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The institution of mediation in Polish criminal law

Abstract: The article deals with the issue of mediation in criminal matters in relation to the idea of restorative justice. Advantages and threats for the victim and offender resulting from the use of this alternative method of conflict resolution are indicated. It presents the procedure of mediation proceedings, the current legal status and the prospects of popularization of mediation at different stages of criminal proceedings.
Key words: restorative justice, mediation, criminal proceedings, victim, offender.

A few comments on restorative justice

Reaching to the thoughts of great philosophers, besides bravery, prudence and restraint, the highest virtue was embodied in justice. According to Cicero, it was supposed to provide everyone with a sense of their personal value, for Ulpian it meant granting everyone a right due to them, Aristotle considered it as ethical perfection, thus treating manifestations of injustice as so-called ethical defects. Kant clearly stated "[...] always act as you would like your neighbor to act, according to that maxim by which you can at the same time will that it should become a universal law", giving justice the title of a categorical imperative (see Aristotle 2011, p. 79; Ziembiński 1992, p. 18; Ajdukiewicz 1960, p. 365; Karp 2004, p. 69; Wojciechowski, Golecki 2008, p. 53; Orczykowski 2007, p. 56–57; Karolak 2005, p. 9 quoted from: Kania 2018, p. 89–91). The term iustitia means justice, while the Latin word ius means law, so the etymology itself points to the juridical background of justice. It is by no means a question

of a thoughtless combination of law and justice, since not always law can realize justice, only when it is associated with axiological values (Tokarczyk 1997, p. 3–4). The justice-oriented approach is reflected in the concepts of criminal punishment, which point to correlations between the perpetrator of an act, his/her guilt and the social harmfulness of his/her act and the legal consequences that result from it, and also take into account individual and overall preventive objectives in order to be able to recognize a just punishment in the final decision. Jim Consedine wrote, „[…] when retributive justice asks first "how shall we punish this criminal?", retributive justice asks "how shall we repair the damage caused by this crime?" They provide two significantly different starting points, which include two different philosophies" (Consedine 2004, p. 207). If a crime is damage, then the law should repair the damage and promote healing, and not only for the individuals – victim and offender, but also for the community affected by the crime. "There is no one concept of restorative justice, no one trial model, no one theory." (Ashworth 2002, p. 578). The literature on the subject cites various definitions of restorative justice (in short: RJ), it is difficult even to indicate who is the author of this term. A common and frequently cited definition is that of T. Marshall, which, as noted by P. Szczepaniak was adopted in 1997 by the Crime Prevention and Criminal Policy Committee of the International NGO Association as the so-called working definition, "restorative justice is a process in which the parties affected by a specific crime jointly determine how to deal with its direct consequences and consequences for the future" (Marshall 1998, source: Szczepaniak 2016, p. 125). The closest to me is M. Wright's opinion, according to which the main aim is to compensate for the harm caused by a criminal act, by expecting and/or enabling the offender to take corrective action and giving the victim the opportunity to participate in a dialog with the offender about the form of this compensation (Czarnecka-Dzialuk, Wójcik 2001, p. 14). The willingness to take action on the part of the victim and the offender may of course be a matter for discussion, so this is already determined at a later stage by corrective practices involving, among others, consent and voluntariness on the part of the parties to the proceedings.

The ideas of restorative justice emerged in the 1970s. as a response and alternative to the low efficiency of the justice system based on the retributive concepts. W. Zalewski places restorative justice in the area of diversion, suggesting the use of legal but less punitive procedures to influence the perpetrator of a crime (Zalewski 2017, p. 244–245).

J. Latała rightly notes that "there is no contradiction between punitive justice and restorative justice, as justice is a priority for both. The only difference between them is the recognition of what is the essence of the crime and the essence of justice" (Latała 2010, p. 31). The concept of restorative justice is intended to enrich the response to the crime with new means of influencing the offender, while at the same time taking care of the interests of the victim.

A crime in the light of the retributive approach is, in a way, an action against the state and is considered in terms of breaking the law and the offender's guilt, i.e. the proceeding takes place between the offender and the state to determine the guilt and impose an appropriate penalty. It is up to the state authorities to capture the perpetrator of a forbidden act, to judge and punish him/her legally. The punishment is to be imposed in accordance with the punishment policy adopted in Poland, it should act as an educational tool for the offender and as a deterrent to all other potential offenders. It should also compensate the victim for his/her losses. This is not always possible or sufficient according to a personal assessment of the losses incurred, the losses in his/her legally protected goods, sometimes even more moral and psychological well-being of the victim rather than material well-being. The contradictory nature, i.e. the participation of opposing parties to the criminal proceeding leaves the victim, the person injured/disadvantaged in the background. It is enough to mention that the victim of crime only notifies about committing a crime (in certain situations this task is taken over by the prosecutor's office), and then does not have too much influence on the course of the proceeding, does not have any influence on the type and severity of punishment, and even less so on the monitoring of its execution. The center of attention seems to be the perpetrator of the criminal act and the lawyers representing him/her. Apparently, since in practice of the proceeding he/she is the addressee of the proceeding, he/she is subject to the jurisdiction of the court and other state authorities (at the stage of adjudication and enforcement of the sentence). When being an accused, it is not possible to influence the content, type and severity of the penalty imposed by the court, i.e. he/she also plays a passive role during the criminal trial. The words spoken by Norwegian sociologist and criminologist Nils Christie, that "the conflict should belong to the people involved, but was stolen by lawyers and other specialists," therefore it must be returned to the people involved as soon as possible (Christie 1977, p. 1–15). As a precursor and propagator of restorative justice, he treats crime precisely as a form of conflict. The victim and the offender remain in conflict with each other, understood within RJ as a state of violated relations in society, which should be restored with the active participation of the offender, as far as possible outside the criminal trial, without applying the state's right to punishment (Hirsch, Roberts, Bottom 2003, p. 195; Ciepły, 2009, p. 180 et seq.).

