International Journal of Engineering & Technology, 7 (4.38) (2018) 174-178

International Journal of Engineering & Technology

Website: www.sciencepubco.com/index.php/IJET

Research paper

Mongolian Trace in the Criminal Penalties Institute in Buryat Society of the Russian Empire in XIX Century

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Abstract

The article is devoted to a scientific study of the criminal penalties status in the Russian Empire of the XIX century in its outlying areas, in particular Transbaikal territory, mainly populated by the Buryats. The modern local institution of criminal penalties is justly criticize due to unsatisfactory implementation of criminal responsibility and the failure to achieve the main goals of penalties in society. The solution of pending problems in this field is impossible without taking into account, both historical and positive foreign experience. Empirical methods of comparison, description, interpretation; theoretical methods of formal and dialectic logic. It is interesting to see the experience of criminal penalties in the Russian Empire of the XIX century in Buryat society, which seamlessly combine both Russian traditions and the customs of the neighboring Mongolian state. Legal regulation of the outlying territories of the Russian Empire in the XIX century, in the context of preventing criminal acts is based on the peculiarities of delineation of legal proceedings depending on categories of the crimes committed. As the study reveals, prevention of new crimes in the outlying territories of the Russian Empire in XIX century (in the Buryat society) and correction of the offender were achieved primarily through public institutions (local government, tribal and clan communities). We believe that in modern conditions, along with the state institutions of subjects of prevention, the possibility of preventive measures by the mentioned institutions should not be discounted.

Keywords: *Russian Empire; Mongolia; criminal penalties system; foreign and historical experience; border states; Buryat society; collective responsibility; crime prevention.*

1. Introduction

Optimizing the system of basic criminal penalties, as well as reforming the system of additional penalties are acting as one of the ways to improve Russian criminal law.

The list and content of criminal penalties in the article 44 of the Criminal Code of the Russian Federation of 1996 reflected the realities of the late 1990s of the last century, the "post-Soviet" period, the transition from one formation to another, and as critics say, this was not always legally and socially conditioned. From the list of the criminal penalties were expectedly eliminated those types of penalties which were either not actually used or failed to reflect the essence of the criminal prevention (for example: dismissal from office; the obligation to recover the caused harm; public reprimand). However, the exclusion of the property confiscation from the Criminal Code of the Russian Federation by the Federal Law dated 08.12.2003 entailed fair criticism, as from the scientists and representatives of public organizations as well as from concerned citizens. According to experts of anti-criminal sector, the return of property confiscation in 2006 to the Criminal Code of the Russian Federation as other measures of criminal-legal character, haven't added positive emotions and the prestige to the Russian legislators. In practice, it was difficult to confiscate property, because there was a need first to prove the receipt of this property as a result of the crime. The prior article 52 of the Criminal Code of the Russian Federation, which provided the confiscation of property as a form of penalty, did not contain the requirement: the property which is subject to confiscation should be the property of the convict, regardless of the source of its origin. The system of criminal penalties assumes a priori its gradual transition from the mildest form of penalty (fine) to the most severe (death penalty), which is not visible in its modern form, we believe the legislators did not take into account one of the essential features of any penalties – it's punitive nature. The significance of the punitive nature of penalties is clearly reflected in the work of the famous Italian thinker of the XVIII century C. Beccaria: "fixation of the idea of inseparability of the crime and the following penalty deep inside, compliance of penalties with the nature of the crime, compliance with the severity of the penalty to the gravity of offence, certainty of penalty, etc." [1], [2], [3]. As the experts in the field of penitentiaries note, the absence of indication of the punitive nature of the penalty led to inconsistent humanization of the criminal law [4].

It can be noted with regret, that the current criminal situation in Russia, as well as the situation in the social and economic spheres, is far from stable. It must beas sent to an opinion that the measures, which are taken to counteract criminality are still superficial, fragmentary and cannot be evaluated as effective. In our opinion, scientists in various subject areas, such as jurisprudence, history, sociology, etc., can assist law enforcement officers [5], [6], [7]. The famous saying "All new is well forgotten old" should not be forgotten, but should be adopted and used effectively in modern conditions.

