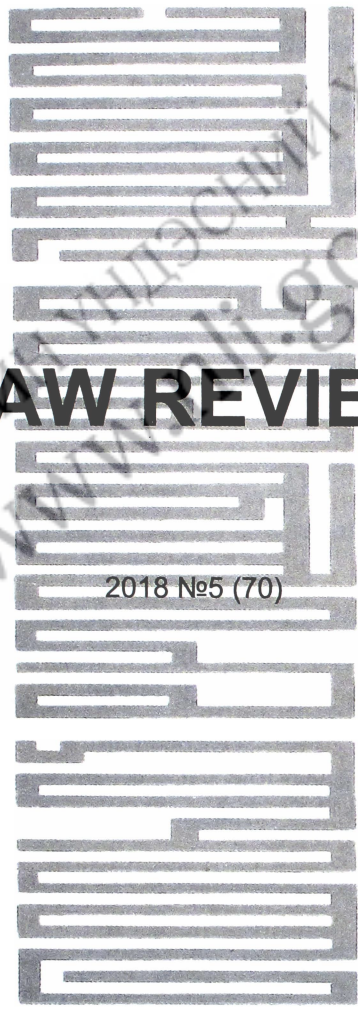
THE NATIONAL LEGAL INSTITUTE OF MONGOLIA



LAW REVIEW

2018 №5 (70)

Ulaanbaatar
2018

EDITORIAL BOARD

State Registration Number:279
ISSN: 2226-9185
The National Legal Institute publishes this law review five times per year.

Address: 4th Khoroo, Chingeltei District, Lawyer's Street-1, Ulaanbaatar-15160, Mongolia
Phone:+(976)-11-315735
Fax: 315735
Website: www.nli.gov.mn
E-mail: lawjournal@legalinstitute.mn

CONTENT

THE GOVERNMENT OF MONGOLIA HAS TAKEN ACCOUNT FOR STATE POLICY ON IMPROVING PUBLIC LEGAL EDUCATION

Enkhtsetseg.S, Director of The tNational Legal Institute

In 2016, the Ministry of Justice and Home Affairs and Open Society Forum conducted a survey[1] on "Current situation of Citizens legal capacity", to identify justiciable challenges faced by citizens on a daily basis, 54.8% of the total respondents faced some kind of justiciable difficulties with legal consequences. The 37% of the survey takers who did not receive any legal assistance revealed that they think "nothing will help to resolve the issue", 26% "didn't know what to do", 17% think "it is not that serious issue", 16% revealed that "didn't know what their legal rights are". The 40.8% of the respondents who received legal assistance, has consulted with their friends, family relatives and acquaintances, 15% has approached to relevant government organization, 16% called police and 15% hired lawyers and attorneys. Whether they faced any justiciable challenges or any problems, 1630 survey respondents been asked "if they know to whom should approach in case of difficultness" and 57.1% answered that "they do not know". The survey result reveals us that lack of citizens taking advantage of legal opportunity, to remedy their violated rights and protect their safety is closely related to the deficiency of legal knowledge, education. Considering the problem, the Government of Mongolia has taken a count for state policy on improving public legal education and adopted "National Program on Empowering Public Legal Education"[2] by its Decree on February, 2018.

The purpose of the Program is to improve each and every Mongolian citizens' legal capacity, to increase in conditions for public of effective applicability of their legal rights and opportunity, to bring a closeness in reachability of first step legal aid to citizens, to increase legal services in order to pressure leading to improvement in governmental organizations' action's efficiency and responsibility and developing good governance. The Program will be implemented in two batches for 5 years, between 2018-2023. The first step/2018-2020/ will ensure the establishment for continuance development of PLE; second step /2021-2022/ will evaluate actions taken at the first step and strengthen the implementation of the establishment for continuance development of PLE. In total of 22 actions and 91 measures will be implemented within the general framework of the program.

The Program indicates that the Ministry for Justice and Home Affair will be responsible for general administration of the program implementation and there is a nonofficial National Council consists of the

[1] www.http://forum.mn/index.php?sel=project&menu_id=411 The survey on "Current situation of citizens' legal capacity" the Ministry of Justice and Home Affairs and Open Society Forum, 2016

[2] https://www.legalinfo.mn/law/details/13249?lawid=13249

representatives of the justice, education, labor, social protection, health sectors and non-governmental and civil society organizations and representatives of the media and information, whose functions include being responsible for unity of the contexts for PLE, to ensure a coherence of the above mentioned sectors and monitoring the progress and results of the program implementation.

Therefore, the Government approved structure of National Council and Procedure for Program's national implementation, regulating sectoral cohesiveness and monitoring the program implementation".

The Ministry of the Justice and Home Affair is a Head of National Council and the governmental and non-governmental organizations are responsible for its structural functionality and administration and regulation. On the other hand, it is very essential that all governmental organizations are responsible to cooperate on implementation of the program, gather information and establish unified database. In other words, the all government officials' involvement is important for the national implementation of the program.

The National Legal Institute is a Secretariat of the National Council, whose main function includes an academic research in the field of law science and provide services for legal training, promotion and information, is also responsible for organizing the program implementation.

We are brainstorming public's legal education upon studying all possible methods of access and reachability to them. We are working on the achievement of structural establishment of legal education by promoting legal information, trainings and legal advocacy based on legal researches.

In other words, we have defined methods with distinctive features or special needs by studying citizens, particularly targeted groups such as invalid or disadvantaged people, adolescence, seniors, rural area residents, herders empower them and we must ensure the distributional adequateness of knowledge in understandable or simplified manner through online or offline and training the actual paralegals (legal guides representatives), who will closely work with the citizens and assist them to access justice through right ways. The Ministry of Justice and Home Affairs has an authority to issue public tenders, by which provided opportunity to start following set of six activities: to research the current condition, situation, needs and requirements for first step legal education and knowledge; to prepare legal training and promotional contexts, distributional methods and develop training program based upon the researches; to train paralegal (legal guides); to develop and publish handbooks for the special targeted groups; organize training and to produce short video and films for promoting legal awareness and education for the public.

We have started providing call service for an immediate and prompt of first step of legal assistance and legal information for (mobile) phone users, improving our aimed enhancement for public legal education. The call service is available for working days and hours with normal charge 1800-1202 to ensure that the public could be reached to legal help over their legal issues.

We also have started introducing www.ehutuch.mn portal website which contains public entities' service, legal news or information, answers for frequently asked questions and legal aid for public, other relevant forms of activities allowing public to receive from anywhere and anytime in Mongolia. The public increases its chance for legal capacity and know their legal rights and responsibility, also receive first step legal assistance when start using the website and after knowing their rights

they learn to protect their legal interest or violated rights by using the knowledge it provides. The website is first-step reachable legal assistance or resolution to their problems or issues they might experiencing and unified legal information database of government services and suitable for all ages of public. The Open Society Forum is helping and assisting to establish and develop a structure and contexts of information and website within its framework of "Improving Public Legal Capacity Program".

The before mentioned survey revealed that public is having not sufficient legal capacity therefore could not resolve their legal issues or protect their legal interests is closely related to a lack of its legal education. To changing this situation is an essential part of program's expected results. The Program outcome is for the public only. In other words, when public gets informed, they expected to increase their chance to resolve their issues in the legal contexts so they would know to whom and how they should apply and how their issues could be resolved.

The government officials need to be initiative and collaborate closely with each other. In order to be open to public, the government organizations need to closely collaborate with the E-khutuch website, have a budget approval for funding the activities, name the official agent in its unit or organization who is responsible for the activity, work closely with Secretariat of the National Council and media to ensure the Program implementation and adequate Public promotions. When the government organizations are open to public and prepare government services information exclusively for the website in return it enables them be clear to the public on its functions and activities therefore less confusion will be created for public upon resolve their issues.

---o0o---

COMPARATIVE ANALYSIS OF MONGOLIAN CONSTITUTIONAL PROVISIONS ON PARLIAMENTARY POWER

Amarjargal.P,(Ph.D), Scientific Secretary, The National Legal Institute

This year Mongolia is celebrating 26th anniversary of the adoption of its democratic constitution.

The Constitution of Mongolia adopted in 1992 established a legal base of during transitional period of political, economic, social and cultural spheres meantime everyone acknowledges that it became foundation of a new era. In order to strengthen its implementation in practice it is essential to have a deep understanding of ideological concepts and historical approaches behind those constitutional provisions then it serves an important role to keep constitutional endurance of its stable legal status and possession of unified understanding.

In this article, I aimed to conduct study the Article 20 of the Constitution of Mongolia in term of constitutional law principle of state power separation with comparison in similar constitutional provision of the Constitution of Japan and reflected my comparative analysis of scholars and researchers of Mongolia and foreign countries and finally to determine my own conclusion.

Although the status of legislative organ and its sovereign power has been studied by social science branches such as political science and science of philosophy I have studied the subject within the context of Constitutional Law[1]. The parliament and its sovereignty of power is one of the main subjects of the Constitutional Law.

The article 20 of the Constitution of Mongolia states that "The State Great Khural of Mongolia is the highest organ of State power. ...." and the provision still raises questions and disputes between scholars and researchers such as "what meaning does this provision express?", "is it in accordance with the separation of powers principle?". Historically our country has a tradition using vast comparative studies on progressive constitutions of the world countries when developing the drafts of constitution. For example, there

[1] B.Chimid. Respect of Constitution. 2006. P.11 J.S.D, Prof B.Chimid said about The Constitutional Law "It is very pleasant to acknowledge and support that since 1992 many legal books of the State Law or Constitutional Law have been produced. Even though these 2 subjects are differs in meaning but both cover the exact subjects therefore it can be viewed as a one.", D.Solongo. Legal Explanatory Dictionary. 2003. pp.133-134 Dr. D.Solongo said that "State /constitutional/ Law regulates social basic relations. State/Constitutional/ Law main resources are The Constitution, Presidential decree, Government acts, the Constitutional court decisions, International treaties and some acts and decisions of local self-government.", Democratic governance, open society terminology dictionary. Ulaanbaatar. 2006. Open society forum, UNDP. P.130 "The other version is The Constitutional law takes an important place in the legal structural branch and is one of its scientific branches. The Constitutional law defines the basic principles of structural guarantees providing citizen rights and freedoms, structural establishment of social, economic, political and administrative and territorial units and relations and partnership between state and civil society.", These 2 subjects also depends on structure of the world law family. Example: Anglo-Saxon law family countries use as "Constitutional law", Roman – Germanic law family sees it as "State Law". In this article I referred it as "Constitutional law". P.A

is an evidence that drafters of the first Constitution of Mongolia of 1924 used a study on the Constitution of Japan, 1884[2]. Our legal scientists indicated that the article 41 of the Constitution of Japan, 1946 has a similar provisional approach of the Article 20 of the Mongolian Constitution, 1992[3].

This study explores how these two provisions explained and understood between scholars of the respective countries of the Constitutional law.

First let me explore how Mongolian Constitutional law academics and scholars defined the parliament, Ms N.Tungalag, Advisor to the Laws and Legislative Department of the Secretariat of the State Great Khural stated in the Explanatory note on Mongolian Constitution[4] that "It expresses the will of all people therefore should be the highest organ of the state power.".

Dr. D.Solongo gave an explanation of the State Great Khural as a legislative power organ with highest organ of state power in connection with election from the people and its representative of democracy, in her State Law" explanatory dictionary.[5] These resources reprinted in 2003 and 2009 respectively and still has its significance till to this day. However, S.J.D, Prof N.Lundendorj[6] defined its reality by saying that it has violated the theory of state power separation and furtherly its principle of checks and balance. This subject has been studied and concluded by many academics and scholars within various and different perspectives and views.

The Article 41 of the Constitution of Japan, 1946 has following explanations from the Constitutional Law Prof. Hiroyuki Hata and Go Nakagawa of Japan, Mr Takahiro Yokomichi, Chairman of House of Representative of Japanese Parliament and Japanese researcher, Prof. Hans H. Baerwald.

Japanese translation of Article 41 of the Constitution of Japan:

第４章　国会

〔国会の地位〕第41条国会は、国権の最高機関であつて、国の唯一の立法機関である

English translation as follows:

Chapter IV. The Diet

Article 41. The Diet shall be the highest organ of state power and shall be the sole law-making organ of the State.

---

[2] Nakamura Masaki. "Constitutional translations of Foreign countries and Documents related to the Mongolian first Constitution. Mongolian Legal Reform and Development on Comparative Law study" Mongolian National Legal Institute. 2004. pp.71-74.

[3] B. Chimid. Respect of Constitution. 2006. P. 48 *"The disputed provision "The State Great Khural of Mongolia is the highest organ of state power...." is a terminology and was written with straight reflection of our tradition and also with mentions from the Article 41 of the Constitution of Japan of 1946. In order to keep this tendency is to provide concept of unitary of state (sole state sovereign) constitutionally from the perspectives of the human rights and freedoms and it must differ from constitutionally recognized principle of "three branches of government" which also separately determined in the constitution at the same time."*

[4] Mongolian Constitutional Explanatory notes. Ulaanbaatar. 2011. P.117 published by Hanns Seidel foundation, "Legal education" Academy, *" In the world countries, the highest organ of state is consisted of either two cabinets of parliament or in some cases single cabinet of parliament. During democratic revolution many countries have used terms such as "legislative power" , "right to make laws", " right to issue a law"," sovereign legislative power". Those terms established in and guaranteed by the Constitution. In other words, the laws or legislation cannot serve as an expression of single politician's personal will. The law must reflect all citizens common will. So the institution of people representatives organ is defined as the highest political representation in the system of state power. There is no other representative institution exist. In our country, the State Great/ Ikh Khural of Mongolia consists of a single cabinet, suitable for its population, representing its people and solely holds the legislative power defined by law."*

[5] D.Solongo. State law explanatory dictionary 2003. pp.139,167 *"...elected from the People, state authority, highest organ of representatives"*

[6] N.Lundendorj Transitional period: Political and Legal Issues. 2010. pp.25-26 *"Today in Mongolia state power is not implemented through branches of executive, legislative and judicial power respectively but only and solely through the "highest organ of state."* more reads available from this book.

Mongolian translation as follows:

Дөрөвдүгээр бүлэг. Парламент /The Diet/

41 дүгээр зүйл. Парламент бол улсын хуулийг дангаар тогтоодог, төрийн эрх мэдлийн дээд байгууллага юм[7].

Constitutional Law Prof. Hiroyuki Hata and Go Nakagawa of Japan[8] have explained the understandings of "law making organ" and "highest organ of the state power". They explored that "What is the meaning of "sole law-making organ"? Those who involved in the constitutional law draft had an unconscious plan to separate the King power from the legislative power and to transfer it to a legislative organ approved by the National government.". Furtherly, "Highest organ of the state power" meaning could be explained similarly with the above approaches. From the point of Judicial power which can repeal parliament laws and legislation so necessarily it cannot be the highest organ of the state power. It was not up to the will of parliament itself constitutionally declare that it should be the highest but a will of Constitution itself chose to declare that the parliament has to be. Then why parliament is the highest organ of the state power? This could be against the separation of powers principle. Maybe this could be explained that it was simply legislative drafters' technical solution to legally protest the previous constitutional declaration of King's absolute power. Their purpose was not to leave any resource of state sovereignty to the King's absolute power but to keep it only within legislative power therefore solely granted to parliament ranking itself as the highest organ of the state power. If it is true then it is not surprising that the highest organ of the state power is not granted to the parliament by constitutionally. From this point they explained that "highest organ of state power" means the parliament is a subject who is a "sole law-making organ".

Mr. Takahiro Yokomichi, Chairman of House of Representative of Japanese Parliament stated that "Our representatives, elected from the people initiate political debates, make Diet "open" and "simple" to understand and always know the burden of responsibility they carry to rule Japanese people in the right direction of every step of life."[9] He explained the provision from the view of parliament member's responsibility which based on representative principles of a policy decision making.

Japanese researcher, Prof. Hans H. Baerwald who conducts its researches by interviewing parliament members and observing the parliament activity stated in one of its research papers that "Most Japanese people and political analysists agree that the terminology "Parliament is the highest organ of the state power" does not reflect real parliament power."[10]

After comparatively studying on two nations constitutional provisional explanations it could be concluded that:

The constitutional law takes an important place in the history of Mongolian state, law and its social and economic relations. The Constitution of every nation provides establishment of the human rights and freedoms, societal structure and economic base of the state.

