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ХУУЛЬ ДЭЭДЛЭХ ЁС

ХУУЛЬ ЗҮЙН ЭРДЭМ ШИНЖИЛГЭЭ, СУДАЛГАА, ОНОЛ, ПРАКТИКИЙН СЭТГҮҮЛ

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INTERNATIONAL EXPERIENCE

CRIMINAL LAW REFORM IN MONGOLIA

Batbayar.E, (Ph.D), Associate Professor, Director of National Legal Institute

Mongolia has an ancient history and tradition of state and legal culture, and had a written legal code titled, 'Ikh Zasag' which has been named in scripts as Ikh Zasag (Great Governance), Ikh Yos (Great Rule), Ikh Zasag Khuuli (Great Governance Law) that expressed the great power and dignity of Chingis Khaan.

Mongolia was subject to the socialist legal system for more than 70 years and, since 1990, social structures have been changing at a fundamental level. Since this time, democracy, human rights, freedom, the rule of law and the free market system have been fully acknowledged by Mongolians and comprehensive legal reform has been undertaken in the country.

In Mongolia, the process of legal reform has taken its strength and works related to legal training and legal research have been developing and advancing to a feasible extend.

An illustration of that is in the field of criminal law. It has been 13 years since the adoption of the Criminal Code in 2002 which is compatible with the concept of the Constitution of 1992. Currently, there is an urgent need for the Criminal Code to be renewed, although, it has in fact been amended 10 times due to changing social relationships and the passage of time.

In line with that, the Government has prepared the Draft Criminal Code and submitted it to the Parliament. The final discussion of the Draft Code will be held in the Parliament's Autumn session.

This Draft Criminal Code has been developed in order to: (1) redress the drawbacks of the current Criminal Code; (2) make the current Code consistent with international conventions that Mongolia is party to; (3) bring the Code into substantial compliance with international benchmarks; (4) make it capable of responding to Mongolia's crime conditions; and (5) improve the Criminal Code's easy of use. On the whole, the Draft Code has been developed to create a just criminal system in the country.

The working group dedicated to the Draft Criminal Code has referred to over 20 research papers prepared by the Research Center of the National Legal Institute /Criminal Code Implementation 2004, Crime Classification and Pointful Punishment 2005, Efficiency of Imprisonment 2007, Comparison of Criminal Code and the Law on Administrative Liability 2007, etc./; criminal laws of the United States, the Russian Federation, the Federal Republic of Germany, the Republic of China, France, Japan; the Model Criminal Code of 2007 developed by international experts, the Rome Statute of the International Criminal Court of 1998; recommendations, and the advice of legal scholars and practicing lawyers for the preparation of the Draft Code.

Some important novel principles that are reflected in the Draft Criminal Code are as follows:

1/ The Criminal Code in its current form are mainly concerned with protection from criminal attack. The new Draft Code aims to reflect the direction and principles comprised in the Action Plan of the Government of Mongolia for 2012-16 adopted through the 37th Resolution of the Parliament. This Resolution proposes to create a criminal law system which is preventive and capable of making relevant parties responsible, is compatible with the values and principles of democratic society, and, most importantly, takes crucial role in Mongolia's development. Regarding punishment, it states that punishment has to be clear, effective and offer wide discretion. Consequently, it is a novel step for Mongolia to make prevention the main purpose of the Criminal Code.

2/ Material-based determination of characteristics of a crime is used within the current Criminal Code. In other words, if damage is caused as a result of any action then it is considered as crime, i.e. damage should be caused in order for any act to be considered criminal act. However, if the damage does not reach the statutory established threshold for damage, then it is not considered a crime or criminal act. Thus, another rule is applicable for these types of actions. These requirements create an ambiguous framework for the characterization of crime. To resolve this, the Draft Code defines clear actions and acts that are to be considered criminal acts. For example, the theft is now characterizable as a crime notwithstanding the level of damage caused.

3/ The current Criminal Code makes no distinction between a crime and an offence. The Draft Code redresses this by distinguishing crimes and offences. Offences are not considered a crime within the Draft Code. Consequently, an introduction of the Draft Law on Offences simultaneously to the Parliament was an appropriate step. According to this change, crimes are distinguished from offences not by the level of damage, but by the nature, method and form of the action itself.

4/ *Nullum crimen sine lege, ne bis in idem* which is an internationally acknowledged idea has been formulated in the Criminal Code through principles of legality and justice. Accordingly, a culprit shall be subjected to criminal liability once only, a culprit shall be subject to criminal liability himself/herself only, and application of the Criminal Code by analogy is prohibited. This is fully compatible with the Rome Statute of the International Criminal Court to which Mongolia has been party to since 1998. Also, according to this principle "being a recidivist, convict and punished for repeated crime" etc., notions and circumstances which aggravate liability and which lead to a more harsh legal consequence should be removed. Consequently, a more favorable environment for ensuring human rights can be fostered.

5/ For the first time, a legal entity may be considered a subject of crime and such punishment and criminal liabilities as "a fine, deprivation of rights, liquidation of a legal entity" may be imposed on legal entities. Consequently, Mongolia may now fulfill its obligations under the Convention on Transnational Organized Crime and other related international treaties and conventions which the county is party to.

6/ Crimes are classified as minor, less serious, serious and grave within the current Code. The Draft Code displaced the old classification as minor (misdemeanor) and serious (felony) depending on the length of imprisonment. Although, it is important to note here that, legal scholars and researchers consider that it is more appropriate not to classify a crime at all.

7/ In Mongolia, court practices have evidenced that the damage arising from a criminal act is a complicated issue. The underlying problem here is a court imposes punishment notwithstanding whether the damage has been compensated. To resolve this, the Draft Code requires that reparation has to be made. If a culprit makes reparation to an injured party then he/she has an opportunity to mitigate his/her criminal responsibility, can be exempted from imprisonment, can be exempted from criminal liability etc. A wide variety of possibilities are included in the Draft Code. Therefore, the Law on Compensation Fund for Victims should be introduced after the adoption of the Draft Criminal Code in order to regulate issues related to compensation of damage caused as a result of a criminal act.

8/ The Criminal Code of 2002 defines 7 types of punishment: (1) fine; (2) deprivation of the right to hold specified positions and engage in specified business; (3) confiscation of property; (4) forced labor; (5) incarceration; (6) imprisonment; and the (7) death penalty. This has been replaced with 5 types of punishment: (1) fine, (2) community service, (3) home arrest, (4) sentencing and (5) deprivation of rights within the Draft Code. By keeping in mind the importance of creating a more humane

and generous policy, this punishment policy provides wide discretion to judges, and provides a differentiated and proportionate punishment policy which will replace the old punishment policy that was mainly concerned with imposing sentencing and punishments that require personal engagement.

The following steps have been taken within this context:

- Capital punishment will be abolished and instead indefinite imprisonment in an open and close jail will be available. This reform is directly connected to the fact that our country ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights, which proposed abolition of the death penalty.

- Under home arrest a convict will be detained at home and given an opportunity to rehabilitate while he/she not being entirely sequestered from society. He/she as well has the responsibility not to do a criminal act and connect with criminal activities. In that way, a convict is entrusted and has an opportunity to remain in society. within his/her family, and in a community.

- A judge will have the competence to impose a penalty not exceeding 50 percent of the original punishment to a convict who has confessed his guilt and compensated for damages that he/she has caused. This shall extend the promotional rule within the Criminal Code, and thus will be very helpful in decreasing the burden on the criminal process.

- Special punishment types and institutions such as "community based labour, home arrest, imprisonment in specialized young offender prisons which have more educational and rehabilitation programs" for 14-18 years old teenagers will be created according to the Draft Code. These and other various changes in principles to the Criminal Code have been included in the Draft Code.

To summarize, it has not been the intent to create a completely new Criminal Code, criminal liability and punishment policy. Rather, a Draft Code has been proposed that will solve practical problems and legal issues that have arisen from the implementation of the Criminal Code of 2002. Further, we have proposed to create a Draft Code that will be consistent with relevant international conventions and international standards.

Personally, I am fully confident that, if this Draft Code is adopted, the development of criminal justice in Mongolia will see further progress.

Thank you for your attention.

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DIFFERENTIATED PUNISHMENT FOR BRIBERY

/Analysis on the Draft Criminal Code of Mongolia 2015/

Undrakh.B, (LL.M.), Policy researcher, National Legal Institute

ABSTRACT

Currently, many countries implement a symmetric punishment policy, which imposes the same penalty upon bribe-givers and bribe-takers and which does not take into consideration different types of bribes. However, this punishment policy seems to work inefficiently and does not seem to be suitable for certain countries. Therefore, certain scholars have started to propose differentiated punishment policies for bribe-givers and bribe-takers as well as differentiated policies for collusive and harassment bribes, in order to effectively disclose collusion and reduce the demand for bribery. This paper will look closer into this policy and analyze the Draft Criminal Code of Mongolia of 2015, which to a certain extent tries to reflect a differentiated punishment for bribery. The paper will attempt to compare relevant foreign experiences with the Draft Code in order to critically analyze and propose more efficient solutions in respect of punishments for bribery.

INTRODUCTION

Many scholars and researchers have sought to initiate, implement new rules and new punishment policies for combating corruption, since conventional anti-corruption policies seem to work inefficiently in detecting bribery and in disclosing collusion.[1]

In our country, the importance of bringing the current legal regulation on bribery, particularly the criminal liability mechanism for bribery, to an international standard has been discussed widely by scholars and legal practitioners. In addition to this, the importance of initiation and implementation of a new punishment policy and rules has been actively proposed. Recently, a new proposal to either exempt a bribe-giver from criminal liability or impose a lighter punishment for a giver if the giver informs the act of bribery to the relevant authorities has been discussed at the International conference titled, "Implementation and Tendency of State Policy of Combating Crime" organized in Ulaanbaatar in 2012.[2] In other words, to disclose collusion in bribery, the concept of implementing a ***differentiated punishment policy, which penalizes a bribe giver and a taker differently***, has been more favorably discussed than implementation of a conventional symmetric punishment policy which imposes the same penalty to bribe-givers and bribe-takers.

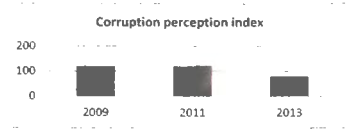
Moreover, initiation of a differentiated punishment policy ***for harassment bribery*** /a bribe given in order to obtain what people are legally entitled to/ and ***for collusive bribery*** /a bribe given in order to obtain an illegal advantage/ have been highlighted in recent years by certain scholars. This viewpoint is connected with the concept that these types of bribes are different according to moral principles. In particular, harassment bribery is special because of the fact that, in such case, a bribe-giver becomes a criminal as well as a victim simultaneously. Thus, a differentiated punishment policy for harassment and collusive bribery has been reflected in the Draft Criminal Code of 2015, which has already been introduced to the Parliament of Mongolia. This has been motivated by the fact that in Mongolia harassment bribery is widespread and has become a serious

[1] Jakob Svensson, Eight Questions about Corruption, The Journal of Economic Perspectives, page 40, 2005.

[2] Implementation and tendency of State Policy on Combating Crime, International Scientific Conference, Materials-II, page 56, 2012.

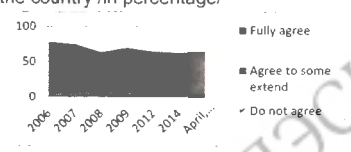
social problem.

Corruption perception index in Mongolia

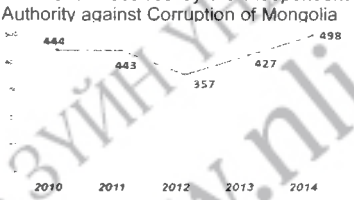


Source: website of the Independent Authority against Corruption of Mongolia. http://www.iaac.mn

Corruption is percieved as custom in the country /in percentage/[3]

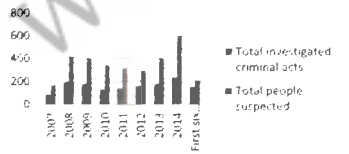


Number of complaints and information received by the Independent Authority against Corruption of Mongolia



Source: website of the Independent Authority against Corruption of Mongolia. http://www.iaac.mn

Total number of investigated criminal acts and suspected people



Source: website of the Independent Authority against Corruption of Mongolia. http://www.iaac.mn

[3] A Study for Establishing the Public Perception concerning Bribery, the Project for Strengthening Transparency in Mongolia 2015

In this paper we will discuss proposals of various new punishment regimes such as: ***differentiated punishment policy for bribe giving and taking and differentiated punishment policy for harassment and collusive bribery*** in Mongolia and abroad.

The organization of the paper is as follows. The current Mongolian punishment policy, some related historical regulations, and the newly proposed punishment regime within the Draft Criminal Code of 2015 for bribery is addressed first. Following this, relevant international and foreign initiatives and regulations are discussed. In that framework, initiatives and regulations with respect to punishment policy for harassment and collusive bribery are analyzed separately. Further, the relevant punishment regime for harassment and collusive bribery within the Draft Criminal Code is analyzed in comparison to international initiatives and foreign regulations. Such a comparison allows us to analyze and evaluate the advantages and disadvantages of the proposed policy within the Draft Code. Finally, a short conclusion and discussion of potential future directions in punishment policy for bribery is offered.

1. PUNISHMENT POLICY FOR BRIBERY IN MONGOLIA

1.1 Criminal Code of 2002

The Current Criminal Code of 2002 imposes criminal punishment upon bribe-takers, givers, and intermediaries.

According to this conventional punishment policy, a bribe-giver, a taker and an intermediary are all criminals in bribery. On the one hand, this policy is just since it punishes all relevant parties for their criminal acts. On the other hand, it creates collusion and a disincentive to disclose the relevant bribery, since all are criminals and all would be punished in the case of detection. Consequently, investigating and detecting bribery is almost impossible and ineffective in practice.

Against that collusion, the Note to Article 270 of the Criminal Code of 2002

states that "...a person who voluntarily reports to the competent authority about Intermediation in bribery shall be released from criminal liability".

Historically, similar regulations that were directed to punish a bribe-taker and not to punish a bribe, in order to increase the incentive to whistleblow have been actively implemented in the country. For instance, the Prosecution and Punishment Script of 1929 reflected "...if a person did the criminal act stated in the 161, 162 of the Script but voluntarily denounces the act shortly to the Ministerial Office and clears the condition of the criminal act, helps to impose punishment to related people then he/she will be relieved from punishment"; the Criminal Code of 1942 stated "...if a briber or intermediary person was constrained in some way by the person who took the bribe and if a briber or intermediary person denounces the act shortly to the relevant authority then punishment will not be imposed to that person"; the Criminal Code of 1961 states "...if a briber was constrained in some way by the person who took the bribe and if a briber or intermediary person denounces the act shortly to the relevant authority then punishment will not be imposed to that person"; the Criminal Codes of 1986 and 1993 as well have reflected similar provisions.[4]

The current Code reflects a similar provision which states "...a person who gave a bribe shall be relived from criminal liability if he/she after committing the crime has voluntarily informed the body that has the right to institute criminal proceedings". However, this provision was invalidated in 2008 without any explanation of annulment.[5] The relevant study conducted in connection with this annulment concluded that the precise effectiveness of that provision in practice could not be analyzed from the relevant data and information.[6]

Overall, Mongolia has long been supporting a differentiated punishment policy for bribe-givers and takers.

1.2 The Draft Criminal Code of 2015

Recently, the Government of Mongolia has prepared the Draft Criminal Code and introduced it to the Parliament. The final discussion of the Draft Code is scheduled in the parliamentary Autumn session. The Draft Criminal Code punishes both bribe-takers and givers, whereas imposing criminal liability for an intermediary has been abolished.

Bribe-giving

A bribe-giving act is more lightly punished than a bribe-taking acting in general.

Article 269 of the Criminal Code of 2002	Article 22 5 of the Draft Criminal Code of 2015
Bribe giving	
Giving of a bribe to an official in person or through an intermediary shall be punishable by a fine equal to 51 to 250 amounts of minimum salary or imprisonment for a term of up to 3 years.	Promising, offering for the benefit and interest of oneself or another material, immaterial property, ownership of material and immaterial property, unpaid or free service to the person who by law, administrative rules and under contract obliged to do public work or public official in connection with his/her official duty and competence, shall be **deprived of the right to hold a position in public office up to 2 years**, **shall be fined** with the equal sum of tugriks with 400 calculation unit to 14000 calculation unit, or **shall be in home arrest from 1 month to 3 years**, or **shall be punished by imprisonment of 1 month to 3 years**. Note: A person **who was constrained by the person who took the bribe** and **has given a bribe for obtaining what he/she is legally entitled to** shall be **relived from criminal liability** and **shall have the right to keep the taken government service** if he/she ***voluntarily informed the body*** that has the right to institute criminal proceedings A bribe giver who gives a bribe to a bribe taker **in order to a bribe taker to do illegal act** for the benefit of bribe giver shall not be exempted from punishment. **A bribe giver shall have mitigated criminal liability** if he/she **voluntarily informed** the body that has the right to institute criminal proceedings

[4] Batjav Lkhamjav, Bolormaa Erdene-Ochir, Bribery and Comfit of Interests, Ulaanbaatar, 2012.

[5] Z.Altai, A Research concerning the Chapter 28 of the Criminal Code, which concerns bribery, the *Center* for Policy Analysis, *Research*, and *Public Relations of the Office of the Parliament, 2009.*

[6] *Id.*

Although the bribe-giving act is punishable in general the Note to Article 22.5 exempts a bribe-giver from criminal liability **in the case of harassment bribery**. In this case, **a bribe giver has the right to keep the taken government service** in addition to be exempted from criminal liability.

This Note also enables **a bribe giver who gives a bribe in order to obtain an illegal advantage** to have mitigated criminal liability if he/she voluntarily denounces the **collusive bribery** to the competent authority. By analyzing the above mentioned regulation, we may conclude that Mongolia, to some extent, accepts the viewpoint that harassment and collusive bribery are morally distinct. Therefore, these two types of bribery should have a different criminal liability and punishment policy applied.

An incentive mechanism to whistleblow within the Draft Criminal Code of 2015	
For collusive bribery:	**For harassment bribery:**
- denounce the act and reveal that bribery act - mitigated criminal liability for a bribe giver	- exemption from criminal liability in the case that a bribe giver is constrained by a bribe-taker and in the case of giving harassment bribe - denounce the act to the competent authority - right to keep the taken government service

2. RELEVANT FOREIGN INITIATIVES AND EXPERIENCES

2.1 Punishment policy for collusive bribery

Countries such as the USA, the Kingdom of Sweden and France implement a symmetric punishment policy, which imposes the same penalty upon bribe-givers and takers. But, some countries such as the People's Republic of China, the Russian Federation and Japan implement an asymmetric punishment policy and impose lighter punishments upon bribe-givers.[7] In addition to imposing lighter penalties for bribe-givers, the Russia and China enable bribe-givers to be exempted from criminal liability in the case of admitting their crime and denouncing their criminal acts. For instance, according to Article 390 of the Criminal Law of the People's Republic of China "...a bribe giver who takes the initiative to admit his/her crime and denounces relevant corrupt act to the competent authority before prosecution may receive a lighter punishment or be exempted from punishment".[8] The Criminal Law of the Russian Federation also states "...a person who has given a bribe shall be relieved from criminal liability if he/she has been active in assisting to the crime's clearing and/or investigation, or this person has been subjected to extortion on the part of an official, or if this person, after committing the crime, has voluntarily informed the body with the right to institute criminal proceedings about giving the bribe".[9]

Punishment policy is not distinguished for harassment or collusive bribery according to this regulation, which enables a bribe-giver to be punished lightly or be exempted from criminal liability. In other words, the same level of punishment applies to a bribe-giver notwithstanding whether the type of bribery is harassment or collusive bribery. Thus, a bribe-giver would be deprived of the right to keep the taken services or advantage irrespective of whether he/she *gave a bribe in order to get what he/she is legally entitled to or gave a bribe in order to get illegal advantage*. On the one hand, this policy is just since a bribe-giver has committed a criminal act, thus he/she has to be deprived of the right to keep the obtained advantage of the bribe. On the other hand, it seems depriving the

[7] Christoph Engel, Sebastian J. Goerg, Gaoneng Yu, Symmetric vs. Asymmetric Punishment Regimes for Bribery Max Planck Institute for Research on Collective Goods, 2012.

[8] Criminal Code of the People's Republic of China, Article 390, 1979.

[9] Criminal Code of the Russian Federation, Article 291, 1996.

right of a bribe-giver to keep the taken government service is unjust in the case of harassment bribery.

The newly adopted Romanian Criminal Code is worth mentioning at this point. It reflects a very interesting punishment policy for bribe-giving. The Article 290 of the Code reflects special conditions of non-imputability and non-punishment for cases of bribe-giving. It states that, "...the act does not constitute an offense when the briber was constrained in any way by the person who took the bribe" and "...the briber is not punished if he/she denounces the act to the authorities before the prosecution body has been notified of the respective offense". In these situations **the money, valuables or any other goods are returned to the person who gave them**.[10]

Recently, a scholar from the USA has proposed a novel idea for curbing corruption in international business transactions. The idea was to exempt American business people from criminal liability who gave bribes to foreign public officials in international business transactions, making this conditional on confidential reporting to the American authority.[11] According to this scholar, many American businesspeople have to give bribes to foreign officials in order to carry out their business in foreign countries. Therefore, this proposal suggests that a bribe-giver should be immune for giving an unwished bribe to foreign public officials in order to carry out their business in their territories. The key to that idea is, the American authority would inform the case and relevant information of the bribe taking official to that country's competent authority. By that, this policy aims at addressing bribery from the demand side by imposing all risks on foreign bribe-takers. In that way, the demand for taking bribes in international business transactions could be decreased as well as collusion between bribers and bribe-takers.

It should be pointed out here that Article 37 of the UN Convention against Corruption requires member states to take measures to mitigate punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence and give immunity for this accused person.

2.2 Punishment policy for harassment bribery

Kaushik Basu, a former chief economist of the Indian Government, and a chief economist of the World Bank, proposed a specific approach to counter harassment bribery in 2012. According to his proposal, harassment bribe-giving should be **legalized**, fines for bribe-taking should be doubled, and the bribe-taker should have to pay back the bribe if discovered.[12]

In that case, bribe-givers would have an incentive to whistleblow after paying a bribe and knowing this, bribe-takers would hesitate to take bribes.[13] In that way, this policy is directed to prevent harassment bribery by imposing all risk upon bribe-takers and by decreasing the demand for harassment bribery. At the same time, this policy enables an ordinary citizen to whistleblow and protect their rights by themselves.

The legalization of harassment bribe-giving should be analyzed in light of moral and ethical concerns, since legalization could lead to the condition of wide spread bribe-giving and acceptance of bribe-giving as a just act. Thus, giving a harassment bribe should be legal ***only in the case of prompt and full reporting*** of the act to the competent authority, i.e. it should be legally conditional on reporting (leniency policy).[14] In other words, a bribe-giver remains guilty unless he/she promptly and fully reports the bribery to

[10] Adrian Fanu-Moca, Evolution of the Regulation of Corruption Offences, Journal of Eastern European Criminal Law issue 1/2014.

[11] Bruce W. Klaw, A New Strategy for Preventing Bribery and Extortion in International Business Transactions, Harvard Journal on Legislation, 2012.

[12] Kaushik Basu, Why, for a Class of Bribes, the Act of Giving a Bribe should be Treated as Legal, 2011.
Bruce W. Klaw, A New Stategy for Preventing Bribery and Extortion in International Business Transactions, Harvard Journal on Legislation, 2012.

[13] Jean Drèze, The Bribing Game, The Indian Express, 2011

[14] Martin Dufwenberg and Giancarlo Spagnolo, Legalizing Bribe Giving, University of Arizona, Working Paper 2012.

the competent authority. In that case, it seems legalization would not be unjust as the citizen can protect his/her right to obtain services to which they are entitled from the government and contributes to the social good by individually combating unjust acts.

Besides that, an economic survey conducted in Kenya and Uganda revealed that we theoretically mischaracterize the problem of corruption. Therefore, anticorruption measures are not particularly effective in practice in such corrupt environments. More specifically, the analysis reveals that "…while contemporary anticorruption reforms are based on a conceptualization of corruption as a principal–agent problem, *in thoroughly corrupt settings, corruption rather resembles a collective action problem"*. This, in turn, leads to a failure of any anticorruption reform that builds on the principal–agent framework.[15] In other words, the problem of corruption seems to be not an individual's problem in developing countries where bribery is widespread, but it rather resembles a collective action problem. In that case, implementation of corruption policy which implements top-down control of individuals' behavior, investigates criminal acts of individuals, and detects individual cases, might not be suitable in highly corrupted countries. In that context, the importance of implementation of not only top-down controlling policy but also bottom-up policy in countering corruption is vital. [16] Consequently, in a corrupt environment, the participation of citizens and legal entities in investigating, preventing, and detecting corruption is considered crucial.[17]

To summarize, the following mechanisms begun to be discussed actively by researchers as important elements in determining anticorruption policy: [18]

-the acceptance of difference in harassment and collusive bribery;

-an application of economic principles such as incentive mechanisms for increasing whistleblowing;

-an application of differentiated punishment policies, which punishes bribe-takers and givers differently, in order to eliminate collusion, and detect and prevent bribery;

-an initiation of a bottom-up deterrence mechanism due to characterization of corruption as a collective action problem.

3. COMPARATIVE EVALUATION OF THE DRAFT CRIMINAL CODE OF MONGOLIA AND RELATED FOREIGN INITIATIVES

Let us comparatively analyze the Mongolian punishment policy for bribery, which is reflected in the Draft Criminal Code of 2015 in the context of collusive bribery at first hand and afterwards in the context of harassment bribery.

3.1 Comparative analyze of punishment policy for collusive bribery

The Draft Criminal Code of 2015	Foreign experiences and initiatives
- a bribe giver has to denounce the act and reveal that bribery act - a bribe giver will have a mitigated criminal liability	- a bribe giver has to be constrained in any way by the person who took the bribe or a bribe-giver has to denounce the bribery act and has to assist in the crime's clearing and/or investigation, in order to be exempted from criminal liability or imposed mitigated criminal liability; - **the money, valuables or any other goods will be returned to a briber giver**

It is not very clear how a whistleblower's liability will be mitigated according to the Note of Article 22.5 of the Draft Criminal Code. Therefore, this rule creates uncertainty on the side of

[15] Anna Persson, Bo Rothstein and Jan Teorell, Why Anti-corruption Reforms Fail-Systemic corruption as a Collective Action Problem. International Journal of Policy, Administration and Institutions, 2013

[16] Danila Serra, Combining Top-down and bottom-up Accountability. Evidence from a Bribery Experiment, CSAE WPS/2008-25.

[17] Id

[18] Olken, Benjamin A. and Rohini Pande, Corruption in Developing Countries, Annual Review of Economics, 2012.

the whistleblower. **Also**, giving the full and correct information, assisting in investigation the process, etc. and some other procedural elements are missing. All in all, it is probable that this provision could not be effective in practice. Consequently, some other variant might be more effective. For instance, absolving from imprisonment could serve as a form of mitigated liability. Or it could even directly absolve a bribe-giver from criminal liability in the case that a bribe-giver blows the whistle, or if a bribe-giver was constrained by the person who took the bribe. In addition to that, implementation of incentive mechanisms which enable a bribe giver to take back money and other items after the clearance of the criminal act could enable more effective detection of collusive bribery.

Overall, the following elements need to be reflected within the Draft Criminal Code:

- a bribe-giver is constrained in any way by the person who took the bribe or a bribe-giver denounces the act and reveals that bribe;
- a bribe-giver has to assist in the crime's clearing and/or investigation;
- exemption of a bribe-giver from criminal liability;
- imposition of a high fine upon a bribe-taker in order to compensate the giver;
- **reward or return mechanism for a briber-giver.**

3.2 Comparative analysis of punishment policy for harassment bribery

The main Article 22.5 of the Draft Criminal Code declares that the act of bribing is illegal in general notwithstanding whether a person gives a harassment or collusive bribe. Whereas the Note to that provision absolved a bribe-giver from criminal liability only in the case of harassment bribery and only if a giver is constrained by a bribe-taker in some way.

It should be noted here that, in Mongolia many people give harassment bribes to public officials even without any constraint by the bribe takers, just in order to get prompt, qualified service without unnecessary bureaucracy. In that case, harassment bribe givers and takers are considered equally criminal, thus, collusion remains between them since both would be considered criminals, who should be punished.

