ASSESSMENT OF THE PERFORMANCE OF THE 1992 CONSTITUTION OF MONGOLIA

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The research team composed of Ch.Enkhbaatar, Tom Ginsburg, P.Amarjargal, Ts.Davaadulam, G.Zoljargal, and D.Solongo started its work to assess the performance of the 1992 Constitution of Mongolia in August 2013 – a study commissioned by the project "Support to Participatory Legislative Processes" implemented jointly by the Parliament of Mongolia and the United Nations Development Programme. The research team assisted the Parliamentary Working Group headed by Mr. L.Tsog, Vice Speaker of the Parliament, whose task was to review whether constitutional amendments were necessary or not, in preparation of its recommendations. An interim research report, which covered the constitutional events through 30 June 2014 was published under the title "The Role of the Constitution of Mongolia in Consolidating Democracy: An Analysis".

The team is now presenting its product of the second phase of the research, which has been enriched by the analyses of the constitutional events in Mongolia in the last two years and the issues that were not sufficiently studied in the previous phase. Ch.Enkhbaatar, Tom Ginsburg, M.Batchimeg, Ts.Davaadulam and O.Munkhsaikhan worked on the updated version of the research report.

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Executive Summary

The Constitution of Mongolia, adopted in January 1992 as part of the country's transition to democracy, is now twenty five years old, making it one of the most stable constitutions in the world. This report, commissioned by the Parliament of Mongolia and the United Nations Development Programme, conducts an assessment of the performance of the constitution and the drafting process. It does so by tracing the history of constitutionally-significant events through several different phases.

Our overall assessment of the performance of the Constitution is positive. The Constitution was adopted to establish the basis for democracy and a market economy, and to improve human rights. Since 1990, Mongolia has conducted several democratic elections, and these have been generally peaceful. Human rights are generally well-respected, the media is free, and genuine political competition exists. The market economy is in place, even as the country's mineral wealth has created new challenges.

Because space and data limitations do not allow us to explore every area in equal depth, we focus especially on the performance of the political system and issues of state structure. We also evaluate the constitutional scheme along several "external" dimensions of performance, by which any constitution could be assessed: generating legitimacy for the government, channeling political conflict, providing a framework for limiting agency costs (limiting the government) and the creation of public goods (empowering the government).

We show that the Constitution has done a good job in terms of the first two objectives, and may be improving in terms of the third and fourth. In terms of legitimacy, there does appear to be a good deal of support for the overall system of government, even if particular political institutions are sometimes distrusted. Mongolia's people seem to value the Constitution, to the extent they know about it. As for channeling political conflict, major issues have been channeled through the institutions of the political system, which itself has evolved with the times. With the exception of the violence around the 2008 elections, protests have generally been peaceful, and even this instance showed the resilience of the Constitution. The emergency regime worked; constitutional rules were followed, and security officers involved in the violence were disciplined. The Constitution passed a major test.

In terms of the function of limiting government, the Constitution has performed decently though not perfectly. There has been good alternation of

parties in power at all levels of government, and two of the incumbent Presidents have lost bids for re-elections. While the report identifies some challenges in the area of human rights, the system of protection has been enhanced with a Human Rights Commission. There has, however, been a major problem of corruption. In addition, the overall scheme of executive-legislative relations leans very heavily toward parliament, which at times seems to be unconstrained in its exercise of power. There are not sufficient checks and balances in the system, and the system of constitutional adjudication has stalled. In short, while there are signs of improvement, we conclude that the constitutional scheme has been only partly successful in limiting government.

Public goods are those things that only government can provide: national security, public services, infrastructure, etc. While a constitution does not itself deliver social services or collect taxes, it does set up the incentive scheme within which politicians operate. The question is whether it encourages politicians to deliver policies that respond to public demand.

Overall, the answer in Mongolia is a qualified yes. In some areas, such as national security, the Constitution has succeeded in providing a stable basis for a truly independent Mongolia. In other areas, political instability caused by short government life has spilled over into policy instability. There has been a good deal of experimentation at the sub-constitutional level in both the content of policy and the mechanisms of service delivery. Some policy areas have been decentralized and recentralized, leading to inconsistent application.

The budget process is not sufficiently supported on a technical level, and the division of labor between the parliament and government has not been clear. This has led to parliamentary modification of budgets from time to time, and directly contributed to deficit spending. Some also criticize the political process as populist. While there is some truth to this criticism, it also reflects the fact that the government is competing with the opposition to be more responsive to the people. Overall, on this metric of providing public goods, Mongolia's constitutional scheme has performed decently but there is also room for improvement.

Our overall view is that the 1992 Constitution has been generally successful in terms of its initial objectives, as well as on the external criteria which we identify. We do, however, identify a number of potential changes which might be considered as Mongolia moves to a new stage in its development.

All constitutions face challenges not fully anticipated by their drafters. In the case of Mongolia, two challenges stand out. First, the major constitutional issue of whether MPs can simultaneously serve in government has absorbed

political attention since a 1996 Constitutional Court case required the separation of government from parliament. While this issue was briefly considered during the drafting debates, no one expected it to be so contentious in practice, or to take up so much political energy. Several amendments in 2000 failed to satisfactorily stabilize the system of executive-legislative relations, and there are many criticisms of their operation. However, there is not yet complete agreement as to how to address the problems of the political system.

The second challenge has been the discovery of minerals which have completely changed Mongolia's economic structure and have challenged the governance system. Whether Mongolia's system can cope with this challenge will likely be a very important issue in the immediate future.

Every constitution must change over time to keep pace with the society. Mongolia is a very different place today than it was in 1991, when the current document was drafted. Current political debate focuses around a small number of potential amendments to the Constitution. We hope that our report can inform this debate and highlight some other potential amendments that might be considered should the political leadership decide that a revision of the Constitution is in order. We also note that the current constitution has the potential to be used in greater depth to meet Mongolia's current challenges. Many of these challenges can be addressed through sub-constitutional legislation, organic law, and political practice as embodied in common understandings among the main political actors.

Our specific recommendations for possible constitutional amendments are listed at the end of this document. We believe that it is appropriate to introduce some restrictions on MPs serving in the Government, along with other changes to focus the State Great Hural on its primary tasks of passing legislation and engaging in oversight. We suggest that staggering presidential and parliamentary elections on a two-year cycle would be an appropriate change to consider, and we also believe that language about presidential elections should be clarified. We also recommend changes to the scheme of local government, including the creation of a category of "city" to recognize the growing urbanization outside Ulaanbaatar, and consideration of having non-partisan elections at the local level. The jurisdiction of the Constitutional Court and its relationship with the State Great Hural is an area in which attention is needed, both to consider a greater role in human rights protection and to more effectively resolve disagreements about the meaning of the Constitution. We also recommend a number of other minor amendments to clarify the constitutional language. We believe that these changes can provide a sound basis for Mongolia's constitution to endure for at least twenty five years and beyond.

Introduction

Mongolia's political system has received well-deserved attention as one of the most successful examples of democratization in the Asian region. Since 1990, Mongolia has undergone peaceful constitutional change and has conducted several democratic elections. With the important exception of the parliamentary elections in 2008, these elections have been conducted peacefully. Human rights are well-respected, the media is free, and genuine political competition exists. These successes are all the more remarkable given that constitutional democracy has developed "without prerequisites,"[1] that is, without a previous history of democracy or social pluralism, which some believe to be necessary for democracy to flourish.

The Constitution of Mongolia was drafted between 1990 and 1992 by a twenty-member multi-party Constitutional Drafting Commission, chaired by President P.Ochirbat, the leading lawyer B.Chimid serving as Secretary. It was debated by the Baga Hural four times, discussed in public for three months, and debated at the end of 1991 by the People's Great Hural for 70 days, and promulgated on 13 January 1992.

Mongolia's democratization has proceeded under the auspices of the 1992 Constitution. That document is now 25 years old, which itself can be considered a great achievement, in that most national constitutions do not last so long.[2] The overall objective, according to those involved in the process, was to provide a legal basis for the transition to democracy, the protection of human rights, and economic development, through an economy with a market component. The deeper motivation was to develop, for the first time in modern history, a truly independent political system for Mongolia after decades of Soviet dominance. These goals are reflected in the language of the preamble: "Strengthening the independence and sovereignty of the nation; cherishing human rights and freedoms, justice, and national unity; inheriting the traditions

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[1] M. Steven Fish, "Mongolia: Democracy Without Prerequisites," *Journal of Democracy* 9, no. 3 (1998): 127.

[2] Zachary Elkins, Tom Ginsburg, and James Melton, *The Endurance of National Constitutions*, 43880th edition (Cambridge ; New York: Cambridge University Press, 2009). This data shows that, for all countries since 1789, roughly 25% of constitutions are replaced before the age of 6; 50% before the age of 15; and only 25% live to the age of 32. There are interesting regional variations; constitutions are more enduring in Western Europe and less enduring in Latin America. East Asian constitutions tend to be quite enduring after 1945.

of national statehood, history, and culture; respecting the accomplishments of human civilization; and aspiring toward the supreme objective of building a humane, civil and democratic society in the country." In all these objectives, the Constitution has been by any measure quite successful. Mongolia's democracy is vigorous and the economy has developed. There have been many elections and multiple alternations in power. Several new institutions have been established in accordance with constitutional requirements. And the country has a level of international independence not experienced for centuries.

The country has changed greatly under the constitutional regime in the last 25 years. The party system has evolved; political and governmental institutions have developed; the economy has grown; and the discovery of mineral wealth has changed the economic structure dramatically. On the other hand, the country's newfound mineral wealth is both a source of great hope and new tensions. The newfound wealth has put strains on the political system because of allegations of bureaucratic and political corruption, a tendency toward populist politics, and questions about the distribution of wealth. Some assert that Mongolia's political party system is increasingly not about policy so much as competing networks of elites. Inequality has been a major factor throughout the post-1992 period, and is growing. While the country's elite grow wealthier, the unemployment rate remains stubbornly high at around 10 percent, with one in four young people unemployed. The poverty rate in 2013 was 27.4 per cent.[3] This is an important contextual factor for thinking about the challenges to the Constitution in the next period. In particular, if unaddressed, economic and social inequality will harm the legitimacy of the Constitution and the governance system more broadly.

In order to contribute to discussions about possible amendments to the Constitution, we have studied some proposals in this regard with special attention. Overall, it seeks to evaluate the overall functioning of the system in light of its declared objectives as well as external performance criteria. Because of limitations of data, time and space, we do not cover all potential topics in equal depth, but focus special attention on the political system and issues of state structure. Furthermore, some issues of constitutional significance require further in-depth study to gather basic data. We discuss these at the end of our report. Our report should thus be considered the beginning of a process of assessment rather than the final word.

[3] National Statistical Office, 2013.

Overview of Methodology and Criteria for Evaluation

Before discussing the Mongolian experience, we need to define the criteria by which one might evaluate constitutions in general. It is important to recognize that constitutions provide a framework for government and regulate relations between citizens and state, but do not dictate every decision or action. In our analysis, we will focus on the things that the Constitution can do, but also be aware of the things that it cannot do. The Constitution should neither be blamed for every bad policy choice, nor given credit for every good one.

Our general focus will be on the impact of the formal constitutional text and the system of government it created. However, in some instances, we will also consider things that were left out of the Constitution, and ask whether constitutionalization might have made a difference. While we will discuss some statutes and court decisions that are of constitutional relevance, we are not providing a complete overview of the legal or political system, but instead try to limit the analysis to areas in which different constitutional choices in 1992 might have affected outcomes.

We recognize that constitutions have many functions.[4] They can be "operating manuals", designed to set up institutions and determine their operation, but can also be "blueprints", which express goals and aspirations toward which the system tries to move over time. Constitutions can also be "billboards" designed only to communicate information to the outside world; they don't change policy or institutions but simply announce them. These different functions are important to take into account in assessing performance.

Constitutions can be assessed on their own terms. Did the institutions that are mentioned in the Constitution get set up? Have their promises been implemented? Constitutions are also designed to achieve broader goals, and can be assessed from an external perspective. At the broadest level, we suggest five such criteria for constitutional success. These are Endurance, Legitimacy, Channeling Political Conflict, Limiting Agency Costs, and Producing Public Goods. We discuss each in turn, and will return to these criteria at the end of this report.

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[4] Tom Ginsburg and Alberto Simpser, eds., "Introduction," in *Constitutions in Authoritarian Regimes* (Cambridge University Press, 2013).

Endurance

Certainly one simple measure of constitutional success is simple endurance. A constitutional text that is a poor fit for its society will be subject to pressures for change or replacement. Whatever the goals of constitutional designers, some level of stability is required to achieve them, and we know that enduring constitutions are correlated with other political goods.[5] But endurance on its own is obviously inadequate as a measure of success. Very bad constitutions can endure a long time, as can ones that have no real effects but are simply ignored. Although it is probably true that any constitution must endure for a minimal period to be effective (say at least four or five years), sometimes external events may undermine even a good constitution. Thus endurance must be combined with other measures of efficacy as a criteria for evaluating success. The real question is whether a constitution has enduring relevance for the population, and is not simply an empty piece of paper.

Legitimacy

Successful systems of government require some measure of legitimacy among the general public. In the short term, popular disaffection from the state can make it difficult to carry out policy initiatives. In the long term, illegitimate states are much more likely to rely on techniques of repression to sustain power. Constitutions can be a potent source of legitimacy. They can help to forge a common identity among the people by reflecting shared normative sentiments. They can help to facilitate participatory politics. They can reassure the public that their most important concerns – such as religion or language – will be protected by constitutional rights. And they can acquire a symbolic value that creates loyalty to the state.

Good constitutions produce political systems that are viewed by their citizens as successful, even if (or especially if) the citizens disagree with current government policy. In this sense, one good test of constitutional legitimacy might be the difference between citizens' views of their constitution and the popularity of the current government. Of course, such data may be very hard to obtain in any particular context. Furthermore, in the case of new constitutions or those in societies that have just undergone a change in political regime, citizens might have a difficult time distinguishing between legitimacy of the constitution and the government it produces. Still, as a conceptual matter, we can assess constitutions by their ability to produce legitimate systems of governments and

[5] Elkins, Ginsburg, and Melton, *The Endurance of National Constitutions*.

social order, in which even political losers agree on the rules of the game. How the people view the constitution is the ultimate test of its power.

Channeling Political Conflict

All societies have political disagreement. The question is how such disagreements are articulated and whether there are mechanisms for resolving them. Successful constitutions channel conflict through formal political and adjudicatory institutions, as opposed to having antagonists take disagreements to the street. They also protect citizens' rights, and so reduce the stakes of political disagreement. These functions require, at a minimum, that governmental institutions be established and functioning. This role of channeling political conflict is easiest to observe in its absence, and especially important in societies recovering from conflict. If political violence persists in the form of civil war, terrorism or riots, or if mass protests confront the post-constitutional government, then political conflict has not been effectively channeled.

Episodes of constitution-making can sometimes exacerbate social cleavages, especially if some forces are excluded from the constitution-making process. Events in Egypt since 2012, for example, reflect a deep social divide between forces loyal to ex-President Mohamed Morsi, and those other elements of Egyptian society who were deeply distrustful of him. The Constitution of 2012 was adopted after a process in which no consensus was achieved, even on the procedures to be used, and the results are evident to see: violence, repression, and a lack of legitimacy. In contrast, "big-tent" constitution-making can lead even bitter enemies to agree on the fundamental rules, and thus channel their disagreements through formal political institutions.

Key to containing and managing political conflict are mechanisms to lower the stakes of electoral loss.[6] If a constitution permits some stakeholders – be they political factions, members of an ethnic group, or even a single dictator – to dominate others after assuming office, those out of power lose the incentive to stay within the bounds of constitutional competition. If the costs of losing in politics are too high, incumbents will respond by entrenching their political power or otherwise refusing to vacate their offices. Thus, making sure that the winners do not have too much power is a central goal of constitutional democracy. Political institutions help to play this role. So do constitutional rights.

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[6] Aziz Huq and Tom Ginsburg, "The Afghan Constitution at Ten: What Constitutions Can and Cannot Do," *Journal of Democracy* 24 (January 2014): 116; Barry R. Weingast, "The Political Foundations of Democracy and the Rule of Law," *The American Political Science Review* 91, no. 2 (1997): 245–63.

Simply establishing political institutions that can operate as alternatives to open conflict is not sufficient, however. Poorly designed parliamentary bodies or electoral rules may provide new forms of representation but can also deepen existing divisions, accelerating what would otherwise have been latent conflicts. Poorly drafted, ambiguous, or merely incomplete constitutional texts may generate new sources of conflict. The task of the constitutional designer, in short, is to create rules and institutions to channel existing conflicts without exacerbating them or creating new ones. And a constitution can be assessed by its ability to channel conflicts, recognizing that eliminating political conflict is impossible.

Limiting Agency Costs

A major goal of constitutionalism is to ensure that government and those who have the privilege of serving in government act on behalf of the citizens rather than themselves. Agency costs, as the economists call them, come in many forms, and occur when a government official either works on his own behalf, or doesn't do any work at all. One major form of this problem is political entrenchment, in which an office-holder or party seeks to remain in power beyond his or her legitimate term. Government abuse of citizens' rights is another cost. Yet another problem is corruption, in which government officials use their offices to enrich themselves at the expense of the public. Many constitutional institutions and concepts – from the separation of powers to term limits to anti-corruption commissions – are designed to reduce the negative costs of government. Constitutions are designed to create a set of control mechanisms, checks and balances, to ensure the application of constitutional principles.[7] A good constitution provides mechanisms for monitoring the performance of government agents, and for punishing bad behavior. This punishment could involve being voted out of office, suffering a criminal or civil penalty from the courts, or a reduction in power. The rule of law, which ensures that government agents follow the rules, and the courts serve as a neutral enforcer, is essential to reduce agency costs.

One measure of agency costs is government turnover. When government performs poorly, it should be removed from office. When term limits provide that political figures must leave office, we can observe whether they do in fact leave. (To be sure, sometimes term limits can be amended, and this is hardly a sign of constitutional failure, so long as the result is not the permanent entrenchment of the relevant office-holder).

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[7] Juliane Kokott and Martin Kasper, "Ensuring Constitutional Efficacy," in *The Oxford Handbook of Comparative Constitutional Law*, ed. Michel Rosenfeld and Andras Sajo (Oxford University Press, 2012).

Another measure is the level of corruption. While in some contexts, petty corruption might be beyond the ability of any constitutional scheme to eliminate, grand corruption by high-level political figures and government officials is something that an effective constitution should be able to minimize or reduce. Thus, we can expect improvement on corruption measures in successful constitutional schemes, while poor constitutional schemes might exacerbate such measures. One might also examine specific efforts to limit government over-reach. Parliamentary investigations, judicial inquiries, and removal from office of corrupt officials are all indicia of some success in this regard.

Creating Public Goods

The flip side of agency costs is the need to empower government to produce things that only it can deliver. The very purpose of government is to produce those goods, such as national security, economic development and environmental protection, which are likely to be undersupplied or poorly distributed in a purely private context. The economists call these public goods. The precise mix of public goods that government delivers in any particular context should, ideally, depend on the preferences of the citizens. Furthermore, different kinds of public goods can be produced by various levels of government, with some things best produced at the national level (like a health insurance program) and others (like decisions on land use) best produced at the local level. Constitutions can help by providing the framework for an effective regulatory environment; a policy-making process that reflects public demands at the appropriate level; and a security apparatus (police and military) that is non-predatory. Of course it must be recognized that many of these outcomes bear only tangential relationship with particular constitutional choices, but nevertheless they do provide a metric for evaluating overall performance.

The Drafting Process

The 1992 Constitution was the fourth in the country's history, following those of 1924, 1940 and 1960.[8] The process of drafting the Constitution began in the aftermath of protests against one-party rule in December 1989. This led the ruling Mongolian People's Revolutionary Party (MPRP) to initiate a program of quick reform and adjustment, including the retirement of J.Batmunkh, the selection of P.Ochirbat as the Chair of the Presidium of the People's Great Hural, and the adoption of amendments the 1960 Constitution of the Mongolian People's Republic (MPR) in May 1990. These amendments provided for the establishment of parliament, multiparty elections, and the drafting of a new constitution. The parliament was to be composed of the People's Great Hural, which would be elected on the basis of districts, and would have the role of electing a president and approving a new Constitution. That body would also elect the members of the Small (Baga) Hural, which was to be the main body enacting legislation.[9] The reform package also included the drafting of a new constitution.[10]

Elections were held in July 1990, leading to the formation of a new government, and the creation of a 20-person constitutional drafting commission under the President P.Ochirbat. Four working groups were set up: human rights, headed by L.Tsog; state structure, headed by S.Bayar; economic and social matters, headed by M.Enkhsaikhan; and legal affairs, headed by J.Amarsanaa. The process was to include several stages: drafting, adoption by the Baga Hural, and ratification by the People's Great Hural.

The drafting commission then engaged in wide study, including surveying constitutions of over 100 different countries. It also solicited input from the

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[8] Like every constitution, legacies of earlier ones mattered for subsequent constitutions. In the Mongolian context, the separation of powers can be traced back to the "Oath agreement" between the Bogd Khan and the revolutionary People's Government of 1921, which set up a division of powers and duties between them. The Bogd Khan served as the head of state until his death in 1924, while the government exercised legislative, executive and judicial power. See D.Lundeejantsan, Separation of State Powers in Mongolia: Conceptual and practical issues, 2000, 179. [Mongolian]

[9] The Baga Hural had previously existed along with the State Great Hural in the Constitutions of 1924 and 1940, but was eliminated in the 1960 Constitution.

[10] See *Law on the Amendment to the* Constitution *of the Mongolian People's Republic (MPR)* discussed in J.Amarsanaa, O.Batsaikhan, the Constitution of Mongolia: Collection of documents with explanatory notes, 2004, 339 [Mongolian]. The design of the process is attributable largely to B.Chimid, who was at the time Secretary of the Presidium of the People's Great Hural.

public, with some accounts saying that more than 200,000 suggestions were received.[11] Study tours were taken to several countries. The commission struggled between proponents of a presidential system and parliamentary systems. The latter had the upper hand as the presidential system was seen as too congruent with the autocratic system, in which too much power was concentrated in one person's hands indefinitely. Drafters instead wanted a system with a separation of powers and checks and balances, and the protection of human rights was a key concern. In addition, there was some evidence that the public preferred a parliamentary system. At the same time, some wanted a directly elected president to serve as a representative and symbol of the state. Others were concerned that there was a risk of a directly elected president playing too partisan a role, which could again create a one party dictatorship.[12]

Other issues that arose early in the drafting process included the system of local government, whether to have one or two houses of parliament, and the role of Buddhism, which some wanted to reinstate as a state religion. This was rejected, but there is some constitutional text that uses Buddhist metaphors.

A draft constitution by the Baga Hural was made available in May 1991, and a modified version was published in June 1991 for public discussion through September 1. The draft was distributed widely, and the public was allowed to submit comments through local hurals.[13] The May and June 1991 drafts were called "Ih Tsaaz", invoking Chinggis Khan's code. These early drafts featured a unicameral State Great Hural, with members to be elected for 6 years, but on a staggered basis, with half the membership elected every three years. In terms of judicial independence, the May 1991 draft assigned the president to be head of the General Council of Courts, but the June draft assigned this task to the head of the Constitutional Tsets.

Local government was very contentious, especially the issue of territorial units. The needs for re-organization of the administrative units that featured the socialist economic management, regional economic development, and amalgamation of the economically unsustainable soums were discussed.

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[11] J.Amarsanaa, Current Situation and Future Trends of the Legal System of Mongolia, Mongolian Law Review 1 (1): 126 (2011) [Mongolian]

[12] B.Chimid, *Complex Issues Around the State, Party and Legal Reform.* Volume 1, UB., 2008, 16. [Mongolian]

[13] According to resolution No.35 of the Baga Hural of the Mongolian People's Republic dated 25 May, 1991, it was decided to release the draft Constitution for a public discussion for the period of 10 June – 1 September, 1991. The Constitutional Drafting Commission, the Government, and the local citizens' representatives' hurals of aimag, city, soum, and district as well as their chairmen were charged with this task. J.Amarsanaa, Founders of the Constitution, 113. [Mongolian]

Thought was given to reviving the old banner system of nine provinces, and the drafting commission at one point listed seven aimags. In the end, the aimag and soum system was retained from the previous era, as it was deemed to be less disruptive and the country did not have the economic and psychological preconditions for the re-organization of aimags.

During the summer of 1991, several foreign experts commented on the draft, including some supported by the International Commission of Jurists and the Asia Foundation. An international conference on the constitution was organized in September 1991, gathering further input. All this input helped to inform the final draft.[14] The Baga Hural formally considered and adopted the draft in the fall of 1991.

On November 11, 1991, the draft was sent to the People's Great Hural. The goal was to complete the adoption process within three weeks, but it took 76 days for the Great Hural members to discuss the draft. Debate focused on several issues, including the national symbol and whether the country should retain the name Mongolian People's Republic. The issue of the title of the constitution was also debated, with *Ih Tsaaz* being dropped.

The Great Hural debates made some changes to the political system, some of which were consequential. The term of the SGH was reduced to four years from six; the number of members and bicameralism were also discussed, though a unicameral system was retained in the end. A presidential system was debated and briefly accepted, but then the parliamentary proposal was revived, with indirect election of the president. The final configuration of the political system is similar to a semi-presidential model, with a directly elected president but a government headed by a prime minister responsible to parliament. Interestingly, in light of subsequent developments, the Great Hural considered whether to *require* all members of government to also be members of parliament or simply 1/3 of them, as had been the case during the interim government composed out of the Baga Hural. The final Constitution is silent on any such requirement.

In assessing the drafting process, one can say that many of the changes introduced by the Great Hural to the Baga Hural draft made the governing system a bit more incoherent. Whether a six-year or four-year term for the SGH was ideal, having complete turnover every 4 years rather than staggered elections has led to some dramatic political shifts in subsequent years, particularly in 2000. And rather than having a pure parliamentary system, a

[14] Among other comments received, some noted that the government was rather weak within the constitutional scheme.

model that is similar to the semi-presidential model was chosen, which we will assess in subsequent sections. A late change from an indirectly elected president to a directly elected president left some provisions in the constitution that were not completely clear. Finally, despite extensive debates on the re-organization of the administrative and territorial units, the final Constitution provided that this could be done only "based on the opinion of the respective local hural and local population". This has been criticized do date for creating a deadlock for administrative re-organization, as no local population is likely to propose to abolish their own soums.

No doubt the active role played by the Great Hural resulted from the members' sense of responsibility. This had been the first democratically elected Great Hural in Mongolian history, but it had played a minimal role in government between its election in 1990 and late 1991. Perhaps a more participatory process of drafting, or giving the Great Hural more of a role in governance for which the Baga Hural was the dominant player, would have made for less dramatic shifts at the end of the process. Regardless, the process of popular participation through the Great Hural led to some significant changes, and produced the first democratically drafted constitution in Mongolia's history.

The ideal role of participation in constitutional design has sometimes been described as resembling an hourglass.[15] At the beginning of the process there must be wide participation to select the drafters; in the middle of the process, there should be a small group that reflects the major political interests in the country to hammer out the details in a relatively closed setting. The final approval should again involve the wider interests. The Mongolian process resembled this perfectly. The initial election of the Great Hural was genuinely open. The MPRP gained the majority of votes in this election. Opposition groups played an active role in drafting and the final stage involved over 400 deputies of the Great Hural.

The Mongolian constitutional transition was accomplished very quickly and smoothly. The drafters included the country's best lawyers. A first draft was produced in a little over eight months, and the entire process from the formation of the drafting commission to final passage took 15 months, faster than in most countries. The draft was prepared in a manner that drew on the country's intellectual resources and engaging a wide set of actors. Through the speedy process and inclusiveness toward the new social forces during the drafting process, the MPRP managed to remain a major force able to form the first post-constitutional government.

[15] Jon Elster, "The Optimal Design of a Constituent Assembly" (College de France, May 2008).

As a matter of political culture, and possibly political necessity, it was understandable that the constitution contained a number of provisions reflecting the socialist legacy of the 1940 and 1960 Constitutions. The focus on parliamentary sovereignty is one example: Article 20 stipulates that the State Great Hural is the highest organ of state power (discussed further in Chapter 3).

In short, the constitution-making process is one that can be considered to be successful, in comparative terms. With a goal of facilitating a transition to a democracy and a market economy, the country's leaders came together. The process did not generate new cleavages, as happens in some constitution-making situations.

Political processes after the adoption of the 1992 Constitution

As in all countries, the Mongolian constitutional scheme has functioned differently depending on the party system. One can identify six different phases of the party system:

1. *Institutional establishment* (1992-96): The first post-constitutional election produced a government dominated by the MPRP. This meant there was some political continuity, but also real political competition. P.Ochirbat won the first direct presidential election in 1993 under the nomination of the Social Democratic Party and National Democratic Party. P.Ochirbat used his powers of veto to try to stop certain laws passed by the MPRP majority. Overall, this phase was marked by the establishment of new institutions and new patterns of political life, but the economic crisis consumed most of the attention of the government.

2. *Democratic Coalition governments* (1996-2000): In 1996, the former opposition parties formed a coalition and won 50 out of 76 seats in parliament. This was one seat short of the number needed to ensure a quorum, and the MPRP used its power to block certain bills. Government formation was complicated by the suit brought by D.Lamjav, concerning the relations between government and parliament (discussed extensively in the next chapter). Disagreements within the governing coalition were exacerbated after MPRP N.Bagabandi won the presidential election in 1997. During the next three years, N.Bagabandi repeatedly rejected two prime ministerial candidates, G.Ganhuyag and D.Ganbold, and governments were short-lived.

3. *MPRP Comeback* (2000-2004). Frustration with the coalition led to the comeback of the MPRP. Securing just above 50 percent of the popular vote in national and local elections, the MPRP won a landslide victory in both, with 72 out of 76 seats in the State Great Hural. N.Enkhbayar became prime minister. Several constitutional amendments passed in the year 2000 resolved the formal crisis over government formation.

4. *Period of Coalitions and Political Crises* (2004-2012): After a deadlocked election, a grand coalition was formed in 2004 under Ts.Elbegdorj; former Prime Minister N.Enkhbayar won the presidency in 2005. By 2006, the grand coalition had fallen apart and the MPRP retook the Prime Ministership, first under M.Enkhbold and then under S.Bayar. The 2008 election was marred

by violence, and a state of emergency was declared. Eventually, after a stalemate of nearly two months, the new Parliament took office, paving the way for the formation of a MPRP-DP coalition government. In the new government headed by MPRP leader S.Bayar, the DP was offered six Cabinet positions, 40 percent of the posts, including the position of first deputy premier. Thus a clear winner voluntarily gave up the constitutional right to form a single-party government. The desire to avoid paralysis and a much needed revision of the minerals law (not achievable without DP support) was part of the reason for this concession on the part of MPRP. In addition, the violence of 2008 was sobering, revealing the risks of continuing political conflict. Ts.Elbegdorj won the presidency in 2009.

5. *The Democratic Party as the parliamentary majority* (2012-2016): The DP won the plurality of seats in the parliamentary elections of 2012 (31 seats out of 76, versus 25 seats for the Mongolian People's Party (former MPRP)), and established a coalition government with (new) MPRP (the party which was formed by a group of people who disagreed with the change of the party name, established the party under the same acronym as MPRP) and the "Justice" Coalition of the Mongolian National Democratic Party. 14 out of 19 Cabinet Members were members of the DP, while the remaining 5 were members of the "Justice" Coalition. The Mongolian People's Party (MPP) became a strong opposition. Fights between the factions within the DP resulted in the dissolution of the Government headed by N.Altankhuyag. Representatives of the opposition were invited to the next Cabinet, and the majority DP established a new coalition government with the MPP and the "Justice" Coalition. However, after 9 months this coalition collapsed, and the DP jointly with the "Justice" Coalition and the Civil Will-Green Party to form a new coalition Government. Ts.Elbegdorj was re-elected as the President of Mongolia in 2013.

6. *The Mongolian People's Party as the parliamentary majority* (from 2016 until now): In the 2016 parliamentary elections, the MPP won the majority or 65 seats out of 76 seats, and as the ruling party was able to form the Government on its own. This was the second time that the MPP (or its predecessor MPRP) won an overwhelming majority of the seats in elections which were preceded by the DP's dismissal of its own government due to conflicts between its factions. It is too early to consider this as the regular course of events; however, the DP needs to learn a relevant lesson from it.

Chapter One
Sovereignty of Mongolia

Introduction

With their long history of statehood and empire, and their contributions to the history of mankind, Mongolians traditionally place great value on national independence and sovereignty. After internal strife led to Mongolia's becoming a dependency of the Manchu state in the 17th century, a period of decay lasted until recently. It was vital for Mongolians to recuperate and strengthen their national independence, which could be evidenced in their continuous efforts in this direction throughout the 20th century. The historical importance of the proclamation of independence in 1911 must be celebrated, along with the consolidation of independence in the first Constitution of 1924. But in reality it required another 70 years for the country to become a genuinely sovereign independent state, and historical evidence confirms that one of the prime goals of the 1990 White Horse Year democratic revolution was to strengthen national freedom and independence.

It is important to recognize that the 1992 Constitution played a vital historic role in completing the whole century-long struggle for national independence; it is also important to further consolidate the successes and achievements, and to conduct more research in this area.

Chapter One of the Constitution declared that "Mongolia is an independent, sovereign republic" and this entire chapter has specified fundamental principles and approaches to realize this declaration. In particular, it addresses such issues as the unity of Mongolia; the inviolability of territorial integrity and frontiers; the prohibition on the stationing or transit of foreign troops on the country's territory without legislative authorization; the need to ensure economic security; requiring state protection of livestock as the basis of the national economy and cultural tradition; the state protection and public ownership of the land and its resources; land ownership only by citizens; and the requirement that Mongolia should not abide by any international treaty or other instruments incompatible with its Constitution and a peaceful foreign policy.

It should be specifically noted that issues related to sovereignty and independence are not limited only to Chapter One of the Constitution, but also

that the whole of the Constitution and the legislation of Mongolia, adopted within the framework of the Constitution, are directly related to the consolidation of national independence and security. It is important to research the inter-relationship of the Constitution and other related legal instruments with national security. There is limited research in this area, no doubt because any such research would take time and require extensive conceptual and empirical effort.

This chapter will consider issues related to the content of the Chapter One of the Constitution, as well as fundamental principles, major provisions, the constitutional state structure of parliamentary system, division of state power, and the impact of the National Security Council on the strengthening sovereignty, independence and national security.

The first National Security Concept was adopted in 1994, two years after the adoption of the 1992 Constitution of Mongolia; in 2010 the State Great Hural adopted the revised concept. Section 1.2.3 of the National Security Concept of 2010 defines the components of national security, identifying six interrelated themes, such as “existential security”, “economic security”, “internal security”, “human security”, “ecological security” and “information security”. Of these, “existential security”, “internal security” and “economic security” issues have a direct connection with Chapter One of the Constitution and accordingly the content of this chapter will be limited to those topics.

Existential Security

The following issues of “existential security” of the National Security Concept, adopted by the SGH in 2010, have been clearly specified in Chapter One of the Constitution. Thus:

1. Mongolia is an independent, sovereign republic. (Article 1.1 of the Constitution)
2. The territorial integrity and frontiers of Mongolia shall be inviolable (Article 4.1 of the Constitution)
3. The frontiers of Mongolia shall be fixed by law (Article 4.2 of the Constitution)
4. The stationing of foreign troops in the territory of Mongolia, and allowing them to cross the state frontier for the purpose of passing through the country's territory shall be prohibited unless an appropriate law is adopted (Article 4.3 of the Constitution)
5. Mongolia shall adhere to the universally recognized norms and principles of international law and pursue a peaceful foreign policy (Article 10.1 of the Constitution)

6. Mongolia shall not abide by any international treaty or other instruments incompatible with its Constitution (Article 10.4 of the Constitution)
7. Mongolia shall have armed forces for self-defense (Article 11.1 of the Constitution)
8. The historical, cultural, scientific and intellectual heritage of the Mongolian people shall be under State protection (Article 7.1 of the Constitution).

There is a wide range of theoretical and definitional debates with regard to the meaning of national sovereignty, but according to international law there is a common understanding that it is the "highest authority of the state to pursue within the territory of country", and it is understood to include the right to establish an independent policy and position in foreign relations, so as to uphold its national interest.[16]

Under this definition, it is difficult to consider that, prior to 1990, Mongolia was a truly independent state fully exercising its sovereignty. Soviet troops were stationed in the territory of Mongolia, Soviet citizens were liable only to Soviet law but not Mongolian,[17] and the country's foreign relations favored the interest of the Soviet-led socialist camp, rather than the national interest of Mongolia.

From the end of the 1980s, tangible changes in international relations, including the end of the cold war era, have laid the foundation for qualitative changes not only in the Soviet-Mongolian bilateral relationship but in the external environment of Mongolian security. Furthermore, Soviet troops were withdrawn from Mongolia and there emerged an opportunity to develop relations with the country's neighbors, upholding the national interest and transitioning toward a new political system, granting power to the country's own people. All these accomplishments were consolidated in the 1992 Constitution. The primary documents adopted within the framework of the Constitution, such as the National Security Concept (1994, 2010), Foreign Policy Concept (1994, 2011), Bases of State Military Policy (1994), and State Defense Policy (2016) have become the basis of the state policy of strengthening national security and activities to safeguard the independence, sovereignty and security of Mongolia.

As specified in these important policy documents, the safeguarding of Mongolia's security and vital national interests should be pursued by political and diplomatic means during peacetime, and consistent with this approach,

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[16] Daniel Philpott, "Sovereignty," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Summer 2016 (Metaphysics Research Lab, Stanford University, 2016), https://plato.stanford.edu/archives/sum2016/entries/sovereignty/; Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton University Press, 1999).

[17] B. Chimid, Upholding the Constitution (four statements addressed to elites and everyone) (UB, 2006), 63.

Mongolia has been pursuing a multi-pillar, active foreign policy. During the 25 years since the adoption of the Constitution, Mongolia has made many important achievements in its foreign policy and in its international relations. Major achievements include:

1. It was agreed in the 1993 “Treaty of Friendly Relations and Cooperation of Mongolia and the Russian Federation” that the two countries would recognize and respect each other’s independence and national interest within the universal norms of international law, and that they would develop relations and cooperation as independent states. The following year, in 1994, the Treaty of Friendly Relations and Cooperation was concluded between Mongolia and the People’s Republic of China following similar principles. These Treaties, concluded within the spirit and principles of the Constitution, are the legal basis of Mongolia’s relations with its two neighbors and an international guarantee for recognition of Mongolia’s independence and sovereignty.

2. Mongolia adopted a “Law on nuclear weapon free zone of Mongolia” in 1992 within its policy of strengthening national security and keeping the territory free from nuclear disaster, and in 2000, a United Nations General Assembly Resolution recognized Mongolia’s international security and non-nuclear-weapons status. With the support of the five permanent representatives to the UN, the five nuclear weapon states, this has become an important step towards the strengthening Mongolia’s international position and security.

3. Within the multi-pillar foreign policy, Mongolia is pursuing an active policy of developing “third neighbor” relations with economically developed democratic countries, in addition to its two neighbors. This has played an important role in the establishment of the democratic system and the economic development of Mongolia.

4. Development of multilateral cooperation in the area of security and the active participation of Mongol soldiers in international peace keeping have contributed to the strengthening of Mongolia’s position in the international arena and the development of military-political cooperation.

5. The constitutional principle of having armed forces for self-defense has put an end to the dispute about whether there is a need for Mongolia to have permanent army, which was a topic of discussion since the beginning of the 1990s, and furthermore the principle has become the legal basis for the development of a national defense system and armed forces.

6. Within the framework of the constitutional principle of fixing the national frontiers by law, the SGH has adopted a Law on Frontiers, followed by

joint frontier check with the two neighbors, establishing border lines and concluding border regime treaties.[18] These were tangible steps towards the safeguarding of the integrity of the territory and the inviolability of the frontiers. In spite of some civilian breaches of a criminal nature, Mongolia does not have any border disputes with its neighbor countries and maintains successful cooperation with them as regard to frontier protection.

Parliamentary system as guarantee of Mongolian sovereignty

Chapter Three deals with the state structure of Mongolia and analyzes in detail the theoretical and practical issues as to whether Mongolia has parliamentary system or semi-presidential system.

At the international level, there are widespread studies, comparing the advantages and disadvantages of presidential and parliamentary systems, including of their different impact on national security.[19] It should be noted that there is no universally superior form of political system and even a good system cannot solve problems alone. Because of the influence of historical, environmental and human factors, countries with similar systems may experience different outcomes in their development.

We can preliminarily conclude that the parliamentary system in Mongolia has had a positive impact on strengthening national sovereignty and security. In making this preliminary conclusion, the following points were considered.

First, the parliamentary system provided an opportunity to take decisions on many vital issues of national security, considering public aspirations through multi-party consensus and public discussions, rather than relying only on the opinion and attitude of one leader. Thus, it could be considered that policies and decisions adopted after discussions with the participation of the majority are less vulnerable to the risks of outside influence, and therefore have a positive impact on the strengthening of national sovereignty. From this point of view, there is every reason to support the position of the drafters of the 1992 Constitution.

Second, comparative political researchers consider that the parliamentary system has more impact on the maturity of democracy than the presidential

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[18] "Intergovernmental Treaty on Mongolian-Russian frontier regime" (2007); "Inter governmental Treaty on Mongolian-Chinese frontier regime" (2010). [Mongolian]

[19] Scott Mainwaring and Matthew Soberg Shugart, "Juan LInz, Presidentialism, and Democracy: A Critical Appraisal," *Comparative Politics* 29, no. 4 (July 1997): 449–71; Alexandra R. Harrington, "Presidential Powers Revisited: An Analysis of the Constitutional Powers of the Executive and Legislative Branches Over the Reorganization and Conduct of the Executive Branch," SSRN Scholarly Paper (Rochester, NY: Social Science Research Network, 2007), https://papers.ssrn.com/abstract=1299999.

system.[20] Some support for this proposition can be found in the experience of the Central Asian countries, which shows that the presidential system is more prone to reversions to dictatorship or authoritarianism, as they selected presidential system to establish their independent states after the collapse of the Soviet Union. As for Mongolia, democratic political system as being the guarantee of its national security, especially including its sovereignty and desire for further development, the selection of parliamentary system had a positive impact on the consolidation of Mongolian democracy and furthermore strengthening its national security.

Third, any decisions taken at a parliamentary level with the consensus of political parties tends to be enduring. Continuity of policy has been relatively apparent in such fundamental documents, adopted by the SGH, as the National Security Concept, Foreign Policy Concept, State Military Policy, and the State Defense Policy, and during the past 25 years there have been fewer disagreements on major foreign policy issues among the main political parties, which could be considered to be the result of the parliamentary system.

Fourth, in the presidential system, the president is elected by all citizens and leads the executive branch, but faces a legislative branch also elected by citizens, so both institutions exercise significant power, and accordingly there is a real possibility of continuous conflicts and fights between them. Especially when a president and the majority of parliament belong to different political parties, the situation may become problematic, and researchers have determined that when the dispute between the two institutions intensifies then there is increasing possibility of involving the army to settle the conflict.[21] As for Mongolia, although the president is elected from the people, the executive branch is led by Prime Minister, appointed by the parliament, which provides an opportunity to avoid the critical conflicts and crises of a pure presidential system.[22] Thus we can conclude that the parliamentary system in Mongolia serves positively to safeguard national unity and social stability.

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[20] Matthew Soberg Shugart and John M. Carey, *Presidents and Assemblies: Constitutional Design and Electoral Dynamics*, First Edition (Cambridge England ; New York: Cambridge University Press, 1992), 36–42.

[21] Juan J. Linz, "Democracy: Presidential or Parliamentary (Does It Make a Difference?)" (July 1985), http://pdf.usaid.gov/pdf_docs/PNABJ524.pdf.

[22] In majority of democratic countries, parliament does not make any appointment and the constitution of many countries specify that prime minister shall be "elected". There is logic that appointment should be made by subject which can be accountable and the parliament could not accountable for its wrong appointment. There is a need to change the provision of the Constitution of Mongolia and other relevant legislations which specify the appointment of number of officials from the SGH.

Internal Security

The national security of any country is affected by external and internal environments. During the past 26 years, Mongolia has been pursuing an active, peaceful foreign policy and has made considerable achievements toward guaranteeing its sovereignty and strengthening its position in the international arena, but much research shows that Mongolia has faced a more complicated internal situation.

The National Security Concept specifically outlines the governance issue within the framework of internal security. An important factor for ensuring internal security is the establishment of a state, which protects the interest of its citizens and delivers services effectively, and is capable of supporting economic development, while being free of corruption, accountable, professional, and competent, with policy continuity.

According to a series of surveys conducted by the "Sant maral" foundation, Mongolian citizens' trust in the state is declining. In 2012 when the economic growth was high, about 54.9 percent of the respondents replied that they had "almost no trust or no trust at all that the government is doing the right thing"[23] and by 2016, the percentage of citizens sharing this opinion increased to 59.9 percent.[24] Subsequent surveys show that the majority of citizens blame the actions of the SGH, Government, politicians and political parties for the pressing political, economic and social problems.

