Mediation in Court Proceedings

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edited by Barbara Janusz-Pohl

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Preface

This work is the result of the research of the Mediation in Judicial Proceedings team, established within the Polish-Hungarian Research Platform 2022. The team consisted of distinguished researchers from Poland and Hungary: prof. Magdalena Kowalewska-Łukuć, dr Michał Peno, Dr. Ferenc Sántha, Prof. Dr. Ádám Rixer, dr Katarzyna Zombory and prof. Barbara Janusz-Pohl, acting as head of the research team. The ad hoc member of the team was Prof. Judit Jasco.

The team's work lasted for a period of eight months (V–XII 2022), during which the complexity and multifaceted nature of mediation were analysed in monthly open seminars, and a summary of the research findings was presented at the final conference.

The most extensive part of the research was dedicated to criminal mediation. It was examined on a dogmatic and theoretical level. At the same time, it should be noted that the examples of Poland and Hungary with regard to criminal mediation (so-called Victim–Offender Mediation – VOM) differ significantly from each other. In Hungary, VOM is assessed as an adequately shaped formula for resolving disputes in criminal cases. Otherwise, in the case of the Polish legal system, the VOM is perceived as an ineffective instrument. It was diagnosed that the reason for these discrepancies is that the criminal procedure in Hungary allows for two basic variants of VOM to be distinguished, and in one case, effectively performed

criminal mediation is associated with defined benefits for the perpetrator. The researchers diagnosed that the lack of clearly defined gains for the accused is precisely the shortcoming of the mediation procedure in Polish criminal law. When analysing VOM, the researchers also focused on the sensitive Victim-Offender Mediation procedure.

Apart from the strictly dogmatic strands, mediation's theoretical and legal aspects were also examined in detail. This ranges from philosophical theories for the adequate design of negotiation procedures to strictly practical guidelines for the legislator based on the effective and axiologically justified mediation model.

In addition to the criminal law stands, mediation in Hungarian administrative procedure (which is in *status nescendi*) and the application of mediation in a case concerning cross-border child abduction were also examined.

The study gave rise to several *de lege lata* and *de lege ferenda* comments and allowed for a slightly broader perspective on mediation. It is also crucial that the research presented in this thesis does not concern the application of mediation in civil proceedings *sensu stricto* or mediation in commercial matters. Thus, the subject of the study is only those areas where mediation as an instrument for dispute resolution requires significant changes both at the level of lawmaking and in its application.

Barbara Janusz-Pohl

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Chapter 1. Court Mediation within Administrative Court Proceedings in Hungary

1.1. Introduction

It is an honour to be part of the second Polish – Hungarian Research Platform organised by The Institute of Justice in Warsaw, as it was a privilege to be part of the first one as well. Previously, my topic was "The legal aspects of the relationship between public administration and civil society in Hungary," and now the title of my present research is "Court mediation within administrative court proceedings in Hungary."

Mediation in Hungary was initially regulated only for specific kinds of mediation (consumer protection, health care). The first general statutory regulation was adopted in the form of Act LV of 2002 on Mediation, which remains the main legal source for mediation even today. Directive 2008/52/EC was implemented in Hungary in 2009. The regulation on mediation – with regard to the specifics of the different fields of law – is still diverse.[1]

[1] See some examples on the early Hungarian scientific literature response to the first legal sources: M. Nagy, *Bírósági mediáció*, Szeged 2011, p. 13; K. Rúzs Molnár, *Mediáció a munkajogban*, Szeged 2007, p. 131; Á. Dósa, *Konfliktusrendezés közvetítői eljárással*, Budapest 2001; and https://birosag.hu/en/court-mediation.

A specific form of mediation, i.e. court mediation, has been available in Hungarian civil courts since 2012 and is an effective tool of enhancing customer satisfaction and timeliness in civil litigious and non-litigious cases. Moreover, under the provisions of Act I of 2017 on the Code of Administrative Court Procedure, a brand-new institution has been introduced in Hungary: from 1 January 2018, in administrative court proceedings, the judge may, with the agreement of the parties, allow court mediation procedure in the cases in which the law does not preclude it.

From both the international and Hungarian perspective, the implementation of the institution of court mediation has been affected by the fast spread of the different methods of alternative dispute resolution outside of traditional forms of court litigation. There was a great need for such a form of dispute resolution that exists within the organisation of the judiciary but, at the same time, is absolutely separated from the court procedure and is also independent from the judge who decides upon the case.[2] The goal of court mediation is to offer such a tool for the parties that makes possible for them to reach the best solution after they went to trial (initiated court proceedings).[3] Court mediation allows them to soften their conflict by formulating their feelings and by clarifying those circumstances that resulted in the debate in question.

My research addresses the new institution, i.e. court mediation in administrative court proceedings in Hungary, introducing and also comparing the relevant "law on the books with the law in action".

[2] *A polgári eljárás alternatívája: bírósági közvetítés. A mediáció helye jogrendszerünkben.* https://www.mabie.hu/attachments/article/99/A%20polg%C3%A1ri%20elj%C3%A1r%C3%A1s%20alternat%C3%ADv%C3%A1ja%20-%20b%C3%ADr%C3%B3s%C3%A1gi%20k%C3%B6zvet%C3%ADt%C3%A9s%20(1).pdf 3.0.

[3] M. Nagy, *Bírósági mediáció*, *op. cit.*, p. 136.

1.2. Theoretical framework. Some preliminary remarks on the relation between mediation and good governance

1.2.1. GOOD GOVERNANCE

If we had to simplify in a single sentence the most obvious ambition and direction for today's public administrations, then alongside the more general responses to good governance and human rights, digitalisation and administrative development (and some technical aspects of the latter) would certainly be included.[4] The most frequently mentioned elements of public administration and social development are still electrification, digitalisation and reduction of various direct administrative burdens ("administrative simplification"), which identify good state with cheapness, speed and technical efficiency.[5]

The word "governance" means: the process of decision-making and the process by which decisions are implemented (or not implemented),[6] and in most cases, we use it within the expression good governance, which is a catchword that describes the most important element of the modern state. Good governance "requires mediation of the different interests in society to reach a broad consensus in society on what is in the best interest of the whole community and how this can be achieved. It also requires a broad and long-term perspective on what is needed for sustainable human development and how to achieve the goals of such development. This can only result from an understanding of the historical, cultural and social contexts of a given society or community."[7]

In the World Bank's 1992 report entitled *Governance and Development*, the notion of good governance was written as the way in which power is used to regulate the economic and social resources

[4] See more: Á. Rixer, *A New Direction for Public Administration: Personalness*, "Journal of Humanities and Social Science" 2020, No. 5, pp. 37–49.

[5] Á. Rixer, *A New Direction for…*, *op. cit*.

[6] *What is good governance?*, Policy Briefs, UN ESCAP, 2009, p. 1.

[7] *Ibid*, p. 3.

of a country for development.[8] Good governance aims to minimise corruption, take into account the opinions of minorities, listen to the voices of the oppressed people in the decision-making process and respond actively to the needs of the community now and in the future. Citing from the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), the concept of good governance has eight principles: participation, rule of law, transparency, responsiveness, consensus-oriented decision-making, equity and inclusiveness, effectiveness and efficiency and accountability.[9]

One of the main pillars of good governance is still the principle of the separation of three independent powers for legislation, administration and jurisdiction. This principle has contributed directly to regulatory quality and rule of law and, more indirectly, to political stability and control of corruption[10] and also refers to the fact that good governance is closely connected with all those three powers.

1.2.2. GOOD GOVERNANCE AND (COURT) MEDIATION

If we put under the mantle of governance not only organs of administration and entities entitled for law-making and their actions, but also institutions of administrative jurisdiction, we face the fact that some institutions of our modern era, like mediation (and especially court mediation), perfectly meet the requirements laid down by the scientific literature of good governance and of similar phenomena: mediation calls in a third person who was not originally involved, makes the whole process more transparent, cheaper and faster and is absolutely compatible with online platforms, etc.

Thinking about the contemporary role of (court) mediation, we have to take into account at least three facts. First, when the human population is expected to add an additional two to four billion by the

[8] https://uclg-aspac.org/good-governance-definition-and-characteristics/.
[9] *Ibid*.
[10] J.C. Ott, *Good Governance and Happiness in Nations: Technical Quality Precedes Democracy and Quality Beats Size*, "Journal of Happiness Studies" 2000, No. 3, pp. 353–368.

year 2050, a requirement for survival is being able to put in place local and international institutions capable of resolving disputes.[11] Second, the different forms of mediation already have a huge global role in promoting good governance by building democratic capacity.[12] Third, as Nolan-Haley states, democratic capacity-building – and the development of jurisdiction – occurs "most vividly today in the institutionalisation of settlement in court-connected mediation."[13]

1.3. Method of the research

1.3.1. METHODS AND TECHNIQUES USED

My current research is primarily concerned with the description and examination of this phenomena, i.e. the (court) mediation within administrative court proceedings, and is made up of the interplay of three components: formal rules, actual legal practices and narratives attached to the law (encompassing everything from the *raison d'être* and the goal of the institution, the public discourse surrounding it, to social attitudes toward the institution).[14]

Consequently, the primary method to approach the topic should be the review of the relevant primary legal sources [actual law in the form of the constitution (Fundamental Law of Hungary), acts, governmental

[11] A. Tabucanon, *The Role of Mediation in Good Governance: Revisiting the Katarungang Pambarangay*, "Ateneo Law Journal" 2020/2021, Vol. 65, No. 1, p. 1395. See also: B. Hohmann, *Possibilities for Modernization of Conciliation Board Procedures in the Countries of Central and Eastern Europe – Online Dispute Resolution and Electronic Communication*, "European Journal of Social Sciences" 2020, Vol. 3, No. 3, pp. 15–21.

[12] N.D. Erbe, *Appreciating Mediation's Global Role in Promoting Good Governance*, "Harvard Negotiation Law Review" 2006, Vol. 11, No. 1, p. 355.

[13] J. Nolan-Haley, *Mediation Exceptionality*, "Fordham Law Review" 2009, Vol. 78, No. 3, p. 1247.

[14] See more: A. Jakab, *Informal Institutional Elements as Both Preconditions and Consequences of Effective Formal Legal Rules: The Failure of Constitutional Institution Building in Hungary*, "The American Journal of Comparative Law" 2020, Vol. 68, No. 4, pp. 760–800; and also V. Lowndes, M. Roberts, *Why Institutions Matter: The New Institutionalism in Political Science*, London 2013.

decrees, court cases, etc.] and secondary legal sources (Hungarian and international scientific literature explaining the primary sources, the legal practice and also the elements and specific circumstances determining the broader social environment) through which we may define relevant scientific problems, create our own definitions and prepare a catalogue of practical problems, specifically for Hungarian issues regarding the topic.[15] I hope the latter can serve as a useful addition to legal and other debates which might take place in various European and domestic public arenas and will predictably re-emerge in the period following the COVID-19 pandemic. The COVID-19 pandemic has necessitated remote hearings around the world as courts seek to dispense justice in spite of logistical hurdles preventing in-person meetings.[16] Moreover, these new needs and answers given have also raised questions beyond the issues of technology. As we've been adapting to the challenges of 2020–2021, our adaptations are helping us solve challenges that had existed long before the COVID-19 pandemic, even within our justice systems. It cannot be said that flexibility, promptness and efficiency characterise most of the Hungarian system of justice, but we can predict that the importance of these features within the Era of Global Crises grows and requires new institutional solutions as well. The justice system is understood to comprise "the institutions that are central to resolving conflicts arising over alleged violations or different interpretations of the rules that societies create to govern members' behaviour; and that, as a consequence, are central

[15] The scientific antecedents of the present work in English are: Á. Rixer, *Features of the Hungarian Legal System after 2010*, Budapest 2012; and Á. Rixer, *Civil Society in Hungary. A Legal Perspective*, Passau 2015; Á. Rixer, *General and Legal Meaning of Civil Society in Hungary from the Beginning till 1989*, "Journal on European History of Law" 2015, Vol. 6, No. 2, pp. 38–47; Á. Rixer, *The relationship between civil organisations and public administration in Hungary, with special regard to their participation in legislation*, [in:] *Hungarian Public Administration and Administrative Law*, A. Patyi, Á. Rixer (eds.), Passau 2014, pp. 252–283; Á. Rixer, *Attempts of the Good State in Hungary – New Contents of Norms Created by the State*, "Iustum Aequum Salutare" 2013, Vol. 9, No. 2, pp. 129–139.

[16] S.B. Zachary, *Alternative Dispute Revolution: Technology and ADR in the Middle East Following the COVID-19 Pandemic*, "John Marshall Law Journal" 2021, Vol. 14, No. 2, p. 57.

to strengthening the normative framework (laws and rules) that shapes public and private actions."[17] Unquestionably, institutions as mediation could be elements and certain tools that broaden and deepen this definition – leading to a more functioning and effective system of administrative justice in Hungary.

Undoubtedly, the overview of practical problems also requires interviews with judges and other participants of those proceedings, anticipating the written conclusions with contemporary and up-to--date findings and opinions. Thus, my work, at least the second part of it, should employ a socio-legal approach as well. The second step of my current research and study – right after the enumeration and brief overview of legal sources that are currently in force – has to be an analysis that aims at collecting and analysing data from articles, journals and other publications on the topic of mediation in administrative court procedures in Hungary. My task is/was to review the content of articles published in Hungarian academic journals from 2013 to 2022. The findings suggested that topics such as the introduction of certain provisions of the new administrative codes have been over-researched, and on the contrary, topics such as the practical conclusions of the first four or five years still offer wider opportunities to be researched (to be more clear, this research is almost completely missing). Scientific papers and studies both in criminal court proceedings and civil court proceedings show several examples on the examination of the theoretical and practical questions of mediation in Hungary. However, the content of materials related to mediation within administrative procedures and especially in administrative court procedures show very opposite characteristics in Hungary: we have only very few of them, and even these concentrate on the introduction of current legal institutions – without a systematic overview of the practice.

But the existence of scientific works related to mediation within civil and criminal court proceedings also predisposes me to make a detailed comparison between the three forms of court procedure according

[17] L. Hammergren, D. Reiling, A. Di Giovanni, *Justice Sector Assessments – A Handbook*, Washington, D.C., 2007, available online at http:// siteresources.worldbank.org/INTLAWJUSTINST/Resources/ JSAHandbookWebEdition_1.pdf.

to their rules related to mediation, i.e. I am also going to look at the similarities and differences between those forms of mediation mentioned above.

1.3.2. WHAT ARE THE GOOD RESEARCH QUESTIONS? MOREOVER, WHAT COULD BE THE NOVELTY AND THE CONTRIBUTION OF THE RESEARCH?

First, one of my hypotheses is that the general practice of reconciliation of interests within Hungarian society, for example the quality of consultative mechanisms devoted specifically to economic and social dialogue, as well as citizens' trust in national authorities[18] or the features of the Hungarian litigation culture, are all elements of the broader social context of mediation within administrative court proceedings, strongly determining the social acceptance of the latter. The question to be answered is: What are the main characteristics of the broader social environment of specific forms of mediation in Hungary? What type of mediation is the best for this context?

Thus, my hypothesis is that the quality of consultative mechanisms, reconciliation of interests, etc., strongly influence the position and social acceptance of certain legal institutions, especially of those that could serve as a tool of alternative dispute resolution within (!) court cases in which one of the parties is an administrative authority. The nature of the impressions on the operability of the wide range of consultative mechanisms and of ADR solutions outside of the courts strongly determines the way how persons knowing or even availing such services relate to certain institutions within administrative court proceedings offered by the law.

The open government paradigm implies that public processes are becoming more transparent, public information is available online, and citizens and non-governmental organisations are encouraged to interact with public administration through old-type and new

[18] K. Gangl, E. Hofmann, B. Hartl, M. Berkics, *The impact of powerful authorities and trustful taxpayers. Evidence for the extended slippery slope framework from Austria, Finland and Hungary*, "Policy Studies" 2020, Vol. 41, No. 1, pp. 98–111.

platform-based forms of participation and collaboration.[19] On the contrary, in accordance with scientific literature instead of horizontal networks, strong autonomies, self-governments, solidarity and civil society, the formal institutions of the nation state and procedural democracy took place after 1990. It is still true that due to the politicised and instable practice of the reconciliation of interests,[20] the quality of the decisions made in the public sector is often inadequate, as is their execution. One of the most important fields of social dialogue should be the promotion of labour relations.[21]

And why are such facts or trends important for us? If we try to understand any particular state – or even a given human being – without serious efforts to understand the facts that can be reasons for the differences between the given entity and the elements of its broader – international or human – environment, our conclusion will not be well-grounded; moreover, our suggestions would be vague, too. This is visible and it can be seen that the analysation of the current legal processes in Hungary, in many cases, happens without the knowledge of the particularities or the special historical and cultural background. According to my research, the open problems related to the consultative mechanisms in Hungary appear primarily as historical, sociological and socio-psychological issues, while the laws and regulations determining forms of mediation respect international standards: the legal environment is highly developed, the rights are provided, and the institutions are established. We must highlight the threats of the analysis solely based on the examination of the domestic legal documents mentioned above. As I have stated in my previous research: "However, [in relation to the contents of the legislation] practice shows a different picture: in addition to intense self-organisation, Hungarian civil society is

[19] L. Schmidthuber, A. Ingrams, D. Hilgers, *Government Openness and Public Trust: The Mediating Role of Democratic Capacity*, "Public Administration Review" 2021, Vol. 81, No. 1, pp. 91–109.

[20] M. Gerő, Á. Kopper, *Fake and Dishonest: Pathologies of Differentiation of the Civil and the Political Sphere in Hungary*, "Journal of Civil Society" 2013, Vol. 9, No. 4, pp. 361–374.

[21] G. Mélypataki, *A szociális párbeszéd lehetőségei a közszolgálat területén*, "Pro Publico Bono – Magyar Közigazgatás" 2019, Vol. 6, No. 1, p. 22.

characterised by an accentuated dependence on the state, the low level of institutional trust,[22] the weakness of channels suitable for lobby and the low level of participation in decision-making processes. In particular, civil control and influence is low, and the large number of civil society organisations do not provide adequate social participation."[23] And once again: What does this mean related to mediation within administrative court proceedings? The answer is very simple: if the performance of that institution was weak, if the numbers showed a low level of usage, then we could offer some reasons behind this data.

Second, international scientific studies outline the possibility of "multi-door courthouses", in which litigants could be triaged into the most appropriate forum for their individual dispute, such as mediation, arbitration or litigation.[24] This it a real scenario for Hungary. If so, would this work in administrative cases?

Third, ADR scholars have long touted the many advantages of non-litigation options for disputants. These advantages include cost and time efficiencies, creative problem-solving, confidentiality, party autonomy and control over the process and outcome and flexible and accessible processes. However, what are the Hungarian reasons behind that institution, and what are the certain advantages that differ from that of others – if there are any?[25]

Fourth, what are the cases in which the current law does not preclude mediation? Mediation is not a suitable procedure for settling disputes in all cases, so what are those case types in which this kind of mediation is most frequently used? Should we broaden the scope of case types?

Fifth, what is and what should be the content of materials of the training courses that prepare the mediators for new challenges? In

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[22] Most global crisis phenomena are closely related to the *loss or lack of trust*, and accordingly, the introduction and implementation of institutional solutions that can enhance confidence in all directions towards the public administration.

[23] Á. Rixer, *Civil society…*, *op. cit*., pp. 23–24.

[24] K.M. Blankley *et al.*, *ADR Is Not a Household Term: Considering the Ethical and Practical Consequences of the Public's Lack of Understanding of Mediation and Arbitration*, "Nebraska Law Review" 2020, Vol. 99, No. 4, p. 797.

[25] K.M. Blankley *et al.*, *op. cit*., p. 799.

general, what makes a good mediator within this specific field? Thus, these are and should be the main subtopics covered and the main questions answered by my research.

Sixth, scientific groupings based on specific characteristics of institutions providing mediation enable us to make comparisons and also to make well-grounded evaluations. Thus, by detecting and examining the five philosophies of mediation – confidentiality,[26] voluntariness, empowerment, neutrality and a unique solution[27] (with a critical view as to what the terms mean and how central to mediation practice they are), we could answer the question: To what extent do these components refer to the specific Hungarian example? Moreover, looking at the various models of mediation, and focusing our attention on the facilitative, evaluative and transformational models,[28] or even understanding-based models,[29] we have the very same task of deciding to which of those categories does the model of the Hungarian court mediation belong.

1.3.3. RESEARCH SCHEDULE

After some consideration about the proper form of my research on court mediation in Hungary, my decision was that I should elaborate and present my topic only through two separate studies: the first one will consist of a general introduction on mediation, as well as the certain questions of mediation in administrative law

[26] P. Kłos, *Confidentiality of Mediation in Civil Cases in Perspective of the Jerzy Lande's Analytical Theory of Legal Norm*, "Studia Iuridica Lublinensia" 2018, Vol. 27, No. 3, pp. 163–174. The article contains a re-conceptualisation which allows for the understanding of specific features of mediation as a legal institution and enables one to gain more insight into the functioning of confidentiality of civil mediation.

[27] M. Brogan, *The Theory and Philosophy of Mediation*, [in:] *Mediation Law and Practice*, D. Spencer, M. Brogan (eds.), Cambridge 2012, p. 83, https://doi.org/10.1017/CBO9780511811005.004.

[28] M. Brogan, *op. cit*.

[29] G. Friedman, J. Himmelstein, *Resolving conflict together. The understanding-based model of mediation*, "Journal of Dispute Resolution" 2006, Vol. 2, No. 8, pp. 523–553.

in Hungary, presenting the hypotheses of the whole research and the legal background of mediation within administrative court proceedings. The method to approach the topic of the first study should be a review of the relevant primary legal sources (actual law in the form of acts, governmental decrees, court cases, etc.) and secondary legal sources (as Hungarian and international scientific literature explaining the primary sources, the legal practice and the elements and specific circumstances determining the broader social environment). Through these sources, many of the main scientific questions can be answered. Consequently, that paper (the chapter of this scientific monograph on Mediation in Court Proceedings you are reading now) should be an introductory writing, complementing or even replacing international scientific literature on mediation within administrative court proceedings in Hungary.

And now turning to the second study (article) – compared to the chapter mentioned above, it deals with the very same topic but in an extended and broadened way: it adds in some further data obtained from the OBH (National Office for the Judiciary), for example about the number of cases settled via mediation, and tries to tackle all the possible aspects of communication related to the topic in question, and this article will also try to add in the results of the interviews with judges and representatives of different defendants (administrative authorities). Qualitative interviewing, including the interviewing of judges, is a relatively new method in the field of legal studies, at least in Hungary (raising questions of its added value and adequate application as well). As Stokoe states in accordance with relevant international literature, the methods to examine mediation usually encompass self-reported data, interviews and survey-responses.[30]

Within my research project, the interviews with judges will take the form of in-depth, semi-structured conversations. This technique allows for flexibility and a conversational way of communication. This technique also provides the possibility to focus on those matters

[30] E. Stokoe, *Overcoming barriers to mediation in intake calls to services: Research based strategies for mediators*, "Negotiation Journal" 2013, Vol. 29, No. 3, pp. 289–314.

which were most relevant for the concerned judge. Qualitative, semi-structured interviewing fits particularly well in the interpretivist research approach that aims at understanding socially-constructed reality and human action in specific contexts.[31]

1.4. Contemporary rules of reaching settlements and mediation

This chapter describes the legal background and environment of mediation within administrative proceedings and consists of two parts: the first one is the introduction of the main rules on settlement and mediation in administrative procedures (not only within court procedures!) in Hungary, and the second one provides a comparison between the main rules of mediation within criminal court procedure, civil court procedure and administrative court procedure in Hungary.

1.4.1. INTRODUCTION OF THE MAIN RULES ON SETTLEMENT AND MEDIATION IN ADMINISTRATIVE PROCEDURES

First, let us begin with the important fact that the Hungarian administrative procedure was transformed by the new Act CL of 2016 on the Code of General Administrative Procedure (hereinafter: CGAP, in Hungarian: *az általános közigazgatási rendtartásról szóló 2016. évi CL. törvény*). The system of judicial review has been changed radically by this act. The intra-administrative remedy, the administrative appeal against the first instance decisions of an authority, has become only an extraordinary type of the remedies, because in principle, the first instance cases could be challenged by an appeal only in cases defined by an Act of Parliament. The judicial review

[31] U. Jaremba, E. Mak, *Interviewing judges in the transnational context*, "Law and Method" 2014, Vol. 4, No. 2, pp. 35–54.

of administrative decisions has become the major remedy against the acts of the authorities.[32]

Searching for those certain legal institutions that are closely connected with settlements reached within administrative procedures, we can detect such institutions in the CGAP, within Act I of 2017 on the Code of Administrative Court Procedure (hereinafter: CACP, in Hungarian: *Kp.*) and also within some specific fields of public administration.[33]

Mentioning only the general rules of the two Codes mentioned above, we should start with Section 4 of the CGAP, which states – under the title of "Principle of effectiveness" – that "The authority, in order to be effective, shall organise its activities so as to impose the least amount of expense upon all parties to the proceedings and to close out the proceedings as fast as possible…" This is a general principle, and one of those institutions that are able to satisfy these requirements within the given Act is mentioned within Section 75 under the title of Settlement attempt (in Hungarian: *egyezségi kísérlet*), which says that "If the authority holds a hearing, at the hearing, the authority shall attempt to mediate a settlement between the adverse parties." Further on, it also states that "If a settlement is agreed upon or if the clients enter into an agreement, and the settlement is in conformity with the Fundamental Law and other legislation, it also provides for the performance deadlines and for covering procedural costs, the authority shall approve it and shall transcribe it in a resolution." There are several further provisions related to the given institution (the settlement), and, of course, there is still a lot to be said on the subject, but I close this point by introducing

[32] I. Hoffman, *Application of Administrative Law in the Time of Reforms in the Light of the Scope of Judicial Review in Hungary*, "Studia Iuridica Lublinensia" 2020, Vol. 29, No. 3, pp. 108–109.

[33] E.g. Act CXVI of 2000 on Mediation in Health Care (in Hungarian: *Az egészségügyi közvetítői eljárásról szóló 2000. évi CXVI. törvény*) and Mediation in guardianship authority's procedure in accordance with Section 4:177 of the Act V of 2013 on the Civil Code ("The guardianship authority may order, upon request or in the interest of the child, ex officio, the parents to avail of a mediation procedure in the interest of creating proper cooperation between the parent exercising parental custody and the parent living separately, including contact between the parent living separately and the child").

the rules of the "approval of a settlement" (Section 83, in Hungarian: *egyezség jóváhagyása*): "If a settlement is agreed upon or if the clients enter into an agreement, and the settlement is in conformity with the Fundamental Law and other legislation, it also provides for the performance deadlines and for covering procedural costs, the authority shall approve it and shall transcribe it in a resolution."

Turning to those forms of settlement that may be found among the rules of administrative court procedure, Act I of 2017 on the Code of Administrative Court Procedure (CACP) allows us three possible ways of reaching a settlement: 1) settlement initiated and approved by the court without mediators, 2) settlement initiated by the parties and approved by the court with or without professional mediators, and 3) the most exciting for us, court mediation itself, which is special because the mediator is a professional judge who is not the single judge of the given case or a member of the panel that hears the case but is an independent mediator without having any right to make formal legal decisions.

The general guiding principles for all those three processes must be also mentioned: Section 2 of the CACP states – under the title "The responsibilities of the court" – that "The court shall provide, upon well-founded claims, effective legal protection against infringements caused by administrative activities [paragraph (1)] (…) The court shall adjudicate administrative disputes in fair, concentrated and cost-efficient procedures" [paragraph (2)].

In addition, Section 1 [Scope of the Act] paragraph (1) says that "This Act shall apply to administrative court actions seeking to adjudicate administrative disputes and to other administrative court procedures". Section 4 [The administrative dispute] paragraphs (1)–(4) makes it clear that "(1) The subject of the administrative dispute shall be the lawfulness of an act regulated under administrative law and taken by an administrative organ with the aim to alter the legal situation of an entity affected by administrative law or resulting in such an alteration or the lawfulness of the administrative organ's failure to carry out such an act (hereinafter 'administrative activity'). (2) Legal disputes relating to public service and administrative contractual relationships shall also qualify as administrative disputes. (3) Administrative acts shall include: a) individual decisions;

b) administrative measures; c) administrative acts of a general scope to be applied in a specific case and not falling under the scope of the Act on law-making; d) administrative contracts. (4) Unless otherwise provided by an Act, no administrative dispute shall take place: a) concerning government activities, in particular with respect to national defence, policing of aliens and foreign affairs, b) concerning the lawfulness of an ancillary administrative act serving the purpose of implementing an administrative act, c) between parties in hierarchical or managerial legal relationships."

We underline that the reformed administrative jurisdiction can fulfil its social function only if it is effective with a service provider attitude, understands the administrative enforcement, considers the ruling in panel fundamental, aspires for consistency in the enforcement, is able to react to the social changes sensitively and is fast but non-politicised, independent and stabile.[34]

Just to summarise the most important rules of the "ordinary" settlements [points 1) and 2) from above]: Section 57 [Measures in the course of preparatory arrangements for the action] states that "(1) For the purpose of preparing the hearing and proceeding within a reasonable time, the court shall take all the necessary measures to ensure that the action can be adjudicated on the merits in one hearing. Measures may be taken before setting the date of the hearing or any time during the procedure if necessary. (2) On the basis of paragraph (1), the court: a) may order the taking of evidence, b) may obtain documents from other courts or authorities, c) may order the hearing of the parties, d) may attempt to create a settlement between the parties", and Section 64 [An attempt to create a settlement] adds that "The court may attempt to create a settlement between the parties even before the date of the hearing is set."[35]

Section 65 [Creating a settlement] says that "(1) If the subject of the action allows it and it is not excluded by law, the court shall

[34] K. Sperka, *Quo vadis közigazgatási bíráskodás? A közigazgatási bírósági szervezetrendszer átalakításával kapcsolatos kihívások*, "Acta Humana" 2019, Vol. 7, No. 1, p. 123, https://birosag.hu/ugyfeleknek/birosagi-kozvetites/.

[35] See also: Section 77 [Decision without a hearing] paragraph (7): "The court may summon the parties and the interested persons to attempt to reach a settlement."

attempt to create a settlement between the parties if, considering the circumstances of the case, it is likely to be achieved within a reasonable time. (2) In order to facilitate the settlement, the court: a) shall inform the parties of the advantages and conditions of a settlement, b) shall inform the parties of the essence of and the possibility and conditions of resorting to a mediation procedure, c) may present to the parties the settlement it proposes in writing during the preparatory arrangements for the action or included in the minutes at the hearing, or d) may summon the parties to attempt to conclude a settlement." Section 66 [The content of the settlement] adds that "(1) In the settlement, the parties may agree as to how to close the administrative dispute or some of the disputed issues as appropriate for them if it complies with legal provisions. In the settlement, the parties may also agree as to how to remedy the infringement caused by the administrative activity. (2) In the settlement, the parties and the interested persons may also undertake obligations, even under civil law, relating to the administrative activity subject to the action that were not covered by the administrative act subject to the dispute or do not fall under the material competence of the defendant, and they may also agree upon omitting the enforcement of the administrative act subject to the dispute. (3) The settlement shall not be valid if concluded without the interested person participating in it or approving its text, except if, according to the court, the settlement does not affect the rights or legitimate interest of the interested person. (4) If the settlement does not comply with the legal provisions, the court shall refuse to approve it and shall continue the procedure. The order refusing the approval of the settlement may be appealed, which does not have a suspensory effect on the continuation of the procedure." Finally, Section 67 [The order approving the settlement] alleges that "(1) If the content of the settlement is complying with legal provisions, the court shall approve the settlement by including it in an order."

Within the framework of the rules related to the court mediation (point 3), Section 69 [Conditions of mediation] paragraph (1) of the CACP states that "The court shall order mediation if the parties and the interested persons have consented to it. During mediation, the parties and interested persons make an attempt to settle

the legal dispute with the involvement of the court. (2) The court shall suspend the procedure until mediation has been completed, but for two months at most. (…)" Section 70 [Rules of mediation] paragraph (1) adds that "The court mediator shall not be a member of the panel that hears the case" [as I have already mentioned – the further rules of the given section command that] and "(2) Upon completing mediation, the court mediator a) shall put the concluded settlement in writing and send it to the proceeding court, b) shall inform the proceeding court that mediation was inconclusive if no settlement has been concluded or if any of the parties has requested so. (3) The proceeding court shall examine the settlement and, if it complies with the laws, incorporate it into an order with the effect of a judgment. (4) If mediation is completed without a settlement covering the whole legal dispute, the proceeding court shall continue the procedure under the general rules. (5) The party shall not use the information that was disclosed to him during the mediation in the course of the action or otherwise. (6) Unless otherwise provided by the settlement, the parties shall bear their own costs arising from mediation."

In addition, there are some further rules enacted in other legally binding legal sources related to court mediation within administrative proceedings. The main ones are Act LV of 2002 on Mediation, Decree 14/2002 (VIII. 1) of the Minister of Justice on the Rules of the Case Administration of Courts [in Hungarian: *a bírósági ügyvitel szabályairól szóló14/2002 (VIII. 1) IM rendelet*] and Directive 11/2014 (VII. 11) of the OBH on court mediation and on the conditions of assignment [in Hungarian: *a bírósági közvetítésről és a kijelölés feltételeiről szóló 11/2014 (VII. 11) OBH utasítás*].

In spite of the fact that the number of scientific papers related to this topic has been increasing, the vast majority of those works do not refer, in a detailed way, to the types of cases in which court mediation is practised.[36] Most of them give us only a shortlist of

[36] See e.g.: B. Hohmann, *Az alternatív vitarendezés lehetőségei a közigazgatási hatósági eljárás keretében*, "Európai Jog" 2019, Vol. 19, No. 1, pp. 23–37; I. Bereczki, *A közigazgatási perek során elrendelt közvetítés alkalmazásának egyes kérdései*, "Iustum, Aequm, Salutare" 2018, Vol. 14, No. 3, pp. 131–149; I. Bereczki,

the possible case types without further details and without offering a theoretical framework or even *de lege ferenda* suggestions. Thus, in accordance with Hungarian literature,[37] the main, detectable fields are as follows: administrative acts carried out within the administrative organ's discretionary power (even if the act was lawful[38]) related to child protection, environment protection (e.g. cases connected with integrated Pollution Prevention and Control permits) and building affairs. We also have to mention, as subjects of the court procedure, the decisions on the matter of compensation in relation to the amount, actions relating to administrative contracts and public service relationships.

