A NOTE ABOUT THE JUDICIAL REFORM

One of the most famous works of Shokan Walikhanov was written in the form of a memo addressed to the Governor-General of Western Siberia. The work was completed in 1864. It was first published by N. I. Veselovsky in the «Works by Shokan Walikhanov» (NRGS, DEЭ, 1904, v. XXIX, pp. 151–178). In connection with the upcoming reforms of the 60s of the XIX century, the tsarist government, intending to introduce the institute of justices of the peace in Kazakhstan, decided to collect information and considerations regarding reforms in the judicial area by interviewing honorary biys and sultans. Yatsenko, the counselor of the regional government of the Siberian Kazakhs, was appointed the chairman of the committee for the collection of the necessary information. The staff rittmeister Sh. Walikhanov was recommended as an assistant by the governor-general of Western Siberia. The methods used by Yatsenko during the work of the committee were criticized by Walikhanov, in connection with which this note appeared.

Recently, our government has been actively engaged in transformations in our administration, in the judicial system, and has paid special attention to public education.

Some of these reforms have also affected our steppe, such as judicial reform. Changes in the judicial area will probably lead to a change in the previous administrative system of our region, and there is no doubt that instead of the complex bureaucratic chaos burdensome for both the Russian government and the Kyrgyz people, more rational administration on the basis of self-government will be formed in the districts, which is now accepted for Russian rural and urban communities.

Considering such important transformations that are being prepared for my homeland, I think it my duty to submit for consideration of Your High Excellency as the chief of the Kyrgyz people) some of my thoughts and notes (concerning the judicial administrative reform and partly public education).

Among its sons, Russia has many peoples of other faiths and ethnic origin, who lead a lifestyle completely opposite to the lifestyle of the indigenous Russian people and have morals and traditions completely opposite to the morals and traditions of Russians belonging to the Slavic tribe. It is clear that, for the reasons above, the transformations designed for the Christian and sedentary Russian population will not be beneficial and will be senseless if they are applied in its entirety to the nomadic peoples of European and Asian Russia.

Probably, due to these considerations, the counselor of the regional government Yatsenko1 was sent to select the opinions of the biys and sultans who knew the laws and judicial customs regarding the judicial reforms proposed for the region.

However, the opinion of the people, especially ignorant and half-wild, cannot always be accepted as an expression of the real needs of the people. The opinions of the privileged classes of society should be treated as the negative expression of the real needs of the people, since the interests of noble and rich people, even in highly civilized societies, are mostly hostile to the interests of the masses, the majority. The people are rude and stupid and, as a result, passive; therefore, the motive and direction of the people's opinions depend on a thousand random circumstances and of the circumstances that are probably insignificant.

A wild and ignorant person is like a child who cannot fully control its external senses. It is difficult for him, like for a child, to adjust his feelings to the actions. Although the desire to improve the internal and external conditions of life is is inherent in humans and was inherent in them in all ages and at all stages of human development, but, nevertheless, this goal was rarely achieved by him. Not understanding himself and not having any positive information about the nature around him, the infant man had to feel his way in his strive for improvement, like a blind, and it is clear that he should have made more mistakes, taking a lie for the truth, harm for benefit. History gives us many instructive examples in this regard.

Therefore, there is no public question that will be so important as the question of public reforms. There is no doubt that all legislators and reformers kept and keep in mind public benefit, but the concepts of what is useful and what is harmful to social development in different centuries were different, and now there are many wild hypotheses among us, which, from routine and because of being accustomed to the old legends are taken by many people on trust as indisputable truths, although the sciences have proved their falseness and inconsistency. Nowadays, the most important and closest reforms for the people are economic and social reforms that directly relate to the urgent needs of the people, and political reforms are allowed as means for the implementation of the necessary economic forms because every individual and the whole mankind pursue one final aim in its development – improvement of their material well-being, and this is the essence of the so-called progress. From this point of view, only those reforms are useful that facilitate the improvement of the daily life of a person, and those are harmful that for some reason prevent the achievement of this aim. Any reform aimed at public well-being can achieve its supposed goal without any accidents only when the public needs and means are known. John Start Mil2 is absolutely right saying that before giving new rights to people of any class, it is first necessary to conduct precise scientific research of the mental, moral, and political qualities of people of this class. Indeed, a doctor treats a patient with the confidence of success only when he knows not only the patient's painful symptoms but also the main causes of the disease. The ignorance of public needs and the excessive jealousy to the humane theories, the innovations and reforms are very often introduced here that are completely unnecessary at the moment and under the given circumstances. It is very easy to avoid mistakes of this kind if, when we introduce various reforms, we will apply the method used in agriculture by the cultivation of plants. According to this method, first, it is necessary to conduct a sufficient study of the plant, then you should know in what soil it grows, how much light it needs, etc. The theory consists in providing a plant with everything that it needs, and eliminate everything that hinders it.

The conditions of the tribal organism of the environment, climate, and soil should always be at the forefront because all human intentions and motives are determined by the combined influence of physical and social conditions. Reforms are successful only when they are correct, that is, when they are based on those inevitable laws of progress, under which only healthy development of the social organism is possible. Reform of that kind should encourage and never stop.

All European revolutions since 1793 were caused only by the desire of the government to suppress the free popular movement. The forced and implanted reforms that are based on abstract theories or taken from the life of other people have constituted the greatest disaster for mankind so far. Our modern historians attribute all our social diseases and anomalies to the crushing and antipopular spirit of Peter's reform not in vain.

In general, the foregoing does not mean that we belong to the followers of that narrow [theory] of nationality who look at a nationality as something predetermined from the beginning and think that it ... should develop only from itself. On the contrary, we think that the assimilation of European and universal human enlightenment and the energetic struggle with the obstacles that hinder the achievement of this aim should be the ultimate goal for every people capable of development and culture. Culture can change the human body for the better, just as cultural care improves the breeds of domestic animals. To make a Kyrgyz capable of perceiving European transformative ideas, we should first develop his brain and nervous system through education. The body cannot accept something, the time for what has not come yet.