Comparative analysis of regulation for harassment bribery

	Legalizing giving harassment bribe	The Draft Criminal Code of 2015
Elements	- legalization of giving harassment bribe -full, correct and prompt whistleblowing -right to keep the taken government service -returning the money, valuables to a bribe giver	-exemption from criminal liability only in the case that a bribe-giver is constrained by a bribe-taker and only in the case of giving a harassment bribe - whistleblowing, denouncing the act to the competent authority -right to keep a taken government service
Pros	- directed to the whole public - awareness-raising in respect of the understanding that harassment bribe taking is illegal and unjust - Responds to a collective action problem - Preventative, self-controlling, self-enforcing	-possible to implement this rule in Mongolia -law enforcement organizations would not be overloaded -not particularly risky to implement

Cons	-law enforcement organizations would be overloaded, burdened -delicate and special implementation is required - need secure and robust legal environment for whistleblowers, victims and public officials /in the case of defamation/	-considers the act of giving a harassment bribe as an individual problem /as a principle agent problem/, thus could not change the perception of giving and taking harassment bribe as an improper and unjust act **-COULD NOT INVOKE INCENTIVES OF PUBLIC TO WHISTLEBLOW** -does not respond to the collective action problem -not preventative

An exemption of a bribe giver from criminal liability *only in the case that a giver is constrained by a taker and only in the case of giving a harassment bribe* is too restricted. Whereas, automatic exemption of a bribe-giver from criminal liability in the case of giving a harassment bribe would be more effective in detecting harassment bribery and reducing the demand for it. Moreover, it is important to include an incentivizing mechanism such as severely fining bribe-givers and returning the given money and valuables to givers. On the whole, the following elements need to be reflected within the Draft Criminal Code:

- whistleblowing, denouncing the act to the competent authority;
- right to keep the taken government service;
- exemption from criminal liability;
- imposition of a high fine to a bribe taker in order to compensate a giver;
- **reward or return mechanism for a briber-giver.**

Finally, intermediation in bribery is not regulated in the Draft Code. However, recently conducted studies established that intermediate people in bribery reduce the moral costs of citizens and officials and, thus, increase corruption.[19] In connection to that, it is important to maintain current regulation in respect of intermediation.

4. IMPLEMENTATION

Delicate and careful implementation of a differentiated punishment policy is of utmost importance for ensuring its effectiveness. Various necessary conditions and situations have been defined through economic experiments for the successful implementation of this punishment policy, which should be highlighted here. In addition to that, other preconditions arising from national peculiarities must be considered, in order to successfully implement this policy. The following are:

A. Awareness-raising:

- Corruption has become a custom in Mongolia. Therefore, it is important to raise awareness and change the perception of the general public, companies and public officials, i.e. changing perception at all levels and making them understand the meaning and importance of this policy is crucial. It is important, on the one hand, to induce the active participation of the general public and, on the other hand, it is important to make public officials understand that all risk lies on their shoulders, and thus they are susceptible to detection by the public and harsh punishment. Particularly, it is vital to make the public understand that they are contributing to creating a just society by whistleblowing.[20] In connection to that, an economic study has shown that, only the involvement of and whistleblowing of the public can lead to effective implementation of this policy.[21]

[19] Mikhail Drugov, John Hamman, Danila Serra, Intermediaries in Corruption: An Experiment, Expenmental Economics, 2014.

[20] Klaus Abbink, Utteeyo Dasgupta, Lata Gangadharan, Tarun Jain, Letting the Briber go Free: An Experiment on Mitigating Harassment Bribes, Journal of Public Economics, 2013.

[21] Prateek Verma, Supratim Sengupta, Bribe and Punishment: An Evolutionary Game-Theoretic Analysis of Bribery, PLos-One, 2015.

B. Ensuring information transparency

- It has been established that information dissemination and transparent implementation will induce and increase the public's interest in more whistleblowing.[22] Therefore, it is important to inform the public on information concerning which government organizations are more corrupt and how public officials have been punished, how many people are rewarded or receive back what they have given in bribery.

C. Institutional setup

- It is important to have a just institution for the implementation of this policy. In addition to that, special courts could be created for deciding harassment bribery related cases by considering the possibility of overload.
- A prompt, cheap, easy, confidential, friendly whistleblowing mechanism should be ensured.[23]

D. Punishing the bribed public officials and law enforcement officers harshly

- Effectively detecting and imposing severe punishments upon bribe-takers would threaten them and therefore reduce the demand for bribery.[24] Following this, the fine amount for harassment bribery needs to be increased in order to make bribe-takers afraid of taking bribes and to give back money or items to the bribe-givers.[25]
- Also, if a public official is to remain in his/her position after being punished for taking a bribe, then, it is possible that they might take revenge from people who have blown the whistle and who have to get his/her service in the future. Therefore, the deprivation of the right to hold a public position for a certain number of years should be imposed upon public officials. This policy is also important to prevent public officials to take bribes since this punishment type is directly related to their career and quality of life. However, in the case of the health service, different punishments might be imposed due to the shortage of human resources in the field in Mongolia.

E. Protection of whistleblowers, public officials

- It is important to create a whistleblower protection and reward mechanism, which still has not been created in Mongolia.
- An anonymous prosecution procedure for accused public officials should be created, in order to protect fair public officials from defamation.[26]

5. CONCLUSION

The current policy against bribery reflected in the Criminal Code of 2002 is punitive and top-down, which requires significant financing and human resources, and does not have a preventative aim. Moreover, this anticorruption policy seems to fit a more mature, developed environment, where corruption occurs on a limited scale. In other words, this limited anticorruption policy is not effective in a highly corrupt environment where various types of corruption exist at all levels of government organizations.

The Draft Criminal Code of 2015, which has been submitted to the Parliament of Mongolia, attempts to create a more comprehensive punishment policy for bribery that better fits the Mongolia's conditions. Namely, it creates a differentiated punishment policy for bribe-takers and givers. More precisely, bribe-givers may have mitigated criminal

[22] Jakob Svensson, Who Must Pay Bribes and How Much? Evidence from a Cross Section of Firms, the Quarterly Journal of Economics, Oxford University Press, 2003.
Alvaro Cuervo-Cazurra, The Effectiveness of Laws against Bribery Abroad, Journal of International Business Studies, 2008.

[23] Christoph Engel, Sebastian J. Goerg, Gaoneng Yu, Symmetric vs. Asymmetric Punishment Regimes for Bribery Max Planck Institute for Research on Collective Goods, 2012.

[24] Karna Basu, Kaushik Basu, Tito Cordella, Asymmetric Punishment as an Instrument of Corruption Control, Policy Reasearch Working Paper, The World Bank, 2014.

25 *Id.*

[26] Klaus Abbink, Utteeyo Dasgupta, Lata Gangadharan, Tarun Jain, Letting the Briber go Free: An Experiment on Mitigating Harassment Bribes, Journal of Public Economics, 2013.

liability or may be exempted from criminal liability in the case of blowing the whistle.

Further, the Draft Code also reflects a differentiated punishment policy for collusive and harassment bribery by acknowledging that these two types of bribery are morally different. This new rule enables harassment bribe-givers, who were constrained by the people who took bribes, to be absolved from criminal liability and to have the right to keep the taken government service. This differentiated punishment policy also enables collusive bribe-givers to enjoy mitigated criminal liability, in the case that bribe-givers denounce the bribery to the competent authority.

However, for collusive bribery it is not very clear how a whistleblower's liability would be mitigated according to the Note of the Article 22.5 of the Draft Criminal Code. In the case of harassment bribery, it seems exemption of a bribe-giver from criminal liability is available *only in the case that a bribe giver is constrained by a bribe-taker and only in the case of giving a harassment bribe*. This provision is too restricted. Therefore, it is important to reflect the following elements in the form of a new separate ***ARTICLE OF NON-PUNISHMENT*** for bribe-giving within to the Draft Criminal Code, in order to impose high levels of risk on bribe-takers and reduce the demand for bribery:

Collusive bribery	Harassment bribery
▪ a bribe-giver has to denounce and reveal that bribery act; ▪ a bribe-giver has to assist in the crime's clearing and/or investigation; ▪ a bribe-giver will be exempted from criminal liability; ▪ **reward or return mechanism for a bribe-giver by severely fining a bribe-taker.**	▪ a bribe-giver has to blow the whistle, denounce the act to the competent authority; ▪ a bribe-giver has the right to keep the taken government service; ▪ automatic exemption of a bribe-giver from criminal liability; ▪ **reward or return mechanism for a bribe giver by severely fining a bribe-taker.**

Finally, intermediation in bribery is not regulated in the Draft Criminal Code. Therefore, it is important to maintain current regulations in respect of intermediation.

In conclusion, the intrinsic purpose of this differentiated punishment policy for bribery is to:

- to create a favorable environment for the weaker party while imposing higher risks upon the people who have a more advantageous position;
- to assist in solving the problem of corruption in equal and just manner;
- to enable citizens to protect their interests from unlawful acts; and
- ultimately, to create a preventative system rather than punitive which reports and controls itself.

In conclusion, the future development of punishment policy for bribery may be characterized as follows:

✓ A differentiated punishment policy for bribe-givers and takers may be introduced to eliminate collusion and reduce the demand for bribery. In this sense, economic mechanisms, which motivate the relevant parties to blow the whistle, such as severe fines for bribe-takers and rewards to whistleblowers or intermediate persons, might be introduced.

✓ Punishment policy in respect of collusive and harassment bribery might be differently regulated in developing countries. Therefore, the current 'one size fits all' punishment policy might be reformulated and various new, flexible punishment policies could be introduced in different countries.

✓ A more decentralized, novel mechanism which is preventive rather than punitive and bottom-up rather than top-down, and which is self-controlling and self-enforcing might be introduced as a new tool to combat bribery in the future.

SETTING THE COORDINATES FOR TRANSNATIONAL INTEGRATION: THEORETICAL AND PRACTICAL APPLICATIONS OF COMPARATIVE LAW IN MONGOLIA'S CONSTITUTIONAL TSETS

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Abstract

The process of constitutional interpretation and application is a constant question of how best to ensure the rule of law conforms to the practices and principles of a particular nation. Today's domestic application of the law takes place in a court system that is increasingly exposed to the influence of supranational legal regimes, as well as foreign court decisions. As such, it becomes imperative in a country's elucidation of its constitutional foundation to develop a theoretical and practical infrastructure to systematize and understand the law from a comparative perspective. What is especially important for any country, and especially those in the development a new civic constitutional history, is ensuring that theoretical and legal scholarship are able to thrive in setting the coordinates for the development of constitutional jurisprudence. This article will elaborate more on this constantly evolving conversation by looking at the function a comparative and transnational approach to constitutional interpretation can play in the context of Mongolia's Constitutional Tsets, and what this approach should look for as it aligns national ideals with the emergence of global and universal values.

Introduction

A constitution exists as an enduring reference by which a sovereign nation is able to define the limits of its power, the function of its government, and the grounds on which the social, political, and economic relations of its peoples are managed. In this respect, a constitution is all at once a foundation for setting the expression of a country's identity while simultaneously establishing the means for that identity to be reformed in the development of human rights and the rule of law behind public and private policy. A key point of debate amongst comparative constitutional scholars is what this process of national constitution-making and evolution looks like in the context of a regional and global integration of markets, ideas, and cultural norms. Questions asking how international legal norms are, or else should be, adopted through constitutional structures, such as the courts, invariably rely on the invocation of abstract theoretical principles and real-life comparisons of court decisions alike.

In the case of a relatively new constitutional system, like Mongolia's, incorporating these trends in comparative law can have significant dividends in inhering a "global sense" for applying the law in constitutional cases. In fact this comparative ethos would have broad and beneficial applicability in all countries, as transnational and universal legal practices have an increasing effect on the lives of citizens everywhere. This note will proceed to funnel a concrete comparative approach toward constitutional interpretation from the level of critical legal theory to implementable legal practices in the context of the unique relation of Mongolia's Constitutional Tsets to legal scholarship and society.

Limits of the Theoretical Sphere

The first matter in establishing a comparative legal framework is determining the field of reference from which to draw comparisons from. This

is not as simple as comparing and contrasting legal systems, but instead requires a theoretical delineation that recognizes the fluid nature of social interactions in relation to national and international law[1]. In a testament to the global scale of constitutional evolution, Mongolia stands as 1 of over 110 countries that have adopted a new constitution since 1990. Since this time, Mongolia has experienced rapid liberalization in global market access, increases in environmental concerns, and greater human rights protection. This creates a huge pool of foreign actors generating an exponentially complex set of constitutional interpretations that not only respond to these global changes, but reverberate to influence them as well. In this sense, legal norms take on a supranational characteristic where state and non-state actors a like form networks whose practices ultimately end up affecting the global legal system.

The existence of international actors developing procedures under their own private authority is a growing challenge for traditional constitutional interpretation.[2]While there is a growing diversity of international organizations with recognized legal personality, the development of international legal norms does not necessarily stop within the limits of their constitutions.[3]To the extent that "law represents the very social relationship mediating markets,"[4] the scope of procedure relating to interstate transactions cannot possibly encompass every innovation in business or rights practices. Private authority regimes end up developing in the shadow of established international and domestic institutions to resolve issues in the pieces of transnational commerce that are beyond a traditional legal body's attention or expertise. Things like credit rating agencies, and the development of *lexmercatoria* (merchant law) create challenges to the state's ability to effect "public" governance.[5]

The incorporation of the "Arrangement on Officially Supported Export Credits" in the WTO's "Agreement on Subsidies and Countervailing Measures" is a particular example of how government, business, and technocratic participants in a global exchange can develop international law from informal cooperation on shared interests.[6] The Arrangement began in 1978 as a result of various trade experts' attempts to level the playing field of government subsidies for exports by imposing a mutually agreed upon set of rules for limiting the amount industries would receive.

This form of self-regulation was an attempt to reduce the distortion of free trade created by government export credits. While the Arrangement evolved over time in conjunction with international business practices, the insular network of persons responsible for formulating the rules began and continued their discussion in hallways and backroom meetings during various international trade summits. Eventually, the rules agreed on in the Arrangement became a standard part of international trade procedure, and formed the vehicle for establishing those international standards as "soft" (not actually binding, but accepted, by those who follow it) law. The WTO's explicit exception for export credits governed by "an international undertaking"[7] has had the de facto effect of making the Arrangement a part of the binding treaty's international regime, despite the fact it is not technically

[1] See Zumbansen, Peer. *Carving Out Typologies and Accounting for Differences Across Systems: Towards a Methodology of Transnational Constitutionalism*. THE OXFORD-HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW. Ed. by Rosenfeld. Michael, Sajy, Andrés 2012, Oxford University Press. 75- 97.

[2] *Id.* at 82.

[3] For theories of legal personality *See* Enkhee, Tuulaikhuu. *International Legal Personality of International Organizations: International Law Perspective*. National Legal Institute of Mongolia Law Review 2014 No. 4 (50) at 49-53.

[4] Kurumisawa, Yoshiki. *Legal Advice and Comparative Law*. National Legal Institute of Mongolia Law Review 2014 No. 4 (50) at 3-9.

[5] Zumbansen, *supra* fn. 1 at 83.

[6] Levit, Janet Koven, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*. YALE JOURNAL OF INTERNATIONAL LAW, Vol. 30, p. 125, at 165 (2005).

[7] Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, ann. I(k) Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31 (1994).

international law.

The above example highlights that, when making international comparisons for how to apply the law, the empirical and conceptual experience informing such a comparison must look beyond the written text of international decisions and enactments to the cross-border conversations and agreements that go into their ultimate creation. Indeed, much of what is written as "hard law" is in itself a form of dialogue to the degree it expresses the particular views of a governing body at a specific point in its historical development. Norms and practices change, and so do the legal conversations surrounding them. The appropriate theoretical sphere in which we develop these conversations[8]should thus recognize the material we use for reference is not bounded by the written decisions of governing bodies, but incorporates the total world of social, political, and market relationships that form the basis for creating universal values.

Mongolia's constitution is fairly unique in the language it employs to adopt this forward-framing mentality in that Article 5(1) bases its form of economy in part on "universal trends." Use of the term "universal" inherently calls into question the totality of international practice, whereas "trends" remains vague enough to allow the Tsets to interpret decisions according to the fluid practices that go into creating universal law. It is not the case that the court would need to wait for the issue to become universal law, so long as a sufficient theoretical reasoning could conclude the decision was principally in line with how global economic norms were evolving. Similar language is employed in Article 10(1) of the Constitution, which states Mongolia "will adhere to the universally recognized norms and principles of international law." In this capacity, Mongolia's Constitutional Tsets could in theory act as early adopters of international legal developments by looking to social and political trends of international economic, environmental, or human rights organizations and agreements.

Indeed, scholars have noted that the quick ascension of new markets in a global economy requires "free exchange, market stability, contractual certainty and enforcement, and even a high degree of respect for private property and other market-oriented rights" that are in harmony with the international convergence of constitutional treatment of such issues.[9]The contention of this note is that Mongolia's Constitution provides its interpreters with a wide-degree of flexibility in ensuring it continues to be in accord with the evolution of those principles.

For example, a 2006 Tsets decision held that Article 6.1.2 of the Law on Excise Tax created an unfair basis for competition by imposing a higher tax rate on alcohol produced in the capital city than alcohol produced in nearby provinces. However, it upheld the law as constitutional by stating the ability to impose different tax policy was within the "exclusive jurisdiction" of the State Great Khural (SGKh).[10] Yet, in both 2005 and 2009, the Tsets held an amendment to Article 6.1 of the Excise Tax Law as unconstitutional because it imposed a different tax burden on imported US beer that was in violation of Mongolia's commitment to the General Agreement on Tariffs and Trade under the WTO.[11]The court used Article 10 of the Constitution to subject the "exclusive" jurisdiction of the SGKh to international law, demonstrating its authority to effect policy as a result.

These decisions seem relatively straightforward, but their conflicting rationales shows there is space for using transnational arrangements and legal trends in conjunction with broad constitutional language to proactively

[8] For a deconstructive theoretical understanding of the development of international law as a process driven by communicative agreement on facts *See* Sourgens, Frederic G., *Reconstructing International Law as Common Law* (January 21, 2015).GEORGE WASHINGTON INT'L LAW REV, Vol. 47, No. 1, 2015 (Forthcoming). Available at SSRN: http://ssrn.com/abstract=2553397

[9] Chang, Wen-Chen, and Yeh, Jiunn-Rong.*Internationaiization of Constitutional Law.*In THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW.Ed. by Rosenfeld, Michael, Sajy, Andr6s.2012, Oxford University Press.at pg. 1165-11854. at 1166.

[10] Tsets, Dec. 6, 2006. No. 10.

[11] SeeTsets, Apr. 13, 2005. No. 2/03; see alsoTsets, May 27, 2009.No. 02.

resolve disputes arising from domestic policies existing in conflict with universal trends in fields ranging from arbitration to human rights. The previous portion of this article demonstrated the conceptual space in which the recognition and analysis of these trends may be done. The next portion will focus on how constitutions form linkages between this transnational space, alongside the role of courts in mediating the two worlds. This will inevitably tie together both theoretical issues and practical methodological approaches that can be used to expound upon them.

Linking Theory and Constitutional Practice

While the field of international constitutional law has expanded along universal discourses of human rights, global markets, and transnational networks, the practice of comparing constitutions has developed divisions along colonial legacy, affinity in the legal system, language or culture, and "most importantly, power politics by competing actors, governments, and courts alike."[12] Indeed, to the extent a constitution serves to maintain a sovereign political identity, courts engaged in comparative analysis may tend to look for interpretations that consolidate judicial authority in the face of decreasing state importance in the development of global legal norms.[13] A comparative methodology has to take into account that many international private actors have specific interests and specialized knowledge that give them strategic advantages in the creation of international norms. Reliance on foreign commerce may undercut the bargaining power of states in the development of transnational legal regimes, resulting in deficiencies to the democratic process as certain corporate decision-makers govern policy.[14]

In fact, developing countries are more likely to be influenced by new transnational policies than developed countries given the fact that its adoption is more likely to confer competitive advantages. Application of a country's constitution within these regimes is important in signaling to international actors the level of guarantee the country is willing to extend to implementing these norms.[15]

This means that understanding the genesis of certain laws or practices is just as important as an understanding of the effects they have in particular countries. Functionalism, a classical method of comparative analysis that looks to the effects of constitutional provisions and interpretations in other jurisdictions, is inadequate to the extent it is divorced from the social, economic, and political complexities of constitutional decision-making.[16]Developing some sense of a critical legal perspective helps inform how constitutional systems develop differently based on contingencies governments face in their historical development. Germany and Hungary, for example, have very similar foundations for their rule of law and yet have very different approaches to the value of fundamental legal principles such as foresee ability and fairness.

An example specific to Mongolia can be seen in the understanding of human rights that existed both before and after the adoption of the Constitution in 1992. While the country was a member of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, Cultural Rights beginning in 1974, the application of these universal concepts was still filtered through the ideological lens

[12] Chang, supra fn 8 at 1166-1168.

13 Benvenisti, Eyal. *Reclaiming Democracy: The Strategic Uses of Foreign and International Law by National Courts* (2008) American Journal of International Law, Vol. 102, 2008 at 246.

[14] *Id. at* 246-47. This has also been a criticism of the current negotiations (2015) for the *Trans-Pacific Partnership Agreement* between the United States and 11 other Pacific nations, wherein opponents claim international corporations are given massive advantages over typical democratic safeguards in the US.

[15] BenediktGoderis, Mila Versteeg. *The Diffusion of Constitutional Rights*.39 Int'l Rev. L. & Econ. 1. (August, 2014). at p. 1-5.

16 RutiTeitel, (Book Review) *Comparative Constitutional Law in a Global Age*, 117 HARV L. REV. 2570 at 2581.. June, 2004.

of communism. After the centering of human rights protections under the establishment of liberal democracy in the new Constitution, however, there was a shift in the orientation government took toward interpreting what human rights looked like for the country based on their global, liberal democratic context.[17]This switch in application and understanding demonstrates that legal mechanisms for interpreting law are subject to the ideological perspective they emanate from.

It can be difficult to gain a sense of foreign constitutional development in relation to transnational principles that takes into account every contingency that went into formulating the political or commercial (or both) motivations for executing a law or decision. Yet in attempting to do so, comparative approaches focusing on transnational sources can offer "a way of testing the understanding of one's own traditions and possibilities by examining them in the reflection of others."[18]

Constitutions thus engage the world of transnational law to the extent they establish the conditions by which international legal norms regulate domestic governance. As mentioned before, language in Mongolia's constitution has the potential to allow for broad consideration of decisions in the context of universal economic and human rights trends, as well as the incorporation of treaties in domestic law. It is important to note that the language does not promote deference to foreign authority, but rather suggests that transnational legal regimes should at least be engaged to ensure constitutional considerations are informed by the field's network of trends.[19]Generally, however, a constitution's ability to allow the application of international law and trends as domestic law leads to a coalescing of the two in a world where international actors and states now have cross-judicial interactions in the litigation of transnational issues.[20]How, for example, should a court recognize the choice of judicial forum in an international dispute when the state's legislature is silent on recognizing the foreign court's authority?[21]

Application of the Constitution is the gateway through which these transnational issues may be resolved. This resolution relies on a background understanding of not just the evolving global legal landscape but also, to the extent other nation's applications of the law contribute to that field's formation, an understanding of the way foreign constitutional courts interpret the same issues. If transnational regimes promote the fluid convergence of legal practice, the resulting international body of judicial application must be in harmony to allow the process to evolve in a predictable and democratic way. The integration and harmonization of constitutional norms in the European Union, for example, was a necessary result of increased free trade within the region, in large part because it reduced transaction costs in the course of commerce.[22]

This form of international judicial integration is admittedly difficult to apply in countries where there is no precedential or even regional motivation for interpreting foreign constitutional understandings. Mongolia shares much of the same legal architecture as Germany, but lacks cultural and linguistic connections that would make application of their legal decisions more directly transferable. Scholars have noted that, unlike similar constitutional court systems such as Hungary, the Tsets

[17] Jugnee, Amarsanaa. *Transitional Period and Legal Reform in Mongolia*.National Legal Institute Press. 2009. p. 51-58.

[18] Jackson, Vicki C. *Constitutional Comparisons: Convergence, Resistance, Engagement*.119 Harv. L. Rev. 109 at 114. November, 2005.

19 This doesn't have to mean incorporation of transnational authority is used as supporting evidence for a particular opinion, scholars stress that refining legal principles should mean foreign sources are used to distinguish particular points when appropriate. *See. Id. See also*, Hirschl, Ran. *The Question of Case Selection in Comparative Constitutional Law* 53 Am. J. Comp. L. 125 at 129-131 (Winter 2005).

[20] *See*, Slaughter, Anne-Marie.*A Global Community of Courts*.44 Harv.Int'l L.J. 191 (Winter 2003).

[21] *Id.* at 196, fn. 68 citing US Supreme Court Justice Scalia's dissenting opinion in *Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting)* (distinguishing "judicial comity" from "legislative" or "prescriptive comity," which is "the respect sovereign nations afford each other by limiting the reach of their laws").

[22] *Chang, supra* fn 9. at 1171-72.

has been reluctant to cite or apply foreign authority in their decisions.[23]

Some countries, such as South Africa or Argentina, have constitutional provisions that explicitly direct judicial or legislative authorities to consider foreign or international law in the execution of their duties. Mongolia's constitution does not explicitly direct this, but this does not mean the process cannot be institutionalized as a norm in the process of Tsets decisions.

This lack of international judicial consideration is not unique to Mongolia. Many European and Asian countries, including Japan, South Korea, and Taiwan, also rarely cite foreign authority. The United States is notorious for refusing to engage in international judicial dialogue in resolving constitutional questions unless the issue is particularly divisive.[24] However, this bias against using foreign and international authority is more ideological than anything else. Empirical evidence shows that courts have a tendency to align with certain legal families and cultural traditions because of a desire to use foreign authority in support of their views and interests.[25]Doing comparative constitutional analysis under the pretense of developing a critical understanding of universal legal trends and norms requires shaking this bias by actively seeking to engage foreign authority for the purpose of fostering a more universal understanding that is necessarily anti-ideological. This is the application of the "global sense" mentioned earlier in this note. A sense that, when applied, serves to reify and strengthen the domestic interpolation of the rule of law as what is recognized as true within the global transnational landscape.

It is thus important for global courts to act as a community in ensuring that legal transplantations and resolutions of conflict are done in a manner of trans judicial uniformity that matches the overarching transnational uniformity developing as a result of state and private authority in international practice.[26]This can be done through citation of foreign decisions, networking with other foreign constitutional decision-makers, and overall promoting a degree of judicial comity that recognizes and respects the decisions of foreign jurisdictions. The field of comparative judicial dialogue is as much a practice in diplomacy as it is scholarship.[27]

Amplifying Comparative Theory in the Constitutional Tsets

Identifying and increasing awareness of the factors that lead to judicial bias is especially important in a constitutional court system that is still developing habits for interpretation of the rule of law. The lack of precedent by subsequent constitutional decisions means there is no real functional barrier to citing judicial authority, but this shift in ideological procedure must be supported by a strong foundation capable of analyzing such a complex network. This includes increased access to knowledge and decisions of international and foreign authority facilitated through increased research, clerks with specialized experience, and legal education that creates an appetite for critical comparisons of law[28]

The incorporation of comparative law into the Tsets system can be accomplished in a number of ways that are especially conducive to facilitating a comprehensive sense of transnational and transjudicial understanding in universal trends. A

[23] Munkhsaikha. Odonkhuu. *Towards Better Protection of Fundamental Rights in Mongolia. Constitutional Review and Interpretation.*Nagoya University CALE Books 4. Published March. 2014 pg. 215

[24] *See, e.g.* Farber, Daniel A. *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History* (December 15, 2006). UC Berkeley Public Law Research Paper No. 954359

[25] Voeten. Erik. Borrowing and NonborrowingAmong International Courts, 39 J. Legal Stud. 547, 567, 572 (2010)

[26] *See*, e.g. Slaughter, *supra* fn. 19.

[27] And indeed, those serving on the Tsets have engaged in many international meetings with justices from other Constitutional courts ranging from South Korea to Poland, in addition to hosting multiple Seminars of Asian Constitutional Justices.

[28] These are true of all legal systems, *Seee.g.*, Lawd, David S. *Judicial Comparativism and Judicial Diplomacy*. 163 University of Pennsylvania Law Review 927. March, 2015; *See also*, Amarsaana, *supra* fn. 17 at 41 (calling for increased education about common law systems for the purposes of developing more scientific approaches toward comparative law).

relationship facilitated by comprehensive judicial opinions, scholarly support, and actions of members of the public has a unique synergistic capacity to tackle the complexities of comparative constitutional law.