Thus, these are the main rules of settlements that can be reached within administrative proceedings, especially within court procedure. However, the real importance of these features could be shown by comparing the particularities of these settlements, especially of those that are reached by the application of rules of administrative court procedure with that of criminal court procedure and civil court procedure.

1.4.2. COMPARISON OF MEDIATION IN ADMINISTRATIVE, CIVIL AND CRIMINAL COURT PROCEDURES IN HUNGARY

My comparison is not complete, introducing all the possible aspects: I concentrate on eight important factors that could be helpful (to others), even though the conclusions are results of generalisations and simplifications to some extent.

A közigazgatási közvetítés elméleti kérdései közvetítés – közigazgatás – atipikus-elmélet, "Magyar Jog" 2018, Vol. 43, No. 4, pp. 228–237.

[37] K. Sperka, *op. cit.*, p. 124.

[38] Section 85 paragraph (5) of CACP states that "Concerning the lawfulness of an administrative act carried out within the administrative organ's discretionary power, the court shall also review whether the administrative organ exercised its power within the limits of its authorisation to proceed under its discretionary power and whether the aspects and the causality of the assessment may be established from the document containing the administrative act."

I. The role of the courts acting in these fields

It is quite obvious that the role of a court acting in the field of administrative law is quite different to that in private law, due to the fact that the role of an administrative authority differs substantially from that of a private party. At least to the extent that an administrative authority is strongly bound by the principle of legality: it may still be allowed some discretion, but it lacks the full amount of private autonomy.[39] In other words, the measurement of the judicial review (the law used) is not at the parties disposal.[40] This means that the content of any settlement is strongly determined by the extent of the legal discretion provided by the law to the given administrative authority.

II. The existence of mandatory mediation within these three fields

Mandatory mediation means that the parties are obliged to attend a first session, but it remains voluntary in that they are always free to leave at any stage once the first session has begun.[41]

There are no mandatory forms of mediation within the administrative and criminal court procedures in Hungary, and there is only one within the civil court procedure: the new Civil Code introduced the possibility of mandatory mediation in some family law related disputes in Hungary. Under the new regulation entered into force on 15 March 2014, courts may refer the parties to mandatory mediation in child custody cases (including visitation rights). Act V of 2013 on the Civil Code [Section 4:172 (Mediation in the action for settling of exercising parental custody)] states that in justified cases, the court may order the parents to avail of a mediation procedure in the interest of the proper exercise of parental custody and of

[39] A. Balthasar, *Alternative Dispute Resolution in Administrative Law: A Major Step Forward to Enhance Citizens' Satisfaction or Rather a Trojan Horse for the Rule of Law*, "ELTE Law Review" 2018, Vol. 6, No. 1, p. 14.

[40] A. Balthasar, *op. cit.*

[41] https://www.lawinsider.com/dictionary/mandatory-mediation.

the cooperation between them required for the former (including the contact rights between parent living separately and the child). There is, however, no obligation (even within that single form of mandatory mediation mentioned above) to reach a resolution of the dispute.

III. Is everyone interested in reaching settlements through mediation within court proceedings? Are all parties and judges deciding upon the case or members of the panel that hear the case interested in reaching settlements through mediation within court proceedings?

The win-win philosophy of mediation reflects the ideology of mutual benefits, the satisfaction of mutual interests and even the conclusion of strategic alliances that are inherent to the institution of mediation. Within criminal and civil law cases, this logic can also be justified easily in Hungary,[42] but in administrative court cases, it is not so easy to prove. Why should the representative of a given administrative authority accept any changes within the decision in question if there are no legal obligations to do so? There are some answers (e.g. settlements can be reached alongside the cooperation developing on a mid- to long-term basis between the given administrative organs and certain clients, with benefits to both sides), but none of them are so obvious as in criminal and civil cases.

Within criminal law proceedings, the existence of real interests in reaching settlements both on the side of the perpetrator and the victim is obvious, especially employing the logic and philosophy of restorative justice.[43] Within administrative cases, administrative organs as defendants in court procedures were not "eager" to reach settlements by giving false impressions of changing their lawful decisions. This was case even before 2018, when the certain form of

[42] E. Héthy, *A büntetőjogi mediáció gyakorlati aspektusai*, "Debreceni Jogi Műhely" 2012,Vol. 9, No. 1, p. 3.

[43] B. Hudson, *Restorative justice and gendered violence: diversion or effective justice?*, "The British Journal of Criminology" 2002, Vol. 42, No. 3, pp. 616–634.

court mediation was not possible in administrative court procedures but the institution of settlements already existed.

IV. At which stages of the given procedure is mediation allowed?

Within criminal court proceedings, mediation is permitted only at a stage before or prior to the issue of an indictment against the person suspected of a crime. In civil law and administrative law court proceedings, this works differently: mediation can be used at any stage of these disputes.

V. What is mediation about as a whole?

Within an administrative court proceeding, the parties are not trying to negotiate the lawfulness of the decision in question, but they are seeking a solution within the frameworks of the discretionary powers of the defendant (of the administrative authority).

On the contrary, within mediation in criminal court cases, the perpetrator admits the violation of the law, and the "only" question is the form and the amount of compensation. Within criminal court cases, the subject of the mediation is not whether the offence was committed or not, or harm was caused or not, but compensation of the material, emotional, spiritual and other damages, as well as the restoration (reparation) of the relationship of the offender and the victim. It also means that by the spread of the concept of restorative justice (and jurisdiction), redefinition of the notion of crime has become a huge need: in accordance with this new concept, crime is not a breach of the law or an attack against the state but an offence against a person or a mere injustice.[44] Such a reshaping of the notion

[44] Zs. Schweighardt, *A büntetőjogi mediáció alkalmazásának kezdeti tapasztalatai Magyarországon*, "Magyar Jog" 2010, Vol. 35, No. 3, p. 172.

makes it possible for the state to let the claim to the monopoly of legitimate punishment go.[45]

VI. Why is the increase of the rate of mediation so slow in all of the mentioned fields? Why do the numbers remain so low?

The number of mediation proceedings showed an upward trend in Hungary in the beginning of this century (until 2013) then stagnated in general or have even been decreasing in some fields.[46] The question inevitably arises as to what the reason for this is.

The explanation, in my view, can be found more in the fact that the new codes and other legal sources have introduced a number of rules aimed at speeding up proceedings, which are sometimes applied instead of mediation proceedings.[47] Moreover, each and every new rule related to mediation makes the process more complex and less transparent for the parties. It is a kind of a paradox in mediation, the result of which is that the number of the forms and rules of mediation have doubled or tripled over the last few years, but the numbers of those particular proceedings have not.[48] According to Giuseppe De Palo, that paradox can be detected all over Europe, especially in commercial cases,[49] and the main reason is the lack of social acceptance and, at least partly, still the lack of integration of the given institution within the broader legal system.[50]

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[45] A. Funk, *The monopoly of legitimate violence and criminal policy*, [in:] *International Handbook of Violence Research*, W. Heitmeyer, J. Hagan (eds.), 2003, pp. 1057–1077.

[46] A. Szabó, *Impact of the Act XC. of 2017 Criminal Procedure on mediation proceedings*, "Büntetőjogi Szemle" 2022, Vol. 10, No. 2, p. 97.

[47] A. Szabó, *op. cit*.

[48] M. Gyengéné Nagy, *A mediáció uniós szabályozásának hatása a magyar perjogi kodifikációra*, "Magyar Jog" 2016, Vol. 41, No. 5, p. 269.

[49] M. Gyengéné Nagy, *op. cit*.

[50] See: T. Becker, *Conflict and Paradox in the New American Mediation Movement: Status Quo and Social Transformation*, "Journal of Dispute Resolution" 1986, pp. 109–129, https://scholarship.law.missouri.edu/jdr/vol1986/iss/10.

VII. Extent of the knowledge of law

While the mediator involved in a civil court procedure does not have to know the rules governing a certain case, the court mediator involved in administrative court proceedings has to be aware of the rules (especially the legal boarders) governing that case. As a consequence, a judge or assistant judge of an administrative court can also be involved in civil cases as a court mediator (!).[51]

VIII. Registration of the mediators

Under the provisions of Act LV of 2002 on Mediation [Section 38/A paragraph (1)], judges or assistant judges are exclusively entitled to perform the tasks of a court judge, and they must be designated by the President of the National Office for the Judiciary. Moreover, the list of these court judges is incorporated into a separate register (of the records) kept by the President of the National Office for the Judiciary.[52] In comparison, the names of "ordinary" civil law and administrative law mediators can be found within another register,[53] and criminal law mediators belong to the third circle of persons.

1.5. Further plans concerning interviews with judges and international comparison

As I have mentioned earlier, my next article on the same topic will try to add in the results of the interviews with judges involved in cases when court mediation is used. Interviewing, including interviewing of judges, is a relatively new method in the field of legal studies, especially in Hungary. Thus, within the next two months, I am going

[51] http://birosag.hu.

[52] https://birosag.hu/ugyfeleknek/birosagi-kozvetites/birosagi-kozvetito-kereso–bírósági közvetítő kereső.

[53] https://igazsagugyiinformaciok.kormany.hu/kozvetitoi-nevjegyzek.

to meet several judges, as I am convinced that the way I collect responses also impacts the quality of my survey, and if there is any chance to meet in person, I will try this. The questions of my survey questionnaire (see below) are partly strict ones, but beyond the questions related to the contemporary features of those mediation processes, I would like to also ask them questions about their suggestions on new legislation related to that field, and I would appreciate if they provided any observations or remarks on the broader context of the field in question. The questions are as follows:

1. What is your perception of the existing legal framework of the "settlement attempt" within administrative court proceedings? When do you apply the rules of this, and how would you develop that institution?
2. To the best of your knowledge, what are the reasons for the use of court mediation by the parties within administrative court proceedings? Why does the defendant, according to your experience, undertake participation within that process?
3. What are those case types within administrative court proceedings in which court mediation is most frequently used? Should we broaden that scope of case types?
4. What is and what should be the content of the materials of training courses dedicated to court mediators? In general, what makes a good mediator within this specific field?
5. How do you think this institution should be known better by society?
6. Do you have any additional comments or concerns you would like to share?

I also have to underline that within administrative court mediation proceedings, a professional judge may be involved in two different roles: some of them are single judges deciding upon the case or members of the panel that hear the case, and others are the so-called court mediators chosen by the National Office for the Judiciary, and the latter are only helpers of the parties without any right to make certain decisions. Thus, both of them must be interviewed. Moreover, my plan is to also carry out some further interviews with representatives of defendants that are the representatives of the given administrative authorities which carried out the administrative

activity subject to the legal dispute. Furthermore, while there are many studies dedicated to two parties arguing, there is still not enough research accounting for the dynamics of and communication between the three participants (at least) in a dispute mediation.[54]

Beyond the interviews, there are some further ways of research as for our topic: international comparison should be the next tool, the last phase of a more detailed examination. There are similarities: "In certain cases, administrative law also provides possibilities for mediation and alternative dispute resolution (…)", as well as differences: "Mediation procedures are, however, always provided before a formal legal procedure is started."[55] Introductory chapters (country reports) on the contemporary rules of Hungarian public law, and especially administrative law, can be found in many comparative works;[56] moreover, we can even find such works that concentrate on administrative court mediation.[57]

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Chapter 2. Theoretical and Praxeological Aspects of VOM in Criminal Cases – Polish Perspective

2.1. Introduction

Mediation is of great value in social sciences, the latter is also one of the most popular issues addressed by researchers. When it comes to numerous studies on legal aspects of mediation, on the one hand, philosophical issues are examined, on the other hand, juridical issues are systematised. In turn, there are relatively few theoretical and methodological studies in which mediation is the central point. Thus, this study has been dedicated to this issue.

For constructing a theoretical and methodological background of mediation, different and complex concepts shall be analysed. The selection of these approaches is strictly linked with the crucial research question of: How can mediation in criminal cases be shaped most efficiently? Apparently, discussing mediation as an institution of the criminal justice system must be emphasised. Another factor is the type of prosecution applied in a given system and the fundamental principles of the criminal trial (especially by indicating whether the given system is based on adversarial or inquisitorial principles), as those directly impact the practical potential of mediation. In this study, I argue that in non-adversarial systems, the effectiveness of one type of mediation, namely VOM (victim–offender mediation), might raise doubts.

Among the various theoretical concepts that could be used to comprehensively explain mediation as a legal institution, some of them seem to be essential. Consequently, mediation could be analysed based on the following 4 models: 1) Conflict Resolution Theory approach, 2) Theory of Communicative Act approach,[1] 3) Conventional Act of Communication, and 4) The Legal Argumentation approach.[2] Moreover, the contrary-to-duty obligation concept

[1] According to the communicative act conception, conversation, in conditions of equal opportunities for argumentation, is a model of social interactions. An ideal communication order can be developed only in the conditions of democracy, which, as a model of political dialogue, takes into account the opinion of every citizen. J. Habermas – two types of actions: rational-purposeful and communicative; the first consist of setting the goal of action and the selection of appropriate means, and the second focus on the interaction of subjects with each other utilising accepted and understandable signs and symbols. Rational discourse is social action free from coercion and repression, based on the equality of freedom of argument. Dialogue, ethics and the consensus associated with them are intended to be a positive alternative to all kinds of domination. Clear, honest argumentative discourse is also an antidote to the increasingly visible split between theory and practice. J. Stelmach draws attention to the need to create a true argumentative approach, in which the science of effective argumentation will be combined with the principles of equity, rationality and competence. See: J. Habermas, *The Theory of Communicative Action: The Critique of Functionalist Reason*, Cambridge 2007, *passim*. J. Habermas, *Teoria działania komunikacyjnego*, Vol. I, Warszawa 1999, pp. 186–187.

[2] Under a discourse theory, communicative rationality legitimises discourse aimed at reaching a consensus. Rational are all actions conducive to free interaction, free for all open exchange of views. Hence, rational is any discourse that meets all formal requirements. The potential for the rationality of individual judgments stems from the participant's conviction of their truthfulness, rightness and sincerity of intentions. Communicative acts of at least two participants are criticised, justified and denied, and the dialogue, conducted without coercion, reveals to the interlocutors the subjectivity of their views. The consensus worked out together ultimately arouses in them the conviction of the existence of a single, common, objective world order. Based on the study of speech acts in dialogue texts, the negotiator, the perpetrator and the victim can be observed from the point of view of conversational strategy. Conversational strategy is understood as a coherent sequence of speech acts consciously directed by the sender and the recipient, employing which interlocutors strive to achieve an acceptable communication goal. Although we are not able to predict verbal behaviour or the actions that entail it, we can develop certain patterns of verbal actions and behaviours and, from them, predict the use of conversational strategies. The interactive model is supplemented by the psychological model

might be seen as a normative basis for mediation.[3] In this paper, my analysis will focus is on the first model. Moreover, I assume that for

of neurolinguistic programming (NLP). A comprehensive approach to the issue includes the relationship between language and thinking, the psychological aspect of the communication process, the social dimension of interaction and eliminating communication barriers. Furthermore, the aim of the research should also be to determine the relationship between the personality of the negotiator and other participants in the negotiation, i.e. to determine the level of communicative competence. See: A. Adamus-Matuszyńska, *Współczesne teorie konfliktu społecznego*, Katowice 1998, *passim*; P.J. Carnevale, D.G. Pruitt, *Negotiation and mediation*, "Annual Review of Psychology" 1992, No. 43, *passim*; R.J. Lewicki, S.E. Weiss, D. Lewin, *Models of conflict, negotiation and third party intervention: A review and synthesis*, "Journal of Organizational Behaviour" 1992, Vol. 13, *passim*; J. Mulholan, *The Language of Negotiation: A Handbook of Practical Strategies for Improving Communication*, London 1991, *passim*.

[3] A contrary-to-duty obligation is an obligation telling us what ought to be the case if something wrong is true. For example: 'If you have done something bad, you should make amends.' Doing something bad is wrong, but if it is true that you did do something bad, it ought to be the case that you make amends. Roderick Chisholm was one of the first philosophers to address the contrary--to-duty (obligation or imperative) paradox (1963). Alternatively, we might say that a contrary-to-duty obligation is a conditional obligation where the condition (in the obligation) is forbidden, or where the condition is fulfilled only if a primary obligation is violated. In the first example, he should not be guilty, but if he is, he should confess. See: R.R.M. Chisholm, *Contrary-to-Duty Imperatives and Deontic Logic*, "Analysis" 1963, No. 24, pp. 33–36. Contrary--to-duty obligations are important in our moral and legal thinking. They turn up in discussions concerning guilt, blame, confession, restoration, reparation, punishment, repentance, retributive justice, compensation, apologies, damage control and so forth. In this context, the interpretation of A. Sarkowicz seems to be innovative. The author states: "*Why do some systems contain norms that somehow imply a violation of other norms of the given system? … It seems that the most important aspect that the legislator has in mind when establishing such a legal norm is that it contributes significantly to the reduction or reparation of damage caused by the previous violation of some other norm of a given system. Such damages can be of various kinds: moral, psychological, and physical – harming the various interests of society or the individual. … A characteristic feature of contrary to duty norms is the leniency of sanctions, compared to that which would have applied to the offender. The degree of leniency depends mainly on the seriousness of the basic norm violated and the offender's efforts to avoid or reduce the damage caused.*' This rather general answer as to the purpose for which the legislator introduces contrary-to-duty norms into the system is closely in line with the so-called restorative justice in criminal law. See: A. Sarkowicz, *O tzw. normach poprawczych czyli rozważania na marginesie paradoksu Chisholma*, [in:] *Prawo*

perceiving and building mediation as a legal institution, the Conflict Resolution Theory (CRT) seems to take the central point.

Before proceeding with the core analysis, we must first highlight some crucial terminological aspects. Even though the terms "consensus" and "consensual", as well as the notion of "conflict", will quite often be exploited in this study for the interpretation of criminal justice, it must be stressed that pre-trail investigations do not concern the concept of the Consensus Model of Criminal Justice & Conflict Model of Criminal Justice (the latter based on the Conflict theory). Apparently, the Conflict and Consensus models of criminal justice are both concepts with philosophical roots and aim to describe the general and fundamental aspects of constructing legal systems. The Consensus model is rooted in John Locke's "Social Contract Theory", in which members of society willingly give control to governing entities. On the contrary, the Conflict model derives from the Marxist ideology that focuses on class divisions, disparity and struggles for power.[4] Regardless of similarities in the terminology, those are completely different concepts from the CRT. The latter guides the informal or formal process, which two or more parties (participants, disputants) use to find a peaceful solution to their dispute within the framework of the broader formula of Alternative Dispute Resolution Tools.[5]

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i Polityka. Księga pamiątkowa ku czci Prof. dr. K. Opałka, A. Bodnar, J.J. Wiatr, J. Wróblewski (red.), Warszawa 1988, pp. 113 *et seq*.

[4] L. Coser, R. Dahrendorf, R. Collins, *Conflict and Critical Theories Part I*, [in:] *Conflict Theory*, pp. 211 *et seq*.

[5] O. Batrymenko, V. Andrushko, *The conflictual and consensual natures of power*, January 2021. DOI: 10.17721/2415-881x.2021.87.44-54; J. Hagan, J.C. Shedd, *Conflict Theory of Perceptions of Criminal Injustice*, "University of Chicago. Legal Forum" 2005, Issue 1, pp. 269 *et seq*.

2.2. Conflict Resolution Theory and Criminal Law – general remarks

To study CRT[6] within the framework of criminal law, several conditions should be met. Firstly, a source of conflict must be described (1). Secondly, the disputants and parties of this type of given conflict (2), as well as the object of the conflict (3), should be juxtaposed. Among the three parameters indicated, only the first, the source of the conflict, is beyond doubt. Criminal law is a system of reactions and sanctions of public authorities to the violations of legal norms (sanctioned norms). Therefore, one can simplify that the source of this relevant conflict is an offense. Hence, the other two issues are no longer unambiguous, and their determination is closely correlated to the model of the criminal trial adopted in a given legal order, especially in the context of the model of criminal prosecution. Among the elements determining such a model are the issues of the stage of the proceedings, the role of the pre-trial stage, the legal position of its parties, the status of the aggrieved party, as well as the application of the principle of adversarial and inquisition and their mutual relations, come to the fore. Fundamentally, it is also necessary to determine whether a given type of prosecution is based on legalism or opportunism. On the other hand, it must be added that in the contex of the analysis of mediation against the background of CRT, the initial issue to be established is whether the profile of a given system constructs a retributive or restorative type of justice.

General theoretic and methodological remarks devoted to mediation will be presented on the example of the Polish legal system.[7] At

[6] J. Burton, *The theory of conflict resolution*, "Current Research on Peace and Violence" 1986, Vol. 9, No. 3, pp. 125–130. B. Blackwell, C. Cunningham, *Taking the Punishment Out of the Process: From Substantive Criminal Justice Through Procedural Justice*, "Law & Contemporary Problems" 2004, No. 59, pp. 68–69.

[7] On perceiving models of the criminal process, see: A. Eser, *The "adversarial" procedure: A model superior to other trial systems in international criminal justice? Reflexions of a judge*, Wienn 2008; H.L. Packer, *Two Models of the Criminal Process*, "University of Pennsylvania Law Review" 1964, No. 1; A. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, "Stanford Law Review", No. 26; M. Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, "Pennsylvania Law Review" 1973,

the same time, the model of the Polish criminal proceedings consists of two stages, with an extensive preparatory stage, in which the role of the party is *ex lege* played by the aggrieved person. Briefly describing the biding Polish model of the trial, it can be emphasised that criminal prosecution is predominantly inquisitorial (except for the very selective group of offenses prosecuted on private accusation), while the model of the proceedings is referred to as a mixed, namely the inquisitorial and accusatorial model. From the perspective of searching for the optimal formula for VOM, both in preparatory and judicial proceedings, the principle of *ex officio* prosecution must prevail. In preparatory proceedings, the main prosecutor is the public prosecutor, performing the functions of the body conducting or supervising the prosecution. On the other hand, at the jurisdictional stage, the public prosecutor obtains the status of a party to the proceedings by bringing and supporting the accusation (mostly in the form of an indictment) before the court. The feature that the burden of proof lies with the prosecutor is of decisive importance in the presented system. In turn, the initiative for evidence taking is vested both on the parties and the authorities of the trial (at the jurisdictional stage – on the court). In cases when the public prosecutor fails to comply with the performance of *onus probandi*, the court has to take evidence both in support of the accusation and in support of the defence, while the court is bound by the principle of veracity (must base its decisions on facts).[8] Hence, a feature of this system is the potential for a complete reduction of the adversarial principle. It must be borne in mind that in the inquisitorial system, with the prevalence of the principle of introducing to the criminal process and taking evidence *ex officio*, the *in dubio pro reo* principle may encourage the defendant to present a passive attitude, as long

No. 121, p. 506; M. Feeley, *Two Models of the Criminal Process: An Organizational Perspective*, "Law & Society Review" 1973, Vol. 7, No. 3, pp. 407–426; E.G. Luna, *The Models of Criminal Procedure*, "Buffalo Criminal Law Review" 1999, Vol. 2, No. 2, pp. 389–535, https://www.jstor.org/stable/10.1525/nclr.1999.2.2.389.

[8] Cf. J. Jonas-van Dijk, S. Zebel, J. Claessen, H. Nelen, *Victim–Offender Mediation and Reduced Reoffending: Gauging the Self-Selection Bias*, "Crime & Delinquency" 2020, Vol. 66, No. 6–7, pp. 949–972.

as the most advantageous strategy of defence might be just 'waiting for a final court decision *in meriti*'.

It must be emphasised that the Polish criminal trial model presupposes the existence of several consensual procedures based on negotiations (e.g. accused-prosecutor negotiations APN).[9] Firstly, these types of negotiations are conducted between the accused and the prosecutor (public prosecutor). The aggrieved party is allowed only to object to the outcome of such negotiations and, accordingly, is not allowed to actively participate (although the condition for reaching an agreement within the framework of consensual procedures (APN) is to achieve the objectives of the criminal proceedings, among which the directive of including the legally protected interests of the victim remains). Secondly, Polish criminal law very narrowly defines the subject of the negotiations. It is only restricted to the sanctions – penalties and other penal measures, as well as the costs of the trial, can be negotiated. Moreover, the legislator does not provide the defendant with a concrete possibility of the preferential limitation of a statutory sanction, which is subject to negotiation. As a consequence, a juxtaposition of the sanction negotiated in comparison with the sanction that could be imposed after a full trial is difficult to estimate. It is therefore not clear that conviction without a trial or plea bargaining in Polish criminal law would, indeed, lead to a conviction on conditions preferential for the accused.[10] Otherwise, VOM may positively affect the judicial application of the law, as one such feature is the attitude of the offender after the crime has been committed and during the course of the proceedings. However, such a form of "bonus" for the perpetrator is not easy to estimate, as the Polish system does not provide a specific formula for shaping sanctions or rewarding the restitution attitude presented by the perpetrator.

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[9] In fact, when it comes to the theoretical approach to negotiations, two different concepts must be presented, namely behavioral and based on game theory.

[10] M.S. Umbreit, R.B. Coates, A.W. Roberts, *The impact of victim–offender mediation: A cross-national perspective*, "Conflict Resolution Quarterly" 2000, No. 17, pp. 215–229; M.S. Umbreit, R.B. Coates, B. Vos, *Victim–offender mediation: Three decades of practice and research*, "Conflict Resolution Quarterly" 2004, No. 22, pp. 279–303.

On the one hand, procedural negotiations require that the accused does not question the findings of facts made by the authority, which materialises in the premise of the application of these institutions (the circumstances of the act and the guilt of the perpetrator do not raise doubts). On the other hand, the consequence of trial negotiations is a conviction.

Meanwhile, if a full procedure (non-consensual) is applied, due to the distribution of *onus probandi*, the accused may be looking for a benefit such as acquittal or discontinuance of the proceedings until the final conviction. Thus, it is clear that negotiations between the accused and the public prosecutor, only with passive participation – namely, with the acceptance of the victim who is excluded from the active phase of negotiations – cannot concern the basis of liability, i.e. the charges connected with the act committed by the accused and its legal qualification.

However, these negotiations cover the issue of principal punishment and penal measures (those must be imposed within the scope of the statutory frameworks provided by the Criminal Code, and the mere fact of negotiations does not authorise specific and preferential conditions for conviction). To conclude, let us emphasise that the condition of VOM is the acceptance of criminal liability by the accused and recognition of guilt, and the outcome of the negotiations may affect the amount of punishment and other penal measures, especially compensatory measures. It would seem, therefore, that from the described perspective, VOM could strengthen procedural negotiations between the prosecutor and the suspect or accused (APN) in the analysed system. *De lege lata*, however, these institutions are not simultaneously applied. It seems that the reason for this state of affairs is the insufficient involvement of victims in the prosecutorial negotiations (APN). Furthermore, the non-adversarial form of the Polish system could be seen as a reason for the rough cohabitation of VOM and prosecutorial negotiation (APN).[11]

[11] J. Shapland, A. Atkinson, H. Atkinson, J. Dignan, L. Edwards, J. Hibbert, A. Sorsby, *Does restorative justice affect reconviction? The fourth report from the evaluation of three schemes*, "Ministry of Justice Research Series" 2008, No. 10,

From the perspective of shaping mediation between the accused (offender) and the victim in the Polish criminal procedure, the two--stage nature of the proceedings also seems to be important. Nevertheless, the pre-trial (preparatory) stage has – one may say – 'full procedural value'. Its purpose is to collect evidence in a procedural manner, and from the moment when the charges are presented to the suspect, the latter is fully covered by the right to the defence guarantees. The final step of the preparatory proceedings is the preparation of the main complaint in a situation where sufficient evidence has been collected to bring and support the indictment before the court. As indicated earlier, in the preparatory stage, the aggrieved is guaranteed *ex lege* status of a party to the trial. It would seem, therefore, that it is the preparatory stage that provides optimal conditions for the implementation of VOM. Meanwhile, statistical data (which will be discussed later) allows us to draw the opposite conclusion that mediation is not really important in the Polish model of criminal prosecution. One could only speculate then that the accused, in principle (except for the institution of conditional discontinuance of criminal proceedings),[12] does not necessarily have to be interested in participating in the VOM in pre-trial proceedings. It could be that the condition for participation in VOM is 'culpability admission' by the defendant, since participation in VOM may 'prejudge' the conviction (in this sense – creates the basis for conviction or, eventually, the conditional discontinuance of the proceedings).

The above-mentioned elements of the Polish system allow for diagnosing that the practical marginalisation of VOM is caused by the so-called 'systemic' limitations, especially: the legalistically and inquisitorially oriented criminal prosecution, the lack of benefits for perpetrators who have decided to participate in VOM or, more generally, in procedural negotiations – and prosecutorial

available at: https://restorativejustice.org.uk/sites/default/files/resources/files / Does%20restorative%20justice%20affect%20reconviction.pdf.

[12] The institution of conditional discontinuation of criminal proceedings with its probative feature includes a specific ground for VOM – see: Article 341 of Polish CCP.

negotiation – as well as the non-adversarial nature of the given system with the prevalence of the principle of acting *ex officio*.

In contrast, it can be pointed out that in common law systems (especially in the US) and those continental systems in which the adversarial principle prevails (Italy)[13] or criminal prosecution is based on the principle of opportunism (France), the practical potential of mediation (VOM) is much greater.[14] Even omitting the social context and another axiological basis for the idea of restitutive justice, those systems in which there are no extensive and formalised preparatory proceedings and procedural negotiations (offender--prosecutor) and assume a wide field of benefits for the accused, as well as activation of victims (who, if they do not decide to participate in VOM at the pre-trial stage, can be completely excluded),[15] has great potential. Regardless of whether VOM is also a condition for a prosecutorial negotiation or remains optional (but may affect the specific benefits for the accused), it is in the interest of the accused to initiate mediation. Of course, this pragmatic factor does not

[13] See: M. Panzavolta, *Of hearsay and beyond: Is the Italian criminal justice system an adversarial system?*, "International Journal of Human Rights" 2016, Vol. 20, Issue 5, pp. 617–633, available at: https://doi.org/10.1080/13642987.2016.1162409; J.R. Spencer, *Adversarial vs inquisitorial systems: Is there still such a difference?*, "International Journal of Human Rights" 2016, Vol. 20, Issue 5, pp. 601–616, available at: https://doi.org/10.1080/13642987.2016.1162408; J.T. Ogg, *Adversary and Adversity: Converging adversarial and inquisitorial systems of justice – A case study of the Italian criminal trial reforms*, "International Journal of Comparative and Applied Criminal Justice" 2013, Vol. 37, Issue 1, pp. 31–61, https://doi.org/10.1080/01924036.2012.721199.

[14] See: M.S. Umbreit, R.B. Coates, A.W. Roberts, *The impact of victim–offender mediation: A cross-national perspective*, "Conflict Resolution Quarterly" 2000, No. 17, pp. 215–229; T. Hansen, M. Umbreit, *State of knowledge: Four decades of victim–offender mediation research and practice: The evidence*, "Conflict Resolution Quarterly" 2018, available at: https://experts.umn.edu/en/publications/state-of-knowledge-four-decades-of-victim-offender-mediation-rese; Y. Boriboonthana, S. Sangbuangamlum, *Effectiveness of the restorative justice process on crime victims and adult offenders in Thailand*, "Asian Journal of Criminology" 2013, No. 8, pp. 277–286; J. Bouffard, M. Cooper, K. Bergseth, *The effectiveness of various restorative justice interventions on recidivism outcomes among juvenile offenders*, "Youth Violence and Juvenile Justice" 2017, No. 15, pp. 465–480.

[15] See: P. Rock, *Victims, Prosecutors and the State in Nineteenth Century England and Wales*, "Criminal Justice" 2004, Vol. 4, No. 4, pp. 331–354.

exclude the axiological underpinning of the mediation process both in the resocialisation and restitution dimension, i.e. mutual benefits for the accused and the aggrieved party, as well as the community to which they belong. However, it seems that without a systemic solution under which a "good attitude" measurably affects the legal situation, it is difficult to rely only on the good intentions of the participants in the proceedings.

The perception of VOM as an instrument of restitutive nature also requires a few general remarks on the two formation paradigms of criminal liability systems, or more precisely the retributive and restorative paradigms.[16] The above-mentioned concepts define models of criminal trials, which in a certain simplification can be described concerning three dimensions: in the context of legalism/opportunism; the acceptable level of prosecutorial negotiations and their impact on the outcome of the proceedings; in the context of the inquisitorial/adversarial approach (which also coincides with the degree of 'dispositiveness' (area and power of competencies) of the parties in the proceedings and the privatisation of the process). Both paradigms are deeply rooted in the axiological context and, as a consequence, create a basis for shaping the reaction to the crime. Albeit, both theories also have their purely procedural dimension, which can be described primarily in the context of the legal position of the participants in the proceedings: the accused, the aggrieved party and the procedural authorities. The procedural dimension of retributivism and restorativism does not coincide unequivocally with the three procedural elements used above, which are distinguished as a key to decoding the position of VOM in the legal system.

[16] M.S. Umbreit, *The Handbook of Victim–Offender Mediation: An Essential Guide to Practice and Research* XXVII (1st edition – 2001); D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society*, Oxford 2001; H. Zehr, *The little book of restorative justice: Revised and updated*, New York 2015.

