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LEGAL ANALYSIS OF SUBJECTIVE ELEMENT OF CRIME IN THE MONGOLIAN CRIMINAL CODE FROM A COMPARATIVE LEGAL STUDY

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LEGAL ANALYSIS OF SUBJECTIVE ELEMENT OF CRIME IN THE MONGOLIAN CRIMINAL CODE FROM A COMPARATIVE LEGAL STUDY

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Key words: Intention, (In) direct Intention, Negligence, (Un) conscious Negligence, Recklessness, Conditional Intention.

Abstract: The subjective element of crime in the Mongolian Criminal Code consists of a general bifurcation of intention and negligence. In other words, there is no mental form for protecting individuals and society from the harmful risk-accepting decisions of an offender. The aim of this article is to find the best solution to resolve that problem based on a comparative legal study. As a result, findings suggest we need a third mental form between direct intention and negligence. There are two types of the third mental form, which are conditional intent and recklessness. Certainly, it is impossible to put two of them all into our criminal code. Hence, a deep analysis must be conducted in that field, and we have to choose the best type of them based on compatibility with our legal system.

I. Introduction

The article has studied the subjective element of crime, mens rea, in the Mongolian Criminal Code from a comparative legal perspective, including German, the United Kingdom and the United States. The subjective aspect of crime is the fundamental element, required to be proven in order to prosecute a defendant. There is no chance to punish an offender, who has violated criminal law unless his or her act falls into any of the subjective elements of the crime. Most offenses of the criminal code require a *mens rea*, the mental or subjective element of a crime. *Mens rea* refers to the psychological attitude of an agent towards his/her behavior and the outcome thereof that does harm to society, including the *mens rea*, the purpose and the motive of the crime. For example, the offense definition of murder in Article 10.1 of the Mongolian Criminal Code: a person who intentionally takes the life of another is guilty of murder. The taking of life is the actus reus of the crime, and the required intention as to that conduct is the necessary mens rea or a subjective part of the crime.

The term '*mens rea*' covers different subjective elements in order to distinguish relative degrees of fault, reflecting a difference in the reproach directed against the defendant. The required *mens rea* standard may vary from crime to crime, but generally the more serious crimes require the strict intention requirement, while less

serious offenses require a less culpable state of mind like negligence. For instance, homicide can be committed intentionally or by negligence. It is reasonable that someone who wants the death of the victim is considered more culpable than someone who causes the death of another by his carelessness. Accordingly, people can be punished much more severely for intentional crimes than for negligent crimes.

Regarding the demarcation of the different subjective elements, the continental civil law system, including Mongolia, distinguishes only two major kinds of *mens rea:* intention and negligence. The Common law framework includes a third subjective element in between intention and negligence, which is called recklessness. Recklessness covers dangerous risk-taking and bridges the gap between the most serious and the lowest degree of *mens rea*. A European counterpart, such as Germany, also has a tool for filling the lacuna between direct intention and negligence. It is called a conditional intent or *dolus eventualis*.

Current types of subjective elements reflected in the Mongolian Criminal Code have been obsoleted from a comparative legal perspective. So, it has to be changed to comply with the changing updates of the global good experience.

II. Subjective Element of Crime in Mongolian Criminal Code

In Mongolian criminal law, the "Subjective Aspect of Crime" refers to the psychological attitude of an agent towards his/her behavior and the outcome thereof that does harm to the society, including the *mens rea*, the purpose and the motive of the crime[1]. Among them, the purpose of crime is only a subjective element necessary for the constitution of certain crimes, which is also known as "selective element". The motive of crime is not a subjective element necessary for the constitution of a crime, which generally does not affect the conviction thereof, but may affect the sentencing.

Direct intention

According to the Mongolian Criminal Code (Art. 2.3.2), the subjective psychological attitude that an actor is fully aware that his/her action will cause harm to society but hopes or allows such a result to happen. More specifically, where the actor clearly knows that his or her action will inevitably or possibly cause harm to society and hopes for such a result to happen.

Indirect intention

Also, pursuant to the Mongolian Criminal Code, where the actor clearly knows that his/ her action may cause harm to the society and allows such a result to happen, it is an indirect intent.

Conscious and Unconscious negligence

Under Article 2.3.3 of the Mongolian Criminal Code, conscious negligence, when the agent has foreseen that his or her action may harm to the society, but credulously believes that it can be avoided. Whereas, the agent fails to foresee that his or her action may harm to society due to carelessness, which is unconscious negligence.

[1] S.Narangerl, J.Erdenebulgan, *Mongol Ulsiin Eruugiin Erkh Zui: Uzel Barimtlal, Ulamjlal, Surgamj,* (Soyombo Printing, 2019), 145 дахь тал.

In the event that although an action objectively results in damage or harm, it is not done intentionally or negligently but caused by reasons that are irresistible or unforeseeable, then it is a force majeure or an accident and shall not be considered as a crime. (Art. 1.4.2)

According to the above provisions, in the case of an offender committing a crime without knowing certain or almost certain of particular consequences of his action or inaction but knowing the probability of results without a good attitude, there is no precise solution in the Mongolian Criminal Code.

One of the objectives of the Criminal Procedure Code of Mongolia is to "... impose fair penalties for crime ...". The criteria for fair sentencing are defined in the Mongolian Criminal Code as "...crime committed by a person or legal entity, the nature of the social danger of the crime, the degree, and the type of guilt". It is a common practice in any country that the legislature determines the punishment based on the degree of loss and damage caused by the crime. However, within the sanction interval of the sentence, the criteria for the court to impose a sentence fairly is to determine the "type of guilt" in detail.

8-15 years of imprisonment has been enacted for the crime specified in the first paragraph of Article 10.1 of the Mongolian Criminal Code, which was enacted in 2015. However, in case of aggravated murder, 12-20 years or life imprisonment will be imposed. It can be concluded from this that the penalty interval for the crime of murder with normal circumstances is very wide and higher than the minimum of the aggravating circumstances, so it is a vital requirement to determine the "type of guilt" in detail for a fair punishment.

III.Continental Law Approach

Germany

Intent: German doctrine distinguishes three forms of intent, namely, intention, knowledge, and conditional intent.[2] It is immediately apparent when looking at the Code's General Part that the law does not define the meaning of intent.[3]

Intention

According to German Criminal Code (Art. 15), unless the law expressly provides for criminal liability based on negligence, only intentional conduct shall attract criminal liability.[4] Intention is characterized by the fact that it is the offender's primary purpose to achieve what the crime definition describes; it is not necessary that the offender is convinced that he or she will obtain that goal. For example, an assailant acts with the intention to kill his victim if that is the purpose of shooting at him; it does not matter if the actor, because of the great distance at which he shoots, is not certain that he will actually hit the intended victim.[5]

Knowledge

In knowledge, on the other hand, the cognitive element of intent is dominant: an offender acts with knowledge when he

[2] Kevin Jon Heller, Markus D.Dubber, *The Handbook of Comparative Criminal Law,* (Stanford University Press, 2011), 261.

[3] Micheal Bohlander, *Principles of German Criminal Law,* (Hart Publishing, 2009), 60.

[4] Micheal Bohlander, *The German Criminal Code: A Modern English Translation,* (Hart Publishing, 2008), 41.

[5] Kevin Jon Heller, Markus D.Dubber, *supra* note 1. 261.

or she is (almost) certain that the act will bring about a certain result; in that case it is irrelevant whether this result is emotionally welcome. Thus, a husband who gives a strong poison to his wife, who is suffering from terminal cancer, kills her knowingly even though he may greatly regret her death.[6]

Conditional Intent

The most controversial form of intent is conditional intent. In this form of intent, both the cognitive and the volitional elements are reduced. Typically, the actor recognizes only the possibility that a certain (prohibited) result will follow from the act and takes the risk.[7] (for example, the actor throw a brick from the rooftop onto a street, knowing that pedestrians are passing below.) Some writers regard the knowledge of risk as sufficient for intent because by doing the risky act the perpetrator shows that he or she disregards the interests of the (potential or actual) victim. The courts and the majority of writers require an additional volitional element, often defined as "approvingly taking into account" the possibility of a harmful outcome.[8] In homicide cases the courts sometimes use this formula to declare nonintentional the life-endangering acts of defendants whom they regard as generally hesitant to kill someone.[9]

Recklessness and Negligence: German law does not recognize recklessness as a separate type of subjective attitude toward the possible consequence of one's act. Many cases that in other jurisdictions are regarded as endangering or causing harm recklessly would in Germany be treated as instances of conditional intent.[10] If, however, the actor lacks the volitional element of "approving" of the result, German courts may find that person guilty only of negligence.[11]

Conscious Negligence

German doctrine has long recognized "conscious" negligence, which occurs when the actor is aware of a risk but thinks (or hopes) that the harmful result will not come about even if he or she performs an act her or she knows to be dangerous.[12]

In general, there are four prerequisites for liability for criminal negligence:[13]

1. The actor can foresee the risk for a protected interest.
2. The actor violates a duty of care with respect to the protected interest.
3. Harm as defined by the statute occurs.
4. The offender could have avoided the harm by careful conduct.

Unconscious Negligence

The standard of foreseeability, as well as of care, is to be determined on the basis of the defendant's individual capabilities, not by an objective standard.[14] A defendant therefore cannot be convicted of a negligent offence if he or she was, because of some cognitive defect, unable to foresee a risk that an average person could have foreseen. However, the subjective standard does not save anyone from criminal

6 Ibid.
7 Ibid 262.
8 Ibid.
9 Ibid.
10 Ibid.
11 Ibid.
12 Ibid.
13 Ibid.
14 Ibid 263.

responsibility when he/she was are of the defect, because in that case he could have foreseen the risk of an accident and should therefore have abstained from endangering situation altogether.

IV. Common Law Approach

United Kingdom

Intention

Intention is the most culpable form of *mens rea*. This is because it is more blameworthy to cause harm deliberately (intention) than it is to do so carelessly (recklessness).[15]

Direct intention

Direct intention corresponds with the everyday meaning of intention. A person who has causing death as his aim, purpose or goal has direct intention to kill. It was defined in *Mohan* [1976] QB 1 (CA) as 'a decision to bring about ... the commission of an offence ... no matter whether the defendant desired the consequences of his act or not'.[16]

Oblique intention

This is broader than direct intention and includes the foreseeable and inescapable consequences of achieving a desired result, even if the consequence itself is not desired.[17]

Recklessness

Recklessness is a sufficient fault element for some serious crimes (such as unlawful wounding) and some less serious crimes (such as common assault). The leading judicial decision on the meaning of recklessness holds that a person is reckless if he or she "has foreseen that the particular kind of harm might be done, and yet has gone on to take the risk of it".[18]

Negligence

Although negligence is rarely found as a requirement in serious crimes, it does feature in some such offences. The offence of careless driving and causing death by reckless driving both turn on whether the defendant drove without due care and attention or inconsiderately.[19] The more serious offences of dangerous driving and causing death by dangerous driving discerns whether the defendant's driving fell "far below what would be expected of a competent and careful driver."[20]

United States

Modern American codes typically follow Model Penal Code section 2.02(1) in providing that "a person is not guilty of an offense unless he or she acted purposely, knowingly, recklessly, or negligently, as the law may require, with respect to each material element of the offense."[21]

Purpose

In fact, early drafts simply defined purpose as to attendant circumstances as "knowledge of the existence of such circumstances."[22] Current Model Code drafters were refreshingly open about the limited significance of the distinction between the mental states of purpose and knowledge in general, even as they defined that very distinction in considerable detail.

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15 Emily Finch, Stefan Fafinski, *Law Express: Criminal Law,* 3rd ed. (Pearson Education, 2011), 36.

16 *Ibid.*

17 *Ibid.*

18 Kevin Jon Heller, Markus D.Dubber, *supra* note 1. 537.

19 *Ibid.*

20 *Ibid.*

21 Markus D.Dubber, *An Introduction to the Model Penal Code,* 2nd ed. (Oxford University Press, 2015), 52

22 *Ibid 54.*

In other words, whatever distinction one might draw between the definitions of purpose and knowledge as to attendant circumstances, it would be no more relevant than the difference between the definition of purpose and knowledge as to any other offence element type.[23]

Knowledge

Here the watchword is awareness. However, Model Code drafters defined knowledge regarding result not simply as awareness, but as awareness of a practical certainty, that is to say, the closest we ordinary mortals can come to knowing anything about the future. The distinction between purpose and knowledge, then, is that between conscious object(ive) and awareness. It is important to get this distinction straight.[24]

Recklessness

To act recklessly means to consciously disregard the risk that something is the case, and to act negligently is to fail to even perceive that risk[25]. In the Model Code scheme of things, the main line between murder and manslaughter is that between knowledge and recklessness. Murder is knowingly (or purposely) causing another's death; manslaughter is recklessly doing the same.[26]

Negligence

As a general rule, criminal liability ends where recklessness ends, and negligence begins.[27] The difference between negligence and recklessness is entirely a matter of attitude. Recklessness implies a conscious disregard of the risk; negligence requires neither awareness, nor disregard, of the risk. It is instead the very failure to be aware of the risk that the Model Code calls negligence.[28]

V. Legal Comparison between Continental and Common Law Approach

The most problematic question regarding the required *mens rea is* what we should do with those agents who did not want the result or where it cannot be proven that they knew their conduct. An adequate protection of legal interests against dangerous risk-taking demands and additional subjective element in between negligence and (in)direct intention. Most continental legal systems (such as Germany) have solved this problem by distinguishing a third type of intention next to direct and indirect intent, called conditional intent (*dolus eventualis*).

Conditional Intent

This form of intent can be defined as the conscious acceptance of a possible risk. *Dolus eventualis* is thus said to consist of:

1. A cognitive element of awareness of a risk
2. A volitional element of accepting the possibility that this risk would materialize

This lowest form of intention differs considerably in culpability in comparison to the other forms, as the agent only knows about a risk that may materialize but takes this risk for granted and acts anyway.

Recklessness

Common law systems, such as the English system, do not recognize the concept

[23] *Ibid.*
[24] *Ibid 55.*
[25] *Ibid.*
[26] *Ibid 56.*
[27] *Ibid.*
[28] *Ibid 64.*

of conditional intent. They tend to apply a separate *mens rea* requirement for risk-taking, in between intent and negligence, called recklessness. Recklessness denotes the conscious taking of an unjustified risk.

An important difference between conditional intent and recklessness is that the latter does not require the volitional element of acceptance. It only needs to be proven that the defendant was aware of a risk, which was, in the circumstances known to him, unreasonable to take. Whereas conditional intent focuses on the attitude of the defendant (accepting the risk or taking it for granted), recklessness focuses on what he knew, his awareness. Cases of risk-taking that would not lead in continental legal systems to a liability based on conditional intent could therefore lead to reckless liability in United Kingdom.

Negligence

Negligence is the most normative form of *mens rea* and is primarily based on a violation of the required duty of care which causes a result prohibited by criminal law. Negligence may be expressed in many different ways. The use of terms as "carelessness" and "lack of due care" or "lack of reasonable care" all indicate that negligence is required as a condition for criminal liability.

Conscious and Unconscious Negligence

Continental legal systems distinguish between conscious and unconscious deviation from the required duty of care. When the agent wrongfully does not consider the consequences of his conduct, this is called unconscious negligence. The agent is not conscious of a risk, but he should and could have been aware of it.

By contrast, when the agent is aware of a risk, but assumes that result will not occur, this is called conscious negligence. This may sound a lot like conditional intent, but the main difference is the agent's attitude toward the risk; in case of "mere" conscious negligence, the agent is conscious of the risk but nevertheless trusts in the good outcome. He does not take this favourable outcome for granted but still thinks everything will be all right.

