

# *Contract as a Primary Form of Evidence in Pro-Logical Criminal Proceedings of Tajikistan Primitive Society*

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**Abstract**—The paper considers the influence of pro-logical civil primitive thinking on contracts as a type of primary evidence in pro-logical legal proceedings at investigation of crimes in historical Tajikistan. It also describes the author's position on the use of a contract as an evidence in pro-logical legal proceedings and in the course of investigation of crimes by ancient Tajiks. The history of the contract as a type of evidence in pro-logical legal proceedings is the most important component of political-legal and procedural institutes in historical development of Tajikistan, which was characterized by the primary worldview, political and cultural values of a society in a certain era of its development. Therefore, the study of this main institute of criminal proceedings always remains relevant. The paper gives the retrospective analysis of a contract as a type of evidence in pro-logical legal proceedings and at investigation of crimes. The study makes it possible to provide basic provisions and ways to implement a contract as type of evidence in pro-logical legal proceedings in investigation of crimes.

**Keywords**—component; formatting; style; styling; insert

## I. INTRODUCTION

At the end of the 20<sup>th</sup> – beginning of the 21<sup>st</sup> centuries the humankind entered a new stage of its progressive historical development – the globalization era. Globalization is not a turn of history and a refusal of universal human values, but a complex historical, which requires multiple cultural and historical knowledge serving for future needs and benefits of human society. In this regard, the study of genesis and evolution of the institute of a civil law contract, evidence law and criminalistics is important since these issues are not sufficiently studied by domestic juridical science. Meanwhile, civil law scholars, processualists and criminalists note that “the civil legislation and the civil law doctrine are now facing their historical roots ...” [1, pp. 5, 72].

The civil law contract, being a phenomenon in its distribution, is not new. Being an independent institute of civil law, evidence law and criminalistics, it covered a long historical path. The fight for its recognition and establishment as a civil phenomenon and a type of evidence started even before the appearance of ancient states. In other words, the genesis of the civil law contract in many respects is caused by

the primitive society having neither rights nor laws governing particular public, economic and business relations.

### 1.1. Research Methods

Historical-legal and comparative-legal methods formed a methodological basis of the study. The study also included such general and private scientific methods of knowledge as the system analysis, system-structural, comparative, legalistic, formal-dogmatic, specific sociological, statistical methods, and methods of comparative jurisprudence.

## II. RESULTS AND DISCUSSION

### 2.1. Historical and legal aspect.

It shall be noted that the primitive communal system covers the longest period in human development. It starts from the appearance of a person on earth and ends with the formation of class society and the state. During this period, despite low development of productive forces and slow rates of their improvement, the contract serves an important tool to solve various economic issues. As a result, it does not only gain recognition, but also forms the history of primitive society as the greatest discovery and achievement of cultural economic activity [2].

The uniqueness of this era is first characterized by the fact that the transition to the highest forms of appropriated economy is fully completed; second, by the beginning of the transition to producing economy that was necessary for human life and activity. Third, the most important change in the Neolithic age is connected with the fact that it fostered progress in the development of productive forces and exchange of goods, which is characterized as the first stage of social division of labor. Then, the development of a society triggers the second stage of division of labor implying individualization of work and development of private property. A person is directly involved in all these changes of material values.

In this regard, the historical view on the development of the civil law contract institute makes it possible to understand the genetic roots of this phenomenon not only as a special phenomenon in domestic and economic life, but also in

respect of satisfaction of socioeconomic needs of a primitive person since he has been the main producer of material values, as well as the procedure of evidence in the course of prological legal proceedings and investigation during the primitive period.

## *2.2. Civil aspect*

The non-material values of that time include the contract, and, mainly the contract of exchange, which was one of the forms of relations in the ancient time. The surplus product serves the reason of exchange. Nevertheless, the main reason of exchange is the separation of craft from agriculture thus making the exchange gain its regular and stable character. This means that "initially one product made for exchange (goods) was directly exchanged for other goods without any proportions, and the unnecessary goods were exchanged for the required ones. Gradually, to simplify, satisfy and improve the exchange people begin to apply a uniform equivalent. At initial stages of exchange development, various nations used different goods – cattle, fur, shells, golden sand, etc. as such equivalent. As scientists say, the commercial relations of this equivalent were not developed during this historical period [3]. Gradually this role was taken by metals" [4]. It shall be noted that the development of exchange and private property leads to slavery, and hence to property inequality between people.

