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CHAPTER 14

**FAMILY MEDIATION IN POLAND:
MECHANISMS, CHANCES, PERSPECTIVES**

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The social and political order based on liberal democracy guarantees to all subjects of social life, particularly individuals and families, the respect of certain rights along with many benefits resulting from the fact that within this system each citizen has a direct access to the basic consumption goods. Democracy, however, as any other system, cannot protect the subjects of the social reality of the negative effects of participating in collective life. It refers, in particular, to a family as it is the major social institution (Dyczewski, 1994, p. 7: the author identifies family with the "primary element of common good"). One thing that has remained common with families is they struggle with problems and have throughout modern history (see Korzeniowska & Szuścik, 2010). The conviction that scientific and technical progress (civilization changes) have influenced the condition of this primary upbringing group in a positive way, turned out to be a myth. Most of the problems families struggle with remain in the centre of interest for various institutions and services that are organized and supervised by the state. The state constantly searches for systemic solutions that would significantly improve the efficiency of activities undertaken for the benefit of a family. It is comforting that institutions of democratic state carry out redressing activities (through social intervention) within social policy, yet, their effects and results are disputable, as very often they solve the problem only partially.

On the grounds of pedagogical reflections on family in the social context, an assumption has been made that the most important social problem is the disintegration of family (Kawula, Brągiel & Janke, 2009). The weight of this issue and its complex nature requires a thorough analysis within a separate paper, therefore, we apply the thesis that the main reason for family disintegration are disturbed interpersonal relations between family members. Practice reveals that such situations are the most common reason for disunity, and in many cases the breakdown of families. In order to meet these problems, today's state forms legislation that is not

only to prevent but also to resolve such matters (according to article 18 of The Constitution of the Republic of Poland of 2nd April 1997: "Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland"). However, the traditional method of resolving conflicts that has already been applied by the judiciary systems in Western-European countries and in the USA in the 60's and 70's of the 20th century is in crisis. There are opinions expressed that in 1950ies and 1960ies arouse a theoretical impulse to use mediation in conflict solving. That impulse was the development of social psychology, represented, among others, by Kurt Levin and Marshall B. Rosenberg (Doherty & Guyler, 2010, pp. 30-31). The similar crisis today can be observed in the Polish judiciary system. In the literature on the subject there are numerous critical analyses of Polish legal-social systems that are undertaken in this context (see Morawski, 1999, pp. 27-35, 151-196). Public opinion began to formulate following critical remarks: a) the procedures used by the courts are far too complicated; b) court trials have become too time-consuming; c) cases heard by the courts began to generate too high of costs. Thus, alternative methods of resolving problems have been sought. Since the end of the 90ies the model of Alternative Dispute Resolution (ADR) has been popularized. ADR includes mainly: mediation, negotiation and arbitration or conciliation. In the literature of the subject they are identified first of all with amicable and conciliatory methods of solving disputes (Kalisz & Zienkiewicz, 2009, p. 26). As Agnieszka Rękas writes (2010: 6), "ADR shortcuts have been introduced to common use by the Green Paper on alternative dispute resolution in civil and commercial law by the European Commission (19.04.2002)". It is worth pointing out that mediation is an example of a method which has been often used by the representatives of various cultures since ancient times (Haeske, 2005, p. 13; Kordasiewicz, 2009, pp. 31-45).

Mediation is the focus point of this paper and through this prism the analysis of the Alternative Dispute Resolution is presented. There are various definitions of mediation. This is due to a different typology method of conflict solving. The three main variations of mediation are the following: evaluative, facilitative and transformative. The approach presented in this paper will expose facilitative mediation. This method of mediation is represented closest to the variation of mediation that has been presented by Christopher Moore who says mediation is "the intervention into a dispute or negotiation by an acceptable, impartial, and neutral third party who has no authoritative decision-making power to assist disputing par-

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ties in voluntarily reaching their own mutually acceptable settlement of issues in dispute" (Moore, 2009, p. 30).

