

The impact of international treaties on the shape of national criminal law on the basis of Article 48(1) of the Istanbul Convention

DOMINIKA BEK

ORCID: 0000-0003-4560-808X

Institute of Legal Sciences, Criminal Law and Criminology
University of Silesia in Katowice, Poland

OLGA SITARZ

ORCID: 0000-0002-2075-3507

Institute of Legal Sciences, Criminal Law and Criminology
University of Silesia in Katowice, Poland

International treaties¹ are always a result of the clash of competing interests represented at times by strongly opposed entities. The procedure of concluding international agreements is not complicated compared to the methods of enacting national law. For its part, the treaty is a flexible instrument.² As a result, international regulations have specific features often obstructing their reading and application. It should be noted that international law

¹ Pursuant to art. 1 of the Vienna Convention, “international treaty” is understood as an agreement between States concluded in writing and regulated by international law, regardless whether it is in one, two or more instruments and regardless of its specific name.

² R. Tarnogórski, “Problem błędu w tekście traktatu w świetle Konwencji wiedeńskiej o prawie traktatów,” *Biuletyn Polskiego Instytutu Spraw Międzynarodowych* 6, 2005, p. 1293.

does not regulate the construction and form of drawing up an international agreement.³ While conducting an analysis of the Convention on the Rights of the Child,⁴ Tadeusz Smoczyński pointed out that it is a legal act which, in terms of its construction and provisions, contains numerous deficiencies — while the language of the Convention is partially juridical, to a large extent it is the language of politics. Consequently, the matter of the regulation is in general spread over many provisions, the text abounds in frequent repetitions of the same or similar issues which are at times expressed in an imprecise manner.⁵ Other issues, in that particular case in the light of EU law, are discussed by Jakub Hanc (in the context of the issue under consideration here, one should mention: the problem of using a conceptual framework applied by the EU legislator, the place of the implemented regulation within the system of internal law, unclarity and complexity of the norms).⁶ In addition to the issues related to the conclusion and entry into force of the treaties, the awareness of various kinds of problems prompted the parties to the Vienna Convention to regulate also the aspect of the interpretation of treaties. Pursuant to art. 31,⁷ a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.⁸

³ J. Sozański, *Prawo traktatów. Zarys współczesny*, Warsaw-Poznań 2009, p. 72.

⁴ Convention on the Rights of the Child adopted by the General Assembly of the United Nations on 20 November 1989 (*Journal of Laws* 1991, no. 120, pos. 526).

⁵ T. Smoczyński, [in:] *Konwencja o prawach dziecka. Analiza i wykładnia*, ed. T. Smoczyński, Poznań 1999, p. 7.

⁶ J. Hanc, “O znaczeniu prawa unijnego dla stanowienia i wykładni wewnętrznego prawa karnego materialnego,” [in:] *Międzynarodowe i europejskie prawo karne — osiągnięcia, kierunki rozwoju, wyzwania*, eds. J. Nowakowska-Małusecka, I. Topa, Katowice 2015, p. 193; J. Hanc, “Implementacja postanowień dyrektywy do prawa karnego materialnego państw członkowskich Unii Europejskiej,” [in:] *Niekarałość ofiar handlu ludźmi — nowe perspektywy*, ed. Z. Lasocik, Warsaw 2015, p. 13 et seq.; more: P. Sylwestrzak, *Transpozycja prawa unijnego do polskiego porządku prawnego na przykładzie prawa ochrony środowiska*, Wrocław 2010, pp. 47–49. <http://www.bibliotekacyfrowa.pl/Content/35568/003.pdf> (accessed: 18.11.2019).

⁷ A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

⁸ Cf.: A. Szpak, “O wykładni międzynarodowego prawa traktatowego i zwyczajowego (z uwzględnieniem międzynarodowego prawa humanitarnego),” *RPEiS* 70, 2008, no. 1, p. 73 et seq.

Although intended as a general proposal, the issues outlined above relate also to the Istanbul Convention featured in the title of this article. The Council of Europe Convention on preventing and combating violence against women and domestic violence is possibly the most far-reaching international agreement dealing with this serious violation of human rights⁹ and is one of over two hundred conventions concluded under the auspices of the Council of Europe.

The European literature on the subject points out that the Council of Europe has always been an important source of standards, as evidenced by the vast number of conventions adopted under its auspices. These conventions make the European *ius communis*, and by virtue of the harmonisation of law, they facilitate the process of the development of democratic norms in the Old Continent.¹⁰

Pursuant to art. 15 of the Statute of the Council of Europe (also known as the Treaty of London),¹¹ the Council of Europe Conventions are one of the means for achieving the aims of the Council of Europe. Pursuant to art. 1 of the Statute, the aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.¹² This aim shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms.¹³

⁹ <https://rm.coe.int/1680464e74> (accessed: 18.11.2019).

