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# Theoretical Thoughts on Legal Regulation of Mediation in Criminal Process in Kazakhstan

Elena Mitskaya<sup>1</sup>

M. Auezov South Kazakhstan State University, Kazakhstan

## Abstract

*Expanding the use of the principle of encouragement in the criminal law and transforming the punitive system into restorative justice make us pay attention to and explore the experience of other countries regarding the legal implementation of an alternative form of settling criminal disputes. Eight years ago, Kazakhstan was the first country of the CIS to introduce an alternative form of criminal dispute settlement in the context of the criminal policy humanization. Mediation became the basis for excluding criminal responsibility. However, the number of criminal cases in Kazakhstan completed through mediation is still insignificant compared to civil cases. The study of Kazakhstan's experience of mediation legislation in criminal cases demonstrates the main approaches to its legal regulation, reveals the problematic issues of meditative legislation principles, doubting mediator's independence and impartiality in preparations for criminal cases. This article provides practical options for resolving problematic issues of mediation on criminal cases in Kazakhstani legislation. The research will be useful for legislators and future development of the legal framework of the mediation on criminal cases.*

Keywords: Mediation Law, Mediation, Mediator, Criminal Cases, Criminal Process.

## Introduction

The introduction of mediation as a form of criminal and civil dispute settlement into European legislation, in particular, was driven by the search for alternative ways to resolve such disputes dating back to the second half of the 20<sup>th</sup> century. The revision of a criminal policy was directed towards identifying possible options for eliminating the negative consequences of a criminal offense beyond the framework of traditional judicial proceedings, i.e., by parties reconciliation. With this reconciliation, the judgment would not be the state's decision and the result of overall will (Carré de Malberg, 1984), but the outcome of mediator's dialogue between the victim and the offender. Criminal dispute

<sup>1</sup> Higher Doctorate Jurisprudence, Professor of Department of Criminal Law and Criminology, M. Auezov South Kazakhstan State University, Kazakhstan.  
Email: elenamits@inbox.ru

settlement is supposed to be through by restoring violated relationship (Walgrave, 2007, p. 559), first, by restitution for harm inflicted (Sessar, 1995, pp. 199-214), what eventually led to the name of “restorative justice” (Consedine, 1995). So, mediation as one of the forms of criminal dispute settlement became the basis for termination of criminal prosecution on the grounds provided by voluntary agreement of the parties to the conflict. Introduction of mediation into the procedural practice contributed to the strengthening humanization, first the Anglo-Saxon legislation, and then the other European countries’ law and its democratic principles since mediation increased public involvement in legal procedure.

Recommendation No. R (99) 19 of the Committee of Ministers of the Council of Europe dated September 15, 1999, provides the explanation for mediation, regardless of types of legal procedure. From this explanation, with regard to the criminal process, mediation could be understood as an intermediary process carried out by the impartial third party (one or more intermediaries) between the victim and the offender on the basis of their mutual desire. Mediation define in criminal cases is given in the fundamental Decision of the Council of the European Union dated March 15, 2001 on victims’ position in criminal procedure. Article 1, paragraph (e) of this Decision defines mediation in criminal cases as “search for mutually acceptable decision between the victim and the offender through mediation under the structured guidance of a mediator before or during criminal procedure”. Mediation procedure is subordinated to its principles implemented for each specific criminal conflict: humanity; impartiality; independence; confidentiality (Merimanov, 2013, pp. 143-150). Although mediation without common moral principles is impossible.

Settlement of criminal dispute outside traditional judgment, i.e., without the strict following procedural requirements, mediator’s participation allows the offender to prove greater independent efforts to solve the conflict (Galaway & Hudson, 1981, pp. 412-418). This also allows the offender to feel the victim’s entire harm and pain, so to say to see emotional reaction of the injured party caused by the offender wrongdoing and at the same time, perhaps by getting over himself, to start negotiations in the name of another (Morineau, 2001, pp. 77-96). Mediation allows assessing the negative consequences of the offender’s actions in face-to-face dialogue and informal environment, (Consedine, 1999, p. 101) to show greater activity for the peaceful outcome of conflict and responsibility for the offender’s actions (Barcz, 2013, pp. 3-19). In the course of a trial, the procedure is subordinated to established rules and strict compliance with action algorithm of all participants. Consequently, the will of the parties to the conflict to reach an agreement outside the judicial system should not be limited. In restorative justice, the emphasis shifts from punishing to restitution of victim’s legal status, but with respect for the legitimacy in a way that satisfies both parties (Marshall & Merry, 1990). Restorative justice could not be based on the instructions of legal norms. J. Bergel is quite right when he stresses that the concept of restorative justice comes from the law (Bergel, 2000, p. 335). Solely the legislator allows shifting judicial reconciliation to extrajudicial and vice versa. At the same time, the law has an auxiliary character, shifting agreements reached through mediation process into the current legal framework, thus ensuring the legitimacy of these agreements and guarantees their further execution.

The widespread practice of mediation (Bacon, 2010) as a restorative procedure and administration of justice (Sherman & Strang, 2007, p. 4) becomes attractive for Kazakhstan's legislation. Since 2011 in Kazakhstan the legal possibility to apply mediation into various spheres of legal practice (family law, civil law, labor law and in other legal relations) becomes valid on a par with the traditional form of dispute settlement (Law of the Republic of Kazakhstan, 2011). The Penal Code of Kazakhstan allows resolving criminal conflicts through alternative dispute settlement as established in Article 68 (Penal Code of Kazakhstan, 2018), which was before impossible to present in criminal law. This is one of the novelties of the new 2014 Penal Code of Kazakhstan on re-socialization of offenders who committed a crime.

Legal adoption of mediation in the Kazakhstan Law occurred solely by studying of foreign countries experience (Velitchenko, 2012, p.50). In line with other foreign countries, reconciliation through mediation in Kazakhstan's criminal process is an alternative to the traditional way of dispute settlement. However, mediation in criminal procedure has not become widely spread either at the pretrial or at the trial stage (Sarsenbayev, 2018, p. 68). This article presents an attempt to understand this matter. With this aim, the basics of mediation in the criminal process under Kazakhstan's legislation considered as well as problematic issues and options for solving.

