The challenges of the institutional framework of mediation in the Republic of Macedonia (part 2)

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Abstract
As mentioned in the previous part 1 of this paper the institutional framework of mediation in the Republic of Macedonia consists of few elements. While in the part 1 of the paper we analyzed the institutional framework through the status of the mediators, this part 2 is dedicated to the other elements of the mediation framework’s structure. The introduction gives some general information about these structures’ elements. The first part is dedicated to the the Chamber of mediators of the Republic of Macedonia. The second part describes the role of the Macedonian Ministry of Justice in the mediation. And the third part is dedicated to the Board for ensuring, monitoring and evaluating the quality of mediation. The Chamber of lawyers of the Republic of Macedonia, the Chamber of Notaries of the Republic of Macedonia and some other bodies like the Academy for Judges and Prosecutors and the chambers of commerce, have been intentionally omitted in this paper, because, when it comes to the mediation, the cooperation with them is also necessary, but it takes place on a different, not an initial level. The conclusion includes assessments of the analyzed questions and recommendations for the further treatment of the mediators in the Republic of Macedonia. Results in this paper are generated by analyzing official legal documents and political acts and using literature connected with the issue.

Keywords: mediation, Republic of Macedonia, mediators, institutional framework.

Introduction
The successful implementation and further development of mediation need assistance from the state. In this sense, an important element of the institutional framework of the mediation is state institutions which are connected with the mediation. This group includes various ministries and other bodies. In addition to the mediators, the other parts that constitute the institutional framework of mediation in the Republic of Macedonia are the following: the Chamber of mediators of the Republic of Macedonia, the Macedonian Ministry of Justice and the Board for ensuring, monitoring and evaluating the quality of mediation. Each of these parts has its own position, role and competencies related to the mediation. The basic legal act which determines their position, role and competences is the Law on Mediation of the Republic of Macedonia (Official Gazette of the Republic of Macedonia No.118/13, 148/15, 192/15, 55/16). Macedonian legal solutions place the greatest responsibility for the efficient functioning and development of mediation at the Ministry of Justice (hereinafter: the Ministry). The only association of mediators in the Republic of Macedonia is the Chamber of Mediators. The decisions in the Mediation Law of 2013 created an additional revolt among the mediators who acquired the status of a mediator in accordance with the Mediation Law of 2006. It should be borne in mind that the mediators in the Republic of Macedonia must be affiliated in a
professional association, as the most prominent body that can perceive the status and quality of the mediators and mediation, and be a guarantee of needed quality. Pursuant to the Law on Mediation, the quality of the mediation activities in the Republic of Macedonia is provided, monitored and evaluated by the Board for ensuring, monitoring and evaluating the quality of mediation. The case of the Republic of Macedonia shows that it is particularly important what concrete law stipulates for all of the mediation questions connected with the particular ministries and other state bodies.

1. The Chamber of mediators of the Republic of Macedonia

The Chamber of Mediators (hereinafter: KMRM or the Chamber) as a professional association of the mediators was introduced for the first time by the Article 28 of the Law on Mediation of 2006 (Official Gazette of the Republic of Macedonia No. 60/2006, 22/2007, 114/2009). It was founded on 22.10.2006, with headquarters in Skopje and had its own statutes, organs and was registered as a legal person. This first Chamber had 155 members - mediators, who held annual meetings and had chosen its bodies. The highest body of the Chamber was the Assembly of the Chamber, which consisted of all mediators. Other bodies of the Chamber were: the Supervisory Board, the Management Board, the President and the Ethics Council. The Chamber of Mediators had its own bodies and functions, but it was not sustainable in the terms of constant human and financial resources, because KMRM did not have stable sources of income (for example, the Chamber did not have any employee, but for its successful functioning mediators organized themselves and did that bona fides and pro bono).

Article 66 of the Law on Mediation of 2013, stipulates that the Chamber of Mediators established under the Law on Mediation of 2006 shall cease to function on the day of establishment of the Chamber in accordance with the new law. As a result of failure of the Ministry of justice to adopt a necessary legislation on the one hand, and the inability to form a new Chamber on the other, a legal vacuum was created, which directly affected on the practice of mediation on the already fragile system of mediation in the Republic of Macedonia. The basic acts on which KMRM operated were: the Statute adopted on 09.11.2006, the Program of KMRM (which was adopted annually) and the Code of Conduct for mediators.

The current Law on Mediation stipulates that the future Chamber will hold its election assembly and will elect its bodies under the provisions of the new law. This election assembly will be convened by the Minister of Justice and it will be chaired by the president of the Board until the election of the Chamber bodies. This new Chamber was established in 2017 and it is very early to comment its work. But, remains the fact that the work of the Chamber of the mediators is unknown to the wider public and experts, there are no public announcements by the chamber nor an available web site for its work.

