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FROM MANDATORY CONCILIATION TO MANDATORY MEDIATION IN FAMILY DISPUTES INVOLVING CHILDREN: NORTH MACEDONIA IN LIGHT OF EUROPEAN HUMAN RIGHTS STANDARDS

Abstract

This article examines the implications of eventual mandatory mediation in family disputes involving children in North Macedonia, assessed against European human rights and children rights standards. It argues that the existing institute of (re)conciliation (*мирење*) is outdated and fails to meet European requirements. Introducing a mandatory mediation session in such disputes could increase mediation uptake, de-escalate conflicts, and better safeguard children's interests. However, mandatory mediation also raises concerns regarding voluntariness, access to courts, and procedural fairness. Through a critical review of international human rights treaties and European legal instruments, alongside national regulation, including the Law on Mediation, the Law on the Family, and the family-related provisions of the Draft Civil Code, the article assesses whether mandatory mediation can effectively "revive" mediation while also advancing the best interests of the child and respecting fundamental rights more broadly.

Key words: conciliation, mandatory mediation, family disputes, children's rights.

I. Introduction. Conceptual foundations of mandatory mediation in family disputes involving children

Alternative dispute resolution (ADR), including mediation, has been a political priority of the European Union for some time due to its cost-effective nature for both the parties and the state.[1] Mediation is generally understood as a voluntary, confidential process in which a neutral third party facilitates communication between disputing parties to help them reach a mutually acceptable agreement. Almost all mediation definitions include three basic elements: 1. *Voluntary engagement of the disputing parties*, 2. *Confidentiality of a neutral third party* and 3. *Purpose - reaching a mutually acceptable agreement* (not mandatory).[2]

The voluntariness of mediation, in contrast to authoritative litigation, is often considered a defining feature, providing autonomy, free consent, and choice rather than obligation. As such, it

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[1] See all the documents regarding mediation of the European Commission for the Efficiency of Justice (CEPEJ) and the European Parliament listed infra, or more precisely: European Parliament, Committee on Legal Affairs, *Draft Report on the Implementation of Directive 2008/52/EC of the European Parliament and of the Council –'The Mediation Directive' (2016/2066/(INI))*, 7.3.2017, pg. 8 and the European Justice web - https://e-justice.europa.eu/topics/taking-legal-action/mediation_en?utm_source=chatgpt.com.

[2] Including the definition from the infra Law on Mediation, 2021 (art.3 – a.) of the Republic of North Macedonia: "Mediation" is a form of facilitation and a method of resolving the disputes listed in Article 1 of this Law, arising between two or more parties, whereby they are enabled to settle the dispute through conciliation, with the assistance of a neutral third party - a mediator or mediators - with the possibility of reaching a mutually acceptable written agreement.'"

is the most contested aspect of mandatory mediation. On one hand, voluntariness is seen as a *conditio sine qua non* - an essential characteristic of mediation as a non-obligatory method of dispute resolution; on the other hand, it is regarded as a barrier to wider use (because it is sometimes difficult to bring opposing parties into constructive dialogue). Some authors even argue that the term "mandatory mediation" is inherently contradictory and an as such, an oxymoron.[3] However, they contend that when parties are free to opt-out without being required to reach a settlement and still retain full access to the courts, the mandatory element does not undermine the voluntary nature of mediation.[4] In such cases, the right of access to court is postponed rather than denied.[5] Conversely, if mandatory mediation is imposed as the sole method of dispute resolution, it clearly infringes that right. Critics argue that even introducing a preliminary mandatory mediation session may restrict direct access to justice. However, the right to access courts is not absolute and may be subject to limitations that are necessary, proportionate, and effective in a democratic society. [6] Accordingly, models of mandatory mediation designed to promote the use of mediation, without imposing significant additional costs, are not considered contrary to article 6(1) ECHR by the ECtHR or ECJ. Nonetheless, evidence indicates that even a mandatory initial session does not significantly increase the use of mediation. Low success rates suggest that parties often treat mediation as a formality or a "stepping stone" to litigation, which remains the more familiar route for resolving disputes.[7]

Based on the extent of compulsiveness in the conceptualization of mediation, the categorization of mediation models in Europe recognizes: full voluntary mediation, voluntary mediation with incentives and sanctions, a required initial mediation session, and full mandatory mediation. The two models in between could be considered as a 'mitigated form of mandatory mediation', balancing encouragement and autonomy. The voluntary mediation with incentives and sanctions would be closer to the full voluntary mediation promoting choice mostly by financial reliefs, while the required initial mediation session would impose possible sanctions in the eventual court proceedings if the party does not attend this initial session in good faith. The later should furthermore provide an opportunity for the parties to easily opt-out of the mediation process at the end of the initial mediation session without incurring additional sanctions or other harmful consequences during the court proceedings. On the other spectrum of full voluntary mediation as it was initially conceptualized is the full mandatory mediation model which implies that parties are obliged to attend and pay for the full mediation process as a prerequisite for proceeding to court if they don't reach an agreement.[8]

Confidentiality of a third neutral party fosters trust in the mediation process, enabling disputes to be resolved outside personal conflicts and emotional tensions, which are particularly pronounced in family law cases. Mediation may involve a single mediator or a co-mediation team, typically comprising a psychologist to address emotional burdens and a legal professional to

[3] Zoroska Kamilovska T., Rakocevic M., "Mandatory Initial Mediation Session: Evaluating the Effects of Compulsion in Dispute Resolution – The Case of North Macedonia" in Bungenberg et al (eds), *Alternative Dispute Resolution in the Western Balkans Trends and Challenges*, Springer 2025, pp. 193-209, pg. 200.
[4] Ibid., pg. 200 and 201.
[5] Ibid., citing Winston (1996), pp.190–92, Hutchinson (2010) pg. 91, cited according to Quek (2010), pg. 486.
[6] Radanova Y., "Forms of Mandatory Judicial Mediation in the Context of the Right to Justice", *Contemporary Law*, No. 3, 2022. While elaborating on the critics too, the author argues that certain models of mandatory mediation do not necessarily infringe upon the right of access to justice. See also Radoja K., "Obvezno mirenje – Osvrt na rješenja iz komparativnog i hrvatskog prava", *Pravni Vjesnik*, Vol. 31, No. 2, pp. 111–130, 2015, pg.115,.
[7] Op.cit. Zoroska Kamilovska and Rakocevic, 2025, pg. 202 and 203.
[8] Ibid. pg. 196 and 197.