In 1822 Speransky3 completed the Siberian Code, which in 1824 was introduced in the Kyrgyz steppe. The illiterate nomadic people with special concepts and customs was suddenly subordinated to the Russian to bureaucratic centralization with all its tricky instances, attributes, and formal names that are still incomprehensible not only for the Kyrgyz, but for the Russians as well.

Together with orders, meetings, outgoing and incoming journals, they imposed Tatar mullahs and Tatar education on us. We consider these very reforms of this kind disastrous for the people and harmful to progress

We considered it necessary to make this long and, perhaps, a bit doctoral introduction because the committee formed at the regional government to solve the issue of judicial reform in the region of ​​the Siberian Kyrguz, obviously, was little familiar not only with those scientific facts that are now acknowledged by everyone as an axiom but with the trends and requirements of our time in general, for it based its conclusion only on «opinions of people» collected from «noble» Kyrgyzs by one of the committee members, counselor Yatsenko.

As we noted above, people's opinions are nothing more than the babbling of a little child, and that's why the primitive peoples are fairly called the infant ones. The opinions of the sultans and biys are even less worthy of respect because the interests of the whole nation, according to strict justice, shall be preferred to the benefits of one class. The issues of reforms require much greater caution and deeper considerations because the people's "to be or not to be" depends on them.

Of all foreign tribes that make up the Russian Empire, the first place in terms of population, wealth, and, perhaps, hopes for development in the future belongs to us, Kyrgyz. We occupy one vast uninterrupted territory, while the other foreigners are scattered among the Russian people. Up to 800 thousand people of our tribe are Russian citizens, and together with our non-citizen tribesmen, this number exceeds one million, while all Tatars of European Russia, including the Bashkirs, Nogais, and Kyrgyz of the Bukey Horde5 constitute hardly a million. All the so-called Central Asian trade of Russia is nothing less than our trade: Bukhara, Kokand, and other countries of Central Asia account for a rather insignificant share in the total trade balance. At last, our people is not so wild and rude as Russian society thinks of it.

We read and hear very often such phrases as: «What Kyrgyz-Kaysak manners! It is excusable for a Kyrgyz-Kaysak,» etc. It is notable that in similar cases, offensive for us, our people is always called Kyrgyz-Kaysaks, and when we are praised, they simply call us the Kyrgyz or Kaysaks. It leads us to the conclusion that the opinion on our extreme wildness and rudeness is based only on the vocal barbarism of the word Kyrgyz-Kaysak. Speaking seriously, the Kyrgyz people belong to one of the most peaceful, and, therefore, the least wild foreigners of the Russian Empire. In this regard, we are second to only the Buryats, and only because they were happy to accept the most humane and advanced teaching, Buddhism...6

Our people has rich plant\* literature not deprived of poetic merits, which is more close to the Indo-Germanic epic than to the oriental works of this kind. Finally, and what is most important, the forms of our social development are in this very artless period when they represent the greatest analogy with the results of higher, cultural development. All our hopes for the future are based on this fact. Moreover, we, as the descendants of Batu Tatars7, have historical and even blood relationships with the Russians.

The future of millions of people who show undoubted promise for civil development, people who consider themselves brothers of the Russians in homeland and who accepted Russian citizenship voluntarily, seems to deserve more attention and greater care in such decisive issues that are formulated into the Shakespearean "to be or not to be." The lack of reasonable self-defense and all kinds of passivity due to underdevelopment oblige the government to be extremely attentive and careful in relation to us.

After the mutual concessions, the matter, through the mediation of the senior sultans, was settled in such a way that the biys could not interfere with the rulers, the rulers - with the biys, and the rulers and biys - with the sultans. The honorable Horde underofficials agreed to everything, because for them, for future candidates for all these positions, it was necessary that the steppe authorities did not interfere with each other to exploit the common people.

From the above sketch of our works on judicial reform in the region of the Siberian Kyrgyz, it can be clearly seen that the wish of the majority of the people masses consisted in leaving the court of biys in ancient folk form, and the personal interest of the official, ranked and rich Kyrgyzs, on the contrary, was to change the very core of the court of biys.

This fact requires special attention by the further consideration of the issue of judicial reforms in the steppe, and is also remarkable since it gives us instructive data on how unceremoniously rich and honorable Kyrgyz behave themselves with their poor and non-honourable relatives. I noticed an illustrative example of the unceremoniousness of the honorable Kyrgyzs to the non-honorable in the Karkarals. Here, the biys and sultans gave their opinions without consulting the «black people», and, by the way, stated that four main biys should be appointed for their district, some biys over the biys. I had to include this opinion, however absurd it may be, in the note, and when this note was being copied in the order, my apartment was besieged by a large crowd of Kyrgyz horsemen and footmen. The people demanded to destroy the article about «biys over biys», and did not leave until this demand was satisfied. The matter was that two honourable elders, one of who was an assessor, and another - a manager, were dismissed for bribery at the request of people, so the Kyrgyz authorities, probably, wanting to show their sympathy for their fellow and disrespect for the people, decided to create the position of a «biy over biys» for these bribe-takers, thereby causing a demonstration from the common people.

We hope that all these acta et facta\* are enough to see all the treachery and falsity of famous people. In these opinions, the committee saw the need for reforms in the court of biys, which, according to the noble Hordians, did not correspond enough to the modern social development of the Kyrgyz people; but still, considering ourselves more competent as a witness, see in these opinions intrigues and low motives, on one side, indifference and passivity on the other side, and ignorance and wildness, on both sides.

While reproaching the Kyrgyz for being proofless, we ourselves will not be proofless. For this purpose, we will now consider the essence of the court of biys to see the sense and character of this institution. Then, based on statistical and other reliable facts, we will try to determine to what extent the court of biys satisfies or does not satisfy the modern development of the Kyrgyz people, and, to make a final conclusion, we will compare how the court of biys is consistent with the main principles of the magistrate court designed by the government, and to what extent the latter is applicable to the daily life of the Kyrgyz <or not applicable at all>.

