

The Institute of Biys in the Imperial Russia and Early Soviet Period: From Reforms to Abolishment

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Abstract

Background/Objectives: The article presents the history of the court of biys in the Soviet period. **Methods/Statistical Analysis:** The authors note that after political and legal reforms of the Russian Empire in the 19th century, the court of biys was not subject to deep transformation. It continued to be a means of regulation of social relations in the Kazakh society. Also, various legal practices - adat, Sharia law, Russian law, gradual incorporation of local cultural and legal space into the Imperial. However, the state of the court of biys began to change with the Bolsheviks' rise to power. **Findings:** In the beginning populist slogans of the Soviet regime about universal equality and equal rights of all the nations formerly being the part of the Russian Empire, weakness and lack of knowledge about government of nomadic peoples made the Bolsheviks to tolerate legal customary practices of local nations. In those years courts of biys continued to exist as Aqsaqal (arbitral) courts and councils. However, with the establishment of the power, the Bolsheviks headed for complete abolishment of all the traditional institutes of the Kazakh society. The government adopted several documents aimed at first at weakening and then at abolishment of legal customary culture of the nation. The measures of the Soviet government revealed persistence of the experience and knowledge in the national conscience. **Applications/Improvements:** Thus, during the first decade of Soviet period the government went from support of traditional Kazakh court over to gradual abolishment and interdiction of their activity in the territory of Kazakhstan.

Keywords: Aqsaqal Court, Major Overhaul, Reforming, Russian Empire, The Court of Biys

1. Introduction

From the moment of inclusion of the Kazakh territories into the Russian Empire, the Kazakh customary law had attention of Russian authorities, who valued its level of development at a low rate. Even though adat is known as a tribal practice, imperial government regarded it as a law. Governmental legal and social reforms introduced in the 19th century established regulatory pluralism in the region. It contained both the imperial law and the adat. Russian lawmaking from imperial point of view was based upon a thesis that each nation has its own laws and practices. Such differentiated approach to lawmaking allowed to embed customary Kazakh law into a general administration system and resulted into strengthening

of public order and high work performance in nomadic auls. The practice of engagement between a state and traditional institutes led to incorporation of chosen biys into bodies of local government of the "new power". According to the intention of Russian administration they should serve to government and be representatives of its policy in the region in return of certain rights. It was supposed that in the course of modernisation of the Kazakh society the legal institutes would become ready for smooth merger with general Russian legislation^{1,2}.

In the beginning the Soviet government tried to apply practices of the Russian Empire and to treat neutrally customary legal institutes, as well as to establish combined adat-soviet legislation. This was manifested in official status of the court of biys (Aqsaqal court) as

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a judicial authority. However, victory of the Bolsheviks in the civil war in 1920 led to a drastic change in their attitude to the biy courts: The Soviet government saw them as a dangerous political force. This is why since then a systematic fight against the Aqsaqal courts has been taking place. In the end of 1920s it resulted into their absolute abolishment^{3,4}.

The history of the biy courts (Aqsaqal courts) in the first decade of the Soviet period is poorly studied. It was researched occasionally, in the context of representation of successful fight of the Bolsheviks against class enemies defending vestiges of patriarchal-clan relations. In this article we used materials of the fund No. 1380 - "The Ministry of Justice (MoJ) of the Kirghiz Autonomous Socialist Soviet Republic" of the Central State Archive of the Republic of Kazakhstan, containing comprehensive correspondence between the department of court organization of MoJ of the Republic and provincial courts about the work of arbitral courts. It also contains instructions on measures for discrediting and abolishment of the Aqsaqal courts in the territory of Kazakhstan. The most important of these sources were used in this article for the first time.

History of traditional nomadic societies have always been attracting attention of the scientific community. The interest was manifested by both local and foreign scientists in modern and early historic times⁵⁻¹³. Among the most interesting issues for the researchers there are problems of functioning of authorities in nomadic societies, and specifically in the Kazakh society.