explain the legal implications of any agreement, often of opposite genders to ensure balanced representation, for example in divorce proceedings.[9] Given that mediators may be psychologists, or a team comprising a lawyer and a psychologist, and that children have the right to express their views in proceedings affecting their interests (art. 12 CRC), mediation in family disputes involving children offers greater flexibility and adaptability than litigation. It enables parties to reach tailor-made agreements, whether on joint property, maintenance, custody, or other matters that better reflect their specific needs. Among civil disputes, family cases, particularly those involving children are often the most suitable for mediation, as it is crucial that outcomes minimize parental conflict during and after divorce.[10] Divorce litigation rarely addresses the psychological consequences for children, especially when custody is granted to one parent and the other becomes merely an occasional visitor. Court proceedings in such matters frequently leave emotional wounds unresolved, perpetuating anger and causing lasting harm not only to former partners but, more importantly, to parent–child relationships.[11] Numerous studies have documented the negative effects of parental alienation behaviors by separated parents.[12] Therefore, a trustworthy person that could neutralize conflict is substantial for their emotional well-being even after the separation. For that purpose, various family mediation models exist: (1) agreement-focused; (2) cognitive/problem-solving; (3) therapeutic; (4) transformative; (5) humanistic; and (6) narrative approaches.[13]

The ultimate goal is for the parties to reach a *mutually acceptable agreement*. If an agreement is not reached, the dispute may proceed to court. Some systems require a court order to enforce mediated agreements, while others rely on the parties' compliance, with contractual remedies available in case of breach. In family disputes involving children, it is advisable for the court to review any agreement to ensure that it serves the best interests of the child. Accordingly, mediated agreements are generally submitted to the court for approval. The court often seeks an opinion from the relevant child welfare authority (e.g., a social work center). If the court determines that the agreement is contrary to the child's best interests, it is not bound by it and may issue its own decision. Even though some authors criticize judicial review of mediated agreements,[14] it remains strongly advisable for courts to assess them in order to ensure that the best interests of the child are fully upheld.

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[9] As for instance in Austria - Poretti M., "Od Mirenja do Medijacije u Obiteljskium Sporovime – Uskladgivanje Hrvatskog Obiteljskog Zakonodavstva o Mirnom Rjesavanju Obiteljskih Sporova s Pravom EU-A", *Zbornik Pravni fakuletet Sveucilista*, RIj, V. 36, br. 1, 2015, pp. 341-380, pg. 364.

[10] Mickovic D., Kockovska K., "Mediation in Family Disputes in the Republic of Macedonia", *Iustinianus Primus Law Review*, Vol. 3, No. 2, 2012, pg. 2.

[11] For which the country already lost several cases in front of the ECtHR, such as Mitovi v. FYRM and Oluri v. North Macedonia. See more on their elaboration here: Ignovska E., "The Family Law of the Republic of North Macedonia through the Prism of the European Convention on Human Rights", *Iustinianus Primus Law Review* Vol. 11, Special issue, 2020.

[12] See more for instance in: Hune B. et al., *Examining the Prevalence and Impact of Parental Alienating Behaviors (PAB's) in Separated Parents in the UK* , University of West London, 2024 < https://www.uwl.ac.uk/sites/uwl/files/2025-01/Alienating%20behaviours_EDIT.pdf >. The author of this paper wants to note that according to some other authors the concept of PUB's should be avoided by family courts in light of the best interests of children in custody disputes. See more in Mercer J., Drew M (eds.), *Challenging Parental Alienation. New Directions for Professionals and Parents*, Routledge, 2022.

[13] Mickovic and Kockovska, 2012, pg. 7, citing Pali B., Voet S., Family Mediation in International Family Conflicts – the European Context, KU Leuven, 2007, pg. 85.

[14] Op. cit. Poretti M., 2015, pg. 352, 358, 360.

II. Human rights and children's rights standards applicable to mandatory mediation

Earlier family related, including mediation regulations' attempts were primarily about voluntary mediation, i.e. amicable settlement,[15] while the later started to include provisions entitling the judicial authority to take all necessary measures to encourage mutual agreements, especially when children are involved.[16]

In Europe, several legal mechanisms are brought for purposes of regulating ADR more broadly or mediation more narrowly.[17] The *EU Mediation Directive (2008/52/EC)*, which is a more general regulation of mediation in Europe though limited to civil and commercial matters, underscores the principle of voluntariness (6 and 13), but also encourages countries to indulge in extra-judicial procedures (1) as a way not to circumscribe but to simplify and improve access to justice (3). The Directive's primary concerns are actually cross-border disputes for purposes of ensuring free movement of persons (6). However, it clearly states that nothing should prevent member states from applying such provisions also to internal mediation processes (8). The Directive has restrictions on family law cases regarding rights and obligations on which the parties are not free to decide on themselves under the relevant applicable law (10), for instance to avoid maintenance etc. It further stipulates that national legislations are free to decide if they will introduce mandatory mediation or subject it to incentives or sanctions provided that such legislation does not prevent parties from exercising their right of access to the judicial system (14 and art 2. 1 (c) and art. 5.2.). The Directive makes it clear that mediation should not be regarded as a poorer alternative to judicial proceedings in the sense that compliance with agreements resulting from mediation would depend on the good will of the parties. On the contrary, it urges member states to ensure that the parties to a written agreement resulting from mediation can have the content of their agreement made enforceable, if it is not contrary to the law (19 and art. 6). When it comes to cross-border family law disputes, the agreement has to be enforceable in all the countries involved and not used as a way to circumvent law (21).

