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**Positioning Mediation in Bulgarian Justice System: the New
Mediation Act Significance**

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The year 2004 ended happily for mediation supporters in Bulgaria, when on December 2nd, the Bulgarian Parliament finally adopted the long-awaited Mediation Act. The Act was promulgated in State Gazette N 110 on December 17th, 2004 and enforced on December 20th, 2004. Given that the path towards the adoption of this law was wrought with difficulties, its' final passage represents a huge success.

Although in the last decade mediation in all fields (civil, labour, penal matters etc.) has had numerous proponents in academic circles and non-governmental organizations (NGOs), and has won recognition in wider society, it only began to attract the attention and support of policy makers and members of Parliament rather late in the day, and not without a push from outside. However, the Government has adopted a Strategy for Judicial System Reform representing *conditio sine qua non* (a prerequisite) for Bulgarian membership to the European Union. A notable point in this strategy has been the establishment of a whole system for alternative dispute resolution (ADR). Almost at the end of the mandate of the 39th National Assembly, and only following great efforts, the Mediation Act was eventually approved as a first step in this direction. This was essential for the future of mediation as Bulgaria is a country belonging to the continental law system and the existence of a legal framework is of vital importance for the legitimacy of mediation.

One of the main reasons for delays in implementation of the Strategy was the resistance encountered from some legal operators. There remains considerable opposition within the judiciary toward alternative dispute resolution methods, based on a fear that legal practitioners will have to surrender some of their professional territory and some of their practical power. Indeed, victim-offender mediation and the other related restorative justice (RJ) practices are considered by some to directly affect the sovereignty of the state and its monopoly in matters of justice, and threatening the lawyers' preserved interests. Opinions were expressed that ADR and RJ are "shadow justice", "second class justice" or a denial of justice. Fortunately, this reluctance to engage with mediation law has now largely been overcome.

The Resolutions of the UN on restorative justice practices, the Recommendations of the Council of Europe on mediation in penal, civil, family and administrative matters, together with regular progress reports of the European Commission on judicial reform (leading up to Bulgarian accession to the EU), have helped to accelerate the process. However, the draft-law was actually developed exclusively by academics and a number of NGOs, who had already

done considerable research work¹ and started pilot projects and training, within a legislative vacuum, in the face of resistance from many legal professionals. While developing the draft, the experts worked entirely on a voluntary basis over a period of several months. The contributions and support received from the American Bar Association Central European and Eurasian Law Initiative and the European Forum for Victim-Offender Mediation and Restorative Justice, should also be recognized.

The Mediation Act is an enabling, organizational act - it allows mediation practice to enter into many areas of the Bulgarian legal system. According to article 1, the Act recognizes mediation as a legitimate alternative method for resolving legal and non-legal disputes. Article 3 defines the subject matter for mediation. Mediation can be used in civil, commercial, labour, family and administrative disputes; disputes related to consumer protection rights and other disputes involving natural and/or legal persons. Mediation may be used also in cases provided under the Penal Procedure Code (victim-offender mediation).

The Act accepts the broadly used definition of mediation as a voluntary and confidential procedure aimed at out-of-court dispute resolution involving a third party – a mediator, assisting the parties in dispute to reach an agreement (art.2).

In Chapter two the fundamental principles of mediation – voluntariness, equal opportunities, neutrality, impartiality and confidentiality - are stipulated.

Chapter three is dedicated to the status of the mediator. As a new actor within the Bulgarian legal arena, the position of the mediator receives due attention from the legislator. According to article 3 the mediator is a natural person, who has legal capacity, has not been convicted of a crime of common nature and is inscribed in the Unified Register of Mediators to the Minister of Justice (under construction). He should also meet the requirements of the Training Standards for Mediators. The mediator may undertake a mediation case only if they are in a position to guarantee their independence, impartiality and neutrality and must withdraw in the event of circumstances likely to give rise to doubts as to independence, neutrality and impartiality. Persons carrying out activities in the judiciary may not conduct mediation. It is explicitly stated that the mediator may not provide legal advice. The mediator shall not bear responsibility if the parties do not reach an agreement and shall not be liable for subsequent failure of an agreement reached by mediation. The mediator shall perform their duties in good faith and in compliance with the law and morals as well as with the Procedural and Ethical Rules of Conduct for Mediators.

Chapter four of the Act is devoted to the mediation procedure. The legal regulations are well-developed. Mediation may commence on the initiative of the parties to the dispute and any party may make a proposal to refer the dispute to a mediator. A proposal to resolve the dispute through mediation may also be made by the court or any other competent body dealing with the dispute.

The mediation procedure is conducted by one or more mediators appointed by the parties. The parties shall take part in the procedure in person or may be represented. Attorneys and other

¹ **Chankova, D.** Victim-Offender Mediation, Sofia, 2002; **Stefanova, M.** Beyond Themis. Legal Aspects of Mediation in Bulgaria, Sofia, 2002; **Manev, M.** Mediation and Civil Procedure, Sofia, 2004

experts may also take part. Before the beginning of the procedure, the mediator shall inform the parties about the nature and consequences of the mediation process and will require the parties' oral or written agreement to participate in the mediation. The mediator shall disclose any circumstances likely to give rise to reasonable doubts as to their absolute impartiality and neutrality.

The procedure itself shall be aimed at clarifying the subject matter of the dispute, determining mutually acceptable options for resolving the dispute, and outlining a possible agreement. In taking the steps indicated above, the mediator may have caucuses with each of the parties with due regard to preserving equal opportunities for each party to participate in the procedure.

Chapter five, the final chapter, gives laconic regulation to the agreement, for which content and form shall be defined by the parties. The form might be oral, written or written with notary certification. The written agreement lists the place and date of conclusion, the parties' names and addresses, the issues or matters in dispute, what the parties have reached agreement upon, the mediator's name and the signatures of the parties. The agreement shall be binding upon the parties and may not be invoked against third parties who were not part of the mediation procedure. The agreement shall bind the parties only within the limits they have agreed upon and may not contravene the principles of law and morality.

The Act does not contain provisions related to the organizational framework of mediation. It provides only that mediators may associate for the purpose of performing their activity. This legislative vacuum leaves substantial scope for grass-root initiatives and the involvement of NGOs. At the same time, non-participation by state institutions and inadequate funding could put at risk timely establishment of a mediation infrastructure, undermining the credibility of mediation within society generally. In a relatively politically immature, paternalistic society – and it may be argued Bulgaria is such a society - the role of the state tends to be overestimated and the confidence afforded to other social actors, such as NGOs, can remain rather low. This can lead to the marginalisation of what can appear to be comparatively novel concepts such as mediation - and consequently a lack of referrals. It is to be hoped that this will not be the case in Bulgaria in future.

Whilst mediation in civil, commercial, labour and family law can be immediately applied even without extra legislative interventions, mediation in penal matters cannot yet be practiced. Further amendments to the Penal Code and Penal Procedure Code will first be necessary. Let us believe that victim-offender mediation will find its due place in the new Penal Procedure Code, which draft is submitted to the new Parliament and which adoption is a pre-condition for Bulgaria's further steps to the EU.

As the Mediation Act is itself relatively short, a number of by-laws were issued in order to create all the necessary pre-requisites for the implementation of mediation in practice. The Training Standards for Mediators, Procedural and Ethical Rules of Conduct for Mediators and Rules Pertaining to the Unified Register of Mediators have been recently approved by the Minister of Justice responsible for the implementation of the law. First steps for creating of an umbrella organisation of mediators have been undertaken. Many universities and NGOs are preparing training programs for mediators. However, it is certainly a time of great excitement and promise for mediation in Bulgaria.