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MEDIATION IN CRIMINAL CASES. THE LEGAL FRAMEWORK, THE MEANING AND THE MULTIFACETED NATURE OF THE INSTITUTION

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Abstract: *Mediation is an alternative form of dispute resolution to court proceedings. By submitting a case to mediation, the power is transferred, as it were, to the parties to the dispute to reach a consensus and give a final shape to the resolution of their dispute. The role of this institution has long had a basis in law, both international and domestic. It is also enjoying increasing popularity. Moreover, it has an important practical value as it reduces the number of cases before the courts. It also reduces the length of court proceedings. It is also a versatile institution, which can be used on many levels, not only in civil or criminal law. This article presents the legal framework of this institution and panoramically demonstrates its potential with particular reference to the Polish solution.*

Keywords: *law; penal cases; mediation; restorative justice; consensus.*

Mediation in the context of European law

Mediation has been present in society for a long time. As civilisation has progressed, it has been formalised and put into a legal framework. As a rule, a self-drafted agreement produces more lasting results than a court judgment. This is because the conflict between the parties has been resolved, a quality that is usually absent in court

proceedings. The entire procedure, both the negotiation stage and the enforcement stage, is faster than formal court proceedings. This translates into faster compensation or redress. Mediation is already present in almost all branches of law. The European Union, however, sees the need to develop the instruments developed so far to protect freedom, security and justice. It is in this context that the idea of mediation, in its broadest sense, as a leading component of efficient, modern restorative justice, fits in. Within the EU, as far as mediation is concerned, there has been a great deal of harmonisation over the years between the law and the standards in force in the individual Member States. There has been standardisation on key issues, mainly in the area of procedural law. Relatively improved cross-border cooperation has been developed, albeit mainly in family, commercial and civil matters (Zgoliński, 2025). This improvement, however, undoubtedly strengthens the functioning of mediation in the European arena (Czabaj, p.12)[1] . Still, the details of mediation remain different in the legal orders of the different Member States.

As a consequence, different patterns can be encountered, ranging from comprehensive, even systemic, regulations to punctual regulations. Within the framework of European law, mediation is generally defined as a form of support for the development of a consensus between the parties to a dispute, which is provided by a third party who has no interest in resolving the dispute[2]. At the same time, the possibility has been given to judges, obviously in agreement with the parties, to refer a case to mediation if this may prove beneficial in the circumstances of the case. Agreements reached as a result of mediation can then be given the necessary enforcement clause by the executive. The directive further introduces a standard for mediation by indicating that it is to be

[1] http://malopolskiecom,pl.

[2] Vide: Council of the European Union, Concept on Strengthening uncil of the European Union, Concept on Strengthening EU Mediation and Dialogue Capacities, doc. 15779/09, http:// www.eeas. europa. eu/cfsp/ conflict prevention/docs/concept strengthening eu med en.pdf , (accessed 17.03.2025).

confidential. It also gives a party the right to initiate court proceedings after the mediation. In the European Union, mediation is undoubtedly an important tool for dispute resolution. Its importance is recognised socially.

It is promoted by various international organisations and institutions, which encourage its implementation. It is worth emphasising that this is also visible in the context of criminal cases, where the position of the victim is systematically increasing and strengthening. It is being provided with various instruments. It is intended to compromise compensation and reparation for the crime. It can be said that this process began in the 1980s. There are numerous recommendations of the Council of Europe in this regard[1]. Moreover, a broader coherence is apparent here, including with the position of the UN in the form of the Declaration on the Basic Principles of Justice for Victims and Abuses of Power, as well as the position of the Council of the European Union, that is, with the EU Council Framework Decision of 15 March 2001 on the status of victims in criminal proceedings. It accepts that mediation is the search for a solution to a specific problem during or before criminal proceedings between the victim and the offender, in the presence of a mediator.

