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FOREWORD

Dear readers, the National Legal Institute is proudly presenting you with the first issue of the Mongolian Law Review.

Mongolian Law Review is the first Mongolian law journal published in English and it will publish articles on all aspects of Mongolian law. Special emphasis is placed on contemporary developments. Moreover, jurisprudence and legal history will be an inclusive attribute.

The articles and notes are designed to have the widest appeal to those interested in Mongolian law - whether as practitioners, students, teachers, judges or administrators - and to provide an opportunity for them to keep abreast of new ideas and progress of Mongolian legal reform.

The journal also contains an extensive section of book reviews to provide information on Mongolian law related books published in English.

An important feature of the journal is to provide opportunities for the lawyers of Mongolia and for distinguished contributors from abroad to express their opinions, as well as to analyse their work developments, recent judicial decisions, new legislation and current law reform proposals in English for further development and improvement of law-making and implementation in Mongolia.

May I wish success in your diligence to contribute in the development of Mongolia.

Batjargal Dugarjav

Director

National Legal Institute of Mongolia

MONGOLIAN LAW REVIEW

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ASIAN CONSTITUTIONAL COURTS AND POLITICS

*Enkhbaatar Chimid**

The prevailing trend in the modern era is an unprecedented increase of the judicial power that swept the globe.[1] It seems, there are many factors that have contributed to this outcome. First, there was a spectacular advent of judicial review[2] power throughout the world. Almost all countries now have established some kind of judicial review, albeit organized in diverse ways. This process has dragged for decades, but accelerated after the collapse of the Soviet Union and the so-called socialist system. Secondly, some contribute it to distrust of government which has bolstered the political power of the judiciary. Thirdly, concerns with the protection of fundamental human rights and the establishment of limited government also contributed to the increased role of judges.

The part and parcel of this rise of judicial review is the growing involvement of the judiciary in the political decision-making process. This phenomena is called differently by constitutional scholars: judicialization of politics,[3] politization of the judiciary, the creation of the juristocracy[4] and so forth. It should be noted from the outset, that all courts are part of politics to the extent that they make authoritative, policy-relevant choices. The key issue in relation to the political role of the courts is their willingness to intervene, and the extent of such intervention, in the terrain traditionally seen to be legislative.

The majority of the countries newly embracing judicial review, has adopted the 'centralized model".[5] For example, almost all former soviet republics,[6] as well as former socialist countries have provided in their

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[1] See, in general, *The Global Expansion of Judicial Power* (1995) (C.Neal Tate and Torbjorn Vallinder, eds), New York University Press, 556 p.

[2] The term judicial review defined in "Encyclopedia of the American Constitution" as " the power of the courts to consider the constitutionality of acts of other organs of government when the issue of constitutionality is germane to the disposition of lawsuits properly pending before the courts." "Encyclopedia of the American Constitution" (Leonard W. Levy et al. eds.) (1986), 1054.

[3] See note 1, p. 5.

[4] See R.Hirschl, (2004) *Toward Juristocracy: the Origins and Consequences of the New Constitutionalism*, Harvard University Press, 1

[5] For the comprehensive review of the two models of judicial review see Cappelletti, Judicatla Review in the Contemporary World, The Bobbs-Merrill company Inc., (1971), 117.

Of the fifteen former Soviet republics, only Turkmenistan has not established a constitutional supervision body yet. Twelve republics have constitutional courts, Kazakhstan has the constitutional council, and Estonia preferred an American model of judicial review: it has now a constitutional supervisory chamber in the Supreme Court. See Armenia (art 96 of the Constitution), Azerbaijan (art 130 of the Constitution), Byelorussia (art 125 of the Constitution), Georgia (art 88 of the Constitution), Kazakhstan (art 7a of the Constitution),

constitutional structure for an organ of judicial supervision, mostly in a form of a constitutional court.[7] Many Asian countries have established these special courts in order to protect their national constitutions against offensive legislation. As for Europe, this continent is now associated with a "centralized model" of constitutional review, where only one court has the authority to strike down a law as unconstitutional.

The importance of these constitutional courts continues to increase as their judgments attract widespread attention. Some of the newcomers, namely the Hungarian Constitutional Court in Europe, the South Korean Constitutional Court in Asia, and the South African Constitutional Court in Africa, have proved to be very active. It seems that constitutional courts by the very nature of the norms they are required to interpret and enforce are unusually entangling with legislative politics. In other words, as an institution entrusted with guarding a constitution, a constitutional court is not fully judicial.

The reasons for choosing the centralized model are differed from a country to a country. Historically, the makers of the early European constitutions (Austria, Poland etc.) were feared that disagreements will arise among courts, if they exercise constitutional review. It will make laws more uncertain and ambiguous for citizens and civil servants alike. On the other hand, to give ordinary judges a power to strike down the laws would result in an encroachment on the exclusive power of the legislative branch to make laws.[8] Asian countries do not view their judiciary as a coequal branch with power to review executive and legislative acts. On the other hand, the exercise of judicial review requires judges to use creativity and discretion in interpreting vague constitutional provisions. Constitutional judges are required to balance and reconcile competing policy preferences. Common law judges are well prepared to offer the policy-minded analysis. On the contrary, like European countries, most Asian countries have civil law legal systems. Asian judges, like their European counterparts, are "career judges" who enter the judiciary early in their professional careers and are promoted on the basis of seniority. They are well trained to follow the rules provided in the codes. Ordinary court judges thus practice technical, rather than policy-oriented, statutory application. On the contrary, constitutional judges are usually

Kyrgyzstan (art 81 of the Constitution), Lithuania (art 102 of the Constitution), Moldavia (art 133 of the Constitution), Russia (art 125 of the Constitution), Tajikistan (art 89 of the Constitution), Ukraine (art 147 of the Constitution), and Uzbekistan (art 107 Constitution).

[7] Albania (Basic Law n. 7561 of 1992), Bulgaria (art 147 of the Constitution), Croatia (art 122 of the Constitution), Poland (art 188 of the Constitution), Romania (art 140 of the Constitution), Czech Republic (art 84 of the Constitution), Republic of Slovakia (art 124 95 of the Constitution), Slovenia (art 160 of the Constitution), Hungary (art 32a of the Constitution), and Mongolia (art. 68 of the Constitution)

[8] Thus, a nation creates a special constitutional tribunal because it either lacks confidence in the capacity of the ordinary court system to decide constitutional questions or considers it inappropriate for such courts to review the acts of the legislature—the primary reasons for the "concentrated" approach to judicial review.

chosen by political authorities and have broader, more policy-oriented training. Therefore, they may be more capable than ordinary court judges of exercising judicial review. Also specialized constitutional courts are modestly staffed and limited in jurisdiction. Therefore, giving the power of judicial review to only one court is thought to be an efficient solution. Thus, these countries created a new institution, independent of the judicial branch, to review the constitutionality of laws.

However, in modern times, other considerations also come into play. First, all countries in transition to democracy underwent through bitter experience of having totalitarian regimes that regularly abused and disregarded their own constitutions. Thus, for those countries not only lacking a tradition of judicial review, but also still struggling to cast aside their historical baggage of authoritarianism, the establishment of an independent constitutional court was a natural choice. They envisage the establishment of an independent constitutional court as a necessary step to promote uniformity and efficiency in the application of constitutional norms. Secondly, the countries with established constitutional review, that has served as an effective mechanism, are deemed to be more stable than the countries in which constitutional review either does not exist or exists but is ineffective. It seems, constitutional courts are one of the best institutions to resort to when there is a political conflict among politicians, especially in the case of political unrest because it helps ease possible street clash by turnings the dispute and protest into legal issue to be decided in a court.

These courts have been created and vested with a variety of powers and duties in order to uphold the characteristics of democratic regime based on the rule of law. The authority to exercise constitutional review is restricted to constitutional courts. In other words, only a constitutional court has a clear authority to use the constitution to strike down legislation.

It should be noted from the outset, that the implementation of constitutional values is one of the main functions of the political process, and therefore a constitutional court, reviewing the constitutionality of laws as the product of this process, should primarily respect it. Only in cases where law infringes an individual's constitutional rights, or violates procedures provided by the Constitution, or breaches the constitutional provision, a constitutional court should step in and make a careful and strict review. Constitutional courts are important judicial organs which are supposed to act as the ultimate national defenders of human rights.

Constitutional review is, in general, designed to resolve social conflicts in terms of law. That is, it is a judicialization of the political process on the condition that politics is under the law. When politics

is not under legal control, constitutional review becomes no more than a meaningless means to justify wishes of political powers. At the very least, judges are political actors to the extent that they make law. This claim does not in itself deny that judicial politics may differ from other politics in important respects. Judicial decision-making does not proceed in the same way as parliamentary law-making or ministerial policy-making. Courts, unlike legislators, do not initiate proceedings, and they constrained by jurisdiction. Courts are restrained by their professional attitudes as well. Judges are professionally trained to consider every argument, however curious, and to balance different arguments against each other. Normally they will give reasons for their decisions, thereby enabling others to reconstruct the court's line of thought.

Another feature of judicial decision-making is that judges have no personal interest in the result. They are more unprejudiced than politicians, who are more frequently linked to the business community or to interest groups, such as, for example, environmental groups. Sometimes, it is argued that judges will be less inclined to prejudice than politicians because they have no political or ideological preconceptions. Judges see social problems in terms of the rights of individuals rather than that of social policy. In cases on urban planning, city authorities will, for example, focus on how to build new residential areas, but the judge is primarily concerned with the rights of neighbouring property-owners. Judicial politics are, therefore, always partly the politics of who and for what reasons litigates.

The opponents of the political role of the courts used to label them as anti-majoritarian because judges strike down legislation passed by elected representatives of the people. Therefore, as they see it, judicial review is contrary to the proper function of judges. However, it was pointed out that as long as a constitution emanates from the people and confers on judges the power to decide conflicts, no problem exists. Citizens may need judicial protection for their liberty as much as they need to secure participation in the governmental process.

The political role of constitutional courts are clearly visible in its powers.

Constitutional courts have jurisdiction over the constitutional review of laws, constitutional complaints, competence disputes between governmental entities, impeachment of high-ranking government officials and dissolution of political parties. In many cases, constitutional adjudication seems to have characteristics of political function. In case of the latter three areas they always tend to have strong political implications given their own political nature. Of course, the first two areas sometimes have political impact depending upon the contents of

the case and the surrounding circumstances. In other words, a political dispute itself may be brought to the Court for judicial review, and it often has significant political implications.

The scope of responsibility of constitutional courts vary from a country to a country.

Since constitutional courts exercise an abstract review, it is usually a posteriori review.[9]

A posteriori review are exercised by the Asian constitutional courts in two forms: abstract and concrete review. Abstract review is exercised in relation to:

a) Constitutional amendments (Kyrgyz Republic);

b) International agreements (Mongolia);

c) Laws (Indonesia, Tajikistan, Mongolia, Uzbekistan);

d) Regulations (Mongolia, Kyrgyz Republic, Tajikistan);

e) Acts of the president (a head of state) (Mongolia, Tajikistan);

2. Concrete review requested by the regular Courts (South Korea, Kyrgyz Republic, Thailand);

Two courts-Kyrgyz and Uzbekistan's-have a power to interpret the constitution, while the constitutional court of Indonesia can interpret laws and other regulations.

One of the major functions of constitutional courts is to decide competence disputes between various governmental agencies. These disputes fall into four categories: disputes between top government bodies (South Korea, Mongolia, Tajikistan); between the state and regional or local units (South Korea, Tajikistan); between local or regional units (South Korea, Tajikistan); and, finally, between the courts and other government bodies (Thailand).

The constitutional courts of Korea[10] and Indonesia have the power to dissolve a political party on the grounds of unconstitutionality of its acts and activity. The constitutional court of the Kyrgyz Republic has even more broad power: it can determine the constitutionality of activities not only of political parties, but also non-governmental and even religious organizations.[11]

Case Study

Decision of the Indonesian Constitutional Court on Civil Rights of Former Communist Party Members

This case was initiated by the former political prisoners from the Soeharto era, who had been detained and punished following accusations that they were involved either directly or indirectly in

[9] Only in one case an Asian constitutional court can exercise preventive review. According to the Art. 89 of the constitution of Tajikistan, the powers of the Constitutional Court of the Republic of Tajikistan are "... to determine the conformity... agreements that have not entered into force in Tajikistan"

[10] Law on the Constitutional Court of Korea-Art. 2, section 3

[11] Constitution of the Kyrgyz Republic-Art. 82 (3.8).

a Communist Party coup attempt. The petitioners argued that their constitutional rights as citizens had been prejudiced by the enactment of Law Number 12 of 2003, and in particular by article 60(g). This had resulted in a number of them being refused registration as voters by the General Elections Commission on the grounds that had been members of an organization that was associated with Communist ideology, even though none of them had actually been involved in the abortive coup.

The coup was attempted by the Indonesian Communist Party. Party members brutally murdered 7 generals with the objective of eliminating what they saw as being counter-revolutionary forces in Indonesia. In the aftermath of the coup attempt, left wingers were set upon by the Army and members of the public, with almost 2 million people being killed as a result. The coup attempt led to the issuing of an Interim People's Consultative Assembly Decree outlawing the Communist Party in Indonesia and prohibiting the dissemination of Communist ideology.

In its decision in this case, which was handed down on 24 February 2004, the judges of the Constitutional Court held that as a state founded on the rule of law, the human rights of every Indonesian citizen were guaranteed and protected by law. Every citizen enjoyed the right to participate politically, and to be spared discriminatory treatment, whether based upon race, ethnicity, class, religion, social status or political persuasion.

The Constitutional Court also referred to international human rights law in its reasoning. The national Constitution, it said, was not exclusive in nature, and was open to the incorporation of the universal values prevailing among the people of the world. Indonesia, as part of the international community, had also adopted and ratified international human rights instruments and incorporated their values and norms into domestic legislation.

In its decision, the Court quoted the provisions of a number of international conventions, such as article 21 of the UN Universal Declaration of Human Rights5 and article 21 of the International Convention on Civil and Political Rights (ICCR)6.

The Constitutional Court's decision in this case was also motivated by a desire to see reconciliation brought about between all components of the nation, so that, besides the legal grounds outlined above, the Court was of the view that article 60(g) of the Electoral Law (Number 12 of 2003) was an impediment to national reconciliation. Accordingly, despite the involvement of the Indonesian Communist Party in the events surrounding the abortive

coup attempt, former members of the Party and its associated organizations must be treated in a non-discriminatory manner in the same way as all other citizens.

Furthermore, the Constitutional Court stressed that the principle of freedom from discrimination was fully explained in Law Number 39 of 1999 on human rights, which elaborated on the provisions of article 27 and article 28 of the 1945 Constitution, which read as follows: "Every person shall enjoy equality before the law and the government," and "Every person shall enjoy freedom from all forms of discrimination, and shall have the right to be protected against all forms of discrimination." Law Number 39 of 1999 was enacted following the ratification of a number of international conventions, including the International Convention on Civil and Political Rights (ICCR).

Several constitutional courts in the region have a power to decide on the conformity of a referendum with the Constitution, as well as the conformity of electoral proceedings with a constitution and the electoral laws (Mongolia, Thailand and Indonesia). Electoral disputes have proven to be a potential minefield for the Asian constitutional courts.

Case Study

The Constitutional Court of Kazakhstan v. Electoral Commission

The Constitutional Court of Kazakhstan was established in 1993 by the new Costitution of Kazakhstan. It was widely regarded as the most expensive and least effective, as well as the most poorly administered. Accordingly, the powers of the Court were under steady attack. There was also growing sentiment in the parliament and in some parts of the government to do away with the court entirely, creating instead a single Supreme Court. On March 6, 1995 the Constitutional Court upheld the complaints of a candidate for the parliament, who ten months previously had sued to have the 1994 election in her district annulled as a violation of the constitution. Two days later, President Nazarbaev submitted a protest to the Constitutional Court, and blocked the implementation of the court's ruling. The basis for this move was that the court's decision would create problems in implementing "socio-economic reforms", and would "impede the activity of the supreme organs of state authority". But the court took a further decision in which it overrode the president's protest.

Nazarbaev went before parliament to inform the deputies that they were an improperly assembled body, and so were now to be annulled, as were all the decisions and laws they had passed.

Then Nazarbaev asserted his own imposition of direct presidential rule pending new parliamentary elections. To take the place of the dissolved parliament Nazarbaev established a consultative council, the People's Assembly, as part of the presidential apparatus. In 1995, the new constitution of Kazakhstan was adopted, which granted the president broad powers.

One of the novelty of the Constitution was the abolishment of the Constitutional Court and establishment of a Constitutional Council instead. Therefore, the Constitutional Court of Kazakhstan was abolished after only two years of functioning, giving way to the French-type constitutional council.

Some constitutional courts can afford human rights' protection through constitutional complaint and similar legal remedies (South Korea, Kirghiz Republic, Tajikistan).

A special case of constitutional courts is their power to impeach highest state officials. Many courts in the region can decide on the impeachment of a president (Indonesia, South Korea, Mongolia). In addition, the constitutional court of Mongolia has a power to consider whether the legal grounds exit for impeaching the Prime-Minister, and for recalling members of the parliament.

Case Study

The Impeachment of the South Korean President Case

On March 12, 2004, the opposition parties, i.e., the Grand National Party and the Millennium Democratic Party, passed a motion of impeachment against the South Korean President for the first time in the constitutional history of Korea.

The issues were what should be the legitimate grounds for the Court to remove the President from his office, whether the "seriousness" of violation of the Constitution and laws should be required to justify such removal, and whether the minority opinion should be disclosed.

National Assembly's impeachment motion turned the nation into turmoil, and a lot of people were shaken and confused by a flurry of pros and cons of impeachment. While tens of thousands of people with candles in their hands gathered in protest against impeachment, the impeachment motion was rejected by the Court. The Court held that while the President violated the duty to protect the Constitution and certain provisions of election laws, the violations were not serious enough to justify his removal from office. The Court did not disclose its minority opinion with reasoning that there is no provision in the law that permits such disclosure.

The President has returned to his office after 63 days of

suspension of his duties.

Next to impeachment is the case of capacity for offices, or a power to decide on the qualifications of high public officials. The provision of the Constitution of Thailand is construed rather broad: the constitutional court can decide on the qualifications of a member of the House of Representatives, a member of the Senate, a minister, the election commissioners and any persons holding a political position. According to the Constitution of Mongolia, under the constitutional court's scrutiny are following public officials: the president, the Chairman and members of the parliament, the prime-minister and members of the government, the chief justice of the Supreme Court and the Procurator General.[12]

The constitutional court of the Kyrgyz Republic hand down an opinion on the discharge of judges of the constitutional court and of the Supreme court of the Kyrgyz Republic, as well as give consent to prosecution of judges of local courts.

These courts also have a power to perform other tasks which the court is charged with by a constitution or the laws on constitutional courts.

It is evident that some of the above mentioned powers of these courts have political characteristics. However, it should be noted that these courts are judicial, not political institutions. We should always bear in mind that constitutional law itself is a product of the political process and as such it has a political nature.

Another major difference between the two models of judicial review is their ability (or inability) to set aside issues coming before them. It is possible for the organs, performing diffused constitutional review, to choose the cases to decide. For example, the US Supreme Court developed the number of techniques to set aside some constitutional issues: the political question doctrine, justiciability, mootness and so on. Moreover, the US Supreme Court can decide itself whether or not to take the case, according to 'sound judicial discretion'.

Nothing of this kind can be found in case of constitutional courts. On the contrary, one of the main features of the constitutional courts is that they cannot easily avoid constitutional issues that are brought to them because they have no discretionary jurisdiction when it comes to abstract challenges and questions.

The reason for this is that a centralized constitutional court is the only institution that is authorized to declare a statute unconstitutional. To give them a power to freely dispose of cases would mean there will be no constitutional review at all, even given the presence of a constitutional court. Therefore, it wouldn't make sense to allow that

[12] Law on the Constitutional Court of Mongolia-Art 8, section 3.

court to select its cases. Thus, if an abstract challenge against a statute is brought to a constitutional court, it must give an answer to it.

The US Supreme Court has also held that cases can be non-justiciable for 'lack of judicially discoverable and manageable standards'. These notions are alien to constitutional courts which are created in order to decide constitutional issues, not to evade them. At least in one instance, a constitutional court did not accept even the notion of "executive privilege", which is played so prominent role in American constitutional adjudication.

Case Study

The Financial and Economic Emergency Decree Case (Decided by the South Korean Constitutional Court on February 29, 1996)

On August 12, 2003, the President of the Republic promulgated the Financial and Economic Emergency Decree to become effective beginning 08:00 P.M. the same day, with a goal of bringing the nation's financial system up to a real name basis, which later was approved by the National Assembly. This Decree was issued under Article 76(1) of the Constitution, which prescribes that in the event of a serious financial or economic crisis, the President may issue orders having the effect of statute, only when it is required to take urgent measures for the maintenance of national security or public peace and order and there is no time to await the convocation of the National Assembly.

The issue was whether "an executive prerogative action"- namely an executive act that requires highly political judgments - can be a "reviewable" subject matter for constitutional adjudication.

For this case, the Court held that even the executive prerogative action could be a reviewable subject matter, with the following reasoning:

The Presidential issuance of an emergency decree on finance and economy falls into so called "executive prerogative action," in a sense that it is issued based upon highly political judgments as one of the rights exercisable in emergent circumstances and is required to be respected. But all governmental activities including "executive prerogative actions" should be acknowledged only to protect and promote people's constitutional rights. Even high -level political decision-making must be subject to constitutional review if it directly related to the infringement of constitutional rights. In particular, the Decree has the same effect as statute, and the exercise of such power should be subject to constitutional scrutiny.

In this case, while not admitting any concept of "executive

prerogative action" beyond the reviewable scope of the Court, the Court upheld the Decree with a reasoning that the scope of Presidential discretion must be widely interpreted in judging whether a Presidential action complies with the requirements and limits set forth in Article 76(1) of the Constitution and the Presidential act must be respected unless it is deemed irrational or arbitrary.

Through this decision, the Court clearly established that there is no area of exercise of governmental power that lies beyond constitutional control.

However, in some circumstances a constitutional court is inclined to accept that certain assessments have to be made by the political institutions and cannot be supervised by the courts. In later years, judgments illustrating the same approach have been rendered in sensitive areas such as defence and foreign relations.

Case Study

Dispatch of Armed forces to the War in Iraq Case (Decided by the South Korean Constitutional Court on April 29, 2004)

In October 2003, the President decided to dispatch armed forces to the war in Iraq. The National Assembly consented to dispatch. The complainant filed a constitutional complaint, arguing that because the war in Iraq is an aggressive war, the dispatch of armed forces to the war in Iraq is against Article 5 of the Constitution (aggressive war prohibition provision) and violates the citizen's duty of national defense.

The issue was whether the decisions of the President and National Assembly to dispatch the armed forces abroad should be subject to judicial review by the Court.

The Court held by 5 to 4 that the President's decision to dispatch armed forces to the war in Iraq is utmost political and it is clear that such decision is made in compliance with the procedures set forth by the Constitution and other laws, thus the judgments of the President and the National Assembly must be respected and it should not be deemed as an exercise of public power subject to review by the Court.

The essential reasoning of the Court is as follows: To dispatch armed forces to a foreign country is closely related to national security and the state's interest. It would not only have impact on the safety and life of dispatched members of the armed forces, but also ultimately affect the national interests and rights of people, in general, in terms of the role and status of Korea in the international society and the relationship with other allies. It is such a complicated

problem to decide that one must consider national goals and the future direction of the state in view of the whole circumstances. Under this Constitution that has a basic principle of representative democracy, the high-level political decision by the President and the National Assembly should be respected with rare exceptions. Because it is an utmost political decision related to the national security and diplomacy and it is evident that all legal requirements were met, the decisions of the President and the National Assembly should be respected and the Court should refrain from judging them through judicial review. Their decisions will be in the end subject to the evaluation and judgment by the people through elections.

The Court has acknowledged certain limitations on its power of constitutional review. However, it should be interpreted as the Court's respect for the function of each governmental institution assigned by the Constitution, rather than as accepting the "political question theory" or the "judicial self-restraint theory."

There is another major difference between the centralized and de-centralized models which also has contributed to the rise of judicial review. The law of standing in the de-centralized model is premised on the notion of a lawsuit— two adversaries, one of whom has allegedly been injured by the other and is seeking redress through the courts. For example, the U.S. Supreme Court usually consider a constitutional challenge if it is raised in an ongoing dispute. But as it is a case with the "centralized" model of judicial review elsewhere, the approach of the Asian countries which adopted the de-centralized model, is different. Unlike the American model, the law of standing in these countries, as a rule, is not based on the adversary process. None of the Asian constitutional courts seem to require a particular legal dispute between adversaries, for all allow the appropriate bodies to challenge laws simply by filing the requisite papers by the appropriate bodies.

Another notable feature is that public officials are the group given standing in all cases. The reason for this is that, given the importance of laws, only some political institutions should be authorized to challenge them because abstract review can be extended to any provision, for any constitutional reasons, which means that the scope of challenge might be unlimited. Therefore, the limitation of standing to a handful of certain institutions is designed to protect laws. Private persons are only occasionally allowed to access constitutional courts .

The provisions of the Constitution of Mongolia seem to be most restrictive: standing is given only to the Great State Hural (the parliament), the President of Mongolia, the Prime-Minister, the prosecutor general and the Supreme Court.[13] An ordinary citizen can reach the constitutional

[13] Law on the Constitutional Court of Mongolia-Art.10.

and ten years (Kyrgyz Republic); the average is six years (which is also the case in Mongolia and South Korea).

However, unlike the well-established European practice to limit constitutional court judges to only one term in order to avoid concentrating too much power in the hands of such a small group[23], most Asian countries, except Thailand, allow re-election of constitutional judges. There is no even any limitation on the number of re-election allowed which amounts to life tenure; however, the respective constitutions set a certain age until constitutional judges can perform their duties: 60 (Tajikistan), 65 (South Korea), 70 (Kyrgyz republic). For other counties the maximum age is usually the general age of retirement set up in other laws. It should be noted here that the fact that the East European courts that have decided cases have shown little deference to the governments and legislatures that appointed them[24], attributed in part to the limitation to one judicial term which means there is little to gain from deferring to the politicians.[25]

The qualifications and the required professional experience of the constitutional judges are subject to high standards: the candidates must not only have more than average legal expertise, but also a high degree of sensibility for the political effects of their decisions.[26] Therefore, a majority of the appointees to the Asian constitutional courts are not career judges (although they could be). The level of expertise required of constitutional judges is usually high: at least ten years in Kyrgyz Republic and Tajikistan. The minimum age acceptable for appointment of a constitutional judge is 30 in Tajikistan, 35 in Kyrgyz Republic and 40 in South Korea and Mongolia. In addition, almost all countries require of constitutional judges to have a law degree (except Mongolia,[27] Uzbekistan, Thailand-in these countries, politicians are allowed to serve on the bench). So as a rule, constitutional judges are selected exclusively out of first-class lawyers with many years of experience, such as attorneys, professors of law, judges, senior government officials, or politicians. So despite the lack of life tenure and the inevitably political nature of the selection process, this unique composition of the Asian constitutional courts (and other constitutional courts elsewhere) may also contribute to encourage a constitutional court to be activist.

[23] The only two exceptions being Hungary, which allows one renewal of a nine-year term, and Czech Republic, the Constitutional Court Act of which is silent on this matter thus implicitly allowing re-election.

[24] The Hungarian and Russian constitutional courts have shown remarkable independence and courage.

[25] In this respect, these judges are following the pattern laid down by the French and German constitutional court judges, who have also been quite independent, despite the political selection process in those countries.

[26] Many of the lawyers chosen as judges have been distinguished lawyers—especially the chief judges, who may be relatively apolitical.

[27] A member of the constitutional court shall be Mongolian national of forty years of age and experienced in politics and law (the Constitution of Mongolia, Art. 65(2) of)

Constitutional courts may stood separately from the court system of any given country; nevertheless they are courts, and as such, they should render decisions with utmost finality. The decisions of most of the Asian constitutional courts are final. In Mongolia, however, a decision on unconstitutionality is automatically forwarded to the State Great Hural that has the right to accept or reject the Court's decision. If the State Great Hural accepts the decision of the Court, the act in question is deemed unconstitutional. On the other hand, if the State Great Hural rejects the finding of unconstitutionality, the case is sent back to the Constitutional Court for consideration by the full court en bane. The full court's decision is final. This procedure of legislative approval of declarations of unconstitutionality reflects residual socialist notions of parliamentary sovereignty, namely that parliament has a legitimate role in constitutional interpretation.

A second factor is the level of rigidity of the constitution. In general, constitutions Asian countries are easier to amend than the U.S. Constitution. Therefore, the majority can revise the constitution in order to make constitutional those acts that have been censored. The feasibility of this option depends on how difficult it is to revise the constitution.

Case Study

Mongolian constitutional crisis

In the 1996 parliamentary elections, the National Democrat-Social Democrat coalition came to power for the first time.11 Before a government could be formed, however, a member of the coalition petitioned the Court to prevent the coalition from filling the cabinet with members of the State Great Hural, relying on a provision in the Constitution that "members of parliament shall have no other employment."12

The Court initially found that parliamentary deputies could not hold cabinet posts. The State Great Hural was controlled, for the first time, by the new parties, and they were given an opportunity to accept or reject the Court's judgment. They predictably rejected it, leading to a reconsideration of the case by the fiill panel of the Court.

After a second round of deliberations, the Court issued a decision upholding its earlier judgment to the effect that MPs could not join the cabinet without resigning their seats.14

In the aftermath of the decision, the democratic coalition found itself in the odd position of having its most powerful leaders ineligible for ministerial posts.

In early 1998, the State Great Hural passed a bill to allow Members of Parliament to serve in the Cabinet. The new legislation

was challenged, and the Constitutional Court duly followed its original decision in holding the act unconstitutional under article 29, section 1 of the Constitution.17 Although this judgment was rejected by the State Great Hural, the full bench of the Court subsequently upheld the original decision.

The amendments sought to resolve the issue by providing that ministers could serve concurrently as MPs.

According to the procedural law of the Constitutional Court, it was up to the Hural to accept or reject the Court decision within 15 days after it received the opinion. The Hural, however, chose to take no action at all. Without a rejection by the Hural, the Court could not hear the case again and issue a final decision.

On July 28, 2000, four months and 12 days after the Court's decision and nearly four months after the expiration of the period required by law for consideration of such a decision, the State Great Hural finally debated the Constitutional Court ruling, but avoided a formal rejection. By a vote of 62 to 2, it stated that the Constitutional Court had heard an issue outside its jurisdiction—namely the constitutionality of a constitutional amendment.

Nevertheless, the MPRP responded by initiating another Constitutional amendment with exactly the same text as had already been adopted—and rejected—the previous year. The proposed amendment was presented simultaneously to the State Great Hural, the President and Constitutional Court, seeking to avoid the charge that the initiators had not followed proper procedures.

The amendment passed by a vote of 68-0 with four members protesting the session by not attending.

Given the role of the constitutional courts, they should exercise some restrain in order to respect the roles granted to other institutions by the Constitution. In controlling other governmental institutions, the Court should not perform or replace roles of other institutions. Constitutional courts are neither act as a lawmaker nor make political decisions on behalf of the political institutions.

Judges are constrained, to some extent at least, by their own backgrounds, which usually include legal education and legal experience. After all, it would be important that each justice has to strive to maintain a neutral attitude, always careful not to be entangled in a political situation.

Conclusion

Given the close relationship between politics and the functions of

constitutional courts, these courts have to maintain its distance from the politicians at all times. This is the only way that constitutional courts will be capable of maintaining its independence and neutrality, and truly serve as the guardian of a constitution based on the rule of law. This is the only way for constitutional courts to win the confidence and trust of the public.

In a situation where political pressure, whether explicit or implicit, is brought to bear on constitutional Courts, everything will depend ultimately on the determination of the judges to remain impartial. Accordingly, maturity will be required on the part of political players, as well as an awareness that the role played by a constitutional court is a logical consequence of the powers vested in it by a constitution - even though a particular decision may be disappointing to the losers. In addition, all need to be aware that the very existence of a constitutional court and the powers and jurisdiction that it has been accorded are prerequisites for the proper operation of a democratic system based on the separation of powers, and for converting political conflicts into legal conflicts.

MISSING INFORMATION: INQUIRY INTO THE CISG [APPLICATION OF ARTICLE 35 AND 8]

*Sukhbaatar Sumiya**

I. Introduction

The 1980 United Nations Convention on Contracts for the International Sale of Goods (hereinafter referred to as 'the CISG' or 'the Convention') is probably the most successful of all attempts in the area of unification of private law at the international level.

International sales contracts play an important role in conducting trade among nations. Specially, they perform an important economic function of delivering goods to their most valuable users. Unfortunately, it may happen, though not frequently, that a buyer receives goods different than he had expected. And it is even more unfortunate if the same happens just because of the parties' failure to notice important facts related to the characteristics of the goods in question. To an observer, it looks as if the facts in question were absent or missing at the time of the negotiations.

Thus, the present essay will attempt to look into the CISG from the perspective of such 'missing facts or information'. The ideas for this essay developed out of a hypothetical case. Therefore, the same case will be used to illustrate the points made throughout the essay.

II. A hypothetical case

A. Facts [1]

A dispute arose between two companies, parties to a sales contract agreed by them to be governed by the CISG.

The buyer had been packing small quantities of products with older machines for some time. In anticipation of a large contract from a third company, the manager for the buyer wrote to the seller, inquiring into the possibility of purchasing several new machines. Below is the crucial part of his letter:

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* Ph.D. Dr. Sumiya Sukhbaatar is associate professor at the School of Law, National University of Mongolia. I am grateful for the useful comments and suggestions of my professors Hiroo Sono and Caslav Pejovic. Naturally, I remain responsible for all eventual mistakes in this paper

[1] The facts are based on the problem for the 11th Annual Willem C. Vis International Commercial Arbitration Moot available at <http://cisgw3.law.pace.edu/vis.html>.

The buyer's letter

We anticipate the possibility of being in the market for up to six machines capable of packaging dry bulk commodities into retail packages of 500 grams to 1 kg. The machines could be expected to be used over a wide range of products, both fine goods, such as ground coffee or flour, and coarser goods such as beans or rice.

I should like to know what you might be able to offer us, including the price and the delivery terms. Both price and prompt delivery would be essential elements of our purchasing decision.

The salesman for the seller promptly answered with the following offer:

The seller's letter

...If you plan to use the machines over a wide range of products, as you have stated, you will wish to purchase auger-feeder machines. You would need auger-feeders for the fine products. Auger-feeders can also be used for coarser items such as beans or rice, though they are slower at doing so than are multi-head weighers. As you are also undoubtedly aware, multi-head weighers are considerably more expensive than are auger-feeder.

I can offer you six of Model 16 auger-feeder machines. This is our newest model introduced this year and it has been a favorite with every one of our customers. The price is $____. Because of the great demand for them, there would be a two month delay before we would be able to ship.

There is another possibility that might better meet your need for prompt delivery and desire for as good a price as possible. I could offer you six of our Model 14 auger-feeder packaging machines. This model was first introduced in 2000 and was also one of our top products. It has been discontinued in favor of Model 16, but I am sure that you would be more than satisfied with it. Because it is a discontinued model, I am able to offer you a special price of $____ per machine with immediate shipment for a minimum order of six machines. We have only a limited number available, so I encourage you to order promptly if you would be interested.

Having received the seller's reply, the buyer ordered six Model 14 machines. They were duly delivered, installed and placed into service. They were used for packaging a variety of products, including salt. After a while, the machines began to show serious signs of corrosion and eventually the buyer decided that they should no longer be used. In fact, the machines were totally destroyed. The manager telephoned the salesman to tell him of the corrosion. As it turned out, the machines were not designed to be used for salt because of salt's corrosive nature.

It also became clear that there was a separate model (Model 17) specially designed for packaging salt.

To complete the main facts of the case, there was a telephone conversation just before the shipment of the machines. During this telephone conversation, the buyer made another statement. Its content is reproduced below as recorded and transcribed:

The buyer's oral statement

It's a good thing we are getting such a versatile machine from you. They (the third company) want us to get going on packaging their stuff. They have everything in mind from large beans to salt to fine powder and we are going to have to do it all. Some of this is stuff we've never handled before, but I am sure we'll do fine with your machines to help us.

The parties later signed a written contract, which, unfortunately, did not contain any provisions on the description of the goods at issue.

B. The disputed question

The seller made a clear offer and the buyer accepted it. However, the crucial point in this offer and acceptance sequence is the description of the machines in question given by the buyer in his letter. That description - although, strictly speaking, lies outside the offer and acceptance scheme - is relevant to the dispute because, on the one hand, the buyer, when accepting the seller's offer, apparently thought that the offered machines fitted into the said description, and, on the other hand, the seller's offer was made in response to the same.

The buyer avoided the contract and claimed damages on grounds of non-conformity (the machines are not capable of packaging salt) under Article 35 of the CISG. The disputed question is whether the machines are in conformity with the contract. To answer this question the court will have to interpret the contract. The contract was concluded as a result of an exchange of communications between the parties. Consequently, the interpretation will be aimed at determining the meaning of the expression 'a wide range of products ...' used by the buyer in his letter.

Intuitively, there are three possible interpretations of the buyer's expression in question: a) the machines were required by the contract to be suitable for salt; b) the machines were not required to be suitable for salt; and c) neither of these two meanings can be inferred or both of them are equally plausible.

C. What is special about this case?

The buyer actually used the machines for packaging salt upon the apparently innocent, but erroneous assumption of their ability to handle

the same. This is partly confirmed by the fact that he, though in a rather casual manner, somehow had mentioned salt before the machines were shipped. Despite the problems caused by salt, the machines were performing well.[2]

Having reiterated these facts and being mindful of the risk of prejudging the case in favor of the buyer, an economic evaluation of the case holds that expensive machines have traveled a long distance at great costs only to arrive at the wrong user and to be destroyed beyond repair in the course of innocent misuse. In other words, the scarce economic resources have been wasted.

What I see is wrong with this case is this: the contract was concluded in the absence of the knowledge of certain facts (related to salt). Because of this, the contract has turned into a worthless transaction for the parties as well as for the society as a whole. So, the focus is on these facts that were missing in the process of contract formation. The facts related to salt include corrosive nature of salt, the existence of a special Model (Model 17) designed for salt, and the inability of Model 14 to process salt. These facts will be referred to as the 'missing facts' or 'missing information' throughout this essay.

One of the important features of the 'missing information' in this case is its direct connection to the contract. Specifically, it was the absence of this information that caused incomplete understanding between the parties. Had the information been noticed, the parties would have never entered the contract or would have concluded it on substantially different terms.

The basic premise of this essay is that the Convention's rules must have some kind of built-in mechanism for 'missing facts' to be realized and taken into consideration by the parties negotiating a contract. This is one issue to be addressed in the present essay.

To a lay person, the facts of this case may produce an impression that the seller, having better knowledge about the machines, should have noticed and volunteered to share the missing information with the buyer. This should remind a lawyer of the so-called duty to inform or disclose.

Duty to inform[3] is commonly recognized in many civil law countries. It holds that a contracting party must inform the other party of material facts that are essential for that party to make his decision whether

[2] This part was deliberately modified for the purpose of the present essay. The actual facts contained an additional poor performance problem.

[3] For an overview of the legal situation in different countries See 'Pre-contractual liability' reports to the XIIIth Congress. International Academy of Comparative Law, Montreal, Canada, 18-24 August 1990', edited by Ewoud H. Hondius.

to enter the future contract or not. In contrast, the common law does not recognize any general duty to inform. Under the CISG, there is no such explicit duty despite the fact that the term appears in some of the provisions (See Art. 1(2), Art. 40, and Art. 68). This is another issue the present essay is interested in.

The relevance of the missing information to the characteristics of the goods sold and its failure to be integrated into their contract description are indications that the same should be analyzed by looking into the non-conformity rules and, by implication, the contract interpretation rules of the CISG.

The following analysis of the CISG rules on lack of conformity laid down in Article 35 in combination with the contract interpretation rules set forth in Article 8 will attempt to answer the above two questions, thus contributing to a better understanding of the CISG.

