

William E. Butler

The Mongolian Legal System

Contemporary Legislation and Documentation

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Contemporary Legislation and Documentation

W.E. Butler,

M.A., J.D., Ph.D., LL.D.

*Professor of Comparative Law in the
University of London*

Translations from Mongolian

A.J. Nathanson, M.A.

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W.E. Butler

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THE MONGOLIAN LEGAL SYSTEM
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Introduction

The present volume opens the door to a well-established legal system which is quite literally almost unknown to the outside world. The historic origins of this legal system lie in one of the great empires in the history of mankind which in its day influenced the law and mores of Chinese and large portions of Eurasian civilization. In modern times the Mongolian legal system represents a distinctive application and adaptation of the socialist legal model which has immediate relevance to many third-world countries. Mongolia has established formal diplomatic links with over ninety countries, joined a number of general international organizations, and seems intent on enlarging its commercial, legal, political, economic, and diplomatic involvement in the international community. As a buffer state surrounded by two of the world's largest powers, Mongolia has a very special importance in the international system, and it is perhaps sobering to realize that if a framework or other arrangement is concluded between the European Economic Communities (EEC) and the Council of Mutual Economic Assistance (COMECON), Mongolia will be directly linked to Europe.

The volume is wholly without precedent, either in Mongolia or elsewhere; it undertakes to lay out as fully as accessible materials will allow the basic features of the Mongolian legal system through legislation and extracts from doctrinal writings by Mongol jurists with introductions to each chapter that place the Mongolian materials in contextual or historical perspective. All of the Mongol codes are translated, and special attention is given to foreign trade and other legislation of transnational importance and to Mongol writings on public international law. Nearly all appear for the very first time in English, having been specially translated from the original Mongol or Russian text. When appropriate, comparative observations are made upon Soviet or Chinese law. The volume is intended to serve as a resource and teaching aid for students of Asian and socialist legal systems or area studies, international institutions, and East-West commerce, lawyers, businessmen, for legal advisers of government agencies or international institutions which have direct ties with Mongolia or are likely to forge them, and, of course, for students of international and comparative law in general.

Since this volume is the first extensive introductory work on the subject of modern Mongolian law in the western world, it will hardly be the last, but

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there are several larger issues which, if not resolved, are at least illuminated by the materials presented here. One relates to the place of Mongolia in the family of socialist legal systems, indeed, to the very existence of a *family* of socialist legal systems prior to the post-World War II period. There has been learned controversy for more than six decades as to whether the Soviet legal system is a distinctive legal order, forming the core of an emergent family of legal systems, or whether it is merely a variant of the continental Romanist civil law systems following the basic pattern originally conceived by Roman jurists. In many respects the dialogue has been a curiously myopic one, for the Soviet legal pattern had taken root elsewhere before its transmission to Eastern Europe, and not merely in Mongolia but also in the Chinese Soviet Republic and other areas administered by the Chinese communist movement during the interwar era. Numerically speaking, it is as appropriate to refer to a family of legal systems following the Soviet model before the Second World War as it is subsequently, assuming, of course, that one accepts they are distinct from the Romanist civil law systems; if this assumption is not shared, then the number of Romanist systems must be enlarged by one to embrace Mongolia at least.

Since "socialism in one country" is not strictly accurate in a broader juridical context when describing the interwar period, is it accurate in the sense that Mongolia developed a mere copy of the Soviet legal order? Such western commentary as there has been on Mongolian law has emphasized the elements of Soviet influence,² and these perceptions have been reinforced by the remarks of contemporary Russian observers in or near Mongolia³ and of Mongol leaders and jurists who have paid tribute to the inspiration of the Soviet model and the direct assistance received. During the early years after the Mongolian revolution, a number of Soviet jurists worked in Mongolia, helped draft legislation, trained Mongol jurists, and published materials on Mongolian law or translated legislative materials. From such Mongol legislation as is available, it is evident that Soviet enactments frequently were adapted to Mongol conditions. Of prevailing codes, the civil code, criminal code, codes of civil and criminal procedure, and, to a lesser degree, the labor code obviously were discussed in the USSR and presumably made available to Mongol draftsmen. Much of the language in the Mongol version is taken ver-

1. J.N. Hazard, "Preface," in Hazard, W.E. Butler, and P.B. Maggs, *The Soviet Legal System* (3d ed.; New York, 1977), pp. xv-xvii.

2. Hazard, "The Constitution of the Mongol People's Republic and Soviet Influence," *Pacific Affairs*, XXI (1948), 162; G. Ginsburgs and R. Pierce, "Revolutionary Law Reform in Outer Mongolia," *Law in Eastern Europe*, VII (1963), 207.

