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# The Enforceability of the Victim – Offender Mediation Settlement in the Context of the Idea of Restorative Justice

## *Wykonalność ugody mediacyjnej w sprawach karnych w kontekście idei sprawiedliwości naprawczej*

SUMMARY

The European Union is committed to protect and establish minimum standards with regard to victims of crime. Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime. The Directive builds upon the key principle of the 'role of the victim in the relevant criminal justice system', so that any victim can rely on the same basic level of rights, regardless of their nationality and country in the EU in which the crime took place. The core objective of this Directive is to assume an individual approach to victims' needs and to offer protection for victims of certain crimes, in particular, due to the risk of secondary victimisation. In this text, I am going to concentrate on the problem of enforcement of settlements reached in the presence of a mediator and to show samples of the results from qualitative and quantitative studies conducted in Łódź. The research aim is to show that the idea of restorative justice, in the light of the victim's right to remedy of damage, when the settlement reached in the presence of a mediator is not performed, is fiction because it is only the perpetrator who benefits from the beneficial procedural effects of the settlement while the victim may be subject to secondary victimisation. I'd like to show a few important facts that should be taken into consideration when referring a case to mediation and when conducting a restorative justice process and current practice it in Poland.

**Keywords:** restorative justice; victim-offender mediation; secondary victimisation; victim's needs; enforcement of mediation settlement

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## INTRODUCTION

The European Union is committed to protect and establish minimum standards with regard to victims of crime. Directive 2012/29/EU of the European Parliament and of the Council builds upon the key principle of the 'role of the victim in the relevant criminal justice system'[1], so that any victim can rely on the same basic level of rights, regardless of their nationality and country in the EU in which the crime took place. The core objective of this Directive is to assume an individual approach to victims' needs and protection for victims of certain crimes, in particular, due to the risk of secondary victimisation. The notion of secondary victimisation is defined as additional suffering of a crime victim, taking place after the occurrence of the offence, which is not its direct effect but rather a consequence of the victim's negative feelings related to the operation of e.g. agendas of the justice system during the process of enforcing the victim's rights violated by the offence. It is generally assumed that secondary victimisation may be prevented through the application of restorative justice services, such as mediation between the victim and the perpetrator: "[…] primary consideration are the interests and needs of the victim, repairing the harm done to the victim and avoiding further harm"[2].

One can indicate two contradictory opinions on mediation. On the one hand, it is regarded as a

> […] consensus of the parties, provided it is a result of a voluntary settlement based on ethical standards, which usually offers greater assurance than a court ruling of a permanent resolution of the conflict between the parties. Furthermore, it increases the chance of fulfilling the provisions agreed upon, obviating the need for the involvement of the enforcement apparatus[3].

The opposite opinion holds that "the mediation process is one more additional opportunity for the perpetrator, while this solution does not benefit the victim"[4]. To check the veracity of the statements, one should regard mediation from the perspective of the victim of an offence, in particular with respect to the consequences of the mediation settlement and the procedural safeguards of its performance by the perpetrator. Mediation is a complete success only when the offender has fulfilled the obligations of the mediation settlement, and the victim has obtained the

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[1] The Directive 2012/29/EU of the European Parliament and of 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, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32012L0029 [access: 10.09.2018], Point 20.

[2] *Ibidem*, Point 46.

[3] A. Rękas, *Mediacja w prawie karnym*, [in:] *Mediacje i negocjacje prawnicze*, red. W. Broński, P. Stanisz, Lublin 2012, p. 38.

[4] *Ibidem*, p. 39.

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redress of the wrong incurred. When the offender refuses to meet the provisions of the mediation settlement, the entire essence of restorative justice is lost and there is a risk of secondary victimisation.

## METHODOLOGY

The study field consisted of the following:

1. Provisions of the Polish civil and criminal procedure related to mediation.
2. Regulations of the European Union and the Council of Europe related to mediation and restorative justice.
3. Legal regulations of selected European states related to mediation.
4. The Polish and international relevant literature.
5. Study material in the form of quantitative and qualitative research, composed of:
   - study of files of cases referred to mediation in court proceedings and preliminary proceedings, irrespective of the outcome,
   - questionnaire.

Quantitative studies were carried out in 2014. The questionnaires were filled out by 151 notaries, 139 judges, 93 prosecutors, and 51 mediators.

Qualitative studies of criminal proceedings cases consisted in the actual physical review of selected case files on the premises of selected courts and prosecution authorities. The study included 231 criminal cases, including 125 cases with strictly charges of domestic violence.