Large part of the positive Law on mediation regulates the Chamber in detail (from Article 32 to the Article 45). Opposite to the all recommendations of the European Union, domestic and foreign experts’ opinions, and global experience, that legislation concerning mediation should be framework legislation, according to the proposer of the law (the then government of the Republic of Macedonia), such detailed legislative regulations will have positively reflection on functioning of the Chamber.

Law on mediation stipulates the obligation for the licensed mediators to be organized in the Chamber of Mediators of the Republic of Macedonia, based in Skopje. The Chamber can have offices in other cities in the country, according to the Statute of the Chamber. With its decisions, the law precludes the opportunity for the mediators to be organized in other associations than the Chamber. Also, this solution raises the question about the appropriate allocation of sufficient resources at the local level, needed for the functioning of KMRM, and in ultima linea for unfettered access to justice through this way of disputes resolving.

The Chamber is entrusted with the following public authorities: maintaining the Register of mediators; certifying the facts for which the Chamber keeps records; and determining the amount of the membership fee for members of the Chamber. Actually, the only fact for which Chamber keeps records is the content of the Register of Mediators. The maintaining of the Register for records of the mediation which ended with an agreement signed before the initiation of court proceedings is obligation for the Ministry of Justice. The maintaining of the Register of trainers and the Register of
accredited training programs for mediators is entrusted to the Board for ensuring, monitoring and evaluating the quality of mediation. With the new legislation series of responsibilities of the Chamber of mediators had been seized. So the Chamber is not responsible neither for the initial trainings of the mediators nor for the training for improvement of the skills of mediators. Also, the Chamber of mediators is not responsible for licensing of the mediators.

According to the proposer of the Law on Mediation, the big news is the introduction of the Ethical Council as a new body of the Chamber, which is responsible directly to the Assembly of the Chamber. Such claims of the law proposer are not correct, because the Ethical Council as a body existed within the past Chamber of mediators. Also, it should be noted that the Law on Mediation of 2013 contains unconstitutional, discriminatory provision, because it provides that as a member of the Ethics Council can be elected only persons older than 35 years of age at a time when the election takes place. It is unclear why the legislator accepted this solution.

The Ministry of Justice supervises the work of the Chamber.

In our opinion, Macedonian legislation regarding the mediators and their organization are not in accordance with the direction: mediation in the Republic of Macedonia to be developed through the private sector, and in the same time these law solutions do not mean that mediation is organized through the public sector. Namely, the law does not provide existence of programs for mediation related to the court and conducted by judges, court staff or mediators who are part-time employees in a court.

2. Ministry of Justice of the Republic of Macedonia

A large number of legal powers connected with the mediation are given to the Ministry of Justice. It is responsible for efficacious functioning and development of mediation in the Republic of Macedonia. The government in May 2012 adopted the Action Plan for the development of the mediation for the period 2012 to 2014, which was conceived as a means for overcoming the problems in this area. The plan defined five major objectives in terms of reviving the concept of mediation in the Republic of Macedonia through: increasing the quality of services of mediation; promotion and implementation of the legal and institutional framework for mediation; raising the capacity and role the Chamber of mediators; increased coordination among all institutions involved in the mediation as well as information and communication with the public. The responsibility for implementation of these activities was on the Ministry of Justice.

The practice so far has shown that strengthening the role of the Ministry of Justice in the formulation, monitoring and evaluation of policies related to the mediation in the Republic of Macedonia, does not guarantee the sustainability of development efforts for the mediation in the long term. The Ministry of Justice does not include all relevant institutions in activities related to mediation, especially mediators, which can be clearly seen through a series of examples from reality, and the most striking example is the process of adoption of the Law on Mediation in 2013. Namely, in the process of adoption of this law, mediators and the Chamber of mediators, the only professional association of mediators in the Republic of Macedonia, which at the time had 166 members, were not invited to participate in the creation of this new legislation. They were not even informed of the intention for adopting a new law on mediation. The mediators were brought into unequal and even humiliating position in relation to the other stakeholders of the justice system, by consuming essential powers of the Chamber of mediators and transferring them into the hands of the Ministry of Justice.