As of October of 2015, 49.7 percent of businessmen replied that the corruption rate was high in the business environment and 58.2 percent of respondents said that the corruption rate was high in public services.[25] According to the opinion of experts, an influential factor for recent years' declining economic growth and foreign investment was the ineffective flabby attitude toward governance, as much as the fall off of commodity prices on the international market. And they have concluded that the reasons for startling investors were the instability of state policy and legal environment, inadequate enforcement of laws, the lack of understanding of administrative organizations at central and local levels with regard to the contribution of foreign and domestic

[23] "Political barometers" (Sant maral, 2012). [Mongolian]
[24] "Political barometers" (Sant maral and Konrad Adenauer Foundation, 2016). [Mongolian]
[25] "Survey on corruption in business environment" (Asia foundation, Sant maral, Foreign ministry of Canada, 2016). [Mongolian]

investment to society and economy, and the lack of a culture of communication with investors.[26]

67.2 percent of respondents of the "Sant maral" survey, conducted in March 2016 viewed that the democratic system was the right way to go, while 49.1 percent replied that the present democratic, political system of Mongolia was not satisfactory. 25.7 percent of the respondents considered that the two main political parties – MPP and DP – can find solution to pressing problems the country is facing, while 35.1 percent considered that neither of them could find solutions to the pressing problems. To the question "which of the political institutions should play the leading role", 45.1 percent replied it should be the government, while 17.2 percent said the SGH and only 3.2 percent replied that it should be political parties. To the question "do you trust the institutions of the political system" 28.1 percent answered that they trust public administration organizations, 10.1 percent trust the SGH, while only 6.5 percent trust political parties.[27] 64 percent of respondents considered the need to have strong leader, while 50 percent favored a presidential system.[28]

A series of survey results revealed that the people's trust in the state is declining and their doubts increasing as to the development of democracy in Mongolia, while the level of acceptance of legitimacy of the SGH as the main institution of democracy is decreasing, and the society is starting to wish for a powerful leader. All these matters cannot be ignored.

According to surveys, support for the SGH and political parties was at its lowest, while a desire to rely on the executive branch was comparatively high. This reflects a social psychology that has gotten tired of the politicization of the SGH, political parties and politicians and is longing for a constructive, stable and capable government. A broad survey could be conducted to identify in more depth the reasons for such a situation. But, there is reason to believe that some of the arrangements of the division of power between the legislative and executive branches, specified in the Constitution, are the main factor influencing this outcome.

Excessive power for making decisions on government appointments, budget allocation, exploitation of natural resources and mining deposits is concentrated in the SGH, some of which should belong to the executive branch, has diverted the parliament from its main legislative function, instead turned it into a battle ground of competition over allocation of government posts and

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[26] "Government agency National development authority," 2015, [Mongolian] http\\investmongolia.gov.mn\?p=1820

[27] "Political barometers" 2016. [Mongolian]

[28] Ibid.

money. This is demonstrated by the fact that when the attendance of the SGH sessions is reviewed, the greatest number of MPs showed up at sessions in which decisions were taken on these issues. As specified in Article 25.1.6 of the Constitution, the SGH has the authority to appoint Government members and the heads of other bodies responsible and accountable to the SGH. As specified in Article 25.1.7 of the Constitution the SGH has the authority to approve the state budget and report on its execution. This provision of the Constitution, regarding parliamentary power to approve the budget, does not put a concrete temporal or procedural restriction, as in other countries, which has resulted in the SGH becoming a budget allocation institution. According to research, in other countries the power of government appointment and budget allocation vests in the executive branch but not in parliament.[29] It should be recognized that human and financial resource management is the key instrument for the implementation of executive authority and the guarantee of executive power and accordingly necessary amendment should be introduced into the Constitution of Mongolia; relevant recommendations will be found in the following chapters.

In any country, it is impossible to separate national independence, sovereignty and national security issues from the State. In brief, the State is their guarantor. If the State lacks the capacity to fulfill its fundamental duty, and furthermore if the society's recognition of its legitimate superiority is falling, then there is no other way, but to consider it as a threat to national security. Comparative constitutional research suggests that the present situation in Mongolia has occurred in the history of other countries, which have had a similar system as Mongolia, resulting in internal war and serious conflicts and crises.[30]

Economic Security

As a general matter, the connections between constitutions and the economy are very loose. The role of the Constitution in a market economy is to establish a framework for both regulation and for private property. Surely the budget process matters for evaluating government policy. In addition, factors

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[29] O. Munkhsaikhan et al., *Checks and Balance between Legislative and Executive Branches of Mongolia* (Ulaanbaatar policy research center, 2016).

[30] Parliaments, similar that of our current structure, existed in Weimar Germany during 1919-1933 and 4th Republican of France which had excessive power and as result in 14 years 20 governments were changed in Germany and finally Hitler took power, playing on the social psychology of wishing to have strong leader and in France during 12 years of fourth Republican parliament the government had been changed 21 times. Ibid.

such as the system of government and the electoral system have been argued by some to make a difference in economic performance.[31] In order to provide an explanation as to how the constitutional division of state power and the executive institution's responsibility impacts the economic policy outcomes, we need to understand fundamental economic issues such as the system of ownership, state budget, regulation of monetary policy, the authority of the state to regulate the economy and its restriction, and fundamental principles of allocation of public resources etc. as specified in the constitution.[32] The subject of "constitutional economics" has not been studied well in the country.

It is worth spending some time summarizing the literature on constitutional arrangements and growth. Much of this analysis, the reader should be warned, has taken place at a very high level of abstraction, and not necessarily applicable in any given country. The classic work is by Professors Persson and Tabellini, who show that parliamentarism is better for growth than presidentialism, and that proportional representation is associated with higher levels of public spending, including corruption, than are presidential systems or those with majoritarian voting.[33] But public spending in parliamentary systems is also broader; in presidential systems, it tends to be directed to politically influential minorities.

Several more recent papers in this literature argue that constitutions may have some effect on corruption. Gerring and Thacker (2004) find some evidence that suggests that parliamentary forms of government help reduce corruption.[34] Kunicova and Rose-Ackerman (2005) show that proportional representation (PR) systems are more susceptible to corrupt political rent seeking than are majoritarian systems.[35] In particular, the combination of PR and presidentialism seems to encourage corrupt rent-seeking.

Constitutions affect the natural resources of a country in a variety of ways. The Constitution must resolve questions of what can be owned; by whom; who

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[31] Persson and Tabellini, *The Economic Effects of Constitutions* (MIT Press, 2003).

[32] James M. Buchanan, "The Domain of Constitutional Economics," *Constitutional Political Economy* 1, no. 1 (1990); N.Lundendoj, Transition period: political and legal issues, UB, 2010), 84–91.

[33] *See* T. Persson, G. Roland and G. Tabellini, "Separation of Powers and Political Accountability," *Quarterly Journal of Economics* 112 (1997), 1163; T.Persson, G.Roland and G.Tabellini, "Comparative Politics and Public Finance," *Journal of Political Economy* 108 (2000), 1141; T.Persson, "Do Political Institutions Shape Economic Policy?" *Econometrica* 70 (2002), 905; T. Persson, and G. Tabellini, *Political Economics: Explaining Economic Policy* (MIT Press 2000); T.Persson, and G.Tabellini, *The Economic Effects of Constitutions* (MIT Press 2003).

[34] J.Gerring and S.C.Thacker, "Political Institutions and Corruption: The Role of Unitarism and Parliamentarism," *British Journal of Political Science* 34 (2004), 330.

[35] J.Kunicova and S.Rose-Ackerman, "Electoral Rules and Constitutional Structures as Constraints on Corruption," *British Journal of Political Science* 35 (2005), 606.

manages and regulates exploitation of natural resources; how revenues from resources are to be distributed; and whether and how the public has any role in making decisions on natural resource use. People are increasingly claiming their environmental rights, as provided in Article 16 of the Constitution.[36]

Article 6.1 of the Constitution provides that natural resources are subject to state protection. Article 6.2 and 6.3 provide that land can be privately owned by citizens, but the "the subsoil with its mineral wealth, forest, water resources and game shall be the property of the State."[37] Thus the Constitution retains the subsoil for state ownership and management. Land can be leased to foreigners, but not sold. These provisions retaining state ownership are consistent with those in many states.[38]

A major challenge to the Mongolian political system is rising inequality. This has been a major issue for much of the post-1992 period. The privatization program of state assets was criticized as leading to misdistribution.[39] These concerns, however, have been exacerbated by the mining boom.

The Constitution is silent as to the distribution of revenues from resource exploitation. This was perhaps understandable given that the Constitution was produced before the major mineral discoveries. Constitutional regulation of the distribution of revenues is particularly important for countries that are federal or have significant ethnic divisions. In a country like Mongolia, issues of distribution can be left to the ordinary political process.

The mining boom poses a major challenge to governance in Mongolia, and therefore to the constitutional system. A large literature in political economy has identified what is known as the "resource curse" in which countries that have certain natural resources – mainly oil or minerals – have higher rates of corruption, autocracy and civil war. The basic logic is that a government needs only to control the natural resource wealth to have enough funds to run the country. Governments without such resources must conclude a bargain with their citizens in order to rule effectively. There is strong evidence that countries with natural resources have poorer institutional quality. This in turn can lead to lower growth, as well as poor political performance.

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[36] These are granted to individuals in Mongolia, who enjoy "The right to a healthy and safe environment, and to be protected against environmental pollution and ecological imbalance." At least one constitution grants rights to nature herself. Constitution of Ecuador, Articles 10 and 71-74.

[37] Article 6.2

[38] Nicholas Haysom and Sean Kane, Negotiating Natural Resources for Peace: Ownership, Control and Wealth-Sharing, Center for Humanitarian Dialogue Briefing Paper, Available at

[39] David Sneath, "Constructing Socialist and Post-Socialist Identities in Mongolia", 47-164 in *Mongolians After Socialism: Politics, Economy, Religion* (eds. Bruce M. Knauft and Richard Taupier. Ulaanbaatar: Admon Press. 2012), 158.

The literature in this area suggests that good institutions can make all the difference between success and failure in managing natural resources.[40] Mongolia is, in some sense, lucky that democratic institutions were already in place before the discovery of major resources. There is therefore some chance that the resources may be used in a manner that does not lead to the full emergence of the resource curse. Mongolia is also fortunate that, as a fairly homogenous country, resource exploitation is not likely to exacerbate prior ethnic divisions.

How might constitutions affect the emergence of the resource curse? A very simple point is that, if government controls the subsoil, and the subsoil has become more valuable, then the stakes of controlling government have increased as well. This means that the stakes of political competition have increased in Mongolia, with risks to the integrity of the electoral system.

One recent article has argued that parliamentary systems are less susceptible to the resource curse than are presidential systems.[41] It argues that the resource curse causes poorer growth only in resource abundant presidential and nondemocratic regimes. The article finds no resource curse in democracies with a parliamentary form of government. While the analysis does not, in our view, deal adequately with selection effects – it may be that abundant resources produce pressure for winner-take-all presidential systems – at least one can say that the literature does not provide strong empirical support for changing Mongolia's political system to one that is purely presidential.

Although there is relatively little constitutional regulation in connection with economic issues, this does not mean that constitution has no impact in the economy. It is exceptionally important to study the interdependence of institutions, and the impact of decision making process on economic development and economic situation, under the circumstance of an inadequate division of authority between the legislative and executive branches, especially the active involvement of the SGH in decision making process as regard to public budget allocation and natural resource exploitation and state economic performances.

The national security concept defines the basic factors of economic security as the development of a multi-pillar economic structure, pursuance of balanced foreign investment policy, guaranteeing security of the financial,

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[40] Atsushi Imii, "Escaping from the Resource Curse: Evidence from Botswana and the Rest of the World," *IMF Staff Paper* No. 54 (2007); on Mongolia see Theodore H. Moran, Avoiding the "Resource Curse" in Mongolia, Peterson Institute for International Economics, Policy Brief o. PB12-18 (July 2013)

[41] Jørgen Juel Andersen and Silje Aslaksen, "Constitutions and the Resource Curse," Working Paper, Department of Economics, Norwegian University of Science and Technology, 11/2006.

energy and minerals sectors, and sound policies on foreign trade and integration (National security concept, 3.2).

Therefore, this section includes a summary of observations and conclusions about the impact of some constitutional regulations concerning economic security issues on actual economic performance, most importantly on economic security.

Article 5.4 of the Constitution specifies that “The State shall regulate the economy with a view to ensure the nation's economic security, the development of all forms of property and social development of the population”.

The Mongolian economy is highly vulnerable, being a country with a small population, situated between world leading economies, and largely dependent on them for markets, energy, fuel supply and transit transportation. The main way to reduce this vulnerability is to meet the domestic needs by strategic products to a certain extent and to develop multi-pillar economic structure capable of competing internationally.

The provisions of the Constitution concerning traditional livestock, subsoil, and natural resource exploitation are exceptionally important and should be the basis of the state policy to promote a multi-pillar economy. Article 5.5 of the Constitution emphasizes the pasture livestock as the traditional basis of the economy and specifies that livestock are to be protected by the State. This has been the basis of the economic policy of supporting herders and promoting business in the agricultural sector. But there are a number of factors that negatively impact and create hardships and challenges to the development of livestock, such as urbanization, climate change, overgrazing of pasture land, soil erosion, desertification, shortage of water resources etc., and the State has taken these challenges into consideration in its agricultural policy and implementing concrete policies.

The Mongolian economy is largely dependent on mining sector growth. There is a need to conduct a detailed study from the point of constitutional economy as regard to Article 6.1 and 6.2 of the Constitution that specify that subsoil natural resources shall be subject to public power and State protection, and that land, except given to citizens of Mongolia for private ownership, shall be the property of the State. For instance, the provision on state ownership of mineral deposits provides an opportunity for the state to be directly involved in economic activities and own shares in businesses. We consider that it would be exceptionally important to conduct a study and draw conclusions from the political and economic and security perspectives as to how this provision influences state activities, the corruption situation and governance quality, mentioned in the previous section.

Under the prevailing situation, from the point of economic security one of the most pressing issues is the increasing vulnerability of the budget and the financial sector, resulting from escalation of sovereign debt and budget deficit and its further negative impacts on economy.

Although the State has been pursuing a policy to “Ensure economic security and develop a healthy sustainable and well-disciplined financial sector supporting long-term national growth and development”, this objective has not been implemented very well (National security concept, 3.2.3.1)

In the beginning of the 1990s, Mongolia adopted the “shock therapy” approach in the transition to a market economy, implementing many reforms simultaneously in order to recover and stabilize as quickly as possible. As a result, economic turbulence with an inflation rate of 325 percent started to appear within a short period of time; yet by the year 2000, there still existed financial difficulties, the inability of the government to pay wages and pensions on time, public institutions saddled by debt, and an outdated system of transactions in banking and financial institutions. Several steps taken by the State to improve the fiscal discipline, including adoption of the Law on Consolidated Budget (2002), the Law on Public Sector Management and Finance Law (2002) and adopting an integrated system of state treasury and creating a mid-term budget planning mechanism, resulted in significant progress in the fiscal sector. The Government has taken several steps towards the improvement of financial management, by developing and approval of the SGH the Fiscal Stability Law (2010) and Budget Law (2011) which resulted in credible progress in the legal environment of the fiscal sector of Mongolia. In addition to these developments, there has been significant economic growth as a result of favorable environment in the international commodity market price for major export products of Mongolia, which continued until 2013. In 2015 Mongolia’s GDP increased fourfold as compared with 1990, and Mongolia became a middle income country, moving up from low income country status in the World Bank classification.

Although the numeric indicators have been positive, there is no ground to assume that financial and economic security is guaranteed or that a long term foundation for development has been set up. The 2008 – 2009 world financial crises, coupled with the decline of prices on the international commodity markets, have clearly demonstrated the weakness of the Mongolian economy. The Mongolian economy is still highly dependent on a single sector, and exercising unstable macro-economic, budgetary, and fiscal policies places the economic situation in high risk. This can be evidenced by the following facts.

1. As of the first 10 months of 2016, the mining sector constitutes 85 percent of total exports of Mongolia, contributing a significant part of the public

budget revenue, while 60.7 percent of exports go to one country, the southern neighbor.[42] The economy of the country being dependent on just a few types of exports to one market is one of the key reasons for economic vulnerability.

2. There has been unstable macro economy, budget policy, and poor mid and long term economic planning, as well as inadequate risk management. Excessive dependence on one economic sector and one external market is the main factor for significant GDP growth fluctuation in a short time. Table 1 shows how public budget revenue and expenditure fluctuate rapidly. Sometimes over two consecutive years' budget revenue and expenditure has been fluctuating by 40-60 percent, which is one of indicators to show the state economic policy and macro economy environment instability.

Table 1. Budget current revenue and expenditure, GDP growth rates

3. Except during periods of sharp growth in mining revenue, influenced by the foreign market, the public budget faced a deficit and the budget deficit has been covered by external and domestic loans, which resulted in a continuous increase of government debt. In 2016 the government debt to GDP ratio was 88 percent and in 2017 it is going to be 85 percent. A serious issue which cannot be ignored is that debt service and debt payment in the relevant years is going to be equivalent to 94 percent and 88 percent of the public budget revenue (Table 2). In other words, Mongolia has to pay interest that is almost equivalent to its entire budget revenue in the relevant years, and then in 2018 it has to pay debt interest exceeding its budget revenue. Although this is not uncommon to have comparatively high sovereign debt in those countries

[42] "Monthly review of foreign trade" (Mongol Bank, 2016) https://www.mongolbank.mn/documents/statistic/externalsector/tradebalancereview/2016/10.pdf.

with developed budgetary and financial management with good fiscal discipline, in Mongolia, where such sound system is lacking, and the government debt has reached a point to create risks for financial and economic security.

Table 2. Indicators of sovereign debt burden

Indicators	2016	2017	2018	2019
Total government debt Current price/GDP	88%	85%	80%	75%
Total government debt Current price/Balanced budget revenue	396%	372%	342%	330%
Debt service of government total debt/balanced budget revenue	94%	88%	120%	-

Dependence on foreign markets is not the main reason for economic, budgetary and financial sectors to be at high risk. But the basic reason for aggravating that risk is the inability to implement policy to reduce risk and to maintain a macro environment of stable economic growth.

Countries have implemented many important mechanisms to maintain sustainable economic development and to reduce high risk and the impact of sudden economic turmoil caused by foreign markets. Mongolia has learned from these models and the SGH adopted the Fiscal Stability law in 2010. The key goal of this law is to estimate the budget revenue in real terms, and to accumulate revenue generated from mining in a sovereign wealth fund instead of using it entirely for current budget expenditure, creating a reserve fund for future generations. In addition, revenue generated in good times can be retained in a sovereign wealth fund and to use it at a time of budget constraint. But the SGH has avoided implementing the requirements specified in the Fiscal Stability law. A clear evidence is that it changed the provisions of the law several times, namely to increase the ceilings on the budget deficit and government debts in 2015 and 2016.[43]

Amendments to the Fiscal Stability law introduced steps to legalize domestic and foreign credit. The government draft budget for 2017 was approved with an increase of foreign credit by 6.7 percent and domestic loans with 17.7 percent increase (Budget Law of Mongolia for 2017).

For a number of years, the SGH has been introducing changes to budgets and economic policies, developed by the Government, without solid technical

[43] Fiscal Stability Law, adopted in 2010 has fixed the debt ceiling at 40 percent of GDP and the SGH introduced twice changes in 2015, 2016 and fixing the veiling at 88 percent in 2016 and 85 percent in 2017 (Fiscal Stability Law, Article 19)

estimation and justification.[44] This could be seen by comparing the Government-tabled budget and the SGH approval of the modified budget and budget expenditure allocation. During the discussion of the budget at the SGH, the budget expenditure usually increases, and in order to increase the expenditure the SGH artificially increases projections of annual GDP growth and budget revenue.[45] The budget revenue target could not be achieved because of its exaggerated estimate, and the prior inability to stash away budgeted expenditure increases the deficit and becomes another reason for the debt increase.

According to the research conducted on the SGH decisions concerning public budget and financial issues during the past 25 years, the SGH as an institution has been exerting negative impact on the budget deficit and has been increasing debt, notwithstanding which political party is the majority. One could draw the conclusion that the SGH practice of issuing a number of important budget financial decisions, without the technical capacity of budget analyses at the SGH level, exerts a negative impact on economic security. Anyway, it is an issue of concern as to whether the SGH acting under the Constitution, or the Constitution itself, is the source of the problem.

According to the division of power as specified the Constitution, the SGH is a legislative body, with responsibility to oversee the implementation of legislation, while the Government is responsible for the implementation of legislation and the management of economic, social and cultural development. The generalized provision of the Constitution as regard to the mandate of SGH and the Government in relation to economy, budget and finance has blurred the actual division of power and further led to imbalance between these two institutions.

Article 25.1.7 of the Constitution specifies the mandate of the SGH to approve the budget, yet there is no provision restricting the budget discussion process and calling for a final decision, which contributed to the sharing by the SGH of the Government's fundamental responsibility of the management of economic activities by introducing any changes as it desires throughout the year.

Article 38.2 of the Constitution specifies the mandate of the Government "to direct economic, social, cultural development", Article 38.2.2 states that it

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[44] There is no budget research structure in SGH, like other countries. SGH's budget expenditure sub-committee, few officers in the Parliament office lack human resource, professional skill to do research in budget and develop professional conclusion and proposals.

[45] It might be too optimistic that finance ministry's estimation of GDP growth to be 3.4 percent in 2017 is significantly high than those of estimation of international organizations.

should "… work out budget, credit and fiscal plans and submit to the SGH and to execute decisions taken thereon" which suggests that the Government has the sole duty of developing the budget and fiscal policy. In addition, logically one can interpret that SGH is superior institution than the Government rather than to be two equal branches of the State.

At the stage of budget discussion at the SGH, the members' competition to allocate the budget to their respective constituencies prevails over the technical debate. In addition, non-technical and politically motivated attitudes towards budget allocation have become widely used practices during the last 20 years. For example, the constituencies of the most influential politicians draw significant amount of capital allocations for projects that are not economically efficient, based on poor estimates and are not proposed by the government. The former scheme allocating a "billion tugriks per member" not intended for any specific purpose is another example. All these reflect one of the key reasons pushing Mongolia toward financial crises and can exert negative impact on economic security.

According to international standards, countries specify in their constitution that the parliament should have mandate only to oversee and approve the budget, and cannot direct the arbitrary increase of budget expenditure. The introduction of new expenditure items must be done only after obtaining Government consent and consideration of its opinion.[46] In this way, the Government's budget, financial management mandate is guaranteed and prevents the SGH interference with the executive branch mandate.

System to Ensure National Security

Researchers have classified security policy as involving three levels: *strategic, organizational and crisis period.*[47] The *Strategic* level covers long term security, and foreign policy issues to be decided within the framework of the head of the Government and the parliament; the *organizational* level refers to daily activities and policy and coordination of activities of those government and parliamentary structures with responsibility for national security issues; and the *crisis* level covers management issues during a time of war, crisis and other urgent situations and emergency period. To understand the different roles of participants and their interrelations requires studying national security policy and activities at each of these three levels.

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[46] O. Munkhsaikhan et al., *Checks and Balance between Legislative and Executive Branches of Mongolia* (Ulaanbaatar policy research center, 2016).

[47] George Edwards and Wallace Earl Walker, eds., *National Security and the U.S. Constitution: The Impact of the Political System* (Baltimore: The Johns Hopkins University Press, 1988), 15–18.

The Constitution of Mongolia and the Law on National security has allocated and regulated the roles of institutions and officials who could be covered in the above said policy different levels.

Under the Constitution, the SGH shall have mandate: 1) to define the basis of the domestic and foreign policies of the State; 2) to fix the State frontier; 3) to set the structure, composition and power of the National Security Council; and 4) to declare a state of emergency or martial law. The President is mandated: 1) to head the National Security Council; 2) to be the Commander-in-Chief of the armed forces; 3) to declare a state of emergency or martial law when the SGH is in recess; and 4) to represent the State in foreign relations. The Government, within the implementation of the state law, has the duty: 1) to ensure national security; 2) to protect public order; and 3) to implement State foreign policy.

The National security law, Defense law, Armed forces law, Frontier law and other relevant legislation adopted in line with the Constitution have further clarified the roles and responsibilities of institutions and officials.

At the strategic level, the SGH discusses and approves the state policy and relevant legislations, initiated by bodies with authority to initiate legislation – the President, Government and members of the SGH. The President initiates and submits draft national security concept, the state military and defense policy and laws of armed forces. While the President's power to initiate security, defense concepts and policy is defined by law, his power to initiate laws on armed forces and defense is not specified in law, but regulated by precedents.

Organizational and crisis level management is important to ensure security in both peaceful and emergency conditions. Therefore, this section discusses issues related to the National Security Council, which has the responsibility to coordinate the activities of the institutions in charge of ensuring national security at these two levels.

Under the prevailing situation of the world becoming "flat", the security issue is becoming multi-sided and more complicated, and many countries started to establish "National security Council" (NSC) or similar institutions with a different name, with responsibility to consult and coordinate security issues. Looking at the history of the national security councils, the majority of them were founded in post-cold war era and in Great Britain and China and some other countries, they were founded just recently.

NSCs around the world can be classified in general as following as for their subordination, responsibility and compositions.

1. NSCs with the duty to coordinate information, policy and activities of institutions of special function, which have the responsibility to ensure national security and functions directly under the head of the executive branch. And the heads of the government agencies of special function, which have responsibility in national security, as specified in legislations, are included in the composition of the NSC. In majority of the countries, Governments have general responsibility to ensure security, and in general, special function institutions with responsibility in security matters are affiliated with the executive branch. Therefore, the majority of the countries consider that it would be appropriate that NSC should be in *subordination* of the government, head of the executive branch.[48]

2. NSCs with extraordinary power to discuss and consult on security and defense issues within the leadership sphere, composed of party and state leaders and subordinate to ruling party structure. This kind of structure exists in few countries with socialist systems, like PRC and North Korea.[49]

Compared to the above two forms, Mongolian National Security Council, composed of the President, Chairman of the SGH and the Prime Minister has unique composition and since the composition includes state and government leadership, it tends to be similar to that of the second type of structure. Of course, since, Mongolia has a different state system, there is no possibility for it to be compared directly with the two countries which come under that classification.

There is no separate article or provision in the Constitution about the National Security Council, but the establishment of the NSC and its function is included in the mandates of the SGH and President and accordingly it could be considered that National Security Council is established within the Constitution. While the Constitution provides the Government with responsibility to ensure national security, it gives the power to define the composition and functions of NSC to the SGH, and the President to chair the NSC. This is a rather unique structure that the Council is not subordinate to any single institution. The National Security Law, adopted in 1992, specified the responsibility of the NSC as being "… to coordinate the process of the formulation of the state integrated national security policy and its implementation" and the Law on National security, adopted in 2001, specifies special function institutions, with

[48] This information could be obtained from the web sites of governments, national security of relevant country

[49] Zhao Kejin, "China's National Security Commission," *Carnegie-Tsinghua Center*, accessed December 11, 2016, http://carnegietsinghua.org/2015/07/14/china-s-national-security-commission-pub-60637; "State Affairs Commission" (GlobalSecurity.org, 2016), http://www.globalsecurity.org/military/world/dprk/ndc.htm.

responsibility to ensure national security, including the "Environmental protection authority, Customs authority, Diplomat service, Civil defense authority, Specialized inspection agency, Armed forces and other military, Taxation authority, and Intelligence agency". Also, the National Security law specifies that "the President of Mongolia as head of the National Security council … shall provide overall leadership in activities with regard to ensuring national security, control and provide guidance to institutions with responsibility for the national security".

According to relevant provisions of the Constitution and National Security law, there is a direct logic that the President leads activities of the executive branch in matters concerning national security. At the theoretical level, this status quo is a reflection of the "semi presidential" nature of the state, but in practice it entails the following difficulties:

- Mongolia is a country with "comprehensive" security concept and the scope of national security is not limited only to military and defense issues but covers much wider issues. The President expresses his view on economic and environmental security issues and provides guidance to government members, which entails criticism that he is "interfering executive government matters" and encounters protests, which hampers his ability to fulfill his legitimate duties.

- The NSC is "far away" from executive government and to be an independent structure; this means that its recommendations often left unimplemented and there are constant difficulties as to coordinating activities of the Government agencies. In particular, NSC's important recommendations, such as "Improve the unity of the State foreign policy and activities", or "control of spending of revenues generated by issuance of government bonds" have not been implemented. The legal capacity of NSC recommendations has been debatable and there is no clear accountability for non-compliance.

All these indicate that there is a need to clearly determine the subordination and status of the NSC in the Constitution and other legislations and to create condition for NSC to carry out its responsibilities.

Conclusion

The Constitution of Mongolia for the last 25 years, since its adoption has been legal basis for the development of a democratic state structure and humane civil society, guaranteeing Mongolian independence, sovereignty and protecting the national interest while upholding human rights.

The Constitution has been the guarantee of the country's sovereignty by letting the people decide the fundamental issue for the state and country's existence, namely "who will exercise the supreme State power" and providing this power to the Mongolian citizens. Furthermore, it becomes double guarantee for the country's sovereignty by choosing parliamentary system, which is directed to avoid absolute power of one person and to decide key issues of the country through the majority consensus.

During the past 25 years, there has been genuine progress in strengthening Mongolian sovereignty and consolidating its position at the international level. One could conclude that the idea and provisions of the Constitution were well implemented in this end.

The Constitution has vested the Government with the duty to ensure national security, while the SGH has the mandate to define the composition and functions of the National Security Council, and the President to be the Chair of the council. This structure leads this important state institution, with vital responsibility to ensure the coordination of state institutions as regard to ensuring national security, to become "stretched" between the state institutions and lacking the opportunity to carry out its fundamental duty. Therefore, there is a need to correct it within the process of the introduction of changes to the Constitution.

There is a real need to introduce amendment to the Constitution to fix these issues, mentioned in this chapter in order to find appropriate solution to the issues related to ensure national security, to guarantee sovereignty, to ensure economic security and to improve the structure and to strengthen the State capacity, which is one of the requisite domestic issues.

Chapter Two
Human Rights and Freedoms

Introduction

The Preamble of the Constitution of Mongolia proclaims the aspiration of the people toward the supreme objective of developing a humane, civil, democratic society in the country. According to the constitution-makers, civil society stands for an individual-centered society, based on respect and protection of human rights. This concept was the most important value for Mongolian society and the reason for constitutional reform.

The significance of 1992 Constitution lies with the fact that it created guarantee of civil, political, economic, social and cultural rights which are commonly recognized in democratic societies around the world in a comprehensive way. Fundamental rights entrench rights and freedoms enshrined in the Constitution and international human rights treaties ratified by Mongolia. There has been some progress in terms of implementation of fundamental rights over the last twenty five years. However, the persistent breach of some fundamental rights is related to lack of legal interpretation of those rights, and a failure of enforcement mechanisms.

This chapter reviews the constitution-drafting process, scope of constitutionally-protected rights, implementation of selected fundamental rights and national human rights mechanisms.

Rights and Freedoms Enshrined in the Constitution

The Commission in charge of Constitution Drafting established four working groups, including one on Human Rights led by L.Tsog, then Head of Standing Committee on Justice of the State Baga Hural along with other eleven members. The working group was guided by the international bill of human rights (the Universal Declaration of Human Rights and its two associated Covenants) in addition to lessons learnt from serious human rights violations under the socialist regime. Records of the sessions demonstrate that members of the People's Great Hural were concerned about such human rights violations

as curtailing of rule of law leading to mass repression, imposing punishment on families of those who were found guilty, nationalization of private property without any compensation. They aimed at creation of constitutional guarantee to put an end to such bitter experience.[50]

By joining the United Nations in 1961 as 101th member-state, Mongolia accepted human rights and freedoms preserved in the Universal Declaration of Human Rights (1948). Mongolia ratified the International Covenant on Civil and Political Rights (1966) and the Covenant on Economic, Social and Cultural Rights (1966) in 1974. It was noted by P.Ochirbat, Chair of the Constitution Drafting Commission that they made a serious effort to comply with international legal norms, principles and international treaties ratified by Mongolia in drafting chapter on human rights and freedoms. In addition, comparative studies[51] and advice by international experts were important in formulation of the chapter on human rights and freedoms.[52]

The majority of civil, political, economic, social and cultural rights commonly recognized in democratic societies are embraced in the Constitution under Chapter Two on Human Rights and Freedoms. However, human rights are found in other parts of the Constitution including Articles 21.2 and 31.3 on universal, free, direct suffrage and secret ballot, Article 53.2 on the right to use his/her native language at the trial, and Article 54 on open trial. In other words, an account of constitutional rights should not be limited to Chapter Two on Human Rights and Freedoms only.

Furthermore, account of fundamental rights extends to implicit rights based on constitutional concepts such as equality and liberty.[53] Article 1.2 of the Constitution stipulates that equality is one of the supreme principles of the state

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[50] "Concepts of the new constitutional draft", Bayar S., then Chair of the Standing Committee on State Structure of the Baga Hural 10; "Outcomes of public consultations on draft Ih Tsaaz of Mongolia", Ochirbat P., President of the People's Republic of Mongolia (presentation) 16; Bayandalai, Barsbold R., Baramsai J., Avkhia J., Chimid B., Records of People's Great Hural sessions No. 17, 1991.11.28, 77, 93, 95-98

[51] Reference was made to comparative constitutional study of Greece, France, Poland, Namibia and other democratic countries, Records of People's Great Hural sessions 18, 1991.11.29, 67, Chimid B.

[52] Advice was provided in 1991 by UN human rights experts P.N. Bhagwati and Reed Brody, Joseph R.Grodin, Herman Schwarz, Louis Fisher, and Martin Shapiro for The Asia Foundation, T. Schweisfurt and G. Stein on the request of Amnesty International, and some representatives of the US Republican Party.

[53] Munkhsaikhan O., "Framing fundamental rights protected by the Constitution of Mongolia," *Human Rights Journal*, No. 1 (2016), 13–22; Chimid B., *Constitutional Knowledge* (UB, 2008), 126; Byambaa J., "Article 16 paragraphs 7, 8, 9, 10, 11, 12, 13, 14," *Commentary on Constitution* (UB, Hans Seidel Foundation, 2009), 90-94; Banzragch G., *Commercial Law* (UB, 2013), 60; Buyankhishig B., "Economic rights adequately protected by the Constitution?", in *Constitution and Rule of Law VII* (2016), 22.

activities, whereas Article 14.1 ensures everyone's equal rights before the law and the court. These articles speak for everyone's equal value and dignity. Everyone's equality before the courts and tribunals, entitlement without any discrimination to the equal protection of the law stipulated in Articles 14 and 26 of the ICCPR apply to this concept. For instance, discrimination on the grounds of sexual orientation and disability is not explicitly prohibited in Article 14.2 of the Constitution, but the broader concept of equality prohibits discrimination on these grounds.

Another fundamental right which needs conceptualization and protection is the right to be free from arbitrary interference. The right to liberty includes a number of rights both enumerated and not enumerated in Article 16.13 of the Constitution ranging from physical integrity to privacy of individual, family life, correspondence and home. In a way, Article 16.13 of the Constitution combines rights stated in Article 7, 9 and 17. Right to liberty extends to rights not to be subject to arbitrary search, arrest, detention, persecution, deprivation of liberty, torture or to cruel, inhuman or degrading treatment or punishment, interference with privacy, family, home or correspondence, honor and reputation, and economic freedom. This broad interpretation of the right to liberty is widely shared among scholars.

International human rights treaties ratified by Mongolia are equally binding as are national laws. Article 10 of the Constitution states "Mongolia fulfills in good faith its obligations under international treaties to which it is a Party. The international treaties to which Mongolia is a Party become effective as domestic legislation upon the entry into force of the laws on their ratification or accession". Therefore everyone is entitled to human rights and freedoms embedded in international human rights treaties of Mongolia, even if the Consitution does not contain these rights and freedoms (provided that there is no applicable constitutional prohibition).[54] For instance, the right to strike is not in the Constitution. However, on the basis of Article 8.2 of the ICESCR, Constitutional Court overruled a provision of the 1990 Procedure for Labour Dispute Resolution adopted by People's Great Hural.[55] Similarly, one cannot assume that the right to disseminate information is not protected simply because it is not enumerated in the Constitution. This right is contained in the right to freedom of expression and enumerated in Article 19.2 of ICCPR. Human rights and freedoms specified in the forty international human rights treaties

[54] B.Chimid, *The Conceptions of the Constitution: Human rights and Judiciary,* Volume 2 (2004), 6. [Mongolian]
[55] *Lamjav D. v. SGH,* the Constitutional Court, Conclusion No. 2, 1993.04.21. [Mongolian]

ratified by Mongolia are as protected as those specifically enumerated in the Constitution.

The guarantee of fundamental rights in the Constitution was influenced by the doctrine of natural rights. The constitution-drafters emphasized a conceptual shift, from viewing civil rights as bestowed by the government toward viewing rights as inherent.[56] That is why the right to life, right to freedom of conscience and religion, right not to be subject to torture, inhuman and degrading treatment were declared to be non-derogable under any circumstance according to Article 19.2 of the Constitution. These four rights were taken as natural rights which cannot be subject even to lawful restrictions in time of emergency and war.[57] Article 16 of the Constitution provides fundamental rights and freedoms guaranteed to citizens of Mongolia. Foreign nationals and stateless persons are guaranteed inalienable rights and freedoms contained in international human rights treaties of Mongolia. It is prohibited to place restriction on these rights even by law (Article 18.5).

The Constitution allows restrictions on fundamental rights exclusively by law, except on the set of natural and inalienable rights. The Constitution sets both specific and general restrictions. Conditions for specific restrictions are explicitly enumerated in the Constitution. For instance, on the basis of Article 16.10 which allows suspension of party membership of some categories of state employees, a restriction was introduced in the Law on Legal Status of Judges (Article 28.1) on political affiliation of judges.

The constitutional requirement to place restrictions exclusively by law in cases of confiscation and requisitioning of private property, forced labor, search, arrest, detention, persecution, deprivation of liberty, demonstrations and other assemblies, is a guarantee against administrative arbitrariness. However, Members of the People's Great Hural and experts at that time expressed views that citizens could not enjoy their rights if necessary laws were either not passed or violated the rights in question.[58] For example, out of fear of censorship[59], the People's Great Hural removed a provision from Article 17.16

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[56] "Concepts of the new constitutional draft", Bayar S., then Chair of the Standing Committee on State Structure of the Baga Hural, 10. [Mongolian]

[57] Chimid B., *The Conceptions of the Constitution: Human rights and Judiciary,* Volume 2 (2004), 16. [Mongolian]

[58] P.N. Bhagwati and Reed Brody, "Assistance to the Government of Mongolia Relating to the Draft Constitution" (UN Centre for Human Rights (Advisory services and technical cooperation), June 1991), 4–5; "On draft Ih Tsaaz of Mongolia", Herman Schwarz, July 18, 1991, 1; p 86, Records of People's Great Hural sessions No.16, 1991.11.27, Bat-Uul E.

[59] Bayartsengel D., Bayartsogt S., Dashnyam L., Urtnasan J., Records of People's Great Hural sessions No. 17, 1991.11.28, pp 81, 107-117. [Mongolian]

of the draft Constitution allowing restrictions by law on publishing. The members of the People's Great Hural were of the opinion that purpose of such law must protect the right to freedom of expression and therefore must not violate the substance of this right. They approved the revised provision on the basis of this understanding.[60]

The Constitution also contains general restrictions. Members of the People's Great Hural were of the opinion that limitation of human rights to protect the rights of others meets the principle of social justice.[61] For this reason, the Constitution declares in Article 19.3 "in exercising one's rights and freedoms, one may not infringe the national security or rights and freedoms of others or violate public order". This provision signifies that 1) fundamental purpose of state activity is the rule of law and therefore must be achieved by law; 2) limitations guard the interests of national security, rights and freedoms of others or public order; and 3) limitations are necessary for the protection of these interests. Both the Constitution and international human rights law requires limitations of fundamental rights to meet all three qualifications to be valid. UN experts and Members of the People's Great Hural conceded that some limitations on rights to peaceful assembly, freedom of expression, and association would qualify on all three grounds.[62]

Realisation of Human Rights and Freedoms in Mongolia

Mongolia is often regarded as a role-model for peaceful democratization in the region and evaluated by international experts as a stable democracy. The country has been ranked free by Freedom House from 1991 to 2016, being one of a few free countries in the region.[63] In free countries, political parties are competitive, civil liberties are respected, free economic activity is allowed, and the media is independent. Mongolia has met the standards of democracy by all these indicators.

However, Mongolia's democracy ranking suffers by some other measures. Mongolia ranked 62 out of 167 countries in 2015 and was listed among flawed

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[60] Lundeejantsan N., Records of People's Great Hural sessions No.16, 1991.11.27, p93; p110, L.Tsog, Records of People's Great Hural sessions No.17, 1991.11.28.

[61] Remarks by Ochirbat P., President, at the Session 2 of the People's Great Hural on the occasion of adopting a new Constitution, 1992.01.13. [Mongolian]

[62] P.N. Bhagwati and Reed Brody, "Assistance to the Government of Mongolia Relating to the Draft Constitution" (UN Centre for Human Rights (Advisory services and technical cooperation), June 1991) 5; Chimid B., Records of People's Great Hural sessions No.16, 1991.11.27, 89.

[63] "Freedom in the World 2016," *Freedom House*, 2016, https://freedomhouse.org/report/freedom-world/freedom-world-2016.

democracies.[64] Flawed democracies are countries where elections are fair and basic rights and freedoms are respected but have issues such as media censorship, inefficient governance, undemocratic political culture or low political participation.

Reports of national and international human rights bodies have pointed out violations of civil, political, social and economic rights and freedoms in Mongolia. These sources include fifteen reports on Human Rights and Freedoms in Mongolia prepared by the National Human Rights Commission of Mongolia between 2002 and 2016,[65] the Universal Periodic Review conducted in 2010 and 2015,[66] concluding observations of the UN Human Rights Committee, Committee on Economic, Social and Cultural Rights, Committee against Torture, Committee on the Rights of the Child and the reports of Special Rapporteurs[67] on torture and other cruel, inhuman or degrading treatment or punishment, adequate food, right to education and extreme poverty. A brief snapshot of challenges faced in terms of some rights and freedoms is provided including electoral rights, right to life, right not to be subject to torture and other cruel, inhuman or degrading treatment, right not to be subject to discrimination, right to fair compensation for requisition of private property, and the rights to freedom of expression, demonstration and assembly.

Right to vote

Though the previous three Constitutions of Mongolia legally fixed the right of citizens to elect and to be elected, the elections fell short of being a legitimate vehicle for the people to directly express their will. Article 3 of the 1992 Constitution stipulates that "State power shall be vested in the people of Mongolia." This rather concise declaration actually has very broad implications, further elaborated in Article 16.9 granting the right to participate in government, to vote and stand for election.

Electoral issues are frequently regulated in constitutions.[68] There seems to be a trend toward greater regulation of the electoral rules in constitutions, for

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[64] "Democracy in an Age of Anxiety," *EIU for the Media*, January 21, 2016, http://www.eiumedia.com/index.php/latest-press-releases/item/2127-democracy-in-an-age-of-anxiety.

[65] Reports on Human Rights and Freedoms in Mongolia. [Mongolian]

[66] "Universal Periodic Review - Mongolia," *UN Human Rights Office of the High Commissioner*, 2010; "Universal Periodic Review Second Cycle - Mongolia," *UN Human Rights Office of the High Commissioner*, 2015, http://www.ohchr.org/EN/HRBodies/UPR/Pages/MNSession22.aspx.

[67] National Human Rights Commission of Mongolia "Recommendations of UN human rights bodies" , 2016, [Mongolian] http://mn-nhrc.org/index.php?do=cat&category=37.

[68] A study of 42 states, which vary in terms of development level, location, size and population. 38 out of 42 selected states have legally fixed the principle of electoral right in their Constitutions as well

obvious reasons: leaving these issues in the hands of the ordinary political process risks manipulation of the rules.

The Constitution's stipulation that citizens shall implement their electoral rights through universal, free, direct suffrage by secret ballot complies with international standards. As in many countries, selection of the electoral system takes place at a sub-constitutional level in Mongolia, and is an important decision conducive to enforcement of democracy. Many studies have confirmed that the electoral system has a major impact on a country's political life and the functioning of the constitutional order. Electoral systems are important but involve distributional questions that are inherently political in nature. Hence, it is not the kind of issue on which technical experts can provide a single "correct" answer. Therefore, it is essential to foresee the possible ramifications and influence arising from the selection of electoral system. The selection of electoral system pursuant to narrow political interests may have a negative bearing on stability of the electoral system.

Since 1990 Mongolia has generally used a majoritarian system in conducting elections. However, this has sometimes led to great distortions. The extreme case was the 2000 elections to the SGH, in which a single representative was elected from each of 76 constituencies by majority vote. In this election, the MPRP received 53.32 percent of votes and 72 out of 76 seats, while the DP received 13.35 percent of the votes but only 1 seat; the MDNSP received 10.95 percent of the vote and 1 seat; the CWP, 3.45 percent and 1 seat; and independent candidates, 2.92 percent and 1 seat. All other parties combined received a total of 15.97 percent of the vote with no seats. In these elections, the votes of 190 thousand electors, or 16 percent of voters, were wasted; this is equivalent to the votes of over 10 constituencies. This is a level of seat-to-vote electoral bias that is very high in comparative terms, and led to partisan distortions in the SGH.[69]

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as the principles of universal, direct, fair, free suffrage by secret ballot. Of the selected countries, only the Constitutions of Malta, the USA, PRC, and Japan contain no mention of the principle of electoral right, and only the USA, PRC and Japan do not legalize their electoral system in their constitutions. The study was carried out by D.Solongo in 2011 at the request of the Parliamentary Standing Committee on State Structure

[69] In electoral studies, partisan bias refers to the extent to which some parties are unfairly advantaged by the voting system. Bias can emerge even without intentional manipulation of the system because of the spatial distribution of voters, differential turnout, the configuration of incumbents, and malapportionment. See Bernard Gary King, Electoral Responsiveness and Partisan Bias in multiparty Democracies, Legislative Studies Quarterly XV (2): 159-81 (May 1990). In Mongolia, see Verena Fritz, Analysis of the electoral system and resulting incentives to propose and implement development-promoting policies in Mongolia, manuscript of August 2008.