¹⁰ F. Benoît-Rohmer, H. Klebes, *Prawo Rady Europy. W stronę ogólnopolskiej przestrzeni prawnej*, Warsaw 2006, p. 92.

¹¹ <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/001> (accessed: 18.11.2019); "Government declaration of 20 May 1994 on the accession of the Republic of Poland to the Statute of the Council of Europe," *Journal of Laws* 1994, no. 118, pos. 565.

¹² The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.

¹³ This aim shall be pursued through the organs of the Council by discussion of questions of common concern and by agreements and common action in economic, social, cultural, scientific, legal and administrative matters and in the maintenance and further realisation of human rights and fundamental freedoms.

From an international perspective, conventions adopted in the Council of Europe are governed by the principles resulting from the Vienna Convention on the Law of Treaties (VCLT)¹⁴ of 23 May 1969 and the Council's internal regulations contained in the Statute of the Council of Europe and other documents.¹⁵ These regulations specify that the conventions covered by them are negotiated, adopted and introduced in the institutional framework of the Council which gives them its own specific features — a “trademark,” among others, by way of establishing a model of uniform final clauses of the convention¹⁶. Pursuant to art. 18 of the Vienna Convention, a State is obliged to refrain from acts which would defeat the object and purpose of a treaty.¹⁷ Moreover, pursuant to art. 26 of the Vienna Convention, every treaty in force is binding upon the parties to it and must be performed by them in good faith.¹⁸

The Council of Europe does not require that conventions be introduced into internal legal order of the Parties in a strictly defined manner, leaving the method to the discretion of a State, depending on its constitutional regulations.¹⁹

The Council of Europe Convention on preventing and combating violence against women and domestic violence was signed by 36 countries and took effect following its ratification by 10 countries. At present 29

¹⁴ http://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (accessed: 18.11.2019); *Journal of Laws* 1990, no. 74, pos. 439.

¹⁵ In the statutory resolutions adopted in 1951 and 1963 and internal regulations of the Committee of Ministers and meetings of the Ministers' Deputies.

¹⁶ F. Benoît-Rohmer, H. Klebes, *Prawo Rady Europy. W stronę ogólnopolskiej przestrzeni prawnej*, Warsaw 2006, pp. 94–95.

¹⁷ Article 18

Obligation not to defeat the object and purpose of a treaty prior to its entry into force
A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.

¹⁸ Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

¹⁹ F. Benoît-Rohmer, H. Klebes, *op. cit.*, p. 137.

countries have ratified it, including Poland. Establishing as its main objective “preventing violence, protecting victims and prosecuting perpetrators,”²⁰ the Convention obliges State Parties to undertake a diverse range of activities. Among other things, pursuant to art. 48, Parties shall take the necessary legislative or other measures to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of this Convention. It is indeed this regulation that will provide a clear illustration of the reasons which render the implementation of the obligations assumed by State Parties into internal legal orders excessively difficult or practically impossible.

The considerations set out in this article will focus on three basic aspects — the ambiguity of the wording of art. 48 (1) of the aforementioned Convention, discrepancy between the legal text and its official substantiation, as well as the commanding and peremptory tone of its language.

As given above, the main problem which arises in connection with the implementation of international treaties is their imprecise wording.²¹ The central concept of the provision referred to above is the mandatory *alternative dispute resolution* (ADR), including mediation and conciliation. In this regard, we will focus our attention on mediation as the principal ADR method.²² The concept of mediation, including that in criminal matters, is very closely linked to voluntariness. This element recurs in various definitions of mediation,²³ in the principles of mediation,²⁴ as well as the rules recommended by the Committee of Ministers of the Council of Europe²⁵ and statutory regulations specified in art. 23a § 4 of the Code of Criminal

²⁰ <https://rm.coe.int/1680464e74> (accessed: 18.11.2019).

²¹ We are amplifying this thread in: O. Sitarz, D. Bek, „Zasadność zakazu obowiązkowej mediacji w sprawach przemocy domowej. Krytyczna analiza przepisu art. 48 ust. 1 tzw. konwencji stambulskiej,” *Studia Prawnicze* 2018, no. 1, pp. 105–129.

²² M. Białecki, *Mediacja w postępowaniu cywilnym*, Warsaw 2012, p. 35.

²³ Cf. e.g. *Mediacja dla każdego*, ed. L. Mazowiecka, Warsaw 2010, p. 133 et seq.; T. Cyrol, “Facylitacja a koncyliacja — jak mediować, aby robić to skutecznie,” *ADR* 2013, no. 3 (23), p. 21.

