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Judicial Reform Of Kazakhs At The End Of Xix Century

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Abstract

The aim of the study is to investigate the judicial reform of Kazakhs at the end of XIX century via the science-based methods used in all humanities (dialectical, systemic) and historical methods of research (retrospective, comparative and contrastive). As a result, at a boundary of the XIX-XX centuries, the position of Islam ignoring by the Russian authorities actually turned into hostile. In conclusion, it is important to note the discriminatory nature of the legislation of the Russian Empire concerning various ethnic groups inhabiting the region and a privileged position of separate estates.

Keywords: National Judiciary, Authorities, Islamic Law.

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Reforma judicial de los kazajos a finales del siglo XIX

Resumen

El objetivo del estudio es investigar la reforma judicial de los kazajos a finales del siglo XIX a través de los métodos basados en la ciencia utilizados en todas las humanidades (dialécticas, sistémicas) y los métodos de investigación históricos (retrospectivos, comparativos y contrastivos). Como resultado, en un límite de los siglos XIX-XX, la posición del Islam ignorada por las autoridades rusas se convirtió en hostil. En conclusión, es importante señalar el carácter discriminatorio de la legislación del Imperio ruso en relación con los diversos grupos étnicos que habitan en la región y una posición privilegiada de estados separados.

Palabras clave: Poder Judicial Nacional, Autoridades, Ley Islámica.

1. INTRODUCTION

Last decades demonstrate live interest and contradictory opinions concerning the assessment of the tempo and stages of social, political and legal development of Kazakhstan and the degree of Kazakhstan development in pre-revolutionary (Russian October Revolution in 1917) historical period. The formation and the development of social, political, administrative and legal issues of Kazakhstan, is clearly presented in 60th years of the XIX century, when the Kazakh lands became a part of the Russian Empire and there was a cardinal transformation of all spheres of activity of the regional population. The features of the region development were stipulated by natural, geographical, historical and legal prerequisites. It entailed

radical destruction of traditional rules and laws of nomadic Kazakh society, integration into a legal orbit of the Russian Empire, social stratification, and transformation of mono national society into multinational one because of large-scale migration of Slavic and other ethnos of the Russian Empire. The government abruptly changed the judicial system, having forced out the adherents of Islamic Sharia – biys and abolished their privileges, which they had during centuries. The Provision, having liquidated the biy court, established new legal structure, which was known as the national court. In each district and cities of Omsk, Semipalatinsk, Vernyi and Uralsk the magistrate's position was appointed by Provision. In Turgai region, the rights and responsibilities of the regional court were entrusted to the Orenburg chamber of criminal and civil court.

The analysis of the law development in Kazakhstan during that period of time is relevant due to the following reasons:

- The functioning of regional administrative, political, social and legal space, shifting and transformation of their various components stipulate the representation of the overall picture of the whole socio-political space of the Russian Empire and specific characteristics of the border states;

- The socio-political changes in the Kazakh steppe under the influence of imperial policy promoted territorial division and formation of the hierarchical structure of a social, legal and property status of the population of the region where the rights of Kazakhs were infringed in comparison with the resettlement population.

The analysis of the problem represents the scientific value and arises the serious political and rule-making interest today. The geographical location of Kazakhstan was the reason of the earliest

integration into apolitical and legal system of the Russian Empire that provided specific features of social and ethno-demographic development of the region. The geographical proximity to Russia caused the appearance of immigrants from Russia, Cossacks particularly.

2. METHODOLOGY

The solution of research tasks is based on the principle of historicism. The reforms of the judicial system of Kazakhs at the end of the XIX century in Kazakhstan with preservation of conventional laws and norms of Sharia were considered as a transitional stage in the policy of the Russian power with the intention to integrate Kazakhstan into a system of socially – legal relations of the Russian Empire. Moreover, this work is based on the science-based methods used in all humanities (dialectical, systemic) and historical methods of research (retrospective, comparative and contrastive). Therefore, the dialectical method promoted the identification and generalization of the geographical and historical factors, which had an impact on levels and chronology of social and legal development of the population of Kazakhstan and it helped to identify the types of the regional judicial system. The systemic method allowed to carry out the analysis of administrative and legal reform of the region through a prism of evolution of imperial policy and through the integration of the Kazakh people into the legal space of the Russian Empire. The method of comparison (comparative method) helped to analyze the legal provisions of the regional population, including the Kazakh nomadic

and resettlement population during the period from 60th years of XIX century up to the beginning of the XX century.

