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LEGISLATION OF THE KAZAKH ASSR ON RESTRICTION AND VALIDITY OF CUSTOMARY LEGAL NORMS AND INSTITUTIONS

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Abstract

The article examines the main stages of the peculiarities of the functioning of customary law in the conditions of the Kazakh Autonomous Soviet Socialist Republic. The violent breakdown of the customary legal method of regulating social relations was not only the result of the tragic events of the early 30s that occurred in Kazakh society, but also one of the objective reasons underlying this tragedy. The legislative policy of state bodies, which determines the limits, spheres and forms of action of customary legal institutions under the conditions of Soviet power, is analyzed.

Keywords: Kazakh Autonomous, legislation, customary law of Kazakhs, Kazakh society, Soviet power, Judicial branch, functioning of customary law, legal policy, customary institutions, customary law.

On the eve of the October Revolution, one of the main sources of current law in Kazakhstan remained unwritten norms of adat. Despite the active penetration of the principles and norms of imperial legislation and the system of Islamic law (Sharia), the customary legal system in its inherent basic structure was not destroyed, although it underwent huge normative and functional-content shifts. Even if there were noticeable changes in the correlation of norms of different systems of law operating in the Kazakh steppe, the dominant position among the means of legal regulation remained for customary legal norms. This is due to the fact that the changes least of all affected the social and economic foundations of society. The existing social relations remained dominant and determining in the structure of Kazakh society up to the beginning of the XX century. True, they did not remain absolutely unchanged, but there were no fundamental, qualitative, revolutionary transformations in this sphere in that period. The prestige and power of customary legal norms were still significant in the early 20th century, especially in the sphere of family and marriage, economic and property relations within nomadic and semi-nomadic societies. However, by that time the position of criminal customary norms had somewhat weakened, due to the active attack on them by the local Russian authorities, whose interests were directly affected by them. The main institutions of adat in the sphere of family and marriage relations were kalym, polygamy, amengerstvo, and criminal customary-kun. The customary legal norms and institutions, which had been formed and were in force for centuries, had a significant social force in Kazakhstan after the establishment of Soviet power. Customary law had a strong system of norms (customs, morals, traditions), which, it seemed, could not be broken by any social transformations. As if grown into the social and economic way of life of the society, organically merged with the forms of everyday life, social

psychology, system of customs, the traditional customary legal culture tested by centuries opposed the legislative and normative one.

From the first days, the Soviet authorities declared respect and attention to the customs, traditions and beliefs of peoples, including customary legal norms and institutions. In the address of the Soviet government of 20 November 1917 "To all working Muslims of Russia and the East" it was stated "Henceforth your beliefs and customs, your national and cultural institutions are declared free and inviolable." [1,114]

In legislative acts and documents, customary law norms were regarded as an integral part of the normative culture of the people, the system of their customs, traditions and beliefs. Accordingly, the Soviet state pursued a cautious legal policy with regard to customary law, allowing in certain cases elements of cooperation, integration, and reinterpretation of customs; measures were taken to collect, systematize and codify the norms of customary law; and the dualism of legal systems and judicial institutions. The prospective goals and interests of the state of the dictatorship of the proletariat allowed for the possibility of the preservation and joint existence of customary and legislative ways of regulating social relations in socialist society, provided that the norms of Soviet laws had priority. Customary-legal regulations could operate under the control of the law-making laws of the Soviet state within the framework and limits of the basic principles of the socialist legal superstructure. Such an approach to customary legal institutions was due to the fact that the main aim of proletarian power in the Krai was to overcome the class character of social relations. The replacement of the legal institutions of the old society with new socialist ones in the conditions of Kazakhstan extended only to that part of the norms of customary law which was incompatible with the laws of Soviet power and to the extent and within the limits in which

it was necessary to overcome this incompatibility. The realization of this task was to take place gradually, and from the very beginning was regarded as a complex and contradictory process of struggle between the old and the new, the progressive and the harmful, designed for a rather long period of time. Such a tolerant and attentive attitude to legal customs during the implementation of transformative actions (concerning various spheres of social relations in the Krai, regulated by the norms of customary law), at that time, did not mean the refusal to fight against the norms of adat contradicting the principles of the new system. But the main attention of the legislator was directed to the transformation of the socio-economic character and the adoption of positive laws consolidating the social relations that had arisen. A new regulator of social relations (as opposed to the one based on customs) was created, and the conditions for its functioning were formed. The customary-legal way of regulating social relations had to be preserved and continue to function to the extent that it did not interfere with the policy of establishing and establishing a unified socialist legality in the country. And this meant inevitable qualitative changes, deep structural transformations. The Soviet authorities paid the greatest attention to customary law in the first ten years of its existence. In these years, customs and traditions, customary legal norms were constantly taken into account in the activities of the party, state authorities, administration and courts. Later on, the Soviet authorities gradually lost interest in the problem of customary legal culture, reducing it to the fight against the so-called relic norms of adat.

