Toward an Independent, Impartial and Fair Judiciary in Mongolia: Judicial Ethics

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TOWARDS AN INDEPENDENT, IMPARTIAL AND FAIR JUDICIARY IN MONGOLIA: JUDICIAL ETHICS

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I. INTRODUCTION

Every Mongolian citizen has the right to an independent and impartial judiciary. A judge must decide cases impartially on the basis of law and evidence. He must do so without external influence, pressure or fear of interference. Judicial independence and impartiality were enshrined in the 1992 Constitution for the first time in Mongolia. The Parliament of Mongolia (the State Great Khural) has passed many laws to implement these principles. Despite this, the public has no confidence that the judiciary upholds these principles and it perceives the judiciary as one of the most corrupt institutions in the country. As a result, the Parliament enacted judicial reform laws in 2012 to address these problems. Both the government and the public hoped that these reforms would be successful. The laws were drafted on the basis of research on how to reform the Mongolian judiciary, which was conducted by both Mongolian and foreign experts.

One of the judicial reforms is the creation of a unified Bar Association, which is composed of all private lawyers, prosecutors and judges. Among other powers, the association has the ability to enact a code of conduct for lawyers. The Constituent Assembly of the Mongolian Bar Association enacted a Code of Professional Conduct for Lawyers (CPCL), which is applicable to all private lawyers, prosecutors and judges. The Code reflects the best practices, principles and norms of professional conduct of lawyers. Its purpose is to prescribe a set of ethical values for lawyers, encourage lawyers to conduct themselves ethically, and set out the repercussions of violation. The framers of the Code envisioned that “if lawyers base their actions on values of professional ethics in their daily activities, they would be proud of their profession, the public will have trust in the legal profession and the judiciary, and justice and the rule of law will be realised to a reasonable extent.”

This paper focuses only on judicial ethics, although the CPCL also covers the conduct of all lawyers. The CPCL is Mongolia’s fifth code on judicial ethics. Prior to the enactment of the CPCL, there were four revisions of the codes of judicial ethics, with the last revision in 2010. The 2010 Code of Judicial Ethics included most values of judicial ethics that can be found in the codes of conduct of mature democracies. However, it failed to garner the public’s trust in Mongolia’s judiciary. The subsequent section on judges in the 2013 CPCL does not incorporate new principles, but elaborates on existing principles and provides more detailed rules. However, mere reliance on laws and codes is not enough. This paper aims to find out what further steps should be taken towards creating an independent and impartial judiciary in Mongolia. The paper will argue that Mongolia should learn from the failures of its previous codes of judicial conduct and from the best practices of mature democracies.

There are three approaches to promoting judicial ethics: the code approach, the guidebook approach and the reflective approach. The code approach uses an enforceable code of judicial conduct. The guidebook approach involves explaining the principles of judicial ethics and

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1 Khuulichiin Mergejliin Uil Ajillagaand Barimtlakh Durmin Tusliin Uzel Barimtual, Taniltsuulga [Concept and Introduction to the Code of Professional Conducts for Lawyers] (5 October 2013) at 6, online: National Legal Institute of Mongolia <http://www.legalinstitute.mn/>.
advising judges to conduct themselves ethically. The reflective approach involves providing judges with lists of questions that allow them to reflect on issues related to judicial ethics and develop their own answers. Mongolia relies on the code approach, but has never used the other two approaches. This paper analyses the advantages and disadvantages of these three approaches, and argues that the CPCL could make the judiciary in Mongolia more independent, impartial and fair if it were to incorporate elements from the guidebook and the reflective approaches.

This paper has six sections: (I) Introduction, (II) History of the Mongolian Legal System and Judiciary, (III) Basic Principles of the 1992 Constitution of Mongolia, (IV) Judiciary and Judicial Reforms in Mongolia, (V) Guidebook and Reflective Approaches to Judicial Ethics, and (VI) Conclusion.

II. HISTORY OF THE MONGOLIAN LEGAL SYSTEM AND THE JUDICIARY

Until 1990, Mongolia was neither democratic nor liberal. The legal system of medieval Mongolia was based on a nomadic culture. This section discusses the history of the Mongolian legal system from 1911 to 1990.

In the early 20th century, Mongolian leaders and scholars were interested in Western constitutional law and attempted to implement some of its ideas. Mongolia started to create a modern government based on a monarchy after declaring independence from Manchu rule in 1911. According to Alan J. K. Sanders, “even though Qing law remained the guide for administration, a professional bureaucracy and various ministries were established... Two houses of a parliamentary type were formed in 1914, although their role was deliberative and they were convened and dissolved by the Bogd Khan.” In the meantime, Mongolian scholars and leaders studied constitutions of developed countries such as the United Kingdom, Norway, Prussia, the United States of America, and Japan, translated them, and prepared drafts for a constitution. These scholars and leaders argued for inviolable human rights, democracy and the distribution of state powers between the king, government, and parliament.

