

THE RUSSIAN EXPERIENCE OF REFORMING NOMADIC COURTS ACCORDING TO *ADAT* IN TURKESTAN, 1850-1900

Olga Brusina

The Turkestan General Governorship was established under the Russian Empire in 1867 after the annexation of the territories of Central Asia by Russia. Two major groups of the Muslim population had long lived in the area – nomads and settled agricultural inhabitants.

Under the Law of 1867 the model of the military-popular rule was adopted in Turkestan. This model envisioned local self-government, and the operation of people's courts for the Muslim population (on the basis of *adat* for nomads and *sharia* for the settled population), in all cases except those having a political character. A promise was given to the native population that their Muslim mode of life would be preserved and would not be infringed. The Russian authorities considered that preservation of the legal customs of the native population would, firstly, secure order and stability, based upon sustainable tradition, and, secondly, make the natives more tolerant of Russian rule. There existed no records of *adat* norms (nor of *sharia*) in legislative enactments. It was merely observed that the practices of people's courts were based on their customs.

Unlike the settled agricultural population, the nomads (the Kazakhs and the Kirghiz) were only formally Muslims. Their *adats* were based on oral traditions transmitted from generation to generation. Consequently the norms of *adat* varied by region and over time.

© Copyright Olga Brusina 2006

Codification

A major aim of the Russian authority was to study and codify the unwritten nomadic laws. Attempts at the codification of *adat* were connected with the necessity to include the steppe territories in the system of government rule. At the beginning of the 19th century the Russian government formulated the goal of controlling *adat* and adjusting its practice for imperial purposes.

Up to the middle of the 19th century the Russian authority assumed that the customary law of the Kazakhs and the Kirghiz could be and would be collected, systematized and recorded as a code without semantic gaps. Such a code would be the basis for the creation of legislation for the nomads. In the second half of the 19th century the authorities changed their position and rejected attempts to codify *adat* for political goals. The administration of Turkestan had understood that the attempts by Russian officers to study the peculiarities of the legal life of this nomadic society had no prospect of success. Besides, the government had decided that to fix in writing the oral customary law would promote its preservation and so hamper the process of integration of the nomadic population into the Russian state system. The process of collection and recording in writing of the nomadic law continued in later decades but primarily for scholarly purposes, not for practical administrative use (Martin 2001: 35-47; Materials 1948; Grodekov 1889).

The collection and recording were carried out mostly by Russian officers. They interrogated the leaders and elders of nomadic communities according to specially designed questionnaires with the help of interpreters. Sometimes Muslim clerics were questioned; as a result some norms of *sharia* were recorded as norms of customary law. As a rule the collectors had no special qualifications and were not equipped to question the reliability of the data they received. Frequently the collectors reconstructed legal norms, using earlier materials or old oral traditions. The collectors rarely reflected on the territorial and temporal variability of legal customs or on their own dependence on the interpretations by experts from among the nomads. The Russian officers tried to make unified codes, to create a classic, ideal system, instead of settling the terms of real legal relations through different variants of the known rules (Materials 1948: 9-11, 120-123).

The nomadic *adat*, known from written sources of the 19th century, applied to a limited class of subjects. In particular, it was poorly adapted for application to land rights, as the main property of nomads was livestock. Moreover, written *adat* was suitable to govern the relations between kinship units only at middle levels in the complex hierarchy of kin structure in nomadic society. On the lower levels within families and kin groups conflicts were decided by heads of the groups, the *aqsakals* (elders). A *biy* (a judge in the nomadic society) resolved conflicts at higher levels, between representatives of different kin groups or clans. The higher the level of the kin or tribal groups, whether clans, lineages, or tribes, the larger the number of *biys* who participated as mediators in court procedures. There was no special 'position' of *biy*: respected men, especially heads of kinship groups, acted as judges; generally they were leaders and carried out various administrative functions. The role of customary law was more limited in relations between big clan unions and tribal associations. The relations based on agreements between such unions were unstable, and periodically contradictions and armed conflicts arose between them (Radloff 1989: 254, 337-339, 353; Dzhanpeisova 2003).

As a rule the principles important for an understanding of the nomadic legal system escaped the view of the collectors and researchers. These principles were connected with kin and tribal structures of the society. They were: principles of collective rights in property; collective responsibility for offences; and estimation of the gravity of an offence according to the degree of kinship between the plaintiff and the defendant. According to the codes of nomadic customary law the subjects of legal relations were individuals, while in practice kinship groups and clans were the real parties to litigation and appeared as payers or recipients of fines and compensation for losses (Materials 1948: 199, 202-203, 225-226, 281-288; Grodekov 1889: 190-193, 233-246, 208-211). It can be concluded from the ethnological data that there were no practical mechanisms protecting the rights of an individual in nomadic society other than kinship groups (Radloff 1989: 336-337).

