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SHARIA LAW, CUSTOMARY LAW OF ADAT, PROBLEMS AND ATTEMPTS TO ADDRESS THEM IN THE MATERIALS OF THE REVISION OF SENATOR K.K.PALEN (1908-1909)

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ABSTRACT

This article analyzes the legal norms of marriage relations among the indigenous population of the Turkestan region, both according to Sharia And Adat, in the late 19th and early 20th centuries, based on the primary source – the materials of the revision of Senator K.K.Palen.

KEY WORDS: *Sharia, Adat, revision, senator, marriage, woman, law, Muslims, “makhr”, “baldyz”, “ayb”, “kalym”, congress, family.*

INTRODUCTION

As you know, the tsarist government has preserved unchanged legal relations among the indigenous population of the region, based on the laws of Sharia. Having tried to check the activities of the people's courts, the kazis, the audit of Senator K.K.Palen in 1908-1909, faced such facts when their decisions on similar cases were not only not united, but, on the contrary, most often contradicted each other. This has led reviewers to conclude “that the reason for this lies in addition to procedural imperfections of the vessels, the properties used by them and protected by our laws under the authoritative name of “custom” substantive law, confused and not understanding how the population and local administrative and judicial authorities and judges” [1.-P.5.]. Among the indigenous population leading a sedentary lifestyle, “local customs” were completely subordinated to the rules of Islamic law - Sharia.

Senator K.K. Palen was the first of the Russian officials in the shortest possible time (in just a year) to prepare and published in Russian a set of laws of the indigenous population of the region on family, inheritance and property law, i.e. Sharia laws.

LITERATURE REVIEW

Let us analyze the legal provisions set out in the revision report entitled “Legal life of the

indigenous population”: in the chapter “On marriage”, in order to understand what a huge difference there was in the two Sets of legal relations, and why Adat was eventually replaced by Sharia.

According to Sharia, chapter I- “On marriage, redemption (makhra) and on the rights and obligations of spouses, consists of 41 articles, in Adat the same chapter, of 19 articles, but there is no information about either the ransom or the obligations of spouses.

Article 1 of the Sharia, reveals the concept of “marriage” – “The parties between whom legal relations are established in a marriage contract are those persons whose sexual relations are legalized by this contrac” on “marriage contract”, Article 3- “Persons who have reached the age of majority can conclude a marriage contract, at their own request, without the intervention of parents or their substitutes (wali), as well as solicit the dissolution of a marriage concluded without their consent”, according to Adat, Article 1, “Marriage is a contract concluded for the purpose of acquiring a woman for marriage with her”, Article 3 “The marriage contract is concluded by the groom's senior closest relatives or by himself, if he is an independent owner”.

MAIN PART

Today, many are interested in, so, when was the coming of age considered and it was allowed to



marry according to Sharia. Adults were considered to be young men who reached the age of 12 and 9, if there were signs of sexual maturity. According to other sources, the age of majority was determined by the age of 15.

The set of legal relations also touches upon issues of religious affiliation, i.e. Sharia was more tolerant of creating families where spouses belonged to different religions, specifically, Article 24 "A Muslim can marry a woman who believes in Holy Scripture, which is also considered sacred by Muslims, that is, a Christian or a Jewess", but again, the advantage was on the side of men, Muslim women, this was not allowed, and according to Adat, such a marriage was generally prohibited. As before, so today incest, and marriage with foster sisters and brothers was prohibited both under Sharia And Adat [1. - P.88].

With regard to the question of the right of women to have two or more husbands, the unity of views is simultaneously traced, both in the Sharia and in Adat - its impracticability, i.e. a ban, but a man "has the right to have no more than four wives at a time. He can marry the fifth after a divorce from one of them or after the death of one of them"[1.- P.16]. (Article 16); according to Adat, in article 12. "It is forbidden to have two wives at the same time who are related" [1.- P.88].

