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PLACE AND ROLE OF BIYS COURT IN STATE ADMINISTRATION OF TRADITIONAL KAZAKH SOCIETY

Abstract. The Kazakh Court of Biys was preserved and established in the memory of generations as independent, professional and wise justice. In the centuries-old history of each people there are events, dates and personalities, which are paid tribute to and proud of subsequent generations, remember them as remarkable and important milestones, spiritual borders of the life path they have passed. There are, although much less often, phenomena, institutional structures and institutions that persistently hold and master the memory and minds of new generations of people because they have civilizational significance or even universal human value. They persist and live in their thoughts as a future orientation and legacy of enduring importance. Such a memorable historical phenomenon is Kazakh judicial proceedings - the court of biys, formed in the subsoil of the nomadic society of Turkologists, which has compiled and received the name “Golden Age” of justice. It, when it was gone, remained forever a living torch in the memory of the people.

Key words: biy, encyclopedic, traditional Kazakh society, litigation, nomadic civilization, arbiter, customs, diplomatic activity, stability, judicial functions.

The relevance of the topic. As well known, Biy resolved disputes not only in his own country, but also went to other lands in order to settle emerging conflicts, establish good relations and thereby ensure a peaceful, calm life for his people. This was said about them by the people: “Enemy brings hostility, the ambassador brings peace”. And again: “People are judged by their messengers”. So highly people valued the diplomatic activity of their biys. Bi-fearless hero. ... The word fearless biya is more dangerous for the khans than the army of the advancing enemy. Biy-politician, public figure. They were the main initiators and advisers in establishing relations of harmony, mutual understanding within various sectors of society, activities aimed at establishing stability in the country, helped the khans and sultans to solve critical political issues. For example, Zhanibek Khan was helped to conduct foreign policy by 60 biys; Abylay Khan had 8 biys. It was these biys who sat on the top of the Kul-Tobe, Martobe mountains and solved the most important political problems. Bi-scientist, thinker. He is an expert on folk history, mores, customs, a keeper of folk wisdom, a philosopher with a living mind, an encyclopedic scientist. He left his people wise sayings in which the experience of the past is concentrated and the foresight of the future is laid [1, P.88].

Biys knew the secret of the effect of words on a person, they knew how to convey hot words from heart to heart. Bi-educator. He did not keep respectful estrangement from the people, proud of his rank of biy. He did not think that “he is on his own”. He delved into the needs of others, did not remove himself from helping those in need, supported the weak, desperate, cared for the younger generation, guided the young, inexperienced on the right path, teaching them not to be afraid of difficulties and rely on their strength”.

Such an extensive classification of the functions of the Kazakh biys given by M.S.Narikkaev is not accidental, and is not any exaggeration of the significance of the biy figure in traditional Kazakh society [2, P.48].

In our opinion, this was facilitated by the very nature of the historical process of development of the Kazakh state and law, which had specific features. The institution of biys in the initial period of the formation of state and law arose, in our opinion, from the institution of tribal elders, or elders, as they became known later. The terms “bi” and “bilik” are closely related, since all power-bilik was concentrated in the hands of bi-rulers, who initially represented the ancestors, tribal elders or patriarchs, as in other

historical systems of state and law. It was they who began to be called biys. Only then, gradually among the biys, who concentrated in their hands the full power, did the "division of labor" begin to appear and the biys appeared, who performed judicial functions to a greater extent. This continued until the beginning of the Mongol period in the history of Kazakhstan, when state power was concentrated in the hands of the Mongol governors, that is, an alien element, an analogue of the Vikings in Russian history. But gradually the "Mongol element" began to take root in Kazakh society and the former "newcomers" became Kazakh khans. It was at this historical moment, in our opinion, that the Kazakh biys lost the fullness of state power, but retained the judiciary [3, P.81].

Although on the example of Edige and his heirs, we see that the original Kazakh biys of the "black bone" could subjugate the "white bone", in the person of khans and sultans of Mongolian origin. Thus, the court in "ancient form" was justice and a people's court at the same time, in which general ethnic interests were put higher than just the norms of customary law. The Kazakh Biys court was distinguished by its spirituality, guidance by the moral principles of "conscience". The Kazakh court resolved disputes and disagreements with which the parties appealed to it, on the basis of the importance of ensuring reconciliation of the parties, of the need to eradicate not so much personal as vices of public importance.

