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REPRESENTATION AS AN IMPORTANT INSTITUTION OF CIVIL LAW

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ABSTRACT

Representation is a fundamental institution within civil law, playing a crucial role in the resolution of legal affairs. Subjects of law during the establishment of legal affairs or undertaking various procedural actions in civil litigation procedures may engage representatives who act on behalf and for the benefit of their interests. This paper explores the significance of representation as a legal mechanism including its impact on the efficacy of legal proceedings and the protection of parties' interests.

The necessity to act through representation arises as a result of the intensification of social relations and finds wide application due to the lack of time and the impossibility of parties to personally carry out their actions every time. Additionally, it is due to the complexity of the legal affairs and the risks that may be encountered in the absence of professional knowledge, whether they are physical or legal persons.

This paper aims to discuss difficulties faced by individuals who do not engage such representatives, like lawyers, to resolve their legal matters and examines the impact of such representation on court proceedings. It also addresses the challenges and limitations associated with representation, such as issues related to the quality and competence of representatives, and the potential disparities faced by those unable to afford legal services.

This research employs various methods, including historical and theoretical analysis, examination of judicial practices, and comparative aspects. The historical method highlights the evolving nature of representation in civil law over time. While the comparative method is used to investigate how the right to representation is regulated across different jurisdictions, revealing similarities and differences in their legal frameworks. The findings underscore the

importance of effective representation in ensuring fair and equitable outcomes in civil legal processes.

Key words: legal representation, authorization, subjects of law, contractual representation.

INTRODUCTION

Analyzing the historical development of this institute shows that representation has its genesis in Roman law. It is evident, that this institute has evolved over time, gaining more and more importance which it did not previously have. In Roman law, initially, the institute of representation did not exist, and individuals were required to carry out their legal affairs without the possibility of involving other persons or delegating their legal authority. Although, the need for representation by others had emerged much earlier. According to the Romans, contractual obligations obliged only the contracting parties.

Later on, representation gained significant momentum and according to Roman jurists, it was conceptualized as *"mandatum"*. The representative or the *"mandatary"* has carried out those tasks on behalf of the *"mandate"*, but the legal consequences always fall upon him. Moreover, he has become a debtor or creditor in the related legal matters with the obligation that only the effects of that task be transferred to the *"mandate"*. Thus, the *"mandator"*, could not be compensated or rewarded for the work performed, due to the dependence of social relations and their class and the non-payment of the *"mandatary"*, which has characterized this institute as distinct from representation. (Bilalli & Bahtiri, 2015).

So now with the evolution of time and due to the complexity of civil legal matters, the need to act through a representative is very necessary. *"Representation means undertaking legal actions on behalf of another, wherein one party - the representative - undertakes the execution of one or more legal actions for the other person - the represented, with the same legal effect as if these actions had been directly performed by the represented"*. (Dauti, et.al., 2013). Representation is attributed to individuals who do not have the capacity to act, individuals whose capacity to act is limited, as well as legal entities. In addition, representation also applies to individuals with the full legal capacity to act, who although they have the capacity to be a party to the procedure, lack professional capacities and knowledge due to the complexity of legal matters. Therefore, the assistance of an experienced lawyer is crucial to achieving a favorable result for the specific case. It is generally accepted that the phenomenon of contracting or conducting other legal matters, through representation has seen significant growth in recent years, as a result of the development of international trade and the advancement of social relations worldwide.

However, the legislator has determined some legal restrictions, obligatorily excluding the representatives, as not all legal matters are conducted through them, such as the compilation of the will or dispositions according to inheritance law, contract of order, adaption, engagement, marriage etc. (Law No.2004/32 on Family of Kosovo, article 133 par.1, 2006). Therefore, the execution of these legal matters, through representation is not allowed, because it is required that the will of the interested party be expressed. (Civil Code of the Republic of Albania, article 76, 1994).

Thus, they are personal and for this reason, the legal action must be carried out by the person themselves according to the law. This is because the establishment of these legal

relationships is closely linked to the specific qualities of the individuals involved and these relationships operate under the *"intuit personae"*. In the context of representation, the key parties involved are the represented person, the representative, and the third party with whom the legal transaction is conducted.

The represented party is a legal subject who transfers the rights to another person, to undertake legal action on behalf and for the interests of the represented party. *The representative* is the person who accepts legal authorizations from the represented party, expressing his willingness to undertake legal work or action on behalf of another, within the terms of the authorization, with compensation. *"The third party is the person with whom the representative enters into legal work on behalf and for the account of the represented party"*. (Aliu, 2013).

