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Thursday, 2019.11.07 №6 (118)

A WEEKLY GLOBAL, NATIONAL, INDEPENDENT, ANALYTICAL NEWSPAPER COVERING THE POLITICS AND ECONOMICS OF MONGOLIA
(IN ENGLISH, JAPANESE, RUSSIAN AND MONGOLIAN)

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WEEKLY



DeFacto **ARTICLE**

№503

*Jargalsaikhan Dambadarjaa,
Mongolian political and
economic observer, columnist*

GREY SOCIETY



DeFacto **INTERVIEW**

*Federica Chiavaroli
Undersecretary of State of Justice,
Senator of the Italian Republic*

“
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It became possible for Mongolians to exercise the right of association since the adoption of the democratic Constitution of 1992. Subsequently, the Law on Non-Governmental Organizations (the Law on NGOs) was adopted 5 years later with an aim to regulate the civil society organizations separately. Mongolians have been annually celebrating the Civil Society Day on January 31 for the last 10 years. Currently, over 20,000 non-governmental organizations (NGOs) in various areas are registered.

The main goals of civil society organizations are to evaluate the governmental decision-making process; to express evidence-based opinions before the bill is passed; and to protect democracy, social development, and human rights. The CIVICUS, an international non-profit organization, conducted a study on the state of civil society organizations in Mongolia and concluded that it is unsatisfactory.

CIVIL SOCIETY TODAY

Both the government and NGOs strongly agree that the weak Mongolian civil society needs to be fixed, improved, and developed. Moreover, both sides are on the same page regarding the first step - to amend the Law on NGOs enabling active support to the NGOs.

The Ministry of Justice and Home Affairs (MoJHA) formulated an NGO bill, *“The Law on Non-Profit Legal Entities”*. The MoJHA, a side that proposed the legislation, and the representatives of civil society organizations have been holding a series of discussions concerning the NGO bill.



► The representatives of NGOs address that the public benefit NGOs must not be treated in the same manner with professional or economic associations which simply protect their own interests. For instance, the women and youth associations of political parties are registered as NGOs. On one hand, those associations are indeed similar to NGOs on the basis that they associate voluntarily and independently from the government and do not generate any profits through their activities. On the other hand, they can be distinguished in terms of who they are serving or why they are carrying activities.

The civil society is a mechanism capable of monitoring

the government independently and, certainly, an inseparable part of democracy. In several countries, the government enters into contractual agreements to delegate part of the public services to NGOs. Therefore, governments offer support to civil society organizations through tax relief in many countries. Also, the governments of South Korea, New Zealand, and Germany allocate funding to NGOs. In Mongolia, the NGOs do not receive any governmental or local support and the government funding constitutes merely 2% of the total NGO funding. Public benefit organizations and their employees do not enjoy any relief on social insurance premiums.

BILL WITHOUT POLICY

A number of things including the definition of civil society are unclear. The government claims that it will grant funding to civil society organizations by all means. Unfortunately, a substantial change has not been achieved in relation to state funding and the legal terminologies remain vague.

The Cabinet of Su. Batbold and civil society organizations jointly set up a working group that prepared the first policy draft, "The State Policy Concept on Civil Society Development". The working group discussions were held in the Government Palace soon after conducting a hearing with NGOs in all provinces. However, the draft policy went down the drain as a new Cabinet was formed after the election of 2012.

Before proposing a new NGO bill to parliament it is critical to review and renew the state policy on civil society. The development of civil society can be achieved only if we hold a parliamentary debate over the NGO bill upon approval of the state policy.

The FATF, an inter-governmental organization that has added Mongolia to its grey list recently, demands the states to "prevent terrorists, terrorist organizations, contributors from transferring, collecting, and using funds through non-profit organizations". Hence, to meet this requirement, the NGO bill, "The Law on Non-Profit Legal Entities", is about to be proposed in the parliament in no time. If the NGOs are in fact vulnerable to money laundering or terrorist financing the problem must be solved through separate regulations, not through the NGO bill. In reality, Mongolia has been placed on the FATF's grey list not because of the lack of regulation but lack of law enforcement.

The legislators point out that there are excessive numbers of NGOs and political parties in Mongolia. Nonetheless, both numbers are relatively lower than post-communist countries such as Hungary and Poland. This was revealed in the *study*, "Comparative Analysis of Institutional Environments of Non-Governmental



Organizations in Mongolia, Hungary and Poland", carried by the Defacto Institute. The number per se is not an obstacle but an advantage.