Roger Fisher and Wiliam Ury are considered to be the pioneers of the idea that shows the perspective to facilitative mediation. According to them a mediator should focus exclusively on initiating and sustaining the dialogue between the parties and in turn they should negotiate with one another. Which is why this concept is called "principled negotiation" or a "negotiation of merits". In literature this type of negotiation is identified as the rational style of negotiation (Nęcki, 1991, p. 32). The above mentioned authors contributed this to the positional negotiation that is limited only to the defense of positions taken by the parties at the beginning of the negotiation process. Fisher and Ury base their concept on four principles: people, interests, solution options and criteria. They say the first thing that should be done is to separate the people from the problem, to disentangle emotions from what constitutes the problem in order to find a facet for settling the issues of the dispute. They suggest the strategy that parties should represent a soft approach towards one another however a hard style of negotiation can be presumed regarding the merit of the case. According to Fisher and Ury, in a case when one party wants to win the original position taken, this is one of the major obstacles during a negotiation. Resigning from such attitude guarantees openness to find new, creative solutions and allows the focus to be on searching and exploring other interests. As for the third principle, it is important that both parties have the possibility to select solution from many alternative scenarios for a final resolution of their dispute. The last principle regards the necessity to work out the objective criteria, that would transfer directly not only on quality of the achieved agreement but also make it lasting (Fisher, Ury, Patton, 1998, pp. 40-44). Due to the limited size of this paper, there is no possibility to focus on those matters further, therefore most of the problems are only sketched out. Similarly, while describing the forms of mediation we will only list them (the term mediation types is used in the literature, describing its dychotomic division to: direct – out-of-court mediation and *ad hoc*: indirect – court mediation (Kalisz & Zienkiewicz, 2009, p. 49). According to the law there are the following types of mediation: civil mediation, mediation in a juvenile case, family mediation, mediation in commercial disputes, workplace mediation, mediation in collective disputes, mediation in criminal cases, peer mediation and finally international mediation.

Despite the possibility to apply the methods provided by alternative dispute resolution since the 1990ies, experts conclude that ADRs are hardly known in Poland and rarely used (Zienkiewicz, 2007, p. 12). Even

though today's situation has improved (thanks to the amendments to the Polish Code of Civil Procedure since 2005 civil cases can be submitted to civil mediation), the situation is still not optimistic, e.g. Polish attorneys point out that the Polish law does not suit the effective mediation processes (Mediacja sądowa, 2011). Yet, this situation should not hinder the introduction and development of alternative dispute resolution methods in Poland. Therefore, there is a need to raise awareness among the Polish people, rationally speaking, mediation is the only alternative to an ineffective legal system, especially in family cases.

Due to the complexity of issues that mediators face during conducting family mediation (which is not only a divorce but also separation or post-divorce situation) two terms are found in literature on the subject: family mediation and divorce mediation. The authors of this paper use the first term as the scope of matters that this name covers is much wider than in just cases of divorce mediation.

Family mediation is applied mostly to the disputes of multithreaded characters, where both parties are strongly and emotionally engaged. Thus, a mediator must first of all concentrate on a professional and skillful approach to the parties. He should have the ability to initiate contact easily, to facilitate discussions, to create the right atmosphere and to present a high level of empathy.

In most cases a mediator, when beginning their work with a family, enters it on a certain level of the conflict in which the parties have already set their positions and continue to defend them regardless of costs. It is extremely important that a mediator, when initiating the mediation process, would determine the strategy and the right plan of action before hand. Additionally, they should provide the parties with a certain level of support during the initiation of contact also security and protection of interests not only of adults but also of children involved in the situation should be addressed (see: Czayka-Chełmińska & Glegoła-Szczap, 2009, pp. 273-276).