The "return" of the conflict to the parties results in engaging them to act, to actively work on solving it. This contribution alone is important and sometimes even more important than the final solution. Moreover, not only the offender and the victim, but also the local community should be involved in resolving the conflict, because according to the new paradigms of restorative justice "crime is a violation of persons and relationships between them. It creates obligations to restore order. Justice unites the victim, the offender and the community in the search for a solution that ensures reparation, peace and reconciliation" (Zehr 1990, p. 181).

The proportions of the criminal trial change, and it no longer focuses solely on the criminal offence and the person who committed it, but allows the victim of the crime to be heard, thus empowering him/her and involves those who have so far been overlooked in the justice process, such as families of the parties, neighbors and representatives of local communities. Having the ability to make the perpetrator aware of the extent of the crime committed, the joint establishment of the facts thus lowers the local community's fear of the offender, the sense of their self-effectiveness in the course of proceedings and increases confidence in the legal order (an extremely desirable educational aspect related to the change of social mentality, minimizing stereotypes, undertaking inclusion activities, etc. – added by ESM) (Amin 1995, p. 135; Zalewski 2017, p. 244–245).

Besides, restorative justice suggests and gives tools to turn conflict into cooperation. These include remedial practices involving all parties in the resolution of the conflict, such as victim – offender mediation, family conferences, adjudicating and recovery groups and remedial councils. There are also various corrective practices aimed at one of the actors of the conflict, such as various programs addressed to victims (psychological and material support, support groups, intervention calls, etc.), support and reintegration programs for the perpetrators of a criminal offence themselves (programs offering assistance in obtaining an education, profession, job, probation programs, programs for the local community) (Vaccination 2016, p. 172). Paul McCold and Ted Wachtel point out the difference between restorative justice programs and restorative practices. They considered that corrective groups, family and community conferences are the most compatible with the idea of corrective justice, while all other activities are corrective practices corresponding to the RJ philosophy to some extent only. Interestingly, they also placed mediation among them, which is, and used to be, identified with restorative justice (McCold, Wachtel, 2003, pdf).

One of the supporters and propagators of restorative justice in Poland, Wojciech Zalewski, already in 2006 published a book with a significant title: Sprawiedliwość naprawcza. Początek ewolucji polskiego prawa karnego? (Restorative justice. The beginning of the evolution of Polish criminal law?) More than a decade has passed since then, and we could ask the same question today, and that does not mean that there has been stagnation in this matter and no effective ways of influencing the perpetrators of crime or reducing the level of crime are being sought. The point is that, as the author of the book indicated rightly recognizes, changes in criminal law cannot be limited only to changes in regulations, liberalization or tightening of criminal policy, but require a different philosophy in approach to crime and the state, supported by deepened discourse. Restorative justice is a term which, in Zalewski's opinion, reflects the meaning of actions undertaken in this paradigm much better than limiting them only to repairing damage. Restorative justice is about reassuring or strengthening, about restoring social peace (Zalewski 2006, p. 7–9).

To sum up, in the law there are disputable, conflict situations between two parties that can be resolved without the involvement of the court, but using the potential of other methods that, by definition, seek to resolve conflicts out of court. They are referred to as ADR – Alternative Dispute Resolution.

In Poland, France and Germany they include mediation, conciliation and arbitration. The United Kingdom has the largest catalog of ADR measures among European countries: arbitration, early neutral evaluation, expert determination, mediation, mediation-arbitration, mediation-recommendations, ombudsmen, neutral fact finding and conciliation. In Europe, there have been created special units concerning the implementation of ADR in the Member States, among others, The Working Group on Mediation (CEPEJ-GT-MED) under CEPEJ (European Commission for the Efficiency of Justice) established by the Committee of Ministers of the Council of Europe, which also postulates a wider use of mediation in particular areas of law (Romanowska 2010, p. 93).

Mediation in Polish criminal law

Due to the limited framework of this study, I do not describe all remedial programs or practices, I focus my attention on mediation, which, as I wrote above, is one of the basic forms of implementing the postulates of restorative justice, and is particularly close to my scientific interests. Both theoretical and practical knowledge of the mediation proceeding, the spectrum of possibilities of its application in various areas of social life and branches of law: civil, family, administrative or finally criminal allows me to place high expectations, but also hopes for the dissemination of this method of resolving disputes, or communication and building interpersonal relations between people in general. According to current approaches, the prerequisite for mediation is not spiritual reconciliation of the parties to the crime, forgiveness or healing of the relationship, as the classic model of mediation between the offender and the victim, the so-called VORP (Victim Offender Reconciliaton Program), assumed.

