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(Not)applying mediation in juvenile cases

Abstract: Presently we are noticing that social control over youth showing symptoms of demoralization is being excessively formalized - especially in case of individuals just on the verge of demoralization, and, at the same time, too arbitrary a role of the judge in cases involving juveniles. Despite legal possibilities, Family Court rarely applies mediation proceedings. In the years 2004-2016 the most mediations occurred in 2006 (366) and the fewest in 2014 (198). In 2016 there were 25 mediations, including 13 in Lodz.

The presentation is aimed to show the research on juvenile cases addressed to mediation proceedings by Lodz courts in the years 2011-2016.

The subject of study is the content of court files and mediation reports concerning the final results of the mediation and terms of agreement if made.

Basing on research analysis we may reason that the only cases directed to mediation are the ones where the victim and the perpetrator are minors and the criminal act was extortion, bodily harm or harassment. The number of cases directed to mediation proceedings suggests that judges are still not fully convinced of the validity of restorative justice.

Key words: mediation, juvenile, restorative justice

In international legal acts concerning the approach to juveniles, the principle of the child (juvenile) welfare used to be dominant until the end of the 20th century. This was followed by the principle of a *balanced approach*, characterized by a balance between the needs of the perpetrator, the victim and the community. This is reflected in the idea of restorative justice, which proposes such solutions in dealing with juveniles as mediation or restorative institutions. The victim, the accused and the community are involved in the process

of searching for a solution to the consequences of the conflict caused by the criminal act, with the aim of seeking redress, reconciliation between the parties and strengthening the sense of security of the community as a whole. The interests of both the victim (the perpetrator should acknowledge the damage done to the victim and make efforts to repair it), the community (interests consisting in achieving rehabilitation of the perpetrator, preventing recidivism and reducing the costs of criminal proceedings) and the accused (who will not go through criminal law procedures, and whose constitutional guarantees will be preserved) are protected here¹. Currently, in dealing with juveniles, the principle of *responsibilization* has emerged, according to which what is important is the responsibility or making a juvenile responsible for his or her act (Kusztal 2011, p. 36).

The Recommendation of the Council of Europe² indicates that the main objective of the juvenile justice system and accompanying measures in the fight against juvenile delinquency is to prevent the crime and the return to crime, to socially (re)habilitate and (re)integrate offenders and to meet the needs and interests of victims. The juvenile justice system should be treated as one of the elements of a broader strategy for a local juvenile delinquency prevention that takes into account family, school, neighborhood and the context of a peer group. Sanctions and measures against juveniles should be based on restorative justice (e.g. mediation or compensation to the victim). The European rules on the enforcement of sanctions and measures against juvenile offenders also point to solutions based on the concept of justice and the principle of individual prevention³.

The Resolution of the European Parliament⁴ points out that it is important, in the fight against juvenile delinquency, to develop measures providing for alternative sentences to imprisonment and penalties of a pedagogical nature, such as public works, mediation with victims, vocational training courses depending on the seriousness of the crime, age, personality and maturity of the perpetrator.

The Polish model of juvenile justice system should take into account international recommendations (especially those contained in the Beijing Rules⁵ and European Rules)

¹ <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006IE0414&rid=1>

² https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805df0b3

³ https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d2716

⁴ <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2007-0283+0+DOC+XML+V0//EN>

⁵ <http://www.ohchr.org/Documents/ProfessionalInterest/beijingrules.pdf>

concerning the implementation of "minimum intervention" measures in the form of short-term protective measures and the related *diversion* strategy, i.e. avoiding formal (judicial) proceedings in juvenile cases. More and more emphasis is placed on the legitimacy of changes, especially those that would take into account the juvenile's responsibility for the conduct violating legal norms (*restorative justice*) (cf. Gaberle 2008), related to the concept of restorative justice (in line with the slogan "*The three R's*" - *restitution, responsibility, reintegration*), the main aim of which is to redress damage caused by a criminal act. The concept of restorative justice is widely applied in the English model of dealing with juveniles (e.g. *reparation order* - the obligation to compensate for damage, *community order*, i.e. sanctions carried out in the local community).