The parties to a mediation proceeding should be given the opportunity to meet directly, or to communicate through available communication tools, in order to establish the details of the agreement and, in particular, the issue of reparation. The provision of Article 2 of this act stipulates the right of the victim to appropriate respect, which is immanently linked to human dignity, including consideration of the legal rights and interests of that party to the dispute. This is an extremely important aspect. Human dignity is the essence and the bedrock of humanism. Dignity belongs to every human being and should therefore also be a point of reference for the regulation of offenders. It has an inalienable value. This means that dignity cannot be done away with on

[1]*Mediation as an alternative to criminal trial*, https://kurator.org.pl/2006/01/03/mediacja-jako-alternatywa-procesu-karnego/ (accessed 20.03.2025).

its own. It is, as it were, integrated into the ontic structure of human beings. Understood in this way, dignity is the basis for the existence of social norms that are designed to protect human beings and interpersonal relations. This is reflected, inter alia, in Article 2 of the TEU, which states that the EU is founded on the values of respect for the human person, freedom, democracy, equality, the rule of law and respect for human rights, including those of persons belonging to minorities. These are values common to EU states. The normative imperative to protect dignity is established by the Charter of Fundamental Rights. The Explanatory Memorandum attached to it indicates that human dignity is a fundamental right in itself and is the real basis of fundamental rights (Wiśniewski, in Lis, & Balicki (ed.), 2012, pp.275 - 282).

The recommendations of the Council of Europe set out in the Recommendations provide a guiding framework for the use of mediation within the European countries that are members of the EU. Each Member State is obliged to take into account the recommendations and recommendations of the EU and to implement the recommendations set out therein in its own legal order. Among the other most important acts of the Council of Europe[1] related to this matter are: a) Recommendation No. 83.7 on public participation in criminal justice policies, b) Recommendation No. 85.11 on the position of the victim in substantive and procedural criminal law, c) Recommendation No. 87.18 on the simplification of criminal justice, d) Recommendation No. 87.20 on the social response to juvenile delinquency, e) Recommendation No. 87.21 on assistance to victims of crime and prevention of victimisation, f) Recommendation No. 88.6 on social responses to crime, g) Recommendation No. 92.16 on European rules on community sanctions and measures, h) Recommendation No. 95 on criminal justice management, i) Recommendation No. 99.19 on mediation in criminal matters.

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1 Mediation Procedures in the European Union Countries, *https://kurator.org.pl* /2006/01/03/mediation-as-an-alternative-to-the-penal process

The normative shape of mediation on the grounds of criminal proceedings in Poland

The Polish Code of Criminal Procedure does not contain a legal definition of this legal institution. However, mediation here boils down to assistance in negotiating a dispute between two or more parties, which is carried out by a person who is not involved in the conflict. It assists the parties in voluntarily working out an agreement acceptable to them. Most criminal procedure cases can, of course, be handled in this mode. However, mediation in the framework of criminal proceedings concerns a specific conflict, as its background is always a criminal act. The subject of negotiation here is obviously not the facts of the case, so the question of the circumstances of the commission of the offence and other issues related to establishing the material truth are outside its scope. As a form of restorative justice, it cannot be used for such activities. In any case, they would be of little relevance, as this sphere always falls within the competence of law enforcement and the courts. What is at stake here, therefore, are other aspects, above all in the form of rationalising the accused's behaviour and attempting to verify the condition, needs and expectations of the victim. Particularly important against this background are health issues, including psychological and emotional ones, but also material issues, including compensation. These elements, generally with a clear negative tinge, are always an aftermath of the defendant's previous behaviour. Sometimes mediation leads to much greater success, as it also allows a consensus to be reached that is a good basis for rebuilding the relationship between the participants. A good example of this is reconciliation with a commitment to undertake addiction treatment without the need for legal coercion (Rogula, & Zemke - Górecka, 2024).

