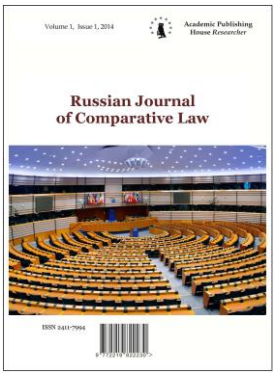

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Articles and Statements

Courts of Biys and Aksakals in Kyrgyzstan: What the History Teaches About?

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Abstract

The courts of biys, which has been developing since XIX century, are usually compared with the courts of aksakals established in 1993. Indeed, both courts during the consideration of cases relied on customs and traditions. As well as the judges in the courts of biys, the members of courts of aksakals are elected by people. The major requirements for being the aksakal or biy are respect and authority.

Yet, can we consider the courts of aksakals as the contemporary prototype of the courts of biys? While comparing the common features and peculiarities of these institutions in the article the following steps were taken:

- Understand the causes of for the demand of public justice institutions in society as an alternative to state justice,
- Understand their compatibility with contemporary state and public institutions,
- Comprehend their ability withstand the challenges of modernity: absence of trust in courts, corruption, length of the proceeding, isolation of the court from people, absence of respect to the law.

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Keywords: court of Biys, Aksakal courts, common law, trial, customs, traditions.

As in the past the future is ripening,
So in the future the past is smoldering.
A.Akhmatova

1. Introduction

Modern aksakal courts consisting of the most respected citizens are designed to resolve disputes at the local level. It is a characteristic institution of the patriarchal society, which reflects the tradition of respectful attitude towards people who have the greatest authority, power and influence. In a traditional Kyrgyz society such an institution existed in the form of a court of biys, but was abolished at the dawn of Soviet power.

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How to avoid mistakes of the past? What useful lessons can be learned from what has already been passed by our society? These questions inevitably arise before an inquisitive researcher who makes an attempt to comprehend the choice of the trajectory of the development of aksakal courts through an analysis of historical experience.

Comparative analysis of the arrangement of courts of biys and aksakals, the legal basis of their activities, the dispute escalation and cooperation with official structures are aimed at clarifying:

• reasons for the demand of public justice institutions in society as an alternative to state justice;

• their compatibility with modern state and public institutions;

• their ability to withstand the challenges of modernity: lack of confidence to the court, corruption, length of the process, isolation of the court from the people and lack of respect to the law.

2. Materials and Methods

The main sources for writing this article were materials of kyrgyz common law, normative legal acts of Russia of the second half of XIX century and legislation of the Kyrgyz Republic. Multi-sited field research investigating the interaction between state courts and aksakal courts in Chui oblast of the Kyrgyz Republic was carried out. For data collection the participant observation in Alamudun aksakal court of Chui oblast was used. All other sources (statistic, reports, and databases of state court decisions, mass media articles, reports of non-governmental and international organizations) were used as supplementary sources for illustration of certain arguments.

Research methodology includes general scientific and special legal methods, such as: historical, system-based, comparative, technical and others.

3. Discussion

Courts of Biys

- *Arrangement of Courts of Biys*.

Courts of Biys were developed in XIX century. In the first half of the XIX century courts of biys were exercising rules of common law of kyrgyz people along with courts of kaziys exercising norms of sharia, and arbitration courts. Arrangement of court of biys of this period looked different rather than in the second half of XIX century due to the affiliation to Russia. The system of court of biys before the affiliation had tribal courts of biys, there were also biys' congresses (Kojonaliev, 1963: 11, 12). In the second half of XIX century courts of biys became the part of the judicial system of Russia after which the arrangement of these courts was subjected to some amendments. Courts of biys began to act in the form of one-man trial of biys, volost congress of biys and extraordinary congress of biys (Proekt polojeniya, 1867: 30).

