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The Development of Judicial Independence and the Birth of Administrative Review in Mongolia*

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Abstract

After the breakdown of the socialist system, former socialist countries, including Mongolia, have begun the transition toward democracy. Since judicial independence is one fundamental element of a successful constitutional democracy, one of the main directions of the development and consolidation of democratic government in these countries is the establishment of an independent, fair and efficient judicial system. However, these developments in the transitional countries are virtually unknown.

The aim of this article is twofold. First, it looks at the essential elements of judicial independence and its applicability to the Mongolian judiciary. The article traces historical background of the judicial system in Mongolia. Then it addresses the three-phased judicial reform and its results. The discussion proceeds to consider institutional safeguards which were put in place to secure the independence of the Mongolian courts. Many institutional factors which influence judicial independence, such as institutional arrangements, terms of office, judicial remuneration, court budgets, discipline of judges, and the appointment process, are examined.

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Secondly, it surveys the establishment of administrative courts, which was set up for the first time in Mongolia during the course of judicial reform as an important part of judicial network. It deals with the characteristics of administrative courts from the perspectives of its jurisdictional limits, its procedure and work load.

This paper suggests that Mongolia's judicial reform has been successful, although certain problems in the judiciary still remain unresolved.

KEYWORDS: judicial independence, judicial accountability, Mongolian Court, judicial reform in Mongolia, judicial review in Mongolia, the system of administrative courts.

Contents

Mongolia has experienced a significant increase in judicial power in the last 25 years after adoption of the new Constitution of Mongolia. Much has been achieved in establishing judicial independence in the country. A number of the main issues related to judicial independence such as the appointment of judges, and their promotion, discipline, tenure, and compensation, as well as the institutional independence of the judiciary are now secured at the constitutional, as well as the legislative level. Hence, the Mongolian judiciary has changed considerably. This is why Mongolia's judicial reform is considered by many to have been quite successful, especially in comparison to other countries in the region.[1]

In the course of judicial reform, Mongolia has established administrative courts in order to protect its citizens against offensive government actions. These courts have been created for the purpose of upholding a democratic regime based on the rule of law. The importance of these courts continues to increase as their judgments, concerning the

1 "Overall, Mongolia's legal and judicial reforms resoundingly have been successful, although they have not been without problems." Sebastian R. Astrada, *Exporting the Rule of Law to Mongolia: Post-Socialist Legal and Judicial Reforms*, 38 DENV. J. INT'L L. & POL'Y. 461, 504 (2010); *see* HEIKE GRAMCKOW & FRANCES ALLEN, JUSTICE SECTOR REFORM IN MONGOLIA: LOOKING BACK, LOOKING FORWARD (2011).

protection of rights of citizens and the establishment of a limited government, attract attention from the public. Ultimately, it has contributed to the increased role of administrative judges.

However, challenges, such as limited resources, increasing caseloads, weak decision-making capacities of judges, and especially public dissatisfaction with the independence and activities of the judiciary, still exist. Also the legal provisions aimed to establish independence of the Mongolian judiciary consistent with standards are not adequately enforced.

In order to move forward, we have to consider our past, assess our current situation, and look at the future.

This paper deals with the state of the Mongolian judiciary in general, and administrative courts in particular. The purpose of *the first part* is to survey the historical development of the Mongolian legal system. It looks at the development of the Mongolian judiciary from a historical perspective, and then concentrates on the state of the Mongolian judiciary during the socialist period (1921-1990). Modern democratic concepts such as the rule of law and separation of powers were foreign to the socialist state and law. The Mongolian judiciary was totally dependent on both politicians and governmental officials. Thus, the negative impact of the totalitarian regime on the status of judges will be analyzed. The *second part* provides a brief review of the pace and outcome of the legal reform in post-socialist Mongolia. In the *third part*, the aspects of judicial independence will be analyzed. Elements of judicial independence such as tenure of judges, their selection, appointment, and promotion, matters related to discipline and removal, compensation and financing, and internal and institutional independence

of the judiciary will be examined in turn. Lastly, in *the fourth part*, the development of administrative courts in Mongolia will be explored.

I. The Development of the Mongolian Judiciary

a. Historical Overview

One of the main directions of the development and consolidation of democratic government in the former socialist countries, including Mongolia, is the establishment of a truly independent judiciary. The experience of established democracies in general, and more particularly the Western tradition of constitutionalism and the role it grants the judiciary in particular, are of critical relevance for transitional countries aiming to institutionalize the rule of law. The constitutional and legislative solutions to the problem of judicial independence in Western countries are of direct relevance to countries in transition; the implementation of some of these solutions is instrumental to advancing legal reforms in these countries. Judicial independence is one of the fundamental principles of the modern concept of government due to the unique position that the judiciary occupies in a free and democratic society. It is an indispensable element of both the doctrines of the rule of law and separation of powers, because the courts are the most forceful mechanisms for the defence of constitutionalism and justice. The independent judiciary sustains the rule of law by enforcing the constitution, other laws, and democratic procedures. Accordingly, it helps to support the supremacy of law by maintaining the submission of the state before the laws.

Every democratic society aims to protect individual rights and

freedoms through an effective court system. Judges are charged with the ultimate decision over the freedoms, rights, duties and property of citizens and non-citizens.[2] Therefore, the first and foremost aim of the independent judiciary is to serve as the guarantor of individual rights and freedoms. The fact that judicial independence is absolutely necessary for the protection of human rights is a good reason for every country, and especially for countries with a totalitarian past, to support judicial independence by all possible means.

However, it is not an easy task due to the fact that courts in these countries are easily manipulated to serve the interests of the state. The judiciaries of the newly emerging democracies are still burdened by institutional legacies, which are difficult to overcome.[3] Therefore, in order to give a proper understanding of the current stage of judicial reform in Mongolia, some insight into the country's legal history should be presented.

For the longest period of its history (from 1206 up to 1921) Mongolia belonged to the religious law family.[4] However, after the Russian revolution of 1917 Mongolia became a satellite state of the Soviet Union, and its legal system for almost 70 years was significantly

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2 Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Independence of the Judiciary*, 60, U.N. DOC. A/CONF.121/22/Rev.1 (1985).

3 ADRIAN KARATNYCKY ET AL. EDS., NATIONS IN TRANSIT, 1997: CIVIL SOCIETY, DEMOCRACY AND MARKETS IN EAST CENTRAL EUROPE AND THE NEWLY INDEPENDENT STATES 321 (1997); M. V. Nemytina, Judicial Power in Russia: The Present and the Future 7-8 (July 4, 2001) (unpublished manuscript) (on file with the Law and Society Association, Hungary); Peter Solomon, Jr., Courts in Russia: Independence, Power, and Accountability 2-5 (May 4-5, 2001) (unpublished manuscript) (on file with the Central European University Law School Library).

4 It was a legal system which had no clear differentiation of the judiciary and consisted of the Khan's decrees and customary and religious norms.

influenced by the Soviet legal system and laws. Thus, Mongolia was brought into the sphere of the socialist legal family.

The most specific feature of the socialist legal system was the rejection of such democratic values as the concept of the rule of law, doctrine of separation of powers,[5] and irremovability of judges on the grounds of their incompatibility with the major postulates of the theory of Marxism-Leninism. The Mongolian courts became simply a weapon of class struggle, an instrument of suppression along with the revolutionary tribunals.

The principle of class justice constituted another specific feature of the system. One of the major propositions of Marxism-Leninism was that a "war of social classes" lies at the heart of any social, political or other type of conflict in a modern society. Based on this proposition, only two main opposing categories were recognized in Mongolian society, namely *arats*, i.e., poor cattlemen, and members of the former ruling class--such as the secular and religious lords. Therefore it was not the dispensation of impartial justice but the protection of the regime that was emphasized as the main task of the Mongolian courts. Needless to say, such a view of the main function of the court completely contradicted the traditional Western understanding of judicial function as the main way for adjudicating disputes.

However, there was one positive outcome for Mongolia in joining

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5 The raison d'être for such deliberate denial of the doctrine of separation of powers by the theoreticians, the Party functionaries, and scholars alike is fairly obvious: historically the doctrine of separation of powers was developed by Montesquieu and Locke as a remedy against absolutism; therefore, the doctrine of separation of powers cannot be applied in a totalitarian state, where all the power is concentrated in the hands of a single Party and its leaders.

the socialist legal family. In the socialist period, the adoption of Soviet law provided an opportunity to comprehend and embrace modern European legal culture. The explanation of this fact is as follows: Russia, as well as Eastern European countries that embraced state socialism, had previously been members of the civil law family.[6] Accordingly, the socialist legal family adopted many important features of Romano-Germanic law. In the period between the years of 1924-1929, Mongolia adopted the Civil Code,[7] the Criminal Code,[8] the Code on Criminal Procedure,[9] and other codified laws[10]. To some extent this legislation reflected civil law philosophy, principles, and law structures, as well as its methodology. Therefore, the original basis of Mongolian law is to be found in continental law.[11]

b. The Establishment of a New Court System

The new government established in Mongolia after the People's revolution of 1921 abolished all laws and institutions of the previous regime, and began to build a new legal order from scratch. The over-

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6 JOHN H. MERRYMAN & ROGELIO PÉREZ-PERDOMO, THE CIVIL LAW TRADITION 1-2 (2007).

7 Иргэний хууль [The Civil Code], *in* 22 Засгийн газрын албаны сэтгүүл [THE OFFICIAL BULLETIN OF THE GOVERNMENT] 27-35 (1927) (Mong.).

8 Эрүүгийн хууль [The Criminal Code], *in* 1 Засгийн газрын албаны сэтгүүл [THE OFFICIAL BULLETIN OF THE GOVERNMENT] 44-62 (1926) (Mong.).

9 Эрүүгийн байцаан шийтгэх хууль [The Code on Criminal Procedure], *in* 13 Засгийн газрын албаны сэтгүүл [THE OFFICIAL BULLETIN OF THE GOVERNMENT] 34-65 (1926) (Mong.).

10 *See, e.g.*, Бүгд Найрамдах Монгол Ард Улсын хүчээ үнэлэгчдийн хууль [The Labor Law of Mongolian People's Republic], *in* 3 Монголын хууль тогтоомжийн түүхэн эмхтгэл [THE HISTORICAL DIGEST OF THE MONGOLIAN LAWS AND REGULATIONS] 254-262 (2010).

11 As some scholars pointed out, a socialist law system strongly resembles the civil law system, especially in terms of its structure. *See* JAMES T. MCHUGH, COMPARATIVE CONSTITUTIONAL TRADITIONS 66 (2002).

simplified court system in Mongolia was first established in 1926 by the first Regulation on courts.[12] Some attempts were made to establish legal guarantees that supported the independence of the judiciary. Such guarantees were the *election* of all judges in Mongolia,[13] which meant that only the electorate could hold judges accountable for their actions, and the establishment of the institute of citizen's representatives (people's assessors). Court decisions were to be made solely by the judge and the citizens' representatives, and the presence of an outsider during court deliberations was strictly prohibited by law.

This Regulation was followed by the 1934 Regulation on the Courts and Procurators[14] and the 1949 Law on Courts.[15] At first glance, the governmental Regulations on the Court of 1926 and 1934, as well as the Law on Courts of 1949, may seem to have many democratic features. These legal documents created institutions of citizens' representatives in the courts, set up the election method for selecting judges, and increased judge's responsibility and accountability with the possibility of them being recalled.[16] On the other hand, it is necessary to look at the

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12 1926 оны БНМАУ-ын аливаа шүүн таслах газруудыг байгуулах тухай дүрэм [The 1926 Regulation on Courts of the Mongolian People's Republic], *in* 1 Үндсэн хууль, түүнд холбогдох хууль тогтоомжийн эмхтгэл [THE CONSTITUTION AND OTHER RELEVANT ACTS OF THE MONGOLIAN PEOPLE'S REPUBLIC] 203-206 (1972) (Mong.).

13 *Id*. at 204.

14 1934 оны Шүүн таслах ба прокуроруудын газруудын дагаж явах дүрэм [The 1934 Regulation on Courts and Procurators], *in* 1 Үндсэн хууль, түүнд холбогдох хууль тогтоомжийн эмхтгэл [THE CONSTITUTION AND OTHER RELEVANT ACTS OF THE MONGOLIAN PEOPLE'S REPUBLIC] 319-328 (1972) (Mong.).

