

Zh.K. Kenzhebekova*, G.T. Mussabalina

*L.N. Gumiliyov Eurasian National University, Astana, Kazakhstan
(E-mail: kenzhebekova-1995@mail.ru; mussabalina@yandex.kz)*

Mediation in Kazakhstan: history and stages of development

The main goal of this study is to analyze the situation of the institution of mediation in the Republic of Kazakhstan and identify areas that need further reform. The article examines the institution of mediation as a historically formed and evolving, complex socio-cultural phenomenon, which to one degree or another is reflected in various cultures from ancient times to the present day. A brief analysis of the emergence of mediation in the USA and Europe is given. Particular emphasis is placed on the development of mediation in Kazakhstan, which began with the adoption of the Law "On Mediation" in 2011. The article also reflects the key differences between modern mediation and its historical model. The authors of the article highlight the stages of development of the institution of mediation, show the experience and features of the development of mediation, as well as the problems that hinder its formation in Kazakh society.

Keywords: history of mediation, history of Kazakhstan, institution of mediation, mediation, stages of development of mediation in Kazakhstan, Assembly of the People of Kazakhstan.

Introduction

Conflict always represents a pressing problem in the life of any state, society, person, regardless of what consequences it entails — positive or negative. First of all, it is necessary to realize that conflict usually occurs, that it escalates, requires its resolution and that it is impossible to ignore it. The consequences of the conflict depend on us, all members of civil society. We must learn to manage them, reduce the tension that arises, achieve positive results and outcomes.

The relevance of the research problem is determined by the need for a scientific understanding of mediation as a relatively new sociocommunicative practice for Kazakhstan and the growing interest in it from the scientific community and from the public. Mediation is a negotiation process with the participation of a third party, rooted in the history of the development of human relations, but which took shape as a modern practice for dealing with conflict situations only in the second half of the 20th century. Today, in countries with a common law system, mediation is widely used in resolving various conflicts, and people increasingly resort to the help of mediators. Statistics show that in most cases they manage to resolve the conflict successfully. The main advantage of mediation is the active position of the parties in communicative interaction. Today in Kazakhstan there are special centers that provide services for conflict resolution and training of specialists. Every experience across the world actualizes the search for prospects for the development of mediation in Kazakhstan.

2020 September 1, the President of the Republic of Kazakhstan K. Tokayev, in his address to the people, drew attention to the need to develop alternative methods of resolving disputes that would allow finding a compromise without the participation of the state. For this reason, the role and importance of mediation as one of the alternative methods of dispute resolution is currently increasing.

Research methods

In research general scientific cognitive methods were used, which made it possible to study mediation as an interdisciplinary and comprehensive institution. In particular, methods of analysis and synthesis, description, induction and deduction were used. The dialectical method made it possible to study the genesis and development of the institution of mediation as an alternative method of resolving disputes in society. The systematization method was used to study the forms of implementation of mediation. In addition, based on the historical and legal method, regulatory data was analyzed, historical patterns of the institution of mediation were determined, and issues of further development were considered.

* Corresponding author. E-mail address: kenzhebekova-1995@mail.ru

Discussion

The concept of “mediation” comes from the Latin word “mediare”, meaning literally “to act in the middle”. Mediation is considered a new alternative form of resolving any dispute or conflict with the participation of a third party who is neutral and has no interest in the dispute or conflict. A third party as a mediator helps disputing states reach some kind of agreement. Mediation can be used in civil, business, family and other legal relations, as well as in controversial situations in criminal cases of medium gravity. As a result of the active use of mediation by individuals and legal entities, the burden on the judicial system can be reduced. For example, according to international statistics, 30-40 percent of all disputes go through mediation [1].