Historically, it should be noted that mediation was formally introduced into the Polish legal system in 1997, when the new Penal Procedure Code was enacted. It should be noted that the introduction of mediation into the Polish criminal procedure is the result of a specific recommendation stemming from Article 10 of the Framework Decision

of the Council of the European Union of 15 March 2001 (2001/220/JHA), specified by the Recommendation of 19 September 1999 No R (99) 19 of the Committee of Ministers of the Council of Europe to Member States concerning mediation in criminal matters (hereinafter: the Recommendation). Since then, mediation has been used more or less successfully in criminal matters, and over the years its normative shape has been modified in a more pragmatic direction. Mediation proceedings are always voluntary. The case is referred to mediation by the court or the court registrar, and in pre-trial proceedings by the public prosecutor or another body conducting those proceedings. It is conducted by an institution or a person authorised to do so (the mediator). Beforehand, however, the consent of the parties must be obtained and they must be properly instructed, informing them in particular of the objectives and principles of mediation proceedings (Article 23a of the Polish Code of Criminal Procedure). Consent to participate in mediation proceedings is taken by the authority referring the case to mediation or the mediator, after explaining to the accused and the victim the objectives and principles of mediation proceedings and instructing them about the possibility of withdrawing this consent until the mediation proceedings are completed. The mediator shall then be given access to the case file to the extent necessary for the mediation proceedings. The institution or person entitled to do so, after the mediation proceedings have been conducted, is obliged to draw up a report on the results of the mediation proceedings. It shall be accompanied by a settlement agreement signed by the accused, the victim and the mediator, if any. Mediation proceedings shall be conducted in an impartial and confidential manner. It is intended to be dynamic in that it should not last longer than one month. Its course, however, affects the course of the criminal proceedings. It is also strictly forbidden to question the mediator before the court as a witness about facts about which the mediator has learnt from the accused or the victim while conducting the mediation proceedings, with the exception of information about the most serious offences, which are enumerated. This is a closed catalogue of acts that are characterised by a shift in the limits of

criminalisation, as their criminalisation covers the entire course of the offence, i.e. not only the commission and attempt but also the preparation. This prohibition has an important guarantee function.

As far as the effects of mediation on the course of the trial are concerned, it must be stated that the conclusion of a settlement agreement as a result of mediation does not by itself end the criminal proceedings. Instead, it constitutes a document setting out the position of the parties with regard to the termination of the case. It does not in itself have legal force. Consequently, the final decision (ruling) in the case will be made by the court. However, it must, as stipulated by substantive criminal law (Article 53 § 3 of the Criminal Code), take into account the content of the mediation agreement when deciding the case. In passing, as it were, a kind of statutory superfluum existing in the Polish Criminal Code may be noted here. The fact of reconciliation between the accused and the wronged party constitutes a circumstance which coincides with the content of Article 53 § 2b(5) of the Penal Code. The mention of this circumstance in the latter provision should result in the deletion of Article 53 § 3, which, however, has not yet occurred. In fact, reconciliation between the offender and the victim has a much broader scope here than that indicated by Article 53 § 3 of the Penal Code. In particular, the manner of reconciliation is not important. It can be achieved by means of other instruments than mediation (Budyn - Kulik, 2025) .

Reconciliation with the victim is always a mitigating circumstance in the assessment of the penalty. As a result, it may be mitigated, even in an extraordinary formula, or the penalty may be waived, or the mandatory penalty measure may be dispensed with. Of course, all options other than conviction are also open for the completion of such proceedings. It must be recognised that mediation is beneficial for both parties. It gives the victim a chance to purge his or her emotions, resolve problems arising from the criminal act and obtain compensation and reparation more quickly. The accused, on the other hand, has the opportunity to communicate with the victim in a transparent manner and

to bring the proceedings to a quicker and more lenient end (which also translates into quicker use of the institution of erasing the conviction).

