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The role and principles importance of the biys court activity as an institution of Kazakh customary law for modern legal relations

The article reveals the unique customs and traditions of the Kazakh people, which were based on the principles that lay down the legal regulation of social relations, condition social justice in resolving disputes and other conflicts arising in the process of economic activity and everyday life. The principles on which the Kazakh society was founded, which are the basis of Kazakh customary law in modern conditions can be characterized as humanistic. On the basis of these principles, the formation of a fundamental principles number is possible that, taking into account the historical roots, will allow modernization of modern law. Despite the fact that the principles of customary law worked effectively in the historical period of the existence of the Kazakh Khanate and semi-nomadic farming, in modern conditions it is possible to modernize and use them in the modern legal culture as a historically established system of authoritative legal values. These are legal values that stipulate certain types of legal punishments and rewards, principles of mutual relations of the parties in civil, family, labor and other legal relations based on the equality of the parties and voluntary rights and obligations determination. The article substantiates the possibility of using the principles of adversariality, transparency, the predominance of property responsibility as the main punishment type, and the wider use of legal incentive measures in modern conditions.

Keywords: Kazakhstan, adaptation of traditional principles, court of biys, customary law, principles of law.

Introduction

Currently, research on the institutions of customary Kazakh law, court of biys, legal principles that have existed for centuries, is carried out, as a rule, from a historical point of view. However, modern legal and political theory can use separate institutions of customary law, which have proved their usefulness in the regulation of public relations. Important aspects of the modern state of law and civil society are self-government, initiative, independence, focus on the legal and social capabilities implementation of the individual. The whole features range that define modern civil society can be extended to the institutions of traditional Kazakh society, since the khan's power has always relied on public institutions, which in turn have a significant impact on the khan's power by limiting it. The non-interference of political (khanate) power in the everyday life of nomads, their autonomy, due to the characteristics of the semi-nomadic life way, implied social interaction based on the equality principles, competitiveness in resolving disputes, openness of legal proceedings and management decisions. At the same time, as a legal relations guarantee, the priority form was property liability, which was due to the way of life and the production mode. Moreover, in modern conditions, personal autonomy is becoming increasingly important. It is also due to lifestyle and mode of production. For an emerging postindustrial society, an autonomous person communicates with other individuals on the basis of equality, independence, non-interference in personal life, personal secrets, family secrets, personal interest in the results of their work, which determines the way of life and life priorities, are becoming increasingly important. Based on this, it seems harmonious to consider the principles of Kazakh customary law, since to a certain extent they are consonant with the requirements of the present.

Methods and materials

The research uses general and private methods of legal research. Based on analysis and generalization, legal sources, views and theories of individual scientists are examined, individual opinions and provisions are examined that reveal the problems of reflecting legal principles in the process of implementing the law. The research basis is the dialectical approach, reflecting the variability and dynamic development of legal norms and social relations. Moreover, legal principles and legal values that are the foundation of legal regulation in a specific historical period are considered as a metaphysical basis. The phenomenon under consid-

eration is studied in the inextricable link of social relations, legal principles and legal regulation of social relations. Based on the method of comparison, analogy, by researching the historical institutions that take place in the history of Kazakh customary law, the value of legal principles is revealed. The concrete historical method made it possible to consider the continuity of the principles governing social relations in a dialectical interconnection and use these principles in modern legal regulation.

