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## **TO THE QUESTION OF PRE-TRIAL ADJUSTING OF THE CONFLICTS IN THE MODERN LEGAL SYSTEM OF THE REPUBLIC OF KAZAKHSTAN**

**Abstract.** The judicial system belongs to the branch of power, which, being the original generator of all Kazakhstan transformations, would be able to transform Kazakhstan in really civilized, law-abiding state. The accrued democratic society and legal state will demand complete reformation of all system of justice, not only courts, but also other law-enforcement institutes of state power. Thus, after acquisition of independence, all this time of reforms, development of the independent judicial system, and realization of judicial and legal reform. Realization of political and economic transformations entailed and deep reformation of legal sphere of the society, legal reform by itself, had to move in accordance with the realization of political and economic transformations. The governmental program of the legal reform assisted to the legal system in Kazakhstan, according to the world standards and future realization.

**Keywords:** constitution, legal system, court, judicial system, legal politics, legal reform, humanizing of the judicial system, democratization, mediation, custom's law.

When mediation is court-connected, there is potential for the satisfaction purpose to be promoted to some degree. Within the privacy of mediation, parties may pursue satisfaction of their individual goals and imaginative solutions. However, there are some additional considerations that apply in that context, including the public nature and rights-based focus of the litigation system. Court-connected mediation is conducted in the shadow of that system. The satisfaction of individual interests and priorities may therefore be promoted in court-connected mediation, in conjunction with other considerations, including the legal standards that apply to the dispute.

An alternative mediation ideology prioritizes equality. If the equality purpose is prioritized, then “the most important concern is promoting equality between individuals or, conversely, reducing inequality”. Like the satisfaction purpose, the equality purpose also aims to resolve the immediate dispute between the disputants.

Equality may be promoted by many features of a mediation process, including: providing disputants with an equal opportunity to participate in the process, encouraging equal disputant control of content, accurate disputant knowledge about the alternatives to an agreed outcome, including the likely legal outcome (to safeguard for fair outcomes) and cooperation between disputants and a willingness to treat each other fairly.

The equality purpose of mediation is promoted by two groups of people; those who believe that mediation has a tendency to oppress particular members of society and conversely, those who believe that mediation can achieve social justice. Some critics of mediation assert that mediation should ensure fairness but that the structures of mediation do not protect vulnerable or less powerful disputants and thereby can contribute to inequality. On the other hand, there are some writers who maintain that

mediation achieves equality by delivering social justice. From this perspective, disempowered members of society are empowered by the forging of links between such groups and the provision of a forum in which they have a voice.

The equality purpose is related to the satisfaction purpose because the meeting of needs and alleviation of suffering is emphasized, however, the priority is that needs are met and suffering alleviated equally between the disputants, rather than to their individual satisfaction. The concept of equality introduces a collectivist sentiment into mediation and moves away from the individualism promoted by the satisfaction purpose. From this perspective, mediation has a public as well as a private purpose.

The equality purpose encourages reference to some external standard of fairness in process or outcome to ensure that equality is promoted and inequality is addressed. The imposition of such external standards can encourage more of a rights-based than an interest-based focus. This potential is likely to be magnified in the court-connected context, where the determination of rights by a court forms a powerful background to the process. Legal standards apply equally to all disputants. Therefore, there are links between the equality ideology of mediation and the formal legal system. Where mediation takes place within the context of the public justice system there is likely to be some emphasis on the equality of the process and objective fairness of outcomes. These may mirror legal standards of procedural fairness and substantive justice.

The transformation purpose has both an individualist and collectivist focus. Attention is placed on a particular relationship for the ultimate purpose of promoting peace in the broader community.

The transformation purpose has emerged in mediation theory in a movement away from the problem-solving approaches to mediation. It developed partly in recognition of some shortcomings in the application of problem-solving approaches such as the tendency to overemphasize settlement and thereby contain the conflict interaction rather than encouraging people to explore their conflict. According to the transformative purpose, the dispute is a symptom of the true problem, which is the way the individuals relate to one another. The resolution of the immediate dispute may be an incidental consequence of the mediation process, but the real issue is relational.