In the 1980s, mediation became widespread throughout continental Europe. The growing need of society for mediation has led to the emergence of a new profession of mediator. In less than twenty years, the mediator movement has managed to secure support from the state and society in the creation of special services. The Council of Europe, at the meeting in Tampere in 1999, called on EU member states to create alternative out-of-court procedures to ensure better access to justice in Europe. The Council of the European Union in May 2000 endorsed conclusions on alternative methods of dispute resolution under civil and commercial law. The EU Council stated that the adoption of basic principles in this area is one of the main steps towards ensuring the proper development and functioning of out-of-court procedures for the resolution of disputes and conflicts in civil and commercial matters and will thus simplify and improve access to justice. A key moment in the development of mediation in European countries was the adoption of a directive by the European Parliament and the Council of the European Union, the purpose of which was to provide access, on a par with judicial procedures, to also extrajudicial methods of resolving conflicts and disputes [2].

In our opinion, we can define the following periodization of the development of the institution of mediation:

1. The Anglo-American stage, in its modern form, the institution of mediation was developed in the countries of the Anglo-Saxon legal and economic model. The beginning of mediation practices in the USA, Great Britain, Australia at the end of the first half of the 20th century.

2. European stage. The emergence of the institution of mediation in its modern form in France and Germany, and subsequently in other EU countries in 1980-1990. The development of mediation in Europe has its own characteristics, which are determined by the influence of the Romano-Germanic legal system, however, some key points in the development of mediation in Germany are very similar to what happened during a similar period of development in the United States.

3. Global stage. After the establishment of the institution of mediation in developed Western countries, general trends emerged in the introduction and development of mediation practices in other countries. In particular, it is worth noting the development of this institution in the former countries of the socialist legal system (USSR and countries of the socialist camp). A key feature of this stage was the formation of various international professional associations and communities of mediators.

The process of resolving disputes through mediation is a new approach for Kazakhstan. However, the mechanisms of the institution of reconciliation and mediation in social tensions appeared in the Kazakh steppe a long time ago and were implemented through the court of biys. Many articles have been written about the court of biys, which existed in the Kazakh steppe back in the Middle Ages, and many scientific literature studies have been conducted, mainly as the origin of the judicial system. I would like to note the works of Zh.M. Dzhampeisova on the institution of the judicial oath [3], which acted as a separate regulatory mechanism when considering cases to end internal strife among the Kazakhs and the works of I.Zh. Bakhtybaev [4], who noted the existence of two types of biys and biy court: the first is people's biys, who were not appointed or elected in the usual sense of the word, but deserved this title and duty among the people solely on business and moral qualities. The second were appointed by the administration of biys-authorities who appeared at the end of the 19th century. And as a result, they had a completely different mentality, different business and moral qualities, formed not by the people, but by the administration, a different attitude of the people towards them and a completely different justice [5].

The establishment of mediation ultimately meets the interests of any rule of law state, because it contributes to: the creation of an effective judicial system; reducing the volume of court cases and the costs associated with their consideration; ensuring the rapid resolution of conflicts and extinguishing their negative consequences; promoting conflict resolution that meets the interests of the parties; ensuring accessibility and diversity of procedural forms; supplanting illegal, forceful methods of conflict resolution. Such a flexible,

trusting and creative criminal procedural procedure as mediation can become an effective part of improving the mechanisms for resolving disputes arising from criminal cases of minor gravity.

The field of organizing mediation in the Republic of Kazakhstan is regulated in accordance with the Law “On Mediation”, adopted by the Parliament of the Republic of Kazakhstan on January 28, 2011. According to Article 3 of this Law, the purpose of mediation in Kazakhstan is to achieve a resolution of the dispute (conflict) that satisfies the parties to mediation and to reduce the level of disputes between the parties [6].

It can be determined that mediation has significant advantages over other methods of dispute resolution provided for by this Law, and these include the following:

- Voluntary. Because mediation occurs only when the parties voluntarily decide to negotiate and reach a peaceful agreement with the goal of achieving mutual understanding. Compared to forceful methods of resolving disputes, mediation allows both parties to balance their interests, maintain their significance and avoid adverse consequences in the future.

- Confidentiality. When going to court, the parties to the conflict will have to come to terms with the need to fully disclose their conflict to the public. A confidentiality agreement is signed between the negotiating parties and the mediator, which guarantees the parties that the conflict will not be made public. The parties, at their own discretion, will decide which part of the information and in what form requires confidentiality.