Christopher Moore, the author of the exemplary mediation process model, assumed that mediation should consist of 12 phases (for more details, see: Moore, 2009, pp. 79-81). There are also propositions that focus only on certain elements of Moore's concept for example the model designed by Alison Taylor (more on this model by Halina Przybyła-Basista: Przybyła-Basista, 2006, pp. 30-31). As a reference point in this paper the model implemented by the Association of Family Mediators (Stowarzyszenie Mediatorów Rodzinnych - SMR) is taken, in this approach the mediation process is seen in categories of permanent conversation (this model is very close to the principles of facilitative mediation). Therefore

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all six stages within this concept assume that a mediator should base the mediation process primarily on dialogue. The proposed scheme presents as follows:

- Initiation of contact, explaining the goals and rules of mediation (mediator's monologue).
- Accumulating information that can be used to help the parties in identifying the problem.
- Determining formal order during the following meetings and the range of issues that should be discussed by the parties.
- Presentation of interests and needs of each party, building the right atmosphere that enables mutual agreement.
- Supporting the parties in searching for potential solutions which should not only be acceptable to both parties but also give them a sense of satisfaction.
- Active support in forming mediation agreement, especially during its construction (see: Mediacje rodzinne, 2007).

It is worth looking at the examples of the models suggested by mediators themselves, regarding the successes they have gained in this field. One of such professionals is undoubtedly Manuela Plizga-Jonarska and her own scheme of family mediation:

- First contact with mediator on the phone.
- First informative and consulting session.
- Proper sessions.
- Finishing session (more in: Plizga-Jonarska, 2008).

Family mediation is the example of a very specific method, especially if we take into account the emotion potential involved. Thus, it is a great challenge for mediators, that results in the necessity to create certain theoretical and know-how databases. In order to be professional and effective, mediators need to improve their workshop constantly. The number of publications on this form of mediation is rather small in Poland. Therefore academic centers should contribute to creating more materials and a compendia about family mediation.

Apart from some obstacles (Hanna Przybyła-Basista, on the basis of her own research, presents in details and analyses the condition of family mediation in Poland: Przybyła-Basista, 2006, pp. 367-373), the great advantage of mediation is the fact that people who have used this form of ADR also have the chance to participate in solving the problem (conflict) and they get direct impact on the range, shape and quality of the achieved agreement. In family mediation the parties (spouses) can submit to discussions of their emotional, practical and even legal problems. This would be impossible in a courtroom. It is undoubtedly the advantage that

the judiciary system cannot grant. Therefore all initiatives leading to closer cooperation between the Ministry of Justice, judges and mediators regarding mediation should be supported. Raising awareness that mediation serves not only to achieve an agreement but also improves the relations between people can have a tangible impact on reducing conflicts which are a major cause for disintegration of families.

One of the important methods of supporting dialogue and conducting mediation is the method called Family Group Conference (FGC). It is even more widely introduced by family support, social assistance and integration institutions, both public (social assistance centers) and non-public (mainly foundations and associations). FGC is a method reaching directly for the resources of a family itself to resolve a dispute. What is special about this is that it uses the principles of empowerment that are a key factor in effective help, it is a practical realization of the subsidiary (auxiliary) principle which enables a family (natural environment) to cope with their problem by themselves. FGC enables gaining support within a family, so that a child, regardless of the kind and scale of the problem to be dealt with, could remain in the family. This is very often possible only due to engaging a wide family environment.

Growing with each year a tendency to place more children within the system of foster care in Poland reveals the need to introduce the Family Group Conference method. It is known that such interfering in a family like: the separation of a child and placing them in any form of foster care, has not only a very negative impact on their psychic, but also causes relationships problems and disorders (which are most often irreparable) contributing to the destruction of the family itself.

FGC method is presented and described in Poland as a pioneering activity, based on the conviction that family has an inner strength to overcome many problems without institutional interference from the outside (also help of the social workers). Yet, the Family Group Conference system is successfully used in many European countries. This model originated in New Zealand, and is grounded on the practice of decision making and resolving family disputes used by the Maori tribe. This community has worked out their own method of solving problems and conflicts - in the crisis situation the whole family gathers to discuss the reasons of the problem and its possible solutions. In New Zealand's legislation this method has been officially recognized in 1989, being part of the standard procedure in cases of domestic violence or neglect of children. Nowadays, there are about 5000 Family Group Conferences per month conducted in this country.