The court of biys in an ancient folk form

1) The Kyrgyz did not condition awarding a title of a biy by any formal choice of people and approval by the rulers; only profound knowledge of judicial customs, combined with oratory, gave the Kyrgyz this honorary title. To become a biy, a Kyrgyz had to show the people his legal knowledge and his oratorical ability many times. The rumor about such people spread quickly throughout the steppe, and their names became famous to everybody. Thus, the name of a biy was a kind of a patent for judicial and legal practice. The children of persons with the title of biys, having extensive legal practice, usually inherited the knowledge and, at the same time, the titles of their fathers.

We can give numerous examples of such hereditary nature of a biy title among the Kyrgyz people. At the end of the XVII century, the Karakisian clan12 of the Middle Horde had a famous biy Kazbek; his descendants still have the title of biys:

Kazbek

↓

Bekbulat

↓

Tlenchi

↓

Alchinbay

However, it does not mean that the title of biys was ever hereditary among the Kyrgyz. Biy Chorman is the son of a rich and noble Kyrgyz of the Karja clan13, but not of a biy. Chorman, whose ancestors have never been biys, has obtained this title at the age of thirteen, having won an important clan process at one meeting of people, and until his death, he was called Chorman-boy. We know many Kyrgyz whose fathers were famous biys, but they themselves do not have this title.

2) The law of clan life, according to which the members of one clan were considered the members of the same family, was caused by the fact that in a process with the involvement of his relative and a member of the other clan, a biy could only be a defender of the member of his clan, but not his judge. The Kyrgyz applied the concepts of kinship to the distant generations as well. For example, the Middle Horde is divided into six main clans: Argyn, Kipchak, Konrad, Nayman, Uvak, and Kerey, who have the relations of brothers, that's why in the process with the defendant from the Argyn tribe, the plaintiff from the Konrad tribe was entitled to disqualify all biys of the region of the Siberian Kyrgyz as belonging to the same clan, therefore, those who supported the defendant, except for the Baganal, Kipchak, Uvak, and Kirey biys, constituting in total about 15-ти volosts in the region. The feature of the clan life of the Kyrgyz served as a basis for the right of free choice on the part of the biys coming to hear their cases from all persons with this title in the entire Kyrgyz steppe, to allow them to elect a sufficiently impartial judge.

So, in 1758\*, sultan Barak, one of the most powerful landowners of the Middle Horde, having killed Abu al-Khair14, the khan of the Lesser Horde, chose 4 biys from among the biys of the whole Kyrgyz people for his trial. Among his judges, there were: Tulebiy15 from the Great Horde and Aytek16 from the Minor Horde.

The nomadic way of life facilitating quick movements from place to place and frequent conflicts of clans, the Kyrgyz habit of traveling, constant visits of biys and other honorable Hordians from distant places to funeral meals, baigas, and other people's assemblies were giving and still give the Kyrgyz an easy opportunity to have their cases heard by a biy from another clan or by any traveling celebrity. Actually, the Kyrgyz preferred and still prefer to be judged by the traveling biys or completely unknown persons than by the biys from the neighboring tribe, with whom they have frequent relations, therefore, clan score.

3) Since the court views the case as a private one, related only to the interests of the litigants, a custom appeared to reward a biy in certain cases for his labor with a penalty, «biyden biylagi\*», imposed on the litigant who was found guilty by the court.

4) The same view of the biys as a private practitioner and the court as a private case matter was the reason that the Kyrgyz biys could accept cases for trial and settlement only at the request of the litigants or being informed by the administrative authorities, and, for the same reason, they could not participate in the fulfillment of their decisions.

5) It is clear that such a free view of the court and the judge could not restrict the right to appeal, and the Kyrgyz were given this right to the widest extent.

6) But the most remarkable feature of the biys' court is, of course, the following custom: when there was no clear evidence against the accused, but only a strong suspicion, the biys recoursed to the mediation of honest relatives, who by oath accused or acquitted the accused. The number of these «jurors» and the scope of persons for their choice was determined by the importance of the case under consideration. Thus, the jury was chosen sometimes from among the close fellow tribesmen of the accused, and sometimes from the whole volost or district.

7) The court of biys was conducted publicly in oral form, and in all cases allowed the defence. It was so much respected by the people that it did not require and still does not require any disciplinary measures.

This is the court of biys conducted in the steppe prior to the establishment of the district prikazes in the nomad territories of the Middle Kyrgyz-Kaysak Horde.

Examining the court of biys, applied now by the Kyrgyz of our region, closely, by all our wish to find something new and implanted, we see the same forms and principles of the ancient people's court as mentioned above. Despite 40 years of Russian influence, the court of biys remained as it was hundreds, maybe a thousand years before us. Consequently, neither the internal inertia of the people nor the influence of Russian institutions and legislation could change its ancient and simple forms, although the Russian government wanted to arrange it in a more solid and official manner many times. For this purpose, the law of 1854 was issued, which has stated: «To leave the title of biys for those who used it before May 19, 1854; in the future, provide it only to the sultans and aul elders who served in these capacities for at least 6 years, performed some duties, or were graciously awarded something, and only at the choice of society and with the approval of the district prikaz (94 p., volume II, part 2. Department for the management of foreigners).» This unsuccessful law aimed at raising the rank of biys, giving them the significance of an official, but the direct consequence of which would be that the rank of biys would certainly pass into the hands of ambitious rich people who certainly did not know the folk customs and rights, fortunately for the Kyrgyz, did not influence the people's court, since the number of persons who were the biys till May 19, was and still is sufficient for the administration of justice by the Kyrgyz people. Thus, the ancient court of biys is still working in the Kyrgyz steppe on the main principles on which it acted before the Kyrgyzs accepted Russian citizenship.

If 40 years of Russian rule, which introduced many completely new elements into the social life of the Kyrgyz people, had no effect on the ancient Kyrgyz court of biys, if this court managed to resist the unfavourable conditions of the Russian laws (for example, the law of 1854), it is clear that it quite satisfies the current development of the Kyrgyz people.

The conformity of the court of biys is brilliantly proved by official sources, namely, by the insignificance of complaints against the official decision of biys and the almost complete absence of requests from the Kyrgyz to hear the cases that are referred to the competence of biys, according to the Russian laws.