Legal scholars play an incredibly important role in the development of a civil, judicial and legislative system. The lack of precedential authority means their opinions and contributions are more likely to be used as grounds for legal interpretation. In addition, the ability for scholars to be unburdened by decisions about domestic law allows them to be free to contemplate and develop legal frameworks and scientific understandings of law at abstract levels, ideal for generating theories and observations from a comparative background.[29]They can further play a functional role in connecting judicial systems, as citation to foreign authority is more likely when there are scholarly connections between them.[30]

Mongolian comparative scholarship should not merely be limited to translation and interpretation of important foreign court decisions.[31]Scholars should continue engagement in the development of comprehensive theories to improve decisions as more in line with concepts of "ordered liberty" that form the progressive background for the application of the rule of law within universal trends and practices.[32] This inherently includes analysis and understanding of how transnational networks are established and affected in other constitutional jurisdictions, as well as globally. However, these should not be limited to mere legal theoretical undertakings. It is important to stress that comprehensive transnational comparative scholarship requires cross-discipline collaboration and engagement with specialists in particular sectors (such as those participating in the development of the export credit financing) to accurately pinpoint how these universal trends fit into the domestic legal order.[33] Having a better theoretical basis to work from allows scholars and practitioners alike to more readily determine what constitutes relevant international comparison. This includes institutionalizing self-reflexive review of how the Mongolian constitutional system evolves as a response to increased incorporation of comparative law in Tsets cases.[34]

While scholars can play a crucial role in forming the theoretical framework for comparative issues, they are also able to play a direct role by encouraging comparative discussion in the Tsets system. The ability to petition the court on specific constitutional issues has the capability to generate new domains for the integration of evolving transnational norms upon their reaching a "critical mass" as a universal trend. They can also submit briefs in key Tsets decisions that bring attention to comparative approaches from foreign jurisdictions.[35]

But this ability to petition the Tsets is not limited to mere scholars, politicians, or practitioners of law. The Constitution allows for any citizen to submit a constitutional petition. Given the tremendous subject matter covered by transnational networks, the hope that legal scholarship will alone be sufficient seems misplaced. Luckily, the ability to identify changing practices in international policy is becoming more rapidly decentralized through access to information via the internet, more comprehensive education, and the pervasiveness of global problems like climate change.

Civil society networks of non-governmental organizations play a substantial role in serving as both watchdogs and catalysts for changing

[29] Legal scholarship is incredibly important in facilitating this capacity in the civil systems of Europe. *See* e.g., Von Bogdandy, Armin. "Comparative Constitutional Law: A contested Domain." pgs.26-34. THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW. Ed. Rosenfeld, Michael, Sajy, Andrбs. 2012. Oxford University Press.

[30] Chang, *supra* fn 9. at 1177.

[31] Munkhsaikha, *supra* fn. 23 at 156.

[32] *Id.* at 210.

[33] *See, e.g.*, Jackson, Vicki C. *Methodological Challenges in Comparative Law.*28 Penn St. Int'l L. Rev. 319 (Winter 2010) Symposium Issue.

[34] For example, it is important to adopt a method for comprehensively analyzing how the court selects various foreign cases in their decisions to determine causal relationships in research and selection processes. *See* Hirschl, *supra fn. 19.*

[35] Although it should be noted that, while Tsets can consider these briefs, it is equally important they *reference* the submitted international principle if it helps in clarifying their decision. Munkhsaikha, *supra* fn. 23 at 215.

international behavior. To the extent these groups can petition the Tsets, they can play an important part in shaping the discussion of globalizing constitutional practice. Individual actors in civil society play an important role in mobilizing sociopolitical discussions, acting as beacons to bring attention to certain domestic and international issues concerning areas like the environment or human rights. This develops an ethos of "preventative foresight" that can be used to ensure political institutions are able to make key decisions before it's too late.[36] Bringing awareness to changing global circumstances can allow scholars to prioritize the attention they give to developing a comprehensive pool of comparative legal knowledge.

Ultimately, however, the power to interpret and apply the Constitution rests in the purview of the Tsets. As discussed before, the interpretation and citation of foreign court decisions is a key component in developing comparative constitutional principles. This capacity works both ways in that it is equally important commentators from other jurisdictions have the opportunity to thoroughly understand and incorporate domestic judicial dialogues. A recognized problem in the Tsets' ability to contribute to comparative constitutional law has been the fairly objective and strict application of the law in decisions lacking detailed rationales.[37] Using comparative examples to delineate concepts is a way to provide elaborate reasoning that better guides scholars, foreign justices, and international actors who are looking for security in constitutional treatment of transnational issues.

Using international comparisons in decisions also has the appeal of increasing the perceived legitimacy of decisions. The ability to point to international trends and say "this is how it's done" provides a safe harbor for decision-makers looking to avoid potential backlash from those holding opposing political interests.[38] This is a particularly useful benefit for the Tsets for at least two reasons. First, because the first round of their constitutional judgment is subject to acceptance by the SGKh, there is more opportunity for the diffusion and justification of transnational trends in the application of domestic policy. It is a chance to inform lawmakers of the nature of legal interpretation and development, thereby strengthening the SGKh's future capacity to develop laws in consonance with constitutional values. Second, because each member's limited tenure is subject to the SGKh's re-approval, having more powerful and authoritative decisions can act as a shield that makes it harder for them to be subject to political influence. Citation to foreign law can make decisions appear not only more justified, but demonstrates judicial restraint through careful and practiced consideration of all relevant details of a decision.

The above reasons for constitutional interpretation in Tsets decisions are, however, merely practical benefits meant to incentivize more treatment of foreign authority. The normative issue of why they *should* adopt such a method is based on a deeper appeal toward developing best practices for ensuring the international commitments set out under the Constitution are met. This is in itself a question about the nature of the rule of law's capacity to incorporate universalizing legal trends in a domestic legal context. It is not enough, then, to remain a spectator. Participation in the process is key from the highest levels of theoretical understanding to the most fundamental levels of civic engagement.

Conclusion

Establishing a comprehensive approach to comparative constitutional development and interpretation is a process of transnational and foreign understanding that starts from the pre-legal "space" of conceptual theory, becomes accessed through the Constitution's adoption of international trends and agreements, and ends in written

[36] Kurasawa, Fuyuki Assistant Professor of Sociology at York University. "Cautionary Tales. The Global Culture of Prevention and the Work of Foresight," *Constellations*, 11.4 (2004).

[37] Munkhsaikha, *supra* fn. 23 at 161.

[38] Lawd, *supra* fn. 28 at 1001-03.

decisions by the Constitutional Tsets. The relationship is not linear, but is instead the result of elaborate and complex networks whose effect on the rule of law through the Constitution is mediated by transjudicial dialogue, comparative scholarship and civic involvement.

This article has contended that global trends in international legal development requires an evolving approach to comparative constitutional practice that goes beyond seeing law as the manifestation of political arrangements. Over time, increased capacities in travel, communication, and access to information will lead to more cooperation among private and public actors alike, leading to further convergence in the global norms regulating social and economic life. Hence it is important for scholars, judges, legislators, and citizens alike to have a "global sense" in terms of developing channels by which it is possible to be aware of, as well as incorporate the universal trends that develop in transnational and foreign networks. Understanding how these relationships reify is crucial to ensure application of constitutional principles is fluidly and effectively managed as Mongolia continues to prosper in the global sphere.

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DIE TODESSTRAFE: WEGE ZUR ABSCHAFFUNG

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1. Einführung: Eine überzeugende politische Initiative in der Mongolei

Der mongolische Präsident Tsakhia Elbegdorj erklärte am 14. Januar 2010 seine Absicht, die Todesstrafe in der Mongolei abzuschaffen. Er stellte gleichzeitig die Gründe vor, die ihn dazu bewogen haben, für die vollständige Abschaffung der Todesstrafe einzutreten [1]. Die Gründe fügen sich überzeugend in den Grundtenor der gegenwärtigen Diskurse zur Todesstrafe ein und die Ankündigung der Abschaffung beschleunigt die globale Dynamik einer Politik vollständiger Abolition. Der Präsident wies auf den unübersehbaren internationalen Trend zur Abschaffung der Todesstrafe hin, er betonte das Risiko von Fehlurteilen und die Gefahr der Exekution von Unschuldigen, er erwähnte glaubhafte Alternativen zur Todesstrafe, die mindestens ebenso gut für Abschreckung und Sicherheit Sorge tragen und er diskutierte Humanitätsstandards entwickelter Gesellschaften, die für den Verzicht auf die Todesstrafe sprechen. Die vom Präsidenten der Mongolei eingenommene Position entspricht insoweit vollständig einer internationalen Bewegung, die auch in der Resolution der Vereinten Nationen für ein globales Moratorium aus dem Jahr 2007 sichtbar wird [2], sowie einem allgemeinen, globalen und im letzten Fünfjahresbericht der Vereinten Nationen zur Todesstrafe wieder betonten Trend hin zur vollständigen Abschaffung der Todesstrafe [3]. Die Ankündigung des Präsidenten, dass er von nun an zum Tode verurteilte begnadigen werde, hat Vorbilder nicht zuletzt auch in den USA [4]. Der in Medienberichten enthaltene Hinweis, dass die Rede des Präsidenten zur Todesstrafenpolitik im Parlament keinen Applaus nach sich gezogen habe [5], mag darauf hindeuten, dass die Implementierung der Abschaffung der Todesstrafe schwierig sein wird. Die offensichtlich eher ablehnende Haltung

[1] www.president.mn, The Office of the President of Mongolia, Public relations & Communications Division "The Path of Democratic Mongolia Must be Clean and Bloodless", 2010-01-14

[2] Resolution 62/149, angenommen durch die Generalversammlung der Vereinten Nationen am 18. Dezember 2007 (104 Stimmen dafür, 54 Stimmen dagegen und 29 Enthaltungen).

[3] Report of the Secretary-General: Capital punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty. New York, 28. 6. – 23. 7. 2010; vgl. auch Annual report of the United Nations High Commissioner for Human Rights and reports of the Office of the High Commissioner and the Secretary-General: Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development. Question of the death penalty. United Nations, A/HRC/15/1916, Juli 2010; Arroyo, L., Biglino, P., Schabas, W.: Hacia la Abolicion Universal de la pena capital. Valencia 2010.

[4] Am 31. Januar 2000 erließ der Gouverneur von Illinois, George H. Ryan, ein allgemeines Moratorium für Exekutionen, das bis heute in Kraft geblieben ist. Zur Zeit liegt in Illinois ein Gesetzesentwurf im Parlament, mit dem die Todesstrafe auch förmlich aufgehoben würde. In Nebraska entstand ein „informelles" Moratorium, nachdem im Jahr 1999 der Gouverneur gegen ein formelles Gesetz zur Einführung eines Moratoriums ein Veto eingelegt hatte. Nachdem der Oberste Gerichtshof Nebraskas im Jahr 2008 entschieden hat, dass die allein vorgesehene Elektrokution verfassungswidrig sei, steht die Todesstrafe (bis zu entsprechenden Reformen des Gesetzgebers) nicht mehr zur Verfügung. In New York hat die Entscheidung des Obersten Gerichtshofs im Jahr 2004 ebenfalls die Verfassungswidrigkeit der Todesstrafe in der damals vorgesehenen Form festgestellt. Der Gesetzgeber hat bis heute keine Anstalten gemacht, die Todesstrafe in verfassungsgemäßer Form wieder in das Strafgesetzbuch einzufügen.

[5] Times Online, January 15, 2010, Mongolia to abolish the death penalty.

des Parlaments dürfte einer öffentlichen Meinung geschuldet sein, die nach wie vor die Todesstrafe als Antwort jedenfalls auf schwere Tötungsdelikte unterstützt.

Insoweit verweist die Situation in der Mongolei auf politische Prozesse, die in Europa weitgehend abgeschlossen sind. Die folgenden Ausführungen sollen dazu dienen, verschiedene Wege hin zur Abschaffung der Todesstrafe nachzuzeichnen, die dabei auftretenden Probleme zu benennen und kontroverse Diskurse vorzustellen.

Der Prozess der Abschaffung der Todesstrafe beginnt in Europa mit der Aufklärung. Insbesondere Beccaria benannte in seinem grundlegenden Werk „Über Verbrechen und Strafe" (1764) allgemeine Gesichtspunkte, die gegen die Todesstrafe sprechen. Die Kritik der Todesstrafe fällt teilweise mit der Kritik der Folter zusammen, sie greift damit eine Debatte über grausame Strafen auf, die noch heute in den Staaten der USA, in denen die Todesstrafe vollstreckt wird, geführt wird. Das zentrale Argument Beccarias bezog sich allerdings auf die Notwendigkeit von Kriminalstrafen. Seine Meinung, dass nur eine rationale Kriminalstrafe legitimierbar sei, und dass jede über das unbedingt Erforderliche hinausgehende Strafe als exzessiv und deshalb als Tyrannei betrachtet werden müsse, beruht auf einem Verständnis von Strafe, die ihre Begründung im Rechtsgüterschutz findet.

Der Prozess der Abschaffung der Todesstrafe in Europa kann grob in vier Phasen unterteilt werden.

Die Aufklärung brachte neben der Erklärung der Menschenrechte auch einen neuen Blick auf die Kriminalstrafe. In einigen europäischen Staaten führte dies zur Abschaffung der Todesstrafe [6]. In den meisten europäischen Ländern wird die Abschaffung der Todesstrafe zwar nicht vollzogen. Es zeigen sich aber ebenfalls bedeutsame Reformen. Denn der Anwendungsbereich der Todesstrafe beginnt sich auf das Delikt des Mordes einzuengen.

Unmittelbar nach dem Zweiten Weltkrieg schafften einige europäische Länder die Todesstrafe im Prozess des Wiederaufbaus demokratischer Strukturen ab, andere führten ein Moratorium ein, das jedenfalls zu einem Ende der Exekutionen führte.

Zwischen 1960 und 1980 nahmen alle Länder Westeuropas die Todesstrafe (für Friedenszeiten) aus dem Strafgesetzbuch.

Unmittelbar nach dem politischen und sozialen Umbruch in Zentral- und Osteuropa wurde die Todesstrafe in fast allen ost- und zentraleuropäischen Staaten abgeschafft [7]. Dabei dürften die Aufnahme in die Europäische Union sowie die in den Europarat wesentliche Anreize gesetzt haben.

Während in Russland die Todesstrafe immer noch auf dem Papier und im Strafgesetzbuch vorhanden ist, wurde ein seit 1997 geltendes Moratorium erst kürzlich durch das russische Verfassungsgericht verlängert.[8]. Das Verfassungsgericht hat anlässlich dieser Entscheidung erklärt, dass das Moratorium erst zu dem Zeitpunkt auslaufe, an dem die Todesstrafe in

[6] Vgl. Suter. S.: Guillotine oder Zuchthaus? Die Abschaffung der Todesstrafe in der Schweiz. Basel 1997; Boulanger. C., Heyes. V., Hanfling. P. (Hrsg.): Zur Aktualität der Todesstrafe. Interdisziplinäre und globale Perspektiven. 2. Auflage. Berlin 2002; Hood. R.: Introduction – The importance of abolishing the death penalty. In: Council of Europe (Hrsg.): The Death Penalty – Beyond Abolition. Strasburg 2004, S. 13-23.

[7] Vgl. den Überblick in OSCE's Office for Democratic Institutions and Human Rights: The Death Penalty in the OSCE Area. Background Paper. Warschau 2009.

[8] www.ksrf.ru/News/Pages/ViewItem.aspx?ParamId=734.

Russland mit einer Änderung des Strafgesetzbuches förmlich abgeschafft wird. Weißrussland ist heute der einzige europäische Staat, in dem die Todesstrafe noch existiert und sowohl verhängt als auch vollstreckt wird [9]. Allerdings hat auch in Weißrussland eine Debatte über die Abschaffung der Todesstrafe begonnen. [10]. Seit dem Jahr 2009 wird jedenfalls über ein Moratorium nachgedacht, im Übrigen wurde der Entwurf eines Moratoriums angekündigt [11]. Dabei kommt dem Wunsch eines Beitritts zum Europarat wohl ein gewisser Einfluss zu.

Ein Blick auf die Entwicklungen in Europa verweist auf unterschiedliche Wege der Abschaffung der Todesstrafe. Die Abschaffung der Todesstrafe im Gesetz folgte in einigen Ländern einem längeren Moratorium (England/Wales, Belgien und Zypern). In einigen Ländern folgte die Abschaffung nach einem signifikanten Wechsel in der Regierung. In Frankreich fiel die Abschaffung der Todesstrafe mit dem Wahlsieg der Sozialistischen Partei im Jahr 1980 zusammen. In der Regierung betrieb Badinter als Justizminister und erklärter Gegner der Todesstrafe ihre sofortige Abschaffung, die wohl auch den grundsätzlichen Wechsel von einer konservativen zu einer fortschrittlichen Politik markieren sollte. In Spanien folgte die Abschaffung der Todesstrafe dem Übergang von einem autoritären Regime zu einer Demokratie in den 1970er Jahren. Die Abschaffung der Todesstrafe geht vereinzelt auf Entscheidungen von Verfassungsgerichten zurück. In Ungarn befasste sich das Verfassungsgericht 1990 mit der Todesstrafe und erklärte sie wegen Verstoßes gegen das Recht auf Leben für verfassungswidrig [12]. Überwiegend verlief der Prozess der Abschaffung der Todesstrafe über die Parlamente. Dies geschah teilweise im Zusammenhang mit grundlegenden Verfassungsreformen und symbolisierte wohl auch auch den Übergang von faschistischen und autoritären zu demokratischen Regierungsformen [13] (Österreich 1950, Deutschland 1949, Spanien 1976, zentral- und osteuropäische Länder nach 1989/1990).

Die grundsätzlich ablehnende Haltung gegenüber der Todesstrafe in Europa kann durch eine Mischung normativer und empirischer Argumente erklärt werden, deren Ursprung bis in das 18. Jahrhundert zurückverfolgt werden kann. Unter dem Einfluss der Aufklärung und vor allem der Arbeiten von Beccaria und Voltaire wurde das Ziel der Abschaffung der Todesstrafe Teil der europäischen Strafrechtsreformbewegung [14].

2. Europa, die Todesstrafe und die Suche nach einer europäischen Identität

Die Europäische Union und das Europäische Parlament haben ihre seit langem etablierte Position im Hinblick auf die Todesstrafe in verschiedenen Dokumenten zum Ausdruck gebracht

[9] Zu Einzelheiten vgl. OSCE Parliamentary Assembly: Resolution on a Moratorium on the Death Penalty and Towards its Abolition Adopted at the Eighteenth OSCE PA Annual Session in Vilnius, 29 June to 3 July 2009.

[10] OSCE's Office for Democratic Institutions and Human Rights: The Death Penalty in the OSCE Area. Background Paper. Warsaw 2009, S. 8.

[11] Europäisches Parlament: Annual report on human rights in the world 2009. Strasbourg, 10. 11. 2010.

[12] Decision No. 23/1990 (X.31).

[13] Schabas, W.: Presentation of the Quinquennial Report on Capital Punishment and implementation of the safeguards guaranteeing protection of the rights of those facing the death penalty, 2010. Cahiers de Defense Sociale 2009-2010, S. 76-74, S. 68.

[14] Vgl. Jescheck, H.-H.: La Peine de Mort. La Position de l Association Internationale de Droit Penal. Revue Internationale de Droit Pénal. La Peine de Mort. The Death Penalty. Travaux de la Conférence Internationale tenue à l Institut Supérieur International de Sciences Criminelles Syracuse – Italie, 17 au 22 mai 1988. 58(1987), S. 331-340, S. 331-332; vgl. auch die gleichlautenden Positionen der Société Internationale de Défense Sociale sowie der International Penal and Penitentiary Foundation, abgedruckt in Revue Internationale de Droit Penal. La Peine de Mort. The Death Penalty. Travaux de la Conférence Internationale tenue à l' Institut Supérieur International de Sciences Criminelles Syracuse – Italie, 17 au 22 mai 1988. 58(1987), S. 331-360.

[15]. Die Charta der Grundrechte der Europäischen Union enthält in Art. 2 das Recht auf Leben sowie den Satz, dass niemand zum Tode verurteilt und hingerichtet werden darf. Die Europäische Union verfolgt eine Politik der globalen und vollständigen Abschaffung der Todesstrafe. Über den Raum der Europäischen Union hinaus zielt die Europäische Union in den Ländern, in denen die Todesstrafe beibehalten wird, auf eine Beschränkung des Anwendungsbereichs der Todesstrafe, auf die strikte Einhaltung der in verschiedenen internationalen Instrumenten für den Fall der Anwendung der Todesstrafe genannten Bedingungen sowie auf die Einführung von Moratorien, die auf die vollständige Abschaffung der Todesstrafe vorbereiten. Die Europäische Union betont die Ablehnung der Todesstrafe insbesondere für Personen, die bei Begehung der Tat das 18. Lebensjahr noch nicht erreicht hatten.

Der Standpunkt der Europäischen Union wird dann in einer Politik sichtbar, die für ganz Europa nicht nur die vollständige Abschaffung in Friedens- und Kriegszeiten vorsieht, sondern auch die Implementierung von rechtlichen Standards, die eine Wiedereinführung der Todesstrafe ausschließen. Dieser Standpunkt findet in zwei Grundüberzeugungen ihre wesentliche Grundlage:

1. Die Todesstrafe ist aus menschenrechtlichen Gründen abzulehnen, wobei auf das Verbot grausamer, unmenschlicher und degradierender Strafe, das Recht auf Leben sowie die Menschenwürde abgehoben wird.

2. Die Todesstrafe ist nicht notwendig, weil Strafen zur Verfügung stehen, die in präventiver Hinsicht mindestens ebenso effizient sind.

Das starke europäische Engagement gegen die Todesstrafe wird auch in den Bedingungen sichtbar, die für den Beitritt zum Europarat gelten. Die Mitgliedschaft setzt nicht nur ein vollständiges Moratorium für Exekutionen, sondern eine förmliche Abschaffung der Todesstrafe im Gesetz voraus. Jedoch erklärt sich die Ablehnung der Todesstrafe als legitime Kriminalsanktion auch aus der Überzeugung, dass staatlichen Befugnissen gegenüber Staatsbürgern jedenfalls eine absolute Grenze bei dem Zugriff auf das Leben in Form der Todesstrafe gesetzt werden muss.

Im Jahr 1998 hat die Europäische Union Leitlinien zur Todesstrafe eingeführt [16], mit denen die Politik der globalen Abschaffung der Todesstrafe umgesetzt werden soll. Darin betont die Europäische Union die Bedeutung der strikten Einhaltung der sich aus dem Internationalen Pakt über Bürgerliche und Politische Rechte ergebenden Verpflichtungen [17] sowie des durch den Wirtschafts- und Sozialrat der Vereinten Nationen angenommenen Katalogs von Mindeststandards im Verfahren gegen Angeklagte, für die die Verhängung der Todesstrafe in Betracht kommt [18]. Die Europäische Union stellt dann die Abschaffung der Todesstrafe in einen Zusammenhang einer progressiven Entwicklung der Menschenrechte, insbesondere der Menschenwürde insgesamt und hat erklärt, dass die

[15] Rat Allgemeine Angelegenheiten: EU Leitlinien zur Todesstrafe. Brüssel, 16. Juni 2008; vgl. zuletzt Entschließung des Europäischen Parlaments vom 16. Dezember 2010 zu dem Jahresbericht über die Menschenrechte in der Welt 2009 und die Politik der Europäischen Union in diesem Bereich (2010/2202(INI)).

[16] Rat der Europäischen Union, Brüssel, 3. Juni, 1998, EU-Richtlinien zur Todesstrafe, zuletzt neu aufgelegt am 16. Juni 2008.

[17] Vgl. auch das 2. Optionale Protokoll zum Internationalen Pakt über Bürgerliche und Politische Recht, das die Abschaffung der Todesstrafe in Friedenszeiten vorsieht (UN General Assembly Resolution 44/128, 15. Dezember 1989; in Kraft getreten am 11. Juli 1991).

[18] UN Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, approved by the Economic and Social Council through resolution 1984/50 of 25 May 1984.

Zielsetzung der Politik zur Todesstrafe gerichtet sei auf:

- die globale Abschaffung der Todesstrafe
- und dort, wo die Todesstrafe noch angewendet werde, auf die kontinuierliche Reduzierung der Anwendung sowie die Implementierung von – vor allem verfahrensrechtlichen - Mindeststandards.

Diese Zielsetzungen sind Teil der Menschenrechts- und Außenpolitik der Europäischen Union geworden. Sie sollen durch Demarchen zur Einflussnahme in Einzelfällen der Vollstreckung von Todesstrafen sowie auf die allgemeine Abschaffung der Todesstrafe außenpolitisch umgesetzt werden. Dies führt freilich in den internationalen Beziehungen auch dazu, dass die Todesstrafe und Moratorien zu Druckmitteln (für beide Seiten) werden können [19]. Nicht zuletzt zeigt sich dies, wenn es – wie im Fall Weißrusslands um finanzielle Hilfen durch die Europäische Union geht (die in diesem Fall zwischen 1991 und 2005 immerhin 221 Millionen € betragen haben) [20].

Als Erklärung der starken Betonung der globalen Abschaffung der Todesstrafe in Europa (und durch die Europäische Union) und ihre prominente Platzierung in Menschenrechtsdialogen sowie in den außenpolitischen Beziehungen wird teilweise der Versuch genannt, Menschenrechte und in diesem Zusammenhang die Abschaffung der Todesstrafe für den Aufbau einer europäischen Identität heranzuziehen [21]. Die Abschaffung der Todesstrafe wird offensichtlich als ein herausragendes Symbol sowohl für ein neues Europa als auch für eine besondere europäische Identität verstanden.[22]. Andere Identitätsangebote stehen kaum zur Verfügung. Das Christentum ist historisch mit der lang andauernden Gewalt der Religionskriege belastet; die Auseinandersetzungen über die letztlich abgelehnte Aufnahme eines Bekenntnisses zum Christentum in die europäische Grundrechtecharta und die europäische Verfassung haben, ebenso wie die gegenwärtigen Debatten über den Islam in Europa erneut demonstriert, wie konfliktreich eine Bezugnahme auf Religion werden kann [23]. Die Industrialisierung birgt, so wie Bezugnahmen auf wirtschaftliche Entwicklung, insbesondere die wirtschaftliche Einheit Europas allgemein, eher Konfliktpotenzial (wie die Schuldenkrise der europäischen Staaten deutlich zeigt) und ferner auch gemessen an europaweiten Befragungen wenig Stoff für die Entstehung einer europäischen Identität. Wurzeln in der

[19] Dura, G.: The EU's Limited Response to Belarus' Pseudo 'New Foreign Policy'. CEPS Policy Brief, February 2008, S. 9.

[20] Dura, G.: The EU's Limited Response to Belarus' Pseudo 'New Foreign Policy'. CEPS Policy Brief, Februar 2008, S. 2.

[21] Vgl. hierzu bereits Sedelmeier, U.: EU Enlargement, Identity and the Analysis of European Foreign Policy: Identity Formation Through Policy Practice. European University Institute, Florenz, Robert Schuman Centre for Advanced Studies RSC No. 2003/13, S. 5f, der in das Zentrum Menschenrechte allgemein sowie demokratische Prinzipien stellt.

[22] Heinen, A.: Das „neue Europa" und das „alte Amerika". Die Geschichte der Todesstrafe in Deutschland, Frankreich und den USA und die Erfindung der zivilisatorischen Tradition Europas. In: Metzger, C., Kaelble, H. (Hrsg.): Deutschland - Frankreich - Nordamerika: Transfers, Imaginationen, Beziehungen. Stuttgart: Franz Steiner Verlag 2006, S. 209-227, S. 225; Devienne, E.: Comparing Exceptionalism in France and the USA. A Transatlantic Approach to the Death Penalty Abolition Debate (1972-1977). *European journal of American studies* [Online] , 1 | 2010 , document 1, Online since 29 January 2010, connection on 19 April 2011. URL : http://ejas.revues.org/7745

[23] European Charter of Fundamental Rights Is Approved for Presentation to E.U. Heads of State., 1 German Law Journal (2000), available at http://www.germanlawjournal.com/index.php?pageID=11&artID=4; Heyward, M.: What Constitutes Europe?: Religion, Law and Identity in the Draft Constitution for the European Union. Hanse Law Review 1(2005), S. 227-235; im Übrigen zeigen Befragungen in den Ländern der Europäischen Union, dass der Religion in den Europa repräsentierenden Werten nur eine ganz untergeordnete Rolle eingeräumt wird, Eurobarometer 69, Values of the Europeans, Brüssel 2008, S. 22.

griechischen und römischen Kultur bieten gewisse Gemeinsamkeiten für die Vergangenheit, die allerdings für eine europäische Identität in der Moderne keine überzeugenden Anhaltspunkte sichtbar werden lassen. Dagegen steht die Geschichte der Abschaffung der Todesstrafe in Europa für eine geteilte Erfahrung und hieraus gezogene gemeinsame Lehren. Diese Erfahrung verweist auf die totalitären Regime in der ersten Hälfte des 20. Jahrhunderts und insbesondere den Blutzoll, den viele Länder unter dem deutschen Faschismus entrichteten. Diese Erfahrungen enthalten belastende und negative Erinnerungen [24]; sie können aber in einen "positiven Gründungsmythos" münden [25]. Die Geschichte der Abschaffung der Todesstrafe in Europa und die Geschichte einer besonderen Betonung der Menschenrechte beschreiben und erklären die Entstehung eines friedlichen und an zentralen Menschenrechten orientierten Europas. Teil dieser Geschichte sind auch ein säkulares Verständnis der Welt und Misstrauen gegenüber einer absoluten staatlichen Gewalt, die in der Todesstrafe symbolisiert ist. Anlässlich einer Rede zum ersten „Europäischen Tag gegen die Todesstrafe" verfolgte der Generalsekretär des Europarats in aller Deutlichkeit diese Perspektiven. Er sagte: „Die Abschaffung der Todesstrafe ist der Höhepunkt des Fortschritts in der Verteidigung der Menschenwürde und der Menschenrechte. Sie symbolisiert den Fortschritt, den wir in Gestalt von Humanität und Zivilisation in Europa gemacht haben. Auch deshalb ist der Europäische Tag gegen die Todesstrafe von Anfang an ein gemeinsames Unternehmen des Europarats und der Europäischen Union" [26].