## SECONDARY VICTIMISATION IN BRIEF

The perpetrator's meeting the obligations of the mediation settlements is of crucial importance from the perspective of the victim. It is the victim, during the mediation proceedings, who re-lives the trauma of meeting the perpetrator and it is the victim who is subject to secondary victimisation when the mediation settlements provisions are not adhered to. The victim bears both the emotional and material negative consequences of the perpetrator's inaction, in particular in cases prosecuted upon a private motion, as a result of discontinuing the proceedings prior to the performance of the mediation settlement provisions. It is the victim, in the event of non-performance of the settlement, who needs to carry out execution proceedings, i.a. applying to the court for enforceability and filing the case with the bailiff. A real possibility of obtaining benefits as a result of an execution, due to the order of claims satisfaction, may be insufficient. The first to be enforced are liabilities for the State Treasury. Studies have shown that only a small number of mediation settlements

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in criminal proceedings, due to the specific nature of the obligations, may be enforceable. Thus the victim of an offence, despite the introduction as of 1 July 2015 into the Polish criminal procedure of making mediation settlements enforceable, still offers no real guarantee of the perpetrator's performance of its provisions and a refusal may result in the victim's secondary victimisation. Importantly, under the Polish criminal procedure, the perpetrator obtains procedural benefits already the moment he or she concludes a mediation settlement with the victim, without the need to perform the settlement provisions. Therefore the offender lacks the incentives to fulfill the provisions of the mediation settlement since he or she has already obtained procedural benefits[5]. As pointed out in relevant literature, what is important for the authority supervising the proceedings when making its decision is "the conclusion of the settlement rather than its performance"[6]. However, pursuant to Directive 2012/29/EU[7], restorative justice services, mediation included, may be applied if they are beneficial for the victim, do not result in secondary victimisation and assure supervision over the performance of any settlement.

The problem of secondary victimisation was raised in Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims[8], stipulating that "Victims should be protected as far as possible from secondary victimisation", and in the case of mediation, "the interests of victims should be fully and carefully considered when deciding upon and during a mediation process. Due consideration should be given not only to the potential benefits but also to the potential risks for the victim"[9]. The commentary to the Recommendation indicates that the experience of secondary victimisation intensifies the effects of an offence by prolonging or deepening the victim's suffering[10]. The effects are especially acute when an offence victim is a person who, because of his or her personality predispositions, such as the intelligence level or knowledge, should seemingly easily cope with the situation. However, the awareness of the course of events and the impossibility to change the state of affairs add to the victim's frustration and disillusion with the justice system. Of paramount importance when

[5] E. Bieńkowska, *Mediacja w projekcie nowelizacji kodeksu postępowania karnego*, „Prokuratura i Prawo" 2012, nr 11, pp. 57–62.

[6] *Eadem*, *Pokrzywdzony w świetle najnowszej nowelizacji przepisów prawa karnego*, „Prokuratura i Prawo" 2014, nr 3, pp. 17–22.

[7] EU Official Journal L 315 of 14 November 2012, p. 57. The Polish version of the text in *Dyrektywa Parlamentu Europejskiego i Rady 2012/29/UE ustanawiająca normy minimalne w zakresie praw, wsparcia i ochrony ofiar przestępstw. Komentarz*, red. E. Bieńkowska, L. Mazowiecka, Warszawa 2014, p. 23 ff.

[8] Council of Europe, *Victims: Support and Assistance*, Strasbourg 2007, p. 71 ff.

[9] *Ibidem*, p. 80.

[10] *Ibidem*, p. 90.

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using the services of restorative justice are the interests and needs of the victim, repairing the harm done to the victim and avoiding further harm[11].

The notion of secondary victimisation, defined in 1980 by M. Symonds as the second injury, refers to the victim's feelings after the commission of the offence, during the time of claiming redress of the rights violated, a result of the victim's negative treatment by the justice system. They result from the disregard for the victim's feelings and needs, "in particular the need for recognition and respect"[12].

Secondary victimisation, after a person becomes a victim of an offence, is the individual's loss of control and of the sense of security. The victim expects recognition and support, but is faced instead with a "cold, professional reaction of the justice system practitioners, which may trigger a sense of being wronged and rejected"[13]. Secondary victimisation is defined as "another wrong and additional suffering the victim is subject to, not necessarily of criminal nature, inflicted by persons other than the offender"[14]. Psychological factors "make the victims experience the effects of secondary victimisation far more acutely than those of primary victimisation"[15]. Sometimes the justice system practitioners believe that "they act in line with professional conduct and procedures even when the victim interprets their conduct as derisive, heartless or disrespectful"[16]. Importantly, as relevant literature indicates, secondary victimisation may be caused by "the use of procedures which insufficiently guarantee the protection of the victims' interests by the institutions which by their very nature are obliged to offer them assistance"[17]. This results in the victim's loss of confidence in the justice system, which in turn hampers cooperation and sometimes causes a conviction that the justice system is on the side of the offence perpetrator. Secondary victimisation may be caused by legal provisions in force, including the regulations pertaining to mediation in criminal cases. The main concern is an absence of an unequivocal indication that "mediation is to safeguard the interests of the victim, in particular that it may result

[11] K. Hanas, *Sprawiedliwość naprawcza w Dyrektywie Parlamentu Europejskiego i Rady 2012/29/ER ustanawiającej normy minimalne w zakresie praw, wsparcia i ochrony ofiar przestępstw oraz zastępującej decyzję ramową Rady 2001/220/WSiSW a unormowania polskie*, „Prokuratura i Prawo" 2015, nr 5, p. 49.

[12] E. Bieńkowska, *Pokrzywdzony w świetle…*, pp. 17–22.

[13] Quoted after J.-A. Wemmers, *Victims' experiences in the criminal justice system and their recovery from crime*, "International Review of Victimology" 2013, Vol. 19(3), DOI: https://doi.org/10.1177/0269758013492755, p. 221.

