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## Exporting the Rule of Law to Mongolia: Post-Socialist Legal and Judicial Reforms

### Keywords

Rule of Law, International Law: History, Globalization

## EXPORTING THE RULE OF LAW TO MONGOLIA: POST-SOCIALIST LEGAL AND JUDICIAL REFORMS

SEBASTIAN R. ASTRADA\*

*This article analyzes Mongolia's legal and judicial reforms and the efforts of international organizations and outside states to assist or encourage those reforms. Most international organizations and outside states predicate their legal assistance on establishing the "rule of law," but they rarely operate from a developed definition of this concept. This article analyzes what the concept of "rule of law" commonly means, and establishes a cogent and tangible, and procedurally-minimalist, rule of law definition. This article then uses this formulation to analyze Mongolia's legal and judicial reforms. Mongolia's experiences demonstrate four important best practices for future rule of law promotion: (1) judicial independence is the cornerstone of the rule of law; (2) formal government action plans offer "more bang for your buck;" (3) public participation and sentiment is a proxy for the institutionalization of the norms and culture of the rule of law; and (4) the leverage of donor coordination pays dividends.*

### I. INTRODUCTION

From the time of its independence on July 11, 1921,<sup>1</sup> and throughout 70 years as a socialist state, Mongolia was something of an enigma to the rest of the world, having withdrawn inward. Mongolia engaged in diplomatic relations almost exclusively with one state: the Union of Soviet Socialist Republics (U.S.S.R. or Soviet Union).<sup>2</sup> Then, after the Sino-Soviet split, Mongolia primarily acted under Soviet direction as a buffer state between the U.S.S.R. and its other large communist neighbor, China.<sup>3</sup> During that time, only the U.S.S.R. knew anything about Mongolia and its people.<sup>4</sup> Mongolia stumbled onto the world scene during the remarkable antecedents which led to the dismantling of the Soviet Union and

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1. Thomas E. Ewing, *Russia, China, and the Origins of the Mongolian People's Republic, 1911-1921: A Reappraisal*, 58 SLAVONIC & E. EUR. REV. 399, 421 (1980).

2. Henry S. Bradsher, *The Sovietization of Mongolia*, 50 FOREIGN AFF. 545, 548 (1971-1972); Tom Ginsburg, *Political Reform in Mongolia: Between Russia and China*, 35 ASIAN SURV. 459, 459 (1995).

3. Ginsburg, *supra* note 2, at 461.

4. *See* Bradsher, *supra* note 2, at 548.

its satellites.<sup>5</sup> Only then did the world awaken to Mongolia and its status as an independent state.

Following the lead of the former satellites, in 1990, Mongolia undertook a joint transition from socialism and a centrally-planned economy to democracy and a free-market economy.<sup>6</sup> At its outset, the parliamentary leaders envisioned a sustainable and modest transition. After the transition began with a basic amendment to the Constitution to provide for a multi-party state, subsequent events enlarged the initial scope of the shift.<sup>7</sup> Put simply, Mongolia collapsed. Mongolia's economic implosion and social structure dissolution resulted from a unique combination: Eastern Europe's rejection of communism; the Soviet Union's disintegration; the resultant destruction of the Soviet trading bloc, the Council for Mutual Economic Assistance ("CMEA"); and the Soviet Union's cessation of aid to Mongolia.<sup>8</sup> As a result, Mongolia probably suffered the worst peacetime economic collapse of any nation this century.<sup>9</sup> By the time the dust settled, the transition had to undertake the goal of completely rebuilding all of Mongolia's internal structures.

As a result, Mongolia's leaders lacked the advantage of gradual change. Instead, they chose a "shock therapy" approach by opening its borders, dismantling trade barriers, ceasing price controls, and privatizing the state's holdings.<sup>10</sup> Throughout this process, over the last twenty years, Mongolia received massive influxes of donor aid in the form of human, technological and financial capital.<sup>11</sup> Surprisingly, Mongolia's transition has been lauded as achieving remarkable success; and its institutions are democratic, widely-established and domestically and internationally respected.<sup>12</sup> However, Mongolia still cannot stand on sturdy legs if the support of donor aid is reduced or retracted.

In order for the government of Mongolia to understand how foreign aid influences its economy, society and government, and what level of dependence or interaction exists, this article addresses certain questions. How did foreign aid influence, assist and advance Mongolia's legal transition? Was foreign aid predicated on a firm understanding of what Mongolia's economy and legal system needed, or did foreign donors merely advance general, and western notions of legal, democratic and capitalistic reforms? Are these systems appropriate for the Mongolian people, its culture and its institutional history?

5. Julia S. Bilskie & Hugh M. Arnold, *An Examination of the Political and Economic Transition of Mongolia Since the Collapse of the Soviet Union*, 19 J. OF THIRD WORLD STUD. 205, 209 (2002).

6. See, e.g., Ginsburg, *supra* note 2, at 459; *id.*

7. Bilskie & Arnold, *supra* note 5, at 209.

8. *Id.* at 211.

9. Ginsburg, *supra* note 2, at 459.

10. See e.g., Ginsburg, *supra* note 2, at 465; Tae Ming Cheung, *The Cure Hurts*, 153 FAR E. ECON. REV. 70, 71-72 (1991); Hari D. Goyal, *A Development Perspective on Mongolia*, 39 ASIAN SURV. 633, 635-43 (1999); Bilskie & Arnold, *supra* note 5, at 211-12.

11. Goyal, *supra* note 10, at 647.

12. See, e.g., President George W. Bush, Remarks by the President in Ulaanbaatar, Mongolia (November 21, 2005), available at [http://www.mongolianembassy.us/mongolia\\_and\\_usa/us\\_presidents\\_visit\\_to\\_mongolia](http://www.mongolianembassy.us/mongolia_and_usa/us_presidents_visit_to_mongolia).

Most international organizations and outside states predicate their legal assistance on establishing the “rule of law,” but they rarely operate from a well-thought definition of this concept. This article analyzes what the concept of “rule of law” commonly means, and establishes a cogent and tangible rule of law definition. This article then uses this procedurally-minimalist formulation to analyze Mongolia’s post-socialist rule of law reforms that focus on the judiciary in particular.<sup>13</sup>

This article is divided into five parts. Part II discusses the concept of the rule of law and conceives of an appropriate rule of law formulation for post-socialist or transitional states. Part III provides a brief summary of Mongolia’s institutional background. Pursuant to the procedurally-minimalist rule of law definition that this article establishes, Part IV addresses Mongolia’s legal and judicial reforms and the efforts of international organizations, states and domestic NGOs to assist or encourage those reforms, and identifies lessons learned and significant issues or stumbling blocks that remain in Mongolia’s reform process. Finally, Part V offers some conclusions. For a more in depth analysis to Mongolia’s transition, this article provides various appendices. Appendix A lays the institutional and legal bases of Mongolia’s socialist times. Appendix B delineates the specific reforms that Mongolia and the donor community implemented.

## II. THE THEORY OF RULE OF LAW REFORM

The rule of law is a concept that gained widespread credence and revival following the dismantling of the former Soviet Union.<sup>14</sup> Prior to September 11, 2001, the United States and other members of the international community began a massive program of foreign aid (including rule of law programs) to states that were transitioning to democracy or that were newly democratic, particularly the former republics of the U.S.S.R.<sup>15</sup> The post-911 environment further intensified the exportation and implementation of law reforms – mostly under the rubric and with the final goal of establishing a “rule of law.”<sup>16</sup> In the present international relations environment, there is an increased emphasis on creating and sustaining democratic states. Western powers in particular believe they can accomplish this through the exportation of the rule of law to states which lack democracy or market-friendly institutions or where they are emerging from conflict.<sup>17</sup> Thus, rule of law

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13. This article derives from my experience working at the Supreme Court of Mongolia, and my many months of research and studies afterward. It owes its completion to a great many people who guided me during my time in Ulaanbaatar and again back in Washington D.C. I’d like to thank Ganzorig Gombosuren, who initiated this experience, Chief Judge Ganbat Chimedikham, Munkhbold Ganbat and their families, who took me in as one of their own, Judge Ts. Tsogt, Judge Enkhbayar and Munkhзориг for their guidance and explanations, and Eggy, who provided me with warm housing for my stay in Ulaanbaatar.

14. See, e.g., Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95, 110 (1998).

15. *Id.*

16. See Dan E. Stigall, *The Rule of Law: A Primer and a Proposal*, 189 MIL. L. REV. 92, 92 (2006).

17. See *Id.*; Jane Stromseth, *Constitution Drafting in Post-Conflict States Symposium: Post-Conflict Rule of Law Building: The Need for a Multi-Layered, Synergistic Approach*, 49 WM. & MARY L. REV. 1443, 1443 (2008); Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms and the*

promotion becomes an element of foreign policy or an unofficial response to the rise of the leftists in Latin America, the autocracies in the remaining communist states, and the dictatorships and sultanates of Africa and the Middle East.<sup>18</sup>

Additionally, rule of law reform has been an important by-product of globalization. In fact, the concept of the rule of law in modern times invariably is tied to the recent phenomenon of globalization of law. Globalization of law is the “degree to which the whole world lives under a single set of legal rules.”<sup>19</sup> It refers to the trend where “what is sought globally is increased transparency of, and increased public participation in, bureaucratic decision-making.”<sup>20</sup>

Before the globalization of law, most states did not require a legal system or legal rules that complemented or interlocked neatly with the global economic rules in place. In no small part due to increased globalization, states increasingly have been encouraging their allies and development organizations to assist in their domestic reform process.<sup>21</sup> Normally, their purpose is to leverage the expertise of their allies and the international community to their specific needs and general benefit.<sup>22</sup>

This process is compounded by the fact that, in the last twenty or so years, a number of regions naturally have undergone catastrophic implosions or drastic changes.<sup>23</sup> Countries in the former Soviet Union, Asia, Eastern Europe, Latin America and parts of Africa all have undertaken recent transformations, mostly resulting in the creation of democratic institutions, if not democracy itself.<sup>24</sup> Complementing these transformations has been a high degree of donor activity, and of course, what generally follows, rule of law reform.<sup>25</sup>

However, as frequently and rightly noted, donors have spent billions of dollars promoting the rule of law without fully understanding or defining the concept.<sup>26</sup> Regardless, the promotion of the rule of law has become a *de facto* rally cry for the international development, human-rights and foreign-policy

“Rule of Law”, 101 MICH. L. REV. 2275, 2275-77 (2003).

18. See, e.g., Carothers, *supra* note 14, at 97-99; Thomas Carothers, *Rule of Law Temptations*, 33 FLETCHER F. WORLD AFF. 49, 50-51 (2009).

19. Martin Shapiro, *Globalization of Law*, 1 IND. J. GLOBAL LEGAL STUD. 37, 37 (1993).

20. *Id.* at 46 (describing the demise of the technocracy, where the government was the technical expert in all fields – that gave rise to the new globalization of law, where law is the instrument for achieving greater transparency and participation in bureaucratic decisions). Given the responses to the credit crisis that began in 2007, however, the technocracy of national governments is resurgent.

21. See Carothers, *supra* note 18, at 50-51.

22. See *id.* at 49-51.

23. Carothers, *The Rule of Law Revival*, *supra* note 14, at 100-101; see Carothers, *Rule of Law Temptations*, *supra* note 18, at 50.

24. See Carothers, *supra* note 14, at 100-02.

25. In their use of rule-of-law ideals, legal and development scholars, western governments and multilateral organizations have attacked one another for being imperialistic, ethnocentric, or motivated by *parti pris*.

26. Brooks, *supra* note 17, at 2283 (describing the confusion and conflation of those who claim to promote the rule of law).

communities.<sup>27</sup> For instance, the mission statement of the international section of the National Center for State Courts of the United States is “to strengthen the rule of law and administration of justice throughout the world.”<sup>28</sup> To be sure, most aid donors operate with a common sense understanding the concept of the rule of law, but their assumptions rarely are grounded in empirical research.<sup>29</sup> Nor is there consensus on the rule of law’s definitive academic conception.

Thus, this section conceives a working rule of law definition for analysis of post-socialist or transitional legal reforms. The benefit of proceeding from a developed conception of the rule of law is that its use can be understood easily for subsequent comparative studies of post-Socialist or other transitional states undergoing legal and judicial reforms.<sup>30</sup>

#### *A. What is the Rule of Law?*

The original meaning of rule of law is simply that persons and institutions should be accountable to predetermined standards – and that those standards must apply to everyone equally.<sup>31</sup> However, scholars strongly differ over the character and the elements of the rule of law in modern conceptions.<sup>32</sup>

This article’s formulation represents a refinement of the best procedurally-minimalist definitions of the rule of law. This minimalist approach encompasses two essential requirements or values: (1) transparency of government decisions and law-making, which creates a system of rules; and (2) meaningful access to redress and justice through an independent judiciary or other body.<sup>33</sup>

27. *Id.*

28. National Center for State Courts, Mission and History, [http://www.ncsc.org/Web\\_Document\\_Library/AboutUs\\_Mission.aspx](http://www.ncsc.org/Web_Document_Library/AboutUs_Mission.aspx) (last visited March 4, 2010). The National Center for State Courts (NCSC) works with the USAID in Mongolia on the Judicial Reform Project. Such an exercise could be undertaken for many institutes, organizations or government ministries.

29. John Hewko, *Foreign Direct Investment: Does the Rule of Law Matter?* 1 (Carnegie Endowment for Int’l Peace, Rule of Law Series, Democracy and Rule of Law Project, Paper No. 26, 2002), available at <http://www.carnegieendowment.org/files/wp26.pdf>.

30. The alternative would be to proceed with a common sense understanding of the rule of law. In that case, however, subsequent studies would struggle with an analysis based on uncertain formulations.

31. William C. Whitford, *The Rule of Law*, 2000 WIS. L. REV. 723, 724 (2000) (explaining the roots of the term).

32. See e.g., Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 31-73 (Thomas Carothers ed., 1996) (discussing the different conceptions and their implications).

33. See Richard Bilder & Brian Z. Tamanaha, *Book Review and Note*, 89 AM. J. INT’L L. 470, 484 (1995) (reviewing ANTHONY CARTY, *LAW AND DEVELOPMENT* (1992), and SAMMY ADELMAN & ABDUL PALIWALA, *LAW AND CRISIS IN THE THIRD WORLD* (1993)) (setting forth two elements: first, that the government acts pursuant to rules produced in the political arena and respects the civil rights of its citizens; and second, that there is a judicial party to resort to that embodies the ethic of treating all before it neutrally and fairly). See also Carothers, *supra* note 14, at 96 (reaching the same procedurally-minimalist rule of law as Tamanaha albeit with more defining substance. Carothers defines the rule of law as a system, where laws uphold the political and civil liberties pursuant to universal human rights recognitions, which are clear in meaning and apply equally to everyone. Further, he calls for the central institutions of the legal system to be fair, competent, and efficient, and for an accused to have the right to a fair, prompt trial with a presumption of innocence. Finally, governance must be integrated into the legal framework and officials must be subject to and accepting of the law); Richard H. Fallon, Jr., “*The*

Additionally, there are primary qualities that support the two essential requirements. These bedrock concepts advancing the minimalist definition are: procedural fairness in the passage of fair, equal and nondiscriminatory laws and decisions with the effect of law; and procedural fairness in access to the courts or other body for meaningful, fair, impartial and equal redress and justice.<sup>34</sup>

Apart from the bedrock concepts, there is a penumbra of other secondary or supporting qualities.<sup>35</sup> For the most part, academics conceive of elements that primarily support the procedural quality of rule of law.<sup>36</sup> Importantly, the rule of law is a system of rules – rules should govern certain relationships and events. Thus, the rule of law: must theoretically and actually guide people through legal rules, standards and principles; must be reasonably stable; must be supreme; and must utilize impartial justice through courts or other bodies with fair procedures.<sup>37</sup> Further, supporting the condition of transparency is the principle that people should know what the government's decisions are – they must be pre-announced, preexisting (no retroactive laws) and made publicly available.<sup>38</sup> Additionally, meaningful access to justice requires the practical availability of process to judge the government's action with the law.<sup>39</sup> Institutionally, actors must have regular availability of tribunals, agencies or courts to resolve disputes, which have impartial judges, and whose decisions are promptly and effectively implemented.<sup>40</sup> The agency that judges the government's actions must be independent from the actor being evaluated.<sup>41</sup> Accessibility, usually found through the courts, should be supported by an active and independent bar association. A series of strictly procedural standards sustain these principles: "adequate record-keeping, fair trial practices, the publicity of proceedings, seasoned explanations of results, and the right of appeal."<sup>42</sup>

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*Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 7-8 (1997) (explaining that definitions of the rule of law generally consist of three values: protection against anarchy; the creation of conditions where people have confidence in their knowledge of the legal consequences of their actions; and protection against official arbitrariness); David Kairys, *Searching for the Rule of Law*, 36 SUFFOLK U. L. REV. 307, 318 (2003) (listing "three essential requirements for the rule of law: certain relationships, events and transactions should be subject to rules; the rules laid down should be followed and should apply to everyone, including limits on the government and on the powerful; and the rules should be enforced with some mechanism for seeking redress").

34. See Kairys, *supra* note 33, at 312-14.

35. *Id.* at 311-14 (collecting and detailing the fourteen most oft-listed conceptions of the rule of law, which includes some substantive elements and some western beliefs, such as the need for judicial decision-making and judicial review).

36. See, e.g., *id.* at 312-14; Brooks, *supra* note 17, at 2284 n.43.

37. Brooks, *supra* note 17, at 2284 n.43 (contrasting other authors' conceptions of the rule of law).

38. Whitford, *supra* note 31, at 725-26 (discussing how laws must be made *ex ante*, or before they are applied).

39. *Id.* at 726 (noting that this is a practical condition – an aggrieved person or someone on their behalf must be able to complain).

40. John V. Orth, *Exporting the Rule of Law*, 24 N.C. J. INT'L L. & COM. REG. 71, 79 (1998).

41. Whitford, *supra* note 31, at 726 (explaining that independence means freedom from fear).

42. Orth, *supra* note 40, at 79 (discussing the "policy framework" of the rule of law).

The benefit of a minimalist, procedurally-oriented conception of the rule of law is that it moderates charges of ethnocentrism or cultural imperialism.<sup>43</sup> In particular, any substantive conception inherently brings into a definition the values and ideals of the culture or professional and personal background of the definer. A minimalist definition also defends against the criticism that a substantive conception leads to transplantation of large bodies of law that may not suit the host environment, and certainly does not suit every host environment.<sup>44</sup>

The value of such a minimalist, procedural rule of law is generally recognized, but not frequently applied.<sup>45</sup> Practitioners frequently jump directly into a substantive conception of the rule of law. Importantly, such a practice skips the creation of a foundation for a substantive conception. Overall, the rule of law is grounded firmly in procedural fairness – categorically referred to as justice. Anything above that would be a substantive or normative addition to the procedural foundation of the rule of law.<sup>46</sup> The lesson here is that any normatively coherent or defensible *substantive conception* of a just legal system should be predicated on the pre-existence of a *procedurally-just conception* of the rule of law.<sup>47</sup> As such, any substantive conceptions above this basic structure are appropriate only after the minimalist, procedurally-oriented rule of law has been established.

Writers and scholars have advanced the notion of the rule of law from imperialism onwards and imperialist states transplanted their legal codes onto their subjects pursuant to this notion.<sup>48</sup> So why has the world once again turned to expounding the benefits of and exporting the rule of law?

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43. Ronald J. Daniels & Michael Trebilcock, *The Political Economy of Rule of Law Reform in Developing Countries*, 26 MICH. J. INT'L L. 99, 105 (2004).

44. *Id.*

45. *See, e.g.*, Brooks, *supra* note 17, at 2283-84.

46. Daniels & Trebilcock, *supra* note 43, at 107.

47. *Id.*

48. *See, e.g.*, Daniel Berkowitz et al., *Economic Development, Legality and the Transplant Effect*, 47 EUR. ECON. REV. 165, 165 (2003) (analyzing the determinants of effective legal institutions in forty-nine countries).

<b>THE RULE OF LAW – MINIMALIST APPROACH<sup>49</sup></b>	
2 Essential Values Transparency of government decisions and lawmaking, which creates a system of rules, AND Meaningful access to redress and justice through an independent judiciary or other body.	
<b><u>PRIMARY QUALITIES</u></b>	
<b>PROCEDURAL FAIRNESS IN:</b>	
Passage of fair, equal and nondiscriminatory laws and decisions with the effect of law, AND	
Access to the judiciary or other body for meaningful, fair, impartial and equal redress and justice.	
<b><u>SECONDARY QUALITIES</u></b>	
System of Rules that Govern relationships and events, Actually guide people, Are reasonably stable, AND Are supreme.	Transparency Principles in Government Decisions, that Are preannounced, Are preexisting, AND Are publicly available.
Meaningful Access to Justice Principles: Practical availability of process, Active and independent bar, Regular availability of tribunals, agencies or courts to resolve disputes, Impartial judges, AND Prompt and effective implementation of decisions.	Procedural Standards: Adequate record-keeping, Fair trial practices, Publicity of proceedings, Seasoned explanations of results, AND The right of appeal.

49. This is the author’s conception of a minimalist, procedurally-oriented conception of the rule of law, distilled from the best academic formulations as discussed above.

### *B. What is the Role of Rule of Law Reform?*

Western legal theorists believe that rule of law reform will allow states to transition from “the first stage of political and economic reform to consolidate both democracy and market economics.”<sup>50</sup> The “rule of law revival” occurred with the political openings of different regions – Latin America, Sub-Saharan Africa, parts of the Middle East, and parts of Asia.<sup>51</sup> The escalation of rule of law reform appears to have grown principally with the fall of the ex-Soviet satellites, whose transitions to market economies and democracy (or some vestige of it) spurred a newfound interest in the role of the rule of law in the development of the twin towers of political and economic reform.<sup>52</sup>

Because of the total or near absolute dismantling of the economies and social institutions of the ex-Soviet states, they immediately needed large amounts of donor aid, primarily in the form of money and technical advisors.<sup>53</sup> Legal advisors, motivated partly by altruism and partly by self-interest, literally poured into the former U.S.S.R. from donor states, bilateral aid agencies, multilateral development banks, and nongovernmental aid organizations.<sup>54</sup> Some legal advisors came from government agencies to assist in the development of their new systems. Others were sent by multilateral donor agencies as strings attached to much needed large-scale financial aid.<sup>55</sup> Of course, legal and development theorists followed their lead in devising new formulations of the proper scope and strategy of legal reform.<sup>56</sup> In any case, the rhetoric of rule of law was used as a catch-all phrase to embody or consolidate democracy, achieve economic growth and expand social progress.

