

# Putting Aside the Rule of Law Myth: Corruption and the Case for Juries in Emerging Democracies

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Over the last two decades, international donor agencies and development banks have invested millions to reform post-communist judiciaries in Central Asia and Europe.<sup>1</sup> The belief that economic growth and democracy depend upon the “rule of law” have driven this investment.<sup>2</sup> “Rule of law” in turn depends on a well-functioning and independent judiciary that businesses and other economic actors can trust to render fair, just and consistent decisions.<sup>3</sup> But after over a decade of rule of law reform, Central Asia is now characterized by growing authoritarianism,<sup>4</sup> and judiciaries across both Central Asia and Eastern Europe are afflicted by rampant cor-

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1. See James H. Anderson and Cheryl W. Gray, *Transforming Judicial Systems in Europe and Central Asia*, in ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS—REGIONAL 329, 333 (Francois Bourguignon & Boris Pleskovic eds., 2007), <http://siteresources.worldbank.org/EXTECAREGTOPJUDREF/Resources/ABCDE.pdf> & resourceurlname=ABCDE.pdf.

2. See, e.g., Susan Rose-Ackerman, *Independence, Political Interference and Corruption*, in TRANSPARENCY INT’L, GLOBAL CORRUPTION REPORT 2007: CORRUPTION IN JUDICIAL SYSTEMS 15 (Diana Rodriguez & Linda Ehrichs eds., 2007), available at [http://www.transparency.org/publications/gcr/gcr\\_2007](http://www.transparency.org/publications/gcr/gcr_2007) (noting that quantified measurements of judicial independence show direct correlation to “other positive outcomes such as higher levels of growth, and of political and economic freedom”).

3. See Norman L. Greene, *Perspectives from the Rule of Law and International Economic Development: Are There Lessons from the Reform of Judicial Selection in the United States?*, 86 DENV. U.L. REV. 53, 70–71 (2008).

4. See generally MARLENE LARUELLE & SEBASTIEN PEYROUSE, *CENTRAL ASIA, THE DRIFT TOWARDS AUTHORITARIANISM* (2006) (arguing that all Central Asian states are becoming increasingly authoritarian).

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ruption.<sup>5</sup> Both the rule of law and democracy are elusive.

Judicial reform projects throughout the post-Soviet space have followed a similar “institution building” approach.<sup>6</sup> This approach has generally centered on improving judicial resources, training and education, and promoting judicial independence.<sup>7</sup> Some argue that strengthening judicial institutions will have the corollary effect of reducing corruption and implanting the rule of law.<sup>8</sup> Regrettably, such has not been the case—not in Central Asia and not in Eastern Europe.

Scholars have recently theorized that institutional reform has failed because it has been stymied by a legacy of disrespect for the law inherited from the Soviet Union.<sup>9</sup> These scholars argue that ingrained practices of nepotism, influence-peddling, and corruption have overshadowed formal institutions and left little room for the rule of law to grow.<sup>10</sup> Moreover, the daily lives of individuals within the post-Soviet space continue to be governed by the assumption that the state and its institutions are universally

5. See Mary Noel Pepys, *Introducing the Problem*, in GLOBAL CORRUPTION REPORT, *supra* note 2, at 12 (noting that “[i]n all former communist countries, 45 per cent or more of the people polled described the legal-judicial system as corrupt”). Also, the Judicial Reform Index (JRI) reports for individual countries, compiled by the American Bar Association Rule of Law Initiative, tend to show low confidence in the integrity of the courts and a perceived high rate of corruption in nearly all countries. See AM. BAR ASS’N, THE JUDICIAL REFORM INDEX, [http://www.abanet.org/rol/publications/judicial\\_reform\\_index.shtml](http://www.abanet.org/rol/publications/judicial_reform_index.shtml) (last visited Mar. 22, 2010). For example, the JRI Report for Kyrgyzstan indicates, “It is widely believed that the courts are corrupt and that the executive branch and senior level judges wield undue influence over judicial decision making.” CENT. EUROPEAN AND EURASIAN L. INITIATIVE, AM. BAR ASS’N, JUDICIAL REFORM INDEX FOR KYRGYZSTAN 24 (2003), <http://www.abanet.org/rol/publications/kyrgyzstan-jri-2003.pdf>. Similarly, the report for Kazakhstan found that “[c]ourts are reported to be subject to undue influence both from state powers as well as private economic interests.” CENT. EUROPEAN AND EURASIAN L. INITIATIVE, AM. BAR ASS’N, JUDICIAL REFORM INDEX FOR KAZAKHSTAN 32 (2004), <http://www.abanet.org/rol/publications/kazakhstan-jri-2004.pdf>. See also RULE OF L. INITIATIVE, AM. BAR ASS’N, JUDICIAL REFORM INDEX FOR KOSOVO 42 (3d ed. 2007), [http://www.abanet.org/rol/publications/kosovo\\_jri\\_08\\_07\\_en.pdf](http://www.abanet.org/rol/publications/kosovo_jri_08_07_en.pdf) (noting the judiciary “remains subject to pressure from private interests, and reports of corruption and ethnically-motivated judgments are prevalent”); CENT. EUROPEAN AND EURASIAN L. INITIATIVE, AM. BAR ASS’N, JUDICIAL REFORM INDEX FOR UZBEKISTAN 26 (2002), [http://www.abanet.org/rol/publications/uzbekistan\\_jri\\_2002\\_english.pdf](http://www.abanet.org/rol/publications/uzbekistan_jri_2002_english.pdf) (“The courts are widely believed to be corrupt, controlled by the executive power . . . and non-independent.”); CENT. EUROPEAN AND EURASIAN L. INITIATIVE, AM. BAR ASS’N, JUDICIAL REFORM INDEX FOR ARMENIA 36 (2d ed. 2004), <http://www.abanet.org/rol/publications/armenia-jri-2004.pdf> (“Undue influence on judicial decisions is a pervasive problem and includes bribery, requests for specific outcomes from government officials or interested parties, *ex parte* communications, and political pressure.”).

6. See, e.g., ABA Rule of Law Initiative’s Regional Institution Building Advisor (RIBA) Program, [http://www.abanet.org/rol/europe\\_and\\_eurasia/riba\\_programs.html](http://www.abanet.org/rol/europe_and_eurasia/riba_programs.html) (last visited Mar. 22, 2010).

7. See, e.g., INT’L PROGRAMS DIV., NAT’L CTR. FOR STATE COURTS, MONGOLIA JUDICIAL REFORM PROGRAM: ANNUAL REPORT 2007 3-5, 15-16 (2008), [http://pdf.usaid.gov/pdf\\_docs/PDACL250.pdf](http://pdf.usaid.gov/pdf_docs/PDACL250.pdf) [hereinafter MONGOLIA JUDICIAL REFORM PROGRAM: ANNUAL REPORT].

8. See, e.g., Linn Hammergren, *Fighting Judicial Corruption: A Comparative Perspective from Latin America*, in GLOBAL CORRUPTION REPORT, *supra* note 2, at 139.

9. See, e.g., CHRISTOPH H. STEFES, UNDERSTANDING POST-SOVIET TRANSITIONS: CORRUPTION, COLLUSION AND CLIENTELISM 1-2 (2006).

10. See *id.* at 118.

corrupt.<sup>11</sup> Individuals thus direct their behavior “towards the expectation of legal failure,” including paying bribes and using back-door connections to circumvent the law and legal institutions, further reifying the negative view of law.<sup>12</sup> Scholars contrast the negative view of law in post-Soviet states with the view of law in the United States and Western Europe, where the strong “expectation that [ ] law will prevail”<sup>13</sup> is said to be enough to compel most people, including judges, to act in accordance with the law most of the time.<sup>14</sup>

Thus, scholars have argued that successful rule of law reform depends as much upon changing the beliefs that people have about the law as it does upon reforming legal institutions.<sup>15</sup> This argument has resonated with rule-of-law aid practitioners, and as a result, civic education programs designed to “foster a rule of law culture” have become a prominent part of rule-of-law reform.<sup>16</sup> Aimed primarily at secondary schools, these programs teach children lessons such as: “the law governs everyone fairly and equally;” rules are common sense, for the common good; and judges have specialized knowledge and experience at the law and are qualified to interpret the meaning of the law that will resolve the conflict.<sup>17</sup> Rule-of-law civic education programs are now underway in a number of countries, including Kyrgyzstan, Armenia, Kosovo, Qatar, and Mongolia.<sup>18</sup>

This article critiques this new civic education approach to rule-of-law reform. It argues that given the socio-political realities of most countries in which these rule-of-law education programs have been implemented, they can best be described as rule-of-law mythmaking projects. In many cases, such mythmaking risks legitimating unjust laws and authoritarian regimes. Moreover, even in relatively strong emerging democracies, these programs can be dangerous if there is insufficient congruency between the message of rule-of-law education and the reality of everyday living. In such cases, rule-of-law education may not only fail but lead to disillusionment, cynicism, and further disrespect for the law.

This article then proposes an alternative to the rule-of-law project: juries. Rule-of-law reformers have largely rejected jury systems on the

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11. *Id.* at 124.

12. Marina Kurkchian, *The Illegitimacy of Law in Post-Soviet Societies*, in *LAW & INFORMAL PRAC.* 25, 27 (Denis J. Galligan & Marina Kurkchian, eds., 2003).

13. *Id.* at 33.

14. *See id.*

15. *See* Mariana Prado & Michael Trebilcock, *Path Dependence, Development, and the Dynamics of Institutional Reform*, 59 *U. TORONTO L.J.* 341, 360-61 (2009).

16. *See, e.g.*, American Bar Association Rule of Law Initiative, Perspectives from the Field 2009, Track 4: Fostering a Rule of Law Culture: Public and Civic Education Initiatives in Armenia, Kosovo, Kyrgyzstan and Qatar, [http://www.abanet.org/rol/perspectives\\_09/track4.shtml](http://www.abanet.org/rol/perspectives_09/track4.shtml) (last visited Mar. 22, 2010).

17. *See, e.g.*, The Rule of Law Project, Lesson One: What is the Rule of Law?, <http://www.ruleoflaw.org.qa/en> (last visited Mar. 22, 2010).

18. *See* American Bar Association Rule of Law Initiative, *supra* note 16.

ground that juries often disregard or cannot understand the law.<sup>19</sup> Reformers have also feared that juries would discourage foreign investment by introducing the type of uncertainty that “rule of law” is meant to prevent.<sup>20</sup> This article responds that in emerging democracies, certainty is less important than contextualized justice that reflects community values. It also argues that the deliberative process of jury decision-making promotes civic engagement and allows broader democratic participation in the law-making project. Equally as important, juries may effectively check judicial corruption and thereby help restore faith in judicial institutions, which may ultimately lead emerging democracies closer to the rule of law ideal.

In making these arguments, this article uses Mongolia as a primary case study, though it also draws lessons from Japan, the United States, the Middle East, and post-Soviet countries in Central Asia and Eastern Europe. Mongolia is a useful reference point because it has a closely shared history with the post-Soviet states of Central Asia and Eastern Europe, and it suffers the same difficulties with systemic corruption.<sup>21</sup> On the other hand, Mongolia has been hailed as a “post-Soviet surprise,”<sup>22</sup> “a democratic oddity in Central Asia,”<sup>23</sup> a “beacon of democracy,”<sup>24</sup> and “a model for democratic development and anti-corruption in Central Asia.”<sup>25</sup> One Western diplomat even said that “[n]o former Soviet state has come so far, and no former communist country in Asia has shown as much commitment to reform as Mongolia.”<sup>26</sup> Furthermore, the World Bank calls Mongolia a model post-soviet economy.<sup>27</sup> Though this glowing picture is overblown,<sup>28</sup> Mongolia’s role as a model of reform makes it an especially useful refer-

19. See Robert P. Burns, *The History and Theory of the American Jury*, 83 CAL. L. REV. 1477, 1478 (1995) (reviewing JEFFREY ABRAMSON, WE, THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY (1994)).

20. Matthew P. Harrington, *The Economic Origins of the Seventh Amendment*, 87 IOWA L. REV. 145, 179 (2001); see *id.*

21. See Richard L. Bohanon & William C. Plouffe, Jr., *Mongolian Bankruptcy Law: A Comparative Analysis with the American Bankruptcy System*, 7 TULSA J. COMP. & INT’L L. 1, 15–16 (1999).

22. Ron Gluckman, *A Post-Soviet Surprise: This Booming Democracy Is an Oddity in Central Asia*, NEWSWEEK INT’L, Sept. 15, 2003, at 34.

23. *Id.*

24. TODD LANDMAN, MARCO LARIZZA & CLAIRE McEVROY, HUMAN RIGHTS CTR., STATE OF DEMOCRACY IN MONGOLIA: A DESK STUDY 4 (2005), [http://www.afpwebfolio.org/\\_files/2079\\_101.pdf](http://www.afpwebfolio.org/_files/2079_101.pdf).

25. Bank Information Center, Mongolia, <http://www.bicusa.org/en/Region.22.aspx> (last visited Mar. 22, 2010).

26. Gluckman, *supra* note 22.

27. See *id.*

28. See generally discussion *infra*, Section II. The UNDP has recently reported that “[d]espite impressive growth during the past five years, the percentage of people living below the poverty line has remained at 36 percent. At disaggregated levels, new forms of poverty are manifesting, such as increasing numbers of urban poor, the homeless, working children and female-headed households.” U.N. Development Programme and Population Fund, Exec. Bd., *Draft Country Programme Document for Mongolia (2007-2011)*, para. 2, U.N. Doc., DP/CCF/MON/2 (July 30, 2001), available at <http://www.undp.org/execute/word/DCPMNG1.doc>. As to the state of Mongolia’s democracy, the UNDP reports:

ence point for understanding the failures of judicial reform throughout the post-Soviet space and for charting a better course forward.

As a preface, the first section of this article argues that the root of the problem has been misdiagnosed. Specifically, it rejects the notion that corruption is necessarily a Soviet legacy. It suggests instead that systemic corruption in modern Mongolia is primarily a result of “shock therapy”—the rapid introduction of a series of harsh macro-economic reforms including rapid privatization, which created conditions ripe for abuse and left the government powerless to control it.<sup>29</sup> This insight suggests that civic education programs designed to undo the lessons of the Soviet era have the wrong target in Mongolia and likely have the wrong target elsewhere. The second section of the article critiques the dominant “institution building” approach to judicial reform by demonstrating, based upon an empirical assessment of the Mongolian judiciary conducted in 2008,<sup>30</sup> that “institution building” tends not to address public concerns about integrity, transparency, and accountability. The third section discusses the role of culture and myths about the law in shaping the behavior of both citizens and judges. Finally, the fourth and fifth sections turn to the critique of the new rule of law mythmaking project and the argument in favor of juries as an alternative.

## I. The Socio-Political Origins of Corruption in Modern Mongolia

In 1921, Mongolia became the world’s second communist country after the USSR.<sup>31</sup> In the ensuing seven decades, Mongolia pursued policies modeled after those of its big brother to the north.<sup>32</sup> During these seven

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First, there have been signs of increasing corruption and inequity, indicating a need to deepen the rule of law and systems of transparency, accountability and responsiveness in both governmental as well as private institutions. Second, . . . many rural areas still lack the meaningful participation of people in government and development processes. Third, gender inequality remains a fact of life. . . . Finally, although energetic and vibrant, the mass media have yet to reach the level of maturity needed in a democratic society.

U.N. Dev. Programme and Population Fund, Exec. Bd., *Second Country Cooperation Framework for Mongolia (2002-2006)*, para. 7, U.N. Doc. DP/CCF/MON/2 (July 30, 2001), available at <http://www.undp.org/execbrd/archives/sessions/eb/2nd-2001/DP-CCF-MON-2.pdf>.

29. See *infra* Part I.

30. Brent T. White, *Rotten to the Core: Project Capture and the Failure of Judicial Reform in Mongolia*, 4 E. ASIA L. REV. 209, 216 (2009). This assessment involved court observation, structure interviews and confidential surveys of over twenty-two local experts on the Mongolian judiciary. *Id.* at 220-22. These experts included attorneys, law professors, heads of law-related non-governmental organizations, government officials, and law enforcement officers within Mongolia’s new anti-corruption agency. *Id.* at 221. The results of the assessment are discussed briefly *infra* Part II.

31. Danielle Conway-Jones, *Mongolia, Law Convergence, and the Third Era of Globalization*, 3 WASH. U. GLOBAL STUD. L. REV. 63, 64 n.2 (2004).

32. MORRIS ROSSABI, *MODERN MONGOLIA: FROM KHANS TO COMMISSARS TO CAPITALISTS* 31 (2005). Mongolia is bounded by Russia on the north and by China on the west, south and east. CIA, *THE WORLD FACTBOOK, MONGOLIA*, <http://www.cia.gov/library/publications/the-world-factbook/geos/mg.html>. While expansive, covering an area of over 600,000 square miles, Mongolia contains only about 2.6 million inhabitants, mak-

decades, Mongolia was frequently characterized as a de facto member of the Soviet Union, known as “a Soviet satellite.”<sup>33</sup> Mongolia was also almost completely dependent on the USSR economically, as trade with the USSR accounted for 80% of imports and 70% of exports.<sup>34</sup> Direct financial subsidies from the USSR for education, health care, and infrastructure also accounted for “about 30 percent of GDP every year.”<sup>35</sup>

Following *perestroika* in the Soviet Union, Mongolia underwent a peaceful democratic revolution in 1990 and held its first free and fair democratic elections in 1991.<sup>36</sup> But Mongolia’s economy completely disintegrated as the Soviet Union collapsed, forcing Mongolia to look elsewhere for financial support and trade.<sup>37</sup> Such support was readily forthcoming from the West, which saw the Soviet Union’s collapse as vindicating free-market principles and welcomed the opportunity to show what a free market economy could do for Mongolia.<sup>38</sup> Western institutions such as the International Monetary Fund (IMF), the World Bank, the Asian Development Bank (ADB), and the U.S. Agency for International Development (USAID) thus rushed in to fill the empty space left by the USSR.<sup>39</sup>

The aid provided by these institutions, however, came with conditions.<sup>40</sup> For example, the international financial institutions (IFIs) conditioned aid upon Mongolia’s embracing free-market ideology and its accompanying structural reforms.<sup>41</sup> The IMF and the ADB, moreover, sent teams in 1990 and 1991 to study the Mongolian economy and devise a strategy for reform.<sup>42</sup> Both agencies proposed the same treatment for

ing it the fourth least densely populated country in the world. Encyclopedia Britannica Online, Mongolia, <http://www.britannica.com/EBchecked/topic/389335/Mongolia> (last visited Mar. 22, 2010); World Bank, World Development Indicators 2007 41 (2007); see CIA THE WORLD FACTBOOK, <https://www.cia.gov/library/publicatoin/the-world-factbook>.

33. ROSSABI, *supra* note 32, at 31.

34. David Sneath, *Lost in the Post: Technologies of Imagination, and the Soviet Legacy in Post-Socialist Mongolia*, 5 INNER ASIA 39, 41 (2003).

35. *Id.*

36. Frederick Nixon & Bernard Walters, *Administrative Reform and Economic Development in Mongolia, 1990-1997: A Critical Perspective*, 16 POL’Y STUD. REV. 147, 148 (1999).

37. ROSSABI, *supra* note 32, at 36. Mongolian reliance on Soviet bloc trade and investment made it vulnerable during the period surrounding the USSR’s fall, including problems stemming from Soviet processing of Mongolian minerals and Soviet supply of significant amounts of Mongolian electrical power. See ASIAN DEV. BANK, MONGOLIA: A CENTRALLY PLANNED ECONOMY IN TRANSITION 170 (1992).

38. See ROSSABI, *supra* note 32, at 36. Mongolia offered free market advocates “a laboratory in which to experiment.” *Id.* “If their theories fostered economic growth in landlocked, sparsely populated Mongolia, they would presumably be effective in other underdeveloped regions . . . .” *Id.*

39. Enkhbayar Shagdar, *Neo-Liberal “Shock Therapy” Policy During the Mongolian Economic Transition I* (Econ. Res. Inst. For Ne. Asia, Discussion Paper No. 0703e, April 2007), <http://www.erina.or.jp/en/Researchdp/pdf/0703e.pdf>.

40. See ROSSABI, *supra* note 32, at 59.

41. *Id.*

42. See ELIZABETH MILNE, ET AL., THE MONGOLIAN PEOPLE’S REPUBLIC: TOWARD A MARKET ECONOMY vii (1991); Kimimasa Tarumizu, *word to ASIAN DEV. BANK, MONGOLIA*, *supra* note 37, at x.

Mongolia's ills: "shock therapy."<sup>43</sup> "Shock therapy" consisted of a simultaneous cocktail of macroeconomic reforms that included the following: rapidly privatizing government industries and banks, liberalizing prices and eliminating government subsidies, creating tight credit policies to preclude inflation, devaluing Mongolian currency, sharply reducing taxes, establishing a free trade regime and virtually eliminating tariffs, and maintaining a balanced budget.<sup>44</sup> The IFIs insisted upon these last three—reducing taxes, eliminating tariffs, and requiring a balanced budget—in an effort to drastically reduce the government's size and power, which would thus leave the market to regulate itself.<sup>45</sup>

Despite warnings from the UNDP and others that rapid macroeconomic reforms were likely to lead to considerable hardship, advisors within the IFIs insisted that while the short-term economic outlook for Mongolia was not bright, these were "the costs of adjustment and restructuring that must be borne by the country during the transition to a market-oriented economy."<sup>46</sup> Moreover, the IFIs threatened to withhold aid if Mongolia refused to take its macroeconomic medicine.<sup>47</sup>

At least partly as a result of "shock therapy," the early transition years in Mongolia were even harsher than in Russia.<sup>48</sup> Inflation reached 325%<sup>49</sup> and unemployment skyrocketed.<sup>50</sup> The number of people living below the

43. See Shagdar, *supra* note 39, at 1.

44. ROSSABI, *supra* note 32, at 46 (noting that the state had previously subsidized food and medical care for children; provided basic staples including "meat, milk, clothing, heat, and electricity"; supported water wells' construction and repair; and supplied veterinary services); Shagdar, *supra* note 39, at 1.