3. Die Todesstrafe und die Europäische Menschenrechtskonvention

Art. 2 der Europäischen Menschenrechtskonvention enthält immer noch eine Beschränkung des Rechts auf Leben. Denn Art. 2 erlaubt den Eingriff in das Leben auf der Grundlage eines auf die Todesstrafe lautenden Urteils eines Gerichts. Jedoch schließen heute zwei Zusatzprotokolle zur Europäischen Menschenrechtskonvention aus, dass die Todesstrafe angedroht, verhängt und vollstreckt werden darf. Das 6. Zusatzprotokoll aus dem Jahr 1982 schreibt die vollständige Abschaffung der Todesstrafe für Friedenszeiten vor. Im Jahr 1994 empfahl die Generalversammlung des Europarats die Annahme des Zusatzprotokolls 13, das die Abschaffung der Todesstrafe auch in Kriegszeiten vorsieht. Das Zusatzprotokoll 13 trat am 1. Juli 2003 in Kraft und markiert den Tag, an dem in Europa die Todesstrafe unter allen Umständen abgeschafft worden ist. Vorbehalte gegen das Zusatzprotokoll 13 sind nicht möglich, ebenso wenig wie eine (zeitweise) Derogation erlaubt ist.

Der Europäische Gerichtshof für Menschenrechte hat sich mit der Todesstrafe zum ersten Mal im Fall Soering befasst [27]. Jedoch behandelte das Gericht in dieser Entscheidung nicht die Vereinbarkeit der Todesstrafe mit dem Recht auf Leben (Art. 2) oder die Frage, ob die Todesstrafe selbst eine grausame oder unmenschliche Strafe sei. Vielmehr ging es um die Frage, ob und inwieweit die gesamten Begleitumstände der Exekution, insbesondere das jahrelange Warten in der Todeszelle, mit den aus Art. 3 sich ergebenden Standards zu vereinbaren

[24] Leggewie, C.: A Tour of the Battleground: The Seven Circles of Pan-European Memory. social research 75(2008), S. 217-234, S. 219.

[25] Fassbender, B.: The Better Peoples of the United Nations? Europe's Practice and the United Nations. The European Journal of International Law 15(2004), S. 857-884.

[26] Terry Davis, Secretary General of the Council of Europe anlässlich des ersten Europäischen Tages gegen die Todesstrafe, Lissabon, 9. Oktober 2007, www.coe.int/t/dc/press/news/ 20071009_disc_sg_EN.asp.

[27] Europäischer Gerichtshof für menschenrechte, Urteil vom 7.7.1989, Series A, Vol. 161.

seien [28]. Der Fall Soering führte den Europäischen Gerichtshof für Menschenrechte zu der Feststellung, dass das "Todeszellensyndrom" (ausgedehntes Warten auf das Sterben unter den Bedingungen von Todeszellentrakten) eine grausame Behandlung sei und deshalb gegen Art. 3 der Europäischen Menschenrechtskonvention verstoße [29]. Bezug genommen wurde dabei vor allem auch auf eine lang durchschnittliche Dauer des Verbleibs in der Todeszelle in den USA. Die Zeit zwischen Verurteilung und Exekution belief sich in den USA für die im Jahr 2007 Hingerichteten auf 153 Monate [30]. Dies entspricht einer herkömmlichen Auslegung des Begriffs der Grausamkeit, die insbesondere auf ein hinausgezögertes Sterben und die Zufügung erheblicher physischer oder psychischer Qualen abhebt. Da ein stark abgekürztes Verfahren der Vollstreckung von Todesstrafen wegen der rechtsstaatlich bedingten Notwendigkeit von Rechtsmitteln und Gnadenverfahren nicht möglich ist, ist damit praktisch ein Verfahrensablauf vollständig ausgeschlossen, der zu einem nur kurzen Aufenthalt in Todeszellentrakten und damit zu einem aus dieser Perspektive nicht grausamen Vollzug der Todesstrafe führt [31].

In der Entscheidung Öcalan gegen die Türkei aus dem Jahr 2003 [32] wurde auf die substantiellen Fragen, nämlich ob die Todesstrafe selbst gegen das Recht auf Leben verstößt oder eine grausame oder unmenschliche Strafe darstellt, ebenfalls nicht eingegangen. Vielmehr sagte der Europäische Gerichtshof für Menschenrechte, dass diese Fragen nicht behandelt werden müssten (schon deshalb, weil die Türkei mittlerweile die Todesstrafe abgeschafft hatte). Das Gericht erklärte freilich, dass die Staatenpraxis in Europa durchaus so interpretiert werden könne, dass die in Art. 2 der Europäischen Menschenrechtskonvention enthaltene Beschränkung des Rechts auf Leben durch die Todesstrafe aufgegeben worden sei. Angesichts der Umwandlung der Todesstrafe gegen Öcalan in eine lebenslange Freiheitsstrafe und angesichts der mittlerweile erfolgten Abschaffung der Todesstrafe in der Türkei jedenfalls in Friedenszeiten beschränkte sich das Gericht auf die Überprüfung einer Verletzung von Art. 3 (unmenschliche Behandlung) wegen der Verurteilung zum Tode nach einem unfairen Strafverfahren. Eine solche Verletzung wurde angenommen, da sich Öcalan nach einem unfairen Strafverfahren etwa 3 Jahre der Drohung mit der Exekution ausgesetzt sah.

4. Diskurse zur Todesstrafe

4.1 Menschenrechte und Todesstrafe

Der Diskurs zu Menschenrechten und Todesstrafe begann in Europa mit der Aufklärung. Im Zentrum stehen die Menschenwürde, das Recht auf Leben, das Verbot grausamer und unmenschlicher Strafe und das Übermaßverbot. So wird in der Präambel zum 13. Zusatzprotokoll zur Europäischen Menschenrechtskonvention ausgeführt, das Recht auf Leben sei ein Grundwert in einer demokratischen Gesellschaft und die Abschaffung der Todesstrafe sei ein wesentlicher Schritt für den Schutz dieses Grundwerts und für die volle Anerkennung der allen Menschen eigenen Würde. Damit wird ein bedeutsamer Zusammenhang zwischen

[28] Vgl. auch die Entscheidung des südafrikanischen Verfassungsgerichts, The State v. Makwanyane and Mchunu, Urteil vom 6. Juni 1995, Case No CCT/3/94, in dem die Todesstrafe in Südafrika wegen eines Verstoßes gegen das Verbot grausamer, unmenschlicher und erniedrigender Strafe für verfassungswidrig erklärt wurde.

[29] Vgl. auch Hermann, J.: Gedanken zur Todesstrafe in Japan. Eine Antwort auf Nishihara. In: Eser, A. (Hrsg.): Festschrift für Haruo Nishihara zum 70. Geburtstag. Baden-Baden 1998, S. 401-418, S. 414.

[30] http://bjs.ojp.usdoj.gov/content/pub/html/cp/2007/tables/cp07st11.cfm

[31] See Jung, H.: Sanktionensysteme und Menschenrechte. Bern, Stuttgart, Wien 1992, p. 79.

[32] Europäischer Gerichtshof für Menschenrechte: Öcalan v. Türkei, Urteil vom 12. März 2003, Application no. 46221/99; bestätigt in der Berufungsinstanz am 12. Mai 2005.

Menschenwürde und dem Recht auf Leben hergestellt; gleichzeitig wird, vergleichbar dem 2. Zusatzprotokoll zum Internationalen Pakt über Bürgerliche und Politische Rechte, betont, dass die Abschaffung der Todesstrafe diese zentralen Menschenrechte stärke. Allerdings geben die Zusatzprotokolle 6 und 13 keinen expliziten Hinweis darauf, dass die Todesstrafe die Menschenwürde oder das Recht auf Leben verletzt. Die Protokolle lassen demgegenüber erkennen, dass mit der Abschaffung der Todesstrafe und dem Verbot ihrer Wiedereinführung das Recht auf Leben bestärkt werden sollte. Bislang hat lediglich das ungarische Verfassungsgericht im Jahr 1990 entschieden, die Todesstrafe verletze das Recht auf Leben und die Menschenwürde, weil die Todesstrafe in die Substanz dieser Grundrechte eingreife [33]. Der deutsche Bundesgerichtshof hat in einer Entscheidung aus dem Jahr 1995 ausgeführt, dass die Gesellschaft dem hohen Wert des Rechts auf Leben durch den Verzicht auf die Todesstrafe Anerkennung verschaffen müsse [34]. Das Bundesverfassungsgerichts hat in der Entscheidung zur lebenslangen Freiheitsstrafe aus dem Jahr ausgeführt, dass die staatliche Strafe die grundlegenden Voraussetzungen individueller und sozialer Existenz eines Menschen unangetastet lassen müsse [35] und damit jedenfalls aus der deutschen Verfassung wohl (auch) ein absolutes Verbot der Todesstrafe gefolgert. Die OSCE bezeichnete in einer Resolution aus dem Jahr 2009, in dem Weissrussland zu einem Moratorium aufgefordert wurde, die Todesstrafe als unmenschlich und als Akt der Folter [36]. Das Menschenrechtskomitee hat zudem in der Entscheidung Judge v. Kanada festgestellt, dass ein Staat nach Abschaffung der Todesstrafe an ein vorbehaltloses Recht auf Leben gebunden sei und sich nicht mehr auf die Beschränkung des Art. 6 Absatz 2 des Internationalen Paktes über Bürgerliche und Politische Rechte berufen könne [37]. Jedoch gibt es nach wie vor Stimmen, die sich dafür aussprechen, dass weder das Recht auf Leben noch die Menschenwürde einen vollständigen Verzicht auf die Todesstrafe forderten [38]. Denn, so wird aus dieser Perspektive argumentiert, die Interpretation von Menschenwürde und menschenwürdigen Strafen sei abhängig von sozialen und kulturellen Dynamiken und deshalb abhängig von einem Wandel, der es zu bestimmten Zeitpunkten durchaus als gerechtfertigt ansehen lassen könnte, die Todesstrafe wieder einzuführen. Dies entspricht wiederum der Rechtsprechung des Bundesverfassungsgerichts zur Menschenwürde, in der diese als historisch kontingent und keiner absoluten oder eindeutigen Auslegung zugänglich behandelt wird [39].

Verfassungsgerichte in anderen Weltregionen haben sich, mit der Ausnahme des Verfassungsgerichts Südafrikas [40] im Prinzip zustimmend zur Todesstrafe geäußert [41]. Dies gilt für Asien wie für die USA. Ein besonderer Diskurs zur Grausamkeit hat sich in den USA im Hinblick auf die Todesstrafe entwickelt. Am 13. Oktober 2006 wurde der wegen Mordes zum Tode verurteilte Angel Diaz

[33] Magyar Közlömy 1990 Nr. 107, S. 2175.

[34] BGHSt 41, S. 317ff.

[35] BVerfGE 45, S. 187ff.

[36] OSCE Parliamentary Assembly: Resolution on a Moratorium on the Death Penalty and Towards its Abolition. Adopted at the Eightennth OSCE PA Annual Session in Vilnius, 29. Juni – 3. Juli 2009.

[37] Human Rights Committee: Judge v. Canada. Communication No. 829/1998, vom 5. August 2002.

[38] Maunz/Dürig: Grundgesetz Kommentar, Rdnr. 31, Art. 102, München 2009.

[39] BVerfGE 45, S. 187ff.

[40] Constitutional Court of the Republic of South Africa: State v. Makwanyane and Mchunu. Entscheidung vom 8. Juni 1995.

[41] Vgl. zu Indien Amnesty International India and People's Union for Civil Liberties (Tamil Nadu & Puducherry) May 2008 Lethal Lottery: The Death Penalty in India. A study of Supreme Court judgments in death penalty cases 1950-2006: www.amnesty.org/en/library/asset/ASA20/007/2008/en/f8d94e73-16dc-11dd-89e2-354ccbabfbe7/asa200072008eng.html: am 25. Februar 2010 hat das (süd) koreanische Verfassungsgericht entschieden, dass die Todesstrafe mit dem in der Verfassung enthaltenen Recht auf Leben vereinbar sei.

in Florida exekutiert [42]. Die Hinrichtung dauerte 34 Minuten, führte zum Vorwurf, Diaz sei zu Tode gefoltert worden und schließlich zur zeitweiligen Aussetzung der Exekutionen durch Giftinjektionen in Florida [43]. In der Entscheidung des Obersten Gerichtshofs zur grundsätzlichen Vereinbarkeit von Exekutionen durch Giftinjektionen mit dem 8. Zusatz zur Verfassung, der ein kurzes Moratorium vorausgegangen war, fand die Debatte einen (vorläufigen) Abschluss [44]. Die Rechtsprechung amerikanischer Obergerichte stellt die Grausamkeit in Zusammenhänge, die hergestellt werden durch von zivilisierten Standards gezogenen Grenzen, die Begriffe der Unmenschlichkeit und der Folter sowie das Leitkriterium der Menschenwürde. In anderem Zusammenhang (Entzug der Staatsangehörigkeit und damit das Versetzen in einen Zustand der Staatenlosigkeit) spricht das Oberste Gericht von einer Strafe „primitiver als Folter", da sie die vollständige Zerstörung des sozialen Status einer Person mit sich bringe [45].

Gerade die gerichtlichen Auseinandersetzungen um die Vollstreckung der Todesstrafe in den USA bieten eine gute Möglichkeit, die Frage der Grausamkeit des Staates bzw. das Verbot der Grausamkeit in das Blickfeld zu nehmen. In diesen Auseinandersetzungen äußert sich das Problem, wie einerseits der „Horror aus der Todesstrafe genommen werden kann", während andererseits der durch die Todesstrafe kommunizierte Schrecken (Abschreckung) erhalten bleibt [46]. Die Frage stellt sich allerdings nicht bloß im Zusammenhang mit der Todesstrafe, sondern im Kern bei jeder Strafe, die sich gründet auf die Zufügung von Schmerzen und Leid, in der deutschen Variante auf die Zufügung eines Übels, mit dem die Schuld ausgeglichen und vergolten wird [47]. Insoweit ist in der staatlichen Strafe immer auch eine (beabsichtigte) Grausamkeit enthalten [48]. Strafen, ohne grausam zu sein, erscheint demnach wenn nicht unmöglich [49], so doch immer eine Gratwanderung.

Das Verbot der grausamen Strafe ist in den USA im 8. Zusatz zur Verfassung enthalten. Der 8. Verfassungszusatz wurde als Reaktion auf die Kriminalstrafen des 17. und 18. Jahrhunderts geschaffen, wie verschiedene Urteile des Obersten Gerichtshofs ausführen. Der historische Ursprung soll aber nicht daran hindern, das Verbot flexibel und das heißt dem jeweiligen gesellschaftlichen und kulturellen Entwicklungsstand entsprechend auszulegen [50]. Maßstäbe seien der Menschenwürde und den allgemeinen Anschauungen der Öffentlichkeit zu entnehmen. Die Methode der Todesstrafe wurde im Hinblick auf Grausamkeit aus unterschiedlichen Perspektiven thematisiert. In einem Urteil, in dem es um die Verfassungsmäßigkeit des „elektrischen Stuhls" ging, führte der Oberste Gerichtshof aus, dass eine Strafe dann grausam sei, wenn ihr Vollzug Folter oder hinaus gezögertes Sterben beinhalte, etwas was „über das bloße Auslöschen

[42] /www.amnesty.org/en/region/usa/report-2007

[43] Vgl. hierzu zusammenfassend Supreme Court of Florida, No. SC06-2391, Lightbourne vs. Bill Mccollum, 1. November 2007; The Governor's Commission on Administration of Lethal Injection: Final Report With Findings and Recommendations Presented to the Honorable Charlie Crist, Governor of Florida, 1. März 2007.

[44] Supreme Court of the United States, Baze et al. v. Rees, Commissioner, Kentucky Department of Corrections, et al., certiorari to the Supreme Court of Kentucky, 16. April, 2008, No. 07-5439.

[45] U.S. Supreme Court, Trop v. Dulles, 356 U.S. 86 (1958) 356 U.S. 86

[46] Schabas, W.A.: The Death Penalty as Cruel Punishment and Torture: Capital Punishment Challenged in the World s Courts, Cambridge 1996, S. 11.

[47] Jescheck, H.-H., Weigend, T: Lehrbuch des Strafrechts, Allgemeiner Teil, Berlin 1996, S. 13

[48] Flanders, C.: Shame and the Meaning of Punishment, Cleveland State Law Review 55(2007), S. 1-27.

[49] Flanders, C.: a. a. O., 2007, S. 4.

[50] Wilkerson v. Utah, 99 U. S. 130 (1879); Weems v. United States, 217 U.S. 349, 373 (1910); Trop v. Dulles, 356 U.S. 86, 101 (1958).

eines Lebens hinausgehe" [51]. Es ging in diesem Fall um einen Verurteilten, bei dem ein erster Versuch der Elektrokution nicht zum Erfolg geführt hatte, und in dem (auch) argumentiert wurde, eine Wiederholung der Exekution sei als grausam einzustufen. In der Entscheidung, die die Exekution auf dem elektrischen Stuhl als nicht durch den 8. Zusatzartikel verbotene Strafe interpretierte, wurde darauf abgehoben, dass ein unvorhersehbares Ereignis, das zum Abbruch eines Exekutionsversuchs führte, der sich daran anschließenden Hinrichtung kein Element von Grausamkeit hinzufüge. Denn darin liege keine Absicht, unnötige Schmerzen oder Qual zu verursachen. Die Grausamkeit, gegen die die Verfassung schützt, sei eine Grausamkeit, die in der Methode der Hinrichtung liege (und darauf ausgerichtet sei, unnötige Schmerzen zuzufügen) und nicht das Leiden, das notwendigerweise mit jeder Exekution verbunden sei. In der Folge verlagerte sich die juristische Auseinandersetzung auf die Frage der Vorhersehbarkeit und der Vermeidbarkeit des Risikos der Zufügung von erheblichen Schmerzen beim Vollzug der Todesstrafe durch die Giftspritze [52]. Diese Auseinandersetzung hat zu tun mit der Verwendung von drei nacheinander intravenös zugeführten Mitteln: zunächst Thiopental, das als Schlaf- bzw. Narkosemittel Schmerzunempfindlichkeit zur Folge hat, sodann Pancuroniumbromid, das Muskellähmung und Ersticken durch Ausfall der Lungenfunktionen auslöst sowie Kaliumchlorid, das in der gegebenen Dosis zu einem Herzstillstand führt. Sowohl Pancuroniumbromid als auch Kaliumchlorid wären ohne vorherige Infusion von Thiopental – dies ist nicht weiter umstritten – mit erheblichen Schmerzen bzw. einem Erstickungstod bei vollem Bewusstsein verbunden. Besondere Bedeutung kommt dabei den Fragen zu, ob ein vorhersehbares Risiko unnötiger Schmerzen deshalb besteht, weil eben keine Ärzte die Infusionen vornehmen und hieraus ein erhöhtes Risiko nicht wirksamer Anwendung des Thiopentals folge, und ob das Hinrichtungsprotokoll die Prüfung der Wirksamkeit des Narkosemittels vorsehen müsse. Die weiter oben erwähnte Exekution des Angel Diaz hat den Verdacht unwirksamer Verabreichung von Thiopental ausgelöst, weil offensichtlich das Mittel wegen eines Fehlers des Personals subkutan injiziert wurde. Tatsächlich wurden das Hinrichtungsprotokoll in Florida in der Folge geändert und die Verpflichtung eingeführt, sofort nach Zuführung des Narkosemittels festzustellen, dass tatsächlich Bewusstlosigkeit herbeigeführt worden ist. In den gerichtlichen Auseinandersetzungen kam es zu unterschiedlichen Beurteilungen der Frage, ob und inwieweit medizinisch geschultes Personal bei Exekutionen zur Verhinderung verfassungswidriger (grausamer) Tötungen hinzugezogen werden muss und welche Konsequenzen aus der eine Teilnahme grundsätzlich ablehnenden Haltung der amerikanischen Vereinigungen von Ärzten und Krankenpflegern folgen sollten [53] und ob die Frage des Risikos der Zufügung (nicht beabsichtigter) Schmerzen für die Feststellung von Grausamkeit überhaupt relevant sein sollte [54].

[51] In re Kemmler, 136 U.S. 436 (1890), S. 447; Gregg v. Georgia, 428 U.S. 153, 96 S. Ct. 2909, 49 L.Ed.2d 859 (1976).

[52] Hill v. McDonough 126 S. Ct. 2096 (2006).

[53] Zusammenfassend Denno, D. W.: The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty. Fordham Law Review 76(2007), S. 49-128; vgl. die Entscheidung des 9. Circuit Court, Morales v. Hickman, 438 F. 3d 926, 931 (2006) für Kalifornien, die offensichtlich dazu führte, dass nach dem vergeblichen Versuch, die Anordnung, zwei Anästhesisten die Bewusstlosigkeit nach der Verabreichung von Thiopental feststellen zu lassen, zu erfüllen, in Kalifornien bis heute keine Exekutionen mehr durchgeführt worden sind.

54 Vgl. hierzu die verschiedenen abweichenden Meinungen in der Entscheidung Supreme Court of the United States, Baze et al. v. Rees, Commissioner, Kentucky Department of Corrections, et al., certiorari to the Supreme Court of Kentucky, 16. April, 2008, No. 07-5439.

Der Diskurs zur Frage, inwieweit der Vollzug der Todesstrafe grausam ist, verweist somit in den USA auf die Methode der Exekution und ob sich in bestimmten Exekutionsprotokollen ein bewusst hingenommenes und vermeidbares Risiko von (ausgedehnten) Schmerzen und (wahrgenommenem) verzögertem Sterben realisiert. Vergleichbare Entwicklungen sind auch in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte festzustellen. Für die Annahme von Grausamkeit wird manchmal ein subjektives Element von Absicht (der Zufügung von Schmerzen oder Leid) verlangt [55]. Allerdings hat der Europäische Gerichtshof für Menschenrechte im Fall Soering auf eine objektive Analyse der Bedingungen des Lebens in der Todeszelle abgestellt [56]. Dabei maß der Gerichtshof dem Argument, die Verzögerungen würden ja durch den Verurteilten selbst bewirkt, keine Bedeutung zu. Denn angesichts des drohenden Todes wird ein Mensch eben alles nutzen, was zur Verzögerung des Todeseintritts geeignet ist. Das lange Warten auf die Exekution ist auch im Zusammenhang mit den Beschwerdemechanismen des Internationalen Pakts über Bürgerliche und Politische Rechte, denjenigen der Amerikanischen Menschenrechtskonvention sowie in Entscheidungen des „Privy Council" (Judicial Committee, Oberstes Gericht für eine Reihe Common Wealth Staaten, insbesondere in der Karibik) thematisiert worden [57].

Gemeinsam ist den rechtlichen Debatten in Nordamerika und in Europa, dass die Todesstrafe nicht unter der Fragestellung der Verletzung des Rechts auf Leben (Art. 2 EMRK) oder der Menschenwürde erörtert wird. Vielmehr ist es die Grausamkeit, die in der Vollstreckung liegt, die die menschenrechtlichen Diskurse zur Todesstrafe bislang beherrscht [58]

Die Todesstrafe wird dann als unverhältnismäßiger staatlicher Eingriff in Grundrechte diskutiert. Das Verhältnismäßigkeitsprinzip setzt staatliche Eingriffe einem dreistufigen Test aus, der Geeignetheit, Erforderlichkeit und Verhältnismäßigkeit im Engeren zu Prüfmaßstäben macht. Thematisiert werden in diesem Zusammenhang die mit staatlicher Strafe verfolgten Ziele, die in dem Schutz zentraler Rechtsgüter bzw. Interessen bestehen. Eine grundsätzliche Geeignetheit der Todesstrafe zum Lebensschutz kann sicher nicht bezweifelt werden. Die Erforderlichkeit dagegen ist offensichtlich nicht gegeben, denn die lebenslange Freiheitsstrafe führt nach allen vorliegenden Erkenntnissen ebenfalls zur Prävention zukünftiger Angriffe auf das Leben durch die verurteilte Person.

1.2 Strafzumessung, Ermessen und absolute Strafandrohung

Ein zweiter Diskurs bezieht sich auf die Zumessung der Strafe und die Frage, für welche Taten und Täter die Todesstrafe als schuldangemessene Strafe in Betracht gezogen werden darf. Der Tod stellt eine absolute und unwiderrufliche Strafe dar. Von daher sieht sich die Todesstrafe dem Problem ausgesetzt, welche Straftaten für eine solche absolute Strafe vorgesehen werden dürfen. Das Problem besteht insoweit darin, solche Taten zu identifizieren, die einen Grad von Schwere aufweisen, die alle anderen Gesichtspunkte in der Bestimmung der Schuld des Täters in den Hintergrund

[55] Schabas, W.A.: The Death Penalty as cruel Punishment and Torture. Capital Punishment Challenged in the World's Courts. Cambridge 1996.

[56] Soering v. The United Kingdom. Application No. 14038/88; vgl. hierzu auch Hudson, P.: Does the Death Row Phenomenon Violate a Prisoner's Human Rights under International Law? European Journal of International Law 11(2000), S. 833-856.

[57] Hierzu Hood, R., Hovle, C.: The Death Penalty. Oxford 2008.

[58] Nowak, U.N. Covenant on Civil and Political Rights. 2. Aufl., Kehl 2005, S. 142

treten lassen müssen. In der Geschichte der Todesstrafenpolitik äußerte sich dieses Problem in Europa in der bereits im 19. Jahrhundert einsetzenden Beschränkung der Todesstrafe auf besonders qualifizierte vorsätzliche Tötungsdelikte [59]. In den Minimumstandards der Vereinten Nationen wird zum Ausdruck gebracht, dass sich die Todesstrafe auf die schwersten Straftaten (vorsätzliche Straftaten mit Todesfolge oder anderen vergleichbar schweren Folgen) beschränken müsse [60]. Allerdings wird in der Gesetzgebung von Staaten, die die Todesstrafe vorsehen und anwenden, deutlich, dass Ermessen und Beurteilungsspielräume immer vorhanden sind.

Der Kontrolle von Ermessen in der Handhabung der Todesstrafe durch die Gerichte wird vor allem in den USA große Aufmerksamkeit gezollt. Hier geht es auch um die Vorhersehbarkeit der Strafe sowie ihrer Vollstreckung und vor allem die Diskriminierung von Minderheiten und Randgruppen der Gesellschaft [61]. In Untersuchungen zur Anwendung der Todesstrafe wird aber immer wieder nachgewiesen, dass die Todesstrafe lediglich für einen kleinen Ausschnitt an Taten, für die die Todesstrafe prinzipiell in Betracht käme, verhängt wird. So wird aus den USA berichtet, dass zwischen 6 und 15% der Angeklagten, die im Prinzip zum Tode hätten verurteilt werden können [62], tatsächlich zum Tode verurteilt werden. Blickt man auf die Vollstreckung von Todesurteilen, so lässt sich eine Exekution pro 100 Fälle beobachten, in denen die Todesstrafe hätte verhängt werden können [63]. Allerdings liegen einzelne Staaten der USA, in denen die Todesstrafe angedroht und verhängt wird, in ihrem Verhältnis zwischen der Anzahl von Todesurteilen und Exekutionen extrem auseinander. So wurden in Virginia zwischen 1977 und 2007 148 Todesurteile verhängt und davon 98 vollstreckt (0,66 Exekutionen pro Verurteilung); in Pennsylvania liegt das Verhältnis demgegenüber bei 0,009 (345 Todesurteile und 3 Exekutionen) [64]. Die Vollstreckung eines Todesurteils ist in den USA je nach Sichtweise vom Zufall oder von Willkür abhängig, eine systematische Selektion entlang des Kriteriums des „schwersten Verbrechens" ist nicht zu beobachten [65]. Vergleichbare Informationen sind für Russland vorhanden. Dort ist im Jahr 1996 in 3% von Fällen des erschwerten Mordes, für die die Todesstrafe verhängt werden kann, ein Todesurteil ergangen [66]. Daneben wird auf regionale Ungleichheiten in der Anwendung der Todesstrafe [67], auf die Konzentration auf untere soziale Schichten sowie ihre Abhängigkeit vom Zugang zu effektiver Strafverteidigung hingewiesen [68]. Besondere Bedeutung (auch für die Frage der abschreckenden Wirkung der Todesstrafe) hat der Befund, dass die Todesrate in amerikanischen Todestrakten nur etwa doppelt so hoch liegt wie die auf Gewalt

[59] Mikhlin, A.S.: The Death Penalty in Russia. The Hague, London, Boston 1999.