Especially important for family disputes is the earlier Council of Europe's *Recommendation No. R (98)1 on family mediation* that encourages member states to promote mediation but maintains its voluntary nature (II. a). However, it allows states to establish methods in individual cases to provide relevant information on mediation as an alternative process to resolve family disputes (for example, by making it compulsory for parties to meet with a mediator), and by this

[15] For instance, cross-border family mediation is promoted in 1980 Hague Convention on Child Abduction - art.7 (c): "Central Authorities shall…take all appropriate measures (…) c) to secure the voluntary return of the child or to bring about an amicable resolution of the issues"; Regulation Brussels II bis (25); "Central authorities should cooperate both in general matter and in specific cases, including for purposes of promoting the amicable resolution of family disputes, in matters of parental responsibility.."; or 1996 Hague Child Protection Convention, art.31 (b)): "The Central Authority of a Contracting State, either directly or through public authorities or other bodies, shall take all appropriate steps to (…) b) facilitate, by mediation, conciliation or similar means, agreed solutions for the protection of the person or property of the child in situations to which the Convention applies".

[16] The European Convention for the Exercise of the Rights of the Child, 1996 also the European Convention on Contact concerning Children from 2003 ask from the judicial authorities to take all necessary measures to encourage parents to reach mutual agreement over the issue of maintaining contact with the child by mediation.

[17] Commission of the European Communities, *Green Paper on Alternative Dispute Resolution in Civil and Commercial Law*, Brussels, 19.4.2002, COM(2002) 196 final; European Parliament and the Council, *Directive 2008/52/EC on Certain Aspects of Mediation in Civil and Commercial Matters (Mediation Directive*) of 21 May 2008; Committee of Ministers, *Recommendation No. R(98)1 on Family Mediation*, adopted on 21 January 1998; Committee of Ministers, *Recommendation (2002)10 on Mediation in Civil Matters*, adopted on 18 September 2002.

enable the parties to consider whether it is possible and appropriate to mediate the matters in dispute (art. VI. B.). This Recommendation recognizes the growing number of family disputes, particularly those resulting from separation or divorce, and their detrimental consequences of conflict for families and the high social and economic cost to states (2). In such circumstances, it is of outmost importance to ensure the protection of the best interests and welfare of the child, as enshrined in international instruments, especially taking into account problems concerning custody and access arising as a result of a separation or divorce (3). It also acknowledges the special characteristics of family disputes, namely: - the fact that family disputes involve persons who, by definition, will have interdependent and continued relationships.[18] For these purposes, the Recommendation emphasizes the potential of the family mediation to: improve communication between members of the family; reduce conflict between parties in dispute; produce amicable settlements; provide continuity of personal contacts between parents and children; lower the social and economic costs of separation and divorce for the parties themselves and states and reduce the length of time otherwise required to settle conflict (7). Even though, the Recommendation allows for discrepancy of the States to determine the specific issues or cases that may be covered by family mediation, in general, it promotes its application to all disputes between members of the same family, whether related by blood or marriage, and to those who are living or have lived in family relationships as defined by national law (art. 1. a). It urges States to recognize the autonomy of mediation and the possibility that mediation may take place before, during or after legal proceedings (V. a.). Regarding the achieved agreements via mediation, the Recommendation encourages states to facilitate an approval by judicial authority or other competent authority where parties request it, and provide mechanisms for enforcement of such approved agreements, according to national law (IV).

A later *Council of Europe Recommendation 1639 (2003)* deals with family mediations with a focus on equality and balance of power between mediated parties, especially when domestic violence or another type of spousal abuse is involved (art. 4 and 7.5). It affords not only equality among genders if one party dominates over the other in any way whatsoever, but also recognizes children's rights, especially their right to be heard in the mediation process because that is found to be genuinely in their best interests (art. 6). It also shows sympathy and concerns to ensure that court-ordered mediation does not become a less expensive, fast-track option reserved for those who cannot afford traditional judicial procedures or a "poor man's justice" (art. 4). For these purposes, it promotes voluntary mediation (mandatory referral to mediation should be prohibited art. 7.1.).

Another practical important instrument for implementation of mediation in Europe is the *Mediation Development Toolkit*, by the European Commission – CEPEJ.[19]

Regarding children's rights, the *Convention on the Rights of the Child (CRC)* engraved the "golden standard" that a child has to be enabled to express views, but with parental consent, according to its maturity in all judicial, administrative, and ADR proceedings. The child has to be heard in a proceeding affecting him/her.[20] The child's capacity to make own opinion is not its own

[18] In this regard, it refers to the European Convention on the Exercise of Children's Rights 1996, and in particular to Article 13 which deals with the provision of mediation or other processes to resolve disputes affecting children (5 and 6).

[19] European Commission for the Efficiency of Justice (CEPEJ), *Mediation Development Toolkit*, CEPEJ(2018)7REV - https://rm.coe.int/mediation-development-toolkit-ensuring-implementationof-the-cepej-gui/16808c3f52.

[20] UN Committee of the Rights of the Child, *General Comment No. 12 (2009), The Rights of the Child to be Heard,* < https://digitallibrary.un.org/record/671444?v=pdf >, art. 52.