In fact, with the appearance of the barter contract the humankind faces a non-institutional period implying purchasing of property, which, in turn, leads to a phase of economic dynamics, and the exchange is included into the structure of household and economic life of a primitive person at a rapid pace. Conditionally in science this period is called an era of "natural economy" when a product is only made for its direct consumption.

At the same time during this period the barter contract in economic life was the only contract, but in its meaning it was not abstract, and in the future became the basis for the appearance of money in economic circulation. As N. Bulgakov notes, "the need for money as an exchange tool is so indisputable and obvious that the money inevitably appear everywhere where there is an exchange" [5].

"It shall be noted that the concept "barter" has evolved and is now more extensive than earlier. The forms of search and organization of barter are also improved" [6].

The issue of the period of emergence of the donation contract is quite debatable in the science of history of the civil law – whether it appeared in the Neolithic age or during other periods prior to state development. At the same time, the science on the civil law is still uncertain regarding the recognition of the donation contract as either independent institute of the liability right or just a type of contract ensuring the transition of the property right from one person to another. In this regard, the civil law scholars write: "Before the revolution of 1917 the legal relations related to donations served a subject of heated theoretical discussions. The civil legislation and the civil doctrine of that time did not provide clear answers to questions of a donation, its legal nature, place of this institute in the civil law system. Suffice it to say that

the civil legislation of that time contained norms on donation not among regulations on contractual obligations, but in the section on the order of acquisition and strengthening of the rights for property" [7]. It may be added that the donation contract appeared in the Neolithic age or even before the transition of the primitive society to this stage of development. Donation was called a "good tradition" and was actively applied to solve controversial issues between the adjoining and conflicting tribes. Civil relations formed the basis for donation. It is not fortuitous that the Romans in the period of the Republic (V-I centuries BC) recognized the donation contract as one of the grounds for the property right. The promise to donate as an incentive to something was also legally effective. Later in the legislation of the Roman Empire the special type of informal donation contract – *pactum donationis* – became enforceable. The latter one was one of compulsory conditions of property transition to the property of another person – the donee. Taking this into account, the consideration of the donation contract features is certainly justified.

According to science, the exchange and donation in a primitive society were accompanied by special rituals called "kula" and "potlatch". In fact, the "kula" ritual represented intertribal exchange. According to B. Malinovsky, the main object of gift exchange was "mvali" – bracelets from sinks, necklaces circulating in the opposite direction, ... where the donation is followed by a reciprocal donation [8, pp. 351, 533, 531]. Thus was the pro-logical understanding of the contract by the primitive society, where the latter one originates from that period.

Negotiations between the parties were typical for barter – economic exchange – and in this respect the contract to purchase some consumer benefits was different from traditional contract. At the same time the barter could not exist independently, it was only possible after the establishment of the "magic unity" and was practiced in addition to kula [9, pp. 74, 185, 69]. The meaning of the kula ceremony at exchange and donation was that it contributed to prestige, respect and strengthening of friendship between tribes due to mutual services rendered by the parties. Undoubtedly, the mission of kula was not limited to this since it performed other functions, i.e. according to B. Malinovsky, "... kula is also some other acts and actions, such as: construction of boats and knowledge of navigation rules, demonstration of food, feast, cult practices developed by the system of magic and mythology". Besides, there were ceremonial and cult rules for kula ritual, which were obligatory to comply with. Since the history of the contract all these and other social rules were caused by individual and public need since continuous increase or valorization of requirements is confirmed by the evolution of mutual human relations [10]. Therefore, the need was and still remains a driving factor for different types of contracts. B. Malinovsky calls these rules "the code of vanity" and gives an example of the fact that the "native expression "to throw" a jewelery well describes the nature of this action because though the value shall be transferred by a giver, but the recipient almost does not pay attention to it and seldom takes it directly in hand. The etiquette of transaction requires that the donation is handed in sharp, almost angry manner and is accepted with

the same indifference and neglect". As a result of this process the partners, i.e. tribes, according to the custom "... exchange objects ... these are beads from red and bracelets from white shells, – but as expensive and glorified jewelry quite often known by name, they temporarily pass into possession of other groups". Therefore, the option according to which the exchange in primitive society was followed by kula ritual is beyond any doubt. The ritual exchange in a primitive society gave the chance to partners to own "mana". According to M. Moss, "mana is something typical for a thing, but not a thing as such" [11, pp. 195, 146-147]. The use of the word "mana" as money is recorded by researchers on some islands with primitive-communal system. For science the existence of money in a primitive system remains not only a debatable but also an open issue.

