

# MONGOLIA, LAW CONVERGENCE, AND THE THIRD ERA OF GLOBALIZATION\*

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## PROLOGUE

In the Spring of 2002, I received a call from a colleague in the School of Hawaiian, Asian, and Pacific Studies at the University of Hawai'i at Mānoa. My colleague wanted to gauge my interest in joining a university delegation to travel to Ulaanbaatar, Mongolia at the request of the Mongolian Government and the Academy of Management. The invitation was the result of an agreement between the Academy of Management, a Mongolian graduate and doctoral degree-granting institution and the University of Hawai'i to produce the Globalization and Development in Mongolia Joint Conference. Globalization peaked my interest almost as much as the prospect of visiting a former socialist country that, as recently as 1992, embraced a constitutional democracy anchored by the rule of law. I accepted the invitation and began preparing my thoughts on the newest era of globalization in one of the newest functioning democracies in the world.

As I made general preparations to travel to Mongolia, I was struck by how far many countries, including Mongolia, have come in transitioning to a market economy. Having read William E. Kovacic's account of the

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Represented at the Conference were The Distinguished Secretary of the Parliament of Mongolia, the Head of the Cabinet, Members of Parliament, the Director of the Academy of Management of Mongolia, the Interim Chancellor of the University of Hawai'i, and Faculty and Presenters from both the Academy of Management and the University of Hawai'i.

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long journey to Mongolia,<sup>1</sup> I was ready for almost anything—anything but a ten minute Internet search yielding three different itineraries for the sojourn from Honolulu, Hawai'i to Ulaanbaatar, Mongolia. In what seemed to me just one day of planning, I virtually connected to Korean Air, which offered me a one-stop flight to the land-locked agrarian country of Mongolia. The only bump was arranging travel during the Mongolian National Holiday called Naadam.<sup>2</sup> The simple experience of making travel arrangements provided a wonderful backdrop for my research regarding Mongolia's quest to study globalization, the Western rule of law, and the impact both of these principles have and will continue to have on Mongolia's young, yet successful constitutional democracy. In one day of preparation, I linked the islands of Hawai'i to Ulaanbaatar through the Internet, completed an airline transaction between Hawai'i and Seoul, South Korea, and learned about Mongolia's national cultural event called Naadam, which celebrates, among other things, the People's Revolution of 1921.

## I. INTRODUCTION

There is no more difficult a task to undertake than a discussion of the maximum optimal law regime that a nation-state should adhere to in an era of globalization and law convergence. Some truths, however, are

1. As recently as 1993, Professor Kovacic begins his accounts of his travel to Ulaanbaatar as follows:

For travelers from the United States, few destinations are more remote in culture or locale than Ulaanbaatar. From North America, reaching the capital of Mongolia usually involved an eleven-hour flight across the Pacific to Tokyo, a connecting five-hour leg to Beijing, and a concluding two-hour hop over northern China and the Gobi Desert in a fully-depreciated aircraft bulging with Chinese, Mongolian, and Russian merchants and their hand-carried wares. The long journey, austere accommodations, and extended, arduous winters, deter casual visitors.

William E. Kovacic, *The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries*, 11 AM. U.J. INT'L L. & POL'Y 437, 437 (1996).

2. Little seen by most outsiders throughout its history, Naadam has continued in modern times under the watchful eyes of observers from Russia and China, who split the Mongolian nation in half in the 1920s. See Ron Gluckman, *The Alternative Olympics*, <http://www.gluckman.com/Naadam.html> (last visited Oct. 15, 2003). In the Chinese-ruled region of Inner Mongolia, Naadam festivals have been held irregularly, often secretly and in outlying areas, due to official bans imposed periodically on displays of native culture. *Id.* In the Republic of Mongolia, which in 1990 became Central Asia's first democracy, the mid-summer festival was initiated by Genghis Kahn in the 12th Century. *Id.* Even under Soviet rule, Naadam remained the Mongol main event, slyly scheduled to begin July 11, for seven decades known as National Day, commemorating the People's Revolution of 1921, which made Mongolia the second communist republic after Russia. *Id.* Mongolia's more recent democratic revolution marked the departure of the former Soviet hosts and opened the festival to western eyes for the first time. *Id.*

immutable. Legal and judicial reform has intrinsic worth and value and a strong, apolitical judicial system can foster the protection of people, land, and economies.<sup>3</sup> Another truth—democratic countries are challenged when it comes to creating, maintaining, and evolving sound laws and regulations for the proper governing of their societies.<sup>4</sup> More so than ever, nation-states are either pushing for or being pushed into participating in the newest era of globalization.<sup>5</sup> It is this push that is the driving force behind global law reform and, in some instances, law hegemony.<sup>6</sup>

Ultimately, the question of law reform is one of will and desire. The perceived desirable outcome for a nation-state is the starting and ending places that will dictate the reception or adoption of part or all of a legal tradition, with a specific system and norms. Is the desired outcome a flexible legal system, capable of untold growth through experience and evolution? Or, is it an authoritative, coherent, and controlled system, capable of almost immediate certainty, at least in previously-conceived fact situations? Or, even more elusive, is there some magic combination of legal traditions and systems that can optimally address a nation—state's quest for law reform and facilitate democracy, open markets, and public law development to maximize, in the most positive manner, a nation-state's impact in the domestic as well as global communities? Responding

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3. See J. Brady Anderson, *Promoting the Rule of Law Around the World*, TRIAL, Nov. 2000, at 84 (concluding that “[i]mproving legal systems in developing countries is in the U.S. interest.”). By improving legal systems, developing countries can stimulate new trade, which attracts foreign, particularly Western, investment. See Matthew Stephenson, *Economic Development and the Quality of Legal Institutions*, <http://www1.worldbank.org/publicsector/legal/institutional.htm> (last visited Sept. 6, 2003).

4. See Tom Ginsburg & Gombosuren Ganzorig, *When Courts and Politics Collide: Mongolia's Constitutional Crisis*, 14 COLUM. J. ASIAN L. 309, 309 (2001). The authors, one of whom is a former judge of the Supreme Court of Mongolia, state: “Mongolia’s political system has received well-deserved attention as one of the most successful examples of democratization in the Asian region.” *Id.* The authors premise such praise on the fact that “Mongolia has undergone peaceful constitutional change and has conducted several democratic elections.” *Id.* In addition, in Mongolia, “[h]uman rights are well-respected, the media is free and political competition exists.” *Id.*

5. The newest era of globalization is a form of domination and colonization driven by technological innovation and the spread of Western cultural ideas, images, fads, and consumerism. See Thalif Deen, “Coca-Colonization” of the Third World, INTERPRESS SERVICE, (July 2, 1999), <http://www.globalpolicy.org/globaliz/special/cocacola.htm> (last visited Sept. 6, 2003). While developing nations are pushed into participation in the global market place of information, finance, and technology, ultimately it is a losing game. Despite the promise of globalization, not only is there uneven distribution of access to technology-based information, developed nations have also wielded their economic muscle to create the rules of the game, largely on a “take it or leave” it basis. Maxwell O. Chibundu, *Globalizing the Rule of Law: Some Thoughts at and on the Periphery*, 7 IND. J. GLOBAL LEGAL STUD. 79, 110-13 (1999).

6. Ultimately, only certain areas of the law are truly amenable to homogenization because such conflation in these areas would not offend or destroy culture, ideology, and natural law evolution in a defined society. See *infra* notes 56-68 and accompanying text.

to any of these questions, as they relate to Mongolia, requires an analysis of the family of legal traditions, with insight into the perceived similarities and differences. In turn, a discussion of the concept of globalization and the impact that it has on law reform and the development and sustainability of the rule of law in Mongolia should follow. Finally, some attention must be paid to those areas of law reform research that will benefit Mongolia in the long term. Regardless of the points covered herein, in today's global community law reform occurs mainly under the aegis of those within the internal system of government and the legal community. Therefore, law reformers in Mongolia must be the sponsors of the important issues to be researched and discussed in the future so as to correspond to the will and desires of the Mongolian people.

## II. LEGAL TRADITIONS

Legal traditions are sharply distinct from legal systems. A legal tradition "is a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in the society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected, and taught."<sup>7</sup> On the other hand, legal systems are the vehicles by which various individual nation-states, exercising and encouraging nationalism and sovereignty, characterize and implement their respective traditions.<sup>8</sup> Many legal traditions are in force across the globe, ranging from civil law, common law, and socialist law to Hindu law, Scandinavian law, Islamic law, and Indigenous Peoples' customary law.<sup>9</sup> Because the civil law and common law traditions are in force in powerful, technologically advanced nation-states, many developing countries involved in the global marketplace of information, finance, and technology are considering some level of implementation of these particular traditions.<sup>10</sup> It is, therefore, critical to analyze these traditions to determine whether implementation within Mongolia is necessary or even desirable.

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7. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA* 2 (2d ed. 1985).

8. *Id.* at 1-2. In other words, a legal system represents the rules, procedures, and institutions that exist within a particular government, whereas a legal tradition represents the ideology upon which that particular system is based. *See id.*

9. *Id.* at 4-5.

10. *Cf.* Rumu Sarkar, *The Legal Implications of Financial Sector Reform in Emerging Capital Market*, 13 AM. U. INT'L L. REV. 705, 723-24 (1998) (advocating a balance between a developing country's traditional legal customs and the adoption of Western forms of legal thought).

### A. *Similarities Between Civil Law and Common Law Traditions*

The civil law tradition owes much of its origin to “Roman civil law, canon law, and commercial law.”<sup>11</sup> The civil law tradition is premised upon a distinct ideology that reveres the unity of the state and the supremacy of legal certainty.<sup>12</sup> Civil law rests on the promotion of the legislature.<sup>13</sup> Thus, the very nature of the civil law tradition provides an unparalleled degree of clarity, completeness, and coherence in known or knowable circumstances. Inherently, the civil law tradition also provides a certain modicum of fairness because individuals within a civil law nation-state can feel confident about an outcome.<sup>14</sup> Certainty, so derived, surely has its successes, but can also count appreciably its weaknesses.

Despite its similarities to the common law tradition, the civil law tradition has a distinct ideology, one that elevates the very tradition to dogma and seeks to replace or nullify prior law or any existing interpretive law.<sup>15</sup> With this ideology in mind, it is critical to assess the viability of the

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11. See MERRYMAN, *supra* note 7, at 6 (stating “[t]he civil law tradition is a composite of several distinct subtraditions, with separate origins and developments in different periods of history.”). These subtraditions are usually described as “Roman civil law, canon law, commercial law, the revolution, and legal science.” *Id.* Roman law, compiled under Justinian in the sixth century A.D., dealt with “the law of persons, the family, inheritance, property, torts, unjust enrichment, and contracts and the remedies by which interests falling within these categories [received] judicial[] protect[ion].” *Id.* It is commonly held among those in the civil law tradition “that this group of subjects is a related body of law that constitutes the fundamental content of the legal system . . . and it is one of the principal distinguishing marks of what common lawyers call the civil law system.” *Id.* Canon law is a “body of law and procedure” that was developed for and by the Roman Catholic Church and its members. *Id.* at 10-11. Commercial law developed around the European commerce throughout the Mediterranean and drew from practical application of the interests of merchants rather than the compilations of scholars. *Id.* at 12-13.

12. See *id.* at 48 (linking certainty in a civil law tradition to clear, complete, judge-proof legislation). The civil law is premised on state positivism such that the state, as the absolute source of law, has a lawmaking monopoly and the role of the judiciary is limited to the application of codes. *Id.* at 22. Accordingly, certainty in law is achieved through a complete code without gaps or conflicting provisions, which would require judicial interpretation. *Id.* at 29.

13. See *id.* at 23 (“[T]he accepted theory of sources of law in the civil law tradition recognizes only statutes, regulations, and custom . . .”). A strict emphasis on separation of powers, stemming from French Revolutionary thought, demands that only the legislature has the power to make law. *Id.* at 22. However, as the supreme lawmaking power, the legislature can delegate its power to administrative agencies, thus giving administrative regulations force of law. *Id.* at 23. Similarly, custom is recognized only to the extent that there is no existing applicable statute or regulation contrary. *Id.*

14. See *id.* at 48 (“Legislation should be clear, complete, and coherent. . . The process of interpretation and application should be as automatic as possible. . .”). In contrast to the common law tradition where equity is achieved through *stare decisis* and judicial discretion, in a civil law state equitable powers are exercised by the legislature. *Id.* at 48-50. Equitable powers are exercised in two ways; the legislature can “specifically delegate that power [to the judiciary] in carefully defined situations” or it can “enact rules of equity for the judge to apply like other rules.” *Id.* at 52.