Any state power is derived from its people. The people implement their power through its chosen representatives. This is a legitimate activity of power transfer from the people through election and so-called representative democracy. By this meaning the base of the power can be kept within the peoples' representative organ which is the parliament. From the other hand, it cannot be understood as

[7] "Constitution of Japan" trans. P.Amarjargal, editors. N.Lundendorj, J.Oyuntungalag *Admon printing 2011*. P.15.

[8] Hiroyuki Hata, Go Nakagawa Constitutional Law of Japan, Kluwer Law International 1997. pp. 58-59

[9] Official webpage for House of Representatives of Japanese Parliament http://www.shugiin.go.jp/index.nsf/html/index_e_message.htm.

[10] Hans H. Baerwald, "Parliament and parliamentarians in Japan" Pacific Affairs, Vol. 37, No3., 1960 Autumn, 271-282 pp. University of British Columbia

a straightforward meaning of the State Great Khural or highest of all of the three branches of the state power. Because it does not fit in the view of the separation of powers or principle of "checks and balances". This could lead to potential ground of loss of the principle of checks and balances between executive, legislative and judicial branches of state power.

For people of Japan the above Constitutional provision has been explained and understood relatively from the historical point of view and peoples' will instead of straight wording from the constitution. In other words, the explanation made and understood of realization of people representatives and necessity of historical situation to transfer the power between subjects.

For people of Mongolia, the Constitutional provision understood within the meaning of historical situation during transitional period and within context of its straight meaning of wording or sentences widely accepted so therefore left a few explanations exist: is it a democratic representative organ or has it any content of "highest legislative organ". On the other hand, "the highest organ of state power" should be properly accepted when it is understood from the view of principle of "rule of law" and state which is the "law"-making highest organ is the parliament who legitimately transferred the power from the people.

According to the Article 5.2.2. of the "Law on Procedures of the Amendments to the Constitution of Mongolia" which adopted on 23 December, 2010, any amendments are prohibited to the above-mentioned Article Twenty. Therefore, it is important that this provision must rightly understood and have a sole meaning in practice.

Conclusion

This provisional study of Article 20 about the State Great Khural has any indication of weakening parliamentary democracy or purpose of denial but has an importance to strengthen parliamentary representative democracy and clarification of its functions.

---o0o---

THE PROTECTION OF PERSONALITY RIGHTS IN PRIVATE LAW

Temuulen.B (Dr. jur.)
Department of Private law
School of Law, National University of Mongolia

Introduction

Individuals are distinguished from other persons by their image, name, voice, and gender. Those are the characters ,which could describe the individual's personality, would be inherent and not be resigned to others. [1]

In the legal perspective, the individuals are considered as participants of legal relations on the whole. Nevertheless, the process of technological and scientific development in society has led to a dominant view of individual legal relationships, as well as the importance of protecting individuals or providing legal protection. For instance, as a result of evolution of the photo industry, the appearance of the person could be published without any permission and even the person can be slandered in virtue of his or her photo.

The voice of the someone can be duplicated by means of devices of communication which are evolving rapidly. Furthermore the identity theft rate has been increased in recent times.

[1] B.Temuulen, Recht am eigenen Biuld, S.13.

Those are the circumstances which could go against the intangible interest of the person. It is the breach of the individual interest that under the circumstance of it breaks the interest of the personality as it be.

In that event, the necessity , which would protect the personality by law, has came out. By this article, let you notify that how the Civil code of Mongolia and other regulations protect the personality rights and his/her interests.

Legal basis for protecting personality rights

Legal basis in the constitution law

In the constitution of Mongolia the personality right to develop freely does not declared. Although in the part 2 of article 17 of the Constitution the citizen Mongolia has to respect the dignity and the legal interest of the others.

From the perspective of the commentary of Constitution of the article mentioned in the last sentence does not declare the general right to protect personality . But the dignity and it's immunity are declared in the Constitution could mean that the personality had to be protected.

As mentioned in the introduction, the individuals are altered by his or her own names, appearances, gender, and voices in society. The individuals could not be separated from the society. They live as members of the society. The dignity of the person is contemplated as how he or she is valued in society. Likewise the dignity does not separated from the individual, it is inseparable part of the person, intangible interest. The declaration that would protect the dignity of the person can mean that the protection of the personality rights is maintained in the Constitution.

The concept that the protection of justified interest of the person could obligate to the regulations such as Civil code and the Privacy law to secure the interest of the individuals that is the prerequisite declared in the Constitution. Protecting personality rights by Civil code of Mongolia designates that to protect the person and his or her interests such as not to be published images and not to be used own names by others.

Let's take a look at that how the interest of the person is protected by the Civil code in accordance with the Constitution.

The protection of personal dignity

In the 21.2 of article 21 of Civil code, if someone, who hawked a news which violate the dignity and repute of others, couldn't prove it's true, he or she is responsible to negative the information by the way he or she use in consonance with the claim of the victim. From the viewpoint of word explanation of this provision of the code, if the information spread about the person was true, it wouldn't considered as illegal. Consequently whatever information about the person was true, it could be recognized as legal and be spread without any permission.

However, the issues of privacy are limited by the Privacy law in Mongolia. In order to defend information of someone's privacy and to avoid to be informed to public, the information belonged to person's privacy is prohibited to be spread in the Privacy law. For instance, in the article 4 of the law, the person's information belonged to correspondence, health and proprietary wealth of the family is referred as privacy of the individual person. Since spreading the someone's privacy is prohibited, the 21 of article 21.4 of the Civil code stated as if the tort caused by someone who spread the information pertained to privacy without permission of the owner, the victim has right to claim to discharge the tort could imply that the information belonged to privacy is restricted indirectly.

Nonetheless it's unilateral to explain the regulation remarked above as the information belonged to privacy is illegal to spread otherwise is legal. Let's clarify is as following.

To come to decision by comparing the interests

To take the concept indicated last part as an argument, the issues of subjective right should be come out.

Mongolian lawyers agree with that systematization, resources of adjustment and doctrines of Civil code of Germany affected hugely to Civil code of Mongolia in force now. The subjective right, main conception of Civil code, is determined by the professors of Germany in Mongolia. The subjective right is explained by Windschein, Germany lawyer and philosopher as the authority to protect person's interest by means of objectively[2]. In civil law countries the things which build up individual's enjoyment of his or her own sense of existence bind with the subjective right relating to the interests. The dignity of the person is connected strongly with the whom, inherent and intangible interest. There would be an interests to be respected by members of society when someone has repute. In conclusion, when the interest to be respected by members of society is protected, the person could be secured as he or she be.

Although spreading the news relating to the dignity or repute of individuals to the public refers to the interest of increasing the engagements of mass media, the media points it out as to provide with information to the public.

To conclude, the personal interest of being respected by the public and the public interest of getting information also the media interest of economy are competing each other.

[2] Brox.H, Allgemeiner Teil BGB, S.271, Auflage 21.

When the court judgment takes places into case relating to slander, it's better to compare and value the interests between personal dignity, publicity and the economic convenience of the media, then as a result the court should make decision based on those comparison and valuation. It's an example of interest indication of jurisprudence and implementation ruled by the courts of civil law countries for the last years.

Consequently whatever news except the information related to privacy including data of private life, correspondence security and wealth, which is protected by the law, can't be legal. But in some cases, the courts should make decision by verifying if there was an interest that had to be defended by the law, though the information meets the law requirements, I guess.

The protection of one's image

Interest to be protected

It's necessary to use concept of subjective right as possible as the protection of dignity for the right to protect one's images in the proceeding. There has been strong conflict between the scholars about what kind of personal interests could be protected by this right.

It's possible to use functional theory in order to determine the interests as a visual being for individuals.

The main principle of functional theory is to determine the image interest by actuating function of the image.

The picture or photo shows appearance of the person, as a consequence the person could be recognized. Furthermore the picture is the image that shows the human visually. On the other hand , the person introduces or shows himself to others through the photos. It is potential to determine the function of the picture by being based, on this point.[3]

[3] Vgl. Pfeifer, Individualitaet im Zivilrecht, S.153.

However, the picture could show appearance of the person, also it could distinguish the one to another as who would be that person. As through the charge of showing or recognizing of the picture, the person whose appearance viewed on the picture has the interests to show or to introduce himself to the public. But it doesn't mean that the person could have the interests to be public by using whatever photos he wants. It is undeniable that he could have the interest to show or recognize him by using only the picture which should meet the necessity of social values consciousness and aesthetics. For example, although no one would inform public the image showing the one who just wakes up and is drowsy, the person wants to show the image that is taken when he dresses beautifully and smiles at his/her office. [4]

It's rare that the picture showing the appearance of the person as directly except the portraits. According to Mr. Muller, a German researcher, in most cases not only the picture illustrates the appearance of the person, but also it could include the information holding the circumstance and the time relating to the image and determine the content of the picture.[5]

The character that could reveal not only the person, but also the time and circumstances forms the data, as a result the information and imagination , such as the political views or the concept of the religion of the individuals, of the person could be obtained.[6]

In addition, the following functions of the image will function as an indispensable functioning of the individual's personal information or, in other words, an indivisible presentation of the identity of the individual. Individuals may be interested in demonstrating the identity

[4] B.Temuulen, Recht am eigenen Bild, S.86.

[5] Vgl. Mueller, Die Verletzung des Persoenlichkeitsrechts durch Bildnisveroeffentlichung, S.46.

[6] B.temuulen, Das Recht am eigenen Bild, S.876

of the individual on the basis of the role of individualized image aggregation. Depending on the situation in which the picture was taken, individuals are interested in communicating their own religious, political concepts, lifestyles and principles to the public and to be aware of themselves. [7]

Consequently, the individual has a personal interest in publishing the image for himself / herself. Otherwise, the photographs shown by others shall contain the risk of disseminating information which is incorrect and inaccurate to the person represented in the drawing. Additionally, individual photographs allow individuals to communicate their deeds, rewards and rewards to others, to communicate with objects, actions, and productivity. In this way, individuals can demonstrate who they are, which reflects the role of indivisible role as the role of the image. The next interest in visual imagery is the economic interest. The rationale for this is the indifference function of the image. There are a number of events that connect people with products and services to promote a variety of products, services and activities. The promotion of goods and services can provide the ultimate goal of transferring the reputation and image of a person who promotes the image of goods and services to the public, thereby increasing the distribution of goods and services to the public.[8]

In this case, it's clear that the images of the people well-known for sports, business and culture would be used as promotion, not an ordinary people's. It is normal for a well-known and reputable person to pursue his or her economic interests in participating in such advertisement, in particular, the desire to receive remuneration in exchange for the participation of the advocate is an expression of economic interest. In the course of arbitral proceedings, the 21.5 and 21.6 of Article 21 of the Civil code shall be regarded as a contentious dispute, on the one hand, the interests of the protected person, on the other hand, the public's interests, and the benefit of the media in the media of the benefit of the public would be valued and compared to vice versa, and it is necessary to resolve which interests should be rated as first by being based upon the valuation of the interests.

Unprotected interest in the image

As noted in the article, an interest in publishing an image is an expression of economic interest to increase the number of media outlets in order to gain access to information about the individual.

In the case of an image that involves a public event, it is clear that not having an individual's consent to publishing the image will undoubtedly protect the interests of the public in the event of a particular event or event, as well as the dissemination of media outlets.[9]

In order to apply the arrangement in practice, the term "community action" should be explained.

The rules of civil code can be interpreted in a sense, systematic and objective. It is more appropriate to interpret the norms in the case of the norms or theoretical methodology.

By means of it that the need to publicly inform community-based measures has arisen. Community-wide measures that need to be publicly available can be understood as a significant part of the life of the society, such as social, political, economic, cultural, educational and social issues, which are of significant importance to the public, as well as the level of living, style, and development. . For example, the visit of a foreign official, a demonstration of demolition, an event of festivals, etc.

In this case, it is impossible and

[7] Vgl. Klippel, Der zivilrechtliche Schuts des Namens, S.356.

[8] Vgl. Klippel, Der zivilrechtliche Schuts des Namens, S.358.

[9] Vgl. Eisenbarth, Das Recht am eigenen Bild von relative und absoluten Personen der Zeitgeschichte, S.69.

absurd to obtain permission from people pictured in the image when publishing information, including images about these events. Further, public interest in the media and the interests of the media are protected superior to the privilege of the individual's image.

The following issues related to the above regulation include: There's no regulations about the publication of the people well-known in the political, economic, arts, sports and business sectors of Mongolia in the Civil code. What is the arguments which is not breaching their rights for publishing these images without their consent?

These people are clearly known to the public as "public person". In the article 21.6 of the Civil Code stating that " ... the image may be published without the permission in connection with the position of the civil society.

The definition of "position of civil society" can be explained by the above-mentioned persons as those who are well-known and responsible for all sectors of society. The photos which don't promote those people should be given permission by the people and can be published. For example, the photos of the President or the Prime Minister who are resting with the families should get permission . In this case, it is justified to believe that the photos of these people are being violated by the yellow prints.

Consequences of violations of the rights to the image

In the article 21.5 of the Civil Code states that "....has the right to demand the remedy of the damage if it considers that the civil image is harmed by the publication or public release of his / her no consent.

There are a number of issues related to this regulation should raise a question.

First, what could be the consequence of unauthorized publishing of an individual image? In order to answer this question, the issue of interest is protected by the distorted image within the article will be arisen. Unauthorized publishing of personal images may result in misleading information or misleading information about the person, misleading false information with articles in the newspaper, or using inappropriate advertising. These losses are often non-material damages.

Furthermore, it is critical that the judiciary does not qualify for damages to compensate for damages caused by "unreasonable damages" as claimed by the unauthorized publication of the individual image.

To make a conclusion a court should consider, when the rights of an individual is violated or not, the importance of reimbursing the non-pecuniary damages in cash, what functions they play, and how they are reimbursed in cash.

Repayment of non-material damages has the following functions:

-Balancing Functions: Disadvantages arising from violation of rights, and money to compensate for emotional pain

- Function of calming emotion: the purpose of seduction and softening the emotions of the infringed person

- Precautionary Functions: The amount of money it is intended to prevent the violation of the rights of the individual to the personal image.[10]

It is undoubtedly, the court should have the legal basis for making a decision on non-material damages would be paid in cash rather than concluding violation of their rights.

[10] BGHZ 7, 223, 229.

---o0o---

CRIME STATISTICS IN MONGOLIA: DESCRIPTIVE STUDIES

Munkhdorj B, (Ph.D), Senior researcher, Center for Police research of the Research and Development Institute, LEU of Mongolia

Enhkbold B, (Ph.D), Chair, department of criminal law and criminology, Police school, LEU of Mongolia

Batsaikhan A, Researcher, Research and Development Institute, LEU of Mongolia

Abstract:

There is a severe lack of scientific research in this area of statistical theory. Based on the comparative study of domestic and foreign literature, "Crime Statistics" is regarded as an independent discipline or applied science, and the need to develop its theory, methods and practical situation is essential. This paper aims to analyze and evaluate the current conditions of crime statistics in Mongolia, its legislation and accordingly propose possible opportunities for improving the system based upon theoretical and practical approaches to the problem.

By providing quantitative indicators of the criminal situation in Mongolia more accurately and improving the conditions for crime prevention; the reasons and causes of crimes are identified and therefore appropriate countermeasures will be developed resulting an improved knowledge on crime statistics, methodology and its usage.

Key words: Crime, statistic, crime statistics, system, legal environment, Mongolia.

Introduction

The significance of this research lies in the fact that the study of crime was not only examined within the limitations of statistical methods, but it was studied in conjunction with all the different sub-fields mentioned above, where recommendations on how to improve crime statistics in Mongolia, the manner that the datasets were authenticated and secured were proposed based upon theoretical approaches.

This paper aims to analyze and evaluate the current conditions of crime statistics in Mongolia, its legislation and accordingly propose possible opportunities for improving the system based upon theoretical and practical approaches to the problem.

Methodological Background

This article contains various research papers, articles, reports and books written on crime statistics. The article also contains several analyses on the manner of registering and using crime statistics made by police, anti-corruption agency, court decision execution agency, prosecutor's office and courts of Mongolia. Within the scope of this research several widely used methods were taken in to consideration: synthesis, analysis, literature reviews, systematic analysis and other popular methods.

Literature review in crime statistics in Mongolia

Although the development of crime statistcs, its theories and methods continue to develop globally, in Mongolia there is a severe lack of research work on this subject, besides two monographs co-authored by Ya.Baatar and D.Tarkhaashin (Statistical Method of Studying Crime, 1988) and P.Ikhzaya, S.Jantsan and B.Munkhdorj (Crime Statistics, 2007).

