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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 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 that 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 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 were 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, 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 chronicle recorder 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 a-Markizi, Mirkhond, 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]

Zardykhan Kinayat uly wrote that Yassa was not a new phenomenon during the Mongol times, and major elements of the legal code were inherited from Turkic, Tungus, pre-Mongol times state formations political legacy. That opinion of Kinayat -uly is taken by most of modern day researches.

Development of social relations, state building are followed by legal culture evolution. The strength of Gengizkhan law was that despite all historical changes, its basic elements remained intact and cemented any state ever built in Eurasia.

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, it 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 thorough 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 does 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 Kassym-khan (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 adopted “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.

Jety Jargy as the codified legal code of Kazakhs was one such evolutionary samples. By the content the Jety Jargy is reflective on specific Kazakh life style; secondly, is based on the previous legal codes, like the one created during the rule of Kassym khan (1511–1523), when Kazakh khanate for the first time came to be known internationally. The first contacts with the Muscovy occurred right at that time. That period was characterized by strengthening of military-democratic structure. Kassym khan unified millions of people under one banner in one country, and governed them. Unwritten legal code, preserved in the folk memory played very important role in state governance.

The basic provisions of the law of Kassym khan are as follows:

1. Property law—on cattle, private property, land disputes.
2. Criminal law—murder, attacks/raids on population, cattle stealing and their punishment.
3. Military law—army formation, military duties of the common folk, ransom, penalties for losses in the military campaigns.
4. diplomatic rules—orator skills, politeness and etiquette in international affairs, tactfulness, *etc.*
5. Law of the public—distribution of food, cattle to the public, rules of the commemoration arrangement, organization of festivities, duties and rule of conduct during the holidays and celebrations.

After Kassym khan legal code was adopted the code of Yessim khan, compiled by the youngest out all khan ever in power in Kazakh steppe. The reason why it was called “old law” is that all the legal practices originate from the ancient customs.

Tauke khan introduced considerable changes in the previous legal codes. Especially was modified the third part of Jety Jargy. The laws of khan Tauke

were based on traditional practices, but were innovated to meet the time challenges and digest the traditions of the tribes that within time became part of the Kazakh khanate. Jety Jargy is the most famous legal code that was in force until mid XI century in the Kazakh steppe. There is no common opinion on the time when and under what circumstances it was adopted. Some researchers consider that it was in late XVII century, others—to early XVIII century. The reason is that in the first half of XVII century the Kazakh khanate unified all lands and to strengthen the state, the leaders needed real deeds. At that time most of eastern part of the state lived under the Sharia law. Social-economic and political situation degraded, therefore the leaders were to take urgent measures to consolidate the country through unification of legal practices. One more reason for Jety Jargy adoption is the external threat—the Jungar invasions intensified. The Jungars by that time had adopted their legal code that helped to strengthen the people from within. Thus, Kazakhs had to take urgent steps to confront the external threat. Thirdly, until XVII century most of legal practices grew outdated and new realities were to be reacted properly. We keep to the origin of Jety Jargy as of late XVII century, and support our proposition by the evidences provided by the tribal chief of Jappas tribe Kobek Shukualiev, that he gave to the Russian researcher G. Spassky:

Ancient tribes of Kyrgyzes (as they were called by the Russian, in fact—Kazakhs) proclaimed Tauke sultan as their khan, at that time three branches of Kyrgyzes (Great, Middle and Minor juzes) sent their judges (biis) to negotiate and they came to conclusion that they would stop fighting and quarreling with each other and adopt a common law.[14]

The rules of Jety Jargy became integral part of the Kazakh everyday life, and its unwritten articles were transmitted orally from one generation to another. The fragments of Jety Jargy were compiled by the members of the Russian research expeditions and officials of the colonial administration. That is their contribution to the preservation of the legal code of Kazakhs. Jety Jargy and some other legal practices of Kazakhs were also compiled by A.I. Levshin, N.N. Grodekov, D. Samokvasov, L.A. Slovokhotov, G. Spassky, Y.I. Gurland. The most valuable collection was made by findings of G. Spassky, Y. Gurland, A. Levshin, P. Makovetsky, L. Balluzek.[14]

It is known that there are two original versions of Jety Jargy. The first one in 1804 was compiled by G.Spasky form the words of tribal chief of Jappas tribe Shukualiev. In 1820 “Herald of Siberia” published notes of G.Spasky on Jety Jargy consisting of 11 fragments. Spassky also described the everyday life of Kazakhs from the results of his expedition in 1806. The second version was given in the works of A.Levshin. Lawyer Nuraly Oserov

critically assessed Jety Jargy, collected all available resources on that legal code, and divided it into several chapters:

1. State integrity.
2. Body cleanliness.
3. Religion.
4. Family unity.
5. Crime and punishment.
6. Human rights and private property.
7. Order of governance.

Thus, Jety Jargy consists of 7 main parts divided into 34 articles. The analysis of the legal code proves that it served the material and political interests of the people in power and as a mediator between those in power, and the common folk. Since the creation of state, the land disputes (zher dau) were extremely important for all members of the community. By Jety Jargy land issues were considered as part of the tribal property sphere. Therefore, any member of the tribe could have right for the pasturelands, winter and summer sites. In that way the conflicts over lands were prevented or regulated.

The basic economic fundamental of the Kazakh community was cattle breeding. Each tribe had its own seal to mark the cattle (tanba), and that was considered under Jety Jargy in case if any disputes arise. A seal could identify a stolen attle as someone's property. The Kazakh community recognized only property rights on cattle. Tanba (seal) ended all the claims on one's cattle.

