CONVERGENCE OF THE BASIC PRINCIPLES OF MEDIATION IN CRIMINAL, CIVIL, ADMINISTRATIVE AND JUDICIAL-ADMINISTRATIVE MATTERS

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Mediation takes place in all the three types of proceedings known in the Polish procedural law; however, only in relation to criminal and civil cases it can be treated as a court proceeding or as one serving the justice system. Mediation referred to in Chapter 5a Act of 14 June 1969: Code of Administrative Procedure (hereinafter: "CAP") takes place before (governmental or local) public administration organs.[1]

On the other hand, mediation serving the justice system is a judicial-administrative one, which is referred to in Article 115 Law on Proceedings before Administrative Courts[2] (hereinafter: "LPAC"). The normative source of all these types of mediation can be found in the provisions regulating a given type of a proceeding because no legal act on mediation has been passed and the legal status of a mediator has not been determined. However, I do not treat this fact as a legislator's oversight, because the institution, with some exceptions, has already established itself in the conscience of procedural organs and citizens. The prospects of mediation do not depend on another normative act regulating it but on the development of our society's legal culture, which is ... not very likely to take place.

Mediation[3] in relation to all these procedures has come into being in the last 25 years; however, only administrative law admits mediation in both arrangements:

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1 Act of 14 June 1960: Code of Administrative Procedure of 14 June 1960 (consolidated text, Journal of Laws 2021, item 735, as amended).

2 Act of 30 August 2002: Law on Proceedings before Administrative Courts (consolidated text, Journal of Laws of 2019, item 2325, as amended).

3 The text uses a term 'mediation' although the regulations discussed in it tend to use the phrase 'mediation proceeding' more eagerly. The acts do not know and apply a differentiation

a horizontal one (between parties: Article 96a § 4 (2) CAP) and a vertical one (between an organ of public administration and a party or this organ and parties: Article 96a § 4 (1) CAP)[4]; other types of mediation are possible only between parties to a proceeding. The oldest type of mediation is one in criminal matters: it occurred in the Polish legal system in 1997. Mediation in civil matters is younger as it was introduced, inter alia, to Article 10 *in fine* and Part II Act of 17 November 1964 Code of Civil Procedure[5] (hereinafter: "CPC") in 2005.[6] Mediation in administrative matters was introduced to CAP a few years ago, i.e. in 2017.[7] The core provisions concerning mediation in civil, administrative and judicial-administrative matters are contained in separate chapters devoted to proceedings, which is expressed in Chapter I Part II CCP, Chapter 5a Part II CAP and Chapter 8 Part III LPAC. Only mediation in criminal matters abandons this editorial practice because it was regulated in Article 23a Act of 6 June 1997 Code of Criminal Procedure (hereinafter: "CCP"),[8] which is not part of a separate chapter; however, this provision, although elaborated in 2003, seems to be succinct in comparison with competitive regulations. The provision was placed in the introductory regulations of Part I CCP as a result of its transfer from the repealed Article 320, which makes it possible to mediate in the course of jurisdictional proceedings and not only in the preparatory one as before 2003.[9] Although mediation is part of every procedural regulation, it is not treated as a separate mode of a given (administrative) court proceeding, which I. Pączek[10] emphasises in the doctrine of a criminal process, and A. Rutkowska[11] in the doctrine of civil litigation, and which is in conformity with the independence of mediation from the organs of the justice system in civil and/or criminal matters, which is recommended by the Committee of Ministers of the Council of Europe.[12]

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between 'criminal mediation' and 'civil mediation' as well as a 'criminal mediator' and a 'civil mediator', which constitutes a certain mental shortcut, which makes it easier to 'move' between those concepts.

[4] Kalisz, A., 'Mediacja administracyjna i sądowoadministracyjna', *Państwo i Prawo*, 2018, No. 3, p. 4.

[5] Ustawa z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego (i.e. Journal of Laws of 2021, item 1805, as amended).

[6] Cf. Article 1(1) of the Act of 28 July 2005 amending Act: Code of Civil Procedure and some other acts (Journal of Laws of 2005, No. 172, item 1438).

[7] Cf. Article 1(20) of the Act of 7 April 2017 amending Act: Code of Administrative Procedure and some other acts (Journal of Laws, item 935).

[8] Act of 6 June 1997: Code of Criminal Procedure (consolidated text, Journal of Laws of 2021, item 534, as amended).

[9] Article 23a added by Article 1(6) of the Act of 10 January 2003 amending Act: Code of Criminal Procedure, Act: Regulations introducing Code of Criminal Procedure, Act on crown witnesses and Act on the protection of non-public information (Journal of Laws No. 17, item 155, as amended), which entered into force on 1 July 2003.

[10] Pączek, I., 'Postępowanie mediacyjne jako konsensualne zakończenie postępowania karnego', *Ius Novum*, 2016, No. 4, p. 102.

[11] Rutkowska, A., in: Piaskowska, O.M. (ed.), *Kodeks postępowania cywilnego. Postępowanie procesowe. Komentarz aktualizowany*, LEX, 2021, Vol. 3 to Article 183^1.

[12] Which can be treated as a basic principle of mediation – cf. Kużelewski, D., 'Ewolucja polskich uregulowań dotyczących mediacji w sprawach karnych na tle standardów europejskich', *Białostockie Studia Prawnicze*, 2014, No. 15, p. 177.

Regardless of all the distinctions between mediation in criminal, civil, administrative and judicial-administrative matters, all these types share common principles of functioning. From the normative perspective, the catalogue of these principles includes amicability, voluntariness (optionality), commonness, loyalty to its participants, confidentiality and non-openness of its conduction, as well as a mediator's impartiality.[13] Apart from these statutory, to some extent fundamental, principles of mediation, one can observe ones that are deontological in nature. Although they are not commonly binding, mediators apply them and that is why they influence the shape of mediation proceedings. They are not discussed here in detail but they include the principle of neutrality in the object of a dispute (standard II), the principle of professionalism (standard VI), the principle of cooperation with other specialists (standard VII), the principle of protection of a weaker party (frankly speaking, breaking or finishing mediation because of circumstances referred to in standard VIII), the principle of mediation safety (standard IX), and finally the principle of informative reliability within the mediation services proposed (standard X).[14]

The above-mentioned amicability of a case settlement is one of the principles governing an administrative proceeding, which is reflected in public administration organs' obligation laid down in Article 13 § 2 CAP to undertake all actions justified at a given stage of a proceeding making it possible to mediate or reach an agreement. It seems that a similar rule can be drawn from Article 10 and Article 205[6] § 2 CPC, where it is stated that courts should strive for an amicable settlement of an argument at every stage of a proceeding, especially by encouraging parties to mediation. If we understand 'striving' as the the dictionary definition suggests, i.e. as aiming at something, a desire to do something or trying very hard to achieve a goal,[15] the directive to settle an argument amicably where it is admitted by law should not be treated as an insignificant permission but as strong obligation of a court to such activeness, which is reflected in the amendment to Article 10 CPC of 2016,[16] which changed the phrase "a court should strive for (...)" into a stronger one: "a court shall strive for (...)". This approach differs from that typical of a criminal proceeding, where an amicable way of settling a case is not distinguished by the legislator in any way,[17] however, admissible on the initiative or with the consent

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[13] In civil law jurisprudence, other types are formulated, i.e. principles of flexibility, fast proceeding, low costs of mediation, autonomy of parties to a dispute, respect to all participants' dignity, and even "satisfaction of both parties"; for more see Arkuszewska, A.M., Plis, J. (eds.), *Zarys metodyki pracy mediatora w sprawach cywilnych*, Warszawa, 2014, pp. 73–94. In the administrative law doctrine, there is a principle of acceptance (in relation to a mediator and assistance in resolving a conflict) and a mediator's professionalism; thus Suchanek, M., 'Mediacja jako metoda rozwiązywania sporów społecznych', *Studia Administracyjne*, 2018, No. 10, pp. 132–133.