Reform

Reform of the people's courts of the Muslim population was effected by the Turkestan Legislation (Provisional Statute) accepted in 1867, and later according to the Legislation of 1886. This reform was conducted according to the legal consciousness of the Russian officers. The basic purpose was to ensure at least a partial control over the social and legal institutions of the Muslim population. Moreover the Russian authorities attempted to stimulate a process of gradual

transition of the nomads to a settled mode of life. The administration supposed that as they settled on the land the former nomads would step by step forget *adat* and adopt the Russian legal system.

In some districts the Russian authorities considered it necessary to divide the membership of clans by imposing administrative borders, and on the contrary, and, on the other hand, to mix artificially the representatives of several kinship groups in one and the same administrative unit. The purpose of this was to loosen clan and lineage ties and the influence of tribal nobility upon the nomads (Grodekov 1889: 13).

Under the law of 1867 ‘nomadic’ and ‘settled’ districts (*volosts*) were headed by *volost* administrators. They were to be elected from the native population for three years by delegates, each one representing fifty tents. The people’s judges, (*biys* for nomads and *kaziys*, judging according to *sharia* for the settled rural population) were elected in the same way and in the same assemblies, as *volost*’s administrators. These chosen officials had to be confirmed by the Russian administration. The elected people’s judges were given seals and special books (*biy*’s books), in which they had to record their legal decisions. These books were necessary if the Russian administration was to control the activity of the people’s judges. As a rule there were four to eight *biys* in each district-*volost*, with one judge for each settlement (*aul*). The duty of the *biys* was to judge cases according to popular legal custom. They were not paid any salary from the state treasury, but according to the custom. Judge-*biys* collected compensation from litigants for resolving their cases. The jurisdiction of people’s courts was limited by the Russian Law: crimes against the State and the Christian Faith and some other grave crimes were excluded from the jurisdiction of *biys*, and also corporal punishment was excluded from the system of penalties. Till 1886 in Turkestan such criminal offences as murder and robbery were within the jurisdiction of people’s courts.

The People’s Court system became hierarchical: the level of the court with jurisdiction depended on a value of a case or on the gravity of an offence. Judge-*biys* made the final decisions only in cases of small value. In cases of greater value, a litigant could appeal a *biy*’s decision. Such appeals, as well as cases of considerable value at first instance were decided in an assembly of judges of a *volost*. For litigation between the representatives of different clans or tribes, for the heaviest offence, and for cases of the greatest value, and also for appeals against the decisions of *volost* assemblies, extraordinary assemblies of people’s

RUSSIAN REFORMS OF NOMADIC COURTS IN TURKISTAN
O. Brusina

judges were convoked. In such assemblies judge-*biys* from either one or several regions (*uezds*) participated. The Russian administration had the function of keeping order at extraordinary assemblies, but was not entitled to influence the determinations of their decisions by the judges. Decisions of extraordinary assemblies were final. Under Russian legislation litigants had a right to turn to the Russian court system to decide their disputes, but only if this accorded with the common desire of both sides to the conflict.

The people's court system, established under the Law of 1867, was amended only slightly by later legislation.

At first glance one would think that the reform of the nomadic courts was based not on principle but tradition. In the past judge-*biys* were chosen according to the mutual agreement of respected clan leaders and elders - but were chosen for every particular case. *Volost* assemblies were analogous to courts of mediators in which several judge-*biys* participated. The extraordinary assemblies resembled major assemblies such as annual feasts, where large clans and lineage groups gathered together to remember respected dead relatives and ancestors and to resolve different problems, including complex disputes between kinships groups. However in reality these reforms caused rapid, rather substantial and unexpected transformations in the social life and norms of *adat* of the nomadic Muslim population. The changes did not follow the pattern the Russian administration had intended. Nomadic society absorbed the innovations imposed by the Russian rulers in the spirit of patriarchal consciousness.

A number of researchers have given attention to various changes in the nomadic customary legal system in the 2nd half of the 19th century. The authors, working in the period at the end of the 19th and beginning of the 20th centuries, based their conclusions on their own observations and on the reports of eyewitnesses (e.g. Radloff 1989, written 1867-1874; Grodekov 1889). On the whole more modern researchers have used as sources the data in archives, such as the records of cases in '*biy's* books', and the numerous petitions which the native population addressed to the Russian administration (e.g. Martin 2001; Dzhanpeisova 2003). However, as will be shown later, the reliability of such archive sources was rather limited because there were frequent falsifications in the '*biy's* books', and a significant proportion of the petitions were false.