Results

In our opinion, the court of biys should be considered as a key institution of Kazakh customary law. From the earliest times, judicial power in the Kazakh society was mainly carried out by the biys. It is impossible to determine the period of the emergence of the biy court, since it is the biy courts that are the main non-governmental institution organizing a traditional society. The biy courts, as such, existed long before the reign of Tauke Khan and, in essence, were an integral institution of not the state, but society. The biys court was not only the central institute of judicial procedural law, but also for a long time the most important active center of the socio-political and, in particular, legal life of the Kazakhs. The peculiarity of the court of biys is that it, in fact, represents only one of the biys activities aspects, which in Kazakh society constituted a «group of custodians», i.e. connoisseurs and interpreters of customary law, sporadically, periodically or continuously performing judicial mediation functions. The judicial power, which belonged to the Biy, was of exceptional importance in the Kazakh nomadic society. It was the leading form of power in the system of self-government, widespread, close and understandable to the people, deserved respect and relied on him. Compared with the khanate, the judiciary was the most developed, fully realized itself. In the nomads understanding, it acted as a statehood symbol, was a convenient, efficient, fast, one might say, universal means of exercising state power. Therefore, almost all state bodies in achieving their goals, in the implementation of their activities, tried to use or rely on the judiciary. Only this can explain the fact that in the system of state power, everything from the khan and the sultans, ending with aul axals, were vested with judicial functions. Accordingly, the authority and legitimacy of power was ensured by a fair resolution of disputes, and non-interference in the personal space of a nomad who turned to the authorities, as a rule, exclusively in case of need. Thus, the principles are: competitiveness; transparency; the predominance of property responsibility as the main punishment form, was the legal relations basis, which provided autonomy relative autonomy from the political and legal authority of the legal relations subjects.

Discussion

In a society of nomads, the judiciary was so revered that it sometimes stood above the khan power. Of course, the power of the khan in the Kazakh society was considered the highest state power, so it was in reality. However, in order to ensure its level, the khan's power was forced to constantly reckon with the supreme power and rely on it. And in many cases, the Khan's power considered the judiciary as its component, a continuation and did not separate from itself. In a society of nomads, the judiciary was so revered that it sometimes stood above the power of the khan. The power of the khan in the Kazakh society was considered the highest state power, so it was in reality. However, in order to ensure its level, the khan's power was forced to constantly reckon with the supreme power and rely on it. And in many cases, the Khan's power considered the judiciary as its component, a continuation and did not separate from itself [1; 23]. This is the main difference between Kazakh biys and Bek-biys in other Turkic-speaking countries. The Biysk judicial power in Kazakhstan enjoyed great influence on the general civil power, including the civil-dynastic power of sovereigns and rulers, and often shared the supreme power with them. The uniqueness of this judicial system is emphasized by the fact that in neighboring countries and certain Central Asian regions agricultural or urban culture prevailed, and the norms of law connected with it were secular and mental. Biy (bi) is first and foremost a judge. The power of the Biy was considered to be the indigenous power, going back into the history depths of the people themselves, in contrast to the power of the khans, who had a «non-Kazakh origin». One of the famous Russian researchers of Kazakh customary law I.A. Kozlov gave the following definition to the Biysk court: «In the minds of the people, the title of bi belongs to the few who were distinguished by impeccable honesty, a natural mind, and combine deep knowledge in the fundamental customs of the people. Biy is a living chronicle of a people, a lawyer or his lawyer» [2; 225]. Such a review was universal on the part of those who were familiar with the Kazakh legal system. According to researcher D. Zuev, «Kazakh Biy was the wisest and most dignified» that their court represented «the bright pages of the distant past, when in the quiet way of the patriarchal life he was as pure and truthful as life itself» [3; 161, 162]. Another author B.N. Delvig biev refers only to as «the sole custodians of customary law» [4; 123]. According to

A. Krahalev, «with regard to the justice of the court, the Kyrgyz (Kazakhs) are very demanding... Justice — the presence of it is most important» [5; 40].

