IRSTI 10.09.91 https://doi.org/10.26577/JAPJ-2019-4-j1

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THE DEATH PENALTY IN THE PUNISHMENT SYSTEM OF TRADITIONAL KAZAKH LAW

Abstract. The article is devoted to the study and analysis of the institution of the death penalty in the traditional law of the Kazakhs. The traditional law of Kazakhs was formed under the influence of nomadic lifestyle and political and legal structure.

The criminal law of the traditional nomadic society of Kazakhs is characterized by the presence of two basic principles. This is the principle of collective tribal responsibility and the principle of composition.

By the period of the accession of Kazakhstan to Russia in the Kazakh customary law, there was the following system of punishments: death penalty, corporal punishment, shameful punishment, extradition of the guilty party of the victim, expulsion from the tribal community, Kun, Aip.

Analysis of customary law shows that the death penalty under Kazakh customary law was applied very rarely and only with the consent of the Kurultai-people's Assembly. This rule lasted until the 18th century.

Starting from the second half of the 18th century, khans and sultans in Kazakh society began to use the death penalty more often, both against their political opponents and those who stubbornly disobey them.

The analysis of historical and legal literature shows that in the traditional legal systems of Central Asia and Kazakhstan there were many types of capital punishment.

Key words: right, society, tradition, kun, ayip, death penalty.

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Қазақ дәстүрлі құқығы бойынша жазалау жүйесіндегі өлім жазасы

Аңдатпа. Бұл бап қазақтардың дәстүрлі құқығындағы өлім жаза институтының зерттеуіне және талдауына арналған. Қазақ халқының дәстүрлі құқығы көшпелі өмір салты мен саяси-заңдық құрылыстың ықпалымен құрылды.

Көшпелі қазақтар қоғамының қылмыстық құқығына екі негізгі қағиданың бар болуы тән. Олар – ұжымдық рулық жауапкершілік және композиция қағидасы.

Қазақстанның Ресейге қосылу кезеңінде қазақтардың кәдімгі құқығында келесі жазалау жүйесі пайда болды: өлім жазасы, дене жазалары, масқаралау жазалары, кінәлінің жәбірленген жаққа берілуі, рулық қауымнан қуылу, кун, және айып.

Кәдімгі-заңдық ережелердің талдауы өлім жазасының кәдімгі заңдық құқық бойынша орындалуы өте сирек кездескендігін көрсетеді. Бұл тек құрылтайдың – халықтық жиналыстың шешімімен орындалған. Бұл ереже 18 ғасырға дейін жетті.

18 ғасырдың екінші жартысынан бастап, хандар мен сұлтандар қазақ қауымында өлім жазасын жиірек орындай бастады: өздерінің саяси жауларына да қарсы, қайраттанып бағынбағандарға да қарсы.

Тарихи-құқықтық әдебиеттің талдауы Орталық Азияның және Қазақстанның дәстүрлік құқықтық жүйелерінде өлім жазасының талай түрлерінің болғанын көрсетеді.

Түйін сөздер: құқық, қоғам, дәстүр, құн, айып, өлім жазасы.

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Смертная казнь в системе наказаний традиционного права казахов

Аннотация. Статья посвящена изучению и анализу института смертной казни в традиционном праве казахов. Традиционное право казахов сложилось под влиянием кочевого образа жизни и политико-правового устройства.

Для уголовного права традиционного кочевого общества казахов характерно наличие двух основных принципов. Это – принцип коллективной родовой ответственности и принцип композиции.

К периоду присоединения Казахстана к России в казахском обычном праве сложилась следующая система наказаний: смертная казнь, телесные наказания, позорящие наказания, выдача виновного стороне потерпевшего, изгнание из родовой общины, кун, аип.

Анализ обычно-правовых норм показывает, что смертная казнь по казахскому обычному праву применялась крайне редко и только с согласия курултая – народного собрания. Это правило действовало вплоть до 18 века.