45. See ROSSABI, *supra* note 32, at 38, 45 (noting that reducing the state budget was integral to shock therapy).

46. ASIAN DEV. BANK, MONGOLIA, *supra* note 37, at 92-93. In 1991, Jeffrey Sachs, the theorist behind shock therapy, visited Mongolia to support the move towards privatization. See William R. Heaton, *Mongolia in 1991: The Uneasy Transition*, 31 *ASIAN SURVEY* 50, 52 (1992). While Sachs warned that Mongolia would face a more severe economic downturn than Eastern European countries, Vice-Premier Gambold, the Premier, and his close advisors pressed ahead with "one of the fastest privatization programs in reforming socialist countries. See *id.* at 52-53. However, a number of other economists cautioned that shock therapy, without the gradual development of a proper legal and economic infrastructure, would harm economic growth and spur corruption. See, e.g., Nixon & Walters, *supra* note 36, at 163-64.

47. ROSSABI, *supra* note 32, at 59. At one point, the ADB threatened to withhold \$15 million in pledged payments if Mongolia did not lift its export ban on raw cashmere. *Id.*

48. Lucian W. Pye, Book Review, *Modern Mongolia: From Khans to Commissars to Capitalists*, *FOREIGN AFFAIRS* (Sept./Oct. 2005), <http://www.foreignaffairs.org/20050901fabook84560/morris-rossabi/modern-mongolia-from-khans-to-commissars-to-capitalists.html>. Some individuals within the international financial institutions continue to object strenuously to the notion that the rapid macroeconomic reforms imposed on Mongolia contributed to the harshness of the transition years. See, e.g., William Bikales, Book Review, *Modern Mongolia: A Review*, *FAR EASTERN ECON. REV.* 69 (Oct. 2005). William Bikales, a former desk officer at the ADB in Mongolia, for example, wrote a scathing review of Rossabi's book in which he argues that the harshness of the transition years primarily resulted from the loss of Soviet aid. See *id.*

49. ROSSABI, *supra* note 32, at 57 (noting that the inflation rate dropped from 325 percent in 1992 to 53 percent in 1995).

50. *Id.* at 77 (noting that "[u]nemployment was conservatively estimated at 20 percent of the population").

poverty line increased from almost zero in 1989 to over 33% in 1998.<sup>51</sup> Moreover, the elimination of public revenue streams created an anemic government unable to provide basic services such as garbage collection, protect the environment, provide adequate health care and education, or provide any assistance to the increasing numbers of Mongolians living in poverty. Mongolia expert and anthropologist David Sneath observed in 2003, “The real transition that Mongolia has experienced has been from a middle-income to poor country, as if the process of development has been thrown into reverse.”<sup>52</sup>

While the loss of Soviet aid may be somewhat to blame for Mongolia’s economic crisis, Western nations, Japan and international financial institutions were soon giving Mongolia aid that exceeded the 25% provided by the USSR.<sup>53</sup> Some scholars have thus argued that the severity of the economic collapse primarily resulted from “the way in which a new regime of private ownership was rapidly and destructively introduced.”<sup>54</sup> Indeed, shock therapy was so harsh that Jeffrey Sachs, the architect of shock therapy, later recanted.<sup>55</sup> Moreover, directly contradicting the shock therapy he once advocated for Mongolia, Sachs has since joined others in arguing that governments of resource rich countries, such as Mongolia, should nationalize rather than privatize key industries, particularly resource-based industries like mining.<sup>56</sup> He has also argued that developing countries should enact tariffs and provide subsidies in order to protect nascent domestic industries and develop a diversified economy.<sup>57</sup> Mongolia, though, was forced to take the opposite course, and it now depends almost solely on mining for survival.<sup>58</sup> This dependence has already begun to take a devastating

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51. Sneath, *supra* note 34, at 42.

52. *Id.* at 49.

53. *Id.* at 42.

54. *Id.* (citing commentator Keith Griffin’s argument that the severity of the economic collapse was due to private ownership being “rapidly and destructively introduced”).

55. See JEFFREY SACHS, *TOWARDS ECONOMIC STRATEGIES FOR RAPID GROWTH IN MONGOLIA* (1997).

56. See generally Joseph E. Stiglitz, *What is the Role of the States?*, in *ESCAPING THE RESOURCE CURSE* (Macartan Humphreys, Jeffrey D. Sachs & Joseph E. Stiglitz eds., 2007).

57. *Id.*

58. See Jordan C. Kahn, *Baikal Beckons: Siberia’s Sacred Sea Compels the Tahoe Watershed Protection Approach*, 18 *COLO. J. INT’L ENVTL L. & POL’Y* 379, 409 n.223 (2007) (stating that “[t]he mining sector is Mongolia’s single largest industry, accounting for 55% of industrial output and more than 40% of export earnings”). Similarly the IMF-imposed-prescription of privatizing banks as a cure for Mongolia’s economic depression directly contradicts current voices with the IMF who have suggested nationalizing ailing banks as a solution to current financial crisis in the United States. See, e.g., Kevin G. Hall, *Nationalizing Troubled Banks May Be the Only Answer*, *McCLATCHY*, Feb. 19, 2009, <http://www.mcclatchydc.com/2009/02/19/62515/nationalizing-troubled-banks-may.html>. Of course, Mongolia was forced to cut back on government spending and balance the budget in the face of unemployment over 36%; meanwhile, the United States government, with the blessing of economic authorities, has spent huge sums of money to stimulate the economy but racked up huge deficits in the process, even though the United States’ unemployment rate only reached a fourth (around 8%) of Mongolia’s unemployment rate in the 1990s. See *IMF, Mongolia Agree in Principle on \$224 Mln Loan*, *REUTERS*, Mar. 7, 2009, <http://www.reuters.com/article/idUSN07427445>.



toll on Mongolia, as the price of minerals has plummeted in the current economic downturn.<sup>59</sup>

More relevant to the issue of corruption, however, is that privatization proceeded in Mongolia before structures were in place to ensure that it would occur fairly.<sup>60</sup> For example, as part of the privatization of government enterprises, each adult citizen could receive, for a nominal payment, seven vouchers to be used for large privatizations (companies valued at more than \$50,000) and three vouchers for small privatizations (mostly trade and service operations); these vouchers could then be used to purchase shares in the company on a newly created stock exchange.<sup>61</sup> But “the vast majority of Mongolia’s citizens had almost no conception” of what a share was, much less understood the workings of a stock exchange.<sup>62</sup> A relatively small number of well-informed and well-connected individuals were thus able to buy up the vouchers for a fraction of their worth from people who needed money to buy consumer goods.<sup>63</sup>

Additionally, these few individuals’ ability to secure the capital necessary to make mass purchases of stock, and later to purchase prime real estate, was primarily due to nepotism by banks, which “approved substantial loans principally to borrowers who had strong links with government officials or with the bankers themselves.”<sup>64</sup> The result of this process of privatization was that within a few years Mongolia’s “vast state-owned enterprises [were] transformed into 330 shareholding companies, 70% of which were owned by just 1,500 people” out of 2.5 million (or a mere 0.05% of the population).<sup>65</sup> A country previously characterized by egalitarian distribution of wealth and an absence of abject poverty was quickly transformed into a society with large numbers of very poor and a few extremely rich.<sup>66</sup>

As these few rich individuals sought to become richer, the social-political conditions of transition and shock therapy engendered further corrup-

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59. See Bill Powell, *Buying Binge*, TIME, Apr. 20, 2009, at Global 2.

60. See ROSSABI, *supra* note 32, at 48 (describing the privatization program in Mongolia as “one of the fastest privatization programs in the reforming socialist countries . . .”).

61. *Id.* at 50.

62. *Id.*

63. ROSSABI, *supra* note 32, at 49. The privatization of the agricultural cooperatives was similarly unfair and resulted in serious abuses by former managers and their families and friends who “laid claim to more animals than the ordinary herders.” *Id.*

64. *Id.* at 58 (noting the role of nepotism in loan decisions and the failure of shock therapy advocates to take this into account).

65. Pye, *supra* note 48.

66. See ROSSABI, *supra* note 32, at 59 (noting that by the mid-1990s in the wealthiest 20% of the population had eighteen times the income of the poorest 20%). While the subsequent years of transition have seen some trickle-down, this has not pulled large percentages of Mongolians out of poverty, or near poverty, and further, the trickle-down is offset by an increasing and glaring disparity between the average Mongolian and the rich elite. See KAMAL MALHOTRA, MONGOLIA: INITIAL IMPRESSIONS AND SUGGESTIONS 20 (1998) (contesting the IFIs view that economic growth would “automatically take care of the country’s social development problems through the . . . trickle-down effect”).

tion.<sup>67</sup> Morris Rossabi explained, “Under the communist system, the threat of severe punishments for embezzlers, disapproval of bourgeois materialism, the impossibility of owning land, apartments, and vehicles, the fear of arousing suspicion by high living, and the paucity of consumer goods had all served to limit corruption.”<sup>68</sup> After 1990, these constraints on corruption vanished—just as other factors began to feed its growth.<sup>69</sup> First, “the rise of private property in the forms of factories, vehicles, and herds, and the disappearance of the ideal of economic equality” eliminated the stigma of materialism and the fear of arousing suspicion by high living.<sup>70</sup> Second, financial and structural limitations imposed upon the Mongolian government by the international donor community left Mongolia too anemic to investigate, and too weak to prosecute, corruption.<sup>71</sup>

That the communist system actually constrained corruption contrasts sharply with a common argument by Western scholars that modern corruption is inherited from the Soviet era.<sup>72</sup> As that argument goes, Soviet citizens were forced to live in two worlds—one formal and one informal.<sup>73</sup> In the formal world, the planned economy limited the distribution of even basic necessities, which were in short supply.<sup>74</sup> In the informal world, citizens secured needed and luxury goods on the black market.<sup>75</sup> In the formal world, citizens were subjected to a dizzying array of rules and regulations that touched all spheres of public and private life.<sup>76</sup> In the informal world, citizens came to understand that bribery was a necessary and effective tool for getting things done.<sup>77</sup>

These two worlds existed because they benefited party and state officials who colluded to exploit their office for public gain through thousands of informal networks that were held together by greed, attempts to advance in the hierarchy, and the search for protection. State officials were not only allowed, but were expected, to solicit and take bribes and to pass a portion up the hierarchy to party superiors through patron-client networks.<sup>78</sup> The result was that Soviet citizens developed “two separate[ ] systems of moral-

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67. See ROSSABI, *supra* note 32, at 59 (noting that the democratic reformers were appalled at the corruption and scandals throughout the country).

68. *Id.*

69. *Id.* at 60.

70. *Id.*

71. *Id.* at 53–54 (discussing also the creation of a weak executive branch, intentionally designed “to avoid the risk of a strong central government”).

72. David Sneath, *Transacting and Enacting: Corruption, Obligation, and the Use of Monies in Mongolia*, 71 *ETHNOS* 89, 108 (2006) (noting that “[t]he standard treatment of corruption in ‘transitional societies’ is to view it as a rent-seeking vestige of an over-powerful bureaucratic state”).

73. Kurkchian, *supra* note 12, at 36–37.

74. See *id.* at 37.

75. See *id.*

76. See *id.*

77. See *id.*

78. Marina Kurkchian, *Judicial Corruption in the Context of Legal Culture*, in *GLOBAL CORRUPTION REPORT*, *supra* note 2, at 104.

ity.”<sup>79</sup> In one moral system, they interacted with friends and family with honesty and trust.<sup>80</sup> In the other, they bribed state officials, stole state property, and circumvented the law whenever they could without any feelings of guilt or moral concern.<sup>81</sup>

Thus, the argument goes, systemic corruption in the post-transition states is primarily a Soviet legacy.<sup>82</sup> The informal rules of clientelism and collusion of the Soviet era are said to have counteracted the development of formal political and economic institutions, because where informal institutions are already established, formal institutions face difficulty in developing.<sup>83</sup> Informal rules “supersede formal institutions, leaving little room for strengthening the rule of law and constitutionalism.”<sup>84</sup> Therefore, despite the advent of a new political and economic system, citizens and public officials have continued to rely upon the same informal rules of “social exchange corruption” and bribery as the primary means of social ordering.<sup>85</sup>

While there may be some truth to this account, the Soviet legacy does not offer “a full or convincing explanation for current perceptions of corruption.”<sup>86</sup> This is particularly true in the case of Mongolia, where claims of widespread corruption in the socialist period “do not match the experiences of most Mongolians.”<sup>87</sup> Among Mongolians, “there is a strong perception that bribery was not a serious problem in the state socialist period.”<sup>88</sup> In 1999, 70.2% of Mongolians considered corruption to be widespread in contemporary Mongolia, but only 7.2% perceived it to have been widespread during the Soviet period.<sup>89</sup> Additionally, over 70% of Mongolians linked current corruption to the dismantling of the socialist state, not to its lingering influence.<sup>90</sup> If contemporary corruption were “a product of the extent and penetration of the [Soviet] state,” then “we might expect corruption to have been at its height with the ‘big state’ of the Soviet period.”<sup>91</sup> Instead, “we see quite the reverse – very little perceived corruption during the Soviet period, but its striking growth since the retreat of the state.”<sup>92</sup>

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79. *Id.*

80. *See id.* at 105 (noting that “[v]alues such as family ties, friendship or the social need to keep in touch are considered more important than the moral impulse to distance oneself from a corrupt person”).

81. *See id.* at 104-05 (discussing that behavior such as bribery and other shortcuts can be explained by people acting against their core values and conforming to general practice).

82. *See Sneath, supra* note 72.

83. STEFES, *supra* note 9, at 19.

84. *Id.* at 18.

85. *See id.*

86. Sneath, *supra* note 72, at 91.

87. *Id.* at 92.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 93 (noting that this idea is linked with the notion of the post-Soviet period as “the age of the market”).

Not only does the low level of perceived corruption during the Soviet period cast doubt upon claims that corruption in Mongolia is a Soviet legacy, but blaming contemporary corruption on the Soviet legacy also conveniently hides the fact that at least part of the responsibility for systemic corruption in modern Mongolia lies with the hasty manner in which privatization was imposed on Mongolia. Had Mongolia been allowed to undertake privatization gradually and in an orderly way, the government, with the help of the international donor agencies, might have been able to devise a system to limit corruption and ensure a more equal distribution of wealth. The Mongolian government might also have found a way to provide basic social services and a safety net to those hurt most by privatization. Doing so may have limited the “remorseless growth of inequality,” which was both a result and a contributing cause of increasing corruption in the transitional state.<sup>93</sup> Moreover, the privatization process could have been designed with specific measures to control both remnants of corruption from the Soviet era and the effect of nepotism in Mongolian society. Blaming the Soviet legacy for the rise of corruption in post-Soviet Mongolia, however, stymies introspection as to how the transition might have been handled differently.<sup>94</sup> At the very least, the early inattention to and even toleration of corruption by the international donor agencies was a contributing cause of the systemic corruption in transition and post-transition Mongolia.<sup>95</sup>

By the time international donor agencies began to push “good governance” and anti-corruption measures in Mongolia at the beginning of the century, it was already “commonplace [ ] to think of bribery as an everyday part of Mongolian life, particularly among the relatively small new elite of wealthy businesspeople and politicians.”<sup>96</sup> As one Mongolian doctor explained,

It is a fact that you will encounter corruption in every form at some point in your life. The bus conductor will charge you the bus fare, but not her or his acquaintance. Go to shop, and you will get the bad, while the shop assistant’s acquaintance will get the best. Provided, you supply your kid’s teacher with sweets and chocolates, your child is assured of good marks. Your child graduates from the tenth grade and it’s time for her or him to go for university admission examinations, and there you’ll see the classical form of corruption. Get hospitalized, you will have to give the best to the doctors and nurses to get the appropriate treatment and medicines. Go to the higher

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93. ROSSABI, *supra* note 32, at 59. Rather than proceeding with caution, however, international donor agencies proceeded under the apparent theory that it did not matter how spoils of privatization were distributed, corruptly or otherwise, only that property be privatized so that “free markets” could operate. *See id.* at 57-58.

94. *Id.* at 64 (discussing the failure to take local conditions into account and Mongolians’ distaste for foreign reformers who frequently ignored Mongolians’ input).

95. Not until 2007, with the financial support and assistance of USAID and the Asia Foundation, did Mongolia pass its first anti-corruption law and create a new anti-corruption agency to enforce it. *Mongolia Passes Anti-Corruption Laws*, MONGOLIA WEB, July 8, 2006, <http://www.mongolia-web.com/government/625-mongolia-passes-anti-corruption-laws> (last visited Apr. 1, 2010).

96. Sneath, *supra* note 72, at 89.

official and you have to bribe the secretary with souvenirs or perfume to ensure the access to that person. These are the everyday, in a way, accepted forms of corruption. The higher the official you have to meet, the graver the issue you are dealing with, the bigger and more hidden the bribe.<sup>97</sup>

The vast majority of Mongolians share this view of widespread corruption.<sup>98</sup> Moreover, Mongolians perceive opportunities for unjust enrichment in post-Soviet Mongolia to have fallen disproportionately to a “small, generally well-educated, and comfortable elite in Ulaanbaatar” connected through a “nexus of close relations.”<sup>99</sup> The Mongolian Parliament, for example, has been transformed into a multi-millionaires club, populated by Mongolia’s wealthiest businesspersons – many of whom are perceived to have gained their wealth by exploiting their public office for private gain.<sup>100</sup> This perception that corruption is largely a vice of the rich and powerful is not without basis.<sup>101</sup> For example, in 1994 the prime minister was implicated in a scandal involving “undeclared and illegal business interests with China through his son and daughter’ and of unauthorized granting of false Mongolian passports to Chinese citizens.”<sup>102</sup> In 1999 a corruption scandal rocked the government when prosecutors convicted three parliament members for accepting bribes totaling over \$200,000 (US) in exchange for tendering a gaming license to foreign casino developers.<sup>103</sup> The perception of corruption runs deeper than a few scandals, however, and reflects “the bitter experience, shared with other post-Soviet economies, of the privatization of state assets, which appeared to generate fortunes for a few while the majority were left with share coupons (*tasalbar*)

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97. B. Batchuluun, Reflections on Corruption and Anti-Corruption Legal Framework, Jan. 7, 2004, available at [http://www.forum.mn/en/index.php?sel=news&obj\\_id=156](http://www.forum.mn/en/index.php?sel=news&obj_id=156).

98. ASIA FOUND., U.S. AGENCY FOR INT’L DEV., MONGOLIA CORRUPTION BENCHMARKING SURVEY: SEPTEMBER 2008 3 (2008), available at <http://asiafoundation.org/publications/pdf/446> [hereinafter ASIA FOUNDATION SURVEY]. As of September 2008, 83% of Mongolians believed that corruption was widespread. *Id.*; see also Sneath, *supra* note 72, at 100 (noting that, whether or not it is “corrupt,” Mongolians have been forced to make payments as part of their daily lives, including a 10% fee to bank officers for loan approval or personal fees to customs officials for tariff reduction on imports).

99. ROSSABI, *supra* note 32, at 60.

100. See *id.* at 62 (stating that a survey conducted in the late 1990s, for example, found “that 52.9 percent of the population believed that state officials benefited most from privatization, and 25.4 percent claimed that businessmen were the greatest beneficiaries”). The Khural’s members include, or have included: Luvsanvandangiin Bold, Mongolia’s richest person and head of Golmont Bank; Erdenebat, Mongolia’s second richest person and head of Erel Co. LTD, a bank and construction company; the wife of Otgonbileg, Mongolia’s third richest person and head of Petrovis Petroleum; Bazarsadyn Jargalsaikhan, Mongolia’s fifth richest person and owner of the Buyan cashmere company; the brother of Odjargal, Mongolia’s seventh richest person and head of Mongol Shuudan Bank; Batbold, Mongolia’s eighth richest person and head of Altai Trading Company; and many others. Discussion Forum, Mongolia’s Top Richest Men, <http://forum.asuultserver.com/viewtopic.php?f=73&t=97197> (last visited Mar. 31, 2010). Thirteenth on the list of Mongolia’s richest is President Nambaryn Enkbayar. *Id.*

101. See ROSSABI, *supra* note 32, at 61.

102. *Id.*

103. *MP’s Found Guilty*, MONGOL MESSENGER, Oct. 27, 1999, at 1.

worth next to nothing.”<sup>104</sup>

Though surveys show that the majority of Mongolians find corruption “unacceptable,” a discernable cynicism also exists among Mongolians that corruption will not abate regardless of who is elected.<sup>105</sup> Indeed, Mongolians have a decidedly fatalistic attitude toward corruption, with 62% of Mongolians believing that corruption has increased over the past three years and only 19% believing that corruption will decrease in the next three.<sup>106</sup>

Despite such fatalism, the cost of corruption in post-transition Mongolia continues to be staggering. According to estimates by the Asia Foundation, the estimated total national cost of bribes to households in Mongolia over a six-month span in 2008 amounted to 66.9 billion tugrik, or an adjusted amount of 133.8 billion tugrik per year (approximately \$88.3 million (US)).<sup>107</sup> Judges are the seventh biggest takers of these bribes, ranking just below customs officials.<sup>108</sup>

## II. The Failure of Judicial Reform

Notwithstanding strong indicators of corruption within the judiciary, international agencies focusing on judicial reform in Mongolia have chosen not to address corruption directly.<sup>109</sup> Judicial reform efforts have focused instead on “second level” institutional issues that judicial reform experts have argued make judges more susceptible to corruption.<sup>110</sup> These include lack of judicial independence, inadequate judicial resources, inadequate judicial training and education, the lack of case tracking systems, poor working conditions and low judicial salaries.<sup>111</sup> Institutional reform

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104. Sneath, *supra* note 72, at 101.

105. ASIA FOUNDATION SURVEY, *supra* note 98. Approximately 70% of those interviewed believed that business and political life are “corrupt” to a moderate or large extent. *Id.* at 9. Additionally, many Mongolians began to view inflation, poverty and unemployment as more pressing matters compared to corruption. *Id.* at 4.

106. *Id.* at 6. Thirty percent believe that corruption will increase, seventeen percent believe it will stay the same, and thirty-five percent did not know. *Id.*

107. *Id.* (indicating that political and business-related corruption would further increase the total cost).

108. *Id.* at 11.

