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The history of the study of mediation institutions in Kazakhstan

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Abstract

Relevance. Mediation is one of the most dynamically developing legal institutions in the modern world. Due to the fact that traditional methods of resolving disputes remain ineffective and do not always satisfy the parties with their results, the use of such an alternative method as mediation allows resolving the conflict at the pre-trial stage in a peaceful way. The need for a comprehensive implementation of the institution of mediation in the life of Kazakhstani society, as promising and necessary in modern conditions, determines the relevance of the study. The history of the study of mediation institutions has not been subjected to special scientific research. The coverage of the problems of the historical development of mediation in Kazakhstan from the court of biys to the modern institution of mediation is the scientific novelty of this article.

Purpose. The purpose of the study is to study the history of the development of mediation institutions in Kazakhstan.

Methodology. Various methods were used for the study, such as descriptive, comparative historical-critical, methods of analysis, synthesis, dialectical method of scientific knowledge.

Results. In the course of the study, it was concluded that despite its apparent unconventionality and modernity, mediation has a long history and deep roots in Kazakh society. A function similar to mediation in the XVIII-XIX centuries was performed by the court of biys, forcibly liquidated by the imperial administration in the 2nd half of the XIX century.

Conclusions. The establishment of a modern institution of mediation in Kazakhstan in 2011 should in part be considered a revival of old traditions. Most scientists dealing with this problem agree that mediation in Kazakhstan needs to be developed, as well as to expand its use in various fields, taking into account both international experience and the traditions and mentality of the Kazakh people.

Keywords: alternative ways of resolving disputes; legislation of the Republic of Kazakhstan; biy court; mediation; reconciliation of the parties.

Introduction

Mediation is one of the most convenient and widespread methods of alternative resolution of legal conflicts in the modern world. In the legal field of Kazakhstan, the Law of the Republic of Kazakhstan No. 401-IV "On mediation" [1] is implemented. Given it, mediation is defined as "a

procedure for resolving a dispute (conflict) between the parties with the assistance of a mediator (mediators) in order to achieve a mutually acceptable solution by them, implemented by the voluntary consent of the parties." In Kazakhstan, mediation is used in the field of civil law, family law, property dispute resolution, as well as in

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criminal law in relation to minor offenses and crimes of medium gravity. The institution of mediation is, on the one hand, an innovation in the public life of Kazakhstan, and on the other hand, it can be considered a revived time-tested practice. The prospects, effectiveness, and necessity of mediation should be explained to the general population, for whom this institution continues to be unusual. The need for the implementation of the institution of mediation in the public life of Kazakhstan forms the relevance of this article.

Although the institution of mediation seems quite new and unusual for Kazakhstan, in fact, in the past, methods were used in Kazakhstan that can be correlated with mediation institutions. For example, in the XVIII-XIX centuries in Kazakhstan, there was a court of biys – authoritative elders, to whom the Kazakhs turned to resolve conflicts. And only by the power of the Russian Empire this ancient institution was liquidated [2; 3]. Thus, the adoption of the Law of the Republic of Kazakhstan No. 401-IV “On mediation” [1] can be considered not so much the establishment of a new institution for Kazakhstan as the revival of an old institution, quite traditional for Kazakh society.

In recent years, several significant studies have been published covering the history of mediation institutions in Kazakhstan. In the scientific works by E.V. Mitskaya [4], the author talks about the current state of mediation institutions in Kazakhstan. She, in particular, considers the use of mediation in the criminal law of the Republic of Kazakhstan, speaking about the need to expand the possibilities of mediation in this area. M.I. Dyachuk [5] examines the problems of implementing mediation institutions in modern Kazakhstan, emphasizing that mediation seems to be something new for modern Kazakhstanis, although in the past the court of biys performed the same functions as the current mediators. The development of mediation in modern Kazakhstan, the problems in the implementation of this institution, as well as the possibilities of expanding the scope of its application, are discussed in their scientific works S.N. Velitchenko [6] and D. Ospanova [7].