[14] Standards of mediation and a mediator's conduct adopted by the Social Council for Alternative Methods of Solving Conflicts and Disputes at the Ministry of Justice on 26 June 2006.

[15] Słownik Języka Polskiego PWN available on https://sjp.pl/d%C4%85%C5%BCy%C4%87 [accessed on: 3.01.2022].

[16] Article 10 amended by Article 1(1) of the Act of 10 September 2015 (Journal of Laws of 2015, item 1595) that entered into force on 1 January 2016.

[17] T. Grzegorczyk is of a different opinion on the amendment that allowed for the application of mediation throughout the whole criminal proceeding. The author believes that

of the accused and the aggrieved.[18] None of the aims laid down in Article 2 CCP is close to settling the whole case amicably, and the mode is sometimes useless in cases that require bringing a perpetrator to criminal justice. However, this does not mean that the outcome of mediation is totally unimportant for final adjudication in a criminal case and this part of a sentence that contains penal consequences of an act. In accordance with Article 53 § 3 Act of 6 June 1997 Criminal Code (hereinafter: "CC"),[19] determining the so-called directives for judicial imposition of a penalty, when imposing a penalty, a court shall take into consideration positive results of mediation between the aggrieved and a perpetrator.[20] R. Koper points out a subsidiary nature of mediation in criminal matters,[21] the results of which may open a gate to conditional discontinuance of a criminal proceeding (Article 66 § 3 CC), extraordinary mitigation of punishment (Article 60 § 2 CC), as well as may be decisive for admissibility of entering into a prosecution agreement leading to sentencing without a trial (Article 335 CCP) or voluntary submission to penalty (Article 387 CCP).

All the procedures discussed herein, the judicial one as well as the administrative (judicial-administrative) one, assume voluntariness of participation in mediation (Article 23a § 1 CCP, Article 183 § 1[1] CPC, Article 96a § 2 CAP, Article 115 § 1 LPAC), thus, it depends mainly on the will of the parties involved, which corresponds to the adversarial system applied in criminal[22] and civil processes,

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giving mediation a "more general character" contributed to granting it a directive-like nature; cf. Grzegorczyk, T., *Kodeks postępowania karnego. Komentarz do art. 1–467, Vol. I*, Warszawa, 2014, p. 170; see also Kużelewski, D., 'Mediacja po nowelizacji kodeksu postępowania karnego – krok ku zwiększeniu roli konsensualizmu w polskim procesie karnym?', in: Sobolewski, Z., Artymiak, G., Kłak, C.P. (eds.), *Problemy znowelizowanej procedury karnej*, Kraków, 2004, p. 273. However, for a different stance, see Steinborn, S., in: Grajewski, J., Rogoziński, P., Steinborn, S., *Kodeks…*, op. cit., Vol. 6 to Article 23a.

[18] In the doctrine of a criminal process, mediation is expected to have an "extraordinarily important element of the system of protection of the victims of crime". Thus, equipping the aggrieved with the ability to communicate ("consensual resolution of criminal conflicts") is treated as a sign of his/her empowerment and the necessity of taking into account his/her interests in a trial to a greater extent. For more see Karaźniewicz, J., 'System gwarancji interesów ofiary przestępstwa we współczesnym polskim procesie karnym', in: Pływaczewski, E.W. (ed.), "Współczesne zagrożenia przestępczością i innymi zjawiskami patologicznymi a prawo karne i kryminologia", *Białostockie Studia Prawnicze*, 2009, No. 6, p. 66 et seq.

[19] Act of 6 June 1997: Criminal Code (consolidated text, Journal of Laws of 2021, item 2345, as amended.).

[20] And also "an amicable agreement between them entered into in a proceeding before a court or a prosecutor".

[21] Koper, R., 'Postępowanie mediacyjne a skazanie oskarżonego bez rozprawy', *Prokuratura i Prawo*, 1998, No. 11–12, p. 58.

[22] For a different stance see Kmiecik, R., who believes that mediation confirms giving up the adversarial confrontation of parties and using the so-called alternative method of solving disputes as a substitute for it. The author interprets mediation in criminal matters as a solution that is "contrary to many supreme procedural rules such as formality, the adversarial system, and finally speed and continuity of a trial"; for more see Kmiecik, R., 'Idea mediacji i probacji w Polsce i USA (z perspektywy procesowo-kryminologicznej)', in: Ćwiąkalski, Z., Artymiak, G., Kłak, C.P. (eds.), *Problemy znowelizowanej procedury karnej*, Kraków, 2004, p. 238.

and the autonomy of parties[23] emphasised in the studies of administrative law. The provisions of Article 23a (4) CCP, Article 183 § 1[1] CPC and Article 96a § 2 CAP express the above-mentioned feature of mediation literally.

Voluntariness of mediation means non-coercing its potential participants to participation in mediation, which matches the definition of the word 'voluntary' in a dictionary. Voluntariness of mediation first of all certifies subjectivity of the parties to it and secondly expresses the right belief that *bonum initium est dimidium facti*, and coercion is not the right method to build agreement between feuding parties to a proceeding. In the doctrine of criminal procedural law, it is rightly stated that voluntariness is a background of mediation,[24] and its rank is raised to that of a rule.[25] As a formality, however, it should be pointed out that the above-discussed feature of mediation within a criminal proceeding was not verbalised until 2015[26]; earlier one could think about such voluntariness only based on the fact that the referral of a matter to mediation took place after the defendant and the aggrieved gave their consent (Article 23a § 1 CCP). There are no exceptions to the principle of voluntariness within a criminal process.[27] The so-called obligatory mediation known in civil and judicial-administrative procedure does not negate the superiority of the principle of voluntariness, although it excludes a decision to refer a case to mediation from the application of the principle. The example of such a solution is family mediation regulated in Article 445[2] CPC ("in order to amicably solve litigious matters concerning the needs of a family, alimony/maintenance, methods of guardianship of children, contact with children and property related matters that are subject to a judicial judgement within adjudication on a divorce or separation"), as well as mediation under Article 115 § 2 LPAC. Both types of mediation are conducted ex officio based on a discrete and not consulted decision of a court,[28] which is not bound by limitations laid down in Article 183[8] § 2 CPC[29] or

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[23] Which contains an element of the adversarial system, parties' availability and free initiative. For more see Wilbrandt-Gotowicz, M., in: Jaśkowska, M., Wróbel, A., Wilbrandt-Gotowicz, M. (eds.), *Komentarz aktualizowany do Kodeksu postępowania administracyjnego*, LEX, 2021, Vol. 6 to Article 96a.

[24] Grajewski, J., Steinborn, S., *Kodeks postępowania karnego, Komentarz do art. 1–424*, LEX, 2013, Vol. 2 to Article 23a.

[25] Steinborn, S., in: Grajewski, J., Rogoziński, P., Steinborn, S. (eds.), *Kodeks…*, op. cit., Vol. 8 to Article 23a.

[26] Cf. Article 1(5) of the Act of 27 September 2013 amending Act: Code of Criminal Procedure and some other acts (Journal of Laws item 1247, as amended); for a similar stance see Kużelewski, D., 'Na marginesie prawa do sądu – mediacja w sprawach karnych w świetle prawa międzynarodowego i krajowego', in: Dynia, E., Kłak, C.P. (eds.), *Europejskie standardy ochrony praw człowieka a ustawodawstwo polskie*, Rzeszów, 2005, p. 331.

[27] Sławomir, S., *Kodeks postępowania karnego. Komentarz do wybranych przepisów*, LEX, 2016, Vol. 10 to Article 23a.

[28] Waszkiewicz, P., 'Zasady mediacji', in: Gmurzyńska, E., Morek, R. (eds.), *Mediacje. Teoria i praktyka*, Warszawa, 2018, p. 163 et seq.; Górska, A., Huryn, V., *Mediacje w rozwiązywaniu konfliktów rodzinnych*, Warszawa, 2007, p. 26.