The socialist system was established in the 1920s under pressure from the Soviet Union. A commission, which was set up for preparing a draft constitution in 1922, considered comparative studies on constitutional law carried out by Mongolian scholars. However, the soviet representatives dissolved this commission and rejected the draft constitution because they disliked the commission’s aim and the draft constitution, which took into account the laws and constitutional concepts of European countries. After King Bogd died in 1924, a republican government was introduced. The country was named the Mongolian People’s Republic, and adopted its first socialist constitution in 1924, modelled on the Russian

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3 Amarsanaj B, Bayarsaikhan B & Shajinbat R, Olon ulsiin undsen khaatiin orshil: ankhduagar undsen khaatiin sudalgaanii ekh survalj [Introduction to the constitutions of foreign countries: Research source of the first constitution] (Ulaanbaatar: KhZUKh, 2009) at 7–58; Chimid B, Undsen khaatiin deedlen shutekh vos [The supremacy of the constitution] (Ulaanbaatar: 2006) at 16.
5 Baabar, Mongolchuud: Nuudel, Suudal [Mongolians: movement and settlement], vol 2 (Ulaanbaatar: Admon, 2006) at 196.
Constitution, followed by two other socialist constitutions in 1940 and 1960. During the period of socialism, the living standards, daily culture, public health and general education in Mongolia improved to a significant extent. The country became de jure a sovereign (nation) state, with countries such as the Soviet Union and China recognising its independence.

None of the Mongolian socialist constitutions had room for the rule of law because they were not meant to restrict political power. As did the constitutions of other socialist countries, these nominal constitutions rested not on the principle of separation of powers, but on the centralisation of powers in the Mongolian People’s Revolutionary Party. The socialist constitutions described the powers of the party and its leaders, carrying the guiding principle that “the leader was above the party, and the party decision was above the law and the judicial decision.” In addition, courts were not intended to be independent. According to Amarsanaa J., “the party and administrative organisations supervised the courts” and used them “as an instrument of coercion”. The courts were prohibited from reviewing the constitutionality of the legislature’s decisions. This was important as the legislature is supposed to represent the working class. However, in reality, the legislature did not serve this purpose because of the one-party system and the denial of political rights.

Most fundamental rights were not protected under the socialist regime, where socialist constitutions excluded most civil and political rights and included only some nominal rights unenforceable by the court. A series of violent purges and forced collectivisation occurred in the Mongolian People’s Republic as they did in the Soviet Union. A survey carried out in 1998 found that the government ruled by the communist party killed 28,185 of 800,000 people (the total population) between 1937 and 1939, resembling the situation in Moscow. The socialist government mostly purged Buddhist monks, nobles and intellectuals by discriminating against them on the grounds of class and destroying almost all monasteries in the country.

III. BASIC PRINCIPLES OF THE 1992 CONSTITUTION OF MONGOLIA

In the late 1980s, the emergence of perestroika in the former Soviet Union affected Mongolia and helped the Mongolian people complete a peaceful transition to democracy in 1990. Mongolia started reforms towards constitutional democracy and a market-economy. In 1992, the People’s Great Khural, a deliberative body elected by the people, adopted the first liberal democratic constitution. As this constitution came into force, its framer Khatanbaatar emphasised that what set it apart was the guarantee during its adoption that its provisions would not become empty declarations. This later proved to be true as the 1992 Constitution,

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7 Chimid B, supra note 3 at 123.
8 Amarsanaa J et al, Mongol ulsiin shaukh erkhi medliin shinetsgel (suuliiin 20 jiliin toim) [The judicial reform of Mongolia (for last 20 years)] (Ulaanbaatar: Open Society Forum, 2010) at 7.
9 Sarantuya Ts, Undsen khudliin processiiin erkhi zui: suuri oilgol, tulgamdsan asuudal [Constitutional procedural law: the basic concept and the problem] (Ulaanbaatar: 2005) at 22–23.
10 Baabar, supra note 5 at 599.
11 Chimid B, supra note 3 at 19–25.
12 Sanders, supra note 2 at 520.
unlike the former socialist constitutions, has been reasonably practised and enforced. This section argues that the 1992 Constitution embodies fundamental rights and limitations on the exercise of political power, and establishes a parliamentary democracy based on the separation of powers, checks and balances, and constitutional review.

The 1992 Constitution introduced important principles of constitutional democracy. Article 70.1 sets out the special procedures for constitutional review and amendments, and embodies the principle that the Constitution is higher law, and that no other laws and legal acts should violate it. Article 1.2 of the Constitution also requires “the State” to secure basic principles such as democracy, justice, freedom, equality and respect for the law. These principles act as broad protections of fundamental rights and general restrictions on the exercise of political powers.

The 1992 Constitution restricts political power because the fundamental rights it guarantees are interpreted and enforced by the Constitutional Court. It includes an extensive list of fundamental rights such as the right to be equal before the law, and the rights of freedom of expression and freedom of religion. Individuals enjoy fundamental rights guaranteed both in the constitution and in international human rights treaties, more than 30 of which, such as the ICCPR and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), Mongolia has ratified. The 1992 Constitution not only restricts arbitrary limitations on these rights but also declares that the right to life, the freedom of thought, conscience and religion, and the right not to be subjected to torture or inhuman and cruel treatment shall not be restrained by ordinary laws even in a state of emergency or war, as provided in Article 19.2. Under the 1992 Constitution, individuals enjoy fundamental rights, and the government largely respects these rights, although there remain human rights problems.