[60] Economic and Social Council: Safeguards guaranteeing protection of the rights of those facing the death penalty. 1984/50.

[61] Jacobs, D., Qian, Z.: Who Survives on Death Row? An Individual and Contextual Analysis. American Sociological Review 72(2007), S. 610–632.

[62] Baldus, D.C., Woodworth, G., Pulaski, Ch.R.: Equal Justice and the Death Penalty. Boston 1990, S. 235-237.

[63] Vgl. Nakell, B., Kenneth, A.H.: The Arbitrariness of the Death Penalty. Philadelphia 1987; Baldus, D.C., Woodworth, G., Pulaski, C.A.: Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts. Stetson Law Review 1986, S. 133-261.

[64] www.deathpenaltyinfo.org/executions-death-sentence

[65] Karamouzis, S.T., Harper, D.W.: An Artificial Intelligence System Suggests Arbitrariness of Death Penalty. International Journal of Law and Information Technology 16(2007), S. 1-7.

[66] Mikhlin, A.S.: The Death Penalty in Russia. The Hague, London, Boston 1999, S. 67.

[67] Vgl. Amnesty International: Volksrepublik China. Bonn 1996, S. 135.

[68] Bright, St. B.: Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer. The Yale Law Journal 103(1994), S. 1835-1883; Dieter, R.C.: With Justice for Few: The Growing Crisis in Death Penalty Representation. Death Penalty Information Center. Washington, October 1995; American Bar Association: Gideon's Broken Promise: American's Continuing Quest for Equal Justice. A report on the American Bar Association's Hearing on the Right to Counsel in Criminal Proceedings. 2004

und Unfälle zurückzuführende Todesrate für amerikanische Männer insgesamt. Vermutlicher ist die Sterbequote in den Todestrakten gar geringer als die Sterbequote von Gewalttätern, die sich in Freiheit (insbesondere auch von Personen, die sich in gewalttätigen Drogenmärkten bewegen)und nicht in einer Todeszelle befinden [69].

4.3 Justizirrtum und Todesstrafe

Neuerdings kommt dem Diskurs über Justizirrtümer und Todesstrafe und damit dem Risiko der Exekution Unschuldiger wieder besondere Bedeutung zu [70]. Dies ist teilweise auf die schnelle Entwicklung und das Potenzial der DNA-Untersuchung zurückzuführen [71]. Auch in Europa war dem Problem der Vollstreckung einer wegen eines Fehlurteils ergangenen Todesstrafe seit der Aufklärung große Aufmerksamkeit gewidmet worden [72]. Insbesondere in den parlamentarischen Debatten um die Abschaffung der Todesstrafe in England nahm das Problem der Exekution Unschuldiger einen prominenten Platz ein [73]. Die Ursachen für Fehlurteile sind vielfältig. Jedoch dürften falsche Geständnisse eine ebenso große Rolle spielen wie fehlerhafte Zeugenaussagen oder die Manipulation von Beweismitteln durch die Strafverfolgungsbehörden [74]. Neuere Forschungen in den USA unterstreichen das besondere Problem von Fehlurteilen. Zwischen 1977 und 1996 wurden 5154 Zugänge zu Todeszellen registriert. Aus dieser Gruppe wurden 358 Personen exekutiert [75]. Zwischen 1977 und 1997 wurden allerdings 75 zum Tode Verurteilte aus dem Gefängnis entlassen (nach bis zu 10 Jahren Aufenthalt in der Todeszelle), weil in Wiederaufnahmeverfahren neue Beweismittel eingeführt werden konnten, die wenn nicht die Unschuld belegten, so doch erhebliche Zweifel an der Schuld begründeten [76]. Damit entfällt auf etwa 50 zum Tode Verurteilte eine Person, die offensichtlich zu Unrecht zum Tode verurteilt worden ist.

4.4 Generalprävention, Abschreckung und die Todesstrafe

Die abschreckende Wirkung der Todesstrafe ist vor allem in den USA in zahlreichen Untersuchungen erforscht worden [77]. In diesem Zusammenhang wurden (und werden) auch andere Annahmen zu Auswirkungen der Todesstrafe, wie beispw. die „Brutalisierungshypothese" (Exekutionen führen zu einem Anstieg von Tötungsdelikten) [78], die Abhängigkeit der Wirkung vom Ausmaß der Medienberichte [79] oder Verschiebungseffekte (Exekutionen

[69] Katz, L., Levitt, S.D., Shustorovich, E.: Prison Conditions, Capital Punishment, and Deterrence. American Law & Economics Review 5(2003), S. 318-343.

[70] Unnever, J.D., Cullen, F.T.: Executing the Innocent and Support for Capital Punishment: Implications for Public Policy. Criminology and Public Policy 4(2005), S. 3-38

[71] Dieter, R.C.: A Crisis of Confidence: Americans' Doubts About the Death Penalty. A Death Penalty Information Center Report, Washington 2007, S. 3f.

[72] Bedau, H.A.: Bentham's Utilitarian Critique of the Death Penalty. The Journal of Criminal Law and Criminology 74(1973), S. 1033-1065, S. 1052f.

[73] Tuttle, E.A.. The crusade against capital punishment in Great Britain. Chicago 1961; so wurde im Übrigen zuletzt ein im Jahr 1950 in Liverpool vollstrecktes Todesurteil im Jahr 2003 nach einer Wiederaufnahme wegen durch die Polizei unterdrückter Zeugenaussagen aufgehoben, news.bbc.co.uk/2/hi/uk_news/england/merseyside/2978838.stm.

[74] Bedau, H.A., Radelet, M.L.: Miscarriages of Justice in Potentially Capital Cases. Stanford Law Review 40(1987), S. 21-179, S. 56ff.

[75] Bureau of Justice Statistics: Bulletin. Capital Punishment 1996. Washington 1997, S.1-2.

[76] USA Today, Friday 13rd November 1998, S. 14A.

[77] Zusammenfassend Albrecht, H.-J.: Generalprävention. In: Kaiser, G. et al. (Hrsg.): Kleines Kriminologisches Wörterbuch. 3. Aufl., Heidelberg 1993, S. 157-164.

[78] Bowers, W. J.: The effect of executions is brutalization, not deterrence. In: Haas, K.C., Inciardi, J.A. (Hrsg.): Capital punishment: Legal and social science approaches. Newbury Park 1988, S. 49-89; Bailey, W.C.: Deterrence, Brutalization, and the Death Penalty: Another Examination of Oklahoma's Return to Capital Punishment. Criminology 36(1998), S. 711-736; Shepherd, J.M.: Deterrence versus Brutalization: Capital Punishment's Differing Impacts Among States. Michigan Law Review 104(2005), S.:203-255.

[79] Phillips, D. D . (1980). The deterrent effect of capital punishment: New evidence on an old controversy. American Journal of Sociology 86(1980), S. 139-148.

führen zu einem kurzfristigen Rückgang der Tötungskriminalität, der nach einigen Tagen/Wochen in einen Anstieg umschlägt) [80]. Dabei standen zunächst Vergleiche zwischen Staaten ohne Todesstrafe und Staaten mit Todesstrafe im Vordergrund, aus denen die von Kriminologen weithin geteilte Schlussfolgerung gezogen wurde, dass es für die Entwicklung der Tötungskriminalität keinen Unterschied ausmache, ob die Todesstrafe für Mord angedroht wird oder nicht [81]. Als besonders einflussreich erwiesen sich in den 1970er Jahren Untersuchungen auf der Grundlage ökonometrischer Analysen von Zeitreihendaten der Verhängung und Vollstreckung der Todesstrafe sowie der Tötungsdelikte. Ehrlich, ein amerikanischer Ökonom, schloss aus einer Untersuchung von Tötungskriminalität und Exekutionen im Zeitraum 1933 - 1969, dass mit einer Exekution 7 bis 8 Tötungsdelikte verhindert werden könnten [82]. Re-analysen der von Ehrlich untersuchten Daten kamen allerdings zu dem Ergebnis, dass der von Ehrlich berichtete starke Zusammenhang dann verschwindet, wenn die letzten (5) Jahre aus der Zeitreihe herausgenommen werden (diese waren durch einen starken Anstieg der vorsätzlichen Tötungsdelikte und durch einen drastischen Rückgang der Exekutionen (kurz vor der Beginn des 1968 beginnenden und bis 1972 reichenden Moratoriums) gekennzeichnet [83]. Allerdings werden ökonometrische Analysen bis heute mit unterschiedlichen Resultaten durchgeführt [84]. So wird aus einer Untersuchung der Periode 1977 - 1997 berichtet, dass mit einer Exekution 5 Tötungsdelikte verhindert würden und mit einer Umwandlung eines Todesurteil in eine Freiheitsstrafe 5 zusätzliche Tötungsdelikte einhergingen [85]. Eine andere Untersuchung kommt zu dem Schluss, dass mit einer Exekution gar 18 Tötungsdelikte verhindert werden könnten [86]. Die neueste Studie dieser Art wurde für Texas ebenfalls mit dem Ergebnis messbarer Abschreckungseffekte der Todesstrafe durchgeführt [87]. In einer zusammenfassenden Untersuchung zu abschreckenden und sichernden Effekten von Kriminalstrafen, die bereits 1978 durch die amerikanische Nationale Akademie der Wissenschaften veranlasst wurde [88], wurde allerdings auf Mängel des ökonomischen Untersuchungsansatzes hingewiesen [89], die bis heute nicht ausgeräumt sind.

Die mangelnde Aussagekraft dieses Untersuchungsansatzes wird zurückgeführt auf die geringen Fallzahlen von Todesurteilen und

[80] McFarland, S. G.: Is capital punishment a short-term deterrent to homicide? A study of the effects of four recent American executions. Journal of Criminal Law and Criminology, 74(1983), S. 1014-1030.

[81] Sellin, T.: Capital punishment. New York 1967, S. 138; zusammenfassend Hood, R.: The Death Penalty. A World-Wide Perspective. Oxford 1996, S. 180-212.

[82] Ehrlich, I.: The Deterrent Effect of Capital Punishment: A Question of Life and Death. American Economic Review 65(1975), S. 397-417; Ehrlich, I.: Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence. Journal of Political Economy 85(1977), S. 74-88.

[83] Bowers, W. J., Pierce, G.: The illusion of deterrence in Isaac Ehrlich's research on capital punishment. Yale Law Journal, 85(1975), S. 187-208; Yunker, J.: Is the death penalty a deterrent to homicide? Some time series evidence. Journal of Behavioral Economics, 5(1976), S. 1-32.

[84] Zusammenfassend Weisberg , R.: The Death Penalty Meets Social Science: Deterrence and Jury Behavior Under New Scrutiny. Annual Review of Law and Social Sciences 1(2005), S. 151–70.

[85] Mocan, H.N., Gittings, R.K.: Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment. Journal of Law and Economics 46(2003), S. 453-478, S. 453.

[86] Dezhbakhsh, H., Rubin, P.H., Shepherd, J.M.: Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data. American Law and Economics 5(2003); S. 344-376, S. 344.

[87] Land, K.C., Teske, R.C., Zheng, H.: The Short-Term Effects of Executions on Homicides: Deterrence, Displacement, Or Both? Criminology 47(2009). S. 1009-1043, mit dem Hinweis, pro Exekution würden in Texas 2,5 Tötungsdelikte verhindert; allerdings wird auf eine zeitliche Verlagerung hingewiesen, die sich nach 12 Monaten noch in der Verhinderung von 0,5 Tötungsdelikten pro Exekution äußere.

[88] Blumstein, A. u. a.: Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates. National Academy of Sciences, Washington 1978.

[89] Klein, L.R. u. a.: The Deterrent Effect of Capital Punishment: An Assessment of the Estimates. In: Blumstein, A. u. a. (Hrsg.): Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates. Washington 1978, S. 336–60.

Exekutionen sowie extreme Verteilungen, die dadurch bedingt sind, dass sich Exekutionen nach der Wiederaufnahme von Hinrichtungen im Jahr 1977 auf Texas und wenige andere Bundesstaaten konzentrieren [90]. Ferner werden solche Bedingungen nicht einbezogen, die die Entwicklung der Tötungsdelikte erklären könnten und vor allem mangelt es an der Erfassung der möglicherweise auf die lebenslange Freiheitsstrafe ohne Entlassungsmöglichkeit zurückgehenden Effekte [91].

Jedoch haben sich die aus ökonomischen Untersuchungen der oben dargestellten Art abgeleiteten Ergebnisse in Form eines Verhältnisses von Exekutionen zu geretteten Menschenleben vor allem in Medien, Politik und Öffentlichkeit als wirksam erwiesen. Sie waren Gegenstand parlamentarischer Anhörungen im Zusammenhang mit Überlegungen, die Todesstrafe wieder einzuführen [92]. Die hieraus resultierenden Debatten ähneln den Diskursen, die sich um die so genannte „Rettungsfolter" und den Abschuss von Flugzeugen, der ihren Einsatz als Bombe verhindern soll, in den letzten Jahren entwickelt haben [93]. Abschreckung und die damit verbundene Verhinderung von Tötungsdelikten werden gegen die Tötung eines schuldigen Straftäters zur Abwägung gebracht [94], so wie die durch Tortur eines Tatverdächtigen abgepresste Information gegen das Leben eines Entführungsopfers oder die Bedrohung Tausender durch Massenvernichtungswaffen abgewogen wird. Ein utilitaristisches Argument schlüpft in einen moralischen Mantel und diese Moral erhebt die Tötung eines Menschen dann zur staatlichen Pflicht, wenn das Unterlassen dieser Tötung den Tod von unschuldigen Personen bedeuten würde. Entwaffnend ist freilich nicht die simple Abwägung von Tortur gegen Leben oder eines einzelnen Lebens gegen das Leben Vieler (Unschuldiger). Entwaffnend ist vor allem der Umgang mit der dahinter stehenden Empirie, den Daten und den Unsicherheiten, die damit verbunden sind. Immerhin geht es um Aussagen auf der Grundlage der statistischen Instrumente und der Modelle einer Disziplin, die nicht dazu in der Lage ist, den Kurs des US-Dollars genau vorherzusagen; für den Fall einer Exekution aber in der Lage sein will, zu prognostizieren, dass eine einzige Exekution wahlweise 5, 7 oder 18 Morde innerhalb eines Jahres verhindern kann. Nun kann man auf der Grundlage derselben Daten natürlich auch vorhersagen, dass durch die Nichtexekution von Verurteilten in solchen Staaten, in denen die Todesstrafe

[90] Donohue, J.J., Wolfers, J.: The Death Penalty: No Evidence for Deterrence. The Berkeley Electronic Press. April 2006, S. 1-6.

[91] Fagan, J.: Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment. Ohio State Journal of Criminal Law 4(2006), S. 255-320, S. 269ff

[92] Fagan, J.: Deterrence and the Death Penalty: A Critical Review of New Evidence. Testimony to the New York State Assembly Standing Committee on Codes, Assembly Standing Committee on Judiciary and Assembly Standing Committee on Correction. Hearings on the Future of Capital Punishment in the State of New York, 21. Januar 2005; Fagan, J.: Public Policy Choices on Deterrence and the Death Penalty: A Critical Review of New Evidence. Testimony before the Joint Committee on the Judiciary of the Massachusetts Legislature on House Bill 3834, "An Act Reinstating Capital Punishment in the Commonwealth", 14. Juli, 2005; Rubin, P.H.: Statistical Evidence on Capital Punishment and the Deterrence of Homicide. Written Testimony for the Senate Judiciary Committee on the Constitution, Civil Rights, and Property Rights Atlanta, 1. Februar, 2006; Muhlhausen, D.: The Death Penalty Deters Crime and Saves Lives. Testimony delivered on June 27, 2007, before the Subcommittee on the Constitution, Civil Rights, and Property Rights of the Committee on the Judiciary of the United States Senate.

[93] Bowden, M.: The Dark Art of Interrogation. The Atlantic Monthly, Oktober 2003; Brugger, W.: Darf der Staat ausnahmsweise foltern? Der Staat 35(1996), S. 67-97; Jahn, M.: Gute Folter – Schlechte Folter? Straf-, verfassungs- und völkerrechtliche Anmerkungen zum Begriff „Folter" im Spannungsfeld von Prävention und Repression. Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft 87(2004), S. 24-49; Kreuzer, A.: Zur Not ein bisschen Folter? Diskussion um Ausnahmen vom absoluten Folterverbot anlässlich polizeilicher „Rettungsfolter". In: Nitschke, P. (Hrsg.): Rettungsfolter im modernen Rechtsstaat? Eine Verortung. Bochum 2005, S. 35-49.

[94] Sunstein, C.R., Vermeule, A.: Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs. Stanford Law Review 58(2005), S. 703-750.

für Mord eben nicht vorhergesehen ist, ebenso gut dieselbe Anzahl von Morden verhindert werden kann [95]. Auch im Zusammenhang mit einem anderen sensiblen Thema, dem Recht auf Besitz und das Mitsichführen von Schusswaffen können vergleichbare Auseinandersetzungen beobachtet werden [96].

Die Debatten zur abschreckenden Wirkung der Todesstrafe sind aus Überlegungen intuitiver Plausibilität von Entwicklungen und Verteilungen, die in dem Typ von Forschung von Sellin und anderen vorgeherrscht hat [97], übergegangen in die Diskussion von Detailproblemen der Mathematik sowie der Spezifizierung von Modellen und deren statistischer Überprüfung. Gerade die intuitive Plausibilität, die sich aus Vergleichen ergibt, zeigt allerdings immer noch, dass es in den USA wenig überzeugend erscheint, angesichts der Praktiken eine abschreckende Wirkung der Todesstrafe zu erwarten. Denn die Exekutionswahrscheinlichkeit von männlichen Insassen der Todestrakte liegt – wie weiter oben bereits ausgeführt - nur etwa doppelt so hoch wie die Wahrscheinlichkeit für Männer, außerhalb des Gefängnisses an Unfällen oder Gewalt zu sterben. Die Mortalitätsziffern sind demgegenüber deutlich erhöht, und sehr wahrscheinlich höher als die von Todeszelleninsassen, bei Mitgliedern aktiver Gangs oder im Straßendrogenhandel [98].

Die Beweislast für einen abschreckenden Effekt der Todesstrafe obliegt dem Staat, der die Todesstrafe einführt oder aufrecht erhält [99]. Zwar ist nicht damit zu rechnen, dass die Debatten über abschreckende Effekte der Todesstrafe in naher (oder auch ferner) Zukunft abgeschlossen werden könnten. Doch gibt es keine plausiblen Hinweise darauf, dass ein abschreckender Effekt tatsächlich überzeugend nachgewiesen werden könnte [100]. Insoweit lässt sich aber aus generalpräventiven Begründungen keine tragfähige Basis für die Todesstrafe ableiten.

4.5 Öffentliche Meinung und Todesstrafe

Die eingangs angesprochenen, eher ablehnenden Reaktionen im Parlament auf die Ankündigung des Präsidenten der Mongolei zur Abschaffung der Todesstrafe beruhen wohl auch auf der Auffassung, dass die Bevölkerung die Todesstrafe ganz überwiegend unterstützt. Die öffentliche Meinung wird auch in anderen Ländern als Begründung für die Beibehaltung der Todesstrafe herangezogen [101]. Die Begründung stützt sich auf die positive Generalprävention und damit auf die Überlegung, dass die öffentliche Meinung aus Gründen der Bewahrung der Rechtstreue der Bevölkerung und zur Erhaltung des

[95] Males, M.: Death Penalty and Deterrence: The Last Word. Center on Juvenile and Criminal Justice, April 2008, www.cjcj.org.

[96] Bronars, S.G., Lott, J.R.: Criminal Deterrence, Geographic Spillovers, and the Right to Carry Concealed Handguns. The American Economic Review 88(1998), S. 475–479; Dezhbakhsh, H., Rubin, P.H.: Lives Saved or Lives Lost? The Effects of Concealed-Handgun Laws on Crime. The American Economic Review 88(1998), S. 468–474.

[97] Sellin, T.: The death penalty. Philadelphia 1959.

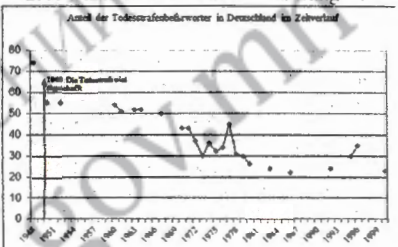
[98] Katz, L., Levitt, S.D., Shustorovich, E.: Prison Conditions, Capital Punishment, and Deterrence. American Law and Economics Review 5(2003), S. 318-343, S. 319f.

[99] Grahl-Madsen, A.: The Death Penalty. The Moral, Ethical, and Human Rights Dimensions: The Human Rights Perspective. Revue Internationale de Droit Penal. La Peine de Mort. The Death Penalty. Travaux de la Conférence Internationale tenue à l' Institut Supérieur International de Sciences Criminelles Syracuse – Italie. 17 au 22 mai 1988. 58(1987), S. 567-582, S. 579.

[100] Vgl. hierzu auch Chan, J., Oxley, D.: The deterrent effect of capital punishment: A review of the research evidence. Crime and Justice Bulletin. Contemporary Issues in Crime and Justice. NSW Bureau of Crime Statistics and Research. Oktober 2004.

[101] Vgl. beispw. für China Hu Yun Teng: On the Death Penalty at the Turning of the Century. In: Nowak, M., Xin, C. (Hrsg.): EU-Cina Human Rights Dialogue. Proceedings of the Second EU-China Legal Expert Seminar held in Beijing on 19 and 20 October 1998. Wien 2000, S. 88-94, S. 93; Schabas, W.A.: Public opinion and the death penalty. In: Hodgkinson, P. (Hrsg.): Capital Punishment. **Strategies for Abolition. Cambridge 2004, S.** 309-331.

Vertrauens in Strafrecht und Strafjustiz berücksichtigt werden müsse. In diesem Zusammenhang können mehrere Fragen aufgeworfen werden. Zunächst sind nämlich Einstellungen zur Todesstrafe von einer Vielzahl von Bedingungen abhängig und offensichtlich nicht stabil. So ist aus empirischen Untersuchungen bekannt, dass die Zustimmung zur Todesstrafe sinkt, wenn die Alternative „lebenslange Freiheitsstrafe ohne Entlassungsmöglichkeit" angeboten wird [102]. Andererseits nimmt die Zustimmung zur Todesstrafe zu, wenn die Frage im Zusammenhang mit Mord und nicht abstrakt gestellt wird. Die Einstellungen gegenüber der Todesstrafe hängen jedenfalls auch mit der Schulbildung zusammen, denn mit höherer Schulbildung sinkt der Anteil der Befürworter der Todesstrafe. Die Unterstützung für die Todesstrafe ist dann über die Zeit hinweg Veränderungen ausgesetzt. So lässt sich in Deutschland (wie auch in anderen europäischen Ländern) beobachten, dass die Todesstrafe im Zeitraum nach ihrer Abschaffung im Jahr 1949 über einen längeren Zeitraum deutlich an Zustimmung verliert [103]. War im Jahr 1949 zum Zeitpunkt der Abschaffung der Todesstrafe nach dem Inkrafttreten des Grundgesetzes noch eine Mehrheit der deutschen Bevölkerung für die Todesstrafe, so sind es 50 Jahre später nur noch 23%, die sich für die Todesstrafe aussprechen. Der Umschwung der öffentlichen Meinung (eine Mehrheit lehnt die Todesstrafe ab) setzt gegen Ende der 1960er Jahre ein [104] und dürfte mit dem diese Periode kennzeichnenden sozialen und politischen Wandel zusammenhängen. Erst über einen längeren Zeitraum ergibt sich demnach eine deutliche Mehrheit gegen die Todesstrafe und damit eine grundsätzliche Übereinstimmung mit dem durch den Gesetzgeber eingeleiteten Wandel. Auch in Russland zeigen sich entsprechende Veränderungen in der öffentlichen Meinung. Nach einer Umfrage des Yury Levada Analytical Center sind heute 37 % der Bevölkerung der Auffassung, dass die Todesstrafe wieder eingeführt werden sollte; im Jahr 2000 waren noch 54% dieser Meinung [105].



Quelle: www.ifd-allensbach.de/news/prd_0214.html

Aus einer kriminalpolitischen Perspektive ergibt sich schließlich die Frage, ob die öffentliche Meinung zur Todesstrafe für den Gesetzgeber überhaupt eine entscheidende Rolle spielen darf. Zwar sind Kriminalstrafen im Hinblick auf ihre generalpräventive Wirksamkeit auf die Unterstützung durch die Gesellschaft angewiesen. Denn ohne öffentliche Akzeptanz ist die Legitimität der Strafe bedroht. Allerdings ergeben sich Begrenzungen durch nicht verfügbare Menschenrechte einerseits sowie durch eine Vermittlungsfunktion der Parlamente andererseits. Jedenfalls in den verschiedenen Formen repräsentativer Demokratie erfüllen politische Parteien auch die Funktion von Schrittmachern der öffentlichen Meinung und bestimmen die politische Agenda.

[102] Vgl. hierzu und für die USA bereits Richard C. D.: Sentencing for Life: Americans Embrace Alternatives to the Death Penalty. Death Penalty Information Center. Washington, April 1993; Death Penalty Information Center: The Death Penalty in 2010. Year End Report. Washington, Dezember 2010, S. 1; für China siehe Oberwittler, D., Shenghui, Qi: Public Opinion on the Death Penalty in China. Freiburg 2009, S. 15.

[103] Reuband, K.-H.: Sanktionsverlangen im Wandel. Die Einstellung zur Todesstrafe in der Bundesrepublik Deutschland seit 1950. Kölner Zeitschrift für Soziologie und Sozialpsychologie 32(1980), S. 535-558.

[104] Reuband, K.-H.: a. a. O., 1980, S. 342.

[105] www.angus-reid.com/polls/view/fewer_russians_would_restore_death_penalty/

Die deutlichen Hinweise darauf, dass die öffentliche Meinung gegenüber der Todesstrafe inkonsistent, für kurzfristige Schwankungen anfällig und in hohem Maße wandlungsfähig ist [106], unterstreichen die Bedeutung, die politischen Eliten in der Formung der öffentlichen Meinung und im Prozess der Abschaffung der Todesstrafe eigen ist [107]. Die Forschungen belegen seit langer Zeit, dass sich eine informierte und vor verschiedene Alternativen gestellte öffentliche Meinung anders äußert als die lediglich mit der Frage „Für oder gegen die Todesstrafe" konfrontierte öffentliche Meinung. Denn bei den gleichermaßen zur Verfügung stehenden Optionen „Todesstrafe" „Lebenslange Freiheitsstrafe ohne Entlassungsmöglichkeit mit zusätzlicher Wiedergutmachung", Lebenslange Freiheitsstrafe ohne Entlassungsmöglichkeit" und Lebenslange Freiheitsstrafe mit Entlassungsmöglichkeit" entscheiden sich in den USA nur noch 33% für die Todesstrafe [108], während etwa zwei Drittel sich für die Todesstrafe aussprechen, wenn allein die Frage „Dafür oder dagegen" gestellt wird [109]. Die Abschaffung der Todesstrafe - auch angesichts einer die Todesstrafe stützenden öffentlichen Meinung - hat politischen Eliten und politischen Parteien bislang langfristig jedenfalls nicht geschadet. Vielmehr kann die politische Elite eine Führungsrolle übernehmen, denn über längere Perioden wird sich nach den bisherigen Feststellungen die öffentliche Meinung ändern und der politischen Entscheidung für die faktische oder förmliche Abschaffung der Todesstrafe anpassen [110]. Dies entspricht dem Forschungsstand zu Zusammenhängen zwischen Kriminalpolitik und öffentlicher Meinung im Allgemeinen. Denn es sind die Kriminalpolitiker, die die Agenda der Kriminalpolitik und damit die öffentliche Meinung und die öffentliche Sensibilität (für bestimmte politische Themen) jedenfalls mitbestimmen [111].

