

Mediation in Family Matters – Albanian Challenge

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Abstract

This paper analyses the legal and practical aspect of one form of restorative justice, "Mediation," in family conflicts in Albania.

The focus is on the legal regulation of this restorative justice method in Albania, compared to the international obligations ratified by Albania in this field, and particularly the practical aspect of recognition and implementation of the legal framework by responsible actors, especially the courts.

The methodology of this paper is qualitative-quantitative based on secondary data of the legal framework as well as the practice of mediation.

Due to restricted access to the statistical component of issues from mediation practice, the paper's results are constrained. National statistical data on extrajudicial mediation and court-ordered referrals are lacking.

Thus, in light of the circumstances, the results, rather than drawing exact conclusions, capture the general pattern of this instrument in family law in Albania. This leaves plenty of space for future additions and in-depth research to address institutional responsibilities regarding the use of mediation as a successful restorative justice instrument.

Keywords: mediation, court, family conflicts, Albania.

I - INTERNATIONAL LEGAL FRAMEWORK FOR MEDIATION

Mediation as an alternative dispute resolution mechanism has a relatively short lifespan. It dates back to the late 20th century with its origins in the Council of Europe and has taken on a new dimension in recent years. Although the focus of this paper is on mediation in family relations, due to limited studies in this field, all international acts in the field of mediation are referenced in this section regardless of the area they regulate.

Thus, the key documents of the Council of Europe referring to mediation are listed as follows:

- ✓ Council of Europe Committee of Ministers, Recommendation (98) 1 on family mediation; (Family)
- ✓ Council of Europe Committee of Ministers, Recommendation (99) 19 concerning mediation in criminal matters; (Criminal)
- ✓ Council of Europe Committee of Ministers, Recommendation (2001) 9 on alternatives to litigation between administrative authorities and private parties; (Administrative)
- ✓ Council of Europe Committee of Ministers, Recommendation (2002) 10 on mediation in civil matters (Civil).

- ✓ Council of Europe Committee of Ministers, Recommendation CM/Rec(2018)8 concerning restorative justice in criminal matters
- ✓ Guidelines for a better implementation of the existing recommendation concerning mediation in criminal matters CEPEJ(2007)13 (Criminal);
- ✓ Guidelines for a better implementation of the existing recommendation concerning family mediation and mediation in civil matters CEPEJ(2007)14 (Family & Civil);
- ✓ Guidelines for a better implementation of the existing recommendation on alternatives to litigation between administrative authorities and private parties CEPEJ(2007)15 (Administrative).
- ✓ European Code of Ethics for Intermediaries (2004)
- ✓ European Code of Ethics for Mediation Providers (2018).

At the European Union level:

- ✓ European Parliament and the Council of the European Union, Directive 2008/52/EC on certain aspects of mediation in Civil and Commercial matters, OJ, L-136, 2008.
- ✓ European Parliament resolution of 12 September 2017 on the implementation of Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters (the 'Mediation Directive') (2016/2066(INI))
- ✓ Directive 2013/11/EU of the European Parliament and of the Council, dated 21 May 2013, "on alternative dispute resolution for consumer disputes."
- ✓ The directive in question fulfills and consolidates two recommendations of the European Commission from 1998 and 2001, which established the minimum requirements of standards for out-of-court procedures in the above-mentioned field, respectively:
- ✓ Commission Recommendation 98/257/EC of 30 March 1998 on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes.
- ✓ Commission Recommendation 2001/310 of 4 April 2001 on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes.
- ✓ Regulation (EU) No 524/2013 of the European Parliament and of the Council of 21 May 2013 on online dispute resolution for consumer disputes and amending Regulation (EC) No 2006/2004 and Directive 2009/22/EC (Regulation on consumer ODR), OJ L 165/1 of 18 June 2013.
- ✓ Commission Implementing Regulation (EU) 2015/1051 of 1 July 2015 on the modalities for the exercise of the functions of the online dispute resolution platform, on the modalities of the electronic complaint form and on the modalities of the cooperation between contact points provided for in Regulation (EU) No 524/2013 of the European Parliament and of the Council on online dispute resolution for consumer disputes, OJ L 171/1 of 2 July 2015.
- ✓ Report from the Commission to the European Parliament and the Council on the functioning of the European Online Dispute Resolution platform established under Regulation (EU) No 524/2013 on online dispute resolution for consumer disputes, Brussels 13 December 2017, COM(2017) 744.

At the level of the United Nations Organization, the list of documents in the function of mediation is as follows:

- ✓ UNCITRAL Model Law on International Commercial Conciliation, 2002.