Negligence in Common Law

Common law accepts a third form of *mens rea* called "recklessness" and distinguishes recklessness from negligence in the form of awareness of the risk, it does not recognize a concept such as "conscious negligence".

For instance, negligence in the United States is always unconscious or inadvertent negligence, as it reflects a culpable failure to be aware of the unreasonable risk entailed in one's conduct. This means that cases of risk-taking that in the Germany would lead to a liability based on conscious negligence could lead to liability for recklessness in the U.S.

VI. Conclusion

Under the Mongolian Criminal code, there is no conditional intent (*dolus eventualis*) or recklessness, but it is limited to intention and negligence. Hence, we do not have clear-cut protection against dangerous risk-taking decisions of agent. On the other hand, a defendant's right may be violated, which is granted by the principle of justice. More specifically, criminal responsibility must correspond to the nature and degree of the social danger of the crime committed by the offender.

For this reason, if we do not somewhat fill the lacuna between direct intention and (un)conscious negligence, the defendant, invariably, would be punished under the indirect intention.

By contrast, there is a risk that the agent may dodge a fair punishment, where he or she accepts a dangerous risk, which has been foreseen, without a good attitude, due to the almost impossibility of proving his or her real attitude for all circumstances. So, maybe we have to look back on our long-lived dichotomy of subjective aspects of crime. Based on all the above studies in previous chapters, it seems we have 2 choices, in order to ameliorate ongoing situations. The first version is all about complying with the current paradigm of the German practice. In other words, we have to put the concept of "conditional intent" in our criminal code, or judicial practice. The second, maybe we should replace conscious negligence with recklessness, due to the difficulty of proving the good attitude of the agent. In this way, it is sufficient to prove, merely, that the agent has foreseen the risk, which is possible to happen. As a result, the principle of justice will be fulfilled for the defendant and victim. What this means is the defendant will neither dodge the fair punishment nor be repressed under the indirect intention.

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ASSESSMENT OF HAGIA SOPHIA DECREE OF TURKEY

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ASSESSMENT OF HAGIA SOPHIA DECREE OF TURKEY

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Keywords

Hagia Sophia, the Council for the State of Turkey, the church, the mosque, and the conquest of Istanbul.

Abstract

The first construction which was originally planned as a basilica was ordered by Constantine the Great (Constantine I) who announced Christianity as the official religion of the Roman Empire. When Constantine the Great died before the building was completed, the church was consecrated during the reign of his son, Constantius II, on February 15, AD 360 After the conquest of Istanbul on May 29, 1453 by Fatih Sultan Mehmet who is known as Mehmed the Conqueror, converted Hagia Sophia Church into a mosque. The 10th Chamber of the Council of State's annulment of Cabinet Decree dated 24.11.1934 and numbered 2/1589 on converting Hagia Sophia Mosque into a museum which is the basis for the action dated 19.10.2016 and numbered 27882 for the annulment of the appeal filed to the Prime Ministry on 31.8.2016 for reopening Hagia Sophia to prayers by General Directorate for Foundations Regional Directorate No.1 is not correct. In the new system the Cabinet Decree dated 24.11.1934 and numbered 2/1589 on the conversion of Hagia Sophia Mosque into museum can only be revoked by Presidential Decree. This article; was made to review this decision.

I.Introduction

Hagia Sophia which means "holy wisdom" is a significant religious symbol both for Islam and Christianity. Holy wisdom is a fundamental concept in Christian theology as it stands for the "God the Son" in perception. The first construction [which was originally planned as a basilica] was ordered by Constantine the Great (Constantine I) who announced Christianity as the official religion of the Roman Empire. When Constantine the Great died before the building was completed, the church was consecrated during the reign of his son, Constantius II, on February 15, AD 360. Later on, since this building was burned and raised to the ground after the political riots, Emperor Theodosius II ordered the construction of a second building on the site where today's Hagia Sophia is located today and in 415 this church was consecrated. However, this building was also burned down during the Nika revolts in 532. Then, the new and the third building was constructed between 532-537 during the reign of Emperor

Justinian I. The columns and marbles used for the building, were brought from significant landmarks like the Temple of Artemis and Temple of the Sun. Since Hagia Sophia became the Patriarchate of Constantinople, many imperial ceremonies including the coronations of the Eastern Roman Empire or more widely known as the Byzantine Empire, were held here. Hagia Sophia which was the biggest temple of that time became the centre of the Eastern Orthodox Church for almost ten centuries. The images and mosaics used for the decoration illustrates the significant religious figures. For instance, the mosaics of four angels with six wings called hexapterygon are seen on the arches of the dome[1].

Hagia Sophia was one the places which was damaged for many times during its history. Hagia Sophia was looted and suffered extensive damage in 1204 during the Fourth Crusade by the Catholics of whom converted it to a Roman Catholic cathedral under the Latin Empire. Although the church was taken back in 1261 and restored as an Orthodox Church, most of the Holy Relics had been stolen by the Crusaders. Following the conquest of Istanbul on May 29, 1453 by Fatih Sultan Mehmet who is known as Mehmed the Conqueror, converted Hagia Sophia Church into a mosque. At that time although all the mosaics illustrating humans were covered with plaster, Fatih Sultan Mehmet ordered not to cover the mosaics of Virgin Mary and child Jesus. While the first minaret was added during the reign of Fatih Sultan Mehmet, the second one was added by his successor Beyazıd II. Later, two more minarets were added by Selim II and Murat III respectively. Again, during the reign of Selim II famous Ottoman architect Mimar Sinan extensively strengthened the building by adding structural supports to the exterior. Later on, the tombs (mausoleums) of Murat III and Mehmet III were built in the 1600s[2].

The illustration of Guillaume – Joseph Grelot from 1680 depicted that the mosaics of the archangels and Virgin Mary on the apsis were not covered. Likewise, in the illustration of the Swiss engineer Cornellus Loos, who was in İstanbul in 1710, the mosaics were also seen. Thus, it can be implied that those days the illustrations or the mosaics drawn in the mosques did not pose any obstacle to the religious services.[3]

In 1739 when Mahmut I ordered the restoration of the building, a library, madrasa (theological school for the Muslims), an imaret (kitchen voluntarily serving food to the poor and the students of the madrasa) as well as a şadirvan (fountain for ritual ablutions) were added, Hagia Sophia became a kьlliye (a social complex). The "Hьnkвr Kasrı" where the sultans used to pray was also built during the reign of Mahmut I. Eight gigantic circular frames written by calligrapher Kazasker Mustafa Izzet Efendi were hung upon the walls of Hagia Sophia during the reign of Sultan Abdьlmecid[4].

[1] Veli Yenisoğancı, Ayasofya-Mьzeler Rehberi, (Publisher Ekin, 2010), 56.

[2] Mehmet Цnder, Tьrkiye Mьzeleri, (Згмлшыхуж Tьrkiye İş Bankası, 1999), 195.

[3] Mehmet Akad, Journal of History to Understand Today, İssue:74 (Publisher Ekin, 2020), 36.

[4] Esra Gьzel Erdoğan, "Bizans Dцnemi'nde Ayasofya, Tarihзesi ve Mimari Цzellikleri Hakkında Genel Bilgiler," İstanbul Ьniversitesi Sosyal Bilimler Dergisi, (August 2012), 6.

The title deed dated on November 19, 1936 issued that Hagia Sophia Grand Mosque is registered on Ebulfetih Sultan Mehmet Vakfı (Fatih Sultan Mehmed Foundation) as "on section 57, lot 57 and 7th plot including tombs, real properties, observatory for prayer (adhan) times (muvakkithane) and madrasa. Thus, Hagia Sophia was defined as a "mosque" in its title deed.

Hagia Sophia was closed almost for five years for restoration and during this period when new mosaics were found, a change in the status of Hagia Sophia, from a mosque to a museum, was discussed and it became a current issue. Following these discussions Hagia Sophia was converted to a museum by Cabinet decree dated November 24, 1934 and numbered 7/1589. Hagia Sophia reopened as a museum on February 1, 1935 and the first Turkish President and founder of the Republic of Turkey, Mustafa Kemal Atatьrk, visited the museum on February 6, 1935[5].

One day after Pope Paul VI prayed at Hagia Sophia during his İstanbul visit on July 25, 1967, a group of people gathered at Hagia Sophia to pray as a reaction. Even though Hьnkar Kasrı where the sultans of Ottoman Empire used to pray, was assigned to the Turkish statesmen and presidents of Islam states who would visit and pray at Hagia Sophia on August 8, 1980, it was closed for restoration and remodelling after a couple months. While this section was opened to the public to for prayers on February 10, 1991, the rest of Hagia Sophia remained as a museum[6].

The juridical process for the conversion of Hagia Sophia into a mosque has been started in 2005 with a lawsuit filed by an NGO called Permanent Foundations Service to Historical Artifacts and Environment Association. However, the 10th Chamber of the Council for the State annulled this lawsuit. Despite another lawsuit being filed in 2016, the Council for the State dismissed the case in 2018 one more time declaring that there was not any contradiction to the law in assigning a museum status to Hagia Sophia.

Turkey's Directorate of Religious Affairs appointed an imam to Hagia Sophia in 2016 and Hьnkar Kasrı section was opened to public for prayer five times a day. In the meantime, 'Adhan' was recited from the minarets of Hagia Sophia along with the Blue Mosque.

Deputy Yusuf Halaзoğlu submitted a bill to Parliament to convert Hagia Sophia into a mosque. However, this topic has never been discussed in the parliamentary commission. Although he claimed that Atatьrk's signature was forged in the Cabinet Decree dated 1934 and that the seals on different pages did not match, his explanations did not create a considerable influence on the public. Even, the Council for the State did not investigate either the signature or the seals[7].

In 2017, the Directorate of Religious Affairs organized a special program in memory of Laylat al-Qadr which marks the night in which the Qur'an was first

[5] Цnder, supra note 2. 196.
[6] Akad, supra note 3. 37.
[7] "Prof. Halaзoğlu'ndan зarpıcı Ayasofya iddiası: Kararname ve Atatьrk imzası gerзek değil" https://www.hurriyet.com.tr/gundem/prof-halacoglundan-carpici-ayasofya-iddiasi-kararname-ve-ataturk-imzasi-gercek-degil-41538600, (2023.11.10).

revealed to the Prophet Muhammad by God. This program broadcast live by state-run television TRT. The next year President Recep Tayyip Erdoğan made a Rabia sign, a gesture used to protest the marches in Egypt, in Hagia Sophia and Greece interpreted this as a challenge to the West. President Erdoğan made two different explanations on Hagia Sophia in two different meetings – Gaziantep and Tekirdağ – both declaring that Hagia Sophia would not be a mosque and would remain as a museum. On the other hand, following the election on March 31, 2019 he emphasized that Hagia Sophia, which had been converted into a museum can be a mosque again. Greece, one more time, reacted to this statement mentioning that it was an electioneering. On May 29, 2020, Al-Fath Surah was recited, and prayers were conducted at Hagia Sophia as part of 567th conquest festival and President Erdoğan went live in this program. Greece too condemned this action.[8].

Another attempt was made by the IYI party by submitting a motion to the Turkish Parliament to reopen Hagia Sophia as a mosque. However, the Justice and Development Party (AKP) rejected it. The leader of the IYI Party Meral Akşener, interpreted this as the "AKP did not really want to convert Hagia Sophia back into a mosque but rather wanted to abuse the people politically."

The third lawsuit for reopening Hagia Sophia as a mosque was filed to the Council for the State by the same non-governmental organization and the case was accepted. The 10th Chamber of th State's Council held a hearing on the case to annul the 1934 Cabinet decree on the conversion of Hagia Sophia from mosque to museum.

[8] Ibid 37.

II. Developments in the Republic of Turkey on the Hagia Sophia issue

A. The Foundation as the Plaintiff and the Cause

The annulment of the Cabinet decree which was the initial case's causation, demanded that the signatures affixed to the cabinet decree ought to be examined graphologically, although all the enactments must be published in the Official Gazette according to Article 52 of the Constitution cited in 1924, consequently, the State's Council had not met this requirement, as it was confirmed by parliamentary minutes that some of the ministers whose signatures were on the decree, were out of town that day, that Hagia Sophia is defined as a "mosque" in its title deed and it is not defined as a museum on the official website of UNESCO either, that Hagia Sophia should be a mosque as it is a property of a foundation and that its current status is against the will of the party who devoted it and that there was not any legal decisions remarking that Hagia Sophia was assigned to the Ministry of Culture and Tourism.

B. Presidency as The Defendant

Dismissal of action was requested claiming that a lawsuit couldn't be filed against the Cabinet decree in 1934 after many years; that the plaintiff occasionally applied to the Prime Ministry and other institutions on account of the status of Hagia Sophia but each time the lawsuits were dismissed as the content of each lawsuit was indifferent to the previous one, so there was a definite judgment for the action; that Hagia Sophia

Mosque was registered as "Hagia Sophia Grand Mosque" including a tomb, real properties, an observatory for prayer times (muvakkithane) and a madrasa on section 57, lot 57 and 7th plot belonging to Mehmed Han-ı Sano Bin Murad Han-ı Sano Vakfı deed of trust and the relevant foundation which is a fused foundation with a legal entity was represented and administered by the General Directorate for Foundations; that the Council of Ministers which is the supreme decision making body of the state administration is entitled to take legal actions provided that the administrative decisions are not illegal or unconstitutional even if it is not given additional or explicit authority; a change in the designation and status is bound to the discretion of the executive organ and the Council of Ministers can take any action within the frame of national and international legal conditions as well as domestic legal order and that the claim concerning the forged signature on the Cabinet Decree does not reflect the reality at all.

The prosecutor for the State's Council ordered a peremptory nonsuit and declared that Hagia Sophia should remain as a museum.

C. Opinion of the Prosecutor for the State's Council

It was understood that the suit filed on the same demand had already been dismissed after a substantial discovery by the verdict of the 10th Chamber of the Council for the State dated 31/03/2008 and numbered E:2005/127, K:2008/1858 before the relevant file was suited, the verdict was approved with the verdict of the State's Council's Plenary Session within the Administrative Law Divisions dated 10/12/2012 and numbered E:2008/1775, K:2012/2639 on different justifications and the request of revision of decision made by the plaintiff was dismissed with the verdict dated 06/04/2015 and numbered E:2013/3803, K:2015/1193.

Thus, considering it was assumed that the plaintiff was informed of the Cabinet Decree dated 24/11/1934 and numbered 2/1589 on the aforementioned date on which the suit was filed at the very latest and there was not any legal condition for a new cause of action, there was no need for the examination of the case due to its prescription.

The decree of the General Directorate for Foundation requesting the conversion of Hagia Sophia Mosque into a museum dated 07.11.1934 and numbered 153197/107 depicted that after the financial assessment of the foundation, it was agreed that the buildings owned by the foundations would be collapsed as well as the expropriation, demolition, reparation and upkeeping expenses of the other buildings, would also be covered to convert Hagia Sophia into a museum.

The Convention Concerning the Protection of the World's Cultural and Natural Heritage was adopted by the General Conference of United Nations Educational, Scientific and Cultural Organization (UNESCO) on November 16, 1972 to introduce the cultural and natural sites with outstanding universal values accepted as the common heritage for humanity, to promote awareness in the society to protect the relevant universal heritage and to provide essential cooperation to sustain

the cultural and natural values which were destroyed and disappeared due to several causatives.

Turkey became a part of this convention with the law dated 14.04.1982 indexed under 2658, it was approved by Cabinet Decree dated 23.05.1982 and numbered 8/4788 and it was published in the Official Gazette dated 14.02.1983 with cited numeration of 17959.