[29] Dończyk, D., Koper, I., in: Wiśniewski, T. (ed.), *Kodeks postępowania cywilnego. Komentarz. Tom. II. Artykuły 367–505(39)*, LEX, 2021, Vol. 2 to Article 445[2]. However, the mediation under Article 436 § 1 CPC is not an obligatory one ("provided there are prospects for saving a marriage"), because the provisions on mediation are applicable to it by analogy, however with a reservation that the mediation may also aim at conciliation of the spouses (Article 436 § 2 CPC).

the lack of a party's motion to conduct it (Article 115 § 1 LPAC).[30] However, waving of mediation voluntariness in such a case is not especially burdensome because it does not go beyond the initiation of mediation and an obligation to appear before a mediator. Civil law experts[31] and administrative law experts[32] agreeably recognise voluntariness as a *sine qua non* of mediation, without which one cannot speak about mediation. However, it is not clear whether the latter also relate the statement to participation in mediation instigated ex officio under Article 115 § 2 LPAC.

Voluntariness of mediation in civil matters is clearly seen in relation to its special form, i.e. contractual mediation (Article 183^1 § 2 *in principio* CPC) as a contract just means parties' agreeable declaration. However, mediation based on a motion (Article 183^6 CPC) and one conducted based on a court's referral (Article 183^8 § 1 in conjunction with § 2 CPC) also have this characteristic feature.

Within the area we are interested in, the activeness of parties to a criminal proceeding, in accordance with Article 23a § 1 CCP, may take the form of an initiative concerning the referral of a matter to mediation, or consent for such referral, provided the other party takes a positive stance towards the initiative. Mediation can also take place as a result of an agreeable and unanimous motion of the aggrieved and the defendant. In a civil proceeding, such activeness takes the form of an agreement on mediation (Article 183^1 § 2 *in principio* CPC), a motion to a court to conduct mediation (Article 183^7 CPC), consent for mediation applied for by the other party or consent for referral of a matter to mediation by a court (*arg. a contrario ex* Article 183^8 § 2 CPC[33]).

The doctrine of criminal procedure does not exclude a situation in which a prosecutor or a court may take the subject-related initiative, which results in the necessity to obtain both parties' consent.[34] Also Article 96b § 1 CAP stipulates a similar 'official' initiative and treats it as equivalent to the motion-like form. After all, taking such an initiative *ex officio* does not mean that a matter is referred to mediation because the provision only stipulates the notification *ex officio* about the possibility of conducting mediation. And in such a case, giving consent for mediation is a requirement for further proceeding aimed at mediation. Taking the initiative to resolve an argument by means of mediation is also within a court's competence, which results directly from Article 183^8 § 1 CPC. In accordance with Article 183^8 § 5 CPC, before the first session of the bench, the chair assesses whether to refer the parties to mediation, and if it is necessary to hear them,

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[30] Woś, T., in: Knysiak-Sudyka, H., Romańska, M., Woś, T., *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, LEX, 2016, Vol. 11 to Article 115; Dauter, B., in: Kabat, A., Niezgódka-Medek, M., Dauter, B., *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, LEX, 2021, Vol. 6 to Article 115.

[31] Broński, W., Dąbrowski, M., 'Status prawny mediatora w sprawach cywilnych – stan obecny i propozycje zmian', *Roczniki Nauk Prawnych*, 2014, No. 4, p. 9.

[32] Łukasiewicz, J.M., 'Zasada dobrowolności', in: Arkuszewska, A.M., Plis, J. (eds.), *Zarys…*, op. cit., p. 75.

[33] However, see Article 202^1 CPC.

[34] Kurowski, M., in: Świecki, D. (ed.), *Kodeks postępowania karnego. Tom I. Komentarz aktualizowany*, LEX, 2022, Vol. 2 to Article 23a.

he/she calls them to appear at a non-public sitting. Only the civil and administrative procedures determine a clear deadline for parties for expressing their stance concerning the referral of a matter to mediation. In case of Article 183[8] § 2 CPC, the deadline for giving their consent is one week from the date of an announcement or delivery of a decision on the referral of a matter to mediation to a party. In case of Article 96b § 3 CAP, on the other hand, the time limit accounts for 14 days. The provisions of CCP do not stipulate similar time limits, which does not constitute a reason why the defendant and/or the aggrieved could give such consent *ad calendas graecas*. The receipt of this consent depends on the procedural organ that refers a matter to mediation or a mediator (Article 23a § 4 second sentence CCP), which results from the amendment of 2013 because earlier a mediator did not have this right. In case a mediator is obliged to receive consent for mediation, it is almost certain that a party will postpone giving it. Such a delay is also possible in the former situation, i.e. when an organ referring a matter to mediation receives parties' consent for it, which may be justified by the need to provide a party with the time necessary to consider such a solution or consult it with their counsel for the defence or proxy.

Nota bene, admissibility of the receipt of "consent for participation in a mediation proceeding" by a mediator (Article 23a § 4 CCP) raises doubts whether it is the same consent as the one referred to in Article 23a § 1 CCP, i.e. whether it is still consent for referring a matter to mediation ("for referring a matter to an authorised institution or person in order to conduct a mediation proceeding") or there is a difference between the two. Despite the terminological inconsistency between the content of § 1 and § 4 of Article 23a CCP, for functional reasons, S. Steinborn is for recognition of the identity of the two, which seems to be the right solution to the problem.[35] Referring a case to mediation in criminal matters (§ 1) shall always be based on the consent given by or on the initiative of one or both parties concerned, *eo ipso* both these types of activeness in general mean giving consent for participation in mediation because it is hard to assume that a party shows initiative and next does not want to use it. Diversification of the scope of consent under Article 23a § 1 and § 2 CCP would imply a two-stage system of obtaining consent from the defendant and/or the aggrieved and would lengthen the running of a case. After all, mediation is to help improve a criminal proceeding and not to complicate it. On the other hand, starting mediation on their own initiative, mediators, also those involved in criminal matters, ask parties about their stance on their onward participation in mediation.

Voluntariness is not only a requirement for referring a matter to mediation but also for continuing it and the way of its finalisation.[36] In each type of mediation

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[35] Steinborn, S., in: Grajewski, J., Rogoziński, P., Steinborn, S. (eds.), *Kodeks…*, op. cit., Vol. 11 to Article 23a.

[36] Although the last aspect may be treated as a symptom of the autonomy of parties to a mediation, i.e. independence of decision making concerning the shape of mediation (its course) as well as its results. See Antolak-Szymanski, K., in: Piaskowska, O.M., Antolak-Szymanski, K., *Mediacja w postępowaniu cywilnym. Komentarz*, LEX, 2017, Vol. 3 to Article 183[1].

discussed herein, its participant[37] may withdraw consent until the end of a mediation proceeding[38]; however, only Article 23a § 4 *in fine* CCP expresses this literally. In other cases, i.e. mediation in civil[39] and administrative[40] matters, such a conclusion may be drawn from the provisions of Article 183[1] § 1 CPC and Article 96a § 2 CAP, which declare their voluntariness[41] not limited by any subjective or objective frames. Voluntariness means that a party does not have to explain the reasons why he/she does not give consent for participation in a mediation proceeding, withdraws from it, or does not accept the other party's proposals. A party does not have to put forward a counter-proposal in order to respond to a solution to an argument proposed in the course of mediation.

In every proceeding in question, consent is the expression of a party's subjective right to take discrete decisions concerning a dispute. Thus, consent given by counsel for the defence or a proxy cannot substitute for it. None of the above-mentioned procedural regulations lays down a form of consent for mediation, which means that it may be given orally or in writing. There are no obstacles to a withdrawal of oral consent by means of a decision in writing and vice versa. While consent for participation in mediation cannot be presupposed, a refusal to participate in it can be linked with persistent and unexplained absence from meetings scheduled by a mediator, as well as with a refusal to sign a mediation report, and in case of mediation in civil and administrative matters, with ineffective expiration of a term referred to in Article 183[8] § 2 CPC and Article 96b § 3 CAP respectively. The need of clear consent for participation in mediation may be concluded based on the fact that, unlike inter alia Article 98 § 3, Article 343 § 2 or Article 343a § 2 second sentence CCP, the provision of Article 23a § 1 CCP does not use the phrase 'lack of objection' but 'consent', thus some form of activeness perceived by others. Consent, meaning a form of active behaviour, is also a requirement for mediation in civil matters because it is carried out not when there is a 'lack of objection' but when both parties give their consent, on a party's motion or based on an agreement between parties (Article 183[7] CPC), as well as for mediation in administrative matters (Article 96c CAP).

