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**From history of nomadic
customary law**

The Kazakh laws originate from Turkic times, and were enriched by the legal practices and cultures of other peoples. Secondly, Kazakh laws borrowed and interpreted adapting to their needs the best samples and models of legal cultures of other peoples. Customary law was designed to address the solution of the complex needs of Kazakh society. Within various historical periods the legal systems aimed to regularize relations between and within nomadic states, have much in common. State structure of Kazakh khanate, system of political governance, legal relations, cultural evolutions originate from early times. Tribal confederations and their legal practices left a rich legacy for Kazakh nomadic society.

Key words: customary, law, political, tradition, society.

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**Көшпелілердің әдеттік
құқық тарихынан**

Көшпелілердің әдеттегі құқығының саяси құрылымда, қоғамдық қатынастағы реттеушілік қызметі мәселесіне мақала арналған. Қазақ қоғамы өзінің құқықтық мәдениетінің қалыптасуында Түрік, Монғол дәуірінің билеушілері мен мемлекеттердің құқықтық негіздерінің ықпалы зор болды. Сондықтан көшпелілердің құқықтық мәдениеті Дала тарихында ортақ даму үлгісінен өтті. Осы мақалада көшпелілер өмірінде құқықтық нормалардың атқарған қызметі туралы талқыланған.

Түйін сөздер: әдеттегі құқық, саясат, дәстүр, қоғам.

Телеуова Э.Т.
**Из истории обычного права
кочевников**

В статье рассматривается обычное право кочевников, которое обеспечивало социальное благополучие и функционирование хозяйства кочевников, выражая волю и интересы не только и не столько привилегированных групп, но и большей части рядовых членов кочевого общества. Этим объясняется и консерватизм, устойчивость норм обычного права, просуществовавших до конца XIX – начала XX веков. Многие же из норм семейно-брачного права и обязательств в той или иной форме сохранились и до наших дней, несмотря на полное разрушение традиционного экономического уклада.

Ключевые слова: обычное право, политика, традиция, общество.

**FROM HISTORY
OF NOMADIC
CUSTOMARY LAW**

The history of steppe civilizations saw many changes through various events. Although Kazakhs retained most of their values as a heritage coming from the ancient times. One of the values is customary legal system. Customary law based on the cultural and democratic traditions until XIX century play important role in regulating their lifestyle. That was caused by two factors. First of all, the basis of nomadic economic lifestyle formed the world outlook of Kazakhs, and secondly, the demand of the social life to form new norms and values. Customary law of Kazakhs is the monument of the rich of nomadic civilization. It is backed by centuries long history, life potential and human freedom demand. Any legal system originates from the social needs. Customary law was designed to address the solution of the complex needs of Kazakh society. Within various historical periods the legal systems aimed to regularize relations between and within nomadic states, have much in common. State structure of Kazakh khanate, system of political governance, legal relations, cultural evolutions originate from early times. Tribal confederations and their legal practices left a rich legacy for Kazakh nomadic society.

Firm tribal relations of the nomadic socium prevented development of individualistic rights. Under the tribal system, the rights of an individual were interpreted within the framework of tribal legal practices. Apart from that the military necessity to protect the tribe from external threat facilitated that factor. Each member of the tribe was to a warrior responsible for its survival. In peacetimes the legal relations were guided by common practices. They covered family and economic relations, criminal cases. Along with that there existed legal practices to settle international relations-trade and others, that proved the high level of state development. In early nomadic period, the notion of «sin/crime» differentiated from family realm, and became part of the social/public relations. Those norms formed the basis of the legal practices to settle private and public issues.

Ancient nomadic law of Kazakhs, Turkic linguistic arts produced valuable cultural heritage. Development of legal relations of nomads went hand in hand with the state formation. The Kazakh khanate inherited the legal practices of the Turkic states – code of customary law, political, criminal, civic practices regulations, and

international law. The failure of the Turkic states to cope with legal problems led to their eventual decline and collapse.