Creating a space for meaningful conversation with the participation of a neutral person is a contribution to conducting mediation proceedings, also between the perpetrator of a prohibited act and the victim. In accordance with one of the basic principles of restorative justice, the parties to the conflict participate in the mediation proceeding on a voluntary basis, expressing their willingness to engage in a dialog in order to seek a solution to the dispute between them, a reparation agreement. It is worth stressing that the agreement/conciliation is not an absolute goal of mediation or a necessary condition for it to be undertaken. The fact that both parties have started mediation process voluntarily, that they are still willing to participate in the process, but also that they can resign from it at any stage, gives them a sense of causation and leaves them free to decide in searching for

different solutions to the conflict situation, and this is already an added value of the mediation process. The fact of handing over the conflict to the hands of the parties, as N. Christie wrote above, without the need to involve the court, constitutes the otherness of mediation and its value. The Civic Council for Alternative Methods of Dispute Resolution at the Ministry of Justice described mediation as "a voluntary and confidential process in which a professionally prepared, independent and impartial person, with the consent of the parties, helps them to deal with the conflict. Mediation enables its participants to identify disputable issues, reduce communication barriers, develop proposals for solutions and, if the parties so wish, reach a mutually satisfactory agreement" (ADR standards).

Regardless of the subject matter and type of the dispute, the style and influence techniques used by the mediator, each mediation proceeding is guarded by the basic principles. The above-mentioned fundamental principle of voluntariness; the principle of impartiality of the mediator in relation to the parties and the problem; the principle of confidentiality, which is particularly important in criminal mediation. Both the course of the mediation proceeding and its results are kept confidential and this applies to all participants. (derogation from the principle of confidentiality where the parties agree otherwise or is required by law). If one party submits confidential information to the mediator, it may be disclosed to the other party only with the consent of the submitting party. Besides, as A. Zienkiewicz notes, and what also follows from ADR standards, "a mediator should not be appointed as a witness in court, arbitration or any other proceedings on the basis of facts, evidence and arguments disclosed in mediation proceedings, unless it is necessary for the protection of human life or health, it is an extremely important public or party interest or both parties release him/her from the obligation of confidentiality (secrecy) of mediation" (Zienkiewicz 2012, p. 190–191). Nor does the mediator derive any benefit from what is negotiated in accordance with the principle of neutrality and does not impose its own proposals for solutions on the parties, it is the victim and the offender who establish, through dialog, the stance to which they jointly agree. Therefore, it is important that the mediator, as a participant, coordinates and ensures the proper conduct of the meeting, is accepted by the parties to the dispute (principle of acceptability) (see Karaszewska et al. 2019, p. 285–298).

Under appropriate conditions (according to the Regulation, as a rule, mediation proceedings should not be conducted in premises occupied by participants or their families or in the buildings of bodies authorized to refer a case to mediation proceedings) and in the presence of a mediator, the aim of criminal mediation is to rectify a situation that has arisen between the victim and the perpetrator of the act. This out-of-court solution is a win-win situation for both parties. The wronged party/victim is treated subjectively, can be heard and listened to, has the opportunity to express himself/herself and negotiate the most satisfactory

solution, does not undergo secondary victimization, and is given back his/her sense of respect and dignity. When confronting the offender, he/she expects explanations from him/her trying to understand his/her motives. The psychological benefits that the victim gains can be as follows: 1. moral and psychological satisfaction from active participation in the criminal proceeding, 2. getting to know the motives of the offender, but also his/her role as a criminal target for the offender, 3. releases and manifests negative emotions caused by the crime, tension, fear, anger, etc., 4. making the offender aware of the consequences of his/her behavior, presenting his/her feelings and perception of the situation, 5. presenting his/her expectations, a form of compensation that will be sufficient and satisfactory for the victim (Zajączkowska 2012, p. 4–5). Simply standing face to face with the offender, hearing his/her apologies and obtaining moral satisfaction are often more important for the wronged party than repairing the damage in material terms. Mediation can restore faith in the protection of ones rights and a sense of justice.

The perpetrator of a prohibited act also obtains the following benefits: 1. face-to-face meeting with the victim, they are no longer anonymous to themselves, confronting the reality (less likely to use defensive mechanisms), 2. he/she has an opportunity to understand the consequences of his/her behavior, 3. he/she has an opportunity to present his/her version of events and his/her opinion on the subject, 4. he/she is given a chance to express his/her sincere regret, remorse 5. in a favorable atmosphere he/she can try to reconcile with the victim and possibly make a settlement (Zajączkowska 2012, p. 5).

The aim of mediation is to find a mutually acceptable solution, as mentioned above. The creation of such an agreement and the resulting obligation that will make the victim and offender feel a "winner". The "win-win" situation shows a consensus between the participants in the mediation proceeding and the term of participants used here is not accidental, since it is intended to emphasize acting on a common case rather than opposition and/or struggle, as is often the case between two opposing parties in court.

Ensuring the conditions for a voluntary, free dialog between participants in the mediation proceeding can not only reduce conflict between them, but also reverse roles – changing the victim's perception of the criminal situation and its causes, the offender can also see and possibly understand the thoughts, emotions and behavior expressed by the victim.

However, it should be clearly emphasized that despite these benefits, mediation in criminal cases is not a therapy for the parties, nor is it a process of social rehabilitation of the offender. During several meetings the mediator is not able to change the personality of the offender and make a profound moral change, but properly conducted mediation sessions can have corrective nature and affect the offender's understanding of the harm caused by his/her behavior and result in the feeling of the need to compensate.