²⁴ Cf. e.g. O. Sitarz, “O mediacji w ogólności,” [in:] *Metodyka pracy mediatora w sprawach karnych*, ed. O. Sitarz, Warsaw 2015, pp. 25–26.

²⁵ Recommendation of the Committee of Ministers of the Council of Europe R (99) 19 of 15 September 1999 to Member States concerning mediation in penal matters.

Procedure.²⁶ It must therefore be concluded that the lack of consent from even one of the parties excludes the possibility of conducting a mediation procedure. The question thus arises whether the prohibition on the compulsory application of mediation to the parties to a conflict does not follow from its very nature. In view of the above, it is important to establish what the prohibition on compulsory mediation consequently means and whether the norm contained in art. 48 (1) of the Istanbul Convention is void.

The answer to the foregoing questions requires determining what the obligation to take part in mediation in criminal cases involving violence against women and domestic violence may mean in practice. Several options should be taken into account:

1. establishment in the system of a standard requiring the parties, on pain of a penalty:

- to take part in mediation proceedings²⁷ and sign a settlement,
- to take part only in mediation proceedings (signing a settlement would depend on the will of the parties),
- to take part only in an information meeting with the mediator (participation in the main mediation proceedings and signing a settlement would depend on the will of the parties);

2. establishment in the system of a standard requiring the parties, on pain of adverse consequences for the parties other than a penalty, such as, for instance, charging the costs of the proceedings to the parties or discontinuing the proceedings:

- to take part in mediation proceedings and sign a settlement,
- to take part only in mediation proceedings (signing a settlement would depend on the will of the parties),

²⁶ Art. 23a § 4 of the Code of Penal Procedure. Participation of the accused person and the aggrieved party in the mediation procedure is voluntary. Consent to participate in the mediation procedure is submitted to the organ remanding the case to mediation or the mediator after the essence and principles of mediation have been explained to the accused person and the aggrieved party who have been advised as to the possibility of revoking their consent until the completion of the mediation procedure.

²⁷ The mediation model adopted in Poland (also by the Polish legislator) distinguishes between two distinct types of mediation procedure: initial meeting (information) and main mediation procedure.

— to take part only in an information meeting with the mediator (participation in the main mediation proceedings and signing a settlement would depend on the will of the parties);

3. lack of a binding standard, while the procedure is constructed in such a manner that resignation from mediation places the parties, in particular the aggrieved party, at a disadvantage by, for instance, initiation of criminal proceedings or where the exemption from fees is conditional on:

- participation in mediation proceedings and signing a settlement,
- participation only in mediation proceedings (signing a settlement would depend on the will of the parties),
- participation only in an information meeting with the mediator (participation in the main mediation proceedings and signing a settlement would depend on the will of the parties).

Given so many alternatives, it is not an easy task to establish what in point of fact the prohibition foreseen in art. 48(1) of the Convention provides. Nonetheless, certain possibilities can be eliminated based on the very essence of mediation.

It should be noted that in the case where a provision existing in the legal system which explicitly obliges the parties to participate in mediation (point 1 and 2) runs counter to the principle of voluntariness, then the situations envisaged in point 3 will also be in conflict with this principle. The obligation to conclude a mediation settlement would be in direct contradiction with the characteristic of voluntariness attributable to mediation and the essence of a settlement which must be consensual in nature.²⁸ There can be no settlement until the parties reach an agreement on all the contentious issues. Given the above, a prohibition on obliging anyone in any mediation procedure to reach a settlement does not require invoking the provisions of the Istanbul Convention. Such a prohibition follows directly from understanding the settlement as a civil law contract which is based on the exercise of free will by the parties to it.

However, obliging the party to appear in person at the mediation meeting or participate in the talks would not go against the essence of the settlement. Such a duty would by no means prejudice any subsequent free de-

²⁸ Cf. D. Bek, “Wpływ ugody mediacyjnej na kształt reakcji prawnokarnej,” [in:] *Idea sprawiedliwości naprawczej a zasady kontynentalnego prawa karnego*, ed. T. Dukiet-Nagórska, Warsaw 2016, p. 83.

cision to sign or not to sign the settlement. Nonetheless, it seems that it would be utterly unrealistic to oblige the parties to engage in mediation talks. Theoretically, one can imagine a provision obliging the parties, for instance, to formulate expectations with regard to the other party. Such a duty would eliminate the element of voluntariness, and the process of exchange of forced proposals without the will to conduct talks could hardly be called mediation, or be termed a method of resolving a dispute. Therefore, the norm envisaged in art. 48 (1) of the Istanbul Convention will be void also in relation to that situation — since the prohibition on compulsory exchange of settlement proposals or compulsory engagement in mediation talks is dictated by the essence of mediation.

