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Criteria to Measure Justice in *Apsua Tsas* [Abkhaz Custom]

Scholars continue to debate whether customs can be considered rules of law. If so, then in what cases, and finally, which customs existing in a particular social environment constitute rules of law?

What is the difference between legal and nonlegal customs? Representing a positivist point of view, G.F. Shershenevich notes, “Though their content is created apart from political authority, the rules of customary law become a legal duty through the will of political authority.”¹ This judgment raises doubts because it denies the presence of an oral form of law.

E.N. Trubetskoi asserted that “only those [rules—F.K.] that, while providing a known sphere of external freedom to some people, accordingly restrict the external freedom of others should be recognized” as rules of law.² Analyzing various definitions of the law, Trubetskoi writes, “A considerable number of these definitions deem it a criterion of the law that it be created by the state or enjoy the state’s recognition. But we have seen that the law can also exist apart from a state, that it precedes and

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brings about the state. In the same way, the law does not require recognition by any external authority, for any authority arises from the law itself.”³

Analyzing the evolution of customary law as a source of law, the contemporary legal scholar S.S. Alekseev also points out the presence of attributes of law in customs even before they are recognized by the state: “Rules of law can also emerge in early stages of the development of civilization, they actually arise everywhere from life itself, especially in economics, in a commodity-market economy, when the state recognizes *standardized models for subsequent resolution of specific life situations*, models that have taken shape spontaneously in life itself.”⁴ In another case, however, Alekseev almost refutes this thesis. Characterizing the law in two dimensions—the first is law as the form characteristic of natural rights, and the second is the intellectual dimension expressed in normative generalization—he writes, “If the normativity, for example, of customs and morality is merged with social activity itself, then the law forms an objectified institution because, being a phenomenon of a spiritual and intellectual order, the appropriate provisions are formally set in place and embodied in written documents. And each rule established in writing as a phenomenon of an ideal order is a generalization that is already known and, in this sense, a product of reason.”⁵

These arguments naturally raise questions: can “objective normativity” be expressed orally? And why cannot “reason” [*razum*] be expressed orally?

In our opinion, the rules of customary law, as models of behavior, do not rule out rational action, which is confirmed by their capability of changing. As research shows, the rules of behavior in “primitive societies”^a are not engendered by fear and dark beliefs in the supernatural, but rather, as now, called into being by the need for social and economic interaction between the members of society.⁶ Thus, people worked out a relationship to the world based on rational elements in oral form, relying on natural imperatives.

The understanding of custom reflected in Abkhaz law is expressed in the root of the word for custom, *atsas*, coinciding with the root of the word *atsara*—knowledge. Evidently, this concept

originally applied to ancestral knowledge. Here, the organizing and regulatory/judgmental orientation of custom is reflected in the idea of “reason.” Customary-law prescriptions are expressed, in particular, in concepts of safety, protection, guarantees, obedience, compromise, and consent. It is obvious that “legal matter” in the form of “the imperatives of reason” was reflected in language, apart from the will of the state.

Studies of Abkhaz customary law confirm the difference between an act that would be shameful (*pkuhash'aroup*) and behavior that entails retribution, recompense, necessitating punishment and/or deprivation of rights (property or nonproperty), social position, honor, dignity, and respect, that is, the consequences of behavior judged to be *itsasym*—contrary to custom. Of course, *atsas* (custom) is what the Abkhaz collectively call all customs—moral, religious, and ethical, including legal customs, that is, those that have signposts of law (justiciability [*iustitsiabil'nost'*]). This is demonstrated by the following series of words with the same root that elucidate the content of the original concept: *Azin tsas*—legal custom, *atsaky*—content, meaning, *atsanakra*—jurisdiction,⁷ *itsasym*—actions that are strictly forbidden and entail retribution or recompense. To indicate nonlegal customs, the Abkhaz use the expressions *auitsas*—to behave as a person should, *itsas baapsup*—he has a bad character, and so forth.

Another series of words with the same root are related to *apsua tsas* (Abkhaz custom), confirming the connection of Abkhaz custom with legal phenomena. Here we consider that what is natural law is the result of the reflection in human consciousness of the “reason of nature,” the objective requirements of life activity. These words show that the need for comprehension is reflected in the term *atas* (custom) itself: *atsara*—knowledge, *atsei*—son, pupil, one who comprehends, *atsaraiuu*—a person who possesses knowledge, *artsaiu*—teacher.

