



You have downloaded a document from
RE-BUŚ
repository of the University of Silesia in Katowice

Title: Mediation as an alternative form of the juridical proceeding toward juvenile delinquents

Author: Anna Nowak

Citation style: Nowak Anna. (2009). Mediation as an alternative form of the juridical proceeding toward juvenile delinquents. "The New Educational Review" (Vol. 19, no. 3/4 (2009) s. 209-217).



Uznanie autorstwa - Użycie niekomercyjne - Licencja ta pozwala na kopiowanie, zmienianie, remiksowanie, rozprowadzanie, przedstawienie i wykonywanie utworu jedynie w celach niekomercyjnych. Warunek ten nie obejmuje jednak utworów zależnych (mogą zostać objęte inną licencją).



UNIwersYTET ŚLĄSKI
W KATOWICACH



Biblioteka
Uniwersytetu Śląskiego



Ministerstwo Nauki
i Szkolnictwa Wyższego

Mediation as an Alternative form of the Juridical Proceeding toward Juvenile Delinquents

Abstract

In the paper the origins and the core meaning of restorative justice are presented. The paper is also focused on the legal basis, meaning, rules and the schema of the mediatory proceeding. Advantages and disadvantages of mediation are analyzed, explored in three perspectives: generally treated social one, specific to the aggrieved party and specific to juvenile delinquents. The Author claims that mediation could be treated as an alternative for the traditional proceeding toward juvenile delinquents.

Key words: *mediation, mediator, mediatory proceeding, restorative justice, juvenile delinquent.*

Mediation as an alternative form of proceedings with juveniles

Considering the reactions to juvenile delinquency different models can be noticed. After the retributive model – oriented to measure out a penalty treated as retaliation for evil and the rehabilitative model – concentrated on the rehabilitation of the juvenile perpetrator of a forbidden deed there is an attempt to create a restorative model, whose major aim is to make amends or compensate for the injustice inflicted by a crime.

In penal justice the most important is the effect and in reform (compensation) justice the process which occurs between the perpetrator and the victim.

When defining reform justice B.D. Meier takes into consideration two elements. One of them is the ascertainment that reform justice is such an approach in the sys-

tem of penal justice in which the perpetrator does not suffer punishment imposed externally upon him/her, i.e. by the court, but alone and voluntarily distances him/herself from the crime (e.g. by financing gratification in favour of the victim or the third party – a charity institution, by work in favour of the local community or by apology). The other element is such an approach in which the victim becomes a rightful partner in the proceedings, the victim ceases to be a person whose significance limits itself merely to the evidential source, but begins to perform an active role in the proceedings (B.D. Meier, 1999, p. 39).

In shaping the model of reform justice the abolitionism ideas played an essential part, including, in particular, N. Christie's opinions, who maintained that penalties should be replaced with different instruments of solving social conflicts, and the opinions of L. Hulsmann. The concept of social marking (stigmatization) and the diversion movement commenced by it played a significant role. The development of victimological research and the promulgated opinions on the need to improve the situation and the status of the victim in the system of the administration of justice also had an essential meaning (D. Wójcik, 1998, p. 13).

The basic elements of the model of reform justice are restitution of the damage done and mediation.

Mediation (Latin: *mediare* – be in the middle) is a voluntary and confidential process of coming to a dispute solution, conducted in the presence of a neutral person – the mediator. The aim of mediation is to reach an agreement, which satisfies both parties.

M. Bieńkowska defines mediation as a voluntarily undertaken attempt to solve the conflict which resulted from a crime and to reach an agreement between the perpetrator and the aggrieved party in the matter of compensation by the agency of an impartial mediator (E. Bieńkowska, 1998, p. 55)

The subject of mediation was reflected in international documents – recommendations of the Committee of the Ministers of the Council of Europe. The most important document in the domain of mediation in the matters of juveniles is recommendation /87/20 in regard to social reactions to juvenile delinquency, which takes up the issues of counteracting juvenile delinquency from the point of view of society which participates in it. In sections II and III of this recommendation the issue of extrajudicial proceedings and mediation was considered.

It is emphasized in this document that society should play an active role in counteracting juvenile delinquency.

Society must get involved in the analysis of the causes of juvenile delinquency at the local level, define suitable strategies of proceedings in this range and help

juvenile delinquents return to society, to interact with society and perform a useful role (W. Rau, 1999).

It is emphasized that such trends of actions are favoured which make use of procedures excluding any inclusion of juvenile delinquents in the system of the administration of justice.

Mediation in the Polish legal system is applied in penal proceedings, in juvenile cases, in judicial-administrative proceedings and in labour conflicts in the range of the labour law.