109. Interview with Interim Director of the Judicial Reform Project, U.S. Agency for Int’l Dev. (May 28, 2008). This approach is consistent with judicial reform programs sponsored by international agencies in other countries. *See generally* Hammergren, *supra* note 8 (noting that banks and other international agencies have failed to develop an effective anti-judicial corruption strategy in spite of continuing involvement in combating judicial corruption).

110. Interview with Interim Director of the Judicial Reform Project, *supra* note 109. The approach instead is to focus on “second level” indicators of corruption, not only in Mongolia but in other countries, including Central Asia and Central and Latin America. *Id.* Historically, judicial reform programs minimized any explicit focus on combating corruption for fear of harming relationships with the courts. Hammergren, *supra* note 8, at 139. However, reform tactics, including alternating the selection process, increasing pay, providing additional training, and preventing judges’ political dismissal, functioned to combat corruption somewhat. *See id.* Similarly, increasing proceedings in open court affected perceptions of transparency. *See id.*

111. *See id.* (describing these type of measures as “the usual reform measures”).

in Mongolia also included eliminating the mixed judge-jury system of the Soviet era in which “civil representatives” shared decision-making power with judges.<sup>112</sup>

Institutional reform, it was argued, will have the corollary effect of reducing corruption.<sup>113</sup> Though, to be clear, reducing corruption is not an explicit goal of judicial reform efforts in Mongolia or, with rare exceptions, elsewhere in the post-Soviet space.<sup>114</sup> As World Bank judicial reform expert Linn Hammergren has explained,

Donors were chary of fomenting bad relations with the courts; governments may have avoided the topic for similar reasons; and judges were understandably reluctant to mention it. Nonetheless, many of the usual reform measures – new selection systems, higher salaries and budgets, real judicial careers with guaranteed tenure, training, courtroom reorganisation and automation, and law revision – were also seen as partial solutions. . . . For example, the introduction of oral proceedings was said to increase transparency, while better courtroom administration would reduce the chances for manipulating files (a problem as often attributed to court staff as to judges).<sup>115</sup>

This “second level” approach appears to have not effectively reduced corruption in Mongolia or in other post-communist societies.<sup>116</sup> It may even have proved counterproductive by increasing the public’s perception of corruption within the judiciary, as suggested by the fact that the Mongolian public views the judiciary appreciably more negatively now than it did when judicial reform efforts began in the late 1990s.<sup>117</sup>

Despite this fact, judicial reform efforts have resulted in some notable progress. First, the Mongolian judiciary has successfully transformed into a separate branch of government, judges are guaranteed life tenure, and in sharp contrast to the Soviet period, the courts have supreme authority and power to interpret the law.<sup>118</sup> Mongolia has also made considerable pro-

112. Interview with B. Bat-Erdene, Supreme Court Justice, Criminal Chamber, in Ulaanbaatar, Mongolia (May 13, 2008).

113. See, e.g., Hamnergren, *supra* note 8, at 139.

114. See *id.*

115. *Id.*

116. See White, *supra* note 30, at 247–48 (indicating that an institution-oriented approach to judicial reform does not work in countries characterized by systematic corruption).

117. L. SUMATI & Ts. SERGELEN, TREND LINES IN PUBLIC PERCEPTION OF JUDICIAL SYSTEM ADMINISTRATION IN MONGOLIA 2 (2007) (“Starting from 2005 there emerged significant changes in public attitudes of negative nature.”).

118. MONGOL ULSYN UNDSÉN KHUULI [CONSTITUTION] (Mong.). The post-Soviet era Constitution provides that “[t]he judicial power is vested exclusively in courts,” and that decisions made by the Supreme Court shall be final and shall be binding upon all courts and other persons. *Id.* arts. 47(1), 50(2). In addition, Mongolia has a separate and independent Constitutional Court, or Tsets, that has “supreme supervision over the implementation of the constitution.” *Id.* art. 64(1). The Constitutional Court may invalidate laws, decrees and other governmental decisions that are deemed as incongruous with the Constitution. *Id.* art. 66(4). Nevertheless, 50% of experts surveyed disagreed with the statement, “Court decisions are respected and enforced by other branches of government.” White, *supra* note 30, at 224. Similarly several experts who were interviewed indicated that the executive branch often does not honor court decisions with

gress in the training and continuing education of judges, which has been one of the primary focuses of the German Technical Cooperation (GTZ), the Judicial Reform Project of USAID, and the World Bank.<sup>119</sup> A centerpiece of this focus was the establishment of the National Law Center (NLC) for the training of judges and lawyers.<sup>120</sup> As evidence of the success of the National Law Center, a significant plurality of experts (43%) that I surveyed agreed that judges receive adequate continuing legal education; only 19% disagreed.<sup>121</sup>

Moreover, the donor community has devoted significant resources to improving the infrastructure of Mongolian courts, including providing computers and furniture<sup>122</sup> and repairing dilapidated courtrooms.<sup>123</sup> Currently, the Asian Development Bank is also funding a complete renovation of the Supreme Court at a cost of approximately \$5 million. As a result, 78% of experts agreed, “[t]he court system operates with a sufficient number of computers and other equipment to enable it to handle its caseload in a reasonably efficient manner.”<sup>124</sup>

Similarly, Mongolia has made significant progress in improving judicial support staffing with the recent addition of court clerks for each

which it disagrees. *Id.* For example, one attorney gave a specific example of the tax authority ignoring a Supreme Court decision because the attorney convinced the tax authorities that the Supreme Court was wrong in its interpretation. *Id.* at 225. This raises the concern that the Supreme Court does not actually have final authority to interpret the law and that government, even tax inspectors, may ignore Supreme Court decisions with which they disagree. *See id.* Indeed, the Constitution itself seems to undermine the “final authority” ostensibly given to the Supreme Court. MONGOL ULSYN UNDSSEN KHUULI [CONSTITUTION] (Mong.) art. 50(2) (“If an interpretation made by the Supreme Court is incompatible with a law, the latter has precedence.”). Thus, it is unclear who has the authority to decide whether the Supreme Court’s interpretation is incompatible with the law. *See, e.g.*, Christopher Kaplonski, Book Review, 184 CHINA Q. 983, 984 (2005) (reviewing MORRIS ROSSABI, MODERN MONGOLIA: FROM KHANS TO COMMISSARS TO CAPITALISTS (2005)) (noting that the Mongolian People’s Revolutionary Party undertook an extensive purge in 2000 even though the Constitutional Court ruled against it).

119. Brent T. White, *supra* note 30, 222–23 (2008); *see* NAT’L CTR. FOR STATE COURTS, MONGOLIA JUDICIAL REFORM PROGRAM: ANNUAL REPORT, *supra* note 7, at 16–18 (generally discussing the improvements made in continuing legal education).

120. *See* White, *supra* note 30, at 223. The NLC is housed in a sparkling modern complex built with funds from the World Bank. *See id.* at 223 & n.52.

121. *Id.* at 223. On the other hand, 66% of experts disagree with the statement that judges are well-qualified to begin with, and 57% believe that they do not receive adequate training before taking the bench. *Id.* Additionally, a solid majority of experts surveyed indicated that judges do not enforce procedural rules, do not follow rules of evidence, and do not apply legal standards or rules in a predictable fashion. *Id.* at 238. The reversal rate of district court decisions approaches 80% in appealed cases (although only 3% of civil cases are actually appealed) reflecting the unpredictability and unevenness of judicial decision-making. Interview with Justice L. Byambaa, Supreme Court of Mongolia.

122. *Id.* at 227.

123. *Id.*

124. White, *supra* note 30, at 227. Despite recent improvement to some courtrooms in Mongolia, a significant majority of experts surveyed (63%) reported that court buildings, as a whole, still do not provide a respectable environment for the dispensation of justice with adequate infrastructure. *Id.* at 226.



judge.<sup>125</sup> As a result, 80% of survey participants believed that judges have “the staff support necessary to do his or her job, e.g., adequate support staff to handle documentation and legal research.”<sup>126</sup>

Judicial salaries have also improved approximately five-fold to around \$300–\$400 per month for lower court judges and \$700 per month for Supreme Court judges.<sup>127</sup> Such salaries are, at best, barely sufficient for judges to secure basic necessities such as food and housing for their families.

Despite this indisputable progress in the areas of formal authority, training, and resources, Mongolian courts continue to suffer from a lack of transparency.<sup>128</sup> Evidence of this failure includes the following: only 18% of experts believed that cases are assigned transparently to judges, members of the public are routinely excluded from court proceedings,<sup>129</sup> significant Supreme Court and appellate opinions are infrequently published or subject to academic scrutiny,<sup>130</sup> decisions by district courts are never published, verbatim transcripts or recordings are not made of trial court proceedings,<sup>131</sup> and litigants have difficulty accessing information about their cases’ status.<sup>132</sup>

Additionally, though Mongolian judges do not lack formal authority or independence, only 19% of experts agreed that “[c]ourt decisions are free from political influence from other branches of government or other public officials.”<sup>133</sup> Experts interviewed widely shared the view that high-ranking government officials (particularly the President) exert considerable influence over Supreme Court and Constitutional Court decisions.<sup>134</sup> Additionally, some experts were able, off the record, to identify specific instances of high-ranking government officials interfering directly with

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125. *Id.* at 227.

126. *Id.* However, the budget of the judiciary remains low both in real numbers and in comparison to other branches of government, constituting less than 0.5% of the national budget (a percentage that is subject to change up or down each year.) *See id.* at 228. As a result, only 29% of experts surveyed agreed that “[t]he overall budget of the courts is adequate to satisfy the demand for court services.” *Id.* Nevertheless, the Mongolian legislature has repeatedly rejected proposals to tie the judicial budget to a percentage of the national budget—whether 3%, 2%, or even 1%. *See id.*

127. *Id.* at 227.

128. *See id.* at 235.

129. *Id.*

130. *Id.* at 236. One expert explained this lack of scrutiny by the fact that given their low salaries, most law professors must also practice law in order to survive, and they fear that criticizing the courts would threaten their livelihood. *Id.* at 236 n.98. The expert explained that most academics “are in the pockets of the judges.” *Id.*

131. *Id.* at 236. While summaries of the trial proceeding are provided, they are frequently incomplete and distorted. *Id.*

132. *Id.* This fact remains true, despite new public access terminals in many court houses that USAID has touted as evidence of the progress of judicial reform in Mongolia. *Id.* at 236 n.97. In reality, however, public access computers are often turned off, broken, or otherwise inaccessible to litigants or other court users. *Id.*

133. *Id.* at 230.

134. *Id.*

judges to arrange specific judicial outcomes.<sup>135</sup>

Mostly disturbingly, however, there was near universal agreement among experts that court decisions are influenced by improper payments and judges' own personal interests.<sup>136</sup> Seventy-seven percent of experts disagreed (with none agreeing) with the statement that "[c]ourt decisions are not influenced by payments, gifts, or favors from litigants or other interested parties."<sup>137</sup> Seventy-three percent of experts disagreed (with only 9% agreeing) with the statement that "[f]amily, social, business, or other relationships do not influence judges' conduct or judgment."<sup>138</sup>

The general public shares this negative perception of Mongolian courts.<sup>139</sup> A 2007 nationwide survey of public attitudes toward the Mongolian courts found that only 28% of Mongolians believed they would be treated fairly were they to find themselves in court.<sup>140</sup> In contrast, over 85% of Mongolians believed that the courts favor each of the following groups: the wealthy, public officials, relatives and friends of court personnel, and corporations.<sup>141</sup> Likewise, approximately 75% of Mongolians believed that political considerations, judges' own personal interests, and government officials influence judicial decisions.<sup>142</sup> Moreover, confidence in the courts is significantly lower, and increasingly so, among individuals who have had actual experience before courts as compared to those who have not.<sup>143</sup> Since 2005 the negative perception of the courts has risen three-fold among those who have actually used the courts.<sup>144</sup>

Nevertheless, the major international agencies that fund legal reform in Mongolia have not sought to address corruption directly, and some officials within these internationally-funded legal reform agencies have downplayed the existence of serious corruption with the judiciary.<sup>145</sup> Judges

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135. *Id.* Judicial reform in Mongolia has done little to directly address this issue and certain features of the new judicial system seem to make it worse. *Id.* First, the President has disproportionate power over the appointment, removal, and promotion of judges, and the processes for each lack sufficient transparency. *Id.* Indeed, one expert expressed the opinion, backed by substantial evidence, that the disciplinary process for judges is more often used to punish judges who are too independent than to punish or remove judges who are unethical or incompetent. *See id.* at 233. Second, the budget of the judiciary, as well as judges' own salaries, are subject to decrease in any given year. *Id.* at 230. Thus, in the words of one Supreme Court judge, "the judicial budget depends on maintaining good relations with those in the legislative and executive branch who control budgetary decisions." *Id.* Third, the Judicial Code of Conduct does not prohibit judges from discussing pending or future litigation either before the court or in private with other public officials (or other non-parties) who are free to convey to judges their preferred outcomes. *Id.*

136. *Id.* at 231.

137. *Id.*

138. *Id.*

139. *Id.* at 215.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 211, 243-46. During an interview with the author, one high-level official of a donor-funded, judicial-reform project denied that corruption was a problem *at all* in

echo this view, denying that improper payments, judges' own personal interests or other branches of government frequently influence court decisions.<sup>146</sup> Rather, judges blame the perception of widespread corruption within the judiciary on an irresponsible press<sup>147</sup> and incompetent lawyers who accuse judges of taking bribes in order to cover their own inadequacies as lawyers.<sup>148</sup>

The judges' claims may have some validity, as the public often "views its judiciary as more corrupt" than it actually is.<sup>149</sup> While the widespread perception of corruption within the judiciary and the anecdotal stories that feed the perception may indeed indicate significant corruption, absent confessions by its participants, the actual extent of corruption within the courts is largely indeterminable.<sup>150</sup> Nevertheless, Mongolian courts (like courts in countries across the post-Soviet space) face a crisis of confidence due to either real or perceived corruption among judges.<sup>151</sup> This crisis of confidence, in turn, poses a profound threat to the goal of developing a judiciary that the public trusts to render fair, just, and consistent decisions. Indeed, many of the purported costs of judicial corruption, including diminished foreign investment and economic growth, perpetuating the "the sense of injury created by unjust treatment," and decreased confidence in governance can be caused as much by the perception of corrup-

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Mongolia. See *id.* at 244 n.126. This official went on to explain that in "ten years" of working with the courts, he had never seen "any evidence" of judicial corruption or improper influence. *Id.*

146. See *id.*

147. *Id.* at 216 n.31. One Supreme Court justice told the author that the real problem is not corruption, but that "there is too much media freedom" in Mongolia. BRENT T. WHITE, REPORT ON THE STATUS OF COURT REFORM IN MONGOLIA 18 (Open Society Forum) (2008). Other government officials apparently share this view of the press, and there has been a recent attempt to crackdown on, and even imprison, reporters who publish articles accusing government officials of corruption. White, *supra* note 30, at 234-35.

148. White, *supra* note 30, at 216 n.31. Similarly, it was suggested that incompetent lawyers try to bribe judges because they do not know how to prepare or argue a case. WHITE, REPORT ON THE STATUS OF COURT REFORM IN MONGOLIA, *supra* note 147. When asked if judges take these bribes, the Supreme Court Justice smiled and replied, "It's like you say in America. If you can't prove it, it didn't happen." *Id.*

149. See White, *supra* note 30, at 216 n.32. "But the public often views its judiciary as more corrupt than it actually is: more people around the world described their judiciary as 'extremely corrupt' than have personally been part of judicial corruption." Kathie Barrett, *How Prevalent Is Bribery in the Judicial Sector?*, in GLOBAL CORRUPTION REPORT, *supra* note 2, at 14.

150. See Edgardo Buscaglia, *Judicial Corruption and the Broader Justice System*, in GLOBAL CORRUPTION REPORT, *supra* note 2, at 69 ("Due to their secretive nature, corrupt practices are difficult to measure through objective indicators, but quantitative data on corruption levels, coupled with detailed research of case files to identify abuse of procedural discretion by prosecutors and judges, allow us to draw conclusions about the phenomenon.").

151. See White, *supra* note 30, at 210-11. According to the Judicial Reform Index, countries across the post-Soviet space continue to battle corruption within the judiciary. See, e.g., AM. BAR ASS'N, JUDICIAL REFORM INDEX FOR ARMENIA 3 (2008), available at [http://www.abanet.org/rol/publications/judicial\\_reform\\_index.shtml](http://www.abanet.org/rol/publications/judicial_reform_index.shtml) (follow "Armenia JRI, Vol. I; ABA Rule of Law II" hyperlink); ABA RULE OF LAW INITIATIVE, JUDICIAL REFORM INDEX FOR KAZAKHSTAN 2 (2004), available at [http://www.abanet.org/rol/publications/judicial\\_reform\\_index.shtml](http://www.abanet.org/rol/publications/judicial_reform_index.shtml) (follow "Kazakhstan JRI" hyperlink).

tion, as its reality.<sup>152</sup>

Both actual judicial corruption and its perception are facilitated by a vague and weak judicial code of ethics that does not adequately define or prohibit judicial impropriety.<sup>153</sup> The judicial code of ethics, for example, allows ex parte communications, a practice that 82% of experts agreed that judges engage in with parties and their lawyers.<sup>154</sup> Regardless of their actual content, such ex parte communications create an opportunity for corruption and contribute to the general suspicion toward the courts.<sup>155</sup>

The judicial code of ethics also only vaguely prohibits judges from deciding cases in which they have an interest.<sup>156</sup> As such, judges frequently hear cases in which there is an appearance of impropriety due to family, business, or other relationships. This likely contributes to perception, or reality, of judicial corruption.

Judges who take bribes (which regardless of the weak code of ethics is clearly prohibited under Mongolian law) are rarely, if ever, held accountable.<sup>157</sup> Indeed, the Judicial Disciplinary Committee is used instead to punish independent judges,<sup>158</sup> who publicly challenge those at the top of the judicial hierarchy.<sup>159</sup>

Experts also alleged that politicians interfere with investigations of judicial misconduct.<sup>160</sup> In the absence of transparency, the accuracy of such allegations is difficult to access.<sup>161</sup> General statistics reveal, however, that “the vast majority of complaints against judges are dismissed without action or explanation,”<sup>162</sup> with 22 of 28 complaints in Ulaanbaatar dismissed between 2003 and 2005.<sup>163</sup> No information is publicly available as to what the other six were accused of or what happened to their cases.<sup>164</sup> In the absence of public transparency in Judicial Disciplinary proceedings,

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152. Barrett, *supra* note 149. Domestically, a corrupt judiciary denies individuals adequate impartial dispute resolution against government authorities and fellow citizens, fomenting community fracture. See *Executive Summary: Key Judicial Corruption Problems*, in GLOBAL CORRUPTION REPORT, *supra* note 2, at xxi. More broadly, a corrupt judiciary affects a country’s international standing; undermines its ability to fight transnational crime and participate in international trade, and damages other factors that in turn affect economic growth and human development domestically. *Id.* Furthermore, a corrupt judiciary readily translates into government-wide corruption because the judiciary is expected to serve as a check on broader government corruption. See *id.* As such, judicial corruption severely hampers national development. Zora Ledergerber, Gretta Fenner & Mark Pieth, *The International Dimensions of Judicial Accountability*, in GLOBAL CORRUPTION REPORT, *supra* note 2, at 62.

153. White, *supra* note 30, at 232.

154. *Id.* at 232-33.

155. *Id.* at 233.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 233-34.

160. *Id.* at 234.

161. *Id.*

162. *Id.*

163. U.S. AGENCY FOR INT’L DEV., JUDICIAL REFORM PROGRAM, ASSESSMENT REPORT OF THE STRATEGIC PLAN FOR JUSTICE SYSTEM OF MONGOLIA (2006).

164. *Id.*

no one knows the actual extent of judicial misconduct or what is done about it.<sup>165</sup>

Regardless, judges are widely perceived to be corrupt, “ranking in public opinion surveys just below customs officials as the second most corrupt officials in Mongolia.”<sup>166</sup> The failure to address this perception of judicial corruption not only undermines the progress that has been made in judicial reform, it also defeats its central goal: the creation of a judiciary that the public can trust to render fair, just, and consistent decisions. Indeed, without addressing corruption within the judiciary, providing refurbished courtrooms and buildings, a modern legal training center, automated computer systems and nice new furniture (with USAID stickers) risks doing little more than legitimizing a corrupt regime.<sup>167</sup>

### III. Legal Culture and The Negative Rule of Law Myth

Mongolian courts, like those in other post-transition societies of Central Asia and Eastern Europe, do not exist in a vacuum, but are embedded within a society. As discussed above, corruption is systemic in Mongolia.<sup>168</sup> Not only do bribes cost Mongolian households over \$88 million a year but 21% percent of Mongolians also paid a bribe in the *three months* preceding September 2008.<sup>169</sup> Not surprisingly, given this statistic, Mongolia scores a dismal 3 out of 10 on Transparency International’s 2008 Corruption Perception Index, which measures the degree of corruption as seen by business people and country analysts on a range between 10 (highly clean) and 0 (highly corrupt).<sup>170</sup> This score places Mongolia 102nd out of 180 countries (listed from least-to-most corrupt), where it is tied with Rwanda, Bolivia, and Tanzania (and falling far below communist China, which is 72nd on the list).<sup>171</sup> The good news is that it could be worse—Russia is 147th on the list.<sup>172</sup> Nonetheless, all indices point to the presence of significant corruption at almost all levels of Mongolian society.<sup>173</sup>

Judicial corruption must be understood and addressed within this context. “The propensity of [judges] to use their office for private gain reflect attitudes to corruption in society more broadly.”<sup>174</sup> Though the

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165. *Id.*

166. *Id.* at 210.

167. Yang & Ehrichs, *The Professionalism of Judges: Education, Salaries, and Career Structure in Asia*, in GLOBAL CORRUPTION REPORT, *supra* note 2, at 55.

168. *See supra* Part II.

169. *See ASIA FOUNDATION SURVEY, supra* note 98, at 9–10.

170. Transparency Int’l, Corruption Perception Index, [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/2008/cpi\\_2008\\_table](http://www.transparency.org/policy_research/surveys_indices/cpi/2008/cpi_2008_table) (last visited Apr. 1, 2010).