Inherent structural elements operate in rules of custom—both mindset and the consciousness of performing compulsory actions. Even in antiquity, rights-oriented customs contained rules that were legal in nature. Here, legal consciousness is based on intellectual and psychological components.⁸

Consequently, to determine distinctive characteristics of customary law one must identify features that distinguish it from other social regulations, "that is, reveal *the criteria of juridical measurement (juridicity)*."⁹ Below, we systematize these signposts, applying the concept of justiciability, which is a longstanding one in the theory of law introduced by the American sociologist G. Kantorovich on the basis of his study of extensive ethnological material.¹⁰

First of all, customary-law normativity (like legal normativity in general) is formal; it is relatively indifferent to specific content.

Both law and morality aspire to the same goals: to protect and assist the development of society on principles of justice. As a consequence, a commonality of content prevails between law and morality. For instance, in the *apsuara* system (the Abkhaz moral and ethical code) and in Abkhaz customary law (*apsua tsas*), the inviolability of a stranger, family bonds, regard for ownership, and distribution of property are equally subject to legal and moral regulation. However, customary law and morality accomplish social objectives in different ways. Morality operates by imposing duties unilaterally; customary law establishes not only a duty but also a claim (a transsubjective connection). The presence of a claim moves the performance of duty beyond unconditional dependence on the obligated person's moral frame of mind. The mutuality of rights and duties as an important feature of customary law is noted by Harold J. Berman: "It is my contention that the folklaw of the peoples of Europe in the sixth to tenth centuries was merged with religion and morality, and yet it was law, a legal order, a *legal dimension of social life*; and further, that it makes sense to identify as a legal dimension of social life the shared sentiment of the members of any community—even a family or neighborhood or school—that they are bound by mutual rights and duties that derive from an authority recognized by them."¹¹

The performance of duty in Abkhaz customary law is not only the observance of moral duty by the one who is obligated, but also the satisfaction of a claim of entitlement. It is quite clear that in establishing this duty the rules of customary law cannot take into account all the subjective characteristics of obligation. Here, we can identify a signpost of a *legal* rule of customary law: abstraction

from particulars. Therefore, all legal duties within Abkhaz customary law are established in general, typical terms. Performance of these duties is intended for the average person in a given community, and subjective characteristics of obligation are not taken into consideration. For the same reason, the legal duties of the rules of customary law are always strictly specified. It is the claim that requires specificity. It is not possible to establish indeterminate claims because they would lead to abuse and exploitation of an obligated person by an entitled person. Abkhaz customary law attempts to establish the equilibrium necessary for people to live and work together. Therefore it lets everyone know the precise limits of their duties and claims. In contrast to their legal customs, the moral customs of Abkhaz in the *apsuara* system do not contain claims; observance of these customs depends solely on the moral efforts of an obligated person. In this moral norm there is no *typical form*, and no limits are set on the performance of duties. Because of this they cannot be turned into legal duties, and consequently, there is no legal regulation. Claims cannot be derived from them, so a rule of customary law, since it recognizes a duty, immediately puts it into familiar typical forms and confines it within familiar typical limits (forms). Consequently, in Abkhaz customary law we can distinguish the following signpost of a legal phenomenon: formal specificity.

Second, customary-law thinking is rational, in that it disposes the parties to resolve an issue: based on the offense, who should bear the burden or be deprived of tangible or intangible goods? In this case, what ought to be done is always normative, that is, it demands adherence to the imposed requirements, expressed in normative form. In contrast, what ought to be done in a moral sense is ideal, different from what is real, and functions as a general ideological and moral mindset. For instance, the Abkhaz moral and ethical code, *apsuara*, is distinguished by a positive attitude, an orientation to how things ought to be in reality, while what ought to be done in a customary-law sense coincides with reality and is constrained only by the need for organization of society as a whole.

Third, in the process of social life two aspects are distinguished: the activity of individuals and regulation of this activity, or coordi-

nation of the actions of individuals. Activity is a necessary trait of individuals, and coordination of actions is a necessary characteristic of social life. The actions of individuals are coordinated thanks to the presence of rules or norms that regulate their activity, bring a level of harmony to it, and establish order, without which living together in society would be inconceivable. These rules of a universal quality take shape in a social environment, determine people's lives in society, and have the purpose of maintenance and development of social life. If the rules of customary law constitute a formal point of social life, then the content of social activity is determined by the purposes of human life. These purposes constitute the material and spiritual welfare that people achieve.