Seat-to-vote bias continues.[70] In 2008 when the SGH elections were held in 26 constituencies with multiple mandates, the MPRP won 1,514,855 votes and 45 seats while the DP garnered 1,396,625 votes but only 28 seats. Though the number of votes won by the two parties was very close, there was a big gap in the number of seats. It was largely because of these concerns that Mongolia's election law was changed for the 2012 elections to include a proportional representation component. But this component was repealed due to an incorrect interpretation by the Constitutional Court of the requirement of direct suffrage.[71] The electoral system shifted back to a majoritarian system again for 2016 general elections with 76 small constituencies, resulting in the MPP receiving 65 seats and DP receiving 9 seats, despite statistics showing that 44 percent of voters supported MPP and 33 percent supported DP.

The Constitution guarantees equal suffrage. Article 14.1 says "all persons lawfully residing within Mongolia are equal before the law and the courts" whereas Article 16.9 guarantees the right of citizens to elect officials. The notion of equality includes equal suffrage.[72] In addition, Mongolia has an international obligation to protect equal suffrage according to Article 21 of the Universal Declaration of Human Rights and Article 25 of the ICCPR.

The Constitutional Court ruled in 1993 that the Constitution did not guarantee equal suffrage, reasoning that there was no textual mention of the principle of equal suffrage in Article 21 of the Constitution, nor were any views and suggestions in this regard found in the People's Great Hural records of constitutional draft debate.[73] The Constitutional Court was silent in response to views in individuals' communications advocating for equal suffrage under Article 14 of the Constitution and Article 25 of the ICCPR. Since 1993 three communications have been filed to the Constitutional Court alleging violations of equal suffrage. However, the Constitutional Court refused to hear about this matter again, leaving the incorrect interpretation untouched.[74]

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[70] This is usually calculated as the sum of divergences between parties' shares of votes and their seats, divided by the number of parties. See Verena Fritz, "Analysis of the electoral system and resulting incentives to propose and implement development promoting policies in Mongolia," Manuscript of August 2008. The argument in Para 129 is drawn from her study.

[71] *Banzragch D., Namsrai Ts. v. the State Great Hural*, the Constitutional Court, Conclusion No 5, 2016.04.22; Munkhsaikhan.O.,"Proportional Election System not Prohibited by the Constitution," *Law Journal*, 34, No. 2, 2016, 1-30. [Mongolian]

[72] Chimid B., *Learning to Elect (system, process and law)* (UB, 2008), 55. [Mongolian]

[73] *U.Sergelen, N.Baasanjav v. SGH*, the Constitutional Court, Conclusion No 4, 1993.12.22. [Mongolian]

[74] *R.Uuganbayar, L.Temuujin v. SGH,* the Constitutional Court, Conclusion No 11, 2007.11.16; *Lamjav v. SGH*, the Constitutional Court, Decision No 4, 2008.03.26; *D.Uurtsaikh, Ch.Unurbayar v. SGH*, the Constitutional Court Member, Resolution No 85, 2008.08.05. [Mongolian]

Election observers have been noting that failure to take population migration into account in electoral districting is affecting balanced political representation. For instance, in the 2016 general elections, the number of voters in 50 districts ranged 15 to 66 percent higher than national average of 25,170 voters per district. This large difference of constituency size breaches the principle of equal suffrage embedded in 1990 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE.[75] Mongolia, as a result of its OSCE membership since 2012, is expected to observe this norm.

Right to life

Article 16.1 of the Constitution guarantees the right to life, and strictly prohibits deprivation of human life unless capital punishment as constituted by Mongolian penal law for the most serious crimes is imposed as final decision by a competent court.[76]

President Elbegdorj expressed the position during a session of SGH on 14 January, 2010 that there should be a pardon for everyone sentenced to death.[77] The SGH passed a law to ratify Second Optional Protocol of the ICCPR on 5 December, 2012. Accordingly, Mongolia accepted the obligation to take all necessary measures to abolish death penalty. Mongolia has suspended the death penalty de facto, and no one has been executed for the last six years.

Abolition of the death penalty is not only an international obligation. The application of death penalty violates human dignity, which is a fundamental constitutional principle, as well as the right to life, and the right not to be subject to torture and other cruel, inhuman or degrading treatment.[78] Considerations must be given to risks of applying death penalty to those who are not guilty, to

[75] Paragraph 2.2 (iv) of the Code of Good Practice recommends that the permissible departure from the norm should not be more than 10 per cent and should certainly not exceed 15 per cent except in special circumstances (protection of a concentrated minority, sparsely populated administrative entity). OSCE - ODIHR. Statement of preliminary findings and conclusions, 17 June 2016.

[76] Incumbent President Elbegdorj along with other members express views at the session of the People's Great Hural deliberating the Constitution that death penalty must be abolished whereas some others considered that it must be abolished eventually. Elbegdorj Ts, Galsandorj Ch., Baramsai J., Lhaasuren B., Records of the People's Great Hural No. 16, 1991.11.27, 95-97 and 103-104; Chimid B., Altangerel E., Records of the People's Great Hural No. 17, 1991.11.28, 54, 71. [Mongolian]

[77] "President Elbegdorj's Statement on Death Penalty Moratorium" *Vip76.mn*, 2010.01.14, [Mongolian] http://vip76.mn/content/8796.

[78] Munkhsaikhan O., "Right to Life and Death Penalty," *Judiciary* Journal, 1 (2015) 130–38. [Mongolian]

the lack of direct link between death penalty and decline of grave crimes, and to global trend of abolition of death penalty.[79]

The death penalty has been removed from the newly passed Criminal Law of 2015. Yet, the effective date of the law has been postponed to 1 July 2017. As a result, death penalty is still valid under seven articles of the existing Criminal Law of 2002 (Articles 81, 84, 91, 126, 177, 178, 302). The courts had given a death sentence based on these articles.

Right not to be subject to torture and other cruel, inhuman or degrading treatment

The international standard for the right not to be subject to torture and other cruel, inhuman or degrading treatment is applied in Mongolia. This is a right guaranteed by Article 16.13 of the Constitution of Mongolia which reads that "No one may be subjected to torture, inhuman, cruel, or degrading treatment". In addition, Article 19.2 of the Constitution recognizes this right as non-derogable. Progress in terms of protection of the right not to be subject to torture and other cruel, inhuman or degrading treatment must be noted. Mongolia ratified Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in 2000, and its Optional Protocol in 2014. As noted above, the death penalty, which is a form of torture, has been suspended.

Nonetheless, the National Human Rights Commission of Mongolia has been regularly reporting on violations of this right in its annual human rights reports. The UN Special Rapporteur concluded in 2005 that torture existed in Mongolia.[80] The Universal Periodic Review of the UN Human Rights Council has shed light on this issue as well. Different forms of torture and inhuman treatment exist in practice including verbal and physical abuse, intimidation, coercion of suspects and accused for obtaining testimony, sending convicts to remote detention facilities and changing detention facilities numerous times, and restricting family visits for months.[81]

Isolated imprisonment in a maximum-security facility is considered to be a form of cruel and inhuman treatment and punishment. According to the existing Criminial Law extremely dangerous criminals are imprisoned for 15 years in a maximum-security facility (Article 52.11) and those pardoned from death penalty

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[79] Ibid.

[80] Manfred Nowak, "Report of UN Special Rapporteur on Torture," (2005).

[81] National Human Rights Commission of Mongolia, "13th Report on Human Rights and Freedoms in Mongolia" (2014), 84; National Human Rights Commission of Mongolia, "14th Report on Human Rights and Freedoms in Mongolia" (2015) 43–45. [Mongolian]

are imprisoned for 30 years in a maximum-security facility (Article 53.3).[82] The Law on Court Decision Enforcement allows prisoners in maximum-security facilities to have brief meetings twice a year, to send letters once a month (Article 109.4) and to enjoy at least one hour's access to open air daily (Article 109.2). But in fact they get access to open air for one hour twice a week at most.[83] The Committee against Torture recommended abolishing this extraordinary regime of long-term isolated imprisonment as it breaches Article 10 of the ICCPR.[84]

Harms of torture are not always fully remedied, and in particular, fair and adequate compensation is not provided for non-material suffering.[85] Article 230.2 of the Civil Law stipulates that "only in exceptional cases stated in the law, non-material harm shall be compensated in money term". However, the Supreme Court issued a restrictive interpretation of this provision in paragraph 6.2.4 of its resolution No.15 of 22 May 2009, which says "monetary compensation cannot be provided if there is no legal regulation for assessment of non-material damage such as loss of life and body parts, pain, suffering and mental consequences".[86] This interpretation is widely applied in courts. That is why victims including those of torture do not receive remedy for non-material damage.

[82] There were 82 prisoners in maximum security prison No. 405 (Takhirsoyot) as of 2015. National Human Rights Commission of Mongolia, "15th Report on Human Rights and Freedoms in Mongolia" (2016) 20. [Mongolian]

[83] Report of UN Special Rapporteur on Torture, Manfred Nowak, 2005 paragraph 47.

[84] Concluding observations of the Committee against Torture regarding Mongolia, (2010) paragraph 16.

[85] National Human Rights Commission of Mongolia, "14th Report on Human Rights and Freedoms in Mongolia" (2015), 24.

[86] Amarsanaa J. et al., Compilation of Supreme Court Resolutions *(1959-2010)*, 2d edition, (General Court Council 2015) 1028. [Mongolian]

Right to be free from discrimination

Article 14.2 of the Constitution and Article 2 paragraphs 1 and 26 of the ICCPR prohibit discrimination on the ground of sex. The UN Human Rights Committee defined sex as inclusive of sexual orientation[87] and this became a basis for advocacy of rights of lesbian, gay, bi-sexual, transgender and intersex people[88] by UN human rights mechanisms.[89] Non-discrimination envisages both negative and positive obligations of the government not to discriminate and to take measures to protect individuals from discrimination by creating criminal and other legal sanctions.

Various studies have established that sexual orientation is innate and irreversible.[90] LGBT people have always been part of societies throughout the history of humanity and they will be so in the future. A comparative study found out that LGBT people make 1.2-5.6 percent of adult populations.[91] Similarly, LGBT people account for certain percentage of Mongolian society.

LGBT people in Mongolia suffer from discrimination due to lack of social recognition. They frequently experience discrimination, harassment, intimidation and violence by family members, classmates, co-workers, other people and even the police.[92] Hate crime is not criminalized in Mongolia. For this reason, crimes against LGBT people go uninvestigated and perpetrators unpunished.

The revised Criminal Law of 2015 marks an important shift towards protection of LGBT rights by prohibiting discrimination based on sexual orientation in criminal charges and sentencing (Article 1.3) and by criminalizing hate-based murder on the grounds of sexual orientation and gender identity (Article 10.1), discrimination, deprivation of liberty, and forcing specific actions

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[87] *Toonen v. Australia, Communication* No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994).

[88] These terms are accepted and used internationally. Lesbian signifies sexual and romantic attraction and relations between females. Gay signifies sexual and romantic attraction and relations between males. Transgender is a person who deeply feels and identifies his/her sex as the opposite from his/her assigned sex and lives by that identity. Intersex refers to genital ambiguity and combinations of chromosomal genotype and sexual phenotype other than XY-male and XX-female from birth. National Human Rights Commission of Mongolia, 12th Report on Human Rights and Freedoms, p 59, 2013.

[89] "Sexual Orientation and Human Rights," accessed October 26, 2016, http://hrlibrary.umn.edu/edumat/studyguides/sexualorientation.html.

[90] National Human Rights Commission of Mongolia, "12th Report on Human Rights and Freedoms in Mongolia" (2013), 76. [Mongolian]

[91] Gary J. Gates, "How Many People Are Lesbian, Gay, Bisexual, and Transgender?" (Williams Institute, UCLA School of Law, April 2011), 3, http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-How-Many-People-LGBT-Apr-2011.pdf.

[92] National Human Rights Commission of Mongolia, "12th Report on Human Rights and Freedoms in Mongolia" (2013), 65 [Mongolian]; "Legal and Policy Document Review regarding Sexual Minority in Mongolia" UB, 2014, 11. [Mongolian]

and inactions on these grounds (Article 14.1). Yet, its entry into force has been delayed until 1 July 2017, impeding immediate investigation and accountability for these acts.

Right to compensation for requisition of private property

Interpretation of fundamental rights must fully integrate fundamental values of equality and liberty. Article 16.3 states "If the State and its bodies appropriate private property on the basis of exclusive public need, they may only do so with due compensation and payment". Certain scholars suggest changing the wording to "fair compensation to be paid in advance", assuming that the above provision of the Constitution not signifying fairness.[93] Yet, according to Article 1 of the Constitution, one of the fundamental purposes of state activity is justice. In light of this, if the government appropriates private property on the basis of exclusive public need, it must provide fair compensation.[94] No amendment to the Constitution is necessary in this regard.

An example of violation of this right could be the decision of Ulaanbaatar City Council to set compensation amount for private land appropriation at least three times lower than the market price (Ulaanbaatar City Council adopted a resolution on Procedure to Land Acquisition for Housing Purpose on 27 June 2011 targeting private land of citizens residing in central district of the city. The market price for one square meter of land at that time ranged from 300,000 to 1,000,000 tugrugs. However, the City Council paid 100,000 tugrugs for one square meter of land as compensation).[95]

Right to freedom of expression and freedom of the press

Article 16.16 of the Constitution guarantees freedom of thought, opinion, expression, speech, press, and peaceful assembly generally in line with international human rights norms. However, the Constitution does not include the test of "necessary" for restrictions on the right to freedom of expression as enshrined in the ICCPR.[96] Therefore, this omission must be corrected for it affects realization of the right in line with international standard.

The rights to freedom of expression and freedom of the press are not adequately implemented in Mongolia. The country ranked 60 out of 180 in the

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[93] Lundendorj N., Sainkhishig J., "Fair process for requisition of private property" in *Pressing Issues of Public and Private Property* (Law School of National University of Mongolia, 2012) 48. [Mongolian]

[94] Munkhsaikhan O., "Framing Fundamental Rights Protected by the Constitution of Mongolia," *Human Rights Journal*, No. 1 (2016), 13-22. [Mongolian]

[95] Ibid, p 47.

[96] International Covenant on Civil and Political Rights, 1966, http://www.legalinfo.mn/law/details/1257?lawid=1257.

2016 World Press Freedom Index as a country with problematic press freedom since 2002.[97] Similar to previous years, freedom of the press in Mongolia was assessed as partly free by Freedom House in 2016.[98]

The report on the freedom of the press in 2015 documents such violations of the right to freedom of expression and freedom of the press as broad classification of state secrets, vague restrictions on the content, lack of transparency of media ownership and affilitation, pressure to disclose one's identity in online communications, registration of online news pages, filtering, lack of legal protection for journalistic sources, and the criminalisation of defamation and libel.[99]

Criminalization of defamation and libel is regarded as a breach of the right to freedom of expression. However, in democratic societies like the USA, UK, France, Germany, Spain, Canada, Denmark and Austria defamation and libel is criminalized. But the difference lies with the fact that this sanction is balanced in regard to free expression, other principles and court precedents. Therefore, criminalization of defamation and libel per se is not a violation of international treaties and customary law. The key test in this regard must be the conditions defined in Article 19.3 of the ICCPR: the sanction should be 1) provided by law; 2) set for purposes stated in paragraphs A and B of Article 19; and 3) necessary for these purposes.[100] Civil sanctions requiring reparation for harms can protect reputation interests as strongly as criminal sanctions.[101] Therefore, criminal sanctions for defamation and libel, particularly arrest and imprisonment may not satisfy the "necessary" test for restriction of freedom of expression.

Lastly, international expertise and advice is important to find appropriate solution on this matter. For instance, the UN Human Rights Committee recommended repealing defamation and libel from the Criminal Law.[102] The same recommendation was provided by eight countries in Universal Periodic Review of Mongolia in 2015. Moreover, the UN Special Rapporteur and OSCE

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[97] "Mongolia : Faltering Efforts |Reporters without Borders," *RSF*, accessed October 31, 2016, https://rsf.org/en/mongolia.

[98] "Mongolia Country Report: Freedom of the Press, 2016," accessed October 31, 2016, https://freedomhouse.org/report/freedom-press/2016/mongolia.

[99] Globe International Center, "Report on Freedom of the Press 2012-2014", "Report on Freedom of the Press 2015" [Mongolian]

[100] Human Rights Committee, "General Comment No. 34 (Article 19: Freedom of Opinion and Expression)," September 12, 2011, para. 22

[101] "Defining Defamation: Principles on Freedom of Expression and Protection of Reputation," (Article 19, 2000); "Revised Defining Defamation Principles: Background Paper (Report)," (Article 19, 2016); "Briefing Note On International and Comparative Defamation Standards," (Article 19, February).

[102] UN Human Rights Committee, "General Comment No. 34 (Article 19: Freedom of Opinion and Expression)," para. 47.

Representative on Freedom of the Media call for civil remedies for defamation instead of criminal sanctions.[103]

An important step was taken toward better protection of the right to freedom of expression when defamation and libel was repealed from the new Criminal Law of 2015. Article 7.3 of new Tort Law of 2015 states "For acts of publicizing false information defaming human dignity and reputation or spreading it through mass media and social networks, an individual shall be fined by an amount equivalent to 1000 units and legal entity shall be fined by an amount equivalent to 10,000 units". There are views that the sanction has become softer than it used to be.[104] Repeal of imprisonment is already a positive sign. There is still more to do, though, to bring defamation and libel accountability totally under civil law.

Right to demonstration and assembly

Article 16.16 guarantees the right to freedom of peaceful assembly and it states "procedures for organizing demonstrations and other assemblies are determined by law".

The State Great Hural passed the Law on Procedure for Organizing Demonstrations and Assemblies in 1994. Revision of the law in 2005 made some progress including opening up for demonstrations and assemblies to be organized in Sukhbaatar (central) Square, but it did not change unnecessary restrictions placed on the right to demonstration and assembly. For instance, replacing the wording of the law from "acquiring permission" to "registration" did not alter the actual practice of "permission" system. According to the procedure set by the law, one must notify local governor of his/her intention for demonstration and assembly. The local governor is required to respond in writing within three working days about the registration status. If no written response is provided within this period of time, one may organize the demonstration and assembly. In case the local governor refuses to register, the individual may file a suit to the court which must be heard within six working days. It is illegal to organize demonstrations and assemblies without registration. Sanctions, including forced disbanding, fine and arrest, serve as the basis for "permission" system.[105]

Restrictions that do not meet all three elements of being 1) provided by law; 2) set for legitimate interests; and 3) necessary for protection of these

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[103] "Report on Freedom of the Press 2015", 22 Globe International Center, 5. [Mongolian]
[104] Globe International Center, "Report on Freedom of the Press 2015", 11 . [Mongolian]
[105] National Human Rights Commission of Mongolia, "8th Report on Human Rights and Freedoms in Mongolia" (2009) 4. [Mongolian]

interests, violate the right to peaceful demonstration. The element of being "necessary" requires that regulations use the least restrictive means for the protection of legitimate interests. A "permission" system has more risks of interference than "notification" system. Article 10.2 of the Law on Procedure for Organizing Demonstrations and Assemblies leaves room for discretion for local governors to refuse to register notifications and to abuse power. In practice, local governors sometimes refuse to register notifications of demonstration on the grounds not provided in the law.[106]

In contrast, a "notification" system is as much able to guard legitimate interests as the "permission" system. It also allows the free exercise of the right to peaceful demonstration. A "notification" procedure does not require registration or permission: it suffices to notify the competent authority that one is going to exercise the right. Prior notification is required only to allow the government to take necessary measures to protect public order, security and rights and freedoms of others.[107] Prior notification allows the police to ensure peacefulness of demonstration and assembly. International human rights bodies have recommended dismantling of "permission" systems.[108] It is important to take this global trend into account.[109]

National Human Rights Mechanism

The drafters of the Constitution not only declared human rights and freedoms but they also paid special attention to the government obligation to ensure conditions for the realization of rights. Article 19.1 of the Constitution reads "The State is responsible to the citizens for the creation of economic, social, legal, and other guarantees ensuring human rights and freedoms, for the prevention of violations of human rights and freedoms, and restoration of infringed rights".

There are national and international human rights protection mechanisms. International mechanism includes the Universal Periodic Review of the UN

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[106] National Human Rights Commission of Mongolia, 7th Report on Human Rights and Freedoms in Mongolia" (2008) 32. [Mongolian]

[107] Nina Belyaeva, Thomas Bull, and David Goldberger, *Guidelines on Freedom of Peaceful Assembly*, 2nd ed. (Warsaw: OSCE/ODIHR, 2010), 63.

[108] UN Special Rapporteur and Venice Commission advise to repeal permission system. Belyaeva, Bull, and Goldberger, *Guidelines on Freedom of Peaceful Assembly*, 65; Maina Kiai, "Report of the Special Rapporteur on the Rights to Freedom of Peaceful Assembly and of Association, A/HRC/20/27" (Human Rights Council, UN, May 21, 2012), 8.

[109] Courts in Tanzania, Zambia, Niger and Georgia annulled permission systems ruling that it contradicts to the Constitution.

Human Rights Council, treaty bodies and special procedures. National mechanisms include the State Great Hural, National Human Rights Commission, courts, prosecutors, lawyers, central and local government, civil society, media, private sector, other government units and offices in charge of human right protection.[110] The Constitutional Court, National Human Rights Commission, Human Rights Sub-Committee of the Parliament, courts and investigation unit at the General Prosecutor's Office have important roles in the national mechanism.

Constitutional Court

Article 66.1 of the Constitution states "The Constitutional Court examines and settles constitutional disputes at the request of the National Parliament, the President, the Prime Minister, the Supreme Court, and the Prosecutor General, or on its own initiative on the basis of petitions and information received from citizens".

The Law on the Constitutional Court of 1992 is no more inclusive than the Constitution when it comes to "petitions and information received from citizens". The Constitutional Court practice also confirms this limitation. Procedure to approach the Constitutional Court is identical to *actio popularis* which exists in a few countries, including Hungary (1989-2011), Croatia, Georgia and Macedonia. Established constitutional democracies abstain from *actio popularis.*[111]

The majority of disputes settled by the Constitutional Court over the last 24 years were based on petitions and information received from citizens. In total, 176 disputes were settled by the mid-sized bench of the Constitutional Court between 2 December 1992 and 2 December 2016.[112] 97.15 percent or 171 disputes were filed by citizens. This demonstrates that petitions and information received from citizens target important constitutional issues.

Contrary to the constitution-drafters' aspiration, the above-described limited perception of Constitutional Court mandate has affected its potential to develop into an effective judicial institution that protects fundamental rights. The Constitutional Court does not hear human rights violations apart from a few circumstances. In most cases, violation of fundamental rights does not occur in the abstract but it is caused by court or administrative decisions and acts. It is

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[110] National Human Rights Action Program of Mongolia (2003), 7–15. [Mongolian]

[111] European Commission for Democracy through Law (Venice Commission), *Study on Individual Access to Constitutional Justice* (Council of Europe Publishing, 2010), 21.

[112] Central Legal System, National Legal System, accessed on 2016.12.02, [Mongolian] http://www.legalinfo.mn

currently not possible for individuals to turn to the Constitutional Court for redress of human rights violations, which is not available from ordinary courts such as in cases of execution despite ratification of Second Optional Protocol to the ICCPR; failure to award non-material damage for victims of torture; impunity due to failure of hate crime prohibitions; breach of equal suffrage caused by malapportionment; failure of the city council to provide fair compensation for private property requisition; arrest of journalists for criticizing a politician's act; and an order of judge which upholds local governor's rejection of demonstration notification. In its history, Constitutional Court found human rights violations in decisions of the Supreme Court and Ulaanbaatar City Council but refused to annul those decisions. It does not accept such disputes.

A broader definition of citizens' petitions and information would entail more progressive approach.[113] In international practice, individuals whose rights have been affected by acts or omissions of the legislature, judiciary or executive may bring a claim to the Constitutional Court if redress is not available through ordinary legal means. Assimilation of this procedure into Mongolian legal practice would open up availability of redress by Constitutional Court in disputes initiated by petitions of individuals. This kind of Constitutional Court rulings would not require endorsement by the State Great Hural. In the same spirit, the National Human Rights Action Program (Article 1.1.2.1.3) aims to "intensify operation of Constitutional Court and to develop its special role in resolving violations of human rights enshrined in the Constitution."

Widening of the Constitutional Court mandate by law would be significant for developing it into a judicial institution that protects fundamental rights as desired by drafters of the Constitution. A number of scholars have stressed that the protection of human rights must be one of the objectives of Constitutional Court.[114] In the first drafts of the Constitution, there was no provision about claims to be made by individuals. The existing provision on petitions and information from citizens may have been added upon recommendation of international experts. An assumption could be made that the drafting commission may have misconstrued the recommendation of international experts to create a grievance mechanism in the constitution by turning citizens'

[113] Munkhsaikhan O., "Views on Interpreting Competence of the Constitutional Court relating to Citizens' Petitions and Information" in *Legal Studies in Mongolia: Today and Tomorrow (compilation of international conference reports)* UB, 2015, 64-81. [Mongolian]

[114] Amarsanaa J., "Constitutional Review and Ways to Apply" in *Constitutional Court of* Mongolia, ed. Amarsanaa J., Sarantuya Ts., 2007, 439. [Mongolian]

petition into an abstract notion excluding human rights violations.[115] This outcome conflicts with views held by a number of People's Great Hural members who saw the Constitutional Court as the main institution for human rights protection, for claims for redress not provided by ordinary courts.[116] It is fully feasible to interpret "petition"[117] as complaint under Article 64 of the Constitution, with reference to the notion of "supreme supervision" exercised by Constitutional Court and its competence to review and make judgment on disputes under Article 66. This point was raised to the Constitutional Court but it was rejected.[118]

Enabling the Constitutional Court to hear human rights complaints would be significant at least in three ways. First, the Constitutional Court will have competence to resolve human rights violations if "petition" is interpreted as complaint. Second, it will be able to offer judicial interpretation of certain human rights concepts to be used as precedent. Third, the Constitutional Court will develop into court which focuses on resolution of human rights violations. As a result it will enjoy reduced tensions with political institution. Demand for courts that hear and resolve human rights complaints is on the rise.

[115] "Complaints and grievance relating to constitutional rights was not incorporated into the Law on Constitutional Court because there was no sufficient research and study on this matter at that time," Sarantuya Ts., *Constitutional Procedure,* 102, 129. [Mongolian]

[116] Ganbayar N., Ochirjav O., Elbegdorj Ts., Tsog L., Records of People's Great Hural sessions: 29, 85-86, 91-92, 96, on 1991.10.18; Tsog L., Gonchigdorj R., Byambajav J., Bolat A.; Purev D., Chimid B., Munkhuu D., Tsog L., Bat-Uul E., Zorig S., Orosoo J, Records of People's Great Hural sessions: 141, 147, 151, 153-154 on 1991.10.20; Records of People's Great Hural sessions: 23, 30-33, 51, 60, 79-80, 85-86 on 1991.12.16; Tsog L., Records of People's Great Hural sessions: 34 on 1991.12.20; Bolat A., Ulaankhuu R., Munkhuu D., Chimid B., Records of People's Great Hural sessions: 28-29, 32, 39 on 1991.12.23. [Mongolian]

[117] Researcher Temuujin Kh. first proposed this interpretation of petitions (2007.01.04); Temuujin Kh., *Jus Frast* (2003), 58–67, 208–32, 238–39. [Mongolian]

[118] Kh.Temuujin v. SGH, Constitutional Court, Decision 3/04 (2004.04.30). [Mongolian]

Interpretation of human rights provisions

In the majority of cases, the Constitutional Court does not provide reasoning for its decisions. Its literalist and historicist approach has parochial effect on protection of fundamental rights. For instance, universal, equal and direct suffrage, the right to fair trial, freedom of religion, and the right to complain to Constitutional Court about violations of fundamental rights are not protected fully, due to the literalist and historicist approach of Constitutional Court to human rights provisions.

Rather, moral (sometimes called as substantive, principled or philosophical) interpretation will contribute to better protection of human rights and freedoms.[119] This will allow judges to interpret constitutional principles as best he or she can on the basis of view that the Constitution is a document containing abstract principles. The best interpretation would be one that takes into account the text and structure of the Constitution, and precedents of constitutional dispute resolution. The greatest decisions of the US Supreme Court, European Court of Human Rights, courts of Germany, Italy and Hungary are based on moral interpretation rather than literalist and historicist approach.

National Human Rights Commission of Mongolia

The Law on the National Human Rights Commission of Mongolia (NHRCM) was adopted in 2000 and the Commission started functioning in 2001. The Commission is an institution mandated with the promotion and protection of human rights and is charged with monitoring over the implementation of the provisions on human rights and freedoms, provided in the Constitution of Mongolia, laws and international treaties of Mongolia (Article 3.1, the Law on NHRCM).

The UN General Assembly endorsed the Principles relating to the Status of National Human Rights Institutions (The Paris Principles) by its resolution 48/134 in 1993. The Paris principles define national human rights institutions to require that they 1) be established by constitution or law; 2) be given as broad a mandate as possible to promote and protect human rights; 3) exercise core and additional responsibilities; 4) be vested with competence to carry out duties and responsibilities; 5) composition and appointment; 6) have their own staff; and 7) enjoy guarantees of independence and pluralism.

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[119] Munkhsaikhan O., "Moral Interpretation to the Constitution", in *Law 33* V1, 2015, 35-75 [Mongolian]; Munkhsaikhan O., *Towards Better Protection of Fundamental Rights in Mongolia: Constitutional Review and Interpretation*, CALE Books 4 (Nagoya University, 2014), 109–220.

The NHRCM was accredited with “A” status according to the Paris Principles in 2003, 2008, 2014 by International Coordinating Committee of National Human Rights Institutions. “A” status signifies full compliance with the Paris Principles. National institutions with “A” status have privilege to make oral statement at meetings of the UN bodies including treaty committees. They are also able to participate in sessions of the Human Rights Council and take the floor under any agenda item, submit documentation and take up separate seating.

The following brief assessment of the NHRCM can be made in terms of its compliance with the standards set by the Paris Principles: 1) The Commission is established by law; it has been successful, within its competence, in protecting and promoting human rights over the last 15 years; and it has become a part of the guarantee for human right and freedoms specified in Article 19.1 of the Constitution; 2) It has a broad mandate to cover human rights and freedoms enshrined in the Constitution, international human rights treaties ratified by Mongolia, and national laws (Article 3.1 of the Law on the NHRCM); 3) It carries out all seven functions specified in the Paris Principles, including advice to the Government and other state organizations, research and examination of human rights issues, investigation of human rights violations, human rights education, public awareness-raising, handling of complaints, and engagement with international organizations; 4) It makes independent decisions on its internal rules and procedures, personnel and payroll within the budget limits approved by the parliament (Article 14.1 and Article 24.1, the Law the on NHRCM); the Commissioners have the right to conduct inquiries and report their recommendations through the media (Article 18.2, Article 19.6, the Law the on NHRCM) and to summon and take explanations from individuals, to have unrestricted access to any organization, to obtain necessary information and evidence, and to have access to confidential data (Article 16.1, the Law on the NHRCM). Business entities, organizations and their officials and citizens are obliged to render all kinds of assistance to Commissioners in exercise of his/her powers.

However, the practice of selection and appointment of its Commissioners does not meet the requirements of the Paris Principles. The Speaker of the SGH submits the list of nominees for Commissioners to the SGH on the basis of respective proposals by the President, the Parliamentary Standing Committee on Legal Affairs and the Supreme Court (Article 5.1, the Law on NHRCM). According to the Paris Principles, vacant posts for Commissioners should be openly announced. But this requirement is not reflected in relevant laws of Mongolia, therefore the selection process is not transparent. It is important to implement recommendations of the UN Human Rights Committee, Committee

against Torture, and International Coordinating Committee of National Human Rights Institutions to make nomination and appointment procedures transparent and to ensure participation of civil society in this process.[120]

A single term of office for Commissioners is six years, and they can be re-appointed only once (Articles 6.1 and 6.3, the Law on National Human Right Commission of Mongolia). The process of selection and appointment of the Chief Commissioner and Commissioners and their eligibility requirements are not transparent as in the case of other independent agencies such as General Election Committee, Civil Service Council and Independent Authority against Corruption. Candidates for Commissioners are required to have high legal and political qualifications, appropriate knowledge and experience in human rights (Article 4.1, the Law on the NHRCM). In practice, however, no assessment takes place as to whether candidates fully meet these eligibility criteria. It is important to introduce parliamentary hearings on candidates' eligibility as part of the appointment process.

The National Human Rights Commission must be independent and Commissioners must be impartial. It is prohibited for any business entity, organization, official or individual person to influence and interfere with the activities of the Commission and its Members (Article 3.4 of the Law on the NHRCM). In addition, the law sets political, economic, social, and legal guarantees for Commissioners (Articles 20, 21, 22). The Commission is independent from the executive government as it is established by the SGH and independently defines its structure and staffing. But the Chief Commissioner is appointed for a term of three years from among Commissioners by the SGH, based on the proposal by the Speaker of the SGH (Article 5.6 of the Law on the NHRCM). The term of 3 years creates a risk of political influence and dependence from the majority in parliament.

The international human rights bodies including the UN Human Rights Committee, Committee against Torture recommended to protect independence of the NHRCM by providing adequate financial and human resources.[121] Although is commendable that the budget of the NHRCM increased by 2.5 between 2011 and 2016, it is important to provide adequate funding commensurate to its new functions assigned by laws. For instance, the

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[120] Concluding Observations of the UN Human Rights Committee regarding fifth periodic review of Mongolia under ICCPR, 2011, paragraph 5; Concluding Observations of the UN Committee against Torture, paragraph 12; Bolorsaikhan B., "Mongolia in National Institutions Accreditation Process" in *Human Rights Journal*, No 2, 2015, 31. [Mongolian]

[121] Concluding Observations of the UN Human Rights Committee regarding fifth periodic review of Mongolia under ICCPR, paragraph 5, 2011; Concluding Observations of the UN Committee against Torture, paragraph 12.

Commission is responsible to receive and resolve gender discrimination complaints and to produce a report every two years under the Gender Equality Law of 2011 (Article 18.6). Yet the law does not provide for the financial resources necessary to carry out these responsibilities.[122]

The President of Mongolia has initiated a revision of the Law on the National Human Rights Commission. The draft assigns a new role to the Commission on prevention of torture in relation to the ratification of Optional Protocol to the Convention against Torture. In addition, the draft is progressive in terms of detailed appointment procedures, including a requirement for public announcement of vacancies for Commissioners, enforcement of recommendations put forward by the Commission in its annual human rights reports, reporting procedures and local presence. However, the draft is still undeveloped when it comes to eligibility criteria, pluralist representation of gender, civil society and academics, civil society participation in appointment procedure, and budget stability.[123]

Human Rights Sub-Committee of the State Great Hural

The State Great Hural, elected by the public, is the expression of the right to take part in government of the country. In that sense, the parliament has to shoulder exceptional responsibilities for the protection and promotion of human rights including making laws compliant with human rights norms, issuing decisions on ratification of international human rights treaties, and overseeing whether budget distribution is responsive to the needs to protect and promote human rights and if it is used appropriately. The SGH oversees implementation of the executive government's duty to respect human rights. Standing Committees of the Parliament which are in charge of grievance, justice and budget play important roles in protection of human rights. However, this study limits itself to the competence and mandates of the Human Rights Sub-Committee which is particularly in charge of human rights issues.

The Law on the State Great Hural (Article 24.1) stipulates that a Human Rights Sub-Committee may be established under the competence of the Standing Committee on Legal Affairs which is responsible for ensuring guarantee for human rights and freedoms (Article 20.7.2). The text of the law is flexible in terms of the creation of the Sub-Committee. For this reason, different parliaments attach varying degree of importance to the Human Rights Sub-Committee. The objective set by the National Human Rights Action Plan of

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[122] National Human Rights Commission of Mongolia, 12th Report on Human Rights and Freedoms in Mongolia, 117. [Mongolian]

[123] B.Bolorsaikhan, "Mongolia in National Institutions Accreditation Process" in *Human Rights Journal*, No 2, 2015, 31. [Mongolian]

2003 (1.1.1.7) to upgrade the status of the Sub-Committee into a Standing Committee still needs to be met.

The Human Rights Sub-Committee is not only a guarantee for human rights and freedoms but it exercises a broad mandate, including deliberation of important issues relating to amnesty, immigration and citizenship (Article 24. 13.6, the Law on the State Great Hural). The Sub-Committee develops policy documents, issues proposals which are tabled to the State Great Hural via the Standing Committee on Justice and exercises inquiry mandates (Article 24.3.6, the Law on the State Great Hural) like its counterparts in other countries.[124] It has the competence to issue observations and conclusions on the human rights implications of draft laws and submit them to the parliament. The Sub-Committee may hear and draw conclusions on the implementation of government obligations under international human rights treaties, assess government reports to treaty bodies and implementation of their recommendations.

Examples of its achievements would include public hearing organized by the Sub-Committee after the election-related public riot of 1 July 2008 in Ulaanbaatar. The public hearing and recommendation of the Sub-Committee had a triggering effect for legal reform intensified in the following year. Moreover, the Sub-Committee deliberated annual human rights reports of the National Human Rights Commission of Mongolia from 2010 to 2016; conducted inquiries into certain human rights issues; organized hearings and produced analysis on human rights compliance of draft laws including revised Criminal Law, Law Enforcement Act, and Court Decision Implementation Act etc. These important efforts need to be done on regular and steady basis.

The Chair of the Sub-Committee is chosen by majority vote of the Standing Committee on Justice (Articles 24.9 and 24.10, Law on the State Great Hural). The selection of an opposition member as Chair of the Sub-Committee in 2009, 2010 and 2015 was important in ensuring its independence.

Courts

Courts play at least four significant roles in the protection of human rights. First, independence, impartiality and integrity of criminal, civil and administrative courts not only ensure the right to fair trial (Article 16.14) but also protect other fundamental rights. For example, the administrative court of all three instances protected freedom of the press by finding decision of the Communications Regulatory Commission to shut down a news website (www.amjilt.com)

[124] Ingeborg Schartz, "Parliamentary Human Rights Committees" (National Democratic Institute for International Affairs, 2005), 21.

illegal.[125] The website was ordered by the Communications Regulatory Commission to shut after it published a report about pollution of the Tuul River by Khaan Jimst resort, owned by then Prime Minister Altankhuyag.

Second, every judge holds legal competence to apply his or her interpretation of vague or contradicting legal provisions in light of fundamental rights. The test of "provided by law" in Article 230.2 of the Civil Law includes the Constitution and international treaties ratified by Mongolia. However, courts are not making full use of this possibility. For instance, no interpretation of fair and adequate reparation including both material and non-material damage has been made by courts on the basis of Article 16.14 of the Constitution which guarantees "the right to be compensated for the damage illegally caused by others" and Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment which stipulates that "each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible".

Third, judges are not supposed to apply laws that contradict the Constitution. If a judge considers that a specific act contradicts the Constitution, he or she can suspend the trial and submit a request for review to the Supreme Court (Article 7.4, Law on the Courts). After deliberation, the Supreme Court may submit a request for review to the Constitutional Court. Over the last 24 years, the Supreme Court submitted only three requests for review to the Constitutional Court. One of these three requests was based on submission from a judge of first-instance court. Judges do not take use of the leeway for review by the Constitutional Court.

Fourth, courts are bound to apply international human rights treaties ratified by Mongolia which are superior to national laws. Currently, there are around 40 binding international human rights treaties ratified by Mongolia. Yet, courts are not necessarily using these treaties in adjudication. The Supreme Court issued a resolution in 2008 on use of international human rights treaties ratified by Mongolia and other international norms and principles. However, courts, which are legal guarantors of human rights, do not commonly apply international norms in adjudication.[126]

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[125] *The Communications Regulatory Commission vs. Tom Amjilt Co Ltd*, the Supreme Court, Decision No 120, 2015.05.11. [Mongolian]

[126] Byambadorj J., "Fifteen years of joint efforts" 2016, 8. [Mongolian]

Investigation unit at the General Prosecutor's Office

An independent investigation of crimes of torture is important to ensure accountability. The UN Human Rights Committee recommended to Mongolia to ensure that the Investigation Unit at the General Prosecutor's Office has the necessary authority, independence and resources to adequately investigate all offences committed by the police.[127]

The State Great Hural dissolved the Investigation Unit by annulling relevant provisions in the Law on Prosecutor's Institution (Article 10 and 45) on 24 January 2014. On the same day, the State Great Hural issued a resolution to transfer staff, budget and property of the Investigation Unit to the Independent Authority against Corruption. This change of regulation left investigation of torture to the hands of local police at aimag and district level. In other words, the crime of torture committed by police is now investigated by the police itself. Public trust in mechanism against torture is declining due to possible conflict of interest and risks of impunity.

Conclusion

The constitutional text in Chapter Two on "Human Rights and Freedoms" guarantees civil, political, economic and cultural rights commonly protected in democratic societies around the globe.

Violations of constitutionally-guaranteed human rights and freedoms are occurring despite Mongolia's successful and peaceful democratization and formation of culture to respect human rights. Failure to fully implement constitutional and international norms relating to human rights in practice is described based on the examples of electoral rights, right to life, non-discrimination, fair compensation, freedom of expression, freedom of demonstration and assembly.

The national human rights mechanism is developing. Yet, pressing human rights issues persist due to the shortcomings of the system including incompetence of the Constitutional Court to receive and solve human rights complaints, lack of transparency in appointment of human rights commissioners, unsteady functioning of the Human Rights Sub-Committee of the State Great Hural and dissolution of independent investigation mechanism against torture.

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[127] Concluding Observations of the UN Human Rights Committee regarding fifth periodic review of Mongolia under ICCPR, 2011, paragraph 13.

Chapter Three
State Structure

Introduction

Throughout 1921-1990, Mongolia had a system which did not adhere to the principle of separation of state powers, in which all state organs implemented their activities under strong control of the ruling party, and competencies of the highest representative body were exercised by elected presidium members of the same body. This was characterized as a strong authoritarian system with red tape.[128] In 1990, Mongolia firmly started on the path to democracy. The law on the amendment to the Constitution which changed the system of the state structure of Mongolia promulgated the classic parliamentary system as the state governance form. However, during the discussions of the draft Constitution, some changes were made in the relationship between state organs which caused slight distortions of the principle of separation of powers, and therefore in the system of checks and balances between the state organs.

As a result, Mongolian scholars differ in their understanding of the nature of the political system as to whether it is parliamentary or a mixed semi-presidential system. The presidential-parliamentary-mixed distinction has been very important for academics who study comparative politics, but recent scholarship has emphasized the internal variety within each category of system, suggesting that perhaps the labels are not so important.[129] The precise balance of powers within the government scheme has varied over time in both law and practice, with the major constitutional amendments of 2000 marking a major change (to be discussed in detail below.) In the majority view, after those amendments, the system is best characterized as parliamentary, because the government depends on the confidence of the parliament.[130] Mongolia being as a parliamentary republic is widely accepted among politicians, political analysts,

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[128] In political science, such a system of government is called a soviet republic.

[129] Jose Cheibub, Zachary Elkins and Tom Ginsburg, "Beyond Presidentialism and Parliamentarism," *British Journal of Political Science*, 2013.

[130] In an excellent analysis, L.Munkh-Erdene argues that the system has become a parliamentary system in practice. See "The Transformation of Mongolia's Political System: From Semi-parliamentary to Parliamentary?" Asian Survey, Vol. 50. Number 2, 311-334; L.Munkh-Erdene, "Who governs in Mongolia?" UB., second of the series. [Mongolian]

lawyers and scholars. However, some scholars view Mongolia as being a semi-presidential system.[131] In practice, Mongolia has had governments that are more or less parliamentary (some members from parliament) and governments that are not parliamentary (no member from parliament) as will be discussed below. Regardless of the label, within the Mongolian constitutional scheme, the unicameral parliament is clearly the strongest body.

The model was chosen because of the concern that a pure presidential system would lead to too much power in a single individual, which was understood to be a defect of the earlier socialist period. At the same time, Mongolia's tradition of strong central leaders led some to argue that it would be good to have a directly elected president as a symbol of the state.

Although directly elected, the presidency appears on paper to be weaker than that of 5th Republic France, which was a model that was consciously considered by the drafters. A comparison of powers between the French and Mongolian presidency yields three categories: (i) powers that both countries grant to the president in their respective constitutions; (ii) powers that only the Mongolian president has; and (iii) powers that only the French president has. The first category includes designating the president as commander in chief of the armed forces; a role in appointing the prime minister (in Mongolia's case subject to the majority party's proposal); the power to veto legislation; the power to declare a state of emergency (in Mongolia's case with the legislature's approval); the ability to grant pardons; the power to convene an extraordinary session of the legislature; the ability to negotiate and ratify treaties (in Mongolia's case in consultation with the legislature) and to appoint and receive credentials of ambassadors; the power to propose some members of the Constitutional Council; and the ability to appoint the prosecutor general. Unlike the French President, Mongolia's president has the ability to initiate legislation. The French president, in contrast, has more direct governmental powers: he can dissolve the legislature, plays a major role in government formation, presides over the Council of Ministers, makes appointments to civil and military posts of State, and has the power to refer draft bills to the Constitutional Council for review.