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2. Institute of Criminal Penalties as an Object of Investigation

One of the most important means in combating crime is a timely response on an unlawful phenomenon by the state, expressed in application of coercive measures, in other words, the penalty. In a context of a modern criminal policy of the state, the institution of criminal penalty is one of the most important elements of the criminal legal means to counteract criminality. It is no coincidence, that it is subjected to constant reforms and changes. Indeed, the execution of criminal penalty logically completes the stage of the criminal legal coercion applied to the person who committed the crime. Exactly by this factor, we can judge the efficiency and effectiveness of the criminal justice, prosperity and well-being of the state, and protection of citizens against criminal offenses.

An effective counteraction of criminality in the modern period, in the age of integration and globalization, is impossible without taking into account both historical and positive foreign experience. The system of criminal penalties in the Criminal Code of the Russian Federation has been criticized for many reasons. In Europe, the refusal from the cruelty of punishment execution and application occurred in the XIX century, whereas in Russia and in a number of the post-soviet states, national legislation changes in humanistic direction only in recent years.

In the context of criminal penalties expansion, which are not related to the isolation of a person from society, scientists propose new schemes of state coercion to persons who have committed crimes. Otherwise they offer to revive those penalties (Skiba A.P., Rodionov A.V.), which have been exist in the recent past [8]. Certain authors (Stromov V.Y.) insist on exclusion those penalties, which have not been applied for a long time (arrest, compulsory labour) from the list of penalties [9], others (Nechaev A.D., Usalev V.V.) offer to shift the execution of non-working penalties to the territorial units of the Federal Penitentiary Service of Russia [10].

The effectiveness of the existing criminal penalties is determined only if the objectives specified in part 2 of article 43 of the Criminal Code of the Russian Federation are achieved. It seems interesting to us the experience of the existing criminal penalties in the Russian Empire of the XIX century in the territory of Eastern Siberia, in Transbaikal (the territory of the modern Irkutsk region, Buryatia, Trans-Baikal Territory). It can be clearly seen that the prevention of unlawful behavior in mentioned society carries within itself both Russian traditions and the customs of the neighboring Mongolian state [11].The similarities and differences in penalty application practice of the Russian state and medieval Mongolia were described in details in the pages of historical and legal literature [12], [13].

It can be recalled that the work on the criminal legislation systematization of the Russian Empire began in the XVIII century, but only in the first half of the XIX century had been resulted in the creation of a codified legislative act – the Penal Code on criminal and correctional penalties as of 1845 [4].

In general, in terms of content, it was the first criminal code of the Russian Empire, since other previous legislative acts, as a rule, consolidated the norms of various branches of law [14]. The Penal Code contained a large number of articles (2224), consisting of 12 sections, which included chapters, parts and sectors. Accordingly, the Code contained an extremely cumbersome penalty system. The complexity of penalties application was compounded by the frankly class approach, uncertainty of sanctions, and presence of numerous references. The researchers noted the discrepancy between the penalties and the severity of the offense, the inability of the court to reduce the penalty below the lower limit prescribed by the law, taking into account mitigating factor. All of the aforementioned indicates that the Penal Code did not constitute a clear enough and legally accurate criminal code. At the same time, it should not go unmentioned its significant difference and perfection in comparison with the previous criminal legislation of Russia. Though, it should be noted about the operation of this source of law on scope of persons, it did not apply to certain peoples of Russia (for example, the Chukchi and other Siberian ethnic groups).

Analyzing the largest regulatory legal acts of the Russian state and Mongolia [15], we can clearly notice the certain similarities and differences in the reaction of states to the unlawful behavior of their citizens, in spite of specifics and peculiarities of their historical, cultural, ethnographic and other traditions. Such attitude of the authorities is realized in the system of criminal penalty, which existed at that time among the above-mentioned states. The legal documents which have survived to our days, are a kind of "historical monuments", allow us to define the basic idea of legislation, supplement and clarify the existing knowledge on the state of affairs, both in Russia and in Mongolia.

Kara, in ancient sources of law, for example in the Russian state, was expressed in the death penalty, physical punishment and penalty payments, whereby the special place was paid to the retribution. It should be taken into account that unmeasured abuse of the private revenge in society had entailed anarchy, disorder, ordered life became more complicated and all this interfered with the administrative function of the state.