At the moment, the history of the institution of mediation in Kazakhstan remains a practically unexplored problem. Until now, there is no specialized in-depth scientific research on the history of its study in Kazakhstan. Such aspects of this problem as the continuity of the ancient institution of the court of biys and modern institutions of mediation in Kazakhstan need to be studied in detail. Also, the question of the possible use of mediation practices in the Kazakh Khanate in the XV-XVII centuries remains unexplored. The scientific novelty of the study lies in the fact that the history of the study of mediation institutions in Kazakhstan has not yet been subjected to a special study. The purpose of the article is to study the history of the development of mediation institutions in Kazakhstan. To achieve the goal, the following tasks were set:

1. To trace the formation of mediation institutions in Kazakhstan from the legislative acts of the era of the Kazakh Khanate to the modern legislation of the Republic of Kazakhstan.

2. To indicate the positions of researchers in the study of the history of mediation institutions in Kazakhstan.

Materials and Methods

In the process of working on the article, various scientific methods were used to achieve the goals of the study:

- descriptive method;
- comparative method;
- historical-critical method;
- methods of analysis and synthesis;
- dialectical method of scientific knowledge.

The descriptive method made it possible to create a research base through the collection of data on the functioning of mediation in different historical periods in Kazakhstan and other countries. Using the descriptive method, it was possible to conduct a primary analysis of data on the origin and application of mediation, and to give a presentation of the factual material on its basis. Thanks to the descriptive method, it was possible to isolate the features of the use of mediation in modern Kazakhstan, as well as to characterize the main problems that hinder the development of mediation in Kazakhstan in our time.

The comparative method helped to realize the common and different between modern mediation institutions, which are applied in accordance with the legislation of the Republic of Kazakhstan, and the ancient institution of the biy court, which operated on the territory of present-day Kazakhstan in the XVIII-XIX centuries. In addition, this method, by comparing the history of mediation in Kazakhstan and abroad, made it possible to draw conclusions about the degree of implementation of mediation in the public life of Kazakhstan and other states.

The historical-critical method provided an opportunity to look at the sources of the history of mediation in Kazakhstan not literally, but from the point of view of their origin in a specific historical context. By highlighting the factual basis in historical sources, it was possible to determine the degree of development of mediation in Kazakhstan in different eras and how mediation institutions were implemented in the public life of Kazakhstan at different times. With the help of the historical-critical method, it was also possible to isolate the key grain in the understanding of the history of the development of the institution of mediation in Kazakhstan by various researchers. Thanks to this method, it was possible to critically evaluate the opinions of the authors regarding the extent to which mediation is traditional for Kazakhstani society, as well as how useful mediation is in modern conditions and may be required in the future.

With the help of the analysis method, it was possible to reach the necessary conclusions regarding the understanding by specific researchers of certain features of the historical development of mediation institutions in Kazakhstan. Thanks to the use of the synthesis method, it was learned to determine the general positions of scientists on this issue, as well as to identify what problems and opportunities for the functioning of mediation in Kazakhstan they currently see.

The dialectical method of scientific knowledge made it possible to look at mediation from the point of view of its emergence and improvement of institutions. Thanks to this method, it was possible to determine the various goals of

the functioning of mediation institutions in Kazakhstan and in the world. Through the analysis of the positions of researchers on this issue and the opposition of their vision of the role of mediation in the public life of Kazakhstan in the past and present, it was possible to understand where the root of the problem lies, why mediation has not yet found the necessary application in the modern Republic of Kazakhstan. The dialectical method of scientific knowledge made it possible to come to specific conclusions and results of a study of the study of the history of mediation in Kazakhstan.

Results

The modern institution of mediation is relatively young in legal practice. Mediation refers to non-traditional methods of conflict resolution, in contrast to litigation, which is the traditional way. For the first time, mediation in its modern sense began to be used after the Second World War in the countries of Anglo-Saxon law. Among the states that were the first to introduce mediation into their legal practices, the United States, Great Britain, and Australia are named [6]. This was largely due to post-war problems in the economy. Thus, in the USA in the second half of the 1940s, the threat of mass strikes of workers dissatisfied with working conditions and wages became more acute. As a result, conflicts between trade unions and employers have become more frequent. In order to somehow smooth the situation and find reconciliation between the parties to the conflict, the US authorities proposed using the Ministry of Labor as a neutral intermediary in negotiations between the conflicting parties. In 1947, the Federal Mediation Conciliation Service (FMCS) that still exists today. This event is considered the birth of modern mediation. Soon this experience began to be actively introduced in the UK and Australia [8; 9].