15 1949 оны БНМАУ-ын шүүхийн зохион байгуулалтын тухай хууль [The 1949 Law on Courts of the Mongolian People's Republic], *in* 2 Үндсэн хууль, түүнд холбогдох хууль тогтоомжийн эмхтгэл [THE CONSTITUTION AND OTHER RELEVANT ACTS OF THE MONGOLIAN PEOPLE'S REPUBLIC] 89-97 (1974).

16 *Id*. at 91.

administration of justice in Mongolia, as well as in other socialist countries, with extreme caution.

It goes without saying that the judiciary as a whole should be perceived by the general public as an independent and impartial institution in order to boost the confidence of the public in the administration of justice. Such confidence and high esteem of the public for the judiciary is very important because the authority of the courts depends on public acceptance of judicial decisions. This acceptance, in turn, depends upon public confidence in judges as truly independent and impartial officials. However, for most of the socialist period, Mongolian courts were weak and dependent bodies that lacked publicrespect, and the career of judges had low status and few rewards. The status of the judiciary was, and remains, low due to the role they play in the legal process.[17] Unlike a common law judge who uses reasoning based on many specific legal rules stemming from the legislature, bureaucracy, precedent, and the courts,[18] civil law judges interpret and apply codified legal norms, without reliance on broader legal principles or precedent; in other words, the characteristic element of the continental system of law is its strict binding to the letter of the law. Their task is simply to understand what it means and to apply it to the case at hand. Therefore, judges are considered to be the "mouths of the law", as defined by Montesquieu. They use different forms of reasoning, which moves from the more general to the specific, or, to put it more clearly, from a legal

17 MCHUGH, *supra* note 11, at 19.

18 It may be said that the facts in the case guide a common law judge to conclude which specific rules apply. They are professionally trained to consider every argument, however curious, and to balance different arguments against each other. Normally they will give reasons for their decisions, thereby enabling others to reconstruct the court's line of thought.

rule provided by the legislature to the facts in the case under consideration in order to deduce a conclusion. Thus, they rather apply rules created and formulated by others.[19] Therefore, they have little opportunity to exercise interpretive discretion. On the contrary, common law judges have broader discretion to interpret legislation.

Also, actual political practice contributed to the low status of judges. Such extra-judicial organs as special revolutionary tribunals were established with the view of eliminating the so-called "enemies of the people" from public life. Although these tribunals were subject to some rules of procedure, their usual method of crushing the "enemies of the people" was summary judgments and executions.

But more than that, there was a huge gap between the political reality and nicely formulated rules of formal procedure. For example, the Constitution of the Mongolian People's Republic (1940)[20] states that "Judges shall be independent and subordinate to law." [21] Notwithstanding this formal recognition of judicial independence, judges in the Mongolian People's Republic were not independent. Members of the Mongolian government or the functionaries of the Mongolian People's Revolutionary Party regularly interfered with judicial deliberations in individual cases, instructing the judges to reach particular decisions. Further, the meaning and application of such concepts as "democracy", "election", "irremovability of judges", and so forth, were completely different in the Mongolian legal system

19 MERRYMAN & PÉREZ-PERDOMO, *supra* note 6, at 110.

20 Бүгд Найрамдах Монгол Ард Улсын Үндсэн хууль [CONSTITUTION OF THE MONGOLIAN PEOPLE'S REPUBLIC], *in* 1 Үндсэн хууль, түүнд холбогдох хууль тогтоомжийн эмхтгэл [THE CONSTITUTION AND OTHER RELEVANT ACTS OF THE MONGOLIAN PEOPLE'S REPUBLIC] 356-375 (1972).

21 *Id*. at 368.

compared to that in the Western understanding of these concepts. Therefore, it is misleading to rely only on the text of legal regulations and laws dealing with the administration of justice.

In order to prove this point, it is enough to analyze the real status of Mongolian judges.

First, let's take a closer look at the election of Mongolian judges. The choice of election of judges over appointment was justified in the following ways: appointment of a judge would greatly reduce society's role in law enforcement, while on the contrary, election of a judge meant that the electorate could exercise efficient control over the judges, and the latter would be responsible to the general public. Therefore, judges were accountable by law to their electorate and were expected to report periodically on their activities.

Although corresponding laws provided for the registration of all candidates for election to judicial office after their nomination, however only one candidate's name would appear on the ballot, leaving voters with no choice but to vote for the candidate imposed on them or reject him or her by crossing the name out. Such "election" without any alternative was fully in contradiction with the standard democratic election procedure, and an explanation that socialist society is welded by moral and political unity, that it has no competitive political forces, and that a choice between several candidates was not necessary, was usually offered. Thus, it was not the electorate but representatives of the nominating organizations who made the final selection.

Secondly, there were simple requirements for the position of a judge. According to the 1926 Regulation, in order to become a judge, one had to have the right to vote for or be elected to the local Hurals

(local people's councils), and have a two-year record of responsible political work. Being educated or experienced in the field of law was not required.[22] Instead of possessing qualities of competence, integrity, and impartiality, it was enough for the nominee to be politically reliable in order to qualify for the position of a judge.[23]

Active participation of two lay assessors (the so-called citizens' representatives) representing ordinary people in deciding cases coming before the court was expected. They usually did not possess legal knowledge; in deciding cases they were guided by their so-called "revolutionary legal consciousness". The introduction of the institution of citizens' representatives was considered to be an additional means of controlling the judge.

Thirdly, the tenure of Mongolian judges was rather short. The judges of the provincial courts were to be elected for only one year's term (art. 8 of the 1926 Regulation).[24]The Regulation on the courts and procurators of 1934 added the requirement for the local governments to get permission from the Ministry of Justice before nominating someone to the position of a judge (art. 8 of the 1934 Regulation).[25] The first Law on Courts adopted in 1949 raised the term of office to three years for lower judges, and to four years for the Supreme Court judges.[26]

The next problem was the way judges were held responsible. Mongolian judges were exposed to various kinds of accountability. The

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22 The 1926 Regulation on Courts of the Mongolian People's Republic, *supra* note 12, art. 7.
23 *Id.*
24 *Id.*
25 The 1934 Regulation on Courts and Procurators, *supra* note 14, at 320.
26 The 1949 Law on Courts of the Mongolian People's Republic, *supra* note 15, at 92-93.

only difference in status between the court and the administrative agencies was that the courts followed a certain procedure and that they were empowered to impose coercive measures. Therefore, it was not a big problem to remove judges from the bench. First, there was always the possibility of resorting to repressive measures imposed by the security agencies of the state. Second, the judge could be recalled in the same manner in which he had been appointed or elected.[27] Recall of judges was considered to be an important guarantee of judicial independence because they could lose their positions only by the will of their electorate or by a court decision or sentence already in force. Both judges and citizens' representatives were subject to recall by the Hurals which appointed them. However, it should be noted that the recall proceedings usually were initiated by the Ministry of Justice, thus placing judges in the hands of the executive. Besides the possibility of recall, there were provisions about dismissal from office by a court's decision or as an outcome of disciplinary proceedings.

On the other hand, as mentioned previously, Mongolian judges were under undue influence and pressure from all directions: the functionaries of the Mongolian Peoples' Revolutionary Party, the state bureaucracy, judicial officials and the administrative organs. As a result, every condition designed to insulate the judiciary from outside influence was rejected.[28]

For the most part, during the socialist period of Mongolian history,

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27 It should be noted that recall procedure is different from the impeachment procedure under the American Constitution. Recall is a simple dismissal from office by a vote of an electoral body.

28 *See* Н. Лүндэндорж [LUNDENDORJ, N.], Төр, эрх зүйн сэтгэлгээний хөгжил ба чиг хандлага [DEVELOPMENT OF STATE AND LEGAL THOUGHTS AND ITS TENDENCIES] 15-16 (2003).

the ruling Mongolian People's Revolutionary Party deeply penetrated every cell of Mongolian society. The judiciary was far from an exception. On the contrary, a person had to be a member of the ruling party in order to be even considered a worthy candidate for many hundreds of positions, including every judicial position. Only judges who obediently and unquestioningly followed the party line were able to get promotion to higher positions, with all privileges attached.

Understandably, party membership not only brought privileges and career growth, but it also required a judge to be bound by strict party discipline. In practice, it meant that judges had to follow the directives of the Mongolian People's Revolutionary Party instead of implementing the law. That is why the notorious "telephone rule"[29] exercised by the party functionaries at various levels proved to be such a reliable method of influencing judges.

In addition, the decision making of the courts was supervised by other branches of the government. The legislative branch was quite active in this regard. The Constitution of Mongolia (1960)[30] provided that the Supreme Court of the Mongolian People's Republic "is accountable to the Great People's Hural of the Mongolian People's Republic and to its Presidium" (art. 66 of the Constitution).[31]

Also the judiciary was considered to be an attachment to the executive branch of government. Since the Mongolian court was a state institution, its activity was part of state activity. The judge was a state

29 The "telephone rule" meant that it was enough for the party functionaries or local bosses to give a call to a judge to get a desirable decision.

30 The 1949 Law on Courts of the Mongolian People's Republic, *supra* note 15, at 306-320.

31 *Id.* at 317.

servant and as such, was bound to follow the state policy. For the Mongolian judge, the directives and instructions from governmental organs were of the same importance as the evidence and the mitigating and aggravating circumstances in every individual case. Indeed, the executive organs exercising administration of justice were the most active in influencing judicial work. For instance, the Ministry of Justice was empowered by law to "issue orders and instructions concerning the organization and bettering of courts work",[32] which is an obvious example of governmental influence on judicial activity.

Furthermore, as with other socialist countries, the Mongolian procurator played a much greater role than simply prosecuting criminal cases. The influence of the procurators on judges was twofold. The procurator performed general supervision over all the institutions of government to make sure they were conforming to legal requirements. According to the first Regulation on the Procurator's Office of 1930[33] (and all subsequent acts including the Law on Procuracy of 1976[34]), the Procurator General exercises "supreme supervisory power to ensure the strict observance of the law by all ministries and institutions

32 Бүгд Найрамдах Монгол Ард Улсын Шүүх яамны дүрэм [The Regulation on the Ministry of Justice of the Mongolian People's Republic], *in* 2 Үндсэн хууль, түүнд холбогдох хууль тогтоомжийн эмхтгэл [THE CONSTITUTION AND OTHER RELEVANT LAWS] 20 (1974). *See also* Бүгд Найрамдах Монгол Ард Улсын Шүүх яамны дүрэм [The Regulation on the Ministry of Justice of the Mongolian People's Republic], *in* Хууль, зарлиг, тогтоолын эмхтгэл [THE LAWS AND REGULATIONS OF THE MONGOLIAN PEOPLE'S REPUBLIC] 93-96 (1952).

33 Улсын прокуроруудын тухай дүрэм [The Regulation on the Procurator's Office], *in* 57 Засгийн газрын Албан сэтгүүл [THE OFFICIAL STATE GAZETTE] 162-173 (1930) (Mong.).

34 Прокурорын хяналтын хууль [The Law on Procuracy], *in* БНМАУ-ын хуулиуд [THE LAWS OF THE MONGOLIAN PEOPLE'S REPUBLIC] 710-722 (1980) (Mong.).

subordinated to them, as well as by officials and citizens".[35] Besides that, the procurator "exercises control over the legality and the validity of judicial decisions, criminal or civil",[36] which in other systems would amount to usurping the function of the judiciary.

Therefore, the Mongolian courts were fully accountable to the government and political forces. This is not surprising, as the existence of independent courts and judges would challenge the core of the totalitarian character of the state and the absolute power of the Mongolian Peoples' Revolutionary Party. As a result, during the socialist period (1921-1990) judicial independence was practically non-existent in Mongolia.

II. Three-Phased Judicial Reform and its Impact on the Independence of the Mongolian Judiciary

In the last twenty years, many legislative acts have been enacted and implemented in relation to the legal sector of Mongolia. The operation of courts has advanced and its impact on development of the country has increased as the court administration and infrastructure has strengthened.

a. Constitutional and Legislative Development at the First Phase of Legal Reform

After the collapse of the socialist system, legal reform in Mongolia

35 *Id*. at 710.
36 *Id.* at 711.

received new impetus. The new Constitution of Mongolia (1992)[37] not only proclaimed the equal status of the judiciary in relation to the legislative and executive branches of government, but also setup a number of general principles of judicial organization. These general principles include administration of justice and the judicial system,[38] basic requirements for entry into judicial service,[39] judicial independence,[40] irremovability of judges,[41] and financing of the courts.[42] Several important legislative acts concerning the judiciary and

37 *See* Монгол Улсын Үндсэн хууль [CONSTITUTION OF MONGOLIA], *in* 1 Төрийн мэдээлэл [THE STATE BULLETIN] (1992); *The Constitution of Mongolia*, *in* 5 Монгол Улсын Үндсэн хууль: монгол, англи, франц, герман, япон, хятад, солонгос хэлээр [THE CONSTITUTION OF MONGOLIA: IN MONGOLIAN, ENGLISH, FRENCH, GERMAN, JAPANESE, CHINESE, KOREAN LANGUAGES] 61-86 (2014).