The judgment was handed down by a neutral judge, neutral and independent. The main criteria for the "certification" of judges-biys were the assimilation of the normative wealth of customary law and the ability to flexibly apply it based on reason, the possession of eloquence as a means of judicial conviction and the ability to be together with the audience in terms of expressing its historical mentality. One of the key specific features of Kazakh customary law is the presence of the main subject of justice. In no other national legal system there is a subject similar to the Kazakh Biy - the representative of a special social stratum [3, P.88].

His high social status did not depend on the origin, nobility of the race, proximity to the powers that be, and even age (in some cases, gender). He did not depend on the spiritual position of biy. The non-election and non-appointment of biys, in our opinion, is the main and necessary factor in a fair and objective court in the common law of the Kazakhs.

The Kazakh biys in the process of the history of the development of the Kazakh state and law played an outstanding role in the formation of the law of the traditional Kazakh society, which is commonly called the common law of the Kazakhs. This right, like any system of law, was, first of all, a system of legal norms that regulated almost all aspects of society. According to one of the many classifications, these norms are subdivided into substantive and procedural norms [3, P.100].

Materials and methods of research. The Kazakh usually-legal system is historical, it consists of layers, although at different times, but connected by a common spirit, that is why it is conservative and at the same time mobile, dynamic, being enclosed in the framework of a nomadic civilization. The judge in this system acts as a connoisseur and custodian of the traditions and institutions of Kazakh law; this is an indispensable and obligatory aspect of his professional activity. And at the same time, bi-free interpreter of the steppe law in accordance with the conditions to which these norms were applied.

The normative legal support of the Biysk court and biys, besides the usual legal "khan" code, was a case law, that is, a resolution on specific cases of famous and famous biys who, as judges, had already gained all-Kazakh fame. The uniqueness of Kazakh law was that it, born within the framework of nomadic civilization, embodied many of the value traits and optima of human dreams and humanity of that era. In this regard, it rightfully can and should take its rightful place in the world of historically significant legal systems.

Accessibility to the masses, spontaneity and non-repudiation in the settlement of disputes, ensuring the impartiality of the court and freedom of proof, unlimited in any way the participation of representatives of the parties and each of those present in the process, the desire for reconciliation of the parties and ensuring greater logical and convincing judicial decisions in the eyes of the public and when they were determined cruel and severe punishments for the guilty party, made up the form and content of the traditional Biysk court.

The famous biys created a kind of legislation in folk customs, which, in all respects, can be said to be very satisfactory, and are not without justification, at least in applying them to the conditions and needs of Kazakh life. If the majority of the studied sources and works of modern scholars are devoted mainly to the study of the material side of the common law of the Kazakhs, then its procedural side requires further careful study. The procedural rules of customary law of the Kazakhs in their entirety, or rather in the

system, form the institution of procedural law or the institution of litigation under the customary law of the Kazakhs.

Research results. L.A. Slovkhotov emphasized: “Each legal institution, as well as the general legal system of the people, has developed under the influence of historical-genetic, territorial, everyday, religious and other factors of people's life ... The people's legal proceedings in Kyrgyzstan are open, public, uncomplicated, and short-lived. For many years of their life, the people developed a peculiar, but completely understandable structure of lawsuits. Having circumvented such a bureaucratic element, which is so harmful to justice, the nomad, with all his underdevelopment, created an adversarial process of a national-family character” [3, P.102].

In our words, in our opinion, two main points should be singled out. Firstly, the publicity, publicity, uncomplicatedness and speed of the judicial process under the common law of the Kazakhs, which meets the international principles of justice over the centuries, expressed in openness, publicity, orality and other characteristics that are fundamentally important for any justice. Secondly, Slovkhotov singles out as an extremely important circumstance the absence of an absolutely harmful and characteristic bureaucratic element, including for the modern judicial process. The bureaucratic element always breaks the necessary connection between justice and society and its members, and undermines the credibility of the court.