Biys were required to know the norms of common law, public speaking and have broad-based knowledge. They had to be distinguished by a natural mind, exemplary responsibility, honesty, directness and openness, resourcefulness and justice. Due to the fact that in the second half of XIX century the position of biy became an elective post, there were introduced the specific procedures for their election and appointment. Biys were elected by the people for three years. The main requirements were: the presence of respect and trust on the part of the people, no criminal record and no finding under investigation. There was an age limit of 25 years. The elected biys were then approved by the military governor (Grodekov, 1889: 176).

Biys were not intended to officially determined monthly or annual salaries (Voropaeva, 2004: 244). However, the reward (biylik) was provided to the court of biys, which was a special form of fine from the guilty person established by the people's custom in favor of judges, the amount of which should not exceed the tenth value of the claim (Grodekov, 1889: 176).

- *Legal basis of the activities*

Up to the middle of XIX century the legal basis of biys' activities was a common law, in the second half of XIX century it became a common law and normative legal acts of Russia. There were requirements to the personality of biys and their activities in such sources of common law as proverbs and sayings. The procedural activity of biys was also regulated by such source of common

law as the rule of extraordinary congresses. Finally, during the adjudication the biys referred to those or other rules of customary law.

- *Dispute escalation*

The trial on common law of kyrgyz people was not divided into civil and criminal (Borubashev, 2009: 218). Thus, the norms of common law did not distinguish such concepts as crime and civil offense. The trial was primarily aimed on reparation to the victim and only then to punish the perpetrator. The trial on common law of kyrgyz people consisted of these stages: bringing a case to the biys court, attempting to reconcile the parties, preparing the case for trial, trial, appealing the decision and executing the decision.

During the investigations of the cases biys have always paid special attention to reconciliation of the parties. Prior to the beginning of the trials biys were offering parties to conclude a peace deal called “butum” or to end the dispute with “salavat” – by forgiveness, giving the case to “oblivion” (Zagryajskii, 2005: 302). Biys often used various symbolic ceremonies, norms of grandfather traditions and ancient rules of the society. For instance, the rite which bore the name: "dostuk" – friendship. This rite was performed by biys in various ways. According to the materials of archives, at that time, in the battles fought by the parties, the parties were obliged "to embrace each other" through a bare saber or to kiss arms giving a vow of friendship. Sometimes biys used the norms and conditions of this rite which were aimed to rapprochement of the parties. Biy was offering to the parties or often forcing them (under the threat of rejecting the case or by other tricks) to hug each other, and then suggesting to call them "Dos-tamyr". Sometimes the biys were giving the parties a certain amount of time. The right to the time was first given to the plaintiff and then to the defendant's side with a time limit so that with its expiration the disputing parties could "cool off", forget the impulses of vengeance, enmity, and could reconcile. At that times’ prevailing ideology of the nomadic Kyrgyz society, the ultimate goal of biys’ justice was the truce and reconciliation of the disputing parties despite any degree of complexity and aggravation of their relationship.

- *Cooperation with official structures*

The decisions of court of biys were appealed by the parties in rare cases. In case of discontent, one of the parties until the middle of the XIX century could turn to a tribal or tribal manap, who made a decision regarding the legal fate of the biy’s decision at his own discretion. Manap either decided to convene a congress to consider a controversial case or in the presence of all the evidence ordered to satisfy the claim of the referring party (Kojonaliev, 1963: 18).

The participation of official structures in the court of biys regarding the appeal of their decisions is seen from the second half of the XIX century. Thus, the decisions of the courts of biys could be appealed to the district chief, who sent the complaints to the prosecutor. The prosecutor sent the case to the regional court which had the right to reverse biy’s decision. In case of reverse the case was returned for the resolution of the new decision with the proper instructions.

In response to the high credibility of the judges (biys) and legal and fair decisions taken by them parties voluntarily fulfilled the decisions of court of biys. Court of biys acted as a judiciary to which the parties were referring due to such court’s authority and confidence to their decisions. However, in rare cases of refusal to implement the court’s decision, there were own mechanisms for executing. The decisions of the biys were performed in the interaction of influential persons of the aiyl or the family of convicts until the middle of the XIX century. In the second half of the XIX century this activity was carried out by aiyl chiefs and rural marshals.