The next ritual in terms of its importance for the primitive society was "potlatch" used in conclusion of transactions. Besides "kula" and "potlatch" rituals, donations and barter, and even aleatory transactions played an important role in the history of the contract since in its meaning the "potlatch" ritual is similar to aleatory contract. According to J. Heising, "... it is not a simple exchange, but a ritualized festival and an action where the clans compete in generosity", where the main action of the parties was aimed at "feeding" and "expenditure" due to sacrifices to spirits and gods. According to G. Bataille, "... gods and spirits were in the primitive thinking were true owners of things and benefits of the world" [12, pp. 106-107, 68]. Even the personal property of people belonged to them. Therefore, the exchange with gods and spirits was a mandatory attribute of the "potlatch" ritual. On the other hand, such actions as the donation to prophetic gods was perceived as a way of communication with them, i.e., with supernatural forces as true owners of matter in order to receive their favor to tribes. In this regard, the donation served not only as a gift, but also as manifestation of primitive human thinking since it was considered that subsequently it will be compensated by the spirit or god in the form of new wealth. As G. Bataille notes, "... as a result of this operation the donator loses whereas the set of wealth remains". On the other hand, the magic essence of the insurance contract is obviously typical for this process. For example, copper ingots with a brand served an important tool of donation in "potlatch" rituals. If ingots represented the main objects of the "potlatch" ritual, for owners they acted as a mascot, i.e. an important means of "insurance" against the loss of authority and physical destruction. This suggests that, perhaps, such rituals formed some basis for the insurance contract. At the same time donation in the "potlatch" ritual is characterized as public means of unilateral will to the spirit and god. Hence it appears that if within a ritual the tribal leaders acted as donators, then the spirits and gods acted as donees, and the donators had not only to spend property, but also to follow the rules of this expenditure. For a leader the compliance with this rule was interpreted as "... spirits constantly come ... and favor wealth, that this wealth possesses it, and it possesses wealth, and he can prove the existence of this wealth only by spending it".

In general, the "potlatch" ritual was necessary to keep property and a high social rank of tribal leaders since in many respects the leaders connected the preservation of material

benefits and traditions of the family and the tribe with this ritual. On the other hand, material and non-material benefits formed the basis for ritual relations, i.e. preservation of wealth. There was no difference between material and non-material benefits since the spirits and gods were true owners of these benefits.

### *2.3. Criminal procedure and criminalistic aspect*

The socioeconomic structure covering all stages of society, which existed from the first human collectives to the appearance of statehood, is called a primitive-communal system. It is divided into several stages: 1) pre-tribal society (primitive herd and primitive community); 2) tribal system (maternal and then fatherly tribe); 3) decomposition of a primitive-communal system and appearance of the state [13].

As I.B. Buriyev notes: "When studying the matter it is necessary to follow the latest theoretical study of the law. Recently the majority of legal theorists recognized that the law appeared before the state, and the set of norms governing the primitive-communal relations are called archaic, common law, mononorm" [14, pp. 12-14]. But the names are not important, but the fact that all authors consider although usual or archaic law as a norm governing public relations. The supporters of this theory recognize that "where there is a society there are definitely rules of conduct" [15]. They are called archaic because these norms have their features, which makes them different from the developed, modern law in our understanding.

We also believe that the law of the primitive society was characterized by two features, which will partially be inherited at the transition stage from legal custom to law establishment of state authorities. First, this is casuistry of law or regulation following the "if, then otherwise" principle and, second, objectivism or strive towards exact clarification of what has happened by means of material evidence and verbal confirmation.