38 "1. Judicial power shall be vested exclusively in Courts. 2. The unlawful establishment of a Court under any circumstances and the exercise of judicial power by any organisation other than the Courts shall be prohibited. 3. Courts shall be established solely under the Constitution and other laws." CONSTITUTION OF MONGOLIA, *supra* note 37, art. 47.

39 A Mongolian citizen of thirty-five years of age with higher legal education and experience in judicial practice of not less than ten years may be appointed as a judge of the Supreme Court. A Mongolian citizen of twenty-five years of age with higher legal education and legal practice of not less than three years may be appointed as a judge of the other Courts. *Id*. art. 51.3.

40 1. Judges shall be independent and subject only to law. 2. It shall be prohibited for a private person or any civil officer (including the President, Prime Minister, members of the State Great Hural or the Government or an official of a political party or other public organisation) to interfere with the exercise by the judges of their duties. 3. A Judicial General Council shall function for the purpose of ensuring the independence of the judiciary. 4. The Judicial General Council, without interfering in the activities of Courts and judges, shall deal exclusively with the selection of judges from among lawyers; protection of their rights and other matters pertaining to ensuring conditions exist for guaranteeing the independence of the judiciary. *Id*. art. 49.

41 "Removal of a judge of a Court of any instance shall be prohibited except in cases when he/she is relieved at his/her own request or removed on the grounds provided for in the Constitution and/or the law on the judiciary or by a valid Court decision." *Id*. art. 51.4.

42 "The Courts shall be financed from the State budget. The State shall ensure economic guarantee of the Courts' activities." *Id*. art. 48.3.

aimed towards the implementation of the constitutional provisions, namely the new Law on Courts,[43] the new Criminal Code[44], the new Law on Criminal Procedure[45], the new Civil Code,[46] and the new Law on Civil Procedure,[47] were passed during the first two phases of judicial reform. Among these legislative advancements, the adoption of the Law on Courts stands as the event of major importance. Being Mongolia's first Law to define the status of judges and citizens' representatives, it was designed to improve the status of Mongolian judges from their traditional low level.

Since legal education and training play a decisive role for civil law judges, the main issues related to judicial personnel such as legal education, recruitment and training, as well as the limitation on the power of the executive or legislative in the areas of compensation and tenure were identified and secured at the legislative level.

b. Legislative Development at the Second Phase of the Judicial Reform

The "Mongolian legal reforms program" was adopted in 1998 by the Resolution No.18 of the State Great Hural. [48] . The first step in

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43 Шүүхийн тухай хууль [The Law on Courts], *in* 4-5 Төрийн мэдээлэл [THE STATE BULLETIN] 957-972 (1993) (Mong.).

44 Эрүүгийн хууль [The Criminal Code], *in* 5 Төрийн мэдээлэл [THE STATE BULLETIN] 113-169 (2002) (Mong.).

45 Эрүүгийн байцаан шийтгэх хууль [The Code on Criminal Procedure], *in* 6 Төрийн мэдээлэл [THE STATE BULLETIN] 172-250 (2002) (Mong.).

46 Иргэний хууль [The Civil Code], *in* 7 Төрийн мэдээлэл [THE STATE BULLETIN] 257-384 (2002) (Mong.).

47 Иргэний байцаан шийтгэх хууль [The Code on Civil Procedure], *in* 8 Төрийн мэдээлэл [THE STATE BULLETIN] 385-468 (2002) (Mong.).

48 Хөтөлбөр, үндсэн чиглэл, төлөвлөгөө батлах тухай Улсын Их Хурлын тогтоол [*The Resolution of the State Great Hural on the adoption of the Programme, Main*

advancing this program was the newly revised Law on Courts of Mongolia adopted in 2002.[49] This Law established more detailed regulations concerning the legal basis for the judicial system, organization, powers and operations. The main novelty of the 2002 amendments to the Law on Courts was the clarification of who would serve as the Chairman of the Judicial General Council. In order to stress its importance, we should look at this question retrospectively. According to Article 33.3 of the 1993 Law on the Courts, the Chief Justice of the Supreme Court was elected as Chairman. Consequently, the article was revised in 1996 to provide that "the Chairman of the Judicial General Council shall be the Cabinet Member in charge of legal affairs."[50] Thus, the Minister of Justice and Internal Affairs started to assume the role of the Chairman of the Judicial General Council. The rationale for this change was to ensure that the Judicial General Council had a strong voice in budgetary discussions within the Government. However, the Law on Courts was revised again in 2002 to provide that the Chief Justice would be the Chairman.[51] This reflected a view that the goal of judicial independence is better served when judges play a role in judicial administration. In particular, the Minister of Justice as a political official was deemed inappropriate to chair the Judicial General Council.[52]

Directions and Plan of Activities], Эрх зүйн мэдээллийн нэгдсэн систем [INTEGRATED LEGAL INFORMATION SYSTEM] (1998), http://legalinfo.mn/law/details/6881?lawid=6881.

49 Шүүхийн тухай хууль [The Law on Courts], *in* 29 Төрийн мэдээлэл [THE STATE BULLETIN] 960 (2002) (Mong.).

50 Шүүхийн тухай хууль [The Law on Courts], *in* 8 Төрийн мэдээлэл [THE STATE BULLETIN] 458 (1996) (Mong.).

51 *See* The Law on Courts, *supra* note 49, at 966.

52 TOM GINSBURG & CHIMID ENKHBAATAR EDS., THE ROLE OF THE CONSTITUTION OF MONGOLIA IN CONSOLIDATING DEMOCRACY: AN ANALYSIS 73 (2015).

The 2002 reforms also corrected a minor legal error in the Law on Courts relevant to the Constitution. The 1993 Law had said that "As provided in the Constitution, the General Council is a co-management and ex-officio organization with the function to ensure the impartiality of judges and independence of the judiciary." This was problematic because the Constitution says nothing about the Judicial General Council being an ex officio body. The phrase "as provided in the Constitution" was removed from the revised Law on Courts.[53]

The first policy document for the judicial reform, the "Judicial Strategic Plan of Mongolia", adopted by the State Great Hural Resolution No. 39 in 2000 [54] was crucial in advancing the implementation of the legal reform, and strengthening of the judiciary.[55]

However, the revised Law on Courts did not fully meet the needs of the judiciary. In order for the Mongolian judiciary to become a true guarantor of human rights, freedom and democracy there was growing demand to ensure independence and impartiality of judges, increase institutional effectiveness and performance of the Mongolian judiciary, and strengthen its transparency and accountability.

c. The Current Phase of the Judicial Reform

On April 15, 2010, the National Security Council of Mongolia

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53 *Id.*

54 Шүүх эрх мэдлийн стратеги төлөвлөгөө батлах тухай Улсын Их Хурлын тогтоол [*The Resolution of the State Great Hural on the Adoption of the Judicial Strategic Plan of Mongolia*], Эрх зүйн мэдээллийн нэгдсэн систем [INTEGRATED LEGAL INFORMATION SYSTEM] (May 4, 2000), http://legalinfo.mn/law/details/6946?lawid=6946.

55 Ж. Амарсанаа, Б. Чимид, Р. Мухийт, Л. Төр-Од [J. AMARSANAA, B. CHIMID, R. MUHIIT & L. TUR-OD], Монгол Улсын шүүх эрх мэдлийн шинэтгэл [THE REFORM OF THE MONGOLIAN JUDICIARY] 13 (2010).

issued recommendations to intensify judicial and legal reforms, which was followed by the "Program to Deepen Judicial Reforms".

Subsequently, the National Legal Forum held on 14-15, April 2011 in Ulaanbaatar collected valuable comments and recommendations on legal reform and changes to the organization and structure of the judiciary provided by representatives of judiciary and law enforcement agencies, civil society, academia and citizens.

As a result, the package of laws, which represents the most comprehensive legal and institutional reform in the judiciary since the 1990s, was adopted by the State Great Hural in 2012-2013. This package of laws consists of the Law on the Judiciary of Mongolia (dated 7 March, 2012),[56] the Law on Judicial Administration (dated 22 May, 2012),[57] the Law on the Legal Status of Lawyers (dated 7 March, 2012),[58] the Law on the Legal Status of Judges (dated 7 March, 2012),[59] the Law on the Legal Status of Citizens' Representatives in Courts (dated 22 May 2012),[60] and the Law on Reconciliation and Meditation (dated 22 May, 2012).[61] These laws provide an "opportunity to implement the right to fair and independent trial guaranteed by the Constitution of Mongolia by

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56 Монгол Улсын Шүүхийн тухай хууль [The Law on the Judiciary of Mongolia], *in* 11 Төрийн мэдээлэл [THE STATE BULLETIN] 594-608 (2012).

57 Шүүхийн захиргааны тухай хууль [The Law on Judicial Administration], *in* 24 Төрийн мэдээлэл [THE STATE BULLETIN] 1509-1527 (2012) (Mong.).

58 Хуульчийн эрх зүйн байдлын тухай хууль [The Law on the Legal Status of Lawyers], *in* 11 Төрийн мэдээлэл [THE STATE BULLETIN] 633-671 (2012) (Mong.).

59 Шүүгчийн эрх зүйн байдлын тухай хууль [The Law on the Legal Status of Judges], *in* 11 Төрийн мэдээлэл [THE STATE BULLETIN] 594-608 (2012) (Mong.).

60 Шүүхийн иргэдийн төлөөлөгчийн эрх зүйн байдлын тухай хууль [The Law on the Legal Status of Citizens' Representatives in Courts], *in* 11 Төрийн мэдээлэл [THE STATE BULLETIN] 610-632 (2012) (Mong.).

61 Эвлэрүүлэн зуучлалын тухай хууль [The Law on Reconciliation and Meditation], *in* 25 Төрийн мэдээлэл [THE STATE BULLETIN] 1566-1582 (2012) (Mong.).

ensuring the independence, openness, and transparency of courts, managing the work balance of the courts and specialization of judges and ensuring the budget and administrative independence."[62] The main purposes of these laws are to clarify the status of lawyers and the legal profession, to restructure court administration and the operations of the judiciary, and to regulate alternative forms of dispute resolution such as conciliation and mediation. For example, the Law on the Legal Status of Judges aims "to regulate legal grounds for qualification of judges with the judiciary mandate set forth in the Constitution of Mongolia, the power, grounds, and procedures for termination, and guarantee for impartiality, as well as sanctions for violators of the law".[63]

Thus, the major safeguards of judicial independence related to appointment, promotion, discipline, tenure, compensation and financing are established in Mongolia now either at a constitutional or legislative level. All legal acts adopted in the course of the three-stage judicial reform were designed to provide for greater judicial independence.

It should be noted that the success of judicial reform became possible with the help of international donors. Since the late 1990's, the World Bank, the Asian Development Bank, USAID, GTZ, the Hanns-Seidel Foundation, and the Japan International Cooperation Agency (JICA), among others, have invested tens of millions of dollars to "reform" the Mongolian judiciary.[64]The international partners remain

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62 The office of the President of Mongolia, *Introduction on Draft Law on Judiciary and Other Relevant Draft Laws on Mongolia*, PRESIDENT OF MONGOLIA (Sept. 1, 2011), http://www.president.mn/eng/newsCenter/viewEvent.php?cid=22&newsId=608&newsEvent=Drafts%20laws%20on%20judiciary%20reformp.

63 *Id.*

64 USAID alone invested US$13.5 million in its Mongolia Judicial Reform Project between 2001 and 2006. The World Bank spent US$5 million in a judicial reform

committed to supporting Mongolia in its efforts toward the creation of a sound justice system. There are several projects just finished or under way aimed at establishing good governance (supported by the Asian Foundation), improving the justice sector's service (sponsored by the World Bank), creating a favorable legal environment for sustainable economic development (financed by the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ, formerly known as GTZ)), and enhancing the reconciliation process (supported by the Japan International Cooperation Agency JICA).