2. Materials and Methods

One of the requirements issued to modern history researchers is a shift from descriptive style to methodological analysis of historic facts, from a mere statement of historic events to comparative analysis of material. This allows to reveal problems of a studied topic and certain aspects of the historic process (which by force of conjuncture or other reasons were left out by scientists), to objectively contrast them and on the basis of that identify perspectives for future research in order to provide knowledge continuity in the evolvement of scientific thought.

In the article we used general and special scientific methods of historic and historiographical research (such as the method of objectiveness and comparative analysis).

3. Results and Discussion

Conclusions and results of the research done within this paper are of theoretical and applied nature. Scientific-theoretical problems and elaborations touched upon in the article shall be used as a basis for future research work of the author. Also, this material may be used for special and general works upon the history of the Kazakh society, relations between the Kazakh and Russians in pre-revolutionary and early Soviet period.

In the 19th century in the result of Kazakh territories merging in the Russian Empire, the government began to reform administrative and political structure of the Kazakh society. To that effect a series of reforms was implemented in the Steppe Territory: In 1822 and 1824 "The Charter about Siberian Kirghiz" and "The Charter about Orenburg Kirghiz", in 1844 "The Statute on the Orenburg Kirghiz", in 1867 "The Temporary Provision on Administration of the Semirechye Oblast and Syr-Darya Oblast", in 1868 "The Temporary Provision on Administration of the Steppe Oblasts", in 1871 and 1873 "The Project of Adjutant General von Kaufman", in 1874 "The Project of the Provision on Administration of the Russian Turkestan", in 1881 "The Project of Lieutenant General Kolpakov", in 1886 "The Statute on Administration of the Russian Turkestan", in 1891 "The Provision on Administration of the Steppe Oblast". The objective of the whole complex of administrative-legal developments was maximum adaptation of the traditional Kazakh society to general imperial administrative system. Thus, the reforms of the first half of 19th century resulted into the establishment of two different legal systems in Kazakhstan: General Imperial law (its regulations were used in order to decide criminal cases in volost' courts and special courts) and customary Kazakh law (used by traditional biy courts). It should be noted that the reforms did not touch the fundamentals of the biy institute, it continued its operation until the beginning of the 20th century. It is partially connected with the fact that the government of Russia was cautious with modernisation measures in this area and tried to avoid dramatic demolition of conventional traditional institutes. More than that, the court of biys, despite administrative and legal reforms of the Russian government, did not lose its influence in the Steppe and continued to be the tool which accumulated the levers of administration of the nomadic society. Thus, shortly before the establishment of the

Soviet power, the Kazakh society combined customary law with traditional legal institutes for regulation of all the social relations.

However, the situation in this region started to change after the October Revolution. In 1917 – mid. 1930s Kazakhstan was undergoing really revolutionary changes: Command-and-control state system was established; political and legal, material and spiritual basis of the culture changed; the social image of Kazakh society transformed. These changes also touched upon the institute of biys - in the first two decades of the Soviet period its destiny was difficult and dramatic.

The Soviet government manifested its national policy in two crucial documents: “The Declaration of the Rights of the Peoples of Russia” (November 2, 1917) and the appeal “To All the Muslim Workers of Russia and the East” (November 20, 1917). New authorities promised to the peoples of Russia and the East: “Henceforward your faith and customs, your national and cultural institutes are declared free and indefeasible”. The Declaration proclaimed “equality and sovereignty of peoples of Russia”. In the sphere of national policy the Bolsheviks Party promised advertence to customs and traditions of the peoples and to customary legal norms and institutes.

However, the Soviet authorities from the very beginning were focused at bringing legal relations of the peoples to an integral system. It concerned peoples which used to be a part of the Russian Empire and, according to the plan of the Bolsheviks, would be an essential part of the Soviet state. For this reason customary law and other customary legal institutes should have gradually given way to Soviet laws, as the customary ones did not correspond to the principles of Soviet society where all individuals are equal and there are no class privileges. Indeed, such change could not have been done within nearest future, as, on the one hand, the norms of customary law still held their position among nomadic peoples, and on the other hand, the position of new power was still unsteady and vague (especially in Kazakhstan, where national proletariat was not numerous as the main support of new power and other political forces were actively performing anti-Soviet agitation activity - for example, Alash Party, Shura-i-Islami Party and others). Soviet authorities understood complicity of fight against anti-Soviet forces, as well as of enhancing of the power of their local authorities. This resulted in the formula “national by form, socialistic (initially - proletarian) by content”, which

allowed to “freely regard this ‘dilemma’ and draw on the basis of this scheme different - even contrary - practical conclusions, adjusting to changing situation”¹⁴.