### **Methodology**

Methodological basis of legal regulation of mediation study in Kazakhstani criminal process is made up of dialectical method of cognition and special methods: comparative legal, structural and functional, system analysis method, logical, formal legal, technical and legal, statistical. General scientific methods of dialectical philosophy have made it possible to comprehensively and objectively investigate the socio-legal mechanism for resolving legal conflicts through mediation and its theoretical development in legal science. Comparative legal method was used in the analysis of the doctrine, models of legal regulation and the practice of mediation in foreign countries. Structural and functional method made it possible to identify the circle of functional purpose of mediation as a social institution. Methods such as logical and system analysis allowed us to study theoretical and legal foundations of understanding mediation by Kazakhstani lawyers and scientists, to determine independence of mediation in the framework of criminal process. Formal legal and technical legal methods were used in the study of normative consolidation of mediation and the development of practical recommendations for improving Kazakhstani legislation on mediation. The statistical method was used in the analysis of activity of Kazakhstani courts for 2015–2017. All methods in combination have allowed us to explore a common understanding of mediation in Kazakhstan and offer recommendations for improving its regulatory framework in hope that it will improve access to justice by ensuring a balanced relationship between mediation and litigation and accelerate the development of mediation in the criminal process.

### **Understanding Mediation in Kazakhstan's Criminal Process**

For the first time, the term “mediation” was officially announced in 2002 in the Concept of Legal Policy of Kazakhstan. In the Concept, speaking of further humanization of criminal policy, expansion of list of crimes falling under possibility of exemption from

criminal liability through mediation procedure was defined as a prospect. Prior to this, mediation in its modern sense was not known to either the wide public in Kazakhstan or legal practice. Unlike the United States and European countries, it was not developed by legal practice of dealing with conflicts. Kazakhstani mediation did not go the evolutionary path from gradual recognition of its advantages gained by practice of its application, formation of a regulatory framework and to expansion of its scope. Mediation was “threw” from above by the state for its implementation and study by lawyers and public. Without state support, it would hardly have taken root due to decades of practice in resolving legal conflicts exclusively in courts. Therefore, in historical terms, the development of mediation in Kazakhstan is only just beginning to take shape. The peculiarity is that at first there was legalization of mediation, and only after that there was propaganda, information support and gradual recognition of mediation among population, accumulation of practical experience and formation of a community of mediators. We can say that the development of mediation comes from inverse known experience of leading countries in use of mediation. Mediation for Kazakhstan is, indeed, novel from a legal point of view. Currently, it is going through a stage of formation and development as a socio-legal institution.

Unfortunately, in Kazakhstan there are still no basic scientific researches covering mediation. Mediation, as a dispute resolution procedure, is theoretically a very versatile phenomenon (Carroll & Mackie, 2016). Many factors influence the course of the procedure. For example, psychological: willingness of participants to cooperate, trust, ability to dialogue, stress resistance, etc. In addition to psychological factors, the sociocultural context is important: commitment to certain values, belonging to certain communities, perception of oneself in gender, social-role, age, professional aspects, etc. Legal environment in which mediation agreement is implemented, economic benefits, moral attitudes of the parties, and much more are also significant. Thus, the study of mediation seems important and useful not only in terms of law, but also in a number of other disciplines. In this sense, Kazakhstani science feels the need for thorough theoretical support for mediation use, consolidated capital work on this topic (Kogamov, 2018, p.59). Unfortunately, today there are no definite answers to simple questions: what evidence exists that mediation used in Kazakhstan is effective, and what fundamental scientific principles underlie it? In the literature, such data is simply not available. Questions regarding the guarantees of the human rights involved in mediation process and its safety are also not adequately answered. Zh. Shukenova’s dissertation research “The essence of Constitution and the current state of Kazakhstan’s judicial authority” is one example of such work, the author partly addresses mediation, in the context of proposals related to reforming the judicial authority (Shukenova, 2014). Scientific articles in journals or digests of conference materials highlight mediation with extensive use of Russian and other foreign authors’, as well as educational articles of Kazakhstan’s judges, and mediators. Such articles are numerous, the largest number were in 2009–2013. This reflects the fact that then there was a necessity of studying the mediation essence, development prospects (Suleimenov, 2009), as well as explanatory work on the new conciliation procedure. All authors without exception explain the core of alternative forms of dispute settlement (Kim, 2011, pp. 219–221) distinguishing between mediation and reconciliation, agree on unquestionable recognition of all benefits of mediation (Urazova, 2013, pp. 27–29; Khan



& Urazalin, 2013, pp. 67-69) and its long-term implementation in Kazakhstan's legislation.

A year after introducing mediation scientific articles began to appear in which authors indicate problematic issues of mediation in criminal cases, unfortunately, they remained unsolved to the present (Akhpanov, 2012, pp. 58-62; Pen, 2012, pp. 65-71). These issues include payment for mediator's services, preparation, maintenance of the register, responsibility (Diachuk, 2016, p. 169; Mitskaya, 2018, p. 114) and ensuring the principles of mediation (Mitskaya, 2018, p. 113) and other. Analysis of scientific publications on mediation in criminal procedure suggests that all authors also understand mediation as a conciliation procedure, which conducted by a mediator to do agreement and reconciliation between the parties to the conflict. Some authors however, try to add to the understanding of mediation in the criminal process such features that are only misleading and moreover contradict the current legislation of Kazakhstan. Dzhumabayeva (2017) believes that mediation based on the mutual will of the parties is "a certain system of methods and techniques formed by a special subject of law – the mediator aiming to settle a criminal conflict of a strictly designated criminal cases small and medium gravity and reach an agreement between conflicting parties" (p. 103).

Including designation of criminal offenses in this definition is not correct. Kazakhstani criminal law allows mediation application not only to crimes of small and medium gravity but also to felonies. This definition excludes misdemeanor out of legislation. The Penal Code of Kazakhstan concedes conducting mediation both for misdemeanors and crimes. Though, the Penal Code of Kazakhstan set up no gravity for misdemeanors. Classification of gravity established solely for crimes. The classification of the crimes with the goal of thorough differentiation and flexible regulation of criminal relations is established in the Code as in other countries. At the same time, this allows the law enforcer to improve on legal technique (Arestov, 2018, p. 39). In view of this, Dzhumabaeva's definition of mediation is theoretically incorrect and contrary to the Penal Code of Kazakhstan.