The Ministry of Justice is directly responsible for the inability for implementation of the present Law on mediation. Namely, the Ministry delayed the enactment of by-laws necessary for function of the mediation which had to be taken within four months from the date of entry into force of the law (Article 65 of the Law on mediation), i.e. no later than April 2014. The Ministry of Justice also

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1 Intrigued by this legal decision I had personal interviews with several psychologists and psychiatrists in terms of whether the age of 35 has any influence on the ethical development of a person and personality traits. I was told that such a qualification is not confirmed neither by the science nor by the practice and ethics of every person depends on his or hers personal characteristics and development, not on age.
delayed taking the necessary constituent activities: within one month from the date of entry into force of the law the Board for ensuring, monitoring and evaluating the quality of mediation should have been constituted. Instead, the Board was constituted nine months later, in September 2014. Then, within two months from the date of entry into force of the law, the Board should had to form professional and examination committees; within nine months after the establishment of the Board, the first mediators’ exam should had to be organized; within ten months after the establishment, the Board should had to commence the procedure for licensing of mediators. Instead, the Ministry of Justice, the first mediators’ exam scheduled even on 01.02.2016 and up to the middle of February 2016 exam was not implemented. Moreover, the mediators’ exam is scheduled and implemented without the minimum legal conditions which are necessary i.e. without organized trainings for mediators. In this sense, it should be noted that the Ministry itself concluded that this system is created to prevent the entry of persons who do not have basic features needed for mediator (Evesti.mk. 12.09.2014) and insists on the existence of a mediation system based on security, monitoring and evaluating the quality of work of mediation. On the other hand, neither the general public nor the experts have any insight into the work of the Board. Also, its decisions are not publicly available.

Within the Ministry of Justice there is a Sector for supervising the work of bailiffs and notaries, who also supervises the work of mediators; implementation of the Law on Mediation; the bylaws in the field of mediation; the trainings of mediators and maintains the Register of Mediators (we must observe that the web site of the Ministry of Justice, in the part of the Department for supervision of mediators Register of mediators is wrongly registered as a list of mediators).

3. Board for ensuring, monitoring and evaluating the quality of mediation

According to the Law on Mediation, the quality of work of mediation in the Republic of Macedonia is provided, monitored and evaluated by the Board, and its authorities are set accordingly this responsible task. In this sense, legally is determined that the Board shall perform the following activities: the fulfillment of the conditions for issuing a certificate of completion of training for mediators; it forms the basis of questions on mediators’ exam; sets the test sessions and the manner of taking the mediators’ exam, organizes and conducts the examination and issues certificate for passing the exam; issues licenses for mediators and trainers of mediators; establishes the conditions and procedures for issuing the accreditation of training programs for mediators and accreditation of training programs for trainers of mediators; creates a system of monitoring of the actions of mediation in the training of persons attending training for mediators; maintains the Registers of trained mediators, trainers of mediators and accredited training programs for mediators; establishes the methodology and manner of monitoring and evaluation of the quality of work of mediators, trainers and the implementation of accredited training programs for mediators; monitors and evaluates the quality of the work of the mediators, trainers and the implementation of accredited training programs for mediators and brings decisions for extension or revocation of licenses or accreditation, based on the results of the interim evaluation; reviews and decides on complaints of the work of trainers and of the implementation of training programs for mediation and other duties prescribed by the law.

The Board forms committees from its members. If necessary, the Board committees may engage external experts. A professional and administrative work for the Board is done by the Ministry of Justice. The experience of other countries in the area of mediation shows that in the conditions of existence of professional associations of mediators, there is no need for the existence of a body such the Board is, because the functions assigned to the Board can be made by the Chamber of mediators. The Albanian Law No.10 385 from 24.02.2011 and Serbian Law on conciliation from 2014 have the similar solutions, but in the mentioned laws’ solutions, the Ministry of justice or commission established by the Ministry, is responsible for issuing and revoking licenses, while the trainings of mediators are performed by the associations of mediators.

The law provides that the Board is composed of ten members appointed by the government, in the following composition: one member proposed by the Chamber from the mediators listed in the Registry of Mediators, one member on the proposal of the Judicial Council of the Republic of Macedonia from the judges of the same, one member on the proposal of the Bar Association of
Macedonia from the lawyers, one member on the proposal of the Inter-university conference from the professors of the universities, one member on the proposal of the Chamber of Psychologists of Macedonia from the graduated psychologists with a special license for psychological activity, one member proposed by the Ministry of Justice from the employees who work on issues of mediation, one member proposed by the Ministry of Labor and Social Policy from the staff who work on issues of mediation, one member proposed by the Ministry of Economy of the employees who work on issues of mediation, one member from the chambers of commerce in the country and one member on the proposal of the Association of Consumers of the Republic of Macedonia. From these members of the Board, the Government appoints Chairman of the Board who represents the Board and performs other duties prescribed by law (Article 57 paragraph 1 and 2 of Law on mediation). Board members are appointed for a period of four years. A person cannot be appointed for a member of the Board more than twice in a row. Chairman of the Board is appointed for a four-year non-renewable. The mandate of the member of the Board shall cease upon expiration of the time for which it is named as well as in the following cases: upon personal request, when the Board determines that the member is unable to perform duties for more than six months, or when it is determined there is a conflict of interest pursuant to the law. It is unclear why the government does have jurisdiction to elect the board members. In our opinion it is more appropriate when the quality of mediation is ensured by the mediators and professional associations of mediators. It can be concluded that the Board has powers very important for mediation and mediators. In this sense an analysis of the composition of the Board and the manner of their appointment shows that, it is quite possible situation the quality of mediation to be evaluated by the persons who may not heard about the mediation as a way of resolving disputes.