15. See *id.* at 20-22. Fueled by revolutionary change on the European continent and the

civil law tradition in the context of spreading federalism, constitutionalism, and continuous competition. In its purest form, the civil law tradition provides an authoritative response from a legislature responsible for portending and then enacting appropriate legislation to prescribe general conduct for particular circumstances. The legislature's actions to set and enforce the rules handed down to the masses work well in the absence of special relationships or circumstances. However, in this era of globalization, special relationships and circumstances are the norm rather than the exception. Along with the normative regime of special interests and relationships comes special interest laws.<sup>16</sup> One area of special interest, for example, is the protection and enforcement of rights in intellectual property. Whether prompted by the desire to be a member of the World Trade Organization (WTO) or just by the desire to be a part of the global economic and trade community, a nation-state must provide a certain level of protection for the intellectual property of its owners whether foreign or domestic. Under the pure civil law tradition, a state would be restricted to acting in the role of a referee, with a mandate to enforce the rules of the game. However, the WTO, alone, is an amalgam of policy and compromise intended to promote specific economic interests. Thus, in providing protection for intellectual property in accordance with WTO protocol, the new role of the civil law state actor becomes fundamentally distinct in ideology from its pure predecessor.<sup>17</sup>

The common law tradition dates back to the Norman conquest of England in 1066, but not until the late fifteenth century did the common

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concomitant desire to end the social and economic injustice of the old feudal order, the ideology of nationalism and state sovereignty emerged. *Id.* at 19. All other sources of law were largely eschewed in favor of the ultimate lawmaking power of the legislature. *Id.* at 20.

16. See Chibundu, *supra* note 5, at 108-10 (analyzing the application of "national treatment" and "most favored nation" status in multi-lateral agreements).

Enshrined most prominently in GATT, [most favored nation status] permits flexibility and discrimination in interstate negotiations, while requiring that the end-product of such negotiations be evenly applied to all members of the "club." A State gives only as much as it is willing, or able, to give to the whole, on the basis of its own calculated interests (including, of course, what it expects in reciprocity from its conduct), not on some uniform appeal to a standard or mean that represents a "second" or "third" best choice. Having settled on a standard, however, a State under MFN is then obliged to apply that standard to all other group members without regard to the level of reciprocal benefits from each individual State. Thus, MFN simultaneously recognizes and furthers the interest of each State in determining for itself the level of engagement with foreign States, while denying that State the capacity to choose (to discriminate insidiously) among the beneficiaries of that engagement.

*Id.* at 111.

17. See MERRYMAN, *supra* note 7, at 24 (describing modern tendencies and the erosion of the strict conception of what law is in a civil law state).

law resemble firm body of legal principles.<sup>18</sup> The common law tradition is based upon dispute resolution to achieve fairness and efficiency of results. Its strength lies in its very independence from an authoritative lawgiver who hands down law “in fixed and finite form.”<sup>19</sup> Like the civil law tradition, the common law tradition recognizes the desirability of certainty, although common law certainty is not held up as dogma.<sup>20</sup> Judge-made jurisprudence provides examples of the application of law and thereby establishes a range of resulting outcomes that can guide people in understanding their rights and obligations within a common law nation-state.<sup>21</sup> But akin to the civil law tradition, the common law tradition also

18. Daniel Berkowitz et al., *Economic Development, Legality, and the Transplant Effect* 4 (2001), at <http://www1.worldbank.org/publicsector/legal/pistor-transplants.pdf> (last visited Sept. 7, 2003). See also Sarkar, *supra* note 10, at 722.

The common law concepts behind the ideas of private property, contracts, and corporate law are complex and stem from the historical experience of the West from the transition of feudalism to mercantile capitalism to more advanced forms of capitalism. These historical transitions occurred over the course of several centuries, not over the course of several years.

*Id.*

19. Calvin Woodard, *Sir William Blackstone and Anglo-American Jurisprudence*, in *THE POLITICAL THEORY OF THE CONSTITUTION* 67, 75 (Kenneth W. Thompson ed., 1990). Unlike the origins of the civil law, the common law developed as a working legal system where “the task of prescribing rules defining the range of permissible individual behavior [was left] to the widely shared values of an insular people.” *Id.* at 74. Thus,

[t]he “splendid isolation” in which the common law developed—in court rooms and trials—was both its glory, and the cause of its most glaring weakness. The “glory” was that it did not owe its existence to any single, determinate law-giver, divine, royal or otherwise, who handed it “down” in fixed and finite form. To a significant degree, the legal system developed a life of its own, dominated to be sure by the legal profession, but nevertheless relatively independent of political intervention because there was no “authoritative word” to which it was bound.

*Id.* at 75. In fact, the common law “stemmed neither from God nor Nature nor any superhuman lawgiver. . . . [I]t was the ‘common law’ that had evolved, along with English society itself, from ancient custom.” *Id.* at 86.

20. See MERRYMAN, *supra* note 7, at 48-49. Merryman identifies three primary differences between legal certainty as recognized in the civil law and the common law. *Id.* In the common law tradition:

certainty is usually discussed in more functional terms, and is not elevated to the level of dogma. . . . [thus] recogniz[ing] that there are limits on the extent to which certainty is possible. Second, certainty is achieved in the common law by giving the force of law to judicial decisions, something theoretically forbidden in civil law. . . . Finally, in the common law world . . . it is more generally recognized that certainty is only one of a number of legal values, which sometimes conflict with each other. . . . In the common law, certainty and flexibility are seen as competing values, each tending to limit the other. In the civil law world, the supreme value is certainty, and the need for flexibility is seen as a series of “problems” complicating progress toward the ideal of judge-proof law.

*Id.* See *infra* notes 35-38 and accompanying text.

21. MERRYMAN, *supra* note 7, at 49. Only after gradual development did it become possible to distinguish between procedural rules and substantive rules. Woodard, *supra* note 19, at 79. “The facts of various cases define the nature of the ‘wrong,’ and the courts, in the process of imposing liability and immunity . . . reflect certain general principles or rules that become progressively clearer and more

contains its fair share of weaknesses.

Scholars have cited the unwieldy cataloguing and shelving of resource materials as one weakness of a law system premised upon the case method of dispute resolution.<sup>22</sup> Because of the wave of technological advancement, many impediments to adopting common law tradition no longer exist. This is no longer the era of brick and mortar libraries. Libraries of information can be transmitted with the click of a button through the Internet, which is accessed via high-speed connections such as broad band. Search engine software provides indexing technology, which allows a user to engage in focused research to find applicable source materials. Myriad higher education institutions provide their resources to the global community at a minimal charge. However, the ready availability of resources is not the primary component to creating an effective law system premised on precedent. Nor is technology the most critical component for the success of a law system. The most important component of a law system, without question, will be the people for whom the system is created.<sup>23</sup> As one Mongolian official stated, “New laws must be suited to our capabilities, experience, and circumstances. If new laws are to succeed, Mongolians will have to carry out the new laws. Do not forget the human dimension of reform.”<sup>24</sup>

For a common law or hybrid tradition to be effective, those elected or appointed to work within the system must believe in it and comprehend their role within it. Under the common law, the judiciary has a unique and

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refined as they evolve through time.” *Id.* Interestingly, the very characteristic from which the common law now derives much of its certainty, was historically the source of much criticism. Lacking a definitive code, the common law appeared unknowable to anyone except members of the Inns of Court. *Id.* at 75-76. “The crude fact was that nobody, certainly no layman, could ever be sure what the ‘law’ was until the courts spoke, and the judges could only speak in actual cases involving certain specific facts.” *Id.* at 76.

22. Paul H. Brietzke, *Choice of Legal System Reforms in Mongolia*, in “RECHTSREFORM UND DAS NATIONALE RECHTSSYSTEM”: INTERNATIONALES SYMPOSIUM [“LEGAL REFORM AND NATIONAL LEGAL SYSTEM”: INTERNATIONAL SYMPOSIUM] 82, 86 (2000).

23. See Berkowitz, *supra* note 18, at 2. Berkowitz, Pistor, and Richard explain that [f]irst, for the law to be effective, it must be meaningful in the context in which it is applied so citizens have an incentive to use the law and to demand institutions that work to enforce and develop the law [and, s]econd, the judges, lawyers, and other legal intermediaries that are responsible for developing the law must be able to increase the quality of the law in a way that is responsive to demand for legality.

*Id.*

24. William E. Kovacic, Recent Development, *The Competition Policy Entrepreneur and Law Reform in Formerly Communist and Socialist Countries*, 11 AM. U. J. INT’L L. & POL’Y 437, 438 (1996) (quoting a Mongolian official who commented on the enthusiasm with which foreign consultants provide laws and regulations from their own countries to reforming and developing countries).



significant role to play within the nation-state. A strong judiciary does not necessarily mean a superior governmental actor; rather, a strong judiciary means an independent actor, free from political persuasion and, thus, free to dispense justice. The Constitution of Mongolia, in fact, established the model for a strong judiciary. Article 47 of the constitution expresses the separation of powers doctrine by stating that the “[e]xercise of judicial power by any other organization but courts shall be prohibited.”<sup>25</sup> Furthermore, Article 49 of the constitution ensures that the judiciary has equal power in the governance of the nation. It states that, “Judges shall be independent and subject only to law.”<sup>26</sup> The significance of these two simple, yet powerful constitutional provisions is clear. Mongolia intends to raise the status of its judiciary and also intends to protect these public servants from politics, outside influence, or, in the worst case, corruption. While the common law tradition is not perfect, a strong judiciary, seeking justice with every ruling, is a formidable governmental entity, capable of evolving within the community as well as with other nation-states making up the global community. The flexibility and the equity that is so evident in the Mongolian Constitution is a hallmark of the common law tradition.

#### *B. Differences Between Civil Law and Common Law Traditions*

When American political scientist Martin Shapiro identified differences between civil law and common law traditions for purposes of characteristic comparisons, he observed that his identified differences were far more false than true.<sup>27</sup> Specifically, Shapiro stated:

For most areas of law in most countries . . . similarities overwhelm differences. . . . [S]ome authors may then seek the grail of universal legal principles derived from a universal moral or natural or categorical law, or international human rights, or the holy progress of the law, to meet universal human needs. To the less sanguine, the dominant similarities point only to the human concerns for security of person, mine and thine, and family that are indeed universal but are not necessarily moral, progressive or unifying. Others, more struck by the legal differences they observe, turn to adumbrating a global law divided into a number of families: common, civil, Islamic, Socialist, Confucian. . . . [M]ore sophisticated and subtle

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25. MONG. CONST. ch. III, pt. IV, art. 47.

26. MONG. CONST. ch. III, pt. IV, art. 49.

27. Martin Shapiro, *The Success of Judicial Review*, in CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE 193 (Sally J. Kenney et al. eds., 1999).

analyses indicate[] that certain ranges of variation between the members of each family exceed[] that variation between families, that many observable entities exhibit a mix of the basic features of two or more families and that phenomena, which at one level and technique of observation appear strikingly different, at another appear quite similar.<sup>28</sup>

There is no question that the civil law provides a measure of coherence, and this coherence buttresses the very ideology that a civil law tradition promotes—unity, nationalism, and simplicity. Additionally, the civil law tradition seeks to place more power in a legislature that is responsible for making law and less power in a judge responsible for applying the law.<sup>29</sup> Whether to demystify the law or to consolidate the power implicit in the function of lawmaking, the civil law tradition diminishes the authority of a judiciary to do little more than apply statutes to particular circumstances. The ideology of the common law tradition, however, does not augur well with the diminished authority of a judiciary to interpret the law and to use discretion only when necessary.<sup>30</sup> Pursuant to the common law tradition, the judiciary is empowered to fill those gaps left open by the legislature, even though principles of separation of powers govern.<sup>31</sup> Such gaps

28. *Id.*

29. See MERRYMAN, *supra* note 7, at 35. The status and role of the civil law judge stems from the tradition's Roman roots. *Id.*

The judge . . . of Rome was not a prominent man of the law . . . [H]e was, in effect, a layman discharging an arbitral function by presiding over the settlement of disputes according to formulae supplied by another official . . . The judge had no inherent lawmaking power . . .

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The net image is of the judge as an operator of a machine designed and built by legislators. His function is a mechanical one. . . .

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The result is that although there is a superficial similarity of function between the civil law judge and the common law judge, there are substantial disparities in their accepted roles.

*Id.* at 35-37.

30. See Woodard, *supra* note 18, at 73-74 (describing the development of the common law as a “dispute-resolving process . . . promoting procedures and practices that enhanced the fairness and efficiency of its results.”). The common law developed from judge-made law, tempered by precedent and, eventually, *stare decisis*. See *id.* at 91. Today, common law judges have the power of judicial review of legislation and administrative action, interpretive power where statutes and rules are incomplete, as well as equitable powers. MERRYMAN, *supra* note 7, at 34, 49, 51; see generally Shapiro, *supra* note 27 (discussing theories of judicial review).

31. See MERRYMAN, *supra* note 7, at 48-49. While both the common law and civil law traditions recognize the doctrine of separation of powers, the concept has distinct implications for each. “In the United States and England . . . judges had often been a progressive force on the side of the individual against the abuse of power by the ruler.” *Id.* at 14. Thus, for the common law, separation of powers was a symbol of “‘judicial independence’ and a relatively apolitical ‘rule of law.’” See Woodard, *supra* note 19, at 75. Contemporary civil law theory, however, rooted in French Revolutionary

include legislative silence, conflicting legislative provisions, and ambiguous or confusing legislative provisions.<sup>32</sup> In such cases, judges in the common law tradition perform the role of interpreter to provide equitable answers to impacted parties.<sup>33</sup> Thus, the ideology of the common law tradition is to promote flexibility.