The efforts of all citizens are vital in developing one of the pillars of democracy, civil society.

2019.10.31 ■

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FEDERICA CHIAVAROLI

Undersecretary of State of Justice,
Senator of the Italian Republic

DeFacto INTERVIEW

For interviews in Mongolian, English and Russian, visit <http://jargaldefacto.com/category/8>

“ THE FIGHT AGAINST CORRUPTION HAS BEEN A VERY STRONG OBJECTIVE OF RECENT GOVERNMENTS ”

Defacto: Good evening. I'm very happy to be here in beautiful Rome, Italy. I'd like to start right off with a question about party finance. How do political parties in Italy get financed and who monitors the finances?

FC: The situation in Italy, with regard to the funding of parties has changed. Before, the parties were financed publicly by the state. Now this has been stopped, and in this legislature the rules have changed. The parties now are funded and financed by both private funds and contributions of citizens from their income tax returns.

Defacto: Tax returns? How does that work?

FC: In Italy, it's not only the political parties that are financed through income tax returns. Citizens can allocate a part of their taxes to bodies that have been chosen by the state. So, for example, to religious institutions such as The Church, to social organizations, or to voluntary associations—bodies that have been recognized by the state as contributors to the state.

Defacto: How big is that contribution? For example, for individual Italian citizens, do they have a choice about whom to give the money to? Can they choose a couple?

FC: No, you have to choose one

out of all the possible choices. For example, of your total tax return, you may contribute “eight per thousand” (otto per mille, 0.8%) for religious institutions; “five per thousand” (0.5%) for social organizations; and “two per thousand” (0.2%) for political parties. So your contribution is in proportion to the taxes you pay.

Defacto: With this change, did parties receive more money or less money as a result?

FC: We don't yet know, because the next elections will be the first since the change. The system was based on a refund that was given to the parties on the basis of the votes that they received in the election. So it was like a refund of electoral expenses, by the state of course. The last elections were in 2013, so basically the parties had a refund of expenses that they incurred. Now things are going to change, starting from the next election.

Defacto: So the money depended on the number of seats gained in the election.

FC: Yes, I mean, so far parties get funds on the basis of the votes they got in the elections, but also through the free contributions of citizens.

Defacto: Do you know the percentages of each, like 80% from the state and 20% from private citizens?

FC: I have no specific data, but the greatest contribution was from the state.

Defacto: What I mean is, if you are very rich, you could contribute to the party, and your money could have an impact on the party's policy making, perhaps?

FC: There's a limit which was set as to the contribution that could be given to a party, so there is not one single person who could “buy” the party, or who could influence the political guidelines of the parties. The contribution limit is €100,000.

Defacto: So you have a very rich person, such as Silvio Berlusconi, who makes his own party and wins. In what way can he impact the party?

FC: With this new law, it's no longer possible. But before, it was possible for a rich person to—there was no limit, so he or she could give as much money as they wanted.

Defacto: But as of today—that is, before the new law goes into effect for the next election—€100,000 is still possible, yes?

FC: It's the limit, even for Berlusconi.

Defacto: Next, I would like to shift to addressing crime, specifically, your policies for fighting organized crime. For example, you have your anti-

corruption agency, your anti-mafia agency. How do these work?

FC: Our system is very different from the system that you have in Mongolia. The Ministry of Justice deals with the organization of the justice system and the prison system. The judiciary is an independent body because in Italy there is a straight separation between the branches of power. The anti-corruption authority is autonomous, and it does not depend on the Ministry of Justice and it does not have judicial powers. So it is different from what you have in Mongolia.

Defacto: Then does the system work well?

FC: The fight against corruption has been a very strong objective of recent governments. The fight against corruption has been undertaken by making more strict rules and by increasing the penalties, making them more severe for corruption offenses.

Defacto: Do the numbers show whether it has been a success, statistically.

FC: The anti-corruption authority has a role of prevention of corruption and of supervising the public contracts or public tenders. It also has an advisory function for public administration. For example, if in doubt on a certain case, a municipality can contact the anti-corruption authority asking for advice. That's how it has this preventative role.

Defacto: Can you tell whether the situation is improving or not, in regard to high-level corruption?