Transformation is focused on the relationship between the disputants rather than focusing on either their interests or their rights. Two fundamental concepts of the transformation purpose are “empowerment” and “recognition”. Empowerment is the development within individuals of a sense of their own value, strength and capacity to make decisions and to handle their own problems. Recognition is the acknowledgement; understanding or empathy for the situation and views of the other disputant. Transformative mediation has the capacity to foster empowerment and recognition in disputants, which are qualities that will result in constructive interaction between them.

The purpose of transformation may be promoted by many features of mediation, including: direct disputant participation in the process, disputant control of both process and content, a flexible process that can be adapted to meet the individual needs of the disputants, cooperation between disputants and commitment to the mediation process [1].

Because court-connected mediation occurs within a problem-solving framework where the aim is to resolve disputes, the purpose of transformation is generally not prioritized in court-connected mediation. The transformation model of mediation is rarely practiced in the court-connected context. On the one hand, Hensler has opposed transformative court-connected mediation on the basis that the goals of transformation are not appropriate for a public justice system. She believes that these goals are private goals that can be pursued outside the civil justice system. Litigants are presumed to be seeking finalization rather than enhanced communication. This assumes that the private goals of parties ought not to be pursued in the public-private context of court-connected processes.

Although there is theoretical potential for transformative approaches to mediation to be adopted in a court-connected program, there are significant obstacles that would need to be overcome before this could be done effectively.

Against the background of the theoretical purposes that may be promoted in mediation, the instrumental purposes for which mediation has been adopted by courts should be acknowledged. Commentators have suggested that mediation was adopted by courts to solve its problems of delay rather than to embrace mediation ideology.

This comment indicates that the primary purpose of court-connected mediation, from the view of courts at least, may not be based upon any of the mediation purposes explored above. Instead, the purpose of court-connected mediation may be to solve practical problems faced by the courts. In order to investigate this further, it is useful to conduct an analysis of the institutional objectives of court-connected mediation.

The analysis starts with a fundamental question: “what is the purpose of court-connected mediation?” Unfortunately, the goals of court-connected mediation programmers in Kazakhstan are rarely articulated. It has been suggested that the enthusiasm of court administrators for mediation was founded primarily on a perception of mediation as a case management tool rather than on an interest in incorporating any of the mediation values identified above into the formal justice system[2, P.12].

Court-connected mediation has been promoted and supported on the basis that it is cheaper, quicker, more readily accessible and less complex than judicial adjudication. Mediation has been promoted as offering informality and direct disputant participation, qualities which theoretically improve accessibility. It also provides an opportunity for cooperation.

One of the big efficiency benefits of mediation is that it has enabled courts to facilitate early settlement of litigated matters. Before court-connected mediation was introduced, the overwhelming majority of civil claims were settled prior to trial.

However, they were often settled literally at the door of the court, on the day of trial. This created problems for courts because judges were left with an empty docket, as matters were settled without there being time to reallocate the judge’s time to another case. Mediation has enabled courts to reduce waiting lists for trial, because it has facilitated earlier settlements in some cases.

By introducing court-connected mediation, often mandatory in nature, courts have been able to encourage settlement to occur earlier in the litigation process. Rather than settling cases that would otherwise actually be tried, mediation has created a forum for settlement of cases that would otherwise have been settled through processes such as unassisted lawyer negotiation. The cases that are bound for settlement tend to be recognized before a trial date is allocated, because mediation is attempted. Therefore, mediation may be a stimulus for earlier negotiation between lawyers than would otherwise occur.

Another efficiency benefit that court-connected mediation has achieved for courts is that it may streamline the remaining legal process even for those cases that do not settle at mediation. For example, the areas of dispute may be more clearly identified, which enables a narrowing of the issues that need to be argued at trial. Furthermore, the sharing of information that occurs at mediation may clarify the legal arguments that will be made between the parties and the evidence that will be necessary to support those arguments. These factors may decrease the amount of time required to try a case. Another benefit of clarifying the legal cases is the exposure of parties to a “reality check” of the weaknesses in their case, which may encourage settlement.