Currently, there are approximately twenty research articles on using mathematics and statistical methods to study crime that were published in scientific journals and presented in research conferences (Batzorig.B 1999, Batbayar.B and Tuvshintulga.A 2014, Shagdarkhorloo.B 1973).

Furthermore, since 2005 there has been only four master's thesis works that touched the subject of crime statistics and which discussed the possible adoption of such methods for domestic usage. These works are stored at Mongolian University of Pedagogy, University of Humanities and University of Agriculture.

What is more, since the year of 2006 the National Police Agency of Mongolia has been maintaining a yearly report of crime covering topics such as the reasons and causes of crime as well as its prevention; this is a commendable effort by the police to combat crime more effectively.

However, the registration of crime do not comply with international standards and thus can be viewed as a disadvantage of its current effort. Most countries around the world conduct analysis on the phenomenon of crime from many different perspectives. Presently, because there is a severe lack of specialized research on the theories and practices of crime statistics in Mongolia, there is significant need in conducting such research works which are of international levels in terms of quality.

Issues Facing Crime Statistics in Mongolia

The crime statistics system in Mongolia is defective as the police, anti-corruption agency, prosecutor's office and courts produce statistical data which are not integrated and unrealistic This makes it ineffective for influencing government policies.

Moreover, there is a severe lack of scientific research in this area of statistical theory. Based on the comparative study of domestic and foreign literature, "Crime Statistics" is regarded as an independent discipline or applied science, and the need to develop its theory, methods and practical situation is required.

The action plans of the Government and the Ministry of Law and Internal Affairs from 2012-2016 included introducing electronic database systems into state agencies, reducing bureaucracy and creating effective procedures for resolving complaints made by the public.

In order to carry out this work, a team was set up by under the Ministry of Law and Internal Affairs in 2013. The team is responsible for the formation of a comprehensive database for law enforcement agencies. The action plan of the Government from 2012-2016 states that "an integrated database for registering administrative and criminal violations will be established, and risk management procedures introduced (Sumiyatseren.D, Tsedevsuren.M and Munkhdorj.B, 2017).

Accordingly, all the law enforcement agencies and courts are expected to create an electronic information system with their joint effort. Furthermore, with the release of crime statistics based on scientific methods, law enforcement agencies and judiciaries will be able to develop effective policies and operational procedures for combatting crime, which in return will ensure the peace and safety of citizens and uphold the principles of human rights and freedom.

The Criminal Law and the Law on Offence which will come into force from 1st of July 2017, and that were amended as part of the legal reform will require incident report and registration forms to be renewed.

Moreover, the draft law on Combatting and Preventing Crime includes sections on developing an integrated policy for effectively combatting crime, eliminating duplications of information amongst law enforcement agencies and courts, creating an integrated database, and for processing data based upon scientific methods.

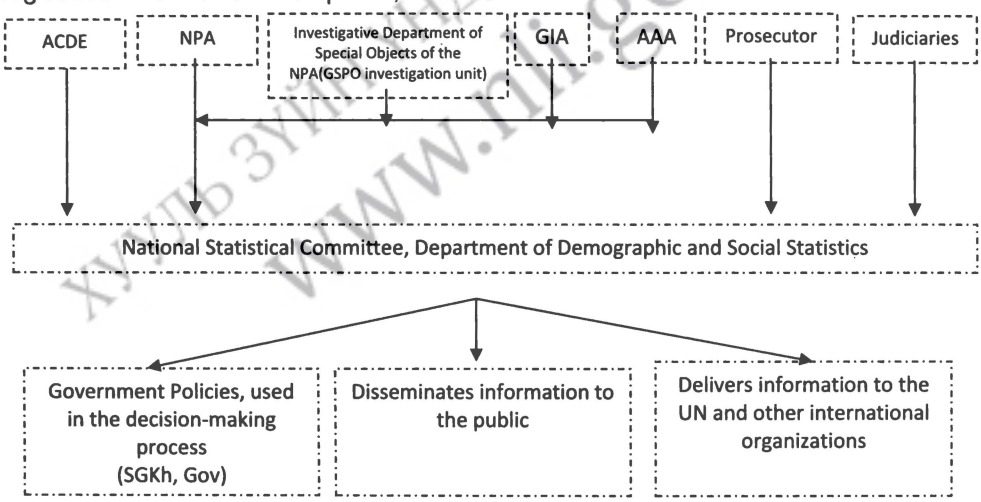
Hence, it is important to conduct basic researches on crime statistics in Mongolia; publish research works and articles; renew the incident report and registration forms of the police, anti-corruption agencies, prosecutor's offices and court decision execution agencies; propose recommendations for developing new software and databases; and to develop recommendations for improving the relevant laws and regulations.

Current condition of the system of Crime statistics in Mongolia

In Mongolia, the maintenance of databases on crime and statistics is maintained by the courts, the prosecutor's offices, the police, anti-corruption agencies and intelligence agencies. These organizations are responsible for producing statistical information which are then submitted to the National Statistics Committee for integration.

Afterwards, the data is presented as part of a socio-economic dataset. The above mentioned organs also publish these data for public use. Statistical information of the provinces, municipalities, cities, districts and counties which are maintained by branches of the above mentioned organs are published in the statistical unit of the local government (Figure 1).

Figure 1. Current system of Crime Statistics in Mongolia



Sourse: National Statistics Committee, Annual report, Ulaanbaatar, Mongolia, 2017

Although to a certain extent, Mongolia does have a system for maintaining crime statistics, this system is not optimal. The complaints and incidents registered by the police; the monitoring activities conducted by the prosecutor's office and the number of cases heard by the courts are all displayed as statistics. However, the initial

incident report and registration forms for these agencies all differ.

Although the General Intelligence Agency of Mongolia monitors crime in accordance with the law, the data for these cases are not publicly released. In terms of anti-corruption agency, although it monitors corrupt activities and registers the files in the national database of the police, details are not released due to confidentiality.

Additionally, the Investigative Department of Special Cases of the NPA (previously known as the Investigative Unit of the GSPO) registers all appropriate data into the databases of the police. In the last 10 years, the average rate of crime per year was estimated to be 23,000. However, researchers remark that this amount could be even greater due to latent criminality. According to scientific research, the rate of latent crime is said to be 2-25 times higher (Enkhbold.B, 2017).

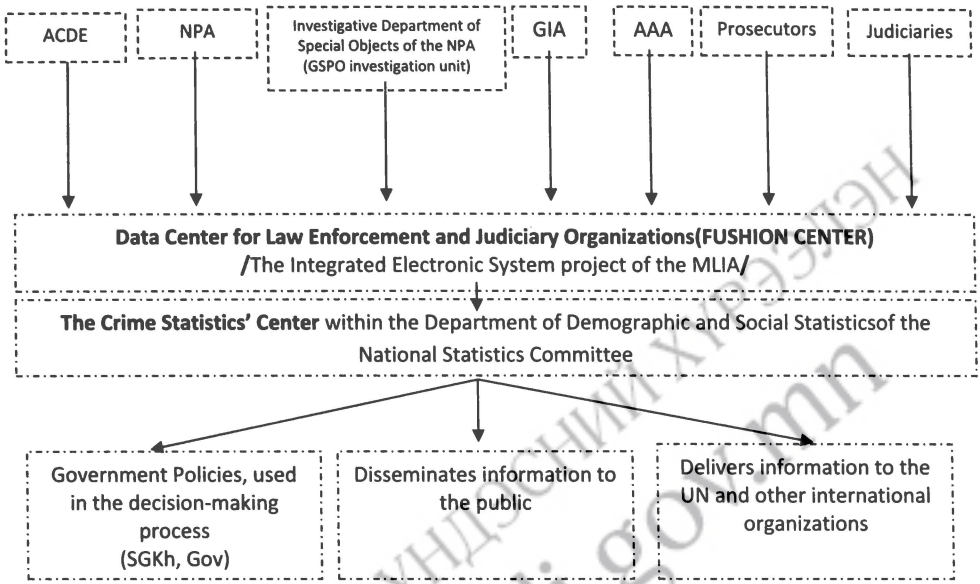
As of 2016, 94,324 complaints were received by the police out of which 27,167 were investigated and registered. For the Anti-Corruption agency, 427 complaints were received out of which 83 were investigated and registered. The prosecutor's office is said to have received 94,751 complaints out of which 29,304 were initiated for criminal proceedings and 41,525 were investigated and registered. Finally, 5762 criminal cases were heard at courts and 6566 people were sentenced (Munkhdorj.B 2017).

At present, data on any incident, dispute, litigation, victim, damage/loss and administrative violation is registered electronically, from which statistical data is produced. This is very convenient for the development of statistical information. On the other hand, the database for judiciaries and prosecutor's offices are in the stage of development.

Statistical information on crime is collected from the police, prosecutor's offices, courts and other organizations to be disclosed by the National Statistics Committee. This information is then delivered to all the relevant government agencies as well as external institutes such as the UN Statistics Division.

In the future, the Mongolian crime statistics system should be further optimized or example, the integrity of data from law enforcement and judiciary organizations must be ensured, laws and regulations for crime statistics must be adopted and enforced nationally, the national crime statistics must be appropriated to international standards and the National Statistics Commttee should establish a special division responsible for maintainenance of crime statistics (Figure 2).

Figure 2.Model of the Crime Statistics System



Sourse: Munkhdorj.B, "Problems with the theory and application of crime statistics", thsesis for doctor law, Ulaanbaatar, Mongolia, 2017

Legal environment for Crime statistics in Mongolia

Crime statistics in Mongolia is regulated by the Constitution of Mongolia, the Law on Statistics, the Law on the Services of the Police, the Law on the Prevention of Crime, the Law on the Services of Prosecutory Organizations, the Law on Judiciaries, and the Law on Judicial Administration.

Furthermore, the following guidelines also regulate crime statistics in Mongolia: the Guideline on Registration of Criminal Incidents of the Police (Gerelsuren.G 2017), the Guideline on Managing the Datasets of Prosecutory Organizations and Ensuring its Information Security (Otgonzul.G, 2017), the Guideline on Filling Criminal Incident Report Forms and Centralized Storage (Myagmarsuren.B, 2017), the Guideline on Court Statistics and Reports (Uyanga.G, 2016), and the Guideline on the Establishment of Sectorial Statistical Databases (Tsedevsuren.M, 2017).

In the last decade, damages equal to approximately 400 billion MNT was incurred upon the government, civilians, business enterprises and other organizations due to the growing rate of criminal activity. What is more, 16 thousand people died whilst 8 thousand people were injured. Article 19.1 of the Mongolian constitution states that, "the Government shall bear the responsibility of ensuring economic and social welfare that guarantees citizens their human rights and freedom, where it shall fight any violations and will put effort into restoring their rights if infringed (Boldbaatar.J, 2010).

Article 3.1 of the Law on the Prevention of Crime also states that "*Preventative action refers to a comprehensive set of action that is administered based upon careful analysis of data* focused towards identifying the reasons for crime, as well

as the prevention and deterrence of criminal activity (White paper on crime in Mongolia, 2016).

Additionally, articles 5.1, 20.1 and 20.2 of the said law also contain regulations that administer criminal statistics in Mongolia. For example, article 5.1 states that "Preventative action shall be implemented in following manner", which is further clarified in article 5.1.1 as it is stated that "*the causes of crime shall be identified by collecting and analysing data* (Crime prevention act in Mongolia, 1997).

Furthermore, article 20.1 states that, "Judiciaries, prosecutor's offices, police departments and any other bodies that reserve the right to register and investigate crime may organize activities to collect and process data for identifying the causes of crime in the following manner ((Crime prevention act in Mongolia, 1997). This is further clarified in articles 20.1.1 and 20.1.2 where such bodies reserve the right to *register, process and analyse data*.

Finally, article 20.2 states that "*the incident report forms and guidelines for providing statistical data by the aforementioned organizations will be approved by the National Statistics Office after consultation with such bodies* (Crime prevention act in Mongolia, 1997*)*. These regulations form the legal environment for criminal statistics in Mongolia.

Moreover, the fact that crimes that are being investigated nationwide is registered in the criminal database of the police based upon the "Instruction on Registering Criminal Statistics" proves that the legal regulations for registration of crime and investigation is severly flawed in Mongolia.

Hence, it is absolutely essential that the legal environment for criminal statistics is improved and if required amendments to appropriate laws and regulations must be made and comparative studies of foreign countries must be conducted in order to optimize the current system of criminal statistics in Mongolia.

Conclusion

The term "crime statistics" refers to the registration of crime, the maintenance of databases, the processing of statistical datasets, the analysis of information and the effective usage of such information in the decision making process and the implementation of policies.

The end goals for crime statistics in Mongolia is to create a system which accurately registers, collects and disseminates data, and which aids to develop effective measures for combatting crime. In other words, the most appropriate method for combatting crime is to improve the theories and methods associated with crime statistics, its legal environment and the validity of statistical information.

By developing the theories and methods of crime statistics as a comprehensive applied science the incident report forms of the police, anti-corruption agencies, court decision execution agencies, prosecutor's offices and judiciaries will significantly improve and the criminal justice system will be optimized. This will ensure that statistical information is integrated and accurate, and that governmental policies towards combatting crime are effective.

Moreover, in addition to providing quantitative indicators of the criminal situation in Mongolia more accurately and improving the conditions for preventing crime; the reasons and causes of crime will be identified where appropriate countermeasures will be developed which will result in improved knowledge on crime statistics, its methodology and usage.

Solutions

1. The improve the system of crime statistics in Mongolia, and to provide law enforcement and judiciary organizations with an integrated data system (*please refer to Figure 2. Model of the Crime Statistics System*);

2. To create a national approach to better management of crime statistics, and to improve the legal environment as well as the enforcement of domestic acts;

3. To create a specialized division responsible for crime statistics at the National Statistics Committee (please refer to Figure 2. Model of the Crime Statistics System);

4. To send recommendations to the Ministry of Law and Internal Affairs and the Ministry of Education, Culture, Science and Sports on preparing specialized statisticians for the police, anti-corruption agencies, prosecutor's offices and judiciaries; and to start developing joint education programs with support from the Law Enforcement University.

Reference

1. Baatar.Ya and Tarkhaashin.D (1988), Statistical Methods for Studying Crime. Ulaanbaatar. Mongolia

2. Batbayar.B and Tuvshintulga.A (2014), A Comprehensive Bibliographic Record of Mongolian Works on the Study of Legal Science. Ulaanbaatar. Mongolia

3. Batzorig.B (1999), Methods for Studying the Reasons and Causes of Crime. The Council for Organizing Crime Prevention Work. Ulaanbaatar. Mongolia

4. Batzorig.B (2003), Factors Influencing the Actual Data Indicators of Crime Trends. Journal of Criminal justice. (№01) 15-19

5. Boldbaatar.J (2010), Criminology. Ulaanbaatar. Mongolia

6. Gerelsuren.G (2017), Issue of delict statistics in Mongolia: Police practice. Journal of Criminal justice. (№ 3) 145-146

7. Erdenebat.G (2003), Reliability of Criminological Studies, Methods for Improvement. Journal of Criminal justice. (№04) 9-13

8. Enkhbold.B (2011), Urbanization and Crime. Ulaanbaatar. Mongolia

9. Jantsan.S, Ikhzaya.P, Munkhdorj.B (2007), Crime Statistics. Ulaanbaatar. Mongolia

10. Munkhdorj.B (2011), Handbook for Datahandlers and Research Workers of the Police. Ulaanbaatar. Mongolia

11. Munkhdorj.B (2006), Dynamic Link Analysis of Crime Registered in Mongolia. Journal of Criminal justice. (№3) 56-61

12. Munkhdorj.B (2012), Using Sampling Methods in Crime statistics. Journal of Police Studies. (№3) 85-91

13. Munkhdorj.B (2012), Analysis of the Crime Statistics of the Police, Recommendations for Improvement. Journal of Criminal justice. (№03) 15-20

14. Munkhdorj.B (2017), Theoretical and Practical Issues Concerning Crime Statistics. Proceedings of the Mongolian Academy of Sciences. Vol. 57 No 01 (221)

15. Mygmarsuren.B (2017), Crime statistics in Mongolia: legal environment and system. Journal of Criminal Justice. (№2) 109-114

16. Otgonbayar.L (2003), Issues Related to the Correlational Data Analysis Method for Studying the Factors which Influence Criminal Events. Journal of Criminal Justice. (№03) 25-29

17. Otgonzul.G (2017), Some problem on police crime statistics procedure in Mongolia. Journal of Police Studies. (№4) 87-91

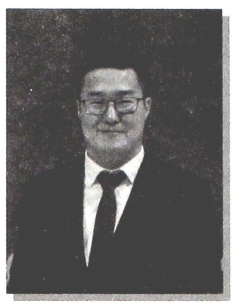
18. Shagdarkhorloo.B (1973), The Reasons and Causes of Crime: Issues Related to its Prevention. Ulaanbaatar. Mongolia

19. Tsedevsuren.M, Sumiyatseren.D and Munkhdorj.B (2017), Strengthening for capacity criminal justice personal, Journal of law Enforcement. (№4) 85-89

20. Uyanga.G (2016), Court statistics on crime: theory and practice in Mongolia. Journal of Court information. (№04) 58-71

---o0o---

COMMAND RESPONSIBILITY IS THE ESSENTIAL TO THE ENFORCEMENT OF INTERNATIONAL HUMANITARIAN LAW: IN THE EXAMPLE OF BEMBA CASE AT THE INTERNATIONAL CRIMINAL COURT



Agar-Erdene G, Head, Human Rights Education and Study Division National Human Rights Commission of Mongolia

Introduction

International humanitarian law, a branch of customary international law, has an important role to regulate the customs of war and to establish norms for the protection of civilians whereas serious offences such as war crimes and crimes against humanity are committed due to grave breaches of its principles. Although war crimes and crimes against humanity involve large-scale acts committed by perpetrators, traditionally, these offences occur under the direct or indirect supervision of high level officials including military or non-military superiors. Therefore, superiors play crucial roles in both of the enforcement and the breaches of the principles of international humanitarian law.