The list of the UNESCO World Heritage Committee includes outstanding cultural or natural sites which are ensured to be protected by the government of the related country. The aim of this list is to enable an international cooperation for preserving and protecting the values of the humanity. By 2008 there are 851entities from 141 countries in the list which has been updated periodically. While 660 of these sites are cultural and 166 of them are natural, 25 of them are both cultural and natural. Historical sites of Istanbul which bear cultural heritage features were included to the World Heritage List on December 6, 1985. The 10th Chamber of the Council for the State accepted the file with the following reasons on its decision on Hagia Sophia.

D. Assessment of Prescription

When the file was prosecuted against the State's Council, the Prime Ministry claimed that the verdict pertaining the conversion of Hagia Sophia into a museum, was legal and that the foundation could not file a suit for the 1934 verdict due to its prescription. According to sub-article 1 of Article 7 of the Administrative Jurisdiction Procedures Law (Law No: 2577) the term of litigation is sixty days for the Council for the State and respective Administrative Courts with a thirty-day period for Tax Courts unless specifically stated otherwise, sub-article 4 of the same article states that the term of litigation starts from the day of notice for the regulatory acts requiring notice, yet it was ruled that on taking any action the concerned parties could bring an action against the regulatory act or procedures or both of them. With Article 10 of the above-mentioned Law, it is ensured that concerned parties can appeal to administrative authorities to take an action or initiate a procedure that can be the subject matter of an administrative suit, that the demand will be assumed as rejected if no answer were to be received within sixty days, the concerned parties could file a suit to the State's Council, administrative courts and tax courts following the sixty-day period is over[9]. The foundation applied the Prime Ministry in 2016; the rejection was delivered and cited to the foundation on 24/10/2016 and the suit was subsequently filed on 20/12/2016 which is within the sixty-day legal term of litigation.[10]

E. Assessment of Ataturk's Signature

The Council for the State decided that there was no need for further examination on the claims on the forged signature of Atatьrk on the decree converting Hagia Sophia into a museum and on the allegations that some of the ministers

[9] Ramazan Sağlayan, "İdari Eylemden Doğan Tam Yargı Davalarında Dava Aзma Sьreleri" Ankara Ьniversitesi Hukuk Fakьltesi Dergisi , İssue: 3-4, (2005), 20.

[10] "Prof Ali Ulusoy danıştayın Ayasofya kararına gцre Atatьrk'un iş bankasındaki hisselerini chp'ye bırakan vasiyeti'de değiştirilmez" https://t24.com.tr/haber/prof-ali-ulusoy-danistay-in-ayasofya-kararina-gore-ataturk-un-is-bankasi-ndaki-hisselerini-chp-ye-birakan-vasiyeti-de-degistirilemez,889943, (2023.11.10).

whose signatures were on the decree were not present in Ankara on the date of the decree.

F. Assessment of The Old Suits

Since the Council for the State dismissed the suit filed by the same foundation for opening Hagia Sophia to prayers in 2008, it was supposed that this State's Council would not decide against its own verdict. However, the verdict was as follows: "considering the changes on the national and international conditions and adhering to the aim of saving and sustaining the historical, architectural and cultural features of Hagia Sophia, the decision regarding a change in the status of Hagia Sophia as a museum and assignment to serve a different purpose is at the administration's discretion." Thus, with this verdict it was ruled that there was not any obstacle concerning The Convention Concerning the Protection of the World's Cultural and Natural Heritage in Turkey's domestic law, and the absolute order on the assignment of Hagia Sophia for a different purpose other than being a museum would be within administrative power. Yet, there are not any examinations or assessments on the claims emphasizing that it is illegal to assign another status to Hagia Sophia other than the one stated in the deed due to this edifice's ownership, foundation nature and the attribution on its title deed. Moreover, there is not any justification or judgement pertaining this issue. Therefore, it was suggested that a new legal decision can be made in conclusion.[11] Moreover in article 2 of the Turkish the Administrative Jurisdiction Procedures Law (Law no: 2577) it is stated that "those whose interests are breached" may bring an annulment action[12]. Plaintiff has no right to sue.

G. A Similar Verdict Relating to the 'Kariye' Mosque

It is stated that the verdict of the Council for the State's Plenary Session of Administrative Law Divisions on the Kariye Mosque in Istanbul, was a precedent. In the suit filed for the annulment of the action for changing the museum status of Kariye Mosque; it was declared that "the museum status of the related building was not opposed to the law regarding its function of having a universal meaning as it is a significant example of a construction or architecture or technology or landscape representing one or more epoch of humanity as well as an example representing one or more culture." This verdict was approved the State's Council Plenary Session of their Administrative Law Divisions.

After the request for revision of the decision Plenary Session of Administrative Law Divisions, which is the supreme board of Council for the State emphasized the fact that that "except the provisions provided within Articles 15 and 16 of Law of Foundations (Law No. 5737) the entity cannot assign to a status except the one declared by the related foundation" and ruled that Kariye Museum should be open to prayers as a mosque. It was also

[11] "Prof Ali Ulusoy danıştayın Ayasofya kararına gцre Atatьrk'un iş bankasındaki hisselerini chp'ye bırakan vasiyeti'de değiştirilmez" https://t24.com.tr/haber/prof-ali-ulusoy-danistay-in-ayasofya-kararina-gore-ataturk-un-is-bankasi-ndaki-hisselerini-chp-ye-birakan-vasiyeti-de-degistirilemez,889943, (2023.11.10).

[12] Ayşe Aslı Yьcesoy, "An Evaluatıon On The Concept Of Indırect And Personal Interest In The Context Of Annulment Actıon", Dokuz Eylьl Bniversitesi Hukuk Fakьltesi Dergisi, İssue: 38, (2018), 173; Lionel Neville Brown / John S. Bell, French Administrative Law, 5th ed. (Oxford University Press, 1998), 158. Halil Kalabalık, İdari Yargılama Usulь Hukuku, (Publisher Sayram, 2018), 152.

underlined that this is a precedent, and the same verdict should be ruled for Hagia Sophia which is a noted similar case.

III. Opinion of European court of human right (echr) on foundations

In the decree from the Council for the State, it is mentioned that: "Opinion of the European Court of Human Rights (ECHR) reviews the claims on the violation of the protection of ownership and reach a verdict regarding the registration and restitution of goods and rights of these foundations or payment of the required material compensations. Upon complaint by one of these foundations named Samatya Surp Kevork Armenian Church, School and the Cemetery Foundation which was established by Imperial Decree in 1832 under the Ottoman Empire and whose status of a foundation was kept under modern Turkish law, the ECHR ruled that the real properties would be registered back to the foundation and if it did not pay compensation considering that the status of the foundation and the fact that the real properties were registered to the foundation for a long time (Samatya Surp Kevork Armenian Church, School and Cemetery Foundation Board of Trustees/ Turkey, no. 1480/03, 16/12/2008). "Therefore, it has been seen that the ECHR guarantees the protection of the rights of the foundations including the said entities established during The Ottoman Period regarding the ownership of their real properties and status of a foundation as a result of their priority. "The verdict on Hagia Sophia was based on the verdict of the ECHR by stating that "the change in the status of the real property of the foundation without the will of the endower or using it in a way contrary to the will of the endower does not comply with the practices of ECHR either."

When the 10th Chamber of the Council for the State annulled the file for opening Kariye Museum for prayers, its function of having a universal meaning was emphasized by referring to the Convention Concerning the Protections relative to the World's Cultural and its Natural Heritage. Controversial opinions turned down by the Plenary Session of Administrative Law Divisions were supported in Hagia Sophia verdict.

Another statement from the aforementioned verdict was as follows: "Within the context of Article 6 of the Convention Concerning the Protection of the World's Cultural and Natural Heritage, it is clear that the parties in the convention agreed that Hagia Sophia is a universal heritage which should be protected cooperatively by the international community by guarding the proprietary rights given by the national state law and by respecting the national sovereignty of State of the Republic of Turkey where Hagia Sophia is located. Thus, there are no obstacle against assigning the status of Hagia Sophia according to national law."

The verdict also emphasized that assigning the status of Hagia Sophia based on the "foundation property law" is an obligation based on "respecting the national sovereignty" and "guarding the proprietary rights given by the national law" principles mentioned in Article 6 of the abovementioned Convention. It was stated that as the aim of the Convention was to

protect the cultural heritage, the status was assigned according to the national law. It was also reminded that there are many historical buildings which are still used as mosques like Selimiye Mosque, Divri□i Ulu Mosque, Sьleymaniye Mosque, Sultan Ahmet Mosque, □ehzade Mehmet Mosque and Zeyrek Mosque in Turkey.

It was underlined that the real properties of a foundation should also be protected against the state itself and the guardianship of the states does not mean that they can dispose of these properties whenever and however they want. The statement was as follows: "A state is in the presence to which all the real properties of a foundation are trusted for utilizing them in accordance with a certain purpose. Allocation of the real properties belonging to the foundation with the regulatory administrative acts is against the legislation and the universal law."

The Law No. 864 arranging the legislation on the foundations established before the Turkish Civil Code clearly states that the registrations in the deed of trust, which is the certificate of formation for the foundation, concern the third parties and the state, that the issues designated by the deed of trust could not be changed at all and that the properties of the foundation must only be used in accordance with the will of the endower. Accordingly, although the "status of an old foundation" was explicitly maintained, on examining the cabinet decree it was recorded that converting Hagia Sophia Mosque whose title deed was in accordance to the Ebulfetih Sultan Mehmet Foundation (also known as Fatih Sultan Mehmed Foundation) and which is a needs to serve as a mosque according to its deed of trust to a museum is contrary to law.[13]

It was also stated that as Hagia Sophia is in the possession of the Fatih Sultan Mehmed Foundation, was brought into community service to be used as mosque for an indefinite time by the will of its endower, and has the attribution of a real property of a foundation as offered to the public use without any charge, was registered as a mosque on its title deed and that the deed of a foundation is equal to the influence, value and power of a rule of law, the attribute and the status of a real property owned by a foundation as written on its title deed, cannot be changed.

The verdict also underlines the obligation to maintain the will of the endower as follows: "It is certain that this issue is binding for the natural and legal persons as well as the defendant administration and that while the state has a positive responsibility for ensuring the utilization of the foundation's property upon the will of the endower, it also has a negative responsibility for acting which would eliminate the will of the endower.[14]

[13] "Prof Ali Ulusoy danıştayın Ayasofya kararına gцre Atatьrk'un iş bankasındaki hisselerini chp'ye bırakan vasiyeti'de değiştirilmez" https://t24.com.tr/haber/prof-ali-ulusoy-danistay-in-ayasofya-kararina-gore-ataturk-un-is-bankasi-ndaki-hisselerini-chp-ye-birakan-vasiyeti-de-degistirilemez,889943, (2023.11.10).

[14] "Prof Ali Ulusoy danıştayın Ayasofya kararına gцre Atatьrk'un iş bankasındaki hisselerini chp'ye bırakan vasiyeti'de değiştirilmez" https://t24.com.tr/haber/prof-ali-ulusoy-danistay-in-ayasofya-kararina-gore-ataturk-un-is-bankasi-ndaki-hisselerini-chp-ye-birakan-vasiyeti-de-degistirilemez,889943, (2023.11.10).

Thus, considering the immemorial utilization and protection of the real properties and the rights of the foundations in Turkish legal system, it is concluded that it is illegal to assign a status to Hagia Sophia other than a mosque, to allocate it to a different purpose and to restrain the people to whom the building was granted to get benefit from it and no compliance with laws was established in Cabinet Decree ruled the conversion of Hagia Sophia into a museum."

Therefore, Annulment of the matter in dispute Cabinet Decree was decided unanimously. After this verdict concluded on July 2, 2020, the Presidency of the Republic of Turkey didn't make an objection against the court decision of Council of State Plenary Session of Administrative Law Division. Besides, as no one made an objection in a 30-day period, the verdict was finalized. The Presidency of the Republic of Turkey has already requested for dismissal of the case. Likewise, a presidential decree was issued for the assignment of Hagia Sophia to Turkey's Directorate of Religious Affairs on July 10, 2020. This decree has a disclosure effect. 1934 Cabinet decree was abated, and foundation deed became in force with the annulment decision of Council of State. Hagia Sophia will serve as a mosque according to Article 35 of the Constitution of the Republic of Turkey which regulates the proprietary and succession right by the will in the foundational deed.

IV. Conclusion

The 10th Chamber of the Council for the State evaluated the 1934 Cabinet Decree as misjudged considering the content of the deed of trust underlining that the property belongs to Fatih Sultan Mehmed Foundation and assigning it as a mosque. The verdict is as follows: "Since it is clear that the proprietary right involves the utilization, assignment, and operation authorization of the entity in one's possession, protection of the will of the endower on the related properties as well as the rights has to follow the essential aspects of the will. In consequence of this obligation, changing the status of real property owned by a foundation or utilization of it contrary to the will of the endower do not accord with the legal precedents of ECHR."

Thus, this verdict invalidated the 1934 Cabinet Decree. As neither Permanent Foundations Service to Historical Artifacts and Environment Association nor Presidency of the Republic of Turkey objected to the verdict, the verdict has been validated. In short, the Cabinet Decree dated 24/11/1934 and cited 2/1589 was annulled by the verdict of the 10th Chamber of the Council of State dated 2.7.2020 and indexed as E. 2016/16015, K. 2020/2595. Thus, considering it was assumed that the plaintiff was informed of on the aforementioned date in which the suit was filed at the very latest and there wasn't any legal condition for a new cause of action, there was no need for the examination of the case due to prescription.

The annulment of Cabinet Decree by the 10th Chamber of the Council of State after 86 years can be interpreted as the realization of a universal message to humanity as well as a verdict finalized upon the request of the defendant, although it was considered as an action for annulment

due to the features of the suit. According to Article 12 of Administrative Jurisdiction Procedures Law "Relevant people have right to file an annulment action to Council of State for an administrative act which violates their rights." The sub-article 3 of Article 14 of the same Law the statements of claims are examined by an investigation judge assigned by the head of department in Council of State from various aspects. "Capacity" and "prescription" according to sub-clauses (c) and (e) are among them. The defendant is Permanent Foundations Service to Historical Artifacts and Environment Association. It is not clear which right of this foundation, that wasn't probably even established at that time, was violated by Cabinet Decree ruled 86 years ago. Therefore, the defendant does not have a capacity to file such an annulment action. According to Article 12 of the Administrative Jurisdiction Procedures Law "In Council of State and administrative courts the term of litigation is sixty days unless additional time was granted by the special laws." The Cabinet Decree annulled by the 10th Chamber of the Council for the State was 86 years, not 60 days.

The 10th Chamber of the Council of State's annulment of Cabinet Decree dated 24.11.1934 and numbered 2/1589 on converting Hagia Sophia Mosque into a museum which is the basis for the action dated 19.10.2016 and numbered 27882 for the annulment of the appeal filed to Prime Ministry on 31.8.2016 for reopening Hagia Sophia to prayers by General Directorate for Foundations Regional Directorate No.1 is not correct. In conclusion the final decision by the State's Council is correct in principle. Hagia Sophia was already a mosque in 1453.

The title deed issued on November 19, 1936 clearly demonstrates that "Hagia Sophia Grand Mosque in the plans / section 57, block / lot 57 and 7^{th} plot including tomb, real properties, observatory for prayer (Adhan) times (muvakkithane) and madrasa is registered on Ebulfetih Sultan Mehmet Vakfı". As it is stated on its title deed it is illegal to change the status of the real property owned by a foundation other than specified by the endower or assign it for a different purpose other than the will of the endower. Thus, utilization of Hagia Sophia as a mosque instead of a museum would meet the criteria of the will of the endower. However, as the State's prosecutor underlined in the verdict accepting the file instead of annulling the case due to the capacity of the plaintiff and the limitation of the action was a misjudgement.