Resting on the separation of powers, the Constitution establishes a parliamentary democracy, which is designed to keep any single individual or institution from having too much power. Ochirbat P., First President of Mongolia and the head of the Constitution Drafting Commission, said that the 1992 Constitution was based on the separation of powers between the legislature, executive and judiciary, and provided checks and balances between these powers. The separation of powers is one of the main principles of the 1992 Constitution. Legislative power is vested in Parliament, executive power in the Government, and judicial power in the Constitutional Court and ordinary courts. Citizens directly elect Members of Parliament (MPs) and the President while Parliament appoints ministers and the Prime Minister, who is proposed formally by the President. Parliament also appoints justices of the Constitutional Court, and is a unicameral parliament that consists of 76 members.

The Mongolian Constitution not only establishes separation of powers but also checks and balances on legislative, executive and judicial powers. Parliament has legislative powers, but the President may veto legislation, which remains in force if two-thirds of MPs present

14 Amarsanaa J, Ardhilsan erkh zuit yos [Democratic rule of law] (Ulaanbaatar: KhZUKh, 2009) at 74.
16 Supra note 13, arts 20 and 25.1.1.
17 Ibid, art 38.
18 Ibid, arts 47.1 and 64.
override such a veto.\textsuperscript{19} All four presidents elected since 1990 have actively used their veto against legislation, an action that raised the issue of unconstitutionality and poor policy planning. Meanwhile, the independent judiciary checks the powers of the legislature and the executive. The Supreme Court has the power “to provide official interpretations for correct application of all other laws except for the Constitution” and separate administrative courts conduct judicial review of administrative acts. The Constitutional Court also has the power to quash unconstitutional laws and other acts, while three-quarters of all MPs in Parliament may overrule the decision of the Constitutional Court by amending the Constitution, according to Article 69.\textsuperscript{20} The Constitutional Court has reviewed the constitutionality of almost 140 statutes and other governmental acts and has quashed more than 50 per cent of them, proving that the principle of checks and balances has worked for two decades.\textsuperscript{21}

The choice of a parliamentary system, which provides for separation of powers and checks and balances, has provided the foundation for democratisation and liberalisation in Mongolia. M. Steven Fish evaluated the parliamentary democracy of Mongolia as follows:

The absence of a constitution that concentrates power was entirely a matter of choice. It left Mongolia bereft of the ‘strong,’ unencumbered executive that so many analysts, politicians, and ordinary citizens in new democracies regard as a boom to reform, stability, and development – but that in fact conducts stagnation, conflict, and authoritarian reversion. Mongolia has been blessed – or in this case, wisely blessed itself – with a constitution that spared it a tenacious obstacle to political development.\textsuperscript{22}

Mongolia has conducted democratic elections since 1990, and has had seven parliamentary elections (in 1990, 1992, 1996, 2000, 2004, 2008 and 2012) and six presidential elections (in 1993, 1997, 2001, 2005, 2009 and 2013). These elections were reasonably fair according to foreign experts, although some non-governmental organisations and politicians were concerned with electoral fraud and imperfection of the election system. Political power has been transferred peacefully between the two main political parties, the Mongolian People’s (Revolutionary) Party and the Democratic Party, a coalition.

IV. THE JUDICIARY AND JUDICIAL REFORMS IN MONGOLIA

This section will examine the constitutional principles of an independent and impartial judiciary, public evaluation of judges’ ethics, recent judicial reforms, and the development of the codes of judicial ethics.

\begin{itemize}
\item \textsuperscript{19} Ibid, art 30.
\item \textsuperscript{20} This special procedure for constitutional amendments is stronger than that for amending ordinary legislation. The only constitutional amendment that was passed in 2000 was to overturn the Constitutional Court’s decisions that MPs could not hold cabinet posts according to the separation of powers. See Constitutional Court, Dugnelt No. 6 (17 July 1996); Constitutional Court, Togtool No. 3 (7 September 1996). Parliament also enacted the Law on the Constitutional Amendment in December 2010.
\item \textsuperscript{21} However, some improvements are needed for the better checks and balances. See Mashbat O, \textit{Bonnoos Westminsteriin Zug} [From Bonn to Westminster] (Ulaanbaatar: 2007) at 160–164; Lundendo\textsuperscript{\textregistered} N, Unurbayar Ch & Batsuuri M, \textit{Mongol ulsaad shuukhiin kharaat bus baidiiig behjiuulekh ni} [To strengthen the judicial independence in Mongolia] (Ulaanbaatar: Open Society Forum, 2010) at 10–26.
\item \textsuperscript{22} Fish, “The Inner Asian Anomaly: Mongolia’s Democratization in Comparative Perspective” (2001) 34:3 Communist and Post-Communist Studies at 335–336.
\end{itemize}
The 1992 Constitution of Mongolia established an independent judiciary. Article 47 of the Constitution provides that “[i]n Mongolia, the judicial power shall be vested exclusively in courts.” “Judges shall be independent and subject only to law” and judges “shall have no right to apply laws that are unconstitutional or have not been promulgated.” These provisions stem from the principle that judges are independent and subject only to the Constitution and the law. The right of every Mongolian to a fair and impartial judiciary is entrenched in Article 16,14, which provides that every Mongolian citizen enjoys “the right to appeal to the court to protect his/her rights if he/she consider that the rights or freedoms as spelt out by Mongolian law or an international treaty have been violated; … to a fair trial.”