In accordance with the general principles of international law, offences against humanitarian law are subject to criminal liability.[1] In other words, a person who commits international crimes incurs individual criminal liability. However, over the years, the cases of war crimes and crimes against humanity have often centred on legal debates around individual criminal liability of a person who enable the commission of such crimes. In response to this, international law has developed the concept of command responsibility, an omission mode of individual criminal liability or an essential method to convict superiors who are responsible for war crimes and crimes against humanity.[2] [3]

Furthermore, the concept of command responsibility reflects that military leadership are responsible for ensuring the principles of international humanitarian law through effective control and command. From this perspective, international tribunals and courts contribute significantly to the enforcement of international humanitarian law when they make determinations over the breaches of this principle. In the same vein, it can be inferred that international criminal tribunals were created for the purpose of enforcing international humanitarian law and holding internationals in breach of humanitarian law to account.

This article will discuss the latest development of the concept of command responsibility by the International Criminal

[1] L. C. Green 'Command Responsibility in International Humanitarian Law', 5 Transnational Law and Contemporary Problems (1995) 323.

[2] Elies van Sliedregt, The Criminal Responsibility of Individuals for Violations of International Humanitarian Law (Asser Press, 2003) 119.

[3] Gideon Boas, James L. Bischoff and Natalie L. Reid, Forms of Responsibility in International Criminal Law (Cambridge University Press, 2008) 143.

Court in *Bemba* case, which is the first-ever decision regarding command responsibility. Although the concept of command responsibility includes non-military superiors or civilian leaders, this article, will explore military settings as the *Bemba* is focused on military commander's criminal liability. The c is set out as follows. Part I of the article looks at the background of the origins of command responsibility in international humanitarian law. Part II discusses the development of the command responsibility concept in the light of practices in some ad hoc criminal tribunals. Finally, in Part III, the article will discuss recent development of the concept within the scope of the Rome Statute of the International Criminal Court[4] and *Bemba* case.

Part One. Origins of Command Responsibility in International Humanitarian Law

The doctrinal root of command responsibility appears to be found as 'an articulation of military practice' before the 20th century.[5] For example, the earliest treatise written by the Chinese military strategist Sun Tzu reads: "When troops flee, are insubordinate, distressed, collapse in disorder or are routed, it is the fault of the general. None of these disorders can be attributed to natural causes."[6] Since that time, this concept has been developed in various military documents throughout the history.[7]

Namely, an Ordinance at Orleans which was issued by Charles VII in 1439 stipulates "The King orders that each captain or lieutenant be held responsible for the abuses, ills and offences committed by members of his company, and that as soon as he receives any complaint concerning any such misdeed or abuse, he bring the offender to justice so that the said offender be punished in a manner commensurate with his offence, according to these Ordinances. If he fails to do so or covers up the misdeed or delays taking action, or if, because of his negligence or otherwise, the offender escapes and thus evades punishment, the captain shall be deemed responsible for the offence as if he had committed it himself and shall be punished in the same way as the offender would have been."[8] The similar principle is also expressed in the Articles of War in 1621: "No Colonel or Captain shall command his soldiers to do any unlawful thing; which who so does, shall be punished according to the discretion of the Judges."[9] In addition, in 1625, Hugo Grotius wrote that: "A community, or its rulers, may be held responsible for the crime of a subject if they knew it and do not prevent it when they could and should prevent it.'[10]

These historical documents generally reflect military disciplinary responsibility of the superiors[11], although few cases which go beyond the 13th century indicate practical realization of the criminal liability of superiors. For example, the trial of Peter von Hagenbach is considered to be the first eminent example of the recognition of command responsibility in criminal law. He was charged for committing murder, rape, perjury and other crimes by the judges appointed by the Holy Roman Empire[12] and convicted because 'he should have

[4] Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('Rome Statute').

[5] Elies van Sliedregt, above note 2, 119.

[6] Gideon Boas, James L. Bischoff and Natalie L. Reid, above note 3, 145.

[7] Patrick Walsh and Joshua F. Berry 'Expanding Command Responsibility Beyond War: The Application of the Doctrine of Command responsibility to Human Rights Law' (2016) 11 Liberty University Law Review 426.

[8] Ordonnances des Rois de France de la Troisieme Race (Louis Guillaume de Vilevault & Louis G.O.F. de Brequigny eds., 1782) cited in L. C. Green, above note 1, 321.

[9] William Winthrop, Military Law and Precedents (Arno Press, 1979) 910, cited in L. C. Green, above note 1, 321.

[10] Hugo Grotius, De jure belli ac pacis: libri tres (1625) 523, cited in Gideon Boas, James L. Bischoff and Natalie L. Reid, above note 3, 145.

[11] Elies van Sliedregt, 'Command Responsibility at the ICTY – Three Generations of Case Law and Still Ambiguity' in A. H. Swart et al. (eds), The Legacy of the ICTY (OUP, 2011), 2.

[12] Elies van Sliedregt, above note 2, 120.

prevented as he had had the duty to do so'[13]. This which was later recognized as one of the fundamental concepts of command responsibility in international humanitarian law.

In the early 20th century, especially between pre-World War I and post-World War II, the concept was developed under international treaties and the judgements of several humanitarian trials. This period is now seen as the foundation of the modern concept of command responsibility. Namely, the Fourth Hague Convention of 1907 first codifies the liability of the superior.[14] Article 3 of the Convention stipulates that "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces."[15] Moreover, Article 1 of the Annex of the Convention states that "an armed force must be commanded by a person responsible for his subordinates."[16]

One of the important case examples of the command responsibility in this period refers to the jurisdiction of the United States War Crimes Commission. In this case, Tomoyuki Yamashita, the commanding general of the 14th Army Group of the Imperial Japanese Army was brought before the Commission and charged with having "unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines".[17] The judgement of the United States Supreme Court shows that general Yamashita was criminally responsible for a number of war crimes including mass killings or atrocities committed in the territory of Philippines.[18]

However, his defence lawyers argued that he should not be punished as he had not known about the crimes of his subordinates. In response, the Prosecutor argued that even if Yamashita had known of the crimes, he 'should have known' of them because of his duty as a commander.[19] Furthermore, Justice Murphy pointed in the conclusion that: "He was not charged with personally participating in the acts of atrocity or with ordering or condoning their commission. Not even knowledge of these crimes was attributed to him. It was simply alleged that he unlawfully disregarded and failed to discharge his duty as a commander to control the operations of the members of his command, permitting them to commit the acts of atrocity."[20] This case was concluded on 4 February 1946.[21] In short, he was criminally charged as he breached the laws of war in international humanitarian law because international humanitarian law recognizes that a failure of duty of the commander is not justifiable. More importantly, Yamashita's case made a significant contribution to the development of 'must have known' and culpability standards in international criminal law.[22]

In addition, the doctrine of individual criminal liability was further developed by the post-war trials at Nuremberg and Tokyo, while there was still no adequate rule for the concept of command

[13] Ibid.

[14] Gideon Boas, James L. Bischoff and Natalie L. Reid, above note 3, 146.

[15] International Committee of the Red Cross, 'Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War and Land. The Hague, 18 October 1907' (n.d.) <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=144930FB7D15DBF6C12563CD00516582>.

[16] Ibid.

[17] Elies van Sliedregt, above note 2, 120.

[18] In re Yamashita, 327 U.S. 1 (1946)

[19] Elies van Sliedregt, above note 2, 121.

[20] In re Yamashita, 327 U.S. 1, 327-28 (1946)

[21] In re Yamashita, 327 U.S. 1, 327-28 (1946)

[22] Max Markham, 'The Evolution of Command Responsibility in International Humanitarian Law' (2011) Penn State Journal of International Affairs 51.

responsibility.[23] The judgements of the Nuremberg Tribunal did not directly consider command responsibility as they focused on active or factual participation of the superiors, in which they had had knowledge of the crimes and the crimes were committed under their order.[24] The Nuremberg Tribunal adheres this perspective when it decided *Kaltenbrunner case* and *Rosenberg case*[25]. As well as, Tokyo Tribunal helped to develop the responsibility of non-military superiors in war crimes and crimes against humanity. For example, in the *Hirota case*, the Tokyo Tribunal concluded that responsibility for crimes committed by Japanese troops was vested in the Japanese Foreign Minister, Kiko Hirota. Although it was a controversial decision, which gave weight to the dereliction of duty, the Tribunal emphasized a 'should have known' standard to the duty to act.[26] It can be inferred that trials at Nuremberg and Tokyo made their contribution to establish command responsibility as a form of criminal liability which has been endorsed in international criminal law.[27]

Part Two. Development of the Concept by International Criminal Tribunals

The jurisdictions of the international criminal tribunals are, traditionally, the primary references in interpreting and applying the principles of international humanitarian law. As far as the command responsibility is considered, it can be said that the concept has necessarily been engaged with international criminal tribunals which impose criminal liability upon those who commit crimes specified in their respective Statutes. From this perspective, their decisions are essential to the further enforcement of international humanitarian law as well.[28]

Provisions of the Statutes of ad hoc tribunals, such as the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda, polished the concept of command responsibility which is enshrined in Article 86 of the Additional Protocol to the 1949 Geneva Conventions in 1977.[29] Article 86 explicitly states that "...breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility"[30] while Additional Protocol draws the standard for the 'failure to act' which encapsulates the concept of command responsibility in general.

Statutes of the ICTY and ICTR further expanded this concept. For example, Articles 6/7(3) of the Statutes of the ICTR and ICTY state that: "The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measure to prevent such acts or to punish the perpetrators thereof."[31] [32]

This provision was cited in the ICTY judgement of *Prosecutor v. Mucic et al*, (*Celebici* case). In *Celebici*, the ICTY

[23] Gerhard Werle, Principles of International Criminal Law (Asser Press, 2nd ed., 2009) 187.

[24] Elies van Sliedregt, above note 2, 124.

[25] L. C. Green, above note 1, 331.

[26] Elies van Sliedregt, above note 2, 130.

[27] Ibid, 3.

[28] Hortensia D. T. Guitierrez Posse, 'The relationship between international humanitarian law and the international criminal tribunals' (2006) 88 International Review of the Red Cross 67.

[29] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), signed on 12 December 1977, 1125 UNTS 3, (entered into force 7 December 1979). ('Additional Protocol')

[30] Additional Protocol, Art 28.

[31] SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, UN SCOR, 64th sess, 6155th mtg, UN Doc S/RES/1877 (7 July 2009) ('ICTY Statute') Article 7.(3).

[32] SC Res 955, UN SCOR, 49th sess, 3453th mtg, UN Doc S/RES/955 (8 November 1994), as amended by SC Res 1431, UN SCOR, 4601th mtg, UN Doc S/RES/1431 (14 August 2002) ('ICTR Statute') Article 6.(3).

3. the accused must have had effective command and control, or effective authority and control, over the forces that committed the crimes;

4. the accused either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes;

5. the accused must have failed to take all necessary and reasonable measures within his power to prevent or repress the commission of such crimes or to submit the matter to the competent authorities for investigation and prosecution; and

6. the crimes committed by the forces must have been a result of the failure of the accused to exercise control properly over them.[48]

These six elements are fundamentally similar to the approaches of ICTY and ICTR. But there are minor differences in each of the elements. This part of the article will give more consideration to last three elements as they represent essential components of the command responsibility while bearing in mind that all six elements are interrelated and interdependent with each other. Moreover, last three elements represent the duty of the military commander or superior as the precondition of the effective enforcement of international humanitarian law. On the other hand, it is also said that the true form of command responsibility generally falls into the last three elements as they indicate indirect or passive participation of the superiors in the commission of war crimes and crimes against humanity. [49]

Firstly, in international humanitarian law, superior or military commander must be responsible for his or her duty to ensure the law of war. If he or she fails to do so or breaches the duty, it is seen as superior's 'personal fault' which is subject to criminal liability.[50] Therefore, actual knowledge of the superior in relation to the specific crimes is crucial for defining his or her culpability. In terms of the fourth element, the Rome Statute defines mental element differently from the ICTY and ICTR Statutes, but similar to Yamashita judgement. It is worth mentioning here that the Rome Statute emphasized the term 'should have known', which sees negligence as a standard for the determination of military commanders' liability, while ICTY judgements emphasize 'had reason to know' as not in relation to negligence.[51] According to the ICTY's opinion, 'had reason to know' or actual knowledge is able to be obtained by way of direct evidence.[52] In contrast, the International Criminal Court interpreted 'should have known' as negligence in failing to acquire knowledge of his subordinates' conducts.

In *Bemba*, the Trial Chamber concluded that "Mr Bemba knew that the MLC forces under his effective authority and control were committing or about to commit the crimes against humanity of murder and rape, and the war crimes of murder, rape, and pillaging."[53] Furthermore, the Trial Chamber did not consider that "re-characterisation of the charges pursuant to regulation 55 to include the "should have known" mental element is warranted."[54] However, *Bemba* reintroduces differences between 'should have known' and 'had reason to know' standards.

Secondly, with regard to fifth element, it is seen as the core duty of the commander, as mentioned earlier in

[48] Prosecutor v Bemba, Para 170.

[49] A. H. Swart et al. (eds), above note 11, 6.

[50] Darryl Robinson, 'How Command Responsibility got so Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution' (2011) 13 Melbourne Journal of International Law 9.

[51] Gideon Boas, James L. Bischoff and Natalie L. Reid, above note 3, 258.

[52] Chantal Meloni 'Command Responsibility, joint commission and 'control over the crime' approach in the first ICC jurisprudence' in Triestino Mariniello (eds.) The International Criminal Court in Search of Its Purpose and Identity (Routledge, 2015) 47.

[53] Prosecutor v Bemba, Para 717.

[54] Prosecutor v Bemba, Para 718.

this article, who is crucial for ensuring the enforcement of international humanitarian law. For instance, in accordance with the Additional Protocol, every commander is under the duty to punish the culprits for the crimes committed prior to the time when he assumed command.[55] It has been one way in preventing further humanitarian crimes. If he or she fails to do so, as the principle of international humanitarian law of command responsibility, he or she will be criminally liable under the international criminal law. Because superior or military commander has to have the effective command and control to prevent the commission of crimes in accordance with third element.

In *Bemba*, the Trial Chamber III emphasized three distinct duties of the commander: '(i) preventing the commission of crimes; (ii) repressing the commission of crimes; or (iii) submitting the matter to the competent authorities for investigation and prosecution.'[56] Compared to the jurisdictions of ad hoc tribunals and provisions of the Additional Protocol, the Trial Chamber made reference to a duty to 'prevention' and 'repress' separately.