TYPES OF REPRESENTATION

The types of representation are as follows:

1. Legal representation,
2. Voluntary or contractual representation.

LEGAL REPRESENTATION

Legal representation is determined by law. Here, the will of the represented party to choose the representative is excluded, based on the premise that the law has determined who can act as a legal representative imperatively. The authorizations of the legal representative to undertake legal actions arise directly from the law or the custodial body. This type of representation is also known as non-contractual representation. *"The legal representative is a physical person, who based on the law, is authorized to undertake legal actions or tasks on behalf and for the account of the represented party, who can be either a physical person or a legal entity."* (Aliu, 2013, p. 342). Physical persons may be represented by legal representatives such as parents of minors, the custody or custodial body, as well as temporary representatives.

Due to fulfilling their legal obligation, towards exercising parental responsibility, parents are considered legal representatives of their minor children, until they reach the age of 18. The parents appear as the legal representatives in these specific situations: *when children are under parental care and do not have the capacity to act until the age of 14, as well as in the case of children with limited capacity to act, respectively from the age of 14 to 18*. The age of 18 constitutes the time limit, when the legal capacity to act is legally determined. This implies that the child is now considered an adult and loses the right to legal representation since the adult is now aware of undertaking legal actions and the consequences which they produce. *"Majority is obtained upon the completion of the eighteenth year of age. Full capacity to act is obtained upon reaching majority or by entering into wedlock prior to this age"*. (Law No.2004/32 on Family of Kosovo, article 133 par.1, 2006).

However, there are cases from judicial practice, where even after reaching the age of 18, parental rights continue for the adult, so the parent remains the legal representative, especially when their children have mental disorders or suffer other illnesses. Due to the close relationship between parent and child, the legislator has recognized parents as legal representatives of the child, and they must always consider the child's best interests in their decision-making. *"Parents are obliged and have the right to legally represent their minor children"*. (Law No.2004/32 on Family of Kosovo, article 133 par.1, 2006). Otherwise, when

children lack parental care, they are represented by the custodial body, until they gain full capacity to act. The custodial body carries out this representation through a competent authorized person - a physical person appointed as a custodian or protector of the interests of children without parental care. (Morina & Nikçi, 2012).

REPRESENTATION OF LEGAL ENTITIES

Legal Representation also applies to legal entities, which must be represented by an authorized physical person, based on the law or the general act of the legal entity (such as its statute). For example, the managing director is presented as a legal representative of limited liability companies. *“Every managing director is authorized to represent the Limited Liability Company as Authorized Representative in the conduct of its Business Activities, including the authorization”*. (Law No.06/L-016 on Business Organizations, article 109, par.1, 2018). Opposite views, related to this position, that the organ is the representative of the legal entity, had Professor Andrea Nathanaili (1974) in his opinion that *“... the organ of the legal entity should not be considered as the legal representative of the legal entity..., but as an integral part of it. Through the organ composed of physical persons, the legal entity conducts its activities, and for this reason, the legal actions carried out by the organ are considered actions of the legal entity itself... The legal entity, through its activities, may also use representation, but it is voluntary representation based on the power of attorney granted by the competent organ of the legal entity to other persons, to carry out specific legal actions”*. (p.102 -103).

Legal representation has its legal basis from the law, from the general act of the legal entity (such as its statute), based on the act of the state organ, and in all these cases, representation is called legal representation. In cases where the representative is appointed based on a court decision, they are considered representatives based on the decision of the competent authority. *“With the statute of the legal entity, it is stipulated who is authorized to represent the legal entity, which usually are the individual organs. However, in this founding act, it may be provided that in various judicial procedures, instead of the individual organ, the legal entity may be represented by a lawyer or another authorized individual”*. (Aliu, 2013, p. 345).

Case from judicial practice: During the preliminary examination of the lawsuit, the court issued a decision on September 21, 2016, inviting the plaintiff to specify the address for the defendant within a precise period of three days. In connection with this, the authorized representative of the plaintiff had proposed to the Court that in the absence of the defendant's address, a temporary representative should be appointed according to Article 79 par. 3 a) of the Civil Procedure Law. In decision No. 197/11 of the Basic Court in Pristina, during the preparation of the preparatory-main hearing, outside the session, the court appointed a temporary representative for the defendant from the list of lawyers, due to the unknown address. (Decision, 2020).

Case from judicial practice: Meanwhile, in decision No. 256/13 dated October 20, 2021, the Basic Court of Pristina obliged the plaintiff B.B, on behalf of the advance payment for the expenses of the temporary representative for the defendant F.F, within a period of three days, to deposit in the treasury of this Court the amount of 310 euros, under the obligation of legal consequences. (Decision, 2021).