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[37] In administrative law jurisprudence, however, an organ taking part in mediation is refused this right; cf. Wilbrandt-Gotowicz, M., in: Jaśkowska, M., Wróbel, A., Wilbrandt-Gotowicz, M. (eds.), *Komentarz…*, op. cit., Vol. 7 to Article 96a.

[38] Steinborn, S., in: Grajewski, J., Rogoziński, P., Steinborn, S. (eds.), *Kodeks…*, op. cit., Vol. 10 to Article 23a.

[39] Rutkowska, A., in: Piaskowska, O.M. (ed.), *Kodeks…*, op. cit., Vol. 14 to Article 183[1]; Stefańska, E., in: Manowska, M. (eds.), *Kodeks postępowania cywilnego. Komentarz. Tom I. Artykuły 1–477[16]*, LEX, 2021, Vol. 9 to Article 183[1]; Żyznowski, T., in: Dolecki, H., Wiśniewski, T. (eds.), *Kodeks postępowania cywilnego. Komentarz. Tom I. Artykuły 1–366*, LEX, 2013, Vol. 3 to Article 183[1].

[40] Morek, R., 'Dobrowolność mediacji i jej ograniczenia (prawo i praktyka)', *Studia Iuridica*, 2008, No. 49, p. 156.

[41] Voluntariness of entering an agreement in the course of a proceeding is also based on Article 117 § 2 LPAC, in which it is pointed out that "establishing the way of resolving a case" is an option that does not have to be implemented.

Parties can give their consent jointly or separately and at a different time,[42] which seems even more probable when the feud between parties is stronger and they avoid any contacts or even trace signs of cooperation. This 'different time' is limited in case of mediation types other than one in criminal matters pursuant to Article 183^8 § 2 CPC and Article 96b § 3 CAP.[43]

Optionality of mediation means that in criminal matters[44] as well as in civil and administrative cases it is a possible element of a proceeding and does not have to take place every time and be necessary. Even in civil cases in which a court used the possibility of referring them to mediation (Article 436 § 1, Article 445^2, Article 570^2 CPC), mediation remains a non-obligatory element of a proceeding. Although the parties whose case was referred by a court to mediation should appear before a mediator, they do not have to give their consent for participation in the mediation recommended by a court. Moreover, in situations under Article 436 § a, Article 445^2 and Article 570^2 CPC, a court just may but does not have to refer a case to mediation. A court's discretion over this referral is also based on the fact that only a decision under Article 436 § 1 CPC requires that particular circumstances occur, i.e. there are "prospects for saving a marriage".[45] Mediation under Article 115 § 2 LPAC is also an optional element of a judicial-administrative proceeding.

This lack of subjective and objective requirements for a decision on the referral of a matter to mediation (without parties' consent) evident in case of mediation in criminal,[46] civil and administrative matters offers an inducement for stating that mediation in those cases is characterised *sui generis* by commonness of application because none of the proceedings discussed uses a closed catalogue of cases in which mediation is admissible,[47] or any subjective exclusions on a priori grounds. It seems that this way the legislator signals certain universality of mediation as a consensual way of concluding a case (its part) and teats a potential exclusion from mediation as an extraordinary situation.[48] Article 96a § 1 CAP is not against

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[42] Grzegorczyk, T., *Kodeks postępowania karnego oraz ustawa o świadku koronnym. Komentarz*, Warszawa, 2008, p. 138.

[43] However, in jurisprudence, the terms are recognised as instructive; cf. Kaczmarek, D., 'Mediacja w sprawach administracyjnych, sądowoadministracyjnych i cywilnych – zakres i zasady (analiza porównawcza)', *Studia Administracyjne*, 2017, No. 9, p. 127.

[44] Judgement of Appellate Court in Warsaw of 4 June 2014, II AKa 136/14, LEX No. 1483853; thus in the doctrine: Kosonoga, J., in: Stefański, R.A., Zabłocki, S. (eds.), *Kodeks postępowania karnego. Tom I. Komentarz do art. 1–166*, LEX, 2017, Vol. 7 to Article 23a; Steinborn, S., in: Grajewski, J., Rogoziński, P., Steinborn, S. (eds.), *Kodeks…*, op. cit., Vol. 9 to Article 23a.

[45] Which seems to correspond to the recommendations of the European Union institutions, which emphasise the necessity to leave the decision and evaluation of grounds for referring a criminal case to mediation to organs of the criminal justice system; cf. paragraph IV.9. of the Recommendation No R (99)19 of the Committee of Ministers (Council of Europe).

[46] Which does not mean that every criminal case can be subject to it. For more about such contraindications see Steinborn, S., in: Grajewski, J., Rogoziński, P., Steinborn, S. (eds.), *Kodeks…*, op. cit., Vol. 9 to Article 23a, as well as Kosonoga, J., in: Stefański, R.A., Zabłocki, S. (eds.), *Kodeks…*, op. cit., LEX, 2017, Vol. 13 to Article 23a.

[47] A similar stance in the light of Article 23a – Kosonoga, J., in: Stefański, R.A., Zabłocki, S. (eds.), *Kodeks…*, op. cit., Vol. 9 to Article 23a.

[48] In the light of Article 183^1 CPC – Rutkowska, A., in: Piaskowska, O.M. (ed.), *Kodeks…*, op. cit., Vol. 2 to Article 183^1.

commonness of mediation as it admits mediation in cases the "nature of which allows for that".[49] On the grounds of a civil proceeding, extraordinary exclusion from mediation is stipulated inter alia in Article 183^8 § 3 (inability to use mediation in proceedings by writ of payment or by writ of payment for a lesser value unless an effective plea is made) and Article 477^{12} CPC (inadmissibility of amicable agreement and submission of a case to an arbitration court for resolution in cases concerning social insurance). On the other hand, reference made to the so-called amicable agreement capability as a requirement for parties' referral to mediation in "other family and guardianship cases" under Article 570^2 CPC constitutes another type of limitation.

The content of the provisions of Article 23a § 1 *in fine*, Article 23a § 4, Article 300 § 1 (§ 2) CCP, as well as Article 103 § 4 in conjunction with § 3 (2), Article 183^8 § 4, Article 205^2 § 1 (1), Article 210 § 2^2 CPC and Article 13 § 2, Article 96b § 4 in conjunction with § 3 CAP makes it possible to formulate a thesis that the principle of loyalty[50] also brings the discussed mediation types closer. It is so because the principle includes a directive that obliges a proceeding organ to inform (to instruct or warn) the participants of the proceeding about the rights and duties they have and the consequences of failure to fulfil the latter. In case of mediation, information about duties and consequences of failure to fulfil them will be scarcer because of the institution is based on parties' voluntary participation and minimising of its consequences, which does not mean that they do not occur at all. The expression of such solitary but negative consequences of failure to fulfil duties resulting from participation in mediation is the possibility of "imposing (in a civil case) an obligation on a party to cover partial costs in the amount higher than the case result might suggest or even all the costs" if the party "in the course of a proceeding, does not appear at mediation sessions without an explanation for their absence regardless of their formerly given consent for mediation" (Article 103 § 3 (2) CPC). Among the proceedings analysed herein in which mediation does not occur, only the provisions of Law on Proceedings before Administrative Courts do not guarantee parties proper information. The above, however, seems to be an omission based on the conviction that, firstly, the proceeding in some sense constitutes the continuation of a feud in accordance with the provisions of CAP, where the informative obligation was implemented under Article 13 § 2, Article 96b § 4 in conjunction with § 3 CAP; and, secondly, a motion to carry out mediation is lodged by the complainant (organ) "before a trial is set" (Article 115 § 1 LPAC),

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[49] And what is recognised as the only substantive reason for mediation in administrative matters, but also a reason that is not excessively rigorous. In jurisprudence it is also emphasised that mediation may be conducted even if no special provision regulates it. Cf. Wilbrandt-Gotowicz, M., in: Jaśkowska, M., Wróbel, A., Wilbrandt-Gotowicz, M., *Komentarz…*, op. cit., Vol. 4 to Article 96a.