[14] *Dyrektywa Parlamentu Europejskiego…*, p. 157.

[15] *Ibidem*, p. 32.

[16] M. Płatek, *Przeciwdziałanie wtórnej wiktymizacji ofiar zgwałcenia*, [in:] *Wiktymizacja wtórna. Geneza, istota i rola w przekształceniu polityki traktowania ofiar przestępstw*, red. L. Mazowiecka, Warszawa 2012, p. 81.

[17] E. Bieńkowska, *Wiktymizacja wtórna – niepożądany dodatkowy skutek przestępstwa*, [in:] *Mediacje w społeczeństwie otwartym*, red. M. Tabernacka, R. Raszewska-Skałecka, Wrocław 2012, p. 91.

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in the actual redress by the perpetrator of the damage and wrong inflicted by the offence, or the amelioration of effects of primary victimisation"[18]. Since, according to E. Bieńkowska, the Polish legal regulations concerning mediation are not fully aligned with the international standards, "mediation by definition is not an institution alleviating primary victimisation or preventing secondary victimisation, as it itself can lead to the latter"[19].

## MEDIATION IN THE CONTEXT OF THE IDEA OF RESTORATIVE JUSTICE

Mediation has become the dominant program of practice of restorative justice in Europe[20]. The parties to the mediation, with the aid of an impartial third party, i.e. the mediator, begin to resolve their conflict by themselves. Reaching a settlement requires cooperation and compromise between the parties. Therefore, a voluntary settlement developed in the course of mediation is a better dispute resolution than a court ruling. In the latter case, usually one party feels victorious and the other one defeated. In mediation, the parties are more satisfied and obliged to meet the terms and conditions of the settlement concluded[21]. Participating in the mediation process offers both parties the chance to present their personal angle on the event having occurred, and a free exchange of information allows them to reach an agreement based on their actual needs and interests[22]. However, mediation in criminal proceedings is a unique mediation type[23]. The annex to Recommendation Rec(99)19 of the Committee of Ministers to Member States concerning mediation in penal matters of 1999[24] provides a definition which describes it as "any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the crime through the help of an impartial third party (mediator)"[25]. The Recommendation highlights the fact that

[18] *Ibidem*, p. 100.

[19] *Ibidem*, p. 103.

[20] I. Aertsen, I. Vanfraechem, J. Willemsens, *Restorative justice in Europe: Introducing a research endeavour*, [in:] *Restorative Justice Realities. Empricial Research in a European Context*, eds. I. Vanfraechem, I. Aertsen, J. Willemsens, The Hague 2010, p. 1.

[21] N.J. Wood, *Can Judges Increase Mediation Settlement Rates? Of "Coase" They Can*, "Ohio State Journal on Dispute Resolution" 2011, Vol. 24(4), p. 685.

[22] R.A.M. Van Schijndel, *Confidentiality and Victim-Offender Mediation*, Antwerpen 2009, p. 11.

[23] I. Aertsen, T. Peters, *Mediation for Reparation: The Victim's Perspective*, "European Journal of Crime, Criminal Law and Criminal Justice" 1998, Vol. 6(2), DOI: https://doi.org/10.1163/157181798X00139, p. 107.

[24] *Ofiara przestępstw w dokumentach międzynarodowych*, red. E. Bieńkowska, L. Mazowiecka, Warszawa 2009, p. 90 ff.

[25] *Ibidem*, p. 92.

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mediation should not proceed if any of the main parties involved are not capable of understanding the meaning of the process; obvious disparities with respect to factors such as the parties' age, maturity or intellectual capacity should be taken into consideration before a case is referred to mediation.

A positive mediation outcome is reflected in the settlement reached by the parties, which should be voluntary and "include only justified and proportionate obligations of the parties"[26]. The victim is interested in a timely and complete performance by the perpetrator of the mediation settlement provisions. However, the perpetrator may not always want to perform his or her obligations in a timely and complete manner, in which case the perpetrator's meeting the obligations imposed by the settlement is impossible or clearly limited. It is therefore crucial, as relevant literature indicates, that the mediation settlement should contain enforceable obligations and that their implementation should be monitored. This monitoring should continue until the perpetrator fully meets the obligations under the mediation settlement[27] and this is most often the mediator's obligation. As I. Aertsen indicated, since the outcome of mediation may impact a court ruling and/or further relevant decisions despite the existence of recognised standards of mediators' practice and professional trainings and supervisions, protection and legal guarantees for all the parties involved is the natural role of the justice system. Hence the need for judicial control and supervision of both the mediation process and its outcome[28], since non-performance of the mediation settlement is at variance with mediation objectives and the essence of restorative justice and may expose the victim to further negative consequences connected with the need to enforce the settlement and with the sense of once more becoming a victim.

A commentary to Recommendation Rec(99)19 indicates that as long as the parties have reached a settlement, approved by an authority of the justice system, which concluded criminal proceedings with a decision to refrain from prosecution or to discontinue proceedings, there is no resumption of proceedings in the case, "as long as the settlement has been performed"[29]. When, however, the parties have not concluded a mediation settlement or "have concluded it yet the parties have not fulfilled their obligations under it, an authority of the justice system conducts the proceedings in an ordinary manner"[30]. The above provision justifies an opinion that the perpetrator's benefits arising from concluding a mediation settlement in criminal proceedings should be contingent on prior performance of the obligations

[26] *Ibidem*, p. 95.