In the 1990s, mediation found due distribution in European and some Asian countries, in particular in Japan. Everywhere, lawyers and legislators in different countries came to a common opinion that mediation is in many ways a necessary procedure in the development of modern society [10]. In particular, mediation makes it possible to unload the courts, making it possible to resolve civil, property and family disputes at the pre-trial stage with the help of mediators, without going to court. In addition, mediation is also convenient to use in criminal law, since with the help of a mediator it is possible to reach a consensus and reach a conciliatory agreement between the victim and the offender, which, in turn, will relieve the burden on the penitentiary system. In recent years, in different countries, the institution of mediation has been increasingly used in various areas of law [4].

The year of international recognition of mediation is considered to be 1999, when the International Conference on Mediation took place in Vienna. Since then, the institution of mediation has been officially implemented in the legislation of different countries. During 2000-2010, mediation is spreading throughout the post-Soviet space. Legislative acts regulating the use of mediation are adopted in turn by the parliaments of the post-Soviet countries. Kazakhstan, establishing Law of the Republic of Kazakhstan No. 401-IV "On mediation" [1] was one of the first in this series. For comparison, in neighbouring Kyrgyzstan, a similar law was adopted only in 2017, in

Belarus in 2013, in Armenia in 2018 [11], in Ukraine in 2021 [12].

In Turkey, mediation at the official legislative level began to be applied somewhat later than in Kazakhstan. A similar law was adopted by the Parliament of the Republic of Turkey in 2012. As in Kazakhstan, the institution of mediation in Turkey has its ancient roots. So, in the Ottoman Empire, the functions that modern mediators perform were performed by ulemas – experts in Islamic law. At the same time, clear regulation of the mediation procedure at the legislative level in Turkey, as well as in Kazakhstan, is typical of the modern period [13]. Despite some resistance from some Turkish lawyers who advocated traditional ways of resolving disputes, over the past 10 years, mediation has become an integral part of the Turkish legal system. To expand the use of mediation in the legal practice of Turkey, several more legal acts have been adopted. In particular, since 2019, mandatory mediation in economic disputes has been introduced. On August 7, 2019, Turkey acceded to the Singapore Mediation Convention [14; 15].

Despite the fact that the institute of mediation has been operating in Kazakhstan for more than 10 years, it has not yet gained the necessary popularity among the population and the necessary distribution in application. This is largely due to the fact that Kazakhstanis still have prejudices regarding alternative ways to resolve disputes. When choosing between the services of a mediator and a court, an ordinary resident of Kazakhstan more often chooses a court to resolve a dispute [7]. For the intensive introduction of the institution of mediation into the public life of Kazakhstan, it is necessary to carry out scientific and explanatory work with the population, to prove the advantages, prospects, and modernity of the institution of mediation. In addition, the population should be explained that mediation is actually not so unusual and non-traditional for Kazakh society. Although the modern mediation procedure has been used in Kazakhstan since 2011, nevertheless, the roots of this institution go back centuries, and in the past, Kazakhs often used the services of people whom we would now call mediators.

In ancient times, people in different parts of the world used various conciliatory methods of resolving disputes with the involvement of a neutral party as an intermediary, which is comparable to modern mediation. Such procedures were predominantly used in countries where trade was well developed. Thus, the beginnings of mediation procedures are visible in ancient Phoenicia. Also, the institution of mediation has become widespread in rural Chinese and ancient Japanese societies [16]. In Europe, the beginnings of mediation can be seen in the practices of Ancient Greece and Rome. In Greece, intermediaries-mediators were called the term "proxentas". In Roman law, people who acted as mediators-conciliators for the first time began to be called the word *medium* or *Mediator* [13]. In medieval Europe, institutions that can be correlated with modern mediation developed most in France. Here the reconciliation of the parties was in great demand. Representatives of the clergy often acted as mediators in medieval European society. Even murder cases could end in a conciliatory agreement between the parties [17-19].