This very ideology—promoting a legal system that develops through application and adaptation to analogous circumstances—is what gave birth to the phrase “the United States Constitution is elastic.”<sup>34</sup> Such an elastic constitution changes for and with the times and lends itself to interpretation to respond to the needs of an evolving society. While flexibility and functional equity are the focal points of the common law tradition, they are directly at odds with the ideology of the civil law tradition.<sup>35</sup> In the civil law tradition flexibility and certainty are in conflict, with the former placing power and control, equal to that of the legislature, in the hands of the judiciary. On the surface, the concept of flexibility appears antithetical to the principle of separation of powers, but such is not the case in modern, global society.<sup>36</sup> All branches of a democratic government have lawmaking roles. In this regard, level of equality ensures the existence of checks and balances, which ultimately benefit the citizens of that democracy. While such flexibility has the potential to create a more complex legal system, other balancing mechanisms exist within the executive and legislative branches to provide clarity and insight.<sup>37</sup>

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thought, employs separation of powers to ensure the supremacy of legislative law-making authority and “to prevent intrusion of the judiciary into areas—lawmaking and the execution of the laws—reserved to the other two powers.” MERRYMAN, *supra* note 7, at 15.

32. *Cf. id.* at 43. Meryman explains that while “the text of a statute remains unchanged, its meaning and application often change in response to social pressures.” *Id.* Additionally, future problems arise which the statute cannot portend. *Id.* In such a climate, the judiciary must have some inherent lawmaking authority to fill the gaps left by the legislature. *Id.*

33. *Id.*

34. Article I, section 8 of the United States Constitution is called the “elastic clause” because this principle allows the legislature and the courts to reinterpret and readapt the laws of the nation to the needs of an evolving society. Specifically, the elastic clause states that Congress shall have the authority “To make all Laws which shall be necessary and proper for carrying into Execution” the various powers allotted to the federal government by the Constitution. U.S. CONST. art. I, § 8, cl. 18.

35. *See* MERRYMAN, *supra* note 7, at 22 (explaining the civil law tradition’s emphasis on separation of powers).

36. *See* Stephenson, *supra* note 3 (weighing the value of credibility and flexibility of legal institutions in a developing economy).

37. In Article I, Section I of the United States Constitution, all legislative powers are vested in Congress. U.S. CONST. ART. I, § I. This power is offset by the executive branch’s power to implement legislation. Roberto Iraola, *Congressional Oversight, Executive Privilege, and Requests for Information Relating to Federal Criminal Investigations and Prosecutions*, 87 IOWA L. REV. 1559, 1564 (2002). The final authority as to whether “the executive or legislative branch exceeds [its] authority” is the judicial branch. *Id.* Agencies, as part of the legislative branch, are also vested with

### C. Modern Overlap

Returning to the earlier premise that common law and civil law traditions are more alike than different, one need only look to the following: the trend towards federalism in Europe; the spread of constitutionalism across the globe; and the increase in decodification in civil law countries for economic purposes, to appreciate that civil law and common law traditions are collapsing into each other in the wave of global integration.<sup>38</sup> The fact that civil law nation-states are enacting legislation by pointing to special policy interests and common law nation-states are attempting to achieve uniformity through either domestic codification of laws or commitment to treaties is not necessarily reflective of purely national interests. These trends signal a desire and willingness to integrate globally by defining a workable way in which domestic and foreign laws can be adapted instead of adhering to a specific legal tradition.<sup>39</sup>

To illustrate the point that the lines between legal traditions have blurred considerably, recall the example of the protection and enforcement of intellectual property. In earlier times, the laws governing intellectual property were significantly territorial in nature.<sup>40</sup> The purpose of these laws centered on domestic internal policy, which generally sought to incentivize invention and artistic creation for the betterment and enhancement of the nation-state and its citizens.<sup>41</sup> With the goal of

rule-making authority and therefore subject to the same checks and balances. For example, under the Administrative Procedure Act of 1946, agencies must submit to a notice and comment requirement before developing a legislative rule. 5 U.S.C. § 553(b)-(c) (2000). *See also* Thomas W. Merrill & Kathryn T. Watts, *Agency Rules With the Force of Law: The Original Convention*, 116 HARV. L. REV. 467 (2002) (discussing the checks and balances that exist within the agency rule-making authority).

38. *See, e.g.*, William M. Reisinger, *Legal Orientations and the Rule of Law in Post-Soviet Russia*, in CONSTITUTIONAL DIALOGUES IN COMPARATIVE PERSPECTIVE 172, 177 (Sally J. Kenny et al. eds., 1999) (identifying common law characteristics that have begun to emerge in the Russian civil law rooted system).

39. *See* Martin Shapiro, *The Globalization of Law*, 1 IND. J. GLOBAL LEGAL STUD. 37, 49 (1993) [hereinafter *The Globalization of Law*] (“[W]hat is sought globally is increased transparency of, and increased public participation in, bureaucratic decision-making.”). *Cf.* THOMAS L. FRIEDMAN, UNDERSTANDING GLOBALIZATION: THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION 10 (2000) (describing the change in economic perspective brought by globalization). “[L]et’s first study the global framework within which we operate and then decide what to produce.” *Id.*

40. JAY DRATLER, *INTELLECTUAL PROPERTY LAW: COMMERCIAL, CREATIVE, AND INDUSTRIAL PROPERTY*, § 1.09 (Law Journal Press 2003). Although lawyers and diplomats have devoted a tremendous amount of time and energy to developing international norms of intellectual property protection, intellectual property law is still largely national law. *Id.* The general principle of territoriality still governs, and it usually insures that each nation’s intellectual property laws have effect only with that nation’s borders. *Id.*

41. *See, e.g.*, *Tilghman v. Proctor*, 102 U.S. 707 (1881) (finding that a process for “the

improving a nation-state through incentivized invention, a nation-state relying on the civil law tradition could well establish myriad statutory provisions to define and clarify complex issues such as who is an owner of intellectual property, who is a creator or developer of an invention or work of art, what rights do owners and creators possess by virtue of their invention or work of art, and to whom do obligations flow after an owner or creator has produced an invention or work of art. In addition, a nation-state could define what constitutes an infringement upon those rights and obligations and under what circumstances, and finally what remedies are available for an infringement and to whom do they flow. Such issues could presumably be resolved with definitive answers from domestic statutes within the territorial framework of intellectual property protection and enforcement, such that the ideology of the civil law tradition is workable and effective.

Now consider the evolution of intellectual property protection and enforcement; specifically the interaction between nation-states and the clash of legal traditions in an environment, which necessitates the promotion of trade and international economies while stimulating national growth and invention through protection and certainty. In the modern era of globalization, laws once domestic in nature have become almost completely extra-territorial.<sup>42</sup> Several reasons exist for this phenomenon. First, travel and movement of individuals and products have reached new heights in efficiency. Second, modes of communication are now highly sophisticated. Third, technology has shifted the paradigm of trade from one nation-state with another to nation-state with nation-state, multinational corporations, small business enterprises, and individuals.<sup>43</sup>

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manufacturing of fat acids and glycerine from fatty bodies by the action of water at a high temperature and pressure" is patentable subject matter). In *Tilghman*, the U.S. Supreme Court declined to find anticipation from other, similar, processes previously employed in England and France. *Id.* at 711-12. Additionally, the Court upheld the antedating of the U.S. patent to that of the English patent because U.S. law provided

that no person shall be debarred from receiving a patent for any invention or discovery . . . by reason of the same having been patented in a foreign country more than six months prior to his application: *Provided*, That the same shall not have been introduced into public and common use in the United States prior to the application for such patent: *And provided also*, That in all cases every such patent shall be limited to the term of fourteen years from the date of publication of such foreign letters-patent. (emphasis in original).

*Id.* at 734 (quoting the 1839 law entitled, An Act in Addition to an Act to Promote the Progress of the Useful Arts).

42. See *The Globalization of Law*, *supra* note 39, at 38-39 (describing the globalization of contract and commercial law).

43. See Sarkar, *supra* note 10, at 706-07.

Global market integration is a reality, best exemplified by the Internet. An unknown concept a

Both paradigm shifting technology and relationships have created complex environments for trade, finance, social policy, and culture in just the areas of intellectual property. Nation-states not only incentivize invention to spur more development, but now these nation-states must consider other policies, such as attracting international capital investment, growing domestic corporate enterprises to satisfy domestic markets as well as exporting trade and services in international markets, and providing an infrastructure conducive for next generation technology, business, politics, and living.<sup>44</sup> What is clear from this focused study of evolution and globalization is that one legal tradition alone will not respond to the kaleidoscopic relationships, technological advancement, clashing cultures, and social policies, particularly those inherent in intellectual property. The complexity of today's globalization necessitates relying on more than one legal tradition to meet the challenges and demands of global technologies responsible for the integration of markets, economies, societies, and cultures.

### III. GLOBALIZATION AND THE RULE OF LAW

The current era of globalization is likely to continue. Thus, globalization, or, more aptly, Americanization, for better or for worse, is moving forward at warp speed.<sup>45</sup> The question then is reduced to whether nation-states will choose to keep pace with this era of globalization, wait for another era, or ignore this era of globalization entirely. Before answering these questions, it is important to define just what is globalization. There are many definitions because there are many tiers and levels to define this phenomenon.<sup>46</sup> For example, George Soros defines

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decade ago, the Internet is now an indispensable tool used by millions of people across the globe, many of whom live in the developing world. These relatively new cross-border exchanges are intensely liberating and have resulted in an explosion of information about emerging market economies. As a result, private actors in the industrialized world have expanded their entrepreneurial interests and forged new connections with the developing world. Thus, private entrepreneurs and investors have entered the development scene on an unprecedented scale. The movement toward more liberalized capital and technology flows is dramatic.

*Id.*

44. *See id.* (highlighting challenges faced by emerging capital economies).

45. *See The Globalization of Law, supra* note 39, at 39. Professor Shapiro correctly observes that, “[g]iven the place of the United States in the world economy, this globalization of law through private corporate lawmaking rather naturally takes the form of the global Americanization of commercial law.” *Id.* He remarks that “[o]ften when we speak of globalization we mean that certain American legal practices are being diffused throughout the world . . .” *Id.*

46. *See* Randall Peerenboom, *Globalization, Path Dependency, and the Limits of Law: Administrative Law Reform and the Rule of Law in The People's Republic of China*, 19 BERKELEY J. INT'L L. 161, 162 (2001).

globalization as “the free movement of capital and the increasing domination of national economies by global financial markets and multinational corporations.”<sup>47</sup> Even more broadly, Thomas L. Friedman defines globalization as:

the inexorable integration of markets, nation-states and technologies to a degree never witnessed before—in a way that . . . enabl[es] individuals, corporations and nation-states to reach around the world farther, faster, deeper and cheaper than ever before, and in a way that . . . enabl[es] the world to reach into individuals, corporations and nation-states farther, faster, deeper, cheaper than ever before.<sup>48</sup>

Globalization of law, however, is much more difficult to assess than globalization of markets, organizations, or culture. It is significant to weigh whether all of the world’s peoples and populations envision themselves living under one single set of legal rules, or whether they envision themselves as part of a movement toward uniformity in only a certain sector, namely the commercial sector, of a globalizing world.<sup>49</sup> Professor Shapiro makes the salient point that globalization of law, a distinct segment of globalization generally, must be considered “in reference to a number of interrelated phenomena.”<sup>50</sup> He observes that the world’s populations have signed on to globalization of law as related to the commercial sector, particularly in response to “the globalization of markets and the organization and business practices of the multi-national corporations that operate in those markets.”<sup>51</sup> In these situations, the

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Globalization can be measured in many ways. Indeed, whether one finds convergence, and hence signs of globalization, or divergence, depends to a large extent on the particular indicators that one chooses, the time frame and the degree of abstraction or focus. Markets, democracy, human rights and rule of law are broad standards, and each is capable of significant variation in theory and practice.

*Id.*

47. GEORGE SOROS, GEORGE SOROS ON GLOBALIZATION, vii (2002).

48. FRIEDMAN, *supra* note 39, at 9.

49. See generally *The Globalization of Law*, *supra* note 39, at 161-64 (discussing the international proliferation of American business law and general trends in the globalization of certain legal vectors). See also Lawrence M. Friedman, *Erewhon: The Coming of Global Legal Order*, 37 STAN. J. INT’L L. 347, 355 (2001).

In today’s world, people in, say, Estonia, are just as eager to dress internationally and eat international food as their government is to join NATO, the European Union, and other international organizations. But there is a certain tension between this desire to globalize, and the desire to preserve local culture.

50. *The Globalization of Law*, *supra* note 39, at 38.

51. *Id.*

globalization of law is an extremely narrow and limited legal phenomenon, which has yet to be capable of measuring the exact quantum of human relationships that it governs.<sup>52</sup>

#### A. *Avoiding the Transplantation Effect*

The selection of a legal tradition based upon the desired ideology of a nation-state is becoming less important in this era of globalization.<sup>53</sup> If globalization is a goal, then adopting law that has a level of familiarity for the transplanting state, and, more critically, is adopted within the context of domestic goals and principles is more important to a nation-state.<sup>54</sup> Contextual transplantation then is nothing more than legal realism within a nation-state. Legal realism refers to a philosophy of law or jurisprudence that proposes that most cases before courts present difficult questions that the judiciary must respond to and answer by balancing the interests of the parties and ultimately drawing a line between those parties in dispute.<sup>55</sup> This figurative line drawn by the judiciary is often done on the basis of its political, economic, and psychological inclinations.<sup>56</sup> Appropriately, transplantation of legal tradition and law systems from other nation-states that occurs, absent consideration of principles of legal realism within the

52. See Friedman, *supra* note 49, at 358.

It is, of course, an empirical question how far this convergence goes. It is widely believed that there remains an “American” way of drafting contracts—with every possible contingency spelled out—and a “Japanese” way which simply sets out the general framework and leaves the rest, through a handshake or nod of the head, more or less to the good faith of the parties. Oddly though, it is the “Japanese” way which, on the surface at least, seems to presume more convergence. After all, the parties to a deal must share some kind of normative presupposition to make the handshake effective. The deal has to rest on an understanding, on a framework of custom. Between two Japanese business people, the handshake may mean one thing; in the international sphere it would be another matter entirely.