Aksakal Courts

- *Arrangement of Aksakal Courts*

Aksakal courts were established in 1993. Primarily they had a status of local courts (Constitution, 1993: frt.79), but afterwards were expelled from a state judicial system. Nowadays it is a public body which has been delegated by such functions as consideration of certain categories of disputes. Courts of aksakals pass the registration in local self-government bodies – district (local) *keneshes*. However, aksakal courts operate independently without forming a single system of bodies. According to the data of 2016, 795 aksakal courts were registered in the Kyrgyz Republic which is 10 times higher than the number of state courts (V Bishkeke..., 2017).

A member of aksakal court is an elected position. Composition of the court consists from 5 to 9 people. Citizens of the Kyrgyz Republic (both men and women) who have reached the age of 50, have completed secondary general education, have lived in the specified area for at least five years,

have no previous convictions, are respected and reputed among the population, capable of performing tasks on professional and moral qualities can be elected to court of aksakals (Art. 8, 9 of the Law on Aksakal courts, 2002).

Candidates for membership in aksakal court are nominated by residents of the area where the aksakal court is located. The election takes place by open voting at general meetings of citizens at the place of residence.

As a general rule, the activities of members of aksakal courts are not payable. However, in some regions of Kyrgyzstan and in its capital they receive a small symbolic reward from the expense of the local budget.

Aksakal courts consider property and family disputes between citizens, some administrative misdemeanors and criminal cases of minor gravity for which punishment is not provided in the form of deprivation of liberty. Aksakal courts consider cases only with the consent of the parties. However, the main purpose of aksakal court is to reconcile the disputing parties. This is especially important in a multi-ethnic environment when any domestic conflict can develop into an ethnic one. The aksakal court makes a decision on the merits of the property and family disputes only if it has not reached the reconciliation of the parties.

The aksakal courts also have a preventive and educational function. One of the main functions of these courts is the assistance to strengthening the legality of the law and prevention of offenses in the local territory; education of the citizens to respect the law, regulations of morals which have historically developed from customs and traditions.

- *Legal basis of the activities*

The legal basis for the activities of aksakal courts consists of the provisions of the Constitution of the Kyrgyz Republic on the right of citizens to establish aksakal courts (Art. 59) and the state's support of customs and traditions that do not infringe the human rights and freedoms (Art. 37), as well as the Law of the Kyrgyz Republic "On aksakal courts" from July 5, 2002. The interaction of state courts and aksakal courts is reflected in the Civil and Criminal procedural codes.

- *Dispute escalation*

Procedure of dispute settlement in aksakal courts has certain benefits:

- the period of consideration of the cases is 15 days.
- consideration of the cases is free of charge.
- there is no formalized procedure of dispute settlement.
- mediation is the main tool used by aksakal courts.
- there are certain grounds to which aksakal courts rely during the consideration, they are: the legislation of the Kyrgyz Republic, conscience, personal beliefs, morality which do not contradict to the legislation of the Kyrgyz Republic.

Disputes in aksakal courts are considered collectively, openly and publicly. The process of considering the case in aksakal court can be divided into the following stages which are consonant with the stages of the process in the state court: preparing the case for consideration; consideration of the case on the merits; adjudication.

During the court session record is issued, the content of which is regulated by law. At the same time the procedures at each stage are not strictly regulated which ensures the activity and initiative of the court of aksakals as a self-regulating organization.

The aksakal court has the right to apply measures of social influence to the person responsible for committing an offense (such as warning, public apology, public censure, etc.) which have the aim of moral impact on the offender (Art. 28 of the Law on Aksakal courts, 2002). Due to the provisions of the legislation on administrative responsibility aksakal courts may impose administrative penalties for certain offenses. This is a rare case in the practice of the Kyrgyz Republic when a public body is authorized by the law to apply measures of state coercion.