One of the issues in court-connected mediation is that if there is an overemphasis on efficiency, without reference to other aspects of mediation, there is a danger that the richness and the variation that could have been present in mediation will be lost. The goal of efficiency impacts on the nature of court-connected mediation by creating pressure to find “quick” settlements and by encouraging the discussion of a narrow, limited range of issues. In other words, it encourages a departure from the core features of responsiveness, self-determination and cooperation towards an emphasis on a narrow scope, reliance upon legal advisors and distributive bargaining practices[3, P.207].

There is a choice to be made by program providers about the extent to which the potential benefits of mediation are offered in court-connected mediation programs. A clear definition of purpose at a program level would clarify the aim of the mediation process.

To facilitate decision making about what courts might offer through court-connected mediation, research about what litigants’ value in dispute resolution provides an important guide.

Research findings that contrast “lawyers and parties” perspectives of the purpose of mediation include Relis interviews of participants in medical injury disputes in Toronto. She found that for both plaintiffs and physician defendants, the purpose of mediation was to facilitate communication between the disputants about the circumstances around the dispute; making mediation a very personal encounter. This perspective contrasted with lawyers (both plaintiff and defendant), who saw mediation as an opportunity for strategic communication to lower plaintiffs’ expectations about monetary outcomes. Defendant lawyers discouraged physician attendance at mediation because the dispute was only about money and the insurer, not the physician, could instruct about money. Researchers have also identified a fundamental distinction between the way that legal actors and disputants evaluate mediation. There is a tendency for legal actors to measure the success of mediation primarily on whether or not a settlement was reached and the nature of the outcome. By contrast, research has consistently shown that disputants measure their satisfaction with mediation (along with all dispute resolution processes) according to their experience of the process. The opportunity to participate directly is a significant part of disputants’ “experience of process and is discussed further at Research findings about disputants” aims in mediation highlight that the narrow, adversarial style of many court-connected mediation programs may not be satisfying the more important interests for litigants.

An example of a mature court-connected mediation program that has maintained a commitment to mediation benefits other than efficiency is the Saskatchewan Queen’s Bench program in Canada. This program was introduced in a court that was not experiencing delay. The opportunity for the parties to have a face to face meeting and the ability to adapt the mediation process on a case by case basis are emphasized in this program.

Despite the range of potential benefits of mediation, the way that the success of court-connected mediation programs has been measured indicates that the benefit of efficiency is the primary institutional focus. The focus of courts on outcomes, measured by immediate short-term settlement statistics, as opposed to quality indicators, demonstrates the dominance of efficiency measures of the “success” of mediation.

Nonetheless, it is clear that there is a range of aims that may be promoted in court-connected mediation. There are opportunities for court programs to promote purposes of satisfaction, equality, transformation or efficiency. This is consistent with the diversity that is found within the mediation field.

In the narrowest of formulations, the affection process is a process that generally involves human agents generating claims for the reciprocal giving and receiving or exchange of positive sentiment. In many such claims, the expectation of physical, sexual exchange of biological and psychological intimacies is expected. Intimate relations also encompass intense demands for intimacy beyond the specific ties of individual emotionally and sexually driven parties. Thus, the relationships generate intense emotional demands and attachments, which require strong subordination of sexual drives while enhancing the emotional interdependence based on positive sentiment between the members of a small micro-social group[4, P.108].

For convenience, we may cross-culturally maintain that such outcomes may be accurately described as affection units in the sense that whatever the precise form these units are specialized however skilled they are to the giving and receiving of positive sentiment and affection. The affection process therefore is a process in which claiming, deciding about the nature and quality of human intimacy uses the methods of communication, of appropriate signs and symbols, of affect, positive sentiment, love including romantic love. In addition to the communication of the appropriate signs and symbols of affection, the behavior of the parties is sustained by expectations of collaboration so that practical conduct and behaviors enhance the reciprocal flow of positive sentiment. Thus, the affection process is a pattern both of communication and of collaboration transmitting and exchanging the symbols and ideals of love, loyalty, positive sentiment, patriotism and ultimately the love of man and God as well as the actual operational behaviors, which sustain the ideals.