Evolution (development) of the law happens in the following directions and in the following forms of legal regulation and control: from unwritten to written law, from patriarchal family to individual and monogamous, from judicial mediatory peacemaking to the stage of legislative and judicial activity of the state or tribal leaders and the protostate autocratic formations. In the transition from the common law to the law the successive elements may include the strive to maintain peaceful social community, order and fair solution of arising personal or property conflicts, punishment for violation of different bans – household, ceremonial, etc.

Initially the common law is a tool to maintain order without participation of state and authoritative administration [16].

The modern science on religious and mythological views and social functions of a myth in a primitive society play an important role in explaining the origin of the law and the legal norms. A myth usually tells a sacral history, narrates about events in memorable times of "the very beginning", about acts of supernatural creatures and manifestation of their superpower, which become a role model in any human activity. "The myth tells how due to feats of supernatural

creatures the reality reached its embodiment and implementation, whether it is a comprehensive reality, space, or only its fragment: island, flora, human behavior or state establishment" [17, pp. 15-16, 19].

The primitive law implies peaceful regulation of useful and productive communication connected with the settlement of personal and social-group conflicts mitigated by complying with the requirements of equality, safety, and mutual obligation. Initially the law exists in undivided form as a complex general norm or, in other words, as a mononorm including not only legal, but also moral, ethical, esthetic, ritual and other cult and ceremonial requirements. Only subsequently, the law stands apart from moral, but keeps certain relations with it following the principle of complementarity necessary for social communication.

Regarding standard regulation of evidence, the common law includes crimes and punishments (bans and permissions). In this respect it may be noted that particular forms of response to a committed crime are typical for every era of human development.

As pictograms and rock paintings show, the main measures and sanctions in the primitive society included the prohibition of hunting to a hunter who does not observe customs, condemnation of a family, a tribe by the public in the name of tribespeople. In case of a crime, a person turned into a derelict, into a "free agent", into a person "without a family and tribe" and hence he may voluntarily and with impunity be killed as a wild animal. We also believe that there were such types of sanctions as revenge, conciliation procedures and penalties ("the tariff of injury").

We support the point of view of I.B. Buriyev who writes: "If earlier the life of a primitive person was understood as a simple living with several simple rules that he had to comply with, then now it is proved by science that life of the tribe member is surrounded by different customs, starting from work, hunting to the distribution of obtained goods. The rules of conduct, which once appeared, after time and constant repetition became customs to be observed. New norms – the bans appear. Similar to other parts of the world, the refusal of the tribe to protect its member was the most terrible punishment".

Besides, different beliefs about the world, the afterlife, the sin, the evil and the good governed the behavior of each member of society and these rules of conduct played a role of norms in the primitive society.

The logic of reasoning leads to the following understanding that in the primitive society the criminal proceedings per se were absent and the concept of crime did not receive its clear institutionalization yet. However, aggression and violence are typical for a person as a biosocial being, therefore it may be claimed with confidence that murders and other socially dangerous acts forbidden by institutional (standard and regulatory) systems of the corresponding era (taboo, religion, customs, morals, law) were committed throughout the history of the humankind, and hence required institutes, which would regulate repressions in relation to persons that committed certain acts.

We are convinced that in the beginning this principle recognized mutual rights for revenge, which were later transformed into the custom to accept a reward (ransom) mainly depending on the will of both parties and which is not connected with any coercion. In certain cases, the right of personal revenge was transformed into religious and cult custom of obligatory revenge in the mould of a custom "to revenge for blood".

The transition from revenge to composition (literally compensation, i.e. ransom) as an alternative to blood feud occurred with the public power. This is Maxim Kowalewski explains it. In the ancient time, revenge threatened the personality and property of the offender. When the offender disappeared, the avenger was simply taking his property. Over time instead of the actual capture of property the voluntary consent on concession of part of the offender's property to the avenger was widely practiced. Then during some period of state and organized life the authorities begin to consider it necessary and desirable to limit the right of obligatory participation in revenge and in composition (compensation of damage with ransom). Hesitating to cancel at once the old custom, due to which the relatives consider themselves solidary with the offended, they replace the obligatory revenge and the ransom with optional revenge, at the choice of relatives [18, pp. 80, 83]. In such cases "the tariff of injury" appears for calculations. It coexists with kinds of calculations – "price of blood", "purchase of wives", etc.