III. Rules on conformity under the CISG

Paragraph (1) of Article 35 confirms that the conformity determination begins with the contract between the parties. Paragraph (2) sets forth a series of implied Convention obligations in respect of quality which apply '[e]xcept where the parties have agreed otherwise.

Article 35

(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract;

(2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they;

(a) are fit for the purposes for which goods of the same description would ordinarily be used;

(b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment.

The first paragraph of article 35 concerns the contractual description of the goods in question. When that description is in dispute, the interpretation rules apply. Therefore, analysis will begin with Article 8 and then go on to the second paragraph.

A. Contract interpretation rules

When the parties to a contract are disputing over the terms of their contract, the settlement of the case depends on the interpretation of those terms. The purpose of the following analysis is to see if and how

interpretation rules operate so that 'missing information' can be brought to the attention of the parties negotiating a contract. The important assumption here is the existence of a direct connection between the disputed unclear terms and certain facts that were missing before or at the conclusion of the contract and which, if realized, could have helped the parties agree on more clear terms.

Article 8

(1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was;

(2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances;

(3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

"Article 8 states the rules to be applied in terms of interpreting the unilateral acts of each party, i.e., communications in respect of the proposed contract, the offer, the acceptance, notices, etc. Nevertheless Article 8 is equally applicable to the interpretation of 'the contract' when the contract is embodied in a single document. Analytically, this Convention treats such an integrated contract as the manifestation of an offer and an acceptance. Therefore, for the purpose of determining whether a contract has been concluded as well as for the purpose of interpreting the contract, the contract is considered to be the product of two unilateral acts."[4]

Theoretically, "paragraph (1) is built on the 'subjective' approach: Interpretation is to be based on the speaker's 'intent' - but only 'where the other party knew or could not have been unaware what that intent was' of the intent. However, because of the practical barriers to providing identity between the intent of the two parties (particularly when they are involved in a controversy) most problems of interpretation will be governed by paragraph (2) which follows the 'objective' approach: Statements by a speaker 'are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had

[4] Secretariat Commentary on article 7 of the 1978 Draft of the CISG available at <http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-08.html>.

in the same circumstances.'"[5]

1. Subjective test

"Since Article 8 states rules for interpreting the unilateral acts of each party, it does not rely upon the common intent of the parties as a means of interpreting those unilateral acts. However, Article 8(1) recognizes that the other party often knows or could not be unaware of the intent of the party who made the statement or engaged in the conduct in question. Where this is the case, that intent is to be ascribed to the statement or conduct."[6]

"It is the intent of the party undertaking the legal act which is decisive. Such intent has an effect only when the other party is actually or supposedly aware of it. When one party clearly expresses his intent through a legal act, the addressee cannot pretend to have insufficient knowledge of that intent. The same applies when the acting party has not clearly expressed his intent, or even disguised it, but the addressee knew of the real intent."[7]

Illustration 1

Suppose the seller knows from his previous experience that his business partners have ordered the machines by giving a description similar to the buyer's, but having in mind salt. In such a case, the seller cannot pretend to have understood the buyer's description 'narrowly, i.e. excluding salt.

"It would, however, be up to the acting party to prove this. In this context, the factors mentioned in paragraph 3 of article 8 will be of particular relevance. Such proof is made easier for him by certain objectiveness in regard to the knowledge of the other party which is based on the fact that it suffices that the other party could not have been unaware'"[8].

Illustration 2

Suppose the buyer in the hypothetical case asserts that his intention was to have machines suitable for 'salt'. Such an assertion will need proof that the seller 'knew or could not have been unaware of' this intent. If he is successful, this will result in the contract having the meaning the buyer asserts. This in turn would mean the buyer expressed himself clearly enough.

"It is your obligation to make clear what you mean, your real intention. If you don't, then the objective meaning from the view point of

[5] John O. Honnold. (1999) Uniform law for international sales under the 1980 United Nations convention. - 3rd ed., . Kluwer Law International, p. 118

[6] Supra Note 4.

[7] Fritz Enderlein and Dietrich Maskow. International Sales Law. Oceana Publications (1992).Available at: <http://cisgw3.law.pace.edu/cisg/biblio/enderlein-art08.html>

[8] Ibid.

the person to whom the statement was addressed will be controlling."[9]

Illustration 3

Suppose it is established by the court that the buyer's letter did not convey his actual intent related to salt in such a clear way that the seller 'knew or could not have been unaware of'. In such a case, the buyer will bear the consequences of his unclear language. The seller's understanding (that there was no indication to salt) will prevail.

2. Objective test

"Article 8 cannot be applied if the party who made the statement or engaged in the conduct had no intention on the point in question or if the other party did not know and had no reason to know what that intent was. In such a case, Article 8(2) provides that the statements made by and conduct of a party are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances."[10]

Illustration 4

Suppose it is not established that the seller knew or could not have been unaware of the buyer's intent related to salt. However, the same intent of the buyer may have been understandable to a reasonable person, thus resulting in something contrary to the seller's actual understanding.

"An objectivized interpretation can very well result in an act producing a legal effect which does not correspond to the intent of the acting person. The latter will then have to rely on rescission."[11]

Illustration 5

Suppose it is found that the buyer's description of the desired machines meant suitability for several products without any specific indication to salt. This will result in a meaning contrary to the buyer's actual intent.

3. Interpretation and missing information

The operation of the interpretation rules shows they can have the effect that missing information may be brought to the surface. Let us see how this works.

Illustration 6

Suppose the result of interpretation was that the machines were to be suitable for salt. This means that the seller should have understood the buyer's statement this way.

As a result, the seller will be liable for breach of contract under

[9] Transcript of a workshop on the CISG available at <http://cisgw3.law.pace.edu/cisg/biblio/workshop-04.html>.

[10] Supra Note 4

[11] Fritz Enderlein and Dietrich Maskow, supra Note 6

Article 35. An understanding of this result may provide a lesson for the seller to disclose and take into consideration any 'missing' facts in similar situations in the future.

Illustration 7

Suppose the interpretation shows that the buyer's statement was not to be understood in the way he asserts now. Then, the buyer will not be entitled to any relief because there is no finding of non-conformity.

The actual intent of the buyer is not important because the addressee's (or the seller's in our case) reliance on his statement is to be protected. The buyer learns a lesson that he should express himself more clearly. This in turn may provide an incentive for the buyer to seek more information in his subsequent conduct. And such conduct may eventually enable him to realize missing facts such as the ones in the hypothetical case by virtue of their direct relevance to the contract under negotiations.

To sum up, interpretation rules, when applied, have the effect that crucial information, which was absent in the formation process of the contract and caused the contract to turn into a worthless dealing, will probably come to the attention of the parties, at least in their subsequent dealings since the party making the statement will try to be as clear as possible and the party receiving it will make his best efforts to understand it correctly.

B. Rules on implied obligations

Disputes over quality cannot always be resolved simply by measuring the goods against the specific terms of the contract. Specially, when the contract is not complete, certain default rules will be applied to ascertain the seller's obligations. This essay will narrow its analysis to subparagraphs a) and b) of Article 35(2) of the Convention.

1. Fit for ordinary purposes

"Goods are often ordered by general description without any indication to the seller as to the purpose for which those goods will be used. In such a situation the seller must furnish goods which are fit for all the purposes for which goods of the same description are ordinarily used. The standard of quality which is implied from the contract must be ascertained in the light of the normal expectations of persons buying goods of this contract description. If the goods available to the seller are fit for only some of the purposes for which such goods are ordinarily used, he must ask the buyer the particular purposes for which these goods are intended so that he can refuse the order if necessary."[12]

[12] Secretariat Commentary on article 33 of the 1978 Draft of the CISG available at <http://cisgw3.law.pace.edu/cisg/text/secomm/secomm-35.html>.

Illustration 8

Suppose packaging machines are normally expected to be suitable for salt and other products. In such a case, the seller must ask the buyer the particular products he wants to package as the seller's machines are suitable for only some products excluding salt. Upon this clarification, the seller is still able to sell his machines, which the buyer may find satisfactory because salt may be not included in his list.

2. Fit for particular purpose

"Buyers often know that they need goods of a general description to meet some particular purpose but they may not know enough about such goods to give exact specifications. In such a case the buyer may describe the goods desired by describing the particular use to which the goods are to be put. If the buyer expressly or impliedly makes known to the seller such purposes, the seller must deliver goods fit for that purpose. The purpose must be known to the seller by the time of the conclusion of the contract so that the seller can refuse to enter the contract if he is unable to furnish goods adequate for that purpose."

Illustration 9

Suppose the normal expectation about packaging machines is suitability for a certain number of products without any specific indication to salt. In such a case, some products plus salt will constitute a particular purpose. Consequently, the buyer must make this particular purpose known to the seller.

"The seller is not liable for failing to deliver goods fit for a particular purpose even if the particular purpose for which the goods have been purchased has in fact been expressly or impliedly made known to him if 'the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment'. The circumstances may show, for example, that the buyer selected the goods by brand name or that he described the goods desired in terms of highly technical specifications. In such a situation it may be held that the buyer had not rely on the seller's skill and judgment in making the purchase."

Illustration 10

The buyer's obligation to have a special purpose made known to the seller may enable him to realize the missing information about salt when he does not rely on the seller's skill and judgment.

"If the seller knew that the goods ordered by the buyer would not be satisfactory for the particular purpose for which they have been ordered it would seem that he would have to disclose this fact to the buyer. If the buyer when ahead and purchased the goods it would then be clear that he did not rely on the seller's skill and judgment."

Illustration 11

Suppose the buyer relied on the seller's skill and judgment, having made his particular purposes known to the seller. In such a case, the seller is under obligation to disclose the facts relating to salt, thus enabling the buyer to cancel his order. A failure by the seller to do so will result in the seller's liability for non-conformity.

3. Implied obligations and missing information

It can be seen from the previous analysis that the CISG default rules on conformity have the indirect effect that certain facts relevant to the contractual characteristics of the goods sold, which are sometimes unnoticed at the pre-contractual stage and later may lead to a dispute, can come to the attention of the parties in the course of their efforts to avoid non-conformity disputes, being mindful of the consequences of their conduct.

The buyer must make sure if he provided a correct description of the desired goods, being aware of the risk of failing to state his particular purposes although in some cases a general description may cover such purposes. Efforts to give a correct description will inevitably bring the buyer to the missing facts.

The seller is also encouraged to share certain facts (i.e. the missing facts) with the buyer when the latter relies on his skill and judgment. A failure to do so will lead to liability. The seller's liability, of course, will not be based on breach of this implied obligation to disclose, but on non-conformity of the goods sold. So, the CISG does not prescribe an explicit duty to inform because the same result can be achieved indirectly through the rules on conformity.

IV. Conclusion

The brief analysis of the CISG carried out in the present essay clearly shows that it already contains sufficient mechanisms for ensuring that the parties to a contract make a rational and well-informed decision whether to enter the contract and, if so, on what terms.

It also shows there is no need for an explicit duty to inform under the CISG, as is widely adopted in civil law countries. The same functions that a duty to inform would perform are sufficiently covered by the obligations of the buyer and the seller set forth in the rules on conformity as well as in the rules on contract interpretation.

However, one should remember that the CISG has its limits. For instance, cases of mistake, dissensus, or fraud, which also involve missing information, will have to be handled by applying the relevant domestic legal rules applicable by virtue of the rules of private international law.

IS IT POSSIBLE TO HAVE THE JURY SYSTEM IN MONGOLIA?

*Khosbayar Chagdaa**

Introduction

Participation of lay people in judicial governing as lay judges and jury systems is developed in most countries. Each state tries to provide for participation of lay people in its judicial system in some way. The jury system is adopted in countries, which have imported the English legal system like the United States, Canada, Australia, Hong Kong and Sri Lanka in Asia. Recently, Russia and Spain revived the jury system. Lay judges are popular in most civil law countries particularly in Europe and in post communist Asian countries after the Soviet Union's disintegration. Trial by jury means that the jury, the group of people who have been chosen from the general public, inquires into any matters of fact (in a criminal case, they decide whether the person accused is guilty or not) and give their verdict according to the evidence apart from professional judges. Lay judges are a system where a citizen participates in decision making in both matters of fact and of law as a member of the panel of judges with the same rights as a professional judge. Either of these systems contributes to the improvement of the judicial system through legal participation of the public. There is a non-traditional type of laymen participation at trials, which is recognized only in Mongolia. In Mongolia, in a criminal trial the laymen are named citizen's representatives. They reach conclusions on fact issues, even deciding whether a defendant is guilty or not guilty, or in a civil trial whether the defendant is liable or not liable. Nevertheless their involvement is of no legal consequence and effect.

Is it possible to imagine an adversary system without the jury? The jury is the heart of the adversary system, in which both parties address the court directly and seek to persuade it to decide the case in their side's favor. Thus, there is a misleading view that the jury exists only in an adversary system in common law countries. However, this is an erroneous point of view. It is possible to have an adversary system without juries and to have juries in a non-adversary system.

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Historical origins of the jury in the United States and the laymen in the Mongolian legal system and the development of their participation in law suits

The Norman King, William the Conqueror's successor, Henry II (1154-1189 C.E.) was an able administrator who implemented, in England, a number of new ideas in government to further consolidate his power.[1] Moreover, after "[founding] the royal court, Henry II implemented the accusing jury, an idea he likely brought from his contact with Islamic law during the Crusades."[2] The accusing jury consisted of lay witnesses who would testify as to the ownership of property in a dispute, accusing the defendant of taking property that belonged to the crown.[3] Over time, the function of the accusing jury changed, though it still consisted of laypersons.[4] By the 1400s, the modern characteristics of the jury as a passive and impartial decider of the facts were well established in English legal procedure.[5] By 1670, the jury was established as an institution independent of the king and the king's judges and was exported to the United States by the English colonists and has been a fundamental part of its jurisprudence. [6]

The development of law in Mongolia can be divided into four main historical periods.[7] The first stage is the period of formation of The Great Mongol State (1190-1660), Genghis Khan and his successors' era. The law by that time was based mainly on local customary law, and local legal tradition was recognized not only by Mongolians, but also among the peoples of occupied countries and territories.[8] As can be seen by an analysis of the content of written laws like the Great Zasag Law the courts were established by the Lords of the ten thousandth, who were conducting trials on issues of any custom violations. Moreover, each of them regularly consulted with an old man, who laypeople named "Wise", and he had to advise the Lords in reaching decisions at trials. The "Wise" was elected from local people's assemblies and these people supplied him anything for life like food and clothes. Usually, the court issued its decision often considering the old man's advice even if the court did not follow his suggestions. The advice was sought on issues either as matters of law like customs, doctrines, and principles or as matter of facts like

[1] Frederick Pollock & Frederic William Maitland (1899) *The History of English law*, Little, Brown 81)
[2] John Makdisi, (1999) *The Islamic Origins of the Common law*, N.C.L. Rev. 1635, 1676-94, 1726-29
[3] *Id.*
[4] Nadia E. Nedzel, (2008) *Legal Reasoning, Research, and Writing for International Graduate Students* 2nd ed., Aspen Publishers, 15
[5] William Burnham,(2006) *Introduction to the Law and Legal System of the United States*, 4th ed., Thomson West, 86
[6] *Id.*
[7] Narangerel S, (2004) "*Mongolin erkh zuin togtolisoo*" (Legal System of Mongolia), Interpress, 16
[8] *Id.* at 22.

character, habit and behavior of the accused.

The second period covers the time after the collapse of the Empire (1660-1911), when the Manchu dynasty ruled over China and Mongolia.[9] The judicial power was exercised only by the Amban saids[10] who were the Manchu King's loyal servants from Manchu nationals, sent by him and located across all Mongolian territories. The Manchu King didn't trust the Mongolian Lords or its people. Consequently, at that time the participating laymen in lawsuits were fully excluded. Thus, there were many controversies among the people on issues of unfair court decisions. Sometimes disputes were turned into seditious actions against Manchu rule in Mongolia.

The third period lasted from the National Freedom Movement of 1911 to 1990. During that time Mongolia abolished Manchurian law and instituted reform of the legal system. [11] The Russian Revolution of 1917 had a great impact on events in Mongolia, inspiring spontaneous uprisings.[12] In the 1920s Mongolia established an alternative to repression and executions following the revolutionary events. The rulers adopted legal systems from Western countries during the years after the revolution years up to 1921. Eventually, the legal system of Mongolia was modeled on the German civil law system with Russian influences based on Communist legal theory. In place of the old court system, the first official legislative act created the people's court and a system of judges to be directly elected, with two assessors. The latter were laymen who served on a part-time basis. Their involvement transformed the trial process in Mongolia into what was referred to in the State Law on Courts as "collective decision-making", a term that reflected the socialist approach in which decisions were made jointly by people's assessors and judges. These lay judges were not professional, but they were nominated by local people's assemblies to sit for terms of two years. In theory, the assessors are to have equal decision-making authority with the judge, and to help ensure a form of "popular justice". The practice, however, has been somewhat different. While bench decisions are made on the basis of a majority vote, the assessors, who are not trained in the law, almost always follow the professional judge's lead, and they rubber-stamp judicial pronouncements, depriving the defense counsel and defendant of two impartial and objective voices.

Direct or indirect participation of citizens within the different decision structures of government is an important means for establishing limits upon the exercise of governmental authority. The election of legislative, executive, and judicial officials allows for the direct

[9] *Id.*
[10] Means "messenger ministers" in Manchu; origin of the word "ambassador" in English.
[11] Narangerel Sodovsuren, *supra* note 9, at 28.
[12] *Id.* at 22.

participation of citizens in selecting the councils of government.

Direct citizen participation in the operation of the judiciary occurs in the United States, through trial juries and grand juries. Similarly, the Mongolian government saw that one of the important ways by which legal socialization comes about is through citizen participation in the legal system and process. Even if lay judges are not very useful, nevertheless the Mongolian legal system tries to include laymen-participants (citizen's representatives), who have strictly limited rights of conduct in civil and criminal trial proceedings.

Present law provisions on the issue of the jury, citizen's representatives in the United States and Mongolia, their roles in criminal and civil proceedings

Juries, in the United States, are used to decide issues of fact in both criminal and civil cases, but they are not expected to be experts on the law.[13] The judges give instructions as to the applicable law, which jurors follow to the best of their ability in deciding whether the defendant is either guilty or not guilty in a criminal trial, liable or not liable in a civil trial.[14] That means, "[a juror] is the quintessential passive decision maker".[15] But in each case, the judge decides issues of law and the jury decides issues of fact. Even on issues of fact, a jury is not free to come to any conclusion it wants.[16] Except for a verdict of acquittal in a criminal case, the trial judge or an appellate court has the power to set aside the verdict if there is no substantial evidence to support it.[17] However, a jury acquittal in a case is not reviewable on appeal or otherwise.[18] This means that in this one situation the juries have the power of "nullification"- the power to acquit a criminal defendant despite clear evidence of guilt. [19] However acquittal is final and cannot be appealed or otherwise set aside.[20] This is because it would entail ordering a new trial, and the Constitution's double jeopardy clause prevents the defendant from being tried twice for the same offence. [21]

Civil suits may demand a jury trial if the legal issue involved is one "at common law", such as for money damages for torts or breach of

[13] Nedzel, *supra* note 6, at 15.
[14] *Id.*
[15] William Burnham, (2006). *Introduction to the Law and Legal System of the United States*, 4th ed., Thomson/West, 85.
[16] Burnham, *supra* note 18, at 87.
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.* at 88.
[21] *Id.*

contract. [22] In civil cases, the jury is subject to control by the judge and must often give reasons for its verdict through the use of "special verdict" forms or by answering questions about the reasons for its decision.[23] Yet juries can still express their resentment of a legal rule by using their broad power to determine contested issues of fact.[24] In contrast to the jury involved in a jury trial, the grand jury still retains some accusatory functions.[25] The grand jury decides whether a prosecuting attorney has enough evidence to prosecute a defendant for a serious crime, but it does not actually decide whether the defendant committed the crime.[26]

The traditional source for jury pools in the United States is the "jury venire"- the group of prospective jurors from which jurors are selected. They are taken from voter registration lists.[27] Moreover, most states use in addition driver's license lists, because they include over 90% of citizens. Beyond the ability to read and write the English language, there are no educational requirements for being on a jury.[28] At the present time in the federal court system, jurors are paid $40 per day.[29]

After the fall of the communist regime, Mongolia adopted legal reforms, in which it revoked the court panel involving lay judges, because of lack of public confidence in them. The result was that there is only one judge, thus depriving the defendant the right to trial by several independent decision makers. Now a judges' panel consists of professionals only. The participation of citizens in the operation of the judiciary is possible only in terms of representatives, who have much less power than previous lay judges had. Generally, the citizen's representatives are entitled to such privileges as interrogation of the parties, examination of the evidence in the case, ruling on petitions to the court about examination of some specific evidence relevant to the case, reaching conclusions on fact issues, and even deciding whether a defendant is guilty or not guilty in a criminal trial or liable or not liable in a civil trial. The citizen's representatives divulge their conclusion at the end of the trial before the court panel leaves for its deliberation. Nevertheless, the citizen's representatives are almost never of any legal consequence and effect. In terms of their legal effect, citizen's representatives are a mute vestige of socialist Mongolia and provide only the appearance of transparency in court decisions.[30] The judges do not

[22] Charles Allen Wright (1983) *Law of Federal Courts*, 610-11

[23] Burnham, *supra* note 18, at 88.

[24] *Id.*

[25] Nedzel, *supra* note 6, at 15.

[26] *Id.*

[27] Burnham, *supra* note 18, at 89.

[28] *Id.* at 90.

[29] *Id.* at 91.

[30] Asian Law Centre, Australian National University, (2003) *The Legal System of Mongolia*, // The Australian Journal of Asian Law, 272.

consider their conclusions and the parties do not try to persuade them in their favor during the trial. Most participants in the trial consider that citizen's representatives are not in a position to have an influence in the situation and they are absolutely not able to change anything, thus their activity is waste of time. Citizen's representatives are involved only in felony cases in criminal proceedings (three persons) and in civil cases (one person), in which money damages are sought usually after the cases have been tried in criminal proceedings. They sit separately from judges in contrast to the lay judges in the previous system.

The Codes of Court (Mongolian basic statutes about the establishment of courts other than the Constitution) are vague on citizen's representatives' election criteria. Citizen's representatives do not have sufficient significance because their decisions on issues in the case are of no importance. Usually they are unemployed poor people, who need a minimum living wage, or retired lawyers, who have nostalgia for the profession. Obviously, neither legal education nor practical legal experience is required for service. Now the citizen's representatives in Mongolia are not nominated by the public as previously occurred. Now, the local administrative body in selecting citizen's representatives sends voter registration lists to the court. Then the court administrative officer makes phone calls to them investigating their ability to participate in court proceedings. After that he invites the citizens who have no obstacles to this service, interviews them and chooses at his discretion up to four persons. The panel consists of up to three persons, with a fourth as a substitute in case of emergency. The Court Judges' Council has to promulgate the names of citizen's representatives. This requirement is formal. The Council approves them even though it does not know who they are. The chosen panel of citizens has to serve in all trials in which participation of citizen's representatives is required by procedural law. The service has no time limit. Some of them sit in courts for more than ten years. In my five years experience working as a judge, the panel in the court where I have served was never established or created fully even though one of them was replaced. Citizen's representatives receive a payment from the court budget, about $40 a month. That is much less than similar jurors receive in the United States. Because of that they have to have other resources for living expenses. Other activities often have more importance than sitting at trials. Sometimes these other activities cause their absence at trials. If they are employed, which is extremely unusual, the government requires employers to continue to pay regular wages to them for a certain number of days of service in trial.

There are some public opinions that say inefficiency and abuses

and unwarranted interference by state officials in the course of justice were widespread. To fight them, it was necessary first and foremost to broaden public participation in lawmaking and to encourage participation in the legal process, for example, by holding more public sittings and by making the enforcement of sentences more transparent. But it is impossible to reach this goal for the judiciary having such trial citizen's representatives, who have a limited function and passive status in trial proceedings. Moreover it is important to ensure strong connection between citizen's representatives and the public. In other words citizen's representatives must spread their knowledge about law application and trial proceedings to all. Nevertheless uneducated citizen's representatives having the lowest position in the community cannot stand in for its intended obligation. In addition the ban on nondisclosure of court proceedings leads to the situation that their knowledge and impression about court trials never extend beyond the courtroom. Eventually, the current involvement of the citizen's representatives in the judiciary of Mongolia does not ensure full transparency in its real meaning. It causes many people to have unfavorable attitudes towards the courts.[31] According to one survey, approximately 66% of the people using the Supreme Court and 54% of people using the lower courts have little trust or do not trust the courts.[32] Although, there are some reasons for suspecting corrupted courts, most people surveyed have this distrust because they view the courts as operating behind closed doors. It seems obvious that Mongolia in choosing to modify the socialist-era institution has committed a mistake by substantially reducing citizen's participation in the judiciary proceeding.

Russian revival of the Jury system, problems, comparison between Russian and American jury systems

On January 1, 2010, jury trials were introduced in Chechnya, the only federal Russian region that did not have this institution.[33] This was the final step in the jury reform process that began in 1993-94, when pilot juries were implemented in nine federal regions before the system expanded to other regions. Jury trials were first implemented in Russia in 1864 and abolished by the Bolshevik government in 1922. The restoration of the jury system was a part of the main plan of transition from an authoritarian system to a democratic society in the Russian Federation. Beginning in the 1990s, the Russian Criminal and Civil

[31] Narangerel Sodovsuren. (2004) *Mongol Ulsin Erkh Zuin Togtolts oonii Udirtgal* (Introduction of Mongolian law system) Interpress. 41

[32] Nationwide survey conducted by Judicial Reform Program in 2001.

[33] *"Jury trials start functioning in the final region of RF, Chechnya."* (2009.12.31) RIA Novosti.

Procedure Codes were revised, including new jury trial provisions in both codes. The revival of the jury system in Russia was not simple and it took almost 10 years to be expanded nationwide.

The current Russian jury model is a peculiar hybrid of pre-revolutionary Russian, Soviet, and Western criminal procedures. The model, in general, fits the classic approach recognized by the world jury model, with the following distinctive elements: the lack of jurisdiction over crimes against the state; the absence of a unanimity requirement; a three-hour maximum deliberation period; the option to remand a case back to the prosecution for additional investigation; and the Supreme Court's right to overturn a verdict (Russian criminal law does not prohibit double jeopardy[34]).[35] Juries have no jurisdiction over civil cases or minor crimes. [36] The jury caseload primarily consists of aggravated murder, racketeering, aggravated (or first degree) bribery, and crimes against justice (such as perjury or obstructing a police officer). [37] An especially important action was that Russian jurists changed the rule for unanimity, which is essential in some common law jury systems. When a conviction is not attained within three hours, votes for 7 out of 12 jurors are sufficient to become the decision of the majority.[38] If the votes were 6 to 6, based on the innocence presumption principle, it was considered a decision of "not guilty".[39] The rule of unanimity is a difficult standard to meet. It takes a lot of time and provokes a pressure situation inside the jury panel. Some jury trials in the US, take months, furthermore courts acknowledge mistrials as a result of a hung jury. But on the other hand, this strict requirement fits the criteria that the guilt of a defendant must be proven "beyond a reasonable doubt", while the Russian alternative ignoring it does not adequately protect a defendant's rights. The prosecution's right to appeal an acquitted verdict, and to remand a case back to the prosecution for additional investigation and the Supreme Court's discretion to overturn a verdict for any reason or for retrial are rules the Russian legal system cannot change. The Russian jury system also has problems and deficiencies that are mentioned next. The absence of a jury sequestration procedure makes jurors even more prone to corruption.[40] Since there is no unanimity of

[34] The author is confused by this issue of "double jeopardy". Civil law jeopardy means "a defendant cannot be punished and serve a sentence twice for the same crime", meanwhile common law understanding is "a defendant cannot be tried twice for the same crime"

[35] Sergei Tokmakov, *(2010) Jury Trials in Modern Russia.*, An Analytical Review, 7

[36] See The Criminal Procedure Code of the Russian Federation, Part XII, and official text

[37] Oleg Mukhin, (2009.12.22) *Juror, even if he is in doubt, must decide whether the defendant is guilty or not*", Izvestia.Ru,

[38] Criminal Procedure Code of the Russian Federation- 328-21

[39] *Id.*

[40] Oleg Mukhin, (2009.12.22) *Juror, even if he is in doubt, must decide whether the defendant is guilty or not*", Izvestia.Ru,

verdict requirement, it may be sufficient to bribe two or three jurors to influence the majority and ensure a desired verdict.[41] In one case, two affluent Russian businessmen, Igor Poddubny and Yevgeny Babkov, were charged with possessing $2 million worth of contraband cigarettes. They were acquitted twice. The members of the first and second jury, after rendering a "not guilty" verdict, went to a restaurant to celebrate the verdict with one of the defendants. The Supreme Court overturned the verdict, but the third jury issued an acquittal as well, setting the men free after five years of pretrial incarceration. [42] Sharp increases in the number of cases[43], in which defendants were acquitted, have been considered a problem. Critics have claimed that it was a system for the defense lawyers. A number of politicians and scholars have maintained that the jury system is meaningful only when it is accompanied by reformation of the total machinery of law. They have concluded that the time for introduction of the jury system was not yet ripe.[44]

One problem is that Russian jurors are uneducated and susceptible to emotional and financial pressure.[45] Usually, they are unemployed or retirees or they are citizens that fail to disclose their criminal past, and persons prone to alcohol abuse.[46] They may see jury duty as a way to supplement their incomes and are frequently indifferent to the interests of justice. Educated and employed citizens often perceive jury duty as an inadequately compensated waste of time and simply ignore the summons.[47]

There are some distinguishing characteristics of the Russian jury system as compared to the general American model. Many American states set unanimity as a principle but in Russia, the verdict can be drawn from the majority vote. Next, the Constitution of both countries guarantees the right to a jury trial in criminal cases involving felonies. Nevertheless in the United States a defendant can waive his or her right to have a jury by pleading guilty. Meanwhile in Russia, trial by jury occurs even if the accused admits guilt. Thirdly, in the USA, an acqui ttal by the jury is final and cannot be appealed because it would entail ordering a new trial, and the Constitution's double jeopardy clause prevents the defendant from being tried twice for the same offense. In contrast in Russia, in some essential cases, the appeal is allowed. In addition, a trial by jury is available for both civil and criminal cases in the United States but in Russia, civil cases do not have a jury. However,

[41] Daria Okuneva. (2006.05.11) *Acquitting jurors //*. Novye izvestiya. 11

[42] *Id.*

[43] The fact that 18.5% of judgments by jury were decisions of "not guilty". During Soviet times the rate for judgment "not guilty" by lay judges was never higher than 0.5 %.

[44] Stephen C. Thaman, (1995) *Resurrection of Trial by Jury in Russia*, Stan. J. Int'l L. 88.

[45] Sergei Tokmakov.(2010.01.28) *Jury Trials in Modern Russia //*. An Analytical Review, 7.

[46] *Id.*

[47] *Id.*

in cases related to commerce and foreign investment, citizen specialists participate in the hearing at the arbitration tribunal.

Conclusion

I. The fact is that Mongolia after taking steps to transfer from a totalitarian system toward democracy, tried to modify citizen participation institutions but these efforts are stuck, going nowhere. The reason is that Mongolia does not want to restore lay judge panels because of the inefficiency concerns mentioned in section III. Mongolia does not choose introduction of the jury system because it is routinely connected to common law systems, and Mongolia has a civil law background. Nevertheless Mongolia cannot pursue democratic principles with its current provisions on citizen's participation in the Judiciary.

II. As a matter of fact Mongolia has no active participation of citizens. The general public's concern about how the courts operate has grown into a force to be reckoned with. They have great suspicion that court cases are treated as business transactions for the benefit of the government. Thus, many in the general public feel that courts are oppressive and are not concerned with justice. Some have called for interventions to open up the courts to public scrutiny and public participation and oversight. These views hurt the court's prestige. Moreover they reduce trust and respect for the government. The people do not want to support court decisions considering them unjust. There is a popular view in the legal community that resolving disputes without lay people, who have no knowledge, education and ethics, has the advantage of saving time and court resources, and guarantees accurate decisions. I do not agree with these positions and I think that a chasm about what constitutes justice has appeared between the general public and the legal community. Justice comes at a high price in time and resources, and the people have to determine what is just.

III. There is strong public opinion that the time has not yet arrived. However, many scholars are advocating for the necessity and adequacy of the jury system claiming that the jury system should be introduced in criminal cases. They emphasize the advantages of the jury system. However, as the discussion on legal reform begins in Mongolia, many judges, lawyers, scholars and politicians see a way of improving the efficiency of trial proceedings, saving it from corruption and strengthening judicial Independence by introducing the jury system into the Mongolian legal system.

IV. Introduction of the jury system in criminal cases is an important social goal. It will contribute to realization of the dream of democracy

through legal participation of people in the judicial system. Also, it will be an important opportunity to increase the human rights of the accused. These are concrete examples of advantages of the jury system.

V. Mongolia has to implement the jury system through gradual steps with thorough preparation as shown in the Russian model example. But the idea of the jury system has to be developed in its original form from Common law sources with consideration of fundamental countermeasures for legal democratization and adequate implementation. The problems facing Russia like uneducated jurors, biased jurors (especially for Mongolia with only three million people) and lack of financial recourses are inevitable for my country. Thus, we have to consider experiences of jury implementing countries like Russia and Spain and how they overcame these difficulties. We do not have to be worried that Mongolia has a civil law background, because Russia and Spain have the same background and they have implemented the jury system successfully, even if they had some troubles and obstacles. It is essential to understand that in Russia the jury system was reintroduced in a transitional manner without complete reform. Furthermore, the fact that the Russian government tried to introduce the jury system as a reform shows a similarity to our situation. Although Russia already had experience with the jury system in the middle of the 19th century and the former soviet system was based on lay judges, still it would be of help to study the revived jury system in Russia so as to overcome procedural errors or problems of application. Although Russia might be a good example for implementation of the jury system and how to prevent some unpleasant consequences, Russia is a perversion of the real jury system based on its original provisions. This perversion causes many problems that lead the system to reduced efficiency. Thus, Mongolia has to use the Russian experience[18] only at the beginning of jury related reforms. Further improvement must be come from historically proved alternatives like the jury system in the US or the UK.

[18] Not many countries have this experience, but many countries are proposing implementation of the jury system.

ASIAN CONSTITUTIONAL COURTS: AN OVERVIEW

*Ulziikham Enkhbaatar**

Introduction

In post-communist countries transitioning to democracy created an unprecedented rise of constitutionals courts. Almost all of the countries that formerly belonged to the so-called socialist block chose to establish some institution to exercise judicial review as a means of promoting the supremacy of constitutional values and protecting fundamental rights. These are mostly embodied in the form of separate tribunals or constitutional courts.[1] Such courts have been vested with extensive authority over the most sensitive issues. The influx of constitutional courts in both Europe and Asia certainly has signified serious change in relations between the governmental branches. Judicial activism in these countries became very impressive. In light of this development, it is of particular concern to look at the experiences of Asian countries that have set the goal of building democracy, free civil society, and rule of law by instituting constitutional courts to promote respect for human rights and freedoms of citizens.

Consequently, this article consists of five parts. In the first part, different systems of judicial review and their main features will be analyzed; in the second part, an overview of constitutional courts in the Asian region with special emphasis on historical development will be presented; in the third part, the aim and composition of these courts will be studied; in the fourth part, the status of constitutional judges will be presented; and, finally, the power and jurisdiction of these courts will be articulated.

Judicial review constitutes the court's power to invalidate a legislative or executive act on grounds of its unconstitutionality. There are two kinds of such judicial reviews. The first one is called an American, or diffused, system of judicial review. Such model is rooted on the concept of constitutional supremacy. This concept was introduced in the United States at the beginning of 19th century with Chief Justice Marshall's opinion in Marbury v. Madison.[2] The U.S. system of diffuse

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[1] Almost all of the East and Central European countries established a constitutional court. Of the fifteen former Soviet republics, only Turkmenistan has not established a constitutional supervisory body yet. Twelve republics have constitutional courts, Kazakhstan has the constitutional council and Estonia preferred an American model of judicial review, it has now a constitutional supervisory chamber in the Supreme Court.

[2] Kashkin C.K. (ed.) (2001) *"Konstitutsionnyi pravo v zarubezhnykh stranakh"* (Constitutional Law in Foreign

judicial review authorizes all courts to consider the constitutionality of legislation. Regular courts have a power to nullify the law inter partes. The validity of the courts' decision extends on other cases through the principle of stare decisis. The diffused system of judicial review of legislation corresponds with the concept of constitutional checks and balances.

The second one is the European (Austrian), or a centralized, system of review.[3] This model is rooted on the concept of parliamentary supremacy. The European model concentrates the power of judicial review on one tribunal. Under a system of concentrated judicial review, constitutional review is exercised only by specialized courts that have been specifically created to decide on constitutional issues.[4] Constitutional court has a power to invalidate the law or the governmental decision in question. With few exceptions, constitutional courts elsewhere decide only constitutional questions; they do not adjudicate non-constitutional litigation between adverse parties. While ordinary European courts generally are not permitted to exercise judicial review of constitutional questions, these courts may be allowed to refer such issues to constitutional courts for decision, and they are subsequently bound by constitutional court rulings.[5]

Constitutional courts are created expressly by provisions in European constitutions, and they are independent of ordinary judicial structures.[6] In fact, the provisions establishing constitutional courts are usually separate from those regulating the ordinary judiciary. This system corresponds with the concept of rigid separation of powers.

The second major difference between these two models of judicial review is that constitutional courts usually practice abstract review which means that they consider the constitutionality of laws and regulations in principle. Therefore, judicial (constitutional) review power is abstract (this review can be initiated through independent action raising an abstract issue of constitutionality). By contrast, the U.S. model permits courts to review constitutional issues only in the context of adversarial lawsuits where parties have a standing to bring a challenge.[7] Therefore, judicial review power is concrete (or incidental) because the constitutional issue can arise only as incidental to another litigious issue.

The reason that most Asian countries have chosen the centralized type of judicial review stems from the above-mentioned differences between

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Countries)/…, Moscow: Yurait press, 59.

[3] Strashun B.A (ed.) (1996) *"Constitutsionny (gosudarstvennoe pravo v zarubejnykh strannakh)"* (Constitutional Law in Foreign Countries) /// , Moscow: BEK press,83.

[4] Ibid, 80.

[5] Maklakov B.B (ed.) (2007) *"Constitutsionny controli v zarubejnykh strannakh"* (Constitutional Control in Foreign Countries) ///, Moscow: NORMA press , 38.

[6] Ibid.

[7] Ibid.

these two systems. The exercise of judicial review requires judges to use creativity and discretion in interpreting vague constitutional mandates.[8] Constitutional judges are required to balance and reconcile competing policy preferences. Common law judges are well prepared to offer the policy-minded analysis. On the other hand, like European countries, most Asian countries have civil law systems. Asian judges, like their European counterparts, are "career judges" who enter the judiciary early in their professional careers and are promoted on the basis of seniority. They are well trained to follow the rules provided in the Codes. Ordinary court judges thus practice technical, rather than policy-oriented, statutory application. Therefore, the concentrated model offers a more appropriate structure for Asian countries adopting judicial review as the specialized constitutional courts are modestly staffed and limited in jurisdiction. On the other hand, constitutional judges are usually chosen by political authorities and have broader, more policy-oriented training.[9] Therefore, they may be more capable than ordinary court judges to exercise judicial review.

Another reason for adopting a concentrated type of review is that, as elsewhere in the civil law system, Asian countries do not view their judiciary as a co-equal branch with power to review executive and legislative acts.[10] Thus, these countries created a new institution, independent of the judicial branch, to review the constitutionality of laws.

Final reason as to why Asian countries adopted the model of concentrated judicial review relates to their bitter experience of having totalitarian regimes that regularly abused and disregarded their own constitutions. Thus, for these countries not only lacking a tradition of judicial review, but also still struggling to cast aside their historical baggage of authoritarianism, the establishment of an independent constitutional court was a natural choice.

II

Asian countries with constitutional courts basically fall into two categories: countries with an authoritarian past (most political leaders of which usually have a military background such as South Korea, Indonesia and Thailand) and the countries with the socialist (Soviet) heritage: Uzbekistan, Tajikistan, Kyrgyz Republic and Mongolia.