Speaking, in fact, about Kazakhstan, the institution of the biy court, established by Tauke Khan at the turn of the XVII-XVIII centuries, can be considered a harbinger of the modern institution of mediation. Both one biy and several biys could act as an intermediary judge. They analysed disputes and conflicts, as well as crimes within the clan or “zhuz”, to which this or that biy belonged. Biyam, like modern mediators, were paid by the parties to the conflict. The institution of the court of biys was enshrined at the legislative level in the code of laws “Zhet i Zhargy” (“Seven Decrees”), compiled on the basis of Kazakh customary law and previous legislative acts during the reign of Tauke Khan. Three of the most influential biys who were not descendants of Genghis Khan took part in compiling Zhet i Zhargy: Tole-biy from the Senior Zhuz, Kazybek-biy from the Middle Zhuz, and Aiteke-biy from the Younger Zhuz. These people are at the origins of the creation of the authoritative institution of the biy court, which was the prototype of modern mediation in Kazakhstan [2]. The main difference between the court of biys and the legal practices that existed in the Kazakh Khanate before Tauke Khan was that the main arbitrators in resolving conflicts and disputes were now not aristocrats from the Genghis Khan family, as it was before, but authoritative elders – biys. The very right to be called and be a biy was not inherited. Any person who achieved authority in society could be elected biy and, thus, become an intermediary judge [20].

Prior to the emergence of the institution of the biy court, practices already existed on the territory of modern Kazakhstan, which were the prototype of mediation and became the basis for the creation of the biy court. In the XV century, in the states that emerged on the site of the disintegrating Golden Horde, the institution of peace mediators appears. Such mediators resolved disputes and conflicts that arose in the communities on the basis of customary law, which ensured the order and vitality of public institutions during the political disintegration of the united Horde state [21; 22]. Later, during the XVI-XVII centuries, it was in the Kazakh Khanate, unlike other post-Horde states, that influential elders of the clans, who earned their authority by justice and knowledge of customary law, gained more and more weight in society, as opposed to the Genghisides. People increasingly turned to these elders for help in resolving vital issues. Such a historical process became fertile ground for the legislative consolidation of the institution of the court of biys during the time of Tauke Khan. This is how the prototype of the modern institution of mediation in the Kazakh Khanate arose [2; 6]. In the Kazakh legal practice of that time, such concepts were used as:

- “torelik aitu” – to dispute resolution;
- “kesim aitu” – to make a decision;
- “bitim aitu” – to conclude an agreement;
- “isti bitiru” – to finish case;
- “ukim shygaru” – to pronounce sentence;
- “daudyn bitimi” – the end of the dispute;
- “sertesip bitu” – a truce with an oath.

After the conciliation agreement was concluded, the participants in the dispute were called by the word “karyndas” (relative), since after the resolution of the conflict, its former participants became, as it were, relatives. One of the foundations on which trust in the court

of the biys was based was the authority of the elders. If the biy made an unfair illegal decision, then his authority fell sharply in the eyes of his fellow tribesmen. Therefore, the biys tried to make the right decisions so as not to lose their authority, deserved over the years [23; 24].

Throughout the XVIII century, the authority of the court of biys only increased. Initially, the descendants of Genghis Khan were not accountable to this people’s court, but later they could also turn to the court of biys in conflict situations. This suggests that in the XVIII century, the institution of elected mediator judges acquired an unprecedented influence in the Kazakh state. This factor had to be taken into account in the administration of the Russian Empire, since at first after the annexation of Kazakhstan, the imperial government retained legal institutions operating in the Kazakh society. At first, even imperial legal acts had to be approved by the biys in order for the documents to gain legal force. According to the Central State Archive of the Republic of Kazakhstan [25], in order for the new articles included in the reports to the collections and the corrected old ones to have the force of legal facts, it is necessary to translate into Tatar and approve them with signatures, seals, and tamgas of biys, aksakals.