[27] D.W. Van Ness, K. Heetderks Strong, *Restorative Justice. An Introduction to Restorative Justice*, 2006, p. 133.

[28] I. Aertsen, *Victim-offender mediation with serious offences*, [in:] *Crime Policy in Europe. Good Practices and Promising Examples*, Council of Europe Publishing 2004, p. 76.

[29] *Ofiara przestępstw…*, p. 114.

[30] *Ibidem*.

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under the mediation settlement. Only a complete fulfillment of the provisions of the mediation settlement assures reaching the objective of restorative justice, i.e. the redress of the wrong inflicted on the victim.

## INTRODUCTION TO MEDIATION IN CRIMINAL CASES IN THE POLISH LAW

With regard to the Polish law, many authors believe that "mediation in criminal cases prevents secondary victimisation and its objective involves the reaching of a settlement acceptable by both parties"[31]. "Such a settlement should be the quintessence of the entire mediation process through the development of a stand where both the offence victim and the offence perpetrator will feel the winners"[32]. In domestic violence cases, sometimes dragging on for years, in my opinion, we cannot assume that when embarking on mediation and concluding the mediation settlement, both parties have fair intentions and really want to fulfill the settlement provisions. Important in this process are psychological elements, including the aforementioned syndrome of the victim's acquired helplessness. It is therefore not fully justifiable to claim that the five pillars of mediation provide its participants an assurance of "an adequate realisation of the idea of restorative justice in the mediation process"[33]. Observing during the mediation process the principles of voluntary nature, confidentiality, impartiality, neutrality, and acceptability is crucial and may really prevent potential negative developments. However, we should bear in mind that the above principles can be applied only in the course of mediation, i.e. until the signature of the settlement in the presence of the mediator. In the Polish legal practice, mediation does not stop at this point and the above principles cannot be applied during the execution of the mediation settlement. Even if its provisions are freely fulfilled by the perpetrator, to my mind mediation has been a success. Otherwise, from the victim's perspective, this is hardly restorative justice.

In the context of mediation in domestic violence cases, it is dubious to assume that in mediation there are no winners or losers since the parties to the conflict ultimately win[34]. Not always, however, although the mediation parties have themselves agreed on particular provisions, will they adhere to them, especially when they do not participate in mediation in good faith. The satisfaction of the parties with the result of mediation, of help in their further contacts, is possible on condition

[31] A. Rękas, *Mediacja w prawie…*, p. 38.

[32] G.A. Skrobotowicz, *Zalety mediacji karnej*, „Prokuratura i Prawo" 2012, nr 2, pp. 129–135.

[33] *Ibidem*.

[34] M. Wysocka-Fronczek, *Dlaczego kieruję sprawy do postępowania mediacyjnego*, „Prokuratura i Prawo" 2011, nr 2, pp. 148–151.

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the provisions of the mediation settlement are adhered to. Otherwise, it is hard to speak about the satisfaction of both parties, but rather about that of the party who, although failing to meet the obligations agreed on, obtained concrete procedural benefits thanks to the positive outcome of the mediation. It is a fact that during the mediation process the parties may, unlike in the court ruling, achieve a mutually acceptable settlement, and thus to terminate a conflict, but only on condition that the settlement obligations are fully met. Without the above reservation, it is hard to consent with the opinion that "this means the conclusion of a retractable dispute" and "nearly completely eliminates the risk of its resumption"[35]. Failure to fulfill the provisions of the mediation settlement may intensify the conflict between the parties as new aspects related to enforcing the provisions of the settlement come into play, such as a loss of trust, sometimes discontinuing close relations or the acceptance of the victim status and loss of an opportunity to change the *status quo*.

It is true that a voluntary and ethical settlement "usually offers higher than a court ruling guarantees of permanently eliminating the conflict between the parties"[36]. However, it should be borne in mind that neither the mediator nor the other party to the proceedings, when participating in the mediation procedure, are aware of the motivation of the opponent. Moreover, it is hard to predict, even at the stage of signing the mediation settlement, whether the perpetrator really intends to redress the wrong inflicted on the victim or merely wishes to obtain concrete procedural benefits. This will become clear only at the moment of implementing its provisions. In domestic violence cases, when often the abuse of trust of the nearest and dearest has been taking place for many years, banking on the perpetrator's ethical conduct may prove hazardous for the victim.

Since a settlement reached in the presence of the mediator has no limits as to the kind and scope of the parties' obligations, it is, therefore, more flexible than a traditional criminal trial. Mediation settlement contents may include many obligations crucial for the mediation parties, of material nature, such a redress of the damage inflicted by means of the offence, or non-material, such as an apology and obligations of entering rehabilitation or therapy in the future. The settlement may determine the future relations of the parties and refer to their satisfaction with the agreement reached. The victim, as relevant literature indicates, has a real impact on the wording and performance of the settlement[37]. While the first part of the statement is true, the impact of the victim on the perpetrator's performance of the mediation settlement provisions is doubtful. It is difficult to impact someone else's

[35] *Ibidem*.

