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Mediation in Penal Enforcement Proceedings *de lege lata*

Mediacja w karnym postępowaniu wykonawczym de lege lata

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ABSTRACT

The purpose of the article is to provide a dogmatic analysis of the current regulations on mediation in penitentiary proceedings in the context of its practical functioning in penitentiary units within the territory of the Regional Inspectorate of the Prison Service in Lublin. The current legal solutions are incorrect and require significant modification. This is supported by significant doubts as to the interpretation of the law and practice related to the regulation in question. Furthermore, they do not sufficiently implement acts of international law. This article consists of four parts. The first part presents the essence of mediation in penitentiary proceedings. Next, the legal nature of the mediation settlement agreement concluded in these proceedings and the international legal acts on restorative justice at the stage of serving a sentence are discussed. The last part describes the practice of applying mediation at the Regional Inspectorate of the Prison Service in Lublin.

Keywords: mediation; penal enforcement proceedings; mediation settlement agreement; penitentiary proceedings

INTRODUCTION

The axiological justification of the legitimacy of use of mediation at the stage of penal enforcement proceedings should not raise any doubts.[1] Mediation at the stage of serving a sentence is a factor which can have a positive impact on the course of rehabilitation and readaptation of a convicted offender. It creates an opportunity to prevent reoffense, making it easier to continue the process of rehabilitation of a convicted person under non-detention conditions. In addition, concluding a settlement as a result of mediation minimises the consequences of an offense committed in particular to the detriment of persons closest to the convicted person or to his/her close environment with which the convicted person will maintain relationships. A settlement reached as a result of mediation during the period of imprisonment is also one of the criteria having an effect on the examination of the convicted person's behaviour in the framework of the criminological prognosis assessment (Article 77 of the Penal Code[2]). The possibility to conduct mediation and to conclude a settlement as a result of it could also constitute an instrument facilitating or even anticipating the fulfillment of the obligations which have been imposed on the convicted person by the penitentiary court under Article 159 § 1 of the Penal Enforcement Code[3] in conjunction with Article 72 § 2 PC.[4] Therefore,

[1] Cf. M. Płatek, *Granice racjonalnej polityki karnej i penitencjarnej*, "Państwo i Prawo" 2006, no. 9, p. 28.

[2] Act of 6 June 1997 – Penal Code (consolidated text, Journal of Laws 2021, item 2345, as amended), hereinafter: PC.

[3] Act of 6 June 1997 – Penal Enforcement Code (consolidated text, Journal of Laws 2020, item 53, as amended), hereinafter: PEC.

[4] J. Lachowski, [in:] *Kodeks karny wykonawczy. Komentarz*, ed. J. Lachowski, Legalis 2021, thesis 34 regarding Article 1.

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there is no doubt that mediation fits into the objectives of the penitentiary policy, making it possible to develop socially desirable attitudes in the convicted person, including in particular a sense of responsibility, pursuing the objectives of the penalty of imprisonment formulated in Article 53 § 1 PC and Article 67 § 1 PEC.

However, the correctness of the normative regulation of mediation at the stage of penitentiary proceedings raises doubts. The aim of this article is to assess the current normative regulation and to answer the question whether it requires changes. In the first part, the issue of the essence of mediation in penitentiary proceedings is analysed. The second presents the legal nature of the mediated settlement concluded in these proceedings. Next, restorative justice at the stage of serving the sentence as approached in the international legal acts is presented, with a particular emphasis on the way in which mediation is regulated. The last part describes the practice of using mediation at the Regional Inspectorate of the Prison Service in Lublin.