Mongolia's president's power is thus somewhat weaker than the French. The choice was made to have the president be a non-partisan institution, as head of state and symbol of the country's unity. Much of the president's power,

[131] See D.Chuluunjav, Modern legal, political and philosophical issues of the state system, structure, governance, and activities of Mongolia in times of liberalization and democracy (1990-2009), UB., 2009, 317-326. [Mongolian]

then, is designed to derive from a kind of moral and symbolic authority. This is consistent with the role of the president in parliamentary republican systems.

The State Great Hural

Introduction

Article 4 of the original Constitution of Mongolia stated, "The State Great Hural shall maintain the supreme state power of the Mongolian People's Republic, and in between the sessions of the State Great Hural, it shall be maintained with the State Small Hural, and in between the sessions of the State Small Hural, State Small Hural Presidiums and the Government shall jointly maintain the supreme state power". This illustrates that Mongolia had a system whereby several state institutions jointly shared the maintenance of the state supreme power. This unique system continued for a long time.[132] The Law on the Amendment to the Constitution approved in 1990 provided, "The highest representative body of state power shall be the People's Great Hural and the supreme legislative body shall be the State Small Hural". The sum of these two separate organizations constitutes the Parliament.[133]

However, in accordance with the new Constitution, Mongolia established a unicameral highest legislative body, the State Great Hural, consistent with global standards. The SGH, with permanent functions, enjoys the sole legislative power of the state and is elected through nationwide elections. Members of the SGH are elected to fully represent and uphold the interests of all citizens of Mongolia. The SGH enjoys the highest position in the state system and, apart from establishing the legal basis for the organization and activities of other state organs, it has full powers to discuss and adopt laws that regulate the economic and social life of Mongolia, and to oversee the implementation of its adopted laws and decisions. The Constitution provides

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[132] For example, the 1940 Constitution provided, "The State Great Hural is the highest organ of state power of the People's Republic of Mongolia. The State Great Hural shall convene 3 times per annum. In between sessions of the State Great Hural the supreme state power shall be vested in the State Small Hural elected and established by the State Great Hural. The session of the State Small Hural shall be convened once per annum. In between sessions of the State Small Hural the supreme state power shall be vested in the Small Hural Presidiums elected and composed from the Chairman, Vice Chairman, Secretary General and four Members of the State Small Hural." Article 19 of the 1960 Constitution stated, "In Mongolian People's Republicthe legislative power shall be vested solely in the People's Great Hural", while article 33 of the said Constitution legislated, "In between sessions of the People's Great Hural the Presidiums of the People's Great Hural shall be vested with the supreme state power".

[133] It is incorrect to think that these two organizations, which are established by their own respective regulations and adopt laws separately, constitute two chambers of one parliament.

that *the State Great Hural is the Supreme Organ of State Power* (Article 20) and has the *exclusive* right to set the basis of all foreign and domestic policy (Article 25). It thus has virtually unlimited legislative power. The language "Supreme Organ of State Power" is drawn loosely from Mongolia's previous Constitutions. Today, the phrase supreme organ of state power is relatively rare, and found almost exclusively in socialist countries, as well as in Japan, the only democratic country which retains this phrase.[134] Sometimes, as in China, these countries distinguish between state *power* and state *administration,* and this idea seems to be reflected in Article 38 of Mongolia's constitution, stating that the Government is the highest organ of the executive power. But clearly the phrase "Supreme Organ of State Power" is anomalous, and part of the socialist legacy.

Mongolian scholars of constitutional law tend to argue that this phrase, the Supreme Organ of State Power, is designed to reflect the democratic legitimacy of the SGH. Some scholars argue that the SGH is the highest organ of state power because according to law it represents the interests of the people, and is elected by them, while some define the supreme legislative power of the SGH and the highest organ of state power by relating these concepts to representative democracy, wherein the Members of the SGH are elected by the people.[135] Others argue that this concept contravenes the principle of checks and balances assumed by the doctrine of separation of powers.[136] Consequently, it is safe to say there is no consensus among scholars about the desirability of retaining this provision.

Comparative experience might be helpful, but only Japan among democratic nations has such a phrase. Article 41 of the Constitution of Japan states, "the Diet shall be the highest organ of state power, and shall be the sole

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[134] See e.g., Constitution of Cuba (2002), Article 69 (The National Assembly of People's Power is the supreme organ of State power and represents and expresses the sovereign will of all the working people.); Constitution of China (1982), Article 57 (The National People's Congress of the People's Republic of China is the highest organ of state power…) and Article 62 (The National People's Congress exercises the following functions and powers: …15. To exercise such other functions and powers as the highest organ of state power should exercise.) Constitution Japan 1946, Article 41 (The Diet shall be the highest organ of state power, and shall be the sole law-making organ of the State.) There are many countries in whose constitution it appeared at one point but no longer does: Afghanistan, Albania, Angola, Bulgaria, Cambodia, Czechoslovakia, Ethiopia, German Democratic Republic, Guinea-Bissau, Hungary, People's Republic of Korea, Mozambique, Myanmar, Poland, Romania, Russia, and the now defunct People's Republic of Yemen.

[135] D.Solongo, Glossary of Definitions and Terms of State Law, 2003, "...The highest representative body elected by the people to hold the supreme state power," 139, 167. [Mongolian]

[136] N.Lundendorj, Period of Transition: Political and Legal Issues, 2010, 25-26. [Mongolian]

law-making organ of the State".[137] Japanese constitutional law professors Hiroyuki Hata and Go Nakagawa have interpreted these concepts and argue that "the drafters unconsciously planned to alienate the Emperor from the legislating power of the State by positioning the Diet as the only legislative organ of the national Government."[138] However, because the judiciary has the explicit power to annul laws in Japan, the Diet is not actually the highest organ of the state power. The view of these Japanese scholars is that defining the Diet as the highest organ of state power violates the doctrine of separation of powers. On the other hand, this phrase can best be understood in the context of the drafting process. The previous Meiji Constitution had provided that the Emperor of Japan was the highest authority, so the 1946 drafters may have been trying to reduce the role of the Emperor by raising the status of the National Diet to be the highest organ of state legislative power and the only law-making organ of the state. From this perspective, the concept of the "highest organ of state power" was intimately related to the status of the Diet as the "sole law-making organ of the state". This historical circumstance is obviously very different from that of Mongolia in 1992 or today.

Prof. Hans Baerwald, an important scholar of the Japanese Parliament writes, "According to the 1947 Constitution the Japanese Diet is the highest organ of state power. Yet most students of Japanese politics, indeed most of the Japanese people, do not believe this to be an accurate reflection of the power of the Diet."[139] In short, there is a gap between the nominal status of the Diet and actual political practice in Japan.

The foundation of any state power ought to emanate from the people, who exercise their power through their elected representatives. Consequently, the Parliament, which constitutes the representative organ of the people, is vested with this power. On the other hand, there should not arise any misunderstanding that the SGH constitutes the highest organ of state power vis-à-vis the other branches of government. This would be incompatible with the principle of constitutional checks and balances and the doctrine of the separation of powers, which was one of the motivating principles of the 1992 Constitution. It could be the basis for undermining the principle of three separate branches of governmental power, namely executive, judicial and legislative power.

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[137] P.Amarjargal (trans), N.Lundendorj and J.Oyuntungalag (eds), Constitutional Law of Japan, Admon Publishing House, 2011, 15. [Mongolian]

[138] Hiroyuki Hata and Go Nakagawa, Constitutional Law of Japan, Kluwer Law International, (1997) 58-59.

[139] Hans H. Baerwald, "Parliament and Parliamentarians in Japan", *Pacific Affairs*, Vol. 37, No.3, autumn 1964, University of British Columbia, 271-282.

In Mongolia most analysts interpret this constitutional provision in the context of the social transition and as furthering the goals of representative democracy. On the other hand, there is some tension between the idea that the Parliament is the "highest organ of state power" and the ideals of the separation of powers and the rule of law. Consideration should be given to amending this provision, although we recognize that this is currently prohibited by the Law on the Constitutional Amendment Procedure of 2010.

Much of the current debate over the political system emphasizes the need to maintain Mongolia as a parliamentary system. From this point of view, the fundamental organization of the state should not be modified, nor should Article 20 be amended, but instead should be interpreted correctly and applied consistently. If Article 20 is misinterpreted, the extensive powers provided to the SGH in Article 22 and 25 of the Constitution could lead to imbalance in the system. For example, there is no guarantee that the "exclusive competence" of the SGH to consider at its initiative any issues pertaining to domestic and foreign policies of the state, as provided in Article 25 of the Constitution, would not allow it to infringe on the judicial power, and it could further provide an opportunity for the SGH to consider any other organization or official as constitutionally inferior.

If Mongolia decides to undertake a major constitutional amendment, consideration should be given to removing the anachronistic language about the State Great Hural being the Supreme Organ of state power. This phrase made sense in the transition from a socialist environment, and the Constitution successfully turned parliament from a rubber stamp into a genuine legislature. But the overall scheme of the Constitution now features a conception of separation of powers and checks and balances, and so the language is neither an accurate description of reality, nor a desirable state of affairs in a modern democracy. It contradicts the idea of a separation of powers.

On the other hand, we recognize that the Law on Constitutional Amendments makes eliminating this language difficult. Consequently, it may be easier to remove the word "exclusive" from Article 25, as not every power listed there is fully in the *exclusive* competence of the SGH.[140] Such an amendment would help ameliorate any distortions that could arise in respect to the full powers of the SGH.

[140] The State Great Hural may consider at its initiative any issue pertaining to domestic and foreign policies of the state, and shall keep within its exclusive competence the following questions and decide thereon.

The Speaker of Parliament

The SGH Speaker has an important office. The Speaker and Vice-Speaker are elected by the SGH for four year terms on the basis of an open ballot (Article 24.1). The Speaker announces and presides over SGH sessions Article 27.4). Along with the President, he can convene extraordinary sessions of the SGH (Article 27.3). He also serves as the person who exercises presidential power in the temporary absence of the president for the reasons stated in the law, and succeeds to the office of President in the event that office becomes vacant, until a new election can be held (Article 27). This is a further reflection of the symbolic importance of parliamentary power.

In 2008, a major incident occurred in which the Speaker of the SGH was accused of modifying the contents of laws after their passage. The Speaker claimed to be doing so only in an "editorial" capacity. However, this led to an investigation, and ultimately a case before the Constitutional Tsets. The incumbent was ultimately removed from office as speaker, though he was allowed to retain his parliamentary mandate. We view this incident as a reflection of the constitutional system working very well to limit misconduct by a high public official.

Parliamentary power in practice

The power of the SGH is not just a matter of constitutional language. In a comparative index of levels of parliamentary powers around the world produced by Professors Fish and Kroenig, Mongolia is tied with Italy and Germany for the top spot in terms of parliamentary power.[141] Not only does it possess very wide power within the government system, the SGH cannot be dissolved except by itself on a vote of 2/3 of its own members (Article 22.1). In many semi-presidential systems, the president or government might have a power to dissolve parliament under some conditions, but in Mongolia the only such power is exercised by the President in consultation with the Speaker of the SGH or in instances in which the SGH fails to approve a Prime Minister within 45 days since submission of the candidacy (Article 22.2).

An example of how the SGH has been unconstrained is the system in which members of the SGH have been able to directly designate funds from the annual budget for spending in their districts. The initial amount was 10 million tugrik per MP in 2004. This number was raised to 100 million tugriks per MP in 2006, 250 million tugriks in 2007, 500 million in 2008 and to billion tugriks in 2009-2012. This system has been argued to violate the rule of law and was

[141] M. Steven Fish and Matthew Kroenig, *The Handbook of National Legislatures: A Global Survey* (New York: Cambridge University Press, 2009).

ruled unconstitutional by the Tsets in 2007. Nevertheless, the SGH continued to utilize the system until 2013 after the Tsets decision. The system of direct district spending was also vetoed by the President Ts.Elbegdorj in 2010, but the SGH overrode it. More importantly, the fact that the SGH used the system despite the criticisms of other constitutional actors suggests that there may be insufficient institutional constraint on the SGH.[142] In addition, as pointed out by some researchers, the very fact that the cabinet sought to cultivate favor with MPs by creating this system in the first place is an indication of excessive parliamentary power.[143] Normally, Government wants to control decisions about the allocation of funds as much as possible.

Thus there is very little check on the SGH, and Mongolia can be characterized as falling very heavily toward the "parliamentary" side of the spectrum of political systems.

Some of these powers are discussed below.

Appointment power. Parliament has adopted the practice of making some direct appointments, which might be seen to violate separation of powers. In particular, the category of "parliamentary organizations" in Mongolia, includes many independent organizations, such as the Mongol Bank, the Civil Service Commission, the Independent Authority against Corruption, the General Election Commission, the National Human Rights Commission, the National Audit Office and the Financial Regulatory Committee. For these organizations, the SGH appoints the Directors for 6 years. Presidential appointments, on the other hand, are limited to those offices specified in the Constitution. One way to think about this is that the appointment power is one of the few that the president has; but parliament has residual appointment power along with many other powers.

All this suggests that, in fact, the levels of SGH power in the system may be too high. The amount of power of the institution creates great competition to join it. But Mongolia's political party system is increasingly not about policy so much as power and competing networks of elites. Instead of debating genuine policies on which different parties disagree, each proposes similar policies. Populism characterizes the political climate in Mongolia today. This is a somewhat worrying situation, given the changing economic structure.

Legislative power. Another issue is related to legal provisions that stipulate that laws become effective upon adoption by the SGH. Many laws so

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[142] See generally P.Amarjargal, Master's thesis on "Improving parliamentary democracy in Mongolia" (2010).

[143] N.Lundendorj, "Tyranny of the Majority", Mongolian Law Review 2012 (2): 145.

provide, but despite this, the SGH has at times acted even before laws come into force. For example, before the Law on the Amendment to the Constitutional Tsets had entered into force, and was not published in the “State Gazette”, the State Great Hural adopted a conclusion that the Constitutional Tsets had made an advance decision upon the citizen’s complaint. The SGH was criticizing exactly what it was doing.

Let us consider how the period for the law to enter into force is calculated. The provision on the entry into force of the law upon its adoption violates several provisions of the Constitution including: Article 26.3, which states: “The State Great Hural shall officially promulgate national laws through publication and, unless a law provides otherwise, it shall be effective 10 days after the day of publication”; Article 33.1.1, which provides: “The President enjoys the prerogative right to veto against a part or entirety of laws and other decisions adopted by the State Great Hural. The laws or decisions shall remain in force if 2/3 of the Members participating in the session of the State Great Hural present do not accept the President’s veto”; and Article 50.3, which stipulates: “The Supreme Court and other courts shall have no right to apply laws that are unconstitutional or have not been promulgated.” This is related to the fact that there are subjects who are to follow and use the given law and other legal acts. They will not be exempt from liability for “not knowing the law”. Without allowing for publication requirements, citizens essentially have an obligation to know in advance the provisions of the newly adopted law. For this reason and to compl with the rule of law, the legislative power also has an obligation to promulgate new laws prior to subjects following the newly adopted legal provisions. The provision on the law to enter into force 10 days after its publication is closely related to the fulfillment of this obligation. However, the Constitutional provision, which states “unless a law provides otherwise,” of Article 26.3, renders an opportunity to set another timeframe such as 3 months, 6 months or one year if there is not enough time to raise full awareness of the law within the set timeframe. Therefore, in any case this period will be more than 10 days. Only in such a case it will be possible to appropriately fulfill its obligation of informing in advance the relevant subjects of the legal regulations and demand they fulfill their obligation of complying with it. Regardless, this provision should not be understood as a provision that renders the lawmaker with a freedom to set the period of implementation on its own will, when it is not published or without the passing of 10 days after its publication. Therefore, every instance of statement made by the SGH that the law shall be enforceable upon its adoption actually conflicts with the provisions of Article 26.3 of the Constitution.

Parliamentary oversight. The Constitution provides that the SGH has the exclusive power “to supervise the implementation of laws and other decisions of

the State Great Hural" (Article 25.8). This is further elaborated in Article 33 of the Law on the State Great Hural, which legislates the principles and tools of the oversight function. Oversight modalities include: (1) receiving reports, information and presentations, and discussing them during the SGH session; (2) asking questions and obtaining responses; (3) overseeing the implementation of laws and other SGH decisions, and discussing the results in Standing Committee meetings, or if necessary, during the plenary session; and (4) inspecting the work of, or allegations of ethical misconduct by, the Prime Minister, Cabinet Members, and other officials, and issuing conclusions and recommendations.

Within the scope of the current study we are unable to assess the effectiveness of these tools in a comprehensive manner. However, some Mongolian scholars were of the view that "the SGH lacks regular mechanisms to monitor the activities of the executive power except for listening to the information from the Government and posing questions to the Cabinet Members. Discussion of the government report seems to be a tool of control; however, it does not go beyond a general talk, and there is a lack of a regular mechanism to oversee the implementation of specific projects".[144] Researchers have pointed to a lack of an inspection tool in parliamentary oversight, and consequently, they propose to introduce and utilize this mechanism.[145]

There have been a number of assessments of parliament's capacity in recent years. Many of them have found that the SGH lacks the tools to carry out its oversight responsibility effectively. To quote one of the assessments, "Parliament is at the center of Mongolia's democracy, but it is hindered by its poor capacity for analyzing policy issues. Therefore there are significant gaps in government accountability, contributing to public disaffection from the political process. In turn lack of participation may lead to lower quality policy formulation, poor implementation and enforcement of law and large gaps between the law on the books and its actual role governing society, politics and economy. Parliament has virtually no ability to consider the potential costs and benefits of alternative policy proposals, little capacity for developing legislative initiatives, and plays a minimal oversight role over the government."[146]

During the SGH regular sessions from 1996-2009, 31 working groups were established by the order of the SGH Chairman, 2 working groups were

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[144] D.Lundeejantsan and L.Ulziisaikhan, *Parliamentarism* 2005, 238. [Mongolian]

[145] B.Chimid, Improving parliamentary oversight: Maturity and development of the full-time parliament in Mongolia, Compilation of conference presentations, 2010, 74. [Mongolian]

[146] Hansard Society, Scrutiny Committee and Pre-Legislative Scrutiny Process of The Westminster, July 2005.

formed by SGH resolution, and 211 working groups were created by Standing Committee resolutions. A quantitative analysis reveals that the findings of these 244 working groups were discussed 21 times during the SGH plenary session, and 125 times before the respective Standing Committees; these led to the issuing of 7 SGH resolutions and 62 Standing Committee resolutions to monitor their implementation. Additionally, it is uncertain whether 60 such working groups performed their duties, while 14 working groups failed to act at all.[147]

During 2010-2012, 14 working groups with oversight tasks were established in accordance with SGH resolutions and the ordinance of the Chairman of the SGH, and 17 working groups were created by Standing Committee resolutions. The number of working groups increased over time. For example, during the period of 2012-2016, 43 working groups were established to inspect the implementation of laws, involving 258 Members participating in these working groups. The range of issues overseen by these working groups has also broadened over time.[148]

The following table shows the implementation of tasks given to the Government since 2009. It indicates that Government is not as responsive as it could be.

Table 3. Implementation of tasks given by the SGH to the Government

Year	By resolution of the SGH or chairman	Implementation	By Standing Committee resolution	Implementation
2009	28 resolutions, 68 articles	Completed-18 In progress-44 Not completed-6	16 resolutions, 93 articles	In progress-28 Not completed-2 Not reached deadlines- 23
2010	32 resolutions, 101 articles	Completed-21 In progress-73	19 resolutions, 116 articles	Completed-49 In progress-32 Not reached deadlines- 35
2011	9 resolutions, 46 articles	In progress-46	3 resolutions, 21 articles	In progress-21
2012	2 resolutions, 7 articles	In progress-7		

[147] B.Munkhtsetseg et al, Research Center of the SGH Secretariat, Working groups established within the scope of SGH oversight, and the statistical data on its activities (1996-2009), Policy study, 4th ed, 2010, 312-368. [Mongolian]

[148] Secretariat of the State Great Hural. "Compilation of the history of the State Great Hural of Mongolia" |2012-2016|", Ulaanbaatar city, 2016, 375. [Mongolian]

Parliamentary oversight has become more regular and its effiency has increased since 2013, with the expansion of the framework for delegated sub-legislative acts. Since then, the Government and Cabinet Members have been allowed them to adopt a list of regulations and procedures in the course of implementing laws, and with the registration and monitoring of the legislative provisions on giving orders and directions into the information database. While 189 provisions of 40 laws, 61 provisions of 8 resolutions of the SGH, and 274 provisions of 43 resolutions of the Standing Committee were initially registered, 334 provisions of 128 laws, 270 provisions of 85 resolutions of the SGH, 373 provisions of 76 resolutions of the Standing Committees were monitored in 2015. The monitoring of the implementation of these orders and directions show that in dual numbers 143 provisions of 64 laws, 139 provisions of the resolutions of the SGH, and 119 provisions of the resolutions of the Standing Committee were implemented.[149]

The following table illustrates the data on the use of parliamentary oversight mechanisms such as inquiries, questions and information provided by the Prime Minister since 2000. There is clear indication that the efforts to oversee the government increased considerably over time.

Table 4. Parliamentary oversight mechanisms (2000-2016 он)

	Inquiry	Question		Information by the Prime Minister
		Oral	Written	
2000-2004	33	80	9	53
2004-2008	87	800	55	47
2008-2012	170	400	68	49
2012-2016	132	742	27	43
Total	422	2022	159	192

Apart from the SGH-appointed oversight bodies such as the Mongolian National Audit Office, the National Human Rights Commission, and the Financial Regulatory Commission, the participation of voters as well as the dissemination of information play a significant role in the improvement of the SGH oversight function.

From the legal documents and the parliamentary internal rules of procedure, there can be seen a lack of standards on justification, criteria, and tools for determining the outcomes of parliamentary oversight. Such a situation seriously impairs the importance and effectiveness of the oversight function. The results of oversight may not be disseminated, or even if they are disseminated, uncertainty still remains in relation to the measures taken

[149] Ibid.

following the outcome of such oversight. Our view is that many of the oversight mechanisms can be improved through institutional development of parliament, but that part of the problem has to do with the incentives of MPs, and so implicates the broader constitutional order. Another problem that some have identified with the power of the SGH is that individual MPs will directly contact government officials to communicate policy preferences and ask for political favors. In principle, this is not a problem, so long as the government officials realize that they are not to take direct orders from individual MPs. Policy must be decided collectively at the level of the government to be effective, or democratic accountability will be undermined. If MPs regularly issue orders to government offices, they would be overstepping their authority. But it is not clear that there is an easy solution to the problem, as it would be difficult to prohibit MPs from contacting government officials on behalf of their constituents, for example.

The SGH is at the center of Mongolia's democracy, playing the dominant role in forming the government. It seems to have played an important role as an arena of political conflict, and has produced a large volume of important legislation in the years since 1992. We do not have a way to systematically evaluate the legislative output of the SGH, but do note that there have been calls for greater attention to the research capacity of the SGH. The larger concern is that, despite its extensive power, SGH performance in overseeing government has been criticized as insufficient. MPs have not devoted much effort to this function.

Accountability and immunity of the members of parliament

It is generally accepted that there should be some form of immunity for legislators, senior public officials and judges to enable them to perform their tasks. But the debate over the extent of these immunities is highly polarized. For some, the immunity principle safeguards freedom of expression in the legislature, and so lies at the core of the democratic system. For others, immunity actively undermines equality before the law and the very foundations of a democracy. Immunity from prosecution is meant to ensure that the elected representatives of the people can speak in the legislature without fear of criminal or civil sanctions and a host of claims for defamation; to act as a shield against malicious and politically-motivated prosecutions being brought against them. Such protection is designed, not to bestow a personal favor on the office holder, but to facilitate his or her ability to perform the functions of office. Immunity for politicians is designed to protect the democratic process – not to

establish a class of individuals who are above and beyond the reach of the law.[150]

Mongolia's Constitution is consistent with this notion in that it provides for the immunity of Members of the SGH (Article 29.2), the President (Article 36), and the Prime Minister and members of the Government (Article 42). Other officials with immunity, privileges and legal guarantees under different laws include Justices of the Supreme Court, members of the Constitutional Court, ambassadors, and prosecutors, among others.[151] As a signatory to the United Nations Convention against Corruption (UNCAC), Mongolia is under an obligation to balance these immunities with the need to investigate and deter corruption.[152] This treaty was ratified in 2006 and therefore is binding in the domestic legal order.

Immunities have become a major issue in recent years, as quite a number of SGH Members have been suspected in the involvement of a crime. As the UNCAC Country Report put it, "the immunities afforded under Mongolian law go beyond the necessary protections for granting immunities to public officials for the performance of their official functions and encroach on impeding the effective investigation, prosecution and adjudication of offences established in accordance with the Convention."[153] Frequently, law enforcement organizations have requested a suspension of the mandates of SGH members for the purposes of investigating, but the suspension has failed to materialize, as the Constitution allows the SGH to vote on any request to suspend the mandate. As a result, there is a suspicion that in some cases the law is unenforceable against the Members of the SGH, which impairs the principle that everyone is equal before the law. Indeed there may be a risk, as in some other post-socialist countries, that criminals infiltrate politics for the purposes of acquiring immunity. Consequently, we focus special attention on immunity of the Members of the SGH.

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[150] Jeremy Pope, "Dimensions of Transparency in Governance", in *Public Administration and Democratic Governance: Governments Serving Citizens,* United Nations, New York, 2007, 164-165.

[151] See for example, article 15 of the Law on the Criminal Procedure, article 78 of the Law on the Court, article 9 of the Law on the Organization of the Procurator, article 22 of the Law against Corruption, article 24 of the Law on the Intelligence Organization, article 5 of the Law on the Constitutional Court of Mongolia, article 28 of the Law on the Central Bank, article 13 of the Law on the State Auditing and article 23 of the Law on the National Human Rights Commission of Mongolia.

[152] Article 30 Para. 2 ("Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.") See United Nations Office of Drugs and Crime, Country Review Report of Mongolia, 2011. [Mongolian]

[153] Para 261 of the same report.

We believe that in the overall context of the constitutional system, in which the SGH is the supreme organ of state power and very powerful, the risk of self-dealing is greater than the risk of politically motivated prosecution. We believe that Mongolia could reduce immunities without much risk to the political system.

Suspension of the mandate of the members of parliament

Immunities of SGH Members were originally regulated in accordance with the provisions of the Law on the Legal Status of the Member of the State Great Hural, which was adopted on 6 February, 1997.[154] Article 13.2 of the Law provides that under certain cases, including when Members are, "1) arrested according to provisions of article 10. 7 of this Law; 2) in cases when the relevant competent authority initiates criminal proceedings in relation to the Member of the SGH, and submits a request to the SGH to suspend their mandate", the SGH will decide on whether to suspend the mandate of the Member of the SGH based on the proposals and reasoning submitted by the Standing Committee on State Structure.

With the adoption of the Law on the State Great Hural on 26 January, 2006, the suspension of the mandate of the Member of the SGH is to be resolved by the SGH based on the proposals and reasoning submitted by the Standing Committees on State Structure and Justice as well as the Sub-Committee on the Immunity of the Member of the SGH during its plenary session, where the decision will be taken by a majority of all Members present and voting by a secret ballot. The Sub-Committee on the Immunity of the Member of the SGH is affiliated with the Standing Committee on State Structure and charged with a task of overseeing the issues related to the mandates of the SGH and its Members. The Law provides that the State General Prosecutor shall submit the proposal to the SGH on suspension of the mandate of the SGH Member, and the SGH shall resolve the issue on whether or not to suspend the mandate of its Member in case he/she is arrested while carrying out a crime or for evidence at the crime scene.[155] The law further states that, "The competent authority shall immediately inform the Speaker of the SGH within 3 hours of arresting the Member of the SGH".[156]

A dispute over the constitutionality of the article 6.9.1 of the Law on State Great Hural was discussed by the Tsets on 21 October 2011, and Tsets decided to suspend this provision because of its narrow interpretation of the Constitutional text and it violated the principle of equality before the law. Despite

[154] This law was abolished when the Law on State Great Hural was adopted on 26 January 2006.
[155] Article 6.9 and 6.9.10
[156] Article 6.10

the legal requirement to discuss the Tsets' judgments within 15 days, the SGH did not discuss the issue until January 2013, when the President submitted draft amendments in the law on State Great Hural for suspension of the mandate of the members of parliament involved in a crime. This meant that during this period, if a member of parliament was involved in a crime, it could not be resolved as the provision was ineffective.

Law enforcement bodies have initiated criminal proceedings and investigated quite a number of Members of the SGH. The first such instance was the so-called "Casino" case, as a result of which the mandate of the Members of the SGH including D.Battulga, D.Enkhbaatar, and S.Batchuluun were suspended, and following the Court ruling were sentenced to jail terms. After that, however, the SGH has regularly rejected proposals for suspending the mandate of its Members, so the process of investigation of crimes allegedly involving Members remains deadlocked. For example, the SGH repeatedly rejected requests by the State General Prosecutor to suspend the mandate of the Members of the SGH including L.Gundalai in relation to tender fraud while in the capacity of the Minister of Health, D.Dondog on the grounds of using fraudulent financial means during election campaign, Ts.Batbayar in relation to the privatization of "Urguu" hotel, Yo.Otgonbayar in connection to attempting to receive a bribe, and O.Chuluunbat, T.Badamjunai, U.Hurelsukh, and G.Zandanshatar. Consequently, despite being suspected in the involvement in crimes, these Members continue to be immune from prosecutions.[157]

In respect to all of these cases, if D.Dondog and Ts.Batbayar, who were unsuccessful in getting elected again to the SGH, after the expiration of their full powers, were sentenced by the court then other people's cases subsided over time.

[157] Despite the proposals for discussion of the suspension of the mandate of the Members of the SGH D.Dondog and O.Chuluunbat, on numerous occasions SGH failed to discuss it. To the question by a reporter on whether it is possible to relax the provisions on the protection of the members, R.Gonchigdorj, Member of the Sub-Committee on the Immunity of the Member of the SGH, responded, "The issue on the suspension of the mandate of the SGH Member has many aspects**.** For example, currently the ratio between the majority and minority at the SGH is relatively close. If the SGH immediately suspends the mandate of some members, in relation to whom legal proceedings are instituted, on an organized basis then the state equilibrium will be lost. If, for instance, the issue is raised in relation to one third of the Members of the SGH then the SGH will itself become legally incapacitated, and there will be no other way than for it to be dissolved. Therefore, the main substance behind the immunity of the SGH Member is the protection of the immunity of the Parliament made up of the Members. If foreigners dislike any of the five members they could implicate them in a crime by any means. Such a case should not garner a support from the majority of the SGH. This is connected with the inviolability and security of the state".

In other words, apart from the very first case, the SGH has consistently rejected requests to suspend the mandate of its Members, regardless of the grounds of such requests. To address this practice, President Ts.Elbegdorj initiated a law to suspend the mandate of the Member of the SGH involved in a crime. However, it failed to garner support at the SGH. This failed draft law included two concrete articles, which stated, "If the Member of the SGH is caught in the act of committing a crime the issue on the suspension of their mandate shall be discussed and decided by the SGH", and "Based on the proposal by the investigator the State General Prosecutor shall submit a request to prosecute the Member involved in a crime as the accused". However, it was evident that the Members of the SGH disliked the second provision, and they immediately moved to reject it. The final formulation of Article 6.9.1 of the Law on State Great Hural requires MPs to be "caught in the act of a crime, with evidence", complicating investigations of corruption offences involving members of parliament.[158] Therefore, Members of the SGH continue to enjoy immunity even if they are involved in a crime, without the ability of the law enforcement bodies to investigate them, and this most likely to persist well into the future.

Comparative Analysis

It should be pointed out that this practice by the SGH conflicts with the provisions of many international documents. For example, the UN Convention against Corruption commits the States Parties to the Convention to create conditions for public officials, including those holding high level offices, to perform their functions with integrity, to prevent their involvement in crimes including those related to corruption, to impose disciplinary or other measures against the officials in violation of these standards, and to ensure that no official escapes liability for their improper actions.[159]

On the other hand, one should never disregard the fact that the immunity of the Member of the Parliament is instituted for specific purposes, to provide

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[158] Ch.Unurbayar, Legal Adviser to the President of Mongolia, at the time of the parliamentary debates, made the following explanation: "There are only a few criminal offences such as murder, plunder, vandalism whereby the suspect is caught in the act, with evidence. But it is very rare to detect the crimes involving abuse of authority, receiving bribe using the office, and other organized crimes, in their acts of commission with evidence. This is so, not only in Mongolia, but also internationally. Such offences are detected through investigation. The final guilt will be established in court. In establishing the innocence or guilt of a member of parliament in question investigators conduct seizure and encounters with the hindrance of the immunity. This necessitates lifting of the immunity. Therefore a proposal is made "based on the proposal by the investigator".
http://www.president.mn/mongolian/node/3124 8 January 2013

[159] For these purposes each Member State of the United Nations is urged to adopt Code of Conduct for Public Officials, which should be guided by the provisions of the International of Conduct for Public Officials, annexed to General Assembly resolution No.51/59 dated 12 December, 1996.

effective normal working conditions for carrying out their elected functions. As a result, even though the immunity of the MP is effective for the duration of their terms of office according to the laws of the prevailing number of countries (Germany, Italy and Spain), in other countries such as France and Japan it is only valid for the duration of the parliamentary session, while in Canada and the US it is in force also during travel to and from the parliamentary session. In the United Kingdom, immunity is available only from 40 days prior through 40 days after the parliamentary session. Mongolia's immunities are quite broad in comparative perspective.

Apart from imposing time period limitations there are also limitations in the scope of immunities. In France the immunity of the parliamentary member cannot be enforced in criminal cases, while in the USA immunity does not apply in cases of high treason, serious crimes, and violations of public order. In addition, the number of countries, which include provisions into the Constitution on prohibitions to the enforceability of immunity of the Parliamentary Member in relation to activities not directly linked to their functions, and the consequences of such activities, is on the rise. In Malaysia and the Netherlands the issue on the immunity of the Member of the Parliament does not exist.

Immunities of parliament members in democratic countries first came to prominence in 15th century England for the purposes of providing protection to the Parliament in times of fierce struggles between the King and the Parliament. Though strong immunity was important in this historical context, in a modern democratic country broad immunity not only conflicts with the fundamental social principles related to the equality before the law, intolerance of discrimination, and abolition of special privileges, but could even undermine legitimacy by creating a misunderstanding that legislative bodies are places to hide criminal actions.

Mongolia's democratic system would be strengthened if it were to adopt measures towards tightening the scope of the immunity enjoyed by the Members of the SGH, and make it enforceable only in the instances of their official functions. This is consistent with the recent report of international experts examining the implementation of the UN Convention against Corruption. We recommend that immunity of members parliament provided in Article 29 be deconstitutionalized or reduced. The risk of politically motivated prosecution is far less than the risk of corruption and self-dealing at this point in Mongolia's development. At a minimum, consideration might be given to introducing an exception for cases involving allegations of corruption. Another possible reform is the end the SGH practice of voting on requests for suspending the mandate in Article 29.3. Because the Constitution stipulates that immunity can be regulated by law, there might be significant work that can be done without any

constitutional amendment, though this requires further research. We believe that a similar analysis would apply to other government officials, and that reform could be realized by amending relevant laws.

Role of the Tsets

The Constitutional Tsets plays a role in ensuring accountability of the Members of the SGH. According to Article 66.2.1 of the Constitution, the Tsets makes and submits a judgment on the issue of whether the SGH Member breached the Constitution, and according to Article 66.2.4 makes and submits a judgment on the basis for recall of the Members of the SGH.

In the period since the adoption of the Constitution the Constitutional Tsets has on several occasions considered the question of violations of the Constitution by Members of the SGH. The MPs in question included Ts.Turmandakh, S.Zorig (twice), Ts.Elbegdorj, D.Ganbold, former Chairman of the SGH R.Gonchigdorj and former Speaker of the SGH D.Nyamdorj. The Tsets issued judgments in relation to Ts.Turmandakh, S.Zorig, and Ts.Nyamdorj, finding that these Members violated the Constitution. Thus, in three out of the seven inquiries into members of the SGH, the Tsets has found that the members had violated the rules. This is evidence of the role of the Constitution in limiting the agency costs of government.

One continuing issue is the provision in Article 29.1, which states that the members of the SGH "shall not hold concurrently any posts and employment other than those assigned by law." (This was the basis for the Tsets decision to separate government and parliament in 1996.) When the Tsets found that SGH Member Ts.Turmandakh had breached this provision, in February 1994 the Standing Committee of the SGH on Internal Affairs decided not to accept the judgment by the Constitutional Tsets. This decision was then submitted to the plenary meeting of the SGH. Members of the SGH debated the power of the SGH to examine and make a final decision on the judgment by the Constitutional Tsets under article 66.2.3 and 66.2.4 of the Constitution, but they failed to conclude the discussion definitively.

In 1994 after fierce debates on the judgment by the Constitutional Tsets that S.Zorig breached the provisions of article 29.1 of the Constitution, the SGH voted to accept the judgment of the Constitutional Tsets. Consequently, the Members concluded that a precedent had been set in the future for SGH to put to a vote the issue of accepting or rejecting the judgment of the Constitutional Tsets under articles 66.2.3 and 66.2.4 on the Member's violations of the provisions of the Constitution.

The process of examining and resolving the legality of the Constitutional Tsets' judgment by the SGH, which was made during its plenary meeting, in

relation to the dispute arising in accordance with the provisions of article 66.2.3 and 66.2.4 of the Constitution is regulated in accordance with article 6.6.5 of the Law on the State Great Hural. If the Constitutional Tsets, as the guarantor of the strict observance of the Constitution, makes a judgment that there are grounds for removal or recall, there could arise a situation, whereby when the Constitutional Tsets submits this judgment to the SGH, the SGH could respond by questioning the legality of the Tsets judgment. This could lead to inaction and gridlock, and a violation of Article 64.1 of the Constitution.[160] If, however, the results of the Tsets judgment are nevertheless accepted as part of the decisions by the SGH then the possibility to redress such violation remains.

Since there is a lack of clear guidance in reviewing judgments issued by the Tsets and these provisions deal with membership of the SGH itself, there is a risk that the SGH will reject the judgment of the Tsets simply to protect politically powerful legislators. In our view, the risk of self-dealing means that these judgments about MPs should not be reviewed by the SGH.

The Constitution had set up the Tsets as an independent body, with final authority to supervise the constitution. Consequently, the SGH practice discussing and rejecting or approving the judgment by the Constitutional Tsets made in accordance with the provisions of articles 66.2.3 and 66.2.4 of the Constitution was an improper rejection of the right of the Constitutional Tsets to exercise supreme supervision over the implementation of the Constitution. We recommend clarifying the Law on the State Great Hural with regard to examining and resolving the legality of the Constitutional Tsets' judgments about members' violations of the Constitution.

Accountability mechanisms of the State Great Hural

It can be stated that the Constitution of Mongolia does not actually provide any mechanisms for holding the State Great Hural accountable or for checking its actions. Initially, Article 22.2 of the Constitution provided: "The State Great Hural may decide on its dissolution if not less than two thirds of its Members consider that the State Great Hural is unable to carry out its mandate, or if the President, in consultation with the Speaker of the SGH, proposes to do so for the same reason", which was quite a weak legal mechanism to ensure checks and balances and accountability for the Parliament. This was amended by 2000

[160] "The Constitutional Tsets shall be an organ exercising supreme supervision over the implementation of the Constitution, making judgment on the violation of its provisions and resolving constitutional disputes. It shall be responsible for guaranteeing the strict observance of the Constitution."

Constitutional amendment, which stated that "Unless otherwise specified in the Constitution, the State Great Hural shall decide on its dissolution or the President shall issue a decree on the dissolution of the State Great Hural if the State Great Hural fails to appoint a Prime Minister within 45 days from the submission of the proposal of his/her appointment to the State Great Hural". Thus, while these changes look consistent with the practice of parliamentary republics, due to the fact that the likelihood of both of these conditions to occur is minimal they failed to substantially improve the situation. The common practice of countries with parliamentary system show that because the powers to dissolve the parliament vested in the head of state are directed to support the interconnected activities of state institutions, to ease the tensions arising between them, and to curb any conditions that could lead to political crisis, they play an important role in maintaining the balance of the state system. On the other hand, because the President of Mongolia is not actually empowered to resolve any conflicts arising between the State Great Hural and the Government it lead to a serious deficit of balancing mechanisms in the political system of Mongolia, and set a trend whereby, if the policies and actions carried out by the Government do not satisfy the SGH, it leads to its imminent dissolution. Thus, instead of "shouting after the storm" every time the Government is dissolved, there is a need to insert provisions into the Constitution that enable conditions for its stable operation.

When we assess some proposals put forward by politicians, they seem to be aimed at reducing the scope of procedures for votes of confidence or 'no confidence' in the government, while retaining full power to dismiss the government by the majority without any risks for themselves.[161] It should not be forgotten that the issue of responsibility for both the Government and the Parliament is lurking behind the procedures on the parliamentary vote of confidence in the Government. By restricting this it could lead to a negative outcome of curbing the main mechanism of the political system of parliamentary republics to signal a warning to the government by the parliament, through the vote of confidence procedure.

During the many years of its evolution, parliamentarism developed several legal means to alleviate the main shortcoming arising from unstable conditions, one of which is the procedure to dissolve the parliament before the expiration of its mandate. The main actor who wields this power is the head of state; indeed

[161] Maybe it is an expression of the state of affairs as Baabar defined "any personality who develops conceptual underpinnings of a law, no matter who they are, take care of the interests of their own or that of the group they belong to… If constitutional amendments take place, the interests of the incumbent members of the parliament of the time will be of utmost priority". "Constitution", *Daily news,* №290 (5242), 2 December 2015. [Mongolian]

out of 77 countries that vest the president with powers to dissolve the parliament, only 14 of these countries grant such powers to other institutions or the parliament itself. The main reason for this is that, in the event of legislative-executive conflict, granting the right to resolve the dispute to one of the parties to the dispute would create an unfair advantage to that party. For this reason democratic countries which abide by the rule of law tend to consider it appropriate for an independent third party without a conflict of interest and unconnected to the dispute to play the primary role. Due to the fact that the misunderstanding between the parliament and the government is usually related to political reasons, the President, who maintains a special position in the political system and as the head of state is delegated with a function to ensure national unity, is undoubtedly seen as the most suitable candidate to put an end to the dispute. Therefore, despite the fact that the head of state enjoys few powers of symbolic nature, at the critical time of political crisis in the country, his/her role in ensuring the national unity and the political weight drastically increases.

In a majority of cases, the powers of the head of state to dissolve the parliament are usually interconnected with the conflict arising between the parliament and government. For example, 30 countries with parliamentary system (60 percent) chose procedures, whereby in the case of the vote of 'no confidence' by the parliament it does not only propose to dissolve the government but also the government advances a proposal to dissolve the parliament in return, which is then decided by the president. At the same time, five countries have inserted procedures into the Constitution for the president to dissolve the parliament on the initiative of the prime minister in cases when the parliament does not adopt important draft laws and programs submitted by the government, which is considered equivalent to the vote of 'no confidence' in the government. Despite the fact that the powers to dissolve the parliament is vested with the head of state it can only occur on a similar request emanating from the government, and thus it constitutes a mechanism to increase the accountability of parliament for the sake of the government.[162] As too much engagement with the government poses a risk to the parliamentary members

[162] S.Narangerel. *Legal Dictionary*, first edition, "Admon", UB, 2007, 368; B.Delgermaa. "Parliamentary system, legislative powers and the State Great Hural," *Issue on the concept of the Constitution of Mongolia* (booklet I). UB, 1999, 77; D.Ganbat, "Democratic development and the concept of the Constitution," *Issue on the concept of the Constitution of Mongolia* (booklet III). UB, 2000, 8. [Mongolian]

themselves[163] in countries where such mechanisms are implemented the state is quite stable.[164]

In summary, in parliamentary republics the separation of powers provides a real opportunity for the government, with the assistance of the president, to respond with retaliatory measures against the strong parliament. These measures ensure checks and balances between the three branches of government and contribute to a balanced and stable state system.

Consequently, in order to further align the state governance system of Mongolia to those of parliamentary republics, it would be helpful if the grounds for dissolving the parliament by the President of Mongolia are more clearly defined and the opportunity to implement them is made available.[165] On the one hand, this would lead to the parliament becoming realistically accountable for the actions of the highest organ of executive power. The State Great Hural will stop threatening the Government with dissolution on every occasion. On the other hand, because the Government is protected against falling prey to political turmoil to a certain extent, it will be able to function more confidently, responsibly and with a long-term vision.

[163] Due to the fact that it is impossible to dismiss a possibility for the president along with the government to put a pressure on the parliament by using these procedures constitutions to a certain extent limit the possibility for the president to dissolve the parliament. For example, such provisions include in countries with a bicameral parliament the upper house is not dissolved, and in cases of state emergency or martial law it is prohibited to dissolve the parliament (France, Russian Federation, Italy, Poland), during the last six months of the mandate of the President (Russian Federation, Italy, Lithuania) or the first six months of the mandate of the parliament (Lithuania), during the first year (France, the Russian Federation) it is prohibited to dissolve the parliament, while several countries prohibit the number of times the parliament may be dissolved within a particular time period (for example, in Romania not more than once per year).

