WALIA journal 31(S6): 1-5, 2015
Available online at www.Waliaj.com
ISSN 1026-3861
© 2015 WALIA

A comparative analysis of legal system in central Asia: from pre-tsarist period to soviet Russia

Muhammad Zubair [1, *], Sadia Khattak [2]

[1]LL.M (Commercial Law), University of Glasgow United Kingdom
[1]Law Department Abdul Wali Khan University, Mardan, K. Pk, Pakistan
[2]Did LL.M from University of Glasgow United Kingdom
[2]Law Department Abdul Wali Khan University, Mardan, K. Pk, Pakistan

Abstract: In this article the legal system of Central Asia has been analysed by dividing it into three periods; that is, the traditional period, legal system during Tsarist period and the legal system in Central Asia during Communist Soviet era. Each of the above mentioned periods has its own characteristics which has greatly influenced the already existing legal system in Central Asia. As the population of Central Asia may be divided into two distinct groups, that is; nomadic and sedentary populations, whose way of life were different from one another. Therefore, nomads were governed by customary law (âdat). The sedentary populations, in contrast, were associated with "real Islam" and thus were under the domain of the Shariat.

Key words: *Legal system; Central asia; Russia; Sharia; Adat; Nomads; Sedentary*

1. Introduction

Legal system usually refers to a procedure or process for interpreting and enforcing the law. It elaborates the rights and responsibilities in a variety of ways. Three major legal systems of the world consist of civil law, common law and religious law. In Central Asia the native population remained subject to indigenous law in civil and personal matters, although the colonial regime brought about many changes later on. The population of Central Asia may be divided into nomadic and sedentary populations. The nomadic population of Central Asia were close to a "natural" way of life, in which Islam provided merely a thin veneer over ancient customs. They were to be governed by customary law (âdat). The sedentary populations, in contrast, were associated with "real Islam" and thus were under the domain of the Shariat (Adeeb, 2007).

Both forms of indigenous law were to be administered by judges elected by local notables. Although in theory election was open to any male over twenty-five years of age, in practice, offices for both qazis (judges in Shariat courts) and *biy*s (those in âdat courts) remained predominantly in the hands of those with traditional qualifications. This assumption of innate differences between âdat and Shariat crystallized a situation that had been much more fluid, leading nomadic and sedentary societies along separate paths. The state's official recognition of the two modes of law began a process of bureaucratizing and codifying them. For our purposes, the Shariat courts are important because they provided a space for the continued influence of the Ulama in the sedentary regions of Transoxiana (Adeeb, 2007).

2. Legal system of central Asia

The Emir was the highest judicial authority in the country and personally heard all the major criminal cases. The Shari'a was the supreme law of the Emirate. Most of the Central Asian population belonged to Sunni Hanafi School of law. The system of justice was highly stratified. Members of the ruling tribe (Manghit) were considered to be superior to all others and enjoyed many privileges. High-ranking civil and military officials were not held responsible for the first nine crimes that they committed against the person or property of ordinary people. However, they were accountable for their wrongdoing against the interests of the Emirate to the Emir alone. The rest of the population was divided into various categories: Sipoi, Ulama, Tujjor ('merchants') and Fuqara ('rabble'). Legally the Sipoi fell under the jurisdiction of the Emir, the Ulama under the Sheikh-ul-Islam (head of the sayyid and hadji), while the merchants were dealt with by the Rais Ishan and the masses (fuqara) by the qazi. The chief of the Justice Department was the Qazi-i-Kalan, who was appointed by the Emir. The Qazi-i-Kalan had jurisdiction over the criminal and civil affairs of the Emirate pertaining to the fuqara. Apart from his authority in the Emirate, the Qazi-i-Kalan also enjoyed some extra-territorial jurisdiction, particularly in matters of personal status laws.

* Corresponding Author.

Besides its judicial obligations, a significant function of the justice department was to ensure that Islamic moral standards were observed in the community. For this purpose a parallel system of supervision was established. The chief of the supervising authority in the city was called the Ishan Rais. His responsibilities also included ensuring that the correct weights and measures were used in market trading.