According to the statements from the files of the district prikazs, during the last three years, there were no complaints about the unjust decision of the biys and requests for awarding judgments under the Russian laws in the prikazs of Karkarala, Kokchetau, and Bayan-Aul districts, although in Karkarala district, the court of biys reviewed 77 cases in 1860 and 22 cases in 1861. In 1861, the Atbasar prikaz had only one complaint with a request for the Russian court; however, the applicant was not a Kyrgyz, but a Cossack. In total, the greatest dissatisfaction with the decisions of biys for the last three years we find in the Akmola district, where the largest number of Russians, Tatars, Tashkenters, and other foreigners live. In 1860, the Akmola prikaz received two complaints, one of which was accompanied by the request for the Russian court, in 1861 – 3, [in] 1862 – 4. Unfortunately, the data provided by the Akmola prikaz on that issue contained no information about the tribe and origin of the applicants. We should assume that the applicants were not Kyrgyz.

However, we know several examples of the facts that the Kyrgyz really wanted a Russian court, but these applicants were the Hordians disrespected by people, quite immoral people\* who hoped to correct the case lost in the people's court through illegal means with the help of Russian officials. They had nothing to lose. Kodzhuk, the famous Kushmurun horse thief, asked this, as well as Baurbek, who was kept for 2 years in the guardhouse in Atbasar because of numerous complaints of the Kyrgyz of his and Kokchetau districts. The court of biys has sentenced this vulture, who once was an associate of Kenedary, to pay several hundred horses, but he completely refused to pay, and, being kept in the guardhouse, asked for the Russian court.

The court of biys can be supported by one more important fact that speaks for itself. In many cases, the Russian plaintiffs or defendants prefer the court of biys to the Russian investigation. It is known for a fact that this summer, several dozens of cases of this kind were resolved in Kokchetau.

Now I will allow myself to proceed to the main task on the issue of judicial reform in the Kyrgyz steppe of the Siberian department, namely: to the comparison of the key elements of the Kyrgyz court of biys with the basic principles of the magistrate court designed for the Russian provinces. At th first general view at these two institutions of obviously different natures, we feel a great similarity between them; there is much in common in the idea, but, examining each point separately, we see only one difference. The similarity consists, for example, in the language and public character of proceedings, but here is a difference when we go into subtleties: justices of the peace record their decisions on paper, but biys not always do it; justices of peace make their proceedings public only in civil cases, and biys – for all cases referred to their competence. (We have borrowed these subtleties together with the articles of laws from the committee project).

The difference consists in:

а) Judicial system

1. There is an indefinite number of biys, while there shall be several justices of peace for each court district.

2. The biys are not elected and approved formally. Their role is based on their own authority that they acquire in the same way as poets, scientists, and lawyers in Europe. Shakespeare and Goethe are recognized by everyone as great poets, but the opinion about their genius is not based on the decrees of governments or formal elections by people. There are a certain procedure and qualification for the selection of justices of the peace.

3. A biy becomes a judge only when the litigants address him, but he is addressed, only till he has a good renommée\*; only the loss of authority deprives him of his title of a biy. The justices of the peace are elected for three years, and, while they serve, they have constant rights and duties.

4. The biys are not paid by the state or people, but they take «biyden biylagi», and a justice of the piece entitled to get a certain amount from the regional taxes for his own needs and office expenses.

5. The congresses of biys are not periodic, but occasional, and a certain period is appointed for the congresses of justices of the peace.

6. A justice of the peace settles all cases at his sole discretion, and the court of biys can be unilateral only when the litigants belong to the same clan as the biy and they want one judge.

b) Proceedings

1. The justices of the peace can settle: in criminal cases – insignificant crimes and misdemeanors indicated in Art. 19 of Criminal proceedings, and in civil cases – claims for an amount not exceeding 500 rubles. (Art. 1 of Civil proceedings). The biys are competent to judge all crimes and misdemeanors, except for those specified in Art. 1167, v. XV, book 2 of the Civil laws, Appendix to Art. 183 of the same volume, book 1, Code §1, clause 2, and a supplement to this clause for the 2nd continuation, and all civil cases of the Kyrgyz between themselves and the foreigners in cases, when the latter, being the plaintiffs, are also subject to the court of biys (Art. 1177, v. XV, book 2 of the Civil laws and Art. 1133 and 1134, v. X, part II of Civil proceedings).

2. The biys start hearing cases only based on the complaints of individuals or according to the reports of policemen and other authorities. The justices of the peace, except for these cases, hear cases of crimes and misdemeanors and at their own discretion and investigation (Art. 24, clause 3 of Criminal proceedings).

3. The biys hear and settle cases in their languages, according to their customs and laws, while the justices of the peace, though they hear cases in the local language, award a judgment according to their consciences or based on the common laws of the Empire (Art. 28 of Criminal proceedings).

4. The decision of biys can always be appealed, while the decisions of justices of the peace in certain cases are considered final and are not subject to appeal (Art. 30 of Criminal laws and Art. 3 of Civil proceedings).

5. The biys hear all cases publicly, while justices of the peace hear only civil cases publicly (Art. 5 of Civil proceedings).

6. In all cases settled by the court of biys, defense is allowed, while the magistrate court allows it only for civil cases (Art. 5 of Civil proceedings).

7. The justices of peace record their judgments in a special book, while the biys have no such book.

8. The decisions of biys are executed by the sultans, rulers, and elders, and the final judgment of a justice of the peace is executed by the judge himself.

9. In the court of biys, some cases allow participation of the «jury» for the settlement of the so-called question of fact; the magistrate court does not need the jury.

From this comparison of the Kyrgyz court of biys with the magistrate court, it is obvious that the magistrate court, despite the great difference in particulars, in its general idea and its practical purpose, has much in common with the Kyrgyz court of biys; the magistrate court is just rich in formalities and has more bureaucratic attributes. In our opinion, the court of biys [is] not surprising if we take into account the analogy of higher development with the lower - has some advantages over the magistrate court, at least, in relation to the Kyrgyz. We would say, absolute superiority, if we were not afraid that we might be suspected of exaggeration.