In article 2 of Turkish the Administrative Jurisdiction Procedures Law (Law no: 2577) it is stated that "those whose interests are breached" may bring an annulment action. In my opinion, the association has no right to sue.

In the new system the Cabinet Decree dated 24.11.1934 and numbered 2/1589 on the conversion of Hagia Sophia Mosque into museum can only be revoked by Presidential Decree. Personally, it would be a better if the change in the status of Hagia Sophia to fulfil the will of the endower was conducted by a presidential decree instead of a Council of State Decree. In my opinion, it would be a better if the change in the status of Hagia Sophia to fulfil the will of the endower, was conducted by

a presidential decree instead of a State's Council Decree.

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THE INTERPRETATION OF ARTICLE 98(2) OF THE ROME STATUTE AND ITS IMPACT ON THE INTERNATIONAL CRIMINAL COURT

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Keywords

Public International Law, International Humanitarian Law, International Criminal Court, Rome Statute, Article 98 Agreements, Jurisdiction of the International Criminal Court

Abstract

The article focuses on the interpretation of Article 98(2) of the Rome Statute, which allows states to engage in international agreements to avoid the ICC's jurisdiction. The author argues that Article 98(2) should only apply to preexisting agreements, and only for nations' military or official personnel sent abroad on official missions, such as Status of Forces Agreements. However, the United States has used Article 98(2) to promote bilateral "Article 98 Agreements" to protect all American nationals from the ICC's jurisdiction, which conflicts with the Rome Statute's objective of ending impunity. The author concludes that different interpretations of Article 98(2) undermine ICC's potential to stem impunity and result in non-cooperation by states in enforcing arrest warrants. The author also examines these agreements and assesses how they affect the current Russian case.

I. Introduction

The International Criminal Court ("ICC") was established by the Rome Statute in 1998 and began operating in 2002.[1] The experiences of ad hoc criminal tribunals, including Rwanda and the former Yugoslavia, led to the idea of establishing the ICC.[2] Its primary goal is to ensure that individuals who are responsible for the most serious international crimes are held accountable for their actions, regardless of their position or nationality.[3] The ICC may exercise its jurisdiction[4] when certain crimes have been committed on the territory of the state's parties[5] and accepting states.[6] According to the Article 86 of the Rome Statute,[7] states parties have the general obligation to cooperate on the arrest and surrender of the accused.[8]

1 International Criminal Court. (n.d.). https://www.icc-cpi.int/about-the-court.
2 International Criminal Court. (2017) 'Joining the International Criminal Court, Why does it matter?', p.3. Joining the International Criminal Court.
3 UN General Assembly, Rome Statute of the International Criminal Court (adopted 17 July 1998, last amended in 2010), Preamble. ("Rome Statute").
4 Rome Statute (1998), Art. 5.
5 Rome Statute (1998), Art. 12(2)(a).
6 Rome Statute (1998), Art. 12(3).
7 Rome Statute (1998), Art. 86, "General obligation to cooperate".
8 Decision on the motion of the defence filed pursuant to Rule 64 of the Rules of Procedures and Evidences, Blaki case (Decision) IT-95-14/00-T (03.04.1996), para [8].

Article 98(2) of the Rome Statute states "The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under ***international agreements***".[9] This article's general language allows states to engage in any international agreements to avoid the ICC's jurisdiction. This opportunity is taken by the United States when promoting bilateral, so-called, Article 98 agreements.[10] As of September 2021, the United States has entered into such bilateral agreements with over 100 countries.[11] In signing them, states help exempt Americans from the jurisdiction of the ICC since they agree not to surrender possible American suspects to the Court. Given the current situation, given the ICC's arrest warrant for Russian President Vladimir Putin and the related geopolitical challenges, this paper investigates the possible use of Article 98 agreements by Russia.

Since the ICC has no police force, to execute warrants of arrest issued by it,[12] this court is dependent on cooperation with state parties.[13] Article 98 Agreements under Article 98(2) of the Rome Statute are arising the conflict as it is resulting in the states parties violating their obligation. Non-cooperation by states in enforcing arrest warrants significantly contributes to efficiency at the Court and undermines its potential to stem impunity.[14] Therefore, this article will concentrate on the interpretation of Article 98(2) of the Rome Statute and its impacts on the ICC.

Criticism and challenges to the International Criminal Court have been explored extensively in various sources, including academic journals such as the European Journal of International Law, as well as reports from institutions like the Congressional Research Service and the International Bar Association. These academic examinations indicate a substantial amount of criticism directed at the ICC. It is important to note, however, that existing resources do not specifically analyse the current Russian case. Given the conflicts and ambiguities that arise among countries, including Mongolia, a neighbouring country of Russia, it is important to elaborate on the possible use of Article 98 agreements without violating their international obligations under the Rome Statute. Therefore, my forthcoming article aims to fill this gap by delving into the criticisms and challenges relevant to the ICC in the context of the ongoing Russian case.

[9] Rome Statute (1998), Art. 98(2), "The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender."

[10] Congressional Research Service Report RL31495 U.S Policy Regarding the International Criminal Court (ICC), (2006), 3.

[11] U.S. Department of State. (2021, September 17). Bilateral Immunity Agreements (Article 98). https://www.state.gov/bilateral-immunity-agreements-article-98/ (Last visited on 5th April, 2023)

[12] Phooko, Moses, R. "How Effective the International Criminal Court Has Been: Evaluating the Work and Progress of the International Criminal Court", Notre Dame Journal of International & Comparative Law, Volume 1 (2011), 195.

[13] H.E. Judge Dr. jur. h. c. Hans□Peter Kaul, The International Criminal Court – Current Challenges and Perspectives, (Salzburg Law School on International Criminal Law, august 2011), 8. (Last visited on 7th November, 2023)

[14] The International Bar Association, Enhancing the efficiency and effectiveness of ICC proceedings: a work in progress, (January 2011), 9.

II. Various Interpretations of Article 98(2)

Rome Statute, Article 98, sub-paragraph (2)[15]

"The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under ***international agreements*** pursuant to which the consent of a sending State is required to surrender a person of that State to the Court unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender."

Article 98(2) of the Rome Statute allows states to engage in bilateral agreements to exclude them from the ICC's jurisdiction.[16] The United States is one state, in particular, that has acquired this opportunity. The main issue regarding this article is that state parties have the right to enter into international agreements after signing the Rome Statute, even where these agreements explicitly limit the ICC's jurisdiction.[17]

The USA was seeing "Article 98 agreements" as within the range of the wording of Article 98 of the Rome Statute and thus not in conflict with international law. On the other hand, the European Council argued that parties to the ICC who signed such agreements with the United States would be acting inconsistently with their obligations under the Rome Statute.[18] According to the European Council's Resolution, USA's action regarding Article 98 agreements was aimed at weakening the credibility of the ICC and Article 98(2) of the Rome Statute was only limited to the preexisting agreements.[19] The European Union also issued guidelines for state parties who signed Article 98 agreements[20] which recommended the language of the Article 98 agreements should require that execution of these agreements would necessarily result in U.S. prosecution of any individual surrendered to the United States.[21] However, Article 98 agreements did not adopt these provisions, resulting in impunity which conflicts with the Rome Statute's objective. Bush administration's stated text of Article 98 agreements does not plainly contradict the ICC's anti-impunity goal.[22] Thus signing the Article 98 agreements is not necessarily legal, but by using the existing loopholes, they are not illegal either.

The author agrees with the European Union's interpretation of Article 98(2) of the Rome Statute for the following reasons. Under well-established international treaty norms such as the Vienna Convention on the Laws of Treaties, parties to a treaty have an unyielding duty to act following a treaty's "object and purpose."[23] The object and purpose of the Rome Statute

15 Rome Statute (1998), Art 98(2).

16 Anna, R. & Veronica, G.J, Article 98 Agreements: Legal or Not? (University of Цrebro, 2007), 21.

17 Antoinette, P.J, "Towards Permanently Delegitimizing Article 98 Agreements: Exercising the Jurisdiction of the International Criminal Court Over American Citizens", New York University Law Review, (2018), 1795.

18 Parliamentary Assembly of the Council of Europe, "Risks for the Integrity of the Statute of the International Criminal Court", Resolution 1300.

19 European Parliament, Official Journal of the European Union, P5_TA(2002)0521, October 2002.

20 Congressional Research Service Report RL31495, U.S Policy Regarding the International Criminal Court (ICC), 2006, 23.

21 New York University Law Review, supra note 18. 1802.

22 New York University Law Review, supra note 18. 1801.

23 Article 18, Vienna Convention on the Law of Treaties (adopted 23 May 1969) United Nations Treaty Series.

is to bring an end to the "impunity to. . . the most serious crimes of concern to the international community within the jurisdiction of the ICC."[24] Under this provision, state parties should not enter into Article 98 agreements since it creates the risk of states violating international treaty norms by exempting potential persons from the ICC's jurisdiction.

Bilateral "Article 98 agreements" rely on the fact that Article 98(2) of the Rome Statute applies to both preexisting and future agreements; however, the legislative history of the Rome Statute reflects that Article's intended scope is limited to preexisting, not future diplomatic immunity and international agreements.[25] The drafters of the Rome Statute understood that states had preexisting agreements with and duties to other states when they ratified the Rome Statute.[26] Article 98 reflects this understanding by conditionally excusing States parties' obligations to surrender an individual to the ICC for specific preexisting agreements.[27] Unfortunately, the Rome Statute does not explicitly codify the drafters' intentions to limit the temporal application of Article 98 to preexisting agreements. Hence, the ambiguity offers a potentially "legitimate loophole" for new agreements.[28]

Furthermore, many commentators point out that article 98(2) has been drafted to specifically address the widely adopted international agreements such as Status of Forces Agreements ("SOFA"),[29] and possibly extradition treaties.[30] SOFAs fit the intended definition of "international agreements" under Article 98(2) because they include provisions establishing criminal jurisdiction and granting the right to exercise criminal jurisdiction over foreign military personnel to one state.[31] However, those so-called "Article 98 agreements" are different as they include nothing about giving any guarantees for investigation and prosecution somewhere else. This makes it even more of an exemption to the Rome Statute's objective, which is to put an end to impunity.[32]

Therefore, the actual provisions of the Rome Statute do not align with the specific intentions of its drafters.[33] The ordinary meaning of its terms is general, extending to any agreement, and possibility for States parties to enter new agreements which would diminish the efficiency of the ICC. The language of Article 98 only requires an "international agreement".[34] To this extent, there can be no international legal objection to the bilateral "Article 98 agreements", since they cannot give rise to

24 Rome Statute (1998), Preamble.
25 New York University Law Review, supra note 18. 1798.
26 Ibid.
27 Nordland, G. (2012) "Non-Surrender Agreements in the Rome Statute Era: A Case for Abolition," Minnesota Journal of International Law 21(2), 202.
28 James, C., Philippe, S. & Ralph, W., Joint Opinion: In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States Under Article 98(2) of the Statute (2003), 2. https://www.legal-tools.org/doc/7f2edf/pdf/ (Last visited on 8th April 2023)
29 Congressional Research Service Report RL31495, U.S Policy Regarding the International Criminal Court (ICC), 2006, 22.
30 Markus, B. (2004) "U.S. Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International Criminal Court: An exercise in the Law of Treaties", United Nations Year Book Series 8, p.209.
31 New York University Law Review, supra note 18. 1799.
32 Rome Statute, Preamble.
33 Roger O'Keefe, Article 98' Agreements, The Law of Treaties & The Law of State Responsibility (The University of Cambridge, 2010), 5.
34 Rome Statute (1998), Art 98(2).

a breach of the Statute.[35]

III. The American Interpretation and "Article 98 Agreements"

Throughout the 20th century, Americans supported the use of international tribunals as a means to bring war criminals to justice and to demonstrate the power and rule of law.[36] While the United States initially supported the idea of creating an international criminal court and was a major participant at the Rome Conference, in the end, the United States voted against the Statute.[37] The primary objection given by the United States in opposition to the treaty is the ICC's possible assertion of jurisdiction over U.S. soldiers charged with "war crimes" resulting from legitimate uses of force, and perhaps over civilian policymakers, even if the United States does not ratify the Rome Statute.[38] Further, in the context of the ICC Statute, the United States has taken certain steps to prevent the Court from exercising its jurisdiction over United States nationals.[39]

One act that was passed to protect Americans from the ICC's jurisdiction, in a preventive manner, is the American Servicemembers' Protection Act ("ASPA").[40] It was passed by Congress in August 2002 and makes it impossible for states to be granted military assistance, or other forms of aid, from the United States if they are members of the Rome Statute and have not signed an "Article 98 agreement" with the United States.[41] The only way for other member states of the ICC not to lose aid from the United States is to sign a so-called Article 98 agreement.[42] Thus, the majority of Article 98 agreements were concluded between the United States and developing countries dependent on aid from it, including health and border security programs.[43] Mongolia is one of the member states that had signed a bilateral treaty with the United States.[44] These bilateral agreements are an arrangement not to hand over possible accused nationals to the ICC without their consent.

Regarding the way of promoting Article 98 agreements, scholars also noted that "The systemically coercive and one-sided nature of Article 98 agreements offers further grounds to doubt their legitimacy."[45] Under Article 52 of the Vienna Convention on the Law of Treaties, a treaty is void when consent is obtained through the threat or use of force.[46] The term coercion is defined as a state of having no real choices.[47] For States who are dependent on aid from the United States,

[35] Anna, R. & Veronica, G.J, Article 98 Agreements: Legal or Not? (University of Цrebro, 2007).
[36] Strategic Studies Institute, US Army War College, Report Part "United States and the International Criminal Court," 2012, 245.
[37] Congressional Research Service Report RL31437, International Criminal Court: Overview and Selected Legal Issues, 2002, 2.
[38] Ibid, 2.
[39] James, C., Philippe, S. & Ralph, W., Joint Opinion: In the Matter of the Statute of the International Criminal Court and in the Matter of Bilateral Agreements Sought by the United States Under Article 98(2) of the Statute (2003), 3.
[40] Strategic Studies Institute, US Army War College, Report Part "United States and the International Criminal Court", (2012), 251.
[41] Anna, R. & Veronica, G.J, Article 98 Agreements: Legal or Not? (University of Цrebro, 2007), 14.
[42] Ibid.
[43] New York University Law Review, supra note 18. 1803.
[44] Link to the agreement, https://guides.ll.georgetown.edu/ld.php?content_id=38318160, (Last visited on 10th April 2023)
[45] New York University Law Review, supra note 18. 1803.
[46] Article 52, Vienna Convention on the Law of Treaties (adopted 23 May 1969) United Nations Treaty Series.
[47] Prosecutor v. Krnojelac, ICTY-IT-97-25-T, Judgment [475] (15.03.2002).

article 98 agreements could be considered as a threat or coercion since it was the only option for them to continue their functions regularly as a State. Contrary, some argue that such agreements are necessary to protect their sovereignty and that they do not conflict with their obligations under international law. Therefore, the validity of Article 98 agreements under international law is not settled and has been the subject of controversy.

IV. The Russian case and the possible use of "Article 98 Agreements"

On 17 March 2023, Pre-Trial Chamber II of the ICC issued an arrest warrant for the President of Russia, Mr Vladimir Vladimirovich Putin for alleged war crimes of unlawful deportation of the population(children) to the Russian Federation under articles 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute.[48] It is arising obligation for state parties to arrest and surrender the suspect to the Court if found on their territory or control.[49] In the meantime, Russia's ex-president Dmitry Medvedev has warned 'Russia would bomb any country that detains Vladimir Putin using the International Criminal Court arrest warrant'.[50] This clearly threatens the world, particularly those who are signatories to the Rome Statute. It is a challenging situation for the legitimacy and efficiency of the Rome Statute as its arrest warrant could be seen as just paper with no legal consequence.