*Id.* (citations omitted).

53. Berkowitz, *supra* note 18, at 2 (“[T]he ‘transplantation effect’ is a more important predictor of legality than the supply of a particular legal family. . . . Moreover, the overall impact of the transplanting process is stronger than the impact of [sic.] transplanting a particular legal family.”).

54. See William E. Kovacic, *Designing and Implementing Competition and Consumer Protection Reforms in Transitional Economies: Perspectives from Mongolia, Nepal, Ukraine, and Zimbabwe*, 44 DEPAUL L. REV. 1197, 1202-03 (1995) [hereinafter *Competition and Consumer Protection Reforms*] (“[L]aw reform initiatives take place in a distinctive national context, featuring a mix of commercial, government, social, and political institutions and circumstances with important implications for the substance and process of law reform.”).

55. See Michael P. Ambrosio, *Legal Realism*, 205 N.J. LAW. 30 (2000) (discussing legal realism and its role in American jurisprudence).

56. See *id.* at 35 (“Realism . . . emphasizes the power of judges . . . to exercise discretion in the application of legal rules. . . . Thus, it is inevitable that the choice of law and the interpretation of facts will reflect the value preferences of judges and juries to form the unarticulated basis for legal decisions.”).



adopting nation-state, may cause confusion, backlash, or rejection within the adopting nation-state.<sup>57</sup> Such results are often referred to as the transplantation effect.<sup>58</sup>

Avoiding the transplantation effect in this era of globalization requires legal reformers to develop a climate of acceptance of new law systems through respect for the judiciary, preservation of the rule of law, and informed study of the law and the reasons supporting the law.<sup>59</sup> It is very likely that one law adopted in a foreign country for one purpose may have little to no effect in an adopting country, because each country may have a different climate for what may on the surface appear to be the same issue.<sup>60</sup> Legal reformers should also be keen about the goals of a government premised upon the rule of law and the method and manner of

57. See Berkowitz, *supra* note 18, at 7-8 (identifying adaptation of a transplanted legal order to the preexisting legal order and familiarity with the legal system from which a nation-state is borrowing as indicators of receptiveness); *Competition and Consumer Protection Reforms*, *supra* note 52, at 1224 (“The tasks of law design and implementation . . . requires a sustained in-country presence by technical advisors, close collaboration with indigenous experts, and a willingness to provide assistance through the critical period in which the host country’s institutions are applying the new law.”).

58. Berkowitz, *supra* note 18, at 3.

Virtually all countries today have a set of rules embodied in codes or court cases that were established by designated state organs, and state institutions in charge of enforcing these rules. We call this set of rules the formal legal order. Although it is quite important in many countries today, the formal legal order is but one element of the governance structure of society. All societies, including the most developed ones, are also governed by informal norms and institutions. This informal legal order evolves over time mostly by internalizing existing norms of a social group . . . .

[C]ountries that have developed formal legal orders internally, adapted the transplanted law to local conditions, and/or had a population that was already familiar with basic legal principles of the transplanted law should be able to further develop the formal legal codes and build effective legal systems. By contrast, countries that received foreign legal systems without similar predispositions are much more constrained in their ability to develop the formal legal order and will have greater difficulties in developing effective legal systems (the transplant effect).

*Id.*

59. Mongolia, for example, has two high courts, the Supreme Court and the Constitutional Court. See MONG. CONST. ch. III, pt. IV, art. 50-51 and MONG. CONST. ch. V, for the constitutional provisions governing the Supreme Court and the Constitutional Court of Mongolia. The latter, not directly part of the structure of the Judiciary, serves a supervisory role to “guarantee . . . the strict observance of the Constitution.” MONG. CONST. ch. V, art. 64, § 1. See also Anita Davis, *Bridging Old and New Democracies: Texas Wesleyan University School of Law Hosts Mongolian Judges*, 64 TEX. BAR J. 482, 483 (2001). The Constitutional Court is the only body with jurisdiction to hear constitutional disputes. See *id.* The judges of the remaining courts usually do not apply the constitution in everyday practice. *Id.* Because Mongolia’s stability is key to a stable northeast Asia, the United States Agency for International Development (USAID) has promised a grant of \$10 million toward the reform of Mongolia’s judicial institutions in order to increase judicial responsibility and independence. *Id.* While altruism should always be the goal, the purpose of the investment is to assuage Western investors who want to guarantee “fairness and accessibility of the courts of any country” in which they do business. See *id.*

60. Berkowitz, *supra* note 18, at 6.

their implementation.<sup>61</sup> The Western rule of law is based upon political and civil liberties and market mechanisms, which promote participatory, egalitarian, and inclusive values of democracy.<sup>62</sup> The Western rule of law also respects and promotes the separation of powers. It recognizes the equality of the people with the state as well as the equality of state actors amongst themselves.<sup>63</sup> Thus, for example, if the legislative or executive branches of government have taken considerable time and effort to develop empirical support for a law that it has created or adopted from another nation-state, then the judiciary should take great steps to respect the implementation of the law. Equally important, the judiciary must evaluate the success of a law and determine whether that law achieves its desired purpose. A law that does not accomplish its purpose has no value as a rule. Thus, these branches of government, with equality of lawmaking power, have the ability to adapt the Western rule of law to fit into the context of a particular nation-state. Nation-states must be aware that in very few circumstances will wholesale adoption of foreign law systems yield meaningful results for the transplanting nation.<sup>64</sup> Accordingly, legal reformers must create a “buy-in” climate that citizens and government are invested in and depend upon to meet independent and national desires.<sup>65</sup>

61. See Sarkar, *supra* note 10, at 723-24 (warning of the trade-offs of wholesale adoption of a foreign legal order without first considering the climate of the developing or transitioning country).

62. See *id.* at 724 (discussing the ideals of democracy and the role of democratization in transitioning countries).

63. See *The Globalization of Law*, *supra* note 39, at 48-49 (discussing judicial review and constitutional guarantees of individual rights as governmental limitations).

64. See Chibundu, *supra* note 5, at 115. Professor Chibundu concludes,

[T]he “two spaces of globalization” are as present in the area of the “rule of law” as elsewhere. There are those spheres of technocratic elitism into which a small proportion of the Third World may have bought, but there are other spaces of globalization—the spaces not simply of “civil society,” but of weakened States . . . . The near-instantaneous communication across the globe provided by current and emerging technologies makes it easy to believe that we are all going through the same experiences. In this atmosphere, it is tempting to see law, particularly the rule of law, as simply another commodity easily manufactured according to well-delineated specifications and readily sold across borders and cultures. When we do so, the specifications we have in mind are, of course, those with which we are familiar; those that have proved successful in our dominant societies are those of the West . . . . Even if one assumes shared experiences, the response to those experiences is unlikely to be identical. To the extent that the rule of law calls for rationally articulable responses to experience, we may expect the development of certain patterns of behavior; but it is unlikely that those patterns will be identical in their content.

*Id.* See also *supra* notes 55-61 and accompanying text.

65. See Anderson, *supra* note 3, at 85 (stating that “constituency-building elements feature prominently in most rule-of-law activities.”); *Competition and Consumer Protection Reforms*, *supra* note 56, at 1213 (“Citizens in many formerly communist or socialist countries are accustomed to nonenforcement, or highly selective application, of laws and regulations. The lack of commitment and institutions to enforce nominal requirements engenders cynicism about the rule of law and the usefulness of enacting new legal commands.”).

Equally imperative in this era of globalization is gauging the desires of public and private parties before the adoption of a law or law system, because often public and private party interests conflict.<sup>66</sup> To illustrate this potential conflict, one need only look to the Constitution of Mongolia. Article 7 provides for the protection of traditional resource rights of the indigenous people of Mongolia, stating that the “Historical, cultural, scientific, and intellectual heritages of the Mongolian people shall be under state protection.”<sup>67</sup> This provision exists under the Sovereignty chapter of the constitution. But, in the Human Rights and Freedoms chapter of the constitution, Article 16, subsection 8 guarantees citizens the privilege to enjoy, as a right, the opportunity to create intellectual property that will be protected by law: “The citizens of Mongolia shall be guaranteed the privilege to enjoy . . . the right to engage in creative work in cultural, artistic and scientific fields and to benefit thereof. Copyrights and patents shall be protected by law.”<sup>68</sup> The State seeks to protect the traditional resource rights of Indigenous Peoples from potential exploitation, while, citizens and domestic companies may wish to profit or benefit from the sale of potentially the same intellectual resource. The former and its constituency represent the public party interest, while the latter represents the private party interest. In seeking to become involved in the global marketplace, a nation-state must address and define its political, economic, and social agenda before settling on rules of law from other nation-states that may not be consistent with the adopting state’s policies.<sup>69</sup> In the above example, if a potential conflict does exist between

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66. See Sarkar, *supra* note 10, at 721-24. The range of competing public and private interests to be weighed and considered during the formulation and implementation of a legal system is both broad and interrelated. If participation in the globalized marketplace is a goal, reformers should consider the expectations of a foreign investor when developing a rule of law regime, it is more important, in the long and short term, to refrain from sacrificing national interests, concerns, and traditions for those of a globalized marketplace. *Id.* To make such a sacrifice often results in confusion, uncertainty, and conflicting laws; defeating the purpose of law reform aimed at attracting capital. *Id.* See also Berkowitz, *supra* note 18, at 16 (“[A] legal reform strategy should aim at improving legality by carefully choosing legal rules whose meaning can be understood and whose purpose is appreciated by domestic law makers, law enforcers, and economic agents . . .”).

67. MONG. CONST. ch. I, art. 7, § 1.

68. MONG. CONST. ch. II, art. 16, § 8.

69. The area of intellectual property offers further illustration in a broader scope. In order to secure trade advantages, developed nation-states advocated for and won international protection of intellectual property through the Trade Related Aspects of Intellectual Property (TRIPS). While “internationalis[ing] standards of protection under intellectual property law, thereby eliminating trade distortions and impediments to international trade that arise from incompatible legal systems,” TRIPS protects the intellectual property of developed nations and simultaneously disadvantages developing and transitioning nations. TONY SIMPSON, *INDIGENOUS HERITAGE AND SELF-DETERMINATION* 116 (1997). The disadvantage is rooted in the inability to access new technologies, which negatively

public and private parties respecting the commodification of traditional resource rights, a domestic policy compromise between these two positions should occur.

### *B. Achieving the Rule of Law*

The conflict and compromise scenario will pervade all domestic policy for all nation-states caught in the wave of globalization. Whether speaking about the impact of globalization on intellectual property rights or discussing tangible property rights or the homogenization of culture, globalization will seek to integrate and change ways of economic and social existence.<sup>70</sup> Globalization will have an impact on the makeup of society, changing once agrarian lifestyles to urban, placing more emphasis on production and innovation, accelerating life and movement beyond the tolerance of many members of society.<sup>71</sup> Such societal changes impact the distribution of law and justice, particularly when globalization is accompanied by free, open markets.<sup>72</sup> Economies will receive capital infusion as a reward for innovation, people will be drawn to centers of commerce to become involved in innovation, and law and law systems will necessarily grow around these environments.<sup>73</sup> The task is to balance

impacts economic development, and impinges on a nation's "sovereign right . . . to exploit their resources in accordance with nationally-determined development policies and priorities." *Id.* at 116.

70. See Friedman, *supra* note 49, at 351.

Certainly, the mass media have powerfully affected world culture. They have influenced the patterns of wants and desires, the patterns of consumption and hoped-for consumption, and the demands for goods and services. Hence, global culture is the messenger that prepares the way for international trade.

But who consumes this global culture? . . . Science and technology have revolutionized production, created the industrial world, and as a result, have produced enormous world wealth. The wealth is very badly distributed within many countries, to be sure, and even more so between countries. Most people in the world are still immured in poverty and misery, without access to the Internet, to jet travel, or even to television.

*Id.*; see, e.g., Daniel Salau, *Globalisation Entrenches Itself on the Maasai*, CIVICUS, Sept. 2002, at <http://globalpolicy.org/globalizing/cultural/2002/0920massai.htm> (last visited Sept. 6, 2003).

71. See Friedman, *supra* note 49, at 348-49 (stating that globalization has globalized two things: trade and people). Ultimately, the phenomena of the proliferation of the Western media, "huge multinational corporations, companies that are everywhere and nowhere," and "[o]rdinary people, business people, jet-setters, tourists, refugees, in-migrants, and out-migrants move[ing] rapidly in and out of their countries and across the world," means that "the Japan of today [is] more like the France of today, than it is like the old, feudal Japan of Lady Murasaki or the Kyoto court." *Id.* at 348-49, 353.