Above we indicated that positive sentiment or affection is one of the outcomes of social organization and we call this an affection process. There is another side to this. We also spoke of social processes reproducing negative sentiment. In short, society frequently generates complex processes, which



reproduce personality types suited to claiming and demanding the values of a negative utopia. Thus, history demonstrates the ubiquity of social institutions, which symbolize human indignity on a colossal scale. Thus, society ubiquitously reproduces its ideals in the form of love, altruism, affect, and at the same time reproduces the negation of those ideals, hate, self-love and narcissism and ubiquity of the genocide-prone pathological personality and terror prone. Below we provide a table, which parallels the social process of affection (positive sentiment) and the social process of negative sentiment (deprivations) to underscore the critical challenge posed by the question of the control and regulation of both positive and negative sentiment and its importance to human rights and the dignity of man on a universal basis.

1. A formal myth of love and affection. The myth may be concealed and informal, but nonetheless, it is a real myth reinforcing the symbology of togetherness of the target of love and affection and those within the ‘in-group’ of the community context.

2. A symbol-myth system of solidarity, affection, and positive sentiment is a crucial component of the perspectives of the community or its elite, or its traditional and opinion leaders.

3. These subjectivities or perspectives of positive sentiment are outcomes of complex behavior patterns, which are characterized by affective sentiments and strong portrayals of the target of affect as appropriate for the displacement of positive inference and meaning in terms of shared affect.

4. Indications of emergent patterns that consolidate the collaborative behaviors of the ‘we’ or the ‘in-group,’ vesting that group with the idealization of appropriate community acceptance as positive sentiment and love and the foundation for the licit family form which is also culturally preferred and valued.

5. There are further emergent, often graduated, behaviors in the primary group, which consolidate and sustain the image of community solidarity through patterns of collaboratively conditioned behavior conditioned by positive sentiment. These include the communication of discrete signs, symbols, operational codes, myths, narratives, and reified stereotypes, which symbolize the institutionalization of the ideals of love and a positive sense of shared affect in the community.

6. The process of affection also involves the manipulation of signs, symbols, codes, myths, narratives and stories between members of the ‘in-group’ and between members of the ‘in’ and ‘out-group.’ Positive sentiment may be used in a way so also isolates those not included in this universe of affect and solidarity.

7. The system of generalized affective behaviors, thus, involves distinctive, and often, discrete pattern of communication of relevant signs and symbols of the ‘in-group’ loyalty and solidarity, as well as signs and symbols that identify, disparage, or threaten members of the ‘out-group.’ The patterns of communication are sustained or enhanced by collaborative operations in the exercise of public or private power. This may mean repression and exploitation for some and the power to exploit positive sentiment for base motives on the other. Thus, solidarity and patriotism may be promoted in such a way that it underlines by implication the vulnerability and validity of victimizing others such as the social pariahs, outcasts, those who are indifferent to the situation of all others.

8. Human beings conditioned to generate positive sentiment [affection] as an ordinary aspect of personal identity are obviously desired from a human rights perspective. The predispositions of the personality inclined to positive sentiment, invariably creates environments in which micro-social relations reflect the normative priority given to the reproduction of positive sentiment or affect. Thus, innocent child rearing and nurturing in which love and affection is practiced generates personality types better suited to reproduce personality types partial to democratic political culture. On the other hand, a person may be raised in a climate of negative sentiment where repression, deprivation and fear wittingly or unwittingly reproduce insecurity and intolerance of others in the self-system. Thus, the practices of negative sentiment in family or affection units may be a dangerous social inheritance. When such personality types mature, they exhibit the partiality to anti-democratic perspectives such as authoritarianism and domination. They reproduce the cycle of negative sentiment.

9. Reproducing the cycle of positive sentiment is critical to the culture of human rights and its sustainability on a global basis. Thus, the micro-social units [affection units] ostensibly specialized to positive sentiment or love and affection are critical for a healthy and normal society that does not

institutionalize compulsive, neurotic or psycho-pathological outcomes. In short, a psycho-political culture of positive sentiment reproduces in effect the social and political foundations of the culture of human rights. Perhaps even more than that, it is giving to those committed to the love of God, the religious redemption of the love ideal through human rights.

The above nine points may of course be mapped with greater precision in terms of the wide range of issues and problems that are implicated in the human prospect. Implicit in what is suggested however, is a normative challenge. The critical challenge is to the boundaries of law in our time. Law, tradition, human rights law and evolving custom are not instruments of social control that are blind, deaf and dumb to the past. On the contrary, they are important challenges for the human aspect of choice and decision in avoiding the negative and affirming the positive.