In Polish law, the institution of mediation for juveniles was introduced in 2000 by including it in the *Act on proceedings in juvenile cases (called: the Act)*, which means the introduction of an element of the restorative justice model. Detailed legal regulations were indicated in the Regulation of the Minister of Justice of May 18, 2001 on mediation proceedings in juvenile cases.

Mediation derives from the idea of restorative justice, the primary objective of which is to compensate for the harm caused by a criminal act, in particular to enable the perpetrator to undertake restorative actions, while the victim (if they wish) to participate in a dialog with the perpetrator on the compensation (Lipowicz 2003, p. 358). Restorative justice, according to Kazimierz Pierzchała (2012, p. 65), is a kind of "philosophy of life that replaces punishment with reconciliation, revenge on perpetrators with help for victims, alienation and insensitivity with community and unification, and negativity and destruction with repair, forgiveness and grace". However, as Martin Wright (2001, p. 207) points out, "what many victims appreciate is the possibility to meet the offender in more appropriate conditions than the courtroom (or to communicate with them indirectly) and agree on appropriate compensation for the damage".

Restorative justice, and mediation at the same time, is an alternative to the traditional retributive and retaliatory approach and gives the possibility of restitution (Potaczała 2010, p. 94; Kuszta 2002, pp. 262-267).

According to art. 3a sec. 1 and 2 of *the Act*, a family court may, at any stage of proceedings, on the initiative or with the consent of the victim and the juvenile, refer

the case to an institution or a trustworthy person in order to carry out mediation proceedings. The institution or the trustworthy person, after conducting mediation proceedings, shall draw up a report on its progress and results, which the family court shall take into account when deciding on the juvenile's case.

The mediation proceedings are optional and can be carried out at any stage of the court proceedings (preliminary investigation, examination and enforcement proceedings), both in the case of a punishable act as well as in the case of demoralization act. Mediation should first of all have an educational meaning, making the juvenile aware, through direct contact with the victim, of the harmfulness of the committed punishable act or other behavior indicating demoralization. The participation of a juvenile in mediation proceedings cannot be used as proof of confession to the committed prohibited act (Górecki, Stachowiak 2010, p. 29). The mediation proceedings are used in particular in cases where relevant circumstances are beyond doubt. Excluded are cases that are questionable in terms of evidence (Bienkowska 2011, p. 6) as well as cases related to organized crime and complex cases. Mediation cannot be carried out also when the condition of a juvenile's mental state requires treatment (Wajerowska-Oniszczyk 2011, p. 6).

The participants of mediation proceedings are the juvenile, the victim, parents or legal guardians of the juvenile, and if the victim is a minor - parents or legal guardians of the minor.

The basic principles of mediation are voluntariness and balance of powers between the parties (Lipowicz 2003, p. 358), therefore mediation proceedings are conducted with the consent of all participants. This consent may be withdrawn at any stage of the proceedings. As indicated by Jacek Pyżalski (2003, p. 466), voluntariness is a relatively important element, because "it does not stand in opposition to the attitude of independence, which is glorified and manifested by many juveniles. Own participation in the resolution of the conflict is also the opposite of the training of learned helplessness". The resulting settlement is not an arbitrary decision of external bodies, but an own autonomous decision.

Mediation proceedings shall be conducted in a confidential manner, preventing third parties from accessing information obtained in the course thereof. Confidentiality may be waived only with the consent of all participants.

According to Małgorzata Michel (2010, p. 53), mediation allows both parties to the conflict mainly:

- to have a direct impact on the resolution of the conflict and to take decisions on compensation, indemnity or to define further rules of co-existence;
- to change the battle between the parties into an action aimed at solving a common problem;
- to have real chances of receiving compensation in both material and moral form;
- to deal with emotions and reduce anxiety;
- to co-decide about themselves and about the course of proceedings;
- to take responsibility for their own actions;
- to prevent stigmatization;
- to express their needs and feelings;
- to reconcile.

The impact of mediation on the perpetrator of a crime seems to be twofold: on the one hand, an agreement resulting from mediation makes it possible to avoid or reduce the sentence, and on the other hand, it has a more psychological aspect. Thanks to the mediation process, the perpetrator realizes not only that they have violated a legal norm, but also that they have done harm to a particular person. They have the opportunity to understand better the consequences of their own actions, and thus to evoke in themselves regret and repentance, as well as to apologize and propose a form of compensation and to try to reconcile with the victim (Gromelska 2007, p. 279).