As far as the systems of justice in the Valayat and Amlakadari are concerned, it is worth mentioning that criminal justice was administered by the executives of the Emirate, while all civil cases up to the value of 500 tillai (local currency, 1 gold tillai = 16 roubles) were adjudicated by the qazi, verbally and publicly. The qazi askar dealt with civil cases pertaining to the army, up to the value of 500 tillai. The qazi were appointed by the Emir himself from amongst the Ulama. Under the qazi, there were several mufti ('jurisconsult', one who is qualified to pronounce a fatva) and mulazim (personnel who execute justice). For example, under the qazi of the city of Bukhara (who was normally the Qazi-i-Kalan), there were 12 mufti, collectively called divon mufti. The qazi based his judicial verdict on the rivayat ('religious opinion formed on the basis of the Traditions') pronounced by the mufti. In the valayat the mufti were appointed by the bek on the recommendation of the Qazi-i-Kalan. The officials of the judicial-supervisory system, when delivering verdicts, often tried to protect the interests of the Bukharan state (Khan, 2003).

3. The legal history of the Central Asian States may be divided into three periods

1- Traditional legal system during the period of the independent and semi-independent Khanates/Emirates (8th – 18th Century);
2- Legal system during the rule of Tsarist Russia (19th Century to 1917);
3- Legal system during the Soviet rule, beginning in 1917.
4- Traditional legal system during the period of the independent and semi-independent Khanates/Emirates (8th – 18th Century)

During this period with regard to the constitutional law, the Central Asian States belonged to the type of feudal monarchies which were headed by Emirs or Khans who had a wide range of powers. The State administration was organised on the model of Islamic administrative law. The central states apparatus, the divan, was headed by numerous civil servants who were directly subordinate to the emir.

The provinces were governed by the Beks or governors with a practically independent status in their office. In the cities the middle class, the traders and craftsmen were organised in guilds (an association of these profession is known as guild). The influential feudal nobility was divided into two classes: the class of the highest nobles, the emirs and khans and the class of the middle and lower gentry. The bulk of the population, the peasants, were split into two groups: cattle breeding nomads with tribal organisation who were living in the less fertile regions, and settled peasants engaged in agriculture mainly in oasis.

The legal system of the States in Central Asia was based on the Sharia, and also on the customary law, the Adat, which developed through many centuries. The courts were presided over by ecclesiastical (religious) judges, known as Qazis, who were appointed by the Khans.

The only legal code known from the Central Asian area is the code of the khan Tauke (1680-1718), who was the head of the Kazakh Khanate. The code (Zhety Zharke) was compiled in the 18th Century and contains mostly Kazakh customary law. It deals with the civil, family and criminal law, and also with the civil and criminal procedure. With regard to the civil law institutions of sale, loan, deposit and transportation are mentioned. In family law, the bridegroom had to pay the 'bride price' (Kalym) to the father of the bride. Criminal law was marked by the severity of the penal system. Blood vengeance, corporal penalties, and various cruel forms of the death penalty were mentioned. In the field of civil procedure, one of the main forms of evidence was the oath.

1. Legal system during the rule of Tsarist Russia in Central Asia (19th Century to 1917):

The Russian conquest of the Central Asian States began in the 19th century. The Tsarist Russian Government was very interested in bringing this economically and politically important region under its domination. Between 1853-1895, the Muslim lands were gradually integrated into the Russian Empire. The Central Asia's judicial arm of the administration was unable to right matters, because it too was in a provisional, defective state. The modernized judicial system introduced in Russia in 1864 was withheld from border regions such as Central Asia until such time as they might have normal civil rule.

The lowest levels of the Russian judicial structure comprised the various rural courts of the peasants. These courts employed customary or unwritten law. The lowest judicial instance employing statutory or written law was that of the justice of the peace. In European Russia these were elected by the Zemstvo, the elective local administrative assembly, introduced in 1864. In Central Asia, however, the Zemstvo was not introduced, and the justices of the peace were appointed by the military governors. Their districts usually comprised entire uezds.