[8] Kashkin C.K. (ed.) (2001) *"Constitutsionny controli v zarubejnykh strannakh"* (Constitutional Law in Foreign Countries) //, Moscow: Yurait press, 66-67.
[9] Maklakov B.B (ed.) (2007) *"Constitutsionny controli v zarubejnykh strannakh"* (Constitutional Control in Foreign Countries) //, Moscow: NORMA press , 40.
[10] Ibid.

Arguably the first specialized Constitutional Court was established in Korea in September of 1988 when the Constitution was still in force, which followed after the people's successful movement for democracy in 1987.[11] The major reason for the creation of the Constitutional Court was the fact that prior to the establishment of the Court the actors within the previous systems were both unwilling and incapable of protecting basic rights. In fact, before the creation of the Court only a handful of laws and government actions were deemed unconstitutional, even though the government frequently and often brutally violated basic rights.

The composition, organization, and powers of the Constitutional Court of Korea are defined by the Constitution of the Republic of Korea and the Law on the Constitutional Court (1988). The new system provided a mechanism for the people to directly challenge the law and also a mechanism for the courts to send constitutional issues to a different court, the Constitutional Court. At present, over 1,500 cases are adjudicated each year and the Court, to date, has declared over 450 laws and government actions unconstitutional.[12]

From a political standpoint, it can be said that the Constitutional Court has accelerated the process of democratization in Korea by doing away with the authoritarian system of past regimes. The legal system, which has been outside the control of the constitution, is now being reformed one step at a time. In particular, the unconstitutionality of many laws passed by the legislating bodies under past regimes has been confirmed. Like the German Constitutional Court in Europe, the Constitutional Court of Korea remains one of the most active and influential courts in this region.

Although Mongolian politicians and judges alike argue that the Mongolian Constitutional Court was the second court of this kind in Asia, it seems that this honor should go to the Constitutional Court of Kyrgyz Republic. As Kyrgyz officials have claimed, the Constitutional Court of Kyrgyz Republic was established in 1990, when Kyrgyzstan was still one of the Soviet republics in the composition of the USSR.[13]

Therefore, the new Constitution of 1993 did not create a new institution, but affirmed the status of the Constitutional Court as the supreme body of judicial power in this country. Its aim was to protect the Constitution, the constitutional structure, and the citizens' constitutional rights and freedoms. This Court began to function in 1994. It determines

[11] *The Constitutional Court of the Republic of Korea*, http://english.ccourt.go.kr (Last visited in 2010.12.12)

[12] *Case Statistics of the Constitutional Court of Korea*, http://english.ccourt.go.kr/home/english/decisions/stat_popup1.jsp (Last visited in 2010.12.12)

[13] Baekova Ch. (2001)"*Constitutional Justice in Kyrgyz Republic*", Conference paper presented at *Constitutional Justice at the Turn of the Century*, Moscow, , http://www.concourt.am/ht/ccl/vestnik/4-14-1-15/baekova-eng.html (Last visited in 2010.12.14)

unconstitutional laws and other acts, and cancels the effect of normative and other acts that are recognized unconstitutional. Annulling the legal force of unconstitutional norms of the law, the Constitutional Court clears a legal field from the unconstitutional laws and the laws, accepted before the adoption of the Constitution. By annulling the laws that are not in conformity with constitutional norms, the Court asserts the constitutional principles of justice and provides for the supremacy of the Constitution.

The organization, the competence and the order of activity of the Constitutional Court is defined by the new Constitution of the Kyrgyz Republic, which was adopted in 2010. The Constitutional Court of the Kyrgyz Republic, the Supreme Court of the Kyrgyz Republic, and the Supreme Arbitrage of the Kyrgyz Republic are equal in legal status and they constitute the highest authorities on the affairs referred to their competence.

However, the constitutional development in Kyrgyzstan experienced several major setbacks, which affected all governmental structures of the Republic including the Constitutional Court. Since March 2005 Kyrgyzstan has been gripped by political infighting, instability, riots, and ethnic conflicts. In its recent political history, the second President of Kyrgyz Republic Kurmanbek Bakiyev proposed an amendment to the Constitution to abolish the Constitutional Court, incorporating it into the Supreme Court as a special chamber. The authorities insisted that dissolving the Court as a separate institution made sense because the country did not need so many higher courts; on the other hand, the scope of its jurisdiction would not be decreased, and the legal protection afforded to citizens would not be suffered.[14]

Naturally, this plan came under fire from experts at the Council of Europe, which Kyrgyzstan joined in 2004. For example, Kestutis Lapinskas, a Venice Commission member, quoted as saying "An attempt to do away with the Constitutional Court weakens the country's court system. Abolishing it is no less than a direct assault on judicial authority with the aim of weakening it, since the court's purpose is to protect human rights and freedoms and solve disagreements and disputes over jurisdiction between the top institutions of authority...a Constitutional Court makes a final decision and puts an end to the matter." Lapinskas concluded, "It's impossible to understand why such an attempt is being made....It is unacceptable for a state that is democratic and governed by the law."[15]

On April 2010 riots against the corrupt government and increasing

[14] Leila Saralaeva, *"Kyrgyzstan: Saving the Constitutional Court"*, Institute for War and Peace Reporting http://iwpr.net/report-news/kyrgyzstan-saving-constitutional-court (Last visited in 2010.12.14)
[15] Ibid.

prices spurred in Kyrgyzstan during which the then President Kurmanbek Bakiyev fled the country. The new President of Kyrgyz Republic Roza Otunbayeva was sworn on July 3, 2010. The country also embraced a new Constitution following a referendum on June 27, 2010, replacing the previous constitution. The Constitution introduces a strong Parliament, which reduces the power of the historically strong president. The constitution is similar in many ways to the previous.[16] However, the constitutional supervision is conducted by the Constitutional Council at the Supreme Court.[17]

The third Constitutional Court established in the region is the Constitutional Court (Tsets) of Mongolia. In 1992, after peaceful movement to democracy, Mongolia adopted its Constitution, which being number four, is the first truly democratic by nature. During the Constitution drafting process, there was widespread agreement on the need for some sort of constitutional oversight body. As elsewhere in other post-communist societies, the drafters of the Constitution rejected the American model fairly early in the process. Instead, they set up a separate Constitutional Court, designed after the European model.[18]

The process of establishing the Constitutional Court in Mongolia came to an end in 1993. Mongolia explicitly grants its Constitutional Court an authority to determine the constitutionality of laws and other legislative acts. It also authorizes review of presidential decrees and orders as well as adopted international treaties.[19] Although the Constitutional Court of Mongolia does not supervise elections, it may review the constitutionality of decisions of the central election authorities on national referendums and the elections of the State Great Hural (parliament) and its members as well as presidential elections.[20] Interestingly enough, the Constitutional Court of Mongolia has been given the authority to review breaches of law by the President, Chairman and members of the State Great Hural, the Prime Minister, members of the Government, the Chief Justice and the Prosecutor General and the well-foundedness of the grounds for the removal of the President, Chairman of the State Great Hural and the Prime Minister and for the recall of members of the State Great Hural.[21] So far, the Constitutional Court of Mongolia is quite active in upholding the Constitution and protecting human rights.

[16] Wikipedia electronic dictionary website on *"Constitution of Kyrgyzstan"* http://en.wikipedia.org/wiki/Constitution_of_Kyrgyzstan (Last visited in 2010.12.12)

[17] Constitution of Kyrgyzstan- Art 97 (1)

[18] Gonchigdorj R (1998) *"Tsets bol Undsen khuulin khemjeeg sakhin biyhuulekhiin batalgaa mun"* (Constitutional Court is the Guarantee for the Observance of Constitutional Principles), *"Undsen khuulin shuukh, parlament khoorondin kharilcaanii erkh zuin bolon yos zuin undes"* (Legal and ethic's basis of the relationship between parliament and constitutional court) Ub, 39.

[19] Constitution of Mongolia- Art 8(2)

[20] Constitution of Mongolia- Art 8(2.5)

[21] Constitution of Mongolia- Art 8(3)

The short-lived and ill-fated Constitutional Court of Kazakhstan represents a special case. It was established in 1993 by the new Constitution of Kazakhstan, but only after two years of functioning it was abolished and substituted by the French-type constitutional council.[22] So it is worth taking a closer look at the process of dismantling the organ of constitutional supervision in this country. Kazakhstan had three "supreme courts" – the Constitutional Court, the State Arbitrage Court, and the Supreme Court. Of the three, the Constitutional Court was widely regarded as the most expensive and least effective, as well as the most poorly administered.[23]

The powers of the Constitutional Court were accordingly under steady attack. There also was a growing sentiment in the Parliament and in some parts of the Government to do away with the Court entirely, creating instead a single Supreme Court. In mid-1993 Kazakhstan's earlier Parliament had revoked the Court's right to institute legal proceedings on its own or to question presidential, parliamentary, or presidium decrees. In November 1994 the Court's staff was cut, and its available funding reduced.[24]

On March 6, 1995 the Constitutional Court in a surprising move upheld the complaints of a candidate for the Parliament, who ten months previously had sued to have the 1994 election in her district annulled as a violation of the Constitution. Two days later, President Nazarbaev submitted a protest to the Constitutional Court, and blocked the implementation of the Court's ruling. The basis for this move was that the Court's decision would create problems in implementing "socio-economic reforms", and would "impede the activity of the supreme organs of state authority".[25] But the Court took a further decision in which it overrode the President's protest.

Nazarbaev went before the Parliament to inform the deputies that they were an improperly assembled body, and so were now to be annulled, as were all the decisions and laws they had passed. Then Nazarbaev asserted his own imposition of direct presidential rule pending new Parliamentary elections. To take the place of the dissolved Parliament Nazarbaev established a consultative council, the People's Assembly, as part of the presidential apparatus. In 1995, the new Constitution of Kazakhstan was adopted, which granted the President broad powers.[26]

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22 Vishnyakov B.G (ed.) (2006) *"Sravnitelniy analiz constitutsii gosudarstv-uchastnikov SNG"* (Comparative Analysis of Constitutions of CIS Participating States) . Moskow: Gorodets press, 179.

23 Ibid.

24 Dookhuu T, Enkhbaatar Ch. (2009) *"Gadaad ornuudiin undsen khuuliin erkh zui"* (Foreign Countries' Constitutional Law), Ub, 39-40.

25 Ibid.

26 Vishnyakov B.G (ed.) (2006) *"Sravnitelniy analiz constitutsii gosudarstv-uchastnikov SNG"* (Comparative Analysis of Constitutions of CIS Participating States) . Moskow: Gorodets press 180.

One of the novelties of the 1995 Constitution was the abolishment of the Constitutional Court of Kazakhstan and establishment of a French-type Constitutional Council instead. The Council rules on election and referendum challenges, interprets the Constitution, and determines the constitutionality of laws adopted by the Parliament. The President directly appoints three of its seven members, including the Chairman, and has a right of veto over Council decisions.[27] The Council may overturn a Presidential veto if at least two-thirds (five) of its members vote to do so. Therefore, at least one Presidential appointee must vote to overturn the President's veto in order for the Council to overrule the President.[28] Citizens do not have the right to appeal to the Council regarding the constitutionality of government actions, although they were allowed to make such appeals to the former Constitutional Court. Under the Constitution, only the President, chairperson of the Senate, chairperson of the Majilis, Prime Minister, one-fifth of the members of the Parliament, or a court of law may appeal to the Constitutional Council. Constitution states that a court shall appeal to the Council if it "finds that a law or other regulatory legal act subject to application undermined the rights and liberties of an individual and a citizen."[29] Recently, the Constitutional Council of Kazakhstan ruled in January 2011 that the referendum plan to extend the rule of the President Nazarbaev until 2020 as unconstitutional.[30]

The Constitutional Court of Uzbekistan was established in 1994.[31] Its activity is regulated by the Constitution of the Republic of Uzbekistan (1993) and by the "Law on the Constitutional Court of the Republic of Uzbekistan" (1995). The Constitutional Court of the Republic of Uzbekistan judges the constitutionality of the laws of the Republic of Uzbekistan and other acts passed by the Oliy Majilis of the Republic of Uzbekistan, the decrees issued by the President of the Republic of Uzbekistan, the enactments of the Government and the ordinances of local authorities, as well as obligations of the Republic of Uzbekistan under inter-state treaties and other documents; confirm the constitutionality of the Constitution and laws of the Republic of Karakalpakstan to the Constitution and laws of the Republic of Uzbekistan; interpret the Constitution and the laws of the Republic of Uzbekistan.[32]

[27] Dookhuu T, Enkhbaatar Ch. (2009) *"Gadaad ornuudun undsen khuulin erkh zui"* (Foreign Countries' Constitutional Law). Ub, 39-40.
[28] Ibid
[29] Ibid
[30] *"Kazakhstan Court Rejects Referendum Plan"* http://www.bbc.co.uk/news/world-asia-pacific-12322151 (Last visited in 2011.02.01)
[31] Vishnyakov B G (ed.) (2006) *"Sravnitelnyi analiz constitutsii gosudarstv-uchastnikov SNG"* (Comparative Analysis of Constitutions of CIS Participating States) v. Moskow: Gorodets press 185.
[32] Dookhuu T, Enkhbaatar Ch. (2009) *"Gadaad ornuudun undsen khuulin erkh zui"* (Foreign Countries' Constitutional Law). Ub, 62.

Constitutional Court does operate in Uzbekistan; however, the ability of the Court to have a significant role in reforming or enforcing the law is minimal because certain provisions of the Constitution preclude the Court from protecting citizens' rights. Because Article 107 of the Constitution provides that judges of the Court are appointed to five-year term, judges do not have the advantage of judicial independence. It is conceivable that, if their decisions are unpopular, they are unlikely to be re-appointed. Article 93, Section 10, of the Constitution grants the President a duty to nominate potential members of the Constitutional Court and present them to the Parliament for election. Furthermore, under Section 11 of Article 93, President may appoint and dismiss from office judges of regional, district, city, and commercial courts. As long as the President has this power of arbitrary dismissal, there is little hope that the Court can improve protections of citizens' rights. Finally, upon resignation of his office, President may assume a lifetime seat on the Court under Article 97 of the Constitution. Therefore, it is not surprising, that the Constitutional Court always sided with the President Karimov, a Soviet-era authoritarian. For example, Article 95 of the Constitution empowers the President, with the approval of the Uzbek Constitutional Court (Court), to disband the Parliament when he feels it is adopting laws that are contrary to the Constitution. Parliament, therefore, acts under the constant threat of disbandment if it opposes Karimov's positions. Thus, its legislative power designed to protect citizens' rights is doubtful.

1994 Constitution of the Republic of Tajikistan prescribes an independent judiciary, including at the national level the Supreme Court, the Constitutional Court (theoretically, the final arbiter of the constitutionality of government laws and actions), the Supreme Economic Court, and the Military Court. Law on the Constitutional Court of the Republic of Tajikistan was adopted by the Parliament in 1995 and the Constitutional Court of Tajikistan was established in 1996.[33] Constitutional Court of Tajikistan consists of 7 members; one of them is the representative of Gorno-Badakhshan Autonomous Region.[34] The authority of the Constitutional Court is the determination of conformity of laws, other legal acts of state and public organizations to the Constitution of the Republic and settlements of disputes among state organizations. However, President retains the power to dismiss judges, and in practice Tajikistan still lacks an independent judiciary after the adoption of the 1994 Constitution.[35] There is little to be said about the activity of the Court.

[33] Ibid., 51-53.
[34] Visnyakov B.G (ed.) (2006) "*Sravnitelny analiz constitutsii gosudarstv-uchastnikov SNG*" (Comparative Analysis of Constitutions of CIS Participating States) . Moskow: Gorodets press 186.
[35] Ibid

The Indonesian Constitutional Court is the youngest court in the region. It was established by the Majelis Permusyawaratan Rakyat (MPR) or People's Consultative Assembly, Indonesia's highest elected assembly, on August 10, 2002, after completing the last in a series of four major constitutional amendments that had begun in 1999.[36] Article 24C of the Constitution grants it a power to make a final decision in reviewing statutes (Undang-undang) in light of the Constitution; to determine disputes concerning the authority of the state organs whose power is derived from the Constitution; to dissolve political parties; and to resolve disputes regarding the results of the general election. It also has the power to make decisions concerning the opinion of DPR with regard to alleged violations by the President and/or Vice President of the Constitution —in other words, the power to have the final say in any impeachment proceedings.

Some argue that the formation of the Constitutional Court was a response to the 2000 constitutional crisis when President Wahid became involved in a lengthy stalemate with DPR resulting in his controversial impeachment and ultimate dismissal by the MPR. This episode clearly influenced the MPR to create a new Court. However, its formation was also, in a broader sense, a response to the long absence of any mechanism to review the constitutionality of statutes. Along with the absence of developed judicial doctrines of constitutional interpretation it contributed to the arbitrary and authoritarian nature of Soeharto's rule.[37]

Detailed regulations concerning the Constitutional Court were provided in Law no. 24 of 2003, passed by DPR on August 13, 2003—only four days before the deadline for the establishment of the Constitutional Court fixed by Article III of Interim Provisions of the amended Constitution. Consisting of eight chapters with eighty-eight articles, this statute deals with definitions, structures, powers, the mechanism for judicial appointment and dismissal, and procedural issues. In particular, Article 45 provides that dissenting judgments are allowed (Article 45, paragraph 10). This is an important development, given that Indonesia is a civil law jurisdiction and dissenting judgments were virtually unknown before the formation of the Commercial Court in 1998 and have only recently been allowed in the Supreme Court (Mahkamah Agung). They are still very rare.

The Constitutional Court of the Republic of Indonesia has entered the ninth year of its existence. Its role in the Indonesian state administration system has been gaining increasing recognition and position, particularly

[36] Dookhuu T, Enkhbaatar Ch. (2009) "*Gadaad ornuudiin undsen khuulin erkh zui*" (Foreign Countries' Constitutional Law), Ub. 37-38.
[37] Ibid

with respect to the checks and balances mechanism. As a newly democratic country which has gained freedom from authoritarianism, the transitional period is not yet over. However, the progress made by the Indonesian Constitutional Court has been remarkable.

The recent history of the Constitutional Court of Thailand is an example of another major drawback in the region. The Constitutional Court of Thailand was initially established under 1997 Constitution with jurisdiction over the constitutionality of parliamentary acts, royal decrees, draft legislation, as well as the appointment and removal of public officials and issues regarding political parties.[38]

The creation of the Constitutional Court was the subject of much debate during 1996-1997 drafting of the Constitution of Thailand. Four senior judges rigorously opposed the concept on the grounds that constitutional and judicial review should remain the prerogative of the Supreme Court and that a constitutional court would create a fourth branch of government more powerful than the judiciary, legislature, or executive.[39] Judges stated their fear over political interference in the selection and impeachment of judges. The Constitution Drafting Assembly eventually made several concessions regarding the composition and powers of the Court.

The Court made several significant rulings since its establishment in 1998. These included the 1999 ruling that Deputy Minister of Agriculture Newin Chidchop could retain his Cabinet seat after being sentenced to imprisonment for defamation; 2001 acquittal of Thaksin Shinawatra for filing an incomplete statement with the National Counter-Corruption Committee; 2003 invalidation of Jaruvan Maintaka appointment as Auditor-General; and 2006 invalidation of the nationwide results of a House of Representatives.[40]

On September 19, 2006, the Chief Commanders of the military force in collaboration with the National Police Commander successfully staged a coup and announced the Government overthrown and the Constitution of the Kingdom nullified. It happened while the Prime Minister was attending a United Nations meeting overseas, which caused him into an exile. A number of Constitutional organs including the National Assembly, the Senate, the Parliament, as well as the Constitutional Court, were dissolved.

An interim Constitution replaced the 1997 Constitution, a provisional Government was set up and the coup leaders group transformed to be the Council for National Security which processes supreme power to

[38] *"Constitutional Court of Thailand"*. http://en.wikipedia.org/wiki/Constitutional_Court_of_Thailand (Last visited in 2011.02.02).
[39] Ibid.
[40] Ibid.

advise the King of Thailand on the appointment and removal of the Prime Minister. A National Legislative Assembly of no more than 250 appointed members was also created.

III

Constitutional court is a specialized body designed to protect the Constitution; therefore, it holds certain legal superiority in relation to other branches of power. In other words, the power to provide constitutional review should be held by the institution that in the scheme of separation of powers has a power to annul the laws adopted by the legislative body. Only a handful of the countries in the region do envisage the role of constitutional courts in their constitutions. Constitution of Mongolia gives the following definition: "the Constitutional Court shall be an organ exercising supreme supervision over the implementation of the Constitution, making judgment on the violation of its provisions and resolving constitutional disputes. It shall be the guarantee for the strict observance of the Constitution."[41]

Among the main functions of Constitutional Courts are:

- assurance of the supremacy of the Constitution on the whole territory of a given country (Kyrgyz Republic, Tajikistan, and Mongolia);
- protection of the fundamental human rights and freedoms (Kyrgyz Republic, Tajikistan).

The number of judges performing the function of constitutional review differs from country to country, ranging from seven (Uzbekistan, Tajikistan) to nine (South Korea and Mongolia) to fifteen (Thailand). Most countries, except Uzbekistan, defined the number of constitutional judges in their respective constitutions. In recent years, some countries made a move towards decreasing the number of judges (for example, Uzbekistan-from eleven to nine).

Influence of government bodies upon the appointment or elections of the constitutional judges differs from case to case. Usually several governmental bodies or the highest ranking officials participate in the appointment or election of constitutional judges. The varieties applicable to elections or appointment of constitutional judges are as follows:

1. An Appointment Based Systems:[42] As a rule Parliaments exercise greater influence upon the elections of constitutional judges as compared to the elections of judges of the regular courts. In Uzbekistan and Tajikistan constitutional judges are exclusively appointed by the

[41] Mongol ulsiin undsen khuuli (Constitution of Mongolia) -Art 64

[42] Kashkin C.K. (ed.) (2001) *"Constitutsiony pravo v zarubejnykh stranakh"* (Constitutional Law in Foreign Countries) ///. Moscow: Yurait press, 63.

legislative body at the proposal of the head of state. Therefore, the participation of executive power in these countries is limited to the recruitment of candidates;

2. The Mixed Systems (Appointment and Election):[14] In this system, the appointment of constitutional judges is subject to the influence of the head of state, Parliament and other body. In the countries, which adopted this system, usually one part of constitutional judges is elected by the Parliament; one part is appointed by the government and the remaining part by senior judicial officials. In Mongolia and South Korea, for example, the President, Parliament and the Supreme Court designate three nominees each; however, the appointing authority is different. In Mongolia the State Great Hural (Parliament) appoints members of the Constitutional Court, while in South Korea, the President of the Republic has a final say on this matter.

As a rule, Constitutional Courts consist of the Chairman, Vice-Chairman(s) and members. In some countries, also the Court's secretary (General Secretary) may be appointed (elected) (Tajikistan, and South Korea). The appointment procedure for ordinary members of the Court differs from that for an appointment of chairmen (vice-chairmen, general secretaries). In some countries, chairmen and vice-chairmen are appointed by Parliaments (Tajikistan, and Uzbekistan), or by the head of state (South Korea). In Mongolia, members of the Constitutional Court elect the Chairman and vice Chairman from among themselves. The term of office of chairmen usually shorter than the term of office of the members (in Mongolia and South Korea – three years against six, which allows rotation among members). It is possible for chairmen to be re-elected once.

The mode of election of chairmen is important because they perform many important tasks. They usually represent a Constitutional Court, take charge of the affairs of the Court, and direct and supervise members and other public officials under his/her authority. Supposedly, an independence of the Constitutional Court is higher if a Chairman is appointed by his/her colleagues – constitutional judges (Mongolia).

The internal organization of Constitutional Courts is usually defined by the Laws on the Constitutional Courts. Only the Constitution of Tajikistan has devoted some articles to these matters.

The decision-making is organized in different ways:

- at the level of a plenary Court (Tajikistan and Uzbekistan);
- at the level of a bench (full bench (7-9 members); middle bench (5 members); small bench (3 members)) (Mongolia and South Korea).

Most Constitutional Courts follow their own rules regarding their

[14] Strashun B.A (ed.) (1996) *"Constitutsionny (gosudarstvennoe) pravo v zarubejnyh stranakh"* (Constitutional Law in Foreign Countries) 2nd, Moscow: BEK press, 92.

internal organization. They also have an independent budget as a separate part of the whole state budget, and they are fully independent in its control. Professional services of the Constitutional Courts are organized in a similar way: they consist of clerks and clerical staff, whereby the head of the professional services generally holds the status of the Secretary General.

IV

The terms of office of constitutional judges last, for instance for five years (Uzbekistan and Tajikistan); the average is six years (which is the case in Mongolia and South Korea). Since constitutional courts act between law and politics, a term of office that is too long may be dangerous in terms of politization of constitutional adjudication, whereas too short a term of office could be detrimental for the continuity and the authority of the institution.

Most Asian countries, except Thailand, allow re-election of constitutional judges. There is no limitation on the number of re-election allowed; however, Constitutions set a certain age until constitutional judges can perform their duties: 60 (Tajikistan), and 65 (South Korea). For other counties the maximum age is usually the general age of retirement set up in other laws.

The minimum age acceptable for appointment of a constitutional judge is 30 in Tajikistan, and 40 in Kyrgyz Republic, South Korea and Mongolia. The qualifications and the required professional experience of the constitutional judges are subject to high standards: the candidates must not only have more than average legal expertise but also all a high degree of sensibility for the political effects of their decisions. In practice constitutional judges are selected exclusively out of first-class lawyers with many years of experience, such as judges, attorneys, senior government officials, professors of law, or politicians.

Almost all countries require of constitutional judges to have a law degree (except Mongolia,[44] Uzbekistan, Thailand – in these countries, politicians are allowed to serve on the bench). The level of expertise required of constitutional judges is usually high: at least ten years in Tajikistan, and fifteen years in Kyrgyzstan.

A special feature of the office of the constitutional judge is its incompatibility with certain activities. In almost all Asian countries the office of constitutional judge is compatible with scientific, teaching and artistic activity (except Uzbekistan), but incompatible with political and commercial activity. Member of the Constitutional Court of the Republic

[44] A member of the Constitutional Court shall be a Mongolian national of forty years of age and experienced in politics and law (the Constitution of Mongolia, Art 65(2)

of Uzbekistan is not allowed to participate even in the activities of the civic organization (NGO). The requirement of incompatibility is given in length in the Constitution of Tajikistan[45], while the Constitution of Uzbekistan is very modest in this regard.[46]

Most countries recognize the immunity of constitutional judges and certain countries recognize explicit parliamentary immunity. Independent position of a constitutional judge also implies to the recognition of the corresponding material independence, as well as the adequate rank.[47]

V

Constitutional courts usually are entrusted with the responsibility of ruling on the constitutionality of laws, status of members of parliaments, conflicting jurisdictions of different constitutional bodies etc. There are numerous other issues emerging as a matter of discussion and decision-making today. The scope of responsibility of constitutional courts varies from country to country.

Since constitutional courts exercise an abstract review, it is usually a posteriori review. Only in one case a constitutional court can exercise preventive review. According to Article 89 of the Constitution of Tajikistan, the powers of the Constitutional Court are "...to determine the conformity...agreements that have not entered into force in Tajikistan".

A posteriori review is exercised by Asian Constitutional Courts in two forms: abstract and concrete review.[48] Abstract review is exercised in relation to:

a) International agreements (Mongolia);

b) Laws (Indonesia, Tajikistan, Mongolia, and Uzbekistan);

c) Regulations (Mongolia and Tajikistan);

d) Acts of the President (head of state) (Mongolia and Tajikistan);

2. Concrete review is requested by the regular courts (South Korea and Thailand).

Two courts in Uzbekistan have a power to interpret the Constitution, while the Constitutional Court of Indonesia can interpret laws and other regulations. One of the major functions of Constitutional Courts is to decide competence disputes between various governmental agencies.[49]

[45] Judges cannot perform other duties, be deputies of representative authorities, members of political parties and organizations, or engage in entrepreneurship except scientific, teaching and creative work. (Art. 90 of the constitution of Tajikistan)

[46] Art.108 of the constitution of Uzbekistan: no member of the constitutional court, including the chairman, shall have the right to simultaneously serve as a deputy. The chairman and the members of the constitutional court may not belong to any political parties or movements, nor hold any other paid posts.

[47] Kyrgyz Republic, Tajikistan, Mongolia, South Korea

[48] Strashun B.A (ed.) (1996) *"Konstitutsionny (gosudarstvennoe) pravo v zarubezhnykh stranakh"* (Constitutional Law in Foreign Countries) 2/3, Moscow: BEK press, 78-79.

[49] Ibid., 77.

These disputes fall into four categories: disputes between top government bodies (South Korea, Mongolia, and Tajikistan); between the state and regional or local units (South Korea and Tajikistan); between local or regional units (South Korea and Tajikistan); and, finally, between the courts and other government bodies (Thailand).

Constitutional Court of Korea has the power to dissolve a political party on the grounds of unconstitutionality of its acts and activity. Constitutional Court of Mongolia has a power to decide on the conformity of a referendum with the Constitution, as well as the conformity of electoral proceedings with the Constitution of Mongolia and the electoral laws (Mongolia). Some Constitutional Courts can afford human rights' protection through constitutional complaint and similar legal remedies (South Korea and Mongolia).

A special case of constitutional courts is their power to impeach the highest ranking state officials. Many courts in the region can decide on the impeachment of the President (Indonesia, South Korea, and Mongolia). In addition, the Constitutional Court of Mongolia has a power to consider whether the legal grounds exist for impeaching the Prime Minister, and for recalling members of the Parliament.

Next to impeachment is the case of capacity for offices, or the power to decide on the qualifications of high public officials. The provision of the Constitution of Thailand is construed rather broad: the Constitutional Court can decide on the qualifications of the member of the House of Representatives, a member of the Senate, a minister, the election commissioners and any persons holding a political position. According to the Constitution of Mongolia, under the Constitutional Court's scrutiny is following public officials: the President, the Chairman and members of the parliament, the Prime Minister and members of the Government, the chief justice of the Supreme Court and the Procurator General.

THE PRINCIPLE OF BALANCE: BALANCING ECONOMIC, ENVIRONMENTAL AND SOCIAL FACTORS IN INTERNATIONAL ECONOMIC LAW

*Altangerel Taivankhuu**

I. Introduction

Globalisation is challenging the current international economic law to deal with increasingly global-dimensional issues with more effective, just instruments, to respond to new structures and power relations. This means that international law is to play a key role in shaping harmonic, equitable, rule-based globalisation with respect for universal values such as human rights and the environment that the international community shares in common, building for all equal members by means of law opportunities for prosperity and welfare that each of them strives for. Behaviouralism, developed in the USA,[1] perceives law as "a process of making decisions in conformity with the expectation or appropriateness of those who are politically relevant, more concisely, a process of authoritative decision". Law as a policy-oriented science becomes a dynamic process and not merely a defined set of rules and obligations.

The article claims that the concepts of common values such as human rights and the environment make the foundation for the development of the policy-oriented role of international law. Due to their ultimate significance and universality, common values appear as long-term goals to shape policy on socio-economic processes at national and international levels. With globalisation, it has become advantageous in terms of developing integrative solutions for common problems that cannot be otherwise resolved by states acting individually or regionally. Emerging circumstances and socio-economic developments have serious impacts upon international law putting it into a new stage of development.

The article proceeds with the concept of justice in conjunction with the globalisation and common values. It assumes that for the international community the concept of justice can imply today the process of maintenance of its common values or consistency with its

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[1] Yale University, McDougal, Reisman, Lasswell, Franck Franck, T.M., *Fairness in international Law and Institutions*, Clarendon Press, Oxford, 1995 (Franck 1995). Lasswell, H.D., and M.S. McDougal *"Criteria for a Theory about Law"*, 44 Southern California Law Review 362 (1971).

common interest.

Values shape "the attitudes of actors" and subsequently, law and policy. They guide and impact the development of principles that may not necessarily be binding, but of considerable significance. The main part of the article deals with the suggested principle of balance that will ground a balanced relationship of common values to each other and to the system as a whole promoting the value of each component, though retaining systemic integrity at the same time. The applicability of the principle in International economic law faces practical difficulties. It is suggested to develop constitutional principles.

The paper aims to contribute to the substantive law within the constitutional framework of International Economic Law (IEL) by suggesting that the principle of balance links three equally legitimate interests: economic, social and environmental. Constitutional, general legal principles could be applied equally and freely in the dispute settlement systems of the international organisations mentioned below by virtue of being fundamental and common in nature. Constitutional function of the principles stems in the scope of the issues they cover and serve systemic, common purposes.

II. The concept of Justice and Globalisation

The legal concept of justice is a social phenomenon that develops from, and functions within a community and reflects community-based concepts and perspectives. Thus, community justice cannot be an absolute, subjective and moral concept but an agreed [contractual], common concept of compounding members that serves as much as possible individual interests of members and the community as a whole. A community-based concept of justice comes out of real, objective circumstances and necessities and it is developed and enforced by the system of law. In order to establish such community justice pursuant to common interest, all processes of law-making and enforcement should be in accordance with democratic instruments like representativeness, majority, voluntary decision-making, consensus, elections etc.

Basic neutrality and objectivity approaches of law derive from its primary function of social ordering that serves inter alia common interests of members. The fact that law should consider individual as well as common interests in order to make orderly society, stipulates moreover fundamental necessity for equal approach for all members before law. In other words, such a normatively common, equal and neutral approach brings stability and order in a society because members of a community are all different in terms of their backgrounds and

interests and clashes between these interests can be avoided, settled and coexistence is guaranteed by establishment of the "formal, equal start." The equality principle, on the other hand, is closely allied with, or a precondition of, the concepts of neutrality and objectivity in law. Altogether these concepts form fundamentals of justice in a democratic, rule-based community, in comparison to totalitarian societies where law is confined to serve only the ruling regime and thus, its subjective interests. There, law lacks equality, neutrality and objectivity principles and therefore it ignores and disadvantages interests of certain groups in the community that, in return, causes in those groups mistrust towards the ruling regime and feelings of unjust treatment that might normally lead to conflicts and civil wars.

In the international community, existence and acceptance of one uniform concept of justice as morality is almost impossible. Existing legal pluralism and diverse cultures and backgrounds, socio-economic structures, and different attitudes around the world imply the relativity of the moral concept of justice. However, members of international community do expect and accept in many cases just and fair, legitimate international rules if such are imposed upon them. This occurs due to the fact that [if] these rules and customs reflect mostly not moral, subjective justice, but community-friendly, common justice that has a neutral, equal and objective approach.

Rules, however, are not free from policy. Indeed, since a society is in constant process and change, law is itself a both static and dynamic mechanism with orientation for long-term goals. Whatever individual interests of diverse community members might be in a particular time, it has been the eternal and natural interest of human beings in existence and life that has found its express recognition in the concepts of human rights. So, for the international community the concept of justice can imply pragmatically process of maintenance of its common values or consistency with its common interest with due regard for individual rights, implemented and grounded on the principles of equality, neutrality and objectivity. Common values that remain unchanged and valid across borders, regardless of origin, backgrounds, sex and race are of core importance because they constitute uniform interest that provides a ground for an international co-operation framework with common aspirations. Globalisation as a form of intense integrative process makes it necessary that any international legal structure be built upon such substantive justice. This is, however, not an easy, self-evident task. The international community is characterised by profound discrepancies in terms of social structures, political and economic power, development, and technological progress. Additionally, the

world community comprises of diverse state, non-state actors, including individuals acting at different levels of relationships. These facts indicate that particular circumstances of each case have been and will be always of great relevance. The case-by-case approach exerts in sum inarguably profound influences on general attitudes and processes. On the other hand, superior and systemic principles that are applicable to the majority of cases generate those particularities into one direction consistent with common values, bringing stability, security and predictability. The necessity for community-interest friendly legal approach as a tool to maintain community justice derives from real circumstances that are shaped today by power-ruled policies. Current process of globalisation is much guided by a growing framework of economic and financial rules (in addition to military), regulations and institutions. But, as we have seen, the world is becoming an increasingly unequal place in terms of income, opportunities and technological change. Existing financial rules, regulations and institutions are not alone sufficient and determined enough to cover global social and environmental concerns that need to be given balanced weight with economic factors. So, the need for a better-integrated, co-operative multilateral system is evident, as no organisation can advance such an agenda on its own. From the legal perspective, international law has to play a key role in the balancing of powers, interests of diverse actors at the international level enabling ab initio fair agreements on trade and services, fair competition, minimum labour standards, accountable dispute settlements, concisely, maintenance of common values by means of law.

III. Principle of Balance

i. The concept of balance

As far as globalisation involves diverse members, this means there are diverse interests too. On the other hand, as humanity we share common future on this planet. This brings us to the concept of balance as an important instrument to cope with the emerging, globalisation-featured phenomena. Balance keeps and promotes diversity, simultaneously maintaining integration of the whole system. Balance is itself a natural phenomenon. We can observe balance everywhere in the nature and natural systems, in all the functioning processes of the forest; population and species number relationships; balance of nature is now commonly used as a conservation science of the ecological system. Nature is an extraordinarily complex web of mutual interactions and dependence, sustaining its own balance and harmony without human intervention. In essence, balance can be described as a state of harmonic coexistence

or balanced relationship of compounding, equal components within a system. Components of the system should be of vital significance for the system itself and their coexistence should hold the system as such. If strong deviations occur among the components destroying the balance, this can disorder or even be fatal for the whole system as such. Even if one factor is in utmost priority, this advantageous position is usually kept only temporary, since the remaining disadvantaged factors in the chain eventually undermine or destroy the whole system, including the one in priority. It means that the components within the system are deeply interdependent and they exist as such only in relationship with others in the group. This equilibrium seems to work in the natural systems, symmetric relationships, suggested and developed in social sciences, like the theory of General equilibrium in economics[2], or the Middle way (Madhyamaka) in Buddhist philosophy. With regard to law, as the main instrument that one uses deliberately for the establishment of social order, it has been playing inarguably a key role in keeping balanced relationship at all levels of social relations, be it horizontal or vertical. Although balance has not been an express objective of law, in substance it often attempts to balance competing equal interests of community members, in rights and obligations, claimant and defendant relationships. Even in procedure, the representativeness of diverse members of the community in a democratically elected parliament creates a balanced relationship of community member's interests and, consequently, impacts the law-making process. If the balance of nature is a natural process, balance in the legal system is a creation of human intellect. Thus, balance as a concept can and should be empirically studied and established in legal and other social sciences.

Balance is not an end objective itself. Establishment of balance serves ultimately the systemic, common purposes, while not undermining individual contribution. Balance as such is neutral and objective, as it does not over or underestimate individual components: i.e., it cannot be discriminative. In my assessment, the concept of balance can be of use in different areas of law, both domestic and international, whenever systemic issues arise. Perhaps because of the universality of the concept, the case-by-case approach is of greatest significance. Therefore, the scope of my study refers specifically to the issue of relationship between economic, environmental and social factors within the globalising system with its emerging common values deployed above.

ii. The legal principle of Balance

With the globalisation process there has been an observable increase

[2] Graciela Chichilnisky, Massimo Di Matteo, (1998) *Trade, Migration, and Environment: A General Equilibrium Analysis*; Kluwer Academic Publishers

in conflicts throughout the world involving human rights, economic development and the environment. International human rights, environmental law and international economic law have each been assumed to be of separate domain, whereas international economic law has often been regarded to be of technical character regulating economic and financial relationships neutral from social and environmental effects. However, emerging global problems show inter-relatedness, independence of each of the spheres. Not only can problems be solved separately focusing on internal relationships, but also by their external, mutual effects. Such an integrated approach not only assists in solving existing global problems and tensions, but also more effectively assists in developing policies and implementations that are beneficial for all involved areas, such as win-win cases where economic integration positively affects production of ecologically-sound products. The issue of economic growth is no longer separable from human rights aspects or a healthy environment and becomes an essential part of human welfare. Current disputes and research on harmonisation and linkage between these and other relevant factors are therefore highly desirable. From an international law perspective, there needs to be developed a coherent legal approach that offers a constitutional integrated and balanced framework linking in its essence those significant factors. This challenge is confronted by considerable difficulties due to absence of a central law-making and enforcing body with networks of recognised courts and compulsory jurisdiction in the international arena. However, in the context of existing institutions, global international bodies, in particular the WTO, which increasingly mediate the present global economic interaction including trade, services, and intellectual property can assume more effectively legitimate, constitutional functions. The WTO massively expanded its influence with appropriate instruments of dispute resolution mechanisms that enforced sanctions in the event of the breaches of the WTO law. Apart from the WTO, the United Nations and regional dispute settlement systems, like the EC, could and should complement international dispute settlement, though specialising and maintaining certain fields and levels. As a multinational, international organisation WTO with its effective dispute settlement can make substantive differences in world order and address global concerns more fully in co-operation with the UN, IBRD and the IMF. However, many recognise that the current structures of the international organisations (both intergovernmental and non-governmental) are "impediments to the progressive development of an international legal system". In fact, issues arise as to legal recognition, rights and duties of the intergovernmental and non-governmental organisations, status and functions of economic

institutions (World Bank, IMF), independence and autonomy clauses within the UN[3], and compatibility of economic domains with common goals. Although fundamental reforms as to structure, law-making, appointment and election of bodies are necessary in many respects as suggested by leading international lawyers, this issue goes beyond the scope of the paper[4].