However, the level of independence of the Mongolian judiciary is still far from what is desired.[65] Traditions of the socialist past have undoubtedly had a significant influence on the Mongolian judiciary throughout its recent history. Despite the independent status of the judiciary under the new Constitution, its old internal culture and *modus operandi* continue to hamper the establishment of an independent judicial branch with strong status and powers. The judges' function is to

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project begun in 2001, and recently announced another US$5 million dollar project in June of 2008 to "support Mongolian justice sector institutions in enhancing their efficiency, transparency and accountability through capacity improvements". BRENT T. WHITE, REPORT ON THE STATUS OF COURT REFORM IN MONGOLIA 5 (2009), http://forum.mn/res_mat/Judicial_Reform_Assessment-eng.pdf.

65 In a study conducted by Brent T. White in his article, 50% of experts surveyed disagreed with the statement, "Court decisions are respected and enforced by other branches of government." These experts also indicated that the executive branch often does not honor court decisions with which it disagrees. One expert even indicated that tax inspectors feel free to ignore decisions by the courts when they believe the courts' interpretation to be wrong. In the same study, only 19% of the experts surveyed agreed that "Court decisions are free from political influence from other branches of government or other public officials." These experts shared the view that high-ranking government officials, including the President, exert considerable influence over the courts, especially where the personal, political or business interests of the government are at stake. *See* Brent T. White, *Rotten to the Core: Project Capture and the Failure of Judicial Reform in Mongolia*, 4 EAST ASIA L. REV. 209, 225, 230 (2009).

simply apply the law. Such a restricted attitude or self-restraint of judges continues to contribute to their minor role and low esteem.

III. Some Aspects of Judicial Independence in Mongolia

The concept of judicial independence is multi-faceted. There are many aspects related to the independence of individual judges, as well as many aspects related to the independence of the judiciary as a whole. The essential elements of the independence of a judiciary as an institution are as follows: 1) the judiciary should function as a separate government branch that is equal in standing and status to the executive and legislative branches; 2) in order to be independent, the judiciary should be self-policing; 3) as an independent entity, the judiciary should prepare and submit the budget for the judicial branch. Alternatively, the personal independence of judges includes clear and transparent procedures that are applied to judicial appointments and assignments; tenure of sufficient length (usually they should be appointed for life); sufficient and appropriate salaries; and promotion based on an objective assessment of the judge's integrity, professional competence, and experience. In addition, judges should only be subject to discipline or removal for misconduct or incapacity by a tribunal composed primarily or entirely of judges. On the other hand, judges should have sufficiently high minimum qualifications in education and experience. A number of important constitutional amendments and legislative innovations should be emphasized in this regard.

a. Selection

It is vital that persons appointed to be judges should be suitable for

the role they are to perform. Their responsibility for upholding the rule of law requires them to be independent, impartial, honest, and competent. Therefore, the reasons for establishing high standards for persons wishing to become a judge are twofold: strong and knowledgeable candidates with high moral standards should be attracted to the bench, while anyone who for whatever reason is not fit to be a judge should be turned away. For this reason the qualification standard needs to be sufficiently strict.

After the beginning of the recent legal reforms, some steps toward attracting to the bench candidates with substantial life experience and professional knowledge have been made. The 1992 Constitution and the Law on Courts (1993) required a candidate for a judgeship to satisfy stricter than ever qualifications: higher legal education, and the completion of a period of professional legal work (at least three years for the lower court judges, and at least ten years for the Supreme Court justices).[66] The next Law on the Courts (2002) added the requirement of passing a qualifying examination.[67]

The newly adopted Law on the Legal Status of Judges (2012) further enhanced the qualification requirements for potential wearers of the judge's gown. According to this Law, requirements for judicial service now include not only a minimum age, university degree in law, and work experience in the legal field, but also good command of the Mongolian language, a high moral reputation, and good health. A would-be judge must also not have been convicted of any crime.[68]

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66 Шүүхийн тухай хууль [The Law on Courts], *in* 2 Төрийн мэдээлэл [THE STATE BULLETIN] 157 (1993) (Mong.).

67 *See* The Law on Courts, *supra* note 49.

68 *See* The Law on the Legal Status of Judges, *supra* note 59, art. 4.1.

b. Appointment

The importance of the manner of the appointment or election for judicial independence cannot be underestimated. The most striking judicial reform achievements have been made in the area of judicial appointments. For example, the method of the election of the Mongolian judges has been changed: from popular elections in traditional one-candidate elections to the appointment of judges by the President in order to insulate the Mongolian judges from the "directing" influence of the local legislatures, as well as from the "mobilizing" influence of the Party and administrative apparatus. The Constitution authorizes the President of Mongolia to appoint judges of all courts, except the justices of the Supreme Court, who have to be approved by the State Great Hural on the proposal of the President of Mongolia.[69] It should be noted that the initial selection of the candidates for the judicial position is organised by the Judicial General Council, which bases its decisions on the recommendations of the Judicial Qualification Commission and conclusions of the Mongolian Lawyers' Association.[70] However, the President has real discretion in the process of making the final nomination for appointment to a judicial vacancy.

c. Tenure

The tenure of judges is historically considered to be a major safeguard of judicial independence. It is obvious that the independence of judges cannot be safeguarded without guaranteeing their tenure in office. Therefore, legally established security of tenure is one important area where the judiciary is supported in upholding the rule of law. The

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69 *Id.* art. 15.1.
70 *Id.* art. 10-13.

IBA Minimum Standards on Judicial Independence states: "Judicial appointments should generally be for life, subject to removal for cause and compulsory retirement at an age fixed by law at the date of appointment" (art. 22).[71] According to the Constitution and respective laws, all Mongolian judges are to be appointed for life (the compulsory retirement age for all Mongolian judges is 60). However, it should be noted that the President failed to reappoint judges several times without providing any plausible explanations. [72] There is no guarantee that such a situation will not be repeated again with every instance of change to the organization of the courts. Therefore, Article 51.4 of the Constitution, which states "removal of a judge of a court of any instance shall be prohibited except in cases when he/she is relieved at his/her own request or removed on the grounds provided for in the Constitution and/or the law on the judiciary and by a valid court decision", has not provided an adequate safeguard to the term of judicial appointments.

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71 Int'l Bar Ass'n [IBA], IBA Minimum Standards on Judicial Independence, art. 22 (1982), https://www.ibanet.org/Document/Default.aspx?DocumentUid=bb019013-52b1-427c-ad25-a6409b49fe29.

72 Despite the proposal by the General Judicial Council of Mongolia that the President of Mongolia release from office and then re-appoint all first-instance and appeals court judges working in accordance with 2013 Law on Establishment of the Court to the reorganized court, the President in issuing the resolution on the re-appointment of judges to circuit courts appointed 397 judges from a total of 409; thus failing to re-appoint 12 judges. Judges dismissed in this way were not informed in advance that they would not be re-appointed, and it remains unclear as to the grounds upon which they failed to be re-appointed. Judges who failed to be re-appointed on uncertain grounds, along with the Mongolian Bar Association, raised this issue with the General Judicial Council, the Office of the President of Mongolia, the Constitutional Tsets (Court), the first-instance civil court and the civil appeals court to no avail. *See* Ж. Хунан, П. Баттулга, М. Мөнхжаргал [J. HUNAN, P. BATTULGA & M. MUNKHJARGAL], Шүүхийн бие даасан, шүүгчийн хараат бус байдлын баталгаа: Шүүгчийн томилгоо [GUARANTEE OF JUDICIAL INDEPENDENCE AND IMPARTIALITY: JUDICIAL APPOINTMENT] 96-97 (2015). This situation was repeated again with the re-appointment of judges in accordance with 2015 Law on the Establishment of the Court, where one judge was not re-appointed and was thus dismissed.

d. Political Neutrality of Judges

De-politicization of the Mongolian judiciary was the first serious problem encountered at the beginning of the judicial reform process. It was obvious that party influence on the Mongolian judges was fully in contradiction with judicial independence. Therefore, the necessity of de-politicizing judicial business as much as possible was universally recognized. Any interference in the activity of judges was prohibited at the constitutional and legislative level. In order to eliminate party influence, the new Constitution of Mongolia provides that "Party membership of some categories of state employees may be suspended".[73] The State Great Hural of Mongolia adopted a Law "On Prohibition of Party Membership of Some Categories of State Employees" ("De-Politicization Law") on August 28, 1991, which barred members of the Mongolian Revolutionary Party' organizations from working in government bodies, institutions and organizations, including courts. This rule was confirmed by the Law on Courts of 1993.[74] The current Law on the Status of Judges also directly prohibits judges from belonging to any political party or movement.[75]

e. Discipline and Removal

Issues of judicial discipline are very important in terms of implementing the principle of an independent judiciary. As mentioned previously, the judiciary should be independent of other branches of government in order to properly perform its functions of judicial review, although this does not mean that the judiciary is exempt from any type

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73 CONSTITUTION OF MONGOLIA, *supra* note 37, art. 16.10.
74 The Law on Courts, *supra* note 66, art. 62.3.
75 *See* The Law on the Legal Status of Judges, *supra* note 59, art. 28.1.1.

of accountability.[76] Independence of the judiciary should not be absolute and needs to be balanced carefully with judicial accountability.[77]

Judicial accountability can be defined as the duty of a policy-maker to justify its actions or decisions and, if necessary, to correct them.[78] While the independence of the judiciary is the source of its legitimacy, judicial accountability is the basis of its conformity with society's democratic principles and legitimate interests. Peculiarities of the legal and political culture of a given country will determine whether it will favor judicial independence or judicial accountability.

The types of judicial accountability followed in a given society may substantially influence the extent of judicial independence;[79] as a

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76 In order to have confidence in the judicial system, the public should get an assurance that appropriate levels of performance are reached and that minimum standards of competence and ethical conduct are upheld.

77 At first glance, the two principles may appear to contradict each other because there seems to be a problem of reconciling the conflicting demands of judicial independence with the demands of accountability and essential levels of judicial competence. However, if judicial independence can be properly conceived as relating primarily to judicial-governmental relations (and, secondarily, to judicial relations with other powerful elites), judicial accountability is better understood as referring to institutional accountability to the civil society first, which is true for the rest of the government. *See* Stephen B. Burbank, *The Past and Present of Judicial Independence*, 80 JUDICATURE 117, 117-18 (1996). It has been said that "the question is not whether there should be judicial accountability but how judicial accountability can be balanced with judicial independence." Robert D. Nicholson, *Judicial Independence and Accountability: Can They Co-exist?*, 67 AUSTRALIAN L.J. 404, 414 (1993). Such balancing can be achieved by introduction of different modes of judicial accountability, first and foremost of which is accountability to the law.

78 *See* Rajeev Dhavan, *Judges and Accountability*, *in* JUDGING AND THE JUDICIAL POWER 165, 167 (Rajeev Dhavan et al. eds., 1985); DAWN OLIVER & GAVIN DREWRY, PUBLIC SERVICE REFORMS: ISSUES OF ACCOUNTABILITY AND PUBLIC LAW 134 (1996).

79 Cappelletti and Shetreet offer two different theoretical classifications of the types of judicial accountability. Cappelletti's classification includes as main types of judicial

consequence, not every method used to hold public officers politically accountable for their actions and decisions can be used for members of the judiciary.[80] For example, forms of "hard" political accountability such as the removal or dismissal from office cannot be used towards judges simply because their decisions are controversial. The use of alternative forms of responsibility such as, for example, disciplinary proceedings, public censure, and civil or criminal liability is constrained.[81]

The Universal Charter of the Judge states in art. 11: "The administration of the judiciary and disciplinary action towards judges must be organized in such a way that it does not compromise the judges' genuine independence, and that attention is only paid to considerations both objective and relevant."[82] Also the *UN Basic Principles on the*

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accountability political (or constitutional), societal (or public), legal (vicarious) and legal (personal) accountability. Shetreet recognizes legal accountability, public accountability, and informal and social controls. A closer look at them reveals that different classifications have more similarities than differences. Legal accountability of a judge in both classifications includes penal, civil and disciplinary accountability. The penal accountability involves the criminal code provisions generally applicable to public servants, while the civil liability and disciplinary responsibility of an individual judge are confined to certain substantive and procedural limitations and special rules. Although a judge should bear negative consequences of his or her wrongdoings, such restrictions are dictated by the need to preserve judicial independence. *See* MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE 73-103 (1991). For the most notable attempt to define it, *see* SIMON J. SHETREET & JULES DESCHENES EDS., JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE 595 (1985).