Furthermore, the Trial Chamber also found the requirement of causation between the commander's failure to prevent or repress the commission of such crimes. For example, the Trial Chamber considered following measures would have been taken by Bemba: "(i) to ensure that superior s forces are adequately trained in international humanitarian law; (ii) to secure reports that military actions were carried out in accordance with international law; (iii) to issue orders aiming at bringing the relevant practices into accord with the rules of war; (iv) to take disciplinary measures to prevent the commission of atrocities by the troops under the superior s command."[57]

Thirdly, with regard to the sixth element, a failure to exercise control properly over subordinates is an essential component of indirect command responsibility. In some detail, the command is a prerequisite for criminal responsibility and control determines the extent of that responsibility.[58] In order to determine whether commander has criminal liability on the basis of command responsibility, it is required to look at both of command and control. Command needs to be exercised through control.[59] In light of this, *Bemba* appears to be concrete evidence of the *de jure* command and control.[60] This is because Bemba exercised effective command and control when he deployed his troops into the territory of Central African Republic.[61]

Therefore, on the basis of indirect command responsibility, a person who passively commits the crimes because of his or her inactivity is also punished. [62] It is said that the Bemba case provides that a commander is criminally responsible for crimes committed by subordinates under his/her effective control as a result of his or her failure to exercise control properly.[63] In its judgement, the Trial Chamber pointed that 'it is a core principle of criminal law that a person should not be found individually criminally responsible for a crime in the absence of some form of personal nexus to it."[64] In other words, the Trial Chamber gave more emphasis on Bemba's failure to exercise control properly over the operations of the MLC troops as the element of causation is important requirement for determining commander's passive participation in the crime.

[55] Additional Protocol, Article 87.

[56] Prosecutor v Bemba, Para 201.

[57] Prosecutor v Bemba, Para 203.

[58] Elies van Sliedregt, above note 2, 153.

[59] Ibid, 152.

[60] Chantal Meloni, above note 52, 45.

[61] Nora Karsten 'Distinguishing Military and Non-military Superiors' (2009) 7 Journal of International Criminal Justice, 1004.

[62] Elies van Sliedregt, Individual Criminal Responsibility in International Law (Oxford University Press, 2012) 187.

[63] Ibid, 198.

[64] Prosecutor v Bemba, Para 211.

Conclusion

The command responsibility plays an important role in international humanitarian law. This is because it is directly related to international humanitarian law's objective to oblige commanders to prevent war crimes, crimes against humanity and other offences through an effective control and command over their subordinates' activities. Although this concept originally emerged from the international humanitarian law, it has been further strengthened with the determinations of the international criminal judiciary organs.

In other words, judicial applications of the concept of command responsibility have established an opportunity to bring a superior before the Court, who is most responsible for the commission of serious international crimes. While judicial applications of the command responsibility appear to be in conceptual development, Bemba case at the International Criminal Court was undoubtedly essential to the further enforcement of international humanitarian law. Because this case has been seen as the only interpretation of Article 28, which represents the most recent development of the concept of command responsibility in international criminal law so far.[65]

Bibliography

Journal Articles

Darryl Robinson, 'How Command Responsibility got so Complicated: A Culpability Contradiction, Its Obfuscation, and a Simple Solution' (2011) 13 Melbourne Journal of International Law

Hortensia D. T. Guitierrez Posse, 'The relationship between international humanitarian law and the international criminal tribunals' (2006) 88 International Review of the Red Cross

Kai Ambos, 'Joint Criminal Enterprise and Command Responsibility' (2007) 5 Journal of International Criminal Justice

L. C. Green 'Command Responsibility in International Humanitarian Law' (1995) 5 Transnational Law and Contemporary Problems

Max Markham, 'The Evolution of Command Responsibility in International Humanitarian Law' (2011) Penn State Journal of International Affairs

Nora Karsten 'Distinguishing Military and Non-military Superiors' (2009) 7 Journal of International Criminal Justice

Patrick Walsh and Joshua F. Berry 'Expanding Command Responsibility Beyond War: The Application of the Doctrine of Command responsibility to Human Rights Law' (2016) 11 Liberty University Law Review

Books and Book Chapters

A. H. Swart et al. (eds), The Legacy of the ICTY (OUP, 2011)

Chantal Meloni 'Command Responsibility, joint commission and 'control over the crime' approach in the first ICC jurisprudence' in Triestino Mariniello (eds.) The International Criminal Court in Search of Its Purpose and Identity (Routledge, 2015)

Elies van Sliedregt, Individual Criminal Responsibility in International Law (Oxford University Press, 2012)

Elies van Sliedregt, The Criminal Responsibility of Individuals for Violations of International Humanitarian Law (Asser Press, 2003)

Gerhard Werle, Principles of International Criminal Law (Asser Press, 2nd ed., 2009)

Gideon Boas, James L. Bischoff and Natalie L. Reid, Forms of Responsibility in International Criminal Law (Cambridge University Press, 2008)

Yusuf Aksar, Implementing International Humanitarian Law: From The Ad Hoc Tribunals to a Permanent International Criminal Court (Routledge, 2004)

[65] Kai Ambos, above note 44, 176.

UN Documents

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), signed on 12 December 1977, 1125 UNTS 3, (entered into force 7 December 1979). ('Additional Protocol')

Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('Rome Statute').

SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, UN SCOR, 64th sess, 6155th mtg, UN Doc S/RES/1877 (7 July 2009) ('ICTY Statute')

SC Res 955, UN SCOR, 49th sess, 3453th mtg, UN Doc S/RES/955 (8 November 1994), as amended by SC Res 1431, UN SCOR, 4601th mtg, UN Doc S/RES/1431 (14 August 2002) ('ICTR Statute')

Cases

In re Yamashita, 327 U.S. 1 (1946)

Prosecutor v Bemba (Judgment pursuant to Article 74 of the Statute) (International Criminal Court, Trial Chamber III, Case ICC-01/05-01/08, 21 March 2016). ('Prosecutor vs Bemba')

Prosecutor v Mucic et al. (Judgement) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case Ni IT-96-21-A, 20 February 2001). ('Prosecutor v Mucic et al.')

Prosecutor v Oric (Sentencing Judgement) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case Ni IT-03-68-T, 30 June 2006)

Websites

International Committee of the Red Cross, 'Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War and Land. The Hague, 18 October 1907' (n.d.). <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=144930FB7D15DBF6C12563CD00516582>.

---o0o---

ADMINISTRATIVE PROCEDURES AND PUBLIC PARTICIPATION OF MONGOLIA[1]

Oyunchimeg.Ts, LL.M Researcher,
The National Legal Institute

1. One.Introduction: Mongolia's Administrative Procedures and Public Participation

The digital era of legal system development of Mongolia has begun since early nineties. The people of Mongolia are very much politically active and pay a huge respect to the state, its culture, national tradition and custom. The Constitution of Mongolia welcomes their participation in the Article 3[1]. The participation of citizens is at the very heart of the idea of democracy. The public comments through direct social media significantly affect and influence the decision makers at government and parliament level on timely matter. The People of Mongolia has over 2200 years of history of state and law. The latest so-called democratic Constitution has established administrative system and local governance in accordance with principles of separation of state powers and rule of law. It aims to develop democracy and civil society; state authorities and public servants undertake their activities under strict rules and procedures and guarantee local self—governance and status of its independence.[2]

There were many critics for lack of Mongolia's legal procedural transparency and openness for legislative drafting and administration decision-making process especially for not including public comment and review. Concerned by the critics the Parliament of Mongolia has successfully enacted around 109 laws guaranteeing public participation.

This essay based on latest three projects and study on public participation in the laws of Mongolia planned by the Office of the President, Ministry of Justice and Home Affair, Swiss Agency for Development and Cooperation SDC and Hanns-Seidel Foundation, Mongolia Office. The projects studied different forms of citizen participation in around 308 articles: informative; consultative; active or direct; review and other forms of participation. I have illustrated them in legal provision examples. Although the term "citizen participation" has not found its clear definition and understandings there is no particular difference between "public participation" and "citizen participation" in meanings and both used in laws of Mongolia.[3]

One of the direct and active form of citizens participations, which has law on its own in administrative adjudicating process by law is to be chosen as citizens

[1] See The Constitution of Mongolia, §3. section 1. (1992) "In Mongolia state power shall be vested in the people of Mongolia. The Mongolian people shall exercise it through their direct participation in state affairs as well as through the representative bodies of the State authority elected by them."

[2] Amarsanaa Jugnee, Transitional period and legal reform in Mongolia, Ulaanbaatar (2009).

[3] Monitoring and analysis on implementation of Mongolian laws coordinating civic engagement. (Printing department, NLI), (2018). P.12

representative[4] (§52.2 The Constitution of Mongolia (1992), §73 Law on Administrative Case Adjudication in Court (2015) (hereinafter referred to as ACAC)) in all first instance courts.

The Modern Mongolian legal system is heavily influenced by the Roman-Germanic law family reflecting many similarities with laws of Federal Republic of Germany particularly in the field of administrative law. The newly adopted administrative law had many praises and expectations from public for the length of long and delayed progress of its drafting and final enactment. Some critics said "... the development of administrative judicial review structure has finally matured, citizens legal education has improved, the frame of the legal administrative disputes has broadened. These three main reasons urged us to adopt a new legislation.[5]" and other said "...it prevents from intentional uncertain circumstances produced by the decision of administrative authority; protect legitimate interests of investors and business owners from unforeseen possible harms when regulation impacts on individuals' rights then authorities justifies its decision based on restrictions *"... in order to protect public interest, or national security, or cherishing the national interests."*; less bureaucratic attitudes toward decision-making process and be reassured that administrative acts are not contrary to prevailing legal norms or laws." [6] and finally " ... the law clarifies the scope of application of the law and specifies where it does not apply; defines the rights and obligations of parties more clearly; enables government agents or agencies to seek professional expert assistance from each another in a written form, resulting communication improvement between governmental agencies; introduces a new procedure called *"Hearing"* which requires the governmental agents and agencies to conduct a hearing to introduce the concept and purpose of a new decision they are intending to adopt and the hear opinion from the affected population. This procedure is mandatory, with some exceptions, however government agencies will though not required to modify their proposed plans to reflect the input received at the hearings and governs the process of drafting, introducing and passing the decisions before it reaches the court."[7]. Previously (in socialist law system) Mongolian courts had no full judicial review over all state administrative decisions and structure or complaint procedure for administrative court because of totalitarian one party regime.

The §48.1 of the Constitution of Mongolia serves as a legal foundation to form specialized administrative court. Since 1st July of 2004 first administrative specialized courts (hereinafter referred to as the court) have started to operate in Mongolia. Today the administrative and judicial mechanism of 21 provincial administrative courts are in full enforce to control any illegal conducts of administrative authorities, citizens and legal entities or persons under General Administrative Law (2015) (hereinafter referred to as GAL) and ACAC.

Two. Overview of Law on Administrative Case Adjudication in Court

Administrative bodies may act in various legal forms: classical administrative act in a narrower sense is any order, decision or other sovereign measure taken by an authority to regulate an individual case in the sphere of public law and intended to have a direct,

[4] See Law on Legal status of citizen representative in court. (22nd May, 2012).
available at http://www.legalinfo.mn/law/details/8688

[5] available at https://www.news.mn/?id=214930 (visited July 31, 2018).

[6] available at https://www.ashidadvocates.mn/files/publications/Mongolian%20pub%20administrative%20pdf.pdf

[7] available at http://lehmanlaw.mn/blog/new-general-administrative-law-to-be-implemented/ (visited July 5, 2018).

external legal effect.[8] The GAL aims to regulate and standardize most basic legal relation between administrative bodies, legal entities and citizens or public in order to exercise authoritative executive power in public law matter by enacting administration legal acts, administrative normative acts and agreements under public law. According to the §13.1 of ACAC: all administrative illegal actions infringing citizens right or public law disputes can be brought before the Administrative Court. In Mongolia the ACAC helps adjust the relationship between the executive agency and citizens with respect to decisions in particular cases and also governs administrative and judicial review of final administrative activities. In order to study administrative procedural law of Mongolia, one has to understand that concepts of GAL since it has already set regulation of the general administrative process of executive power of decision making and any disputes of public law outside of purely constitutional matters. The both laws came into effect on 1st July, 2016.

The General Administrative Law

The main legal sources of GAL are the Constitution of Mongolia and the laws in accordance with the Constitution (§2, GAL), not necessarily national practices, observances or autonomous laws like in Germany.[9] The GAL contains no personal applicability or definition of "citizen" which means "a citizen of Mongolia, a citizen of foreign country and stateless person". Therefore, administrative courts are open to foreign citizens who assert that public administrations or officials of Mongolia breached their rights legitimized by Mongolian and International law[10]. The GAL has in total of 11 Chapters. The judicial review of administrative disputes regarding all[11] activities (*administrative acts and normative act, agreement under public law*) of administrative or public law authority (§3, Chapter I, GAL) which also must be in accordance with constitutional fundamental principles of the activities of the State and its special principles[12]. The §5 gives a definition of administrative authority: *"administrative authority issues an authoritative decision reflecting public interest"* and its representation exception[13] is regulated by §7, GAL. The general civic engagement regulation is governed by Chapter III "Administrative decision-making process". The legal status of participants in Administrative decision-making procedure is defined in the §13, GAL as follows:

"1. Participants in the decision-making process are person(s) **who** *submitted a complaint or petition to the administrative authority or public law authorities,* **those whom** *legal effects of administrative acts and agreement under public law are directly or indirectly out to and* **those who** *forced to be involved in the decision-making process referred by the administrative or public law authorities."*

[8] See Report for Germany Dr. Carsten Günther, Judge at the Federal Administrative Court, Leipzig ADMINISTRATIVE JUSTICE IN EUROPE. available at http://www.aca-europe.eu/en/eurtour/i/countries/germany/germany_en.pdf

[9] Eberle, Edward J, The West German Administrative Procedure Act: A Study in Administrative Decision-making, (Penn State International Law Review: Vol. 3: No. 1, §4.) (1984). P.4

[10] available at http://tsogt.blogmn.net/11306/law-on-procedure-for-administrative-cases-%7Cmongolia%7C-essey-in-english.html

[11] See The GAL, § 3 (2016) "… with exceptions: legislating drafting process and legislative activities, activities to ratify international treaties to which Mongolia is a Party, activities regarding criminal cases and legal disputes of the Constitutional Court of Mongolia, courts of all instances, activities of criminal investigation and its prosecutor and enforcement of judiciary decisions, activities for deployment of armed forces during declaration of state emergency or a marital law, direct activities of state intelligence service, protection of national security and implementation of State foreign policy and activities of political decision-making."

[12] See The GAL, § 4 (2016). "legality, immediacy, continuity, openness with exception of confidentiality, effectiveness, achieved its aimed outcome, reality or reasonableness of decision, notification, rights of refusal or have opportunity to refusal and protect principle of legal certainty."

[13] See Law on the Regulation of Public and Private Interests and Prevention of Conflict Interest in Public Service (LRPPI), § 14 (2012). "3.1. if any of the aforementioned entities is related to him/her; 3.2. if he/she or his/her related persons derive any type of income from any of the aforementioned entities; 3.3. if he/she or his/her related person is a member of the governing, auditing or executive body of the aforementioned organization or economic entity."

The §14, GAL asks to recognize citizens legal capability and §15, GAL defines rights of participant[14] in relation rulemaking with administrative authorities within following regulations: planning procedure of decision-making, enforcement of administrative decision, a complaint procedure, remedies and sanctions.

The Law on Administrative Case Adjudication in Court

As mentioned before fundamental right of access to court is for any person claiming that his/her person's individual rights were affected or violated by a public authority or as a plaintiff, public interest representing body or administrative authorities.

The principles of the ACAC (**§§**4-10) include: independence of judges, judicial power shall be vested exclusively in courts, equality of all before the court, pleadings, burden of proof by court and openness of the proceedings, continuity of court session.

The Court cannot refrain or waive its right to consider case on ground of missing any laws or normative regulation and court proceedings must be conducted in official state language of Mongolia which is Mongolian. The citizens can file a claim to administrative authority's residing territorial administrative court within 30 days upon: delivery or notification of decision, refusal of administrative authority decision; omission of higher administrative authorities; or exhaust all and other options of challenging the decisions stipulated in complaint procedures in the GAL according to **§**14, ACAC.

The Court has a sole duty for inspecting all circumstance surrounding the case, collection of evidence, its evaluation and in case of necessity to provide translators or interpreters. Participants of the court proceedings are: administrative plaintiff, defendant and third party with legal capacity or capability, their representation, rights and duties of plaintiff[15] and other parties regulated by Chapter III.

For more, all procedures in the law have fully detailed and effectively regulated by the ACAC: evidence; court procedural expenses, state registration fee; submission of administrative statement of claim, its acceptance by the Court; simplified proceedings adjudication; preliminary hearing of Court; scheduling a Court session, Composition of the Court, Participants of the Court proceedings and Common procedural Rules; procedural rule in a Court of First Instance, Court decision; special rules, adjudication of Courts of Appeal, adjudication of Court of Cassation; review of effective judicial acts due to new or newly discovered facts.