- Impartiality. It is one of the main characteristics of the person managing the mediation process. The mediator is never an interested party. He acts not as a judge, but as a neutral assistant; he does not give advice, does not make decisions, and is equally impartial to the parties (not interested in the victory of one side). Its goal is not to make a decision in favor of one of the parties, but to reconcile the disputing parties.

- Equality of the parties, since the sites have equal rights in negotiations and decision-making.

- Speed of conflict resolution. Mediation takes much less time than enforcement of a court decision.

Thus, in 2011, after the adoption of the Law “On Mediation,” the institution of mediation began to develop and be used in various fields.

Basically, the institution of mediation is widely used in the judicial system, in the structures of the Assembly of the People of Kazakhstan, as well as in the Federation of Trade Unions of the Republic of Kazakhstan. All these structures work in close cooperation with each other in accordance with mutually signed contracts. For example, in 2018 a Memorandum of Cooperation signed between the Supreme Court of the Republic of Kazakhstan and the Federation of Trade Unions is aimed at reducing tension in society. The purpose of the Memorandum between the Supreme Court of the Republic of Kazakhstan and the Assembly of the People of Kazakhstan, signed on June 30, 2016, is to implement joint measures to introduce and develop the institution of pre-trial dispute resolution, including the institution of mediation.

In the territorial associations of trade unions of the Federation of Trade Unions of the Republic of Kazakhstan, 17 Reconciliation Centers (“Reconciliation Center”) were created, and in 2019, 15,000 mediation procedures were carried out (including 4,000 economic disputes), 2,800 mediation agreements were concluded, and 380 disputes were resolved through negotiations. The work of the “Reconciliation Center” involves 30 professional mediators and these specialists participate in the projects of the Supreme Court of the Republic of Kazakhstan “Conciliation procedures for labor disputes”, “Family disputes”, “Reconciliation before and during the trial”. As a result, we see a decrease in the number of labor disputes in court. For example, in 2018, 8,596 cases and applications on labor disputes were referred to the court, and in 2019, 8,250 cases and applications were received, that is, there was a decrease of 4 percent [7].

According to Article 6, Section 14-1 of the Law of the Republic of Kazakhstan “On the Assembly of the People of Kazakhstan”, the Assembly of the People of Kazakhstan promotes the development of the institution of mediation in the field of national unity and social harmony. And according to Article 6 of Article 11 of the said Law, one of the main functions of the Assembly is to process proposals and practical measures in resolving conflicts and disputes [8].

As a result, the Republican Mediation Council was created under the Assembly, 28 regional mediation councils and 503 mediation offices were opened, with 962 mediators working in them. In total, in 2019, mediators of the Assembly of the People of Kazakhstan received 31,000 requests, including 19,053 requests (61 percent) were resolved by signing a mediation agreement, and the remaining 12,375 (38 percent) requests were resolved through consultation with mediators [9].

The Assembly attaches great importance to the involvement of representatives of the younger generation in mediation. This is facilitated, as mentioned above, by the creation of youth associations within the

Assembly, as well as the active participation of its various links in events held in the republic in 2019, which was declared the Year of Youth. 2020 has been declared the Year of the Volunteer in the country. This is a kind of continuation of the Year of Youth, since in many respects its tasks are aimed at continuing work with young people, increasing their activity in the life of the country, nurturing such qualities as responsibility, responsiveness, and the desire to provide assistance to citizens in need of support. Such qualities have become especially relevant in the difficult situation associated with the coronavirus pandemic.

An analysis of the development of mediation, especially through the activities of the Assembly of the People of Kazakhstan, highlights another positive phenomenon: its close connection with volunteering. This similarity is based on a very real basis; the focus of volunteering, as well as mediation, is tolerance, the desire to help people, to provide all possible assistance to those who find themselves in difficult situations. It is extremely valuable that this growing relationship allows more young people to be involved in mediation and volunteering. In many cases this happens because of the Assembly.