The paper aims to contribute to the substantive law within the constitutional framework of the International Economic Law (IEL) by the suggestion of the principle of balance that links three equally legitimate interests: economic, social and environmental. Constitutional, general legal principles could be applied equally and freely in the dispute settlement systems of the mentioned international organisations by virtue of being fundamental and common in nature. Constitutional function of the principles stems in the scope of the issues they cover and serve systemic, common purposes. The principle of balance should found a more legitimate, fair and just relationship between the fundamental domains of competing aspirations like human rights, environment and economic development and assist in establishing an integrated, common interest and, friendly decision-making. International law has not been merely a set of rules, but also a system involving customs and recognised principles[5] and by application of the general principles of law via diverse specialised international courts, panels, dispute resolution bodies create certainty, consistency, predictability and an overall fair approach. General principles of law may concern fundamental rights such as human rights, equality, good faith, non-discrimination or principles of judicial protection like proportionality[6], legitimate expectation and non-retroactivity. The neutral and fundamental character of these principles as such from the standpoint of political impact and recognition in major legal systems establish them as valuable instruments of overall applications in national and international courts. Dworkin proposed in Taking Rights Seriously[7] that principles are standards that are adhered to on the basis of justice, fairness or other moral dimensions. They do not demand a particular outcome since they possess different normative characteristics.

[3] Specific provisions have been negotiated for individual agency agreements, such as agreements with ILO, FAO, WHO contain details of tight United Nations coordination and oversight clauses, the agreements with the economic institutions are different for independence and autonomy clauses that create no more than loose and weak coordination responsibilities for the UN.

[4] Ernst-Ulrich Petersmann, (1999) *Constitutionalism and International Adjudication: How to Constitutionalize the U.N. Dispute Settlement System?* , 31 N.Y.U. J. INT'L L. & POL., 753

[5] In relation to principles as a source of law, Article 38 of the ICJ Statute reads:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:...

c. the general principles of law recognized by civilized nations.

[6] Proportionality is used mostly in the European Community courts.

[7] R. Dworkin, (1978), *Taking Rights Seriously*, Cambridge, Harvard University Press.

Their legal principles are distinguishable from legal rules in that they do not mandate a specific decision; however, they must be taken into consideration whenever it is relevant. Rules have a binding nature, whereas principles can be understood as neutral and empirical tools which, in comparison to rules, have non-specific, common, permanent and flexible character. Their principal function is to assist a fairer, more elaborated decision-making in both general and particular cases.

The core principles of the WTO have been developed in pursuance of achievement of its objectives by reducing existing barriers to trade and by preventing new ones from developing. Economic objectives to establish fair and equal competitive conditions for market access and predictability of access for all traded goods and services are based on two fundamental principles: the national-treatment and most-favoured nation principles which together form the "discipline" of non-discrimination at the core of trade law[8]. Apart from economic principles there is another emerging principle that relates directly to our topic, environmental concerns, until recently missing from the agenda of international trade. With the setting up of the Committee on Trade and Environment (CTE) with the objective of promoting sustainable development and identifying relationships between trade and environmental measures, the WTO made a progressive step towards an integrated approach. The concept of sustainable development, as some argue, has now emerged as a subsidiary principle to the core principles of non-discrimination to guide the interpretation of the WTO Law. In the 1998 Appellate Body ruling in the so-called Shrimp-Turtle case[9], it was made clear that the interpretation of WTO law should reflect the Uruguay Round's deliberate inclusion of the language and concept of sustainable development. This ruling may have moved the WTO toward requiring the legal provisions of its agreements to be interpreted and applied in light of the principles and legal standards of sustainable development. It is clear that the necessity of consideration of environmental issues, in addition to economic policy, challenges the WTO law to develop more constitutional functions. The significance of an integrated approach linking economic, social and environmental domains is increasingly important as their mutual effects are proven to be acutely interrelated.

It was proposed by M. Sornajarah to shift cases that involve non-trade values, like environment and human rights, from the WTO panel to the ICJ in order to provide adequate solutions with due protection for constitutional rights and interests.[10] This might be unrealistic

[8] http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm

[9] United States-Import Prohibition of certain Shrimp and Shrimp Products, Appellate Body Report, WT/DS58/AB/R, circulated on 12 October, 1998.

[10] M.Sornarajah, (2002) *Developing country perspective of International Economic Law in the context of Dispute Settlement* (Perspectives in International Economic Law, pp 83-100).

under the current dichotomy of dispute settlement systems in terms of structure and subject matter. However, as international organisations sharing at the end the same common values of member states, it can be suggested that although allocation of different functions is necessary in the international arena, it is also vital that international bodies should share in essence the same basic legal principles that speak for an integrated and elaborated approach to global, multinational concerns and that constitute a mutually interdependent, predictable, organised international law system. In particular, when panels are of specialised nature, like WTO and DSU, with concentration on economic issues by agreement, they may develop and use constitutional principles of common application that are recognised and common in other international dispute settlement systems in order to maintain an overall coherent approach. In other words, international systems that maintain the same common values and goals (economic welfare, sustainable development) could develop a substantively similar basic law of mutually accepted principles that are objective and neutral and by nature justify their universal applicability. Also, the UN Charter clearly states the legal position as to the inter-relatedness of the economic, social, and cultural domains. The application of law within the international economic domain should take cognizance of the international law standards in the social, cultural and other domains. The principle of balance might constitute exactly such an integrated methodology. It can be described as a systemic approach that takes into account relating factors of the given system. It can be defined as follows:

"Equal and interdependent factors constituting an integrated system should be in balance".

To find the balance is a delicate task and there are certain characteristics that are essential preconditions to do so. Firstly, balance can be given only within a system comprising of diverse factors. Slight deviations or fluctuations of one of the factors does not much effect nor is necessarily detrimental for the condition of the others. However, if deviations are extreme, reaching limits, then it does almost always disadvantage, or negatively effect other components. This, in its turn, can be fatal to the harmonic existence of the whole system. This equilibrium works only when the compounding components are firstly, interrelated and secondly, of equal nature (in strength, position, interest etc). Provided these basic two conditions are met, then balance can be well-founded.

Secondly, we need to consider one very important factor that characterises every system: the constant process. Compounding units of any existing system are involved in one or more processes of constant change and/or mutual interaction, so that while some new units may

develop, some may disappear evolving new forms. Nothing exists totally independent on its own without being involved in a mutually interdependent process. It is therefore essential to keep in mind the system of relationships of dynamic factors. Although the components of the system exist in constant process, each system has long-term, permanent factors that characterise and keep the system as it is. By consideration of the dynamics of the system, it is thus important to distinguish long-term from short-term factors because the first determine systemic goal orientation and establish general balance within the system. In other words, factors like human rights, the environment and economic growth may be regarded as permanent, long-term interests of the international community and are of equal nature since these three factors are equally of utmost necessity for human existence and maintenance of its life.

Certainly deeper empirical scholarship is needed in the areas of economics, environmental and human rights studies to maintain a well-founded balance, in particular, in the areas of mutual relationships and interactions and effects of the balanced approach. As a legal approach, based on the assumption that there are equally legitimate factors or interests that are consistent and interdependent such as human rights (labour rights, right to development, developing country specific needs etc), economic growth and the environment, balance can substantiate a legal principle that complies with common values of the international community and holds within limits the interests where their priority over others can be detrimental to the latter, or the whole system. The foundation of the balance is based in summary on the following five enquiries which I suggest as a test to be applicable where economic, environmental and human rights factors come into question. This test could be applied as a rational instrument of decision-making, in particular in dispute settlements.

The balance test should, I assess, consist of the following:

1. Equally legitimate components. Firstly, one needs to consider whether the components in question are of equal character (in terms of interest, power, and necessity) because only in such cases one can substantiate balance;

2. Interdependence. Secondly, whether the components in question of the given system are interdependent and whether this interdependence is direct and strong. The components should be considered in their relationship;

3. Process. Here one needs to consider the components in process, their impacts of mutual interaction, co-operative and beneficial ways. Also, it is necessary to distinguish between short-term, less relevant components from long-term, permanent factors since the latter play a

key role in the determination of balance within the system;

4. Degree of deviation. Here it is necessary to consider whether long-term factors are in imbalance and, if so, whether this disproportion is so strong as to negatively effect others in the system and/or the whole system, inconsistent with the main objective;

5. Consistency with the systemic goal. Balance itself is not a goal, but an instrument that assists to achieve an appropriate objective. For instance, common values of the international community can be the objective achieved by harmonic balance of economic, environmental and human rights domains. The concept of balance and the test can therefore be applicable where policy is a matter of debate.

These five main considerations solved one by one would establish a base of legitimacy because balance would be established between equal interests. On the other hand, it aims to facilitate harmonic, mutually beneficial ways of cooperation by three interdependent domains oriented on long-term objectives and collaborative efficiencies This is the issue which will be discussed in the following passages.

iii. Economic factor

In the second half of the 1980s, there was a powerful consensus for closer integration of all countries into the global economy through rapid liberalisation of trade, finance and investment. It was believed that such policy would prevent setbacks to development caused by recurrent balance of payments crises and that trade liberalisation would ensure the best allocation of resources delivering welfare, growth rates and development to developing countries, while financial liberalisation would attract foreign capital seeking high returns in the developing countries. It was also believed that higher flows of FDI would further accelerate growth, not only by shaping domestic resources for capital accumulation, but also through the transfer of technology and organizational skills. Liberal economic policies (Washington consensus) followed by international financial institutions were reflected by international law and there emerged a dramatic increase in bi- and multilateral investment agreements giving high protection to foreign investment. The trend has been to create, as much as possible, favourable conditions to investment and remove anything standing in its way.

However, it is now clear that both globalisation and liberalisation which shape current global economy have led to deep rooted imbalances that have become a target of continued criticism and to an overall agreement for the need for governance. The recent financial crises in South East Asia, which later spread to Brazil and Latin America, the break down of social systems, massive unemployment in developing

countries, increasing poverty and hunger are only a few examples of current disparities. Rapid trade liberalisation in developing countries has further added to deficits leading to sharp increases in imports but without corresponding increases in exports. Liberalisation of capital flows, often prompted by the need to redress external deficits, has made matters worse and has lead to increased debts, currency appreciations and instability, thereby undermining trade performance.

Apart from direct economic consequences, the domination of economic interests to the detriment of human rights has led to migration, corruption, political instability and/or an abuse of human rights in countries bringing an overall downfall of their economies, feeding the totalitarism and furthermore to military conflicts[11]. Without paying adequate attention to the effects on the environment, economic development brings harmful consequences for the latter. As the former president of the World Bank, Robert McNamara said, "The problem facing development finance institutions, including the World Bank, is whether and how we can help developing countries to avoid or mitigate some of the damage economic development can do to the environment, without at the same time slowing down the pace of economic progress. It is clear that the costs resulting from adverse environmental change can be tremendous. It is equally clear that, in many cases, a small investment in prevention would be worth many times over what would have to be expended later to repair the damage."[12]

Undoubtedly, free economy does increase overall wealth and it is a prescription of economic policy, but, as a number of the Clinton administration's advisers recognised in an article in Foreign Affairs, "the United States enters the 21st century as the greatest beneficiary of the global system it helped create after World War II"[13]. The world population in 25 years will be 8 billion of which 7 billion will live in the developing countries. The discrepancy between rich and the poor is a realistic picture that shows that the hasty liberalisation of policy at any cost makes this disparity even greater. As J. Stiglitz writes in his ground breaking book "Globalisation and its Discontents"[14], much tuning has to be done to make globalisation fairer and more beneficial for all. He also stressed that by the imperfect competition, which is the existing policy adopted as the Washington Consensus, will make the poor poorer and the rich richer, because the poor cannot compete with the rich in markets where, for example, agricultural products are highly subsidised by richer countries. Freedom is a legitimate value in economic affairs

[11] Such as conflicts in Rwanda, Yugoslavia.

[12] Address to the UN Economic and Social Council", Nov. 13, 1970

[13] Cutler, W.B., Sperro, J. and Tyson, L.D'Andrea (2000), *"New World, New Deal"*, 79 (2) Foreign Affairs 80, p.81

[14] J Stiglitz, (2002) *"Globalisation and Its Discontents"*,.

and must be cherished. However, it cannot be justified as an unlimited concept because it involves multi-faceted aspects of social, political, economic and environmental dimensions. GATT/WTO principles of non-discrimination are important. However, they are only part of the main issue, not a solution, and do not cover the problem in the context with the main factors needed to be seen in coherence. The WTO Preamble acknowledges economic freedom is not an end in itself and political and social freedom are part of human welfare and are in the interests of achieving better standards of living. However, no adequate representation of non-trade values was established in the Bananas case where EU argued to be consistent with Lome Convention and the Appellate Body took a narrow view. Thai Cigarette[15] and US Embargo on Imports of Tuna[16] are further significant cases where competing free trade and environmental protection policies were decided for the first time. Environmentalists express concern that years of work negotiating environmental treaties could be disrupted if the WTO rules of trade are used to nullify those environmental enforcement measures under the assumptions that they violate free trade principles. International order therefore needs active and effective governance by the rule of law. Such is the international economic law that covers issues of competition, anti-dumping, fairer agreements on trade, services and intellectual property.

A balanced relationship of the economic factor with other factors would imply compliance with the common set of objectives, where it should not be underestimated, or given a priority at any cost to the detriment of other equally legitimate interests. Balance is not an elimination of any advantage in trade or economic profit, but the support of competitively-based trade restrictions with compliance with minimum labour and environmental rights standards. Economic liberalisation within the balance theory should constitute qualitative, competitive-based efficiency and adjustment policies reflecting economic, social and environmental factors. Balance cannot be regarded as an impediment to progress or development, but shall be understood to be an incentive for an integrated, cooperative and ab initio rational development that is sound with common, long-term interests. The concept can have a fundamental constitutional impact on the relationship between trade, environment and labour rights and can replace narrow-scoped, blanket prohibitions of trade restrictions to effect other countries' policies. Small dimensional trade restrictions do not bring substantial effects and, moreover, in the context of the disproportionate membership of the WTO (LDCs and rich countries) can be disadvantageous for the poorer countries.[17] Free trade

[15] Thailand –*Restrictions on Importation of and Internal Taxes on Cigarettes*, (1990) DS10/R-37S/200

[16] United States — *Restrictions on Imports of Tuna* (Tuna-Dolphin I 1991, 51pp. DS21/R; Tuna-Dolphin II, 1994. 63 pp. DS29/R)

[17] Bananas case where Ecuador did not use sanctions against EU which is typical when a poorer country

lawyers and policy-makers assume that reflection of minimum social and environmental standards is welfare minimising. Having regard for such fundamental "absolutes", one should not reflect only on their short-term, particular or exceptional effects, but should also consider the system as a whole. The minimum social and environmental standards should be studied and taken into account as to their long-term effects in the majority of cases.

iv. Human rights factor.

Humans are central in the drive behind the economy as employees or as consumers. On the other hand, economic welfare cannot be separable from human rights domain. Human rights and economic processes belong together in seeking to define goals, rules and principles of social order. Significant studies have been made recently by leading economists such as Jeffrey Sachs[18], Amartya Sen[19] as well the UN and other international organisations[20] that concentrate on the linkage of economic and social factors, their mutual interdependence and effects and, most importantly, ways of effective cooperation and win-win situations. The universal human rights concerns in international economic contexts relating to slave, abuse of child labour, inhuman and degrading working conditions, all forms of discrimination, right to collective bargaining and freedom of association should surely have a place in the formulation of economic law and policy. Reflection of the minimum labour rights and principles of the Universal Declaration of Human Rights should shape labour policies and standards. International cooperation, including international economic cooperation, must be based on the conditionality as to whether it upholds and advances human rights protection – civil, political, economic, social and cultural. Apart from labour rights that emerge within the context of economic development norms of self-determination, permanent sovereignty over natural resources forms a part of customary international law and specifically of international human rights law, and these come into question with regard to the interrelationship between human rights, economic development and environmental protection. There is considerable international support for the proposition that the right to participation, the right to development, and the right to environment are also international norms within the context of human rights law.

faces a powerful partner.

[18] Jeffrey Sachs, Macroeconomics and Health: *Investing in Health for Economic Development*, Report of the Commission on Macroeconomics and Health, December (2001) (www.un.org/esa/coordination/ecosoc/docs/RT K. MacroeconomicsHealth.pdf)

[19] Amartya Sen, (1999), *Health in Development*, The 52nd World Health Assembly, Geneva, 18 May.

[20] Such as UNDP (www.undp.org), World Health Organisation (www.who.org), International Labour Organisation (www.ilo.org), The Worldbank Group (www.worldbank.org) and European Bank of Reconstruction and Development (www.ebrd.org).

Establishing balance between economic development and human rights factor can be a delicate issue. It is important to study effects of the implementing policies as they may be different from initially intended. For instance, higher minimum wages that raise labour costs may sometimes result in a significant increase in unemployment. Alternatively, human rights abuses may lead to acute social conflicts and political and social instability. Current imbalances in the allocation of income and consumption among rich and poor countries cause a massive and rapid acceleration of labour migration across international borders. Labour migration, which is quite restricted in comparison to finance and trade flows, is temporary or undocumented and thus less protected. Many suggest that protection of basic labour rights in the developing countries would decrease labour markets' distortions. It is a difficult, if not impossible, task to consider all mutual interactions, dynamic and static effects of reflection of social standards. However, an ab initio balanced approach oriented on long-term effects taking into account not just the exceptional, but the majority of situations, can possibly be the most reasonable way of maintaining balance. Development of cooperative, win-win situations, both for domestic and global environment, where balanced economic and social factors affect positively and promote mutually, should challenge current economic and law studies. For instance, there is an overall agreement that reflection of human rights, promotion of health, reliable and true information, absence of coercion (slavery, violence, and child labour), and valued labour have important implications for productive efficiency and for shaping markets.

v. Environmental factor.

Environmental factor relates closely to human rights and economic factors. Many natural resources are needed for economic development such as petroleum and other minerals, timber, sources of hydro-electric and geothermal energy, and land for agricultural expansion. Air, water and soil pollution creates health hazards in addition to damaging economic assets. Inappropriate production techniques and the lack of capital to invest in environment friendly technologies result in air pollution which causes global warming and climate change. Poverty and lack of resources lead to inadequate management of waste with subsequent health problems, an acceleration of land erosion in rural areas, and increased ecological vulnerability. Training and access to information on sound agricultural methods, waste management, natural resources management, reforestation, water resources management, fisheries management and like policies reduce poverty and the effects of poverty on the environment. Support to municipalities and community

organisations, particularly in the field of waste management, can create jobs and reduce the pressure on the environment. International cooperation is needed to replace environmentally damaging production technologies with environment friendly ones as well as to take care of the global commons. Uninterrupted growth in the economic system and excessive consumption exhausts the resources, results in the degradation of natural systems and raises questions of human survival. In order to balance between economic development and environmental protection, the concept of sustainable development has been introduced in the international community. Sustained development requires the aim of economic growth to be made compatible with ecological balance. In other words, balance should be cherished between the right of States to exploit their natural resources and development policies. Natural resources should be carefully managed for present and future generations; capacity of vital renewable resources must be maintained and for non-renewable resources, prevention of their future exhaustion[21]. Moreover, the international environmental law has developed the concepts of preservation of the environment, conservation of natural resources, intra- and intergenerational equity, common but differentiated responsibilities (CDR) influencing the domestic and international development policies and laws.

International Economic law encompasses a range of issues that relate to the environment such as provisions on exploitation of natural resources, foreign investment and trade. The WTO Agreement recognises in its Preamble the objective of sustainable development and the need to protect and preserve the environment. The Agreement on Subsidies and Countervailing Measures treats as a non-actionable subsidy government assistance to industry covering up to 20 per cent of the cost of adapting existing facilities to new environmental legislation. And both the intellectual property (TRIPs) and the services agreements contain environment-related provisions. In earlier environmentally-related significant disputes under Article XX which makes an exception allowing the parties to deviate from trading provisions if necessary to protect human, animal or plant life or health and conservation of natural recourses, the GATT panel found the US law (following US Marine Mammal Protection Act) banning the import of tuna from Mexico inconsistent with the free trade provisions of the GATT. The case became the target for extensive criticism. Soon afterwards the newly established Committee on Trade and Environment within the WTO made its first report, submitted to the WTO Ministerial Conference in Singapore in

[21] Stockholm Declaration of the United Nations Conference on the Human Environment, 1972; Rio Declaration of the United Nations Conference on Environment and Development, 1992; UN Convention on Biological Diversity, (1992).

1996, where it was noted that the WTO is interested in building a constructive relationship between trade and environmental concerns. Progressively, in recent cases such as Shrimps and Turtle[22]s case, the WTO panel considered the objective of sustainable development to be relevant in the interpretation of WTO agreements. The multilateral economic system has the capacity to further integrate environmental considerations and enhance its contribution to the promotion of sustainable development.

Identifying and evaluating evolving standards in international law, both in "hard and soft" law, the WTO faces inevitably a new development trend that would not totally coincide with the initial objectives of unrestricted, liberal trade. Nevertheless, the trend is progressive and adjustments sound to the current process are needed. Policy-makers, lawyers, economists and environmentalists are required to come together. It becomes necessary for international organisations to cooperate more closely in order to achieve coherent, systemic international standards that link economic, social and environmental factors in a balanced, mutually supportive and beneficial way. For instance, policies to support modern, technologically advanced manufacturers to produce more environmentally friendly products with no additional costs (at the same time complying with minimum standards) and no subsequent increase in prices for consumers. GATT Secretariat advocated financial inducement as an alternative means to sanction for influencing countries to adopt higher environmental standards.[23] Labelling of products is another alternative for the consumers to make their investment choices for more environmentally sound products. However, the difficulty of the task can relate, in particular, to developing countries when implementation of strict environmental regulations (like eco-labelling) is perceived to negatively affect a country's competitiveness and would instead promote industries of developed countries. Whereas theoretical analyses of trade and the environment indicate that relatively strict environmental policies can have a strong impact on foreign trade, empirical studies present mixed results. Often developed and developing countries confront each other as consumers versus producers of intellectual property; new producers versus producers with established standards; traders entering markets versus traders protecting existing markets[24]. Tensions are likely to stay; however, it is the role of international law and policy to facilitate a harmonic and stable relationship. Thus, more fine-tuned approaches that meet national capacity and international

[22] United States-*Import Prohibition of certain Shrimp and Shrimp Products*. Appellate Body Report. WT/DS58/AB/R. 12.10.1998

[23] GATT Secretariat (Feb.3 1992) *Trade and Environment*, GATT Doc. 1529

[24] Sheila Page, (2002) *Developing country participation in multilateral trade negotiations: developing country perspectives and negotiating framework*. (Perspectives in International Economic law p. 111).

assistance[25] should be established.

Conclusion

Unlike previous attempts to deal separately, there is currently a growing consensus that environmental, economic, and human rights concerns are linked and possess a multidimensional, fundamental nature. It is realised that the international community needs studies reflecting systemic inter-relationships among the issues raised.

Sustainable development has become a very broad principle of soft-law character which, on the other hand, also hinders its particular application in international law. Nevertheless, its significance as a balancing concept between economic and environmental tensions must not be undermined. Principles of international environmental and human rights law should complement international economic law when fundamental issues are concerned and in tension. This should create in the end a systemic, integrated international approach that is consistent with international commons and that harmonises policies of different areas. Policies mentioned above show the necessity of broader cooperation between diverse studies and scholarship and, moreover, of political awareness.

Based upon the broad consensus that a balanced approach is needed, the legal principle of balance has been suggested to be applied either as a constitutional fundamental or a dispute settlement instrument where tensions between the three essential domains occur. Reflection of legitimate equal factors will develop WTO inevitably into a multifunctional system that has a constitutional dimension which might need structural and substantive law reforms in the coming years. Dispute settlement of the WTO is often criticised for non-democratic, non-transparent procedures and unilateralism. Sornajarah suggests that the dispute concerns not only the parties to the contract but wider society in general, whose interests cannot be adequately considered by a tribunal created by the will of the parties. On this analysis, the presence of factors in the dispute which implicate the interests of society at large, or the international community, become inherently incapable of resolution through the process of arbitration[26]. Thus, further adjustment and development are required. In particular, enhancement of the legitimacy of the WTO dispute settlement body by inclusion of impartial experts, professional NGOs, closer co-operation with the ICJ, the openness of hearings can be improved. Recently a Consultative Board to advise the WTO Director

[25] Bernard Hoekman, (2002) *Economic Development and the WTO after Doha*.

[26] M. Sornarajah, (2002) *A Developing country perspective*, Perspectives in International Economic law, p.109.

General on the challenges and opportunities confronting the WTO and the multilateral trading system was established. It will be preparing a report on how to institutionally strengthen and equip the WTO that expands to almost universal membership to respond effectively to future systemic challenges brought about by an increasingly integrated global economy[27].

Apart from direct policies, challenges necessitate the interpretation of the agreements to go beyond the strict written documents and assume more contextual interpretation considering systemic objectives and concerns, whenever this becomes relevant. The Balance test as a legal and neutral instrument can assist to achieve balanced decision-making. Principles of law even if they are not found in the legal system of every Member State could be a principle of WTO law and not of domestic law. This is particularly evident in the protection of fundamental commons of the international community.

[27] http://www.wto.org/english/news_e/pres03_e/pr345_e.htm

RELATIONSHIP BETWEEN THE CONSTITUTIONAL AND SUPREME COURT OF MONGOLIA

*Ganzorig Gombosuren**

I. Background

Although Mongolia generally considers itself to have a civil law system, unique geographic, cultural, and political influences have made Mongolia's civil law system diverse from the traditional civil law systems that flourished in the Western European countries of France, Germany and Italy which are similar. This paper explores how Mongolia's Central Asian location and nomadic history have influenced the development of its legal system.

In the twelfth century, the Mongols established an empire that ultimately extended from the Pacific Ocean to the Mediterranean Sea and from Siberia to India. The Mongols governed their conquered territories with strict administrative laws enforced by a well-disciplined army of horsemen. During the rule of the Great Chingis Khan (1165-1227), Mongolia developed the "Great Yasa."[1] This complex code regulated family, trade, hunting, military, tax, property, criminal, and administrative issues. Although many of these rules have been forgotten since the fall of the Mongolian Empire, some of the rules of the "Great Yasa" still live in the customs of nomadic Mongolian life. For example, in setting up military rule, Chingis Khan ordered waistbands must be confiscated from all prisoners of war before they were sent to jail, to prevent them from committing suicide. Over the years, this led to a custom among Mongolians that a properly-dressed man must wear

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Justice of the Criminal Division of the Supreme Court of Mongolia, Judge and Chief Judge of Military Court, Dornogobi,
Argued number of times (as a private citizen) before the Constitutional Court, defending human rights and judicial independence (lost most of them).
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Attended seminars and conferences on human rights in Mongolia, Thailand, South Korea, Canada and USA.

[1] Sengee S (1992), *"Great yasa of Chingis Khan"*

a "deel"[2] and waistband; otherwise, he would lose respect before his people.

During the seventeen years before 1990, under the influence of communist Russia, Eastern Germany and other socialist countries, Mongolia adopted three Constitutions that contributed to the development of Mongolia's traditional civil law system with its heavy socialist ideological orientation.[3]

After peaceful democratic revolution in 1989, Mongolia's fourth constitution (adopted in 1992) created the basis for democratic reforms and established a balanced governmental structure with a legal basis for new institutions such as the Parliament, the Presidency, and the two highest courts -- the Constitutional Court and the Supreme Court.[4] The purpose of this paper is to compare the Constitutional Court of Mongolia and other judicial and government institutions; to examine the jurisdiction of the Constitutional and Supreme Courts; and lastly, to identify the best means of cooperation between the Constitutional and Supreme Courts so that they can better serve the people of Mongolia by protecting and promoting their constitutional rights.

II.Comparison of the Constitutional Court of Mongolia and the Constitutional Council of France

A. Establishment and Jurisdiction

Before examining the function of the Constitutional Court, I would like to make a brief comparison of the Mongolian Constitutional Court with the Conseil Constitutionnel (Constitutional Council) of France.[5] The two institutions have many identical functions, despite their differences.

The constitutional courts are relatively new institutions in both countries. In Mongolia, the Constitutional Court was created by the Constitution of 1992, prior to which there was no judicial or government institution dealing with constitutional matters. The 1992 Constitution provides for review by the Constitutional Court of acts of the Ikh Khural

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[2] Mongolian traditional costume consists of a deel, which is a long, warm coat, and a bys, which is a 2-3 meter long piece of material used as belt or strap over the deel

[3] Sovd S. (2000) *Mongol Ulsin Undsen Khuulin tailbar.* (Interpretation of the Constitution of Mongolia) Ub. p. 4

The Constitution of Mongolia (1924)

The Constitution of Mongolia (1940)

The Constitution of Mongolia (1960)

The Constitution of Mongolia (1992).

[4] Mongol ulsiin undsen khuuli (Constitution of Mongolia)- art 20 (Parliament); art. 30 (Presidency); arts. 48 and 50 (Supreme Court); and art. 64 (Constitutional Court)

[5] Constitution of France (1958) - Title VII (*available at* http://www.assemblee-nationale.fr/english/8ab.asp).

(the parliament).[6] Judicial review of the constitutionality of acts of Parliament is something of a novelty in France, since the concept was long rejected on the grounds of the absolute sovereignty of Parliament. The Constitutional Council was set up under Title VII of the Constitution of October 4, 1958,[7] as the "expression of the will of the people" according to Article 6 of the Declaration of Human and Civic Rights of 1789.[8]

Generally, a constitutional court exercises supreme supervision over the implementation of the constitution by passing judgments on the violation of its provisions by individuals and government entities and resolving constitutional disputes. The Constitutional Court serves as a guarantor of the strict observance of the Constitution. With similar authority, the Constitutional Council is also endowed with consultative powers, which is unusual for courts. The President of the Republic must consult with the Council in order to know whether any conditions exist for the "exercise of emergency powers" as well as about terms of other measures taken.[9] Additionally, the Council has power to impeach the President.[10]

B.Composition, Appointment and Removal

The 9 members of the Mongolian Constitutional Court are appointed by the National Parliament, for a term of six years, upon the nomination of three by the National Parliament, three by the President, and the remaining three by the Supreme Court.[11] The Constitutional Council has the same number of members, but they are appointed by the President of the Republic and by the Presidents of each of the Parliamentary Assemblies for a non-renewable nine-year term.[12] One-third of the members are replaced every three years.[13] In addition, former Presidents of the Republic are de jure life members of the Constitutional Council.[14] To date, only two Presidents of the Fourth Republic, Ren Coty and Vincent Auriol, have taken their seats. The Chairman of the Mongolian Constitutional Court is elected from among the 9 members for a term of three years by a majority vote of the members of Constitutional Court, and may be re-elected once.[15] In contrast, the President of the French Republic appoints the President of the Constitutional Council from

[6] Mongol ulsiin undsen khuuli (The Constitution of Mongolia)-art 66(2)(1).
[7] Constitution of France- Arts 56-63.
[8] La Déclaration des droits de l'homme et du citoyen (Declaration of the Rights of Man and of Citizens)
[9] Constitution of France- Art 16.
[10] Constitution of France- Art 7.
[11] Mongol ulsiin undsen khuuli (The Constitution of Mongolia)- Art 65(1).
[12] Constitution of France- Art 56.
[13] Constitution of France- Art 56.
[14] Constitution of France- Art 56.
[15] Mongol ulsiin undsen khuuli (The Constitution of Mongolia)- Art 65(3).

among the members he nominates.[16]

If the Chairman or a member of the Mongolian Constitutional Court violates the law, he or she may be withdrawn by the National Parliament on the basis of the decision of the Constitutional Court and on the opinion of the institution which nominated him or her.[17] On the other hand, "members of the Constitutional Council can freely relinquish their functions and can be compulsorily retired from office in the event of incompatibility or permanent physical incapacity as determined by the Constitutional Council."[18] The institutional independence of both courts is therefore ensured by the fact that members can be removed from office only upon their own institution's determination.

The President, members of the National Parliament, the Prime Minister, members of the Government, and members of the Supreme Court may not be nominated to serve on the Constitutional Court of Mongolia.[19] The same restrictions apply to the members of the Constitutional Council, where "the office is incompatible with that of member of the government, the parliament, the European Parliament, or the Economic and Social Council."[20]

The Constitutional Court examines and settles constitutional disputes at the request of the National Parliament, the President, the Prime Minister, the Supreme Court, and the Prosecutor General, or "on its own initiative on the basis of petitions and information received from citizens."[21] In France, in contrast, individuals who may refer constitutional disputes to the Council are limited to the President, the Prime Minister, the President of the National Assembly, the President of the Senate, or a group of sixty deputies or senators.[22]

It is interesting to note that in Mongolia, bills passed by the Parliament become laws, at which point, if an interested person or institution challenges it, the law may be reviewed by the Constitutional Court.[23] On the other hand, in France, bills being considered by the Houses of Parliament are submitted before enactment to the Constitutional Council, which then rules on their conformity with the Constitution.[24]

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[16] Constitution of France-Art 56.

[17] Mongol ulsiin undsen khuuli (The Constitution of Mongolia)- Art 65(4).

[18] Présentation du Conseil (Description of the Constitutional Council), available at http://www.conseil-constitutionnel.fr/anglais/ang4.htm.

[19] Mongol ulsiin undsen khuuli (The Constitution of Mongolia)- Art 65(5).

[20] Presentation du Conseil, *supra* note 18.

[21] Mongol ulsiin undsen khuuli (The Constitution of Mongolia)- Art 66(1).

[22] Constitution of France-Art 61.

[23] Mongol ulsiin undsen khuuli (The Constitution of Mongolia)- Art 66(2)(1).

[24] Constitution of France- art 61 ("Institutional Acts, before their promulgation . . . must be referred to the Constitutional Council, which shall rule on their conformity with the Constitution. ").

Thus, the principal procedural differences between the two courts are seen in their rules on standing and jurisdiction.

C.Landmark Cases

Initially, the French Constitutional Council's principal powers seemed to be to determine the respective areas covered by acts of Parliament and executive regulation and to monitor presidential and parliamentary elections and referendums under Articles 58, 59 and 60 of the Constitution. No one foresaw that France's Constitutional Council, like constitutional courts elsewhere in Europe or America, would come to occupy the prominent place it now has in the government and in the protection of fundamental freedoms.

One of the factors that greatly contributed to this prominence was a landmark ruling in 1971, in which the Constitutional Council settled a difference of opinion as to the legal status of the preamble to the 1958 Constitution, which makes reference to the preamble to the Constitution of the Fourth Republic of 1946 and to the Declaration of Human and Civic Rights of 1789. While some legal authorities and draftsmen of the Constitution had regarded the principles contained in these texts as mere affirmations without direct force of law, the Constitutional Council recognized their legal status in 1970 and on July 16, 1971, when it relied on the preamble to the 1946 Constitution to establish that the freedom of association had constitutional status -- a fundamental principle recognized by the laws of the Republic.[25]

Thus, the Council was transformed into a judge of the consistency of the law with the totality of rules and principles of constitutional status. This is a typical development process of the constitutional courts in various countries. The Constitutional Court of Mongolia is no exception, as it continues to struggle to establish its authority. A recent ruling dealt with Article 29(1) of the Constitution, which provides that Members of the National Parliament receive remuneration from the State budget during their tenure and may not concurrently hold any posts and employment other than those assigned by law.[26] After the 1996 election, during negotiations on the establishment of the government, the parliamentary majority, the Democratic Coalition, proposed to appoint some Members of Parliament as governmental ministers. Mr. R. Lamzav, one of the well-known leaders of the Social Democratic movement, challenged this action as contrary to the Constitution.

The Constitutional Court reviewed the dispute and ruled that the

[25] Conseil Constitutionnel, July 16, 1971, decision no 71-44 DC (Liberté d'association [freedom of association]), available at http://www.conseil-constitutionnel.fr/decision/1971/7144dc.htm.

[26] Mongol Ulsiin Undsen Khuulin Tsetsiin Shiidverin Emkhetgel-2, (2000) (The Constitutional Court Report, Vol.2), Ub, p 58.

action was unconstitutional and that a Member of Parliament may not hold the position of Minister.[27] This was without a doubt very important political decision. The Parliamentary majority was composed of brand new members of the young Democratic Coalition and were eager to become Ministers in the Government, but the opposition Mongolian People's Revolutionary Party (MPRP)[28] members angered the majority by blocking this attempt.

The Constitutional Court upheld the MPRP's position in their decision that contributed greatly to the popularization of the Constitutional Court. Moreover, the ruling made the Parliament change the existing practice of Government formation, as Members of Parliament could no longer be appointed to the soft, comfortable position of Minister. Parliament in turn reacted strongly to this decision and on December 24, 1999, adopted the First Amendment to the Constitution.[29] The Amendment was designed to realize the Parliamentarians' chance to be at the same time a Member of Parliament and a minister in the Government. Article 29(1) now states: "Members of the National Parliament receive remuneration from the State budget during their tenure. A member of Parliament may not hold concurrently any posts and employment other than those assigned by law, except the position of Prime Minister and a member of Government."[30]

The President strongly opposed the First Amendment, which he then vetoed. According to the procedure established by the Constitution, the Parliament considered the President's veto and rejected it by a two-thirds vote.[31] Surprisingly, that was not the final solution to the problem. A group of citizens, among them former Member of Parliament Mr. S. Narangerel, brought the dispute to the Constitutional Court. Article 68(1) of the Constitution states that the Constitutional Court may propose an amendment to the National Parliament.[32] The petitioners claim that the Parliament has infringed on the Constitution, since the Parliament did not present an opportunity for the Constitutional Court to submit an Amendment. The issue is therefore still being considered by the Constitutional Court.

While the historical ruling of the Constitutional Court in the Lamzav case caused much controversy, it ultimately led to a Constitutional Amendment. Nevertheless, I can only assume now that the Constitutional

[27] Id.

[28] The Mongolian People's Revolutionary Party (MPRP) is the former Communist Party, which now has a more social democratic tendency

[29] "Turiin Medeelel" (1999-59) (Government Report)

[30] Mongol ulsiin undsen khuuli (The Constitution of Mongolia)-Art 29(1)

[31] Mongol ulsiin undsen khuuli (The Constitution of Mongolia)-Art 33(1)(1)

[32] Mongol ulsiin undsen khuuli (The Constitution of Mongolia)- ("Amendments to the Constitution . . . may be proposed by the Constitutional Court to the National Parliament.").

action was unconstitutional and that a Member of Parliament may not hold the position of Minister.[27] This was without a doubt very important political decision. The Parliamentary majority was composed of brand new members of the young Democratic Coalition and were eager to become Ministers in the Government, but the opposition Mongolian People's Revolutionary Party (MPRP)[28] members angered the majority by blocking this attempt.

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[29] "Turiin Medeelel" (1999-59) (Government Report)

[30] Mongol ulsiin undsen khuuli (The Constitution of Mongolia)-Art 29(1).

[31] Mongol ulsiin undsen khuuli (The Constitution of Mongolia)-Art 33(1&4).

[32] Mongol ulsiin undsen khuuli (The Constitution of Mongolia)- ("Amendments to the Constitution ... may be proposed by the Constitutional Court to the National Parliament.").