The decision of aksakal court may be appealed to the state court in territory of which the aksakal court is located (Art. 30 of the Law on Aksakal courts, 2002). The right of appeal is granted to a wide range of persons - the person against whom the adjudication was made, as well as to other persons participating in the case. The complaint against the decision of aksakal court is considered by the judge within 10 days from the date of its receipt. In this case, the judge checks the compliance of the decision of aksakal court with the law and the circumstances of the case.

If the judge finds the complaint justified, he willfully revokes the decision of aksakal court and returns the materials for reconsideration or closes the proceeding.

The authority of aksakal court rests on the authority and respect of aksakal court members which naturally implies the voluntariness of the parties' execution of the decisions. Aksakals court itself exercises control over the execution of its decisions (Art. 30 of the Law on Aksakal courts, 2002). If the parties fail to comply with the decision, it can be enforced through the district state court.

The judge checks the compliance of the decision of aksakal court with the current legislation. Based on the results of consideration of the application, a decision is made on the issue of the writ of execution or on refusal to issue it.

If the state court refuses to issue the writ of execution, the party will have the right to repeatedly apply to the aksakal court or to the state court.

- *Cooperation with official structures*

The courts of aksakals interact with the prosecutor's office, police (invitation of persons to a meeting), local *keneshes* (registration, issuance of certificates, material support of activities and encouragement, reporting) and state administration (methodological and organizational assistance, allocation of premises for holding a court session of aksakals).

Aksakal courts also constantly cooperate with state courts, both on organizational and procedural matters. Thus, state courts are entitled to refer cases (materials) to courts of aksakals with the consent of the parties of the dispute. The state court should close the proceedings if it has already been adjudicated by aksakal court. Aksakal courts also do not have the right to review the cases on which a decision of the state court has already been rendered. Appeals and enforcement of decisions of aksakal courts are carried out through the state courts.

However, the status of aksakal courts has changed over time, but the principles of interaction with state courts have remained the same. In some cases, they are distorted: the interaction is not symmetrical and has a tendency toward the state courts. It often looks like a patronage, especially on organizational matters. For instance, a certificate of a member of aksakal court is established by the Supreme Court of the Kyrgyz Republic. District (city) courts provide aksakal courts with methodological assistance in applying legislation. The state courts coordinate the regulations of aksakal courts.

4. Results

Thus, the institutions of public justice occupied and continue to maintain their stable place in the legal landscape of Kyrgyzstan, both because of the accessibility and effectiveness of dispute resolution, and because of trust in the public institution itself, to the authority of members of the courts and the proximity and understanding of the rules for resolving the conflict to the local population.

The logic of the historical process makes us think about the fate of aksakal courts in the near and long term. The administrative and judicial reforms that are taking place in society which affect, in particular, the aksakal courts, focus on adjusting informal justice to Western standards and ideals (introduction of qualifications for members of aksakal courts, mandatory business style in clothes, experiments with competence). Changes in the legislation are very technical and situational and are not based on a deep analysis of the historical, cultural, social context.

5. Conclusion

Historical experience shows that court of biys was the true people's court until the middle of IXX century, until the Kyrgyz affiliated to Russian Empire and the tsarist government began to adapt local legal norms and the judiciary to new conditions. That way, these changes took place: more detailed regulation of the activities of courts of biys, electoral procedures came into existence, the dependence of biys to the administration (military governor), affirming the candidacy of biys increased, the codification of sources of customary law, the accusations of improper deeds (false claims and charges, custom decisions, bribery, abuse of trust, red tape, etc.). Courts of biys quickly lost the basis of their legitimacy – moral and ethical qualities of biys, simplicity and clarity of rules and procedures.

Reflecting on the future of aksakal courts, it is necessary to take into account the lessons of recent history. Institutional and procedural rapprochement of courts of aksakals with state institutions impedes the preservation of elements of their identity, and on the contrary, promotes mimicry with state courts. The aksakal court risks losing its value as a non-state mechanism for settling disputes among the residents of the community.

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