[164] There are very few countries with parliamentary system that do not provide the head of state with the powers to dissolve the parliament on the proposal by the Government. (Other countries apart from Mongolia include Bosnia-Herzegovina, Bulgaria, Ethiopia, Iraq, Macedonia and Somalia).

[165] A.Tsanjid. "Some issues related to the theoretical concept of the Constitution of Mongolia," *Issue on the concept of the Constitution of Mongolia* (booklet I). UB, 1999, 32-33; D.Ganbat, "Democratic development and the concept of the Constitution," *Issue on the concept of the Constitution of Mongolia* (booklet III), UB, 2000, 8. [Mongolian]

The Presidency

Introduction

The May 1990 Amendments to the 1960 Constitution facilitated the creation of a new institution in Mongolia, namely the presidency. According to these amendments, the President was to be elected from the People's Great Hural. Since 1990 Mongolia has had a head of state consistent with common democratic practice. There was also a regulation requiring that the President be responsible to the State Great Hural. This creates a legal basis for the office of President which conforms with the classical presidential model of a country with a parliamentary republican system. P.Ochirbat was elected as the first President of Mongolian People's Republic and R.Gonchigdorj was elected as the vice President through this procedure.

While a directly elected presidency was introduced in 1992, some residual ideas from the previous model of a President being dependent on the Parliament have been preserved in the new Constitution to a certain extent. For example, the Constitution provides that "Political parties which have obtained seats in the State Great Hural shall nominate individually or collectively Presidential candidates, one candidate per party or coalition of parties"; "The President shall be responsible to the State Great Hural"; "In the temporary absence of the President his/her full powers shall be exercised by the Chairman of the State Great Hural". In addition, the Constitution reflects the main characteristics of countries with a parliamentary system where the Government is headed by the Prime Minister appointed by the Parliament, the Parliament decides on whether to proceed with a vote of confidence in the government, in the case of the vote of 'no confidence', the parliament enjoys the powers to remove or to recall the Prime Minister and cabinet members.

During the 1991 debates over the new draft Constitution, presidential election procedure was one of the most debated issues at both the Baga Hural and the People's Great Hural.[166] Ultimately, it was decided that the Presidency would be directly elected by the people. On the other hand, the Constitution also includes some characteristics of countries with presidential and semi-presidential systems. For example, the President, in consultation with the leaders of the majority party or coalition of parties that won the parliamentary elections, nominates the candidate for the office of Prime Minister for approval

[166] B.Chimid, *Challenging Issues around the Government, Political Parties And Legal Reforms*, Vol.1, UB, 2008, 133. [Mongolian]

to the Parliament. The Prime Minister is obligated to consult with the President on the appointment of Cabinet Members. And some of the amendments to the Constitution vary from the classical presidential model. This is most likely related to differing understandings of the presidential institution as well as differing interests of the political parties and groups involved in the draft discussion, and particularly the differing interests of those involved in the discussion at the People's Great Hural.

Since then, there have been four occupants of the office: P.Ochirbat (1993-97); N.Bagabandi (1997-2005); N.Enkhbayar (2005-2009), and Ts.Elbegdorj (2009-present).

The President is the Head of State and "the embodiment of the unity of the people" (Article 30.1). This role has been interpreted to require that the president be non-partisan once elected. The President was also designed play a role of mediation between various parties and factions during times of stress. The constitutional powers of the presidency are largely found in Article 33. They include power over foreign affairs, the authority of serving as commander in chief, and heading the National Security Council. The President also has the power to veto legislation, and the power to propose legislation as well as issue some decrees in areas of his competence. While the president initially had a major role in government formation, this was reduced in the amendments of 2000, and the president now can only consult with the Prime Minister on the composition of the Government; if there is no agreement between the two, the Prime Minister can propose the government on his own. The initial scheme of 1992 gave the president the power to consult with the Speaker on the dissolution of the SGH, but that power is now limited to instances in which the SGH fails to appoint a new Prime Minister after 45 days.[167]

The president also has a number of formal powers. The President convokes the first session of the SGH, and in addition to initiating the extraordinary session of the SGH in case of emergency and military situations. He can, at his discretion, attend SGH sessions.

Presidential elections

Article 31 of the Constitution regulates presidential elections. The presidential election is to be conducted no less than 30 days and no more than 60 days before the expiration of the mandate of the sitting President, and

[167] Article 22.2. The President may propose dissolution of the Parliament only in consultation with the Chairman of the State Great Hural, if the State Great Hural is unable to carry out its mandate; he may also dissolve the SGH if it fails to appoint the Prime Minister within 45 days after submission of proposal of his/her appointment to the State Great Hural.

political parties which have obtained seats in the SGH can nominate individually or collectively presidential candidates, one candidate per party or coalition of parties. There is some tension between this provision and the idea that the presidency will be above politics.

The selection procedures for the President were a significant issue of debate during the drafting of the Constitution in 1991. Members of the Baga Hural argued fiercely about the requirement in the draft prepared by the Constitutional Drafting Commission that candidates for the presidency be limited to those who had been native-born citizens for three generations. This was ultimately removed.

However, the key issue surrounding the debates at the People's Great Hural was the issue of who would elect the President. Comparative practice provided two basic options: election by the people or by the Parliament, and the initial drafts from the Drafting Commission relied on the latter method. In countries with popularly elected presidents, a common model consists of a two-stage process in which an absolute majority is required. In the first stage, any candidate can run, and then, if no candidate receives a majority of the votes, a second stage is held between the top two vote-getters. The Draft Constitution submitted by the Baga Hural to the People's Great Hural contained a unique system combining the two: the presidential elections were to be held in two rounds, whereby in the first round voters cast single votes for their chosen candidate; then the top two candidates would go to parliament for final selection. This proposal was for a rather ambiguous system that existed nowhere else in the world.

President P.Ochirbat explained the reasoning behind this proposal in his speech at the second session of the People's Great Hural as follows: "The principle of direct election of the President by the Parliament is quite a common practice and in such a situation in countries with a developing parliamentary system the state power is concentrated in the Parliament elected by the people. In addition, there are possibilities for limiting the exercise of presidential power by vesting the highest state authority in the hands of people's representatives to preclude any shortcomings in the activities of the President or to correct them in a timely manner. However, in this case the presidential election is only conducted within the confines of the Parliament and the parties with the seats in the Parliament; therefore, the people's will cannot affect it as much.

Consequently, we selected this format that combines these alternatives and constitutes a flexible "middle ground."[168]

This proposal, while seeming to offer a compromise, actually would have combined the worst of both systems: it would generate great public competition in an expensive election, but then leave the final choice to elite selection. This scheme might lead to the undermining of popular will, and if the parliament ever chose the second-place popular winner, it would generate much controversy. In such an instance, the supporters of the first-place winner would be mobilized and justly angry. On the other hand, if parliament confirmed the results of the popular vote, then there is no reason for the additional step.

This procedure was carefully considered and discussed at the People's Great Hural for four full days. It attracted great debate and consumed a lot of time. The proposals on either electing the President through a popular vote or by parliamentary vote, and the third alternative, which combined these two methods into a two stage election, were tabled for polling. In the end, the rather confusing proposal submitted by the Baga Hural received a majority of support, and influenced the final Constitution somewhat. Article 31 provides that the SGH formally recognizes the mandate of the president, but it does so on the basis of a "two-round" election system.

The role of the SGH in this process has from the very beginning created confusion, as can be evidenced from differing interpretations and definitions in laws and legal commentaries explaining the second round of elections. Article 31.1 states that the Presidential election "shall be conducted in two stages." What are the two stages: election and appointment by the SGH? Or two rounds of election? Since a candidate could win a majority in the first round of election, there is no requirement that there always be a second round of election. So perhaps the second stage is simply the formal appointment by the SGH. For example, the Law on the Election of the President of Mongolia provides, "At the second stage the State Great Hural shall acknowledge as President elect the candidate who has obtained a majority of the votes cast in the primary elections and pass a law recognizing his/her mandate".[169] Scholars have correctly criticized this legal provision, noting that it is difficult to assume that the second stage of elections expressed here is an independent "electoral" stage, since no election is conducted to elect the candidate. Instead, the SGH has no discretion and must consider the candidate who has obtained a majority of all votes cast in

[168] P.Ochirbat speech, "Outcome of the public discussion of the draft "Ih Tsaaz" constitution of Mongolia and on the draft itself" Constitution of Mongolia: documents. (compiled by J.Amarsanaa, O.Batsaikhan), UB, 2004, 523. [Mongolian]

[169] Article 4.8 of the 2012 Law on the Election of the President.

the first voting as having been elected President and pass a law officially recognizing his/her mandate.[170] This is comparable to practice in some other countries, wherein the Parliament validates the outcome of public referendum by adopting a law. This is not the case of dual validation of a decision but rather the case of putting the decision expressed by the people into a legalized format. Of course, there is no real reason why the Parliament should dually validate the people's choice of President, which took place according to the constitutional principle that the state power shall be vested in the people. The Parliament is itself a representative institution; thus it cannot fail to recognize the expression of people's will. Since the SGH can never change the people's choice there is no need to consider the process of validating this choice as an independent electoral stage.

There are a number of interpretations of the above constitutional provision in the academic literature. One explains, "The sentence stating that the presidential election is to be conducted in two stages does not have to be materialized in each election, but which rather means that if there is such a necessity then the election could go through two stages. If three or more candidates participate in the primary elections and none of them receives the required majority then according to Article 31.5 of the Constitution the possibility of conducting the second vote involving the two candidates with the largest number of votes can be appropriately considered as the second stage of elections."[171] This interpretation has also attracted criticism, for if the second stage of the presidential election is not considered to be a necessary step, then the constitutional phrase providing that "the Presidential elections shall be conducted in two stages" is rendered meaningless.[172] Furthermore, even if there is a second round of voting, the presidential election is not necessarily limited to these two stages because if as a result of the second ballot neither of the candidates wins then the presidential elections shall be conducted again, which might be considered a set of further stages.[173]

Recommendation: Article 31.1 should be modified to clarify what is meant by two rounds.

Indirect presidential election

[170] Commentary on the Constitution of Mongolia (joint publication), UB, 2009, 154. [Mongolian]
[171] Commentary on the Constitution of Mongolia (joint publication), UB, 2000, 162. [Mongolian]
[172] Commentary on the Constitution of Mongolia (joint publication), UB, 2009, 154. [Mongolian]
[173] Paragraph 6 of article 31 of the Constitution provides, "If neither of the candidates wins in the second ballot, presidential elections shall be held anew". Commentary on the Constitution of Mongolia (joint publication), UB, 2009, 154. [Mongolian]

There has been some discussion of shifting to a system of indirect presidential elections, as in the original proposal in 1991. In some pure parliamentary systems, the President is elected not by the people but by a relatively small group of people, which has a specific purpose. The most important objective is to prevent the President from being pitted against the Parliament.

In countries with strong parliaments like Mongolia, the president is usually elected indirectly by the Parliament (Czech Republic, Hungary, Latvia, Israel, Slovakia and Greece), or by a special conventions or voters' council (Germany Italy, and India). The election of the President by special convention uses a special session of state representative organ. This special session is usually composed by the Members of the Parliament and the state representatives. The method of electing the President through the voters' council is similar to the election of the President by the Parliament. The difference is related to the fact that the voters' council is only established for the purposes of electing the President. After electing the President the council dissolves itself.

The advantages of indirect election are that it reduces any friction between the president and parliament and is cheaper. However, the system also has some defects. Most obviously, it weighs the expert opinions of Members of the Parliament more highly than those of ordinary people. It may be that the opinions of the people and the Members of the Parliament on the person to be elected as the head of state could differ. For example, the people may prefer a strong leader, while the Parliament prefers a more submissive person, who can be "ready at hand". There is also a risk for the Members of the Parliament to espouse narrow interests of the party and factions rather than the people during the presidential elections.

A President elected by the people derives his/her full powers from the people. Consequently, the President will perform his/her functions with confidence and will be able to maintain independence. Furthermore, in times of political crisis the President elected by the people will be better able to vigorously undertake courageous and decisive steps.

To be sure, the separate national election of the presidency also has its drawbacks, including the fact that, with only 60-70 percent voter turnout, and a majority of, say 60 percent, the president may only obtain the approval of one third of the voting age population. The separate national election is also expensive. People often judge the presidential candidate based on their outer appearance, and the image created through the mass media reports, and thus there is no possibility to realistically assess the candidate. However, the majority of countries use a system in which the President is elected by the nationwide election.

How have these issues played out in Mongolia? Because both the President and the Parliament derive their mandate from the people, the President has at times come into conflict with the Parliament. This was especially apparent during the presidency of N.Bagabandi, who turned down the nomination of the candidate for the Prime Minister by the SGH seven times. After this the political parties reached a consensus that the presidential power needed to be limited, and there was even discussion of moving toward indirect election of the President by the Parliament.[174] This change was ultimately rejected during the constitutional amendment process of 2000, and we do not endorse it now, as it would mark a great structural change. We also see certain advantages of a nationally elected presidency in advancing the goal of the separation of powers.

The Veto Power

Vetoes are perhaps the president's greatest power in day-to-day governance. The veto can be overridden by a 2/3 vote of the SGH. Each President has used his powers to veto legislation. The entire period has seen 17 complete vetoes and 34 partial vetoes of laws and legislation adopted by the SGH during the years of 1994-2013. Of these, the SGH adopted resolutions to accept more than 2/3 of these vetoes. Vetoes have been issued on many subjects including the laws and legislation on Public Service, Government, activities of the SGH, and amendments to the Constitution, as well as the laws and legislation related to the functions of the state structure, political parties, taxation, and judicial and prosecutorial power. The rejected vetoes included those related to the ranking and post remuneration of government high officials, government structure, interim measures, amendments to the Constitution, amendments to the functions of the judicial power, as well as the amendments to the laws on political parties, budget, and election. This suggests that the presidential veto is playing an important role in the scheme of checks and balances.

[174] Z.Enkhbold, ""Parliament should elect the President" *Today Newspaper* (6 March 2009), B.Hajidmaa, "Let the Parliament but not the People elect the President" *Today Newspaper* (28 May 2008). [Mongolian]

Table 5: Presidential Vetoes

President	Number of vetoes	Accepted (incl. partial)	% of successful vetoes
P.Ochirbat	7	3	42%
N.Bagabandi I	15	11	73%
N.Bagabandi II	15	10	66%
N.Enkhbayar	9	7	78%
Ts.Elbegdorj I	4	3	75%
Ts.Elbegdorj II	3	3	100%
Total	53	37	72.3%

Appointment powers

Presidential appointments constitute a significant source of power. In many cases, the appointed officials may in theory remain in office after the term of the president, which allows him to have some influence on policy even after he has left office. The Prosecutor General, who is appointed for a six year term, is an example. However, the President's power in appointments of other officials including judges of the constitutional Tsets, ambassadors, and heads of independent commissions is limited to proposing candidates who are then approved by the Parliament.

A key factor in considering the appointment power is whether the president has free discretion, must consult with other actors, or is otherwise limited. After the constitutional amendments of 2000, the President no longer has any discretion in appointing the prime minister or cabinet. Similarly, Article 51 states that the President "shall appoint" judges of the Supreme Court upon presentation to the SGH by the General Judicial Council (GJC), and appoints other judges upon nomination by the GJC. In practice, the President has no discretion in these appointments. His key appointment in practice has been the Prosecutor General, and this office has major power as the chief of law enforcement. The presidential appointment of this office holder allows a degree of independence from the SGH which might be considered beneficial in view of this office's mandate to prosecute cases against government officials, including MPs. We see some potential benefit in the current system of presidential appointment here.

Proposing Legislation & Executive Decree

The power to propose legislation allows the President to set the political agenda with regard to certain issues. By definition, the institution that proposes legislation is able to shape the debate somewhat, even if the parliament later modifies the proposal. As a comparative matter, there is substantial variation in

the degree to which executive-proposed legislation is enacted across countries.[175] To provide only one example, while only 3 out of 28 laws proposed by President León Febres Cordero in Ecuador were passed in 1986, the Indian Congress passed 55 out of 58 bills proposed by Prime Minister Rajiv Gandhi that same year.

The following table shows that Ts.Elbegdorj, the fourth President of Mongolia, for the period of 2009-2016 took an active role in initiating laws.

Table 6. Information on draft laws initiated by the President Ts.Elbegdorj

Year of submission	Approved	Withdrawn	Returned	Endorsed for discussions	Not endorsed for dis-cussions	Total
2009	1	0	0	0	0	1
2010	4	1	1	0	0	6
2011	11	1	0	0	0	12
2012	5	0	3	0	1	9
2013	1	1	1	0	0	3
2014	3	2	1	0	1	7
2015	4	1	1	5	2	13
2016	0	0	2	9	1	12
Total	29	6	9	14	5	63

Source: The President of Mongolia: Chronology (2009-2016).UB, 2016, p.88

We have been unable to obtain data on the number of laws proposed by the other presidents and their success rates of approval. We suspect that the proportion has varied with the various presidencies, and whether the president had a previous association with the party that controls parliament. When the President is affiliated with the leading party in parliament, there is less incentive to propose legislation, but a greater likelihood of success. In contrast, when the President is from a different political camp, there may be greater incentive to control the agenda by proposing legislation, but passage will require much more negotiation and may be less likely.

Although the functions of Mongolia's presidency are close to that of the executive government, his/her power on executive decision making is rather limited. While Article 33.3 allows the President to issue governmental decrees, these require the co-signature of the Prime Minister. Article 34 allows for a

[175] Sebastien Saiegh, Ruling by Statute: How Uncertainty and Vote Buying Shape Lawmaking. Cambridge: Cambridge University Press, 2011.

broader decree power within those areas of the president's exclusive competence.

Other Powers

The President has not played a role in dissolving the SGH under the current Constitution, nor has any president initiated a proposal for dissolving the government. This reflects the central role of the SGH in the Mongolian constitutional order.

As discussed above, the decision to include a directly elected president was made very late in the drafting process in 1991-1992. Prior to that, the concept had been for an indirectly elected presidency. To some degree this is reflected in provisions of the Constitution that indicate presidential subordination to the parliament. For example, Article 31.2 of the Constitution states, "Political parties which have obtained seats in the State Great Hural shall nominate … one candidate per party or coalition of parties" and Article 35.1 provides, "The President shall be responsible to the State Great Hural".[176] In additon, the regulations of article 37 of the Constitution provides that in the temporary absence of the President his/her full powers are to be exercised by the Chairman of the State Great Hural.

The Government

Introduction

After the People's Revolution in 1921, the first Government of Mongolia was established by the plenary meeting of the Mongolian People's Revolutionary Party (MPRP) Central Committee, under the title of People's Interim Government. Until 1924, this Government simultaneously exercised the legislative, executive and judiciary powers. The 1924 Constitution defined the Government as the main administrative body, and provided it with the realization of the highest state power in conjunction with the Presidium of the State Small Hural during the recess of the State Small Hural. In 1932, the People's Government was renamed the Council of Ministers of the Mongolian People's Republic (MPR), which constituted the highest organ of the state executive body.

A document called the "Concepts of the New State Structure of the MPR", which was submitted and adopted by the People's Great Hural on 3 March

[176] The Mongolian word for responsibility "xaryutsan" here is different from that used in Article 41.1 which speaks of the responsibility of the Prime Minister to the SGH.

1990, for the first time mentions the operation of the government activities based on cabinet principles. The 1990 Amendment to the Constitution of 1960 renamed the Council of Ministers as the Government, and this was reflected in article 38.1 of the new Constitution providing that “the Government of Mongolia is the highest executive body of the state”. Consequently, the nature of the government has been changed, whereby it transitioned from the highest executive body to the highest executive organ of the state, functioning according to the cabinet principle. In cabinet systems, the principle of collective responsibility typically applies, in which all government ministers are pledged to support a collectively-arrived-at decision or else resign their posts. The Cabinet is the highest executive decision making body.

Terms and Stability of the Government

Since the adoption of the new Constitution, 13 governments have been formed in Mongolia. The following table summarizes the duration of the full powers of these governments, the Prime Ministers leading these governments as well as the political party affiliation and the form of the government.

Table 7. Governments established after the adoption of the Constitution

№	Dates of formation, and the termination of full power (resignation)	Prime Minister in power	Political party affiliation and the form of government
1	21 July, 1992 – 19 July,1996	Jasrai Puntsag	MPRP majority government
2	19 July, 1996 – 23 April,1998	Enkhsaikhan Mendsaikhan	Mongolian National Democratic Party (MNDP) and Mongolian Socialist Democratic Party (MSDP) formed a coalition government
3	23 April, 1998 – 9 December, 1998	Elbegdorj Tsakhia	MNDP and MSDP formed a coalition government
4	9 December, 1998 – 22 July, 1999	Narantsatsralt Janlav	MNDP and MSDP formed a coalition government
5	30 July, 1999 – 26 July, 2000	Amarjargal Renchinnyam	MNDP and MSDP formed a coalition government
6	26 July, 2000 – 20 August, 2004	Enkhbayar Nambar	MPRP majority government
7	20 August, 2004 – 13 January, 2006	Elbegdorj Tsakhia	Mongolian People's Party (MPP) (coalition: MPP and MPRP)
8	26 January, 2006 –7 November, 2007	Enkhbold Miyegombo	MPRP(coalition: MPRP, Republican Party, Motherland Party, and Justice Party (JP))
9	22 November, 2007 – 29 October, 2009	Bayar Sanj	MPRP(coalition: MPRP, Civil Will Party (CWP), and JP)
10	29 October, 2009 – 10 August, 2012	Batbold Sukhbaatar	MPRP(coalition: MPRP, CWP and JP)
11	10 August, 2012 – 21 November, 2014	Altankhuyag Norov	DP (coalition: MPRP, CWP, and MNDP)
12	21 November, 2014 – 8 July, 2016	Saikhanbileg Chimid	DP (grand coalition: MPP, MPRP, CWP, and MNDP); from 16 August, 2015 democratic coalition (DP, MPRP, CWP, and MNDP)
13	8 July, 2016 – present	Erdenebat Jargaltulga	MPP majority government

The above table shows that except for two occasions when the MPRP formed a majority government, coalition governments have been the norm. Ten

governments have been formed either by two major parties or one major party in cooperation with several smaller parties. Usually this has resulted from a failure of one party to secure a majority of seats; however, after winning the majority of seats in the 2008 Parliamentary elections, the MPRP formed a coalition government in cooperation with other parties.

Article 40.1 of the Constitution establishes that the term of the mandate of the Government shall be four years. Factors on whether the governments resigned before the expiration of their mandate, and what were the reasons for such resignations constitute important indicators for determining the stability of the highest executive body.

Table 8. Duration of the Governments

№	Prime Minister	Duration	Reasons for the termination of full powers
1	P.Jasrai	4 years	Parliamentary mandate expires and a new government is formed (opposition won the election).
2	M.Enkhsaikhan	1 year and 9 months	Political opposition initiated the resignation jointly with its own party.
3	Ts.Elbegdorj	8 months	Political coalition in power initiated the resignation.
4	J.Narantsatsralt	8 months	Political opposition initiated the resignation.
5	R.Amarjargal	1 year	Parliamentary mandate expired and a new government was formed (opposition won the election.)
6	N.Enkhbayar	4 years and 1 month	Parliamentary mandate expired and a new government was formed (coalition government).
7	Ts.Elbegdorj	2 years and 5 months	Cabinet Members from the opposition party requested the resignation.
8	M.Enkhbold	1 year and 10 months	Resigned on own accord.
9	S.Bayar	1 year and 11 months	Requested to be released from the office for health reasons.
10	S.Batbold	2 years and 10 months	Parliamentary mandate expires and a new government is formed (opposition won the election).
11	N.Altankhuyag	2 years and 3 months	Own party initiated the resignation.
12	Ch.Saikhanbileg	1 year and 9 months	Parliamentary mandate expired and a new government was formed (opposition won the election).
13	J.Erdenebat	5 months as of 8 Dec 2016	

The above table shows that only two governments have completed their mandate, while other governments resigned prior to the expiration of their mandate. Indeed, from 1996 to 2000 four governments had to be formed to complete the maximum term for one government. It is true that the amendments of 2000 were accompanied by greater political stability. Governments lasted an average of 19 mos. 1992-2000, and 28 mos. thereafter.[177] But this is largely due to the extreme instability from 1996-2000, itself caused by the separation decision of the Tsets. A government duration of 28 months is not particularly low in comparative terms and would place Mongolia between the Netherlands and the United Kingdom.[178] But most such governments involve replacement by a government of the same party; the average length of party control (as defined by replacement of PM by member of a different party) in parliamentary systems is 68.7 months.[179] The figure for Mongolia since 1992 is 48.2 months, slightly below the average but hardly indicating a problem of instability. Further, parliamentary governments have much greater variation in length than presidential governments do, and government formation in Mongolia is essentially parliamentary.

Prime Minister, Head of the Government

Due to the fact that Mongolia has a parliamentary system the Prime Minister, as the Head of the Government, has substantial political influence and plays a significant role in politics. Even though the Government works in accordance with cabinet principles, Article 41.1 of the Constitution legislates that the Prime Minister shall lead the Government and shall be responsible to the SGH for the implementation of state laws. Actually, the Prime Minister should play a decisive role in approving or making amendments to the Government structure and composition as well as on the issue of dissolution of the Government. This demonstrates the important role that the Prime Minister plays in the state system. As is the case in other countries with a parliamentary system, in order to raise the public standing of the Prime Minister a practice was established whereby the leader of the party which won the elections is appointed to this government post. This became common practice in Mongolia with the appointment of the leader of the Mongolian People's Revolutionary

[177] Acting Prime Ministers were not included in the averages.

[178] Strom, Muller and Bergman 2010. Cabinets and Coalition Bargaining: The Democratic Life Cycle in Western Europe

[179] John Huber and Cecelia Martinez-Gallarado, "Replacing Cabinet Ministers: Patterns of Ministerial Stability in Parliamentary Democracies", *American Political Science Review* 102: 169-180 (2008). An alternative measure, based on a GCI Index (wherein a cutting point past a 50% change in party composition of cabinet was used to denote a change in party control), yielded an average duration of party control in parliamentary systems of 83.8 months.

Party (MPRP) N.Enkhbayar as the Prime Minister in 2000. Subsequently all successive Prime Ministers, including Ts.Elbegdorj (Democratic Party), M.Enkhbold (MPRP), S.Bayar (MPRP), S.Batbold (MPRP) and N.Altankhuyag (DP) were leaders of their own parties. However, after the resignation of N.Altankhuyag's Cabinet, Ch.Saikhanbileg was appointed as the Prime Minister rather than Z.Enkhbold, who had been elected as the leader of the DP. Z.Enkhbold instead remained as the Chairman of the State Great Hural.

After a landslide victory in the 2016 nationwide elections, the leader of the Mongolian People's Party (previously MPRP) M.Enkhbold was elected as the Chairman of the State Great Hural, which shows that Mongolia has abandoned the common practice of appointing the leader of the winning party in the parliamentary elections as the head of executive power.

The Core Structure of the Government

In line with the ideas in the Constitution, the Law on the Government and the Law on Civil Service were adopted in 1993 and in 1994 respectively, which were directed to establish organizations of public administration system, to define their operating principles, structure and functions, as well as to form professionalized civil service. Much later after this in 2004 the Law on the Legal Status of the Ministry and the Law on the Legal Status of Government Agency were adopted.

The structure and organization of the central government ministries and agencies changed as the new governments formed. Under any government there were widespread changes such as the partitioning, merging, creation, dissolution, changing of names of ministries as well as amending the agency affiliations. Each of the governments explained these changes in relation to making it consistent with the objectives of the government action program. However, in undertaking such changes there is always a lack of justification including the economic studies, functional analysis, and other studies on the ways to improve the inter-sectoral coordination, on attaining the proposals from the central and local government organizations as well as on reducing the budgetary burden. In some cases there were criticisms, which stated that increasing the number of ministries served the purpose of awarding with the post of the Minister to the members and supporters of the winning party as well as parties that joined the coalition. The following table shows changes in the main structure of the government.

Table 9. Changes to the core structure of the government, by year

Organization/Year	1992	1996	2000	2004	2008	2012	2016
Ministry	16	9	11	13	11	16	13
Government Regulatory Agency	-	22	17	14	12	11	10
Government Implementing Agency	-	37	31	23	31	17	17
Total number of agencies	-	59	48	37	43	28	27
Total number of ministries and agencies	16	68	59	50	54	44	40

In transitioning to agency structure in 1996 it was envisioned that the agencies would be separated from policy making, while the ministries were supposed to have small structures focused primarily on policy making. In this way, the agencies were to implement policies and undertake government regulatory functions, and were to become self-sustaining. However, currently there is a need to assess how the ministries and agencies are performing their respective functions of policy making and implementation and regulation, and how appropriate their current structure is. It is time to review and regulate the fact that some agencies have amassed larger structure and authority in comparison to ministries, while other agencies are heavily dependent on the respective ministers.[180] Internationally, the situation is quite similar. These new agencies were mainly created to function separately from ministers, in order to give the managers greater flexibility and freedom. However, it created problems of coordination (getting many public sector organizations cooperatively pursue the same overall policy objectives) and problems of political accountability (the agencies were harder for ministers to control, but in most cases, if they did unpopular things, it was still ministers who got the blame from the media and the public)[181].

Despite efforts to create a professional and nonpartisan civil service, including the 2008 amendments in the Law on Civil Service which introduced a provision requiring civil servants to refrain from party affiliations, there is continuing politicization of personnel policy at the central executive level. High turnover of staff in senior positions is observed after each election. This is an issue of concern as it undermines government stability and continuity, and impedes sustainable capacity-building within the civil service. These issues are

[180] Speech of J.Sukhbaatar, Chairman of the Standing Committee on State Structure of the SGH, at the conference "Administrative Reform: Issues and Solutions" jointly organized by the SGH and UNDP in April 2011. [Mongolian]

[181] Pollit C. and Bouckaert G. (2011), Public Management Reform: A Comparative Analysis-New Public Management, Governance, and the Neo-Weberian State, Oxford University Press.

related to the weak implementation of laws in the civil service rather than to the lack of a legal framework.

Conclusion

The Constitution says little about the system of public administration and civil service. In the implementation of the constitutional regime, the main area that lacks any significant reforms is the public administration system. In 1996, the SGH adopted the "State Policy on Reforming Government Processes and the General State Structure," and in 2004 it adopted the "Medium-term Civil Service Reform Strategy". However, there has been no systematic assessment and evaluation of the implementation of these policy documents. There was also a lack of evaluation of the outcome of the management reforms initiated with the adoption of the Public Sector Management and Finance Law in 2002. Moreover, the Budget Law adopted in 2011 failed to address management issues such as performance management in the public service, leaving it unregulated.

Urgent issues facing developing countries, such as corruption and bribery, are the outcome of inadequate basic administrative norms and lack of sufficient control, and experience shows that they are not effectively addressed by merely "improving management". International experts have concluded that "importing" the New Zealand model into Mongolia demonstrates a famous case of how solutions applied in one country cannot address the problems faced by the other country.[182] While, the above issues related to public administration and civil service and other regulations cannot be directly addressed in the Constitution, they are critical to effective service delivery, thereby implementing the constitutional framework so that government delivers for the population in practice. As such, they need to be reviewed along with the local government systems, and appropriately addressed within ordinary laws and administrative reforms as a matter of priority.

[182] Bouckaert G. Public Administration Reform in Eastern and Central Europe, (2009: 101).

The Judiciary

Introduction

During the socialist years (1921-1990) judicial independence was practically non-existent in Mongolia. This is not surprising, as the very existence of truly independent courts and judges would challenge the core of the totalitarian character of the state and the absolute power of the Mongolian Peoples' Revolutionary Party (MPRP). During the socialist period, the MPRP deeply penetrated into all spheres of the Mongolian society, and the judiciary was no exception. The judges were appointed based on their political reliability rather than qualities of competence, integrity, and impartiality. In order to be considered as a candidate for judge, the person had to be a party member, and career advancement of judges was totally dependent upon their loyalty to the party.

In the old system, the judiciary was a part of the executive branch of government. The central organ of the state in charge of directing the activities of courts and justices was the most influential. For instance, the Ministry of Justice was empowered by law to "issue orders and instructions concerning the administration of courts and improvements of their activities". This is an obvious example of government influence on judicial activity. Therefore, it can be said that the Mongolian judiciary was accountable to the government and political party.

After the collapse of the socialist system, judicial reform in Mongolia was intensified. The new Constitution of Mongolia (1992) proclaimed the judiciary to be equal to the legislative and executive branches of government. It also proclaimed the principles of judicial organization. These include the administration of courts and judicial system,[183] main requirements for judges,[184] judicial independence,[185] irremovability of judges,[186] and financing of the courts.[187]

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[183] Article 47: "1. Judicial power shall be vested exclusively in Courts. 2. The unlawful establishment of a Court under any circumstances and the exercise of judicial power by any organisation other than the Courts shall be prohibited. 3. Courts shall be established solely under the Constitution and other laws."

[184] Article 51.3: "A Mongolian citizen of thirty five years of age with higher legal education and experience in judicial practice of not less than ten years, may be appointed as a judge of the Supreme Court. A Mongolian citizen of twenty-five years of age with higher legal education and legal practice of not less than three years, may be appointed as a judge of the other Courts."

[185] Article 49: "1. Judges shall be independent and subject only to law. 2. It shall be prohibited for a private person or any civil officer (including the President, Prime Minister, members of the State Great Hural or the Government or an official of a political party or other public organisation) to

A number of important laws aimed towards the implementation of the constitutional provisions concerning the judiciary, namely the new Law on Courts, the new Code on Criminal Procedure and the Law on Court Structure, were passed during the first two phases of the judicial reform. As in many other countries, the initial version of the judicial structure, including court administration and the General Judicial Council (GJC), has been subject to some tinkering over the period the Constitution has been in force. Initial efforts focused on setting up the court system for a democracy, and for readjusting the relations between court, prosecutor and police in criminal investigations. A key step in this regard was the initial Law on Courts, adopted in 1993, which provides details for the organization of the judiciary and the GJC.

As part of the "Mongolian legal reforms program" adopted by the State Great Hural in 1998, the Law on Courts of Mongolia was amended in 2002. This law established more detailed regulations concerning the legal basis for the judicial system, its organization, powers and operations. Also additional guarantees for exercising the judicial power were set up. The adoption of the first policy document for the judicial reform, the "Judicial Strategic Plan of Mongolia", by State Great Hural Resolution #39 of 2000 was crucial in advancing the implementation of the judicial reform, and especially crucial to the strengthening of the judiciary.

On April 15, 2010, the National Security Council of Mongolia issued recommendations to intensify legal and judicial reforms and approved the "Program to Deepen Judicial Reforms". As a result, a package of laws aimed at improving the performance of courts and judicial independence was adopted by the State Great Hural in 2012-2013. This package of laws consists of the Law on the Judiciary of Mongolia (7 March, 2012), the Law on Administration of Courts (22 May, 2012), the Law on the Legal Status of Lawyers (7 March, 2012), the Law on the Legal Status of Judges (7 March, 2012), the Law on the Legal Status of Citizen's Representatives in Courts (22 May, 2012), and the Law on Reconciliation and Meditation (22 May, 2012). The main purposes of these laws are to deepen judicial reforms, enhance independence and

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interfere with the exercise by the judges of their duties. 3. A General Council of Courts shall function for the purpose of ensuring the independence of the judiciary. 4. The General Council of Courts, without interfering in the activities of Courts and judges, shall deal exclusively with the selection of judges from among lawyers, protection of their rights and other matters pertaining to ensuring conditions exist for guaranteeing the independence of the judiciary."

[186] Article 51.4: "Removal of a judge of a Court of any instance shall be prohibited except in cases when he/she is relieved at his/her own request or removed on the grounds provided for in the Constitution and/or the law on the judiciary or by a valid Court decision."

[187] Article 48.3: "The Courts shall be financed from the State budget. The State shall ensure economic guarantee of the Courts' activities."

impartiality of the judiciary, establish a system for fair dispute settlement, and to ensure transparency in the judicial process. The package of laws represents the most comprehensive legal and institutional reform in the judiciary since the 1990s. It clarifies the status of lawyers and the legal profession, and restructures court administration and the operations of the judiciary. It also regulates alternative forms of dispute resolution such as conciliation and mediation. The reforms are intended to lay the foundation for judicial practice in Mongolia for the next decade and beyond. Their entry into force marks a new era for the Mongolian legal system.

Judicial Independence

The essential elements of judicial independence are as follows: 1) the judiciary should function as a separate government branch that is equal in standing and status to the executive and legislative branches; 2) in order to be independent, the judiciary should be self-policing; 3) as an independent entity, the judiciary should prepare and submit the budget for the judicial branch; 4) clear and transparent procedures should be applied in judicial appointments and assignments; 5) judges should be appointed for life and judges' salaries should be sufficient and appropriate; 6) judges should have sufficiently high minimum qualifications in education and experience; 7) promotion of a judge should be based on an objective assessment of the judge's integrity, professional competence, and experience; and 8) judges should only be subject to discipline or removal for misconduct or incapacity by a tribunal composed primarily or entirely of judges.

It can be said that the major safeguards of judicial independence related to appointment, promotion, discipline, tenure, compensation and financing are established in Mongolia now either at constitutional or legislative level. All legal acts adopted in the course of three-stage judicial reform were designed to provide for greater judicial independence.

According to the Constitution and respective laws, all Mongolian judges are to be appointed for life (the uniform age of retirement for all judges is 60). A judge's term in office does not depend upon government officials, party leaders, and higher court judges, as well as changes in the government. These legal provisions show that the term of a judge's mandate is protected by law. However, when the courts were reorganized in accordance with the 2013 law on Establishment of the Court, all occupants in all first instance and appellate courts were first released and then re-appointed. In this process, when the President issued a resolution on the re-appointment of judges to circuit courts, he appointed 397 judges from a total of 409, leaving out 12 judges, despite the

proposal by the General Judicial Council of Mongolia.[188] This situation was repeated again with the re-appointment of judges in accordance with 2015 Law on the Establishment of the Court, where one judge was not re-appointed and thus dismissed.[189] No prior notice or clear justifications were provided to the judges who were dismissed. These judges raised the issue with the Mongolian Bar Association, the General Judicial Council, the Office of the President of Mongolia, the Constitutional Tsets, the first instance civil court and the civil appeals court, but could not get any redress.[190] Article 51.4 of the Constitution protects judges from removal except for violations stipulated in the Constitution or the Law on Courts, as determined by a court decision. This system really began to operate effectively after the year 2000, and indicates some ability to limit misconduct by government actors even as the system faces corruption allegations.[191] There is no guarantee that such a situation will not be repeated again with every instance of change to the organization of the courts, as article 51.4 of the Constitution has not provided an adequate safeguard to the term of judicial appointments.

Any interference in the activity of judges is prohibited at the constitutional and legislative level. The current Law on the Status of Judges also directly prohibits judges from affiliation with a political party or a movement (Article 28.1.1.). By law, the power to take disciplinary actions and remove judges is placed in the hands of the judges themselves. The Ethics Committee consisting of prominent lawyers (mainly judges) is established with the function to decide the cases of alleged judges' misconduct (Article 30-31 of the Law on Judicial administration). Judges may be removed from their office and their power may be suspended or terminated, but only on the grounds and by the procedure established by law (Articles 17.1, 18.3 and 18.4 of the Law on the Status of Judges).

Making the judicial administration more democratic is one of the agendas of the reform. The chief judge heads the respective court; however, it is

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[188] J.Hunan, P.Battulga, M.Munkhjargal. *Guarantee Of Judicial Independence And Impartiality: Judicial Appointment*. Ulaanbaatar, 2015, 96-97. [Mongolian]

[189] Decrees No.110 and 111 of the President of Mongolia dated 30 June, 2015. [Mongolian]

[190] Despite the fact that the commentary provided by the Office of the President to the Constitutional Tsets states that the President did not accord faith to aforementioned judges on the grounds of their serious ethical violations, there are no decisions of the Judicial Ethics Committee as well as a valid court decision on the dismissal or violation of law by these judges. J.Hunan, P.Battulga, M.Munkhjargal. *Guarantee Of Judicial Independence And Impartiality: Judicial Appointment*. Ulaanbaatar, 2015, 100. [Mongolian]

[191] As of April 2013, a total of 47 judges were removed from office for serious ethical breaches.

prohibited by law for him or her to interfere with the exercise of judicial authority by any judge, by the issuance of directives, guidelines, the assignment of a case to a particular judge, or in any other manner (6.3 of the Law on Judiciary of Mongolia). According to the article 13 of the Law on the Judiciary, the chair of the respective court exercises the following powers: represents the court in domestic and foreign relations; announces, organizes and convenes the panel of judges, and organizes enforcement of decision of the panel; chairs court hearing, appoints a chair and other judges, supervises operation of chamber of the court; organizes meetings with citizens regarding relevant laws; and reviews written petitions and requests from citizens and legal entities.

Adequate remuneration and compensation of judges is an important factor for ensuring the judicial independence. The Law on the Legal Status of Judges provides, “Remuneration for the office of the judge shall be sufficient to provide for their economic independence and commensurate with the cost-of-living” (Article 23.1). Article 23.5 of the same Law states: “In approving the court budget no reduction shall be made to the wage component and its amount”. This provides a further guarantee of the judge’s economic independence. Since these legal provisions came into force, judge’s remuneration has increased by 1.5-2 times in comparison with previous years. However, this increase in remuneration has also become an apple of discord. Previously the GJC was blamed by several Members of the SGH for violating the legislation by setting the judge’s remuneration at a very high level. The 2016 draft law on the amendment of the state budget, submitted by the Government to the State Great Hural, aimed at making savings in budget expenditure by including a provision on salary cuts for judges. If this draft law were to be adopted then a judge’s annual remuneration would decrease by 3.2 billion tugrugs, or 61-66 percent.

The financing of the courts is important for the judicial independence. The system of financing judicial activities is prescribed at the constitutional level. According to article 48.3 of the Constitution, the judicial system has to be financed from the state budget. According to the Law on the Judiciary, the judiciary shall have a separate budget which is an integral part of the state central budget (Article 28.2). Since the time when the GJC started directly submitting draft budgets of courts to the SGH, in accordance with relevant legislation, there has been an increase in the percentage share of the court budget in the total state budget. For instance, since 1997 the percentage share of the state budget allocated to the court budget ranged from approximately

0.39 to 0.48 percent.[192] According to a 2015 Court Statistical Report by the GJC, the court budget share in the state budget increased to 0.65 percent in 2013, to 0.85 percent in 2014 and 0.82 percent in 2015 respectively.[193] Despite such positive steps to increase the court budget allocation, there is a continued need to raise the court budget share up to no less than 1 percent of the total state budget.[194]

On the other hand, attempts have been made by the SGH to reduce to some extent the court budget and judge's remuneration fund on the grounds of economic difficulty. For instance, in addition to the 2016 draft law on the state budget of Mongolia submitted by the Government to the SGH in October, 2015, which estimated a reduction to the court budget of 23.4 percent and the judge's remuneration fund of 35 percent, it also submitted a draft law to annul Article 23.5 of the Law on the Legal Status of Judges, which states, "In approving the court budget no reduction shall be made to the wage component and its amount". The Government also submitted a draft law on the amendment to the state budget in 2016 to the SGH, which included a provision on the reduction of court's budget by 3.9 billion tugrugs. If passed, this legislation could pose a danger to the economic independence of judges, which is meant to be guaranteed by the Constitution and other relevant laws. Therefore, the state has the responsibility not to encroach upon the economic independence of the judiciary.

Despite the fact that Mongolia has made significant strides in strengthening judicial independence and the impartiality of judges through legislation consistent with global standards, these legal provisions are not adequately enforced. It is observed that some of the issues related to judicial independence are not adequately regulated. For instance, despite the concepts of rotation and transfer of judges, embedded in the Law on Legal Status of Judges, the practice of rotation and transfer of judges to other courts without their consent remains, because these forms and their consequences are not well distinguished as in the case of the Law on Civil Service.

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[192] D.Solongo (2014) The Overview of the Research of Judicial Administration), Open Society Forum, Ulaanbaatar, 4-5. [Mongolian]

[193] General Judicial Council of Mongolia, Court Statistical Report, Ulaanbaatar (2015). [Mongolian]

[194] B.Chimid, *The Conceptions of the Constitution: Human Rights And Judiciary*, Volume 2, (2004), 147. [Mongolian]

The General Judicial Council

Mongolia's judiciary is to be independent, and a crucial guarantor of this is the General Judicial Council (GJC) created for the first time under the Constitution.[195] This was part of a global trend towards judicial councils as devices to manage and insulate the judiciary.

The history of the GJC can be divided into three different developmental stages.[196] The first stage (1993-1998) was one of institutional establishment. During this period, the GJC got operationalized as an institution, its internal procedures were developed, financial and human resources departments were formed, and completed the first institutional goals. During the second stage, lasting until 2012, the GJC worked to deepen the judicial reforms in light of the overall reforms in the legal sector of the country.[197] This stage saw the active use of the mechanisms to discipline judges. Since the major legal reforms of 2012, the third stage has been one in which the ideals of independence and impartiality have begun to be realized.