### **1. Democratic Reform**

Democracy is the (broadly speaking) principle of “popular control over public decision making and decision makers; and equality between citizens in the exercise of that control.”<sup>57</sup> The institutional means of accomplishing the basic democratic

50. Carothers, *supra* note 14, at 97. *But see* Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge* 6 (Carnegie Endowment for Int’l Peace, Working Paper No. 34, 2003) (explaining how the proposition that rule of law is necessary for economic development and democracy is not as axiomatic as first appears).

51. Carothers, *supra* note 14, at 97-98.

52. *Id.* at 95.

53. *See, e.g.*, Tom Ginsburg, *Political Reform in Mongolia: Between Russia and China*, 35 *ASIAN SURV.* 459, 459-60 (1995).

54. Carothers, *supra* note 14, at 103.

55. *Id.* at 103-04.

56. *See, e.g.*, Orth, *supra* note 40, at 71; Whitford, *supra* note 31, at 723; Kairys, *supra* note 33, at 307-08; Brooks, *supra* note 17, at 2276-79.

57. Int’l Inst. for Democracy & Electoral Assistance [IDEA], *Democracy Assessment: The Basics of the International IDEA Assessment Framework*, at 3 (2002), available at [http://www.idea.int/publications/sod/upload/demo\\_ass\\_inlay\\_eng\\_L.pdf](http://www.idea.int/publications/sod/upload/demo_ass_inlay_eng_L.pdf) (providing a methodology for citizens of any democracy in the world to assess the functioning of their own democratic systems. The Government of Mongolia invited representatives from all over the country, officials, civil society and private sector on June 30 – July 1, 2005, to discuss a Draft National Plan of Action to Consolidate Democracy in Mongolia. The focus of this plan is a national research project conducted according to the Democracy

principle are realized through legal institutions.<sup>58</sup> Rule of law reform is intrinsically attached to democratic ideals, if not to democracy itself. Democratic institutions are protected by law and necessarily dependent on the rule of law.<sup>59</sup> States that have backslid – or are struggling with weak rule of law reform – are generally those that are becoming authoritarian or disrespectful of their constitutional underpinnings and thus, undemocratic.<sup>60</sup> Additionally, the globalization of the humanitarian regime and human rights law has influenced the definition of a rule of law. The consecration and protection of individual rights is a core tenet of democracy, and has become intertwined irreducibly from the rule of law ideal.<sup>61</sup> Overall, there is a substantial grey area between democracy and the rule of law. Nonetheless, undertaking rule of law reforms invariably strengthens and consecrates already-established democratic institutions.

Mongolian citizens understood that they had joined the worldwide democratic movement. The government of Mongolia's denouncement of the communist state and its subsequent successful elections with full suffrage signaled so much.<sup>62</sup> To a great extent, the impetus for change took place in Ulaanbaatar, in the universities and with the young, moderate leaders.<sup>63</sup> Although the state began a democratic transition, the countryside itself still was mired in its communist recent past, and most, if not all of the population still was attached to Mongolia's socialist institutions.<sup>64</sup> In Mongolia, the attainment of procedurally-minimalist rule of law would encourage and assist the success of their democratic transition.<sup>65</sup>

## 2. Economic Reform

It is "regarded as a truism that the 'rule of law' is causally related to economic development."<sup>66</sup> At the very least, legal reforms of post-Leninist or post-

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Assessment methodology).

58. *Id.* at 3-4 (describing the values that create democratic legal institutions; examples of democratic legal institutions include civil and political rights systems, economic and social rights, electoral and party systems, NGO rights, anti-discrimination laws, effective and appropriate avenues to legal redress, and an appropriate domestic and international human rights framework).

59. See United States Agency International Development [USAID], Rule of Law Program, [http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/technical\\_areas/rule\\_of\\_law/](http://www.usaid.gov/our_work/democracy_and_governance/technical_areas/rule_of_law/) (last visited Feb. 11, 2010) ("The rule of law is the cornerstone for all other elements of democracy. A free and fair political system, protection of human rights, a vibrant civil society, public confidence in the police and the courts and economic development all depend upon accountable governments, fair and accessible application of the law and respect for international human rights standards. In post-conflict settings, reestablishing the rule of law is the first step in the rebuilding process. Establishing peace and security and rebuilding justice institutions can help to develop the necessary climate for reconciliation, public confidence and subsequent economic growth.")

60. Carothers, *supra* note 14, at 98 (describing regional experiences with rule-of-law reforms).

61. See, e.g., BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 1-2 (2004).

62. See, e.g., Ginsburg, *supra* note 53, at 463; Bilskie & Arnold, *supra* note 5, at 205.

63. Ginsburg, *supra* note 53, at 462-63.

64. *Id.* at 463-64.

65. See Bilskie & Arnold, *supra* note 5.

66. Daniels & Trebilcock, *supra* note 43, at 102 (referring to evidence of a negative correlation between individuals' perceptions of judicial unpredictability and growth and investment; evidence of a negative correlation between corruption and investment; and evidence of positive correlation between

authoritarian societies are necessary to establish a fair, functioning market economy.<sup>67</sup> In other developing or transitional countries, extensive legal reforms are undertaken to establish more market-friendly legal systems, rather than to create a market economy from scratch.<sup>68</sup>

The rule of law is essential because it provides the necessary elements to a market system, including: “universal rules uniformly applied, which generates predictability and allows planning; a regime of contract law that secures future expectations; and property law to protect the fruits of labor.”<sup>69</sup> With the large-scale promotion of rule of law by the international aid community, the conventional understanding is that a fair, transparent, stable and accountable legal and judicial system is necessary to attract foreign direct investment, itself a crucial factor in economic growth and development in transitional and developing states.<sup>70</sup> The pressure to create this framework comes not just from institutional advisors and requirements within the aid packages, but from the organic demands that economic globalization puts on governments to accommodate or lose out.<sup>71</sup>

In Mongolia, economic collapse was the primary influence on the minds of the population. Resultantly, to achieve the long-term goals of a market economy and a political democracy, Mongolia’s leaders realized that its initial reforms must achieve, in the short term, economic stability and a fundamental change in the psychology of its citizens.<sup>72</sup> The procedurally-minimalist rule of law would achieve these necessary economic reforms.

It is important to note that the economic agenda of the rule of law also achieves democratic benefits. For instance, the rule of law protects the functioning of major economic institutions and guards businesses and individuals from discriminatory, inefficient or illegal actions of government in the economy.<sup>73</sup> Indeed, as there are substantial political, economic and social benefits from rule of law reforms, a more appropriate view is that the rule of law achieves integrated benefits.

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de facto independence of a state’s highest court and economic growth).

67. See Hewko, *supra* note 29, at 3.

68. *Id.*

69. Bilder & Tamanaha, *supra* note 33, at 473. See also *id.* at 484 (arguing that beyond protecting economic development and the liberal-democratic framework, law is of secondary status, where lawyers are “technicians who effectuate decisions made by others”).

70. See Hewko, *supra* note 29, at 3. Of course, when accounting for the realities of economic globalization – there is an increased need for a country to create the legal and judicial framework to take advantage of the free flow of goods, labor and capital. Without this framework in place and protected, risk-averse investors will refuse to invest.

71. Governments that do not accommodate globalization through liberal foreign investment laws, accession to the WTO and its obligations, etc., invariably lose the benefits of globalization like increased trade and investment.

72. See, e.g., Ginsburg, *supra* note 2, at 459; Bilskie & Arnold, *supra* note 5, at 205; Goyal, *supra* note 10, at 633.

73. Carothers, *supra* note 14, at 97.

### 3. Integrated View of Reform

The rule of law fulfills more than the creation of a democratic or economic framework. Development should be seen in a comparative integrated view, and legal development should not be analyzed in isolation nor only connected to economic development. Amartya Sen argues that there is a need for conceptual integrity in the development of a successful legal and judicial system, one that views legal development not merely by its achievements through the passage of laws and their successful exercise, but through the enhancement of personal capabilities – “[the] freedom - to exercise the rights and entitlements that we associate with legal progress.”<sup>74</sup> In this integrated view, the development of a successful legal and judicial system has a peripheral effect on all aspects of development, and should be valued and judged by its peripheral as well as its intrinsic effects.<sup>75</sup>

Legal reforms of stable states generally have a specific focus, such as amendment to the constitution or the modernization of the criminal code.<sup>76</sup> In a post-socialist environment like that of Mongolia, the government tables every aspect of society for reform. After completing its constitution, Mongolia engaged its political, economic and social spheres in a comprehensive reformation, to achieve its goals of a political democracy and a market economy.<sup>77</sup> Transformation to a market economy and a capitalist system results in winners and losers, and resultant social inequities occur. Particularly because socialism ensured that most (if not all) Mongolians had basic necessities, for legal reforms to be successful, any arising social concerns in a transition must also be countered.<sup>78</sup>

The goal of rule of law initially must be the achievement of the minimalist requirements. However, the rule of law reform should be valued by its fundamental effects arising from its definition, as well as its peripheral effects – primarily social progress. Having discussed both the elements of a procedurally-minimalist rule of law and the judgment methodology, the actual consummation of the rule of law reform program is the critical problem for post-Socialist or transitional states.

#### *C. How Do We Achieve the Rule of Law?*

Simply conceptualized, to achieve the rule of law, a state must undergo judicial and legal reforms with the intent of realizing its minimalist requirements.<sup>79</sup>

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74. Amartya Sen, Keynote Address, World Bank Conference- Comprehensive Legal and Judicial Development: What is the Role of Legal and Judicial Reform in the Development Process? (June 5, 2000), available at <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/legalandjudicial.pdf> (explaining that legal development, like economic or political development, is a constitutive part of development as a whole, which resembles a “thickly interwoven textile”).

75. *Id.*

76. Carothers, *supra* note 14, at 99-100.

77. See, e.g., Ginsburg, *supra* note 2, at 459; Bilskie & Arnold, *supra* note 5, at 205; Goyal, *supra* note 10, at 633.

78. See, e.g., Sen, *supra* note 74.

79. See, e.g., Orth, *supra* note 40, at 71; Whitford, *supra* note 31, at 725; Kairys, *supra* note 33, at 307; Brooks, *supra* note 17, at 2275.

For post-autocratic states, the central task is to introduce the over-arching concept of accountability that “requires public officials to obey laws and their own rules and calls them to account when they do not.”<sup>80</sup> To achieve this, the reforms have to be sanctioned and supported from above – from those who categorically lead the state, politically and economically.<sup>81</sup> Ultimately, rule of law reform is (at least partly) a political enterprise aimed at constraining public authority. The danger inherent in holding accountable public authority is that those who wield public power generally will resist any reforms which deny them the benefits of their authority.<sup>82</sup> Consequently, reforms have to combat or temper such resistance at the outset. In addition to being a political exercise, achieving a rule of law is a process-oriented development.

### 1. Rule of Law Realization Theories

**Rule-Based Economic Realization:** Richard Posner advocates a strict rule-based reform, whereby existing institutions, however inefficient themselves, will administer newly created, efficient rules.<sup>83</sup> The benefit lies in the small fixed costs of creating and instituting a rule, as compared with the very costly and time-consuming reforms of legal institutions.<sup>84</sup> Thus, legal reform can stimulate economic growth through rule reforms, at a smaller expense. Increased economic growth will in turn add stability to the nation, increasing its human and economic resources, and creating a framework for more ambitious legal reforms in the longer run.<sup>85</sup>

Posner seems to advocate a more ambitious rule-based reform at the expense of legal institutional strengthening – particularly of the judiciary.<sup>86</sup> However, Posner’s rule-based reform agenda leans heavily on a substantive conception of the rule of law, thus it encounters the difficulties of transplantation and cultural imperialism.<sup>87</sup> If the rules are not appropriate for the host country or enforceable, then all is practically for naught, at the expense of possible institutional strengthening.<sup>88</sup> Especially in the face of a poor-track record of rule of law reform over the past two decades, it appears rather more propitious to hedge the risk of failure through active reforms of multiple sectors. Because of these criticisms, the realization theory that this article promotes does not include this formulation.

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80. Shapiro, *supra* note 19, at 57.

81. See Carothers, *supra* note 14, at 96.

82. *Id.*

83. Richard Posner, *Creating a Legal Framework for Economic Development*, 13 WORLD BANK RES. OBSERVER 1, 4–5 (1998).

84. *Id.* at 4.

85. *Id.* at 3.

86. *Id.* at 5-7.

87. *Id.* at 6.

88. *But cf.* Daniels & Trebilcock, *supra* note 43, at 101-09 (criticizing the typical conception of viewing institutional strengthening as a necessity to attract FDI, and arguing for legal reform to emphasize the details and not general concepts; e.g., specific, even mundane changes that are necessary for “existing legislation to function within the cultural, political, and economic realities of the host countries”). This argument seems to defend against charges of cultural imperialism while advocating a rule-based reform agenda.

Rule-Based Formalistic Realization: Carothers forcefully argues that the concentration of donors and reforming states should be on the depth of the reforms, in three categories: type-one reform concentrates on the laws themselves; type-two reform strengthens the law-related institutions to make them more competent, efficient, and accountable; and type-three reform has a deeper goal of enforcing government's compliance with law.<sup>89</sup> This reformation agenda is rule-driven as well, concentrating on technical and institutional reforms that primarily affect the formalistic legal system.

Norm-Creation Realization: There is little evidence that formalistic reforms or institutional strengthening is effective without a culture of support for the rule of law.<sup>90</sup> Another and perhaps more cogent methodology of rule of law reform operates from a general rule of law theory to specific applications. First, there are norms of universal application, usually stated in great generality – in particular the notion of fairness which underlies transparency, accountability and inclusion—which must permeate the bureaucratic decision-makers and the legal culture.<sup>91</sup> Second, there are specifically-tailored reforms that achieve particular, defined goals while continuing to uphold the norms of universal application.<sup>92</sup> Aptly, this type of reform focuses on norm creation. Institutional strengthening, while certainly necessary, is neither a condition precedent nor a by-product of norm creation.

Particular rules should be reformed or created *only* to meet particular societal challenges or shortcomings in the existing framework.<sup>93</sup> In this formulation, the rule of law is a culture, and the stimulation and creation of that culture is the overarching goal within which the state undertakes the judicial and legal reforms.<sup>94</sup>

Integrated Realization: However, these models are not in a zero-sum game. A more appropriate methodology for realizing the procedurally-minimalist rule of law combines formalistic reform theory with the norm creation theory.<sup>95</sup> If the umbrella paradigm of norm creation is indeed the universal and ubiquitous concept that it seems, institutional strengthening and formalistic reforms will help expand and support it.<sup>96</sup> In this view, norm creation is the umbrella paradigm overseeing

89. Carothers, *supra* note 14, at 99-100 (discussing rule of law reforms by focusing on the depth of reforms).

90. See Brooks, *supra* note 17, at 2284-85 (positing that Thomas Carothers' "Rule of Law Assistance Standard Menu" is an untenable model and arguing that rule-of-law reform is fundamentally an issue of norm creation); Stromseth, *supra* note 17, at 1443-44.

91. Brooks, *supra* note 17, at 2285 (criticizing the formalistic rule of law conception: "[t]he rule of law is not something that exists 'beyond culture' and that can be somehow added to an existing culture by the simple expedient of creating formal structures and rewriting constitutions and statutes").

92. *Id.*

93. Thus, specific rule-creation controls the typical problem of adequate or well-formulated laws with inefficient enforcement mechanisms which undermines the rule of law by lowering individual or investor confidence in the sanctity of the legal system.

94. See Brooks, *supra* note 17, at 2285.

95. This is the authors' conception distilled from the best academic formulations as discussed *supra*.

96. See also Bilder & Tamanaha, *supra* note 33, at 484 (urging the importance of the development

the long and difficult process of creating efficient legal institutions, which requires heavy doses of capital and expensive, educated labor.<sup>97</sup>

Of course, the criticism of the rule-based and formalistic conceptions is that they work at the expense of concentrating on norm creations, since the rewriting of laws and upgrading of the courts does not cause judges, ministers and parliamentarians to “absorb” the doctrines underlying the rule of law.<sup>98</sup>

In an integrated view, the focus is on norm creation, but the typical formalistic reforms are both suitable and needed to establish an appropriate legal culture. The actual reforms should follow the integration and development of the intellectual norms – not only the training in market economics and democratic institutions – but also a thorough understanding of governmental and judicial accountability, transparency, responsiveness, and accessibility. To put it another way, the focus should be on the creation of a rule of law culture while accomplishing necessary institutional and particular reforms.

## 2. The Path of Realization

The reform of legislation is a natural starting point in transforming a society from socialist legal traditions and a centrally-planned economy to a market economy. In Mongolia, before legal reforms could occur, Mongolia’s leaders had to meet the preconditions to reform discussed above, which culminated with the establishment of a multi-party system and the adoption of a new Constitution.<sup>99</sup> The difficulty then lay in conveying the provisions of this modern Constitution to a restructured economic, political and legal system that could implement and enforce these new rights.<sup>100</sup>

Many donor organizations and academics utilize a version of the following chronology for the undertaking of rule of law reforms.<sup>101</sup>

Stage One: Rewrite the constitution, laws (including modernizing the civil and criminal code) and regulations.

Stage Two: Undertake judicial reforms through: creating an independent judiciary; professionalizing the bar and the bench; increasing judicial efficiency; increasing judicial accessibility; increasing the competence and professional standards of the judiciary through a reformed law school curriculum, support for bar associations, and judicial training; and establishing alternative dispute resolution mechanisms.

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of the body of legal doctrine in addition to the basics of institution building).

97. *See, e.g.*, Brooks, *supra* note 17, at 2275.

98. *Id.*

99. *See also*, B. Chimid, Advisor to Parliament, Speech at Conference in Celebration of Tenth Anniversary of Asian Foundation’s Mongolian Program, (Sep. 11, 2000), in THE ASIA FOUNDATION, MONGOLIA’S POLITICAL AND ECONOMIC TRANSITION: CHALLENGES AND OPPORTUNITIES, 18-22 (2000).

100. *See, e.g.*, Ginsburg, *supra* note 2, at 459; Bilskie & Arnold, *supra* note 5, at 205.

101. In addition to this chronology, and what is not focused on by donors, the rule-of-law definition and realization theory proposed by this article require overarching emphasis on norm creation.

Stage Three: Encourage legislative and executive reform through good governance programs.

Stage Four: Increase legal representation and accessibility through legal aid programs and nongovernmental organizations.

Stage Five: Embark on other institutional reforms such as police, prosecutor, and prison reforms.<sup>102</sup>

Additionally there are other factors, not perfectly congruent with the universal notions embodied in rule of law, but tangential and supportive. First, an independent, active media can do much to push for transparency of government decisions and advance meaningful participation in the decision-making.<sup>103</sup> At the least, an independent media can create a meaningful dialogue that can lead to increased participation in governance. An active media can make public criticisms, raise awareness levels, be a voice to the poor and vulnerable, and most importantly, force the government to be accountable, transparent and inclusive.<sup>104</sup> Of course, the right of free speech must be judicially protected for this outlet to carry its weight. Second, public interest in social responsibility can create social challenge and change, thus stimulating a rule of law culture.<sup>105</sup> Further, sensitivity to the actual social environment is an important aspect in these legal reforms.

### 3. The Problem of Constraining the Leaders

Owing to the limited successes by rule of law reforms over the last two decades, it is commonly accepted that “rule of law reform will succeed only if it gets at the fundamental problem of leaders who refuse to be ruled by the law.”<sup>106</sup> Emphasis on a notion-based rule of law aims to achieve precisely this – to reduce and eventually eliminate unreceptive leaders and officials.<sup>107</sup> To be sure, these individuals will only surrender their “traditional impunity” under great pressures.<sup>108</sup> More often than not, domestic pressure alone will not suffice in achieving this surrender, thus there is a clear role for foreign sources.<sup>109</sup> The underlying assumption, as discussed above, is that rule of law reform is a political endeavor and not a technical or bureaucratic enterprise, so its success is subject to inherent and internal political uncertainties.<sup>110</sup> Changing the mindset of leaders is

102. See, e.g., Orth, *supra* note 40, at 77; Whitford, *supra* note 31, at 725; Kairys, *supra* note 33, at 312-14; Brooks, *supra* note 17, at 2284-85; Carothers, *supra* note 14, at 99-100.

103. See Sen, *supra* note 74, at 19 (arguing that a vigorous media can strengthen economic security, political liberties, legal and human rights, etc., but judicial guarantees must protect the right of fair speech, fair comment and public criticism).

104. *Id.*

105. *Id.*

106. Carothers, *supra* note 14, at 96.

107. See *id.* at 100.

108. *Id.* at 96 (describing the primary obstacles to achieving the rule of law).

109. Daniels & Trebilcock, *supra* note 43, at 128-34 (arguing that because of the importance of historical, cultural and social impediments, rule-of-law reforms need effective monitoring and assessment by a credible, and likely multilateral, institution). One need only look at the example of Mobutu in Zaire / Democratic Republic of the Congo to see what could occur when foreign donors do not exert pressure on leaders to surrender their impunity.

110. See *id.*

necessarily a political exercise, where the actors will weigh the benefits, costs, and realities of ceding to the rule of law. Consequently, this formulation leads credence to the general understanding that the success of reforms relies not on technical or financial support, but on combating political and human obstacles.<sup>111</sup>

#### 4. The Use of Pre-Conditions for Constraining the Leaders

Leaders and non-receptive officials can be constrained through a combination of domestic and foreign influence. Domestic interest groups play an important role in exerting bottom-up pressures. Nongovernmental organizations, domestic investors, minorities, and entrepreneurs should agitate for suitable changes and form broad coalitions with the populace and government officials. The goal is to stimulate change horizontally and ultimately vertically using a broad section of alliances, rather than fractured interest groups clamoring for specific favors and changes, what usually supports or results in corruptive political exchanges.