Another possible interpretation is recognising that art. 48 concerns the prohibition on imposing on the parties the obligation to participate in the mediation meeting. In the absence of the will of at least one of the parties to conduct talks, the fulfilment of the obligation would in practice consist in appearing at the mediator's office at the appointed time and making a statement in the presence of the other party as to one's refusal to engage in the talks. Still, such a statement could not give rise to any formal negative consequences for the party, e.g. charging the costs of organising the meeting to the party. It appears that although it might not be economically reasonable, such a solution would not adversely affect the essence of mediation.

In the light of the above, it may be concluded that the prohibition on the mandatory mediation concerns compulsory participation in the mediation meeting. However, it is not clear whether the prohibition relates also to the so-called initial (information) meeting, or whether it relates to indirect mediation as well.

In his well-known mediation process model, Ch. W. Moore distinguishes 12 stages, the first of which consists in establishing contact with the parties and explaining the essence of mediation to them.²⁹ Regardless of the detailed purpose of the meeting (information, resuming of talks), contact of the aggrieved party — in particular a victim of violence — with the perpetrator may be difficult, at times even painful. The risk of secondary

²⁹ Ch.W. Moore, *Mediacje, praktyczne strategie rozwiązywania konfliktów*, Warsaw 2003, p. 95 et seq.; cf. K. Bargiel-Matusiewicz, "Komunikacja w mediacji: prawidłowości, problemy, możliwe rozwiązania," [in:] *Metodyka pracy mediatora...*, pp. 67–68.

victimisation, indicated by opponents of mediation in cases of domestic violence, will also occur when the parties meet only to obtain detailed information on the essence and principles of mediation. The obligation to participate in such a meeting would jeopardise the personal rights of the aggrieved party almost to the same extent as the obligation to participate in the mediation meeting in the strict sense. The learnt helplessness of a victim of violence or his or her dependence on the perpetrator would induce the victim to hold talks against their will. The intentions of the creators of the Convention expressed in the Explanatory Report³⁰ lead one to assume that the prohibition on compulsory mediation in cases of violence also includes the stage of the information meeting with both parties.

Numerous negative consequences of mediation for the aggrieved party may arise from a direct meeting with the perpetrator. Meanwhile, both theoreticians and practitioners of mediation, as well as the Polish legislator, allow for indirect mediation, and accept individual initial meetings as a rule.³¹ The question thus arises whether this form of mediation is also subject to the prohibition. The provision of the Istanbul Convention under investigation, in its wording, certainly does not differentiate between the types of mediation, and therefore, the prohibition on compulsory mediation would include indirect mediation as much as direct mediation, in all their phases. It is thus legitimate to wonder whether this interpretation is in line with the *ratio legis* of this provision, and whether the obligation to participate in indirect exchange of positions could entail any risk for a victim of violence. The term ‘indirect mediation’ may imply various situations. Firstly, one option consists in the mediator meeting individually with each of the parties and forwarding the positions and arrangements between the parties. Secondly, the mediator may contact at least one party by phone or post. Thirdly, the mediator may meet only the representatives of the parties, or one person directly involved in the conflict and a representative of the other party, and discuss possible solutions within

³⁰ Explanatory Report...

³¹ Cf. § 15 of the Ordinance and e.g. D. Wójcik, “Zasady i reguły mediacji między podejrzanym i pokrzywdzonym,” [in:] *Nowa kodyfikacja karna. Kodeks postępowania karnego. Krótkie komentarze*, vol. 14, Warsaw 1998, p. 238; O. Sitarz, D. Bek, “Mediacja w sprawach karnych — krok po kroku,” [in:] *Metodyka pracy mediatora w sprawach karnych*, ed. O. Sitarz, Warsaw 2015, pp. 117–119, 123–126.

this group. Each of the solutions outlined above has advantages and disadvantages,³² but they all allow the victim of violence, among others, to formulate his or her position in the absence of the perpetrator, which in itself should provide the victim with greater comfort and independence. As A. Sitarska notes, “this will not be a good solution for people who, due to their post-traumatic mental state, are totally unable to consciously work out a compromise.”³³ Moreover, the indirect form of mediation does little to change the situation where the victim and the perpetrator continue to live together at one place, and in the case of domestic violence it is not an unusual situation. From the perspective of the victim, the prohibition on compulsory indirect mediation seems to be equally reasonable as the prohibition on compulsory direct mediation.

Considerations on the scope of the prohibition on the use of compulsory mediation lead to the conclusion that it affects all forms of mediation. In essence, the prohibition specifically refers to the obligatory appearance at the information or mediation meeting, or obligatory establishment of contact with the mediator, given that the prohibition on the compulsory mediation talks or the obligatory signing of a settlement stems from the essence of mediation and the principle of voluntariness incorporated into it. Moreover, this prohibition relates to other forms of ADR which may potentially be applied to cases of violence against women and domestic violence. It should be emphasised that art. 48 of the Convention does not provide any basis for making a distinction between the situation of the parties — the prohibition extends to the perpetrator and the victim on an equal basis.