3. Institute of Criminal Punishment in Medieval Mongolia

It is interesting to consider criminal penalty application in medieval Mongolia [13], which is clearly reflected in the Eighteen Steppe Laws, which contains the legislation of Mongolia of the XVI century [16], [17], and which has a prominent place among other legal monuments and represents the unique document, primarily due to the exceptionality of the period of Mongolian history. If the Great Yasa of Genghis Khan provided mainly the death penalty as a punishment for any offence, then in the Middle Ages, with the advent of Lamaism (the religious trend) to the territory of Mongolia, which rejects violence against any living being, Eighteen Steppe Laws focused on property punishments such as fine.

Imprisonment as a penalty, unlike the Russian state, as well as a number of European powers, was rarely used by Mongols as representatives of nomadic peoples. Even neighboring sedentary China was not familiar with penalties as imprisonment and deprivation of liberty. As noted by E. I. Kychanov [18], "the prisons were only for carrying out an investigation, where the convict was waiting for the punishment". As well in Mongolia, with all the abundance of various types of penalties, arrest and imprisonment were not applied. As evidenced by the material "Eighteen Steppe Laws" [15], [19], the Mongols practiced detention for up to nine days to clarify the circumstances of the case.

Basing on the above-mentioned normative source [19], the list of criminal penalties can be divided according to the degree of their strength as follows [15], [19].

1. The death penalty assigned to a plebian, includes a number of offences for which it may be provided: for insulting the person of the Khan's origin; to those who quarrel the two noyons (rich men) by slandering them; to those who left Khan in the battle; to those who had seen or had heard a considerable force of the enemy and not reported about it; for insulting religion by their actions. All this was accompanied by the property confiscation.

The death penalty without confiscation of property was relied in two cases – to the officer, who stabbed with the edge his noyon and to the leader and instigator of the group theft.

2. Property confiscation as a special form of penalty was applied to: selfish officials; commoner, who ceased to perform duties; absconder, going to the enemy.

3. Deprivation of rank, title, accompanied by a fine, was imposed to: a petty officer who hid the thief; the judge for the improper analysis of the case in a drunken state.

4. The fine by the cattle – the main form of penalty. Especially often mentioned in the laws is the payment of the fine by horses and camels as the most valuable ones, rarely mentioned sheep and cows. The penalty is basically calculated by "nines" and "fives". These forms of fine preserved in the subsequent legislation of Mongolia. One "nine" traditionally consisted of four heads of heavy beasts and five small cattle. The "five" consisted of a horse, a bull and three sheep.

The fine by the cattle was called in the laws by two terms – "Aldangi" and "Andza". The fine "Andza" was imposed in most cases for a criminal offence. For example, by "Andza" were punished for kidnapping, homicide by negligence, causing injury to a person, theft, etc. Violation of the marriage law was also punished by "Andza". There are many more examples determining the punishment, "Andza" is expressed quantitatively.

"Aldangi" was used mostly in determining the penalty for official crimes and the size of the "Aldangi" was always indicated: three "nines", five camels, one horse, etc. For example, by "Aldangi" were punished the judge, incorrectly analyzed the case; official using his official position, etc.

In addition to the fine by the cattle there was a fine by the valuables, as evidenced by the K. F. Golstunsky [20], usually it was something of weapons. The fine by the valuables, as a rule, was accompanied by the fine by the cattle. A distinctive feature of the legislation is the fine by the armaments - armor, coat of mail, bow.

5. In the "Eighteen Steppe Laws" there is a mention of the composition as a form of criminal penalty. The killed man should be reimbursed by a camel; the one who died from the bites of dogs should also be reimbursed by a camel; the one, who killed a captive enemy, compensated him with a camel. As we see, the camel is the most expensive animal among the Mongols, that is why, it was taken as a compensation. Since it is known from the history of law that the talion, originated in the tribal system and expressed by the wording "an eye for an eye, a tooth for a tooth", was replaced by composition, namely by payment of a fine to the victim. It can be assumed that the blood feud and talion were a past stage in the lawmaking of the Mongols-Khalkhasts in the beginning of the XVII century. Later legal monuments also do not contain a mention of the talion.