72. See generally Chantal Thomas, *Globalization and the Reproduction of Hierarchy*, 33 U.C. DAVIS L. REV 1451 (2000); Gracia Clark, *The Roots of Cultural Backlash in Contemporary Processes of Globalization*, 7 IND. J. GLOBAL LEGAL STUD. 257 (1999).

73. See, e.g., Jeremy Rifkin, *Is Ownership an Outmoded Concept?*, L.A. TIMES, Apr. 10, 2000, <http://www.commondreams.org/views/041000-103.htm> (last visited Aug. 29, 2003) (describing the restructuring of the concept of property and ownership).

such growth by injecting legal realism to support both international and domestic initiatives that in turn reduce the level of homogenization attendant with globalization.<sup>74</sup> The rule of law can accomplish this balancing act by promoting strong internal legal systems directed at national interests. The Mongolian Constitution provides for this in Article 1, Section 2,: “The supreme principles of the activities of the State shall be ensurance of democracy, justice, freedom, equality and national unity and respect of law.”<sup>75</sup>

Essential to achieving respect for the law, as well as to strengthening legal institutions and creating a climate favorable to economic development, is the promotion of the constitutional function of each governmental entity. Legal stability fosters both social and economic development through certainty, ultimately providing a balance between national interests and economic growth. Another hallmark of the overlap between the globalization of law and Americanization is the worldwide proliferation of “written constitutions dividing government powers and guaranteeing individual rights, [and] the spread of constitutional courts and constitutional judicial review.”<sup>76</sup> Professor Shapiro notes that

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74. *See Competition and Consumer Protection Reforms*, *supra* note 56, at 1216. Professor Kovacic opines: “To the greatest extent possible, the law’s substantive commands and implementation mechanism should build upon existing legal commands and institutions.” *Id.* *See also*, Sarkar, *supra* note 10, at 723. Although Rumu Sarkar agrees that a rule of law regime is necessary if a developing country intends to attract Western foreign investment, Sarkar warns that adoption of Western legal thought may have extremely high costs, “especially when indigenous or traditional forms of legal thought and governance are sacrificed in the process.” *Id.* Sarkar further states: “A developing country’s own legal conceptual framework, legal history, and institutions may lose [its] authenticity in this process, and that loss could be permanent.” *Id.*

75. MONG. CONST. ch. I, art. 1, § 2.

76. *The Globalization of Law*, *supra* note 39, at 48. The trend toward constitutionalism and judicial review may appear antithetical to the theory underlying the civil law tradition. While the civil law states of the European continent, did not adopt a system of judicial review until after World War II, France, Germany, and Italy now have flourishing systems. *Id.* Further, Eastern European states as well as Asian post-Leninist states “have adopted constitutional judicial review almost automatically.” *Id.* The recognition of judicial review as an important limitation on governmental powers manifests differently along the lines of common law and civil law traditions. Unlike the U.S. model, where every court can rule on the constitutionality of a law, civil law states have created a separate constitutional court. *The World Bank Group, Constitutional Review and Government Accountability*, at <http://www1.worldbank.org/publicsector/legal/review.htm> (last visited Aug. 29, 2003). The primary rationale for creating a separate court harkens back to the role of judges in the civil law tradition. Constitutional review often requires “judges to decide value-laden, quasi-political matters” and thus requires much greater discretion; career civil law judges, it was believed, “were unlikely to have the policy and political skills needed.” *Id.* Additional nuances to the systems of judicial review are practiced by nation-states. Some constitutional courts act as an overseer and conduct abstract review of laws while others are empowered to decide the issue only if it is presented in a controversy between two litigants. *Id.* *See* Shapiro, *supra* note 27 for a discussion of the various hypothesis behind the phenomenon of judicial review.

“[w]henever a constitution divides powers, it almost always necessitates a constitutional court to police the boundaries.”<sup>77</sup> Emerging as an important ingredient toward the security of a transition government is, thus, an independent judiciary, which serves to temper legislative and executive discretion.<sup>78</sup> The Constitution of Mongolia, in fact, provides for a Constitutional Court, mandated to “guarantee . . . the strict observance of the Constitution.”<sup>79</sup>

However, providing for judicial review by an independent constitutional court and achieving actualization are discrete matters.<sup>80</sup> For example, the Parliament, the State Great Hural, and the Constitutional Court of Mongolia appear to be at an impasse, severely threatening the legitimacy of the court. Following an initial period in which “Mongolia’s democratic system seemed to be deepening,”<sup>81</sup> the Court was faced with the question of whether the Constitution established “a presidential system where the cabinet is unrelated to the parliament” or whether the system created was “a parliamentary system, wherein the government is formed by the leading parties in parliament.”<sup>82</sup> The provision of the Constitution

77. *The Globalization of Law*, *supra* note 39, at 49. See also Shapiro, *supra* note 27, at 196-99.

78. See Christopher M. Larkins, *Judicial Independence and Democratization: A Theoretical and Conceptual Analysis*, 44 AM. J. COMP. L. 605, 606 (1996) (“Ideally, through the application of judicial or constitutional review, judges cannot only mediate conflicts between political actors but also prevent the arbitrary exercise of government power. In fulfilling this role, the courts become powerful actors in maintaining the submission of the state to law.”).

79. MONG. CONST. ch. V, art. 64, § 1.

80. Several factors have been identified as integral to the definition of judicial independence. The first is impartiality, “or the idea that judges will base their decisions on the law and the facts, not any predilection toward one of the litigants.” Larkins, *supra* note 80, at 609. Another has been termed “‘political insularity,’ or the notion that judges should not be used as tools to further political aims nor punished for preventing their realization.” *Id.* The government is often viewed as posing “the most serious threat to judicial independence for two reasons: it has a potential interest in the outcome of myriad cases, and it has so much potential power over judges.” Matthew Stephenson, *Judicial Independence: What it is, How it Can be Measured, Why it Occurs*, at <http://www1.worldbank.org/publicsector/legal/judicialindependence.htm> (last visited Aug. 29, 2003). The final characteristic of an independent judiciary is that, once rendered, judicial decisions are respected, especially in relation to “the scope of the judiciary’s authority as an institution or, in other words, the relationship of the courts to other parts of the political system and society, and the extent to which they are collectively seen as a legitimate body for the determination of right, wrong, legal, and illegal.” Larkin, *supra* note 78, at 610.

81. Ginsburg, *supra* note 4, at 311. After the promulgation of the 1992 Constitution, ushering in a new era of democracy, the Constitutional Court of Mongolia successfully exercised its jurisdiction by occasionally reviewing legislation, sometimes striking it as unconstitutional, and resolving a number of politically charged disputes in a “manner that led to the increased legitimacy of the Court.” *Id.*

82. *Id.* at 312. The controversy arose when, following the 1996 parliamentary elections, the Court was petitioned to “prevent the [parliamentary majority] from filling the cabinet with members of the State Great Hural relying on a provision in the Constitution that ‘members of parliament shall have no other employment.’” *Id.* at 311. In this initial round, the Court found that members of parliament could not hold cabinet positions, erupting “several tensions in the political system that were either

of Mongolia in question provides, “Members of the State Great Hural . . . shall not hold concurrently any posts and employment other than those assigned by law.”<sup>83</sup> The events that followed resemble a political tug-of-war. In response to the Court’s decision that there was a separation between the Parliament and the Cabinet, the Parliament passed a constitutional amendment, which the Court also found “incompatible with the Constitution, particularly the separation of powers principle.”<sup>84</sup> After further jockeying, the Parliament initiated and passed another, identical, amendment.<sup>85</sup> However, like the first, this amendment will ultimately come before the Court, again, begging the original question.<sup>86</sup>

Legal and economic reform stir a variety of internal and external tensions. In strengthening legal institutions and the rule of law, reformers should be wary, not only of the external influences brought by globalization, but also those internal power struggles that may ultimately undermine the transition process. The Mongolian situation may be best considered through the doctrine of separation of powers. The mandate and jurisdiction of the Constitutional Court is set forth in the Constitution.<sup>87</sup> Functioning as a fourth arm of government, the Court “exercis[es] supreme supervision over the implementation of the Constitution, making judgment on the violation of its provisions and resolving constitutional disputes.”<sup>88</sup> By repeatedly ignoring the findings of the Court relating to the separation of Parliament and the Cabinet, the Mongolian Parliament is effectively hindering the transition process and weakening the rule of law.<sup>89</sup> Judicial empowerment does not have to mean judicial superiority.

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directly caused or exacerbated by the decision to separate the parliament from the government.” *Id.* at 311, 314. When the Parliament passed legislation in 1998 “to allow Members of Parliament to serve in the Cabinet,” and when challenged, the Court followed its original decision and rendered the law unconstitutional, “the result was political chaos.” *Id.* at 314.

83. MONG. CONST. ch. III, art. 29, § 1.

84. Ginsburg, *supra* note 4, at 317.

85. *Id.* at 321.

86. *Id.*

87. The Constitutional Court is not directly a part of the judiciary. *Compare* MONG. CONST. ch. V (establishing the Constitutional Court of Mongolia) with MONG. CONST. ch. III, art. 47-56 (establishing the Judiciary of Mongolia). Interestingly, the Court is created under a separate chapter of the Constitution, whereas the other branches of government, the legislature, a divided executive, and the judiciary, are created in the same chapter of the Constitution. *Compare* MONG. CONST. ch. V (establishing the Constitutional Court of Mongolia) with MONG. CONST. ch. III (establishing the state structure of Mongolia).

88. MONG. CONST. ch. V, art. 64, § 1.

89. Following the Court’s initial decision that the first amendment passed by the Parliament was unconstitutional, the Parliament failed to follow its own procedural rules and neither accepted nor rejected the Court’s decision. Ginsburg, *supra* note 4, at 317. The Parliament subsequently debated the issue and voted that the Court had “heard an issue outside its jurisdiction—namely the constitutionality

Close study should reveal that a strong, apolitical judiciary helps to guarantee the elasticity of the constitutional principles that is the pillar of Mongolia's new democracy. For these principles to apply, the rule of law should be practiced at all levels of the judiciary, thereby allowing for the flexibility and fairness of a democratic justice system to reverberate throughout the entire legal system.

#### IV. FUTURE ISSUES

Law is a tool, and lawyers and judges are social engineers. As such, law should assist a nation-state in achieving just goals for its citizenry. Mongolia should look at law reform, legal traditions, and law systems with an eye toward navigating through this era of globalization by defining its will, its desires, and its goals. Post-World War II saw one era of globalization, and the technology revolution has borne yet another. More opportunities will undoubtedly emerge to become even more connected to the global marketplace. The keys to law reform and law system adoption are to know the limits for receiving laws from other nations, inject legal realism of the adopting State into the adopted law, and strengthen the rule of law within the State by promoting transparency of the law, thus building confidence in the system encouraging flexibility in the interpretation of law, and allowing for evolution of that law in changed circumstances, one of which will surely be yet another era of globalization. Mongolia should also study additional methods to promote domestic human rights laws, such as labor laws, environmental laws, education laws, and child protection laws.<sup>90</sup> Adherence to these types of public laws should benefit any bargain that Mongolia strikes with Western globalists.

If time permitted more research regarding the law of intellectual property protection and enforcement, the law and policy on traditional resource rights of the indigenous peoples of Mongolia, as compared to the

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of a constitutional amendment." *Id.* at 318. In effect, the Parliament circumvented the Constitution and "authorized itself to interpret the Constitution," a duty exclusively delegated to the Court. *Id.*

90. Another trend in the globalization of law has been the "worldwide increase of legal protection against the ill effects of technical, economic, and social devices too complex, distant, or powerful to make individual self-protection possible." *The Globalization of Law*, *supra* note 39, at 50. On the surface, these types of laws serve the most important function of law; they address the protection and welfare of people. However, they have been labeled "protectionist" by economists. By enacting laws like environmental laws and consumer protection laws, a nation-state can create effective trade barriers. *Id.* at 51. Consequently, in the capitalist mind, two alternatives surface: recognition of each country's standards, effectively creating a "race to the bottom" to attract more and more capital or a movement toward transnational standards of protection. *See id.* at 52-54.



private intellectual property rights of citizens engaged in the production of inventions and creative works, would be of great interest.<sup>91</sup> A large facet of trade in the global community has been the exploitation and commodification of spirituality, culture, art, and medicines of the indigenous peoples, like the Aboriginal Peoples of Australia, the Maori Peoples of Aotearoa, and the Native Hawaiians, Alaska Natives, and Native Americans of the United States.<sup>92</sup> In the case of each of these peoples, law worked as a colonizing force, and traditional resource rights became a commodity for the colonizers' trade and desecration.<sup>93</sup> Globalization may have a similar impact on the Indigenous Peoples of Mongolia, but time and attention to this area of inquiry may avoid future conflict and even inspire compromise.

Another area of inquiry is the State perspective on the development and creation of intellectual property at the government's expense or with government resources, but where the innovation results from individual endeavor or the time and effort of a party in contract with the State. This area is especially controversial in this era of globalization because technology provides individuals with the power to bargain with individuals or corporations in foreign countries or even with foreign governments for intellectual properties that are, by their very nature, movable and easily transportable. Such areas of inquiry require study and refining so that Mongolia, like other nation-states, can promote national unity through innovation while still providing citizens with the incentive to produce and create for their individual benefit.