Another problem of interpretation is the determination of the scope of obligations imposed on State Parties. The question is whether art. 48 (1) of the Istanbul Convention requires that the legislators of State Parties introduce an explicit prohibition on the application of ADR methods in such cases, or whether it is sufficient not to impose the obligation in positive law. The provision under examination bears the following wording: “Parties shall take the necessary legislative or other measures to prohibit mandatory alternative dispute resolution processes, [...]”. It therefore seems

³² Cf. O. Sitarz, D. Bek, “Mediacja...”, pp. 123–126.

³³ A. Sitarska, “Przemoc w rodzinie a mediacja,” *Prokuratura i Prawo* 2006, no. 1, p. 65.

that E. Bieńkowska and L. Mazowiecka may not necessarily be correct in their claim that “in item 1 of the provision under investigation, the Convention obliges State Parties to remove from their legal systems any regulations which on a mandatory basis subject women who are victims of the offenses included in it to conflict and dispute resolution procedures alternative to the formal justice system.”³⁴ Clearly, these are to be “prohibitive activities”, and hence the authorities are expected to be active in preventing the use of compulsory forms of ADR, and not merely to remove the binding provisions (although obviously it is necessary, too). Nonetheless, the Convention does not oblige State Parties to introduce a general prohibition on mediation in cases of violence against women and domestic violence, even where mediation is fully voluntary. It is also clearly indicated that these activities do not have to be of a legislative nature. State Parties can make use of lower-level legal acts or seek non-legal solutions which make it impossible to oblige the victim of domestic violence to participate in mediation, e.g. appropriate training and guidelines for judges, prosecutors and mediators.

The conclusions regarding the obligations imposed on State Parties by way of art. 48 (1) of the Istanbul Convention seem to lose their edge in comparison with the statements appearing in the Explanatory Report.³⁵ Pursuant to art. 31 (2) of the Vienna Convention, for the purpose of the interpretation of a treaty, the context shall comprise, in addition to the text, including its preamble and annexes: a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty. Thus, the contents of the Report are of utmost importance. On the one hand, the creators of the Report raise the issue of access to the court.³⁶ They emphasise that it is crucial to prevent situations where compulsory mediation would replace criminal

³⁴ *Konwencja o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej. Komentarz*, ed. E. Bieńkowska, L. Mazowiecka, Warsaw 2016, p. 483.

³⁵ Explanatory Report..., p. 42, point 252.

³⁶ Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, p. 42, point 252 <https://rm.coe.int/16800d383a> (accessed: 18.11.2019).

proceedings. Given this substantiation, it seems preferable to narrow down the scope of the prohibition defined in art. 48 (1) of the Convention — only cases of compulsory mediation that exclude the right of recourse to the court held by the victims of violence would be inadmissible. On the other hand, the authors of the Report expressly indicate that victims of violence referred to in the Istanbul Convention can never enter the alternative dispute resolution processes on a level equal to that of the perpetrator. It is in the nature of such offences that such victims are invariably left with a feeling of shame, helplessness, and vulnerability, while the perpetrator exudes a sense of power and dominance.³⁷ This unambiguous statement sheds new light on art. 48. The question remains whether the aim of the creators of this provision was complete elimination of mediation and other ADR methods from dealing with violence against women and domestic violence. If so, then this aim was by no means expressed in art. 48 (1). On the whole, the substantiation does not correspond to the norm to which it relates and this situation clearly does not facilitate the implementation of the norm, i.e. the fulfilment of the commitment accepted by a state.

The linguistic and teleological interpretation of art. 48 (1) compared to the further-reaching meaning expressed in the Explanatory Report leads to the conclusion that the prohibition on compulsory mediation in cases of acts of violence covered by the Convention is categorical and absolute. Therefore, no one may, under any circumstances, be obliged to participate even in an information meeting prior to any possible mediation procedure. The question which arises is whether this prohibition is rational.

Mediatory experience clearly indicates that mediation in cases of domestic violence can bring considerable benefits to the injured person. Supporters of *restorative justice* point to the remarkable effect of properly conducted mediation on the relationship between the parties, psychological strengthening of the victim and rehabilitation of the perpetrator.³⁸

³⁷ Victims of such violence can never enter the alternative dispute resolution processes on a level equal to that of the perpetrator. It is in the nature of such offences that such victims are invariably left with a feeling of shame, helplessness, and vulnerability, while the perpetrator exudes a sense of power and dominance.