Because of the sparse population and the lack of qualified personnel, the next higher judicial reforms were not introduced in Turkestan. Instead Von Kaufman had the Oblast administrative boards take over the functions of this court level. The military governors were given the right of cassation- the review of cases and perhaps the overruling of the decision of lower court-over decisions of the oblast administrative boards.

Elsewhere in the empire the prosecutor (prokuror) was directly responsible to the minister of justice, ensured proper procedure in the courts, and acted in criminal matters as public prosecutor. In Turkestan, however, Von Kaufman entrusted the functions of the prosecutor to the military governors. Von Kaufman also removed military governors, uezd commandants, and a number of lesser officials from the jurisdiction of the courts, believing it impolitic to subject the local administrative personnel to judicial action which might make the Russian government seem inconsistent or divided in authority before the natives (Curzon, 1889).

The next higher instance, the district court (okruzhnyi sud), consisting of a chairman and two members, normally examined matters beyond the competency of the justices of the peace as well as appeals from their decisions. Under Von Kaufman the function of this court, too, was vested in the oblast administrative board. A so-called Military-Judicial Commission, consisting of officers often unsuitable for military service because of alcoholism and other reasons, heard cases and handed down decisions (Graham, 1916).

A method of bypassing the courts frequently resorted to in Turkestan was the practice of dealing with offenders "by administrative procedure." By this means an alleged political offender could simply be sent without trial to some distant town, there to live under police surveillance until the authorities might feel it possible to lift the restriction.

Each community was administered by a village meeting (setskii skhod), including all the householders and headed by an elected elder (starosta). The elder acted as a judge in the trial of minor offenders.

Several villages constituted a volost. The volost was administered by a volost meeting (volostnoi skhod), consisting of one member from each ten householders in the village communities. An elected volost elder (volostnoi starshina) served as the executive official of the volost meeting and as chairman of the volost administrative board (uolostnoe pravlenie), in which all of the village elders took part. The volost elder also had a judicial function and could mete out light sentences to minor offenders. The volost meeting likewise elected a chairman and members of a volost court, with jurisdiction over the inhabitants of the volost. Decisions of these courts could be appealed to the superior rural court (verkhnii selskii sud), which was made up of the chairmen of the volost courts of each uchastok of a uezd. The decisions of the Russian rural courts were not based on statutory law, but on customary law, derived from the ideas of right and wrong gained in the long experience of the people.

The administration of Cossack communities, as in the oblast of Semirechie, was similar in form to that of the non-Cossack Russian peasants, but differed slightly in nomenclature. Cossack villages were grouped into stanitsas instead of volosts, each headed by an elected ataman.

As among the Russian peasants, several native villages constituted a volost. Electors chosen in the villages on the basis of one for each fifty householders formed a volost meeting. This body, meeting at a time and place determined by the uezd commandant, elected a volost headman and judges (kazi). Successful candidates were confirmed by the uezd commandant.

The volost headman was charged with executing court decisions and government orders, keeping a list of inhabitants of the volost, and noting losses or accessions of population. In case of misconduct a volost headman could be removed by the military governor.

The courts of the natives were so organized as to be roughly parallel to the Russian lower courts. The Judges/Kazi was appointed by the khans or beks after an examination of their knowledge of the Shariat. They had no set district of jurisdiction; any native could turn to the kazi he trusted most.

By western standards, punishments in pre-Russian times were severe. Torture, the cutting off of hands or feet, and various more or less ingenious forms of the death penalty were employed. Confinement was in pits or dungeons, often for indefinite periods with little food and no sanitation. In theory the severest sentences were subject to confirmation by the bek, and the conduct of the kazi was subject to censure by other officials. In practice these slight judicial safeguards were more often disregarded.

Among the nomads, disputes and offenses had usually been judged by elders of the clan or group, who received the title of bii. Although they were Moslems, the Kazakhs and other nomads did not use the Shariat, but employed instead the adat, an elaborate system of customary law developed through many centuries. While it was the Russian policy to preserve these native courts, considerable alteration resulted from the abolition of inhumane practices, and from efforts to regularize their procedure and bring the courts into conformity with the empire's basic judicial structure (Graham, 1916).