To augment domestic efforts, there is a clear role for international pressure. Foreign governments, multilateral banks, bilateral organizations, nongovernmental organizations, and foreign citizens should exert top-down pressures on the leaders of host countries through conditionality, to push for specific and traceable rule of law reforms. Of course, by no means does this formulation intend for loans and grants to be conditioned on the *creation* of a rule of law program. The host country should conceive of and establish a rule of law program on its own, lest the reforms be reduced to mere formalities. Only after a consensus of high-level support is in place will international pressure serve any purposes. In the absence of upper-level sponsorship, or at least acceptance, rule of law reforms will be diametrically opposed by those whose power, influence, or economics will be affected.<sup>112</sup>

When domestic support for a rule of law program is lacking, legal advisors should forgo imposing or conditioning donations on legal and judicial reform, and focus on encouraging a grass roots movement for reform, through discourse with the host country's bar associations, nongovernmental associations and government officials.<sup>113</sup> However, where a rule of law program is in place, foreign organizations and groups should exert influence to set in motion a rule of law culture.<sup>114</sup>

Use of condition precedents is a potentially successful method for foreign donors and states to achieve the rule of law.<sup>115</sup> To illustrate, consider the area of nongovernmental organizations. Where restructuring is taking place, and some elites do not want a comprehensive nongovernmental organization law for fear of

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111. Carothers, *supra* note 14, at 96 (explaining the human obstacle as the central difficulty in the establishing the rule of law); *see also* Daniels & Trebilcock, *supra* note 43, at 119 (creating a five-part strategy to address the political barriers to rule-of-law reform).

112. Carothers, *supra* note 14, at 96; Daniels & Trebilcock, *supra* note 43, at 119.

113. Richard E. Messick, *Judicial Reform and Economic Development: A Survey of the Issues*, 14 THE WORLD BANK RESEARCH OBSERVER 117, 123-28 (1999).

114. *See id.* at 124-25.

115. Daniels & Trebilcock, *supra* note 43, at 132.

losing political control, serious pressure should be placed on those elites to cede their opposition through conditions precedents.<sup>116</sup> Condition precedents can be desirable benefits from industrialized countries, the international aid community, accession to regional trade blocs, bilateral trade deals, or accession to the WTO. These pressures should be used to disrupt opposition only to the reforms which are necessary to create the rule of law culture and framework – in this case, the legal basis for nongovernmental organizations to operate domestically.

Even though the underlying doctrine will surely not be the influential factor in an actor ceding opposition, there are fringe benefits that actually support the creation of a rule of law culture. Younger generations will have a needed reform in place (the inclusion of nongovernmental organizations in the dialogue of society), thus increasing transparency, participation and redress in the future.<sup>117</sup> At least in this way, the notion of inclusive governmental rule will be experienced by the individuals who publicly participate in society and those in government who are receptive to such ideas. Resultantly, the rule of law culture increasingly develops, deepens and strengthens.<sup>118</sup>

#### *D. The Role of the Judiciary in Implementing the Rule of Law*

*"The Rule of Law depends on judges willing to decide cases in accordance with principle, despite occasionally incurring official displeasure, and sometimes at real personal risk."*<sup>119</sup>

While the rule of law necessitates the constraint of leaders, it depends on the judiciary. A close study of the rule of law chart demonstrates that the judiciary is the focus of most of the rule of law reforms.<sup>120</sup> By and large, judicial reforms play a determinative role in the establishment of a rule of law culture.

An underlying goal of judicial reforms is to achieve government compliance with the law and create acceptance of the rule of law values at the top echelon of government.<sup>121</sup> This is possible through the integrated combination of institutional reforms and the creation of norms.<sup>122</sup> Institutional judicial reforms are capital and labor intensive, and demand sophistication and patience. An impartial administration of the rule of law is only accessible through the creation of a strong

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116. *Id.* at 129-33.

117. See Carothers, *supra* note 14, at 100.

118. It appears that many Central Asian post-Leninist states that embraced rule-of-law reform during their transitions and that have backslid into increasing authoritarianism, would have benefited by a more strict and principled focus on rule-of-law doctrine and the creation of a notion-based legal culture. This study is formulated precisely for such purpose – to create a theoretical framework to compare the experiences of post-socialist states. Here, the author focuses on Mongolia, probably the least written about ex-Soviet "satellite."

119. Orth, *supra* note 40, at 81.

120. This assessment is pursuant to the author's formulation for the rule-of law chart. Other rule-of-law formulations do not *necessarily* focus on the judiciary though it is hard to conceive a formulation that does not impact the judiciary.

121. Daniels & Trebilcock, *supra* note 43, at 110-11.

122. See Brooks, *supra* note 17, at 2283-87.

legal culture that supports the rule of law notions.<sup>123</sup> The following factors constitute the principal judicial reforms that a country can undertake and that assist in the establishment of a procedurally-minimalist rule of law.

**Judicial Independence:** Principally, achieving judicial independence is a key reform that ensures a strong apolitical judiciary, which is free to mete out justice.<sup>124</sup> Judicial independence is one of the essential values to the above formulation of a procedurally-minimalist rule of law. The constitution or other legislation usually assures judicial independence. Above all, a strong and independent judiciary embodied with the ethos of rule of law will have the freedom and strength to challenge governmental actions that hinder the rule of law. Thus, a high level of support is necessary from the ministry of justice, judges and judicial employees, in addition to the legislature and senior executive branch officials, for judicial reform to succeed.<sup>125</sup> Judicial independence reforms in societies which previously lacked it depends on executive and legislative actors willing to allow an independent judiciary.<sup>126</sup> This usually occurs through the provision of a sufficient budget, compliance with judicial decisions and support for institutional strengthening.<sup>127</sup>

**Judicial Council:** The creation and implementation of a judicial council supports an independent judiciary.<sup>128</sup> This reform is of particular importance in post-Socialist societies that historically have not had an independent judiciary.<sup>129</sup> The institution of a judicial council assists judicial independence, since a cross-section of government screens judicial appointments, monitors the judiciary, institutes disciplinary proceedings and sets the budget.<sup>130</sup> The procedures for selection of judges must be refined to limit improper influence and achieve genuine judicial independence. If judges and judicial employees are sufficiently secure in their tenure, and have a sufficiently high salary, they will be more independent, competent, and honest.<sup>131</sup>

**Judicial Efficiency:** Increasing judicial efficiency embraces the notion of fairness, which underlies the rule of law culture. Technical and material aid increases the resources and capabilities of courts, by disseminating computers, copiers and fax machines; streamlining court processing times; and creating a framework for public access to printed judicial decisions.<sup>132</sup> These reforms are fundamentally

123. *Id.*

124. Danielle Conway-Jones, *Mongolia, Law Convergence, and the Third Era of Globalization*, 3 WASH. U. GLOBAL STUD. L. REV. 63, 71 (2004) (expressing that the flexibility inherent in the Mongolian Constitution under Article 49, judicial independence, is a hallmark of common law traditions). Indeed, judicial independence is grounded in the ideal of fairness.

125. See Messick, *supra* note 113, at 117-36 (summarizing a six case study of USAID judicial reform projects and holding so).

126. See Messick, *supra* note 113, at 124; Thomas Carothers, *supra* note 14, at 96.

127. See Daniels & Trebilcock, *supra* note 43, at 120-21.

128. *Id.* at 120.

129. See *id.* at 120-21.

130. *Id.* at 120.

131. See *id.* at 120-21.

132. But see Messick, *supra* note 113, at 124-25 (explaining that the authors of the six case study

important as they increase judicial efficiency. "Protracted case processing times and overburdened administrative staff may lead to resource-privileged individuals dominating the court's time to the detriment of those who have fewer resources with which to exert influence."<sup>133</sup> Reforming judicial procedures also can increase efficiency by eliminating duplicative or contradictory procedures.<sup>134</sup> Overall, judicial efficiency reduces possibilities for corruption, increases accessibility to the courts, and ensures that decisions are consistent throughout the country.<sup>135</sup>

Alternative Dispute Resolution (ADR) Mechanisms and the Informal Society: Improving access to justice through new procedures and the creation of alternative dispute resolution mechanisms increases individuals' ability to achieve meaningful redress – and hold government and other individuals responsible for their actions.<sup>136</sup> In many countries, informal dispute mechanisms must be studied and brought into the formal legal environment, so that extra-judicial remedies are limited in size and context, thus entrenching the rule of law firmly in the judiciary.<sup>137</sup> Of course, these informal mechanisms can be kept in local or neighborhood governments or councils, but reforms at the least should create the ability to appeal decisions to a judicial body.

Professionalizing the Judiciary: Professionalizing the judicial system is an important reform for creating a fair and impartial judiciary.<sup>138</sup> Raising accreditation standards, reforming legal education, creating ethics standards and monitoring committees, increasing the status of bar associations and raising the status of the judge in society will contribute to both an increased professionalism within the judiciary and an increased public perception of the profession.<sup>139</sup>

Legal Education: Reforming and modernizing the curriculum of the legal education creates a new awareness of modern legal norms, issues, and the nuances of a market economy, and encourages a more sophisticated rule of law culture.<sup>140</sup> As well, reformation of legal education ensures that all law schools offer coursework that meets predetermined standards. There is a need to coordinate the legal education so that law schools teach substantially the same subject matter, to reduce discrepancies in knowledge and in the practice of law once the students become accredited lawyers. The creation of a required bar examination will ensure that these minimum standards are met by all legal graduates.

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found that these types of reforms have little impact where there is a lack of a consensus for judicial reform).

133. See Daniels & Trebilcock, *supra* note 43, at 111.

134. *Id.*

135. *Id.*

136. USAID, OFFICE OF DEMOCRACY & GOVERNANCE, ALTERNATIVE DISPUTE RESOLUTION PRACTITIONERS GUIDE 1 (1988), available at [http://www.usaid.gov/our\\_work/democracy\\_and\\_governance/publications/pdfs/pnacp335.pdf](http://www.usaid.gov/our_work/democracy_and_governance/publications/pdfs/pnacp335.pdf).

137. See *id.* at 28, 49.

138. See Carothers, *supra* note 14, at 100.

139. See *id.*; OFFICE OF DEMOCRACY & GOVERNANCE, *supra* note 136, at 35.

140. Daniels & Trebilcock, *supra* note 43, at 117-18.

Bar Associations: Bar associations regulate the legal profession, and create and administer the standards for accreditation and professional licensing.<sup>141</sup> Increasing their scope and role as an oversight committee will generate an infrastructure of accountability and professionalism. Bar associations also provide Continuing Legal Education (CLE) programs, which help to educate the judiciary in how to understand, implement and judge newly-passed legislation and ensure that accredited attorneys continue to meet minimum knowledge and training requirements.<sup>142</sup> Perhaps most importantly, CLE programs can emphasize rule of law notions, and over time these can influence acceptance for the rule of law.

Accountability: Since rule of law reform is in part a political activity, proper performance is dependent on political actors deciding to comply or being forced to comply with the law. Thus, accountability of officials is predicated on the psychological willingness of the individual judge to rule honestly and professionally.<sup>143</sup> But it would be folly to predicate the establishment of the rule of law wholly on the judiciary, since ultimately high-level officials must accept living subject to the law. As such, weak judicial commitment to rule of law reform will undermine the efficacy of the whole premise.<sup>144</sup>

Overall, the judiciary is fundamentally important for achieving a procedurally minimalist rule of law. The judiciary is prevalent in the rule of law's essential values (meaningful access to redress and justice through an independent judiciary), in its primary qualities (access to the courts or other bodies for meaningful, fair, impartial and equal redress and justice), and overwhelmingly so in its secondary qualities (procedural standards and meaningful access to justice principles).<sup>145</sup>

"Rewriting constitutions, laws, and regulations is the easy part. Far-reaching institutional reform, also necessary, is arduous and slow."<sup>146</sup> The accumulation of the appropriate legal doctrine and professional norms and institutional "upgrading" takes time, and necessarily, donor organizations must be patient and supportive of the whole process of legal assistance, and host states must be committed to the full stage and scope of reforms.

### III. MONGOLIA'S TRANSITIONAL AND INSTITUTIONAL BACKGROUND<sup>147</sup>

The reformists agitating a transformation to democracy advocated four main policy changes: a multiparty system and free and fair elections – i.e. inclusion in the government; a free-market economy; democracy; and the end of bureaucratic

141. *Id.* at 115-16 (describing several functions of a bar association in the legal system of a nation).

142. *Id.* at 116.

143. Orth, *supra* note 40, at 81.

144. See Carothers, *supra* note 14, at 100-03 (painting a global picture of rule-of-law reform by making continental and regional observations, and opining that the movement toward rule of law is broad but shallow); Carothers, *supra* note 18, at 50 (noting that over the last 10 years, political leaders worldwide have asserted a commitment to building the rule of law).

145. See *supra* text accompanying note 49.

146. Carothers, *supra* note 14, at 95-96.

147. See *infra* pp. 80-86.

control.<sup>148</sup> Indeed, when the reformists in the Mongolian People's Revolutionary Party ("MPRP") persuaded the party to accept the democratic demands, the government's subsequent acts primarily sought to establish a (facially) democratic system.<sup>149</sup>

The first parliamentary act inspired by the reformists' pressure was purely symbolic. In 1990, Parliament amended its 1960 constitution, deleting the article which stated that the MPRP was the guiding force of the Mongolian state and its society – Mongolia was to be a multi-party, democratic society.<sup>150</sup> During July – September of 1990, Mongolia experienced its first free parliamentary elections, following other amendments that restructured the government and that allowed the legal formation of opposition parties.<sup>151</sup> The MPRP earned a majority of the seats in the People's Great Hural, but the Little Hural (the lower house of Parliament, subsequently abolished) was representative of the competing political parties.<sup>152</sup>

The first sessions of the Mongolian People's Great Hural (the new unicameral Parliament) formally abolished the directives, ordinances and decisions that constituted Mongolian law.<sup>153</sup> "The society had once and for all decided to take a leap from the rule of leaders to the rule of law."<sup>154</sup>

The first MPRP government's level of inclusiveness was astounding for a party accustomed to full political control – the MPRP assigned four cabinet posts to opposition parties.<sup>155</sup> Much has been speculated about the reason for this inclusive governing style.<sup>156</sup> Suffice it to say, it also invited a coalition government after sweeping local elections two years later, in 1992.<sup>157</sup> At a minimum, the MPRP leaders have proven more adept at massaging the democratic institutions to their favor than have the opposition leaders that initiated those institutions.

Further, immediately following the elections, then-President Ochirbat created a Constitution Drafting Commission, led by three majority MPRP members, but

148. Joseph E. Lake, First Resident U.S. Ambassador to Mongolia, Perspectives on Early Political Change, Speech at A Conference in Celebration of Tenth Anniversary of The Asian Foundation's Mongolian Program (Sep. 11, 2000), in THE ASIA FOUNDATION, MONGOLIA'S POLITICAL AND ECONOMIC TRANSITION: CHALLENGES AND OPPORTUNITIES 5 (2000).

149. *Id.* at 4-5.

150. Alan J.K. Sanders, *Mongolia's New Constitution*, 32 ASIAN SURV. 506, 510 (1992) (explaining how amendments to the 1960 constitution created a bicameral government for a short time and created the posts of president and vice-president).

151. Ginsburg, *supra* note 2, at 463.

152. *Id.* at 464.

153. Sanders, *supra* note 150, at 506.

154. WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT 5 (2000).

155. Ginsburg, *supra* note 2, at 464.

156. *Id.* at 464-65 (listing the possibilities as such: first, because of a generational change in the MPRP, the young party leaders actually had more in common with their opponents; second, that the only free-market economics experts were in opposition parties, thus necessitating a coalition government; and third, that the MPRP deftly put opposition leaders in charge of economics posts, in order to have a scapegoat in the inevitable case of economic decline).

157. *Id.* at 467.

with representation from all political parties.<sup>158</sup> Additionally, any proposed amendments to drafts were open to the public, with the only requirement that they be submitted through the proper channels to the Commission by September 1, 1991.<sup>159</sup>

Mongolia's natural path towards effective democratic governance was impressive, given its history. Not only did Mongolia's initial reforms kick off with panache, the government officials in charge were serious about the thoroughness of their tasks, completely remaking their constitution in the modern mold after the Constitutional Committee reviewed one hundred foreign constitutions for comparison.<sup>160</sup>

Mongolia's new constitution was formally ratified in early 1992, rescinding immediately the 1960 constitution.<sup>161</sup> The 1992 constitution is a modern constitution in the new European style, giving elevated status to human rights and social safety. The Asia Foundation supported the drafting of the new constitution.<sup>162</sup> The Foundation assisted the delegation of Mongolian parliamentarians who visited the U.S. to study its Congress and government institutions, and funded an American delegation of legal specialists who gave lectures and seminars in Mongolia on constitutional law and human rights.<sup>163</sup> After the draft constitution was circulated to the public for comment in June of 1991, The Foundation had several leading American constitutional experts contribute their commentary for the parliamentarians to consider.<sup>164</sup>

With their new Constitution firmly established but untested, Mongolia turned its attention to creating a market economy and enacting legislation to implement the Constitution. Mongolia, like other post-Leninist countries, searched for an optimal law regime in an era of globalization and law convergence.<sup>165</sup> For this intricate task, Mongolia's leadership was ill-equipped to make the transition alone.

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158. Sanders, *supra* note 150, at 511.

159. *Id.* at 510 (discussing the different drafts and the changes made to them, and noting that the International Commission of Jurists assisted the formation of the first draft). In fact, in addition to the International Commission of Jurists, representatives from the Asia Foundation, USAID, the diplomatic community in Ulaanbaatar and foreign experts reviewed the constitution's drafts and made suggestions. This was probably the first collusion in legal reform between the Mongolian government and international organizations and foreign governments.

160. Tom Ginsburg and Ganzorig Gombosuren, *When Courts and Politics Collide: Mongolia's Constitutional Crisis*, 14 COLUM. J. ASIAN L. 309, 310 (2000).

161. Sanders, *supra* note 150, at 506.

162. THE ASIA FOUNDATION, *THE ASIA FOUNDATION & MONGOLIA: A TEN YEAR HISTORY* 1 (2000).

163. *Id.*

164. *Id.*

165. There are numerous foundations, international organizations and governmental agencies and groups assisting legal and judicial reform in Mongolia, all ostensibly advancing the rule of law. See United Nations Dev. Programme [UNDP], *Human Development Report Mongolia* 51-52 (2003). The ones who have been the most contributory are, in no particular order: the National Center for State Courts of the United States; United States Agency for International Development (USAID); Asian Development Bank; World Bank; The Asia Foundation; United Nations Development Program (UNDP); Hans Siedel Foundation; German Technical Cooperation Association (GTZ); the Soros

Mongolia received extensive technical assistance from international organizations and used its newly formed bilateral relationships to enlist the legal and technical assistance of donor countries.<sup>166</sup> To its benefit, Mongolia had a respectable starting point: Eastern Europe and Central Asian ex-Soviet satellites already had stumbled through a few years of growing pains. Indeed, the United States Agency for International Development (USAID) and German Development Corporation (GTZ) were experienced legal reform advisors by the time they entered Mongolia in 1990.<sup>167</sup> The Asian Development Bank (ADB) began working with Mongolia's government in 1991.<sup>168</sup> To all parties involved, the goal was to create a market economy, a multi-party system, and a democratic governance structure.<sup>169</sup>

#### IV. LESSONS LEARNED FROM MONGOLIAN LEGAL REFORMS AND THE WORK OF DONOR ORGANIZATIONS

*The justice of Mongolia should become a Mongolian product.*<sup>170</sup>

It is neither apparent nor likely that Mongolia or its donors used any procedurally-minimalist formulation of rule of law or any analogous guide for its initial reforms.<sup>171</sup> Instead, they engaged in many reforms on an as-needed basis.<sup>172</sup> Nonetheless, over time, Mongolia and its donor agencies touched on nearly every single stage of rule of law promotion.<sup>173</sup>

Mongolia's experiences demonstrate four important lessons to future rule of law promotion: (1) judicial independence is the cornerstone of the rule of law; (2) formal government action plans offer "more bang for your buck;" (3) public participation and sentiment is a proxy for the institutionalization of the norms and culture of the rule of law; and (4) the leverage of donor coordination pays dividends.

##### *A. Lesson One: Judicial Independence Is The Cornerstone of the Rule of Law*

The importance of judicial independence seems self-evident, but a remarkable number of rule of law definitions omit it as a factor or put it very low on the

Foundation and Open Society Institute (OSI); and PACT.

166. WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 7.

167. See USAID, Brief Chronology and Highlights of the History of U.S. Foreign Assistance Activities, [http://www.usaid.gov/about\\_usaid/chronology.html](http://www.usaid.gov/about_usaid/chronology.html) (last visited Mar. 15, 2010); GTZ, The 1990s – A Dynamic Decade, <http://www.gtz.de/en/unternehmen/29091.htm> (last visited Mar. 15, 2010).

168. ASIAN DEVELOPMENT BANK, ASIAN DEVELOPMENT BANK & MONGOLIA: FACT SHEET 6 (2008).

169. Lake, *supra* note 148, at 5.

170. B. Chimid, Advisor to the Parliament, The New Constitution of Mongolia and Legal Reform, Speech at A Conference in Celebration of Tenth Anniversary of The Asian Foundation's Mongolian Program (Sep. 11, 2000), in THE ASIA FOUNDATION, MONGOLIA'S POLITICAL AND ECONOMIC TRANSITION: CHALLENGES AND OPPORTUNITIES 26-30 (2000).

171. See Cheung, *supra* note 10, at 70-72.

172. See *infra* Appendix B for a detailed summary of Mongolia's rule-of-law reforms and the donor institutions that assisted these reforms.

173. *Id.*

hierarchy of essential values.<sup>174</sup> The Mongolian experience highlights the importance of judicial independence.

Mongolia has had some difficulties with judicial independence for a few fundamental reasons. First, during its socialist past, the executive controlled the judiciary, which the executive utilized as another way for the state to exercise control over the country. Accordingly, judges occupied a lower status and decided cases and implemented decisions based on party lines and executive directives. Second, the continuity of the Mongolian communist party and continued party affiliation negatively affect judicial independence. The MPRP continues to be in power (although under a reformulated democratic basis) and many of the present judges on the bench were and continue as MPRP members. Thus, there is a close interrelation between the past and the present, and the executive and legislative branches continue to influence the attitudes and decisions of some judges. The third main factor affecting judicial independence is the difficulty in changing legal psychology from communist times.

In Mongolia and other similarly situated states, an early and targeted focus on judicial independence would be appropriate. The fundamental barriers to the establishment of judicial independence in Mongolia were not adequately dealt with during the first six years of reforms, until the government of Mongolia and the donor community had turned to judicial reform projects. But, two failures have resulted in Mongolia's judiciary having a precarious independence: the failure to acknowledge the fact that judicial independence is a cornerstone to the rule of law; and the failure to acknowledge the seriousness of the impediments to the establishment of judicial independence in Mongolia and then dedicate money and programs to removing those impediments.