As Russia had made clear intentions regarding Mr Putin's arrest warrant, many State Parties are expressing their political preference not to arrest the Russian President, such as Hungary.[51] International Relations Minister of South Africa Naledi Pandor says "We are awaiting a refreshed legal opinion on extending an invitation to Russian President Vladimir Putin to attend the BRICS Summit in August and we continue to be a member-state of the Rome Treaty".[52] Therefore, such states are seeking a solution to a given situation without violating their international obligation under the treaty of ICC. Here, bilateral Article 98 agreements are a viable solution.

For Mongolia, in the event of Russian President Mr. Putin entering our territory, the prospect of detaining him poses a tricky situation. Even if there's an obligation under the Rome Statute to arrest him, doing so could harm our country's politics and policies. Our constitution emphasizes maintaining friendly ties with neighbouring countries, including Russia.[53] Mongolia is not alone in this; other countries also want to avoid becoming enemies with Russia. So, these nations are trying to

[48] "Situation in Ukraine", International Criminal Court, March 17, 2023, Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova | International Criminal Court (Last visited on 3rd April 2023).

[49] Dikran, M. Z, "Enforcement of the Cooperation Obligation with the ICC for the Accountability under International Criminal Law", Journal of International Criminal Law, Vol.2, (2021).

[50] "Russian Hawks Threaten Nuclear Strikes Over Putin Hague Warrant," The Moscow Times, March 20, 2023, Russian Hawks Threaten Nuclear Strikes Over Putin Hague Warrant - The Moscow Times (Last visited on 8th April 2023).

[51] "Hungary says it would not arrest Putin if he entered the country," Luke Mcgee, CNN, March 23, 2023, https://edition.cnn.com/2023/03/23/europe/hungary-icc-warrant-putin-intl/index.html (Last visited on 8th April 2023).

[52] "South Africa Mulls Options After ICC's Putin Arrest Order," Voice of America, March 28, 2023, https://www.voanews.com/a/south-africa-mulls-options-after-icc-s-putin-arrest-order-/7025238.html (Last visited on 8th April 2023)

[53] Constitution of Mongolia (1992), Art 10(1).

find a solution that doesn't break their international commitment to the ICC treaty. In this context, using bilateral Article 98 agreements seems like a practical way out.

Despite the underlying issue of Article 98(2) of the Rome Statute, States still can enter into bilateral agreements with other states since it has not established a breach under international law. Therefore, signing Article 98 agreements between Russia and another state could potentially provide some level of protection for Mr Putin, however, it would not provide complete immunity from ICC jurisdiction. It indicates more clearly that Article 98 agreements are ambiguous about the ICC's efficient operation.

V. Conclusion

The ICC is the first global permanent international court with jurisdiction to prosecute individuals for "the most serious crimes of concern to the international community."[54] The ambiguity surrounding the scope of Article 98(2) of the Rome Statute, coupled with the lack of clarity around the types of international agreements that fall within its scope, has allowed States parties to enter into bilateral agreements that limit the ICC's jurisdiction, thereby undermining its ability to stem impunity.

The United States' approach to the ICC has been particularly significant, with its use of Article 98 agreements serving to protect American citizens from the ICC's jurisdiction. This approach has been controversial, with critics arguing that it undermines the ICC's effectiveness and potential to end impunity for those who commit international crimes. Despite all the debate, it is clear that Article 98 agreements are a growing problem for the ICC. These agreements contradict the purpose and object of the Rome Statute. The widespread signing of Article 98 agreements will therefore become a threat to this equality, since exempting almost all Americans from the ICC's jurisdiction may lead to them escaping punishment.

In the context of the Russian case, exploring Article 98 agreements within the challenges faced by the ICC underscores the relationship between international legal obligations and geopolitical considerations. Countries, including those neighbouring Russia, may consider entering into Article 98 agreements as a pragmatic solution, given that, under international law, such agreements do not constitute a violation of obligations similar to the United States' approach. However, it is crucial to acknowledge that while these agreements offer a practical path for states and Russia, they inherently undermine the fundamental objectives of the Rome Statute.

To address this issue, it is important to clarify the proper interpretation of Article 98(2) and ensure that it does not enable States parties to undermine the ICC's mandate to prosecute serious international crimes. States parties must be encouraged to cooperate fully with the ICC in its investigations and prosecutions, including the execution of arrest warrants, to ensure that the Court can function effectively in the pursuit of justice. The ICC plays a crucial role in deterring international crimes and upholding the rule of law, and it is essential that state parties work together to ensure its success.

[54] Rome Statute (1998), Preamble.

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14. Strategic Studies Institute, US Army War College, *Report Part "United States and the International Criminal Court"* (2012).
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17. Prosecutor v. Krnojelac, ICTY-IT-97-25-T, Judgment [475] (15.03.2002).
18. Congressional Research Service Report RL31495, *U.S Policy Regarding the International Criminal Court (ICC)*, (2006).
19. The International Bar Association, Enhancing the efficiency and effectiveness of ICC proceedings: a work in progress, (2011)
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ANALYSIS OF JUDICIAL PRACTICE RELATED TO INHERITANCE OF REAL ESTATE OWNERSHIP

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Keywords

Inheritance, Succession, Judgment, Registration, and Real estate.

Abstract

Inheritance has been around since the beginning of humanity and is still essential today. In most countries, people can inherit their properties with or without wills (intestate). Inheritance law is a civil law relationship with a unique regulation. In other words, various other rights correlated with civil property rights and property rights are crucial for our existence and essential to the values of freedom.

Within the framework of this study, we will acknowledge how the Civil Court of Mongolia resolves the dispute regarding the inheritance of real estate ownership in practice. We have recently learned of the extensive research on inheritance law in Mongolia.

Namely, six monographs, one undergraduate research work, eight master's theses, and one doctoral research work on this significant subject matter. However, there has never been an analysis of court practice related to the inheritance of real estate ownership rights in Mongolia. We hope this research would be innovative enough to fill this knowledge gap and provide valuable insights into this area of law.

As part of the research work, we accessed and searched www.shuukh.mn, which is the publicly accessible database for Mongolian court decisions and researched a total of 178 judgments related to an inheritance that was processed from January 1, 2013, to March 31, 2023.

According to the study, 41% of real estate inheritance claims are resolved. Thus, the settlement of the claim is revealed on the following grounds:

1. According to the law, the court determines whether the person is the owner and heir and enjoys a right to inherit (60 percent of the claims are satisfied by the court).
2. Determined the heirs and ensured the fulfilment of obligations (7 percent of the claims are satisfied by the court).
3. Due to the respected grounds, the successors have not declared the acceptance note (7 percent of the claims are satisfied by the court).
4. The fault action of the notary (4 percent of the claims are satisfied by the court).

Therefore, when the Civil Court deals with disputes related to the inheritance of real estate ownership, generally, article of the Civil Code (2002) "520.1.2. In the absence of a lawful successor specified in Item 520.1.1 or in case they relinquished their inheritance right or their right was revoked, the inheritance right shall be transferred to the grandparents, brothers and sisters, and grandchildren of the deceased" or based on this provision, the claims were resolved. In doing so, the situation of "no heir" is considered.

In other words, in order to determine the legal heirs and protect the property, we need to study and pay more attention to the principles of inheritance registration.

MAIN SECTION

I. A (brief) comprehension on ownership of real estate through inheritance

Legal coordination relevant to the regulation of "inheritance relations"

Before we review an issue of inheritance law, it is worth to promote ideas briefly and clearly how comprehensions on real estates or material wealth and proprietorship rights are related to inheritance law and to make promotions on the most vulnerable and urgent issues of the topic.

Inheritance law issues are wide relations with wider contents of Civil Law, namely in economic frames. Inheritance law has been occupying certain places in the Civil Law system since that time when proprietorship relations appeared in the human society and its legal coordination methods and types were formed[1].

As an independent sub-branch of Civil Law, inheritance law has some features of its legal coordination. This article of legal coordination is included into the general frames of regulatory influences, i.e., it will be a coordination subject when certain social relations are complex. Inheritance law norms coordinate relations to transfer properties or proprietorship rights and obligations from dead persons (inheritors) to legal persons (successors)[2].

In other words, inheritance right issues are directly related to proprietorship rights. Legal theorist L. Hart has explained it in the theoretical framework of legal interest and choice theory "Proprietorship right is certainly a vital right to protect their rights and interests to make free choices. The proprietorship right also becomes the only implementation and enforcement of the right to live similarly to the main right to live that becomes a basis of all the human rights". Other thinkers also explain rationally "without proprietorship rights, other rights shall not be enhanced. A person must live on personal strength and efforts; therefore, he will not be able to feed and earn his living without a right to make these efforts"[3].

Proprietorship rights is protected by law in accordance with Section 3 of Article 16, the Constitution of Mongolia that states, "A person enjoys a right to fair acquisition, possession, and inheritance of movable and immovable property. Illegal confiscation and requisitioning of the private property of citizens are prohibited. If the State and its bodies appropriate private property based

1 VANCHIGMAA Munkhbayar, Rights inherited through wills, 2015, 31.

2 Tserendagva, Oyunaa, Inheritance Law, 2018, 60 дахь тал.

3 DORJSUREN Altangerel, Legal coordination of inheritance, its vulnerable issues, 2023, 2.

on exclusive public need, they may only do so with due compensation and payment." Moreover, the right is also coordinated in accordance with Articles 515-538 of Civil Code of Mongolia. For instance:

Statement 515.1 of Article 515, Civil Code of Mongolia states, "Property and rights of a testator shall be inherited", whereas property is referred to as immovable properties such as but not limited to land, private house, apartment building, production and service construction buildings, garage etc. and movable properties such as vehicles, savings or monetary assets in the savings and correspondent bank accounts, money, assets, guns, and furniture to obtain through legal resolutions[4].

Thus, from above comprehension, you can see that inheritance is tightly related to the property wealth and proprietorship rights.

The transfer of inherited proprietorship rights (within the framework of the theoretical and legal coordination)

The inheritance is implemented through two backgrounds such as through inheritance and in accordance with the relevant legal statements. The difference between these backgrounds is that deceased person's assets are distributed through his personal will whereas its contents, size, limits, and types are stated and coordinated through the law statements. However, in the second case, inheritance is implemented only on basis of legal norms and statements of inheritance law[5].

4 Oyun-Erdene V., Comprehension of Inheritance and legal coordination of inheritance, 2023, 2.
5 Tserendagva, Oyunaa, Inheritance Law, 2018, 61.

It is understood that participations of a person in the legal relations are interrupted and terminated when the person dies; however, in accordance with inheritance law, it is a complex of special legal norms that explains the proprietorship rights and responsibilities transferred from dead person to other persons in accordance with the relevant procedures[6]. Within the framework of this comprehension, inheritance right is included into one type of inheritances whereas legislators are based on the vital requirements to keep property relations of deceased persons even after his death to enhance uninterrupted sustainable service of civil transactions with his participations[7].

It has shown that transfer of inheritance rights shall become an integral part of obligations' relations where the inherited properties and their composites include not only rights (active) relevant to testator, but also his responsibilities (passive). As mentioned above, when the inherits start, the relevant rights and responsibilities are also transferred to the successor[8].

When a successor accepts the inheritance properties, the inheritance process shall be performed; in accordance with Article 527.3, the inheritance shall belong to the successor from the date of opening the testament or acceptance of the inheritance. Such a regulation shall become a background that the movable properties relevant to inheritance subject have been transferred legally to the successor in accordance with the relevant law[9].

6 Ibid, 64.
7 Ibid, 62.
8 Ibid, 63.
9 Buyankhishig B., Introduction to Civil Law, 2018, 109.

However, proprietorship rights for immovable properties shall also be transferred on basis of agreement whereas the transfer of the proprietorship right is registered into state registration on basis of the authorizations given by Owner. In this case, it is possible to consider that property agreement has been done through notarized contract and a request to the state registration authority for transfer of the property.

Proprietorship rights for immovable properties relevant to the inherited properties shall be transferred to the successor from the moment of opening the inheritance in accordance with Article 527 of Civil Code of Mongolia; however, it is necessary to make amendments and changes, and notes into the state registration on basis of the circumstances[10]. In this case, the successor shall become the owner of the immovable property and enjoy rights to own, possess, and use the immovable property of his ownership limitlessly[11].

All these circumstances illustrate that when proprietorship rights to the movable and immovable properties are transferred from testator to successor, the relevant rights and responsibilities shall be transferred actively and passively in accordance with the theory. In accordance with the law, persons with inheritance rights (such as children, spouse, parents, grandchildren of successor) shall enjoy a right to accept the inheritance by the order of inheritance rights and become a legal successor upon registration into state registration on basis of negotiations with the owner of the immovable property.

10 Ibid, 110.

11 Oyuntungalag J., Civil Law 1, General Part, 2020, 156.

In accordance with the observations on the process of proprietorship right transfer, we have noticed that Civil Code of Mongolia does not have detailed statements and explanations on the ways and methods to identify who will be the owner when the successor is not identified within one year[12] after opening of the inheritance right after the death of property owner or until the identification of the legal successor and how to use the properties during this period and how the relevant measures shall be taken on the property; however, there are coordination giving more importance on the subject how will receive and refuse from the inheritance.

"Inheritance contract" as a method of inheritance:

On the other hand, inheritance contract[13] can be concluded by and between testator and successor; however, it is not regulated vert well in the inheritance law of Civil Code of Mongolia and this inheritance contract becomes a tool of inheritance with disposal features similarly to will and inheritance regulations.

Similarly, to wills, inheritance contracts become effective upon death of testator. Even, it is considered as a contract, it is distinguished from the obligation law contracts and agreements through its features that no responsibilities and obligations will arise from the contract when the testator is alive. Inheritance contract and deed of gift due to death have features that successor shall obtain no

12 Civil Code of Mongolia (2002), art. 528(2).

13 A probate agreement is a contract between two parties that determines how their assets will be disposed of in the event of a person's death. This contract has two main characteristics: first, it is an expression of the will to dispose of assets and is a contract.

preliminary rights or rights to require future rights until the death of testator[14].

Due to such reasons, it is impossible to registered advanced rights to be obtained on immovable properties' proprietorship rights through inheritance contract; however, it is common for testators not to use the property while the testator is alive to verify the obligations and responsibilities of inheritance contract. However, the transaction shall be deemed void in accordance with Article 56.1.1 of Civil Code when the restrictions have property rights features[15].

Maintaining inheritance registration procedure in case of real estate ownership rights are transferred through inheritance:

The principle of registration in inheritance is important for determining the legal ownership and transfer of property or assets from one generation to another. Depending on the country or jurisdiction, different laws and procedures may apply to the registration of inheritance.

For example, in some countries, such as Japan and Germany, the registration of inheritance is mandatory and requires the involvement of a judicial scrivener or a notary public. In other countries, exemplified by the United States and the United Kingdom, the registration of inheritance is optional and may depend on the type and value of the property or assets, as well as the existence of a will or a trust[16].

.Since that time, when Mongolia became a democratic country, no major changes and contributions have been made into the legal coordination of inheritance; therefore, it is urgent to pay special attention on this issue.

Pertaining the aforementioned, the contents, type, and limits of legal coordination that regulates civil relations in Mongolia is like German and Japanese legal coordination in some matters. As the legal system is the same, the absence and lack of reports, discussions, research works, books, and creatures touching the transfer of immovable properties' proprietorship rights through inheritance procedure and researching the theoretical and practical aspects of the issue show the insufficient comprehensions on this issue.

The owner of real estate inheritance until found the owner after the real owner died in Japan and Germany is the person who is registered as the owner in the official records, such as the real estate register or the land register[17].