However, this state of affairs was only temporary. At the end XVIII century-the 1st half of the XIX century on the territory of Kazakhstan, the traditional court of biys and imperial judicial bodies operate in parallel. The population of Kazakhstan continued to give preference and trust to the traditional biy court as opposed to imperial institutions [2; 3]. Here is how it is said about the position of the court of biys at that time in one of the documents of that era: The Central State Archive of the Republic of Kazakhstan [26] says that every Kyrgyz (in Russian Empire, the Kazakhs were called the Kirghiz at that time) without distinction of ranks firmly believes in their customs, why the court according to folk customs is the most suitable for the Kirghiz, especially since the majority of Kyrgyz cases, due to their originality, are not always applicable to the rules of the court according to general laws... The court of biys is not unconditionally obligatory, litigants... can, by mutual agreement, turn to the court of mediators, who are elected at their discretion, and to the Russian court. The same document tells us that even those Kazakhs who formally accepted external signs of integration into the general imperial system and even converted from Islam to Orthodoxy, still continued to trust not imperial, but traditional Kazakh judicial institutions, leaning on the Central State Archive of the Republic of Kazakhstan [26], it can be concluded that in the Semipalatinsk region there were no questions about the seizure of the Kyrgyz, who have ranks and medals, occupy official positions and converted to Orthodoxy, but those who remained in the former estate – all such persons unquestioningly obeyed their people’s court.

At the end of the XVIII century, there was also a common judicial body – the Border Court, in 1799, reorganized into the Orenburg Border Commission, which existed until 1859. This body included equally appointed imperial officials and elected Kazakh assessors from among the biys. The specified judicial body resolved border conflicts, and also carried out communication between the imperial administration and the elite of the

Younger Zhuz. Initially, the authorities of the empire wanted to involve a wide representation of the Kazakh national elite in the work of this body. This is stated in a number of documents relating to the work of this judicial body [27; 28]. Kazakh members of the Border Commission were involved in resolving disputes between Kazakhs and merchants of non-Kazakh origin at the Orenburg, Orsk, and Guryev exchange yards. The Central State Archive of the Republic of Kazakhstan [29] indicates that the members of the Border Commission resolved the proceedings of mutual claims between the Kyrgyz and traders, and also existed for an amicable end on the site of disputes that might arise between them and, in particular, to protect the Kirghiz from unjust claims and harassment in the exchange yards.

Elected Kazakh members of the Border Commission often acted as defenders of Kazakhs from unfair accusations. If there was no significant evidence of the guilt of the suspected Kazakhs, then they were released. In case of confirmation of guilt, the accused could avoid punishment if he compensated the damage to the victim. [30; 31]. Among the functions of the Border Commission was the participation of its chairman in the approval of the elected leaders of the Kazakh administrative units adjacent to the border strip, the so-called distances [32].

In the first half of the XIX century, the court of biys also considered cases where the litigants were Russian on the one hand and Kazakh on the other. Moreover, if the guilt of the Kazakh turned out to be proven, then the court of biys acted in defence of the victim. So, in the Central State Archive of the Republic of Kazakhstan [33] gives us information that in 1853 the peasant Shestakov filed a complaint against the Kazakh Kochkentaev, whom he accused of attacking and stealing sheep. As a result of the trial of the lawsuit by the court of biys, Shestakov "was satisfied, having received 600 rubles in banknotes and one horse instead of sheep". From the 1820s, the authorities of the Russian Empire began a gradual attack on the traditional Kazakh judicial institutions. In the process of implementing the judicial reform and implementing the idea of general unification of the judicial system of the Russian Empire, in 1863 the Steppe Commission began to work to establish an all-imperial institute of justices of the peace in the Kazakh steppes. Its purpose was, as stated in the relevant document, "to select from biys and sultans knowledgeable in laws and judicial customs their opinions regarding changes and additions that need to be made in the general basic provisions and the judicial part when applying them to the Kirghiz of the steppe" [34; 35]. In addition, the Steppe Commission carried out explanatory work among the Kazakhs about the need and "progressiveness" of the reform, and also tried to make the court of biys ineffective and outdated. As a result of the judicial reform in the Russian Empire in 1864, the judicial system was unified, and the biy court lost its primary importance, and by the 1890s it was finally abolished [3].