Donors provided a great deal of focus on the General Council of Courts (GCC), which controls the management of the judiciary, including the budget, selects judges and undertakes disciplinary proceedings of justice sector employees.<sup>175</sup> As mentioned above, the creation and implementation of a judicial council supports an independent judiciary and embodies it with the freedom and strength to challenge governmental actions that hinder the rule of law.

The General Council of Courts, mandated by Article 49 of the Constitution of Mongolia to assure judicial independence, has twelve members: the Chief Justice, the General Prosecutor, the Minister of Justice and Home Affairs (MOJHA), a Secretary appointed by the President, two members appointed by the Supreme Court, two by the Parliament, two representing the *Aimag* and Capital City courts, and two representing the courts of first instance.<sup>176</sup>

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174. See discussion *supra* Part II.A.

175. See USAID, THE JUDICIAL REFORM PROGRAM IN MONGOLIA: ACCOMPLISHMENTS, LESSONS LEARNED, AND RECOMMENDATIONS FOR THE FUTURE 10 (2009), available at [http://pdf.usaid.gov/pdf\\_docs/PDACO255.pdf](http://pdf.usaid.gov/pdf_docs/PDACO255.pdf).

176. WORLD BANK, LEGAL AND JUDICIAL REFORM PROJECT 7 (2001) (discussing the state of the judiciary).

Although the majority of the membership comes from the judiciary, there is significant representation by the executive and legislative branches, compromising the independence of this body and the judiciary branch.<sup>177</sup> There has not been any indication that the membership composition will change in the near future. Indeed, Ganzorig Gombosuren, a former Supreme Court Justice, argued that this executive oversight influenced the GCC and reduced its independent decision-making capacity, resulting in its decision not to renew his nomination.<sup>178</sup> The International Commission of Jurists relates this incident.

**Ganzorig Gombosuren – Retired Judge of the Supreme Court of Mongolia:**

Mr. Ganzorig Gombosuren served as a Judge of the Supreme Court of Mongolia for eight years and left the Court in 1998 to take a master in law degree in the United States. When he returned to Mongolia in March 2001 he was nominated by the Supreme Court to be appointed as a judge again. In spite of his prior service, he had to take a test that the Judicial Professional Committee has established as a first step in order to ensure the adequate qualification of candidates. He was unsuccessful on the test and was therefore not recommended by the General Council of Courts to the President for renewed appointment. The General Council of Courts rejected his request to reconsider this decision. Reportedly, the majority of the members of the General Council of Courts at first voted in his favour, but after the Minister of Justice, who was Chairman of this body, made comments to his disadvantage, the second round of voting confirmed the negative decision not to renew his nomination . . . . According to Ganzorig Gombosuren, the *de facto* reason behind his rejection is that he has been active in promoting the independence of the judiciary in Mongolia. In December 1993 he and his colleagues established the Mongolian Group for the Independence of Judges and Lawyers to support judicial independence and legal reform in Mongolia. He has also written a number of articles in newspapers and law journals, spoken on TV and on the radio, and in law schools and conferences.<sup>179</sup>

As this anecdote demonstrates, judicial independence is precarious in Mongolia, in part because of executive oversight of the judiciary by the Ministry of Justice. Donors have had to implement reforms within the reality of this framework, and have thus focused on increasing transparency and accountability and improving public relations.<sup>180</sup>

The GCC has been criticized for having a hierarchical management style, an inadequate budget and a small and poorly trained staff, all of which constrain the

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177. INTERNATIONAL COMMISSION OF JURISTS, MONGOLIA: ATTACKS ON JUSTICE 263-64 (2002), available at <http://www.icj.org/IMG/pdf/mongolia.pdf>.

178. *Id.* at 268-69.

179. *Id.*

180. USAID, THE JUDICIAL REFORM PROGRAM IN MONGOLIA: ACCOMPLISHMENTS, LESSONS LEARNED, AND RECOMMENDATIONS FOR THE FUTURE, *supra* note 175, at 5.

creation or implementation of the rule of law.<sup>181</sup> The other branches of government have not made enough human and fiscal resources available to the GCC, to assist in its judicial reforms of accountability and transparency.<sup>182</sup> As well, within the leadership of the GCC, there has not been significant willingness to modernize its decision-making process to give the judiciary more control over its branch and independence vis-à-vis the other branches of government.<sup>183</sup> This could result from the existence of membership from the executive and the legislative branches in the Council.

Apart from institutional issues with the judicial council, status, continuity, and legal psychology were barriers to an independent judiciary. At the time of its transformation, Mongolia's judges and legal professionals had no training in adjudicating disputes in a market economy, and their mindset remained that of the communist era – viewing the judiciary is an instrument of state power, not an independent branch of government.<sup>184</sup> In addition to basic market-economy training and changing the mentality of the judiciary, the donors focused on teaching the many newly-passed laws, which included whole sectoral changes.<sup>185</sup>

Judges have “had to adjust to a rapidly changing legislative environment, particularly in the civil area. Although most of the judges have attempted to familiarize themselves with the new legislation, there are still some who base decisions on their old knowledge as they find it difficult to keep up with the changes. Their experience in the application of commercial laws is limited, and many find the unfamiliar situations of a market economy that they are faced with confusing.”<sup>186</sup> Mongolia's judges and other legal professionals have had to absorb the many changes in the law, and then decide how to prosecute, administer, or implement these laws. This was particularly difficult since many of the new laws were poorly drafted, overlapping or inconsistent.<sup>187</sup> Mongolia and the donor organizations have managed these challenges through the creation of judicial training centers, as further discussed in the lesson on donor coordination.<sup>188</sup>

Overall, given Mongolia's unique cultural and institutional attributes, the donor community should have recognized the fundamental value of judicial independence and dedicated attention and resources to identifying and then overcoming impediments to the independence of the judiciary in Mongolia.

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181. *Id.* at 12, 17-18, 20-21.

182. *Id.* at 17

183. *Id.* at 18-20

184. See USAID, THE JUDICIAL REFORM PROGRAM IN MONGOLIA: ACCOMPLISHMENTS, LESSONS LEARNED, AND RECOMMENDATIONS FOR THE FUTURE, *supra* note 175, at 4-8 (discussing how the attitudes of the judiciary were slow to respond to the Constitution's adoption of an independent judiciary as a third branch of government).

185. See *infra* Appendix B.

186. DEVELOPING MONGOLIA'S LEGAL FRAMEWORK: A NEEDS ANALYSIS, ASIAN DEVELOPMENT BANK 32 (1995), available at [http://www.adb.org/Documents/Papers/Mongolia\\_Legal\\_Framework/the\\_judges.asp?p=lawdevt](http://www.adb.org/Documents/Papers/Mongolia_Legal_Framework/the_judges.asp?p=lawdevt).

187. See *e.g.*, *infra* note 345 and accompanying text.

188. See *infra* Part IV.D.

Instead, work on the judiciary was largely ignored during the first six years of independence while necessary legislative reforms took precedence.

As will be further shown in the other rule of law lessons, the precariousness of judicial independence leads to serious societal problems, namely corruption and perceptions that there is no rule of law, thereby ensuring that people do not access the judiciary in the case of disputes, and instead engage in corrupt exchanges or "black market justice."

*B. Lesson Two: Formal Government Action Plans Offer "More Bang for Your Buck"*

This lesson recognizes the inherent limitation of exhaustible resources of a donor state or donor institution. The resources that a donor would be able to offer is limited to budget constraints and the political willingness to commit money, resources and personnel to the establishment of the rule of law in a donor-recipient country. For instance, after September 11, 2001, the United States focused its state-promoted programs and money predominantly on Afghanistan and Iraq, its two main foreign policy commitments.<sup>189</sup> In that regard, resources and even commitments can be pulled from recipient states and recommitted elsewhere. Recognition of the inherent limitation of exhaustible resources would aid the provision of rule of law assistance. The experience of Mongolia demonstrates that formal government action plans offer one method of counteracting that inherent limitation.

Mongolia's legislative reforms can be divided into two phases, each with a distinct hallmark.<sup>190</sup> Phase one was the "uncoordinated emergency reforms," and had as its hallmark ongoing political strife and disorganization between the government and its donors, as well as among the donor community itself.<sup>191</sup> Phase two was the "government reform plans" that had as its hallmark formal government plans to direct the various branches of government and its government agencies and employees, as well as civil society and the donor community, which resulted in a more dynamic, lasting and comprehensive reform process.<sup>192</sup> The formal government action plans resulted in numerous benefits, including by signaling formal government "buy-in" of some of the earlier reforms and norm creation; offering guidance to the executive, legislation and judicial branches as to the next phase of reform; broadening and deepening the reform process; and pushing the donor community to work together as an effective "single organism."<sup>193</sup>

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189. See generally CONGRESSIONAL RESEARCH SERVICE, FOREIGN AID: AN INTRODUCTORY OVERVIEW OF U.S. PROGRAMS AND POLICY (2004), available at <http://fpc.state.gov/documents/organization/31987.pdf>.

190. The phases discussed herein are the author's conclusions concerning the effectiveness of Mongolia's legal reforms. See B. Chimid, *supra* note 170, at 12.

191. *Id.* at 12-13.

192. *Id.* at 12-14.

193. *Id.* at 13-14.

Judicial reforms mostly occurred during phase two and as such, have been more thoughtful and complete. Reforms of the judiciary began modestly with the 1993 Law on Courts, which mandated a reduction in the number of courts, an increase in the number of judges and the establishment of higher eligibility standards for appointment to the bench.<sup>194</sup> After the passage of this restructuring, Parliament did little to advance the judiciary and its legal institutions. For some reason, there seems to have been a lack of attention to judicial reform between 1994 and 1998. This could be the result of the balance of powers crisis and deadlock in Parliament during those years. Conversely, it could be the result of needed attention to reforming the economic system to become a market-based system and reforming the political system to become a multi-party democracy. Regardless, the institutional strengthening of the judiciary stalled, while free market and economic reforms continued.

The lesson to be learned by the power of formal government action plans, however, begins with the reform of legislation. From 1992 to 1998, the State Great Hural enacted nearly 180 independent laws and approved over 200 amendments, and Mongolia joined nearly 60 international agreements and treaties.<sup>195</sup> Following Mongolia's democratic transition, the legal reform process was intense and immediate. On the whole, the GTZ has been the greatest stimulus of the legislative reforms in Mongolia, and much of the new civil legal code closely approximates German law.<sup>196</sup> A likely reason for the prevalence of the GTZ in legislative reform is the fact that the GTZ undertook similar reform projects in the former Soviet republics.<sup>197</sup> Essentially, the GTZ's previous expertise in the recodification of the civil and criminal codes in Eastern Europe and Central Asia was available immediately to Mongolia.<sup>198</sup>

Despite the success in the sheer number and breadth of the passage of new laws, Mongolia had substantial difficulty with its phase one legislative reforms. This was due in large part because, for the first six years of its democracy, the government undertook reforms without a comprehensive program in place.

All donor outcomes could have been better if agreements on strategic frameworks could have been reached for more sectors . . . While initial technical assistance . . . helped to change the thinking toward a market-based economy (particularly within the Ministry of Finance and the Central Bank), many aspects of the institutional framework for a market-based economy remain fragile (lack of compliance with new

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194. THE ASIA FOUNDATION, *supra* note 162, at 2.

195. See Tsund Munkhorgil, Justice Minister, Government of Mongolia, Speech at the Investor's Forum: Legal Reform in Mongolia, *available at* <http://www.mol.mn/modules.php?name=News&file=print&sid=7611>. (A noteworthy piece of legislation is Mongolia's liberal Mining Law, said to be among the best in the world).

196. See WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 22.

197. See GTZ, Europe, Caucasus and Central Asia, <http://www.gtz.de/en/weltweit/574.htm> (last visited Feb. 13, 2010).

198. *Id.*

laws and regulations, weak institutional capacity and resources, and poor accountability of public service delivery).<sup>199</sup>

Inadequate methods and practice of legislative drafting has been an additional major cause of legal disorder. "Legal science is just not present there."<sup>200</sup> In addition to better legal drafting, there was little coordination of legislative drafting among the donors and all members of parliament, which could have been a system for checking the consistency and relevance of legislation.<sup>201</sup>

Indeed, much of donors' subsequent assistance in legislative reforms occurred to amend previously enacted laws that were poorly drafted, inconsistent with other obligations and laws, or simply improper for Mongolia given its unique history and cultural attributes.<sup>202</sup> These early laws were developed without any single policy in mind, and without effective planning or integration.

Then-Deputy Justice Minister, Ts. Munkhorgil, later concluded that during the early years of reform, the "failure to enact economic laws in mutually consistent and comprehensive ways so as to be able to set up a legal framework of market relations, with the enforcement mechanism defined optimally . . . might have a negative impact on economic reform."<sup>203</sup> Further, he considered that "the differences and specific features of [foreign] legal systems were disregarded with laws and regulations of different countries taken as a model. All this led to such negative consequences, as incompatibility of laws and inappropriate mechanism for their enforcement."<sup>204</sup>

It seems that reforming the legal code with assistance from donor countries has resulted in transplantation effects – whereby laws from Germany, for example, were not appropriate for Mongolia's culture. In fact, one can easily surmise that much of the impetus in specific legal reforms – as well as in the pace and direction of reforms – came not from Mongolian leadership but from donor countries and donor organizations willing and hoping to remake Mongolia in its own vision.

To be fair, most Mongolian government officials had little expertise in market systems and did not understand even the patent impact that certain legislation would have.<sup>205</sup> Thus, it is fair to say that these leaders did not foresee the latent

199. WORLD BANK, MEMORANDUM OF THE PRESIDENT OF THE INTERNATIONAL DEVELOPMENT ASSOCIATION TO THE EXECUTIVE DIRECTORS OF A COUNTRY ASSISTANCE STRATEGY OF THE WORLD BANK GROUP FOR MONGOLIA 12 (2004) [hereinafter WORLD BANK COUNTRY ASSISTANCE STRATEGY 2004], available at [http://siteresources.worldbank.org/MONGOLIAEXTN/Resources/CAS\\_Mongolia2004.pdf](http://siteresources.worldbank.org/MONGOLIAEXTN/Resources/CAS_Mongolia2004.pdf).

200. WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 28-29 (quoting Supreme Court Justice Hon. A. Dorjgotov. A course on legislative drafting is no longer taught in the standard law-school curriculum, and needs to be reintroduced in the curriculum to cure drafting in the future. Law students need to be taught critical and analytical thinking, to understand the policies underlying the laws, for better legal drafting, coordination of laws and interrelating of laws.)

201. *Id.*

202. See e.g., Munkhorgil, *supra* note 195.

203. *Id.*

204. *Id.*

205. Dan Southerland, *Mongolia: A Democratic Breakthrough*, CHRISTIAN SCI. MONITOR, Dec. 31, 2009, <http://www.csmonitor.com/Commentary/Opinion/2009/1231/Mongolia-a-democratic>

and long-term implications of certain legislation. Whether or not the donor organizations understood these implications and whether they communicated such dangers to the leadership is uncertain. Nonetheless, these donors impacted the reform of the legislation greatly, and bear at least part of the fault in the resulting negative consequences.

As a result of these discrepancies and early failures in these phase one reforms, the government decided to change the structure within which the previous legislation occurred. In the view of this author, the clear demarcating line between the phase one reforms and the phase two reforms in Mongolia was the passage in January of 1998 of the “Legal Reform Program of Mongolia” by the State Great Hural.<sup>206</sup> The purpose of the Legal Reform Program is to implement the objective of “developing a human, civil and democratic society,” to define basic guidelines of work of state organization and officers at all levels, and to create a legal framework and favorable environment to ensure political, social and economic development and progress in compliance with the principles and concepts proclaimed in the Constitution.<sup>207</sup>

In an elemental sense, the Legal Reform Program articulated a framework for the government and civil society to implement the rule of law. In order to guide key stakeholders in the creation of this framework, the Act articulates six objectives: (i) development of the legal basis for ensuring the sovereignty of Mongolia; (ii) perfection of the legal basis of economic relations; (iii) ensurance of human rights freedoms and its legal guarantees; (iv) perfection of the legal basis of state structure; (v) creation of the environment for legal reform; (vi) perfection of the training of legal professionals; and (vii) broadening of participation of Mongolia in international legal regulations.<sup>208</sup>

The Legal Reform Program has been one of the fundamental pieces of legislation since Mongolia’s democratization. It created the framework for further reforms and defined the policies and principles that the State Great Hural should follow in future legislation. Importantly, as well as improving legislation, it *deepened* the reform process. For example, the State Great Hural subsequently passed the “Guidelines for Improvement of Legislation of Mongolia for Period Up to 2004,” which listed over 40 laws to be enacted in six main areas.<sup>209</sup> The government complied with these guidelines and also passed measures “to set up a system of studying enforcement and impact of legislation, carrying out monitoring and making assessment.”<sup>210</sup>

One of the principal benefits of the Legal Reform Program has been to guide the substantial amount of donor activity in assisting further legislative reforms. Donor activity became particularly helpful after Mongolia passed the well-crafted

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breakthrough.

206. WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 40.

207. *Id.*

208. *Id.* at 41.

209. See Munkhorgil, *supra* note 195.

210. *Id.*

"Law on Non-Government Organizations" in 1997.<sup>211</sup> Donors such as the Asia Foundation began to influence the reform process by working with new interest groups and domestic NGOs, as well as members of government.<sup>212</sup> As well, NGOs have taken a more active and direct role in influencing the reformation process. After some tepid initial moves, Mongolian society began to interact with the government to influence the passage of *specific* laws (whereas previous agitation occurred to stimulate general ideals – like a democratic revolution). The benefit of the legal reform program in part has been for Mongolians to take more ownership over the path of the reform process.

For instance, NGOs with the support of donors played a formative role in the passage of the new Family Law in 1999.<sup>213</sup> Additionally, The Asia Foundation assisted in the revision of the 25-year old Family Law to reflect the changed social and economic conditions of Mongolia.<sup>214</sup> The Foundation provided support for a seminar to discuss subjects of amendments, such as domestic violence, joint property, and social benefits.<sup>215</sup>

Another example illustrates the confluence of donors with domestic actors. In 1999, The Asia Foundation supported the Political Education Academy of Mongolia to study the Constitution, its organic laws and its impact on government.<sup>216</sup> This exercise has contributed to the development of Mongolian democratic and constitutional studies, and it should lead to constitutional changes to increase efficiency, effectiveness, transparency and accountability of the government.<sup>217</sup> Partly because of these efforts, in December of 1999, the State Great Hural passed the first amendments to the Constitution.<sup>218</sup>

Although the Legal Reform Program created the atmosphere for positive rule of law reform, there was a risk that no subsequent enactments would guide or implement the rule of law. In this vein, the government recognized the need for more guidance and implementation and subsequently passed various government action plans, further signaling a divide between phase one and phase two reforms.<sup>219</sup>

Although they were probably not intended to do so, these action plans embody a procedurally-minimalist rule of law definition, and focus on the creation of norms and concepts, rather than ends-based goals. They closely follow the

211. Tom Ginsburg, *Mongolia in 1997: Deepening Democracy*, 38 ASIAN SURV. 64, 65 (Jan. 1998).

212. THE ASIA FOUNDATION, *supra* note 162, at 3.

213. THE ASIA FOUNDATION, BUILDING LEGAL INSTITUTIONS IN MONGOLIA 2 (2000).

214. THE ASIA FOUNDATION, *supra* note 162, at 4.

215. *Id.*

216. *Id.*

217. *Id.*

218. Stewart Fenwick, *The Rule of Law in Mongolia -- Constitutional Court and Conspiratorial Parliament*, FED'N PRESS, <http://digital.federationpress.com.au/pageview/3aj4a/9n061/17> (last visited Feb. 13, 2010).

219. See generally WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154.

suggestions of this article's rule of law formulation, with an appropriate overarching emphasis on norm creation, especially in the judiciary.

Suffice it to say, the reforms that occurred after these government action plans were superior to those that preceded them. The contrast between reform of legislation (many reforms occurred before the plans) and judicial reforms (most reforms occurred after the government plans) demonstrates the importance of these plans. To be clear, these action plans affected the legal and judicial reforms in two ways – (i) they implemented a more detailed framework to guide the passage of future legislation and reforms and (ii) they mandated and embodied the rule of law in the work of Mongolia's branches of government, and the donor organizations consulting them.

Donor coordination accelerated after the release of the Legal Needs Assessment, which was funded in part by the Danish International Development Agency (DANIDA) and administered by the World Bank's Mongolian Legal and Judicial Reform Project.<sup>220</sup> World Bank officials implemented the assessment process with the assumption that the country itself must design the course of action.<sup>221</sup> There was much institutional disagreement with this theory, as it was not usual World Bank practice to cede control of the agenda to the donor-recipient state.<sup>222</sup> However, World Bank staff members that were supportive of this idea were able to exert enough pressure on obstructions within the World Bank system to overcome these doubts.<sup>223</sup>

The assessment utilized the guidance of the Government's Legal Reform Program, and it was designed to further achieve the government's stated goals.<sup>224</sup> The assessment culminated in the identification for assistance of the following areas: (i) *legislative drafting*: development and coordination; (ii) *judicial and criminal justice reform*; (iii) *legal profession*: improvement of legal education and bar development; (iv) *legal scholarship*: development of materials and research databases; (v) *public awareness*: dissemination of legal information; and (vi) *coordination and harmonization of international treaties*.<sup>225</sup>

220. WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 3.

221. This conclusion is based on the author's off the record discussions with an official of the World Bank while in Mongolia.

222. *Id.*

223. *Id.*

224. The Legal Needs Assessment assessed the major problems affecting the efficiency of the newly shaped legal system; identified programs that were needed to further legal reform activities; provided information to external donor community for designing of legal reform projects and for coordination of ongoing activities; and coordinated efforts of government, parliamentarians, judiciary, scholars and civil society to assess their needs of legal and judicial reform. See WORLD BANK, PROJECT APPRAISAL DOCUMENT ON A PROPOSED LEARNING AND INNOVATION CREDIT IN THE AMOUNT OF SDR 4.0 MILLION (US\$5.0 MILLION EQUIVALENT) TO MONGOLIA FOR A LEGAL AND JUDICIAL REFORM PROJECT 4-5 (2001), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2002/01/07/000094946\\_01121708452144/Rendered/PDF/multi0page.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2002/01/07/000094946_01121708452144/Rendered/PDF/multi0page.pdf) [hereinafter WORLD BANK, MONGOLIA PROJECT APPRAISAL DOCUMENT]; WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 15-16.

