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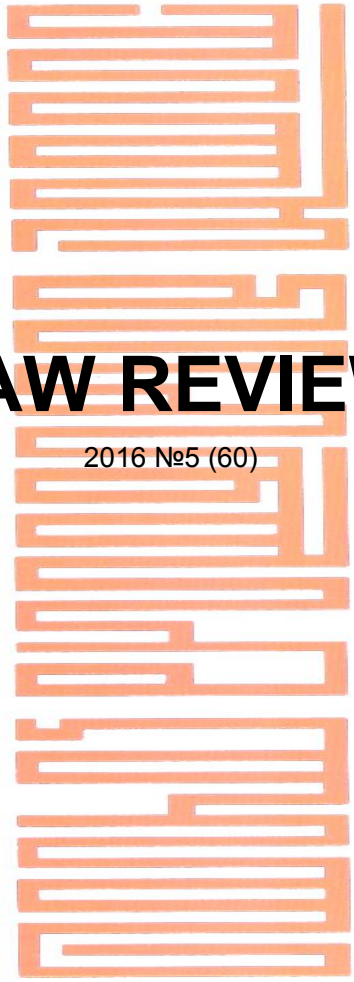

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ESTABLISHING A FORWARD-LOOKING LAWYERS' ASSOCIATION

An interview with Mr. Vladimir Jirousek, the former president of the Czech Bar Association

Mr. Vladimir Jirousek has been working as an advocate since the socialist time. He is one of the leading figures in the Czech lawyers' community, who has pushed the reforms of the Czech Bar Association (CBA). Mr Jirousek has served as a member of the Disciplinary Committee and a Board member as well as the Vice-Chairman and the Chairman of the CBA respectively. Mr. Jirousek is the founder and partner of the law firm Jirousek, Skalnнk, Bernatнk & partneři that provides legal services to medium-sized and large companies in commercial transactions.

Thank you for this interview. We may start with the time of Czechoslovakia. How did you start your career as a lawyer?

I joined the legal profession in 1974 as a law clerk (Konzipient, junior lawyer). After completing a three-year legal traineeship under the supervision of a coach (senior lawyer), I passed the bar exam and started exercising my advocate practice, on the basis of an employment contract, in a (state run) law counselling office (LCO) in Ostrava.

Did you have a Bar Association during the communist era? Was this organisation independent?

At the time when I started my career, the professional organization was the Centre of Czech Advocacy (CCA). Though the CCA was formally independent, in fact, of course, it was dependent. In this context, it should be recalled the organization system of the Czech advocacy, which consisted of LCOs bringing together practicing lawyers, these were placed under the authority of the Regional Bar Association, and all these parts were subject to the control of the CCA. Steering of all the systemic parts of the advocacy was in principle entrusted to selected members of the Communist Party, who are of course subject to the "Party's guidelines". Regardless of this fact, however, the advocacy maintained to a significant extent (in the personal-individual sense) an "internal" independence and the majority of ordinary lawyers respected, as much as possible, the principle mission of the advocacy. In this sense, it may be noted that the advocacy was the only opposition tolerated to the regime at the time, although an opposition sui generis.

Did citizens in Czechoslovakia have the right to choose its lawyer? How did you select a lawyer for a case?

In normal cases without political connotations citizens were free to choose to be represented by any lawyer. In a criminal case, if a citizen did not chose his/her lawyer, and the legal defence was compulsory in law, he/she was assigned ex officio a lawyer from the competent LCO. In addition, however, for each administrative area existed special lists of advocates and only the advocates registered in these lists were entitled to represent or defend in the matters in which the discussed subject matter was allegedly classified as "confidential" or "secret". Of course, it concerned mostly the political cases, or as the case may be, the cases over which the party maintained the control.

From today's perspective, it seems that the "Advokates' Collegium"

of the Mongolian People's Republic was organised like a single state run law firm. It seems that the "Advokates' Collegium" exercised control over the salary of each lawyer. How was the practice in Czechoslovakia?

Legal services were paid entirely in accordance with the regulation on legal fees, i.e. contractual prices were not allowed. Attorneys of each LCO (number of lawyers in each LCO was regulated – e.g. for Ostrava and the district of Ostrava applied a limit of up to 27 lawyers) were employees in employment relationship whereby their maximum salary was set significantly lower than was the case with prosecutors and judges (taxi drivers and hairdressers had also salary significantly higher). Usually once in a quarter the LCO head was deciding, in collaboration with the management of the Regional Bar Association, about bonuses by considering the amounts earned for the LCO by the advocate. In this context, it should be noted that even under the socialist rule the citizens paid for legal services from their own money (there was a cash desk in each LCO).

What reforms did you do to ensure the citizens' right to choose their own lawyer after the fall of the communist regime? How did you reform the CCA? What did you do for establishing an independent bar association?

As for the citizens' right to choose their own lawyer, there was necessary nothing else than to abandon the above-mentioned lists. We embarked on the reform of the legal profession immediately after the fall of the totalitarian regime, and already during the first half of 1990, we prepared and got through such legislative changes that, as from 1 July 1990 each advocate, until then registered as an employee of the CCA, became an independent and self-employed lawyer, and this as a member of an independent and autonomous professional organization - the Czech Bar Association (CBA). I emphasize that from the very beginning until now the membership of the advocates in the Czech Bar Association is mandatory.

If you ask about the first and fundamental steps involved in starting an independent bar association, then it should be mentioned the followings: laying down the conditions for practising the legal profession while ensuring a free (liberal) exercise of the profession, i.e. an absolute abolition of the principle of "numerus clausus", introduction of compulsory insurance of legal services and defining the rules of the disciplinary responsibility of advocates.

How do you select the president and board members of the CBA? Are there differences in voting procedures that were used during the communist era and those used today? Did you have to deal with the situation where a handful of people exercised power over the Association during several generations? If so, how did you democratize the Bar Association?

Every four years the Assembly of the CBA is convened, whereby each advocate has the right to attend the Assembly. The Assembly elects 11 members of the Board of the CBA and five alternate Board members. Board members then elect the president of the CBA. In addition, the Assembly elects the members of the Supervisory Board of the CBA and the members of the Disciplinary Committee and the Appeal Disciplinary Committee of the CBA.

It is true that during the socialism existed, within the limits set by the then applicable provisions, the CCA electoral conferences, but with the important difference that the candidates for the functions were, safe exceptions, carefully selected and appointed (the clear majority were members of the Communist Party, who were relatively very few in the legal profession).

At present, any of the advocates can run for any function based on his or her free decision. I can say that it has never happened since 1990 that a group of people would have an uncontrolled power over the Association. For example, the CBA president is the subject to the control and the disciplinary powers of the CBA bodies are independent from the Board of Directors of the Association.

The Czech Republic is

economically integrated with the European common market and the world market strongly. There are many foreign law firms in the Czech Republic. It seems, however, that the Czech law firms are highly competitive against the foreign law firms.

Already in the 90s of the last century the CBA allowed the operation of foreign lawyers and foreign law firms in the Czech Republic. Although the move was criticized at the beginning, it soon became apparent that it was a step in the right direction, because the Czech lawyers, namely the larger law firms with larger ambitions, had to demonstrate – following the entry of the foreign players in the market – sufficient quality to be competitive. At present, the situation is completely free of conflicts, and moreover the so-called foreign law firms are today virtually without exceptions managed and staffed by the Czech advocates. In this context, it is also to be recalled that the Czech Republic's accession to the European Union enshrined the institute of the established European lawyer and the visiting European lawyer.

What is the main feature of the regulations concerning the foreign lawyers and law firms?

Generally, the lawyers from the EU are authorized to provide legal services in another Member State under approximately the same conditions, either in the position of the so-called visiting lawyer or as a so-called established European lawyer. The Act on Advocacy also regulates the operation of foreign law firms in the Czech Republic. A visiting European lawyer operates on a case-by-case basis, which is reflected in a relatively simple regulation of his position. Established European lawyer must be registered in the list of European lawyers kept by the CBA, whereby the conditions for his or her registration are relatively extensive and stringent.

The advocates providing legal assistance through an established foreign law firms are mainly Czech advocates registered in the list kept by the CBA. If in the beginnings of the functioning of foreign law firms in the Czech Republic were these companies led by foreign lawyers, then it meant almost exclusively the matters of management. Today, also these positions are held mostly by Czech advocates. I would like to emphasis here that the openness of the Czech advocacy to the world paid off.

In Germany, for example, the law firms are led by partners who are entitled to share the profits. A contract for provision of legal services is in principle concluded between the client and the law firm. The client pays the law firm. This means that the finances of the law firms are separate from its shareholders (partners). What is the principal structure of financing in an average, well-established Czech law firm? What is the main feature of the liability of the advocates in relation to the client?

An advocate may perform advocacy individually, in an association or in limited liability companies, limited partnerships (Kommanditgesellschaft) or general partnership (Offene Handelsgesellschaft). If the lawyer practices law within the firm, the practice is similar to that in Germany. The advocate himself / herself may also be a firm, or be employed by another lawyer. He or she can also practice advocacy in liaison with a firm, association or with another advocate in a so-called associated form based on the contract as defined by the Act on Advocacy.

Regarding the liability for damages, an advocate who practices advocacy independently or in association is responsible for damage to the client personally, or in solidarity, if an advocate practices law in a company or a foreign company, the company is liable for the damage caused to the client. Something else, however, is the responsibility for the performance of an advocate in relation to a client in terms of disciplinary liability. It can be stated that in the Czech Republic both the corporate practice of law and the independent law practice are developed. One does not exclude the other. It should be emphasized, though, that only the advocates may be partners or associates in the law firm and the subject of business may only be the practice of law.

Normally, the owners of law firms should be lawyers by themselves. This principle seems to be global, so that worldwide law firms are owned by lawyers only.

But it is not true that the principle that partners in a law firm could only be lawyers applies throughout the world. One can find multifunctional companies providing, among others, legal services in the Anglo-Saxon concept. To my knowledge, however, the advocate professions both in the Czech Republic and in continental Europe refuse this practice.

For example, in Germany, those who are not members of the German Bar Association may not provide legal advice as independent lawyers. Likewise, they may not represent a client before courts. Do you have a similar system in the Czech Republic? If so, do you think that such restriction is necessary for the development of independent advocacy?

The system in the Czech Republic is indeed similar. In principle, the commercial provision of legal services along with the right to represent clients before courts for fees is reserved only for advocates and notaries. It is principle that exclusively advocate (exceptionally notary) registered in the list maintained by the Bar Association may perform the legal representation for consideration.

This legal practice is however eroded e.g. by "general proxies" who act in the manner that, seemingly ("on the outside"), the service is provided for free. The possibility of such representation, however, applies only to civil litigation. The representation through the above-mentioned general proxies is, therefore, exceptional.

It is of course also true that a company may be represented by a company lawyer in litigation, and special regulations apply for the representation of the state, for which the lawyers employed by the Office of the Government Representation in Property Affairs act before courts.

The quintessence derives from the fundamental rule that the advocate provides legal assistance under his/her disciplinary liability and covered by the compulsory insurance for damage.

In Mongolia, the system tends to create two different markets, namely the one for the legal advice and the other one for the legal representation before courts. In your opinion, what are the risks or benefits associated with this system?

I am not able to fully assess the practice in Mongolia that you describe. However, I am convinced that a division of the subject-market always introduces a kind of schizophrenic condition which can lead to unhealthy, even to unfair competition. I am convinced that advice and representation are that much "connected vessels" that mostly a continuous relationship is necessary.

Advocates often cooperate with professions such as patent attorneys and tax advisors, who are not lawyers. In Germany, the advocates may establish partnerships with a limited range of other professionals. Do you have similar rules in the Czech Republic?

We reject multifunction law firms. Cooperation with other professionals on a relevant contractual basis, however, is a commonplace. If you mention e.g. patent attorneys, then many Czech advocates are specialists in the patent field and it is their primary legal activity.

What are the conditions of operation of an advocate in the Czech Republic?

First, the candidate for advocacy must graduate in law master studies at one of the universities that have appropriate accreditation (universities in Prague, Brno, Olomouc and Pilsen). The studies are concluded by a state examination and defence of a master thesis, and followed by a three-year legal traineeship based on an employment relationship between a particular advocate (trainer) and a trainee. Within the framework of the legal traineeship, the trainee must participate in compulsory professional education organized by the CBA. When the above conditions are met, the trainee must pass the advocate examination, which consists of a three-day written exam (every day a written test from one of the three main

subjects: Civil Law including Family Law and Labour Law, Commercial Law and Criminal Law) and subsequent oral exams before the five-member commission (each of the aforementioned law areas plus Constitutional and Administrative Law and Regulations of the Advocacy Profession). The head of the Examination Commission is an advocate, but the Commission is also composed of judges, academics, etc. Each member of the Commission examines an area of law.

It is important that the attorneys-at-law keep up with the changing legal and business environment. Therefore, the role of the Bar Association, as the organisation for the advanced education of its members is important. Do the Czech advocates need to participate in obligatory training programs?

As already mentioned, the Czech advocacy ensures mandatory training of the legal trainees (Konzipient). During my tenure at the head of the Bar Association, we tried to enact compulsory education of advocates in the range of about 20 hrs. per year, but the legislative proposal did not pass the Czech Parliament. The truth is that today we are coming back to this question again and the need for the compulsory education of advocates is voiced louder and louder. On the other hand, I may mention perhaps that under my leadership two permanent training centres were established, in Prague and Brno, whereby their utilization rate and the interest of responsible advocates are enormous.

The 25 years following the fall of communism in Mongolia yielded many positive results, as well as many new challenges. One of the biggest challenges is the independence of the judiciary. The lack of strong independent law firms further underscores the importance of this challenge. What would be your advice for the Mongolian lawyers in this regard?

The independence of advocate profession is an essential prerequisite for the fulfilment of its mission. That is why the Act on Advocacy puts the primary emphasis on the principle of independence. The fundamental requirement for the formation of an independent advocacy is a creation of an autonomous Bar Association ensuing from a legislative act, i.e. not merely on the basis of a legislative act, whereby the autonomy (i.e. self-governance) must be complete in the sense that all competences of the public-law nature – i.e. those that enable the complete and integral management of the advocate profession – are delegated to the Bar Association.

Any interference of the government in the autonomous operation of the advocacy is an interference in the independence and as such a dangerous intervention in the very mission of the advocacy, thereby also in the principles of democratic justice. We will surely agree that advocacy is undoubtedly a part of the justice in a broader sense.

It is essential to realize that to the independence is linked another fundamental principle of the advocate profession, and this is the duty of confidentiality. The advocacy would not be able to protect this duty if e.g. the government interfered in the independence of advocacy. Therefore, for example, the CBA speaks loudly today about the need to professionalise the control and disciplinary functions – although solely within the framework of the autonomy of the advocacy – when we at present see the signals of attacks by government authorities against the exercise of the control and disciplinary competences by the Bar Association. There is no doubt that any intrusion by a state official in the control powers vis-a-vis the advocates would be totally unacceptable interference with their independence, and, at the same time, a manifest breach of the duty of confidentiality. In this context, it is necessary to constantly remind that the duty of confidentiality was not established "to cover the back" of the advocate but virtually exclusively in order to protect the interests of the client.

And what I wish the Mongolian advocacy and the Mongolian advocates? A single self-governing organization compulsorily uniting independent,

disciplinary liable and adequately insured advocates.

Mr. Jirousek, thank you for the interview!

This interview was prepared by Dr. Uyanga Delger, legal advisor in Intellectual Property Law

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COMPETITION LAW: ALIGNMENT OF PRIVATE LAW AND PUBLIC LAW

M.Munkh-Erdene, LL.M, University of Vienna

1. Foreword

In the world-renowned law dictionary Creifelds, the concept of Economic Competition is described as "a competition between independent economic entities, when they emerge in the market together or independently, on making an offer and a deal with clients or suppliers a more profitable and favourable terms than others"[1]. The concept is no longer foreign for Mongolia as the decided to embrace the free market economy[2] and adopted the Constitution of Mongolia in 1992.

Competition is a fundamental concept of the market economy. A fair competition keeps the economy sound and brings development while underdevelopment, poverty and destruction are caused by an unfair economy[3]. As part of the priority to prevent unfair competition, a mechanism for the competition law has been constituted with a perpetual focus on the effective nature and innovation of any country's legal regulation for the competition law.

Numerous studies and practices from many countries reveal that a country's economic growth and development directly rely on how optimised the regulation is, whether it meets the practical requirements, or how effective the regulation is. Also, the question whether the regulation has a direct consequence, and the professionality of the public administrative apparatus, which implements a direction towards controlling and stopping unfair competition, is directly liked to growth and development.

Therefore, a thorough theoretical and practical knowledge on the competition law is required for business sector's lawyers, lawenforcing public administrative organisations and their staff.

2. The Competition Law – A Distinctive Sector Law

In modern time, the competition law is being developed to become distinctively sector law. For example, the competition law has the natures of both public and private laws and is connected to their regulating items in many aspects.

A systematic division of the law into the public and the private is one of the achievements of civil law (Romano-Germanic law). The basic principle of Mongolia's laws and other legal standards is based on the civil law[4]. The private law is a complex set of standards that regulate the relations between legal subjects with equal rights while the public law regulates the relations of legal subjects with unequal rights which belong to the public oris under management of the public or other public law entities.[5]

In plain words, the civil law, which is the main sector of the private law, regulates agreements. Administrative law, which is the main sector of public law, deals with administrative acts and contracts.

Competition law and its regulations and standards are subject to both private and public law, which leads competition

[1] Creifelds law dictionary., 19th edition., Munich., 2007., page 1370

[2] Please notice that according to the Constition of Mongolia 1992, the choice was the market economy system with the appropriate state regulation. A legal basis for this is stated in Article 5, Clause 4 of the Constition:"The state/government regulates the economy consistently with the aim to ensure the economic security and social development of economic entities and population". Another thing to notice is that some national researchers including PhD in law G.Banzragch said: "As the constitutiondoes not specify type of the economy, it would be reasonable to consider that this is the economy withneutral and open nature." G. Banzragch., Economic Administraive Law.,Ulaanbaatar., 2013., page59.

[3] G. Banzragch., Economic Administraive Law., Ulaanbaatar., 2013., page 160

[4] Please note that it is mentioned in some recent literatures on law theory that the common law and the civil law are intensively covering each other – this is being evidenced through practices by German and US courts to some extent.

[5] Creifelds law dictionary., 19th edition., Munich., 2007., page 907.

law to become a distinguished sector law.

3. Connection between the Competition Law and the Private Law

The origin of competition law dates back to the end of the 19th century when a number of strong trusts – new type of economic entity – emerged in the US economic sector and then dominated the main economic sectors and started running operations against consumer interests. This forced the US governmenttomake a policy to control and regulate the market competition and limit monopole operations, which created ever-first well-arranged understanding on the prohibition of unfair competition.[6]

Since then, some other countries started forming their own legal regulations for competition[7]. For example, Germany adopted the Act against Unfair Competition (AAUC) in 1896.

Mongolia first adopted the Law on Prohibition of Unfair Competition (LPUC) in 1993 and its updated version was passed by the parliament in 2010, renaming it the Competition Lawof Mongolia. The law aims at creating a condition which enables fair competition of economic entities in the market, the prevention, prohibition and limitation of any dominations or operations against fair competition, and determination of a legal basis for the government agency to regulate the competition.

As part of international conventions for the prohibition of unfair competition, the statement of Article 10bis of the Paris Convention for the Protection of Industrial Property adopted in 1883 reads:[8]

(1) The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition.

(2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition.

(3) The following in particular shall be prohibited:

(i) all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor;

(ii) false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a competitor;

(iii) indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.

This article is to make its readers understand its aim to consider how the prohibition of agreements and deals, which might cause bottleneck in the LPUC, is regulated so that the competition law directly relies on the private law. To understand this, four main objects protected by the competition law need to be considered frist. These include:

This article aims at explaining the regulation of

1) Protection of a competitor against unfair competition;

2) Protection of a consumer against unfair competition;

3) Decentralisation of power; and

4) Limitation of an agreement against fair competition.

Protection of competitors: One subject protected by the competition law is the competitors. Article 1 of the AAUC reads: “The Act aims at protecting competitors, consumers and other stakeholders against unfair agreement activities. At the same time, it also aims at protecting the public interests in the competition.”[9] According to the above statement, the main goal of the competition law has clearly and accurately been determined by the Act.

Protection of consumers: The

[6] The Unfair Competition Supervising and Regulatory Agency of Mongolia, 2005-2007 /report, research, audit/., Ulaanbaatar., 2007., page 4

[7] Gesetz gegen der Wettbewerbsbeschrдnkungen and Gesetz gegen den unlauteren Wettbewerb in Germany; Antitrust law (Sherman Act, 1890, Clayton Act, 1914, Federal Trade Commission Act, 1914) in the US; Restrictive Trade Practice 1976, Fair Trading Act, 1973, Resale Price Act, 1978 Competition Act 1980 in the UK;Monopoly Regulation and Fair Trade Act, 1981 in the Republic of Korea; Prohibition of Monopoly and Maintenance of Fair Trade Act, 1947 in Japan; and Law on Prohibition of Unfair Competition in Mongolia, 1993, 2000, 2010.

[8] http://www.legalinfo.mn/law/details/1194?lawid=1194

[9] Art. 1. Gesetz gegen den unlauteren Wettbewerb, BRD

competition law also functions to protect consumers against unfair competition. The issue is not completely regulated by the Mongolia's competition law and the law does not serve from the perspective of unfair competition. However, competition law is an independent law. In fact, it only protects the consumers' interests in terms of non-competition issues including hygienic requirements during processes such as sale, purchase, work performance and service provision. But German and European competition laws focus on the issue without putting the consumers' protection issue aside.

Decentralisation of power: The purpose of this objective is to prevent centralization of economic powers an equal distribution of the economic resources. In his address to the US Congress, the 26th President of the United States Theodore Roosevelt said that when private power becomes stronger than the democratic state, the liberty of democracy is unsafe[10].

In the past, AT&T, of one of the world's largest corporations was weakened through the US competition law, to prevent monopolization of power. Also some court decisions made against tech giants such as Microsoft, Apple and Samsung could be mentioned.

Limitation of agreements against competition: The most important objective of the competition law is the limitation of anti-competition agreement. The core value of this article is subject to the object and the way that **the competition law becomes part of the private law** is clearly proved on this point. Because very many number of agreements are discussed on the point. The agreements of competition law are a major subject of discussion by lawyers in business sector.

Stakeholders in the market usually make various agreements that cause bottlenecks in the competition in order to protect themselves against the competition. Theoretically, they fall under the following three categories:

A) Horizontal Agreement;

Б) Vertical Agreement;

В) Data Exchange Agreement[11].

The horizontal agreement is made between competitors in the same sector while the vertical agreement is made between competitors in different sectors. The data exchange agreement is an activity of data collection through data exchange from/to one another or through competition limitation and data distortion.

The most common type of the horizontal agreement is price fixing agreements, which are when manufacturers, suppliers and vendors agree to sell the same product in the market at the same price. Another common type of price fixing agreements is market sharing agreements. This type of agreements includes manufacturers and suppliers sharing the market and agreeing on a specific market segment and geographical location to run operations.

Besides that, the agreement also involves quota arrangements between manufacturer and supplier on the quantity of products, exclusive supplier vendor relationship and much more.

The horizontal agreement is considered to be in contradiction of competition as it limits the competition. In Mongolia, it is also deemed an invalid agreement that contains legal consequence that was per se illegal[12] according to Clause 56.1.1 of the Civil Code of Mongolia. Besides, the agreement could also possibly create a cartel agreement in its classical meaning.

European Union's competition law regards the issue in the same fasion and Clause 101.2 of the Treaty on the Functioning of the European Union[13] states that the horizontal agreement or cartel is illegal.

One of the Most commonly found vertical agreement is the tying agreement. For the content, a manufacturer and

[10] "... the liberty of a democracy is not safe if the people tolerate the growth of private power to a point where it becomes stronger than their democratic State itself." - Message to Congress on Curbing Monopolies. April 29, 1938.

[11] Regarding this

[12] The term "Per se illegal" means the act is inherently illegal. The principle is an essential part of the US anti-trust law as it undoubtedly considers any horizontal agreements an invalid/ineffective and imposes criminal liability. Please refer to Northern Pacific Railway v. United States, 1958, 356 US 1 (US Supreme Court).

[13] Art. 101 Abs. 2 AEUV, http://www.aeuv.de/aeuv/dritter-teil/titel-vii/kapitel-1/abschnitt-1/art-101.html

supplier make a mutual agreement in which a vendor conditions the sale of a particular product on a vendee's promise to purchase an additional unrelated product.

The other common types are the exclusive dealing agreements in which manufacturer and supplier agree that they will only deal with a certain vendor and the resale (retail) price maintenance agreements in which manufacturer and supplier set the prices of products.

Data exchange agreements are activities in which manufacturer and supplier exchange their information on the industrial cost, price, know-how, technique and technological indicator, or exchange data on consumers face insolvency, or provide consumers with misleading figures.

The importance of categorising the anti-competition agreements determines a causal relationship that becomes the basis of legal responsibilities. The type of responsibility to be imposed depends on the agreement type; whether the agreement is a horizontal or a vertical. If any cases of the horizontal agreement are found and confirmed, it would be the basis to impose the legal responsibility which is relatively heavier than that of the vertical agreement.

How the three types of agreements are defined by the Competition Law of Mongolia[14] is as follows:

[14] http://www.legalinfo.mn/law/details/12?lawid=12

No	Agreements and activities prohibited by the Competition Law of Mongolia
	Type of Agreement: Horizontal Agreement
1	The Competition Law of Mongolia §11.1 - Agree and set the prices of products; - Divide the market into territory, production, service, sales, product description, and buyer; - Limit production, supply, sale, loading and transportation of a product, market penetration opportunity, investment, equipment and technological innovation; - Pre-agree the price of products and other conditions and requirements before taking part in competitive selection, tender and the public procurement of a product, work and service. The Competition Law of Mongolia §11.2 - Object to the establishment of any economic relations without carrying out a feasibility study; - Limit sales and purchase of goods to/from a third party; - Co-object to any agreements that are important for the competition; - Hinder competitor in becoming a member of any organisations to increase the profitability of an economic entity. The Competition Law of Mongolia §7.1 - Set the price and identify the territory of a product to be resold; - Demand any economic entities unreasonably to transfer its financial tool, property, their rights and workforce to oneself; - Demand competitor to reorganise his/her company in ways of incorporation, merger and acquisition, division and separation.
Type of Agreement: Vertical Agreement	

2	The Competition Law of Mongolia §7.1 - Creating an artificial scarcity, halt the production and sales of a product and limit the quantity of a product; - Setting unreasonably high price for a product; - Demanding additional condition from an economic entity, charge different prices for the same product sold in the market and object to product sales without any reasonable base; - Hindering other economic entities in emerging in the market and charge lower prices than the market price in order to push them away from the market; - Objecting to establishing other economic relations without a feasibility study and set criteria without reasonable bases; - Demanding vendor not to buy its competitor's product by setting a condition when selling own product; - Demanding vendor to include irrelevant provisions in the agreement on a certain product and set a discriminatory condition for other stakeholders in the market.
Type of Agreement: Data Exchange Agreement	
3	The Competition Law of Mongolia §12.1 - Spreading a misleading, biased or distorted data and information that damage the reputation of the competitor and its products, or might bring loss to the competitor; - Misleading others using untruthful data and information such as providing misleading or biased data on its product, or distorting the truth; - Placing an advertisement that causes negative consequences for the competition; - Using a trademark, label, name and product quality guarantee of other economic entities without their permission, and imitating their names and packing; - Selling, publishing or distributing confidential information on science, technology, industry and trade without permission of a patent owner or author; - Concealing the product quality deficiency or the natures of its harmfulness to human life, health and the environment; - Spreading misleading information that products that are on sale, or intentionally organising false sales while it has already been agreed with parties in advance through offer; - When taking part in the activities including competitive selection, tender and the public procurement, misleading competitors about that activity's realistic condition and putting them under pressure.

Another prohibition stated in Clause 12.1.10 of the Competition Law of Mongolia, which is not included in the above table, is a concept that reads: "Using a trade method that is against legal interest and that illegally damages consumer".

The statement considers two types of actions: "Using a trade method that is against legal interest" and "Using a trade method that illegally damages consumer". The former's "legal interest" should be considered covering legal interests of overall competitors in the market. Because Clause 12's general provision of the law is interpreted as it starts with "With the aim to limit the competition, an economic entity…",it means that competitors cannot use any trade methods that are against legal interests of one another through any activities aimed at limiting the competition among them[15].

[15] There have been several practicesinthe court stages that settled disputes by using Clause 12.1.10 of the Competition Law of Mongolia and an explanation on how to understand the statement's content has been given by the court. With regards to this, please refer to the Supreme Court of Mongolia's Decision No. 96 dated on April 20, 2015 on a legal case related to National University of Mongolia (plaintiff) and AFCCP (defendant).

4. Connection Between the Competition Law and the Public Law

The competition law is not only subject to the private law as aforementioned, but it is also connected to the public law according to the ideology and trend of a modern legal science. The public law internally serves as a special study of the administrative law. At the same time, it has become an important subject for the economic administrative law[16].

A pioneering rationale which is subject to the competition and administrative law is that the way the public administrative agency – Agency for Fair Competition and Consumer Protection of Mongolia (AFCCP) – is given a direction and function to examine, identify and impose responsibilities on any competitors in the market that entered into any agreements or actions against the competition, including cartel agreement.

Business sector lawyers are required to have an in-depth knowledgeon the general and special categories of the administrative law when they have any legal disputes in relation to the competition law based on the above rationale. They also need a deep understanding of the administrative act– the main study of the administrative law – issued by the public administrative agency and its officers. Simultaneously, a sufficient knowledge on the agency's function is also required.

The AFCCP examines and identifies any agreements or actions against the competition based on the rationale and provision stated in the law, and has as prime responsibility proving the results before the court.

In proving the results, the AFCCP should consider the following legal requirements:

A) As the public administrative agency in charge of fair competition does not issue an act by identifying any agreements/actions limited or against the competition (it is impossible to do so), it would be impossible to prove if there were any unfair agreements or limitations in the competition through general and abstract conclusions; or

B) As the administrative act is the only way to identify the competition limitations or anti-competition agreements, the act's legal basis should be proven through certain documented evidences that are deemed sufficient.

In plain words, it means that if M (manufacturer) and S (supplier) provided C (consumer) with false and biased product information when M and S sell their product to C, then C should prove it through evidence collected by using evidence methods and tools acceptable by the law.

Without evidence, general and abstract conclusions cannot be made and an audit cannot be conducted just based on a hypothesis that once M and S damaged C then they might have damaged P (person), or there might be damage to P. If it is audited without any evidence, then the State Principle for Audit (to be conducted within the scope of eyewitness testimony and evidences derived from the testimony) will lose credibility, and it might cause a serious deficiency in the activities of the Rule of Law.

There is an independent and detailed rule against anti-competition agreement and cartel[17] adopted by EU.According to the rule, processes for identifying and auditing any illegal competition agreements or cartels have been put in order.

When it comes to the Competition Law of Mongolia, it does not regulate the issue above in detail and a special rule for the regulation is still absent.

In conclusion, the competition law is a distinctive sector law which contains legal natures of both private and public law. In terms of these natures, the competition law exists between an alignment of the public and private law, which is the same as that of the labour law. The article aims at making it certain that an issue of the competition law for business sector lawyers absolutely requires high knowledge on the public and private laws.

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[16] Detailed information is available in a literature by G.Banzragch.,The Economic Administrative Law., Ulaanbaatar., 2013.

[17] Verordnung 1/2003, Durchfьhrung von Verfahren 773/04, Europдischer Rat

INTRODUCTION TO MONGOLIAN LAW

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I. INTRODUCTION

The purpose of this article is to introduce an outline and main aspects of the legal system of Mongolia and to provide readers with general information on Mongolian law.

The political transition of 1990-1992 saw Mongolia move away from the previous communist ideology and Soviet system toward a constitutional democracy, free market economy, a multi-party political system, and a unicameral parliament. To undertake changes of such sweeping sociopolitical and economic scope in such a short period, Mongolia effectively managed a deliberate and expansive process. To some degree, the transition is still a work in progress, and much of this can be seen through the lens of Mongolia's ongoing legal and judicial reforms.

It is important to recognize from the beginning that Mongolian law follows the Germanic, or Continental, tradition of law; that is to say that common law, or case law, does not exist in Mongolia as it does in the U. S., U. K., and other countries that follow some form of the common law tradition. No new law is made by Mongolian courts through their rulings; there is no precedential value in Mongolian jurisprudence, only the application of existing laws by the courts.

With this in mind, we will first discuss briefly the sources of current Mongolian law before examining the laws of Mongolia.

II. LEGISLATIVE SYSTEM

A. Overview

Supreme legislative authority in Mongolia is vested in the Parliament.[1] The mission of the Parliament is to build a nation with humane and civil democratic society and to ensure the Mongolian people's right to govern. The Parliament is unicameral and consists of 76 members elected by election.[2]

The main sources of law in Mongolia are: (i) the Constitution; (ii) parliamentary laws, or statutes; (iii) other types of legislative acts; (iv) international treaties and law; (v) emergency executive orders; (vi) orders; and (vii) municipal ordinances and municipal rules of local governments.[3]

B. Categories of Status

i. Constitution

With the Constitution of Mongolia being enacted in 1992 by the State Great Hural (the Parliament), the country codified its acceptance of human rights, democratic values, the market economy, and the rule of law. The 1992 Constitution is the fourth in the Nation's history, following those of 1924, 1940 and 1960. All other constitutions were established with regard to socialist structures and the communist model for government and society. The 1992 Constitution has 6 chapters and 70 articles; included are chapters on Sovereignty of the Mongolian State, Human Rights and Freedoms, state systems of Mongolia, administrative and territorial units of Mongolia and their governing bodies, the Constitutional Court of Mongolia, and amendments to the Constitution of Mongolia. Amendments to this Constitution have thus far been made in 1999 and 2000 only. By the 1992 Constitution, the highest organ of state power and the highest legislative power is vested solely in the Parliament; the highest executive body of the State is the Government; and the judicial power is vested exclusively in the independent courts in Mongolia. Therefore, the President is the Head of State and living

[1] Mong. const. art. XX (1992).

[2] The State Great Hural (Parliament) of Mongolia, About State Great Hural, http://www.parliament.mn/en/stategreathural, (last visited Jul. 18, 2016).

[3] Overview of the Mongolian Legal System and Laws, Sources of Law http://www.nyulawglobal.org/globalex/Mongolia_Research.html#SourcesofLaw (last visited Jul. 22, 2016).

embodiment of the unity of the Mongolian people.

Article 1.2 of the Constitution states that “the Constitution of Mongolia is the core of Mongolian law, and the foundation of the country’s legal system.”

According to the Constitution and related laws of Mongolia, the parliament, executive body (the Government) and judicial branch (Court system) shall exercise the following powers:

1. Parliament.

Per the Constitution, Parliament has both legislative and oversight authority as delineated below:

- Legislative functions are primarily the preparation for and the conduct of plenary sessions or standing committee sittings, discussing drafts of laws or other decisions of the Parliament and adopting, and passing laws and resolutions.

- Parliamentary oversight authority includes the power to: conduct hearings and call for reports, presentations and briefings from the Cabinet and other organizations directly accountable to Parliament; holding the Prime Minister, cabinet members and executives of other organizations directly accountable to the Parliament, and to that end generate debate of government responses and issues in its sessions; holding the Prime Minister, cabinet members and executives of other organizations directly accountable to Parliament, and in the course of that duty demand appearances of those officials to deliver responses to inquiries; assessing implementation of laws and other resolutions of the Parliament at the cabinet and other organizations that directly accountable to the Parliament and generate debates through the Standing Committee, or if necessary at the plenary sessions; and delivering the verdict on professional or ethical offenses committed by the Prime Minister, cabinet members, those who have been appointed by the Parliament, and executives and members of other organizations that are otherwise directly accountable to the Parliament.

2. Executive Body.

The highest organization of the executive body is the Cabinet, which shall serve for a four-year term unless it is dissolved upon either resignation of the Prime Minister or the simultaneous resignation of half of the Cabinet, or upon a parliamentary vote for dissolution. The Cabinet and its ministries are directly accountable to Parliament. The main function of the Cabinet is to implement the laws of Mongolia, in accordance with its constitutional duties to direct economic, social and cultural development of Mongolia. The Cabinet is currently composed of 13 ministries, each charged with carrying out the various programs and projects within their scope of responsibility, and with formulating policies in their relevant areas.