Despite the enactment of laws establishing an independent judiciary and the rule of law in the last two decades, the public has criticised the judiciary and the legal profession. The Office of the President noted: “there is persisting number of criticisms towards weak rule of law and justice, and loss of independence of courts and impartiality of judges, which shows public non-satisfaction in independence and activities of the Judiciary. It was also proven simultaneously by foreign and domestic studies held several times.” Surveys have been conducted since 2001 to seek public perception of court operations in Mongolia, and have shown that the public perceives the courts as one of the most corrupt organisations in the country. The key findings of surveys conducted up to 2008 indicated that:

− From 2005 onwards, significant negative changes in public attitudes have emerged;
− In 2007, there was also a dramatic drop of confidence in the Supreme Court and Constitutional Court;
− In 2007 there was a major shift in personal experience with respect to the courts. Although there were still more positive than negative views among the public, there was a threefold increase in “very negative” attitudes in comparison with 2005;
− As in previous years, along with the growing democratisation process in the courts, there was strong public awareness of interference in court decisions;
− There was continuing awareness of increasing bureaucratic inefficiency in the courts;
− “People with highly influential positions” remained most favoured by the courts, closely followed by “wealthy people” and by “relatives and friends”;
− “Corruption”, “bureaucracy” and “unfair treatment” contributed most to the reasons for the bad performance of the community courts.

Negative attitudes towards the judiciary, low levels of trust in the courts and widely perceived corruption of judges and prosecutors have not changed. The courts were one of

23 Supra note 13, art 49.1.
24 Ibid, art 43.3.
27 USAID, “Avilgiin Talaarkh Olon Niittiin Oiilgot Medleg Togtookh Sudalgaa [the Survey on the Public Understanding and Knowledge of the Corruption]” (2013); Research Unit, the Anti-Corruption Agency of
the five organisations that were perceived as the most corrupt in surveys conducted between 2006 and 2012. Mongolian and foreign scholars highlighted the results of these surveys and provided suggestions to reform the judiciary.

In light of public criticism and widespread perception of corruption, the Mongolian Parliament enacted judicial reform laws in 2012: Law on Courts, Law on Judicial Administration, Law on Legal Status of Judges, Law on Legal Status of Citizens’ Representatives, Law on Reconciliation and Mediation, and Law on Legal Status of Lawyers. These laws provide an “opportunity to implement the right to fair and independent trial guaranteed by the Constitution of Mongolia by ensuring the independence, openness, and transparency of courts, managing the work balance of the courts, specialisation of judges and ensuring the budget and administrative independence.” Studies done by scholars have found these laws to have substantially altered the whole judiciary and legal profession.

According to the Law on Legal Status of Lawyers, the Mongolian Bar Association was created on 7 September 2013, and is composed of all private lawyers, prosecutors and judges. The new association has the powers to establish the bar exam, impose sanctions where there has been misconduct of lawyers, prosecutors and judges, organise continued legal training, protect the rights and legal interests of lawyers, enact the Code of Professional Conduct for Lawyers, and accredit law schools. Bruce Green endorsed the creation of the unified Bar in Mongolia, saying: “The unified bar is thought to build shared understandings and promote collegiality among private lawyers, prosecutors and judges who interact with each other and, ultimately, to promote the professional independence of the judiciary and bar. Unified professional regulation contributes toward the unity of these professionals.”

The Law on Legal Status of Judges aims “to regulate legal grounds for qualification of judges with judiciary mandate set forth in the Constitution of Mongolia, and power, grounds, procedures for termination, and guarantee for impartiality, sanctions for violators of the law.” It also serves as the legal basis for ensuring judicial independence and immunity. For example, no law or administrative act that weakens the legal, economic and social guarantees of the independence and safety of judges may be enacted. It is prohibited to reduce the component and amount of judges’ salaries. Judges also have immunity with respect to their person, office, home, transportation, means of communication, documents, properties, and correspondence. In addition, the Law on Judicial Administration strengthened the legal status of the Judicial General Council to protect judicial independence.

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28 USAID, ibid at 19.
30 The Office of the President of Mongolia, “Introduction on Draft Law on Judiciary and Other Relevant Draft Laws of Mongolia” (1 September 2011) online: <http://www.president.mn/eng/newsCenter/>.
31 Bruce Green, “Re: Draft Code of Professional Conduct for the Mongolian Lawyers” (30 September 2013) at 1.
32 The Office of the President of Mongolia, supra note 25.
33 Law on the Legal Status of Judges, art 20.3.
34 Ibid, art 23.5.
Brent T. White and a team of Mongolian scholars headed by Lundendorj N. suggested a number of specific measures targeted at reducing corruption and making the judiciary more independent and impartial, many of which were incorporated into the judicial reform laws.\(^3^6\)

For example, judges are subject to periodic performance evaluations designed to assess each judge’s integrity, fairness, temperament, legal knowledge, legal reasoning, diligence and professionalism.\(^3^7\) Minimum qualification requirements are established for new judges\(^3^8\) and promotion within the judiciary is now merit-based.\(^3^9\) The Judicial General Council proposed a draft bill to increase judges’ salaries to USD1500 per month to attract the best lawyers to become judges and to prevent judges from engaging in corrupt activities. Article 25.2 of the *Law on Courts* states that a Consultative Conference of Judges, consisting of all the judges of each court, shall determine the bench composition of judges that will participate in court sessions, while Article 31.6 of the same statute requires all court decisions to be posted online and publicised. According to the *Anti-Corruption Law* and *Law on Regulating Public and Private Interests and Preventing Conflict of Interests in the Public Office*, judges are required to disclose their assets and income every year. Lastly, the *Law on Legal Status of Judicial Representative of Citizens* establishes the system of lay judges.