This means the enhancing the balanced shaping and the sharing of positive sentiment (affection). The alternative puts law and legal culture in a position of complicity in enhancing the outcomes of negative sentiment with the destructive potential for the future of our species[5, P.921].

The power of positive sentiment is clearly challenged by the power of reproducing negative sentiment as the world becomes fragmented and polarized in culture wars and wars, which it is asserted, are inevitable conflicts about universals inherent in the ostensible clash of civilizations. We summarize the framework therefore of the social process of negative sentiment. We note parenthetically that from a human rights perspective the disidentification of the other is a short distance from the application of the strategies fed by hate and destruction for the extermination or depreciation of the other[6, P.49].

In human rights law, we have made progress in seeking to define the boundaries of behaviors fed by negative sentiment. These include the laws prohibiting genocide, persecution on grounds of religion, racial prejudice, apartheid and in general, crimes against humanity.

1. A formal systemic myth or a concealed, informal, but nonetheless, real myth reinforcing the symbology of otherness of the target 'out-group'.

2. A symbol-myth system of prejudice, fear and hate is a crucial component of the perspectives of the dominant group or its elite and opinion leaders.

3. These subjectivities or perspectives are outcomes of complex behavior patterns, which are characterized by negative sentiments and negative portrayals of the 'other,' such that the symbolic 'other' is reinforced as a target for negative inference and meaning.

4. There are emergent patterns that consolidate the collaborative behaviors of the 'we' or the 'in-group', vesting that group with a sense of superiority, or 'herrenvolkism,' paternalism, and further, seeking to enhance the value position of that group at the expense of the 'out-group'.

5. There are further emergent, often graduated, behaviors in the dominant group, which consolidate and sustain the image of the victim group through patterns of conflict-conditioned behavior. These include the communication of discrete signs, symbols, operational codes, myths, narratives, and reified stereotypes that such issues as racism, anti-Semitism and more.

6. The process of group deprivations also involves the manipulation of signs, symbols, codes, myths, narratives and stories between members of the 'in-group' and also between members of the 'in' and 'out-group'.

7. The system of generalized group deprivations, thus, involves distinctive, and often, discrete pattern of communication of relevant signs and symbols of the 'in-group' loyalty and solidarity, as well as signs and symbols that identify, disparage, or threaten members of the 'out-group.' The patterns of communication are sustained or enhanced by collaborative operations in the exercise of public or private power that move beyond discrimination, anti-Semitism, prejudice or hate to the possibilities of wholesale extinction of cultures and masses of human beings.

Our focus and emphasis is on love and hate as foundational sentiments for animating sentiments which shape who we are and what we might become. Our focus therefore is on the most foundational of all the animating sentiments of humanity, the generation and the distribution of both positive and negative sentiment. By positive sentiment, we mean the shaping and sharing of affection at every level of

organization but with a particular focus on micro-social affection units. The term, affection unit, permits us to focus on the universality of affect and positive sentiment in all human beings. The reference to ‘affection unit’ would refer to whatever micro-social structure is an outcome in any particular culture of how that culture controls and regulates the affection process [7].

In the Law “About mediation” this principle is enshrined in the Law of the Republic of Kazakhstan thus: The mediator has to be impartial, carry out mediation for the benefit of both parties and provide to the parties equal participation in the procedure of mediation.

In the conclusion we would like to stress, that the processes of affection as expressed in institutionalized forms may serve as a base of power to secure other values central to the culture of human rights. Finally, it would enquire into the relevance of other values that may condition the nature of the affection process itself. Thus, enquiry would look toward the relationship between power and affect, or religion, wealth, education and enlightenment, skill, health and well-being as factors contextually relevant to the nature of the affection process itself. Perhaps this suggests a more comprehensive and novel paradigm of thinking and conceptualizing about the nature of family relations, kinship ties and other micro social affection units in a complex world with heightened expectations for the universality of human dignity based on the culture of human rights.