JUDICIAL REPRESENTATION

"Judicial Representation is an institution that finds application in everyday life, aiming for legal entities and physical persons to protect their interests during the adjudication of disputes brought before the court for examination". (Kondili, 2008). Through the issuance of specific decisions, the Court appoints temporary representatives to certain physical persons and legal entities with the purpose of protecting the rights of the party absent in civil litigation and avoiding delays that prolong the judicial procedure. "If the court determines that the party has no legal representative or the legal representative does not have the special authorization if such is needed, it will require from the competent custody body to appoint a custodian to the person who lacks procedural capabilities, respectively' will invite the legal representative to acquire the special authorization or may undertake other measures which enable a fair representation of the party who lacks procedural capabilities". (Law No. 03/L-006 on Contested Procedure, article 83, 2008).

The temporary representative appointed by the court's decision has all the rights and responsibilities that a legal representative would have. By Court decision, the temporary representative is appointed from the list of lawyers. (Law No. 03/L-006 on Contested Procedure, article 83, 2008).

VOLUNTARY REPRESENTATION

Voluntary representation implies that this type of representative is appointed by the party based on their declaration of will and is otherwise known as *a representative by authorization*. Here, the representative undertakes legal actions on behalf of another, not for themselves, while the legal consequences are created as if the represented party themselves had acted, of course, when they have acted within the scope of the authorizations, and directly bind the represented party and the other contracting party. For example, when the representative undertakes actions for the represented party, such as entering into sales contracts or terminating them etc. (Bydlinski, 2018). *"An authorization is the entitlement to act as representative conferred upon the authorized person by the authorizer via a legal transaction"*. (Law No.04/ L-077 on Obligational Relationships, article 75 par.2, 2012).

An authorization is a unilateral legal act or declaration of the will of the represented party, who, through their free will, determines the scope of the authorization and depending on the given mandate, the authorization may be general or specific. Regarding the authorizations arising from a specific authorization, Law No.04/L-077 on Obligational Relationships of Kosovo has enumerated, the cases in which the representative must have specific authorization. These are specific legal actions that do not fall within the regular scope of their work. *"Without a special authorization for each individual case authorized persons may not assume an obligation under a bill of exchange, conclude a contract of surety, a contract on settlement, or a contract on the alienation or encumbrance of real estate, become involved in a dispute, conclude an arbitration agreement, or waive any right without recompense"*. (Law No.04/ L-077 on Obligational Relationships, article 75 par.2, 2012).

The Law on Contested Procedure has also determined expressly the situations when the legal representative, the lawyer, or the representative who is not a lawyer must have specific authorization. Likewise, the Civil Code of the Republic of Albania has generalized the special authorization just like the legislation of Kosovo, but it has not specified the cases. Contractual Representation exists when the representative is appointed by contract. Through, the representation contract, the co-contracting parties specify the legal actions that the

representative must undertake, as well as the obligations arising for the represented party, mainly the obligation for remuneration or compensation to the representative. (Dauti, et.al., 2013) . The person representing based on the authorization must have full legal capacity to act. The full legal capacity to act is also provided for by article 86 of Law No. 03/L-006 on Contested Procedure. The legal obligation for full capacity to act of representatives is also recognized by the Civil Code of the Republic of Albania. In contrast to this, the Civil Code of Austria recognizes limited capacity for representatives to act in order for representation to produce valid legal consequences. (Bydlinski, 2018).

The Civil Code of the Republic of Albania provides that an authorization for the execution of certain legal actions before courts and state institutions must be made by a notarial act, except in cases where it is permitted to be made by a simple written document. (Civil Code of the Republic of Albania, article 76, 1994). Unlike, the Civil Code of Austria, the Law on Contested Procedure of the Republic of Kosovo, does not expressly require an authorization to be made by a notarial act, while the Law on Obligational Relationships of Kosovo, prescribes the form of authorization, according to a notarial act only for the contracts that must be drawn up in writing, thus requiring an authorization according to a notarial act.

In contrast to the positive law of Kosovo, Swiss Law, although, for contracts that require a written form, does not see the presentation of an authorization in that form as necessary. (Dauti, et.al., 2013) *"A representative, besides a physical person, may also be a legal entity, which implies a legal office dealing with representation matters for the performance of legal tasks or procedural matters on behalf and for the account of another. For example, if a legal entity is authorized to conclude contracts, then its duty would be to conclude the contract on behalf and for the account of the principal"*. (Aliu, 2013, p. 347).