The application of mediation in juvenile cases is settled by art. 3a §3 of the act about proceedings in juvenile cases of 26th October 1982 (Journal on Laws No. 35, with later amendments) and the decree of the Minister of Justice of 18th May 2001, in regard to mediation proceedings in juvenile cases (Journal on Laws No. 56).

According to art. 3a § 3 act about proceedings in juvenile cases, at each stage of proceedings the family court can, out of or with the consent of the aggrieved and the juvenile, address the case to an institution or a trustworthy person in order to carry out mediation proceedings. According to § 2 of the quoted decree particularly cases whose essential circumstances are not dubious are directed to mediation proceedings. The court may, in order to carry out mediation proceedings, pass the case over to an institution which was entered on the list (kept by the district court) and pursuant to the statute was appointed to carry out tasks in the range of mediation, rehabilitation, educational counseling and psychological aid, psychological diagnosis, crime prophylaxis, protection of freedom and human rights; moreover, mediation can be conducted by a family diagnostic-consultative centre. The court may pass a case over, in order to carry out mediation proceedings, to a trustworthy person, who fulfills the conditions determined in § 4 of the decree (is over 26 years old, makes full use of the civil and public laws, is fluent in the Polish language orally and in writing, has an education in the field of psychology, pedagogy, sociology, rehabilitation or law and is experienced in educating or rehabilitating youth, has skills in solving conflicts and establishing interpersonal contacts, provides a guarantee for the proper performance of duties, received training for mediators and was entered on the list kept by the district court).

In the decision about directing a case to mediation proceedings the family court defines the deadline when it should receive the report on the course and results of mediation proceedings, no longer than 6 weeks. The participants of the mediation proceedings are: the juvenile delinquent, the aggrieved party and the parents or the juvenile's tutor and if a minor is aggrieved also his/her parents or tutor.

Mediation is carried out with the consent of all participants on the basis of five basic principles (J. Waluk, 2002, pp. 21–23, N. Górska, 2008, pp. 448–449):

- 1) the principle of voluntariness – which means that no one can be coerced into joining mediation. Consent should be expressed at the beginning of the lawsuit and can be revoked at each stage of proceedings.
- 2) the principle of confidentiality – which means that the mediator is obliged to maintain the confidential character of mediation proceedings. Talks, held in the course of mediation, are confidential and a report drawn up by the mediator cannot disclose the course of the mediation meeting. Abandonment of the confidentiality of mediation proceedings is possible exclusively with the consent of all its participants.
- 3) the principle of impartiality – which means that the mediator does not support any of the parties. The parties have equal rights and should be treated equally by the mediator. The mediator helps the parties to fully participate in the mediation proceedings and gain benefits from mediation.
- 4) the principle of neutrality – which means that the mediator is not allowed to impose solutions on the parties, even when he/she is convinced that his/her solution is the best for the parties.
- 5) the principle of acceptability – which means the acceptance of rules and principles of mediation, the course and mode of conducting the proceedings, the content of the arrangement, the person of the mediator by the parties of the mediation proceedings.

The scheme of mediation proceedings is determined by §14 of the decree in regard to mediation proceedings in juvenile cases of 2001. After submitting the case to the mediation proceedings, the mediator:

- gets acquainted with the information included in the dossier
- establishes contact with the participants and collects from them the consent for the participation in the mediation proceedings,
- conducts individual meetings with the participants providing information about the essence and principles of mediation proceedings and the role and powers of the participants,
- conducts mediation meetings with all participants,
- helps to formulate the content of the arrangement between the participants and checks the execution of obligations resulting thereof,
- draws up a report for the family court on the course and results of the carried out mediation proceedings.

The mediator presents a report to the family court:

According to § 7, item 2 the report should include:

- the reference symbol of file, the surname, first name and address of the trustworthy person or institution conducting mediation proceedings,

- information about the number, deadlines and places of individual and common meetings and also the indication of persons taking part in them,
- information about the results of the mediation proceedings.

The report can neither disclose the course of the meetings nor contain the assessments of the participants' behaviour and the contents of their declarations. If an arrangement was concluded it is enclosed in the report.

As A. Gaberle notices, mediation creates an opportunity of a more efficient educational impingement upon a juvenile delinquent than measures adjudicated by court. (A. Gaberle, 2002, p.10).

In juvenile cases mediation is accepted by society. Mediation procedures should arouse a sense of responsibility for the committed deed in the perpetrator and negotiate an arrangement between him/her and the victim in regard to compensation, which he/she could not sue in the course of the proceedings before the court. It allows to avoid stigmatization and traditional severe measures of proceedings. Mediation enables a juvenile delinquent to fully understand the consequences of the prohibited act and enables to undertake rational redress and compensate for the value of the damage jointly agreed by the parties. A chance thus appears to obtain a direct impact on the solution of the conflict which occurred between the parties as a result of a crime (A. Nowak, 2006).