Kustavletov mentions mediation as one of the types of intermediary serving, where person responsible for conflict settlement conducts negotiations between the disputants with aim of making a settlement agreement between them (Kustavletov, 2016, p. 25). We cannot accept such a definition, because it distorts the mediation essence. Within the mediation, it is not a settlement agreement but mediation agreement which is made. This definition connects mediation as a type of reconciliation procedure under Kazakhstani legislation with reconciliation itself, the result of which is a settlement agreement (Kim, 2011, p. 220). Reconciliation is possible with or without an intermediary. Intermediary can be anyone who is trusted by the parties of the conflict, but when mediation is used this person can only be a mediator. Reconciliation in a criminal process as a legal institution is characterized by certain characteristics, certain functions, its object and subject of relations (Chernyshova, 2012, pp. 7-9). Perhaps, Kustavletov thought of mediation procedure as an agreement conclusion similar to an amicable agreement. The current Penal Code of Kazakhstan in article 68 provides the same grounds for reconciliation and mediation. The Criminal Procedure Code of Kazakhstan has no special chapter that would fully prescribe the entire mediation procedure, and Kustavletov's definition of mediation connects the legal consequences of two conciliation procedures, which is also theoretically incorrect and contrary to law.

Some authors give more detailed definitions of mediation. The most impressive definitions are given by Musabaeva (2016): 1) “mediation is a confidential procedure for settling a dispute (conflict) between the parties with mediator’s assistance aiming to reach a mutually acceptable solution, implemented by voluntary consent of the parties” (p. 5). 2) “Mediation is a special form of conciliation procedure in which the parties, supported by the third, neutral, impartial side represented by the mediator, strive for consensus, jointly work out a mutually satisfactory solution to existing differences” (p. 91). These definitions of mediation do not contradict each other; on the contrary, they reveal the peculiarities that characterize it.

However, the universal definition of mediation, regardless of its application to any legal relationship, provides Kazakhstan Mediation Law. According to clause 5, article 2 of Mediation Law, mediation is “a procedure for settling a dispute (conflict) between the parties with mediator’s assistance aiming to reach a mutually acceptable solution, implemented by voluntary consent of the parties” (Law of the Republic of Kazakhstan, 2011). Indeed, this definition is completely consistent with the understanding of mediation in accordance with Recommendation No. R (99) 19 of the Committee of Ministers of the Council of Europe dated September 15, 1999.

Kazakhstani researchers note that despite borrowing foreign countries experience, mediation in Kazakhstan has its own roots (Sarsenbayev, 2018, p.70) since there were examples of reconciliation of the parties in the local customary law (Zimanov, 2008, pp. 94-95; Turetskiy, 2018, p. 92). Mediation in modern Kazakhstani criminal process is a part of it because it carried out within the framework of criminal legislation. From the variety of alternative forms of dispute settlement, Kazakhstani legislator chooses mediation as most effective way of dispute resolution based on foreign experience of mediation use (Zholdybayev, 2018, p.11; ПЕН, 2012, p. 66). In turn, of all varieties of mediation (Davydenko, 2006, pp. 35-37), restorative mediation was introduced into Kazakhstani criminal process. Restorative mediation is aimed at creating conditions for dialogue, during which the responsibility for the decisions made lies with the parties to the conflict, and as a result of which the harm is redressed and relations are restored (Beyzmozor, 2006, pp. 25-28), and intrapersonal statuses of the participants in the conflict are also restored (Maksudov, 2009, p. 195). Mediation in criminal procedure is an alternative form of criminal dispute settlement carried out by a mediator’s assistance. In a way that parties to the criminal process voluntarily determine (Mitskaya & Mamatay, 2016, p. 18) their reconciliation. The main task of the mediator is not to reconcile the parties, but to create conditions for the parties and their dialogue in which they can themselves come to an important restorative effect of reconciliation and conclusion of an agreement. The models proposed by L. Boulle and M. Nasic are well applicable to Kazakhstan’s mediation (Boulle & Nasic, 2001, p. 27).

Accordingly, mediation is one of the alternatives to conciliatory procedure and a form of restorative justice (Madybaeva, 2014, pp. 10-15). At the same time, mediation has features that distinguish it from adversarial (traditional or punitive) justice:

- Voluntary nature of its application by the parties to criminal procedure;
- A simplified and informal procedure based on the cooperation of the parties;

- Self-dependence of mediator's decision as well as the way of final settlement of a criminal conflict by the parties;
- Mediator's neutrality as a duty under the law;
- Non-disclosure of information obtained in the course of conflict settlement (confidentiality).

Mediation is characterized as an independent procedure but additionally applied within the framework of the criminal process with a view to conciliation of the parties and termination of criminal prosecution. The fundamental difference between mediation and the criminal process is the position to the offender, in particular, offender's possibility to find a compromise with victims and reparation for the harm they've caused to victims. Mediation procedure independence is determined by the concept of mediation in criminal procedure, its application procedure, differentiation by category of criminal cases, mediator's legal position, legal implications of a mediation agreement. Taking into consideration foreign countries' experience of mediation application as a restorative procedure or justice, Kazakhstani legislator established mediation definition according to European practice.

### **Normative Base of Mediation in Criminal Process**

Decree of the President of Kazakhstan No. 949 dated 20<sup>th</sup> September of 2002 "On Conception of the Legal Policy of the Republic of Kazakhstan" formed the basis of mediation application into traditional judicial proceedings, in which criminal policy humanization must necessarily be carried out through mediation, but this Decree had no explanation and methods of mediation use. A special law adopted at the beginning of 2011, determined the scope of mediation application, purposes, and principles of mediation, requirements for mediators and their legal status, rights and obligations of the parties to mediation, mediation procedure and specifics of legal relations, including requirements for a mediation agreement and termination of mediation. Mediation principles in this country do not differ from Europeans and have legislative consolidation in Article 4 of the Mediation Law. Mediation is conducted by the following principles:

- Voluntariness;
- Equality of the parties to mediation;
- Mediator's self-sufficiency and impartiality;
- Impermissibility of interference in mediation procedure;
- Confidentiality (Law of the Republic of Kazakhstan, 2011).

