

CUSTOMARY LAW OF KYRGYZSTAN AND THE SPECIFICS OF THE FORMATION OF CRIMINAL PROCEEDINGS (AGE DIFFERENTIATION OF PARTICIPANTS AND PROTECTION OF RIGHTS)

DIREITO CONSUTIDINÁRIO DO QUIRGUISTÃO E ESPECÍFICAS DA FORMAÇÃO DE PROCESSOS CRIMINAIS (DIFERENCIAL DE IDADE DOS PARTICIPANTES E PROTEÇÃO DE DIREITOS)

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Abstract

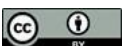
The insufficient study of customary law in theoretical jurisprudence, criminal law, and criminal procedure, its inadequate consideration in the development of modern democratic society, modern criminal procedure law, and other factors not only complicate the regulation of social relations but also give rise to conflicting views. The issues of age differentiation of legal participants and the formation of a human rights function are examined.

Keywords: Custom. Customary Law. Litigation. Children. Law. Regulation. Differentiation. Protection of Rights. Dance. Court. Advocacy.

Resumo

O estudo insuficiente do direito consuetudinário na jurisprudência teórica, no direito penal e no processo penal, sua consideração inadequada no desenvolvimento da sociedade democrática moderna, no direito processual penal moderno e outros fatores não só complicam a regulamentação das relações sociais, mas também dão origem a visões conflitantes. São examinadas as questões da diferenciação etária dos participantes jurídicos e da formação de uma função de direitos humanos.

Palavras-chave: Costume. Direito Consuetudinário. Litúgio. Crianças. Direito. Regulamentação. Diferenciação. Proteção de Direitos. Dança. Tribunal. Advocacia.



1 INTRODUCTION

The study of the genesis of criminal proceedings in national legislative acts is one of the most important issues of modern domestic jurisprudence. This is due to the fact that the origin of national legislative acts, their formation and development inevitably affect the formation and development of current legislative acts.

Current criminal procedural legislation in Kyrgyzstan requires the selection of optimal solutions for the legal regulation of public relations in the conditions of the rule of law, not only according to the quality of legal norms, but also taking into account the public national consciousness and mental characteristics of the Kyrgyz people.

In this context, a comprehensive study of the meaning of the provisions of Kyrgyz customary law in criminal proceedings will allow not only to correctly select the existing legal framework, but also contribute to the introduction of amendments and additions to the current criminal procedural legislation.

2 MATERIALS AND METHODS OF RESEARCH

In the process of research, archival materials of the Kyrgyz Republic and Kazakhstan, historical works and expert conclusions of customary law researchers were used. In the process of research, general scientific and specialized methods of cognition were used, such as analysis, synthesis, induction and deduction, formal-logical, grammatical, system-functional, formal-legal methods of cognition.

3 DISCUSSION

According to the renowned scholar B.I. Borubashev, "the systematization of customary law allows us to identify a number of fundamental principles of customary law, in particular, tribal ownership of property, communal responsibility for violations, tribal-kinship ties between the offender and the victim in determining the degree of the crime, as well as the participation of tribal groups in the judicial process"(Borubashev. B.I.2009)

It should be noted that during the Soviet period, many layers of social relations, including customary law, were resolved through class and administrative methods. In the field of scholarship, including legal studies, the interpretation of problems was limited to administrative regulation. Despite the emphasis on administrative, political, and class relations from a theoretical and legal perspective during the Soviet period, a number of scholarly works paved the way for their study as an independent object of scholarship and for their methodological, including systemic-structural, research methods.

In Central Asian countries, another pressing issue in this study is the legal regulation of social relations. As is well known, in the history of the Kyrgyz people, relations were regulated by customary law and were not widely disseminated in printed sources.

Another significant challenge for research in Eastern countries is the legal regulation of social relations. As is well known, in the history of the Kyrgyz people, relations were generally regulated by customary law and were not widely disseminated in printed sources (Zhusupov B.A.2016)

It should be noted that the phenomenon of customary law is common to many nomadic peoples in Central Asia. Research into the phenomenon of "customary law" is also interesting because many sources of customary law are undocumented and unsystematized. Meanwhile, despite its primitiveness, it regulated social relations during the corresponding historical period of Kyrgyz society's development (Murzaibraimov, N. B, & Zhusupov, B. A.2022). Researcher O.S. Shurguchuyev notes that "Law as a sociocultural factor arises in specific historical conditions, reflecting them and being an integral part of them. The content of the law, developed and possessed by an ethnic group, is determined by the characteristics of the historical community within which it lives and develops," and we support this position (Shurguchiev O.S. 2016).