[36] A. Rękas, *Mediacja w Polsce na tle doświadczeń państw Unii Europejskiej*, [in:] *Konferencje i Seminaria 4(48)03. Mediacja w krajach Unii Europejskiej i w Polsce*, Warszawa 20033, p. 10.

[37] G.A. Skrobotowicz, *Mediacja w sprawach o przemoc w rodzinie*, „Prokutura i Prawo" 2014, nr 3, pp. 90–91.

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fulfillment of their promise, which the mediation settlement between the victim and the perpetrator in fact is. This is especially true of mediation settlements in domestic violence cases, where the victim frequently wants the perpetrator to change his conduct and the offender makes such a promise. This type of provisions of the mediation settlement cannot be enforced during bailiff execution and I, therefore, refer to them as 'wishful' settlements. As studies have shown, there is a large number of such settlements.

It is in order to mention the study of "the use of mediation in criminal proceedings in Kraków district courts"[38], which led its authors to formulate two conclusions: 1) "the victims have no trust in mediation as they are afraid that their interests and rights will not be duly assured"[39] and 2) "judges are unwilling to widely apply mediation, which stems from the concern that the defendant may impact the victim to conclude a mediation settlement and from the fact that well-to-do defendants may 'buy' a settlement with the victim"[40]. At the same time, the study authors indicate that mediation "is highly efficient and resolves matters quickly"[41]. A question arises at this point about the efficacy of the mediation process. Was this the conclusion of a mediation settlement or the conclusion of criminal proceedings *via* its discontinuation or conditional suspension of the sanction for the perpetrator, or the redress of victim's wrong? The first two benefits, i.e. the conclusion of a mediation settlement or the conclusion of criminal proceedings *via* its discontinuation or conditional suspension of the sanction are important from the perspective of the justice system (speedy proceedings and statistics) and from the perspective of the offender (procedural benefits of a possible reduction of penalty or discontinuation of proceedings). From the point of view of the victim of an offence, it is crucial to have his or her wrong redressed, either in material or non-material form, and sometimes a change of the perpetrator's conduct. To my mind, only in this context we can speak about the efficacy of the mediation process between the victim and the perpetrator.

As to the enforcement of the mediation settlement, we should indicate that under the Regulation of the Minister of Justice of 13 June 2003 on mediation proceedings in criminal cases[42], the mediator was obliged to verify the performance of the mediation settlement, but this fact was recorded neither in the mediation report, nor elsewhere. The Regulation of the Minister of Justice of 25 May 2015 on the mediation procedure in criminal cases[43], like the Regulation of 2003, mandates the mediator to verify the performance of the mediation settlement and to inform the

[38] M. Chalimoniuk-Zięba, G. Oklejak, *Sprawiedliwość naprawcza i jej zastosowanie w praktyce*, „ADR. Arbitraż i Mediacja" 2013, nr 1, p. 7 (online access Legalis, 20.08.2015).

[39] *Ibidem*, p. 26.

[40] *Ibidem*.

[41] *Ibidem*, p. 27.

[42] Journal of Laws, No. 108, Item 1020.

[43] Journal of Laws, Item 716.

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defendant and the victim of the effects of the mediation settlement[44]. Again, the Regulation fails to set forth a mediator's obligation to include information on the performance of the mediation settlement in the mediation report, and a mediation report is to be drawn up by the mediator immediately upon its completion. The Polish law does not envisage a 'grace period' for the perpetrator's fulfilling the mediation settlement provisions.

It should be borne in mind that for many years the Polish law did not provide any safeguards assuring the enforcement of the mediation settlement in criminal proceedings. Unless the content of the mediation settlement was included in a court ruling or the parties repeated the settlement in court, there was no legal assurance of the enforcement of the mediation settlement provisions. Still, the perpetrator enjoyed beneficial procedural effects already at the moment of concluding the mediation settlement with the victim. If the perpetrator refused to perform the provisions of the mediation settlement and if the contents of the settlement were not part of the court ruling, the victim had to pursue his or her claims by filing a private case. This triggered a sense of injustice and of becoming once again a victim, this time of the justice system.

The amendment to the Code of Criminal Procedure, in force as of 1 July 2015[45], introduced the enforceability of the mediation settlement. A refusal to make the mediation settlement enforceable is possible solely when it is unlawful or incompatible with principles of social conduct or aims at circumventing the law. Thus, when the perpetrator refuses to perform the settlement, the victim may file for mandatory enforcement. The victim is therefore obliged to perform executory action, including filing a case in court to make the ruling enforceable and to file a case with the appropriate bailiff. As earlier indicated, not always, despite the bailiff's proceedings, will the victim's wrong be redressed due to the sequence of satisfaction of claims as set forth in Article 1025 of the Code of Civil Procedure and due to the nature of the provisions of the mediation settlement, which are not enforceable by bailiffs.

## RESULTS OF QUALITATIVE AND QUANTITATIVE STUDIES IN ŁÓDŹ APPELLATE JURISDICTION

Qualitative studies of cases referred to mediation and quantitative studies took place in 2014. Among 231 criminal cases referred to mediation under examination, 125 (54.11%) were domestic violence cases (physical and mental violence, bodily injury and punishable threat with respect to a family member or member of the

[44] The possibility of making the mediation settlement enforceable.