2.3. Retributivism v. restorativism. Foundations and philosophical aspects. Compatibility approach

Retributivism and restitution have very strong philosophical dimensions. Thus, in the case of both, axiological references can be found in Christianity. Retributivism could be seen as a traditional penal reaction to a crime that perceives the state as the primary offended party or a victim of the criminal offense and places those harmed by the offense, and the community, in passive or subsidiary roles (as a witness or juror). The central reasoning for this concept is that the offender should be punished because they deserve to be punished for choosing to violate an official rule of behaviour. Punishing the offender because they need to be rehabilitated or because the offender can serve as an example to instruct others involves using the offender for some purpose.

In turn, a philosophical approach to retributivism and retributive punishment is based on human autonomy and respect for an individual as a rational actor obligated to conform to the law.[17] Following the classic impact of Kant's conception, one could state that "The right of administering punishment is the right of the sovereign as the supreme power to inflict pain upon a subject on account of a crime committed by him." What must be stressed is, Catholic Church doctrine could be observed, on the one hand, as a basis for retributivism and, on the other hand, for restorativism. Pope Pius XII claimed retributivism by confirming the vision of Kant and Hegel: the view that the offender has chosen punishment by the free act of violating a penal prohibition. He observed that: "In this case, it is reserved for the public power to deprive the condemned person of the enjoyment of life, in expiation of his crime, when by his crime, he[18] has already dispossessed himself of the right to live."[19] In the

[17] I. Kant, *The philosophy of law. An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*, 2010.

[18] U.S. Catholic Bishops, Responsibility, Rehabilitation and Restoration: A Catholic Perspective on Crime and Criminal Justice, United States Catholic Conference, 2000.

[19] Pope Pius XII, *International Penal Law*, supra note 73 at 117; H. Hart, *The Aims of the Criminal Law*, "Law & Contemporary Problems" 1958, No. 23, pp. 401

vision of Pope Pius XII, equitable (just) criminal punishment must be retribution for the evil done. Such views accept severe and even draconian punishment, including the death penalty.

The restoration trend is interpreted differently. The latter assumes that all the parties come together to collectively resolve how to deal with the aftermath of the offense and its implications for their future. Looking for Christian values on which restorative justice is constructed, one should recall Pope John Paul II's endorsement of restorative justice: "[w]hat Christ is looking for is trusting acceptance, an attitude which opens the mind to generous decisions aimed at rectifying the evil that was done and fostering what is good." While retributivism explains the reasoning for criminal punishment by the concept of the free will of human beings, restorative justice promotes basic Christian values of justice and forgiveness beyond that which occurs in the simple operation of the penal law system and also reflects on values and traditions. Faith calls us to hold people accountable, to forgive and to heal. Focusing primarily on the legal infraction without a recognition of the human damage does not advance our values. Based on retributivism, the individual remains isolated, and the just punishment is to be, on the one hand, adequate retribution, proportionate to the fault and implementing the directive of individual prevention. On the other hand, though, it is to be a deterrent to the public interest and, as such, a warning that shall act as general prevention. In the case of restorative justice, the relationship between the individual (perpetrator) and society (community) dominates over the isolated perception of the perpetrator. The dominant function of criminal responsibility is to compensate for the harm caused by the perpetrator to the community, especially to the victims, and, as a result of these actions, to restore the accused to the community. Retributivism, therefore, has a very strong rehabilitation dimension. Apparently, a distinction is drawn between the retributive criminal justice system and the restorative justice system based on its goal. While the former

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et seq. "In traditional thought and speech, the ideas of crime and punishment have been inseparable, the consequences of a conviction for crime have been described as a matter of course as punishment."

focuses on 'justice' by punishing the criminal, the latter focuses on individuals and their healing.[20]

Describing the indicated two paradigms, one can observe that defendant-driven focus is typical for retributivism, and victim--driven focus is dominant for restorativism. Furthermore, restorative justice, by moving beyond the offender-driven focus, identifies three subjects: individual victims, victimised communities and offenders (but it must be added that VOM is an instrument where the community is not represented in direct form). Due to such an approach, crime is understood primarily as an infringement against people within communities. Those most directly affected by the crime are allowed to play an active role in restoring peace between the individuals and within communities. While retributivism emphasises the public-law dimension of criminal liability, restorativism can be seen as a step toward the privatisation of the trial. Within the latter, restoration of the emotional and material losses resulting from a crime is far more important than imposing ever-increasing levels of costly punishment on the offender. It is argued by scholars claiming for restorative justice that the debt owed by offenders is concrete. Rather than passively "taking their punishment", offenders are encouraged to actively restore losses, to the best possible degree, to the victims and communities.[21]

Looking for the most adequate conception for responding to the offense, a formula of cohabitation of restorativism and retributivism is to be taken. Retributive justice and restorative justice are two processes for dealing with crime, and each has distinctive features; however, it is argued that there is a firm basis for finding their

[20] M. Price, *Personalizing Crime: Mediation Produces Restorative Justice for Victims and Offenders*, "Dispute Resolution Magazine" 2000, No. 8–11.

[21] M.S. Umbreit, *The Handbook of Victim–Offender Mediation: An Essential Guide to Practice and Research* XXVII (1st edition 2001); D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society*, Oxford 2001; H. Zehr, *The little book of restorative justice: Revised and updated*, New York 2015; W. Bradshaw, D. Rosenberg, *Victim–offender mediation (VOM), family group conferencing, and/or peace-making circles, Restorative justice dialogue: The impact of mediation and conferencing on juvenile recidivism*, "Federal Probation" 2005, No. 69.

complementarity, since both have the same goal of justice for the offender, victim and community. Restorative justice operating alone is inadequate because of the lack of participation by the state, nor is there sufficient regard for the harm to the social order caused by the crime. The hypothesis adopted in this research is that restorative justice and the accountability required by retributive justice are not mutually exclusive as long as the punishment is humane and rehabilitative. While it may be argued that the punishment should precede the restorative justice process, it seems necessary for the sentencing authority to be able to take account of the results of the restorative justice process when determining the culpability and nature of the censure. The acceptance of responsibility, restitution and reparation, as well as the authentic asking of forgiveness, are relevant to the determination of an appropriate sentence or punishment.[22]

Apparently, among the many problems connected with the relations between retributivism and restorativism, one must bear in mind that the issue of the extent of *ratione materiae* for restorativism persists. There has been an ongoing debate about whether restorative justice mechanisms, including VOM, can be used in severe violent crime cases.[23] So far, both these practices have been used to predominantly address non-violent property crimes and perhaps even minor assaults. Due to the examination of VOM through different legal systems, one must observe that mediation is typically used as a 'front-end' diversionary option, reserved primarily for 'lightweight' cases.[24] On the contrary, various studies and cases present empirical evidence which suggests that many principles of restorative justice

[22] D.H.J. Hermann, *Restorative Justice and Retributive Justice and Retributive Justice: An Opportunity for Cooperation or an Occasion for Conflict in the Search for Justice*, 2017.

[23] Compare: J. Jonas, S. Zebel, J. Claessen, H. Nelen, *Victim–Offender Mediation and Reduced Reoffending: Gauging the Self-Selection Bias*, "Crime & Delinquency" 2019, No. 6–7, pp. 963 *et seq.*, DOI: 10.1177/0011128719854348.

[24] W. Bradshaw, D. Rosenberg, *Victim–offender mediation (VOM), family group conferencing, and/or peace-making circles, Restorative justice dialogue: The impact of mediation and conferencing on juvenile recidivism*, "Federal Probation" 2005, No. 69.

can be applied in crimes of severe violence, including murder.[25] In the Polish legal system, as will be stated, VOM is implemented in a broad dimension.

2.4. Methodological approach to VOM and its essence – dogmatic aspects

The deeper roots of VOM are believed to be associated with the traditions of numerous indigenous peoples on many continents who have long held the view that criminal offenses represent a tear in the social fabric which must be healed, and face-to-face conversations between victims and offenders could prove very helpful in this.[26] Regardless of the general theoretical basis, mediation must be embedded in a strictly dogmatic reality. On their basis, it is necessary to present the essence of VOM, outline various typologies and divisions regarding mediation and approach mediation and semi-mediation as a formula of 'negotiated justice'.

Meanwhile, the significance of mediation exceeds the field of criminal law (VOM or prosecutorial negotiations), as the former is being used in an increasing number of conflict situations, i.e. in private and administrative, law the parties are called "disputants".

The practice of victim–offender mediation first began in the Ontario province of Canada. This experiment in Elmira, Ontario, in May 1974 is the earliest example of restorative reform in the justice system.[27] Although many other types of mediation are largely settlement-driven, one could argue that victim–offender mediation

[25] M.S. Umbreit *et al., Victims of Severe Violence Meet the Offender: Restorative Justice Through Dialogue*, "International Review of Victimology" 1999, No. 6, pp. 321, 323; M. Armour, M.S. Umbreit, *Violence, Restorative Justice and Forgiveness. Dyadic Forgiveness and Energy Shifts in Restorative Justice Dialogue*, London and Philadelphia 2018, pp. 18 ff.; E.L. Worthington, *Forgiving and Reconciling: Bridges to Wholeness and Hope*, Downers Grove 2003, pp. 7–23.

[26] J.R. Gehm, *Victim–Offender Mediation Programs: An Exploration of Practice and Theoretical Frameworks*, "Western Criminal Review" 1988, No. 1, http://westerncriminology.org/documents/WCR/v01n1/Gehm/gehm.html.

[27] M.S. Umbreit, *The Handbook of Victim–Offender Mediation: An Essential Guide to Practice and Research*, 2001, *passim*.

(VOM) should be primarily dialogue-driven, especially when it comes to shaping mediation as a restorative justice formula. From this point of view, VOM attempts should provide victims with the best opportunity to confront their offender, have their questions answered, participate in the criminal justice process, be empowered through participation in developing a restitution agreement and forgive. On the other hand, VOM allows offenders the opportunity to acknowledge their wrongdoing and experience sincere remorse with the crucial aim of bringing personal healing to the victims. Additionally, it assists in the offender's rehabilitation, changes the way victims view the offender and contributes to their spiritual well--being.[28] While defining VOM, we must emphasise that it provides interested victims with an opportunity to meet their offenders in a safe and structured setting. The goal is to hold offenders directly accountable, while providing important support and assistance to victims. With the assistance of trained mediators, the victims may let the offenders know how the crime affected them, receive answers to their questions and be directly involved in developing a restitution plan that holds the offenders financially accountable for the losses they caused. The offenders are directly responsible for their behaviour. Therefore, they must learn the full impact of their wrongdoing and develop a plan for making amends, to the best degree possible, to the persons they violated. More recently, a "humanistic victim–offender mediation" approach has been proposed, which re-focuses the goal of VOM to be healing through dialogue rather than arriving at a restitution agreement.[29]

At the same time, the starting point is the perception of VOM as a legal institution in criminal law. In this respect, not only the normative context (denotation indicating the objective and temporal scope) is important but also its very name (connotative aspect) is important. VOM means Victim–Offender Mediation, and this very name emphasises the substantive meaning of the terms: 'Victim' and

[28] R.A. Rossi, *Post-Sentence Victim–Offender Mediation in Capital Cases*, "Pepperdine Dispute Resolution Law Journal" 2008, No. 9, pp. 185, 195.

[29] R.A. Rossi, *Post-Sentence Victim–Offender Mediation in Capital Cases*, "Pepperdine Dispute Resolution Law Journal" 2008, No. 9, pp. 185, 195.

'Offender'. In the procedural context, these entities can be defined as the aggrieved person and the accused (defendant).

Meanwhile, in the case of mediation in criminal law, dialogue is conducted between the (real) victim and the (real) perpetrator; consequently, the assumption is made that for starting mediation, the facts must be established. Implicitly, mediation does not concern the issue of facts (these must be reproduced following objective truth) but the issues of legal consequences linked with the situation of victim and perpetrator. Particularly significant is the use of the name 'offender' and not 'defendant', as the former somehow confirms the lack of formal presumption of innocence functioning within the framework of VOM. Before the offender takes part in the mediation, his culpability and crime's commission must be accepted. What shall be emphasised in the discussion on VOM is that one party has committed a criminal offense and has admitted doing so, whereas the other has been victimised. As stated before, the issue of culpability or innocence is not mediated (nor is there an expectation that victims of a crime compromise what they need to restore their losses). In addition, negotiations within VOM, alongside prosecutorial negotiations, can be seen as part of the broader concept of 'negotiated justice', which means negotiation by the participants to criminal proceedings during the trial in the form of conventional and consensual legal actions.[30] At the same time, VOM is most often not seen as part of the criminal trial but as legal activities outside of it.[31]

As part of general analyses dedicated to mediation as a legal institution, importantly analyses not only limited to criminal law, several typologies and divisions allow for organising this institution. Generally, the types of mediation used (in a broader sense, namely not limited to VOM) are so-called diversion-mediation (diversion from prosecution before the court) and (adjudication)

[30] B. Janusz-Pohl, *Definitions and typologies of acts in legal acts in criminal proceedings. Perspective of conventionalisation and formalisation*, Poznań 2017.

[31] See: *Criminal plea bargains in the English and the Polish administration of justice systems in the context of the fair trial guarantees*, C. Kulesza (ed.), Białystok 2011.

post-adjudication mediation. The first type of mediation occurs before the court decision, mostly during the pre-trial stage or early phase of the court stage. In this type, mediation could be seen as a diversion from prosecution, assuming the mediation agreement is completed. In case of adjudication (post-adjudication) types of mediation, cases are referred primarily after a formal admission of guilt has been accepted (sometimes by the court, with the mediation being a condition of probation and if the victim is also interested at the post-adjudication level).

Another typology distinguishes direct mediation, indirect mediation and semi-mediation. Direct mediation consists of a face-to-face conversation between the victim and offender in the presence of a trained mediator. Moreover, the effect of mediation could be a written agreement if the disputants decide to enter into it. In addition to direct mediation, other indirect forms of communication are also applied in VOM.[32] Indirect forms may consist of letter exchanges, enabling victims and offenders to present their questions and answers in written forms. In such a situation, it is a mediator who delivers statements of will and other acts of communication to the corresponding party. Another indirect formula of mediation concerns the so-called 'shuttle mediation', in which the mediator orally communicates the messages from one party to the other.[33] Both indirect options of mediation enable the victim and the offender to communicate, without having to meet each other. The third formula, so-called semi-mediation,[34] is fundamentally different from (in)direct forms of mediation. The essence of semi-mediation is that there is no communication between the victim

[32] J. Bouffard, M. Cooper, K. Bergseth, *The effectiveness of various restorative justice interventions on recidivism outcomes among juvenile offenders*, "Youth Violence and Juvenile Justice" 2017, No. 15, pp. 465–480.

[33] L.W. Sherman, H. Strang, C. Angel, D. Woods, G.C. Barnes, S. Bennett, N. Inkpen, *Effects of face-to-face restorative justice on victims of crime in four randomized, controlled trials*, "Journal of Experimental Criminology" 2005, No. 1, pp. 367–395.

[34] See: J. Jonas-van Dijk, S. Zebel, J. Claessen, H. Nelen, *Victim–Offender Mediation and Reduced Reoffending: Gauging the Self-Selection Bias*, "Crime & Delinquency" 2020, Vol. 66, No. 6–7, pp. 949–972.

and offender, and therefore the relationship and inflicted harm between these parties could not be restored or resolved directly (indirectly) by the parties themselves.[35] In semi-mediation, the defendant holds a conversation with the public prosecutor (with the mediator being present) to conclude an agreement (instead of the situation where the defendant passively accepts the punishment proposed by the prosecutor).

At the same time, semi-mediation might entail a victim-oriented conversation between the prosecutor and defendant (although it misses the restoration of and contact between the victim and offender, which is one of the core elements of mediation and restorative justice).

Based on the criterium of 'conclusivity', one could denominate settlement (agreement) -driven mediation and discussion-drive mediation. When discussing the former, the focus is put predominantly on the defendant. Such type of mediation is characterised as a moderate restorative impact formula in which the following elements could be observed: a) its prime outcome is a focus on financial restitution to be paid, b) the nonflexible formula of the mediation procedure prevails, c) direct offender–victim (V–O) communication is not accepted, d) low tolerance of moments of silence during V–O communication, e) mediation is mostly settlement--driven, f) the time for mediation is relatively short. On the contrary, dialogue-driven mediation is focused on the victim, with a full restorative impact, and presents the opportunity for confrontation between the offender and victim, with the latter's right to express the full impact of the crime upon their lives. The above elements could be indicated as predominant in this type of mediation, namely: a) restitution is important but secondary, b) the procedure of mediation is flexible (this means that unformalised appointments of participants are accepted), c) the procedure of mediation could be divided into sections: first – a separate meeting with victims, and second – meeting of mediator and offenders then mixed meeting in the formula: victim–offender–mediator), d) the model of mediation is humanistic and transforming, e) high tolerance for disputant's

[35] J. Jonas-van Dijk, S. Zebel, J. Claessen, H. Nelen, *loc. cit.*

freedom of expression is accepted, f) mediation operates on an open formula during dialogue-driven sessions. Certainly, both models could be mixed by exposing different accents and shades as a version of the mixed model, with the offender-driven aspect or victim--driven aspect being dominant.

2.5. Place of mediation in the penal system

Generally, scholars argue that offenders participating in restorative justice conferences have a lower risk of reoffending, but it must be stressed that conferences differ from VOM in terms of inclusivity.[36] Within conferencing, the victim, offender and others from their community participate in the dialogue and are actively involved to agree upon ways to repair the harm caused and prevent future harm. In VOM, this dialogue and deliberations about reparation and prevention are confined to the victim and offender, without the community being present. If it turns out that using restorative justice does not decrease recidivism rates, governments might decide not to use it as a response to a crime within the criminal justice system but as a complement to it. However, important to note is that reducing reoffending is not the aim of restorative justice but an additional positive outcome. Very interesting research was conducted, by J. Jonas-van Dijk, S. Zebel, J. Claessen, H. Nelen, in *Victim–Offender Mediation and Reduced Reoffending: Gauging the Self-Selection Bias*.[37] In this study, the authors aimed at involving a valid control group to rule out the alternative explanation that self--selection biases underlie the reduced rates of reoffending observed after participation in VOM. Four different groups of offenders for this purpose have been distinguished. The first group consists of offenders who participated in direct or indirect forms of VOM (mediation group). The second group gathered offenders who participated in semi-mediation (semi-mediation group). Offenders who were not willing to participate in VOM, and therefore had

[36] *Ibidem*, pp. 949–972.
[37] *Ibidem*.

their case dealt with by a criminal prosecutor or through a court hearing, formed the third group (court group). The last group consisted of offenders who were willing to participate in VOM but for whom VOM did not take place, because the other party declined it (control group) and whose case was thus dealt with in the same way as the court group. As one of the conclusions of the research, the authors acknowledged a lower risk of reoffending for the (semi-) mediation group compared to the control group (this would point in the direction of a positive effect of the mediation process itself on reoffending, as the offenders in these three groups were all willing to participate and were therefore likely to be similar in terms of pre-existing factors that promote participation). In the given research, 1,314 criminal cases in which mediation was offered between 2000 and 2010 were analysed.

2.6. VOM – Polish perspective

In the Polish legal system, mediation is very well implemented when it comes to normative aspects, but its functioning in practice is doubtful. One can state that the significance of mediation in Poland is very limited.[38] Examining the available statistical data on mediation in criminal cases,[39] we could observe a decreasing trend. In 2017, there were 4,364 cases of mediation in District Courts[40] registered in the MED system, in 2018 – 3,973 cases, in 2019 – 4,272 cases, in 2020 – 3,443 cases. Unsurprisingly, even further interpretation could be achieved when detailed data is examined. Thus, in 2017, 4,079 cases were finally referred to mediation by the decision of the authority, and among the cases referred to mediation, 2,569 ended the settlement, and 1,252 were registered as no-settlement mediation cases. In other cases, the proceedings ended differently

[38] Data available at: Baza statystyczna/(ms.gov.pl) (accessed on: 1.08.2022).

[39] Data collected in MED System.

[40] As Article 24 paragraph 1 of CCP states: "A district court shall adjudicate all cases in the first instance except for those referred under the Act to the jurisdiction of another court".

(i.e. in discontinuation of prosecution). At a similar level, procedural tendencies were formed in the following years. In 2018, there were 3,829 cases referred under the decision of the authority to mediation proceedings. In cases referred to mediation, settlements were concluded in 2,331 cases, and without settlement, the mediation procedure ended in 1,272 cases. In the remaining cases, the proceedings ended with a different conclusion. In the following year 2019, 3,936 criminal cases were referred to mediation proceedings under the decision of the authority. Among the cases referred to mediation, settlement was concluded in 2,430 cases, and without a settlement, the mediation proceedings ended in 1,224 cases. In the remaining cases, the proceedings ended with a different conclusion. In 2020, 3,010 cases belonging to district courts were finally qualified for mediation proceedings. Among the cases referred for mediation in 1916, a settlement was reached, and 901 cases of mediation proceedings ended without a settlement. In the remaining cases, the proceedings ended with a different conclusion. As a rule, between 2017 and 2020, i.e. in the four-year time interval, the total number of cases in which mediation was carried out decreased by more than 1/4, which also proportionally reduced the number of cases in which mediation ended in a settlement, but the efficiency ratio in the case of concluded settlements decreased even more significantly. This data should be supplemented by statistics on mediation proceedings in criminal matters falling within the jurisdiction of the regional courts.[41] Let us add that in the system in force in Poland, there

[41] CCP Article 25 paragraph 1: "A regional court shall adjudicate in the first instance the following criminal offences: 1) felonies defined in the Criminal Code and special acts; 2) misdemeanors specified in Chapters XVI and XVII, and Articles 140 to 142; Articles 148 paragraph 4; Articles 149, 150 paragraph 1; Articles 151 to 154, 158 paragraph 3; Article 163 paragraphs 3 and 4; Article 165 paragraphs 1, 3 and 4; Articles 166 paragraph 1; Article 173 paragraphs 3 and 4; Article 185 paragraph 2; Article 189a paragraph 2; Article 210 paragraph 2; Articles 211a, 252 paragraph 3; Articles 258 paragraphs 1 to 3; Article 265 paragraphs 1 and 2; Articles 269, 278 paragraphs 1 and 2 in conjunction with Article 294; Article 284 paragraphs 1 and 2 in conjunction with Article 294; Article 286 paragraph 1 in conjunction with Article 294; Article 287 paragraph 1 in conjunction with Article 294; Article 296 paragraph 3 and Article 299 of the Criminal Code; 3) misdemeanors which, under a specific provision, lie within

are no subject restrictions on the admissibility of referring certain types of cases to mediation proceedings. Mediation is therefore full and not limited to a strictly designated category of cases. Therefore, mediation can also be carried out in the most serious cases. Analysing the data contained in the MED System, it can be seen that in 2017, 34 mediation cases were disclosed in the Regional Courts, in 2018 – 39, in 2019 – 57, and in 2020 – 61. Analysing the detailed data, it can be seen that in 2017, 22 cases were effectively referred to mediation proceedings under the decision of the authority, 14 settlements were concluded, and in 5 cases, the mediation procedure ended without conclusions. Accordingly, in 2018, under the decision of the authority, 22 cases were referred to mediation proceedings, 14 ended with the conclusion of a settlement, and in 5, no settlement was reached. On the other hand, in 2019, 40 cases were referred to mediation proceedings under the authority's decision, in which 23 settlements were concluded, and in 15 cases, no settlements were concluded. In 2020, mediation was carried out in 33 cases, with 21 settlements and no settlements in 10 cases. To interpret statistical data,[42] it should be added that general data on cases in court proceedings in 2017–2021. Accordingly, in the given period 1,603,877 cases were adjudicated by district courts (*sądy rejonowe*) and regional courts (*sądy okręgowe*) in the first instance. District courts concluded 306,710 cases in 2017, in 2018 – 319,480 cases, in 2019 – 328,076 cases, in 2020 – 283,739 cases, in 2021 – 324,967 cases, amounting to 1,562,973 cases adjudicated by the district courts in the given period. Additionally, regional courts concluded 8,489 cases in 2017, 8,272 cases in 2018, 8,462 cases in 2019, 6,930 cases in 2020, and 8,751 cases in 2021, amounting to 40,904 cases adjudicated by regional courts in the first instance in the indicated period. Bearing in mind that the average number of cases adjudicated in the first

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the jurisdiction of the regional court (paragraph 2). Upon a motion of a district court, an appellate court may refer a criminal case for examination to a regional court as the first instance court due to a particular significance or complexity of the case paragraph 3. A regional court shall also examine appeal measures against first instance rulings and orders issued in a district court, as well as other cases referred to it under the Act."

[42] Data available at: Baza statystyczna/(ms.gov.pl) (accessed on: 1.08.2022).

instance by district and regional courts per year is about 330,000 cases, this means that the VOM procedure concerns less than 1% of all cases adjudicated in the first instance and 0.25–0.5% in cases adjudicated in the first instance by regional courts.

At the same time, core regulations of mediation in Polish criminal law are impressive. On the one hand, mediation is regulated in detail, and on the other hand, a broad variant of mediation has been chosen. The mediation procedure is not formally part of the proceedings. It has an optional character, which results from the nature and essence of this procedure and the necessity of voluntary participation of the participants: the perpetrator and the victim. As indicated earlier, mediation in the Polish system is not limited to a specific group of cases or stages of the proceedings. According to the Article 23a of CCP,[43] the court or a court clerk, and in the investigation stage, the public prosecutor or another body conducting the investigation, may, upon the initiative or upon the consent of the accused and of the injured, refer the case to an institution or person authorised thereto in order to conduct mediation proceedings between the injured and the accused, of which they shall be advised, and such advice shall indicate the purposes and principles of the mediation proceedings, including the contents of Article 178a.[44] The decision on referring a case to VOM is therefore inclusively a matter for the authority, and a decision on refusal is not appealable. In accordance with Article 459(1) and (2) of the CCP, only those provisions which close the way to a judgment or if the law so provides are open to challenge. If the VOM application is not granted, and if both the offender and the victim express such a statement of will, they can independently use private mediation. This may be justified especially if the decision on refusal has been issued by the public prosecutor. In the situation outlined, the parties may submit an appropriate motion to the court.

The mediation procedure is temporally limited, but this deadline is indicative, and therefore exceeding it does not have any

[43] Act of 6 June 1997 – Code of Criminal Procedure, official consolidated version Polish Journal of Laws of 2022, item 1375; hereinafter: CCP.

[44] Article 178a of CCP creates a questioning the mediator as a witness.

detrimental effects on the course of the proceedings. The mediation proceedings shall last no longer than one month, and their duration shall not be included in the duration of the investigation. The short deadline for mediation proceedings is certainly one of the elements that allow for characterising mediation proceedings in criminal cases on the basis of the Polish system as offender-driven more than victim-driven. Temporal limitations for mediation proceedings also correlate with the inquisitorial aspect of the Polish model of proceedings in criminal cases discussed at the beginning of this study. Mediation is formalised, and the dominant formula is direct mediation. The accused and the injured shall participate in the mediation proceedings on a voluntary basis. The consent to participate in the mediation proceedings shall be received by the body referring the case to mediation or the mediator after the said body advises the accused and the injured of the purposes and principles of mediation proceedings, as well as of the possibility of withdrawing consent until the mediation proceedings are ended.

Mediation proceedings are confidential and must meet the standard of objectivity expressed in the Act (Article 23a CCP): The mediation proceedings shall be conducted impartially and confidentially. This standard is, e.g., ensured by the proper formation of the mediation body – the mediator. Not only can this entity not be an active judge, public prosecutor, junior public prosecutor, as well as trainees in the foregoing professions, a lay judge, court clerk, judge assistant, assistant public prosecutor or an official of an institution authorised to prosecute crimes but they must meet certain statutory requirements and, in a specific proceeding, not be exempt as *actore inhabilis* or *actore suspectus* (as an entity related to the case or party to the proceedings). At the same time, however, the mediator shall have access to the case files to the extent necessary to conduct the mediation proceedings.

The formal aspect of the mediation procedure is enhanced by the fact that the mediator draws up, after conducting the mediation proceedings, a report on its outcomes. The report shall contain the settlement document (if concluded), signed by the accused, the injured and the mediator.

Although VOM can be carried out both in the preparatory and judicial stages, as the system in force in Poland has not introduced temporal exclusion clauses, the observation of the practice by Polish courts gives rise to the conclusion that most cases are referred to mediation by the court (specifically the President of the Court) before the commencement of jurisdictional proceedings. The Code of Criminal Procedure has created the possibility of referring cases to mediation, after a preliminary examination of the case brought by the prosecutor or the police, who has filed an indictment or a request for conditional discontinuance of the proceedings. As Article 339 paragraph 4 CCP states: the president of the court shall also commit the case to the session when there is a need to consider the possibility of transferring the case to mediation proceedings, and the provision of Article 23a shall apply accordingly.

Based on Article 23a paragraph 8 CCP, the Minister of Justice has been authorised to issue the executive provisions – regulation, the detailed procedure of mediation proceedings, the conditions to be met by the institutions and persons authorised to conduct such proceedings, how the foregoing are appointed and dismissed, the scope and conditions of their access to the case files and the form and scope of the report concerning the outcome of the mediation proceedings, with a view to the efficient conduct of the proceedings. As a consequence, the Ordinance of the Minister of Justice of 7 May 2015 on mediation proceedings in criminal matters was created.[45] The Ordinance specifies: 1) the detailed procedure for conducting the mediation; 2) the conditions to be met by the institutions and persons authorised to conduct the mediation; 3) the manner of appointing and dismissing institutions and persons authorised to conduct mediation; 4) the scope and conditions of making the case file available to institutions and persons authorised to conduct mediation; 5) the form and scope of the report on the results of the mediation.

From a typological point of view, it is worth noting that the regulation shapes the formalised mediation procedure, as mentioned above, all in the form of direct mediation. At the same time,

[45] Polish Journal of Laws of 2015, item 716.

in paragraph 15 of the Ordinance, grounds for indirect mediation (as a subsidiary formula) have been explicitly established. If it is not possible for the accused to meet the victim directly (with the victim referred to in paragraph 14 point 3), the mediator may conduct the mediation procedure indirectly, providing each of them with information, proposals and a position regarding the conclusion of the settlement and its content taken by the other participant.

In addition, an interesting basis for mediation at the post-jurisdictional stage is provided by Article 162 of the Polish Criminal Enforcement Code (PCEC). In the context of the rules on an order on conditional release, a regulation has been introduced. The latter impacts various interpretations, including those which allow for broad and somewhat autonomous use of mediation within the framework of enforcement proceedings (post-adjudicative mediation).

Thus, under Article 162 PCEC: "Paragraph 1. The penitentiary court hears a representative of the prison administration and a probation officer if he has applied for a conditional release and takes into account the settlement reached as a result of mediation. In the case of a person convicted of an offense referred to in Articles 197–203 of the Criminal Code, committed in connection with sexual preference disorders, the conditional release may not be granted without seeking the opinion of experts. Paragraph 2. The decision on conditional release may be appealed against. It shall be recognised within 14 days. Under the provision of Article 154 of the prosecutor's complaint regarding the granting of a break in serving a custodial sentence: 'Paragraph 1 shall apply *mutatis mutandis*'. Paragraph 3. A decision refusing to grant conditional release may also be appealed against by the director of the prison or the probation officer if they have applied for conditional release."

The key to the aforementioned interpretation is the expression "settlement reached as a result of mediation". Despite a certain doctrinal dispute on that point, such an approach makes it possible to infer that the 'settlement' may be concluded in the course of the mediation procedure so that it is not only a question of a prior 'settlement' preceding the criminal court's ruling on criminal liability and its relevance to the enforcement procedure. However, as indicated,

such an interpretation is rejected by some representatives of Polish legal thought, who consider that the enforcement procedure is based on the appropriately applied Article 23a of the CCP.

Article 162 of the Criminal Enforcement Code is indeed laconic. In my opinion, the space for the development of mediation and increasing the use of probation institutions in non-adversarial systems is the enforcement procedure. The question of guilt and perpetration is already then legally decided in the decision of the criminal court. Mediation, on the other hand, can contribute to the improvement of enforcement proceedings and perform a rehabilitation function for both the victim and the offender. As indicated at the beginning, system-wide reasons do not seem to support the institution of mediation in the Polish system. However, these restrictions do not apply after the decision has become final.

De lege ferenda, therefore, is postulated to establish a clear and consistent normative basis for the use of mediation in enforcement proceedings as an element of probation measures, or even to a broader extent. It should be noted that in the case of the implementation of the VOM procedure in the pre-judicative phase of the procedure, the results of this procedure do not guarantee concrete and measurable benefits for the accused. They may be relevant in the case of a group of criminals prosecuted upon the request of the victim. In these cases, a positive result of mediation, especially the settlement-driven formula, can lead to the withdrawal of the request of prosecution by the aggravated party. In principle, however, the results of the mediation procedure are only one of the circumstances taken into account by the court in the context of the adjudicative process. Under Article 53 paragraph 3 of the Criminal Code, the court shall take into account the positive results of mediation when determining the sentence. The wording of Article 60 paragraph 2 of the Criminal Code sounds more optimistic by stating that a positive result of mediation may even affect extraordinary mitigation of the sentence. According to Article 60(2)(1) and (2), extraordinary leniency may be applied when the injured party has reconciled with the offender, the damage has been repaired or the parties have agreed to compensate for the damage and when the offender has made efforts

to compensate for the damage. It should be emphasised, however, that these activities can be taken outside of VOM.[46]

The above normative description of mediation in the Polish system of criminal law allows us to characterise mediation as a complex institution with the following features: offender-driven rather than victim-driven; direct and indirect (within a limited framework); full as well as settlement and non-settlement-driven. The legal framework for mediation in the pre-adjudicative stage of the criminal trial is satisfactory and allows for wider use. The marginal practical significance of mediation – as indicated earlier – is rather related to issues of 'a systemic nature' connected with the given model of the criminal trial (non-adversarial model).