- ✓ UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation, 2002).
- ✓ Singapore Mediation Convention or United Nations Convention on International Settlement Agreements Resulting from Mediation.¹

Until 31.05.2024, this convention has been signed by 55 UN countries, including Montenegro, North Macedonia and Serbia, but not yet Albania, and has been ratified by 14 of them.

The Convention was finalized at the fifty-first UNCITRAL Commission session, which came to a close in July 2018. The amended Model Law (the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018)) was also adopted at the same session.

In December 2018, the United Nations General Assembly, by consensus, passed a **resolution** to adopt the United Nations Convention on International Settlement Agreements Resulting from Mediation, recommended that the Convention be known as the “Singapore Convention on Mediation”, and authorized the signing ceremony of the Convention to be held in Singapore on 7 August 2019. On 25 February 2020, Singapore and Fiji became the first two countries to deposit their respective instruments of ratification of the Convention at the United Nations Headquarters in New York. With the third instrument of ratification deposited by Qatar on 12 March 2020, the Convention entered into force on 12 September 2020.

II. THE ALBANIAN LEGAL FRAMEWORK FOR MEDIATION IN THE FAMILY DOMAIN.

The Civil Code of the Republic of Albania, in its article 973, defines the mediator as the person who connects two or more parties for the conclusion of an agreement, without being related to any of them in a relationship of cooperation, dependence or representation. Mediation is a relatively new institution in Albanian restorative justice, initially regulated by Law No. 8465, dated March 11, 1999, "On mediation for the settlement by agreement of disputes", following the Council of Europe Recommendation of 1998. This law was quickly repealed by Law No. 9090, dated June 26, 2003, "On mediation in the settlement of disputes", and after nearly a decade by Law No. 10 385, dated February 24, 2011, "On mediation in the settlement of disputes". Despite legislative changes, the implementation of mediation remained a challenge, leading to the first amendments with Law 81/2013, dated February 14, 2013. As part of the Justice Reform in 2015, it was noted that the legal aspect of mediation still faced problems hindering its functioning². Analysis showed that mediation had not been properly implemented in the field of law and was not harmonized with other legislation, mainly Codes, as these acts did not provide the necessary space for it³.

For this reason, the need arose for legal changes with law no. 26/2018, changes which focus mainly on modernizing the status of mediators, simultaneously strengthening and consolidating the ethical standards according to the European Mediation Code of Ethics as well as its harmonization with the EU directive

¹ *About the Convention | Singapore Convention on Mediation*

² *Analysis of the Justice System, Parliament of the Republic of Albania, year 2015, http://www.reformanedrejtisi.al/sites/default/files/dokumenti_shqip_0.pdf*

³ *ibid*

2008/52/EC "On some aspects of mediation in civil and commercial matters" and with the recommendations of the Council of Europe.

In Article 1/2 "Definitions", this law defines in its points a and b two types of mediations: - extrajudicial (voluntary) and - "referred by the court or prosecutor". Depending on the type, in the following articles, the law also defines different ways of execution.

In article 2.2, the law defines as the field of application of this institute also the family one without distinguishing between different institutes of family relations.

In point 4 of this article, the obligation of the court and other state bodies⁴ to guide the parties towards mediation is envisaged, expressed literally as follows:

- a) in civil and family matters, when the interests of minors are involved;*
- b) in reconciliation matters in cases of marriage dissolution, as provided for in Article 134 of the Family Code;*

This obligation of the court is also provided for in Article 25 of the Civil Procedure Code in general for all cases brought before the court.

Article 134 of the Family Code sets out the court's obligation to summon the parties to a reconciliation session, but in this case, the special law on mediation leaves this possibility to the mediation institution. This is the case when only one of the spouses has filed for divorce, not both. Furthermore, it is inferred from the following article that the parties reconcile (thus the marriage is not dissolved), while in the analysis of Article 2.4.b as above, mediation seems to emerge as an alternative process when the parties do not reconcile after seeking marriage dissolution.

However, when both spouses seek marriage dissolution, it is regulated in Articles 126 – 128 of the Family Code. In addition to the divorce petition, they may submit to the court for approval a draft settlement agreement for the resolution of all consequences of marriage without limitation. It is at the discretion of the court to approve or reject this agreement. This draft agreement may be formulated by the parties themselves or their representatives. The law does not prohibit the parties, but it is the court that intervenes to approve or correct it in whole or in part.