Analyzing rules of customary law from this point of view, we can distinguish the following characteristics: (1) they require that the facts characterizing the motivation for an individual's actions be established; (2) they contain the grounds for making the rule compulsory; (3) they establish a means of realizing the rule's dictates; (4) they indicate the purpose. These four points correspond to the psychology underlying human actions. A rule of customary law regulates people's actions, and consequently it is one of the motives inducing the individual will to act. A rule will be accepted by an individual as a motive because the individual recognizes it as compulsory for one reason or another. An authoritative dictate of customary law (whether the authority comes from god or from the knowledge [precepts] of ancestors, an elder, or public opinion) is realized in actions either voluntarily or by force, accordingly determining the means of realizing the rule. And finally, since a rule of customary law regulates and directs people's activity, its function is determined by the known purpose that the rule's prescriptions serve to accomplish.

Fourth, to reveal the legal nature of rules of customary law it is necessary to establish the essential quality of such a nature: normativity. Close examination of the rules of customary law can convincingly show that it contains a *code* for proper and compulsory behavior addressed to all members of society and thereby directly regulates their activity, focusing it on a common goal recognized in this union. Customary law establishes the form of marriage,

determines mutual relations between family members, provides for possession of property, regulates agreements and contracts, and indicates the procedure for transferring property through inheritance. In one case, a rule of customary law denotes a dictate intended to serve as a standard for a person's actions; in another case, it denotes a means, a model of adherence to rights and duties in certain circumstances.

Fifth, the customs that take shape in other spheres—morality, religion, politics, management methods, and so forth—though they possess features of normativity, do not possess the signpost of “universally compulsory normativity.” The rules of morality establish normativity at an individual's subjective discretion. The nature of legal normativity, consequently, and of customary-law normativity, lies in a different plane; it is formed by external factors: nature, the character of interaction with the environment and parameters of the security of the social community and the state. In this case, normativity means “that the law, through general rules, fulfills society's need for affirmation of *normative principles* on which the existence and development of the whole social organism are based. . . . In response both to needs of a purely natural (to some extent even cosmic) order and the requirements of expediency, manifested through reason, a community of people *exists and functions not only in a cyclical routine, a repetitive pattern of relations and processes, but also due to the need to maintain the unity of this routine within the whole community*. This is so that, in contrast to the implacably harsh, unvarying cycles of ‘naked’ nature, space is made for freedom of individuals' intellect, activity, and initiative. The optimum form of expression and assurance of this kind of ‘objective normativity’ (cyclicity, the repetitive pattern of the whole social organism in conditions of individuals' rational creative activity) is law.”¹²

Analysis of the dictates of Abkhaz customary law shows the following signposts of “justiciability” (legality): the rules of customary law regulate the most important issues; they contain obligatory rules of behavior; they are abstracted from moral judgments, giving them formal specificity; they are aimed at establishing a unified, stable, expedient, procedure; they take into account people's interests; they

are called on to protect the established order and values in society (punishability); and requirements of formal justice are incorporated in them. These signposts distinguish the rules of Abkhaz customary law from other, nonlegal customs that also perform the function of social regulation. However, as noted above, some rules of Abkhaz customary law may include a social norm that is simultaneously moral, religious, and legal. In such cases, custom bears the imprint of normative syncretism.

The "importance of the matter" signals justiciability in that rules that do not affect people's vitally important interests can be determined judgmentally, on the basis of internal experience and response to actions and deeds. They can also be regulated by customs that have no legal characteristics (normativity, sanctionability, obligatoriness, etc.), and they can be called the simplest customs. Because they lack clear normativity, their operational mechanism is different; they are observed "not out of a feeling of obligation and not because of external obligation, but rather for the satisfaction and ease of social intercourse that come from adhering to them."¹³ Abkhaz legal customs, on the other hand, regulate social relations involving retribution and compensation, property and family relations, inheritance, and so forth.