There is a difference in the chapters "On marriage" in relation to the existing sections "on redemption (makhr)" and "On the rights and obligations of spouses" under the Sharia, which is not the case under Adat. According to Sharia, a woman has the right to demand "ransom" or "makhr" in the form of a reward for marrying him, and the most interesting thing is expressed in money (in the amount of 2 rubles), in property or in the harvest. However, as noted by representatives of the clergy, at the congress, each locality had its own customs regarding the method of paying the makhr. For example, in Tashkent, they often gave in the form of a terry one room and a terrace with a courtyard or only a room with a terrace (today we can still observe a residual manifestation of this type of terry in Tashkent), in other places the terry was paid in goods or movable property, worth 2 rubles [1.- P.19]. And according to Adat, there was no makhr for the bride, but there was a payment (kalym) for the bride, the girl's relatives, and even under Article 4 "The groom has the right to demand the extradition of the bride for cohabitation with her, only after paying the entire agreed amount and not before reaching brides of 15 years of age", however, according to article 5, if the groom does not pay the agreed amount no later than the bride reaches the age of 20, after which the marriage contract expires, he loses the right to both the bride and to receive back all the money.

Regarding the section "Rights and obligations of spouses" in the chapter "On marriage" there are

articles where, according to Muslim law, a woman, like a man, starting from the 7th century, was endowed with certain rights and obligations: this is the protection of life, honor, property and dignity. For example, a wife is obliged to live in her husband's house, respect, obey him, but if under Art. 40 there are "... cases of violence, by the husband's actions, beatings, abuse of force, coercion, imprisonment, etc., a woman has the right to seek protection from a judge", and even more, according to article 38 "... in the event of the husband's refusal from marriage", the wife can also "turn to the people's judge ...", and according to Adat, the opinion and consent of both the bride and the groom do not matter, since they are in complete submission to the will of the parents, especially the father. A girl was often given in marriage before reaching "marriageable age", i.e. puberty, if the marriage seemed particularly advantageous to the head of the family or the Council of relatives. According to Adat, a woman absolutely does not have any rights and freedom of choice, this is proved by Article 7, according to which "in the event of the death of the bride, instead of her, the next non-enlisted sister (baldyz), if any, intercedes; otherwise, the bridegroom is returned the kalym"[1.-C.87], in case of "death of the groom, the pre-emptive right to the bride is acquired by the brother of the deceased, immediately after him the next or closest relative. If there are no such persons, or they do not wish to exercise their right, the parents of the deceased shall be returned 1/2 of the paid kalyma"[1.- P.87].

And under Sharia law, a woman could have legal protection.

In the chapter "On divorce", the very concept of "divorce" - "talak", committed at the request of the husband, is considered in the Sharia; divorce by mutual will - "khulg" or "mubaraat", depending on whether the parties give each other any reward (meaning a property transaction - N.M.); ways of divorce; divorce for violation of the terms of the marriage contract - Article 49 "if the wife in the marriage contract includes a condition on the right to divorce, if the husband takes a second wife". Moreover, the division of property is taken into account in the divorce proceedings. According to Sharia, there was also a divorce by court (tafrik): if the marriage was concluded for minors or insane; with the sexual impotence of the husband; when the wife is unfaithful [1.-P.26]; if the wife, having not reached the age of majority, falls ill with an incurable disease, madness, leprosy; if the husband slandered his wife for treason. But at the same time, the husband must, until the court's decision, support his wife - Article 58, unless she filed a lawsuit.

According to Adat, "the husband has the right at any time to divorce his wife, stating this in a letter of divorce, sealed by two witnesses", and the children remain with the husband or his relatives, except for



infants, they remain with the woman's support during feeding. According to Adat, a woman was also not protected from a tyrant-husband, and in matters of divorce, unlike Sharia, the wife's desire was completely disregarded. Although the husband abused his wife and even tortured her, she has no right to demand a divorce. At the suit of the wife's parents and relatives, the husband could only be fined for this, but he still could not let his wife go. Thus, the woman had only one option-to run away to her family or with another person, but this flight was equated to "stealing someone else's wife" and was punished by a fine in favor of the husband. Even in the case of proven "torture or self-harm", if the husband demands his wife, and her relatives protect her and don't give her to her husband, the husband receives a fine from the relatives, minus only "aiba" for the health disorder inflicted on his wife"[1.-P.91]. This explains why women leading a nomadic lifestyle left their husbands in exceptional cases, if they found protection from their parents or relatives.