burden to prove, but on the one who claims the opposite.[21] For the UN Committee on the Right of the Child, a child can express its own opinion in many different ways via verbal or not verbal communication, even at very young age (throughout play, body language, facial expression, drawing, painting etc.).[22] The child may decide to use or not its own right and it cannot be manipulated or pressured, meaning that it is their right and not their duty.[23] The responsibility is on the state to make the realization of the right happen, while the child has to receive all the necessary information to be enabled to make a decision according to its own best interests.[24] The child should also decide how to be heard, while attention has to be payed if he/she needs representation or a guardian, especially if there is a conflict between child's interests and the interests of one/both of the parents.[25] The child should be informed that he/she could always opt-out from the hearing.[26] The UN General Comment provides that those responsible for hearing the child have to ensure that the child is informed about the right to express own opinion in all matters affecting him/her and in any judicial and administrative decision-making processes and about the impact that his or her expressed views might have on the outcome. Furthermore, the child must receive information about the option of either communicating directly or through a representative. She or he must be aware of the possible consequences of this choice. The decision-maker must adequately prepare the child before the hearing, providing explanations as to how, when and where the hearing will take place and who the participants will be, and has to take account of the views of the child in this regard. [27] The context in which a child exercises her or his right to be heard has to be enabling and encouraging, so that the child can be sure that the adult who is responsible for the hearing is willing to listen and seriously consider what the child has decided to communicate. The person who will hear the views of the child can be an adult involved in the matters affecting the child (e.g. a teacher, social worker or caregiver), a decision maker in an institution (e.g. a director, administrator or judge), or a specialist (e.g. a psychologist or physician).[28] Experience indicates that the situation should have the format of a talk rather than a one-sided examination. Preferably, a child should not be heard in open court, but under conditions of confidentiality.[29] The child's views must be given due weight, when a case-by-case analysis indicates that the child is capable of forming her or his own views. If the child is capable of forming her or his own views in a reasonable and independent manner, the decision maker must consider the views of the child as a significant factor in the settlement of the issue. Good practice for assessing the capacity of the child has to be developed.[30] Whenever a decision is made to remove a child from her or his family because the child is a victim of abuse or neglect within his or her home, the view of the child must be taken into account in order to determine the best interests of the child. The intervention may be initiated by a complaint from a child, another family member or a member of the community alleging abuse or neglect in the family.[31] The Committee's experience is that the child's right to be heard is not always taken into account by states parties. The Committee recommends that states

[21] Ibid. General Comment at 20
[22] Ibid. at 21.
[23] Ibid. at 16.
[24] Ibid. at 16.
[25] Ibid. at 35 and 36.
[26] Ibid. at 134.
[27] Ibid. at 41.
[28] Ibid. at 42.
[29] Ibid. at 43.
[30] Ibid. at 44.
[31] Ibid. at 53.

parties ensure, through legislation, regulation and policy directives, that the child's views are solicited and considered, including decisions regarding placement in foster care or homes, development of care plans and their review, and visits with parents and family.[32]

The *Guidelines for Better Implementation of the Existing Recommendation concerning Family Mediation and Mediation in Civil Matters* goes even so far that considers that in order for children to gain knowledge about mediation, it should be included in the national school programs.[33] The *Recommendation (2011)12 on Children's Rights and Social Services Friendly to Children and Families* is in the same line – children's right to participation and protection should be guaranteed to enable them to have tailored Protocols and Procedures.[34] [35] The term "social services" refers to an inclusive range of services meeting general social needs as well as personal social services provided either by public or private bodies. While the former refers to standardized, universal services provided to people as members of a category, the latter are "needs specific" and are addressed to particular needs of beneficiaries. The term "social services for children and families" refers to a set of measures and activities to meet the general or individual social needs of the child and/or the family.[36] They are designed to meet the diverse needs of children and families as general, specialized and intensive social services delivered at different levels. The term "child-friendly social services" refers to social services that respect, protect and fulfil the rights of every child, including the right to provision, participation and protection and the principle of the best interest of the child.[37] Social services in their work should ensure that the child is heard and taken seriously. Children should be considered and treated as full bearers of rights, as active subjects in the planning, delivery and evaluation of social services. Children should be empowered to exercise their rights in accordance with their capacity, given due weight to their age, development and individual circumstances. More or less formal measures, protocols and procedures should be envisaged to this end. Participation should not only be perceived in terms of the evolving capacities of the child, the positive outcome in the future, but also in terms of the quality of the child's life in the present. Thus, children should be seen as they are today, not only as beings "in the making".

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[32] Ibid. at 54.

[33] European Commission for Efficiency of Justice, (CEPEJ), *Guidelines for Better Implementation of the Existing Recommendation concerning Family Mediation and Mediation in Civil Matters*, 2007 – at 45.

[34] Committee of Ministers, *Recommendation No. (2011)12 on Children's Rights and Social Services Friendly to Children and Families* < https://rm.coe.int/168046ccea > Part III B. 1.

[35] Ibid. pg. 5. In this sense, it encourages member states to: a. review domestic legislation, policies and practices to ensure the necessary reforms to implement this recommendation; b. ratify as soon as possible, if they have not yet done so, relevant Council of Europe conventions concerning children's rights; c. promote co-operation in the field of child- and family-friendly social services, including in the field of research and sharing of good practice, both domestically and internationally; d. ensure that social services co-operate across borders in individual cases where children are at risk and are moving between countries; e. disseminate the content of this recommendation in a child-friendly language and form; f. foster a dialogue with stakeholders as well as the public on the outcomes and general satisfaction of the child and family friendliness of social services.

[36] Ibid. pg. 8. In all processes where social services are provided to children, these should have the right to: a. be informed in a child-friendly way about their rights to access social services, about services available as well as about the possible consequences of alternative course of action; b. receive all relevant information about their situation; c. be supported to express their views; d. be listened to; e. have their views taken into account in the decision-making process according to their age and level of maturity; f. be informed about decisions taken and to what extent their views have been taken into account.

[37] Ibid. pg. 6.