Generally speaking, the magistrate court is not yet a perfect court, the best that we could expect. And in England, this model country of a magistrate court, according to the latest researches, there are many lawyers and officials who are not absolutely satisfied with the modern state of British world institutions. In their works, Blackstone17, Gneist18, and Charles Comte19 indicate some positive of the positive shortcomings of the British magistrate court.

In our opinion, the main advantage of the courts of biys consists in the lack of formalities and any official routine. The weight of a biy is based on authority, and this title is like a patent for judicial practice. The litigating Kyrgyz are given a free right to address any of the persons who have judicial renommée, just like here the patients address medical authorities, and the defendants address to famous lawyers. The official elections can never meet these supreme conditions, and, in our steppe, under the influence of the law of clan life, the elections now are limited only to clan intrigues and serve only to feed the vanity of the rich Kyrgyz and to enrich Russian officials who are excellent at catching fish in muddy water.

If according to the selfish wish of Kyrgyz officials and wealthy herd owners, the election of biys is subject to formal elections, the administration of justice in the steppe will inevitably pass through money transactions and various mean intrigues, which happens here very often, into the hands of the herd-owning and trade nobility, which knows nothing about our judicial customs and legal rights. The free choice of judges from among the biys, provided to the litigants, completely replaces elections and even more reaches the goal for which elections are usually held. Biys are now engaged in their professions and have reasons to value their reputation. Having become elected officials, they will resemble our rulers, who demand money from everyone and pay everyone themselves, in everything.

Under the current circumstances, an ill-intentioned judge can be avoided without any scandal: no one will address him, and that's all. But if this ill-intentioned judge will be elected officially and for a term, the Kyrgyz will have to endure all his nasty things till the election term\*. Finally, if a judge is a wealthy man, perhaps, the elections will not free the people of his injustices.

The advantage of the court of biys is that it is rarely unilateral; it allows unlimited publicity, and sometimes something like the participation of a jury; its decisions are subject to appeal, while justices of the peace are given too much power in this respect, which is more dangerous since in many cases, a judge can be guided only by the laws of conscience without any other guarantee.

In relation to the Kyrgyz, the court of biys wins finally, since the other articles of the common project are not applicable to the life of the nomads, especially the main articles concerning the magistrate courts. For example, the Kyrgyz cannot be tried under Russian laws. The reason is very simple. First, by another tribe organism and other conditions of environment and nature, we cannot demand from a Kyrgyz the same understanding and opinion on crimes and misdemeanors, as from Russians and other Europeans, and, finally, the Kyrgyz do not know and cannot know Russian laws, though during the investigations, they, just like Russians, cannot refer to ignorance of the law. A Kyrgyz who does not understand a single Russian word cannot refer to the ignorance of Rusian laws! (The absurdity and routine of this requirement are obvious). This, of course, is a Sinicism, so to say, they made a pearl of creation. It turns out that our government deliberately demands impossible things from its citizens as quite possible.

There is no doubt that for a people, the law is good that is better known to it; a native law, under which a person grew up and was brought up, no matter how imperfect this law may be, should seem to him better and clearer than the wisest laws taken from outside or imposed by the top authorities. Meanwhile, the common law of the Kyrgyz, by the same analogy of higher development with the lower, to which we like to refer so much, has more humane aspects than, for example, the <Muslim, Chinese, and> the Russian laws in the Rus' Justice20. The Kyrgyz laws do not provide for these preventive and frightening measures, which fill in the latest European codes. The Kyrgyz have never applied corporal punishments. And the clan laws, under which the clan members are responsible for their relatives, bring a lot of practical benefits in clan relations.

It is also not comfortable to apply the initiation of cases at own discretion to the Kyrgyz biys. This right would turn a Kyrgyz biy, a judge, to a policeman who would become unbearably captious to get more «biyden biylagi», and the participation in the execution of judgments would give him, to a certain extent, the power. . <Due to which he [from] a private court practitioner would turn into\* a policeman...\*>. This foreign fiction is in direct contradiction to the main idea of ​​the court of biys.

From the facts and evidence provided by us it follows:

1. That the principles of the magistrate court, designed for the Russian provinces, in many of their aspects are absolutely inapplicable in relation to the Kyrgyz people.

2. The court of biys, which is now applied by the Kyrgyz, by the clan life and clan relations dominating among them, is quite suitable for the development of the people as the product directly created by the people itself <from [its] past life, the products of its development, and> under the influence of the peculiarities of their country.

3. That the court of biys has some advantages over the magistrate court, at least, in relation to the Kyrgyz.

4. That the wishes of the majority of the Kyrgyz people in case of selection of their opinions on the issue of judicial reform were expressed in favor of the ancient court of biys without any changes or additions.

Taking into account all the mentioned reasons and being guided by the truth that for the normal growth of the people, no matter what degree of development it has, self-development, self-defense, self-government, and own court are necessary, we come to a fascinating conclusion that the court of biys should be left for some time in the same form as it had before the publishment of the law of 1854, and this law, as born under the influence of bureaucratic ideas, should be abolished only in the forms of formalism and order. Nowadays, regulation and formalism should be treated only as an anachronism, or as 10,000 Chinese ceremonies. Formalism and bureaucratic routine caused only stagnation <and immobility> and still served as the Chinese wall for every useful public activity, stopping the free flow of those total and daily transformations and improvements necessary for the living popular forces. To implant any reform and preserve it later, this reform should correspond to the material needs and be adapted to the national character of the society, for the benefit of which it was undertaken. Any innovation beyond these conditions can be certainly harmful, and as an abnormal phenomenon, it can only give rise to incurable social diseases and anomalies.

4. That the wishes of the majority of the Kyrgyz people in case of selection of their opinions on the issue of judicial reform were expressed in favor of the ancient court of biys without any changes or additions.