[50] The informative obligation is recognised in the doctrine of criminal proceedings as a component of the right to a fair trial/hearing, but it is sometimes also raised to the rank of the right to information, which is done inter alia by Grzegorczyk, T., *Kodeks…*, op. cit., Warszawa, 2008, p. 104, and Hofmański, P. (ed.), Sadzik, E., Zgryzek, K., *Kodeks postępowania karnego. Komentarz*, Vol. 1, Warszawa, 1999, p. 111.

i.e. an entity that knows the rules of mediation and does not need instruction *post factum*.

The provisions of Article 23a § 1 *in fine*, Article 23a § 4 and Article 300 § 1 (§ 2) CCP constitute an almost classical example of the implementation of a directive of Article 16 § 1 CCP, which imposes a general informative obligation on organs carrying out proceedings; however, the circumstances of its implementation, as well as the scope of this obligation and the addressee of the information are laid down in special provisions. They include Article 23a § 1 *in fine* and Article 23a § 4, as well as Article 300 § 1 (§ 2) CCP. Pursuant to them, at different stages of a criminal process, the accused and the aggrieved are informed about the aims and rules of a mediation proceeding, including the content of Article 178a CCP (Article 23a § 1 and Article 23a § 4 CCP), about the possibility of withdrawing their consent "until the end of a mediation proceeding" (Article 23a § 4 CCP) and about the rights laid down in Article 23a § 1 CCP (Article 300 § 1 and § 2 CCP).[51] Although on civil law grounds the informative obligation also results from a series of special provisions, unlike the criminal procedure law, its civil law counterpart does not stipulate a general 'informative' directive. It is hard to recognise the norm under Article 5 CPC as such because in accordance with it a court may provide parties and participants of a proceeding with instructions concerning procedural activities; thus its form constitutes a court's right and not an obligation to take such steps,[52] and only "in case of a justified need" and only in relation to entities that are not represented by a solicitor, a legal advisor, a patent representative, or a solicitor of the General Counsel to the Republic of Poland [Prokuratoria Generalna Rzeczpospolitej Polskiej]. The last requirement reveals that the provision of Article 5 CPC serves other aims, i.e. ensuring a procedural balance between parties represented and not represented by legal practitioners. Despite the lack of a more general directive, the legislator quite often determines a court's informative obligation on civil procedure grounds, which in case of mediation adopts the form of the provisions of Article 103 § 4 in conjunction with § 3 (2) CPC (possibility of charging a party, regardless of the case result, for their conduct generating costs during a mediation proceeding), Article 183^8 § 4 CPC ("amicable methods of dispute resolution, in particular mediation"), Article 205^2 § 1(1) CPC ("possibility of resolving a dispute by means of an amicable agreement reached before a court or a mediator"), Article 210 § 2^2 CPC ("possibility of resolving a dispute amicably, in particular by means of mediation").

On the other hand, Article 9 CAP shows many parallels with the principle of loyalty within criminal procedure. It results from the obligation [imposed on public administration organs] to "inform parties properly and exhaustively about

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[51] Also see § 14 (2) Regulation of the Minister of Justice of 7 May 2015 concerning a mediation proceeding in criminal matters (Journal of Laws, item 716; hereinafter "RCM"), obliging a mediator, i.e. an entity deprived of the features of a procedural organ, to "explain to the accused and the aggrieved", during the so-called introductory meeting, "the aims and rules of a mediation proceeding, as well as instruct them that they have the right to withdraw their consent for participation in mediation until the end of it".

[52] Dolecki, H., Radkiewicz, T., in: Wiśniewski, T. (ed.), *Kodeks postępowania cywilnego. Komentarz. Tom I. Artykuły 1–366*, LEX, 2021, Vol. 1 to Article 5.

actual and legal circumstances that may affect the determination of their rights and obligations that are subject to an administrative proceeding. The provision is quite commonly believed to reflect the rule that obliges to inform parties, or the rule that obliges to inform parties to and participants of a proceeding, implemented by a series of special provisions and matching the principle of the protection of trust in appropriate activities of administrative organs and courts.[53] These special provisions certainly include Article 13 § 3 CAP stipulating "provision of explanation concerning the possibilities and advantages of amicable resolution of a matter"[54] and Article 96b § 4 in conjunction with § 3 CAP, which requires "instruction on the rules of carrying out mediation and covering its costs".

As far as confidentiality of mediation is concerned, criminal, civil, administrative and judicial-administrative proceedings also show far-reaching similarity, which does not mean identical solutions. However, the reasons behind the legislator's decisions were identical: the aim was to introduce an additional incentive for parties,[55] assured that participation in mediation does not create a risk of worsening their procedural situation, to at least try to reach an agreement. The legislator may admit confidentiality of mediation because a mediator is not an organ of the justice system and does not play the judicial role. Thus, mediation is free from the 'burdens' connected with the implementation of the constitutional principle of public hearing before a court (Article 45(1) of the Constitution of the Republic of Poland[56]).

Two aspects of confidentiality of mediation may be analysed. Firstly, mediation alone is carried out in a way ensuring limited internal openness, i.e. parties have only access to information necessary to reach an agreement, which does not cover all semi-mediation statements, declarations or conduct of the opponent. Secondly, except its result, mediation is subject to complete external confidentiality, i.e. no entities other than parties (or "other persons" under Article 183^4 § 2 CPC, an organ under Article 96a § 4 (1) and "other persons" under Article 96j § 2 CAP) or their assistants or legal representatives have access to mediation. Confidentiality of mediation is referred to in Article 23a § 7 *in fine* CCP (a mediation proceeding shall be conducted in a confidential way). On the other hand, Article 183^4 § 1 CPC, Article 96j § 1 CAP and Article 116c § 1 LPAC stipulate it is not public, which is a synonymous term and has the same consequences.

The circle of people admitted to participation in mediation, thus indirectly to information about the course of it or at least its part is laid down in Article 23a

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[53] Wróbel, A., in: Jaśkowska, M., Wilbrandt-Gotowicz, M., Wróbel, A., *Komentarz…*, op. cit., Vol. 1 and 3 to Article 9; Knysiak-Sudyka, H., in: Cebera, A., Firlus, J.G., Golęba, A., Kiełkowski, T., Klonowski, K., Romańska, M., Knysiak-Sudyka, H., *Kodeks postępowania administracyjnego. Komentarz,* LEX, 2019, Vol. 1 to Article 9; Wegner, J., in: Chróścielewski, W., Kmieciak, Z. (eds.), *Kodeks postępowania administracyjnego. Komentarz*, LEX, 2019, Vol. 1 et seq. to Article 9.

[54] Przybysz, P.M., in: *Kodeks postępowania administracyjnego. Komentarz aktualizowany*, LEX, 2021, Vol. 1 to Article 9.

[55] In the doctrine of civil law, it is said that it is just this "basic rule" that was decisive for its popularity with the parties to a civil proceeding – cf. Ereciński, T., in: Grzegorczyk, P., Gudowski, J., Jędrzejewska, M., Weitz, K., Ereciński, T., *Kodeks postępowania cywilnego. Komentarz. Tom II. Postępowanie rozpoznawcze,* LEX, 2016, Vol. 2 to Article 183^4.

[56] The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483, as amended).