Institutions and instruments supporting mediation

When discussing the issue of mediation in Poland, it should be mentioned that the year 2010 turned out to be quite important in this regard, when the Department for Victims of Crime and Promotion of Mediation was established within the structure of the Ministry of Justice. It was located within the Department for International Cooperation and Human Rights. From that point on, mediation was placed under institutional paternalism. Although there have been modifications in later years, the specially designated cell has been continuously operating within the ministerial structure since then. Currently, it is the Mediation Unit, which is located in the Department of Strategy and European Funds. It is an important official cell that monitors the title institution and is tasked with supporting and popularising it. Currently, the aspect of supporting the effectiveness of mediation and all forms of ADR in general is quite popular in Poland. This is done, among other things, by a network of mediation coordinators which has been in operation since 2010. Coordinators are appointed from among judges and their task is to carry out activities for the development of mediation, to ensure efficient communication between judges and mediators, as well as to cooperate in the organisation of various informational and popularisation meetings. From the formal point of view, the mediation coordinator is appointed by the president of the district court concerned, by means of a decree, from among the judges of that court (Article 16a of the Law on the Common Courts System[1]). The Social Council for Alternative Dispute and Conflict Resolution (the so-called ADR Council) is also important in this context. This body is composed of a dozen or so members, recruited from among judges, mediators, advocates and legal advisers, academics and

[1] Consolidated text Official Gazette 2024, item 334.

representatives of administration. It is an advisory body to the Minister of Justice. Its main purpose is to promote activities aimed at the development of alternative dispute resolution methods, give opinions on draft legislation, promote the principles concerning the work of a mediator and mediation proceedings, and mediator training standards. Furthermore, it deals with the development of various recommendations and principles for the functioning of the national system of alternative dispute resolution[1] , harmonisation of the ADR system with the provisions of the EU law; improvement of the mediation institution model in the Polish legal system, dissemination of basic standards of mediation proceedings, promotion of ADR mechanisms as methods of conflict resolution in the society, creation of institutional conditions for supporting and evolving various forms of ADR, as well as ad hoc undertakings undertaken in order to develop mediation. It should be emphasised that the main information on mediation, gathered by the Social Council for ADR, including documents, legal regulations, information and promotional brochures, is generally and widely available in the public space. This state of affairs significantly strengthens the popularity of mediation. The "International Mediation Day", which has been organised since 2008, also contributes to this. "International Mediation Day", which has become "Mediation Week" since 2013. The Ministry of Science and Higher Education, in turn, attaches great importance to making alternative forms of dispute resolution a part of the training of students in law faculties. Elements of mediation are also present in the training programme of trainee prosecutors and judges at the National School of Judiciary and Public Prosecution. They also receive appropriate attention within the framework of continuing education, as they are present in the training programmes of judges and prosecutors. This is complemented by the independent activities of the judges - mediation coordinators. who are additionally trained to fulfil this

[1] *Mediation in EU countries-Poland*, [online], https://e-justice.europa.eu /64/EN/ mediation _in_eu_countries? POLAND &member=1

function. This training particularly concerns communication, management of the human team and cooperation with mediators.

In parallel, social organisations are creating a supportive role in mediation. They define their own standards in terms of relevant training, certification, requirements for mediator candidates and, finally, mediation methods, its additional ethical standards and good practice. These regulations are purely internal, applying to mediators who are members of the respective organisation. Units established within legal professional corporations, such as the Mediation Centre at the Supreme Bar Council, the Mediation Centre at the National Chamber of Legal Advisers or the Mediation Centre of the Association of Notaries of the Republic of Poland, also play a similar supporting role. Importantly, these organisations, as well as universities, are entitled to maintain their own lists of mediators. Information about these lists is provided to presidents of district courts, hence the range of people who can conduct mediations is relatively large.

