

I.A. Akhmetova*, Zh.O. Galy

*Karaganda University of the name of academician E.A. Buketov, Karaganda, Kazakhstan
(E-mail: i.akhmet@inbox.ru, gjo1984@mail.ru)*

Mediation in Kazakh customs as an institute of volunteerism

The concept of “mediation” is a complex system based on the establishment of a compromise in a historical and philosophical context. Volunteering is the implementation of voluntary activities in providing assistance to vulnerable groups in a social strata. The article considers the answers to the questions what is the concept of mediation in the traditional Kazakh society and its connection with voluntariness, what is its essence. This article will not only allow us to scientifically study the relationship of conciliation procedures in Kazakh society with mediation, moral aspects, but also assess the essence of this concept from the point of view of voluntariness, spiritual and moral value as an ethical phenomenon. The authors take a step towards scientific theoretical analysis based on the theses of scientific works of a number of researchers who studied the patterns of mediation in the article. The ethno-cultural aspects of mediation are revealed, based on the fact that the activities of the board members who carried out voluntary mediation activities in the Kazakh steppe to reconcile the conflicting parties are really connected with voluntariness. Although the historical and theoretical foundations of conciliation procedures are considered only in the law of customs, at the present stage it is concluded that research is necessary along with voluntary, ethical principles.

Keywords: Kazakh society, volunteerism, institute of mediation, history of mediation, Kazakh customs, biys, disputes, institute of peace, conflict resolution, ethical standards.

Introduction

This topic is one of the most important and innovative. Mediation has been an institution of reconciliation and a procedure in the Kazakh steppe since ancient times. It has been carried out to resolve and reconcile various disputes in the country. In Kazakhstan, the proverb “The purpose of the dispute is a truce” is proof of this.

The main purpose of mediation is bilateral reconciliation, the formation of mutual understanding without bringing biys to court. Thus, during religious holidays, with the postponement of consideration of the case to the court of biys, consent, affinity (unrelated bilateral matchmaking), with the postponement of the case on the same holiday, methods were used not to bring the case to court, forgiving each other with the conviction: “a Muslim is not offended by a Muslim”. This was carried out owing to common sense, foresight and the mediator’s policy.

Why is mediation considered a voluntary activity? After all, an intermediary is an employee who voluntarily, without receiving any payment, calls on both sides to reconcile and acts to prevent revenge and discord. In this sense, we see the philosophical and ethical aspects of mediation. He did his best to solve a stressful problem: “with unity there is strength”. One can see the involvement of this conciliatory tradition in a religious institution. The Prophet said: “a Muslim will not be offended by his brother for more than three days”.

Mediation in the Kazakh steppe is an invaluable asset of the nation, an ethical and moral principle, a unique, distinctive embodiment of another culture and nation.

Separately, it should be noted the value and importance of mediation as an institution of volunteerism in science. After all, mediation is a description of human civilization, a legal source. The object of the study is to consider that mediation as an institution of voluntariness is the basis of humanistic ideas in the civilization world; the subject of the study is the historical and philosophical-ethical analysis of mediation.

Justice was represented by the Kazakhs mainly not as an institution of law enforcement, but as an institution of peacemaking. The absence of a mechanism for implementing the decision also required the establishment of an agreement between the parties since a court decision based only on the authorities could remain unfulfilled.

* Corresponding author’s e-mail: *i.akhmet@inbox.ru*

Experimental

To disclose the humanistic roots, spiritual realities, and value realities in Kazakh traditions, the topic of the study was taken into consideration as a voluntary mediation institution. During the study, the method of conceptual analysis was used, updating the work of an ontological, anthropological, axiological nature. In this regard, the great Kazakh biys Töle biy, Aiteke biy, Kazybek biy acted as mediators. Scientific theoretical sources of legal regulation and resolution of civil disputes in the Kazakh steppe were obtained, in particular guided, by the works of research scientists such as S.K. Atakhanov, B.A. Zhetpisbayev, R.G. Melnichenko., L.F. Balluzek.

Results and Discussion

The idea of universal voluntariness as a universal human value is widespread in all civilizations of the world, as evidenced by the philosophical works of thinkers of different civilizations in the history of mankind.

Mediation is a procedure for resolving a dispute (disputes) between the parties, carried out by a voluntary agreement of the parties, with the assistance of a mediator (s) in order to achieve a mutually acceptable solution [1].

Mediation in English means to be an intermediary. Today, mediation is widely used in world practice, from large enterprises to issues such as divorce and the division of property. If we turn to international statistics, 30-40 percent of all disagreements are conducted through mediation, of which 85 percent have a positive result. After the Soviet period, mediation was used for the first time by Moldova and Lithuania to resolve criminal cases. The last of these countries have achieved an economic effect from this practice. As for the biy court system in Kazakhstan, it is the core of this mediation.