VOLUME OF AUTHORIZATION

Authorization can be general or specific. Law No. 03/L-066 on Contested Procedure has provided for situations when the representative needs to have specific authorization, in the cases of representing the interests of the represented party. Depending on who represents us and the type of legal actions taken, the law has specifically defined situations for the possession of this authorization. For example, when a non-lawyer person represents us with authorization and the granter of the authorization has not specifically detailed the authorizations, the grantee requires express authorization from the same for undertaking specific actions. According to the Law on Contested Procedure, a party who is not a lawyer needs specific authorization for withdrawing the lawsuit, submitting a counterclaim or renouncing it, for court settlement agreements etc. (Law No. 03/L-006 on Contested Procedure, article 83, 2008). Therefore, specific authorization implies the execution of tasks on behalf and for the account of another party, which are not part of regular business activities. (Aliu, 2013).

The Law on Obligational Relationships of Kosovo provides for which obligations require specific authorization, respectively a special authorization. This is stipulated in article 79 paragraph 4, which states that *"Without a special authorization for each individual case authorized persons may not assume an obligation under a bill of exchange, conclude a contract of surety, a contract on settlement, or a contract on the alienation or encumbrance of real estate, become involved in a dispute, conclude an arbitration agreement, or waive any right without recompense"*. (Law No. 03/L-006 on Contested Procedure, article 83, 2008). The principal, when granting authorization, whether it is a general or specific authorization, may impose certain limitations on the execution of tasks on his behalf and for

his account, such as for the person with whom the contract will be concluded or for the duration of the contract. In these cases, such an authorization is called a limited authorization. (Aliu, 2013).

EXTENT OF AUTHORIZATION

The representative is authorized to undertake only those legal actions for which an authorization has been issued, on behalf and for the account of another person. In cases, where the representative exceeds the limits of the authorization, then these actions executed beyond the scope of representation are not binding on the represented party, thus they do not produce legal consequences for them, but for the representative who becomes liable to the other contracting party. (Nuni, 2009). However, if the represented party subsequently approves the unauthorized action through tacit representation, this exceeding or surpassing of the authorization is equated with authorization as if it had been given from the beginning. This means that the subsequent approval also for the part that exceeded the authorization has a retroactive effect from the moment the representative acted (the act of retroactive approval). Thus, here we have an extension of the authorization after the completion of the legal action. (Bydlinski, 2018). *"If the represented party does not approve the contract within the period required for such contracts to be regularly reviewed and evaluated, it will be considered that approval has not been given at all."* (Law No.04/ L-077 on Obligational Relationships, article 75 par.2, 2012).

REVOCATION OF AUTHORIZATION

The positive legislation of Kosovo has envisaged several ways of revoking the authorization, which it has specifically defined in the respective provisions. Similarly, the Civil Code of Albania has listed comprehensively the cases of termination of such authorization, such as the representative has completed the legal actions for which it was given, the deadline for which it was given has expired, the representative or the represented person has died, or when one of them has lost the capacity to act, the legal entity, the representative or the represented party has ceased to exist, the represented party has revoked the authorization or the representative has renounced it. (Civil Code of the Republic of Albania, article 76, 1994). The most common form of terminating an authorization is revocation. Just as the authorization is given to a specific person, it can also be revoked through revocation as a unilateral legal act. Generally, the revocation does not need to be justified or approved by the representative; it is sufficient for the granter of the authorization to express the desire that they no longer wish to be represented by someone else or not to act on their behalf anymore. The consequences of revocation lie in the fact that the legal authority of the previously authorized person is terminated *ex nunc* - meaning it does not have a retroactive effect. (Bydlinski, 2018).

ASPECTS OF JUDICIAL PRACTICE REGARDING REPRESENTATION

From the findings of the Court of Appeal's practice, it has emerged that this court has referred many cases back for retrial to the Court of first instance without even considering the appeals and counterclaims of the inter-party litigants, when it found, that the same has made fundamental breaches of procedural provisions, while lacking authorization in the case file. For example, with decision No. AC.nr.158/13, dated March 25, 2016, the Court of

Appeal, in fulfilling its official duty, referred the case back for retrial, because the authorization of the plaintiff's representative, who had taken procedural actions on their behalf during the contested procedure, by filing a lawsuit and representing them during court sessions, was missing from the case file.

Additionally, the authorization of the defendant was also lacking. Furthermore, the Appellate Court in its decision, instructed the court of first instance, that during the retrial, it should compel the plaintiff's lawyer and the defendant's representative to submit their authorizations within a specified timeframe, which is left to the judge's discretion, or to present approvals for the procedural actions undertaken by these representatives, so that they may have legal effects. Depending on this, the court will then take further procedural actions according to the applicable legal provisions. (Llulluni et al., 2019).