However, the development of the institution of mediation in Kazakhstan has its own problems. For example, more than ten years ago the Law "On Mediation" was adopted. But until now, no government body is involved in its development; there is no clear state policy. This state of affairs should be corrected. This concern issues related with mediation: Why is mediation not properly used in our country? Why don't citizens take advantage of the opportunity provided by the state? The authors who studied this topic indicate a number of reasons: According to A. Ramazanov, an analysis of the reasons for the insufficient distribution of trial procedures in society showed that, first of all, this is insufficient information and explanatory work with citizens about the advantages of the mediation procedure, about their right to seek assistance in resolving a dispute from a mediator. Although there have been noticeable changes in this matter lately, on the website of each court, in the lobby for visitors there are stands with information about the trial procedures [10].

A.I. Karipova believes that one of the main reasons for the low demand for mediation among the population is the fact that citizens of the Republic of Kazakhstan are poorly informed that an agreement reached during the mediation process can satisfy the interests and promote harmony between the conflicting parties, then a court decision can satisfy only one from the parties, in some cases — not even in full [11].

The problem of judicial mediation, which is currently being resolved, but has not been fully resolved, is that judges conducting mediation in courts are equated to non-professional mediators. They do not have the knowledge, skills and abilities to conduct the negotiation process, or psychological techniques used by professional mediators to resolve a dispute. The solution to this problem, in our opinion, is that the judge should be trained in training programs for professional mediators. At the same time, out-of-court mediation is developing less dynamically, and there are several objective reasons for this. Firstly, the community of professional mediators does not have the same administrative resources as government bodies, including the Supreme Court of the Republic of Kazakhstan. Secondly, professional mediators and mediator organizations are self-financing entities; the material resources of professional mediators are negligible, which makes it impossible to organize a wide information campaign among the population. Thirdly, people who decide to become professional mediators enter the market for providing these services without an established name. Against the backdrop of low public awareness about the possibilities of out-of-court mediation, new professional mediators simply cannot withstand the period of lack of opportunities to earn money when it is necessary to maintain offices for receiving clients and simply leave this field of activity.

Various structures deal with mediation issues in the republic. Among them are the Assembly of the People of Kazakhstan, the Supreme Court, the Ministry of Information and Social Development, the Ministry of Justice, and local authorities. But there is no main body that, on the basis of legal provisions, would implement a unified policy regarding their activities. It is advisable to create a republican association of mediators and establish an exchange of work experience. The problem of accessibility of services to socially vulnerable segments of the population requires resolution, since their payment falls on the initiator of the pre-trial settlement of the dispute, and in rare cases, on both parties. These and other problems in the development of mediation are relevant not only for Kazakhstan, but also for the world community as a whole. What is needed, first of all, is a deeper and more systematic approach to studying and improving mediation, increasing the popularity of its practical application through building trust in the institution of mediation in society. The analysis shows that mediation has a future. Its development makes it possible to relieve the workload of courts of various instances, reduce social tension in society and strengthen the prevention of conflict in society.

In general, the main problem in the development of mediation is the lack of an integrated and systematic approach, both in the legislative regulation of this procedure and in the practical activities of government bodies and civil society, despite the fact that there is already a law on mediation.

Conclusion

Thus, mediation, an effective and beneficial procedure in many respects, is gradually occupying its niche in the field of dispute resolution. A clearer and more systematic development of the regulatory framework is needed, as well as a specification and more detailed approach to the procedure itself and its subjects. Certainly, our citizens will increasingly trust and use mediation, which will contribute to improving its application and will allow us to establish a system of organizations involved in mediation. Mediation in Kazakhstan is a necessary institution, since our modern state is actively developing in all existing areas, and mediation, in turn, as a modern method of resolving disputes, will help citizens improve their quality of life.

Conditionally, the development of mediation in Kazakhstan at the moment can be divided into three stages. The first stage covered the years 2011-2013, which was devoted to the actual understanding of mediation by Kazakh society, the legal community, and most importantly, the training of professional mediators. During the same period of time, the first organizations of professional mediators were created. By the end of 2013, there were 27 of them. Currently, according to the analytical report "Mediation as a way to resolve disputes and conflicts and reduce the level of social tension in society", there are 56 mediator organizations.

The second stage of mediation development covers 2014-2017. This stage was marked by the assignment of the function of developing mediation to the Assembly of the People of Kazakhstan. Mediator offices have been created at Friendship Houses throughout the country.