FC: In Italy, the problem of corruption is addressed from

a global point of view. We have decided to address this issue with great determination, and we have made the penalties stricter. We have engaged in activities concerning the prevention through our anti-corruption authorities. And we have decided to work in schools to change the mentality of children, and introduce a culture of legality. So we believe that through all of these things put together we are going to improve the situation.

Defacto: Regarding the safety of journalists who are reporting on important topics, or prosecutors who are prosecuting important criminal cases, are they protected?

FC: We have journalists who write about organized crime cases and they have to be, and they are, protected by the state because we believe in the freedom of the press.

Defacto: Are they physically protected?

FC: With escorts.

Defacto: It's very important to protect journalists. How does it work?

FC: In Italy, we have a body within the Ministry of the Interior that assesses the level of danger that a person is in, and, depending on the level of danger, a level of protection is provided by the state to the person. This protection is provided the whole time there is danger.

Defacto: But the danger could last for a long time: months, years maybe. Does the protection last as long?

FC: Yes.

Defacto: Have there been any cases where you could not

protect or the protection failed—for example, if the person was killed?

FC: No, over the recent times, I have no knowledge of people who have been killed.

Defacto: Turning now to prisons: In the Netherlands they are closing several prisons because there are no prisoners, and thus no need. What is the situation here?

FC: Not the same.

Defacto: I see.

FC: In Italy, we have overcome the time when prisons were overcrowded. Now the situation is normal. During this legislature and the past governments, lawmakers have introduced innovations in the prison system. We have gone from a system where prisoners stayed in their cells to one where prisoners can leave their cells and engage in activities.

Obviously this system cannot be applied to all prisoners, especially to those who have committed very serious offenses and who are dangerous—for example, those who have engaged in organized crime. So that's not possible. But our constitution says that penalties should have the function of rehabilitating offenders.

The original interview was conducted in English via an Italian translator and broadcast in 21st of February 2018. It has been edited for clarity and space.

You can watch the full 30-minute interview at www.jargaldefacto.com



DeFacto **REVIEW**

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PROBLEMS RELATED TO THE CONSTITUTIONAL COURT OF MONGOLIA



D.Odbayar



THE CONSTITUTIONAL COURT OF MONGOLIA

The abolition of certain provisions of the Minerals Law and the detention of the chairman of the Constitutional Court, Mr. D.Odbayar being in South Korea directed significant attention towards the court in recent days. The Constitutional Court derives the prerogative to review the constitutionality of legislation and actions of public officials from the Mongolian Constitution provided that this review and subsequent judgement are not politically motivated. This decision by the court abolished royalties on minerals and while there are claims that this decision violated previous legislation leading to this decision being void, there is no reliable indication to this as of yet. With this said, there is no denying that the decision will have a significant impact on the economy.

In determining whether the decision was driven by the constitution or political motivations, we may refer to the interpretations of constitutional amendments on the basis of which the decision was reached. The first clause that was cited was a general one which state that the state shall regulate the economy with a view towards social development and means of production. In addition to this, the state duty principle clause regarding state provision of conditions for upholding human rights was also cited. In order to evaluate the decision which has

been fully published on www.legalinfo.mn, we must determine whether the interpretation of these clauses are valid but there don't seem to be compelling arguments for reaching the decision.

In tracing the judicial history of the decision, we uncover that it relied heavily on policy documents rather than theories and Parliamentary acts as is common practice. There is no denying that taxation is an economic issue and in general, Constitutional courts from around the world have established a precedent of self-restraint in rendering decisions on issues surrounding the economy and politics. The President's Chief of Staff and Finance Minister Ch.Khurelbaatar have expressed reservations regarding the decision as the deadline for approving the budget for the next fiscal year is fast approaching and this decision creates a volatile environment whereby the budget may have glaring issues if these new developments are not reflected.

The Chairman of the Constitutional Court was detained in at Incheon airport and it needs to be stressed that sexual harassment in the workplace is inappropriate conduct, especially for public officials. If the alleged incident occurred, the Public Service Law includes stipulations on the prohibition of sexual harassment for civil servants

and provides for disciplinary actions including but not limited to removal from office. The one concern this case raises is that these forms of disciplinary actions are usually enforced by the highest ranking official within an organization so it is unclear who would enforce it in the case of the Chairman of the Constitutional Court. Moreover, the Constitutional Court does not possess its own ethics codes or codes of conduct that regulate these processes.