³⁸ E.g. A. Sitarska, op. cit., pp. 56–74; D. Wójcik, “Czy należy zakazać stosowania mediacji w sprawach o przemoc rodzinną (partnerską),” [in:] *Węzłowe problemy prawa karnego, kryminologii i polityki kryminalnej. Księga pamiątkowa ofiarowana Profeso-*

Moreover, they emphasise that the risks involved in mediation in situations of violence are not greater than those related to participation in court proceedings.³⁹ By virtue of the principle of voluntariness and confidentiality, one can achieve what is virtually impossible during court proceedings — resolving a conflict. It also appears that co-shaping the settlement is of utmost importance to victims of domestic violence. Moreover, sincere apologies and regret as well as voluntary declarations on abandoning various forms of violence made by the perpetrator are of immense value to the victim.

Regardless of how considerable the advantages of mediation may be, they do not justify its obligatory use. In the case of mediation, compulsion raises objections on the grounds that 1) in general, compulsory personal involvement of the perpetrator is presumed; 2) mental health costs sustained by the victim by participating in involuntary mediation may be high. Committing parties to mediation talks, all the more so as regards signing a settlement, is at odds with the essence of mediation. However, the issue of mandatory participation in the information meeting remains to be addressed. Legal regulations that oblige parties to the proceedings to pursue a specified course of conduct are not uncommon, in particular in the case of the duties imposed on the accused. A case in point set out in the Polish penal procedure may be a conciliatory sitting on matters which are the subject of private accusation. From the perspective of the issue under examination here, the effects of unjustified failure to attend the sitting are particularly significant. Pursuant to art. 491 § 1 of the Code of Criminal Procedure, such failure to attend the sitting is deemed to be the withdrawal of the accusation, which results in the discontinuation of the proceedings. This means that the participation of the aggrieved party acting as a private prosecutor in the conciliatory sitting is *sui generis* compulsory. In contrast, unjustified failure of the perpetrator to appear at the conciliatory sitting results in referring the case to the main trial (art. 491 § 2 of the Code of Criminal Procedure). In the opinion

rowi Andrzejowi Markowi, eds. V. Konarska-Wrzošek, J. Lachowski, J. Wójcikiewicz, Warsaw 2010, pp. 1017–1032 and C. Pelikan's (chairwoman of the Committee of Experts on Mediation in Penal Matters) research cited there.

³⁹ Cf. A. Gójska, V. Huryn, *Mediacja w rozwiązywaniu konfliktów rodzinnych*, Warsaw 2007, pp. 208–209.

of the legislator, in matters of private accusation (being the proper mode for minor matters consisting in damage to reputation, dignity, and bodily integrity and health in a minimum range of up to 7 days), it is sensible to expect that the aggrieved party will attempt conciliation and appear at the sitting regardless of his or her own views on this matter.

The element of obligation also appears in the case of various penal measures imposed on the sentenced person. Some of them require consent or even hearing the accused, e.g. obliging the perpetrator to undergo addiction treatment therapy (art. 72 § 1 point 6a of the Penal Code). Nonetheless, there is a group of measures which do not consider the wish of the perpetrator, e.g. the obligation to apologise to the aggrieved party (art. 67 § 3 of the Penal Code, art. 72 § 1 point 2 of the Penal Code). Finally, there are such institutions that require the involvement and consent of the aggrieved party. The criminal-law institution which involves both the aggrieved party and the perpetrator is electronic supervision in the no-contact mode (art. 43b § 3 of the Executive Penal Code), which may be a form of enforcing a measure where prohibition on contacting specific persons or approaching them is imposed (art. 39 point 2b of the Penal Code). However, in this case, the protected person must submit a relevant request (art. 43l § 1 of the Executive Penal Code), which clearly entails his or her consent and will to participate in the mechanism.

A more thorough review of all such institutions leads to some general conclusions. In the opinion of the legislator, where in general the mere activity of the perpetrator is sufficient, and only of the perpetrator, without his deeper mental or emotional involvement, the consent of the perpetrator is irrelevant. Whereas the institutions correcting the attitude of the perpetrator, hence requiring his full involvement (e.g. goodwill), must be preceded by obtaining the relevant consent. Moreover, where the imposition of a specific measure interferes in the life of the aggrieved party, then his or her consent has in essence the normative effect.

By applying the aforementioned findings to the area of mediation, two distinct forms of the perpetrator's involvement in the mediation process may be indicated. The former is the information (initial) meeting which requires that the perpetrator be present, mindful, and ready to accept certain facts. The latter consists in the proper mediation sitting. At this point, we expect the perpetrator to engage actively in conflict resolution,

including making attempts to understand his deed and the harm he inflicted, as well as to display genuine willingness to redress it and improve his attitude to the aggrieved party. In so far as the improvement of the attitude necessarily requires voluntariness, the acknowledgement of certain facts does not. This means that there are grounds for examining the possibility of making mediation proceedings as regards the information meeting of the perpetrator with the mediator obligatory (i.a. in cases of domestic violence).

