



Mediation an Important Segment of Kosovo Legal System for Alternative Civil Dispute Resolution

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Abstract: States in transition and which are building state mechanisms face numerous challenges and problems. Among challenges that Kosovo face is building a legal system which should be in accordance with universal legal values. In order to strengthen the legal system have been foreseen also various supportive mechanisms in terms of completing the system and reflecting on a more efficient judicial system. As supportive mechanisms are arbitration and mediation, hence through their application the judicial system has also various alternatives concerning dispute resolution. Through this working paper we intend to elaborate the Kosovo mediation historic and its transition from a traditional mediation to mediation under legislation. We tend to handle also mediation as the Kosovo legal system part. We shall be focusing on alternative civil dispute resolution through mediation. Through this working paper shall be elaborated also the importance of this institute within legal system and citizens approach to justice which is one of the most fundamental human rights guaranteed by domestic and international legal acts.

Keywords: Mediation; legal system; law; alternative resolution

1. Introduction

Kosovo has always been occupied by different occupiers, which at any costs had tried to install their legal system and through which to manage to govern. The tendency to install their legal system had resulted also in the impossibility of developing the country's legal system. Objection of foreign legal systems has been achieved through using different methods and mechanisms. As any nation also the Albanians had a very well developed and advanced their customary law. Albanian customary law had been dispersed and had no consolidated form mainly different provinces had built the customary law which they implemented. Customary law

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derived directly from the people, and also has served to oppose the legal system of centuries-old occupiers which have been in the Albanian territories. Mediation according to customary law had a mechanism through which were settled disagreements and problems arising among citizens. Mostly, mediators were people with a lot of experience in life, with a strong character and with a high social reputation in country. Decisions to mediation procedure were uncontested and had been implemented with precision. Even though it is called mediation, mediators had been those who had made a decision regarding a particular dispute, not based on the will or position of the parties concerning the dispute. Based on the fact that customary law is still present to Kosovo residents and in many cases they give the priority in comparison to the legal system in the country, it is considered as a possibility for customary law to be part of the Kosovo legal system. And this occurred in 2008 where the Assembly of Kosovo has issued the Law no. 03/L-057 on Mediation as the first law of this nature. Within the purpose of this law is stipulated: "This law establishes rules of mediation procedure in contested relationships, in legal-assets matters, of natural and legal persons, commercial, family, labor, other civil, administrative and criminal relationships, on which the parties can freely act with their good will, if otherwise not foreseen the exclusive liability of a court or other competent body with a separate law" (Law No. 03/L-057 on Mediation, Article 1, sub-paragraph 1.2).

2. Legal Regulation of Mediation in Kosovo

Establishing mediation within Kosovo legal system has been done based on several facts supposed to be positive. It is meant that mediation shall be a segment within legal system and through its application shall be achieved to influence to court case resolution in a shorter time and at minimal costs. In addition, through application of this institute shall be expressed the will of parties in dispute resolution where the resolution will be meritorious and acceptable by the parties. Where the mediation base may be launched is "Everyone shall be guaranteed equal protection of the rights in the proceedings before the courts, other state bodies and holders of public powers" (Constitution of the Republic of Kosovo, Article 31, paragraph 1). The Ministry of Justice, in its functional role and by being mandatory for drafting policies and legislation, has undertaken concrete actions and has prepared a draft-law for mediation in 2008. The Ministry of Justice in accordance to the competences and in harmony with Kosovo legal system has established the Mediation in Kosovo and has made it functional. The issuance of the Law on