Regarding the appointment of temporary representatives, the Court of Appeal of Kosovo has noted the ongoing violations by the courts of first instance, related to the provision of article 83 of Law No. 03/L-006 on Contested Procedure. (Law No. 03/L-006 on Contested Procedure, article 83, 2008). According to the provisions of the Law on Contested Procedure of Kosovo, the Court appoints a temporary representative from the list of lawyers (Law No.04/L-193 on the Bar, article 14 par.2, 2013), who has all the rights and obligations of a legal representative. As for the appointment of the temporary representative, the Court of Appeal of Kosovo has found continuous deficiencies in the application of the provisions of Law No. 03/L-066 on Contested Procedure by the first-instance courts, regarding the legal obligation for the decision on the appointment of the temporary representative to be published in the Official Gazette in three languages. Additionally, other dilemmas for the first-instance Court arise regarding the selection of the temporary representative. These dilemmas depend on whether the appointment should be made *ex officio* by the Court or solely based on the proposal of the plaintiff party, which has a legal interest in conducting the judicial procedure without delays and the dilemmas on how to proceed further with the procedure, after issuing the decision for the appointment of the temporary representative.

In this regard, the Court of Appeal has established a unified practice regarding the appointment of temporary representatives, who must be officially appointed once the legal conditions are met, even without a proposal from the parties. If the party with a legal interest in the appointment of the temporary representative fails to deposit the financial means for the expenses of the temporary representative within the specified timeframe, then the court revokes the decision for the appointment of the temporary representative. As a result, the Court of Appeal of Kosovo, in its decision Ac. No. 2105/16, dated October 24, 2016, characterized the appealed judgment of the Court of first instance, as illegal and unjust and involved a violation of the contestation provisions, thus remanding the case for retrial. This decision was made because the Court of First Instance did not apply the procedure for appointing a temporary representative in accordance with the legal provisions of the Contested Procedure Law. In its reasoning, the Court of Appeal noted that through the issued decision, the Court of First Instance appointed a temporary representative for the defendant, but subsequently failed to comply with the law by not publishing the announcement in the official gazette and displaying it on the Court's notice board. Despite these legal omissions, the Court of First Instance proceeded with the main trial and made a substantive decision on the merits of the lawsuit. (Llulluni et al., 2019).

CONCLUSIONS

Contemporary states pay considerable attention to the regulation of the matter of representation because issues such as contract binding and other legal actions hold significant importance in their legislation, considering their complexity and sensitivity. The legal systems of European contemporary states tend to harmonize the treatment of this institute as uniformly as possible. German Civil Code has played a significant role in this regard, making a clear distinction between representation and mandate. Following Germany, many other states such as Denmark, Norway, Sweden, Greece and Switzerland have adopted this approach to regulation.

This regulation found reflection in the Albanian Civil Code of 1994 as well. Considering, that people are often busy at work, and engaged in continuous travel, whether due to physical or mental incapacity or other reasons, which prevent them from engaging in legal matters directly, the necessity to act through representation becomes crucial and widespread in today's world. Representation in civil law is a powerful tool for effectively promoting the interests of a person, who delegates legal authority to another person with experience and professional knowledge. Representation as a highly specialized institution of civil law can be exercised by individuals such as lawyers, legal experts and other persons who are specialized in certain fields or who are legally recognized to have the right to representation. Representation through a lawyer in a civil litigation procedure arises due to the complexity of legal tasks or actions so the assistance of an experienced person is decisive in achieving favorable results for the specific case. Due to the importance of this institute, Kosovar legislation has enacted Law No. 04/L-017 on Free Legal Aid, which enables citizens, who lack financial means to have effective access to justice through services such as drafting documents, providing legal advice, representing in civil procedures and other procedures etc. This legislation elevates the institute of representation to a more advanced level. This institution in the Republic of Kosovo operates satisfactorily due to the improvement of legislation and its implementation in practice. It is regulated both by substantive and procedural provisions. Representation according to procedural law stipulates that individuals who have full legal capacity have the right to self-representation in civil matters, but it also allows them to be represented by legal representatives as well as through voluntary representatives. Parties who represent themselves often face difficulties of various kinds and in most cases are unable to understand the complexity of the relevant legislation and judicial practice. Therefore, to avoid these difficulties, the necessity to act through a representative is very evident in practical terms. Hence, acting through a representative is highly important, because it ensures efficiency and effectiveness in facilitating and expediting legal work.

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