3. M.A. Vaksberg, *Konstitutsiia revoliutsionnoi Mongolii* (Irkutsk, 1925); V.V. Engel'feld, *Kitaiskii parlament i parlamentarizm. Politicheskaiia organizatsiia sovremennoi Mongolii* (Kharbin, 1926).

batim from the Soviet text.⁴ It is, as it were, almost as though in certain respects these codes were an extension of law reform measures in the USSR. The western student of Soviet law also will find basically familiar, making due allowance for the absence of a federative state system in Mongolia, the structure of court organization, procuracy, arbitrazh, legal profession, legal education, and the basic branches of law.

But these similarities would be misleading if one were to stop there. The substance of Mongolian legislation differs in many key respects from the Soviet, and it may be especially noteworthy that the Mongolian codes of the 1970s seem more original than those of the 1960s when compared with their Soviet counterparts. The reason in part, I would speculate, is that a larger corpus of Mongol jurists, some with Soviet legal training and others with exclusively a Mongol higher legal education, is available and experienced in assuming this kind of responsibility. A Mongolian legal elite, several with postgraduate degrees, has been fashioned for the first time in Mongolian history.

The present writer has cautioned elsewhere against readily assuming that the "common core" of what, in my view, is a socialist family of legal systems can be assimilated without taking due account of the legal, cultural, and other traditions or factors which may resist, shape, or alter the importation of legal institutions from elsewhere, whether they be revolutionary or otherwise. The common core, whatever it may be, can not be divorced from the heritage of legal values and institutions of the past, whether these be dispensed with by the new legal order or absorbed as congenial or essential elements in the new scheme of things.⁵

A number of features emerge from these materials as examples of distinctiveness in the Mongol legal tradition. From Mongol attitudes of the prerevolutionary era, noted at least as early as the thirteenth century, is the Mongol preference for a mild approach to punishment. The harshness of investigative tortures in prerevolutionary Mongolia is attributed to Chinese influence, and it is noteworthy that the present MPR Criminal Code embodies a milder approach than the Soviet codes (see Articles 18-19, MPR Criminal Code). The provision that suits in civil proceedings may be filed orally in aimag or district courts of first instance (Article 101, Code of Civil Procedure) is perhaps an accommodation to the level of juridical literacy and to traditional practices. Provisions on statutes of limitations take into account vast distances and the

4. Some of the contrasts drawn between family legislation of the RSFSR and the Chinese Soviet Republic would seem not to be so evident if Mongol and Chinese Soviet legislation of that period were compared. On the similarities between Russian and Chinese Soviet legislation, see M.J. Meijer, *Marriage Law and Policy in the Chinese People's Republic* (Hong Kong, 1971), pp. 35-68.

5. See, *inter alia*, Butler, "Comradely Justice in Eastern Europe," *Current Legal Problems*, XXV (1975), 200-218; *id.*, "Eastern European Approaches to Public International Law," *Year Book of World Affairs*, XXVI (1972), 331-345.

fragility of transport and communications of a society still engaged in pastoral agriculture. Criminal penalties against abuse of women's rights, arranged marriages or refusals to allow marriages, and the like represent a rejection of Mongol traditional practices which may still persist. It is noteworthy that the Mongolian codes have nothing to say about custom as a source of law: Mongol jurists are somewhat evasive on the issue and indicate that customs not proscribed by law are welcome to continue. In many instances (for example, registration of marriage) the law has proceeded slowly so that people may be properly educated about their legal responsibilities.

There are dozens of examples of this kind in the materials, but in the larger sense it is what might be called the Mongolian context that accounts for features of originality of the Mongol legal system in the socialist family of legal systems. Mongol jurists stress, and not without reason, the uniqueness of the Mongol revolution against a feudal order having no counterpart in Europe. The revolutionary government of 1921 made its peace with the spiritual leader of the Buddhist faith in Mongolia and assumed total control only after his natural death, three years later. Abolition of the pre-existing legal order was gradual. A number of revolutionary reforms introduced had the effect of confirming, in the Mongol psyche, the legitimacy of the new order rather than accentuating the social trauma of revolution (for example, nationalization of land), even though the reforms did fundamentally alter social and economic relations. Similarly, other revolutionary measures of far-reaching significance in the Soviet context, such as nationalization of banks, transport, industrial enterprises, and the like, had no immediate impact in Mongolia, where either these components of the economy were wholly absent or extremely primitive. The absence of a working class, the nomadic character of the Mongol economy, the peculiar role of the Buddhist faith in Mongol society, the level of illiteracy and poverty, and the international position of Mongolia in its relations with, principally, China, the Soviet Union, and Japan all contributed to the Mongol approach to societal development, called "by-passing capitalism." The Soviet Union was now not merely a source of inspiration and emulation to the Mongolian revolutionary leadership, but the only natural ally against Mongolia's traditional nemesis to the South.