Thus, the development of mediation in Kazakhstan was forcibly interrupted. In the Soviet years, the court of biys was assessed mostly negatively, as a "class court". In our time, the attitude towards the court of biys has changed in a positive direction. Modern Kazakh lawyers and scientists in the field of law consider it to be the predecessor of the modern institution of mediation. In particular, the use of

mediation in criminal law should be expanded, as well as it should be allowed to involve mediators in disputes involving state bodies, which is not yet allowed by the current law. It was then that mediation will take the leading place in Kazakhstani society, which was once occupied by the court of biys.

Discussion

Last time many studies have been published on the development of the institution of mediation in Kazakhstan. Their authors are predominantly Kazakh scientists in the field of law. They are considering the establishment of the institution of mediation at the state level in 2011 and its further implementation in the public life of Kazakhstan. One of the leading researchers of the mediation institute in Kazakhstan is M.I. Dyachuk [5]. In her works of recent years, she discusses both the development and popularization of mediation in Kazakhstan, and the need to improve legislation in this area, which is vital in modern conditions. The researcher emphasizes that mediation has been successfully operating in many countries of the world, where it has a fairly long history. The researcher emphasizes that mediation has long been used to resolve conflicts without the use of force and the help of a third party. The essence of mediation is determined by a combination of two seemingly opposite elements – a high degree of autonomy of the parties and significant guarantees to develop a common position and achieve a mutually beneficial result [36-39].

Another prominent researcher of this issue in Kazakhstan is E.V. Mitskaya [4]. In her opinion, mediation is in some way a "universal legal instrument", and therefore its advantages should be used to resolve various conflict situations. At the same time, the author emphasizes that in order for mediation to work effectively, one should competently approach changes to the current legislation and carry out full legal regulation of the institution of mediation in Kazakhstan.

Another researcher of this issue S.N. Velitchenko [6] speaks about the problems in the development of mediation in Kazakhstan and possible ways to solve them. She, in particular, talks about the history of this institution in different countries of the world, emphasizing the importance of Kazakhstan borrowing the successful world experience in introducing the institution of mediation. The scientist also claims that this institution is not alien to Kazakhstan, but has its own long history. Mediation, in conformity with the study, originated in the second half of the XX century. The place of her birth can be several countries at once, united by the system of Anglo-Saxon law. Later, this method of conflict resolution spread to Europe, and is currently being actively used in Japan, China, Korea, India, and many other countries. To date, mediation is actively developing in Kazakhstan. In Kazakh society, the mediation procedure has existed since ancient times. From time immemorial, there has been a tradition to resolve conflicts with the help of respected aksakals and biys. Modern mediators propose to revive it in a new light and within the framework of the law [40-42].

Some issues and problems in the development of mediation in Kazakhstan are considered by D. Ospanova [7]. She, like other Kazakh researchers in the field of law, draws attention to certain difficulties in the implementation

of mediation procedures in the legal practices of Kazakhstan. The researcher emphasizes that despite the fact that the institution of mediation was enshrined in the legislation of the Republic of Kazakhstan more than a decade ago, the people of Kazakhstan still prefer litigation over mediation procedures. This state of affairs is largely due to the fact that a certain distrust of the seemingly new institution remains in society. Therefore, it should be that there is the same trust in modern mediators as there was in the biys in the past of Kazakhstan.

S.M. Begmatova [43] can also be considered one of the modern researchers of the institution of mediation. This researcher studies the general notion of the concept of mediation, as well as the principles of functioning of its institutions. The author says that mediation, which is based on the principles of mutual trust in the mediator, is typical not only for European or American legal systems, but also for Islamic law, where it also has deep roots.