Qualification of criminal cases for mediation

Formally, the institution of mediation was introduced into the Polish Code of Criminal Procedure in 1997 and this is sufficiently long period of time to be analyzed in terms of its limitations and possibilities. Currently, Art. 23a § 1 of the Code of Criminal Procedure stipulates that a case may be referred to mediation by a court or a court referendary, and in preparatory proceedings by a prosecutor or other body conducting the proceedings. Mediation with the person violating the law can take place at any stage of the proceedings. However, practice suggests that the sooner we use mediation, the faster the results can be achieved, because the escalation of the conflict have not occurred yet. Moreover, during the preparatory proceeding, the bodies responsible for conducting it stay in direct contact with the parties, which makes it easier for them to propose a solution to their dispute through mediation (it is important to explain what the institution of mediation is and what it is used for, as it is often the lack of knowledge of the parties about alternatives that raises their fears of using them). It is necessary to indicate the importance of mediation, depending on the way it ends, for further stages of criminal proceedings, i.e. how the offender will be treated and how this will affect the victim. According to E. Bieńkowska, the postulate of the idea of restorative justice concerning placing the wronged party in the center of attention and securing his/her goods and interests is not reflected strong enough in Polish legal regulations. The author notes that the positive outcome of mediation takes into account the benefits that the perpetrator of a crime (rather than the victim) may gain, and only at the stage of court proceedings. This is regulated, among others, by Art. 53 § 3 of the Criminal Code: when imposing the penalty, the court also takes into account the positive results of mediation between the wronged party and the offender or a settlement between them achieved in the proceedings before the court or the prosecutor, and further in Art. 60 § 1 the court may apply extraordinary leniency if the wronged party reconciled with the offender, the damage was repaired or the wronged party and the offender agreed on the manner of repairing the damage (item 1), The decisions favorable to the offender are already made as a result of the settlement, not after its execution (Bieńkowska 2012a, p. 34–35; Bieńkowska 2014b, p. 21).

The mediation proceeding should not last longer than one month, and its duration is not included in the duration of preparatory proceedings (Art. 23a § 2 of the Code of Criminal Procedure). The phrase 'should not' in the provision means that, at the request of the mediator, it may be extended for the time necessary to complete the proceedings. This is a relatively short period of time compared with the time of the proceedings in court and a great role for the mediator to efficiently coordinate meetings, in accordance with the applicable mediation rules and

using his/her experience, mediation techniques, which may result in the parties signing a settlement agreement. Besides, legal acts do not include any limitation in the form of only single use of the mediation proceeding. The final result of the previous mediation is also irrelevant. In practice, this means that, with the mutual consent of the parties, mediation proceedings can be resumed.

The institution of mediation may also be used in cases of private prosecution, pursuant to Art. 489 § 2 of the Code of Criminal Procedure at the request or with the consent of the parties, the court may, instead of a conciliation meeting, set a deadline for mediation proceedings. A positive outcome of the mediation, concluded by conciliation between the parties and a duly drawn up protocol, results in discontinuance of the criminal proceedings, and moreover, the conciliation involving other private prosecution cases between the same parties as a result of mediation is also acceptable.

According to Polish criminal implementing rules, mediation with persons deprived of liberty is possible, the so-called post-verdict mediation (Art. 162 § 1 of the Code of Criminal Procedure), when conditional early release of the convicted person is considered. In practice, the courts rarely make use of this possibility despite the fact that the Ministry of Justice is in favor of a wider use of alternative dispute resolution methods, including mediation also in the conditions of isolation. Olga Sitarz, on the basis of the research, demonstrated a considerable willingness of persons harmed by crime to resolve the problem through mediation. The willingness to enter into a court settlement in the case of burglary was declared by more than half of potential and actual victims of this crime, in a situation of deliberate delay in payment of remuneration, such willingness was declared by nearly half of the wronged parties, and in the case of health damage in the form of a broken arm 27% of wronged parties. For less than 1% of the respondents it was not possible to carry out mediation in criminal proceedings (Sitarz et al. 2013, p. 82–85).

In 2015, A. Lewicka-Zelent attempted to examine the readiness of persons deprived of their liberty to take part in the mediation proceeding. The results of the author's research cannot be generalized to the entire population of persons deprived of liberty (the research group of 60 person deprived of liberty in two penitentiary units), but they may contribute to further exploration and signal important issues already at this stage. The willingness to compensate the victim was more often declared by convicts over 35 years of age with secondary education than with primary, vocational education. In the case of detainees who are not interested in an amicable solution to the situation, there is a need to educate them and present the barriers and benefits associated with it (Lewicka-Zelent 2016, p. 127).

The access to post-verdict mediation is also indicated by W. Zalewski, referring to the results of European research. According to them, nearly half of the victims declared their willingness to participate in a post-verdict mediation meet-

ing, and as many as 64% of prisoners expressed their willingness to participate in a meeting with the victim. These positive declarations on the part of the offenders were influenced by the following factors: education (at least secondary), good family relations, religiousness, own experience of being a victim and knowledge of the victim (Zalewski 2017, p. 252).

Course and results of mediation in criminal cases

Before referring a case to mediation, it is important to familiarize with it carefully. "Participation in mediation may not be considered as evidence of an admission of guilt, and the mediation report may not constitute a source of evidence" (Gmurzyńska, Morek 2018, p. 365). At the stage of the preparatory proceeding, it is essential that the parties (victim and suspect) confirm the basic facts of the event. There are two modes of referring a case for mediation. The first one is the so-called ex-officio mediation and is managed by the authority, with the consent of the wronged party and the suspect in the preparatory proceeding or the wronged party and the accused in the judicial proceedings. The second concerns a referral of a case for mediation by one of the parties to the preparatory or administrative proceedings, provided that the other party agrees to do so.