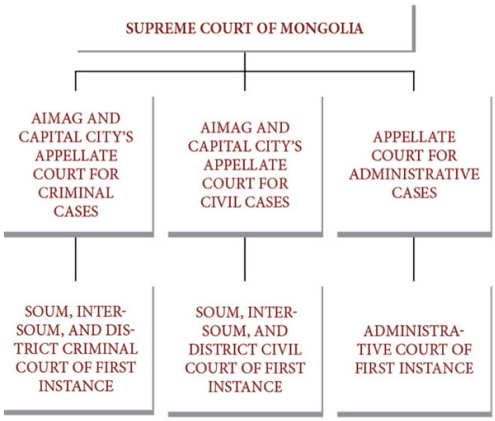
3. Judicial system.

The Supreme Court of Mongolia is the highest judicial organ of the State and the national court of last resort. The Supreme Court is comprised of a Chief Justice and 16 Justices, and its jurisdiction is exercised by three chambers: Criminal, Civil and Administrative. The main duties of each chamber is to adjudicate cases under their jurisdiction and to provide professional guidance to judges within those corresponding areas of law. These chambers were created by the Supreme Court and their membership is approved by the Chief Justice. The judicial system of Mongolia is composed of the Supreme Court (the court of cassation or review), lower province and capital city courts (the court of appeals), the soum (sub-administrative unit under province), or inter-soum courts, and district courts (courts of first instance).

• Soum, inter-soum and district courts have jurisdiction only at first instance;

• Province courts, found in the province capitals, deal with appeals from the lower level courts;

• The Supreme Court is the highest court in the land, and deals with any matters of first instance that are not specifically within the jurisdiction of the lower courts. It also hears appeals of decisions of the provincial courts as well as the Capital city court.



4. President.

The President of Mongolia possesses and exercises the full rights and powers as promulgated by the Constitution of Mongolia, as follows:

• The right to veto, either in part or in its entirety, those laws and other decisions that are adopted by Parliament. The laws or decisions shall remain in force if two thirds of the members present in the session of the Parliament override the President's veto;

• Propose to Parliament the nominations for appointment to the post of the Prime Minister, in consultation with the majority party or parties in the Parliament if none of them has majority of seats, as well as to propose to Parliament the dissolution of the government;

• Instruct the government on issues within scope of his authority. If the President issues a lawful decree, that decree shall become effective upon signature by the Prime Minister;

• Represent the state with full powers in foreign relations and, in consultation with Parliament, to conclude international treaties on behalf of Mongolia;

• Appoint and recall ambassadors, diplomats, and representatives of Mongolia to foreign countries in consultation with the Parliament;

• Receive the credentials or recall of heads of diplomatic missions of foreign states to Mongolia;

• Confer state titles and higher military ranks and award orders and medals;

• Grant pardons;

• Decide matters related to granting and withdrawing Mongolian citizenship and granting asylum;

• Head the National Security Council of Mongolia;

• Declare general or partial conscription;

• Declare a state of emergency or a state of war in any portion or throughout the entirety of the national territory in an emergency situation as described in paragraphs 2 and 3 of Article 25 of the Constitution of Mongolia, where such circumstances of urgency exist when Parliament is in recess, and to issue ordinances commencing military operations. The Parliament shall consider within 7 days any such Presidential Decree declaring a state of emergency or a state of war and shall approve or disapprove it. If Parliament makes no decision whatsoever within the prescribed time, the Presidential Decree shall automatically be void.

• Serve as the Commander-in-Chief of the armed forces of Mongolia.

The president may address messages to Parliament and/or to the people. The President may at his or her own discretion attend sessions of Parliament and report on and submit proposals concerning vital issues of domestic and foreign policies of the country.

ii. Substantive Laws

In general, laws passed, other than the Constitution, are classified as substantive law in Mongolia, and are divided into two categories; public law and private law. Private law regulates relations between equal parties, and public law regulates all disputes between a private citizen or group and a public body or the government. The Civil Code is the core of private law in Mongolia, and the Criminal Code and Administrative General Law govern public law. Statutes are the primary source of law in Mongolia; and as of July 2016, 596 laws exist. Legislation may be enacted solely by Parliament pursuant to its constitutional authority, by prescribed means and such that it becomes the law governing conduct within

its scope. Members of the Parliament, the Government, and the President of Mongolia may initiate a draft of a law in accordance with Law on Legislation of Mongolia.

In Mongolia, legal acts, in the broad sense of the word, may take any number of forms, to include parliamentary resolutions, presidential decrees, cabinet ministry resolutions, and ministry rules and orders. Parliamentary resolutions may regulate the following issues: Government and other organizations. Parliamentary resolutions are most frequently concerned which specific topics for the implementation of a broad range of Government activities.

iii. Treaty and International Law

The status of international law in the Mongolian legal system was dramatically transformed by the 1992 Constitution of Mongolia; as part of its transition since 1990 and commitment to the rule of law, Mongolia is a signatory or party to a number of international treaties that bind the government to honor international standards and norms of law. The 1992 Constitution of Mongolia provides that "the international treaties to which Mongolia is a party, shall become effective as domestic legislation upon the entry into force of the laws or on their ratification or accession. Mongolia shall not abide by any international treaty or other instruments incompatible with its Constitution."[4]

International treaties to which Mongolia is party to are bilateral or multilateral written agreements to be regulated by international law. These determine the rights and responsibilities of Mongolia, the Parliament of Mongolia, the Government of Mongolia, as well as single or multiple foreign countries their governments or international organizations with regard to certain issues.

The term 'international treaties' refers to all interstate, intergovernmental, or interdepartmental documents irrespective of their form and appellation.

iv. Emergency Executive Order

The President is specifically authorized to issue decrees in accordance with the Constitution and Mongolian laws. Presidential decrees must conform to the rights granted by the Law on the Presidency (also generally known as Presidency Law). These rights were originally promulgated in the Constitution, and have been restated in the Law on the Presidency.[5]

v. Orders

1. Overview

In Mongolia, orders can take several forms, including Parliamentary resolutions, presidential decrees, cabinet resolutions, and ministerial or agency rules, procedures, and orders.[6]

1. Presidential Decree

The Constitution of Mongolia specifically grants the President the authority to issue decrees; the Law on the Presidency further codifies the President's decree powers. The aim of both is to limit the President's powers by requiring that all decrees must be in accordance with, and not be in violation of, any of the Nation's laws.

2. Ordinances of Prime Ministers and Ministerial Ordinances

Executive power in Mongolia is vested in the Government, which, in accordance with the limitations prescribed by the Constitution, laws, and normative, or regulatory, acts of Parliament, issues resolutions and ordinances. Cabinet ministry resolutions have many forms and functions. In their simplest from they are a formality used to adopt decisions by a higher level of the Government. For example, the Government may issue a resolution formally adopting a piece of legislation which has already been voted on by Parliament. Resolutions can, however, also rise to the same legal status of regulations. If these resolutions and ordinances are incompatible with laws and regulations, the Government itself or Parliament has the constitutional power to invalidate them.

All ministries and agencies have the power to issue regulatory acts pursuant

[4] Mong. const. art. X, § 1-3 (1992).

[5] Overview of the Mongolian Legal System and Laws, Sources of Law, http://www.nyulawglobal.org/globalex/Mongolia_Research.html#SourcesofLaw (last visited Jul. 21, 2016).

[6] Overview of the Mongolian Legal System and Laws, Sources of Law, http://www.nyulawglobal.org/globalex/Mongolia_Research.html#KeyElementsofModernMongolianLegalSystem

to specific delegations of authority promulgated by Parliament and the Government. The acts of ministries and other government offices of Mongolia are sometimes called instructions or instructive regulations. Ministries issue, as a rule, an order or instruction.

vi. Municipal Ordinances and Municipal Rules of Local Governments

2. According to Law on Administration and territorial units and its governance, local governance shall be exercised by following organizations:

- Bag[7] or Khoroo[8] Civil meeting and Governor;
- Soum or District Civil Representative Meeting and Governor;
- Province or Capital city Civil Representative Meeting and Governor.

3. All of above civil or representative meetings has a right to issue its own resolution for the local level governance for its implementation.

III. LEGISLATIVE PROCEDURES

A. Overview

Legislation in Mongolia consists of law, presidential decrees and orders, resolutions of the government, ministers, and agencies, and resolutions of the capital city and province, or soum, level citizen's representative meetings. With the exception of province-level resolutions, all legislation is enforceable throughout Mongolian jurisdiction.

In order to establish clear legislative procedures and best practices of promulgating law and other resolutions of Parliament, the Law on Legislation of Mongolia was adopted on May 29, 2015 by Parliament and will be effective beginning on January 1, 2017. This law governs: the process of initiating, drafting, content, and format requirements for the first drafts of proposed laws; drafting and submission requirements of Parliament resolutions; and the process and requirements for public discussion and comments regarding legislation drafts which are to be adopted by the Parliament of Mongolia. Additionally, this law codifies the administration and processes of a legislation database, publication, public access, and the organization of implementation and subsequent implementation evaluation of all legislation.

B. Legislative Procedures

i. Laws proposed by Legislators

The Constitution assigns Parliament and its members their role as legislators in Mongolia. However, in addition to members of Parliament, the President and the Government also have the constitutional right to propose, or otherwise initiate, legislation. Legislators are required by law to follow the procedures of the Law on Legislation during the processes of initiating laws and Parliamentary resolutions. The different types of initiated laws are prescribed as the first draft of law, draft of law amendments, draft of renewed law, and draft of package law. A member of Parliament shall introduce the law draft to the Government for further research and comments. If circumstances warrant such a course of action, a legislator may also introduce a draft of pending legislation directly to the public or related government organizations in order to receive their input and gauge support for the drafted law.

ii. Legislation/Bills proposed by Government

The Government of Mongolia has the constitutional right to initiate a law and submit the draft to Parliament for sessional discussion and enactment. The Government also has the constitutional authority to issue decrees and Prime Minister's ordinances for the purpose of implementing changes to the Constitution, laws and other regulations. Government decrees and Prime Minister's ordinances are to be effective throughout Mongolia and enforceable to all legal entities, officials and citizens.

In accordance with Administrative general law of Mongolia, administrative authority is exercised through administrative acts, regulatory acts of administrative organizations, and administrative agreements. All procedures for drafting are set forth in the Administrative General Law of Mongolia.

IV. BASIC LAWS IN MONGOLIA

[7] Bag is a lower level of Public administration body in province governance.

[8] Khoroo is lower level of Public administration body in District and Capital city governance.

A. Overview

The Constitution of Mongolia was adopted in 1992 and sets forth the goals and priorities of the state in terms of the preservation and advancement of human rights, individual liberties, and the maintenance of a free, sovereign, and independent democracy. From the Constitution additional specific sets of laws have been promulgated to specialize in the various legal areas that compose Mongolia's functioning legal system, such as criminal, civil, and administrative matters. These basic laws regulate the workings of all legal processes within Mongolian society, and further serve as the primary legal sources for further laws and regulations that are promulgated as may be deemed necessary.

B. Constitution

The Constitution of Mongolia has announced that the supreme principles of the activities of the State shall be to ensure democracy, justice, freedom, equality, and national unity and respect for the law. Since 1992, Mongolian society has been re-structured in accordance with the Constitution and it's associated freedoms, and since the transition has been an enormous undertaking, there are still some missing implementations of Constitutional provisions today. As in other countries, the Mongolian constitutional scheme has functioned differently depending on local politics, cultural influences, and the policy of ruling party which won at the most recent Parliament election.

In July 2016, the seventh parliament election has been held in Mongolia, in which 65 members of Mongolian People's Party were elected to a Parliament with 76 total members. As for a party which has a concept of radical democracy, the current ruling party re-structured the government and announced their ideology for more attention on policy of effective labor and social development including health and education issues. Please find an English translation of the Constitution of Mongolia from www.ilo.org and www.unesco.org.

C. Civil Code

The Civil Code of Mongolia, enacted in 2002, as amended, recognizes the freedom of citizens and business entities to contract, stipulating that parties to a contract are entitled, within the applicable legal framework, to conclude contracts freely and to define the contents of their contracts. Mongolian law is based on an overarching principle reminiscent of the English legal constitutional concept that everything that is not prohibited is allowed. This is codified in the Article 13.2 of the Civil Code, which states that "Participants to civil legal relationship may, at their own will, exercise any rights and duties that are not prohibited or directly stated in the law".

The Civil Code's recognition of the freedom to contract introduces an element of liberality for contracting under Mongolian law. For example, aside from certain agreements relating to a real property or shareholder rights and obligations, parties to a contract are free to accept the laws of any state to govern the interpretation of the contract's terms in the event of a dispute. If the parties agree, a foreign-language version of the contract may prevail over the Mongolian language version.

Contract parties may agree to submit disputes for final resolution to an arbitral tribunal either in Mongolia or overseas, with London and Singapore being frequently selected forums. As a signatory to the New York Convention for the Mutual Recognition and Enforcement of Foreign Commercial Arbitral Awards, Mongolian Courts are obliged to recognize and enforce foreign arbitral awards. In addition, the country is party to the Hague Convention on Civil Procedure, making it legally possible to recognize and enforce requests and decisions of courts in any foreign country which is also party to the convention.

D. Administrative General Law

After a decade of experience in Administrative Procedure Law and Administrative Court in Mongolia, the Government initiated its first draft of Administrative General Law, which was enacted by the Parliament on June 19, 2015. The purpose of this law is to fulfill the basic and legal grounds of activities on relations between administrative bodies and citizens or legal entities in the course of exercising executive/government

power under public law framed by issuing administrative acts, administrative normative acts, and administrative contract/agreement. This law determined the administrative legislation as "related part of the Constitution, Administrative general law and other laws which pertain to administrative activities."

Administrative General Law shall not govern the below relations:

- Activities of law drafting and legislative procedures;
- Procedure of international treaty acceptance and signature;
- Proceeding of the Constitutional Court and all level court for trial and litigation of criminal, civil and administrative cases;
- Investigation procedure of cases, prosecutor's control, and correctional service activities;
- Intelligence, national security, and all related activities for direct implementation of state foreign policy;
- Procedures for political discussion and decisions.

Administrative organizations in Mongolia consist of:

- Central and local organizations which implement the executive power of the state;
- Non-Government agencies or other public law entities which have duties to implement legislation and have the right to issue orders for the public;
- Legal persons who transferred administrative duties based on administrative contracts or legislation;
- Executive bodies of state-owned or joint school, hospital, media, communication, transportation, and energy organizations for public service;

Local self-managing organizations and other organizations such that decisions and activities are sorted out by public law decisions and are thereby eligible to make a claim to administrative court.

E. Administrative Procedure Law

The first Administrative Procedure Law was enacted in 2002 and enforced till June 30, 2016. Legal basis of this law and administrative court is stated on Article 19.1 of the Constitution as "The State shall be responsible to the citizens for the creation of … guarantees for ensuring human rights and freedoms, to fight against violation of human rights and freedoms and to restore of infringed rights" and also Article 48.1 states that "Specialized courts such as administrative courts may be formed". Under this constitutional regulation, the first Administrative Procedure Law was enacted and also the first Administrative courts were established in the capital city and 21 provinces. The main concepts and principles of Administrative Procedure Law was adopted from German law which is a strong representation of Romano-Germanic legal tradition. After a decade of practice of the Administrative Court of Mongolia, scholars and practitioners were made an assessment and evaluation for the more developed procedure law and court of administrative cases.

The purpose of the first Administrative Procedure Law was to regulate the relations connected with the preliminary decision making on administrative cases according to the complaints and claims submitted by citizens and legal entities who have considered an administrative act as illegal in order to protect their infringed rights, and with the proceedings of administrative cases in the Administrative Cases Courts.

On this basis, the court is dedicated to secure and protect the rights and freedoms of citizen and legal entity from illegal administrative acts and unlawful action of Public administrative body.

Thus, the Administrative Court of Mongolia is an independent institution of the Judiciary power that protects the lawful rights of citizen and legal entity from the unlawful action of the Public administrative body.[9]

On the demands of rapidly developing society and the weaknesses of the first Administrative procedure law, a renewed draft of Administrative Procedure Law was enacted by Parliament in February 04, 2016 and enforced from July 1, 2016. The main purposes of this law are that it will: regulate relation in relevance with

[9] The Administrative Court of Mongolia as a Protector of Human rights, Erdenetsogt.A, Law review, National Legal Institute, page 47, Series 55.

proceedings of administrative cases at courts for protecting the person's or legal entity's infringed or potential risks of rights and interests due to illegal decision of administrative organization; and regulate relation in relation to proceedings of administrative cases which are claimed by the authorized legal entity or administrative body for protecting public rights.

In Mongolia, each province has the first instance administrative cases court and there is a single national appellate court which operates in Ulaanbaatar. An intermediate appellate court is one chamber of a Supreme Court and it has power to make decisions on the administrative cases and disputes.

The establishment of an independent Administrative Court in Mongolia had brought a brand new institutional aspect to the judicial structure and it has a great opportunity to become a trademark of the judiciary power of Mongolia. The function of the Administrative Court is to ensure that administrative bodies shall not issue disputable acts and to further define the legal ways of issuing lawful administrative acts. This is the nature, dedication, and main purpose of the Administrative Court of Mongolia.

Business Law Environment

Opening a Business

Seeing the ease of registering legal entities as an important step to ensure a business-enabling environment, the Government attempted to simplify the registration process when in May 2015 it revised the Law on Legal Entity Registration, eliminating some of the bureaucratic steps and allowing for online registration.

Corporate Legal Environment

The enactment of the revised Law on Company ("Company Law") in 2011 was an important step towards the government's aim of bringing Mongolian corporate governance standards closer to those found in more developed jurisdictions. The law broadly regulates various aspects — from reorganization to obligations of shareholders — of companies operating in Mongolia.

If a foreign investor wishes to establish a limited liability company in Mongolia, such a company must be registered with the Legal Entities Registration Office (the "LERO") as a "business entity with foreign investment" ("BEFI"). Under the Law on Investment ("Investment Law"), each foreign investor of a BEFI must invest US$ 100,000 or an equivalent amount in Mongolian tugrugs ("MNT"). This capital requirement must be paid in before the entity can be registered by LERO. As a measure of the progress made in this area, it is worth noting that World Bank Group's Ease of Doing Business 2015 Index ranks Mongolia 42nd out of 189 economies in the world.

Investing in Mongolia

Legal Framework

Replacing the 1993 Law on Foreign Investment and the controversial 2012 Law on the Regulation of Foreign Investment in Business Entities Operating in Sectors of Strategic Importance, Parliament passed a new Investment Law in 2013.

The new Investment Law eased the regulatory approval requirements and streamlined the registration process for foreign direct investment. Further, it sets out certain legal guarantees and incentives so as to promote investment activities in Mongolia.

Intellectual Property Rights

The Law on Trademarks and Geographical Indications, the Law on Patents, the Law on Copyright and Related Rights, and the Law on Technology Transfer are the main laws that regulate intellectual property in Mongolia. In addition, Mongolia is a member of the World Intellectual Property Organization and signatory of the World Trade Organization Agreement on Trade Related Aspects of Intellectual Property Rights. Although the Intellectual Property Office of Mongolia ("**IPOM**"), the main enforcer of intellectual property rights in Mongolia, has made significant progress in protecting intellectual property in Mongolia in the last 25 years, due to capacity and resource constraints, the IPOM usually acts only upon receiving complaints, rather than taking a more proactive approach.

Anti-Corruption Legislation

In Mongolia, acts of corrupt behavior

are primarily regulated by the Law of Mongolia on Anti-Corruption, enacted on 6 July 2006 ("Anti-Corruption Law"), the Criminal Code, enacted on 3 January 2002, and the Law of Mongolia on Regulating Public and Private Interests in Public Service and Preventing Conflicts of Interest, enacted on 19 January 2012 ("Conflict of Interest Law"). In 2014, Transparency International Corruption Perception Index ranked Mongolia 80th out of 175 countries in terms of the perception of the level of corruption in the public sector.

Mining

Minerals Regulations

Mongolia has effected several important changes in the past few years to its minerals regime, such as the adoption of the State Policy on Minerals, the enactment of the Law on Common Minerals and the Amendment to the Law on Minerals ("Minerals Law"), all in an effort to support the mining sector and ensure continued economic growth.

Environmental Regulations

The mining sector plays an important role in the economy of Mongolia and accounted for 20% of GDP in 2015. It is thought that it will become the major force of economic growth for the development of Mongolia in coming years. However, the increasing level of mining activities also raises, among others, issues of environmental protection and restoration. Although a comprehensive Mongolian environmental regulatory regime existed, and the Minerals Law covers license holders' obligations towards the environment, the government did not consider it to be adequate in practice. Attempts had been made to resolve this issue on a piecemeal basis by adopting several measures in last few years, such as increasing water abstraction fees, imposing stricter environmental obligations on mining license holders and requiring the deposit of environmental restoration bonds. Further, in July 2009, Parliament adopted the Law on Prohibition of Mineral Exploration and Mining Activities in areas in the Headwaters of Rivers, Protected Water Reservoir Zones and Forested Areas to address environmental concerns.

The Law on Environment is aimed to reduce duplication and improve the quality of regulation, ensure responsible, environmentally-friendly and sustainable development, improve economic efficiency, introduce international standards in environmental auditing and the "polluter pays" principle, increase public participation in environmental decision-making, and secure funds for environmental protection.

Banking/Finance

The Law on Banking, enacted on 28 January 2010, as amended, currently provides the general regulatory framework for carrying out banking activities and offering banking-related services in Mongolia. Parliament approved the revised version of the Law on Securities Market ("Securities Market Law") on 24 May 2013, which came into force on 1 January 2014. As a framework regulation it is subject to additionally implemented regulations which are to be issued by the relevant regulators.

Although the Mongolian banking sector is quite developed, the Mongolian securities market is still at early stage of development and the applicable regulatory framework is not as sophisticated as that of other more established jurisdictions. Reforms are underway to modernize the legal and institutional framework of securities market.

Petroleum Sector

Mongolia is nearly entirely dependent on the import of refined petroleum products. Given the risk to the country's national security posed by this dependence, Mongolia has been working to develop its domestic petroleum sector by attracting foreign investors through a revision of its legal framework and by introducing tax incentives for oil refineries.

The Law on Petroleum ("Petroleum Law"), enacted on 1 July 2014, distinguishes between two main categories of petroleum products: (i) "oil" and (ii) "unconventional oil." Oil refers to crude oil and natural gas in addition to refined petroleum, whereas unconventional oil refers to oil sands and oil shale.

The Petroleum Law identifies three types of petroleum-related activities:

(i) research, (ii) exploration, and (iii) extraction. Exploration and extraction activities for oil and unconventional oil are subject to licensing procedures under the Petroleum Law while other activities, such as research and the storage and transportation of petroleum, are subject to the issuance of permissions or approvals from the relevant authorities. Such permissions usually involve a simple approval process, whereas licenses involve more complicated procedures whereby applicants must satisfy more rigorous requirements provided under the relevant laws and regulations including the entry into of a production sharing agreement until the Mongolian government.

V. HOW TO FIND MONGOLIAN LAWS

A. Overview

Currently, free Mongolian legal resources in English are still difficult to locate and no integrated source to find English translation of Mongolian law exists.

However, the National Legal Institute operates a web portal for free distribution of all legislation in Mongolian language and updates makes in daily basis. The Institute and the Government both regularly publish updated paper series of laws.

Source in Mongolian language: www.legalinfor.mn.

Source in English language: The user can find via Google search many Mongolian laws in English, but the most recent amendments could be missing. This author recommends that if someone needs updated laws or opinions he/she should contact odugerel@gmail.com at the National Legal Institute.

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TRUST LAW CONCEPTS IN MONGOLIA[1]

J.Oyuntungalag, LL.D, Chief Judge of the Appellate Court for Civil Cases

Introduction

Mongolia is a developing country which is making efforts to move from a centrally planned economy to a property-based open market economy.[2] This transition process began in the 1990s,[3]and since then, as a result of extensive industrial and trade sector privatization, Mongolian people have begun[4]to engage in various business activities which their educational background and former life style have not prepared them.

Lack of knowledge and experience in property management, in the commercial[5], social[6] and personal[7] spheres combine with inadequate legal infrastructure to create difficulties for the people. Moreover, in Mongolia's young and developing market, business and private affairs are conducted in a rather informal way. These factors have contributed to increased fraud crimes[8], breach of confidential relationships, and the abuse of legal tools for unjust purposes. Poor quality in management service has brought potentially serious harm to society, through loss of trust in law and the marginalization of courts (nihilism) in the pursuit of pure advantage or of remedies for violated rights. These bad effects on the legal mentality of general public are a potential barrier to the development of a free and transparent economy. It is necessary to provide an adequate system for protecting citizens' property rights, in order to close the shutters on this bad scenery.

Trust law can help address these problems, as a flexible regulatory mechanism which applies to both the structure of property management and protection against malfeasance in following ways:

-As a general legal structure,[9] trust law can extend or build upon existing legislation,[10] by providing standards for determining the status of property held in law by one party in another's interest;

-Trust law can provide a set of default provisions applicable to fiduciary relationships and the management of property by another;

-Examples of trust law practice in

[1] This is the first chapter of the master thesis written the author in Graduate School of Law of Nagoya University in 2007

[2] UndsenKhuuli [Constitution of Mongolia] (Mong.)

[3] The new Constitution of Mongolia was adopted in 1992, which is followed by much legislation, particularly in the economic sector, including the new Civil Code 1994 and 2002.

[4] S. Narangerel Legal System of Mongolia 102 (Matthew Linley et al. eds., Interpress. 2004), As before 1992 Mongolians were allowed to have no private property, but only personal property, such as cars and clothing.

[5] P. Tsenguun. Stock exchange, monetary policy, tax.2005 Liberal economy fund. (author's translation from Mongolian language) "…the only way to secure money of people is known as a saving and the most popular form of fundraising of companies is loans from the banks".

[6] Various social, pension and other public benefit funds, schools and hospitals are still state owned being heavy burden on the state budget and can not meet the public demand. So it is already decided (the Social sector privatization program) to separate some of them from state management.

[7] For example, overseas remittance constitutes a majority of the income of beneficiary households in Mongolia but is losing value due to inflation, unproductive investment by agents and increased levels of fraud.

[8] MongoliinTsagdaagiinErunkhiiGazriinStatistikSudakgaaniiHeltesiinStatistikMedee [Statistical data of Statistic Survey of general department of Police] (2006) (From this statistic data fraud increased until 1997 and, although decreasing from 1998 to 2005 in quantity, in quality these types of crimes are getting more serious, as characterized by a rise in the professionalism of the criminals, and in the number of victims affected).

[9] Noomi Yoshihisa, Modern Trust Law in Japan [GendaiSintakuHou] 2 (2004)

[10] Company Law, Civil Code, Law on Social Insurance, Law on Issuing pension allowance and payment from the social welfare funds, Law on the fees of the pension of the personalized pension accounts are covering some areas of common law trust law in Mongolia

other jurisdictions can contribute to the improvement of the remedial system;

-As a comprehensive device external to the tradition of the Mongolian legal system, the study of trust law can stimulate fresh thinking about property law issues among Mongolian lawyers, policymakers and commentators.

At the same time, an incorrect or incomplete understanding of trust principles may give rise to problems such as the defrauding of creditors, the circumvention of laws prohibiting certain activities,[11] or the unfair distortion of the fabric of existing law.

This paper will cover the standards applicable to trust relationships in the legal systems of the United States of America and Japan, for the purpose of identifying norms that may help in the further development of the property relationship in Mongolia from a legal and economic point of view. The author has chosen these two jurisdictions as a particular reference not only because of the size of their economies, but also because of the characteristics of their social and legal structure. Japan is a civil law country which has more than 80 years' experience with trust regulation, and is now in the process of reforming its own law. The United States is a country having statutory trust regulation and successfully developing trust structure in both of the social and commercial sphere.

The objective of the current thesis is not to suggest the transplantion of Anglo-American trust law[12] to Mongolia, but ultimately to explore ways of improving the civil remedial system by drawing upon constructive trusts concepts. The fundamentals common to all forms of trust, such as the concept of trust property and fiduciary duty must be outlined first, in order to understand trust principles. These two elements of the trust are generally considered to be essentially common law concepts, and not recognized in civil law jurisdictions (like Mongolia) due to incompatibility with the underlying legal system.[13] However, rules relating to the management of another's property and to relationships based on personal trust can be a source of good examples for the formulation of legal regulations necessary to protect property rights in a system undergoing transition.

Chapter 1 will identify Civil Code concepts having similar characteristics to the trusts of the common law, and identify the applicable scope of the trust concepts in this enquiry. Chapter 2 will compare ownership rights of the parties to a trust participants with ownership concepts in the Civil Code of Mongolia, and will identify the monitoring requirements for trust property, which can be useful tools for the identification identify and control of property in the hands of another. Chapter 3 will concentrate on fiduciary duties of the trustees and ways to enforce them, with particular attention to the core of duties and responsibilities arising from the fiduciary relationship and the justification of legal remedies for breach. The final chapter will compare property remedial system of Mongolia and constructive trust, to find ways to improve the current remedial system of Mongolia.

Chapter 1. Fundamental principles, usages and types of trusts

Section 1.1. Description of trust and its requirements

1.1.a Trusts and other related regulations in Mongolian legislation. The eventual purpose of this thesis is to find proper ways to develop trust concepts which can contribute to or enable the development of measures to support property management and

[11] In Mongolia Non bank institutions are prohibited to deal saving and loan activities, but now they are taking saving from the public under the name of the "trust service".

[12] AndreyA.Zdanov, Transplanting the Anglo-American Trusts in Russian soil, Review of Central and Eastern European Laws 31 (2006) 179-231

[13] Adair Dyer, Recognition of Common Law Trusts and Their Adoption in Civil Law Societies. Vanderbilt Journal of Transnational Law. October,(1999) (…idea of division of ownership seemed irrelevant,…and even dangerous, since some civil law systems had a comprehensive division of ownership as an absolute concept…)

protection as well as to reinforce existing legal relationships by escaping various side effects produced by the gaming of existing regulations.[14]. Many gaps remain in legislation in Mongolia in areas that involve trusts or trust-like relationships.

Estate entrustment[15] This is a new type of contract in the Civil Code of Mongolia originating from the German *Treuhand*. According to the legislative definition, such a trust is a contract in which a settlor is obliged to transfer moveable property or a right[16] to a trustee and the latter is obliged to receive it and dispose of the settlor's right and interest for the benefit of the settlor.[17] Although the law[18] refers to the recipient of the property or right as a "trusted owner" and stipulates that he enjoys the powers of the real owner of the trust property agains third parties, there is no transfer of the owner's right, because expenses and risks still fall on the settlor.[19] So it is used like agency for long term period to perform fiduciary duty on his own name[20].

It is not clear whether there can be any third parties benefiting from the trust property however if we will refer to article 406.6[21]of the Civil Code of Mongolia, settlor is the only beneficiary from the trusts. Consequently, it seems that the regulation is lacking possibility of third party beneficiary.

Nonbank financial institutions have already begun to offer trust banking services under the Law on Non Bank Financial Activities.[22] Whether the Civil Code provisions on Treuhand will apply to these activities only, or whether these provisions regulate trust relationships more generally is waiting comprehensive answers from the policymakers.

Trusts dealt by Non Bank Financial Organizations[23]**.** Law On Non-bank Financial Activities determined "trust" as following[24]: "Trust service" shall mean an arrangement whereby a trustee temporarily controls, uses and manages assets (cash, loan, other assets) of a beneficiary on the basis of an agreement with the beneficiary with the purpose of preserving the value of the assets and earning a profit. The problem here is that the regulations related to this activity is limited only by this definitions, however the legislation should provide standards related to the trustee's property management.

The other question is that "Is there any similar or equivalent to trust legal instrument in Mongolian legislation?", consequently the following institutions, which have some characteristics of the trust.

Contract for third parties.[25]According to the Civil Code both of the third person and obligation assignee of the contract can require the performance of the contract from obligee. The existence of the third parties right to require and how to exercise the right will be determined by the contract and objectives of the contract, if these issues are not specially stipulated by the contract. Third person-beneficiary's position is very vague, but this is a

[14] For example, legislation allowed Non bank institutions deal with trusts, but did not give any regulations related to the duties and rights of the trust participants, that is putting the consumers in very dangerous situations.

[15] Translation of the title as well as following provisions are made by the author

[16] Irgeniikhuuli [I.H] [Civil Code of Mongolia] art.8.4.5 (Mong.) ("Right" is understood as one of the non material assets, which gives to its possessor benefit and right on claim)

[17] I.H art. 406.1. (Subject to contract on estate entrustment, a trustor is obliged to transfer moveable property or right to a trusted owner and the trusted owner is obliged to receive it and dispose for the trustor's right and interest.)

[18] I.H art. 406.4. (A trusted owner executes power of the real owner in relation to third parties and is responsible for its consequences and obliged to compensate damage to the trustor arisen by his activity against trustor's interests.)

[19] I.H art. 406.3. (A trusted owner is obliged to dispose trusted property on his own name by expenses and risk of the trusts.)

[20] Compare to agency in this part

[21] I.H art. (406.6. A trustor will own income and benefit from trusted property.)

[22] Bank bus sankhuugiinuilajillagaaniitukhaikhuuli [B.B.S.H] [Law on Non Bank Financial Activities] Art.7.1.8 (Mong.)

[23] B.B.S.H Art. 7.1.8.

[24] B.B.S.H Art. 4.1.7.

[25] I.H Art. 203.

contract, but not property relationship, it is assumed that no property right is given to the beneficiary of this contract, whose counterpart in trusts relationship has such rights.

Usufruct[26] .Usufruct is defined in Civil Code of Mongolia as a right to possess and use other's property with limits for earning property and benefit. The usufruct possessor is entitled on the same right as the real owner except to dispose it through the comprehensive transfer to third person. The usufruct possessor should take permission from the owner in case of pledge and rent of the property. This is similar to the trusts in sense of that it limits the owner's right, but it is not the complete limit of the ownership rights like trusts, because the usufruct possessor has no right to dispose.

Transfer of the immovable property to the other's administration[27]. This will be attached only to the immoveable subject to the hypothec. It is one type of the measures to ensure the performance of the obligation and an alternative method of selling property by auction and established by the court on the request of the obligation assignee with hypothec claiming rights on the property. It is very similar to trusts, since administrator has a right of ownership, such as right to dispose and distribute benefits earned from the administration to the entitled on it people according to the plan approved by the court. But it is distinguished from the trusts as a short term structure and can be initiated only by the obligation assignee who is not the owner of the property. Moreover after the complete performance of the obligation the remained property should be returned to the owner of the property.

Fiducia[28].It is also one way of ensuring performance of obligation by transferring a legal title to an obligation assignee. It is similar to the trust in that the legal title is transferred to others and fiduciary relationship, but it is not independent contract. From the scholastic interpretation the transferor of the property is losing all his property right, so he has only right on damage claim but not property claim from the fiduciary, that is evidencing impossibility of the ownership separation[29]

Agency[30].According to the contract an agency is to do certain actions on behalf of and at the expenses of a principle and the principle should pay for a service. It differs from trusts as an action undertaken by the agent is on the name of the principle. There is no transfer of the ownership right, although agent is acting for the benefit of others and holding the fiduciary duties like trustees, but he is entitled only on certain actions instructed by the principle.

Guardianship.[31]The article is also one of the confusing articles of the Civil Code and it does not stipulate directly that the guardian has ownership rights and some other property rights on the assets of the ward. But it is assumed that guardian is legally entitled on the property as article 485.2 stipulates that "… in case of death of the guardian the successor of the transferred property will have obligation to take care of the ward…" Here the transferred property means the property transferred to the guardian from the ward for guardianship as the article 483.2 stipulates that "… in case of the contract termination the transferred property shall be returned to the ward…". If the successor of the guardian can receive the transferred property, logically it means that the property is included into the guardian's will. Consequently, the guardian has a legal title on the property like trustee in the trusts, but he is not entitled on disposition, because law requires the consent of the

[26] I.H Art. 152.

[27] I.H Art. 181.

[28] I.H Art. 235.

[29] KhuuliZuinUndesniiTuv [National Legal Center], Irengiikhuuli: ShinelegZokhitsuulalt [Civil Law: Newer Regulations] 89, 92 (GTZ.2003)

[30] I.H Art. 399.