The principles also clarified in this Law. The basis for mediation application in criminal process is the Penal Code standards, enshrined in Article 68. Legal grounds for mediation uses are as follows:

- Gravity of committed offense;
- A victim is an individual person;
- Voluntary nature of mediation application by the parties to criminal procedure;

- Full compensation for injuries sustained.

Mediation is applicable for persons committed a criminal offense or crimes of medium/minor gravity, which did not cause death, if person reconciled with victim and reimbursed victim's harm. Grounds for mediation application under part 1, article 68 of the Penal Code of Kazakhstan are a commitment of crimes of medium/minor gravity, compensation of victim's harm considering victim's full consent to reconciliation with the offender. As explained by the Supreme Court, it is irrelevant whether a person committed a criminal offense of medium/minor gravity for the first time, or repeated commission of offenses, recidivism, or whether a person served the previous sentence or committed a new crime while serving sentence/probation/suspension of sentence or while remaining unserved part of the sentence under parole (Normative Resolution of the Supreme Court of the Republic of Kazakhstan, 2001). Mediation leads to mandatory exemption from criminal liability for those persons.

For a certain category of offenders, however, the Criminal Law also allows mediation application even for grave crimes which they have committed for the first time an exception of those causing death or serious harm to human health: minors, pregnant women, women with young children, single parents, women over 58 years, men over 63 years, who had never before been committed a crime, if they compensate for harm inflicted. This category of offenders can also be exempted from criminal liability. Moreover, since July 2018, grounds for mediation application have been expanded. Now mediation is also admissible for those persons who have committed a serious crime related to death. The Penal Code of Kazakhstan establishes mediation in particular for persons who committed a traffic accident resulting in the death of person's close relatives through the negligence.

Hence, now mediation is admissible for all categories of crimes. As for grave crimes, the use of mediation is not admissible to all serious crimes with causing death, but only to a traffic accident, resulting in the death of accused person's close relatives through negligence. Therefore, in order to use mediation for felonies, it is necessary to determine the following: 1) the Penal Code of Kazakhstan allows using mediation for the victim, 2) the crime had never before been committed, 3) the crime related to causing death or serious harm to human health (it should not relate to causing death or serious harm to human health, except as already indicated above, resulting in death through the negligence of accused person's close relatives and the accused person is responsible for their death in a traffic accident). Essentially, criminal law's response from prosecution authorities to the use of mediation becomes identical. The most important thing is to determine the aggregate of all grounds of its application. However, not everyone considers this unified approach correct, there is a criticism of it, too (Golovko, 2010, p. 4). Indeed, an experienced criminal and a person committed a negligent crime both might be on an equal footing. Mediation will be equally admissible for both. But this is humanization essence in criminal law. The victim's refusal to mediate is an example of avoiding this equation. Without the victim's consent, even with all other grounds, mediation will become impossible. On the other hand, unification allows excluding misperception of criminal norms by prosecutors.

The mandatory ground of mediation in case of any gravity of the crime, as well as misconduct, is full reparation for the harm caused to the victim. Kazakhstan's criminal law,

considering the offender's exemption from criminal responsibility connected with the offender's reconciliation with the victim through mediation, allows no possible temporary suspension of reparation for the harm caused. Without reparation for the harm caused to the victim, without actually restoring the victim's rights, as well as without the victim's consent to reconcile, mediation is impossible on any other grounds.

The criminal law prohibits the use of mediation for persons who committed torture, crimes against sexual inviolability of minors, except crimes committed by persons under the age of majority in respect of a minor between the ages of fourteen and eighteen, negligent crimes resulting in death of a person or the death of two and more persons, a corruption offence, a terrorist offence, an extremist crime, collective crime. Mediation Law contains other restrictions regarding the use of mediation. The law prohibits mediation application regarding the cases where one party is a state body if the conflict affects or may affect the interests of third the parties or persons declared incapable by the court.

The Criminal Procedure Code of Kazakhstan had also changed and provides the victim with the right to reconcile during the mediation procedure. The list of other persons participating in the process includes a mediator and mediator's procedural position. The Criminal Law provided reconciliation, which was before possible only between the victim and the offender. Reconciliation is now also possible through involvement of mediator established by the Criminal Law. If the mediation agreement occurs, by the decision of a judge, the criminal procedure shall be terminated. This was made possible through the grounds for terminating criminal case established by the Criminal Procedure Code. Mediation procedure is also determined by the legal norms of the Criminal Procedure Code. The rules of mediators training are established in the law (Resolution of the Government of the Republic of Kazakhstan, 2011).

Therefore, mediation has its own legal basis and established on the law. The normative base of mediation on criminal cases includes general and specific legal norms. General legal norms apply to all spheres of mediation application, including criminal law. As for specific legal norms, they refer exclusively to criminal disputes. General legal norms includes: Mediation Law, Mediator Training Program Rules. Specific legal norms are: the Penal Code of Kazakhstan, the Criminal Procedure Code of Kazakhstan, the Normative Resolution of the Supreme Court of Kazakhstan "On judicial practice in the application of Article 68 of the Penal Code of Kazakhstan". On this basis we can conclude that the mediator is not only carries out general procedural management of mediation, but also ensures the legality of its conduct in accordance with all legislative requirements.

### **Requirements for Mediators and Mediation Procedure**

What person can be a mediator and mediator's criteria – these requirements are enshrined in separate article in the Mediation Law. The requirements essentially reflect mediation principles, this person is an independent, impartial, uninterested individual, chosen by mutual agreement of the parties to the mediation, included in mediators register and agreed to perform mediator's function. The Mediation Law establishes that the mediator shall not be an individual:

- authorized to perform public functions and equated to it;

- declared by the court as legally incompetent or severely incapable;
- under prosecution;
- with existing conviction or unexpunged conviction.

Moreover, the Mediation Law allows the parties to mediation to set extra demands to the mediator in the mediation agreement. This law establishes two categories of mediators: professional and non-professional mediator. A mediator on an unprofessional basis shall be an individual who meets only two criteria: 1) age of 40 years and 2) included in the non-professional mediators' register. Requirements for professional mediators are tougher: 1) individuals with higher education who have reached the age of twenty-five, having a certificate confirming the passage of mediators training approved by the Government of Kazakhstan and included in the professional mediator's register; 2) retired judges.

