawo" 2017, z. 4.
- Kovač P., Mediation and Settlement in Administrative Matters in Slovenia, "Hrvatska Javna Uprava" 2010, no. 10.
- Lambert K.A., *Fundamentals of Alternative Dispute Resolution*, "Franchise Law Journal" 1992, vol. 11.
- Maurer H., *Ogólne prawo administracyjne*, Nowacki K. (ed.), Wrocław 2003.
- Parkin J., Adaptable due process, "University of Pennsylvania Law Review" 2012, vol. 160, no. 5.
- Singh M.P., *German Administrative Law*, Springer-Verlag, Berlin-Heidelberg 1985.
- Stelkens U., *Administrative Appeals in Germany*, (in:) D.C. Dragon, B. Neamtu (eds.), *Alternative Dispute Resolution in European Administrative Law*, Springer-Verlag, Berlin-Heidelberg 2014.
- Szpor A., *Mediacja w prawie administracyjnym*, (in:) Gmurzyńska E., Morek R. (eds.), *Mediacje. Teoria i praktyka*, Warszawa 2014.
- Szwast M., Szwed M., Nadużycie prawa do sądu w postępowaniu sądownoadministracyjnym, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2016, no. 6.
- Wegner-Kowalska J., Koncepcja włączenia instytucji mediacji do kodeksu postępowania administracyjnego, "Przegląd Prawa Publicznego" 2016, no. 11.
- Wegner-Kowalska J., Mediacja w sprawach administracyjnych – pytania i wątpliwości, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2017, no. 6.

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Woś T. (ed.), Postępowanie administracyjne, Warszawa 2017.

Zillessen H., The transformative effect of mediation in the public area, "ADR Bulletin" 2004, no. 5, vol. 7.