Court is slowly, but surely, moving toward to its right position in the Mongolian governmental hierarchy.

The Constitutional Court is supposed to be the only institution in Mongolia, that authorized to exercise judicial review over the Parliament and Executive's action and to say whether their activities in accordance with the Constitution. There was a lack of experience and well-educated constitutional law professionals since no one exercised this power before; nevertheless, the Constitutional Court is doing its job well. It already has demonstrated it throughout the country and I believe that the Constitutional Court strengthened its position in the Mongolian governmental hierarchy.

D.Submission of Petition to the Constitutional Court

There are two types of petitioners that can bring a dispute to the Constitutional Court. First and most importantly, all citizens of Mongolia are eligible to petition directly, skipping the ordinary courts and proceeding directly to the Constitutional Court if they believe that their constitutional rights have been violated.[33] Thus, the Constitution puts in the hands of the Mongolian people a powerful instrument for the protection of their rights. Through this instrument, they have been able to successfully challenge a bill that has been adopted by Parliament.

On August 21, 1992, the Parliament passed Law No. 24 "Joining of some Provincial Cities", which allowed the merger of several small provinces in the northern and southern parts of Mongolia.[34] However, people in these provinces were unhappy with the law, as a result of which Mr. I. Badarch and some other citizens petitioned the Constitutional Court, complaining that the law violated their constitutional rights, since the merger was not consistent with the will of local people. The Constitutional Court determined that because Parliament did not meet with local residents to assess public opinion before passing the Law, it had disregarded the autonomy of the local administration and people. The Court thus upheld the claim, stating that while passing this law, the Parliament had violated article 57(3) of the Constitution, which provides that revision of an administrative and territorial unit shall be considered and decided by the National Parliament on the basis of a proposal by a respective local parliament and local population. This was the first case decided by the Constitutional Court after its creation in 1992.[35]

Rules governing the procedure of communication with the Constitutional Courts differ in various states. In France, only certain

[33] Undsen Khuuliin Tsetsiin tukhai khuuli (Law on the Constitutional Court) (1992)-art 9

[34] Sum duurgiig negtgekh tukhai khuuli (Law on merger of Certain Provincial Cities) (1992)

[35] Badarch.I and Parliament (2000-1) "Undsen Khuuliin Tsetsiin shiidverim emkhetgel" (The Constitutional Court Report) Ub.

officials such as the President, the Prime Minister, the Speakers of the two Houses of Parliament, or a group of 60 senators are entitled to apply to the Constitutional Council,[36] whereas in the United States, the Supreme Court may rule on constitutional matters raised by parties in the course of proceedings before lower federal or state courts.[37]

In Mongolia, the Law on Constitutional Court Procedure determines who has standing before the Court. Article 16(2) says that foreign citizens and stateless persons residing lawfully in Mongolia shall enjoy the right to forward petitions and information.[38] The Law also states that Mongolian citizens are "entitled to submit petitions"; the President and other high officials are "entitled to forward requests"; and foreign people "enjoy the right to forward petitions".[39] Despite the different use of words, it seems that the very idea of the Constitution is that all people in Mongolia, without any discrimination, shall have equal rights to petition to the Constitutional Court.

According to Article 66(1) of the Constitution, there is also a limited number of governmental officials and governmental institutions such as the National Parliament, the President, the Prime Minister, the Supreme Court, and the Prosecutor General that are authorized to refer a dispute to the Constitutional Court.[40] Upon request by one of these bodies, the Constitutional Court shall render an intermediate ruling on 1) the constitutionality of laws, decrees, and other decisions by the National Parliament and the President, as well as Government decisions and international treaties signed by Mongolia;[41] and 2) the constitutionality of national referendums and decisions of the central election authority on the elections of the National Parliament and its members as well as on presidential elections.[42]

The Constitutional Court then presents its opinion to the Parliament for consideration. Despite this procedure, the interference from the Parliament has only a symbolic meaning, since, if the Parliament does not agree with its opinion, the Constitutional Court will re-consider the matter again and make the final decision, in which it may uphold its previous intermediate ruling.[43]

In addition, there is a second type of area that illustrates a combined

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[36] Constitution of France- Art 61.

[37] Constitution of U.S-Section III.

[38] Undsen khuuliin shuukhed khereg khyanan shiidverlekh tukhai khuuli (Law on Constitutional Court Procedure) (1997), Ub

[39] Undsen khuuliin shuukhed khereg khyanan shiidverlekh tukhai khuuli (Law on Constitutional Court Procedure)(1997), Ub

[40] Mongol ulsiin undsen khuuli (The Constitution of Mongolia)- Art 66(1).

[41] Mongol ulsiin undsen khuuli (The Constitution of Mongolia)- Art 61(2)(1).

[42] Mongol ulsiin undsen khuuli (The Constitution of Mongolia)- Art 61(2)(2).

[43] Mongol ulsiin undsen khuuli (Constitution of Mongolia)- art 66(3) ("If a decision . . . is not acceptable to the National Parliament, the Constitutional Court re-examines it and issues final judgment.").

or shared function. Article 66 (2) of the Constitution also authorizes the Constitutional Court to rule on whether the President, Chairman and members of the National Parliament, the Prime Minister, members of the Government, the Chief Justice and the Prosecutor General have breached the Constitution;[44] and whether there are good grounds for the removal of the President, Chairman of the National Parliament, and the Prime Minister and for the recall of members of Parliament.[45] Despite the fact that the Constitutional Court rules on these matters, it is not the final decision. After the finding of the Constitutional Court, the institution that is authorized to request the Constitutional Court's opinion makes the final decision about the removal of high governmental officials.[46]

III.The Supreme Court

A. Judicial Power

As discussed above, the Mongolian Constitution contains certain provisions designed to regulate the relationship between the two high courts, the Constitutional and Supreme Courts. Chapter Three, section four of the Constitution focuses on the judiciary, whereas Chapter Five contains provisions regarding the Constitutional Court.[47] Article 47 provides that the judicial power is vested exclusively in courts and "exercise of judicial power by any other organization but courts is prohibited."[48] However, the phrase "judicial power" should be interpreted more narrowly in the Mongolian context than it is elsewhere.

"Judicial power . . . is the power of a court to decide and pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision," according to Mr. Justice Miller, in writing about the U.S. Constitution.[49] Black's Law Dictionary defines judicial power as "the authority exercised by that department of government which is charged with declaration of what law is and its construction."[50] This is the essence of the judicial power vested in courts and judges, as distinguished from executive and legislative power.

Courts have general powers to decide and pronounce a judgment and carry it into effect between the persons and parties who bring a case before it for decision, as well as such specific powers as contempt

[44] Mongol ulsiin undsen khuuli (Constitution of Mongolia)- Art 66(2)(3).
[45] Mongol ulsiin undsen khuuli (Constitution of Mongolia)- Art 66(2)(4).
[46] Mongol ulsiin undsen khuuli (Constitution of Mongolia)- Art 35 (providing for removal of President by National Parliament "on the basis of the findings of the Constitutional Court.").
[47] Mongol ulsiin undsen khuuli (Constitution of Mongolia)-Ch. III, part 4, arts. 47-56 and Ch. V, arts. 64-67.
[48] Mongol ulsiin undsen khuuli (Constitution of Mongolia)- Art 47(1) and (2).
[49] Muskrat v. United States, (1911), 219 U.S. 346, 356 *quoting* Miller on the Constitution.
[50] Black's law dictionary (5th ed. 1983), 441.

powers, power to control admission and disbarment of attorneys, and power to adopt rules of court. This power involves the exercise of judgment and discretion in determination of questions of right in specific cases affecting interests of person or property, as distinguished from ministerial power involving no discretion. The Mongolian Supreme Court's power to declare "of what law is and its construction"[51] is limited to the scope of ordinary laws and does not enable the Supreme Court to apply this authority to the Constitution.[52] Additionally, a member of the Government in charge for justice (Ministry of Justice), has the "power to control admission and disbarment of attorneys"[53] and the "power to adopt rules of court" has been vested in the Parliament.[54]

These provisions in the Mongolian context make the Supreme Court weaker in comparison to the Parliament and other branches of government. As a result, the Supreme Court of Mongolia is not as powerful as its counterparts in Western countries.

B.The Supreme Court Jurisdiction

Article 50 of the Constitution, which defines the jurisdiction of the Supreme Court, states that it exercises the following powers:

1) according to relevant law, to try at first instance criminal cases and legal disputes under its jurisdiction;

2) to examine decisions of lower instance courts through appeal and supervision;

3) to make decisions on human rights and freedoms protection issues transferred to it by the Constitutional Court and the Prosecutor General;

4) to provide official interpretations for the correct application of all other laws except the Constitution; and

5) to make decision on all other matters assigned to it by law.[55]

The wording of Article 50 seems to raise two important issues. First, it is possible to derive a significant and logical conclusion that courts in Mongolia have limited jurisdiction. It can hear only cases and disputes assigned to it by a law, while all other cases and disputes are not within the jurisdiction of an ordinary court. The very first constitutional case, I. Badarch v. Parliament, mentioned in section I (D), clearly illustrates this procedure.[56] Mr. I. Badarch petitioned the Constitutional Court

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[51] *Id.*

[52] Mongol ulsiin undsen khuuli (Constitution of Mongolia)-Art 50(1)(4) (the Supreme Court interprets "all other laws except the Constitution.").

[53] Umguullun tuhai khuuli (Law on Advocacy)(1994)-Art 9, 11.

[54] Mongol ulsiin undsen khuuli (Constitution of Mongolia)-Art 25(1)(1) (the Parliament amends and passes laws).

[55] Mongol ulsiin undsen khuuli (Constitution of Mongolia)-Art 50.

[56] *Supra* note 35.

directly, without filing a complaint with an ordinary court. According to Article 50, even if I. Badarch had brought the petition to an ordinary court, it would have considered the issue out of its jurisdiction and directed the petition to the Constitutional Court. Currently, the Parliament has passed about 250 laws that in some way refer disputes to the judiciary in case of conflict. [57] As a result, the courts have enough cases and disputes to keep their 360 judges[58] extremely busy. Nevertheless, an appropriate Mongolian proverb says that "life is always richer than man's imagination." Whatever the rule is, there will always be areas that are not administered or covered by a law. Second, Article 50 excludes constitutional interpretation from the power of the Supreme Court, but fails to vest this power in either the Constitutional Court or the Parliament. Nor does it says who will exercise this extremely important power and how it will be exercised. Hence, it leaves a vacuum in power, causing extraordinary controversy.

C.The Supreme Court Interpretation of the Constitution

It is important to mention that while explaining certain definitions in the statutory laws, the Supreme Court is also establishing precedent on the interpretation of the Constitution, which would be considered indirect interpretation. For example, Article 33 states that the President enjoys certain prerogatives, including the right to propose candidates for the appointment to the post of Prime Minister, in consultation with the majority party or parties.[59] Describing President's power in the Law on President, the legislature used the same word, "consultation," as in the Constitution.[60] In 1995, President requested the Supreme Court to give an official interpretation of the word "consultation" in the context of the Law on President.

In response, the Supreme Court rendered a short resolution explaining the word "consultation."[61] An interpretation of legislation in Mongolia is quite different than in the US or common law countries, where the highest court determines, through the application of law at the court hearing, what the law is. Traditionally, the Supreme Court of Mongolia makes an abstract interpretation, describing the legal meaning of certain words or sentences in a particular law. The interpretation is in effect a guideline or advisory opinion on how to understand or apply

[57] *Announcement from Ministry of Justice*, http://www.pmis.gov.mn/supreme/main1.htm, (Last visited in 1999.08.21)

[58] Deed Shuukhiin 1997 ond ajliin tailan (The Supreme Court Year Report) (1998) //, Law Journal Tur Erkh Zui (Law and State), Ub

[59] Mongol ulsiin undsen khuuli (Constitution of Mongolia)- Art 33

[60] Mongol ulsiin erunkhiilugchiin tukhai khuuli (Law on President) (1993).

[61] Supreme Court Report (1996-3), "Erunkhiilugchiin tukhai khuulig tailbarlakh tukhai" 1996.06.28-ni udriin 216 toot togtool //(Interpretation of Law on President) June 28, 1996, NO. 216, Ub

a certain provision of law in future judicial proceedings or in general. The Supreme Court interpretation of "consultation" was considered satisfactory, since it did not cause any controversy among the lawmakers and presidential office members and the Constitutional Court did not complain that the Supreme Court was interfering with its exclusive function.

As I was working at the Supreme Court at the time, I naturally took part in the deliberations on this official interpretation. Although the issue as to whether the Supreme Court has the power to make interpretations of legal language contained in both the Constitution and statutory law caused enormous discussion at the Supreme Court hearing, we reached at a compromise through which our explanation would apply only to the Law on the President and not to the Constitution. Therefore, we mentioned in our explanation only the provision of the Law on President, not the Constitutional provision on this matter. In addition, the interpretation was strictly limited by article 50 of the Constitution, which states that the Supreme Court interprets all laws except the Constitution. In my opinion, the rendering of this resolution was one of the first important steps that the Mongolian Supreme Court took towards establishing the leadership role that belongs to the judiciary in a democratic society.

It therefore must be acknowledged that, despite Article 50, the Supreme Court is able to interpret the Constitution while acting in its ordinary court capacity. In addition, there is one essential nuance in the interpretation of laws that makes the Supreme Court equal with the Constitutional Court. The Supreme Court, in exercising its constitutional power, shall interpret all laws, including the Law on the Constitutional Court. In contrast, the Constitutional Court has no power to interpret laws and it cannot interfere with this exclusive prerogative.

III.Interaction of the Constitutional and Supreme Courts

A. The Supreme Court Request to the Constitutional Court

The Constitution and relevant statutes have established special procedures to regulate the interaction of the two high courts. Depending on the parties to the action, the procedures may involve three different communications that would result in the cooperation of two high courts. First, the Supreme Court could refer a constitutional dispute to the Constitutional Court.[62] Second, the Constitutional Court also has the authority to send a request to the Supreme Court.[63] Both requests lead to the voluntary interaction of the courts. Third, an individual citizen

[62] Mongol ulsiin undsen khuuli (Constitution of Mongolia)- Art 66(1).

[63] Mongol ulsiin undsen khuuli (Constitution of Mongolia)- Art 50(1)(3) (the Supreme Court has the power "to examine and take decision on matters related to the protection of law and human rights and freedoms therein and transferred to it by the Constitutional Court").

who brings a petition to the Constitutional Court, claiming that the Supreme Court ruling violates his constitutional rights, could create an involuntary interaction of the two courts.[64]

There are several ways for a case that is before the Supreme Court to reach the Constitutional Court, allowing the Supreme Court varying degrees of discretion. In article 66(1) of the Constitution, the Supreme Court is listed as one of the institutions that may refer a matter directly to the Constitutional Court. In addition, according to article 66(2)(3), the Constitutional Court, in response to a request by any of the institutions mentioned in section 1 or a petition by a citizen, shall review any "breach of law" by the Chief Justice of the Supreme Court. However, since most cases brought before the courts are regulated by the Criminal or Civil Procedure Codes, decisions of the Chief Justice of the Supreme Court are unlikely to reach to the Constitutional Court for review. Therefore, this opportunity for interaction is almost impossible.

However, there is a second option: the Supreme Court itself may refer a dispute to the Constitutional Court, in accordance with article 66(1). In my opinion, this is the only means of effective interaction between the high courts. The Law on Courts provides a detailed description of application of this Constitutional provision in article 23, which states that if a court finds that the laws as applied are not consistent with the Constitution, then the court shall suspend the hearing on the case and shall submit it to the Supreme Court for discussion. If the motion has grounds, the Supreme Court may transfer it to the Constitutional Court.[65] The Constitution, the Law on Courts, and the Law Examining and Resolving Disputes at the Constitutional Court were adopted in 1992 and 1997 [?]. Despite this regulatory legislation, the Supreme Court has yet to make a reference to the Constitutional Court regarding the conformity of a law with the Constitution.

The procedure for referral to the Constitutional Court lacks effectiveness for several reasons, even though it is clear that the laws that passed by the Parliament are not always perfectly in accord with the Constitution.

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[64] Mongol ulsiin undsen khuuli (Constitution of Mongolia)- art 66(1) and (2):
(1) The Constitutional Court shall review and make judgement on the disputes . . . on the basis of petitions and information received from citizens.
(2) The Constitutional Court in accordance with Section 1 of this Article shall make and submit judgment to the State Ikh Khural [National Parliament] on:
(3) the breach of law by the President, Chairman and members of the State Ikh Khural, the Prime Minister, members of the Government, the Chief Justice and the Prosecutor General

[65] Shuukhiin tukhai khuuli (Law on Courts) (1993)

1. Why are the courts reluctant to make request to the Constitutional Court?

Although a judge can raise the question of constitutionality from an early stage of court proceedings—namely, at the trial and appellate level, as well as after reaching the Supreme Court—there are certain reasons that prevent the Supreme Court from sending a request to the Constitution Court.

The complexity of analysis regarding the inconsistency of laws with the Constitution, however, seems to be the primary problem. A judge must make an initial ruling explaining why he considers a particular law to be unconstitutional. This is clearly very challenging for judges who have never dealt with a constitutional matter. In order to overrule the decision of Parliament, one needs to be both an experienced judge and a scholar. Moreover, the judge must be confident that his reasoning will convince the Supreme Court justices and the members of the Constitutional Court that the law in question is contrary to the Constitution.

If a majority of the seventeen Supreme Court justices vote in favor of a referral motion, then the Supreme Court sends the request to the Constitutional Court.[66] The law does not specify that a judge must appear before the Constitutional Court, it only says that the Court shall inform parties of date and place of hearing, however, if parties did not appear before the Court, it can proceed and rule on the case[67]. In addition, the procedure is completely new, established only by the Law on Courts, and is not contained in either the Criminal Procedure Code or the Civil Procedure Code. It is remarkable that the Law on Courts has a number of new concepts that are integrated with the Constitution and human rights. For instance the Law provides that the Supreme Court is obliged to review a criminal case with capital punishment; cases and disputes shall be heard on the adversarial manner; a court is the guarantee for human rights, judicial power shall be vested only in courts and so on.[68]

The court procedural codes, which date from the 1960s, although subsequently amended, do not contain these new procedures. Because of this inconsistency, a court must apply both the Law on Courts and Criminal Procedure Code in criminal proceedings. For example, when the Supreme Court hears a criminal case on appeal, its rule of procedure shall be the Criminal Procedure Code. On the other hand, it will apply the Law on Courts for mandatory death sentence hearings.

Next, it is not quite clear what should be done with the underlying case or dispute that is before the lower court while the constitutional question is being addressed. It is likely that the court will suspend the proceedings for indefinite time, because it is impossible to predict if the

[66] Undsen khuulim shuukhiin tukhai khuuli (Law on Constitutional Court)- Art 10

[67] Undsen khuulim shuukhiin tukhai khuuli (Law on Constitutional Court)- Art 27

[68] Shuukhiin tukhai khuuli (Law on Courts) (1993) - Art 3, 15, 24

case will reach the Constitutional Court and whether the Constitutional Court will choose to consider it. On the other hand, judges naturally do not like to cause a significant delay in proceedings or keep the defendant in jail for an indefinite period of time, by requesting a referral to the Constitutional Court. Therefore, judges prefer to hear a case without raising questions of constitutionality.

2. Does the Supreme Court have any discretionary power?

As provided by the Law on Courts, the Supreme Court is authorized to refer issues to the Constitutional Court.[69] In this scenario, the Supreme Court has discretion over whether or not to initiate interaction with the Constitutional Court. Nevertheless, the Constitutional Court may either accept or reject the request for consideration at its own discretion. If the Constitutional Court believes that insufficient grounds exist to raise a constitutional question, then it will simply return the matter to the Supreme Court and the interaction between the two courts comes to an end.[70]

B. The Constitutional Court Request to the Supreme Court

In accordance with the Constitution, the Constitutional Court has authority to transfer a dispute to the Supreme Court.[71] But, in contrast to the rule established by the Law on Courts, the Constitution provides for a one-way communication, from the Constitutional Court to the Supreme Court. In this situation, the Supreme Court is obliged to hear the referred issue and make a ruling, even if it considers that the matter transferred is not within its jurisdiction.

C. A Supreme Court Final Ruling and Consequent Constitutional Vacuum

According to Article 50(3) of the Constitution, citizens as well as a number of government bodies may petition the Constitutional Court. Nonetheless, this paper will focus only on complaints brought by ordinary citizens to the Constitutional Court.

The major issue facing the Constitutional and Supreme Courts is whether a Supreme Court ruling is final. According to Article 50(2) of the Constitution, the decision made by the Supreme Court is a final judicial decision and binding upon all courts and other persons. If a decision made by the Supreme Court is incompatible with law, the Supreme Court itself repeals it. If an interpretation made by the Supreme Court is incompatible with a law, the latter has precedence.[72]

[69] Shuukhiin tukhai khuuli (Law on Courts) (1993)- Art 23

[70] Undsen khuulinii shuukhiin tukhai khuuli (Law on Constitutional Court)- Art 10

[71] Mongol ulsiin undsen khuuli (Constitution of Mongolia)- Art 50(1&3)

[72] Mongol ulsiin undsen khuuli (Constitution of Mongolia)-Art 50(2)

Many legal professionals and research scholars have commented that under this provision, the Supreme Court makes the final judicial decision and any other government institution or individual would not have the authority to review its last decision. However, the author does not agree that the Constitutional Court's lack of review authority stems directly from Article 50. Both Mr. Sovd,[73] former Chairman of the Constitutional Court, and Mr. Dembereltseren,[74] former Chief Justice of the Supreme Court agree that the Supreme Court's ruling must be the final decision. In other words, although the concept is not stated in the Constitution, there is still a common understanding that the Constitutional Court would not review the final ruling of the Supreme Court.

So far no citizen or governmental entity has challenged a Supreme Court ruling before the Constitutional Court. A comment on the scope of specific jurisdiction of Mongolian ordinary courts is necessary here. The Criminal and Civil Procedure Codes have established procedures by which a party may make an appeal to the Supreme Court to reconsider his/her case. The Supreme Court is therefore obliged to review every criminal case or civil dispute in which such an appeal is made and make a final ruling. In turn, this ruling nullifies any Constitutional Court review, since it is considered that the Constitutional Court has no power to review the Supreme Court's final decision.

This analysis is based on the views of the above mentioned distinguished lawyers and the fact that many statutes such as the Criminal and Civil Procedures, the Penal Code, and the Administrative Procedure Code contain direct and exact quotations from the Constitution. Therefore, my conclusion is that the Constitutional Court does not have the power to review the Supreme Court final ruling, which creates a serious gap in the interaction between the Supreme Court and the Constitutional Court. This vacuum thus creates a situation that can lead to serious human rights violations, which can be seen very clearly from the following hypothetical example. While applying and interpreting legislation, the Supreme Court also indirectly applies the Constitution. Article 16(14) of the Constitution states that citizens have the right to defend and to receive legal assistance and it is prohibited to compel defendants to testify against themselves.[75] Articles 44 and 50 of the Criminal Procedure Code have similar provision on these issues.[76] If a

[73] Doctor Sovd is a well known law professor and an outstanding lawyer. He served as a director of the Research Institute on Law and Government, as Deputy of the Chief Justice of the Supreme Court, and as the President of the Constitutional Court, before retiring in 1999.

[74] Mr. Dashdorj Dembereltseren is one of the leading figures in the Mongolian legal community. He served as Chairman of the Law Standing Committee of Ikh Khural (Parliament) and as the Chief Justice of the Supreme Court from 1991 to 1999, and is now a member of the Constitutional Court.

[75] Mongol ulsiin undsen khuuli (Constitution of Mongolia)- Art 16(14).

[76] Eruugiin baitsaan shiitgekh khuuli (Criminal Procedure Code)1999)- art 125, 129

defendant raises questions about inadequate legal aid and violation of the Criminal Procedure Code, the Supreme Court will consider the issue and at the same time rule on whether there was violation of the constitutional right to defense. Of course, the Court would be careful enough to rule in accordance with the provision of the Criminal Procedure Code and refrain from application of the Constitution. Because the Supreme Court's decision is final, the Constitutional Court would reject a petition from this defendant on the same issue. Thus, this defendant's complaint about the violation of his constitutional right to legal aid will not reach the Constitutional Court, and as a result, his right to submit a petition to the Constitutional Court will be seriously violated.

D.International Experiences of Different Constitutional Courts

The experiences of other Constitutional Courts may be helpful in analyzing the unusual consequences of a final ruling by the Mongolian Supreme Court. In Germany, for example, in 1993 the Federal Constitutional Court extended the jurisdiction of its Second Panel to include the review of specific laws and constitutional complaints involving, among other matters, asylum and nationality law, military and civil alternative service, some aspects of criminal law and criminal procedure, and "the execution of remand in custody and imprisonment and of custodial measures . . ., as well as the ordering and execution of other forms of deprivation of liberty."[77]

The Constitutional Council of France in 1973 established the principle of equality before the law as contained in the 1789 Declaration. Moreover, between 1979 and 1995, in series of decisions concerning vehicle searches, voluntary termination of pregnancy, and strikes in radio and television services, the Council guaranteed individual freedom, the right to strike, and respect and freedom of conscience,[78] thus protecting those rights from infringement by the lower courts.

Unlike Mongolia or France, in common law countries such as the United States the Supreme Court or highest court handles constitutional issues. Article 3 of the Constitution states that the judicial power in the United States is vested in one Supreme Court, and the Supreme Court has original and appellate jurisdiction.[79] A constitutional question raised by a party in a dispute before lower federal or state courts may reach the

[77] Federal Law Gazette I "*Decision of the Federal Constitutional Court (Bundesverfassungsgericht) November 15, 1993*", p 2492. http://ecl.iuscomp.org/gla/judgments/bverfg/v931115.htm. (Last visited in 2009.01.29)

[78] *See* Constitutional Council of France *at* http://www.conseil-constitutionnel.fr/decision/1973/7351dc.htm

[79] Constitution of U.S-III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.") and art. III, § 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

Supreme Court, if it chooses to grant certiorari, meaning it decides to review the issue in question. In the more than two hundred years of its history, the U.S. Supreme Court has established an enormous amount of outstanding precedents that serve as a rule of procedure for lower courts.

One of the landmark US Supreme Court cases that is related to the problem discussed here is Miranda v. Arizona,[80] in which the Supreme Court held that a confession is not admissible at trial if it has been taken from an individual in custody in violation of the Fifth Amendment guarantee that "no person shall . . . be compelled in any criminal case to be a witness against himself . . . ."[81] This remarkable precedent creating the Miranda Rule has remained in effect for some 37 years.

Before the case reached the U.S. Supreme Court, the Arizona Supreme Court had held that the defendant Ernesto Miranda's constitutional rights had not been violated when police obtained a signed statement containing a written "waiver clause."[82] The US Supreme Court reversed the decision of the state Supreme Court, holding that the statement was inadmissible because "it is clear that Miranda was not in any way apprised of his right to consult with an attorney and to have one present during the interrogation, nor was his right not to be compelled to incriminate himself effectively protected in any other manner."[83] This landmark ruling made history in the US criminal procedure and it is an excellent example of how the Supreme Court, which is empowered to rule on constitutional matters, may successfully intervene in an ordinary criminal case when a lower court's ruling contradicts the Constitution.

V.Conclusion

In Mongolia there are many works written specifically on the relationship between the Constitutional and Supreme Courts. As a result, it is difficult to make any ultimate conclusions. However, I believe that we must continue to debate this issue in order to reach an appropriate solution.

Within scope of its jurisdiction provided in the Constitution, the Supreme Court has the capacity to interpret all laws except the Constitution. However, an abstract comment by the Supreme Court about the law, in turn, seems to allow the Supreme Court to indirectly interpret the Constitution itself, thus successfully avoiding a conflict with the Constitutional Court's specific jurisdiction.

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[80] Miranda v. Arizona, (1966) 384 U.S. 436

[81] Constitution of U.S (amend. V).

[82] Miranda v. Arizona, (1966) 384 U.S. 436, 492 ("At the top of the statement was a typed paragraph stating that the confession was made voluntarily, without threats or promises of immunity and 'with full knowledge of my legal rights, understanding any statement I make may be used against me.'").

[83] *Id.*

The experiences of the Constitutional Courts in France and Germany and the United States Supreme Court clearly demonstrate that Constitutional Courts or similar organizations may strictly ensure that lower courts' rulings are in conformity with the national Constitution, without interfering with the independence of the judiciary and its exercise of exclusive judicial power. Mongolia values democracy and human rights and has adopted many international standards for human rights. Hence, when the question of the Constitutional Court's authority to review a ruling of the Supreme Court arises, internationally recognized democratic practices and traditions must be taken into account and observed in addressing the problem.

The Mongolian Constitution declares respect for "the accomplishments of human civilization, and moves toward the supreme objective of building a humane, civil and democratic society."[84] We must make sure that these fundamental purposes have been implemented by every governmental institution, including the Constitutional Court and Supreme Court. These two high courts currently appear inactive, which is not the best means of protecting human rights. A final ruling by the Supreme Court that is challenged by an individual citizen or another authorized body for violation of the Constitution must be reviewed by the Constitutional Court. As the Constitution provides, the Constitutional Court is the ultimate guarantor of the constitutional rights and freedoms that are provided in the Constitution, and no person or institution, including the Supreme Court, is above the supervision of the Constitutional Court.

The key issue here is that the institutions of the state and all of its citizens are equal before the law and courts. Most importantly, when the Supreme Court, even though it is a governmental institution, violates the Constitution, it will be held accountable, just as citizens and lower governmental institutions would be. Therefore, the Constitutional Court must exercise its sole power to review every constitutional dispute involving human rights issues and it must make the final ruling on whether the Supreme Court's decision is contrary to the Constitution.

Only through an immediate action and effective intervention by the Constitutional Court will the protections of the constitution be realized and guaranteed in the future. Only by establishing this concept clearly and publicly can the two courts can keep alive the Constitution and further Mongolia's participation in the global movement of human rights protection. In an interview published in 1996, the former President of the Constitutional Court, Mr. Sovd, espoused an idea which caused much controversy among law professors and practicing lawyers. He stated that "the Constitutional Court must be on the top of the judicial power."[85] Indeed, this rings true more so today.

[84] Mongol ulsiin undsen khuuli (Constitution of Mongolia)(1992)

[85] Sovd S, *(1996) "Tsetsam deer zuvkhun khukh tenger buina"(*Blue sky is above the constitutional court) /, Ardiin Erkh-1996.06.19, Ub

NATIONAL HUMAN RIGHTS INSTITUTIONS, HUMAN RIGHTS EDUCATION AND FORMAL EDUCATION PROGRAM

*Khishigsaikhan Batchuluun**

To begin this presentation, I would like to cite from the Universal Declaration of Human Rights which contains the 57-year old classic definition of human rights education.

"... Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace..."[1]

A number of international human rights documents subsequent to this important and historic declaration addressed human rights education in a variety of ways including its importance. For example, we could refer to the International Covenant on Economic and Social Rights (Article 13), Convention on the Elimination of All Forms of Racial Discrimination (Article 7), Convention on the Elimination of All Forms of Discrimination against Women (Article 10), Convention on the Rights of the Child (Article 29), Vienna Declaration and Program of Action (Section 1, 33-34, Section 2, 78-82), and the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance and Program of Action (Section 1, 33-34, Section 2, 78-82).

Human rights education must strive to build basic values in students and to develop a strategy that can assist to protect their rights and freedoms. Human rights education must include equal opportunity and non-discrimination which paves the way to recognition of and tolerance towards differences of cultures, traditions, languages, religions, sexual orientation and gender, harmony between majorities and minorities and equal enjoyment of human rights and freedoms. On the other hand, better human rights education of individuals means they are better equipped to stand for their rights and in the long run this will lead to peace and highest attainable development of individuals.

Once individuals are better equipped to stand for their rights, they would also respect the rights and freedoms of others and would be more interested in human rights protection mechanisms in the societies of

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[1] Universal Declaration of Human Rights-Art 26

individuals with equal rights and freedoms which would require active participation in decision-making. These abilities all require quality knowledge and their full realization is contingent on complex abilities including knowledge, ability, action and existence. At the end of the day, these can only be achieved through education.

The 1993 World Conference on Human Rights in Vienna acknowledged the importance of human rights education to all in order to make progress in protection and provision of human rights. To ensure human rights education to all, the Governments are obliged to provide human rights courses at all levels including pre-school institutions and universities in accordance with the needs of each audience, specifics of their age and psychology. The Governments are also obliged to train and re-train teachers and strengthen informal training in the field.

The Human Rights Education Decade proclaimed by the General Assembly of the United Nations from 1995 to 2004 was an important step forward in advancing human rights. After discussing the outcomes of the Human Rights Education Decade, the General Assembly adopted the World Program on Human Rights Education. The first phase of the Program from 2005 to 2007 focuses on human rights education in secondary schools. The Program would definitely have important outcome on integrating human rights education into the formal education system.

This report is aimed at presenting about measures Mongolia has been taking to integrate human rights education into the formal education system and their progress. The report is based on the findings of some of the research and studies on human rights education. The education system of Mongolia is the synthesis of formal and informal education. The formal education system consists of pre-school education, primary, secondary and tertiary education.

In case of Mongolia, human rights and freedoms are ensured in the genuine sense and in light of international human rights standards only since the democratic revolution of 1990's and following the new democratic Constitution of 1992. Therefore, the challenge now is the provision of human rights education to all and to specific target groups. Although there are some good developments in Mongolia such as establishment of the National Human Rights Commission (2001) and adoption of the National Human Rights Action Program (2003), there are still much more needs to be done to reinforce the success of integrating human rights education into the formal education program, to assess and evaluate this success for even better outcomes.

The Government is obliged to provide human rights education to its citizens through formal and informal education. As to the formal education

system, the good news is that legal education curriculum of secondary schools was revised under the "Street Law" program implemented by the Ministry of Education, Culture and Science in cooperation with the Mongolian Foundation for Open Society. The program renewed the content of human rights course in a much more different way than it was studied previously and it was made much more compliant with international standards relating to human rights education. However, the quality of training is not satisfactory. Moreover, there is no human rights course in the programs and curricula of universities and vocational training centers except a few law schools, where human rights is among either compulsory or optional courses.

As to Mongolia, there is still no principal human rights education policy. The failure of the recently adopted National Human Rights Action Program to address the human rights education shows that there is a strong need to advance this issue in the future. In such context, I would like to present about human rights education in Mongolia within the framework of secondary and tertiary education only.

Secondary education

A significant action carried out by Mongolia within the timeframe of the UN Human Rights Decade is the comprehensive revision of legal education curriculum of secondary schools. As mentioned above the revision of the legal education curriculum of secondary schools were carried out under "Street Law" program of the Mongolian Foundation for Open Society in 1998-2003. The program attached great importance to the human rights education of the youth and children: curriculum for each grade contains human rights components and in the 6th grade students study human rights as a separate subject. The objectives of the human rights course taught since 2003 under the revised legal education curriculum are improve human rights knowledge of the students, develop their abilities to take use of prevention mechanisms, and build an attitude in them respectful of the rights and freedoms of others. Certainly, these complex abilities cannot be developed solely through conventional methods of teaching; application of various teaching methods by teachers, physical and psychological setting for teaching human rights is very important.

The evaluation of human rights education in secondary schools identified the following strengths and weaknesses:

Strengths	*Weaknesses*
· *The human rights education standards aim at developing complex abilities;* · *The human rights course was revised.*	· *Schedules are not fully followed in teaching, in other words, the human rights subject is easily replaced by other subjects; significant difference in teaching human rights as a compulsory and an optional course;* · *Lack of teachers who are specialized in teaching human rights; no significant support to teachers in terms of content and methodology;* · *Teachers are constantly changed or on move;* · *Reliant on conventional methods of teaching;* · *Failure of training managers to maintain regular supervision over the education standards and plans.*

The education standards have been revised and renewed in connection to the transformation from 10-year secondary education to 11 years starting from the academic year of 2005-2006. Accordingly, human rights are taught from 1st to 11th grade in relation to age and psychological specifics of students. This is an important step forward.

Without being limited to teaching human rights, the secondary schools must:

· Ensure that all other subject studied in secondary schools are based on human rights;

· Everyone including the management of the schools and other teachers should be accountable for human rights education progress in their schools in addition to the teacher of human rights;

· Provision of human rights education is not only contingent on the classroom but also on the environment outside the classroom. An important objective of human rights education is to create human rights environment in the communities and the society. On the other hand, human rights education cannot be attained fully where there is no human rights atmosphere. Human rights atmosphere or environment is a vital condition for children to learn about human rights. Therefore, everything in the school starting from the rules and regulations should be based on human rights;

· The school management should take into consideration the principles of human rights for evaluation of the work of teachers,

equality of opportunity among students, accountability and discipline mechanisms that ensure respect for human dignity and reputation. Democratic school environment is the most favorable condition for the advancement of human rights education.

Unfortunately, there are no specific researches and studies that look into human rights based education and human rights environment in schools. The recent study by the NHRCM shows that human rights and the rights of child are subject to regular abuse. Due to the lack of resources, the physical environment of schools cannot meet the rights of children to study in healthy and safe environment, access to adequate training materials and teachers. Sadly, the remoter the worse is the situation.

Tertiary education

There are a few research and studies that explored about human rights education in universities and other higher education institutions. The current research and studies are carried out in different ways to study human rights education in law schools and other universities and colleges. There is an essential need to integrate human rights education into the curriculum of universities and colleges. A number of research and studies demonstrate that it is common for employees both in public and private sectors to violate human rights and freedoms.

Human rights have been studied in law schools since 1997 following a joint decree by the Minister of Justice and the Minister of Enlightenment for 36 hours a year. However, very few law schools offered human rights as a compulsory course whereas majority offered it as an optional course which is not adequate to educate lawyers about human rights. There are still views among the university managements to undermine importance of teaching human rights as a separate subject and to try to squeeze human rights into other courses of legal education. Currently, the legal education curriculum of universities and colleges is being revised with the support of the World Bank and specialists are showing hard efforts to make human rights one of the compulsory courses. The pilot curriculum includes 40 hour optional course of Human Rights Law and 48 hour optional course of the Rights of the Child for specializing.

As to other universities and colleges, although they claim that they teach human rights it is taught only within the Constitutional Law and there is no link between human rights and specific professional courses. Moreover, a number of university management, lecturers and students regard human rights as a subject that is relevant only to lawyers. Only from very recently, some teacher training universities started

developing and piloting human rights curriculum for law and social science professions. This is an important step forward.

The Role of the NHRCM

The next part of the presentation takes you through what the NHRCM is doing to integrate human rights education into the formal education system.

According to the law, one of the main duties of the Commission is to promote human rights education. Thus, the Strategic Plans of the NHRCM (2000 and 2004), state that promotion of human rights education is one of the main objectives of the NHRCM. Accordingly, the Commission has developed and implementing a Human Rights Education Plan. The main objective of the program is to apply the human rights principles to all social norms and actions. The plan targets three main groups:

- All levels of schools;
- Specific social groups;
- The general public.

Let me reflect more in detail on what have been done in terms of all levels of schools:

The Strategic Plan of the Commission sets up to cooperate with relevant Ministries and agencies on development and implementation of a principal policy to integrate human rights education into the curriculum of secondary schools and colleges. The NHRCM has had active participation in development of human rights education programs since it was established. For instance, the Chief Commissioner and the staff contributed into creation and editing of a human rights textbook for the students of the 6th grade of secondary schools.

One of the largest works that the Commission has been running is a project on "Human Right Education in Secondary School" with the support of UNESCO since 2005. The objective of this project is to evaluate how human rights education is taught in secondary schools, to develop proposals and recommendation to the relevant authorities, and to develop minimum qualification standards for the teachers of human rights. The report of the research is at completion followed by next activities.

Furthermore, the Director of the Commission has contributed into development of a teachers' handbook on human rights in secondary schools funded by HURISTMON project. In the current situation of lack of specialized teachers, this handbook will definitely make a difference in improving human rights education and be very useful to the teachers

in rural areas.