At the same time, development trends for mediation can be referred to as the increasing importance of VOM against the background of probation measures in enforcement proceedings. In this respect, however, some legislative amendments would be desirable. The question remains: Why do we need victim–offender mediation in criminal law? Whether the arguments for this institution are connected with the values (restoration toward the victim and community and reintegration of the perpetrator) or are rather based on an instrumental effect linked with pure benefits for the defendant? It seems that VOM in penal systems, where prosecutorial negotiations allow for a deep impact on the dimension of criminal responsibility, also has deeper significance for the community and even society. The Polish criminal system is on the opposite side. While the benefits for the defendant are not obvious, the axiological dimension of VOM must be enough, but it might be not enough. This might not be the case when it comes to the numbers, but one could believe that when it comes to the quality of VOM performed in Poland, the axiological grounds are strong. Unfortunately, when 'the numbers' have failed, regardless of the other aspects, an institution cannot be perceived as effective.

[46] A different situation arises only in the case of criminal offenses prosecuted in a private complaint procedure, where the principle of legality of prosecution is not applied, and the proceedings are adversarial. In the case of settlement-driven VOM, the proceedings are then discontinued.

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Chapter 3. Victim–Offender Mediation as a Form of Restorative Justice in the Hungarian Criminal Justice System

3.1. Introduction

Over the last few decades, restorative justice has been developing rapidly all over the world from both a theoretical and practical perspective. It has further evolved around the concept of victim–offender mediation both in legislation and the practice of many different criminal justice systems. In this way, mediation has also been introduced into Hungarian criminal law since 1 January 2007, and it can be applied in a procedure against juvenile delinquents as well. Furthermore, mediation has been available in the field of infraction law (administrative criminal law) since 1 January 2014. As victim–offender mediation has existed in Hungarian criminal law and administrative criminal law for a longer period, and considerable experience has been acquired in practice, the Hungarian lessons can be used in the legal regulation of other countries.

The study aims to prove the following hypothesis: Mediation and other forms of restorative justice as alternative and cost-effective responses can be used to reduce the burden of the criminal justice system by removing cases from it (effective forms of diversion and acceleration of the criminal procedure) and offer the communities useful means for resolving conflicts related to or caused by the crime (effecting forms of conflict management). These methods can reduce

recidivism and facilitate the reintegration of the offenders into the communities (effective forms of prevention).

To prove this hypothesis and to place mediation into the legal system, the first three parts of the study are devoted to the introduction of the criminal justice system of Hungary, including the role of the prosecutor and forms of diversion in Hungary, as well as the role of the victim in the criminal proceedings. In the next part, we try to answer the questions of how restorative justice can fit into the traditional criminal system and what is the relationship between restorative and retributive justice. The final part of the paper, without attempting to be comprehensive, aims to give an overview of the legal regulation of victim–offender mediation in Hungary, analysing, among other things, the way that mediation is implemented, the categories of crimes for which mediation may be applied and crimes that are usually avoided from the implementation of mediation and the legal consequences of successful mediation. In closing, we will examine whether the relevant statistical data supports the success of mediation in Hungary.

3.2. The criminal justice system of Hungary

Criminal justice systems can be classified in several ways. One of the most enduring is by reference to the distinction between 'adversarial' and 'inquisitorial' systems.[1] The adversarial system (also known as accusatorial procedure) was developed in common law countries where the court is an impartial referee between the prosecution and defence, and the purpose of the process is the discovery of the procedural (the 'formal') truth. The procedure usually starts upon the request of the victim,[2] the focus is on the judicial phase. and the procedure is based on the principle of verbality (verbal and public trial) and directness.[3]

[1] Duff, Hutton, 1999, p. 56.
[2] Sléder, 2010, p. 25.
[3] Bartkó, 2022, pp. 9–11.

The second, the inquisitorial system, is used in civil law countries where the procedure aims to establish the material (the 'objective') truth. The principle of officiality is applied in this system, the investigative phase is the dominant part of the procedure, and literacy[4] prevails rather than verbality. The current Hungarian system of criminal procedure belongs to a third system, the so-called 'continental mixed system', as it has the characteristics of both the adversarial and the inquisitorial procedure.

The inquisitorial features in Hungary are the following: the prevalence of the principles of officiality and legality, an emphasis on the investigation phase, and the purpose of the proceedings of discovering the procedural truth. The elements taken over from the adversarial system are the principles of verbality and directness, the contradictory nature of the trial, the principle of the division of procedural functions and the detailed regulation of the parties' rights.

From the point of view of our topic, the most important issues are the principle of officiality and the principle of legality. The first means that where a crime is being suspected, the competent authorities are obliged to initiate and carry out the procedure *ex officio*, without being bound by the consent of a third party. The principle of legality in this context focuses on the obligation: the public prosecutor is obliged to prosecute all the crimes he/she becomes familiar with. In Hungary, the basic principles of criminal procedure are legality and mandatory prosecution, namely – in principle – every person who commits a crime is brought before the court.[5] Nowadays, based on the new Criminal Procedure Code, the principle and practice of opportunity are significantly increasing, and the prosecutor has more and more discretionary power. The principle of opportunity can be considered as a possibility available to the prosecutor to not initiate or conduct criminal proceedings against the perpetrator even though the legal conditions for prosecution are fulfilled. The question must be asked: Why are prosecutorial

[4] The product of the investigation is a *dossier*, built up by the investigating judge, which is transmitted to the trial court. See Duff, Hutton, 1999, p. 57.

[5] Róth, 2008, p. 289.

discretion and opportunist institutions so important in the context of our topic? The answers and our statements are the following:

1) if the principle of legality is the general rule, and opportunistic considerations are the exception, the procedural situation of the victim is different from that in a system where the criminal procedure is based on opportunism;[6]
2) in Hungary, victim–offender mediation and several other legal institutions that contain restorative elements are closely linked to the discretionary powers of the prosecutor and different forms of diversion. Furthermore, the close link between the requirement to accelerate (speed up) the criminal proceedings and the need for victim reparation can also be identified.[7]

3.3. The role of the prosecutor and forms of diversion in Hungary

The Public Prosecution Service and the public prosecutor play a key role in the Hungarian criminal justice system. The prosecutor is the public accuser. His/her tasks are wide-ranging, both in the investigative and court phase. In Hungary, the investigation phase has three parts: the preliminary procedure (where the purpose is to determine whether an investigation can be ordered at all); the detection (its purpose is fact-finding and the gathering of evidence); the examination (after the first interrogation of the suspect, the investigation enters into the phase of examination).

During the examination phase, the prosecutor not only monitors the lawfulness of the process but can also order investigative measures to be executed by the investigative authorities. The prosecution phase is no longer in Hungary, so the prosecutor has the possibility – at the final stage of the examination – to decide how to continue the proceedings, taking into account the seriousness

[6] Kiss, 2018, p. 17.
[7] Vida, 2020, p. 8.

of the offense committed, circumstances of the commission of the crime and the personality of the offender.

At the end of the examination – if the investigation is not terminated – the prosecutor has several options. We now mention just two possible decisions:

(a) The 'traditional' way to deal with a criminal case, namely the prosecutor may file an indictment, and the case will be adjudicated at a formal trial. However, the 'obvious and strategic aim of the Prosecution Service is to complete cases as quickly as possible, and only serious, complicated and multi-party cases are to be brought to court.'[8] Based on this requirement, the other options:

(b) Applying the different forms of diversion, which, to a greater or lesser extent, contain a restorative element. These options are the following:

1. Admonition (reprimand): the mildest criminal measure which may also be applied by the prosecutor if the perpetrator's conduct is no longer dangerous for society or its dangerousness has become negligible. In assessing this condition, in addition to the lack of a criminal record and the minor gravity of the offence, it is of great importance as to whether the offender has compensated the victim or has otherwise made reparation. By admonition, the prosecutor expresses his disapproval and calls upon the perpetrator to avoid committing further crimes.
2. Conditional prosecutorial suspension of the procedure: the prosecutor may suspend the investigation for a specified time period if law-abiding behaviour can be reasonably expected from the suspect, which could lead to termination of the case. This form of diversion can only be applied in less serious cases, namely if the perpetrator committed a crime punishable by a maximum of 3 years (or, exceptionally, a maximum of 5 years) imprisonment. The prosecutor may prescribe rules of behaviour for the suspect, among others:

[8] http://ugyeszseg.hu/en/about-us/tasks/ (accessed on: 5.09.2022).

- to compensate the victim for the damage, loss of property or loss of tax revenue caused by the crime;
- to ensure the compensation of the victim in another way; or
- to make a financial contribution for a specific purpose or perform community service.

If the damage, loss of property, etc. can be quantified, the compensation is mandatory; namely, the prosecutor shall order the suspect the pay compensation, provided that the suspect can do so and the victim consents to this.

3. Agreement on a guilty plea and its consequences: the agreement between the prosecutor and the suspect includes the facts of the case and the legal classification of the crime; the guilty plea of the suspect and the sanction to be applied. The agreement may include other obligations undertaken by the offender. On this basis, the offender may undertake to satisfy the victim's civil claim or to compensate the victim for the damage, loss of property or loss of tax revenue caused by the crime.

   If an agreement has been concluded, and the offender has complied with the terms of the agreement, the prosecutor subsequently proposes to the court, in an indictment, to approve the plea bargain and to impose the agreed sanction on the accused.
4. Victim–offender mediation process.

As can be seen, the prosecutor has a decisive – almost exclusive – role in the use of restorative institutions. It should be emphasised that the mediation process was also possible in the court stage until 1 July 2018, but currently, only the prosecutor may decide to transfer the case to mediation at the investigative stage. The question is whether it was the right decision.

The main argument in favour of this decision is that the most important tasks of mediation, namely the agreement and reconciliation, can best be accomplished close to the time of the commission of the crime. Mediation should be conducted as early as possible in the proceedings in order to reduce the burden on the authorities and

to provide quick reparation for victims.[9] Furthermore, it is a fact that the number of mediation proceedings ordered by the court has always been extremely low in Hungary.

In contrast, in most European countries, mediation can be applied at any stage of the procedure. This is also in line with international trends, for example the relatively recent Recommendation of the Committee of Ministers concerning restorative justice in criminal matters (2018). According to section 18, "restorative justice should be a generally available service", which means that "restorative justice should be available at all stages of the criminal justice process" (section 19).[10] On the other hand, by limiting mediation to the investigative stage, we are losing the possibility of mediation in cases where a compromise between the victim and the offender is reached only after the indictment.

Consideration should also be given to the application of victim–offender mediation in the judicial phase of the criminal proceedings.

3.4. The role of the victim in the criminal procedure

Anna Kiss wrote about 15 years ago: "In criminal proceedings, the victim is an 'insignificant person': he or she has little or no opportunity to shape the course of the procedure or influence its outcome."[11] The victim has been called a 'stepchild of the criminal proceedings'[12], 'an unpleasant but necessary participant'[13] who usually appears as a witness. In recent decades, however, the victim has returned to the focus of the proceedings, and the need for fair treatment and compensation of the victims has become more and more pronounced in

[9] However, from a psychological point of view, it may be more appropriate not to conduct the mediation process shortly after the commission of the crime (especially in the case of more serious crimes or crimes against persons), as it is necessary to give the parties time to process the events, especially with possible traumatic experiences. See Szabó, 2022, p. 101.

[10] Barabás, 2020, p. 47.

[11] Kiss, 2006, p. 70.

[12] Békés, 2018, p. 115; Róth, 1990, pp. 49–51.

[13] Barabás, 2015, p. 5.

European and international legal instruments. In the following, we would like to demonstrate that the previously described situation has now also changed in Hungary, and the procedural role and protection of the victim have recently been significantly strengthened. To enable the victim to play an active role in criminal proceedings, the explicit and clear statement of the rights of the victim and the establishment of the procedural definition of the victim have played a major role in this process.[14]

Before the entry into force of the new CPC (2018), Council Framework Decision 2001/220/JHA[15] was the first legal act adopted by the European Union to lay down general provisions addressing victims of crime and their rights. This directly inspired the Hungarian legislator, since Act LI of 2006 made victim–offender mediation possible to comply with the obligations flowing from the Framework Decision. It is also worth mentioning that the Framework Decision explicitly regulates the right to compensation.[16] It should be emphasised that not only the civil claims in criminal proceedings (the so-called adhesive procedure) but also mediation and other measures that can be applied by the prosecutor are appropriate to ensure the right to compensation.[17]

A decade later, significant progress was achieved by adopting Directive 2012/29/EU[18] (the Victim's Right Directive), which established minimum standards on the rights, support and protection of victims of crime. Relevant to our topic, the Directive defines the concept of restorative justice[19] and lays down the conditions for its

[14] Békés, 2018, pp. 115–116.

[15] Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings (2001/220/JHA).

[16] See Article 9: "Each Member State shall ensure that victims of criminal acts are entitled to obtain a decision within reasonable time limits on compensation by the offender in the course of criminal proceedings (…)".

[17] See Róth, 2011, p. 164.

[18] Directive 2012/29/EU of the European Parliament and the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/JHA.

[19] Article 2 (1) d): "'restorative justice' means any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the

application. It also provides the victim's right to access restorative services[20] and the right to compensation within a reasonable time.[21] Important to note is that the EU norm establishes a link between the right to compensation and the requirement of timeliness;[22] in other words – as already mentioned – there is a close link between the requirement to accelerate criminal proceedings and the need for victim reparation/compensation.[23]

In 2015 (Act CLI of 2015), the Hungarian Parliament modified the CPC and related Acts in order to make the Hungarian legal system compatible with the Directive, and the necessary amendments have been incorporated into the new CPC.

One of the objectives of the new CPC was to further strengthen the protection of victims' interests and their procedural role.[24] As a result, the Preamble of the new Code explicitly states that special emphasis should be placed on the increased protection of victims and the enforcement of their rights, and the Explanation of the Code states that the "new Code places greater emphasis on the need to ensure that the victim fulfils an active and formative role in criminal proceedings.

To meet this requirement, like other participants, the CPC clearly and explicitly defines the procedural rights of the victim. This is very important, because the provisions concerning the victim were

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resolution of matters arising from the criminal offence through the help of an impartial third party."

[20] See Article 12 (1): "Member States (…) shall ensure that victims who choose to participate in restorative justice processes have access to safe and competent restorative justice services (…)."

[21] See Article 16 (1): "Member States shall ensure that, in the course of criminal proceedings, victims are entitled to obtain a decision on compensation by the offender within a reasonable time (…)."

[22] Vida, 2020, p. 8.

[23] Görgényi note that the Victim's Right Directive cannot be considered an adequate legal basis for restorative justice, and, therefore, a comprehensive EU directive and its linkage with other EU instruments is necessary. See Görgényi, 2022, p. 167.

[24] According to the Concepcion of the new CPC, "the fundamental interest of victims is to have an effective and speedy criminal procedure, which can provide a space for the resolution of tensions between the victim and the accused and ensure the maximum possible compensation for the damage caused by the crime."

previously placed in different parts of the CPC. Currently, the Code provides the definition of victim[25] and regulates all the rights of the victim in a separate chapter. The most important rights are the following:

1. The declaration of the victim: the victim has the right to declare at any time what physical or mental harm or what material damage he or she has suffered and whether he or she wishes the perpetrator to be found guilty and punished. The presentation of physical or psychological injuries can not only help the victim deal with the harm suffered but can also indirectly facilitate more efficient and faster proceedings.[26] The declaration[27] is an opportunity for victims to ensure that their interests are taken into account by the authorities so that they are seen not just as an accessory to the proceedings but as the person who has suffered harm.
2. Right to withdraw: the victim has the right to declare at any time that he or she no longer wishes to exercise his or her rights as a victim in the proceedings. The right to withdraw provides an opportunity to exercise the rights granted to the victim instead of forcibly enforcing them.[28]
3. Classic procedural rights: the victim (i) has the right to present evidence, make motions and observations and intervene in court proceedings during the speeches; (ii) can be present at the trial and the procedural actions provided by the law and ask questions; (3) has access to the file relating to the

[25] "The victim is a natural or non-natural person whose rights or legitimate interests have been directly affected or threatened by the crime." (See Article 50 of the CPC).

[26] Farkas, 2020, p. 65.

[27] The declaration was first used in Anglo-Saxon countries (Victim Personal Statement), which gives the victim the opportunity to declare how he or she has been affected by the crime, how he or she feels and what punishment he or she would consider acceptable. The purpose of the victim statement is to provide information that is taken into account by the judge when imposing the sentence and as a therapeutic tool to improve the victim's satisfaction with the criminal justice system. See Róth, 2011, p. 162.

[28] Farkas, 2020, p. 65.

crime concerning him or her; (4) has the right to the legal remedy provided by the law, etc.

4. The victim has the right to pursue a civil claim as a private party in court proceedings. It can be seen that the Code does not expressly declare the victim's right to compensation or reparation. This is problematic, because the right to a civil claim in criminal proceedings and the right to compensation or reparation is not the same. Nevertheless, some experts in Hungary list the right to reparation among the rights of victims.[29]

Consideration should be given to the inclusion of the declaration of the victim into the Criminal Procedure Code and to the explicit declaration of the victim's rights by the Code, including the right to compensation and the right to request reparation.[30]

3.5. The concept of restorative justice[31]

3.5.1. DEFINITIONS, ELEMENTS AND RANGES OF INTERPRETATION OF RESTORATIVE JUSTICE

The term 'restorative' itself means restoration of a broken order. American psychologist Albert Eglash is generally credited with first adopting the term 'restorative justice' in 1959.[32] Interpreted in the context of criminal justice, it denotes – in contrast to the previous retributive and preventive approach – a new trend that, by focusing on the role of the victim, aims to repair the damage caused to

[29] Kiss, 2018, p. 127.

[30] The right to request reparation means that the victim has the right to initiate victim–offender mediation and other procedures to obtain reparation.

[31] This sub-chapter was written by Prof. Judit Jacsó (University of Miskolc, Institute of Criminal Law and Criminal Sciences).

[32] https://www.britannica.com/topic/restorative-justice (accessed on: 6.09. 2022).

the victim and the victimised community and the reintegration of the offender.[33]

Willigenburg and Van der Borght pointed out that there is no fixed definition of restorative justice, but it contains at least the following characteristics:

- understands crimes not primarily as a violation of rules but as a violation against persons and human relations; crimes are regarded as conflicts that need to be given back to their rightful owners to resolve: offenders/victims and their communities;[34]
- gives primary attention to the needs of the injured persons involved: first the victim and the related community, and second the perpetrator and related community;
- based on values like non-domination, empowerment of victims, respectful listening, equal concern for all stakeholders and accountability;
- does not regard sentence and punishment as the crucial criteria to establish justice; instead, it aims at a constructive dialogue between victims, offenders and their communities, seeking to identify responsibilities and obligations, meet needs and promote healing and dignity.[35]

According to Gavrielides, restorative justice is 'an ethos with practical goals, among which is to restore the harm done by including all affected parties in a process of understanding through voluntary and honest dialogue and by adopting a fresh approach to conflicts and their control, retaining, at the same time, certain rehabilitative goals.'[36] It has been characterised as an "approach to problem solving that, in its various forms, involves the victim, the offender, their social networks, justice agencies and the

[33] Barabás, 2020, p. 40. A similar definition is used by Latimer et al.: "Restorative justice in the criminal justice system uses victim and offender dialogue to address the harm caused by a crime, as well as victims' experiences, interests and needs." See in Latimer, Dowden, Muise, 2005, pp. 127–144.

[34] See originally Christie, 1977, pp. 1–15.

[35] Van Willigenburg, Van der Borght, 2021, pp. 404–405.

[36] Gavrielides, 2006, p. 139.

community."[37] In the interpretation of the Council of Europe, 'restorative justice' refers to any process which enables those harmed by crime, and those responsible for that harm, if they freely consent, to participate actively in the resolution of matters arising from the offence, through the help of a trained and impartial third party (hereinafter the "facilitator").[38]

The above analysis shows that the concept of restorative justice is not uniform, but based on the common elements of the definitions, the following 'working concept' can be defined:

Restorative justice is a process that, focusing on the conflict and its resolution, is based on the active participation of the parties involved. Taking into account the interest of both the victim and the perpetrator, as well as the needs of the community, restorative justice focuses on the future rather than the past and gives priority to repairing the harm caused by the crime.[39]

The restorative justice process could be defined as any measure, procedure, programme, practice and initiative which aims to resolve the conflict between an offender of a crime and the victim by restoring the harm done and/or the relationship disturbed, within a voluntary and organised process – which can replace or complete the traditional criminal justice system – being based upon the interaction of the affected parties (the offender, the victim and, where appropriate, members of the community) and upon the

[37] United Nations Office on Drugs and Crime, *Handbook on Restorative Justice Programmes*, United Nations, New York 2006, p. 6.

[38] See the Recommendation of the Committee of Ministers concerning restorative justice in criminal matters (2018). Vígh enlists five characteristics of restorative justice: (i) evaluation appropriate to the objective situation of the crime (including damage and affront) has to be restored, (ii) the role of calling to account is to solve the conflict between the offender and victim and to restore the disrupted situation of the community, (iii) justice also aims to rehabilitate the offender and reintegrate him into the community, (iv) the sanction inflicted upon the offender is not a retribution of the crime that has been committed but rather a means of preventing further crimes in order to achieve an optimal social co-operation, (v) attempts to socialise justice are an important element (e.g. calling to account through the social court, disciplinary procedure at the workplace, through the mediation process). See Vígh, 1998, pp. 330–331.

[39] Szabó, 2022, p. 20.

understanding and the dialogue between them, generally with the help of an impartial third party/person that delivers, manages or/and facilitates the process.

Restorative justice may include one or more of the following forms: victim–offender mediation, community conferencing, restorative family group conferencing, etc. It may include, as part or as a result of the actual process, one or more of the following types: a dialogue between the victim and the offender, an agreement between them, a written apology, a community punishment/community service, restitutional work as a criminal measure, different forms of reparation/restitution, different forms of measures applied by the prosecutor and others.

Terms used in the context of restorative justice need to be distinguished, since confusion of definitions is sometimes to be found in legal literature.

1) Mediation, as the most important and widespread form of restorative justice, is a process whereby the parties involved in a dispute are able to resolve the conflict between them with the help of a mediator as an impartial outsider. Mediation is neither an administrative nor a judicial procedure; it does not provide justice but seeks to solve the problem between the parties. The mediator is not a law enforcer and has no right to decide; he/she is an expert who uses his/her expertise to help the parties identify and understand the conflict. The outcome of the mediation is, in an ideal case, the victim–offender agreement.[40]
2) The victim–offender agreement is an arrangement resulting from mediation, a 'contract' between the parties, by which the dispute is considered closed. It should be stressed, however, that the victim–offender agreement is not only an immanent element of mediation but can also be the result of other forms of restorative justice. The victim–offender agreement may involve several issues but always includes reparation.
3) Reparation is the content of the victim–offender agreement. Reparation is not an agreement but its content. Reparation

[40] Kiss, 2018, p. 95.

is not mediation but a fulfilment by the offender as a result of the mediation.[41] Note that reparation is not only the content of the victim–offender agreement. Reparation can be provided by the offender through the application of other procedures and sanctions which contain a restorative element, e.g. the conditional prosecutorial suspension of the procedure or the community service order.

3.5.2. RESTORATIVE JUSTICE VERSUS RETRIBUTIVE JUSTICE

Restorative justice is a term referring to a set of theories and practices that are critical of the existing criminal justice system and the retributivist philosophy.[42] Three conceptions of criminal justice have become common since the beginning of the 20th century:

- retributive justice, where imposing a retributive punishment proportional to the offence is seen as desirable (and so the injured party and the damage caused to him are irrelevant);
- preventive justice, which influences the future behaviour of the offender, i.e. attempting to prevent him from re-offending is considered to be the main goal of punishment;
- restorative justice, where compensating the victim for the damages and restoring the situation to the pre-crime conditions (and besides these, rehabilitating of the offender and involving the community) are considered to be the main tasks of justice.[43]

The following Table (3.1) made by Glicken[44] shows the main differences between retributive justice and restorative justice.

[41] *Ibidem*, p. 96.
[42] Willigenburg, Van der Borght, 2021, p. 404.
[43] Vígh, 1998, p. 328.
[44] Glicken, 2013, p. 7.

Table 3.1. Differences between retributive justice and restorative justice

	Retributive justice	Restorative justice
Definition of crime	Crime defined as violation against the state	Crime defined as violation against one person or a community
Focus of the process	Focus on establishing blame and guilt, backwards looking (did he/she do it?)	Focus on problem solving and obligations, forward looking (what should be done?)
Goal of the process	Imposition of pain to punish and deter/prevent	Restitution as a means of restoring both parties; goal is reconciliation/restoration
Participants of the process	Action directed from state to offender – victim ignored – offender passive	Victim and offender's roles recognized in problem/solution – victim rights/needs recognized – offender encourages to play active role, take responsibility
Offender accountability	Offender accountability defined as taking punishment	Offender accountability defined as understanding impact of action and working to make things right
Stigma of crime	Stigma of crime is permanent	Stigma of crime removable through restorative action
Involvement of additional parties	Dependence upon proxy professionals	Direct involvement by participants

Source: Glicken, 2013, p. 7.

Kerezsi, however, points out that both traditional (retributive) and restorative justice have the three "R" as their goals: rehabilitation, reparation and restoration.[45] Although restorative justice may

[45] Kerezsi, 2014, p. 93. She notes, at the same time, that the development process is going in two very opposing directions in traditional and restorative justice: while traditional justice shifted from the rehabilitation phase to the reparative phase, European restorative justice, rather than reaching the restorative phase, is content with that the enforcement of reparation and does not only serve the interests of the victim but those of the offender as well.

have several possible advantages over retributive justice, it cannot completely replace, and certainly does not need, the legal institutions of the traditional criminal justice system. Restorative justice and retributivism can work in parallel and complement each other effectively, because different social groups can be dealt with by different criminal law instruments. Moreover, the restorative justice approach and tools can serve as a catalyst for reform processes in criminal justice systems.[46]

3.6. Victim–offender mediation in Hungary

3.6.1. GENERAL QUESTIONS

Victim–offender mediation has been introduced into Hungarian criminal law as a double-faced legal institution since 1 January 2007, and it can be applied in a procedure against juvenile delinquents as well.

Ranges of interpretation of victim–offender mediation and its placements in the criminal justice system can be as follows:

- mediation is one of the most important forms and clearest expressions of restorative justice;
- a cost-effective form of diversion, namely a way to avoid criminal court proceedings, which can also reduce the burden of the criminal justice system and accelerate the criminal procedure;
- useful means for resolving conflicts related to or caused by the crime, which can also reduce recidivism and facilitate the reintegration of the offenders into the communities;
- a form of so-called community sanctions as an alternative to imprisonment.[47]

[46] Szabó quotes Kerezsi, who adds that restorative justice is appropriate when retributive justice is no longer applicable or when the application of retributive justice is not yet justified. Szabó, 2022, p. 84.

[47] See Appendix 2 to Recommendation Rec(2000) 22 of the Committee of Ministers to Member States on improving the implementation of the European rules on community sanctions and measures.

According to the CPC, the objectives of the mediation process are to reach a written agreement between the victim and the offender in order to:

(a) giving compensation for the consequences of the criminal offence;
(b) encourage the future law-abiding conduct of the offender;
(c) settle the conflict between the victim and the offender with the involvement of a person independent from the authority (the mediator).

The advantages of mediation can be summarised as follows:

1. Mediation is an effective tool to reduce the burden on criminal courts and is faster than traditional criminal procedures: the mediation process takes on average three months, and the criminal procedure can be completed within about three months after mediation. Conviction in a traditional criminal procedure is often unenforceable, and the injured party receive only a quarter of the damages. Mediation provides better compensation.
2. Mediation does not deal with the crime but with the conflict itself, and the suspect must personally take responsibility for his/her actions (the legal representative is only involved in reaching an agreement). The suspect may be affected by a personal encounter with the victim, which may give him or her a possibility to change. Mediation can make the suspect aware that his or her actions can affect personal destinies. The agreement may contain a sanction, but the mere fact that the accused must listen to the victim can be considered as a form of sanction.

The possible disadvantages:

– it suggests that a criminal sanction can be avoided in this way, and this may undermine the preventive role criminal law the credibility of normative expectations;
– the individual interests in compensation of the victim and effective general prevention may be in conflict;
– carries of the danger of discrimination: perpetrators in more favourable social and financial circumstances may find it easier to accept financial compensation in the form of mediation.

3.6.2. LEGAL REGULATION AND THE TYPES OF MEDIATION

The relevant regulations can partly be found in the Criminal Code and the Criminal Procedure Code, and further detailed rules are set in a separate Act.[48] The procedure is of a mixed nature[49] since the prosecutor has the right to suspend the criminal procedure[50] and transfer the case to mediation if the statutory conditions are fulfilled. The prosecutor's decision is followed by the mediation process, which is a non-criminal procedure between the suspect and the victim carried out by an independent probation officer (or a lawyer) as a mediator.

Currently, two types of mediation can be distinguished: (a) mediation process in order to apply active repentance as a basis for exemption from criminal responsibility ('traditional mediation': the scope of relevant crimes is limited); (b) mediation process in order to make reparation for the consequences of the offence and to obtain a lighter sentence ('new form of mediation': applicable to any crime – in principle).

(a) Traditional mediation is applicable in criminal cases if the criminal offence is a misdemeanour or a felony punishable with a maximum imprisonment of three years, and the offence is a traffic offence or an offence against:

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[48] The three pillars of the relevant legislation:
- Article 29 of the Hungarian Criminal Code (Act C of 2012) regulates Active Repentance as a basis for exemption from criminal responsibility (substantial criminal law rules);
- Articles 412–415 of the Code of Criminal Procedure (Act XC of 2017) contain the relevant criminal procedure rules;
- Act CXXIII of 2006 on Mediation in Criminal Cases regulates in detail the mediation procedure to be followed.

[49] The mediation process itself cannot be regarded to be a part of traditional criminal procedure but has an 'autonomous' character within it, as it is conducted with the involvement of persons independent from the staff of justice administration – mediators. Görgényi, Jacsó, 2013, p. 9.

[50] A mandatory mediation process does not exist in Hungary, and it is entirely at the discretion of the prosecutor in deciding whether to transfer a case to mediation.

- life, physical integrity or health,
- personal freedom,
- human dignity and fundamental rights,
- property or intellectual property rights.

In case of a successful mediation, the criminal procedure is to be terminated (Article 29 (1) of the CC). If the abovementioned felony is punishable with a maximum five years of imprisonment, successful mediation will not terminate the punishability (the case goes to trial), but the penalty may be mitigated by the court without limits (Article 29 (2)). There are grounds for refusing mediation[51], namely circumstances that exclude the 'traditional mediation process'. Reiteration alone does not exclude mediation, but it shall not be applied if the (new) intentional crime is committed during the probation period as a result of suspension of a prison sentence or after being sentenced to prison and before she/he has finished serving the sentence or while released on probation or during the period of conditional suspension of the procedure. Mediation is also excluded if the (new) intentional crime is committed within two years after a successful mediation process or the offender is qualified as special or multiple recidivist. Finally, this is also impossible if the crime was committed through a criminal organisation or the crime caused death.

(b) The new form of mediation (which can be applied from 1 July 2018) is not linked to active repentance, and it can be used in criminal proceedings for any offence in which the objectives of mediation can be achieved. Its purpose is to make reparation for the consequences of the offence and to obtain a lighter sentence. Since the scope of relevant crimes is not limited, this type of mediation applies to any criminal offence and, consequently, in more serious criminal cases. Note that grounds for refusing mediation do not apply, in principle, to the 'new form of mediation'; thus, a case of a special recidivist can be referred to mediation if the conditions are met.

[51] See Article 29 (2) of the CC.

3.6.3. CONDITIONS OF VICTIM–OFFENDER MEDIATION

The CPC and the related special Act define the following conditions for both types of mediation.

3.6.3.1. Crimes relevant to mediation

Two basic methods have been developed to define the scope of offences covered by the mediation process. While a common precondition is the existence of a specific identifiable victim,[52] the first approach does not limit the scope of the relevant offences, and mediation can be applied, in principle, for any offence. In the second, the legislator narrows the range of applicable offences, mainly on the basis of their seriousness. As has been shown, in Hungary, in the case of 'traditional mediation', the limitation is based on the type and substantive gravity of the crime, on the one hand, and the circumstances that exclude the process, on the other.

The majority of cases referred to mediation in Hungary are offences against property and traffic offences. The question arises as to whether mediation is appropriate in cases of violence against a person (e.g. battery) and offences against personal freedom. There is a view that the right to physical integrity and the right to personal freedom are fundamental constitutional rights which must be protected by the state. On this basis, there is no room for mediation in cases of violence against a person, and criminal proceedings must be brought against the perpetrator.[53]

[52] Furthermore, a general perception is that mediation simply does not work for very serious crimes (crimes against the state, crimes committed within the framework of organised crime, homicides, etc.). Most white-collar crimes fall into this category, either because there is no specific victim or because the number of victims is so large that the use of restorative techniques seems physically impossible. See Szabó, 2022, p. 251.

[53] Bérczes, 2009, pp. 144–145. In contrast, the objectives of mediation can be achieved even in cases of minor violent crime. Similarly, in cases of domestic violence, many question the voluntariness of the victim in the process and the seriousness of the content of the agreements reached and reject mediation precisely to protect the interests of the victim. See Barabás, 2015, p. 30.

In our view, the current Hungarian legislation is adequate and could serve as a model. Victims of more serious, especially violent crimes generally reject the possibility of mediation; therefore, limitation based on the substantial gravity of the crime is appropriate. There is also a need to regulate the grounds for excluding mediation, because certain perpetrators – based on their criminal records – do not deserve the benefits of mediation.

As mentioned above, the limitation of offences relevant to mediation and grounds for refusing mediation do not apply to the 'new form of mediation'. In theory, this solution is welcome because it could significantly increase the number of mediation process. Unfortunately, statistics do not show this. Since 2018, when the new form was introduced, the number of mediation procedures has slightly decreased.[54] There can be two reasons for this development. First, from 2018, the prosecutor has several other forms of diversion at his/her disposal. Second, the perpetrators are not sufficiently motivated to participate in the mediation process,[55] because successful mediation is only a mitigating circumstance to be taken into account in court proceedings.

In our view, the optimal and appropriate legal consequence of successful mediation is the termination of the criminal procedure or the unlimited mitigation of the penalty by the court. Successful mediation as only a mitigating circumstance does not encourage the offenders to participate in the mediation process.