80 Although it does get money for its operations from public funds, the judiciary is not responsible to the executive and the legislative in the same way as other public officials. *See* KATE MALLESON, THE NEW JUDICIARY: THE EFFECTS OF EXPANSION AND ACTIVISM 39 (1999).

81 *Id.*

82 *The Universal Charter of the Judge*, INTERNATIONAL ASSOCIATION OF JUDGES, art. 11, www.iaj-uim.org/universal-charter-of-the-judges/ (last visited July 17, 2017).

Independence of the Judiciary[83] set forth a principle that all disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.[84]

Mongolia looks good in this regard, with powerful guarantees of the independence of judges in terms of removal and discipline predetermined at both constitutional and legislative levels. The current Law on the Judiciary provides that judges are irremovable from office. Article 20.1 of this Law states: "Judges shall be independent and shall be subordinated only to the Constitution, officially published laws, and international treaties to which Mongolia is a party. They shall be accountable to no one in their activity with regard to the effectuation of justice." The power to discipline and remove a judge was placed exclusively in the hands of the Mongolian judiciary. According to the Law on Judicial Administration, the Committee on Ethics consisting of prominent lawyers (mainly judges) is established with the function of deciding the cases of alleged judges' misconduct.[85] Judges may be removed from their office and their power may be suspended or terminated, but only on the grounds and by the procedure established by law.[86] According to this Law, a judge's authority may be terminated under the following circumstances: if a judge has been found guilty of committing a crime; if a judge has engaged in activities which are incompatible with the duties of a judge (the Law prohibits a judge from engaging in any outside paid activity other than teaching and research); if a judge's incapacity (or inability to perform his/her duties) is proven

83 *See Basic Principles on the Independence of the Judiciary*, *supra* note 2.
84 *See also* "The grounds for removal of judges shall be fixed by law and shall be clearly defined." IBA, *supra* note 71, art. 29(a).
85 The Law on Judicial Administration, *supra* note 57, art. 30-31.
86 The Law on the Legal Status of Judges, *supra* note 59, art. 17.1, 18.3, 18.4.

by medical examination and documents; if a judge after being formally reprimanded has shown repeated neglect of duty; or if his or her lawyer's professional license has been terminated.[87]

f. Internal Independence of the Judiciary

One of the current directions of judicial reform is to make a court management system more democratic. It is necessary to differentiate powers of a judge and the chair of a court: as a judge he or she is to be appointed for life, and as the chair of the court—for a limited term. This has a number of advantages: first, rotation will always bring fresh views, and, on the other hand, a judge will see the perspectives of his or her career more clearly. A chief judge of the Supreme Court is appointed for a term of six years, while the chairs of other courts are appointed for a term of three years, which can be extended for another term.[88] The chief judge heads the respective court; however, it is prohibited by law for him or her to interfere with the exercise of judicial authority by any judge, by the issuance of directives, guidelines, the assignment of a case to a particular judge, or in any other manner.[89] According to Article 13 of the Law on the Judiciary of Mongolia, the chair of the respective court exercises the following powers: represents the court in domestic and foreign relations; announces, organizes and convenes the panel of judges, and organizes enforcement of decisions of the panel; chairs court hearings, appoints a chair and other judges, supervises operation of the chamber of the court; organizes meetings with citizens regarding relevant laws; and reviews written petitions and requests from citizens and legal entities.

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87 *Id*. art. 18.4.
88 The Law on the Judiciary of Mongolia, *supra* note 56, art. 12.3, 12.4.
89 *Id*. art. 6.3.

g. Compensation

Adequate compensation for judicial work is another key aspect of judicial independence. Appropriate salaries and benefits are essential to the proper functioning of the judiciary. The *UN Basic Principles on the Independence of the Judiciary* states that there should be 'adequate remuneration' for judges.[90] The same wording can be found in the *Beijing Statement on Principles of the Independence of the Judiciary in the LAWASIA Region*.[91] Judges' salaries should be sufficiently high to correspond to the dignity of the profession, and to make a judicial career an attractive alternative to young graduates making a choice of a professional career.

The compensation for judges is prescribed by the *Law on the Legal Status of Judges*, which provides: "Remuneration for the office of the judge shall be sufficient to provide for their economic independence and commensurate with their livelihoods."[92] Under the law, judicial salary is composed of the basic payment and extra pay for judicial qualifications and number of years served.[93] The law also contains provision for extra pay in accordance with other laws and acts. Extra pay is provided for scientific degrees, and ranges from 5 to 10 per cent of basic payment.[94] Also corresponding laws set forth guarantees for a reasonable

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90 *Basic Principles on the Independence of the Judiciary*, *supra* note 2, art. 11.

91 The Law Ass'n for Asia and the Pacific [LAWASIA], *The Beijing Statement of Principle of the Independence of the Judiciary in the LAWASIA Region*, art. 31 (Aug. 19, 1995), https://www.hurights.or.jp/archives/other_documents/section1/1995/08/beijing-statement-of-principles-of-the-independence-of-the-judiciary-in-the-lawasia-region-beijing-1.html.

92 The Law on the Legal Status of Judges, *supra* note 59, art. 23.1.

93 *Id*.

94 Төрийн албаны тухай хууль [The Law on State Service], *in* 28 Төрийн мэдээлэл [THE STATE BULLETIN] 903, art. 28.2.1 (2002) (Mong.).

remuneration in case of illness, maternity leave, and for the payment of a retirement pension, which has a reasonable relationship to their level of remuneration when working.[95]

Judicial salaries are not yet adequate, and would still considered low by Western standards, but they have substantially increased in relation to that of many civil servants, although these increases in salaries sometimes came at the expense of the administrative budgets of courts, since they are not always accompanied by increases in the overall court budgets. It is prohibited to reduce the component and amount of judicial salaries.[96]

h. Other Aspects of the Independence of Mongolian Judges

The Law on the Legal Status of Judges serves as the legal basis for ensuring other aspects of judicial independence and immunity. For example, no law or administrative act that weakens the legal, economic and social guarantees of the independence and safety of judges may be enacted.[97] Judges also have immunity with respect to their person, office, home, transportation, means of communication, documents, properties, and correspondence.[98]

i. Institutional Independence of the Mongolian Judiciary

The judiciary should decide disputes without regard to the policies, preferences or interests of the government of the day; this may sometimes lead judges to confrontation with the political branches.

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95 The Law on the Legal Status of Judges, *supra* note 59, art. 23-24; The Law on State Service, *supra* note 94, art. 27, 29-32.
96 The Law on the Legal Status of Judges, *supra* note 59, art. 23.5.
97 *Id*. art. 20.3.
98 *Id*. art. 26.

Therefore, it is important that judges should not be the subjects of control by the political regime, and that they should be shielded from any threats, interference, or manipulation which may either force them to unjustly favor the state or subject themselves to punishment for not doing so. Most importantly, the power holders must be willing to uphold the court decisions, even when they disagree with the decision itself.

Only the judiciary, which is independent of the executive and legislature, is able to effectively restrain the other branches of power. Hence, the status of the judiciary as the co-equal and independent branch of government should be maintained.

During the entire socialist period, the Mongolian judiciary was considered to be a part of the executive branch. The Ministry of Justice administered all material, financial and technical aspects of the activities of the court system. Not surprisingly, courts always felt pressure coming from the executive branch.

Dependency of the courts on the executive has been removed by the Constitution[99] and the 1993 Law on Courts (art. 32-54). With the creation of the Judicial General Council, the Ministry of Justice was finally released of its functions relating to the maintenance of the courts, technical supply, retraining of judges and staff recruitment. Its remaining functions related to the supervision of court activity were also

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99 "3. A Judicial General Council shall function for the purpose of ensuring the independence of the judiciary; 4. The Judicial General Council, without interfering in the activities of courts and judges, shall deal exclusively with the selection of judges from among lawyers, protection of their rights and other matters pertaining to ensuring conditions for guaranteeing the independence of the judiciary; 5. The structure and procedures of the Judicial General Council shall be defined by law." CONSTITUTION OF MONGOLIA, *supra* note 37, art. 49.

transferred to the Judicial General Council.[100]

j. Financing of the Courts

The financing of the court system is very important to the collective independence of the judiciary. The difficult financial situation of the Mongolian courts during the early days of reform was reflective of the broader hardships caused by economic reform as Mongolia moved away from socialism. While the financial situation of Mongolian courts has improved somewhat, they remain inadequately funded. Severe under-financing of the courts negatively affects every aspect of judicial work. The insufficiency of funding not only renders judges increasingly vulnerable to bribery and outside influence, thus deleteriously affecting the impartiality of judges, but also precludes the courts as an institution from asserting financial independence.

The Constitution of Mongolia prescribed that the judicial system has to be financed from the state budget.[101] According to the Law on the Judiciary of Mongolia, the judiciary shall have a separate budget which is an integral part of the state central budget.[102] The judiciary shall be financially independent and the government shall ensure its continuous operation by providing adequate financial support. [103]

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100 The various functions of the Judicial General Council include questions of personnel (determining norms for caseload, need for new positions, helping to recruit, organizing perks and benefits for judges and other court employees, developing training etc.); organizational matters (including systems of court records, archives, statistics); and resource questions (support for the courts and the agencies of the judicial corporation: the judicial qualification commissions and the councils of judges.).

101 CONSTITUTION OF MONGOLIA, *supra* note 37, art. 48.3.

102 The Law on the Judiciary of Mongolia, *supra* note 56, art. 28.2.

103 *Id.* art. 6.4.

Staffing, budget, and finance shall be adequate to ensure the independence of the judiciary and the impartiality of judges. On the other hand, the judiciary is strictly prohibited from receiving any donations in any form from domestic and foreign individuals or legal persons, except international, humanitarian aid and loan programs through official agreements between Mongolia and foreign parties.[104]

The experience of other countries shows that a self-administered court budget is very important to maintaining collective judicial independence. To be dependent on the executive for apportioning the budget means that courts can be hostage to the executive for financing judicial operations. Thus, one of the recent directions of legal reform was to give the courts power to administer their own budget. Under the Law on the Judiciary of Mongolia, the Judicial General Council now plays a central role in creating and submitting its budget request, thus ensuring that it receives all the funds appropriated to it. The Judicial General Council develops the judiciary budget, including an operational budget and capital investment budget for all courts, and submits the budget directly to the State Great Hural.[105]

Currently there has been an increase in the percentage share which the court budget receives from the state budget.[106] According to a 2015 Court Statistical Report by the Judicial General Council of Mongolia, the court budget share in the state budget increased to 0.65 percent in 2013,

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104 *Id*. art. 28.6.

105 *Id*. art. 28.4.

106 For instance, since 1997 the percentage share of the state budget allocated to the court budget ranged from approximately 0.39 to 0.48 percent. Дамдинсүрэн Солонго [DAMDINSUREN SOLONGO], Шүүхийн захиргааны талаарх судалгааны тойм [THE OVERVIEW OF THE RESEARCH OF JUDICIAL ADMINISTRATION] (Open Society Forum, 2014) 4-5.

0.85 percent in 2014, and 0.82 percent in 2015 respectively.[107]

Therefore, the positive dynamics of reforms to the system of financing the court are apparent at present; however, additional funding is required.

IV. Development of the Administrative Review in Mongolia

"Mongolia's Strategic Plan for Justice Sector Reform", which was developed with the assistance of the US Agency for International Development (USAID), defined one of the objectives of judicial independence as "to create an oversight mechanism for illegal decisions of the executive power". A proper system of administrative justice represents an essential element of good governance. Therefore, establishment of the specialized administrative courts in order to perform an effective check on the arbitrary exercise of power by government was a necessary and important step in advancing judicial reform. Also the system of administrative justice is exceptionally important in countries with an authoritarian past, where the traditional approach in relations between the state and citizens is based on "power and subordination" principles.

In this Part, the need for administrative review and the creation of an administrative court system will be discussed in detail.