THE ESSENCE OF MEDIATION IN ENFORCEMENT PROCEEDINGS

The institution of mediation in the enforcement proceedings causes divergent positions in the doctrine, related not so much to its legitimacy in the axiological sphere as to the source of normative regulation that constitutes the basis for its performance. There is no doubt that mediation proceedings have not been regulated, even in a fragmentary way, in the Penal Enforcement Code. There are also no executive regulations which would directly regulate the specific nature of mediation being conducted in prison isolation conditions. The main source of the doubts is the content of Article 162 PEC. This regulation only indicates the obligation of the penitentiary court to take into account the mediated settlement agreement in the proceedings on the application for a conditional release, which does not constitute an autonomous prerequisite for a conditional release and thus does not make the court obliged to rule it.[5] Therefore the question is whether the reference to the mediated settlement agreement in the content of Article 162 PEC opens the way to the possibility of mediation at the stage of enforcement proceedings pursuant to Article 1 § 2 PEC and the corresponding application of Article 23a of the Criminal Procedure Code,[6] or whether it merely reproduces the prerequisite in the form of an assessment of the convicted person's behaviour during the serving of the sentence

[5] D. Michta, A. Szczepański, *Mediacja w postępowaniu wykonawczym*, "Palestra" 2013, no. 7–8, p. 82.

[6] Act of 6 June 1997 – Criminal Procedure Code (consolidated text, Journal of Laws 2021, item 534, as amended), hereinafter: CPC. For more information on the settlement agreement in penal proceedings, see P. Sławicki, *Ugoda zawarta przed mediatorem w postępowaniu karnym jako tytuł wykonawczy*, "Nowa Kodyfikacja Prawa Karnego" 2020, vol. 58, pp. 25–40.

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as indicated in Article 77 § 1 PC. According to some representatives of the doctrine, the lack of regulation of mediation proceedings in the Penal Enforcement Code regulations means that Article 162 § 1 PEC refers to a settlement agreement concluded at the stage of pre-trial or jurisdictional proceedings,[7] which the penitentiary court should take into account anyway even in the absence of the aforementioned regulation.[8] The above position is complemented by the exclusion of the possibility of a corresponding application under Article 1 § 2 PEC of the provisions on mediation in Article 23a CPC,[9] thus excluding the admissibility of mediation between the incarcerated person and the victim. However, it is not possible to accept the position presented. This would, in fact, mean that the settlement agreement would have to be taken into account by the court at the substantive stage of sentencing as one of the sentencing directives (Article 53 § 3 PC) and then by the penitentiary court at the ruling enforcement stage as one of the prerequisites which can have an effect on conditional release. Furthermore, the content of Article 162 § 1 PEC refers to the very fact of a mediated settlement agreement being concluded and not to the progress of its implementation, disregarding the fact that this regulation does not narrow the material scope of the concluded settlement agreement exclusively to the settlement agreement concluded in penal cases. According to the resolution adopted by the panel of 7 judges of the Supreme Court, the basis for ruling on conditional release from serving the remainder of the penalty of imprisonment are the criteria set out in Article 77 § 1 PC and not the directives on the degree of penalty set out in Article 53 PC.[10] When deciding on the conditional release, the court may not base its decision once again on the same prerequisites which determined the degree of penalty.[11]

The opposite view assumes, on the other hand, that the wording of Article 162 § 1 PEC in conjunction with Article 1 § 2 PEC allows for the appropriate use of the institution of mediation as regulated in Article 23a CPC[12]. Of course, it can be assumed that since Article 162 § 1 PEC refers to a mediated settlement agreement

[7] K. Dąbkiewicz, *Kodeks karny wykonawczy. Komentarz*, Warszawa 2012, p. 473; K. Postulski, *Kodeks karny wykonawczy. Komentarz*, Warszawa 2016, p. 1008.

[8] S. Lelental, *Kodeks karny wykonawczy. Komentarz*, Warszawa 2020, p. 655.

[9] K. Dąbkiewicz, *Mediacja w postępowaniu wykonawczym – refleksje na tle historii pewnej nowelizacji (art. 162 § 1 k.k.w.)*, "Probacja" 2013, no. 4, p. 73.

[10] Resolution of the panel of 7 judges of the Supreme Court of 26 April 2017, I KZP 2/17, Legalis no. 1587114; decision of the Court of Appeal in Białystok of 31 January 2013, II AKzw 43/13, Legalis no. 665853. Cf. J. Lachowski, *Warunkowe zwolnienie z reszty kary pozbawienia wolności*, Warszawa 2010, p. 253.

[11] Resolution of the Supreme Court of 24 May 2017, V KK 82/17, Legalis no. 1637183; E. Bieńkowska, *Mediacja w sprawach karnych*, Warszawa 2011, pp. 14–15.