One of the prominent researchers of the traditional legal practices of the Kazakh people, in particular the court of biys, is academician S.Z. Zimanov [44]. He is one of the first scholars who drew attention to the connection between the court of biys and modern mediation practices. Also, the researcher emphasized the special cultural value of the biy court for the Kazakh people, spoke about the uniqueness, efficiency and fairness of this judicial system. Based on the research, a biy is defined as a judge, a court of biys is the judiciary, and continues to this day, in the conditions of modern Kazakhstan, to personify and are officially used as exemplary models of professionalism and honest attitude to the administration of the judicial function.

S.M. Shamshinurova [2] discusses the development of independent court institutions in different periods of the history of Kazakh statehood. As an example of an independent court in the past of Kazakhstan the researcher names the court of biys, speaking of it as a forerunner of modern institutions, including mediation. The author emphasizes the authority and importance of the court of biys in the traditional Kazakh society. The study says that the Kazakh legal traditions were still preserved in society, despite the opposition of external forces. It can be said that the institution of the biy court, which functioned on the principles of independence and fairness of judges, embodied the full range of legal consciousness of the people in understanding the proper existence of Kazakh society, the latter, in turn, was able to bring to life the functional and organizational conditions for the formation independence of judges.

The article by K.Z. Dalmatov [3] is dedicated to the difficult period in the history of the Kazakh state and law – the second half of the XIX century, when the authorities of the Russian Empire finally eliminated the traditional Kazakh legal institutions. The author talks about how Kazakh institutions were gradually supplanted by general imperial legal practices. It is told about the last stages of the functioning of the court of biys and the spread of the actions of all-imperial courts instead of them. Although the traditional court of biys still continued to function in the 2nd half of the XIX century, its significance was reduced to a minimum. Criminal cases on murders, mutilations, and rape, felony assaults, and robberies were withdrawn from the jurisdiction of the court of biys. By mutual agreement, the litigants had the right to turn to an intermediary for the

consideration of the case in an arbitration court – an outsider not from among the approved biys. Thus, as a result of the introduction of a number of regulatory legal documents of Tsarist Russia, the judicial system of the Kazakh Khanate, previously represented by the court of biys and the khan's court, was significantly transformed in order to integrate it into the Russian judicial system.

Thus, despite the fact that enough works published in recent years have been devoted to the institution of mediation, the history of this institution itself, and, in particular, its history in Kazakhstan, remains a practically undisclosed topic. There are certain gaps in the research question. So, declaring the connection of the biy court with the institution of mediation, the researchers of this issue do not say what was common and different between the institution of biys and modern mediation. The question of the origins of mediation, in particular, the functioning of such practices in the Kazakh Khanate until the XVIII century, also remains uncovered.

In general, we can agree with the general conclusions of the researchers that mediation is not entirely new and unusual for Kazakhstan and the Kazakh people. However, in connection with the forcible liquidation of the court of biys by the authorities of the Russian Empire in the middle of the XIX century, and, as a result, the interruption of the Kazakh legal tradition, the modern institution of mediation in Kazakhstan is not a direct successor to the traditional biy court. The current legislation of the Republic of Kazakhstan is forced to draw its main principles mainly from the experience of foreign countries. This state of affairs largely determines why the institution of mediation has not acquired the necessary distribution among the broad strata of Kazakhstani society so far. In general, it should be noted that a detailed history of mediation in Kazakhstan is still waiting for its in-depth study.

Conclusions

The institution of mediation is an effective alternative way to resolve disputes, which in recent years has been increasingly used in different countries of the world. The workload of the courts and the conservatism of the traditional judicial system contribute to the fact that an increasing number of people resort to conflict resolution using alternative methods. As a result, the popularity of mediation has increased significantly in recent years, and mediators are involved in the settlement of disputes in various areas of jurisprudence. The overwhelming majority of experts agree that the use of mediation in legal practices has a significant prospect, and in the foreseeable future, most disputes will be resolved not in courts, but with the help of mediators. In addition, the intensive use of the mediation procedure in criminal law will relieve the burden on penitentiary institutions and reduce the number of petty offenses.

The institution of mediation is a relatively new legal practice for Kazakhstan. In the legislation of the Republic of Kazakhstan, mediation was enshrined in the relevant law in 2011. The United States is considered the birthplace of the modern institution of mediation, where mediation has been used since 1947. In the second half of the XX century, mediation gained popularity and spread in the public life of the countries of Anglo-Saxon law: the USA, Great Britain, Australia. Subsequently, this institution was

universally recognized as an effective legal practice, and in 1990-2010, mediation was implemented in the legislation of various countries around the world.