Customary law is a set of customary norms and rules of behavior used in the form of traditions. Customary law arose during the period of the destruction of primitive communal society and the emergence of private property. Common law is characteristic of a society in which people live in tribes. Norms of ordinary rights change and adapt depending on the conditions of society. In the middle of the 19th century, Kyrgyz used customary law (Political science. Encyclopedic textbook 2004).

Legal regulation was accompanied by the influence of the lifestyle of the Kyrgyz, their culture, religious and moral norms on customs. The absence of general norms in customary law provides for liability only for specific actions. Customary law has a casuistic nature and is accompanied by various options for legal regulation. Ordinary law serves as the main source of law (Zhusupov, B. A., Saipidinov, B., Pasanova, K. B., & Matmusaeva, M. K. 2026).

The implementation of customary law was in a dialectical relationship with the development of social processes. At the same time, the patriarchal-feudal character of public life left its mark not only on the formation of customary law in Kyrgyzstan, but also on the legal traditions of Central Asia and other neighboring nations.

The framework of the official law helped formalize social types of human interaction. However, the real social behavior could hardly fit within the framework of law because most relations were not considered by positive norms.

These spheres of social relations were governed by customary law considered as a supplement to the existing laws. In addition, customs regulating social behavior could be in conflict with law or simply deny it (Erin, P.V., Melekhova, & N.V., Nikolashin, V.P_2018).

The difficulty of studying the substantive aspects of criminal proceedings in Kyrgyz customary law is also explained by the fact that the Kyrgyz did not distinguish between customary crimes and other violations of the law. Extant documentary sources do not confirm the veracity of these circumstances. D. Turanov, who studied Kyrgyz customary law, writes: "The Kyrgyz have underdeveloped concepts of content and form, which lawyers strictly distinguish in customary law, as well as civil-criminal legal contradictions" (Turanov D.1900).

Along with studying customary law, we believe that an analysis of the customary law of nomadic peoples, including identifying common features and similarities in the criminal-legal and procedural aspects of the Central Asian states, will contribute to a more comprehensive study.

The customary laws of neighboring Kazakhs are also of great interest to us.

As cultural values of a Turkic-speaking nomadic civilization, they occupy a special place in the history of law. Kazakh customary law, which arose within the

framework of nomadic civilization and developed over many years, also includes legal norms adequate for that historical era.

Kazakh customary law, along with Kyrgyz customary law, regulated social relations of that historical era and developed in accordance with the order of legal concepts and institutions. Kazakh customary law was also intended not only for direct application but also served as a classical standard of order.

Like Kyrgyz customary law, Kazakh customary law was characterized by a predominance of property liability. This, in turn, was a widespread class form characteristic of the patriarchal-feudal structure of nomadic peoples.

The customary law of the Kazakhs also differed from written law and had a somewhat simpler structure and content.

Among the researchers of the Kazakh customary law, it is worth mentioning the work of T.M. Kultelev "Criminal Common Law of the Kazakhs" (Kultelev T. M. 1955).

Customary law was prevalent. The patriarchal-feudal nature of social life left its mark not only on the formation of Kyrgyz customary law, but also on the legal traditions of Central Asia and other neighboring peoples.

The difficulty of studying the substantive aspects of criminal proceedings in Kyrgyz customary law is also explained by the fact that Kyrgyz customary law does not distinguish between crimes and other offenses.

Under customary law, civil and criminal cases were not significantly different from each other, as both ended with the payment of a ransom or a fine. Civil disputes between Kyrgyz, legal proceedings between Kyrgyz and other nationalities, as well as claims based on acts adopted with the participation of Russian authorities, were excluded from civil law. These criminal and civil cases began to be heard by the courts of the Russian Empire (Gulnura Toktakun Kyzy_2017).