§ 1 CCP and § 14 Regulation of the Minister of Justice concerning mediation in criminal matters (hereinafter: "RMC"). None of the provisions stipulates that, apart from a mediator, the defendant and the aggrieved,[57] as well as their potential legal assistants (Article 6 *in fine*, Article 86 § 1 CCP) or representatives (Article 51 CCP),[58] other persons selected by a mediator could take part in mediation. The existence of such a right cannot be concluded based on § 15 *in fine* RMC, because the term "another participant [of a mediation proceeding]" used in this provision, depending on the direction of action, means a procedural party other than the one who initiated the action, i.e. either the aggrieved or the defendant, but nobody else. In a civil proceeding, only parties have unlimited access to participation in mediation. To tell the truth, Article 183^4 § 2 CPC mentions "other persons" but it indicates them only in the context of the obligation to keep "the facts they got acquainted with in connection with the conduction of mediation"[59] secret, and not in relation to the right to participate in mediation. "Other persons" do not have such a guarantee as the civil law doctrine expresses a right opinion that they can take part in mediation "only if the parties give their consent for that and in consultation with a mediator",[60] i.e. their participation is also conditional and not guaranteed by law. There is no consensus about the subjective scope of "other persons". Thus, A. Rutkowska interprets them as parties' representatives,[61] and T. Żyznowski, apart from professional and non-professional proxies, also sees family members, expert witnesses and other third parties among them provided they took part in a mediation proceeding,[62] which seems to be closer to the literal content of Article 183^4 § 2 CPC. Thus, although the provision does not give "other persons" any guarantees of participation in mediation, by requiring that they keep mediation secret, it indirectly admits that they can participate in it if the parties involved give their prior consent.

It might seem that Code of Administrative Procedure is best at precisely indicating entities that have access to mediation, because Article 96a § 4 lists who can be its participants (an organ carrying out a proceeding and a party or parties – subparagraph (1), and parties to this proceeding – subparagraph (2)), but this impression quickly vanishes after reading Article 96j § 2 CAP. The provision, besides those "participants of mediation", also indicates "other persons taking part in mediation", which means obvious separation of the two groups. The "other persons" first of all include parties' proxies, interpreters and expert witnesses,[63] as

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[57] Also the so-called substitute party under Article 52 CCP.

[58] The participation of counsel for the defence, proxies and representatives seems to depend on the attitude of the other party, who can make participation in mediation dependent on their absence and effectively block their access to mediation this way.

[59] The thesis that this provision expresses the "rule of a lack of openness of a mediation proceeding" sounds awkward from the linguistic point of view – thus, Stefańska, E., in: Manowska, M. (ed.), *Kodeks…*, op. cit., LEX, 2021, Vol. 1 to Article 183^4.

[60] Rutkowska, A., in: Piaskowska, O.M. (ed.), *Kodeks…*, op. cit., Vol. 2 to Article 183^4.

[61] Ibidem.

[62] Żyznowski, T., in: Wiśniewski, T. (ed.), *Kodeks postępowania cywilnego. Komentarz. Tom I. Artykuły 1–366*, LEX, 2021, Vol. 1 to Article 183^4; for a similar stance see Łukasiewicz, J.M., *Zasada…*, op. cit., p. 79.

[63] Majer, T., in: Karpiuk, M., Krzykowski, P., Skóra, A. (eds.), *Kodeks postępowania administracyjnego. Komentarz do art. 61–126. Tom II*, LEX, 2020, Vol. 2 to Article 96j.

well as a prosecutor, the Ombudsman, or a representative of a cooperating organ.[64] However, they all, i.e. the "participants" of mediation in administrative matters and those "other persons that take part [in it]", are obliged to keep all facts they got to know in connection with the conduction of mediation secret unless the participants of mediation decide otherwise (Article 96j § 2 CAP). The final part of Article 96j § 2 CAP undoubtedly weakens the confidentiality of mediation in the same way as Article 116c § 2 LPAC does by admitting that parties may express a different stance on the issue ("unless they decide otherwise"). Confidentiality of civil mediation is characterised by the same condition because Article 183[4] § 2 second sentence CPC stipulates a possibility of granting exemption from this "obligation" by parties. Any attempts to break the confidentiality obligation are purposeless, which results from ineffectiveness of reference "in the course of a proceeding before a court or an arbitration court to amicable resolution proposals, mutual concessions proposed or any other declarations made in the course of a mediation proceeding" (Article 183[4] § 3 CPC), and on administrative grounds, inadmissibility of using whatever "amicable resolution proposals, revealed facts or statements made in [its] course" "after the mediation" (Article 96j § 3 CAP).[65]

In all these cases, "deciding otherwise"[66] by participants of mediation in administrative and judicial-administrative matters (Article 96j § 2 *in fine* CAP, Article 116c § 2 LPAC), and "exemption from this obligation" (Article 183[4] § 2 second sentence CPC) are optional and fully dependent on the will of parties (participants of mediation), and not on an organ that conducts an administrative or civil proceeding. Only Article 183[4] § 2 second sentence CPC determines the addressee of this exemption, i.e. "a mediator and other persons taking part in a mediation proceeding", and at the same time omits the possibility of mutual or cross exemption from confidentiality by the parties themselves, which seems to be the legislator's oversight. It seems that maintaining confidentiality by parties while they gave consent for exempting other participants of mediation from it is not important; not to say that it does not make sense.

On the other hand, the criminal procedure provisions do not stipulate any exemptions from mediation confidentiality.[67] Confidentiality of mediation in

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[64] Wilbrandt-Gotowicz, M., in: Jaśkowska, M., Wróbel, A., Wilbrandt-Gotowicz, M., *Komentarz…*, op. cit., Vol. 2 to Article 96j.

[65] With the exception of "arrangements included in the report on the course of mediation [in administrative matters]".

[66] CAP does not use a term "exemption from confidentiality" – for more see Sowiński, P.K., 'Zakaz dowodowy przesłuchania mediatora w postępowaniu cywilnym, administracyjnym i karnym. Elementy wspólne i różnicujące (Uwagi na tle art. 183[4] § 2 k.p.c., art. 83 § 4 k.p.a. oraz art. 178a k.p.k.)', *Acta Iuridica Resoviensia*, 2021, No. 1(32), p. 202.

[67] However, see Article 178a CCP in the context of waiving *ex lege* confidentiality of "information about offences referred to in Article 240 § 1 CC". Such "incompleteness" of the principle of confidentiality of mediation in criminal matters is approved of in V.30 Recommendation No. (99)19 within the scope in which "the mediator should convey any information about any imminent crimes, which can come to light in the course of mediation, to the appropriate authorities or to the persons concerned", as well as III.17 *in fine* Recommendation No. CM/Rec (2018)8, which is even more liberal as it cedes the decision to parties and increases their level of empowerment ("unless parties give their consent for that").

criminal matters was statutorily protected relatively late, i.e. in 2013,[68] although there was an opportunity to do that a decade earlier, i.e. when Article 320[69] was repealed and mediation procedure was moved to introductory provisions. Since then, confidentiality has been systematically strengthened, which is expressed in the occurrence of a new provision in 2015,[70] i.e. Article 178a CCP, which excludes ("it is forbidden") interrogation of a mediator as a witness that could speak about facts that he/she got to know from the accused or the aggrieved during a mediation proceeding, which does not apply to ("with the exception of") information about offences referred to in Article 240 § 1 CC. Before the date, a mediator could only exercise the right to refuse testifying pursuant to Article 180 § 1 CCP, which, in the face of the defectiveness of this provision, provided conditional and uncertain protection. The provision of Article 178a CCP, although not without defects (it protects information from strictly determined personal sources, i.e. the accused and the aggrieved, but not other participants of mediation in criminal matters), constitutes an important and necessary incomplete absolute ban on evidence.[71] The incompleteness of this ban causes that the same circumstances that cannot be revealed by a negotiator's testimony may be provided as different evidence.[72] Following those solutions, the legislator changed the rules of documenting mediation in criminal matters, making a mediator exempt from the obligation to report "the course and results [of mediation]" (until 2003: Article 320 § 2 CCP; until 2015: Article 23a § 4 CCP), which might lead to unintended disclosure of stances and statements of the parties to mediation, by limiting the content of a report to "the results [of mediation]"[73] alone (now Article 23a § 6 first sentence CCP). Elimination of the risk was a step in the right direction. So why have not similar steps been made in mediation in civil and administrative matters, where the binding provisions of Article 183[12] § 1 CPC and Article 96m § 1 CAP unanimously require "a report on the course of mediation"? This lack may explain

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[68] Article 1(5) of the Act of 27 September 2013 amending Act: Code of Criminal Procedure and some other acts (Journal of Laws, item 1247, as amended).