Mediation by the Assembly of Kosovo obliged the Ministry of Justice to undertake various concrete actions for the functioning of Mediation in Kosovo. The first obligation of the Ministry of Justice was to establish a Mediation Commission as a mechanism which shall have mandate as follows: “Defining development policies related to the mediation field; issuing and supervising the implementation of the rules of the Code of Professional Ethics for Mediators; issuing decisions and recommendations for regulating the field of mediation activity; issuing its rules of procedure; compiling and maintaining a registry for mediators; giving professional opinions; organizing trainings and courses for mediators; providing information to the public about mediation opportunities; the exercise of other duties stipulated by law”. (Law No. 03/L-057 on Mediation, articles 17 and 19) Mediation as a very important dispute resolution segment is present also in disputes from civil law. Mediation in civil- law disputes is regulated and foreseen by law and provides to the parties with the possibility (although their case is being dealt with in court), resolve their dispute through mediation as an alternative civil dispute resolution mechanism. “It’s in court discretion in a moment that assesses that a case can be resolved to mediation procedure, to refer the parties to resolve their dispute through mediation. This court competence is a legal category and it is defined in this form: “If the court finds it is necessary, then it will suggest in the preparatory session, based on the nature of the case and other circumstances, to resolve the issues with the intermediation based on a special law”. (Law No. 03/L-006 on Contested Procedure, Article 411, paragraph 1) In order to resolve disputes and disagreements that are court cases, the law has granted to parties the competence to require for their case from the court to be proceeded for settlement in the mediation procedure. Such a competence and possibility is foreseen and regulated by the law on this form: “Dispute resolution through mediation may also be proposed from the parties themselves by their agreement”. Such proposal the involved parties can make any time until the end of the main hearing session. (Law No. 03/L-006 on Contested Procedure, Article 411, paragraph 1) This is a bigger possibility granted to the parties in order to decide to proceed their case for resolution to mediation procedure. To civil contests the relevant legislation in force has strengthened litigants so much and has given them the possibility for a moment during the main trial of their dispute to proceed the case to the mediation procedure. This is a very good possibility and full of value due to the fact the legislator recognizes a right to a party through which might come to a faster dispute resolution at lower cost and the parties’ relationship to be repaired. Mediation in obligational relationships is a legal category which has been regulated by the Law No. 04/l-077 on obligational

relationships. What is regulated by the law refers to the possibility of engaging mediators in negotiating and contracting services in the benefit and on behalf of the mandator. Mediation in obligational relationships is stipulated as follows: “Through a mediation contract the mediator undertakes to endeavour to find and place in contact with the mandator a person that will negotiate with the mandator to conclude a specific contract, and the mandator undertakes to make a specific payment if the contract is concluded. (Law No. 04/1-077 on Obligational Relationships, Article 834) Mediator’s and mandators’ rights and obligations are determined rights and obligations which are a legal category. Mediator’s obligations within mediation contract from obligational relationship are defined as follows:

1. The mediator must seek an opportunity to conclude the specific contract and draw the mandator’s attention thereto with the diligence of a good businessperson;
2. The mediator is obliged to mediate in negotiations and endeavour to see the contract concluded if the mediator specifically undertook to do so;
3. The mediator shall not be liable if despite the necessary diligence endeavours do not succeed. (Law No. 04/1-077 on obligations relationships, Article 839, paragraph 1, 2, 3).

Obligations of mandator within mediation contract from the obligational relationships are defined as follows:

1. The mediator shall have the right to a payment, even if not agreed upon;
2. If the size of the payment is not stipulated by a tariff or any other legal act, by the contract or by custom the court shall stipulate it by taking the mediator’s endeavours and the services performed into consideration;
3. At the orderer’s request the court may reduce the agreed mediation payment if it finds that it is excessively high in comparison with the mandator’s endeavours and services;
4. It shall not be possible to request the reduction of the agreed payment if it was paid to the mediator after the conclusion of a contract that he mediated.

Kosovo legal system has strengthened mediation system and has given legal character so everything that derives from mediation to produce legal effects to the parties. Agreement reached to mediation procedure which produces legal effects to

the parties has also a legal security. This legal security enables parties to have confidence and security for what they determine in reached agreement to mediation procedure. Cases referred by the court to mediation procedure which results in the conclusion of agreement, the latter after being signed by the parties and mediator is returned to the court. "If the case file is in court the agreement reached in writing must be sent to the court which after approval has the power of an executive title". (Law No. 03/L-057 on Mediation, Article 12, sub-paragraph 12.5) This legal security is extremely important due to the fact that makes the agreement an executive title, where is made possible to the party if it is not fulfilled by the other party, this right to execute it in enforcement procedure. In order to secure even more reached agreement to mediation procedure Kosovo legal system has foreseen legal categories in enforcement procedure. Within the Law on Enforcement Procedure reached agreement to mediation procedure is an enforcement document. Enforcement documents are as follows: agreement reached to mediation procedure in accordance with the Law on Mediation. (Law No. 04/I-139 on Enforcement Procedure, Article 5, paragraph 1) This is another fact that Kosovo legal system reached agreement to mediation procedure for those cases which are self-referral to mediation procedure strengthens and gives the character of an enforcement document by not having the need to get the consent and approval by the court and then to be considered as an enforcement document. Through this the parties are assured that what has been foreseen to agreement if not fulfilled on voluntary basis shall be realized through enforcement procedure.

