


Criminal Mediation in Polish and Bosnian Legislation – Similarities, Differences, and Challenges in the 21st Century


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Abstract: Worldwide, mediation is one of the most used mechanisms of alternative dispute resolution across many fields of law and one of the most common forms of restorative justice. Although it brings advantages to criminal law, some criticize its potential application for certain types of crimes. However, its benefits seen through effectiveness, efficiency in reaching conflict solutions, and the positive impact on victims and perpetrators are irrefutable. Having that in mind, this article aims to conduct comparative research, discuss the functioning of mediation in criminal cases in Polish and Bosnian criminal law and present similarities and differences between their legal regulations.

1. Introduction

Mediation¹ is an alternative to judicial conflict resolution, allowing judicial confrontation to be replaced by consensual action, which aims at the welfare and interest of the disputing parties, toning down the conflict and preventing it from escalating, as well as helping in life after the trial. Mediation, as provided for by law, is a means of regulating and restoring correct relations

¹ Lat. *Mediare* – to interfere, to go in-between.

in society and between specific individuals. Mediation offers an opportunity to reach an agreement that is fair and satisfactory from the standpoint of the parties involved in its establishment. While court judgments that end a legal case are lawful and compatible with the public interest, they are not always in line with the expectations of the parties, i.e., those directly involved in or affected by the crime, and thus may often fail to resolve the problem that exists between them. Mediation is an opportunity for the parties to work together instead of arguing in the courtroom. Mediation meetings allow the parties to calmly discuss the conflict, and outline expectations and concerns, avoiding the additional stress of being in court. Mediation makes it possible to find a long-lasting solution to their conflict, with the process itself being efficient and possible to finalize in a few weeks (compared to judicial procedures that may last for years).²

Mediation aims to try to resolve conflicts between parties who are unable to do so themselves. This is exactly why the role of the mediator who moderates the whole process, ensuring equality between the parties so that they can agree and reach a settlement under the most favorable conditions, is so crucial here. The fact that the parties formulate the provisions themselves makes mediation more attractive and increases the solidity and acceptability of their agreement.

In Poland, criminal mediation has over 25 years of tradition, so it is reasonable to assume that society has had time to become accustomed to this institution. Unfortunately, statistics show that the application of this consensual tool is still extremely rare in Polish society. This issue will be presented in juxtaposition with the legal regulations in Bosnia and Herzegovina. Such an approach will result in a comparative work juxtaposing two, at times different and at times similar, legal systems. The choice of these two countries and their legal systems is linked to the fact that both shared a similar history of rebuilding their identity and independence in the past and transitioned to democracy, which may have left traces of similarity in their present legal approach.

This article is broken down into four sections. Apart from the introduction and concluding remarks, the second and third sections are similarly

² Dragan Golijan and Dijana Šoja, “Medijacija u Bosni i Herecegovini,” *Svarog- Časopis Za Društvene i Prirodne Nauke* 2 (2011): 262.

organized in terms of structure, as they examine the legal framework, personal and real scope of mediation, principles, application, and costs of mediation in the positive criminal law in Poland and Bosnia and Herzegovina, respectively.

2. Criminal Mediation in Poland

The socio-political changes that took place in the 1980s demonstrated the need for democratization, increased public participation in important aspects of civic life, and self-governance at the local level. New solutions began to be considered, and new directions in the law were sought, including learning about regulations in force in other countries and considering the possibility of implementing them into the national legal system.³ As a result, restorative justice and mediation in criminal proceedings began to be recognized in the early 1990s.

Mediation appeared in Polish criminal procedure on September 1, 1998, the day the Code of Criminal Procedure of June 6, 1997, came into force.⁴ In establishing the possibility of resolving disputes through mediation, the Polish legislator drew on German models. Due to Soviet influence, criminal mediation did not exist in the previous CCP of 1969.⁵ At the time the CCP entered into force, mediation was introduced under Art. 320, Section VII “Preparatory proceedings.” In its original form, mediation proceedings were primarily used in preparatory proceedings and aimed at alleviating conflicts caused by a crime at the initial stage of criminal proceedings.⁶ The Act of January 10, 2003, repealed Art. 320 of the CCP while simultaneously adding Art. 23a to Section I “Preliminary Provisions” of the Code, which completely changed the way mediation in criminal cases is regulated, perceived,

³ Beata Czarnecka-Działuk, “Wprowadzanie mediacji między ofiarą i sprawcą – polskie doświadczenia i perspektywy,” in *Mediacja*, ed. Lidia Mazowiecka (Warsaw: Wolters Kluwer business, 2009), 90.

⁴ Act of June 6, 1997 (Journal of Laws 2022 item 655, as amended), hereinafter referred to as the CCP.

⁵ Act of April 19, 1969 – Code of Criminal Procedure; Journal of Laws 1969 No. 13, item 96, as amended.

⁶ Grzegorz A. Skrobotowicz, “Wykonalność ugód mediacyjnych w sprawach karnych po 1.7.2015,” in *Konsensualizm i kompensacja a podstawy odpowiedzialności karnej*, ed. Iwona Sepiolo-Jankowska (Warsaw: C.H. Beck, 2016), 309.

and used.⁷ This change has allowed mediation to be used at any stage of the proceeding.⁸ The outcome of mediation can be taken into account during the judicial sentencing, which is why mediation applies in principle to the preparatory and judicial stages, but also in the application of probation measures in the form of conditional early release from the remaining part of the sentence at the executive stage. Considering the duration of the investigation or inquiry, the new regulations must assume that the duration of the mediation proceedings shall not count towards the duration of preparatory proceedings.⁹ The amendment of mediation rules aimed to facilitate the practical application of mediation and to guarantee the best possible procedural conditions for the mediating parties.¹⁰ Today, Art. 23a provides general rules for the initiation of proceedings, indicates who can conduct them, specifies their duration, and obliges the mediator to draw up a report on them.¹¹ This provision simultaneously implements Art. 12 of Directive 2012/29/EU. Detailed rules concerning the course of mediation proceedings are regulated in an implementing act – the Regulation of the Minister of Justice of May 7, 2015, on mediation proceedings in criminal cases.¹²

2.1. Personal and Material Scope

Since the CCP sets out no subject matter criteria indicating which offenses must or may be referred to mediation, law enforcement, and judicial authorities have broad discretionary power in this regard.¹³ As rightly noted

⁷ Act of January 10, 2003, amending the Act – Code of Criminal Procedure, the Act – Provisions introducing the Code of Criminal Procedure, the Act on the crown witness and the Act on the protection of classified information; Journal of Laws 2003 No. 17, item 155.