171. *Id.*

172. *Id.*

173. *See ASIA FOUNDATION SURVEY, supra* note 98, at 11 (identifying the following groups of people as the top bribe takers in Mongolia: clerks in state administration, doctors, teachers, policeman, custom officers, tax officers, judges, prosecutors, lawyers, and the press).

174. Kamal Hossain, *Forward*, in GLOBAL CORRUPTION REPORT, *supra* note 2, at xx; Hamnergren, *supra* note 8, at 140 (citing J. Clifford Wallace, *Resolving Judicial Corrup-*

sectors perceived to be the most corrupt in Mongolia are customs and banking, “the judicial system, parliament, tax office, business institutions, political parties, and the police” also suffer from significant perceived corruption.<sup>175</sup> It makes little sense then to talk about reducing judicial corruption without reference to the fact that judges operate as individuals within a legal culture and will be judged based upon the norms of that culture.<sup>176</sup>

The external legal culture can interfere with efforts to contain corruption in the judiciary in two primary ways. First, external legal culture may contain social norms that require judges to engage in practices that would be considered corrupt according to “rule of law” norms. Second, the external legal culture may legitimate corrupt behavior such as bribery, not because the behavior is viewed as socially desirable but because such behavior is deemed a reasonable response to socio-economic and political realities.

To take an illustrative case of the role positive social norms play in undermining rule of law, traditional Mongolian culture places a high value on obligation and reciprocity, also known as “giving help to friends and relations.”<sup>177</sup> This reciprocal obligation,

should be seen in the context of the very substantial material flows generated by obligations owed to kin, such as providing food supplies (*idesh*).” Those who visit relatives who keep livestock can expect meat, for example, in winter, and dairy products in summer. Similarly those from rural districts who visit urban relatives can expect help and assistance of various sorts.<sup>178</sup>

However, the reciprocal obligation to give “help to friends and relations” extends not only to close friends and relatives but also to distant kin, coworkers, neighbors or *neg nutag* (those from the same birth place) and acquaintances.<sup>179</sup> To the extent a request is made, it may also extend to the relatives, friends, coworkers, neighbors, and acquaintances of one’s

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*tion while Preserving Judicial Independence: Comparative Perspectives*, 28 CAL. W. INT’L. L.J. 341 (1998)). The extent of corruption in the judiciary will also generally correspond to the general level of corruption in society as a whole. See Kurkchiyan, *supra* note 78, at 101; see also *Executive Summary*, *supra* note 152, at xxii (“Judiciaries that suffer from systemic corruption are generally found in societies where corruption is rampant across the public sector.”). While judicial corruption is arguably more harmful to democratic development than is true of other public agencies, courts are products of their political environment. Where corruption is rampant, judges will not remain untouched.

175. Sneath, *supra* note 72, at 100.

176. See David Nelken, *Disclosing/Invoking Legal Culture: An Introduction*, 4 SOC. & LEGAL STUD. 435, 437 (1995). “Legal culture” describes the way in which societies both view and embed law. “Internal legal culture” denotes legal and political actors’ practices, processes, and rationales, while “external legal culture” denotes expectations and impressions of “ordinary people.” *Id.*

177. Sneath, *supra* note 72, at 95

178. *Id.* at 96.

179. Byambajav Dalaibuyan, *Social Networks in Post-Socialist Mongolia: Access, Uses, and Inequalities* 6 (unpublished Ph.D. dissertation, Hokkaido University) (on file with author).

own “friends and relations.”<sup>180</sup>

These informal circles of connected individuals are called *tanil tal* in Mongolian and have been described in academic literature as exchange networks or fields of reciprocity.<sup>181</sup> Whatever their description, *tanil tal* are grounded in the cultural norm of reciprocity and obligation—moral individuals should help those with whom they are connected and can expect help in return when needed.<sup>182</sup> As David Sneath has explained, such transactions with one’s *tanil tal* are “positively valued practices” and are “so common and expected that they can be seen as materializations of the social relations themselves . . . .”<sup>183</sup>

The critical importance of cultivating *tanil tal* in traditional nomadic Mongolian culture is evident from public idioms, such as *taniltai bol taliin chine* (literally, “have many acquaintances reach far in the steppe,” but which expresses the idea that one can accomplish much if one has many acquaintances).<sup>184</sup> The importance of *tanil tal* also pre-dates the socialist and post-socialist eras, although *tanil tal* has remained crucially important through both.<sup>185</sup> One’s *tanil tal* is, in short, a traditional and accepted source of support and obligation and an important means of gaining access to assistance, goods and services in contemporary Mongolia.<sup>186</sup>

Judges, too, belong to *tanil tal* and must be responsive to the social obligations that that entails. Otherwise, they “face the alternative of becoming misfits, even outcasts.”<sup>187</sup> One judge in post-Soviet Armenia, which places a similar importance on reciprocal obligations, explained,

How can I be free when I live in society and am tied into the social network? Let’s imagine that a member of my family falls badly ill and needs special treatment. Naturally I would do everything I could do to find someone in the Ministry of Health and ask him for help in order to get the treatment. Doing that would automatically make me dependent on him. I will have to do whatever I could for him if he should ever need it.<sup>188</sup>

The judge may, for example, show leniency to the official or the official’s relative, should either the official or the official’s relative end up before the judge in a criminal matter, or the judge may render a helpful judicial decision in a civil case that affects the official’s interest. While such a practice may fit the definition of corruption, to regard a judge who

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180. *Id.* at 11. Dalaibuyan explains:

Personal networks are not only embedded in dyadic relationships, but can be expanded to the actors beyond the dyad, in other words to people whom one does not know directly. Kinship ties, on the other hand, are the primary or perhaps most important in one’s social networks. Whilst weak ties connect one to a variety of people and thereby to expand information or opportunity range, strong ties may provide a variety of resources and support. *Id.* at 11-12.

181. Sneath, *supra* note 72, at 96.

182. *Id.*

183. *Id.* at 93, 96.

184. See Dalaibuyan, *supra* note 179, at 6.

185. See *id.* at 12.

186. *Id.* at 13.

187. Kurkchiyan, *supra* note 78, at 101.

188. *Id.* at 103.

takes care of a sick family member as corrupt overlooks the fact that it would be “more dishonorable for a judge to ignore the [needs] of a family member than to abide strictly by the law.”<sup>189</sup> The judge’s predicament is particularly complicated in the context of post-transition states like Armenia and Mongolia, where austerity measures created anemic governments, depleted public resources, and led to considerable decline in the availability of health care services. Without finding someone in the Ministry of Health to intervene, the judge’s family member may not receive care until it is too late. The moral course of action in such a situation may very well be to call upon one’s *tanil tal* for assistance, even if it means having to render a corrupt decision in the future.

In societies such as post-socialist Mongolia, characterized by scarcity, economic deterioration, and social segmentation, networking becomes an increasingly important means of “coping and grabbing.”<sup>190</sup> It is, of course, not just in securing health care that Mongolians must rely on connections and reciprocal favors to cope and grab.<sup>191</sup> It is instead a way of life.<sup>192</sup> Moreover, “the loosely coupled networked nature of contemporary society means that social support does not come reliably from one group.”<sup>193</sup> “Rather, it comes contingently from a variety of ties and networks, which people must navigate nimbly through partial involvements in multiple networks, giving and getting network capital.”<sup>194</sup>

As members of Mongolian society, judges too must cultivate multiple *tanil tal* networks to survive and prosper.<sup>195</sup> Judges do not simply face pressures only from close family members and friends to tilt the hand of justice in a particular direction or to render a particular decision.<sup>196</sup> Rather, judges find themselves under significant pressure from a host of “informal networks” linked to the various “groups with whom they associate.”<sup>197</sup> To constantly refuse to honor such requests both invites social isolation and cuts off important—perhaps critical—means of assistance in the future.<sup>198</sup>

Additionally, most judges secure their positions in the first place through *tanil tal* and have reciprocal obligations to those who put them there, including, notably, the president.<sup>199</sup> Because repaying reciprocal

189. Pepys, *supra* note 5, at 4.

190. Dalaibuyan, *supra* note 179, at 12.

191. *See id.*

192. *Id.*

193. RAY-MARY HSUNG, NAN LIN & RONALD L. BREIGER, CONTEXTS OF SOCIAL CAPITAL: SOCIAL NETWORKS IN MARKETS, COMMUNITIES, AND FAMILIES 49 (2009).

194. Dalaibuyan, *supra* note 179, at 12.

195. *See* Kurkchiyan, *supra* note 78, at 103.

196. *See id.*

197. *Id.*

198. *See id.*

199. While judicial selection in Mongolia is ostensibly merit based, a number of experts that I interviewed explained that familial relations played the largest role in selection of judges, with a few family networks occupying most judicial positions. Additionally, experts complained that judges are particularly beholden to the president, who holds the ultimate appointment power.



obligations is such a deeply internalized social norm, when the individual to whom the judge is beholden suggests either directly or indirectly that the judge render a particular decision, judges tend to comply.<sup>200</sup> In such circumstances, formal guarantees of judicial authority and life tenure may have minimally appreciable impact on judicial independence.<sup>201</sup>

As this last point suggests, the line between the positively held value of helping friends and relations on one side, and mere influence peddling on the other, is less than clear.<sup>202</sup> This distinction has become even murkier as post-socialist Mongolia has grown increasingly polarized along the lines of rich and poor, well-educated and lesser-educated, and rural and urban.<sup>203</sup> Not only has such segmentation meant that the advantages of *tanil tal* have been spread less-and-less equally, but the *tanil tal* of the elite have become closed and increasingly monetized patron-client relationships and power-sharing networks.<sup>204</sup> These networks then facilitate and hide “law-breaking big cash deals”<sup>205</sup> and other forms of naked corruption,<sup>206</sup> not to mention foster nepotism and cronyism.<sup>207</sup> As a result, the use of *tanil tal* to get things done has become increasingly problematic in Mongolian culture, as evidenced by a headline in *Unuuder*, which read, “Please Contact Us Directly in Person, No Need to Contact via Your Acquaintances.”<sup>208</sup>

Nevertheless, the “first tactic” in getting almost anything done in Mongolia remains to search for ties, strong or weak, within one’s *tanil tal*.<sup>209</sup> Once such ties are found, mobilization depends, particularly if the tie is weak, on the perception of one’s ability to offer reciprocal assistance in the future.<sup>210</sup> The net effect of this is that the poor and disenfranchised are less likely to effectively mobilize their *tanil tal*, even if they happen to know someone with access to power.<sup>211</sup>

Such unequal access to *tanil tal* has legitimized more direct forms of getting things done, such as the paying of bribes and other inducements.<sup>212</sup> The “next option” after searching one’s *tanil tal*, “seems to be to give a bribe, surely if one has the money.”<sup>213</sup> In fact, 60% of Mongolians report having paid an inducement in the absence of *tanil tal* to “get something done.”<sup>214</sup> Among these 60%, individuals most commonly paid

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200. *See id.*

201. *See id.*

202. *See Sneath, supra note 72, at 90, 94.*

203. *Id.* at 94-95.

204. *See Dalaibuyan, supra note 179, at 15.*

205. *Sneath, supra note 72, at 95.*

206. *See Dalaibuyan, supra note 179, at 12.*

207. *Id.* at 7.

208. *Id.* at 1.

209. *Id.* at 14.

210. *Id.*

211. *See id.* Moreover, even relatively well-connected individuals may not always have access to *tanil tal* that allow them to obtain desired services or benefits.

212. *Id.* at 14.

213. *Id.*

214. *Sneath, supra note 72, at 100.*

bribes to “(a) secure a place for their daughter or son at university, (b) receive the necessary grade in an exam, (c) get a job, (d) complete official documents or papers, (e) get a bank loan, and (f) facilitate a business transaction.”<sup>215</sup>

Because such bribes are seen as a rational response to one’s exclusion from the necessary social network, the social sanction for paying bribes in such circumstances is likely to be nil.<sup>216</sup> Indeed, the directive to “Please Contact Us Directly in Person, No Need to Contact via Your Acquaintances” may be primarily geared to those without *tanil tal*, as if trying to suggest that since the use of *tanil tal* is not necessary, neither is a bribe in its place.<sup>217</sup> Those with helpful *tanil tal*, however, would contact them regardless in order to pave the way with the relevant official before showing up at the door.

One should not conclude from this discussion, however, that traditional Mongolian culture sanctions corruption.<sup>218</sup> Such “culture of corruption” discourse, while frequently invoked<sup>219</sup>, is tinged with orientalist undertones and does not reflect the reality of Mongolian culture.<sup>220</sup> As recent surveys and anthropological studies bear out, Mongolians widely disapprove of bribery.<sup>221</sup> Mongolians also care as much about honesty, fairness, trust, and keeping promises within personal relationships as much as any other people.<sup>222</sup> These “values are just not expressed by fidelity to the law.”<sup>223</sup> Many Mongolians are utterly dismayed at the growing sense that corruption has become both systematic and endemic in modern Mongolia—a dismay that becomes readily apparent to visitors who have spent even a small amount of time in Mongolia.<sup>224</sup> There is a similar feeling of dismay amidst citizens of other post-Soviet states.<sup>225</sup>

Most Mongolians who pay bribes do so in contradiction of their own moral preferences and out of the belief that bribes or *tanil tal* are necessary to get anything done in the corrupt state bureaucracy.<sup>226</sup> Additionally, they do so with the belief that everyone else is using *tanil tal* or paying bribes as well.<sup>227</sup> Regardless of their own ethical values, Mongolians have come to perceive using only formal legal channels as a recipe for losing out

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215. *Id.*

216. Kurkchiyan, *supra* note 12, at 31 (noting that bribes are seen as necessary under the conditions imposed on individuals by the society around them).

217. See Dalaibuyan, *supra* note 179, at 1.

218. See Sneath, *supra* note 72, at 89-90.

219. See, e.g., Andrew Marshall, *Emerging SE Asia Haunted by Culture of Corruption*, REUTERS, Dec. 17, 2008, <http://www.reuters.com/article/worldNews/idUSSP39045120081217> (last visited Apr. 1, 2010).

220. See Sneath, *supra* note 72, at 92.

221. See generally ASIA FOUNDATION SURVEY, *supra* note 98; Sneath, *supra* note 72.

222. See Kurkchiyan, *supra* note 12, at 43-44 (describing the importance of these values in interpersonal relationships in post-Soviet countries).

223. *Id.* at 44.

224. *Id.* at 31 (describing the predominance of similar sentiments throughout countries of the former Soviet Union).

225. *Id.*

226. Dalaibuyan, *supra* note 179, at 13.

227. *Id.*

in the competition to survive, much less prosper in the new capitalist society.<sup>228</sup>

The lives of Mongolians are in effect controlled by the same negative rule of law myth that predominates in other post-Soviet states—that the state and its institutions are universally corrupt and everyone is on the take, including legislators, the president, judges, prosecutors, the police, tax collectors, and especially customs officials.<sup>229</sup> In this social environment, individuals take the illegitimacy of the law and legal institutions for granted.<sup>230</sup> Laws are assumed to benefit the elite, and legal institutions are not trusted for impartial resolution of conflict.<sup>231</sup> Individuals thus direct their behavior “towards the expectation of legal failure.”<sup>232</sup> Because they assume that everyone else is ignoring the law—whether by bending the rules, going through the backdoor, paying bribes, or misusing their public position for personal gain—they do the same.<sup>233</sup>

The negative rule of law myth is best understood in contrast to the positive rule of law myth that generally prevails in Anglo-American and northern European societies.<sup>234</sup> In a society where the positive rule of law myth predominates, people assume that law is good and just and that the law represents the will of the people rather than that of the elite.<sup>235</sup> The legitimacy of law and legal institutions is taken for granted “all the way up from the minor neighbourhood official to the national parliament and the highest court.”<sup>236</sup> People are assumed to “function most of the time according to the rule of law,” and to be caught breaking the law is “socially disgraceful.”<sup>237</sup>

Of course, even in “the home of rule of law rhetoric,” U.S. courts do not consistently enforce the law,<sup>238</sup> at least if defined as faithfully applying legal rules without bias or prejudice.<sup>239</sup> Additionally, “[t]he United States clearly violates the requirement—embodied in the mantra ‘the rule of law,

228. See Kurkchian, *supra* note 12, at 42–43 (“There is no faith that the law will bring about a just outcome by itself, and everyone assumes that everyone else will use it as an instrument for their own purposes.”).

229. See *id.* at 29.

230. See *id.* at 43 (“[T]he visible corruption of the judiciary is based . . . upon a general belief in law.”).

231. See White, *supra* note 30, at 215.

232. See Kurkchian, *supra* note 12 at 27.

233. See *id.* at 104–05.

234. See *id.* at 29.

235. See *id.* at 28–29; John Hasnas, *The Myth of the Rule of Law*, 1995 WIS. L. REV. 199, 206 (1995).

236. Kurkchian, *supra* note 12, at 28.

237. *Id.* at 28.

238. Frank Upham, *Mythmaking in the Rule of Law Orthodoxy* 7 (Carnegie Endowment for Int’l Peace Work Paper Series, Paper No. 30, 2002), available at <http://www.carnegieendowment.org/files/wp30.pdf>. Studies at the U.S. state level show that elected judges, especially those chosen in competitive elections, tend to sentence convicted criminals to longer terms as the date of the election approaches. Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 247 (2004).

239. See *id.* at 7.

not men’—that the rule of law must be apolitical.”<sup>240</sup> That politics plays a central role in judicial appointments is an open secret.<sup>241</sup> And the argument for the frequent indeterminacy of the law is certainly not without merit.<sup>242</sup> Furthermore, as evidenced by the recent conviction of two Pennsylvania juvenile court judges for sending hundreds of children to a private detention center in exchange for monetary kickbacks<sup>243</sup> and the impeachment of Illinois Governor Rod Blagojevich for attempting to sell the current President’s former Senate seat,<sup>244</sup> the United States does not lack for corruption. Americans, like Mongolians, are frequently regaled with “revelations of white-collar crime, or of reports in the media of corruption, influence-peddling, and fraud among politicians, civil servants, financiers, and businessmen.”<sup>245</sup> Nevertheless such incidents are perceived as aberrations rather than the rule by the public, leaving the positive rule of law myth intact.<sup>246</sup>

Conversely, as in other post-Soviet states, much “law-abiding behavior” occurs in Mongolia.<sup>247</sup> Mongolia has an extensive legal system, produces numerous new laws each year, and “law” is a prevalent topic of conversation in the media and among politicians.<sup>248</sup> In fact, “Legal Hour” (*Huuliin Tsagt*), which provides the public with information about their legal rights, was the most watched television program on public television in 2003.<sup>249</sup> Additionally, Mongolia regularly holds vigorously contested

240. *Id.* at 1.

241. *See id.* (“It is no secret that U.S. judges are routinely elected or appointed based on their ideological views, and it is wrong to completely separate politics—which is absolutely essential to the functioning of democratic governments—from law. Additionally, federalism, the jury and adversary systems, and the effects of economic class on access to the law ensure that rules will not be applied or evaluated consistently, marking further deviations from the formalist rule of law ideal.”).

242. *See, e.g.,* Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *YALE L.J.* 1, 10 (1984) (explaining that legal doctrine is “indefinitely manipulable” and thus indeterminate); Hasnas, *supra* at 235, at 206 (“[B]ecause the law is made up of contradictory rules . . . what conclusion one finds will be determined by what conclusion one looks for, i.e., by the hypothesis one decides to test. This will invariably be the one that intuitively ‘feels’ right, the one that is most congruent with one’s antecedent, underlying political and moral beliefs.”).

243. *See* Ian Urbina & Sean D. Hamill, *Judges Plead Guilty in Scheme to Jail Youths for Profit*, *N.Y. TIMES*, Feb. 12, 2009, at A22.

244. *See* Ray Long & Rick Pearson, *Impeached Illinois Gov. Rod Blagojevich Has Been Removed from Office*, *CHICAGO TRIBUNE*, Jan. 30, 2009, <http://www.chicagotribune.com/news/local/chi-blagojevich-impeachment-removal,0,5791846.story> (last visited Mar. 31, 2010).

245. Kurkchian, *supra* note 12, at 32.

246. *See* Hasnas, *supra* note 235, at 200-01. Common complaints about corruption in Congress “in no way prevents people from simultaneously regarding the law as a body of definite, politically neutral rules amenable to an impartial application which all citizens have a moral obligation to obey.” *Id.* at 200. Thus, they seem both surprised and dismayed to learn “of each new incident of corruption.” *Id.* at 200.

247. Kurkchian, *supra* note 12, at 32.

248. U.S. AGENCY INT’L DEV./MONGOLIA, STRATEGIC PLAN: 2004-2008, at 14 (2003), available at [http://pdf.usaid.gov/pdf\\_docs/PDABY661.pdf](http://pdf.usaid.gov/pdf_docs/PDABY661.pdf) (last visited Mar. 31, 2010) [hereinafter MONGOLIA STRATEGIC PLAN].

249. *See* MONGOLIA JUDICIAL REFORM PROGRAM: ANNUAL REPORT 2006.

elections according to rules that are not only widely followed, but the results of which are respected by losing incumbents.<sup>250</sup> Moreover, though 22% of Mongolians report having paid a bribe in the three months preceding September 2007, 78% reported that they had not.<sup>251</sup> And, as in the United States, corrupt public officials are sometimes brought to justice, as evidenced by the successful prosecution of nearly two dozen mid-ranking officials in Mongolia for corruption-related crimes from August 2007 through the end of September 2008.<sup>252</sup>

But, in spite of this, the positive rule of law myth “remains stubbornly absent,” and the negative rule of law myth remains the interpretive lens through which all official actions are interpreted.<sup>253</sup> For example, during the summer of 2008, I assisted in drafting an appeal of a district court decision involving a property dispute between an American company and one of its Mongolian employees. The company alleged that the employee had defrauded it by registering company property in her own name. The attorney with whom I worked insisted that the district court decision, which awarded a very valuable apartment to the employee, was the product of a bribe. He was also certain that the employee, who seemed to have become quite well-off by allegedly embezzling funds from the company, would bribe the appellate court as well. Nevertheless, we put together an appellate brief, and the attorney later appeared before a three-judge panel for oral argument. I sat in the public gallery.