In Poland mediation in juvenile cases can be conducted at each stage of proceedings, at the moment of opening the proceedings, in the course of the court proceedings, in the executory proceedings.

At an earlier stage a positive result of mediation can be a proof of the inexpediency of applying educational or reformatory measures (provided for in the act about proceedings in juvenile cases). At the moment of adjudgement, the court may apply an educational measure by committing the juvenile delinquent to a certain conduct and especially to apologize the aggrieved party and to make amends for the inflicted damage either entirely or partially. In the executory proceedings the result of mediation can be interpreted as a premise of changing or reversing the executed educational measure. The act about proceedings in juvenile cases also admits directing the juvenile case for mediation during the probation when the juvenile is conditionally released from the reformatory or placed outside the youth custody centre.

The mediation proceedings are less formalized than the court procedure – the conflict which resulted from committing a prohibited act by a juvenile delinquent is in the hands of the interested parties (the perpetrator and the aggrieved party) and it is entirely up to them what content the possible agreement will have.

As A. Gaberle notices, the court is not a good place to take educational actions,

as it is not possible to avoid the official atmosphere which prevails there, which undoubtedly hinders establishing contact with the juvenile delinquent and inclines towards treating him/her as a subject matter of an executory act.

The court has to investigate whether any and which measures should be applied to the juvenile to achieve educational goals, a charge is not filed against the juvenile. In such a model of proceedings the aggrieved person can merely play a marginal role, he/she cannot even present his/her claims and it leads to an increase in the sense of injustice and an escalation in the conflict between him/her and the juvenile. In the proceedings conducted without the victim's participation, it is extremely difficult to make the juvenile aware of the fact that he/she did wrong to somebody and to convince him/her about the inappropriateness of his/her behaviour (A. Gaberle 2002, p.8).

V. Konarska –Wrzosek writes that introducing the possibility to direct cases of juveniles who commit a prohibited act to mediation proceedings, opens the road to a broad extrajudicial educational impingement on the juveniles by making them realize the harmfulness of their behaviour, the scope of the victims' suffering and the necessity to compensate for the wrong and damage they had done via a direct contact with the victim, which should contribute to establishing a sense of responsibility for one's own behaviour (V. Konarska-Wrzosek, 2000, No. 4, pp.62–69).

Mediation proceedings in the face of the overburdening of the system of the administration of justice and the high costs of its functioning and the social dissatisfaction with treating perpetrators and victims by the traditional system creates a chance for a quicker, less costly (mediation enables to save public means which would have been spent if the juvenile delinquent had been placed in a rehabilitation centre or if there was a decision about a tutor's supervision) and extrajudicial solution of the conflict (the parties, however, retain a possibility to enter the traditional legal course).

The mediation procedure should bring benefits to the person wronged by a crime, who decides to handle the case on his/her own account. As a result of a crime the victim suffers a mental shock, feels utterly uninformed, feels that the authority conducting the court proceedings does not sufficiently inform or does not inform him/her at all about the course of the matter, as though the role of the victim ended at the moment of reporting the fact of committing the crime to the police. People who become victims of crime ponder about why such a misfortune had befallen them – mediation gives the victim the possibility to clarify doubts and obtain answers to the posed questions, among others, about the motives of committing the prohibited act by the perpetrator. The procedure of mediation enables the victim to relieve anger, it is also a way to avoid post-traumatic effects of

fear and stress suffered in the course of the crime. The “face to face” meeting with the perpetrator of the prohibited act allows the victim to rationalize fear, to get rid of anxiety in relation to the perpetrator, regain psychological comfort.

As B.D. Meier remarks such a face to face meeting of the perpetrator and the victim of a crime gives the participants a possibility to get over the emotional stress and enables disclosure of emotions, the so-called “ventilation of emotions” triggered off by the arisen conflict, to view the case from a distance. Referring to the theory of “Braithwait’s reintegrated abashment” it can be demonstrated that the constructive social forms of solving a conflict which are accompanied by indications of voluntary distancing from the crime by the perpetrator are characterized by a significant drop in recidivism. (B.D. Meier, 1999, p.51).

As a result of mediation proceedings a perpetrator reaps numerous profits. Perpetrators, at the beginning, usually make up their minds about participating in mediation in order to avoid penal proceedings and penalty (and juvenile delinquents want to avoid educational or reformatory measures). However, in the course of mediation proceedings the majority of perpetrators change their attitude to their victims. As a result of the confrontation the juvenile has a possibility to see a suffering person in the victim, whom he/she harmed or did damage to, he/she has an opportunity to understand the consequence of his/her conduct. He/she has a chance to take over the responsibility for his/her own deeds and decisions, he/she has a possibility to get acquainted with the feelings of the other person.