⁸ Skrobotowicz, “Wykonalność ugód mediacyjnych w sprawach karnych po 1.7.2015,” 309–310.

⁹ Cezary Kąkol, “Dlaczego kieruję sprawy do postępowania mediacyjnego?” *Prokuratura i Prawo*, no. 1 (2011): 133–134.

¹⁰ Sławomir Steinborn, *Commentary on Art. 23(a) of the Code of Criminal Procedure*, Lex No. 493619, accessed November 10, 2022.

¹¹ Katarzyna Liżyńska and Justyna Żylińska, “Prawne i psychologiczne skutki mediacji w sprawach karnych,” in *Mediacje w społeczeństwie otwartym*, eds. Magdalena Tabernačka and Renata Raszewska-Skałecka (Wrocław: GASKOR, 2012), 146.

¹² Journal of Laws 2015 item 716, hereafter referred to as the Regulation on mediation.

¹³ Cezary Kulesza, “Prawa podmiotowe pokrzywdzonego a instytucja mediacji w sprawach karnych,” in *Mediacja dla każdego*, ed. Lidia Mazowiecka (Warsaw: Wolters Kluwer business, 2010), 64.

by C. Kąkol,¹⁴ the type, nature, and circumstances of the act and the criminal threat are not relevant when referring a case to mediation. The only requirement is that the parties to the conflict must voluntarily agree to use this ADR instrument.

Pursuant to Art. 23a(1) of the CCP, entities entitled to refer a case to mediation at the preparatory stage include public prosecutors or other authorities leading it, and at the jurisdictional stage, the court and the court referendary. The above division is mutually exclusive at the relevant stages of the proceedings. The court and the referendary cannot refer a case to mediation while the preparatory proceedings are still pending, even if the court is performing judicial acts such as hearing a complaint against the prosecutor's refusal to discontinue the proceedings. The article in question also imposes an obligation to instruct the parties on the possibility of mediation, as well as its objectives and principles, including the content of Art. 178a of the CCP.¹⁵

Pursuant to Art. 23a(2) of the CCP, mediation proceedings shall not last longer than one month and their duration shall not be added to the overall time of preparatory proceedings. This is also intended to encourage law enforcement agencies, which are held accountable for the timeliness of their actions, to use mediation at the preparatory stage. The duration of the mediation shall be counted from the date on which the order of referral to mediation is communicated to the mediator. If the mediation lasts longer than one month, the additional time shall not count towards the duration of the preparatory proceedings since there are no obstacles to mediation lasting longer than one month in justified cases, especially when there is a good chance that the parties may reconcile and reach a settlement. If the mediation is not completed within the time limit indicated in the order of referral to mediation and the parties agree to continue with the proceedings, the mediator shall draw up a status report to the authority that referred the case to mediation. At the mediator's request, this authority may extend the duration of the mediation proceedings.¹⁶

¹⁴ Kąkol, "Dlaczego kieruję sprawy do postępowania mediacyjnego?" 135.

¹⁵ See also: Art. 300 of the Code of Criminal Procedure.

¹⁶ Art. 17(2) of the Regulation on mediation.

Art. 23a(3) of the CCP indicates what persons are prohibited from conducting mediations. These include: “an active judge, a prosecutor, an associate prosecutor, as well as a trainee of the aforementioned professions, a juror, a court referendary, an assistant judge, an assistant prosecutor and an officer of an institution authorized to prosecute crimes.” With the amendment of the Code, barristers and legal advisers were removed from this list, enabling them to apply for registration as mediators. The amendments to this provision were formal, aiming to define persons prohibited from applying to register as mediators.¹⁷ Mediation may not be conducted by persons to whom the circumstances of Articles 40 and 41 of the CCP apply. Excluding mediators from leading the same case more than once is also justified: since the parties had failed to reach an agreement in the earlier proceedings and the mediator may already have some understanding of and views on the matter at hand, the new proceedings should be led by a mediator unburdened by this knowledge. However, this does not apply to different cases involving the same parties – there are no obstacles for the same mediator to conduct their proceedings.

2.2. Guiding Principles of Mediation

Although it is a highly flexible instrument, criminal mediation also has certain guiding principles that establish its framework. The basis of mediation proceedings is the principle of voluntariness. Once the objectives and rules of the proceedings have been explained to the parties, the agreement to participate must be accepted by the body referring the case to mediation or the mediator. There are no exceptions to the principle of voluntariness; mediation is only possible if the parties consent to it and want to participate. The parties may withdraw their consent to participate in the mediation up until the conclusion of a settlement agreement or the end of the last mediation meeting, after which the mediator shall draw up a report. No specific form of withdrawing consent has been established, and the party does not have to justify its decision to do so.¹⁸

Art. 23a(7) of the CCP introduces the principle of impartiality and confidentiality, which requires mediators to be neutral toward the matter

¹⁷ Skrobotowicz, “Wykonalność ugód mediacyjnych w sprawach karnych po 1.7.2015,” 313.

¹⁸ Art. 23a(4) of the CCP.

and impartial toward the parties. Mediators cannot advocate for any participant in the proceedings, nor can they impose their views and solutions on them. The mediator's role is to help the parties to reach an agreement and resolve the conflict by creating an atmosphere of confidentiality and security. Moreover, the mediator's impartiality is implicit in the Code of Ethics of Polish Mediators, which prohibits mediation where the mediator cannot be impartial or prove their impartiality.¹⁹

The amendment of September 27, 2013, introduced Art. 178a into the CCP, which stipulates that the mediator may not be questioned about the facts they learned from the parties during the mediation proceedings. This rule shall not apply to hearings regarding information on offenses under Art. 240(1) of the Penal Code.²⁰ This serves to implement the requirements of Section 30 of Recommendation No. R (99) 19 of the Committee of Ministers [of the Council of Europe] to Member States concerning mediation in penal matters – “Notwithstanding the principle of confidentiality, the mediator should convey any information about imminent serious crimes, which may come to light in the course of mediation, to the appropriate authorities or to the persons concerned.”²¹ The enactment of this provision was necessary to ensure proper and convenient mediation.²² Nonetheless, it is argued in the literature that there is no such exemption as regards the parties to the mediation themselves; thus, when applying a strict interpretation of this article, it is possible to question the mediation participants as to the facts disclosed during the mediation proceedings. This seems hardly realistic, as such problems did not occur in practice even before the amendment, at a time when the rules did not provide for confidentiality or exclude the questioning of mediators. Thus, it is unlikely that the ban on questioning

¹⁹ Olga Sitarz, *Metodyka pracy mediatora w sprawach karnych* (Warsaw: Wydawnictwo DIFIN, 2015), 30.