Three. Legal regulation of Public Participation at the Central and local government

1. Public hearing at the central government level

As a highest executive body of the State by the Constitution, the Prime Minister (his Cabinet) is responsible to the State Great Khural for the implementation of law and supervise the conformity of decisions of the central state administrative bodies and the local administrations with the laws and regulations in force.

[14] "the right to receive information on decision-making activities in accordance with laws, desired projects, activities, plan, complaint or petitions, through archives or register of administrative organ,
-the right to obtain a copy of the required documents, to be informed by the regulation stated in LRPPI and Law on Information Transparency and Right to Information (LITRI),
-the right to obtain returned original or notarized copy of documents, supplied by the participant,
-the right to present evidence and supply requested relevant documents prior to a decision-making,
-the right to request administrative authority to fulfill its legal obligation and other rights."

[15] The plaintiff enjoys seven rights stated in the §20.1 ACAC (2016) with exception of right to "renounce the claim in full or in part when representing public interest."

Nevertheless, there are nine categories of citizens participation at central government level:

- ***citizens right to information***: on Decree or ordinance of President, Prime Minister and his Cabinet members and Parliament; open session of Constitutional court in Mongolian language, publicize upon issuance of Decision; law drafters publish public comments received on proposals within 30 days on its website; dividend of stock of state and its information along with auction type publication prior 30days before privatization of State or state partially owned entities; long and short term Government foreign bonds and securities (with Central Bank) etc.

- ***through electing in professional committee***: Judicial General Council; non-official Monitoring Commission at Central Bank; Personalized Medicine Council at Ministry of Health[16]; National Statistical Council; Council of Boards on issue of Standardization and Conformity Assessment; Committee of Energy Regulation at Ministry of Energy etc.

- ***public hearing*** and ***preliminary process prior to decision making***: Minister of Education and Culture supports public reading[17], Government organizes a hearing prior implementing any national or local policy or projects /environmental protection etc. /, its strategic assessments to planning etc.

- ***direct issuance of administrative acts, normative acts***: decree of the Prime Minister on earthquake risk reduction or emergency response [18] ; tax reduction or rewarding procedure regarding any activities for the protection of cultural heritage and history etc.

Recent survey revealed that in general around 1476 public law organizations have authority to issue administrative normative act by 206 laws. In 2017 the Government alone issued 47 such acts.[19]

- ***permit, license, or concession and special activities***: Minister of Finance's rule for licensing professional tax advising service[20]; Ministry of Geology and Mining issues license of Cadastral Survey to citizens, legal entities and organization[21] etc.

- ***public legal promotion and educational training or review*** on its relevant issues: General Election Commission for monitoring election campaign broadcasting on radio, tv during election; Communications Regulatory Commission; Department for Financial Information for prevention and combatting activities for money laundering and financing of terrorism etc.

- ***cooperation or agreement under public law*** in an area of: forest protection; gender equalization etc.

- ***support by financing or rewarding***: rewarding crew, non-governmental organization, police and border patrol on discovery of illegal actions against environmental laws or laws on regulation of the foreign trade of endangered animals, plants or derivatives thereof etc.

At last ***direct obligation entitled on legal entities (corporation) or citizens***: direct involvement for the implementation of laws on health or when developing detailed effect valuation of projects must organize hearing and receive comments of residents or local people, where the project aimed to take place in etc.

2. Public hearing at the local government level

[16] available at https://www.mohs.mn/news/1265

[17] See Proposal: open for public comment. available at: http://nationallibrary.mn/en/mergejiltnuud/huuli-erhzuin-akt

[18] See "Earthquake disaster prevention and acknowledgement day" Government Ordinance № 67 (2017).

[19] Hanns- Seidel Foundation. Assessment on implementation's consequences of General Administrative Law (2018).

20 available at http://legalinfo.mn/law/details/12551?lawid=12551

[21] *See* "issue service license to Land administration and cadastral professional organization" Minister of Construction and Urban development. Decree № 246 (2015). *available at* http://legalinfo.mn/annex/details/7045?lawid=11606

The citizens local involvement opportunities also in laws have broadened:

- ***right to information***: Generally, citizens, legal entities and public or non-governmental organizations are entitled to receive information (§3, LITRI) etc.

- c***itizens enjoy general rights or be responsible directly***: to propose or request on issues over national security, drug or medicines etc.

- ***monitoring***: regarding the implementation of the accounts or glass account law; production or usage of idiom salts or food health safety etc.

- ***public hearing*** which should be held regularly due to assess the implementation of administrative normative acts or planning in every 24-30 months after laws and normative acts take into effect or prior of issuance to which legal consequences imply such as a nullification of administrative acts. The law defines must and necessary activities for public hearing: upon requests made by citizen or legal entities on infringement of their rights then it has been accepted by the KRC; on issues of local projects or programs invested by local development foundation of Governors of Bagh and Khoroo etc.

- ***electing or take a participation in councils or voluntary citizens associations***: Owners association of copyrights; civilians' voluntary group protecting livestock etc.

- ***training or promotional activities*** on implementation of law on: tax, employment promotion; against AIDS, domestic violence, fair competition etc.

- obtaining ***special license or owner's permission***[22] on: special professional training; archive; use forest; hunting; release forecast information in special need etc.

- ***public law agreement*** or ***rights transfer of administrative authority*** on area: public service; health sector; protection of environment; land management; social protection and insurance.

At last supporting citizens for their efforts by ***financial assistant and rewarding or suggestion for paid information***: innovation; human trafficking; crimes against livestock; protection of cultural heritage; air pollution and illegal hunting etc.

Four. Recent Trends and Developments

The Administrative Courts are successfully working with fair budget, independent judiciary, open court activities within excellent operational condition. The people access to the all instances of administrative courts have increased since 2004-2015, from 145 to 1439 cases decided in total, favoring 60 percentage for the claimants which means approximately 4000 administrative decision voided by the courts.[23] Statistics show that total of 832 effective administrative decisions setting norms and standards have been registered officially. Recent survey reveals that Courts have most disputes regarding dismissal from public service, disputes over land issue and election results or mineral resources. The newly adopted "hearing" need more practicality in administrative authorities.[24] It may ensure effectivity but not necessarily trial type procedures in its rulemaking. [25]

Lately the Minister of Justice and Home Affair gathered much public attention and criticism on his latest claim o. i potential release of government decisions (including its supervising bodies) from judicial

[22] See "EEE" LLC and others v. Durvuljin Soum's, Khural of Representatives of Citizens, available at htpp://shuukh.mn, Ref:118/2018/0044/3. (2018)

[23] Analyses on the implementation of the Mongolian Constitution of 1992 (Best Color International LLC).(2016). P.121

[24] Hanns- Seidel Foundation. Assessment on implementation's consequences of General Administration Law (2018). P.22, 36.

[25] Rene Seerden, Administrative Law of the European Union, its Member States and the United States (Intersentia).(2012). P.336

reviewing because of administrative court judges have been influenced by political parties therefore illegally interfering his activities.[26] The special courts are one of the great achievements of legal system development in Mongolia. In theory or practice the political decisions of government are not subject matter of administrative court jurisdiction anyway. The GAL has been clear on that according to its Article 3.

It is early being judgmental on implementation of these laws or practicality due to their length of effectivity in less than two years. There are many concerns about the lack of correlation between GAL and Law on Infringement and misunderstanding particularly over jurisdictions. There is a possibility that if state as a plaintiff at ACAC seeking remedy, then workloads of court might get heavier. We might need a new re-legislation (§103, 103.4, 104.4 GAL) over the issue, because there is not a single court decision. [27]

[26] *See available at* http://www.inews.mn/a/2008 (visited on Aug 29, 2018)

[27] Hanns- Seidel Foundation. Assessment on implementation's consequences of General Administration Law (2018). P. 132-5

---o0o---

SPECIAL FEATURES OF THE LEGAL ACT OF MONGOLIA DURING A PERIOD OF MANCHU CHIN

Jargalsaikhan B. Lecturer of "Ikh Zasag" International University, Mongolia

Abstract: The Nations issue of Mongolia was solved by Manchu Chin state's government with approving national legislation respecting Mongolian national customs and regulating relationship between Manchu Chin government House and Mongolians in order to strengthen Manchu Chin's rule and implement its law among the small nation.

In the article: Some legislations of Nation which were implemented by Manchu Chin government among Mongolia were introduced and also it was expressed easily about historical value of united country that was established by many nations together.

Key word: Small nation, Government House, Custom

Introductory

The Nation's issue was solved by Manchu Chin's government within implementation of national state policy, using complete legal methods and regulating relationship between Manchu Chin's government House and Mongolians in order to strengthen Manchu Chin's rule and enforce its law among the small Nation. There were two features of Nation's law implementation adopted by Manchu Chin in Mongolia.

First, Sources Law of Mongolia. This law which was involving the primary content of Source Law of Mongolia was implemented.

Second, State policy to restrict the Nation was implemented during the enactment.

Main section

First

The primary content of Sources Law of Mongolia was remained and implemented.

One. Rights of Mongolian nobility were protected. Due to Manchu Chin ruled Mongolia through Mongolian nobility their privilege and feudal status were protected. The privilege and feudal status of Mongolian nobility were legalized and if someone attacked their reputation he or she could be punished. Such articles were shown up more often in criminal laws. Nobilities who killed someone intentional or accidental should be sentenced to pay a fine of livestock without legal proceedings. Servants who killed their lords should be hanged. Commons who defamed nobles should be sentenced to pay a fine of livestock. Commons who dug nobles' grave should be hanged and their family should be beaten with a stick 100 times, sentenced to pay a fine with animals and sent to work.

Two. There were heavy penalties of theft for protecting livestock and properties. There were two features of criminal law in Mongolia during Manchu's rule.

1. Penalties of criminal offences were heavy comparing with an inner country (China).

2. There were many articles about livestock theft in criminal law and its content was accurate.

Law of State Ministry of Outer Mongolia (about theft) had upper and lower chapters. Major parts of this law were about the punishments of livestock theft and sentences depended on types and number of livestock and vehicle. "Fines were four types of livestock such as cows, horses, camels and goats. Four goats were equal to one cow or one horse, or one camel. If the punishment for livestock theft is light (stolen only one or two animals), a head of the criminal offence shall be beaten with a stick one hundred times and kept in chains for one month according to the Article 1129 of Law of State Ministry of Outer Mongolia. If the criminal stole the livestock alone and the others used it after the theft, partners in crime should be beaten with stick 90 times." According to the Article 1133 of Law of State Ministry of Outer Mongolia, a person convicted of committing the offence of theft of more than 20 animals should be sentenced for death penalty in the end of autumn and until the autumn the criminal should be imprisoned. When it became autumn if the previous punishment could be believed light, the criminal might be banished to Hokhuwan and Fujen which had bad and unpleasant weather. According to the Article 1138 of Law of State Ministry of Outer Mongolia, a person convicted of committing the offence of theft of dog, pig and chicken should be sentenced to pay a fine.

3. The types of punishments of criminal law of Mongolia including death penalty (to execute by cutting, stretching, and hanging), banishing, imprisonment, beat with stick and paying a fine were same as punishments of inner country.

These punishments had the following features:

A. A sentence to pay possessions was inherited and kept in the criminal law. Mongolia had nomadic lifestyle and 5 types of livestock were their main possessions. Because of that a livestock theft was one of the criminal offences and the penalty for that was payment of animals. Mongolians worshiped the Number 9. There were fine unit within 9 livestock, because of Mongolians worshipping concept associated with the Number 9.

The 9 livestock fine unit included: 1 horse, 2 cows, 3 milk cows, 2 goats, 2 calves in its second year. And there were fines with one 9s, two 9s, three 9s, four 9s, five 9s, six 9s and so on till it becomes number nine. Mongolian administration nobles were paid by Manchu Chin Government House[1]. It was legalized that nobles who commit a crime should be sentenced to pay a fine with animals and gotten a wage cut.

Mongolia was given the right to amend the law of Central State by Manchu Chin government House. Punishments of inner state included banishing, going into the army, appointment to the border[2]. For example there were appointments to the north east of Mongolia and Shinjan of China. But the appointment to the border in Mongolia was very different and more difficult than the appointment to the border in China. According to the Law of State Ministry of Outer Mongolia, a convicted person with heavy punishment should be banished to the Eanung, Khuijwu, Guandun and Guanshi which had the bad and unpleasant weather and a convicted person with light punishment should be

[1] 刘广安, 中国古代民族自治研究(M)北京. 中央民族大学出版桂, 2009, (103-107)

[2] 刘广安, 中国古代民族自治研究(M)北京. 中央民族大学出版桂, 2009, (103-107)

banished to the Khokhuwan, Fuze, Fujen, Jensh, Jejen and Jenen.

For instance, according to the Article 1115 of Law of State Ministry of Outer Mongolia a leader of robbers (no more than three people) who robbed and stole possessions should be banished to Yenung, Khuijou, Guandun, Guwanshin which had the bad and unpleasant weather and other accomplices should be banished to Khokhuwan, Fuze, Fujen, Jensh, Jejen and Jenen.

According to the Article 1116 of Law of State Ministry of Outer Mongolia noble who killed someone while robbing and stealing things or noble who was joined with other people robbed possessions without killing someone should be beaten with a stick one hundred times, kept in chains for two months and should be demoted.

Two. A State policy to restrict the Nation was implemented during the enactment.

Manchu Chin government exploited and prevented Mongol nation while was ruling Mongolia. Manchu had enacted laws that restricted administration rights of Mongolia, relationship between Mongolia and foreign countries, and relationship between Mongolia and China nation. A person who travelled abroad could be sentenced to a death penalty. According to the Chapter 34 of Law of State Ministry of Outer Mongolia if someone wanted to go abroad, he or she had to inform his or her province administration. If that person went abroad without informing, a ruler of this province should be sentenced. A person who escaped abroad should be sentenced to a heavy punishment. There was an order about the escaped people. It was enacted in this order that if the escaping people protested with weapon, all escapees had to be executed. If escapees protested without weapon, a leader of these escapees should be executed by stretching. An escapee who injured someone should be executed and an escapee who didn't injure someone should be sentenced to pay a fine. An escapee who didn't injure someone and came back yourself should be beaten with a stick 100 times and sent to his or her lord. The relationship between Mongols and people of Inner country (China) was restricted. If Mongols came into Inner state (China), they had to pursue rules of Inner State. If Mongols wanted to travel to Inner State, they had to get a permission document in Military Ministry and the number of guides was stated. Mongols traveled without a permission document could be punished.

It was enacted that Mongols shouldn't go abroad and get in touch with each other in order to restrict the relationship between Mongols, protect to consolidate force and reduce disputes between groups.

Although the state policy to restrict the nations' rights was implemented, the relationship between people of Mongolia and China broadened and people of two countries got married much due to their necessities of life.

According to the Chapter "men marry Mongolian women" of Law of State Ministry of Outer Mongolia citizen of Inner state (China) should not marry Mongolian woman. If Mongolian woman married a citizen of China, she should be divorced and sent to her homeland. And Mongolian man who married citizen of Inner state should be kept in chains for 3 months, beaten with a stick 100 times and sent to his homeland. However these cases might be decided according to the law about administration nobles.

If a citizen of Outer Mongolia cheated a woman of Inner state, brought her in his home and married her, a leader of this case should be executed by stretching in the end of autumn and accomplices should be beaten with stick 100 times and sentenced to pay a fine with three times 9 animals.

Manchu Chin government House restricted the relationship between Mongolian and Chinese people, and protected to bloom Chinese culture in Mongolia, to become Buddhist monk, and to speak Chinese in Mongolia.

Three. Historic events of Nation's legislations which were implemented by Manchu Chin government among Mongolia

1. In order to strengthen their rule among Mongolians, the Manchu Chin State government took following measures: according to reality of Nation, different types of legislations were implemented.

Mongolia was given the right to administer Nation and to implement their laws by Manchu Chin government House. Special rights and status of Mongolian nobles were protected by laws. Mongolian nobles were given the right to decide themselves. Manchu Chin government restricted Mongols to strengthen their authority, the relationship between Mongolian and Chinese people and the relationship between Mongols and people of foreign countries. A Relationship between Mongolian groups was enacted by Manchu Chin government.