During the previous system, the doctrine of separation of powers

107 *See* THE JUDICIAL GENERAL COUNCIL OF MONGOLIA, JUDICIAL GENERAL COUNCIL OF MONGOLIA COURT STATISTICAL REPORT (2015).

was not accepted in Mongolia, which resulted in the lack of administrative justice. Courts usually refused to review administrative acts. Ordinary courts, in reviewing criminal and civil cases, had mere rights to "demand" and "assert" to rectify any failures by the middle- and lower-level administrative organizations and officials if they considered that such failures in their actions had impacted the outcome of particular cases or disputes. These rights were weak in terms of their influence. At the same time, the provisions allowing for the courts to utilize these rights "if necessary" made them rather discretionary. Therefore, it is inadequate to consider such ordinary rights of the courts to issue decisions as conducting effective oversight over the activities of administrative organs. Also the range of issues subject to decision by the judiciary was very narrow; only a handful of arbitrary actions could be contested in a court. There was no comprehensive complaints system to restore rights violated by state administrative bodies and public officials. Most complaints were directed to the procuracy, the administrative agency charged with enforcing legality in public administration.

After the adoption of a new, democratic Constitution, Mongolia began to build a modern democratic society based on a market economy. There came an awareness that empowerment of courts to hold public officials accountable for their decision-making through the application of fair procedural rules and the use of appeal processes and judicial review is important in aligning relationships between the state, market, and civil society. For example, administrative justice would provide necessary safeguards against illegal interference of governmental agencies into the activities of legal entities. Furthermore, it certainly will have positive impact on easing the registration, permission, and licensing procedures of governmental agencies. This is why the establishment of

administrative courts in countries in transition to democracy is considered a cornerstone of judicial reform, and Mongolia is far from an exception.

The State Great Hural of Mongolia adopted in 1990 the Law "On Review of Allegedly Illegal Acts of Administrative Bodies and Officials by the Courts",[108] which allowed courts to exercise judicial review of both "collegial and individual acts". Under the Law, judges had sole authority over those actions and decisions of any executive, state, or governmental agency or representative, which may have violated citizens' rights.[109] In addition, the Supreme Court of Mongolia issued in 1991 the Resolution "On the Correct Application of some Provisions of the Law 'On Review of Allegedly Illegal Acts of Administrative Bodies and Officials by the Courts'".[110]

However, despite the existence of some forms of judicial control over government actions, a large loophole was still prevalent in the scope of judicial control and its influencing capacity, especially over the legislative actions and those of the high administrative body. Attempts to eliminate this loophole were initiated in 1990. Provision 27 of the 1998 Legal Reform Program provides for the enabling legal climate to launch the operations of the specialized court in Mongolia. The period from 1998-2000 marked the initial stage of drafting the Law on

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108 Захиргааны байгууллага, албан тушаалтны хууль бус шийдвэрийг шүүхээр хянах журмын тухай хууль [The Law on Review of Allegedly Illegal Acts of Administrative Bodies and Officials by the Courts], *in* 2 Бүгд Найрамдах Монгол Ард Улсын хууль, зарлиг, тогтоолын эмхтгэл [BUNDLES OF LAWS, DECREES AND RESOLUTIONS OF THE MONGOLIAN PEOPLE'S REPUBLIC] 103-106 (1990) (Mong.).

109 *Id*. at 104-105.

110 The Supreme Court of Mongolia is empowered to issue the official interpretations for correct applications of all laws, except for the Constitution. *See* CONSTITUTION OF MONGOLIA, *supra* note 37, art. 50.

Administrative Courts, which saw active involvement from the Supreme Court of Mongolia, the Secretariat of the State Great Hural and the Ministry of Justice, as well as rigorous support from the Hanns Seidel Foundation of Germany through its resident representative office in Mongolia.

The second stage of drafting the law continued from 2000 until 2003. Based on the rationale of the "Strategic Plan for Justice Sector Reform",[111] several provisions were included such as to establish specialized courts for resolution of administrative cases, and to become acquainted with other countries' law on administrative and other specialized courts and their activities.

As a result of implementing these measures, a system of specialized administrative courts was created, along with the Constitutional Tsets (Court) of Mongolia. The creation of administrative courts was based on the Constitution of Mongolia (Article 48 (1), which provides that specialized courts may be established, if such necessity arises. On December 26, 2002, the State Great Hural passed the Law on the Establishment of Administrative Courts[112] along with the Law on the Procedure for Administrative Cases.[113] These laws became effective from 1 June, 2004. With the establishment of administrative courts, citizens were able to access these courts to make a complaint about

111 *See The Resolution of the State Great Hural on the Adoption of the Judicial Strategic Plan of Mongolia*, *supra* note 54.

112 Захиргааны шүүх байгуулах тухай хууль [The Law on the Establishment of the of Administrative Courts], *in* 3 Төрийн мэдээлэл [THE STATE BULLETIN] 74 (2003) (Mong.).

113 Захиргааны хэрэг хянан шийдвэрлэх тухай хууль [The Law on Procedure for Administrative Cases], *in* 3 Төрийн мэдээлэл [THE STATE BULLETIN] 54 (2003) (Mong.).

illegal decisions by state bodies, which were kept in the shadows previously. The administrative courts started to annul such decisions and put a stop to illegal actions.

It should be noted that since Mongolia belongs to the civil law family, it adopted all of its major characteristics. Thus, Mongolia created a system of special administrative courts because it considered it inappropriate for the courts of general jurisdiction to review the acts of the executive.[114] The need to create a whole network of administrative courts was explained by the sharp growth of cases connected with complaints about the actions of government officials.

The current system of administrative courts includes courts of first instance, an appellate court, and the court of last resort. This was not always a case. At first, the system of administrative courts in Mongolia operated without an intermediate appellate court. There are 21 provincial administrative courts, including the capital city administrative court, acting as courts of first instance. The decisions of the provincial administrative courts were appealed directly to the Chamber for Administrative Cases of the Supreme Court, which acted as both intermediate appellate court and court of last resort for administrative

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114 This is a typical way for civil law countries to set up separate administrative courts. The reason for this is the doctrine of separation of powers, according to which the branches of government should be separate from each other. The separation of the administrative and judicial powers denied judges of ordinary courts any opportunity to intervene in the administrative process. Therefore, administrative review is performed by the courts with special jurisdiction, i.e., administrative courts. Usually, these are not linked to the ordinary judiciary. Ordinary judges may not rule on the legality of governmental decisions, because to give them a power to annul acts of government would result in an encroachment on the executive power. MERRYMAN & PÉREZ-PERDOMO, *supra* note 6, at 88-89, 134-35; HERBERT JACOB ET AL., COURTS, LAWS AND POLITICS IN COMPARATIVE PERSPECTIVE 185-88 (1996).

cases. Only seven years after Mongolia established its first specialized court for administrative cases, the decision was made to complete the country's administrative court system by establishing the intermediate appellate court. On April 1, 2011, the Administrative Court of Appeals began operating in Ulaanbaatar. So from 2011, the administrative court system of Mongolia include three instance courts: 20 first-instance administrative courts, the administrative appeals court and the Chamber for Administrative Cases of the Supreme Court of Mongolia, employing approximately 80 judges and over 90 court administrative officers.[115]

Another significant feature of the administrative courts is that they are organized differently from an ordinary court system. The notable distinction of the system of administrative courts from that of the ordinary court system is the absence of administrative courts in sums and districts,[116] while every province (aimag) and the capital city has its administrative court. These administrative courts deal with disputes between public officials and citizens or legal persons arising from the exercise of public authority.

The intermediate appellate panel decides cases with a panel of three justices and is not limited to considering the issues stated in appeal but instead has to review the whole case. As a last instance court, the Chamber for Administrative Cases hears the case with a panel of five justices. Moreover, if the case has been heard by the Chamber prior to

115 *See Judiciary and Judicial Administration*, THE JUDICIAL GENERAL COUNCIL OF MONGOLIA, http://eng.judcouncil.mn/administration.html (last visited July 15, 2017). These numbers does not include 6 justices—members of the Administrative Chamber of the Supreme Court of Mongolia.

116 Lower territorial and administrative units in Mongolia.

this later hearing, the justices who took part in the first hearing must exclude themselves.

The Law of Mongolia on the Procedure for Administrative Cases entered into force on June 1, 2004. This Law regulates functioning of the administrative courts; jurisdiction and competencies of the administrative courts; principles and procedures of trials, parties in the process, and other persons involved; administrative court decisions and their execution. The goal of the administrative courts as a legal institution is to counteract the abuses and excesses of power of the public authorities, defend people's rights under the law, and to ensure the legal order. The only target of this court procedure is "administrative acts or actions" and their validity and legitimacy.[117] Any disputes which arise from an administrative act and which may affect a person's rights may be challenged before these courts.

The main power of the administrative courts is to exercise court control of activities of the executive organizations within a legally defined scope and power. According to the law, administrative courts are to process all cases protesting the actions of officials, and their legal acts. Article 4 of the Law on the Procedure for Administrative Cases provides the broad jurisdiction for administrative courts by defining the

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117 Article 3.1.4 of the Law of Mongolia on Procedure for Administrative Cases provides the following definition: "An administrative act is a single compelling order or commanding action with direct legal outcome that was issued or acted by an administrative authority or official in oral or written form, for the purposes of regulating a particular incident caused in the public legal arena." Hence, the most common type of acts that are likely to be issues in administrative cases would be, but are not limited to, all kinds of government licensing, tax orders, land-related regulations, and government procurement. *See* Захиргааны хэрэг хянан шийдвэрлэх тухай хууль [The Law on Procedure for Administrative Cases], *in* 3 Төрийн мэдээлэл [THE STATE BULLETIN] 54 (2003) (Mong.).

administrative agencies and officials whose acts are subject to judicial control. All areas of public life such as the police, school regulations, roads, and civil service are covered. Administrative courts do not examine disputes that are related to the normative acts that, according to the Constitution, are in the competence of the Constitutional Tsets; and also disputes examination of which, according to the legislation, are in the jurisdiction of another court.

In matters before the administrative courts, the defendant must always be a public administration authority; this includes not only the executive branch of government but also the administration of public schools, hospitals, and even energy providers. The plaintiff must always be a citizen or legal entity.

The Law on the Procedure for Administrative Cases is divided into two sections: the first contains the procedure for administrative tribunals and higher administrative officials to pre-decide the original act based on a complaint submitted by a citizen or legal entity, and the second is the procedure for administrative courts. Pre-hearing by the administrative tribunals before commencing action in the courts is an important step. Any person who considers his or her legally acknowledged rights to have been violated by an administrative act or action can submit a preliminary petition to a hierarchically superior official or administrative tribunal. There is a 30-day "statute of limitation" period within which an aggrieved individual must submit a preliminary petition to the administrative tribunal. If the petitioner is not satisfied with the answer on their preliminary petition or does not receive any answer under the terms established by law, he or she is entitled to submit a complaint to the administrative court.

Trials are held in public. While administrative courts do not look into the reasonableness, suitability, or purpose of the administrative act, they may perform substantive review (of whether it has a sufficient legal basis) or procedural review (on whether procedures imposed by law have been observed by the administrative agency). All evidence must be presented and examined at the hearing. Judges must base their decision on the evidence properly gathered in the case and presented. If non-compliance with the law is found, the administrative act in question is invalidated. A summary of judgment is announced at the end of the hearing.

All appeals are considered by three (intermediate appellate panel) or five judges, who receive the complete file from the lower court and base their decision on it. Judgments that are not voluntarily executed are implemented for the winning party by the court bailiffs.

Therefore, the institutional design of administrative courts looks quite good.

The establishment of administrative courts signifies marked progress in the improvement of the national judicial system as well as the increased awareness that the country is placing due emphasis on protecting individual rights against unlawful governmental action.

Since 2004, Mongolian administrative courts have begun to play an important role in protecting and securing human rights. They review the legality of both administrative acts and inaction in a growing number of cases and in broadening areas of social regulation. Between 2004 and 2016, the number of cases in which citizens sued the state rose from 145 to 1780 (see Table 1).