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#### ҚАЗІРГІ ҚАЗАҚСТАН РЕСПУБЛИКАСЫ ҚҰҚЫҚТЫҚ ЖҮЙЕСІНДЕГІ ДАУЛАРДЫ СОТҚА ДЕЙІНГІ РЕТТЕУ МӘСЕЛЕСІНЕ

**Аннотация.** Сот жүйесі биліктің ерекше тармағын бола отырып, Қазақстанды өркениетті құқықтық мемлекет ретінде қалыптастырып демократиялық қатынастарды жетілдіретін ерекше генераторлық ықпалға ие болып саналады. Сондықтан да сот жүйесі мемлекеттегі барлық әділет жүйесін құқық қорғау органдарын мемлекеттік билік институттарын түбегейлі реформалауды жүзеге асыруға тікелей ықпал етеді. Осы себептерге байланысты егемендікке қол жеткізгеннен кейін елімізде тәуелсіз сот жүйесін қалыптастырудың жолдары ізделіп сот-құқықтық реформалар жүзеге асырылды. Саяси және экономикалық өзгерістер қоғамдағы заңнамаларды түбегейлі өзгерістерге әкелді. Сол себептен де құқықтық реформа саяси-экономикалық трансформациялармен параллельді түрде жүргізіліп отырды. Мемлекеттік құқықтық реформаның бағдарламасы Қазақстан Республикасының құқықтық жүйесін әлемдік стандарттармен есептесе отырып дамыту талаптарын қойды. Сондықтан да осы өзгерістер сот құрылымы мен сот жүргізу әдістерін, процессуалды заңнамаларды, құқық қорғау органдарын және адвокатураны реформалау қажеттіктерін туындатты. Мемлекеттік құқықтық реформалар бағдарламасын талдағанда көз жеткізетін жағдай, ол Қазақстанда сот билігін жетілдіру оған еркіндік беру демократизациялау, сот билігін мемлекеттік биліктің еркін, тәуелсіз тармағына айналдыру бағытында көптеген жұмыстар жасалғаны көрінеді. Бұл іс-әрекеттердің

барлығы азаматтардың құқықтары мен еркіндігін қорғап конституциялық құрылым мен еліміздің құқықтық кеңістігін қалыптастыруға бағытталған.

**Түйін сөздері:** конституция, құқықтық жүйе, сот, сот жүйесі, құқықтық саясат, құқықтық реформа, сот жүйесін гуманизациялау, демократиялау, медиация, адат.

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### **К ВОПРОСУ О ДОСУДЕБНОМ РЕГУЛИРОВАНИИ КОНФЛИКТОВ В СОВРЕМЕННОЙ ПРАВОВОЙ СИСТЕМЕ РЕСПУБЛИКИ КАЗАХСТАН**

**Аннотация.** Судебная система относится той ветви власти, которая, являясь своеобразным генератором всех казахстанских преобразований, была бы способной трансформировать Казахстан в истинно цивилизованное, правовое государство. Вновь созданное демократическое общество и правовое государство потребует полного реформирования всей системы юстиции, в которую входят не только суды, но и другие правоохранительные институты государственной власти. Таким образом, после приобретения независимости, все это время было поиском путей развития независимой судебной системы, реализации судебно-правовой реформы. Осуществление политических и экономических преобразований повлекло за собой и глубокое реформирование юридической сферы общества, поэтому правовая реформа должна была идти параллельно с осуществлением политических и экономических трансформаций. Государственная программа правовой реформы способствовала приведению правовой системы Казахстана в соответствие с мировыми стандартами и предусматривала реализацию следующих взаимосвязанных направлений: изменение структуры судостроительства и судопроизводства; совершенствование процессуального законодательства; реформа в правоохранительных органах и адвокатуры. Анализ основных положений Государственной программы правовой реформы показывает, что в Казахстане был осуществлен комплекс необходимых мер по утверждению судебной власти как самостоятельной, демократичной и ведущей ветви государственной власти, которая стремится реализовать свои полномочия в интересах защиты прав и свобод граждан, конституционного строя и правового пространства страны.

**Ключевые слова:** конституция, правовая система, суд, судебная система, правовая политика, правовая реформа, гуманизация судебной системы, демократизация, медиация, обычное право.

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