225. *Id.*

The Legal Needs Assessment was direct, comprehensive, and signaled to the state that the government direction imposed by the Legal Reform Program was acceptable to the donor community and the domestic constituencies.<sup>226</sup> A principal benefit of the assessment was that it resulted in a sincere societal buy-in of the assessment's conclusions by both government actors and citizens, since it was designed and administered by domestic actors. Many of these same domestic actors then designed and endorsed the resulting legal reform plans that arose from the legal reform program and assessment. Although the assessment was unusual and it likely would be difficult to repeat in many donor organizations – even its source, the World Bank – it should be held up as a prototype, as it has resulted in many tangible benefits.

Following in the wake of the Legal Needs Assessment, on May 4, 2000 the government of Mongolia passed its first government action plan, the “Strategic Plan for the Justice System of Mongolia.”<sup>227</sup> This plan identified the direction of the development of the judiciary within the framework of the overall Legal Reform Plan and sets strategic goals to define the judicial reforms.<sup>228</sup> A working group that involved representatives of all judiciary bodies and experts of USAID prepared the Strategic Plan.<sup>229</sup>

The Strategic Plan identified six fundamental values: (i) *independence*: that the judiciary protects its political, economic, organizational and decision-making independence; (ii) *accountability*: ability to use public resources efficiently including personal accountability on the part of all individuals who work in the justice system; (iii) *responsiveness*: ability of the justice system to anticipate and timely respond to the changing needs of society; (iv) *fairness*: ability to treat all with respect and to apply only the law; (v) *accessibility*: ability of the justice system to be convenient, timely and affordable to everyone with a legitimate claim or concern; and (vi) *effectiveness*: ability to uphold and apply the law consistently throughout the country.<sup>230</sup>

This Strategic Plan is extraordinary because, rather than calling for ends (such as an online court database), it mandated the establishment of *values* that are the equivalent to norms of the rule of law. These values represent process-oriented reforms and closely relate to the procedurally-minimalist rule of law. An analysis of each of the values clearly corresponds to the rule of law formulation described above; in particular, this plan establishes the framework to implement the second

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226. See WORLD BANK, IMPLEMENTATION COMPLETION AND RESULTS REPORT ON A LEARNING AND INNOVATION CREDIT OF XDR 4.0 MILLION (US\$5.0 MILLION EQUIVALENT) TO MONGOLIA FOR A JUSTICE SECTOR REFORM PROJECT 6-7 (2001), available at [http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2009/08/21/000333037\\_20090821003929/Rendered/PDF/ICR8770P0740011C0disclosed081181091.pdf](http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2009/08/21/000333037_20090821003929/Rendered/PDF/ICR8770P0740011C0disclosed081181091.pdf).

227. See USAID, THE JUDICIAL REFORM PROGRAM IN MONGOLIA: ACCOMPLISHMENTS, LESSONS LEARNED, AND RECOMMENDATIONS FOR THE FUTURE, *supra* note 175, at 5; WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 31.

228. WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 30-31.

229. WORLD BANK, MONGOLIA PROJECT APPRAISAL DOCUMENT, *supra* note 224, at 5.

230. WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 30-31.

essential value, the second primary quality and all of the secondary qualities of the rule of law. Most importantly, this Strategic Plan calls for an integrated approach to the rule of law (at least in the judiciary) where norms of universal value create an umbrella structure in which to generate specific ends that assist the procedurally-minimalist rule of law. The linchpin of this strategy is the USAID-funded Judicial Reform Program (JRP), which will be discussed below.<sup>231</sup>

Overall, the Government of Mongolia and donors have promulgated many new concepts in the justice system, and the adoption and implementation of these concepts in a coordinated fashion has been difficult. An emphasis on training new and established judges in these concepts somewhat has mitigated these difficulties. Apart from some conceptual confusion, judicial reforms mostly have been successful. The judicial sector has been modernized, and its court management and processes have been automated to increase efficiency, transparency, accountability and fairness.<sup>232</sup> The judiciary is becoming more professional, and is engaged in training to learn the new legal codes, and how to implement them. As well, there have been significant efforts to reduce corruption and increase judicial independence.<sup>233</sup> The challenge for Mongolia and its donors will be to move beyond the “introduction” of these new approaches and ensure that they are actually “embedded” and “institutionalized” within the legal profession.

Further, since the government reform plans, legislative reforms have been passed in a coordinated fashion. While some technical and drafting issues persist, donor coordination and guidance by the government of Mongolia has resulted in the passage of laws that are cleaner, clearer and appropriate for the circumstances of Mongolia.<sup>234</sup> The deepening of the reform process, leading in particular to judicial reforms, has helped to ensure that the implementation of these laws by judges and practitioners has become more accurate and appropriate.

While it is clear that in the case of a total societal implosion, there is an immediate need to begin to pass laws to structure a new society, the case of Mongolia demonstrates that as soon as it is possible, the government and the donor community should pass a government reform plan that will guide future reforms. These plans can identify specific needs, and, more fundamentally, contain important norms and notions that should guide the passage of laws and rules, and their subsequent implementation. For a variety of reasons, including clarity, buy-in, guidance, and comprehensiveness, these government reform plans offer the most bang for the buck.

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231. See National Center for State Courts International, *Mongolia – Mongolia Judicial Reform Project*, [http://www.ncscinternational.org/x/Document\\_Viewer.aspx?DocumentID=683](http://www.ncscinternational.org/x/Document_Viewer.aspx?DocumentID=683) (last visited Feb. 9, 2010); USAID, THE JUDICIAL REFORM PROGRAM IN MONGOLIA: ACCOMPLISHMENTS, LESSONS LEARNED, AND RECOMMENDATIONS FOR THE FUTURE, *supra* note 175, at 4.

232. See USAID, THE JUDICIAL REFORM PROGRAM IN MONGOLIA: ACCOMPLISHMENTS, LESSONS LEARNED, AND RECOMMENDATIONS FOR THE FUTURE, *supra* note 175, at 6-11.

233. *Id.* at 5, 10-11.

234. See *id.* at 7-8.

*C. Lesson Three: Public Participation and Sentiment is a Proxy for the Institutionalization of the Norms and Culture of the Rule of Law*

This article puts forth a definition of the rule of law that focuses in large part on the creation of the norms and culture of the rule of law. While the institutionalization of norms through legislation is a stepping stone, as would be the case where a law formally makes the judiciary independent, there are a variety of other factors that impede the true institutionalization of those norms. Indeed, some of those impediments are apparent facially, such as the particular legal history of Mongolia and the recent control of the judiciary by the Communist party. Others are more nuanced and thus difficult to identify. Because of the difficulty of direct identification of the creation and implementation of these norms, practitioners could utilize a proxy to aid in such an identification.

One proxy for whether the culture and norms of the rule of law are being adopted is public participation and public sentiment. In short, whether the public is participating in the passage of laws, in elevating disputes to the judiciary, and in other aspects of the rule of law actually indicates whether those norms and culture are being institutionalized.<sup>235</sup> This proxy will provide gross direction (that is, not nuanced) to the practitioner or researcher and would not permit a sophisticated understanding (or if somehow enumerated, a statistically significant conclusion) of whether a particular norm has been established. Nonetheless, it provides important guidance to aid in a determination of the efficacy of the donors' assistance to a donor-recipient and could provide an opportunity to change direction or refocus efforts and aid as needed.

The experience of Mongolia provides a useful example. In Mongolia's implementation of legal, judicial and societal reforms, the members of parliament and government leaders enacted the first four years of reforms without proper participation of the public. This was more or less expected since governmental decision-making during the communist era was private and opaque, so most initial reforms in the democratic era were nontransparent or minimally so. The fact that there were very few NGOs or interest groups operating in Mongolia also contributed to this lack of public participation.<sup>236</sup> Mongolians simply were too worried about their financial situation to invest energy in special interest reforms to create a particular ideal within, or type of, a market economy.<sup>237</sup> Anyways, very few knew about the workings of a market economy. While it is difficult to state with certainty which factor impeded public participation, the very fact that the public was not a part of the process indicates that there was no culture of the rule of law at the inception of the reforms.

As discussed above, only once there was a law on NGOs in place and sufficient donor activity in this field, did the public actually and actively

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236. See, e.g., Ginsburg, *supra* note 211, at 65.

237. See USAID, THE JUDICIAL REFORM PROGRAM IN MONGOLIA: ACCOMPLISHMENTS, LESSONS LEARNED, AND RECOMMENDATIONS FOR THE FUTURE, *supra* note 175, at 20; see WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 6.

participate.<sup>238</sup> Prior to that point, public participation was limited to mass protests over faulty or hasty previous reforms. To its credit, Mongolia's leaders quickly have recognized errors in new legislation, and enacted subsequent legislation to remedy those problems.<sup>239</sup>

This awareness and willingness to rectify the earlier reforms is nowhere more apparent as in electoral reforms. The parliamentary election of 1992 resulted in the election of an overwhelming majority of representatives for the MPRP.<sup>240</sup> Because the opposition garnered 40% of the vote, but won only 5 out of 76 seats, the public revolted and engaged in a stinging protest against the new government.<sup>241</sup> An ensuing hunger strike by the Mongolia Democratic Union resulted in a negotiated agreement to revise the election law, to enact a law for the independence of the media from government control and interference,<sup>242</sup> and to address the new problem of corruption.<sup>243</sup> Previously, the MPRP had come to power under 76 single member districts, but after pressure from the opposition, who concentrated their support in urban areas, the election law changed to a mixed system of districts and proportional representation.<sup>244</sup>

The Asia Foundation sponsored exchange programs and forums to develop information for the revised election law, which was approved in 1992.<sup>245</sup> The revised election law paid dividends to the MPRP-opposition – the subsequent national election resulted in a coalition ousting the MPRP and winning 47 of 76 seats in Parliament.<sup>246</sup> The new election law also increased fairness and accountability, by requiring all candidates to open separate finance accounts which were subject to audits, by giving equal access to state-run media for campaign purposes, and by liberalizing nomination processes.<sup>247</sup>

The hunger strike also clearly identified corruption as a public issue and exposed the sense that many of the key norms of the rule of law were not being established or absorbed by the government actors.

Corruption in the judicial system is a root of corruption throughout society, as it reduces the ability of a judiciary to freely mete out justice. Corruption displaces the natural process of decision-making, and makes access to justice insignificant. In a 2005 Transparency International corruption survey, Mongolia scored a 3.0 out

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238. See Ginsburg, *supra* note 211, at 65.

239. As well, Mongolia has been receptive to social considerations arising from their reforms, such as poverty, rural inequities, and the increased presence of street children. *Id.* For the most part, Mongolia's commitment to democracy has allowed interest groups and NGOs to agitate to bring these problems to the attention of the MPs, free from undue interference or violence by the government. *Id.*

240. Sheldon S. Severinghaus, *Mongolia in 1994: Strengthening Democracy*, 35 ASIAN SURV. 70, 70-71 (1995).

241. *Id.*

242. The State Great Hural finally passed the required Media Law on January 1, 1999, after hunger strikes in 1995 protesting the failure to do so. *See id.* at 71.

243. *Id.*

244. *See id.*

245. THE ASIA FOUNDATION, *supra* note 162, at 4.

246. Tom Ginsburg, *Mongolia in 1996: Fighting Fire and Ice*, 37 ASIAN SURV. 60, 61 (1997).

247. THE ASIA FOUNDATION, *supra* note 162, at 4.

of 10 on the corruption scale, indicating Rampant Corruption.<sup>248</sup> As well, Mongolian surveys and public opinion polls indicated that after Customs, participants ranked Judicial Institutions as the most corrupt institution.<sup>249</sup> Judicial corruption greatly impacts the rule of law in that it operates as a disincentive for the public to take complaints to judicial institutions for resolution. It impacts meaningful access to justice principles, and negatively affects the rule of law in that it prevents laws from being an actual guide, decreases the stability of the law and renders the law far from supreme.

The recent Law on the Courts changes the process of judicial discipline by including public participation.<sup>250</sup> However, as of 2005, the implementation of this aspect has yet to be realized.<sup>251</sup> Robert La Mont, the former and long-term director of the JRP, suggested a suite of solutions to address judicial corruption in Mongolia, as a first step to dealing with society-wide corruption.<sup>252</sup> These suggestions are typical suggestions to either face judicial corruption or increase professionalism in a judiciary.

In terms of corruption, the twin towers of transparency and disincentives are key tools. La Mont indicates that the inquisitorial procedures of the Mongolian judiciary create a system where judges frequently meet *ex parte* with witnesses and parties.<sup>253</sup> Thus, there is ample opportunity for the passing of bribes. The new Judicial Code of Ethics, however, did not contain a prohibition on *ex parte* conversations, because an overwhelming majority of the judges objected.<sup>254</sup> La Mont also specified that salary levels that allow judges to meet their needs would limit the possibility of bribe-taking.<sup>255</sup> However, he notes that donor activity may not have much effect, since the Mongolian government's finances dictates judicial salary.<sup>256</sup> He also indicates that the cost of corruption has been nearly non-existent in Mongolia, as there has been little prosecution of judicial corruption, save for cases of drunkenness on the job.<sup>257</sup> Thus, while dishonest judges and judicial

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248. Transparency International, Corruption Perceptions Index 2005, [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2005](http://www.transparency.org/policy_research/surveys_indices/cpi/2005) (last visited Feb. 16, 2010).

249. See ROBERT LA MONT, SOME MEANS OF ADDRESSING JUDICIAL CORRUPTION IN MONGOLIA 2 (2002), available at [http://www.forum.mn/en/index.php?sel=resource&f=resone&obj\\_id=11&menu\\_id=3&resmenu\\_id=35](http://www.forum.mn/en/index.php?sel=resource&f=resone&obj_id=11&menu_id=3&resmenu_id=35) (summarizing Mongolian Chamber of Commerce and Industry 2000 survey, Annex 4, question 11).

250. See *id.* at 3 (stating that in the past, judicial discipline was initiated by chief justices and decided by fellow justices, thus resulting in a bias against punishing colleagues).

251. This is personal knowledge relating from the author's experiences working at the Supreme Court of Mongolia in the summer of 2005.

252. See LA MONT, *supra* note 249, at 6-8. These suggestions represent the views of the Mr. La Mont and they are not official USAID policy.

253. *Id.* at 3.

254. *Id.* at 3-4.

255. *Id.* at 4-5.

256. *Id.* at 4. The one impact donors can have, however, is where the executive does not raise salary levels in par with other governmental agencies, either as punishment for certain decisions, or to limit judicial independence. *Id.* There, donors can pressure the executive to continually raise judicial salaries where the budget allows. *Id.*

257. *Id.* at 3.

employees have some incentives to act corruptly, there are only few disincentives.<sup>258</sup>

La Mont suggests that there are a number of additional steps that can be taken to limit judicial corruption: require random assignment of cases;<sup>259</sup> require regular analysis of case reassignment; require public access terminals for all automated courts; require special rules of financial disclosure for judges, penalties in the Judicial Ethics Code, and random audits by the GCC Ethics Committee; prohibit *ex parte* conversations in the Judicial Ethics Code; train and provide equipment to the Judicial Disciplinary Committee; and train and provide equipment to the Prosecutor's corruption investigation unit.<sup>260</sup>

Not only does the public perception of corruption offer a proxy into the establishment of the norms of the rule of law, it can be a negative influence in and of itself. In particular, the public perception of corruption also influences actual corruption regardless of whether those perceptions are mistaken.<sup>261</sup> The more the public perceives corrupt legal institutions, the more likely that the public will be induced to make corrupt overtures, rather than settle for legal mechanisms to resolve disputes. To combat this ongoing danger, MFOS coordinates a public competition in conjunction with the Zorig Foundation.<sup>262</sup> Together, they seek to increase public awareness of corruption through the publication of anti-corruption essays and posters that are collected in a nationwide competition.<sup>263</sup>

The JRP released a report in August of 2005, which shows that public perception of the judiciary has improved significantly, and the JRP credits some of that increase to its work in the area.<sup>264</sup> Indeed, the JRP has instituted many of La Mont's suggestions, including equipping and training the new Judicial Disciplinary Committee, and equipping and training the new Special Investigative Unit of the Prosecutor General, empowered with investigating crimes in the judiciary.<sup>265</sup>

During the socialist era, corruption only existed at the highest echelons of government.<sup>266</sup> Small gifts and promises constituted the extent of influence peddling on every other level. But now, with a market economy, privatization and property rights, corruption has thrived.<sup>267</sup> It is commonly known that corruption is

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258. *Id.* at 2.

259. *Id.* at 6. This reform has been undertaken, although there is indication that the automatic case management systems are not being used by all courts.

260. *Id.* at 6-8.

261. *Id.* at 2-3.

262. See ZORIG FOUNDATION, FINAL REPORT ON THE IMPLEMENTATION OF THE PROJECT SUPPORTED BY PTF 1 (2002), available at <http://www.partnershipfortransparency.info/uploads/completed%20projects/Mongolia%20-%20Final%20report.pdf>.

263. *Id.*

264. HEIKE GRAMCKOW, MONGOLIA JUDICIAL REFORM PROGRAM, ANNUAL REPORT 7 (2004) (stating the JRP's intention to strengthen the management and procedures of the Special Investigative Unit).

265. *Id.* at 3.

266. Verena Fritz, *Democratization and Corruption in Mongolia*, 27 PUB. ADMIN. & DEV. 191, 195 (2007).

267. See, e.g., J. OYUNTUYA, NATIONAL INTEGRITY SYSTEMS COUNTRY REPORT: MONGOLIA,

widespread in Mongolia.<sup>268</sup> With free speech and a free media, stories of corruption circulate within the media widely.

Civil society was the sector that first exposed corruption and began to educate the public about the costs of corruption. Indeed, in the early part of this decade, civic dialogue centered around this increasing corruption and its effects on society, and what measures must be taken to prevent it.<sup>269</sup> The Zorig Foundation created public education campaigns and reported on this problem widely through surveys and summaries.<sup>270</sup> The Zorig Foundation's efforts were assisted by the UNDP.<sup>271</sup> In response to these efforts, in 2002 the State Great Hural passed the National Programme for Combating Corruption (NPCC) and the National Anti-Corruption Action Plan (NAAP).<sup>272</sup> The UNDP's Anti-Corruption Program aims to support the implementation of the NPCC and the NAAP.<sup>273</sup> These three actors – the Parliament, the Zorig Foundation and the UNDP – created a Mongolian Anti-Corruption website as an informative portal for Mongolians.<sup>274</sup>

The four major components of the UNDP project are: (i) participatory priority setting within the NPCC and the NAAP and the designation of the concrete immediate elements that can provide visible evidence of forward movement of the plan; (ii) broad public awareness on the complex issues of corruption and their negative impact on human security and sustainable human development; (iii) institutional capacity building to enforce, monitor, and evaluate the police, legal and regulatory framework to combat corruption; and (iv) strengthening the mechanisms necessary to improve the management, coordination, and monitoring of the implementation of the NPCC.<sup>275</sup>

Donors have stimulated a multitude of anti-corruption efforts, including creating a special anti-corruption prosecutor's office, automating and streamlining caseloads, and reforming election legislation to create campaign-funding

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DEMOCRATIC GOVERNING INSTITUTIONS CAPACITY BUILDING PROJECT (2001). *See also* NANCY TAYLOR, MONGOLIA CASE STUDY IN ANTI-CORRUPTION (2003); USAID, ASSESSMENT OF CORRUPTION IN MONGOLIA (2005), *available at* <http://www.usaid.gov/mn/documents/MongoliaCorruptionAssessmentFinalReport.pdf>; USAID, MONGOLIAN JUDICIAL REFORM PROGRAM, PUBLIC PERCEPTION OF THE JUDICIAL SYSTEM ADMINISTRATION (2005), *available at* [http://pdf.usaid.gov/pdf\\_docs/PDACG136.pdf](http://pdf.usaid.gov/pdf_docs/PDACG136.pdf).

268. *See generally* OYUNTUYA, *supra* note 267; TAYLOR, *supra* note 267; USAID, ASSESSMENT OF CORRUPTION IN MONGOLIA, *supra* note 267; USAID, MONGOLIAN JUDICIAL REFORM PROGRAM, *supra* note 267.

269. *See generally id.*

270. *See* Zorig Foundation, <http://www.zorigfoundation.org.mn> (last visited Feb. 12, 2010). The Zorig Foundation is an NGO named after the slain founder of Mongolian democracy. *Id.*

271. *Id.*

272. United Nations Development Programme, *Completed Projects, Democratic Governance and Human Rights, Anti-Corruption (National Integrity System Enhancement) in Mongolia (Nov 2004 – Dec 2008)*, UNDP, <http://www.undp.mn/dghr-ac.html> (last visited Feb. 12, 2010).

273. *Id.*

274. *See* The Mongolian Anti-Corruption Website, <http://www.anticorruption.mn/index.php> (last visited Feb. 12, 2010).

275. United Nations Development Programme, *supra* note 272.

transparency.<sup>276</sup> These efforts are becoming more diverse, to meet the specific instances of corruption. However, there are still strong criticisms of Mongolia's efforts – primarily that its anti-corruption statute is flawed, that there is no sufficient enforcement, and that there are no sufficient anti-corruption mechanisms or bodies tasked with undertaking these efforts.<sup>277</sup> Needless to say, corruption remains Mongolia's largest impediment to advancing the rule of law and democracy.

It appears that one of the main aspects that influenced the perception of corruption in the judiciary is that the perception carried over from Mongolia's communist past – that the decisions of the executive branch and its actors are unassailable regardless of wrongfulness or illegality. Apparently in response to this challenging vestige of its history, Mongolia and its donors enacted a major initiative to establish an oversight mechanism for wrongful decisions made by the executive branch, through the creation of an administrative court system.<sup>278</sup>

The Administrative Cases Courts (ACC) was established by the State Great Hural in June of 2004.<sup>279</sup> It represents a significant success and progress in the improvement of the judicial system – in particular it creates accountability procedures for challenging government decisions which threaten the rule of law. The Law on Administrative Procedure governs the jurisdiction of these courts.<sup>280</sup> In short, “any disputes which arise from an administrative act and which may affect a person's rights may be challenged.”<sup>281</sup> The implication is that the judiciary now settles disputes between public authorities and individuals arising from the exercise of public authority.