Начиная со второй половины 18 века, ханы и султаны в казахском обществе стали чаще применять смертную казнь как в отношении своих политических противников, так и лиц, упорно не повинующихся им.

Анализ историко-правовой литературы показывает, что в традиционных правовых системах Средней Азии и Казахстана существовало множество видов смертной казни.

Ключевые слова: право, общество, традиция, кун, айып, смертная казнь.

Introduction

An integral element of the history of Kazakh society is the legal system. It was formed under the influence of nomadic lifestyle and political and legal systems.

As a rule, the behavior of people in traditional society is subject to the norms developed in society, certain stereotypes of behavior, the justification of which is the reference to such phenomena as Shezhire, laws of ancestors, including the first codification of Kazakh customary law. It is at the level of blood-related relations in the traditional Kazakh society that the process of educating the individual nomad takes place, laying in him the principles taken for faith in the nomadic society, stable beliefs generated by the worldview of nomads, which found expression in such peculiar phenomena as gerontocracy-respect for elders in age and kinship; meritocracy-the distinction between the categories of "good" and "bad", questions of origin and heredity, moral attitudes, good manners; collective ideas about tribal unity, religious beliefs, legends, norms of morality and law, symbolic elements of which are Tamga, Urans, various forms of mutual assistance, assistance between relatives and tribesmen, such as Asar, Zhylu, Zhurtzhylyk; adherence to a greater extent the norms of Adat, to a lesser extent shariat, as well as samples of customary law: amengerism, ant, barymty, etc. all those fundamental motivational attitudes that are initially focused on the self-knowledge of the nomadic society, assuming the identification of their " I "with the personal generic self-consciousness of"We". Strict strict observance of these provisions served as a "guarantor of life both for the individual Kazakh and for the entire Kazakh people as a whole" (Orazbayeva 2005: 168, 216).

Kazakh law, which has more than a long history, based on democratic and humanistic ideals, has stepped over its era. Until the beginning of the twentieth century, Kazakh customary law continued to maintain its regulatory function. Academician S. Z. Zimanov explains such longevity of the Kazakh law by two factors: first, economic and ideological foundations of nomadic civilization on a vast territory. Secondly, the maximum approximation of the Kazakh customary law to the people themselves, to the logic of his life (Zimanov 2004: 17).

Main part

The customary law of the Kazakhs was designated by the term adet or law. Quite often in the Kazakh society expressions and terms uniform for customs and usually-legal norms were used: "Eski

adet", "Adet guryp", "Ata-Baba salty" (ancient, long customs, traditions, customs of ancestors).

At the same time, when it was necessary to emphasize the importance of norms, other terms were used: "Zhora", "Jargy", "Zhol", "Zhoba", which can be translated as "rule", "establishment", "once tested way", "rules-guidelines". Sometimes these terms were used in a pair combination: "Zhol-Zhora", "Zhol-Zhoba". But the term "jargy" is not associated with other concepts.

As academician S. Z. Zimanov emphasized, " the types and forms of responsibility and punishment in the Kazakh law are extremely rich and diverse. There is a large choice that provides, on the one hand, great scope for the actions of courts and judges, and with another – imposes on judges a special responsibility for logical, business and moral reasons for its decision while choosing responsibility. Here just also personal qualities of the judge and his intellect which are valued not less, than an outcome of business" (Zimanov 2004: 632) have to be shown.

The basis for punishment in the law of traditional society was the Commission of a crime.

Researcher Useinova K. R. notes that "although in the Kazakh customary law, there was no clear distinction between the concepts of criminal offense and civil offense, yet the differences between criminal liability and civil liability, though weak, existed. In contrast to civil liability, which provides for compensation for the harm caused, criminal liability provided for a certain type of punishment. However, in practice, there was a mixture of these two types of responsibility" (Useinova 2007: 112 p.) That is why, in our opinion, the criminal law of the traditional nomadic society of Kazakhs is characterized by the presence of two basic principles. This is the principle of collective tribal responsibility and the principle of composition that we mentioned earlier.