In VI century, in Central Asia was formed a Turkic kaganate out of dispersed tribes, brought together by Bumin kagan. He adopted a law on state integrity and protection of the rights of ordinary members of society. It is known from the Chinese sources. We should mention the articles that worked as legal acts:

- 1) The one who instigates a rebellion or riot must be condemned to death.
- 2) The one who betrays the interests of Turks is considered to be the traitor and must be put to death.
- 3) The one found guilty in death of an innocent person must be put to death.
- 4) Adultery with somebody's wife is punishable with death penalty.
- 5) Stealth of a horse tied to someone's yurt is punishable by death.
- 6) Injury during the fight must be compensated by ransom.
- 7) The compensation for stolen horse is ten times more than its original price [1].

These legal establishments on internal solidarity and integrity cemented the newly created state. The runic inscriptions of the Turkic rulers' call to unity were extremely important for Turks. This legal monument of the first independent Turkic state testified its creation, and that law governed various problems people faced – criminal, family or economic disputes. But these legal practices could be applied only to the medieval nomadic states. The researches on Turkic states analyzed state governance methods, nomadic public relations, and developed the concept of «nomadic state». The ideological power justified the legal structure of the Turkic state, and its norms. Civil, criminal, family, property cases were regularized. The legal rights of the Ashina dynasty had enormous power in the state. The law «Tore», as the pillar of the state regime and the dominant dynasty managed them. The power of kagan was inherited by his successor. The power passed only from grandfather to grandson, and from elder brother to the younger one. The third pillar was creation of the laws to manage the state and intra-tribal relations, as the basics of the international law. These norms formed the «Tore» legal system set up in VIII century. Along with the formation of Turkic states, the «Tore» legal principle influenced other legal practices. «Tore» had the legal right for governance. The main aim was to provide state integrity, to overcome intra-tribal conflicts and contradictions, orderly arrange any relations in the

socium. Turkic legal practices and «Tore» principle were continued within the further development of Turkic states and societies. From that viewpoint for present times, it is very important to investigate «Tore» legal principle, as in XVI century Armenian-Kypshak legal code and procedural norms were based on it, and are part of the world legal heritage [2].

In the history of steppe civilizations the big state formation set up by nomads in early XIII century got to the world prominence and spread its influence on other states and societies. During the formation of single Mongol ulus (people) with the aim to strengthen the state was adopted the modified code of legal practices of nomads with the amendments by the demands of the Mongol community «Great Yassa». The name «great» implied that it was compulsory for all Mongols. In this point, the common Yassa was superior to the local/tribal legal practices. Yassa in Mongol means «yassak» or establishment, enactment, or law. Gengizkhan as the collection of laws and legal practices adopted Yassa for Mongols. Rashid-ad-Din informed that for adoption of that law was convened a kurultai in 1206 [3]. The law was adopted after victory of Gengizkhan over Kereits, Naimans and Merkits. The law taken at Great kurultai opened the way to strengthening the power of Gengizkhan.

In 1218, at the kurultai with the objective to arrange a campaign to Turkestan were introduced some amendments. In 1225 was adopted with amendments «Great Yassa» again. But unfortunately the original version of Great Yassa was not preserved, and its fragments are found in the works of Arabic and Persian historians. Almost complete version of Great Yassa was found in the chronicle of the Persian chronicler Ala ad-Din-Ata Malik Juveini «Tariq –I- Jakhangushai», in translation it sounds – «History of Jakhangushai» or «History of the world conqueror» [4]. Other authors – al-Omari, al-Markizi, Mirhond approved the facts given in the works of Juveini. On one side, the «Yassa» research of Juveini is big, no doubt. By Juveini, the Yassa in Mongol language was preserved in Uigur inscriptions on tumars (protective talismans). The talismans were distributed to prominent noble people, experts of Yassa and members of the khan dynasty. In translation of the Russian orientalist V.Minorsky, the chapter from Juveini work on Yassa, was used by Vernadsky G. in his research as an appendix [5]. Qalmyk researcher E.Kara-Davan in his work dedicated to the history of Gengizkhan used the data from Yassa, as well as from al-Markizi, Mirhond, ibn-Batuta, etc [6].