We believe that punishments in the primitive society are rather moral than legal and are closely connected with religious permissions and bans, as well as public control over their observance. According to German historians Steinmetz and Oppenheimer, these punishments had the following gradation according to their weight and danger (degree of fear, which they cause among tribespeople): crimes against religion, crimes against sexual morality, cognate offence, violations of hunting rules.

As history shows, the earlier operating institutes form the basis for new ones, though facilitated in the updated form or the new concept is embedded into institutional framework of old rules [19, pp. 31-42]. In this regard we cannot neglect the issue of determination of guilt of a person committing a criminal action in the primitive society.

The American ethnographer L.G. Morgan subdivides the entire history of human development into three periods: savagery, barbarity and civilization [20]. Thus, in ancient society the functions of accusation were depersonalized and were performed by all members of the group in the conditions of complete unanimity [21, pp. 491, 549-655], and various procedures, including fortune-telling and other magic means, mediation, oath (swear, company) were developed to settle a conflict caused by crime. Since the primitive legal norms mainly act as rules on reconciliation of conflicting tribes and families, the investigative and judicial functions in such conflicts were most likely performed by persons from among intermediaries chosen by conflicting parties.

In the description of duties and procedures of the court of intermediaries, M. Kowalewski highlighted the following features. Intermediary conciliators (mediators) made an oath

to treat any case as their personal one. This oath was made in response to the inquiry of the victim's relatives: "Do you swear to consider the case in equity, without being distracted by relationship, without twisting the facts, exactly as though it was your own case? Shall you violate this oath let your family be unfortunate until the Judgment Day and then goes to hell". Then the parties made an oath in response to the requirement of judges: "We force you to take an oath that our decision will be executed by you: if you do not obey to it and do not execute it in accuracy, let you be responsible for violation of the oath both for yourself and for us". The sentence of intermediaries was final and was not subject to any appeal or revision.

However, as A.A. Mikhaylov notes: "Throughout the entire period of the tribal system the most typical way to settle a social conflict arising due to any criminal action was the trial by ordeal (Lat. ordalium – sentence, court)". Though trials, in particular, by fire and water, are usually associated with medieval criminal proceedings, we are convinced that trials by ordeal originated in extreme antiquity when people had "full and invincible confidence" in them [22, pp. 177, 198, 181-182, 357, 204]. At the same time one cannot equal between trials by ordeal by primitive people, in the period of Zoroastrianism, antique Greece and the trials by ordeal of the Middle Ages, which on the basis of the analysis of considerable factual information relating to life of African and Australian tribes is convincingly demonstrated by L. Levy-Bruhl in his basic study "Primitive Mentality".

In particular, the specified French philosopher and ethnographer notes that "the trial by poison applied in magic cases so frequent in many African societies was a mystical action similar to fortunetelling, and was aimed to find a sorcerer, to kill him and to destroy the harmful beginning. This has nothing in common with the trial by ordeal".

In ancient times, the trial by ordeal was also used in circumstances not connected with legal proceedings. Thus, the trial by boiling water also served to obtain a medical forecast and test through muavi (a tree with poisonous bark) in order to suddenly overcome the arising difficulty.

The specified role of the trial by ordeal in the life of primitive people is explained by their particular thinking, which may be defined as religious and mystical. In this regard, L. Levy-Bruhl writes: "Similar to ours the primitive mentality seeks to learn the reasons of events. However, it seeks for reasons not in the same direction as ours. It lives in the world where numerous occult forces either constantly act or are ready to act". The thinking of a primitive person did not yet get its logical forms, which develop in process of accumulation of practical experience, development of spiritual and material culture. As L.I. Bondarenko reasonably concludes, "ideal activity appears in the most material practical activities, develops and gains relative independence. At the same time the logic of ideal activity reproduces the logic of practical activities" [23]. This clearly demonstrates the mythicalness of consciousness of that period, mythological assessment of events. In this regard, people of the primitive society, being captured by the myths, assumed that all events are carried out by religious and supernatural forces [24; 25;

26]. The fear of sin for punishment of the innocent formed the basis for the use of natural powers to administer justice.