²⁰ Act of June 6, 1997, (Journal of Laws 2022 item 1855, as amended), hereinafter referred to as the Penal Code.

²¹ Tomasz H. Grzegorzcyk, *Commentary on Art.178, art.178(a) of the Code of Criminal Procedure*, Lex No. 428734, accessed November 10, 2022.

²² Skrobotowicz, “Wykonalność ugód mediacyjnych w sprawach karnych po 1.7.2015,” 310–311.

will bring this issue to the forefront.²³ Another amendment to the CCP changed the regulation on allowing mediators to access prosecution files. Since July 1, 2015, under Art. 23a(5) of the CCP, such files shall be made available to the extent necessary for the proper conduct of the mediation. In deciding to refer a case to mediation, the judicial body shall determine the method of access, taking into account the specifics of the case, including its circumstances. This can be done by allowing mediators to review files at the body's headquarters, but also providing them with copies of the relevant documents. Mediators shall be given access to the files to such an extent as to enable them to contact the parties, learn about the facts, and determine the source of the conflict and the damage or harm caused.²⁴ The mediator shall not be given access to documents containing classified information or information covered by professional secrecy.

2.3. Course of Mediation

Upon receipt of the order of referral to mediation, the mediator shall immediately make contact with the accused and the victim, setting a date and place for a meeting with each of them. At a time and place convenient to them, they shall hold individual or joint preliminary meetings with the parties to explain the objectives and principles of the mediation procedure and instruct them that they may withdraw their consent to participate in the mediation procedure before it is completed. They shall also obtain the consent of both the accused and the victim to participate in the mediation procedure if it has not been obtained by the authority referring the case to mediation. Subsequently, they shall conduct a joint mediation meeting with the accused and the victim at a place and time convenient for the participants and, if necessary, help them formulate the content of the settlement agreement to be concluded by and between the accused and the victim, informing them, in particular, that the mediation agreement may be made enforceable.²⁵

²³ Krzysztof Piasecki, "Przyczyny niskiej popularności polskiej mediacji karnej," in *Mediacja – nowa przestrzeń zarządzania konfliktem wyzwania, strategie, rozwiązania*, eds. Sebastian Morgała and Edyta Stopyra (Warsaw: Wydawnictwo Uniwersytetu Warszawskiego, 2014), 145.

²⁴ § 12 of the Regulation on mediation.

²⁵ § 14 of the Regulation on mediation.

The penultimate stage of mediation may be the conclusion of a settlement agreement by the parties, which is primarily to address the manner and extent of redressing damage and compensating any harm done, and which may include a provision on enabling the victim to file for discontinuance of the proceedings or state that the victim shall not oppose such a conclusion of the criminal proceedings. Indeed, where the mediating parties consent to draw up an agreement and formalize the concessions made, this must be viewed as successful mediation.²⁶ Unfortunately, one of the parties may subsequently refuse to comply with its commitments, despite their voluntary nature. Where this is the case, it is necessary to enforce the mediation agreement. Pursuant to Art. 107 of the CCP, a mediation agreement shall be declared enforceable at the request of an entitled person.²⁷ The person entitled to apply to the court or court referendary for an enforcement order shall be the victim in whose favor an obligation to make reparation, pay compensation or compensatory damages has been issued. Entitled persons shall also include the victim's next of kin and dependants who have been awarded a compensatory measure under Art. 46(1) of the CCP or the victim's legal successors.²⁸ Where a settlement is reached before a mediator, the victim may apply for an enforcement order before the criminal proceedings have become final.²⁹

Art. 107(4) of the CCP contains a limitation under which the court or referendary may refuse to issue an enforcement order if "the settlement is contrary to the law or principles of social co-existence or is aimed at circumventing the law."³⁰ Enforcement orders may only be issued with regard to admissible settlements, i.e., ones that are not contrary to the law and principles of social co-existence, or aimed at circumventing the law.³¹ Following the conclusion of the mediation, a report on its results shall be drawn up by the institution or person authorized to do so (the mediator).

²⁶ Skrobotowicz, "Wykonalność ugód mediacyjnych w sprawach karnych po 1.7.2015," 310.

²⁷ Sławomir Steinborn, *Commentary on Art. 107 of the Code of Criminal Procedure*, Lex No. 493715, accessed April 18, 2017.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Skrobotowicz, "Wykonalność ugód mediacyjnych w sprawach karnych po 1.7.2015," 316.

³¹ Steinborn, *Commentary on Art. 107 of the Code of Criminal Procedure*, accessed November 5, 2022.

The report shall only concern the results of the mediation and shall not contain any information concerning the course of the proceedings, e.g., the positions of the parties, their arguments, views, or other elements that would breach mediation confidentiality. Therefore, the mediator's report shall specify whether the parties have reconciled, reached an agreement, or signed a settlement. Annexed to the report shall be the settlement agreement, if the parties have entered into one.³²

2.4. Impact of Mediation on the Conclusion of Criminal Proceedings

Art. 53(2) and (3) of the CCP list specific directives for judicial sentencing, though only the general ones. A new regulation with respect to the 1969 Criminal Code, this provision is related to the legislator's focus on the victim's situation, in the sense that it is the victim and their loved ones who directly suffer from and experience the harm caused by the crime. Therefore, if the victim and the offender reach a mutually satisfactory agreement setting out how the damage is to be redressed or compensation paid, either through mediation or through an agreement made before a court or prosecutor, this is bound to affect the court sentence. Art. 53 is an important provision from the standpoint of the functioning and development of restorative justice, as it points directly to mediation, which is an indispensable element of the overall idea of restorative justice. The function of Art. 53 of the CCP is to provide a substantive legal basis for the court to consider the settlement agreement in its final decision. This regulation is important for the function of criminal law as far as the elimination of interpersonal conflicts is concerned and for the compensatory function of the sentence imposed. Art. 53 is linked to a directive concerning the offenders themselves, their behavior immediately after the offense, as well as their attempts to make amends for the damage caused, as it is mediation that is the means of compensation on the part of the offender.

One example of the importance of mediation in the resolution of a case in Polish judicial practice can be found in the judgment of the Court of Appeal in Krakow of May 17, 2000, which reads: "Forgiveness by the crime victim offered to the perpetrator of the harm they have suffered

³² Art. 23a(6) of the CCP.

is a particularly substantial mitigating circumstance, eliminating the individual harm and therefore justifying mitigation of the punishment to the farthest limits.”