Yu. Rossel. He notes that "one of the most characteristic features of customary law is the indistinction of civil offenses from criminal acts, which are inherent in all crimes as a relationship - the purpose of punishment is aimed at satisfying the victim" (Rossell Yu.1978)

Domestic researcher S.K. Kojonaliyev writes that "the Kyrgyz customary criminal law does not deal with extraneous crimes and offenses in general, but recognizes the crime

as an act dangerous to society and inciting the interests of the ruling classes" (Kojonaliyev S.K. 1963).

According to the famous national student G. A. Mukambaevoi "In addition to the state power of the nomadic peoples, the power of the Khan, uniting the people, is an important element of the political system of the Yenisei Kyrgyz. Power in the older generation was based on authority, respect and norms, customs, traditions, ethical norms, etc (Mukambaeva G. A.2003).

According to the authors who conducted research in this area, the customary law of the Kyrgyz people, despite its primitiveness, feudal-patriarchal origin and lack of systematization, was adopted in the theory of legal regulation, criminal law, civil law and several democratic forms and included in the modern legal system of Kyrgyzstan (Murzaibraimov N.B., Kushbakov Ch.2016)

The renowned researcher B. I. Borubashev also shares this view: "Kyrgyz customary law did not distinguish between criminal and civil cases. In all cases, both criminal and civil, the court's decision resulted in an award of compensation in favor of the plaintiff who suffered damages. Under customary law, the plaintiff was not only the victim, but also his or her close relatives and trusted persons. The defendant also had the same right.

The development of the judicial system spans a long period of time and encompasses several historical periods. In each historical period, mechanisms for dealing with violations of the law were developed, depending on the mentality, customs, and traditions of a given people.

Patriarchal class and tribal relations also left their mark on the formation of the judicial system. Despite the lack of a written language, the Kyrgyz judicial system of that historical period regulated social relations in accordance with customs for several centuries. During an era of excessive exploitation of their rights by wealthy tribal leaders, they began to defend their rights in various ways. They used measures such as banning attendance at "tois" and funeral feasts, while biys seeking personal gain would take married daughters back.

Victims defended their rights directly or through representatives. Sometimes, without informing the victim, close relatives would file a lawsuit. In less serious cases, it was permissible for the victim or accused to swear an oath or for witnesses to be selected

to corroborate the plaintiff's or defendant's statements or to establish the accused's innocence.

This position is also supported by Russian researcher G.B. Aidarbekova, who writes: "If there was no clear evidence against the accused, the biys resorted to the mediation of honest clan members, who, by oath, would accuse or acquit the defendant. This institution is analogous to a modern jury trial. We should note only its antiquity, development, and fairness. Here we see a crucial prerequisite for self-regulation, which is an essential attribute of civil society"(Aidarbekova G.B.2012).

Ch.V. Valikhanov writes: "The law of tribal life, according to which members of one clan were considered members of the same family, was the reason why a biy of the same clan, in a lawsuit between his relative and a member of another clan, could only be an advocate for his own clan, but not his judge.

The biys' trial was conducted verbally, publicly, and in all cases allowed for the exercise of legal representation. It was held in such high esteem by the people that it did not, and still does not, require any disciplinary measures"(Valikhanov Ch. Ch. 1985)

Thus, the human rights function belonged not only to the court of biys, but also to the victim, the accused, his close relatives and the person who took the oath.

The formation of the Kyrgyz criminal justice system, including its defense institutions, underwent a long period of historical development and evolution. Customary law existed for several centuries and regulated social relations during a specific historical era. Beginning in the second half of the 19th century, conditions for a certain systematization were created. In particular, the Judicial Charters of the Russian Empire of 1864 were extended to various regions of Kyrgyzstan, which facilitated the legal regulation of criminal justice, including the formation of defense institutions.

Researcher T.T. Shamurzaev notes that: "An important step in the development of Soviet criminal procedure was the preceding Tsarist Judicial Charters of 1864, since, parallel to Russia in 1864, legal prerequisites based on law emerged in Kyrgyzstan, which were used in the institution of defense with the aim of strengthening the principles of legality in the young state, as well as respecting the legitimate interests and rights of citizens (T.T. Shamurzaev A.S. Osmonova 2013).