2 According to reality of Nation, different types of legislations were implemented. Manchu Chin's government implemented state policy of Nation, decided Nation's problems according to law and regulated relationships between Manchu Chin government and Mongols legitimately in order to improve state control and law enforcement. The National legislation that was enacted by Manchu Chin's government suited well to features of Mongolian life. Because of that a Manchu Chin's feudalists had the opportunity to develop their rule among Mongolia and showed their opinions to become one united country.

National legislation respecting national custom was enacted and the unit of the state legislation was ensured. This national legislation regulated relations between central laws of Manchu and laws of Mongol nation due to the meaningful legislation of Manchu Chin. Manchu Chin had legalized that if a citizen of few nation (Mongolia) committed a crime, he or she should be sentenced according to the laws of Manchu Chin. If a citizen of Mongolia who belonged to the State Ministry committed a crime, he or she could be sentenced for other categories of laws. Some categories of Manchu Chin state laws were directly enacted. For example, (in the article about killing someone during holidays) if a person killed someone accidentally during the holidays, he or she should be punished. In the article about killing someone during the quarrelling, if someone died within 50 days after quarrelling and battery, a person who beat should be imprisoned and executed by stretching.

Conclusion

The above mentioned categories of laws had demonstrated the unity of Manchu Chin and Mongols. The self-governing rights and rights to enact laws solely were given by Manchu Chin government to Mongols. Manchu Chin took into consideration differences between two nations. Therefor special laws only for few nations were enacted. For example, there were "Mongolian Code", and "Law of State Ministry of Outer Mongolia".

These laws reflected Mongolian customs and demonstrated historic tradition and reality of Mongolia. Laws including a content of Mongolian tradition were implemented by Manchu Chin.

The amount of a fine could be depended on conditions of cases according to the article about "Sentencing Mongols in Da Chin Hun Diyan". The main features of laws of Mongolia were

penalties to pay a fine with animals or other possessions. It was the reflection of Mongolian customs.

Manchu Chin government proved the power of laws of small nation, broadened and strengthened enforcement of these laws.

Manchu Chin government enacted laws of Mongolia which was reflecting national tradition, using Mongolian morality and experiences of law enactment and laws that could separate and restrict Mongols from other countries.

However it had helped to develop a society of small nation and protect the collectivity between a small nation and other countries. And Manchu Chin government had strengthened its law enforcement among small nation.

Nowadays these are more important historic and academic actions for us. Historical values for establishment of united country were collected.

Used books

1. Legal act of the Ministry of improving the State and its Foreign affairs trend of Borjigon, Mungundalai, and Garguulsan №34, Beijing, Publishing Committee, 2006

2. Law history of ancient Mongolia of Chige and Manchu Chin, Publishing Committee, 2004

3. 田利姝：清朝民族立法特点之研究(J)：贵州民族研究, 2003, №4

4. 徐晓光：清朝民族立法原初探 (J)：民族研究, 1992, №1

5. 刘广安： 中国古代民族自治研究：北京：中央民族大学出版桂, 2009

---o0o---

UNSUPERVISED CHILDREN IN KOREA AND IN MONGOLIA:REQUIRED LEGAL SOLUTION TO PROTECT THEM.

Inhee Ahn, 3L,
Handong International Law School

INTRODUCTION

If economic conditions, political institutions, diplomatic relations, and etc. are indicators to assess the current status of a nation, then the most important factor in predicting the future of the nation is how the state treats their children. The reason why Korea, Japan and other countries are struggling with the aging issue and declining fertility rates is because of these important factors on which future and nation's power depends.

Despite the fact that children are the future of a nation, they have a present characteristic that they are the most vulnerable groups and the weakest dependents among the group of the weak. In other words, child welfare is not like an investment in one industry that might recover in a short period of time. Vulnerable children are also not like adults who can quickly adapt back to society. Therefore, it is also true that there is a significant burden to support these children until they become adults who can contribute to a society. State must provide an appropriate help to the vulnerable children, and this is even critical for its future, but it is not easy to input enough human and material resources into these children in a long period time as if pouring water in a sieve. That's why an appropriate care and support for them is always limited. In addition, there is opinion that parents have primary responsibility to take care of their children, thus it is not easy to oppose to such opinion and say that government has to take care of unsupervised children on behalf of irresponsible parents and to use national budgets on them. Therefore, many countries, including Korea, are struggling to create the best policy for children, therefore caught on between the importance of support and on the other hand of various difficulties. Mongolia is no exception on this matter.

Here, in this report, we will examine the current situation of unsupervised children in Mongolia and in South Korea, and will discuss what legal solution can be taken to protect and support these unsupervised children.

1. WHO ARE UNSUPERVISED CHILDREN?

There are several terms describing unsupervised children: social orphans who have living parents or close relatives but live out of family care; orphans who have lost parents to death[1]; parentless children, homeless children, street children, abandoned children, children without parental care, and etc.[2] Under UNICEF's typology, children on the streets are those whose family support base has become weakened and who share in the responsibility for family survival by working on city streets and market places. Children of the streets are those who daily struggle for survival without family support, are abandoned.[3]

Depending on its terms, some children are subject to the criteria of children living in residential institutions, or living with care givers at small group homes or under foster care. Even though they are do not live on street and live in such facilities, many of them still lack appropriate care and are subject to abuse or dangers. And such situation let children run away and live on street. Unsupervised children mean all children who lack protection and care regardless of living out of residential care or under residential care, but here, it is meant to cover mainly about children on the street.

Unsupervised children are everywhere. They are not only found in developing countries or in area where war or armed conflicts happened. They are even in economically developed countries, facing possible danger of huge violations of their rights. Consequential problems, such as exploitation of children's labor, sexual abuse, prostitution, child trafficking, drugs, or involvement in other crimes might be raised differently depending on each country, but the same thing is that unsupervised children out of appropriate protection and care are exposed to dangers in all countries around the world. Korea and Mongolia are no exception on this matter.

Korea defines such children as a "child subject to protection." According to Ch.1 Art.3.4 of the Child Welfare Act of Korea, "the term "child subject to protection" means a child who has no protector or is separated from a protector, or whose protector is unsuitable for, or incapable of, rearing them, such as in cases of child abuse by the protector."[4] Under the same Act, a person who is under 18 years old of age is defined as a child. Thus, orphans, quasi-orphans, street children all are defined as "children subject to protection" in Korea.

Ratification Status for Mongolia

Treaty	Signature Date	Ratification Date, Accession(a), Succession(d) Date
CAT - Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment		24 Jan 2002 (a)
CAT-OP - Optional Protocol of the Convention against Torture	24 Sep 2013	12 Feb 2015
CCPR - International Covenant on Civil and Political Rights	05 Jun 1968	18 Nov 1974
CCPR-OP2-DP - Second Optional Protocol to the International Covenant on Civil and Political Rights aiming to the abolition of the death penalty		13 Mar 2012 (a)
CED - Convention for the Protection of All Persons from Enforced Disappearance	06 Feb 2007	12 Feb 2015
CEDAW - Convention on the Elimination of All Forms of Discrimination against Women	17 Jul 1980	20 Jul 1981
CERD - International Convention on the Elimination of All Forms of Racial Discrimination	03 May 1966	06 Aug 1969
CESCR - International Covenant on Economic, Social and Cultural Rights	05 Jun 1968	18 Nov 1974
CMW - International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families		
CRC - Convention on the Rights of the Child	26 Jan 1990	05 Jul 1990
CRC-OP-AC - Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict	12 Nov 2001	06 Oct 2004
CRC-OP-SC - Optional Protocol to the Convention on the Rights of the Child on the sale of children child prostitution and child pornography	12 Nov 2001	27 Jun 2003
CRPD - Convention on the Rights of Persons with Disabilities		13 May 2009 (a)

[1] Sara Dillon, International Children's rights 445 (Carolina Academic Press, 2010).

[2] Sara Dillon, International Children's rights 446-48 (Carolina Academic Press, 2010).

[3] Sara Dillon, International Children's rights 529 (Carolina Academic Press, 2010).

[4] Child Welfare Act, Act No.14224, May 29, 2016 (S. Kor.), http://www.law.go.kr/LSW/eng/engLsSc.do?menuId=1&query=child&x=0&y=0#liBgcolor19.

Like the table above shows, Mongolia is a country that has signed and ratified various international treaties. With respect to children's rights, Mongolia signed the Convention on the Rights of the Child (CRC) on January 26, 1990 and ratified it in on July of the same year. In 2003 and 2004, October 2013, Mongolia ratified of CRC II OP, in October 2013, it signed the CRC III OP. Thus, it can be said that Mongolia is well familiar with various terms defining vulnerable children.

Under description of Committee on the Rights of the Child, street children are those who, "in order to survive, are forced to live and/or work on the streets."[5] In Mongolia, street children mean that "temporary and permanent children who live in manholes, apartment entrances and tunnels" and some agencies in Mongolia argue that using such term is inappropriate, thus this term is also used interchangeably with "unsupervised children who are in care facilities."[6] Considering this fact, term "unsupervised children" will be used here to describe children on the streets and of the streets as well.

2. CURRENT SITUATIONS OF UNSUPERVISED CHILDREN IN MONGOLIA AND SOUTH KOREA

The statistical data for the unsupervised children is not consistent. As it is mentioned in the Ch.1 defines the meaning of the unsupervised children, it is possible to have single category or several categories depending on the definition of unsupervised children. There is one report of 2015 that provides a real picture of current children's rights in Mongolia. The survey has taken from 3,285 children, between ages of 11-18 for this report.[7] This is the report of UN Committee on the Rights of the Child - Mongolia and "The Rights of All Children", prepared by both, Save The Children and World Vision.

Children participating in this survey were the children who is under the care of their parents, grandparents, or other caregivers. Nonetheless, the findings of the survey show that children's rights still have a number of problems, which makes it possible to assume that the situation of the unsupervised children is much worse.

There are a lot of children who are not currently being cared for in the right family, mainly because of the economic difficulties of the family due to high unemployment rates. There is saying that at least one member of each family in Mongolia is working in Korea. It is very often that one parent or both parents work aboard giving their children to others to take care for them. This is also a good indicator of high unemployment rate and difficult economic conditions in Mongolia. When parents work in overseas or far away from living places, the child is left to other households, thus, proper care cannot be provided. Children who live with relatives or other households are often subject to multiple forms of abuse. And unemployment related poverty leads to a new problem, alcoholism of parents, and because of it, the children are subject to mental and physical abuse of its parents and are forced to make money by going out to the streets. Children who are not being cared for by their parents, but improperly cared for by other families or relatives, and children who suffer from abuse by drunken and unemployed parents, are afraid of the family. The level of fear of the respondent children was 32%. [8]

In particular, 1,198 children from urban and rural areas participated in the survey on the family environment, with 4 out of 10 children answered that they cannot study because of house chores such as caring for their younger siblings, carrying water, chopping firewood, and cleaning home. The 20% of respondents said they had been

[5] Sara Dillon, International Children's rights 530 (Carolina Academic Press, 2010).

[6] Street and Unsupervised children of Mongolia, UNICEF, at 9 (2003).

[7] For the Rights of All Children, Children's report to the UN Committee on the rights of the child – Mongolia, Save the children and World Vision, at 3 (2015).

[8] For the Rights of All Children, Children's report to the UN Committee on the rights of the child – Mongolia, Save the children and World Vision, at 8-9 (2015).

sexually abused or abused in their family. The 28% of the children said that they do not know from which agency to ask for help in case of domestic violence, and 58% of respondent children said they do not know about the procedures of accepting and resolving the complaints of child rights.[9]

The results have shown that the duty of the state to communicate and promote the Convention on the Rights of the Child is still fulfilled insufficiently. According to this survey, there is no legal framework for raising complaints by children, and works of National Committee for Human Rights and the National Authority for Children has brought no significant outcome. Moreover, there is no government support for involvement of NGO's.

As a result of poverty and dysfunction of family, abuse by family member or placing responsibilities on children to make money and children are forced to live on the street and/or away from appropriate care and to be vulnerable to exploitation, abuse, trafficking, and crimes. The analysis of the Situation of Children in Mongolia in 2014 says that "there were around 3700-4000 children who are unsupervised or street children, primarily in Ulaanbaatar but also in Darkhan, Dornod and Selenge provinces in 2003. However, the Police data from 2007 indicated that only 50 or so children were living on the street. The street children in Mongolia are predominately male adolescents, although the numbers of girls have gradually increased."[10] However, considering the fact that there are 40 children currently attend The World Vision Day Activity Centre in Ulaanbaatar that helps for street children who have no family but particularly resist organized care, the police data can be inaccurate or is considered different source of information.[11]

Like the pictures show above, street children who do not live with parents live under the manholes in the city. They are homeless children. They look for food, wandering from place to place, searching through the same piles of scraps. They beg, collect bottles and anything else that they can scavenge that might have some monetary value. They have no parents, thus often they are subject to human trafficking to China. Some of street children live with parents. Even if they are not homeless, still they are street children and unsupervised children because these children are sent out to beg by their parents who use the monetary compensation to buy alcohol. Others are forced into selling themselves on the streets, while their pimps are protected by corrupt policemen.[12]

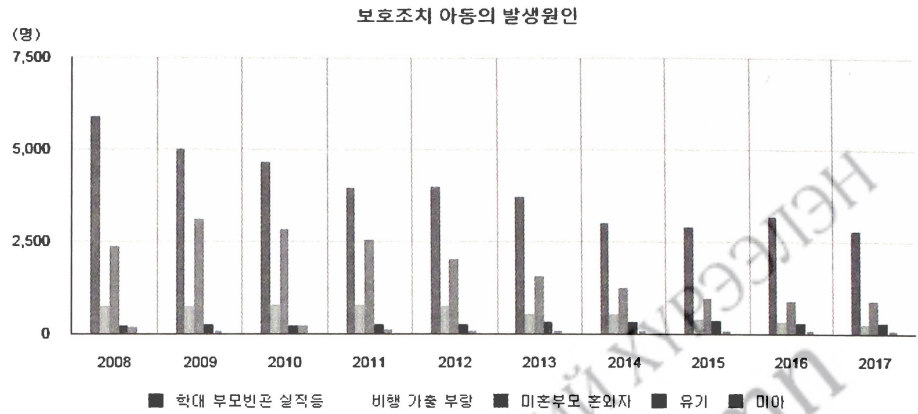
[9] For the Rights of All Children, Children's report to the UN Committee on the rights of the child – Mongolia, Save the children and World Vision, at 19 (2015).

[10] Analysis of the Situation of Children in Mongolia, Government of Mongolia National Authority for Children and UNICEF, at 60 (2014).

[11] http://www.streetchildren.de/en/day-activity-centre/index.html

[12] Damien Dawson, Street Children Remain Neglected, World Street Children News, April 06, 2007, https://streetchildrennews.wordpress.com/2007/04/06/street-children-remain-neglected/

Table 1. Cause of occurrence[13]



출처 : 보건복지부「보호대상아동 현황보고」

According to statistics of Korea, total number of unsupervised children in 2017 was 4,121 children, and main cause of occurrence was a poverty, abuse in family, parents' and unemployment. Its number was 2,769 children. Table 1 helps to assume that poverty results in family break and further in occurrence of unsupervised children.

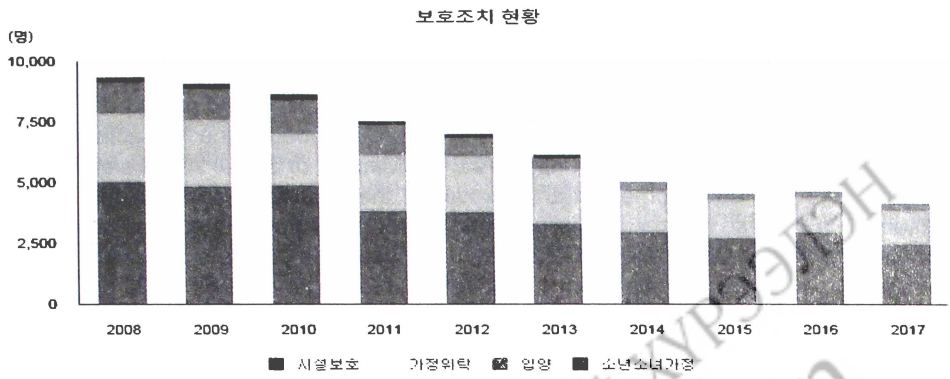
unit: person

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Total	9,284	9,028	8,590	7,483	6,926	6,020	4,994	4,503	4,592	4,121
abuse, poverty, parents' unemployment	5,876	4,994	4,613	3,928	3,944	3,668	2,965	2,866	3,148	2,769
delinquent,runaway,vagrant children	706	707	772	741	708	512	508	360	314	229
single parent	2,349	3,070	2,804	2,515	1,989	1,534	1,226	930	856	850
	202	222	191	218	235	285	282	321	264	261
missing child	151	35	210	81	50	21	13	26	10	12

(http://www.index.go.kr/potal/main/EachDtlPageDetail.do?idx_cd=1421)

[13] Statistics Korea, Ministry of Health and Walfare, posted May 17, 2018, http://www.index.go.kr/potal/main/EachDtlPageDetail.do?idx_cd=1421.