The first decade of the GJC's operation was the years of intense debates between the Minister of Justice and the Chief Justice over who would head the Council. According to Article 33.3 of the 1993 Law on the Courts, the Chairman of the General Council was elected by the majority vote from among the members for a term of three years. Subsequently, at the first session of the General Council, the Chief Justice of the Supreme Court was elected as Chairman. Consequently, the article was revised in 1996 to provide that "the Chairman of the General Judicial Council shall be the Cabinet Member in charge of legal affairs." Thus, the Minister of Justice and Internal Affairs started to assume the role of the Chairman of the General Council. The rationale for this change was to ensure that the GJC had a strong voice in budgetary

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[195] Article 49.3 of the Constitution of Mongolia provides "A General Council of Courts shall function for the purpose of ensuring the independence of the judiciary"; Article 49.4: "The General Council of Courts, without interfering in the activities of courts and judges, shall deal exclusively with the selection of judges from among lawyers, protection of their rights and other matters pertaining to ensuring conditions for guaranteeing the independence of the judiciary"; and 49.5 "The structure and procedures of the General Council of Courts shall be defined by law".

[196] On developmental periods see N.Ganbayar, Opening Speech delivered at the Conference "the General Judicial Council: Today and Tomorrow" organized on the occasion of the tenth anniversary of the JCC. 2003 [Mongolian]; Ch.Ganbat, Speech on "The General Judicial Council as the Guarantor of Judicial Independence" discussed during the Conference "General Judicial Council: Today and Tomorrow", 2003 [Mongolian]; S.Batdelger, Speech delivered during the joint forum of the heads of the administrative departments of the courts, 2008 [Mongolian].

[197] This second period is closely connected to the adoption and implementation of 1998 SGH resolution No.18 on "Program of Legal Reforms of Mongolia" and 2000 SGH resolution No.39 "Strategic Program of the Judicial Power of Mongolia". [Mongolian]

discussions within the Government. In 2002, however, the Law on Courts was revised again to provide that the Chief Justice would be the Chairman.[198] This reflected a view that the goal of judicial independence is better served when judges play a role in judicial administration. In particular, the Minister of Justice as a political appointee was deemed as inappropriate to chair the GJC. This view was supported by an opinion from the National Security Council.

The initial Law on Courts of 1993 had a special chapter on court administration. During the nine years of implementation of this Law, a substantial number of amendments and changes were made to it, focused mainly on court administration. The issue of court administration continued to be regulated by the Law on Courts of 2002. In 2012, a new Law on Administration of Courts was passed which regulates the GJC and other aspects of judicial administration. The law covers a wide range of issues such as reporting line of the GJC, an authority to appoint the Chair of the GJC and the appointment procedures, re-appointment of the Chair and other members of the GJC, their ranking, salary, and benefits, conditions under which a member of the GJC is transferred to another position without decreasing their salary levels, if the member is resigned from the post for a valid reason.

Subsequently, on 17 January, 2013, the Law on the Procedure for Adherence to the Package of Judicial Laws was adopted. According to article 1 of the said Law, the GJC increased the vacant positions for judges of the Supreme Court of Mongolia,[199] conducted a selection of judges for these vacant positions, and introduced them to the SGH; after the submission of this proposal to the President, the new judges were appointed to their positions. This represented an effort to ensure that appointed judges were not corrupt and were of the highest quality.

Development of the Administrative Review in Mongolia

The expansion of the jurisdiction of courts constitutes yet another area of radical change. The whole network of the specialized courts, namely administrative courts, was created in order to perform an effective check on the arbitrary exercise of power by government. The reason for this was that the socialist legal doctrine did not recognize the doctrine of separation of powers;

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[198] State Gazette, issue no.29, 2002, 966. The 2002 reforms also corrected a minor legal error in the Law on Courts relevant to the Constitution. The 1993 Law had said that "As provided in the Constitution, the General Council is a co-management and ex-officio organization with the function to ensure the impartiality of judges and independence of the judiciary." This was problematic because the Constitution says nothing about the JCC being an ex officio body. The 2002 version removed the phrase "as provided in Constitution".

[199] Previously, there were 17 judges at the Supreme Court, now increased to 25 judges.

therefore, any possibility for a Mongolian court to review an administrative act was eliminated. The range of issues subject to decision by the judiciary was very narrow. There was no comprehensive complaints system to restore rights violated by state administrative bodies and public officials.

The legal foundation of administrative courts was the constitutional article on the possibility of creating specialized courts (Article 48.1). On December 26, 2002, the State Great Hural passed the Law on the Establishment of Administrative Courts along with the Law on Administrative Procedure. The establishment of administrative courts was a major step towards improvement of the national judicial system as well as the expression of the country's will to place special emphasis on protecting the rights and freedoms of citizens against arbitrary actions by government organizations and public officials. By providing opportunities to citizens to appeal to administrative courts, the process of disclosure of unlawful decisions of state organizations and annulling these decisions by courts began.

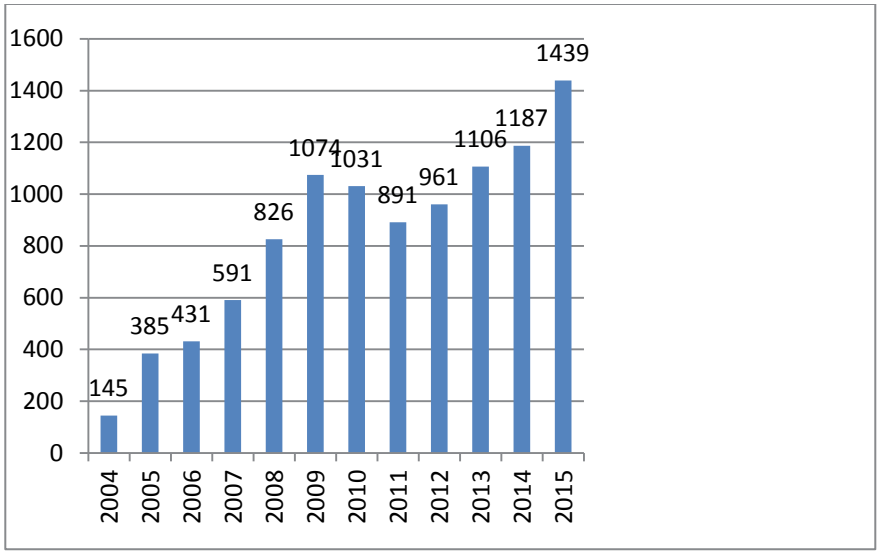
Administrative courts began their operation from June 1, 2004. Currently, there are 21 provincial administrative courts, including the Capital city administrative court, acting as courts of first instance. The Administrative Court of Appellate in Ulaanbaatar city acts as an intermediate court, and the Administrative Chamber of the Supreme Court acts as the court of last resort for administrative cases. It should be noted that from 2004 to 2011, the system of administrative courts in Mongolia operated without an intermediate appellate court. The decisions of the provincial administrative courts were appealed directly to the Administrative Chamber of the Supreme Court, which acted as both intermediate appellate court and the court of last resort for administrative cases. Seven years after Mongolia established its first specialized court for administrative cases, the decision was made to complete the country's administrative court system by establishing an intermediate appellate court. On April 1, 2011, the Administrative Court of Appeals began operating in Ulaanbaatar. Another significant feature of the administrative courts is that they are organized differently from an ordinary court system. The notable distinction of the system of administrative court from that of ordinary court system is the absence of administrative courts in soums and districts.

The main competence of the administrative courts is to exercise judicial control as to whether administrative organizations act within legally defined scope and limits. According to the law, administrative courts have the right to review the cases and disputes against decisions by administrative organization and public officials. Article 4 of the Law on Procedure for Administrative Cases provides the broad jurisdiction for administrative courts by defining the administrative organizations and officials whose acts are subject to judicial

control. All areas of public life such as the police, school, roads, and utility services are covered under administrative review. But, administrative courts do not review the disputes that fall under jurisdictions of the Constitutional Tsets and other courts.

Since their establishment, administrative courts have played an important role in protecting human rights and freedoms of citizens. Previously, citizens had a fear of state organizations and public officials, complied with any administrative decisions without a protest. As this attitude has changed now, the number of appeals has grown. As a result, decisions by administrative organization and officials reviewed by the administrative courts have been constantly growing both in terms of the number and the scope. Between 2004 and 2015, the number of cases reviewed by administrative courts rose from 145 to 1439 (see Diagram 1).

Diagram 1. Judicial Review of Administrative Acts



Source: Yearly Reports on the Activities of the GJC

Therefore, administrative courts are playing an active role in safeguarding fundamental rights and freedoms. Remarkably, between 2005 and 2015, administrative courts supported more than 60 percent or two of every three requests for remedial action. Approximately 60 percent of the total number of cases resolved by administrative courts were resolved in favor of citizens and legal persons. This means that the illegal decisions by about 4,000 state administrative bodies and public officials were annulled restoring the citizens' as well as legal persons' legitimate rights and interests.

Legal Process

One of the major areas of heightened scrutiny for human rights compliance is in the realm of criminal justice. Article 16.14 of the Constitution guarantees a right to a fair trial, and global standards in this area are well established. Mongolia's justice system has been criticized in this regard, but is improving. Article 39.4 of the Criminal Procedure Code provides that investigators, prosecutors and judges must ensure that a lawyer is available to suspects during the pre-trial procedure. A new Law on Legal Aid was passed by the Parliament on 5 July 2013, entering into force from 1 January 2014. This law establishes legal aid centres nationwide under the Ministry of Justice and introduces a public defender system for indigent defendants. While it is too early to evaluate these developments, they are positive signs, if somewhat overdue.

As in some other countries in the region, victims are allowed to appear in criminal trials. In Mongolia, the victim can be represented by a lawyer, and observers report that victims do have a strong influence on actual trials. In cases where there is inadequate quality of defense provided to the accused, there could be concerns about the extent of compliance with fair trial standards. Many of these concerns could be addressed through a revision of the criminal procedure code in compliance with the Constitution.

The prosecutor's role in criminal justice has declined. As with other socialist countries, the procurator was perhaps the most important legal institution in Mongolia before 1990. The procurator was tasked with the job of general supervision over all the institutions of government to make sure they were conforming with legality, a role much greater than simply prosecuting criminal cases. The constitutional reforms had to confront the issue of the role of the prosecutor. Article 56 lays out the general guideline in the following way: "The Prosecution shall exercise supervision over the inquiry into and investigation of cases and the execution of punishment, and shall participate in the court proceedings on behalf of the State."

In this way, the prosecutor lost the function of general supervision, being replaced by a more conventional regime of administrative law for legal violations by government and the Constitutional Tsets for constitutional violations. The prosecutors also lost the ability to directly investigate cases. Under the 1992 Constitution the "supervision" function is retained only for the area of investigation, but the police undertake the actual investigation. Notably, the courts did not take on a function of investigation, instead being conceived as a more adversarial, referee-type institution. The precise boundaries of supervision and investigation remained to be worked out. Prosecutors now issue warrants for wiretapping, search, which are elements of investigation, and judges only issue warrants for arrest. But these things might change.

Performance with regard to abuses of power

Mongolia's legal system is a work in progress. As a matter of constitutional evaluation, the key question is whether it can help to serve to limit government agents from abusing power and promotes accountability for the protection and promotion of rights as defined in the constitutional order. On this score, the system seems to have performed relatively well. When former President N.Enkhbayar was investigated and sent to jail on corruption charges in 2012, his supporters called the prosecution politically motivated. But holding former rulers accountable is one of the biggest challenges for any legal system, and might be seen as demonstrating genuine progress toward the rule of law. There have been many other instances in which powerful actors have been subjected to criminal punishment. Also in 2012, D.Batkhuyag, the former head the Mineral Resources Authority, was found guilty of illegally issuing licenses and sent to prison. The previous decade had seen other scandals, including the Casino scandal of the late 1990s, and the incident in the early 1990s when officials at the Mongol Bank lost the country's entire foreign exchange reserves in a speculative investment (popularly known as the "gold dealers' case; both scandals led to jail terms for the officials in question. Our overall assessment is positive, but we recognize that criminal justice continues to face major challenges in providing fair trials, particularly for poor defendants.

Beyond the regular legal institutions, the independent investigative agencies such as the Independent Authority Against Corruption (IAAC) established in 2007 have some role to play in advancing the constitutional goal of reducing agency costs.

Problems of the State Structure

Much of the political and constitutional debate in Mongolia has concerned the relationship between parliament and government, specifically about government formation. Mongolia's 1992 Constitution failed to clearly specify what exact authority the president and Parliament exercise in appointing the prime minister and forming the cabinet. According to the Constitution, the President has the right to propose a candidate for the Prime Minister, but in consultation with the majority party or coalition (Article 33.2). The prime minister is expected to secure the president's approval not only over the composition and structure of the cabinet but also for the selection of cabinet ministers - before submitting the matter to parliamentary deliberation (Article 39.2). It is unclear from the text what would happen in the event of a disagreement between the SGH and the President on the candidacy for Prime Minister. It is also unclear what would happen if there was disagreement between the Prime

Minister and President on the composition of the cabinet. Article 25.6 gives the SGH the power to appoint, replace or remove the prime minister, and form the cabinet. The cabinet is responsible to the Parliament while discharging its duty.

Another ambiguity concerned who could serve in the government, and whether MPs would have to resign their seats to do so. In early 1996, the MPRP included sitting MPs in its cabinets, but the fact did not catch much attention. The issue was brought to the fore in 1996 in a suit by D.Lamjav before the Constitutional Tsets, just after the election which brought the Coalition to power. Before a government was formed, D.Lamjav warned the Coalition to prevent from filling the cabinet with members of the SGH, relying on Article 29 which stated that "members of parliament shall have no other employment."[200]

The issue turned on the type of political system established by the 1992 Constitution and the role of the separation of powers therein. Was it a presidential system where the cabinet is unrelated to the parliament? Or a parliamentary system, wherein the government is formed by the leading parties in parliament? Semi-presidential systems vary on this question.[201]

Although some argued that Mongolian democratic practice had already established the parliamentary character of the political system, since the MPRP had formed the government with members of parliament during the first post-constitutional election in 1992, the initial panel of the Tsets found that parliamentary deputies could not hold cabinet posts. The SGH, controlled by the Coalition rejected the Tsets judgment. After a second hearing before the entire Tsets, the Tsets issued a decision upholding its earlier judgment to the effect that MPs could not join the cabinet without resigning their seats. Under Article 66 of the Constitution, this decision was final (see section on Tsets below).

In part because of the constitutional rules on quorum, the decision had profound effects on subsequent politics. The Tsets decision was made after the nomination and approval of Prime Minister M.Enkhsaikhan, who had not run in the parliamentary election and so could head the government; but other coalition leaders who had won parliamentary seats had to decide whether to

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[200] This section draws on Tom Ginsburg and G. Ganzorig, When Courts and Politics Collide: Mongolia's Constitutional Crisis, COLUMBIA JOURNAL OF ASIAN LAW 309 (Spring 2001).

[201] As a formal matter, some semi-presidential systems, which subscribe to the notion that the government is formed out of the parliament, forbid the simultaneous participation of members in government. Countries in which the two are separated include Taiwan (Art. 75); France (Art. 23); Portugal (Art. 154); Ukraine; countries in which it is allowed include Poland (Art. 103; 108); the Czech Republic (Art 22); South Africa (Art. 47); and Romania (Art. 79)

resign them to take ministerial posts, which would lead to by-elections that might cause the coalition to lose its historic majority.

In the aftermath of the decision, the democratic coalition found itself in the odd position of having its most powerful leaders ineligible for ministerial posts. With the coalition forced to give ministerial positions to second-line leaders, many top leaders were left as mere MPs. Without distributing ministerships, de facto power within the coalition could not match formal structure. Factional problems ensued, and the democratic coalition's term in government was unstable for the next four years, exacerbated by N.Bagabandi's rejection of governments. In 1992, 1993, 1998, an attempt to resolve the problem through legislation that would allow the members of parliament to serve in government was rejected by the Tsets.[202]

However, in 1999 in accordance with the proposal by the majority of parliament members, the so-called "seven worsening amendments" to the Constitution were passed, and despite the conclusion by the Constitutional Tsets that these amendments violated the Constitution, a year later in 2000 these amendments were re-introduced again. One of these seven amendments relates to the provision on allowing the concurrent holding of the office of the Cabinet Member by the Member of the SGH (please refer to the amendments chapter of this study to learn in detail about the political situation of the time and the debate surrounding this issue).

The long struggle among constitutional institutions was, in a sense, "won" by the SGH, which is appropriate in a democracy. Still, no institution emerged unscathed. For this reason, some analysts argue that Mongolia has become a parliamentary system. The arguments given for striking the amendment were not strong. Nor was the president a neutral arbiter, since his veto may have reflected his frustration at losing institutional power over government formation. The Tsets suffered the embarrassment of having its decision ignored.

After these amendments were made in the Constitution in 2000, several governments have been formed, the composition of which included many Members of the SGH who concurrently held the position of the Cabinet Member.

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[202] Provisions allowing the members of the SGH to concurrently serve in the Cabinet were introduced in the 1992 Law on the State Great Hural and the 1993 Law on the Government were annulled by the Tsets in 1996, the same provision in the Law on Legal Status of the Members of the State Great Hural was annulled by the Tsets in 1998 on the ground that they were in breach with the Constitution.

Table 10. Members of the State Great Hural, who concurrently held the post of the Cabinet Member (1992-2016)

Cabinet	Term	Number of ministers	Number of MPs in the cabinet
P.Jasrai	1992.07.21 - 1996.07.19	19	5
M.Enkhsaihan	1996.07.19 - 1998.04.23	10	0
Ts. Elbegdorj	1998.04.23 - 1998.12.09	10	0
J.Narantsatsralt	1998.12.09 - 1999.07.22	10	0
R.Амарjargal	1999.07.30 - 2000.07.26	10	0
N.Enkhbayar	2000.07.26 - 2004.08.20	13	4
Ts. Elbegdorj	2004.08.20 - 2006.01.13	18	13
M.Enkhbold	2006.01.25 - 2007.11.22	17	15
S.Bayar	2007.11.22 - 2008.09.11	16	8
S.Bayar	2008.09.11 - 2009.10.28	15	11
S.Batbold	2009.10.29 - 2012.01.27	15	12
S.Batbold	2012.01.20 - 2012.08.09	14	9
N.Altankhuyag	2012.08.09 - 2014.11.05	19	17
Ch.Saikhanbileg	2014.11.05 - 2015.09.08	19	10
Ch.Saikhanbileg	2015.09.08 - 2016.07.21	19	14
J.Eredenebat	2016.07.21 – present	16	8

Source: J.Amarsanaa, O.Batsaikhan, A.Tuvshintulga, The Government of Mongolia: Historical Overview 1911-2012 (UB, 2013); The Parliament of Mongolia (1990-2000) UB, 2000; study by the research team members.

In a classical parliamentary system it is the Parliament that acts as the main guarantor against constitutional amendments which would allow members of the parliament to go into the Cabinet. Even though it is a common practice in countries with parliamentary system for a member of the parliament to concurrently hold the post of the cabinet member, our study illustrates that this does not constitute the main characteristic of a parliamentary system.[203] For example, in many countries with a parliamentary system, including Austria, Netherlands, Norway, Belgium (since 1995) and Thailand, the Constitution directly prohibits the cabinet from being composed of members of the parliament. This position is justified on the basis that it more consistently

[203] Only countries such as Australia, India, New Zealand, Sri Lanka and Nepal, which were former colonies of Great Britain, as well as some countries such as Greece include provisions in their Constitutions that require the Ministers to mandatorily be the Members of the Parliament. Constitutions of the Countries of the World. The Commonwealth of Australia Constitution Act. NY.,1987; Article 75 of the Constituion of India; article 38 of the Constitution of Nepal. In the study titled "World Parliament" it says, "there are 34 countries, where cabinet members are composed of parliament members, 24 countries, which prohibit the concurrent holding of these two posts, and 24 countries that adopt a medium position". This statement was referenced by Mongolian scholars as well. D.Lundeejantsan, L.Ulziisaikhan. Parliamentarism. UB, 2005, 129. [Mongolian]

implements the principle of the separation of powers, prevents the cabinet from having too much political influence, and ensures the independence of the legislative power from the executive power.[204] On the other hand, it can be seen that such a choice is also largely dependent on the total number of parliament members of the given country and on whether the parliament is bicameral or unicameral. In countries which allow the concurrent occurance of these two posts the number of parliament members is usually more than 200,[205] and their parliament is bicameral, where the cabinet members only conduct their activities in the lower chamber. Critics note that other countries with pure parliamentary systems, like the United Kingdom and Germany, have far bigger parliaments and so there is no problem of getting people to focus on the day-to-day legislative work. In the case of the Mongolian parliament with a total of 76 members, a session of which is considered as valid with the presence of a simple majority – a quorum of 39 members, any laws or decisions can be approved with the majority votes of 20 members. Where ten or half of these Members are Cabinet Members, it is conceivable that the Government, rather than Parliament, could adopt any laws and/or decisions they desire. This is an extreme not found in other countries.

On the other hand, many of these countries have second chambers of parliament which can assist with both legislative work and government oversight; Mongolia has only a unicameral parliament and so is ill-equipped to lose so many MPs to executive service. Finally, critics argue that laws are more poorly drafted after the amendments.

For this reason, many Mongolian politicians and researchers consider that provisions allowing politicians to be both members of parliament and cabinet members are incompatible with the principle of the separation of powers and have weakened the Parliament's legislative power and parliamentary oversight mechanism.

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[204] As R.Andeweg has noted, such a provision was inserted into the Constitution of the Netherlands with a purpose to demonstrate that the Cabinet should be kept apart from the politics, and the leaders of the country should be driven not by narrow self-interest but by a common national interest. Andeweg R. Centrifugal Forces and Collective Decision-Making: the Case of the Dutch Cabinets, European Journal of Political Research. Dordrecht, 1983. Vol.16, N 2, 131.

[205] Number of parliament members of some countries, where it is permitted for the Parliament Member to concurrently hold the post of the Cabinet Member: Australia226 (Upper House 76, Lower House 150), Federal Republic of Germany 691 (Upper House 69, Lower House 622), India 790 (Upper House 245, Lower House 545), Japan 722 (Upper House 242, Lower House 480), Greece 330, Finland 200, Spain 609 (Upper House 259, Lower House 350), Denmark 175, Jordan 165 (Upper House 55, Lower House 110), and New Zealand 120. World Parliaments (summary). UB, 2010, please refer to relevant sections.

Regardless, there seems at this writing to be a consensus that there is a need for reform. We have not identified any arguments in favor of retaining the current system. Instead, we believe there are some grounds for returning to a system in which government and parliament are separate. There are several reasons for our recommendation. Even if, as a formal matter, the government is still accountable to parliament, the latter does not have a strong incentive to threaten to end the government and so in practice there is less leverage for parliamentary oversight. Furthermore the small number of majority MPs who are not in the Government are left to take care of all purely legislative work. Having more people serving in both bodies will reduce the possibility that one faction can capture the governing apparatus, and will help to make sure that checks and balances operate effectively. Separating the two might encourage more technocratic participation in Government, which might bring policy benefits.

Several possible solutions are feasible. One idea is allow only the Prime Minister or a limited number of members of the cabinet to serve as MPs, perhaps restricting this privilege to particular ministries (such as the Ministers of Finance or Justice). We have not been able to identify a system that uses this model as a matter of constitutional law. However, it would allow for some accountability while also ensuring the institutional links that have characterized Mongolian political practice for most of the period of the constitution.

Comparative experience might be of interest in devising a solution. In Brazil, as in all presidential systems, a member of the legislature cannot be simultaneously a member of Congress. At the same time, members of Congress who become Ministers do not have to resign their seats. They are, however, required to take a leave from the legislature while they serve in the government. Specifically, the way this is done in Brazil is that when a deputy becomes a member of the government, his "substitute" takes his seat while he is in government and gives it back to him when he comes back to Congress. This is possible because the electoral system is a "list" system. For example, suppose that in the relevant deputy's district, the party presented a list with, say, ten candidates, but only four were elected. If one of these four MPs enters the government, the fifth place candidate (or the sixth, etc. if that one is not available) takes over that seat for the duration of that person's tenure in government. This substitute would then leave parliament thereafter.

In short, the institutional solution for the issue in Mongolia is likely to be tied to the type of electoral system in place. The "list" system provides a costless way to replace a representative who joins the government and guarantees that the party's share of seats in the legislature will remain the same until the next election. Having a system that requires by-elections (as in a district system), however, makes the participation of the individual MP in

government very costly for the strongest party; in addition to the costs of having to fight another election (often right after a national election has just taken place), it introduces a lot of uncertainty about the party's actual legislative strength. Another solution would be to allow the next biggest vote-getter in a district to take the seat, even if from a different party. This is what Brazil requires if Senators join the Government, and partly explains why there are fewer Senators serving in government than deputies.

If Mongolia re-adopts the “mixed” system of elections, one solution might be to allow MPs who are elected on the party-list system to join the government and to be replaced by the next person on the party list. This would encourage parties to put their top leaders onto the party list rather than in districts. In turn this might have a positive effect on political competition and representation, because the most prominent nationally known leaders would not be running in individual districts. Instead, parties would have to recruit district candidates with strong local connections.

Recommendation: Thus one of the main conclusions of this research is that it is not appropriate to make a provision which states that not more than one third of the Cabinet Members be composed from the State Great Hural. Instead, the post of Cabinet Member should be incompatible with the post of the Member of the State Great Hural. Consequently, a complete, rather than partial, prohibition of the concurrent holding of these two government posts is needed for the proper operation of parliamentary oversight and implementation of a genuine separation of powers.

Issues Related to Establishing the Government

Some of the 2000 Constitutional amendments altered the powers of the President regarding the appointment of the Prime Minister and the composition of the Cabinet. First, responding to President N.Bagabandi’s role in rejecting the coalition governments, the amendments removed presidential discretion in this regard. The president’s negotiating power regarding nomination of the prime minister was removed from Article 33.2. Instead, the amendments forced the president to propose to Parliament the prime ministerial candidate nominated by the majority within five working days, turning a former power into a duty. Further amendments to Article 39.2 granted the prime minister the authority to submit proposals on changing the structure and composition of the cabinet to the Parliament, freeing the premier from presidential interference. These amendments were directed towards reducing the President’s powers, not towards comprehensively resolving some of the urgent constitutional issues connected with establishing the Government.

The amendments made to the Constitution of Mongolia in 2000 did succeed in alleviating confusions related to the state structure and also played a significant role in overcoming the political crisis and deadlock.[206] In addition, the amendments are also considered to have added to the features of the parliamentary system by providing the elected majority in Parliament with the power to nominate a candidate to the post of the Prime Minister without third-party interference.[207]

Researchers point to the following urgent issues that still remain in the Constitutional provisions on the establishment of the Government. These include: a) The SGH shall determine the appointment of the candidate to the post of the Prime Minister through secret ballot by a simple majority of those present and voting. The appointment and not the selection of the Prime Minister, which is not a common international practice, constitutes the grounds for the appointment of the Prime Minister, who did not enjoy great support from the SGH. However, the situation could be improved if the practice of appointing the leader of the party with majority seats in the Parliament to the post of the Prime Minister is maintained steadily; [208] [209] b) The requirement for mandatory consultation by the Prime Minister with the President regarding the composition of the Cabinet was relaxed in accordance with the Constitutional amendment. However, procedures requiring the approval by the SGH of each candidate to the post of the Cabinet Member and allowing discussion at any time by the SGH on the resignation of individual Ministers remained.[210] The fact that the Prime

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[206] N.Enkhbayar: I did not intend to make major changes on principle to the Constitution. "Today" newspaper, 1999-12-24, №299 (849), 1, 2; L.Gundalai: It is one-sided to refer to one as the minority of the minority based on single standpoint. "Daily newspaper", 2000-07-28, № 175 (428), 2. "On the issues surrounding the amendment to the Constitution", UB, 2010, quoted in 126, 168. [Mongolian]

[207] "On the issues surrounding the amendment to the Constitution", UB, 2010, 230-231; O.Munkhsaikhan. "On the establishment of the Government" in *Checks and Balance between Legislative and Executive Branches of Mongolia* (Ulaanbaatar policy research center, 2016) 20. [Mongolian]

[208] In a parliamentary republic the Head of State appoints the Leader of the party/coalition that won the parliamentary elections to the post of the Prime Minister, and on his/her advice appoints other Ministers (Greece, India, Italy). In some countries the Head of the Government emerges after the ballot by the parliament, whereby he/she is appointed in accordance with the decree by the Head of State (Germany, Finland).

[209] In this case, there is no need to conduct elections, whereby usually the Head of State/President directly appoints the Prime Minister.

[210] Many researchers criticize the fact that the SGH appoints and/or dismisses after discussing each candidate to the Minister. N.Lundendorj. Transition period: political and legal issues. Ulaanbaatar, 2010, 19-20; N.Lundendorj: It is appropriate to organize activities to make amendments to the Constitution and resolve it through the SGH. "Daily newspaper", 2016.11.11, №260 (5525); O.Munkhsaikhan. "On the establishment of the Government," in *Checks and Balance between Legislative and Executive Branches of Mongolia* (Ulaanbaatar policy research center, 2016), 14-15. [Mongolian]

Minister is unable to appoint[211] or dismiss Cabinet Members without consultation with the President and the support of the SGH restricts the Prime Minister's opportunities to create their own team and limits the Government's ability to adopt and implement long-term effective policies in a confident and consistent manner in accordance with the Cabinet principle; c) Opening the possibility for the SGH to decide on a vote of confidence in the Government by simple majority creates an opportunity for the SGH to dissolve the Government any time it desires. This makes the Government overly dependent on the Parliament.

Regardless of the presence of the majority in the parliament, the fact that a certain number of members of parliament can advance a joint proposal on the removal of the Prime Minister undermines the principle on the implementation of common policies by the majority party or coalition at the SGH, resulting in frequent changes in the Government and destabilizing its course of actions. This diminishes the essence of parliamentarism and disrupts the activities of the executive power. The following table illustrates practice on the discussion of dissolution of the Government and removal of Cabinet Members at the plenary session of the SGH.

Table 11. Discussion on the dissolution of the Government and removal of Cabinet Members at the plenary session of the SGH and its outcome

№	Date of discussion during the plenary session	Member, who submitted it, and whom it proposes to remove	Outcome
1.	17 October, 1997	The minority or 24 Members of the MPRP at the SGH proposed to dissolve the Government headed by M.Enkhsaikhan.	Resolution No.78 of the SGH dated 17 October, 1997, stating that there are no grounds to dissolve the Government was adopted.
2.	22 April, 1998	Prime Minister M.Enkhsaikhan made a statement on the resignation of all Cabinet Members.	Resolution No.83 dated 24 July, 1998, on the dissolution of the Government was adopted.
3.	24 July, 1998	The minority or 26 Members of the MPRP at the SGH proposed to dissolve the Government headed by Ts.Elbegdorj.	Resolution No.83 of the SGH dated 24 July, 1998, on the dissolution of the Government was adopted.

[211] For example, on 23 April, 1998, Ts.Elbegdorj was appointed as the Prime Minister, and due to the fact that his nominees to the Minister of Defense and Minister of Education did not receive support he nominated other candidates, who were appointed accordingly.

4.	23 July, 1999	Several Members of the SGH as well as 7 Cabinet Members of the Government headed by J.Narantsatsralt issued a proposal on the resignation.	Resolution No.53 of the SGH dated 23 July, 1999, on the dissolution of the Government was adopted.
5.	12-13 January, 2006	10 Cabinet Members of the MPRP including Ch.Ulaan of the Government headed by Ts.Elbegdorj issued a proposal on the resignation.	The Government is dissolved. Resolution No.02 of the SGH dated 13 January, 2006, was adopted.
6.	25-26 October, 2006	Members of the DP Council made a proposal on the dissolution of the Government.	The majority decided that there was no need to dissolve the Government.
7.	21 December, 2006	Members representing the Civil Will Party such as M.Zorigt and S.Oyun made a proposal on removing the Minister of Road Transportation and Tourism S.Tsengel.	The proposal on the removal was not approved.
8.	4 January, 2007	Prime Minister M.Enkhbold made a proposal on removing the Minister of Health L.Gundalai.	Resolution No.01 of the SGH dated 4 January, 2007, on the removal of the Cabinet Member was adopted.
9.	19 January, 2007	Some Members of the SGH including A.Murat made a proposal on removing the Minster of Social Security and Labor L.Odonchimed.	The proposal on the removal was not approved.
10.	6 February, 2007	Member of the SGH L.Gundalai made a proposal on removing the Minister of Industry and Commerce B.Jargalsaikhan.	Resolution No.22 of the SGH dated 6 February, 2007, on the removal of the Cabinet Member was approved.
11.	May, 2007	Some Members of the SGH including L.Gansukh and M.Zorigt made a proposal on removing the Minister of Fuel and Energy B.Erdenebaatar.	The proposal on the removal was not approved.
12.	24 July, 2007	Members of the DP Council advanced a proposal on the dissolution of the Government.	The majority decided that there was no need to dissolve the Government.
13.	8 November, 2007	Prime Minister M.Enkhbold made a request for resignation.	Resolution No.76 of the SGH dated 8 November, 2007, on the dissolution of the Government was adopted.
14.	15 May, 2008	Members of the SGH,	The proposal on the

		including Z.Enkhbold and R.Erdeneburen made a proposal on removing the Minister of Food and Agriculture D.Gankhuyag.	removal was not approved.
15.	17 July, 2008	26 Members of the SGH including L.Gansukh made a proposal on the dissolution of the Government.	The majority decided that there was no need to dissolve the Government.
16.	23 January, 2011	Members of the SGH, including Ts.Batbayar, Ts.Sedvanchig and S.Erdene made a proposal on removing the Minister of Mineral Resources and Energy D.Zorigt.	The proposal on the removal was not approved.
17.	13 May, 2011	Some Members of the SGH including S.Erdene, G.Bayarsaikhan and D.Gankhuyag made a proposal on the removal of the Minister of Mineral Resources and Energy D.Zorigt.	The proposal on the removal was not approved.
18.	27 April, 2012	Some Members of the SGH including D.Zagdjav and Ch.Ulaan made a proposal on removing the Minister of Justice and Internal Affairs Ts.Nyamdorj.	The Standing Committee decided that there is no need for removal. During the plenary session the DP caucus took a break.
19.	18 April, 2013	25 Members of the SGH including N.Enkhbold made a proposal on the removal of the Prime Minister N.Altankhuyag.	The proposal on the removal was not approved.
20.	24 December, 2013	26 Members of the SGH, including S.Byambatsogt made a proposal on removing the Minister of Economic Development N.Batbayar and Finance Minister Ch.Ulaan.	The proposal on the removal was not approved.
21.	5 November, 2014	28 Members of the SGH including D.Khayankhyarvaa made a proposal on the removal of the Prime Minister N.Altankhuyag.	Resolution No.68 of the SGH dated 5 November, 2014, on the dissolution of the Government was adopted.

Source: Draft Concept on the Amendment to the Constitution of Mongolia. "Citizen Participation" Journal

In addition, there were instances where proposals on the removal of Cabinet Members were discussed during the Standing Committee meetings, but

were dropped during discussions at plenary sessions. For example, the proposals on the removal of the Defense Minister J.Enkhbayar and the Justice Minister Kh.Temuujinin were discussed in 2012 and 2014 by the SGH sessions respectively. In the past, the SGH discussed the issue on the removal of Cabinet Member every half year. Some citizens appealed to the Constitutional Tsets on the ground that the practice of removal of Cabinet Members by the Members of Parliament is in breach of the cabinet principle stipulated by the constitution. The Constitutional Tsets reviewed the case and concluded that "the fact that the SGH discusses proposals of the removal of cabinet members by a Member of Parliament is in breach of the constitutional concept of functioning of the government based on the cabinet principle."[212] Thus the practice of proposing removal of a Cabinet Member by an individual MP has ceased. There is no doubt that the resolution of these urgent issues at the constitutional level will positively contribute to making the state structure of Mongolia more stable, and regulating the interrelationships between the highest organs of state power in the classical sense of parliamentary governance.

The Quorum and Majority Voting for Decision-making

One of the amendments made in 2000 was the amendment to Article 27.6, which requires open votes in Parliament, allowing parties to exercise greater control over their members' voting. Changes to Article 27.6 also reduced the quorum from a super majority of 51 to a simple majority of 39 MPs for the sessions of the State Great Hural and Standing Committees. This was designed to prevent the opposition from boycotting the sessions, but the result was that as few as 20 MPs (less than 1/3 of total members) can effectively pass laws. It has also become possible to decide on other important issues, including the dissolution of the government, by a simple majority of Members present and voting.

We believe that the parliamentary quota of 39 members is too low. While it was a solution to the opposition's tactics early in the constitution's history, the risks of narrow majoritarianism may outweigh those of blocking tactics at this point in the country's political development.

Recommendation: We recommend increasing the parliamentary quorum.

[212] P.Battulga, M.Munkhjargal, B.Turbold, B.Erkhembayar *v. SGH*, Resolution of the Constitutional Tsets #9, 25 November, 2015. [Mongolian]

Elections, Parties, and Political Cycles

Mongolia's Constitution does not stipulate an electoral system, and the system has gone through a number of changes since 1992. Until 2012, the plurality system was used, in which the largest vote-getter wins the seat. Within the category of plurality systems, Mongolia moved from a multi-member district system (block vote in 1992) to a single-member district system (First-past-the-post in 1996, 2000, and 2004) and back to block voting in the 2008 elections.

In 2011, a new election law introduced a combination of this majoritarian system and a proportional system based on the ratio of 48:28. In other words, 48 of 76 parliamentary seats are reserved for individual candidates nominated by their parties, while the remaining 28 seats are reserved for political parties. Small parties had been in favor of the proportional system because it would give them a better chance of gaining seats in Parliament. According to the new law, in order to gain a seat a political party must get 5 percent of the total national vote. The 2016 parliamentary election was supposed to be conducted using the mixed system. However, it was ruled out by the decision of the Constitutional Tsets[213] as violating the Constitution. Accordingly, changes were made in the Election Law, and the parliamentary election of 2016 was conducted based on a single-member district system. External observers noted this as a regressive step. It led to serious seat-vote bias in the results.

All of the above points to great instability of the election laws, changing after each election. Therefore according to the recommendation of international organizations[214] it is useful to reflect the chosen electoral system in the Constitution so that to prevent attempts by the majority in place to change the election laws. Otherwise, the majority party in the parliament will have permanent temptation to choose a system as they see fit and change the election law accordingly.

The political party system is an essential factor in the success or failure of any constitutional system. In 1924, after the People's Revolution in Mongolia, the Mongolian People's Party (MPP) was founded, and later renamed the Mongolian People's Revolutionary Party (MPRP). This was the sole ruling party until the 1990s, when with the successive establishment of the Mongolian National Democratic Party, the Mongolian National Progressive Party, and the Mongolian Social Democratic Party laid the foundation for a multiparty system in

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[213] D.Banzragch, Ts.Namsrai *v. SGH*, The Constitutional Tsets of Mongolia, Conclusion #5, 22 April, 2016. [Mongolian]

[214] "Compilation of Venice Commission Opinions Concerning Constitutional and Legal Provisions for the Protection of Local Self-government" (European Commission for Democracy Through Law (Venice Commission), 2015, 13.

Mongolia. Since then, Mongolia has seen an intensive process of parties being created, merging, partitioning, and restructuring. Currently 24 parties are officially registered with the Supreme Court, and these represent a range of social groups upholding different views. While political party regulation is beyond the scope of this study, there has been some debate over the establishment of independent institution for elections. Electoral institutions can serve to strengthen reporting, oversight, enforcement and sanctions, and serve to regulate the crucial questions of political and electoral finance.[215] In many countries such institutions are constitutionalized to ensure adequate protections from politicians. In the Mongolian context, this may not be necessary as there are no consistent allegations of electoral fraud or manipulation.

Rhythm of Elections

There does seem to be something of a political cycle related to elections. When parliament and the president are aligned, policy will be stable. When elections approach, however, the focus on policy is weakened as campaigning begins. The current system also features staggered elections, with parliament and the president each being elected for four year terms, but staggered by one year. This was not a matter of conscious design so much as a compromise produced in the final weeks of constitutional negotiations in 1991. It introduces an odd rhythm to the political system, as there are frequently periods of cohabitation between a president of one party and a parliament of another. This can lead to three year periods of political tension. Furthermore, both the years before and after a parliamentary election are largely spent campaigning, distracting legislators from their ordinary duties.

Since there is no particular rationale for the current system of elections one year apart, consideration should be given to either aligning the elections cycles (with joint elections every four years) or staggering the elections so that the cycles would be two years apart. We believe the latter is the better solution as it allows the public to provide a kind of check on the performance of either president or parliament. If parliament is perceived to be overreaching and too dominant, the public can elect a president of the opposition party; similarly, if the public is dissatisfied with the President, they can vote for his/her opposition party; on the other hand, if it elects a president of the majority party, there will be a period of unified government. Aligning the election cycle, with elections to both president and parliament at the same time, risks either extended periods of gridlock, or long periods of single party dominance without a public blessing of the mandate. An additional possibility would be to have half the SGH elected

[215] Report by Bjarte Tora and Ts.Namshir, Political Party Reform, September 2011, International IDEA.

every two years. This would introduce the kind of regular opportunity for voters to express their views and would mean more fluidity in the composition of the SGH.

Voter Turnout

Voter turnout in elections was relatively high, but has declined over the period of the Constitution's regime (see Tables 12 and 13). For example, in the 2008 Parliamentary elections 74 percent of voters turned out, around the same percentage as in the next year's presidential election. This suggests a good deal of legitimacy for the constitutional order. It is surely higher than many advanced industrial democracies. The decline in voter turnout might be seen as either a cause of concern; alternatively it might suggest that voters perceive that the stakes of elections are declining as the institutional structure of the country becomes more developed and routinized. Either way, we find electoral participation in Mongolia to be basically healthy, especially in comparison with other countries in its income class.

Table 12: SGH Election Voter Turnout

Year	Percentage of registered voters	Percentage of voting population
2016	73.6	67.9
2012	65.24%	56.24%
2008	74.31%	60.47%
2004	81.84%	64.91%
2000	82.42%	70.96%
1996	88.39%	73.64%
1992	95.60%	86.11%
1990	98%	87.23%

Table 13: Presidential Election Voter Turnout

Year	Percentage of registered voters	Percentage of voting population
2013	66.79%	58.47%
2009	73.59%	54.98%
2005	74.98%	53.89%
2001	82.94%	67.92%
1997	85.06%	70.03%
1993	92.73%	

Source: International IDEA, available at

http://www.idea.int/vt/countryview.cfm?CountryCode=MN

It is worth noting the importance of populism. Mongolia's political debates have tended to focus not on major policy differences across parties, but competing attempts to pander to the public through distributing universal cash handouts. In 2008, both major political parties promised to distribute over 1 million tugriks per person, years before the country's major mining projects were fully operative. This led eventually to the need to borrow from abroad to deliver on the promises, and a large budget deficit for the next government. Such handouts, especially if divorced from need, do not particularly qualify as public goods, as they simply increase private demand in the economy, and create a risk of inflation. From one perspective, an ideal political system would invest in infrastructure and other developmental policies rather than cash handouts. But the fairly poor reputation of politicians makes this model difficult to achieve in Mongolia. If voters do not believe in the ability of government to deliver policies for long-term development, they have an incentive to choose politicians who will provide immediate cash. In this sense, populism in Mongolia can be seen as a rational, if less than ideal, outcome.

Direct Democracy

The Constitution refers to the ability of the SGH to call referenda. Article 25.1.16 provides that this is a general power within the discretion of the SGH. The Article provides that the SGH may consider the results valid if a majority of "eligible citizens" turn out, and a majority of those voters approve of the proposition. Article 68.2 allows 2/3 of the Members of the SGH to call for a referendum on constitutional amendment, though this is only optional and not a requirement. Article 66.2.2 allows the Tsets to make decisions on the validity of these referenda.

To facilitate the implementation of these provisions, a Law on Public Referendum was approved in 1995. However, this mechanism has not yet been used under the 1992 Constitution; the only referendum in Mongolian history was the 1945 plebiscite on independence, which led China to finally recognize the country's independent status.

While direct democracy has its proponents around the world, it has also produced policy incoherence and excessive populism in certain polities; the experience of California is a common example. During the course of the study, we did not find convincing arguments for greater promotion of direct democracy in Mongolia; we see some risk of greater populism. Instead, greater use of consultative mechanisms to obtain citizen views is more desirable.

Recommendation: We recommend that consideration be given to staggering presidential and parliamentary elections. The cycle of presidential elections following parliamentary elections by one year has no particular

rationale, and creates an atmosphere of intense politicization, with only two years of political stability before election cycles begin again. Staggering elections would allow a genuine political rhythm to develop, and could produce coherent party politics while also enhancing the separation of powers. Another compatible possibility would be to stagger SGH elections so that half the body is replaced every two years, which would give more stability to the parliament. We recognize, however, that implementation might be tricky under the current mixed electoral system.

Conclusion

It is worth summarizing the overall performance of the Mongolian political system under the 1992 Constitution. The system has allowed for genuine alternation in power, and competition over important political offices. Many incumbents have lost election campaigns, including two incumbent presidents. The internal balance of powers is heavily weighted toward the State Great Hural, notwithstanding the directly elected presidency, and this balance has become more extreme since the amendments of the year 2000. The role of the presidency has evolved from being a genuine actor in the separation of powers before 2000, to an office whose major powers are the veto, a few appointment powers, and the ability to set the political agenda, both through proposing legislation and through public prominence of the office.