3.6.3.2. Initiation of the mediation process

The suspect, his/her defence counsel and the victim have a right to file a motion in order to start the mediation process. Based on these motions or *ex officio*,[56] the prosecutor has the (discretional)

[54] The number of mediation process (adult and juvenile offenders) – 2018: 6,184; 2019: 5,698; 2020: 5,378; 2021: 5,729.

[55] Szabó, 2022, p. 166.

[56] Mediation is not excluded if neither party has requested it. This can be explained by the fact that the mediation process may also be initiated *ex officio* by the prosecutor without a specific request from the parties.

right to transfer the case to the mediation process and suspend the criminal proceedings for a period of six months. It can be seen that both the victim and the suspect (and their legal representatives) are entitled to request the mediation process, but if one of the parties has not requested mediation, his/her consent must be obtained. If the offender has committed more than one offence against more than one victim, and mutual consent exists in relation to only one of them, mediation can only be applied to that offence.[57]

3.6.3.3. Confessional statement by the suspect

The necessary prerequisite for mediation is that the suspect has made a confessional statement/has pleaded guilty during the investigation no later than when filing the indictment. The confessional statement by the suspect must cover both the facts (circumstances) of the case and his/her guilt. This requirement is closely linked to the main objective of mediation, which is the establishment of a mutually acceptable agreement between the victim and the offender.[58]

One can see the opinion that the confessional statement must be accompanied by repentance on the part of the suspect, since this is the only way to achieve a peaceful settlement of the conflict between the victim and the suspect.[59] In this context, it should be stressed that repentance is not a legal condition for mediation, and the sincerity of repentance is difficult to verify.

Apart from the suspect's initiation or consent and his/her guilty plea, there are no other procedural requirements for the ordering

[57] Belegi, 2018, p. 855. It is also worth noting that, according to court practice, if the same crime has been committed by more than one perpetrator, it is not excluded that only one of them may take part in the mediation process. If the damage caused by the offence has been recovered as a result of the mediation process, only the perpetrator involved in the process shall be released from criminal liability. The suspect not involved in the mediation process will face no discriminatory restrictions or adverse legal consequences at all. See the 3. BKv – Opinion of the Penal Board of the Supreme Court/Kúria.

[58] Schmidt, 2020, p. 321.

[59] *Ibid*, p. 322.

of mediation. It is not necessary to conduct a full investigation nor to obtain all the evidence necessary to prove the crime. The conditions of the mediation process may be fulfilled even at the initial stage of the investigation.

3.6.3.4. The discretionary and subjective condition of the process

The prosecutor suspends the procedure for the purpose of mediation if reparations for the consequences of the crime are expected and criminal proceedings may be omitted or the mediation process is not contrary to the principles of the imposition of a penalty on the basis of the nature of the crime, the method of the perpetration and the personal circumstances of the suspect. This latter condition is entirely at the discretion of the prosecutor. Consequently, he or she has a decisive role in transferring a criminal case to mediation. This method can be criticised, because the circumstances taken into consideration by the prosecutor are mostly connected to the crime or the offender, and the victim's needs are not prioritised.[60]

The question must also be asked as to why the prosecutor may refuse to refer the case to mediation if the statutory conditions are met, there are no grounds for exclusion and both the victim and the offender request it. The solution to this problem could be to introduce a kind of 'mandatory mediation' or 'mandatory diversion', as in Austria[61], if the parties request it, and the objective statutory conditions are met.[62]

[60] Törzs, 2011, p. 2.

[61] According to Austrian legislation, if the statutory conditions are met, the prosecutor is obliged to propose to the accused the application of a diversionary measure, such as mediation, taking into account the interests and needs of the victim. See Bruckmüller, Koss, 2010, p. 111.

[62] Fellegi also criticises the exclusive discretionary power of the prosecutor. She notes that 'it would be wiser to allow the mediator to make a decision on the applicability of mediation, and the parties should be informed by the mediator of the possibility of mediation as early in the procedure as possible.' See Fellegi, 2011, p. 30.

3.6.3.5. Reparation

Successful mediation requires reparation; namely, the suspect shall provide reparation by way of the means and to the extent accepted by the victim within the framework of a meditation process or if previously approved of in the mediation process. Restoration or reparation activity is an essential condition for mediation, because in the mediation process, the agreement is only concluded if the victim and the accused have agreed upon compensation for the damage caused by the crime or to otherwise make reparation for the harmful consequences of the crime.

In our view, the scope and form of reparation should not be limited by legal regulation: reparation can be provided in any form if it is not immoral or illegal; it all depends on the needs of the victim and the parties' agreement.[63] Reparation can be defined as the compensation or reduction of the consequences of a crime by means of voluntary performance by the offender.[64] Forms of reparation, which is determined by the needs of the victim and the possibilities of the offender, may include the following:

(a) Material (financial) compensation, which is the simplest and most common form of reparation. The payment of financial reparation does not necessarily have to be made directly to the victim, it can also be agreed upon with a third party (e.g. an insurance company or a foundation that has helped the victim).[65] Material compensation can take place not only by paying money but also, for example, by the perpetrator giving another similar thing instead of the stolen one. Our experience shows that victims of crimes against property demand compensation for their damages – and usually for all their damages. Others note that we should not underestimate the importance of non-material (symbolic) reparation, which is appreciated and stressed in a much smaller number of cases by the authorities in spite of the fact that it is obvious in a

[63] Törzs, 2011, p. 3.
[64] Based on Nagy, 1993, p. 90 and Szabó, 2022, pp. 54–55.
[65] Barabás, 2004, p. 186.

number of mediation cases that symbolic gestures have the same importance as financial reparations or may even be more important than the latter.[66]

(b) Reparation in kind or reparation activities by the offender, which can be the physical repair of the damage caused, any activity needed by the victim (e.g. the offender paints the victim's fence) or a personal service by the offender (in case of causing personal injury, if the victim is at work, the offender transports the victim to and from work).[67]

(c) Symbolic reparation, which can be achieved even with an apology.[68] Very often an apology is the first step on the road to resolving a conflict between the parties, because they often find it difficult to be open and communicate with each other.[69] In practice, there are also various forms of symbolic reparation, such as a promise by the offender to drink less alcohol, to change his behaviour and to settle the conflicts in a non-violent way,[70] ending a relationship,[71] the offender's promise to undergo treatment or therapy for crime prevention purposes.[72]

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[66] Fellegi, 2011, p. 31.

[67] Szabó, 2022, p. 58.

[68] A study in Hungary (2007) found that in 179 out of 300 mediation cases selected on the basis that the offender did not provide financial compensation, the victim was satisfied even with an apology from the offender. See Iványi, 2008, p. 87.

[69] Szabó, 2022, p. 56.

[70] Sümegi, 2019, p. 79.

[71] For example former or current spouses or partners who want to end a period of time and ask the perpetrator to stop contacting them. The primary aim of mediation in this case is not to improve the broken relationship between the parties, but to find a solution to the conflict situation. See Iványi, 2008, p. 89.

[72] Törzs, 2011, p. 3.

3.6.4. INITIATION AND CONDUCT OF THE MEDIATION PROCESS

According to Article 159 of the Government Decree 100/2018 (VI. 8), the investigative authority has a duty to inform[73] the suspect and the victim about the possibility and the conditions of mediation at the time the suspicion is communicated.[74] The information shall be recorded in the minutes. The suspect, his/her defence counsel and the victim have the right to file a motion in order to start the mediation process. The investigative authority then sends the case file to the prosecutor within eight days of the suspect's interrogation. The prosecutor examines, based on the case file, whether it is possible to suspend the criminal procedure for the purpose of mediation. On the bases of the parties' motions or *ex officio*, the prosecutor has the right to transfer the case to the mediation process and suspend the criminal proceedings for a period of six months. If the suspect or the victim requests or consents to mediation but the legal conditions are not met, the prosecutor shall refuse to suspend the proceedings for the purpose of mediation by issuing a decision.[75]

The mediation process starts with the decision of the prosecutor suspending the proceedings. The prosecutor communicates the decision to suspend the proceedings to the suspect, the victim and the probation service or the attorney acting as mediator.

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[73] In practice, this has not always happened in the past, but now the authorities are paying attention to this duty. See Törzs, 2011, p. 2. Perpetrators are usually informed about the possibility of mediation by their lawyers in advance, before the interrogation. From the perspective of the suspect, it is appropriate to plead guilty in the first interrogation, to express his/her willingness to make a reparation and to initiate the mediation process.

[74] If the victim requests the mediation process before the suspect is interrogated, the prosecutor shall, after the interrogation of the suspect, arrange for the obtaining of his/her consent and decide to suspend the proceedings for the purpose of mediation or to refuse mediation.

[75] The decision of the prosecutor is subject to legal remedy (complaint). Complaint may be submitted by the suspect, the victim or their representatives. If the complaint is justified, the prosecutor annules or modifies the decision. If she/he does not agree with the complaint, it will be dealt with by the superior public prosecutor's office, which has the right to annule or modify the decision.

The mediator sets a date for the first mediation meeting within fifteen days of the receipt of the prosecutor's decision and informs the parties, their legal counsel and legal representatives[76] about the date of the mediation meeting. Both the victim and the suspect actually have an obligation to take part personally in the mediation process since, if the suspect or the victim fails to appear at the mediation meeting for the second time and has not justified his/her failure with reasonable grounds, they shall be deemed to have withdrawn his/her consent. The defence counsel of the suspect (also the authorised representative of the victim) participates in the mediation process as a legal counsel.[77] The victim and the suspect may request that up to two persons designated by them (the so-called 'helpers') be present at the mediation meeting and speak in the order determined by the mediator.[78]

The pre-mediation stage was introduced as a new legal instrument in 2022, which allows for flexible contact between the parties and the mediator. The mediator may contact the victim, the suspect or both parties at the same time in order to prepare the mediation meeting, to settle the conflict effectively and to prepare the parties for a direct personal meeting. The mediator may use any means of telecommunication accepted by the parties in the course of contact.[79]

The place of the mediation meeting is the office of the Probation Service, unless the mediator decides otherwise. The meeting, as a main rule, shall be conducted in the simultaneous and joint personal presence of the victim and the suspect.[80] The mediator listens

[76] The participation of the legal representatives of the victim and the suspect (e.g. in case of a juvenile person) is mandatory in the mediation process.

[77] The authorisation or the official appointment of the defence counsel also covers the mediation process.

[78] The mediator may refuse to comply with the request only if the presence of the designated person would be contrary to the purpose of the mediation.

[79] The pre-mediation stage can help to break a deadlock in the obstructive positions of the parties concerned and make the face-to-face mediation discussion more productive and effective. See the Explanation of the Act CXXXIV of 2022.

[80] The meeting may take place in the simultaneous personal presence of the victim and the suspect, but in the absence of each other, by means of a telecommunication device, with continuous video and audio transmission, if the conflict

to the parties as much as necessary. The victim and the suspect may express their views on the case orally and present the documents available to them. The meeting, which usually takes about 2–3 hours, provides an opportunity for the parties to explain how the crime has affected them, and the offenders may express that they take responsibility and can apologise to the victim. The parties are also provided with an opportunity to come to an agreement on compensation for the damage or any other kind of reparation.[81] The mediator makes a record of the mediation meeting.

A precondition for the success of the mediation process is the conclusion of an agreement. An agreement is reached when the victim and the accused agree on compensation for the damage caused by the crime or other reparation for the harmful consequences of the crime. There is only one legal limitation to the agreement: the obligations undertaken are not allowed to infringe upon the rights and legitimate interests of others, and the obligations must comply with the law and must not be contrary to good morals.[82] The agreement shall contain a provision that the offender will pay the damages caused by the offence in a lump sum or in instalments or otherwise make reparation during the period of suspension of the proceedings or within a maximum of two years, as well as who will bear the costs of the process. The agreement between the victim and the suspect is given in writing by the mediator and is signed by both the victim and the offender. The mediator shall immediately deliver the agreement to the victim, the suspect, and the prosecutor's office. The validity of the agreement concluded in mediation does not require the approval of the prosecutor, but he or she also supervises the legality of the agreement and has the right to repeal it.[83]

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can be resolved in this way and either party is unable to attend the meeting because of his or her location or circumstances.

[81] Törzs, 2011, p. 2.

[82] See Article 13 (3) of the Act CXXIII of 2006 on Mediation in Criminal Cases.

[83] The prosecutor repeals the agreement if it violates Article 13 (3) of the Act CXXIII of 2006. If the prosecutor does not issue a ruling on the repeal within five working days of receipt of the agreement, it shall be deemed not to have raised any objection to the agreement from the point of view of legality.

The mediator monitors the fulfilment of the agreement. In this context, a very important provision is that if the suspect has started to fulfil the obligations undertaken in the agreement but the mediation cannot be completed within the initial period of the suspension of the criminal proceedings (which is six month), the mediator shall inform the prosecution of the expected time of its completion. In this case, the prosecutor's office may extend the period of suspension by up to eighteen months.

Mediation is considered successful if the suspect has compensated the victim for the damage caused by the offence as agreed upon in the agreement or has made reparation for the harmful consequences of the offence as agreed upon in the agreement. In this case, the mediator informs the prosecutor of this fact in a report.

The mediator will then report this fact to the prosecutor, who – in the case of 'traditional mediation' – applies Article 29 (1) of the Criminal Code and terminates the criminal procedure (the perpetrator will not be criminally liable). In case of Article 29 (2), the prosecutor does not make a separate decision on the mediation but brings charges against the suspect, and the penalty may be mitigated by the court without limits at the end of the criminal procedure.

Successful completion of the 'new form of mediation' has a different legal consequence: the case will return to the normal course of criminal proceedings, and the prosecutor has the right to decide to prosecute or not at the end of the proceedings. In case of prosecution, the fact of a successful alternative settlement will be considered as strong mitigating circumstances in the imposition of punishment by the court.

Mediation is considered unsuccessful if the parties cannot reach an agreement or the suspect does not comply with the terms of the agreement. In this case, the criminal proceedings will continue, and the parties have the same status they had in the original procedure and will not have the right to apply for mediation again.[84]

[84] Törzs, 2011, p. 3.

3.6.5. THE MEDIATOR

The mediation process is conducted by the mediator, who is a specially trained[85] probation officer of the Probation Service or an attorney (who earned a mediator's qualification or was specially trained). The duty of the mediator is to contribute to the mediation process as an impartial and responsible 'outsider', according to professional standards, in order to reach an agreement between the parties. The mediator shall respect the dignity of the participants in the process and ensure that the participants also show respect for each other.[86] Voluntary participation, confidentiality and neutrality of the mediator are the most important basic principles.[87] The mediator is not a law enforcer and has no right to decide: he/she is an expert who uses his/her expertise to help the parties identify and understand the conflict. The mediator's role is to maintain the contact between the parties and to help resolve the conflict.[88]

In our view, there is no room for laypersons in victim–offender mediation as mediators. Therefore, we need professionals who have not only a general range of legal and economic expertise but also considerable psychological knowledge. Mediators need to have good

[85] According to Decree of the Ministry of Justice 38/2015 (XII. 21), mediation may be carried out by a probation officer who has completed at least two 30-hour specific courses on the subject of mediation, which include theoretical and practical training, or has obtained a mediator qualification from a Hungarian or foreign university or college and meets the requirements of the mentoring process. The latter means that after four or five cases led by a mentor and observed by the 'mediator candidate', he or she will first only conduct the introductory phase of the process and later the entire mediation conversation. After five successful mediations led by the candidate, the mentor will evaluate in detail the performance of the candidate, who, if the feedback is positive, will be able to work independently as a trained mediator. See in: https://juratus.elte.hu/mediacio-a-magyar-buntetougyekben/ (accessed on: 25.09.2022). Furthermore, the mediator is expected to participate in ongoing professional consultation, training and case discussions as part of the mentoring scheme.

[86] See Art. 3 (3) of the Act CXXIII of 2006.

[87] Törzs, 2011, p. 3.

[88] Kiss, 2018, p. 95.

communication skills, be skilled in conflict management methods and be familiar with the operation of the criminal justice system.[89]

In Hungary, mediators use the technique of direct mediation, which involves a face-to-face meeting between the victim and the offender, and follow the transformative mediation school, which means that mediators are not outcome-focussed; their main task is to create a safe environment for the parties and allow them to define their own issues and emotions and to seek solutions on their own.[90] One of the basic principles of transformative mediation is that the transformation and improvement of the relationship between the parties leads to the resolution of the conflict. The focus is on constructive interaction between the parties, which can improve the relationship and communication between them.

Improved communication and subsequent constructive interaction could lead to an agreement between the parties. Nevertheless, it should not be that a skilled, "good" mediator never sees the agreement itself as a success but as a process that leads to an agreement. Empowerment, recognition and understanding – These are the three basic concepts of mediation.[91]

Each case is unique and specific, so there is universal pattern to apply in the course of conducting mediation meetings. A skilled mediator has characteristics including sympathy, reliability and

[89] The Faculty of Law of the University of Miskolc was the first in the country to get training in a programme entitled 'General and justice mediators', accredited in the form of a specialised further training course. The course consists of two semesters, with the theoretical and practical classes/trainings altogether amounting to 250 hours. This year, the sixth student group is attending the course. Major subjects are the following: 'Legal framework of mediation', 'Communication', 'Conflict management', 'Getting to know customers (personality and social psychology)', trainings, vocational practice.

[90] Törzs, 2011, p. 3.

[91] Kertész, 2011, pp. 28–29. According to legal literature, the two main goals of transformative mediation are to empower the disputing parties and to enhance each party's recognition of the other. Recognition and empowerment are then key concepts in the theory of transformative mediation. To empower the disputing parties, the mediator seeks to strengthen people's capacity to analyse situations and make effective decisions for themselves. See Folger, Baruch Bush, 1996, p. 264. We can add a third goal – understanding: mediation helps the parties to better understand each other's motivations.

impartiality, which are indispensable for successful mediation.[92] In communicating with the parties, the age and gender of the parties, the relationship between the parties (whether they knew each other or they are family members) and the characteristics of the crime committed should be taken into account by the mediator. One can also read that the widest possible involvement of mediators of the same gender for female victims and of similar age for elderly victims is necessary to facilitate the psychological processing of the crime.[93]

3.7. Closing remarks: is mediation a success story in Hungary?

'The application of mediation is a real success story in Hungary.'[94] To confirm this statement, it would be useful to examine the relevant statistical data.

In the first three-year period since the introduction of mediation in criminal matters, the Probation Service has had more than 2,500 cases referred to mediation per year.[95] In the following years, this rising trend continued as follows (Table 3.2).[96]

Table 3.2. Number of crimes committed by adult and juvenile offenders between 2010 and 2021

Year	Adult offenders	Juvenile offenders	Total
2010	3979	472	4451
2011	5333	647	5980
2012	5793	617	6410
2013	5802	629	6431

[92] See in https://juratus.elte.hu/mediacio-a-magyar-buntetougyekben/ (accessed on: 25.09.2022).

[93] Bérczes, 2009, p. 152.

[94] Barabás, 2017, p. 78.

[95] The number of mediation process (adult and juvenile offenders) – 2007: 2,451; 2008: 2,976; 2009: 3,532. See Törzs, 2011, p. 3.

[96] The figures represent the number of mediation cases *pending* in a given year (cases ongoing from the previous year + received in the given year).

2014	5766	633	6399
2015	5875	624	6499
2016	5820	552	6372
2017	5796	485	6281
2018	5730	454	6184
2019	5302	396	5698
2020	4972	406	5378
2021	5377	352	5729

Source: https://igazsagugyistatisztika.kormany.hu/partfogo-felugyeloi--tevekenyseg (accessed on: 1.10.2022).

It is also important that in criminal matters, the parties have concluded the agreement in 80–85% of the mediation cases, and 85–90% of the concluded agreements have been fulfilled.[97] Finally, the statistical data[98] in some Central-Eastern European countries in proportion to the population (number of cases/1 million inhabitants – 2016–2019) also shows the effective application of victim–offender mediation in Hungary:

1) Latvia – 734,
2) Estonia – 525,
3) *Hungary* – 399,
4) Poland – 97 (2016),
5) Czech Republic – 78,
6) Romania – 4.

However, there is another side to the coin. From the point of view of the victim and the offender, it makes quite a difference where the criminal proceedings take place, because the use of mediation varies considerably from one county to another in Hungary. There is a wide variation in the number of cases, which suggests that, in

[97] The conclusion of the agreement is not usually frustrated during the mediation process but because one of the parties fails to appear in the mediation meeting. See Szabó, 2022, p. 177.

[98] Szabó, 2022, pp. 108–110.

addition to the crime rate, human factors have a significant influence on the 'propensity to use'.[99]

Furthermore, if we look at the number of cases referred to mediation in relation to the number of prosecutions, compared to 8–10% in Western Europe, mediation is applied in only 2% of the cases in Hungary. Consequently, although the legal framework of victim–offender mediation is properly developed in Hungary, and its practical application can basically be regarded as successful, there is still room for improvement. We hope that this modest study will contribute to this process.

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Chapter 4. Integrating Cross-Border Family Mediation into Polish Court Proceedings for the Return of a Child under the 1980 Hague Convention

4.1. Introduction

Far-reaching globalisation and the exponential rise of cross-border travel has been accompanied by an increasing number of binational marriages and partnerships. In the European Union, the principle of free movement of persons, resulting in unrestricted travel and employment in all the Member States, has enabled a rise in the number of binational couples among Europeans.[1] Mixed marriages are also increasingly commonplace for Poles, especially since Poland's accession to the EU in 2004.[2]

[1] In 2011, out of approximately 122 million marriages in the European Union, around 13% had a cross-border dimension, https://epthinktank.eu/2014/05/28/international-parental-child-abduction. Further reading on binational relationships: E. Sowa-Behtane, *Binational marriages in Europe*, [in:] *Le ragioni di Erasmus*, M. Geat, V.A. Piccione (eds.), Rome 2017, pp. 279–281; K. Slany, M. Żadkowska, *Mixed relationships and marriages in the context of migration and multiculturalism*, "Studia Migracyjne – Przegląd Polonijny" 2017, Vol. 4, No. 166, pp. 5–12.

[2] For statistics on cross-border mobility and binational marriages of Poles, see: M. Gierczyk, D. Dobosz, *Functioning of Polish Women in Binational Relationships – An Outline of the Issue against the Background of Migration in the Interpreted Paradigm*, "Humans" 2022, No. 2, pp. 52–53; K. Slany, M. Żadkowska, *op. cit.*, pp. 8–9.

According to some scholars, due to cultural differences, binational couples are more likely to divorce or separate than couples in which both partners come from the same country.[3] In Europe alone, there are more than 170,000 binational divorces each year.[4] Parental divorce has significant implications for the children involved, both in binational couples and in families where both parents are of the same nationality. However, in mixed families, divorce or relationship breakdown is more likely to involve the relocation of a child to a country other than where the family has its regular residence. Such a decision normally requires the consent of both parents having parental authority. Nonetheless, high escalation of conflict in the family may lead to one parent committing child abduction by taking the child abroad without the consent of the other parent or not returning the child from abroad.[5] There are no reliable statistics as to how many international child abductions take place globally, as such data is difficult to estimate.[6]

The international community has adopted mechanisms of cooperation designed to deter parental child abductions and to allow those left-behind parents to seek the return of wrongfully taken children. The most significant scheme of international cooperation is provided for by the Convention of 25 October 1980 on

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[3] N. Irastorza, *Sustainable marriages? Divorce patterns of binational couples in Europe versus North America*, "Ethnicities" 2016, No. 16, pp. 649–683; M. Gierczyk, D. Dobosz, *op. cit.*, p. 51.

[4] Statistics from 2012, C.C. Paul, S. Kiesewetter, *Foreword*, [in:] *Cross-Border Family Mediation*, C. Paul, S. Kiesewetter (eds.), Frankfurt am Mein 2014, p. 11.

[5] Cross-border parental child abduction involves either a child being wrongfully removed from their place of habitual residence and taken abroad by a parent who does not have sole responsibility ('wrongful removal') or a child not being returned to their state of habitual residence by a parent or who does not have sole responsibility, in breach of the rights of custody and access ('wrongful retention'). See: *European Parliament Mediator for International Parental Child Abduction. Handbook*, p. 26, available at: https://www.fmc.ca/wp-content/uploads/2021/07/Child_abduction_handbook_en.pdf.

[6] According to the data presented by Missing Children Europe, on average, around 1,248 international child abductions are reported each year, https://missingchildreneurope.eu/international-child-abduction/. According to a different source, more than 100,000 parental child abductions take place every year throughout the world. See: C.C. Paul, S. Kiesewetter, *op. cit.*, p. 11.

the Civil Aspects of International Child Abduction (1980 Hague Convention),[7] adopted under the auspices of the Hague Conference of Private International Law. International instruments encourage alternative dispute resolution methods (ADR), especially mediation, to solve family disputes. In addition to the advantages of mediation inherent in the process of reaching an agreed upon solution (e.g. it facilitates communication between conflicted parties, leads to a win-win outcome, is relatively fast and cost-effective), mediation in international child abduction cases can be helpful to secure the right of the child to maintain, on a regular basis, personal relations and direct contacts with both parents, guaranteed in the UN Convention on the Rights of the Child[8] and in the Charter of Fundamental Rights of the European Union.[9]

The present research explores the international legal framework and Polish regulations relevant to cross-border child abduction, focusing primarily on the 1980 Hague Convention and EU law, with the view (i) to examine the legal background for mediation in such proceedings, (ii) to establish challenges in integrating mediation into domestic return proceedings conducted under the 1980 Hague Convention and, finally, (iii) to lay the foundation for *de lege lata* and *de lege ferenda* recommendations for the Polish legislator.

4.2. International framework for mediation in cross-border child abduction

Starting from the 1970s, the problem of international parental child abduction has been the subject of concern for various international

[7] Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter: 1980 Child Abduction Convention), adopted in the Hague on 25 October 1980 under the auspices of the Hague Conference on Private International Law, UN Treaty Series, Vol. 1343, No. 22514.

[8] Convention on the Rights of the Child, adopted in New York on 20 November 1989 by General Assembly Resolution 44/25, UN Treaty Series, Vol. 1577, No. 27531, Article 10 paragraph 2.

[9] Charter of Fundamental Rights of the European Union, proclaimed on 7 December 2000, OJ EU C 326/391, Article 24 paragraph 3.

organisations, both at the universal and the regional levels. The main developments in this field are owed to the Hague Conference of Private International Law and the Council of Europe, and in the last two decades, the European Union has also been active in regulating issues relating to cross-border child abduction.[10] Although the international legal framework relevant to cross-border child abductions consists of several instruments, by far the most significant document in this field is the 1980 Hague Convention.[11] On the EU level, the main document relevant to judicial cooperation in intra-EU child abductions is Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility and on international child abduction-recast (Brussels II ter Regulation).[12]

4.2.1. 1980 HAGUE CONVENTION

The drafters of the 1980 Hague Convention expressed in the Preamble their desire to protect children internationally from the harmful effects of their wrongful removal or retention. The principle underlying the adoption of the Convention was that the child's welfare is best protected by an immediate response to the wrongful act of abduction and that parental abductions should be prevented

[10] On the development of international legislation pertinent to international child abduction, see: S. Vigers, *Mediating International Child Abduction Cases. The Hague Convention*, Oxford–Portland 2011, pp. 61–62.

[11] International framework for family matters is discussed in more detail in: K. Nehls, *The Legal Framework of Child Abduction Cases*, [in:] *Cross-Border Family Mediation*, C. Paul, S. Kiesewetter (eds.), Frankfurt am Mein 2014, pp. 19–36.

[12] Council Regulation (EU) 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast), Official Journal of the European Union L 178/1. The Regulation entered into force from 1 August 2022, replacing the previous Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, OJ EU L 338, 23.12.2003.

in general by denying any recognition from the international community.[13] As a consequence, the 1980 Hague Convention aims to establish procedures to (i) ensure the prompt return of children wrongfully removed to or retained in any contracting state and (ii) to ensure that the rights of custody and of access under the law of one contracting state are effectively respected in the other contracting states.[14] The authorities of the state of abduction do not have international jurisdiction to decide on custody and contact rights. Such decision is within the competence of the courts in the country of the child's habitual residence in accordance with the Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children.[15] Such allocation of jurisdiction is based on the assumption that the court of the child's habitual residence has the closest connection to the child's regular environment and is most suited to assess the child's living conditions.

In the Hague return proceedings, initiated upon an application submitted by the left-behind parent or an institution exercising custody rights, the state authorities are obliged to act expeditiously and to use the most expeditious procedures available.[16] According to Article 11 paragraph 2 of the 1980 Hague Convention, the decision on the return of the child shall be reached within six weeks from the date of commencement of the proceedings.[17] As a general rule, where a child has been wrongfully removed or retained, the court seized with a return application is expected to order the return of

[13] See E. Pérez-Vera, *Explanatory Report to Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, [in:] *Acts and Documents of the Fourteenth Session (1980), tome III, Child abduction*, p. 432; K. Nehls, *op. cit.*, p. 19.

[14] Article 1 of the 1980 Hague Convention. See also: E. Pérez-Vera, *op. cit*, pp. 429–430.

[15] Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children, adopted in the Hague on 19 October 1996 under the auspices of the HCCH, Article 7 paragraph 1. See also Article 3 of the 1980 Hague Convention.

[16] See Article 2 and Article 11 paragraph 1 of the 1980 Hague Convention.

[17] Article 11 paragraph 2 of the 1980 Hague Convention.

the child.[18] The principle of prompt return and expeditious proceedings, however, does not exempt the Hague court from examining the circumstances of the case. The 1980 Convention provides for several legal grounds which allow the court seized with a return application to refuse the return of the child.[19]

Although the text of the 1980 Hague Conference does not explicitly refer to mediation, the legal basis for the use of mediation in the Hague cases can be derived from the obligation of the Central Authorities to seek amicable resolution and voluntary return of the child, laid down in Article 7 paragraph 2 (c) and reiterated in Article 10 of the 1980 Hague Convention.[20] The referral of the parents to mediation is one way to attempt an amicable solution and has consequently been recommended to states parties by the Special Commission of the Hague Conference on the practical operation of the 1980 Hague Convention.[21] In intra-EU child abduction cases,

[18] Article 12 paragraph 1 of the 1980 Hague Convention.

[19] Under Articles 12 paragraphs 2, 13 and 20 of the 1980 Hague Convention.

[20] According to Article 7 of the 1980 Hague Convention, 'Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention. In particular, either directly or through any intermediary, they shall take all appropriate measures (…) to secure the voluntary return of the child or to bring about an amicable resolution of the issues.' Pursuant to Article 10 of the 1980 Hague Convention, 'the Central Authority of the State where the child is shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.'

[21] The HCCH Special Commission to Review the Operation of the 1980 Hague Convention recommended the referral of parties to mediation as a way to attempt to secure the voluntary return of a child for the first time in 2001. See: HCCH Permanent Bureau, Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Child Abduction Convention (22–28 March 2001), paragraph 1.10. From then on, the Special Commission has consequently referred to mediation during its periodic meetings: in 2006 (Conclusions and Recommendations of the 5th meeting of the Special Commission, 30 October–9 November 2006, paragraph 1.3.1) and in 2011 (Conclusions and Recommendations and Report of Part I of the Sixth Meeting of the Special Commission on the practical operation of the 1980 Hague Child Abduction Convention and the 1996 Hague Child Protection Convention, paragraphs 225–259).

the obligation of Central Authorities and Hague courts to consider mediation is explicitly laid down in Brussels II ter Regulation.

The domestic return proceedings under the 1980 Hague Convention are carried out in accordance with the domestic law of the requested state. Therefore, in different countries, different legal solutions exist as to the treatment of evidence, availability of appeals and the enforcement of return orders. Similarly, legal conditions of mediation in return proceedings may also to some extent vary from state to state. However, the mechanism regulated in the 1980 Hague Convention sets out a general framework into which mediation processes need to be integrated, regardless of where they takes place. The Hague Conference on Private International Law has provided unified guidelines for organising and conducting mediation in the 1980 Hague Convention proceedings by publishing in 2012 a Guide to Good Practice in the field of mediation.[22]

4.2.2. BRUSSELS II TER REGULATION

The European Union has not designed its own legal mechanism to deal with cross-border child abductions. Instead, it has integrated the 1980 Hague Convention into its procedural family law, first into the Brussels II bis Regulation in 2003[23] and subsequently into the Brussels II bis Regulation adopted in 2019. While incorporating the 1980 Hague Convention, the European legislator introduced special provisions to reinforce the practical effectiveness of the return mechanism in relations between the EU Member States. The main

[22] The Guide to Good Practice discusses several legal and practical issues connected with the use of mediation in the 1980 Hague Convention proceedings, such as the scope of mediation in international child abduction cases, models of mediation, the involvement of the child, rendering the mediated agreement legally binding and enforceable. See: HCCH Permanent Bureau, Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction: Part V – Mediation, The Hague, 2012.

[23] Council Regulation (EC) No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No. 1347/2000, Official Journal of the European Union L 338, 23.12.2003.

ideas underlying the EU response to cross-border child abduction are the following: (1) to complement the system of the 1980 Hague Convention, (2) to recognise the preference of the courts of the state of habitual residence of the child prior to his or her abduction to conduct parental responsibility proceedings concerning him or her and (3) to expedite the return proceedings and, in particular, the enforcement of the return decision issued by the court having jurisdiction to decide upon parental responsibility after it has learnt of the adoption of a non-return decision in another Member State.[24]

The Brussels II ter Regulation, which has been the cornerstone of judicial cooperation in family matters in the EU since 1 August 2022, has introduced several new elements to make the Hague return mechanism even more effective.[25] One of the significant novelties of the Brussels II ter Regulation is strengthening of the role of mediation and alternative dispute resolution in general. The use of alternative dispute resolution has been encouraged by introducing the obligation of the Hague courts to invite the parties to consider mediation or other ADR methods, albeit the courts are left with the discretionary power to decide whether mediation would be appropriate in a particular case. According to Article 25 of the Brussels II ter, 'as early as possible and at any stage of the proceedings, the court either directly or, where appropriate, with the assistance of the Central Authorities, shall invite the parties to consider whether they are willing to engage in mediation or other means of alternative dispute resolution, unless this is contrary to the best interests of the child, it is not appropriate in the particular case or would unduly delay the proceedings'. Furthermore, Article 79 (g) of the Brussels II ter Regulation imposes on the Central Authorities the obligation to 'facilitate agreement between holders of parental responsibility

[24] F. Gascón Inchausti, P. Peiteado Mariscal, *International child abduction in the case law of the Court of Justice of the European Union: learning from the past and looking to the future*, "Polski Proces Cywilny" 2021, nr 4, pp. 618–620.