[12] T. Szymanowski, *Kodeks karny wykonawczy po nowelizacjach z 2003 r*., "Państwo i Prawo" 2004, no. 3, p. 40; E. Bieńkowska, *op. cit.*, p. 14; L. Osiński, [in:] *Kodeks karny wykonawczy. Komentarz*, ed. J. Lachowski, Legalis 2021, thesis 11 regarding Article 162.

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which is not regulated in the enforcement proceedings and which not only does not conflict with the principles of these proceedings but may even contribute to the implementation thereof, then the appropriate application of Article 23a CPC should not be excluded. In fact, there are no formal obstacles which would explicitly exclude the possibility of using mediation at the stage of serving a penalty of imprisonment. However, the adoption of the above position would require far-reaching modification of the regulations within their respective scope of application, including the overcoming of organisational barriers that would determine the course of mediation in the prison isolation environment.[13] The historical interpretation also does not provide arguments that would support the presented position, only pointing out errors in the law-making process that result from the inclusion of the part of the proposal assuming normalization of mediation in the enforcement proceedings.[14] It is therefore difficult to conclude that the theoretical possibility of appropriately applying Article 23a CPC constitutes an undeniable argument which closes the discussion on the shape and possibility of mediation at the stage of penitentiary proceedings, assuming that the current provisions are sufficient. The application of the institution of mediation in enforcement proceedings should not be just the result of an extremely clever juxtaposition and modification of, i.a., the provisions of Article 38 § 1, Article 105 § 1, and Article 105a PEC, supported by the appropriate application of Article 23a CPC and the enforcement provisions issued on its basis.

The doctrine also expressed the position that the rudimentary regulation of mediation in the Polish Penal Enforcement Code basically consists in the regulation of the institution of the settlement agreement concluded before a mediator, which is of an autonomous nature and is not supported by regulations determining the manner and mode of the mediation proceedings, pointing to the need to make them standardized.[15] At the same time, the possibility was provided to apply Article 23a CPC and the enforcement provisions issued on the basis thereof as appropriate, with the indication of the drawbacks of this solution, which in practice hinder the application of mediation at the stage of enforcement proceedings. Thus, this position is largely of a postulatory nature and follows the direction of the necessity to standardize mediation in the Penal Enforcement Code regulations in the face of the existing regulatory problems and drawbacks, taking the current standardization of settlement in Article 162 § 1 PEC as a starting point.

Taking into consideration the positions outlined and the interpretative doubts expressed about them as well as the axiological justification for the formal regulation of mediation at the stage of enforcement proceedings, one should unequivo-

[13] Cf. D. Michta, A. Szczepański, *op. cit.*, pp. 82–83.

[14] T. Szymanowski, *Kodeks…*, pp. 39–40; idem, *Zmiany prawa karnego wykonawczego (o potrzebie i zbędności nowelizacji przepisów)*, "Państwo i Prawo" 2012, no. 2, p. 58.

[15] Cf. D. Michta, A. Szczepański, *op. cit.*, pp. 81–83.

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cally advocate the necessity to formally regulate the institution of mediation at the penalty enforcement stage. The counter-argument that mediation could pose a risk of secondary victimisation should be rejected since the essence of mediation and the condition for its commencement is always the consent of both parties – the offender and the victim. Undoubtedly, the appropriate solution would be to introduce a separate editorial unit designed after Article 23a CPC[16] in the general part of the Penal Enforcement Code, supplemented with enforcement provisions.