3. RESULTS

One of the sections of the Temporary Provision of 1868 was devoted to the judicial system and actually fixed jurisdiction of Kazakhs to imperial court – based on laws of the Russian Empire. The integral parts of the imperial judicial system were regional boards, district judges and the military courts, which were under the direct control of governors and the Minister of Justice. The superior court of appeal for the Kazakh areas was the Government Senate – as well as for the internal provinces of Russia. The representatives of all these judicial authorities were the Russian imperial officials. As well as in administrative management, Kazakhs had an opportunity of direct participation in judicial activity only at the lowest level of the judicial system – in the form of so-called national courts. However, according to Temporary Provision, the national judges even kept the name biy (judge), the principles of their elections and activities were revised radically. If earlier the biy could be any person who had a good reputation and knew common law to solve issues, then now biy was officially chosen in volosts for a period of 3 years and approved by the governor.

District chiefs gave to newly elected biy the standard bronze badge and the seal of the standard sample which he used during the meetings. It was the confirmation that the national court, which the

imperial authorities supposedly preserved for the retaining Kazakh common law, in fact was the local instance of the Russian judicial system. It is interesting to note, that the aim of this Provision was (as well as Temporary Provision of 1868) full integration of Kazakhstan into imperial legal space and some of its norms demonstrated that the authorities tried to take into account the national specifics – but mostly at the formal and declarative levels. For example, according to paragraph 106 of the Provision, the officials of public management of natives can be awarded, at the discretion of the governor general, honorable dressing gowns or money payment.

As we see, the Russian authorities preserved the tradition of rewarding the dressing gowns, typical for Turk-Mongolian people that, however, did not mean the maintaining of other, more significant national legal traditions of natives. Provision of 1886 regulated the legal relationship of the settled population of the Turkestan region. Therefore, in 1891, due to the next stage of administrative reforms in Kazakhstan the new legislative act was adopted –Provision of monitoring Akmola, Semipalatinsk, Semirechensk, Ural and Turgai areas, also known as Steppe Provision (Provision, 1893), which officially ensured the norms of Temporary Provision of 1868 as a constant one. It is interesting to note that the norms of the Provision of 1868 sometimes literally were reproduced in the new Steppe Provision and the former Temporary Provision was not repealed. Therefore, solving the land disputes of Kazakhs at the end of the XIX century, the authorities relied on the norms of Temporary Provision of 1868, which were actually duplicated in the Provision of 1891. Even at the beginning of the XX century, the Russian officials referred to the Provision of 1868.The Steppe Provision of 1891 became the main

normative act regulating legal relationship in Kazakhstan up to the end of the Russian Empire. However, after it the regulations concerning single issues were also adopted. For example, in 1895 there was a decree of the Government Senate that the lawsuits of the Kazakhs belonging to different districts or volosts, investigated on the basis of the Kazakh common law, were subjected to consideration of extraordinary congresses of biys. In 1898, the State Council of the Russian Empire enacted Temporary rules about the application of judicial charters to the Turkestan region and Steppe areas. This document had the rules with the paragraphs of the judicial charters of Alexander II acting in all areas of Russia.

It is remarkable that these rules regulated with details the magistrates' activity in Turkestan and Kazakhstan though in the European part of Russia this judicial institute stopped its activity as a result of counter-reforms of the 1880th and began to function again only since 1912.The Steppe Provision of 1891 fixed the supremacy of the Russian law over the legal traditions of Kazakh national judges: paragraph 111 provided a possibility of replacement of the monetary collecting, appointed by the national judge, with arrest in a case insolvency of the debtor – the law was above the tradition. Because of the selectivity of judges, Kazakhs began to lose respect for national judges. Having seen their bias, partiality and bribery, they used other instances. The appeal to not officially chosen judges with their problems, but to intermediaries or respectable people who made a decision or reconciled the parties and then informing national judges about it, was a typical situation.