In other words, the registration of inheritance can also help to avoid disputes, fraud, or taxation issues that may arise from the transfer of property or assets from the deceased to the heirs and the registration of inheritance of property also requires the involvement of a professional, such as a judicial scrivener in Japan[18] or a

14 Buyankhishig B. Special parts of Civil Law: Contract law, 5th ed., 2019, 461.

15 Ibid, 462.

16 Legal Information Institute (LII), wills | LII / Legal Information Institute (cornell.edu) (Last seen 2023.12.21).

17 Amendment of Japan's Real Property Registration Act, https://www.realestate-tokyo.com/news/amendments-property-registration-act/(Last seen: 2023.12.24).

18 When the owner of real property in Japan dies, the heirs have an obligation to change the names on the real property registration to indicate their ownership, https://kobelp.com/en/obligation-to-register-inheritance (Last seen: 2023.12.24).

notary public in Germany[19], who can assist with the preparation and submission of the necessary documents.

In Japan, the law that regulates the principle of registration of inheritance of property in Japan is the Real Property Registration Act, The Family Registration Act and the Civil Code in Japan outline the legal procedures for inheritance registration.

This law stipulates that the person who inherits the property from the deceased owner must register the change of ownership in the real estate register within three years from the date of the start of inheritance or the date of knowing that he/she has acquired such ownership and It's essential for heirs or beneficiaries to report the death and inheritance details to the local municipal office, submitting documents such as the death certificate, will (if available), and information about the deceased's assets and heirs. Once the information is verified, the municipal office updates the family registry to reflect the changes in inheritance rights and property ownership[20].

In Germany, the law that regulates the principle of registration of inheritance of property in Germany is the Civil Code. This law states that the transfer of ownership of immovable property requires two steps: a purchase agreement and a conveyance of property. Both steps must be notarized by a public official and registered in the land register5. The registration is done with the assistance of a notary public, who can verify and certify the legal documents to the Land Registry Office[21].

In other words, the registration of inheritance has the main objective to simplify the processes to document properties of dead persons, to identify their legal successors, and to transfer immovable properties to successors in conformity with relevant laws and to transfer on basis of equality and justice.

Thus, we shall provide statistics data how above theoretical issues are enforced into the legal practice of Mongolia, how and on which backgrounds these disputes on inheritance of proprietorship rights of immovable properties are solved, and how many legal resolutions on inheritance issues have been made.

II. Quantitative data on judgment related to the inheritance of real estate ownership rights

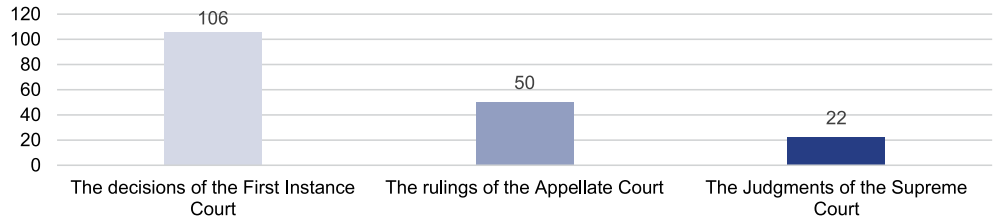
Judgments related to real estate ownership rights has been on the increase in recent years /in particular, inheritance disputes/. As seen in Chart 1, according to the law, between 2013.01.01 and 2023.03.15, there were 106 decisions of the First Instance Court, 50 rulings of the Appellate Court, and 22 judgments of the Supreme Court related to the inheritance of real estate ownership rights.

19 European Union, https://europa.eu/youreurope/citizens/family/inheritances/planning-inheritance/index_en.htm (Last seen: 2023.12.24).

20 Amendment of Japan's Real Property Registration Act, https://www.realestate-tokyo.com/news/amendments-property-registration-act/(Last seen: 2023.12.24).

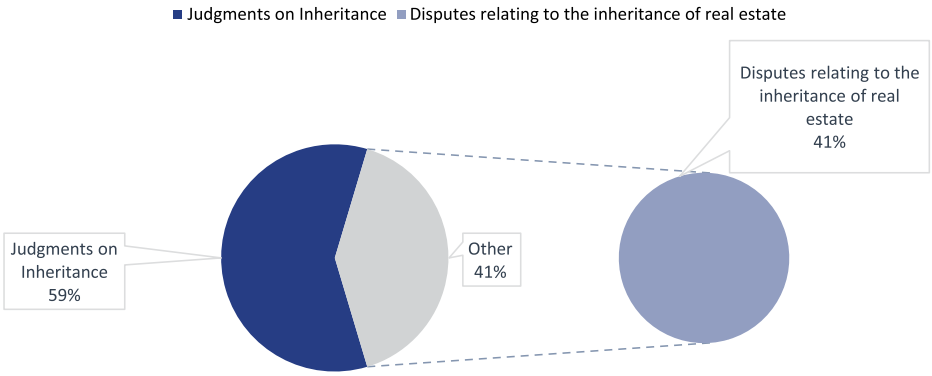
21 German Law: Inheritance and Probate in Germany, https://www.hg.org/legal-articles/german-law-inheritance-and-probate-in-germany-21341 (Last seen: 2023.12.26).

Chart 1. The number of court decisions related to the inheritance of real estate ownership rights /in the last ten years/



Furthermore, as shown in Chart 2, 41 percent of the total claims filed in court related to inheritance disputes are occupied disputes about real estate ownership.

Chart 2. The number of court decisions related to the inheritance of real estate ownership rights in percentage /the last ten years/.



Let us address the real estate types (such as immovable property), which refers to claims relating to immovable property / In Chart 3/.

Chart 3. The content of disputes related to the inheritance of real estate ownership rights /in the last ten years/.

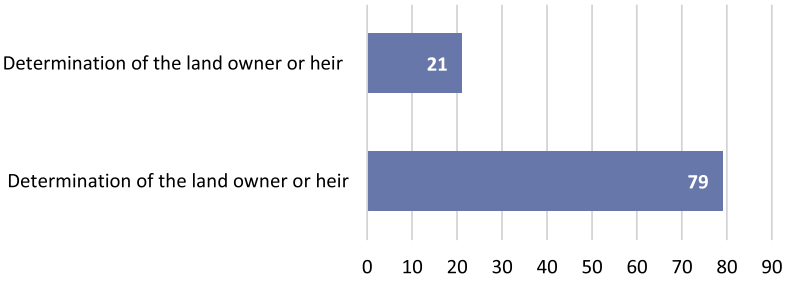
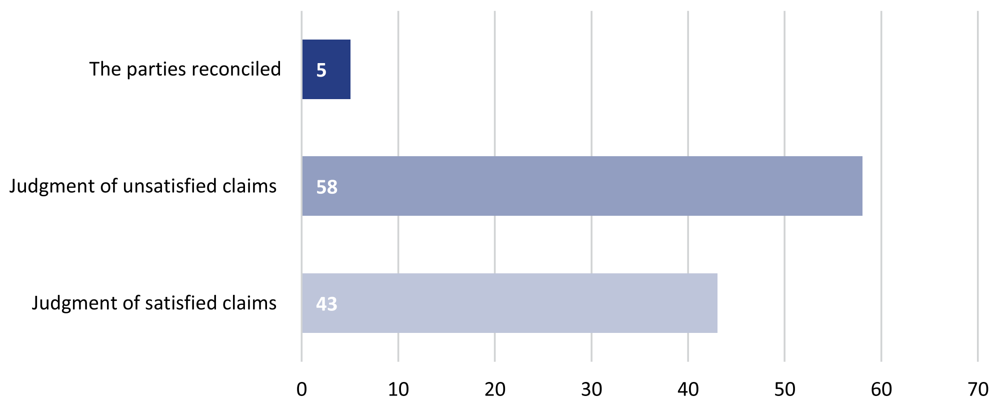


Chart three shows that there are 79 disputes related to determining the owner and heir of apartments and 21 conflicts related to determining the owner and heir of the land. It illustrates how the plaintiff's claim related to the inheritance of the Real Estate in this dispute was resolved (in the last ten years).

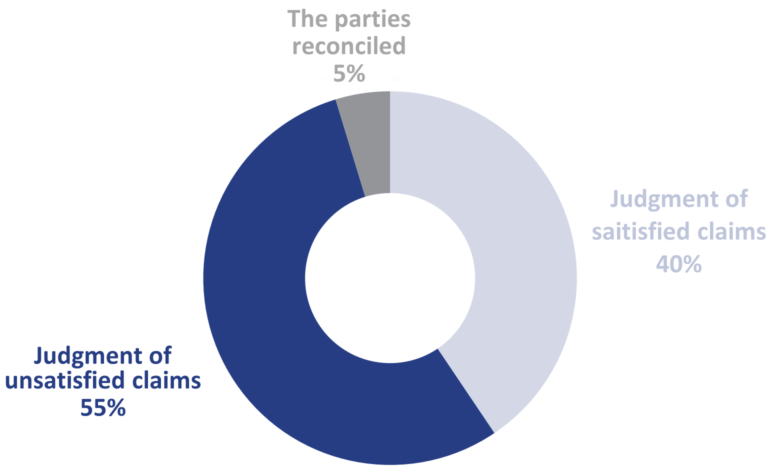
Chart 4. The plaintiff's claims are satisfied, unsatisfied claims, and reconciliation agreement of the parties /by number/.



	Judgment of satisfied claims	Judgment of unsatisfied claims	The parties reconciled
In the Trial Court /By numbers/	43	58	5

According to the above chart, there are 58 decisions of unsatisfied claims, 43 judgments of the satisfied claims, and five disputes that were reconciled.

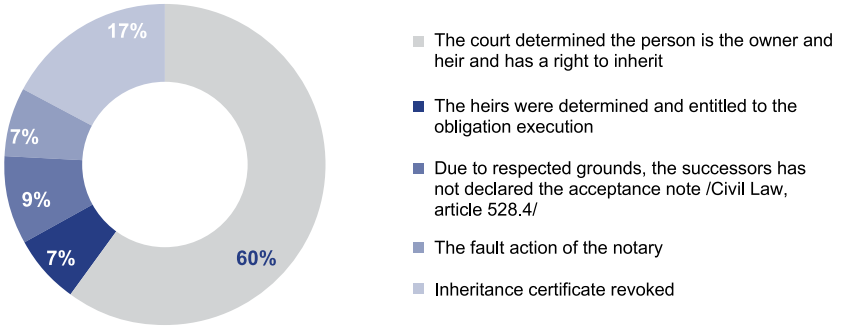
Chart 5. Satisfied, unsatisfied claims, and reconciliation agreement of the parties /in percentage/.



In the First Instance Court, 55% of the plaintiff's claims are unsatisfied, and 40% of the plaintiff's claims are satisfied.

It also considers the grounds on which claims in disputes related to Inheritance of Real Estate Ownership on the Civil Court of the First Instance, the Court of Appeals, and the Supreme Court.

Chart 6. Grounds for the First Instance Court to satisfy the claims /on percentage/

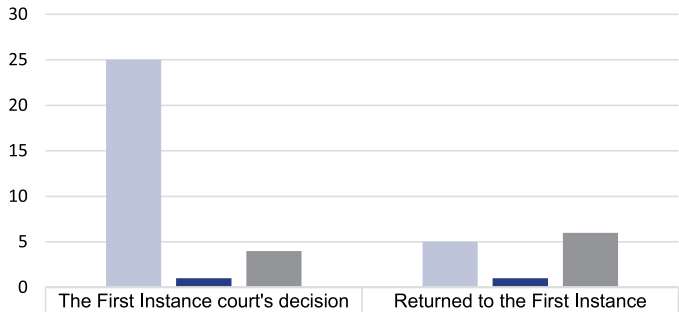


The Court of First Instance satisfied the plaintiff's claim and decided on the following grounds. It includes:

1. According to the law, the court determined the person is the owner and heir and has a right to inherit (60 percent of claims are satisfied by the court)
2. Determined the heir and ensured the obligation execution (7 percent of the claims are satisfied by the court)
3. Due to respected grounds, the successors has not declared the acceptance note (7 percent of the claims are satisfied by the court)
4. The fault action of the notary (4 percent of the claims are satisfied by the court)

However, considering the contents of the reasons why the appellate court upheld the decision of the first instance court after reviewing the claims of the defendant and the plaintiff and returned to the First Instance Court for reconsideration:

Chart 7. The Court of Appeals is considering the complaints of the defendants and plaintiffs according to the content of the following grounds and resolving the dispute.

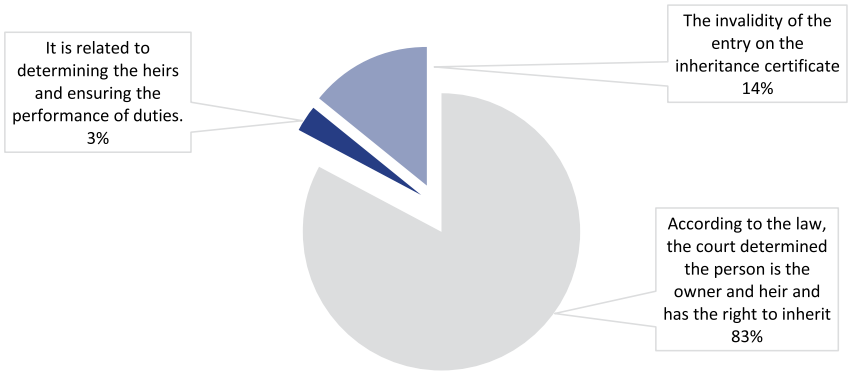


	The First Instance court's decision was upheld	Returned to the First Instance Court
The owner and heir has a right to inherit	25	5
Determined the heirs and ensured the obligation execution	1	1
Inheritance certificate revoked	4	6

The Appellate Court resolved 30 claims to determine the legal owner and heir, two allegations related to determination and entitlement to the obligation execution of the heirs, and ten claims related to the invalidity of the entry on the inheritance certificate.

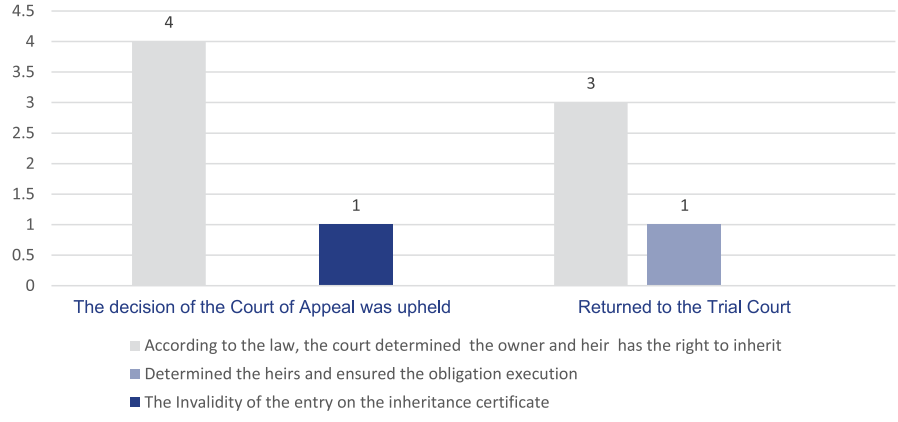
The following chart will show the percentage of disputes that have upheld the decision of the First Instance Court. It includes:

Chart 8. The Court of Appeals upheld the decision of the First Instance Court



Based on the research, we considered the cases of the number of disputes in which the appeal court's rulings were upheld and returned to the Frist Instance Court after the Supreme Court reviewed the defendant's and the plaintiff's claim requirements.