The process and course of action of customary law in the conditions of the KazASSR in the literature is conditionally divided into three stages [2,26].

Chronologically, it looks as follows:

- 1) from the establishment of Soviet power in Kazakhstan to the formation of the KazASSR;
- 2) from the moment of KazASSR formation to the end of the restoration period (1920-1925);
- 3) The third stage of 1925 until the application of customary law norms in judicial practice is completely excluded and they become customs that are not authorized by the State.

At the first stage, the Soviet state officially recognizes customary law as one of the sources of law in Kazakh society and preserves the principles that determine the limits and scope of its influence, the nature of interaction of its norms with the laws of Soviet power.

Thus, the norms of customary law were to be valid in the krai and accepted for guidance insofar as they did not contradict the socialist foundations of law and Soviet legislation. This was the basic principle that was to determine the activity of the authorities of the krai in applying the norms of customary law, as well as in harmonizing them with Soviet legal provisions. For the first time, general guidelines in this regard were formulated in the Decree on the Court No. 1 of 22 November (5 December) 1917. "Local courts," said paragraph 5 of the decree, "decide cases in the name of the Russian Republic and are guided in their decisions and verdicts by the laws of the overthrown governments only insofar as they have not been abolished by the revolution and

do not contradict the revolutionary conscience and revolutionary legal consciousness" [3,25].

Applied to the conditions of Soviet Kazakhstan, this general legal attitude was interpreted in the article of the decree of the SNK RSFSR "On the Revolutionary Committee for the Management of the Kirghiz (Kazakh) Territory" of 10 July, which stated: "The purpose of the Revolutionary Committee is: ...to implement all the decrees of the Central Soviet power in accordance with the life, customs and conditions of the local population... Cases between the Kyrgyz are resolved by the people's court on the merits of the case according to customary law" [4,129].

The legalised nature of the norms of customary law has left its mark on all the activities of the party, state and other bodies in the region, in particular, in the conduct of party-political and social activities. In the context of the Kazakhstan of that period, attention was paid to ensuring that the cadre of local bodies consisted of persons well versed in the customary legal life of the Kazakhs. Particular attention was paid to the fact that the cadre of local bodies consisted of persons who were well versed in the customary legal life of Kazakhs. In a letter dated

7 May 1919 to the All-Russian Bureau of Political Commissars, the regional bodies demanded the early approval of the second military commissar of the Turgai province, Comrade II. V. Tokarev, as he "perfectly knows the Kyrgyz (Kazakh-Z.K.) language and customs of this people.." [5,143-144].

In the legislative activity of the State of the dictatorship of the proletariat, the consideration of customary law found its manifestation in the fact that it was legalized to the extent that it did not contradict Soviet laws and was recognized as a valid source of law in parallel with them. In this connection, the regional bodies of Kazakhstan have taken measures aimed at collecting, systematizing and codifying norms of customary law. Thus, one of the main tasks of the Kazakh Department of the People's Commissariat of the RSFSR, established on 1 May 1918, was "to draft civil and criminal laws accordingly with the customary law of the Kirghiz (Kazakhs), putting the idea of socialism in the basis" [6,82].

The existence of customary law along with the laws of the Soviet government affected the activities of administrative bodies and other authorities vested with administrative powers in Kazakhstan. They had to be particularly careful and attentive

when dealing with issues concerning the interests and needs of the population, while maintaining a strictly loyal attitude to their rites and customs. The practice shows that these bodies and their representatives on the ground mainly tried to keep "neutrality" and not to interfere (except for emergency cases, appeals of the population) in those areas and spheres of relations that were regulated by centuries-old customs.