5. Schlussfolgerungen

Die Abschaffung der Todesstrafe hat sich in Europa über einen Zeitraum von einem halben Jahrhundert vollzogen. Für die Abschaffung der Todesstrafe spielten in den einzelnen Ländern verschiedene Faktoren eine Rolle. Von besonderer Bedeutung waren hier aber entweder scharfe Brüche in den politischen Entwicklungen, die insbesondere durch das Ende des Zweiten Weltkriegs, den Übergang von autoritären Regimen zu Demokratien und den sozio-politischen Umbruch in den Ländern Mittel- und Osteuropas markiert waren. Die Politik der Abschaffung wurde durch eine klare Haltung des Europarats unterstützt, die zur Ratifizierung von zwei Zusatzprotokollen zur Europäischen Menschenrechtskonvention führte, mit denen die Todesstrafe in Friedens- und Kriegszeiten in Europa beseitigt wurde. Auch die Europäische Union hat sich mit einer eindeutigen Politik von der Todesstrafe distanziert. Es ist damit vor allem die Staatenpraxis und das heißt die Kriminalpolitik der europäischen Länder, die in Europa (auch gegen die öffentliche Meinung) für die Abschaffung der Todesstrafe sorgte. Die öffentliche Meinung hat sich ganz überwiegend an die politischen Entscheidungen und die die Politik der Abolition tragenden Überzeugungen angepasst.

[106] Zimring, F.E., Hawkins, G.: The Path Toward the Abolition of Capital Punishment in the Industrial West. Grahl-Madsen, A.: The Death Penalty. The Moral, Ethical, and Human Rights Dimensions: The Human Rights Perspective. Revue Internationale de Droit Penal. La Peine de Mort. The Death Penalty. Travaux de la Conference Internationale tenue à l Institut Superieur International de Sciences Criminelles Syracuse - Italie. 17 au 22 mai 1988. 58(1987), S. 669-688, S. 680.

[107] Zimring, F., Hawkins, G.: Capital Punishment and the American Agenda. Cambridge 1986; Kelley, J., Braithwaite, J.: Public Opinion and the Death Penalty in Australia. Justice Quarterly 7(1990), S. 529 - 563.

[108] Death Penalty Information Center: The Death Penalty 2010. Year End Report. Washington 2010. S. 1.

[109] Gallup. In U.S., 64% Support Death Penalty in Cases of Murder. 8. November 2010.

[110] Hierzu Kelley, J., Braithwaite, J.: a. a. O., 1990.

[111] Beckett, K.: Making Crime Pay: Law and Order in Contemporary American Politics. Oxford 1997; Beckett, K.: Political Preoccupation with Crime. Overcrowded Times 8(1997), S. 1, 8-11.

THE ADMINISTRATIVE COURT OF MONGOLIA AS A PROTECTOR OF HUMAN RIGHTS

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On the occasion of the 11th anniversary of the Administrative Court of Mongolia, making an assessment and evaluation of the court's nature and its activity is a matter of great significance, both in terms of science and practice. The Administrative Court of Mongolia was the first court in Asia established in the Romano-Germanic tradition. In Mongolia, each sub-national unit (21 provinces) includes a first instance administrative court. There is a single appellate court operating in Ulaanbaatar, the capital of Mongolia, which hears all appeals from these first instance courts. From this appellate court, cases may be appealed to the Supreme Court of Mongolia where they will be heard in its administrative chamber. The establishment of an independent administrative court system in Mongolia represented a radical change in the structure of the Mongolian judiciary, and it has since come to exemplify the exercise of judicial power in Mongolian.

Purpose of the Administrative Courts of Mongolia

The administrative courts of Mongolia serves as a pillar of the rule of law and exercises control over the executive branch of the Mongolian state.

Many years of domination by the communist totalitarian regime in Mongolia had obstructed human rights and freedoms. The main result of the Democratic Revolution of 1990 in Mongolia was a new Constitution that became the basis to foster human rights and freedoms[1].

Article 19.1 of the new constitution states that "The State shall be responsible to the citizens for the creation of ... guarantees for ensuring human rights and freedoms, to fight against violation of human rights and freedoms and to restore infringed rights" and also Article 48.1 states that "Specialized courts such as administrative courts may be formed". On this basis, the legal grounds for the formation of a new and independent administrative cases court was established.

In accordance with the Law of Mongolia on the Procedure for Administrative Cases2002, Article 1.1 declares the purpose of the law that "to regulate the relations connected with preliminary decision making on administrative cases according to the complaints and claims submitted by citizens and legal entities who have considered an administrative act as illegal in order to protect their infringed rights, and with the proceedings of administrative cases in the Administrative Cases Courts"[2].On this basis, the court is dedicated to secure and protect the rights and freedoms of citizens and legal entities from illegal administrative acts and unlawful actions of public administrative bodies.

The previous totalitarian regime's public administration willfully engaged in bureaucratic practices that encouraged the use of the executive power to breach the rights and freedoms of citizens and legal entities, engaging in various illegal

[1] Constitution of Mongolia, www.legalinfo.mn

[2] Law of Mongolia on procedure for Administrative case. www.legalinfo.mn

acts. Remnants of this systematic abuse continue today.

Considering the 20 years of totalitarian rule, it is evident that public administrative bodies are likely to continue breaches of citizens' lawful rights and flout the rule of law.

Therefore, the goal of the Administrative Court is to convince administrative bodies to issue only lawful administrative acts and to define the methods of issuing those acts. This is the nature and main purpose of the Administrative Court in Mongolia. However, the fundamental principle of the Administrative Court of Mongolia is to protect the subjective rights of individuals.

For administrative proceedings, the plaintiff must be a citizen[3] (that is, a citizen of Mongolia, a foreign citizen or a stateless person), and legal entity[4] (private and public law) and the defendant must be a public administrative body[5]. Citizens and non-government legal entities cannot be a defendant in an administrative proceeding. Claims in administrative proceedings must complain of a specific administrative act[6]. The legal definition of an 'administrative act' can be considered 'classical' however, the definition is perhaps unusually broad, covering the features of a legal act, an actual omission and a real act[7]. Acting on this basis, the Administrative Court of Mongolia has great scope to protect the subjective rights of individuals.

Potential of Legal Protection to the Plaintiff

In order to fulfill the individual's right to bring a case before the administrative courts, the minimum requirement to a claim is stipulated in the law. A claim must indicate the name of the administrative court to which the claim is submitted, the given and family name of the plaintiff, their place of residence and describe the demand of the claim.[8]Setting up a minimum requirement to the claim gives an individual an opportunity to exercise an appeal to a court.

The content of the claim must express how the administrative act or acts in question violate individual rights, but it does not need to express the legal grounds on which the claim is made.

Inquiry[9]is one of the main principles for the conduct of proceedings in the administrative courts and, as a consequence, the court irresponsible for the collection and estimation of evidence which is important for settling dispute[10].

A major function of the Administrative Court of Mongolia is to retain the equality of participants in a case. This is important in administrative proceedings, because the non-government party is ordinarily at a material disadvantage to the administrative body. Inequality between individual citizens and administrative bodies has been recognized as a significant issue, especially in development studies literature, and thus it receives special attention in Mongolian administrative law.[11]

Only the plaintiff and participants to an administrative case has the right to submit a claim, withdraw a claim and settle with the defendant.

The vast majority of claims submitted to the administrative courts are requests to invalidate administrative acts, compel administrative acts, and recognize obvious illegalities in administrative acts. Out of these, the most typical claims are requests to invalidate administrative acts.

The following statistics provide information about these disputes that come before the administrative courts:

[1] Law of Mongolia on procedure for Administrative case Law . §3.1.3

[4] Ibid., §12.1

[5] Ibid., §4.1

[6] A.Erdenetsogt, "Administrative Procedural Law of Mongolia," National handbook, Ulaanbaatar, 2006, p 221-228

[7] Law of Mongolia on procedure for Administrative case. §3.1.4, §4.2

[8] Law of Mongolia on procedure for Administrative case. §32

[9] Inquisitionsmaxime

[10] Ibid., §31.1

[11] .Erdenetsogt, "Administrative Procedural Law of Mongolia," National handbook, Ulaanbaatar, 2006, p 16-17

Content / Year	Claims filed	Claims refused to accept	Claims accepted and decided	Demand of Claim is		Remaining Cases
				satisfied	dismissed	
2004, first half year	516	337	145	111	34	34
2005	745	286	386	271	115	73
2006	765	222	431	318	113	112
2007	998	287	591	448	143	120
2008	1455	427	826	619	207	202
2013	2170	533	1106	851	255	531
2014	2437	648	1187	516	671	602
Total	**9086**	**2740**	**4672**	**3134**	**1538**	**1674**

From the statistics[12], we can observe that the number of claims filed in the administrative courts have dramatically increased since 2004. This is attributable to an increase in citizens' trust in the judicial system and greater awareness of individual rights among the Mongolian public and the administrative courts' role in upholding these rights. This is underpinned by the statistics demonstrating that demands of claims are satisfied far more often than being dismissed.

Administrative Court of Mongolia grants temporary legal protection to the plaintiff at highest level. After receiving the claim, the shall proceeds to issue an ordinance to suspend the implementation the administrative act in question until the issuance of a court decision by the request of plaintiff or by its own initiative[13].The suspension of the implementation of the administrative acts is impossible if such suspension will cause serious damage, if the act obliges payment of taxes, fees or other payments, or if the act is specified in law as exempted from suspension orders.[14]

Looking at the administrative courts' practice in Mongolia, suspension of implementation of administrative acts is the most efficient tool to protect the rights of citizens and legal entities from administrative authorities. The Administrative Court of Mongolia is dedicated to protect the subjective rights of individuals; however there is a need to file a claim to the court on behalf of the public interest, otherwise known as public interest litigation. Mongolia is a mining-intensive country, and there for the issue of environmental protection is becoming increasingly important. Within this framework, if the common rights or public interests of local citizens are violated, it is necessary to protect their rights before the court. In addition to these environmental issues requiring administrative redress, Ulaanbaatar's rapid development also requires attention. The city government frequently transfers public assets and real estate, such as roads and parks, into the ownership of private individuals and entities. Arguably, in some instances, this constitutes a breach of the public rights and interests of groups of citizens. A public interest litigation procedure within the framework of the administrative court of Mongolia could offer a solution to preventing these kinds of breaches.

[12] Annual report of the Supreme Court, www.supremecourt.mn/index.php.
Annual report ofGeneral Council of Courts for 2013 and 2014. www.judcouncil.mn

[13] Law of Mongolia on procedure for Administrative case. §45.1

[14] Ibid., 46.1.

With regard to the first issue, in accordance with the Law on Environmental Protection, which was amended in 2010, Non-Governmental Organizations whose purpose is the protection of the environment and natural resources, are granted the power to conduct public supervision and inspection of the implementation of environmental protection legislation, may demand the rectification of breaches and may submit claims to courts for decision[15]. This is one example of good practice in the field of public interest litigation. With regard to the second issue, there is great controversy among scholars and lawyers as to who should represent the public interest in proceedings before the administrative courts dealing with transferrals of public assets into private ownership by the city government.

The types of administrative court decisions are defined in the Law on Administrative Proceedings[16]. Defendants have a right to counterclaim to a claim requesting administrative bodies to repay damages caused to a person. Other than that, the Administrative Court of Mongolia cannot make intrusive decisions such as limiting the rights and imposing obligations upon individuals. A decision to dismiss the claim is the only decision that may be made 'against' individuals' interests. Accordingly, the Administrative Court of Mongolia is a tool to protect subjective rights from willful and unlawful actions of administrative bodies.

Enforcement of administrative decisions are divided into (1) enforcement proceedings with representation and (2) enforcement proceedings without representation.[17]Enforcement proceedings with representation may include a defendant other than the public body that is capable of fulfilling the court's decision. For enforcement proceedings without representation, only the public body as a defendant is capable of fulfilling the court's decision, for example, where the court orders the public body to issue an administrative act.

If a decision of the Administrative Court of Mongolia has not been fulfilled voluntarily it will be enforced and a fine will be imposed. In accordance with Article 30.4 of the Administrative Penalty Law[18], fines of between MNT5,000 and MNT10,000[19]may be imposed. This is widely considered a very low amount. Due to this, the chance of fulfillment of administrative courts' decisions is low and the protection of individual rights cannot be reliably guaranteed. In conclusion, strengthening the enforcement methods for court decisions is an important issue in Mongolia.

[15] Law of Mongolia on Environmental Protection, §32.1.1, www.legalinfo.mn

[16] Law of Mongolia on procedure for Administrative case. §70.

[17] A.Erdenetsogt, "Administrative Procedural Law of Mongolia," National handbook, Ulaanbaatar. 2006, p 304-305

[18] Law of Mongolia on Administrative Penalty. www.legalinfo.mn

[19] 1 USD=1985 MNT, Official rate of Mongol bank on 2015.03.29, www.mongolbank.mn

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AN ANALYSIS OF INTERNATIONAL AND DOMESTIC HUMAN RIGHTS LAW: MONGOLIA'S OBLIGATION TO IMPLEMENT ANTI-DISCRIMINATION LAWS FOR SEXUAL ORIENTATION AND GENDER IDENTITY

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I. Introduction

Protecting human rights is an integral part of a free and democratic society in the modern world. Unfortunately, many minorities are still fighting for recognition of their rights that are guaranteed to them. One of the most prevalent human rights issues of the 21st Century concerns sexual minorities. Lesbian, Gay, Bisexual, and Transgender (LGBT), individuals around the world have been fighting for recognition by and protection under their respective governments. Many have succeeded in gaining their basic rights; others have been able to achieve full marriage equality.[1] Yet there still remain numerous countries that have not yet adopted laws to protect this vulnerable minority from discrimination. Many of these countries claim that non-heterosexual sexual orientations are a product of choice, and therefore are not entitled to protection, or that anti-discrimination laws are not required because LGBT people do not reside in their country. This, however, is completely untrue. Sexual orientation and gender identity are inherent, inalienable characteristics of a person, the same way that race is inherent and inalienable.[2] A person's sexual orientation is a part of who they are; it is tied to their dignity. As such, all citizens of every country are entitled to legal protection from any discrimination that arises due to their sexual orientation. LGBT rights are human rights, and must be treated as such.

Although homosexuality is not criminal in Mongolia, there are no anti-discrimination laws that exist in the country concerning sexual minorities.[3] Homophobia and transphobia is widespread in Mongolia, with the treatment of LGBT people being indistinguishable from persecution. In 2010, the LGBT Centre[4] released a report detailing the violence that LGBT people face in Mongolia, ranging from verbal attacks to physical and sexual assault.[5] The Mongolian government made promises to address LGBT anti-discrimination laws as early as 2011, and again in 2014, but there has been little progress made on those promises.[6]

In order to realize the full potential of being a democratic society and to fulfill their international legal obligations, the Government of Mongolia must pursue legislation and policies to prohibit discrimination based on an individual's sexual orientation or gender identity. Human rights law exists through the interplay between law and policy. As such, I will first address multiple policy

[1] For further information, look to the laws of Canada, Spain, the United States of America, Brazil, Australia, Mozambique, and El Salvador.

[2] The National Human Rights Commission of Mongolia, "12th Report on Human Rights and Freedoms in Mongolia," (2013) at 47 [NHRC Mongolia].

[3] Frank Billik, "Difference Shades of Blue: Gay Men and Nationalist Discourse in Mongolia," (2010) 10:2 Studies in Ethnicity and Nationalism, 187-203, at 193 [Billik].

[4] The LGBT Centre is a non-government organization operating in Ulaanbaatar, working on LGBT rights in Mongolia. It was founded in 2007 but was not given official status until 2009.

[5] Andie Noonen, "Pride on the Steppe: Being Gay in Mongolia," *Star Observer*, 11 October 2013, Accessed 29 July 2015, http://www.starobserver.com.au/features/feature-pride-on-the-steppe-being-gay-in-mongolia/110852 [*Star Observer*].

[6] Hillary Clinton, Secretary of State, "Remarks in Recognition of International Human Rights Day," Speech in Geneva, Switzerland, U.S. Department of State, 6 December 2011 [Hillary Clinton]; Lisa Gardner, "Mongolia Plans Anti-Discrimination Laws," Aljazeera, 22 June 2014, Accessed 29 July 2015, http://www.aljazeera.com/indepth/features/2014/06/mongolia-plans-anti-discrimination-laws-20146171018548142 48.html [Aljazeera].

reasons for why anti-discrimination laws are essential to the existence of a modern democratic nation. Second, I will address the legal obligations that Mongolia has internationally and domestically to protect all citizens from discrimination. Finally, I will present various solutions that can offer anti-discrimination protection for sexual minorities in Mongolia.

II. Protecting Human Rights is Important for Personal, Social, and Economic Reasons

a) A Person's Dignity is Fundamental to Who They Are

Anti-discrimination laws do more than punish those who abuse them. By recognizing the need to protect a specific minority, governments legitimize that minority.[7] To refuse protection, thereby refusing recognition, there is a detrimental effect upon the dignity and self-worth of all members of that minority group. Further, refusing protection legitimizes any attack upon that group. When the Mongolian Government refuses to protect sexual minorities, it implicitly condones homophobic and transphobic attacks that occur throughout the country. This leads to victims not reporting the attacks because the government and its officials are seen as unsympathetic.[8]Homophobic and transphobic attacks are brutal violations of humanity: assaults, analrape, genital mutilation, and murder.[9] A democratic government cannot continue to be unsympathetic towards their own citizens facing these extreme levels of violence.

When victims are not heard, many resort to suicide. People who face discrimination based on their sexual orientation will often have psychological detachment from society, leading to depression and suicidal thoughts.[10]By combating this discrimination, allowing LGBT youth to be open about their sexual orientation, the Mongolian government can help reduce the number of LGBT Mongolians committing and attempting suicide. Acceptance has to begin somewhere. If the Mongolian Government enacts anti-discrimination laws, social and cultural opinions regarding LGBT people will improve, and, in turn, the quality of life of Mongolian LGBT citizens will increase.

b) Legitimizing Homophobia and Transphobia Affects Society as a Whole

When minority groups are discriminated against, countries experience various social, economic, cultural and political repercussions. In Mongolia, when an LGBT person decides to live their true sexual orientation,[11] their risk of living in poverty doubles.[12] If they do this while still living with their family, they face being kicked out of their home and abandoned. Some are able to find other accommodation, but most do not. And those who do find accommodation face the risk of eviction because of their sexual orientation.[13] Homelessness is a serious issue worldwide in the LGBT community, but the problem is exacerbated when there is no anti-discrimination protection for housing, like in Mongolia. Homelessness coincides with extreme poverty, causing these individuals to need social assistance to be able to survive. And for many LGBT homeless youth, sex work is seen as their only option for survival, causing further societal problems in Mongolia where sex work is illegal.[14]

Due to the discrimination that LGBT people face in Mongolia, many have no choice but to flee the country to escape torment. A substantial number of LGBT people in Mongolia have contemplated suicide because of the treatment that they receive.[15]In order for them to feel safe, they feel they must flee abroad. Citizens of Mongolia should not have to

[7] *Egan v Canada*, [1995] 2 SCR 513 (Supreme Court of Canada) at para 161 [*Egan v Canada*].

[8] UNDP, USAID (2014), *Being LGBT in Asia: Mongolia Country Report*, Bangkok, at 21 [UNDP Report].

[9] A/HRC/29/23, *Discrimination and violence against individuals based on their sexual orientation and gender identity*, Office of the United Nations High Commissioner for Human Rights, at para 23 [A/HRC/29/23].

[10] UNDP Report, *supra* note 8 at 28.

[11] Commonly referred to as "coming out of the closet."

[12] UNDP Report, *supra* note 8 at 25.

[13] A/HRC/29/23, *supra* note 9 at para 59.

[14] Mongolia: Criminal Code, 1 September 2002, Accessed 29 July 2015, http://www.refworld.org/docid/4721ca222.html, at Article 123 [Criminal Code].

[15] NHRC Mongolia, *supra* note 2 at 52.

seek asylum in a foreign country in order to escape persecution and harassment. A truly democratic society protects its citizens. Unfortunately many LGBT people recognize that there is no justice for them at home.[16] Mongolian society cannot flourish when the inaction of the government is causing so many of its citizens, many from the younger generation, to leave and establish a life for themselves abroad. Society succeeds when all citizens come together, not when specific minorities are segregated with no other option but to seek asylum elsewhere.

c) Economic Growth Suffers When Discrimination Exists

Without anti-discrimination laws, LGBT people can be deprived of employment, access to health care, education, and housing.[17] As previously stated, homelessness and extreme poverty are significant issues facing LGBT people in Mongolia. When these individuals are deprived of employment and education, they are unable to contribute to the economic growth of Mongolia. The absence of anti-discrimination laws limits the possibility of LGBT people from achieving economic success. The World Bank has analyzed homophobia and discrimination, finding that there is a negative impact on national development and economic growth when discrimination is prevalent.[18] It is difficult for openly LGBT people to find employment and opportunities in Mongolia.[19]Unfortunately, due to the lack of anti-discriminatory employment laws, the economic potential of Mongolia's LGBT people cannot be realized.

The economy is also dependent upon foreign investment. Specifically, tourism is a large profit-making enterprise being realized by many countries throughout the world. Tourism in Mongolia has increased since the implementation of democracy in 1992. However, tourists who may face discrimination while in Mongolia may be less inclined to visit and spend money. In April 2014, three foreign men who were perceived as being homosexual were physically attacked in Ulaanbaatar.[20] Yet due to the lack of hate crime legislation, there was minimal justice provided for these men. In order to increase tourism and build the economy through foreign investment, the Mongolian Government must ensure that visitors will be protected from discrimination while here, or at least will have the ability to seek justice should a discriminatory incident occur.

III. Mongolia is Required to Protect the Human Rights of LGBT People Under International and Domestic Law

There are many positive outcomes that arise when governments enact anti-discrimination laws with respect to sexual orientation and gender identity. It allows for a more open and free society in which sexual minorities are able to freely express their inalienable characteristics. This in turn can lead to a more unified society, producing further economic growth. Yet in Mongolia, these policy reasons are not the only driving force behind the need to protect LGBT people from discrimination. Mongolia is legally obligated to protect LGBT citizens due to its international obligations as well as its constitutional obligations under the Mongolian Constitution of 1992.

a) International Legal Obligations

The mandate of the United Nations is clearly set out in the UN Charter: "The purposes of the United Nations are [...] promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[21]Although not explicitly included, the United Nations has since read this Article as including sexual orientation as a protected ground. All member states of the United Nations have a fundamental obligation under international law to enact equal protection of all people under the law and to require freedom from discrimination.[22]

[16] *Ibid.*

[17] A/HRC/29/23, *supra* note 9 at para 42.

[18] *Ibid.*

[19] NHRC Mongolia, *supra* note 2 at 57.

[20] Aljazeera, *supra* note 6.

[21] United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, at Article 2(3) [UN Charter].

[22] A/HRC/29/23, *supra* note 9 at para 16.

This obligation, as stated by the United Nations, requires all States to include sexual orientation and gender identity as protected grounds. To not implement anti-discrimination laws with respect to sexual orientation is in clear violation of international law.

Mongolia has done well in upholding a large proportion of its obligations under international law when it comes to human rights, prohibiting discrimination on the basis of "ethnic origin, language, race, age, sex, social origin and status, property and assets, employment occupation and official position, religion and conscience, conviction and opinion, and education."[23] These are guaranteed rights in the Constitution. Yet sexual orientation and gender identity continue to be overlooked. There are nearly thirty international human rights treaties that Mongolia has ratified, including seven significant treaties that form the basis of LGBT rights.[24] But there are still no laws protecting sexual minorities. This is a glaring omission that must be rectified in order to bring Mongolia into compliance with international law.

As recently as March 2011, the UN Human Rights Committee made a recommendation to the Mongolian Government to "take urgent steps to address the issue of discrimination against LGBT persons."[25]Over four years later, these "urgent steps" have yet to be taken. Protecting LGBT people from discrimination does not require debate or the creation of new standards. Rather, it is a well-established legal obligation that Mongolia must adhere to.[26] The United Nations Commissioner for Human Rights has stated this obligation simply:

All people, irrespective of sex, sexual orientation or gender identity, are entitled to

enjoy the protections provided for by international human rights law, including in

respect of rights to life, security of person and privacy, the right to be free from torture,

arbitrary arrest and detention, the right to be free from discrimination and the right to

freedom of expression, association and peaceful assembly.[27]

i) The International Covenant on Civil and Political Rights

As one of the most significant international treaties concerning discrimination, the International Covenant on Civil and Political Rights (ICCPR) is an international authority. When it came into force in 1976, sexual orientation was not a protected ground enumerated under Articles 2 and 26. However, in 1994 the Human Rights Committee understood "sex" to be understood as including sexual orientation in the landmark decision of *Toonen v Australia* [(488/1992), CCPR/C/50/D/488/1992 (1994)]. This effectively extended an international obligation to protect sexual minorities from discrimination.[28] Mongolia is a party to this convention and is therefore legally obligated to follow the accepted interpretation of all Articles. All civil and political rights enumerated in the ICCPR must be provided to all Mongolians free from discrimination on the grounds of sexual orientation and gender identity.

ii) The Universal Declaration of Human Rights

The Universal Declaration of Human Rights(UDHR) is the foundation for international human rights, recognizing that "All human beings are born free and equal in dignity and rights."[29] This treaty was enacted in response to the atrocities committed during World War II, where nations around the world vowed that all people are entitled to legal protection. Again, sexual orientation and gender

[23] *Constitution of Mongolia* [Mongolia], 13 January 1992 [Official English Translation], at Article 14(2) [Constitution].

[24] UNDP Report, *supra* note 8 at 18, 7.

[25] NHRC Mongolia, *supra* note 2 at 51.

[26] United Nations Office of the High Commissioner for Human Rights, *Combatting Discrimination based on Sexual Orientation and Gender Identity*, Accessed 30 July 2015, http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx [Combatting Discrimination].

[27] *Ibid.*

[28] Paula Gerber and Joel Gory, "The UN Human Rights Committee and LGBT Rights: What is it Doing? What Could it be Doing?" (2014) 14 Human Rights Law Review, 403-439, doi: 10.1093/hrlr/ngu019, at 429 [Gerber and Gory].

[29] UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), at Article 1 [UDHR].

identity are not enumerated grounds of protection. However, Article 2 includes "other status" in its enumerated grounds.[30] The eleven other enumerated grounds include characteristics that are inalienable or deeply personal. As sexual orientation and gender identity are accepted as being both inalienable and fundamental to a person's dignity, the international community has interpreted "other status" as including sexual orientation.[31]LGBT rights are to be protected by every party to the UDHR, including Mongolia.

iii) The Yogyakarta Principles

The Yogyakarta Principles have not been ratified internationally and therefore are not considered to be conventional international law. However, as they were drafted under the values created by various international treaties, such as the ICCPR and the UDHR, these principles are arguably a reflection of customary international law, and therefore still enforceable.[32] Customary international law is a powerful tool in determining how states view their international legal obligations. Therefore, these principles are a fair representation of the obligations states feel towards protecting LGBT people from discrimination. The Mongolian government should look to these principles to determine the best way to apply international human rights law to its LGBT citizens.[33] The mandate is clear: "All human beings are born free and equal in dignity and rights. Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights."[34] This is arguably the new international standard for LGBT anti-discrimination law.

The Mongolian Government has a clear international obligation to protect all citizens from discrimination, including on the grounds of sexual orientation and gender identity. This obligation stems from both conventional and customary international law. The United Nations has directly addressed the Mongolian Government, indicating that they must tackle LGBT discrimination. There is no legal argument available to Mongolia to not follow their international obligations. By not protecting LGBT citizens, Mongolia is in direct breach of international human rights law.

b) The Constitution of Mongolia Protects All Citizens' Rights

The Constitution of Mongolia requires the Mongolian Government to fulfill all of the duties required of it under any treaty to which it is a party.[35] As such, the Government is constitutionally obligated to protect LGBT people from discrimination due to its international agreements. But under Mongolia's own domestic laws, there is debate as to whether or not the Government is obligated to extend discrimination protection to sexual minorities. The protection of human rights is guaranteed under Article 14(2) of the Constitution:

> No person shall be discriminated on the basis of ethnic origin, language, race, age, sex, social origin and status, property and assets, employment occupation and official position, religion and conscience, conviction and opinion, and education.[36]

Sexual orientation and gender identity are not enumerated, but they may be analogous.

Following the decision in *Toonen v Australia*, there is a strong legal argument that "sex" as an enumerated ground can be read to include sexual orientation, as it is in the ICCPR. Some countries have used this argument to extend protection to sexual minorities, whereas others have read sexual orientation as being analogous to protected grounds that are

[30] *Ibid* at Article 2.

[31] Lucie Cviklovič "Advancement of Human Rights Standards for LGBT People Through the Perspective of International Human Rights Law," (2012) 2 Journal of Comparative Research in Anthropology and Sociology, 45-60, at 56 [Cviklovič]

[32] *Ibid* at 56

[33] *Ibid* at 48

[34] International Commission of Jurists, *Yogyakarta Principles – Principles on the application of international human rights law in relation to sexual orientation and gender identity* March 2007, at Principle 1 [Yogyakarta Principles].

[35] Constitution, *supra* note 23 at Article 10(2).

[36] *Ibid* at Article 14(2).

inalienable, such as race.[37] The Mongolian Constitution guarantees that all persons are equal before the law.[38]Current practice appears to deny equal rights before the law to sexual and gender minorities under this Article 14(1). Clearly this is not how a democratic society should function. Discrimination protection for all citizens is a constitutionally enshrined right. To not protect LGBT people, a group that exists due to an inalienable personal characteristic analogous to race and social origin, is unconstitutional.