Participation in social services delivery for children and families can be on different levels, both individually and as a group.[38]

Other instruments for protection of children's rights in mediation context are *Recommendation on the Participation of Children and Young People under the Age of 18* that promotes the right of the child to be heard and his/hers opinion to be taken with due weight as important for the dignity of each child and young man,[39] as well as the *Guidelines on Child Friendly Justice*, especially part I and III regarding the procedure of family mediation.[40]

Empirical studies consistently show that divorce and custody disputes significantly affect children, particularly when parents use them as tools in disputes, often casting the non-custodial parent as the "loser" of the process.[41] Divorces constitute the largest portion of domestic relations cases in most states. Modern reforms in divorce proceedings aim less at punishing the party at fault and more at addressing the future consequences of separation, prioritizing the best interests of the child, including the child's right to maintain relationships with all significant people in their life. Studies have shown that in mediated custody arrangements, children tend to spend more time with the non-custodial parent compared to cases resolved without mediation. Consequently, a key recommendation is for mediation laws to include discretionary provisions allowing judges to appoint an attorney or guardian *ad litem* to represent the child's interests when necessary. Such a guardian or attorney should review mediated settlement agreements and be present during mediation sessions whenever the parties' attorneys are present.[42]

As a conclusion from above elaborated instruments, the most effective way to increase mediation usage is through a 'mitigated' form of mandatory mediation (voluntary mediation with incentives and sanctions or required initial mediation session) that balances between mediation and civil litigation without compromising art. 6 of the ECHR. Regarding children's rights, mediation in family disputes involving children must comply with art. 12 CRC, guaranteeing children the right to express their views freely, with due weight given according to age and maturity. The Committee on the Rights of the Child clarifies that participation is a right, not a duty, hearings must be child-friendly, safe, and confidential, children may participate through verbal or non-verbal communication (play, drawings, gestures), and they may opt out. The Council of Europe *Guidelines on Child-Friendly Justice* further require that mediation processes: respect children's capacity to participate, enable children to have representation if conflicts of interest exist and give due weight to children's views when forming agreements. Children's participation can be: consultative (child's views gathered separately); collaborative (child participates with parents), and child-led (child actively shapes agreements).

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[38] Ibid. pg. 7. a. consultative participation, recognizing that children have expertise and perspectives which need to inform and affect adult decision making; b. collaborative participation, offering children the opportunity to be actively involved at any stage of decision making, initiatives, projects or services; c. child-led participation, facilitating the initiative of children and their own advocacy in relation to the various activities and services established to meet their needs.

[39] Council of Europe, *Recommendation on the Participation of Children and Young People under the Age of 18*, 2012.

[40] Committee of Ministers of the Council of Europe, *Guidelines on Child Friendly Justice*, adopted on 17 November, 2010 at the 1098th Meeting of the Ministers' Deputies.

[41] Munroe C.E., "Court-Based Mediation in Family Law Disputes: An Effectiveness Rating and Recommendations for Change", *Probate Law Journal*, Vol. 13, No. 2-3, 1996, pp. 107-132, pg. 108, 112 and 113.

[42] Ibid. pg. 131.

III. North Macedonia's legal framework on family dispute resolution. From mandatory conciliation to possible mandatory mediation in disputes involving children

North Macedonia adopted its first Law on Mediation in 2006,[43] later revised several times through amendments. A new Law on Mediation was introduced in 2013 to align fully with the EU Mediation Directive.[44] However, as its practical impact remained limited (mediation continued to be rarely used), it was replaced by the Law on Mediation of 2021.[45] The new law reflects evolving policy priorities,[46] as outlined in the Strategy for Reform of the Justice Sector 2017–2022 (including improved access to justice via mediation) and incorporates the CEPEJ *Guidelines on Mediation*. It promotes faster procedures, requiring mediation to conclude within 90 days, or within 45 days when children are involved (pursuant to the Law on Children's Justice). In 2022, several legal acts were adopted to further specify procedural details and enhance implementation.

The 2010 amendments to the Law on Civil Procedure required courts, in disputes eligible for mediation, to inform the parties in writing (at the stage of preparing the main hearing) that their dispute could be resolved through mediation. Although this measure aimed to encourage mediation, it did not introduce any coercive elements.[47] In an effort to further promote its use, the 2015 amendments to the Law on Civil Procedure introduced a limited degree of compulsiveness by requiring a mandatory attempt at mediation in commercial disputes involving claims of up to 1,000,000 denars (approximately €16,000).[48]

The 2010 amendments to the Law on Non-Contentious Procedure required judges to inform parties about the possibility of mediation and to invite them to a preparatory hearing. Government incentives included the first four hours of mediation free of charge and public awareness campaigns. Mediation is also promoted under the Law on Free Legal Aid, the Law on Criminal Procedure, and the Law on Children's Justice.

A study found that only 18% of disputing parties seek information about mediation from a judge, and 39% of judges support a mandatory obligation to refer suitable disputes to mediation, particularly contentious divorces.[49] Judges cited that main obstacles to wider mediation use are: a lack of information, party withdrawal during the process, and mediators' written statements that further attempts would be unproductive. Suggested improvements include promoting mediation's advantages, offering better conditions compared to litigation, reducing costs, providing free legal

[43] Law on Mediation 2006, *Official Gazette of the Republic of Macedonia*, No. 60/2006, 22/2007 and 114/09. The law was part of the Strategy for reform of the justice sector for the period 2004–2007.
[44] Law on Mediation 2013, *Official Gazette of the Republic of Macedonia*, No. 188/2013, 148/2015, 192/2015 and 55/16.
[45] Law on Mediation 2021, *Official Gazette of the Republic of North Macedonia*, No. 294/2021;
Министерство за правда, *Стратегија за реформа на правосудниот сектор за периодот 2017-2022 година со акциски план* - https://www.pravda.gov.mk/Upload/Documents/Strategija%20 i%20akciski%20plan_MK-web.pdf.
[46] In this light, article 2 stipulates that the aim of the law is to facilitate the access to mediation as an ADR, to raise the public conscience and to guarantee balanced relationship between mediation and judicial proceeding.
[47] Op. cit. Zoroska Kamilovska and Rakocevic, 2025, pg. 201.
[48] Article 461, Law on Civil Procedure, *Official Gazette of the Republic of North Macedonia*, No. 79/2005, 110/2008, 83/2009, 116/2010 and 124/2015.
[49] Институт за европска политика, *Патот на медијацијата во Република Северна Македонија*, Скопје, 2022, pg. 6.

aid, and building trust.[50] Mediators also advocate mandatory initial mediation sessions in family disputes, especially in non-contentious divorces and child-friendly justice cases.[51] Ministry of Justice data show modest use of mediation in disputes concerning children, which, when initiated, usually ended in agreement, while labor disputes recorded the highest success rate (91%).[52]