6. In the "Eighteen Steppe Laws" it is said about an interesting way of solving disputes, as an oath and test. The subject had to pass through the gates of three sticks, to which were attached the old shoes, clothes, etc. If he touches any of the objects, he was considered guilty, otherwise the deflect blame away from him. The existence of such a test, according to K.F. Golstunsky [20] refers to shamanistic rituals. Similar forms of dispute resolution – ordalii – were used in medieval Western European courts.

7. As an additional penalty, the Mongols often applied a compensation for a loss. It was imposed on the arsonist for the burned out; on the one who did not interfere the theft of a livestock, for the stolen cattle, etc.

In connection with the above said, the following conclusions can be drawn:

Criminal penalties in medieval Mongolia had certain similarities with those penalties (especially those related to property sanctions), which, by this time, were practiced in the Russian state, and the number of European countries, despite the different geographical location.

The amount and the type of penalties applied to the guilty person in Mongolia primarily depended on his origin class.

Specifics and the way of the nomadic life of the Mongols left a significant imprint on the penal system in medieval Mongolia (absence of imprisonment or any isolation of a person from society).

Property penalties mainly extended to the seizure of the cattle as the main measure of life of nomadic people.

The death penalty in Mongolia was gradually replaced in practice by using the other types, primarily under pressure of the Lamaism spread, which rejects the death penalty, like any other violence against a living being.

4. Features of criminal penalties in Buryat society of the Russian Empire

As for the legal regulation of the marginal territories of the Russian Empire in the XIX century in the context of preventing the criminal phenomenon, we can see the distinction feature of judicial proceedings depending on the categories of crimes committed. The Charter on indigenous dwellers(non-Russians) management dated 1822, legislatively formalized to the Siberian non-Russians, including the Buryats, the customary law application, i.e. judicial proceedings by the self-government [21].The Charter established a three-phase system of local self-government of Siberian non-Russians: 1) patrimonial administration; 2) non-Russian government; 3) Steppe Duma. They were entitled to the right of trial and legal proceedings.

At the same time, according to the Charter dated 1822, the investigation prosecution for the following crimes was withdrawn from the jurisdiction of Siberian non-Russians authorities, quite rightly and reasonably: 1) "indignation"; 2) homicide; 3) robbery and violence; 4) "making a false coin and stealing state property" [21]. All other crimes, including theft, were considered actionable and were solved by local authorities within the patrimonial administration, while the non-Russian government was actually the highest court of verbal punishment. Monuments of customary law in conjunction with the survived archival documents allow exploring the penal system of the criminal cases of the Buryats of the Russian Empire in the XIX century.

Discrete role in classification of normative legal acts of the customary law of the Buryats was played by the well-known Buryat researcher B.D. Tsybikov, who pointed out: "it is already feels the significant influence of a half-century joint life of the Buryats with the Russians and the norms of the law of the Russian statehood" [22].

The system of criminal punishments in accordance with customary law of the Buryats was as follows:

1) physical punishment of the accused by the rods, lashes;
2) physical punishment of wife and children of majority age (in case of theft);
3) monetary penalty and property fine "yala";
4) custodial placement;
5) exile to another nomadic, a different clan, expulsion from the society;
6) religious punishments.

The most common punishments were physical punishments by rods, lashes, and whip. As a rule, they were imposed for insulting and beating the lama of a high rank and officials of local government, for insulting and beating parents, stealing, and crime concealment.

The next common kind of punishment was a fine, which had a lower limit of 15 kopecks in silver and an upper limit of 91 rubles 25 kopecks, depending on crime category. If in the early monuments of the customary law there is a property penalty "yala", then, further the priority is given to a fine. Custodial placement could be imposed for committing crimes against the individual and morals of the society, bodily injury (maiming injury), insulting by words and actions, gambling, wine drinking, etc.