The difference between a mediator and a judge is that a mediator can actively participate in negotiations with the parties to the conflict, but a judge cannot do this, he is obliged to follow the principle of non-interference. Mediation takes only 30 days, and trials last for months and even years.

The history of mediation dates back to ancient times. In different historical periods, there were many forms of resolving controversial issues. It included a set of numerous measures and solutions that could temporarily or permanently eliminate the disputes of the parties which were considered suitable for this particular historical society. Conciliatory ways of resolving disputes also existed in a primitive communal society. The need to involve a third neutral party in resolving the dispute was caused, first of all, by the need to survive. In ancient times, this procedure was especially widespread and developed in regions where trade was primarily well developed. Historians associate the emergence of mediation with the Phoenician civilization and ancient Babylon, which was based on maritime trade.

Further development of the institution of mediation took place in ancient Greece, where mediators were known as "proxenetas". In ancient Rome, starting with the Digest of Justinian, the legislative consolidation of the position of mediators began. In Roman law, they had various names: medium, interpres, internuncius, intercessor, interlocutor conciliator, interpolator, and also mediator. In the Middle Ages, attempts were made in the Land of Russia to peacefully settle civil strife between knyazes (rulers). In those days, the clergy most often acted as mediators and conciliators.

The use of the institute of mediation was also reflected in the history of the development of Kazakh customary law. In particular, the "Zhety Zhargy" (seven regulations) enshrines the right to compensation for damage due to cost and penalties. Biy played the role of mediator. The historical significance of the biy court lies in the fact that it was an example of justice.

The trial began when people came to find a solution to the dispute. They only went to biys, in whom they themselves believed. They, who were considered a storehouse of folk wisdom and spirituality, were outstanding personalities of the people.

Peacemaking and mediation are historically established institutions in Kazakhstan. Kazakh researchers: S.Z. Zimanov, Z.Zh. Kenzhaliev, K. Alimzhan, T.M. Kultelev, and many others said that judicial power in Kazakh society had long been exercised by the biy court, which satisfied the needs of the then society in the settlement of disputed issues.

Justice was represented by the Kazakhs mainly not as an institution of law enforcement, but as an institution of peacemaking. The absence of a mechanism for implementing the decision also required the establishment of an agreement between the parties, since a court decision based only on the authorities could remain unfulfilled. The biy of the prosecution and the biy of protection from the ru (clan) took part in

resolving disputes that arose between the rus (clans). The trial was carried out based on the rules adopted in such institutions as the “kenes” (council) and “zhuginis” (go to court). L. Balluzek said: “before the court, there must be the conviction of others, that is, impartial and authoritative for the disputants, so that the disputants do not allow quarrels because they are the sons of one national family “Kazakh” ...” [2; 165]. If the parties did not agree on a peaceful settlement of the dispute, then the court was the next instance.

The measures of reconciliation, which the official jury court subsequently applied in its activities, were also highly appreciated by some authors. I. Kozlov noted that the appeal of the biy courts “to the conscience and spirit of reconciliation of the disputing parties” will be guided by biy when considering each case [3; 306]. The moral procedural law of the Kazakhs and the judicial practice of authoritative biys of antiquity, the main purpose of which was coercion, persuasion, suggestion of the parties in the need for reconciliation, there were various types of peace agreements of the disputing parties – “truce”, “consent”, “decision”. They also include the following techniques and methods of biys:

1) In most cases, not only in minor cases, but also in major disputes: criminal cases and generic disputes were resolved using the “karyndas” (sister) technique. The main purpose of this type of agreement is the reconciliation of brothers and sisters without going to court;

2) If there were no strong reasons and supporting evidence, a “half” or “partially” resolution was used instead;

3) If the biy or the person who took the oath on the part of the defendant were not sure of the defendant’s innocence and did not find the grounds necessary to protect his interests, then they had the right to recommend to the plaintiff (upon his arrival) to end the case peacefully, “involving” him [4; 225, 226].

“Brevity is the soul of wit”, i.e. a wordy controversial issue should end with a brief solution. Although it should be such that the decision is accurate and convincing, as the following theses warned biy about: “Deliberate often – decide once”. The decision of the biy court should be only like this [5; 94, 95].

The structure of Kazakh society (the court of biys, the power of sultans) did not lose its former significance until in 1869 Alexander II signed the “temporary regulations” on the management of the steppe region and Russian legislation began to spread. After the adoption of this rule, only marriage and family cases, small claims and disputes came to the consideration of the biy court [6; 84]. Arbitration courts existed in Kazakhstan from the end of the XVIII to the beginning of the XX century as an alternative to the biy court for the independent resolution of legal disputes and litigation without distinction into criminal and civil law torts.