The latest Law on Mediation in North Macedonia applies to family disputes, property disputes in inheritance proceedings, among others, and is harmonized with the EU Mediation Directive 2008/52.[53] It defines mediation as a means of resolving disputes between two or more parties through conciliation (*мирење*) with the assistance of a neutral mediator or mediators, with the aim of reaching a mutually acceptable written agreement.[54]

Under the Law, mediation may be voluntary**,** contractual**,** or legally determined**.** Voluntary mediation occurs when parties freely choose to attempt resolution before or after initiating court proceedings. Contractual mediation arises from a binding agreement in areas covered by article 1, whereby the parties stipulate that any dispute will be resolved through mediation before initiating court or other proceedings. In such cases, if a lawsuit is filed without evidence from a mediator showing that mediation was attempted, the court may dismiss it for lack of jurisdiction. Legally determined mediation refers to a mandatory attempt required by law, either before or after court proceedings are initiated.[55] The process is guided by the principles of voluntariness, equality, informality, impartiality, confidentiality, accessibility of information, fairness, efficiency, and economy. Courts, notaries acting as their delegates, lawyers, and state administrative bodies are obliged to inform parties about the possibility of mediation and provide procedural details.[56] Voluntariness, in legal terms, means initiating mediation by submitting a request under article 17 to a chosen mediator or mediators listed in the official Register of Mediators.[57] The parties may agree to co-mediation and may select mediators from the Directory of Mediators.[58] Voluntariness in mediation is not excluded when a court or other procedure is already pending in relation to the disputed matter, regardless of the stage of those proceedings.[59] Exceptions to this principle arise when mediation is conducted: (1) in a dispute stemming from a previously concluded agreement between the parties; (2) following a referral by decision of a court or other competent authority; or (3) in cases where a mandatory attempt at mediation is prescribed by law.[60] In voluntary mediation, the process begins on the date the opposing party signs a written statement consenting to participate. Where the law or a binding contract makes mediation a prerequisite for court or other proceedings, the procedure begins upon the expressed consent of both parties. For disputes already subject to ongoing court or other proceedings, mediation commences when the competent court or authority, with the parties' consent, issues a decision to terminate the ongoing procedure in order to refer the parties to mediation. Once referred, the parties must submit a mediation request to a chosen mediator immediately, and no later than three working days from receiving the termination or referral decision. They must attach a copy of that decision to their request. The mediator, upon

[50] Ibid. pg. 6 and 7.
[51] Ibid. pg. 10.
[52] Ibid. pg. 10.
[53] Op. cit. Law on Mediation 2021, art 1.
[54] Law on Mediation, art. 3, a).
[55] Law on Mediation, art. 4.
[56] Law on Mediation. art. 36.
[57] Law on Mediation. art. 7(1).
[58] Law on Mediation. art. 21 (1 and 2).
[59] Law on Mediation art. 7 (2).
[60] Law on Mediation art. 7(3).

receipt, is obliged to schedule a meeting between the parties within three working days.[61] If mediation occurs before the commencement of court proceedings, any agreement reached may have the force of an enforceable title if solemnized before a notary, in accordance with the law.[62] Where mediation follows a court referral, the mediator must prepare the settlement agreement within three working days of concluding the mediation. The parties must submit the signed agreement to the court within eight days of signing for further processing.[63]

The provisions of the Law on Obligations govern the conclusion, effects, and termination of any settlement agreement reached through mediation, as well as the mediator's material liability.[64]

Although the costs of mediation are generally borne by the parties, the process may be conducted free of charge if the parties and the mediator agree, or if so provided by law.[65] To encourage the development of mediation in the Republic of North Macedonia, the state subsidizes part of the mediation costs where: (1) the mediation is conducted before the initiation of court proceedings; (2) no special law prescribes a mandatory attempt at mediation as a precondition for initiating court or other proceedings; (3) the contractual relationship between the parties does not require mediation prior to submitting a claim to the competent court; (4) at least one party to the procedure is a natural person; (5) the mediator records the case as concluded by settlement in the official Registry, in accordance with legal requirements; and (6) the mediator submits a cost breakdown on the prescribed form, specifying the fee and expenses reduced by the subsidy amount. [66] State subsidies are limited to one mediation procedure between the same parties for the same dispute and may not exceed MKD 4,000 (approximately EUR 65) per case.[67]

Participants in mediation may include the mediator; the parties to the dispute, either in person or represented; their proxies or authorized representatives; and third parties whose participation has been mutually agreed in advance, with or without the right to make a personal statement.[68]

Mickovic and Kockovska advocate introducing a mandatory mediation attempt for spouses seeking divorce by mutual consent who have no mutual children. In their view, such couples have no substantive dispute requiring judicial resolution, and, if capable of settling all ancillary matters (such as the division of joint property or maintenance), they should be allowed to terminate their marriage by signing a notarized statement, thereby avoiding unnecessary litigation.[69] They place particular emphasis on increasing the use of mediation in disputes concerning custody, as well as contact and visitation rights between parents and children. In this respect, they argue that the Centre for Social Welfare (CSW) should refer parents to mediation before issuing its opinion to the court or rendering its own decision. Furthermore, they maintain that judges should have the discretion to refer divorcing parties involved in property disputes to mediation.[70]

Macedonian Family Law recognizes the institute of (re)conciliation (*мирење*), but not mediation in the strict sense. This can be explained, at least in part, by the fact that family law remains one of the most neglected legal fields in the country, having undergone no substantial reform since the adoption of the Law on Family in 1992 - a statute that largely continued the family

[61] Law on Mediation art 18 (1,2,3 and 4)
[62] Law on Mediation art. 28 (1).
[63] Law on Mediation art. 28 (3).
[64] Law on Mediation art. 29.
[65] Law on Mediation art. 31.
[66] Law on Mediation art. 36.
[67] Law on Mediation art. 35.
[68] Law on Mediation art. 10.
[69] Op. cit. Mickovic and Kockovska, 2012, pg. 11
[70] Ibid.

law tradition of the former Yugoslavia. In the following section, this paper will examine the regulation of conciliation under the current Family Law, compare it to similar provisions found in other former Yugoslav jurisdictions prior to their respective reforms, and analyze the relevant provisions of the draft Civil Code, which has now been in preparation for almost fifteen years.