Here is how N. Rychkov describes the presence of the ancestral origin in the Kazakhs: "No one in the Kyrgyz has such power to punish at the discretion of at least the most serious crime, no one, not even the rulers themselves, let alone the military chiefs. The stronger the race to which one belongs, the greater his influence and authority, for in case of need he can use the power of his kind for his protection, in addition to all justice. To move the Kyrgyz in any case only with the approval of many generic heads; the command of the Khan has relatively little value (Rychkov 1772: 104).

Relations of relatives of clan and non-clan, both internal and intergroup, were subject to strict etiquette, each line was carefully regulated for each subject – mutual rights and obligations, the level of claims to honor and gifts, the boundaries of reverence, permissiveness and impermissibility, prohibitions and penalties...all possible and even extremely rare situations on the scale of law, duties were painted. The system of rights and duties acted as a single and integral etiquette in the full sense of the word...the penalties were different up to the most severe – rejection from the native environment, that is, in fact, complete exclusion from the members of a single family. For a normal person there was no more terrible and shameful punishment" (Nazarbaev 1999: 296)

The presence of the same principle of composition, according to researcher K.R. Useinova, did not mean that criminal law relations in the Kazakh society were underdeveloped, as some researchers try to imagine. The existence of a system of fines and ransoms, in our opinion, meant only that property relations were developed in the Kazakh society (Useinova 2007). Some researchers of the past and present have criticized Kazakh customary law for the presence of the principle of composition. Thus, N. Rychkov believed that the Kazakhs have neither legal norms nor courts to resolve legal disputes. The responsibility under Kazakh customary law for committing murder and theft seemed to him at least very strange. In particular, he points out that " the set of legal provisions against theft, is the name of the Kyrgyz aybana. By force of these laws, the thief detained with a horse or with a sheep, brought to the foreman of the ulus, is obliged to pay 27 horses or sheep. It rarely comes to the point that any Kirghiz came under this court against theft: among his Kirghiz, in General, does not allow his thieving inclinations to break through, once he satisfies these inclinations to the full in neighboring countries" (Useinova 2003: p.44) One of the leaders of the Alash party, who dealt with the problems of Kazakh customary law, Dzhansha Dosmukhamedov, comes to a slightly different, more original conclusion. Based on the analysis of the principle of composition, which existed in the traditional law of the Kazakhs, Dosmukhamedov points out that in favor of this principle, " the character of the people speaks, the Kyrgyz (Kazakhs) are by nature very intelligent, impressionable and responsive. Full freedom, charming charm of fragrant nights of steppe, luxury of beauty of the spring nature-all this had to pacify to a certain extent cruelty in the nomad-Kyrgyz-and wide and free, a velvet carpet of a green murana the steppe inspired them with a community of interests, kinship of relations, it

(steppe) in itself was the element forcing all living on it to be considered more or fewer members of one family... " (Sajmanova 2019) As a representative of the indigenous population of the steppe, Dzhansha Dosmukhamedov very simply and clearly explained the existence of the principle of composition in traditional law, taking as a fulcrum the conditions, life, and manners of the Kazakhs, without inventing any over scientific explanations. It is difficult to disagree with this.

Kazakh customary law did not know a clear definition of the concept of "crime". Under the crime was understood to be "a bad thing", "bad behavior".

Formally, the crime was understood as inflicting moral and material harm to the victim. There was no clear distinction between a criminal offense and a civil offense in Kazakh customary law.

The subject of the crime under Kazakh customary law could only be a person. Animals and inanimate objects were not the subjects of the crime. Also, the subjects of the crime were not insane, mentally retarded, deaf and dumb. Slaves, too, could not be the subject of a crime.