Indeed, political situation in 1917 was not beneficial for the Bolsheviks, as “Turkestan entered the Revolution of 1917 being quite ‘primitive’”¹⁵. This is why the Bolsheviks in order to win the trust of people used simple and understandable slogans: “Down with the war!”, “All power to the Soviets”, “Construction of a new classless society with no rich or poor” etc.

Alongside with use of populist slogans, the Bolsheviks party during this period regarded their crucial way of strengthening of their positions among the peoples of remote areas in appreciation of existing traditions and customs of local people in different aspects of social life, in avoiding of harsh intervention into the framework of social and legal community of the peoples still living ‘in the grip of’ patriarchal-clan vestiges. Main attitude of authorities to customary legal norms was stipulated by the Decree on the Court No. 1 of November 22 (December 5), 1917. It says that “Local courts decide cases in the name of the Republic of Russia and rely in their decisions and judgements on the laws of overthrown governments only as long as they are not abolished by the Revolution and do not contradict revolutionary conscience and revolutionary sense of justice”. The question of competence of traditional courts in this document is not regarded. The norms of customary law remained in force and had practical application as they did not contradict the Soviet legislation.

These provisions also concerned Kazakhstan. Thus, on July 10, 1919 the People’s Commissariat for Nationalities at a special meeting decided on establishment of the Kirghiz (since 1925 - Kazakh. - Zh. M.) Revolutionary Committee and adoption of the Decree “Temporary Provision on the Revolutionary Committee on Administration of the Kirghiz Area”. In particular, this document stipulated: “All the adversary proceedings between the Kirghiz (hereinafter - the Kazakh. - Zh. M.) are decided at place of residence of the defendant by an arbitral court affiliated with aul or volost’ executive committee chairmen. Judgements of the arbitral court (this was official name for courts of biys during the Soviet period. - Zh. M.) may be subject to final appeal under cassational procedure in the Kirghiz department of country court. The cases between the Kirghiz are decided by the people’s court upon its merits according to the customary law”. This

norm enabled protection and operation on the institute of “biy courts”, however with certain restrictions (their judgements must not contradict the Soviet legislation).

The positions of the biy court were temporally strengthened by an instruction of the Justice Department of the Revolutionary committee “On Arbitral Court” of December 24, 1919, which stipulated: “The court of mediators in their judgements rely upon witness testimonies, circumstances of the case, national legal practices and personal beliefs according to the interests of working people” (the Central State Archive of the Republic of Kazakhstan - CSA of RK, F. 1380. List 1. Case 10 “A”. P. 95 on the reverse).

The victory of the Soviet power during the civil conflict set up new tasks. Their solution meant to implement Leninist slogans, which should have strengthened Soviet positions in the region. Thus, on August 26, 1920 the All-Russian Central Executive Committee and the Council of People’s Commissars of the Russian SFSR adopted a Decree “On Establishment of the Kirghiz (Kazakh) Autonomous Soviet Socialist Republic” (hereinafter KazASSR) within the RSFSR with the capital in Orenburg. The same year the Founding Congress of Soviets of Kazakhstan was held in Orenburg. This Congress adopted the Declaration of Rights of the Working People of KazASSR, which formalised the establishment of the KazASSR. However, further strengthening of positions of the Bolsheviks in this region was impeded by existing traditional principles of public organisation of the Kazakh society.