Quite often Kazakhs appealed to the Russian judicial authorities. Russian researchers noted that Kazakh women appealed to Russian

court very often; as the imperial authorities made a lot to raise the status of the woman in the Kazakh society, to make her more capable and independent from male will. Such situation was welcomed by the Russian authorities, which fixed it in a legislative order. Paragraph 244 Provisions about Turkestan Region monitoring of 1886 granted to Kazakhs the right to appeal to the Russian judicial authorities, escaping the national courts. Further Temporary Provision of 1898 affirmed this right. The dependence of national judges on influential and rich Kazakhs was supported by the fact that the Russian legislation, having accurately defined an election order, competence and subordination of national judges, did not regulate the issues connected with their remuneration. Paragraph 226 of the Provision of 1886 said, National judges earn a reward on the basis of the existing traditions. As a result, the judges depended on rich patrons, or abused their position being dependent, living at the expense of other persons. Only in some cases, the national judges tried to settle this problem. For example, in 1878 an extraordinary congress of judges of Turgai district, noting that national judges quite often abuse the hospitality of wealthy Kazakhs, made a decision to lay the costs of judges on guilty persons of civil and criminal cases. However, this rational decision connected only the national judges who accepted it. It did not become the standard practice. (Dana & Sabzi, 2014).

In the second half of the XIX century, erezhe became a widespread source of law for Kazakhs – it was an agreement between the participants of the extraordinary congress of national judges before the development of principles and norms, on a basis of which, they had to make a decision. The practice of written regulations of national courts contradicted ancient traditions of the oral judicial proceedings

accepted by Kazakhs based on the discretion of judges. In most of the cases, the biys of pre-reform Kazakhstan while making the decision were appealing to the moral values of participants, to their conscience. They tried to reconcile the warring parties, with flexibility to adapt the norms of conventional law to a concrete situation. Erezhe, prescribing the obligatory and strict following to the terms of agreement of national judges, excluded such flexibility, corresponding to the principles of not the conventional law of Kazakhs, but the written imperial legislation.

Thus, even formally recognizing the existence of a system of conventional law in Kazakh steppe, the Russian authorities managed to incorporate the certain principles peculiar to the imperial legislation – both in material and procedural aspects. The practice of erezhe acceptance is a confirmation of it. It is worth to note that the increase of the role of the conventional law and national court making decisions on its basis can be explained by a significant decrease of the significance of Islamic law and representatives of the Islamic clergy. In the first half of the XIX century, the Russian imperial authorities considered the distribution of Islam in the Kazakh steppe and strengthening of Islamic law positively among Kazakhs as they saw in Sharia the intermediate stage from Kazakh conventional law to the imperial legislation. However, after the reforms of 1867-1868 years, the Russian policy in relation to Islam and Sharia was radically changed. The policy of cooperation was changed into policy of Islam ignoring by Russian authorities. They did not interfere with affairs of Muslim clergy and did not protect it. However, it did not mean that the Russian authorities did not pay attention on activity of Muslim clergy

and Sharia; they hoped that Islamic law would become obsolete. They did everything to promote this process significantly.

According to Temporary Provision of 1868, the institute of decree mullah was abolished: all representatives of Muslim clergy from Kazan or Ufa who were sent to Kazakhstan as mullah went home now, and Kazakhs acquired the right to choose mullah from their compatriots. At the same time, the specific education for a mullah candidate was not required: it was enough for a candidate not to be discredited by court and not to be under investigation. As mullah was elected now from Kazakhs, the carriers of national legal customs, he was not active in fight for Sharia priority over the norms of conventional law. According to the same Temporary Provision, it was allowed to choose one mullah for volost and the military governor on the basement of district chief reporting approved the elected candidate. Besides, the mullah who earlier had the tax immunity was considered now as a taxpayer estate. He had to pay taxes and duties on an equal basis with other Kyrgyz. The undermining of Muslim clergy positions in Kazakh steppe was the fact that Muslim taxes obligatory before – such as zyaket or collecting money for the building and maintenance of mosques and other charitable institutions remained, but they got the status of voluntary contributions: those who did not want to pay were not forced to do it. The creation of new waqfs was officially forbidden and former were liable to land tax – in that part, which was profitable for individuals. Thereby, the legal nature of waqfs was destroyed. It was created for tax exemption of property and income for religious and charitable purposes and according to Sharia, was not taxed (Fateminasab, 2014; Robani & Salih, 2018).