The mediator's register updated annually. Therefore, compulsory education is mandatory only for a professional mediator. The Mediation Law obliges a professional mediator to follow the Code of Professional Ethics of Mediators, approved by the mediators association. However, it does not mean that the mediator on an unprofessional basis should not ethical. The principles of conducting mediation presuppose ethics rules, although direct law has no requirement for the mediator of this category being conscientious. Mediators training is carried out following the provisions of the Rules of Mediators Training approved by the Decree of the Government of Kazakhstan (hereinafter – the Rules). The Rules are equal for all mediators, regardless of legal conflict sphere. But we will remind, they are obligatory only for the professional mediators. These Rules provide the mediator with the minimal amount of knowledge since this is then his personal experience of how to improve his qualification.

The Rules establish three mandatory training programs with indication of amount of training hours. Training programs differ not only by training time but there are also training programs with/without the right to teach, i.e. students granted the right to work only as a practicing mediator. There is a training program to study and specialisation of legal disputes. Legal dispute training is available to study. Thus, all three mediators training programs divided into 1) a teaching program of general practical mediation, 2) a teaching program of general mediation skills and the right to teach future mediators, and, and 3) a teaching program of specific areas of legal conflicts. The Rules define an approximate curriculum for each educational program and topic. The general content of mediators training is enshrined in law. There are two certificates issued after completing the training program: theoretical knowledge checked in the form of interviews or testing, and practical skills test based on the results of imitative mediation. The student who successfully passed the Mediators Training is given a certificate which established by the Rules.

Mediation is admissible both at pre-trial stage and at the court. The proposal to hold mediation can come from any party of criminal conflict as well as from criminal investigative body, depending on site of the criminal case. According to the Normative Resolution of the Supreme Court of Kazakhstan “On judicial practice on the application of Article 68 of the Penal Code of Kazakhstan” (2001), conciliation is expressed in victim's request to terminate the criminal case against the person committed a crime. The victim writes an official statement or the victim's will to reconcile is reflected in the

records of investigation or court trial. The mediation agreement discussed by the parties with mediator's participation and must meet requirements established in the Mediation Law. Kazakhstan's law provides the written form of the mediation agreement only. An oral agreement is not provided, although it would be possible to expect a range of circumstances in which a simple oral apology allowed through mediation carried out by mediator when there is no need to use mediation agreement. In particular, when full reparation for the harm caused to the victim's health. Pre-trial mediation terminates no criminal procedure. The mediation agreement is submitted to a court of law. Judge's decision to terminate the criminal prosecution is final. The Code of Criminal Procedure of Kazakhstan allows the use of mediation at the trial procedure stage. From this it follows that the rights of the parties to a criminal conflict to the use of mediation are not limited to any stage of the criminal process. Mediation is possible at any stage of the criminal process. Impose a ban on the use of mediation at the pre-trial or trial stage does not make sense. Otherwise, it would be difficult to talk about the expansion of contractual relations in criminal conflicts.

Under the Code of Criminal Procedure, the judge's responsibilities include clarifying the parties to proceedings possible exemption from criminal liability and criminal case termination through mediation at the stage of the trial procedure. None of the prosecutors have such responsibilities at the pre-trial stage. This explains, in part, the lack of mediation notices at the pre-trial stage (Dyachuk, 2016, p. 180). For all the years of mediation use in the criminal process, there are no examples of its implementation at the pre-trial stage (Sabdin, 2018).

If at any stage of the criminal process, the parties, having declared the mediation, shall not agree nor approve of the mediation agreement, then the case resumed and the trial continues. Mediation must carry out within the terms of pre-trial and trial proceedings established by the criminal procedure law. Mediation refusal has no effect on the offender's legal status. Only the parties to the criminal conflict decide on mediator's assignment as long as the assigned mediator is included in mediators register. Under no circumstances, neither the prosecutor nor the judge can influence mediator's assignment, without consideration as pressure on the parties and coercion to mediation. The Mediation Law prohibits prosecutors to force the parties to mediation. Therefore, the freedom of the parties' will and their voluntary consent to the resolution of the conflict with the help of a third party i.e. the mediator, is guaranteed. If there is no consent to conduct mutual mediation, mediation cannot be applied. Reconciliation agreement through mediation is used therefore in several articles of the Criminal Procedure Code of Kazakhstan. Accordingly, the Criminal Procedure Code of Kazakhstan provides no rules of mediation conduction.

After cessation of the case through mediation procedure the victim is no longer has the right to raise the issue of resumption of a criminal trial against the same person for the same charge. The Mediation Law stipulates unless otherwise provided by the agreement of the parties that the costs associated with conduction of mediation are paid jointly by the parties in equal shares. Importance must be paid to that the mediation is also admissible in civil proceedings. The Criminal Procedure Code of Kazakhstan defines a civil suit as a claim for damages by individuals and legal entities caused by a criminal offense or a socially dangerous act committed by a mentally disturbed person, including

costs and compensations. As part of a civil claim, mediation is applied regardless of the grounds which are listed in article 68 of the Penal Code of Kazakhstan as exempting the offender from criminal responsibility. Mediation is also admissible for crimes that have resulted in the death of a person. In this case mediation is used for reparation for the harm caused by a criminal offense and not to release the offender from criminal liability.

A civil claim procedure might be terminated when the parties reach a mediation agreement. In this case, the mediation agreement may allow either full compensation of damage or installments. Grounds, conditions, scope, and method of compensation for damage are determined by the norms of civil, labor and other legislation. Applying mediation with subsequent offender's exemption from criminal responsibility, partial compensation for damage or installment is prohibited. Compensation for damage must be implemented in full. The mediation agreement comes into force upon its signing by the parties. It is subject to execution by the parties to the mediation voluntarily in the manner and within the time limits specified in this agreement. In case of non-compliance with perform or improper fulfillment of this agreement, the party in breach of such an agreement shall be liable in the manner prescribed by Kazakhstan's laws. The aggrieved party has the right to address the court for compensation for damage in the way established by the Civil Procedure Code of Kazakhstan. Thus, extrajudicial and "delegated" mediation is developing in Kazakhstan. Dispositive approaches are widely used in regulation of mediation procedures, which is associated with its social orientation and social usefulness. Mediation as a procedure is a procedural institution that has a mixed legal nature with a pronounced combination of often public principles.