The multifaceted nature of mediation in criminal matters

However, it must not be overlooked that in criminal proceedings it is not permissible to treat both parties to mediation in the same way. After all, they are not partners, as is the case in civil and especially commercial proceedings. Referring a case to mediation in the context of a criminal trial therefore requires careful consideration of its necessity, advisability and any other needs and, moreover, taking into account any victimological aspects. This issue is recognised in the arena of European law. The Recommendation of 19 September 1999 No. R (99) 19 of the Committee of Ministers of the Council of Europe to Member States concerning mediation in criminal matters even indicates that mediation should not be implemented in certain situations. According to the Recommendation, mediation should be limited by certain sociodemographic factors as well as by certain types of offences. According to the Recommendation, certain categories of offences, such as cases of abuse of a person close to the offender, can also be a negative

factor for mediation. However, this is also the case where there is an apparent disproportion between the parties. This may be for a variety of reasons. The first that comes to mind is a gross material, financial or property disparity between the victim and the perpetrator, who is living on the poverty line. These are quite common situations, as one of the main criminogenic factors is poverty. Mediating in such realities usually has little chance of being realised financially and leads to social frustrations. A parallel situation arises when there is a significant age or health disparity between the perpetrator and the victim. It is, of course, not a rule that mediation in such cases will not be effective. Finally, the facts of the case may be a negative indication for referring the case to mediation. This becomes more apparent in those situations where there is significant doubt as to causation. Similarly, the situation may be similar in complex cases, complex in terms of subject and object. Particularly relevant here is the analysis of the motives of the defendants in the context of referring a case to mediation. It must be stressed that these are, however, relative obstacles and can be labile depending on the stage of the proceedings. To illustrate - at the enforcement stage, the obstacle of doubt as to perpetration no longer exists. Mediation is generally beneficial for the authority conducting criminal proceedings. It can shorten the length of proceedings considerably. In those situations where mediation does not even take place, the authority has the positions of the parties and has knowledge of what they expect.

Conclusions

Compensation through mediation, and even more so out of court, does not on its own fulfil the essential functions of criminal law (Zgoliński, 2012, p. 116). It is only an instrument, albeit a very important one, for the implementation of a specific element of criminal policy. However, it should be recognised that it fulfils one of the objectives of the process in the form of restorative justice (Czerwińska, 2024, p. 126). On the other hand, the primary functions of the criminal process, i.e. the protective and guarantee function, must nevertheless be realised through

state proceedings. Undoubtedly, however, mediation plays an important role in the course of criminal proceedings and significantly supports the realisation of the above-mentioned functions. Above all, it makes it possible to put an end to mutual settlements between the victim and the perpetrator of the criminal act.

Mediation in the context of criminal proceedings has a clearly visible, specific character, determined by the background against which the dispute has arisen. On the other hand, the circumstances described in the body of the article are extremely relevant in the course of criminal proceedings. They dictate, however, that summarised, mediation should be implemented first and foremost in cases that are uncontested, evidentially transparent, not complex and in those situations where there is no gross disproportion between the parties. Above all, cases should be referred to mediation in respect of which there is a positive forecast of the possibility of a successful conclusion of the negotiations. Then it will be not only to the benefit of the parties themselves, but also to the authorities conducting the proceedings, which consequently builds a positive image of the broader justice system.

Mediation is one of the key forms of alternative dispute resolution (ADR), whose importance is constantly growing, both in European and national law. The European Union considers mediation as an essential component of a modern restorative justice system, promoting its use especially in civil, commercial and family matters. EU legislation, including Directive 2008/52/EC, introduces common minimum standards for mediation, emphasising its voluntariness, confidentiality and the enforceability of the settlement agreement.

The mediation process is supported by state institutions (e.g. the Mediation Division of the Ministry of Justice, a network of mediation coordinators), as well as social and professional organisations that maintain lists of mediators, organise training and promote good practices. Systematic education of lawyers and judges and popularisation initiatives (e.g. Mediation Week) strengthen public understanding and acceptance of mediation.

However, the specific nature of criminal mediation requires consideration of the asymmetry between the parties and victimological conditions. Therefore, not every case is suitable for mediation - contraindications may include, for example, crimes against relatives, a large disproportion in assets or age of the parties, as well as cases with complex evidence or an unclear aspect of perpetration.

Taken as a whole, mediation in criminal matters is a valuable criminal policy instrument, contributing to greater party participation, shorter proceedings and greater public confidence in the justice system. Implemented sensibly and with respect for the rights of the parties, it can add real value to the legal system as a whole.

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