In the exercise of judicial power, the legalized nature of the existence of the customary law method of regulating social relations in Kazakhstan was expressed in the direct use and application of adat norms in the resolution of civil and criminal cases. The peculiarity of the action of norms and institutes of customary law in the legal practice of the region in the first years was that they were applied both by the Soviet authorities

and its judicial and investigative apparatus, and by the biys and arbitration courts that existed in this period. The harmonization of the norms of customary law with the socialist acts of Soviet power was carried out in the course of direct practical activity of local judicial and investigative bodies in solving specific cases and disputes. And the main and only way to resolve and remove existing contradictions was to harmonize them in each specific case (court case, disputes) by making an individual decision of an authoritative nature by an authorised body or person.

All these documents once again show that the attitude of the organs of the dictatorship of the proletariat to customs and traditions in this period was determined first of all by and subordinate to the task of imposing and strengthening Soviet power in the localities. A tolerant and loyal attitude to the traditional norms of the population did not express a principled position of the Soviet power, but was only a means, a "temporary tactical move" for the achievement of the above-mentioned goal, after the fulfillment of which it was replaced by other measures corresponding to the next urgent slogans of the Bolshevik Party. Customs and traditions were not regarded as values in themselves, but as potential social objects of state influence in need of change and transformation.

The second stage of the functioning of customary law in the region lasts from the moment of formation of the Kazakh ASSR to the end of the restoration period (1920 -1925). At this time, the issues of attitude to customary law mainly begin to be considered and solved by the higher and local authorities of the young Kazakh Republic. They were guided by the already adopted decisions of the Centre and proceeded from the needs and realities of local life. Based on the continuity in their activities, the supreme bodies of power and administration of the KASSR preserved and repeatedly confirmed the legalized nature of the norms and institutions of customary law, which did not contradict the principles and laws of Soviet power.

During this period, as before, the customary law method of social regulation was taken into account in the activities of party, state and other institutions of the region. The Constituent Congress of Soviets of the Republic set before the NKJ as one of the tasks "collection and systematization of materials of customary law of the Kyrgyz (Kazakh) people for practical legislation" [8,34].

The All-Kazakh Congress of Soviets, the CEC and the SNC of the KazASSR not only authorized adat provisions, allowing their parallel existence along with their own legal provisions, were engaged in their codification, but also undertook other measures aimed at the fullest consideration and use of customary law. Indicative in this regard is the adoption of the decree "On dowry, jasau and marriage gifts" [9]. The purpose of this decree, approved by the Council of People's Commissars of the KazASSR on 29.09.1921, was to protect progressive folk traditions and customs in the sphere of family and marriage from administrative interference of local authorities and administration. At the same time, the legislator aimed to familiarize the employees of the regional state apparatus with the purpose, content and existence of these customs and characterized them.

Thus, jasau and liyu, according to the decree, are "property (in money, things or livestock) given by par-

ents or relatives of the bride on the occasion of her marriage..." [9,99]. According to the meaning of the law, jasau and liyu consists of two parts. The first part - dowry - is "a gift, which the bride on the occasion of her marriage receives personally for herself from her parents or relatives - in money, livestock, clothes and various household items" [9,100]. It was recognized as property forming an integral part of the bride's property. The other part of the jasau and liyu, which did not constitute the bride's personal dowry, was "irrevocably owned by the persons who received this property, even if the marriage was later dissolved by divorce of the spouses" [9,101]. The decree also recalled the existence in Kazakh society of non-refundable gifts and offerings exchanged between the bride and groom on the occasion of marriage.

At the second stage of the functioning of customary law, the decisions of the Constituent Congress of Soviets of Kazakhstan played a certain role in determining a new legal policy in relation to the norms and institutions of adat, recognized as contradicting Soviet laws. The Congress made it clear that kun and kalym were deprived of judicial protection, condemned polygamy and amengerism, and recognized barimta as a crime. The norms and institutions of customary law, recognized as contradicting Soviet laws, were condemned in their entirety and in all their manifestations. The significance of the congress's guidelines was that they reflected the policy of the new authorities and the overdue opportunities in this direction. Although the abolition of these adat norms did not mean changes in the existing judicial and investigative practice aimed at limiting their effect. The judiciary still had to take into account the power and influence of the institutions of kun, kalym, amengerism and polygamy when deciding cases. The practical implementation of these congress decisions required the drafting and adoption of special bills that would regulate in detail the activities of law enforcement agencies in connection with the transition to more decisive measures to combat the adat system.