There has been a variety of characterizations of the performance of politics. One outside observer characterizes the Mongolian system as consociational, by which he means that the winners have tended to include the losers in political decisions.[216] However, others are critical about the dominance of the majority.[217] Both positions have an element of truth; the persistent bias in the electoral system between seats and votes has tended to support the view that the system is "winner-take-all". But the winners have during some periods been willing to grant the opposition some voice and rights. This was apparent in the early years of transition, when the MPRP allowed the new political forces some voice, and in the post-2008 grand coalition. In general, this is a good thing.

Some prominent scholars see in this some evidence of collusion among major parties, and attributes it to the parliamentary dominance of the system. It

[216] David Sneath, "Constructing Socialist and Post-Socialist Identities in Mongolia", 147-164 in Mongolians After Socialism: Politics, Economy, Religion (eds. Bruce M. Knauft and Richard Taupier. Ulaanbaatar: Admon Press. 2012, 155.

[217] N Lundendorj, "Tyranny of the Majority", Mongolian Law Review 2012 (2): 141-50.

is clear that the current system leans very heavily toward the parliament, without many checks and balances. The SGH has nearly unlimited legislative power, and has even been able to push through constitutional amendments that were deemed to be unconstitutional. There are ample opportunities for the SGH to influence or even exert pressure on other governmental organizations; however, there are scarce possibilities for the President or the Government to answer back, pressure, or mistreat the Parliament. The SGH effectively controls its own dissolution, while being effectively in control of the Government. One potential negative consequence of all this power is that the SGH is distracted from its core tasks of producing legislation and overseeing the government.

Classical parliamentarism was embodied in the doctrine of parliamentary supremacy, that the parliament was unconstrained. However, parliamentary supremacy has been on the decline for many decades, even in countries with a parliamentary system. The concentration of all power within one institution is seen as negatively affecting the doctrine of the separation of powers, which is directed towards ensuring the balance of the organs implementing the state power.

It is important here to take a comparative and functional perspective rather than a purely formal one. Mechanisms of accountability in modern political systems are complex and multiple. In a classical parliamentary system, the parliament regularly held the government accountable through mechanisms like the vote of no confidence.[218] In established democracies, such votes have become rarer in the modern era. The rise of mass political parties means that the fates of the legislature and government are closely linked together. In addition, there has been a major shift toward the executive within the parliamentary systems. This is partly the result of the growth of the administrative state, in which expertise and information are concentrated in the executive branch; few legislatures have significant ability to gather their own sophisticated information about policy. It also reflects the changing media environment in which leaders like Tony Blair appeal directly to the public, like presidents. Some people call this the “presidentialization” of parliamentary systems.

In light of this shift, the system of ensuring accountability in modern democracies typically includes courts, including constitutional and administrative courts along with independent institutions like human rights commissions and anti-corruption bodies. Mongolia has such mechanisms. The

[218] Stephen Gardbaum, “Separation of Powers and the Growth of Judicial Review in Established Democracies (or Why has the Model of Legislative Supremacy Mostly been Withdrawn from Sale?)”, paper presented at Association of American Law Schools Conference, January 5, 2014, New York NY

more immediate question in assessing the political system is what role the SGH ought to play in holding the executive accountable. The prime minister in the Mongolian system is relatively weak, and has not been “presidentialized”, in part because there is a directly elected president. But the government still has the advantages of information, and also the ability to set the agenda. The question then is who holds the government accountable. It seems plausible that the presence of MPs in government reduces the incentives to monitor government. The SGH thus becomes focused on other less important functions. Making some adjustments has the potential to improve accountability.

There are surely more radical proposals present in the political debate, including some to move to a pure presidential system. We think these changes are too radical, given our overall conclusion at the end of this report that the Mongolian constitutional scheme is functioning fairly well along a number of dimensions. The original arguments against a presidential system in 1992, namely the risk of too much concentration of power, remain persuasive today.

Chapter Four
Local Governance

Introduction

Local government can be authorized through the country's constitution, or through a separate law on local government. Clearly, in the former case the authority and powers of local government enjoy greater protection. Mongolia's administrative and territorial units and the system of local government are one of the fundamental issues of the Constitution and the state structure, indicating their importance to the overall scheme of governance.

This chapter examines the evolution of local government structures in Mongolia and the implementation of the local governance model defined by the Constitution. Based on the theory and practice of state administration, comparative constitutional studies and Mongolian practice, it discusses the issues related to the territorial division, the relationship between central government and local authorities and local autonomy, and the separation of powers at the local level– all issues that are hotly debated in the light of the constitutional reform in Mongolia.

This chapter will also discuss the implementation challenges of the Law on Administrative Units and their Governance, the main law which regulates local government affairs and which was approved in 1992 and revised in 2006. Because it was adopted in the early transition period, it still contains many elements of the socialist legacy and falls short of keeping pace with the country's more recent social, economic and political transformations.

The chapter also provides a critical review of the proposals by the parliamentary working group on constitutional amendments, presented to the State Great Hural in November 2015.

The Drafting Process

When the transition began in 1990, Mongolia inherited the administrative units set up to suit the economic management arrangements established during the socialist period. This involvedcentralised state management exercised through the People's Deputies' Hurals and their executives and party structures present in soums and rayons. The system was fully dependent on the centre

and based on the socialist principle of democratic centralism. It was designed primarily to control rather than empower local populations. Consequently, it was evident that there was a need to improve the system of administrative and territorialorganisationin Mongolia.

A separate chapter on "Administrative and Territorial Units of Mongolia and Their Governance" in the version of the Ih Tsaaz submitted by the Constitutional Drafting Commission to Baga Hural proposed that the territory of Mongolia should be administratively divided into aimags (provinces) and a capital city; the capital city be divided into horoos (municipal sub-districts); and in rural areas, aimags would be divided into hoshus and baghs (sub-districts).[219] Moreover, the territory would be divided into seven aimags and a capital city, and a new principle was introduced, whereby the local self-governance of aimag, capital city, hoshu and horoo would be carried out by the respective Hural – the authority to represent the population of the given territorial and administrative unit. In addition, the Governor, who would be elected and appointed from the local population, would play the executive role for the respective administrative unit.

The draft constitution paved the way for the introduction of a flexible system, combining the principles of both self-government and central government, by altering the centralised system of governance in administrative units and by aiming to transform it into self-governing administrative, territorial, economic and social entities each having their own functions and administration. By organizing the administrative units into a *complex*, the draft constitution further pursued a goal of, for the first time in Mongolian history, creating a legal entity with full powers enjoying their own functions. However, when the draft was being discussed in the Baga Hural, it was pointed out that the economic and psychological preconditions for integrated organisation of aimags was lacking in the short term. At this juncture in the debate, the specific names of aimags were deleted, and the mechanism for selecting Governors was changed to one based on appointment from the central government.

The minutes of the sessions of the Baga Hural and the People's Great Hural show that the discussion of the Chapter on "Administrative and Territorial Units of Mongolia and Their Governance" assumed quite a prominent place in the discussion of the overall draft. Legislators focused their main attention on

[219] In the drafting process of this version, administrative and territorial divisions were studied based on the geographical maps of Mongolia including the "Mongol Empire /autonomous state", "Mongolia during the years of 1919-1921", "Administrative map of Mongolian People's Republic (1925), "Administrative map of the Mongolian People's Republic (1931-1934)", and considered the proposals made by research institutes and individuals, related to the location of nationalities and ethnic groups as well as environmental and climatic conditions.

issues related to the determination of the administrative and territorial units of Mongolia, their governance, and the competencies to be enjoyed by the relevant self-governing bodies. For example, during the session of the Baga Hural, significant debate ensued around the reasons for proposing hoshus instead of soums and the types of changes such an arrangement would entail.[220] However, members agreed that there was no necessity to create a stir immediately after adoption of the Constitution. Whilst the draft considered at that time spoke of hoshus rather than soum, it was anticipated that, as the country recovered from the economic crisis and became stronger, the issue of hoshu would be gradually decided by law. The Baga Hural accepted these explanations.

At the conclusion of these discussions the deputies participated in ballots on each of the articles and paragraphs of the draft constitution, as a result of which the majority of the deputies of the People's Great Hural supported keeping the system of administrative units of Mongolia unchanged. Another hotly debated issue related to the inclusion of a provision on the legal status of "city" into the Constitution. Despite being subject to heated discussions including the threat by some to boycott the session, the draft proposal remained unaffected. No major changes were made to the regulation of the local authorities, and the current provisions were adopted.

In line with the ideas in the Constitution, the Law on Administrative and Territorial Units and their Governance was approved in August 1992. Accordingly, the re-organisation of the administrative units was completed, and the first general elections of the local self-governing bodies were conducted in the autumn of 1992.

Administrative and Territorial Division

Territory is an essential part of the state, and therefore one aspect of special interest in the state structure is the distribution of public functions across

[220] According to the explanations given by K.Zardykhaan, S.Tumur, and B.Chimid, who were the main drafters of this section, in 1648 for the first time in the history of Mongolia, seven Khalkh hoshus were established, which later under the Manchu era increased to 89, and in 1930s due to the systemic distortion the number of hoshus swelled to 128. Soums had been created by Manchu Khans, where a soum was established for each group with a population of 150 males aged 18-60. Consequently, with the growth of the population Mongolia had 524 soums. Currently there are 330 soums. Soums were created around agricultural cooperatives, economic enterprises and organizations; therefore, it was argued that soum had lost its original meaning, and included many units that would be unable to develop independently. As a result, it was argued, there was a need to integrate and enlarge them.

the territory. The matter of how many local government levels should exist and the determination of the level of geographical disaggregation at which different tiers of government should exist and their institutional forms is a complex matter affecting the constitutional structure of the state.

There is considerable variation among countries in the number of tiers of local government. The following table provides a comparison of levels of local governments in unitary states in the Asia-Pacific and Europe drawing from the First Global Report on Decentralization and Local Democracy in the World, 2008:

Table 14: Levels of local governments (comparison)

Levels of local governments	Countries
3 levels: local council; department/province/district; regional body	France, Poland, Philippines, Republic of Korea, Vietnam, China (has 4 tiers),
2 levels: local council; department/province/district local council; regional body	Croatia, Greece, Hungary, Ireland, Latvia, Netherlands, Norway, Poland (cities with district status), Romania, Indonesia, Japan, Thailand, Albania, Czech Republic, Denmark, France (Paris), Serbia, Slovak Republic, Sweden, United Kingdom (England, Wales), New Zealand
1 level: local councils	Bulgaria, Cyprus, Estonia, Finland, Iceland, Lithuania, Luxembourg, Macedonia, Malta, Montenegro, Portugal, Serbia, Slovenia, United Kingdom (England: unitary councils and metropolitan districts)

Historically in Europe, the intermediate levels of local government were creatures of “territorial penetration of the state”, by which centralized powers (such as Napoleonic France) were able to establish authority over the entire territory and population. Since the end of the 19th century, however, under the influence of liberalism and democracy, the intermediate tier underwent two forms of institutional and functional development: 1) the establishment of a local authority evolving to become more like a municipality, both as an institution and in terms of services it performed; 2) the differentiation and reduction of the administrative tasks of the state. Gradually the original consolidating and centralizing mission of the intermediate tier of government gave way to incipient democratization. The election of a representative assembly gradually became the rule in all countries. Some countries can be seen to have extended their system of local self-government to the intermediate level without impinging on the unitary nature of the State (Denmark, France, Poland, Czech Republic, Slovak Republic).

As finally adopted, the system of territorial division in Mongolia bears a good deal of resemblance to that of the socialist period, except that the status of towns of Darhan, Erdenet, and Choir was redefined to that of aimag. The basic structure is one of aimag-soum-bagh in the countryside, which is more or less the same that Mongolia has had since 1932, with the main difference from the 1960 Constitution being seen in the capital city: rayons were renamed as "districts" and "horoos" were created. There are 21 aimags, divided into 330 soums and 1613 baghs; the capital city is divided into 9 districts and 152 horoos.

Article 57.3 of the Constitution states *"Revision of an administrative and territorial unit shall be considered and decided by the SGH on the basis of an opinion by a respective hural and local population, and with account taken of the country's economic structure and the distribution of the population. "*This became the subject of strong criticism, especially during discussions on the concept of regional development in early 2000s. It also became the subject of disputes at the Tsets, and indeed this provision was the topic of the very first Tsets case in 1992.[221]

Several problems arise from the 1992 scheme of administrative and territorial division, mainly related to shifts in population:

By 2015, over 60 percent of soums have a population of less than 2500, including 19 soums with a population of less than 1000. There are 43 soums located at a distance of less than 50 kilometers from the aimag centres, including soums which are very near to the adjacent soums (at a distance of 5-25 km). This situation results in administrative inefficiency, difficulties in service delivery to the population, and disputes over territorial boundaries.[222] However, a number of initiatives by the Government to amalgamate the economically unviable soums fell victim to deadlock due to the restrictive constitutional provision to consult with citizens.[223] By contrast, there have been a number of

[221] In this case, the Tsets reviewed a complaint about the unconstitutionality of the SGH resolution of 21 Aug.1992 on "Merging some cities and horoos under jurisdictions of local government to the nearest soums". It concluded that the resolution breached the Constitution as the local population was not consulted.

[222] G.Jargal, "Administrative and territorial units of Mongolia: Features, challenges and solutions, in the proceedings of the National Forum on Local Governance: Issues and Solution, ed. Ts.Davaadulam, Ulaanbaatar, 2015, 76-102. [Mongolian]

[223] For the purposes of balancing social and economic development of Mongolia through regional development of the economy, in 2003 the State Great Hural issued legal acts to explore ways to improve regional development, governance and regulations. According to these acts, the country would be divided into four economic regions or large aimags, the Altai, Hangai, Tuv and Dornod. The new administrative and territorial division would include 68 hoshus, 329 soums and 26 cities. According to this concept, apart from restoring the traditional administrative subdivision "hoshu" of

recent cases in which initiatives by citizens to merge soums did not receive support because of the wish of existing officials such as soum Governors or representatives of Citizens' Representative Hurals to keep their positions. There is also a tendency to keep administrative and territorial units for the electoral purpose.[224]

On the other hand, the population of Ulaanbaatar has increased by 2.4 times greater than it was in 1990, with almost half of the country's population (1,363,100) living in the capital city.[225] With the increase of population, there has been a tendency to partition horoos, which forces people to change their addresses when they have not moved physically, thus creating burdens on both citizens and administrative bodies to change many civil registration documents and certificates.

The provision requiring that any administrative reorganization must be done "on the basis of an opinion by a respective hural and local population" is too restrictive. In such circumstances, there is a need for some flexibility regarding local boundaries.

Article 57.3 might be revised to read "revision of an administrative and territorial unit shall be considered and decided by the SGH afte*r consultations with* the respective hural and local population, and with account taken of the country's economic structure and the distribution of the population."

The drafters of the Constitution reserved "city" status for Ulaanbaatar alone. But as time has gone on, secondary cities in the country have also grown a good deal and require distinct administrative organisation from their surrounding soums. It would be advisable to have a category for cities other than the capital city, as a system of government designed for rural areas may not be appropriate for urban settings. In connection with this, it is worth highlighting Article 4.3 of the Appendix to the Constitution of Mongolia (which was approved together with the Constitution and has the equal status with it) stating that "Until the status is defined by the Law on Legal Status of Cities and Villages and self-governing bodies are established, Darhan, Choir and Erdenet cities shall have the same administrative and territorial arrangements with

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previous generations, it retained the soum structure, to which Mongols have become accustomed to living for the last hundred years. It restored the city status of old aimag centers, to which settled areas with the population of more than 15 thousand people were added.

[224] A note from the proceedings of the National Forum on Local Governance: Issues and Solution, ed. Davaadulam, Ts. page 158. [Mongolian]

[225] Statistical Office of UB municipality. In 1990, the population of Ulaanbaatar was 560,600 constituting 26.7% of the population, in 2015 it reached 1,363,000 and 46%. http://www.ubstat.mn/StatTable=11

aimags in their respective territories". Thus, these cities were temporarily given the status of an aimag pending the approval of the Law on Cities and Villages and the establishment of territorial self-government of cities. However, in the Law on Legal Status of Cities and Villages, adopted early in the reform period (1993), the SGH defined the status of rural settlements only, thus failing to fulfil the obligation set by the Appendix that has a constitutional nature. The creation of several examples of an "aimag within aimag" in 1994, namely Darhan-Uul, Orhon, Gobisumber within the territory of Selenge, Bulgan and Dornogobi aimags, was a violation of the territorial principle for state administration. Therefore, despite the lapse of time, the SGH still needs to implement this provision for defining the legal status of cities, which was passed over 20 years ago.

In addition, removal of "town" designation from local settlements and turning them into aimag centre soums created double administration in the aimags, causing duplication of functions. They also have urban problems and larger population to serve compared to other rural soums, requiring a distinct regulatory framework. The establishment of Bagahangai and Baganuur as districts of Ulaanbaatar by "cherry-picking" is another example of violation of the territorial principle for state administration. It has created a distance between the administration and the people, weakened accountability and control, and land disputes.[226]

These fundamental issues related to the territorial division are not resolved until today. The Government Action Plan for 2016-2020[227] puts *"rationalization of the structure, competencies, functions, operational principles and organization of the administrative and territorial units of Mongolia"* as one of the priority policies of the Government of Mongolia. It is too early to judge the extent to which the Government will address the issues discussed above.

A constitutional category of "city" should be created to recognise that some areas outside Ulaanbaatar deserve that designation.

Dr.B.Chimid stated that the management of administrative and territorial units should be implemented and viewed at the intersection of both the state administration on the vertical line and local self-governance on the horizontal

[226] G.Jargal, "Administrative and territorial units of Mongolia: Features, challenges and solutions, in the proceedings of the National Forum on Local Governance: Issues and Solution, ed. Ts.Davaadulam, Ulaanbaatar, 2015, 76-102. [Mongolian]

[227] The Government Action Plan for 2016-2020 was approved by the SGH on 9 September 2016. [Mongolian]

line as defined by the Article 59.1 of the Constitution.[228] In the next two sections, we will assess the implementation of a combined model of state administration and local self-governance in Mongolia, and discuss practical challenges along with international trends.

Protection of Local Self-Government

Local government in unitary states tends to fall into three broad categories – fused systems, dual systems and local self-government – ranging from the most to the least centralized.

Fused systems. The clearest example of the fused model is the centralized and uniform system set up by Napoleon in France. He placed agents of central government *(préfets)* in each local government unit *(département)* to supervise their work and ensure that central government policies are carried out. Variations on the centralised French system are found in Italy, Spain, and Portugal and in their former colonies and spheres of influence in Africa, Asia and the Americas, as well as in Japan and South Korea. Fused systems are also found in many of the new democracies where local political officials were traditionally appointed by the ruling central government.

Dual systems. The classic example of the dual system is Britain, where central government retains a good deal of power, though it does not directly control local government through an army of préfets. Rather it 'manages' local government at arm's length, thereby giving it rather more autonomy. Many key public services (education, housing, health) are delivered by local councils but controlled and financed to varying degrees by central government. The dual system is found in the UK, the USA, Israel and India, and in many former British colonies in Africa, Asia and the Pacific.

Local self-government. The principle of local self-government with more freedom of local action characterizes the Nordic countries. Local government is entrusted with the tasks allotted to it by central government, and has freedom of taxation within limits. Local government in Denmark, Finland, and Sweden accounts for a relatively high proportion of public expenditure and employment among the unitary states.

The 1992 constitutional choice of Mongolia does not reflect any of the models described above. Instead, it can be regarded as a *"mixed model"* that

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[228] B.Chimid, *The Conceptions of the Constitution: Local Governance*, Volume 3, UB, 2004. [Mongolian]

synthesized certain elements of each model. In that sense, a unique structure was created that does not exist anywhere else in the world, justified on the grounds that the system suits Mongolia's specific features. As Article 59.1 summarizes, *"Governance of administrative and territorial units of Mongolia shall be organized on the basis of combination of the principles of both self-government and central government."* Self-government is reflected in the locally elected assemblies; but the central government appoints the Governors of aimags and the Mayor of the capital city, upon nomination by the relevant Hural. The scheme is duplicated for lower levels of government.

The Oxford Handbook of Comparative Constitutional law[229] provides the following examples of the territorial organization of the state:

Centralist Tendencies: Examples of constitutional provisions

France provides an interesting model of the centralisation of state power. The representatives of the state in the territories are entrusted to guarantee 'the national interests, the administrative supervision and the observance of the law' (Article 72 of the current Constitution).

The French example is followed, for instance, in Romania, where according to Article 123.2 of the Constitution *"The Prefect is the representative of the Government at a local level and shall direct the decentralized public services of ministries and other bodies of the central public administration in the territorial-administrative units."* In Spain, 'a delegate appointed by the Government shall direct state administration in the territorial area of each autonomous community and shall coordinate it, when necessary, with the community's own administration'. This arrangement follows the example of a similar provision in Italy's 1948 Constitution (Article 121), the abrogation of which by the constitutional reform of 2003 does not prevent the existence of representatives of the state in every region, who coexist with the prefects acting on a provincial basis, while control and supervision of local government is shared by state authorities and the regional governments.

Autonomy of the Local Government: Examples of Constitutional Provisions

It can be easily seen that *the principle of unity and uniformity of the state's public administration* has been competing with the principle of territorial self-government, which means the right of local collectivities for management of their interests in a free and autonomous way. In France, besides the departments, there are municipalities, regions, and collectivities with a particular

[229] Michel Rosenfeld and Andras Sajo, *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012).

statute. All of them are freely self-governing entities entrusted with their own functions and resources whose decision-making bodies are elected by the people of that territory. This modality of administration, which is an evident manifestation of the principles of democracy and freedom, is called *decentralization* (especially in countries with a tradition of centralization) and implies the creation of entities which are distinct from the central and local organization of the state and which have a separate *legal personality.* Decentralization should give special emphasis to the local interests of the communities which are not expected to coincide with the interests of the state and are not meant to be a mere territorial expression of them.

This model is very common in continental Europe. The concept which inspires this model of organizing the exercise of administrative functions at the local level is "local autonomy". Local autonomy is a flexible concept. It can be defined as the right and effective capacity of local collectivities to rule and manage important areas of public interest within the frame of law. *"Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population"* (Article 3, European Charter of Local Self-Government, 1985).[230] Therefore, the concept of local autonomy covers not only the legal and formal attribution of functions affecting local affairs but also the concrete and material (i.e. financial) conditions of the exercise of those functions for the advantage of the people living in that territory. Undoubtedly, the interests dealt with by the local collectivities are connected with the national interests of the state and have clear public relevance. But they are primarily considered by the law as interests of the local collectivities and have to be promoted according to the choices and the will of the local electors.

Local autonomy does not require local collectivities' qualification as *legal persons.* However, there may be some need to provide judicial standing to ensure for the free exercise of their competences with effective judicial remedy.

Respect for local autonomy is not unconditionally constitutionalized but, is frequently reflected in the presence of provisions concerning local government in constitutions. The differentiation between local interests and the interests of the central authorities of the state has been seen as requiring a constitutional guarantee of the independent existence and functioning of the institutions of local government as protection against any future overwhelming measures taken by the central bodies of the state aimed at curtailing their powers or

[230] Chapter 3, The European Chapter on Local Self-government, 1985.

depriving them of the resources which are necessary to their efficiency. Fiscal autonomy has received special attention in constitutions in recent years.

An interesting and advanced example of this tendency of the modern constitution is offered, inter alia, by Article 28 of the German Constitution. According to which:

Municipalities must be granted the right to regulate all local affairs on their own responsibility, within the limits prescribed by the law… The guarantee of self-government shall extend to the bases of financial autonomy; these bases shall include the right of municipalities to a source of tax revenues based upon economic ability and the right to establish the rates at which these sources shall be taxed.

Poland is cited as the most advanced country in Eastern Europe in terms of Constitutional Law. Chapter VII of the 1997 Constitution on Local Government states:

Article 163

Local government shall perform public tasks not reserved by the Constitution or statutes to the organs of other public authorities.

Article 164

1. *The commune (gmina) shall be the basic unit of local government.*
2. *Other units of regional and/or local government shall be specified by statute.*
3. *The commune shall perform all tasks of local government not reserved to other units of local government.*

Article 165

1. *Units of local government shall possess legal personality. They shall have rights of ownership and other property rights.*
2. *The self-governing nature of units of local government shall be protected by the courts.*

Article 167

1. *Units of local government shall be assured public funds adequate for the performance of the duties assigned to them.*

Article 168

To the extent established by statute, units of local government shall have the right to set the level of local taxes and charges.

Among Asian countries, Japan and Philippines are cited as good examples of the constitutional protection of local governments:[231]

The Article X of the 1987 Constitution of the Philippines:

Section 2. The territorial and political subdivisions shall enjoy local autonomy.

Section 5. Each local government unit shall have the power to create its own sources of revenues and to levy taxes, fees and charges subject to such guidelines and limitations as the Congress may provide, consistent with the basic policy of local autonomy. Such taxes, fees, and charges shall accrue exclusively to the local governments.

Section 6. Local government units shall have a just share, as determined by law, in the national taxes which shall be automatically released to them.

The Chapter 8 "Local Self-Government" of the 1947 Constitution of Japan:

Article 92. Regulations concerning organization and operations of local public entities shall be fixed by law in accordance with the principle of local autonomy.

Article 93. The local public entities shall establish assemblies as their deliberative organs, in accordance with law. The chief executive officers of all local public entities, the members of their assemblies, and such other local officials as may be determined by law shall be elected by direct popular vote within their several communities.

Article 94. Local public entities shall have the right to manage their property, affairs and administration and to enact their own regulations within law.

Article 95. A special law, applicable only to one local public entity, cannot be enacted by the Diet without the consent of the majority of the voters of the local public entity concerned, obtained in accordance with law.

From modern constitutions, local autonomy is enshrined in the 1987 Constitution of the Republic of Korea (Article 117 and 118) and the 1997 Constitution of Thailand (Article 78), whereas the Constitutions of People's Republic of China (Article 110) and Vietnam (Article 6) contain the opposite provisions.

From the most recent deliberations of the Venice Commission,[232] we can see that there is an increasing trend for recognizing local self-government in

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[231] "Decentralization and Local Democracy in the World (First UCLG Global Report)" (World Bank and United Cities and Local Governments, 2008).

constitutions. For instance, the Venice Commission advised Ukraine to move from "the combination of centralization and decentralization" as provided by the current constitution to "decentralization in the exercise of state power".

The competences and functions of local government are not explicitly listed in constitutions. For instance, almost all European states now, either in their constitution or in their legislation, acknowledge the general nature of municipalities' competence. Whatever wording is used, the *general competence clause* is always indeterminate, for it implies freedom, rather than being a principle for the attribution of functions. It means that the municipality may act in any matter, subject to its action meeting a local interest, complying with the law and not impinging on the powers of another central or sub-national authority.[233]

Article 62.2 of the Constitution of Mongolia states that *"Authorities of higher instance shall not take decisions on matters coming under the jurisdiction of local self-governing bodies. If law and decisions of respective superior state organs do not specifically deal with definite local matters, local self- governing bodies can decide upon them independently in conformity with the Constitution"*. This is consistent with the principle of the general competence clause which is considered as a progressive provision in other countries. It also demonstrates the constitution's intention to grant real power to local Hurals, because Hurals can enjoy a wide range of powers other than those given to central government and other higher authorities. It also denotes the absence of supervision except in respect of *constitutionality and legality* where Hurals are exercising their independent (non-delegated) powers.

Article 58.1 of the Constitution states that *"aimags, the capital city, soums and districts are administrative, territorial, economic and social complexes with their functions and administrations provided by law".* Dr.B.Chimid in his book "the Conceptions of the Constitution" and other writings on the subject, explained that the term "complex" was meant to denote "legal personality" and was selected to avoid a foreign term.[234] This article should serve as a real guarantee of the independent functioning of local self-governing bodies, in that,

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[232] The Venice Commission is an advisory body of the Council of Europe, composed of independent experts in the field of constitutional law. It was created in 1990 after the fall of the Berlin Wall, at a time of urgent need for constitutional assistance in Central and Eastern Europe. The Commission's official name is the European Commission for Democracy through Law, but due to its meeting place in Venice, Italy, where sessions take place four times a year, it is usually referred to as the Venice Commission.

[233] Gerard Marcou, "Local Authority Competences in Europe (Study of the European Committee on Local and Regional Democracy" (Democracy and Political Affairs, Council of Europe, 2007).

[234] B.Chimid, *The Conceptions of the Constitution: Local Governance*, Volume 3, UB, 2004; *The Knowledge of the Constitution*, 2008. [Mongolian]

the boundaries of territorial units are to be set in accordance with the requirements of economic self-reliance. Lands within the territory are to be allocated for ownership by Hurals of respective levels, and this can be understood as a guarantee for the development of administrative and territorial units as independent units.

We conclude that Article 58.1 did not serve the intended purpose of the drafters and the meaning and legal significance of "economic and social complex" remains unclear. Therefore it remains a passive provision with the following implications: 1) it cannot be used as a means to amalgamate the economically unviable soums as was originally envisaged; 2) unlike progressive provisions mentioned in the comparative analysis, it lacks an explicit guarantee of local government independence such as the right to property ownership or a principle for public finance commensurate with its functions; and 3) local government organizations cannot use the provision to seek judicial remedy in respect of the free exercise of their competences.

There are several problems to highlight which might threaten local self-governance in Mongolia:

First, it has become a common practice, when adopting sectoral laws, to assign "unfunded mandates" to local authorities, which usually exceed the local resources, or to appoint local government personnel directly from sectoral ministries (vertical appointments). Central government controls the appointment of heads of agencies at the aimag level, only 3 out of 16 civil servants in soums are the direct reports of the Governor, making it difficult to assess their performance and hold them accountable. Currently, except for the capital city, Darhan-Uul, Dornogobi, Orhon and Umnugobi aimags, the territorial units are dependent on the central government's fiscal transfers. Although the dependency of local authorities on central transfers is common, a stable and predictable revenue source can have major implications for local autonomy and efficiency of the operation. Some recent progress has been made in this regard with the establishment of a Local Development Fund (LDF) in 2013. Notwithstanding the fact that LDF's funding accounts for only 10 percent of the total local expenditures (as of 2013), the predictability of local financing has had a positive impact on citizens' participation and revitalizing of local Hurals. More reforms are needed in this area to expand the tax base of local authorities and create incentives for revenue collection.

Second, in recent years, a negative pattern has been established in the process of discussions and approval of the annual budget laws – of making changes in relevant laws, especially the Law on Territorial Units and their Governance (hereafter LATUG) curtailing powers of local governments, delegating unfunded functions, or attacking their role in respect of the property

ownership. Usually these amendments are made outside of the normal legal reform process of the concerned sector, and therefore get approved unnoticed. In the words of local government officials, this phenomenon is called as 'legal theft'.[235] Such ill practices are likely to continue.

Third, the Article 59.2 of the Constitution defines general meetings of citizens as a basic organ of local self-governing bodies. However, the LATUG does not regulate the functioning of these meetings in any way. There have been instances in which decisions made jointly by citizens have been dismissed by courts for having "no legal basis". The general public meeting is distinct from the Citizens' Representatives Hurals in terms of its legal basis and means of establishment. Trying to regulate it by referring to provisions related to other tiers of local self-governing bodies means that it will not be regulated at all. Therefore, in order to further the constitutional concept of local self-governance, there is an urgent need to clarify the legal status of general meetings.[236]

Fourth, there has been greater promotion of direct democracy in recent years through the presidential decree approving a strategic policy paper on "Decentralization based on direct democracy and citizen participation" in September 2012 and the establishment of citizen halls in all localities from 2010. The President's Office is currently working on a draft law on the political rights of citizens. Another concept of deliberative democracy has been promoted by some politicians. The Government Action Plan for 2016-2020 also has a goal to implement a "people's governance" program for the promotion of deliberative democracy and citizen participation. While we do not have a negative view about these initiatives, we consider that it is worth cautioning as to their possible unintended consequences on representative bodies. We observe that with strong rhetoric about direct citizen participation, there is a tendency for the people to disassociate from their elected representatives. This could further weaken the already weak relationship between elected

[235] One such example is the revision made in the Article 20.3 of LATUG on 23 January 2015, by adding *"…Staffing and wages of Hural Secretariat shall be defined within the budgetary limits of that year as specified by Article 10.1.2 of the Budget Law"*. This gave the opportunity to the Ministry of Finance to define the staffing level of Hural Secretariat on an individual basis. As a result, most aimag Hural Secretariat had to cut its staffing starting in 2016. Another example is the Government's attempt to remove all the articles of LATUG concerning the property ownership rights of local authorities. However, because of a strong resistance from local authorities, the Cabinet withdrew its proposal submitted to the SGH at the end of 2015.

[236] D.Ganzorig, *"Local Governance: Legal framework and future solutions",* in the proceedings of the National Forum on Local Governance: Issues and Solution, ed. Ts.Davaadulam, Ulaanbaatar, 2015, 114-18. [Mongolian]

representatives and their constituencies,[237] a relationship which is the very essence of local self-governance.

In constitutional law, creating both forms of political participation – direct democracy and local representative democracy – can lead to tension unless they are carefully calibrated. For instance, the focus of the European Charter of Local Self-Government is on the autonomy of the organs of local self-government. Political rights exercisable "directly" must not displace the rights exercisable through the elected authorities and hence should not be construed as undermining the autonomy of local authorities guaranteed by the Charter.[238]

Drawing from examples of the protection of local self-government in modern constitutions, Article 58.1 could be improved to enhance the protection of local authorities by including provisions on legal personality, the availability of financial resources sufficient for the discharge of local authority competences, the rights of property ownership, and the requirement to consult with local authorities on the revision of the national legislation on local government (LATUG).

Local Autonomy as a Relative Concept

While the previous section discussed the constitutional protection of local self-government, this section will review the limits set on local self-governance. The word *autonomy* is used in the comparative analyses provided in this report. However, a word of caution is needed in understanding this concept. For instance, the literature stresses the importance of distinguishing regional self-government from regional autonomy, which is a much stronger form of government, closer to federalism. The law sets limits to the freedom of local self-governing bodies, because they are not isolated units in the public administration system of a country. Therefore *autonomy is always a relative concept*.[239] Additionally we should understand that such control of central government is limited to the supervision of constitutionality and legality of decisions passed by the organs of self-governance. The concept of securing *the*

[237] According to the public perception survey on the functioning of Citizens' Representative Hurals, collected from 1200 households from 5 aimags, 15 soums, 7 districts and 20 horoos in Ulaanbaatar, in 2015 by the UNDP and the Parliament Secretariat, 55 percent of the respondents did not know what CRHs are as an institution. Only 15.8 percent could name their elected representatives correctly. This percentage was higher in rural areas (23.7 percent) and much lower in urban areas (4.8 percent).

[238] "Compilation of Venice Commission Opinions Concerning Constitutional and Legal Provisions for the Protection of Local Self-Government."

[239] Marcou, "Local Authority Competences in Europe (Study of the European Committee on Local and Regional Democracy."

unity and indivisibility of the state through central government and its power to review the acts of decentralized institutions is emphasized in the constitutional doctrines of France and Turkey.

Countries use different channels to supervise the legality decisions of local government organizations and override them depending on their legal and administrative traditions. In New Zealand, in so far as both local and regional councils are the creature of national Parliament and operate within the English Common Law doctrine of *ultra vires* (limiting powers to those given by law), national government and the courts are in the position to override local decisions. In the United States, when a local government body has made a decision for which it has no constitutional authority, the State takes action through the State Supreme Court through an action for judicial review. In France all directly elected authorities are deemed to "participate in the exercise of sovereignty under the national administration headed by the President". The Mayor of a commune, although directly elected, is by law the delegate of the State. The Ministry of the Interior exercises control through general directorates for local authorities and for law and order. In Switzerland the constitution prevents any over-riding of, or intervention in, the activities of the communes.[240]

Among these, the French example is closest to the case of Mongolia. However, unlike the French model, the Constitution of Mongolia does not sufficiently empower the Governor to suspend or override any decisions of a Hural that have no constitutional and legal authority. Instead, a rather strange regulation applies – any such attempt is deemed to prompt his/her resignation.

Article 60.1 states that state power shall be exercised by Governors in their territories, Article 61.1 further clarifies this as *"while working for the implementation of the decisions of a respective Hural, a governor as a representative of state power, shall be responsible to the Government and the Governor of the higher level for implementation of laws and decisions of the Government and respective higher level authorities in his/her territory".* As stated in Article 61.2 the Governor has the right to veto Hural's decisions; but Article 61.3 provides that "*If a Hural by a majority vote overrides the veto, the Governor may tender his/her resignation to the Prime Minister or to the Governor of higher instance if he/she considers that he/she is not able to implement the decision concerned".* Logically, this leaves little incentive for Governors to challenge unlawful Hural decisions as to do so may lead to dismissal.

[240] The Scottish Office, Central Research Unit, the Constitutional status of local government in other countries, 1998.

In addition, constitutional articles 62.2[241] and 63.2[242] set out the requirements for the constitutionality and conformity of decisions and acts of local authorities with the laws and decisions of superior state organs. However, the Constitution does not identify a body to supervise compliance of acts of Citizens' Representative Hurals with the law and with constitutional principles. This could be interpreted to mean that the matter is left to administrative courts or the constitutional court. But the Constitutional Court does not have jurisdiction over individual complaints from citizens regarding the breaching of their constitutionally guaranteed rights. We do not have systematic data to assess how the courts have addressed such appeals from citizens.

The 2006 amendments of the LATUG attempted to regulate this matter through the inclusion of several provisions, which were eventually overruled by the Constitutional Court in 2009. As a result, Hurals retain their powers to change or annul their own decisions.[243]

25.4 Resolutions and other decisions, passed by Hural, that contravenes with existing laws and regulations shall be annulled or amended by the respective Hural ~~or higher level Hural~~.

25.5 ~~Decisions of the Hural of Aimag or Capital city that contravenes with existing laws and regulations or Governmental decisions shall be annulled or amended by the State Great Hural.~~

In practice some legal breaches are found in hural resolutions, although this is not the case for all Hurals. The Independent Authority against Corruption, for instance, assessed the legality of resolutions passed by Hurals of 15 aimags and 208 soums between 2013 and 2015 and found 97 breaches mostly on setting local fees and where tariffs exceeded legally defined thresholds.[244]

Local self-governing bodies fall within the scope of the General Administrative Law,[245] which introduced stricter scrutiny for administrative decision making by requiring the undertaking of potential impacts assessment, cost-benefit analysis and public consultations prior to approval, a review of legality by a central executive authority in charge of legal affairs (the Ministry of

[241] Article 62.2 of the Constitution "… If law and decisions of respective superior state organs do not specifically deal with definite local matters, local self- governing bodies can decide upon them independently in conformity with the Constitution"

[242] Article 63.2 of the Constitution "Resolutions of the Hural and ordinances of the Governor shall be in conformity with Presidential decrees and decisions of the Government and other superior bodies, and shall be binding within their respective territories".

[243] Decree of Constitutional Court #1, 20 May 2009.

[244] Data from the Mongolia Independent Authority Against Corruption (IAAC), 2015 report.

[245] Article 5.1.5 of the General Administrative Law, passed by the SGH on 19 June 2015.

Justice and Home Affairs), the registration of administrative acts and compensation for losses incurred by citizens and legal entities due to unlawful acts by administrative bodies. However, in Article 64 of the Law, which describes procedures for the approval and submission of administrative acts by competent bodies to their respective higher instance state bodies, paragraph 5 only mentions Governors of soums and districts. It is not clear to us, whether this is a deliberate intention to recognize local self-governance in the law or an error by the drafters of the law.

Overall, both the Constitution and LATUG define this relationship in a vague and contradictory way, and so it remains as an issue of constitutional debate. Perhaps, the issue was not so significant in the early 1990s when the tradition of strong central control was still paramount and the size of the overall state budget and the share of public spending controlled by local authorities were significantly lower. The country's context has changed. With the growth of the mining industry, mining exploration and operation licenses have been given for the most of the territory, and local authorities increasingly engage with the private sector and local communities. At the same time, urbanization, climate change, natural disasters, and desertification, all the new emerging development challenges that were not discussed in 1990, call for concerted action in respect of the sound management of natural resources, environmental protection and the strengthening of accountability lines among state bodies and local authorities.

In conformity with the principle of the rule of law and the unity and indivisibility of the state structure as specified in Articles1.2 and 2.1 of the Constitution,

Article 61.3 should be revised as follows: "if a Hural by a majority vote overrides the veto on unlawful decisions of the Hural, the Governor shall refer the matter to the competent court", or alternatively "to a central executive body in charge of legal affairs." The latter is consistent with the General Administrative Law; otherwise a constitutional foundation of the relevant articles to local self-governing bodies of the law could be questionable.

Article 63.2 could be improved by clearly identifying a state body in charge of supervision of legality of acts passed by local self-governing bodies.

The System of Checks and Balances

According to classical political theory, democracy is best protected by creating separate branches of government with different functions and powers,

each checking and balancing the power of the others. There are three common models of executive-legislative relations at the local level.

"Strong mayor system", in which there is an elected council and a popularly elected mayor, who wields strong executive authority. In this model the executive exercises more authority and the council's role is reduced to rubber-stamping the decisions of the executive. This form of local leadership is practiced in Southern European countries and Asia.

"Strong council" model, in which a mayor is elected by the council, usually from among the council members; in this model, the council has more power and supervises the executive. The mayor, often reduced to chairing council meetings, has a largely ceremonial role. This form of local leadership is practiced in Denmark, Sweden and United Kingdom.

"Council-manager" model, in which the council appoints and contracts with a politically neutral administrator to run and manage the city. All executive functions are held by a professional administrator (the city manager) who is appointed by local council. Although not a political figure, he/she has considerable influence on local policy making and its implementation. This model can be seen in Ireland, Iceland, Finland, and in some cities in the United States.

From the countries studied for the purpose of comparison, most countries in Asia have moved to a system of direct election of mayors, with the exception of China and Vietnam. Out of 34 unitary states in Europe, mayors are directly elected in 13 countries and mayors are elected by councils in 17 countries. In countries such as France, Greece, Portugal, Spain, Croatia the mayor is usually the head of the party list in council elections. There are only 3 countries which have a similar system to that used in Mongolia. In Luxembourg and the Netherlands, mayors are appointed by the central government on the recommendation of the municipality for a term of 6 years, while in Belarus mayors are appointed by the President on the advice of city council.

The system based on separation of powers provides greater autonomy and independence in the scope of the competences of the bodies. However, separation of powers may lead to a lack of cooperation and dialogue between the bodies. There is a risk of the executive blocking the representative body, or vice versa. To prevent this happening requires a mechanism of active control and sanctions for the body that blocks the process.

In South-East European countries, except Slovenia, the legislature and citizens have the right to revoke the mayor. However, in Macedonia, Romania and Serbia the removal of the mayor can be performed by the bodies of the central government as well. In Hungary it is the national parliament which has

this right. The usual conditions for removal of the mayor are: continuous incapacity to perform the work, violation of law, or involvement in criminal acts. In all other countries except Bosnia-Herzegovina and Bulgaria, the legislature can be dissolved by the central government or as in Hungary and Slovenia by parliament. Conditions for dissolution include behavior contradictory to the law, failure to convene a session for a period longer than specified, failure to approve the budget for two consecutive years or if the council repeatedly passes acts that had been charged as illegal by the constitutional court or by an administrative court.

The 1992 constitutional choice of the system of election and appointment of local government organizations is again unique to Mongolia, i.e. it does not belong to any of the models described above. However, the Constitution has a clear intention to separate powers at the local level (Article 61.1 and Article 62.1). We turn to analyzing how these articles are clarified by other provisions in the Constitution and the LATUG, and consider whether they create an effective system of checks and balances in practice.

The Constitution of Mongolia does not specify which matters come under the jurisdiction of local self-governing bodies. As was mentioned earlier, it is consistent with the principle of the general competence clause. Instead, this is left to the LATUG.

Dr.B.Chimid in his book “the Conceptions of the Constitution” noted that *”on the surface the 1992 LATUG texts do not obviously contradict the new Constitution, however, we should admit that it is not compliant with the conceptual underpinnings of the Constitution for two reasons: 1) Most of its provisions, in particular, the provisions regarding the competences of Citizens’ Representative Hural and its Presidium were ‘cut and paste’ from the laws on People’s Deputies’ Hurals approved in 1978 and 1983 and the resolution of the Presidium of People’s Great Hural approved in 1989; 2) while the constitutional articles 62.1 and 61.2 give most powers to Hurals on local matters and restrict interference from higher instance bodies, it assigned most important functions to the Governor, whereas only seven issues of an organizational nature were defined as “exclusive competence” of hural.* The situation described by Dr.B.Chimid here was not improved with the 2006 amendments.