[45] The Act of 27 September 2013 on amendment of the law – Code of Criminal Procedure and selected other law (Journal of Laws, 2013, Item 1247).

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household). Domestic violence cases are especially difficult for the victim: they are an additional burden because of the close relation with the offender. These are cases where the victim usually trusts the perpetrator as the person closest to them, and very often the victim is dependent on the offender. Mediation settlements in such cases mainly concern the relations between the parties (e.g. the perpetrator's abstention from alcohol abuse, abstention from strong language, the obligations of entering rehabilitation or another therapy). This type of mediation settlements, due to the contents of the obligations, cannot be efficiently enforced. When the perpetrator refuses to fulfill the obligations, the victim re-lives the trauma, intensified by a loss of trust in the perpetrator.

The study follows from the above that the most frequent cases referred to mediation in the period under examination concerned cases of mental and physical abuse, punishable threats, bodily injury, and damage to property, where the perpetrators and their victims were closely related and where there were incidents of domestic violence. In 40.00% of cases of domestic violence, the perpetrators were charged with abuse, in 25.60% of cases with violations of bodily integrity, in 20.80% of cases charges addresses punishable threats. The three categories of charges were raised in a total 86.40% of cases of domestic violence referred to mediation.

Most victims in domestic violence cases referred to mediation were wives (51.40%) or common-law-wives (14.40%). Another group of victims of domestic violence were children (12.80%) and mothers (10.40%). In the last case, violence was most often perpetrated by sons. As for the perpetrators of domestic violence, husbands were the most frequent offenders in the cases referred to mediation examined (54.40%), followed by common-law husbands (14.40%).

Age of victims in domestic violence cases referred to mediation was examined in order to assess the potential of coping with the situation of a court trial and the mediation process and the potential perception and cognitive skills, which might impact the ability to understand and perceive, as well as susceptibility to influence and manipulation. The average age of the victims was between 30 and 60 years. However, there were also much older victims, more than 70 and 80 years old. The oldest victim referred to mediation in domestic violence case was 92 years old. In the cases of domestic violence referred to mediation there were six victims under 18 years of age. Minors were represented by a parent in a case against the other one, court probation officer, director of a care institution where the minor stayed on a temporary basis, or appeared on their own. Given the age of minor victims and the nature of offences in domestic violence cases, the above practice seems dubious.

In 32.00% of domestic violence cases examined were special problems, like psychological or psychiatric problem, alcoholism, and the Blue Card; 85.60% offenders had had no previous criminal convictions; 8.00% perpetrators had been earlier convicted in criminal proceedings, including 4.80% for the offence of domestic violence or similar offences –3.20%.

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The duration of violence inflicted on the victim by the perpetrator varied on average between 3 and 6 years. In this period six cases were identified where domestic violence continued from 3 and from 6 years, four cases where violence was inflicted on the victim for 5 years and as many as eleven cases where domestic violence lasted 4 years. The longest duration of domestic violence was 20 and 19 years. Such a long time of being subjected to domestic violence left an imprint on the victims' mental state and their capacity to take part in mediation. A punishable threat was usually a one-off case.

Mediation in criminal cases, in general, was initiated by the judge in 48.86% of cases, by the perpetrator in 14.62%, by the defender in 10.00%, by the victim in 12.31%, by both parties in 13.85%. In domestic violence cases, mediation was initiated by the judge in 73.60%, by the perpetrator in 10.40%, by the defender in 8.80%, by the victim in 4.00%, and by both parties in 3.20%. It follows that in criminal cases of domestic violence, judges are far more willing to refer the parties to mediation. This is influenced by the specific nature of the cases, which usually concern very close relations, but also communication problems with the parties or alcohol addiction. In domestic violence cases the victim initiates mediation three times less often.

Mediators were asked in the questionnaire about the object of the mediation settlement in criminal proceedings. The most frequent obligation of the perpetrator indicated by the mediators (43.14% settlements) was of financial recompense. An apology came second (41.18%), followed by damage redress (39.22%). Compensation was indicated in 37.25% cases. Obliging the perpetrator to refrain from a specific conduct was mentioned in 29.41% settlements, therapy in 21.57%, and treatment in 19.61%. 9.80% settlements set forth contacts with the children, child support and division of shared property.

Here are some typical records of mediation settlements labeled by me as 'wishful'. Wishful settlements, because of their contents, cannot be enforced by court. They cannot be executed in a usual legal way (there is no guarantee that the perpetrator will actually perform the obligations of the settlement reached in the presence of the mediator): "Refraining from verbal and physical aggression"; "Promise to do their best so that the difficult situation between them does not lead to escalation of the conflict"; "Parties declare that they will treat each other respectfully".

The above genuine examples of mediation settlements indicate that their contents in many cases greatly depart from a common notion of a settlement. In the Polish law only quasi-civil ones, related to a specific benefit or financial obligation, may be enforced after the court makes them writs of execution.