Thus, the subject of the crime could be a natural, sane person, freely disposing of their property.

The subjective side of the crime was characterized by the presence of guilt. There is already a distinction between intentional and unintentional criminal acts. Intentional acts implied the existence of direct intent in all other cases of unintentional acts.

For the qualification of crimes, elements of the subjective side, such as the method, place and time of the crime, also played an important role.

The most serious crime from the place of its Commission was considered a crime committed in his native village. It was punished more severely than a crime committed in a foreign village.

The timing of the crime was equally important. Thus, theft committed during the day was punished more severely than theft committed at night, since in the first case it was associated with a special audacity and neglect to be noticed.

Of great importance for the qualification of crimes was the method of committing the crime. According to the Kazakh common law murder mystery, as it is, in the opinion of the legislators was connected with the robbery. An apparent murder was understood to be a murder committed in a quarrel, a fight, etc.

Kazakh customary law already knew the institution of complicity. However, it has not yet distinguished the degrees of complicity in the crime. All accomplices were equally, that is, jointly and severally liable.

As for the Institute of necessary defense, it should be noted that the laws of Tauke this Institute was not known.

Responsibility for the crime occurred from the age of 13.

By the period of the accession of Kazakhstan to Russia in the Kazakh customary law there was the following system of punishments:

- death penalty;
- corporal punishment;
- shameful punishments;
- extradition of the guilty party to the victim;
- expulsion from the ancestral community;
- kun;
- aip.

One of the main principles of "Zheti-Jargy" was the proportionality of punishment to the crime committed, that is, the principle of Talion (an eye for an eye, a tooth for a tooth).

According to some authors, " the application of the death penalty as a capital punishment by individual khans, sultans depended on the influence they enjoyed among the people, especially among the tribal nobility. The khans and sultans sentenced to death only those who did not have strong advocates behind them. Because each case of application of the death penalty was an occasion for a new crime, the emergence of barymta, lynching and other arbitrary actions" (Kozhonaliev 2000)

Analysis of customary law shows that the death penalty under Kazakh customary law was applied very rarely and only with the consent of the Kurultai-people's Assembly. This rule lasted until the 18th century.

Such a rule also worked in the nomadic and semi-nomadic environment of the Kyrgyz, where Adat prevailed. Thus, the researcher of Kyrgyz customary law Kozhonaliev S. K. notes that " the Death penalty by the court of biys was much rarer among the Kyrgyz than murder by revenge, lynching, barymta, etc. (Borubashov 2009: 284)

Another Kyrgyz researcher Borubashov B. I. notes: "in the second half of the XIX century. the death penalty as a form of punishment is not provided. Kun (ransom) was the most common form of punishment in Kyrgyz customary law... Paid kun cattle, things, money. At the same time, its size was not established and depended on the property and legal status of the victim and the perpetrator in society (Valihanov 1985)

Thus, based on the statements of the scientist, we can conclude that the death penalty for murder in the Kyrgyz in the second half of the XIX century. was imposed only in respect of persons who are

not able to pay the kun for the life of the murdered. Starting from the second half of the 18th century, khans and sultans in Kazakh society began to use the death penalty and other severe punishments more often, both against their political opponents and those who stubbornly disobey them. CH. CH. Valikhanov wrote: "not one Kyrgyz Khan did not have such unlimited power as Ablay. He was the first to grant the death penalty to his arbitrariness, which was carried out before not otherwise than according to the position of the people's diet" (https://www.eurasialegal.info/index.php?option=com_content&view=article&id=630:2011-03-03-07-33-52&catid=2:right-of-the-countries-cis&Itemid=1) This statement Valikhanov confirms the fact that the death penalty has become more often used in a relatively late period. With the consent of the injured party, the death penalty could be replaced by a ransom (kun).

As a rule, those guilty of the murder and rape of a married woman or a betrothed girl were sentenced to death. With the consent of the injured party, the death penalty could be replaced by kun.