Of course, our government will never agree to give those crimes and misdemeanors to the court of biys that still were tried under the Russian criminal laws and constituted a subject of special government supervision. Art. 1167 of the Law on Criminal Proceedings, v. XV, part II, edition of 1857, states: «There are the following crimes in relation to the Siberian Kyrgyzs: treason, murder, robbery, baranta21, incitement of fellow tribesmen against the government, expressed disobedience to the established authorities, crimes of officials, falsification and deliberate transfer of falsified government stocks and coins, arson, and taking a false oath in cases heard under the common Russian laws; for these cries, as well as for the crimes and misdemeanors committed by the Kyrgyz not in their nomad territories, but in cities and settlements, they are sentenced to the punishments under the common laws of the empire.» We believe that those accused of murder, robbery, and misappropriation must be tried under the Russian laws, as the Kyrgyz judicial customs are extremely unsatisfactory in this relation, assessing the life of a human at one hundred сто horses and 6 valuable things. But in relation to baranta, several mitigations and concessions should be made. In our courts, the word "baranta" has a <non-characteristic of the act itself, a fatal>, terrible meaning, and is considered to be the most important crime after treason and murder.

Meanwhile, the importance of the baranta is based only on tradition, prejudice. The crime lies not in fact but the fearsome sound of this word. The question is, what is called a baranta in our forensics? The question of baranta is not clarified, and there can be no positive answer. The regional government has [already] been demanding from the prikazs to solve this mystery, and cannot wait. The lawyer of the regional government, Mr. Kondratovich, translates baranta with the word driving away: driving away with murder, but this explanation is nothing more than a witty guess. We will try to explain baranta as the Kyrgyz themselves understand it. By the Kyrgyz, baranta sometimes was allowed by law. For theft, robbery, driving away, aip\* is imposed, and for baranta - nothing. Baranta is the driving away of someone else's livestock or property, in general, of someone else's property for unpaid debt, bride price, or kun\*. It happened in the old days that a Kyrgyz who had strong tribal relations <did not pay a kun for murder or aip for an insult in relation to a less powerful Kyrgyz, or>, having committed a murder or a deadly insult, did not want to go to court. Then, by the decision of a clan assembly, the insulted and humiliated people went for baranta, and, having made a sensitive capture, forced the proud offender to give a lawful satisfaction22. After reconciliation, the baranted livestock was returned in full, but without any aip.

Baranta was done publicly, i.e., in the daytime, if necessary, with violence, or secretly, thievishly. In the latter case, the people engaged in baranta had to inform their opponents that baranta was made by them and for a certain deed within 3 days, otherwise it was considered a theft. It is clear that by public baranta, the people engaged in it faced rebuff, there were fights and murders. But all this can happen during a driving away, which, however, is not considered a criminal offense.

Driving away is just a raid, robbery, misappropriation, when the criminals attack and drive away the herds of careless Kyrgyz without any reason, just out of greed. Now baranta is done for a debt or unpaid bride price, and mostly secretly, thievishly.

Baranta, whatever it may be, as arbitrariness, of course, cannot be tolerated by our government, but, taking into account the people's view of baranta and the strength of custom, we think that our government is acting too strictly, and, perhaps, not quite fair, attaching baranta the utmost importance. We believe that the secret and thievish baranta should be referred to the competence of the court of biys as a type of theft, and public baranta should be treated with more indulgence. However, why not refer it to the competence of biys, if it was not accompanied by murder, because this is the same as driving away.

But whatever may be with baranta, there are a lot of other crimes and misdemeanors for which the Kyrgyzs were tried, and, of course, now will be tried under the common criminal laws of the Empire.

The arrangement of court places for the Kyrgyz regions causes some troubles due to the specific local conditions, with which we will deal now. During the survey of their opinions on this issue, the Kyrgyz were concerned about only one thing: the location of the criminal court as far away from them as possible. Drawing on the fact that they have very few cases subject to criminal proceedings, they proposed to establish this court in Akmola\*. Some of them, however, suggested Omsk, but Mr. Yatsenko did not approve it.

Indeed, our region still has very few criminal cases subject to trial.

During the last three years, the following was submitted for revision by the regional board of cases:

in 1861 – 45

in 1862 – 27 in 1863 – 39

——————-

Total 111

Submitted by years: in 1861 in 1862 in 1863

From the Kokchetau prikaz 31 7 13

» Atbasar » 1 3 2

» Akmola » 3 5 4

» Bayan-Aul » 2 5 4

» Karkarala » 8 7 14

TOTAL 45 27 31\*

Of 111 cases, the following were settled:

in 1861 – 34

in 1862 – 35

in 1863 – 34

------------------

Total 103

Besides, it will not harm to note that in completed cases, a crime was found in hardly 43 cases!

The arrangement of a court in Akmola for the Kyrgyz and Russian inhabitants of the steppe borders, due to the extreme insignificance of cases within the court competence, will be just an unnecessary and useless waste of money, if, as some suggested, this court is traveling and nomadic, then, in addition to spending state money, it will be unbearably burdensome for the Kyrgyz. The post coach station duty, as we know from experience, was one of the main reasons for the dissatisfaction of the Russian people with the government in the last century. The Siberians and Siberian foreigners still complain about the burdensome provision of carts for police officers, assessors, and priests. The Kyrgyz fulfill this duty without any order and extremely unevenly. Many officials still take 40 and 60 horses for one carriage and give nothing to the carters, except punches. The latter is also done by individuals.

It often happens that some «majors» (as the Kyrgyz call Russian officials) do not return the hosts taken by them for carts to their hosts (without punches).

For all these reasons, we think that there is no specific need to arrange a special court for our steppe. The geographical position of Omsk, where, probably, there will be one level of court, is as favourable as the position of Akmola. For the Baganals who migrate along the rivers Chu and Sarysu, it will be farther than Akmola, but, for the other, more populated regions, it will be closer and more convenient. In any case, it is much more profitable for the Kyrgyzs to go to Omsk for trial than to receive justice in their volosts.

Another question is the choice of the jury. To tell the truth, it is difficult to vouch for the impartial choice of these persons and one cannot but be afraid of the influence of the noble Hordians and clan sympathies and antipathies\*. In order to avoid this inconvenience, we think that the jury could be appointed at the trial by taking a list of all biys who had solved any cases in the previous year and choosing a jury by lot. The composition of the jury during the term of court, of course, will count for nothing, if we do not take into account the savings that the treasury gains without establishing a special district court for the steppe.