There are many different opinions among the historians (Kazakh, Russian, Qalmyk, Tatar, Chinese, Mongol) on the articles of Yassa. A prominent researcher from Kazakhstan, Zardykhan Kinayat-uly in his work «Kazakh state and Joshy khan» made a comprehensive analysis of Yassa. Here we dwell on the opinions of the Chinese and Mongol scholars [7]. The Chinese researcher Li Zu Fin divides Yassa in 8 chapters, and meticulously revises each chapter. Historian B.Saishal after critical assessment of Yassa, came to conclusion that it consists of 6 parts, and the content of article 54 was decoded in full by him [8].

Thus, the Mongol empire was based on Yassa as a legal fundamental. The strength of Yassa was in the fact that successors to Gengizkhan despite the long distances separating them had to subdue to it. The content of Yassa: international law, state and administrative law, criminal and trade laws, procedural- the rights and duties of the judge, as the pillar of the law. The solidity of the laws adherence among Gengizkhan successors was supported by the words of Rashid-ad-Din who provided some pieces in his works: »The customs (uisun) left by Gengizkhan and laws (yassak) must be strictly observed, not changing them, then the Heaven would support their people, they would always live in happiness and joy«. The following extract supports the previous statement on the need to observe the law: «If the state formed after us, their leaders, sons, great people, military commanders and emirs would not follow the laws, then state affairs would be undermined, destroyed, they would search for Gengizkhan, but would never find» [9].

If even the successor to Gengizkhan had to strictly follow Yassa, then for ordinary citizens observance of the law was compulsory. That generated many difficulties. Yassa was based on the nomadic lifestyle, and the sedentary population of Turkestan, Persian lands whose life practices were different could not easily adapt to legal requirements of Yassa, as it did not cover their life specifics. Contradictions over Yassa interpretations and implementation between local rulers and Gengizkhan successors caused many conflict situations. The ruling khan Chagatai was very persistent in introducing Yassa in Turkestan, and Juveini described that in the following way: «He frightened the subject peoples by Yassa, as its non-observance was punishable by his army, that always was ready to do that at first order; any woman with a plate full of gold could walk without fear. He took some small decrees, but they were hard for Muslims

to observe it. For instance, it not permitted to slay a sheep openly in Horassan. He forced them to eat meat of the dead animal (cattle)» [10].

Yassa was very strict legal code. Any wrong act was interpreted as a crime, and strictly persecuted. Despite that the western part of the Mongol empire adopted the Muslim culture, and gradually yassa establishments were not followed strictly. That was written by Hamdallah Kazvini. By Yassa it was prohibited for Mongols to live in urban areas, but descendants of Chagatai and Jochi soon forgot about those bans.

It is not clear how long Yassa establishments worked in Mongol lands. In the state in Mawerennahr set up by Timur and his successors «tore» in Turkic language was interpreted as the law of Gengizkhan. In Syria and Khorezm, Timur and his descendants were accused in putting «tore» above Sharia, and people under his control were not viewed Muslims. During the rule of Timur's son Shahruh (1409-1447) was adopted a decree to follow only Sharia and annul 'Bilik» of Gengizkhan and his legal practices. But son of Shahruh, Ulugbeg viewed that it was correct to observe all laws of Gengizkhan. The last Timurid, Babur, wrote: «Our ancestors implicitly obeyed the laws of Gengizkhan. At the kurulai, parties and feasts, before taking a meal, or any acts, I did nothing against «tore». All people by the decrees of Gengizkhan must follow the words of God. Whoever it is to leave those valuable words/laws, must be not forgotten. If your father left a good law, its must be observed. If he left a bad law, it must be replaced by a good one» [11]. In XV-XVI centuries in Mogolistan basic articles of Yassa were still in force. Eastern Desht-I-Kipshak Kypshaks followed Yassa in settlement of complex problems. As the th descendants of Gengizkhan ruled the lands for a long time, then Yassa was seen as the supreme law. But it is wrong to state that all the territories of former Gengizkhan Empire observed Yassa. The subject people practiced their own legal codes along with Yassa. Part of the law provisions of Gengizkhan adopted with the aim to strengthen his state, were kept in the criminal code of nomads.