The Constitution requires the Mongolian Government to ensure human rights and freedoms and to fight any violations of such.[39] The Government has been instructed by the UN on how to proceed with implementing these protections, yet no protection has come to fruition. So the question now is why are they refusing to take action? Why is the Mongolian Government breaching not only international law, but also their own Constitution?

It is evident from the preceding argument that Mongolia is legally obligated, both internationally and domestically, to provide discrimination protection for LGBT people. So how can the Government implement the changes necessary to meet their obligations? What are some solutions that will help to prevent discrimination on the grounds of sexual orientation and gender identity in Mongolia?

IV. Legal Reform and Educating the Public will Reduce Discrimination Against LGBT People

In government, most laws are created as a response to a changing society. Society evolves and develops, and the government must respond to and regulate changes. This cannot be the case for human rights. Human rights protect minorities from the majority. As such, if a government waited until the majority changed its position with respect to the minority group, anti-discrimination laws would be redundant. In many cases, governments enacting anti-discrimination laws are the first steps for social movements.[40] In order to reduce the extreme homophobia and transphobia that exists in Mongolia, the Government must deter such behavior. This deterrence is enacted through the passage of anti-discrimination laws and criminal sanctions.

a) Amendments Must Be Made to the Criminal Code of Mongolia

i) Consensual Same-Sex Sexual Activity Cannot Be Penalized

Consensual same-sex sexual activity is not explicitly prohibited in Mongolia. However, there is still a way in which consensual same-sex sexual activity can lead to criminal penalties. Article 125 of the Criminal Code prohibits "satisfaction of sexual desire in an unnatural manner."[41] Amnesty International and the International Lesbian and Gay Association have both criticized this wording, arguing that it could be used to punish same-sex sexual activity.[42] In many countries throughout the world, similar wording of "unnatural desires" has been used against LGBT people.[43] There needs to be a clear definition of "unnatural manner" in the Criminal Code to prevent the authorities from arbitrarily using it to punish LGBT people. Sexual orientation and gender identity are natural, and the Mongolian Government must explicitly recognize and state this fact in the law.

ii) Crimes Based on Prejudice are Hate Crimes and Must be Treated as Such

Violent attacks on LGBT people are often brutal.[44] When a person is attacked due to the fact that they belong to a specific minority group, that is a hate crime; they are attacks stemming from prejudice towards a specific group. Crimes of this nature cannot go

[37] *Egan v Canada*, *supra* note 7 at para 177.

[38] Constitution, *supra* note 23 at Article 14(1).

[39] *Ibid* at Article 19(1).

[40] Chen Yu-Rong, Wang Ping, Petrus Liu, "Obstacles to LGBT Human Rights Development in Taiwan," (2010) 18.2 East Asia Cultures Critique, 399-407, at 400 [Taiwan].

[41] Criminal Code, *supra* note 14 at Article 125.

[42] Embassy of the United States in Mongolia, "Report on Human Rights in Mongolia," (2012) http://mongolia.usembassy.gov/hrr2013.html [US Embassy].

[43] A/HRC/29/23, *supra* note 9 at para 13.

44 *Ibid* at para 23.

unpunished in a democratic society. There must be respect from all human beings towards all others, a respect that is constitutionalized in Mongolia.[45] How, then, does the Mongolian Government ignore ultra-nationalist targeting of LGBT people and ignore the inaction of police forces in protecting LGBT victims? In the last year, the Mongolian Government has put forward draft amendments to the Criminal Code that provide legal protection for LGBT people, but it has been a slow process.[46] Hate crime legislation is urgent and time-sensitive. LGBT people need these laws in place to feel protected and to feel as though their government cares about their protection.

Since 2011, many countries have enacted or strengthened their hate crime laws with respect to sexual orientation and gender identity. Albania, Chile, Finland, Georgia, Greece, Honduras, Malta, Montenegro, Portugal, and Serbia have all worked to ensure that perpetrators of attacks on LGBT people, attacks based on prejudice, are punished for their actions.[47] It is now time for Mongolia to enact their own hate crime laws that establish prejudice towards LGBT people as an aggravating factor.[48]

b) Constitutional Amendments Must Be Made

It must be realized that without explicit protection for LGBT people, there is no guarantee of protection. Sexual orientation and gender identity protection need to be explicitly included in Mongolian law in order to fulfill both the international and domestic obligations that the Government has. To even include an open ended "or other basis" at the end of Article 14(2), as it exists in the UDHR, would provide a more secure guarantee of discrimination protection for LGBT people than they currently have.[49] These are issues that have been pointed out to the Mongolian Government by the UN Human Rights Council over four years ago, but there has been no progress.[50]

By explicitly protecting sexual minorities from discrimination, society will benefit. As has been demonstrated, homophobia and lack of protection leads to homelessness, poverty, and economic disadvantage throughout the entire country. When LGBT people are protected from being fired because of their sexual orientation, they are more likely to contribute economically in society. When LGBT people are protected from eviction because of their sexual orientation, they are more likely to remain sheltered and out of poverty. By simply adding sexual orientation and gender identity as protected grounds in the Constitution, Mongolia as a whole will benefit.

c) Education Reduces Discrimination

Laws have a teaching effect. Laws inform citizens as to what is acceptable and what is not. To protect human rights, the law has to change before society will change.[51] Equality is reinforced when legal protections are put into place. This is particularly true for Mongolia. There are many nations throughout the world that when debating the introduction of anti-discrimination laws for LGBT people used religious arguments to justify not protecting LGBT people. Yet in Mongolia, there is a lack of underlying religious factors that influence society's view of the LGBT community.[52] Understanding this, it is clear that homophobia is a result of lack of education concerning this minority. Steps must be taken to increase the public awareness of LGBT issues and rights, and that begins with the Government acting first, rather than the Government waiting for social acceptance of LGBT people to improve.[53]

First steps have been taken on this front, as the curriculum for grade nine students in Mongolia covers topics on sex, including sexual orientation and identity.[54] Unfortunately, sexual orientation

[45] Constitution, *supra* note 23 at Articles 17(1) and 17(2).

[46] UNDP Report, *supra* note 8 at 20.

[47] A/HRC/29/23, *supra* note 9 at para 39.

[48] *Ibid* at para 78.

[49] UNDP Report, *supra* note 8 at 19.

[50] *Ibid* at 18.

[51] Hillary Clinton, *supra* note 6.

[52] UNDP Report, *supra* note 8 at 24.

[53] US Embassy, *supra* note 42.

[54] UNDP Report, *supra* note 8 at 28.

and gender identity is typically ignored by the teachers. In a survey completed by young LGBT community members in Mongolia, only ten percent of respondents stated that they were taught about sexual orientation and gender identity.[55] The curriculum exists, but the Government now needs to enforce it. Social change begins with education, especially through educating the younger generation. By ensuring public awareness of LGBT issues, the Mongolian Government can curtail the extreme levels of homophobia and transphobia evident in Mongolia.

V. Conclusion

Human rights are an international reality. They cannot be restricted because of domestic morality or opinions.[56] LGBT people are entitled to their rights and to be free from discrimination, just the same as women, children, and racial minorities are. These rights are absolute. To explicitly protect LGBT people from discrimination in Mongolia is simply to recognize the rights that this minority has always had. As then United States Secretary of State Hillary Clinton simply stated: "that is why gay rights are human rights, and human rights are gay rights."[57]

Anti-discrimination laws are just the first step. There is so much more work that needs to be done throughout the world, not just in Mongolia, on LGBT rights. There are rights to be represented as a family, adoption rights, surrogacy rights, and marriage equality, to name a few. In order to achieve these rights, discrimination towards LGBT people cannot be condoned or tolerated. Any society that allows a minority group to be openly discriminated against "remains in a Dark Age without democracy."[58] Democracy calls for the equal treatment of all before the law and puts an obligation on the State to prevent, investigate, and punish acts of violence or discrimination towards all groups of people.[59]

The current state of LGBT affairs in Mongolia is changing, and credit must be given to the Mongolian Government for that. Unfortunately, it is not changing fast enough. Stereotypical views of LGBT people in Mongolia must be changed through education, which stems from legal reform. The Government must punish those who attack or discriminate against LGBT individuals, or risk legitimizing that violence. This issue is urgent and the Government cannot delay action any further, particularly since the Mongolian Government is in breach of both international law and its own Constitution. Furthermore, delay only places LGBT Mongolians at continued risk of physical and sexual assault and murder. By enacting anti-discrimination protections for LGBT Mongolians, the Mongolian Government can uphold its promise to foster a democratic society that protects the rights of *all* Mongolians.

[55] *Ibid.*

[56] Gerber and Gory, *supra* note 28 at 433.

[57] Hillary Clinton, *supra* note 6.

[58] Taiwan, *supra* note 40 at 403.

[59] A/HRC/29/23, *supra* note 9 at para 11.

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РЕФОРМЫ ПЕНИТЕНЦИАРНОЙ СИСТЕМЫ ОБЩЕСТВА, КАК ВАЖНЕЙШИЙ ЭЛЕМЕНТ ОБЕСПЕЧЕНИЯ БЕЗОПАСНОСТИ ГОСУДАРСТВА (НА ПРИМЕРЕ РОССИИ И МОНГОЛИИ)

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Концепция развития уголовно-исполнительной системы Российской Федерации до 2020 года, утвержденная распоряжением Правительства Российской Федерации от 14.10.2010 г. №1772-р, большое внимание уделяет расширению сферы применения наказаний и иных мер, не связанных с лишением свободы, а также создание условий для подготовки освобождающихся лиц к постпенитенциарной адаптации. В последнее время произошли большие перемены в сфере исполнения наказаний и мер уголовно-правового характера, не связанных с изоляцией осужденных от общества.Внесены изменения в уголовное и уголовно-исполнительное законодательство.

Наряду с названными выше изменениями в законодательстве, важное внимание уделялось и уделяется режиму отбывания наказаний и обеспечению безопасности в местах принудительного содержания[1].

Режим в исправительных учреждениях выражает сущность и содержание наказания, поскольку в нем осуществляется кара, то есть совокупность применяемых к осужденным мер принуждения и правоограничений.Одновременно режим устанавливает правила поведения всех субъектов и участников правоотношений, их права и обязанности, возникающие по поводу исполнения и отбывания наказания. Нормы режима обеспечивают порядок реализаций правоограничений[2], прав и обязанностей соответствующих субъектов и участников процесса исполнения и отбывания наказания.

Исправительные учреждения во все исторические периоды отличались специфической замкнутостью, отчужденностью от других общественных структур и институтов, что связано с исполнением уголовного наказания в виде лишения свободы, с требованиями обеспечения изоляции осужденных, постоянного надзора за ними, в точном следовании официальным Правилам внутреннего распорядка исправительных учреждений.

Европейские пенитенциарные правила к основным требованиям режима относят: обеспечение условий жизни, совместимых с человеческим достоинством, поддержание и укрепление связей с родственниками и общественностью, предоставление возможности осужденным развивать навыки и склонности, которые помогут им успешно включиться в жизнь общества после освобождения[3].

В соответствии с ч. 2 ст. 9 УИК РФ основными средствами исправления

[1] В федеральном законе № 76 – ФЗ от 10.06.2008 года подробно указываются, какие места относятся к местам принудительного содержания.

[2] Чучаев А.И., Фирсова А.П. Уголовно-правовое воздействие: понятие, объект, механизм, классификация: монография. – «Проспект», 2010. С.23.

[3] Российский курс уголовно-исполнительного права.В 2-х т. Т.2. Общая часть: учебник / Е.А. Антонян, А.В. Бриллиантов, А.Я. Гришко и др.; Под ред. В.Е. Эминова, В.Н. Орлова. – М.: МГЮА имени Кутафина; ООО «Элит», 2012. С. 559.

осужденных являются: установленный порядок исполнения и отбывания наказания (режим), воспитательная работа, общественно полезный труд, получение общего образования, профессиональная подготовка и общественное воздействие. Исправление осужденных – это формирование у них уважительного отношения к человеку, труду, нормам, правилам и традициям человеческого общежития и стимулирование правопослушного поведения (ч. 1 ст. 9 УИК РФ).

Главной задачей режима отбывания наказания в колонии является создание таких условий отбывания наказания, при которых как можно полнее использовались бы средства воспитательного воздействия на осужденных.И хотя режим связан с принуждением, одна из его задач – это добиться сознательного выполнения осужденными требований внутреннего распорядка в колонии, соблюдении дисциплины.

Нормы УИК РФ, регулирующих режим в исправительных учреждениях (гл. 12 УИК РФ), детализируются таким ведомственным нормативным актом, как Правила внутреннего распорядка исправительных учреждений, утвержденные Минюстом России[4].

Существенное место в обеспечении режимных требований в исправительных колониях (далее ИК) принадлежит его средствам, которые законодательно закреплены в ст. 83-86 УИК РФ.Уголовно-исполнительный кодекс регламентирует использование технических средств надзора и контроля (ст. 83), применение которых до его принятия не имело нормативно-правовой базы. Данные технические средства можно классифицировать на: средства обнаружения нарушений режима; средства связи; аудиовизуальные средства[5].

Другим важным средством обеспечения режима отбывания лишения свободы является оперативно-розыскная деятельность.В исправительных учреждениях она осуществляется оперативными аппаратами.Уголовно-исполнительное законодательство определяет главное в работе оперативных аппаратов исправительных учреждений (далее ИУ).Наиболее важным является борьба с преступностью в ИУ.Оперативно-розыскные мероприятия в ИУ осуществляются, прежде всего, в целях обеспечения безопасности осужденных, персонала и иных лиц, выявления, предупреждения и раскрытия готовящихся и совершенных преступлений и нарушений установленного порядка отбывания наказания.С помощью этой деятельности часть преступлений пресекается на стадии их подготовки, профилактируется большая часть правонарушений, перекрываются каналы поступления в ИК запрещенных предметов.

Нормативно-правовая база пенитенциарной системы Монголии во многом совпадает с российским законодательством, но в то же время имеет и свои особенности.

Обеспечению безопасности в исправительных учреждениях Монголии уделяется повышенное внимание, особенно в связи с наступившими изменениями в уголовном и уголовно-исполнительном законодательстве начиная с 2008 года.Важное значение здесь имеет закон Монгольской республики «О профилактике преступлений» от 5

[4] Бюллетень нормативных актов федеральных органов исполнительной власти.- № 47.- 21.11.2005.

[5] Комментарий к Уголовно-исполнительному кодексу Российской Федерации и Минимальным стандартным правилам обращения с заключенными/ Под общ.ред. И.Г. Мищенкова. – М.: Экспертное бюро. – 1997. – С. 82-84.

декабря 1997 г.[6] Ряд его положений сформулирован в строгом соответствии с нормами международных документов. В частности, закрепляется положение п. V (5.1.4) об участии общественности в профилактической работе; п. VI (6.1.3) об устранении условий и причин преступности; п. XI об обязанностях телевидения и средств массовой информации в профилактической работе и др. Особое внимание уделяется вопросам обеспечения безопасности в исправительных учреждениях Монголии в отношении несовершеннолетних осужденных.[7]

С учетом указанных рекомендаций в Монголии был принят соответствующие законы, в которых реализована определенная часть их. Это такие законы как «Об исполнении постановлений об аресте, заключении под стражу подозреваемого, обвиняемого, подсудимого» (1999 г.), «Об исполнении судебного решения» (2002 г.)[8] и ведомственный нормативный акт -приказ Министра юстиции «О порядке исполнения Закон «Об исполнении постановлений об аресте, заключении под стражу подозреваемого, обвиняемого, подсудимого»[9].

В соответствии с законами Монголии и иными нормативно-правовыми актами в целях обеспечения безопасности в исправительных учреждениях основное внимание заострено на следующее:

1) установление и определение основных целей обеспечения безопасности в ИУ;

2) определение основных внешних и внутренних факторов, воздействующих на обеспечение безопасности в ИУ;

3) установление схем обеспечения безопасности в ИУ;

4) определение понятия, содержания, особенностей и состава обеспечения безопасности в ИУ.

Обеспечение безопасности в исправительных учреждениях базируются, во-первых, на современной нормативно-правовой базе, регулирующей правоотношения основных субъектов в ИУ; во-вторых, зависит от состояния специальных средств, техники и вооружения, имеющихся в наличии в ИУ; и в-третьих, от профессиональных навыков и способностей самого персонала пенитенциарной системы Монголии.

Под внешними факторами, влияющими на безопасность в исправительных учреждениях в первую очередь, понимают саму объективную обстановку, которая, как правило, зависит от социально-экономических, политических, нормотворческих, идеологических и иных особенностей государства; а также воздействия неконтролируемых стихийных сил природы.

К внутренним факторам относят следующий перечень обстоятельств:

- состояние, уровень, динамику и тенденции пенитенциарной преступности в исправительных учреждениях Монголии;
- дисциплинарную практику осужденных в соответствии с правилами внутреннего распорядка в ИУ;
- состояние специальных средств, техники и вооружения, а также качественное состояние самих объектов уголовно-исполнительной

[6] О профилактике преступлений. Закон Монгольской Республики // Сб. законов Монгольской Республики - Улан-Батор, 2002

[7] Сб. нормативных актов по правам несовершеннолетних - Улан-Батор, 1997. Хуухдийнэрхийнталаархи Монгол улсынхууль Улаанбаатар он. - 2001 он.

[8] Сборник законов Монгольской республики - Улан-Батор, 2002

[9] Приказ МЮ № 74-2000

системы;

- квалификация и профессиональный уровень самих работников пенитенциарной системы Монголии.

В соответствии со ст. 3 и ст. 5 закона Монголии «Об исполнении судебного решения» (2002 г.)[10] дается классификация обеспечения безопасности в исправительных учреждениях, которая подразделяется условно на три группы:

а) роль и значение руководителя (исполняющий субъект);

б) техническое состояние объекта исправительных учреждений;

в) оперативно-служебная деятельность персонала ИУ.

Сама деятельность уголовно-исполнительной системы Монголии, как государственная, основывается на основных принципах, таких как:

- принцип эффективности деятельности субъектов управления;

- принцип превентивности, опережения и предотвращения негативных последствий;

- принцип научного подхода по обеспечению безопасности;

- принцип взаимодействия всех субъектов, заинтересованных в обеспечении безопасности;

- принцип адекватности и гибкости, реагирующий на воздействие внешних и внутренних факторов.

В результате изучения и анализа предмета исследования, как в России, так и в Монголии обосновывается вывод о необходимости учитывать внутренние и внешние, влияющие на обеспечения безопасности в исправительных учреждениях и соблюдения в них режима. Их игнорирование вызывает негативные последствия - ослабление или ужесточение режима, что будет, безусловно, препятствовать выполнению поставленных государствами задач в свете реформирования пенитенциарной системы.

[10] Сборник законов Монгольской республики. - Улан-Батор, 2002.

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ПРАВОВАЯ ПРИРОДА ЗАРУБЕЖНЫХ СВЯЗЕЙ СУБЪЕКТОВ РОССИЙСКОЙ ФЕДЕРАЦИИ

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В статье исследуется правовая база, регламентирующая вопросы осуществления субъектами Российской Федерации международных связей, анализируются имеющиеся в юридической литературе мнения относительно правовой природы таких связей, обосновывается позиция о многоаспектности участия субъектов РФ в межгосударственной деятельности.

Ключевые слова: международные связи, субъект Российской Федерации, федеративные отношения

In article the legal base regulating questions of implementation by subjects of the Russian Federation of international relations is investigated, opinions of rather legal nature of such communications available in legal literature are analyzed, the position about different forms of participation of territorial subjects of the Russian Federation locates in interstate activity.

Keywords: international relations, subject of the Russian Federation, federal relations

С позиций международного права государство всегда рассматривается как целостная структура, при этом форма его государственно-территориального устройства не имеет существенного значения при выстраивании дипломатических отношений, оформления акта признания и пр. Между тем очевидное различие правового статуса территорий в составе государства в зависимости от того является ли оно сложным или простым, конфедеративным, федеративным либо унитарным, влияет на выстраивание зарубежных связей частей государства (субъектов, автономий). При этом, на наш взгляд, имеется также прямая зависимость возможности выстраивания соответствующих взаимоотношений от степени централизации либо децентрализации страны.

Последний тезис можно проследить на истории становления и развития федеративных отношений в Российской Федерации. Так, после распада СССР на этапе «парада суверенитетов» произошло резкое расширение международных контактов субъектов РФ, при этом регионы активно, а в каких-то аспектах и чрезмерно активно, включились в межгосударственные отношения. Подтверждением тому является и региональное законодательство 90-х, в особенности республик. Так, например, в статье 74 Конституции Республики Башкортостан1993 г. закреплялось, что она является самостоятельным участником международных и внешнеэкономических отношений и связей, кроме тех, которые

добровольно переданы по Договору в ведение Российской Федерации. [1]

Нельзя не вспомнить и имевшиеся сепаратистскиедвижения в некоторых республиках, составивших реальную угрозу территориальной целостности государства.

Следующий этап, хронологически ознаменованный приходом нового столетия, проявился в резком усилении централизации власти, выстраивании единства правового пространства, законодательном и доктринальном обосновании единства системы государственной власти. Так, в Определении Конституционного Суда Российской Федерации от 27 июня 2000 г. № 92-О указано, что нормы конституций республик, устанавливающие их статус в качестве субъектов международного права, противоречат положениям Конституции Российской Федерации. Отмечалось, что «республика не может быть субъектом международного права в качестве суверенного государства и участником соответствующих межгосударственных отношений, не может заключать договоры международно-правового характера»[2].

В этот же период был принят Федеральный закон от 04.01.1999 № 4-ФЗ«О координации международных и внешнеэкономических связей субъектов Российской Федерации» [3]. Статья 1 данного закона закрепляет право субъектов Российской Федерации на осуществление международных и внешнеэкономических связей с субъектамииностранныхфедеративных государств, административно - территориальными образованиями иностранных государств, а также на участие в деятельности международных организаций в рамках органов, созданных специально для этой целив пределах полномочий, предоставленных им Конституцией Российской Федерации, федеральным законодательством и договорами между органами государственной власти Российской Федерации и органами государственной власти субъектов Российской Федерации о разграничении предметов ведения и полномочий.Осуществление таких связей с органами государственной власти иностранных государств возможно для субъектов Российской Федерации с согласия Правительства Российской Федерации. В статье 10 Закона закреплено право субъектов Российской Федерации в целях реализации соглашений об осуществлении международных и внешнеэкономических связей по согласованию с Министерством иностранных дел Российской Федерации открывать свои представительства за пределами Российской Федерации. При этом прямо подчеркивается, что представительства не имеют дипломатический статус и на него не могут быть возложены дипломатические либо консульские функции.

Указанный закон имел исключительно важное значение для правового обеспечения баланса интересов РФ и ее субъектов в вопросах соблюдения единства внешней политики. Более того на законодательном уровне четко определено, что дипломатических представительств регионального уровня быть не может.

В этой связи создаваемые представительствав зарубежных государствах, как правило, являются региональными органами государственной власти. Например, в Республике Бурятия на основании Указа Президента Республики Бурятия от 07.08.2007 № 486 «О структуре исполнительных органов государственной власти Республики Бурятия»создано представительство Республики Бурятия Российской

Федерации в г. Улан-Батор Монголии, являющиеся исполнительным органомгосударственной власти Республики Бурятия[4]. Согласно Положению о Представительстве в его компетенцию входит представление интересов Республики Бурятия в г. Улан-Батор Монголии всфере торгово-экономического, научно-технического, культурного, гуманитарного сотрудничества [5].

В 2003 году принят Федеральный закон «Об основах государственного регулирования внешнеторговой деятельности», определивший основы государственного регулирования полномочий Российской Федерации и ее субъектов и также четко очертил границы полномочий субъектов Российской Федерации в сфере внешней торговли [6].

Следует отметить, что, по мнению ряда авторов, «положения данного Закона в определенной мере сузили компетенцию региональных властей в области правового регулирования внешнеторговой деятельности по сравнению с ранее действовавшим законодательством. Были исключены полномочия, связанные с возможностью предоставления дополнительных, по отношению к федеральным, финансовых гарантий участникам внешнеторговой деятельности, зарегистрированных на территории соответствующего субъекта Российской Федерации и др.»[7].

Таким образом, с учетом норм действующего законодательства, сформированного в период условно выделяемого нами «второго этапа», а также исходя из исторической, доктринальной посылок, можно говорить о том, что субъекты Российской Федерации не являются и не могут быть субъектами международного права. Регионы России по примеру классической федерации передали федеральным властям часть своих полномочий, признают общегосударственный неделимый суверенитет, поэтому и говорить о некой доле суверенных прав, в том числе связанных с возможностью осуществления внешних сношений, сегодня, вряд ли оправдано. Вместе с тем, анализ действующего законодательства позволяет говорить о наличии определённых суммарных прав, позволяющих субъектам РФ участвовать в международном общении. Однако в юридической литературе на сегодняшний день отсутствует единая позиция относительно правовой природы таких зарубежных связей и статуса субъектов РФ при их осуществлении. Так, некоторые авторы исходят из различного правового статуса самих субъектов РФ. Например, имелась позиция о государственной природе международных отношений республик в составе РФ, исходящая из толкования части 2 статьи 5 Конституции РФ, где указывается на то, что республики являются государствами[8]. В литературе высказывалось также мнение, что в вопросах международных связей статус республик и статус других субъектов равнозначен [9].

В то же время, учитывая, что в нормах текущих законов мы встречаем полномочия субъектов РФ в рамках внешнеэкономической деятельности, высказываются мнения, что именно вопросы экономического развития являются основным аспектом международных связей субъектов РФ[10].

Ещеболее весомой составляющей межгосударственных взаимоотношений субъектов РФ является приграничное сотрудничество. Значительно количество регионов РФ граничат с территориями иностранных государств и это, безусловно, не может не влиять на выстраивание связей с приграничными территориями. При этом вопросы

приграничного сотрудничества могут охватывать не только сферу экономики, но и распространяться на создание условий для взаимодействия в области образования, культуры, изучения населением языков сопредельных государств, осуществления градостроительной деятельности, иных вопросов инфраструктуры, вопросов интеграции систем предупреждения и ликвидации чрезвычайных ситуаций. Направлениями приграничного сотрудничества могут быть также научно-технические, экологические, спортивные и иные связи, которые способствовали бы созданию благоприятных условий для развития приграничных территорий. Соответствующие правоотношения должны быть, на наш взгляд урегулированы законодательно. Следует отметить, что работа по подготовке и внесению на рассмотрение проекта Федерального закона «О приграничном сотрудничестве в Российской Федерации» проводилась отдельными субъектами права законодательной инициативы, но до настоящего момента так и не реализована[11].

Доводом в пользу того, что на правовую природу зарубежных связей субъектов РФ влияет значительное количество факторов, прослеживается на примере создания международных структур не столько по приграничному, сколько по географическому принципу.

Так, например, с 2005 года Республика Бурятия является членомсозданной в 1996 г. Ассоциации региональных администраций стран Северо-Восточной Азии (АРАССВА), включающей 65 региональных администраций из России, Республики Корея, Китая, Монголии и КНДР.

Широкое взаимодействие субъекты Российской Федерации осуществляют со странами СНГ, поскольку там сосредоточены жизненно важные для страны ресурсы, проживает большая часть соотечественников.

В этой связи полагаем, что на законодательном уровне должны быть учтены все возможные аспекты выстраивания субъектом Российской Федерации отношений в межгосударственном пространстве, отлажены различные формы такого взаимодействия.

Вышеизложенное позволяет резюмировать, что на современном этапе после выстраивания четкой вертикали власти в России выстроено централизованное федеративное государство, однако не в полной мере определены правовые и организационные формы взаимоотношений субъектов РФ и зарубежных государств, что обусловливает необходимость продолжения проведения исследований в указанной сфере.

1. Конституция Республики Башкортостан в редакции от 24.12.1993 г. № ВС-22/15 (Ведомости Верховного Совета и Правительства Республики Башкортостан", 1994, № 4 (22), ст. 146)

2. Определение Конституционного Суда РФ от 27.06.2000 № 92-О "По запросу группы депутатов Государственной Думы о проверке соответствия Конституции Российской Федерации отдельных положений Конституций Республики Адыгея, Республики Башкортостан, Республики Ингушетия, Республики Коми, Республики Северная Осетия - Алания и Республики Татарстан" (Собрание законодательства РФ, 17.07.2000, № 29, ст. 3117).

3. Федеральный закон от 04.01.1999 №4-ФЗ «О координации международных и внешнеэкономических связей субъектов Российской Федерации» (Собрание законодательства РФ, № 2, 11.01.1999, ст. 231).