One of the significant activities that the Commission carried out to integrate human rights education in formal education was the project on "Human Rights Education" supported by Canada Fund. Within the framework of this project, we developed a Model Human Rights Curriculum for law schools. It is essential to prepare lawyers who have advanced human rights knowledge and human rights based approach in the society that has proclaimed in the Constitution to build a humane and democratic society and where human rights and freedoms have acquired totally new and genuine meaning. The reason is that there is a strong conviction in the public to regard the justice institutions as state spear to investigate and punish individuals. Research and studies carried out by the Commission and other organizations show that there are serious violations of human rights and freedoms in administration of justice.

Goal of the Model Human Rights Curriculum for law schools was defined as building complex abilities in students including advanced human rights knowledge, ability to use the human rights protection and provision mechanisms, and attitude to value the human rights and freedom.

The objectives of the Model Human Rights Curriculum are to:

- Provide knowledge and understanding of human rights and freedom, national and international human rights mechanisms;
- Learn from new trends in human rights study;
- Learn using all national and international human rights mechanism in order to identify, investigate and eliminate human rights violations;
- Develop balanced and critical approach, learn to make decisions based on abilities to listen to and cooperate with others;
- Develop human rights approach.

The Model Human Rights Curriculum is a comprehensive document that suggests a number of modern participation methods; it contains an information part for the reference of lecturers and a methodology part suggesting commonly used participatory teaching methods. To make the Model Curriculum more realistic and effective, it was piloted in three universities for a summer course involving 20 students. Using those programs, we held 3 trainings for 60 professors from 20 universities (in duplicated number). At the end, we held a conference to bring to the knowledge of all the stakeholders the importance of human rights course in law schools.

Moreover, NHRCM staff shared their experience with the team developing human rights curriculum for teacher training universities.

All the above mentioned activities have been carried out by the

NHRCM with the purpose to integrate human rights education into the formal education system and we will maintain hard efforts to reinforce our work.

We appreciate the significant financial contribution of Canada Fund and UNESCO and other donors, professional and methodological contribution of all the professors, teachers, and specialists for supporting our endeavors to integrate human rights education into the formal education system.

Based on the suggestions reflected in the report, the following conclusions can be reached:

· Considering the lack of a principal policy for human right education in Mongolia, it is important to develop it in the future;

· In order to improve the quality of human rights education in secondary schools, it is important to re-train the teachers, improve the training facilities, upgrade training management and create human rights environment in schools;

· It is important to reinforce the current level of human rights education in law schools, and immediately start developing and introducing human rights curriculum in other educational institutions;

· Assistance of the UN and other international donor organizations is highly needed for the integration of human rights education into the formal education system considering the lack of resources faced by the country.

We call on all national, regional and international organizations to cooperate for integrating human rights education into the formal education system and introducing human rights education in all sectors and fields as this is the way to maintain peace in the world and to eliminate all forms of discrimination, violence and human rights violations.

DEVELOPMENT OF INSURANCE LAW IN MONGOLIA

*Javkhlant Batmunkh**

Introduction

Mongolia, one of the most ancient nation-state countries in the earth, is a landlocked country in central Asia bordered by Russia to the north and China to the south, east and west. With an area of more than 1.5 million square kilometers and a population of 2.7 million, Mongolia has a population density of 1.5 people per square kilometer.

In the ancient period, the current territory of Mongolia was ruled by various nomadic tribes and Mongols founded and ruled Ikh Mongol Empire, the largest Empire ever in history of humankind. In the early 20th century, Mongolia declared their independence from Qing dynasty, founded by one of the nomadic tribes-Manchu. Bolshevik Russia decided to support the establishment of a communist Mongolian government and army in 1920s and this event led to Mongolia's close alignment with the Soviet Union over the next seven decades.

In this year, 100th Anniversary of Mongolian independence and 805th Anniversary of the Foundation of Ikh Mongol Empire will be held, which are the pride of every Mongol in the world.

Foundation of insurance industry in Mongolia

Mongolyn Nuuts Tovchoo, the oldest surviving Mongolian language literary work to history of Mongols stated that Mongols established foundation for the people who died in battle field. The foundation was established from fees paid by the citizens of Ikh Mongol Empire and other vassal countries' tax and the compensation were paid to the family of died person in the battle field. This type of compensation leads that Mongols initiated and operated one of the very first forms of social insurance in Mongol steppes.

The Agency of State Security, the modern insurance organization was founded in 1934 with a support by GosStrakh, a Soviet insurance agency and the Agency was a part of Ministry of Finance until 1991. Just after the Democratic Revolution 1990, it was declared that Mongolia is a democratic country with parliamentary government and free market economy. The only insurance organization in the industry,

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General Department of State Insurance was reorganized and as a result of this event, the very first national insurance companies Mongol Daatgal and Tushig Daatgal, were founded and it was the early stage of the development of the industry. However, until privatization of those national companies, Mongol daatgal and Tushig daatgal, the insurance market was dominated by these national insurance companies.

Insurance law in the Socialist period (1934-1990)

As per aforementioned, and according to the Decree No.83 of the Government of People's Republic of Mongolia, the very first insurance organization was established. This organization was in charge of undertaking all insurance aspects, including underwriting, claims handling, legislation, monitoring and controlling over insurance industry and so on.

The actions and operations implemented by acts and regulations proposed and enacted by the General Department of State Insurance (former Agency of State Security) were the basis of the development and formation of the modern insurance industry in Mongolia. In this period, following compulsory and voluntary insurance products were formed and introduced to the local market, including:

- In December 1936, the Government decree was enacted and according to this Decree, fire insurance for government agencies was declared as compulsory insurance;
- In 1944, personal accident insurance of the employees was formed as of voluntary insurance;
- By the Government Decree No 13, in 1959, the yurt insurance was declared as compulsory insurance;
- By the Government Decree No 196, in 1961, crop insurance was declared as of compulsory insurance;
- By the Government Decree No 580, in 1963, livestock insurance was declared as of compulsory insurance;
- By the Government Decree No 159, in 19671, passenger legal liability insurance was declared as of compulsory insurance;
- By the Government Decree No 419, in 1968, driver's liability insurance was declared as of compulsory insurance;
- By the Government Decree No 95, in 1970, Crew personal accident insurance was declared as of compulsory insurance.

In addition to the above mentioned insurance products, all classes of businesses were written by the General Department of State Insurance and it was a unique market experience that the Department performed functions of both underwriting and monitoring of insurance industry.

The first Insurance Law of Mongolia

In 1990, Mongolian people abolished the totalitarian regime, rejected the planned economy, and began a comprehensive transition toward a new political system. This new choice was to develop a country respecting human rights, democratic values, the market economy, and the rule of law. From a narrow perspective, this led to a complete reform of the legislative system and structure. This reform did not take place all at one time but was rather an on-going and gradual process.

The Baga Hural proclaimed the legitimacy of private property, and determined new financial, economic, and loan relationships through adoption of 35 new laws and amendments. All of these laws became a solid base in the process of adopting the 1992 Constitution. The 1992 Constitution, as it was pointed out, "mobilized the intellectual capacity of the country". In 1994, a new edition of Civil Code of Mongolia was enacted by the Parliament of Mongolia following new Constitution of Mongolia and the new edition of Civil Code was the basic regulation of free economy system. The very first Insurance Law of Mongolia was passed by Parliament of Mongolia in 1997 and according to this law, the very first government body were formed which is called Insurance Monitoring Department as a part of the State Monitoring Agency. Following by the enactment of the Insurance law, Motor Third party liability insurance were reformed as compulsory insurance and capital requirement for insurance companies were set legally.

The current insurance legislation

The Civil Code of Mongolia, that determines basic legal background of insurance, notably Articles 431 to 444 deal with fundamental terms of insurance and legal obligations as well as rights of insurers and insureds. Other legal acts and rules in respect of insurance industry are based on the Civil Code of Mongolia.

Current insurance legislation is the Law on Insurance of 30 April 2004, which came into effect on 1 January 2005. It controls the transaction of both life and non-life insurance. The law replaced the Insurance Law of 1997, which was the first legislation to regulate the local market. The Financial Regulatory Commission (FRC) came into existence in January 2006, having been set up under the Law on the Legal Status of the Financial Regulatory Commission dated 25 January 2006. In addition to supervising the insurance market in Mongolia, the FRC also oversees the securities market and microfinance activities.

The activities of the insurance department include:

- proposing laws;
- encouraging market stability;
- granting and revoking licences;
- organising professional training;
- developing accounting standards;
- analysing risks and furnishing statistics;
- conducting inspections;
- resolving disputes between insurers, and between insurers and their clients, and
- cooperating with international counterparts.

The law allowed reinforcing with a number of regulations and guidelines by FRC. The more important ones include:

- methodology for estimation of insurance premium rates (Attachment to Resolution 190 issued by the FRC in 2007);
- regulation on fees and conditions for insurers to provide information to the insured (Attachment to Resolution 187 issued by the FRC in 2007);
- conditions for investing capital and reserve funds (Appendix to the FRC Resolution No 66 of 26 December 2006);
- list of voluntary ordinary insurances (Annex of FRC Resolution 18, June 23, 2006);
- regulations concerning the establishment, expenditure, and control of reserve funds (Appendix to the FRC Resolution No 23 dated 07 July 2006);
- regulation for estimating long-term insurance premiums (Appendix to FRC Resolution No 66 of 2008);
- guidelines for reporting by insurers and intermediaries (Appendix to FRC Resolution No 23, 2008);
- code of ethics for insurers and intermediaries (Attachment to FRC Resolution No 136, 2007);
- guidelines for insurers and intermediaries (Appendix to FRC Resolution No 193, 2007);
- regulation for intermediaries' reports (Appendix to FRC Resolution No 192, 2007);
- regulations concerning actuaries' licences (Attachment to FRC Resolution No 212, 2007);
- regulations concerning solvency requirements for insurers (Attachment 66, 2007, issued by the FRC), and
- regulations concerning solvency requirements for long-term insurers (Attachment to FRC Resolution No 65, 2008).

The Law of Intermediaries of 2005 regulates the legal relationship arisen out from licensing and operation of intermediaries in Mongolia.

Reinsurance

The local direct market is still at early stage of development, and the majority of business is written without reinsurance. The reinsurance market is limited to the placement of a few large risks, the majority of which are placed on a facultative basis. Most direct writing companies have no treaty arrangements established with reinsurers for the placement of business.

As the market grows, however, local insurers are establishing contacts with international brokers and reinsurers both in Russia and in the London and European reinsurance markets. In the short term, most business will continue to be placed facultatively, but Mongolian insurers have already started to purchase treaties i.e the most recent practice on treaty purchased by the local insurers is Whole Account Excess of Loss Treaty.

There are no restrictions on the amount of business that local insurers may retain and reinsure. Local companies are free to reinsure and place their business abroad, however, any local reinsurance company conducts their business yet.

Article 47 of the 2004 Law on Insurance provides that insurers shall have their reinsurance arrangements approved by the insurance supervisory authority in accordance with regulations to be issued under the law.

Summary

Mongolia has already set up its main framework of the insurance legislation, but there are still need to develop and change local legislative acts due to market development as well as social and economical growth of the country.

The local insurance law is still in the early stages of development, and primary issues of insurance industry such as non-disclosure, subrogation, arbitration, joint and several liability of coinsurers or innocent misrepresentation are almost not covered and regulated by the 2004 law on insurance. As of recent market practice, the major group companies and financial groups started to set up captive insurers, but any legislation have not been adopted yet on captive insurer.

In terms of consumer protection, there are several acts have been effected, but the dispute settlement procedure is still difficult to proceed.

Furthermore, Mongolia have not yet set up insurance ombudsman or arbitration leading to prolonged dispute settlement method.

The current market practice is "cash for cover". As per increase of the capacity of local insurance industry followed by economy boom due to florishing mining industry of Mongolia, some large risks have to be insured by the local insurers and various kinds of premium i.e flat premium, adjustable premium etc to be used in the market, however, there is nothing stipulated in 2004 Law on Insurance covering premium types.

The draft law on Motor Third Party liability insurance law is still pending, but there are urgent needs from public to adopt and effect Motor Third Party liability insurance law to be a compulsory insurance.

PUNISHMENT SYSTEM OF MONGOLIA AND LEGAL TECHNIQUES OF CRIMINAL CODE

*Erdenebat Ganbat**

The Criminal Code of 2002 has reformed the socialist system and made progress towards new humanitarian criminal laws which meet the demands of the Constitutional determination on human rights.

This criminal law, however, has become an experiment because of the occurrence of the certain events in recent years, particularly, Court judgments on sensational cases such as the "SAPU" Trade Center fire caused by non-standard construction; the bankruptcy of the credit-cooperatives; the Savings Bank-inflicted loss of 14 million tugrugs on other banks; the case of Altantuya Case who stole 18,000 tugrugs and was sentenced to 10 years; Asian Wolf-brand vodka produced using non-provisional methyl spirits; the July 1st case that occurred after Election 2008;. These and other non-sensational events still proceeding in the court have are now led us to make a decision that at present Criminal cannot ensure recent demands by our society to protect the rights and interests of the public, society, and the state from criminal encroachments.

According to judicial statistics, while offences in Mongolia have been decreasing in comparison to previous years, the number of punished criminals have increased, resulting in an increase in the number of the incarcerated.

In 1996, there were 26,000 registered offences in Mongolia, with 6000 incarcerated at that time. In 2000, there were about 24,000 offences and over 6200 prisoners. In 2003, 23,000 offences were registered and 6500 prisoners served sentences in the prisons. Although, the Law on Amnesty was approved twice for 2435 prisoners, and 2008 prisoners were released by probation and amnesty under the court rulings. Currently, of 20704 registered crimes, there are 7800 prisoners.

Thus, this condition of systemic criminal liability relates to the undeveloped legal techniques of the criminal code. If an offender compensates the damage caused, the law states that he or her shall absolved (Article 55, Criminal Code),or sentenced under light penalty (Article 55.1), or changed an imprisonment with probation (Article 60), or released from criminal liability (Article 70, 71) and punishment

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(Article 74). These Articles, however, have not been well exercised in current practice. Use of regulations on release from criminal liability solely for perpetrators of minor crimes or release and/or probation solely for less serious crimes are adapted from a criminal code with weak or poor mechanism on compensation of damages. Criminals who have committed serious crimes or have caused major damages to others are certain that they will be sentenced for many years whether he or she compensated or not, so they choose the way of imprisonment even if they can compensate the victims.

Besides the above regulations, I agree with the researchers' suggestions on making regulations to serve the purpose of punishment by confiscation of assets in order to the compensation of damages.

As there was specialty in the Criminal law of Mongolia that made a reception from former Criminal law of Soviet Socialist Republic, and under this specialty the mitigating methods were used when their hard penalties were determined in the special part of the criminal code for the purpose of protection from the criminal actions, but impose lighter penalties in the general part of the code rather than stated in the law. That traditional procedure disrupts the real content of the criminal law principle "nullum crimen sine lege". The Criminal law of 2002 has relieved the procedure "to impose lighter penalty than stipulates by law".

Thus, the relieving of the procedure "to impose lighter penalty rather than stipulated by law" made progress towards development of the concept of the "Rule of law" under its real content. However, as a result of reducing the sentence interval and determining the certain sanctions, the sentencing policy and overall application of the criminal code became increasingly difficult. As a result, judges, prosecutors and advocates came to criticize the criminal code strongly. In 2008, in the limited scope of the Criminal Code, attitudes moved to keeping past tradition and the procedure was to impose lighter or easier penalties rather than those stipulated by law. In reality, the presenter thinks that it was more reasonable to follow the concept of the Rule of Law and to legalize for longer term the imprisonment interval determined in the special part of the Criminal law.One method regulation that has stayed in the system of criminal liability from the socialist tradition is the concept of repeat offenders. The recent criminal code's procedure of "imposing the penalty under aggravating circumstances for an offender who has repeatedly committed a crime" was followed under the socialist criminal law. More recently, Article 47 references "punishment under aggravated circumstances on the grounds of repeat offence".

Thus, if a criminal commits a crime repeatedly, whether he or she inflicts harm, they are considered as repeat offenders. On those ground,

they sentenced to penalties under aggravated circumstances. By 2008, two thirds of the prisoners repeat offenders.

The Criminal Law of Mongolia is a code. However, this code has not codified all criminal rules or norms yet. Because this criminal code has not determined which offences are less socially damaging and has not also clearly defined criminal liability in those cases, these norms are stated in the Law on Administrative Liabilities or in other laws.. In Mongolia, the constituent elements of less socially dangerous offences and their imposition of criminal liabilities have been legalized and are being used effectively in 300 of 370 cases. According to a survey, 33 of those constituent elements of less socially dangerous offeces which have not been codified today and the constituent elements of crimes determined in the criminal code are duplicated. Furthermore, the rules and norms for imposing liabilties contradict one another.

Thus, many criminals are not punished for crimes because the courts and law enforcement organizations cannot determine which standards will be applied to a case or take bribes from the suspect or perpetraror.

The author considers that settling these problems in the Criminal law of Mongolia is urgent.

One of the issues in developing the Mongolian system of criminal liability is a blanket norm for the criminal code. Currently, constituent elements of crimes are determined by citing precedent. Particularly, to determine whether the crime is defined by the criminal code or not, the rules of the other laws are considered as a continuation of the criminal code. Seventy six Articles of the present criminal code have similar rules and norms as those quoted in other laws. As European observers have said, the techniques that determine the constituent elements of crimes under the criminal code must be clear. If they cannot meet the demands of the criminal code, they are codified as impossible to define (types of constituent elements and scope of the crimes). Particularly, 17 of those blanket rules and norms that are quoted in the legal acts are policies such as Government decrees rather than laws. Fourteen are indefinite as to which sources they quote from. In practice, as those rules and norms are impossible to apply, liability could not be imposed on certain actions that may cause harm in our society.

Lacking infrastructure to ensure legal enforcement is one serious difficulty of the system of criminal liability. The present Criminal Code defines 7 types of punishments such as fines, limitation of rights, confiscation of property, completed labour, arrest, imprisonment and capital punishment. Arrest and imprisonment are types of punishment that limit rights and freedom, but fines and completed labor are types of punishment which correspond to the goal of a humanitarian criminal

code and the enforcement of which do not separate the individual from his or her community. Unfortunately, enforcement of those punishments have been insufficient till today.

The author will not touch arrests which do not enforce in its real content because of no arrests in here, and about fines which exceed age household salaries. Enforcement of those punishments will be mentioned in the other presentations. At judicial practices, enforcement of completed labour is also very insufficient at recent time. The presenter considers that one of the reasons of insufficient enforcement is related to infrastructure.

The author also considers that the "criminal law encroaches on human rights in order to protect human rights". Under this code in order to punish a person, the constituent elements of crimes must be defined clearly. This is very important for our country in that it relates to the the continental legal system. While applying the criminal code, and when the constituent elements are determined insufficiently or not appropriately, there were a few occasions that the cases could not be decided. Particularly, in the recent years not a few have been registered in Mongolia from human trafficking and saving-cooperatives. They had shown that the constituent elements of those crimes were formulated unclearly, and liabilities to them were light.

Thus, the author comes to the the conclusion that in order to meet the demands of the criminal law, it needs to extend the scope of regulation related to compensating damages for the purpose of confiscation of property.

It should be noted that amendments needed in the regulations to become free of the ideas of socialist criminal law which define clear sanctions but apply lighter procedures for the penalties than the law provides and which define the constituent elements of crimes by the quotation of the other laws with disparate purposes.

The author considers that our future purpose will be to extend the scope of measures reducing criminal liability to ones such as probation, release from criminal liability, fine, execution of completed labor and arrests that will meet the contents of humanitarian criminal laws.

In connection to the above, our near future issue is building infrastructure to enforce the measures of criminal liabilities such as place of arrest and regulations related to completing labor.

In order to solve the deficiencies in the system of criminal liability, about 200 norms of the criminal code were amended in 2008.

In the future, the criminal law and other laws need to be significantly amended.

RECENT TREND AND PRESENT CONDITION OF THE LEGAL SYSTEM OF MONGOLIA*

*Amarsanaa Jugnee***

First. The development of Mongolian legal system

For us who live in one of the planets of the Solar system, which called the Earth, one of the achievements of the mankind and values of the civilization shall be the law. And nobody will argue with this statement.

The law within the long period of time continued for more than 5000 years reflected the trends of society development, undergo changes and developed.

Mongolians has 2200 years of state tradition and 800 years tradition of the state-customary law.

Within the historical curves the Mongolian state's stability and succession have been interrupted. But it's development has not had any interruption.

The Mongolian legal system establishment and development could be divided into 3 stages.[1]

1) The establishment of the Mongolian state, and formation of national legal system (1206-1634)

2) Second codification of the legal system (1640-1921)

3) Modern legal system development stage (since 1921 up to now)

First stage: Eighty one Mongolian tribes were unified into one Great Mongolian state and in 1206 Chingis khan enacted the Law Ikh Yasuu to be obeyed nationwide. This stage covers the period up to the end of young khans ruling. (1370-1634)

Within the period of ruling of Chingis Khan and his descendants Mongolia strengthened and became an empire covering a territory of the Central and South East Asia, and territory from the Far East to the Western Europe and the Middle East (in modsern terms). Many factors facilitated such strengthening and among them well thought-out strong legal system played important role. The Law Ikh Yasuu was the main pillar of this system.

The Law Ikh Yasuu was a codified uniform law which regulated wide range of relations including the state policy, administrative

* Amarsanaa J. (2009). *"Shiljiltiin ue dekh Mongolin erkh zuin shinechlel"* (Transitional Period and Legal Reform in Mongolia). UB.

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[1] Some our researches on their work divide the development of the legal system in Mongolia into 7 stages.

division of the state, customs, military, civil and criminal policy.

The effect and impact of the law created the highest power source and strict order.

The scholars and researchers of the Legal Institute of the Mongolian State University provided comparative study on this Law and divided the provisions of the law into 12 chapters according to its contents and 216 articles. It does not mean that this law has the same structure when it was enacted in 1206. It is only scientific guess developed to make the law more understandable to the public. More than 100 researchers from Mongolia, Russia, China, USA, Great Britain, Japan, Germany, Italy, Turkey, Egypt and Iran specially considered this law and wrote their research work. For example, "Session of history" by Rashid Din, "History of the world conqueror" by Juvein, "Notes from Syria " and "The History of the Yan state" by Abdul Faragi could be mentioned here. Mongolian researcher Ph.D, professor G.Sovd estimating the significance of the law wrote "The Law Ikh Yasuu first time legalized the order of bringing the lifestyle and conduct of the nomadic people under the administration of the unified state of the Khan (king). Therefore the role of this Law in the history of the East culture was almost similar to the role which the Roman law played in the continental Europe."[2]

For this period of time Mongolian Yan empire issued "Collection of legal documents collected by way of discussion ", "Newly collected legal documents" (1264), "The legal document submitted by the Erkhen Council state" (1271), "New laws of Chji-Yan" (1291), "The decree of Da-De" and descended from this "Perfect law of Great Yan" (1322), "Great Yan's law documents", "The law on correction of the world". But those laws based in Chinese and Eastern tradition did not contain Mongolian law features.

Even during the ruling of the Yan dynasty when Mongolia became "frontier territory" of this empire the Law Ikh Yasuu has been followed.

After collapse of the Yan dynasty during 260 years when in Mongolia the fighting for the khan's throne continued since the ruling of the Bilegt khan (Aushiridar) up to the ruling of Ligden Khutagt khan for the period of 22 khans ruling various laws descended from the Ikh Yasuu were enacted. (New Governing law by Tumen Khan 1558-1593, The old law enacted by Ligden khan in 1617).

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[2] Sovd G. (1998) "*Mongolin erkh zuin systemiin khugjil ba khunu erkhiin undesnii khamgaalalt*" (The development of the legal system in Mongolia, it's specific-Human rights national security). UB. 24

Second stage: Oirat-Mongolian law/1640A Khalh juram (1709), External Mongolian legal documents (1785), Mongolian legal documents set by a decree (1911) were passed during the second stage of the codification.

Oirat-Mongolian law has main purpose of establishing internal unity and order from one side and protecting Mongolian state from outside interference from other side.[3]

Middle centuries' legal norms were based on religious teaching and protected the religion. This world trend has not been avoided by the Oirat-Mongolian law.

The almost half of the provisions of this law contains criminal law provisions.[4]

Researchers consider that the Oirat-Mongolian law contained the administrative, civil, family and many other legal branch regulations.[5]

Khalkh Juram intended to regulate social relations of Mongolians and was effective up to the beginning of 20th century.

Some our researchers concluded that this law "in comparison with previous laws more comprehensively regulated all aspects of the social relations and set more precise sanctions".[6]

At this stage Mongolian legal document (1637, 1739) and External Mongolian legal documents set by decree (1789) were passed. Although up to monarchy no one enacted law kept the tradition of the Ikh Yasuu and traditional laws features except Khalkh Juram.

The movement for national independence which took place in 1911 created good condition for the national reform in the Mongolian legal system. The main source of the law by this time was the 65 volume collection of "Legal documents of the Mongolian state set by the decree".

These laws were developed and collected in 1915-1918, discussed by the State Baga Khural and State Ikh Khural and enacted by the decree of the Bogdo Khan. Codified law drafting work involved comparative study of Mongolian legal system, and foreign practice, of which's results were considered by law makers. Laws included in the "Legal documents of the Mongolian state set by the decree" could be classified depending on social relations and legal objects,

[3] Ryazanovskii V.A. (2000) *"Historical review of Mongolian legal documents"*, *The Law Ikh Yasuu*. UB, 16

[4] Ryazanovskii V.A. same book, 20

[5] Dashnyam.E. (1995) *"The Stages of development of Mongolian legal system, it's specific"* Shine toil. UB, 40-44

[6] Boldbaatar J, Lundeejantsan.D. (1997) *"Mongolin tur erkh zum togtolts00n tuukhen udamlal"* (Historical tradition of Mongolian state and legal system). UB.167

in the on following categories: 6 volumes related to the Khan's state organization, 9 volumes related to the state administration, 3 volumes regulating religious ceremony, 6 volumes related to the custom, tax, agriculture, family and other civil relations, 3 volumes related to the state military organization, 13 volumes containing criminal law and court proceeding rules and 1 volume on foreign relations.

These laws depending on it's structure and content shall belong to the middle centuries' legal system. But even so they reflected Mongolian lifestyle, morality and tradition from which we could conclude that Mongolian state and legal culture and sense was at comparatively high level by this time. But the Mongolian autonomy was abolished and those laws have not come into effect.

Third stage: Modern legal system development stage started since 1921. 20th century opened new opportunities for the development of the state organization and legal thinking not only for Mongolia but also for all countries over the world.

This period's legal development was originated from Khan's state limited by People's Power established in 1921 in the result of the national democratic revolution.[7] This stage should be classified into 2 sub stages: first is from 1921 up to 1990, second sub stage starts from 1990 up to the present.

The development of the Constitution in Mongolia has continued for two centuries and Mongolia is one of the first states in Asia which had written Constitution.

To make the above mentioned classification more precise this stage of Mongolian legal development could be classified according to the stages of Constitutional system development in Mongolia as follows:

1. The period of struggling for the establishment of the Constitutional system in Mongolia (1921-1924);

2. The period of effectiveness of the First Constitution of Mongolia (1924-1940);

3. The period of effectiveness of the Second Constitution of Mongolia (1940-1960);

4. The period of effectiveness of the Third Constitution of Mongolia (1960-1990);

5. The transition period (1990-1992);

6. Democratic Mongolia and legal system reform development stage (since 1992)

[7] Boldbaatar J, Lundeejantsan D. (1997) "*Mongolin tur erkh zuin togtoltsoonii tuukhen ulamjlal*" (Historical tradition of Mongolian state and legal system). UB. 253

1. The period of struggling for the establishment of the Constitutional system in Mongolia (1921-1924)

The process of abolishing of the old social system and composing of the new system continued for 4 years. Although it was short term it took special place in the development of the legal system and played renovating role in the society.

The legislation of this period regulated the requested sphere of the social life and became a tool, which used for the decision of problematical issues of the state. But it's content and form have not reached the decent law level. Even so it contained some elements of law and created a good condition for it's future developments.

Among constitutional acts of this period we could mention "The Oath agreement" (1921), "The rules of competence of Mongolian Governments, and competence of Vans and Gun's, who have not vested with governmental power" (1922), "The temporary rule of the Mongolian People's Government Khural" (1922), "The rule of the Local administration of Mongolia" (1923), "The administrative rule of Ikh Shavi" (1923), "The rule of Khovd territory" (1924).

In overall, the legal acts of the first stage have common characteristics. For instance:

-Legal acts have not been passed by the officially established legislative organizations, but by the highest state administrative organization vested with legislative power or passed on consultation with Khan who has limited power;

-"law" has not been recognized as one of the form of the legislative act and mainly passed act called "resolution", "rule";

-all acts have transitional feature depending on historical condition of country fighting for the republic organization;

-the acts have not reached the decent level depending on regulated relations, it's structure and content;

-it became preliminary condition for the development of the Constitution and establishment of the new legal system.

2. The period of effectiveness of the First Constitution of Mongolia (1924-1940)

First State Khural in 1924 adopted first Constitution of Mongolia which determined the social, political and economical basis and direction of foreign and internal policy of the state, fundamental rights and duties of genuine arat person (citizen), the structure and organization of the state, principles of it's activity. This created legal basis for the establishment of the new laws.

The Constitution of 1924 abolished Khan's ruling system[8], and established republic Government which was important factor of the future legal system development.

On this basis in Mongolia many interrelated legal branches like constitutional, administrative, financial, labour, family, cooperatives, ecology, civil, criminal and procedural law were developed.

Between 1924-1940 in Mongolia many laws were passed. For example, "The rule of competence of members of the State Great Khural and State Small Khural" (1925), Civil law (1926), Criminal law (1926, 1929, 1934). The procedural rule of exercising of all crimes (1926, 1935), Law on separation of the state power from the religious (1926), Custom rule (1926), The rule of arat people industrial cooperatives (1939). This activity from one side was proposed to protect values of Mongolian traditional customary law and the state, from other side it was proposed to restrict national democratic feature under the influence and pressure of the Komintern to adopt revolutionary, democratic, socialist style legal system.

In Mongolia since the end of 1920 with direct participation of the Komintern the efforts to coerce "soviet model of the socialism" was very strong, and since 1930 it became official policy of the state and have been effected. In particular up to 1930's legislation had capitalist feature and therefore it had been adjusted according to "social organization". Some researchers specified that according to this decision almost 300 acts were passed in 1932-1935 including laws, rules, Government resolutions developed to establish" non capitalist way of development"[9].

Legal branches were established and new laws as the source of it were enacted. But it's future implementation was strongly influenced by the political oppression held in 1930's. During 1935-1940 the sufficient number of legislative acts were adopted. But the number of resolutions passed by the State Great Khural and State Baga Khural (parliament) decreased while the number of state administrative organization's resolutions and orders sufficiently increased. During this time no one codified law was adopted[10].

3. The period of effectiveness of the Second Constitution of Mongolia (1940-1960)

Since 1940 the socialist family of the law irrevocably have been

[8] Undeejantsan.N. (2002) "*Tur erkh zuin setgelgeenii khuglun chig khandlaga* "(The tendency of the development of the state and legal thinking). UB, 283

[9] Narangerel.Sodovsuren. (2001) "*Mongolun ba delkhiin erkh zuin togtoltsoo* "(Mongolian and world legal system), UB, 105; E. Gbhart (FRG), (2003) *Mongolian law reform*, Rule of law journal, 39

[10] Narangerel.Sodovsuren, (2003) "*Mongolnn erkh zuin togtoltsoonii udirgal*" (Mongolian legal system preamble), UB, 2003, 24-27

adopted in Mongolia. The Constitution adopted in 1940 has socialist and class character.

This period social and political situation was connected with time when Mongolia left behind such difficulties like mass oppression, war in Khalhiin gol but from the other side extolling of one person greatly extended. For instance, the Constitution and five-year plan were named after marshal Choibalsan and every "achievement" has been considered as his merit.

Constitution was effective for 20 years from 30 June 1940 until 6 July 1960. Same amendments to the Constitution were made in 1949, 1957 by the decision of the State Ikh Khural. In violation of the Constitution amendments to the Constitution were passed by the decree of the Chairman of the State Ikh Khural by the Presidium of State Baga Khural or joint decision of the Council of Ministers and the Central Committee of the Mongolian People's Revolutionary Party.

Even so after enactment of the Constitution great work has been done to bring the legislation in conformity with the Constitution. For instance, Criminal law (1942), Criminal procedure law (1949), Civil law (1949), Civil procedure law (1949), Labour law (1941), Forest law (1940), Land exploitation law (1942), Hunting and fishing law (1944) and other law and rules were renewed.

By this time codification of the legislation started and several progressive steps have been done.

Since the middle of 1950's especially after 00 congress of the Communist Party of the Soviet Union new tendency in the legal system arose and political regime and ideology in Mongolia comparatively mitigated, which also impacted in the legal system.

4. The period of effectiveness of the Third Constitution of Mongolia (1960-1990)

This situation had impact in content of the Constitution adopted in 1960. Even so it has kept the features of the socialist law family model.

In 1960's all countries of the world divided into 2 politics, socialist and capitalist. In socialist history Soviet Union had the objective to build material and technical basis of the communist society, while European socials countries had the objective to make transition to stage of developed socialism which was declared in their ruling party's Congress. Conceptually it was a very enthusiastic period of time.

To understand the essence and the regularity of the development of

this periods legal system we must consider social, political, economic and external factors of this period which will help us to objectively assess this issue.

This period's legal system is characterized by the laws with "social content" passed within the overall objective of the building the socialism in Mongolia. For instance, the Constitution specified that "The economic basis of Mongolian People's Republic shall be socialist property which shall own industrial tools collectively."

This provision denied private property and enhanced absolute leading position of the state property.

Around 50 laws and legislative acts were passed during this period. They were better drafted and specially codified laws left evident trace in the legal system development of our country. In particular, in the field of civil, criminal, family, ecology law sufficient progress has been made. For example, ecology law development specifically became more comprehensive and it covered all objects to be protected by this legislation. Even so laws for regulating multilateral social relations including financial, economic and commercial relations have not been passed.

Main achievement in the education field was that in 1970 Mongolia became one of few countries of the world which completely abolished illiteracy.

The Constitution of Mongolia from 1960 was effective for 30 years. And one of it's achievement was that it has guaranteed and actually provided some social and economic rights of the citizen. For instance, right to work, right to receive wages appropriate to fulfilled work amount and quality, right to financial assistance at old age, disability and loss of the bread-winner, right to free of charge education and right to state stipend during the study in vocational schools, institutes and universities[11].

But during this time serious violation of the human rights and freedoms had place and almost up to the middle 1980's under the name "Intelligent people delusion" oppression and discrimination of people occurred.

One of the specifics of this time should be mentioned here. In 1961 Mongolia became a member of the United Nations and in 1962 a member of the Mutual Economic Assistance Council (of socialist countries), established diplomatic relations with more than 100 countries and economic, cultural relation with more than 40 countries, concluded bilateral agreement on cooperation in civil, criminal, family law field with all former socialist countries and assessed to more than 90 multilateral

[11] Narangerel Sodovsuren. (2003). *"Mongolun erkh zuin togtoltsoonii udirtgal"* (Mongolian legal system preamble) ШБ, 108

treaties which requested to bring national legislation in conformity with international law.

5. The transition period (1990-1992)

Since the middle of 1980's all socialist countries led by Soviet Union politically, socially, economically and all other field faced the problem of getting over the crisis of considering own specific way of "renovation".

This situation at the end of 1980's and start of 1990's created condition for renovation in Mongolia too. It opened for Mongolia the door for abolishment of the totalitarian political system and for making democratic changes.

New option was the way of development of rule of law state, which adhere human rights, democratic regime based on market economy. The selection of this option became main condition of the legal and in particular legislative reforms.

Reforms have not been made suddenly or in one step.[12]

In May 1990 two chapters legislative act called Amendments to the Constitution was passed. It established main frame of the political system. Then in July 1990 democratic election to People's Ikh Khural was held according to this law, which established multi-party parliament vested with legislative, monitoring and organizational power. The first permanent parliament is called State Baga Khural.

The State Baga Khural declared the right to private property and determined new economic, financial, commercial relations of market economy and passed 35 new laws for the renovation of the political, social system[13], and made amendments in some of laws. Those legal grounds became official concept of the development of the new Constitution. This institution main objective was institution's drafting, discussing and submitting to the People's Great Khural the draft of the New Constitution of Mongolia.

The State Baga Khural established the commission for the drafting of the new Constitution headed by the President of Mongolia. The State Baga Khural provided opinion poll on the draft of the new Constitution and in overall more than 200,000 proposals were submitted to the commission.

The State Baga Khural twice discussed the draft of the Constitution and submitted it to the People's Great Khural. The draft of the new Constitution was discussed by the 2nd session of the People's Great Khural of People's Republic Mongolia established

[12] Chimid B. (2002). *"Undsen khuulin uzel barimtal"*. (The concept of the Constitution)., UB. 200

[13] *"Ardin erkh"* newspaper, 1992.6.1. 82(386)

by the 12th election opened on November 11, 1991 for 76 days and adopted it at 11.35 on 13 January, 1992. The new Constitution of Mongolia consists from preamble, 6 chapters, 70 articles.

6. Democratic Mongolia and legal system reform development stage (since 1992)

The Constitution declared that Mongolian people strengthening the independence and sovereignty of the nation, cherishing human rights and freedoms, justice and national unity, inheriting the traditions of national statehood, history and culture, respecting the accomplishment of human civilization, and aspiring towards the supreme objective of developing a humane civil, democratic society in the country, proclaim the Constitution of Mongolia.

Mongolian Constitution is political and legal document recognizing democratic development of Mongolian society, state and citizen, which established legal basis for bringing it to the modern democracy level. New Constitution of Mongolia is core of the Mongolian legal life and it's legal fundament[14].

On 6th, January, 1992 the attachment to the Constitution on transition from the Mongolian People's Republic Constitution to the Constitution of Mongolia was adopted. This law determined the principle of power separation, local governance power, and legal reform tracks.

The attachment law to the Constitution specified the objective of the State Great Khural shall be adoption of all laws mentioned in the Constitution according to the set schedule by 1993 and completion of the work related to the bringing all legislative acts in conformity with the Constitution of Mongolia by 1996. The law also specified The State Great Khural shall decide whether international treaties to which Mongolia is a party are consistent with the new Constitution of Mongolia. In other words it was decided to make legal reform in two stages 1992-1993, 1994-1996 and all measures involved 5 activities. For instance, 1-the renovation of the legislation, 2-the renovation of the law implementation, law application system, 3-the renovation of legal education system, 4-the renovation of legal research work organization and it's methods, 5-the development of new legal consciousness in the society.

First of all within the objective of renovation of the state organization, and reform of Governmental and local self governing bodies the Law on State Great Khural, the Law on President of Mongolia, the Law on Government, the Law on Administrative unit

[14] Tumur S. (2003) "*Mongol ulsin Undsen khuulin erkh zui*" (The Constitutional law of Mongolia). UB. 21

and it's administration and set of election laws were adopted and enacted. First time in Mongolia multiparty parliament or State Great Khural vested with legislative power has been established.

The highest executive organ, which has function of implementing the Constitution, other laws and state policy within the country or Government have been composed.

The Law on courts adopted in 1993 changed the court system, established the guarantee for independence of the court and set fundaments for creation of the legal environment for the courts.

Until 1998 the laws regulating major social relations, like state organization, defence, foreign relations, state budget, tax, custom, health, social insurance, social security, land, environment, economic activity, infrastructure have been adopted and effected.

The State Great Khural research service specified that State Great Khural has done sufficient work on renovation of the legislation and other parts of the legal framework. In particular, since July 1992 up to July 1996 adopted 137 laws, made amendments to 142 laws, accepted and ratified 40 international treaties, and cancelled 46 laws.

Since July 1996 till July 2000 adopted 110 laws, made amendments to 255 laws, accepted and ratified 71 international treaties, and cancelled 32 laws.

Even it was renovation continued after adoption of the Constitution it reflected the main demands of the society[15].

The State Great Khural adopted the Action plan for Legal Reform in 1998 which determined the future tendency of the legal policy of Mongolia. It is an important document based on political parties consensus.

The main objective of the Legal Reform within the aim of establishing a humane, civil, democratic society in Mongolia shall be determination of the direction of activity of all state organization and officials according to the principles and ideas stipulated in the Constitution and creation of the favorable legal environment for the development of the political, social and economic system.