Compensation for the damage and harm done is a circumstance that improves the victim’s situation. It is therefore important for it to be taken into account in favor of the offender when determining the penalty. At the same time, it is justified that it is not indicated how this should affect the sentence imposed, since this issue is an accumulation of many different circumstances, and the final decision should always rest with the court. Particularly noteworthy is the phrase that “the court shall take into account positive results of mediation,” meaning, a contrario, that negative results of mediation, i.e., failing to conclude a settlement agreement, is not a circumstance taken into account by the court. The failure to conclude a mediation with an agreement cannot be detrimental to the accused, especially by imposing a more severe sentence. Failure to settle can sometimes be due to the reluctance or uncooperative behavior of the victim.

It seems reasonable for the court to consider not only the positive outcome of the mediation, i.e., concluding a settlement agreement, but also the mere fact that the offender chose to participate in the mediation since this expresses their attitude towards the case and the act committed. The provision in question mentions two different issues to be taken into account by the court. It is therefore important to clarify the notion of “positive results of mediation” and the nature of the “settlement reached in proceedings before a court or prosecutor.” The mere fact of drawing up a settlement agreement or signing and implementing it can be considered a positive outcome of mediation. It is accepted in the literature, though not without reservations, that the mere fact of settlement is sufficient for the outcome of the mediation to be considered positive. As stated by E. Bieńkowska, a positive outcome is “any result of mediation that the parties to the conflict, especially the victim, have accepted.” One may imagine a situation where the parties are satisfied with the outcome of the mediation despite failing to settle because, for example, the discussions during its course might have had a positive impact on the offender’s attitude. In this provision, the legislator seems to have deliberately distinguished between a positive mediation outcome and a settlement. Therefore, the sentence and sentencing rationale should be influenced not only

by the agreement itself but also by any other positive outcome of the mediation that satisfies both parties and, above all, the victim.

For the purposes of mediation, a settlement is conceptually broader than a civil law agreement and may also include other forms, such as a written apology and its acceptance or expression of forgiveness by the victim, which are not directly associated with any obligation to make reparation or compensation. As the above-mentioned provision equates a mediated settlement with a “settlement reached before a court or a public prosecutor,” it seems reasonable for the court to be able to consider the various forms of mediation settlement invoked by the parties in its judgment.

2.5. Costs of Mediation

Pursuant to the applicable provisions on criminal mediation, the costs of mediation shall be borne by the State Treasury and shall be a flat-rate amount (Art. 619(2) of the CCP).³³ This means that the parties may participate in mediation at no cost. The principle of the State Treasury bearing the costs of the mediation proceedings is not conditional on the need for a settlement. Where the parties fail to settle, the State Treasury shall still bear the costs. This is to encourage the parties to use mediation and to avoid situations where the parties do not take advantage of mediation or do not agree to refer the case to mediation for the sole reason that they are unsure of the effectiveness of the potential mediation and therefore do not want to incur additional costs. Thus, the parties must be informed at the introduction meeting or in the meeting invitation that mediation is free of charge. Such a regulation leaves the issue of travel expenses to attend mediation meetings to the parties, meaning that both the victim and the offender cover their own travel expenses. In exceptional cases, however, separate arrangements may be made between the parties to a criminal mediation regarding travel expenses.

³³ Art. 4(1) of the Regulation of the Minister of Justice of 18 June 2003 on the amount and method of calculating the expenses of the State Treasury in criminal proceedings (Journal of Laws 2013 item 663) states that “The costs of mediation proceedings shall include: a flat-rate fee for conducting the mediation proceedings and a lump sum for the service of letters related to the mediation. Item 2. The flat-rate fee for mediation proceedings shall be PLN 120.”

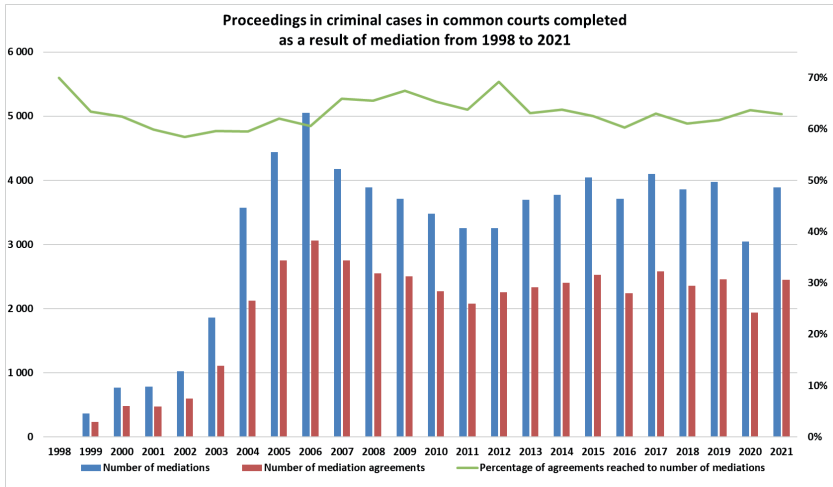


Fig. 1. Proceedings in criminal cases in common courts completed as a result of mediation from 1998 till 2021.³⁴

The graph presents a summary of criminal cases between 1998 and 2021 that were concluded as a result of mediation proceedings. The above figures relate to cases at the litigation stage. Cases in which the institution of mediation was used are marked blue, and those in which a mediation settlement was reached are marked red. The green line shows the percentage of mediated settlements reached relative to all cases mediated.

The beginnings of mediation in Polish criminal law were difficult. Over the 20-plus years analyzed, after a period of growth between 1998 and 2006, a negative trend was observed between 2007 and 2011/2012. In this period, the number of mediated cases steadily declined, from a peak of 5,052 mediations (2006) to 3,254 mediations (2011 and 2012), representing a reduction of more than 35% in the number of cases mediated. The decline in the number of cases referred to mediation over the period indicated is a puzzling trend. On the one hand, the reasons for this can be legislative changes, though no such changes have been made in the area of criminal

³⁴ "Mediacje karne w latach 1998–2021," Ministerstwo Sprawiedliwości, accessed November 10, 2022, <https://isws.ms.gov.pl/pl/baza-statystyczna/opracowania-wieloletnie/>.

mediation.³⁵ On the other hand, the reason can be the lack of nationwide awareness or promotional campaigns to encourage mediation, as well as the somewhat transient novelty of this tool of restorative justice.