Mediation in district courts in Lodz

Presently we are noticing that social control over youth showing symptoms of demoralization is being excessively formalized - especially in case of individuals just on the verge of demoralization, and, at the same time, too arbitrary a role of the judge in cases involving juveniles. Despite legal possibilities, Family Court rarely applies mediation

proceedings. In the years 2004-2016 the most mediations occurred in 2006 (366) and the fewest in 2014 (198). In 2016 there were 25 mediations, including 13 in Lodz.

The conducted research concerned the analysis of juvenile cases referred to mediation proceedings in the years 2011-2016 by the courts in Lodz.

The subject of the research is the content of case files concerning the reason for referring the case to court, the family situation of the juvenile and the content of the report on mediation proceedings on the outcome of mediation and the conditions for conciliation, if such has been concluded.

The analysis covered 14 cases referred to mediation proceedings in the years 2011-2016. According to the information presented in Table 1, in the years 2012-2014, the judges of courts in Lodz did not refer any case to mediation. It can be noted that judges are not convinced of the legitimacy of the use of mediation in juvenile cases (usually it was the same judge who referred cases to mediation).

Table 1. Number of mediations in Lodz courts in the years 2011-2016

Years	Number of mediations in Poland	Number of mediations in Lodz
2011	312	1
2015	212	1
2016	285	12
Total	809	14

Source: own research.

The conducted analysis shows that most often the case was referred to court by the Police, after prior reporting by the victim's parents and the headmaster of the school where the incident took place. Boys were more often involved in mediation proceedings (both as victims and perpetrators). The average age of victims and perpetrators is 14 years. The perpetrators usually come from full families (6 people) or are raised only by their mother (3 people) or only by their father (4 people), one is from a reconstructed family.

The analysis covered the types of acts committed by juveniles according to the Penal Code. The most frequent punishable acts included: extortion under threat (Art. 282 of the Penal Code), harassment (Art. 190a sec. 1 of the Penal Code), infringement of the body organ activity lasting up to 7 days (Art. 157 sec. 2 of the Penal Code), threat of beating which raises a justified fear in the threatened person that it will be fulfilled (Art. 190 sec. 1 of the Penal Code), violation of inviolability (Art. 217 sec. 1 of the Penal Code), physical and mental abuse (Art. 207 sec. 1 of the Penal Code), fight (Art. 158 sec. 1 of the Penal Code), insulting with words (Art. 216 sec. 1 of the Penal Code), perpetuating the image of a naked person (Art. 191a of the Penal Code). Juveniles usually committed more than one offense.

Out of 14 mediation proceedings, 10 ended with a conciliation agreement, in the remaining cases no solution was reached. In the case of a conciliation, the perpetrator most often apologized to the victim.

Excerpts from mediation reports are presented below.

Mediation 1 (victim: 15-year-old girl; perpetrator: 16-year-old girl; act: violation of inviolability, posting naked pictures on the Internet)

Perpetrator: admitted that she acted badly towards the minor, she would like the minor to forgive her; to have mutual respect; to have a positive relationship, because they go to the same school together.

Victim: wants to forgive the juvenile for what she has done to her and at the same time to apologize to her; to rebuild the relationship with the juvenile; she wants it to be like before, so that they trust each other.

At the end of the proceedings the minor and the juvenile embraced and kissed each other as proof of reconciliation, which met with the full acceptance of the present parents.

Mediation 2 (victim: 14-year-old boy; perpetrator: 14-year-old boy; act: infringement of the body organ activity lasting up to 7 days as a result of beating)

Perpetrator: undertook not to harass or provoke the minor to fights; promised to stay away from the minor and avoid contact with him so that no further conflicts could arise; declared that he would not be coming to the minor's home or school.

Victim: promised to stay away from the juvenile; not to provoke or threaten him.

At the end, the boys shook hands to prove reconciliation, which met with the acceptance of the present parents.

Mediation 3 (victim: 14-year-old girl; perpetrator: 14-year-old boy; act: infringement of the body organ activity lasting up to 7 days; threat of beating; harassment)

Perpetrator: apologized to the minor for the harm done, undertook, during the meeting with the minor, not to offend her, not to threaten her and not to use any form of violence.