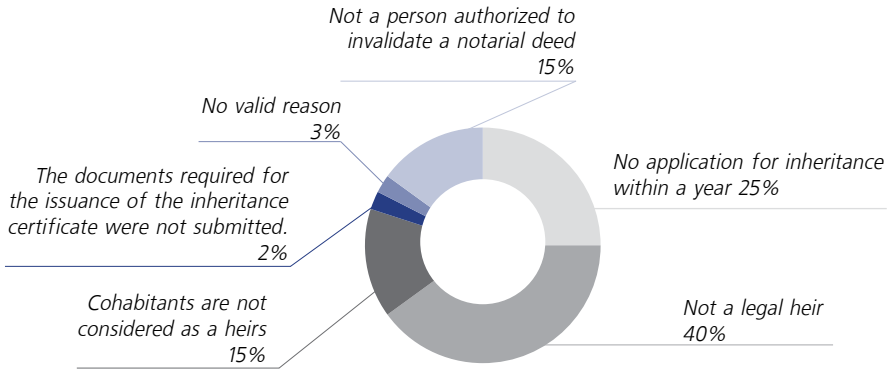
Chart 9. Review and resolution of the complaints of plaintiffs and defendants by the Supreme Court



The Supreme Court returned four cases to the First Instance Court, and the Appeal Court upheld five rulings.

The First Instance Court, Appeal Court, and Supreme Court resolved the case related to the Inheritance of Real Estate Ownership dispute and left the plaintiff's claim unsatisfied on the following grounds.

Chart 10. The grounds for an unsatisfied the requirements of the claim /Percentage/



40% of cases where the court decided the claim of the plaintiff as not being a legal heir, 25% of cases where there is no application for inheritance within a year, 15% of cases where the notary is not a person authorized to invalidate a notarial deed, 15% of the cases where cohabitants are not considered as heirs, 2% of the cases where the documents required for the issuance of the inheritance certificate is not submitted, and 3% has not a valid reason, and the claims are unsatisfied.

III. Analysis of court decisions related to inheritance of real estate ownership

The Court satisfying the claim of the plaintiff /for example/

Claims to be determined by banks and authorized people as "heirs" regarding fulfilling the obligations of the loan agreement with immovable property are decided as follows[22].

Requirements of the claim: Determining the person who is responsible for contractual obligations, collecting 491,747.21 USD from those who are responsible for contractual obligations, and securing the performance of duties with collateral.

Case number: 001/HT2019/00134

Date: January 19, 2019

Judgment of the Court: The Supreme Court overruled the Court of Appeal's decision and upheld the decision of the First Instance Court.

22 Supreme Court Decision: 001/XT2019/00134 dated January 29, (2019), https://shuukh.mn/single_case/5810?start_date=&end_date=&id=3&court_cat=1&bb=1 (Last seen: 2023.03.11)

BACKGROUND:

"Chingis Khan Bank" LLC signed a loan agreement No. 0142/01/SS-2007 with CHS on May 31, 2007. As a result, it was agreed to lend 250,000.00 USD for 120 months with an annual interest rate of 4%. The loan amount increased on February 28, 2008, and the term was determined until June 30, 2017, and the loan was added to the contract to be paid according to the appendix. On November 13, 2009, the borrower's identity card number was amended, and 500,000.00 USD was transferred according to the agreement. A credit relationship was established as Article 451.1 of the Civil Code stipulated.

The parties of the loan agreement signed and notarized the Real estate with a total area of 365 sq.m. located in Khan-Uul district, 11th Khoroo, "Royal Green Villa" /17027/ Zaisan toiruu 62/4, apartment No. A2-506, 606, with Parking spaces No. 26 and 27 on the basement floor, registered in the General Authority for State Registration of Mongolia.

The defendant explained the basis of the counterclaim, "...The pledge agreement is registered in the state three years after the bank has signed the loan or mortgage agreement and 14 days after the borrower's death, and the deal is marked. This violates Articles 156.1 and 162.1 of the Civil Code, and it is transferred without the appropriate person's consent, so it will be an invalid transaction according to Section 56.1.8.

JUDGEMENT:

Due to the death of the borrower *Ch.*, the contract's payment of the interest stopped. *C. A* and *C.M.* were determined to be liable for their obligations. The loan principal of 491,317.28 USD, the interest of 46,277.00 US dollars, and a total of 491,747.81 USD are collected from defendant *C.A* and *C.M's* guardian *D.* and granted to "Chingis Khan Bank" LLC. However, if the defendants did not fulfil their obligations voluntarily, the Supreme Court upheld the decision of the First Instance Court[23], which idecided to provide the property as collateral.

The Judgment of not fulfilling the claim of the plaintiff /example/

1. A contentious case concerning the annulment of the act of the notary who registered the will was resolved as follows[24]:

Claim requirements: A certificate was granted on 23.02.2016 for the property not mentioned in the will without reference to the heir, and found guilty of violating the rights of the legal heir and disclaiming the inheritance's facts, and must recover 20,000,000 MNT for the damages

Case number: 181/ШШШ2017/01949

Date: 07/05/2017

Judgment of the Court: Decision of the First Instance Court

BACKGROUND:

D.A /Д.А/, the plaintiff, filed a lawsuit: "...my stepfather passed away in 2014 and he left his estate to unknown children, not me, his legal heir. When I found out all of it in 2015, I tried to transfer the rights

23 It was considered to comply with Art. 528, Art. 528.1, Art. 515, Art. 515.1, Art. 535, Art. 535.1, Art. 535.2, Art. 451, Art. 451.1, Art. 175, Art. 175.1.

24 Decision of the Sukhbaatar district first instance court: No. 1949 dated July 5, (2017), https://shuukh.mn/single_case /71137?daterange= 2016-01-01%20-%202018-12-31&id =1&court_cat=1&bb=1 (Last seen: 2023.03.11)

to one's possessions, but everywhere I went did not take this issue seriously..." his explanation does not correspond to reality at all. It is considered that it was possible to know that *D.A*.'s mother, *L. Dejid* /Л.Дэжид/ died on August 3, 2000, by the explanation of the defendants and the evidence collection in the case.

Notary /name: *P.G-П.Г*/ notarized the will on October 2, 2012, and noted a record according to Article 34.1 of the Notary Law. Also, the court examined the video recording of the testament, and since the evidence required by the law was taken into the case, it is considered that this testament meets the requirements stipulated in Article 523, Clause 523.1 of the Civil Code.

The deceased *Y.D* /Я.Д/ clearly expressed the meaning of his will by saying "..." in court-enhanced video footage.

The testator *Y.D* died on March 10, 2014, according to the Death Certificate, and litigant's comments. Previously noted, the notary *P.G /П.Г/* granted the certificate of Inheritance No. 001 to heir *B.C /Б.С/* on February 23, 2016, according to article 531, section 531.1, and 531.2 of the Civil Code, and 2-room apartment with an area of 29 sq.m. located in Sukhbaatar district, 5th khoroo, 5th khoroolol, No. 33 of 6th building was registered, and the apartment became the legal owner of *U.D /У.Д/* and *T.Ts /Т.Ц/*. So then, on March 1, 2016, the Court of the First Instance ruled that the certificate of the Real Estate Ownership No. 000464898 did not violate the law.

IV. Conclusion

In Mongolia, inheritance is governed by the Civil Code, and when someone passes away, their estate and assets are typically distributed according to the law or the deceased's will. However, the process might not strictly involve a centralized inheritance registration system similar to what is found in some other nations, as well as not being taken seriously, and the opportunity to ensure the safety of the owner's property has not yet been formed.

The specifics of inheritance procedures and documentation might vary, and while there might be requirements to file certain documents or inform relevant authorities about death and inheritance matters, the extent and structure of such registration might differ from more formalized systems found in other countries like Japan. it is necessary to improve the norms and structure of the registration.

Within the framework of this study, we individually sampled the Inheritance of immovable property dispute is to be considered the object of this research, and the judicial decisions made in the period between 01.01.2013 and 03.15.2023 from the Database for Mongolian court decisions.

As part of this analysis, we sampled and studied the decisions of the First Instance Court, the ruling of the Appellate Court, and the judgment of the Supreme Court.

At the end of this research, we reached the following conclusion.

There were 79 disputes regarding the determination of the owner and heir of an apartment and 21 disputes regarding the determination of the owner and heir of land. In this dispute, the plaintiff's claim related to the inheritance of the real estate is rejected by the First Instance court for

the majority of cases, 55%, and 40% of the cases are satisfied.

However, the Appellate court reviewed the claims of the defendant and the plaintiff and upheld the decision of the First Instance court. Including:

The First Instance Court determined 25 claims that the person is the owner and heir and has a right to inherit, 7 claims related to the heirs were determined and ensured the obligation execution and 10 claims regarding the invalidity of the entry on the inheritance certificate. Also, the Supreme Court granted 4 decisions that were returned to the Court of First Instance, and 5 decisions that upheld the Appeal Court's ruling.

In addition, 3 inheritance disputes by will, and according to the law, most disputes over inheritance rights were observed in court practice.

According to the numerical data of these court decisions, the disputes related to the transfer of the ownership rights of immovable property through the inheritance procedure have increased relatively, and in most cases, the demand for determining the ownership of the immovable property, especially the apartment, has been raised in the majority of cases.

Therefore, considering the above issue from the point of view of theory and judicial practice, it is necessary to improve the regulations related to the Inheritance Rights in the Civil Code of Mongolia, including how to deal with inheritance or how to ensure the security of the property of the deceased person in case the heir is unknown, and the property until the true heir of the property is determined, there is no detailed regulation on who will own and keep the property owned by the deceased one.

Thus, there is a need and requirement to define the relevant legislation in detail and study the inheritance relationship in more detail.

In order to create a solution to this problem, the researcher believes that it is time to incorporate the principle of inheritance registration, which is considered very important in other countries, into their laws, as well as in the future, researchers should conduct more research on this issue and consider the relationship of inheritance.

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5. European Union, https://europa.eu/youreurope/citizens/family/inheritances/planning-inheritance/index_en.htm
6. German Law: Inheritance and Probate in Germany, https://www.hg.org/legal-articles/german-law-inheritance-and-probate-in-germany-21341

Online resources:

1. Database for Mongolian court decisions www.shuukh.mn

SUMMARY OF COURT DECISION (ADMINISTRATIVE LAW CASE[1])

COURT DECISION "LAWYERS STUDIED AT THE EVENING LAW SCHOOL WAS DISQUALIFIED FROM LEGAL PROFESSIONAL EXAM ON THE GROUND THAT THEY HAVE NOT COMPLETED MANDATORY 4-YEAR OF LEGAL EDUCATION" IS UNJUSTIFIABLE

JUDICIAL RESEARCH CENTRE

[1] Link to the full judgement: https://shuukh.mn/single_case/3138?daterange=2023/01/01%20-%20 2023/06/16%20&id=3&court_cat=3&bb=1

Note: This summary is not a substitute for a court decision and is intended to support the establishment of uniaformity in the application of law, promote the reasoning of court decisions, and provide legal knowledge to citizens and the public. The decision used in the summary is the decision of the reviewing court.

Court decision number: 001/XT2023/0040

Date of court decision: 22 May 2023

Status of the decision: Court decision and ruling was changed in line with the application of law.

BACKGROUND OF THE CASE

Plaintiffs A.U, G.O and O.A submitted a request to take a legal professional exam in 2022. Legal professional exam organization commission of the Mongolian Bar Association then discussed the request and decided to grant permission to O.A, however, refused the request of A.U and G.O in accordance with the Resolution No.1 dated 28 July 2022. After reviewing complaints made by other exam-takers, in accordance with Resolution No.3 dated 12 Aug 2022 of the Legal professional exam committee, relevant part of the resolution granting permission to take legal professional exam for O.A has been invalidated. The ground for refusal was while the plaintiffs met criteria **"to complete 120 credits hour"**, they have not met the criteria **"to have at least 4-year legal education"**.

Plaintiffs argued against decision made by Legal professional exam committee of the Mongolian Bar Association and requested to be claimed that the decision refused to grant permission to take bar exam was invalid, hence, grant permission to take legal professional exam for plaintiffs, and to reverse the decision revoked permission to take legal professional exam for plaintiff O.A.

LAW APPLICATION AND JUDGEMENT

1. ***First Instance Court:*** In accordance with the Article 58 of the Law on Legal Status of Lawyers, requirements including "credit hours, study duration, and content of the curriculum" set up by the Bar Association were set forth for regulating accreditation of legal curriculum of the law schools. Court decided that such requirements were set for law schools not for exam-takers and it is wrong to set additional requirements besides requirements identified in Article 9.1[1] of the Law on Legal Status of Lawyers. Hence, court upheld plaintiffs claim in full.
2. ***Court of Appeals:*** Court found that Article 9 of the Law on Legal Status of Lawyers had clear requirements for registering legal professional exam takers of which plaintiffs met with the criteria including "should have graduated from law school accredited by the Bar Association" and "has completed at least 2 years of professional experience". Therefore, there is no legal ground to refuse plaintiffs' request to take legal professional exam. Judgement made

[1] Law on Legal Status of Lawyers (2012), art. 9 (9.1) "A Mongolian citizen, a foreign citizen and a stateless person who graduated from law schools accredited by the Bar Association and who has completed professional practice at least two years shall be entitled to take the lawyer's examination."

by the First Instance court in which court upheld plaintiffs' claim in full and ordered the removal of relevant parts of the Resolution No.1 and Resolution No.3 were indeed correct, hence the judgment to granting permission to take legal professional exam is legally compliant. Court decided that "first instance court judgment was ruled rightfully as it found that the law was wrongfully applied and additional requirement besides legally provided requirements were set forth for exam takers while additional requirements were dedicated for accrediting law schools

3. ***Defendant's attorney:*** The court interpreted the relevant law contrary to the will of the legislator, causing a serious error in the application of the law, disregarding the systematization of the Law on the Legal Status of Lawyers, interpreting and applying Article 9, Section 9.1 and Article 58, Section 58.3 as if they were not related to each other and regulated separate relations. Complaints were filed in the reviewing court, saying that they were unfounded.
4. ***Reviewing court:*** It is being interpreted that the Bar Association of Mongolia requires a law school to provide at least 4-year legal education and 120 credit hours in order to be accredited by the Association and in return, a graduate who completed legal education at these accredited universities shall be able to take legal professional exam and work as a lawyer. (23)[2]
5. The decision of the courts that "Section 58.3 of Article 58 of the Law on the Legal Status of Lawyers is not relevant to the examination of the legal profession" is incorrect (24). However, **the regulation of Article 58 has not been implemented at all**, in other words, Bar Association has not been granted any accreditation upon completion of certain conditions since effective implementation of the law to any law school, so to say, it is **impossible to judge** that plaintiffs' "lawyer" degree is "**different**" than others. (25)
6. The provision that "a student who has obtained professional legal education and is being trained as a lawyer must complete 120 credit hours upon graduation and the student's **study period shall not be less than four years**" shall be the **basic requirement for entering the legal professional examination in the case where Bar Association conducts accreditation activities for law schools**. However, in this case, the reviewing court concluded that imposing such requirements to the plaintiffs is not justifiable since Bar Association has not conducted any accreditation activities to law schools. (26)

[2] The numbering in parentheses written at the end of the sentence of the "Law application and court decision" section is the number of the original court decision complex.

SUMMARY OF A COURT DECISION
(CRIMINAL CASE[1])

THE DEFENDANT, HAVING UTILIZED A FRAUDULENT DIPLOMA WHILE TEACHING, IS EXPECTED TO REIMBURSE THE STATE FOR THE TOTAL INCOME EARNED DURING THEIR ENTIRE PERIOD OF EMPLOYMENT

JUDICIAL RESEARCH CENTRE

[1] Link to the full judgement: https://shuukh.mn/single_case/3462?daterange=2023-01-01%20-%20 2023-09-10&id=3&court_cat=2&bb=1

NOTE: This summary is not a substitute for a court decision; its purpose is to foster consistency in the application of the law, bolster the reasoning behind court decisions, and disseminate legal knowledge to citizens and the general public.