Considering the history of mediation in Kazakhstan, Kazakh folk biys, such as Töle biy, Kazybek biy, Aiteke biy, who became biys of their period, provided for the regulation of the political and legal system and the strengthening of justice in the nomadic Kazakh steppes.

The historical, philosophical, political, and cultural heritage of biys is very important in the Kazakh steppe. The three biys supported the idea of unity and understanding of the category of basic requirements, principles in the management of the state, in the conduct of political power. That is, the biy was a source of establishing peace, strengthening the state, and calling for unity.

The researchers from the organization The Dispute Resolution Center (USA) gave the following definition to the mediator:

“Mediators are a neutral third party to help people in conflict find solutions, in agreement together. We offer beginner and advanced mediator trainings and workshops at a low cost” [7].

Kayla Matthews notes the mediator’s functions as follows:

“Becoming a mediator, then, might seem like a stretch for you and your inherent skills. Rather than choosing a side, the mediator works for both parties. Families, professionals and even strangers seek mediation, and it’s the mediator’s job to listen to the issue at hand. Then, they help highlight the best course of action, one that’s likely to be a compromise for both sides” [8].

Kazakhstani researcher B.A. Zhetpisbayev in his work “Legal issues of property disputes” noted that “Mediation is an out-of-court method of dispute settlement chosen by the parties on a voluntary basis to achieve a certain goal” [9; 92]. Thus, mediation as an institution of volunteerism in the Kazakh steppe is an alternative way to resolve conflict situations with the help of a mediator without bringing it to court. Publicity is a necessary condition for nomadic democracy, public opinion conforming to the norms of ancient traditions and customs of law, as well as the firm assertion of the principle of justice exceeding any law – all these are guarantees that ensure the biy court, which everyone trusts.

The mediator explains to the parties the essence and principles of the procedure. Then he listens to their statements: how each of the participants in the dispute sees the conflict that is being worked on. Issues are

formulated that the parties are ready to discuss together. Then the mediator determines the interests of the parties. The participants propose solutions that can be evaluated according to the realism and interests of each of them. As a result, a mediation agreement may be concluded, fixing the agreements reached.

In her work, Becky L. Jacobs offers the following conclusion referring to the practical activity of the mediator: “Many others, however, particularly those in the legal profession, contend that non-lawyer mediators are severely limited in their ability to successfully mediate disputes because they cannot accurately assess the strengths and weaknesses of each party’s case. Even if they were able to make legal assessments, they are forbidden from doing so in many states by unauthorized practice of law concerns” [10].

In his textbook “Mediation”, R.G. Melnichenko emphasizes that mediation is the principle of voluntariness. He notes that “volunteering is an opportunity to keep the mediation activity under control”. The mediation procedure based on the principle of voluntariness is as follows:

- voluntary start and end of the procedure. Mediation is carried out if both parties are willing to agree with each other;
- freedom of bilateral decisions. The warring parties voluntarily make their choice, referring to one mutual decision;
- voluntary choice of mediator. During the mediation process, the parties may voluntarily choose and change the mediator. The mediator cannot force them to make a choice;
- voluntary determination of mediation processes;
- freedom of the parties to choose the mediation procedure. Although the mediator himself regulates the activity of mediation on a professional basis, maintaining a “balance” in its implementation [11; 73].

In the quarter of the XX century, the concept of mediation was fully revealed, and we will try to answer questions about how this type of activity is carried out and who can hold this position:

- Anyone who believes in conflict resolution with the choice of conflicting parties can become a non-professional mediator.

If the dispute is transferred to the jurisdiction of the court, only a professional mediator can be called to conduct a conciliation procedure. The list of judicial peacekeepers is approved based on personnel submitted by state courts.

What happens after the mediation procedure?

The result of reconciliation of both parties may be a settlement agreement, full or partial rejection of the claim, recognition of the circumstances of the case. The settlement agreement, the recognition of the claim and the rejection of it are fully approved by the court if they do not contradict the law and do not violate the rights and legitimate interests of other individuals [12].

Currently, mediation is a global transnational movement that is developing everywhere in response to the impossibility of a continuous solution, which is a common phenomenon.

Mediation is a profession characterized by ethical responsibility and obligations. Since mediation is a voluntary process, to effectively perform the duties of a mediator, the candidate must be favorable to the parties in terms of professional knowledge and skills, objectivity, fairness and experience [13; 60].

Members who have carried out voluntary mediation activities are actually skeptical about the ethical and moral side of mediation, relying on the fact that it is related to voluntariness.

The reason why we attribute mediation to voluntariness is that mediation is free, and the mediator is free to spend his time on this dispute or issue. The main goal of the mediator is to call for reconciliation, resolve a dispute, and help people. Special attention of volunteering is paid to helping people.