LEGAL NATURE OF A SETTLEMENT AGREEMENT IN PENAL ENFORCEMENT PROCEEDINGS

The lack of comprehensive regulations leads to significant doubts also with regard to its consequences for the convicted person. Although the legislator refers to the institution of mediation in Articles 43 and 162 PEC, the latter provision is the only one which refers to the settlement agreement. It follows from the content of Article 162 § 1 sentence 1 PEC that the penitentiary court shall hear a representative of the prison administration, and a judicial professional probation officer if he/she has applied for a conditional release, and shall take the settlement agreement reached through mediation into account.[17] Consequently, neither the provisions of the Penal Code nor the provisions of the Criminal Procedure Code concerning the effects of mediation, including the legal nature of the settlement agreement, directly apply to it.[18] This supports the adoption of the view that the settlement agreement described in the aforementioned provision *de lege lata* is of the *sui generis* nature and therefore it constitutes an autonomous institution of enforcement proceedings.[19]

The shape of the regulation of the mediated settlement agreement in the Penal Enforcement Code suggests that it has been linked to the proceedings of the penitentiary court on the application for conditional early release from the penalty of imprisonment.[20] This is supported by the placement of Article 162 PEC in Chapter X Section 11 titled "Conditional Early Release". This regulation leads to significant

[16] *Ibidem*, pp. 82–83.

[17] It is sometimes indicated in the doctrine that the invoked provision does not make any sense and is not applied. See T. Szymanowski, *Zmiany prawa*..., p. 58.

[18] Cf. E. Bieńkowska, *op. cit.*, p. 14. Differently S. Lelental, *op. cit.*, theses 7–9 regarding Article 162.

[19] L. Osiński, *op. cit.*, thesis 11 regarding Article 162. It should be additionally noted that the regulation of the *sui generis* mediated settlement agreement is also known in civil proceedings in the Polish legal system as exemplified by the settlement in the case of an appeal to the competition and consumer protection court. See P. Sławicki, *Ugoda w sprawie odwołania do sądu ochrony konkurencji i konsumentów – ujęcie teoretyczne*, "Przegląd Prawa Handlowego" 2022, no. 2, pp. 35–36.

[20] Cf. K. Dąbkiewicz, *Mediacja*..., pp. 65–66.

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interpretative doubts since it can be assumed that in the course of mediation carried out at the stage of penitentiary proceedings, the prisoner and the victim will often strive to settle also other issues, related, e.g., to compensation for damage or remedy. It is also possible that the parties will want the content of the agreement to include additional issues – especially when the victim is a person close to the prisoner – associated, e.g., with the fulfillment of the obligation to pay alimony.

When analysing the content of Article 162 PEC, one can assume that the legislator has regulated the mediated settlement agreement on an autonomous basis in executive proceedings, the agreement being indicated only as one of the prerequisites – for the penitentiary court – to assess the legitimacy of an application for conditional early release. However, there are no grounds for assuming that the regulation being discussed has made the parties unable to shape their mutual legal relations by means of other legal instruments, including those of a mediatory nature. Therefore, one cannot rule out a settlement agreement which will be both a settlement agreement within the meaning of Article 162 PEC and a settlement agreement of a different nature, in particular a settlement agreement regulating civil law relations.[21] In such a situation, regardless of whether the settlement agreements in question are contained in a single document or in separate documents – they will be subject to different legal regimes. Therefore, as far as the regulation referring to civil claims is concerned, it will be subject to the procedure provided for in the Civil Procedure Code, including its legal effects.[22] This means that once it has been approved by the court, it will be an enforcement title constituting a basis for the commencement of enforcement proceedings before a court bailiff. In the remaining scope related to the application for conditional early release, it will constitute a settlement agreement of an autonomous nature, which the penitentiary court should take into consideration when assessing the application in question. It should be emphasised at this point that such distinction is grossly artificial, however, it is impossible to exclude the possibility of concluding an effective mediated settlement agreement causing civil law consequences only due to the stage of its conclusion (penal enforcement proceedings) and the entities concluding it (the convicted and the wronged). A correct interpretation of Article 162 PEC should lead to the conclusion that a settlement agreement which will be qualified as a settlement agreement concluded before a mediator within the meaning of the Civil Procedure Code should also be taken into consideration by the penitentiary court

[21] The literature indicates that Article 162 PEC refers to a settlement agreement concluded at the earlier stages of the penal proceedings. See K. Postulski, *op. cit.*, p. 783; D. Michta, A. Szczepański, *op. cit.*, pp. 83–84.

