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FORMATION AND DEVELOPMENT OF THE MEDIATION INSTITUTE IN THE REPUBLIC OF KAZAKHSTAN: PROBLEMS AND SOLUTIONS

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Abstract. This article describes the history of the formation of the institution of mediation in Kazakhstan as a historically formed and developing, complex sociocultural phenomenon, which, to one degree or another, is reflected in various cultures from ancient times to the present day. The authors considered the problems and prospects for the development of the institution of mediation. The characteristic features of mediation, its principles are analyzed, attempts are made to reveal the ethnopsychological features that impede the development of mediation in Kazakhstani society. The authors consider the implementation of the law “On Mediation”, the practice of using mediation in civil proceedings, which contributes to the development in Kazakhstan of an effective tool for resolving disputes and conflicts.

Key words: Institution of mediation, history of formation of the institution of mediation, mediator, alternative way of resolving a dispute, interethnic conflict, Kazakhstan

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ҚАЗАҚСТАН РЕСПУБЛИКАСЫНДАҒЫ МЕДИАЦИЯ ИНСТИТУТЫНЫҢ ҚАЛЫПТАСУЫ МЕН ДАМУЫ: МӘСЕЛЕЛЕРІ ЖӘНЕ ОЛАРДЫ ШЕШУ ЖОЛДАРЫ

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Андатпа. Мақалада ежелгі дүниеден бастап қазіргі кезеңге дейін әртүрлі мәдениеттерде көрініс табатын, тарихи қалыптасқан және дамыған, күрделі әлеуметтік-мәдени құбылыс ретінде Қазақстандағы медиация институтының қалыптасу тарихы зерттелген. Медиация институтының даму мәселелері мен болашағы талданған. Сонымен қатар медиацияның ерекшеліктері, принциптері қарастырылып, қазақтандық қоғамдағы медиацияның дамуына кедергі келтіретін этнопсихологиялық ерекшеліктерді ашып көрсетуге талпыныс жасалған. Авторлар Қазақстандағы шиеленістерді шешудің тиімді құралының дамуына ықпал ететін

«Медиация жөніндегі» Заңның жүзеге асырылуы мәселелерін, азаматтық сот ісіндегі медиацияны қолдану тәжірибесін қарастырған.

Түйін сөздер: Медиация институты, медиация институтының қалыптасу тарихы, медиатор, шиеленісті шешудің баламалы құралы, ұлтаралық шиеленіс, Қазақстан

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ФОРМИРОВАНИЕ И РАЗВИТИЕ ИНСТИТУТА МЕДИАЦИИ В РЕСПУБЛИКЕ КАЗАХСТАН: ПРОБЛЕМЫ И ПУТИ ИХ РЕШЕНИЯ

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Аннотация. В статье описана история становления института медиации в Казахстане как историческое, сформировавшееся, развивающееся и сложное социокультурное явление, которое в той или иной степени находит отражение в различных культурах с древнейших времен до наших дней. Авторами рассмотрены проблемы и перспективы развития института медиации. Проанализированы характерные особенности медиации, ее принципы, сделаны попытки раскрыть этнопсихологические особенности, препятствующие развитию медиации в казахстанском обществе. Авторы рассмотрели вопросы реализации Закона РК «О медиации», практику применения медиации в гражданском судопроизводстве, которое способствует развитию в Казахстане эффективного инструмента разрешения спора и конфликта.

Ключевые слова: Институт медиации, история становления института медиации, медиатор, альтернативный способ разрешения спора, межнациональный конфликт, Казахстан

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Introduction. Throughout all periods of human history, various methods and approaches have been used to resolve disputes and conflicts. One such method is mediation. Like other methods of conflict resolution (negotiations, dialogue, arbitration, courts, etc.), mediation has its own specific features at the social and political levels and is currently widely applied in the practice of managing social processes. Mediation is a negotiation process carried out with the involvement of a third party, which has its origins in the history of human relations, but was institutionalized in modern practice in the second half of the 20th century. Today, in countries with developed legal systems, mediation is broadly used in resolving different types of conflicts, and citizens frequently seek the help of mediators. Therefore, the necessity of scientifically studying the formation and development history of the institution of mediation in Kazakhstan is linked both to the novelty of this institution for our country and to the growing interest from society and the academic community.

Research Methods. The methodological basis of the research is formed by general scientific and specific methods of cognition. In studying the formation and development history of the institution of mediation in Kazakhstan, as well as the development of mediation abroad, comparative analysis, dialectical, and historical-systematic methods were applied. In addition, based on the historical-legal method, normative data were analyzed, the historical regularities of the mediation institution were identified, and its future development issues were explored.