### **Problematic Issues in Kazakhstan's Law on Mediation**

Alternative ways of criminal conflicts settlement have been applied relatively recently in Kazakhstan. Therefore, each year, when summing up the results of the activities of the courts, the Supreme Court of Kazakhstan pays special attention to the number of completed cases through mediation. This information is posted on the website of the Supreme Court. (<https://sud.gov.kz/>). The official data of the Supreme Court of Kazakhstan on the results of work of Kazakhstani courts in 2016 demonstrates increase of terminate of criminal cases through mediation by two-thirds more than in 2015. For the first half of 2017, terminate of criminal cases through mediation increased by 1.6 times (from 3,596 in the first half of 2016 to 5,635). But for the entire 2017, terminate of criminal cases through mediation increased by 1.7 times compared with 2016. So the conclusion is that terminate of criminal cases through mediation for the second half of 2017 did not give a qualitative increase compared with the first half of the year. The use of mediation in civil cases is significantly greater than in criminal cases. Not coincidentally T. Khvedelizde, without going into statistics, gives such a ratio where 99% of civil cases terminated through mediation and only 1% of criminal cases (Khvedelizde, 2017, p. 162). In a civil proceeding, in contrast to a criminal proceeding, a judge may act as a mediator (Part 4, Article 179 of the Civil Procedure Code of Kazakhstan). There were 8220 of civil cases in Kazakhstan's courts in 2017 which were terminated through mediation, a judge was a mediator in 5821 of cases and 2373 of cases terminated by mediator's participation. Accordingly, citizens trust judges more than mediators. The numbers of criminal cases addressed to the courts do not decrease, on the contrary, there is a marked increase. In



2017, this number increased by 15.3% compared with 2016 (V 2017 godu, 2018). Four million citizens are annually involved in litigation (Poslaniye Prezidenta Respubliki Kazakhstan, 2018). In this regard, the President of ECDR (Zalar, 2017) believes that mediation in Kazakhstan “has not yet received due attention and acceptance neither from the rule-making bodies, nor from the professionals and the general public” (p.5).

The practice of the use of mediation in criminal cases is developing but quite slowly. There are problematic issues requiring clarification and changes in legislation. Firstly, the Criminal Procedure Code of Kazakhstan neither defines nor establishes a special chapter on mediation. There is no specially prescribed procedure for mediation in the Criminal Procedure Code of Kazakhstan. In this respect, we agree with the idea of famous Kazakhstani processual lawyer M. Kogamov, that mediation in the Criminal Procedure Code of Kazakhstan is fragmented (Kogamov, 2018, p. 57). A. Akhpanov, taking into account the different legal nature, purpose, mechanism, conditions and legal consequences, notes that the reconciliation shall not be replaced by mediation in investigation and consideration of criminal cases (Akhpanov, 2013, p. 55). The new Civil Procedure Code of Kazakhstan (2015), for example, has a separate chapter №17 on the conciliation procedures. The need to introduce a separate chapter on the mediation procedure to the Code of Criminal Procedure of Kazakhstan is explained by the formation of a uniform and correct application of criminal procedure and mediation legislation. Particular attention must be paid to the mediation procedure in this chapter, in the case where one of the parties is minor, with mandatory participation of minor’s legal representatives (or a representative of the guardianship and custody agencies in their absence), as well as minor’s teacher or a psychologist.

Secondly, questions are raised why nonprofessional mediators do not pass training. Kazakhstani legislation defines the requirements for individuals who might be a mediator, both on a professional and non-professional basis. It follows that a mediator is not obliged to be a lawyer since knowledge of all the details of the legal incidence is not always the must. Mediator’s mission is to reconcile the parties with the least amount of negative consequences. Accordingly, in the current criminal law, there is no categorical indication of whose assistance is used as reconciliation through mediation between the victim and the offender but mediator’s participation in mediation procedure is obligatory. The professional mediator is required to have higher education, but not necessarily legal education. In other words, despite mediator’s professional level, the mediator can participate in reconciling criminal conflicts, but for that a professional mediator has to complete the training. French example of legal implementation of requirements for mediators is more thoroughly designed since only mediators who completed training approved by the Department of Justice of France are allowed to participate in the mediation procedure (Circulaire, 1996). Kazakhstani judges are also insisting on mediators training admitting the inexpediency of non-professional mediators’ participation in the mediation procedure both at pre-trial and judicial stages (Kasymova, 2016). By allowing the non-professional person to interfere with the conflict when the victim needs protection against the offender is unwise. At the moment, it is impossible to protect the parties of mediation, and mainly the victim from a possible perfunctory approach by a non-professional mediator. To allow the victim and the offender to resolve the conflict themselves, the government, however, cannot and should not leave the victim defenseless

in the mediation procedure. It is inadvisable to expect that the victim is familiar with all the differences of mediator's preparation whatsoever. Judge O. Shalabayev, notes that in 2017 the number of professional mediators (table 1) was more than 3 times less than the non-professional ones (table 2) (Shalabayev, 2017).

**Table 1. The Number of Professional Mediators  
in the Republic of Kazakhstan by Regions**

City/region	Administrative center	Population	Number of professional mediators	% the ratio of mediators to the population
1	2	3	4	5
Astana	Astana	792775	104	0,01311
Almaty	Almaty	1485496	100	0,00673
Akmola region	Kokshetau	734145	21	0,00286
Aktobe region	Aktobe	801273	22	0,00275
Almaty region	Taldykorgan	1966786	2	0,00010
Atyrau region	Atyrau	561512	9	0,00160
East Kazakhstan region	Ust-Kamenogorsk	1394015	62	0,00445
Astana	Astana	792775	104	0,01311
Jambyl Region	Taraz	1077893	11	0,00102
West-Kazakhstan region	Uralsk	620349	22	0,00355
Karaganda region	Karaganda	1365849	35	0,00256
Kostanay region	Kostanay	880589	35	0,00397
Kyzylorda Region	Kyzylorda	734047	0	0
Mangistau region	Aktau	577464	32	0,00554
Pavlodar region	Pavlodar	750871	15	0,00199
North-Kazakhstan region	Petropavlovsk	578089	11	0,00191
South Kazakhstan region	Shymkent	2707459	63	0,00233
Total:		17028612	544	0,0032