[22] In particular, Article 183^{15} § 1 of the Act of 17 November 1996 – Civil Procedure Code (consolidated text, Journal of Laws 2021, item 1805, as amended). Cf. M. Dąbrowski, *Mediacja w świetle przepisów kodeksu postępowania cywilnego*, Lublin 2019, pp. 285–286.

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when assessing the legitimacy of the application for early release. Undoubtedly, participation in mediation, and in particular the conclusion of a settlement agreement with the wronged party done with the aim to remedy the damage caused by the offense, can constitute an element of a positive criminological prognosis.[23] It should be highlighted that the very fact of concluding a settlement agreement does not constitute an autonomous pre-requisite for accepting an application for early release,[24] and the basis for the penitentiary court's ruling in this respect should be the totality of the circumstances.

INTERNATIONAL LEGAL ACTS ON POST-JUDGMENT MEDIATION

International regulations[25] such as the 1983 European Convention on the Compensation for Victims of Violent Crimes,[26] Recommendation No. R (85) 11 of the Committee of Ministers to Member States on the position of the victim in the framework of criminal law and procedure,[27] Recommendation No. R (87) 21 of the Committee of Ministers to Member States on assistance to victims and the prevention of victimization,[28] or Directive 2004/80/EC of the Council of the European Union of 29 April 2004 relating to compensation to crime victims[29] have played an important role in the considerations on the use of mediation in the process development of policies towards victims of crimes. The legal acts referred to above provide for, i.a., the right of the victim of crime to use mediation in order to reconcile with the offender or as a means of restitution and compensation for the harm suffered as a result of a criminal offense.

The Recommendation Rec (2006)2-rev of the Committee of Ministers to Member States on the European Prison Rules[30] has also played a significant role in the context

[23] G. Goniewicz, *Pozytywna prognoza kryminologiczna jako przesłanka stosowania środków probacyjnych*, "Czasopismo Prawa Karnego i Nauk Penalnych" 2017, no. 4, p. 131.

[24] D. Michta, A. Szczepański, *op. cit.*, pp. 80, 83; L. Osiński, *op. cit.*, thesis 11 regarding Article 162.

[25] Cf. P. Kłos, *Mediation in the Legal System of the United Nations*, "Studia Iuridica Lublinensia" 2020, vol. 29(4).

[26] European Convention on the Compensation of Victims of Violent Crimes of 24 November 1983, ETS No. 116.

[27] Adopted by the Committee of Ministers on 28 June 1985 at the 387th meeting of the Ministers' Deputies, https://rm.coe.int/16804dccae (access: 4.3.2022).

[28] Adopted by the Committee of Ministers on 17 September 1987 at the 410th meeting of the Ministers' Deputies, https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016804e24dc (access: 4.3.2022).

[29] OJ L 261/15, 6.8.2004.

[30] Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies and revised and amended by the Committee of Ministers on 1 July 2020 at the

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of mediation and restorative justice. The European Prison Rules provide for the use of mediatory mechanisms in all areas of prison administration. For example, Rule 56.2 provides that prison authorities shall use mediatory mechanisms to resolve disputes with and between prisoners wherever it is possible. On the other hand, under Rules 70.1 and 70.2, prisoners have a broad right to submit requests to the director of the institution, including requests for mediation. Where mediation proves appropriate, it should be used as the first means of resolving the dispute. According to Rule 103.7, restorative justice is implemented, i.a., by including prisoners who consent to it in a programme of restorative justice and repairing damages caused by their own crime.

It should also be indicated that the above-mentioned regulations on the use of mediation as an instrument allowing for the implementation of restorative justice were also influenced by international legal acts, including UN declarations. Among the legal acts concerning this issue, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power which was adopted by Resolution No. 40/34 of the UN General Assembly of 29 November 1985[31] and which provides, i.a., for the use of mediation as one of the informal means of dispute resolution and reconciliation between the victim and the offender should be specifically mentioned. Clause 4 of the UN Declaration provides victims' entitlement to be able to use procedures provided by the justice system to obtain immediate compensation for the harm suffered. On the other hand, Clause 7 of the UN Declaration stresses that mediation is one of the informal means of dispute resolution, aimed at facilitating reconciliation and obtaining compensation for victims.