## V. CONCLUSION

Globalization is about pure competition. Law is the tool that protects people from the harms attendant with competition. Free and open markets are the highlight of today's globalization. Understanding and defining the

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91. The cultural and intellectual property rights of the world's indigenous peoples are areas gaining critical attention in national and international forums. See UNITED NATIONS HIGH COMMISSION ON HUMAN RIGHTS, LEAFLET NO. 12: WIPO AND INDIGENOUS PEOPLES, at <http://www.unhchr.ch/html/racism/indileaflet12.doc> (last visited Aug. 29, 2003) for a synopsis of the cultural and intellectual property rights of indigenous peoples as well as initiatives and activities related to its protection. See also Wilton Littlechild, *Report of the First Session of the Permanent Forum on Indigenous Issues*, E/2002/42 ¶¶ 61-62, 81-82 (2002); *Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples: First International Conference on the Cultural & Intellectual Property Rights of Indigenous Peoples*, Whakatane, Aotearoa, New Zealand (1993), at <http://www.ipcb.org/resolutionshtmls/mataatua.htm> (last visited Aug. 29, 2003).

92. See generally Doris Estelle Long, *The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective*, 23 N.C. J. INT'L L. & COM. REG. 229 (1998).

93. *Id.*

course that a nation-state should take in this era of globalization is the cornerstone for recognizing how much globalization a nation can withstand. This era of globalization means Americanization and that leading the global community in globalization creates a commensurate responsibility to temper the hegemonic impact that globalization will have on developing nations, their markets, and their cultures. If globalization is to be optimal, nation-states should insist on law reform and implementation that will protect their borders. To work optimally for all, globalization must be accompanied by a strong and respected rule of law. The rule of law is a principle to be followed for both adopting nation-states and particularly for the leaders of globalization, which in this era is the United States. Without the rule of law, regardless of the legal tradition that a nation-state follows, chaos will result, and chaos does not make for efficient markets, much less civilized societies.

## APPENDIX

THE CONSTITUTION OF MONGOLIA<sup>94</sup>

We, the people of Mongolia:

- Strengthening the independence and sovereignty of the state,
- Cherishing human rights and freedoms, justice and national unity,
- Inheriting the traditions of national statehood, history and culture,
- Respecting the accomplishments of human civilization,
- And aspiring toward the supreme objective of building a human, civil and democratic society in the country

Hereby proclaim the Constitution of Mongolia.

## CHAPTER ONE

## Sovereignty of Mongolia

Article 1

1. Mongolia is independent, sovereign republic.
2. The supreme principles of the activities of the State shall be ensurance of democracy, justice, freedom, equality and national unity and respect of law.

Article 2

1. By its state structure, Mongolia is a unitary State.
2. The territory of Mongolia shall be divided into administrative units only.

Article 3

1. State power shall be vested in the people of Mongolia. The people shall exercise it through their direct participation in state affairs and through the representative bodies of State power elected by them.
2. Illegal seizure of State power or attempt to do so shall be prohibited.

Article 4

1. The territorial integrity and frontiers of Mongolia shall be inviolable.
2. The frontiers of Mongolia shall be safeguarded by law.
3. Stationing of foreign troops in the territory of Mongolia, allowing them to cross the state borders for the purpose of passing through the country's territory shall be prohibited unless an appropriate law is adopted.

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94. Translated by Lama Bataa Mishigish.

Article 5

1. Mongolia shall have an economy based on different forms of property and answering both universal trends of world economic development and national specifics.
2. The state shall recognize all forms of both public and private property and shall protect the rights of the owner by law.
3. The owner's rights shall be restricted exclusively by due process of law.
4. The State shall regulate the economy of the country with a view to ensure the nation's economic security, the development of all modes of production and social development of the population.
5. The livestock is national wealth and subject to state protection.

Article 6

1. The land, its subsoil, forests, water, fauna and flora and other natural resources shall be subject to national sovereignty and state protection.
2. The land except that in citizen's private ownership, as well as the subsoil with its mineral wealth, forest, water resources and game shall be the property of the State.
3. The State may give for private ownership plots of land, except pastures and areas under public and special use, only to the citizens of Mongolia. This provision shall not apply to the ownership of the subsoil thereof.

Citizens shall be prohibited to transfer the land in their possession to foreign nationals and stateless persons by way of selling, bartering, donating or pledging as well as transferring to others for exploitation without permission from competent state authorities.

4. The State shall have the right to hold responsible the landowners in connection with the manner the land is used, to exchange or take it over with compensation on the grounds of special public need, or confiscate the land if it is used in a manner adverse to the health of the population, the interests of environmental protection and national security.
5. The State may allow foreign nationals, legal persons and stateless persons to lease land for a specified period of time under conditions and procedures as provided for by law.

Article 7

1. Historical, cultural, scientific and intellectual heritages of the Mongolian people shall be under State protection.

2. Intellectual values produced by the citizens are the property of their authors and the national wealth of Mongolia.

#### Article 8

1. The Mongolian language is the official language of the State.
2. Section 1 of this Article shall not affect the right of national minorities of other tongues to use their native languages in education and communication and in the pursuit of cultural, artistic and scientific activities.

#### Article 9

1. The State shall respect religions and religions shall honor the State.
2. State institutions shall not engage in religious activities and the Church shall not pursue political activities.
3. The relationship between the State and the Church shall be regulated by law.

#### Article 10

1. Mongolia shall adhere to the universally recognized norms and principles of international law and pursue a peaceful foreign policy.
2. Mongolia shall fulfill in good faith its obligations under international treaties to which it is a Party.
3. The international treaties to which Mongolia is a Party, shall become effective as domestic legislation upon the entry into force of the laws on their ratification or accession.
4. Mongolia shall not abide by any international treaty or other instruments incompatible with its Constitution.

#### Article 11

1. The duty of the State is to secure the country's independence, ensure national security and public order.
2. Mongolia shall have armed forces for self-defense. The structure and organization of the armed forces and the rules of military service shall be determined by law.

#### Article 12

1. The symbols of the independence and sovereignty of Mongolia are the State Emblem, Banner, Flag, Seal and the Anthem.
2. The State Emblem, Banner, Flag and the Anthem shall express the historical tradition, aspiration, unity, justice and the spirit of the people of Mongolia.
3. The State Emblem shall be of circular shape with the white lotus serving as its base and the "never-ending Tumen Nasan" pattern forming its outer frame. The main background is of

blue color signifying the eternal blue sky, the Mongols traditional sanctity.

In the center of the Emblem a combination of the Precious Steed and the Golden Soyombo sign is depicted as an expression of the independence, sovereignty and spirit of Mongolia.

In the upper part of the Emblem, the Chandmani ( Wish-granting Jewel) sign symbolizes the past, the present and the future.

In the lower part of the Emblem, the sign of the Wheel entwined with the silk scarf Hadag in an expression of reverence and respect, symbolizes continued prosperity. It is placed against the background of a “hill” pattern conveying the notion of “mother earth.”

- 4.The traditional Great White Banner of the unified Mongolian State is a state ceremonial attribute.
- 5.The State Flag shall be a rectangle divided vertically into three equal parts colored red, blue, and red. The blue color of the center of the flag, symbolizes “the eternal blue sky” and the red color on both sides symbolizes progress and prosperity. The Golden Soyombo sign shall be depicted on the red stripe nearest to the flagpole. The ratio of the width and length of the Flag shall be 1:2.
- 6.The State Seal having a lion-shaped handle, shall be of a square form with the State Emblem in the center and the words “Mongol Uls” (Mongolia) inscribed on both sides. The President shall be the holder of the State Seal.
- 7.The procedure for the ceremonial use of the State symbols and the text and melody of the State Anthem shall be prescribed by the law.

#### Article 13

- 1.The capital of the State shall be the city where the State Supreme bodies permanently sit. The capital city of Mongolia is the city of Ulaanbaatar.
- 2.The legal status of the capital city shall be defined by law.

### CHAPTER TWO

#### Human Rights and Freedoms

#### Article 14

- 1.All persons lawfully residing within Mongolia are equal before the law and the court.

2.No person shall be discriminated on the basis of ethnic origin, language, race, age, sex, social origin and status, property, occupation and post, religion, opinion or education. Every one shall be a person before the law.

#### Article 15

- 1.The grounds and procedure for Mongolian nationality, acquisition or loss of citizenship shall be defined only by law.
- 2.Deprivation of Mongolian citizenship, exile and extradition of citizens of Mongolia shall be prohibited.

#### Article 16

The citizens of Mongolia shall be guaranteed the privilege to enjoy the following rights and freedoms:

1) the right to life. Deprivation of human life shall be strictly prohibited unless capital punishment constructed by Mongolian penal law for the most serious crimes, is imposed by a competent court as its final decision.

2) the right to healthy and safe environment, and to be protected against environmental pollution and ecological imbalance.

3) the right to fair acquisition, possession and inheritance of movable and immovable property. Illegal confiscation and requisitioning of the private property of citizens shall be prohibited. If the State and its bodies appropriate private property on the basis of exclusive public need, they shall do so with due compensation and payment.

4) the right to free choice of employment, favorable conditions of work, remuneration, rest and private enterprise. No one shall be unlawfully forced to work.

5) the right to material and financial assistance in old age, disability, childbirth and childcare and in other cases as provided by law.

6) the right to the protection of health and medical care. The procedure and conditions of free medical aid shall be defined by law.

7) the right to education. The State shall provide basic general education free of charge. Citizens may establish and operate private schools if these meet the requirements of the State.

8) the right to engage in creative work in cultural, artistic and scientific fields and to benefit thereof. Copyrights and patents shall be protected by law.

9) the right to take part in the government of the country directly or through representative bodies. The right to elect and to be elected to State bodies. The right to elect shall be enjoyed from the age of eighteen years and the age eligible for being elected shall be defined by law according to the requirements in respect of the bodies or posts concerned.

10) the right to freedom of association in political parties or other voluntary organizations on the basis of social and personal interests and opinion. Political parties and other mass organizations shall uphold public order and state security, and abide by law. Discrimination and persecution of a person or joining a political party or other associations or for being their member shall be prohibited. Party membership of some categories of state employees may be suspended.

11) Men and women shall have equal right in political, economic, social, cultural fields and in marriage. Marriage shall be based on the equality and mutual consent of the spouses who have reached the age defined by law. The State shall protect the interests of the family, motherhood and the child.

12) the right to submit a petition or a complaint to State bodies and officials. The State bodies and officials shall be obliged to respond to the petitions or complaints of citizens in conformity with law.

13) the right to personal liberty and safety. No one shall be searched, arrested, detained, persecuted or restricted of liberty save in accordance with procedures and grounds determined by law. No one shall be subjected to torture, inhuman, cruel or degrading treatment. Where a person is arrested he/she, his/her family and counsel shall be notified within a period of time established by law of the reasons for and grounds of the arrest. Privacy of citizens, their families, correspondence and residence shall be protected by law.

14) the right to appeal to the court to protect his/her right if he/she considers that the right of freedoms as spelt out by the Mongolian law or an international treaty have been violated; to be compensated for the damage illegally caused by other; not to testify against himself/herself, his/her family, or parents and children; to defense; to receive legal assistance; to have evidence examined; to a fair trial; to be tried in his/her presence; to appeal against a court judgment to seek pardon.



Compelling to testify against himself/herself shall be prohibited. Every person shall be presumed innocent until proved guilty by a court by due process of law. The penalties imposed on the convicted shall not be applicable to his/her family and relatives.

15) Freedom of conscience and religion.

16) Freedom of thought, opinion and expression, speech, press, peaceful assembly. Procedures for organizing demonstrations and other assemblies shall be determined by law.

17) the right to seek and receive information except that which the State and its bodies are legally bound to protect as secret. In order to protect human rights, dignity and reputation of persons and to ensure national defense, security and public order, the information which is not subject to disclosure shall be classified and protected by law.

18) the right to freedom of movement and residence within the country, to travel or reside abroad, to return to home country. The right to travel and reside abroad may be limited exclusively by law for the purpose of ensuring the security of the country and population and protecting public order.

#### Article 17

1. Citizens of Mongolia while upholding justice and humanism, shall fulfill in good faith the following basic duties:

- 1) to respect and abide by the Constitution and other laws;
- 2) to respect the dignity, reputation, right and legitimate interests of others;
- 3) to pay taxes levied by law;
- 4) to defend motherland and serve in the army according to law.

2. It is a sacred duty for every citizen to work, protect his/her health, bring up and educate his/her children and to protect nature and the environment.

#### Article 18

1. The rights and duties of aliens residing in Mongolia shall be regulated by the Mongolian law and by the treaties concluded with the State of the person concerned.

2. Mongolia shall adhere to the principle of reciprocity in determining the rights and duties of foreign nationals in an international treaty being concluded with the country concerned.

3. The rights and duties of stateless persons within the territory of Mongolia shall be determined by the Mongolian law.
4. Aliens or stateless persons persecuted for their convictions, political or other activities pursuing justice, may be granted asylum in Mongolia on the basis of their well-founded requests.
5. In allowing the foreign nationals and stateless persons under the jurisdiction of Mongolia to exercise the basic rights and freedoms provided for in Article 16 of the Constitution, the State of Mongolia may establish necessary restrictions upon the rights other than the inalienable rights spelt out in international instruments to which Mongolia is a Party, out of the consideration of ensuring the national security of the country and populations, and public order.