In the chapter "On Parents and Children" 11 articles are presented on Sharia, and 32 articles on Adat. Such a difference in the number of articles lies in the fact that according to the Sharia, only the issues of recognition and establishment of paternity are considered, the responsibilities of parents and children are not considered, and "adoption" is not recognized as a way of establishing paternity [1.-P.30], when, according to Adat, the following are considered: questions of sole ownership of the wife's property by the husband; the responsibilities of parents are to bring up, educate, marry sons and allocate them a share of the property, except for the younger one (he remains to live with his parents - N.M.), to marry daughters with dowries. Moreover, according to Adat, children, although they are adults always must obey their father, and moreover, he could punish them, and for insulting a father, a son could be sentenced to pay a fine, but at the same time, the allocated sons could demand allotment in the order of seniority if they were married and they were 20 years old. It is necessary to note in Adat the following position: 1. in relation to a divorced daughter (although, divorce was extremely rare) - the father is obliged to take her into his home; 2. ten articles out of 32 (from article 45 to article 54) are devoted to the issues of adoption, and this requires the consent of the wife or, if there is, the father of the adopted child, since it was possible to adopt children from a kind as for a while, upon reaching the age of 15, the adopted child could return to his genetic parents, retaining all property rights; to be adopted forever, with the right to transfer to the name of the adoptive parent [1.-P.93-95]. The remaining four articles are devoted to the issues of the father's rights about the transfer of his daughter with her husband to his home (at the same time, the father was exempted from giving the dowry to his daughter), while none of

the family members had the right to object to this decision, but the son-in-law had no right to allotment or any property, and all income from the moment of transfer to the father-in-law was considered not his. If the son-in-law decides to leave home, then he had the right to do so, just as the father-in-law had the right to demand that the son-in-law leave. The articles reviewed show how wide the scope of possible life situations was according to Adat, which was not observed in the Sharia.

Regarding the articles presented in the chapter "On guardianship", there are more of them according to Sharia than according to Adat, 34:20. If according to Adat there are only two types of guardianship, and then this is over minors and over the insane, then according to Sharia there are three of them - for marriage; over the personality of an underage; over the property of a minor, however, it must be borne in mind that, according to Adat, a woman had already belonged to a man from childhood by contract and had no rights to property, and after the death of her first husband, she usually passed as an inheritance to his brother or another close relative; juvenile - orphans, along with the property passed to the next of kin, before reaching the age of majority - 15 years or before marriage [1.-P.96-99]. According to Sharia, guardians could be appointed by the person himself during his lifetime (father) or a kazi. The judge must take into account the interests of the ward, the degree of kinship with him-article 77. A distinguishing feature of Sharia law on guardianship is reporting guardians before the judge, and in front of family members and by a ward in adulthood-article 68,69,70,71, but he has the right to pledge, sell real estate ward with the permission of the judge for a period of 3 years [1.- P.37] or until adulthood. Moreover, according to article 96, he can be "released from responsibility for the consequences of his actions", it is this kind of undefined statements that gave people's judges not always decently perform their powers. The next chapter on Sharia is chapter 5. "On the maintenance of relatives", there is no analogous to it according to Adat. In the first article under the chapter - Art. 106, states that "with the exception of the wife, none of those who have the opportunity to derive a livelihood from their own property has the right to demand that it be maintained", thereby expressing respect for the woman. The chapter contains the following norms: the father's obligation to support his minor son, daughter, until marriage, and if she is divorced or a widow, regardless of her legal capacity and age; contain poor relatives; children should support their poor parents, except for their stepmother and stepfather, and if the son cannot allocate money for the maintenance of his parents, then he should allow his parents to live and eat at his house, and this relationship lies with the grandchildren in relation to their grandfathers and grandmothers, and both on the



paternal and maternal side, and if there are several children, then the costs are distributed equally among the children; even if the husband changes his faith, and in this case he is not released from the obligation to “support his wife and children during the iddi”.

Of the remaining chapters similar to each other - Chapter 5. “On inheritance”, Chapter 6. “On property” according to Adat and Sharia - Chapter 6. “On inheritance”, the last Chapter 11 “On property, about contracts”, and such chapters as Sharia as, Chapter 5 “On the maintenance of relatives, Chapter 7 “On the procedure of inheritance by law”, Chapter 8 “On Will and Gift on the Deathbed”, Chapter 9 “On donation”, Chapter 10 “On the right of pre-emptive purchase (shivaat)” according to Adat no.