The influence of the quoted declarations, recommendations and directives on the Polish legislation on restorative justice and the necessity to implement them, which undoubtedly requires a number of actions to be undertaken by Member States, is also not without significance.[32] In agreement with governmental and non-governmental institutions and organisations, the Ministry of Justice prepared the Polish Charter of Victims' Rights[33] which was announced in October 1999. The Charter takes into account, i.a., the inherent inalienability of human and civil dignity guaranteed by the Constitution of the Republic of Poland of 2 April 1997[34]

1380th meeting of the Ministers' Deputies, https://rm.coe.int/09000016809ee581 (access: 4.3.2022), hereinafter: European Prison Rules.

[31] A/RES/40/34, https://www.un-documents.net/a40r34.htm (access: 4.3.2022), hereinafter: UN Declaration.

[32] W. Broński, *Europejskie regulacje dotyczące mediacji w sprawach cywilnych i gospodarczych*, "Roczniki Nauk Prawnych" 2011, no. 1, p. 50.

[33] https://www.zielona-gora.po.gov.pl/pdf/polska_karta_praw_ofiary.pdf (access: 4.3.2022), hereinafter: the Charter.

[34] Journal of Laws 1997, no. 78, item 483, as amended, hereinafter: the Polish Constitution. English translation of the Polish Constitution is available at https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm (access: 10.5.2023).

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(Article 30 of the Polish Constitution), the constitutionally guaranteed principles of social justice (Articles 2 and 83 of the Polish Constitution), international recommendations shaping the policy of dealing with victims of crimes, including the indicated declarations, recommendations and directives. Furthermore, in items 2 and 3, the Charter guarantees victims, i.a., the right to mediation and reconciliation with the perpetrator as well as the right to restitution and compensation.

To sum up, it should be indicated that the regulations currently functioning in the Polish legal system and concerning the use of mediation as an instrument allowing the implementation of the restorative justice programme do not adequately implement the solutions adopted in the above-mentioned international regulations, which in consequence forms an argument for the right to introduce appropriate normative changes in national legal acts, especially in the Penal Enforcement Code.[35]

MEDIATION AT THE STAGE OF ENFORCEMENT PROCEEDINGS AS EXEMPLIFIED BY REGIONAL INSPECTORATE OF THE PRISON SERVICE IN LUBLIN

The idea of restorative justice consists in repairing damages resulting from committing a criminal act or in applying certain alternatives to the penalty of imprisonment in lieu of retribution for the harm done. In practice, it assumes an extended attempt to reach an agreement between parties related to a particular crime and one of the basic forms of its implementation is the institution of mediation.[36] The activities undertaken in all penitentiary units within the area of the Regional Inspectorate of the Prison Service in Lublin (the RIPS) that consist in conducting mediation with the participation of the inmates in order to reduce their return to crime and improve the situation of persons who have been wronged by crime are in line with this idea. The legal bases, assumptions and ways of performing these activities have been based on the legal regulations contained in the aforementioned international (soft law) and national documents as well as on the 2020 Rules for the Organisation and Conduct of Non-Judicial Mediation at the Stage of Enforcement Proceedings,[37] primarily taking into account the provisions of Recommendation

[35] On the proposals for normative changes, see W. Broński, *Mediacja w karnym postępowaniu wykonawczym jako metoda realizacji idei sprawiedliwości naprawczej*, "Probacja" 2022, no. 4, pp. 67–89; M. Dąbrowski, *Prawo dostępu do sprawiedliwości naprawczej i mediacji na etapie postępowania wykonawczego w sprawach karnych. Uwagi de lege lata i de lege ferenda*, "Probacja" 2022, no. 4, pp. 129–164; P. Sławicki, *Status mediatora w postępowaniu karnym wykonawczym de lege ferenda*, "Probacja" 2023, no. 1, pp. 153–179.

[36] T.F. Marshall, *Restorative Justice: An Overview*, London 1998, p. 1.