While there is little legal recourse, if the incident took place, it is expected that the Chairman will voluntarily offer his resignation without needing political or societal pressure. It would have been a different case if he was involved in criminal activities as there are laws that govern criminal activities of public officials. As sexual harassment is not regarded as a crime or misdemeanor under Mongolian legislation, it is more of an ethical issue.

MEDIA FREEDOM CONCERNS: MINISTER OF JUSTICE SPYING ON JOURNALISTS

Government surveillance of journalists is not a new issue with 8 journalists were subject to surveillance in 2018 and the issue was raised again during the Journalistic Ethics Forum. The issue was first brought to the public attention in April 2018 when the General Intelligence Agency disclosed that it was investigating two police officers for illegal surveillance of journalists without proper authorization from prosecutors. This time, the issue was raised by a member of Parliament and the General Police Office also made a statement on them.

According to the statement from the General Police Authority, a case was initiated against two intelligence officers two years ago and was later closed due to lack of grounds. The officers in question have been reinstated to their posts but there are many lingering questions regarding the issue from the public and the media. Given that press freedom is a fundamental building block of

democracy, I believe that the police should divulge significantly more information to the public. The right to obtain information from a diverse and free media with the capacity to operate without fear of government reprisal is an institutional right in a functioning democracy.

There are specific regulations and procedures within the police and Prosecutor's office regarding lawful surveillance of individuals. In this instance however, these procedures don't seem to have been followed and it is not clear whether the journalists were subject to any criminal inquiry. When the incident first emerged the Journalists' Association stated that they would lodge complaints with the Ministry of Justice and the General Police Authority but both entities have declined to comment on the complaint.

FORMER MPP OFFICIALS GIVEN FOUR-YEAR SENTENCES FOR ELECTION FRAUD

The "60 billion MNT conspiracy" case was held and defendants Ts. Sandui and A. Ganbaatar were convicted of electoral fraud rather than conspiracy to obtain high-level offices and received four-year sentences. This is a disheartening case as the sale of government offices to individuals in an effort to obtain campaign funding is detrimental to the very ideals of a democratic society. However, in a functioning democracy, the Rule of Law and due process should be upheld regardless of offences. Against this backdrop, the decision to convict on the lesser charge of electoral fraud when neither the defense nor the prosecution discussed this avenue in their arguments came as a surprise to many.



Ts. Sandui

A. Ganbaatar

In a normal judicial proceeding, the prosecution would indict individuals for a specific crime and the defense would articulate their position accordingly. With the courts sentencing the defendants to a different crime for which the defendants have not been indicted, it is a severe violation of the defendants' right to a fair trial as they would have not been privy to complete information regarding the indictment. It is therefore my hope that both the prosecution and the defense will seek to bring this case to an appellate court and that their decision can rectify this miscarriage of justice and restore some semblance of judicial integrity.

The Rule of Law is a founding principle of a democratic constitutional country which stipulates that the law shall serve as the supreme authority of the land regardless of the status of the defendant. Given the unexpected unilateral decision by the judges to reclassify the crime, it is safe to state that the Rule of Law was clearly violated. There is however another issue of the proximity to the statute of limitations in the case running out but this issue needs to be resolved in some manner and new procedures need to take place in accordance with the criminal code.

The Criminal Code reform has been ongoing for an extended period of time, since 2012 and Parliament set a 4-year sentence for electoral fraud which I don't believe is an insignificant sentence. The basic principle upon which our courts are founded upon is independence from external influences. The Constitution holds that the General Judicial Council shall provide all necessary conditions for the judiciary to operate independently but this office is only staffed with five individuals appointed by the Presi-

dent. Moreover, the Judicial Ethics Commission attached to the entity as well as the Chairman of the Independent Authority Against Corruption and the Prosecutor General are also appointed by the President's Office.

This raises concerns over the amount of judicial influence that seems to be concentrated with the President. The current constitutional amendments in discussion will attempt to dilute this influence through measures such as doubling the size of the General Judicial Council to 10 and diversifying the entities from which they are appointed. These amendments would also seek to establish a more effective checks and balances framework by limiting of certain Presidential extra constitutional prerogatives. Since the establishment of the Office of the Presidents, its holders have sought to consolidate their power and influence through legislations to grant them powers outside of the constitution and the current constitutional amendments seek to minimize these.

This review has been edited here for space and clarity. You can watch the full 30-minute review on the Defacto website [\[HERE\]](#).

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