Within the main direction of the action plan on improvement of the legislation and it's sustainable development up to 2000 or during the two years it aimed: 1) to provide human rights and it's legal guarantee, 2) to improve legal basis of the economic relations, 3) to improve legal basis of the state organization, 4) to improve legal basis of the social branch by drafting and adopting 69 laws, and making amendments to 49 laws. Major duties related to this plan were transferred to the current State Great Khural. This is great amount of work for assessment of the previous period of the Legal reform and directed to abolishing

[15] Chimid B. (2002) *"Undsen khuulin uzel baramlal"* (The concept of the Constitution).UB. 201

it's drawbacks.

In paragraph 3 of the part 6 of the of the "Government activities action plan adopted in 2000 by the state Great Khural was specified that " the Government shall strengthen the legal reform, develop the plan for the renovation of the Mongolian legislation up to 2004 and shall submit it to the State Great Khural and make improvements in law implementation". According to the provision an action plan was adopted.

In 2002 all laws related to legal institutions were revised for purpose of making improvements in the organization of legal institutions, for establishing less bureaucratic, less complicated structure, for providing human rights and freedom. Within the scope of this activity Criminal law, Criminal procedure law, Civil law, Civil procedure law, Law on courts, Law on Court decision enforcement, Law on Prosecutors organization, Law on Advocacy, Law on decision of the administrative cases were adopted.

For example, civil legislation within the scope of economic reform sets its fundaments of legal regulation of the economic relations in the society. In drafting such main principles, like equality of the participants of the civil relation, the free and equal development of all forms of the property, establishing it's guarantee and strengthening the civil law guarantee were adhered. Also for purpose of extending opportunities for business, economic and investment making new provisions related to franchising, options, trust were included in the Civil law.

The law on decision of the civil case in the court made improvements on rational distribution of court work load, on elimination of bureaucracy for participation of the citizen in the court hearing, on development of the legal environment for the implementation of adverbial principle, on extending parties rights on protection of the independence of the court, on more precisely determination the rights and duties of all court levels.

In the criminal law the sanctions imposed for the commitment of the crime were charged and the forms of the crime were determined more precisely, the provisions related to the specific crimes were adjusted to the existing external and internal criminal situation.

To intensify land reform, to involve land in economic transactions, to bring the land ownership, possession and use on higher level the Law on land, the Law on Mongolian citizen's land ownership have been adopted.

To create comprehensive financial, budget and management system the Law management and financing of the budget organization have

been enacted since 2003.

The important reform to provide human rights and freedoms was the adoption of the Law on National Human rights Commission of Mongolia and establishment of such national institution.

In the process of the intensification of the legal reform the public awareness of the legislation and Rule of law was improved and new perception of the law as a tool for guaranteeing human rights and human values, and strengthening private property created, which leaded to raise legal awareness and legal culture of the public. This is also one of the achievements of the legal reform.

The achievements of the legal reform also could be expressed in the figures. Until 1990 more than 50 laws regulated social relations, but now more 300 laws regulate multilateral social relations. For 30 years since 1961 when it is became full member of United Nations, Mongolia accepted (ratified) more than 80 international treaties in comparison to the 10 years of legal reform it acceded more than 100 international treaties.

Future objective of the legal reform shall be comparative study of passed laws and it's stabilization based on "cleaning", "balancing" and "codification" work.

In the law drafting the law branch classification must be held, the drafting activity shall be made more transparent, the proper codification work shall decrease the law numbers and improve it's regulation capacity.

One of the objectives of the legal reform shall be legal training, information and promotion for purpose of improving public and legal professionals legal education which will help to raise public awareness of their rights and development of the culture of law respect.

Moreover, the basic and supplementary law research must be developed. The researchers and scholars participation in legislation, law implementation, law promotion work shall be increased. The legislation needs to brought in conformity with widely accepted international law and work on transplantation of the international law norms must be intensified. All this will be important steps for strengthening of the legal reform.

The legal reform in Mongolia is developing upon considering the progressive achievements of the state organization for several hundred years, the ways of establishment of legal system, the common tendency of the other countries in the world, the specific of own country, upon adhering the principle of consistency with the national interest, upon determining every provision of the Constitution on the following way. For instance:

1) To develop legal grounds for providing sovereignty of the nation;

2) To develop legal grounds for regulation of economic relations;

3) To provide legal guarantee for exercise of human rights and freedoms;

4) To develop legal grounds for regulation of state organization;

5) To create environment for the legal reform;

6) To improve the legal education system of legal professionals;

7) To extend Mongolia's participation in international law regulation.

Second. Law families and Mongolian legal system

This part of the report is conclusion of the first part of the report. The systematic approach to any issue and making right choice is one condition of decent regulation of complicated social relations and it's successful management.

The law is most universal and powerful tool for bringing the life of the society to democratic and market economy system mainstream, for it's protection from deviation and disorder and for it's decent regulation. It's system has decisive impact on development of other public institutions.

Every family of the law has own specific characteristics but in overall legal families have sources such as legislation, administrative organizations decision, custom, tradition, precedent, agreement and treaty. Mongolian legal system has a legislation as a main source.

Legal system in a broad sense considered as a set of legislation, other legal norms it's concepts, approaches, practices of it's application and many other factors. In a narrow sense legal system considered as set of legislative norms.

National legal system is "living" organism which develops reflecting the historical tradition, political, economic, social intellectual precondition of concerning country, outside environment impact and influence of certain law family[16].

The legal family is a notion which is much wider than national legal system and it's branches.

Every national legal system has own specifics. But depending on similarity of historical condition, methodic, source, legal proceeding, economic and political system, religion, language, culture and interaction its sources could be the same.

The world legal system is divided into following 4 widely recognized

[16] Chimid B. (2002) *"Undsen khuulin uzel barimtal"* (The concept of the Constitution). UB, 208

law families:

1) Common law or Anglo-Saxon law system;

2) Continental or Roman law system;

3) Religious law system (effective in islamic (traditional), and hindi religion countries);

4) Socialist and ideological legal system.

To which law family Mongolian legal system should belong?

Based on the legal theory and comparative approaches study of the historical development of the Mongolian legal system until 1990 we could conclude that the Mongolian legal system since 1206 up to 1921 belonged to the religious law family. In other words, it was a legal system which has not clear differentiation and which consists from the Khan's decree, customary and religious norms.

The state decisions and policies (including laws and legislative acts) adopted for the first 7-8 years since 1921 revolution in some way mistakenly justified capitalist orientation.

Therefore this "left wing" mistake under the Komintern pressure needs to be corrected in conformity with "social justice rule" according to the decision of the extraordinary 3rd Joint Plenary meeting of the Central Committee of the Mongolian People's Revolutionary Party and Central Auditing Commission held in 1932, 17th State Conference also issued the same decision.

When the draft of the first Constitution of Mongolia was developed the Constitutions of France, Austria and Germany have been translated and studied.

It means that Mongolia even by this period made efforts to make orientation in continental law system.

From the other side during 1924-1930 Mongolian system consisted from numerous codified laws adopted many notions, principles, structures and definitions from the continental law family.

Then since the end of 1920's fully ignored the valuable legal tradition[17] for the reason of it's "cruel", "primitive" nature and up to 1990's for 60 years was developed under the influence of the Soviet law, and belonged to the socialist law system.

It had some advantage of getting closer to the European legal culture through the Soviet Russian legal system. But finally it was a

[17] Valuable tradition does not mean written and customary law of the ancient and middle centuries Mongolian state and also it does not mean the law of Khan's ruling, but it means the customary norms concerning to the respect of the law, to the protection of the motherland, to the adoration of the mountains, rivers and environment, the state officials ethic rule of respecting the state position, the engagement for marriage, the horse racing, new year celebration, hunting which became habitual for centuries. It's inheritance through the law shall have same impact with the legal norms.

big mistake[18].

Mongolia almost up to the present as a country, which "skipped capitalist stage", set an example for the Asia and African developing countries, which chose socialist orientation.

10 years of the transition period proved us that the "skipping the capitalism" is not a desirable thing.

As I mentioned above on establishment of the legal system it is important firstly to determine the family of law to which it belongs. At present general orientation cleared up but still theoretical disputes continue.

It is not issue which could be decided by discretion, but it should be assessed by the specific scientific criteria.

While using the law and practice of the other law families we should judge it from principally different point but from modern converging point. Nobody will deny that some law family "foetus" is contained in other law family.

Beside this it seems that the process of reapproching of Anglo-Saxon law with continental law started in the 19th century. Especially since 1787 when USA adopted written Constitution USA's legal system in the family occupied specific position. At the beginning of the 20th Century, among parliament statutes, the number of codified laws increased which fastened the rapprochement of English law with continental law family noticed some researches[19].

Professor E.Anners from Stockholm University wrote: "Between 1870-1934 English parliament adopted 109 laws and it was actually revision of the old statutes for purpose of their coordination. By this way England gradually, approached continental legislation[20]". And mentioned as example commercial, sea, family, married person and property law containing 748 articles.

World economy integrated, international trade extended, the international communication and information network established, human rights globalized and in private law the numerous international multilateral treaties, conventions and other documents were enacted and every country undertake certain responsibility on them. Depending on this national legislation is becoming similar and through this process law families reapproaching each other.

Especially European Union members more clearly realize the influence of the integration process to the reapproching of the legal systems. Even Mongolia realized how integration reapproching national legal systems from own experience when it was a member of the Mutual

[18] Ibid. p. 211

[19] *The general theory of state and law*.. Academic course. 1-2, 1998. p. 103-104

[20] Ibid p. 365

Economic Cooperation Council which was one of the form of the "socialist integration".

By this way law families reapproching each other and the national legal systems "blood" getting mixed to each other. Even so main difference has determining role. The consideration of such difference one of the condition of the keeping the specific of the nation, it's civilization and independence.

The democratic Constitution passed in 1992 secured democratic society, state organization and status of the citizen in the society, state organization; local governance system. The concept of the Constitution is fundament of the new legal system in Mongolia.

Therefore depending on the concept of the Constitution we could define the law family.

Mongolian Constitution based on following principles:

1) Rule of law shall be the main principle of the state activity;

2) Strengthened the principle of development of the Rule of law state and humane civil society;

3) Declared the natural human rights and freedom and secured that state shall provide condition for their exercise;

4) Specified that Mongolia shall have market economy with social features based on private and public property with diverse economic forms which oriented on social or "a humane state";

5) Courts shall be independent and subject only to law;

6) Established local self-governing bodies and secured it's comparatively independent position;

7) Established the court system for the monitoring and implementation of the Constitution based on continental law system, new court specialized on the Constitutional issue has been created;

8) Declared the principle superiority of the Constitution.

The principal concepts indicated that the Constitution of Mongolia belongs to Roman-German family of law.

From the other side the general features of the Roman-German law could be used as criteria for determining whether the Mongolian legal system belongs to this law family. The criteria as follows:

- make difference between law and legislation;
- based on legal principles (rule of law, power separation and so on);
- legislation and first of all codes, written laws used as main source;
- legislation consists of norms, which classified and precisely formulated the reality and tradition from the legal theory and logical thinking view;

- court and other law using organizations mainly follow the material and procedural law instead of the precedent;

- mainly based on natural and positive law;

- legal professionals undertaken modern legal education had risen out of traditional education.

Also one of the components of this system legal consciousness, ideology also belongs to this family. For the abolishment of the monopoly of one ideology and recognition of pluralism the renovation in the legal consciousness is necessary. It will demand intensive reform in the scientific and education system. We face this problem.

The professional training development mainly depended on subject of the research, it's doctrine, methodic, material basis, teaching personnel. Mongolia traditionally has European style legal study. Mongolian law institutes develop their training programs based on Roman-German law and teachers fully adopt theories and methods.

Even so training of Mongolian lawyers in Common law system, especially on American and English system shall extend Mongolian legal culture and scientific cognition and shall create favorite condition for development of comparative law which will extend it's scope of practical influence.

Creation and development of legal research structure and support to such initiatives is necessary. Legal ideology and transplantation of law respecting especially the Constitution respecting consciousness is an important task, which we face today. In this work the experience of USA and European countries will play influential role.

German Technical Cooperation Society (GTZ), Hanns Seidel Foundation, Konrad Adenaur Foundation, American USAID, Asian Fund, Japanese Jaica, World Bank, Asian Development Bank, United Nations Development Programme put great intellectual investment by implementing projects on development of the Mongolian legal system, on streamlining judiciary power, on human rights legal education fields.

As I mentioned above in one law family "foetus" of other law family is kept and some our law or law provisions is developed and implemented in Anglo-Saxon law principles. Examples are Company law (1999), Law on Prohibition of Competition (2000), Law on Bankruptcy (1997), Banking law (1996) and other commercial laws. Also in 2002 the Law on Management and Financing of the Budget organizations was developed on the basis of New Zealand experience and was adopted. The time will indicate consistency of this law to the actual life circumstances.

MONGOLIAN LEGAL HISTORY AND LEGAL DEVELOPMENT*

*Narangerel Sodovsuren***

1.1. Introduction

The development of Mongolian law has been a volatile process that distinctively tied to the dissolution of a massive empire and its replacement by an independent, modern nation-state.

Therefore, through various historical stages, numerous laws and institutions have lost their historical context. In contrast, in many states, there are no such classifications as "law after revolution" or "law after a new constitution". However, throughout their history, Mongolians have endured various level of prosperity, disorder and dissolution. These have directly affected the development of law itself. The development of law in Mongolia can be divided in to three main historical stages.[1]

First stage. This is the period of the formation of the legal system of the nation of Mongolians. The Great Mongol state was formed and conquered vast territories under the so-called Great Zasag law (Also known as "Yassa") of Chingis Khaan, the first integrated written code. The law of the Yuan Empire became effective in the eastern part of the Mongolian Empire.

Second stage. This is the period of the second integration of such laws as the Mongolian-Oirat Laws, Khalkh Juram law, the Mongolian law paper, the Ministry of Statehood Affairs legal document related to Outer Mongolia adopted by the order, and the Mongolian legal document adopted by the Order.

Third stage. This is the period of the formation and development of the modern legal system.

The most important feature was an attempt by Mongolians to establish a national and socialist legal system with the aim of making the transition to industrial capitalism. Despite this, the fundamental legal system remained intact.

1.2. Law of the period of the Great Mongol State

Mongolians, however, know that their legal tradition embodies more than merely the writings of Chinggis Khan. The Great Zasag Law, written sometime between 1206 and 1218, was for the most part a codification of the general principles of law already held by the tribes under his

* Narangerel Sodovsuren (2004) "*Mongoliin erkh zuin togtoltsoo*" (Legal system of Mongolia). UB.

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[1] See Narangerel Sodovsuren, (2001) "*Mongolin ba Delkhiin erkh zuin togtoltsoo*". *Kharisuulsan erkh zui*" (Mongolian and World legal systems, comparative law). Ulaanbaatar. 92.

command. Except for the military and administrative innovations of Chinggis, it doesn't represent a sudden invention of the rule of law. Written and unwritten, laws had likely always played a significant role in the lives of Central Asia's nomadic peoples, even reportedly as far back as third century BC. Mongolia may not have existed as a single nation prior to its unification under Chinggis Khaan, but it did exist in the form of nomadic tribes each of which had some form of unwritten traditional law. Chinggis Khaan had the foresight to have some of them recorded for posteriry.

Today, although a few researchers have characterized the period of Chinggis Khaan and his successors as barbarians and a threat to civilization, no one can deny the fact that the unification of the various tribes and the formation of a Mongolian state became a significant factor in the world history.

Although the success of Chinggis Khaan and his successors can be attributed to various factors, one often neglected element is his development of a strong and well-thought out legal system. A key part of this system was the Great Zasag Law, integrated code regulating multisided social relationships.[2] The result was that laws were strictly obeyed.

The influence of the Great Zasag law in the development of the Mongolian and world legal system can be summarized below.

The Great Zasag law was established to manage the family, organizations, and states. In this law, it was stipulated that "who manages his her own life in a good way, that person can govern the country; person who is able to control ten thousandth, thousandth, hundred and ten (ten thousand, thousand, hundred and ten is the name of the both both very strict population (social) and military structure of that time Mongolia composed of for example ten thousand people etc.) can be given to that person can govern". Chinggis Khaan formed the structure of ten thousand, thousand, hundred and ten.[3] He gave a thousand to a person who is close to him and lord of thousandth appointed lord of hundred, lord of hundred lord of ten so that they control lower structure. In the Great Zasag law, it was mentioned "People should be in their thousand, hundred and tens", "Lord of a thousand shall instruct the lord of hundred, lord of hundred a lord of ten". There were provisions to unify the people's will so as to protect Mongolian national interest. For instance, military lords were to be carefully in any circumstances including the control and regulation of the behavior of the soldiers as well as their horses.[4]

[2] See Rashid-Ad Din (1952) "*Sbornik letopisei*". (Script Digest.) Vol.1. Moscow-Leningrad. 197.
[3] See Phillips, E.D (2003) "*Mongols*". trans. In Russia, Moscow. Central press. 37.
[4] "*Mongolin ert edutgeegim huub tsaazni sedev devter*". *1927* (Mongolian old and contemporary legislation themes). Bayarsaikhan's, B. transcription from old Mongolian into Cyrillic. Ulaanbaatar, 2002. p.13.

Thus modern management fundament and core of victory of the Empire was reflected into Great Zasag Law. In the Great Zasag law, it was prohibited to transfer common person from one tent to another person and anyone breached was punished with a capital punishment.[5]

It can be said that the idea to respect and develop achievements of civilization is contained in this law. Some scholars think that after the wars led by Chinggis Khaan and his successors, economic crisis did not occur in the occupied countries. In the Great Zasag Law, it states that countries, towns and villages that gave up voluntarily should not be destroyed.[6] In all the countries occupied by Mongolians, development was not interrupted and most became quite prosperous. For example, in the large town of Sarat, which now belongs to the capital city of Batkhaan, an amazing water supply system served various manufacturers. Remains of ferrous tube, brick plant and remains of ceramic goods are witness to the above-mentioned facts.

Moreover, coins, decorative items, remains of shoes and other crafts, as well as brick houses, have been found. Mongolian tents were also found in the Golden Palace city. The reason for pointing this out is to counter the argument that the Mongolians were nothing more than barbarians.[7]

Researchers think that the Great Zasag Law was the written code. Riazanovski, V.A. has written, "Considering views based on historical writings done mainly in the thirteenth and fourteenth centuries, the Great Zasag Law is written based on legal materials composed by Chinggis Khaan himself."[8] No copy of the Great Zasag Law exists in its copmleteness today. Some parts do remain today, recounted by Arabian, Persian by Armenian historians. Even though many researchers and scholars deny that the Great Zasag law existed in a written form, this contradicts some Mongolian, Arabian, Persian, Russian and Chinese sources. Aforementioned sources offer evidence that Chinggis Khaan's Great Zasag law was not only the compilation of oral directives but was a written code.[9] "From Rashid ad-Din's data it is evident that Chinggis Khan, striving to establish firm order in his domain, not only employed old custums and law, but also created new ones, directed towards enforcing the khan's power over Mongolians in general. In this regard

[5] See Dalai.Ch. (1994) "*Mongolun tuukh., Ih Mongol Uls*". (History of Mongolia , Great Mongol State) , 1206-1260. Vol.2. UB. 63

[6] See Riazanovski, V.A. (1932) "*Mongol,huudiin huuli tsaazni dursgal bichgiudiin tuukhen tom*" (Historical overview of Mongolian legal documents). Harbin, trans. From Mongolian, Ulaanbaatar. (2000). 98; Phillipd, E.D. Mongols., translation from Russian, Moscow, Central press, (2003). 38.

[7] See Shapovalov, V.A. Gaikov, V.I. Razvitie, (1996) "*Ugolovno-pravovoi I kriminologicheskoi mysli v Rossii*". (Development of criminal and criminology thoughts in Russia). Rostov University Publications,.26-27.

[8] Riazanovski, V.A, Ibid, 59.

[9] Riazanovski, V.A, Ibid, 65.

the legal terminology used in Rashid ad-Din's work is of interest when he clearly cites the diferendes between such concepts as yusun (costum), biligs and yasa (laws). There is the reason to think that on the basis of these legal concepts expressing the judicial creativity of the Mongol people, there arose the Mongolian Codes of Laws, the Great Yassa. It is difficult to explain why Rashid-ad-Din nowhere mentions this code. However, considering the fact that numerous Mongolian practices and laws are cited in his work, one may assume that the code was known to him and used to some degree."[10] Thus Great Zasag Law was not only one of the first written codes in human history, but it contributed to the ideology of respect for law.

The Great Zasag law was an ideal model of law

Looking at the section 26 of the Great Zasag law, the function to supervise its own implementation was given to Tsagaadai, the son of Chinggis khan and known for his cruel nature. All Mongolians, including Khan's and their relatives were to be punished for refusing to obey the Great Zasag Law. According to the directive of Chinggis Khaan (oral): "If someone from my lineage breaches the Great Zasag Law once, then advice him of this;if breaches it twice, then work to convince him; if he breaches it a third time then send to the Baljin Hujir (Place of exile). Returning from there, hope he would relize what he has done himself. If he does not, then imprison him in shackles. After this, I hope that his character has become gentle and he has understood what he has done. Should this not be the case, then it must be decided what to do with him after gathering his family together and discussing this with them."[11] Batkhaan once said, "Anyone who breaches the Great Zasag Law should be beheaded." It was through strict obedience of laws such as these that a stable legal order developed in Mongolian society and the occupied countries.

There was no meaning to regulate all the occupied countries and territories in common way from the content of the Great Zasag law which meant civilization, language, economy, lifestyle, tradition, custom of people of particular country should be respected. In other words, it was not intended to force the Mongolian nomadic lifestyle on other more sedentary people.

According to the Great Zasag law, the right to religion was respected.[12] It is provided that "All religions should be respected without

[10] Bira, Sh. (2002) "*Mongolian Historical writing from 1200 to 1700*". Translated from the original Russian by John R.Krueger and revised and updated by the author, second edition, Center for East Asian Studies Western Washington University, 2002, 108.

[11] Rashid-ad-Din, "*Chingiz-Hana*". (*Gingis Khaans..*) vol, 2. P.120.

[12] See Bira Sh., (2003) "*Mongolian Tenggerism and modern Globalism*": *A restrospective outlook on globalisation*. The white horse press, inner Asia, 5 :107-117.

preference for one of them".[13] According to another provision, "four Heavens (Buddha, Manse, Jesus, and Mahomet) shall be respected". The protection of the territories churches and temples of occupied countries was a major consideration. The king of Golden Place (Altan Ordnii Haad) permanently cited from Great Zasag Law on religious matter. The norms governing religion and state confirmed respect for all religions and the separation of church and state.[14]

The Pope's first envoy came to China under the auspices of the Mongolian king in the Thirteenth century and the first Catholic church was built in Beijing in 1299. Tax exemption was granted to the priest of the temples and churches. The prohibition on "giving preference to one particular ideology" is evidence that some kind of pluralism was generally accepted.

The Great Zasag Law shows that there was an attempt to establish a court and that supreme judicial authority rested with Chinggis Khaan, who appointed a State supreme magistrate.[15] Chinggis Khaan appointed his adopted brother Shihihutag as a State supreme magistrate saying "prohibit theft, stop falsehood, and kill what should be dead, charge what should be charged within the country." He also ordered Shihihutag to "be the eyes to see and ears to listen during governance of the state under the auspices of Eternal Sky... No one can change the words says by you". In addition, it was ordered to "divide the property of all the country, and resolve law suits, then publish it in a blue notebook. No one can change published writings in a blue on the white (this means No one can change what was decided by Shihihutag) decided by Shihihutag and consulting with me for age."[16] From the above, in the Chinggis Khaan age, there was attempt to establish the foundation of judicial precedent law. It seems that lords of the ten thousandth, the thousandth, and the tenth were conducting trials. The most serious crimes and disputes were submitted to the King and state magistrate.

Currently, only a few documents remain that show evidence as to how a trial was conducted at that time. Examples of the provisions on judicial procedure in Yuan Empire legislation include:

"Judicial proceedings shall be based on a request (complaint S.N.) and it should not be judged when there is no request";

"The accuser should bear the burden of proof and if a false accusation is made, sentencing should be invoked against that person";

[13] See Phillips, E.D. (2003) *Mongols*., translated from the original English, Moscow, Central press, 38.

[14] See Bayasgalan.G, Mongolia., -Legal systems of the World, A political, social, and cultural encyclopedia., Volume III: M-R, Edited by Herbert M.Kritzer, santa Barbara, California*Denver, Colorado*Oxford, England, (2002), p.1058.

[15] Boldbaatar J. and Lundeejantsan.D. (1997) "*Mongol ulsin tur, erkh zuin tukhhen ulamjlal*"., (Historical overview of Mongolia's State and Legal Tradition), Ulaanbaatar, 63-64.

[16] "*Mongolin nuuts tovchoo*". (The secret history of Mongolia), Ulaanbaatar, (1976), 168.

"Parties can go to court for all the matters within the jurisdiction of court. They should first go to the ruler of rural area and it is prohibited to apply to a higher authority unless bureaucrats of that area are corrupt".

From here we can see the beginnings of what could be called court proceedings at the first instance and appellate levels. Law in the Chinggis Khaan era was based mainly on local customary law, as can be seen by an analysis of the content of the Great Zasag Law. As a result, the court issued its decisions based on local tradition and custom.

Local legal tradition was recognized not only among Mongolians, but also among the peoples of the occupied countries and territories. Customary norms were the basis of the Great Zasag Law. At that time, they followed the general principle that "if it is better for two parties to compromise rather than partake in judicial proceedings, then the magistrate should issues this order". In other words, there were initiatives to encourage conciliation and mediation in those disputes common to daily life. In many ways, the Great Zasag Law was the law that helped to unify the customary norms of the time.[17]

The Great Zasag Law included norms related to the state, administrative matters, and criminal and civil matters.[18] In particular, the criminal system and definition of crimes was covered extensively.[19] However, one should still remain cautious about drawing too many parallels with the modern classification of law.

Some researchers wrote evaluating the Great Zasag Law's significance: "As the Great Yasa (Zasag S.N) presented a codification which brought the habits and customs of a nomadic people under the Khaan's administration, this legal compilation can be regarded as having a significance for eastern legal culture and civilization similar to that of the function of the old Roman laws for the legal system of settled peoples".[20]

Among the laws enacted after the Great Zasag law by the successors of Chinggis Khan, the "Complete Collection of Laws of the Great Yuan Empire" was the most prominent. This comprehensive work led to the establishment of a concrete legal system.

In 1264, after his accession to the throne, Khubilai Khan began to introduce numerous new laws and ordinances. In the years which followed Khubilai and his successor promulgated a total of 2539 laws and

[17] "*Pravovie systemi stran mira*"., "*World Legal Systems- Encyclopedia*"., Entsiklopedicheski spravochnic, Edited by A.Y. Sybirev, Moscow, Norma press, 200, 445.

[18] Riazanovski, V.A. Ibid. 77.

[19] See Mongolia: "*Legal needs assessment report*" WB. Ulaanbaatar, (2000), p.12.

[20] Sovd, G. (1996), "*Mongolun erkh zun togtoltsoonu khugjil, tuunu ontslog-Khuuli erkh ba undesnii ayulgui baidal*" (The development of the legal systems of Mongolia and its characteristics- Human rights and national security), International Symposium, The Hanns Seidel Foundation of the Federal Republic of Germany at Ulaanbaatar 30 September-4 October, 27.

ordinances which appeared in 1320 as the "Complete Collection of Laws of the Great Yuan Empire". It is significant to legal history that in this collection, the function and application of law regulating and ordering social life was worked out and that account was taken of the prevailing legal culture in society as well as of theoretical legal concepts.[21]

In the preface to the "Complete Collection of Laws of the Great Yuan Empire" it is stated: "Ever since ancient times. The great rulers of the world have not been able to rule by punishment alone. Wisdom is also necessary... If men are not wise, then laws are necessary. If men break the law, then that must result in the severest punishment not to demonstrate their power but to promote the good of the State."

This passage succinctly expresses three theoretical and methodological concepts of legislation: First, the principle of upholding the law is given great importance. Scientific and theoretical thinking must give priority to this principle. Second, it declares that where the law is violated, the person concerned must be punished. In other words, everyone must obey the law or accept the consequences. Third, it declares that issuing laws and enforcing them is not merely a demonstration of power by the khans, nobles, state or government, but is rather a response to the needs of ordering and regulating a society.[22]

The following few facts will show that the "Complete Collection" unmistakably contains Mongolian and not Chinese laws.

The "Complete Collection of Laws of the Great Yuan Empire" was promulgated by Mongolian emperors and nobles to ensure the functioning of their administration. The laws and ordinances enacted by Khubilai Khan (1264) and the eight Mongolian emperors who followed him reveal a uniformity of language.

There are many provisions in this Collection which have been taken over and adapted from the Great Zasag law of Chinggis Khan. Thus, the first version of the Collectio in 1264 improved Chinggis Khaan's directive about commanders (daruyaci) and applied it to provincial governors. The governors were noblemen invested with the highest powers in their respective provinces and, according to law, had to be Mongols. Furthermore, the Judges Rules issued in 1265 also required judges to be of Mongolian origin, which again was a continuation of Chinggis Khaan's original directives.

According to these laws Mongols were placed in the highest level of the social order[23], while the Chinese and nanhias were placed in the lowest. This resulted in vast differences in how they were treated under the law.

[21] Sovd, G. *"Mongolun erkh zum togtoltsoonu khugjil, tuunii onislog-Khuniu erkh ba undesnii ayulgu baidal"* (The development of the legal systems of Mongolia and its characteristics- Human rights and national security), 27

[22] See Sovd, G., Ibid, 27-28

[23] See Phillips, E.D. (2003) *"Mongols"*, trans. From Russian. Central press. Moscow, 119-120.

This also shows that these laws were intended to support Mongolian supremacy. According to the "Complete Collection", the Chinese were not allowed to possess information regarding military capabilities and were also banned from possessing bows and arrows. Furthermore, since Chinese warriors were not allowed to be armed during peace time, they were issued with weapons immediately before military campaigns and had to give them back immediately afterwards. A Chinese who killed a Mongol suffered the death penalty, whereas a Mongol who killed Chinese was drafted in to war. Such inequalities were common.[24]

The fact that parts of the "Complete Collection of Laws of the Yuan Empire" are similar to laws of the Ming and Chin dynasties is evidence that they served as models for the Ming and Chin dynasties. The Ming dynasty was founded after the down-fall of the Yuang dynasty and the Ming dynasty was followed by the Ching dynasty. It was not possible for the "Complete Collection of Laws of the Yuan Empire" to have contained material from laws promulgated at a later date.

The "Complete Collection of laws of the Yuan Empire" raised Mongolian languege to the status of official language.[25] Evidence that Mongolian habits and customs were codified also shows that it is a collection of Mongolian laws.[26]

Of course, the state and legal system of the Yuan Empire also shows signs of Chinese influence. It was natural that the Mongolian khans and nobles, as a result of their supremacy over China and the Chinese, should take account of Chinese habits and customs, culture and ways of life when formulating laws. Chinese influences accordingly resulted from the need to bolster supremacy over the Chinese.

A special feature of the legal system of the Yuan Empire consisted of the fact that, unlike the Great Zasag Law of Chinggis Khan, its territorial extend was limited. The Great Zasag Law was effective in all parts of Chinggis khaan's world empire, whereas the "Complete Collection" was applied only in the eastern part of the Mongolian world empire, i.e. at that Mongolia, China and Korea.

1.3 Mongolian Law of the Sixteenth to Nineteenth Centuries

The collection of laws from this period has survived in the "Mongolian-Oirat Laws" of 1640 and the Khalkh Juram Law of 1709. These laws legally strengthened and guaranteed social relations in

[24] Sovd, G. "*Mongolyn erkh zuin togtoltsoony khugjil, tuuny ontslog*" (The development of the legal system of Mongolia and its characteristics), p.30

[25] See Phillips, E.D. "*Mongols*", trans. From Russian, Central press, Moscow, 2003, p.120.

[26] Sovd, G. "*Mongolyn erkh zuin togtoltsoony khugjil, tuuny ontslog*" (The development of the legal system of Mongolia and its characteristics), pp.29-30

Mongolian society.[27]

The main objectives of the Mongolian-Oirat laws were to halt the dissolution of the Empire by strengthening internal solidarity and order and to protect the nation from foreign invasion. As a result, many norms served the purpose of improving the defence capacity of the country by discouraging internal fighting, encouraging people to warm one another in cases of invasion, conscripting fighters to come to the defence of the empire when summoned, preparing at least one armed soldier for every ten households, and marshalling forces together at the lords place when a warning sign has been sounded. Those found to have broken these provisions were severely punished.

Mongolian-Oirat laws did not follow the tendency of the Middle Ages that legal norms should be based on and protect religious doctrine. However, some researchers do believe that Buddhism became state ideology and the statue of the monks and temples were strengthened.[28]

One of the most distinctive characters of this law is how it codified the class structure of Mongolian society at the time. According to this law, Mongolians were classified as aristocrats; common persons; members of the higher, middle and lower classes; and slaves. Aristocrats were lords and could be classified as dignitaries (Khan, prince, or nobleman), middle class lords (governors of provinces, tavnan), lower class lords (lords without chair). These lords received tributes from their subjects and governors received a potion in taxes. Any violation of the rights of these lords was severely punished. Governors lower than lords, tavnan, associates, and persons of good breeding were also considered to be aristocrats. Middle class people were people with special privileges, including not having to pay taxes. Lower class people were common persons and included craftsman, nomads, and peasants. Slaves took the lowest position in society and were mainly prisoners of war. Generally, this classification defined their legal capacity and fixed their rights based on the structure of the social class.

Including the introduction, the Mongolian-Oirat Laws contained 186 articles, with almost half of them related to criminal law.[29] Mongolian scholars have conducted a great deal of research on this topic.[30]

The Mongolian-Oirat Laws regulated various spheres of activity, including matters related to administrative, civil, and family.[31] For instance, the head of the household was held patriarchal authority and

[27] Riazanovski, V.A. Ibid, p16. See also Golstunsku, K.F. "*Mongol-Oiraskie zakony 1640 goda*".. "*Mongolian-Oirat laws of 1640*", Sanktpeterburgi tipografiya imperatorskoi akademii nauki, 1880.

[28] Boldbaatar, J. and Lundeejantsan, D. p.128

[29] Riazanovski, V.A. Ibid, p.20.

[30] See Narangerel, Sodovsuren. (1999) "*Mongolin ertuugin erkh zui-ertunkhii angi*" (Criminal law of Mongolia, General part), Ulaanbaatar, 41–45. Sovd, G. (1973) "*BNMAU-in Ertuugin erkhiin kurs*" (The course on Criminal Law MPR), Ulaanbaatar, 32.

[31] Boldbaatar, J. and Lundeejantsan, D. 129

was allowed multiple numbers of wives.[32]

Content of Mongolian-Oirat Laws of 1640 has distinctive character from that of Chinggis Khaan's Great Zasag law. For instance, in contrast to the Great Zasag Law which had a provision stating that all religions were to be treated with equal respect, in the Mongolia-Oirat laws, there was a provision in which Buddhism was named as the major religion and shamanism was banned. In another example, in the great Zasag Law, capital punishment was imposed for minor breaches of law, while under Mongolian-Oirat Laws the use of capital punishment decreased and the imposition of fines increased.

However, this being said, many vestigial provisions of the Great Zasag law still remained. Some scholars have stated that this law was a "Mirror of the reality of seventeenth century Mongolia" and that this was a "second peak in the cultural history of the Mongolian nation".[33]

The Khankh Juram Law was the unified code that kept the legal tradition that followed the earlier ages and regulated increasingly complex social relationships. As a result, it has come under great scrutiny by scholars and researchers.[34] It was intended to regulate the social life of outer (khalkh Mongols) and is significant for the study of legal tradition and the culture of Mongolians in the middle ages. This law was in effect until the beginning of the twentieth century.

While Khalkh Juram Law was intended to regulate Mongolians as a whole, the Mongolian-Oirat Laws regulated interrelationships between the tribes. The Khalkh Juram Law is in "substance and structure a typical medieval legal compilation. It gathers together many laws from different fields and was promulgated as a Collection of laws at different fields and different times."[35] Thus, norms of the state, as well as administrative, civil, family, and criminal laws, were stipulated in the Khalkh Juram Law. Some researchers see this as "trying to regulate reflect all the aspects of the social relationships compared with the previous laws and clarified types and amount of punishment".[36]

Temples and monks were honored as a special legal person under the Khalkh Juram Law.

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[32] Riazanovski, V.A. Ibid. 21.

[33] See Dalai, Ch. (2002) *"Oirat-Mongolun Tuukh"*. "History of Oirat-Mongols", vol.1, Ulaanbaatar, 112; (1985) *"Oirad Tsaaz"*. (Oirat Laws.) China. Hoh Hot.: 5

[34] See Jalan-Aajav, S. (1958) *"Khalkh juram Mongolun khuuli tzaazun durtgalt biching mun"*. (The Khalkhy Juram as an Early Source of Mongolian law.), UB; Dylykov, S.D. (1965) *Halh Djouram: Memorial Mongolian Feudal Law of XVIII century*. Nauka, general editorial staff of eastern literature, Moscow.; Jalan-Aajav, S. (1995) *The Khalkh Juram*. UB; Avirmed, F., D.Dashtseden, D.Sovd, G. (1997) *Mongol Huuli. (Mongolian laws.)*. UB; Khalkh Juram khuulun 290 jilin oid zorilsan erdem shinjlgeeni baga khurlun iltgelin emkhetgel., (Collection of presentation on research conference on occasion of the 290th anniversary of Khalkh Juram.) Ulaanbaatar, (1999)

[35] Sovd, G., *"Mongolun erkh zun togtoltsoonu khugjil, tuunu ontslog"* (The development of the legal system of Mongolia and its characteristics), 32.

[36] Boldbaatar, J. and Lundeejantsan, D. 167

After the disintegration of the Empire in the eighteenth century, the Manchu dynasty ruled over China and Mongolia, the first case of rule by a foreign state and rule that would last for two hundred years.

The "Mongol Cayajin bicig" (Collection of Mongolian Laws) adopted in 1789 in the legal document reflecting years of policy implemented toward Outer Mongolia by the Manchurian state.[37] In the 1875, the Ministry for Outer Mongolia issued a new collection of laws made up for sixty-three volume which reflected the legal tradition of the former Mongolian empire.[38] Under the influence of the Manchu's policy and culture, specific feature for legal thought included understanding, preserving and strengthening the historical basis for the national legacy and restoring some kind of national consciousness. Second, their legal culture was developed by a permanent civilization, method and technology to process and classify traditional laws. Third, cruel, long term punishments were established.[39]

The national freedom movement of 1911 held in Mongolia led to some freedom I reforming the legal system. Some researchers argue that the abolishment of Manchurian law was a two stage process consisting of, first, establishing a new judicial system, and second, drafting new legislation between 1911-1915. Moreover, new legislation was prepared to submit to the State Supreme Assembly and to be adopted by the Bogd Khaan to publish and distribute.

The "Collection of Laws of Mongolia sectioned by decree" is a digest of the laws with sixty-five volumes codified to strengthen social relationships in the short period of independence due to National Freedom Movement of 1911.[40] In order to draft this Code, both Mongolian legal tradition and legal practices of foreign countries were studied. "This Collection also in structure and substance and still a medieval system of law. It reflected however the way of life, habits, customs and moral values of the Mongols, and is consequently evidence of the high standard of that time Mongolian legal culture and awareness."[41] However, this law never came into effect because of the loss of Mongolian autonomy.[42]

1.4 Mongolian Law of the Socialist period (1921-1990)

[37] See Bayarsaikhan, B. (2001) *"Mongol cayajin bicig"*. UB

[38] See Bajarsaikhan, B. (1988) *"Huvisgalin umnukh Mongolin tur ba khuuli tsaaz"*. (State and Laws in pre-revolution Mongolia.). (1911-1920). UB

[39] See Lundendorj N. (1988) "Tur bolood erkh zuin setgelgeenii khugiil ba chig khandlaga" (Development of states and legal thoughts and its tendencies) (general and specific study). UB

[40] Sodovsuren, B. Ibid. 46.