This specialized court system is considered as an essential guarantee of the rule of law with emphasis on equity and fairness. The component would include the refurbishing of allocated space for the functioning of three pilot courts in Ulaanbaatar (Supreme Court and Capital City Court) and one at a selected aimag (Darkhan), training all administrative judges, public awareness campaign, introducing new techniques of case and court management within these administrative courts and, gathering and publication of data on court personnel and public opinion.<sup>282</sup>

Thus, the ACC uphold access to justice principles and accountability of government decisions by public decision-makers. There is an ongoing concern

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276. *See infra* Appendix B.

277. USAID, ASSESSMENT OF CORRUPTION IN MONGOLIA, *supra* note 267, at 2. *See* Brent T. White, *Rotten to the Core: Project Capture and the Failure of Judicial Reform in Mongolia*, 4 E. Asia L. Rev. 209, 209 (2009).

278. Interview with various officials that were involved in the formation and staffing of the administrative court system, Mongolia Supreme Court, in Ulaanbataar, Mongolia (2005). *See generally* Odgerel Tseveen & Battsetseg Ganbold, *The Mongolian Legal System and Laws: A Brief Overview*, GLOBALEX, (Jan. 2006), available at <http://www.nyulawglobal.org/globalex/Mongolia.htm>.

279. Tseveen & Ganbold, *supra* note 278.

280. *Id.*

281. *Id.*

282. WORLD BANK, LEGAL AND JUDICIAL REFORM PROJECT, *supra* note 176, at 9.

that the *aimag* (provincial) ACCs will not have a sufficient workload, and as a result, there have been delays in deciding on the exact structure of the courts and in filling available positions.<sup>283</sup> However, it seems likely that the advent of the administrative court will affect public perceptions of corruption in society, by giving it recourse to legal institutions when wronged by administrative actions. This goes far in creating a society-wide ethos of the rule of law.

At this point it seems that by and large, the legislature and the executive in Mongolia accept the prerogative of the administrative courts and intend to comply with decisions by these courts. However, at any time, if these high-level officials decide not to abide by these decisions, the rule of law will be compromised seriously. Judges from the Administrative Supreme Court seem to be waiting to see what reaction the other branches of government will have to the work of the administrative courts.<sup>284</sup>

As judged by the proxy of public sentiment and public participation in Mongolia, there have been improvements in the rule of law, including the establishment of a rule of law culture. Nonetheless, judging both by public participation and public perception, such improvements appear to be tenuous in Mongolia, and accordingly are at risk of backsliding. Nonetheless, the fact that the donor community and Mongolian governmental actors have responded to the failure of the public to participate or to its perceptions and demonstrations for change is significant and is a foundation to a promising rule of law culture.

#### *D. Lesson Four: The Leverage of Donor Coordination Pays Dividends*

One of the main benefits of the World Bank's Legal Needs Assessment was the coordination of donor activities, which resulted in a comprehensive plan among donors.<sup>285</sup> Indeed, the accompanying report to the assessment complained that "there is little effort made to coordinate project activities. In a nutshell, donors and international institutions foster legal reform activities piece by piece without a comprehensive approach."<sup>286</sup> Donors took up this call to arms, and engaged in a substantial amount of donor coordination of projects and funding, to reduce competitive or duplicative efforts, as well as to combine the power of the purse.<sup>287</sup>

The JRP has been the primary mechanism for donor coordination, after the passage of the Legal Reform Program of Mongolia. JRP is a mixture of work from the National Center for State Courts, the USAID, PACT, the Mongolian Open Society Forum, and the German Technical Corporation (GTZ).<sup>288</sup>

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283. Interviews with various officials, *supra* note 278.

284. Indeed, it seems that the other branches of government perhaps do not understand the full implications of these administrative courts. Thus, there is a danger that once the first big decision is adopted, there may be significant resistance to compliance, and backtracking away from an independent administrative court.

285. See USAID, THE JUDICIAL REFORM PROGRAM IN MONGOLIA: ACCOMPLISHMENTS, LESSONS LEARNED, AND RECOMMENDATIONS FOR THE FUTURE, *supra* note 175, at 13.

286. WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 39.

287. GRAMCKOW, MONGOLIA JUDICIAL REFORM PROGRAM, *supra* note 264, at 39.

288. *Id.*

The JRP works closely with the General Council of Courts (GCC)<sup>289</sup> to focus on six major tasks: (i) provide hands-on policy advice and training, including continuing legal education; (ii) build the capacity of legal institutions, to strengthen court management; (iii) introduce new approaches to legal education, including establishing legal professional qualifications; (iv) curb judicial corruption; (v) improve legal ethics; and (vi) increase public awareness and information about Mongolia's changing judicial landscape.<sup>290</sup> In short, the JRP works towards achieving the Justice System Plan, with particular focus on the Mongolian-identified objectives of "good governance" and "accountability."<sup>291</sup>

One significant criticism of the Judicial Reform Project is that their office is located at the Ministry of Justice & Home Affairs, an executive agency, thereby threatening judicial independence and compromising the integrity of the program. Those charges appear to be meritless, however, as the Judicial Reform Project seems to be impartial, well-executed and was headed by an extremely competent American lawyer, Mr. Robert La Mont.

JRP produces a "Rule of Law" newsletter to assist donor coordination and inform interested sectors of reform activities.<sup>292</sup> By 2004, JRP nearly had integrated its activities with the GTZ, particularly in public education and judicial training, and closely coordinated its work with the World Bank's Judicial and Legal Reform Project.<sup>293</sup>

However, the center that made the most impact in training has been the National Legal Center on Legal and Judicial Research, Training, Information and Publicity.<sup>294</sup> The JRP and other foreign donors, with the support of the World Bank, assisted in the creation of the National Legal Center (NLC) formed in late 2002.<sup>295</sup> The NLC moved to a new Mongolian-designed building in a central location in Ulaanbaatar on June 16, 2004.<sup>296</sup> The NLC is one of the linchpins of the Mongolian Legal and Judicial Reform Project, and gets most of its support from the JRP and the World Bank's Legal and Judicial Reform Project.<sup>297</sup> It is clear that the NLC usurped most if not all of the functions of its predecessors, and the JRP and GTZ have provided the bulk of training and CLE programs to judges, prosecutors and advocates.<sup>298</sup>

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289. The General Council of Courts is responsible for the administration of the courts.

290. THE UNITED STATES AGENCY FOR INTERNATIONAL AID, USAID/MONGOLIA, JUDICIAL REFORM PROJECT FACT SHEET, [http://www.usaid.gov/mn/programs/pdf/JRP\\_061306.pdf](http://www.usaid.gov/mn/programs/pdf/JRP_061306.pdf).

291. USAID, THE JUDICIAL REFORM PROJECT IN MONGOLIA: ACCOMPLISHMENTS, LESSONS LEARNED, AND RECOMMENDATIONS FOR THE FUTURE, *supra* note 175, at 6, 11.

292. GRAMCKOW, MONGOLIA JUDICIAL REFORM PROGRAM, *supra* note 264, at 38.

293. *Id.* at 3.

294. *See* USAID, THE JUDICIAL REFORM PROJECT IN MONGOLIA: ACCOMPLISHMENTS, LESSONS LEARNED, AND RECOMMENDATIONS FOR THE FUTURE, *supra* note 175.

295. *Id.* at 8.

296. *See* Mongolia Legal Center, <http://www.legalcenter.mn> (last visited Feb. 22, 2010).

297. *See* USAID, THE JUDICIAL REFORM PROJECT IN MONGOLIA: ACCOMPLISHMENTS, LESSONS LEARNED, AND RECOMMENDATIONS FOR THE FUTURE, *supra* note 175.

298. *See id.*

The JRP continues working with the NLC to develop new courses and undertake trainings. USAID has funded the training of virtually every judge in Mongolia through a JRP-provided training program, mostly administered by the GTZ.<sup>299</sup> The NLC holds annual “Baby Judges” training course to introduce newly appointed judges to best practices and to assist in their receivership of their position.<sup>300</sup> The JRP also sponsored training in distant *aimags*, and inquired into their estimation of their training needs, for future provision of services.<sup>301</sup>

The donor coordination that Mongolia’s donors engaged in after the government action plans and the legal needs assessment was remarkable and has been held up as a model for future donor activity. The GTZ in particular refers to this structure as a “best practice” in donor coordination.<sup>302</sup> After donor coordination began in earnest in 1999, the pace and depth of Mongolia’s judicial and other reforms increased tremendously and have created a promising context for a deep and permanent rule of law culture and civil society.<sup>303</sup> Certainly, the engagement of donors with each other to create complementary activities and not overlap has been an important factor in the success of Mongolia’s reforms this decade.

#### V. SOME CONCLUSIONS ON MONGOLIA’S LEGAL AND JUDICIAL REFORMS

Mongolia has made the transition from communism to freedom, and in just 15 years, you’ve established a vibrant democracy and opened up your economy. You’re an example of success for this region and for the world. I know the transition to liberty has not always been easy and Americans admire your patience and your determination. By your daily efforts, you’re building a better life for your children and your grandchildren.<sup>304</sup>

Over the past two decades, Mongolia has moved towards a procedurally-minimalist definition of the rule of law. Overall, Mongolia’s legal and judicial reforms resoundingly have been successful, although they have not been without problems. Donors have shown a great capacity to work together under unified leadership, and have effected serious and deep change. Mongolians have embraced their role and nongovernmental organizations have proliferated (especially those started by women) and have stimulated the reform process. And finally, Mongolia’s leaders have shown a willingness to embrace honest and suitable changes to their legal system, for the benefit of all Mongolians.

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299. See Skip Waskin, *Judicial Reform Project Update, Q4 Updates 2005*, USAID, Dec. 13, 2005, <http://www.usaid.gov/mn/programs/jrp/jrp-updates-Q4-05.html>.

300. *Id.*

301. Skip Waskin, *Judicial Reform Project Update, Q3 Updates 2005*, USAID, Sept. 15, 2005, <http://www.usaid.gov/mn/programs/jrp/jrp-updates-Q3-05.html>.

302. GRAMCKOW, MONGOLIA JUDICIAL REFORM PROGRAM, *supra* note 264, at 40 (indicating that the JRP is “seen by other donors as the focal point for legal and justice sector information and more and more as the hub for rule of law coordination”).

303. Heike Gramckow, *The Long Winding Road: Judicial Sector Reform in Mongolia*, 2 INT’L JUD. MONITOR 1, 1 (2007), [http://www.judicialmonitor.org/archive\\_0207/sectorassessment.html](http://www.judicialmonitor.org/archive_0207/sectorassessment.html).

304. Bush, *supra* note 12.

In the beginning of its democracy, Mongolia did not have much direction over the path of its reforms, as donor organizations and outside states influenced a large amount of the legislation. Obviously, these donor organizations were working with appropriate counterparts in Mongolia's government to enact the passage of laws, implementation of new procedures, and restructuring of institutions. But there was not a great deal of understanding by Mongolia's leaders of the exact effects of the reforms. Likewise, in the initial stages, Mongolia's institutions did not have any sectoral integration or cooperation amongst themselves, or even full command over much of the reforms, resulting in poor implementation.

During the first seven years of its democracy, Mongolia and its donors focused its reforms on legislation. Besides a slight restructuring of the courts, the government and its donors engaged in modest work in the judiciary. New legislation was imperfect as it was poorly drafted, difficult to implement, overlapping and inconsistent. As it were, the initial response to many issues in Mongolia was to draft a law or administrative procedure and as a result, the enactment of laws has not proven to be careful or targeted solutions for Mongolia's needs. Accompanying donor assistance in drafting laws has been transplantation problems, where the laws or regulations of foreign jurisdictions are ill-suited to the unique cultural context of Mongolia.

The tipping point, however, occurred when the government passed its reform plans. The reforms occurring before the passage of the government action plans were fundamentally flawed as they were not coherent or coordinated. Nonetheless, the government action plans at the least showed that there was a high level of acceptance for the pace and direction of the reform process that previously occurred, despite shortcomings of the process. More importantly, after the process of planning and memorializing an action plan, Mongolia's leaders gained a more intimate understanding of and control over their reform situation.

As well, the Legal Needs Assessment by the World Bank and domestic Mongolian actors was well-crafted and resulted in a societal buy-in, as it was designed in part and administered by domestic actors. This type of assessment is unusual and repeating it would be difficult in the present institutional bureaucratic environment in many donor organizations. Nonetheless, the Mongolian experience can be held up as a prototype, as it resulted in many tangible benefits, including the creation of an administrative court system, which should operate to protect the creation of a rule of law culture.

In addition to signaling high-level acceptance of the prior reforms, the government action plans led to other tangible benefits as well. International donors followed the government's prerogatives, and created their donor plans to fit within the framework of the government's plans. The existence of these plans also assisted the work of civil society to stimulate deeper reforms. Civil organizers and leaders needed only to point to the appropriate section of the government plan, how their work assists that goal, and then pressure for acceptance or assistance, as the case may be.

The government action plans stimulated the donors to accept the JRP as a donor clearinghouse and coordination center. As mentioned above, the GTZ uses

Mongolian donor coordination as a best practice in the field of rule of law donor assistance.<sup>305</sup> Once the JRP began its donor coordination, donors were able to minimize or discontinue duplicative or contradictory reforms.

The impact of these action plans cannot be understated. They created concepts or norms as goals of rule of law reforms, rather than ends-based institution-building. They affected the psychology of the Mongolian society, and in particular, its leaders. Taking control over the reform process creates the belief in the parliamentarians and civil society that they are the catalysts – and this will make them more conducive to establishing a rule of law culture and accepting the rule of law. Now, Mongolian justice can become a Mongolian product, since many actors of society are taking part in the planning and decision-making in a fixed and controlled framework.

Overall, judicial reforms largely have been successful. As with legislative reforms, however, certain problems in the judiciary remain unresolved. Fixing the procedural standards of the judiciary does not increase the rule of law ethos. Increasing case-processing times, court administration and public access to information creates needed transparency, but these technical fixes do not create human change. Judges continue to be unwilling to embrace a more stringent ethics standard and many of the “old guard” judges question the efficacy of most of the reform programs. The plethora of new laws and procedures and the manifestation of extraordinary disputes based on market circumstances have left many judges confused, uncomfortable and ill-equipped to make good professional decisions. During the first phase of democracy, judges in rural courts obstinately refused to apply new laws, and used many of the outdated communist-era laws. It is unclear to what extent this practice continues.

Training has increased the capacity of the individual judge, and procedural and legal manuals have aided in the decision-making capability and uniformity of the judiciary. Legal education is undergoing beneficent change, and experts agree that it is improving and becoming standardized. Accreditation standards and bar associations also are beginning to raise the professionalism of the judiciary.

Lastly, donors adeptly utilized public perception surveys to gauge the public's knowledge, understanding and support for government institutions and the reform process. After having discovered a low level of confidence in the judiciary and other institutions, Mongolia and its donors responded effectively and engaged in reforms that raised public confidence. Without a public buy-in, the creation of the norms of the rule of law, as embodied in the action plans, would not be sustainable, as the public would not feel that the rules passed by the legislature or executive are supreme or guiding and would not have confidence in the judiciary to resolve its disputes. Future rule of law programs would benefit from utilizing public perception surveys and responding accordingly.

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305. GRAMCKOW, MONGOLIA JUDICIAL REFORM PROGRAM, *supra* note 264, at 40 (indicating that the Judicial Reform Program is “seen by other donors as the focal point for legal and justice sector information and more and more as the hub for rule of law coordination”).

But in the context of all of these tangible successes, the human problem remains in Mongolia. The norms of the rule of law have been introduced, but have not fully taken root. Judges must embrace the independence of the judiciary, and lose the culture of complacency of the past – that of following executive directives. Mongolia's judges are young, competent, and embracing of the ideals of the rule of law. As the old guard steps into retirement and the young tireless leaders continue to adopt and accept the notion of the rule of law, Mongolia's judiciary will be what the Constitution promises, an independent, impartial and equal branch of government. Although the public is beginning to understand and accept the rule of law reforms and attribute a heightened status to essential government institutions, like the judiciary, there remains space for much improvement.

While the government plans effectively have guided the last phase of legal reforms, there have been difficulties in their implementation. Resultantly, the next phase of legal reforms intends to concentrate on assistance in implementation of the recently created laws, institutions, norms and culture. The Judicial Reform Project's 2004-2008 program focuses on implementation of specific measures of the Program of the Government of Mongolia, which the Parliament adopted in November of 2004.<sup>306</sup> As well, the USAID states that "[o]ver the next five years, the challenge for USAID will be to move beyond the "introduction" of these new approaches and ensure that they are actually "embedded" and "institutionalized" within the legal profession."<sup>307</sup>

Overall, the Mongolization of the legal system has not fully occurred yet, as it is still adjusting to a new legal system and language applicable to a market economy.<sup>308</sup>

The seeds of the rule of law culture are planted, and Mongolia and its donors continue to look forward to tilling the grounds, to embed these concepts and watch their offspring grow and stimulate a deep and successful democracy and market economy.

But this optimism belies Mongolia's serious concern – corruption. The problem of corruption has far-reaching implications and seriously has affected Mongolian democracy, its market economy, foreign investment, judicial independence, public perceptions, and the rule of law. Corruption has caused renewed and invigorated protests recently. Pro-democracy parties have threatened to boycott, unless the corrupt leaders step down.<sup>309</sup> Mongolia's society presently is colliding over its rampant corruption. Can effective legal and judicial institutions fully combat corruption? No, but these institutions are a prerequisite to doing so.

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306. USAID, THE JUDICIAL REFORM PROJECT IN MONGOLIA: ACCOMPLISHMENTS, LESSONS LEARNED, AND RECOMMENDATIONS FOR THE FUTURE, *supra* note 175.

307. USAID, MONGOLIA STRATEGIC PLAN 2004-2008 40 (2003) *available at* [http://pdf.dec.org/pdf\\_docs/PDABY661.pdf](http://pdf.dec.org/pdf_docs/PDABY661.pdf) [hereinafter MONGOLIA STRATEGIC PLAN 2004-2008].

308. *See* WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 37-38 (discussing problems with Mongolia's legal reforms, as of 2000).

309. Oyungerel Tsedevdamba, *Pro-Democracy Activists in Mongolia Worry about Potential Roll Back of Reforms*, EURASIANET, Nov. 22, 2002, <http://www.eurasianet.org/departments/rights/articles/cav112202.shtml>.

Bending the leaders to accept the rule of law is fundamentally a political exercise, and they must be constrained through domestic bottom-up pressures and international top-down pressures. This is true for judges as well as parliamentarians as well as employees of the executive. It is the psychological willingness of the judges to rule honestly and professionally, and of high-level officials to accept living subject to the law. Otherwise, the whole premise is undermined.

The focus is *not only* on the leaders. Public perception of corruption has been very high in all sectors, although in recent years, the public seems to think more highly of the judicial branch. But the prevalence of corruption has a basic effect on the mentality of the citizenry, which can undermine a rule of law culture.

The administrative court is a significant catalyst to reducing corruption in government and constraining leaders through law, but questions abound. Will the government allow the court full discretion to hear cases and controversies – will it allow it to be independent? Will the government accept its decisions? Will it hold itself responsible for its actions? Will the Mongolian citizenry embrace the concept of the rule of law? Or will they live subject to corruption and engage in corruptive exchanges, because it is “the only way”? While the passage of time answers these questions, the Mongolian dream of democracy hangs in the balance.

## APPENDIX A

## MONGOLIA'S SOCIALIST TRADITIONS:

## INSTITUTIONAL AND LEGAL BACKGROUND

After the U.S.S.R., Mongolia became the second nation to embrace communism, establishing a one-party system and eventually a command economy administered by five-year plans.<sup>310</sup> The U.S.S.R.'s military and diplomatic assistance in Mongolia's independence from China initiated an extremely close bilateral relationship between the two states.<sup>311</sup> Although formally independent, Mongolia became the *de facto* sixteenth republic of the Soviet Union.<sup>312</sup> Indeed, of all former soviet bloc states, Mongolia was the most dependent of Soviet aid and technical assistance. In the 1980s, Soviet direct aid reached as high as 30% of Mongolia's GDP, and approximately 40,000 Soviet advisors gave technical assistance to Mongolia's industrial development, particularly in the mining and manufacturing sectors.<sup>313</sup> This aid helped Mongolia close its wide trade gap and increase social services, thus benefiting Mongolian rural society and increasing the legitimacy of the rule by the communist Mongolian People's Revolutionary Party (MPRP).<sup>314</sup>

The beginning of the disintegration of the Soviet Union and the Council on Mutual Economic Assistance (CMEA) in the 1980s was the principal agitation for change in Mongolia.<sup>315</sup> Mongolian students, like their Eastern European counterparts, began peaceful demonstrations calling for democracy, and organized sit-ins and hunger strikes in Sukhbaatar Square, the main square in Ulaanbaatar where the Parliament is located.<sup>316</sup> Math and Physics professors from the Mongolian National University formed the Social Democratic Party, and professors from the Economics Department formed the National Progress Party.<sup>317</sup> Mongolia's versions of *glasnost* and *perestroika* unexpectedly promoted the democratic reformists' agenda, although the government originally initiated them

310. See Fedor S. Mansvetov, *Russia and China in Outer Mongolia*, 24 FOREIGN AFF. 143, 147-49 (1945-46).

311. *Id.* at 146-47 (explaining that in return for the 1912 treaty whereby Russia agreed to assist Mongolian autonomy from the "presence of Chinese troops on her territory [and] the colonization of her land by the Chinese," Russia gained unfettered rights to railroad construction).

312. CEVDET DENIZER & ALAN GELB, MONGOLIA: PRIVATIZATION AND SYSTEM TRANSFORMATION IN AN ISOLATED ECONOMY 3 (2005). See also Bradsher, *supra* note 2, at 548.

313. Bilskie & Arnold, *supra* note 5, at 208; Cheung, *supra* note 10, at 70-71 (detailing the withdrawal of Soviet assistance and Mongolia's initial painful reforms).

314. See Bradsher, *supra* note 2, at 545-46. In fact, aid disproportionately influenced Mongolian welfare, in that herdsman's standard of living was greatly higher than it would have been without it. In 1970, Mongolian aid far outpaced other developing countries. *Id.* at 546. Bradsher cites \$220 in aid per capita for Mongolians, in comparison to \$4.20 in 80 non-communist countries and \$36 in US aid for the South Vietnamese. *Id.*

315. See Ginsburg, *supra* note 2, at 461.

316. *Id.* at 462-63 (examining the transition period and the elasticity of the MPRP in responding to the popular demonstrations, after briefly debating whether to respond with force, like the Chinese in Tiananmen Square).