Despite the modernity of the institution of mediation, such a method of conflict resolution as mediation has been used in various parts of the globe since ancient times. In Kazakhstan, a kind of prototype of the modern institution of mediation is the institution of the court of biys, when authoritative elected elders – biys were engaged in trials and reconciliation of the parties on the basis of Kazakh customary law. Officially, this institute was established by the Khan of the Kazakh Khanate Tauke at the turn of the XVII-XVIII centuries in the code of laws “Zhet i Zhargy”. The court of biys enjoyed considerable prestige among all strata of the Kazakh society of the XVIII-XIX centuries, it continued to function successfully in the first decades after the annexation of the Kazakh lands to the Russian Empire. Initially, the imperial power was forced to reckon with the authority of the biy court, and the Kazakh court, according to Kazakh customary law, initially coexisted with the imperial judiciary. However, in the 2nd half of the XIX century, in connection with the unification of the judicial system of the Russian Empire, the court of biys was forcibly liquidated by the imperial authorities.

Most researchers of the institution of mediation in Kazakhstan focus in their work mainly on modern problems of the implementation of mediation in Kazakhstan, speaking about the difficulties of spreading

this practice in society after the adoption of the Law of the Republic of Kazakhstan No. 401-IV “On mediation”. Researchers emphasize the connection of modern mediation with the institution of the biy court, but at the same time, they practically do not touch on the analysis of the similarities and differences between the old institution and a relatively new alternative way of resolving conflicts. Most researchers agree that mediation in Kazakhstan should be developed and expanded in various areas, taking into account both international experience and the traditions and mentality of the Kazakh people.

Thus, the institution of mediation, although modern, nevertheless has its own long-standing roots. The expansion of its application in Kazakhstan will help to solve the problems that exist in the current legal practices and legal proceedings. In general, the history of the study of this institute still needs its deeper research. The practical significance of this article lies in the fact that it can serve as material for such studies.

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Conflict of Interest

None.

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Історія дослідження інституту медіації в Казахстані

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Анотація

Актуальність. Медіація є одним з правових інститутів, що найбільш динамічно розвиваються в сучасному світі. У зв'язку з тим, що традиційні способи вирішення спорів залишаються малоефективними і не завжди задовольняють сторони своїми результатами, використання такого альтернативного методу, як медіація, дозволяє вирішити конфлікт на досудовому етапі мирним шляхом. Необхідність всебічного впровадження інституту медіації в життя казахстанського суспільства, як перспективного і необхідного в сучасних умовах, визначає актуальність дослідження. Історія вивчення інституту медіації не була предметом спеціального наукового дослідження. Висвітлення проблем історичного розвитку медіації в Казахстані від суду бійів до сучасного інституту медіації становить наукову новизну даної статті.

Мета. Метою дослідження є вивчення історії розвитку інституту медіації в Казахстані.

Методологія. Для дослідження були використані різні методи, такі як описовий, порівняльний історико-критичний, методи аналізу, синтезу, діалектичний метод наукового пізнання.

Результати. У ході дослідження було зроблено висновок, що, незважаючи на свою уявну нетрадиційність і сучасність, медіація має давню історію і глибоке коріння в казахстанському суспільстві. Функцію, подібну до медіації, у XVIII-XIX століттях виконував суд бійів, примусово ліквідований імперською адміністрацією у 2-й половині XIX століття.

Висновки. Створення сучасного інституту медіації в Казахстані в 2011 році частково слід вважати відродженням старих традицій. Більшість вчених, які займаються цією проблематикою, сходяться на думці, що медіацію в Казахстані необхідно розвивати, а також розширювати її застосування в різних сферах, враховуючи як міжнародний досвід, так і традиції і менталітет казахстанського народу.

Ключові слова: альтернативні способи вирішення спорів; законодавство Республіки Казахстан; бійський суд; медіація; примирення сторін.