In other words, the absence of a bureaucratic element is one of the most important distinguishing features of the lawsuit under the common law of the Kazakhs. The first Kazakh encyclopedic scientist Chokan Valikhanov also noted this important feature of the lawsuit developed in the Kazakh steppe over the centuries: “... The main advantage of *biy* court, in our opinion, is the absence of formalities and any official routine” [4]. “Formality”, or rather, formalism reaching the absurdity and “official routine”, according to Ch.Ch. Valikhanov, and are the defining features of the state court.

Other authors wrote about the openness, publicity and orality of the trial, as its fundamental principles, while their statements significantly complemented each other.

“With regard to justice, the Kyrgyz courts are very demanding: in order to win in their eyes and stand, so to speak, on the basis of unshakable fame, first of all, one must thoroughly know the traditions and customs that have been sanctified for centuries. It is also necessary to have a huge memory for an oral solution of cases, sometimes requiring the presentation of the smallest details of the entire course of the case with a large crowd of people; then justice- her presence is most important. That is why not every Kyrgyz can be a *behem* in the Steppe,” A.I. Krakhalev rightly remarked in due time [5, P.122].

His contemporary L.F. Balluzek substantially supplemented it: “Due to the lack of any education among the Kyrgyz and their illiteracy ... an oral court should have been established, with its characteristic openness and publicity, - a court in which every case, starting from the simplest offense of a person with a word to the highest criminal offense or murder, and from the most unimportant theft to a significant barymty, it was examined and judged verbally, without the slightest participation of a pen and paper”. In one L.F. Balluzek was the injustice, publicity and publicity of the trial, not only among Kazakhs, but in all other legal systems, is not a consequence of illiteracy, but a necessary condition, the most important principle of the trial [6, P.114].

This principle in the modern judicial process of our country is regulated by the relevant norms of the Code of Civil Procedure and Code of Criminal Procedure of the Republic of Kazakhstan (Articles 29, 311 and others). Modern researcher K.A. Alimzhan also highlights publicity and publicity as important features of the *biy* court. Even if the *biy* as a judge was recognized by both parties, he could (or should) have invited the other *biy* as judges or invited people respected in the society who, not taking a direct part in the decision, by the fact of their presence and appropriate behavior ensured his authority and legitimacy. Any person had the right to witness the trial. There were no restrictions in this regard. The concept of a private meeting is not known in Kazakh customary law.

The author emphasized another important feature of the *biy* court, which was that the trial considered conflicts not only and not so much between private individuals, but more so between clans and tribes, which gave their decisions the character of a legal doctrine.

The absence of bureaucratic formalism as another sign or feature of the lawsuit in the common law of the Kazakhs, of course, did not mean that this process itself was not clothed in a certain form. The *biys* court, of course, had a certain form, but it was not imposed “from above” by the countless instructions and rules of officials from the court. The popular form of court has been developed for centuries by the people, by eliminating possible errors and instilling the most effective techniques through natural selection.

Therefore, it is no coincidence that different peoples and at different historical times in the forms of the judicial process have much in common, the most rational, which made it possible to efficiently and quickly, and, most importantly, honestly and fairly, administer justice. How and when a certain form of legal proceedings arose in traditional Kazakh society is rather difficult to determine.

This statement refutes the established opinion that the court under the common

law of the Kazakhs was exclusively of a lawsuit and private law nature. In this regard, we agree with K.A. Alimzhan, who noted: "that conflicts involving litigation in legal systems based on customary law are not private in nature, as is now commonly believed. Any such conflict was obviously socially significant, because, firstly, autonomous communities consisted not so much of individuals as such, but of various micro groups (family, gender, etc.), i.e. damage to a person is inevitable involved a lot of other people in the conflict, especially if it was a conflict between people who are not related; secondly, the validity of such disputes was confirmed by the unconditional right to appeal to public law (judicial) institutions" [7, P.151].