Victim: apologized to the minor for insulting him when provoked.

The juvenile and the minor undertook not to make negative comments about themselves to third parties, in particular to common acquaintances.

Mediation 4 (victim: 14-year-old boy; perpetrator: 15-year-old boy; act: fight)

During the mediation meeting both sides to the conflict presented their position on the matter, they explained everything to each other. The boys stated that there was no more conflict between them. The case is closed. The parties unanimously declared that they are committed to conciliation and do not wish to pursue the case in court. Therefore, the juvenile and the minor wrote statements which were signed by their parents present at the mediation meeting. As a sign of reconciliation, the boys shook their hands.

Mediation 5 (victim: 14-year-old boy; perpetrator: 14-year-old boy; act: extortion under threat, threat of beating which rises a well-founded fear of being fulfilled)

Perpetrator: apologized to the minor; undertook not to use physical violence, especially beating, kicking against the minor; undertook not to use psychological violence, especially insulting by means of vulgar words, name-calling, inappropriate expressions about the minor's family.

Victim: accepted the apology; undertook not to use vulgar words towards the minor.

The boys developed and signed a mediation agreement, which was read by the parents of the minor and the father of the juvenile participating in the mediation; the parents accepted it.

The content of these settlements shows that both the victim and the perpetrator are trying to work together to find a solution. Both sides are also trying to find solutions for the future and not focus only on apologizing. The advantage of mediation proceedings is undoubtedly the active participation of the victim. In contrast to a court trial, during mediation, it affects the type of compensation by the perpetrator. In court, the victim is only a passive participant and the "recipient" of the judge's decision regarding the application of measures against the perpetrator (which most often do not constitute any compensation to the victim).

The analysis of court files shows that mediation is a very rarely used measure in juvenile proceedings. If the judge decides to refer the case to mediation, it usually concerns a situation where the victim and the perpetrator are peers, often already knowing each other and attending the same school. Mediation provides a chance for both parties not to remain in further conflict or sense of injustice, and, as a result of a conciliation, their relations may improve or become neutral.

In Poland, the most frequently used probation measure for juveniles is court-ordered supervision (Sawicka 2001, p.121), although *the Act* also provides for other probation measures. Unfortunately, probation measures quite often function as control mechanisms rather than as tools for social reintegration (Opora 2010, p. 218). And the mediation alone in juvenile proceedings, despite its great educational potential, is still underestimated by the Polish justice system.

Abstract: (Nie)wykorzystywanie mediacji w sprawach nieletnich

Obecnie można zaobserwować zjawisko nadmiernego formalizowania reakcji kontroli społecznej wobec dzieci i młodzieży z przejawami demoralizacji – zwłaszcza dopiero zagrożonych procesem wykolejenia oraz nadto arbitralną rolę sędziego w sprawach z udziałem nieletnich. Mimo możliwości prawnej, sądy rodzinne niezbyt często kierują sprawy do postępowania mediacyjnego. W latach 2004 – 2016 najwięcej skierowano spraw do mediacji w 2006 roku - 366, a najmniej w 2014 roku – 198. W 2016 roku – 285 spraw, w tym łódzkie sądy – 13.

Celem artykułu jest prezentacja badań dotycząca analizy spraw nieletnich skierowanych przez łódzkie sądy do postępowania mediacyjnego w latach 2011-2016.

Przedmiot badań stanowi treść akt spraw oraz treść sprawozdania z postępowania mediacyjnego dotycząca wyniku zakończenia mediacji i warunków ugody, jeżeli taka została zawarta.

Na podstawie analizy badań można wnioskować, że sędziowie kierują do postępowania mediacyjnego jedynie te sprawy, gdzie poszkodowanym i sprawcą są osoby małoletnie, a czyny karalne dotyczyły m.in. wymuszenia, naruszenia nietykalności, nękania. Z liczby spraw skierowanych do mediacji wynika, że sędziowie nadal nie są przekonani co do słuszności rozstrzygnięcia spraw z wykorzystaniem sprawiedliwości naprawczej.

Słowa kluczowe: mediacja, nieletni, sprawiedliwość naprawcza

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