Table 1. Judicial Review of Administrative Acts

#	Year	Number of cases	Decrease or increase in number of lawsuits	Percentage of decrease or increase in cases
1	2004	145	-	-
2	2005	386	241	+165.5
3	2006	431	45	+11.7
4	2007	591	160	+37.1
5	2008	826	235	+39.7
6	2009	1074	248	+30.0
7	2010	1031	-43	-4.0
8	2011	891	-140	-13.6
9	2012	961	70	+7.9
10	2013	1106	145	15.1
11	2014	1187	81	7.3
12	2015	1439	252	21.2
13	2016	1780	341	23.7

Source: The 2004-2016 Reports of the Activities of the Courts of Mongolia.[118]

118 Монгол Улсын Дээд Шүүх [The Supreme Court of Mongolia], Монгол Улсын шүүхийн 2004 оны шүүн таслах ажиллагааны нэгдсэн дүн мэдээ [*The 2004 Report on the Activities of the Courts of Mongolia*], at 7 (2004), http://www.supremecourt.mn/uploads/files/5577d849136f_2004shuuhtaslah.pdf; Монгол Улсын Дээд Шүүх [The Supreme Court of Mongolia], Монгол Улсын шүүхийн 2005 оны шүүн таслах ажиллагааны нэгдсэн дүн мэдээ [*The 2005 Report on the Activities of the Courts of Mongolia*], at 7 (2005), http://www.supremecourt.mn/uploads/files/557fe12bdb3f6_shuuntaslah2005.pdf; Монгол Улсын Дээд Шүүх [The Supreme Court of Mongolia], Монгол Улсын шүүхийн 2006 оны шүүн таслах ажиллагааны нэгдсэн дүн мэдээ [*The 2006 Report on the Activities of the Courts of Mongolia*], at 7 (2006), http://www.supremecourt.mn/uploads/files/558036a05bc35_taniltsuulga2006.pdf; Монгол Улсын Дээд Шүүх [The Supreme Court of Mongolia], Монгол Улсын шүүхийн 2007 оны шүүн таслах ажиллагааны нэгдсэн дүн мэдээ [*The 2007 Report on the Activities of the Courts of Mongolia*], at 7 (2007), http://www.supremecourt.mn/uploads/files/55813bac4da99_taniltsuulga2007.pdf; Монгол Улсын Дээд Шүүх [The Supreme Court of Mongolia], Монгол Улсын шүүхийн 2008 оны шүүн таслах ажиллагааны нэгдсэн дүн мэдээ [*The 2008*

In the period between 2004 and 2015, a total of 19,683 cases were received by all instances of administrative courts, out of which 12,767 cases were resolved including 7,441 cases decided at the first instance administrative courts, 3,519 cases were resolved at the administrative appeals court, and 1,807 cases were finalized at the Supreme Court. A review of administrative cases resolved for the past decade by the administrative courts reveals that the number of petitions as well as the

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Report on the Activities of the Courts of Mongolia], at 7 (2008), http://www.supremecourt.mn/uploads/files/558032c3aac2e_taniltsuulga2008.pdf; Монгол Улсын Дээд Шүүх [The Supreme Court of Mongolia], Монгол Улсын шүүхийн 2009 оны шүүн таслах ажиллагааны нэгдсэн дүн мэдээ [*The 2009 Report on the Activities of the Courts of Mongolia*], at 8 (2009), http://www.supremecourt.mn/uploads/files/558035c64da1b_taniltsuulga2009.pdf; Монгол Улсын Дээд Шүүх [The Supreme Court of Mongolia], Монгол Улсын шүүхийн 2010 оны шүүн таслах ажиллагааны нэгдсэн дүн мэдээ [*The 2010 Report on the Activities of the Courts of Mongolia*], at 8 (2010), http://www.supremecourt.mn/uploads/files/5581331fa8660_taniltsuulga2010.pdf; Монгол Улсын Дээд Шүүх [The Supreme Court of Mongolia], Монгол Улсын шүүхийн 2011 оны шүүн таслах ажиллагааны нэгдсэн дүн мэдээ [*The 2011 Report on the Activities of the Courts of Mongolia*], at 9 (2011), http://www.supremecourt.mn/uploads/files/557ff452b0544_taniltsuulga2011.pdf; Монгол Улсын Дээд Шүүх [The Supreme Court of Mongolia], Монгол Улсын шүүхийн 2012 оны шүүн таслах ажиллагааны нэгдсэн дүн мэдээ [*The 2012 Report on the Activities of the Courts of Mongolia*], at 9 (2012), http://www.supremecourt.mn/uploads/files/558016f4bd544_taniltsuulga2012.pdf; Шүүхийн Ерөнхий Зөвлөл [The Judicial General Council], Монгол Улсын шүүхийн 2013 оны шүүн таслах ажиллагааны нэгдсэн дүн мэдээ [T*he 2013 Report on the Activities of the Courts of Mongolia*], at 32 (2013), http://www.judinstitute.mn/stastistic_report/137--2013-.html; Шүүхийн Ерөнхий Зөвлөл [The Judicial General Council], Монгол Улсын шүүхийн 2014 оны шүүн таслах ажиллагааны нэгдсэн дүн мэдээ [*The 2014 Report on the Activities of the Courts of Mongolia*], at 30 (2014), http://www.judinstitute.mn/stastistic_report/141--2014-.html; Шүүхийн Ерөнхий Зөвлөл [The Judicial General Council], Монгол Улсын шүүхийн 2015 оны шүүн таслах ажиллагааны нэгдсэн дүн мэдээ [*The 2015 Report on the Activities of the Courts of Mongolia*], at 198 (2015), http://www.judinstitute.mn/staStistic_report/145--2015-.html; Шүүхийн Ерөнхий Зөвлөл [The Judicial General Council], Монгол Улсын шүүхийн 2016 оны шүүн таслах ажиллагааны нэгдсэн дүн мэдээ [*The 2016 Report on the Activities of the Courts of Mongolia*], at 44 (2016), http://www.judinstitute.mn/stastistic_report/161--2016-.html.

administrative cases resolved has been constantly increasing on an annual basis. This trend is expected to continue in the future.

Remarkably, between 2005 and 2016, approximately 60 percent of the total number of cases resolved by administrative courts were resolved in favor of citizens and legal persons.[119] This means that the illegal decisions by about 4,000 state administrative bodies and public officials were annulled, restoring the citizens' as well as legal persons' legitimate rights and interests. The number of cases decided in favor of plaintiffs has slightly decreased in recent years but still remains very high.

Table 2. Percentage of lawsuits in favor of petitioners (2013-2016)

	2013	2014	2015	2016	Three years' average
Percentage of lawsuits decided fully in favor of plaintiffs	49.9	47.30	51.2	49.4	49.45
Percentage of lawsuits decided partially in favor of plaintiffs	9.0	10.36	9.3	11.2	9.9
Total number of lawsuits decided in favor of plaintiffs (whether fully or in part)	58.9	57.66	60.5	60.6	59.4

Source: The yearly (2013, 2014, 2015 and 2016) Reports of the Activities of the Courts of Mongolia.[120]

119 For the appellate court and the Administrative Chamber of the Supreme Court, these numbers are slightly lower: 57.3 and 55.7% respectively.

120 Шүүхийн Ерөнхий Зөвлөл [The Judicial General Council], Монгол Улсын

Citizens made claims against the state on a wide range of issues involving the use of land and natural resources, the imposition of taxes, the holding of elections, and so on.

Table 3. Kinds of disputes resolved by the administrative courts (2012-2016)

#	Kind of dispute	2012	2013	2014	2015	2016	Number of cases	Percentage
1	Land dispute	210	280	386	338	419	1633	25.22
2	Civil service dispute	133	203	297	400	417	1450	22.40
3	Election dispute	120	103	14	-	184	421	6.50
4	Natural resources dispute	119	72	43	96	142	472	7.29
5	Tax dispute	73	65	81	128	127	474	7.32
6	Proprietary rights dispute	80	88	59	104	83	414	6.39
7	Registration of entities dispute	-	-	12	14	-	26	0.40
8	Registration of citizens dispute	-	13	28	16	30	87	1.30

шүүхийн 2013 оны шүүн таслах ажиллагааны нэгдсэн дүн мэдээ [*The 2013 Report on the Activities of the Courts of Mongolia*], at 34 (2013), http://www.judinstitute.mn/staStistic_report/137--2013-.html; Шүүхийн Ерөнхий Зөвлөл [The Judicial General Council], Монгол Улсын шүүхийн 2014 оны шүүн таслах ажиллагааны нэгдсэн дүн мэдээ [*The 2014 Report on the Activities of the Courts of Mongolia*], at 32-33 (2014), http://www.judinstitute.mn/staStistic_report/141--2014-.html; Шүүхийн Ерөнхий Зөвлөл [The Judicial General Council], Монгол Улсын шүүхийн 2015 оны шүүн таслах ажиллагааны нэгдсэн дүн мэдээ [*The 2015 Report on the Activities of the Courts of Mongolia*], at 199 (2015), http://www.judinstitute.mn/stastistic_report/145--2015-.html; Шүүхийн Ерөнхий Зөвлөл [The Judicial General Council], Монгол Улсын шүүхийн 2016 оны шүүн таслах ажиллагааны нэгдсэн дүн мэдээ [*The 2016 Report on the Activities of the Courts of Mongolia*], at 46 (2016), http://www.judinstitute.mn/stastistic_report/161--2016-.html.

9	Dispute against decision of controlling organs	42	46	81	83	75	327	5.13
10	Tender dispute	-	-	40	55	-	95	1.46
11	Other	184	236	146	205	303	1074	16.59
12	Total	961	1106	1187	1439	1780	6473	100

Source: The yearly (2012, 2013, 2014, 2015 and 2016) Reports of the Activities of the Courts of Mongolia.[121]

During this period, the majority of cases were related to land disputes, which made up about 30 percent of all administrative cases. Approximately 20 percent of all disputes were related to civil service, while most other common disputes were related to elections, property registration, mineral licenses and tender-related disputes. Generally, these types of relations were arisen most commonly between the state bodies and citizens. Consequently, the majority of disputes also were arisen in these administrative areas.

Therefore, administrative courts now play an active role in

121 Монгол Улсын Дээд Шүүх [The Supreme Court of Mongolia], Монгол Улсын шүүхийн 2012 оны шүүн таслах ажиллагааны нэгдсэн дүн мэдээ [*The 2012 Report on the Activities of the Courts of Mongolia*], at 10 (2012), www.supremecourt.mn/uploads/files/558016f4bd544_taniltsuulga2012.pdf; Шүүхийн Ерөнхий Зөвлөл [The Judicial General Council], Монгол Улсын шүүхийн 2013 оны шүүн таслах ажиллагааны нэгдсэн дүн мэдээ [*The 2013 Report on the Activities of the Courts of Mongolia*], at 34-35 (2013), http://www.judinstitute.mn/stastistic_report/137--2013-.html; Шүүхийн Ерөнхий Зөвлөл [The Judicial General Council], Монгол Улсын шүүхийн 2014 оны шүүн таслах ажиллагааны нэгдсэн дүн мэдээ [*The 2014 Report on the Activities of the Courts of Mongolia*], at 33-34 (2014), http://www.judinstitute.mn/stastistic_report/141--2014-.html; Шүүхийн Ерөнхий Зөвлөл [The Judicial General Council], Монгол Улсын шүүхийн 2015 оны шүүн таслах ажиллагааны нэгдсэн дүн мэдээ [*The 2015 Report on the Activities of the Courts of Mongolia*], at 200 (2015), http://www.judinstitute.mn/stastistic_report/145--2015-.html.

safeguarding fundamental rights and freedoms.[122]

In the next diagram, the kind of public authorities being respondents to the lawsuits are shown. As can be seen, the local governors are the most frequently named respondents.

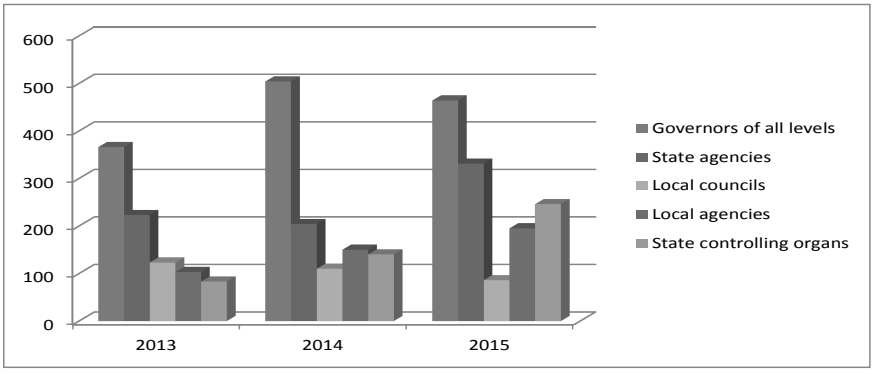

Diagram 1. The kind of respondents

Source: The yearly (2013, 2014 and 2015) Reports of the Activities of the Courts of Mongolia.[123]

122 In one example of an action involving judicial review of administrative action in 2005, an application for a mining license by a mining company was discussed at a local Hural (local council) of a sum (rural district or a governmental sub-division of Mongolia with administrative powers) and most of those present were opposed to the application. However, the Presidium (executive head of the sum) approved the application, and the mining company obtained a license from the central government. Despite protests from leaders of the Hural, the Presidium issued a decision that the company had the right to proceed under its license. The leaders of the Hural subsequently appealed to the Arkhangai Province Administrative Court. The court held that the Presidium had no authority to overrule the decision of the Hural; that the mining company's license was invalid; and that if the river were damaged by mining activities, the families in the valley would not be able to sustain their herds and would have to move to the city; and it called for more transparency in licensing procedures by the sum executive. Decision of the Administrative Court, Arkhangai Province, No. 4 (May 2, 2005) (Mong.).