Therefore, the definition of conflicts and the lawsuit as having a private nature is inaccurate in essence. "... The court of biys and their congresses," said the people, "has existed with us for a long time and contains all the principles of a world court, now proposed by the Russian government. This court, the assembled Kyrgyz continued, "fully satisfies the conditions of our national life, therefore the court of biys and congresses must be left in ancient folk form," appealing to the people Ch.Ch. Valikhanov spoke out in his "Note on judicial reform" and then expresses his reasoned point of view on the proposed draft court reform in the Kazakh steppe: "If the 40-year-old Russian rule, which introduced many completely new elements into the public life of the Kyrgyz people, had no influence on the ancient Kyrgyz court of biys, if this court could resist the unfavorable conditions of Russian law (for example, the law of 1854), it's clear that he is fully satisfied with the real development of the Kyrgyz people. In favor of the court of biys, we can cite another major fact that speaks for itself. This is what the Russian plaintiffs or Russian defendants in many cases prefer the court of biys to the Russian investigation. It is known for certain that in Kokchetav this summer several dozen such cases were decided", Ch.Ch. Valikhanov confirms his point. In our opinion, the last argument of Ch. Valikhanov that many Russians appealed to the biys court emphasizes, among other things, the absence of a bureaucratic element in it, which objectively attracted just such a court, including the Russian population of Kazakhstan [8, P.81].

Ch.Ch. Valikhanov noted for the first time that the biys court has much in common with the Russian arbitral tribunal, however, he also pointed out the significant differences between these forms of legal proceedings: "1) Biys exist in an indefinite number, while justices of the peace rely on several each world district. 2) Biys are not formally elected by anyone and are not formally approved by anyone. Their significance is based on private authority, which they acquire in the same way as poets, scholars, and lawyers in Europe. ... For the choice of magistrates, there is a certain order and qualification. 3) Biy then only a judge, when litigants appeal to him, they turn to him while he enjoys a good reputation, only the loss of authority deprives him of his biish rank. Justices of the peace are elected for three years and, while serving, enjoy permanent rights and obligations. 4) The biys do not receive any maintenance either from the treasury or from the people, but they take the "biidin biligi", and the justice of the peace relies on a certain amount from the zemstvo dues for the maintenance of himself and the expenses of his office. 5) The congresses of biys are not periodic but random, and a certain term is appointed for the congresses of justices of the peace. 6) The justice of the peace shall decide the cases on his own, and the court of biys may be single-handed only if the litigants belong to the same family with the bi and will themselves wish one judge" [9, P.91].

One of the most important conclusions made by Ch.Ch. Valikhanov, and even relevant now, should be considered the following: "There is no doubt that the law is good for the people that are more familiar to him, the native law, according to which a person grew up and was brought up, no matter how perfect this law should seem to him better, clearer and clearer than the wisest legislations taken from the outside and imposed from above ... But the reforms are violent, grafted, based on abstract theories or taken from the lives of other peoples, so far constituted the greatest disaster for mankind" [10, P.5].

In the conclusion, we emphasize that this statement by Ch.Ch. Valikhanov is very relevant in our time, when a deep reform of the modern Kazakhstani court is carried out. Foreign, even positive experience, forcibly instilled on other soil, without taking into account traditional national conditions, in any field can give results diametrically opposed to the expected effect.

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СОТ БИЛЕРДІҢ ДӘСТҮРЛІ ҚАЗАҚ ҚОҒАМЫНЫҢ МЕМЛЕКЕТТІК БАСҚАРУЫНДАҒЫ ОРНЫ МЕН РӨЛІ

Аннотация. Қазақ билер соты ұрпақтар жадында тәуелсіз, кәсіби және парасатты сот төрелігі ретінде сақталып, орнатылды. Әр халықтың ғасырлар бойғы тарихында кейінгі ұрпаққа құрмет көрсетіліп, оларды мақтан тұтатын, өмір жолының маңызды кезеңдері, рухани кезеңдері ретінде есте сақтайтын оқиғалар, даталар мен тұлғалар бар. Мұндай құбылыстар әлдеқайда аз болса да, институционалды құрылымдар мен институттардай маңызы бар, олар өркениеттік маңызы бар немесе тіпті жалпыадамзаттық құндылыққа ие болғандықтан адамдардың жаңа ұрпақтарының жадтары мен саналарын жинақталады. Олар болашаққа бағдар ретінде және ұзақ мерзімді маңызы бар мұра ретінде сақталады және өмір сүреді. Бұлар есте қаларлық тарихи құбылыс - бұл қазақстандық сот ісі - қазақ түріктерінің көшпелі қоғамының негізінде құрылған билер соты, әділеттіліктің «Алтын ғасыр» атауын құрастырды. Осы құбылыс әрқашанда адамдар жадында мәңгі тірі алау болып қала берді.