Thus, the Russian authorities undermined personnel and material security of Muslim clergy and, respectively, a position of the Islamic law in Kazakhstan. The unfavorable position of the Russian authorities in relation to Islam did not cause a negative reaction from the most part of the Kazakh population. Russian officials and researchers noted the low level of religiousness of Kazakhs and reasonably criticized the predecessors who described Kazakh conventional law incorrectly and mixed legal traditions of Kazakhs and Sharia. Therefore, Kozlov wrote:

Due to religious indifferentism of Kyrgyz they did not become the fanatics despite a diligence of mullah and visiting descendants. Mahomet's strict rules described in the collection of Samokvasov, protecting the inviolability of belief and religion of Kyrgyz by fear of death and deprivation of property, in fact did not work. These rules existed only in the imagination of representatives of Mohammedan clergy who among the other persons were invited to give the evidences to the special commission in the face of Speransky, making the collection of the common law of the Kyrgyz foreigners, gave information not about Kyrgyz, but about Mohammedan honoring of god (1998: 304).

Makovetsky (1886) notes, it is hard to believe that for religious crimes Kyrgyz (Kazakhs) were sentenced to death earlier, knowing indifference of Kyrgyz to religious issues. Before the reforms of the 1860^{th,} the oath based on common law practiced in biy court (for example, on the graves of ancestors). It was honored very highly, and Kazakhs tried to avoid it, resorting to it very rarely, due to absence of other proofs of the innocence or legality of the requirements. Due to transformations of the end of the 1860^{th,} the Russian government

established the Mohammedan oath (on the Koran) which Kazakhs, without fluctuating, violated in the national court. The Russian officials in Kazakhstan with astonishment noted that witnesses in court, swearing before Allah, right there for the sake of friendship, rage or reach person» were ready to lie in court. If before the entry into the structure of Russia, the oath was used rarely, then after the reforms Kazakhs began to practice it so frequently that biy congresses periodically had to adopt special resolutions and erezhe concerning the restrictions in the use of the oath at judicial trials (Siska et al., 2018).

Nevertheless, Sharia continued to be applied and occupied a certain position in the regulation of legal relationship in the Kazakh society. For example, the military governor of the Turgai region Ballyuzek(1871) noted in 1871 that Kazakhs resorted to rules of Sharia concerning marriage relations (in particular – when widows chose husbands) and when there were gaps in their conventional law. The divorce was also regulated on the basis of the Muslim legal principle of a triple divorce –sin talak. Zuev (2005) shows very interesting erezhe of an extraordinary congress of national judges, accepted in 1885: it was made on the basis of Sharia, but not on Kazakh legal customs and principles of the Russian legislation. Moreover, these rules contradicting both conventional and imperial laws, were adopted not only by congress, but approved by military governor of the Semipalatinsk region by order of whom were even printed. According to Grodekov (1889), the best people of Kazakhs who had closer contacts with settled Muslim regions and mullah, inclined to Sharia, but not conventional law – adat.