[25] F. Gascón Inchausti and P. Peiteado Mariscal discuss in detail the improvements of Brussels II ter with relation to cross-border child abductions in: F. Gascón Inchausti, P. Peiteado Mariscal, *op. cit.*, pp. 620–640. See also: B. Tóth, *The Revision of Brussels IIa Regulation on Questions of Parental Responsibility and Child Abduction*, "European Integration Studies" 2019, Vol. 15, No. 1, pp. 90–102.

through mediation or other means of alternative dispute resolution and facilitate cross-border cooperation to this end.'[26] Apart from the obligation of the court to consider the possibility of an agreed upon solution, the Brussels II ter Regulation does not regulate mediation in a broader manner. It therefore remains within the domestic legal realm of the Member States how to organise and integrate mediation into the Hague return proceedings, in which the 2012 Guide to Good Practice may be of great assistance and practical value.

4.2.3. TIMEFRAME AND SCOPE OF MEDIATION IN CROSS-BORDER CHILD ABDUCTION PROCEEDINGS

Mediation is part of the broad process of handling a Hague return application, and it should take place in line with the obligation of states to use the most expeditious procedures. Mediation or other measures aiming to obtain amicable resolution or voluntary return cannot be used in a way that would cause any undue delay in the child's return to the place of habitual residence.[27] As Vigers notes, the need for the mediation process to take place expeditiously is the most significant difference between mediation in Hague cases and general family mediation.[28]

Depending on the rules of the applicable domestic law, mediation may be initiated either prior to the institution of judicial proceedings or already at the stage of judicial proceedings.[29] According to the Guide to Good Practice, mediation should be suggested by the Central Authority at an early stage, after having received from the left-behind parent the return application, providing that the

[26] The importance of mediation is also emphasised in Recitals 35, 43 and 75 of the Brussels II ter Regulation.

[27] HCCH, Conclusions and Recommendations of the Fourth Meeting of the Special Commission to Review the Operation of the Hague Child Abduction Convention (22–28 March 2001), paragraph 1.11.

[28] S. Vigers, *op. cit.*, p. 43.

[29] Guide to Good Practice…, *op. cit.*, paragraph 62. See also: S. Viger, *op. cit.*, pp. 24–29.

case is appropriate for mediation.[30] It is recommended to initiate judicial proceedings prior to the beginning of mediation, to let the court determine the exact timeframe for mediation and to avoid the mediation process becoming a delaying tactic.[31] Mediators having experience with cross-border child abduction cases recommend that the scheduling of mediation sessions be coordinated with the court hearing(s).[32] This allows the parent travelling for the court hearing(s) to avoid double travel costs, and more importantly, it allows the mediated agreement to be confirmed within a short period of time in subsequent court hearing(s).

Mediation initiated at the stage of judicial proceedings should take place within the schedule and timeframe determined by the court. The Guide to Good Practice recommends the judges examining return applications either to adjourn the pending Hague proceedings for a short period of time, during which mediation will take place, or if no adjournment is necessary, to schedule the next court hearing before which the mediation needs to be completed, preferably between two or four weeks.[33] The scheduling and number of court hearings in the 1980 Hague Convention are determined by the regulations of applicable procedural law implementing the Convention mechanism. Mediation may equally be used at the stage of execution of the return order. Mediation in ongoing Hague court proceedings may assist in reaching an amicable solution and re-establish communication between the parents. Once the return

[30] Guide to Good Practice…, *op. cit.*, paragraph 57.

[31] Guide to Good Practice…, *op. cit.*, paragraph 61. Regardless of whether mediation has been recommended by the Central Authority, the court examining the return application under the 1980 Hague Convention should consider the referral of the parents to mediation or other similar ADR proceedings, where it is appropriate: for example, if mediation was already attempted without success before the beginning of judicial proceedings, a referral to mediation for a second time may not be appropriate. Guide to Good Practice…, *op. cit.*, paragraph 130.

[32] S. Kiesewetter, C.C. Paul, *op. cit.*, p. 45; E. Carl, M. Erb-Klünemann, *Integrating Mediation into Court Proceedings in Cross-border Family Cases*, [in:] *Cross--Border Family Mediation*, C. Paul, S. Kiesewetter (eds.), Frankfurt am Mein 2014, pp. 57; Guide to Good Practice…, *op. cit.*, paragraph 61.

[33] Guide to Good Practice…, *op. cit*., paragraph 131.

order has been issued, mediation may streamline the return process of the child and provide a 'soft landing' for the child and the parent.[34]

While the court examining a return application under the 1980 Hague Convention is competent to deal only with the issue of return, for which it has international jurisdiction, mediation in Hague cases is not limited in the same way.[35] It is accepted that cross-border family mediation in the context of the 1980 Hague Convention can address both the possibility of return and non-return of the child together with its conditions, but it can also cover long-term issues related to parental responsibility, such as custody and contact rights or child maintenance, other financial arrangements or even a decision on the child's permanent relocation.[36] Although concluding such 'package agreements' is not contrary to the 1980 Hague Convention, in practice, obtaining legal effect and enforceability by such agreements may give rise to certain difficulties and delay the process of rendering the agreement enforceable in the two legal systems concerned due to jurisdictional issues. The court examining the return application under the 1980 Hague Convention has jurisdiction to approve the mediated agreement in the part relating to the decision on the return or non-return of the child, but it does not have international jurisdiction to approve the rest of the agreement relating to custody rights or maintenance.[37] Such difficulties might be overcome by separating the question of return or non-return of the child, which is primarily at stake in the Hague cases, from other issues such as maintenance or contact rights and to include them in a separate agreement.[38]

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[34] O. Łachacz, *Mediacja międzynarodowa w sprawach rodzicielskiego uprowadzenia dziecka za granicą-uwagi na tle skali zjawiska i rozwiązań prawnych stosowanych w państwach europejskich*, "Studia Prawnoustrojowe" 2016, nr 33, p. 182.

[35] S. Vigers, *op. cit.*, pp. 39–41; Guide to Good Practice…, *op. cit.*, paragraphs 186–187.

[36] Guide to Good Practice…, paragraphs 186–187. See also E. Carl, M. Erb-Klünemann, *op. cit.*, pp. 58–60; S. Vigers, *op. cit.*, pp. 39–42.

[37] Guide to Good Practice…, *op. cit.*, paragraph 309.

[38] Guide to Good Practice…, *op. cit.*, paragraph 189.

4.2.4. EXAMPLES OF INTEGRATING MEDIATION INTO THE HAGUE PROCEEDINGS

Apart from the general indications and guidelines provided by the 2012 HCCH Guide to Good Practice, there is no uniform legal regulation on how to integrate cross-border family mediation into judicial return proceedings. Several international organisations have explored the possibility to develop a universal model of introducing mediation in the 1980 Hague Convention cases.

In Germany, the Mediators in Court (MiC) model was developed by Hague family judges in cooperation with the International Mediation Centre for Family Conflict and Child Abduction (MiKK).[39] The key element in the MiC model is the recommendation of mediation by the court in the presence of all concerned in a Hague case: the parents, their lawyers, the mediator, the guardian *at litem* and the interpreter.[40] After having received a return application, the judge schedules two court hearings, which are listed approximately 10 days apart and which are within the six-week timeframe required by the 1980 Hague Convention. During the first court hearing, which is held within three or four weeks after the return application was received by the court, the parents are informed about the possibility and advantages of mediation. The duration of the first hearing is limited to one hour, during which the parents can meet the mediator and deal with other issues, such as arranging contact between the left-behind parent and the child for the period of the court proceedings (if necessary, it can be regulated by an interim court order). The second and final court hearing takes place irrespective of the outcome of the mediation, and it is a 'regular' hearing in a Hague return case. If the parents have concluded an agreement, the second court hearing proceeds with making the mediated agreement legally

[39] A Germany-based non-profit organisation providing support and referrals to mediation for parents in cases of cross-border contact, custody and relocation conflicts, as well as in cases of international parental child abduction.

[40] The MiC model is presented in detail in: J. Hirsch, S. Brieger, *German Best Practice Model: Specialised mediation in international child abduction cases in connection with return proceedings under the 1980 Hague Convention*, Berlin 2021, pp. 4–5. See also E. Carl, M. Erb-Klünemann, *op. cit.*, p. 64.

binding and enforceable as far as possible. The result will be a court documented settlement and/or a court decision based on the agreement. If the parents have not managed to reach an agreement by the end of mediation, the hearing will proceed as normal in the Hague cases, dealing with the issue of return or non-return of the child.

In the MiC model, mediation takes place usually over 10 hours within two or three days between the first and second court hearing (typically over a weekend). The exact date and time of mediation sessions can be arranged immediately after the first court hearing while the parents and the mediator are present in court. All efforts connected to finding a suitable mediator and organising the logistical side of mediation are handled by the MiKK, which grants relatively easy, albeit not cost-free, access to mediation for the parents. In this way, mediation becomes a real and available option of dispute resolution which can be embedded in the 1980 Hague Convention proceedings within the narrow six-week timeframe. The possibility of further mediation is given until a final decision is enforced, either by the first or second instance. Mediation can go on between the two instances, during the appeal or to avoid enforcement of the return order. According to statistics, approximately 80–90% of cases mediated by MiKK that are based on the MiC model result in a mediated agreement signed by the parties.[41]

Another scheme of integrating mediation into the Hague cases was developed by the Reunite International Child Abduction Centre, a UK-based charity specialising in international parental child abduction. The Mediation Pilot scheme, explored by the Reunite International from 2003 to 2006, was intended for use in cases of international parental child abduction in conformity with the requirements of the 1980 Hague Convention. The aim of the project was to mediate cases where children had been removed to or retained in the United Kingdom and where the left-behind parent

[41] J. Hirsch, S. Brieger, *op. cit.*, p. 5. The MiC model has not been legally regulated under German law and is not yet implemented by all courts dealing with the 1980 Hague Convention applications. This is also due to the significant workload of family judges and their reluctancy to try out a new procedure, as well as to the complex legal issue of making the mediated agreements legally binding.

was pursuing a Hague application for the return of the child.[42] In the Reunite Mediation Pilot Scheme, the mediation process included three sessions over a 2-day period, each mediation session lasting a maximum of three hours with two independent mediators and an interpreter if required. Where an agreement was reached, the mediation was concluded by a written Memorandum of Understanding, signed by the parents and the mediators. The memorandum of understanding was sent to the parents' lawyers and submitted as a draft consent order in court proceedings in the United Kingdom in order to register or mirror that consent order in the other jurisdiction.[43] A similar solution involving three mediation sessions over the course of two days, each of them lasting for three hours, was developed in the Dutch Mediation Pilot Programme by the International Child Abduction Center (Center IKO) in the Netherlands.[44]

4.3. Mediation in cross-border child abduction proceedings in Poland

4.3.1. GENERAL OVERVIEW OF POLISH PROCEEDINGS FOR THE RETURN OF A CHILD

Poland became a state-party to the 1980 Hague Convention in 1992. In intra-EU cross-border child abduction cases, Poland applies the 1980 Hague Convention as complemented by the provisions of the Brussels II ter Regulation (or in case of proceedings initiated before 1 August 2022 – by the provisions of the Brussels II bis Regulation). Ever since the ratification of the 1980 Hague Convention, the number of return applications submitted to Polish authorities has

[42] About the Reunite Mediation Pilot Scheme, see: T. Buck, *An Evaluation of the Long-term Effectiveness of Mediation in Cases of International Parental Child Abduction*, Leicester 2012, pp. 17–20, available at: https://hdl.handle.net/2086/6329.

[43] See also N. González Martín, *International Parental Child Abduction and Mediation*, "Anuario Mexicano de Derecho Internacional" 2015, Vol. XV, p. 407.

[44] I. Bakker, R. Verwijs, K. Lünnemann, I. Olthof, M. Bruning, *Evaluatie Pilot Internationale Kinderontvoering*, Utrecht 2010, p. 77.

been constantly growing.[45] Poland has struggled with the problem of the excessive length of proceedings in the Hague return cases,[46] as well as with the lack of specialisation among family judges hearing the return applications. These issues, along with several other shortcomings of the Polish regulation, were attempted to be remedied by the reform of the Polish court proceedings for the return of the child under the 1980 Hague Convention passed in 2018.[47] The reform, introduced by the adoption the Act of 26 January 2018 on the Performance of Certain Activities of a Central Authority in Family Proceedings in the Field of Legal Cooperation under European Union Law and International Agreements (hereinafter: Act on the Central Authority),[48] was carried out parallelly to the legislative work within the EU that had led to the adoption in 2019

[45] In 2003, Poland received 18 return applications, in 2014 – 64, in 2015 – 93, in 2016 – 105, in 2017 – 122, in 2018 – 133, in 2019 – 116, in 2020 – 144. Statistics according to J. Pawliczak, *Reformed Polish court proceedings for the return of a child under the 1980 Hague Convention in the light of the Brussels IIb Regulation*, "Journal of Private International Law" 2021, Vol. 17, No. 3, p. 561; N. Lowe, E. Atkinson, K. Horosova, S. Patterson, *A statistical analysis of applications made in 2003 under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction*, October 2006, document available at www.hcch.net.

[46] In several cases, the European Court of Human Rights (ECtHR) has found Poland responsible for the violation of the right of respect for family life within the meaning of Article 8 of the European Convention on Human Rights and Article 6 paragraph 1 on account of failing to take without delay measures that could reasonably be expected to enforce return orders and secure the visiting rights of parents of abducted children. See: ECtHR, Case H.N. v. Poland, judgment of 13 September 2005, Application No. 77710/01; ECtHR, Case P.P. v. Poland, judgment of 8 January 2008, Application No. 8677/03. More recently, see: ECtHR, Case G.N. v. Poland, judgment of 19 July 2016, Application No. 2171/14; ECtHR, Case Oller Kamińska v. Poland, judgment of 18 January 2018, Application No. 28481/12.

[47] The former Polish regulations for the Hague proceedings, as well as the main elements of the 2018 reform, are described by Pawliczak. See: J. Pawliczak, *op. cit*., pp. 560–586.

[48] Act of 26 January 2018 on the Performance of Certain Activities of a Central Authority in Family Proceedings in the Field of Legal Cooperation under the European Union Law and International Agreements, Journal of Laws of 2018, item 416, as amended.

of a new EU regulation for international family matters and child abductions (Brussels II ter).

The proceedings for the return of a child conducted under the international instruments of judicial cooperation – referred to in Polish law as *cases involving removal of a person from parental authority or custody* – are now regulated in the Act on the Central Authority and in the relevant provisions of the Code of Civil Procedure.[49] The Hague return proceedings in Poland are embodied in a non-trial civil procedure, the first stage of which is of adjudicatory nature and aimed at determining whether a return order shall be issued (Articles 598^{1}–598^{5} of the Code on Civil Procedure). During that stage, the court may order a competent officer to examine the social background of the child,[50] and if the whereabouts of the child is unknown, the court may order the Police or other competent authorities to determine the location of the child.[51] In the course of proceedings conducted under the 1980 Hague Convention, no decision on parental authority or custody may be taken by the court seized with the return application.[52] The second stage of the Polish Hague proceedings is the enforcement of the return order (regulated in Articles 598^{6}–598^{14} of the Code on Civil Procedure).

The return application within the meaning of the 1980 Hague Convention can be filed either to the Polish Central Authority (Ministry of Justice) or directly to the competent court.[53] Since 2018, there is a concentration of jurisdiction in the Hague cases, meaning that only eleven regional courts are competent to examine return applications in the first instance, while all appeals are heard by one court: the Court of Appeal in Warsaw.[54] The court of first instance

[49] Act of 17 November 1964 on the Code of Civil Procedure, Journal of Laws of 1964 No. 43, item 196, as amended. See: Articles 388^{1}–388^{3}, Article 518^{2}, Article 519 paragraphs 2^{1} and 2^{2}, Article 569^{1}, Article 579^{3}, Articles 598^{1}–598^{14}, Articles 1106^{5}–1106^{7} of the Code of Civil Procedure.

[50] Article 570^{1} paragraph 1 of the Code on Civil Procedure.

[51] Article 598^{3} of the Code on Civil Procedure.

[52] Article 598^{2} paragraph 1 of the Code on Civil Procedure.

[53] Article 569^{1} paragraph 4 of the Code on Civil Procedure.

[54] Article 518^{2} paragraph 1 and Article 569^{1} paragraphs 1 and 3 of the Code on Civil Procedure. Before the adoption of the 2018 Act on Central Authority, family divisions in over 300 district courts were competent to examine Hague

shall reach a decision within six weeks from the date of filing the return application, while another six-week deadline is provided for appeal proceedings in the second instance.[55] Against the decision of the Court of Appeal in Warsaw, a cassation appeal may be submitted to the Polish Supreme Court, albeit by a limited number of petitioners (General Prosecutor, Ombudsman and Children's Rights Ombudsman).[56] The cassation appeal may be filed within four months from the date on which the decision of the Court of Appeal in Warsaw becomes final.[57] In Polish return proceedings under the 1980 Hague Convention, legal representation is mandatory, meaning that parents are required to be represented by an attorney-at-law or a legal counsel both in the first and second instance.[58] However, mandatory legal representation does not apply to submitting the return application. In the Hague return proceedings filed in Polish courts, a public prosecutor is also involved.[59]

4.3.2. MEDIATION IN CROSS-BORDER CHILD ABDUCTION PROCEEDINGS IN POLAND

The 2018, the Act on the Central Authority was drafted under the influence of the forthcoming reform of EU law and follows several solutions introduced by the Brussels II ter Regulation to be later

cases in the first instance, and more than 40 court had jurisdiction to examine the appeals. Due to low recurrence of the Hague cases, judges were not specialised in this specific type of family proceedings. See: J. Pawliczak, *op. cit.*, p. 565.

[55] Articles 518^2 paragraph 2 and 569^1 paragraph 2 of the Code on Civil Procedure.

[56] Article 519 paragraphs 2^1 and 2^2 of the Code on Civil Procedure. For more on the course of Polish judicial proceedings within the framework of the 1980 Hague Convention, see: M. Białecki, *Orzekanie w sprawach o wydanie dziecka w trybie Konwencji dotyczącej cywilnych aspektów uprowadzenia dziecka za granicę sporządzonej w Hadze w dniu 25 października 1980 r.*, Warszawa 2021.

[57] Questions arise whether such a long deadline for the filing the cassation appeal is compatible with the obligation of the state parties to use the most expeditious procedures available. See also: J. Pawliczak, *op. cit.*, p. 567.

[58] Article 578^2 of the Code on Civil Procedure.

[59] Article 598^1 paragraph 1 of the Code on Civil Procedure.

adopted in 2019 (e.g. the concentration of jurisdiction in Hague proceedings). In the spirit of strengthening the role of mediation, reflected in the new EU instrument, the 2018 Act on the Central Authority provides for the obligation of the Ministry of Justice, acting as the Central Authority, to notify the receiving parent about the possibility of using amicable methods of dispute resolution.[60] The Act on the Central Authority itself does not regulate the issue of mediation in cross-border child abduction proceedings under the 1980 Hague Convention. In this regard, the general provisions of the Code of Civil Procedure regulating mediation in civil proceedings (Articles 183^1–183^{15}) are applicable.[61] In addition, after 1 August 2022, the provisions of the Brussels II ter Regulation on mediation are directly applicable to Polish domestic proceedings in intra-EU child abduction cases.

According to Article 183^1 paragraph 2 of the Code on Civil Procedure, mediation in civil cases, thus also in cross-border child abduction proceedings, can be conducted based either on an agreement on mediation or on the court decision referring parties to mediation.[62] Prior to the commencement of judicial proceedings, mediation is possible on the basis of an agreement between the parties, and when the case is already pending before the court, it is possible to conduct mediation both on the basis of an agreement on mediation and on the basis of a court order referring the parties to mediate.[63] Regardless of its legal basis, in every case, mediation is a voluntary process, requiring the consent of both parties, which

[60] Article 13 paragraph 1 of the 2018 Act on the Central Authority.

[61] M. Białecki, *Praktyczne aspekty mediacji transgranicznej w sprawach z udziałem dziecka*, [in:] *Arbitraż i mediacja – perspektywy prywatnoprawna i publicznoprawna: między teorią a praktyką: księga pamiątkowa ku czci Profesora Jana Łukasiewicza*, Ł. Błaszczak, R. Morek, J. Olszewski (red.), Rzeszów 2018, p. 47.

[62] Pursuant to Article 183^1 paragraph 2 of the Code on Civil Procedure, an agreement on mediation is also concluded in the case if a party consents to mediation after the other party has filed a request to mediator for conducting mediation together with a proof of delivery of a copy of such request to the other party.

[63] E. Stefańska, *Art. 1–477(16)*, [in:] *Kodeks postępowania cywilnego. Komentarz aktualizowany*, tom I, M. Manowska (red.), LEX/el. 2022.

is expressed in 183[1] paragraph 1 of the Code on Civil Procedure. The mere referral of parties to mediation does not encroach upon its voluntary nature, as mediation does not take place if one of the parties is not willing to consent, and even if the parties do participate in mediation sessions, they are by no means required to conclude a memorandum of understanding before the mediator.[64]

The main form of carrying out mediation proceedings under Polish civil law is contractual mediation based on an agreement between the parties.[65] Agreement on mediation can be concluded either before submitting the return application or after the court has been seized with the return application.[66] In the agreement on mediation, the parties shall specify, *inter alia*, the subject-matter of mediation, the person of the mediator or the method of selecting a mediator.[67] In the context of international child abduction, it is essential that the conflicted parents choose such a mediator or a mediation organisation which offers specialised mediation services in cross-border family disputes due to the legal and socio-cultural specificity of such cases.[68]

According to the general rule laid down in Article 10 of the Code on Civil Procedure, in cases which are appropriate for an amicable settlement, the court should attempt to reach an amicable settlement at any stage of the proceedings, especially by encouraging the parties

[64] According to Article 1838 paragraph 2 of the Code on Civil Procedure, in case of a referral to mediation by the court, mediation shall not be conducted if a party did not agree to mediation within one week from the date on which a decision referring the parties to mediation is published or served to that party. The lack of consent for mediation may be expressed at a later stage, although it may entail a court order to pay the costs of the proceedings, pursuant to Article 103 paragraph 3 point 2 of the Code on Civil Procedure. See also: E. Stefańska, *Art. 1–477(16), op. cit.* LEX/el. 2022.

[65] M. Białecki, *op. cit.*, p. 49.

[66] According to Article 1831 paragraph 4 of the Code on Civil Procedure, mediation shall be conducted before instituting proceedings or upon the consent of the parties in the course of proceedings.

[67] Article 1831 paragraph 3 of the Code on Civil Procedure. For more on the agreement to mediate under Polish law, see: M. Macyszyn, M. Śledzikowski, *Umowa o mediację w prawie polskim – wybrane uwagi*, "Kwartalnik ADR" 2015, nr 3(31), pp. 5–16.

[68] M. Białecki, *op. cit.*, p. 49.

to mediation. This has been reiterated in Article 210 paragraph 2^2 of the Code on Civil Procedure, according to which the court shall advise the parties of the possibility of amicable dispute settlement, in particular by way of mediation. A similar obligation also stems from Article 205^2 paragraph 1(1) of the CCP, in terms of which the parties shall be advised of the option to resolve their dispute by way of a settlement reached before the court or a mediator. Attempting to reach an amicable solution, the court might refer the parties to mediation at each stage of the proceedings (Article 183^8 paragraph 1 of the Code on Civil Procedure). The possibility of referral to mediation shall be carefully considered and assessed by the court before the first hearing in case, and if it is necessary to do an assessment, the presiding judge may summon the parties to appear in person at a closed-door hearing.[69] Regardless of such assessment, the presiding judge may also summon the parties to participate in an information meeting on an amicable dispute resolution, in particular mediation. In intra-EU cases involving removal of a person from parental authority or custody, the obligation of Polish courts to consider the ADR and to discuss with the parties the possibility of mediation also stems from the provisions of Article 27 of the Brussels II ter Regulation. The courts are left with the discretionary power to decide whether mediation is appropriate in a particular case and will not unduly delay the proceedings or otherwise be contrary to the best interests of the child.

The court, while referring the parties to mediation, determines its duration, which, as a rule, shall not exceed three months in civil proceedings and does not count towards the length of the court proceedings.[70] Considering the requirement of expeditious proceedings and the six-week-timeframe stemming from Article 11 of the 1980 Hague Convention and Article 24 paragraph 2 of the Brussels

[69] Article 183^8 paragraph 5 of the Code on Civil Procedure. In Hague proceedings, such careful assessment is in line with the guidelines presented by the HCCH in the Guide on Good Practices on Mediation and the requirements under Article 25 of the Brussels II ter Regulation. Referring parties to mediation where the case is not appropriate for ADR is against the best interest of the child, and this may lead to substantial delays in return proceedings.

[70] Article 183^{10} paragraph 1 of the Code on Civil Procedure.

II ter Regulation, the court seized with a return application should set a much shorter timeframe for mediation. If the parents have not chosen a mediator, the court, while referring to mediation, should appoint a mediator with appropriate knowledge and skills related to the conduct of mediation in cross-border family disputes.[71] While appointing a mediator, the court should first consider the list of permanent mediators available in every regional court.

If parents have reached an agreement before the mediator and signed a memorandum of understanding (mediated agreement), such an agreement needs to be validated by the court. Validation takes place upon the request of one of the parties (in case of contractual mediation) or upon the motion of the mediator (in case of referral to mediation by court).[72] A mediated agreement validated by the court has the binding effect of a settlement reached before the court. The court will refuse to validate the agreement reached before the mediator, in whole or in part, if it is contrary to the law or social norms, or intends to circumvent the law, or where it is incomprehensible or contains contradictions.[73]

4.3.3. MAIN CHALLENGES OF MEDIATION IN POLISH PROCEEDINGS UNDER THE 1980 HAGUE CONVENTION

The Polish Ministry of Justice, for several years, has been supporting and actively promoting alternative dispute resolution methods, advocating for mediation and introducing legal amendments

[71] Pursuant to Article 183^{9} paragraph 1 of the Code on Civil Procedure.

[72] Articles 183^{13} paragraph 1 and 183^{14} paragraph 1 of the Code on Civil Procedure.

[73] Article 183^{14} paragraph 4 of the Code on Civil Procedure. For more on validating the agreement reached before mediator in civil cases, see: M. Malczyk, *Ugoda zawarta przed mediatorem w mediacji cywilnej – zagadnienia wybrane*, [in:] *Ius est a iustitia appellatum. Księga jubileuszowa dedykowana Profesorowi Tadeuszowi Wiśniewskiemu*, T. Ereciński, J. Gudowski, M. Pazdan, M. Tomalak (red.), 2017, pp. 319–330; K. Flaga-Gieruszyńska, *Kryteria kontroli sądowej ugody zawartej przed mediatorem*, [in:] *Ius est a iustitia appellatum. Księga jubileuszowa dedykowana Profesorowi Tadeuszowi Wiśniewskiemu*, T. Ereciński, J. Gudowski, M. Pazdan, M. Tomalak (red.), 2017, pp. 131–143.

favourable to alternative dispute resolution in general.[74] The Polish legal regulations in force impose upon courts dealing with civil matters obligations which should support and promote mediation.[75] Nonetheless, mediation in Poland is still underused. According to Tabernacka, this is due to the low public awareness of mediation, which results in a general lack of trust in this institution.[76] The costs of mediation, which are usually borne by the parties, are relatively high compared to a court decision, which is 'free of charge'. Some authors argue that the legislative amendments introduced with the aim to spread the use of mediation have not been effective at all.[77] In the courts' practice, encouraging the parties to mediation is often

[74] Mediation was introduced into the Polish Code of Civil Procedure with a legislative amendment in 2005. Since 2010, a special department dealing with mediation has been operating within the Polish Ministry of Justice, which is endowed *inter alia* with the task of promotion and development of mediation, developing recommendations with the aim to support mediation, awareness-raising and implementing European Union directives on mediation. See: https://www.gov.pl/web/sprawiedliwosc/dzialania-ministerstwa-sprawiedliwosci-w-przedmiocie-mediacji. Concerning promoting mediation and the awareness-raising campaigns in Poland in recent years, see: M. Plucińska-Nowak, *Status i oblicza mediacji w społeczeństwie polskim*, Poznań 2021, pp. 149–172.

[75] See: Article 10, Article 183^8 paragraph 1 and Article 210^2 paragraph 2 of the Code on the Civil Procedure.

[76] M. Tabernacka, *Polish Best Practice Model: Specialised mediation in international child abduction cases in connection with return proceedings under the 1980 Hague Convention*, [in:] *Best Practice Model Mediators-in-Court-Model. Specialised mediation in international child abduction cases in connection with return proceedings under the 1980 Hague Convention*, J. Hirsch, M. Tabernacka (eds.), Berlin 2021, p. 5. See also: M. Plucińska-Nowak, *op. cit.*, pp. 173–177.

[77] M. Malczyk, *op. cit.*, pp. 319–320. However, the statistics concerning mediation in civil matters show that since the introduction of the provisions on mediation into the Polish Code of Civil Procedure in 2005, which took effect in 2006, there has been a clear trend of an increase in the number of civil cases in which the parties were referred to mediation by the court. In 2006, there were altogether 1,448 cases referred to mediation by district courts and regional courts (270 cases in family matters). In 2010 – 2,196 cases (988 in family matters) and in 2017 – 7,668 cases (6575 in family matters) were referred to mediation. Statistics after: M. Plucińska-Nowak, *op. cit.*, pp. 135 and 146. Nevertheless, the number of cases referred to mediation represent only a small number of all civil cases filed in the Polish courts in respective years, and they do not include statistics on contractual mediation.

limited to providing the parties with basic information about the possibility of reaching an agreed upon solution for the mere sake of recording that fact in the minutes of the hearing.[78] The use of mediation in the Hague proceedings is not common either. Białecki's research that shows that among thirty Hague cases filed in the Polish courts during the period from August 2018 to December 2019, only in three cases was mediation introduced.[79]

One of the main challenges faced by state authorities in international child abductions is the six-week deadline imposed by the 1980 Hague Convention and the Brussels II ter Regulation, which requires not only timely conduct of judicial proceedings but also a very smooth organisation of mediation. No public institution or NGO in Poland offers dedicated support or specialised mediation in cross-border family disputes, such as MiKK in Germany, Reunite in the UK or the International Child Abduction Center in the Netherlands.[80] Practitioners argue that without any organisational support from either a pubic or an NGO mediation institution, they need to devote too much time and effort in preparing and organising mediation, which is difficult considering the tight timeframe of the Hague proceedings.[81] Finding a suitable bilingual interpreter is only one of these issues. Similarly, Polish judges hearing the Hague cases lack sufficient organisational support if they decide to refer parents to mediation.[82] That is why finding a suitable (and available at short notice) mediator, either by the parties or by the court, is not without major challenges. Currently, there is no separate register of mediators specialised in mediating international family disputes. The register of permanent mediators, which the court is expected

[78] M. Malczyk, *op. cit.*, pp. 319–320.

[79] In two cases, mediation led to an amicable settlement, and in one case, the parties did not reach an agreement. M. Białecki, *op. cit.*, pp. 64–68.

[80] There are many mediation associations or foundations in Poland, e.g. Stowarzyszenie Mediatorów Rodzinnych, Krajowe Stowarzyszenie Mediatorów, Stowarzyszenie Mediatorów Cywilnych, Fundacja Partners Polska or Polskie Centrum Mediacji; however, none of them seem to offer such complex and specialised organisational support, which is necessary for preparing mediation in international child abduction cases.

[81] M. Tabernacka, *op. cit.*, pp. 3, 7.

[82] *Ibidem*, p. 7.

to refer to in the first place, lists mediators with different fields of expertise. Some mediators have listed cross-border family disputes as their specialisation. However, even though the legal regulations governing the maintenance of the register[83] require mediators to submit several documents and training certificates to demonstrate relevant qualifications, their genuine experience in mediating in cross-border abduction cases is nevertheless difficult to assess.[84] In other words, both the judge and the conflicted parents who have decided to attempt to reach an amicable settlement need to engage in the preparation and organisation of mediation, which is not only a procedural and organisational burden but also puts at risk the timely conduct of the return proceedings.[85]

4.4. *De lege lata* and *de lege ferenda* recommendations

In response to the challenges of integrating mediation into ongoing return proceedings, some recommendations can be made for the Polish legislator and policy making bodies. Undoubtedly, further awareness-raising is necessary to remedy the general lack of trust in mediation and alternative dispute resolution. As for mediation in the specific context of cross-border child abduction, it is crucial that parents in such high-conflict and tense situations received complete and reliable information about mediation. Since the first point of contact for the left-behind parents is often the Central Authority, its role as a source of information should therefore be strengthened. The Polish Ministry of Justice, pursuant to Article 13 paragraph 1 of the Act on Central Authority, is required to inform the parents about the possibility of using mediation. Such information should be sufficient for the parents to make an informed decision about resorting to mediation instead of, or parallel to, filing court proceedings, and this should be available in foreign languages as well. The

[83] Paragraph 5 of Regulation of the Minister of Justice of 20 January 2016 on maintaining the list of permanent mediators, Journal of Laws of 2016, item 122.
[84] M. Tabernacka, *op. cit.*, pp. 3–4.
[85] *Ibidem*, p. 3.

information provided to the general public by the Polish Central Authority is available on the webpage of the Polish Ministry of Justice, in Polish, English and German.[86] The Brochure (leaflet), which can be downloaded from the website, covers information on how to submit a return application and a request for the exercise of the rights of access and accommodation, and it also has a separate section dealing with mediation.[87] Unfortunately, this section is rather concise and by no means provides exhaustive information about mediation and its advantages; it merely explains the notion of cross-border mediation and provides contact details of some Polish and international mediation institutions. The author believes that the Brochure should encourage parents to mediation by presenting the benefits of an agreed upon solution or at least make them consider the possibility of resorting to alternative dispute resolution. The current form and content of the Brochure is not helpful in that regard. Practical and comprehensive information on cross-border family mediation should be directly available on the Central Authority's webpage so that the 'possibility of mediation' does not remain hidden in a short subsection of a downloadable leaflet. The layout of the Central Authority's webpage should also be redesigned to make the navigation more user-friendly.