The third stage of mediation development covers the period from the end of 2017 to the present. This period was marked by the emergence of mediation specialization in various categories of disputes. The specialization of mediators in banking disputes about the collection of loans, as well as in disputes about the collection of loans by microfinance organizations, is being actively introduced.

The difficulties in developing mediation in Kazakhstan lie, firstly, in the lack of awareness of the population. Secondly, the issue of trust. For many, this is something new, so people are wary of it. Thirdly, the degree of professionalism of mediators, the level of quality of their work. However, it seems that these problems are temporary and completely solvable. To this day, a lot of work is being done in our republic to clarify and apply it. These include round tables, seminars, trainings, and media appearances.

References

- 1 Урегулирование споров путем медиации. — [Электронный ресурс]. — Режим доступа: <https://egov.kz/cms/ru/articles/mediation>
- 2 De Palo. "Rebooting" the mediation directive. Assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU / Palo De, L. D'Urso, M. Trevor, B. Branon, R. Canessa, B. Cawyer, L.R. Florence // European Parliament, manuscript, 2014.
- 3 Джампеисова Ж.М. Казахское общество и право в пореформенной степи / Ж.М. Джампеисова. — Астана: Евраз. нац. ун-т им. Л.Н. Гумилева, 2006. — 269 с.
- 4 Казахский суд биев — уникальная судебная система // Юридическая газета. — 2008. — № 65–77.
- 5 Нарикбаев М.С. От наших великих биев до Верховного Суда / М.С. Нарикбаев. — Алматы: Атамұра, 2000. — 190 с.
- 6 Закон Республики Казахстан «О медиации». — [Электронный ресурс]. — Режим доступа: https://online.zakon.kz/Document/?doc_id=30927376
- 7 Медиация — эффективный инструмент разрешения трудовых споров. — [Электронный ресурс]. — Режим доступа: <https://assembly.kz/ru/news/mediatsiya-effektivnyy-instrument-razresheniya-trudovykh-sporov/>
- 8 Об Ассамблее народа Казахстана. Закон Республики Казахстан от 20 октября 2008 г. № 70–IV. — [Электронный ресурс]. — Режим доступа: https://adilet.zan.kz/rus/docs/Z080000070_
- 9 Диханбаева Д. Астанинский процесс и его роль в политико-дипломатическом урегулировании сирийского конфликта / Д. Диханбаева. — [Электронный ресурс]. — Режим доступа: <https://isca.kz/ru/analytics-ru/2601>
- 10 Рамазанов А. Формирование единого пространства продвижения института медиации / А. Рамазанов // Юрист. — 2018. — № 7 (204). — С. 52, 53.
- 11 Карипова А.И. Некоторые аспекты сравнительной характеристики медиации в США и Республике Казахстан / А.И. Карипова // Вестн. Академии правоохранительных органов. — 2021. — № 1 (19). — С. 51–57.

Ж.К. Кенжебекова, Г.Т. Мұсабалина

Қазақстандағы медиация: даму тарихы мен кезеңдері

Мақаланың мақсаты — Қазақстан Республикасындағы медиация институтының жағдайын талдау және оны одан әрі реформалауды қажет ететін бағыттарды айқындау. Мақалада медиация белгілі бір дәрежеде әр түрлі мәдениеттерде ежелгі дәуірден бүгінгі күнге дейін көрініс табатын, тарихи қалыптасқан және дамып келе жатқан күрделі әлеуметтік-мәдени құбылыс ретінде қарастырылған. АҚШ пен Еуропадағы медиацияның пайда болуына қысқаша талдау жасалған. 2011 ж. «Медиация туралы» Заңның қабылдануынан бастап Қазақстандағы медиацияның дамуына назар бөлінген. Авторлар медиация институтының даму кезеңдерін, медиацияның даму тәжірибесі мен ерекшеліктерін, сондай-ақ оның қазақстандық қоғамда қалыптасуы мен дамуына кедергі келтіретін мәселелерді атап көрсеткен.

Кілт сөздер: медиация тарихы, Қазақстан тарихы, медиация институты, медиация, Қазақстандағы медиацияның даму кезеңдері, Қазақстан халқы Ассамблеясы.