In Kazakh customary law, there is a whole principles layer and norms that determine the essence and status of judge *biy*. They are formed in short and expressive sayings-formulas: «Do not be the son of only your father, but be the son of mankind». «There is no more punishment for a judge-judge than his addiction in favor of a relative»; «The stone has no root, and likewise the *biy* has no relative». Truth and justice, the desire to comprehend them were the fundamental foundations of court proceedings and adjudicated judgments of *biys*, based on the norms of Kazakh law: «Worship justice if it is expressed even by your father's slave»; «Expression is important in eloquence, but more valuable than isin». An important feature of the Kazakh *Biysk* court is its spirituality, that is, recognition of the primacy of the spiritual content of the case before its material and substantive content on the one hand, and the management of moral principles of «conscience» on the other. The words «There is no god above truth», «Material wealth should serve spirituality, and spirituality is the main honor» were preserved in the people's memory. These statements had real content: in a man his conscience, honor and dignity were declared the highest values. The strength of this high morale was predetermined by the fact that, after centuries, it was noted by Academician S.Z. Zimanov, established itself as an integral part of the Kazakh people's mentality [6; 30]. With regard to justice, this general morality was reflected in such normative and moral principles: «The ruler of the khan has the mind of forty people, and the *biy* has the knowledge and conscience of forty people», «The rich man is the keeper of livestock, and *biy* is the guardian of conscience»; «The judge (*biy*) is impartial, because he has no bias in favor of his own and not his own, violation of this leads to the justice itself death». A well-known national culture figure, S. Seifulin, wrote about the Kazakh *biys*: «Those who were extremely devoted to the wills and wise ancestors legacy, mastered the past historical ancient rules and customs selection and traditions, laws — heres and case-law decisions became *beas*, the statements and judgments of the sages, knew them by heart and had the eloquence gift» [7; 8]. In the Kazakh nomadic society, «*biy*» and «*speaker*» were used as single-meaning concepts. Moreover, the judicial «*oratory*» among the Kazakhs was not so much eloquence in general and a speech form as it was evidence-based, included in the proof means and persuasiveness. This was expressed in installation sayings: «The one who is resourceful in expressiveness excels». The power of words in a nomadic society has always been so prestigious and authoritative that often the victory was delivered to those who possessed the speech art. «Artificial *biy* can solve the murder case with just one short speech». Recognizing that «Of all the arts, the most important thing is the language culture», at the same time, Kazakh law has formed its judicial goal: «Language is valuable, but truth is more valuable in court». In Kazakh society, the title «*biy*» was not so much hereditary or granted as a well-deserved honorary title. *Bii* were not appointed or elected. At least, that was before the intervention of the Russian colonial administration in the 19th century. The applicant (candidate) could sometimes be determined, distinguished by *beas*, elders and other respected and wise people who initially provided him with some support, but you can become a *beater* only after popular recognition of the applicant deserving such a title. The main requirements that were presented to the *Biy* as a sender of justice were: thorough knowledge of the norms of customary law, mastery of the wealth of the steppe law and its basic norms, fixed in the Codes «True Establishments of Kassym Khan», and «Ancient Establishments of Yessim Khan» «Supplemented by the precedential decrees of famous *biys*, possession of oratory talent and honesty. Customs sanctioned by state authorities turned into legal customs, reflected in the above code. The attempt to codify customary law adopted during the reign of Khan Tauke at the end of the 17th century is better known. The Codex, developed by the famous *biys* under Tauke Khan, was called the *Jet of Jarga* (seven regulations) [8; 100–101]. Thus, customs were transformed into legal customs, provided by the official, khanate power to one degree or another throughout the entire period characterized as the Kazakh khanate from its formation to the period of the protectorate.

The historical period in literature is called as the Golden Age of Justice. This is a major milestone, a kind of spiritual frontier in the history of Kazakhstan, is strongly associated with the triumph and authority of the law and justice rule, which have been and remain in all time and among all nations a special moral criterion for human society. It is known that according to the canons of the Golden Age of Justice, the life of all three Kazakh *zhuzs* flowed: Elder, Middle, Younger. And it is especially important that regardless of the period and the names of the supreme rulers, under which a «fair order» was possible and established, its incorruptible judge, sage, orator, historically acts as an active creator — bearer, defender, interpreter, reformer and guide of law and justice. real *biya* figure. These were people whom the famous orientalist, professor A.I. Levshin calls «geniuses of his own kind» on his merits standing «along with Solons and Lycurgus», who assert high morality and holiness in public relations in their work [9; 367].