The question asked in the questionnaire for the judges, prosecutors and mediators was as follows: "In your opinion, may the perpetrator's non-performance of a settlement reached in the presence of a mediator in criminal cases result in secondary victimisation?". The "yes" answer was provided by 59.57% mediators,

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52.17% prosecutors and 33.60% judges; "no" was chosen by 8.51% mediators, 24.64% prosecutors, 11.20% judges; "I have no opinion" was indicated by 31.91% mediators, 23.19% prosecutors and 55.20% judges. Most mediators and prosecutors regarded the perpetrator's non-performance of the mediation settlement as the cause of secondary victimisation. Interestingly, 55.20% judges replied "I have no opinion", which may imply that the issue of the victim's secondary victimisation is not their immediate interest.

Of major significance from the point of view of the victim is the verification of the perpetrator's performance of the mediation settlement provisions. Pursuant to the Regulation of the Minister of Justice of 2003 on the mediation procedure in criminal cases, in force as of the study (2014) this was the mediator's obligation. The same obligation is set forth in the regulation, in force as of 1 July 2015. 43.86% respondents provided a negative answer; additionally, 24.56% respondents among the mediators indicated the reply "I have no such obligation", which was at variance with the regulation in force as of the date of the study. A mere 15.79% mediators verify the performance of the mediation settlement. The same percentage of mediators (15.79%) pointed out the reply of verifying the mediation settlement 'occasionally'. It is, therefore, justifiable to claim that the perpetrator's performance of the mediation settlement provisions is verified by the mediator only exceptionally in little than over 15.00% cases where such a settlement was concluded. Two questions arise in light of the above: 1) What does 'occasionally' mean when verifying the performance of the mediation settlement; is it linked with the mental or physical predispositions of the parties (e.g. age, awareness level), or rather with the nature of the case or the content of the mediation settlement?, and 2) How does the answer "I have no such obligation" relate to the program and quality of earlier education of mediators?

Of major significance from the point of view of the victim's right to have the damage redressed is the offender's performance of the obligations of the mediation settlement. Since, as an earlier study results indicated, mediators extremely rarely check the performance of the mediation settlement, they were asked if they had been notified about this fact by the mediation participants. Over half of mediators (52.17%) said "yes", with 6.52% respondents indicating "many times". Only 41.30% mediators taking part in the study provided a negative answer. The result indicates that the perpetrator's non-performance of the mediation settlement is a real problem, especially in the context of the offender's procedural benefits obtained the moment of concluding the mediation settlement and of the victim's potential secondary victimisation.

The question concerning the guarantees of the execution of the mediation settlement in criminal proceedings was asked in a questionnaire to be filled out by judges, prosecutors, and mediators. The results obtained are as follows: "recent amendments in the criminal procedure" were indicated by 9.80% mediators, 2.73%

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judges, 10.14% prosecutors; "introduction of solutions analogous to the civil procedure with regard to the endorsement and enforcement of the mediation settlement" was marked by 29.41% mediators, 18.18% judges, 19.57% prosecutors; "making beneficial procedural effects for the perpetrator contingent on a prior performance of the settlement provisions" was indicated by 47.06% mediators, 33.64% judges, 64.49% prosecutors; "other" were indicated by 13.73% mediators, 22.73% judges (who indicated the transfer of settlement provisions to the content of a court ruling), 5.80% prosecutors. The study results indicate that most of the respondents considered making beneficial procedural effects for the perpetrator contingent on a prior performance of the settlement provisions as a safeguard of execution of the mediation settlement in criminal cases.

As studies have shown, mediation in criminal cases is not always beneficial for the victim and may sometimes trigger secondary victimisation. We may say that "in principle mediation fails to adequately protect the weaker individuals, not only weaker in the economic sense […] but also due to a weaker knowledge of the law, psychological and tactical preparation for holding negotiations and exerting pressure, personality or the comprehension of facts"[46]. This is especially evident when participating in the mediation process are older persons, dependent on the offender or subject for a long time to the negative mental effects of domestic violence.

## CONCLUSIONS

The study results justify a conclusion that a few important facts should be taken into consideration when referring a case to mediation and in conducting a restorative justice process: the nature and severity of the crime, the ensuing degree of trauma, the repeat violation of a victim's physical, sexual, or psychological integrity, power imbalances and the age, maturity or intellectual capacity of the victim, which could limit or reduce the victim's ability to make an informed choice. This is especially significant in mediations in domestic violence cases, where the victims are in close relations with the perpetrator, the elderly, or subject to longer-term domestic violence. Mediation in such cases should take place with a maximum degree of caution, making both parties to the mediation process equal and with the use of measures preventing secondary victimisation, not only directly during the mediation process, but also after the parties have concluded the mediation settlement, prior to the perpetrator's performance of its provisions.

Effectiveness of mediation depends on the real cause of the conflict and on the real expectations of the parties, especially in domestic violence cases. Not always

[46] M. Skibińska, *Zalety i wady mediacji jako sposobu rozwiązywania sporów cywilnych*, „ADR. Arbitraż i Mediacja" 2010, nr 3, p. 106 (online access: Legalis 20.08.2015).