A vigorous exchange ensued between the panel and both parties' counsel on the interpretation of a statute's text, which appeared to provide that a court could not look beyond the name on a title, even if it was convinced of underlying fraud. As is required by Mongolian appellate procedure, the panel orally announced its decision shortly after the arguments, reversed the district court's decision, and remanded the case for a new trial that was to consider the issue of fraud.

As we left the courthouse, the company attorney insisted that the decision was a product of my sitting in the courtroom. My presence must have scared the judges, he surmised, and forced them into making the correct decision, despite pressure or bribes from the other side. While perhaps he

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250. MONGOLIA STRATEGIC PLAN, *supra* note 248, at 14. Since 1990 Mongolia has had three peaceful transitions of power between opposing political parties. See Tom Ginsburg, *When Courts and Politics Collide: Mongolia's Constitutional Crisis*, 14 COLUM. J. ASIAN L. 309, 311-18 (2001). The most recent elections, however, were marred by rioting upon allegations of widespread voter fraud. Edward Wong, *In Election Dispute, a Challenge for Mongolia's Democracy*, N.Y. TIMES, July 8, 2008, at A6. The allegations were rejected by international monitoring agencies, which pronounced the elections free and fair. See *id.*

251. See ASIA FOUNDATION SURVEY, *supra* note 98, at 7.

252. The Mongolia Monitor: News from USAID Mongolia, U.S. Agency Int'l Dev./Mongolia, Mongolian Monitor, No. 86, Sept. 2008, at 12, available at [http://www.usaid.gov/mn/documents/September\\_08\\_Mongolian\\_Monitor.pdf](http://www.usaid.gov/mn/documents/September_08_Mongolian_Monitor.pdf). This includes an Ulaanbaatar tax inspector who was sentenced to five and a half years in prison for accepting a Tg20 million bribe (approximately \$17,000 (US)). *Id.*

253. Kurkchiyen, *supra* note 12, at 33.

was right,<sup>254</sup> where the negative rule of law myth prevails, it may not matter so much what actually happens. Though anecdotal, this example is consistent with a pattern that exists in other countries where the negative rule of law myth prevails. Whatever the decision, it will be cynically reinterpreted in a way that is consistent with the negative rule of law myth.<sup>255</sup> The reverse applies as well. Where the positive rule of law myth prevails, even the most political of judicial decisions, such as *Bush v. Gore*,<sup>256</sup> can be recast as the validation of the rule of law.<sup>257</sup>

Though half-truths about the rule of law, whether positive or negative, may distort the public's perception of legal institutions and legal processes, different myths about the rule of law in the United States and transitional countries may partially explain the difficulty of judicial reform in transitional countries, on the one hand, and the persistency of American legal institutions on the other.<sup>258</sup> This is because strongly believed myths about the rule of law are self-reinforcing and can have significant consequences on how people, including judges, behave.<sup>259</sup>

In societies where the rule of law myth is strong, its very existence creates "an expectation that law will prevail."<sup>260</sup> The "general belief that the law is out there, that it really works, and that most people usually do what it tells them to do" fosters a "general habit of obedience" to the law.<sup>261</sup> The shame and social disgrace associated with breaking the law is enough to compel most people to act in accordance with it most of the time, except perhaps when they think they are unlikely to be caught.<sup>262</sup> Additionally, the positive rule of law myth means that the public generally accepts judicial decisions as valid and rarely suspects that decisions are the product of corruption, even when they are (such as those of the Pennsylvania juvenile court).<sup>263</sup>

The expectations arising from the positive rule of law myth also

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254. Or, perhaps, the company paid a bribe of which we were unaware. While I have no suspicion that that was the case, this same attorney told me that many clients do pay bribes without their attorney's knowledge. The attorney's job is simply to provide a colorable legal argument.

255. Kurkchian, *supra* note 12, at 33.

256. 531 U.S. 98 (2000).

257. See Mark Tushnet, *Renormalizing Bush v. Gore: An Anticipatory Intellectual History*, 90 GEO. L. J. 113 (2001) (predicting that the opinion would be recast as the rule of law) and Todd J. Zywicki, *The Rule of Law, Freedom, and Prosperity*, Law and Economics Working Paper Series, available at [http://www.law.gmu.edu/assets/files/publications/working\\_papers/02-20.pdf](http://www.law.gmu.edu/assets/files/publications/working_papers/02-20.pdf).

258. See Kurkchian, *supra* note 12, at 28-32. Here, myths about the rule of law refers to "the beliefs that people hold about the degree of commitment of other people—those around them—to legality." *Id.* at 28.

259. Kurkchian, *supra* note 12, at 30-33.

260. *Id.* at 33.

261. *Id.* at 34.

262. See *id.* at 28. Alternatively, the law is a "minor" one, such as speed limits, that many people ignore.

263. *Id.* at 29; Urbina & Hamill, *supra* note 243.

restrain the internal legal culture of judges.<sup>264</sup> Judges' self-conceptions of their role as judges generally align with the conception "held by the culture of which they are part."<sup>265</sup> Social commentary and other feedback about their decisions thus create incentives for judges to behave in certain ways.<sup>266</sup> For example, judges recognize popular disdain for "activist judges" who "make" rather than "enforce" the law and thereby substitute their own views for the "rule of law."<sup>267</sup> Thus, a judge may attempt to avoid the activist label by adhering to the text of a statute<sup>268</sup> or "sticking to the safest possible interpretation of the evidence and legal principles."<sup>269</sup>

Most judges also internalize through professional acculturation, beginning at the "time [they] were law students and [continuing] throughout their careers as lawyers and judges," a belief that "legal decisions turn on accepted methods of doctrinal analysis."<sup>270</sup> To blatantly depart from accepted modes of legal reasoning not only risks undermining the judge's own self-image but also invites public condemnation and internal reprimand within the judiciary.<sup>271</sup> John Ferejohn and Larry Kramer argue, "a judiciary fearful of provoking a political backlash and concerned about preserving its institutional autonomy, not to mention its reputation, must find ways to control its own members."<sup>272</sup> This means not only policing illegal and unethical behavior but also limiting "renegade behavior" such as "controversial rulings."<sup>273</sup> This control is accomplished most commonly through shaming of lower court judges.<sup>274</sup> Shaming methods include not only reversing judges for failing to "correctly" apply the law but also harshly admonishing lower court judges for controversial actions.<sup>275</sup>

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264. See Vicki C. Jackson, *Packages of Judicial Independence: The Selection and Tenure of Article III Judges*, 95 *Geo. L.J.* 965, 969 (2007) (noting that popular conceptions about law have a restraining function).

265. Jamal Greene, Review, *Giving the Constitution to the Courts*, 117 *Yale L.J.* 886, 918 (2008) (reviewing KEITH WHITTINGTON, *POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY* (2007)) ("Judge Posner says, judges, like the rest of us, 'like to be liked.'").

266. See John N. Drobak & Douglass C. North, *Understanding Judicial Decision-Making: The Importance of Constraints on Non-Rational Deliberations*, 26 *WASH. U. J.L. & POL'Y* 131, 150.

267. See Diarmuid F. O'Scannlain, *Lawmaking and Interpretation: The Role of a Federal Judge in Our Constitutional Framework*, 91 *MARQ. L. REV.* 895, 896 (2008) ("All of us who have observed the increasingly combative judicial confirmation hearings in the U.S. Senate in recent years are quite aware that it has become popular for Americans of all political persuasions to applaud the values of 'judicial restraint' while criticizing so-called 'activist judges.'").

268. See *id.* (arguing that "a judicial philosophy that relies on text, structure, and history" avoids judicial activism).

269. Kurkchian, *supra* note 12, at 43.

270. Drobak & North, *supra* note 266.

271. Phillip E. Johnson, *Do You Sincerely Want to Be Radical?*, 36 *STAN. L. REV.* 247, 266-68 (1984).

272. John A. Ferejohn & Larry D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, 77 *N.Y.U. L. REV.* 962, 997 (2002).

273. *Id.*

274. *Id.* at 999-1000.

275. See *id.* at 1000-01. "Appellate courts sometimes use their opinions not only to correct legal errors but also to reprimand lower court judges for controversial actions or comments. They may also reassign cases to a different judge on remand. Extraordinary

Shaming might also include reassigning cases on remand as the ultimate signal that the higher court has lost faith in the lower court judge's competency or impartiality.<sup>276</sup>

In contrast, Supreme Court Justices must, given the indeterminacy of the law in the cases that reach them,<sup>277</sup> take special care not to openly expose the holes in the rule of law myth and thereby damage the legitimacy of legal institutions.<sup>278</sup> This too has a restraining influence. Judge Posner suggests, for example, that the Justices are constrained by "an awareness, conscious or unconscious, that they cannot go 'too far' without inviting reprisals by the other branches of government" or an "indignant public."<sup>279</sup> Thus, when the Court might be tempted to deviate sharply from settled law, "it anticipates the likely external response and moderates its position accordingly."<sup>280</sup>

Concern for protecting its own legitimacy and independence might also help push the Court toward narrow consensus and away from split decisions.<sup>281</sup> Chief Justice Roberts, for example, has cited the number of 9-0 decisions by the Court as evidence that law is not politics.<sup>282</sup> His efforts in this regard are understandable, as the legitimacy of law depends to a large degree on the public's perception that the law dictates outcomes.<sup>283</sup> On the other hand, "a widely-based popular perception of partisanship by the Judicial Branch carries the threat of diminishing the public's trust and confidence in the Justices and endangering the Court's institutional standing and overall effectiveness."<sup>284</sup>

Split decisions, particularly 5-4 ones, risk creating such a perception of partisanship and threaten the public's faith in the rule of law—a fact

writs like mandamus and prohibition can be used to correct particularly flagrant misbehavior by lower court judges." *Id.*

276. *Id.*

277. See Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 32, 42-43 (2005). Judge Posner notes that the Court's docket is "dominated by cases in which the conventional sources of legal authority, such as pellucid constitutional text or binding precedent . . . do not speak in a clear voice. If they did, the Court would rarely have to get involved in the matter; it could leave it to the lower courts." *Id.* He further remarked that "[t]he most striking characteristic of constitutional debate in the courts . . . is its interminability. Everything is always up for grabs intellectually, though not politically." *Id.* at 41.

278. *Id.* at 44-45.

279. Franklin B. Cross, *What Do Judges Want?*, 87 TEX. L. REV. 183, 191 (2008) (reviewing RICHARD A. POSNER, *HOW JUDGES THINK* (2008)).

280. *Id.*

281. See Posner, *supra* note 277, at 49 n.52.

282. Video feed: John G. Roberts, Jr., Chief Justice of the United States Supreme Court, Delivers the Third Rehnquist Center Lecture, held by the James E. Rogers College of Law (Feb. 4, 2009), available at <http://www.rehnquistcenter.org/eventsarchive.cfm?page=events>.

283. See John M. Scheb II & William Lyons, *Judicial Behavior and Public Opinion: Popular Expectations Regarding the Factors That Influence Supreme Court Decisions*, 23 POL. BEHAV. 181, 182 (2001).

284. Jesse H. Choper, *Why the Supreme Court Should Not Have Decided the Presidential Election of 2000*, 18 CONST. COMMENT. 335, 335 (2001).



about which the Justices are well aware.<sup>285</sup> Chief Justice Roberts, for example, explained his intention to promote unity and consensus within the Court, a goal plainly unrealized in the 2006 term,<sup>286</sup> as follows: “I think it’s bad, long-term, if people identify the rule of law with how individual justices vote.”<sup>287</sup> Similarly, Justice John Paul Stevens expressed concern that the 5-4 decision in *Bush v. Gore* had seriously shaken “the Nation’s confidence in the judge as an impartial guardian of the rule of law.”<sup>288</sup> Both Justices are right. Over time, split decisions about politically-charged issues do encourage public cynicism and threaten the rule of law myth.

The public has every right to be confused when Ivy League-educated judges—who were sold to the public for their legal prowess—continually split 5-4 on the crucial legal issues of the day. The confusion this engenders in the public can easily morph into cynicism.<sup>289</sup>

Justices consequently have ample motivation to limit split decisions and to instead seek out narrow “consensus.”<sup>290</sup> As such, even 9-0 decisions may have as much to do with preserving institutional legitimacy and judicial independence as the “determinacy” of the law.<sup>291</sup>

The point here is not to be cynical, but to recognize that the positive rule of law myth plays an important restraining function.<sup>292</sup> Moreover, examples of the Supreme Court reaching 9-0 consensus, and examples of judges deciding cases in ways that are clearly in opposition to their personal or political beliefs, both powerfully reify the myth.<sup>293</sup> As the case of Mongolia shows, the existence of the positive rule of law myth, even if a half-truth, may be preferable to its absence.<sup>294</sup>

Where a negative rule of law myth prevails, it also becomes a self-fulfilling prophecy.<sup>295</sup> The “very existence” of the beliefs that the law is meaningless, that the law rarely works, and that most people ignore the law when expedient, means that these things usually come true.<sup>296</sup> When the public generally believes that most people break the law, for example by

285. See David Cole, *The Liberal Legacy of Bush v. Gore*, 94 GEO. L.J. 1427, 1449 (2006).

286. See Timothy P. O’Neill, “*The Stepford Justices*”: *The Need for Experiential Diversity on the Roberts Court*, 60 OKLA. L. REV. 701, 701 (2007) (noting that the U.S. Supreme Court decided one-third of its seventy-two cases by a 5-4 vote in the previous term, the highest percentage in a decade, coupled with the second lowest number of unanimous decisions, 25%, in the past decade).

287. *Id.*

288. *Bush v. Gore*, 531 U.S. 98, 129 (2000) (Stevens J., dissenting).

289. See O’Neill, *supra* note 286, at 703.

290. Tom S. Clark, *The Limits of Judicial Independence: Institutional Support and the Separation of Powers 2* (Book Proposal, 2008), available at <http://userwww.service.emory.edu/~tclark7/proposal.pdf> (last visited Mar. 27, 2010).

291. See O’Neill, *supra* note 286, at 703; Robin West, *Taking Moral Argument Seriously*, 74 CHI.-KENT L. REV. 499, 499-500 (1999).

292. See John C. Reitz, *Export of the Rule of Law*, 13 TRANSNAT’L L. & CONTEMP. PROBS. 429, 435-36 (2003).

293. See Hasnas, *supra* note 235, at 201-02.

294. See *supra* Part II.

295. See Kurkchian, *supra* note 12, at 32.

296. See *id.* at 33-34.

using *tanil tal* or bribes to facilitate business transactions, the social sanction associated with breaking the law ceases to function.<sup>297</sup> There is no shame in doing what everybody else does, and, of course, the more people break the law, the more the negative myth is reinforced.<sup>298</sup> Furthermore, because the public assumes that almost everyone is on the take, they believe the same about judges and others within the judiciary.<sup>299</sup> This perception is continuously fed as part of a never-ending cycle by a stream of anecdotal stories and regular public opinion surveys that suggest that high levels of judicial corruption exist.<sup>300</sup>

Judges are therefore besieged on two fronts. First, because litigants believe judges are susceptible to external pressure or bribes, they seek ways to influence judges themselves.<sup>301</sup> A judge from the Ukraine observed:

When a case is about a small amount of money, it usually proceeds without interference. But once the sum in dispute reaches a reasonable figure, I cannot recall an instance in which both sides of the case did not find some way to put pressure on me - even if it was only by sending someone to talk. And the approach does not depend on which side is in the right.<sup>302</sup>

Second, because opportunities for illegal gain are always present and judges are perceived to be corrupt regardless of whether or not they take bribes, the temptation for judges to use their office for private gain is immense.<sup>303</sup> The “negative image of the judiciary is self-fulfilling and self-extending” in that, as discussed above, judges’ self-conceptions generally align with the conception “held by the culture of which they are part.”<sup>304</sup> One who is perceived as corrupt might as well act corruptly.<sup>305</sup> Also, because the broader culture is characterized by the perception of widespread corruption, judges who take bribes can rationalize such behavior on the ground that anyone else in their position would do the same.<sup>306</sup> Judges are “just as in need of the promise of favours as everyone else, even if they do not take bribes in all cases.”<sup>307</sup> Low judicial salaries and inflation only intensify this need.<sup>308</sup>

Additionally, because the internal legal culture of judges is both underdeveloped and a reflection of the external legal culture, there are few separate limits on judicial corruption.<sup>309</sup> First, as in many civil law coun-

297. Kurkchiyan, *supra* note 78, at 104.

298. *See id.*

299. *See id.* at 104-05.

300. *See id.* at 101, 103.

301. *See id.* at 103.

302. Kurkchiyan, *supra* note 78, at 103-04.

303. *See id.*

304. *Id.* at 104; Greene, *supra* note 265, at 918.

305. *See, e.g.,* Kurkchiyan, *supra* note 78, at 103-04.

306. *See id.* at 104-05.

307. Kurkchiyan, *supra* note 12, at 42.

308. *See* Vincent Yang & Linda Ehrichs, *The Professionalism of Judges: Education, Salaries, and Career Structure in Asia*, in GLOBAL CORRUPTION REPORT, *supra* note 2, at 49.

309. *See* Kurkchiyan, *supra* note 78, at 101.

tries, the professional identity of judges in Mongolia is relatively weak.<sup>310</sup> Judges see themselves as a member of their kinship networks first, their *tanil tal* second, and the judiciary a distant third at best.<sup>311</sup> Being a judge is a job, not an identity that sets judges apart from the broader community.<sup>312</sup> Influence peddling and bribery is thus tolerated within the judiciary to the same extent as in the community at large. Why, the reasoning might go, should judges be any less entitled to capitalize upon their positions than anyone else?

Moreover, there is no corollary risk of being labeled an activist or incompetent judge for making decisions that appear to deviate from legal norms. First, there is little media oversight and absolutely no scholarly review of judicial decision making.<sup>313</sup> Judges operate for the most part in the dark.<sup>314</sup> Second, there appears to be slight risk of being overturned, as only 3% of district court cases are appealed.<sup>315</sup> Third, approximately 80% of appealed district court decisions are overturned, and there is little shame in reversal when it happens with such great frequency.<sup>316</sup> Fourth, higher court judges are perceived to be equally corrupt, and so, lower court judges can rationalize reversals as the result of influence-peddling or bribery and not the incompetence or corruptibility of the lower court judges.<sup>317</sup>

Similarly, the judicial code of ethics does not prohibit judges from hearing cases in which they have an apparent conflict of interest, discussion of ongoing litigation with outside individuals, or *ex parte* communications with parties.<sup>318</sup> As such, judges can meet secretly with parties and engage in self-dealing without raising eyebrows among their colleagues.<sup>319</sup> In fact, the internal legal culture seems to encourage judges to turn a blind eye to corruption among their colleagues.<sup>320</sup> This attitude is typified by one Mongolian Supreme Court Justice with whom I spoke at length. This justice first denied the existence of corruption within the courts altogether. But when pressed as to whether, given the wide perception of corruption, there might actually be some judges who take bribes, he smiled and

310. See *id.* at 102-03. "In these societies - mostly developing countries or ones in which radical change has recently occurred - little or no internal judicial culture has evolved. There is no impression of even a slight social distance between those who judge and those who are judged. Under these conditions a judge's professional self-identity is not a dominant construct for him or her; to be a judge is to have a job and little more. A person's sense of being a judge is less significant than his or her awareness of belonging to a family, a social network or a wider community based on religion, locality, politics and so forth." *Id.*

311. See *id.*

312. See *id.*

313. See White, *supra* note 30, at 236.

314. *Id.* at 235-38.

315. Interview with Luvsandorj Byambaa, Supreme Court Justice, in Ulaanbaatar, Mongolia (May 21, 2008).

316. See White, *supra* note 30, at 238-39.

317. See *id.* at 239 n.103.

318. *Id.* at 230, 232-33.

319. *Id.* at 232-33.

320. *Id.* at 244.

responded, “It’s like you say in America. If you can’t prove it, it didn’t happen.” Not only does this response suggest that corruption is tolerated at even the highest level of the courts, it also underscores the cynicism about law and legal institutions that feed the negative rule of law myth.

Some scholars argue that the negative rule of law myth, like corruption generally, is a Soviet legacy in Eastern Europe and Central Asia.<sup>321</sup> These scholars suggest that the Soviet period was characterized by ritualized lip service to the law, on the one hand, and wide disregard for the law in daily life, on the other.<sup>322</sup> The formal world was characterized by an official Communist Party ideology, rituals of state power, and elaborate military spectacles, all held together by obligatory language that, though compulsory, was also meaningless.<sup>323</sup> In the informal world, individuals were deeply cynical about the law, which was seen merely as a tool of the Party elite and a method of coercion.<sup>324</sup> Individuals also understood that they could not depend on the Party or the “formal, planned, legally constituted economy” for survival.<sup>325</sup> To ignore the law, as well as “falsify, distort, and manipulate [formal] documents,” became “universal practice.”<sup>326</sup> It was not a matter of officials applying the law while ordinary people circumvented it; everybody was involved, including the officials.<sup>327</sup> When the Soviet Union collapsed, the formal legal system collapsed with it, but people’s attitudes toward law remained the same:

The post-Soviet period is inevitably conditioned by [its Soviet] heritage. There is no reason to expect that, after nearly a century of having to find ways to get around arbitrary legislation, ordinary people would suddenly begin to think of law as an autonomous sphere justly administered.<sup>328</sup>

Though this argument has a certain appeal, it also ignores competing facts and glosses over the contributions of the transition period to the negative rule of law myth. For one, people in Soviet Mongolia were quite law-abiding as compared to post-Soviet Mongolia, and a number of Mongolians nostalgically long for the Soviet days when “people obeyed the law and politicians served the public good.”<sup>329</sup> More critically, however, if, as scholars argue, the negative view of the law in the Soviet period resulted from the belief that law was nothing more than a tool of the elite, then the transition years did nothing to disabuse Mongolians of that notion. While a popular movement for democracy led to Mongolia’s peaceful revolution in 1990, there was no similar popular movement for free-market capital-

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321. Kurkchian, *supra* note 12, at 36 (“[T]he tradition whereby law is treated as a tedious formality, albeit a necessary one, is deeply rooted in the Soviet [ ] experience of life for ordinary people . . .”).