The procedure for hearing a case should also be considered a significant characteristic of justiciability. In this regard, M.A. Supataev writes, "Apparently, the boundary between what is legal and nonlegal is not where we are inclined to draw it with our modern legal consciousness, which is not very different from the Roman. Indeed, one may assume rather that the rule and the procedure are so unified and indivisible that it seems best to select precisely this trait as the criterion for law, without dissolving the latter in some elusive and 'general' feeling of law."¹⁴ This judgment is in keeping with Jean Carbonnier's conclusion: "As soon as the relationship between two people becomes the object of analysis by a third party who settles disputes, this means that the relationship has moved from the field of morality to the somewhat indefinite realm of law."¹⁵

Another signpost for legality in rules of behavior is that they are obligatory for everyone. To better understand the nature of custom-

ary law, it is necessary to identify distinctive characteristics of the genesis of legal consciousness. A key question becomes “from what is the initial consciousness of law derived?” Consciousness always presupposes a ready object and content, making it all the harder to solve this riddle. Obviously, the object of one act of consciousness comes from a previous conscious act. But in discussing the initial emergence of consciousness of something, this explanation does not fit. We are left to assume either that legal consciousness is innate, or that an unconscious act provides the first object of legal consciousness.^b

The idea that legal consciousness is innate has been developed by natural law theory, which asserts that the very content of law is innate. In our opinion, this is untenable from a scientific point of view. We can hypothesize innateness only of the consciousness of a need for rules of law, apart from their possible content. But then the concept of law would have to be present in human consciousness from the beginning in the most general form, and moreover, definitely circumscribed from other concepts, such as morality and religion. In reality, we have to establish the reverse sequence: legal consciousness originates in a particular form, and a general concept of law embracing all of its specific forms comes comparatively late. In the preliminary stage of early communal systems, individuals know only separate rights, and a general concept of law is beyond grasp. In the same way, separation of law from morality and religion is a comparatively later phenomenon. Initially, law, morality, religion, and propriety are a syncretic phenomenon—a “mononorm”—eliminating the thesis that what is legal is innate in any form. Because conditions are the same and relations are simple during this period, people naturally have virtually the same way of life. The level of development of conscious thought, the meagerness and limited scope of impressions experienced, and the strong predisposition to imitation mean that, in most cases, early humans act as others do, as fathers and grandfathers did.^c Because of this, each person is convinced that in the same conditions everyone will act in the same way. A person expects the same, customary behavior, counts on it, and arranges and settles affairs based on this expectation. If in a particular case expectations deceive, if someone acts

differently than expected and not as others usually act in such cases, the person feels dissatisfied and angry. One blames the person who is disappointed and one attempts vengeance. As such conflicts are repeated, the idea of a breach of established, customary behavior is associated with concepts of rebuke, anger, and revenge on the part of the one who suffers harm from such a breach. As a result, what was formerly instinctive, unconscious, spontaneous observance of customs becomes conscious. N.M. Korkunov notes the difference between customs that originate naturally and unconsciously and those that acquire the quality of normativity through consciousness: "the formerly instinctive, unconscious, spontaneous observance of customs becomes conscious. Now the custom is no longer observed on the strength of unconscious habit alone, but on a conception of the trouble that a breach of the custom would entail. So the custom as obligatory now becomes conscious. The custom is observed even when there is an interest in breaching it and an urge to do so; it is observed for the sake of avoiding the trouble and the disadvantages that come from violating it. The emergence of such consciousness that a custom is obligatory (*opinio necessitatis*) also transforms a simple habit that is unconsciously and instinctively observed into a consciously observed, legal custom that is recognized as obligatory and is the initial form of expression of rules of law."¹⁶

The next signpost of legality (justiciability) in rules of behavior can be identified as the requirement of reason as a reflection of the natural order of the surrounding world and parameters of the security of the social community and the state. It is manifest in the establishment of boundaries of freedom that are indirectly dictated by the lived conditions of the social community and its individuals. In this case, customary law normatively objectifies and fulfills these requirements. The requirement of reason makes the dictates of customary law a sphere of obligation, so that models of proper behavior can be established. They are called on to determine what a person may and may not do.