In an individual return case pending before a competent Polish court, parents should have access to comprehensive information on mediation directly from the court examining the return application. Such an obligation, in the author's opinion, stems from Article 10 of the Code on Civil Procedure and from Article 25 of the Brussels II ter Regulation, since 'encouraging the parties to mediation' and 'inviting the parties to consider whether they are willing to engage in mediation' implies, in the first place, providing exhaustive information on mediation by the court. As has been mentioned earlier, the Polish legislator may authorise the presiding judge to summon the

[86] https://www.gov.pl/web/stopuprowadzeniomdzieci.

[87] Ministry of Justice, *Guide on How to Submit an Application for Return of a Child Taken Abroad Without Permission and Request for Exercise of Right of Access*, available in English at https://www.gov.pl/attachment/854e165e-464d-4b35-814c-92b5d6059fff and in German at https://www.gov.pl/attachment/6eb04abc-212a-401a-961f-2669b6fc03fc.

parties to participate in an information meeting about mediation (Article 183^8 paragraph 4 of the CCP), which can be held by the judge themselves, but also by other persons, including mediators. In cross-border child abduction cases, such information meetings present an excellent opportunity for the parents to learn about mediation and its benefits and to hear that it is in their child's best interest that they reached an agreed upon solution. In the author's opinion, in cases involving removal of a person from parental authority or custody carried out under the 1980 Hague Convention, summoning parents to an information meeting about mediation should be made obligatory, unless it would not be appropriate in the circumstances of the case. To this aim, the author suggests that the current wording of Article 183^8 of the CCP be amended by adding a paragraph 4^1, according to which: '*Summoning the parties to participate in an information meeting is obligatory in cases concerning the removal of a person subject to parental authority or custody conducted on the basis of the Hague Convention of 1980, unless this is contrary to the best interests of the child, it is not appropriate in the particular case or would unduly delay the proceedings*.'

Ideally, a mediator should be invited to the information meeting, which is already possible under the existing regulations. Giving the parties an opportunity to learn first-hand about the mediation process and to meet the mediator personally would contribute to making mediation a real and available option worth considering by the parents. Judges intending to hold an information meeting with a mediator – or to refer the parents to mediation – should be actively supported by mediation coordinators, whose tasks include ensuring efficient communication between judges and mediators and cooperating in organising information meetings (Article 16a paragraph 1 of the Act on the Organisation of Common Courts[88]). Mediation coordinators, based at the regional courts, are in the most suitable position to act as an intermediary between the Polish Hague judges and mediators having suitable knowledge, experience and the language skills to conduct mediation in international child

[88] Act of 27 July 2001 on the Law on Organisation of Common Courts, Journal of Laws of 2001 No. 98, item 1070, as amended.

abduction cases. Strengthening the role of mediation coordinators could to some extent compensate for the lack of a public or non-profit organisation which would offer dedicated support in cross-border child abduction.

In response to the difficulties faced by the Hague judges referring parents to mediation under Article 183^8 paragraph 1 of the CCP, a separate register of mediators capable of mediating in international family disputes should be created. Such a register would also help the parents themselves seeking a competent mediator; furthermore, it would support the work of mediation coordinators, helping them to act as a contact point between the Hague judges and mediators. To this end, as an example, the Regulation of the Minister of Justice of 20 January 2016 on maintaining the list of permanent mediators could be modified to add a new subtype of permanent register of mediators. It would be of great practical significance if a sub-register of cross-border family mediators was established within the National Register of Mediators that is expected to be created within the Project on the promotion of alternative dispute resolution methods by improving the competence of mediators, establishing a National Register of Mediators (KRM) and awareness-raising activities, implemented by the Polish Ministry of Justice in 2020–2023.[89] That considered, the author suggests that while drafting the new Act on the National Register of Mediators and its implementing regulations, the Polish legislator shall endeavour to create a special category of register of international family mediators. Either a special register should be introduced in the Regulation of 20 January 2016 on the list of permanent mediators or in the new Act on the National Register of Mediators or through any other legislative solution, and the requirements for mediators applying

[89] In 2020–2023, a major project is being implemented by the Ministry of Justice, together with 4 consortium partners, entitled 'Promoting alternative dispute resolution methods by improving the qualifications of mediators, establishing a National Register of Mediators and awareness-raising activities'. The project is addressed to the entire Polish population, but it also targets specific groups of professionals, such as judicial authorities and professional mediators. One of the goals of the project is creating a National Register of Mediators. See more: https://www.gov.pl/web/sprawiedliwosc/projekt-krm2.

to be listed on such register should be *expressis verbis* specified in the legal regulations (e.g. listing certificates or training institutions that are accepted, requiring a certain number of hours of experience in cross-border mediation), and some procedures of verification of the fulfilment of such qualifications by the applicants should also be introduced.

The biggest challenge of the Hague proceedings is undoubtedly the six-week timeframe required by the 1980 Hague Convention, within which a decision on the return of a child must be rendered (which has been expanded to include six weeks in the first instance and six weeks in appeal proceedings in intra-EU abduction cases). Such a rigid time limit, which has proven to be difficult to comply with by the Polish courts,[90] makes it difficult to accommodate any 'extracurricular' proceedings, such as mediation, whose organisation due to special requirements is a difficult and time-consuming activity. The application of the Mediation in Court (MiC) model, described in the first part of the chapter, might be helpful in overcoming some of the difficulties by providing a clear scheme to be followed while introducing mediation in pending return proceedings in Poland (the MiC model requires from the court seized with a return application scheduling two court hearings within a six-week timeframe: for advising mediation and presenting the mediator during the first hearing and issuing a court order on the return during the second hearing, so that in-between the two court hearings, intensive mediation sessions can take place). The MiC model was tested for its compatibility with the Polish legal framework for cross-border child abduction in the international AMICABLE Project.[91] Based

[90] According to the latest available statistics, the return applications received by Polish authorities in 2015 were decided on average within 151 days, i.e. 21.5 weeks (the average number of days from receipt by the Central Authority to final outcome). The problem with meeting the deadline set by Article 11 of the 1980 Convention is not only that of Poland. Globally, the mean number of days to arrive at a final settlement was 164 days, from the date on which the application was received, compared with 188 days in 2008. See: N. Lowe, V. Stephens, *op. cit.*, paragraph 106 and Annex 7.

[91] The AMICABLE project was implemented between 2019 and 2021 by the MiKK, with the participation of Italian, Polish and Spanish universities, all of whom have developed country-specific best practice tools for introducing

on the MiC scheme, Tabernacka presented an outline of the Polish model for introducing mediation in the Hague proceedings.[92] She recommends scheduling two court hearings in the after the court has been seized, the first of which should take place early enough so that effective mediation could be prepared and carried out. During the first hearing, the parents and their legal representatives should be informed about the principles and benefits of mediation. The judge should choose the mediator, unless the parties make their own choice. The first hearing is also an appropriate moment for the court to determine the issue of contacts between the left-behind parent and the taken child until the end of judicial proceedings. According to Tabernacka, it is important that the parties and their legal representatives know the date of the second court hearing as soon as during the first hearing so that they could thus be able to plan mediation. The date and venue of mediation should be set immediately after the first court hearing. The second court hearing should take place on the scheduled date, regardless of whether the parties have reached an agreement during mediation or not.

The author considers it crucial that the parents in conflict are provided with an opportunity to hear about mediation and to meet with a mediator within the court setting. The esteem of the court 'legitimises' the use of such soft instruments as mediation and guarantees that regardless of its outcome, parents will not be deprived of judicial remedies. All in all, it helps parents in making an informed decision about resorting to mediation, either within the framework of contractual mediation or by consenting to mediation after having been referred to this by the court. The possibility to meet a mediator personally is not without significance, either. In the author's opinion, to this end, two different solutions can be adopted. First, information can be provided to parents, and a meeting with a mediator can be arranged under the auspices of the court at an information meeting convened pursuant to Article 183^8 paragraph 4 of the CCP

specialised mediation in connection with return proceedings under the 1980 Hague Convention. The project received support from the European Union's Justice Programme. See: https://www.amicable-eu.org/amicable-eng/mediation.

[92] M. Tabernacka, *op. cit.*, pp. 8–9.

(ideally, summoning parents for such a meeting should be mandatory in the Hague cases, as recommended earlier). Alternatively, this can be achieved by introducing into the Polish Code of Civil Proceedings a scheme of integrating mediation inspired by the MiC model, which would imply informing about the ADR and presenting a mediator during the first court hearing, as well as ruling on the return of a child during the second hearing. In this latter case, the question arises whether the court's discretion and assessment as to the number of hearings necessary considering the circumstances of the case would not be overly limited. Especially since Białecki's research shows that while summoning parties at the beginning of a Hague case, Polish courts often issue an order scheduling several consecutive hearing dates.[93] Nevertheless, the MiC scheme shall not be underestimated, as it provides for a feasible example of how a Hague judge can facilitate the incorporation of mediation into the short timeframe of child abduction proceedings. Such an example of good practice should be taken into consideration by the Polish legislator and policymaker, especially in the context of the obligation of the Central Authority and the Hague court to make an attempt at an amicable solution. The MiC model highlights that successful mediation in ongoing child abduction proceedings requires the cooperation of all persons concerned in Hague cases: parents, judges, cross-border mediators and mediation NGOs, Central Authorities and the parties' lawyers.

4.5. Conclusions

During the last twenty years, there has been growing support from the international community for the use of mediation to resolve cases arising under the 1980 Hague Convention. It has become evident that family conflicts involving cross-border child abduction are a distinct category of disputes that require an interdisciplinary approach to accommodate both legal challenges and the socio-psychological aspects. International family mediation

[93] M. Białecki, *op. cit.*, p. 19.

complementing the 1980 Hague Convention court procedure has proven to be an effective way of resolving such highly escalated family conflicts, which also helps to safeguard the best interests of the child. Cross-border family mediation needs to fit within the temporal constraints of the 1980 Hague Convention, stemming from the principle of expeditious proceedings. Integrating mediation into ongoing court proceedings in such cases is undoubtfully highly challenging considering the overall organisational effort related to finding a suitable mediator, an interpreter and organising mediation sessions, all that in the six-week timeframe for the court to reach a decision on the return of a child. Nevertheless, one of the most challenging parts is persuading the parents to submit their conflict to mediation, which requires providing them with comprehensive and reliable information on an alternative dispute resolution as early as possible.

There is no uniform regulation in international documents on how to integrate mediation into domestic Hague return proceedings, considering that the return proceedings under the 1980 Hague Convention are carried out in accordance with the domestic law of the requested state, as well as with mediation. Nonetheless, the Hague Conference on Private International Law has developed universal guidelines relating to mediation in cross-border child abduction cases (2012 Guide to Good Practice), while several mediation NGOs have been testing different schemes of integrating mediation into ongoing Hague proceedings (MiKK, Reunite, Center IKO).

This study examined the international legal framework for mediation in the 1980 Hague Convention cases, together with the relevant provisions of Polish law, with the aim to recommend solutions allowing for better integration of mediation into ongoing return proceedings in Poland. Although Polish civil law generally promotes the use of mediation, the current practice of mediation, as well as in cross-border family cases, has been limited. Building upon existing legal solutions, such legislative and practical changes can be suggested that could translate into more widespread use of mediation in Polish cross-border child abduction cases. The author's recommendations revolve around two groups of issues: informing parents and organising mediation. Informing parents can

be improved by strengthening the information role of the Central Authority and equipping it with materials promoting ADR, including a well-designed webpage. At the judicial stage, summoning parents by the court to an information meeting about mediation should be obligatory, unless not appropriate in the given case. While organising information meetings or referring parents to mediation, the Polish Hague judges should be actively supported by (already existing) mediation coordinators, whose role as an intermediary between the Hague judges and specialised mediators is underused, mainly due to the lack of an official register of cross-border family mediators. The Polish legislator should endeavour to create a register of international family mediators while drafting the new Act on the National Register of Mediators or otherwise make an attempt at creating a verifiable list of mediators specialised in cross-border family matters, for example through amending the 2016 Regulation on the list of permanent mediators. The scheduling of mediation sessions in Polish return proceedings is limited by the six-week timeframe of the 1980 Hague Convention and Brussels II ter Regulation. In this regard, German, Dutch and British models provide for a feasible example of how mediation sessions can be scheduled to fit into those time constraints.

Integrating mediation into ongoing Hague proceedings requires the cooperation of several stakeholders who are all under the pressure of time, but the game is definitely worth the candle. Mediation in these cases in particular has many advantages, and when it complements the return proceedings, it allows the parents to deal both with a legal problem and with the human face of cross-border child abduction to attain a tailor-made and sustainable solution in the child's best interest.

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Chapter 5. Mediation in Polish Criminal Proceedings – *De Lege Lata* Reflections and Crucial Problems

5.1. Introduction

When we think today about mediation and its purpose in criminal proceedings, it is quite obvious that we perceive it as trying to attempt a voluntary resolution of the conflict caused by the crime. The parties should reconcile and agree upon a way to repair the damage caused by the offence and to compensate for the harm suffered. This goal should by achieved with the assistance of an impartial mediator and through the conclusion of a settlement agreement.[1] It should be noted, however, that mediation in Polish criminal proceedings appeared quite late with the 1997 Code of Criminal Procedure (CCP). It was not present in the 1929 CCP nor in the 1969 Code. The emergence of the institution of mediation in Polish criminal proceedings can be interpreted as an expression of Polish legislators turning towards the idea of restorative justice and a certain shift of focus in criminal law from a total concentration on

[1] See: S. Steinborn, *Art. 23a*, [in:] J. Grajewski, P. Rogoziński, S. Steinborn, *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, LEX/el. 2016, no. 4.

the perpetrator, characteristic for the sociological school of thought, towards noticing the interests and position of the victim.[2]

This chapter analyses how the current shape of mediation in Polish criminal proceedings corresponds with the mentioned shift. It outlines and analyses mediation as it is but also attempts to diagnose problematic issues in the Polish regulation of mediation and the practice of its application in criminal proceedings. Such a diagnosis is obviously necessary for the formulation of optimal *de lege ferenda* postulates.

5.2. Mediation in Polish Code of Criminal Procedure and Regulation of the Minister of Justice

In the 1997 CCP, mediation was initially regulated in Article 320 as one of the provisions on pre-trial proceedings. This gave rise to serious doubts as to whether a case could be referred to mediation only at the pre-trial stage or also at the trial stage. This doubt was dispelled by placing, by the amendment from 2003, the regulation concerning mediation in Article 23a of the CCP, in Division I of the Code, entitled 'Introductory provisions'. It is already clear that the institution of mediation refers to the entire criminal proceeding. The provision of Article 23a of the CCP regulating mediation was amended in 2015. The current regulation of Article 23a of the CCP defines the authorities that can refer a case to mediation, the grounds that permit this, the maximum period of mediation and the entities that cannot act as mediator.

In 2015 a new regulation of the Minister of Justice was also issued to define the detailed procedure of mediation, the conditions which have to be fulfilled by institutions and the persons authorised to conduct mediation, the manner of appointing and dismissing mediators, the scope and conditions for making case files available to the mediator and the form and scope of the report on the results of mediation proceedings.

[2] Zob. I. Pączek, *Postępowanie mediacyjne jako konsensualne zakończenie postępowania karnego*, "Ius Novum" 2016, No. 4, p. 104.

Searching within the content of Article 23a of the CCP for the conditions of mediation, only one can easily be decoded. This is the requirement of consent of the victim and the accused to refer the case to mediation. It should be noted here that consent is an absolute condition for initiating, as well as for conducting, mediation proceedings. It can be withdrawn at any time.

In consideration of the parties to the mediation proceedings – the accused or suspect and the victim – it also becomes an obvious condition for mediation that the criminal proceedings have reached an appropriate stage. This has to be at least the *in personam stage* of the pre-trial proceedings. From the moment of bringing the charges, we are dealing with the suspect as a person who can participate in mediation with the victim. Analysing further the stage of criminal proceedings in which mediation may take place, it should be stated that it may be both in the stage of pre-trial proceedings (from the *in personam stage*) and the court stage, both during the proceedings in the court of first instance and during the appeal proceedings.

When discussing the procedure of mediation, it should first be pointed out that a case may be referred to mediation by a court or a court referendary, and at the stage of pre-trial proceedings, also by a public prosecutor or another body conducting such proceedings, for example the Police. Referral of a case to mediation is made by court order. There is no right of appeal against it. The order should specify the name of the institution or the name of the person appointed to conduct the mediation proceedings. The order should also contain the details of the accused and the victim and identification of the act charged against the accused with its legal qualification. A time limit for the mediation proceedings should also be set. These proceedings should generally last no longer than one month, although this is an instructional deadline.

Upon appointment, the mediator should immediately establish contact with the accused and the victim and set a date and place for a meeting with each of them. The mediator should then conduct individual or joint preliminary meetings with the accused and the victim, at a time and place convenient for them, during which he explains to them the objectives and principles of the mediation procedure, instructs them on the possibility of withdrawing their

consent to participate in the mediation and collects from the accused and the victim their consent to participate, only if the authority referring the case to mediation has not done so. Following these preliminary steps, the mediator conducts a mediation meeting with the accused and the victim, at a place and time convenient for the participants. In doing so, he or she helps to formulate the content of a possible settlement between the accused and the victim. Mediation proceedings shall not, in principle, be held on the premises occupied by the participants or their families nor at the buildings of the authorities entitled to refer the case to mediation.

In an ideal arrangement, the mediation proceedings end with the conclusion of a settlement agreement between the victim and the accused. In any case, however, even if no settlement is reached, the mediator prepares a report on the results of the mediation. This report is then submitted to the authority that referred the case to mediation. A key element of such a report is information on the results of the mediation proceedings. If a settlement agreement has been reached, it shall be attached to the report. The subject matter of the settlement agreement is most often the issue of compensation for damages and harm suffered. The mediated settlement agreement can then be made enforceable.

In defining who may be a mediator, it should be noted first and foremost that mediation proceedings may only be conducted by an institution or authorised person entered in a special list. Such a list is kept by the presidents of the individual district courts. The mediator must be impartial and inspire confidence in both the victim and the accused. What is particularly important from the point of view of the further course of the criminal proceedings is that the mediator may not be questioned as a witness as to facts of which he or she has become aware from the accused or the victim while conducting the mediation proceedings.

To conduct mediation proceedings, an institution is entitled which, in accordance with its statutory tasks, has been established to perform tasks in the field of mediation, rehabilitation, protection of social interest, protection of an important individual interest or protection of freedoms and human rights. Such an institution must be in a position to ensure that the mediation proceedings are

carried out by persons who meet the requirements for mediators, and moreover, it must have organisational conditions that make it possible to carry out the mediation proceedings.

A mediator may however be a person who enjoys full public rights and has full capacity to perform legal acts, is at least 26 years of age, has verbal and written command of the Polish language and has not been validly convicted of an intentional crime or an intentional fiscal crime. Such a person must, moreover, have skills and knowledge in conducting mediation proceedings, resolving conflicts and establishing interpersonal relations and must be able to guarantee the proper performance of his or her duties.

However, a mediator cannot be a judge, prosecutor or prosecutor's assistant, judicial or a prosecutor's trainees, a court juror, legal secretary or an officer of an institution authorised to prosecute crimes (for example the Police or the Military Police). Furthermore, mediation proceedings cannot be conducted by a person of whom the same circumstances exist as those justifying the exclusion of a judge in criminal proceedings.

From the above regulations on mediation, four principles can be deduced for mediation proceedings in Polish criminal courts – the principle of voluntariness of mediation, its confidentiality, the principle of impartiality and the neutrality of the mediator.[3]

It is still necessary to indicate what the objectives of mediation are. As mentioned in the introduction, mediation is obviously intended to lead to a resolution of the conflict by means of an agreement on compensation for the harm caused by the offence and to make reparation for the harm suffered. It also, of course, should give the victim some sense of justice and compensation taking place. In practice, however, it is the defendant who stands to gain the most from mediation.

First of all, pursuant to Article 53 paragraph 3 of the Criminal Code, the court shall take into account the positive results of mediation when determining the sentence. Under Article 60 paragraph 2 of the Criminal Code, a positive result of mediation may even affect extraordinary mitigation of the sentence. However, the

[3] Compare: I. Pączek, *op. cit*., p. 105.

most far-reaching effects of a positive result of mediation can be achieved in private prosecution proceedings. In private prosecution proceedings, the effect of a positive result of mediation is that the proceedings are discontinued. The offender is therefore not criminally liable at all in that case. In cases of offences prosecuted upon request, a positive outcome of mediation may translate into the withdrawal of the request.

5.3. Mediation in practice

However, it is rightly pointed out in the doctrine that the consent of the victim and the accused is not the only condition, and not all criminal cases are suitable for mediation. Mediation will not be an appropriate solution in all cases. Above all, mediation is supposed to be in the interest of the victim. This, moreover, follows directly from the 2012 EU Directive, which the current form of Article 23a of the CCP is intended to implement.[4] It is difficult to identify *a priori* the categories of criminal cases that should not go to mediation. If there are any criteria or generalised limitations, it is possible to state that the circumstances of the case should not raise major doubts and that the accused should not dispute his or her guilt. The importance of circumstances that are not necessarily related to the act itself is also relevant. These circumstances include the nature of the conflict between the parties, the type of relationship between the perpetrator and the victim (for example family, neighbourhood, collegial and professional relationships). Circumstances that concern the accused person are also important (such as previous criminal record, demoralisation, mental health condition), as well as the circumstances connected to the victim (claimant, health condition).[5]

[4] Article 12 section 1 letter B Directive of the European Parliament and of the Council 2012/29/UE of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and replacing Council Framework Decision 2001/220/WSiSW, OJ L 315 of 2012, p. 57.

[5] See: S. Steinborn, *Art. 23a*, *op. cit.*

Research conducted in Poland on the use of mediation in criminal cases shows that it most often takes place in cases of offences against the family and guardianship, and more specifically, the offence of maltreatment. The second group of cases that were most frequently referred to mediation were cases of offences against life and health, primarily participation in a fight or beating and causing medium bodily harm. The third group of cases, which appeared relatively frequently in mediation studies, were cases of offences against property. In addition, a greater number of cases were referred to mediation for the offence of criminal threats, defamation or causing a road traffic accident with moderate bodily harm. However, there were also mediations for acts such as the offence of rape. Thus, it can be seen that the practice has taken a flexible approach to the institution of mediation.[6]

From the outlined regulations on mediation, it seems to follow that it should work quite efficiently in Polish criminal proceedings and be used quite often. Meanwhile, statistics indicate that only a small number of criminal cases are submitted to mediation (less than 1%[7]). This may suggest the existence of some problems or limitations in the application of this institution. It appears that two cautious hypotheses can be formulated in the search for reasons for this state. According to the first, the very limited extent of the use of mediation in criminal trial practice may be related to the so-called consensual modes of ending criminal proceedings,[8] which can be perceived as more attractive to the accused than mediation itself. The second possible reason appears to be a lack of interest not only from the accused but also from the victim to take part in mediation. From the perspective of victim, he or she obtains very

[6] D. Szumiło-Kulczycka, *Mediacja i zakres jej zastosowania w świetle kodeksu postępowania karnego*, [in:] *Mediacja. Teoria, normy, praktyka*, M. Araszkiewicz, J. Czapska, M. Pękala, K. Płeszka (ed.), Warszawa 2017, p. 290.

[7] Compare: *Mediacje karne w latach 1998–2021*, https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/ (accessed on: 8.09.2022).

[8] See: D. Szumiło-Kulczycka, *Alternatywne metody rozwiązywania i rozstrzygania spraw karnych w praktyce*, [in:] *Mediacja, Teoria, normy, praktyka*, M. Araszkiewicz, J. Czapska, M. Pękala, K. Płeszka (ed.), Warszawa 2017, p. 303.

little from it. Both outlined hypotheses require development and further explanation.

5.4. Consensual modes and mediation

Turning to the first hypothesis that the defendant in Polish criminal proceedings is not particularly interested in mediation, mainly due to the so-called consensual modes, it should be noted that this assumption is confirmed by statistical data. While, as mentioned above, only about 1% of criminal cases go to mediation, the majority of criminal cases end in one of the consensual forms – specifically conviction without trial or voluntary submission to a penalty.[9]

It should be noted that mediation itself is, of course, also a form of consensualism in criminal proceedings. However, it seems that the current constructions of the so-called conviction without trial (Article 335 of the CCP) and voluntary submission to punishment (Article 387 of the CCP) are simply more attractive for the accused and more easily accessible. In Poland, when a defence counsel accepts his client's criminal case, where the perpetration and guilt are not in doubt and the facts are quite clear, the first thing that comes to the defence counsel's mind is precisely a conviction without trial or voluntary submission to punishment. These institutions are also attractive for the authorities conducting criminal proceedings – for the prosecutor and for the court. Sentencing without trial and voluntary surrender of sentence win out over mediation in the field of pragmatism. They cause criminal proceedings to end quickly, in a manner acceptable to both the authority and the accused, which, of course, does not mean in a way that is favourable to the victim.

One of the most frequently indicated advantages of consensual modes of ending criminal proceedings is significantly accelerating criminal proceedings and limiting their costs. Time and financial rationalisation are very important here. Statistical data shows that in the case of applying the institution of sentencing without trial, the

[9] See i.a.: W. Jasiński, *Porozumienia procesowe w znowelizowanym kodeksie postępowania karnego*, "Prokuratura i Prawo" 2014, nr 10, p. 5 *et seq*.

majority of cases end within the first session.[10] Another advantage is the convicted person's acceptance of the verdict and the punishment imposed upon him or her. This aspect seems to be very important for the individual-preventive goals of a penalty.

However, the question that inevitably arises is: Where, in consensual modes, can the victim and the idea of restorative justice or the compensatory function of criminal law in general be found? Obviously, in the case of a conviction without trial, the "legally protected interests of the victim" are required to be taken into account, and the granting of a request for a conviction without trial is possible if the victim does not oppose this. However, this is where his role formally ends. The victim does not formally have any influence on the final shape of the trial agreement. The situation is similar in the case of Article 387 of the CCP and the institution of voluntary submission to penalty regulated therein. In this institution, the victim may oppose the defendant's motion for a guilty verdict without taking evidence. Formally, however, he or she has no other means of influencing how the criminal proceedings will end.

5.5. Potential opportunities to counter crucial problems with mediation in Polish proceedings

It is important to note that if consensualism is to be an expression of a broader tendency to modify the continental model of proceedings, to focus on the resolution of the social conflict caused by the commission of a crime, it would seem that the person of the victim should be taken into account much more than in conviction without trial or in voluntary submission to a penalty, even if we remain with the inquisitorial model of criminal proceedings. Mediation seems to be the answer to such a need.

Mediation provides, or rather can provide, more possibilities to take into account the perspective of the victim, a perspective not limited only to opposing a conviction without trial or to voluntarily submitting to a penalty and requesting an obligation to compensate

[10] W. Jasiński, *op. cit.*

for damage or harm suffered. The mediation procedure and the agreement reached at its conclusion are not the result of negotiations between the defendant and the prosecutor or court but remain with the victim.

However, the question that inevitably arises at this point is: How does one redirect the "popularity" of conviction without trial and voluntarily submitting to a penalty to mediation. One simpler, though probably not ideal, solution could be making mediation an element of consensual institutions, for example, making mediation a condition for the defendant to benefit from the institution of sentencing without trial or voluntary submission to punishment. With the introduction of such a condition into these consensual modes, the speed of the proceedings would be somewhat lost. It would no longer be one conversation with the prosecutor or a hearing in court but a mediation procedure. However, the time limit for this procedure is, after all, relatively short, as it is generally one month. The results of the mediation proceedings, including, above all, the settlement agreement, could then be taken into account in the final verdict of the criminal proceedings by way of conviction without trial or voluntary submission to a sentence. The victim would then stop to be merely a subject accepting a consensual conviction but would also become a participant in it.

It seems, however, that such a "forced" imposition of the activation of the mediation procedure in every case of consensual mode would certainly increase the percentage of mediation but would not necessarily contribute in every case to a real strengthening of its role in criminal proceedings and to the resolution of the conflict related to the commission of a criminal offence. A slightly more difficult but possibly better solution for strengthening the role of mediation in Polish criminal proceedings could be making it more attractive for both the accused and the victim.

We had, in the Polish Criminal Code until 2016, the possibility to discontinue proceedings upon the request of the victim, where the prerequisites were specifically reconciliation of the offender with the victim and reparation of damages – all determined mainly through mediation. Perhaps it is worth trying to return to this? Especially as the removal of this provision has been met with rather fair criticism

from the doctrine.[11] One way is to make mediation more attractive from the defendant's perspective. The discontinuation of proceedings upon the request of the victim appears, first and foremost, as some form of benefit for the offender. It is the most far-reaching reduction of criminal responsibility, as there is no conviction at all. These benefits of mediation, however, the offender may have more. A great example could be the psychological aspects of mediation. Some studies show that after mediation, offenders take more responsibility and have more empathy for victim, feel more guilt and shame and experience higher moral failure than offenders who do not participate in mediation proceedings.[12] This may explain why offenders participating in mediation proceedings have decreased risk of recidivism.[13]

However, it is also worthwhile to look at what the victim can get out of mediation. In order to make mediation more popular and make it a viable alternative in criminal proceedings to other forms of consensualism, it is necessary to take into account certain victimological and psychological aspects related to the victim. Meanwhile, it seems that the victim is also not particularly interested in mediation in Polish criminal proceedings. This interest could perhaps be increased by clearly showing the victim what he or she can get out of such mediation. To this, it may be necessary to adapt mediation proceedings in a certain way by taking into account victimological and psychological aspects and recognising that mediation can even be therapeutic in its own way for the victim.[14] In this context, it is

[11] Compare: P. Kardas, *Zarządzanie konfliktem. Dlaczego w prawie karnym potrzebne jest umorzenie kompensacyjne*, Kraków 2019, p. 163.

[12] J. Jonas, S. Zebel, J. Claessen, H. Nelen, *The Psychological Impact of Participation in Victim–Offender Mediation on Offenders: Evidence for Increased Compunction and Victim Empathy*, "Frontiers in Psychology" 2022, No. 12, pp. 9 *et seq*., DOI: 10.3389/fpsyg.2021.812629.

[13] Compare: J. Jonas, S. Zebel, J. Claessen, H. Nelen, *Victim–Offender Mediation and Reduced Reoffending: Gauging the Self-Selection Bias*, "Crime & Deliquency" 2019, No. 6–7, pp. 963 *et seq*., DOI: 10.1177/0011128719854348.

[14] See J. Wemmers, K. Cyr, *Can Mediation Be Therapeutic for Crime Victims? An Evaluation of Victims' Experiences in Mediation with Young Offenders*, "Canadian Journal of Criminology and Criminal Justice" 2005, No. 47, pp. 527 *et seq*. DOI: 10.3138/cjccj.47.3.527.

worth noting so-called victim-sensitive mediation, which is mentioned in some works on institution of mediation[15] as a variation of victim–offender mediation (VOM). Perhaps developing this mediation formula and injecting it into the legal regulation of mediation proceedings could somehow contribute to positive changes in the use of mediation in the practice of criminal proceedings and thus increase its role and reach of use.

5.6. Conclusion

As already indicated above, the legal regulations on mediation in Polish criminal proceedings from the CCP and the ordinance of the Minister of Justice seem to be quite well thought out and functional. However, there is an undoubted problem with the institution of mediation in practice. The two key problem areas indicated above seem to suggest a certain need and area for change. Mediation 'loses' to conviction without trial and voluntary submission to punishment. It is less popular, and it seems to be less attractive for both the offender and the procedural authorities. Furthermore, mediation does not look particularly attractive to the victim either. There is therefore a need to place more emphasis on what the victim can gain from mediation, perhaps by using the formula of victim-sensitive mediation. In any case, however, there seems to be a need for further research into the institution of mediation in Polish criminal proceedings, the formulation of *de lege ferenda* postulates based on it and, of course, in the longer term, the reform of this institution.

[15] See M. Umbreit, J. Greenwood, C*riteria For Victim-Sensitive Mediation* & *Dialogue with Offenders*, The Office for Victims of Crime U.S. Department of Justice, 1997, https://www.ojp.gov/pdffiles1/Digitization/177657NCJRS.pdf, pp. 2 *et seq.* (accessed on: 8.09.2022).

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Chapter 6. Axiology of Mediation and Restorative Justice. Legislative Theory Perspective

6.1. Introduction

First, the terminology and concepts will be clarified. In the second part, an outline will be presented of certain problems that concern the model of rational legislation, which is recognised in the Polish theory of law. In the third and last part, the actions that must be taken in light of this model of legislation will be juxtaposed with the needs associated with the introduction of the institution of restorative justice. The text concerns general concepts, but due to the reference to the idea of restorative justice, it focuses more on issues of public law, especially criminal law *sensu largo*, rather than civil law, business law, etc.

The analysis carried out during the research included, *inter alia*, regulations norming the issue of mediation and restorative justice (international and Polish), other source materials (reports, opinions, etc.), literature analysis and analysis of statistical data.

This article fits within the scope of the theory of legislation. The theory of legislation, in its pragmatic aspects (as a set of activities), formulates directives, suggestions and proposals based on the characteristics of social phenomena (descriptive aspect) that concern the shape and contents of legal institutions. It can be perceived as a legal policy. This serves the purpose of drafting legal acts. In legislation,

the "ideal" is a "reflective response" to emerging problems, needs and the expectations of the public. The only means that may (but do not have to) lead to the achievement of this objective is extraordinary care and understanding of the entire situation by the legislator. This is the "ideal" way of achieving the objective.