[31] I.H Art. 483.

ward for it. This provision is evidencing the sensitiveness of the civil law system in division of ownership rights.

However these above listed relationships are having some elements of the trusts, they can not be considered as trust relationship[32] due to lack of one or more of the following characteristics of the trusts.

1.1.b Definition of the trust. There is no strictly stated trust definition in common law, because its structure is very clear and deceptively simple for common law system. Thus Scott has stated that "… the definition results from the rules, and not the rules from the definition"[33] and he has mentioned that trust is understood in two ways, such as broader and narrower sense. In broader sense, trust is a fiduciary relationship including all like bailment, executorships, guardianship and so on. In narrower sense, the term is applied to the definition of the Second Restatement and he gave main characteristics of trusts, such as intentionally created fiduciary relationship, related to the property, and existence of equitable duties, benefit of another people[34].

But the definitions is needed for giving general idea, namely for answering question "What is trust?"[35]and for distinguishing it from other concepts, like bailment, and agency for civil lawyer. Specially in statute based system of law like Mongolia regulations begin from the definition. Thus according to the Article 1 of the Trust Law of Japan[36] trust is a transfer and otherwise dispose of a property right and cause another person to administer or dispose the property for a specific purpose. This article did not give the trust form[37] but the characteristic and content of the trust relationship, as an instrument to cause trustee to administer and dispose the property for the benefit of others.

Basing on the opinions of the scholars and definition of the legislations the author compared the common characteristics of the trusts given by them[38], the following description is made for trusts:

Trust is a legal relationship where a person (trustee) to manage the other's property (trust property) for special purpose (charitable or for the benefit of the beneficiary)[39]. The main binding[40] characteristics of the trust are following:

- Ownership and interests in related property are separated between trustee and beneficiary;
- Fiduciary duties of the trustee in administration and disposition of trust property;
- For benefit of other than legal owner (trustee) of the property.

The composition of these 3 main characteristics makes trusts distinct from other similar institutions, such as bailment, agency, guardianship and others.

Distinction of the trusts from other similar relationships[41]

[32] See table "Distinction of the trusts from other similar relationships" of this chapter

[33] 1 Austin W. Scott, The Law of Trusts 37 (3rd ed., 1967)

[34] Id.

[35] ItineraFiduciae: Trust and Treuhand in Historical Perspective 37 (R.Helmholz R.Zimmermann ed., Duncker&Humblot. 1998)

[36] ShintakuHou [S.T.H] [Trust Law] art.1. (Japan)

[37] Trust form means how or by what document trust can be created

[38] Stevan L. Schwarcz, Commercial Trusts as Business Organizations: An Invitation to Comparatists 43 Duke J. Comp.&Int'lL.321 (2003), Hayton and Marshall Commentary and Case Law of Trusts and Equitable Remedies 1, Donavan W.M.Waters, The Institution of the Trust in Civil and Common Law 449 (1995), the Hague Convention on the Law Applicable to Trusts and on their recognition,

[39] Definition applies only to the express trust

[40] "binding" is used as that if even one of these characteristics is missing it can not be considered as an express trust

[41] The table is based on the Bogerts comparisons, though there are many other comparisons, for instance Edward and Stockwell made comparison with contract, bailment, administration of estate, condition and power.

	Trust	Bailment[1]	Agency	Guardian ship	Receivership[2] /by court decision/	Contract for third parties	Usufruct	fiducia	Trusts dealt by Non Bank Financial Organizations.	Asset entrustment in Civil Code	Transfer of immoveable to other's administration
For benefit of other than legal owner	+	+	+	+	+	+	-	-	+	+	+
Fiduciary duty	+	-	+	+	+	+	-	+	+	+	+/-
Separation of ownership and interest	+	-	-	-/+	-	-	+	-	+/-	-	+

Section 1.2 Usages and types of the trusts

The significance of this chapter is to show the reason why trust or trust like devices are employed by the people as a legal device. Economic behavior is a social exchange model in which people want resources from others and engage in organized life, where the motivation is a desire to maximize their gain of resources and minimize losses42. The trust is a flexible device that opens possibilities of exchange that are not supported by the strict rules of a Civil Code or judicially establish property regime.

In the legal theory trust as a legal concept is born by Courts of Equity in England to avoid unjust results under inflexible Common law rule on land rights43.Trust law has become an established element of English law because it has proven to be useful instrument for dealing managing of settled land and property, establishment of business entities and pursuing charity, defining right and obligation in various types of transactions44. So understanding of usages and types of the trusts will help to compare trusts to the civil law concepts fulfilling similar functions and to identify applicable sphere of trust concepts in civil law.

1.2.a. Usages of the trusts. Modern usages of trust is wide arranging from family asset planning to investment and security tools. For instance, in the USA historically, the trust is being used and recognized as a device for intra-family wealth transfer, but in recent times it has begun to play a significant role in the capital market as a commercial tool, as shown by the fact that pension trusts and mutual funds hold 40 percent of all US equity securities and 30 percent of corporate and foreign bonds45. Since modern usages of trust is very diverse and uncountable, as a summary of various views of the opinion leaders in this sense, followings are some of more common uses of trusts in common law jurisdiction46.

1. Family and personal property planning and preservation. Trust is used for many purposes, like transferring property or benefit for his desired persons, at the same time managing and preserving wealth professionally and

[42] 2 Russel Safe Foundation Series in Trust, Tom. R Tylor, Why People Rely on Others? Social Identity and Social Aspects of Trusts. Trust in Society 287 (2001)

[43] Black`s Law Dictionary, 579 (8 th ed., 2004) (equity… 4. The system of Law or Body of originating in the English court of Chancery and superceding common and statute law when two conflict…

[44] R.Edward&N.Stockwell, Trusts and Equity 5 (Pitman, 1992)

[45] H.Hansmann&U.Mattei, Trust law in the United States. A Basic study of its Special Contributions, 46 Am.J. Comp.L.133 (Supplement, 1998)

[46] Almost all books on trust issues clearly describes the trust usages, therefore the author generalized these purpose and mentioned which are more popular and common.

effectively.

2. To make gift or charity. It enables the purpose achieved and enforced by the beneficiary, who are not strictly identified by name or by certain relation, but by common characteristics or criteria.

3. To provide safe pension fund for employees. It's advantage is that trust can provide safety of the pension funds on case of employer's financial difficulty, improper use, and it gives tax advantages for the employers, where such kind tax regulation is provided by law.

4. For commercial purposes. In this respect we can name many kinds of trusts, like investment trusts, unit trusts, voting trusts and so on. These kind of trusts give possibility for non professional investors to utilize their money through investing into the stock markets.

5. To minimize tax burden. One of the first usages of trusts was to avoid feudal dues of trust. Recently, trust is often used to avoid or minimize present day taxes, especially, income tax, capital tax, and inheritance tax47.

6. Business control. Trustees play a simple role in stock voting trusts, where they will pay dividends to the beneficiaries and to support the corporate management, their registered ownership of stocks prevents stock being sold to strangers, and the unwelcome takeover bid. This kind of trust is also very popular in the investment schemes, for example, in pension trusts, the board of trustees will determine the investment policy, usually relying upon investment consultants for the immediate day to day purchase and sale decisions, and actual securities at any one time will be registered in the name of the custodial trustees, invariably in the corporate trustee48.

7. Remedial instrument. Courts in common law system imposing constructive trusts to the prevent unjust enrichment and recover fair parties right.

1.2.b. Types of the trusts. Hence it's usages are potentially unrestricted and trusts can fulfill so many functions because of it's flexibility which is expressed by it's structure and various types. The main two characteristics of the trusts make it similar to the corporate structure by the separate patrimony49 as well as to contracts, giving freedom of identify relationship by the agreement50. Understanding about general types of the trusts will help to understand rules applying different types of the trusts.

Most traditional classification of trust is related to the creation of trusts dividing it into express and implied, which is divided into types such as resulting and constructive51. Express trusts is a trust createdby the intentional expression of the settlor.52 Theoretically, it is not necessary to use exactly the word "trust", but it should be clear that settlor is intended to create trust from the declaration of the settlor, in other words all necessary characteristics should be included into the statement of the settlor. In author's opinion, trust is possible to be created as express or statutory trusts in civil law counties, since main source of law is statutory legislation. Implied (resulting) and constructive is a trust imposed by the court for providing justice and good conscience in property relationship. Although there can be difficulty directly impose due to current level of court experience and statutory legislation, main principles of the constructive trusts can enrich and fulfill gaps in the remedial system in Mongolia.

Depending on the purposes trust is classified private (family, commercial and other) and public (charitable), where types of the beneficiary is differed. For example in case of the commercial and

[47] Supra note 45 at 47

[48] Donavan W.M. Waters, The Common Law Trust in The Modern World, 11 (Forum Internatianale No.5, Oct., 1984)

49 Patrimony used as set of not only assets and rights, but also obligations related to the property

50 Supra note 49 at 6

51 D.J.Hayton, Hayton& Marshall Commentary and Cases on the Law of Trusts and Equitable Remedies 43 (10 th ed., Sweet&Maxwell. 1996)

52 D.B. Parker& A.R. Mellows, The Modern Law Of Trusts 31 (2nd ed., Sweet&Maxwells. 1970)

private trusts, it is necessary that the beneficiary is identified more clearly and individually. But in the charitable trusts, as the beneficiaries are multiple subjects, the important is the purpose rather than individually identified persons. More over, according to the UTC private trusts require determined (ascertainable) beneficiaries, on the other hand charitable trusts are created for public interests. Interesting is that the UTC allowed to create trusts for animals, and other trust of non charitable purposes, which is named as honorary trusts. Valid period, requirement for identifying beneficiary purposes and enforceability53 and property distribution at the end of the trust is differed, so the principles of charitable activities also will be applied to it.

Depending on the possibility of withdrawal by the settlor trust is sorted as a revocable and an irrevocable. In the revocable trusts settlor preserves some rights on trust, namely the rights to appoint, resign or change trustees and others. Revocable trust is used for avoiding probable process as a substitute for a will in the USA54. In contrary to the common law concepts, according to the UTC trusts are presumed to be revocable. On the other hand, in irrevocable trust, a setllor loses all his property interest on the trust property and the beneficiary who is the only capable person to enforce duties by the trustee. Consequently, the rights of the creditors of the trust parties also will be quite different in this two types of the trusts, so is the distribution of the trusts property after the end of period of the trusts.

Relating to the duties of the trustee, trust is classified like simple and special trusts.55 In simple trust, sometimes named as passive or bare trusts, trustee has only duty to hold legal title to the property. But in active trusts trustee has active management responsibility56 and depending on the level of his discretionary power it also can be divided into two types like, ministerial and discretionary57. In the ministerial or fixed trusts the settlor determines the exact benefit which each beneficiary should receive and in the discretionary trusts, the trustee has a power to decide the shares of the beneficiary.

Section 1.3. Conclusion from the chapter

From the trust descriptions and its comparison to the Mongolian Civil law concepts having similar characteristics, the author has come into the conclusion that there is no similar concepts fulfilling the functions Anglo American trusts. So from the summarizing of various usages of the trusts in common law jurisdictions, it is becoming clear that trust concepts can not be applied in such broad sphere in civil law jurisdiction like its counterpart in common law jurisdiction, because some of these usages are covered by the current legislation related to the corporation, non government organization and contract law. But its standards related to the holding of trust property independently, imposing fiduciary duty on managers of other's funds can help to address the deregulations of the current legislation related to the property management and protection. Since the rules related to the above mentioned trusts differ depending on the types of the trusts and such types are arisen from the case laws as a result of social needs for them, it would be impossible challenge to develop all types of the trust in Mongolia. Because Mongolian economy and legal structure is still young and immature comparing to the conditions of the Japan and USA, when trust was introduced. For example, for developing express trusts, there should be more justified legal and

[53] David M. English, *Uniform Trust Code and Its Application to Ohio*, Capital University L.Rev., 1 (2002)

[54] Id.

[55] *Supra* note 56 at 33

[56] Nicole Y. Emnett, *Case note: McCollunm v. McCollunm: Merger a*n*d Fiduciary duty in Arkansas*, Ark.L.Rev. (1999)

[57] *Supra* note 45 at 58

economic infrastructure, on contrary it would be either a law on paper in best case, or the tools to abuse unsophisticated citizens, like in current scandals related to the Loan& credit cooperatives, where citizens are blaming the government for legislations lacking institutional and legal tools to protect citizens from abuses. But trust principles related to the trust property and fiduciary duties will be a good standards which can shape property remedial system of Mongolia.

(Footnotes)

1 I.H Art.233. (bailment is arisen when one of the contract delivers a money to other party as a guarantee of performing obligations)

2 Dampuurliintukhaikhuuli [D.H] [Bankruptcy Law] Art. 3.1.4 (This function is performed by a trustee in bankruptcy procedure, who is a person appointed by the court with claimants proposals for executing work of liquidation and recapitalization, protecting and controlling assets of the defendant)

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THE EXTRACTIVE INDUSTRY: LEGAL, ECONOMIC AND POLICY FRAMEWORK

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1. **Minerals law and Minerals policy of Mongolia**

The legal and policy framework in Mongolia for the extractive industry has been developing with its own specifics along with adopting international policy trends.

In general, *the non-renewable and finite character* of oil, gas, and mineral resources is the primary premise of an extractive industries (EI) sector policy.[1]In this article, a greater focus is given to the mining sector legal and policy framework.

Mongolia, as a resource rich nation, adopted its last Minerals Law in 2006 (amended in 2014 and 2016) and the Minerals policy in 2014. Until 2006, Mongolian minerals policies and practices were governed by the 1997 Minerals law.

The minerals policy of Mongolia adopted for the period of 2014-2025 has been shaped to create a stable environment for foreign investment. The aim is to, draw on the private sector, develop transparent and responsible mining, produce value added, export-oriented and internationally competitive products, provide equal opportunities to investors, and promote sustainable development and economic diversification.

The Minerals policy of Mongolia highlights improving the legal environment, promoting international initiatives for transparent and responsible mining, and understanding the impact of mining on social and economic conditions. In addition, the same policy discusses about preparing specialized lawyers, economists, analysts, and arbitrators in the extractive industry and bringing dispute resolution systems up to international standards.

Another highlight of the Minerals policy of Mongolia is that the new policy seeks the government's oversight and ability to regulate *strategically significant deposits* to increase their returns and benefits to the country's social and economic development.

The Minerals law of Mongolia defines a strategically significant deposit as one which has greater impact on the national security, and socio-economic development of the country. Such deposits are expected to produce over 5% of the national Gross Domestic Product (GDP).

Bringing mining closure, and rehabilitation to an international standard, encourage prevailing use of surface waters rather than underground water for minerals extraction and processing, and water re-use and utilization of advanced technologies in the mining sector are also and notable themes discussed in the Mongolian minerals policy.

Mongolia also aims to create targeted funds from mining revenues for economic diversification and environmental protection.

It is noteworthy that Mongolia's legal and policy frameworks have been

[1] A World Bank Study, 2015, The Extractive Industries Sector, Essentials for economists, public finance professionals, and policy makers, page 11

responsive to commodities boom and bust cycles as well as investors' interests. The objectives of mining sector policies have increasingly moved beyond mobilized revenue. In recent years, lower demand for bulk commodities, combined with a bleak global outlook and a production hangover, sent commodity prices down,[2] although in 2016 some commodity prices have improved, and the outlook is somewhat more promising. However, it is not safe to assume a direct connection between legal and economic cycles. The duration of the investment downturn and recovery prospects are likely to be uneven in various countries.[3]

The Minerals law of Mongolia has certain provisions to highlight which are outlined below:

- An exploration or mining license may be pledged with banks or non-banking institutions as security for receiving finance together with work result reports, geological information, and feasibility studies. (Article 51)
- "A deposit use agreement" may be entered into between the government and a mining business. The government participation in mining projects may be agreed by such agreement. Up to a 50% participation right may be permitted to the government if the government funded the costs of exploration for a strategically significant deposit. (Article 5)
- The government's participation in the strategically significant deposit may be substituted by a royalty. (Article 5)
- Mineral royalties are increased to reflect market price rises for mineral products. (Article 47)
- An extraction license holder is required to trade no less than 10% of its shares at the Mongolian stock exchange. (Article 5.6)

2. Mining industry is a business

The mining industry and investment flows are *international* in nature. Improving the Minerals laws and Minerals policy is not sufficient to attract increased foreign investment, and promote social development and economic growth.

The mining industry is a business. Therefore, a profit making goal is its essential element. In addition, the mining industry is subject to the requirement of "responsible mining" which implies safe mining practices for the environment, people, and supporting the social and economic development of a host country. "Transparent mining" practices ensure that mining revenues are clearly and accurately reported, disclosed, and are managed at fair and equitable terms.

In this regard, a resource rich country like Mongolia must pay ad equate attention to its taxation, accounting, revenue administration, contract negotiation and management capacity. In addition, it is crucial that the host country understands the economic meaning and effects of various taxes, and fees associated with the mining well.

3. Legal and contractual regimes

The legal obligations placed on a company operating in the mining sector may be enshrined in a mining law, in an individually negotiated agreement, or within model contracts with specified exceptions. In a pure permit regime, the government details all the major obligations for mining companies in legislation, and companies apply for permits for exploration and extraction under the defined terms of laws. This framework allows little scope for discretion in granting differential terms for companies involved in the extraction of the same mineral. In a pure contractual regime, the obligations of individual companies are negotiated and detailed in a contract often referred to as a mineral development agreement. In practice, most countries do not operate a pure permit or a pure contractual regime. The range of obligations that a typical mining company

[2] PWC, Review of global trends in the mining industry, Mine 2016, page 5

[3] African mining industry developments and opportunities: A Global Perspective, Presentation delivered at Norton Rose Full bright Event by Professor Peter Cameron, Mining Indaba, Cape Town, 9 February 2016, page 2

faces under a resource contract includes fiscal regimes, operational commitments, environmental obligations, worker safety obligations, and social obligations.[4]

4. Role of the relevant ministries

In general, the ministry of mining/ resources is responsible for the overall management of the extractive industry sector, including setting resource policies, drafting laws and regulations, managing exploration and extraction rights, regulating the sector and monitors operations, developing technical specifications and standards, developing and maintaining geological maps and databases, and maintains a reliable information on national earth science infrastructure.[5]

Production plans are critical in providing bottom-up estimates of production and should be submitted by the companies to the sector ministry for monitoring, together with revenue forecasts.

Responsibilities for the ministry of finance include ensuring that resource revenues are shared, participating in the formulation of resource policy and administrative guidelines, in particular with respect to revenue collection and administration, management of resource revenues (including the creation and governance of sovereign wealth funds), ensuring transparency of resource contracts and revenues, and monitoring the build-up of liabilities arising from extractive exploration and production, including maintenance costs associated with public infrastructure built by mining companies, costs of environmental damage, and costs of resettling displaced communities.

5. Mining cycles and the tax system

The ultimate goal of any government's mining tax system is to ensure the greatest possible benefit for the public while encouraging investment in the sector. For companies, the overall tax level influences incentives to explore and develop. The timing of tax charges also influences investment patterns. Although taxes on corporate profits are more efficient and recognize the inherent risks in mining operations (particularly wide fluctuations in minerals prices and geological, technical, financial and political factors over a mine's lifetime) the challenge is that they are complex and have greater potential for corruption and tax fraud- key concerns in the EITI context. When deciding whether or not to invest, companies consider not only the profitability but also the stability of the tax regime.

Different mines have differing capacities to pay taxes at various stages of mining. For instance, exploration is a substantial cost phase without any income and is highly risky. Governments typically respond by allowing losses to be carried forward and to be off-set against profits in the production phase. Mine development is a high cost phase requiring the purchase of capital inputs, most of which need to be imported. Typical responses are to enable accelerated recovery (depreciation) of capital costs once production begins, and to have low import duties and value added taxes (VATs). Production is the longest and most profitable phase in the mining cycle and is usually when payments to the government begin to be generated. However, minerals are sold into competitive markets and prices fluctuate, meaning that governments often provide flexibility, such as relief from export duties and VATs.

Post mining or after mining ceases, projects often incur significant rehabilitation costs. The typical response is to provide tax deductibility to encourage companies to set aside funds progressively during the production phase. Given the diversity

[4] A World Bank Study, 2015, The Extractive industries sector, Essentials for economists, public finance professionals, and policy makers, page 71

[5] A World Bank Study, 2015, The Extractive industries sector, Essentials for economists, public finance professionals, and policy makers, pages 36-37

of operations in the mining sector, it is impossible to define an ideal tax system for all jurisdictions. There is, however, a common objective of encouraging successful projects while avoiding social costs. Tax systems must be neutral and progressive to motivate corporate innovation and profit-seeking. Given that any set of tax rates and the mix of taxes will be based on assumptions about prices and costs, and these will change over time, there should be a preference for transparency. This can be implemented by multi-stakeholder bodies to conduct regular reviews of key assumptions, so that any policy change is predictable and decision making is consensual. As tax systems increasingly converge, the question of whether mining tax revenues are being properly utilized will become more important than the division of wealth between companies and the state.[6]

6. Taxes, fees, and costs

There are several different types of fees and taxes the host country normally collects. They are:

- Royalty –this is rent paid by a mining business to the government (or the owner of minerals) for granting the right to extraction to non-renewable subsoil asset;
- Land fees (normally charged for any portion of land/tenure used for mining and related operations)
- Minerals license fees (exploration or extraction license fees) –which are normally charged annually for "per hectare tenure" whereon exploration or mining activities are conducted;
- Water fees (charged for water used for extraction or processing);
- Business income tax, which is assessed on profits made by a mining business; and
- Contributions or monies provided to the communities located close to mines.

In addition, it is important to understand the costs (past, current or future) and expenditures associated with a mining business to deal appropriately with the mining industry.

It should be noted that the mining investment involves an *opportunity cost*, which means that the current use of mineral resources reduces or depletes the supply of mineral resources available for future use. This is particularly relevant to subsoil resources which are nonrenewable.

Capital costs are normally high and these are often sunk costs, and operating and maintenance costs may vary due to extraction, labor, processing and transportation costs.

An efficient, fair and effective taxation policy is a key issue for the development of the mining industry, and the government's ability to implement public programs. It is also important that people of the host country are provided a fair share in mining profits. The best tax policy is the one which reflects the type of commodities, the method of extraction, and the one which enables sustainable mining.

7. Transparency of the extractive industry and international initiatives

Timely and regular release of comprehensive information about resource licenses, contracts, and revenues allows governments, legislators, and citizens to exercise oversight and conduct an informed debate about the best use of revenues.

In addition, the legal framework is the main pillar of resource transparency and provides the basis for reconciling the possibly divergent interests of key stakeholders.

In the experience of many developing countries, setting up a special structure to control large taxpayer compliance has generated both increased compliance and more effective tax administration.[7] Regardless of the institutional structure employed for resource taxation to be

[6] Paul Mitchell, Taxation and investment issues in mining, https://www.oecd.org/site/devaeo10/44282904.pdf

[7] A World Bank Study, 2015, The Extractive industries sector, Essentials for economists, public finance professionals, and policy makers, page 77

effective, the very large imbalances in expertise between governments and resource companies must be reduced by appropriate staffing, and staff training. Here, quality is more important than quantity.

In respect of international initiatives, in 2014, members of the Organization for Economic Co-operation and Development (OECD) including several developed nations in Europe and Latin America and many tax havens such as the British Virgin Islands, issued a joint statement calling for a global standard for the automatic exchange of information between tax authorities. They believe that such exchanges can help to clamp down on tax evasion, and shift the burden of proof from tax authorities to tax payers who would have to defend their structures.

The move towards transparency is nothing new for mining companies, having already experienced the Extractive Industries Transparency Initiative (EITI) which passed in 2003 and which calls for certain disclosure of payment and revenues. Annual EITI reports produced by mining companies are subsequently reconciled by the national tax authorities. Country-by-country reporting is a more recent trend.

In 2013 the OECD began a collaboration to address international rules that enable profit shifting, allow "double non-taxation" and erode domestic tax bases. Its September 2014 draft recommended revised standards for transfer pricing documentation with multinationals required to annually report revenue, profits, income taxes paid, and/or accrued, the number of employees, stated capital and retained earnings, and tangible assets for each country in which they do business. Additionally, companies would have to identify each entity within the group that operates in a particular tax system, and indicate the nature of its business.

Although the OECD has no power to force any member to adopt such rules, governments clearly recognize the benefits of taxpayer disclosure over government/auditing agent searches. Any required disclosure that includes payments to foreign persons may increase the risk of scrutiny by anti-fraud regulators, especially regarding semi-legal payments to public officials for transport permits and other essential tools of business.[8]

Various countries, including Australia (in particular Western Australia) and South Africa, have reviewed the rules for determining royalty rates. The royalty rates reflect the depth of a mine (deep underground, underground or open cut mines) different levels of value added processing (semi-processed, concentrate or metal) and the profitability of mining projects.

Any country contemplating changing royalty rates should be aware of the significant risk of capital being withdrawn due to *sovereign risk perceptions*. Mining companies look for certainty. They are using tools such as advanced compliance agreements, ruling requests and tax policy submissions to policy makers. When investing into new projects, mining companies are using advanced pricing agreements, bilateral investment treaties, and fiscal stability agreements to obtain certainty around key tax variables underlying their investment decisions.[9]

8. Profits sharing and policy objectives

It is commonly argued that resource rich countries are not always economically advanced or are not experiencing noticeable growth. It is also claimed that mining revenues do not promote social equity. There are countries where mining revenues are managed successfully. For example, the Alaska Permanent Fund has been in place since 1977 and it receives about 10 per cent of the state's income

[8] KPMG, Trends in taxation, Coping with transparency, mining royalties and volatility, kpmg.com/mining

[9] KPMG, Trends in taxation, Coping with transparency, mining royalties and volatility, kpmg.com/mining

from oil and annually distributes a share of the accrued interest to all citizens as a dividend. Advocates suggest that such a plan would do a better job than the government in allocating rents by keeping part of the oil revenues out of the hands of politicians, hence reducing corruption and government inefficiency, and becomes a powerful tool for achieving social goals.[10] Although there are several methods of profits sharing, there are legitimate interests in the host country that local regions develop, new jobs are created, targeted public programs are supported and the gap between the poor and rich narrows.

At the end, the objectives of the mining sector policies may be, among others, to:

- Offset the depletion of finite subsoil assets with investments in human resources, infrastructure, and broader and long term productive capacity and diversification;

- Ensure that resource extraction takes place in a manner that minimizes environmental degradation and promotes biodiversity;

- Ensure benefits for communities are defined through a fair process;

- Develop capacity for local, regional, and national value adding through the development of upstream and downstream linkages -as well as side stream linkages to skills and technology-based sectors and infrastructure – and support for entrepreneurs at the local and national levels;

- Ensure health and safety standards.[11]

[10] Macartan Humphreys, Jeffrey D. Sachs, and Josepth E. Stiglitz, Escaping the resource curse, 2007, Page 242-243

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[11] A World Bank Study, 2015, The Extractive Industries Sector, Essentials for economists, public finance professionals, and policy makers, page 13

CRIMINAL JUSTICE SYSTEM IN MONGOLIA

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Abstract

The objective of this article is to introduceabout criminal justice reform in Mongolia and its outcome of performance encompassing last 11 years. Data on criminal justice statistics for period between 2004 and 2014 obtained from three different criminal justice agencies police, court and correction services. Despite the passage of significant legal reforms and considerable changes in criminal justice sector operations, especially in the courts and the police service, public trust in the rule of law is still not well established; and critics often question the capacities and fairness of the criminal justice system.Statistics shows that average crime rate per 100,000 persons were 767 last 11 years. According to statistics, 20973crimes were reported to police and 13036 or 63.1percent out of the total number were solved. Averagely, 19308 persons were investigated as suspects per year and 8359 or 43.9 percent out of that number were ruled as guilty and convicted by court. As for types of punishment per 100,000 persons, 0.2 percent was imposed by death penalty, 73.5 percent by imprisonment, and 26.3 percent by other punishments. Currently, over 6000 inmates are serving in prison in Mongolia. It requires further following studies which support to evaluate Mongolian Criminal Justice System.

Keywords: *Mongolia, Criminal justice system, transition, legal reform, criminal law, crime clearance, punishment, prison population*

1. Introduction

With Mongolia being a unitary state, the criminal justice system in the country comprises a composite whole. The legal and social institutions for enforcing the criminal law thus apply uniform rules and procedures in all twenty one administrative units of the country in executing their respective mandates.The criminal justice system in Mongolia has changed significantly over the 20 years since the country became democratic.The criminal justice system is deemed a focal area in the transition to democracy, and in the process of democratization of institutions and civil society. Police and courts are seen as the vanguard of democratic change. It is a significant characteristic of such claims that the legitimacy of criminal justice institutions—the police and the courts—is seen as decisive in securing legitimacy for the transition to democracy, and for democratic government, and thus the contribution of these institutions to the political stability in the transitional environment is of major importance (Susanne, 2003).

ComparingMongolia with other countries within the region, the country's reform efforts have been generally successful. During the early and economically difficult times since democracy was established, reform activities naturally focused on legal reforms, including the creation of a legislative framework for democratic institutions, the transition to a market economy, and significant changes in the

relationship between the state and the people.

Within last 20 years, numerous studies on legal reforms of criminal justice system and its component organizations such as court, prosecutor, police and correction agencyhowever those studies were focused on their respective fields solely. Following issues have mainly been covered on above mentioned studies. 1) Making analysis on the consequence of implementation of enacted laws based on the criminal justice reform being effective since 1990 andits process as well as upgrading the process as a whole(Carlos, 2001;Gramckow & Allen, 2011;Landman et al, 2005; Jantsan,2005; Narangerel, 2001;Tavanjin, 2004),2) Transparency of law enforcement organizations, ensuring of human rights,freedoms and its legal guarantees,and public attitude towards the performance of law enforcement organizations(Brent, 2008; Dolgorsuren, 2014; ICFMC 2008; Tsend, 2010),3) HR policy, definition of legal condition of law enforcement personnel (Batayev, 2005; Dumburai,1999;Lundendorj, 2002). Although the studies have covered quite broad areas as mentioned above,unitaryresearch onoutcome of the establishment of law enforcement organizations and its purpose has not been conducted yet. New aspectof this article is to make analyseson legal reforms of law enforcement organizations and their performances.

The core objective of this article is to introduceabout legal reform of criminal justice systemas a whole as well as on the outcome of performance of law enforcement organizations such as police, court, and correction encompassing last 11 years. In order to reach to the objectives, numerous fundamental issues onhistorical and political background of legal reform,reform of criminal justice in transition, crime and punishment under Mongolian criminal code, currentcriminaljustice administrationandcriminal justice statisticshave been taken into consideration. Moreover, crime and crime clearance rate in Mongolia (responsibility of police), criminal punishments for offenders convicted (responsibility of court), and prison population (responsibilityof correction service) were applied as general objectsin the research forthe criminal justice analysis.

This article is not only focused on the analysis of crime combat system, its reform process, and current situation of the reform in Mongolia but also included some recommendations for discussion which may contribute to further development of the reform process.

II. Reform of Criminal justice in Transition

In 1990, Mongolia went through a transition, establishing political democracy and creating market economy while abolishing the totalitarian regime and began a comprehensive transition toward a new political system(Pomfret, 2000).The Rule of Law is equally important for both objectives: the development of a market economy and a democratic state. Strong, autonomous, and respected criminal justice system are the necessary parts of an effective legal order(Carlos, 2001). In order to achieve the above goals there was an urgent need to establish a basic legal framework within which society could evolve itself politically and economically while maintaining its culture and identity.

The first stage of criminal justice reform culminated in 1992 with the adoption of a new democratic Constitution. The Constitution formalized the separation of powers between the judicial and other branches of the government, ensuring the judiciary's independent status. The Constitution also introduced judicial standards, such as the right to a fair trial, the right to counsel, and the presumption of innocence. The court structure has been transformed by significantly reducing the number of courts, abolishing both military and railway courts and those for hearing the state-owned enterprises, and introducing a constitutional court(Narangerel, 2001).Moreover, role and authority of the prosecutor had been specifiedwhile police organization was legalized to bea separate agency under the government with authorized roles of ensuring public security and fight against crimes, which became the fundamental

to reform the criminal justice system in democratic Mongolia.

Accordingly, the Parliament of Mongolia developed its very first law of court, prosecutor and police in 1993 (Jantsan, 2009). The laws define the organizational structure of each component and prescribe its rights and duties. At the time, most countries in the developing world move from authoritarian to democratic criminal justice system especially in policing. Mongolia has undergone tremendous reforms to establish court and prosecutor function and police service led by rule of law, justice, equality, respecting human rights and freedom of people and police become an independent state central administrative body in charge of combating crime and securing public safety. The goals of the innovation were establish an image of the criminal justice system as trusted and feared by the public.

The second step of reform the Mongolian Government adopted the Legal Reform Program in 1998 that was aimed at consolidating the push for a new political and economic system(Landman, Claire,&McEvoy 2005). This was followed in 2000 by the adoption by Mongolian legislature of the Strategic Plan for the Justice System of Mongolia. To further achieve the objectives of the Legal Reform Program the following areas for assistance were identified:1. Legislative drafting: development and coordination.2. Judicial and criminal justice reform.3. Legal profession: improvement of legal education and bar development.4. Legal scholarship: development of materials and research databases.5. Public awareness: dissemination of legal information.6. Coordination and harmonization of International treaties(Gramckow & Allen 2011).The Strategyalso stressed the need for the judiciary to strengthen its political, economic, organizational and decision-making independence as the first fundamental value. This was a significant step and the first time a developing nation embarked on such comprehensive and inclusive strategic planning process. The Strategyoutlined detailed action plans under each of six overall goals: Independence, Responsiveness, Accountability, Fairness, Effectiveness, and Accessibility.

Within this scope, several laws and legislations directly related to criminal justice were amended including court and prosecutor's laws. In 2002, criminal code, criminal procedure law, and correction law were passed first time reflecting the concept of Constitution (Lundendorj, 2002). It is considered the third stage of the reform when Democratic Party won in the presidential election in 2009 and parliamentary election in 2012 with action plan -"Bring national mechanism to secure thejustice, enhance legislation-oriented governance, and fight against corruption into next developmentstage.

Reform programs included law environment, structure of criminal justice organization including police, correction, court and using equipment law enforcement, the method of investigation, collect in evidence practice, monitoring civil rights violations by police. Especially, the government officials recognized shortcomings today's system of National Police agency. They concluded that National Police Agency has been keeping bureaucratic old system remained in effect, however, except when superseded by the new regulations and police investigation practice and law enforcing activity system that had been utilized unchanged since 1990s. Also one study founded that the most pervasive factor affecting the police department and the functioning of the police are the vestiges of the old communist regime(ICFMC, 2008).

In 2011, it was convened a Judicial Reform and Justice Forum encompassing legislative and institutional reforms, while guaranteeing political, economic and legal security for the judiciary. The reform ensures open and transparent trials. It also introduced laws to guarantee the impartiality of judges while establishing mechanisms to ensure that new judges are selected fairly and strictly on merit. Also, an important tenet of the judicial reform is promoting the role of citizens in judicial procedures. To that end, the reform will enable citizen representatives to participate in trials in order to promote

the legitimacy of the legal system. Moreover, citizen representatives will boost public confidence in the courts, while increasing popular awareness of and civic involvement in the judiciary.

Recently, Political leaders have been taking following steps to upgrade the criminal justice system: 1) Establish transparent and human right reflected fundamental to crime combat,2) Abolish the authority of prosecutor to conduct special operations which contain some characteristics of human rights violation during interrogation processand transfer the this authority to judges, 3) Provide secure working environment to law enforcement personnel and equip the law enforcement organizations with cutting-edge technologies, increase HR capability, offer competitive benefits, and enhance legal environment of the organizations in order to bring their performance to world standard.