4. Указ Президента Республики

THE APPLICABLE LAW MECHANISM OF THE INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

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Introduction

The 1966 International Centre for Settlement of Investment Disputes (ICSID) Convention arguably created some remarkable breakthroughs. The consent of a state to the jurisdiction of ICSID gives a private right to a party to remain sovereign and in an equal position in a lawsuit. In doing so, contracting states make compromises and promises to investors. Article 25(1) of the ICSID Convention requires a submission of parties' consent prior to a dispute to the ICSID jurisdiction and no proceeding can take place under the Centre unless parties have given their written consent. Moreover, the system of the Convention is premised on two levels of consent. At the first level, one finds the consent given by a host state, and the second, an investor by means of an agreement to ICSID arbitration[1]. Consent forms the foundation and cornerstone of the jurisdiction and proceedings of the ICSID mechanism.

I.1 The method of application of law in Article 42

The applicable law mechanism under the ICSID Convention provides a new and convenient way for the arbitrator to decide using the proper law, which in some cases, has caused considerable problems. The ICSID Convention of 1965 used a unique method in selecting the applicable law. As some scholars may refer, the 'direct line of application method' states that the arbitrator will not consider conflicts in rules of law but rather directly decides the appropriate law for the case.[2] Article 42 created a guideline system, which defines how the appropriate law is selected for disputes between a contracting state and a national of the other contracting state. Article 42 should receive attention as it only addresses the application of substantive law. The Convention laid down:"*The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable*".[3]

This section clearly and directly emphasizes that when there is no choice of selecting applicable law between the parties to the dispute, the tribunal should apply the law of the host state and rules of international law. In doing so, the parties to the dispute will know what law will apply from the beginning. Therefore, the predictability and certainty of the result of arbitration increases as well as efficiency and transparency. The direct application of law dispenses with the traditional rules of conflict, and it clearly invests in the arbitration the right to apply international law as it may be applicable.

I.2 Issues regarding applying the law agreed by the parties

The first sentence of Article 42(1) states that the Tribunal shall decide a dispute in accordance with such

[1] BerbardoM.Cremades, "Arbitration between States and Investors; some jurisdiction issues, in Business Law", 2001, P.157

[2] Zhu Kepeng, "Applicable Law in International Commercial Arbitration",Law Press of China, 1999, P.154

[3] See, Article 42.1 of ICSID Convention

rules of law as may be agreed by the parties.[4]This principle was not only recognized universally as a basic principle in the international arbitration field, but it was also illustrated in many important international arbitration conventions such as the ICC[5]Arbitration Rules, which set forth: "The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute."[6]

Similar to the ICC, the European Convention articulated: "The parties shall be free to agree upon the rules of law to be applied by the arbitrators to the substance of the dispute."[7]Similar provisions can be found in Article 28 of the UNCITRAL Model Law and in arbitration laws of many countries such as France, Sweden, and Egypt. The principle of party autonomy was prioritized and adopted by the ICSID Convention.

As some scholars point out, the parties are free to decide the substantive law that the Tribunal should apply in their dispute settlement. They can also leave the matter to the second sentence of the residual rule of Article 42(1)[8]. The common explanation is that both parties can choose the law of the host state, the law of the home state, and international law, and general rules of law.

However, practice shows that in most circumstances, parties usually choose the law of the host state to govern the investment agreement since the investment and the dispute always take place in the territory of the host state. Considering all these elements, the autonomy of the parties is limited in most occasions and it is very rare for host states to agree on the application of law from a third state to govern investment occurring in its territory. In addition, the autonomy of the applicable law cannot breach mandatory international law, international customary law or treaty obligations. The conclusion is that the law of the host state is the typical choice for a contractual relationship concerning an investment. The law selected by the investor's home state or third state is uncommon as it conflicts with activities closely related to the host state's legal system, e.g., administrative law, labor law and tax law.

According to statistics on cases arbitrated by ICSID, most parties agreed in applying the law of the host state. Only in the case of *Colt Industries Operating Corporation v. Republic of Korea* (Case No.ARB/84/2),[9]both parties agreed to apply the law of the investor's home state in their dispute. In this case, technical and licensing agreements for the production of weapons was more closely related to the law of the investor's home state. Such cases are special and rarely appear.

I.3 Legal issues concerning the application of host state law

As previously mentioned, the law of the host state is the typical choice, the ICSID Convention confirms this by the following:"In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable".[10]

This provision emphasizes that the arbitration tribunal can directly decide the applicable law in the dispute if the tribunal cannot find an agreement in selecting a law between parties or if an

[4] See, Art42 of ICSID Convention.

[5] ICC activities cover a broad spectrum, from arbitration and dispute resolution to making the case for open trade and the market economy system, business self-regulation, fighting corruption or combating commercial crime. It has direct access to national governments all over the world through its national committees.

[6] See, Art 17.1 of the Rules of Arbitration of the International Chamber of Commerce 1988

[7] See, Art VII.1 European Convention on International Commercial Arbitration, 1961

[8] See Art Shihata, I.F. and Parra, A.R.Applicable, "Substantive Law in Disputes Between States and Private Foreign Parties" The Case of Arbitration under the ICSID Convention, 9 ICSID Review-Foreign Investment Law Journal 183, 1994 P.189

[9] Available at, http://worldbank.org/icsid/cases/conclude.htm

[10] See, ICSID Convention, Art 42.1

agreement is incomplete and ambivalent. The traditional choice of law in arbitration always relied on the conflict of rules. As for UNCITRAL Model Law, in the case of failure to designate a law by both parties, the arbitral tribunal applies the law determined by the rules of conflict laws considered to be applicable[11]. Also, there are similar provisions in article VII of the 1961 European Convention as well as in the ICC's Arbitration Rules. This principle of closest connection is universally accepted and applied in international arbitration when choosing law. However, in practice, only a few countries have adopted it. For instance, Switzerland's Federal Code on Private International Law stipulates that: "The arbitral tribunal shall rule according to the law chosen be the parties or, in the absence of such choice, according to the law which the action is most closely connected."[12]

When there was no agreement about applicable law, the tribunal used this provision. For instance, in the case of *Amco v Indonesia*, the Tribunal pointed out that: "*The parties having not expressed an agreement as to the rules of law according to which the dispute between them should be decided, the Tribunal has to apply Indonesian law, which is the law of the Contracting State Party to the dispute*".[13]

Sometimes, the law of the host state changes in later stages. This happens in many developing countries whose legal system is still in a transitional condition. As a general principle, the host state's new law will be applicable as it changes. This was supported by many scholars such as G.R.Delaume's argument, which states that when there is no stabilization clause, the law governing the contract is the law in force not the law when the agreement was made, so the ICSID Centre should apply contemporary law when arbitration occurs.[14] In practice, foreign investors usually require a Stabilization Clause in the investment agreement to prevent the impact of law from changing. If the parties have this kind of agreement between them, the applicable law will be the law they use to close the contract.

I. 4 Legal issues concerning application of international law in dispute

In Article 42.1, the Convention mentioned the application of international law, but it did not illustrate the function and rank between the law of host-contracting state and the rules of applicable international law. It was a compromise between developing and developed countries when the draft was discussed. As a middle measure, the Convention only placed them together with the word "and". Thus, concerning how to apply international law, many legal questions and debates arose.

Usually the parties choose both domestic law and international law to govern the dispute. However, choice of only international law and excluding any reference to a domestic law is not advisable and thus, the chosen law may lack in clarity and technical detail. In *AGIP v. Congo*, the parties had agreed on the application of Congolese law supplemented by the principles of international law. After establishing the Congolese ordinance, which nationalized the claimant's property, it came forth to be a breach of Congolese law, the Tribunal turned to international law and held that:

"In the present case, it must be recalled, that according to Article 15 of the Agreement, Congolese law can be supplemented when the occasion arises by principle of international law."[15]

In some instances, there is no

[11] See, "UNCITRAL Model Law on International Commercial Arbitration", 1985, Art28

[12] See, "Switzerland's federal Code on Private International Law", 1987,Art 187

[13] See, Award of the Case, 20 November 1984, ICSID Report 452

[14] G.R.Delaume, "Transnational Contract-Applicable Law and Settlement of Disputes "New York, Oceana Publications, 1982, P.69

[15] Award, 30 November 1979, 1 ICSID Report 323, Para. 82

mention of the application of international law in agreement between parties, therefore, is there room for the application of international law? The practice of ICSID proved the confirmation of international law by the tribunal as being fit to be applied in such circumstances. In the case of *South Pacific Properties Limited v. Egypt*, there was disagreement as to whether a choice of Egyptian law had been made by the parties, and consequently, as to whether international law was applicable in conformity with the second sentence of Article 42(1). The Tribunal declared that international law was applicable either way:

"Finally even accepting the Respondent's view, the Parties have implicitly agreed to apply Egyptian law, such an agreement cannot entirely exclude the direct applicability of international law in certain situations."[16]

Furthermore, the Tribunal pointed out that, when municipal law contains a lacuna, or international law is violated by the exclusive application of municipal law, the Tribunal is bound in accordance with Article 42 of the Washington Convention to directly apply the relevant principles and rules of international law.[17]

This attitude toward applying international law demonstrates that the Tribunal applies minimum international standards, even if the parties do not include international law in their agreement on applicable law. The complete exclusion of international law from the agreed choice of law containing only a domestic legal system would lead to undesirable consequences. A foreign investor, by assenting to only host state law, may waive the right of minimum standards for the protection of aliens and their property developed in customary international law. Such a circumstance would be contrary to the Convention's objective, which is to stimulate investment through the creation of a favorable investment climate.[18]Thus, the application of international law is always considered to play a very important role under the mechanism of the ICSID Convention.

Then, what is applicable international law? The Convention itself did not give a clear definition of applicable international law. The official interpretation about the applicable international law was found in the Report of the Executive Directors and states that the term 'international law' as used in this context, should be understood in the sense given to it by the Statute of the International Court of Justice.[19]The Statute of the International Court of Justice defines as the following:

a. International conventions, whether general or particular, establishing rules expressly recognized by the contesting state;

b. International custom, as evidence of general practice accepted as law;

c. General principles of law recognized by civilized nations;

d. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various of the nations, as subsidiary means for the determination of rules of law[20]

Many scholars, especially those from developing countries, claim the above definition is too broad and difficult to apply in practice.

Today, a significant part of international laws applicable in disputes are Bilateral Investment Treaties (BITs) between counties, with the first modern Bilateral Investment Treaty, made nearly 40years ago between Germany and Pakistan.[21] Since this time, an increasing number of European counties have concluded such treaties with

16 Award, 20 May1992, 3 ICSID Report 189, P.207

17 *Id at* 208

18 Report of Executive Directors, para.9, 1ICSID Report 25.

19 *Id, para.*40

20 See, Art 38 (1) of Statute of the international court of justice

21 Available at, http://en wikipedia.org/wiki/Bilateral_investment_treaty

developing countries. It is only since the late 1980s that BITs have come to be universally accepting of the promotion and legal protection of foreign investment. According to surveys, by the end of 2009, there were over 2,500 BITs in the world[22] and these enormous BITs constitute most of the legal rules comprising international investment law for parties in dispute.

Another noticeable development in this field is the fast increase of multinational investment treaties; we can find that several regional multilateral treaties dealing with investment have already been ratified.[23] In 1995, negotiations were established within the Organization for Economic Co-operation and Development (OECD)[24] in conclusion of the Multilateral Agreement on Investment (MAI).[25] It was envisaged that apart from providing covered investments with substantive protections (as to general standards of treatment, expropriation, currency transfers and so on), the MAI would set forth the consent of the parties to the submission of disputes with investors from other parties to arbitration under the ICSID Convention.[26] In addition, The United Nations Conference on Trade and Development (UNCTAD) is implementing a working program on a possible multilateral framework on investment. If these Multinational Agreements on Investment comes into force, the settlement procedures will include both state-to-state mechanisms such as in WTO and an investor-to-state mechanism as stipulated in most Bits. Therefore, the application of international law in the ICSID mechanism will be greatly enhanced and facilitated.

ICSID tribunals have frequently applied rules of customary international law in its practice. In the case of *Benvenuti & Bonfant v Congo*, the Tribunal upheld the principle of compensation in nationalization, constituting one of the generally recognized principles of international law.[27] Similarly, in the *LETCO v Liberia* case, for nationalization to be lawful, the Tribunal argued that it would have to be based on a legislative enactment, taken for a bona fide public purpose, remain non-discriminatory and accompanied by appropriate compensation.[28]Customary international law usually provides rules on the minimum standard for the treatment of aliens related to their property, and more specifically on expropriation and compensation, on the prohibition of denial of justice and on state responsibility for injury to aliens, these being obvious examples. In addition to customary international law, there are general principles of law and other opinions of well-established scholars related to the definition of Article 38 from the statute of the International Court of Justice debating whether legal rules require practice by a

[22] World Investment Report 2009 overview, P.1] Available at, http://r0.unctad.org/wir/pdfs/fullWIR02/ppxv-xxx.pdf

[23] These include the North American Fee Trade Agreement, reprinted in 32 ILM 289(1993); the Colonia Protocol on the Reciprocal Promotion and Protection of Investment within Mercosur, signed on January 27, 1994 and the Buenos Aires Protocol on the Promotion and Protection of Investment Made by Countries That are not Parties to Mercosur, signed on August 8, 1994(both protocols concluded under the Asuncion Treaty Establishing a Common Market Between Argentina, Brazil, Paraguay and Uruguay (Mercosur), signed on March 26, 1991); the Treaty on Free Trade Between Colombia, Mexico and Venezuela, signed on June 13, 1994; and the Energy Charter Treaty, reprinted in 34 ILM 381 (1995).

[24] OECD was established 1961 in Paris, it brings together the governments of countries committed todemocracy and the market economy from around the world. It provides a setting where governments compare policy experiences, seek answers to common problems, identify good practice and coordinate domestic and international policies.

25 It was negotiated between members of the Organisation for Economic Co-operation and Development(OECD) between 1995 and 1998. Its purpose was to develop multilateral rules that would ensure international investment was governed in a more systematic and uniform way between states. When the first draft was leaked to the public in 1997, it drew widespread criticism from civil societygroups and developing countries, particularly over the possibility that the agreement would make it difficult to regulate foreign investors. After an intense global campaign was waged against theMAI by the treaty's critics, the host nation France announced in October 1998 that it would not supportthe agreement, effectively killing it due to the OECD's consensus procedures.

[26] See, Antonio R.Parra "The Role of ICSID in the Settlement of Investment Disputes" ICSID news, Volume 16,No.1.1999,P.5

[27] Award, 15 August 1980, 1 ICSID Report 357

[28] Award,31 March 1986,2 ICSID Report 366

majority of countries.

On this point, developing countries still hold different opinions compared to developed countries and the question must be scrutinized in the ICSID practice to find a pragmatic and effective answer.

I.5 The function and relationship between international law and the law of the host state

As mentioned previously, the ICSID Convention did not indicate the hierarchy or priority between international law and host state law to govern a dispute. Although an agreement between a state and investors usually prioritizes the law of the host state, it simultaneously agrees to apply rules of international law. However, in practice, the disagreement between the application of international law and domestic law often arises.

So what role should international law play in dispute settlement? When international law and the law of the host state takes effect in one dispute, their relationship becomes a complicated question. There are several points of dispute.

Developing countries often are of the view that international law is solely supplemented to domestic law. However, scholars from western countries opposed this idea and claim that international law should at least play a corrective role, if not more. This idea was reflected in some cases, for instance, in the case of *Amco v. Indonesia*, where the Tribunal put forward an important analysis, which reads:

"This Tribunal notes that Article 42(1) refers to the application of host-state law and international law. If there is no relevant host-state law on particular matter, a search must be made for the relevant international laws. And, where there are applicable host-state laws, they must checked against international laws, which will prevailed in case of conflict. Thus, international law is fully applicable and to classify its role as only supplemental and corrective seems a distinction without a difference. In any event, the Tribunal believe that its task is to every claim of law in this case first against Indonesian law, and then against international law."[29]

From this point of view, the Tribunal thought that international law would be the last defense line of the justice. But still, this idea did not completely put international law on a higher rank than the domestic law of the host state.

Another idea further claims that international law has a higher rank of effectiveness and it will supervise and revise application of domestic law in dispute. Some scholars held this position agreeing that the Tribunal should take the law of the host state and it should be applied in the dispute first, and the Tribunal can then compare the law of the host state with international law, with the domestic laws in conflict with international law not being applied.[30] A similar opinion was found in the annulment decision in *Wena Hotels v. Egypt*. The ad hoc Committee sustained the prevalence of the host state's treaties over domestic rules of law, therefore, holding:

"In particular, the rules of international law that directly or indirectly relate to the State's consent prevail over domestic rules that might be incompatible with them. In this context it cannot be concluded that the resort to the rules of international law under the Convention, or under particular treaties related to its operation, is antagonistic to that State national interest."[31]

So this opinion concludes that the Tribunal is to examine legal issues under domestic law and international law. In case of conflict, international law prevails. An

[29] See, Resubmitted Case: Award, 5 June 1990, ICSID Report 580, Para 40

[30] AronBroches, "The Convention on the Settlement of Investment Disputes between States and Nationals of other states" Applicable law and default procedure, in Select Esseys-World Bank, ICSID and other subject of public and private International law 1995, P.195

[31] ICSID Case No ARB/98/4 Decision on annulment dispatched to the parties on February 5,2002, P.15

ICSID tribunal may not render a decision on the basis of the host state's domestic law, which is in violation of a mandatory rule of international law.

The idea of international law playing a supervisory role has earned objections from many developing countries. The key point of contention is domestic control of international investment disputes. Therefore, if the host state does not have international obligations to the investors, international law should not interfere with measures taken by the host state to deal with foreign investment in their territory.[32]Insisting on international law as only playing a supplemental role reflects the concern of developing countries before the 1990s; their concerns related mainly to politics and national security. Today, along with the current changes in the international environment, especially the acceleration of globalization, international law has been strengthened, e.g., the rules of WTO[33] as part of international law.

Considering the current international social climate, international law is still based on the principle of state sovereignty, and as a result, the state has the authority to manage activities in its territory. Under the ICSID mechanism, a state already makes a concession of this exclusive jurisdiction to foreign investors and consents to submit an investment dispute to the jurisdiction of the ICSID. Hence, if international law can supervise and revise the law of the host state in dispute settlements, developing countries will be greatly frustrated and refused by the ICSID mechanism. Thus, in order to enable the ICSID mechanism operate effectively, the idea of superiority of international law should be seriously considered.

The feasible and predictable relationship between international law and the law of host states in dispute should be one of interdependency and interaction. Today, no state can exist without trade and business with others. The gap between international law and national law is narrowing. An important priority is to harmonize national law and international law.

Theoretically, international law and domestic law are both made by states, therefore, international law and domestic law should not necessarily be in conflict, but penetrate and assist each other.[34]In consideration of the current imperfection of international law, the application of international law in practice should be subject to some standard. The Tribunal should try to find clear and generally recognized rules of international law, such as international conventions, bilateral treaties, general international commercial customs, etc.

In conclusion, there must be taken cautiously when applying rules of international law in investment dispute; relationship between law of host state; international law should be interdependent and inactive rather than fighting against each other.

I. 6 Issues concerning the application of Article 42(2)

Article 42(1) is the most important rule regarding the selection process of applicable law under the ICSID mechanism, and in most cases parties adopt this rule in their agreement. At the same time, the Convention includes another very important supplementary rule. It is Article 42(2) of ICSID convention, which reads: *The Tribunal may not bring in a finding of non liquet on the ground of silence or obscurity of the law.*

This article also is found in many international arbitration rules, which are widely recognized and applied in

[32] Zhou Chengxin "Measure of international investment dispute settlement", Publishing house of China University of Politics Science and Law,1989, P.213

[33] It was established on 1995 in Geneva, it is the only global international organization dealing with the rules of trade between nations.

[34] Wang Qieya, "International Law" law press of China, 1981. P.35

practice.[35]

Non-liquet means that it is not clear: a verdict given by a jury when a matter is to be deferred to another day of trial. The provision directs that a tribunal may not refuse to render a decision on the grounds of the law being unclear. It also prohibits an award that decides only certain questions. This provision empowers the Tribunal to create and apply appropriate law including general rules of law. It is an important guarantee of the efficiency and authority of the ICSID mechanism. Some scholars' interpretation states this provision; international law has achieved a flawless and complete stage that can provide sufficient legal base for judges and arbitrators to resolve any problem.[36] Therefore, the authority of the ICSID mechanism is greatly enhanced and it enlarges the discretion of the ICSID Tribunal.

If parties have agreed on the applicable law, the Tribunal must try to use the selected law to solve the legal questions as the first step. If the chosen law provides no answer to the legal question, the tribunal will resort to the second sentence of Article 42(1).

If there is still no applicable law or the applicable law is vague, controversial, what can the Tribunal do? According to this provision, the Tribunal must find some appropriate principle from the host state's laws or other legal sources. Particularly, this provision strengthens the application of international law, which is stipulated in Article 42(1). If the Tribunal cannot find any appropriate regulation in host state's law, and applicable international law is also lacking, they will apply general rules of law extracted from a national law system or the international system. Thus, the Tribunal is given a very broad choice of rules of law; they can even apply a measure of analogy. In addition, the Tribunal can receive help from judicial decisions, academic writings, etc. Usually, this way will allow the Tribunal to develop some principles within the international investment legal framework.

Therefore, Article 42(2) combined with Article 42(1) provides strong protection for international investors and it guarantees that investors will receive a judgment from the international realm when confronting powerful sovereign states. As a result, investing and import-focused countries, especially developing countries, will face greater pressure due to the relative imperfection of their legal systems.

There are some limitations to this provision, however. The ICSID Convention put forward the award, which shall deal with every question submitted to the Tribunal and shall state the reasons upon which it is based on.[37]Then, we can find that even article 42(2) empowers the tribunal to give an award(what award?-unclear) when there is no applicable law, the Tribunal must state the reason that it is based on, in other words, the tribunal must find rule of law to apply in the dispute no matter how difficult it is. In so requiring, the tribunal must be very responsible and diligent in that dispute. This kind of authority and obligation offers the ICSID a very unique and prudent character.

In fact, this principle is rarely applied in dispute. The combination of the host law and international law offers such a wide field of authority that a real *non liquet* situation is almost inconceivable.

I. 7 Issues concerning the application of Article 42(3)

Article 42(3) states that 'the provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute ex aequoet bono if the parties so agree. 'The principle of *ex*

[35] See, Section (G), Art 4, Annex II of Multilateral Investment Guarantee Agency Act 1988, and in Art 11 of International Law Commission Model Rules on Arbitral Procedure.1958,Y.B I L C.83

[36] Chen An "Arbitration of International Investment Dispute"A Research on ICSID Mechanism, Publisher of Fu Dan University, 2001, PP.160-161

[37] See, ICSID Convention, Art 48, section 3

*aequoet bono*is an ancient legal principle universally accepted by countries. It is derived from Roman law and used to supplement a defective contract or to prevent bias in law. This principle has a very positive function to fill the lacunae or insufficiency of law.[38] The meaning of it is: according to what is right and good or in justice fairness or from equity and conscience (unclear).[39] Through this principle, Article 42(3) furthermore reinforces the spirit of autonomy of parties embodied in article 42(1).

This principle of *aequoet bono* requires a specific party to consent and such an agreement must be explicit. The parties agree to resolve a dispute through the principle of *aequoet bono*, which allows them to maintain flexibility and amity. When an application of law can cause unfair or stiff results, they may alleviate the side effects by using this principle.

As mentioned above, if the award has failed to state the reasons on which it is based, the Tribunal must express their reason in the award according to Article 48(3) of the Convention.[40]Therefore, in practice, the Tribunal applies this principle caution and seriousness. If appropriate law can be applied, they should apply it as long the application of *exaequo at bono* is objective and reasonable.

In practice, the application of this principle always pertains to compensation, and always, the parties to the dispute have very different claims. Especially in the case of complex long-term investment relationships, unexpected circumstances may arise. Thus, a decision based on equity rather than on law may provide a fair and satisfactory solution while sustaining amity between the investor and the host country.[41] The application of *ex aequoet bono* can be agreed between parties before or after the emergence of a dispute. In the case of *Benvenuti & Bonfant v.Congo*, there was no mutually agreed choice of law. At the Tribunal's first session, the claimant suggested that the Tribunal be granted the power to decide *ex aequo et bono*, but the respondent rejected. Later on during the proceedings, the parties reached an agreement to attempt an amicable settlement on June 6 1979; they authorized the Tribunal to render its award as quickly as possible by judgment ex qequoet bono.[42] After being notified of a failure to settle through negotiation, the Tribunal applied Article 42(3).

When the parties have no agreement to authorize the Tribunal to apply the principle of *ex aequo et bono*, the application of it by the Tribunal will constitute a use of excess powers occasioning annulments stipulated in Article 52(1)(e) of the Convention.[43]

In practice, the application of Article 42(3) has caused great disagreement; it is not easy to give a clear standard to appraise an award based on this principle. However, the power conferred on the Tribunal to decide *aequo et bono* does not prevent the Tribunal from applying the rule of law, and it is on this point that the controversial issue occurred. Like in the same case of *Benvenuti & Bonfant v Congo*, the Tribunal was authorized by the parties to decide ex *aequoet bono* and it did not preclude the Tribunal from looking at the rule of law. The Tribunal held that compensation for nationalization was required by the host state's law, international law as well inequity. The result is that the Tribunal determined

[38] LyuoByoungHwa,"International Law"Volume 1, Publisher of China University of Political Science and Law. 1997. P.224

[39] Steven H.Gifis. Law Dictionary 1996, Barron's Education Series, Inc.P.179

[40] See, Art 52.1 of ICSID Convention

[41] P.F.Sutherland, "The World Bank Convention on the Settlement of Investment Disputes" In international and Comparative Law Quarterly, Vol.28.July 1979, P.393

[42] See, Award, 15 August 1980, 1 ICSID Reports, P.342

[43] Art 52.1 Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds (e) That the award has failed to state the reasons on which it is based.

the quantum of damages *ex aequoet bono*. The Tribunal was criticized, and it was argued that they should have apply Congolese law and the measure they took in fact excluded the application of Congolese law.

This provision accords the Tribunal the right to judge regardless of the law of a host state or international law and to some extent, it enables the arbitrators to decide the case based on their consciousness and understanding of justice. Therefore, there must be some limitation. In practicing ICSID, most arbitrators come from developed countries and they always incline to apply the standard of developed countries. At the same time, many cases prior to the establishment of the ICSID Centre were occasioned by nationalization and expropriation caused by developing counties; and the quantum of compensation always is a controversial aspect between foreign investors and the host state. Developed countries, such as the United States of America claimed that the compensation must be prompt, adequate and effective.[44]On the contrary, developing countries, based on various U.N. documents, only recognize appropriated compensation given to foreign investors; they emphasize that disputes about compensation should be settled under the domestic law of the nationalizing state unless agreed otherwise.[45]Thus, if this principle is not given more restriction and interpretation in practice, it will undermine developing countries' position and their acceptance of the ICSID mechanism as a legitimate form of conflict resolution.

So what is the best method in applying the principle of *ex aequoet bono* in dispute? Firstly, as a prerequisite, the Tribunal must receive the consent of both parties. Secondly, the Tribunal must state the reasons underlying an award for the obligation imposed by Article 48(3) and may render decisions made by the principle of *ex aequo et bono* without manifesting reasons to annul under Article 52(1)(e). Finally, based on commonsense, the application of *ex aequoet bono* must be in conformity with mandatory rules and international public policy. As a suggestion, developing countries such as Mongolia must be very cautious when choosing to apply Article 42(3) during dispute settlement.

Conclusion - Comments on Article 42 of the ICSID Convention

Article 42 sets up the basic principles for the ICSID mechanism to operate and provides a robust example of international arbitration law. The autonomy of the parties stipulated in the first sentence of Article 42providesflexibility and freedom in the settlement of disputes.

Further, Article 42 manifestly sets forth law of the host state and international law as applying unless the parties stipulate otherwise. On the one hand, the clear expression of the application of host state law protects its interests and respects its legal sovereignty. However, on the other hand, application of international law can bring more protection to foreign investors and requires the state to improve its domestic law in accordance with international standards.

The structure of Article 42 consists of Section (1), the main body and Sections (2) and (3) as important supplements to Section (1). Section (2) requires the Tribunal to work out a resolution in a dispute. In doing so, it reinforces the authority and efficiency of the ICSID mechanism. Section (3) gives the Tribunal the right to apply the *ex aequoet bono* principle, which further strengthens the functions and discretion of the Tribunal.

In conclusion, Article 42 builds an interactive, complete system of applicable law within the ICSID mechanism while setting an example for other international

[44] Schwebel. The Story of the U.N's Declaration on Permanent Sovereignty over Natural Resources. 49 A.B.A.J 463, 1963

[45] See: Resolution on Permanent Sovereignty over Natural Resources. Dec:. 14,1962

arbitration institutions and the use of international commercial law. In practice, countries, especially developing countries with applicable law issued in their legal system, must find a balance to sufficiently protect their national interests, and at the same time guarantee protection for foreign investors.

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