Moreover, the question arises as to why victims of domestic violence might be deprived of all the benefits offered by mediation. The advantages of mediation as such are constantly repeated in the literature.⁴⁰ However, we wish to explore here its additional aspect which has not been examined thus far. The aggrieved party is the beneficiary of mediation, given the fact that the perpetrator participates in it. Truly, the beneficial effect of mediation on the perpetrator is an advantage for the victim, in particular where the victim-perpetrator relation is so close that their further contacts are inevitable. It should be recalled that also the information meeting brings certain benefits to the aggrieved party, though to a far lesser extent. In this context, one can mention, for instance, making the perpetrator aware of the wrongs caused thereby, the pending penalty and other criminal law consequences, as well as the manner in which the perpetrator may shape judicial decisions. In the course of the information meeting, the mediator may outline the prospects of peaceful relations between the perpetrator and aggrieved party, in contrast to the current strained situation. The mediator may not act as a moralist, tutor, psychologist, or a coach, but may instead indicate several crucial facts which can in many cases bring the perpetrator to his senses, given the fact that such information is provided by a person not involved in the conflict, nor a representative of the law enforcement or justice system before whom the perpetrator must defend himself, prove his innocence or minimise the guilt. In other words, although participation in mediation and achieving reconciliation seem to be the best solution to any conflict, including domestic violence, we also see significant advantages in the first phase of the mediation procedure — the information (initial) meeting. It should also be recalled that pursuant

⁴⁰ O. Sitarz, *op. cit.*, pp. 34–38 and the literature referred to there.

to the relevant Polish regulations, mediation should as a rule be preceded by two information meetings — one with the perpetrator, and another with the aggrieved party. This means that the benefits of a partial mediation process (provided that the information meeting may be considered as such) can be obtained without exposing the victim to trauma related to meeting the perpetrator.

The Spanish research cited by Magdalena Grzyb provides a strong argument supporting the possibility of conducting mediation in cases of domestic violence. She points out that the major reason for women's reluctance to turn to police for help in the case of violence inflicted upon them is the fear of the negative consequences of a criminal judgment. In the opinion of the cited author, women think that the aggressor should not in fact go to prison, but they expect provision of assistance to the perpetrator to help him combat alcoholism or drug addiction. Therefore, too severe a reaction of law enforcement authorities results in an increase in invisible crime involving serious violence against related persons. Women in a violent situation actively seek help, but instead of police, they tend to enlist the help of doctors, lawyers, social workers or friends.⁴¹ In short, they wish to solve a problem, but do not expect a criminal case to be resolved by the competent institutions which use repression. This means that the categorical and absolute obligation defined in art. 48 of the Convention leaves practically no room for discretion of State Parties to shape the obligations imposed on the perpetrator of domestic violence, even where it is beneficial to the victims and in line with their expectations. In such situations, article 14 of the Istanbul Convention may serve as an alternative solution, pursuant to which, "Parties shall take, where appropriate, the necessary steps to include teaching material [...] in formal curricula and at all levels of education." Thus, the Convention gives the Parties a margin of discretion not only to choose a particular measure to achieve the intended objective, but also to assess whether this measure is necessary.

In conclusion, it should be noted that the reasons hindering the implementation of any international treaty can be located in its linguistic layer or in the substantive form of the developed and accepted solutions. The

⁴¹ M. Grzyb, "Hiszpańska ustawa o przemocy ze względu na płeć. Analiza kryminalno-polityczna," *Archiwum Kryminologii* 39, 2017, pp. 355–356.

former may be rectified by way of a proper interpretation of the treaty. The substantive controversies are of a more serious nature, since they impede real implementation of a treaty, and in extreme situations, they may cause the state to fail to sign or ratify it. It is therefore hard to disagree with Jarosław Sozański's claim that a precisely structured agreement facilitates reading and performing mutual rights and obligations, and it also serves to avoid content-related disputes.⁴²