Before deciding to consider a criminal case through mediation, it is necessary to ensure that certain requirements are met. The victim must be revealed. It should be verified whether the suspected or accused person is not a highly demoralized, aggressive person, a member of an organized crime group or a perpetrator of multiple crimes, punished in particular for the same type of crime as the one subject to proceedings, or a person with a negative criminological prognosis. In addition, various types of mental disorders, addictions which may affect the difficulty of understanding their conduct and its consequences, as well as understanding the legitimacy of implementing the proceeding, its purpose and consequences related to the possible conclusion of a settlement. Also the state of mental health and the use/abuse of psychoactive agents should be a prerequisite for making mediation decisions, also in the case of the victim.

Therefore, one should not make hasty decision on referring a criminal case for mediation, due to the type and nature of the act committed, that is why E. Bieńkowska pointed out that only the court should make decisions about referring cases to mediation, and not the court referendary who, as a rule, performs organizational and technical activities and qualifying cases for mediation significantly exceeds his/her competence (e.g. lack of direct contact with the parties, lack of participation in criminal proceedings, limited information about the parties to the conflict on the basis of the case file) (Bieńkowska 2012a, p. 29). A similar stance is presented by D. Gil, considering that the criminal law regulations boldly grant the rights to referendaries in open hearings (for comparison, such rights were not

granted to referendaries in civil and administrative court proceedings). In the light of the current provisions, Art. 107 of the Code of Criminal Procedure gives the court referendary the power to grant or refuse granting an enforcement clause to a settlement concluded before a mediator, in whole or in part, if the settlement is contrary to the law or the rules of social coexistence or aims to circumvent the law. The author mentioned would, however, see the court referendary in the role of a person holding a confidential preliminary ruling meeting during which the mediation report should be analyzed and further decisions related to the conduct of the main hearing should be taken, and the minutes of that meeting should constitute evidence in the case (Gil 2014, p. 14). This is a disputable issue, without undermining the competence of either the court or the referendary, in my opinion the most important thing at this stage is the knowledge of the referring authorities about the mediation procedure, its benefits and limitations and their conviction to alternative ways of resolving conflicts. Therefore, for years it has been postulated that training for the community of lawyers, judges, etc. should be provided, which already takes place, in order to provide the parties with reliable, comprehensive information about the possibility of using mediation, thus contributing to its dissemination.

The regulations do not explicitly indicate prohibited acts eligible for mediation proceedings, these should not be crimes in which the victim's sense of harm is so extensive that he/ she is unable to confront the offender, e.g. violent crime, robbery, rape. A. Lewicka-Zelant writes in her article that contraindications to mediation may include, among others, the nature of the crime, e.g. sexual or fatal; the awareness of the offender during performing the act, i.e. intentionally/ unintentionally, deliberately; reversibility of the effects of the crime, e.g. irreversible effect; the degree of cruelty of the offender (Lewicka-Zelent 2016, p. 118). Again, there is a need for a thorough analysis of the case resulting in a decision on whether or not to undertake or abandon the mediation procedure.

In my opinion, the type of crime committed should not preclude mediation, but perhaps it should not take place at the preparatory stage, when the victim may be traumatized, accompanied by strong emotional reactions, and this is understandable, but at the stage of the enforcement proceedings, when the victim and the offender express their readiness and consent. It is worth remembering that according to the basic principles of mediation, each party may withdraw its consent to participate in it at any stage of the mediation proceedings – A. Szymańska also points out that "the decision to refer a case to mediation in the case of more serious crimes must be thoroughly considered, because a later withdrawal may bring more harm to the victim than a complete abandonment of mediation" (Szymańska 2014, pp. 338–339). At the execution stage, one must bear in mind the danger of secondary victimization of the victim of crime, even though mediation is intended to neutralize, eliminate this phenomenon. A professionally qualified mediator guards the mediation procedure, which means that in addition to

following the stages, observing the rules, mediation techniques, he/she presents the victim with material and psychological benefits which he/she can gain with simultaneous and clear indication of the risks which may also occur in the course of the proceedings.

In this context, it is important to use the so-called "shuttle mediation". It does not involve direct confrontation and communication between the victim of the crime and the person who committed it. It takes place when there is insufficient readiness on one or both sides to meet face-to-face or when there is an imbalance of power between the parties, the victim may know the offender, may be somehow emotionally, financially dependent on him/her. Each of the parties meets and talks with a mediator, whose mediation eliminates the danger of taking advantage of the stronger position of one of the parties, while the mediator's professionalism guarantees the correct course of mediation proceedings in accordance with the rules of the profession. The shuttle mediation, despite the fact that it does not allow the parties to fully satisfy their emotional and psychological needs, still remains in the spirit of restorative justice, where the parties can finally negotiate a satisfactory corrective agreement (Różyńska 2003, p. 12).

Mediation proceedings in criminal cases may end with a settlement reached by the participants, which the court may include in the content of its decision. It is only after it has been given an enforcement clause that it is possible to demand the implementation of its provisions. A mediation agreement in criminal cases is an expression of repairing the relationship between the parties to a conflict and indicates a way of repairing damage or compensating the victim, e.g. apologizing to the victim, commitment to withdrawal treatment, non-violence, financial compensation, etc. However, mediation in criminal cases does not have to result in the signing of a settlement agreement, and the parties do not bear any legal consequences. The lack of settlement is not synonymous with a lack of effectiveness of the mediation, because during the meetings the participants could improve their relations and could gain other psychological benefits from the confrontation itself.