Discussion of the Problem. At present, disputes and conflicts of various types — including social, political, economic, cultural, religious, and others — are widespread in society. This is a natural phenomenon, since with the passage of time, conflict situations inevitably arise within any social structure due to scarcity of resources or other reasons. Mediation plays an important role in resolving such tense disputes. The term “mediation” derives from the Latin word *mediare*, meaning “to mediate.” Mediation is considered an alternative method of resolving any conflict or dispute with the involvement of a neutral third party who has no vested interest in the conflict. As a mediator, this third party facilitates the disputing or litigating sides in reaching a certain agreement. However, researchers define the concept of “mediation” differently. For example, A. Rau, T. Sherman, and S. Peppet, in studying alternative dispute resolution methods, describe mediation as a process in which a neutral third party helps disputants identify their mistakes and different viewpoints, explore alternative opportunities for conflict resolution, and seek compromise to achieve agreement (Rau, et al., 2002: 26). According to Moore, mediation is the intervention of a third party who has no authority to impose decisions but helps the parties voluntarily resolve their conflict (Moore, 2003). Other researchers such as P.S. Pributko, Yu.V. Mikhaylenko, and L.M. Dubchak describe mediation as the use of a mediator, either individually or confidentially, to resolve a conflict situation. In their view, mediation has several advantages as an alternative to judicial proceedings and other coercive procedures. The most significant of these advantages is that mediation aims to resolve disputes through a voluntary and fair process, equally satisfying the interests of the involved parties

Of course, the history of mediation dates back to ancient times. As we know, in every historical period various forms of dispute resolution emerged, which included a set of methods allowing the parties to settle conflicts either temporarily or permanently. Therefore, several stages in the formation and development of mediation can be distinguished.

According to the Russian researcher V.V. Kolomytseva, the first stage of the development of mediation is associated with the need to resolve disputes between tribes and communities during the primitive communal system and the ancient era, and later between city-states (Kolomytseva, 2013: 268). At that time, of course, the concept of “mediation” was not formally used. Nevertheless, in regions where mutual trade was developed, mediation practices can be observed. Historians trace the origins of modern mediation to the Phoenician civilization, where maritime trade was widespread, and to Ancient Babylon. Later, the institution of mediation developed in Greece and Ancient Rome. For example, in Ancient Rome, starting from the *Digest of Justinian*, the rules of mediators were enshrined in law, and mediation was referred to by various terms in Roman law (Allakhverdova, Ivanova, 2007: 16). Apart from these civilizations, reconciliation procedures were also present in Africa. In many African countries, the institution of public assemblies that resolve disputes through a trusted third party has survived to this day.

In Ancient Rus, attempts were also made to resolve princely disputes, as well as interstate conflicts, through mediation. In the early 19th century, a system of commercial courts was established in the Russian Empire and functioned effectively. Records from that time indicate the use of the term “mediator,” noting the effectiveness of resolving trade-related disputes with the help of mediators (Kniazev, 2004: 9).

Kazakhstan also has its own history of applying alternative methods of conflict resolution. As is well known, the nomadic Kazakh tribes widely used the *biys' courts*. Given that the biys were recognized as representatives of the people who took part in governance, the Kazakh system of rule can be considered a model of steppe democracy. The institution of biys emerged long ago and went through certain stages of development in our history. Biys were recognized as judges who carried out judicial authority. Therefore, a biy had to possess deep knowledge of customary law and the ability to apply it when necessary, and only with these qualities could he exercise judicial authority among the people.

Shokan Ualikhanov, in his work *“The Court of Biys of the Ancient Popular Model”*, emphasized the role of biys, writing: “In the Kazakh steppe, the honorable title of biy was not conferred through any election or by the government in power, but was given only to a Kazakh who thoroughly knew the court procedure and mastered the art of eloquence. To earn the title of biy, one had to engage in

several eloquence contests before the people and prove his knowledge and oratory skills” (Valikhanov, 1984: 39).

One of the main goals of a *biy* elected by the community was to reconcile the disputing parties. However, the *biys' courts* did not consider cases outside their jurisdiction, that is, they did not intervene in the affairs of other villages or tribes. State-level issues and disputes between clans or tribes were resolved by the council of sultans and the eminent *biys* at the khan's court. Thus, the institution of *biys* played a key role in the development of Kazakh society and remains part of the nation's heritage today. Modern mediation is in some respects similar to the institution of *biys*, but there are notable differences: first, *biys* resolved disputes publicly, whereas modern mediation is usually conducted confidentially; second, *biys* made binding decisions, while mediators, relying on their professional skills, only assist the parties in reaching an agreement.