317. *Id.* at 463.

to strengthen the socialist economy, not render it obsolete.<sup>318</sup> Under these plans, moderates in the MPRP were increasingly placed in leadership positions while Mongolia sought to increase government transparency and performance, by allowing more autonomy to state enterprises and government ministries.<sup>319</sup> In the end, these moderates were the key factor in the MPRP's decision to allow a transition to democracy. During *glasnost* and *perestroika*, Mongolia began to establish international relationships with deft speed.<sup>320</sup>

Economic Background: Initially, Soviet control was largely over Mongolia's economic system – all of Mongolia's trade was with the Soviet Union from 1921 until 1952.<sup>321</sup> During that time, the Soviet Union left Mongolia relatively undeveloped, as the U.S.S.R. tended to its own nation-building. Mongolia's economy remained dominated by livestock-raising and nomadism. Once appropriately strengthened, however, the U.S.S.R. eventually asserted control over Mongolia's political and social spheres in addition to its economy.<sup>322</sup> In 1948, the Soviets introduced economic planning in Mongolia with the first of the five-year plans, which collectivized herds, built winter animal shelters and wells, and sought to industrialize Mongolia.<sup>323</sup> The plans aimed to stimulate a change from an agricultural-industrial economy to an industrial-agricultural economy.

The Soviet Union invested substantial sums in developing Mongolia's mining industry, primarily its copper trade, and in developing light industries within Ulaanbaatar (translation: red city), such as carpet, wool and shoe factories.<sup>324</sup> After the establishment of the CMEA, the Soviet trade bloc, Mongolia's industrialization reflected the "international Socialist division of labor and the steady growth of international cooperation between Socialist countries."<sup>325</sup> Within that framework, Mongolia provided meat, hides and other livestock products, minerals and coal to the Soviet bloc, and imported the balance of other daily necessities.<sup>326</sup> The government administrated and coordinated all banking, production, distribution, and social services functions during Mongolia's socialist era.<sup>327</sup>

Political and Social Background: The MPRP controlled Mongolia from 1921, when that party's young revolutionary founder, Sukhbaatar, led the state to independence from China, with the help of the U.S.S.R.<sup>328</sup> Soviet assistance came

318. *Id.* at 461.

319. Bilskie & Arnold, *supra* note 5, at 208-11 (discussing the "renewal" program modeled after Mikhail Gorbachev's efforts in the Soviet Union).

320. *Id.*

321. Bradsher, *supra* note 2, at 548.

322. *Id.* at 206.

323. *Id.* at 207; Bradsher, *supra* note 2, at 549-50.

324. K.L. Abeywickrama, *The Marketization of Mongolia*, 10 MONTHLY REV. 25, 27 (1996).

325. Bradsher, *supra* note 2, at 550 (quoting former Premier Tsedenbal in 1970).

326. Omar Sattaur, *Thoroughly Modern Mongolia*, NEW SCIENTIST, Sept. 1, 1990, at 23. *See also* Ginsburg, *supra* note 2, at 461 (detailing that in the 1980s, Mongolia traded 95% with the Soviet Union, and the balance with CMEA).

327. *See* Abeywickrama, *supra* note 325, at 26-27.

328. Ginsburg, *supra* note 2, at 462.

hand in hand with Soviet influence, which soon changed into Soviet command, mainly by directing the MPRP, the governing Mongolian communist party.<sup>329</sup> The MPRP increased its stranglehold on society until it controlled all aspects of its citizens' behavior. The MPRP regulated prices.<sup>330</sup> It collectivized and controlled herds. The government managed domestic production and all traffic and supply of goods.<sup>331</sup> The MPRP controlled foreign trade, and consistently ran trade deficits, which Russian direct aid closed.<sup>332</sup> In terms of human development, the socialist regime in Mongolia stymied human freedoms.<sup>333</sup> The MPRP controlled the media, and there was no freedom of speech or association.<sup>334</sup> There was no opportunity for private initiative. In short, the Mongolian people were governed, not governing.

In addition to the communist party, the *negdels*, the state herding and agricultural cooperatives, governed Mongolia.<sup>335</sup> They provided veterinary care, abundant wells, and decreased risk of loss from natural disasters.<sup>336</sup> The *negdels'* marketing function supplied necessary services – they purchased raw materials at fixed prices set by the Ministry and transported the products to the state run processing facilities at set schedules.<sup>337</sup> The *negdels* also established customary land use rights, controlling concentration of the herds and their grazing within each *negdel* as well as among themselves.<sup>338</sup>

Under the rule of various dictatorships, the Mongolian people suffered through a period of brutal atrocity.<sup>339</sup> The state eventually provided its people with a strong sense of security. Indeed, Mongolia's development advanced considerably under communist rule. Economically, society benefited from fixed prices at home,<sup>340</sup> above market prices for meat, leather, cashmere and copper abroad,<sup>341</sup> and cheap luxury goods from Eastern Europe. Socially, educational

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329. *See id.* at 460.

330. Bilskie & Arnold, *supra* note 5, at 207.

331. Abeywickrama, *supra* note 325, at 26.

332. Ginsburg, *supra* note 2, at 462.

333. Bilskie & Arnold, *supra* note 5, at 206-07.

334. *See id.*

335. *See* U.N. DEVELOPMENT PROGRAMME, HUMAN DEVELOPMENT REPORT MONGOLIA 2003 25 (2003), available at <http://hdr.undp.org>.

336. *See id.* at 39.

337. *Id.*

338. *Id.*

339. *See* Bilskie & Arnold, *supra* note 5, at 207 (describing the destruction of the lamaseries and the transformation of the command economy). Mongolia's two dictators are known as the Mongolian equals of the Soviet versions. *Id.* Horolyn Choibalsan was "Mongolia's Stalin" for transforming Mongolia's society with murder and violent purges to rid it of any challenges, killing over 100,000 persons, including Monks, intellectuals and the traditional elite, and causing the near-total destruction of Buddhist lamaseries. *Id.* Yumjaagiin Tsedenbal was "Mongolia's Brezhnev" for suffocating Mongolia's economy through the introduction of command and control characteristics. *Id.*

340. *Id.* Fixed prices allowed rural society to purchase goods for the same prices as in Ulaanbaatar, although the distances to supply rural aimag (provincial) centers was vast. *Id.* Ultimately, the demise of fixed prices undermined rural society's well-being and civic participation. *Id.*

341. *See* Abeywickrama, *supra* note 325, at 27. These goods were sold to the U.S.S.R. at prices fixed at a percentage over world prices. *Id.*

improvements were impressive, health services were free, and there was practically no unemployment.<sup>342</sup> Importantly, the government solidified (superficial) gender equality, social protection, and human security.<sup>343</sup>

Legal Background: Mongolia has gone through various and interrupted legal systems during its existence as a state. Mongolia's rich legal history originated from the *yassa*, Chinggis Khan's legal codification.<sup>344</sup> Subsequently, during Manchu rule over Mongolia, administrative authority encompassed judicial authority.<sup>345</sup> Once Mongolia gained independence from China as a result of the 1921 People's Revolution, the government instituted a mixed Asian and European legal system.<sup>346</sup> Mongolia's legal system during the communist era was based on the Soviet adaptation of the Roman law system; however, there were no professional lawyers or judges.<sup>347</sup> In 1933, Mongolia reorganized its court system and vested much judicial power in the executive.<sup>348</sup> When the judicial system was reestablished during communist rule, it was structured primarily as a criminal legal system.<sup>349</sup> After heavy amounts of Russian funding, a tangible legal profession emerged.<sup>350</sup>

Thousands of directives from the MPRP, ordinances of the People's Representatives *Hurals* (parliaments) and decisions of the Ministerial Counsel comprised the rest of Mongolia's legal system.<sup>351</sup> Overall, the appropriate government ministries resolved what problems arose, and there was no need for a formal civil law system. *Negdels* and other cooperatives also played a significant role in the rule of law. Along with *aimag* (provincial) governors, *negdels* were the primary regulators of the rural population, and they settled disputes amongst themselves, or went to the *aimag* governor for assistance.<sup>352</sup>

342. *Id.*

343. U.N. DEVELOPMENT PROGRAMME, *supra* note 336, at 6.

344. M. BYAMBA & MONGOLIAN WOMEN LAWYERS ASSOCIATION, HISTORICAL AND CURRENT OVERVIEW OF THE MONGOLIAN JUDICIAL SYSTEM 1 (2005); GEORGE LANE, GENGHIS KHAN AND MONGOL RULE 37 (2004).

345. Tseveen & Ganbold, *supra* note 278; Dorothea Heuschert, *Legal Pluralism in the Qing Empire: Manchu Legislation for the Mongols*, 20 INT'L HIST. REV. 310, 321 (1998).

346. TOM GINSBURG, JUDICIAL REVIEW IN NEW DEMOCRACIES: CONSTITUTIONAL COURTS IN ASIAN CASES 161 (2003).

347. *Id.*; BYAMBA, *supra* note 345, at 4.

348. WILLIAM ELLIOTT BUTLER, THE MONGOLIAN LEGAL SYSTEM: CONTEMPORARY LEGISLATION AND DOCUMENTATION 92-93 (1982). *See also* The Supreme Court of Mongolia, Judicial System of Mongolia, <http://www.supremecourt.mn/english/index.php?what=system> (last visited Feb. 28, 2010) (giving a broad overview of the history of Mongolia's judicial system).

349. GINSBURG, *supra* note 347, at 161.

350. *Id.*

351. WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 4-5.

352. U.N. DEVELOPMENT PROGRAMME, *supra* note 336, at 39-40.

## APPENDIX B

### MONGOLIA'S REALIZATION OF THE PROCEDURALLY-MINIMALIST RULE OF LAW:

#### STEPS TAKEN BY MONGOLIA AND ITS DONOR ORGANIZATIONS

##### I. REFORM OF LEGISLATION

The first phase of legal reform was the reformation of the Constitution. The Asia Foundation contributed the most, but there also were independent analyses of the draft constitution by scholars and professors from the U.S. and Germany.<sup>353</sup> The next aspect of stage-one reforms was the rewriting of the legal code to create appropriate rules that govern newly-created market-based relationships.<sup>354</sup> To be consistent with the rule of law formulation described above, any decisions with the effect of law and any lawmaking should be transparent and should allow for meaningful public participation. As such, the reforms of the legal code should result in the passage of fair, equal and nondiscriminatory laws and decisions with the effect of law.

Construction of a market-oriented economy was the first priority of Mongolia's newly elected government, which based this transformation on (i) privatization as the centerpiece, (ii) financial, fiscal and external sector reforms and (iii) removal of controls on prices, tariffs and wages.<sup>355</sup>

Moderate price reforms occurred first, to soften the way for privatization. In January of 1991, the government freed prices on most non-essential commodities and increased prices on state subsidized essential items and public utilities.<sup>356</sup> An increase in salaries, a reduction in spending and the budget, and a decrease in subsidies to most state enterprises rounded out these price reforms.<sup>357</sup>

The government then privatized state assets under the Privatization Law of May 1991, which entitled all citizens to 10,000 *tugrug* (Tg) of vouchers.<sup>358</sup> These citizens could redeem small-value assets under the green vouchers, and shares in public limited or joint stock companies from large state enterprises under the blue vouchers.<sup>359</sup> Public utilities and key transport, telecommunications and mining enterprises however, remained under state control.<sup>360</sup> Livestock was privatized to herdsmen and accommodations were privatized to its inhabitants.<sup>361</sup>

The Banking Law of May 1991 reformed the financial sector and created a new state central bank (its previous version was the sole banking center of

353. See Bilskie & Arnold, *supra* note 5, at 210 (stating that Mongolia lobbied the U.S. for help in formulating their constitution); THE ASIA FOUNDATION, *supra* note 213, at 1.

354. See Bilskie & Arnold, *supra* note 5, at 211-12. See also *infra* note 101 and accompanying text.

355. See Goyal, *supra* note 10, at 635 (discussing the development of the transition period).

356. Cheung, *supra* note 10, at 70.

357. *Id.*

358. Goyal, *supra* note 10, at 635.

359. *Id.* at 635-36.

360. *Id.* at 636.

361. *Id.*

Mongolia) as well as constructed the basic legal framework for commercial banks to operate in Mongolia.<sup>362</sup> An unlikely early reform that complemented Mongolia's financial reforms was the establishment of a stock exchange in 1992, under the direction of Zoljargal, one of Mongolia's many "brash young reformers."<sup>363</sup> The Foreign Investment Law of May 1994 created the necessary conditions for Mongolia's entry into the globalized system of investments and trade, by stipulating the conditions for foreigners to own property and investments.<sup>364</sup>

## II. REFORM OF THE JUDICIARY

### *A. The Present State of the Mongolian Judiciary*

Legal Profession: The legal profession is composed of the same four main groups of professional lawyers as during the socialist period: (i) judges; (ii) prosecutors representing the state; (iii) advocates who are admitted to practice law, provide legal advice and represent parties in court; and (iv) notaries, who witness or authenticate documents.<sup>365</sup>

Advocates: Previously, the state operated the economy, the social network and the administration and its officers resolved any arising disputes. Resultantly, citizens had little need for lawyers and the legal system, unless they were involved in a criminal case. Now, with increasing citizen rights (property rights, civil rights, etc.) and the rise of a civil law system, the number of lawyers is growing. The number of advocates in the Association of Mongolian Advocates (AMA) has increased from 200 in 1994 to over 500 in 2001.<sup>366</sup> In 1995, Mongolia passed the Law on Advocacy, which delineates the functions of the profession – advocates may present legal advice, prepare legal documents, participate in investigations, and may represent clients in court and other administrative organs.<sup>367</sup> Advocates must be members of the AMA, and to qualify for membership, an individual must have a law degree, an absence of a criminal record and pass an examination administered by the AMA and the Ministry of Justice and Home Affairs (MOJHA).<sup>368</sup>

Judges: During the communist era, judges historically occupied one of the lowest governmental levels, and garnered little respect.<sup>369</sup> In those times, the MPRP directly appointed judges and retained and exercised a substantial amount of oversight. For instance, oftentimes the party recalled judges to explain a decision to a local party committee where it disagreed.<sup>370</sup> Prosecutors traditionally had more power than judges, and effectively decided cases based on party lines,

362. *Id.* at 637.

363. Cheung, *supra* note 10, at 71.

364. Tsedendambyn Batbayar, *Mongolia in 1993: A Fragile Democracy*, 34 ASIAN SURVEY 41, 44 (1994).

365. Tseveen & Ganbold, *supra* note 278. This article does not treat notaries in depth.

366. WORLD BANK, MONGOLIA PROJECT APPRAISAL DOCUMENT, *supra* note 224, at 8.

367. *Id.*

368. *Id.*

369. See Tseveen & Ganbold, *supra* note 278.

370. *Id.*

resulting in about a 98% conviction rate before 1991.<sup>371</sup> Today however, judges are gaining more prestige in society, and the Constitution and national legislation protect their independence. Presently there are approximately 360 judges in Mongolia, who are appointed by the President upon the recommendation of the General Council of Courts, and who have life tenures.<sup>372</sup> Most Mongolian judges are very young, between 30 and 35 years old. This result is due to the low age and experience requirements to be a judge: for the lower courts, judges must be at least 25 years old and have three years legal experience; for the Supreme Court, judges must be at least 35 years old and have ten years of legal experience.<sup>373</sup> At present, two-thirds of the judiciary's cases are civil, in contrast to the communist period where nearly all cases were criminal.<sup>374</sup> However, judges in Mongolia are overloaded with cases.<sup>375</sup> On average they settle 350 cases a year— far in excess of the international average – which “often causes a superficial approach in settling cases and disputes.”<sup>376</sup>

Legal Education: As of 2005, there were 31 law schools operating in Mongolia.<sup>377</sup> In 2001, approximately 6,000 students attended law school, with half of those students enrolled in one of the four main universities.<sup>378</sup> The Ministry of Justice and Home Affairs has been planning to audit all law schools to determine their curricula and the level of expertise and qualifications of the law professors. It is unclear whether this exercise has been completed. In general, law schools in Mongolia need a unified curricula standard applicable to all accredited law schools and elevated standards of entry into the legal profession on the basis of merit, equality and fundamental fairness.

Judiciary System: *Soum*, *intersoum* and district courts are courts of first instance that handle less serious crimes and civil disputes under ten million *tugrug*.<sup>379</sup> *Aimag* (province) and city courts are found in the capitals of the *aimags* and there is one specialized court in Ulaanbaatar called the Capital City Court (this is the equivalent of an *aimag* court).<sup>380</sup> These are also courts of first instance but they have different jurisdiction than the other courts of first instance.<sup>381</sup> *Aimag* courts have jurisdiction over more serious crimes, civil disputes over ten million *tugrug*, and appeals from lower courts.<sup>382</sup> The Supreme Court has jurisdiction over all

371. *Id.*

372. *Id.*

373. *Id.*

374. ZORIG FOUNDATION, REPORT ON THE NATIONAL INTEGRITY SYSTEM 10 (2001).

375. *Id.* at 8.

376. *Id.*

377. WORLD BANK, MONGOLIA-LEGAL AND JUDICIAL REFORM PROJECT, REPORT NO. PID10443 5 (2005). See also Worldwide Legal Directories, Schools of Law in Mongolia Directory, <http://www.hg.org/law-schools-mongolia.asp> (last visited Feb. 20, 2010).

378. WORLD BANK, MONGOLIA-LEGAL AND JUDICIAL REFORM PROJECT, *supra* note 378, at 5. The report identifies that MOJHA provided this information to the World Bank. *Id.*

379. Tseveen & Ganbold, *supra* note 278.

380. *Id.*

381. *Id.*

382. *Id.*

appeals from decisions of *aimag* and the Capital City courts as well as jurisdiction over some matters of first instance.<sup>383</sup> In 2004, the government of Mongolia with the assistance of the World Bank initiated a specialized system of administrative courts.<sup>384</sup> Lastly, there is a Constitutional Court which only has jurisdiction over questions concerning the constitution.

#### *B. Donor Activity And Structuring The Judicial Reforms*

Law on Courts: Reforms of the judiciary began modestly with the 1993 Law on Courts.<sup>385</sup> During the passage of the Law on Courts, The Asia Foundation provided two legal consultants to work with the Chief Justice of the Supreme Court, the Ministry of Justice, and the Parliament.<sup>386</sup> These consultants were two Americans – Clifford Wallace, Chief Senior Judge of the Ninth Circuit, and a specialist from the U.S. Congressional Research Service.<sup>387</sup> Between 1994 and 1998 USAID entered its second phase of assistance for Mongolia, and it reported that this era was marred with energy crises and economic stabilization issues. As a result, although it paid attention to and engaged in reform programs concerning democratization and improving legal institutions, short-term emergency considerations disproportionately diverted its aid away from rule of law programs.<sup>388</sup>

#### *C. The Progression of Mongolia's Judicial Reforms*

Although the reform process occurred across various fields simultaneously, this appendix describes Mongolia's judicial reforms by subject matter, for ease of understanding. This approach paints a cogent picture of the overall path of Mongolia's judicial reforms, but not necessarily a temporally accurate one.

Judicial Independence: Increasing the political, economic, organizational and decision-making independence of the judiciary is the first fundamental value of the parliament's Strategic Plan for the Justice System of Mongolia.<sup>389</sup> Judicial independence is of course a necessary aspect of a procedurally-minimalist rule of law.

In advance of the legal reform program, The Asia Foundation supported the Mongolia Group for Independence of Judges and Lawyers (MGIJL) seminar on judicial independence and ethics.<sup>390</sup> As well, the JRP brought a consultant to Mongolia – Marie Milks, a retired Hawaii State Court Judge who has had prior

383. *Id.*

384. See interview with various officials, *supra* note 278, and accompanying text; THE WORLD BANK, MAJOR WORLD BANK JUDICIAL REFORM PROJECTS APPROVED AUGUST 2004 1 (2004).

385. THE ASIA FOUNDATION, *supra* note 162, at 2.

386. *Id.*

387. *Id.*

388. USAID, MONGOLIA STRATEGIC PLAN 2004-2008, *supra* note 308, at 10-11 (summarizing its prior programs and strategies).

389. *Id.* at 11 ¶2; WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 30.

390. See THE ASIA FOUNDATION, *supra* note 213, at 1.

experience in Mongolia –in September of 2005 to work on improving judicial independence.<sup>391</sup>

Capacity Building of Legal Institutions: Mongolia and its donors have spent a great amount of money and resources on increasing the capacity of the judiciary and other legal institutions. One necessary and specific focus has been on reforming the Judicial Council.

The Judicial Reform Project has focused its assistance on Mongolian legal capacity building, with particular attention to the General Council of Courts (GCC), Mongolia's judicial council. The initial priority of the JRP was assistance in court management and administration, with the goal of increasing transparency, accountability and judicial efficiency. Throughout its assistance, the JRP did not impose any of its own ideals on the GCC.<sup>392</sup> Rather, it presented the GCC with comparative background material from other countries with different administrative and management systems, and aided in the GCC's informed decisions.<sup>393</sup> The JRP supports the GCC in creating a national case information database and improving its budget expertise. Further, it has assisted the GCC in making adjustments in its decision-making processes and introducing the use of sub-committees for better information and broader participation in the GCC's decisions.<sup>394</sup> In addition, Robert La Mont, then-Chief of Party for the JRP, personally participated in the GCC's meetings, as a monitoring activity and to directly impact the GCC's policy making and administrative decisions.<sup>395</sup>

Outside of the GCC, over the last fifteen years, Mongolia has built a substantial amount of capacity in its judiciary. Mongolia has automated all 61 of its courts under the JRP's assistance, which includes automated case management procedures and records, and automated random assignment of cases.<sup>396</sup> More than three-quarters of the caseloads in Mongolian courts are automated, and almost all courts have computers, and many with Internet access.<sup>397</sup> Mongolia soon hopes to create a central database for case information on the Internet. After a slight learning curve, USAID issued and installed generators to back up the computers when the power goes out, as frequently occurs in the *aimags*.<sup>398</sup>

As well, the JRP has assisted each court in creating public information areas and improving the efficiency of records management processes. The goal has been

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391. See Skip Waskin, *Judicial Reform Project Update*, USAID, Oct. 21, 2005, <http://www.usaid.gov/mn/programs/jrp/jrp-updates-Q4-05.html>.

392. See GRAMCKOW, MONGOLIA JUDICIAL REFORM PROGRAM, *supra* note 264, at 4.

393. *Id.*; See USAID, THE JUDICIAL REFORM PROGRAM IN MONGOLIA: ACCOMPLISHMENTS, LESSONS LEARNED, AND RECOMMENDATIONS FOR THE FUTURE, *supra* note 175, at 6.