3. Contribution of Mediation in Legal System

The time when was handled and assessed that Kosovo legal system needs to have mediation as a segment within the justice system, the idea was initially to influence in bringing to life and practice by Kosovo citizens in order to resolve numerous contests and disagreements through mediation without having the need to address to the Court or Prosecution. Except this, the goal was also the influence of mediation for several cases in court and prosecution not to be pending and to be referred for resolution to mediation procedure as a possibility of alternative dispute resolution. Through this goal shall be achieved another goal which is the backlog reduction in courts and prosecutions, according to statistics this number is extremely big. What can be evaluated as very positive is the awareness of citizens with the possibility of dispute resolution through mediation because through application of this institute is aimed to come to raising awareness that not for any

dispute citizens should apply vigilantism or address to courts. The possibility itself for citizens to address to mediation centers makes possible access to justice and dispute resolution for any citizen in a shorter time and at low cost. Mediation system provides to the parties the possibility to have quicker and more efficient access to justice. This due to the fact they may send their case to mediation procedure even if it has been activated within court and prosecution. This is because to mediation procedure the case must be concluded within 90 days. The possibility to access to justice is also due to the fact that a party may refer to mediation procedure by itself any disagreement or contest without having the need to go to court or prosecution. This helps to the party to resolve the disagreement in shorter time with the other party and to preserve human relations they had prior to have the dispute for which they have reached an agreement to mediation procedure. Mediation as an alternative dispute resolution institute shall also contribute in the field of foreign investment in Kosovo. Mediation segment plays an active and constitutive role in building legal system and the rule of law as one of the most demanding conditions on foreign investments in Kosovo. Rule of law is the most important factor in order for foreign investments in Kosovo to be on the rise and succeed.

4. The Effects of Mediation in Alternative Dispute Resolution

The installation of mediation in Kosovo meant to provide support and assistance to the judicial and prosecutorial system in resolving several cases that by their nature would have been possible to be handled and resolved to mediation procedure. This goal has not been achieved yet, but it is important that it has started to be active and to resolve various cases which for the beginning are hopeful that mediation will succeed in Kosovo. The official statistical data of the Ministry of Justice indicate that to mediation procedures in Kosovo in 2012, 155 cases were referred by the courts, while only 1 case by prosecution and by self-referral 22 cases. In 2012 as the first year have been resolved 76 cases whereas 63 cases remained unresolved, in process to be resolved are 39 cases. Bearing in mind the fact this was the first year of mediation which had faced numerous difficulties and problems concerning functioning of mediation, notification of citizens with this possibility, the awareness of judges and prosecutors, hence, can be considered as a successful year, this because it made possible to have a clear picture and an announcement that mediation can be a successful segment within the Kosovo judicial system. The year 2013 offers us very useful data regarding referral and dispute resolution cases to