Other issues under Jety Jargy referred to family and marriage sphere, and originated from the early times traditions. Father was the head of the family, the owner of his children, master for his wives, servants, cattle, pasturelands and sites (winter and summer). No decisions were taken without his permit. The family related articles also stipulated the marriage strategies-count 7 generations to make marriage policy to form a family: within 7 generations people were viewed relatives. No permit is given for marriages with foreigners. Therefore, every Kazakh was obliged to know 7 generations history—genealogy—zhezhire. The one who could not name 7 ancestors was believed to be without roots.

Russian researcher N. Grodekov wrote, that every Kazakh knows his genealogy that was supported by Tauke khan's legal code that was seen as one of the pillars of social system and its stability. Peace between relatives was equivalent to just solidarity and strengthening of the basis of the state, in understanding of Tauke khan.

The significance of tribal system is visible I big events taken place in Kazakh social history. For example, it was observed during marriages and wedding ceremonies, funeral commemorations, property division, *etc.* when relative

supported each other. In the soviet times, as well as presently, do serious events are arranged without relatives participation and support. Although within times the traditions changed, part of them is still observed.

Family and marriage related traditions of Kazakhs are very complex. For example, the seeking a marriage partner for son, marriage contract negotiations, etc., rites and rituals of girls marriage and wedding ceremonies arrangement, parties on a child's birth (shildekhana), ages transitions cycle ceremonies (12 year cycle—mushel, zhasqa toly), funeral commemorations, and other events were followed by traditions coming from early times.

Jety Jargy also stipulated the cases settlement as revenge/vendetta, material compensation for crime (and even murder). Although Jety Jargy dose not disclose the notion of what is crime, and names a criminal as the one who was sinful. It is impossible to eradicate crime at all in any country or society, but it is possible to create barriers on the way of making crime by someone. Jety Jargy put revenge/vendetta at first place in the list of crimes, and viewed it in equivalent manner—blood for blood (tit-for-tat principle), life for life. Sometime the one condemned to death by the decision of the council of judges (biis) could save his life by a ransom or material compensation. That article demonstrates historically progressive significance of the Kazakh legal code. The payment is taken from the criminal or member of his tribe. Principle of revenge prevented keeping the state integral. Russian researcher Balluzek wrote that: “The original historical narratives of Kyrgyzes, revenge lasted for centuries, and was transmitted from one generation to another. Then they understood that it was harmful for all the community/tribe.”[14] In the nomadic community, with the advent of Islamic practices, material compensation for the crime was introduced. In the legal codes of Kassym khan and Yessim khan, compensation was mentioned, but not interpreted in full manner. While in the laws of Tauke khan, revenge was interpreted as a big damage for the community and was replaced by material compensation. Emergence of compensation, principles of its type and size were caused by subjective reasons. As other members of the tribe were responsible for someone's crime, it was better to pay for the crime, and release them from the fear of being killed. The tribe paid for the crime certain amount of cattle agreed under Jety Jargy by judges, as it was reported by Levshin. Information of material compensation practices can be found in the works of I. Georg and N. Rychkov. By Georg:

... if someone killed another man, he will be sentenced to death for that crime, or released if compensated for the death to the relatives of the victim. For the murder the compensation is 100 horses, 2 camels, and 1 slave. Instead of horse he can give 5 sheep. For the murder of a woman, the

compensation is twice less than for a man's murder. For the physical injury or trauma to the genitals of a man or a woman, the punishment is very serious. For theft—9 times more.

The historical foundations of the Kazakh legal practices are customs, Sharia norms and legal codes of the some rulers, like khan decrees, but they could not cover the variety of legal cases happening among the people in steppe. Customary legal systems of Kazakhs were created within the long historical process, condensed within the nomadic life style, and were flexible and gradually evolved. The institute of judges (biis) in Kazakh society as responsible for following and timely reaction to the changes and challenges, as well for the maintenance of traditional legal culture and practices. They were practitioners, theoreticians, and interpreters, presided over the legal trials, took decisions, negotiated in disputes whatever they were, criticized and took the final actions. The main objective the court of biis was to establish the truth, reveal it to the public and take appropriate decision. They were to possess a common sense, strong logic, orator skills, deep analytical potential and good memory. They were to take into account positions of both parties involved in the case, thoroughly investigate the case, critically assess the words and actions of all the participants. Biis had certain freedom in taking decisions, as well as the one found guilty disagreed with the court decisions, had right to protests and the case were revised from anew, all cases were considered publicly. The complexity of cases necessitated the number of biis involved, if the case was too difficult, then several biis were involved and out of them was elected by his colleagues the chief one—tore bii. He took the final decision. If the trial was public, then all present had the right to speak out on the case. Tore bii was to arrange the due procedure and control the order of the process. Relatives and interested people from both sides could speak, but had no right to vote. In many cases the tribal biis could suppress by their tribes' authority the opposite party, as all tribal members covered the responsibility for the crime. The trial was held in the specially arranged place or in the tent of bii.

Thus, the steppe legal practices were naturally formed within the normal course of life and developed in content and structurally by people and law might regulate their vision of how.

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.

Notes

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Abstract

The author of the article considers the historical foundations the customary law of Kazakhs from their cultural and democratic traditions of the rich of nomadic civilization and shows too important roles of customary law in regulating their lifestyle.

Key words: nomadic customary law, history of Kazakhs.