#### Article 19

1. The State shall be responsible to the citizens for the creation of economic, social, legal and other guarantees for ensuring human rights and freedoms, for the prevention of violation of human rights and freedoms and to restoration of infringed rights.
2. In case of a state of emergency or martial law, the human rights and freedoms as defined by the Constitution and other laws shall be subject to limitation only by a law. Such a law shall not affect the right to life, the freedom of thought, conscience and religion, as well as the right not to be subjected to torture, inhuman and cruel treatment.
3. In exercising his/her rights and freedoms one shall not infringe on the national security, rights and freedoms of others and violate public order.

### CHAPTER THREE

#### The State Structure of Mongolia

##### I. The State Great Hural of Mongolia

#### Article 20

The State Great Hural of Mongolia is the highest organ of State power and the supreme legislative power shall be vested only in the State Great Hural.

#### Article 21

1. The State Great Hural shall have one chamber and consist of 76 members.

2. The members of the State Great Hural shall be elected by citizens of Mongolia entitled to vote, on the basis of universal, free, direct suffrage by secret ballot for a term of four years.
3. Citizens of Mongolia who have reached the age of 25 years and are eligible for elections shall be elected to the State Great Hural.
4. The procedure of the election of members of the State Great Hural shall be defined by law.

#### Article 22

1. If extraordinary circumstances arising from sudden calamities occurring in the whole or a part of the country, imposition of martial law or outbreak of public disorder prevent regular general elections from being held, the State Great Hural shall retain its mandate till extraordinary circumstances cease to exist and the newly elected members of the State Great Hural are sworn in.
2. The State Great Hural may decide on its dissolution if not less than two thirds of its members consider that the State Great Hural is unable to carry out its mandate, or if the President in consolidation with the Chairman of the State Great Hural, proposes to do so for the same reason. In case of such a decision, the State Great Hural shall exercise its powers till the newly elected members of the State Great Hural are sworn in.

#### Article 23

1. A member of the State Great Hural shall be an envoy of the people and shall represent and uphold the interests of all the citizens and the State.
2. The mandate of a member of the State Great Hural shall begin with an oath taken before the State Emblem and expire when newly elected members of the State Great Hural are sworn in.

#### Article 24

1. Chairman and Vice-Chairman of the State Great Hural shall be nominated and elected from among the members of the State Great Hural by secret ballot.
2. The term of office of the Chairman and Vice-Chairman of the State Great Hural shall be four years. They can be relieved of or removed from their posts before the expiry of their terms for reasons defined by law.

#### Article 25

1. The State Great Hural may consider at its initiative any issue pertaining to domestic and foreign policies of the country, and

shall keep within its exclusive competence the following questions and decide thereon:

- 1) to enact laws, make amendments to them;
- 2) to define the basis of the domestic and foreign policies of the State;
- 3) to set and announce the date of elections of the President and the State Great Hural and its members;
- 4) to determine and change the structure and composition of the Standing Committees of the State Great Hural, the Government and other bodies directly accountable to it according to law;
- 5) to pass a law recognizing the full powers of the President after his/her election and to relieve or remove the President;
- 6) to appoint, replace or remove the Prime Minister, members of the Government and other bodies responsible and accountable to the State Great Hural as provided for by law;
- 7) to define the State's financial, credit, tax and monetary policies; to lay down the guidelines for the country's economic and social development; to approve the Government's program of action, the State budget and the report on its execution;
- 8) to supervise the implementation of laws and other decisions of the State Great Hural;
- 9) to define the State borders;
- 10) to determine the structure, composition and powers of the National Security Council of Mongolia;
- 11) to approve and change the administrative and territorial divisions of Mongolia at the suggestion by the Government;
- 12) to determine the legal basis of the system, structure and activities of local self-governing and administrative bodies;
- 13) to institute titles, orders, medals and higher military ranks; to determine the table of ranks in some special fields of State service;
- 14) to issue acts of amnesty
- 15) to ratify and denounce international agreements to which Mongolia is a Party; to establish and sever diplomatic relations with foreign State at the suggestion of the Government;
- 16) to hold national referendums. To verify the validity of a referendum in which the majority of eligible citizens has

taken part, and to consider the question which has obtained majority votes as decided;

17) to declare a state of war in case the sovereignty and independence of Mongolia are threatened by armed actions on the part of a foreign Power, and to abate it;

18) to declare a state of emergency or martial law in the whole or some parts of the country in special circumstances described in Sections 2 and 3 of this Article, and to approve or nullify the President's decree to that effect.

2. Under the following extraordinary circumstances the State Great Hural may declare a state of emergency to eliminate the consequences thereof and to restore the life of the population and society to norm:

1) natural disasters or other unforeseen dangers which have threatened or may threaten directly the life, health, well being and security of the population in the whole or a part of the country's territory, occur;

2) public authorities are not able within legal limits to cope with public disorders caused by organized, violent, illegal actions of any organization or a group of people threatening the constitutional order and the existence of the legitimate social system.

3. The State Great Hural may declare martial law if public disorders in the whole or a part of the country's territory result in an armed conflict or create a real threat of an armed conflict, or if there is an armed aggression or real threat of an aggression from outside.

4. The other powers, structure and the procedures of the State Great Hural shall be defined by law.

#### Article 26

1. The President, members of the State Great Hural and the Government shall have the right to legislative initiate.

2. Citizens and other organizations shall forward their suggestions on draft laws to those entitled to initiate a law.

3. The State Great Hural shall officially promulgate national laws through publication and, if law does not provide otherwise, it shall be effective 10 days after the day of publication.

#### Article 27

1. The State Great Hural shall exercise its powers through its sessions and other organizational forms.

- 2.Regular sessions of the State Great Hural shall be convened once in six months and last not less than 75 working days on each occasion.
- 3.Extraordinary sessions may be convened at the demand of more than one third of the members of the State Great Hural, and/or on the initiative of the President and the Chairman of the State Great Hural.
- 4.The President shall convoke constituent session of the State Great Hural within 30 days following the elections. Other sessions shall be convoked by the Chairman of the State Great Hural.
- 5.In case of the proclamation by the President of a state of emergency or war, the State Great Hural shall be convened for an extraordinary session within 72 hours without prior announcement.
- 6.The presence of an overwhelming majority of the State Great Hural shall be required to consider a session valid, and decisions shall be taken by a majority of all members present if the Constitution and other laws do not provide otherwise.

Article 28

- 1.The State Great Hural shall have Standing Committees dealing with specific fields.
- 2.The State Great Hural shall determine the competence, structure and procedures of the Standing Committees.

Article 29

- 1.Members of the State Great Hural shall be remunerated from the State budget during their tenure and shall not hold concurrently any posts and employment other than those assigned by law.
- 2.Immunity of members of the State Great Hural shall be protected by law.
- 3.If a question arises that a member of the State Great Hural is involved in a crime, it shall be considered by the session of the State Great Hural to decide on the suspension of his/her mandate. If the court proves the member in question to be guilty of crime, the State Great Hural shall terminate his/her membership in the legislature.

II. The President of Mongolia

Article 30

- 1.The President of Mongolia shall be the Head of State and embodiment of the unity of the people.

2. An indigenous citizen of Mongolia who has attained the age of forty-five years and has permanently resided as a minimum for the last five years in Mongolia, shall be eligible for election to the post of President for a term of four years.

#### Article 31

1. Presidential elections shall be conducted in two stages.
2. Political parties which have obtained seats in the State Great Hural shall nominate individually or collectively Presidential candidates, one candidate per a party or coalition of parties.
3. At the primary stage of the elections citizens of Mongolia eligible to vote shall participate in electing the President on the basis of universal, free direct suffrage by secret ballot.
4. The State Great Hural shall consider the candidate who has obtained a majority of all votes cast in the first voting as elected, the President, and shall pass a law recognizing his/her mandate.
5. If none of the candidates obtains a majority vote in the first round, second voting shall take place involving the two candidates who have obtained the largest number of votes in the first round. The candidate who a law recognizing his/her mandate shall be passed by the State Great Hural.
6. If neither of the candidates wins in the second ballot, Presidential elections shall be held anew.
7. The President can be re-elected only once.
8. The President shall not be a member of the State Great Hural or the Government and shall not concurrently hold the post of the Prime Minister or any other posts and pursue any occupation not relating to his duties assigned by law. If the President holds another office or a post he/she shall be relieved of it from the date on which he/she is inaugurated.

#### Article 32

1. The mandate of the President shall become effective with an oath taken by him/her and shall expire with an oath taken by the newly elected President.
2. Within 30 days after the election the President shall take an oath before the State Great Rural: "I swear that I shall guard and defend the independence and sovereignty of Mongolia, freedom of the people and national unity and I shall uphold and observe the Constitution and faithfully perform the duties of the President".

Article 33

1. The President enjoys the following prerogative rights:

1) to veto, partially or wholly, laws and other decisions adopted by the State Great Hural. The laws or decisions shall remain in force if two thirds of the members of the State Great Hural present do not accept the President's veto;

2) to propose to the State Great Hural the candidature for the appointment to the post of Prime Minister in consultation with the majority party or parties in the State Great Hural if none of them has majority of seats, as well as to propose to the State Great Hural the dissolution of the Government;

3) to instruct the Government on issues within his competence. If the President issues a relevant decree it shall become effective upon signature by the Prime Minister;

4) to represent the Mongolian State in foreign and, in consultation with the State Great Hural, to conclude international treaties on behalf of Mongolia;

5) to appoint and recall heads of plenipotentiary missions of Mongolia to foreign countries in consultation with the State Great Hural;

6) to receive the Letters of Credence or Recall of Heads of diplomatic missions of foreign states in Mongolia;

7) to confer state titles and higher military ranks and award orders and medals;

8) to grant pardon;

9) to decide matters related to granting and withdrawing Mongolian citizenship and granting asylum;

10) to head the National Security Council of Mongolia;

11) to declare general or partial conscription;

12) to declare a state of emergency or martial law on the whole or a part of the national territory and to order the deployment of armed forces when extraordinary circumstances described in Sections 2 and 3 of Article 25 of this Constitution arise and the State Great Hural concurrently in recess, cannot be summoned at short notice. The State Great Hural shall consider within 7 days the presidential decree declaring a state of emergency or martial law and shall approve or disapprove it. If the State Great Hural does not take decision on the matter, the Presidential decree shall become null and void.



- 2.The President shall be the Commander-in-Chief of the armed forces of Mongolia.
- 3.The President may address messages to the State Great Hural and/or to the people, he may at his own discretion attend sessions of the State Great Hural, report on and submit proposals concerning vital issues of domestic and foreign policies of the country.
- 4.Other specific powers may be vested in the President only by law.

#### Article 34

- 1.The President within his powers shall issue decrees in conformity with law.
- 2.If a Presidential decree is incompatible with law, the President himself or the State Great Hural shall invalidate it.

#### Article 35

- 1.The President shall be responsible to the State Great Hural.
- 2.In case of a violation of the Constitution and/or abuse of power in breach of his oath, the President may be removed from his post on the basis of the finding of the Constitutional Court by an overwhelming majority of members of the State Great Hural present and voting.

#### Article 36

- 1.The person, residence and transport of the President shall be inviolable.
- 2.Dignity and immunity of the President shall be protected by law.

#### Article 37

- 1.In the temporary absence of the President his full powers shall be exercised by the Chairman of the State Great Hural.
- 2.In the event of the resignation, death or voluntary retirement of the President his full powers shall be exercised by the Chairman of the State Great Hural pending the inauguration of the newly elected President. In such a case the State Great Hural shall announce and hold Presidential elections within four months.
- 3.The procedure of the discharge of Presidential duties by the Chairman of the State Great Hural shall be determined by law.

### III. The Government of Mongolia

#### Article 38

- 1.The Government of Mongolia is the highest executive body of the State.

2. In discharging the duty of directing economic, social and cultural development of the country in observance of State laws, the Government shall exercise the following powers:

1) to organize and ensure nation-wide implementation of the Constitution and other laws;

2) to work out a comprehensive policy on science and technology, guidelines for economic and social development, the State budget, credit and fiscal plans and to submit these to the State Great Hural and to execute decisions taken thereon;

3) to elaborate and implement comprehensive measures on sectional, intersectoral, as well as regional development;

4) to undertake measures on the protection of the environment and on the rational use and restoration of natural resources;

5) to provide efficient leadership of central state administrative bodies and to direct the activities of local administrations;

6) to strengthen the country's defense capabilities and to ensure national security;

7) to take measure for the protection of human rights and freedoms, enforcement of public order and prevention of crime;

8) to realize the State foreign policy;

9) to conclude and implement international treaties with the consent of and subsequent ratification by the State Great Hural as well as to conclude and abrogate intergovernmental treaties.

3. The specific powers, structure and procedure of the Government shall be determined by law.

#### Article 39

1. The Government shall comprise the Prime Minister and members.

2. The Prime Minister shall, in consultation with the President, submit his/her proposals on the structure and composition of the Government and on changes in these to the State Great Hural.

3. The State Great Hural shall consider the candidatures proposed by the Prime Minister one by one and take decision on their appointment.

#### Article 40

1. The term of the mandate of the Government shall be four years.

2. The term of office of the Government shall start from the day of the appointment of the Prime Minister by the State Great Hural and terminate upon the appointment of a new Prime Minister.