Some Kazakh public figures, thinkers, cultural and art figures considered that it was more preferable for Kazakhs to follow Sharia

and fulfilled its instructions. The use in Kazakhstan the norms of Sharia even during the post-reform period was connected with respect of Kazakhs to representatives of the Muslim clergy. Grodekov (1889) says about the traditionally high authority of khodja in Kazakh society; how Kazakhs took into account their opinion in solving controversial issues. However, Krakhalev (2005) notes that mullah was respected in the Kazakh society, but there were no comments about his justice court. It is possible that the Russian authorities, undertaking measures for the restriction of the status of Muslim clergy and decrease the role of Sharia in the Kazakh legal relationship, took into account the attitude of Kazakhs to religion and religious instructions. Therefore, knowing that their actions will not meet hostile reaction, over the time they curtailed the rights and powers of clergy and the sphere of Sharia in imperial regulations. In return, mullah stirred up the activity and even achieved a certain progress. In the 1870-1890^{th,} the Russian researchers of Kazakhstan noted that Kazakhs were quite often inclined to represent themselves as consecutive Muslims, than they were in fact. After the reforms of the 1860-1890th, Kazakhs began to worry that they would be assimilated with Russian peasants or Cossacks; therefore, the demonstration of commitment to Islam was a tool of their self-identification and differentiation from the alien Russian population.

As a result, at a boundary of the XIX-XX centuries, the position of Islam ignored by the Russian authorities actually turned into hostile. The number of the Russian officials' works and scientific publications where the harmfulness of Islam and Sharia was proved for the interests of the empire became a vivid example of such a policy. For example, Miropiyev's composition, which appeared in 1901, was very typical

concerning the issue mentioned before. One of the chapters has an eloquent name: Criticism of the negative beginnings of Islam preventing rapprochement of Muslims with other people. It should be added that the downgrade of Muslim clergy and replacement of Islamic law in Kazakhstan was connected with counteraction to propaganda work of the Muslim missionaries (being spies quite often) from Central Asia. In spite of the fact that Bukhara since 1868 and Khiva since 1873 were the Russian protectorates, the policy of their authorities was not correlated with the Russian Empire and positions of the clergy were sometimes very aggressive. Besides, among missionaries, there were agents of the Turkish sultan who was considered as the Caliph, the spiritual head of all Muslims.

However, in the heat of fight against foreign Muslim missionaries, the Russian authorities substantially oppress the local clergy. There is no wonder that Muslim priests were active participants of the largest 1916 revolt in Kazakhstan. Thus, the administrative and political reforms of 1867-68, 1886 and 1891 years integrated Kazakhstan into the system of legal relations of the Russian Empire, traditional institutes of the right in the Steppe were destroyed, and the Kazakhs became the powerless population in Russia. Because of this integration the system of the right, acting in Kazakhstan earlier, substantially lost the value. However, it is impossible to tell that they totally disappeared. Taking into consideration the identity of the Kazakh society, its legal, social, religious traditions, and the Russian imperial administration retained certain elements of the Kazakh conventional law and less Sharia – but did everything to avoid conflicts with the legislation of the Russian Empire. Thus, since the end of the 1860th and before the fall of the Russian Empire (1917)

Kazakhstan had a specific legal situation: the value of Sharia was decreasing, the Russian laws were expanded and conventional law, being national according to content, form and principles, became closer with imperial one. Enacting Temporary Provisions of 1867-1868, the imperial authorities planned to extend gradually all over Kazakhstan the Russian legislation. The purpose of Temporary Provision was the preparation of Kazakh areas for final transition to the imperial law, gradual inclusion the principles and rules of law used in the internal provinces of Russia.

4. DISCUSSION

Pre-revolutionary historical sources of a social legal status of the population of Kazakhstan are used. The social and legal structure of Kazakhs was comprehensively presented in the materials of the Kazakh conventional law published by the military governor of the Turgai region Ballyuzek (1871) named as the folk customs, which are having partly and had the power of law in the Small Kyrgyz Horde. In Makovetsky (1886) and Kozlov's (1998) works the questions of losing by Kazakhs respect for national judges are raised. The significant research of the administrative and legal reforms in the XIX century carried out by the Russian Empire in Kazakhstan belongs A. Leontev who in details describes erezhe – is some kind of an agreement on the basis of which the problem is solved. The huge amount of materials in resolutions of biy congresses, Temporary Provision of minoring Ural, Turgai, Akmola, and Semipalatinsk areas (October 21, 1868) gave a