[69] Article 1(126) of the Act of 10 January 2003 amending Act: Code of Criminal Procedure, Act: Regulations introducing Code of Criminal Procedure, Act on crown witnesses and Act on the protection of non-public information (Journal of Laws No. 17, item 155, as amended).

[70] Article 1(55) of the Act of 27 September 2013 amending Act: Code of Criminal Procedure and some other acts (Journal of Laws, item 1247, as amended).

[71] Gruszecka, D., in: Skorupka, J. (ed.), *Kodeks postępowania karnego. Komentarz*, Warszawa, 2020, p. 416; Gil, D., 'Problematyka mediacji w kontekście zmian w polskim procesie karnym', *Ius et Administratio*, 2014, No. 3, p. 9.

[72] Grzegorczyk, T., *Kodeks…*, op. cit., Warszawa, 2014, p. 612. It is argued in literature that Art. 178a CCP, beside a mediator, also covers other persons taking part in mediation in criminal matters – thus Kurowski, M., in: Świecki, D. (ed.), *Kodeks…*, op. cit., LEX, 2022, Vol. 4 to Article 178a; on the other hand, a different stance is presented inter alia by Stefański, R.A., Zabłocki, S. (eds.), *Kodeks…*, op. cit., Vol. 2 to Article 178a.

[73] In accordance with § 16 RCM, such a written report shall be developed without delay and presented to an organ that referred a matter to a mediation proceeding. The report alone should contain reference number of the case (paragraph 1), given name and surname of the mediator or name of the institution designated to conduct a mediation proceeding (paragraph 2), information about the outcomes of a mediation proceeding (paragraph 3) and a mediator's signature (paragraph 4).

the wording of the final part of the first sentence of Article 183^{12} § 1 CPC and Article 96m § 2 (4) CAP. They refer to "determination [...] of the mediation result" and the inclusion of "arrangements concerning the case resolution" respectively, which limits the reports under discussion to recording the results of mediation in civil or administrative matters, but never the conduct of participants of mediation.[74] Thus, despite this and not different terminology, the reports on mediation in civil and administrative matters, although *de iure* they remain reports on the course of mediation, they are in fact reports limited to mediation results.

The above-mentioned Article 178a CPC is denuded of this condition on which evidence bans are based under Article 259^1 CPC and Article 83 § 4 CAP. Both these provisions stipulate a possibility of exempting a mediator from the confidentiality obligation concerning "facts about which he/she got to know in connection with the conduction of mediation" (Article 259^1 CPC, Article 83 § 4 CAP), however, this exemption cannot be granted by an organ carrying out a proceeding but the parties to this proceeding (Article 259^1 CPC) or participants of mediation (Article 83 § 4 CAP). Until then, a mediator is legally unable to play the role of a witness ("cannot be a witness" – Article 259^1 CPC; "cannot be interrogated as a witness" – Article 83 § 4 CAP). However, both Article 259^1 CPC and Article 83 § 4 CAP broadly determine the area of immunised circumstances, including facts, about which a mediator got to know in connection with the conduction of mediation, and not only those that, as it can result from Article 178a CPC, were communicated to him/her by "the accused or the aggrieved" when he/she "conducted a mediation proceeding". As a result of the above-mentioned legislative arrangement, Article 178a CCP to some extent reminds the concept of confidentiality laid down in Article 101 (b) CCP of 1928, which treated the knowledge that counsel for the defence had in a similarly not equivalent way, protecting only the knowledge that originated from the accused and leaving without protection all information that originated from third parties even if it had been provided in the interest of the accused.[75] As it was already signalled above, one cannot draw a conclusion based on the statutory provisions discussed whether they protect confidentiality of mediation typical of the given procedure or also confidentiality of mediation conducted in accordance with the provisions of other Polish procedures. Personally, I am for the solution allowing broader protection of mediation confidentiality conducted based on mutuality, although it is not a collision-free solution and may raise a series of practical problems.[76]

Mediator's impartiality, in every type of proceedings discussed, is determined in the content of Article 23a § 7 CCP, Article 183^3 § 1 CPC, Article 96g

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[74] Finally, what especially ensures confidentiality of mediation in administrative matters is a ban on entering into the proceeding files any documents and other materials that are not in the proceeding files but are revealed in the course of mediation by its participants if the documents and materials do not constitute grounds for solving the matter in accordance with the arrangements laid down in the report on the course of mediation (Article 96n § 2 CAP).

[75] Peiper, L., *Komentarz do kodeksu postepowania karnego i przepisów wprowadzających ten kodeks*, Kraków, 1933, p. 171.

[76] For more see Sowiński, P.K., *Zakaz…*, op. cit., pp. 207–208.

§ 1 CAP and Article 116a LPACP. Maintaining impartiality and neutrality in the case, beside professionalism, seems to be a fundamental requirement for referring a case to a particular mediator (Article 183^9 § 1 CPC; Article 96a § 3 (2) in conjunction with Article 96d § 2 CAP), because it is hard to imagine that the parties might accept unequal treatment in the course of mediation. The best expression of the latter may be the right that a party to mediation in a criminal matter has to file a motion to recall a mediator (§ 11 (1)(4) and § 11 (2)(3) RMC).

A mediator in criminal matters is subject to a challenge ("a person cannot conduct [mediation]") in case of circumstances laid down in Article 40 and Article 41 § 1 CCP. Moreover, an active judge, a prosecutor, an assistant prosecutor, as well as a candidate for those professions, a lay judge, a court referendary, a judge's assistant, a prosecutor's assistant and an officer of a law enforcement agency cannot be a mediator. The occurrence of the circumstances laid down in Article 40 and Article 41 § 1 CCP constitutes grounds for recalling a mediator *ex officio* following the mode stipulated in § 11 (1) (3) or § 11 (2) (2) LPAC. Doing the job of a judge is the basis for a challenge to a mediator in civil matters ("cannot be"), which does not apply to retired judges (Article 183^2 § 2 CPC). On the other hand, the catalogue of challenges to a mediator in administrative matters can be found in Article 24 § 1 and § 2 CAP (*arg. ex* Article 96g § 1 *in fine* CAP), and additionally also Article 96f § 3 CAP.[77] In case of a mediator in judicial-administrative matters, the circumstances that imply a challenge are listed in Article 18 LPAC, thus the same as those applicable to a judge (Article 116a LPAC).

Conducting mediation, a mediator should refrain from developing relationships that can raise doubts about his/her impartiality,[78] and cannot support any of the parties to the proceeding or impose his/her opinions[79] or force parties to particular conduct.[80] A mediator cannot relate to any of the parties to a dispute,[81] and his/her neutrality, which is not directly required by statute but which seems to be connected with impartiality and result from Standard II, allows for building links based on trust in him/her.[82] The obligation to be impartial is included in the standards of a mediator's job. Thus, a mediator, first of all, knowing about inability to fulfil his/her obligations in the right way, should refuse to undertake mediation in any of the cases discussed. However, this duty is laid down only in Article 96g § 2 CAP, which obliges a mediator to refuse to conduct mediation in case of

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[77] An employee of a public administration body before which a proceeding is conducted cannot be a mediator.