It is necessary to note that recognition by the people gave the Biy great authority and social power over the nomads. However, it was honesty, impartiality, knowledge of customs and their correct application, and not state coercion, that execution ensured of court biys decisions. A dishonest man inevitably lost the biy title, since no one considered it possible to turn to him for a fair decision. An impeccable reputation was a necessary and sufficient guarantee of justice. However, in order to recognize the applicant as meeting these requirements, it was necessary to show his skill in practice by taking part in any judicial (legal) dispute. Success in such a case actually ensured the recognition of the applicant by bi. Other criteria (social origin, age, etc.) were not critical. For example, researchers sometimes note a rather early age, even for those times (13 years), when the applicant was recognized as a biy. Usually the biys came from commoners, were not distinguished by generosity, although the biys from the sultans were known. The title of biy was a kind of perpetual license to legal practice as a judge or lawyer. Of course, the biys differed from each other in terms of power and sphere of influence, they occupied different levels in the judicial hierarchy — from the biys of a small aul, tribal collective to biys, whose fame and influence extended to zhuzes, uluses and the entire territory of Kazakh statehood. Depending on this, the stringency of the requirements for beats changed. The trial was the main function of the bi judges. It was at this stage that the biys should have revealed their skill, experience and acted as «heralds of truth», signs of customs, «guardians of order» and justice, defenders of traditions: to show the ability in eloquence, ability to apply various methods and tricks in resolving conflict litigation.

Conclusions

Kazakh customary law defined the following judicial tasks:

1. Ensuring the restoration of the lost right to property, things, livestock, wintering, summering, ponds; restore the right to brides, widows, the recovery of kun, ayp and punish the offender, the guilty.
2. Recovery of material damage and losses caused by unlawful actions of the offender to the victim.
3. The common Kazakhs law the distinguished damage as in the form of lost profits (offspring, growth in property and others).
4. The restoration and proper the tribal honor of the injured party satisfaction in litigation. Protection of the honor and personal dignity of the community member, his family, noble family, the clan honor, tribe and their branches.

It should be noted that, among the goals and the biy court objectives, there was no punitive function, which is so inherent in the modern state court. The absence of such punishments as imprisonment, awesome punishments and torture, as well as the lawsuit the proceedings nature, the representation possibility and surety in court put the biys court in an institutions number of non-state social authority, bringing it closer to the modern arbitration court. Thus, considering the court of biys institution from the point of view of the modern approach to legal institutions, we can characterize it as a human rights and law-restoring public institution. Emphasizing the main features of the biy court, it should be noted its independence, autonomy from the khan (state) government, self-financing, the security of the court decision by the power of public opinion, the conciliatory orientation of decisions, designed to realize the personality's capabilities in this historical period. The court of biys was an important institution of the Kazakh society for 15–18 centuries. This institution was indispensable and vital for a traditional society, which, with relatively weak khanate power and strong beginnings of social self-organization, allows us to consider it as an institution of a traditional society based on principles that could be acceptable in modern times. The independence of judges in making decisions, strict adherence to the principles enshrined in the Constitution of the Republic of Kazakhstan, procedural codes and other legal acts should bring the judiciary to a new level of legal impact on public relations.

The exercise of the judiciary on the justice basis, openness, publicity, human rights protection, violated rights restoration is intended to make the courts the main bodies protecting the individual interests in modern conditions. Judges are called upon to become «heralds of truth», «guardians of order» and justice, defenders of law: to show the ability not only of eloquence, but also the ability to apply various methods and skills in resolving court cases in modern conditions.

According to the authors, Biysk justice continues to be preserved in the historical memory of the people as a standard of legality and justice. Centuries separate modern generations from the Golden Age of bi justice, the socio-political environment, norms and content of law have fundamentally changed, however, even at the present stage of the development of the judicial system, bi as a judge, the court as a judicial power should embody high professionalism and honest attitude in the public representation to the administration of the judicial function. Biysk justice as a standard of legality and justice not only continues to be preserved in

the historical memory of the people, but is also gaining relevance at present as a value reference point and the democratization of justice in the Republic of Kazakhstan.