Mediator in criminal cases

The role of the mediator as a guarantor of the proper conduct of mediation proceedings in criminal case has been repeatedly stressed in this text. It is his/her knowledge, life experience, skills in conflict resolution and establishing interpersonal contacts, adherence to ethical principles, but also a kind of intuition understood as quick reaction to events during mediation sessions, adapting to the situation, being a so-called third party in a dispute – attentive, leading the procedure, but at the same time not disturbing – that are extremely important elements in the course of mediation proceedings. Formally, the status of a mediator is

governed by the Regulation on the conduct of mediators in criminal cases (I will not refer to them here due to the limited framework of the text, see Journal of Laws of 2015, item 716, 4). There are no special requirements for the direction, speciality of education and I think that this is right approach, because often more important than education itself are the social skills and competences that influence the efficient management of the mediation process, which become apparent already when participating in basic and specialist training for mediators. Bearing in mind the need to observe the fundamental principles of mediation, reliability and professionalism during the entire mediation proceedings, the legislator decided that professionally active judges, prosecutors, prosecutors' assessors or trainees of any of these professional groups, as well as jurors, judge's or prosecutor's assistants, court registrars and officers of institutions appointed to prosecute crimes (Art. 23a § 3 of the Code of Criminal Procedure) are persons who, due to the above, cannot carry out mediation (cf, Cybulko 2017, p. 75–95).

In 2005, on behalf of the Minister of Justice, the Civic Council for Alternative Methods of Dispute Resolutionwas established, which developed documents specifying the requirements concerning the conduct of the mediation process and the requirements concerning the substantive preparation of mediators, their objectivity and professionalism. These include: Standards of conducting mediation and mediation proceedings (2006), Standards of mediators' training (2007), Code of ethics for Polish mediators (2008), Assumptions for systemic changes (2012). Among practitioners, there are voices concerning the need for a statutory regulation of the institution of the mediator and the increase of prestige of the role performed by them.

The number of trained mediators entered by the presidents of the district courts on special lists, i.e. "The list of institutions and persons authorized to conduct mediation kept by the district court", is growing every year, but it is disproportionately higher than the number of cases reported for criminal mediation and solved in this manner.

Table 1. Mediation proceedings in criminal cases in district courts in 2010–2018

Mediation proceeding					
Years	Number of cases referred for mediation	Number of mediations carried out	Number of mediations ended with		
			a settlement	a lack of settlement	another result
2010	5,660	3,480	2,274	1,051	155
2011	5,427	3,251	2,071	1,035	145
2012	5,887	3,252	2,251	874	127
2013	5,307	3,694	2,330	1,146	218
2014	4,726	3,770	2,400	1,158	212

Mediation proceeding					
Years	Number of cases referred for mediation	Number of mediations carried out	Number of mediations ended with		
			a settlement	a lack of settlement	another result
2015	4,624	4,046	2,530	1,259	252
2016	4,327	3,696	2,227	1,245	224
2017	4,364	4,079	2,569	1,252	258
2018	3,973	3,829	2,331	1,272	226

Source: Mediation proceeding in the light of statistical data. District and regional courts in the years 2006–2018 and the first half of 2019, Managerial Statistics Information Division. Department of Strategy and European Funds. Ministry of Justice, Warsaw 2019, p. 23.

Over the years, there has been a downward trend in the number of cases referred to criminal mediation, but – which can be interpreted optimistically – if mediation was finally carried out, most cases ended with a settlement. This is further proof of the dialog between the previously conflicting parties.

Writing, speaking of mediation, about the different stages of the criminal trial there is usually some "but", an issue to be clarified, supplemented. In view of these uncertainties, should the institution of criminal mediation be abandoned? – on the contrary. It should be subject to scientific and social discourse, all doubts about its application to criminal practice should be resolved, provisions of the law should be verified and, above all, clarified (transparent, leaving no room for discretionary interpretation by various authorities, complementary to the fundamental principles of mediation proceeding), so as not to waste the potential of mediation, and thus the chance to change the situation of many people, wronged parties, perpetrators and communities.

Final thoughts

"Punishment is still mainly the case between the state and the criminal. The problem of fighting crime will probably not be solved if the relationship between the wronged party and the perpetrator is not given the right status. This conflict must now be very much taken into account, even by at least partially giving up the 'satisfaction' of the state" (Szewczyk 1993, p. 156). Several dozen years have passed and unfortunately the above sentence can still be quoted, the need to change the optics, knowledge and openness to the paradigm of restorative justice is the starting point for the dissemination of restorative practices in the criminal trial. The implementation of mediation in Polish law is already an example of this. Moreover, the establishment of legal acts, among others, Directives of the

European Parliament, Recommendations of the Council of Europe has given direction and basic rules for the use of mediation in European Union countries. Since the introduction of the institution of mediation into Polish law, amendments to legal acts have already appeared to define the possibilities of using mediation in resolving various types of disputes, a group of theoreticians and practitioners has been formed, focusing their interests on the issue of mediation, scientific research has been conducted on the subject (Diagnosis of the state of use of mediation and the reasons of low popularity of mediation in relation to the expectations. Final Report, 2014), numerous scientific texts, books, handbooks and [...] have been written, and, surprisingly, the institution of mediation (especially in criminal cases) can still be treated as an innovation. "Innovation is carried out in a specific civilizational, cultural, institutional, awareness, axiological and legal context. By comparing mediation in different cultural circles, an appropriate level of cultural self-awareness can be ensured [...]" (Czapska et al. 2014, p. 9), which is also done in Poland using the good practices of countries where mediation is used much longer and the effects of which are noticed by direct and indirect participants.