Success of the reforms depends on the fidelity of the judges to the law and the principles of honesty, integrity and wisdom. There was no code of ethics for judges in Mongolia until 1997, since when Mongolia has had five of them: (1) Code of Ethics of Mongolian Judges (1997); (2) Code of Ethics of Judges of the Mongolian Courts (2002); (3) Code of Ethics of Judges of the Mongolian Courts (2003); (4) Code of Ethics of Judges of the Mongolian Courts (2010); (5) Code of Professional Conduct for Lawyers (2013). The codes of judicial ethics have been constantly revised and improved. They have also been enacted by different authorities – the Judicial General Council adopted the first two codes, and the Council of Judges, a meeting composed of all the chief judges of the courts of appeals and justices of the Supreme Court, adopted the third and fourth codes. The new Bar Association adopted the fifth code.

The CPCL has a section on ethics of judges, which is modelled on the 2007 ABA Model Code of Judicial Conduct. The former has several advantages over previous codes. First, the representatives of private lawyers, prosecutors and judges in the Constituent Assembly of the Mongolian Bar Association discussed and adopted the code collectively after a majority vote of two-thirds. Second, this code not only defines common principles and duties applicable to all private lawyers, prosecutors and judges, but also lists specific duties applicable to each of them. Third, the provisions of the code are more detailed and specific than all the previous codes. The 2010 Code of Ethics of Judges of the Mongolian Courts had only 17 articles, while the Judges Section of the CPCL has 55 articles.

Provisions in the CPCL adopt the best practices of other codes of judicial ethics. Article 15.1 states that judges are subject to the law and justice when exercising judicial power and Article 15.2 requires judges to adhere strictly to the principles of independence, impartiality and integrity of the judiciary, while refraining from any improper conduct.

The 2013 CPCL prohibits judges from the following activities:

\(^{3^6}\) White, “Rotten to the Core: Project Capture and the Failure of Judicial Reform in Mongolia,” 32–39; 
\(^{3^7}\) Lundendorj N, Unurbayar Ch & Batsuuri M, *supra* note 21. 
\(^{3^8}\) *Supra* note 33, art 8.3. 
\(^{3^6}\) *Ibid*, arts 5 and 6.
- misusing official prestige for the purpose of satisfying personal or economic interests, or allowing other persons such use of that prestige;  
- performing judicial duties with bias or prejudice or participating in discriminatory activities;  
- engaging in ex parte communications with parties or their lawyers;  
- publicly commenting on pending and impending cases, which may affect the outcome and impair the fairness of a matter;  
- hearing cases in which there is a real or apparent conflict of interest;  
- participating in extrajudicial activities that would undermine the judge’s independence, integrity, or impartiality;  
- intentionally disclosing or using non-public information acquired in the judge’s adjudicative capacity for any purpose unrelated to judicial duties;  
- accepting any gifts, benefits, or other things of value, which are prohibited by law or would undermine the judge’s independence, integrity, or impartiality;  
- participating in political activities, which conflict with the judge’s independence, integrity and impartiality.

If a lawyer learns that another lawyer or judge has violated the CPCL, he must inform the Committee of Professional Responsibility of such violation. The Committee of Professional Responsibility is composed of 30 members, 18 of whom are judges elected by advocates and prosecutors, six of whom are advocates elected by judges and prosecutors, and six of whom are prosecutors elected by judges and advocates. A panel of five members, consisting of three judges, one prosecutor and one advocate, decides whether a lawyer has violated the CPCL. If a violation is found, the panel may impose any of the following sanctions: (1) open or closed notice, (2) suspension of the right to represent before the court for a definite period of time or indefinitely, (3) suspension of the lawyer’s license for a definite period of time or indefinitely, and (4) nullification of the lawyer’s license for a definite period of time or indefinitely.

V. THE GUIDEBOOK AND REFLECTIVE APPROACHES TO JUDICIAL ETHICS

As discussed above, the three approaches to promoting judicial ethics are the code, the guidebook and the reflective approaches. This section presents research done on these three approaches, the advantages and disadvantages of each of them, and proposes ways for improving the CPCL by incorporating elements of the other two approaches.

40 The Mongolian Bar Association, Code of Professional Conduct for Lawyers 2013, art 15.3 [CPCL].
41 CPCL, ibid, arts 15.5 and 17.5.
42 CPCL, ibid, art 15.10.
43 CPCL, ibid, art 15.11.
44 CPCL, ibid, arts 16.1-16.3.
45 CPCL, ibid, art 17.1.
46 CPCL, ibid, art 17.4.
47 CPCL, ibid, arts 17.11-17.13.
48 CPCL, ibid, arts 18.1-18.3.
49 Law on Legal Status of Lawyers, art 63.
50 Ibid, art 29.
Firstly, the code approach is based on a code of conduct that defines the rules and sets out sanctions for their violation. Like many countries such as the United States, Mongolia adopts this approach. When developing a code of judicial conduct, it is useful to refer to the Bangalore Principles of Judicial Conduct, which is an important model. The Judicial Group on Strengthening Judicial Integrity (later named Judicial Integrity Group), an informal gathering of chief justices and senior justices, developed the Bangalore Principles of Judicial Conduct as a Draft Code of Judicial Conduct in Bangalore, India, in February 2001. The Judicial Integrity Group completed a commentary on the Bangalore Principles of Judicial Conduct in 2007.51