My conclusions are based upon almost unknown archival sources. The larger part of the data has been collected from the reports of the Russian officials of the Turkestan administration to the authorities, which were written during the

Government Inspections of Turkestan¹. These materials have attracted almost no attention from scholars. The authors of the reports and the papers were the chiefs of provinces (*oblast'*) and regions (*uezd*), their deputies and *uezd* judges. The officials had the possibility to observe directly the everyday life of the native population over periods of several years during their frequent trips through the territory under their control. Besides this they received information while examining the numerous appeals of the native inhabitants to the Russian administration. The officials gathered statistical information concerning the activity of the people's courts too. In their reports the authors frequently quoted or summarized the private judgments of native 'experts' – local respected members of the nobility (clan leaders, mullahs, and other representatives of the nomad elite), with whom the officials had personal contact. Only a small part of the officials knew local languages, and usually they worked with the help of translators and interpreters. As a rule, the latter were the educated Tatars. One such interpreter, I.Ibragimov, is known as the author of interesting ethnographic papers about nomadic people's courts at Turkestan (e.g. Ibragimov 1878).

The officials had no incentive to give distorted representations, showing things as better than they actually were. On the contrary, they gave frank opinions and impartial conclusions aimed at stimulating improvement in the administrative system. As a whole, their reports are an excellent ethnographic source. One may see that the authors of some reports had a deep understanding of the cultural features of the native peoples and realistically described their behavior and customs. Ethnographic papers supplement and correct the picture drawn by the officials (in particular: Slovokhotov 1905; Sabataev 1900). Generally the former and the latter sources do not contradict each other. The ethnographic data throws

¹ The materials of the Government Inspections of Turkestan are contained in the Russian State War-Historical Archives (RSWHA), Moscow, fond. 400, opis' 1, (the data, concerning peoples courts, are contained in particular in file: *delo* 4849) and in the Russian State Historical Archives (RSHA), St Petersburg, fond 1396, opis' 1, (in particular in files: *dela* 388-408). On the basis of these materials the Secret Report of the Inspection 1880-1883 was published as: *Otchet revizuiushchego po Vysochaishemy poveleniiu Turkestanskii krai, Tainogo sovetnica Girsas*, St Petersburg, [1883-1886] and the Report of the Inspection of 1904-1909 was published as: Palen K.K. *Otchet po revizii Turkestanskogo kraia*, Sankt-Peterburg, 1909-1910, in particular: Volume 4. *Narodnye sudy Turkestanskogo kraia*, 1909. However most of the archival data were not used in the Reports and remained unpublished.

light upon 'shadowy' side of nomad life, partially hidden from the Russian administration, despite the fact that the majority of ethnographic works in that period were written by the persons on government service.

Results

1. The system of elections of local people's administrators at the level of the *volost* proved to be absolutely alien to nomadic society. The elections turned into a system of manipulations and abuse. This trend was especially acute for those Turkestan regions where Russian authority had mixed together in the same administrative units parts of different kin groups and clans. Artificial interclan contradictions arose in these cases. Parts of different sub-clans groups competed for authority and influence in the same territories. Election campaigns emerged as incessant struggles of clan groups or 'parties'. Clashes, intrigues, bribery and a large number of (usually false) petitions addressed to the Russian administration accompanied the elections. In the regions, where administrative borders coincided with those of clans, the elections passed quietly. However they were fictitious too, as in reality administrative positions were distributed by respected elders and leaders of clans.

2. The status of a people's judge-*biy* was significantly changed and declined. This occurred for the following reasons. Under the Legislation the functions of a people's judge were separated from the functions of a leader of a kin group, whereas traditionally only a head of a group was named *biy* (Martin 2001: 94-95). He usually carried out both administrative and judicial functions. Now a judge-*biy* occupied a subordinate position in relation to a *volost* administrator. The work of the people's judges became less subject to the control of public opinion, because elections were predetermined by the manipulations of clan leaders. The work became immediately dependent on those influential elders and *volost* administrators who supported the judges in the elections. The official judge-*biy* did not have the authority among members of his society which had been enjoyed by a traditional *biy*, a head of a kin group. Moreover a judge-*biy* did not have the same incentive to keep his reputation as a traditional *biy* had had. Lacking independence, enjoying little respect, and without wealth, people's judges sometimes rather easily committed official abuses with the object of obtaining material benefits for their patrons, relatives and themselves.

The status of an official judge-*biy* had little in common with the status of a traditional *biy*. A new 'official elite' was created through the Russian regime, but it is doubtful whether the new elite consisted of traditionally respected persons of noble birth. It is significant that rich, influential and authoritative persons sought to avoid the court of the official judge-*biy*; they preferred not to participate in such courts to save their reputations. At the same time traditional *biys*, the clan heads, preserved their authority and acted as 'shadow' leaders. They supported their protégés at elections, and might occupy positions of *volost* administrator, but not of official judge.