Atakhanov S.K. in his work states that “mediation is an activity in which this procedure is voluntary. The subjects of mediation voluntarily turn to mediation, voluntarily accept agreements based on the results, and also voluntarily fulfill agreements reached in the mediation process” [13; 96].

However, this does not mean that there is no payment for mediation services, but that modern mediators receive a salary for their services, as stipulated by the law “On Mediation”.

Conclusions

According to Article 2 of the Law “On Mediation” adopted by the Government of the Republic of Kazakhstan Resolution No. 1108 of October 26, 2010, mediation is a voluntary process where disputes between parties are settled with the help of a mediator in an effort to find a resolution that is acceptable to all parties. [1].

Analysis of the scientific and practical material collected during the research, review of works on this topic, the processing of one of the voluntary mediation institutes in the Kazakh steppe were carried out. As a

result, the goals and purpose of the study were achieved. Proceeding from this result, by maintaining legal service in a country that has long existed in the Kazakh steppe, without losing the trend that was formed by the wisdom of traditional Kazakh khans and biys, and becoming an example for future generations, one can raise a faithful descendant of its homeland.

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И.А. Ахметова, Ж.О. Ғалы

Қазақ әдет-ғұрпындағы медиация — еріктілік институты ретінде

«Медиация» ұғымы тарихи-философиялық тұрғыда даулы жағдайда компромисс орнатуға негізделетін күрделі жүйе. Еріктілік болса әлеуметтік қоғамда қорғалмаған топтарға көмек көрсету барысында ерікті қызметті жүзеге асыру. Мақалада дәстүрлі қазақ қоғамындағы медиация ұғымы деген не және оның еріктілікпен байланыстылығы, мәні қандай деген сұрақтарға жауаптар қарастырылған. Сонымен қатар мақалада қазақ қоғамындағы татуластыру рәсімдерінің медиациямен байланысын, моральдық қырларын ғылыми тұрғыда зерттеуге жол ашып қана қоймай, талдау жасау арқылы бұл концептінің мәніне еріктілік, әрі этикалық құбылыс ретінде рухани-моральдық құндылық тұрғысынан баға берілген. Авторлар мақалада медиация заңдылықтарын зерттеген бірқатар зерттеушілердің ғылыми жұмыстарының тезистерін негізге ала отырып, ғылыми теориялық талдау жасауға қадам жасаған. Қазақ даласындағы ерікті түрде медиациялық қызметтерді жүзеге асырған алқалы жиынның билері, мүшелерінің жанжалдасушы тараптарды татуластыру бойынша қызметі шын мәнінде еріктілікпен етене байланыстылығына сүйене отырып, медиацияның этно-мәдени қырлары ашылған. Татуластыру рәсімдерінің тарихи-теориялық негіздері әдет-ғұрып құқығында ғана қарастырылып келсе де, қазіргі кезеңде еріктілікпен, этикалық принциптермен қатар қарастыру үшін зерттеулер жүргізу қажет деген пайымдар жасалған.

Кілт сөздер: қазақ қоғамы, еріктілік, медиация институты, медиация тарихы, қазақ әдет-ғұрыптары, билер, даулар, татуластыру институты, бітімгерлік, этикалық нормалар.

Медиация в казахской традиции как институт добровольчества

«Медиация» в историко-философском смысле представляет собой сложную систему, в основе которой лежит установление компромисса в решении спора. Добровольчество, в свою очередь, это осуществление добровольной деятельности при оказании помощи незащищенным группам в социальном обществе. В статье рассмотрены ответы на вопросы: о понятии медиации в традиционном казахском обществе и ее связи с добровольчеством, рассматривается ее сущность. Данная статья не только позволит научно изучить моральные аспекты взаимосвязи примирительных процедур в казахском обществе с медиацией, но и в результате произведенного анализа позволит оценить сущности этого концепта с точки зрения духовно-нравственной ценности как добровольчества, так и этического феномена. Авторы статьи, основываясь на тезисах научных работ ряда исследователей, изучавших закономерности медиации, произвели научно-теоретический анализ. Кроме того, они считают, что деятельность биев, осуществлявших добровольную медиационную деятельность в казахской степи, по примирению конфликтующих сторон действительно связана с добровольчеством; раскрыты этнокультурные аспекты медиации. Несмотря на то, что историко-теоретические основы примирительных процедур изучены только в обычном праве казахов, сделан вывод о необходимости проведения исследований медиации на современном этапе, с точки зрения добровольчества и этических принципов.

Ключевые слова: казахское общество, добровольчество, институт медиации, история медиации, обычай казахов, бии, споры, институт примирения, разрешение конфликтов, этические нормы.

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