Secondly, the best example of the guidebook approach is the Ethical Principles for Judges (the ‘Ethical Principles’), which was adopted by the Canadian Judicial Council in 2004. The ‘Ethical Principles’ endorses judicial independence, integrity, diligence, equality and impartiality, and each of these values is expressed in statements, principles and commentaries. The ‘Ethical Principles’ states its purpose as follows:

The Statements, Principles and Commentaries are advisory in nature. Their goals are to assist judges with difficult ethical and professional issues, which confront them, and to assist members of the public to better understand the judicial role. They are not and shall not be used as a code or a list of prohibited behaviours. They do not set out standards defining judicial misconduct.52

Judges follow a non-compulsory guidebook on ethical conduct after reflecting and accepting its underlying values. The guidebook approach is educational as it helps judges to learn ethical principles and decision-making through its extensive commentaries. Furthermore, this approach is flexible as judges can apply their own understanding of the ethical statements and principles in making decisions depending on the context of each case. The ‘Ethical Principles’ can be improved and amended accordingly as the understanding of judicial ethics develops.

While the ‘Ethical Principles’ is not a code of conduct, there is still a procedure for submitting a complaint against a judge’s misconduct. According to the Judges Act, the Canadian Judicial Council has the power to investigate and rule on complaints about the conduct of federal judges.53 The council can recommend to the Parliament of Canada through the Minister of Justice that the judge be removed from office, and Parliament has the power to effect such removal.

The guidebook approach utilises an ethical advisory committee, composed of members who are experts in judicial ethics. The committee advises a judge in confidence if it receives a question on ethics from the judge. The ‘Ethical Principles’ talks about the Advisory Committee of Judges:

Publication of these Statements, Principles and Commentaries coincides with

51 The Judicial Integrity Group, “Commentary on the Bangalore Principles of Judicial Conduct” (March 2007) online: Council of Europe <http://www.coe.int/t/dghl/cooperation/ccje/textes/BangalorePrinciplesComment.PDF>.
the establishment of an Advisory Committee of Judges to which specific questions may be submitted by judges and which will respond with advisory opinions. This process will contribute to ongoing review and elaboration of the subjects dealt with in the Principles as well as introduce new issues that they do not address. More importantly, the Advisory Committee will ensure that help is readily available to judges looking for guidance.54

Some states in the U.S. have judicial ethics advisory committees. For example, Virginia established a Judicial Ethics Advisory Committee in 1999 to provide “advisory opinions concerning the compliance of proposed future conduct with the Canons of Judicial Conduct”.55 The committee is composed of nine members appointed by the Chief Justice of the Virginia Supreme Court for three-year terms. Five of the nine members are active or retired judges, two are attorneys, and two are laypersons. The committee may issue advisory opinions at its own initiative on matters of interest to the judiciary or upon receiving a request from any judge or person whose conduct is subject to the Canons of Judicial Conduct. The committee may not issue an opinion in response to a request where the facts are known to be the subject of a past or pending litigation or disciplinary proceeding or investigation. All opinions are only advisory, and they are not binding on the Judicial Inquiry and Review Commission or the Supreme Court.

The Virginia Judicial Ethics Advisory Committee has issued 31 formal advisory opinions since 1999 in response to questions on topics such as impartiality, media, bias and prejudice, disqualifications, ex parte communications, and judicial independence. For instance, on 16 July 2001, the committee issued an opinion concerning recusal based upon acquaintance with party, attorney or witness. The issue was whether a judge must recuse himself or herself merely because a party, attorney, or witness is an acquaintance of the judge, and the committee answered no. The facts were as follows: “A judge realises that he is an acquaintance of a party or a witness involved in a case before him or her. The judge has no business relationship with the party or witness, nor is there a close social or personal relationship between the two.”56 The committee interpreted Canon 3E of Canons of Judicial Conduct for the State of Virginia, which says “A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where: (a) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding.” In the Discussion part of the opinion, the committee provided its reasons for why a judge is not required to recuse himself or herself simply because he or she is an acquaintance of a party, attorney, or witness involved in the proceeding before the judge:

In such situations, however, it is advisable for the judge to inform counsel and the parties of the situation... The Canons, when read as a whole, encourage the prompt disposition of cases in the courts. Recusal, when not required by the canons, necessarily delays the business of the court, and judges should not routinely recuse themselves merely because they may know an attorney, party or witness. Whether required or not, recusal imposes additional stress on parties and witnesses, increases the expense of litigation, and delays the resolution of issues

54 Canadian Judicial Council, “Ethical Principles for Judges”, supra note 52 at 5.
before the court. Recusal is particularly disfavoured where replacing the judge would cause a significant waste of judicial resources. ...Judges should be keenly aware that frequent recusal by a judge may lead the public to conclude that the judge is avoiding unpleasant cases or that the judge is not carrying his or her appropriate share of the court's work. Further, when a judge recuses himself or herself frequently, attorneys and litigants may well be encouraged to use recusal motions as a means of judge shopping.57