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Family Group Conference is a type of mediation that refers to respect for the autonomy, dignity, tradition and strength of a family struggling with a problem. The Conference is often described not only as a method but as a wide or systemic view on the function of family in the social assistance and support system. The essence of the method are the meetings in which possibly biggest number of family members take part; it is *de facto* that the method of dialogue, giving the family members a chance to meet, to listen to each other, to reconcile and to assume their responsibility for the problem. Each time the aim of the conference is the mutual help and support: integration of common efforts in the attempt to deal with the problem. Such integration provides the persons involved in the matter (preferably all close and extended family, even people significant for the child who may not be family members) with the opportunity to receive help, counsel, to undertake their own initiative to resolve the problem and to provide safety for the child. In the Family Group Conference the family is treated as "the expert", as its members are linked with one another by specific emotional bonds, they possess the proper information (not revealed to the persons from outside), they highly recognize the specific family structures, they identify with its inner dynamic and their way of making decisions. Thus, common activities allow family members to engage themselves in the diagnosis, designing, implementation and monitoring of the common plan – they provide a real chance to change the problematic situation in the family.

As it has been already mentioned, the Family Group Conference method is more widely used by public social assistance institutions, institutions of family and child help as well as by social support organizations (charities, NGOs, denominational organizations). What is important is that introducing this method is fostered by the EU financial mechanisms – subventions granted to the social assistance units and the poviats centers of family support (Powiatowe Centra Pomocy Rodzinie).

In this context it is worth mentioning the wider activities initiated and facilitated by the Ministry of Justice, which are aimed at the promotion and popularization of the alternative methods of resolving conflicts and disputes. The Ministry carries out the activities in two categories: informative, educational social campaigns and trainings on ADRs. Social campaigns for mediation have been carried out since 2010 and they use various media and communication channels. They are addressed to three groups of people:

- The widest: society as a whole (the goal is to raise awareness on out-of-court methods of conflicts and disputes resolution, the role of compromise, consensus, restorative justice etc.);

- The narrower group: parties in disputes or conflicts – court proceedings (in this case the aim is to make aware that mediation allows to achieve agreement by the parties themselves, that it does not need to be imposed by the judiciary body);
- The narrowest: group of professionals: judges, persecutors, mediators, police officers, probation officers and law corporations working directly with the institutionalized judiciary system. The aim of these activities is in this case “to increase the access to courts, encourage to resolve conflicts and disputes by using ADRs with the help of non-formal, out-of-court institutions” including social institutions, NGOs etc.

The activities pointed at the widest target group are worth commenting. The Ministry's first social campaign was realized under the title *You have a right to mediation* in 2010-2011. It involved activities of education-information character regarding ADR, publishing a handbook *Can only court handle a dispute? Mediation and amicable judiciary. I am a crime victim, what next?* With broad supportive actions: distribution of over 400 thousands leaflets, 3000 posters, TV and radio spots, distribution of over 2 millions informational brochures about mediation as well as activities for children and youth: organization of thematic contests, debates and meetings, and finally presentation of movies and documentaries. Most of the information and educational materials have been published on-line at the Ministry's website (<http://ms.gov.pl>) and in professional services. A year after the campaign, in August 2012 another, one-month long, nation-wide outdoor campaign has been launched for further promotion of mediation. The creations of the campaigns were exposed on billboards, so called *citylights* and within the Internet and press advertisements. Simultaneously, the logo of mediation was designed, the graphic image of intertwined hands with a signature saying *You have a right to mediation*.

The above mentioned activities are accompanied by other initiatives: realized in local environments by courts and institutions, in cooperation with external subjects and organizations, practitioners and representatives of science, the Human Rights Defender, the Children Rights Defender, mediation coordinators, social organization representing the mediators including the Association of Family Mediators and the Polish Center for Mediation. We can conclude that social campaigns and activities carried out by the Ministry's initiative, concurrently with promoting and financing the Family Group Conference method are visibly present in Polish public and media spaces. The activity of other units such as including social help and integration institutions, associations and social organizations

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as well as mediators themselves. In the context of low levels of social awareness on mediation and lack of rooted traditions of introducing these methods to the process of resolving social disputes, they are very important, extremely needed activities that require further development. It is up to us to support them, observe and monitor how they correspond with the real introduction of good mediation practices.

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