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the victim is interested in the direct punishment of the offender. Sometimes the victim wants to exert pressure on the offender to enforce a change of conduct or to obtain other tangible benefits, like the consent to the proposed property division during the divorce proceedings or the acquisition of child support. Not always the mediation settlements are concluded in cases of this type meant to obtain financial recompense from the perpetrator. Sometimes it is more important for the victim to receive an apology and a promise of a change of conduct. Provisions of this type in mediation settlements cannot be enforced by bailiffs. Therefore, it is worthwhile to consider, as in other states, the introduction of a time period between the conclusion of the mediation settlement and the perpetrator's obtaining beneficial procedural effects; during this period the perpetrator will be able to fulfill the obligations and the beneficial procedural effects should be contingent on his or her performance of the mediation settlement.

The court's decision to refer to mediation is not always informed by the best interest of the victim. Sometimes the court's decision depends on the complexity of the case, the judge's difficulties in communicating with the parties or the desire to close the case as soon as possible. This is especially evident in domestic violence cases referred to mediation on the court's initiative when communication with the parties is hampered, the victim and the perpetrator cannot express themselves or define their expectations. Sometimes we deal also with an alcohol problem, another addiction or the victim's old age.

Sometimes the system of justice and the offender are real beneficiaries of terminating the criminal proceedings as an outcome of a mediation agreement. In Poland, when the beneficial procedural effects for the perpetrator are not contingent on his or her performance of the mediation settlement, the problem is quite frequent. Under the current legal regulation, neither the justice system nor the mediator are interested in verifying the performance of the mediation settlement. The perpetrator gains procedural benefits already at the moment of concluding the settlement. It is also when the mediation process finishes for the mediator, and the court, since the parties have entered into a mediation settlement, may issue the final ruling. A case is recorded in statistical data and the proceedings are efficiently and quickly concluded.

When the mediation agreement is not performed, there is a risk of secondary victimisation of the victim. The victim, when notifying the justice system about domestic violence, has taken a huge risk. Often the victim shares a flat with the perpetrator or is in another way, psychologically or economically, dependent on the perpetrator. To take part in the mediation process requires a renewed trust in the offender. In such a situation, the perpetrator's refusal to fulfill the provisions of the mediation settlement is all the more acutely felt by the victim and may intensify his or her problems in relations with the perpetrator of violence.

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The character of settlements reached in the victim-offender mediation determines whether there is a real possibility to secure their performance by the offender (wishful settlements and quasi-civil settlements). Studies have shown that not all mediation settlements, because of the nature of their provisions, may be successfully executed by bailiffs. Even if the mediation settlement contains provisions of civil nature has been enforceable, the victim may not always be able to apply for such execution, and even if they do, it may turn out that there is no property against which the claim can be settled.

The perpetrator's non-performance of the mediation settlement provisions, with his or her simultaneous obtaining procedural benefits arising from the very fact of concluding a mediation settlement, may result in the victim's secondary victimisation.

Based on the research presented, the Public Advisory Council on Alternative Dispute Resolution at the Polish Ministry of Justice on 22 June 2017 adopted Resolution No. 5/2017 in Amendments to the Law on Mediation in Criminal Matters[47]. In the Recommendation, the Council identified the victim as the principal beneficiary of mediation, her security, her interest in remedying the damage and the prevention of secondary victimisation. In addition, the obligation for the Law Enforcement and Judicial Authorities to check whether the settlement concluded before the mediator has been or is being performed by the perpetrator before the judgment giving rise to the case.

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[47] www.ms.gov.pl/pl/dzialalnosc/mediacje/spoleczna-rada-ds-alternatywnych-metod-rozwiazywania-konfliktow-i-sporow/o-radzie/download,2964,18.html [access: 13.09.2018].

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STRESZCZENIE

Unia Europejska zobowiązała się do ochrony i ustanawiania minimalnych standardów odnoszących się do ofiar przestępstw. Dyrektywa 2012/29/EU Parlamentu Europejskiego i Rady z 2012 r. ustanowiła minimalne normy w zakresie praw, wsparcia i ochrony ofiar przestępstw. Dyrektywa opiera się na kluczowej zasadzie „roli ofiary w odpowiednim systemie wymiaru sprawiedliwości w sprawach karnych", tak aby każda ofiara mogła mieć dostęp do tego samego podstawowego poziomu praw, niezależnie od narodowości i kraju UE, w którym przestępstwo miało miejsce. Głównym celem dyrektywy jest przyjęcie indywidualnego podejścia do potrzeb ofiar oraz zapewnienie specjalnej ochrony ofiarom niektórych przestępstw, w szczególności ze względu na ryzyko wtórnej wiktymizacji. Niniejsze opracowanie jest skoncentrowane na problemie wykonalności ugody mediacyjnej oraz przedstawieniu wyników badań jakościowych i ilościowych przeprowadzonych w apelacji łódzkiej. Celem artykułu jest zaprezentowanie kilku ważnych faktów, które należy wziąć pod uwagę, kierując sprawę do mediacji i przeprowadzając proces sprawiedliwości naprawczej.

**Słowa kluczowe:** sprawiedliwość naprawcza; mediacja pomiędzy ofiarą a sprawcą; wtórna wiktymizacja; potrzeby ofiar; wykonalność ugody mediacyjnej