If we talk about the types of the death penalty, they were diverse in the traditional Kyrgyz society. These include hanging, strangulation, leaving in the mountains bound to the wolves, drowning, pushing off the rocks, tying the tail of an untrained wild horse, etc.

The analysis of historical and legal literature shows that in the traditional legal systems of Central Asia and Kazakhstan there were many types of capital punishment. But we cannot regard them as inherent in customary law proper. For example, such punishment as stoning is more inherent in Muslim law. Such types of punishment as hanging from trees, impaling, burning on coals, starvation, cutting the throat, cutting the body into pieces, cutting the abdomen with the insertion of hands, feet, and head can not be attributed to the punishments of the customary law of the Kazakhs.

In the Kazakh law of traditional society, if the perpetrator was sentenced to death and relatives for some reason did not pay the kun, the execution was carried out either by strangulation or by hanging on a camel.

Corporal punishment is the most ancient Kazakh customary law was not known. The laws of Tauke did not provide for such punishment and in his time the court of Biy did not impose such sentences. The reason for this was that with the weakness of the state power, the use of cruel penalties usually caused internecine war, blood feud, and barymta, sometimes ending in the extermination of entire villages. After the accession of Kazakhstan to Russia in 1838 was introduced punishment shpitsrutenami.

Shameful punishment pursued one goal – to shame the offender in public, in front of all the people. The condemned to shame was subjected to the following humiliation: they put a dirty felt around his neck, put him on a cow or donkey backward and drove around the village, and then the condemned had to publicly make a solemn promise, an oath not to commit any more criminal acts.

Extradition of the guilty party to the victim was applied if relatives of the guilty did not wish to pay kun or aip. In this case, the injured party at best could force the convict to work kun or aip, and at worst to punish at its discretion.

Expulsion from the tribal community was considered a heavier punishment than the death penalty. Guilty sentenced to this type of punishment, cut off the hem of the clothes and expelled from the community, declared it illegal.

One of the most common types of punishment in the system of Kazakh customary law was kun (ransom). Kun-the Persian word which designates the payment for murder and the mutilation exempting guilty from blood (patrimonial) revenge or lawful prosecution. The death penalty and corporal punishment could be with the consent of the victim or his relatives replaced by the verdict of the court kun, that is, payment for blood and injuries. By paying the Kun, the perpetrator or his relatives were exempt from private vengeance and further legal prosecution. Kun among the Kazakhs and many other peoples of Central Asia and Kazakhstan was essentially the same as Vira and anniversary in Kievan Rus. Size purchase, according to legal monuments of different Nations, bore a class character. Thus, according to the law of Khan Tauke, the life of an ordinary man was estimated at 1000 rams, or 100 camels, or 200 horses, and the life of a woman was estimated at the half as much. This rule did not apply to members of the noble family, for their lives had to pay sevenfold the size of the Kun of an ordinary man. According to Russian truth, the amount of the fine also depended on the position of the person (40 hryvnias for the murder of a common man, 80 hryvnias for the murder of a privileged).

Kun was beneficial only for representatives of the propertied class, since, being exposed even in the most serious crimes, they were completely exempted from the death penalty or other more serious criminal penalties by payment of kun. At the same time, the application of the kun system also helped to reduce the number of useless bloodsheds,

to reduce mutual hostility and internecine strife among the members of the ruling class itself. So, for example, Maksimov N. in this regard wrote: "... for the murder of a person relies on penalty kun. However, Kun is not criminal punishment and a civil sanction, we can say, the value of the person". Soviet historian V. F. Shakhmatov, well familiar with the materials of customary law, also States: "with defaulters exacted" kun " force. But this strict observance of tribal traditions by the Khan and sultans pursued one goal – to appropriate most of the "kun". At that time, the main punishment imposed on the perpetrator was fine, which was collected in whole or in part in favor of the victim. Such penalty in case of its imposition for infringement of non-property rights of the person, obviously, it is possible to consider and as monetary compensation for the physical and moral sufferings caused to the victim. Therefore, we believe that kun was a measure of criminal punishment with elements of compensation for material and moral harm (Isagaliev 2003: 152)