Subsequent years, i.e. 2013–2021, saw two distinct phases. The first one shows a slow increase in the number of cases submitted to criminal mediation at the litigation stage (from 3,696 in 2013 to 4,046 in 2015); the second one (2016–2021) brought a stabilization in the number of mediation proceedings, which remained at a virtually unchanged level of about 4,000 cases per year. Due to the global COVID-19 pandemic caused by the SARS-CoV-2³⁶ coronavirus, the year 2020 should be disregarded when assessing the extent of the use of mediation since the scale of restrictions introduced in many areas of daily life, especially across state institutions, disrupted the regularity, speed, and efficiency of the functioning of the state and its organs, including the judicial ones.

The graph also includes data on mediation settlements. Analyzing the statistical material for the entire period, i.e., between September 1, 1998 (marking the introduction of mediation into the Polish penal system) and December 31, 2021, it can be seen that the share of criminal cases involving mediation and a settlement remains practically unchanged at about 63%. This value should be deemed acceptable — it means that almost two in three mediation proceedings conclude with an agreement satisfactory to both conflicted parties. The unchanged level of mediation settlements reached means that the trend is stable with no significant shifts in either direction. Even in 2020, a level of over 60% was maintained.

3. Criminal Mediation in Bosnia and Herzegovina

Compared to Poland, mediation in criminal cases is a newer legal institution in Bosnia and Herzegovina, as its legal framework was established in 2003 with the new criminal codes of Bosnia and Herzegovina. Namely, due to the particular constitutional division of jurisdictions in that country, criminal law area is regulated by substantive, procedural, and executive criminal codes which are implemented at four levels of authority: state actors

³⁵ Amendments to Art. 23a of the CCP came into force on July 1, 2003, and July 1, 2015.

³⁶ “Koronawirus,” Serwis Ministerstwa Zdrowia i Narodowego Funduszu Zdrowia, accessed May 22, 2022, <https://pacjent.gov.pl/koronawirus>.

(Federation of Bosnia and Herzegovina and Republika Srpska) and district (Brčko District BH). Once the criminal procedure codes of Bosnia and Herzegovina had been established and entered into legal force in 2003,³⁷ Bosnia and Herzegovina introduced mediation in criminal cases into its legal system.³⁸ Although the codes are not harmonized for many items, they all regulate the issue of mediation in a very similar manner; this has been done through only one section of one article, referring to mediation as a potential, voluntary path for a property claim. Therefore, with this general law, mediation in criminal cases in Bosnia and Herzegovina is limited only to the issues of achieving damage compensation.

According to Art. 198(1) of the Code on Criminal Procedure of Bosnia and Herzegovina:

The court may propose to the injured party and the accused, i.e. to the defense counsel, conducting the mediation procedure through a mediator³⁹ in accordance with the law, if it evaluates that the property claim is such that it is expedient to refer it to mediation. Proposal for mediation may be submitted by either the injured party or the accused until the completion of the main trial.⁴⁰

³⁷ Criminal Procedure Code of Bosnia and Herzegovina (Official Gazette of Bosnia and Herzegovina, No: 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13, 65/18); Criminal Procedure Code of Brčko District of Bosnia and Herzegovina (Official Gazette of Brčko District of Bosnia and Herzegovina, No: 10/03, 48/04, 6/05, 14/07, 19/07, 21/07, 2/08, 17/09, 9/13); Criminal Procedure Code of Federation of Bosnia and Herzegovina (Official Gazette of Federation of Bosnia and Herzegovina, No: 35/03, 37/03, 56/03, 78/04, 28/05, 55/06, 27/07, 53/07, 9/09, 12/10, 8/13, 59/14); Criminal Procedure Code of Republic of Srpska (Official Gazette of Republika Srpska, No: 53/12, 91/17, 66/18, 15/21).

³⁸ Udruženje medijatora u BiH, "Vodič kroz medijaciju u Bosni i Hercegovini," n.d., 4.

³⁹ According to Article 3 of the Law on Transfer of Mediation to the Association of Mediators, the mediation procedures are conducted through the Association of Mediators of Bosnia and Herzegovina. Established in 2002, the Association is tasked with: "providing mediation services, providing training services for mediators and certifying mediators, providing special training programs for judges, lawyers, mediation users and other interested groups, monitoring achievements in the development of mediation in the region and the world and connecting with similar organizations." See: Dragan Golijan and Dijana Šoja, "Medijacija u Bosni i Hercegovini," 264.

⁴⁰ Article 212(2) of the Criminal Procedure Code of Federation of Bosnia and Herzegovina, Article 198(1) of Criminal Procedure Code of Brčko District BH, Article 108 (2) of the Criminal Procedure Code of Republika Srpska.

Based on this general provision, it is evident that mediation is a voluntary option of remediation for property claims for which the judge finds mediation suitable. Mediation is characterized by the active involvement of the injured party in proposing the solution to the property claim, coupled with the active and equal decision-making power of the defendant in the mediation process, and is a form of restorative justice available in Bosnia and Herzegovina.⁴¹

Following the introduction of mediation through a *legi generali*, a *legi speciali* was also established to make mediation more understandable and applicable. To that end, 2004 saw the entry into force of the Law on Mediation, which, along with the procedural criminal code, is the most important legal basis for mediation. The Law on Mediation regulates the process of mediation in Bosnia and Herzegovina.⁴²

⁴¹ However, only traces of restorative justice exist in Bosnia and Herzegovina. The term restorative justice is never used in the criminal codes of Bosnia and Herzegovina. Instead, individual cases are analyzed to determine whether they enable restorative justice. Through this, together with mediation, the world's most prominent form of restorative justice, Bosnia and Herzegovina recognizes educational recommendations, police warnings, suspended sentences (through additional obligations) and community service as other forms of restorative justice, because they include either the injured party or the community in the decision on the punishment. See: Ena Kazić and Rialda Ćorović, "Restorative Justice Within Legal System of Bosnia and Herzegovina," in *Restorative Approach and Social Innovation: From theoretical Grounds to Sustainable Practices*, ed. Giovanni Grandi and Simone Grigoletto (Padua: University Press, 2019), 171–180; Ena Kazić and Rialda Ćorović, "Is Restorative Justice an appropriate legal remediation for Sexual Violence," *Review of European and Comparative Law* 37, no. 2 (June 2019): 82–83, <https://doi.org/10.31743/recl.4774>.