References

- Bargiel-Matusiewicz K., "Komunikacja w mediacji: prawidłowości, problemy, możliwe rozwiązania," [in:] *Metodyka pracy mediatora w sprawach karnych*, ed. O. Sitarz, Warsaw 2015.
- Bek D., "Wpływ ugody mediacyjnej na kształt reakcji prawnokarnej," [in:] *Idea sprawiedliwości naprawczej a zasady kontynentalnego prawa karnego*, ed. T. Dukiet-Nagórska, Warsaw 2016.
- Benoît-Rohmer F., Klebes H., *Prawo Rady Europy. W stronę ogólnopolskiej przestrzeni prawnej*, Warsaw 2006.
- Bialecki M., *Mediacja w postępowaniu cywilnym*, Warsaw 2012.
- Cyrol T., "Facylitacja a koncyliacja — jak mediować, aby robić to skutecznie," *ADR* 3 (23), 2013.
- Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence.
- Gójska A., Huryń V., *Mediacja w rozwiązywaniu konfliktów rodzinnych*, Warsaw 2007.
- Grzyb M., "Hiszpańska ustawa o przemocach ze względu na płeć. Analiza kryminalno-polityczna," *Archiwum Kryminologii* 39, 2017.
- Hanc J., "Implementacja postanowień dyrektywy do prawa karnego materialnego państw członkowskich Unii Europejskiej," [in:] *Niekarałość ofiar handlu ludźmi — nowe perspektywy*, ed. Z. Lasocik, Warsaw 2015.
- Hanc J., "O znaczeniu prawa unijnego dla stanowienia i wykładni wewnętrznego prawa karnego materialnego," [in:] *Międzynarodowe i europejskie prawo karne — osiągnięcia, kierunki rozwoju, wyzwania*, eds. J. Nowakowska-Małusecka, I. Topa, Katowice 2015.
- Konwencja o prawach dziecka. Analiza i wykładnia*, ed. T. Smoczyński, Poznań 1999.
- Konwencja o zapobieganiu i zwalczaniu przemocy wobec kobiet i przemocy domowej. Komentarz*, ed. E. Bienkowska, L. Mazowiecka, Warsaw 2016.
- Metodyka pracy mediatora w sprawach karnych*, ed. O. Sitarz, Warsaw 2015.
- Moore Ch.W., *Mediacje, praktyczne strategie rozwiązywania konfliktów*, Warsaw 2003.
- Sitarska A., "Przemoc w rodzinie a mediacja," *Prokuratura i Prawo* 2006, no. 1.

⁴² J. Sozański, op. cit., p. 72.

- Sitarz O., "O mediacji w ogólności," [in:] *Metodyka pracy mediatora w sprawach karnych*, ed. O. Sitarz, Warsaw 2015.
- Sitarz O., Bek D., "Mediacja w sprawach karnych — krok po kroku," [in:] *Metodyka pracy mediatora w sprawach karnych*, ed. O. Sitarz, Warsaw 2015.
- Sitarz O., Bek D., "Zasadność zakazu obowiązkowej mediacji w sprawach przemocy domowej. Krytyczna analiza przepisu art. 48 ust. 1 tzw. konwencji stambulskiej," *Studia Prawnicze* 2018, no. 1.
- Sozański J., *Prawo traktatów. Zarys współczesny*, Warsaw-Poznań 2009.
- Sylwestrzak P., *Transpozycja prawa unijnego do polskiego porządku prawnego na przykładzie prawa ochrony środowiska*, Wrocław 2010.
- Szpak A., "O wykładni międzynarodowego prawa traktatowego i zwyczajowego (z uwzględnieniem międzynarodowego prawa humanitarnego)," *RPEiS* 2008, no. 1.
- Tarnogórski R., "Problem błędu w tekście traktatu w świetle Konwencji wiedeńskiej o prawie traktatów," *Biuletyn Polskiego Instytutu Spraw Międzynarodowych* 2005, no. 6.
- Wójcik D., "Czy należy zakazać stosowania mediacji w sprawach o przemoc rodzinną (partnerską)," [in:] *Węzłowe problemy prawa karnego, kryminologii i polityki kryminalnej. Księga pamiątkowa ofiarowana Profesorowi Andrzejowi Markowi*, eds. V. Konarska-Wrzošek, J. Lachowski, J. Wójcikiewicz, Warsaw 2010.
- Wójcik D., "Zasady i reguły mediacji między podejrzanym i pokrzywdzonym," [in:] *Nowa kodyfikacja karna. Kodeks postępowania karnego. Krótkie komentarze*, vol. 14, Warsaw 1998.

Summary

The Council of Europe Convention on preventing and combating violence against women and domestic violence has been ratified by 29 countries, including Poland. Among other things, pursuant to art. 48, Parties shall take the necessary legislative or other measures to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of this Convention. It is regulation that will provide a clear illustration of the reasons which render the implementation difficult or even impossible. Considerations set out in this paper will focus on three basic aspects — the ambiguity of the wording of art. 48 (1), discrepancy between the legal text and its official substantiation, as well as the commanding and peremptory tone of its language.

Keywords: Istanbul Convention, implementation, victim-offender mediation, ADR, domestic violence, violence against women