Another characteristic of the justiciability of rules of Abkhaz customary law is their sanctionability. They are armed with a mechanism by which they are enforced, in the form of compulsion, as well as through strictly positive incentives for compliance.¹⁷

Conclusions

In sum, Abkhaz customary law contains rules of law. The phenomenon that it denotes goes beyond moral regulation, given requirements of natural order—the “reason of nature”—in individuals’ interrelations with others, society, and nature. Here the legal significance of customary law is determined by the consciousness of it as an *external* dictate reflected in people’s consciousness as a just and indisputable order that must be observed. Abkhaz customary law not only reflects the potential of society’s normative/regulative system, but also the phenomenon of *Homo sapiens*. Thus, Abkhaz customary law embodies legal reality as an objectification of people’s physical and spiritual powers.

These theses are confirmed by study of the traditional legal consciousness of Abkhaz society, which has worked out a whole set of means to sanctify normative custom and enable it to be “actualized in people’s consciousness.” They foster the consolidation and unification of the social whole on the basis of its fundamental life values, and the rules of customary law that they contain help to establish a just social order for Abkhaz—*aiuitsas* (order that conforms to human nature).

In our opinion, the manifestation of a universal understanding of law is best shown at a particular level, on the example of the Abkhaz traditional legal consciousness.

As we know, V.S. Nersesyants distinguished three essential universal properties (characteristics) of law: freedom, justice, and an equal measure of regulation for all.¹⁸ “The organizing, regulatory/judgmental coorientation or law is reflected in the idea of measure.”¹⁹ Legal measure is embodied, in particular, in safety, protection, guarantees, obedience, compromise, and consent. The Abkhaz language reflects such an understanding of law in that the translation of the word “law” in Abkhaz is *azin*, with the same root as *azaga* (scales). In our opinion, along with the external criteria for justiciability (legality), the word “scales”—a sign of formal measure (in contrast to a measure of behavior determined by the rules of morality and propriety)—characterizes a basic criterion for justiciability in its content. Legal measure is not only capable

of determining a violation in deeds, which a moral norm can also do in theory; it determines by *how much* freedom and justice have been violated. This is demonstrated by words etymologically and semantically related to the concept of "measure" and with the same root as *azin*, law: *azaga* (scales), *azara* (weighing), *iza* (suspension), *zaka* (how much), *zakarouzei* (how large) and *izeipshrouzei* (like what).

The development of features of the phenomenon of what is legal is reflected in Abkhaz thinking through the concept of *azakuan* (statute), which consists of the roots *azin* (law), derived from *azaga* (scales), and *aky* (one, or part). The word *azakuan* formed by joining these two roots literally means part of a measure or part of the law. Legal matter, essentially what is encompassed by the concept of "measure" (*azaga*), and form, by a unit of measurement, are distinctively reflected in the Abkhaz language, which reflects the natural link between content and form. The form of the law is understood here not simply as something external in relation to its content (measures), but the organization of content that is objectified and exists as part of a measure, indicating the presence of rules for regulating social relations in various areas.

As noted, the Abkhaz language distinctively reflects the phenomenon of customary law in the following way: *atsas* means custom; combining this root with *abyrg* (oldest) gives the concept *atsabyrg*—justice, truth. So, for Abkhaz, justice and truth are associated with rules of behavior that have been *established over time* and tested by the experience of many generations. In this case, rules of behavior that have been consistently and repeatedly applied in Abkhaz society for resolving complex life situations act as the criterion for justiciability (legality).

Thus, our analysis enables us to distinguish signposts differentiating custom that has no legal significance from customary law and legal custom.

Nonlegal custom:

—its fulfillment depends on individual subjective, personal discretion;

—no indication of the boundaries separating rights from duties and permission;

- not enforced by any authority singled out from society;
- regulates the least significant interests.

Customary law:

- includes rules that have been in effect for a long time, regulating the most important interests (importance of the matter);
- general rules contain “standardized models for subsequent decisions” (normativity);
- contains indisputable rules enforced by external authority (the presence of a third party);
- is fulfilled following a special procedure, and substantiates and justifies behavior through an established procedure (proceduralism);
- provides for compensation, eliminates antisocial behavior;
- distanced (abstracted) from moral and ethical judgments;
- fosters integration (oriented to the interests of the larger social whole).²⁰

Legal custom:

- receives legal recognition from the state;
- is considered by rulers, judges, and all officials as a basis and sufficient criterion for determining whether people act rightfully or unrightfully, that is, as a criterion for legal rights and legal duties, for what is legally permitted and what is not legally permitted.