Although the criminal justice system is neither systematized nor differentiated, a number of elements within it indicate the existence of such differentiation.

In particular, the inequality between men and women and trials involving adults and minors were interpreted depending on the specific circumstances of the case. Judges, in exercising their judicial functions, considered civil and criminal offenses, even where clearly defined boundaries existed. According to Kyrgyz customary law, only men and children over 15 years of age participated in the oath-taking ceremony.

The Kyrgyz criminal justice system has a rich history and evolved over many years. It incorporates feudal, patriarchal, and religious elements. Many scholars believe that it was precisely through this accumulation that the Kyrgyz people were able to resolve legal disputes within society.

Customary law was shaped by customs and traditions, and although it did not develop like the European judicial system, it developed without the influence of a universal, open authority.

Judicial proceedings served as a mechanism for justice, incorporating a number of established norms. Many scholars believe that judicial proceedings took into account the interests of tribes and served as the primary mechanism for justice.

It should be noted that in customary judicial proceedings, although many institutions are undifferentiated, certain elements are present, such as the prohibition of children under 15 and women from participating in trials, as well as the prohibition of persons over 15 from taking oaths.

Historical documents in Rus' reveal a very similar situation regarding the responsibility of minors. While not recognizing them as full participants in procedural relations, Old Russian legislation nevertheless failed to develop special norms establishing benefits and privileges for them. This is consistent with the Pskov Judicial Charter, which states, "The presence of persons assisting the parties in the proceedings is not permitted in court; only litigants are admitted to the courtroom; neither party should nominate intercessors in their place, except for women, adolescents, monks or nuns, very old people, or deaf people, in whose place intercessors may act" (Zimin A.A. Yushkov S.V. 1953).

Based on these analyses, it can be assumed that in the customary law of the Kyrgyz people there were elements of differentiation of participants in criminal proceedings by age.

4 RESULTS

Despite the lack of a clear distinction between criminal offenses and misdemeanors, customary law norms allow us to examine individual institutions within these branches of law. Archival documents allow us to generalize certain institutions of criminal law and examine criminal procedure as an independent object of study.

An analysis of Kyrgyz customary law suggests that, despite its primitiveness, patriarchal-feudal nature, and lack of systemic structure, it contained some modern democratic forms of legal regulation pertaining to legal theory, criminal law, civil law, and criminal procedure legislation.

It is worth noting that a number of customary law norms have found their way into modern procedural legislation in Kyrgyzstan.

The current decriminalization policy is based on a discretionary approach, which is more beneficial for transitioning from the state's repressive approach to criminal procedure legislation to compromise options. At the same time, legislators must find an optimal balance between private and public interests in regulating procedural legal relations, including those arising from criminal prosecution. This, in turn, strengthens its role and creates conditions for its development in conjunction with other institutions of criminal procedure, acting as an effective mechanism for ensuring the objectives and goals of criminal procedure and protecting human rights and freedoms.

5 CONCLUSION

To summarize the above, the following conclusions can be drawn:

We believe that a distinctive feature of the formation of national legislative acts is the consolidation of norms, the definition of their role in regulating criminal proceedings, the disclosure of theoretical concepts that will significantly contribute to the improvement of existing legislation, the possibility of a methodological approach to them taking into account their historical and legal aspects, and the advancement of scientific work in this area.

A more comprehensive study of customary law norms makes it possible to uncover the most significant issues of legal validity not only of a specific historical period

but also allows for the resolution of some modern approaches to regulating social relations. This is especially significant in the context of specialized sciences, especially criminal law and criminal procedural law.

- The human rights function of rights belonged to a wider range of subjects of criminal proceedings (the court of biys, relatives, the oath-taker, the victim, the accused, and the legal profession);
- Despite the lack of systematization and differentiation in customary law, there were elements of differentiation of participants in criminal proceedings by age;
- the genesis of the norms of customary law of the Kyrgyz people allows for the expansion of the dispositive principle and conciliation procedures in the current criminal procedural law of Kyrgyzstan.

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Authors' Contribution

All authors contributed equally to the development of this article.

Data availability

All datasets relevant to this study's findings are fully available within the article.

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