The chief Russian innovation was the election of judges. Both kazis and biis were elected for three year terms and received regular salaries drawn from local tax funds. The native courts were given jurisdiction over all criminal cases not concerned with the general order of the region, and over all civil matters not based on documents completed by or witnessed by Russian authorities and not involving Russians. Kazis could judge cases not involving more than 100 rubles.

Election was intended to lessen the influence of the kazis upon the people, but because of lack of surveillance by Russian authorities the kazis actually enjoyed more power under the new order than under the khans. Unrestrained by the traditional influence of other Moslem officials, the kazis relied less on the Shariat than on their own personal power. As a result, the native courts soon showed themselves to be partial and corrupt.

Under these conditions, unscrupulous natives were quick to seize opportunities for personal advantage. The elections soon became battles royal between influential and wealthy natives, with victory going to whoever could buy the most votes.

Natives who fell into the hands of the Russian judicial authorities received no better treatment than in their own courts. Instead of having a normal trial, their cases were often disposed of by "administrative procedure." Either General Golovachev or Colonel Medinskii, the city commandant of Tashkent, could jail a native by verbal order without trial, and release him when it suited them. Medinskii frequently punished natives by flogging them with birch switches.

Under such conditions the natives quickly lost any illusions they might have based on Russian promises. They had been used to tyranny under their khans and beks but it was a Moslem tyranny which they understood, imposed by men of their own race and beliefs. They knew nothing of the Russian system of government, and it was rarely explained. All that they could see was arbitrary action (Richard, 1960).

However, after the conquest, Central Asia became a colonial dependency of Russia. The Russian Administrative system was extended to the occupied territories comprising a vast area of 1.5 million square miles. In 1867 a Governor-Generalship of Turkestan was established with headquarters in Tashkent. The Governor General, who was appointed by the Tsar, received broad powers in legislative, administrative, and military matters. On the Russian centralised model the country was divided into Gubernii. The gubernii were headed by governors. The Uezdy were subdivided into lesser units, called a volost, each containing several villages (Qishlaq). The administrative functions in the Volosti remained widely in native hands. The old Uzbek states, Bukhara and Khiva, ruled by their princes, acquired an autonomous status as protectorates of the Russian Empire. They received some independence in their internal administration.

The judicial system was set up on the model of the Russian Judicial Laws of 1864 with some modifications. As lower courts, judges of the peace were introduced. The judges were appointed by the Governor. Besides the Russian courts, the native Sharia courts were also allowed to function, dealing with small civil cases worth fewer than 300 rubles.

With regard to the legal system, the Russian Code of Laws – Svod zakonov rossiiskoi imperii – came into force. The institution of slavery and corporal penalties were thereby abolished.

However, the local customary law was partly accepted and left in force.

4. Legal system during the Soviet rule in Central Asia, beginning in 1917

After the 1917 October Revolution, the Soviet government began to expand its rule over Central Asia. On account of the complex nationality problem in this area, sovietisation was carried out only gradually and in several stages. The Bolsheviks also allowed the resuscitation of the courts of qazis and biys. These courts, which had been abolished or curtailed during the civil war, were allowed to operate again. A decree of December 1922 allowed such courts to operate in Turkestan in parallel with Soviet courts and to adjudicate matters of civil law if both parties were willing. The judges were to be elected, and their decisions could be appealed in Soviet courts. Nevertheless, the Party recognized the parallel existence of Islamic law. In an even more radical move, also in 1922, the Party allowed the creation of Shariat administrations (*mahkama-yi shar`iyya*) in different localities in Turkestan. These entities were religious boards, complete with presidiums and administrative councils, whose task was to oversee the administration of personal law, and they harked back directly to Jadid projects of 1917. They were elected bodies charged with "dissemination among the masses of the ideas of progress, culture, and humanity."