Particular concern of the government was caused by weakness of local personnel of the Soviet power, who were losing to traditional agents of the norms of customary legal culture. In order to weaken the latter and to abolish it in future, at the Founding Congress of Soviets of the KazASSR on October 4-12, 1920, Justice Department chairman Zaromkiy offered main principles of organisation of the Soviet court. According to him “Arbitral courts on their current basis cannot be authorized. The organisation of correctly established People’s courts largely relieve the necessity of arbitral courts”. At the same time there were other suggestions at the Congress. Thus, the chairman of the Turgai Country Revolutionary committee B. Karaldin (1877–1930) upon the discussion of Congress resolution set forward a proposal about retention of tribal oath of allegiance and arbitral court which according to him “are quite widely accepted and... should be retained as a legal organisation” (Founding Congress, 1936). In view of this the Congress did not arrive at a final decision of this

question.

Decision of the Founding Congress left the legal status of arbitral unclear, which in its turn led to inconsistency of activities of executive authorities as to this institute.

Thus, on December 1, 1920 S.V. Ostrivodov, the Chairman of the Presidium of Orenburg-Turgai Provincial Board, had to confirm that: “...these courts are actually existing in the territory of KirRepublic, as we may see in cases and appeals submitted to the Soviet People’s Court and continue to levy so-called ‘biylyk’ for their own benefit for the decision of cases, moreover their decisions subject to immediate execution through the militia” (CSA of RK, F. 1380. List 2. Case 17. P. 6.). The same situation was observed all over Kazakhstan. This made the Ministry of Justice of the KazASSR send to all country courts on December 20, 1920 a Circular Letter of Explanation, which read as follows: “The people’s judges of KSSR, until certain expected changes are issued, should rely on the Regulation on the United People’s Court and the Decrees of the Soviet Government and in case they are not clear or incomprehensive, they should rely on customary traditions, as they do not contradict the Decrees and general provisions of the Soviet Government, as well as common tone of the socialistic legislations (socialistic sense of justice)” (CSA of RK, F. 1380. List 2. Case 17. P. 7.).

However, on December 25, 1920 the MoJ of KazASSR adopted the Circular Letter No. 2 “On Abolishment of Arbitral Courts”, according to which all the existing arbitral courts in the territory of the Republic are declared ‘self-constituted’ and subject to ‘immediate abolishment’ (CSA of RK, F. 1380. List 2. Case 17. P. 8.). In accordance with this Circular Letter the work on dissolution and abolishment of existing arbitral courts was initiated in the region. In reality the measures of authorities did not result into their complete vanishing. These courts continued to operate as ‘Aqsaqal Courts’ and ‘Aqsaqal Councils’ based on the Kazakh traditions.

Yet another stroke on this institute was made in 1924 by adoption of two Circular Letters of MoJ of the KazASSR. The first document of August 22 No. 50 proclaimed that “abolishment of the Aqsaqal courts and declaring their decisions invalid only are not reaching any objective. This is why it is necessary to recourse to repressive measures”. In the same time, this legal document did not allow to institute criminal proceedings against Aqsaqals for deciding of criminal cases covered by the Articles No. 151, 153 (p.1), 172, 173, 175 of the CC

of RSFSR, criminal cases solved by conciliation of parties and of civil cases on inheritance and cases triable by work sessions of the People's Court. In the letter on October 8, 1924 from Kashirin, the representative of the State Political Directorate, to N. Iralin, of the MoJ of KazASSR, this fact is called "a mistake, rendering all the positive part of your Circular Letter null" (CSA of RK, F. 1380. List 1. Case 27. p. 123). The solution of the problem was put ultimately in the letter: either Aqsaqal court or Soviet judicial authorities. "Any exception leads to ambiguity. The result of such confusion was clearly described by you in the Circulatory Letter: "Because of Aqsaqals accepting criminal cases to their trial and encouraging the parties to conciliation, many crimes in the Steppe are left unpunished". The representative of MoJ N. Iralin was offered "...to surely, strongly and unhesitatingly shape [his] course for absolute abolishment of Aqsaqal courts. It is obvious that this course demands criminal penalty for actions of Aqsaqal courts as to the crimes indicated in Article No. 10 of the Criminal Procedure Code".

Later the same year there was another Circular Letter No. 68 of October 30 "To all Provincial Courts and Provincial Prosecutors - on Institution of Criminal Proceedings Against Aqsaqals for Deciding of Criminal and Civil Cases". This letter did not impede authorities from judicial penalties against the Aqsaqals, with no restriction or exceptions.

