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The Legal Regulation of Siberian Peoples in the Russian Empire: the Interplay Between Customary Law and Legislation

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The paper uses historic and legal materials to analyse the contemporary theories that describe the correlation of customary law and legislation. The authors identify the applicability of these theories in studying regulation of Siberian peoples in the Russian Empire. The paper explores the role of the historical school of jurisprudence and the normative theory of law in determining the interplay between customary law and legislation in the 19th and 20th centuries in Russia. The authors make the conclusion that the implementation of judicial reform of 1864 was impeded in Siberia due to the state giving preference to customary law in governing the relations not regulated by legislation.

Keywords: customs, customary law, legislation, Siberian peoples, legal systematization.

Research area: law.

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Introduction

The interplay of customary law and legislation has a great significance in Russia for a plethora of reasons. First, legislation had not been the major mechanism of regulating societal relations in Russia for centuries, and customs had governed more societal relations than legislative acts. Second, Russia's territory was continuously expanding since the 16th century to accommodate new nations with substantially different ways

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of life, which required both legislative regulation and respect to traditions (customs). And third, customs are mainly focused on ‘horizontal’ relations of equal individuals in the private sphere, while legislation is building up hierarchical relations and regulates the matters of both private and public nature, which means that the study of correlation between customary law and legislation is the prerequisite of understanding the legal system of Russia.

The systematization of Russia’s law posed new theoretical questions –specifically, those regarding the correlation between the imperial and local legislation, and between legislation and customary law. On 31 January 1833, Nicholas I issued a manifesto to effect the Digest of Laws of the Russian Empire, which was approved as a ‘general digest’ with certain exceptions recognizing the local rules on seven territories, including Siberia (Kodan, 2011: 64–65).

Theoretical framework

First, the paper draws upon the analysis that identifies four theories of customary law. Specifically, the historical school considers customary law to be a self-sufficient legal phenomenon and a basic legal belief intrinsic to the people. The school of natural law considers customary law to be an eternal and universal phenomenon that, in contrast to state laws, has a capacity for perpetual evolution. The normative theory of law views customs as something totally dependent on recognition by the state. The sociological theory considers customary law to be a crucial source of law that is the direct opposite of the state law (Konovalova, 2005: 12–13). One of the goals pursued by our paper is to apply these theories to the study of customary law of the Siberian peoples in the Russian Empire.

Second, we use the classification of customary law put forward by René David, a famous French scholar of comparative law. The classification is based on the correlation between customary law and legislation and includes: 1) customs supplementing legislation and assisting in understanding the meaning of terms and phrases used in legislative acts or court judgements in an unusual sense (*secundum legem*); 2) customs that exist outside of the law and are used where the law is silent on a particular matter (*praeter legem*); 3) customs that contradict the law (*contra legem* and *adversus legem*) and govern the relations arising from the conflict between the law and the custom (David, 1967). This classification allows identifying the type of customs that regulated the life of Siberian peoples in the Russian Empire.

Statement of the problem

The experience of the Russian Empire may be used to evaluate, *inter alia*, the advantages and disadvantages of Russia possibly joining the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (Convention, 1989).

Methods

The descriptive method is used to describe R. David's classification of customary laws and to describe the theories of customary law outlined by A.S. Konovalova. The formal juridical method was used to analyse the enactments effective in late 18th to early 20th centuries. The chronological method was used to ascertain the chronology in which the Siberian people's customs were included in the Russian Empire's system of sources of law. The comparative legal method allowed two kinds of analysis: a) the diachronic analysis of the way in which the correlation between customary law and legislation regulating Siberian peoples evolved in the Russian Empire, and b) the synchronic analysis of the specifics of customary law existing among the Siberian peoples. The statistical method is used to study certain quantitative data — specifically, the number of people belonging to indigenous ethnicities of the Russian Empire.

Discussion

In the 18th century, the interplay of customary law and legislation in regulating the life of Siberian peoples became an acute issue on the agenda. On 06 February 1763, Catherine II issued a decree to send a team to conduct a census of indigenous ethnicities in Siberia. The Empress insisted on a good treatment of Siberia's and the Volga region's peoples who paid their tribute to the state in furs, and ordered no plunder or any other damages inflicted on them. Catherine II allocated land to some of the sedentary indigenous peoples in Siberia and gave trading preferences to others — specifically, the Bukharans (Iadrintsev, 2000: 212). This shows that the government attempted a balanced regulation of the Siberian peoples through both pre-existing customary law and legislation.

In 1819, the codification of Siberian indigenous peoples' customary law began in Russia. During the Siberian Reform (1819–1822), M.M. Speransky and G.S. Batenkov prepared a number of draft enactments and later in 1822 Alexander II effected several documents on the governance of Siberian Governorates, Indigenous Peoples etc.