Court decision number: No. 98

Date of court decision: June 28, 2023

Status of the decision: The judgment of the Court of Appeals, which modified the sentence of the Court of First Instance, was amended.

BACKGROUND OF THE CASE

Defendant ... , having been appointed as a secondary school teacher in the year 2011, employed a counterfeit educational diploma throughout an 11-year period with full awareness of its fraudulent nature.

LAW APPLICATION AND JUDGEMENT

1. The District Criminal Court of First Instance rendered a verdict, finding the defendant culpable of the offense as per Section 1[1] of Article 23.2 of the Criminal Code (2015). Subsequently, the court imposed a sentence requiring the defendant to fulfill 720 hours of community service. In accordance with Article 5.4, Part 2[2] of the General Section of the Criminal Code applicable to the relevant district, the community service sentence imposed upon the defendant is prescribed at 4 hours per day. Failure to comply with the community service sentence, as outlined in Article 5.4, Part 4[3] of the General Section of the Criminal Code, will result in the imposition of a fine totaling 75,992,729 Mongolian Tugrik from the defendant. This fine is designated for restitution for criminal damages as specified in Article 497, Section 1[4], and Article 510, Section 1[5] of the Civil Code (2002). The decision entails the enforcement of this fine from the defendant's income, directing the funds towards the state budget.
2. **The Criminal Court of Appeals** nullified the 6th provision in the Determination section of the sentencing decision from the Criminal Court of First Instance, substituting the 2nd provision with "360 hours" in place of "720 hours," and revising the 8th provision to state, "Article 7.5[6] of the General Section of

[1] Criminal Code of Mongolia (2015), art. 23.2 (1) "Forging with the view of using or giving in to other's use, or use or sale for forged of permission of licenses, their extension or release from duty or seals, blanks of the letter, citizen's identification card, driver license, diploma, foreign passport, state awards, certification of property documents shall be punishable by fine equal to four hundred to five thousand units of amount, or two hundred forty to seven hundred twenty hours of community work or one month to one year of limitation of free travel right."

[2] Criminal Code of Mongolia (2015), art. 5.4 (2) "A court shall impose a penalty to perform community service for not less four hours a day, totally for from two hundred and forty to seven hundred and twenty hours depending on circumstances of committing a crime, character of damage and harm caused and personality of a person committed a crime."

[3] Criminal Code of Mongolia (2015), art. 5.4 (4) "If the convicted did not execute a penalty to perform a community service, eight hours of community service shall be replaced by one day of imprisonment penalty."

[4] Civil Code (2002), art. 497 (1) "A legal person who caused damage to others' rights, life, health, dignity, business reputation or property deliberately or due to negligent action (inaction) shall compensate for that damage."

[5] Civil Code (2002), art. 510 (1) "A person who causes damage to the property of another shall compensate for that damage by restoring the damaged property to its original state (substitution of property of a similar description, species and quality or repair of defective property) or shall compensate for the resulting damages."

[6] Criminal Code of Mongolia (2015), art. 7.5 (1) "Assets and proceeds gained by committing of a crime, or property and income equal to damage caused due to a crime designated to compensate

the Criminal Code, in accordance with the provisions of Sections 1, 2, and 3, a sum of 75,992,729 Mongolian Tugrik from the defendant's criminal income is mandated to be compulsorily withdrawn from their assets and income, respectively, and transferred to the state budget." Modifications were made to other sections of the sentencing decree, and the appeal submitted by the defendant's lawyer was rejected.

3. **In the defendant's appeal to the reviewing court,** the defendant asserted, "Per Clause 1.2 of Section 1 of Article 40.1 within the Law on Criminal Procedure (2017), the egregious breach of procedural regulations in adjudicating the case has influenced the court's decision, rendering the defendant's complaint about the legality and reasonableness of the court's decision justified."

4. In rendering a decision on the case, **the reviewing court shall declare that** "no substantial breach of the legal prerequisites outlined in Article 39.8 of the Law on Criminal Procedure is evident if the evidence mandated by law has been adequately examined and elucidated, and the rights of participants protected by law have not been determined to be excluded or curtailed during the investigative and judicial processes." The rationale for this determination is elucidated as follows.

5. In this instance, the legal determinations issued by both the court of first instance and the appellate court are deemed justified, having been derived from evidence that was substantiated in accordance with the prescribed legal procedures and deliberated upon during the court proceedings. Considering the circumstances established by the evidence, the court reached the conclusion that the defendant's actions constituted the offense of "Knowing that an educational diploma is fake," as delineated in Article 23.2, Section 1 of the Criminal Code, warranting a sentence of 360 hours of community service. The correct interpretation and application of criminal law were asserted, and the imposed criminal liability was deemed fitting in alignment with the nature of the offense, the degree of the defendant's culpability, and their individual characteristics.

6. Furthermore, it was noted that "the defendant significantly transgressed the principle of the rule of law in public service and equal opportunities for Mongolian citizens, as defendant, through the use of a counterfeit higher education diploma, attained a teaching

damage caused to others shall be mandatorily removed from a portion of property and income of a person or legal entity."

Criminal Code of Mongolia (2015), art. 7.5 (2) ""Assets, proceeds gained by committing of a crime" shall refer to property or non-property assets obtained directly or indirectly by committing of a crime, in Mongolia – specified in the Special part of this Code, in a foreign country – specified in a particular law to impose a penalty of an imprisonment for one year and more term, cost or proceeds of the respective assets, techniques and tools used or attempted to use in committing of a crime."

Criminal Code of Mongolia (2015), art. 7.5 (3) "Confiscated assets, proceeds shall be used to compensate damage caused to others, pay expenses of case investigation and settlement process. In case if an amount of assets, proceeds gained by committing of a crime exceeds damage, it shall be assigned to the state budget."

position. This resulted in him receiving a higher salary compared to other public service officials who had mastered the profession but lacked a professional diploma, thereby establishing an unjust advantage for himself."

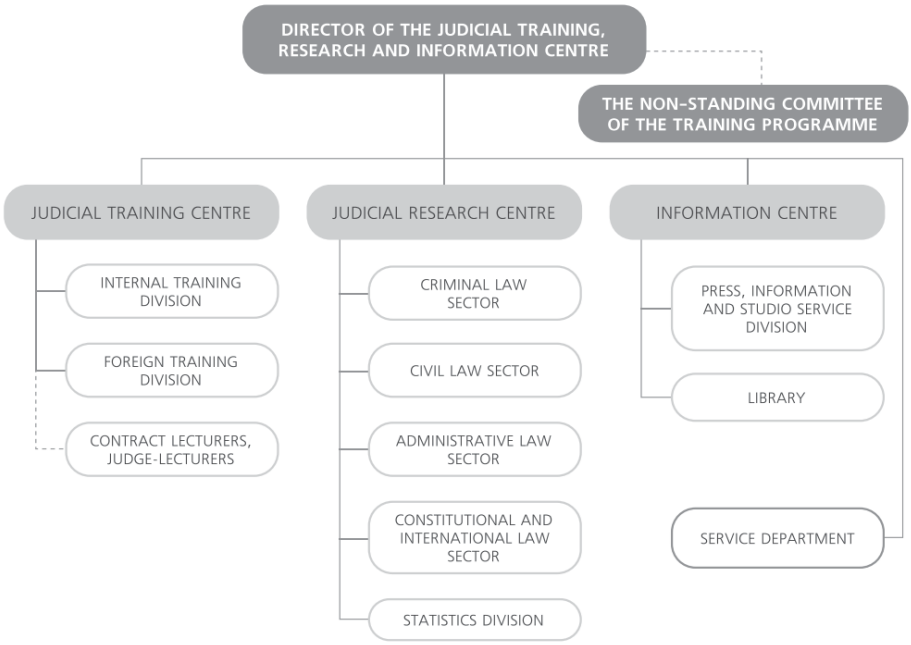
7. Nevertheless, based on the testimony provided by the school director and accountant, it was affirmed that "the defendant did not undergo formal teaching training but assumed the role of a teacher through the submission of a fraudulent diploma. Throughout his tenure spanning 11 years and 3 months, it is asserted that he inflicted tangible damage to the normal functioning of the school and the welfare of the children. Despite the absence of formal complaints or a fully elucidated context, the lack of such grievances does not absolve the defendant from the obligation to redress the harm inflicted upon the state due to the unjust advantage he procured for himself."

8. Henceforth, "the remuneration that would have been disbursed to the defendant for his service as a school teacher spanning from October 2011 to the conclusion of November 2022 is assessed at 39,048,846 Mongolian Tugrik. Additionally, an amount equivalent to the basic salary for a period of 6 months, calculated based on the prevailing minimum wage of 420,000 Mongolian Tugrik during that timeframe, stands at 2,520,000 Mongolian Tugrik. Consequently, the variance of 41,568,846 Mongolian Tugrik is identified as damages. In accordance with the stipulations articulated in Article 497, Section 497.1, and Article 510, Section 510.1 of the Civil Code, the specified amount is to be recovered from the defendant, and it is deemed fitting to allocate said sum to the state budget," as concluded by the panel of the reviewing court.

THE JUDICIAL TRAINING, RESEARCH AND INFORMATION INSTITUTE'S STRUCTURE, FUNCTIONS AND THE NON-STANDING COMMITTEE OF THE TRAINING PROGRAMME

The Judicial Training, Research and Information Institute has established under the Supreme Court of Mongolia according to the newly adopted legislation Law on Courts (2021), and the Articles of Institute has adopted by Order No.35 of the President of the Supreme Court in consultation with the Judicial Council of Mongolia.

I. INSTITUTE STRUCTURE



II. INSTITUTE FUNCTIONS

- Host training for judges based on the training needs and demands of courts;
- Provide the courts and judges with research and information, conduct research about practice on judicial proceedings, unity of the law by each type of law, disputes in all courts;
- Provide the Supreme Court of Mongolia with research and information to interpreting legislations with the aim of developing the unity of law except for the Constitution;
- Propose to develop law based on a study about legal practice of judicial proceedings;
- Collect and analyze the judicial statistics according to data collections from Secretariats of courts;
- Inform and promote judicial reform, activities through the public media;
- Publish a peer-reviewed, legal periodical journal *Supreme Court Law Review (Mongolyn Tur, Erkh Zui)*, and e-newspaper of the Institute;
- Provide the courts with information by creating the database of relevant

regulations other than laws;

- Exchange, disseminate experience and collaborate with similar organizations who are responsible for training, research and information;
- Promote the advancement of judicial as well as legal field through holding international and domestic academic conferences, seminars.

III. JUDICIAL TRAINING CENTRE

Judicial Training Centre is responsible for the justice training on the grounds of the professional needs and demands of unity of the law application, interpretations of laws which aims to make sure judges exercise their power according to law. The Centre also promotes the professional capacity and personal skills of judges of Mongolia.

The Centre collaborates with the Non-Standing Committee of the training programme and coordinates the judicial training under the policy adopted by the Committee.

The request of judges to participate in the training scheduled by the Centre shall be reviewed by the Judges' Council of the relevant court, and the court shall send the names of judges who will take part in the training to the Centre.

IV. JUDICIAL RESEARCH CENTRE

Judicial Research Centre is in charge of judicial and justice advancement through the academic research papers based on demands of development and unity of the law as well as interpretations of laws. The Centre also provides the courts and judges with any other research and information to propose to develop the law.

According to Article 24.1 of Law on Courts, "The judges of Court of First Instance and Court of Appeal can be appointed by the request of themselves or the suggestion of the Judges' Council as a judge-researcher at the Institute for no more than 6 months; and the salary of the judge-researcher is considered as the same as the judge during the appointment, and they shall be deemed to have served as a judge."

The judge-researcher shall be appointed at the Judicial Research Centre by the following rules:

1. The judge of the Court of First Instance and Court of Appeal is entitled to be employed as the judge-researcher at the Centre, for no more than **6** months;
2. The number of judge-researchers to work from one court in a given year shall not exceed more than **1**, and the Centre may employ up to 5 judge-researchers per year;
3. A judge who works as a judge-researcher shall submit the following documents to the Institute by **January 20** of the relevant year:
   - Written request to work as a judge-researcher;
   - Supporting documents (resolution, meeting protocol) by the Judges' Council of the relevant court which approved work as a judge-researcher;
   - Research statement (executive summary, research questions,

objectives, findings, research field areas, future goal, research term, graphics).

4. The salary of the judge-researcher is considered as the same as the judge during the appointment, and the judge-researcher shall be deemed to have served as a judge;
5. The Institute shall determine the research findings, quality, evaluation methodology and time capacity in detail, and the judge-researchers shall report their performance to the Institute and the Judges' Council of the relevant court.

V. INFORMATION CENTRE

Information Centre provides the public with information about judicial proceedings and is responsible for pressing the judgment summary of notable decisions suggested by the Judicial Research Centre. The Information Centre publishes the judgment summary or press summary on the electronic or any other sources.

VI. THE NON-STANDING COMMITTEE

According to Article 24.2 of Law on Courts "The Non-Standing Committee of the Training Programme who is in charge of drafting the training programme in which the representatives of judges, the Judicial Council, the Ministry of Justice and Home Affairs, law schools shall be work under the Institute".

The Non-Standing Committee consists of the Director of the Institute, a total of nine judges from each of the criminal, civil and administrative courts of First Instance, Appeal, and the Supreme Court, one representative from the Judicial Council, one from the Minister of Justice and Home Affairs, and three professors or scholars from law schools.

The Non-Standing Committee of the Training Programme shall exercise the following duties regarding the justice training programme:

1. Develop the training programmes within the framework of the national legal system and taking into account international good practices, based on research according to the Constitution, laws, the judicial development policy, strategic plan of the judicial and the Supreme Court
2. Identify and analyse the training needs of the judiciary prior to developing the training programmes
3. Request to make conduct research to ensure the unity of law application in civil, criminal and administrative court proceedings, identify and analyse problems on the advancement of

the judicial proceedings, determine international practice and prospects of the judicial training in order to develop the training programmes

4. Hold meetings on the discussion about the draft of the training programmes, and hear an opinion from the relevant parties, receive written proposal from the Judges' Council by the Law on Courts
5. Determine the criteria for the training programmes, timetables, expected results, methodology for evaluating the relevant programme implementation, and durations
6. Plan and manage to make the professional evaluation based on research, regarding the implementation of the training programme, and promote the training programme quality according to the findings as a result of the evaluation
7. Make a decision based on the research and the demanding teacher resources and capacity, textbooks and manuals, other facilities regarding the learning tools, a limit on the seats, classroom access
8. Manage the process to make the adopted training programme to be accredited under the relevant regulations
9. Cooperate and exchange information with the Institute and its Judicial Training Centre regarding the training programme, ensuring the implementation of the programme and any other topics
10. Create the timetable as well as plan on the implementation of the evaluation of the training programme
11. Make a directive on practice for the advancement of the training programme implementation following the results of the implementation
12. Suggest the training lecturers

VII. "MONGOLIAN STATE AND LAW" JOURNAL

In 1995, the Supreme Court of Mongolia initiated the publication of the "Mongolian State and Law" journal, and it had been published a total of 99 issues until 2021. Starting with the 100th issue in 2022, the journal has been published by the Judicial Training, Research, and Information Institute under the Supreme Court of Mongolia, and 4 issue are published per year. The journal's editorial policy aims to contribute to the development of law by publishing articles and news about relevant subject matters from general legal theories to theoretical and comparative judicial studies.

The journal covers articles, essays, reviews, interviews and news on legal theory, theoretical and practical judicial studies, comparative judicial research, case study analysis, development of law, legal and judicial translations, and any other relevant topics and has the following sections:

- Academic Articles;
- Case Study Analysis;
- Views (Essays, interviews, review);
- News and Information (Academic sources, translations).