In nearly all former Yugoslav countries, the institute of (re)conciliation was incorporated into positive family law provisions, albeit under different names, such as *posredovanje*, *mirenje*, *savjetovanje*, or *nagodba* and with sometimes nuanced differences in meaning.[71] The procedure was generally conducted before the Centre (CSW), a court, or another specialized institution authorized to handle family disputes, with a primary focus on the protection of children's rights. While *mirenje* typically comprised two stages: (1) the investigation and potential restoration of the marital relationship, and (2) conciliation between the spouses, *posredovanje* generally referred to the process of informing spouses about the legal and practical consequences of divorce, particularly with respect to their mutual children.[72] These approaches could be combined; however, neither *posredovanje* nor *mirenje* can be considered a form of alternative dispute resolution (ADR) in the modern sense.

The Family Law of North Macedonia provides for the conciliation procedure exclusively in the context of divorce proceedings, except where: (i) one or both spouses are incapable of reasoning; (ii) one or both spouses reside abroad; (iii) one spouse has had an unknown place of residence for more than six months; or (iv) a counter-petition is filed after conciliation has already been attempted in the main petition.[73] Upon receipt of a divorce petition or a proposal for consensual divorce, and before serving the petition on the respondent, the court must initiate a conciliation procedure between the spouses.[74] If the attempt at conciliation fails, the presiding judge schedules a hearing for the main trial and transmits the divorce petition to the respondent. [75] This procedural structure demonstrates that conciliation is designed to precede litigation, with the primary aim of dissuading the parties from proceeding with the divorce altogether. Where the spouses have no mutual minor children or children with extended parental responsibilities, the conciliation is generally conducted by the judge (who may consult the CSW if necessary).[76] In cases where such children are involved, the CSW must conduct the conciliation session within three months of receiving the request from the court.[77]

When the judge conducts conciliation, it cannot be merged with the main divorce hearing; separate appointments must be scheduled.[78] The procedure also differs depending on whether the divorce is initiated by one spouse or by mutual consent. In unilateral divorce proceedings, if one or both parties fail to appear, conciliation is deemed unsuccessful. In consensual divorce proceedings, however, if either or both parties fail to appear without justification, the divorce petition is automatically considered withdrawn.[79] This procedural rule is intended to address potential disagreements that may arise even in consensual divorces. If, at the conciliation hearing, the spouses do not reconcile but the judge or CSW assesses that prospects for conciliation remain,

[71] Senjak K., "Institute of Mediation in Family Law and the Practice of the European Court of Human Rights", *Zbornik Radova Fakulteta Pravnih Nauka*, No. 8, pp. 136-143, 2022, pg. 137.
[72] Ibid. pg. 138.
[73] Law on Family, *Official Gazette of the Republic of North Macedonia* 80/1992, consolidated text, art. 237.
[74] Ibid. art. 237.
[75] Ibid. art. 246.
[76] Ibid. art. 247 (3).
[77] Ibid. art. 247 (4).
[78] Ibid, art. 239.
[79] Ibid. art. 240.

i.e., there is no firm conviction that further efforts would be futile, a new conciliation hearing may be scheduled.[80] During this process, the reasons for the marital breakdown are to be examined, efforts made to restore the relationship, and, where necessary, the parties advised to seek assistance from premarital or marital counselling services, or other relevant institutions.[81]

It is evident that the primary function of the mandatory conciliation in North Macedonia is to encourage the spouses to abandon their intention to divorce, sometimes even against their expressed wishes to proceed. This approach is problematic for several reasons. First, conciliation focuses on changing the parties' decision to divorce rather than addressing the consequences of divorce, such as child custody, maintenance, or property division. Second, it diverges significantly from mediation as promoted by European standards, as it imposes an additional layer of pressure on parties to reconcile, undermining the principles of voluntariness (even more so than in mandatory initial mediation sessions) and personal autonomy in making life decisions. Third, judges or CSW staff do not qualify as mediators under European mediation standards. Statements by state officials emphasizing rising divorce rates as a societal problem and insisting that consultations must precede divorce proceedings suggest that the intention is to preserve, rather than abolish, the conciliation procedure. Some authors argue that mandatory mediation, particularly when oriented toward conciliation as promoted by family courts, implicitly prioritizes the preservation of marriage. As such, it can undermine the advances achieved by women's movements, as it fails to acknowledge the unique challenges women face in marital relationships and risks exposing them to further violence, retaliation, and uncertainty. They argue that the establishment of family courts, designed to promote 'conciliation' and the 'speedy settlement of disputes' between litigating parties, can be particularly problematic in cases involving domestic violence.[82]

There are attempts to overcome the legacy of the (re)conciliation institute and to replace it with mediation in the draft Civil Code's family law provisions.[83] The draft introduces mediation as a method for resolving disputes in three main areas: (1) divorce between spouses, (2) custody and maintenance between parents and children, and (3) other significant family matters. It provides that if a dispute arises between spouses regarding shared life, the fulfillment of family needs, child care, or other significant marital or family matters, either spouse may initiate mediation. If mediation fails, the mediator must inform the court within 30 days, after which the court will decide the dispute.[84] For divorce without spousal agreement, if the parties cannot agree on a parenting plan, division of joint property, or spousal maintenance, either may initiate mediation. If mediation is unsuccessful within 30 days, the mediator must notify the court, which will then reject the consensual divorce proposal. In consensual divorces without joint children, the parties must submit a settlement agreement covering the division of property and spousal maintenance.[85] If they cannot agree, either spouse may initiate mediation; failure of mediation again results in court rejection of the proposal.[86] This mirrors the current Family Law rule that a consensual divorce petition is considered withdrawn if the parties fail to appear for conciliation, but with the added requirement to settle all post-divorce consequences beforehand.