III. Criminal justice statistics

Data source

Data on criminal justice statistics for period between 2004 and 2014 obtained from three different criminal justice agencies; police, court and correction. The content of criminal justice statistics is established by the criminal legal system of nation. It is the criminal legal system that defines crimes and consequently designates individuals as offenders. Transnational differences in definitions of such widely used terms as crime, offender, suspect, charge or conviction are inevitable. Similar observations apply to data from the administrative records of the police, courts and prisons. Mongolia has a centralized data-collection system and each criminal justice components that cover all areas of Mongolia are required to follow standardized national procedure to record crime, offender, charges and sentence and prison related statistics. Statistics departments under police, prosecutor, court, and correction services make analysis on data, sent by local level law enforcement organizations, which ismonthly, quarterly, and yearly, sent to National statistics office that is responsible for publishing all data for public purpose. The content of published information on crimes and criminal justiceby the National statistics agency is too generalized therefore,official datadirectly taken from the statistics departments under police, court, and correction services was applied as reference in this research. It is limited to use national criminal justice relateddata collected by the National criminal justice components in Mongolia.In this analysis, the form of simple descriptive statistics such as frequencies, percentages, rates and rates of change were applied. Below simple formulas can provide several basic standards such as what was the crime rates and rate of incarceration in Mongolia between 2004 and 2014. It is based on the number of crimes, rate of incarceration per 100,000 people.

Crime and crime clearance rate

Public trust on the police is closely related to the police performance in crime control (Jang & Hwang, 2014). Thereforecrime prevention and control have been considered the primary responsibility of the police. In particular, the crime rate of a society is commonly used as one of the most important indicators of police performance (Goldstein, 1977; Kelling, 1996). However, there has been a significant increase in recorded crime rates, especially since 1990, and it has fluctuated over the last 10 years. As indicated in below table-2, averagely 20973 crimes have been reported to police in 11 years and 63.1 percent out of that was solved whilecrime rate was 767 per 100,000 people in 11 years. Starting from 2007, crime rate decreasedgradually while it started to increase again from 2012 reaching its peak in 2014. The crime rate went by 33.8 percent or 8413 crimes comparing the rate between 2004 and 2014. Rate of clearance the crimes was the highest about more than 80 percent between 2004 and 2006 whereas it reached the lowest between 2007 and 2008 followed by constant decrease from 2010. Comparing to the year 2004, rate of crime clearance went down by 23.2 percent in 2014. During socialist regime, the rate of solving crime was over 90 percent however this trend significantly went down from mid-1990.

Table 2.*Crime and crime clearance*

rate in Mongolia. (2004-2014)

Year	Number of crimes	Rate per 100.000 population	Number of cleared crime	Clearance rate (%)
2004	18905	750	15472	81,8
2005	17411	682	14576	83,7
2006	18253	707	15203	83,2
2007	21268	812	6092	28,6
2008	20704	777	8147	39,3
2009	20373	750	12721	62,4
2010	19825	718	13466	67,9
2011	19197	683	12552	65,3
2012	22089	770	14323	64,8
2013	25362	865	14836	58,5
2014	27318	911	16008	58,6
Avg	**20973**	**767**	**13036**	**63.1**

Source: National Police Agency (NPA)

Analyzing above statistics, it can be observed that crime rate increased year by year from 2011 while rate of solving crimes decreased, which caused by fiscal crisis happened since 2011 and influenced to boom violent crimes and crimes against property.Statistically, violent crime increased by 19 percent and crimes against property grew by 14.6 percent comparing 2011 with 2014 (NPA 2015). The reason why the rate of solving crimes reached its lowest point is that new method to calculate the rate was newly introduced and applied in police.

Public trust toward police still remains considerably low even though police conducts activities on combating crimes and maintaining public security. Results of several studies conducted in Mongolia show that only 17.5 percent of peopleresponded to the survey that they reported crimesto police when 37.8 percent replied that they are notconfident enough that police would transparently and fairly solve the crime followed by 28.6 percent answered criminal proceduretakes too long time to be solved (Tamir et al, 2010).In contrast with these, there are other studies concluded the rate of solving crimes is relatively high in Mongolia because police organizations openly receive information and complaints from public concerninga crime where the suspect of the crime is already clear (Enkhbold, 2011). A reality reveals that official statistical data needs to be thoroughly analyzedthrough research conducted by the third party.

Criminal punishments for offenders convicted 2004-2014

As shown in table 3, average number of suspects per 100,000 persons in last 11 years is 701 and 43.2 percent or 308.2 of total suspects was played guilty by court. Compared to the year of 2004, suspect rate was risen by 14.2 percent at 792per 100,000 persons in 2014 while rate for convicted offenders decreased by 27.7 percent at 274 per 100,000 persons. A trend of convicted offendershas been steadily going down since 2007. As per types of punishment per 100,000 people, 0.6 or 0.2 percent was imposed death penalty, 226.2 or 73.5 percentfor imprisonment, and 81.6 or 26.4 percent for other punishments. The death penalty was at its peak in 2007 however, it has not been practically imposed since 2012. Average imprisonment rate per 100,000 people was at 226.6 and reached its peak at 273.9in 2005, which is 20.8 percent more than the average rate of a

Year	Total Suspect	Punished	Sentence to death	Imprisonment	Other punishment
2004	679,5	377,6	0,9	266,5	111,1
2005	645,4	400,3	1,2	273,9	126,4
2006	655,4	303,5	0,9	212,5	91,1
2007	684,5	325,3	1,0	225,4	99,9
2008	705,3	321,4	1,0	232,7	88,7
2009	728,8	279,2	0,4	213,4	65,8
2010	707,6	266,3	0,7	202,2	64,1
2011	645,4	294,7	0,4	228,2	66,5
2012	694,9	293,1	0,2	227,4	65,7
2013	760,5	275,2	0,0	209,8	65,4
2014	792,3	273,0	0,0	209,5	63,5
Avg	**701,8**	**308,2**	**0,6**	**226,6**	**81,6**

year. The lowest rate happened in 2010 at 202.2which is lower than the average imprisonment rate of a year. Comparing the statistics of 2004, the rate of imprisonment per 100,000 personsdecreased by 21.6 percent in 2014and the trend is to continuously drop. Rate of imposing other punishments per100, 000 people is constantly decreasing since 2007.

Table 3.*Punishments for offenders convicted per 100.000 populations. (2004-2014)*

Source: Court Statistic Report (CSR)

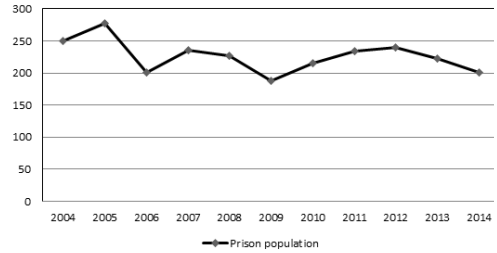
The president of Mongolia, ElbegdorjTsakhia, proposed to abolish death penalty based on 8 provisions and 2 specific rationales on Jan 14, 2010 to the Parliament of Mongolia and it resulted to proclaim moratorium for death penalty in Mongolia. By the first 4 months of 2010-2011, total of 14 inmates were sentenced to 30 years in a prison with the strictest control, who were pardoned by the president of Mongolia according to Article 15, provision 15.2 of Presidential law (NHRCOM, 2012).

The government of Mongolia voted for abolishing death penalty at the general Assembly of UN on Nov 2, 2010 and the Presidential office drafted 7 amendments in the criminal code. The moratorium for death penalty has not been legalized and officially passed by the Parliament yet but it has been avoided to be applied in judicial practice.Due to punishment policy in new criminal code enacted in 2002, there is no significant fluctuation on the imprisonment rate per 100,000 persons between 2004 and 2012. Although number of accused individual is decreasing, it is relatively high percentage that 73.5 percent of total criminals has been imposed imprisonment, revealing that the punishmentpolicy is very strict in Mongolia. In the effective criminal code, 449 acts are considered as a crime, of which 330 crimes are determined to be imprisoned (Erdenebat, 2013).According to the criminal code, there are two ways to executing court decision on the accused person: imprisonment and probation. The figure 1 shows that the trend of execution of court decision. By the average of last 11 years, total of 6147 individuals were imposed imprisonment, of which 2738 or 44.5 percent was given probation, 2750 or 44.7 percent sent to prison while 659 or 10.7 percent released from criminal liability according to the Pardon law(CSR, 2014).

Prison population in Mongolia 2004-2014.

According to below line graph, prison population per 100,000 personsreached its peak in the last 10 years at 278 in 2005, which is 11 percent more than the that of 2004.This indicator became 201 in 2006, declining by 27 percent compared to 2005 and dropped till188 in 2009 reaching its lowest point. Between 2010 and 2012, prison population per 100,000 persons steadily increased whereas it descended between the year of 2013 and 2014. As per 2014 statistics, prison population per 100,000 persons was 201 which is 19.1 percent lower than that of 2004.

Figure 1.Prison population in Mongolia (2004-2014)



Source: National Correction Service (NCS)

Table 5 shows prison population per 100,000 persons in Mongolia including the rate of sentenced and remanded prisoners along with their genders. According to several clauses stated in the criminal code, court has an authority to transfer controlling responsibility to local police if the court ruled that the convicted person does not have to be physically imprisoned. Study presents thatthe imprisonment rate per 100,000 persons was 101.4 or 44.6 percent out of total punishments(NCS, 2014).Number of new inmates coming to prison per 100,000 persons reached its peak at 123.6 in 2005 followed by 88 or 27.9 percent decline in 2006. This indicator significantly escalated till 109.9 in 2007 which is 26.5 percent more than the previous year. Since 2009, the rate

is gradually going down. Rate of women inmate per 100,000 persons throughout all prison population was 12.8 or 6.2 percent while rate of juvenile prisoners was 1.3 or o.6 percent out of total number of prisoners. The rate of women inmate per 100,000 persons peaked at 15.7 in 2010 whereas it reached its lowest point at 8.5 in 2007 followed by constant increase since 2008. The rate of juvenile inmates reduced to minimum at 0.1 in 2006 and 2009 and reached the highest at 3.3 which is 2.5 times more than the average rate of last 10 years. Inmates released from prison per 100,000 persons were averagely 140.0 or 12.1 percent lower than the number of those coming to prison. In contrast, this indicator rose till 196.6 or 183.3 percent more than the number of new prisoners in 2006 and 176.9 or 78 percent more in 2009. Except for 2006 and 2009, the rate of new inmates was constantly higher than the rate of released ones.

Table 5. Prison population in Mongolia per 100.000 population. (2004-2014)

Year	Rate of prison population	Rate of sentenced prisoners	Rate of female prisoners	Rate of juvenile prisoners	Rate of remand prisoners
2004	250	116.6	11.0	3.0	137,0
2005	278	123.6	12.1	3.3	126,2
2006	201	88.0	10.3	0.1	196,6
2007	236	109.9	8.5	0.8	97,2
2008	227	113.9	12.3	1.3	126,4
2009	188	114.2	12.3	0.1	176,9
2010	215	92.9	15.7	0.7	73,7
2011	234	99.8	14.2	1.1	79,7
2012	240	94.8	14.3	1.6	98,4
2013	222	80.2	14.1	1.2	73,2
2014	201	81.5	14.9	1.3	68,9
Avg	**205**	**101.4**	**12.8**	**1.3**	**114,0**

Source: National Correction Service (NCS)

As shown above table, prison population and number of women and juvenile inmates per 100,000 persons dramatically descended in 2006 and 2009. In contrast, the rate of inmates released from prison significantly rose up. The key reason behind this increase is because of implementation of pardon law initiated by the President of Mongolia and enacted by the Parliament in 2006. According to that law, all prisoners except for those committed grave crimes and crime against the national security were pardoned and released from prison including juvenile inmates who committed crime before reaching 18 year old. Statistically, it can be seen that total of 2424 prisoners were pardoned, of which 1971 or 81.3 percent was released from prison in 2006 while 1290 or 51.4 percent out of 2524 inmates were released in 2009 (Batchimeg,2010). Moreover, all 74 inmates being imprisoned in juvenile prison were pardoned by the law.

Some researchers claim that increased number of prison population per 100,000 persons in 2007 and 2009 directly correlates with the people released from prison by the pardon law committed crime again and re-incarcerated. The main cause is because there is no rehabilitation program and/or environment to support the released people, which impacts them to be involved in crime again (Nymgombo 2012). According to study, 48.3 percent of all prisoners were previously pardoned by the law but incarcerated again by being involved in repeated crime (Batchimeg,2010). Furthermore, number of female inmates increased per 100,000 persons since 2008. Percentage of crime committed by women accounts for small amount compared to total crimes however statistics shows thecrimes they committed are mainlyclassified as serious and grave crimes and get imposed by incarceration punishment as indicated in the criminal

code. Analyzing on the crimes committed by women, 56.3 percent committed fraud, causing significant amount of monetary damages to others,19.3 percent for intentional murder, 5.6 percent for human trafficking and drug related crimes (Nasanbat 2011).Due to above mentioned particular character of crimes committed by females, length of incarceration is relatively long for women and very small number of women inmates are released from prison per year. For instance, as for last 11 years, averagely 29 women were released while 112 women were imprisoned per year (NCS, 2014). Low rate of juvenile inmates is linked with pending imprisonment for 2-5 years if juvenile is imposed imprisonment punishment and rehabilitation responsibility is transferred to the inmate's parentsand/or public instead. Due to the mass release of juvenile inmates from prison in 2006 and 2009 implementing the pardon law, number of juvenile prison population was significantly low however it started escalating since 2010. According to recent study, juveniles who committed grave crime and/or re-committed other crimes are serving in prison now.

VII. Discussion and conclusion

The modern criminal justice system recognizes the importance of rule of law, due process, protection of individual rights, and judicial independence and all police officers are required to understand laws and due process pertinent to police work through education and training (Yoon, 1998). The adoption of Mongolia's new Constitution in 1992 marked the departure from 70 years of communismand laid the groundwork for a series of significant criminal justice related legislative and institutionalreforms that have spanned the last two decades and are still continuing. But reforms have not systematically addressed the long-term implications of criminal justice system reform efforts, including the need for ongoing assessment and further development of a comprehensive modernization plan, adequate and sustained funding, enhanced institutional capacity. Despite the passage of significant legal reforms and considerable changes in criminal justice sector operations, especially in the courts and the police service, public trust in the rule of law is still not well established; and critics often question the capacities and fairness of the criminal justice system.

One of the important indicators of criminal justice system performance is rate of crime and punishment related policy. Average crime rate per 100,000 persons was 767 last 11 years. Since 2007 the crime rate was constantly decreasing while it started rising year by year from 2012 reaching its peak in 2014. According to statistics, 20973 crimes were reported to police and 13036 or 63.1 percent out of the total number were solved. Averagely, 19308 persons were investigated as suspects per year and 8359 or 43.9 percent out of that number were ruled as guilty and convicted by court. As for types of punishment per 100,000 persons, 0.6 or 0.2 percent was imposed by death penalty, 226.2 or 73.5 percent by imprisonment, and 81.6 or 26.4 percent by other punishments. This statistics reveals that the harsh sentencing policy influences to the increased number of prison population.Also, decline in imposing non-imprisonment punishments year to year manifests that there is a strong tendency forthe increased rate of imprisonment.

Over 6000 prisoners are serving in 38 prisons, 26 detention centers. It reveals that prison structure, its location, management, and personnel, budget, and equipment are scattered throughout the country resulting in facing difficulty to organize rehabilitation activities among prisoners. Therefore, it is needed to upgradeprotection technologies and to establish centralized prison systems in world standard and high qualified rehabilitation programs for inmates by the governments support.

As for effective police law, juveniles who imposed probation and commute imprisonment punishment are controlled by police. There is no specific organization designated to deal with people under probation period and rehabilitation managements in order to prevent from recommitting crime.In the conclusion it is

practically required as follows:

First:to decrease the number of types of crimes under the criminal code in Mongolia which imposes to imprisonment; Second: abolishing the death penalty from the criminal code; Third:establishing flexible legal regulationwhich encourages non-imprisonment punishment to convicted people;Fourth:to develop effective parole system and juvenile justice system in order to effectively manage the juveniles under probation; Fifth:conducting crime victimization survey every two year in order to evaluate performances of the police.

Reference

Altanzul, A. (2005). Concept of the punishment in criminal code of Mongolia, it's purpose and type. (Unpublished M. Phil. Thesis).University of the Krasnador of the Cubana, Russian Federation.

Batbayar, E. (2005). Circumstances Which Mitigate responsibility and aggravate Liability under Mongolian criminal code. (Unpublished M. Phil. Thesis). University of the Krasnador of the Cubana, Russian Federation

Rabindra. B.(2008).Principles of Sentencing in Criminal Justice System. *Kathmandu Law Review. 1, 1-6*

Brent, T.W. (2008). Report on the status of court reform in Mongolia. *The journal of open society forum 18, 36-42.*

Budkhand, TS. (2000) Historical Development of Prosecutor in Mongolia *-70 years. Munkhiin Useg express , pp.11-18*

Carlos, R.E. (2001). Legal and judicial reform project in Mongolia: East Asia and pacific region. The World Bank Report 23286-MOG, 14-17.

Chimed.B. (2004). Concept of constitution in Mongolia: general issue (I book). Ulaanbaatar express, pp.12-23

Criminal code of Mongolia, (2002). Journal of State Information, 5:5-63

Dolgorsuren, J. (2014). Mongolian police legislation Law.Soyombo press, pp.45-52.

Enkhbold, B. (2011). Urbanization factors to influence criminality and it's prevention: The journal of Mongolian criminal justice 3: 9-11.

Erdenebat, G. (2013), Protection of values that declared by the constitution of Mongolia: tangible legal reforms fight against crime. *The brochure of implementation and tendency of state policy on combating crime, (International Scientific Conference).pp.33-42.*

Ginsburg, T. (2003). Judicial review in New Democracies, Constitutional Courts in Asian Cases, New York,Cambridge University Press, 2003

Goldstein, H. (1977), Policing a Free Society. Cambridge, MA: Ballinger Publishing Company.

Gramckow, H.,& Allen, F.(2011). Justice Sector Reform in Mongolia: Looking Back, Looking Forward. The justice and development working paper series, 16, 12-23.

ICFMC (2008). Mongolia survey: Community-oriented policing in Mongolia. Ulaanbaatar, Mongolia.

Jang, H., & Hwang, E. (2014). Confidence in the police among Korean people: An expressive model versus an instrumental model. International Journal of Law, Crime and Justice, 42, 306-323.

Jantsan, S. (2009). Theory of criminal law, doctrines of crime: Admon press, Ulaanbaatar, pp. 56-63

Jantsan, S.(2013). **The nature, actuality and tendency of state policy on fighting against crimes**.*The brochure of implementation and tendency of state policy on combating crime, (International Scientific Conference).pp.10-23.*

Kelling, G. (1996). Defining the bottom line in policing: Organizational philosophy and accountability. In L. T. Hoover (Ed.), Quantifying quality in policing (pp.23−36).Washington, DC: Police Executive Research Forum.

Landman, T., Larizza, M., & M. (2005). Paper prepared for 'Democracy Development in Mongolia: Challenges and Opportunities': National Conference, Ulaanbaatar, Mongolia 30 June to 1 July 2005.

Narangerel, S. (2001). Mongolian and World legal system: comparative law, Admon press, pp.146-152.

Nasanbat, D. (2011). Characteristic of Woman crime in Mongolia; time series study 2004-2013, Journal of Mongolian

criminal justice, 1:7-19.

Nyamgombo, B. (2013). Effects and trends of imprisonment and other types of criminal sanctions.The brochure of implementation and tendency of state policy on combating crime, (International Scientific Conference).pp.76-81.

National Police Agency. (2015). Current conditions of crimes committed in Mongolia: 2004-2014, Ulaanbaatar: National Police Agency of Mongolia.

NCS, (2014).Correction White Paper 2004-2013. Ulaanbaatar, Mongolia: Mongolian Correction Agency Press.

NHRCM. (2012). Human Right Report: Mongolia 2011, Ulaanbaatar: National Human Rights Commission of Mongolia, (1)14:68.

Oyunbadam.R. (2003). Prison related statistics, current situation and future issue. The journal of Mongolian law and state. 4, 25-31.

Pomfret, R. (2000). Transition and Democracy in Mongolia: Europe-Asian Studies, 1, 149-160.

Police law of Mongolia, (2013). Journal of State Information, 2:2-56

Susanne, K. (2003). Legacies of a culture of inequality: The Janus faces of crime in post-communist countries. Journal of Crime, Law and Social Change.40(2),295-320

Supreme Court, (2014).Court statistic report 2004-2014. Ulaanbaatar Mongolia: Supreme court of Mongolia.

Tamir, Ts., Bold, Ch., Batbaatar, M., &Tumennast, G (2010). Distribution, reason and circumstance of urban crimes, research report, Ulaanbaatar: Mongolian Sociological Academy.

Tsend. TS. (2010). Judicial Procedure for Administrative case in Mongolia.SSRN Electronic Journal, DOI: 10.2139/ssrn.1695283.

Yanjindulam.P. (2012). Reduction of tuberculosis burden among prisoners in Mongolia: review of case notification, 2001–2010. The International Journal of Tuberculosis and Lung Disease (Impact Factor: 2.76).03/2012; 16(3):327-9. DOI: 10.5588/ijtld.11.0251

Yoon, O. (1998). The economy, political repression and crime control: A time-series analysis of Korean data. 1964-1993. Unpublished doctoral dissertation, university of Georgia, Athens, GA.

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DAS REFORMIERTE MONGOLISCHE SANKTIONENSYSTEM AUS DER SICHT DES DEUTSCHEN STRAFRECHTS

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I. Einführung

Die Tatsache, dass sich die deutsche Rechtswissenschaft bereits zu Beginn des 19. Jahrhunderts mit dem mongolischen Recht beschäftigt hat, ist erstaunlich. Der große deutsche Jurist Paul Johann Anselm v. Feuerbach (1775–1833) hatte in seinem Versuch einer universalen Rechtsgeschichte auf die verschiedenen Rechtsfamilien hingewiesen, zu welchen er auch die mongolische Rechtsfamilie als eigenständige Entwicklung eines Nomadenvolks zählte[1]. Außerdem beschäftigten sich zahlreiche mongolische junge Juristen, die in Russland und später auch in der DDR studiert haben, mit dem DDR-Recht, das zwar Teil einer sozialistischen Rechtsordnung und Rechtsfamilie war, das aber doch noch wesentliche Züge des deutschen Rechtes beibehalten hatte. Über die Brücke des sowjetischen Rechts, das ebenfalls auf dem römisch-germanischen und damit dem deutschen Recht aufbaute, hat auch nach dem Ersten Weltkrieg, also in der Zeit der Unabhängigkeit der mongolischen Republik bis hin zur Wende 1990er Jahre, das deutsche Recht Einfluss auf die Entwicklung in der Mongolei gehabt. Deshalb war die Mongolei mit westlichem und damit speziell deutschem Recht schon über einen längeren Zeitraum vertraut. Daher sollte es keine Überraschung sein, warum die Mongolei für die Modernisierung ihres Rechtssystems das deutsche Recht als Vorbild ausgewählt hat.

Nach der politischen Wende von 1990 verfolgt die Politik der Bundesregierung Deutschland das Ziel, die Mongolei zwischen den beiden großen Nachbarn Russland und China als freiheitlich-demokratischen Rechtsstaat zu etablieren. Im Einklang mit der Bundespolitik hat sich die Hanns-Seidel-Stiftung zum Ziel gesetzt, die Mongolei auf dem Weg zu einem modernen Verfassungsstaat zu begleiten und zu unterstützen. Die Kernpunkte der Zusammenarbeit seit 1995 waren die juristische Ausbildung, die Rechtsberatung und die Rechtsentwicklung. Im Rahmen dieser Zusammenarbeit waren Richter und Professoren aus Bayern durch Fachvorträge über Menschenrechte und den Verfassungsstaat tätig, durch Unterstützung beim Aufbau der Verwaltungsgerichtsbarkeit in der Mongolei, Schulungen für die Richter der Verfassungs- und Verwaltungsgerichte und auch Beratungsarbeiten bei der Entwicklung des reformierten

[1] Siehe dazu Scholler, 2010, S. 127 ff. und die dort zitierte weiterführende Literatur.

Strafgesetzbuch von 2002[2].

Um eine Bewertung über das mongolische strafrechtliche Sanktionensystem aus der Sicht des deutschen Strafrechts machen zu können, möchte ich zunächst zeigen, von welcher Grundeinstellung über die strafrechtliche Sozialkontrolle das deutsche Strafrecht ausgeht, um deutlich zu machen, aus welcher Perspektive das Sanktionensystem des mongolischen Strafrechts hier bewertet wird.

II. Überblick über das deutsche Strafrecht und das Sanktionensystem

2.1 Die deutsche Strafrechtsentwicklung und Grundsätze der Kriminalpolitik

Das deutsche materielle Strafrecht ist im Strafgesetzbuch in strafrechtlichen Hauptgesetzen (Jugendgerichtsgesetz, Wehrstrafgesetz) und in zahlreichen Nebengesetzen (z. B. Straßenverkehrsgesetz, Betäubungsmittelgesetz, Abgabenordnung, Urheberrechtsgesetz, Waffengesetz, Gesetz gegen den unlauteren Wettbewerb) geregelt. Das geltende deutsche Strafgesetzbuch geht zurück auf das Strafgesetzbuch für das Deutsche Reich von 1871, das rechtsphilosophisch von der strengen Vergeltungsidee der Philosophie Kants und Hegels bestimmt war. Die wesentlichen Grundstrukturen des Strafgesetzbuches sind bis heute erhalten geblieben. Je nach den Bedürfnissen der Zeit ist das Strafgesetzbuch immer wieder verändert bzw. mehrfach neu bekanntgemacht worden. Besonders deutlich verändert haben sich seit der Einführung des Reichsstrafgesetzbuchs von 1871 die Regelungen über die strafrechtlichen Sanktionen. Das strafrechtliche Sanktionensystem damals bestand aus Geldstrafe, Freiheitsstrafe und Todesstrafe.

Vorherrschend vertreten wird in der Rechtsprechung und Lehre in Deutschland die so genannte Vereinigungstheorie[3], die mit drei unterschiedlichen Ansätzen begründet wird: mit der Veränderung des zu Bestrafenden zum Besseren (Spezialprevention), mit dem Ziel des Schutzes anderer (z. B. der sonstigen Bevölkerung), mit dem Ziel der Abschreckung potentieller anderer Straftäter (Generalprevention), mit der Wiederherstellung der Gerechtigkeit (Schuldausgleich) sowie mit Vergeltung.

Die gegen den Täter verhängte Strafe darf nicht ungerecht sein, insbesondere im Verfassungsstaat des Grundgesetzes. Die Gerechtigkeit kann aber als lediglich abstrakte Wertorientierung nicht zur Begründung der Strafe, sondern nur zu ihrer Begrenzung herangezogen werden[4]. In seiner Leitentscheidung betont das Bundesverfassungsgericht zunächst in Kurzform: „Schuldausgleich, Prävention, Resozialisierung des Täters, Sühne und Vergeltung für begangenes Unrecht werden als Aspekte einer angemessenen Strafsanktion bezeichnet“[5].

Im Mittelpunkt des Sanktionensystems stand ursprünglich die Freiheitsstrafe, während heute die Geldstrafe die am häufigsten verhängte Strafe geworden ist.

Bei der Betrachtung des deutschen Rechtssystems in der Nachkriegszeit soll hier nur das Rechtssystem der Bundesrepublik Deutschland näher betrachtet und mit der Mongolei verglichen werden. Die damalige DDR hatte ein vollkommen anderes sozialistisch geprägtes Rechtssystem, in dem es z. B. bis 1987 die

[2] Ausführlicher dazu s. Gebhardt, I. (2002): Justizreform in der Mongolei. In: Jahrbuch für Ostrecht 43, 1. Halbbd, S. 237–257; Nelle, D. (2003): Die Reform von Strafrecht, Strafprozess und Strafvollzug in der Mongolei. ZStW 115, H. 2, S. 51–88; Kajuth, J. (2003): Монгол улсын эрүүгийн эрх зүйн цаашдын хөгжилд өгөх зөвлөмж (Empfehlungen zur weiteren Entwicklung des mongolischen Strafrechts, acht Jahre der mongolischen Rechtsreform), Ulaanbaatar, S. 503–528; Konferenzunterlagen zum Thema „Reformen des öffentlichen Rechts und des Strafrechts“, Ulaanbaatar, 2002; Konferenzbuch „Die Verfassung und demokratischer Rechtsstaat“ in Zusammenarbeit mit der GTZ, KAS zum Anlass des 30. Jahrestages der Aufnahme diplomatischer Beziehungen zwischen der Bundesrepublik Deutschland und der Mongolei, Ulaanbaatar 2004.

[3] Zur Diskussion und zur Vereinigungstheorie siehe näheres Meier, 2006, S. 33 ff.; Jescheck & Weigend, 1996, § 8 V; Roxin, 2006, § 3, Rn. 33 ff.; aus der Sicht des BVerfG grundlegend: BVerfGE, 45, 187, 253 ff.

[4] Meier, 2006, S. 21 ff.; zur empirischen Sanktionsforschung und der Begründbarkeit von Kriminalpolitik siehe Albrecht, H.-J., Dünkel, F. & Spieß, G., 1981, S. 310 ff.

[5] BVerfGE, 45, 187 ff., Rn. 219.

Todesstrafe gab, das hier nicht betrachtet werden soll. Wenn im Folgenden von „Deutschland" die Rede ist, dann beziehen sich die Aussagen nur auf die Bundesrepublik Deutschland.

Die Todesstrafe ist seit der Gründung der Bundesrepublik Deutschland 1949 auf Bundesebene *de jure* und *de facto* abgeschafft. Nur in der Verfassung des Bundeslandes Hessen ist in Art. 21 Abs. 1 HV die Todesstrafe für besonders schwere Verbrechen zulässig. Weil jedoch laut Art. 102 GG die Todesstrafe abgeschafft ist und gemäß Art. 31 GG Bundesrecht das Landesrecht bricht, und weil auch das deutsche StGB die Todesstrafe nicht enthält, ist die Todesstrafe in der Hessischen Verfassung *de facto* gegenstandslos und nur ein juristisches Kuriosum.

Auch die Mitgliedstaaten des Europarats haben sich im 6. Zusatzprotokoll zur EMRK verpflichtet, die Todesstrafe abzuschaffen[6], und die Mitgliedstaaten der Europäischen Union haben in Art. 2 Abs. 2 der Grundrechte-Charta festgelegt, dass niemand zur Todesstrafe verurteilt oder hingerichtet werden darf. Körperstrafen sind in Deutschland verboten, explizit folgt dieses Verbot aus der EMRK. Die Vermögensstrafe (§ 43a StGB) ist nach der Entscheidung des BVerfG vom 20.03.2002 (entgegen der Auffassung des Bundesgerichtshofs) wegen Unvereinbarkeit mit Artikel 103 Abs. 2 des Grundgesetzes für verfassungswidrig und nichtig erklärt worden[7]. Als Alternative zur Strafe sowie zu gängigen gerichtlichen Strafverfahren in Deutschland wurde das Konzept „Restorative Justice" eingeführt, welches eine alternative Form der Konfliktschlichtung bzw. -lösung darstellt. Der Täter-Opfer-Ausgleich und die Schadenswiedergutmachung sind als Diversionsmaßnahmen im allgemeinen Strafrecht verankert. Ferner ist die informelle Verfahrenserledigung durch § 153a StPO im Bereich der mittelschweren Kriminalität möglich.

[6] Zum 6. Zusatzprotokoll zur EMRK genauer Calliess, 1989, S. 1019 ff.

[7] BGBl. I 1340.

2.2 Die Sanktionenrechtsreformen in Deutschland

Das System der Strafarten des geltenden Rechts geht in seinen wesentlichen Grundstrukturen auf die Strafrechtsreform des Jahres 1969 zurück. Das Kernstück des 1. StrRG vom 25.06.1969[8] waren die Ersetzung der bis dahin verfügbaren vier Arten von Freiheitsentziehung (Zuchthaus, Gefängnis, Einschließung und Haft) durch die einheitliche Freiheitsstrafe, die Einräumung der Prioritäten der Geldstrafe im Bereich der unteren und mittleren Kriminalität, ferner die „ultima ratio"-Klausel für die Verhängung der kurzen Freiheitsstrafe (heute § 47 StGB), die Erweiterung des Anwendungsbereichs der Strafaussetzung zur Bewährung sowie die Einführung der Möglichkeit zum Absehen von Strafe.

Die Vereinheitlichung der Freiheitsstrafen erfolgte im Einklang mit der internationalen Reformtendenz, wobei die Abschaffung der als besonders diskriminierend und resozialisierungsfeindlich wirkenden Zuchthausstrafen gefordert wurde. Bei der Einheitsfreiheitsstrafe gibt es deswegen keine abstrakte Unterscheidung nach der Strafart mehr, sondern es wird eine sinnvolle Differenzierung nur nach der Persönlichkeit des Täters und der Dauer der Strafe vorgenommen.

Das deutsche Strafrecht verzichtet seit dieser Strafrechtsreform absichtlich auf die kurze Freiheitsstrafe. Die Idee der Einschränkung der Verhängung kurzer Freiheitsstrafen geht bereits auf die schon vor fast 130 Jahren erhobene Forderung von Franz v. Liszt aus dem Jahre 1883 zurück, der die kurze Freiheitsstrafe als „eine Strafe, die das Verbrechen fördert" definierte[9]. Die Gefahr der kriminellen Ansteckung, die schädliche Unterbrechung der sozialen Beziehungen des Täters zu seiner Familie, Arbeitsplatz und Umwelt, sowie die Unmöglichkeit

[8] In Kraft getreten zum Teil am 01.09.1969, zum Teil am 01.04.1970. Zur Reform des Sanktionensystems siehe Laun, S., 2002.

[9] Maurach, Gössel & Zipf, 1989, § 64 Rn. 1 ff., Baumann u. a. 1969, S. 75, kritisch hierzu Weigend JZ 1986, 262 ff; Jescheck & Weigend, 1996, S. 760.

einer Resozialisierung innerhalb kurzer Zeit und nicht zuletzt die finanziellen Fragen waren die ausschlaggebenden Gesichtspunkte gegen die kurze Freiheitsstrafe.

Das ursprünglich im Jahr 1953 in das deutsche Sanktionensystem eingeführte Rechtsinstitut, die Aussetzung zur Bewährung der Freiheitsstrafen, wurde durch das 1. StrRG weiter ausgebaut. Die Grenze der Anwendung wurde von neun Monaten auf bis zu zwei Jahre angehoben, wobei bei Freiheitsstrafen von über einem Jahr erhöhte Anforderungen an die Strafaussetzung gestellt werden (§ 56 Abs. 2 StGB). Außerdem ist die Strafaussetzung im deutschen Strafrecht mit bestimmten Bewährungsauflagen und/oder Weisungen gebunden (§§ 56b und 56c StGB).

Inhalt des 2. StrRG vom 04.07.1969[10] waren neben einer Neufassung der Paragraphenfolge vor allem die Anhebung des Mindestmaßes der Freiheitsstrafe auf einen Monat, die Umgestaltung der Geldstrafe nach dem skandinavischen Tagessatzsystem und die Einführung der Verwarnung mit Strafvorbehalt. Außerdem wurden in Zusammenhang mit dem 1. und 2. StrRG weitere Reformen durch das EGStGB vom 02.03.1974 durchgeführt: die Aufhebung der Deliktskategorie der „Übertretungen" und die Einführung der „prozessualen Lösung" für die Ahndung der Bagatellkriminalität durch §§ 153 und 153a StPO. Durch die neuen Regelungen sollte u. a. „die moderne Ausgestaltung des Sanktionensystems als taugliches Instrument der Kriminalpolitik mit dem Ziel einer Verhütung künftiger Straftaten, vor allem durch Resozialisierung des Straftäters" erreicht werden[11]. Damit wurde die Idee der Spezialprävention wesentlich gestärkt und in den Vordergrund gerückt[12].

Die vom Gesetzgeber seit dieser Zeit vorgenommenen Änderungen beinhalten vor allem die weitere Ausdifferenzierung des Strafensystems für besondere Tätergruppen. In der jüngeren Vergangenheit werden darüber hinaus Tendenzen sichtbar, die auf eine Verschärfung der Rechtsfolgen hindeuten[13].

Hervorzuheben sind die folgenden seit der Strafrechtsreform der 1960er/1970er Jahre ergangenen Gesetzesänderungen im Bereich der strafrechtlichen Rechtsfolgen:

– Das Gesetz zur Neuordnung des Betäubungsmittelrechts vom 28.07.1981 schuf für betäubungsmittelabhängige Täter die Möglichkeit der Therapieüberleitung (§§ 35 ff. BtMG).

– Das 20. StrÄndG vom 08.12.1981 eröffnete die Möglichkeit zur Aussetzung des Strafrechts für Täter, die zu lebenslanger Freiheitsstrafe verurteilt wurden (§§ 57a, 57 f. StGB).