Көп ғасырлық тарихы бар және ар-ождан, мен әділдікке негізделген қазақ билері ұрпақтан ұрпаққа өздерінің шынайы жоғары адами қасиеттерін берді. Істің мән-жайына қарамастан, ең қиын шешілгендердің өзінде, ол әрдайым дұрыс шешім тауып, қабылдады. Тіпті қазақ даласының әкімшілік құрылымын реформалау кезінде де дана сөз, нанымның талантымен және халықты біріктіре білді және пайда болған саяси шиеленістерді шешеді. «Бидің» сөзі ешқашан ескерусіз қалмады, дау айтылмады, ол әрқашан отандық нақыл сөз ретінде естілді. Қазақстан тарихында билердің әділдігі батыс мәдениеті мен қазіргі заман құқығы үшін Рим құқығы сияқты рөл атқарды. Ежелгі дала құқығы өмірінің жоғары моральды негіздері байлық немесе билік ұғымынан гөрі құнды болды. Осы идеалдардың арқасында билердің қазақ соты даланың мемлекеттік даму барысына ықпал еткен нақты саяси күшке айнала білді. Тарихшылар бұл кезеңді «әділ соттың алтын ғасыры» деп атады. Билердің қызметі тек қана сот төрелігін жүзеге асырумен ғана шектелмей, қоғам өмірінің басқа салаларына белсене қатысты: біріктіруші және жасаушы рөлінде болды. Олардың пікірлері сұлтандар мен хандардың жоғары ақсүйектері үшін де салмақты және танылатын болды. Көбінесе билер көшпенді ұжымдардың басында тұрды. Осылайша, сол уақытта сот өте құрметті және тәуелсіз орган болды.

Қазақ қоғамында «би» атағы мұрагерлік немесе жалынды емес, лайықты құрметті атаққа ие болды. Би тағайындалмаған және сайланбаған. Мұндай адамдарға қойылатын негізгі талаптар: қарапайым құқық нормаларын толық білу, шешендік талант пен адалдық. Әділ адам би атағын сөзсіз жоғалтпаған, өйткені ешкім оған әділ шешім үшін жүтінуге мүмкін емес деп санаған жоқ. Мінез бедел сот төрелігінің қажетті және жеткілікті кепілі болып табылады. Билер адамгершілік пен әдет-ғұрыптарды, идеологияны, жазылмаған құқықтық ұстанымдарды, құқықтық ережелер мен нормаларды жетік меңгерген адамдардан құралған әлеуметтік топ болып табылады. Бұл адамдар халықтың оң қырынан шыққан, өзінің даналығымен және шешендік дарындылығымен олар туындаған барлық дауларды тамаша шешкен, ол үшін лайықты құрметке ие болған. Біздің ата-бабаларымыз билерді, олардың тазалығы мен мөлдірлігі үшін, олардың табиғи дарындары үшін - олар халықтың ар-намысы мен абыройына ие болды. Терең ақыл, жоғары интеллект, кең ой-өрісі мен данышпандығы-халық та, мемлекеттік деңгейде де мойындалған және қастерлі болу үшін биге ие болуы тиіс жеке қасиеттер. Би институты далада маңызды рөл атқарды. Мүдделі тараптар басқа туыстармен келіссөздерде билерді таңдап, әділ шешім шығара алады. Қазақ соты тараптардың татуласуын және олардың арасындағы бейбітшілікті қамтамасыз етудің, қоғам ішіндегі және аясындағы бірлік пен бүтіндікті қамтамасыз етудің маңыздылығын негізге ала отырып, қоғамдық маңызы бар ақауларды жою қажеттілігін негізге ала отырып, оған тараптар жүгінген даулар мен келіспеушіліктерді шешті. Дәл осы, соттың қарапайым міндеттері би-төрешілер дала даналықтарының мектептерінде білім алуын талап еткен.

Түйін сөздер: бий, энциклопедист, дәстүрлі қазақ қоғамы, сот процессі, көшпелі өркениет, арбитр, әдет-ғұрып, дипломатиялық қызмет, тұрақтылық, сот функциялары.