During the Middle Ages and the early modern period, the second stage of the development of mediation began. At this stage, the history of mediation was closely linked to the need to end prolonged wars between states. A landmark event was the adoption in 1803 of the first mediation-related legal document in human history — the *Act of Mediation*. Therefore, this period can be considered the starting point of mediation's institutional development. At the crossroads of medieval and modern history, one of the longest and most destructive conflicts in Europe — the Thirty Years' War — ended in 1648 through peace treaties achieved with the help of reconciliation processes, i.e., mediation.

In the modern period, Napoleon Bonaparte played a mediating role in the conflict between Switzerland, Germany, and France. In 1803, Napoleon approved the *Act of Mediation*, which restored Switzerland's independence and its former state system.

The third stage in the development of mediation is characterized by its widespread necessity, legal institutionalization, and application in various spheres of activity. This stage is marked by the rapid growth of mediation in the second half of the 20th century in common law countries — the USA, Austria, and the United Kingdom — followed by continental Europe, where the modern concept of “mediation” became widely used.

For example, in the early 20th century, the American economy faced a new type of conflict — the struggle between trade unions and employers over working conditions and wages. As a result, strikes, mass dismissals, and the threat of factory closures emerged. To address these disputes, the U.S. government proposed using the Department of Labor as a neutral mediator. To carry out this function, in 1947 the U.S. Federal Mediation and Conciliation Service was created. From the 1970s onward, mediation became an independent procedure in the United States, attracting increasing interest. During this period, local non-governmental organizations began to provide free or low-cost mediation services in cases of tenant-landlord disputes and family conflicts.

From the 1980s, the mediation institution expanded geographically: reconciliation practices spread from America to England, Ireland, Canada, India, Australia, and later throughout Europe. In 1999, an international conference on mediation was held in Vienna, and from that point the international community officially recognized mediation. Since 2000, mediation has become an established part of international law and international relations, actively used in resolving intercultural, interethnic, civilizational, economic, trade, and military disputes (Akhmedinova, 2019).

On January 29, 2011, the Law “On Mediation”, essential for contemporary Kazakhstani society, was signed. This law established the legal foundation for the use and development of mediation as a tool for resolving disputes and conflicts in Kazakhstan. At the same time, the institution of mediation has found wide application not only within the territory of Kazakhstan but also at the international level. In particular, on March 26, 2012, the Supreme Court of the Republic of Kazakhstan signed an agreement with the United Nations Development Programme (UNDP) for 2012–2014 within the framework of the project “Introduction of the Institution of Mediation in the Republic of Kazakhstan.” Following this agreement, Kazakhstan began to regularly host international conferences, informational seminars, training programs, and round tables with the participation of experts from Germany, Slovenia, Switzerland, Belarus, and EU countries.

Currently, Kazakhstan's strategy to join the ranks of the world's most developed countries and its active integration processes require that judicial proceedings meet the challenges of modern times. In this respect, a new model of civil proceedings is being built upon pragmatic approaches that ensure a balance of interests between the parties.

However, despite the adoption of the "Law on Mediation," mediation in Kazakhstan has not yet acquired a widespread character. This is because the mediation institution in Kazakhstan is still going through its formative stage. Nevertheless, there are several important factors contributing to the development of this socially significant dispute-resolution technology. These factors include: the revival of the historical tradition of peaceful dispute settlement (the practice of *biys*) supported by regional executive bodies; state programs allocating financial support; the absence of licensing requirements for training mediators; the simplified accreditation process for specialists trained abroad; the uncomplicated procedure for establishing mediator organizations; and the recognition of previously obtained international certificates of mediators.

In addition, under the Law "On Amendments and Additions to Certain Legislative Acts of the Republic of Kazakhstan on Mediation Issues," changes were introduced into the Civil and Criminal Codes of Kazakhstan, as well as the Code on Administrative Offenses. These amendments more closely connected the former legal system with the new legal institution. On July 3, 2011, by decree of the Government of the Republic of Kazakhstan, the procedure for mediator training was approved, regulating professional mediator education and ensuring a three-tier training system. Thus, today we can observe the formation of a unified legislative framework that regulates mediation as a legal institution and ensures its effective application.

At the initial stage of its establishment (2011–2012), Kazakhstan had 14 mediator organizations in operation, and 260 professional mediators were registered in the official roster. During this period, 700 mediation procedures were carried out, 15% of which were within the judicial process. Between August 2011 and October 1, 2012, the "Unified Mediation Center" and the "Mediation and Reconciliation Center" conducted 450 mediations, including 39 court mediations (Romanovskaia, 2017: 19). In 2018, 371 professional and 4,465 community mediators were officially registered in Kazakhstan. According to statistics, 4% of 871,000 civil cases were terminated on the basis of mediation procedures. According to the Ministry of Justice of the Republic of Kazakhstan, in 2019 there were 126 registered mediator organizations. This means that compared to 2012, the number of mediation organizations in Kazakhstan increased by 112 by 2019.