– Durch das 23. StrÄndG vom 13.04.1986 wurden die Möglichkeiten zur Aussetzung des Strafrests nach Verbüßung der Hälfte der verhängten Freiheitsstrafe erweitert (§ 57 Abs. 2 StGB).

– Durch das 23. StrÄndG von 1986 wurden ferner die Voraussetzungen für die Abwendung der Vollstreckung der – an die Stelle einer uneinbringlichen Geldstrafe tretenden – Ersatzfreiheitsstrafe durch gemeinnützige Arbeit (Art. 293 Einführungsgesetz zum Strafgesetzbuch [EGStGB]) neu gefasst.

– Das Gesetz zur Bekämpfung des illegalen Rauschgifthandels und anderer Erscheinungsformen der Organisierten Kriminalität vom 15.07.1992 (OrgKG) erweiterte die Möglichkeiten, mit Hilfe der strafrechtlichen Sanktionen illegal erlangte Gewinne abzuschöpfen (§§ 43a, 76d StGB).

– D a s Verbrechensbekämpfungsgesetz vom 28.10.1994 (VerbrBekG) eröffnete die Möglichkeit, nach freiwilliger Schadenswiedergutmachung die Strafe nach den Grundsätzen des § 49 Abs. 1 StGB zu mildern oder ganz von einer Strafe abzusehen (§ 46a StGB).

– Durch das Gesetz zur

[10] In Kraft getreten am 01.01.1975.

[11] Sonderausschuss für die Strafrechtsreform, BT-Drucks. V/4094, S. 3.

[12] Kaiser, G. 1996, S. 986 ff.; Roxin, C. 1997, S. 86 ff.

[13] Ausführlicher zur Strafrechtsreform und Sanktionierungspraxis siehe Heinz, 2007, S. 10 ff., und die dort ausgeführten Literatur.

Bekämpfung von Sexualdelikten und anderen gefährlichen Straftaten vom 26.01.1998 (SexBG) wurden die Prognosevoraussetzungen für die Entlassung aus dem Straf- und Maßregelvollzug verschärft und die Möglichkeiten zur Anordnung von Sicherungsverwahrung für bestimmte Tätergruppen erweitert (§§ 57 Abs. 1, 66 Abs. 3, 67d Abs. 2 StGB).

– Das am 26.01.1998 erlassene 6. StrRG hatte die Harmonisierung der Strafrahmen zum Ziel. Der Gesetzgeber, dem es vor allem um die Beseitigung von Wertungswidersprüchen ging, nahm die angestrebte Harmonisierung durch Verschärfung der Strafdrohungen und Vermehrung von Qualifikationstatbeständen vor.

– Durch das Ende Dezember 2006 in Kraft getretene Zweite Gesetz zur Modernisierung der Justiz wurde die Verwarnung mit Strafvorbehalt mit dem Ziel einer häufigeren Anwendung moderat erweitert.

Die Vermögensstrafe gemäß § 43a StGB kann nicht mehr verhängt werden, weil die Vorschrift wegen Verstoßes gegen das Bestimmtheitsgebot des Art. 103 II GG verfassungswidrig und daher nichtig ist[14]. Sie war in gesetzlich bestimmten Fällen schwerer Kriminalität, insbesondere bei Delikten der organisierten Kriminalität, neben lebenslanger oder zeitiger Freiheitsstrafe von mehr als 2 Jahren zugelassen. Die Vermögensstrafe war eine Geldsummenstrafe, deren Höhe durch den Wert des Vermögens des Täters, das geschätzt werden kann, begrenzt war.

2.3 Das gegenwärtige Sanktionensystem im deutschen Strafrecht

Im Laufe der Geschichte hat sich das deutsche strafrechtliche Sanktionensystem immer weiter ausdifferenziert und die Strafdauer und -härte sind allmählich sehr zurückgegangen. Heutzutage werden auf sehr unterschiedliche Weise Verstöße gegen das Strafrecht sanktioniert. Das gegenwärtige deutsche strafrechtliche Sanktionensystem stellt eine Reihe von verschiedenen Reaktionsmitteln als Rechtsfolgen der Straftat zur Verfügung. Hier haben die o. g. Gesetze zur Reform des Strafrechts einige erhebliche Veränderungen gebracht, die zu einer Erweiterung der sanktionsrechtlichen Palette führten. Theoretisch sind die Strafen, deren Bezugspunkte eine in der Vergangenheit liegende Tat und die Schuld des Täters sind, und die Maßregeln zur Besserung und Sicherung, die sich an der Gefährlichkeit des Täters orientieren und zukunftsgerichtet sind, zu unterscheiden. Daneben kennt das Gesetz weitere Sanktionen eigener Art, die zwischen den Strafen und Maßregeln der Besserung sowie Sicherung stehen und Nebenfolgen genannt bzw. zu den Maßnahmen gerechnet werden. Außerdem gibt es weitere sogenannte verschonende Sanktionen: Strafaussetzung zur Bewährung, Verwarnung mit Strafvorbehalt, Absehen von Strafe und Einstellung des Verfahrens nach §§ 153 ff. StPO.

Im Bereich der Strafen differenziert das Gesetz zwischen Haupt- und Nebenstrafen. Die Hauptstrafe besteht aus zwei Arten von Strafen, nämlich die Geldstrafe und die Freiheitsstrafe, während als Nebenstrafe nur das Fahrverbot vorgesehen ist. Im folgenden werden die Sanktionsarten im deutschen Strafrecht sehr knapp wiedergegeben, um einen kurzen Überblick zu geben, denn es ist nicht Gegenstand dieser Arbeit das deutsche Sanktionensystem zu analysieren und zu beurteilen. Die Übersicht wird benötigt, um eine Beurteilung des mongolischen strafrechtlichen Sanktionensystems aus der Perspektive des deutschen Strafrechts zu ermöglichen.

2.3.1 Die Geldstrafe

Im Bereich der kleinen und mittleren Kriminalität kommt der Geldstrafe grundsätzlich der Vorrang zu. Sie wird nach einem sogenannten Tagessatzsystem verhängt[15]. Zunächst wird die Anzahl der Tagessätze bestimmt, die zwischen fünf und in der Regel maximal 360

[14] BVerfG, NJW 2002, 1779.

[15] Siehe dazu näheres Albrecht, H.-J., 2005, S. 1354 ff.

Tagessätzen umfassen können (§ 40 Abs. 1 StGB). Bei einer Gesamtstrafe sind jedoch 720 Tagessätze möglich (§ 54 Abs. 2 Satz 2 StGB). Mit dieser Anzahl sollen das Unrecht und die Schuld des Täters zum Ausdruck gebracht werden, unabhängig von dessen wirtschaftlichen Verhältnissen. Diese werden erst bei der Höhe des Tagessatzes (von 1 bis 30 000 Euro) berücksichtigt, wobei man in der Regel vom Nettoeinkommen ausgeht, das der Täter durchschnittlich an einem Tag hat oder haben könnte. Der größte Nachteil der Geldstrafe, nämlich die ungleichmäßige Wirkung auf Arm und Reich, wird dadurch einigermaßen ausgeglichen und damit soll in dieser Hinsicht eine größere Gerechtigkeit erreicht werden. Es werden hohe Geldstrafen ermöglicht, welche den Täter zum Konsumverzicht zwingen. Dafür werden auch Möglichkeiten der Zahlungserleichterung in Form von Stundung oder Ratenzahlung gemäß § 42 StGB geboten. Zahlungserleichterungen können auch dann gewährt werden, wenn ohne sie die Schadenswiedergutmachung durch den Verurteilten erheblich gefährdet wäre.

An die Stelle einer uneinbringlichen Geldstrafe tritt die Ersatzfreiheitsstrafe (§ 43 StGB). Ein Tag Freiheitsstrafe entspricht einem Tagessatz. Da die Geldstrafe in Tagessätzen verhängt wird, ist die Anrechnung der Ersatzfreiheitsstrafe sehr simpel. Die Vollstreckung der Ersatzfreiheitsstrafe kann nach geltendem Recht nicht ausgesetzt werden. Die Vollstreckung dieser Ersatzfreiheitsstrafe kann jedoch dann unterbleiben, wenn das Gericht dies wegen einer „unbilligen Härte" für den Verurteilten anordnet (§ 459 f. StPO). Ist der Verurteilte einverstanden, so kann er anstelle der Ersatzfreiheitsstrafe gemeinnützige Arbeit leisten und auf diese Weise die Geldstrafe tilgen (§ 293 EGStGB).

2.3.2 Die Freiheitsstrafe

Die Freiheitsstrafe ist die härteste Strafe, die das deutsche Sanktionensystem von heute kennt. Sie kann entweder als zeitige oder als lebenslange Freiheitsstrafe verhängt werden. In der kriminalpolitischen Diskussion wird meist davon ausgegangen, dass sich mit dieser am tiefsten in die Rechtsstellung des Verurteilten eingreifenden Strafart das gesamt Spektrum der in Betracht kommenden Strafzwecke abdecken lässt. Die Freiheitsstrafe soll Vergeltung für die Tat üben und die Sühne ermöglichen, sie soll dem Täter die Möglichkeit eröffnen, im Vollzug die für ein Leben ohne Straftaten erforderlichen Voraussetzungen zu erwerben, sie soll abschrecken, sie soll die Gesellschaft durch die sichere Unterbringung des Verurteilten schützen und sie soll das durch die Tat erschütterte Vertrauen der Allgemeinheit in die Bestands- und Durchsetzungskraft des Rechts wiederherstellen[16].

Sowohl in der Wirklichkeit als auch im Rahmen der Kriminalpolitik werden positive Wirkungen der Bestrafung für den Täter weniger als die Regel, sondern eher als Ausnahme betrachtet. Repressive Formen der Sanktionierung werden angesichts zahlreicher schädlicher Neben- und Folgewirkungen für die Betroffenen insbesondere beim Vollzug einer Freiheitsstrafe in Frage gestellt. Aus kriminalpolitischer Sicht haftet der Freiheitsstrafe dabei eigene Problematik an. Häufig wirkt der Vollzug einer Freiheitsstrafe negativ auf die Lebensumstände des Verurteilten. Für die Begrenzung der Eingriffsintensität sprechen sowohl humanitäre als auch rationale, an Effizienzkriterien orientierte Erwägungen[17]. Um die mit ihr einhergehenden Gefahren für die soziale Reintegration des Verurteilten anzumildern, hat der deutsche Gesetzgeber versucht, den Anwendungsbereich der Freiheitsstrafe auf unterschiedlichen Ebenen einzugrenzen und deutlich zu machen, dass die Freiheitsstrafe nur als „ultima ratio" des Strafensystems in Betracht kommt. So hat sich in Deutschland in den Jahren zwischen 1882 und 2005 das Verhältnis von verhängten Freiheitsstrafen und Geldstrafen im Ergebnis umgekehrt.

[16] Meier, B.D. 2006, S. 79 ff.

[17] Albrecht, H.-J., Dünkel, F. & Spieß, G., 1981, S. 323.

1882 waren noch 76,8 % aller verhängten Strafen Freiheitsstrafen und 22,2 % Geldstrafen. 2007 waren dagegen 69,6 % aller verhängten Strafen Geldstrafen und lediglich 8,3 % Freiheitsstrafen[18].

Das Höchstmaß der zeitigen Freiheitsstrafe beträgt fünfzehn Jahre, ihr Mindestmaß einen Monat (§ 38.2 StGB). Die lebenslange Freiheitsstrafe ist insbesondere für Mord oder Völkermord angedroht. Früher bedeutete „lebenslang" bis zum Lebensende, was heute jedoch anders definiert wird. Das Bundesverfassungsgericht hat 1977 die Dauer der lebenslangen Freiheitsstrafe begrenzt[19]: Der Gesetzgeber wurde verfassungsrechtlich gezwungen, auch dem zu lebenslanger Freiheitsstrafe Verurteilten eine Chance auf Wiedereingliederung in die Freiheit und in die Gesellschaft zu ermöglichen. Er müsse die Möglichkeit haben, „je wieder der Freiheit teilhaftig zu werden". Die Möglichkeit einer Begnadigung allein sei nicht ausreichend. Der Gesetzgeber ist 1981 mit dem Erlass eines neuen Paragraphen im StGB diesem Urteilsspruch nachgekommen: Ein Gericht kann die Vollstreckung des Restes einer lebenslangen Freiheitsstrafe nun unter bestimmten Voraussetzungen zur Bewährung aussetzen, wenn 15 Jahre der Strafe verbüßt sind[20].

Das deutsche Jugendstrafrecht kennt keine lebenslange Freiheitsstrafe. Das Höchstmaß einer Jugendstrafe beträgt für Heranwachsende 15 Jahre (§ 105 III 2 JGG). Wenn für Heranwachsende das allgemeine Strafrecht angewandt wird, kann das Gericht anstelle von lebenslanger Freiheitsstrafe eine zeitige Strafe bis zu 15 Jahren verhängen (§ 106 I JGG).

Weitere Differenzierungen ergeben sich daraus, dass die Freiheitsstrafe nicht zwingend vollstreckt zu werden braucht. Die Vollstreckung kann entweder bereits im Urteil oder nach Verbüßung einer bestimmten Mindestdauer zur Bewährung ausgesetzt werden.

2.3.3 Strafaussetzung zur Bewährung

Im deutschen strafrechtlichen Sanktionensystem ist die Bewährungsstrafe eine Form der Reaktion nicht freiheitsentziehender Art[21]. Das kriminalpolitische Ziel dieser durch das 3. StrÄndG im Jahr 1953 eingeführten und 1969 sowie 1986 stark erweiterten Sanktionsoption besteht in der Förderung des Strafzwecks der Spezialprävention. Bei Strafaussetzung zur Bewährung wird eine Bewährungszeit zwischen zwei und fünf Jahren festgesetzt (§ 56a StGB), wobei diese Dauer nachträglich vor ihrem Ablauf bis auf das Höchstmaß verlängert oder bis auf das gesetzliche Mindestmaß verkürzt werden kann.

Im Bereich der leichteren und mittleren Kriminalität (bis zu 2 Jahren Freiheitsstrafe), in denen dies mit den Strafzwecken vereinbar ist, kann dem Verurteilten aus dem Grund der Vermeidung von Desintegration die Strafaussetzung zur Bewährung angeordnet werden (§ 56 StGB). Darüber hinaus zielt der deutsche Gesetzgeber darauf ab, in geeigneten Fällen an die Stelle des Strafvollzugs eine Form der ambulanten Sanktionierung treten zu lassen, die dem Täter einerseits Hilfe und Unterstützung bei der Bewältigung von Problemlagen gewährt, und ihn andererseits mit dem Druck des drohenden Widerrufs dazu zwingt, künftig ein straffreies Leben zu führen[22]. So kann das Gericht dem Verurteilten bestimmte Auflagen und Weisungen anordnen, denen nachzukommen er verpflichtet ist (§§ 56b, 56c ff. StGB). Auflagen wie z. B. eine Schadenswiedergutmachung, die Zahlung eines Geldbetrages an eine gemeinnützige Einrichtung oder zugunsten der Staatskasse, dienen „der Genugtuung für das begangene Unrecht" (§ 56b Abs. 1 Satz 1 StGB). Mit dieser Festlegung knüpft der Gesetzgeber an die Schuldausgleichs-Funktion der Strafe an.

[18] Heinz. W., 2007, S. 40 ff.

[19] BVerfGE 45, 187, 222 ff. Vgl. hierzu auch BVerfG NStZ 1996, S. 614.

[20] Die Voraussetzungen sind in § 57a Abs. 1 Nr. 1–3 dStGB festgelegt.

[21] Albrecht, H.-J. Rechtsvergleichendes Gutachten, in: Abschlussbericht der Kommission zur Reform des strafrechtlichen Sanktionensystem, 2000, S. 20; zur historischen Entwicklung genauer Dünkel, F., 1983, S. 1039 ff.

[22] Meier, B.D., 2006, S. 99 ff.

Weisungen, wie z. B. die Unterstellung unter die Aufsicht und Leitung eines Bewährungshelfers, „Anordnungen zu befolgen, die sich auf Aufenthalt, Ausbildung, Arbeit oder Freizeit oder auf die Ordnung seiner wirtschaftlichen Verhältnisse" beziehen, bestimmte Gegenstände nicht zu besitzen, die „Gelegenheit oder Anreiz zu weiteren Straftaten bieten können", dienen ausschließlich dem Zweck, Straftaten des Verurteilten in Zukunft zu verhüten. Kommt der Verurteilte den ihm erteilten Verpflichtungen nicht nach, dann wird die Aussetzungsentscheidung widerrufen und die Freiheitsstrafe vollstreckt.

Sowohl bei zeitiger als auch bei lebenslanger Freiheitsstrafe besteht die Möglichkeit, die Vollstreckung eines Strafrestes zur Bewährung auszusetzen (§§ 57, 57a StGB).

2.3.4 Das Fahrverbot als Nebenstrafe

Das deutsche Strafensystem kennt auch eine Nebenstrafe, das befristete Fahrverbot. Das befristete Fahrverbot kann im Urteil nicht selbständig, sondern nur in Kombination mit einer Hauptstrafe verhängt werden[23]. Das Fahrverbot kann von 1 bis zu 3 Monaten verhängt werden, wenn die Tat, wegen der Angeklagte verurteilt wurde, im Zusammenhang mit dem Führen eines Kraftfahrzeuges stand (§ 44 StGB). Zum Unterschied der Maßregel der Entziehung der Fahrerlaubnis (§ 69 StGB) zielt das Fahrverbot nicht darauf ab, die Allgemeinheit vor ungeeigneten Verkehrsteilnehmern zu schützen. Es hat die spezialpräventive Funktion, nachlässigen oder leichtsinnigen Kraftfahrern, die zum Führen von Kraftfahrzeugen nicht grundsätzlich ungeeignet sind, zusätzlich zur Hauptstrafe eine Mahnung zu erteilen.

Das Fahrverbot hat zur Konsequenz, dass es dem Verurteilten untersagt ist, im Straßenverkehr Kraftfahrzeuge zu führen. Der Führerschein wird in amtliche Verwahrung genommen (§ 44 Abs. 2 Satz 2 StGB), die eigentliche Fahrerlaubnis bleibt aber vom befristeten Fahrverbot unberührt. Der Verstoß gegen dieses Verbot stellt eine erneute Straftat dar (§ 21 Abs. 1 und 2 StVG).

2.3.5 Maßregeln der Besserung und Sicherung

Das deutsche Strafrecht kennt insgesamt sechs Maßregeln der Besserung und Sicherung, drei nichtfreiheitsentziehende (sogenannte ambulante) und drei freiheitsentziehende (sogenannte stationäre) Sanktionen. Die Entziehung der Fahrerlaubnis, Führungsaufsicht und Berufsverbot gelten als die ambulanten Maßregeln, während die Unterbringung in einem psychiatrischen Krankenhaus (§ 63 StGB), in einer Entziehungsanstalt (§ 64 StGB) oder in der Sicherungsverwahrung (§§ 66-66b StGB) zu den stationären Maßregeln gehören.

Mit dem sogenannten Gewohnheitsverbrechergesetz wurden im Jahre 1933 neben den eigentlichen Strafen Maßregeln eingeführt. Damit wurde das sogenannte zweispurige System im deutschen Sanktionenrecht errichtet. Die Dauer der Maßregeln wird vom Gesetz nicht befristet und auch nicht durch das gerichtliche Urteil bestimmt, sondern erst während des Vollstreckungsverfahrens konkretisiert.

Bei den Maßregeln der Besserung und Sicherung kommen kriminalpolitisch die drei Elemente der Spezialprävention zur Erwägung, die Abschreckung (z. B. durch die Entziehung der Fahrerlaubnis), Besserung und Sicherung. Darüber hinaus werden bei den Maßregeln der Besserung und Sicherung je nach der Art und den Einwirkungsmitteln im einzelnen sehr verschiedenartige kriminalpolitische Zwecke verfolgt. Alle Arten von Maßregeln verfügen jedoch über gemeinsame Ziele: die Verhinderung von Straftaten und die Sicherung der Allgemeinheit[24].

Die Maßregel der Sicherungsverwahrung stellt die „ultima ratio" des strafrechtlichen Sanktionensystems dar und ist sie in

[23] Näheres zu dieser Sanktion Kulemeier, R., 1993, S. 212 ff.; Meier, B. D., 2006, S. 137 ff.

[24] Dazu ausführlicher Meier, 2006, S. 219 ff.

Deutschland kriminalpolitisch umstritten. Hierbei wird weniger kritisiert, dass es grundsätzlich nicht legitimiert sei, Sanktionen schuldunabhängig zu verhängen und den Täter im Interesse der Allgemeinheit über den Endzeitpunkt der Strafe hinaus sicher zu verwahren[25]; vielmehr gibt es Kritik daran, dass der Gesetzgeber den Anwendungsbereich der Maßregel in den Jahren 1998 bis 2004 kontinuierlich ausgeweitet und damit die durch das 1. StrRG geschaffene Grenzlinie der „Notmaßnahme der Kriminalpolitik“[26] überschritten hat.

Aus kriminalpolitischer Sicht dient die Unterbringung in der Sicherungsverwahrung dem Schutz der Allgemeinheit vor Tätern, die erhebliche Straftaten begangen haben und die wegen ihres bekannten Hangs zur Begehung weiterer erheblicher Straftaten fortdauernd gefährlich sind. Die Maßregel verfolgt ausschließlich das Ziel der Sicherung der Allgemeinheit. Der Besserungsgedanke spielt auf der Anordnungsebene keine, aber auf der Vollzugsebene nur eine untergeordnete Rolle.

Seit 2008 wurde der Anwendungsbereich der Sicherungsverwahrung mehrfach erweitert (§ 66a StGB, Vorbehalt der Unterbringung in der Sicherungsverwahrung und § 66b StGB. Nachträgliche Anordnung der Sicherungsverwahrung). Zwar wurden nach einer Neuordnung dieser Maßregel, die mit Beginn des Jahres 2011 in Kraft getreten war[27], durch das Bundesverfassungsgericht die meisten Vorschriften über die Sicherungsverwahrung für verfassungswidrig erklärt. Dabei stützte sich das Gericht jedoch ausschließlich auf das mit diesem Urteil ausdifferenzierte Gebot eines hinreichenden „Abstands“ zur Freiheitsstrafe und ihrem Vollzug[28]. Dementsprechend hält das jüngste Gesetz zur bundesrechtlichen Umsetzung des Abstandgebotes im Recht der Sicherungsverwahrung am Konzept des Neuordnungsgesetzes fest[29]. Mit diesen Gesetzesänderungen wurde die traditionelle Form der Maßregel eingeschränkt und dafür die vorbehaltene Sicherungsverwahrung ausgeweitet.

Bei der Reform zur Führungsaufsicht vom 22.03.2007 wird eine straffere und effizientere Kontrolle der Lebensführung von Straftätern zur Verhinderung von Rückfällen erzielt, und dies mit weiteren neuen Weisungen wie mit Strafe bewehrtes Kontaktverbot, Verbot Alkohol zu trinken, regelmäßige Vorstellung bei Arzt etc. erweitert. Bei schuldhaften Verstößen gegen Weisungen sah der Gesetzgeber eine Erhöhung der Freiheitsstrafenandrohung auf 3 Jahre nach § 145a StGB vor. Weitere Änderungen sind die Erweiterung der Befugnisse der Führungsaufsichtsstellen und die Einführung einer „stationären Krisenintervention“ für Personen, die nach ihrer Entlassung aus einer Klinik für psychisch oder suchtkranke Straftäter in eine krisenhafte Entwicklung geraten (z. B. unkontrolliert in großen Mengen Alkohol konsumieren) durch vorübergehende Unterbringung im Maßregelvollzug sowie die Anordnung unbefristeter Führungsaufsicht für die Durchsetzung von Medikamenten und sonstiger Compliance.

2.3.6 Verwarnung mit Strafvorbehalt und Absehen von Strafe

Unterhalb der Geldstrafe gibt es zwei weitere Strafarten, deren Anwendungsbereich etwas unscharf ist: das Absehen von Strafe und die Verwarnung mit Strafvorbehalt. Beim Absehen von Strafe begnügt sich das Gericht mit einem Schuldspruch und erlegt dem Täter kein Strafübel auf. Voraussetzung für das Absehen von Strafe nach § 60 StGB ist, dass der Täter bereits durch die Folgen der Tat schwer getroffen ist. Das Absehen von Strafe ist nur dann mit den Strafzwecken vereinbar, wenn die Folgen, die den Täter getroffen haben,

[25] Unter Bezugnahme auf die erste Entscheidung zur lebenslangen Freiheitsstrafe (BVerfGE 109, 133 (151)) ist sie als legitim und als mit der Verfassung vereinbar angesehen.

[26] Dazu siehe den 1. schriftlichen Bericht, BT-Drucks. V/4094, S. 19.

[27] Gesetz zur Neuordnung des Rechts der Sicherungsverwahrung und zu begleitenden Regelungen vom 22. 12. 2010 (BGBl. I 2300).

[28] BVerfGE 128, 326 (Beschluss vom 04. 05. 2011)

[29] Gesetz vom 5. 12. 2012 (BGBl. I 2425).

die Schuld als hinreichend kompensiert erscheinen lassen und es keine präventiven Gesichtspunkte gibt, die eine Verhängung von Strafe erforderlich machen. Das Absehen von Strafe nach § 60 StGB kommt grundsätzlich bei allen Delikten in Betracht. Aber der Gesetzgeber hat eine gewisse Grenze aufgestellt, dass der Täter für die Tat keine Freiheitsstrafe von mehr als einem Jahr erhalten haben darf (§ 60 Satz 2 StGB). Eine Besonderheit beim Absehen von Strafe stellt dar, dass es als alleinige Form der Reaktion anzuwenden ist. Erachtet das Gericht die Voraussetzungen für gegeben, so muss es das Absehen von Strafe im Urteil zwingend wählen. Es gibt keine Wahlmöglichkeit. Dem Gericht ist ein Ermessen nicht eingeräumt.

Bei der Verwarnung mit Strafvorbehalt verwarnt das Gericht den Täter zusätzlich zum Schuldspruch, bestimmt bereits eine (Geld-)Strafe, und setzt die Verhängung zu dieser Strafe aber zur „Bewährung“[30] aus (§ 59 StGB). Allerdings ist die Verwarnung mit Strafvorbehalt nur bei Geldstrafen bis zu 180 Tagessätzen zulässig. Ziel der Verwarnung mit Strafvorbehalt ist es, im unteren Bereich der Kriminalität der Täter – insbesondere dem Ersttäter – die Bestrafung zu ersparen. Aber die Verwarnung mit Strafvorbehalt spielt in der Praxis nur eine geringe Rolle.

2.3.7 Einstellung des Verfahrens nach §§ 153 ff. StPO

Durch das EGStGB vom 02.03.1974 wurde der Justiz in Deutschland die Möglichkeit geboten, Verfahren aus Opportunitätsgründen einzustellen. Es geht dabei nicht darum, dass sie nicht wegen des fehlenden (oder nicht beweisbaren) Tatverdachts erfolgen, sondern wegen des fehlenden öffentlichen Interesses an der weiteren Verfolgung der Tat.[31]

Nach § 153 StPO kann ein Ermittlungsverfahren eingestellt werden, wenn die gesetzlichen Voraussetzungen erfüllt sind. Voraussetzungen für die Einstellung wegen Geringfügigkeit gem. § 153 StPO sind, dass die Schuld des Täters gering anzusehen wäre, kein öffentliches Interesse an der Verfolgung der Tat besteht und es sich bei der Tat um ein Vergehen handelt. In der Praxis hat die Einstellung nach § 153 StPO enorme Bedeutung. Ein Strafverfahren kann im Ermittlungsverfahren oder auch noch in der Hauptverhandlung eingestellt werden, ohne dass es zu einer Bestrafung des Beschuldigten kommt.

Auch gem. § 153a kann eine Verfahrenseinstellung gegen Auflagen oder Weisungen erfolgt werden. Die Voraussetzungen dafür sind: es muss sich um ein Vergehen handeln, bei einem Verbrechen ist die Einstellung gegen Auflagen ausgeschlossen. Die Schwere der Schuld und das öffentliche Interesse durfen einer Einstellung nicht entgegenstehen. Diese Art der Einstellung ist bei Delikten bis in den Bereich der mittleren Kriminalität. Darüber hinaus sind im deutschen Strafrecht weitere Einstellungen eines Strafverfahrens nach §§ 154 und 170 StPO möglich.

2.3.8 Gemeinnützige Arbeit

Ist die Geldstrafe uneinbringlich, so ist mit Androhung bzw. Anordnung der Ersatzfreiheitsstrafe nach entsprechenden, gem. Art. 293 EGStGB erlassenen Rechtsverordnungen und Verfügungen der einzelnen Bundesländer (die seit Anfang 1987 überall und flächendeckend gelten) dem Verurteilten gleichzeitig mitzuteilen, dass er die Geldstrafe auch in Form der freiwilligen Arbeit leisten kann. Es setzt die Freiwilligkeit von Seiten des Verurteilten voraus, jedoch gibt es für ihn keine eigene Wahlmöglichkeit zwischen der Bezahlung der Geldstrafe und einer Leistung durch Arbeit, sondern das Gericht entscheidet. Nachdem entsprechende Projekte bereits Anfang der 1980er Jahre erfolgreich waren, wurde die Ableistung gemeinnütziger Arbeit schrittweise in den verschiedenen

[30] Eine Aussetzung der Vollstreckung der Geldstrafe zur Bewährung sieht das StGB nicht vor. Die Verwarnung mit Strafvorbehalt im Anwendungsbereich der Geldstrafe hat jedoch eine ähnliche Wirkung. Zur Verwarnung mit Strafvorbehalt und Absehen von Strafe siehe näheres Albrecht, H.-J., 2005, S. 1751 ff. und 1759 ff.

[31] Siehe näheres dazu Meier, B.D., 2006, S. 8 ff.

Landgerichtsbezirken eingeführt[32]. Es ermöglicht Verurteilten, die Vollstreckung einer Ersatzfreiheitsstrafe durch Leistung von gemeinnütziger Arbeit abzuwenden, wenn sie die in erster Linie verhängte Geldstrafe auch nicht in Raten bezahlt können. Der Verurteilte kann in diesen Fällen einen Antrag bei der für die Vollstreckung der Geldstrafe zuständigen Staatsanwaltschaft stellen. Die Anzahl der abzuleistenden Stunden ergibt sich aus der Anzahl der Hafttage, die zu verbüßen wären. Pro Hafttag müssen je nach Bundesländern vier bis sechs Stunden Arbeit geleistet werden. Damit werden nicht nur Haftkosten gespart, sondern auch unnötige Gefängniserfahrungen vermieden. Verurteilte, die schon lange arbeitslos sind, können wieder einen geregelten Arbeitsrhythmus erlernen und ihre Chancen auf dem Arbeitsmarkt erhöhen. Auch kommt die gemeinnützige Tätigkeit der Allgemeinheit zugute.

2.3.9 Das Jugendstrafrecht

Das Jugendstrafrecht stellt sich seit 1923[33] als selbstständiger Rechtsbereich im deutschen Sanktionensystem dar, der in den 1980er Jahren durch eine „Reform durch die Praxis“[34] weiterentwickelt wurde. Im Rahmen dieser Reform wurden neue ambulante Maßnahmen erprobt und das Konzept der Diversion wurde in hohem und wachsendem Maße umgesetzt, die die traditionellen Sanktionen (Geldbuße, Jugendarrest, Jugendstrafe) weitgehend ersetzen können. Als solche ambulante Maßnahmen gelten der Täter-Opfer-Ausgleich, die Betreuungsweisung, ein sozialer Trainingskurs und eine Arbeitsweisung, bei denen die Besonderheiten der Kriminalität im Jugendalter in vollem Maße berücksichtigt sind[35]. Die Regelungen des JGG beziehen Jugendliche im Alter von 14 bis unter 18-Jährige und Heranwachsende im Alter von 18 bis unter 21-Jährige ein. Hierfür ist das Alter zum Zeitpunkt der Tat entscheidend. Das Jugendstrafrecht wird bei Heranwachsenden angewandt, wenn der Täter nach seiner sittlichen und geistigen Entwicklung zur Tatzeit einem Jugendlichen entsprach oder die Tat als eine „Jugendverfehlung“ eingeordnet werden kann. Unter Letzterem versteht man Straftaten, die Ausdruck einer typischen jugendlichen Lebenssituation sind, die beispielsweise aus Imponiergehabe, jugendlichem Leichtsinn, Neugier oder Gruppendruck begangen worden sind.

Das Rechtsfolgensystem des JGG umfasst drei Kategorien von formellen Rechtsfolgen, nämlich Erziehungsmaßregeln, Zuchtmittel und Jugendstrafen. Darüber hinaus sind auch die Anwendung von Nebenfolgen aus dem StGB, insbesondere das Fahrverbot sowie einige der Maßregeln der Besserung und Sicherung zulässig.

Als Erziehungsmaßregeln gelten Weisungen (§ 10 JGG) und Hilfe zur Erziehung (Erziehungsbeistandschaft (§ 12 JGG) und Heimerziehung (§ 12 JGG)). Als Zuchtmittel gelten die Verwarnung, die Erteilung und der Jugendarrest (§ 13 Abs. 2 JGG).

2.4 Entwicklung der Sanktionierungspraxis in Deutschland

Deutschland ist in Bezug auf die Sanktionierung eines von wenigen guten Vorbildern auf der Welt[36]. Im Jahr 1882 waren nur 22,2 % aller verhängten Strafen Geldstrafen und noch 76,8 % Freiheitsstrafen[37]. Vor den Reformen in den 1960er und 1970er Jahren lag das Verhältnis von verhängten Geldstrafen zu Freiheitsstrafen ohne Bewährung schon bei 70 : 20 von 100 % aller Strafen. Diese

[32] Zu solchen Projekten wie z. B. „Schwitzen statt Sitzen“ – Projekt in Baden-Württemberg siehe http://www.justiz-portal-bw.de/pb/,Lde/Startseite/THEMEN+UND+AKTUELLES/Schwitzen+statt+Sitzen.

[33] In 1923 wurde das Jugendgerichtsgesetz verabschiedet und damit wurde erstmals in Deutschland ein Sonderstrafrecht für jugendliche Straftäter geschaffen. Siehe dazu ausführlicher Heinz, 2007, S. 25 ff.

[34] Vergleiche hierzu BMJ [Hrsg.]: Jugendstrafrechtsreform durch die Praxis, Bonn 1989; Albrecht, H.-J. & Hotter, I. (2003), S. 282 ff.

[35] Zur Sanktionen und Sanktionierungspraxis im Jugendstrafrecht detailierter in Heinz, 2006.

[36] Vgl. dazu Albrecht, H.-J., 2004, S. 20-25.

[37] Zur Entwicklung der Sanktionierungspraxis in Deutschland und des deutschen strafrechtlichen Sanktionensystems ausführlicher Heinz, 2007, S. 40 ff.;

Entwicklung setzte sich in den folgenden Jahrzehnten noch erheblich weiter fort und steht derzeit in einem Verhältnis 82,8 % Geldstrafen zu nur noch 5,2 % Freiheitsstrafen (vergleiche *das Schaubild 1*).

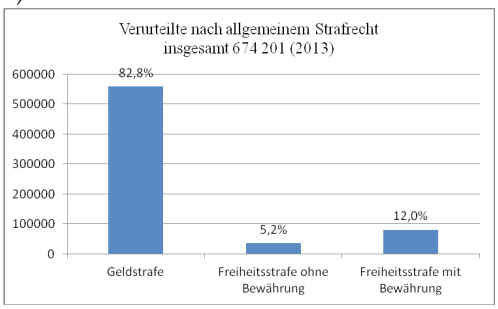

Schaubild 1. Sanktionen nach allgemeinem Strafrecht in Deutschland[38]

Dies wird in der Literatur mit einem gewissen Stolz wie folgt beschrieben: „In der Neuregelung des Sanktionensystems steht das gegenwärtige Recht mit dem Übergang von der Freiheitsstrafe zur Geldstrafe als weitaus häufigster Strafart an einem ähnlich bedeutsamen Wendepunkt, wie es einst der Übergang von den Leibes- und Lebensstrafen des Mittelalters zur Freiheitsstrafe der Aufklärungszeit gewesen ist“[39].