322. *Id.* at 36-37.

323. *Id.*

324. *See id.* at 37.

325. *Id.*

326. *Id.*

327. *See id.*

328. *Id.* at 40.

329. Interview with Badam Myadag, in Ulaanbaatar, Mongolia (June 13, 2008).

ism.<sup>330</sup> Rather, free market reforms were driven by external, non-democratically elected, advisors from the IFIs.<sup>331</sup> As already discussed, these organizations imposed a series of harsh macro-economic reforms on Mongolia, known as shock therapy, described as one of the fastest privatization programs in any former socialist country.<sup>332</sup> Not only were these reforms initiated without public debate or transparency, they were also foisted upon Mongolia despite popular protests and, at times, over the specific opposition of Mongolia's democratically-elected government. Many highly educated Mongolians, in fact, were convinced that the international financial institutions actually governed Mongolia.<sup>333</sup> One foreign reporter observed during the 2001 presidential election,

I talked with other highly educated Mongolians who shared Sumati's apparent indifference to the outcome of the election. Some of them felt that, regardless of who won, the country's fortunes were largely in the hands of the three most influential foreign donors—the I.M.F., the World Bank, and the Asian Development Bank.<sup>334</sup>

Regardless of whether this perception was entirely true, the fact that so many Mongolians believed it to be so does not engender respect for democracy or the rule of law. Moreover, because the people were not consulted in the decision to impose shock therapy on Mongolia, the public was left with the impression that privatization laws were drafted for the special interests of the elite.<sup>335</sup> Privatization resulted in creating a few rich elites but also many impoverished people, lending support for this view.<sup>336</sup>

Meanwhile, the harshness of shock therapy and the elimination of basic social supports contradicted long-standing beliefs about right and wrong, nurtured through seventy years of socialist thinking, that the state bears a responsibility to ensure the general well-being of all citizens.<sup>337</sup> Part of the rejection of "rule of law" in the free market era might thus come from the fact that the version of capitalism imposed on Mongolia violates many Mongolian's sense of moral justice. As others have recognized, "people do not respect the law [when] it contradicts their sense of right and wrong."<sup>338</sup>

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330. TODD LANDMAN, MARCO LARIZZA & CLAIRE MCEVOY, HUMAN RIGHTS CENTRE, STATE OF DEMOCRACY IN MONGOLIA: A DESK STUDY 2 (2005).

331. ROSSABI, *supra* note 32, at 37.

332. ASIAN DEV. BANK, MONGOLIA (2006).

333. See Peter Hessler, *Letter from Mongolia: The Nomad Vote*, NEW YORKER, Jul. 16, 2001, at 59-65.

334. *Id.*

335. See Kurkchiyan, *supra* note 12, at 38.

336. *Id.*

337. See Odgerel Tseveen & Battsetseg Ganbold, *The Mongolian Legal System and Laws: A Brief Overview*, GLOBALEX, (Jan. 2006) <http://www.nyulawglobal.org/globalex/Mongolia.htm> (explaining that the socialist constitution "guaranteed the social and economic rights of the citizen," including "the right to work; receive a fair salary; receive welfare assistance in cases of old age, sickness, or unemployment; and the right to a free education").

338. Kurkchiyan, *supra* note 12, at 42.

The point here is not that unfettered free markets were necessarily the wrong path for Mongolia. Instead, if one goal of the transition was to undo the Soviet legacy of disrespect for the law, which was grounded in part on the belief that law was a tool imposed by the elite, then the perceived anti-democratic imposition of a particular economic system likely worsened the negative rule of law myth.<sup>339</sup> This is particularly true given “the remorseless growth of inequality” that resulted.<sup>340</sup> The unintended message might very well have been that no matter the system—capitalist, socialist, democratic or authoritarian—the result is the same: the law is used to serve the interest of the political elite.<sup>341</sup>

Mongolia is now trapped in a vicious cycle, explained by Marina Kurkchiyan as follows:

Everyone believes that the only way of getting ahead is to use the informal practices of know-how, influence-trading, and exploiting contacts, and that is precisely what everyone else expects too. Near universal conformity to the same pattern of behaviour makes the informal practices sustainable as a way of managing the society, and reinforces the myth that law stands completely outside the social space.<sup>342</sup>

#### IV. Remaking Culture: The New Rule of Law Project

The self-reinforcing nature of the negative rule of law myth does not necessarily mean that Mongolia must remain mired in corruption forever.<sup>343</sup> On the other hand, the intractability of corruption is widely recognized.<sup>344</sup> Despite volumes of scholarship on the subject and years of

339. See Mark A. Chinen, *Secrecy and Democratic Decisions*, 27 QUNINNIPIAC L. REV. 1, 3 (2009) (“Given this strong legitimating power, it is natural to ask whether democracy, either as an idea or in its incarnations, can help society make difficult choices, including how to use secrecy. Indeed, democracy and secrecy seem to be linked: the question of legitimacy boils down to whether citizens have a moral obligation to obey or to respect the laws and decisions of their government. Secrecy is useful to a society, but it also seems to threaten that very legitimacy.”).

340. ROSSABI, *supra* note 32, at 63.

341. Many political scientists agree that law serves the interest of the elite. See, e.g., FREDERICK J. DESROCHES, FORCE & FEAR: ROBBERY IN CANADA 20 (2002). The theory of symbolic politics, for example, suggests that “the ‘real’ nature of politics is a procession of socially constructed symbols upon which ordinary citizens project their wishes, hopes and fears and which the government and other elites manipulate to serve their own, sometimes competing, objectives. See Brent T. White, *Ritual, Emotion, and Political Belief: The Search for the Constitutional Limit to Patriotic Education in Public Schools*, 43 GA. L. REV. 445, 495–500 (2009). This competition between elites to manipulate politically salient symbols, typically for their own benefit, “creates the appearance of a rational democracy, while obscuring structural inequality and the limited role of the masses in actually shaping public policy. *Id.* (arguing that the theory of symbolic politics was borne out by research in the cognitive sciences). Regardless, had the Mongolian people, as part of a transparent, open, and democratic debate, or at least a convincing facsimile of it, chosen “shock therapy” among other options, such as Nordic social democracy, then Mongolians might feel more positive about their legal institutions and the rule of law.

342. Kurkchiyan, *supra* note 12, at 45.

343. ROSSABI, *supra* note 32, at 31–32.

344. *Id.* at 32–33.

involvement by banks and other international agencies in judicial reform programs around the world, “it is fair to say that none of them has yet developed a distinctive (let alone effective) judicial anti-corruption strategy, in general or in individual country programs.”<sup>345</sup>

I have written elsewhere about institutional measures that the Mongolian judiciary might take to begin to address the perception of corruption in the courts.<sup>346</sup> However, neither the judiciary nor the executive or legislative branches have the political will to implement the most promising of these measures, particularly to the extent that they risk exposing corruption within the highest levels of government.<sup>347</sup> Judicial reform in Mongolia and elsewhere has consequently focused on non-controversial reform measures that the local judiciary has supported, such as training, education, and the current ADB project to refurbish the Mongolian Supreme Court.<sup>348</sup> While, as discussed above, arguments have been made justifying this approach on the grounds that it will have the corollary effect of reducing corruption, such has demonstrably not been the case in

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345. LINN HAMMERGREN, *THE MULTILATERAL DEVELOPMENT BANKS AND JUDICIAL CORRUPTION 1* (2000), available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20756643-menuPK:2036129-pagePK:210058-piPK:210062-theSitePK:1974062,00.html> (last visited Mar. 31, 2010).

346. See, e.g., White, *supra* note 30. These measures include: instituting judicial performance evaluations, judicial selection based solely upon objective criteria, significant increases in judicial salaries, a transparent system for the assignment of cases, improved media access to court filings and decisions, verbatim transcripts of court proceedings, creation of an official reporter system, meaningful public access to information about the status of cases before the courts, more transparency in judicial disciplinary proceedings, revising the Judicial Code of Ethics, income and asset disclosures for judges, whistle blower protection to individuals who report judicial corruption, rotating judges to different geographic regions in order to mitigate the corrupting effect of social exchange relationships, and implementing a jury system in Mongolia. *Id.* While some of these measures are suggested by others and certainly none are a panacea, they could make a positive impact on limiting corruption. See Huguette Labelle, *Preface to GLOBAL CORRUPTION REPORT*, *supra* note 2, at xvi-xvii (illustrating that “many factors mitigate corruption and many steps can be taken to ensure that judicial professionals avoid engaging in it”); see also *Executive Summary*, *supra* note 152, at xxv-xxvii (listing and discussing the following areas that should be considered as part of a comprehensive anti-corruption program: independent judicial appointments body, merit-based judicial appointments, civil society participation, judicial protections, judicial transfers, case assignment and judicial management, access to information and training, security of tenure, disciplinary procedures, transparent and fair removal process, due process and appellate reviews, code of conduct, whistleblower policy, strong and independent judges’ association, transparent organization, transparent work, transparent prosecution service, judicial asset disclosure, judicial conflicts of interest disclosure, widely publicized due process rights, freedom of expression, quality of commentary, and donor integrity and transparency).

347. See White, *supra* note 30, at 240-41. The Mongolian judiciary has, for example, resisted suggested revisions to the Judicial Code of Ethics that would prohibit ex-parte communications and clearly define and prohibit conflicts of interest. *Id.* at 233. The judges that I interviewed were also resistant to the idea of performance reviews.

348. See *id.* at 222. Other measures have included increasing salaries and staffing, field trips to observe courts in the United States and elsewhere, improving infrastructure, modernizing computer systems, and introducing case management programs to ensure judicial compliance with procedural time tables. *Id.* at 227.

Mongolia.<sup>349</sup> There are few success stories in other post-Soviet states as well.<sup>350</sup>

This failure and the reality of political resistance to measures addressing judicial corruption have forced rule-of-law-aid practitioners to search for new strategies to promote the rule of law.<sup>351</sup> One of the newest strategies to emerge from this search is the development of civil and education programs designed to foster a rule-of-law culture in society more generally in the hopes that doing so will plant the seeds for the actual rule of law.<sup>352</sup> In other words, reformers are trying the other answer to the chicken and egg question—instead of reforming legal institutions as the first step towards a society that respects rule of law, they seek to transform the external legal culture on the theory that a public that believes in the rule of law will demand it from their government.<sup>353</sup>

Such programs are in their infancy in Mongolia but have included a television series funded by the USAID Judicial Reform Project,<sup>354</sup> some targeted public awareness campaigns, and education programming by Mongolia's new anti-corruption agency.<sup>355</sup> Internationally, such programs are already well underway. The most prominent programs have been initiated by the USAID-funded American Bar Association Rule of Law Initiative (ABA ROLI), which has civic and public education initiatives designed to promote “rule of law cultures” in a long list of countries including Kosovo, Armenia, Kyrgyzstan, and Qatar.<sup>356</sup>

The ABA describes its program in Qatar, for example, as a course curriculum on the rule of law in preparatory and secondary schools, with the goal of strengthening and deepening the understanding of the rule of law among young citizens.<sup>357</sup> For adults, the ABA program utilizes radio and television public service announcements stressing “the importance and

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349. See, e.g., *id.* at 213.

350. AM. BAR ASS'N, THE JUDICIAL REFORM INDEX, *supra* note 5.

351. See THOMAS CAROTHERS, CRITICAL MISSION: ESSAYS ON DEMOCRACY PROMOTION 138 (2004) (suggesting that aid providers must acknowledge that, in many countries, powerful actors benefit from poorly performing judicial systems because these systems works in their favor, whereas these systems do not work as a means of justice for poor persons who, for example, have difficulty when they seek to uphold land claims); Hammergren, *supra* note 8, at 139 (noting that political considerations limit the ability of donor banks to address judicial corruption directly).

352. See American Bar Association, Track 4: Fostering a Rule of Law Culture: Public and Civic Education Initiatives in Armenia, Kosovo, Kyrgyzstan and Qatar, [http://www.abanet.org/rol/perspectives\\_09/track4.shtml](http://www.abanet.org/rol/perspectives_09/track4.shtml).

353. See Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the “Rule of Law”*, 101 MICH. L. REV. 2275, 2338 (2003) (suggesting that belief in the rule of law “may magically circumvent the chicken-and-egg problem of getting to the rule of law in societies where formal law has been discredited”).

354. MONGOLIA STRATEGIC PLAN, *supra* note 248.

355. Examples of Public Service Announcements available in Mongolian at the Independent Agency Against Corruption of Mongolia, <http://www.iaac.mn> (last visited Apr. 1, 2010).

356. See A.B.A. Rule of Law Initiative, Perspectives from the Field 2009, [http://www.abanet.org/rol/perspectives\\_09/track4.shtml](http://www.abanet.org/rol/perspectives_09/track4.shtml) (last visited Apr. 1, 2009).

357. See A.B.A. Rule of Law Initiative, Middle East and North Africa, <http://www.abanet.org/rol/mena/qatar.shtml> (last visited Apr. 1, 2010).



value of the rule of law.”<sup>358</sup> The Qatar program website includes general information about the rule of law, training materials for teachers, and “a four-lesson curriculum for exploring the rule of law in classrooms.”<sup>359</sup> The website opens to a video featuring a series of Qataris nodding or shaking their heads at the appropriate times as the narrator says the following in the Queen’s English:

What is the “Rule of Law”? It means that the law governs everyone fairly and equally. What are the sources of law? Islam. Our customs and traditions. Our Constitution. National and local laws. Treaties with other countries. How are laws made? Can you imagine driving on our roads without rules? Would it be dangerous? Rules are common sense, for the common good. How does the law resolve conflict? Our judges have specialized knowledge and experience at the law and are qualified to interpret the meaning of the law that will resolve the conflict. The rule of law governs everyone fairly and equally, which is good for you and good for Qatar.<sup>360</sup>

What makes this video remarkable is that the actual situation in Qatar is antithetical to the rule of law ideal. Qatar is not a democracy, but a monarchy—ruled by the same family for two centuries.<sup>361</sup> Qatar does not allow political parties nor hold elections on a national level.<sup>362</sup> Though limited elections are held at the municipal level of government, only 200,000 out of Qatar’s 900,000 residents are permitted to vote or hold office.<sup>363</sup> Qatar’s government also sharply limits rights to speech, religion, and assembly.<sup>364</sup>

While relatively liberal compared to Saudi Arabia, Qatar is still governed by Shari’a law in areas such as family, inheritance, and criminal law,<sup>365</sup> which means, among other things, that women do not have equal rights to divorce, women have fewer inheritance rights than men, and a

358. Qatar Rule of Law, Purpose of the Project, <http://www.ruleoflaw.org.qa/en/about.php> (last visited Apr. 1, 2010).

359. Qatar Rule of Law, For School, <http://www.ruleoflaw.org.qa/en/school.php> (last visited Apr. 1, 2010).

360. Qatar Rule of Law, <http://www.ruleoflaw.org.qa/en> (last visited Apr. 1, 2010).

361. See U.S. Department of State, Background Note: Qatar, <http://www.state.gov/r/pa/ei/bgn/5437.htm> (last visited Apr. 1, 2010).

362. FREEDOM HOUSE, FREEDOM IN THE WORLD 2008: THE ANNUAL SURVEY OF POLITICAL RIGHTS AND CIVIL LIBERTIES 577 (2008).

363. *Id.*

364. Letter from Kenneth Roth, Executive Director, Human Rights Watch, to Paul O’Neill, Secretary of the Treasury, United States, (Jan. 24, 2001), available at <http://www.hrw.org/en/news/2001/01/24/us-should-block-qatar-venue-wto-meeting>. Freedom of assembly in Qatar is nonexistent, and the right to freedom of association is sharply circumscribed. *Id.* In its annual Country Reports on Human Rights Practices, published in February 2000, the U.S. State Department acknowledged that political demonstrations are not allowed in Qatar. Qatar, <http://www.state.gov/g/drl/rls/hrrpt/1999/425.htm>. The report also noted that Qatar has severely limited freedom of association and refuses to allow any political parties or membership in international professional organizations that are critical of the government of Qatar or any other Arab government. *Id.* Security forces also monitor the activities of “private social, sports, trade, professional, and cultural societies.” *Id.*

365. FREEDOM HOUSE, *supra* note 362, at 578.

woman's testimony is worth half that of a man's.<sup>366</sup> Qatari criminal law "either mitigate[s] or completely excuse[s] the murder of a female relative if the man has committed this act in an attempt to restore the family's honor."<sup>367</sup> Qatar also fails to protect poor foreign workers, who are frequently forced into involuntary servitude through the sponsorship system (*Kafeel* or *Kafala*), which provides that sponsored immigrants cannot leave the country or change jobs without their sponsor's permission.<sup>368</sup>

Moreover, despite the ABA ROLI's video assurance to the public that Qatar's judges "have specialized knowledge" and are "qualified to interpret the meaning of the law," the judiciary is neither independent nor transparent.<sup>369</sup> "The majority of Qatar's judges are foreign nationals who are appointed and removed by the emir."<sup>370</sup> Qatar bans journalists from covering court proceedings, and journalists cannot "even enter the country's courtrooms without first obtaining permission, restricting the media's ability to monitor judicial corruption."<sup>371</sup> As a result of these and other factors, Freedom House lists Qatar as "not free."<sup>372</sup>

Similarly, Kyrgyzstan, another focus of the ABA's Rule of Law Civil Education Program, is far from the rule of law ideal.<sup>373</sup> From 1991-2005, the country was ruled by the corrupt and authoritarian government of Askar A. Akayev.<sup>374</sup> Akayev was replaced among promises of reform by the

366. See Uzoamaka N. Okoye, *Women's Rights Under the Shari'a: A Flawed Application of the Doctrine of "Separate but Equal"*, 27 *WOMEN'S RTS. L. REP.* 103, 105-06, 111, 114 (2006); Julia Breslin & Toby Jones, Freedom House, *Women's Rights in the Middle East and North Africa 2010 - Qatar*, <http://www.unhcr.org/refworld/docid/4b99011ec.html> (last visited Apr. 28, 2010) (noting that "[m]en in Qatar have the right to divorce by verbally announcing their intent to do so three times, a common Islamic practice found throughout the region. Options for women are far more limited. . . . A rapid resolution requires the husband's consent, but if he does not agree to the divorce, a mandatory six-month period of arbitration and reconciliation is necessary. If the spouses still cannot be reconciled, the court may order the divorce, though this obliges the woman to give up any right to financial support and return her mahr (dowry)").

367. Michael B. Dye, *Qatar: The Pearl of the Middle East and Its Role in the Advancement of Women's Rights*, 84 *U. DET. MERCY L. REV.* 747, 762 (2007).

368. Qatari Law, <http://www.stenden.com/en/stenden/Locations/qatar/aboutstateofqatar/Pages/Qatarilaw.aspx>. According to the U.S. State Department, "The Government of Qatar does not fully comply with the minimum standards for the elimination of trafficking and is not making significant efforts to do so. . . . [Qatar] continues to detain and deport the large majority of victims rather than provid[e] them with protection." *Trafficking in Persons Report 2008 - Qatar*, <http://www.unhcr.org/refworld/type,ANNUALREPORT,,QAT,484f9a3732,0.html>.

369. Dye, *supra* note 367.

370. FREEDOM HOUSE, *supra* note 362, at 578.

371. *Id.*

372. *Id.* at 576. Freedom House ranks countries on a 1-7 scale (1 being the most "free"). Those countries with average ratings of 1.0 to 2.5 are considered "free," 3.0 to 5.0 "partly free," and 5.5 to 7.0 "not free." *Id.* Qatar received a 6 for political rights and a 5 for civil liberties. *Id.*

373. See *JUDICIAL REFORM INDEX FOR KYRGYZSTAN*, *supra* note 5, at 1.

374. *Id.* The ABA acknowledged in its report on Kyrgyzstan's judiciary in 2003 that elections since 1991 have not been free and fair, leading to the election of President Akayev to three terms. *Id.* The report also notes that Akayev "has been accused of using the courts to suppress free speech, to harass opposition candidates, and to consolidate his political position." *Id.* The report further noted that: "It is widely believed that

similarly corrupt and authoritarian Kurmanbek Bakiyev, who in 2007 dissolved the parliament in an effort to rid it of his political opponents and vastly increased his own powers with the adoption of a new constitution.<sup>375</sup> USAID reported in its January 2008 country profile of Kyrgyzstan:

Governmental gridlock continues to be a significant barrier in Kyrgyzstan's development, as its Parliament and Executive work to establish positive working relationships after significant political upheaval and constitutional reform. Corruption remains a major factor in the lives of most citizens. . . . Democratic reform remains a challenge as government agencies continue to place pressure on media outlets, political parties, and non-governmental organizations.<sup>376</sup>

Like the program in Qatar, the ABA ROLI's public education program in Kyrgyzstan aims to teach children to respect the law and legal institutions.<sup>377</sup> The program does so through "We and the Law" classes at madrassas and secular secondary schools across the country that teach students to address problems with the help of the law and explain the function of the law in Kyrgyzstan.<sup>378</sup>

Civic education projects, such as those in Qatar, Kyrgyzstan, and Mongolia, rest upon the following three fundamental assumptions: first, rule of law is necessary for significant economic growth;<sup>379</sup> second, rule of

[Kyrgyzstan's] courts are corrupt and that the executive branch and senior level judges wield undue influence over judicial decision making." *Id.* at 24. Similarly, the ABA reports that Kyrgyzstan's procuracy may be both corrupt and complicit in human rights violations:

The Office of the Prosecutor General is publicly perceived as being impaired in its professional functions due to *improper influence from prosecutorial and non-prosecutorial authorities*, despite legal provisions that attempt to address these issues. Improper influence is alleged to derive from Office supervisors, government authorities, and elected officials. Prosecutors are also sometimes influenced by business interests as well. . . . The Prosecution Service is generally believed to be *inadequate in its efforts to prosecute corruption, police misconduct, and cases involving the violations of human rights*. There is a troubling perception that prosecutors are complicit in, or at least tolerate, corruption and overlook human rights violations by state actors. *Id.* (emphasis in original).