**Table 2. Number of Non-Professional Mediators  
in Kazakhstan in a Regional Context**

City/region	Administrative center	Population	Number of nonprofessional mediators
Astana	Astana	792775	No data
Almaty	Almaty	1485496	1
Akmola region	Kokshetau	734145	107
Aktobe region	Aktobe	801273	10
Almaty region	Taldykorgan	1966786	43
Atyrau region	Atyrau	561512	No data
East Kazakhstan region	Ust-Kamenogorsk	1394015	148
Astana	Astana	1077893	12
Jambyl Region	Taraz	620349	No data
West-Kazakhstan region	Uralsk	1365849	219
Karaganda region	Karaganda	880589	36
Kostanay region	Kostanay	734047	370
Kyzylorda Region	Kyzylorda	577464	109
Mangistau region	Aktau	750871	83
Pavlodar region	Pavlodar	578089	327
North-Kazakhstan region	Petropavlovsk	2707459	444
Total		17028612	1 809

In 2018, more than three thousands of non-professional mediators were working throughout Kazakhstan (Razvitiye instituta mediatsii, 2018). The number of professional mediators is still not significant. Minimum learning standards were developed for professional mediator only. The training rules for mediators, approved by the Government Decree of Kazakhstan, establish a uniform approach to the training of professional mediators. It follows that participation of either professional or non-professional mediator trained in criminal cases shall be enshrined in law. It will be necessary then to provide training for a non-professional mediator as an admission to mediate in the criminal process. This will allow relatively reduce possible further litigation against mediator's bad faith.

Thirdly, mediator's autonomy and impartiality are not established by the law. Autonomy and impartiality, along with other principles of mediation, contribute to the universalizing of continental criminal law. As E. Alaukhanov draws attention to the universalizing of modern criminal legal systems are forming so-called "matrix" for the further progressive development of national criminal law (Alaukhanov, 2010, p. 64). Nevertheless, it is impossible to speak of mediator's full autonomy and impartiality, taking into account the clause defined in part 3, article 7 of the Mediation Law "except as

provided by the laws of the Republic of Kazakhstan” is not possible. Thus, intervention in mediator’s activity, except in cases stipulated by the law of Kazakhstan. Consequently, in some cases, intervention is possible. But in what cases is so? Current legislation gives no explanation on this matter. The point is that, following international practice, there shall not be such a clause at all. Thus, Kazakhstan’s legislator violates the principle of autonomy and impartiality of mediation, defined in the Mediation Law. At the same time, the legal consequences for non-observance of the mediator’s duty to be impartial are not defined. The mediator himself decides whether to be impartial or not. The Mediation Law defines no responsibility whatsoever for mediator’s failure to comply with impartiality.

Fourthly, payment for mediator’s services. According to the Mediation Law, unless otherwise is stipulated by the agreement of the parties, the costs associated with conducting mediation procedure is paid jointly by the parties in equal shares. However, it would not be entirely reasonable for the victim obliged to pay the costs of mediation but if only one party – the suspect or the offender or the defendant will bear the costs, then the other party – the victim, may consider that the mediator will pay more attention to the arguments and proposals of the party that pays for mediator’s services. Therefore, to secure the impartiality in resolving the conflict and achieve professional mediator’s autonomy from the parties of the conflict is to pay for mediator’s labor from some other sources, such as, from the state budget, in particular, by analogy with members of the jury. In addition, how can the victim be obliged to pay a fee and compensation for mediator’s service if the victim’s rights and harm inflicted were not yet been restituted? Such financial burdening for the victim becomes a reason hindering expanding of the mediation application.

Extra payment to the professional mediator though, if the parties wish to do so, might be carried out at the parties’ discretion. However, it is clear that the law places the professional mediators in a privileged position due to the requirements for them are stricter than for non-professional mediators, and thus they can choose more favorable proposals for payment. In this regard, not many people will be able to afford the services provided by professional mediators. That is why we should not ignore the view of payment for mediator’s service hinders mediation development process and consideration of the possible “providing mediation services for the participants free of charge for the criminal process at the expense of the Republican budget” (Pen, 2012, p. 69). For Kazakhstan, we can take as an example the experience of free mediation in Germany (Abolonin, 2013, pp. 205,211), Finland (Kortelainen & Kostinen, 2012, p. 29) or other European countries. Since October 3, 2016, the centers of free meditational assistance have been working throughout Kazakhstan (V Kazakhstane nachali rabotu, 2016). But they work at the expense of sponsoring the International Human Rights Center, and not at the expense of associations of mediators of Kazakhstan or the state.

Fifthly, the current Kazakhstan legislation defines no fully mediator’s responsibility and offender’s responsibility for non-execution of the mediation agreement. The Mediation Law has no specific article defining mediator’s responsibility. Along with liability for breach of confidentiality in the mediation process, possible responsibility of mediator’s actions (inactions) that caused losses (damage) to the parties of the mediation is not established in Law but implied only. The paragraph 8, article 21 “The form and content of a mediation agreement” of the Mediation Law establishes mediation agreement and the

scope of mediator's responsibility involved in settling a dispute (conflict) between the parties to the mediation as essential condition. Consequently, the mediator's responsibility will be based on the mediation agreement. In fact, we are talking about a variety of civil tortuous liability for causing harm to the legally protected interests of the conflict party. Therefore possible offenses committed by mediators that resulted in harm might be recognized as special professional misconduct (such as, the mediator's violation of the principles of impartiality and independence from the parties to the conflict, or the disclosure of confidential information by the mediator while conducting a conciliation procedure, as well as any other offenses, including criminal offenses (such as, fraud).

But it will be difficult to prove in court that the mediator has violated the rights of the parties, because, under the Mediation Law, the parties to the conflict decide and the mediator has the right to provide them with oral and written recommendations for solving the dispute (conflict). Therefore, only if written recommendations for dispute settlement are given by the mediator, which prove mediator's abuse of rights, then it will not difficult to bring the mediator to justice. However, otherwise, if the parties choose their own option of reconciliation, then the mediator is not responsible for the content of the agreement. It seems that, against this background, it is necessary to work out the mediator's responsibility, specifically, with a separate article.