3. The system which was established of appeals from decisions of people's courts undermined the authority of judge-*biys*, as in the past decisions of traditional *biys* had usually been final. At the same time the institution of appeals to *volost* or extraordinary assemblies was largely ineffective. Judge-*biys* were connected to each other through mutual support systems and always preferred in their common interest to confirm, not to revise decisions of their 'colleagues'.

4. Attempts by the Russian officials to establish control over the people's courts by means of the *biy*'s books proved to be inefficient. It became a well-known fact that only a small proportion of judicial decisions were recorded in these books, because the majority (more than 90%) of judge-*biys* were illiterate. Only a small number were able at their own expense to employ a scribe (*mirza*). But even literate and rich judge-*biys* recorded few of their decisions in different cases in the books. For the Russian rulers they would register some fictitious cases and petitions, and then report to the Russians that there were few cases and that on the whole the situation was satisfactory. (On these and other instances and forms of falsification of the records, see Ibragimov 1878: 6-7, 17-18.) But one finds that it was on the basis of these books that the Russian officers collected statistical records of the activity of the people's courts.

Generally, in spite of their official status the people's courts remained closed to the Russian administration. In such circumstances the Russian authority could not effectively control the types and level of criminality among the native population. The decline of authority of the courts of official *biys* was also a reason for the rise of alternate dispute resolution forms according to *adat*.

5. Tribal leaders aspired to escape from Russian control and to seize from it the reins of power. For this reason 'shadow' courts, based on *adat*, were created. These courts were independent of the Russian authority, to which they were

RUSSIAN REFORMS OF NOMADIC COURTS IN TURKISTAN

O. Brusina

invisible. For example, the Kazakhs contrived to conceal from the authorities grave criminal offences such as murder that were indictable in the Russian court. They decided such cases according to *adat* secretly among their kinsfolk (e.g. as described in Slovokhotov 1905: 136). The ruling functions of the clan elders increased. So, for example, the author of an ethnographical work concluded on the basis of his field materials that by the beginning of the 20th century elders-*aqsakals* acting as informal judges and mediators had almost replaced the official *biys* (Sabataev 1900: 66-72).

6. Contrary to the intention of the Russian authority the development of the nomad *adat* did not draw nomads closer to the Russian legal system. Only in a very few cases would litigants by mutual agreement take appeals to the Russian courts. There was rather another tendency, resulting from the processes of gradual settlement on the land by some nomads and the partial loss by them of kin relations. Former nomads step by step passed from the *adat* to the *sharia*. Such processes were especially characteristic of the contact zones, where semi-nomads lived together with traditionally agricultural populations which adhered to the local variant of *sharia*. The movement of semi-nomads towards Muslim law was furthered by their changing mode of life. New forms of property and landholding relations spread among them (in particular the leasing and selling of land), which were unknown to *adat*.

Thus, it is impossible to see as successful and effective the attempts of the Russian authority to reform the nomadic courts with the goal of incorporating nomadic *adat* into the state legal system and to establishing control over the activities of people's courts.

References

DZHANPEISOVA, Zh. M.

2003 'Otrazhenie barymty v sydebnykh prisiagakh Kazakhov pervoi poloviny XIX veka (na materialakh Orenburgskogo i Sibirskogo vedomstv).' *Vestnik Evraziiskogo gumanitarnogo instituta*, Astana, 1: 4-12.

MATERIALS

1948 *Materialy po kazakhomu obychnomu pravu. Sbornik 1*. Alma-Ata, 1948.

MARTIN, Virginia

2001 *Law and custom in the Steppe. The Kazakhs of the Middle Horde and Russian colonialism in the nineteenth century.* Richmond: Curzon Press.

GRODEKOV, N.I.

1889 *Kirgizy i Karakirgizy Syr-Dar'inskoi oblasti. Tom 1. Iuridicheskii byt.* Tashkent.

IBRAGIMOV, I.

1878 *Zametki o kirgizskom sude,* Sankt-Peterburg.

RADLOFF, V.V.

1989 *Iz Sibiri. Stranicy dnevnika.* Moscow.

SABATAEV, S.

1900 'Sud aksakalov i treteiskii sud u kirgizov Kustanaiskogo uezda, Turgaiskoi oblasti.' *Etnograficheskoe obozrenie.* 3.

SLOVOKHOTOV, L.A.

1905 *Narodnyi sud obychnogo prava Kirgiz Maloi Ordy,* Orenburg.