The Ministry of Justice has taken numerous initiatives at various levels to promote ADR methods and mediation. In 2009, the Department of Human Rights was established and a year later, ADR methods, including mediation, were included in its competence. In 2010, a network of mediation coordinators was established to promote mediation, assist judges in its use and establish cooperation with mediators and organizations dealing with ADR issues. Successively, social informational and educational campaigns promoting mediation were carried out and training courses for mediators, judges and lawyers were held to introduce the issues and encourage the jurisprudence of mediation. The circle of probation officers in Wrocław is strongly involved in promoting the idea of restorative justice, including mediation. In 2019 they joined an international project called Restorative Justice. Strategies for Change in which also Albania, Belgium, the Czech Republic, Estonia, Italy, the Netherlands, Poland, Portugal, Ireland and Scotland participate. The aim is to promote knowledge of restorative justice practices and to cooperate with institutions and centers active in this area and to coordinate actions at national level. Such initiatives are in line with the Council of Europe Recommendations of 2018 recommending the exchange of information on the application, development and impact of restorative justice, and on co-development of policies, research, training and innovative methods.

In conclusion, one should not stop at popularizing out-of-court methods of resolving disputes and conflicts, one should look for solutions, reach a wider audience, believing in the sense and effectiveness of actions taken.

References

[1] Ajdukiewicz K., 1960, *Język i poznanie*, t. 1, PWN, Warszawa.
[2] Amin S.M., 1995, *Ofiara przestępstwa we współczesnych systemach prawnokarnych ze szczególnym uwzględnieniem jurysprudencji Islamu*, WN UMK, Toruń.
[3] Arystoteles, 2011, *Etyka nikomachejska*, PWN, Warszawa.
[4] Ashworth A., 2002, *Responsibilities, rights and restorative justice*, „British Journal of Criminology", 42(3).
[5] Bieńkowska E., 2012, *O unormowaniu mediacji w sprawach karnych*, „Prokuratura i Prawo", nr 1.
[6] Bieńkowska E., 2014, *Pokrzywdzony w świetle najnowszych nowelizacji przepisów prawa karnego*, „Prokuratura i Prawo", nr 3.
[7] Christie N., 1977, *Conflicts as property*, „British Journal of Criminology", nr 17.
[8] Ciepły F., 2009, *Sprawiedliwość naprawcza wobec przestępstwa*, [w:] *Mediacja w teorii i praktyce*, red. A. Gretkowski, D. Karbarz, Polskie Centrum Mediacji, Stalowa Wola.
[9] Consedine J., 2004, *Sprawiedliwość naprawcza. Przywrócenie ładu społecznego*, Polskie Stowarzyszenie Edukacji Prawnej, Warszawa.
[10] Cybulko A., 2017, *Mediator w postępowaniu karnym i cywilnym*, „Ius Novum", nr 4.
[11] Czapska J., Szeląg-Dylewski M. (red.), 2014, *Mediacje w prawie*, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków.
[12] Czarnecka-Dzialuk B., Wójcik D., 2001, *Mediacja w sprawach nieletnich w świetle teorii i badań*, Topografika, Warszawa.
[13] *Diagnoza stanu stosowania mediacji oraz przyczyn zbyt niskiej w stosunku do oczekiwanej popularności mediacji. Raport końcowy*, 2014, Warszawa.
[14] Gil D., 2014, *Problematyka mediacji w kontekście zmian w polskim procesie karnym*, „Ius et Administratio", nr 3.
[15] Gmurzyńska E., Morek R. (red.), 2018, *Mediacje. Teoria i praktyka*, Wolters Kluwer Polska, Warszawa.
[16] Kania A., 2018, *Z problematyki retrybutywnej oraz utylitarnej sprawiedliwości karania*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny", z. 2.
[17] Karaszewska H., Rajewska de Mezer J., Silecka-Marek E., 2019, *Increasing role of mediation in conflict resolution in the family*, „Studia Edukacyjne", nr 53.
[18] Karolak S.J., 2005, *Sprawiedliwość. Sens prawa. Eseje*, Kantor Wydawniczy Zakamycze, Kraków.
[19] Karp J., 2004, *Sprawiedliwość społeczna. Szkice ze współczesnej teorii konstytucjonalizmu i praktyki polskiego prawa ustrojowego*, Ksiegarnia Akademicka, Kraków.
[20] Kulesza C., 1995, *Rola pokrzywdzonego w procesie karnym w świetle ustawodawstwa i praktyki wybranych krajów zachodnich*, Temida 2, Białystok.
[21] Latała J., 2010, *Od idei odwetu po sprawiedliwość naprawczą. Rozważania nad resocjalizacyjnym charakterem instytucji mediacji po wyroku jako formy sprawiedliwości naprawczej*, „Probacja", nr 2.
[22] Lewicka-Zelent A., 2016, *Gotowość osób pozbawionych wolności do zadośćuczynienia osobom pokrzywdzonym*, „Lubelski Rocznik Pedagogiczny", t. 35, z. 2.
[23] Marshall T., 1998, *Restorative Justice. An Overview, Restorative Justice Consortium, Social Concern*, London, England.