Another two important issues characterizing the trial by ordeal in the primitive society shall also be noted.

First, the trial by ordeal does not aim to directly convict a person since in many cases when a guilt does not raise questions (a person who committed a criminal action is known and does not deny the act, his relatives have no disputes over this matter with the relatives of the victim), the trial is still made, and it is also necessary to such an extent that in case there is no guilty person, other member of his social group, preferably a brother or another person, shall be subject to trial.

Second, the opponents and their friends often reconciled with each other after the trial.

Hence, not the result of the trial by ordeal per se was important but the course of the trial according to rules ensuring satisfaction (calm) of a person and his relatives (deceased spirit), regarding which a criminal action was committed.

Thus, the trial by ordeal in the primitive society is some kind of ritual of purification, which was obligatory to restore consent in a social community (protocommunity being an initial form of community [27], a family, a tribe) and peace of mind of its members disturbed by a criminal action. There are common features and origin of the trial by ordeal and such institutes as fortune telling, an oath and a duel, which initially had the specified ritual nature. The authors studying the legal proceedings of the early Middle Ages also noted common roots with the trials by ordeal, an oath and a duel [28; 29].

The trial itself ensured legitimacy, i.e. recognition by the corresponding social community, and in this case unconditional decision concerning a person under trial.

The above stated allows highlighting the first two criteria making it possible to analyze the development of evidence systems in the history of criminal proceedings. The first and the main criterion is the type of thinking dominating during the corresponding era of human development, which is important for the person's worldview. Hence, it may be called the worldview criterion.

The second criterion of the evidence systems in the history of the law of evidence of historical Tajikistan is the way of legitimization (in other words, as how legitimization takes place) in social community of a sentence (finding a person guilty or innocent), for which the evidence system generally functions. The final goals of procedures aimed to find a guilty person and apply the corresponding repressions included and still include a settlement of a social conflict, prevention of new similar conflicts and, thereby, maintenance of the existing world order in a social community, whether it be a protocommunity or a modern society. At the same time the transformation of the system of social values, content and correlation of institutional systems during societal and state development inevitably involves the change of a system of coordinates, according to which the sentence is recognized legitimate by a social community. Therefore, this criterion may be defined as social and valuable.

### III. CONCLUSIONS

On the basis of the above it is possible to make the following conclusions.

In general, the issue of genesis of contractual relations in a primitive society is quite unknown and disputable due to the lack of sources making it difficult to answer the relevant questions. Considering the existing facts it is possible to say that the contractual relations already existed in noncommercial forms. The main prerequisite of contracts was rational utilization of surplus, which formed the concepts of ritual exchange and donation in the economic life of primitive society. Functioning of such rituals as "kula" and, "potlatch" in particular, most likely demonstrates the existence and functioning of aleatory contracts in the primitive society since during the "potlatch" ritual the clans competed among themselves in generosity. The generosity implied the risk in how "to spend" and how "to feed", but, the main thing that the lost material and non-material benefits were allegedly compensated by the spirits and gods during rituals. At the same time the scholars do not say anything about risk during rituals and games. But we do not deny the presence of risk since communication with supernatural forces and counting on their favor were accompanied by risk for leaders and clans. We believe that all this was caused by specific historical conditions and, most likely, demonstrates pro-logical civil thinking of a primitive person since without the latter one it is difficult to imagine the genesis and evolution of contractual relations.

The religious and mystical type of thinking dominated in the primitive society, and legitimization of a sentence was made through the ritual of purification by the accused person or its representative. At the same time during the specified period one cannot talk about the existence of the formed evidence system, but interrogation, testimonies of a victim and a suspect, which shall be confirmed by material evidence were already laid during the primitive period, and the inquiry and justice was based on the principle of justice.

We also believe that already at the stage of tribal relations a great emphasis was placed on the initial principles (sources) of customs, rituals and other collective human institutions. According to modern anthropologists studying these processes and phenomena, the concept of supernatural forces and the corresponding rules of etiquette performed the function of approval of power and consecration of social differentiation of the primitive society. Initial obligatory rules of conduct, which did not differentiate between various precepts of social regulation, such as legal, ethical, moral, religious and cult, procedural and other standards and rule, also served the same objective.

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