2013 wurden insgesamt rund 674 000 Personen in Deutschland nach allgemeinem Strafrecht verurteilt. Der Anteil der Frauen liegt bei 19,7 %. Wie das Schaubild 22 zeigt, ist bei Verurteilungen die Geldstrafe mit 558 000 Fällen die häufigste Strafe. In den übrigen 116 000 Fällen werden Freiheitsstrafen oder sehr selten Strafarrest verhängt. Zwei Drittel der Freiheitsstrafen werden zur Bewährung ausgesetzt.

Dies entspricht 12 % aller Verurteilungen. Lediglich 5 % (35 000) der Verurteilungen sind Freiheitsstrafen ohne Bewährung. 30 % aller Freiheitsstrafen sind kurze Freiheitsstrafen unter 6 Monaten Dauer, rund 45 % haben eine Dauer zwischen 6 und 12 Monaten und 18 % haben eine Dauer zwischen 1 und 2 Jahren. Die nicht aussetzungsfähigen Freiheitsstrafen über 2 Jahre machen zusammen 8 % aus, während die Freiheitsstrafen zwischen 5 und 15 Jahre lediglich 1,4 % (1517) der Fälle betragen. Es gibt nur 92 Fälle, in denen die lebenslange Freiheitsstrafe verhängt wurde. Dies macht 0,1 % der Fälle aus[40].

Was die Verurteilungen zu Geldstrafen betrifft, liegt jeweils knapp die Hälfte der rund 560 000 Fälle bei bis zu 30 Tagessätzen sowie zwischen 31 und 90 Tagessätzen. Während 6 % der Fälle über 90 Tagessätze ausmachen, werden in nur 0,5 % der Fälle über 180 Tagessätze verhängt. Die Höhe des Tagessatzes bewegt sich mit 37 % am häufigsten bei Beträgen zwischen 10 und 25 Euro, in nur 2,7 % der Fälle bei Tagessätzen bis zu 5 Euro. Bei nur 2 % aller zu Geldstrafen Verurteilten beträgt der Tagessatz mehr als 51 Euro.

2.5 Das Europarecht und das deutsche Strafrecht

Deutschland ist ein Mitgliedstaat der Europäischen Union (EU). Die EU hat zwar bisher keine Befugnis zur Schaffung eines einheitlichen europäischen Strafrechts, aber sie unternimmt seit längerer Zeit Anstrengungen zur Verbesserung und Vereinheitlichung der Verbrechensbekämpfung in den Mitgliedstaaten. Durch den Vertrag von Lissabon, der am 01.12.2009 in Kraft getreten ist, wurde den Organen der EU die Möglichkeit gegeben, die Mitgliedstaaten zum Erlass von Strafgesetzen zum wirksamen Schutz des Vermögens der EU zu verpflichten[41]. Darüber hinaus sieht Art. 83 AEUV die Harmonisierung der Strafvorschriften der Mitgliedstaaten für zahlreiche, typischerweise grenzüberschreitende Deliktsbereiche vor (z. B. Terrorismus, Drogenhandel, Computerkriminalität, organisierte Kriminalität).

Die Europäische Konvention zum Schutze der Menschenrechte und Grundfreiheiten von 1959, zu der Deutschland ebenso wie alle übrigen

[38] Quelle: Strafverfolgungsstatistik 2013, Statistischen Bundesamt, Wiesbaden, Tab. 2.3.

[39] Jescheck, 1992, Einleitung, Rndr. 93.

[40] Siehe näheres zu der Sanktionierungspraxis Jehle 2015, S. 32 ff.; zur Perspektiven kriminologischer Forschung Albrecht, H.-J. (2007), S. 177 ff.

[41] Art. 325 Abs. 4 des Vertrages über die Arbeitsweise der EU (AEUV).

Mitgliedstaaten des Europarats beigetreten ist, ist unmittelbar geltendes nationales Recht im Range eines einfachen Bundesgesetzes[42]. Ihre Gewährleistungen sind daher durch die deutschen Gerichte wie anderes Gesetzesrecht des Bundes im Rahmen methodisch vertretbarer Auslegung zu beachten und anzuwenden[43].

Die EMRK enthält in Art. 2 Regelungen über den Schutz des Lebens, in Art. 3 das Verbot von Folter sowie von unmenschlicher und erniedrigender Bestrafung oder Behandlung, in Art. 5 Regeln über den Freiheitsentzug und in Art. 7 den Gesetzlichkeitsgrundsatz für Strafvorschriften. Verletzt ein Staat die Garantien der EMRK, so kann die betroffene Person dagegen Beschwerde zum Europäischen Gerichtshof für Menschenrechte (EGMR) in Straßburg einlegen und gegebenenfalls eine Verurteilung des Staates zu Schadensersatz erwirken. Außerdem passen die Staaten in der Regel ihre Gesetze an die Vorgaben der Entscheidungen des EGMR an, um weitere Verurteilungen wegen Menschenrechtsverletzungen zu vermeiden.

III. Das mongolische Sanktionensystem aus der Sicht des deutschen Strafrechts

Das deutsche Strafrecht basiert auf die rechtsstaatlichen Prinzipien, bei denen u. a. auf die Grundrechte des Einzelnen und auf die Verhältnismäßigkeit der Reaktion des Staats großen Wert aufgelegt wird. Die Mongolei strebt danach, sich diese Werte und Wertschätzungen anzueignen. Dies ist u. a. auch bei der Kriminalpolitik zu sehen. Im Folgenden wird nun eine Beurteilung des mongolischen strafrechtlichen Sanktionensystems im Vergleich mit dem deutschen Strafrecht sowohl aus kriminalpolitischer Sicht als auch von der Sanktionsstruktur her erfolgen.

3.1 Aus der kriminalpolitischen Sicht

In der Mongolei ist die vor etwa zwei Jahrzehnten in Angriff genommene Reformarbeit in ihren wesentlichen Teilen erfolgreich abgeschlossen. Die Anpassungsgesetze an das demokratische Grundgesetz von 1992, das Strafrechtsreformgesetz von 2002 und das sechs Jahre später eingeführte Gesetz zur Änderung und Ergänzung zum StGB vom 01.02.2008, welche die kriminalpolitischen Grundentscheidungen und die Ausgestaltung des Sanktionensystems der heutigen Mongolei ausformen, lassen große Fortschritte im Bereich der Strafrechtsordnung erkennen und wurden dafür wertgeschätzt, die Grundvoraussetzungen für ein modernes und rechtsstaatlich orientiertes Strafjustizsystem geschaffen zu haben. Andererseits stößt das Strafrechtsreformgesetz von 2002 im Hinblick auf die Härte seiner Strafen auf scharfe Kritik. Mehrfach wurde das strafrechtliche Sanktionensystem in öffentlichen Diskussionen zur Zielscheibe der Kritik.

Kriminalpolitik umfasst die Festlegung des Bereichs des Strafbaren und die Bestimmung der staatlichen Reaktion auf strafbares Verhalten. Dies ist in Deutschland in den strafrechtlichen Haupt- und Nebengesetzen im StGB festgelegt. Die Auffassungen hinsichtlich der verfassungsrechtlichen und menschenrechtlichen Grenzen des Strafrechts, bzw. die Ziele, Möglichkeiten und Grenzen der strafrechtlichen Sozialkontrolle haben sich in Deutschland grundlegend gewandelt.

Wie im Folgenden hat *Jescheck* diesen Wandel ganz deutlich beschrieben: *„Die Erkenntnis, dass das Strafrecht nur ein Mittel der sozialen Kontrolle neben anderen ist und wegen der mit seiner Anwendung verbundenen tiefen Eingriffe in Freiheit, Ansehen und Einkommen der Betroffenen und wegen der daraus folgenden sozialen Nachteile möglichst sparsam verwendet werden sollte, hat sich weitgehend durchgesetzt. Zugleich ist durch die vielfältigen ideologischen Angriffe auf alle repressiven Institutionen des Staates als Gegeneffekt die Überzeugung gewachsen,*

[42] BVerfGE 74.358, 370; 111.307, 323 f.; BGHSt 45.321, 329; 46.178, 186; siehe allgemein über die Sanktionen in Europa Albrecht, H.-J., 1999, S. 382 ff.

[43] BVerfGE 111. 307, 323.

dass nur ein am Schuldprinzip orientiertes Strafrecht den Schutz der Allgemeinheit in Freiheit ermöglicht, weil allein ein solches Recht den Menschen als verantwortlichen Mitbürger betrachtet, indem es durch Gebot und Sanktion an seine Einsicht und seine Disziplin appelliert, aber damit auch Ernst macht. Auch die Notwendigkeit der Beschränkung des Strafrechts durch die Grundsätze des Rechtsstaats und die Erkenntnis, dass nicht alles, was für die Behandlung von Rechtsbrechern zweckmäßig erscheint, auch gerecht ist, sind heute Allgemeingut geworden. Allmählich beginnt man ferner zu verstehen, dass die Humanität als Grundlage der Kriminalpolitik nicht nur eine Angelegenheit des Idealismus von Einzelnen ist, die sich dieser Sache aus Mitgefühl annehmen, sondern auch eine Frage der Mitverantwortung der Gesellschaft für die Kriminalität, und dass die Sorge um den Rechtsbrecher nicht eine Gnade, sondern ein verbindlicher Auftrag des Sozialstaats ist. Endlich wird die Strafrechtspflege selbst – viel stärker als früher – nicht mehr nur als Instanz für die Verwirklichung der Gerechtigkeit verstanden, sondern auch als eine soziale Aufgabe, die durch die Art und Weise ihrer Erfüllung dem straffälligen Menschen eine Lebenshilfe geben soll. Dabei wird die Wirksamkeit der Strafrechtspflege nicht so sehr in dem statistischen Nachweis von Erfolgen bei der Resozialisierung von Straftätern gesehen, als vielmehr in einer Ausgestaltung der gesamten kriminalrechtlichen Tätigkeiten des Staates, die sich mit dem geschärften sozialen Gewissen unserer Zeit vereinbaren lässt.“[44]

Man kann mit einem Satz sagen, dass eine solche wie von *Jescheck* formulierte Ansicht bzw. Grundeinstellung in der mongolischen Kriminalpolitik im Allgemeinen fehlt, woraus alle anderen Grundprobleme entstehen. Dies ist ein grundsätzlicher allgemeiner Unterschied zwischen beiden Rechtssystemen.

Es gab auch in Deutschland Zeiten, in denen zu hohe Zielsetzungen im Rahmen der Kriminalpolitik angestrebt wurden. Dies hat sich allmählich verändert. Insbesondere die Strafrechtsreformen nach den 1960er und 1970er Jahren haben eine Wende im Strafrecht bewirkt. Im Rahmen dieser Strafrechtsreformen wurden die Zwecke der strafrechtlichen Sanktionen neu definiert sowie die Modalitäten einzelner Strafen erweitert und besser differenziert. Dies lässt sich insbesondere bei Hauptstrafen und ebenso bei weiteren Rechtsfolgen beobachten. Es gibt hier viele gute Erfahrungen, von denen auch die Mongolen lernen könnten.

Die in dieser Zeit bereits am häufigsten angewandte Geldstrafe blieb nicht nur die am meisten praktizierte Strafe im deutschen Sanktionenrecht, sondern wurde bis zur Gegenwart sogar noch weiter ausgebaut. Die Wirkungen der Geldstrafe sind weitaus höher als in der Mongolei. Der Erfolg der deutschen Geldstrafenpolitik liegt nicht daran, dass die in Deutschland verurteilten Täter im Vergleich zur Mongolei in einer relativ besseren wirtschaftlichen Lage sind. Es hängt vor allem damit zusammen, weil die Regeln der Geldstrafe des deutschen Tagessatzsystems in einem sehr großen Bereich eine genaue Anpassung an die individuelle finanzielle Leistungsfähigkeit des Täters ermöglichen, die selbst dann noch funktioniert, wenn diese Fähigkeit fast gegen Null geht. Der entscheidende Vorteil des Tagessatzsystems ist seine fast beliebige Skalierbarkeit. Die „maßgeschneiderte“ Belastung des Täters erleichtert nicht nur sehr die Vollstreckbarkeit, sondern vermeidet auch weitgehend soziale Ungerechtigkeiten.

Nicht zuletzt spielt die Tatsache eine ganz wichtige Rolle, dass der deutsche Gesetzgeber die Anwendung der Freiheitsstrafe als „ultima ratio“ vorschreibt und dies auch von Gerichten dementsprechend in Gebrauch gemacht wird.

Im deutschen wie im mongolischen Strafrecht ist die Schuld als Voraussetzung der Strafe anerkannt. Bei der Sanktionszumessung spielt „das Maß der Schuld“ eine besondere Rolle. Es fehlt jedoch im mongolischen Strafrecht sowohl auf theoretischer als auch auf gesetzlicher Ebene an der grundsätzlichen Einsicht, dass die Strafbemessung sich nach der Schuld des Täters richten soll. Der Tenor der Bestrafung ist jedoch, dass die unrechte Handlung eines Straftäters

[44] Zit. nach Jescheck, 2004, S. XII ff.

mit Strafe auszugleichen ist (Vergeltung). Die Aufgabe des Strafrechts erschöpft sich jedoch nicht im Ausgleich von Schuld, sondern geht darüber hinaus. Das übergreifende Ziel ist vielmehr die kontrollierte Wiederherstellung und Sicherung der durch die Tat gestörten Ordnung bzw. die Prävention[45].

3.2 Betrachtung der Sanktionsstruktur

In der Grundstruktur ähnelt das mongolische Sanktionensystem dem deutschen. Im groben ist das Entwicklungsstadium des mongolischen Strafrechts in vieler Hinsicht mit dem Stand des deutschen Strafrechts der 1960er und 1970er Jahre zu vergleichen. Obwohl sich die Ausgestaltung des modernen strafrechtlichen Sanktionensystems der Mongolei bereits über einen Zeitraum von fast 100 Jahren erstreckt, wurde der Entwicklungsprozess in den fast 70 Jahren des Sozialismus in Richtung einer Weltanschauung geleitet, nämlich das sozialistische Strafrecht nach der sowjetischen Strafrechtsschule. Die Entwicklung des deutschen Strafrechts konnte über einen viel längeren Zeitraum erfolgen, auch wenn es durch die diktatorische Zeit des Nationalsozialismus von 1933–1945 eine Unterbrechung gab. In der DDR wurde ähnlich wie in der Mongolei das Rechtssystem unter sowjetischen Einfluss in eine sozialistische Richtung gelenkt.

Erst in den 25 Jahren nach dem politisch-gesellschaftlichen Umbruch von 1990 eröffnete sich für die Mongolei die Möglichkeit, ihre Zielrichtung selbst zu bestimmen und zu ändern, also eine Richtungsänderung bezüglich der Rechtsentwicklung im Allgemeinen.

Im Folgenden werden die wichtigsten Bemerkungen ausgeführt, die den Unterschied der beiden Systeme verdeutlichen.

3.2.1 Die Zweckbestimmungen einzelner Sanktionen

Die Zwecke der Strafe sind in beiden Rechtssystemen grob gesehen zwar ähnlich definiert, aber bei näherer Betrachtung dieser Definitionen scheinen die Auffassungen im mongolischen Strafrecht etwas oberflächlicher zu sein als bei den deutschen Auslegungen der Zweckbestimmungen.

Auf der anderen Seite hat der deutsche Gesetzgeber in Verbindung mit der Strafzumessungsvorschrift von § 46 StGB durch die Strafrechtsreform von 1969 die Idee der Spezialprävention wesentlich gestärkt und in den Vordergrund gerückt. Die Geldstrafe sollte die Hauptstrafe der Gegenwart sein, deren Anwendungsbereich die leichte und mittlere Kriminalität sein sollte. Der Bundesgerichtshof hat die Neuorientierung der Strafziele mit der neuen Bedeutung präventiver Strafzwecke folgendermaßen zusammengefasst: „*Nach der kriminalpolitischen Gesamtkonzeption, von der die Strafrechtsreform ausgeht, soll in der Regel auf die Verhängung kurzer und die Vollstreckung mittlerer Freiheitsstrafen verzichtet werden. [...] Dem 1. Strafrechtsreformgesetz liegt der Gedanke zugrunde, dass die Strafe nicht die Aufgabe hat, Schuldausgleich um ihrer selbst willen zu üben, sondern nur gerechtfertigt ist, wenn sie sich zugleich als notwendiges Mittel zur Erfüllung der präventiven Schutzaufgabe des Strafrechts erweist.*“[46]

Während im deutschen Strafrecht ausdrücklich die möglichst geringe Anwendung der kurzen Freiheitsstrafe gefordert wird, wird sie dagegen im mongolischen Strafrecht sogar gefördert und vergleichsweise häufiger angewandt. All die Gründe, die im deutschen Strafrecht gegen die kurze Freiheitsstrafe aussprechen, scheinen im mongolischen Strafrecht lediglich bei längeren Freiheitsstrafen Probleme zu sein.

Die Dauer der 2002 in der Mongolei eingeführten Einzelhaftstrafe reicht von einem bis zu sechs Monate. Die Einzelhaftstrafe stellt eine besondere Art der freiheitsentziehenden Strafe im mongolischen Strafrecht dar und sollte nur im Bereich leichter und minderschwerer Kriminalität verhängt und vollstreckt werden, während

[45] Meier, 2006, S. 10 ff.

[46] Zit. nach BGHSt 24, 42, Entscheidung vom 08.12.1970.

die eigentliche Freiheitsstrafe für minderschwere, schwere und besonders schwere Straftaten vorgesehen ist. In der Theorie ist die Einzelhaftstrafe als leichtere Bestrafung gedacht. Die Maßnahme der Einzelhaft wird jedoch grundsätzlich als eine besondere Härte kritisiert und zur Frage gestellt. In der Praxis scheitert die Umsetzung der Einzelhaftstrafe an den Vollzugsbedingungen. Oft erfolgt ihre Vollstreckung in den Vollzugsanstalten für Freiheitsstrafen mit normalen Sicherheitsmaßnahmen. Es ist deshalb auch nicht selten, dass die zu Einzelhaftstrafen Verurteilten wegen des Platzmangels zusammen mit den zu Freiheitsstrafen verurteilten Insassen inhaftiert sind. Bei der Haftstrafe werden die Zwecke der Spezialprävention und der individuellen Abschreckung in den Vordergrund gestellt, von der Resozialisierung ist dagegen gar nicht die Rede. Im Gegensatz zum mongolischen Strafvollzug orientiert sich der deutsche Strafvollzug stärker am Resozialisierungsgedanken.

3.2.2 Zur Regelungen und Anwendung der Hauptstrafen

Was die Hauptstrafe anbetrifft, scheint die Sanktionenpalette im mongolischen Strafrecht auf den ersten Blick breiter zu sein als das deutsche. Aber das deutsche Sanktionensystem hat eine einfachere und relativ klare Struktur, die aus Geld- und Freiheitsstrafe besteht und bereits aus der zweiten Hälfte des 19. Jahrhunderts stammt[47].

Das Sanktionensystem des mongolischen Strafrechts, insbesondere im Bereich der Geldstrafe, kann mit dem deutschen nicht verglichen werden. Während die Besonderheit der Geldstrafe im deutschen Strafrecht durch das flexible Tagessatzsystem gekennzeichnet ist, hat die Mongolei ein starres Geldstrafensystem, in dem die Bemessung an den gesetzlichen monatlichen Mindestlohn geknüpft ist.

Beim Tagessatzsystem sollte sich die Höhe des Geldbetrages nach der Schuld des Täters auf der einen und seiner wirtschaftlichen Leistungsfähigkeit auf der anderen Seite richten. Unzumutbare Anforderungen dürfen an den Verurteilten nicht gestellt werden wie es im § 56b Abs. 1 Satz 2 StGB im deutschen Strafrecht geregelt ist.

Das mongolische Strafrecht enthält diese gesetzlichen Anforderungen nicht, nur die Berücksichtigung der wirtschaftlichen Leistungsfähigkeit des Täters erfolgt ein eher symbolischer, aber nicht in praktikabler Form. Das mongolische System mit starr festgelegten Geldstrafen stammt aus der Zeit des Sozialismus, als es landesweit noch relativ einheitliche Löhne und Lebensverhältnisse gab. Durch die heutige Marktwirtschaft gibt es enorme Unterschiede bei den Lebensverhältnissen, die ein starres System nicht mehr abdecken kann. Vor allem sind die willkürlich festgelegten Geldstrafen so hoch bemessen, dass der Großteil der Bevölkerung sie gar nicht leisten kann.

Was die Entwicklung der Geld- und Freiheitsstrafen in der Gerichtspraxis der beiden Länder betrifft, zeigt sich ein differenziertes Bild. Im Jahr 1882 waren in Deutschland noch 76,8 % aller verhängten Strafen Freiheitsstrafen und 22,2 % Geldstrafen. Heutzutage liegt der Anteil der Geldstrafe in Deutschland bei ca. 84 %, während die Freiheitsstrafe ohne Bewährung bei 5,2 % aller Verurteilten verhängt wird.

Die Anwendungsquote der Geldstrafe in der Mongolei dagegen lag bis zur Strafrechtsreform von 2002 noch bei 22 %, sank aber ab 2002 im Durchschnitt auf ca. 6 % und liegt seit 2009 sogar ständig bei unter 4 % aller Kriminalstrafen. Die Quote der Freiheitsstrafe ohne Bewährung in der Mongolei liegt in den letzten zwei Jahrzehnten im Durchschnitt dagegen bei ca. 33 %.

Die gesetzliche Festlegung der hohen Mindeststrafen im BT des mongolischen StGB schränkt nicht nur den richterlichen Entscheidungsspielraum ein, sondern führt in der Praxis zu unangemessenen Bestrafungen sowie außerdem zur Überfüllung der Gefängnisse. Deswegen sollte das Zurückdrängen des Freiheitsentzugs unnötiges Leiden vermindern und einen Rückfall des Täters

[47] Albrecht, H.-J., 2000, S. 21.

durch eine geeignete Behandlung in der Gesellschaft und in Freiheit verhindern.

Tabelle 1. Entwicklungstrend der

	Deutschland			Mongolei		
Bevölkerungszahl* (pro km²)	81,8 Mio. (230)			2,8 Mio. (1,9)		
Entwicklungstrend bei den Gefängnisinsassen**	Jahr	Gesamt-zahl	Rate pro 100 000 E	Jahr	Gesamt-zahl	Rate pro 100 000 E
	1992	57 448	71	1993	6085	270
	1995	66 146	81	1996	6070	265
	1998	78 592	96	1999	6414	271
	2001	80 333	98	2002	7256	296
	2004	81 166	98	2005	6998	274
	2007	75 719	92	2008	7570	287
	2010	72 052	88	2010	7265	269
Anteil weibliche Gefängnisinsassen	5,6 %			6,2 %		
Anteil jugendliche Gefängnisinsassen unter 18 Jahren	3,2 %			1 %		
Ausländische Staatsangehörige	26,7 %			0,3 %		
Anzahl Vollzugs- und U-Haftanstalten	186			62*** (Stand 2010) (davon 25 Gefängnisse; 26 U-Haftanstalten, 11 Arresthäuser)		
Offizielle Kapazität des Vollzugssystems	78 525 (30.11.2011)			8000 (28.08.2009)		
Belegungsrate (basiert auf offizieller Kapazität)	86,7 % (30.11.2011)			63 %**** (28.08.2009)		

Gefängnisinsassen in Deutschland und in der Mongolei

Wie in der *Tabelle 1* gezeigt wird, ist die Gefangenenrate pro 100 000 Einwohner in der Mongolei dreimal höher als in Deutschland. Für die Mongolei als eines der weltweit am dünnsten besiedelten Länder ist die Gefangenenrate extrem hoch. Sie beträgt schon 0,25 % der Gesamtbevölkerung. Nach der Liste der 222 Länder mit den weltweit höchsten Gefangenenraten belegt die Mongolei im Jahr 2015 mit 264 Gefangenen pro 100 000 Einwohner Platz 45, Deutschland mit 78 Gefangenen pro 100 000 Einwohner Platz 165.[48]

Im mongolischen Sanktionenrecht ist eine Zahlungserleichterung der Geldstrafe möglich, die im Grunde auch der Regelungen der deutschen Geldstrafentilgung ähnelt. Was das mongolische Strafrecht bisher gar

* Stand 2011.

** Roy Walmsley, ICPS World Prison Brief, aus http://www.prisonstudies.org/info/worldbrief/wpb_country_print.php?country=104; (und =139), vom 23.05.2012.

*** Diese Angabe der Gesamtzahl ist irrefьhrend, weil hier einzelne Abteilungen der Gefдngnisse separat gezдhlt werden. Es gibt insgesamt nur 25 Gefдngnisse mit integrierten U-Haftanstalten sowie eine separate U-Haftanstalt. Die 11 Arresthдuser sind ebenfalls in die Gefдngnisse bzw. in die U-Haftanstalten integriert.

**** Die amtliche Belegungsrate bezьglich der Verteilung der Gefangenen bzw. der Belegung einzelner Vollzugsanstalten ist wegen der Zдhlweise nach Abteilungen nicht nachvollziehbar. Die Belegungsrate wurde wohl automatisch ьber die Anzahl der Gefangenen und Anstalten errechnet. In der Mongolei werden stдndig Probleme der Ьberfьllung einzelner Vollzugsanstalten mit einfachem und strengem Regime berichtet.

[48] http://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All, letzter Zugriff Okt. 2015.

nicht kennt, ist die Verwarnung mit Strafvorbehalt im deutschen Sanktionensystem, die in Verbindung mit der Geldstrafe angeordnet wird. Dies ist identisch mit der Strafaussetzung zur Bewährung der Freiheitsstrafe, aber es ist eben nur bei der Geldstrafe anwendbar. In den mongolischen Reformdiskussionen wurde eine Aussetzungsmöglichkeit der Geldstrafe gelegentlich erwähnt, fand aber keine Zustimmung. Für viele scheint die Aussetzung der Geldstrafe zur Bewährung unvorstellbar zu sein, denn man kennt die Strafaussetzung in der Mongolei nur in Verbindung mit der Freiheitsstrafe. Aber das heißt nicht, dass es nicht machbar wäre. Ähnliche Strafarten wie die Verwarnung mit Strafvorbehalt des deutschen Strafrechts scheinen für die mongolischen Verhältnisse kriminalpolitisch durchaus interessant zu sein. Es ist zwar im mongolischen Strafrecht noch ein unbekanntes Feld, welches jedoch in Zukunft entdeckt und erforscht werden sollte.

3.2.3 Die Strafaussetzung zur Bewährung

Was die bedingte Freiheitsstrafe betrifft, wurde die Einführung der Strafaussetzung und Entlassung zur Bewährung im allgemeinen Strafrecht in das deutsche Sanktionensystem erst 1953 eingefügt und deren Wiedereinführung im Jugendstrafrecht. Im Vergleich dazu kannte das mongolische Strafrecht dieses spezielle Institut des Strafrechts dank des sowjetischen Rechtseinflusses bereits seit den 1920er Jahren. Es gibt aber einen Unterschied zwischen der beiden Ländern bei den Anwendungsmöglichkeiten der Strafaussetzung zur Bewährung. Auf den ersten Blick scheint das mongolische Sanktionenrecht bezüglich der Strafaussetzung zur Bewährung milder zu sein, denn es ist gesetzlich möglich die Freiheitsstrafen bis zu 5 Jahre zur Bewährung auszusetzen, während das in Deutschland nur bei Freiheitsstrafen bis zu 2 Jahren möglich ist. Der Haken des mongolischen Strafrechts liegt darin, dass mehrere gesetzliche Voraussetzungen zur Strafaussetzung auf Bewährung gesetzt sind, die alle gleichermaßen erfüllt werden müssen. Es muss also eine minderschwere Tat sein, der Täter muss ein Ersttäter sein, den Schaden freiwillig ersetzt und die Folgen der Tat beseitigt haben. Erst dann kann das Gericht entscheiden, wie lange die Dauer der Strafaussetzung erfolgt.

Im Gegensatz dazu gibt es im deutschen Strafrecht wenige Kriterien. Es muss bloß eine Straftat sein, für die vom Gericht bis zu 2 Jahre Freiheitsstrafe angedroht wird, wobei es genügt, dass vom Täter „zukünftig keine Straftaten zu erwarten sind." Dies war der Kernstück des deutschen kriminalpolitischen Programms, die nachhaltige Einschränkung der als resozialisierungsfeindlich angesehenen kurzen Freiheitsstrafe, die „in Zukunft nur noch in einem ganz engen und auch kriminalpolitisch vertretbaren Bereich verhängt und vollstreckt" werden sollte[49]. Ihre zeitliche Grenze bestimmt sich ohne Rücksicht auf den Deliktcharakter nach der Höhe der erkannten Strafe, so dass auch wegen Verbrechen verhängte Freiheitsstrafen aussetzungsfähig sind. Damit war die Erwartung verbunden, den Strafvollzug nachhaltig zu entlasten und so überhaupt erst die tatsächlichen Voraussetzungen für dessen Reform zu schaffen[50].

Solche Maßnahmen wie die Vereinfachung der Prognose und der Wegfall der formellen Ausschlussvoraussetzungen sind für die Mongolei kriminalpolitisch sehr ratsam, um das Problem der Gefängnisüberfüllung nachhaltig lösen zu können.

Im Gegensatz zur deutschen Regelung über die Strafaussetzung ist im mongolischen Strafrecht keine nachträgliche Verkürzung bzw. Verlängerung der Dauer der Strafaussetzung zur Bewährung möglich[51]. Die Grenze der Bewährung liegt zwischen einem und bis zu fünf Jahren. Die Frist wird in der Gerichtspraxis häufig sehr einfach festgelegt. Bei

[49] Erster Schriftlicher Bericht des Sonderausschusses für die Strafrechtsreform. BT-Drs. V/4094, S. 6.

[50] Erster Schriftlicher Bericht des Sonderausschusses für die Strafrechtsreform. BT-Drs. V/4094, S. 11.

[51] Vgl. dazu § 56a Abs. 2 Satz 2 dStGB.

Freiheitsstrafen für ein Jahr kann ein Jahr Bewährung, bei 3 Jahren Freiheitsstrafe ebenfalls 3 Jahre Bewährung und bei 5 Jahren Freiheitsstrafe 5 Jahre Bewährung etc. ausgesprochen werden.

3.2.4 Das Maßregelrecht

Obwohl die Maßregeln der Besserung und Sicherung etwas früher in das strafrechtliche Sanktionensystem der Mongolei eingeführt und angewendet wurde als die in Deutschland[52], entwickelte sich die mongolische noch nicht in so einem Umfang. Schon im ersten modernen StGB von 1926 (Kapitel 2, § 5 Abs. 11 mStGB von 1926) gab es zwar Regelungen über „die zwangsweise Behandlung von geistig gestörten Tätern" und „Befreiung von der Strafe" für solche Täter. Die deutsche Variante ist viel umfangreicher, während sich die mongolischen Maßregeln nur auf die stationäre Behandlung unzurechnungsfähiger Straftäter wegen psychischer Erkrankungen im psychiatrischen Krankenhaus oder auf die Unterbringung von zurechnungsfähigen alkohol- oder drogenabhängigen Verurteilten in einer Entziehungsanstalt beschränken. Die zweite Personengruppe wird während der Maßregelzeit nicht von der verhängten Strafe befreit, da die Abhängigkeit von Alkohol oder Drogen nicht als unzurechnungsfähig anzusehen ist. Diese Sanktionsart besteht bis heute, welche aber von Gerichten nicht häufig angeordnet wird. Ähnlich wie im deutschen Sanktionsrecht haben die behandlungsorientierten Maßregeln des mongolischen Sanktionensystems die gesellschaftssichernde Funktion.

Das Verbot der Ausübung einer bestimmten Tätigkeit oder eines bestimmten Berufes im mongolischen Sanktionensystem, was sowohl als Hauptstrafe als auch als Nebenstrafe angedroht werden kann, umfasst in gewisser Weise die nichtfreiheitsentziehenden Maßregeln (Entziehung der Fahrerlaubnis und das Berufsverbot) des deutschen Sanktionenrechts. Das mongolische Strafrecht kennt die Maßregel der Sicherung und die Führungsaufsicht dagegen nicht.

3.2.5 Die Jugendstrafe

Ein weiterer wesentlicher Punkt beim Vergleich betrifft die Regelungen der Jugendstrafe. Die 1953 erfolgte partielle Einbeziehung der 18- bis unter 21-Jährigen (Heranwachsende) in das deutsche Jugendstrafrecht ist für die mongolische Verhältnisse ganz neu. Das geltende Strafrecht der Mongolei kennt den Begriff des Heranwachsenden nicht. Es scheint sehr sinnvoll zu sein, für bestimmte Fälle solche Unterscheidung zu machen.

Im mongolischen Strafrecht wird das Jugendalter eines Täters bloß als Strafmilderungsgrund eingestuft. Außer den erziehungsorientierten Maßnahmen sind keine gesonderten Rechtsfolgen für Jugendliche vorgesehen. Im Vergleich zur Mongolei ist das Jugendstrafverfahren in Deutschland wesentlich anders und umfangreicher gestaltet. Erstens werden dort nur erzieherisch befähigte und in der Jugenderziehung erfahrene Jugendrichter sowie Jugendstaatsanwälte eingesetzt. Zweitens wird im gesamten Verfahren, insbesondere in der Hauptverhandlung, die Jugendgerichtshilfe herangezogen, die im mongolischen Strafrechtssystem nicht existiert. Außerdem haben die Eltern und gesetzlichen Vertreter ein weitgehendes Mitwirkungsrecht, während das Mitwirkungsrecht der Eltern in der Mongolei kaum geregelt ist. Die Sanktionen in Form von Erziehungsmaßnahmen und Zuchtmitteln werden in Deutschland nicht in das Zentralregister und dementsprechend nicht in das Führungszeugnis aufgenommen, sondern in ein sogenanntes Erziehungsregister eingetragen. Solche Sonderregelungen für Jugendliche Straftäter kennt das mongolische Strafrecht nicht.

[52] Die Wurzeln der hinter dem Gesetz von 1933 stehenden kriminalpolitischen Konzeption reichen zurück bis zum „Marburger Programm" Franz von Liszts aus dem Jahre 1882, in der er die Fragen der individualpräventiven Wirkungen der Strafe verdeutlichte. Vgl. dazu Germann, U., 2009, S. 85 ff.

IV. Fazit

Angesichts der aufgezeigten Entwicklung wäre aus Sicht der Verfasserin in der Mongolei darüber nachzudenken, folgende Änderungen im Bereich der strafrechtlichen Sanktion vorzunehmen.

– Da die Kriminalitätsentwicklung durch Verschärfung der Sanktionen in der Regel nicht günstig beeinflusst wird, ferner empirische Untersuchungen dafür sprechen, dass nicht das Strafniveau, sondern das subjektive Strafempfinden positiv generalpräventiv wirkt, besteht Spielraum für einen Ausbau des Sanktionenkatalogs, z. B. bei den nicht freiheitsentziehenden Alternativsanktionen[53]. Aus dieser Prämisse brauchen wir die Erfahrungen aus Deutschland im strafrechtlichen Bereich, wo der Staat eine gesellschaftliche Zielsetzung in den Vordergrund stellt.

– Andererseits dürfen die Erwartungen an die Wirkung und Effizienz mancher strafrechtlichen Sanktionen nicht zu hoch angesetzt werden. Andere Kontrollmechanismen aus dem weiteren Bereich des Rechts und auch außerhalb des Rechts können die Wirkungen der strafrechtlichen Sanktionen verstärken oder sie neutralisieren. Für die Neuerrichtung von Vollzugsanstalten und deren Finanzierung wurde in der jüngsten Vergangenheit aus dem Staatsbudget der Mongolei viel Geld ausgegeben. Würde dieses Geld stattdessen für die Neuschaffung von Arbeitsplätzen und für die Ausbildung verwendet, wird das sicherlich mehr zum Ziel beitragen, dass weniger Straftaten begangen werden. Dadurch könnte denjenigen Formen der Kriminalität der Nährboden entzogen werden, die durch extreme Armut sowie völlige Aussichts- und Perspektivlosigkeit verursacht werden, was das eigentliche Ziel der Sanktionen sein sollte und die gewünschten positiven Auswirkungen auf die Gesellschaft bringen wird. Diese die Kriminalität fördernden Ursachen zu beseitigen ist eine Aufgabe der Gesellschaft und der Politik, aber es kann ein wirkungsvollerer Weg sein, als die Symptome der Kriminalität nachträglich mit einem aufwendigen Justizapparat und dem Bau teurer Gefängnisse zu bekämpfen.