375. See David L. Stern, *Kyrgyzstan's Leader Dissolves Parliament*, N.Y. TIMES, Oct. 23, 2007, at A5 (reporting that the country was sliding into authoritarianism under Bakiyev, who pushed through measures drastically expanding his powers to enable him to freely dismiss the government and directly appoint judges).

376. U.S. AGENCY FOR INT'L DEV., KYRGYZ REPUBLIC: COUNTRY PROFILE: JANUARY 2008, [http://www.usaid.gov/locations/europe\\_eurasia/pdfs/kyrgprofile.pdf](http://www.usaid.gov/locations/europe_eurasia/pdfs/kyrgprofile.pdf).

377. See Am. Bar Ass'n Rule of Law Initiative, ABA ROLI Hosts Sustainability Workshop for Kyrgyz Street Law Centers (Dec. 2009), [http://www.abanet.org/rol/news/news\\_kyrgyzstan\\_street\\_law\\_sustainability\\_workshop\\_1209.shtml](http://www.abanet.org/rol/news/news_kyrgyzstan_street_law_sustainability_workshop_1209.shtml).

378. See Am. Bar Ass'n Rule of Law Initiative, Kyrgyzstan's Madrassa Students Participate in Street Law Classes (Feb. 2008), [http://www.abanet.org/rol/news/news\\_kyrgyzstan\\_madrassa\\_street\\_law\\_classes.shtml](http://www.abanet.org/rol/news/news_kyrgyzstan_madrassa_street_law_classes.shtml).

379. Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge 6* (Carnegie Endowment Rule of L. Series, Working Paper No. 34, Jan. 2003), available at <http://www.policyarchive.org/handle/10207/bitstreams/6461.pdf>. In testimony before House Appropriations Subcommittee on Foreign Operations, ABA President Michael Greco explained that it's programs:

promote the rule of law and democracy around the world. Transparent government institutions and a legal system based on the rule of law are fundamental

law is a *prerequisite* to democracy;<sup>380</sup> and third, fostering a rule of law culture will plant the seeds for the actual rule of law in the future.<sup>381</sup> The first two assumptions have underpinned the rule of law movement from the start.<sup>382</sup> The third assumption is more recent. Empirical support for all three is very thin.

Contrary to the assumption that rule of law is necessary for significant economic growth, a review of studies on the causal relationships between judicial reform and economic growth found that “the relationship is probably better modeled as a series of on-and-off connections, or of couplings and decouplings.”<sup>383</sup> Despite claims that rule of law is necessary to attract investment, another study found that weak rule of law is not a major factor in companies’ decisions whether or not to invest in a particular country.<sup>384</sup> Moreover, the axiom that rule of law is necessary for significant economic growth is contradicted by the experiences of Japan, China, Taiwan, and Korea—to name just a few.<sup>385</sup> China, for example, grew “on average 9.7 percent from the beginning of economic reforms in 1978 to the late 1990s” and attracted “\$45 billion in foreign direct investment in 1998 alone . . . without a legal system worthy of the name.”<sup>386</sup> On top of this, official corruption in China is much less than that which exists in most developing countries,<sup>387</sup> including Mongolia.<sup>388</sup> A similar story can be told of post-war Japan, which sustained a booming economy for nearly forty years, even though it kept the law and formal legal systems in the background.<sup>389</sup>

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prerequisites to creating vibrant democracies and market-based economies. Programs that promote the rule of law abroad are a sound investment of U.S. dollars that enhance the national security and economic prosperity of the U.S. and the emerging democracies in which the ABA works.

Michael S. Greco, President, Am. Bar Ass’n, Statement Before the Subcommittee on Foreign Operations, Export Financing, and Related Programs Committee on Appropriations, U.S. House of Representatives (Mar. 22, 2006).

380. *Id.*

381. See Am. Bar Ass’n Rule of Law Initiative, About the Rule of Law Initiative, <http://www.abanet.org/rol/about.shtml> (last visited Mar. 10, 2009 (“[R]ule of law promotion is the most effective long-term antidote to the most pressing problems facing the world today . . .”).

382. See Carothers, *supra* note 379 at 6 (“At the core of this burgeoning belief in the value of rule-of-law work are two controlling axioms: The rule of law is necessary for economic development and necessary for democracy.”).

383. Richard E. Messick, *Judicial Reform and Economic Development: A Survey of the Issues*, 14 WORLD BANK RES. OBSERVER 117, 123 (1999).

384. See John Hewko, *Foreign Direct Investment: Does the Rule of Law Matter?* (Carnegie Endowment for Int’l Peace, Working Paper No. 26, 2002), available at <http://www.ciaonet.org/wps/hej02/hej02.pdf>.

385. Upham, *supra* note 238, at 13, 24.

386. *Id.* at 12-13.

387. *Id.* at 12.

388. Transparency International, 2008 Corruption Perceptions Index (2008), [http://www.transparency.org/news\\_rom/in\\_focus/2008/cpi2008/cpi\\_2008\\_table](http://www.transparency.org/news_rom/in_focus/2008/cpi2008/cpi_2008_table) (showing that Mongolia ranks 102 out of 180 countries on the Index and far below China, which is 72nd on the list).

389. Upham, *supra* note 238, at 24. Upham explains:

Put simply but accurately, during the very same period that the [Japanese] economy boomed and society underwent substantial changes, the number of legal

Additionally, early economic development in the United States itself suggests that rule of law is not a necessary ingredient for sustained economic growth.<sup>390</sup>

The point is not to argue in favor of one model of economic growth over the other<sup>391</sup> but that the axiom that rule of law is necessary for economic growth is “at best badly oversimplified and probably misleading in many ways.”<sup>392</sup> The economic rationale alone is thus an insufficient basis for rule-of-law programs—particularly when such programs risk lending support to authoritarian regimes.

Rule-of-law advocates also argue, however, that rule of law provides a stable foundation for freedom and democracy.<sup>393</sup> If true, this rationale would be compelling. But the rule-of-law-equals-democracy rationale is equally as simplistic as the economic one.<sup>394</sup> “Although it is often assumed that the rule of law and democracy go hand-in-hand, they are in fact not always harmonious concepts.”<sup>395</sup> While the rule of law ideal is intimately connected with democracy, not just any law will do.<sup>396</sup> Rule of law orthodoxy can be antithetical to democracy if the rules themselves are unjust or anti-democratic.<sup>397</sup> For example, it is difficult to see how adherence to the rule of law in Qatar—where the law subjugates women, bans political parties, sharply limits freedom of association, and prohibits

professionals per capita declined, the litigation rate fell, and the size of the formal legal system relative to the economy shrank substantially. . . . If formal legal institutions were necessary for either social order or economic growth or even just weakly associated with it, one would expect the deemphasis of formal law to have hindered growth. Instead, in Japan a shrinkage of legal institutions is positively correlated with growth, although no causal connection—that the lack of attention to formal legal institutions created growth—can be proved. *Id.*

390. *Id.* at 20–21 (discussing judicial decisions from the 19th century that show a ready willingness of federal judges to disregard the rule of law when the rule of law was perceived to interfere with economic growth). For example, federal courts, following the rule of *Swift v. Tyson*, frequently disregarded controlling local common and statutory law in favor of “corporate-friendly general common law.” See David Marcus, *Erie, The Class Action Fairness Act, and Some Federalism Implications of Diversity Jurisdiction*, 48 WM. & MARY L. REV. 1247, 1266–69 (2007) (discussing the manner in which federal courts acted as protectors of the national economy, often in disregard of statutory law).

391. *But see* Upham, *supra* note 238, at 22 (arguing that the Japanese model of informal control “may be considerably easier” for developing countries to follow).

392. Carothers, *supra* note 379, at 7.

393. See Zywicki, *supra* note 257, at 1, 17.

394. See Carothers, *supra* note 379, at 7 (“Democracy often, in fact usually, co-exists with substantial shortcomings in the rule of law.”).

395. Thomas Humphrey, *Democracy and the Rule of Law: Founding Liberal Democracy in Post-Communist Europe*, 20 COLUM. J. E. EUR. LAW 84, 100 (2008).

396. See Carothers, *supra* note 379, at 7; John Hasnas, *supra* note 235, at 213 (“It is certainly true that one of the purposes of law is to ensure a stable social environment, to provide order. But not just any order will suffice. Another purpose of the law must be to do justice.”) (emphasis in original).

397. See Lawrence B. Solum, *A Law of Rules: A Critique and Reconstruction of Justice Scalia’s View of the Rule of Law* 22 (Loy. L. Sch., Los Angeles, Pub. L. and Legal Theory, Research Paper No. 2002-5, 2002), available at <http://papers.ssrn.com/abstract=303575> (proposing that rules of law should provide predictable results and uniform treatment, as well as constrain arbitrary judicial power).

speech critical of the government—promotes democracy.<sup>398</sup> Many of the institutions that underscore the rule of law can be seen as illegitimate, essentially “muzzling the voice of the people.”<sup>399</sup>

One might respond that, as a definitional matter, Qatari laws do not qualify as the rule of law because the rule of law ideal requires that all people are treated equally and fairly and that no one (especially the king) should be above the law.<sup>400</sup> But this response then begs the question—why promote “habits of obedience” to the law in anti-democratic countries like Qatar?<sup>401</sup> Doing so ignores that the rule of law ideal is predicated, at least in part, upon the underlying democratic legitimacy of the law.<sup>402</sup> The simple “no rule of law, no democracy” equation misunderstands the complicated and intertwined relationship between the two.<sup>403</sup> Liberal notions of democracy can both promote and check the rule of law, just as rule of law can both foster and undermine liberal democracy.<sup>404</sup> Context is

398. U.S. DEP’T OF STATE, 2008 HUMAN RIGHTS REPORT: QATAR §§ 2-3, 5 (2009), <http://www.state.gov/g/drl/rls/hrrpt/2008/nea/119125.htm>.

399. Fareed Zakaria, *The Rise of Illiberal Democracy*, 76 FOREIGN AFF. 22, 42 (1997).

400. See Guillermo O’Donnell, *The Quality of Democracy: Why the Rule of Law Matters*, J. DEMOCRACY 32, 33-35 (2004). There is no precise definition of rule of law. See Richard H. Fallon, Jr., “The Rule of Law” as a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 1 (1997) (“The Rule of Law is a historic ideal, and appeals to the Rule of Law remain rhetorically powerful. Yet the precise meaning of the Rule of Law is perhaps less clear than ever before.”). However, the modern rule of law *ideal* commonly includes (1) supremacy of law (the rule of law, not men) and (2) equality before the law. See generally A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (8th ed. reprint 1927).

401. The answer for some ardent rule of law advocates is that economic growth is more important than democracy:

Interestingly, democratic elections are far less important than the rule of law in building economic growth. The reason is straightforward—there is no reason to believe that democracy will tend to produce the types of institutions necessary for economic growth to occur. Indeed, democracies may be prone to redistributive and special interest politics that have the tendency to dampen economic growth. Zywicki, *supra* note 257, at 17.

402. See Chinen, *supra* note 339, at 103 (suggesting that “whether citizens have a moral obligation to obey or to respect the laws” depends upon the laws underlying democratic legitimacy); Harry F. Tepker, Reply to Noah Feldman, *Democracy’s Paradox: Popular Rule as a Limit on Foreign Policy Promoting Popular Rule*, 58 OKLA. L. REV. 21, 27-28 (arguing that democracy “fortifies respect for the law”).

403. See Carothers, *supra* note 379, at 7.

404. See Morton J. Horwitz, *The Rule of Law: An Unqualified Human Good?*, 86 YALE L. J. 561, 566 (1977) (reviewing DOUGLAS HAY ET AL., ALBION’S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND (1976) and E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT (1976)), Professor Horwitz’s review explains the complexities of the rule of law as follows:

I do not see how a Man of the Left can describe the rule of law as “an unqualified human good”! It undoubtedly restrains power, but it also prevents power’s benevolent exercise. It creates formal equality—a not inconsiderable virtue—but it promotes substantive inequality by creating a consciousness that radically separates law from politics, means from ends, processes from outcomes. By promoting procedural justice it enables the shrews, the calculating, and the wealthy to manipulate its forms to their own advantage. And it ratifies and legitimates an adversarial, competitive, and atomistic conception of human relations. *Id.*

everything.<sup>405</sup>

The importance of context is often lost in programs that promote the “rule of law” mantra in developing countries, as typified by the ABA ROLI civil and public education program in Qatar. Context also matters in whether programs seeking to promote a rule of law culture can even be successful.<sup>406</sup> In countries like Mongolia and Kyrgyzstan, where corruption is systemic and poverty is rampant, seeking to inculcate faith and trust in the fairness of law and legal institutions can best be described as rule of law mythmaking. This asks people to accept that the law is a positive good, that all are equal before it, and that the law leads to the just resolution of conflict—even though these things are demonstrably and glaringly false in the society around them.<sup>407</sup> Though mythmaking is not necessarily bad, there is no evidence to suggest that it actually works in the face of overwhelming contradiction.<sup>408</sup>

Like much well-intentioned work by rule-of-law-aid practitioners, the rule of law mythmaking project rests upon a shaky foundation.<sup>409</sup> The primary empirical support for the rule of law mythmaking project in developing countries stems from the successful results of a civic education program designed to combat Hong Kong corruption in 1974.<sup>410</sup> “Indeed, many anti-corruption groups and governments encouraged an (academic) debate in order [to] assess whether and how far to imitate Hong Kong.”<sup>411</sup> The Hong Kong program was again brought to light in a recent article by Marina Kurkchyan that appeared in Transparency International’s *Global Corruption Report*, a publication widely read by rule-of-law practition-

405. See Upham, *supra* note 238, at 7 (“[L]aw is deeply contextual and . . . cannot be detached from its social and political environment.”).

406. See Upham, *supra* note 238, at 33 (arguing that because law is deeply contextual, problems will arise if reformers ignore “social, cultural, economic, and political contexts” surrounding the rule of law).

407. See Horwitz, *supra* note 404.

408. See Upham, *supra* note 238, at 8 (explaining there is no accepted rule of law model because of contrary evidence as to whether these models actually work in practice).

409. See Carothers, *supra* note 379, at 5 (“[T]he base of knowledge from which [rule-of-law-aid practitioners] are operating is startlingly thin.”).

410. Esther Hauk & Maria Saez-Marti, *On the Cultural Transmission of Corruption* 107 J. ECON. THEORY 311, 311 (2002) (“[P]olicy interventions via parents’ efforts have long-lasting effects on corruption and show the success of intensive education campaigns. Educating the young is a key element in reducing corruption successfully.”). This is not to say that others have not been influential. See, e.g., John A. Gardiner & Kathryn L. Malec, *Mobilizing Public Opinion Against Corruption: A Report to the Chicago Ethics Project*, in *CORRUPTION and Reform* 107 (Vol. IV 1989). Determining the exact starting point of the “fostering rule of law culture” through civic education movement, and identifying all those whose ideas may have played a part, is difficult. See *id.* (discussing the objectives of an education program—increase public information, opportunities and incentives, as well as improve public values—and who should play a part in this); Rosa Ehrenreich Brooks, *supra* note 353, at 2338 (“Sometimes ‘make-believe’ may work. . . . [A]t times, norm entrepreneurs may be able to bring about change simply by acting as if change has already occurred.”).

411. Hauk & Saez-Marti, *supra* note 410 at 3 (parenthesis in original).

ers.<sup>412</sup> In her article, Kurkchiyan suggested that change in a country's legal culture "can be achieved if institutional reforms incorporate education policies and combine with projects to build up a common way of thinking."<sup>413</sup> She then presented evidence of this possibility from a 1999 article written on the Hong Kong program:

Hong Kong's success in doing this is notable. After a number of earlier reforms to curb a long-established tradition of corruption failed, new measures introduced in 1974 achieved a considerable improvement in a comparatively short time. The cause was not immediately obvious, but observers pointed out that the 1974 reforms incorporated a novel policy: promoting ethical values against corruption. The moral element was instilled in children via primary education and in adults by means of an energetic campaign of advertisements and public relations. In their assessment of the importance of this factor 25 years later, Hauk and Saez-Marti identified a large shift between successive generations in their willingness to tolerate corruption in Hong Kong.<sup>414</sup>

The problem with Hong Kong as a model, however, is that pre-turnover Hong Kong was a profoundly different place than modern Mongolia, Qatar, Kyrgyzstan, or many other countries where the model is now being applied. First, as Hauk and Saez-Marti note, the Hong Kong education program was implemented along with a vigorous anti-corruption campaign that succeeded in significantly "reducing the profitability of corruption."<sup>415</sup> While Mongolia has, with the support of USAID and the Asia Foundation, created an anti-corruption program that is modeled after the Hong Kong program, surveys show that the public has very little faith in the anti-corruption agency's ability to actually reduce corruption.<sup>416</sup> Second, by the time the anti-corruption civic education program began in Hong Kong, institutional structures for the rule of law, including well-functioning courts, were already well established.<sup>417</sup> In other words, there was sufficient congruency between the message and the reality of legal institutions for the intended message to take hold. Such is not the case in

412. See Kurkchiyan, *supra* note 78, at 106. Transparency International's *Global Corruption Report* is widely read by practitioners in the rule of law field. Kurkchiyan is a sociologist at the Centre for Socio-Legal Studies at Oxford. Faculty Page for Dr. Marina Kurkchiyan, [http://www.csls.ox.ac.uk/research\\_staff/marina\\_kurkchiyan.php](http://www.csls.ox.ac.uk/research_staff/marina_kurkchiyan.php). Her research on the negative rule of law myth in post-Soviet cultures helps inform the negative rule of law in Mongolia. See Kurkchiyan, *supra* note 12, at 27.

413. Kurkchiyan, *supra* note 78, 106.

414. *Id.*

415. Hauk & Saez-Marti, *supra* note 410, at 330.

416. ASIA FOUNDATION SURVEY, *supra* note 98, at 4-5 (2008), available at <http://asiafoundation.org/resources/pdfs/MGbenchmarkingsurveyvieng.pdf> (revealing that as of September 2008, 75% of Mongolians believe that the Anti-Corruption Law (ACL) is not functioning).

417. See Hsin-chi Kuan, *Support for the Rule of Law in Hong Kong*, 27 HONG KONG L.J. 187, 188 (1997) (arguing that cultural support for the rule of law in Hong Kong is a colonial legacy and noting that from the earliest years of colonization, laws were published; any government action had to have a legal basis; all cases, criminal or civil, were normally heard in open court; and that there was an established body of statutory and case law informing citizens of what they could and could not do).



Mongolia, where courts and other legal and political institutions operate in a manner antithetical to the rule of law and there is no similar history of rule of law upon which to draw.<sup>418</sup>

These differences pose potential dangers that should not be ignored. When there is insufficient congruency between the message of civic education and the message individuals receive as a result of everyday living, literature on political socialization suggest that civic education not only fails, but leads to disillusionment and cynicism.<sup>419</sup> Evidence for this comes from both the former Soviet Union, where the message of socialist prosperity did not mesh with the reality of standing in line for bread,<sup>420</sup> and the United States, where messages of equality before the law often do not mesh with the experiences of minorities, leading to higher levels of detachment among minorities than whites from the political community.<sup>421</sup>

Additionally, parents, and not schools, are the primary agents of socialization for children.<sup>422</sup> Hauk and Saez-Marti's analysis of the Hong Kong study was premised on the assumption that children would receive

418. See Patrick Francois, *Norms and Institution Formation* (London, Centre for Economic Policy Research, CEPR Discussion Paper no. 6735, 2008), available at <http://ssrn.com/abstract=1141641> (demonstrating that countries with a history of institutional success are more likely to be successful at imparting rule of law norms than those where institutions are dysfunctional).

419. See ANNE FREEDMAN & P.E. FREEDMAN, *THE PSYCHOLOGY OF POLITICAL CONTROL: COMPROMISING DIALOGUES BETWEEN A MODERN PRINCE AND HIS TUTOR ON THE APPLICATION OF BASIC PSYCHOLOGICAL PRINCIPLES TO THE REALM OF POLITICS* 106, 113 (1975). “[T]he schools failed when the message being transmitted by teachers and texts was incongruent with other message the students received, particularly those that came as a result of his everyday living.” *Id.* at 105. “New nations and governments face in acute form the problems created by a lack of congruence among socializers.” *Id.* at 113.

420. See *id.* at 105–06. With regards to the failure of Soviet education to sustain faith in socialism, they explain,

It is difficult to believe that the socialist state is a glorious success when your shoes have holes and you have to stand in line for bread. In this context, especially, the hard-sell approach of Soviet education and indoctrination may have missed its mark, giving rise to disaffection in those who accepted Communist ideals and were dismayed by the gap between reality and theory; to apathy in and political indifference in those bored by the repetitious message; and to opportunism in those who saw political involvement in instrumental terms as the royal road to success. *Id.* at 105–06.

421. *Id.* at 111 (“Among black children it has been found, too, that the brighter and more perceptive the child, the more disillusioned he becomes. High levels of cognitive understanding are associated with high levels of disaffection—a dangerous trend from the establishment’s point of view. It would appear that the black child’s life experiences undermine his initial attachment to the political community. Studies of Chicanos have yielded similar results, and the pattern might well be found in other minorities not included in the initial research on childhood socialization.”). See also ROBERT E. CLEARY, *POLITICAL EDUCATION IN THE AMERICAN DEMOCRACY* 102 (1971) (“A real question exists as to how long a child who has been indoctrinated to believe in an item to the idealistic kind of democracy . . . and freedom will ignore the flaws that exist in the system. . . . As a result, the cynicism, apathy, and alienation concerning politics that is exhibited by many adults contrasts rather sharply with the favorable attitudes that are usually expressed by children.”).