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Қазіргі құқықтық қатынастар үшін қазақ әдет-ғұрып құқығының институты ретіндегі билер сотының қызметінің қағидаларының рөлі мен маңызы

Мақалада күнделікті өмірде және шаруашылық қызмет процесінде туындайтын, өзге де қайшылықтарды және дауларды шешу кезінде әлеуметтік әділдікті негіздейтін, қоғамдық қатынастарды құқықтық реттеуді құрайтын, қағидаттар негізі болған, қазақ халқының бірегей салт-дәстүрлері мен әдет-ғұрыптары ашылған. Қазіргі жағдайда қазақтың әдет-ғұрып құқығының негізі болған, соның негізінде қазақ қоғамы құрылған, қағидаттарды гуманистік деп сипаттауға болады. Осы қағидаттардың негізінде тарихи түп-тамырларды ескере отырып, қазіргі құқықты жаңғыртуға мүмкіндік беретін бірқатар негіз қалаушы бастамалар қалыптастыруы мүмкін. Қазақ хандығының құрылуының және жартылай көшпелі шаруашылық жүргізудің тарихи кезеңдерінде әдет-ғұрып құқығының қағидалары тиімді жұмыс істегеніне қарамастан, қазіргі жағдайда оларды заманауи құқықтық мәдениетте тарихи қалыптасқан, беделді құқықтық құндылықтар жүйесі ретінде жаңғырту және пайдалануға мүмкін болады. Бұл тараптардың теңдігіне және құқықтар мен міндеттерді бекіту еріктілігіне негізделген, азаматтық, отбасылық, еңбектік және өзге де құқықтық қатынастардағы тараптардың өзара қарым-қатынастарының қағидаларын, көтермелеу және заңды жазалар түрлерін негіздейтін құқықтық құндылықтар. Мақалада қазіргі заманғы жағдайларда жарыспалылық, транспаренттілік қағидаттарын пайдалану, мүліктік жауапкершіліктің негізгі жаза түрі ретінде басым болуы, құқықтық көтермелеу шараларын кеңінен пайдалану мүмкіндігі негізделген.

Кілт сөздер: Қазақстан, дәстүрлі қағидалардың бейімделуі, билер соты, әдет-ғұрып құқығы, құқық қағидалары.

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Роль и значение принципов деятельности суда биев как института казахского обычного права для современных правовых отношений

В статье раскрыты уникальные обычаи и традиции казахского народа, в основе которых находятся принципы, закладывающие правовое регулирование общественных отношений, обуславливающих социальную справедливость при решении споров и иных коллизий, возникающих в процессе хозяйственной деятельности и повседневной жизни. Принципы, на которых было основано казахское общество, находящееся в основе казахского обычного права, в современных условиях можно охарактеризовать как гуманистические. На их основе возможно формирование ряда основополагающих начал, которые позволят, с учетом исторических корней, модернизировать современное право. Несмотря на то, что принципы обычного права эффективно работали в исторический период существования казах-

ского ханства и полукочевого ведения хозяйства, в нынешних условиях возможны их модернизация и использование в современной правовой культуре как исторически сложившаяся система авторитетных правовых ценностей, которые обуславливают определенные виды юридических наказаний и поощрений, принципы взаимоотношений сторон в гражданских, семейных, трудовых и иных правоотношениях, основанных на равенстве сторон и добровольности установления прав и обязанностей. В статье обоснована возможность использования в современных условиях принципов состязательности, транспарентности, преобладания имущественной ответственности как основного вида наказания, более широкого использования мер правового поощрения.

Ключевые слова: Казахстан, адаптация традиционных принципов, суд биев, обычное право, принципы права.

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