The Mongolian context also affected the role of the MPRP in Mongol society. Although the role of communist parties in general with respect to their legal systems is not adequately understood, the MPRP seems to have had greater direct involvement in the legislation and legal process of Mongolia, at least in the early period, than one assumes a Party in the Leninist mold would be likely to assume. Unlike the Soviet Union, Mongolia had no educated strata to draw upon for leadership nor an educational system to rapidly create individuals capable of assuming positions of responsibility in state or social administration. When such individuals did appear, the MPRP itself both recruited substantial percentages of them and, it would appear, used its own organs and personnel to a high degree not merely to guide, lead, or oversee,

but also to directly prepare, formulate, or vet legislation and become involved in the daily administration of legal affairs. When Mongol jurists praise the role of the MPRP in the legal process, they seem to have a somewhat different understanding of that role than, for example, a Soviet jurist appears to have.

The same considerations serve as a note of caution about assuming that the Mongolian legislation reproduced in the present volume, however much it may approximate Soviet or East European patterns, has necessarily been absorbed into the Mongol legal consciousness to the same degree or in the same manner. This is not merely a question of whether the "law-in-books" is the "law-in-action," although that issue is as germane – and as difficult to answer – with respect to Mongolia as it is to other legal systems. Nor is it merely an issue of revolutionary or socialist legality, although Mongolia too experienced a decade or more of internal conflict and purges during the 1930s which official Mongolian sources now acknowledge constituted flagrant abuses and violations of the Mongol legal system of that time. It also is a question of whether legislative prescriptions of conduct and social regulation in the Mongolian context represent a sharper break with previous practices or represent the lack of any practices in Mongol society. After three decades, for example, Mongol sources still report unsatisfactory compliance with the requirement that acts of civil status be registered, a lack of juridical discipline in administration of the economy on a scale and of a nature that can only arise from unfamiliarity or lack of appreciation of the need for such regulation, and other examples which suggest the tribulations of a society endeavoring to master the complexities of a modern legal order. When modern Mongol codes depart from their Soviet models, they often do so by way of simplification or omission of complex provisions. But even of those provisions which remain, for example, one may wonder whether many Mongols actually draft wills and thereby bring into operation the articles of the Civil Code on the subject.

Mongolian legislative technique also deserves a note of caution. However substantial the body of legislation translated in the present volume, it is at best a glimpse. Mongolian draftsmen with some frequency amend enactments by subsequent legislation without expressly repealing earlier acts; the codes are not exhaustive compilations of their respective branches of law, and one may find administrative and even criminal penalties provided for in subordinate legislation, including instructions. Citations to legislation are frequently incomplete. These practices make it difficult for foreign commercial and legal interests to fully understand the legal aspects of their transactions with Mongolia, and so long as that is true, those relationships can not prosper as they otherwise might.

The role of Mongolia as a juridical model for other legal systems of a socialist orientation in the third world may be just beginning.⁶ Afghanistan would appear to be another area for possible adaptation of Mongolian expe-

6. See R.A. Ul'ianovskii (ed.), *Pravo v stranakh sotsialisticheskoi orientatsii* (M., 1979).

rience. Some Western observers believe Mongolia has served as a base of experience which influenced policy choices in Eastern Europe in the late 1940s. In his pioneering study exploring the common core of socialist legal systems, John N. Hazard comments on how the nationalization of land in the Soviet Union and Mongolia was, as a pattern, followed only partially in Eastern Europe.⁷ On reflection, this should not be surprising; the Mongolian practice, essentially identical to the Soviet Union, occurred under dramatically different patterns of land relationships and would have been unsuitable for imitation in Eastern Europe. The nationalization of land in Mongolia meant, to the common arat, that the state now allocated pasture for use instead of the pre-existing authority. Leaving aside questions of political essence, the nationalization of land constituted a restructuring of the use-allocation system and not an uncongenial deprivation of property in land. Had in fact the Soviet leadership relied upon the Mongolian experience in land reform as a guide for policy in Eastern Europe, the result would have been what the late Otto Kahn-Freund called, in another context, a "misuse of comparative law."

7. Hazard, *Communists and Their Law* (Chicago, 1969), pp. 14-15.

Translation Note

We have encountered problems of varying degrees of intractability in the course of translating texts for the present volume, and some of them require explication in order to orient the reader. The source materials available to the western student of modern Mongolian law fall into the following basic categories, all of which have been drawn upon here. First, are the original texts of legislation and doctrinal writings in the Mongolian language (modern script). These are exceptionally difficult to obtain and for all practical purposes have not formed part of the body of data available either to western or Soviet and East European students of socialist legal systems. Virtually all of the doctrinal writings and some recent legislation reproduced here have been translated from the original Mongolian by Ms. Nathanson. Second, are texts of legislation in the Russian language published in Mongolia by official agencies for circulation there to those who may require them. Most of the legislation, including all of the codes, reproduced here I have translated from this type of material. Third, are original writings by Mongol jurists published abroad, principally in the USSR; this is source material of growing significance, for Mongols pursuing higher degrees in the USSR, for example, are publishing the fruits of their dissertation research. We include an extract from one such article, but many others have been used to prepare the introductory comments.