Finishing my notes about judicial reform, I cannot leave another important popular question, the question of religious principle, unmentioned, especially since this question will now get some connection with the judicial one.

When giving opinions on judicial reform, the Kyrgyz of all districts of our region, excluding, however, Kokchetau, asked: «Refer the cases of marriages and divorces that are now tried by mullahs, to the competence of the court of biys, as before.» The reasons that caused this protest of people are explained by some historical facts, which we will now consider.

Before accepting Russian citizenship, the Kyrgyz were Muslims only by name and constituted a special Sunni split23 in the Muslim world. Muslim laws were never accepted by the Kyrgyz and were introduced into the steppe by the governmental initiative, along with the bureaucratic delights of external prikazs.

We do not know and cannot understand what the Russian government meant when it introduced Islam in the regions where it was not fully accepted by the people themselves.

The apostle of Mohammed in the Siberian steppe was the great Speransky, who appointed mullahs and proposed the construction of mosques and Tatar schools under district prikazs. (see the Special department for the affairs of foreigners called Siberian Kyrgyz, Code of laws, edition of 1857, v. II, part 2).

This fact strikes us, especially because Speransky says in his «Establishment» that the Kyrgyz are Muslims only by name, and they can be easily converted to Christianity, etc. We wonder, what made this wonderful, intelligent man spread such ignorant and wild teaching? It must be assumed that at that recently passed time it was considered not quite decent to recognize a people that become a part of the Russian Empire as having no faith, or officially recognize the Russian loyal subjects, although Muslims, as nonconformists, and they considered it not quite political to take measures for the conversion of the Kyrgyz to Christianity. That times have passed, and pruderism\* is not popular.

The Orenburg border authorities have long taken measures to hinder the development of Islam in the steppes under its jurisdiction; it is forbidden there for the Tatars not only to be the mullahs but also to live among the Kyrgyz in the steppe for a long time. In Siberia, our government still adheres to the previous patronage system in relation to Islam, and due to this, Islam takes giant steps in our regions. The entire steppe is filled with half-literate Tatar mullahs and fanatics from Central Asia giving themselves out to be saints. For some time, there appear the dervish Kurds, Nogais, and Turks in the border districts. The personal interest of the foreign Muslim strangers and especially Tatar seminarians (whom I consider to be the most fanatic followers of the prophet) is to lead the Kyrgyz with their influence to that blind religious fanaticism, in which all these elders, pilgrims and dervishes live so easily.

This propaganda has succeeded in many respects. In Bayan-Aul, and, partially, in Karkarala districts, the Kyrgyz indulged in hypocrisy with an enthusiasm typical only for the new believers. Many ishans24 and khojas from Bukhara and Kokand live there under the patronage of the local native authorities, and a lot of these scum cone and leave these places every year. The Tatar clergy, whom the Russian government entrusted with our moral upbringing, has so far been engaged only in our moral corruption, took bribes, taught hypocrisy, and, together with the Central Asian immigrants, deceived our trustful people. The fact that the Tatar clergy was constantly supporting the charlatanism of the traveling Muslim sanctimonious persons and constituted one common association of ideas with them can be evidenced by Mansurov's case25. All the indicated mullahs had correspondence with him; many of them called themselves his murids. You need to know what kind of people in our steppe occupy the positions of priests and who is entrusted with the moral education of the Kyrgyz people and judicial power in respect of such a difficult social issue as marriage. Most of our mullahs are Tatars, and all of them, without exception, are cheats. It is a highly ignorant people which is hardly literate but is infected with gloomy fanaticism and wild superstition. In all respects, [it is] a dark kingdom <in the broadest sense>.

To tell the truth, to become a mullah, one must pass an exam held by a Tatar mufti26 living in Ufa. But the success of the exam depends not on the knowledge of the examined person, but the amount of monetary peshkesh\*. We do not know if there are anywhere in the world such greedy bribe takers as our Russian Muslim clergy. The mufti himself, this highest Muslim cleric in Russia, cannot be addressed with a request otherwise than with putting money into the application. This is what one Bashkir tells about the Muslim clerical board in Ufa. «Here you have to blandish all officials, starting from the mufti, secretary, kaza, and clerks. Sometimes you have to blandish the servants and attendants of the mufti or kaza.» Note of a Bashkir about the Bashkirs.» – The Contemporary, 1863, №XI, November.)

The Tatars have many jokes and sayings confirming what we have just said about the Tatar mullahs. But for all that, our essay happened to be not so prominent as we wanted; we could not characterize even a hundredth part of all that ignorance, fanaticism, charlatanism, and meanness that dominate among the Tatar priests. However, no matter how weak our characteristic was, the facts speak for themselves.

Now we will talk about the state of public education in the region of the Siberian Kyrgyz, who are currently under unlimited control of the mullahs. It will add some more great features to what we said about Islam and [its] clerics. In almost every aul of our region, there is a nomadic school, where teachers are mostly Tatar mullahs or seminarians. Tatars prevail in Kokchetau, Atbasar, and Akmola districts. In Bayan-Aul and Karkarala districts, they are currently supplanted by the Central Asians. To understand, the spirit in which the Tatar clergy are educating the Kyrgyz youth, we will give just one example: no more is needed...The Muslim population of the city of Petropavlovsk has got a question: it is a sin to play cards, and if it is, to what extent? They addressed one mullah known for his profound knowledge. This casuist, having consulted his «black books,» declared that it is a great sin for the Muslims to play cards with each other, but playing with Russians with the intention to beat them is a righteous deed, like a kind of jihad\*, a struggle for faith, which was bequeathed by the prophet to his followers as their mandatory duty. In his popular article about Islam, published in the «Notes of the Fatherland» in the 50s, professor Berezin has proved elementary, based on the texts from the Quran and the Book of Legends, that Islam and education are incompatible concepts, even hostile, displacing one another. For example, Muhammad says that [there are] seven skies (i. е. planetary spheres), therefore, a religious Muslim should reject all astronomical discoveries since the time of Ptolemy27, otherwise he will not be faithful.