[24] Orczykowski T., 2007, *Szkoła psychologiczna w prawie*, Wydawnictwo Adam Marszłek, Toruń.
[25] *Postępowanie mediacyjne w świetle danych statystycznych. Sądy rejonowe i okręgowe w latach 2006–2018 oraz I półroczu 2019 roku*, Wydział Statystycznej Informacji Zarządzczej, Departament Strategii i Funduszy Europejskich, Ministerstwo Sprawiedliwości, 2019, Warszawa.
[26] Romanowska M., 2010, *Miejsce mediacji wśród ADR w Wielkiej Brytanii i Polsce*, „Kwartalnik ADR", nr 1.
[27] Szczepaniak P., 2016, *Sprawiedliwość naprawcza w resocjalizacji więźniów*, Uniwersytet Warszawski, Warszawa.
[28] Szewczyk M., 1993, *System środków karnych w projekcie nowego prawa karnego*, [w:] *Problemy kodyfikacji prawna karnego. Księga ku czci Profesora Mariana Cieślaka*, red. S. Waltoś przy współpracy: Z. Dody, A. Światłowskiego, J. Rybaka, Z. Wrony, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków.
[29] Szymańska A., 2014, *Problematyka stosowania mediacji na etapie postępowania karnego wykonawczego*, [w:] *Mediacje w prawie*, red. J. Czapska, M. Szeląg-Dylewski, Wydawnictwo Uniwersytetu Jagiellońskiego, Kraków.
[30] Tokarczyk R.A., 1997, *Sprawiedliwość jako naczelna wartość prawa*, „Państwo i Prawo", z. 6.
[31] Zajączkowska MJ., 2012, *Mediacja ofiara–sprawca. Sposób na lęk, agresję, przemoc*, „Gospodarka Rynek Edukacja", Vol. 13, nr 1.
[32] Zalewska M., 2008, *Racjonalne koncepcje sprawiedliwości w ocenie Hansa Kelsena*, [w:] *Rozdroża sprawiedliwości we współczesnej myśli filozoficznoprawnej*, red. B. Wojciechowski, M.J. Golecki, Wydawnictwo Adam Marszałek, Toruń.
[33] Zalewski W., 2017, *Sprawiedliwość naprawcza jako forma diversion w perspektywie penitencjarnej. W poszukiwaniu racjonalności*, „Humanistyczne Zeszyty Naukowe – Prawa Człowieka", nr 1.
[34] Zehr H., 1990, *Changing Lenses: A New Focus for Crime and Justice*, PA: Herald Press, Scottsdale.
[35] Ziembiński Z., 1992, *O pojmowaniu sprawiedliwości*, Instytut Wydawniczy „Daimonion", Lublin.
[36] Zienkiewicz A., 2012, *Standardy prowadzenia mediacji i postępowanie mediatora uchwalone przez Społeczną Radę ADR przy Ministrze Sprawiedliwości*, „Studia Prawnoustrojowe", nr 18.

Internet sources

[37] Hirsch A., Roberts J.V., Bottom A., (red.), 2003, *Restorative Justice and Criminal Law: Competing or Reconcilable Paradigms?*, Oxford and Portland, Oregon, http://kurator.info/2019/04/03/restorative-justice-strategies-for-change-miedzynarodowy-projekt-z-udzialem-wroclawskich-kuratorow-sadowych/ (access data: 24.02.2020).
[38] http://www.iirp.edu/pdf/paradigm.pdf (dostęp: 24.02.2020).
[39] https://e-justice.europa.eu/content_mediation_in_member_states-64-pl-maximizeMS en.do?clang = pl&member = 1 (access data: 24.02.2020).
[40] https://www.academia.edu/2632573/Sprawiedliwo%C5%9B%C4%87_naprawcza_w_praktyce._Medicje_ofiara-sprawca_Restorative_justice_in_practice._Part_I_ (access data: 14.02.2020).

[41] https://www.arch.ms.gov.pl/Data/Files/_public/mediacje/adr1/kodeksetyczny.pdf (access data: 14.02.2020).
[42] https://www.arch.ms.gov.pl/pl/dzialalnosc/mediacje/spoleczna-rada-ds-alternatywnych-metod-rozwiazywania-konfliktow-i-sporow/dokumenty-deklaracje/ (access data: 14.02.2020).
[43] McCold P., Wachtel T., 2003, *In Pursuit of Paradigm: A Theory of Restorative Justice, Restorative Justice*. *E-Forum*, http://www.iirp.edu/pdf/paradigm.pdf (access data: 10.02.2020).
[44] Różyńska J., 2003, *Sprawiedliwość naprawcza w praktyce. Mediacje ofiara-sprawca* [wersja pdf], https://www.academia.edu/2632573/Sprawiedliwo%C5%9B%C4%87_naprawcza_w_praktyce._Medicje_ofiara-sprawca_Restorative_justice_in_practice._Part_I_(access data: 20.02.2020).
[45] Sobczak K., *Mediacja także w warunkach izolacji*, https://www.prawo.pl/prawnicy-sady/mediacja-w-aresztach-i-zakladach-karnych-konferencja-w-lublinie,495972.html (access data: 17.02.2020).

Legal acts

[46] Rozporządzenie Ministra Sprawiedliwości z dnia 7 maja 2015 roku w sprawie postępowania mediacyjnego w sprawach karnych (Dz. U. 205, poz. 716).
[47] Ustawa z dnia 6 czerwca 1997 r. – Kodeks karny wykonawczy (tj. Dz. U. z 2019 r., poz. 676).
[48] Ustawa z dnia 6 czerwca 1997 r. – Kodeks postępowania karnego (tj. Dz. U. z 2020 r., poz. 30).