Notes

1. G.F. Shershenevich, *Obshchaia teoriia prava* (Moscow, 1911), p. 369.
2. E.N. Trubetskoi, *Lektsii po entsiklopedii prava* (Moscow, 1917), pp. 99–100.
3. *Ibid.*, p. 30.
4. S.S. Alekseev, *Pravo na poroge novogo tysiacheletia: nekotorye tendentsii mirovogo pravovogo razvitiia—nadezhda i drama sovremennoi epokhi* (Moscow, 2000), p. 35 (emphasis added).
5. Alekseev, p. 258.
6. See D. Lloyd, *The Idea of Law* [Russian edition cited], trans. M.A. Iumasheva and Iu.M. Iumashev (Moscow, 2002), p. 10.
7. V.L. Kharaniia, *Slovar' iuridicheskikh terminov (russko-abkhazskii, abkhazsko-russkii)* (Sukhum, 2002), pp. 149–50.
8. G.V. Mal'tsev [and D.Iu. Shapsugov, ed., *Obychnoe pravo v Rossii: problemy teorii, istorii i praktiki* (Rostov-on-Don: SKAGA, 1999), p. 16.
9. Zh.-L. Berzhel [J.-L. Bergel], *Obshchaia teoriia prava* [Théorie générale

- du droit], ed. V.I. Danilenko, (Moscow, 2000), p. 299 (translated from French).
10. See Zh. Karbon'e [J. Carbonnier], *Iuridicheskaiia sotsiologiia* [Sociologie juridique] (Moscow, 1986), pp. 170–71.
11. Garol'd Dzh. [Harold J.] Berman, *Zapadnaia traditsiia prava: epokha formirovaniia* [Law and Revolution: The Formation of the Western Legal Tradition] (Moscow, 1998), p. 90 (emphasis added).
12. Alekseev, p. 258.
13. Mal'tsev, p. 8.
14. M.A. Supataev, "O ponimaniia prava," in *Iuridicheskaiia antropologiia: zakon i zhizn'*: *Sbornik* (Moscow, 2000), p. 46.
15. Carbonnier, *Iuridicheskaiia sotsiologiia*, p. 171.
16. N.M. Korkunov, *Lektsii po obshchei teorii prava* (St. Petersburg, 1894), pp. 112–13.
17. *Ibid.*, p. 9.
18. "Osnovnye kontseptsii prava i gosudarstva v sovremennoi Rossii (Po materialam 'kruglogo stola' v Tsentre teorii i istorii prava i gosudarstva IGP RAN)," *Gosudarstvo i pravo*, 2003, no. 5, p. 6.
19. V.P. Malakhov, *Filosofia prava* (Moscow, 2002), p. 129.
20. See F.G. Kamkii, "Priznaki pravovogo v iuridicheskii antropologii," in *Filosofia prava*, 2004.

Editor's notes

- a. The author self-consciously uses the old term "primitive societies" [*primivnye obshchestva*] in the context of trying to understand how customary law originally transformed into full-fledged consciously organized legal systems.
- b. Here focus is on one of the ultimate measures of legality—social systems following mutually agreed precedent. This emphasis on origins, while theory and abstraction-oriented, is part of what made early European anthropologists so interested in what differentiates humans from animals.
- c. The gender-biased language of "fathers and grandfathers" has been kept here, since it was in the original text. Equally appropriate would be the term "ancestors." This paragraph touches on one of the most important of the early tenets of customary law in the Caucasus (and throughout the Mediterranean region)—blood revenge. Strict codes of blood revenge usually specifically prescribe gender-related behavior and restrictions. For more on Abkhaz codes and their contemporary implications, see Paula Garb, "The Return of Refugees Viewed Through the Prism of Blood Revenge," *Anthropology of East Europe Review*, 1995, vol. 13, no. 2, pp. 41–44. For context, see Sula Benet, *Abkhassians: The Long-Living People of the Caucasus* (New York: Holt, Rinehart and Winston, 1974); B. George Hewitt, ed., *The Abkhaz: A Handbook [Aphsuua]* (New York: St. Martin's Press, 1998); Shalva Inal-ipa, ed., *Abkhazy: istorikoetnograficheskie ocherki* (Sukhumi: Alashara, 1965).