We may say that this moment is the beginning of criminal and judicial prosecution of 'Aqsaqal courts'. It appears that this measure did not come to expected results. In the report of the representative of MoJ S. Mambeev at the meeting of Council of People's Commissars of the republic on November 28, 1927 he suggested to continue systematic fight against Aqsaqal courts (they were accused of work bribery) (CSA of RK, F. 1380. List 2. Case 200. P. 60). In the end of the same year participants of the meeting of the Commission for consideration of the Regulation about arbitral courts had to admit: "Judicial and investigating authorities are not yet ready to serve the needs of all the population, this is why in auls their functions are performed by Aqsaqal courts". This is why a member of the Commission Ruziev suggested to authorise Aqsaqal courts as an interim measure. However, as we may see from the minutes of the meeting, not all members supported this initiative. For example, Aralbaev spoke for "establishment of some flexible and trusted by population authority for decision of some minor common cases which are still inevitably decided by Aqsaqal courts".

On the basis of the Commission decision, the Central Executive Committee (CEC) and MoJ of KazASSR adopt the Order "On Arbitral Courts in Aul, a Kishlak and a Village", which reads: "Civil cases where the parties are private individuals may be reviewed in rural areas of the KazSSR by arbitral courts subject to consent of the parties".

The Order of the CEC and the MoJ of the Republic not so much solved the matter as complicated it. The point is that legitimization of legal status of arbitral courts resulted in revival of Aqsaqal courts "the form of which is close to arbitral courts". Arbitral judges, now legally, chose Aqsaqals, who decided the cases on the basis of norms of customary law. In order to eliminate unwanted for Soviet authorities concentration of judicial powers in the hands of representatives of traditional legal institute, the MoJ of the Republic introduced an additional chapter to the CC of RSFSR for consideration by the MoJ of the RSFSR. New chapter covered the crimes representing the vestiges of clan system. The most interesting of this chapter in the Article No. 23, covering 'Aqsaqality', "i.e. initiation proceedings and deciding of cases, which must be tried by judicial, civil or other authorities, by persons not liable to do so, give rise for imprisonment up to 3 years and a fine of 1,000 rubles". However, legal bodies were not sure as to practical implementation of this article, as, according to Zh. Sadvakasov, the representative of MoJ, the people continue "to resort to Aqsaqal bays and they are deciding the cases".

It is worth to be noted that the initiative of complete abolishment of arbitral courts in the territory of Kazakhstan belonged to local authorities. This social and legal paradox may be explained, to our mind, by weakness of local Soviet judicial and investigating authorities and still strong clan relations of the Kazakh. This led to a fight for power between the Bolsheviks and clan leaders (Aqsaqals, bays etc.) in a nomadic aul. In the aggregate these reasons resulted into the Motion of January 6, 1928 from the Republic authorities represented by the CEC of KazASSR to the All-Russia CEC of the RSFSR about exempt of Kazakh auls from the Regulation on arbitral courts (1924). On the basis of this Motion, the All-Russian CEC and the Council of People's Commissars made an amendment to the Article No. 1 of the Regulation on arbitral courts on April 3, 1928 signed by M. Kalinin. It read as follows: "Civil law cases between the Kazakh people in rural area (auls) of the Kazakh ASSR cannot be submit to an arbitral court".

As we may judge from a letter by N. Zhalnin, interim officer of the MoJ of the KazASSR, to the presidium of Kazakh CEC in the end of 1928, official abolishment of Aqsaqal (arbitral) courts led to implicit forms of domestic crime, "which made them almost impossible to find out and significantly more difficult to fight, ...in the result of which the cases lose their social significance and criminals stay unpunished" (CSA, F. 1380. List 2. Case 200. P. 215–215 on the reverse).

From the end of 1920s we may talk about gradual vanishing of this legal institute. Its final abolishment was caused by the measures of 'Little October' - line of policy of authorities aimed at sovietisation of Kazakh aul and wide-scale collectivization of nomadic population¹⁶.