- Das Rechtsstaatsprinzip bzw. die Geeignetheit der Mittel, die Verhältnismäßigkeit und das Subsidiaritätsprinzip gelten als Leitprinzipien einer rationalen Strafgesetzgebung. Außerdem gelten internationale Einschränkungen zum Schutz der Menschenrechte[54] als Grenzen der Strafe bzw. der durch Strafe zuzufügenden Übel. Strafe ist eine Art von Gewalt und daher wird sie zum Stigma. Fraglich ist nun, ob das Stigma einer Gefängnisstrafe wegen seiner langanhaltenden negativen Wirkung für den Bestraften in der Gesellschaft nicht als eine zusätzliche „Strafe“ anzusehen ist, oder ob man deshalb möglichst versuchen soll die Stigmatisierung durch die Strafe zu verringern oder gar zu vermeiden. Für alle Fälle sollten die allgemeinen Grundsätze des Rechtsstaates und die des Strafrechts als Leitprinzipien sowie das Stigma durch die Strafe als Nebeneffekte bei der Bestimmung und Anwendung der mongolischen strafrechtlichen Sanktionen mehr Berücksichtigung finden.

– Darüber hinaus sollte der Staat das fundamentale Prinzip der mongolischen Philosophie und das traditionelle Lebensmotto der Mongolen „gegenseitige Unterstützung ist das Fundament der Weiterentwicklung“ zum Leitthema machen. Für diejenigen, die leichtere Verfehlungen begangen haben, sollten zuerst die informellen Kontrollmechanismen (Familie, Schule, Beruf usw.) benutzt werden.

– Weiterhin sind vielfältige Auswahlmöglichkeiten der Sanktionen (Bewährungsmöglichkeit bei Geldstrafe, gemeinnützige Arbeit, Täter-Opfer Ausgleich, Wiedergutmachung) sowie eine Erweiterung des Anwendungsbereichs der alternativen

[53] Zitat aus Abschlussbericht zur Reform, S. 28.

[54] Art. 5, 9 und 11 der Allgemeinen Erklärung der Menschenrechte vom 10. Dezember 1948, Art. 6, 7, 8, 9 und 10 des Internationalen Paktes über Bürgerliche und Politische Rechte vom 16. Dezember 1966, die UN-Anti-Folter-Konvention vom 10. Dezember 1984, die UN-Kinderrechtskonvention vom 20. November 1989 usw.

Sanktionen sehr zu empfehlen.

Künftig sollten folgende internationale Trends im Rahmen der Sanktionspolitik zur Überlegung stehen:

– Einführung der Diversion und informellen Konfliktschlichtung in Strafsachen. Eine ähnliche Regelung gibt es schon in der StPO der Mongolei nach § 70 StGB, nämlich die Einstellung der leichten Straftaten durch den Staatsanwalt nach §§ 25, 208 StPO. Dies könnte in minderschweren Fällen weiter ausgeweitet werden.

– Mediation in Strafsachen. Die ersten Schritte der Mediation in Zivilverfahren, in familien- und arbeitsrechtlichen Streitigkeiten sind schon in der Mongolei vorgenommen worden und gewisse positive Erfahrungen sind bereits vorhanden. Das ist als Vorteil anzusehen. Praktisch spricht nichts dagegen, die Mediation ebenfalls im Bereich des Strafrechts einzuführen.

– Verzicht auf die Zwangsarbeit des geltenden Rechts der Mongolei in der jetzigen Form. Dies sollte nicht nur durch bloße Umbenennung, sondern vielmehr durch eine konzeptuelle Änderung zur gemeinnützigen Arbeit weiterentwickelt werden. Diese soll mit mehr Beteiligungsmöglichkeiten und unter Einbeziehung der Zivilgesellschaft erfolgen, oder die Form der Arbeit müsste völlig neu organisiert werden.

– Prinzipiell muss die gemeinnützige Arbeit gegen Entgelt abzuleisten sein, wobei ein Abzug in bestimmter Höhe als Strafe anzuerkennen ist und dem Verurteilten mindestens das Existenzminimum übrigbleiben muss. Man darf nicht vergessen, dass manche Täter nur Verbrechen begehen, um überhaupt überleben zu können[55]. In solchen Fällen besteht in immer stärkerem Maße ein Bedarf für andere Sanktionsformen als die Geldstrafe. Um eine bessere Umsetzung der gemeinnützigen Arbeit zu erzielen, müssen neue Stellen bzw. Aufgaben geschaffen werden, die allgemein nützlich sind und auch von ungelernten Arbeitskräften gemacht werden können, statt neue Gefängnisse zu bauen.

– Kriminalpolitisch sollte die Stellung der gemeinnützigen Arbeit weitgehend über ihr Potential hinaus als Alternative zur Freiheitsstrafe und insbesondere zur kurzen Freiheitsstrafe werden lassen. Dadurch könnte es möglich werden, die Verhängung unbedingter Freiheitsstrafen einzuschränken und die Entwicklung der Gefangenenraten positiv zu beeinflussen. Die Erweiterung des Anwendungsbereichs der gemeinnützigen Arbeit im mongolischen Strafrecht kann jedoch nur unter der Voraussetzung erfolgreich sein, wenn eine ausreichende Zahl von geeigneten Beschäftigungsstellen vorhanden ist, bzw. gewonnen werden kann. Durch den Aufwand für die Vermittlung der Beschäftigungsstellen und die Betreuung der Verurteilten während der Ableistung der Arbeit entstehen zwar Kosten, denen man jedoch mit den weitaus höheren Kosten der Gefängnisstrafen entgegenstellen muss, die derzeit vorrangig praktiziert werden. Schließlich wiegt die Freiheitsstrafe auch als Kriminalsanktion bedeutend schwerer als die Ableistung gemeinnütziger Arbeit, die die Freiheit des Verurteilten weniger beschränkt.

– Da sich die Strafziele verändert haben, sollte der Opferschutz mehr in den Vordergrund gestellt werden als bisher. So ist die Wiedergutmachung als selbständige Sanktion bei kleinerer und mittlerer Kriminalität eingeführt werden, insbesondere scheint sie als Jugendstrafe sehr sinnvoll und angemessen zu sein.

– Die Abschaffung der Todesstrafe *de jure*, die Streichung der Kerkerstrafe und der Einzelhaftstrafe aus dem Sanktionensystem sind wegen ihrer Grausamkeit bzw. der unangemessenen Härte dringend erforderlich.

– Es ist unabdingbar, gesonderte mildere Jugendstrafe anzuschaffen. Hier können die Erfahrungen in deutschem Jugendstrafrecht ein gutes Beispiel sein.

[55] Armut ist kein Rechtfertigungsgrund für Verbrechen, aber eine Ursache. Es ist leider ein häufig vorkommendes Phänomen in der mongolischen Gesellschaft, welches bei der Normsetzung unbedingt mitberücksichtigt werden sollte. Die Mongolei sollte vielmehr mit sinnvoller sozialer Politik nachhaltig die Ursachen der Armut bekämpfen, statt mit strengen Sanktionen gegen die Straftäter vorzugehen, die wegen ihrer Armut Verbrechen begehen.

– Nicht zuletzt darf das Strafrecht nicht mehr als ein Instrument des parteipolitischen Kampfes benutzt werden, damit der Fehler, den die Mongolei vor der Demokratisierung begangen hat, nicht wiederholt wird.

Literaturverzeichnis

Albrecht, H.-J. (2007): Perspektiven kriminologischer Forschung. Der Wandel im Konzept der Sicherheit und neue Aufgabenfelder der Kriminologie. In: Kriminologie im 21. Jahrhundert. Hrsg. K. Liebl. Wiesbaden, S. 177–201.

Albrecht, H.-J. (2005): §§ 40-43, §§ 59, 59a, 59b, 59c und 60. In: Nomos Kommentar zum Strafgesetzbuch. 2. Aufl. Hrsg. U. Kindhäuser, U. Neumann, H.-U. Paeffgen. Nomos, Baden-Baden.

Albrecht, H.-J. & Hotter, I. (2003): Jüngste Vorschläge zu Reformen im Bereich des Jugendstrafrechts. In: Recht der Jugend und Bildungswesens 51, S. 282–298.

Albrecht, H.-J. (2000): Rechtsvergleichendes Gutachten, in: Abschlussbericht der Kommission zur Reform des strafrechtlichen Sanktionensystem, S. 20.

Albrecht, H.-J. (1999): Strafen, Sanktionen, Tabus in Europa – Bibliographie. In: Das gemeinsame Haus Europa – Handbuch zur Kulturgeschichte Europas. Hrsg. W. Köpke, B. Schmelz. DTV, München, S. 382-394.

Albrecht, H.-J., Dünkel, F. & Spieß, G. (1981): Empirische Sanktionsforschung und die Begründbarkeit von Kriminalpolitik. MschrKrim 1981, S. 310-326.

Baumann, J., u. a. (1969): Alternativ-Entwurf eines Strafgesetzbuches. Allgemeiner Teil, 2. Aufl. Tübingen.

Calliess, R.-P. (1989): Die Abschaffung der Todesstrafe – Zusatzprotokoll Nr. 6 zur Europäischen Menschenrechtskonvention, NJW 1989, 1019–1021.

Dünkel, F. (1983): Rechtliche, rechtsvergleichende und kriminologische Probleme der Strafaussetzung zur Bewährung, ZStW 95, S. 1039–1075.

Erster Schriftlicher Bericht des Sonderausschusses für die Strafrechtsreform. BT-Drs. V/4094, S. 6 ff.

Gebhardt, I. (2002): Justizreform in der Mongolei. In: Jahrbuch für Ostrecht 43, 1. Halbbd, S. 237–257.

Germann, U. (2009): Zweispurige Verbrechensbekämpfung. Rg14/2009 (S. 84-121), unter: http://data.rg.mpg.de/rechtsgeschichte/rg14_084germann.pdf (abgerufen am 20. 08. 2015).

Heinz, W., (2007): Das strafrechtliche Sanktionensystem und die Sanktionierungspraxis in Deutschland 1882–2005. Konstanzer Inventar Sanktionsforschung. Unter: www.uni-konstanz.de/rtf/kis/sanks05.pdf (abgerufen 1/2007).

Jehle, J.-M. (2015): Strafrechtspflege in Deutschland. Fakten und Zahlen. 6. Aufl. Unter: http://www.bmj.de/SharedDocs/Downloads/DE/Broschueren/Strafrechtspflege-Deutschland.pdf?__blob=PublicationFile (abgerufen Oktober 2015).

Jescheck, H.-H. (2004): Strafgesetzbuch. 39. Aufl., München 2004.

Jescheck, H.-H. & Weigend, T. (1996): Lehrbuch des Strafrechts. Allgemeiner Teil, 5. Aufl., Berlin.

Jescheck, H.-H. (1992): in: Leipziger Kommentar, 11. Aufl., Berlin/New York.

Kaiser, G. (1996): Kriminologie. Ein Lehrbuch. 3. Aufl., Heidelberg.

Kajuth, J. (2003): Монгол улсын эрүүгийн эрх зүйн цаашдын хөгжилд өгөх зөвлөмж (Empfehlungen zur weiteren Entwicklung des mongolischen Strafrechts, acht Jahre der mongolischen Rechtsreform), Ulaanbaatar, S. 503–528.

Konferenzbuch „Die Verfassung und demokratischer Rechtsstaat“ in Zusammenarbeit mit der GTZ, KAS zum Anlass des 30. Jahrestages der Aufnahme diplomatischer Beziehungen zwischen der Bundesrepublik Deutschland und der Mongolei, Ulaanbaatar 2004.

Konferenzunterlagen zum Thema „Reformen des öffentlichen Rechts und des Strafrechts“, Ulaanbaatar, 2002.

Kulemeier, R. (1993): Fahrverbot und Fahrerlaubnisentzug – Sanktionen zur Bekämpfung der allgemeinen Kriminalität? NZV, 212–215.

Laun, S. (2002): Alternative

Sanktionen zum Freiheitsentzug und die Reform des Sanktionensystems, Frankfurt am Main.

Maurach, R., Gössel, K.-H. & Zipf, H. (1989): Strafrecht Allgemeiner Teil. Teilbd. 2: Erscheinungsformen des Verbrechens und Rechtsfolgen der Tat (C.F. Müller Lehr- und Handbuch). 7. Aufl., Heidelberg.

Meier, B. D. (2006): Strafrechtliche Sanktionen. Springer-Lehrbuch. 2. Aufl.

Nelle, D. (2003): Die Reform von Strafrecht, Strafprozess und Strafvollzug in der Mongolei. ZStW 115, H. 2, S. 51–88.

Roxin, C. (2006): Strafrecht. Allgemeiner Teil, Bd. 1, 4. Aufl., München.

Roxin, C., (1997): Strafrecht. Allgemeiner Teil, Bd. 1: Grundlagen, Aufbau der Verbrechenslehre, 3. Aufl., Verlag C.H. Beck.

Scholler, H. (2010): Grundrechte und Rechtskultur auf dem Weg nach Europa. Berlin.

Walmsley. R., ICPS World Prison Brief, unter: http://www.prisonstudies.org/info/worldbrief/wpb_country_print.php?country=104; (und =139) (abgerufen am 23.05.2012).

Weigend, T. (1986): Die kurze Freiheitsstrafe – eine Sanktion mit Zukunft? JZ, S. 260–269.

Wolfrum, R. (2006): Das Recht der Mongolei unter Dschingis Khan und seinen Nachfolgern: Die Bedeutung des Rechts in nicht-staatlich verfassten Gesellschaften. In: Verfassung und Recht in Übersee (VRÜ). 39. Jg., S. 5–17.

Монгол улсын Эрүүгийн хууль (Das Strafgesetzbuch der Mongolei), Төрийн мэдээлэл (Staatsbulletin), 2002 Nr. 5.

Монгол улсын Эрүүгийн хууль, Эрүүгийн байцаан шийтгэх хууль (Strafgesetzbuch und Strafprozessgesetz der Mongolei), Ulaanbaatar 2008.

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MAJOR CHARACTERISTICS OF THE HUNGARIAN PRISON SERVICE

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Abstract: The aim of this publication is to introduce the activities of the Hungarian Prison Service[1]. The main parts of article is about the government agency responsible of providing prison service, the main characteristics of Hungarian Prison Service (HPS); some key data and statistics and the future perspective of the Hungarian prisons.

Keywords: Hungarian prison Service (HPS), prisons, prisoners and prison officers.

Hungarian Prison Service (HPS)

Because there is limited information published in English on the HPS, I offer a brief overview of the structure of the prison system. In Hungary, prison service fall under the authority of the Ministry of Interior. Prison statistics are updated half a year on the HPS website (www.http://bv.gov.hu/en).Along with fulfilling its legal obligation of providing data of public interest, the PHS provides a wide range of up-to-date information for research and analysis purposes.

The historical background of the Hungarian Prison Service (HPS).

In Hungary the penal enforcement became institutionalized by the state in the last quarter of the 19th century, and the prison system was established in these decades, accompanied by suitable legal regulation.

At the end of World War I up to the change of regime, which took place in 1990, the successive political regimes did not care about the development of the prison estate. There were some attempts to bring the prison system in line with the standards of the penitentiary organizations in the most developed countries of the world.This is particularly a characteristic practice since Hungary became a Member of theEuropean Union in 2004, and deriving from the Membership, several undertakings have fallen upon the HPS as well. The physical upgrading in the conditions of detention, such as the modernization, repairs, construction constitute only one part of this developmental process, while the establishment of forms of adequate treatmentand activities for inmates is of the same importance.

Legislative framework

The Criminal Code (Penal Code) of 1978 has been substantially amended onmany occasions, notably by a new Act which came into force in 1993[2]. TheCriminal Procedural Code dates back to 1973, but has been amended to accordwith democratic developments and a new code was approved by Parliament in1998; originally expected to come into force in the year 2000, this date has beenput back until 1 July 2003[3].After the enactment of the **European Prison**

[1] **The Prison Service** carries out custodial detention and sanctions defined by law. The organization is also responsible for the after-care following the release from prison and the tasks related to the correctional probation services. The Prison Service is under the control of the Ministry of Interior and is an independent and armed law enforcement agency.

[2] Roy Walmsley, Prisons In Central And Eastern Europe, HEUNI Paper No. 22, The European Institute For Crime Prevention And Control, Affiliated With The United Nations Helsinki, 2005 (ISSN 1236-8245), pp. 303-3

[3] Ibid.

Rules[4] in 2006 and the Hungarian Prison Code in 2009, many changes followed in Hungarian prison policies. These changes aimed to improve prison conditions, though the implementation of the Prison Rules has been gradual and much work remains.

The new Prison Code, part of the ongoing comprehensive legal reform, used the new criminal code. Act no. CCXL of 2013 places great emphasis on the social integration of former prisoners in order to facilitate their successful participation in the lives of law-abiding communities after release[5].

Organizational structure

The Hungarian prison system has been the responsibility of the Ministry of Interior since1963. The Director General (head of the National Prison Administration) is General MrAndrás Csóti[6]. The senior management team includes the first Deputy Director **Major General Dr. Tamás Tóth**, the Deputy Director General responsible for financial matters **Major General József Lajtár and** Deputy Director General, Security and Incarceration **Major General János Schmehl**[7]. The HPS Headquarters is based in Budapest.

General prison conditions

Hungary has three categories of security prisons: i) *Minimum* (Fogház), holding those under 18 years of age and prisoners authorized to be in atransition group towards the end of their sentence. Prisoners may move freely withinthe parameters of the prison[8]; ii) *Medium* (Börtön), holding the majority of prisoners on remand(Bv. Intézet) and those convicted of nonviolent crimes. Prisoners may move freely in determined areas within the parametersof the prison[9]; iii) *High security prisons* (Fegyház), holding prisoners serving life imprisonment; for a sentence ofover three years for crimes against the state, terrorism, firearms, drugs, homicide,kidnapping, sexual assault, and other violent crimes. Prisoners may move within theparameters of the prison only with proper authorization and under supervision. Thismay be loosened exceptionally after one year of imprisonment[10]. Female prisoners are segregated from male prisoners and adult prisoners are segregatedfrom juvenile prisoners under 21 years of age.Most of the prisons were built in the second half of the 19th century[11].

Financial Management: The available central funding is sufficient to ensure stable operation. The amended spending allowances on December 31(2014) called for 61,5% personnel and related cost, 33,9% material cost, and only the remaining 4,6% were dedicated to other operational and savings cost. The HPS used some of savings to make investments and renovations during the year, including security system upgrades, guard station modernization, installing new kitchen appliances, renovating cells and upgrading electric networks[12]. In 2014 every eligible member of staff received HUF 61,500 worth of clothing and uniform (12M law enforcement summer service boots, summer service jacket and tactical belt) and HUF 35,000 in cash as clothing allowance[13].

Prison population: Prisoners numbers increased at a slower rate than before. Strict and medium regime sentences continue to dominate; the increase in total prisoner numbers fell almost entirely into one of these categories[14] (Figure1).

[4] The European Prison Rules, which provide the benchmark for assessing the quality of the management of prisons and the treatment of prisoners. The Director General and his deputies have copies, as do management staff at the national prison administration and in each prison. Copies are also said to be available to be used by other prison staff and by prisoners.

[5] Annual Report 2014,pp. 88-108

[6] www.http://bv.gov.hu/en (Viewed 12 November 2016)

[7] Ibid.

[8] The report on the visit of the Hungarian penal institutions (The information was obtained during the visit of Hungarian prisons by author in 2015-2016).

[9] Ibid.

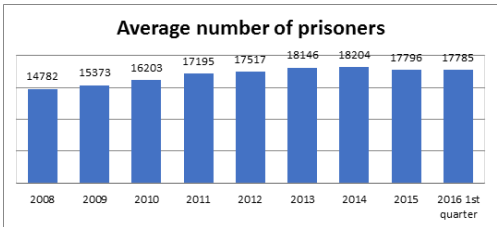
[10] The report on the visit of the Hungarian penal institutions (The information was obtained during the visit of Hungarian prisons by author in 2015-2016).

[11] Ibid.

[12] Annual Report 2014, pp. 88-108

[13] Ibid.

[14] Ibid.



On 2015, 17,796 individuals were incarcerated in Hungary (nearly as the same as from the previous year). Hungary has an overall incarceration rate of 128 per100,000 population, compared with a rate of 149 per 100,000 population for England and Wales, 143 for Australia, 142 for Spain, 81 for Germany, and 57 per 100,000 population for Sweden[15]. While Hungary does not have the highest imprisonment rate in Europe, these figures have been on the decline over the course of the past decade.

Accommodation and overcrowding

There are 27 prisons, Headquarter (HQ) and 6 affiliated institutions to Prison Service Headquarters[16]:

- Training Center of the Prison Service, National University of Public Service, Faculty of Law Enforcement, Penitentiary Department.
- Further Training and Conference Center of the Prison Service.
- Central Hospital of the Prison Service, Forensic Psychiatric Mental Institution.
- The Museum of the Hungarian Prison Service.

In addition to these institutions, the set of public (prison) limited companies[17] are operating under the control of Prison Service HQ[18]:

- BV Holdings Kft.,
- ADORJAN-TEX Ltd.,
- Allampuszta Ltd.,
- Annamajor Ltd.,
- BUFA Ltd.,
- DUNA-MIX Ltd.,
- DUNA-PAPIR Ltd.,
- Ipoly Ltd.,
- Nagyfa-Alfold Ltd.,
- Nostra Ltd.,
- Palhalma Agrospecial Ltd.,
- Sopronkohida Ltd.

Prison establishments are headed by prison governors. They are tied to the Headquarters through service agreements. According to the rules, all prisoners would have at least3.5m² of space. This increase in planned space per prisoner brought the Hungarian prison system closer to the 4m² which is regarded as the minimumacceptable by the European Committee for the Prevention of Torture (CPT) but, having been accompanied by an increase in the prisonpopulation, has drawn attention to the *degree of overcrowding* in the system (Figure 2).

Very few prisoners arehoused alone in single cells. Some of new institutions, such as the prison section for the life sentenced prisoners follow a policy of locating a prisoner in a cell[19].

The prison service provides the toilet paper[20]. Everyprisoner is able to have a bath or shower at least once a week; those in work canshower every day[21]. Women and juveniles are also able to shower every day[22]. Pretrial detainees are given the opportunity of wearing their own clothing if it isclean and suitable; sentenced prisoners must wear a prison uniform but may usethei own underwear

[15] Annual Report 2014, pp. 88-108

[16] REVIEW OF HUNGARIAN PRISON STATISTICS, The Hungarian Prison Service Headquarters, ISSN 2416-1233, 2016, pp.3-26

[17] Prison limited companies are 100% state owned companies, serving outstanding social and public safety interests. The goal of the companies is to use the resources efficiently and even strive towards profit oriented operation in a holding structure.

[18] Annual Report 2014, pp. 88-108

[19] Roy Walmsley, Prisons In Central And Eastern Europe, HEUNI Paper No. 22, Prisons In Central And Eastern Europe, The European Institute For Crime Prevention And Control, Affiliated With The United Nations Helsinki, 2005 (ISSN 1236-8245), pp. 303-3

[20] The report on the visit of the Hungarian penal institutions (The information was obtained during the visit of Hungarian prisons by author in 2015-2016)

[21] Ibid.

[22] Ibid.

and take responsibility for washing it[23].

YEARLY AVERAGE OVERCROWDING (%)

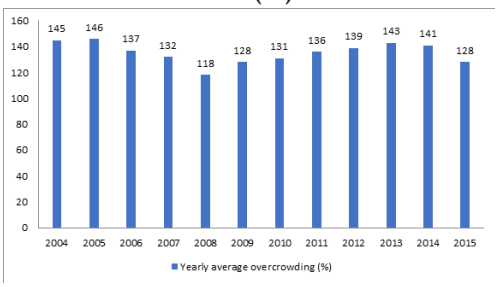


Figure 2

The average of these indexes is 128%,which is a significant decrease (the average overcrowding was 141% for 2014)[24].The overcrowding of prisons is mainly caused by the changes in criminal law and the changesin capacity (restructuring institutions and establishing new places). During the last year asignificant expansion of 900 capacities took place (e.g. Middle-Transdanubium NationalPrison (Martonvásár), Szombathely National Prison, Budapest Strict and Medium RegimePrison) and furthermore a plan has been accepted to build until 2019 one prison holding 1000inmates and 8 prisons holding 500 inmates each and furthermore a prison hospital[25].

Food and medical services

The prison authorities have assured us that the food they provide is a balanced dietsupplying the necessary daily nutritional requirements[26]. The quality and quantity of food is regarded by the head of the health care department as at least equal to average standards in communal catering outside,with the variety and quantity often being superior.

Prison health care isfunded from two sources: from the central prisons budget and from public healthinsurance[27]. An outside hospital is used if the prison hospital does not have the specialistrequired. There is also a forensic psychiatric unit (IMEI) within the grounds ofBudapest Central Prison which is used for neurological and psychiatric treatment and for the observation of those suspected of being mentally ill.

HIV testing is compulsory in Hungarianprisons and is part of Ministry of Health regulations. It forms part of the processof medical examination on admission[28]. The National Ambulance Emergency Service offered emergency care when it was needed. The HPS also organize preventive measures like screenings, vaccines and protective gear[29].

Discipline and punishment

The least serious disciplinary sanction is a caution and the most serious is solitary confinement.In maximum security regimes, solitary confinementmay be for up to 30 days, in medium security up to 20 days and in minimumsecurity up to 10 days. "During this time they cannot receive or send parcels,cannot have visitors, cannot buy any items for themselves, and cannot use theprison's cultural or sport facilities either[30]. As part of ongoing IT application development project, an integrated criminal and disciplinary record subsystem (module) was created under our updated and extended human resource records[31].

Contact with the outside world

The legislation only states that visits, both to pre-trial detainees andsentenced prisoners, shall be at least once a month,

[23] Ibid.

[24] REVIEW OF HUNGARIAN PRISON STATISTICS, The Hungarian Prison Service Headquarters, ISSN 2416-1233, 2016, pp.3-26

[25] REVIEW OF HUNGARIAN PRISON STATISTICS, The Hungarian Prison Service Headquarters, ISSN 2416-1233, 2016, pp.3-26

[26] The report on the visit of the Hungarian penal institutions (The information was obtained during the visit of Hungarian prisons by author in 2015-2016).

[27] Roy Walmsley, Prisons In Central And Eastern Europe, HEUNI Paper No. 22, Prisons In Central And Eastern Europe, The European Institute For Crime Prevention And Control, Affiliated With The United Nations Helsinki, 2005 (ISSN 1236-8245), pp. 303-3

[28] Ibid.

[29] Annual Report 2014, pp. 88-108

[30] The report on the visit of the Hungarian penal institutions (The information was obtained during the visit of Hungarian prisons by author in 2015-2016).

[31] Annual Report 2014, pp. 88-108

for half an hour[32]. Low security prisoners may be permitted to receive a visitor outside the prison;*medium security visits are across a table which has a shelf dividing the prisoner from the visitors*, and high security visits are closed in that they are conductedby telephone through a screen[33].

Mail/Parcels and calls

The prison authorities can open all letters and parcels to check their contents, unless theletter is between you and consular officials, international organizations, or Hungarianauthorities[34]. The prisoners are entitled to send one letter free of cost per month[35].

The prisoners can receive and send one package per month, although the prison director may allow for them to send and/or receive parcels at shorter intervals. Each package should weigh nomore than 5kg. Food stuffs, drinks, medicines and objectsdeemed as a threat to prison security.

In regard to the calls, in all cases this will be decided by the public prosecutor's office or by the judge. Once you have been sentenced this would normally be lifted and you would be able to make calls[36]. To do this you would normally have to buy a telephone card.

Prison staff

Staff Training: At the Prison Service training there are short-term (14 week elementary prison service, intermediate level, modular) courses[37]. In addition to it the main way of training are the Correctional Supervisor and the stress management training courses (it was introduced to help preserve employee health and improve the working environment)[38]. The programs were approved by the Ministry of the Interior Training Council[39].

Initial training for new recruits to the prison service as basic level securitystaff lasts three weeks at the Prison Service Training Centre. A key part of staff training is aboutchanging attitudes towards prisoners but the prison administration reports thatdue to staff vacancies and lack of resources such training is not occurring inpractice[40].Most educators in prisons are women. The male staff are security guards, economic anddducational experts and the doctor.Security staffs are selected either to guard the perimeter or to work in theprison in contact with the prisoners.

There were 8,315 approved positions in the organizational chart, with funding for 8,350. In accordance with applicable legislation, 30 positions were moved from Government Offices to the Prison Service to account for an increased workload (prisoner follow-up, probation services)[41]. In terms of human resource management, the HPS Annual Report 2015 reveals that there was 4,048 staff working across Hungary (HPS 2015)[42].

The number of prison staff on 2 February 2016 was 8,362, of which 2,639 were female and 5,723 male[43].

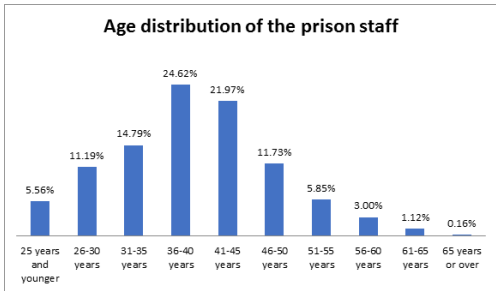


Figure 3[44]

In the figure above age distribution of the total prison staff can be seen. The average age for the total prison staff of 8,362 is 39 years, the

[32] The report on the visit of the Hungarian penal institutions (The information was obtained during the visit of Hungarian prisons by author in 2015-2016).

[33] Ibid.

[34] Ibid.

[35] Ibid.

[36] Ibid.

[37] Annual Report 2014, pp. 88-108

[38] Ibid.

[39] Ibid.

[40] Ibid.

[41] Ibid.

[42] Annual Report 2014, pp. 88-108

[43] REVIEW OF HUNGARIAN PRISON STATISTICS, the Hungarian Prison Service Headquarters, ISSN 2416-1233, 2016, pp.3-26

[44] Ibid.

youngest staff member is 19, and the oldest is 71years old. The majority of the staff belongs to the categories of 36-40 and 41-45 years of age,altogether they make up almost half of the staff (more than 46%). The two ends of thespectrum proportioned by age groups are the under 25 years of age (5.56%) and the above 50years of age (adding up to more than 10% when aggregated).

Treatment and regime activities

The prison administration points out that following the political changes in 1990the prison system ceased to attempt to change the prisoners but wanted rather togive them the opportunity to change. This is seen as a long process that willdevelop gradually.Each sentenced prisoner becomes part of an educator's group, the educatorbeing responsible for the prisoner's welfare, progress and activities. Sentenced prisoners spend 8 or 9 hours out of their cell or room if they havework; otherwise it is 4 or 5 hours on average[45]. Pre-trial prisoners are reported tohave one hour exercise but no additional time out of their cells.

For social and psychological problems it is sometimes possible to makeuse of social workers, psychologists or priests.Sixmonths before release the educator discusses accommodation and employmentprospects, and there is a special programme for providing assistance in findingwork[46]. Long-term prisoners are prepared for release during the last two years oftheir sentence[47]. They are placed in groups giving them more independence andthe possibility of leaving the prison to find employment[48]. Non-governmental organizations are also reportedto play an important part in pre-release preparation.

Prison Enterprises and Central Procurement: Industrial enterprises are greatly affected by central procurement, which is a way for the government to regulate demand for the products in order to support prisoner employment. Agricultural enterprises have a stable operational background due to the reliable sectoral structures and subsidies in place. The enterprises participated in government programs under the Ministry of the Interior by delegating experts and providing support to various programs like the START program, public worker employment in a sewing factory, and document shredding[49].

PRISONER EMPLOYMENT STATISTICS[50]

Table1

	Average number of employed prisoners			
(capita)	2012	2013	2014	2015
Employment by the prison ltd. companies	3,570	3,753	4,137	4,405
Of which employed in industrial prison ltd. companies:	1,653	1,846	2,082	2,334
Of which employed in agricultural prison ltd. companies:	1,917	1,907	2,055	2,071
Penitentiary employment	2,430	2,765	2,741	2,963
PPP employment	781	723	684	672
Total:	6,781	7,241	7,562	8,040

[45] Roy Walmsley, Prisons In Central And Eastern Europe, HEUNI Paper No. 22, Prisons In Central And Eastern Europe, The European Institute For Crime Prevention And Control, Affiliated With The United Nations Helsinki, 2005 (ISSN 1236-8245), pp. 303-3

[46] Ibid.

[47] Ibid.

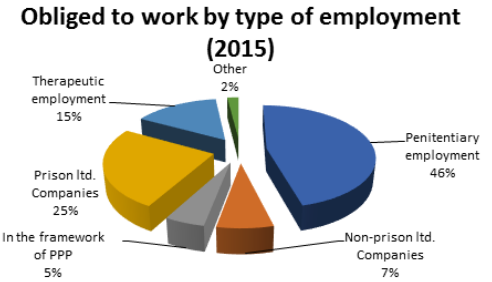
[48] Ibid.

[49] Annual Report 2014, pp. 88-108

[50] REVIEW OF HUNGARIAN PRISON STATISTICS, The Hungarian Prison Service Headquarters, ISSN 2416-1233, 2016, pp.3-26

Employment is the key element and main instrument of the reintegration of prisoners intosociety (Table1). In the table above employment is categorized by the nature of work carried out by the prisoners. It may be seen that both the employment by the prison limited companies, and also the penitentiary employment shows a constant expansion, while the rate of the prisoners employed in the framework of Public Private Partnership (PPP) construction decreases.Paid work is available in accordance with theopportunities of the prison. When considering a detainee for work, physical, psychological,professional skills, and interests are taken into consideration. The time permitted to workand the compensation for work done is determined by the relevant labor law regulations. The prisoner may request to take part in primary/secondary education or vocational training and mayuse the prison library (könyvtár)[51].

compared to the number of prisoners obliged to work. This ratio of the prisoners was 80% in 2014 and 87% in 2015[53].



Sentenced prisoners are required to work if they are fit to do so and if work is available for them.

There are now **economic companies** (public limited companies) operating within the prisons but under directors whoreport to the Ministry of Interior through the national prison administration. Prisoners either work for one of these prison companies or they are employed by the prison on work

Employment of prisoners		
Average yearly number (capita)	2014	2015
Convicted prisoners obliged to work	11,746	11,933
Employed in working	7,562	8,040
Other employment	1,819	1,654
Total employed	9,381	9,694

Table 2 [52]

The employment of prisoners takes place in the framework of *budgetary employment*, employment by the *prison limited companies* and in other forms. The annual average number of prisoners taking part in the various forms of employment is shown in the table above (Table 2). Thepie chart below shows the ratio of the prisoners in different employment forms, when

connected withthe efficient running of the institution (e.g. cleaning, catering, and laundry). A prisoner's working hours are thesame as those of other workers, as regulated by labor law, generally 40 hours per week[54].

Conditional release and probation[55]

Prisoners may obtain conditional early release after two thirds of their sentenceif they are in a minimum security regime, after three quarters in a medium security regime, and after four-fifths

[51] The report on the visit of the Hungarian penal institutions (The information was obtained during the visit of Hungarian prisons by author in 2015-2016).

[52] REVIEW OF HUNGARIAN PRISON STATISTICS, The Hungarian Prison Service Headquarters, ISSN 2416-1233, 2016, pp.3-26

[53] Ibid.

[54] The report on the visit of the Hungarian penal institutions (The information was obtained during the visit of Hungarian prisons by author in 2015-2016).

[55] Annual Report 2014, pp. 88-108

in a maximum security regime. The securitystatus is defined by the court at the time of sentence but can be changed onapplication to a court, for example if a prisoner has satisfied the prison that adifferent level is appropriate.

Conditional release can be grantedearlier, after half the sentence, if the sentence is no longer than three years, ifthere are mitigating circumstances, and provided that the offender is not a multiple recidivist. By contrast life sentence prisoners become eligible for conditional release after a period of between 15 and 30 years depending on a minimumperiod decided by the sentencing court.Conditional release is decided by a 'penitentiary judge' on the application ofthe prison.

Three months before eligibility for conditionalrelease the heads of department are consulted and the governor decides whether the application should be made.