Article 41

1. The Prime Minister shall lead the Government and shall be responsible to the State Great Hural for the implementation of State laws.
2. The Government shall be accountable for its work to the State Great Hural.

Article 42

Personal immunity of the Prime Minister and members of the Government shall be protected by law.

Article 43

1. The Prime Minister may tender his/her resignation to the State Great Hural before the expiry of his/her term of office if he/she considers that the Government is unable to exercise its powers.
2. The Government shall step down in its entirety upon the resignation of the Prime Minister or if half of the members of the Government resign at the same time.
3. The State Great Hural shall consider the matter and make a final decision within 15 days after taking initiative to dissolve the Government or receiving the President's proposal or the Prime Minister's statement on resignation.
4. The State Great Hural shall consider and take decision on the dissolution of the Government if not less than one fourth of the members of the State Great Hural formally proposes the dissolution of the Government.

Article 44

If the Government submits a draft resolution requesting a vote of confidence, the State Great Hural shall proceed with the matter in accordance with Section 3 of Article 43.

Article 45

1. The Government shall, in conformity with legislation, issue resolutions and ordinances which shall be signed by the Prime Minister and the Minister concerned.
2. If these resolutions and ordinances are incompatible with laws and regulations, the Government itself or the State Great Hural shall invalidate them.

Article 46

1. Ministries and other government offices of Mongolia shall be constituted in accordance with law.
2. State employees shall be Mongolian nationals. They shall strictly abide by the Constitution and other laws and work for the benefit of the people and in the interest of the State.
3. The working conditions and social guarantees of state employees shall be determined by law.

IV. THE JUDICIARY

Article 47

1. The judicial power shall be vested exclusively in courts.
2. Unlawful institution of courts under any circumstances and exercise of judicial power by any other organization but courts shall be prohibited.
3. Courts shall be instituted solely under the Constitution and other laws.

Article 48

1. The judicial system shall consist of the Supreme Court, Aimag and capital city courts, Soum, intersoum and district courts. Specialized courts such as criminal, civil and administrative courts may be formed. The activities and decisions of the specialized courts shall not but be under the supervision of the Supreme Court.
2. The structure of courts and the legal basis of their activities shall be defined by law.
3. The courts shall be financed from the State budget. The State shall ensure economic guarantee of the courts activities.

Article 49

1. Judges shall be independent and subject only to law.
2. Neither a private person nor any civil officer be it the President, Prime Minister, members of the State Great Hural or the Government, officials of political parties or other voluntary organizations shall not interfere with the exercise by the judges of their duties.
3. A General Council of Courts shall function for the purposes of ensuring the independence of the judiciary.
4. The General Council of Courts, 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 the ensurance of conditions guaranteeing the independence of the judiciary.

5.The structure and procedures of the General Council of Courts shall be defined by law.

Article 50

- 1.The Supreme Court shall be the highest judicial organ and shall exercise the following powers:
  - 1) to try at first instance criminal cases and legal disputes under its jurisdiction;
  - 2) to examine decisions of lower-instance courts through appeal and supervision;
  - 3) to examine and take decision on matters related to the protection of law and human rights and freedoms therein and transferred to it by the Constitutional Court and the Prosecutor General;
  - 4) to provide official interpretations for correct application of all other laws except the Constitution;
  - 5) to make judgments on all other matters assigned to it by law.
- 2.The decision made by the Supreme Court shall be final judiciary decision and shall be binding upon all courts and other persons. If a decision made by the Supreme Court is incompatible with a law, the Supreme Court itself shall have to repeal it. If an interpretation made by the Supreme Court is incompatible with a law, the latter shall have precedence.
- 3.The Supreme Court and other courts shall have no right to apply laws that are unconstitutional or have not been promulgated.

Article 51

- 1.The Supreme Court shall comprise the Chief Justice and judges.
- 2.The President shall appoint the judges of the Supreme Court upon their presentation to the State Great Hural by the General Council of Courts, and appoint judges of other courts on the proposal of the General Council of Courts.
- 3.A Mongolian national of thirty-five years of age with higher education in law and a professional career or not less than 10 years may be appointed a judge of the Supreme Court. A Mongolian national of twenty-five years of age with higher education in law and a professional career of not less than three years may be appointed judge of the other courts.
- 4.Removal of a judge of a court of any instance shall be prohibited except in cases 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.

Article 52

1. Courts of all instances shall consider and make judgment on cases and disputes on the basis of collective decision-making.
2. In passing a collective decision on cases and disputes, the courts of first instance shall allow representatives of citizens to participate in the proceedings in accordance with the procedures prescribed by law.
3. A judge alone may take decision on some cases which are specifically singled out by law.

Article 53

1. Court trials shall be conducted in the Mongolian language.
2. A person who does not know Mongolian shall be acquainted with all facts of the case through translation and shall have the right to use his/her native language at the trial.

Article 54

1. Court trials shall be open to the public except in cases specifically singled out by law.

Article 55

1. The accused shall have a right to defense.
2. The accused shall be accorded legal assistance according to law and at his/her request.

Article 56

1. The Prosecutor shall exercise supervision over the inquiry into and investigation of cases and the execution of punishment, and participate in the court proceedings on behalf of the State.
2. The President shall appoint the State Prosecutor General and his/her deputies in consultation with the State Great Hural for a term of six years.
3. The system, structure and legal basis of the activities of the Prosecutor's Office shall be determined by law.

CHAPTER FOUR

Administrative and Territorial Units and their Governing Bodies

Article 57

1. The territory of Mongolia shall be divided administratively into Aimags and a capital city; Aimags shall be subdivided into Soums; Soums into Baghs; the capital city shall be divided into districts and districts into Horoos.
2. Legal status of towns and villages located on the territories of administrative divisions shall be defined by law.

3. Revision of an administrative and territorial unit shall be considered and decided by the State Great Hural on the basis of a proposal by a respective local Hural and local population, and with account taken of the country's economic structure and the distribution of the population.

Article 58

1. Aimag, the capital city, Soum and district are administrative, territorial and socio-economic complexes with their functions and administrations provided for by law.
2. Borderlines of Aimags, the capital city, Soums and districts shall be approved by the State Great Hural at the suggestion of the Government.

Article 59

1. Governance of administrative and territorial units of Mongolia shall be organized on the basis of combination of the principles of both self-government and central government.
2. The self-governing bodies in Aimag, capital city, Soum and district shall be Hurals of Representatives of the citizens of respective territories; in Bagh and Horoo-General Meetings of citizens. In between the sessions of the Hurals and General Meetings their Presidiums shall assume administrative functions.
3. Hurals of Aimags and the capital city shall be elected for a term of four years. The memberships of these Hurals as well as those of Soums and districts, and the procedure of their election shall be determined by law.

Article 60

1. State power shall be exercised on the territories of Aimags, the capital city, Soums, districts, Baghs and Horoos by their respective Governors.
2. Candidates for Governors are nominated by the Hurals of respective Aimags, the capital city, Soums, districts, Baghs and Horoos. Governors of Aimags and the capital city are appointed by the Prime Minister; Soums and district Governors by the Governors of Aimags and the capital city; Governors of Baghs and Horoos by the Governors of Soums and districts respectively for a term of four years.
3. In case the Prime Minister and Governors of higher levels refuse to appoint the gubernatorial candidates, new nominations shall be held in the manner prescribed in Section 2 of this Article.

Pending the appointment of a new Governor the previously appointed Governor shall exercise his/her mandate.

Article 61

1. While working for the implementation of the decisions of a respective Hural, a Governor, as a representative of State power, shall be responsible to the Government and the Governor of higher instance for proper observance of national laws and fulfillment of the decisions of the Government and the respective superior body in his/her territory.
2. Governor shall have a right to veto decisions of respective Aimag, capital city, Soum, district, Bagh and Horoo Hurals.
3. If a Hural by a majority vote overrides the veto, the Governor may tender his/her resignation to the Prime Minister or to the Governor of higher instance if he/she considers that he/she is not able to implement the decision concerned.
4. Governors of Aimag, the capital city, Soum and district shall have secretariats/Offices of the Seal. The Government shall determine the structure and size of these offices individually or by a uniform standard.

Article 62

1. Local self-governing bodies besides making independent decisions on matters of socio-economic life of the respective Aimag, the capital city, Soum, district, Bagh and Horoo shall organize the participation of the population in solving problems of national scale and that of larger territorial divisions.
2. Authorities of higher instance shall not take decision on matters coming under the jurisdiction of local self-governing bodies. If, law and decisions of respective superior state organs do not specifically deal with definite local matters, local self-governing bodies can decide upon them independently in conformity with the Constitution.
3. If the State Great Hural and Government deem it necessary they may delegate some matters within their competence to the Aimag and capital city Hurals Governors for their solution.

Article 63

1. Hurals of Aimag, the capital city, Soum, district, Bagh and Horoo shall adopt resolutions and Governors shall issue ordinances within their competence.
2. Resolutions of the Hurals and Ordinances of the Governors shall be in conformity with law, Presidential decrees and decisions



- of the Government and other superior bodies, and shall be binding within their respective territories.
3. Administrative and territorial units, and the powers, structure and procedure of their governing bodies shall be determined by law.

## CHAPTER FIVE

### The Constitution Tsets of Mongolia

#### Article 64

1. The constitutional Tsets shall be an organ exercising supreme supervision over the implementation of the Constitution, making judgment on the violation of its provisions and resolving constitutional disputes. It shall be the guarantee for the strict observance of the Constitution.
2. The Constitutional Tsets and its members in the execution of their duties shall be subject to the Constitution only and shall be independent of any organizations, officials or anybody else.
3. The independence of the members of the Constitutional Tsets shall be ensured by the guarantees set out in the Constitution and other laws.

#### Article 65

1. The Constitutional Tsets shall consist of 9 members. Members of the Constitutional Tsets shall be appointed by the State Great Hural for a term of six years upon the nomination of three of them by the State Great Hural, three by the President and the remaining three by the Supreme Court.
2. A member of the Constitutional Tsets shall be a Mongolian national who has reached forty years of age and is experienced in politics and law.
3. The Chairman of the Constitutional Tsets shall be elected from among 9 members for a term of three years by a majority vote of the members of Constitutional Tsets. He may be re-elected once.
4. If the Chairman or a member of the Constitutional Tsets violates law, he/she may be withdrawn by the State Great Hural on the basis of the decision of the Constitutional Tsets and on the opinion of the institution which nominated him/her.
5. The President, members of the State Great Hural, the Prime Minister, members of the Government and members of the Supreme Court shall not be nominated to serve on the Constitutional Tsets.

Article 66

1. The Constitutional Tsets shall examine and settle constitutional disputes at the request of the State Great Hural, the President, the Prime Minister, the Supreme Court and the Prosecutor General and/or on its own initiative on the basis of petitions and information received citizens.
2. The Constitutional Tsets in accordance with Section 1 of this Article shall make and submit judgment to the State Great Hural on:
  - 1) the conformity of laws, decrees and other decisions by the State Great Hural and the President, as well as Government decisions and international treaties signed by Mongolia with the Constitution;
  - 2) 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;
  - 3) the breach of law by the President, Chairman and members of the State Great Hural, the Prime Minister, members of the Government, the Chief Justice and the Prosecutor General;
  - 4) the well-foundedness of the grounds for the removal of the President, Chairman of the State Great Hural and the Prime Minister and for the recall of members of the State Great Hural.
3. If a decision submitted in accordance with Clauses 1 and 2 of Section 2 of this Article is not acceptable to the State Great Hural, the Constitutional Tsets shall re-examine it and make final judgment.
4. If the Constitutional Tsets decides that the laws, decrees and other decisions of the State Great Hural and the President as well as Government decisions and international treaties concluded by Mongolia are incongruous with the Constitution, the laws, decrees, instruments of ratification and decisions in questions shall be considered invalid.

Article 67

Decisions of the Constitutional Tsets shall immediately enter into force.

## CHAPTER SIX

## Amendment of the Constitution of Mongolia

Article 68

1. Amendments to the Constitution may be initiated by organizations and officials enjoying the right to legislative initiative and /or proposed by the Constitutional Court to the State Great Hural.
2. A national referendum on constitutional amendment may be held on the concurrence of not less than two thirds of the members of the State Great Hural. The referendum shall be held in accordance with the provisions of Clause 16, Section 1, Article 25 of the Constitution.

Article 69

1. An amendment to the Constitution shall be adopted by not less than three fourths of votes of all members of the State Great Hural.
2. A draft amendment to the Constitution which has twice failed to win three fourths of votes of all members of the State Great Hural shall not be subject to consideration until the State Great Hural sits in a new composition following general elections.
3. The State Great Hural shall not undertake amendment of the Constitution within 6 months pending the next general elections.
4. Amendment which have been adopted shall be of the same force as the Constitution.

Article 70

1. Laws, decrees and other decisions of state bodies, and activities of all other organizations and citizens should be in full conformity with the Constitution.
2. This Constitution of Mongolia shall enter into force at 12.00 hours on the 12<sup>th</sup> of February of 1992, or at the hour of Horse on the prime and benevolent ninth day of Yellow Horse of the first spring month of Black Tiger of the year of Water Monkey of the Seventeenth 60-year Cycle.

Learn and Abide.

THE GREAT PEOPLE'S HURAL OF THE MONGOLIAN  
PEOPLE'S REPUBLIC

11.35 a.m. Ulaanbaatar

13 January 1992