The consequences and responsibility for non-execution of mediation agreement are not defined in the current legislation of Kazakhstan. The Code of the Republic of Kazakhstan on Administrative Offenses (2014) establishes liability only for disclosing a mediation agreement, but not for its non-execution. The suggestion deserves attention that if a person who committed a crime did not comply with the terms of mediation agreement, including compensation for harm, they would be expedient either to allow resumption of proceedings, or to establish a twofold increase of amount of compensation for harm, and provide criminal liability in accordance with Penal Code of Kazakhstan if a person is culpable of persistent failure to comply with the terms of mediation agreement (Akhpanov, 2012, p. 62). At the present time, the person has no responsibility for non-execution of the mediation agreement.

Sixthly, the analysis of mediators' work around this country is a difficult task. Unfortunately, today there is no data in this country on the exact number of cases which were completed through mediation either by a professional or by a non-professional mediator. Were there any specific number of complaints about mediators' actions, challenging mediation agreements in a civil process, but regarding to noncompliance with mediation agreement concluded on the requirements of the Code of Criminal Procedure? Keeping such statistics as one of the ways to determine effectiveness of mediators would be useful for analyzing their activities. In this regard, there should be considered a centralized analysis of mediators work by the efforts of the authorized body which would unite all mediators work, while conducting their training with a unified approach to certification or licensing their activities, keeping the register of non-professional mediators in the country and the general register of mediators, updating the database of professional mediators in case of termination or suspension of their activities and providing statistics on the number of mediation agreements concluded. Such authorized body might analyze the effectiveness of mediators work and compare the adequacy of funds spent by mediators and assess mediation services quality, including the issues of termination and suspension of

mediator's activity. It would be better to compare the cost of mediator's services and the costs for the traditional criminal procedure. Mediator's activity evaluation by an independent body, as well as identification of satisfaction degree of mediator's work, is very important for determining qualitative and quantitative indicators of mediator's activity.

### **Conclusions and Recommendations**

Based on the foregoing, it can be concluded that mediation in Kazakhstan is indeed trying to become widely used alternative to the already ingrained system of adjudication of disputes. Mediation is not considered as a complete replacement for the court. It only provides an opportunity for the parties to the criminal conflict to find their own way of its settlement, based on the mutual agreements and mutually beneficial conditions. Mediation as an effective and helpful procedure in many respects will gradually be expanding its application in the criminal process, but it is necessary to further improve mediation's legal framework, to work out a more detailed approach to the procedure and mediators.

Despite the mediation on criminal cases procedure under the Criminal Procedure Code of Kazakhstan is not perfectly formalized or enshrined in law, there are separate articles in the Criminal Procedure Code which devoted to the mediation procedure. To eliminate the partial recognition in the Criminal Procedure Code of Kazakhstan procedure for the mediation application, it is necessary to introduce a special chapter enshrining a clear regulation of the procedure for conducting mediation. This will eliminate duplication of reconciliation during mediation. Besides, introducing judicial mediation into special chapter would also be one of the measures to increase citizens' confidence in mediation in criminal procedure.

It is necessary to establish the mandatory training of mediators who want to take part in criminal conflict settlement. The citizens cannot be expected to choose only professional mediator as an intermediary. Those desiring to mediate in criminal disputes have pass special training course or it should be imposed a restriction on the mediation service provided by non-professional mediators in resolving criminal conflicts. This is consistent with ensuring individuals protection, society and the state from criminal offenses.

For the purpose of complete implementing the principle of autonomy and impartiality of mediation, the clause "except as required by the laws of Kazakhstan" shall be excluded from part 3, article 7 of the Mediation Law and leave part 3 to read as follows: "3. Intervention in mediator's activities during mediation by those who are not the party to the mediation is not allowed." For the purpose of ensure autonomy and impartiality of the mediator, parity of the mediation parties, as well as promoting voluntary reconciliation through mediation and to encourage the parties to mediate, the Mediation Law should establish the provision that the costs incurred by the mediator during mediation in crimes of small and medium gravity to be paid from the budget in the way and amount established by the Government of Kazakhstan.

The administrative law should provide the liability for violation of mediation agreement. In this case, the legal norms of the Penal Code of Kazakhstan will be in harmony with the Mediation Law stating that the mediation agreement signed by the parties has such conditions as the methods and terms of its execution, as well as the

consequences of failure or improper performance. At the same time, the mediator's responsibility remains open. Mediator's responsibility could be provided as a separate article in the law. Abuse of authority can lead to termination of mediator activities and serve as the responsibility for an ethics violation by the mediator including those established in the code of honor of organization of mediators. Currently, the Law of Kazakhstan on mediation has no list of grounds for termination and suspension of mediator's activities. Inclusion in the current law of specific grounds for the termination and suspension of mediator's activity would coincide the legal regulation of mediation not only in criminal cases but also in all others.

Along with the public associations of mediators, creating a specifically authorized state body within the Ministry of Justice on alternative methods of conflict settlement would undoubtedly help increase the level of citizens' confidence in mediation as an alternative to legal proceedings.

The analysis of Kazakhstan's legislation on mediation application in the criminal process allows to affirmatively say that mediation can develop primarily based on the legal norms, which shall be characterized by their preciseness, forming, in turn, a clear mechanism for conducting mediation in criminal cases. Neglecting monitoring and evaluation of the results of mediators activities must not be allowed. Mediation must contradict neither the law nor the morality. The mechanism of mediation in criminal proceedings should become the guarantor of the victim's legal security and protection, who chooses reconciliation with the offender by mediator's assistance. The mediator's personality shall in no way be secondary in the process of mediation. That is why, in addition to the organizational and legal framework of mediation in the criminal process, attention paid to mediators requirements. As a professional judge is a key to the trial according to all legal requirements, the guarantor of fairness and objectivity so is the mediator, whose professionalism must become the key to conducting mediation also according to the requirements of current legislation.

Precise legal regulation of mediation in criminal proceedings will provide even greater victim's protection. A meaningful and widely used mediation in its idea is intended to have a positive impact on the formation of a legal culture, as well as a positive type of legal awareness and behavior. The upbringing and cultivation of a peaceful way to resolve conflicts through mediation is today an important factor in the development of Kazakhstan's civil society. Comparative analysis and practice of applying mediation of other countries, as well as discussions about introducing mediation into the criminal process, are very relevant for all countries speculating introduction of mediation practice. These recommendations to improve the regulatory framework of mediation could contribute to expansion of mediation on criminal cases and strengthen actual possibilities of restorative justice in Kazakhstan.

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