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МЕСТО И РОЛЬ СУДА БИЕВ В ГОСУДАРСТВЕННОМ УПРАВЛЕНИИ ТРАДИЦИОННОГО КАЗАХСКОГО ОБЩЕСТВА

Аннотация. Казахский суд биев сохранился и утвердился в памяти поколений как независимое, профессиональное и мудрое правосудие. В многовековой истории каждого народа бывают события, даты и личности, которым дают дань последующие поколения и гордятся ими, вспоминают о них как примечательные и важнейшие вехи, духовные рубежи пройденного ими жизненного пути. Бывают, хотя намного реже, и такие явления, институциональные структуры и учреждения, которые стойко держатся и овладевают памятью и умами новых поколений людей в силу того, что они имеют цивилизационное значение или даже общечеловеческую ценность. Они сохраняются и живут в их мыслях как ориентация на будущее и наследие, имеющие непреходящее значение. Таким памятным историческим явлением является казахское судопроизводство - суд биев, формировавшееся в недрах кочевого общества тюрков-казахов, составившее и получившее наименование «Золотой век» правосудия. Оно, когда его уже не было, оставалось вечно живым факелом в памяти народной.

Казахский суд биев, имевший тысячелетнюю историю и основанный на совести, чести и справедливости, передавал свои истинно высокие человеческие качества из поколения поколению. Независимо от обстоятельств

дела, пусть даже самых трудноразрешимых, он всегда находил и принимал правильное решение. Даже в период реформирования административного устройства казахской степи, бии мудрым словом, талантом убеждения и умением сплачивали народные массы и разрешали возникающие политические обострения. «Слово» бия никто, никогда не игнорировал, не оспаривал, оно звучало всегда как отечественное наизидание. В истории Казахстана правосудие биев сыграло такую же роль, как и римское право для западной культуры и современного права. Высокоморальные основы жизни древнего степного права были более ценны, нежели понятия богатства или власти. Благодаря приверженности этим идеалам казахский суд биев сумел стать реальной политической силой, повлиявшее на весь ход государственного развития степи. Не случайно этот период истории называли «золотым веком правосудия». Деятельность биев сводилась к осуществлению не только правосудия, они активно участвовали в других сферах жизни общества: выступали в роли объединяющего и созидającego. Их мнения были весомыми и признаваемыми даже для высшей знати султанов и ханов. Нередко бии стояли во главе кочевых коллективов. Таким образом еще в те времена суд являлся весьма уважаемым и независимым органом.

В казахском обществе титул «бий» был не столько наследственным или жалуетым, сколько заслуженным почетным званием. Бии не назначались и не избирались. Основными требованиями к таким людям были: доскональное знание норм обычного права, обладание ораторским талантом и честность. Бесчестный человек неизбежно утрачивал звание бия, так как никто не считал возможным обращаться к нему за справедливым решением. Безупречная репутация являлась необходимой и достаточной гарантией правосудия. Бии представляли собой социальную группу, сложившуюся из людей, в совершенстве изучивших нравы и обычаи, идеологию, неписаные правовые устои, правовые правила и нормы. Эти люди были выходцами из самой гущи народа, своей мудростью и ораторским талантом они блестяще разрешали все возникавшие споры, за что пользовались заслуженным уважением. Наши предки почитали биев, за их чистоту и прозрачность, за их природный дар – они были совестью и честью народа. Глубокий ум, высокий интеллект, широкий кругозор и гениальность – вот те личные качества, которыми должен обладать бий, чтобы быть признанным и почитаемым как на народном, так и на государственных уровнях. Институт биев играл существенную роль в Степи. Заинтересованные стороны выбирали биев, которые могут представить род на переговорах с другими родами и вынести справедливое решение. Казахский суд решал споры и разногласия, с которыми обращались к нему стороны, исходя из важности обеспечения примирения сторон и мира между ними, единения и обеспечения единства внутри и в сферах общегития, исходя из необходимости искоренения не столько личных, сколько пороков общественного значения. Именно эти, далеко не простые задачи суда насущно требовали того, чтобы бии-судьи учились в школах степных мудрецов.

Ключевые слова: бий, энциклопедист, традиционное казахское общество, судебный процесс, кочевая цивилизация, арбитр, обычаи, дипломатическая деятельность, стабильность, судебные функции.

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