The institution of mediation in Kazakhstan has its own characteristics as well as certain challenges. Among its distinguishing features is the fact that corruption does not play a role in the process of dispute settlement through mediation. This is because there is no need to favor or support one of the parties, and an agreement cannot be signed unless it satisfies the interests of both parties. Furthermore, the aim of mediation is not to determine the guilty or innocent party, but to find mutually beneficial options for resolving the dispute. Additionally, mediation reduces the number of court cases, thereby easing the workload of the judicial system. For disputing parties, it is advantageous because of lower court costs and the opportunity to exercise control over the course of the dispute.

Another unique feature of Kazakhstani mediation is that the "Law on Mediation" explicitly identifies three situations where mediation is not possible:

1. When the interests of individuals declared legally incapable or partially incapable by the court are involved.
2. When one of the parties is a state body.
3. When the dispute involves corruption-related crimes.

However, the development of the institution of mediation in Kazakhstan also faces a number of challenges. Among them are the insufficient dissemination of conciliation procedures in society, as well as the lack of adequate public information and awareness campaigns regarding the advantages of mediation and the right of parties to seek the assistance of a mediator in resolving disputes. For example, according to researcher A.I. Karipov, one reason for the low level of recourse to mediation among the population is that citizens of the Republic of Kazakhstan are not sufficiently aware that agreements reached through mediation equally satisfy the interests of both parties (whereas in court

proceedings the decision usually favors only one party) and that mediation reconciles the disputants (Karipova, 2021).

Researcher I.A. Karatayev, examining the pressing issues of mediation, emphasizes: "... however, the widespread dissemination of mediation and the improvement of its normative framework will only be possible if factors such as citizens' mentality, their level of legal culture, and legal consciousness are taken into account. In our opinion, solving this problem depends on the active educational work of state authorities at all levels, including local self-government bodies, the mass media, and the mediators themselves" (Karataev, 2016: 74).

In addition, Article 9 of the Law of the Republic of Kazakhstan "On Mediation" stipulates that professional mediators must be at least 25 years old, have a higher education, and hold a certificate confirming that they have completed the mediator training program approved by the Government of Kazakhstan. Retired judges may also serve as professional mediators. Non-professional mediators, however, can be citizens over the age of 40 who have completed a mediation training course. Thus, it is not mandatory for mediators to have a legal background. Nevertheless, in the context of rapid social development and globalization, entrusting the resolution of disputes to individuals without professional legal training or analytical capacity understandably creates a degree of public mistrust, which negatively affects the development of the institution of mediation in the country.

Conclusion. At present, mediation occupies an important place in the field of dispute and conflict resolution and, in many cases, proves to be an effective procedure. The institution of mediation has passed through several stages of its formation and development: from the emergence of early ideas about mediation and its application in conflict situations to its modern legislative consolidation. Since 2011, modern mediation has been introduced into Kazakhstan's legal system. Of course, mediation in Kazakhstan has its own specific features and challenges.

Foreign experience demonstrates that mediation not only allows for the rapid and efficient resolution of disputes, but also addresses many issues faced by judicial systems, such as reducing the number of civil cases, simplifying trial procedures, and shortening case consideration times. Today, mediation is increasingly applied in resolving intercultural, interethnic, civilizational, economic, trade, and even military disputes. In foreign practice, alternative dispute resolution institutions are regarded as effective mechanisms for protecting human and civil rights and freedoms. Therefore, the positive experience of alternative dispute resolution abroad is highly significant for the Kazakhstani legal system.

Recommendations. In order to further develop and improve the functioning of mediation in Kazakhstan, we propose the following:

1. *Refine the legal framework:* The normative-legal basis of the mediation institution should be clearly and systematically revised or supplemented. A more comprehensive and consistent approach to the mediation process and its actors is required. Such improvements will strengthen public trust in mediation and encourage citizens to make greater use of it.

2. *Establish a central coordinating body:* At present, it is difficult to know the exact number of mediators and the organizations maintaining mediator registries in Kazakhstan. Consequently, it is also impossible to accurately determine how many cases and disputes are resolved annually through mediation, which prevents reliable statistical analysis. Therefore, it is necessary to establish a specialized national-level body responsible for coordinating all issues related to the mediation institution and for conducting statistical monitoring and analysis.

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