Ж.К. Кенжебекова, Г.Т. Мұсабалина

Медиация в Казахстане: история и этапы развития

Основной целью настоящего исследования является анализ положения института медиации в Республике Казахстан и определение направлений, нуждающихся в дальнейшем реформировании. В статье рассмотрен институт медиации как исторически сформировавшееся, эволюционирующее и сложное социокультурное явление, которое в той или иной степени находит отражение в различных культурах с древнейших времен до наших дней. Дан краткий анализ появления медиации в США и Европе. Особый акцент сделан на развитии медиации в Казахстане, начавшейся с принятия Закона РК «О медиации» в 2011 г. Авторами статьи отражены ключевые отличия между современной медиацией и её исторической моделью, выделены этапы развития института медиации, показаны опыт и особенности развития медиации, а также проблемы, мешающие её становлению в казахстанском обществе.

Ключевые слова: история медиации, история Казахстана, институт медиации, медиация, посредничество, этапы развития медиации в Казахстане, Ассамблея народа Казахстана.

References

- 1 Uregulirovanie sporov putem mediatsii [Dispute resolution through mediation]. Retrieved from <https://egov.kz/cms/ru/articles/mediation> [in Russian].
- 2 De Palo, D'Urso, L., Trevor, M., Branon, B., Canessa, R., Cawyer, B., Florence, L.R. (2014). "Rebooting" the mediation directive. Assessing the limited impact of its implementation and proposing measures to increase the number of mediations in the EU. *European Parliament, manuscript*.
- 3 Dzhampeisova, Zh.M. (2006). Kazakhskoe obshchestvo i pravo v poreformennoi stepi [Kazakh society and law in the post-reform steppe]. Astana: Evraziiskii natsionalnyi universitet imeni L.N. Gumilyova [in Russian].
- 4 (2008). Kazakhskii sud biev — unikalnaia sudebnaia sistema [The Kazakh court of biev is a unique judicial system]. *Yuridicheskaya gazeta — Legal newspaper*, 65–77 [in Russian].
- 5 Narikbaev, M.S. (2000). Ot nashikh velikikh biev do Verkhovnogo Suda [From our great biys to the Supreme Court]. Almaty: Atamura [in Russian].
- 6 Zakon Respubliki Kazakhstan «O mediatsii» [Law of the Republic of Kazakhstan "On Mediation"]. Retrieved from https://online.zakon.kz/Document/?doc_id=30927376 [in Russian].
- 7 Mediatsiia — effektivnyi instrument razresheniia trudovykh sporov [Mediation is an effective tool for resolving labor disputes]. Retrieved from <https://assembly.kz/ru/news/mediatsiya-effektivnyy-instrument-razresheniya-trudovykh-sporov/> [in Russian].
- 8 Ob Assamblee naroda Kazakhstan. Zakon Respubliki Kazakhstan ot 20 oktiabria 2008 goda N 70–IV [About the Assembly of the People of Kazakhstan. Law of the Republic of Kazakhstan dated October 20, 2008 No. 70-IV]. Retrieved from https://adilet.zan.kz/rus/docs/Z080000070_ [in Russian].
- 9 Dikhanbaeva, D. Astaninskii protsess i ego rol v politiko-diplomaticheskom uregulirovanii siriiskogo konflikta [The Astana process and its role in the political and diplomatic settlement of the Syrian conflict]. Retrieved from <https://isca.kz/ru/analytics-ru/2601> [in Russian].
- 10 Ramazanov, A. (2018). Formirovanie edinogo prostranstva prodvizheniia instituta mediatsii [Formation of a single space for the promotion of the institution of mediation]. *Yurist — Lawyer*, 7 (204), 52, 53 [in Russian].
- 11 Karipova, A.I. (2021). Nekotorye aspekty sravnitelnoi kharakteristiki mediatsii v SShA i Respublike Kazakhstan [Some aspects of the comparative characteristics of mediation in the USA and the Republic of Kazakhstan]. *Vestnik Akademii pravoohranitelnykh organov — Bulletin of the Academy of Law Enforcement Agencies*, 1 (19), 51–57 [in Russian].