[80] Ibid. art. 241.
[81] Ibid. art. 242.
[82] Op.cit. Nayyar 2021. pg. 5.
[83] Draft Version Civil Code RNM, Book 4 – Legal family relations.
[84] Ibid. art. 4:47.
[85] Ibid. 4:67.
[86] Ibid. 4:78.

The draft also prescribes mediation for disputes between parents over major child-related decisions.[87] If mediation fails, and upon request of one parent and after obtaining the Center's (CSW) opinion, the court may either authorize one parent to decide or resolve the matter itself, in line with the child's best interests.[88] Regarding parental responsibilities, disagreements may be resolved through mediation, a CSW decision, or a court ruling.[89] In maintenance proceedings, the CSW must attempt to help parents reach an agreement on child support or on changes to maintenance obligations when required by the child's increased needs or improved financial circumstances of the payer. If no agreement is reached, either parent may initiate mediation. If mediation fails within 30 days, the mediator must notify the CSW, which will then submit a proposal to adjust the maintenance amount.[90]

In family disputes involving children, it is preferable for the court to review any agreement (including those reached by mediation) to ensure that it serves the best interests of the child. This aligns with the current provisions of the Law on Family, which stipulate that when children are involved, the Center may introduce new facts or evidence not presented by the parties, as well as file legal remedies or undertake other procedural actions to protect the child's interests.[91] Furthermore, in divorce proceedings based on mutual consent, the spouses must submit their settlement to the court for approval, particularly with regard to child custody.[92] The court is obliged to seek the Center's opinion on the proposed arrangements for the children, and if it finds that the settlement is contrary to their best interests, it may issue a decision independently.[93] The rationale is that agreements between parents, even if consensual, must not undermine the best interests of the child, which is a guiding principle in both international and national family law (e.g., article 3 of the CRC and article 24 of the EU Charter of Fundamental Rights).

IV. Conclusion

Mediation in family disputes, particularly those involving children, remains underutilized across Europe and is especially limited in North Macedonia. Despite being European Union political priority and despite its well-documented advantages, experts have highlighted the persistent "EU Mediation Paradox," whereby mediation is applied in only a very small fraction of eligible cases.[94] Comparative research indicates that moderated or mitigated forms of mandatory mediation, such as opt-out models, can enhance participation while preserving voluntariness and access to justice.[95] Nonetheless, critics caution that compulsory approaches may compromise party

[87] Ibid. 4:103
[88] Ibid. 4:104.
[89] Ibid. 4:161 and 4:162.
[90] Ibid. 4:323.
[91] Law on Family, art. 249 (2).
[92] Law on Family, art. 253.
[93] Law on Family, art. 256.
[94] European Parliament Directorate-General for Internal Policies, *'Rebooting' the Mediation Directive: Assessing the Limited Impact of Its Implication and Proposing Measures to Increase the Number of Mediation in the EU*, 2014.
[95] See more in the upcoming publication Ignovska E., "Mandatory Mediation in Family Disputes Involving Children. North Macedonia's Case Assessed through Comparative Good Practices", (eds.) Schumacher H., Buchstatter E., Lentner G. *Festschrift for Prof. Dr. Marianne Roth*, Department of Private Law and Civil Procedure, Paris, Lodron, Universitat Salzburg, June, 2026.

autonomy, reinforce power imbalances, and raise concerns under Article 6 of the European Convention on Human Rights,[96] although such concerns are gradually being reconsidered.[97]

Mandatory mediation in family disputes must balance the principles of voluntariness with the protection of children's and human rights. European instruments, including the EU Mediation Directive, Council of Europe Recommendations, the CRC, and the Guidelines on Child-Friendly Justice, emphasize that mediation should facilitate amicable settlements without limiting access to courts. For cases involving children, compliance with Article 12 CRC is essential: children must be able to express their views freely, in a safe and child-friendly environment, with appropriate representation when needed, and with due weight given to their opinions. Evidence shows that mediation can improve post-separation arrangements and parental cooperation while reducing conflict. Accordingly, a mitigated form of mandatory mediation (combining voluntary engagement with incentives or required initial sessions) emerges as the most effective approach to increase mediation uptake, ensure procedural fairness, and safeguard the best interests of children in family disputes.

In North Macedonia, the primary purpose of mandatory conciliation in divorce proceedings is clearly to persuade spouses to abandon their intention to divorce, sometimes even when both have expressly stated their desire to proceed. This model raises several concerns. First, conciliation aims to reverse the decision to divorce rather than to assist the parties in addressing the consequences of separation, such as child custody, maintenance, or property division. Second, it departs significantly from mediation as promoted in European standards, as it adds an additional layer of pressure on spouses to remain together, thereby undermining voluntariness and personal autonomy even more strongly than moderated forms of mandatory mediation. Third, judges and Centre for Social Work staff do not meet the qualifications required of mediators under European mediation frameworks, further distancing the process from recognized professional standards.

To better align with European standards and to increase the mediation rates, several measures are recommended for the North Macedonian legal context:

1. Introduce mandatory initial informative session and opt-out mechanisms in mandatory mediation schemes to preserve voluntariness and access to courts, rather than relying on conciliation (мирење), particularly in disputes over divorce involving children.
2. Develop child-inclusive mediation practices that meaningfully consider children's voices (the service infrastructure must be fully operational, including dedicated mediation spaces, child-friendly zones, and child care support).
3. Ensure that the best interests of the child are respected by judicial review of any reached agreement.
4. Invest in mediator training and accreditation to ensure quality and procedural fairness, potentially including co-mediation with one mediator specialized in law and another in psychology or social work.
5. Strengthen legal aid for mediation to make it accessible to those unable to afford it.
6. Raise public awareness to promote equitable access to mediation services.[98]

[96] See for instance Nayyar G., "Mandatory Family Mediation in Indian Family Law: A Feminist Critique", *Indian Journal of Law and Legal Research*, Vol. 3, No. 1, 2021, pp. 1 – 8.
[97] Op. cit. Radoja, 2015, pg. 115 and Radanova, 2022.
[98] See also conclusions reached in op. cit. Ignovska 2026.

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