[41] Sovd, G, *"Mongolin erkh zuin togtoltsoonii khugiil, tuuni ontslog"* (The development of the legal system of Mongolia and its characteristics), 34.

[42] Maiski, I.I, (1921) *"Sovremennaya Mongoliya"*. *(Contemporary Mongolia.)*, Irkutsk, 331.

The Russian revolution of 1917 had a great impact on events in Mongolia, inspiring spontaneous uprisings. In the 1920s, after the death of the Bogd Khaan, Mongolia had an alternative to repression and executions following the revolutionary events. The idea of development along the path of national democracy was extremely popular among leader of the Mongolian People's Party (MPP) and government. Western countries' legal system was kind of orientation to the Ruler at that time after the revolution of 1921. According to the decree of the Government on the "drafting legislation" of 19 May 1922: "Even though our country has a republican government, the thing that a constitution's provisions have not been decided is an inaccurate part to decide any matters. Thus, from now on a special commission should be appointed and analyze right or wrong on the legal documents planned during the previous autonomous government which had not been finalized. The special commission should redraft laws of any judicial issues in accordance with the policies of the current government considering European countries' laws since our country adjudicates foreign nationals' disputes".[43] From the content of the decree, it can be noted the importance of considering not only one country's law, but also that of various European countries' for drafting a constitution and civil code. In the interpretation of Article 14 of the Constitution of the People's Republic of Mongolia of 1924, the provision saying "to be at peace with any foreign country considering the circumstances"[44] draws particular attention. At that time, scholars noted that the constitutions of many countries were being translated and studied.[45] Based on the Constitution of the Soviet Socialist Republic of Russia of 1918, it was drafted in a "capitalist legal methodology".[46] It can be seen in such provisions as "all the government bodies should be under law", "the Soviest Republic is a legal state" of the Constitution.

The drafting process of the Mongolian Constitution started from autumn of 1921. However, during the discussions regarding the Constitution, several Constitution Acts were adopted. For instance, these are the "Solemn Treaty" (Agreement concluded between People's Government and the religious leader of Mongolia, the Bogd Gegeen),[47] "Ordinance Concerning the Rights of the Governing and Non-Governing

[43] *"BSMLU-un Undsen Ghaals, tuund holbogdokh zarim aktuin emkhetgel"*. (Collection of Constitute and related legal acts of PRM..). Ulaanbaatar, (1972)..54.

[44] Ibid.. 121

[45] Chimid, B. (2009) *"Zokhiston togtoltsoog barimjaalakh ny erkh zuin shintgeling ur noloonei khukh undes bolokh ny-Erkh zuin shinetgel ba undesnii erkh zuin togtoltsoo"*. Olon ulsiin sympoziumiin barimt material.. (The Holistic system as s foundation of Legal Reforms and national legal system.. publications for international symposium). Hanns-Seidel fund's representative office in Mongolia. UB. 23

[46] Kaganovich, L. *"Dvenatsat let stroitel'stva Sovetskogo gosudarstva I borjba s oppruntizmom"*. (Twelve years of Soviet State and battle with opportunism..). A Journal of Soviet state and revolution of the Law. No.1, (1930), 8; Malitski, A. Sovetskaya Konstitutsiya.. (Soviet Constution..). Harykov, (1924). 27-28.

[47] Regulating stansards relationship between People's Government and Bogd Khaan. S N

Nobles" (1922), "Ordinance on Government Representatives" (1923), "Ordinance on the Administration of Ikh Shavi" (1923).[48]

The socialist Constitution of 1924 greatly influenced —the implementation of law in Mongolia in which became an "instrument of the proletarian dictatorship,"[49] "to stipulate order in society"[50], "to have a class character"[51], to reject private property, and to eventually eliminate the state and law. This concept became the base for the Constitution of the People's Republic of Mongolia of 1924. Provisions included: "the Supreme power of the State shall be kept by the true people"[52], "private property will not be established"[53], "title of king, nobleman, an order of holy people will be eliminated and authority will be granted to confiscate people's property and introduce socialism and communism"[54], "to exclude the right to elect and be elected those people who is by exploiting others or who hire moneylenders or ex-Khans, and holy people and monks permanently living in temples"[55]. This Constitution was the beginning of the latter Constitutions of the development stage of the People's Republic of Mongolia.

Some Mongolian scholars have concluded that "the historical significance of this document declares an independent country to the world and legally ensures a completely new political structure, core principles of law, and national democratic transformation by abolishing the monarchy for the first time in the history of the Mongolian state."[56]

One important achievement of this Constitution was to declare and guarantee civil rights and freedoms including freedom of religion, freedom of press, freedom of demonstration, freedom of celebration, freedom of association, freedom of free education, freedom of equal rights without discriminate based on origin, religion, age and sex were legalized. Thanks to this Constitution, Mongolians who were universally illiterate become educated and the legal environment became such that men and woman were equal.[57]

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[48] *BNMAU-ын Ündsen khuuli, tüünd holbogdokh zarim aktuin emkhetgel* " (Collection of Constitute and related legal acts of PRM). 39-40, 60-63,65.

[49] Kurski, D.I. (1948) *Izbrannye Statyi I Rechi*., (The selected articles and speeches..) Moscow, 38, 42, 47, 56.

[50] Ctuchka, P.I. *Moi Puty I moi oshibki*. (My journey and my mistakes..) A journal of Soviet state and revolution of the Law, No.5-6, p.63.

[51] Ctuchka, P.I. (1964) *Izbrannie proizvedenya po Marksistsko-Leninsloi teorii prava*. (The Selected works on Marxist-Leninist legal Theory..) Riga, 58.

[52] "*Mongol ulsin Ündsen Khuulnuud, tedgeert orson nemelt oor chlolnuud*". {1924-1992}. (Constitution of Mongolia, and their amendments..), UB, (1998), 4.

[53] Ibid.

[54] Ibid.

[55] Ibid, 11.

[56] Boldbaatar, J. and Lundeejantsan, D. Ibid, 228-229.

[57] Narangerel, Sodovsuren (2003) "*Mongol ulsin erkh zuin togtolitsoon udirtgal*" (Introduction to legal system of Mongolia..), UB, 23.

After adopting the Constitution of 1924, the work of drafting and adopting major law began. From 1926-1929, the Civil and Criminal Codes in the 1926 Civil Procedure Code were adopted. Some Scholars wrote: "It is clear that terms and techniques of the Continental law family are in some part being used to reflect concepts, principles and structures of the family and those codes".[58] It can be mentioned that many legal acts have a status regulating multisided social relationships such as the "Ordinance on the Power of State Lower Assembly Representatives" (1925), "Ordinance on Presidium of the state Lower Assembly" (1925), "Ordinance on Establishing Judicial bodies of the people's Republic of Mongolia" (1926), "Law on the Separation of Sate and Religious Affairs" (1926), "Ordinance on Labour Force" (1925), "Temporary Ordinance of Hunting" (1926), "Ordinance of Cooperatives to improve the Economy".

The decision to reform legislation in accordance with the socialist ideal led the country to imitate the "Soviet modal of Socialism" under the direct pressure of the Comintern in the early 1930's. Legislation up until this time was deemed to be of a capitalist character.[59] Scholars have calculated that according to this decision, around 300 legal acts such as laws, ordinances, and decrees of Government of "drafted reflecting a non-capitalist development agenda"[60] from 1932-1935. As a result, many laws of the Soviet Union were thus transplanted into Mongolia, regardless of how suitable they were to Mongolian culture and conditions.

Joseph Stalin, a strong follower of the Marxist-Leninist ideology on Proletarian dictatorship, stated that "the Communist party should not share power with any other political party and only one political party should lead the proletarian dictatorship system"[61]. He added that the "state is the machine in the hand of the ruling class to repress the struggle of class enemies"[62]. In other words, class struggle was critical.

In the socialist legal sciences, a first conference on the soviet state and legal sciences took an important role. According to Stalin's orders, the organizer and head of this conference was Director of the State and Law Institute and Prosecutor General of the USSR, A.Ya. Vishinski. The main agenda of this conference was to provide theoretical justification of the punitive practices of a dictatorship.

Soviet law was defined thus in the conference on the soviet state and legal sciences took an important role. According to Stalin's orders, the organizer and head of this conference was Director of the State and Law institute and Prosecutor General of the USSR, A.YA.vishinski. The

[58] Chimid. B. Ibid. 23.
[59] Narangerel. S, "*Mongolin ba delkhiin erkh zuin togtoltsoo*",(Mongolian and world legal systems). 104-105.
[60] Boldbaatar. J and Lundeejantsan, D. 256
[61] Stalin, I.B. (1946) "*Voprosi Leninizma*". (Issues of Leninizm.). Moscow. 41.
[62] Ibid, 2.

main agenda of this conference was to provide theoretical justification of the punitive practices of a dictatorship.

Soviet law was defined thus in the conference document: "Soviet law is the aggregate of rules of conduct established in legislative procedure by the power of the working people expressing their will and the application of which is ensured by the entire coercive power of the socialist State for the purpose of the defense, consolidation, and development of relations and procedures advantageous and suitable for the working people, the full and final destruction of capitalism and its survival in the economy, domestic life, and consciousness of people, and the building of a communist society."[63] On this theoretical soil, the danger of universal political repression was justified not only by the USSR but also the People's Republic of Mongolia.

The legislation of the 1930's in Mongolia, especially criminal law, was a throwback to middle ages, providing a legal basis for assassinations and ignoring principles such as legitimacy, altruism and justice. They violated the principle of legitimacy, imposing harsh sentences on so-called "people's enemies", "counterrevolutionaries", "saints", "monks" and those considered "feudal". Criminal liability was assigned based on the so-called "dangerous behavior of a person", even when no crime was committed.

Criminal liability was sometimes imposed on family members of the accused, violating a fundamental principle.

There are some provisions on the principle of justice loosing opportunity to impose sentencing differently by the court by stipulating absolute definite sanction in the Criminal Code. The court did not have the authority to make decisions. Instead, it merely inserted punishments in accordance with the provisions of the criminal code. According to official statistics, 20474 persons were victims of capital punishment, more than 5000 persons were imprisoned for false political crimes during the detentions, chastise of 1937-1939. The people's right to life, to liberty, and to immunity from unfair prosecution could not be protected during this terrible repression.[64]

The Constitution of the Republic of Mongolia of 1940 was of a socialist and class-based character. It states that "to develop a non-capitalist way", the "Mongolian People's Revolutionary Party is the main force for leading all the organs of the country". It will abolish the right to vote of "person who gains profit from other people's labour, moneylenders, ex-saints, high ranking monks, Governor lords and lords without chair, princess, noblemen who had subjects, influential

[63] Vishinsky, A.Ya. (1938) *"Osnovnie zadachi nauki Sovetskogo Sotsialisticheskogo prava"*. (The main goals of the science of the Soviet Socialist legal system.), Moscow. 183.

[64] See Rinchin, M. (2000) *"Ulis turin [illegible]gdsudelt ba tsagaatgal"* (The political repressions and exonerations.), Ulaanbaatar. 40.

shamans, and participants actively involved with the white army and counterrevolutionary activities".[65]

According to this Constitution, civil rights and freedoms expanded considerably. After its enactment, work was done to revise and promulgate the Criminal Code (1942), the Criminal Procedure Code (1949), the Civil Code (1949), the Civil Procedure Code (1949), Labour Law (1949), the Law on Forests (1940), the Law on Land (1942), and the Law on Hunting and fishing (1944).

From the middle of the 1950s especially after the Twentieth Communist party Congress of the Soviet Union, a new attitude toward law began to develop. Some Soviet legal scholars criticized the definition given by Vishinski in 1938 on law and proposed a wider concept of ideology in the country at the time directly influenced the law.[66]

Even though this did influence the content of the Constitution of 1960, it still maintained its socialist character. This can be seen in the following provisions:

- "The People's Republic of Mongolia is the socialist country of workers, cooperative people (nomads, farmers), intellectual workers and at its base is the alliance of the working class and cooperative people";
- "The main principle of the activities and organization of all state bodies is centralized democracy";
- "The economic foundation of the People's Republic of Mongolia is the socialist ownership of the means of economy and production thanks to the abolishment of exploitation, the liquidation years of struggle by the workers";
- "The objective of the People's Republic of Mongolia is to perfectly establish socialism and then communism";
- "The leading force of the state and society of the People's Republic of Mongolia is the Mongolian People's Revolutionary Party, the vanguard of Marxist-Leninist theory".

According to William Abutter, Professor of Comparative law at the University of London: "The extend the early Mongolian Leadership could be said to have been in the mainstream of Soviet Marxist-Leninist ideology is still debated, but all sides readily concede that the Soviet Union played a decisive role in bringing the revolution to the fruition in Mongolia and, through precept, direct counsel, and assistance in shaping

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[65] *"Mongol Ulsin undsen khuulnuud, tedgeeri orson nemelt uurchlluuud"*. (The Constitution of Mongolia and amendment), (1924-1992), 14,38-39, 42.

[66] See Kechekyan, S.F. *"Norma prava I pravoonoshenya"*. (The legal norms and relation.), A Journal of Soviet state and law, (1955), No.2; Kechekyan, S.F. (1958) *Pravoonoshenya v Sotsialisticheskom obshestve*. (The legal relation in socialist society), Moscow; Piotkovski, A.A. Nekotorie voprosi obshei teorii Cosudarstva I prava. (Some issues of general theory State and law.) A Journal of Soviet state and law, No.1, (1956); Piotkovski, A.A. *K voprosu ob Izuchenu obshenarodnogo prava*.. (Problems of studies of all-people's law..) A journal of Soviet state and law, No.1m. (1962).

the form and substance of Mongolian legal institutions."[67]

The major achievement of the Constitution of 1960 is that it realized and guaranteed the social and economic rights of the citizen.
For instance, it should be mentioned that the right to work; receive a fair salary; receive welfare assistance in cases of old age, sickness, or unemployment; and a right to a free education, including the right to receive a stipend for post-secondary education. During the years of the Constitutions of 1924, 1940 and 1960, the people experienced great hardships in getting access to medical aid, shelter, and a secure life.

But during these years, there were gross violations of human rights and freedom, with priority given to state (meaning ruler's) interests. This had negative consequences on the development of the country.

All Constitutions and laws of the People's Republic of Mongolia were of a socialist nature, with the issue of class declared. Provisions in those Constitutions mentioned scientific communist ideology as being a significant part of the country's life. Only state and cooperative property, not private property, were recognized as the foundation of the economic system of the country.

Formally, strengthened Hurals were the base of the organizational structure of the state. However, in fact, the Hurals changed and all power was vested in one political party.

According to the Constitution of the People's Republic of Mongolia, political, socio-economic, personal rights and freedom were recognized and strengthened. However, there was no Constitutional mechanism or guarantee to exercise and ensure these rights.

In the period of socialist legal theory and Marxist ideology, Mongolian ideas were influenced by European legal culture and thought. In these years, modern legal regulations, basic notions of the legal sciences, and a comprehensive training and research structure wee formed. This development of Mongolian legal thought was one positive aspect of that area.

The socialist legal system which existed in Mongolia, also known as 'bolshevism', was based on social thought, human rights and freedoms. However, these were protected only on paper. The classic principle of representative democracy was changed to "central administrative democracy", elective democracy was transformed into a "mobilization company", the party policy was presumptuous, laws were adopted to protect it, besides the adopted laws, party policy. Ideas and everything else depend on the desire of the authorities.[68]

The legal consciousness based on Marxist-Leninist ideology

[67] Butler, W.E. (1982). "*Mongolian legal system: Contemporary Legislation and Documantation*". The Hague, Nijhoff.

[68] See Lundendorj, N. (2003) "*Tur erkh zum sergelgeeni khugjil ba chug khandlaga*" (Development of state and legal troughts and its tendencies (general and specific study). UB, 15-16.

considered society to be a unity of collectives and believed that social collectives were united under common interests in material conditions. I addition, the legal consciousness of the public aimed towards creating "a medium person".[69] This is the location of the core values and assumptions of socialist law. Legal propaganda was of great importance, since it was essential to disseminate opinions about fair and humanitarian characteristics of socialist law to the people. Nevertheless, law and its usage did not correspond and often resulted in repression (1930s) and "illegality".

During the socialist era, the "I-we model" was implemented. This meant that the interests of the individual had to correspond with the dominant social interests through ideology, political and material factors, where the unity of socialist legal consciousness existed.

Most people in Mongolia merely adapted to life style and became passive observers of what was happening in their society. Their legal consciousness to some extent was special. Despite the fact that they evaluated most of political and legal matters from faithless point of view, they had a fear of repression. They were formed as part of "one same as the rest" scheme.

Some individuals who were not part of the above-mentioned scheme were, in order to the meet their goal, in clear conflict with the authorities. They realized that socialist ideology and the totalitarian system were dangerous. Actions and decisions from state authorities and officials were not comprehensible/clear to them and were always interpreted and evaluated according to the "I" or individual context, and therefore, were always considered rebellious. This is clear evidence of a totalitarian regime. Material "equalization", which is common in socialist totalitarian regimes, stunts people's personal development and is a barrier to self-expression.

1.5 Modern system of Mongolian Law

In 1990, the Mongolian people abolished the totalitarian regime, rejected the planned economy, and began a comprehensive transition toward a new political system. This new choice was to develop a country respecting human rights, democratic values, the market economy, and the rule of law. From a narrow perspective, this led to the complete reform of the legislative system and structure. This reform did not taken place all at one time but was rather an on-going and gradual process.

In March 1990, one-party rule was abolished. Political pluralism was recognized and the shift toward a multi-party system commenced.

[69] See Narangerel, S. (2004) *"Pravovaya systema Mongolii"*, Moskva, (Legal system of Mongolia., Moscow), 34

This was the king of shining "star" that launched reforms. In May 1990, an Amendment law with two separate charters, "Amendments to the Constitution of Mongolia", was adopted. Based on this Amendment Law the first-ever democratic elections of the State Great Hural took place in July 1990 and a permanently operating Parliament called the Small Hural with a multi-party system was established. The Small Hural proclaimed the legitimacy of private property, and determined new financial, economic, and loan relationships through the adoption of 35 new laws and amendments. All of these laws became a solid base in the process of adopting the 1992 Constitution. The 1992 Constitution, as it was pointed out, "mobilized the intellectual capacity of the country." The Constitution of Mongolia of 1992 is the result of the political situation from 1980-1990 and the struggles of the Mongolian people.[70] It was adopted on 13 January 1992.

The Constitution of Mongolia reflects the following principles and concepts:

- In the preamble of the Constitution, it is stated, "Aspiring toward the supreme objective of developing a humane, civil, democratic society in the country";
- Human rights and freedom are accepted as the highest value. "The State shall be responsible to the citizens for the creation of economic, social, legal and other guarantees for ensuring human rights and freedoms, to right against violations of human rights and freedoms and to restore infringed rights."[71]
- Sovereignty and legitimacy will reside with the people. "State power shall be vested in the people of Mongolia";[72]
- All forms of state and private ownership were recognized and are equally protected. "The State recognizes all forms of both public and private property and shall protect the rights of the owner by law.";[73]
- State power is exercised based on the allocation of legislative, executive and judiciary power;[74]
- Pluralism and a multiparty system are recognized and no particular ideology shall be declared as that of the state or mandatory;
- Universally recognized principles of international law and international treaties are recognized as part of the Mongolian legal system. "Adhering to the universally recognized norms and principles of international law"; "The international treaties to which Mongolia is a

[70] See Chimid, B. (1998) "*Mongol ulsin 1992 oni Undsen khuulin uzel barimtal*.. (The underlying concept of the 1992 Constitution of Mongolia.) – *The Constitutions of Mongolia, and their amendments (1924-1992)*. Ulaanbaatar, 117-137.

[71] CM, Article 19(1)

[72] CM, Article 3(1)

[73] CM, Article 5(2)

[74] CM, Chapter 3

party, shall become effective as domestic legislation upon the entry into force of the laws or on their ratification or accession";[75]

• Principle of the respect of the law became the supreme principle of the activities of the State.[76] However, this does not mean "legal despotism", but rather a respect and adherence to universally recognized laws, abiding by a new legal awareness and legal protection of the interests of the individual;[77]

• The courts shall be independent and subject to law;[78]

• Establishing a judicial supervision system over the implementation of the Constitution, it founded a special Constitutional Court (Tsets).[79]

The Constitution serves a society in transition from totalitarianism and socialism to a post-socialist legal structure and the beginnings of the formation of a civil society and State ruled by law. The Constitution combines a "legal-axiomatic" approach (the rights and freedoms of man are the highest value) with a "natural law" approach (the rights and freedoms of man are innate and not conferred to by the State).

Many laws have been adopted toward regulating new social relationships, in addition to reforming old laws and trying to make and revise legislation to conform to the Constitution. Four elections judged free and fair, the smooth transfer of power after multi-party elections, the establishment of a legal framework for ongoing political and economic reform, and the emergence of a concerned and committed community of NGOs are all positive characteristics of the first decade of Mongolia's reforms. In terms of institution building, the magnitude of the changes during the first ten years of reform is reflected by the five hundred new laws adopted by the State Great Hural during this period.

What are the lessons from legal reform? Until the end of 2003, legal reform occurred in the absence of a comprehensive program with a solid theoretical and methodological basis. In the majority of cases, laws were drafted by non-professional organizations, a factor that has affected their quality and impact. Adopted laws were not well integrated, there was a different interpretation of concepts, and central and local authorities, economic sectors, and organizations simply copied one another's' laws to protect institutional interests via law. In some cases regulations and rules were proclaimed as law and administrative norms remained dominant.

The legal system of Mongolia is part of the Romano-Germanic legal tradition. Rene David, the eminent French jurist, identified

[75] CM, Article 10(3)
[76] CM, Article 1(2)
[77] Chimid, B. "*Zokhistoi togtoltsoog barimjaalakh myerkh zuin shinetgeelig ur noloonei khukh undes bolokh nyu*" (The Holistic system as s foundation of Legal Reforms and national legal system), 24
[78] Article 47(1) CM
[79] Chapter 5 CM

RESEARCH WORK REPORTS OF THE NATIONAL LEGAL INSTITUTE OF MONGOLIA

The National Legal Institute is a research training and information facility affiliated with the Ministry of Home Affairs and Justice of Mongolia.

The Institute is over seen by a governing board and managed by its director, the director's council and an academic council.

Overall, there are eight divisions. Three of them, including the general affairs division, the legal training center and the legal information center, directly report to the Institute's director.

The remaining four divisions, which specialize in particular areas of legal research, report to a Scientific secretary, who in turn reports to the director.

The research divisions are as follows:

- Administrative Law;
- Civil and Economic Law Sector;
- Criminal Law and Criminology Sector;
- International Law Sector.

The research arm of the Institute studies laws and regulations of Mongolia from the perspectives of the present status of the legislative framework, the current trends of legislative development, the practical needs for new legal interventions, the internal systemic coherence of legislation and the effectiveness of implementation.

Based on the research findings, the Institute develops scholarly recommendations and methodological guidelines for practical legislative action. In particular, the Institute carries out upon requests a scholarly and legal scientific appraisal of the draft of new laws or amendments to existing laws.

The regular format of the Institute's research activities involves conducting comparative studies or thematic studies focusing on specific topics, areas, or major pieces of legislation upon request from government bodies, including those responsible for developing the conceptual framework of new legislation or drafting such legislation. The final reports on such studies are then discussed and evaluated by the relevant stakeholders and the general public. Following the passage of new legislation, the Institute also conducts monitoring, analysis, and assessment work regarding its implementation.

In the area of criminal law, the Institute engages in investigation of the causes and other circumstances of common criminal offences committed on the territory of Mongolia by using scientific and survey data collected by the police as well as other independent agencies. The purpose of this activity is to suggest possible preventive measures and

strategies.

The institute is working towards improved comparative legal scholarship through cooperation with its counterparts in foreign countries. International law conferences, training seminars, and workshops are organized by the institute on a regular basis.

Administrative Law Sector

The sector conducts theoretical research on administrative and public law, studying its implementation and effect, making comparative law study, formulates related recommendations and references and organizes scientific trainings and seminars.

In 2010, the Administrative and Humanitarian law sector conducted five research works and some of which are introduced below.

Administrative accountability imposition authorized functionary and its legal status, the process to file the administrative offence, and examine the legal regulations of its conduct

The main purpose of the research work lied on clarifying the basis of methodology and theory, thoroughly researching theoretical regulations of the legal status of the administrative accountability imposition authorized functionary, the affiliation to settle, and the control over the process to settle disputes relating to administrative offence.

As a result of the research work our team concluded that there is a demand to reduce the number of the administrative accountability imposition authorized functionary. The main conclusion is there is a need to draft an administrative accountability specialized law unifying legal regulations of administrative accountability.

As a result of research work our research team formulated following suggestions:

1. To propose enrichment or additions in the purpose of the law of General part of Administrative accountability law, universally recognized regulations, the principles to follow especially, the presumption of innocence, the principle of equal rights, the relations protected by administrative accountability law, the limits and areas of law effectiveness, to impose administrative accountability to foreign citizen, stateless person and foreign legal entity, consideration of the administrative accountability to impose when he/she were drunken, and improve the purpose, types and forms of administrative offence;

2. To make regulation that administrative accountability law and criminal law could replace each other;

3. The amount of fine for similar infringement is regulated differently in various laws. So the amount of fine should be legalized accordingly to administrative accountability law;

4. To make the administrative offence subjects clear, such as imposing or answering who's going to answer for the administrative offence;

5. To intercept the actions of making various rules under the names of rules, regulations and dictations;

6. To make the administrative ordinance tickets into unified standard;

7. To add new offences to administrative offence:

- Admonition;
- Forced labor.

Legal status of civil service, renewal and its content

The purpose of the law lies on the making comparison on the laws relating to civil servants such as Constitution of Mongolia, Law on Civil service and the other laws relating to the legal status of civil service, evaluating and finding its popular or distinct side, and finding its duplications, violations, omissions among its articles and titles.

1. The civil service of our country had formed since the early time as sovereign's servant because of its empire state. In other words, they all were just for their king and for their aide, and for their envoy. Since the first Constitution had enacted, it had started developing as public service. Since then, till 1990, because of our country adhered to socialist direction the civil service had became a service for one political party.

By the Constitutions of 1924 and 1940 of Mongolia, however our country had chosen more modern republic, it had consolidated centrally structure of the government with political power.

2. According to preamble of the Constitution of 1960, the purpose of Mongol people's republic was to establish socialism perfectly, and further to establish communist society. Civil service had developed according to this ideology.

It is enacted in the article 5 of the law: "Democratic centralism shall be the fundamental principle of the organizational structure and operational functions of all organs of the state". According to this article, the main governmental authority which had the system of democratic centralism, held its operation with the system of administrative direction of governing body.

The legal regulations of civil service had central system to let someone work by appointing for the civil servant, and to let someone

work by selecting for the system of court and political service.

However, by 1970's, there had been a system to let people work for civil service by making selection, it was principally different from the recent test selection system;

3. The law on Civil servant enacted in 1994, has formulated accordingly to the principles of new Constitution. It is the first basic law on Civil service of Mongolia;

4. The first law on Civil service had paid prior attention on state administrative servant. The renewal of Law on Civil service in 2002 had made doctrinal renewal with the character of principal, ideology and formulated new terms such as "authentic official" in the frame of classification of state administrative and state special position.

5. In 2008, by the amendments made into the law on Civil service, the civil servants except political servant, should be suspended from membership to a political party. Administrative, special and operational servants are prohibited to participate in any operation of election.

It formulated an opportunity that the council of civil service should candidate only one person for one position and the authorised person may be recall only once.

6. The legal status of Civil servant is the concept being thoroughly defined by the Constitution of Mongolia. Law on Civil service and the other legal acts enacted according to the laws mentioned above.

Research work on the legal acts relating to the methodology to set the floor space of apartment

The main purpose of this research work lies on examining the methodology to set the floor space of apartment and related legal regulations, and defining its legal and practical basis.

The result of formulating and submitting the standard, in other words, methodology to set the floor space of apartment reflected in the decision of the national center of standardization and measurement. The annex "B" of the decision titled "Calculation note for measurement of room floor space of apartments" is the main regulation. Because of the former non existence of such regulation, construction companies rarely reflected the detailed regulations in its agreements, they used more brief and general measurements to define the floor space of apartments. Hence, there were many events that people have suffered surplus payments. This regulation has been formulated to prevent from such events.

And there is a need to add an article into the Law on Administrative Accountability about the sanction for an action for breaching the "Methodology to measure the inner floor space of the

apartments" formulated by the National Center of Standardization and Measurement.

Civil and Economic Law Sector

The sector conducts material and procedural applied research on private law studying its structure, consistency, effect, relationship, excludings, duplications and implementations on the basis of scientific methodology, formulates related recommendations and references and organizes scientific trainings and seminars.

In 2010, the Sector conducted five research works and some of which are introduced below.

The present condition and urgent issues on legal environment for Press Liberty

Mongolian government confirmed the 2009-2010 plan to implement the national project to provide Human Rights in Mongolia, with the purpose of implementing Mongolian governmental resolution number 69, of 11th March of 2009, and the decision of the Great State Khural of Mongolia number 41. According to this plan, the Civil and economic law sector of the National Legal Institute carried out a research work under the theme of "The present condition and urgent issues of legal environment of press liberty" during 1st Jan, 2009 - 31st June 2010. Aiming to examine the conditions of legal status of press liberty, to find its urgent questions, and to frame suggestion of necessary amendments into the law and the arrangements to carry further, we have conducted research in the frame of theoretical literature, the cases settled by court according to articles 110 and 111 of criminal law and articles 21 and 27 of Civil Code during 2006-2009, and the internal laws relating to press liberty and media.

The result of the research work: There came the conclusion that the articles, 3 "The mass media shall be responsible for its publishing and broadcasting", and 4, "It is prohibited, the governmental organization to have the media in its ownership" of the Press liberty law, are not implemented, therefore, there is a need to change title 1 of article 3 as "the staff of media shall be responsible for its own publishing and broadcasting", and 4 article as "The governmental organization may intake media to advertise its function, but it is prohibited to have an intention to make profit" .

And also, we have submitted the following proposals:

1. To legalize the liberty of information, the journalist's obligation of not to disclose its resources and to provide the journalists security;

2. To legalize the matters of ownership of the media;

3. To reflect into the law the matters of media status, journalist's status and the journalist's functional right and responsibility;

4. To generate the system to keep the journalists under guard if necessary by their own initiatives, who are working on hot spots;

5. To reflect into the law the matters of how to work the journalists in time of state of emergency;

6. To rigourosly reflect into the law the matters of establishing Journalists ethics council and determining the council's functional direction - establishment method, member and sphere, election or appointment period, legal status of members of council and nomination, and regulatory legal act for the basis of its function.

7. The press council should be responsible for the matters relating to journalist's ethic. The field of press and media should have only one council. And the council should serve only for its members.

8. To form "Ethics rule for journalists" and its procedure to be formed. This rule should be accepted by press and media field and legally valid for pre-settling disputes relating to journalist's ethic. Also it should be the source that the council should adhere.

Indemnification for damages caused by doctors and medical staff's default and misconduct to the others

The research work had been conducted during June, 2010-Sep, 2010. The purpose of this research work was to examine the legal conditions of doctors and medical staff, examining legal sanctions for doctors and medical staff and defining related urgent issues.

By this research work we aimed to:

1. Examine the laws and legal conditions relating to doctors and medical staffs and summarize the practices.

2. Analyze the law and legal act's implementation.

3. Analyze the dispute settlement, in which the defendants were the doctors and medical staffs, and also analyze the reason why people are claiming against medical staff.

4. Make comparisons with the foreign law.

5. Formulate suggestions and references to use law correctly.

The result of the research work: As a result of research work we aimed to organize the one day training for doctors and medical staff.

As a result of the research work, looking from the adjudication, the matters relating to indemnification for damages caused by the doctors and medical staff are basically being regulated by "Liability for damage" of Civil code. If the specific legal tort has a character reflected in special

part of criminal law, it should be regulated by the Criminal law.

Establishment of a health care professional's guilt will be the legal basis to recover damages by them as material or non material compensation.

Looking from the world tendency, indemnification, for damages caused by doctors and medical staffs, is basically being regulated by insurance laws. Legal torts relating to doctors and criminal sanction for medical staff's misconduct are not used in practice. In case someone smashes someone or commits grave crimes intentionally, the guilty person should accept the criminal punishment.

As this kind of insurance law is not developed well in our country, such kinds of disputes are settled by criminal or civil procedures.

As a result of this research work, the research team deemed that this kind of relation should be regulated by insurance law. Every doctor and the medical staff should be insured and this process should be organized and controlled by medical organizations.

Veil piercing-The head and subsidiary company's liability

The Civil and Economic Law sector of the National Legal Institute carried out this research work during 1st Feb, 2010 – 31st May, 2010. The main purpose of the research work was to examine the legal status and the content of the liability of head and subsidiary company, to identify advantages and disadvantages of recent legal regulations and to draft a handbook as a result of it.

In this scope, we tried to examine the legal theory relating to head and subsidiary company's liability and its basis, the interrelation of head and subsidiary company, the independency of subsidiary company, the matters of potential of liability before shareholder and stakeholders and the other related legal regulations, and to further explain and prepare a suggestion and proposal of necessary amendments into the law and arrangements for implementation.

As a result of this research work, we have determined the reasons of establishing a subsidiary company with illegal purpose and defined its social and economic negative results. In some cases, subsidiary company was established with illegal purposes such as to obtain a loan, to evade taxes and to obtain the exploration and mining license of minerals. This leads to crisis of bank and economic system and also it has negative effects to harm the interests of stakeholders of the subsidiary company.

And furthermore, we have conducted a research in the foreign practices and theories relating to the possibility of veil piercing and we have produced scientific suggestions for consideration in putting into

the practice of our country.

In some foreign countries where business law is highly developed, the issue on head company's liability for responsibilities of subsidiary company, is already understood thoroughly and it is recognized as a veil piercing.

This concept and its theoretical nature are based on placing its liability into the head company by denying its independency and its nature of legal entity of the subsidiary company.

As a result of this research work, our research team made a conclusion that it is possible to introduce into the practice the "veil piercing" in the Mongolian legal system.

International Law Sector

The sector holds theoretical research in international law, researching its implementation and effects in international treaty, including, international treaties to which Mongolia is a party and legislation regulated issues on international law, makes comparative law study, formulates related suggestion and references and organizes scientific trainings and seminars.

In the recent years, the International Law sector conducted several research works, some of which are introduced below.

Research on legal systems of foreign investment

In the scope of this research, we prepared research report and have put forward the following basic proposals:

1. In order to further develop the Law on Foreign Investment, we should have a concrete understanding on policies that describe type of investment/market-seeking, resource-seeking, efficiency-seeking, strategic asset or capability-seeking.

2. In the laws of foreign countries, specifically, Russian Federation and Kazakhstan, contain the regulation about the termination called "Foreign investment project". With this understanding, regulating about the understanding of "Project with superlative situation of foreign investment", "Repaid Term of the Profit of foreign investment project" need to reflect in the Laws of Mongolia, too.

3. There is a need to regulate in detail "Legal guarantee" to foreign investor. Twelve types of Legal guarantee was legislated by the Law on Foreign Investment of Russian Federation in 1991. Specifically, protection guarantee from possible damage to foreign investment, guarantee of obtaining real estate, buildings, natural resources and land

and some other guarantee were mentioned due to make amendments to the Law of this country,

4. Based on the world practice, different types of discount used to attract foreign investment. Specifically, *Foreign trade discount.* It is a special regime of currency tariff and tax exemption for activities of foreign trade and special regime of tax and customs; *Tax exemption.* These are tax encouragements and standards which are rendered relating to kind of activities of manager of its own business; *Financial discount.* The measures are low price system of total services, renting land and industry field at a low price and so on; and *Administrative measures.* It relates to simplify the order of registration procedure of producer in Free zone and to encourage entrance of foreigner and investors . Provision of information of market, preparation of business plan and some other business helps is related to it.

5. Investors, administrative and monitoring organization, authorities and their role function, level of power, responsibility and activities for managing in Free zone were not legislated in detail by the Law on Free zone and the Law on Legal statue of Free zone. Moreover, traveling to Free zone, residence and obligations of the residence in the Free zone were not regulated or the legal regulation is unclear.

The ways to apply international law's norm and conflicts between legislation of Mongolia on the Judiciary and international treaties

In the process of this research, we compared related norms of the seven laws exercised in the scope of Judiciary in Mongolia (Civil code, Civil procedural code, the Law of Mongolia on Court, the Law of Mongolia on Prosecutor Organization, the Law of Mongolia on Payment fee, Criminal code and Criminal Procedure code), and related 9 international treaties and the Order of supreme court of Mongolia which titled "Using international treaty to which Mongolia is party and international norms and principles in judicial practice" and interpreted, concluded and worked out suitable proposals. As a result of the research, we had come to the following conclusion:

No conflict in the 46 treaties of the 76 treaties involved the research.

Selected 208 norms in the 30 treaties related to Criminal code and Criminal procedure code and explained, compared and made a conclusion accordingly, and worked out some suitable suggestions.

Among the 308 compared norms of the 30 treaties involved the research:

· 209 or 67.8 percent was reflected completely in national

legislation;

- 29 or 9.4 percent was reflected incompletely;
- 41 or 13.3 percent was not reflected completely.

It is an act of expressing that Mongolia is not fulfilling its obligation under international treaties in good faith.

We researched the 9th order of Supreme Court of Mongolia, which named "Application of international treaty to which Mongolia is party and international norms and principles in judicial practice", dated 28th, February, 2008 and the way that legal environment for application of international treaties in judicial practice have completed. The results are:

1. In order to provide its implementation and to implement an action there is a need to develop a methodology of international treaties are used in court;

2. To developе plans and topics of training for judges and to provide methodology of using international treaty in judicial practice with the quality;

3. There is a need to research possibilities to decide the issues of not using inedited Mongolian International treaties by temporary readjustment or by temporary article.

Criminal Law and Criminology Sector

This sector, as a training and research department, holds theoretical and practical research in criminal law and criminal procedure law, analyzing the implementation of legislation, researching and determining the causes of the crime with scientific reasoning and the basis of it develops proposals, conclusions and recommendations.

The Prospect of the Implemcntation of Criminal code

The Criminal code of Mongolia was adopted in 2002 and was exercised for the past 8 years in the scope of Law reform from 1998 in Mongolia. During this time, the Criminal code was altered three times in 2004 and 2008 and some legislators suggested to complete alteration.

Where do we go in it?, How do we determine the policy of criminal code in the future? And how should we follow? By answering these questions, the sector introduces the research report, made two times in 2004 and 2009 with five years frequency, about the prospect of the implementation of Criminal code.

In order to research about needs for reform in the Criminal code, we considered the following four issues:

1. Issues on determining the difference between criminal offences and administrative offence;

2. Criminal offences alleged "to breach a procedure" stated in Criminal code is or not affected to the implementation of the law contrarily;

3. Classification of crime;

4. To determine whether there is a need to reform execution of penalty and specific regulations enacted by law;

5. The prospect of the policy of criminal penalty.

Some countries faced a protest to alter Criminal code and decided it simply. Specifically, in Russian Federation, altered its Criminal code by every chapter and section since 1992 and completed full reform by 2003 and it suited the standards of the European Union.

Further, there is a need to reflect the concepts of what activities should not be deemed as crime, the classification of crime should be classified by guiltiness of a subjective character, and to reflect not frequently intergarded concepts protected social and civil values.

Imprisonment has no alternatives. In practice, it led to be called "imprisoned country", due to imprisonment of people whose offences were serious crimes and grave crimes. Due to there is less alternative penalty, other penalties are rarely being used.

In some foreign countries the types of sentences, which are supposed to be imposed upon juveniles to be considered different from adults it demands creating new types of sentences relating to specific features of minors. One thing we cannot ignore is the issue on Criminal Justice Principles (Doctrines).

There is a lack of rendering of some significant principles like prohibiting double jeopardy meanwhile the Criminal Code is overwhelmed by principles which do not require mandatory legislation. It should be noted that there are no court decisions in which the judges pointed which principles they are adhering in order to resolve the case.

ANAND BATZAYA

A D V O

Founded in 2003, Anand & Batzay in Mongolia. We provide services i international commercial and business

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