⁴² Murtezić notes correctly that this code applies in the entire territory of Bosnia and Herzegovina, in contrast with most of substantive and procedural criminal codes which are applicable at four authority levels. See: Arben Murtezić, "The Interlinkage of Justice and Mediation in Bosnia and Herzegovina. Assessment and Recommendations," accessed December 16, 2020, <https://www.balkanmediation.org/2020/12/dr-arben-murtezic-the-interlinkage-of-justice-and-mediation-in-bosnia-and-herzegovina-assessment-and-recommendations/>. In order to make that code implementable, additional bylaws have been established, including: Law on the transfer of mediation tasks to the retention of mediators (Official Gazette of Bosnia and Herzegovina, No. 52/05), Rulebook on the register of mediators (Official Gazette of Bosnia and Herzegovina, No. 21/06), Rulebook on the list of mediators (Official Gazette of Bosnia and Herzegovina, No. 21/06), Rulebook on referral to mediation (Official Gazette of Bosnia and Herzegovina, No. 21/06), Code of mediator ethics (Official Gazette of Bosnia and Herzegovina, No. 21/06), Rulebook on the liability of mediators for damage

Mediation may apply in cases involving both adults and juveniles. Moreover, it has been prescribed by the juveniles-related *legi speciali*. Indeed, Art. 26 of the Code on Protection and Dealing with Juveniles in Criminal Procedure in the Federation of Bosnia and Herzegovina,⁴³ which is the special criminal procedure code related to juvenile perpetrators, prescribes the potential use of educational recommendations. Educational recommendations are alternative measures that can be imposed on a juvenile as a remedy for milder criminal offenses, once the objective and subjective criteria for their use are fulfilled.⁴⁴ Two of them are of a restorative justice nature: an apology to the victim and damage compensation.⁴⁵ This article also states that mediation in such cases is led by a social work center, and in cases where the center does not employ a mediation specialist, by a mediation organization. Through the provisions of this particular code, the potential for the use of mediation in criminal cases related to the property claim process is expanded to cover mediation as part of the process of applying educational recommendations for victim apology and restitution.

caused in the course of mediations (Official Gazette of Bosnia and Herzegovina, No. 21/06), Performing mediation book of proceedings (Official Gazette of Bosnia and Herzegovina, No. 21/06), Rulebook on disciplinary responsibility of mediators (Official Gazette of Bosnia and Herzegovina, No. 21/06), Rulebook on rewards and compensation of mediation costs (Official Gazette of Bosnia and Herzegovina, No. 21/06), Rulebook on the training program for mediators (Official Gazette of Bosnia and Herzegovina, No. 21/06).

⁴³ Official Gazette of Federation of Bosnia and Herzegovina, No. 7/14.

⁴⁴ According to Art. 24(2) of the Code on Protection and Dealing With Juveniles in Criminal Procedure in Federation of Bosnia, the objective criteria are that the criminal offence be punishable with imprisonment of up to three years or with a monetary fine, with the subjective criteria being as follows: the juvenile plead guilty, the plea was voluntary, there is enough evidence that the crime had been perpetrated, the juvenile expresses their readiness to make up with the victim in written form, both victim and juvenile give their written approval for the use of the educational recommendation.

⁴⁵ Other educational recommendations, which do not represent restorative justice, are: “regular school attendance or regular work attendance; work without compensation at humanitarian organizations or jobs of social, local or environmental nature; treatment in a suitable health institution (hospital or outpatient); involvement in individual or group treatment at educational, psychological or other counseling centers;” Article 26(1) of the Code on Protection and Dealing With Juveniles in Criminal Procedure in Federation of Bosnia.

3.1. Criminal Offenses for Which Mediation is Available

Damage compensation (property claim) is the right of victims of all criminal offenses. However, the Criminal Procedure Code stipulates that the court shall recommend mediation if it deems that the property claim in the particular case is suitable for mediation.⁴⁶ That provision gives discretion to the court to screen every case of property claim and to decide whether or not mediation would be acceptable. Thus, the decision to apply mediation is up to the court in each case. Mediation in the application of educational recommendations is subject to the same legal limits that are prescribed for educational recommendations themselves, in the sense that they can be used in the case of criminal offenses for which a fine or imprisonment of up to three years has been prescribed (and additional subjective conditions are met).⁴⁷

Theoretically, the application of mediation in the case of serious criminal offenses and criminal offenses of sexual and domestic violence can be challenged. Serious criminal offenses involve the risk of potential re-victimization, making it inappropriate for the perpetrator and the victim to meet, and many authors such as Drost et al.⁴⁸ challenge its application in domestic and sexual violence cases as their nature and ethio criminalis conflict with the idea of mediation. More precisely, mediation as a process requires the equality of powers and fearlessness of the parties, yet cases of

⁴⁶ The following criteria indicate that the case is not suitable for mediation: “The parties do not have the right of disposal, that is, it is prohibited by compulsory regulations; The parties refuse mediation; The conflict has escalated too much, the parties are not talking to each other; The verdict seeks revenge or confirmation of rights that have not been exercised in court practice so far; There is a risk of violence or abuse; One or more parties are addicted to alcohol, drugs, etc.; There is an obvious and insurmountable imbalance of the parties to the dispute; If it is considered that private or public interests will be better served by a decision made by the court; The parties show their intention to prolong the procedure, to use mediation for collection more information in the case or obstruction of court proceedings; Criminal and family matters except where mediation is possible by law.” Aleksandar Živanović and Obren Bužanin, *Priručnik za stručne saradnike u sudovima* (Sarajevo: Centar za edukaciju sudija i tužilaca, 2009), 65.

⁴⁷ Article 24 of the Code on Protection and Dealing With Juveniles in Criminal Procedure in Federation of Bosnia. The same article of the the Code on Protection and Dealing With Juveniles in Criminal Procedure in Republika Srpska and the Code on Protection and Dealing With Juveniles in Criminal Procedure of Brčko District BH.

⁴⁸ Lissane Drost et al., *Restorative Justice in Cases of Domestic Violence. Best Practice Examples between Increasing Mutual Understanding and Awareness of Specific Protection Needs* (Utrecht: Verwey-Jonker Instituut, 2015), 9.

domestic and sexual violence are caused by the initial inequality of powers of parties, which may continue in their confrontation during the mediation. Further, the potential fear of the perpetrator may persist, so the agreement of the victim and even the acceptance of an apology can be due to the fear of the perpetrator and not genuine acceptance of the apology or agreement to the given case solution. Therefore, many judges decide not to propose property claim mediation in the case of such criminal offenses.

3.2. Definition of Mediation and its Principles

According to the Law on Mediation,⁴⁹ mediation is “a procedure in which a third, neutral person (mediator), assists parties in their aim of achieving a mutually acceptable solution to their dispute.” The important element of this definition is the verb “to assist” and it truly illustrates the essence of mediation. The task of the mediator is not to solve the dispute for the parties but to assist them in doing so themselves.