422. See CLEARY, *supra* note 421, at 55 (concluding “family is a leading agent of political socialization”).

new anti-corruption values “via their parents.”<sup>423</sup> A child in a post-transition country, however, who watches his parents use their social exchange networks on a daily basis to circumvent formal legal channels (and occasionally pay bribes when it is the most efficient way to “get things done”) is not likely to be persuaded by a civics class that characterizes such activity as inappropriate.<sup>424</sup> Nor is a child who frequently hears adults complain of corrupt politicians and who sees that these politicians go unpunished likely to believe school lessons about equality or the fairness of the law.<sup>425</sup> Rather, the child is likely to grow up to see the law as his grandfather saw the law in the Soviet period—a cynical tool of the elite used for self-enrichment.<sup>426</sup> Contrary messages about the importance of respecting the law will be disregarded as propaganda at best and feed the negative rule of law myth at worst.<sup>427</sup>

In Mongolia and other countries where corruption is an everyday reality, rule of law rhetoric also risks replicating the relationship in the Soviet period between ritualized lip service to the law, on the one hand, and wide disregard for the law in daily life, on the other.<sup>428</sup> Indeed, the Soviet legacy of incongruence between official propaganda and everyday life is exactly what many rule of law advocates and scholars blame for the development of the negative rule of law myth in the first place.<sup>429</sup> As should thus be understood, civic education programs that seek to foster a culture of respect for the law in anti-democratic regimes such as in Kyrgyzstan and Qatar are doomed to repeat the mistakes of the past.

## V. Juries as an Anti-Rule-of-Law Solution

The failure of institutional reform and the difficulty of remaking culture through civic education suggest that it may be time to set aside the rule of law project. Alternate approaches that have been proposed include focusing instead on empowering the poor,<sup>430</sup> developing civil society,<sup>431</sup>

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423. See Hauk & Saez-Marti, *supra* note 410, at 316.

424. See FRED I. GREENSTEIN, *CHILDREN AND POLITICS* 56 (rev. ed. 1970) (noting that the most important agent of political socialization “is in the behavior of adults”) (emphasis in original); CLEARY, *supra* note 421, at 81 (“The young child is largely dependent upon primary care groups for cues on how to react to environmental stimuli. These groups operate on the basis of personal contact and their opportunities for influence are great.”).

425. See FREEDMAN & FREEDMAN, *supra* note 419, at 126. Not only specifically political experiences but also the individual’s general life experiences will influence his political attitudes and behaviors. *Id.* at 126. The character of his life is also shaped by the kind of community in which he lives. *Id.*

426. See Kurkchiyan, *supra* note 12, at 27.

427. See FREEDMAN & FREEDMAN, *supra* note 419, at 117, 196. People have a tendency to reject information that is inconsistent with the beliefs they already hold. *Id.* Once political orientations have been formed, then attitude change is usually a slow process related to sharply divergent or greatly increased information. CLEARY, *supra* note 421, at 84.

428. See Kurkchiyan, *supra* note 12, at 36-37.

429. *Id.*

430. See generally POVERTY AND DEMOCRACY: SELF-HELP AND POLITICAL PARTICIPATION IN THIRD WORLD CITIES (Dirk Berg-Schlosser & Norbert Kersting eds., 2003). While rule of

and cultivating a vigorous and independent press.<sup>432</sup> While all three of these have received some attention in Mongolia and elsewhere in the post-Soviet space, banks and donor agencies have placed vastly more emphasis on infrastructure projects, such as building or remodeling court houses, installing modern computer systems, and judicial education and training (including the building of new legal training centers).<sup>433</sup> This focus in part reflects a bias by international banks and donor agencies for big money projects.<sup>434</sup> But, this also reflects the state-centeredness of international rule of law approaches to reform.<sup>435</sup>

Even a bottom-up, community-based approach to reform, however, still would not address the question of where citizens should go to resolve private conflict, to enforce rights, or to check abuses of the state's prosecutorial power. One possibility is to follow post-war Japan's approach of informality. Japan's approach intentionally limited access to formal avenues of dispute resolution and set up a complex array of informal dispute resolution systems, including mediation and third-party conciliation to ameliorate social conflict and resolve private disputes.<sup>436</sup> But, as Curtis Milhaupt and Mark West have shown, the absence of viable formal dispute

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law advocates have argued that rule of law combined with free markets will create the conditions for prosperity and freedom, the legacy of the transition in Mongolia has concentrated wealth in a small number of individuals, while large numbers of Mongolians have been reduced to poverty. See ASIAN DEV. BANK, *ASIAN DEVELOPMENT OUTLOOK 2004: ECONOMIC TRENDS AND PROSPECTS IN DEVELOPING ASIA 60* (2004), available at [http://www.adb.org/Documents/books/ADO/2004/ADO2004\\_PART2\\_EA.pdf](http://www.adb.org/Documents/books/ADO/2004/ADO2004_PART2_EA.pdf) (last visited Mar. 31, 2010). This "remorseless growth of inequality" is antithetical to broad democratic participation because those who live in poverty do not live in freedom, as they must concern themselves with the everyday struggle to survive. See *id.* This struggle to survive can overwhelm other concerns, which is illustrated by the fact that Mongolians express drastically more concern with the interconnected issues of poverty, unemployment, and inflation (collectively 74%) than corruption (12%). ASIA FOUNDATION SURVEY, *supra* note 98, at 4.

431. See Stephen Golub, *Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative* (Carnegie Endowment for Int'l Peace, Working Papers, Rule of Law Series, Paper No. 41, 2003), available at <http://www.carnegieendowment.org/files/wp41.pdf> (last visited Mar. 31, 2010).

432. Freedom of the press is of particular and growing concern in Mongolia as several reporters have recently been jailed on charges of defamation for reporting allegations of corruption within the government. See *Repression of Journalists Continues with Two More Arrests*, REPORTERS WITHOUT BORDERS, May 7, 2008, <http://www.rsf.org/Repression-of-Journalists.html>. For a discussion of the importance of media in fighting corruption, see Geoffrey Robertson, *The Media and Judicial Corruption*, in GLOBAL CORRUPTION REPORT, *supra* note 2, at 109 ("Editors and journalists who have no 'public interest' defence when they make credible allegations about malfeasance in the justice system, or who are liable to go to jail if they allege judicial misconduct, cannot fulfil [sic] their role as public watchdogs.").

433. See Golub, *supra* note 431, at 3 (explaining that banks use a "top-down" state-centered approach to rebuild the rule of law in countries by focusing their resources on judiciaries).

434. See *id.*

435. See *id.* Organizations also use the state-centered approach, the rule of law (ROL) orthodoxy, "to promote such additional goals as good governance and public safety." *Id.*

436. See Curtis J. Milhaupt & Mark D. West, *The Dark Side of Private Ordering: An Institutional and Empirical Analysis of Organized Crime*, 67 U. CHI. L. REV. 41, 44 (2000).

resolution mechanisms and governmental rights-enforcing agents in Japan has a dark side, including non-trivial resort to violence and the reliance on organized crime as an alternative rights-enforcing agent.<sup>437</sup> Additionally, as Frank Upham has detailed in his work on bureaucratic informalism in post-war Japan, the channeling of disputes to mediation and other non-public forums can impede the development of rights and hinder social change.<sup>438</sup>

One approach from Japan that does offer promise, however, is the recent move to introduce a quasi-jury system.<sup>439</sup> This trend is not limited to Japan, however.<sup>440</sup> Juries are similarly being introduced in Korea and a few countries of the former Soviet Union, including Georgia and Kyrgyzstan.<sup>441</sup>

Jury systems are not typical components of rule-of-law initiatives because of the jury's "uneasy coexistence with the first principle of the formal rule of law, that like cases be treated alike."<sup>442</sup> Additionally, negative attention focused on the American jury system has generated popular skepticism as to whether juries can comprehend complex issues and raised concern over a juror's "alleged inclination to make decisions on the basis of emotion" rather than the law.<sup>443</sup> Others have feared that juries would discourage foreign investment by introducing local prejudice to the judicial system and increasing the risk of unfair or disproportionate verdicts.<sup>444</sup>

Thus, even in countries that have introduced some type of jury system, these countries have primarily instituted mixed judge-jury systems or limited the use of juries to a narrow range of cases, such as serious criminal trials.<sup>445</sup> By seeking to counter the perceived risk of juries, however, these limited systems have undercut the jury's primary benefit—the delivery of a high level of substantive justice, the democratization of the law, and the countering of corruption in the judicial system.

Despite allegations that juries do not apply the law out of ignorance or emotion, studies have shown that jury verdicts tend to be well-grounded in

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437. See *id.*

438. See FRANK UPHAM, *LAW AND SOCIAL CHANGE IN POST-WAR JAPAN* 12 (1978).

439. See Hiroshi Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 *CORNELL INT'L L.J.* 315, 320 (2007).

440. See, e.g., Eric Seo, Note, *Creating the Right Mentality: Dealing with the Problem of Juror Delinquency in the New South Korean Lay Participation System*, 40 *VAND. J. TRANS-NAT'L L.* 265, 266 (2007).

441. See *id.* at 266; see generally Stephen C. Thaman, *The Resurrection of Trial by Jury in Russia*, 31 *STAN. J. INT'L L.* 61 (1995); Draft Law on Court Juries of Kyrgyzstan, European Commission for Democracy Through Law: Venice Commission, Opinion No. 480/2008, [http://www.venice.coe.int/docs/2008/CDL\(2008\)069-e.asp](http://www.venice.coe.int/docs/2008/CDL(2008)069-e.asp); Am. Bar Ass'n Rule of Law Initiative Programs - Georgia: Judicial Reform, [https://www.abanet.org/rol/europe\\_and\\_eurasia/georgia\\_programs.html](https://www.abanet.org/rol/europe_and_eurasia/georgia_programs.html) (last visited Mar. 31, 2010).

442. Burns, *supra* note 19, at 1478.

443. *Id.*

444. See *id.*

445. See, e.g., Stephen C. Thaman, *Spain Returns to Trial by Jury*, 21 *HASTINGS INT'L & COMP. L. REV.* 241, 242 (1998).

evidence.<sup>446</sup> Diversity of experience and viewpoints among jury members tends to encourage jurors to deliberate carefully and consider rival explanations, resulting in juries delivering high levels of substantive justice.<sup>447</sup>

But more importantly in the context of emerging democracies, the possibility of jury nullification is a substantial benefit when the law does not reflect community notions of fairness or social justice, or the law was enacted through anti-democratic means. For example, Mongolian law provides that an individual who bribes to secure government services is equally as guilty as the public official who solicits or demands the bribe.<sup>448</sup> This law discourages people from coming forward with proof of bribery, and systemic corruption thrives because everyone has guilty hands and must remain publically silent for fear of prosecution.<sup>449</sup> Mongolian juries, however, may be unwilling to convict individuals who pay bribes out of necessity, which over time effectively nullifies the law and eliminates the negative incentive against reporting to the anti-corruption agency officials who solicit bribes. In other words, jury nullification itself is part of the law-making project.

Moreover, jury trials might provide a platform for the national discussion of a variety of important issues, including the appropriate and inappropriate uses of *tanil tal*, or social exchange connections, to circumvent formal legal channels. As discussed above, growing disparities between rich and poor and well-educated professionals and less-educated herders, has led to the growing social conflict over the appropriate use of *tanil tal*, causing David Sneath to explain,

Currencies of various kinds can be used to materialise relations of assistance and obligation. But the transformed power of money and its role in the popular imagination is directly linked to current perceptions of corruption, and is closely bound up with the association between large sums of money and dishonest, secret deals.<sup>450</sup>

On the other hand, there remains a collective sense that reciprocity and obligation to one's *tanil tal* remains an important part of Mongolian culture, summarized as follows:

Enacting the positively valued role of helpful relative/friend is seen to be a very different matter from exchanging favours for money. The gift of a bottle of vodka to a relative who uses a company truck to help a family move, for example (a very common form of assistance among rural kin), is expressive of the supportive relationship between the parties concerned and is not thought of as an exchange. But giving cash to a railway baggage handler to load an overweight package onto a train is clearly understood to be a transaction – in this case a potentially corrupt one.<sup>451</sup>

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446. See, e.g., HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 149 (1966).

447. See Phoebe C. Ellsworth, *Are Twelve Heads Better than One?*, 52 *LAW & CONTEMP. PROBS.* 205, 206 (1989).

448. Jon S. T. Quah, *Comparing Anti-Corruption Measures in Asian Countries: Lessons to be Learnt*, 11 *ASIAN REV. OF PUB. ADMIN.* 71, 77-78 (1999).

449. See White, *supra* note 30, at 234-35.

450. Sneath, *supra* note 72, at 90.

451. *Id.*

Juries offer the potential for contextual justice and nuanced line-drawing between legitimate and illegitimate exchanges. Jury decisions will more likely reflect community values and provide just outcomes than will judicial decrees that enforce the “rule of law as a law of rules.”<sup>452</sup>

The deliberative process of jury decision-making could also play a critical role in encouraging more active civic engagement on important public issues such as the proper balance between traditional nomadic conceptions of public land and growing privatization of land in the interest of economic development.<sup>453</sup> “[C]itizen participation in face-to-face [jury] debates over political issues offers a core method of promoting meaningful civic engagement.”<sup>454</sup> Mongolian juries might, for example, help define and set legal norms for resolving growing disputes between the mining industry and nomadic herders.<sup>455</sup>

Juries can also check judicial corruption and create a public space for the fair and just resolution of conflict, which may, in fact, be the most attractive advantage of juries in developing countries mired in systemic corruption.<sup>456</sup> Indeed, juries originally served as anti-corruption devices in the United States, a point that is often lost in modern discussions of juries.<sup>457</sup> “Unlike judges, who could be regularly and predictably bought, juries were larger (and therefore harder to corrupt, in the current thinking) and did not depend upon their role for their livelihood, creating far fewer temptations.”<sup>458</sup>

As the “rule of law myth” has firmly taken hold in the United States, however, this corruption-checking function of juries has received less attention. In turn, the myth of impartial judges has pushed questions of jury prejudice and inconsistency to the forefront, leading to attacks on juries as antithetical to the rule of law.<sup>459</sup> But in developing democracies where judges are widely perceived to be corrupt and consistency is not a hallmark

452. See generally Antonin Scalia, *The Rule of Law As a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

453. See John, Gastil, E. Perre Deess & Phil Weiser, *Civic Awakening in the Jury Room: A Text of the Connection Between Jury Deliberation and Political Participation*, 64 J. POL. 585, 592 (2002).

454. Valerie P. Hans, *Introduction: Citizens as Legal Decision Makers: An International Perspective*, 40 CORNELL INT’L L.J. 303, 307 (2007).

455. See generally Orhon Myadar, *Imaginary Nomads: The Myth of Nomadic Mongolia and Fenceless Land Discourse* (Dec. 2007) (unpublished Ph.D. dissertation, University of Hawaii) (on file with the Cornell Int’l L.J.) (describing the variety of conflicts that have arisen, including degradation of pasture and water sources, from the government’s granting of long-term leases to various mining companies in areas previously used by herders for grazing).

456. See JOHN T. NOONAN, JR., BRIBES 429 (1984).

457. See *id.* (noting that some founders urged the necessity of juries to guard against corrupt judges).

458. Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 369 (2009) (reporting on multidisciplinary studies showing that participation as a juror results in greater civic engagement).

459. See Lisa Litwiller, *Has the Supreme Court Sounded the Death Knell for Jury Assessed Punitive Damages? A Critical Re-Examination of the American Jury*, 36 U.S.F. L. REV. 411, 456 (2002) (discussing the risk that jury verdicts may be biased or capricious).

of judicial decision making, arguments that juries may be prejudiced or inconsistent lose their force.<sup>460</sup> In emerging democracies, such as the United States in the late 18th and 19th century, juries are primarily a tool for checking the abuse of power.<sup>461</sup>

Juries check corruption not only by dispersing decision-making power but also by providing a public audience for the exposure of official corruption. Currently, journalists and news outlets that report corruption in Mongolia face the prospect of arrest for defamation trials, huge fines and imprisonment.<sup>462</sup> They also face trials before judges who may be unsympathetic to the media's role as a public watchdog.<sup>463</sup> Indeed, one Supreme Court Justice with whom I spoke declared that the problem in Mongolia is not that there is too much corruption but rather, that there is "too much media freedom."<sup>464</sup> Juries composed of ordinary citizens, who must suffer the inequities of systemic corruption, may have a different take.<sup>465</sup> Moreover, the prospect of public jury trials, without the promise of conviction, may serve as a check on the government's attempts to prosecute journalists for defamation in the first place, and this might indirectly contribute to the growth of media freedom in Mongolia.

Finally, jury systems may increase respect for the law and legal institutions, both by bringing the law more in line with community values and by educating the public on a much deeper level than would civics courses or public service announcements about the role of law in society. As Alexis de Tocqueville recognized in 1835:

The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It invests each citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge toward society; and the part which they take in the Government.<sup>466</sup>

Jury service, in other words, may ultimately be the best way to educate the public about the law and legal ideas, to foster a rule of law culture, and to generate faith in the courts. Temporarily setting aside the rule of law project in favor of democratic participation in the legal system may actually, in the end, save the rule of law.

Caution is in order, however, in several regards. First, attempts to legitimate the courts through the use of pseudo-juries that lack actual decision-making power risks reinforcing public cynicism rather than increas-

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460. See generally GLOBAL CORRUPTION REPORT, *supra* note 2. Eighty percent of appealed district court cases are reversed in Mongolia. White, *supra* note 30.

461. J. Wilson Parker, *Free Expression and the Function of the Jury*, 65 B.U. L. REV. 483, 491 (1985).

462. See White, *supra* note 30, at 234.

463. See *id.* at 233.

464. Interview with Anonymous Supreme Court Justice, in Ulaanbaatar, Mongolia, (May 28, 2008).

465. See White, *supra* note 30, at 215.

466. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 284-85 (Henry Reeve trans., Alfred A. Knopf, Inc. 1945) (1835).

ing faith in legal institutions. For example, juries were introduced in Russia during *perestroika* with great hope in the West that they would serve as “laboratories for democracy.”<sup>467</sup> However, procedural limitations on the power of juries have effectively nullified the right to independent juries in Russia, which are limited to serious criminal cases in the first place.<sup>468</sup> For example, Russian judges can take cases away from juries even once they have begun deliberation, and appeals courts have broad discretion to overturn juries’ verdicts, including not-guilty verdicts in criminal trials.<sup>469</sup>

Mixed judge-jury systems in parts of Eastern Europe are equally as disappointing. The European experience has shown, for example, that mixed systems (which combine judges and jurors into one decision-making body) allow judges to effectively control deliberations and to reduce citizen participation to “mere window-dressing, unjustly enhancing the legitimacy of the legal system without assuring meaningful input.”<sup>470</sup>

Jury systems should thus be implemented along with specific procedural protections designed to limit judicial power and place real decision making power in the hands of the jury. The trial judge’s role should be that of a facilitator of process, much like a mediator, rather than a decision maker.

Of course, the judiciary will not welcome sharp procedural limits on judicial power. Even were the judiciary persuaded by donor agencies or international financial institutions to introduce juries, such a state-centered approach would inevitably include provisions to preserve the ultimate power of judges to control outcomes, as has been the case in Russia.<sup>471</sup> One Supreme Court Justice that I interviewed suggested, for example, returning the mixed judge-civil representative system of the Soviet period as a means of “reducing the perception of corruption.”<sup>472</sup>

Juries, if they come, should come as a result of popular demand. Japan, again, offers both a positive example and a cautionary tale as to how support for a jury system might come about.<sup>473</sup> The movement for juries in Japan was built gradually over several years—first by scholars who wrote articles; then, by the Japan Bar Association which held conferences and sponsored mock jury trials; and ultimately, by civil society groups who

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467. See generally Stephen C. Thaman, *The Nullification of the Russian Jury: Lessons for Jury-Inspired Reform in Eurasia and Beyond*, 40 CORNELL INT’L L.J. 355 (2007).

468. See generally *id.*

469. See *id.* at 359.

470. Hans, *supra* note 454, at 309.

471. See generally Thaman, *supra* note 467.

472. Interview with Anonymous Russian Supreme Court Justice, date unknown. This Justice, who also served on the court during the Soviet period, is surely aware that the civil representative system of that era was not effective in dispersing judicial power. See Sanja Kutnjak Ivkovic, *Exploring Lay Participation in Legal Decision-Making: Lessons from Mixed Tribunals*, 40 CORNELL INT’L L.J. 429, 440 (2007) (drawing upon consistent research showing that professional judges dominate mixed tribunals while lay assessors participate minimally).

473. See generally Ingram Weber, *The New Japanese Jury System: Empowering the Public, Preserving Continental Justice*, 4 E. ASIA. L. REV. 125 (2009).



joined in the cause.<sup>474</sup> In 2001, this movement resulted in a special commission's dramatic proposal for Japan to introduce a lay assessor system.<sup>475</sup> The proposal was unexpectedly accepted by Prime Minister Koizumi.<sup>476</sup> Initial excitement, however, gave way as the Ministry of Justice bureaucracy took over implementation and eventually replaced the idea of juries with a mixed judge-jury system of still uncertain composition, though one prominent proposal is a three-judge, two-citizen panel.<sup>477</sup>

While the Japan experience cautions against the dangers of a state-centered, top-down approach to implementing legal reform,<sup>478</sup> it also suggests that a movement for juries and other movements for legal reform can grow out of interactions between scholars, the bar and civil society.<sup>479</sup> This alone is encouraging for the power of deliberative democracy. Moreover, while practical difficulties would have to be overcome,<sup>480</sup> there is reason to hope that juries might be a way out of the corruption conundrum that has dogged emerging democracies and undermined the effectiveness of rule of law reform. Juries could paradoxically lead new democracies closer to the rule of law ideal.

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474. See Kent Anderson & Mark Nolan, *Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (Saiban-In Seido) from Domestic Historical and International Psychological Perspectives*, 37 VAND. J. TRANSNAT'L L. 935, 939-40 (2004).

475. See *id.*

476. *Id.* at 940.

477. *Id.* at 976.

478. One hopeful advantage in Mongolia, as well as in countries of the former Soviet Union, is that citizens have already been exposed to the idea of citizen participation in legal decision-making and have experienced the failure of a mixed judge-jury system. See generally Thaman, *supra* note 467.

479. See, e.g., Takashi Maruta, *The Criminal Jury System in Imperial Japan and the Contemporary Argument for Its Reintroduction*, INT'L REV. PENAL L. 215, 220 (2001).

480. See Frank Munger, *Constitutional Reform, Legal Consciousness, and Citizen Participation in Thailand*, 40 CORNELL INT'L L.J. 455, 456 (2007) (warning that regular comparative socio-legal scholarship finds that efforts to transplant western regulatory and judicial regimes, even if successfully instituted in other regions of the world, may operate in wholly unexpected and distinctive ways).