[78] Dąbkiewicz, K., *Kodeks postępowania karnego. Komentarz do zmian 2015*, LEX, 2015, Vol. 7 to Article 23a.

[79] Steinborn, S., in: Grajewski, J., Rogoziński, P., Steinborn, S., *Kodeks…*, op. cit., Vol. 28 to Article 23a.

[80] Dauter, B., in: Kabat, A., Niezgódka-Medek, M., Dauter, B., *Prawo…*, op. cit., Vol. 2 to Article 116a.

[81] Przybysz, P.M., *Kodeks…*, op. cit., Vol. 1 to Article 96g.

[82] Dańczak, P., 'Wymagania względem mediatora', in: Chróścielewski, W., Łaszczyca, G., Matan, A. (eds.), *System Prawa Administracyjnego Procesowego. Tom II. Część 1. Zakres przedmiotowy i podmiotowy postępowania administracyjnego ogólnego*, LEX, 2018, https://sip.lex.pl/#/monograph/369448067/386822/chroscielewski-wojciech-red-laszczyca-grzegorz-red-matan-andrzej-red-system-prawa...?keyword=zaufanie&cm=URELATIONS [accessed on: 16.01.2022].

doubts about his/her impartiality, as well as to immediately inform participants of mediation and an organ of public administration that is not a participant of mediation about that. In mediation in civil and administrative matters, a mediator is obliged to immediately inform parties about the circumstances that might raise doubts about his/her impartiality (Article 183[3] § 2 CPC; Article 96g § 1 CAP), however in case of the latter type of mediation, and also about the circumstances referred to in Article 24 §§ 1 and 2 CAP (Article 96g § 1 *in fine* CAP). A similar obligation is imposed on a mediator in judicial-administrative matters, however, Article 116a LPAC limits itself to indicating what this obligation consists in and when ("immediately") it should be fulfilled, but it does not indicate an addressee of the information about the circumstances that might raise doubts about [a mediator's] impartiality, i.e. circumstances referred to in Article 18.

The rules discussed in the article are treated in the doctrine as basic or even fundamental principles of mediation. Although they are laid down in the frames of so much different legal acts with so many differences in their construction, they are interpreted analogously within the respective normative acts and in the way that corresponds to the EU approach to them. Also from the perspective of the EU law, in order to meet the expectations that mediation will increase an individual's importance in a given proceeding and unburden the organs of the justice system, it must be based on particular principles. According to the Committee of Ministers of the Council of Europe, those principles include voluntariness,[83] commonness,[84] loyalty,[85] confidentiality of mediation[86] and a mediator's impartiality (neutrality).[87] Regardless of whether the Council treats any of those principles as a component

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[83] Paragraphs II.1 and V.31. of the Recommendation No. R (99)19 of the Committee of Ministers to Member States of the Council of Europe concerning mediation in penal matters of 15 September 1999, as well as paragraphs III.14, III.16 and IV.26 of the Recommendation No. CM/Rec (2018)8 of the Committee of Ministers to Member States of the Council of Europe concerning restorative justice in criminal matters of 3 October 2018, as well as paragraph IV of the Recommendation Rec (2002)10 of the Committee of Ministers to Member States of the Council of Europe on mediation in civil matters of 18 September 2002, paragraph II(a) of the Recommendation No. R (98)1 of the Committee of Ministers to Member States on family mediation, and explanatory memorandum of 21 January 1998.

[84] Paragraphs II.6 and III.18 of the Recommendation No CM/Rec (2018)8, paragraphs II.3 and II.4 of the Recommendation No. R (99)19, paragraph I(a) of the Recommendation No. R (98)1.

[85] Paragraphs IV.23 and IV.25 Recommendation CM/Rec (2018)8, paragraphs III.8 and III.10 Recommendation No. R (99)19, paragraph VI second sentence of the Recommendation Rec (2002)10, paragraph III (x) of the Recommendation No. R (98)1 (also therein, the admissible provision of legal information is distinguished from inadmissible legal advice).

[86] Paragraph II.2 as well as V.29 and V.30 Recommendation No. R (99)19, paragraph III.17 of the Recommendation No. CM/Rec (2018)8, paragraph IV third sentence of the Recommendation Rec (2002)10, paragraph III (v) and (vi) of the Recommendation No. R (98)1. See also recital 46 of 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, which mentions the necessity of confidentiality that can be waived if the parties agree ("agreed otherwise") or due to "an overriding public interest".

[87] Paragraph V.26 of the Recommendation No. R (99)19 and paragraph VI.46 of the Recommendation CM/Rec (2018), paragraph IV second sentence of the Recommendation Rec (2002)10, paragraph III (i) and (ii) of the Recommendation No. R (98)1.

of mediation organisation, the course of mediation or one addressed to a person conducting mediation, it recognises them all as foundations of a coherent and modern vision of an alternative out-of-court or pre-judicial resolution of legal disputes.

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CONVERGENCE OF THE BASIC PRINCIPLES OF MEDIATION IN CRIMINAL, CIVIL, ADMINISTRATIVE AND JUDICIAL-ADMINISTRATIVE MATTERS

Summary

The article constitutes a comparative legal study of mediation based on for procedural regulations, i.e. Act of 6 June 1997: Code of Criminal Procedure, Act of 17 November 1964: Code of Civil Procedure, Act of 14 June 1960: Code of Administrative Procedure, and Act of 30 August 2002: Law on the Proceedings before Administrative Courts carried out with the use of a dogmatic method. The author analyses the solutions that, in his opinion, make it possible to propose a thesis on far-reaching convergence of the basic, and at the same time of normative provenance, principles of mediation. The principles include amicability, voluntariness (optionality), commonness, loyalty to parties, confidentiality and non-openness of mediation, as well as a mediator's impartiality. The above-mentioned convergence does not mean complete homogeneity of particular solutions or their non-defectiveness, which is exemplified by Article 2591 CPC and Article 83 § 4 CAP. It is also shown that the domestic solutions are in conformity with the solutions recommended by the Committee of Ministers of the Council of Europe.

Keywords: mediation, mediator, parties to a proceeding, principles, openness, confidentiality, commonness, voluntariness, criminal justice proceeding, civil proceeding, administrative proceeding

ZBIEŻNOŚĆ ZASAD LEŻĄCYCH U PODSTAW MEDIACJI W SPRAWACH KARNYCH, CYWILNYCH I ADMINISTRACYJNYCH ORAZ SĄDOWOADMINISTRACYJNYCH

Streszczenie

Tekst stanowi studium prawnoporównawcze instytucji mediacji występującej na gruncie czterech regulacji procesowych, tj. ustawy z dnia 6 czerwca 1997 r. Kodeks postępowania karnego, ustawy z dnia 17 listopada 1964 r. Kodeks postępowania cywilnego, ustawy z dnia 14 czerwca 1960 r. Kodeks postępowania administracyjnego, a także ustawy z dnia 30 sierpnia 2002 r. Prawo o postępowaniu przed sądami administracyjnymi przeprowadzone w oparciu o metodę dogmatyczną. Analizie poddano te rozwiązania, które – zdaniem autora – pozwalają postawić tezę o daleko idącej zbieżności podstawowych, a zarazem mających normatywną proweniencję, zasad rządzących tymi mediacjami. Do zasad tych zalicza się w tekście polubowność, dobrowolność (fakultatywność), powszechność, lojalność wobec stron, zasadę poufności i niejawności prowadzenia mediacji, a także bezstronności mediatora. Wspomniana zbieżność nie oznacza całkowitej homogeniczności poszczególnych rozwiązań, ani też ich niewadliwości, co wykazuje się m.in. na przykładzie art. 2591 k.p.c. oraz art. 83 § 4 k.p.a. Wskazano na zgodność krajowych rozwiązań z rozwiązaniami rekomendowanymi przez Komitet Ministrów Rady Europy.

Słowa kluczowe: mediacja, mediator, strony procesowe, zasady, jawność, poufność, powszechność, dobrowolność, proces karny, proces cywilny, postępowanie administracyjne

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