4. Conclusion

Thus, the court of biys, affected by certain modernisation during the reform of Russian government in the 19th century, continued to be a tool for regulation of social relations of the Kazakh. Different legal regimes, legalised in the Russian Empire, had several objectives: To establish supremacy of imperial power through engagement of local nobility into the bogies of administration in the region. In addition, "incorporation of local 'customs' into the system of imperial legislation was a kind of deal: The Empire maintained local justice in its local representation in exchange for fees and taxes paid by local people"¹. Judicial and legal reorganisation of the region did not lead to the loss of status by the court of biys - it only changed the form but its content stayed the same.

However, after 1917 when the Bolsheviks came into power, the court of biys started to change significantly. Enunciatory slogans of soviet power about equality and equal rights of peoples, unstable position, lack of knowledge about the mechanism and ways of destruction of traditional institutes made Soviet government tolerate (in the beginning) political and legal culture of remote peoples. In those years the courts of biys continued to operate as Aqsaqal (arbitral) courts and councils.

However, with the strengthening of the proletarian dictatorship, the Bolsheviks started - though, inconsequently - to implement the policy of liquidation of knowledge and practice which had been evolving for centuries. Implemented measures revealed persistence of legal institutes in the Kazakh society. In order to

completely abolish the Aqsaqal courts, the CEC and Council of People's Commissars of the Republic adopted several circulatory letters, which made these courts first significantly narrow their competence and then pushed them out of legal sphere of the Republic. By the end of 1920s the Aqsaqal courts as arbitral authorities are completely abolished by the Soviet power.

Thus, during the first decade of its existence the Soviet government, on the basis of current social and political situation in the region, changed its attitude to customary law and traditional institutes - from tolerant (customary legal norms were accepted and in force together with Soviet legislation) to gradual abolishment and interdiction of their activity in Kazakhstan.

5. References

1. Burbank G. Local courts, imperial law and citizenship. Russian Empire in comparative perspective. Novoe Izdatelstvo; Moscow. 2004. p. 320–60.
2. Mazhitova ZS. The court of biys in the Kazakh traditional society on the materials of pre-revolutionary Russian historiography (second half of the 19th - beginning of the 20th century). Vestnik NGU Journal. 2014; 7(1):97–104.
3. Abashin SN. Soviet Kishlak: Between the colonialism and modernisation. Moscow: New Literary Observer; 2015.
4. Bobrovnikov VO. The muslims of North Caucasus: Custom, law, violence. Moscow: Vostochnaya Literatura; 2002.
5. Herodotus. History. Moscow: Nauka; 1972.
6. Olcott MB. The emergence of national identity in Kazakhstan. Canadian Review of Studies in Nationalism. 1981; 8(2):285–300.
7. Saray M. The Russian conquest of Central Asia. Central Asia Survey. 1982; 1(2-3):1–31.
8. Litvinskii BA. The ecology of the ancient Nomads of Soviet Central Asia and Kazakhstan. Ecology and empire: Nomads in the cultural evolution of the Old World; Los Angeles. 1989. p. 61–72.
9. Singer A. Contemporary Khanates: Compromises adopted by Kazakh and Kirghiz leaders. Ecology and Empire: Nomads in the cultural evolution of the Old World; Los Angeles. 1989. p. 193–203.
10. Kradin NN. Political anthropology. Moscow: Ladomir; 2001.
11. Matin V. Law and custom in the steppe: Kazakh, Middle Zhuz and Russian colonialism in the 19th century. Almaty: Sanat; 2009.
12. Bocharov VV. Common law: Anthropology of the law. Publishing House. St. Petersburg: Academy of Culture's Researches; 2013.
13. Hosseini SI, Arya A, Ahmadi M. Nationality in private in-

- ternational law. Indian Journal of Science and Technology. 2015; 8(12):1–5.
14. Abashin SN. Soviet regime and Uzbek mahallah. Neprikosnovennyi Zapas Journal. 2011; 4(78):96.
15. Safarov GI. Colonial revolution (Practice of Turkestan). Moscow: Gosizdat; 1921.
16. Masanov NE, Abylkhozyn ZB. The history of Kazakhstan peoples and culture. Almaty: Daik-Press; 2001.