The Law on mediation stipulates that, the working of the Board is closely regulated by the Rules of the Board, which needs the prior consent of the government (Article 59, paragraph 2 of the Law on mediation). Although the Board is functioning from September 2015, until now the Rules are not available even for the mediators. Just like the previous one, this legal solution gives an impression as legislator forgot that mediation in Macedonia has a private nature. There is no doubt that successful implementation of mediation needs assistance from the state, but in the case of the Republic of Macedonia, too many competencies are given in the hands of the government.

The legislator states that the existence of this separate body and especially licensing of the mediators is in accordance with the requirements of Directive 2008/52/EU (Official Journal of the European Union L 136/3 of 24.5.2008) of providing quality of mediation, which is not quite true because this Directive does not know the licensing of mediators, but requires the state to provide quality control system of mediation, with emphasis on compliance with the Code of conduct for mediators and organizations offering mediation services (Article 4 of the Directive 2008/52/EU).

Funds needed for the Board are provided by the State Budget and from own revenues (funds that applicants would pay such necessary expenses for the examination, recognition of training completed abroad and issuing licenses or accreditations).

Conclusion

It can be concluded that the institutional framework and its placement in a specific legal system is very important for the development of mediation. As regards to the institutional framework of mediation in the Republic of Macedonia, despite the remarks made in the analysis above, we can underline the following main points: we believe that the organization of mediators should be seen as the main guarantor of mediation as a profession. Other institutions related to the mediation should realize that they should bear substantial responsibility in ensuring the quality of mediation. KMRM and Ministry of justice need to work as partners and in this regard to develop practices aimed at maintaining standards of mediation; development of training for trainers and mediators; providing specific courses for judges, lawyers and all other stakeholders; and increasing public awareness of mediation. Together they should work with international groups and local institutions in order to continuously develop the legal framework and standards for mediation in the Republic of Macedonia.
Through all the processes, needed fact is that organizations of mediators are essential for the success and evolution of mediation and other ADR processes in the country.

Generally, we can conclude that according to the Macedonia legislation, the key institution for the establishment of an effective system of mediation in the Republic of Macedonia is the Ministry of justice. First of all, it is responsible for the following two things: the timely adoption of appropriate laws, and bylaws and because it has a decisive role in the establishment and maintenance of the institutional framework of mediation. The general impression is that mediation and especially mediators do not receive their rightful place in the strategic plans and politics of the Ministry of justice. In the very near future this should be repaired.

As to the Board, taking into account the overall social conditions in the Republic of Macedonia, the dependence of funded by financiers, and even more, if the legislature had intention to create a functional system for mediation, which will be fully in the spirit of getting closer to the European Union, such a solution should not be permitted. In this regard, we believe that if the existence of an external body that performs accreditation and supervision of mediation is “must to” then in its formulation and function should be borne in mind the solution present in the Romanian mediation law (Act No.192/2006 on mediation and organization of the mediator profession, Official Journal from 22 May 2006) regarding this issue. According to the previously analysis, the conclusion is that the existence of such a body is an unnecessary administrative and financial burden for the system of mediation in the Republic of Macedonia.

And finally, coordination of the institutions involved in mediation and mutual consultation of the stakeholders is neither on the desired nor on the required level. Also, the transparency of the activities of the analyzed institutions, related to the mediation and mediators, is on a very low level. It is obvious that in the process of development of the mediation in the Republic of Macedonia, the concentration of real power is in the hands of the state’s institutions, but strong and competent leader for needed activities is not visible yet. There is still an obvious need for installing a regular mechanism for consultation and coordination between the Ministry of Justice, the Chamber of mediators, the courts, the Academy of Judges and Prosecutors and the chambers of commerce, until the creation of a natural habit for such communication and coordination. This interaction is necessary for making the right decisions that will lead to the creation of a sustainable system for the mediation in the Republic of Macedonia.

Generally, it can be concluded that in the Republic of Macedonia there is still no critical mass of stakeholders, which can help revive the mediation process.

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