For many years, in philosophy, sociology, law and practical thought alike, a lot of attention has been paid to an alternative or complementary way of responding to acts that are not socially desirable, e.g. crimes in criminal law, conflicts between spouses or in families in family law, etc. The concept that often appears in those not purely academic debates is restorative justice. The concept of restorative justice has a half-century-long history that is linked mostly to the critical currents in criminology which questioned the classical and rehabilitative approach to the criminal justice system and criminal law. These currents first emerged in the United Kingdom, Canada and Norway.[1]

Solutions that made reference to these ideas are also present in Polish legislation. The first attempts at implementing restorative justice were made after the political transformation, and the solutions implemented constantly evolved. However, they never met the expectations associated with them. Suffice it to say that mediation, which is the most typical method considered to be a reasonable alternative to the classical model of adjudicative justice, can in fact be considered as non-functional. In 2019, the mediation rate, i.e. the percentage of cases submitted for mediation in all cases filed with courts in which mediation could be applied, reached a record value of 1.3% compared to previous years. Since this record applies to just over 1% of all cases, no in-depth analysis is probably required. This is a negligible percentage.[2] Mediation is an important form of proceeding in cases from the point of view of every concept of

[1] Cf.: M. Zernova, *Restorative Justice. Ideals and Realities*, London 2008, p. 152; J. Goodey, *Victims and Victimology. Research, Policy and Practice*, Harlow 2005, pp. 92–109; K. Daly, *Restorative justice: The real story*, "Punishment and Society" 2002, No. 1, pp. 55–79.

[2] *Informator Statystyczny Wymiaru Sprawiedliwości*, https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/ (accessed on: 20.02.2022).

restorative justice. There are many possible causes of this state affairs, but low interest in mediation is a fact.

Strategies for the implementation of the restorative justice solutions must concern both the way of developing models (or models) of legal institutions, as well as the practical and social implementation of them. What model can be attributed to the (hopefully) historical process of implementation of mediation in Poland? The analysis of the evolution of Polish law, in the discussed scope, shows that the legislature was primarily driven by instrumental needs (speed of proceedings, costs, productivity).[3] The Polish model of implementing mediation and restorative justice belongs to the technical (instrumental) model, and there are serious risks associated with it. In fact, we should start with the axiology.

The starting hypothesis for this paper is that restorative justice institutions (a set of legal institutions) must be redesigned and reformulated systematically and comprehensively. Another hypothesis is that the previous practices of the Polish legislator (and hence the political decisions behind specific laws) have been instrumental. The third hypothesis is that the operation of restorative justice requires an axiological approach and taking into account the legal culture and quality of public life. These are technical hypotheses that can be tested largely by just making a reference to the rational legislation model that is accepted in Poland. The reasons why the previous activities in this regard have been ineffective and the restorative justice institutions are not working as expected are evaluated.

[3] A characteristic and typical thought about mediation was the conference of the Polish association of prosecutors on 14 March 2017, entitled: *Can mediation relieve the courts? The role of mediation in accelerating the* proceedings, https://lexso.org.pl/2017/03/15/ (accessed on: 1.09.2022). Although it is worth comparing this to the explanations of the Polish government in two cases, i.e. in the judgment of the Constitutional Tribunal of 29 November 2006, SK 51/06 (OTK ZU No. 10/A/2006, item 156) and in the judgment of the Constitutional Tribunal of 11 June 2010, P 15/09 (OTK ZU No. 56/5A/2010. The inherent value of mediation and conciliation as a new look at the law and action of the state, which builds civil society, is directly pointed out there. We will talk about the values later in the article.

It can be assumed that there are two model ways to implement restorative justice institutions. The first way can be called instrumental and the other – reflective.

It appears that the legislation and approach in Poland are an example of operation based on erroneous and instrumental assumptions. In Poland, restorative justice, both as an idea and as a specific legislative solution, is considered as an autonomous objective of the state's policy, i.e. Criminal policy. It is assumed that the objective can be assumed by just implementing institutions that are similar to the institution of restorative justice or that reflect it to some degree. It is assumed that the institution "justifies itself". However, without a debate, we cannot be sure that it is good and needed from all perspectives and that it is a desirable direction of changes in Polish law. Moreover, to be successful, restorative justice – as a legal institution – must be based on previous social reforms and broad education. The institution of restorative justice is a means to an end, not an end in itself. However, one must pay attention to excessive instrumentalisation (e.g. treating this institution as a way to improve the productivity of the system of penalties, shorten the waiting lines in the judiciary or reduce the costs of the justice system). Therefore, it must be considered what goal the implementation of this institution is to serve and whether it is worth the costs that must be borne so that it can be fully operational.

Various ideas and concepts concerning the regulation of some spheres of social activity, especially in legal sciences, may concern institutions (e.g. by proposing legal principles in the descriptive sense or patterns for shaping legal institutions). The word "institution" is ambiguous, too. For example, social, economic and legal sciences have a different definition of this term. In legal sciences, a legal institution (*institutio* – arrangement) is a separate set of legal norms that constitute a functional whole and refer to the relationships in a specific area of public life. The second meaning of the term that is often used in jurisprudence, which means a set of actions designated by a set of norms separated as a legal institution or by a person or group of persons organised and acting on the basis of such a set of norms.

Therefore, Z. Ziembiński points at the distinction of legal institutions, stating that they can be understood as "personal institutions (teams of persons applying the norms that give them competence in a certain scope) or as normative institutions (sets of materially or formally linked norms)."[4] The concept of a normative legal institution is linked to the concept of principles of law.

The legislator should be interested in the proper shaping of legal institutions (the normative aspect), but of course, one must not forget the effectiveness of law, i.e. the operation of legal institutions (the personal aspect).

The term "restorative justice" has several meanings.[5] In this paper, restorative justice is understood as a legal institution that is not shaped in an arbitrary manner. In the literature on this subject, the term "restorative justice" usually refers to a unique process that is aimed at remedying a wrongdoing caused by the perpetrator with the participation of the community, including the victim and the stakeholders – families, friends, neighbours, etc. The institution of restorative justice must be shaped in accordance with these principles (otherwise it will not be restorative justice).[6] This understanding of restorative justice is due to some propositions, as well as moral, functional and social assumptions. Most importantly, the restorative process is focused on solving a problem, most often a conflict and a violation of personal bonds and relationships (loss of trust, emotional injury, causing distress, indignation, fear, etc.).The wrongdoing caused by the perpetrator is a problem that is faced by the perpetrator himself, the victim and the community alike, and all of them are responsible for resolving it, eliminating the causes and ensuring a stable harmony of common life within

[4] Z. Ziembiński, *Rola badań socjologiczno-prawnych* dla *teorii prawa* i *szczegółowych nauk prawnych*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1970, nr 4, pp. 121–136.

[5] Cf.: Recommendation CM/Rec (2018)8 of the Committee of Ministers to Member States concerning restorative justice in criminal matters (Adopted by the Committee of Ministers on 3 October 2018 at the 1,326th meeting of the Ministers' Deputies).

[6] See: L.L. Miller, *The Politics of Community Crime Prevention*, Burlington 2001.

the community in the future. There is not a single model of the restorative justice process, because it is strongly dependent upon the social, cultural and moral context of a given society or community.[7] The meaning of the word "community" is unique, not in terms of space but rather with reference to the sense of common interest and ability to share emotions. This will be discussed later in the paper. This remedial process is partly characterised differently in various concepts of restorative justice, although the aforementioned components, such as remedying a wrongdoing, involvement of the victim and responsibility of the community, are usually shared by various concepts. The procedures of restorative justice that are deliberately community-based depend upon the "really existing, strong and integrated community."[8]

It has been said that, in the normative aspect, the remedial process is regulated in legal systems by properly shaped legal institutions or, where such institutions are lacking, by ad hoc restorative justice programs (e.g. experimental programmes carried out by the NGO sector in community centres or prisons). When looking for examples of practical application of the institution of restorative justice, it is good to consider its main techniques and methods, namely programmes for reconciliation between the victim and the perpetrator and mediation,[9] meetings or conferences or family groups and conciliation or adjudicating circles. Mediation is, therefore, only one of the techniques used in the remedial process.

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[7] Cf. P. Gensikowski, *Analiza możliwości implementacji wybranych procedur stosowanych w Midtown Community Court oraz Red Hook Community Justice Center w Nowym Jorku w warunkach polskiego prawa karnego*, [in:] *Współpraca organizacji społecznej z wymiarem sprawiedliwości. Poradnik*, C. Kulesza, D. Kużelewski, B. Pilitowski (red.), Białystok 2015, pp. 47–66

[8] A. Stypuła, *Kręgi rekoncyliacyjne. Sprawiedliwość naprawcza w służbie wspólnoty*, "Studia Socjologiczne" 2010, nr 4, p. 184ff.

[9] In this work, mediation has a broad meaning – the analysed concepts of restorative justice do not need to meet all the requirements concerning mediations, such as equal standing of the parties, the passivity of the mediator, who may have a scope of authority, leaving the course of the proceedings to the participants, and lack of compulsoriness (according to the studied concepts, a *quasi*-mediation may be imposed) – this will be discussed later.

It is worth explaining the relationship between the remedial process and mediation. Mediation is a voluntary agreement between the victim and the perpetrator aimed at remedying the material and moral harm done with the help of a mediator, who is an impartial and neutral person supporting the parties to the mediation.[10] However, it should be emphasised that in many restorative justice concepts, mediation is not always understood in exactly the same way: sometimes it can take the form of a *quasi*-mediation (with partial compulsoriness, an active role of the mediator – or rather a facilitator, imbalance between the standing of the parties, etc.).

In the Polish legal system,[11] it is virtually only mediation that fulfils some requirements imposed by advocates of restorative justice. This is also how it is perceived by the legislators. Legislative materials state e.g. that "the amendment of Article 59 a of the Criminal Code aims at eliminating the obvious error of omitting conciliation, in particular by way of a mediation between the perpetrator and the victim, as the condition for application of (…) restorative justice".[12]

[10] In criminal law, mediation can be understood as voluntary negotiations between individuals or groups in conflict; E. Bieńkowska, *Mediacja w polskim prawie karnym*, "Przegląd Prawa Karnego" 1998, nr 18, p. 21; R. Citowicz, *Kilka uwag na temat mediacji w sprawach karnych*, http://arbitraz.laszczuk.pl/_adr/25/Kilka_uwag_na_temat_mediacji_w_sprawach_karnych.pdf (accessed on: 5.09.2022).

[11] E.g.: in W. Lang's concept, the legal system is identified as a collection of norms. The legal order has a broader meaning and is the element of a larger order – social order. There are important links between law and other systems of values: morality, customs and religion. It is indicated that a good *legal order* should be based on an order of values. See: W. Lang, *System prawa i porządek prawny*, [in:] *System prawa a porządek prawny*, O. Bogucki, S. Czepita (red.), Szczecin 2008, pp. 9–16; T. Stawecki, P. Winczorek, *Wstęp do prawoznawstwa*, Warszawa 1999, p. 84. Of course, restorative justice goes beyond the legal system, as it requires a very strong foundation in various social norms and even adjustment of these norms to meet its requirements.

[12] See the explanatory memorandum for the government bill amending the Criminal Code and certain other laws (print no. 2393), p. 29, http://sejm.gov.pl/Sejm7.nsf/druk.xsp?nr=2393 (accessed on: 6.07.2022). Although this solution (restitutive discontinuation) was abandoned, it continues to be a solution (although *de lege lata* historical) that strongly implements the principles of the most important restorative justice concepts and their axiology.

In functional terms, the concept of restorative justice is also linked in Polish literature to the institution of compensatory measures. It should be mentioned that in the Polish legal system, compensatory measures have a typical civil-law character.[13] The provisions on those measures are to implement the compensatory function of criminal law, which is intended to be qualitatively different from the punitive function. Eventually, the typical goal of traditional criminal law is to punish the perpetrators of crimes.[14]

The results of studies and analyses, as well as reports and the daily experience of mediators, court-appointed custodians, lawyers who are attorneys, legal counsels or judges, prove that, generally speaking, mediation is a mostly insignificant technique in the daily operation of the justice system. Mediation is scarce. When talking about the institution of restorative justice, a reference is made to a project that is much broader than the mediation technique itself and its application. Practical consideration of all the aforementioned elements of the remedial process is a big challenge for authors of bills, as well as a social task. This is because it appears to be impossible to introduce effective regulations related to restorative justice (or, strictly speaking, the remedial process) and even mediation itself without social change.

[13] If a verdict provides for the obligation to remedy a damage or to redress the harm done as part of the obligatory basis provided for in Article 46 (1) (upon the request of the authorised person), Article 363 (1) of the Civil Code applies, which provides that a damage shall be remedied, at the choice of the victim, by restoring the original state or by paying an appropriate sum of money, provided that if it is impossible to restore the original state or if it requires excessive difficulty or cost to the person obliged to do it, the victim's claim shall be limited to a pecuniary payment. If the damage is to be remedied by paying a sum of money, the sum of the compensation should be set according to the prices as of the date on which the compensation is set, unless special circumstances require using as the basis the prices in place at another time (Article 363 (2) of the Civil Code).

[14] It can be added that compensation, in the broad sense, includes compensation of all damages caused by a crime, including those caused to the entire society. In the narrow sense, this means remedying the damage caused directly to a specific victim.

6.2. Rational legal policy and restorative justice

Sociologists, especially sociologists of law, rightly believe that law is an important instrument of social control. Therefore, by using legal measures, it is possible to intentionally and effectively affect the behaviour and attitudes of both individuals and groups of people. Of course, as we know, as late as in the 19th century, people believed (V. Dicey, W. G. Sumner and E. Ehrlich) that in each organised community, the behaviour of its members and the community as a whole is determined by extra-legal rules – a natural order reflected by social rules.

According to this approach, law does not shape the morality of the society but is variable and unilaterally dependent upon customs, cultural behavioural patterns and moral rules. This point of view was opposed by Leon Petrażycki. He believed that the law that reflects mental and social processes is "a factor of social life and its development, causes further processes in individual and mass psyche and comportment, and in the development of individuals and masses."[15] According to Petrażycki and other representatives of legal realism – the Uppsala school of jurisprudence (V. Lundstedt, K. Olivecron), law is to motivate or thwart the motivation for certain actions or omissions and reinforce and develop the promoted inclinations, attitudes and personality traits. It is hard not to notice that this perspective was also accepted in American realism. Legal norms are therefore treated as an indispensable instrument of rational social engineering as a determinant of the legal policy.[16]

The rational social policy implemented with the help of law – legal policy – can constitute an effective tool for behaviour control. As indicated by Andrzej Kojder, regulating specific behaviour can serve the following purposes: "1) stimulating and complementing changes in behaviour; 2) creating general social conditions for the desired changes to take place; 3) legalising the changes in behaviour

[15] L. Petrażycki, *Wstęp do nauki prawa i moralności. Podstawy psychologii emocjonalnej*, Warszawa 1959, p. 39.

[16] A. Kojder, *Prawo jako instrument kontroli zachowań społecznych*, [in:] *Prawo w społeczeństwie*, J. Kurczewski (red.), Warszawa 1975, p. 303.

that take place; 4) gradually stopping changes that are not taking place; 5) maintaining the status quo in terms of some behaviour; 6) eliminating behaviour considered to be undesirable."[17]

The rational legislation proposed in the Polish legal theory consists of five components: (1) setting a sufficiently precise objective; (2) determination of the relationship between the objective, understood as a type of states of affairs, and the means to achieve the objective (the types of phenomena that may lead to the state of affairs that is the objective); (3) determination of which means are of a legal nature; (4) selection of a legal means; and (5) formulation of regulations, including the design of legal institutions. Finally (6), such regulations must be established.[18]

6.3. Objectives and values

A sufficiently precisely set objective is one that enables selecting the means needed to achieve it. Therefore, this is not only a general idea but a possible clarification of how to cause a desirable state of affairs. With reference to the item concerning the objective, it can certainly be stated that the objective of legislative activity is determined by political decisions. Law is the product of political decisions. As the product of political decisions, law should be of particular interest for those planning reforms, not only of the law itself but also partly of social reforms, which indispensably involve the implementation of some concept of restorative justice and the legal institution that is linked to it (or a set of legal institutions). This can be considered a preliminary proposition: to carefully consider all social and moral aspects of the political decision to reform law in the spirit of restorative justice, which promotes mediation, etc. This is because adopting some legal norms, as an implementation of a decision with specific content, will not cause, for example, mediation to become an important element complementary to the adjudicative justice system.

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[17] *Supra note*, p. 327.

[18] J. Wróblewski, *Zasady tworzenia prawa*, Łódź 1979, p. 71ff.

As indicated by M. Zieliński and J. Wróblewski, objectives are values that the legislator intends to implement.[19] Values are linked to the axiology of law-making. With reference to values, three situations are possible. First, the legislator empirically determines the system of values (morality) prevailing in society. Second, the values are arbitrarily decided by the legislator. The third possibility, which goes beyond the rational legislation model for positive law normally discussed in legal theory, is recognition by the legislator the objectively existing values. However, this is not a case that cannot be radically reconciled with many restorative justice concepts which, if they do not adopt the position of ethical objectivity, then at least assume a universal acceptance of a set of subjective values. After all – as an advocate of objectivity would say – such existing values include conciliation, agreement, kindness, care and forgiveness.[20] Personal relationships, which in most restorative justice concepts are considered the overarching moral principles, often objective, must also be significant from the point of view of the legislator striving to introduce the institution of restorative justice. The legislator must therefore acknowledge the moral significance of personal relationships, which is consistent with Christian values, apparently common in Polish society. Whether they are objectively high values or there is only an acceptance of the fact that relationships of this type are of higher moral value in the hierarchy of such values or preferences than revenge, punishment or even justice in the strict meaning of the word is of no significant practical importance.

Of course, this leads to the question of how autonomous the legislator's decision to recognise these values is. What if the values are recognised by the legislator but not by a majority or part of the society? Thus, does the legislator educate and shape the society or describe the current state of affairs? Most restorative justice concepts maintain and consider as an important rule that moral education is

[19] *Supra note*, p. 77; M. Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki*, Warszawa 2012, p. 16.

[20] M. Armour, M.S. Umbreit, *Violence, Restorative Justice and Forgiveness. Dyadic Forgiveness and Energy Shifts in Restorative Justice Dialogue*, London–Philadelphia 2018, pp. 18ff; E.L. Worthington, *Forgiving and Reconciling: Bridges to Wholeness and Hope*, Downers Grove 2003, pp. 7–23.

included in all restorative justice programmes and that the role of the legislator is to organise remedial processes so as to encourage their implementation by promoting appropriate moral attitudes: cooperative, reconciliatory, kind and based on shared responsibility. Thus, the role of the legislator would be to prepare the society, in different ways, to the operation of the institution of restorative justice.

When designing restorative justice institutions, such forms of activity as remedial processes, mediations, etc. are considered to be valuable. However, what is the basis for the conclusion that restorative justice, including its techniques, such as mediation, is valuable? There are two possible answers to this question, as there are two possible approaches to the implementation of restorative justice institutions:

a) An ethical answer, which claims that A is valuable due to a set or system of values Z. Systems are rare these days, because systems require separation of an orderly set (class) of moral norms and appraisals. Of course, A is the value that is in relation to a certain – and not another – set of values. In this area, the legislator has a special possibility to make autonomous appraisals or appraisals that correspond to the moral appraisals shared by the society.
b) An instrumental answer, which assumes that A is valuable only as an effective means to achieve objective B. The justification of this appraisal depends on whether A is really capable of causing effect B.[21]

Therefore, is the institution of restorative justice an objective and a value in itself due to a set of values? Or perhaps is it a means to achieve a different state of affairs desirable to the legislator? What would be that state of affairs?

Therefore, a specific directive for the legislator can be formulated: if restorative justice, including its techniques, such as mediation, is to be a working legal institution, it is necessary to clearly identify the goal of law-making in this area.

I suggest that research should exclude the extreme instrumentalism of law in which a given legal institution solely serves current

[21] J. Wróblewski, *op. cit.*, Chapter 5.

political objectives, such as ad hoc financial savings, masking the ineffectiveness and lengthy operation of the justice system, or populist objectives (ones that help the ruling elite win elections). Of course, as clearly indicated by e.g. A. Peczenik, such ad hoc motives are often the reason for the adoption of some normative acts, and this is actually inevitable; however, the rational legislation model considered here does not include them.[22]

This paper assumes that the instrumental approach must be supplemented with a reflexive one. Reflectiveness, in this case, means recognition of the institution of restorative justice as an autonomous value in view of the system of values adopted by the legislator, which also serves to achieve a specific state of affairs in the social and ethical dimensions.

Identification of these values appears to be a fairly simple task. Let us look at the elements that characterise almost every concept of restorative justice. These are three main elements: remedying a wrongdoing, active participation of the victim in the remedial process and responsibility of the community which is involved in the solution of the conflict (or the problem caused by the wrongdoing and resulting from its perpetration, as a response to a crime, etc.). The axiological link between these elements is based on giving a moral dimension to the personal relations (such as care, forgiveness and kindness). Morality is not everything. Personal relations are possible because people are guided not only by their reason but also by their emotions.[23] As a result, revenge does not have to be proportional to the wrongdoing caused, and a utilitarian calculation of profits and losses is not the motive for actions by the perpetrator, the community or the victim.

Personal relations are possible if a kind of community is formed and to the extent to which the community is engaged in the remedial process. Community is understood in sociological terms, i.e.

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[22] A. Peczenik, *Stressing Legal Decisions and Theory of Law*, [in:] *Stressing Legal Decisions*, T. Biernat, K. Pałecki, A. Peczenik, Ch. Wong, M. Zirk-Sadowski (ed.), Kraków 2004, pp. 11–16.

[23] See: D. Engster, *The Heart of Justice: Care Ethics and Political Theory*, Oxford 2009, pp. 74ff.

through the lens of the strength of these social bonds among its members and the level of kind involvement in each other's affairs.[24] This can be a neighbourhood community. As a certain idea, restorative justice is a programme of revitalisation of "worlds of life" (to make a loose reference to the famous slogan of Jurgen Habermas), including education and reconstruction of neighbourhood, rural and urban communities, etc.[25] If the legislator decides to implement these values, which in my opinion would be just and would correspond to the idea of restorative justice, then in such case, the institute of restorative justice is valuable due to the fact that its application restores, promotes and strengthens communities and personal relations. As a result, communitarian values are implemented, which give precedence to the common good and the good of other people, sometimes at the expense of one's own egoistic interest. Depending on the concept of restorative justice, it can be said that it supports such objectives as shaping attitudes that support shared social responsibility, building mutual empathy, promoting personal relations, etc.

In light of works on restorative justice, a principal role in the exercise of social control is to be played not by society at the national level but in local communities. At the level of society as such, only mechanisms are to be worked out to support and animate communities to implement restorative justice. These communities are to take care of the perpetrator but also the victim and the persons affected by a conflict and to assume shared responsibility for each of those persons, as well as for the conflict and its solution.[26] They

[24] A. Etzioni, *The "Community" in Community in Justice. Issues, Themes and Questions Perspective*, [in:] *Community Justice. An Emerging Field*, D.R. Karp (ed.), Lanham 1998, pp. 373–378.

[25] See: J. Habermas, *Discourse Ethics: Notes on Philosophical Justification*, [in:] J. Habermas, *Moral Consciousness and Communicative Action*, Cambridge 1980; W. Cyrul, *Problem ważności w habermasowskiej teorii uniwersalnej pragmatyki*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2005, nr 2, pp. 201–221.

[26] See e.g.: G. Bazemore, D. Maloney, *Rehabilitating community service: Toward restorative service sanctions in a balanced justice system*, "Federal Probation" 1994, No. 1, pp. 24–35; R.J. Sampson, W.B. Groves, *Community Structure and Crime: Testing Social-Disorganization Theory*, "American Journal of Sociology" 1989, No. 4, pp. 774–780; T. Hope, *Community Crime Prevention. Building a Safer*

are also responsible for education and the infrastructure needed for peaceful problem resolution. Last but not least, communities are required to identify the reasons for the conflict and to strive to eliminate them in the future.[27]

At the same time, the institution of restorative justice in itself is a value if, in the adopted set of values, conciliation has priority over a formalised punishment. One cannot be sure that, from the point of view of the preference of the Polish legislator – political decision--makers, conciliation is really so high in the hierarchy of values.

6.4. Means to an end

Identification of the means needed to achieve a set objective requires an understanding of the reality and the links between different states of affairs. The links may be statistical, causal or functional – but they have to be known to the legislator. Therefore, it is necessary to clearly identify the phenomena that will lead to the state of affairs to be achieved. Such knowledge makes it possible to formulate targeted directives (to achieve state S means that A, B and C should be used).

Unfortunately, the objective in this case is not clearly identified. This is why it is impossible to determine the means – including the institution of restorative justice – that will result in the achievement of the objective.

The selection of the legal means is the result of a calculation (i.e. the balance of the costs of the means and the value of the objective) – of the utility of the legal means in comparison with another type of means of influence (instead of putting up a no stop sign or a no parking sign, sometimes it is easier to install bollards). It is worth mentioning that what matters is not only the effectiveness and cost (praxeological criteria) but also the validity of the legal means in

Society: Strategic Approaches to Crime Prevention, "Crime and Justice" 1995, Vol. 19, pp. 21–89.

[27] P. McCold, *Restorative Justice and the Role of Community*, [in:] *Restorative Justice: International Perspectives*, B. Galaway, J. Hudson (eds.), New York 1996, pp. 85–101.

view of the specific legal culture, the broad social context, morality and political order.

This aspect strongly depends upon the objective that the Polish legislator has not clarified with reference to the institution of restorative justice. Nevertheless, one should pay attention, for example, to the community aspect. What is the level of social activity of Poland's citizens? In Poland, less than 1% of persons having the right to do so are members of political parties (2020), and approx. 5% of the population is involved in any activity (outside organisations providing aid to the sick or children, as well as education and church organisations).[28] The number of communal court-appointed custodians is decreasing in Poland. Estimates of the Supreme Audit Office indicate a decrease from nearly 28,000 in 2014 to less than 24,000 at the end of the 1st half of 2017.[29] There are many reasons for this, but the facts are beyond dispute. Can it be expected that, in light of relatively low involvement in public life, it will be possible to build working institutions that require such involvement? (Especially in criminal cases or cases concerning juveniles, where the level of involvement appears to be very low).

Therefore, in light of the Polish legal culture, the dominant value systems, attitudes and social order, is there a chance that the institution of restorative justice will work? Most importantly, is it perceived as an autonomous value (do Poles actually give priority to conciliation over a severe penalty), and is the state of affairs to be achieved by applying it acceptable to the society? Of course, political decision-makers can shape the moral and social sphere. However, this should be the first thing to do instead of introducing the institution of restorative justice. However, no comprehensive studies have been carried out to answer these questions.

[28] P. Czakon, *Zaangażowani czy obojętni? Aktywność społeczna i polityczna młodych Polaków*, "Zeszyty Naukowe. Organizacja i Zarządzanie" 2016, book 95, pp. 78–87.

[29] *Raport: Wykonywanie obowiązków przez kuratorów sądowych*, Warszawa 2018, https://www.nik.gov.pl/plik/id,17872,vp,20457.pdf (accessed on: 20.02.2022).

6.5. Legal regulation method

Let us assume, however, that we will decide that the idea of restorative justice should be legally institutionalised in the Polish social reality. If, in the light of analyses, law is the appropriate instrument, it is only necessary to select the form of legal regulation, i.e. to determine the regulation method (penal, administrative or civil), the rank of the normative act and the way of formulation of the legal text (how to determine the behaviour of the addressees, what terminology to use, etc.). These issues only appear to be technical. For example, many concepts of restorative justice do not use the term "crime". Should a regulation of mediation in criminal cases use typical criminal-law terms? Or perhaps should regulations on a conceivable pre-trial mediation not use stigmatising (socio-linguistically) words and should instead use words such as "conflict", "client", or "party" instead of "victim" and "perpetrator", and should terms that are emotional and ethically significant ("forgiveness", "care", "equity" – "the perpetrator of the wrongdoing is to show care for the persons affected by his erroneous behaviour") be used?

6.6. Conclusions and *de lege ferenda* propositions

In conclusion, it must be emphasised that the legislator must make important decisions in three areas. First, the legislator must recognise the reality in terms of facts. Second, what is important is instrumental cognition, which in turn concerns the ways to apply or use empirical knowledge (facts) and hence the selection of those or other targeted directives (conditioned upon the recognition of correctness of sentences about the facts and relationships between phenomena). Third, the legislator must properly recognise the sphere of values or at least determine the hierarchy of values that is important from any point of view and the preferences as to the general objectives of law. All this is necessary to cause people to behave in a certain way in certain situations. This means bringing about new behaviours, limiting previous behaviours or changing the existing ways of acting. All this determines the effectiveness of law.

The community aspect should be emphasised as an example. The community and the institutions functioning within it (neighbourhood mediation centres, associations and leaders that advocate conflict resolution but also prisons and rehabilitation centres, etc.) are established to apply restorative justice; therefore, such communities are needed before the institution of restorative justice can be implemented.[30] The engagement of a community also means a certain level of trust in those people, entities and institutions that are involved in the conciliation between the perpetrator and the victim but that are not directly associated with the bureaucratic justice system. Of course, one can imagine mediation, e.g. in criminal cases, without the community aspect associated with the involvement of the local community, but it is impossible to imagine the operation of the institution of mediation on a broader scale without trust in the community.

In some circumstances and societies, the institution of restorative justice can be desirable and effective. However, the introduction of this institution or reference to it through mediation may not be advisable or effective in Poland. It appears that the motivation for the legal changes intended to strengthen the institution of restorative justice and its techniques (such as mediation) is to change individuals' behaviour so that they use mediation in different situations that require the interference of external actors in their affairs. This applies to criminal, family or even administrative matters alike. Contrary to appearances, this requires extensive educational activities to promote the desirable attitudes and values.

Adoption of a new law is often the condition for changes in the behaviour of the addressees of norms, but this is not a sufficient factor. A change in behaviour is the measure of the effectiveness of legal regulation. The effectiveness of law can be foreseen; however, this requires, among other things, knowledge about the social functions of law, especially the legal culture, the scope of the interference of law with social life, the degree of citizens' participation in the

[30] J. Goodey, *Victims and Victimology. Research, Policy and Practice*, Harlow 2005, p. 210.

creation and enforcement of law, the level of public acceptance of law and the authority of the state and law.

De lege ferenda propositions are usually understood as recommendations for specific regulations. An analysis of legislative materials, both draft and parliamentary, as well as current and historical normative acts, and comparative-law studies of the evolution of mediation and other techniques that fit within the broader concept of restorative justice, leads to the conclusion that it is too early to design laws in Poland. It is necessary to think about the appropriate objective of the implementation of such – analysed – legal solutions. The model of lawmaking outlined herein, with reference to the institution of restorative justice, confirms that, in fact, the Polish legislator (as well as others) should consider the form of legal institutions within the social and axiological context. This is because it is not even certain that mediation is desirable in the society and in what form it will (possibly) meet the society's expectations. I believe that mediation should be implemented as a form of a remedial process, which requires broader social reform – not only legal but certainly educational work and thorough identification of values.

The legislator must answer the question of whether restorative justice institutions are a goal and a value in itself that results from a specific set of values. Or perhaps is it just a way to achieve another state of affairs that is desirable for the legislator? Suppose mediation or another technique is an autonomous value. In this case, these institutions will be supported and promoted independently of other objectives of the legal policy, which then become secondary, such as reducing the duration of court proceedings, reduction of their costs, improving the quality of public services, etc. On the other hand, if a specific state of affairs is to be achieved by implementing this institution, then it is necessary to define the desired state of affairs and the objective, to have the objective in front of one's eyes and to think whether the planned legal institution (mediation, etc.) can be the means leading to the achievement of that objective.

The general conclusions of the research are as follows:

(1) The usefulness of mediation and other forms of restorative justice results not from instrumental reasons but due to the value of the culture of dialogue itself, ethics of care, civic

responsibility, as well as typically Christian values (mercy etc.); the goal is social change and the strengthening of personal relationships and the ethicality of social life. Restorative justice and mediation must not be equated. Restorative justice is a method of social impact, broader than legal and requires appropriate social institutions.

(2) Both the society and public authorities need to internalise the value and effectiveness of mediation and other alternative forms of conflict resolution. Restorative justice in social relations goes beyond traditional retaliation, blame and sanction solutions. Building a culture of dialogue should be a priority. This requires educational activities (raising social awareness of mediation, etc.) and training (for officials, judges, law students, etc.). It is necessary to systematise the approach to personal relationships based on dialogue, empathy and respect for diversity and to offer space to practice mediation. The state should take responsibility for these actions, though not from a control-authorship position but as being reflective and supportive.

(3) There is a need for a unified model for mediation and restorative justice treated as a public service. A comprehensive regulation should be created that would lead to a general and harmonised regulation of mediation with regard to all areas of activity, not only in the area of legal conflicts but also where there has been a disturbance to social relations. One selected concept of restorative justice, including the conception of mediation, should be implemented which also organises terminological and conceptual issues. The aforementioned uniform model would allow, *inter alia*, one to overcome the terminological confusion that still exists in some departments of administration with regard to the concept of mediation, because it is difficult to define what mediation processes are by comparing mediation itself with ongoing remedial processes. The very word "mediation" is not always appropriate, especially when there is no voluntary element. The unification of these issues will permit, for

example, the evaluation of the operation of restorative justice institutions.

(4) At least in the field of criminal and juvenile cases, an institution should be established to coordinate and organise the restorative justice process, responsible for the evaluation of activities, training and perhaps also for the restorative justice process itself. For example, due to general tasks and roles, probation and mediation could be combined into a separate authority responsible for the treatment of, supervision of and assistance to perpetrators (i.e. based on the existing professional and volunteer court probation service).

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