Table 2. Children under protection[14] 16



출처 : 보건복지부 (시도별 보호대상아동 현황보고 자료)

unit: person

	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Total	10,534	10,153	8,590	7,483	6,926	6,020	4,994	4,503	4,592	4,121
residential care	4,964	4,767	4,842	3,752	3,748	3,257	2,900	2,682	2,894	2,421
foster care	2,838	2,734	2,124	2,350	2,289	2,265	1,688	1,582	1,449	1,413
adoption	1,304	1,314	1,393	1,253	772	478	393	239	243	285
	178	213	231	128	117	20	13	0	6	2

(http://www.index.go.kr/potal/main/EachDtlPageDetail.do?idx_cd=1421)

Table 2 explains which care facilities unsupervised children live in. So, 4,121 unsupervised children are not street children and they are under different type of care system, and 2,421 children of them live in residential institutions. Unsupervised children in Korea is formed by similar reason like Mongolia. For economic poverty, the majority of parents are unable to nurture their children. The other reason is that the orphans run away from the orphanage because of abuse from other older children or run away from abusive parents.

However, these statistics do not include number of street children. It is assumed that the number of unsupervised children, including children who are accommodated in the facility, will be 250,000.[15] The number of unsupervised children occurred in 2012 was around of 7,000.

Numbers of unsupervised children in Mongolia and in South Korea might be different depending types of data, but the important thing is that a considerable number of unsupervised children are at risk and that they may cause other social problems when they become adults.

[14] Statistics Korea, Ministry of Health and Walfare, posted May 17, 2018, http://www.index.go.kr/potal/main/EachDtlPageDetail.do?idx_cd=1421.

[15] Cristian Martini Grimaldi, Helping Seoul's homeless kids in the spirit of Jesus, UCAnews, Mar. 28, 2016, https://www.ucanews.com/news/helping-seouls-homeless-kids-in-the-spirit-of-jesus/75572.

3. WHAT LEGAL SOLUTIONS IS REQUIRED TO PROTECT UNSUPERVISED CHILDREN?

The Constitution of Mongolia assures that "all children have a right to exercise, either on his/her own or through their legal guardians, every right entitled by this fundamental law... The children's right for survival, protection, development and participation as set forth in the Convention on the Rights of the Child are included in the Mongolian Law on the Protection of the Rights of the Child.[16] And the Ministry of Social Welfare and Labour put its efforts into development and approval of the Standards for Residential Care Institutions in 2008 so that residential care institutions can follow a child protection policy. The General Police Department (GPD) has introduced the program titled "Partnership for children with governmental and non-governmental organizations till 2012" in order to increase the capacity of Police dealing with child protection issues. Since 2010, the National Centre against Domestic Violence has appeared to accommodate child victims of domestic violence.[17]

There is law on education that prohibiting corporal punishment, emotional harassment and disclosure of personal information in the educational settings, and the Social Welfare Law granting the conditional monetary allowances of MNT 31,500 per month to foster families to encourage families for offering temporary care for child victims of violence.[18] Moreover, family group care service which places 4-8 children under supervision and care has been implemented by supporting of international organizations.[19]

Despite of these improvements in laws, it is still required to add other solutions. Most of laws are focused for victim children, and thus, it is necessary to make laws for children who are not a victim yet still unsupervised. For example, it is good to support monetary allowance to foster families temporarily protecting child victims of violence, however, it is needed to expand monetary allowance system to the extent of foster families taking care of unsupervised children so that foster care turns into long term home care.

Corporal punishment is now prohibited in school, however, corporal punishment at home is still not banned in the present law. [20] Unfortunately, the most of corporal punishment and abuse happen at home by parents or adults of family members. Even though there is law to punish parents abused their children, domestic violence does not disappear because law exist only as a written law giving space such adults to escape from punishment. For example, there was no law in Korea to accuse parents or caregivers who abused children, if a child victim does not bring complaint. Since victims are children, they were afraid of filing complaint against their parents, thus many cases were hidden without taking any legal measures. In 2013, law was amended and now victim child's complaint is not required to accuse and punish such parents and caregivers. Law itself became a protector of unsupervised children who have been exposed to violence.

Enforcing laws is more important than making laws. There are already many laws and mechanism in Mongolia, but comparing to 2009, child protection challenges remain

[16] Report by the Government of Mongolia in response to the Global Progress Survey on Violence against Children 13 (2012).

[17] Report by the Government of Mongolia in response to the Global Progress Survey on Violence against Children 9 (2012).

[18] Report by the Government of Mongolia in response to the Global Progress Survey on Violence against Children 14 (2012).

[19] Report by the Government of Mongolia in response to the Global Progress Survey on Violence against Children 85 (2012).

[20] Report by the Government of Mongolia in response to the Global Progress Survey on Violence against Children 18 (2012).

relatively unchanged. For example, banning corporal punishment at school exists, but data of Ministry of Education and Culture from 2007 show that 80% of older preschool children, 77.5% of primary school children and 98.6% of secondary school students have experienced corporal punishment.[21] As another example, in 2012 the Government of Mongolia passed a new law on combating human trafficking yet has not implemented the proposed national program, and has dissolved or failed to appoint the relevant coordinating committees. Many national programs for child protection developed over the least 10 years have not been documented nor evaluated for relevance or effectiveness.[22] Therefore, along with making adequate laws it is required to enforce laws and have system to monitor and evaluate whether laws are enforced well and these laws are helpful and effective for protection of children.

At the same time, it is required to make preventive measures to protect unsupervised children. Data provided by National Statistics Office of Mongolia (NSO) show that "crimes involving juveniles have significantly increased over the last two decades, rising from 733 recorded offences in 1991 to 1,080 in 2008."[23] Of course, it does not mean that these all 1,080 children are unsupervised or street children, but it can be assumed that most of them would be unsupervised children. Unsupervised children are exposed to various violence and dangers and such environment makes them commit crime no matter they intended or not. Therefore, there is a need for legal provisions that specifically address the rights of street and unsupervised children for protection,[24] so unsupervised children are protected from danger and risks, also are prevented from involving in criminal environment and further, being criminals.

It seems to be necessary to make laws assuring employment for parents. According to article "Traffickers profit from vulnerability of street children in Mongolia" posted in 2006, more than 36 per cent of the population was classified as poor or very poor, and almost 48 percent of children live in vulnerable, poor and very poor families where their parents are likely to be unemployed. Another source of information says that poverty rates sit at over 27%.[25] As it is mentioned above, poverty directly causes of increase of unsupervised children, thus such law resolving unemployment rates would help to decrease the number of unsupervised children.

It is also very important to make family-like environment so that unsupervised children are willingly to live in care center, not thinking of running away from it. According to NSO data from 2012, "there were 6173 full orphans and 34,321 semi-orphan children in Mongolia. There are very limited alternative or foster care arrangements available in Mongolia and orphaned children are mostly housed in one of around 43 child care centers in Ulaanbaatar, Darkhan and Erdenet.". The quality of care in such facilities is often not sufficient.[26] Thus, group home and foster care must be developed as an alternative family environment for unsupervised children.

---

[21] Analysis of the Situation of Children in Mongolia, Government of Mongolia National Authority for Children and UNICEF, at 56 (2014).

[22] Analysis of the Situation of Children in Mongolia, Government of Mongolia National Authority for Children and UNICEF, at 61-62 (2014).

[23] Analysis of the Situation of Children in Mongolia, Government of Mongolia National Authority for Children and UNICEF, at 60 (2014).

[24] Daryhand Bayar, Traffickers profit from vulnerability of street children in Mongolia, UNICEF Mongolia (2006), https://streetchildrennews.wordpress.com/2006/03/07/traffickers-profit-from-vulnerability-of-streetchildren-in-mongolia/.

[25] Mongolia's Most Vulnerable Children, World Vision, at 2, (2014), https://www.wvi.org/sites/default/files/mvc_website.pdf.

[26] Analysis of the Situation of Children in Mongolia, Government of Mongolia National Authority for Children and UNICEF, at 57 (2014).

Same as Mongolia, Korea has many laws with regard to child care facilities and operates many child care centers. Still most of unsupervised children live in residential institutions. Allocated budget for one child who lives in residential institution is mere $20, while one person with disabilities receives $400 of governmental subsidy. One caregiver has to take care of at least 10 children. The UN Committee on the Rights of the Child has recommended to protect unsupervised children at group homes than facilities.

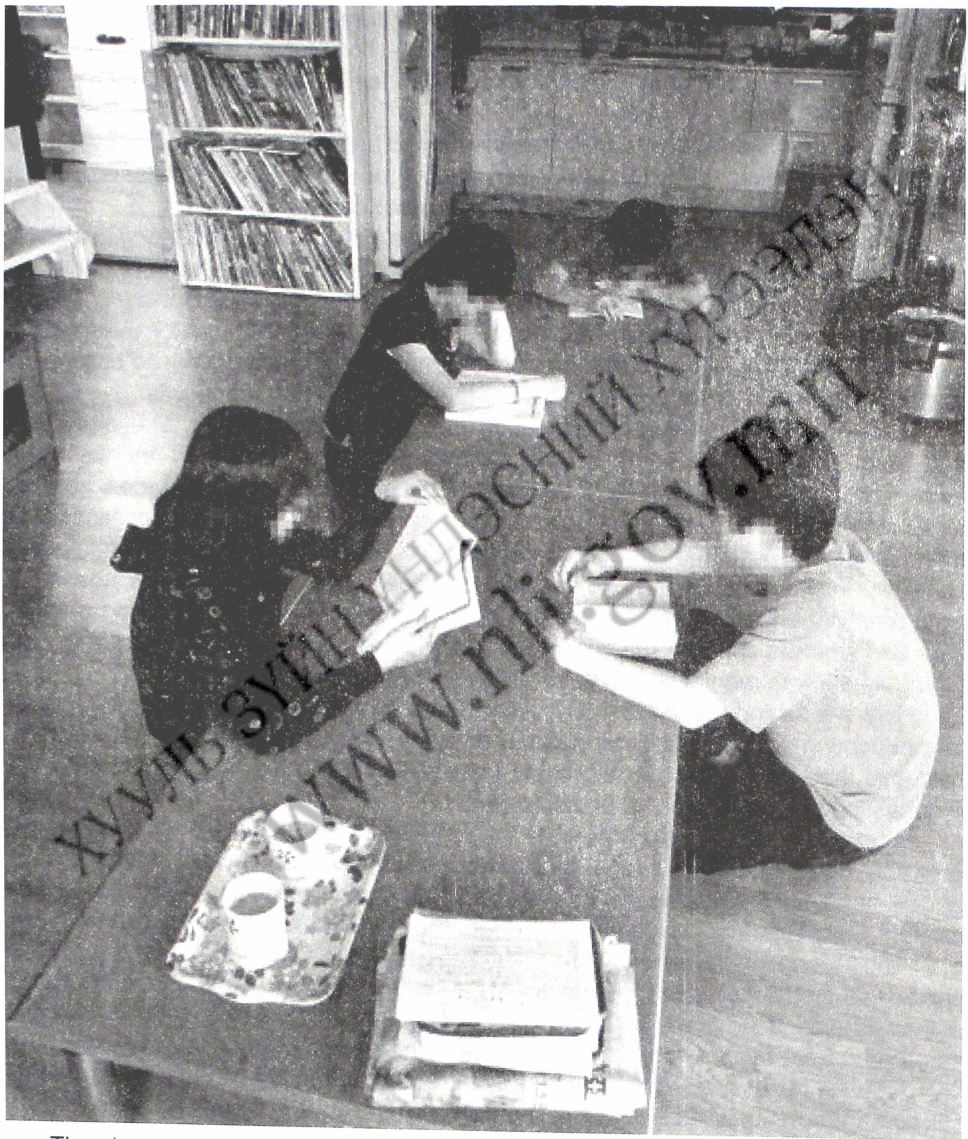
As alternative way, Korea implemented small group home and foster care earlier than Mongolia, and Korean government found out that the effect of small group home and foster care is better than residential institutions. Ik Jung Jung, a professor at Ewha Woman University, said, "A lot of children are greatly shocked by the experience of entering the residential facility, thus a small group home type would be more appropriate than a large-scale facility, even for the same facility."[27]

72% of children at group home feel safe because there is an adult whom they can rely on, and 78.3% of children answered that they consider the caregiver at group home like their parents. Because children can interact with the caregiver and feel that they are cared by protectors. Foster care also gives positive results as well in terms of child support. Therefore, Korean government has increased amount of allowance to group homes and foster care homes.[28]

[27] Hyo Jung Kim, Life of unsupervised children wandering on the streets, Chosun, Jun. 27, 2014, http://news.chosun.com/site/data/html_dir/2014/06/27/2014062703187.html.

[28] Hyo Jung Kim, Life of unsupervised children wandering on the streets, Chosun, Jun. 27, 2014, http://news.chosun.com/site/data/html_dir/2014/06/27/2014062703187.html.

Pic.3. Group home[29]



The above photo has shown a group home in Korea. It is an effective way to protect nd support unsupervised children because it has the advantage of providing a family-ke environment. It would be helpful to develop the group home and foster family system ı Mongolia by referring to this case of Korea.

[29] Hyo Jung Kim, Life of unsupervised children wandering on the streets, Chosun, Jun. 27, 2014, ttp://news.chosun.com/site/data/html_dir/2014/06/27/2014062703187.html.

CONCLUSION

Article 20 of UNCRC provides that "1. A child temporarily or permanently deprived of his or her family environment, or in whose best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State. 2. States Parties shall in accordance with their national laws ensure alternative care for such a child."

As this provision states, a child has the right to be assured of a family environment, and a child deprived of it must be given special protection and assistance. And the country must have a legal basis to provide adequate care for children.

One adult who was an unsupervised child was asked in the interview with a Korean journalist what is the most necessary thing for Korean unsupervised children. The answer was "interest."[30] Children need love and interest from their parents. However, if parents do not nor cannot give such interest, the state has to pay attention to such children. If the state does not establish care and appropriate measures for unsupervised children, the state will face more severe problems when these children become adults.

Story of failure of Korean education might give good lesson. The enthusiastic education of Korean parents is well known worldwide. However, as the private education market has been overheated as a result of focusing only on grades, academic achievements to enter into prestigious university, public education has collapsed, and the character education that needs to be done in schools and homes has been pushed back. Due to parents' wrong choices 20 to 30 years ago, Korean society now suffers from many social problems caused by immaturity, which means that young people in their 20s and 30s suffer from various psychological and psychological problems. Some young adults with mental illness commit various crimes more frequently.

There is saying that education is a big plan preparing next hundred years. It means that educating a child is long term plan preparing future after one hundred years. It is also said that whole village is needed to raise one child. Growing up as a healthy adult requires long time and diverse people's efforts.

According to 2014 Statistics, 35.5% of the 2,995,949 people in Mongolia are children between the ages of 0-19 years. In other words, one in three persons is now children, but will be adults.[31] According to the UNICEF source, 69% of the population live in urban areas.[32] Certain number of unsupervised, unprotected children are among them.

The Mongolian government faces two choices, not to take care of the unsupervised children when their parents or protectors abandoned them or take care of them instead of their parents. If the government chose to do the latter, and give real care to them, it will see the positive results later when these children become adults. They willingly would give help to the unsupervised children of the next generation, remembering how big support and love they received from the adults of previous generation. Protecting and raising unsupervised children based on appropriate laws is not only long-term investment in future of the country, but also realization of desirable society.

[30] Hyun Jung Park, Children who are not subject to protection, Hankyoreh21, Jan. 01, 2014, http://h21.hani.co.kr/arti/society/society_general/36108.html.

[31] For the Rights of All Children, Children's report to the UN Committee on the rights of the child – Mongolia, Save the children and World Vision, at 3 (2015).

[32] Analysis of the Situation of Children in Mongolia, Government of Mongolia National Authority for Children and UNICEF, at 12 (2014).

---o0o---