This is not the situation when the parties have resolved the marriage or its consequences through out-of-court mediation or have sought suspension of the judicial process to resolve the conflict through mediation. These cases are regulated by Articles 22 and 23 of Law No. 10 385/2011. In this case, the agreement reached between the parties through the mediator cannot be challenged in any part by the court. Depending on the case, the court approves it as is and simultaneously issues the enforcement order or issues only the enforcement order in the case of non-judicial mediation or declares it invalid. The agreement here is an enforceable title, unlike the provisions of Articles 125 – 127 of the Family Code where the draft agreement is merely a judicial document without legal force.

An issue worthy of discussion is the guarantee of the rights of the child in cases where the consequences of mediation-marriage dissolution affect them. The Convention on the Rights of the Child, Law No. 18/2017 "On the rights and protection of the child", the Family Code, etc., sanction "the hearing of minors in any procedure concerning them" according to the specified rules, direct hearing, with representation, or through a psychologist.

⁴ This provision is not reflected in the definition of article 1/1.2/b, which speaks of "mediation referred by the court or the prosecutor" excluding from the definition the reference of other competent bodies, especially in the context of mediation of disputes between public administration bodies and subjects private.

Albanian legislation (Article 155 of the Family Code), as well as international conventions, envisage the role of the psychologist as a mandatory standard for assessing the interests of minors in any procedure, whether judicial or extrajudicial, which assists in evaluating the minor's interest and in assessing their opinion, preference, and any stance of the minor.

In this context, this obligation should also be included in the mediation procedures in respect to Article 2 point 7 of Law No. 10 385/2011, to hear and guarantee the best interest of the child according to procedural and formal provisions of the Civil Procedure Code and the Family Code.

"For matters related to procedures not regulated by this law, in the mediation activity, as far as possible, legal provisions regulating other procedures are applied, taking into account the legal nature of the issue."

Despite the general principle of referral or resolution through mediation of all conflicts, including those in family relationships mentioned above, the provisions of special laws are considered as limitations to this principle.

Thus, from an analysis of the "Invalidity of marriage" provided for in Articles 40, 41, Articles 44 and following, as well as Article 49 of the Family Code, it is deduced that this type of conflict is attributed solely to the Court, as in Articles 40, 41, the Code refers to the term "court", in Articles 44 and following it refers to the term "lawsuit", and in Article 49 "final decision".

Similarly, the exempted areas from mediation in family relationships are: Authorization for the performance of legal acts (Articles 58, 59 of the Family Code); Urgent measures (Article 61); Measures against violence (Article 62); Authorization for the administration of joint property (Article 92); Waiver of rights (Article 94); Acknowledgment of paternity/maternity and objection thereto (Article 170 and following); Immediate protection order and Protection Order according to the special law for measures against violence in family relationships; Adoption; Custody.

III. THE REGULATION THAT THE ALBANIAN LEGAL FRAMEWORK MAKES TO EXTRAJUDICIAL AND COURT-REFERRED MEDIATION

As mentioned above in Article 1/2 "Definitions", Law No. 10 385/2011 specifies in points a and b two types of mediation: - extrajudicial (voluntary) and - "referred by the court or prosecutor". Depending on the type of mediation, the law also specifies different ways of executing the parties' will or otherwise the mediation agreement.

When the case is referred by the court, Article 10/6 of Law No. 10 385/2011 provides: ". At the conclusion of the mediation procedure, the mediator notifies in writing, within the deadlines set forth in this law, the court or arbitration, in order to initiate the suspended procedures for the mediation effect." Article 23/1 provides: ". When the case is referred to mediation by the court or prosecutor, the mediator, at the conclusion of the mediation procedure, or within the specified deadline in this law, notifies them of the resolution or non-resolution of the disagreement, also sending the relevant documents." Article 23/2 of Law No. 10 385/2011 provides: ". In cases where the issue is resolved through mediation, the judicial authorities decide, depending on the case, to approve the settlement of the civil case or to suspend the criminal case or not to initiate criminal proceedings, except in cases where it is concluded that invalidity is observed." So clearly as mentioned above, in cases referred by the court, it is the latter that approves the civil settlement agreement or suspends/decides not to initiate the criminal case.

The Family Code specifically does not provide for the approval of the settlement of the case through reconciliation, but if reconciliation is reached, the trial is postponed for this reason (Article 134). However, this institute ("Reconciliation") is different from the institute of "Mediation" - If the parties agree, the case (divorce) is postponed. Meanwhile, "Mediation" is an institute that continues if "Reconciliation" fails, resulting in divorce but not through a court process and decision, but through a mediation process and a mediation agreement. Therefore, the approval of the agreement as a necessary process in the second case stems from the Mediation Law as above, from Article 158.q of the Civil Procedure Code and from an analogy interpretation of Articles 125 - 127 of the Family Code.