They were also to "be the link between the government and the people, to conduct the reform of religious affairs and to struggle with very unnecessary superstructures of Islam and the incorrect interpretations of Islam" (James, 1996). To struggle against "incorrect" interpretations of Islam, to cleanse it of superfluous ideas, and to institutionalize and rationalize the administration of Islamic law were objectives that had been an integral part of the Jadid platform in 1917 and a part of the Jadids' reform project for even longer. These Shariat boards appeared in several cities in Turkestan in early 1923 and quickly became a major part of the local cultural and political landscape. The first round of elections returned majorities of reformist Ulama to these boards, enabling them to fulfill the goals assigned to them. The first criticisms of Sufism and of customary practices in the Soviet era came from these boards. For the Jadids, the establishment of the boards was only the beginning, and much remained to be done. The religious boards had no connection to each other; the hope was to create a centralized structure for all of Central Asia that would bring the rural areas under the control of urban reformist Ulama.

The model was the religious assembly in Ufa that continued to exist after the revolution as the Central Religious Administration of Muslims. The Jadids also hoped that this central organization would have access to waqf revenues and thus take on the task of reforming Islam and building Muslim institutions throughout Soviet Central Asia. Soviet power seemed to have made two of the basic goals of Jadid reform possible (Adeeb, 2007).

On 20 April 1918, the establishment of the Turkestan Autonomous Soviet Socialist Republic, as a regional unit in the RSFSR, was proclaimed. A Central Executive Committee of the Republic and a Council of People's Commissars was set up, and a preliminary Constitution was also enacted. It is interesting to note that, with regard to the relations

with the RSFSR, the Constitution reserved far reaching rights to the new Republic. No federal decrees could enter into force in Turkestan until they had been confirmed by the Turkestan Central Executive Committee. The second Constitution of 1920 widely restricted these rights in favour of the government of the RSFSR.

The next step of the Soviet government was directed against the Khanates of Khiva and Bukhara. With the help of the Red Army in 1920, the old regime was overthrown and both states were proclaimed 'People's Soviet Republics'.

The Constitutional law of the People's Soviet Republics of Khiva and Bukhara showed some interesting elements. Their constitutions had some features in common with the basic laws of the European People's democracies of 1945. The form of state was not a proletarian dictatorship, as private ownership of land and industrial enterprises remained.

In Turkestan and Uzbek Soviet Republics, the first Constitution was enacted in 1924, modelled on the first Constitution of the USSR of 1923. Afterwards, in all five constituent republics of Central Asia, new Constitution came into force in 1937, largely based on the 1936 USSR Constitution. In 1978 in all the constituent republics of Central Asia, new Constitutions were adapted, based on the principles of the USSR Constitution of 1977.

With regard to the legal system, the law Codes of the RSFSR were introduced in all republics. Only after 1958 did these States draw up their own codes in different fields (Encyclopaedia of Soviet Law, 1985).

5. Conclusion

It may be concluded that the Central Asian region since the Russian conquest has passed through a lot of changes including the change in the legal system as well. Initially the Russian intervention in the Central Asian legal system was limited to the Turkestan Gubernii in which they have also given recognition to the local customary law and the Khanate of Bukhara Khiva with the Russian Protectorate Status were independent in their internal matters including the legal system as well. But after the October 1917 Bolshevik revolution, the Central Asian region passed through a lot of transformation and everything including the legal system was changed.

References

Adeeb, K., (2007): Islam after Communism: Religion and Politics in Central Asia; University of California Press, USA.

Available at: http://definitions.uslegal.com/l/legal-system/ 10/11/2014

Becker, S., (2004): Russia's Protectorates in Central Asia: Bukhara and Khiva, 1865–1924: Routledge Curzon London, UK.

Curzon (1889): Russia in Central Asia: London.

Encyclopaedia of Soviet Law, 2nd Ed; (1985): edited by F. J. Ferdinand Joseph Maria Feldbrugge, Gerard Pieter Van den Berg, William Bradford Simons.

Graham, T., (1916): Through Russian Central Asia: by Graham, London.

James, P., (1996): Muslim Politics: Princeton, USA.

Khan, S., (2003): MUSLIM REFORMIST POLITICAL THOUGHT: Revivalists, modernists and free will; Routledge Curzon London.

Richard, P., (1960): RUSSIAN CENTRAL ASIA 1867-1917: A STUDY IN COLONIAL RULE; UNIVERSITY OF CALIFORNIA PRESS, USA.