[37] Regulations for organising and conducting extrajudicial mediation at the stage of the enforcement proceedings within the framework of the implemented project titled "Pilot stage of the

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CM/Rec(2018)8 of the Committee of Ministers [of the Council of Europe] to Member States concerning restorative justice in penal cases[38] containing, i.a., the definition of restorative justice,[39] general practical rules,[40] and basic principles of restorative justice – including the key principle of harm reparation.[41]

The Rules define, among other things, the specific objectives of mediation at the stage of enforcement proceedings conducted in penitentiary units, its basic principles, the mediator's tasks and obligations and the course of the mediation proceedings, and they contain final provisions along with 10 attachments. In § 1 Clause 4 of the Rules it is indicated that the basic aim is to establish conditions for direct talks, enabling the parties to disputes arising out of the offense to contribute to the resolution thereof and to rebuild their mutual relationships as well as to enable the convicted person to take responsibility for the consequences of the offense and repair them by, e.g., apologizing to the wronged party, expressing remorse, making moral and/or material reparation, etc. Mediation should also make it possible to express one's emotions, expectations and needs, and to end or mitigate the dispute in a permanent manner, which is expressed in a settlement agreement that has been worked out and accepted by all parties to the dispute.

Mediation proceedings are voluntary (§ 3), neutral (§ 5), and confidential (§ 7). It is also an important rule that a party or parties referring a case to mediation undertake to cooperate and act in good faith, particularly with regard to the information provided, documents submitted, positions taken and solutions proposed or accepted in matters of restorative justice (§ 4).

Mediation is conducted by the mediator in accordance with applicable laws, standards and ethical principles. Before the first mediation meeting begins, the mediator sets up a document file for each mediation. Into them, he/she puts a written declaration of confidentiality, impartiality and neutrality and indicates all kinds of circumstances that could give rise to reasonable doubts about his/her neutrality and impartiality in the given case if any exist (§ 12). The mediator does not settle the dispute or give legal advice, and if he/she has made notes during the mediation proceedings for his/her own use, he/she is obliged to destroy them after the proceedings have ended (§ 13). The mediator's basic tasks include diagnosing the type of the case and the subject matter of the dispute in terms of the legitimacy of

programme implementing the restorative justice idea in the area of the Regional Inspectorate of the Prison Service in Lublin", financed by the Fund of Justice which is at the disposal of the Minister of Justice of 2020 (internal material), hereinafter: the Rules.

[38] Adopted by the Committee of Ministers on 3 October 2018 at the 1326th meeting of the Ministers' Deputies, https://www.euforumrj.org/sites/default/files/2019-12/polish-coe-rec-2018.pdf (access: 11.3.2022).

[39] Recommendations no. 3 and 4, Attachment to Recommendation CM/Rec(2018)8.

[40] Recommendations no. 3–11, Attachment to Recommendation CM/Rec(2018)8.

[41] Recommendations no. 13–20, Attachment to Recommendation CM/Rec(2018)8.

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mediation in the given case. The mediator should also identify the person initiating the mediation and all the participants of the mediation process and any contraindications to conducting the mediation as well as analyse the prerequisite of exclusion if he/she is related or has any close relations with any of the parties to the dispute (§ 2) or the occurrence of other circumstances that may affect his/her impartiality and neutrality (§ 14).

Mediation at the stage of enforcement proceedings in the practice of the RIPS in Lublin, in accordance with the Rules, may be initiated at the request of one of the parties to the dispute, provided that the other parties have agreed to it and at the joint request of the parties, whereby at least one of the parties must be a convicted person.[42] Mediation may also be initiated through a penitentiary judge, the director of a penitentiary institution, a custody suite, a penitentiary commission (administration of the penitentiary unit where the inmate is held) and the professional probation officer with the inmate's consent or at the inmate's request. When deciding whether to initiate mediation, one must take into account the purpose of the mediation to be assumed as well as the inmate's motives and his/her readiness to compensate the person harmed by the crime (§ 15).

Mediation lasts no longer than one month from the date the request to conduct is delivered to the mediator (§ 7). It is conducted directly at a joint session with the participation of all parties to the dispute or indirectly, i.e. with each party separately at separate meetings. E-mediation can also be conducted via teleconference, video conference, instant messenger service or electronic mail. In a situation where at least one of the parties is unable to participate in the mediation, in particular due to his/her physical or mental condition, the proceedings shall be suspended and the period of suspension shall not count towards the duration of the mediation. When the obstacles causing the suspension cease to exist and the parties maintain their agreement to participate in the mediation, the mediator takes up the proceedings for further conduct (§ 20).