As of August 9, 2014, the Ministry of the Interior is responsible for organizing and supervising the activities of the Probation Services, an area closely related to correctional work[56]. As a result of organizational changes, 30 county and metropolitan probation officers were moved from under the Justice Services of Government Offices to the direct supervision of the Ministry of the Interior, which left Prison Service headquarters in direct control of the area[57]. The plan is to assign one probation officer to each of the 28 correctional institutions in the country[58].

Education and vocational training[59]

General education and vocational training "*are regarded as the core of the rehabilitation programmes*". Educational and vocational training activities occupy between 6 and 20 hours per week and have developed significantly in recent years, very good contacts having been establishedbetween the prison administration and the Ministry of Education.

Prisoner education-prisoners' programs: In order to facilitate social integration, prisoners are offered education and training, in addition to employment. The increased number of prisoner has been participating in vocational training[60]. Many prisoners were included in a priority project titled "TAMOP- 5.6.3-12/1-2012-0001; Multistage social and labor market integration and intensive after release care for prisoners"[61]. As part of TAMOP 5.6.3 special project, every correctional institution in the country organized community compensation events[62]. ***Prisoners were offered volunteer work in support of local communities***: picking litter, gardening maintenance, painting, and renovation at parks, playgrounds, kindergartens and retirement homes[63].

Several of our institutions offered prisoner integration programs through the help of Hungarian and international non-governmental organizations (NGOs)[64]. For example, our service dog training project, in which prisoners participate in the training of assistance dogs for the blind, earned international acclaim[65]. The project follows a training program developed by the Hungarian Federation for the Blind and Partially Sighted, and its primary aim is to give puppies as much contact and experience in the world as possible before they become old enough to undergo real service training[66].

[56] Ibid.
[57] Ibid.
[58] Ibid.
[59] Ibid.
[60] Ibid.
[61] Annual Report 2014, pp. 88-108
[62] Ibid.
[63] Ibid.
[64] Ibid.
[65] Ibid.
[66] Ibid.

Data Related to Education and Training of the Prisoners[67]

Schooling indicators									
Academic year	Elementary school		Secondary school		Vocational training		High school		Total
	Capita	(%)	Capita	(%)	Capita	(%)	Capita	(%)	
2010/2011	1,020	42.50	878	36.58	479	19.96	23	0.96	2,400
2011/2012	1,159	42.55	920	33.77	606	22.25	39	1.43	2,724
2012/2013	787	34.78	836	36.94	602	26.60	38	1.68	2,736
2013/2014	1,151	42.07	819	29.93	720	26.32	46	1.68	2,736
2014/2015	1,083	34.91	858	27.66	1,131	36.46	30	0.97	3,102
2015/2016	1,016	25.20	967	23.98	1,993	49.43	56	1.39	4,032

Table 3

Schooling Indicators (%)	2010			2015		
	Total	Male	Female	Total	Male	Female
Illiterate	1.02	0.88	2.93	0.74	0.63	2.14
Less than 8 grade	27.48	27.21	30.5	11.63	11.19	17.25
Elementary	46.28	46.41	44.42	58.32	58.58	55.11
Vocational	14.94	15.52	6.61	16.13	16.87	6.64
General Certificate of Secondary Education (GSCE)	7.71	7.56	9.71	9.57	9.34	12.37
University/College	2.57	2.4	4.81	2.50	2.31	4.89
N.a.	0	0	0	1.12	1.08	1.60

Table 4

Inspection and monitoring[68]

The prison administration organizes three kinds of inspection. One-third of theprisons are inspected each year, involving all departments and sections of eachestablishment.

Second, there are thematic reviews, for example on health carein all prisons. In both cases a report is produced with recommendations and theprison is given a copy indicating the changes that must be made.

The third typeof inspection is known as 'target control' where prisons are visited in order to see if they have carried out the recommendations of the inspection or the thematic review.

Ensuring that penal institutions function within the law is the responsibilityof *the Office of the Public Prosecutor*.

Another source of independent inspection is the Parliamentary Commissioner for Human Rights, the Ombudsman. Cases dealt with by the

[67] REVIEW OF HUNGARIAN PRISON STATISTICS, The Hungarian Prison Service Headquarters, ISSN 2416-1233, 2016, pp.3-26

[68] The report on the visit of the Hungarian penal institutions (The information was obtained during the visit of Hungarian prisons by author in 2015-2016).

Commissionerhave focused on ensuring that prison sentences have been enforced in a lawfulmanner.

There are a number of methods by which the law enables prisoners to make complaints:

- They may complain to the prison governor;
- They may request a hearing from the public prosecutor;
- They may take the case to the Ombudsman or the parliamentary commissioner for ethnic minorities' rights.

PSHQ is the unit responsible for managing, supervising and controlling activities of the organization[69]. The new "mobile" audit has been added to the activities of the audit teams at PSHQ[70].

Non-governmental organizations[71]

The prison administration reports good cooperation with a large number of nongovernmental organizations, including religious and charitable bodies and the campaigning organization the Helsinki Committee for Human Rights.

There arereligious services in the prisons and also missions; full-time priests are availablefor sentenced prisoners and part-time priests in the remand houses.

There is good co-operation with the Catholic charitable organization CARITAS, with the InternationalRed Cross and with the 'Martyrs'.

Other matters[72]

Convicted prisoners are not allowed to vote in Hungarian elections but pre-trialdetainees retain the right to do so. The court can also impose the secondarypunishment of 'prohibition from public affairs'. In this case a prisoner may bebanned from voting even after release from prison. ***An annual report/yearbook is produced*** 'Йvкцnyve'. It is not formally published but it is not a secret document. Copies are sent to Members of Parliament,the Central Statistical Office, research institutes, universities, heads of media outlets and other organizations with whom the prison service co-operates.

*Leisure and entertainment***:** All prisons in Hungary have a library. Most prisons also have a wide selection ofsporting activities which include table tennis, football, darts etc. And most prisons also offer agym with weight training equipment.

*Drugs***:** Drugs trafficking in Hungarian prisons is illegal. If you are caught with any kind of illegaldrugs (marijuana, cocaine, etc.) you may face punishment according to Hungarian law.Most prisons also offer a drugs programme for those inmates with a drug addiction.

Prison security: The new Prison Code made some regulatory tasks a priority, for example those related to coercive devices and the extended protocol for gradual action preceding the use of firearms[73]. Cooperation with partner organizations in law enforcement is key in maintaining security and preventing incidents[74]. For instances, the emergency services provided courses to our staff in managing fire incidents[75]. Suicide prevention was a priority task (the number of suicides is decreasing from year to year but the methods became more diverse)[76].

Projects[77]: EU tenders aiming at social cohesion, crime prevention, social and labor market integration of prisoners, and intensive post-release care (TAMOP 5.6.2 and 5.6.3 priority projects) are very efficient means to offer prisoner education and improve the chances of

[69] Annual Report 2014, pp. 88-108

[70] Ibid.

[71] Roy Walmsley, Prisons In Central And Eastern Europe, HEUNI Paper No. 22, Prisons In Central And Eastern Europe, The European Institute For Crime Prevention And Control, Affiliated With The United Nations Helsinki, 2005 (ISSN 1236-8245), pp. 303-3

72 Roy Walmsley, Prisons In Central And Eastern Europe, HEUNI Paper No. 22, Prisons In Central And Eastern Europe, The European Institute For Crime Prevention And Control, Affiliated With The United Nations Helsinki, 2005 (ISSN 1236-8245), pp. 303-3

[73] Annual Report 2014, pp. 88-108

[74] Ibid.

[75] Ibid.

[76] Ibid.

[77] Ibid.

employment after release. The Hungarian prisons used a total of HUF 947 million under the two projects in 2014. In addition to it, they received a total of HUF 351 million in support of, from TAMOP and other international cooperation projects, to improve prisoner education and employment.

Infrastructure developments aiming at improved energy sufficiency and the use if renewable energy (under the Environment and Energy Operative Program "KEOP") were carried out in 2013 and 2014 in a total value of HUF 812 million at various Prison Service institutions. The Ministry of Interior used its own budget to support some investments aiming at reducing energy costs. IT development worth HUF 500 million were carried out under the Electronic Public Administration Operative Program (EKOP).

International relations: International relations are greatly influenced by European professional events, especially those organized by the Council of Europe directorates for criminal justice and prison administration.

In regional cooperation, the Visegrad Group[78] meeting for Director Generals in May laid a new foundation for high-level international relations between the four countries. We organized a consular meeting for the representatives of 47 consulates and embassies at Budapest Strict and Medium Regime Prison. In addition to keeping in touch with embassies, these events have special significance in facilitating the contact of foreign nationals in custody with their home countries.

Perspective

We have seen that the HPS have both obstacles and opportunities to the further development. The overcrowding of prisons remains a concern. The enterprises and the continued effort of the Prison Administration made it possible to the increase in prisoners' employment, which also contributes of facilitating prisoner social integration. The HPS has carried out all of its duties with the help of a dedicated and highly professional staff, and that of their partner organizations: ***local governments, churches, and non-governmental organizations***.

Current objective[79]*:* The following are some of the main objectives reported by the HPS:

- The continuation of the programme of developing the prisons;
- The development of staff training;
- Enlarging the number and scope of treatment programmes for prisoners (including for sex offenders and drug addicts);
- Reducing the prison overcrowding, in order to have more space for cultural and leisure activities;
- Modernizing old buildings for new conditions;
- Increasing the number of staff and improving their educational level;
- Continuing to ensure a good atmosphere in the institutions;
- Dealing with the problem of separating difficult prisoners from others;
- Introducing more differentiated treatment for prisoners.

Main problems[80]*:* The following were identified by the HPS as some of the mainproblems, which are obstacles to the achievement of the objectives and to theadvancement of the prison system:

- The serious overcrowding in the institutions (128% occupancy in the system as a whole at the end of 2015);
- The fact that the prison system is insufficiently developed in terms of facilities;
- The fact that there are not enough

[78] The Visegrad Group, is an alliance of four Central European states – Czech Republic, Hungary, Poland and Slovakia – for the purposes of furthering their European integration, as well as for advancing military, economic and energy cooperation with one another. https://en.wikipedia.org/wiki/Visegr%C3%A1d_Group (Viewed 12 November, 2016).

[79] The report on the visit of the Hungarian penal institutions (The information was obtained during the visit of Hungarian prisons by author in 2015-2016)

[80] Ibid.

prison staff and they are inadequately prepared by training for their duties;

- The difficulties of the probation service in reintegrating prisoners into the community;
- The need for improved suicide prevention measures.

Achievements[81]*:* The achievements of the HPS include:

- Staff attitudes are reported to have changed, with real efforts being made to deal with prisoners in a way that fully respects their human dignity;
- The education system has developed in the last few years, with very good contacts having been established with the Ministry of Education;
- A generally relaxed atmosphere has been achieved, including among pre-trial detainees and in seriously overcrowded conditions;
- A number of prisoners involved in education and vocational training are increasing, and short vocational or basic education programmes are available in some remand houses;
- There has been a large expansion in religious activities in the prisons, with full-time priests for sentenced prisoners and part-time priests in pre-trial institutions;
- **A new penal executive code has been adopted, which is intended to bring practice in the Hungarian prison system fully into conformity with the European Prison Rules**[82]*;*
- Daily efforts are made to present to the media a balanced picture of what is going on in the prisons, in order to have a positive effect on public opinion.

[81] Ibid.

Reference:

Article:

Roy Walmsley, Prisons In Central And Eastern Europe, The European Institute For Crime Prevention And Control, Affiliated With The United Nations Helsinki, (2005) HEUNI Paper No. 22. (ISSN 1236-8245).

ANNUAL REPORT (Yearbook), Hungarian Prison Service, (2014) Budapest.

The report on the visit of the Hungarian penal institutions (The information was obtained during the visit of Hungarian prisons by author in 2015-2016).

REVIEW OF HUNGARIAN PRISON STATISTICS, the Hungarian Prison Service Headquarters, (2016), Budapest. ISSN 2416-1233

Online resource:

https://bv.gov.hu/en (Viewed 12 November 2016)

https://en.wikipedia.org/wiki/Visegr%C3%A1d_Group (Viewed 12 November, 2016)

[82] The European Prison Rules, which provide the benchmark for assessing the quality of the management of prisons and the treatment of prisoners. The Director General and his deputies have copies, as do management staff at the national prison administration and in each prison. Copies are also said to be available to be used by other prison staff and by prisoners.

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PLEA AGREEMENTS IN AMERICA: DOES ANYONE REALLY WIN?

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Abstract

Plea agreements, almost clichй in their portrayal in American film and television, often seem a uniquely American phenomenon; in movies such as *A Few Good Men* and *The Lincoln Lawyer*, protagonists start out as smooth-talking hired legal guns that, through a slick negotiation style and cynical view of the legal system, are successful at making these deals with little care about guilt, innocence, or the public interest. But in both stories, these attorneys eventually see through the veneer and gain insight into the moral, ethical, and legal quandaries associated with a defendant bargaining away his rights in exchange for a lighter sentence, the avoidance of a trial, or some other legal expediency. The question then comes to mind, for both the character and the viewer, as it so often does in society writ large: who really benefits from plea agreements?

Introduction

The origin of plea agreements in America is somewhat murky, but legal scholars generally place their beginnings, in terms of the scope, frequency, and concept we know today, in the 1920s. Prior to that time, jury and bench trials were more common, enabled by the distinguishing characteristic that trials were summary proceedings,[1] with many judges presiding over multiple jury trials in a single day something unheard of, and quite impossible, in today's judicial system in America.[2]

The 1960s saw a series of jurisprudence from the Supreme Court of the United States that led to the advent of several key legal tenets that contributed to the greater implementation of, and subsequent reliance on, plea agreements as we know them today. Prior to this transformative period in legal proceedings, Supreme Court jurisprudence on this subject was relegated to addressing exceptions and extraordinary circumstances.[3] In its 1963 decision in *Gideon v. Wainwright*, the Supreme Court described a defendant's Sixth Amendment right to legal counsel as being so indispensable to his assurance of receiving a fair trial that counsel must be provided for him if he cannot afford it.[4] In their landmark 1966 ruling in *Miranda v. Arizona*, the right to legal counsel was even more broadly applied by the Supreme Court and conflated with the Fifth Amendment protection against self-incrimination.[5] With the two aforementioned cases serving to set conditions for the increased frequency and widespread acceptance of structured, attorney-crafted plea agreements, 1970's *Brady v. United States* cemented the legitimacy of plea agreements in every day criminal proceedings.[6] In writing the majority opinion of the Supreme Court's

[1] John H. Langbein, Understanding the Short History of Plea Bargaining, 13 L. & Soc'y Rev. 261, 263 (1979).

[2] See Justin H. Dion, Prosecutorial Discretion or Contract Theory Restrictions? - The Implications of Allowing Judicial Review of Prosecutorial Discretion Founded on Underlying Contract Principles, 22 W. New Eng. L. Rev. 149, 161 (2000) (Discussing the dependence of the modern American judicial system on adjudication via plea agreements).

[3] Albert Alschuler, Plea Bargaining and Its History, 79 Colum L. Rev. 1, 6 (1979).

[4] Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

[5] Miranda v. Ariz., 384 U.S. 436, 469 (1966).

[6] Brady v. United States, 397 U.S. 742, 751-52 (1970).

1971 ruling in *Santobello v. New York*, Chief Justice Warren E. Burger went so far as to call the practice of plea bargaining "an essential component of the administration of justice."[7]

In the years that followed, the prevalence of plea agreements in criminal proceedings, much like that which is represented in film and television, ushered in a new norm. The extent of the surge in such pleas, and the reliance of the judicial system on them as a means to adjudicate the large number of criminal cases that appear before the bar in jurisdictions throughout the United States, is best summed up in a single staggering statistic: up to 95% of all criminal cases in America are adjudicated by plea agreements.[8]

What Is a Plea Agreement?

While the wording varies from one statutory source to another, Black's Law Dictionary provides perhaps the most widely accepted definition of a plea agreement which best illustrates the concept:

"[a] negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty or no contest to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor, usually a more lenient sentence or a dismissal of the other charges."[9]

The process of plea agreements requires three actors: the prosecutor, the defendant (usually represented by defense counsel), and the court, or judge. The prosecutor and defendant negotiate, as best the term can be applied here, on three distinct points: the charge, the sentence, and the facts. Once the two parties have reached an accord on these three points, they must submit the agreement to the court to obtain a judge's approval in order for the plea agreement to take effect.[10]

The judge's role in plea agreements is simple but vital; he or she must determine whether the defendant knows his rights, whether the defendant chooses to voluntarily waive those rights, and whether there is a factual basis for a finding of guilty on the charges in the case — even if the defendant still maintains his innocence while pleading guilty.[11] This role is critical in safeguarding the rights of the accused by ensuring that the accused is not being victimized by imbalances within the legal system.[12]

The facts of a case that is subject to a plea agreement are generally straightforward; they are usually either not in dispute or the accused finds that he or she cannot prove, or afford the expense of attempting to prove, his case in front of a jury. This highlights the role that a lack of resources, in time and money, may play on both sides of any given case that can directly create incentives to seek a plea agreement. For a prosecutor, any opportunity to obtain a legal victory without the expenditure of scarce public funds and limited manpower is likely tempting, as well as career-enhancing. For a defendant, it is often a less desirable choice: an elective fast-tracking of their case in order to avoid legal bills, and to either avoid jail time or get out of jail sooner than would otherwise be the case. [13]

But these incentives can also lead to opposite outcomes. A prosecutor can be bullied by a wealthy defendant with a team of investigators and defense attorneys at his disposal; a poor defendant is even more susceptible to maltreatment at the hands of a determined prosecutor with enough state or federal funds to eclipse

[7] Santobello v. New York, 404 U.S. 257, 260 (1971) (The Chief Justice further stated that "[p]roperly administered, [plea bargaining] is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.").

[8] Bureau of Justice Assistance, U.S. Department of Justice, Plea and Charge Bargaining: Research Summary, 3 (2011).

[9] Plea bargain, Black's Law Dictionary (10th ed. 2014). For an example of a state court's sample form, see Appendix 1, State of Alabama, Court E-forms, http://eforms.alacourt.gov/Sample%20Forms/Plea%20Agreement.pdf (accessed Aug. 28, 2016). For an example of a federal district court's sample form, see Appendix 2, United States District Court, District of Colorado Forms and Instructions, http://www.cod.uscourts.gov/CourtOperations/RulesProcedures/ Forms.aspx (accessed Aug. 28, 2016).

[10] Guide For Users, 39 Geo. L.J. Ann. Rev. Crim. Proc. 1, 419-23 (2010) (Discussing the application of USCS Federal Rules of Criminal Procedure Rules 11 and 13 to the court-room phase of plea agreements).

[11] Todd A. Berger, After Frye and Lafler: The Constitutional Right to Defense Counsel Who Plea Bargains, 38 Am. J. Trial Advoc. 121, 168 (2014).

[12] Deirdre Bowen, Calling your Bluff: How Prosecutors and Defense Attorneys Adapt Plea Bargaining Strategies to Increased Formalization, 26 JUST. Q. 2, 26-27 (2009).

[13] Robert E. Scott & William J. Stuntz, Plea Bargaining as Contract, 101 Yale L.J. 1909, 1912 (1992).

any feeble attempt he can make with a defense. These factors, along with statutory requirements, can vary greatly from one geographic area to another, and from one level of government to another. Add the occasional lack of true consideration of guilt or innocence in the decisions being made, as well as the motives for making those decisions, and the ramifications of the plea agreement process can become quite troubling.

Ethics In Plea Agreements

Socioeconomics make an undeniable difference in the type of justice people receive; faced with an already disproportionate enforcement of laws and subsequent charging rates for crimes, disadvantaged groups are already more likely to find themselves in the position of having to consider a plea agreement.[14] Add to that the higher conviction rates and harsher sentencing that these same groups face if they go to trial,[15] one can see why the decision to accept a plea agreement is virtually reinforced by the criminal justice system. The decision can often be thrust upon already at-risk members of society, resulting in a subtle form of coercion; if an unscrupulous prosecutor leverages this perception during a negotiation the nature of the process is blatantly coercive.[16]

Unless the accused has the means to afford a team of defense attorneys and private investigators, the prosecutor holds the clear majority of power in the equation. Additionally, his priorities are often career- and politically-motivated.[17] Most commonly seen is the prosecutor's need to at least appear to the public to be tough on crime, sometimes with very little attention given to whether the accused is actually guilty of the crime, thus enhancing the perception and very real sense of coercion in the process. Prosecutors also frequently benefit from the informational imbalance that exists during plea bargaining; without the otherwise normal pretrial motions regarding discovery and exculpatory evidence, the prosecutor has a much clearer picture than the accused of the accused's ability to muster an effective, potentially charge-defeating defense, especially if the accused is actually innocent.[18]

What is also clear, as illustrated by recent nationwide statistics examining plea agreements across all levels of the American legal system, is that plea agreements, although skewed in socioeconomic impact, are still often the most practical and relatively desirable outcome given the usually harsher outcome achieved through a jury trial.[19] While this is encouraging news to proponents of plea agreements, this also spotlights the reality of system-wide bias against those disadvantaged socioeconomic groups once they are ensnared, appropriately or not, in the American criminal justice system. The problem is not plea agreements themselves; rather, they are but a part — even an outgrowth of and manner of efficiently dealing with — of the systemic bias that disproportionately impacts those who are already the most vulnerable in society.

When considering the impacts of coercion and bias on the plea agreement process, the importance of the judge's role emerges as an indispensable judicial review mechanism that often is the best and last chance of ensuring fairness and transparency where the accused has already forfeited key Constitutional safeguards.[20]

Serving the Public Interest

Thomas Jefferson once wrote that trials are vital to the protection of citizens' rights from the power of the state; that they

[14] U.S. Dep't of Justice, supra note 8, at 2-3.

[15] Id.

[16] Ronald Wright & Marc Miller, The Screening/Bargaining Tradeoff, 55 Stan. L. Rev. 29, 33 (2002).

[17] Stephanos Bibas, Plea Bargaining Outside the Shadow of Trial, 117 Harv. L. Rev. 2463, 2470-71 (2004).

[18] Erica Hashimoto, Toward Ethical Plea Bargaining, 30 Cardozo L. Rev. 949, 951-52 (2008).

[19] U.S. Dep't of Justice, supra note 15.

[20] Sanford I. Weisburst, Judicial Review of Settlements and Consent Decrees: An Economic Analysis, 28 J. Legal Stud. 55, 58 (1999).

were one sure way to force the state to be transparent in its exercise of power, and to do so in accordance with the provisions of the Constitution.[21] So strongly did Jefferson and the other founders believe this idea that it was later written into the Constitution of the United States — as one of the legal protections afforded under the Sixth Amendment.[22] More recently, however, legal scholars have written about the societal benefits of plea arrangements, specifically the efficiency created in an already overburdened legal system.[23]

What, then, should be done with the practice of plea agreements, where one surrenders their Fifth and Sixth Amendment protections as a means of judicial expediency? The incentive to serve the public interest via efficient adjudication methods must be squared with the inherent flaws that work against another important aspect the public interest: safeguarding the rights of the accused. While there are some that argue for the need to abolish plea agreements altogether due to the coercion and bias that are inherent in the process,[24] this is also largely seen as unrealistic. Plea agreements are viewed by many as a solution to a certain problem; where most disagreement among jurists and scholars seems to arise is whether plea agreements have become their own problem, and if there is a need for them to be — or through which manner they can be —improved or corrected. Many argue that it must be the reforms that address these shortcomings that will have to shore up the rights of the accused in what is generally regarded as a rational and necessary process within the American criminal justice system.[25]

Serving the public interest is a significant tenet of jurisprudence that has been specifically addressed, and there are binding precedents that require judges to consider this when deciding whether to accept or reject a plea agreement either as a whole or in part.[26] When applied effectively and consistently, such principles can further temper the process and ensure dispassionate and efficient adjudication of criminal cases. This in turn serves to foster the public trust in judicial proceedings. There are also other second-order effects of the effective use of plea agreements that shore up other areas of the law. What the majority of scholars appear to agree on is that the wide spread use of plea agreements keeps the criminal trial case load manageable to the point that they effectively maintain the judicial integrity of the criminal trials that do take place; were plea agreements to be abolished, overloaded trial courts would naturally seek other efficiencies that would ultimately render trials much less protective of the rights of the accused than is the case with the plea agreements that are in practice today.[27]

Conclusion

When facing criminal charges in the American legal system, the very real disadvantage of the poor and certain minority groups should not be conflated with the very real advantage of the wealthy in terms of seeking the best possible outcome. The incentivized actions that each of these socioeconomic groups has at their disposal diverges significantly, and are a world apart in terms of achievable outcomes. Where a poor person is faced

[21] Thomas Jefferson, Letter to Thomas Paine (Jul. 11, 1789) (may be viewed at http://founders.archives.gov/ documents/ Jefferson/01-15-02-0259).

[22] USCS Const. Amend. 6.

[23] See Fred C. Zacharias, Justice in Plea Bargaining, 39 Wm. & Mary L. Rev. 1121, 1129 (1998) ("A settlement is societally efficient, compared to the alternative of requiring each party to keep what they have; namely, their chance of winning at trial, with all attendant risks and benefits.").

[24] Stephen J. Schulhofer, Plea Bargaining as Disaster, 101 Yale L.J. 1979, 2009 (1992).

[25] Robert E. Scott & William J. Stuntz, Plea Bargaining as Contract, 101 Yale L.J. 1909, 1926 (1992).

[26] Ellis v. United States Dist. Court (In re Ellis), 356 F.3d 1198, 1209 (9th Cir. 2004) (A federal district court may reject a plea agreement if it believes the sentence related to a negotiated charge is inadequate in serving the public interest).

[27] Robert E. Scott & William J. Stuntz, A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants, 101 Yale L.J. 2011, 2013 (1992).

with a decision that may have them plead guilty to a crime in order to receive a lesser charge and reduced sentence, even if innocent of that crime, a wealthy person will likely pour resources into fighting the charge and have a very good chance of receiving a lesser charge, reduced sentence, or outright acquittal, even if they are in fact guilty of that crime. This is how the inherent bias and coercive effects of the plea agreement system play out in millions of cases annually across the United States. This is where the scales of American justice can sometimes be unbalanced.

While there are flaws in the existing implementation of plea agreements throughout the United States, there is also a near-universal sentiment that plea agreements are necessary in order to prevent the inundation of American courts with an unmanageable number of trials and the subsequent loss of what judicial integrity there is to be seen in the trials that do take place. The accused, the prosecutor, and even the public interest all compromise, or are to some degree compromised, in the course of negotiating a deal. The single fact that so many plead guilty to crimes they did not commit, solely for the sake of extricating themselves from the criminal justice system in which they have become ensnared, illustrates how the public interest is not being adequately served and that reforms are necessary. Abolishment of plea arrangements is not the answer; nor is maintaining the status quo. The answer, as is so often the case with the truth, lies somewhere in between.

What the current state of the American criminal justice system shows is that plea agreements are necessary, and that they can be concluded without violating the rights of the accused. But this comes with a warning: as with all human systems and processes, adequate and effective safeguards must be in place to prevent biases from negatively influencing outcomes. Effective oversight and unyielding vigilance must also be in place to ensure that these deals do their part to sustain the public's faith in any criminal justice system in which plea agreements are made an integral part.

APPENDIX 1

Sample Form 21

PLEA AGREEMENT

☐ State of Alabama
☐ Municipality of
_____

v.

_____
Defendants

_____
Case Number

STATE OF ALABAMA
In the _____Court
of _____ County
[The City/Town of
_____]

After discussion and negotiation between the parties, after a full explanation of rights has been given to defendant as evidenced by the attached Explanation of Rights form, and after such disclosure of information between the parties as each deems sufficient, it is agreed in this case, subject to acceptance by the Court, that:

1. Defendant will enter a plea of guilty:

☐ As charged in the complaint/information/indictment.

☐ To the charge of_____,

and the Prosecutor will move for dismissal with prejudice of all other offenses charged in the compliant/information/indictment.

2. ☐ The prosecutor will recommend to the Court that the defendant by given a sentence of _____.
   ☐ The prosecutor will not oppose the Court's giving the defendant a sentence of _____.
3. ☐ The prosecutor will recommend to the Court that the sentence given to defendant by the Court be suspended and the defendant be placed on probation for a period of_____.
   ☐ The prosecutor will not oppose the Court's suspending the sentence given to defendant and placing defendant on probation.
4. ☐ (Any other matters agreed upon.)_____

_____

_____

_____

_____ _____

Date Signature of Defendant

_____

Signature of Defendant's Counsel

_____

Signature of Prosecutor

Having reviewed the above agreement entered into by defendant and the prosecutor, and having reviewed the presentence report, the Court hereby:

☐ Accepts the Plea Agreement. The disposition provided herein will be embodied in the judgment and sentence.
☐ Rejects the Plea Agreement; therefore, the plea agreement does NOT bind the defendant, the prosecutor, or the Court to any of the above provisions.

Notice to Defendant

Since the agreement has been rejected, your may withdraw your offer to the prosecutor to plead guilty to the charged offense. If you do decide to plead guilty, the disposition of the case may be either more of less favorable to you than contemplated in the agreement.

The Court will allow the prosecutor to change his recommendation and the parties may submit further plea agreements for the Court's consideration.

_____ _____

Date Judge

Rule 14.3

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Criminal Case No.

UNITED STATES OF AMERICA
Plaintiff(s),

v.

1.
Defendant(s).

PLEA AGREEMENT

The United States of America (the government), by and through _____, Assistant United States Attorney for the District of Colorado, and the defendant, _____, personally and by counsel, _____, submit the following Plea Agreement pursuant to D.C.COLO.LCrR 11.1.

I. AGREEMENT

The defendant agrees to plead guilty to _____ of the Indictment *[or Information],* charging a violation of _____ U.S.C. § _____,

_____. *[Insert additional charges, if any.]*

[Set forth the complete agreement between the parties, including whether the agreement is pursuant to Fed. R. Crim. P. 11(c)(1)(A), (B), or (C), and whether there are agreements regarding departures, variances or other sentencing matters. Also set forth

Revised: April 25, 2012

any agreements regarding forfeiture or restitution.]

[If the parties intend to tender any agreement regarding waiver of appellate rights, insert here.]

II. ELEMENTS OF THE OFFENSE(S)

The parties agree that the elements of the offense[s] to which this plea is being tendered are as follows:

[Set forth each element required by law for the commission of each criminal offense to which the defendant intends to enter a plea.]

III. STATUTORY PENALTIES

The maximum statutory penalty for a violation of _____ U.S.C. § _____ is: not more

than _____ months imprisonment; not more than $_____ fine, or both; not more than _____ years supervised release; $ _____ special as-sessment fee; plus _____ restitution. *[Insert, if applicable: The minimum statutory penalty is_____ months imprisonment.]*

[Insert, if applicable, any mandatory consecutive term of imprisonment required by law.]

[Insert, if the defendant is pleading to multiple counts: The Court will impose a separate sentence on each count of conviction and may, to the extent permitted by law, impose such sentences either concurrently with or consecutively to each other.]

[Insert, if applicable, any term of supervised release: at least _____ years, but not more than _____ years.]

If probation or supervised release is imposed, a violation of any condition of pro-bation or supervised release may result in a separate prison sentence and additional supervision.

IV. COLLATERAL CONSEQUENCES

The conviction may cause the loss of civil rights, including but not limited to the rights to possess firearms, vote, hold elected office, and sit on a jury. *[Insert if applica-ble: If the defendant is an alien, the conviction may cause the defendant to be deported or confined indefinitely if there is no country to which the defendant may be deported, to be denied admission to the United States in the future, and to be denied citizenship.]*

V. STIPULATION OF FACTS

The parties agree that there is a factual basis for the guilty plea[s] that the defen-dant will tender pursuant to this plea agreement. That basis is set forth below. Because the Court must, as part of its sentencing methodology, compute the advisory guideline range for the offense[s] of conviction, consider relevant conduct, and consider the other factors set forth in 18 U.S.C. §3553, additional facts may be included below which are pertinent to those considerations and computations. To the extent the parties disagree about the facts set forth below, the stipulation of facts identifies which facts are known to be in dispute at the time of the execution of the plea agreement.

This stipulation of facts does not preclude either party from hereafter presenting the Court with additional facts which do not contradict facts to which the parties have stipulated and which are relevant to the Court's guideline computations, to other 18 U.S.C. §3553 factors, or to the Court's overall sentencing decision.

The parties agree that the date on which relevant conduct began is _____.

The parties agree as follows: *[Insert facts and qualifications or disagreements, if any]*

VI. ADVISORY GUIDELINE COMPUTATION AND 3553 ADVISEMENT

The parties understand that the

imposition of a sentence in this matter is gov-erned by 18 U.S.C. §3553. In determining the particular sentence to be imposed, the Court is required to consider seven factors. One of those factors is the sentencing range computed by the Court under advisory guidelines issued by the United States Sentencing Commission. In order to aid the Court in this regard, the parties set forth be-low their estimate of the advisory guideline range called for by the United States Sen-tencing Guidelines. To the extent that the parties disagree about the guideline computa-tions, the recitation below identifies the matters which are in dispute.

A. The base guideline is § _____, with a base offense level of _____.

B. [Insert specific offense characteristics.]

C. [Insert victim-related, role-in-offense, obstruction and/or multiple- count adjustments.]

D. The adjusted offense level therefore would be _____.

E. [Insert the parties' positions on the adjustment for acceptance of responsibility.] The resulting offense level therefore would be _____.

F. The parties understand that the defendant's criminal history computation is tentative. The criminal history category is determined by the Court based on the defendant's prior convictions. Based on information currently available to the parties, it is estimated that the defendant's criminal history category would be _____.

G. The career offender/criminal livelihood/armed career criminal adjustments *[would or would not]* apply. *[If any of these adjustments applies, identify the convictions or facts which are believed to trigger the adjustment and include the final offense level and/or criminal history category.]*

H. The advisory guideline range resulting from these calculations is _____ months. However, in order to be as accurate as possible, with the criminal history category undetermined at this time, the offense level(s) estimated above could conceivably result in a range from _____ months (bottom of Category I) to _____ months (top of Category VI). The guideline range would not exceed, in any case, the cumulative statutory maximums applicable to the counts of conviction.

I. Pursuant to guideline § 5E1.2, assuming the estimated offense level above, the fine range for this offense would be $ _____ to $_____, plus applicable interest and penalties.

J. Pursuant to guideline § 5D1.2, if the Court imposes a term of supervised release, that term is *[insert if applicable: at least _____ years, but]* not more than _____ years.

K. Describe any restitution orders or conditions required by guideline § 5E1.1.]

The parties understand that although the Court will consider the parties' estimate, the Court must make its own determination of the guideline range. In doing so, the Court is not bound by the position of any party.

No estimate by the parties regarding the guideline range precludes either party from asking the Court, within the overall context of the guidelines, to depart from that range at sentencing if that party believes that a departure is specifically authorized by the guidelines or that

there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the United States Sentencing Commission in formulating the advisory guidelines. Similarly, no estimate by the parties regarding the guideline range precludes either party from asking the Court to vary en-tirely from the advisory guidelines and to impose a non-guideline sentence based on other 18 U.S.C. §3553 factors. *[Adjust or delete language to account for any Rule 11 (c) (1)(C) agreement or other agreement as to departures or variances.]*

The parties understand that the Court is free, upon consideration and proper ap-plication of all 18 U.S.C. §3553 factors, to impose that reasonable sentence which it deems appropriate in the exercise of its discretion and that such sentence may be less than that called for by the advisory guidelines (in length or form), within the advisory guideline range, or above the advisory guideline range up to and including imprison-ment for the statutory maximum term, regardless of any computation or position of any party on any 18 U.S.C. §3553 factor. *[Insert if Rule 11(c)(1)(C) agreement: However, because this plea agreement is made pursuant to Rule 11 (c)(1)(C), the Court is bound by the parties' agreement once the Court accepts the plea agreement. Alternatively, if the Court determines that it intends to impose a sentence different from that agreed to by the parties as part of this agreement, the Court must first give the parties an oppor-tunity to withdraw from this agreement before it may impose any such different sen-tence.]*

VII. ENTIRE AGREEMENT

This document states the parties' entire agreement. There are no other promis-es, agreements (or "side agreements"), terms, conditions, understandings, or assur-ances, express or implied. In entering this agreement, neither the government nor the defendant has relied, or is relying, on any terms, promises, conditions, or assurances not expressly stated in this agreement.

Date: _____
[insert name]
Defendant

Date: _____
[insert name]
Attorney for Defendant

Date: _____
[insert name]

Revised: 04/25/2012

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