As J. Waluk notices mediation contains a big load of positive educational and preventive values (J. Waluk, 1998, p. 115).

By participating in mediation, the perpetrator has a possibility to avoid stigmatization. Moreover, another advantage of mediation is the consideration of arguments and interests of both the perpetrator, as well as the victim, acquaintance and understanding of the arguments and the point of view of the other person by the parties of the conflict.

B. Urban claims that the alternative system of proceedings with juveniles gives a chance to change the personality and behaviour without the sense of an unfair and strict punishment, secures the former social ties in the natural environment (the family is the main issue) and is less stigmatizing (B. Urban, 1997, p. 197).

Bigger satisfaction of the parties of the conflict is also noticed from the engagement in the direct solution of the conflict and from the possibility to decide about compensating the victim, as mediation enables to conclude a court arrangement in accordance with the needs and interests of the parties and also paves the way for obtaining restitution by the victim and condonation by the perpetrator.

Mediation also arouses threats and concern, a charge appears that mediation

threatens the traditional administration of justice, yet Poles are accustomed to the traditional system of the administration of justice.

The victim is afraid to experience the event again by directly facing the perpetrator of the prohibited act, the victim fears being blackmailed by the perpetrator. There is concern over the extortion of the consent of the aggrieved party by the perpetrator to his/her participation in mediation and over the abuse of mediation by the aggrieved party in order to make high demands towards the perpetrators exceeding the value of the damage.

Applying mediation in cases in which the legal order or the social interest was violated is questionable, and mediation is perceived as an indication of the powerlessness of the state in the execution of the observance of the law and applying mediation towards more depraved juveniles also seems dubious.

A sense of impunity may also occur in the perpetrator, if he/she could participate in mediation many times.

It should be added that efficient mechanisms of executing mediation arrangements have not yet been worked out and there is a low awareness of rules of and possibilities to apply mediation in Polish society and mediation is still commonly perceived as administration of justice of a worse category.

S. Falck maintains that there is concern that the centres which are occupied with mediation proceedings in case of juveniles will become quasi-courts for juveniles (quoted in D. Wójcik, pp. 15–16).

An adequate selection of matters for mediation proceedings and properly conducted mediation by a suitably prepared mediator can contribute to the success of mediation. Society must ensure means for juvenile perpetrators to enable them to make amends for the damage and the state should provide suitable services which provide help for crime victims, support organizations defending the interests of victims and set up funds functioning in their favour.

Mediation is one of the reactions towards juvenile delinquents, it can be an alternative to the traditional approach based on applying educational and reformatory measures provided for in the act about proceedings in juvenile cases. Mediation proceedings create a chance due to the criticism of the inefficiency of the traditional system and traditional impingement measures on juveniles, which do not bring the expected results and it might cause negative consequences – an increase in the level of social non-adjustment of juveniles and their stigmatization in the community, which hinders their social reintegration.

Bibliography

- Bieńkowska, E. (1998). Essence and significance of mediation in penal law. *Mediator*, 8
- Gaberle, A. (2002). Alternative measures applied to juveniles. *Mediator*, 20.
- Górska N. (2008). *Mediation – an alternative form of settling disputes in marital and guardianship cases in Outline of the methodology of work of the court guardian*. Ed. T. Jedynak and K. Stasiak. Warsaw.
- Konarska-Wrzosek, V. (2000). Mediation proceedings in juvenile cases. *Judicial Review*, 4
- Meier, B.D. (1999). *Reform justice – conception outline*. in: *W. Mediation. Juvenile delinquents and their victims*. Ed. B. Czarnecka-Działuk, D. Wójcik. Warsaw.
- Nowak, A. (2006). Mediation in proceedings with juveniles. *Chowanna*, 2
- Rau, W. (1999). *Work of the Council of Europe in the field of mediation between victim and perpetrator of a crime in Mediation. Juvenile delinquents and their victims*. Ed. B. Czarnecka-Działuk, D. Wójcik. Warsaw.
- Decree of the Minister of Justice of 18th May 2001 on mediation proceedings in juvenile cases. *Journal on Laws*, 56
- Urban, B. (1997). *Deviant behavior of the youth*. Cracow.
- Waluk, J. (1998). Who conducts mediation in Poland and why? *Jurist*, 3–4.
- Waluk, J. (2002). Mediation as an institution for the aggrieved. *Mediator*, 20.
- Wójcik, D. (1998). Psychological problems of mediation in proceedings with juveniles. *Jurist*, 3–4.