However, the most serious punishment for criminal offenses, which could be considered by non-Russian courts, was excluding from the clan, eviction from the administration. The decision on eviction was taken at the general suglan (meeting) of the society. Mostly, to the exclusion from the clan and to the exile were subjected non-Russians for numerous cases of theft after previously imposed of such punishments as fine, physical punishment
(30 strokes by rods), subjection to officials supervision [21].

We can see in archival documents that the exile of tribesmen could be both in the territory of Transbaikal (for example, in Mukhorshibirskaya volost) as well as in isolated locations (the Yakut region, for works in the Nerchinsk plant; isolated locations in Siberia, or "beyond the sea Baikal, along the port of Okhotsk") [21].

It is draws attention, that even then all crimes could be classified according to the object of criminal offense [21].

1. Official crimes are distinguished by the fact that, as a rule, the subjects are the members of a society endowed with a certain power. In archival documents there were preserved investigative cases concerning the highest officials of local self-government of the Buryats in the XIX century, who are tais has, assessors and heads. The investigation with regard to the highest officials of local government was conducted by the local police and it is understandable that the criminal cases were withdrawn from the non-Russian authorities. Additionally, the following officials, such as headmen of patrimonial administrations, their assistants, supervisors of economic stores were the subjects of these crimes. In addition to the exile, exclusion from the clan, prison supervision up to three days, physical punishment with whips and rods, and removal from office could be imposed to such officials.
2. The second group of crimes can be combined as the acts directed against the public and morals. These acts include drunkenness, gambling. The norms for combating drunkenness and gambling are contained in all large monuments of customary law of the Buryats.

Officials also had to comply with prohibitions on unauthorized wine consumption and gambling, in addition, they were forbidden to solve any cases in a state of intoxication. For violation of the established rules, the following punishments were provided: imprisonment for three days; monetary fines (from 15 kopecks to 30 rubles); physical punishment from 10 to 35 rods; disfrocking (with regard to a religious servitor).

3. In the group of crimes against the person, the murder was issued by the Zemskoy (district) court, and the department of non-Russian court could make decisions only for attempted assassination, various kinds of bodily injury (maiming injury), and also for insulting by words and actions. For the most serious crimes in this group the guilty persons were punished by livestock reimbursing (usually 50 or 25 heads of livestock), the penalties clearly show the class dependence on the person who is offended, and also to which clan the offender belongs. The punishment for insulting parents was specially highlighted. In accordance with the Regulations dated 1808 [23], for insulting parents, public punishment by two whip whacks was imposed to frighten and verbal suggestion.
4. Crimes against property (thefts) differed, first of all, by the fact that they were considered in court actions. In accordance with the Regulations dated 1808 for the commission of such crimes there were four types of fines, including stolen: 1) "a head for a head" when the stolen cattle was compensated in kind; 2) reimbursement of a cattle, identical with the stolen one; 3) compensation of a half of a stolen cattle;4) compensation of a quarter of a stolen cattle. In case of detection of stolen cattle and returning it to the owner, the offender was still imposed to a fine in the amount of one cattle and was subjected to physical punishment.

Shared responsibility for the theft was show ninphysical punishment by whipping not only the thief, but also his family members: wife and children of majority age.

5. Conclusion

It is possible to draw some conclusions by summarizing the analysis of criminal penalties in the Buryat society of the XIX century of the Russian Empire [24].

The purposes of criminal penalties, as a prevention of new crimes, correction of the offender, in our opinion, were achieved primarily through public institutions (local government, tribal and clan communities) [25].

Shared responsibility for the property crimes played a certain preventive function, exactly at the local self-government bodies level.

There is a clear tendency in increase of penal sanctions in resolving criminal cases at the local level, and we also see that the stimulation of law-abiding behavior is provided by monetary payments (for example, a witness who caught a thief is getting a half of the fine due to the thief) [21].

Another observation, that even far in Siberia, in the Transbaikal region (that is the limit) a person who committed an illegal action, as one of the most severe penalty, was departure from society and where ("to Russia", to the Yakut region, "beyond the Baikal see, along the Okhotsk tract" etc.).

Acknowledgement

The article is prepared within the framework of the Grant "Protection of the rights and legal interests of citizens of Mongolia on the territory of the Russian Federation and citizens of Russia in the territory of Mongolia" No. 16-23-03006.

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