During this period, various methods and measures were being prepared and tested in order to develop the most optimal ways and means of combating the recognized harmful norms of adat. The latter was formalized and established as a state-organised struggle against remnant relations in the Krai. The latter was formalized and established as a state-organised struggle against remnant relations in the Krai. Such measures as the abolition of adat institutions (decree on the abolition of kun, kalym on the punish ability of polygamy and amengerism), abolition of customary legal institutions of adat (court of biys, "aksakal courts"), establishment of criminal punishment for certain vestiges representing social danger (barymta, etc.), official non-recognition of some customary legal norms (clan oath, religious oath) were widely practiced. In other words, a number of norms of customary law institutions are legally prohibited from being legal as they are recognized as incompatible with the socialist principles and laws of the Soviet government. The point is that in the conditions of Kazakh society, the struggle against the above-mentioned institutions of adat could not be immediately organized, since there were not yet objective conditions for a decisive struggle against them. This is also evidenced by the fact that the question of methods and forms of struggle against the recognized harmful customary-legal establishments had not yet been finally

resolved. Thus, kalym, kun and baryta were proposed to be and were being fought with criminal law, while polygamy was initially limited to a simple legislative (verbal) prohibition and only later supplemented with criminal law punishment. Similarly, with regard to the courts of biys and aksakal courts, at first they limited themselves to their organisational dissolution, later they were going to fight them mainly with civil law measures (partially introducing criminal law liability), but later, considering half-hearted and insufficiently effective what they had done, they began to focus on the criminal law type of struggle. The criminal-legal struggle against manifestations of adat was introduced (1920), then suspended by the central organs of the Federation (1922), and then reintroduced (2 years later at the end of 1924). It became organized and legally formalised in late 1924-early 1925.

All these measures, accompanied by the adoption of various normative acts sanctioned by the supreme bodies of state power of the Republic and the Russian Federation, had as their common consequence that in 1920-1925 it was only possible to achieve the abolition and supplanting of legal forms of existence and the official open nature of the existence of the abolished customary legal institutions. They went into the "underground" and existed in hidden and veiled forms. It is characteristic that while at first the measures taken to overcome the norms of adat were of a local, regional nature, later they were recognized and approved at the federal and all-union level, thereby acquiring nationwide significance and force.

The next (third) stage covers the period from 1925 until the moment when the application of customary law norms in judicial practice is completely excluded and they become customs that are not authorized by the state.

In the legislative acts of the Republic of this period they are no longer mentioned as one of the sources. At the same time, the issue of customary law remained as if "open", the application of its norms was not officially prohibited and the possibility of their use was not completely excluded. This was a period of "tacit" recognition of customary law as an "unofficial", "reserve" source, some norms of which could be allowed into the sphere of the official normative superstructure in particularly limited limits, under strict control, to solve cases related to the need to take into account the level of legal consciousness and legal psychology of the masses.

Such a need was observed, in particular, in solving cases related to barimta during the period when it became widespread. In setting up government commissions to resolve such conflicts, the supreme authorities emphasized that mutual quarrels should be resolved through peaceful agreements, which was usually achieved by invoking and referring to existing customs, legal views and attitudes.

The action of some norms of customary law during this period in Kazakhstan, its occasional "break-throughs" into the normative sphere of the official legal superstructure of the region were explained by the fact that it still had force and retained its position in the sphere of legal psychology and legal consciousness of

the indigenous population.

In the time period under consideration, under the conditions of the orientation of party-state power in the country towards command-administrative methods of management and the strengthening of unitary tendencies in the sphere of nation-building, the main thing in the activities of local authorities in relation to customary law is the fight against its abolished and recognized harmful provisions. Becoming a priority and striking, the task of combating these norms of adat completely absorbs not only the problem of using customary legal norms, but also the problem of taking into account the legal psychology and legal consciousness of the masses, reflecting the specificity of national consciousness and national psychology.

The end of the third stage of the existence of norms and institutions of customary law in Kazakhstan falls on the years of continuous settlement and collectivisation of nomads and semi-nomads. In these years, the customary legal method of regulating social relations in the region was subjected to violent breakage. The violent breakdown of the customary-legal method of regulating social relations was not only the result of the tragic events of the early 1930s that took place in Kazakh society, but also one of the objective reasons underlying this tragedy.

The results of the violent breaking of the customary-legal way of regulating social relations are very contradictory and tragic. On the one hand, it seemed that radical changes were made in the life and consciousness of people, patriarchal attitudes and norms were overcome. At the same time, the masses did not accept and master the new legal system. The proposed legal reality, as before, was not clear, imposed from above. The masses have not only lost their former legal understanding and legal reality, but have not lost their new legal understanding and have not mastered the new legal situation.

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