Law No. 10 385/2011 does not provide for the approval of the Mediation Agreement in cases of extrajudicial or voluntary mediation. For these cases, it sanctions the status of an "executive title" if the requirements of Article 22 are met.

Article 23.3 of this law states: "If the settlement agreement meets the conditions specified in Article 22 of this law, it constitutes an executive title and, in this case, the enforcement service is responsible for its execution." Also, the last paragraph of Article 22.1 states: "This agreement is mandatory and enforceable to the same extent as arbitration awards."

In reference to the meaning given by Law No. 52/2023 "On Arbitration in the Republic of Albania" in Article 39.4, arbitration awards are cited. "The arbitration court decision is final and binding for the settlement reviewed from the date of publication."

Article 46.1 of this law states: "Arbitration court decisions, when the place of arbitration is in the Republic of Albania, constitute an executive title and are enforced after the issuance of the enforcement order by the district court in accordance with the rules established in the Civil Procedure Code." Article 432 of the Civil Procedure Code states: "The arbitration court decision is final regarding the dispute under consideration, as soon as it is pronounced, except in cases provided for by Article 434 of this Code. It becomes enforceable by force based on an enforcement order issued by the court of first instance of the place where the decision was made."

This provision complies with Article 510 of the Civil Procedure Code. They are executive titles:

e) other acts defined as executive titles by special laws and the enforcement office is responsible for their execution.

Article 511 of the Civil Procedure Code states: "The executive title is enforced through the issuance of the enforcement order."

Clearly, in cases of extrajudicial or voluntary mediation, the court is tasked with issuing the Enforcement Order upon request of the parties if the Mediation Agreement meets the conditions of Article 22.2 (parties; description of the disagreement; obligations and conditions imposed by the parties on each other and the manner and deadline for their fulfillment; signatures of the parties and the mediator), or to reject the request for the issuance of the enforcement order by declaring its invalidity if these conditions are not met. Approval of the mediation agreement is not required in this case. In any case, regardless of the type of mediation, voluntary execution is a universal and open way for the parties.

IV. IMPLEMENTATION OF THE LEGAL FRAMEWORK IN THE FAMILY FIELD IN MEDIATION PRACTICES

The number of mediation practices analyzed for the purpose of this study was relatively small, due to the obligation to maintain the confidentiality of the parties and the data, as well as because in general, conflicts resolved through mediation continue to be few. Also, national statistics are lacking on the number of cases referred to each type of mediation or resolved, as well as on the method of resolution and the execution of the settlement agreement.

Their analysis shows that despite the parties expressing their willingness to resolve the dispute through extrajudicial mediation, often the court becomes a barrier to this process. It is not uncommon for the court to reject requests for "Enforcement Order" for extrajudicial mediation agreements with the argument of incorrect presentation of the request object. According to the court, the object of the request should be "Approval of the Settlement Agreement" and not "Enforcement Order⁵," which contradicts the legal framework analyzed above and makes mediation incredible and inefficient for the public. This is especially true in the current Albanian judicial context when the time span between sessions spans several months.

Meanwhile, there are many other examples where the court has made a correct interpretation of the law regarding its duties in relation to the two types of mediation and, depending on the case, has issued an enforcement order or approved the Mediation Settlement Agreement and then either simultaneously or subsequently issued the Enforcement Order⁶.

V. CONCLUSION

Although 13 years have passed since the enactment of Law No. 10 385/2011 and 5 years since the amendments of 2018, mediation, especially in the field of family relations, continues to face significant challenges.

The increase in public awareness to embrace mediation as an alternative to justice often confronts the judiciary's confusion in interpreting the legal framework regarding judicial discretion in the two types of mediation, extrajudicial and court-referred, often resulting in the rejection of requests for "Enforcement Order" for extrajudicial mediation.

This situation is further exacerbated by the lack of a decisive/unifying judgment from the Supreme Court, as requests for orders are generally not appealed after rejection due to long judicial deadlines.

In this case, we believe that an appeal is still a useful instrument that the parties or their representatives should take into consideration in the event that "Enforcement Orders" for extrajudicial mediation are refused, in order to pursue the legal avenue of enforcing agreements of this type of mediation. This is true whether the goal is to unify judicial practice all the way up to the Supreme Court.

⁵ Decision No. 945 date 16.05.2024 of the Court of General Jurisdiction of the First Instance of Durrës

⁶ Decision No. 11–2023-7083 dated 22.12.2023 of the General Jurisdiction Court of First Instance in Durrës; Decision No. 167 dated 17.07.2023 of the General Jurisdiction Court of First Instance in Durrës; Decision No. 5365 dated 2.06.2023 of the General Jurisdiction Court of First Instance in Tirana.

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