The third and final approach, the reflective approach, is practised in Germany. Unlike many countries, Germany has no code of judicial conduct. Articles 92 and 97 of the Basic Law of Germany, sections 38 to 43 of the German Judiciary Act and the respective judiciary acts of the German Lander provide guidance on how judges are to conduct themselves ethically. These laws are less detailed than the codes of conduct in common law countries like the United States, including only general principles such as independence and some rules regarding incompatibilities. The German Judiciary Act aside, Germany does not have any code of conduct or its equivalent. The German Association of Judges (Deutscher Richterbund) recently established a working group on judicial ethics. “The aim of this working group is not yet to adopt a binding canon or code of conduct but to start a first discussion about judicial ethics.”58

The reflective approach assumes that ethical behaviour is always a result of a person’s free will and his own deliberation process. There is no one right or wrong answer to many ethical issues. The German Association of Judges has therefore consciously avoided formulating guidelines or codes of ethical behaviour,59 preferring instead to define values of judicial ethics for judges to reflect, discuss and apply in their daily lives. A non-exhaustive list of nine values is listed and interpreted: independence, impartiality, integrity, responsibility, restraint, humanity, courage, conscientiousness, and transparency.60 For example, courage is defined as follows:

Both the recognition of what is good and right, and the implementation of this knowledge sometimes requires courage. Courage is reflected in judges’ willingness and strength to overcome their own fears, and to make the right decision even when it may be difficult to do so. Judges and prosecutors need courage especially when they have to make unpleasant or unpopular decisions, to resist temptations and to not allow their decisions to be influenced by concerns about future opportunities or their career. It requires courage for judges to uphold the values and principles of the law when the right decision comes into conflict with their personal beliefs or poses certain disadvantages to them. Advocacy is the opposite of indifference, apathy and silence. Finally, courage manifests itself in judges’ willingness and strength to openly deal with their own mistakes.61

57 Ibid. However, the committee also accepts that “Although the situations which follow do not of themselves require recusal, other attending circumstances may lead the judge to conclude that recusal is necessary because of the appearance of impropriety or because the personal relationship between the judge and others involved, as opposed to the situation itself, requires recusal.”
60 Ibid.
61 Ibid, ch VIII.
These nine values are to be interpreted with reference not only to theory, but also to hypothetical cases. Accompanying each value are cases and questions on how judges would act in a particular situation. For example, the following case is given to illustrate the value of courage: “During a celebration with your tennis club, a few of your fellow colleagues loudly tell racist and xenophobic jokes for amusement. What should you do?”62 This question invokes reflection on the situation and encourages judges to consider the ethical values involved before arriving at their own answers.

The Schleswig Ethics Roundtable is an alliance of judges from Schleswig-Holstein who, since May 2006, have been reflecting on whether judges need rules of ethics, and if they do, why these must be laid down in writing. Like the German Association of Judges, the Ethics Roundtable rejected formulating a code of conduct, a set of professional duties, formal requirements and prohibitions. Instead, it produced a set of questions from which judges could reflect on ethical issues. The questions were categorised into the following five headings in the Pillars of Judicial Ethics: (1) Citizens and I,63 (2) the Public and I,64 (3) Legal Rulings and I,65 (4) the Judicial Apparatus and I,66 and (5) Judicial Robes and I.67 The Schleswig Ethics Roundtable explains the reason of their approach:

The fear – whether justified or not – of being disciplined by superiors, in whatever form, for failure to comply with specific rules is too great. And this is how the idea arose not to set up rules, but rather to formulate questions without providing answers to them. Our goal in this is to raise the awareness of judges for ethical issues and encourage them to find answers for themselves. They will not agree with all of the questions. But this is precisely what can lead to a provoked discourse, and that is what we want.68

Such an approach allows judges to reflect on their own conduct. For example, judges are encouraged to reflect and answer the following questions: “how do I conduct myself opposite those seeking justice? How would I want to be treated by the judge in a courtroom? Does my conduct do justice to the person standing before me with his/her problem? Do I live up to the judge's duty of impartiality in dealing with the participants in the proceedings especially with those I know personally?”69 If a judge finds that he is unhappy with his own answers to the questions, he may need to reconsider his conduct and seek advice from his colleagues. Accordingly, this approach is more advanced and flexible because it allows judges to reflect on ethical issues and discover their own answers. The preamble to the Pillars of Judicial Ethics states: “the questions are designed to encourage judges to reflect on problems which may arise in their professional and extraprofessional lives. There are generally no valid

64 Ibid at 6.
65 Ibid at 8.
66 Ibid at 12.
67 Ibid at 14.
68 Ibid at 2, para 4.
69 Ibid at 4.
answers to these questions. Those who would demand answers deny the central goal of the series of questions. Unlike the guidebook approach, which mostly suggests a certain answer as the right answer, the reflective approach promotes judges’ self-development and autonomy.

The guidebook and reflective approaches are better than the code approach because they encourage judges to understand ethical principles and act responsibly, which in turn facilitates ethical decision-making. Such a process is important because only a responsible judge can fulfill his main duty to develop the law. However, the code approach is heteronomous since it imposes ethical rules externally. Mongolia uses the code approach by adopting the Bangalore Principles of Judicial Conduct and the 2007 ABA Model Code of Judicial Conduct. Although a code of ethics is useful in developing countries where a great number of judges are perceived to act in an unprincipled manner unless bound by compulsory rules of ethics, the code approach should incorporate elements of the guidebook and reflective approaches, and can even be gradually replaced as judicial ethics matures.