mediation procedure in Kosovo. These data are very hopeful that in Kosovo mediation has been a very good idea and will succeed in the future. By courts in 2013 were referred 347 cases, whereas by prosecution 69 cases, whilst by self-referral were referred 16 cases, the total number of cases referred for this year is 432 cases. During this year have been resolved 216 cases, unresolved cases 45, whereas in process of being resolved 52 cases. Regarding the effect of mediation in Kosovo, there is a positive assessment by Progress Reports drafted by European Commission on the achievements and challenges of Kosovo state. Progress Reports by European Commission for Kosovo in 2014 concerning mediation determines as follows: mediation centers had a positive impact. The number of cases referred to mediation centers has been increased considerably (699 cases in the period of September 2013-March 2014, in comparison to 104 cases in the same period a year ago). The same applies also to the number of resolved cases (350 in comparison to 38 cases). (Progress Report for Kosovo, 2014) Such an assessment expressed through Progress Report may be considered that evaluates mediation in a positive manner as an important mechanism within alternative dispute resolution. This assessment is encouraging that the mediation system is on the right path and should therefore be strengthened to the extent that it is a very important segment within Kosovo legal system. Also the Progress Report for Kosovo in 2015 considers mediation as a successful story where determines as follows: The number of cases has constantly increased, so between 2012 and July 2015 the mediation system has handled 2,598 cases. (Progress Report for Kosovo, 2015) A similar assessment is made also by the 2016 Progress Report for Kosovo where determines as follows: "A mediation system has been functional since 2008, with seven regional mediation centers and 163 active mediators licensed by the Ministry of Justice. On April 2016, 21 candidates for the position of a mediator (17 from the Kosovo Serb community) passed the necessary training and are awaiting certification. A great contribution to the awareness and familiarity of citizens with the mediation system is played by courts, prosecutions, advocacy and other institutions. This may be expressed and accomplished if the courts and prosecutions refer cases as much as they can to mediation procedure as stipulated: "When the matter is with the court or the prosecution and if they consider that a dispute can be resolved successfully with mediation, they suggest the parties to follow the mediation procedure". (Law No. 03/1-057 on Mediation, Article 9, paragraph 9.5) Through application of this mechanism is achieved to become the mediation institute more popular, and depending on success achieved in dispute resolution procedure to be known by Kosovo citizens as a good possibility for dispute resolution they might have in the

future. The Law on Mediation granted to the court the right for cases that it considers they might be referred to mediation procedure to act based on that in any phase of procedure and it determines as follows: “At any stage of the court procedure until its completion, the court may suggest the parties to follow the mediation procedure”. (Law No. 03/L-057 on Mediation, Article 9, paragraph 9.6)

5. Conclusion

The Mediation System in Kosovo is part of the country’s legal system and is regulated by the relevant legislation in force. In terms of tradition and culture, mediation in Kosovo has its own history from generation to generation. Tradition to mediation has greatly helped mediation nowadays that as a part of the legal system to extend and have a positive effect due to the fact that for the people mediation is known as a concept. The number of cases handled and resolved to mediation procedures is very hopeful for the future, due to the fact it indicates that this segment is on the right path. Dispute resolution in alternative procedures in the field of civil-law, it also gives a signal that this is good news for foreign investors in Kosovo as well as business facilitation. The mediation segment in Kosovo is one of the important segments assures foreign investors that Kosovo has a stability regarding legal security of their capital. The traditions and achievements of mediation in Kosovo enable us to begin to have a positive assessment regarding the human rights protection throughout the period of dispute and disagreement. This is due to the fact that their dispute or civil law dispute can find the maximum resolution within a period of 90 days. Resolution of cases for this period of time is a very good reference to human rights protection because the citizens shall have access to justice quickly and for a short period of time shall find a solution to his dispute. In order for the mediation system in Kosovo to succeed and to be more complete and having full scope there should be an amendment of legislation referring to mediation in Kosovo. Within legislation is necessary also harmonization of legislation referring to Mediation, the Criminal Procedure Code of the Republic of Kosovo and the Law on Contested Procedure. The amendment of legislation should be focused on the part that refers to the extension of mediation powers not only the cases referred by Courts and Prosecutions to have the possibility to refer, it should be regulated so that other institutions shall have the possibility to refer cases. The amendments should also focus on obligation of courts and prosecutions that for several cases initially are obliged to orient the parties to mediation procedure, if the parties do not have the interest to go to

mediation procedure, then to initiate court proceedings. This would create a chance for many cases not to cross the court and to resolve disputes faster and at lower cost. This shall also affect citizens' awareness for mediation as a mechanism to dispute resolution alternatively. Within the mediation system there should be a specialization of mediators in certain areas. The specialization of mediators shall enable efficiency, quality of the mediation procedure and better deals between the parties. The specialization of mediators shall achieve increase of citizens' trust to mediation. Mediation is active and amendments in the field of mediation are evident every day, so these innovations should be known to the mediators which through trainings shall be able to have professional capacity building. This shall have a positive effect on the work and quality of their work. The working conditions of mediators should be a priority of the country's institutions due to the fact that the premises where the mediation profession is practiced are currently in poor condition.

6. References

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