At the end of the mediation proceedings, the mediator draws up a report, a copy of which is given to each of the parties to the proceedings. One copy remains in the mediation file (§ 25). If a settlement agreement is reached, its text shall be signed by the parties and the mediator. The parties apply to the competent court, under separate rules, for approval of the settlement agreement or for its inclusion in the decision, which the mediator shall instruct them about. A settlement agreement concluded as a result of mediation or a copy thereof, can, at the request of a party, also be submitted through the mediator to the director of the penitentiary unit where the inmate is detained to be included in the inmate's personal file (§ 26).

[42] Under the Rules, a convicted person is a person serving a penalty of imprisonment and incarcerated in a penitentiary unit (§ 1 (2)).

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The essence of the measures taken in penitentiary units is therefore to initiate a dialogue between the victim and the offender. Since the inmates are able to meet with mediators in the penitentiary unit where they are detained, they receive sufficient information about the institution of mediation. Their frequent participation in these meetings translates into an increased interest in mediation, the number of mediations conducted and settlement agreements concluded, giving them an opportunity to repair their relations with wronged parties. In the period from 20 April 2020 to 30 June 2022, the number of initiated mediation proceedings at the stage of enforcement proceedings in the practice of the RIPS in Lublin amounted to 173 cases, including 152 mediations concluded with a settlement, which gives an effectiveness of 87.86%.[43]

CONCLUSIONS

Mediation proceedings constitute an important component shaping the legal culture of Polish society. It seems that it can also be an appropriate response to the situation of a prisoner, both by making it possible to regulate the legal situation between the prisoner and the wronged party and by having a positive effect on the process of his/her readaptation. The above considerations lead to the unambiguous conclusion that amendments to the current legal regulation are necessary. This is supported both by the dogmatic analysis of Article 162 PEC and the doubts related to the assessment of the nature of both the mediation itself and the agreement concluded at the stage of penitentiary proceedings. The current legislation also fails to adequately implement recommendations of an international nature. The example of mediations conducted on the area of the RIPS in Lublin confirms that it is legitimate to continue the popularisation of the so-called post-judgment mediation while emphasising the necessity to implement normative changes which will allow for an unambiguous interpretation of the provisions concerning mediation and effects of a settlement agreement concluded in the course of the mediation.

[43] A. Gmurowska, *Założenia i przebieg projektu pilotażowego*, [in:] *Implementacja modelu mediacji po wyroku na przykładzie pilotażowego programu wdrażającego ideę sprawiedliwości naprawczej na terenie Okręgowego Inspektoratu Służby Więziennej w Lublinie*, ed. A. Lewicka-Zelent, Warszawa 2022, p. 43.

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ABSTRAKT

Artykuł ma na celu dogmatyczną analizę obecnych regulacji mediacji w postępowaniu penitencjarnym w kontekście praktycznego jej funkcjonowania w jednostkach penitencjarnych na terenie Okręgowego Inspektoratu Służby Więziennej w Lublinie. Aktualne rozwiązania prawne są nieprawidłowe i wymagają znacznych modyfikacji. Przemawiają za tym istotne wątpliwości interpretacyjne w nauce prawa i praktyce związane z przedmiotową regulacją. Ponadto nie implementują w wystarczającym stopniu aktów prawa międzynarodowego. Niniejszy artykuł składa się z czterech części. W pierwszej przedstawiono istotę mediacji w postępowaniu penitencjarnym. Następnie omówiono charakter prawny ugody mediacyjnej zawartej w tym postępowaniu i międzynarodowe akty prawne dotyczące sprawiedliwości naprawczej na etapie odbywania kary. Ostatnia część opisuje praktykę stosowania mediacji na terenie Okręgowego Inspektoratu Służby Więziennej w Lublinie.

Słowa kluczowe: mediacja; karne postępowanie wykonawcze; ugoda mediacyjna; postępowanie penitencjarne

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