The role of the mediator is to help parties in negotiation through their expertise of posing questions and directing parties to different aspects of their conflict, establishing dialogue, listening and understanding their common interests which may result in a better solution to their dispute. Parties usually have different views of their dispute and conflicting, contradictory aims as regards the ideal solution.⁵⁰

Therefore, mediators play an important role in helping them find ways to overcome differences and find an acceptable way to resolve the dispute. Parties can jointly choose a mediator⁵¹ from a list of mediators,⁵² typically,

⁴⁹ Mediation, apart from criminal affairs, is possible in other fields of law, such as labor, commercial, etc. This code is universally referring to mediation, regardless of the fields of law it may be applied in.

⁵⁰ Dragan Uletilović et al., *Mogućnost Primjene Medijacije u Sistemu Maloljetničkog Krivičnog Pravosuđa* (Banja Luka: Save the Children Norway, 2008), 8.

⁵¹ According to Art. 31, of the Mediation Code, there are several cumulative criteria for being a mediator: meeting general criteria for employment, having a high level of education, completing mediator training organized by the Association of Mediators and being entered into the Mediators' Registry. Mediators can be foreigners if a principle of reciprocity has been established with their respective country and if they are approved by the Ministry of Justice and the Association of Mediators.

⁵² In cases where they are unable to agree on the mediator, the mediator is appointed by the Association of Mediators.

only one mediator is involved in a mediation process⁵³ (unless the parties agree to appoint more than one).⁵⁴

Principles of mediation are prescribed by the Code and are as follows: voluntariness, confidentiality, equality of rights, and neutrality.⁵⁵

Voluntariness is one of the most important principles of mediation, since the potential restoration of the broken ties between the perpetrator and the victim, in terms of restorative justice, can only be achieved if both parties approach this process and participate in it voluntarily. Therefore, the judge can only suggest that they solve the property claim in the process of mediation, but that is entirely optional for the parties. They may accept the suggestion or reject it and opt for the traditional adjudication to resolve the given property claim. The same approach applies to mediation in applying the aforementioned educational recommendations, in which both parties participate voluntarily.

Confidentiality shall be ensured throughout the entire mediation process. All statements by the parties shall be confidential and may not be used as evidence in any other procedure. Moreover, all information delivered by one party during individual meetings shall be kept secret and shall not be disclosed to the other party.⁵⁶

Parties shall have equal rights in the mediation process. Therefore, they shall be treated equally, shall be heard with the same attention and respect, and shall be granted the same motions throughout the process. Equality of their rights derives from the equality of their powers, as they are both needed in order to reach an agreement.

Finally, mediators shall act neutrally, in an unbiased manner, without any prejudice towards the subjects and the object of the mediation. Their role is neither to judge, nor to solve the dispute, but to offer options for

⁵³ According to Golijan and Šoja, the characteristics mediators should have include “active listening skills, ability to express one’s needs without sounding accusatory, criticizing and labeling others, negotiation skills that direct the process towards the positive outcome and the rebuilding of trust, procedures and rules that bring order to the behavior and relationships between parties in the mediation process.” See: Golijan and Šoja, “Medijacija u Bosni i Herecegovini,” 268.

⁵⁴ Articles 3 and 5 of the Mediation Code.

⁵⁵ Articles 6–9 of the Mediation Code. Also see: Udruženje medijatora u BiH, “Vodič kroz medijaciju u Bosni i Herzcegovini,” n.d., 9.

⁵⁶ Article 7 of the Mediation Code.

dispute resolution and to lead the parties to their own solution to the conflict. Moreover, mediators may not provide any guarantees as to the outcome of mediation.⁵⁷

3.3. Mediation Process

The mediation process begins with both parties and the mediator signing a mediation agreement, a formal legal act whose form and content are set out in the Mediation Code. It shall contain the following: “information about the parties to the agreement and their legal representatives (if any), description of the dispute, statement of acceptance of the mediation principles, place of mediation, provisions on procedure costs and mediator’s fee.”⁵⁸ Once the agreement is concluded, the judge shall be informed about the mediation. At the same time, the mediator agrees with the parties on the time and place of mediation. Attending mediation meetings is obligatory for parties who are natural persons. Nonetheless, parties may also be represented by their legal representatives. The meetings may be attended by third parties with the consent of the mediating parties.⁵⁹ At the very onset of the mediation process, the mediator shall inform the parties about the aim of the mediation, the course of the procedure, and the role of the parties and the mediator in it. Either party may request that the mediation be terminated at any stage of the procedure. Additionally, the mediator may choose to terminate the mediation upon establishing that it is not suitable in the given case or if there are reasons preventing them from remaining neutral and unbiased. However, if such difficulties do not appear, the mediator shall bring the procedure to its conclusion without undue delay. Once the parties reach an agreement, they shall draw up and sign a written settlement agreement.⁶⁰ According to Uzelac, “the Law sets forth that the settlement agreement has the power comparative to the valid court decision, i.e. that it has the force of enforcement document, pursuant which, if necessary, enforcement can be directly required.”⁶¹

⁵⁷ Articles 22–23 of the Mediation Code.

⁵⁸ Articles 10–11 of the Mediation Code.

⁵⁹ Articles 15–17 of the Mediation Code.

⁶⁰ In that sense articles 18–25 of the Mediation Code.

⁶¹ Alan Uzelac et al., *Paths of Mediation in Bosnia and Herzegovina* (Sarajevo: IFC, World Bank Group, 2009), 50.

Below is a diagram showcasing how mediation meetings work in practice.