In the customary law of nomads Biliks (procedural interpretations of Yassa) left by Gengizkhan played big role. In the oral spiritual legacy of Kazakhs are kept numerous references to it. In the opinion of the expert on medieval nomadic history T.Sultanov, the researchers of XIV century made a mistake when mixed Bilik with Yassa [12]. After through analysis of Bilik and Yassa, in 1901 P.Melioransky came to conclusion that there are different in many points.

Yassa clearly identifies types of crimes and how they in due way must be persecuted. Bilik provides legal procedure and its stages, and also punished those who disobeyed Yassa. In the process of state governance by Yassa, administration of public affairs, the successors of Gengizkhan followed Bilik. Gengizkhan left to his descendants and people not only the laws, but also the rules of their correct implementation. Full text of Bilik is given by Rashid-ad-Din in his work's chapters: «The best praiseworthy quality of Gengizkhan is to leave legal knowledge of Bilik». Rashid-ad-Din employed many evidences on Mongol legal code from various sources – historical narratives and memoirs. In the historical narratives Gengizkhan who conquered the world is depicted as the one who founded a state out of scattered Mongol tribes, set up a unified system of governance instead of tribal rule, introduced a system of administrative bureaucracy as well as wise statesman. On the other hand, his invasions and plunder of the occupied territories led to disappearance of their cultural and economic wealth, postponed for centuries the development and formation of big people out of Turkic tribes. Assessment of Bilik from various sides allows us to understand what role his laws, and legal establishments, provisions of how to rule conquered peoples, played in the state he left for his descendants. The Gengizkhan's establishments were promoted by Kazakh zhuraus, poets, biis, oral folk art- proverbs and sayings. For instance: «Where sons do not listen to father, younger brother do not respect the elder ones, husband is not backed by his wife, and wife dose not follow her husband, mother-in-law do not like their daughters-in-law, senior did not protect the youngsters, and youngsters did not

follow the seniors, and the nobles being close to god could not influence the public, and having a lot of wealth could not build a wealthy country for the people and ignored the customs (uisun), and law (Yassa), and people fought against the state; in that state grow thieves, robbers, enemies, cheaters, and offenders, they inflict big damage to people, steal their horses and cattle, and if the army launches a campaign, its exhausted horses would die halfway, and both- army and horses would die» [13].

Bilik of Gengizkhan taught the statecraft, gave useful advises on governance – what to do in various spheres, and which are the priority. It teaches that the rulers must care about the people close to power, families, and how to manage family affairs, lead an army, control international affairs, what qualities are desirable in peacetime, etc. and gives full answers to all these questions.

Here we should refer to the extract from Bilik: «The content of the Bilik is that at that time the demands of the Kazakh khanate society were fully responded by it».

The nomadic states were interested in codification of their legal establishments, and Gengizkhan timely reacted to that, and although within time the situations changed, in general Yassa addressed most of the problems on the way. Further on Kazakhs adopted the Laws of Kassymkhan (The direct path of Kassym khan), Legal Code of Hak-Nazar khan (Just path of Hak Nazar khan), the legal code of Yessim khan and Jety Jargy of Tauke khan. In 1640 Oirtas adoped «Tsaadjin bichikte»- legal code of Jungars. There is much in common between them as they all are based on the Mongol legal practices, and represent the stage by stage evolutionary changes.

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