123 Шүүхийн Ерөнхий Зөвлөл [The Judicial General Council], Монгол Улсын

Administrative courts play an important role in the formation of a culture in which state bodies function in accordance with law. State administrative bodies and public officials, like citizens, are also required to comply with law in their actions. Resolution of disputes at the administrative courts enables citizens to appreciate that they do enjoy equal rights with state officials. In the past, citizens were afraid of state administrative bodies and public officials, and thus accepted and complied with administrative decisions. Now this attitude is changing, with many more people accessing administrative courts. Citizens are cultivating an attitude for asserting their rights. Citizens are also starting to learn about the law and recognize illegal decisions. This is a great progress in citizens' legal knowledge and awareness.

The establishment of administrative courts also had a positive impact on curbing corruption. Previously, without access to administrative courts, citizens had no other recourse than to bribe public officials in order to resolve a particular administrative issue. However, with the establishment of administrative courts, citizens now have the option to apply to administrative courts for resolution of certain issues.

Through administrative court actions, the rule of law in Mongolia will be strengthened.

шүүхийн 2013 оны шүүн таслах ажиллагааны нэгдсэн дүн мэдээ [*The 2013 Report on the Activities of the Courts of Mongolia*], at 35 (2013), http://www.judinstitute.mn/stastistic_report/137--2013-.html; Шүүхийн Ерөнхий Зөвлөл [The Judicial General Council], Монгол Улсын шүүхийн 2014 оны шүүн таслах ажиллагааны нэгдсэн дүн мэдээ [*The 2014 Report on the Activities of the Courts of Mongolia*], at 34-35 (2014), http://www.judinstitute.mn/stastistic_report/141--2014-.html; Шүүхийн Ерөнхий Зөвлөл [The Judicial General Council], Монгол Улсын шүүхийн 2015 оны шүүн таслах ажиллагааны нэгдсэн дүн мэдээ [*The 2015 Report on the Activities of the Courts of Mongolia*], at 201 (2015), http://www.judinstitute.mn/stastistic_report/145--2015-.html.

Despite such positive development, a good deal of criticism has arisen over the role of administrative courts in Mongolia in judicial review. First, despite there having statistically been an apparent boom in judicial review of administrative action, the actual level of administrative justice in Mongolia is still low. One reason for this may be an ongoing lack of knowledge on the part of many citizens about the opportunity to bring to court complaints against officials. Secondly, there is the concern of jurisdictional overlap with the Constitutional Tsets. After the capital city administrative court ruled in favor of the plaintiffs in two landmark cases,[124] the decisions provoked some conflict between the administrative courts and the Constitutional Tsets in relation to acts by the General Election Committee, and constitutional challenges to the validity of laws. Consequently, the Constitutional Tsets invalidated some articles of the Law on the Procedure for Administrative Cases on the grounds of their incompatibility with the Constitution.

The Constitutional Tsets's Case

- A request was made to the Constitutional Tsets to invalidate Articles 4.1.1 and 4.1.6 of the Law on the Procedure for Administrative Cases on the grounds of their incompatibility with the Constitution. Articles 4.1.1 and 4.16 of the Law on the Procedure for Administrative Cases provide that the Government of Mongolia and the General Election Committee are under the jurisdiction of the administrative court. More particularly, Article 4.1.1 provides that disputes concerning illegal acts made by the

124 *See* Erdenebat & Erdenebaatar v. Government of Mongolia, Capital City Administrative Court, 2005 (Mong.); another case is Enkhbold v. General Election Committee, Capital City Administrative Court, 2004 (Mong.).

Governmental Cabinet of Mongolia shall be decided and invalidated as provided by Article 8.1.2 of the Law on the Procedure for Administrative Cases by the Administrative Court;

- Article 4.1.6 provides that decisions made by the General Election Committee shall be considered to be an administrative act that can be validated by the Administrative Court in accordance with Article 8.1.2 of the Law on the Procedure for Administrative Cases.

The request to the Constitutional Tsets argued that:

- Article 4.1.1 was in conflict with Articles 38.1 and 45.2 of the Constitution; and Article 4.1.6 was in conflict with subparagraph 2 of paragraph 2 of Article 66 of the Constitution. The Constitutional Tsets of Mongolia found that clause "4.1.1 The Government Cabinet of Mongolia" of Article 4.1 of the Law on the Procedure for Administrative Cases was in breach of Articles 38.1 and 45.2 of the Constitution, and therefore unconstitutional. The ground for the decision is as follows: Article 38.1 of the Constitution states that "the Government is the highest executive body of the State," and Article 45.2 of the Constitution states that "If Government resolutions and ordinances are incompatible with laws and regulations, the Government itself or the State Great Hural shall invalidate them." Therefore, the competent body to invalidate decisions by the Government which are incompatible with laws is the highest executive body of the State. The adjudication on constitutionality is open for procedure in the case of non-compliance with responsibilities by the State Great Hural and the Government, as provided in the Constitution. The

> competence to review the acts of the highest executive body is not provided to the administrative court by the Constitution. Consequently legislation stating that Government acts shall be reviewed by the administrative court, as adopted by the legislature, has been found unconstitutional on the grounds that it interferes with the powers of the Government and the State Great Hural as stated in the Constitution.

The Constitutional Tsets of Mongolia also found that clause "4.1.6. The General Election Committee" of article 4.1 of the Law on the Procedure for Administrative Cases was in breach of Article 66.2.2 of the Constitution, and therefore unconstitutional. The General Election Committee has functions to conduct referendums and elections for members of the State Great Hural and the President, and to make decisions regarding exercising the right to elect and to be elected by citizens. As seen from the Constitutions of different democratic countries, there is a precedent that this type of dispute shall be subject either to jurisdiction by the Constitutional Court in countries where a constitutional court exists, or to the Supreme Court where a constitutional court does not exist. According to Article 66.2.2 of the Constitution, "Tsets shall make judgments on the conformity of national referendums and decisions of the central election authority on the elections of the State Great Hural and its members, as well as on presidential elections with the Constitution." Therefore, the adjudication on the constitutionality of acts of the General Election Committee shall be subject to Article 66.2 of the Constitution. However, if disputes concerning illegal acts made by the General Election Committee are decided by the administrative court, this is interfering with the competence of the Constitutional Tsets, as provided by the Constitution.

The Constitutional Tsets concluded that:

> The statement in subparagraph 4.1.1 regarding "The Governmental Cabinet of Mongolia", of paragraph 1: "Administrative Case Courts shall decide disputes concerning illegal acts made by the following bodies and officials," and of Article 4: "Disputes under Jurisdiction of Administrative Case Courts of Law on the Procedure for Administrative Cases, is found unconstitutional on the basis of a breach of Article 38.1," which states that "the Government is the highest executive body of the State", Article 45.2, which states that "if the resolutions and ordinances are incompatible with laws and regulations, the Government itself or the State Great Hural shall invalidate them" and also Article 4.1.6 stating "the General Election Committee" is found unconstitutional on the basis of a breach of Article 66.2.2, which states that "Tsets shall make judgments on the conformity of national referendums and decisions of the central election authority on the elections of the State Great Hural and its members, as well as on presidential elections with the Constitution."

Also, the level of discretion of an administrative judge has attracted some attention. It should be noted that the civil law tradition of judicial independence is characterized by a doctrinal approach, which generally limits the role of a judge.[125] Politics play a minor role in the judicial

125 The judiciary is subject to a long training process. The career is attractive to those with limited ambition. The initial choice of a legal career tends to be final, and the resulting sharp separation of each branch of the legal profession from each other precludes young lawyers from deciding wisely which is best for them. They get only minor judicial positions early in their careers, progressing to more important offices as they acquire experience.

selection, as the primary importance is laid on the professional qualifications. They enter at the bottom and advance according to seniority and merit.[126]

The question of administrative action in the civil law family is thus exclusively a question of legality, not reason. As a result, many specific principles, concepts and doctrines like the principle of proportionality, reasonableness, balance, and so forth developed in constitutional, international, and administrative law are still unfamiliar to Mongolian judges.

V. Conclusion

During the socialist period, Mongolian judges did not enjoy any independence, and were accountable for their actions to the superior judicial bodies, government officials, and party functionaries. The status of Mongolian judges was low as well. Some attempts to establish judicial review of government actions were made during that period; however, they were destined to fail because the socialist legal doctrine did not recognize the principle of separation of powers. Only after the collapse of the Soviet Union and disintegration of the socialist system did Mongolia adopt a new democratic Constitution and initiate a long process of judicial reform. Indeed, the socialist legacy has made it difficult to establish an independent and respected judiciary in Mongolia. Nevertheless, despite the considerable barriers to the creation of an

126 MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 86 (2008); GRAHAM HASSAL & CHERYL SAUNDERS, ASIA-PACIFIC CONSTITUTIONAL SYSTEMS 183 (2002); MCHUGH, *supra* note 11, at 19.

independent judiciary, significant progress in improving the justice system in Mongolia has been made over the past twenty years. Currently the Mongolian judiciary is constitutionally independent from the other branches of government. Judicial disciplinary mechanisms have been established and are working. Management of the judiciary is much improved from what it was in the past. The courts now control their own budget process through the Judicial General Council.

One outcome of judicial reform was the expansion of court jurisdiction to embrace a judicial review of government actions. Being a country with a civil law tradition, Mongolia has established a separate system of administrative courts. The process of establishing a system of administrative courts in Mongolia followed a long and difficult path.

Establishment of the administrative court resulted in the following advantages:

1. A new and powerful mechanism to protect human rights was created. This expanded the legal guarantees towards the provision of human rights.
2. A new instrument was created to limit and address corruption, bureaucracy and red tape, which were still persistent within the public administration.
3. A flexible approach and new legal culture were introduced into the relations between administrative bodies and government officials, on the one hand, and citizens, on the other hand, and the democratic principles of government actions were strengthened.
4. By placing government actions under the purview of judicial control, a condition is being created to make the weaker judicial power equal to that of other state powers such as legislative and

executive powers.

5. Administrative review is especially important in a country moving from a planned economy to market economy by providing safeguards against illegal interference of governmental agencies into the activities of legal entities.

Yet the reality of judicial independence leaves much to be desired. Despite the fact that Mongolia has made significant strides in strengthening the judicial independence and impartiality of judges through legislation consistent with global standards, these legal provisions are not adequately enforced. Thus, despite many improvements in the justice system of Mongolia realized over the past two decades, much still remains to be done.

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蒙古國司法獨立發展與行政訴訟制度的創立

*Enkhbaatar Chimid**

摘　要

在社會主義體制崩潰之後，包括蒙古國在內的前社會主義國家，均開始民主轉型。由於司法獨立是健全憲政體制的重要基礎之一，這些國家進行民主發展與鞏固的方向就是建立獨立、公平與有效率的司法制度。然而這些轉型國家的發展幾乎為人所忽略。本文的目的有二：首先本文觀察司法獨立的核心概念與它如何適用於蒙古司法制度，並將追溯蒙古司法制度的歷史背景。接著本文將分析三階段的司法改革與成果，並將檢驗用以確保蒙古法院獨立的制度安排，包括許多影響司法獨立的因素，例如制度安排、任期、薪俸、法院預算、法官懲戒、與任命程序。其次，本文將研究蒙古司法改革史上首次建立之行政法院制度，以作為司法網絡重要的一部分。本文論及行政法院的特徵，主要關於管轄權範圍、程序以及工作負擔。雖然有許多問題仍待解決，但本文認為蒙古司法改革是成功的。

關鍵詞：司法獨立、司法問責、蒙古法院、蒙古司法改革、蒙古司法審查、行政法院制度。

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