Kun is a ransom paid by agreement of the parties by the guilty party to the injured party in the case of the most serious crimes, that is, murder or grievous bodily harm. Kun was two species: the main and an additional. The value of Kun depended on the social status of the victim and the severity of the crime. For the murder of an ordinary commoner, a kun was paid in the amount of 1000 rams, 200 horses or 100 camels. For the murder of a woman, a Kun of 500 rams, 100 horses or 50 camels was paid. In the case of the murder of the representative of "white bones" were paid seven kuns, that is 7000 sheep. For the murder of a slave, his master was paid a kun in the amount of the value of a hunting dog or Golden eagle.

As a rule, the kun was paid not by the culprit himself, but by his community.

Additional on were of two kinds: on the art of kun and kun on the bone. The first view of a Kun was introduced to poets, famous wrestlers, judges, and scientists.

For the murder of this category of people guilty paid kun in double size, as for the murder of two simple people. Kun on bones was imposed on the guilty in case of destruction of traces of the crime by it.

One of the most common types of punishment in Kazakh society was also "Aip" (fine). Aip on the Kazakh customary law the same as "sale", "lesson" taken together on "Russian truth". Aip is a punishment imposed by a court for a crime, but at the same time, it is a reward collected in favor of the victim or his relatives. He was appointed mainly for property crimes, as well as for crimes against the person (except murder and grievous bodily harm), against the order of management and for some other categories of crimes.

Usually, for various crimes, Aip was appointed in the amount of one "Toguz", but often there were cases that for more important crimes Aip reached three Toguz and even higher. For minor crimes, "Ayak-Toguz" was replaced by the so-called "tokal" (abbreviated) Toguz, consisting of 8 different small heads of cattle. For a misdemeanor appointed Aip "atchapan" – a horse and a robe, Aip "at-ton" – a horse and a fur coat or anything one thing. Aips were paid by the perpetrator or his close relatives, provided that the immediate culprit was not found or appeared in court, or if he was unable to pay the designated Aip. At insolvency of close relatives, responsibility for payment of the put aip was assigned to the whole aul to which the guilty belonged. Practically, the norms that operated in the customary law of the Kazakhs in solving this issue are similar to the norms of Russian Truth. The principle of imposing collective responsibility on the members of the community, very long preserved under Patriarchal-feudal relations among the Kazakhs and other nationalities, was one of the most reactionary customs of the ancient era, which served as an instrument of subordination of the oppressed masses of workers to the will of the ruling class.

In the pre-revolutionary literature and practice of the tsarist administration, there was a wrong view of the Aip as compensation to the victim of the damage caused. Aip was not merely a compensation for the damage done, but a punishment for the crime committed, which was applied by the court to protect the existing order, pleasing and beneficial to the ruling class. Thus, the appointment of Aip for theft in an amount several times higher than the value of the stolen (while under barymta property was recovered within its normal value), indicates that the Aip was not only a civil law norm of compensation for the damage caused, but one of the measures of state coercion.

Thus, Aip in the customary law of the Kazakhs is also a type of criminal punishment with elements of compensation for material and moral harm. Such conclusions are based on the fact that there were no sharp lines between criminal penalties and civil liability in our ancestors at that time. However, it should be noted that with all this traced attempts to compensate not only material but also moral harm in society. According to domestic authors, imbued with humanistic ideas, legal norms preached the

ideas of goodness and nobility, as evidenced by the conciliatory nature of the ordinary procedural law of the Kazakhs. Biy urged to love his people, to serve them faithfully, to strive to ensure the cohesion of the community and to restore good relations between people (Isagaliev 2003).

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