Muhammad introduced all his contemporary cosmogonic, medical and other legends and prejudices into his teaching as a dogma and thereby stopped the development of experimental sciences. <To be honest, the Arabs practiced pretty well in mathematics because Muhammad did not know arithmetic and did not introduce it into his Quran. The Arabs liked the philosophy of Yurkevich28 because it was easily applied to everything, even the teaching of Muhammad>.

As some defenders of Islam think, the teaching of Muhammad cannot be purified; any reforms in it are impossible. What revival can be expected from a religion, which is based on wild barbaric prejudices of the nomadic Arabs of the sixth century, the traditions of the spiritualists, the Jews, and various hocus-pocuses of the Persian magicians of the same period? If this is the Islam of the Turks and the Persians, what should be then the Tatar Islam, which is a kind of puritanism in Islam? The Tatars reject poetry, history, mathematics, philosophy, and all natural sciences, considering them to be temptations for the weak human mind, and confine themselves to Muslim scholasticism and casuistry. There is not a single book in the Tatar language that does not have the character of obscurantism. It is clear that the Tatars are raising fakirs like them in the Kyrgyz steppe, but the fresh popular forces do not easily come under their deadening influence.

The direct relationship with the Central Asian lands, and, finally, knowledge of the Tatar literacy gives the Kyrgyz youth the opportunity to read novels, stories, poems, and fairy tales in the Chagatai dialect of the Turkic language. Epic and fictional works of Chagatai literature either smell pf Shamil's29 teaching (heroic poems about the war of the Arabs with the Greek Empire), or resemble the odes of Horatius30 to Ligurin (a novel about Mavlevi-Jami's love for the beautiful boy Mirza-Hamdam31), or they have no sense at all (a poem about a nightingale's love for a rose, a story about a Chinese prince who loves the ghost of a light maiden whom he saw in a dream32).

Of course, none of the right-thinking people would argue that reading pederastic novels is immoral and harmful and that reading utopian books that darken common sense with fanatic mess cannot be useful.

But none of them would suggest that reading heroic novels could be even more harmful. In Bukhara, during the time of Emir Mir-Khaidar33, the public reading of the heroic poem Abu-Muslim34 was prohibited, because listeners, in fanatic ecstasy, went to Persia in droves to have there the blessed death of the Sheids (martyrs) in the war for faith.

These are the fruits that Tatar education can give to the Kyrgyz. Awful fantasy, dead scholasticism, and not a single real thought. To complete the picture, these outrageous phenomena must be supplemented by the fact that all this <carrion, rote learning of texts from the Quran in Arabic without any comments and translations, and learning of various scholastic nonsense by heart> is flogged into the Kyrgyz children not otherwise than by stick. «Your body, – the Kyrgyz usually say to mullahs giving their children to study, – my bones» 35.

In 1860, in the «Northern Bee,» one young Kyrgyz, Mr. Babadzhanov36, described the study in the Tatar schools of the Bukey Horde with extraordinary vividness. This fact is especially remarkable since Mr. Babadzhanov, as a descendant of Muhammad and a correspondent of the «Northern Bee,» is an ardent Muslim, and, apparently, not an enemy of the Tatar enlightenment.

Our administration still paid little attention to the mental education of the Kyrgyz, and, being a violent enemy of baranta, horse stealing, and generally disciplining the Kyrgyz people, had no time to monitor the actions of mullahs and traveling dervishes. But the situation still can be improved, and the reaction is still possible…

Probably, the reason that prompted the government to refer the cases of marriages and divorces to mullahs was a rude custom of the Kyrgyz to give their daughters in marriage at a very young age and mostly without their consent. The Kyrgyz sometimes promised their children in marriage in cradle.

We believe that this custom could be changed even without the participation of the Muslim clergy: it was only necessary to order the chief sultans and rulers, on pain of responsibility, to strictly monitor, so that the Kyrgyz did not give their daughters in marriage earlier than a certain age, to prevent fathers from forcing their sons and daughters to get married without their personal consent, etc.

The police supervision and the spirit of time did their work, but, of course, not fast. The enormous number of complaints that are still received on marriage matters shows that the Muslim Shariah was completely helpless against the power of an established custom,

Taking into account the fanaticism and ignorance of the Tatars, who exclusively occupy the posts of mullahs in our steppe, and the harmful influence of any ultra-clerical movement on the social development of peoples, we find that in order to weaken the influence of the mullahs and to moderate religious fanaticism, it should be necessary to refer, according to the people's requests, the cases of marriages and divorce to the competence of the court of biys, especially since marriage among the Muslims is not a sacrament.

The predominance of the theological spirit in Europe also manifested itself in the development of the people in the most disastrous way.

There is still no talk about the administrative reform, so we will not touch upon this subject, which is for many reasons delicate for us. For us, the Kyrgyz, the administrative issue is of too great interest to talk about it in passing. However, we believe that the private administration of the Orenburg steppe, with the administrative reform of our regions, can be more usefully taken into consideration as something that has already been tested for many years. Orenburg management probably had time to notice its advantages and disadvantages.

The most fundamental disadvantage of Orenburg steppe management, of course, consists in the fact that the Hordian officials are appointed there not at the choice of people but at the discretion of the border authorities. The right to choose the authorities, given to us, the Middle Horde, is such a right that we cannot but value, although we now use it both badly and dishonestly.

The nomad tent tax, collected from the Trans-Ural Kyrgyz, is wrong from the point of view of science and a burden for people. Although this tax doesn't stand up to scrutiny, some of our border administrators, for some limited considerations, were so enthusiastic about it that they thought of imposing fumage in our steppe. There is no doubt that the tribute in furs37 paid by the Siberian Kyrgyz according to the number of livestock is the only possible tax, which is quite right according to the latest theories, that can be imposed on nomads without burden.

February 28, 1864

Omsk.

Source: Valikhanov Ch. Ch. A five-book set. Volume 4 – Alma-Ata, Office of the chief editor of the Kazakh Soviet Encyclopedia, 1985, 2nd revised edition, pp. 77-104.