The code approach is designed to work in transitional countries, which do not have an established tradition of judicial ethics and standards such as independence, impartiality, integrity, justice and fairness. Hence promulgating these standards would serve to educate lawyers and discipline judges who clearly violate the code, which would be difficult in the absence of a code of conduct. Allowing a judge who has clearly acted unethically to continue performing judicial duties would damage the public’s trust in the judiciary. For example, a panel that decided a case related to a major political party consisted of a justice of the Mongolian Supreme Court whose husband was a high-ranking official of the party. This caused the public and lawyers to talk about the case. The Law on Civil Procedure has a very general provision on recusal that requires a judge to recuse herself where there is reasonable suspicion of her ability to decide the case fairly and impartially. The justice in the case should have recused herself, but she failed to do so. The CPCL sought to remedy the problem of judges not voluntarily recusing themselves by defining situations of clear conflicts of interests in which judges ought to recuse themselves. According to Article 16.2 of the CPCL, a judge shall not decide a case where her husband or wife is in a managerial position of a party in the case. Non-compliance with this provision could lead to suspension and nullification of the lawyer’s licence.

Even though the code approach fits transitional countries like Mongolia, this approach should be improved by adopting relevant elements of the guidebook and reflective approaches. A combination of the merits of all three approaches would make the judiciary more independent and impartial. The main reason why previous codes of ethics of judges in Mongolia failed despite including principles similar to those in countries with a mature judiciary is a lack of understanding of ethical values. The National Legal Institute of Mongolia has been conducting legal ethics trainings for all private lawyers, prosecutors and judges since the start of the 21st century, and it translated a classic book on judicial ethics from Japanese to Mongolian. However, no commentary on Mongolian codes of judicial ethics has ever been published. On the other hand, the Canadian Principles, which are advisory and educational, establish and comment on the principles of judicial ethics. This points to the utmost importance of a commentary on the principles and rules in order for the code approach to

70 Ibid at 3, para 2.
71 Yasutomo Morigiwa, Khuulichiin Yos Zui [Ethics of Lawyers] (Ulaanbaatar: 2006).
succeed. The ABA Model Code of Judicial Conduct also includes an extensive commentary on each of its rules.

In addition, an advisory committee on judicial ethics should be created in Mongolia to give advice in confidence to judges who face ethical issues. Its opinions should be published so that judges and the public may learn from it. Even while preserving the code, content from the code of conduct and other sources can be used to develop questions that invoke reflection on the spirit of the ethics code, in a bid to help judges develop ethically and become more autonomous.

VI. CONCLUSION

Mongolia has been a liberal democracy for more than two decades. However, the rule of law is still the biggest challenge today and the public does not trust in the independence and impartiality of judiciary. Many studies show that the public perceives the judiciary as one of the most corrupt organisations in the country, and judges and prosecutors as treating parties unequally, favouring those with money and power. To address this, Mongolia is reforming its judiciary and legal profession. One of the reforms is the creation of the unified Bar Association, which is composed of all lawyers, judges and prosecutors. On 5 October 2013, the Constituent Assembly of the new Bar Association adopted the Code of Professional Conduct for Lawyers, which has more detailed and specific provisions than previous codes of ethics. Nevertheless, the basic principles and values of the previous codes and the new one are largely the same. All the previous codes were failures, but the public and the legal profession hope that the new code will contribute to the progress of judicial ethics in Mongolia.

In order to make judicial reform successful, Mongolia should look at the lessons learned from its experience with previous codes of conduct and the experiences of advanced democracies. The history of judicial ethics in Mongolia has shown that having a good code of conduct is not enough to create an independent and impartial judiciary. Hence Mongolia should research and implement what mature democracies do beyond adopting a code of conduct. First, the Mongolian Bar Association or the Judicial General Council should continue the judicial ethics training which started in the mid-2000s, which would include teaching law students ethical values. Judges should learn and practise the fundamental values in the code of conduct. Second, the Bar Association should produce and publish a commentary on the new Code of Conduct for Lawyers based on international and domestic commentaries on judicial ethics (or legal ethics in general). All successful democracies which have the code or guidebook have commentaries on judicial ethics (or legal ethics). Commentaries on the Bangalore Principles, the ABA Model Code of Judicial Conduct, and the Canadian Ethical Principles for Judges are valuable resources in writing such commentary. Third, the Bar Association or the Judicial General Council should utilise the reflective approach while still preserving the code of conduct to take account of Mongolia’s current situation. Judges behave ethically only when they have developed ethical maturity, because ethical decisions are made out of free will and deliberation. Reflective questions are important in achieving this result as they allow judges to ponder over ethical issues and develop their own answers based on an understanding of ethical values. Fourth, there should be an Ethics Advisory Committee which issues opinions on ethical questions asked by lawyers, prosecutors and judges. According to the Law on Legal Status of Lawyers, the Bar Association has an Ethical Committee, and this committee can exercise an advisory function. If all of these steps are
taken, the public’s hope that the recent legal reforms will make the judiciary independent and impartial and strengthen the rule of law will be realised to a reasonable extent.