Fourth, are monographs and articles by Soviet jurists or observers who have in many instances spent time in Mongolia and are in a position to offer special insight. Maiskii's account of traditional Mongolian law is an example reproduced in the present volume. Finally, there is the work of western scholarship which draws on all of the above and is sometimes supplemented by first-hand observations and commentary. Professor Bawden's article is an example, and the introductions to each chapter incorporate, where relevant, interview data which I gathered while in Mongolia in 1979.

Ms. Nathanson is responsible for all translations from *AT* and *SKE*, the selection on "The Nature of Socialist Law" (Chapter II), the extract from Sangidanzan, the legislation on court organization (Chapter V), the 1978 Law on Deputies of the MPR and the 1978 Law on local khurals of people's deputies (Chapter VII), and the excerpt from Jaalan-Aajav (Chapter VIII). I

am responsible for translating all of the rest, excluding, of course, those few items originally in English.

In selecting materials for the volume, I have endeavored to include items which collectively would illuminate the historical origins and basic elements of the entire legal system. The Constitution and all of the codes are included, and doctrinal writings have been chosen to provide explanation about those areas where the legislative texts were unavailable or commentary on the genesis, implementation, or elaboration of the legislation. Examples of judicial materials and procuracy protests offer some insight into the style and manner in which these facets of the legal system operate in Mongolia. In some cases the materials have implications which transcend Mongolia itself and contribute directly to our knowledge of socialist legal systems in general; *e.g.*, the 1976 Conditions for Delivery of Export Goods (Chapter XX). Although as a whole the volume is necessarily a path-breaking undertaking, and long overdue, to the best of my knowledge it has no peer in scope, either past or present, within Mongolia or without. It goes without saying that responsibility for the selection of materials and all views expressed in the chapter introductions rests solely with me.

Terminological problems encountered during our labors were formidable. Available general dictionaries proved to be inadequate, and we have in fact constructed a glossary, relying heavily upon the set of Russian equivalents which I have developed over the years in translating Soviet legal materials, which is being published as a separate volume and incorporates an invaluable terminological bank published by the MPR State Terminological Commission. This approach has, we believe, been especially fruitful because the principal Mongolian codes of law have been adapted from Soviet legal experience and much of the terminology has been carried over.

Most territorial-administrative terms are given in their Mongolian version and are italicized. The term *raion* is translated as district. In some cases the texts presented, at least in the redaction available to us, had not been amended to reflect administrative-territorial modifications, and we have in all instances adhered to the text. The same applies to terms rendered differently in Mongolian and Russian. The administrative-territorial unit called a sum in Mongolian or a somon in Russian has been transliterated according to the original text; so too has Ulaanbaatar in Mongolian and Ulan Bator in Russian or English.

The expression *khural* posed a different issue. The name has been retained when it refers to a state agency, such as the *khural* of people's deputies, but translated as meeting or session when referring to a convocation of such a body.

The transliteration from Russian and Mongolian follows the Library of Congress system with slight modifications and without diacritical markings. The two additional letters in the Mongolian alphabet are transliterated as *ö* and *ü*; the Russian letter transliterated as *zh* is, in Mongolian, rendered as *j*.

Virtually all footnotes in the original Mongolian materials have been eliminated, and all doctrinal writings, without exception, have been extracted from the original. Omitted passages are indicated by three dots. All legislative texts, on the other hand, are given in full.

W.E.B.

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In September-October 1979 I was privileged to spend a month in the Mongolian People's Republic to gather materials for this study. I should like to express my thanks to The British Academy and the Mongolian Academy of Sciences for arranging my visit, to the Mongolian State University for assuming the responsibilities of host institution, to Mongol jurists in the University and Academy who so patiently explained to me aspects of their legal system, to the MPR Supreme Court, the College of Mongolian Advocates, the MPR Ministry of Justice, and other institutions for granting interviews and visits, to the State Public Library of the MPR, and to diplomatic personnel of both the United Kingdom and the Mongolian People's Republic for many courtesies extended.

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W.E.B.

Abbreviations

AT	<i>Ardyn tör</i>
CPSU	Communist Party of the Soviet Union
M.	Moscow
MNR	Mongol'skaia Narodnaia Respublika
MPR	Mongolian People's Republic
MPRP	Mongolian People's Revolutionary Party
Revsomol	Revolutionary Youth League
SKE	<i>Sotsialist khuul' ës</i>
SKhO	agricultural association

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