There were two tiers of governance — the imperial and the local ones. The imperial tier was represented by the Governor-General who was responsible for entire Siberia. The local tier was represented by *inorodcheskaia upravas* (the upper level of local governance that controlled the compliance with legislative acts and customs, conducted censuses, and executed the orders of local police) and *rodovoe upravlenies* (the lower level of local governance). In addition, the nomadic peoples also had *stepnaia dumas* that conducted censuses, divided the tax burden among inhabitants, kept records of the public money and property, developed agriculture and public industry, and could file motions to the supervising authorities on behalf of their community members.

While preparing the said regulations, M. M. Speransky fulfilled an enormous work systematizing the customary law of the Siberian peoples. As the result, two compendia were produced: the Digest of Steppe Laws of Nomadic Indigenous People in Eastern Siberia and the Digest of Customary Laws of Indigenous Peoples in Western Siberia. Both were compiled based on the information obtained at tribal and clan gatherings and through interviews with the elders. The state pursued the policy of unification of the Siberian peoples' customary law (Trotsenko, 2012: 98).

Therefore, the compendia established the tradition of combining customary laws and legislation in the governance of Siberian peoples. This tradition is exemplified by Russia's first criminal code (*Ulozhenie*) adopted in 1845 that combined two sources of law. In particular, article 168 sets out that the *Ulozhenie* applies to all subjects of the Russian Empire with exception to nomadic and “vagrant” indigenous peoples that shall be prosecuted according to their customs for all but grave offences (Kistiakovskii, 1876: 10–11).

However, soon after the regulations adopted in 1822 had been published, there emerged a problem that started to become worse ever since. The system of courts created by indigenous peoples was quite complex — e. g., the courts of nomadic ethnicities included the *rodovoe upravlenie* consisting of the elder and his assistants, *inorodnaia uprava* consisting of the head with two officials and a clerk, and the *stepnaia дума*, the body that could review the decisions of the *inorodnaia uprava* (Derevskova, 2014: 69–70). But most importantly, this system of courts operated in isolation from the procedure established in both customary law and legislation. Therefore, the official (legislative) rules *de facto* ceased to be an effective means of societal regulation (Tumurova, 2010: 5).

The government faced this problem once again while planning and implementing the Judicial Reform of 1864. It soon became apparent that the customs of Siberian

indigenous peoples, being unwritten, were quite conducive to arbitrary judgements. The abolition of clan courts and customary law in criminal trial administered by nomadic and “vagrant” indigenous ethnicities seemed to be the only solution (Derevskova, 2014: 69–70).

The new Regulation (*Polozhenie*) for Indigenous Ethnicities effected of 1892 made little changes to the life of Siberian peoples, but it strengthened the state control.

In 1894–1896 a new draft of the Siberian judicial reform was put forward. On 13 May 1896, Nicolas II approved the Provisional Rules for the Application of Court Regulations (*Ustavs*) to Siberian Governorates and Districts, but still they did not extend the competence of magistrate and general-jurisdiction courts to the indigenous peoples. Importantly, the contemporary scholarship shows that the Siberian peoples had made great progress in their social, economic and cultural development by the middle of the 19th century, which resulted in the destruction of the clan’s administrative and economic functions. In these conditions, the transition from customary law to legislative regulation could have yielded positive results, but no such transition was made.

Conclusion

The approach represented by the historical school of jurisprudence largely dominated in the Russian Empire’s government policy throughout the first half of 19th century. Customary laws were studied, systematized and introduced in legislation. With time, the positivist approach was becoming increasingly influential and demanded that customs should be necessarily recognised by positive law.

In terms of R. David’s classification, the customary laws of the Siberian peoples in the Russian Empire should be subsumed under the *praeter legem* category, as they regulated a significant portion of the private sphere and were used to fill gaps in legislation.

The judicial reforms were the touchstone that revealed the actual correlation between customary law and legislation in regulating the life of Siberian indigenous peoples. The analysis of these reforms shows that the government was not prepared to abandon the use of customary law even though it was impeding the legal development of the country.

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Соотношение обычая и закона в регулировании жизнедеятельности народов Сибири в Российской империи

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В статье на примере историко-правового материала рассматриваются теории соотношения обычая и закона, выделяемые современными исследователями, выявляются возможности их применения к регулированию жизнедеятельности сибирских народов в Российской империи. Раскрывается значение исторической школы права и позитивистской теории в определении соотношения обычая и закона в России XIX — начала XX в. В результате сделан вывод, что ориентация государства на обычное право, которое регулировало отношения, не подпадающие под действие законов, тормозило проведение Судебной реформы 1864 г. в Сибири.

Ключевые слова: правовой обычай, обычное право, закон, народы Сибири, систематизация права.

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