chance to define that the legal transformations, which are carried out in the region were the reasons of deviation from the norms of conventional law and Sharia. That is why the Kazakhs often began to appeal to the Russian judicial authorities. Kerimov (2007), Vulfson (2005), Zuev (2005) and others were engaged in analysis of a problem. In Grodekov (1889), Beysembiyev (1961), Miropiyev (1901) and Karimov's works was analyzed the policy of the Russian power on adaptation of Kazakhs' law to the imperial legal system by weakening of Muslim position and conventional law. During the Soviet period Fuchs, was engaged in analysis of the right of Kazakhs. The important roles in deepening of the political and legal organization of the Kazakh society were played the works of Sartayev (Siagian et al., 2019; Iravani & ShekarchiZade, 2014).

5. CONCLUSION

The main changes in social legal status of the population of the Western Kazakhstan were carried out during the reforms of 1867-1868 and 1891. In October 21, 1868, the Temporary Provision of monitoring Ural, Turgai, Akmola and Semipalatinsk regions affected by the decree about the reconstruction of monitoring Kyrgyz of the Orenburg and Siberian Departments was accepted. The reforms of 1867-68 provided the distribution all-imperial judicial system and the all-imperial legislation in the territory of Kazakhstan. The imperial legislation became one of the essential innovations in the legal system of Kazakhstan. All norms of the imperial law had two groups: norms of

law for the whole territory of the Russian Empire and norms of law established especially for Kazakhstan taking into account the features of the region. Due to impetuous decomposition of the community and penetration of the new social and economic relations, the significant changes appeared in conventional law. Erezhe becomes the main reaction to changing of living conditions (Saidi & Siew, 2019).

All-imperial courts on the territory of Kazakhstan became one of the important innovations of Provision of 1867-68. According to Provision of 1867-68, a position of biy became the elective one; there were three instances in the hierarchy of biy court. The position of the magistrate existing in Central Russia was established, which considered claims on personal obligations, contracts and property of the sum not over 2000 rubles. Besides, the magistrate had the right at the request of the claimant to consider the cases subordinated to the national court. The reforms undermined the personnel and material security of Muslim clergy and respectively the role of Islamic law in Kazakhstan. It was connected with counteraction to propaganda work of the Muslim missionaries (being spies quite often) from Central Asia. Thus, the legal reforms undertaken by tsarism in Kazakhstan in the 60th of the XIX century had the purpose to integrate a legal system of Kazakhstan into the legal system of all Russian Empire. The law system of the Western Kazakhstan gets features of all-imperial one. On March 25, 1891 Provision of monitoring Akmola, Semipalatinsk, Semirechensk, Ural and Turgai regions was accepted, according to which the system of Temporary Provision was fixed.

Reforms 1867-68, 1886 and 1891 set the colonial status of Kazakhstan. In early 50th of the XIX century, the monitoring of the region was transferred from the Ministry of Foreign Affairs to the

jurisdiction of the Ministry of Internal Affairs and Ministry of Defense. Kazakhstan stopped being the subject of international law. At the same time, the monitoring system was turning from all-imperial into military and police one in the region. The civil and military authorities were not divided that meant the establishment of the occupational mode. Even those insignificant rights and freedoms, which were acquired by the population of Russia due to bourgeois reforms of the 60-70th years of the XIX century, did not influence Kazakhstan. In spite of the fact that Kazakhs became rural inhabitants, they did not take any part in region monitoring. Discrimination took place at national and religious levels. The government actively encouraged justification and Christianization of the Kazakh population, occupied the best lands, deprived of all political rights, destroyed the traditional economy and social structure. The response was in the form of the growth of national liberation movements at the beginning of the XX century, which led to the awareness of the development of the new principles of administrative and legal regulation by the Kazakh intellectuals. I think that it is necessary to continue the research of a social-legal status of the population of Western Kazakhstan, the changes of the law status and position of the indigenous Kazakh and resettlement people of the region are the most relevant. It is important to note the discriminatory nature of the legislation of the Russian Empire concerning various ethnic groups inhabiting the region and a privileged position of separate estates.

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