394. *Id.*

395. See GRAMCKOW, MONGOLIA JUDICIAL REFORM PROGRAM, *supra* note 264, at 8.

396. USAID, *Judicial Reform Project Update*, USAID, Aug 5, 2005, <http://www.usaid.gov/mn/programs/jrp/index.html> (explaining improvements in judicial independence).

397. See USAID, *Case Study, Helping Mongolia to Reform Judicial Sector*, USAID, Oct. 6, 2009, [http://www.usaid.gov/stories/mongolia/cs\\_mongolia\\_law.html](http://www.usaid.gov/stories/mongolia/cs_mongolia_law.html).

398. See Skip Waskin, *Mongolia, Judicial Reform Project Update*, USAID, July 18, 2005, <http://www.usaid.gov/mn/programs/jrp/jrp-updates-Q3-05.html> (explaining court automation).

to improve transparency, efficiency and reduce opportunities for system manipulation. The JRP organized court management training to increase the performance of case flow management of individual courts, to raise the efficiency and productivity of the bench.<sup>399</sup>

Further, the World Bank has funded a Unified Information System (UIS), to link all national level justice sector institutions in Ulaanbaatar to share data and make court information available to the public, and make available all laws and regulations, with the intention of giving courts complete knowledge to allow judges to rule consistently.<sup>400</sup>

These reforms have increased judicial efficiency, which in turn assures fairness, a fundamental principle of the rule of law. As well, these reforms increase accountability and transparency, to reduce possibilities of corruption and assure access to the courts for meaningful, fair, impartial and equal redress and justice.

Training and Continuing Legal Education: Training professionalizes the judicial system, and has been an extremely important part of Mongolia's rule of law reforms. In January 2000, the Association of Mongolian Judges, the Association of Mongolian Lawyers, and the Association of Mongolian Advocates founded the Judicial Training Center.<sup>401</sup> The Mongolian Foundation for Open Society (MFOS), which jointly runs the JRP with USAID and PACT, supported the establishment of the Judicial Training Center through financial and technical support.<sup>402</sup> The Judicial Training Center resides at the Supreme Court. As well, The Asian Development Bank opened a Legal Retraining Center for Lawyers in February of 2000.<sup>403</sup>

### III. LEGISLATIVE AND EXECUTIVE REFORM THROUGH GOOD GOVERNANCE PROGRAMS

With judicial reforms in place, the Government of Mongolia and its donors have begun fine-tuning the application of these reforms. While this process occurs, their joint attention has shifted to good governance reforms, through increasing transparency and accountability. Mongolia has undertaken many good governance reforms that donors primarily advance and fund.

Capacity Development of the Office of the President: The UNDP supports the Office of the President of Mongolia in developing its institutional capacity for public consensus building and to provide long-term solutions to political and socio-economic challenges.<sup>404</sup> The four core objectives of the project are: (1) to

399. *See id.* at ¶ 4 (Court Management Training).

400. *See* GRAMCKOW, MONGOLIA JUDICIAL REFORM PROGRAM, *supra* note 264, at 16 (stating that the Judicial Reform Project is assisting the World Bank in networking the courts into the UIS).

401. *See* Retraining Centre of Judges, Introduction to Judges Retraining Centre of Mongolia, ¶ 1, [http://www.owc.org.mn/jrc/English/introduction\\_eng.html](http://www.owc.org.mn/jrc/English/introduction_eng.html) (last visited Feb. 21, 2010).

402. *Id.* at ¶ 2.

403. WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 6 n. 6.

404. *See* United Nations Development Programme, *Completed Projects, Institutional Capacity Development of the Office of the President of Mongolia (Jan.2005-Dec. 2007)*, UNDP, <http://www.undp.org/projects/mongolia.htm>.

enhance constitutional and legal status of the President of Mongolia, including the President's inclusive public policy-making powers, (2) improve organizational development of the Office of the President, including its policy analysis capacity and human resources management, (3) improve staff performance management system of the Office of the President, including results based assessment for public service delivery, and (4) increase responsiveness and transparency / accountability of the Office of the President, including better connecting the President with the people and application of tools.<sup>405</sup>

Capacity Development of the State Great Hural: The Asia Foundation has a program on Strengthening the Legislative Research and Analysis Capacity of the State Great Hural.

Mongolia's State Great Hural (SGH), or parliament, is at the center of the country's democracy, but possesses little independent capacity to conduct policy research and analysis. This hinders its ability to play an active role in policymaking and oversight of the government.<sup>406</sup>

The Asia Foundation has focused on creating an independent analytic capacity for the parliament. It endeavors to go past donor-driven demands to create local demand. In order to achieve this, The Asia Foundation has worked to increase transparency in governmental and legislative processes, so that nongovernmental organizations and civil society have a role in influencing the legislature.<sup>407</sup> The Asia Foundation supports improving the quality of policy research capacity, and advances the notion that civil society may be able to increase that capacity.<sup>408</sup> This "may be a linchpin reform that will lead to more demand for information, more transparency, and better quality information. But the current situation of low transparency provides a core structural constraint to the development of more analytic capacity."<sup>409</sup>

Finally, the Asian Development Bank has been assisting Mongolian governance reforms on a more macro level. ADB has undertaken a country governance assessment which highlights the importance of public sector reform and strengthening the government's institutional capacity.<sup>410</sup>

Legal Professional Qualifications: In addition to training of existing judges, prosecutors and advocates, Mongolia has been revamping its legal professional qualifications. The reformation of legal education meets two fundamental goals: creating predetermined standards that all graduates must meet; and coordinating

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[undp.mn/dghr-icd.html](http://undp.mn/dghr-icd.html).

405. *Id.*

406. THOMAS B. GINSBURG, STRENGTHENING LEGISLATIVE RESEARCH AND ANALYSIS CAPACITY OF MONGOLIA'S STATE GREAT HURAL 3 (2005).

407. *Id.* at 5, 17.

408. *Id.* at 8.

409. *Id.* at 3.

410. ASIAN DEVELOPMENT BANK, MONGOLIA COUNTRY STRATEGY AND PROGRAM UPDATE 2004-2006 4 (2003) (showing the relatively large size of Mongolia's public sector and the high public sector wages in proportion to GDP).

legal education to ensure that all law schools teach substantially the same subject matter.

The Mongolia Legal Needs Assessment Report indicated that legal education needs drastic improvement. The quality of the courses and testing is inadequate, as the "faculty is basically confined to teaching the relevant chapters of the Civil Code and limited to recitation of the provisions of the passed laws."<sup>411</sup> The report calls for a new methodology, which concentrates on developing critical and analytical thinking, to understand and debate the rationale behind the law, and not just to memorize and know the provisions of the law.<sup>412</sup> The Soros Foundation has supported curriculum development and the development of textbooks, and donated funds to the Ulaanbaatar Metropolitan Central Library to establish a specialized public law library.<sup>413</sup> While Mongolia and its donors have begun curriculum and systemic reforms in the Mongolian legal education, they leave much to be desired.

As a third prong of legal educational reform, the creation of a required bar examination will ensure that established minimum standards are met by all legal graduates. The JRP assisted in the creation and administration of the first qualification exam for legal professionals (bar exam) given by the Ministry of Justice and Home Affairs.<sup>414</sup> As of 2005, there have been two exams.<sup>415</sup> There were some major problems in the first qualification exam; however, the report on the second Lawyer Qualification Exam, offered in 1995, showed that the exam was conducted fairly and openly and that grading mistakes were corrected and being investigated.<sup>416</sup>

Bar Associations: Mongolia does not have a functioning bar association. The Mongolian Advocate's Association regulates advocates, but not government legal advisors, prosecutors or judges.<sup>417</sup> It functions to represent the interests of only its advocate members. Accordingly, to cure this deficiency, the JRP is assisting the Mongolian Advocates Association's efforts to become a full Bar Association, with two main functions: monitoring of member ethics; and training of member skills.

Ethics in the Legal Profession: Because of Mongolia's socialist legal traditions, judges have not understood the concept of conflict of interests, and a majority of judges has met with significant resistance the work that donors have done in this field. Judges maintain significant personal relationships with the participants of cases, parties and witnesses, and (in part because of this) judges are prone to

411. WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 32.

412. *Id.* at 7.

413. See *id.* at 33 (lamenting also the lack of adequate study and research textbooks and teaching materials).

414. See GRAMCKOW, MONGOLIA JUDICIAL REFORM PROGRAM, *supra* note 264, at 2 (demonstrating JRP's seminal role in contributing to the drafting of the legislation that created this exam, and its assistance in drafting the exam questions and ensuring secrecy).

415. Skip Waskin, *Mongolia, Judicial Reform Project Update*, USAID, Aug. 18, 2005, <http://www.usaid.gov/mn/programs/jrp/jrp-updates-Q3-05.html>.

416. See Waskin, *supra* note 302, at ¶ 2.

417. See ASIAN DEVELOPMENT BANK, LAW AND POLICY REFORM: DEVELOPING MONGOLIA'S LEGAL FRAMEWORKS: A NEEDS ANALYSIS 39, ¶ 3 (1995).

financial and personal influence.<sup>418</sup> The JRP also has recognized that the communication culture of judges is very low.<sup>419</sup> The JRP provided advice on the Judicial Ethics Code and the draft Law on Courts.<sup>420</sup> Jack Marshall has taught ethics courses in an interactive and enthusiastic environment, and the participants have indicated that they actually changed their behavior as a result of these workshops.<sup>421</sup> Professor Marshall continues to work with the Judicial Disciplinary Committee to fine tune the recommended changes to the Judicial Ethics Code and helps improve procedures for investigating and prosecuting violations.<sup>422</sup>

Public Education and Awareness: Public opinion surveys have shown that confidence in Mongolia's legal institutions has been low.<sup>423</sup> The JRP developed a variety of public outreach and information programs, including a television program that presents changes in the criminal code.<sup>424</sup>

PACT administers the public education campaign for the JRP. PACT conducted focus groups to gauge their awareness levels and then developed themes and content for the public education campaign.<sup>425</sup> The result was its production in collaboration with the German Technical Corporation of a TV drama series, *Huuliin Tsag*, which informed people of the new Criminal and Criminal Procedure codes.<sup>426</sup> More importantly, it provided practical knowledge on how to exercise rights by showing how the courts work and demonstrating the independent rule of law.<sup>427</sup> At the time, this series was the most watched program on Mongolian television.<sup>428</sup> After success with the television program, the JRP created a radio drama with the same subject matter and purpose, to reach Mongolia's rural population.<sup>429</sup>

To manage public information about the judiciary, JRP has created a Public Access website which will put all case information on the web. This is occurring despite the reservations of some judges.<sup>430</sup>

418. GRAMCKOW, MONGOLIA JUDICIAL REFORM PROGRAM, *supra* note 264, at 24 (stating also that judges are careless in court sessions and are too bureaucratic).

419. *Id.* at 24.

420. *See id.* at 17, 22.

421. *Id.* (emphasizing that future lawyer qualifications examinations must include the subject of legal ethics).

422. *Id.*

423. *See* USAID, THE JUDICIAL REFORM PROGRAM IN MONGOLIA: ACCOMPLISHMENTS, LESSONS LEARNED, AND RECOMMENDATIONS FOR THE FUTURE, *supra* note 175, at 9-10.

424. *Id.*

425. *See* PACT, Judicial Reform Program, [http://www.pactworld.org/cs/judicial\\_reform](http://www.pactworld.org/cs/judicial_reform) (last visited Feb. 11, 2010).

426. USAID, THE JUDICIAL REFORM PROGRAM IN MONGOLIA: ACCOMPLISHMENTS, LESSONS LEARNED, AND RECOMMENDATIONS FOR THE FUTURE, *supra* note 175, at 38.

427. *Id.*

428. *Id.*

429. *Id.*

430. *See* Judicial Reform Project Update, National Center for State Courts, <http://www.usaid.gov/mn/programs/jrp/jrp-updates-Q3-05.html> (last visited Feb. 12, 2010). (Although not stated, publicizing the case docket prevents the shifting of cases between judges, and this may be one reason for their reservations, since they are known to reassign cases frequently. Reassignment of cases to "interested"

Public Media Education: Mongolia has not had a long tradition of independent media, and journalists during the socialist-period mostly reiterated and reported the government line.<sup>431</sup> They have not had a tradition of impartiality and critical thinking.<sup>432</sup> In addition to its public outreach, PACT maintains the JRP website, and conducts training for public affairs and public information officers and journalists, to improve the depth and quality of the media, which plays a vital role in monitoring and public awareness.<sup>433</sup>

#### IV. INCREASING LEGAL REPRESENTATION AND ACCESSIBILITY THROUGH LEGAL AID PROGRAMS AND NGOS

Legal Representation and Accessibility: With the advent of a market economy, Mongolia has had to increase its citizens' accessibility to the courts. Many of the access to justice problems focus on access to information. However, in many cases, there is not sufficient personal access to legal representation.

For instance, due to inefficiencies in the system, free legal assistance has not been fully used by citizens charged with crimes. A key underlying cause of this is likely to be a shortage of well-trained lawyers. Until October 2002, for instance, there were only 390 certified advocates in the country, of whom only 21.0 percent were located outside Ulaanbaatar. There were fewer than five advocates in most aimags. Bayan-Olgii and Govi-Altai aimags had just one advocate each. While the number of lawyers has increased with the holding of qualification examinations for lawyers in 2002, the concentration of lawyers in Ulaanbaatar has also continued to increase.<sup>434</sup>

Under their Rule of Law Program, MFOS undertook a legal education program that supported the Law School of Mongolian State University's efforts to start a legal clinic to provide free legal aid to indigent clients, under the supervision of law professors and attorneys.<sup>435</sup> MFOS had previously assisted the Shikhikhutug private law school's establishment of a legal clinic.<sup>436</sup> MFOS supports a project that provides free legal aid and psychological consultancy to prisoners of juvenile and women's prisons.<sup>437</sup>

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judges has resulted in charges of corruption and bribe-taking and the JRP and civil society has clamored for rules controlling and monitoring reassignment of cases).

431. GRAMCKOW, MONGOLIA JUDICIAL REFORM PROGRAM, *supra* note 264, at 5 (assessing the past traditions of the media in Mongolia, and stating that impartial public awareness and public monitoring of the justice system is "not always mastered even in advanced democracies").

432. *Id.*

433. See Amartya Sen, Speech at the World Bank Legal Conference: What is the Role of Legal and Judicial Reform in the Development Process? (June 5, 2000), *available at* <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/legalandjudicial.pdf> (discussing how an active and free media can do much to advance the rule of law).

434. U.N. DEVELOPMENT PROGRAMME, *supra* note 336, at 17.

435. M. ICHINOROV, ET AL. & SOROS FOUNDATION, ACCESS TO JUSTICE: ACCESS TO A FREE LEGAL AID (NEEDS ASSESSMENT REPORT, MONGOLIA) (2002), *available at* [http://www.soros.org.mn/en/index.php?sel=resource&f=resone&obj\\_id=263&menu\\_id=3&resmenu\\_id=2](http://www.soros.org.mn/en/index.php?sel=resource&f=resone&obj_id=263&menu_id=3&resmenu_id=2).

436. *Id.*

437. *Id.*

MFOS also has a new initiative, an Access to Justice Project, which promotes right-based justice reform.<sup>438</sup> MFOS intends to create a new justice system with the cooperation of state and non-state actors.<sup>439</sup> This entails linking legal clinics, human rights NGOs and private law firms to provide effective legal assistance to all of society, with a focus on vulnerable groups. This MFOS program focuses on the creation of an adequate fee structure and a budget for a mandatory legal defense system and legal assistance to the indigent.<sup>440</sup>

Lastly, MFOS' Freedom of Information Project aims to increase access to government information and raise public awareness and active participation. In 1998, MFOS assisted the creation of the Legal Resource Center with the Ulaanbaatar Metropolitan Library to increase access to legal information and research materials by creating a centralized law library for law students, lawyers and other professionals and the general public.<sup>441</sup>

Alternative Dispute Mechanisms: Improving access to justice through the creation of alternative dispute resolution mechanisms or formalization of traditional dispute resolution mechanisms increases the ability to achieve meaningful redress.

The Asia Foundation has supported legal mediation and research on traditional dispute resolution to deal with social developments – such as the herding communities' disputes over traditional pastureland use. The Asia Foundation is documenting traditional conflict resolution practices on a comparative basis to identify the changes in the pastureland use and the effects of economic and political transitions, to increase and improve the resolution of these disputes.

Likewise, the JRP has worked with the Foreign Trade Arbitration Court of the Mongolian Chamber of Commerce and Industry and the Mongolian Advocates Association to organize training on arbitration principles, case resolution at the arbitration court, and mediation and involvement of state courts in the court procedures.<sup>442</sup>

Strengthening the Role of NGOs as Civil Society: Nongovernmental organizations assist in the advancement of the rule of law by advocating on behalf of individuals, interest groups or causes, to influence governments to take action, usually through the promulgation of legislation or legal reforms. International nongovernmental organizations play a complementary function by drawing attention to governmental violations of the rule of law. These organizations, like the UNDP or the World Bank, widely disseminate detailed reports, which actually influence governmental action.

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438. *Id.*

439. *Id.*

440. *Id.*

441. *Id.*

442. GRAMCKOW, MONGOLIA JUDICIAL REFORM PROGRAM, *supra* note 264, at 23 (discussing a lack of donor coordination in the arbitration field, and stating that the JRP will focus on creating a combined donor strategy as it has in the legal education field).

As well, domestic nongovernmental organizations can advance the rule of law by exerting bottom-up pressures. Foreign donors in Mongolia have done a formidable job at stimulating the role of domestic NGOs and increasing their influence in communications with the Mongolian government.

The Asia Foundation's program on nongovernmental organizations aims to expand and strengthen citizen decision-making and relationships between rural NGOs, government and business to improve governance.<sup>443</sup> In that regard The Asia Foundation assisted in the passage of the NGO law, which has given nongovernmental organizations a robust freedom to operate in Mongolian society.<sup>444</sup> As well, The Asia Foundation has supported the work of numerous NGOs (primarily women's rights and family rights organizations) and citizen civic outreach programs.<sup>445</sup>

Specifically, The Foundation built the Center for Citizen Education, which has a rural outreach program.<sup>446</sup> It also has supported the Mongolian Women's Lawyer's Association with technical assistance, in their efforts to develop a judicial advocacy program to advance women's rights, by filing test cases in key areas of discriminatory practices.<sup>447</sup> Resultantly the Mongolian Women Lawyers Association has raised public awareness of laws and regulations, published handbooks on legal topics and undertaken legal training programs.<sup>448</sup>

#### V. POLICE, PROSECUTOR, AND PRISON REFORMS

The police system, the state prosecution system, and the prison system all can impact the rule of law. They principally affect meaningful access to justice and procedural standards. These three systems should be reformed to prevent interference with the establishment of a procedurally-minimalist rule of law. Mongolia has not ignored these structures. Rather, Mongolia actively has been reforming the police, the prosecutor's office and the prison system.

Prosecutor Reforms: The JRP assists the Office of the Prosecutor General. The JRP formed a special prosecutor's office focusing on judicial corruption – the General's Special Investigation Unit – which investigates crimes by justice sector officials.<sup>449</sup> The JRP provided specialized training from a U.S. prosecutor with experience in corruption, and provided equipment to the Prosecutor General.<sup>450</sup> The JRP has been developing a joint procedural manual for prosecutors and investigators, which will ensure compliance with international standards for human rights and provide uniform implementation procedures and enhanced coordination

443. See THE ASIA FOUNDATION, STRENGTHENING MONGOLIA'S NONGOVERNMENTAL ORGANIZATIONS (2000). See also THE ASIA FOUNDATION, WOMEN'S POLITICAL PARTICIPATION IN MONGOLIA (2000).

444. THE ASIA FOUNDATION, *supra* note 162, at 1.

445. *Id.*

446. *Id.*

447. *Id.*

448. WORLD BANK, MONGOLIA: LEGAL NEEDS ASSESSMENT REPORT, *supra* note 154, at 38.

449. Judicial Reform Program, Ethics in the Legal Profession, <http://www.usaid.gov/mn/programs/jrp/index.html> (last visited Feb. 12, 2010).

450. *Id.*

among justice sector institutions. As well, the JRP has begun to automate the prosecutor's office to link the work of the prosecutors with the administration of the judiciary.

Penitentiary Reforms: MFOS has worked in the criminal justice system, in support of penitentiary training. MFOS is assisting the Penitentiary Department to establish a long-term, sustainable training structure for corrections officers. In addition, MFOS lends support to a pre-trial detention centers monitoring project implemented by the Center for Human Rights and Development.<sup>451</sup> This project investigates human rights abuses in detention centers and publicizes them to the general public. MFOS has supported the establishment of community service sentencing, which is a provision of the new Penal Code.<sup>452</sup>

Arrest and Detention Reforms: Many organizations, domestic and international, work in the reformation of arrest and detention. The JRP assisted in developing arrest and detention joint regulations, and then used these regulations to make recommendations on the Criminal Procedure Code.<sup>453</sup> UNDP also engaged in arrest and detention reforms. As well, the National Human Rights Commission made significant headway in securing the constitutional rights of those who are in arrest and detention situations.<sup>454</sup>

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451. *Id.*

452. *Id.*

453. GRAMCKOW, MONGOLIA JUDICIAL REFORM PROGRAM, *supra* note 264, at 2.

454. The National Human Rights Commission is beyond the scope of this work, but does affect the rule of law in that it has helped to create fair procedural standards and meaningful access to justice. For more information on this, see the National Human Rights Commission website, available at <http://www.nhrc-mn.org>; the National Human Rights Status Report 2003, available at <http://www.nhrc-mn.org/docs/Annual2003StatusReport.pdf> (last visited Feb. 20, 2010); and United Nations Development Programme, UNDP Current Projects, Democratic Governance, Capacity Development of the National Human Rights Commission of Mongolia, <http://www.undp.mn/dghr.html> (last visited Feb. 20, 2010). The UNDP Capacity Development of the NHRC is also supported by NZAID. NZAID, New Zealand's International Aid and Development Agency, <http://www.nzaid.govt.nz/programmes/c-timor-leste.html> (last visited Feb. 20, 2010). This project provides technical assistance to the National Human Rights Commission of Mongolia to enhance Mongolia's capacity to promote and protect human rights. New Zealand Ministry of Foreign Affairs & Trade, Mongolia, <http://www.mfat.govt.nz/Countries/Asia-North/Mongolia.php> (last visited Feb. 20, 2010).