THEORETICAL BACKGROUND

If we analyze Chapter 6 “On inheritance”, according to Sharia, then it examines the facts about the division of property between the heirs, with the deduction of funeral expenses, for the debts of the deceased - Article 120. Interesting are the facts about who distributes the inheritance - by the judiciary or by agreement - Article 119. According to Sharia, the interests of the widow were even taken into account: “if the widow of the deceased receives possession of his indivisible property at a time when the makhr or part of it that she follows has not yet been paid, then she has the right to retain such possession until the remuneration due to her will be paid”[1.-P.44]. Chapter 7 “On the procedure for inheritance by law” is logically connected with this chapter, where rules are presented explaining who and how manages the inheritance of the deceased, who has the right to inherit property or money. It turns out that according to Sharia, almost all male relatives, up to the grandparents, have the right to be heirs, if they are alive, that is, “father’s father”, “father’s father’s father” - Article 158, but first of all “inherit” equity participants, they include the following male relatives: father, father’s father, brother, husband; female: wife, daughter, daughter of a son, natural sister, sister from one father, sister from one mother, mother, mother of mother, mother of father... If a pregnant wife remains, then the child who has a birth is recognized as a son, to whose share a part of the inheritance is counted”-Art.148 [1.- P.50]. Although even here we can observe the advantage of the male sex in receiving inheritance, for example, “the daughter and the son receive: the son is two parts, the daughter is one” - Article 152.

The shares of parents are also indicated if one of their children died - one sixth each, if the deceased have no sons or sons, i.e. grandchildren. If there is no heir, then the property of the deceased without a will goes to the treasury. The rights of illegitimate children are also protected, who also inherit after the mother and her relatives according to the same system as described above. A person belonging to

another faith could also become the heir. According to Adat, Chapter 5 “On Inheritance” consists of two subparagraphs: a) a will and b) according to custom, i.e. this is tantamount to two chapters of the Sharia - on inheritance and on the order of inheritance according to law, with a difference in the number of articles, if according to Adat in Chapter 5 “On inheritance” there are 25 article, then according to the Sharia in the chapter “On Inheritance” -28, “On the order of inheritance according to law” 48 in total 76 articles in two chapters.

It should be noted that the chapter “On inheritance”, according to Adat, includes articles relating to the will, and according to Sharia - a separate chapter 8 “Will and gift on the deathbed”. In chapter 9 “On donation” of the Sharia, articles are recorded that explain such provisions as: the record of the act of donation from the people’s judge is not required; the donor must be capable and legally capable; the gift passes from the moment of the announcement; a gift to an underage can be made through a guardian and there are even articles that establish the donor’s right to income from the gift.

The penultimate chapter 10 on Sharia – “On the right of pre-emptive purchase (shafaat)”, consists of 24 articles devoted to the right to acquire land property to the co-owner, the owner of the property associated with the common rights to water use or the use of a common road being sold, to the owner of adjacent real estate and arising from them provisions and conclusions. The last chapter 5 “On property” according to Adat is identical in name with chapter 11 according to Sharia “On property”, but not in content: according to Sharia it consists of 16 articles, which include paragraphs on property and contracts; according to Adat from 86 articles, which includes 13 paragraphs.

RESULTS

All of the above information was clarified by the revision at the congress, where it was also noted that the original “Kyrgyz Adat of ancestors did not survive and was transformed into a law representing a mixture of the rules of Adat and Sharia”. Thus, the revision of Senator K.K. Palen first of all combined the disparate legal provisions of Muslim law on family and marriage and property relations for the sedentary population of the region into uniform Sharia laws and recreated the full text of the Customary Law of Adat, and thereby contributed to streamlining the activities of local legal scholars [2], as well as, for the supervision of their activities by the regional administration, “Sharia articles...” were published. The results of the audit of Senator K.K.Palen contributed to the development of not only Russian oriental studies and Islamic studies, but also to the development of world history on issues of Muslim law.



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