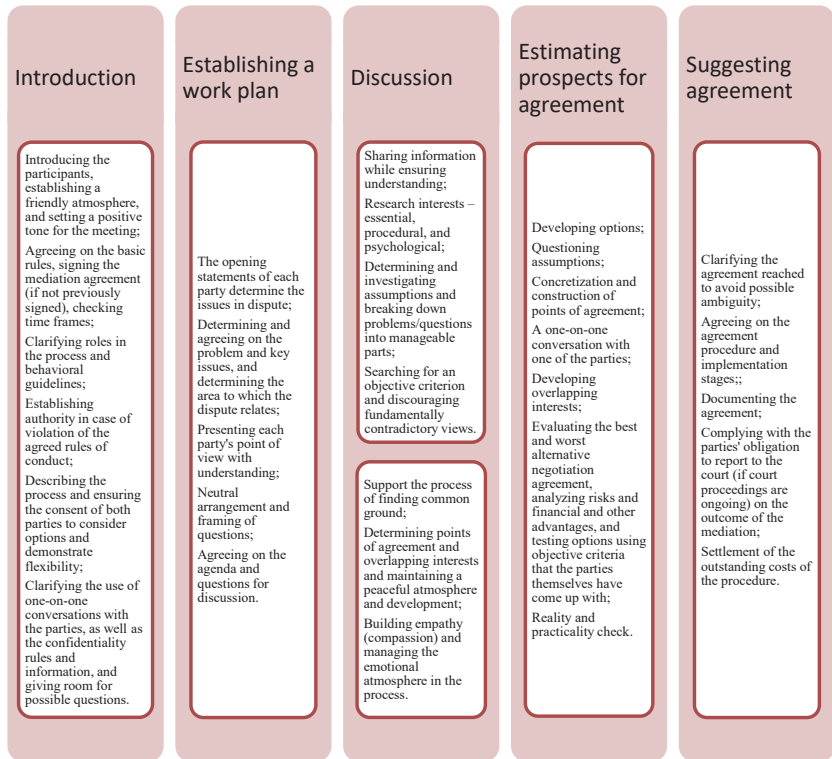


Fig 2. Mediation meeting stages. (Aleksandar Živanović and Obren Bužanin, *Priručnik za stručne saradnike u sudovima* (Sarajevo: Centar za edukaciju sudija i tužilaca, 2009), 56–57).

3.4. Mediation Costs

The costs of mediation shall be borne equally by the mediating parties (unless they agree otherwise). According to the Rulebook on mediation costs, the costs of mediation include a fee for requesting mediation, administrative costs necessary for carrying out the mediation procedure, and reimbursement of the costs of the mediator.⁶² Where no agreement is reached,

⁶² Article 2 of the Rulebook on mediation compensation.

the party who requested mediation shall pay 50 KM (25 euros).⁶³ The mediator's remuneration is calculated per hour of mediation. Mediation meetings may last no more than four hours (one hour of preparation and three hours of mediation). One hour costs 100 KM (50 euros). An additional hour of preparation costs 25 euros.⁶⁴ The costs of mediation and the need for the parties to cover these costs themselves may put into question the accessibility and impact of mediation since it may discourage parties from opting for it in the first place.

3.5. Application of Mediation in Criminal Cases

The data about the application of mediation in criminal cases is not readily available. The general statistics published by statistics agencies contain no such data. The deconcentration of the statistics agencies and different statistics checklists imposed by courts make it challenging to establish a clear picture of how mediation is applied. However, the report of the Council of Europe entitled "Evaluation of judicial systems (2018–2020): Bosnia and Herzegovina" establishes that in that period considered there were no mediations in criminal cases.⁶⁵ Murtezić finds that in practice, mediation in criminal cases is "out of focus"⁶⁶ as judges have shown no interest in mediation and educating about it in the last decades. Yet, he finds that education and raising awareness about mediation are crucial points for its further development.⁶⁷ Transitioning to mediation means embracing new motions in criminal law, and leaving the traditional approach behind. Therefore, comprehensive education of the representatives of judicial power and the wider

⁶³ Article 5 of the Rulebook on mediation costs.

⁶⁴ Ibid.

⁶⁵ Apart from mediation in criminal cases, mediation is possible in civil, labor, and commercial law cases. The same report shows the success in the application of mediation in those other fields, as in the period analyzed saw 771 successful cases of mediation. Mediation prevails in civil and commercial issues. See: Council of Europe, "Evaluation of the Judicial Systems (2018–2020): Bosnia and Herzegovina" (The European Commission for Efficiency of Justice, 2020), 84.

⁶⁶ Arben Murtezić, "The Interlinkage of Justice and Mediation in Bosnia and Herzegovina. Assessment and Recommendations," accessed December 16, 2020, <https://www.balkanmediation.org/2020/12/dr-arben-murtezic-the-interlinkage-of-justice-and-mediation-in-bosnia-and-herzegovina-assessment-and-recommendations/>.

⁶⁷ Ibid.

public about the benefits of mediation is an essential step in making the existing laws on mediation in criminal cases applicable.

4. Conclusions

Mediation is a way of moving away from the belief that the only just manner of conflict resolution is through court proceedings and that the only justifiable punishment for an offender is the harshest sentence possible. Such an approach is a remnant of the previous regime; its change is the result of modern sentencing policies as well as the evolution of the justice system and the objectives of the criminal justice process. It can be an opportunity to improve the administration of justice but also to change the perception and treatment of litigants and, above all, the victim. Mediation is not a recently introduced institution; it is not a new construct that has been completely unknown up until now. Throughout history, mediation in its various forms has operated throughout the world, each culture having its own construct that has evolved and adapted to the circumstances, conditions, and particularities of the region. Although mediation has varied from culture to culture, from region to region, and from law to law, there are several elements that all forms of mediation have in common: first and foremost, the desire to reach an agreement and end the conflict, to satisfy both parties equally, the hope of fulfilling the resolutions reached, and using third-party assistance in the discussions. The centuries-old culture of mediation testifies to the fact that every society needs an alternative to judicial means of conflict resolution. Disputes settled in court often result in conflict escalation, while the conclusion of the case by the court is not the end of the conflict itself. The conclusion of an agreement between the parties to the conflict, the development of common provisions, and the fulfillment of obligations is a desirable attitude in society and one that positively influences the functioning of people in a given group.

This comparative research showed that the mediation procedures in criminal cases in Poland and Bosnia and Herzegovina are very similarly regulated. The differences are limited and originate in different constitutional regulation of jurisdictions in those two countries (regarding the number of sources of mediation) and the scope of mediation. Namely, mediation in criminal cases in Bosnia and Herzegovina is restricted to issues of property claim and application of two educational recommendations, whereas

in Poland it is applied in a broader sense as a conflict resolution measure. The countries share the same principles of mediation, the same discretion of the court to decide about mediation, and the course of the mediation itself is very similar. However, the biggest difference is that the conflicted parties can opt for mediation free of charge in Poland, while a mediation fee covered by the parties applies in Bosnia and Herzegovina. That may well be one of the reasons why mediation in criminal cases in Bosnia and Herzegovina has not proven successful, as the data about its application shows negative results. The difference compared to Polish mediation in criminal cases is that parties in Bosnia and Herzegovina hesitate to use it, even though it is by no means a new tool. Raising awareness about its benefits among the wider population and legal experts on one hand, and reducing or waiving fees on the other, are crucial steps that may improve the applicability of mediation in criminal cases in Bosnia and Herzegovina.

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