Article 59.2 of the Constitution states that in between the sessions of Hurals and general meetings their Presidiums shall assume administrative functions. Perhaps, the purpose was to ensure continuous operation of Hurals in between sessions which are usually held 2-3 times a year. However, neither the Constitution nor the LATUG clearly define the criteria for the selection of the presidium members. In addition to the exclusive powers assigned to the Presidium by Article 20, the LATUG delegates important powers of Hurals to the

Presidium, such as property and land ownership and management, the setting of fees and tariffs, and the cancelling of Hural's decisions. The size of the Presidium varies between 7-11 members for the capital city and aimag Hurals, 5-7 for soum and district Hurals and 3-5 for the general meetings of baghs and horoos. This means that a few privileged individuals can decide on behalf of Hurals with no clear accountability line towards the Hural representatives. Hence, Hural's *de facto* role is limited to discussions of the appointment and dismissal of the Governor, election of Hural chairs, the Presidium and committees, annual budgets and revisions, and reviewing the performance of the Governor. Articles 20.3 and 20.4 refer to the Secretariat and Chief of Staff of the Presidium rather than of the Hurals. All these factors lead one to question the very institution of local self-governance and who possesses the mandate, whether it is with Hural representatives or the Presidium members. In view of this situation, we recommend that Article 59.2 should be revised either to remove the reference to "Presidiums" or to clarify their selection criteria.

The LATUG does not clearly stipulate the reasons for the dismissal of Governors by Hurals. There are blockades of the Governors' activities and frequent threats of dismissal by Hurals, both of which serving to create deadlock in the system.

Article 60.2 states that "Candidates for governors shall be nominated by the hurals of respective aimags, the capital city, soums, districts, baghs and horoos. Governors of aimags and the capital city are appointed by the Prime Minister; soums and district Governors by the Governors of aimags and the capital city; Governors of baghs and horoos by the Governors of soums and districts respectively for a term of four years".

There are two distinct problems with this article:

First, the capital city and aimag hurals are entitled to nominate a Governor of their choosing. But if the local hural is controlled by a different party from that of the central government, the Prime Minister may decide not to approve the nomination. Such cases have occurred in the past and there is no guarantee that they will not reoccur in the future. Article 60.3 of the Constitution simply provides that in such an instance, the process starts over again. This can lead to deadlock.[246]

[246] The first case was when the Prime minister M.Enkhsaikhan declined a candidate nominated by the MPRP dominated CRH of the capital city. A similar pattern was observed in Dundgovi, Gobi-Altai, Khuvsgul, and Dornod Aimags when the Prime Minister Altankhuyag rejected the candidates proposed by respective Hurals and these aimags had no Governors for a certain period.

Second, the same constitutional article defines the appointment procedures and the term of office of Governors at all levels (Article 60.2). This has led to the interpretation that bagh and horoo Governors are political appointees by the Constitutional Court in 2009 (resulting in changes in Article 6.1.12 of the Civil Service Law in force).[247] This is another case in which the Constitutional Court interpreted the original concept of the Constitution in a distorted way as these administrative units were primarily designed to provide public services at the closest level to citizens. When amending the Civil Service Law in 2008, the aim of the SGH was to separate the management of baghs and horoos from the political structure and ensure stability and professionalism.

Hurals are expected to oversee the performance of the executive on behalf of citizens, including monitoring the implementation of Governor's action plan, budgets, national programs and sectoral laws. Often, these additional functions are given to Hurals without clear instructions and adequate financial and human resources. The effectiveness of the oversight of Hurals is reduced because of the status of elected representatives who do not have full-time employment and lack the means to hold accountable centrally appointed civil servants.

We believe that the system of top-down appointment of local governors should now be modified to allow for locally elected executives and the adoption of the mayor-council model, at least at the soum level.

Functional Assignment

As was mentioned earlier, the constitution does not specifically deal with functional assignment between central government and tiers of local government. This rather technical issue is left to regulation by ordinary laws.

Currently there are some 150 laws in force defining the competencies of Governors at all levels and about 50 laws defining competencies of CRHs at all levels. These laws sometimes fail to clearly distinguish between the powers and responsibilities of the different government tiers (the capital city, district, horoo, aimag, soum, bagh), while many duplicative and/or contradictory provisions exist in the LATUG and sectoral laws. As a consequence, there are numerous cases in which decisions that were adopted by the central government and local

[247] The case was brought to the Constitutional Court when the 2008 amendments of the civil service law categorized Bagh and Horoo soum Governors as administrative civil servants. The Constitutional Court's decree of 4 March 2009 concluded that the relevant article of the Civil Service Law was in breach of the Constitutional Articles 60.2 and 62.2. Accordingly, the relevant articles were amended on 12 March 2009.

authorities are contradictory or overlapping, hence generating conflicts and weakening lines of accountability. This has been evident in decisions regarding land management, property ownership, mining licenses, environmental protection and large investment projects. Since both the capital city and district and aimag and soum bodies are self-governing, it is not obvious that the higher level body should actually win in the event of conflict. While specifying the optimal division of labour is beyond the scope of this study, we note that more empirical evidence about what kinds of decisions are being made at each level would be helpful to policymakers.

Another problem is that both the Constitution and the LATUG have uniform treatment of powers and functions for the capital city and aimags; for districts and soums; and for horoos and baghs. But with the growth of urban population, the scope and volume of services provided by municipal administrations have greatly increased. There is a need to carefully study this issue in order to assign distinctive powers and functions to reflect demographic, social and economic changes.

Local Democracy

The election to municipal councils by direct, free and secret universal vote is today a reality in all the countries of the Council of Europe. In some cases, indirect elections are used for the intermediate level to prevent legitimate interests at the middle level from competing and conflicting with those of local councils and also to protect the independence of the latter as exemplified by regional authorities in Ireland, regional councils in Finland and Romania, and provincial delegations in Spain. Indirect election for higher tier council is also used in China and Vietnam.

Typically, when upper tier councils are themselves directly elected by voters, their local executives are invariably also directly elected by voters. Similarly, where upper tier councils are indirectly elected, local executives are generally also indirectly elected.

Election laws, electoral systems and political party structure have a big impact on the quality of local representation. Advocates of non-partisanship in local elections maintain that local government pertains to “bread and butter” issues, on which there can be no division along party lines. Elected officials may be focused on securing re-election or delivering benefits to their narrow client base, rather than delivering policies that benefit the entire community in the long run. Allowing parties to participate in local government, by contrast,

acknowledges the link between local government and national government.[248] Partisan local elections are the norm in the Asia-Pacific region, except for Pakistan, which banned political parties from contesting local elections. In China and Vietnam, the only political party allowed to contest local elections is the ruling communist party.

In Mongolia, partisanship and political polarization is perhaps expressed most strongly at the local level. This situation might seriously affect national unity and result in inefficiency given that 60 percent of Mongolia's soums have fewer than 2500 people including those of non-voting age. The practice of political appointment of the heads of the primary administrative units - Governors of baghs and horoos, combined with creating opportunity for party groups in CRHs even further increased this politicization. The LATUG does not explicitly allow party groups as internal organization of CRHs. However, the wording used in Article 26.2 regarding the nomination of Governors by "party or coalition groups" is widely interpreted by Hurals as allowing party groups. This creates polarization along the party lines and deadlocks due to boycotts by party groups affecting both attendance levels and the overall decision making process.

In the recent past, there have been instances in which majority party groups attempted to dismiss governors using their majority power. There is a risk of turning the CRHs from the body that represents local people's interests into a platform where political parties jostle for power.

In the 2012 local elections, the mixed system was used in the same way as for parliamentary election. This created significant problems for smaller soums where the number of representatives would be just 15 persons, 5 of whom are from the party list. It is well known that, in smaller legislative bodies, proportional representation becomes less effective as a reflection of popular will. Small size creates another problem too: there may be very small soums that are dominated by one or two families resulting in nepotism. In the 2016 elections, the electoral system was changed back to majoritarian.

Some observers feel that local and national elections should be staggered in time in order to prevent local elections from becoming miniature battle grounds for national issues. A second issue is low turnout of voters in local elections. In the 2016 elections, turnout did not reach the threshold of 50

[248] Serdar Yilmaz, Yakup Beris, and Rodrigo Serrano-Berthet, "Local Government Discretion and Accountability: A Diagnostic Framework for Local Governance," *Local Governance and Accountability Series (World Bank)* 113 (July 2008).

percent in many electoral districts resulting in the need for elections to be reconvened.

Comments on the Proposed Changes by the SGH Working Group

The Working Group of the SGH presented its proposed amendments in the Constitution to the SGH on 6 November 2015. The Working Group proposed substantial changes that might affect the entire system of local governance in Mongolia. The following is a summary of our reflections on the proposed changes from the expert's point of view:

Article 57.1 *The territory of Mongolia shall be divided administratively into Aimags, Ulaanbaatar, Darhan, Erdenet city; aimags shall be divided into soums; soums into baghs, and cities into horoos. Administrative structures and operational procedure of Ulaanbaatar, Darhan, Erdenet city shall be determined by law.*

1. It is a welcome step to acknowledge the city status of Darhan and Erdenet in the Constitution.
2. It is worth remembering that by Article 4.3 of the Appendix to the Constitution of Mongolia (which was approved together with the Constitution and has the equal status with it) aimag status was given to Darhan and Erdenet temporarily. Therefore, there is still room to explore options through revising the Law on the legal status of cities and villages.

Article 58.1 Aimag, Ulaanbaatar, Darhan, Erdenet city, Soum and city are administrative, territorial and socio-economic complexes with their functions and administrations provided for by law, territorial boundaries of which shall be determined by the SGH as proposed by the Government.

This acknowledges a city status of Darhan and Erdenet, but does not clarify the term "socio-economic complex".

Article 59.3 *Political parties shall not nominate candidates in the election of Citizens' Representative Hurals (CRH). Members of soum and city CRH shall be elected from bagh and horoo general meetings of citizens; members of aimag and city CRHs shall be elected from soum and city CRHs. The procedure for election of Ulaanbaatar, Darhan and Erdenet shall be determined by law.*

1) The election to municipal councils by direct, free and secret universal vote has become the international norm today. Election to CRHs at soum and district levels by bagh and horoo general meetings was the system used in the 1992 elections. Going back to this arrangement means

a regression from both the international trend and today's achievements in building democracy at the local level. Such an indirect system of election to local councils is used only in authoritarian states such as China, Vietnam and Pakistan. In addition, there are all kinds of problems related to the general meetings of baghs and horoos including low attendance by citizens, the legitimacy of decisions and the potential risk of the process being captured by the vested interests of a few individuals.

2) Politicization and polarization by party lines is a function of the absence of political culture rather than of legal regulation. Trying to resolve temporary political problems by changing the constitution might result in the need to continue making amendments if the alternative system does not work. It is more appropriate to address these issues through ordinary laws such as election and political party laws.

Article 60.2 *Governors of aimags, Ulaanbaatar, Darhan, Erdenet city shall be appointed by the Prime Minister, Governors of baghs and horoos shall be appointed by Soum and City Governor for a term of 4 years; political parties shall not nominate candidates in the election of governors of soums and cities, only citizens shall nominate themselves. Soum and City Governors shall be directly elected by citizens for a term of 4 years, aimag Governors endorse the candidates and shall release and dismiss on the grounds that are legally defined.*

1) In the proposed system of election and appointment systems of Governors, the role of Hurals in the nomination of the candidates disappears. In this case, the relationship between Governors appointed by the Prime Minister and higher tier Governors and directly elected by voters and indirectly elected Hurals at other levels is left unclear.

2) There seems to be some misunderstanding of the concept of direct election in the Working Group's proposed endorsement of the elected soum and city Governors by aimag Governors.

Article 61.2 *Governor of the respective level shall have a right to veto decisions of the CRH.*

1) Only the names of administrative tiers – aimag, soum, the capital city, district, bagh and horoo are removed. It is not clear why such small editorial changes are necessary at this point.

2) The Working Group did not tackle Article 61.3 relating to Governors rendering resignation following rejection of the veto by Hurals, which is the much debated issue.

Moreover, the Working Group proposed to remove the word “territorial” from all the articles containing the term “Administrative and Territorial Units”, including the title of the Chapter Four itself. This is a serious breach of the principle of territorial administration of the state.

We conclude that the Working Group has simply put the ideas discussed in the country in the light of the constitutional reforms such as the application of city status to Darhan and Erdenet, direct election of soum Governors, exclusion of political parties in local elections, without giving sufficient consideration to how the systems of local governance work in practice, relationships with other state bodies and overall integrity of the state structure.

Conclusions

The hybrid system of local governance as defined by the 1992 Constitution, both on vertical and horizontal lines, has created both confusion and ambiguity with regard to the relationship between local executive and representatives bodies and their accountability relationship with their respective higher administrative tiers and with central state bodies and citizens.

The Law on Administrative and Territorial Units and their governance has largely failed to clarify the above matters, and it has not kept pace with the country’s recent social, economic and political changes. It is therefore considered advisable to write a new law on local government rather than looking to revise existing legislation.

Instead of trying to resolve particular problems of local governance through constitutional and legal reforms, and before rushing to write amendments, it is advisable to consider the whole system of local governance and to develop consensus on what decentralization means within the unity of the state structure today and what institutions are suitable for this purpose given the current economic, social, political and demographic context of the country.

In the discourse of constitutional reform in Mongolia, we would like to highlight the following as guiding principles.

- Improve the constitutional protection of local self-governance as opposed to some proposals to abolish local self-governing bodies as an institution. This is consistent with global trends. For instance, local self-governance has been recognized as a governing principle by the EU.
- Chapter IV of the Constitution “Administrative and Territorial Units and their Governing Bodies” should not be viewed in isolation from the other chapters of the Constitution. Seemingly small changes in some areas may

have a big adverse impact on other areas such as national sovereignty, human rights and freedom and the overall state structure.

Many of the problems identified in this assessment could be addressed through statutory and administrative changes. For example, one could have a different electoral system more appropriate to the size of each Hural. One might be able to limit partisanship by simply requiring that local citizens nominate local candidates, without allowing national parties' role. Parties might still exist at the local level, but they would be more organic. The whole area of local governance should probably be subject to *less* constitutional regulation, so that flexible solutions can be found for particular problems. We urge redrafting this section of the Constitution toward this end.

Chapter Five
Constitutional Review

Introduction

Mongolia's early constitutions did not establish any organ of constitutional review or any similar mechanisms of the constitutionality control. In early 1990, the Law on Amendments to the Constitution of 1960 included a provision on establishment of the Constitutional Council, but this body was not put into place. The 1992 Constitution established an organ of constitutional review for the first time in the history of Mongolia. This chapter will review the evolution of the Constitutional Tsets and its effectiveness in interpretation and protection of the Constitution.

The Drafting Process

During the drafting of the 1992 Constitution, the drafters considered various models of constitutional review found in other countries. These included three major models: first, the American model in which the ultimate control over the Constitution is exercised by the Supreme Court, and ordinary judges interpret the constitution; second, the Austrian model, invented by Professor Hans Kelsen, in which a specialized court performs constitutional control; and, third, the French model in which constitutional control is exercised by a Constitutional Council before legislation is promulgated.[249]

After carefully studying each of these legal models in light of the country's own legal traditions, the drafters of the new Constitution created a distinctly Mongolian version of constitutional review, drawing largely on the Austrian model.[250]

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[249] This model was set forth in the Constitution of France in 1958, but has since 2008, in that country, come to resemble the Austrian-German model in that the council can hear challenges to legislation after promulgation.

[250] Almost every formerly socialist country chose to establish some institution to exercise constitutional review as a means of promoting the supremacy of constitutional values and protecting fundamental rights, mostly in a form of separate constitutional courts. Of the fifteen former Soviet republics, only Turkmenistan has not established a constitutional supervision body yet. Twelve republics have constitutional courts, Kazakhstan has the constitutional council, and Estonia preferred

As elsewhere in the civil-law world, Mongolia does not view the judiciary as a coequal branch with power to review executive and legislative acts. Mongolian judges are "career judges" who enter the judiciary early in their professional careers and are promoted on the basis of seniority. They are well trained to follow the rules provided in the codes, but not to practice the complex policy-oriented interpretation that is required of constitutional review. Judges on a special constitutional court are usually chosen by political authorities and can be selected to have broader, more policy-oriented training. Therefore, they may be more capable of exercising judicial review than ordinary court judges.

For all these reasons, the centralized model offered a more appropriate structure for Mongolia, in the view of the drafters of the Constitution. The June 1991 version of the draft constitution included a special constitutional body within the judiciary. It stated, in Article 52, that "Judicial power shall be exercised in Mongolia only by a court. Tsets of Ih Tsaaz shall have a right to resolve the disputes related to the Ih Tsaaz".

This draft provided that the Tsets would consist of 6 members, appointed for a term of 9 years; and it would include former Presidents of the country who could serve until the age of 65 (except for Presidents who left office as a result of impeachment). In terms of jurisdiction, the Tsets could consider the constitutionality of laws; disputes among the State Great Hural, the President, and the Government of Mongolia about their spheres of competence; and other issues related to activities of supreme state bodies and their officials on request of the President of Mongolia. This draft did not specify the grounds for initiating disputes, nor was there any provision for over-ride of Tsets decisions by the SGH. It did, however, have a provision allowing a public referendum to over-ride a Tsets decision.

The draft of the Baga Hural provided in Article 48 that "the judicial system shall consist of the Ih Tsaaz Tsets, the Supreme Court, aimag and capital city courts, hoshuu and horoo courts. Specialized courts such as criminal, civil and administrative courts may be formed."

The second draft of Ih Tsaaz provided that the number of members would be 9, rather than 6 in the previous draft, but removed the provision allowing former presidents to serve on the Tsets *ex officio*. It also provided a bit more detail on jurisdiction and decisions. It stated that the Tsets would exercise supreme supervision over the implementation of the Ih Tsaaz; that it would provide official interpretations for correct application of Ih Tsaaz and serve as a

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an American model of judicial review: it has now a constitutional supervision chamber in the Supreme Court.

guarantee for its observance; that it could on its own initiate a dispute on breach of the Ih Tsaaz but also respond to requests from members of the State Great Hural; and that the decision of the Tsets would become effective upon adoption. However, it removed the provision giving the Tsets jurisdiction over competence disputes among the SGH, the President, and the Government of Mongolia; and the provision on consideration of other issues related to activities of State Superior bodies and their officials upon request of the SGH and the President. This draft also removed the provision allowing cancellation of the Tsets' judgment by public referendum, but introduced the idea that the Tsets' initial decisions would go to the SGH for review.

The People's Great Hural then made several modifications in its first reading. In its draft, the Tsets was removed from the Chapter on "Judicial power" to a new Chapter 5. The provision of the law allowing the Tsets to initiate a dispute on a breach of the Ih Tsaaz was revised to read "the Tsets on its own shall initiate disputes on breach of the Law on Ih Tsaaz upon receiving complaints and information from the citizen." During the second hearing on the Constitution of Mongolia on January 1992, Chapter Five on the Tsets was discussed and adopted by 70 percent of votes of members of the People's Great Hural.

Constitutional Court (Tsets)

Thus, Mongolia created a new institution, independent of the judicial branch, to review the constitutionality of laws. Article 64 of the Constitution of Mongolia stipulated "The Constitutional Court (Tsets) shall be an organ exercising supreme supervision over the implementation of the Constitution, handing down conclusions on the violation of its provisions and resolving constitutional disputes. It shall be a guarantee for the strict observance of the Constitution." Article 66 provides that several designated bodies can submit questions, but also that citizens can petition the Tsets to decide a case on its own initiative.

The Law on the Constitutional Court has been interpreted to limit Tsets jurisdiction to cases in which there is an abstract question of law. That is, the Tsets is not allowed to decide cases in which a specific citizen is alleging a violation of their rights. This is a limitation on jurisdiction relative to several other countries' constitutional courts, and has been interpreted to mean that the Tsets cannot hear specific complaints of human rights abuses. This has led some, including the UN Human Rights Council, to recommend that the Tsets be given more explicit authority to hear human rights issues.

A rather unique feature of the design of the Tsets is that is subject to parliamentary approval of its decisions, as per Article 66.3. Initial cases of the Tsets are heard by a panel, according to the Constitutional Court Law, which then issues a decision. These decisions are then sent to the SGH for approval. If the parliament does not accept the decision, the Tsets re-examines it with the full bench, and can issue a final judgment which will be binding on all parties. Although there was an earlier dispute on the effect of silence by the SGH, it is now agreed that silence means that the Tsets decision becomes final and binding.

The Constitution left much of the detail about the Tsets organization, and competence to ordinary law. The Law on Constitutional Tsets, adopted by the Baga Hural on 8 May 1992 had three chapters, 23 articles. With the adoption of a new Law on the Constitutional Tsets Procedure in 1997, Articles 11, 13-21 of the Law on Constitutional Tsets were annulled and Article 1.3 was amended as follows, "Disputes concerning the breach of the Constitution shall be settled under the Law on the Constitutional Tsets Procedure." New draft revisions of these two laws developed by the Tsets were ready for submission to the SGH. However, a number of MPs initiated revisions of these two laws and submitted draft revisions along with amendments to the Law on Procedure of Parliamentary Session. With the enactment of these revisions in early 2016, the legal environment for the Tsets's organization and activities has changed to a certain extent. The Tsets has annulled some provisions of these laws on the ground that they breached the Constitution.

Dispute Resolution at the Tsets

According to the Law on Constitutional Tsets, high officials can submit "requests" to the Tsets. In addition, citizens can submit petitions and information on matters concerning the breach of the Constitution by higher officials, and the Tsets may instigate the process of examining and resolving disputes. If the Tsets decides that the matter is not in breach of the Constitution, it closes the case; if the matter does not fall within its jurisdiction, the Tsets passes it to a relevant authority.

Between its establishment in July 1992 and December 31, 2015, the Tsets received a total of 2067 petitions, submissions of information, and requests. Most of these were petitions from citizens. As for the organizations and officials which are entitled to submit a request as per the Law on the Constitutional Tsets Procedure, the Tsets received 9 requests: 1 from the General Prosecutor, 6 from the Supreme Court, and 2 from the President. In the 24 years, the State Great Hural did not make any request.

During this time, the Tsets examined and resolved 182 disputes, and provided 16 referrals. A total of 163 cases reviewed by the Tsets can be divided into two categories: whether a legal act breached the Constitution (153 and 94 percent of total cases); and whether a high official breached the Constitution (10 disputes or 6 percent). Out of disputes related to legal acts breaching of the Constitution, 101 disputes (76 percent) were related to legal provisions; 8 (6 percent) were related to provisions of resolutions of the SGH; 10 (7.5 percent) were about government regulations; 2 (or 1.5 percent) were about decrees of the President; and 2 (or 1.5 percent) were related to decisions of the General Election Commission.

As of October 2016, the Tsets adopted 173 conclusions, 99 (57.2 percent) of which are found in breach of the Constitution. The SGH accepted 31 conclusions (33.5 percent), rejected 56 (60 percent) conclusions, and did not pass a resolution on 2 conclusions (2.1 percent). It passed 4 conclusions on breach of the Constitution by officials (4.4 percent). (Information on others was unavailable.)

The Tsets made a final decision on 59 disputes. The content of the resolutions passed by the Tsets include:

1. 55 resolutions regarding laws and other decisions passed by the SGH (93.2 percent of the total resolutions) in which:

   - 52 disputes regarding legal provisions that are in breach of the Constitution (88.2 percent)

   - 1 dispute as to whether restoring the legal provisions that were previously invalidated by the Tsets's decision

   - 3 disputes on resolutions and other decisions of the SGH that are in breach of the Constitution (5 percent)

2. 3 disputes on the decisions of the Government that are in breach of the Constitution.

3. 1 dispute on the decision of the General Election Commission that was in breach of the Constitution.

The following table presents the number of Tsets decisions in each year that were initially rejected and the result of the final decision by Tsets.

Table 15. Decisions of the Tsets and their acceptancy by the SGH (1992-2016)

Year	Total conclusions	No violation of the Constitution	Violation of the Constitution	Number of conclusions accepted by the SGH
1992	1		1	-
1993	4	2	2	-
1994	9	2	7	2
1995	7	5	2	-
1996	10	4	6	1
1997	6	3	3	2
1998	9	5	4	2
1999	1	1	-	-
2000	4	2	2	-
2001	2	1	1	1
2002	4	-	4	-
2003	3	1	2	1
2004	3	2	1	1
2005	9	2	7	4
2006	13	5	8	4
2007	13	9	4	-
2008	10	4	6	3
2009	7	4	3	1
2010	8	3	5	2
2011	5	3	2	-
2012	5	4	1	-
2013	6	3	3	2
2014	8	3	5	3
2015	16	2	14	2
Until Oct. 2016	10	4	6	1
Total	173	74	99	32

Altogether, the Tsets has decided that 71 provisions of 35 Articles of the Constitution have been violated. Among the most infringed provisions of the Constitution are: those related to human rights (Article 16 of the Constitution), equality before the law and the court (Article 14 of the Constitution), basic principles of the state activity (Article 1), legal status of a member of parliament (Article 29 of the Constitution), application of international law (Article 10), conformity of laws, regulations, resolutions and actions to the Constitution (Article 70), and independence of judges (Article 49). Among these, tax laws, laws on the composition, organization and activity of the Parliament, election laws, the Law on Criminal Procedure and the package of the judicial reform laws, are on the top list of laws, the provisions of which were in breach of the Constitution.

Relationship with the Parliament

Since the Tsets can negate laws adopted by the parliament, playing the role of the 'negative law-maker', the relations between these two bodies are extremely important in understanding the current status and role of the Tsets. After the establishment of the Tsets these relations were often turbulent. According to the law, one of the main features of relationship between Tsets and SGH is that constitutional dispute must first be decided at the Tsets, before being submitted to the SGH.

This provision has both positive and negative consequences. On the positive side, it provides the SGH with an opportunity to correct provisions deemed to be in breach with the Constitution without waiting for the final decision of the Tsets. Furthermore, there is some comparative literature celebrating the role of constitutional dialogues in which constitutional courts and legislatures exchange views on particular decisions. Some countries in the common law tradition have adopted systems in which court decisions are not final.[251]

On the other hand, as Table 15 shows, the SGH regularly declines to accept decisions of the Tsets. Sometimes these rejections seem to be motivated by political considerations rather than genuine concern about the integrity of the constitutional order. Furthermore, the SGH has on many occasions overstepped the legal time period allocated to decide on the conclusions of the Tests, thus effectively stalling the procedure. There are even some Tsets conclusions currently waiting for the SGH's decision, even though several years have passed since their submission to the parliament.

In hearings of the Tsets regarding the laws passed by the SGH, a member of parliament is assigned to serve as a designated representative of the SGH. These representatives tend to protect the position of the SGH by all possible means even if he or she personally agreed that the provision in question is in breach of the Constitution. Depending on the final decision made by the session of the Constitutional Tsets, people perceive the SGH and the Constitutional Tsets as "winner" or "loser". This public perception undermines the idea that both organs of the state should work cooperatively when it comes to the implementing of the Constitution in Mongolia, protecting fundamental human rights and strengthening of the rule of law.

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[251] See Stephen Gardbaum, The New Commonwealth Model of Constitutionalism, New York: Cambridge University Press, 2012.

According to the law, the SGH should not restore in any way a provision previously invalidated by the final decision made by the Constitutional Tsets. However, in many cases the SGH did otherwise, passing new laws that re-enact abolished provisions. For example, in 2002 the final decision of the Constitutional Tsets nullified Article 94.2 of the Law on Civil Procedure; however a provision similar to the abolished one appeared in 50.4 of the Law on Criminal Procedure. Also, the Constitutional Tsets in conclusion 2 of 2002 abolished Article 17.2 of the Law on the Police, which was later restored by an amendment to the said Law. Such an attitude is surely not consistent with the idea of constitutional supremacy or the rule of law.

According to the appointment provisions of the Constitution, members of the Tsets are nominated by the State Great Hural, the President, and the Supreme Court, each selecting three members. The members are then appointed by the SGH; if the SGH has declined to appoint the nominated person, the nominating body or the official must nominate another person within 7 days. Nominations for vacancies must be made within 14 days after the position becomes vacant, and the SGH then has 30 days to make a decision after the nominating procedure is completed. The term of office of the newly appointed or reappointed member commences on the day of appointment and continues until the expiration of their term of office as provided in the Constitution. However, the SGH has at times failed to make appointments, resulting in the Tsets having to operate without a full cohort of members for extended periods.

Leading up to 2012, there were improvements in relations between the State Great Hural and Constitutional Tsets, but since 2012 the relationship has deteriorated. In the past four years, many of the laws passed by the SGH have failed the constitutionality test at the Constitutional Tsets. For example, the package of judicial reform laws initiated by the President of Mongolia and overseen by the Ministry of Justice and Home Affairs has all but failed the Constitutional Tsets. This situation certainly did not please the Members of the SGH. Therefore, Kh.Temuujin, Member of the SGH and Minister of Justice and Home Affairs, initiated a draft law with a proposal to amend the Law on the Constitutional Tsets by setting the retirement age of a Member of the Constitutional Tsets at 60 years on the basis of the Labor Code and the term of a Member's mandate, which is 12 years. However, after it was pointed out that a Member of the Constitutional Tsets is a civil servant and therefore the Labor Code is not applicable, Mr.Temuujin submitted a revised draft law proposing to set the retirement age at 65 years. This draft law was approved by the State Great Hural by a majority vote. After this, events unfolded very rapidly.

The Constitutional Tsets initiated proceedings on whether this Law violated the Constitution, and in an official letter sent to Z.Enkhbold, Speaker of the SGH, on 20 January, 2016, stated: "…by this letter we are informing you not to make any decisions or actions by using the Law on which proceedings to determine whether it violated the Constitution has been initiated". However, the Democratic Party Members of the SGH considered that by sending this letter, the Chairman of the Constitutional Tsets had violated several legal provisions such as Article 12.4 of the Law on the Constitutional Tsets Procedure, which provides, "A member of the Tsets shall not be permitted to express his/her opinion in advance on disputes under examination or make recommendations to others in this respect", as well as Article 32.4 of the same Law states that, "Upon delivery by the Tsets of a judgment constitutionally invalidating a law, decree, other decisions of the State Great Hural, resolutions of the Government, international treaties of Mongolia and related articles, these shall be suspended and remain suspended until a final decision by the Tsets is delivered. The Tsets shall determine separately the effective date of such suspension". Thus the Democratic Party Members considered it appropriate to recall the Chairman of the Constitutional Tsets, and the Secretary General of the Parliament Secretariat B.Boldbaatar sent an official letter to the Chief Justice of the Supreme Court of Mongolia stating that as the official letter sent to the SGH by the Chairman of the Tsets J.Amarsanaa violated the law, they proposed to recall the Member of the Tsets. A request was made for the Chief Justice to provide an opinion on the issue. The Chief Justice of the Supreme Court, Ts.Zorig, in his official letter of reply to the SGH stated: "We have been informed of official letter No.14/214 dated 20 January, 2016, sent by the Secretary General of the Parliament Secretariat B.Boldbaatar regarding the Member of the Constitutional Tsets. It ... states that it has determined that the official letter No.1/42 sent by the Chairman of the Tsets J.Amarsanaa … addressing the Speaker of the SGH dated 20 January, 2016, has violated the relevant legislation. On this issue … for the State Great Hural to make a relevant decision within its full powers as stipulated by law … the Supreme Court does not have any specific proposals".

Consequently, the Constitutional Tsets sent a further official letter to the SGH in relation to the official letter sent by the Parliament Secretariat, warning that discussion of recalling the Member of the Tsets by the SGH, in the absence of the proposal by the Supreme Court to recall the Member of the Tsets, would constitute an act violating the law. In addition, it also sent official letters with similar content to the Chief Justice of the Supreme Court, Presiding Justices of the Chamber for Criminal Cases, Chamber for Civil Cases, and Chamber for Administrative Cases of the Supreme Court as well as to the Head of the Supreme Court Administrative Department. However, in a hurry to recall the

Chairman of the Tsets the SGH had violated a number of provisions of the Law on the Parliamentary Sessions, which detail timeline and procedures of the plenary and the Standing Committee meetings of the SGH. This was evidenced by the fact that the Standing Committee meeting was organized speedily, and all of a sudden discussed one single issue related to the recall of Chairman of the Constitutional Tsets J.Amarsanaa, a topic which was not included in the agenda of issues to be discussed during the meeting. Moreover, the sudden discussion of this single issue resulted in the delay in considering more than 20 laws that were planned to be discussed during the extraordinary meeting of the Standing Committee to be held for more than 10 days. After the discussion, a resolution on recalling the Chairman of the Tsets passed by a majority vote. The session was then adjourned.

Such rapid development of events is closely related to the fact that both sides harbored their own particular agendas. At the time, there was an interest on the part of the SGH to act quickly before the initiation of proceedings based on citizen's information to determine whether the Speaker of the SGH Z.Enkhbold had violated Article 1.2 and Article 13.10 of the Constitution, and to further determine whether there were grounds for his impeachment. The Constitutional Tsets was interested in resolution of certain issues regarding the legislation to: set the age threshold for individuals holding the office of Member of the Tsets; limit the number of re-appointments; require the disclosure of meeting protocols; and to disclose the separate opinions.

Regarding the conflict between the SGH and the Constitutional Tsets, and without supporting either side, the research team members make the following legal assessment of the situation. It is clear that the letter sent by the Chairman of the Tsets J.Amarsanaa to the Speaker of the SGH Z.Enkhbold played a central role in adding the fuel to the already brewing tensions, which ultimately became the reason for recalling the Chairman of the Tsets on the basis of the violation of the law. The content of this letter has been explained in different ways. Democratic Party Members of the SGH considered that by sending the official letter stating that the Law on the Constitutional Tsets and the Law on the Constitutional Tsets Procedure, and the additional provisions of the Law on Procedure of Parliamentary Sessions, must not be used or implemented because they might violate the Constitution, the Chairman of the Tsets had himself violated the law. This was because they considered he had made a preliminary conclusion prior to the issue being examined by the medium bench of the Constitutional Tsets. However, there are many people who hold the view that the wording of the official letter, which states that "the laws … might have violated the Constitution" does not entail a finding that a direct violation of the

law has occurred. Rather it could be interpreted as a statement to protect the meaning of the constitution when it was under threat.

The second issue of concern is related to the question of who will determine whether the Chairman and the Members of the Constitutional Tsets violated the Constitution. In accordance with the previous regulation to recall the Member of the Constitutional Tsets, a court of law should have established that the Member has committed a crime or violated a law. Article 5.3 of the Law on Constitutional Tsets states, “If a court determined that a Member of the Tsets had committed a crime or breached a law, the State Great Hural may withdraw the mandate of the Member on the basis of a proposal of the nominating body and the decision of the Tsets on the removal of his/her membership”. In other words, to remove the Chairman or another Member of the Constitutional Tsets from their office, there should be a valid court decision stating whether they have committed a crime, or violated a law. The SGH has added into the Law on the Constitutional Tsets a provision which states: “If the competent authority has determined that the Member of the Tsets has violated the law then the State Great Hural may recall him/her”. The operation of this provision was suspended by the decision of the initial bench of the Constitutional Tsets dated 18 February, 2016, on the basis that it violated the Constitution. However, the SGH has recalled the Chairman of the Tsets under the suspended law. It is clear that the so-called “competent authority” would be the SGH, which is how the SGH has treated the provision in practice.

In this case, the determination by Mongolia’s highest legislative authority as to whether the Member of the Tsets has violated the law is inconsistent with the principle of the separation of powers and inconsistent with one of the main principles of the rule of law that any person’s guilt shall be determined by the court alone. Therefore, it is inappropriate for the SGH to make a determination on whether the Member of the Constitutional Tsets has violated the law. There is no such practice in other countries either. While in some countries, a legislature may “impeach” a judge, this requires a full hearing and procedure, and is reserved only for serious violations of law, not simply differences of opinion on interpretation.

Based on these regulations, a member of the Constitutional Tsets can be recalled based on: 1) the Member of the Tsets must have committed a crime, or violated the law. Guilt must be determined by the court; 2) there should be a decision of the Tsets on recalling the Member of the Tsets; 3) the decision should be based on the proposal by the nominating institution, which in this case was the Supreme Court. Only when all of these conditions are fully met should the Member of the Tsets be recalled. This constitutes an important guarantee for strengthening the independence and impartiality of the

Constitutional Tsets. However, some Members of the SGH interpreted this provision as providing that the decision by the Constitutional Tsets and the proposal by the nominating institution are separate conditions, which can be understood to be separated by the conjunction “or”; therefore, it is not necessarily of significance if the decision by the Constitutional Tsets has been reached or not. A proposal by the nominating institution is sufficient to recall the Member of the Tsets on the basis of him/her violating the law. This reasoning constituted the grounds for the majority decision. However, interpreting the provision as granting a crucial role to the Constitutional Tsets on resolving the issue of whether there has been a violation of law by the Member of the Tsets has an important role in protecting this institution from the arbitrary decisions of politicians. Consequently, it seems inappropriate to resolve the issue on recalling the Member of the Tsets without the participation from the Constitutional Tsets itself. However, the law should be drafted in a precise, clear manner and be efficient with words, without excessive words or gaps which might create dual meaning. The law is not a puzzle. Article 65.4 of the Constitution is, in fact, a very clear, understandable and unambiguous legal provision. For instance, the words “decision by the Constitutional Tsets, proposal by the nominating institution” are not linked by the conjunction “or”. If, as in the opinion of the majority of the SGH, these were not concurrent conditions then it is clear that the legislator would have and should have used the conjunction “or” or “either or”.

Whether the official letter sent from the Chief Justice of the Supreme Court Ts.Zorigt to the SGH on 26 January, 2016 has the status of a decision of the Supreme Court is also a disputed issue. The key issue of contention is whether the proposal of the Supreme Court may be made by the Chief Justice of the Supreme Court alone or whether it should have been made after session of the chamber of the Supreme Court. The majority of representatives of the SGH, who considered that the proposal sent by the Chief Justice of the Supreme Court Ts.Zorig on behalf of the Supreme Court was sufficient, advanced their standpoints on several grounds. Firstly, it is fully in compliance with article 13.1.1 of the current Law on the Courts, which has given the Chief Justice of the Supreme Court the powers to represent the Supreme Court in domestic and foreign relations. Secondly, the issue on the recall of the Chairman and Members of the Constitutional Tsets is not regulated by any of the current laws in force. Therefore, in accordance with the current legal regulation they considered that the right to make a proposal rests with the Chief Justice of the Supreme Court.

The Members of the SGH who held opposing views stated that because the Supreme Court is a collective decision-making body, issues pertaining to

the full powers of the court shall be decided not by the Chief Justice alone but by the full court. This is legislated by the Constitution and other laws. Article 51.1 of the Constitution states, “The Supreme Court shall comprise of the Chief Justice and judges”, while Article 12.1 of the Law of Mongolia on the Courts provides, “Courts of all instances shall be composed of a Chief justice and judges”, and article 16.1 of the same Law states, “The Supreme Court shall be composed of the Chief Justice and not less than 24 judges”. These provisions clearly show that the Chief Justice of the Supreme Court cannot alone be considered to be the Supreme Court.

The concept of what is a ‘decision’ of the Supreme Court is also a clearly regulated and undisputed issue in legal science. The decisions or official documents issued by the Chief Justice of the Supreme Court alone are not Supreme Court decisions. A Supreme Court decision espouses the resolution discussed and issued by the full session of the Supreme Court. In addition, the resolution of the Constitutional Tsets of 13 May, 2015 considered and fully resolved the question of what is a decision of the Supreme Court.

Article 3.2 of the Law on the Constitutional Tsets of Mongolia provides: “In nominating to the State Great Hural a person for appointment to the Tsets… the Supreme Court shall make a decision based upon a proposal agreed to by a majority of its justices”. Despite the fact that the procedure for recalling a Member of the Tsets is not regulated in detail by law, simple logic dictates that the same principles and procedures by which a candidate is nominated to the position of Member of the Tsets should be applied to determine whether there are grounds to recall him/her. Otherwise, there will be a contradictory notion that the grounds for nomination of a person for appointment to the Tsets shall be based on the majority decision of the Supreme Court (i.e., after the en banc session of the Supreme Court), while for recalling a Member of the Tsets the decision of the Chief Justice is sufficient.

The content of the letter of the Supreme Court also calls attention. Initially, the Secretary General of the Parliament Secretariat sent a letter the Supreme Court stating that the Chairman of the Constitutional Tsets J.Amarsanaa violated the Constitution. In the response letter, the Chief Justice stated that “your letter states that the Chairman of the Tsets J.Amarsanaa has violated the Constitution. We do not have any specific proposals when the SGH is considering the issue within its full powers”. The purpose of this letter seems to be the one essentially to distance the Supreme Court from the upcoming decision. In fact, the letter did not comment on J.Amarsanaa’s violation of the Constitution and if there were grounds to recall him. In line with the Constitutional interpretation, the proposal by the nominating institution should make a legal analysis on whether the Member of the Constitutional Tsets has

violated the Constitution, and if so whether this violation constitutes sufficient grounds for recalling him/her. Only then should such a proposal form one of the bases for making a decision by the SGH. Otherwise, a letter stating “decide as you wish” is not sufficient to be considered as a proposal.

All of the above points to the need for better protection of the Constitutional Tsets from any actions leading to infringement of its powers and damaging its reputation.

Recommendation: Relevant articles of the Constitution and other laws should be clarified for better protection of the independence of the Constitutional Tsets and its members, from any actions infringing its powers and damaging its reputation.

Another possible amendment to consider is to eliminate the power of the State Great Hural to reject Tsets conclusions. This would enhance the separation of powers. Perhaps the State Great Hural should be deemed to have accepted any conclusion which it does not formally reject, including those conclusions by the Tsets on which the State Great Hural is silent within legally defined timeframes. Also it is useful to introduce a provision requiring the State Great Hural to clearly explain justifications for disagreement, when it passes a resolution rejecting the Constitutional Tsets’s decision.

Chapter Six
Amendments

Introduction

Since the Constitution regulates all aspects of the fundamental social relations and upholds the most significant political and social values at the highest legislative level for the purposes of serving the common interests of the society, it acts as a guarantor of the country's sustainable development. In order to achieve these goals, the Constitution must provide stability. Only when the Constitution itself is stable can it serve as the necessary prerequisite for the immunity of the constitutional structures and play its historic role in the development of the national legal system and the protection of human rights. Therefore, it is of utmost importance that the Constitution be strictly observed and steps taken to protect its immunity. On the other hand, a constitution should never be misunderstood to be an eternal and untouchable document. As life constantly enriches itself and the society always advances, if no timely and necessary changes are reflected into the Constitution it will visibly lag behind social change, which could in turn slow the country's development.[252]

Constitutional amendment is necessary, but should not be left to the whim of political parties to amend anything as they please. Instead, amendments should be limited to those that enhance overall constitutional stability by bringing the constitution into conformity with the requirements of the current era, to vigilantly reflect the evolving social demands, and to find an appropriate balance between such stability and change. Hasty constitutional amendments entail a danger of creating a social instability, disorder and crisis. Therefore, special procedures of constitutional amendment espouse a goal towards striking the right balance.

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[252] There are many examples from history, which show that any country at a certain period of time encounters with a necessity to amend and improve their constitutions. Despite the efforts by Belgium to draft its 1831 Constitution as an "eternal" document, in 1994 it realized the need to completely amend its Constitution. This was due to the escalation of the language issue within the country, and Belgium made a move towards abandoning the unified state in favor of the federal state. The drafters of the 1831 Constitution could not possibly foresee such turn of events. Also at the end of the twentieth century, the 1871 Constitution of Switzerland, which was considered to be one of the most progressive of the time, had given its way to a new Constitution.

As Dr. B.Chimid said on this issue, "There is no law that cannot be changed. However, tampering with the Constitution, which constitutes the fundamental matter on state structure and its principle, could damage the state and political life of the country. This is because the Constitution is not a temporary or short-term program, but a road once chosen by the people, and a fundamental law, which binds the structure of the social bones and muscles by its roots, and where each article is logically connected. Therefore, if any of the vessels are cut the wound will be made visible somewhere else in the network. This was demonstrated by the regressive seven constitutional amendments. Consequently, instead of resorting to amendments at the first instance, a less damaging way needs to be found. For this to happen the meaning of each word and concept needs to be well understood and implemented, and more appropriately it is best to deal with the detailed, specific, constitutional (organic) law, ordinary law, and bylaws (regulations). Undoubtedly, this practice has been proven to be useful in many countries. Therefore, it is time to cease the practice of tampering with the Constitution as if it is some kind of a user manual or regulation (procedure)."[253] We believe that this is the best approach to any constitutional amendment.

Most countries have adopted stringent procedures for the constitutional amendment and introduce certain restrictions, which act as legal guarantors for constitutional stability. Some of the articles, which comprise the heart of the Constitution, may even be designated as unamendable. For example, while the German Constitution prohibits amendment to the provisions on fundamental principles in articles 1 and 20, regarding the foundation of the state structure and human rights and freedoms, the French and Italian Constitutions prohibit amendments to the republican form of government. Some constitutions require extensive time periods to complete amendments. In some cases, the decision to amend the Constitution of the previous Parliament enters into force when the newly elected Parliament ratifies it, or the decision by the representative body is approved by the national referendum.[254] In addition, some constitutions stipulate different thresholds and procedures to amend different provisions of the constitution. The more complex and high threshold the constitutional amendment process is the more difficult it is to amend the Constitution.

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[253] B.Chimid, *Upholding the Constitution*, Ulaanbaatar, 2006: 112-113. [Mongolian]

[254] Other restrictions, for instance, include protection of some chapters and sections from amendment (Portugal, Namibia, Greece, Romania, and Russia), limits on the constitutional amendment initiating body and subjects (e.g. in Kazakhstan only the President is entitled to propose changes to the Constitution), temporal restrictions on revision to the Constitution (Greece, Portugal, Brazil), prohibitions on constitutional amendment during state emergency and martial law (Brazil, Belarus, Moldova, Spain, Romania, Estonia), and prohibitions on constitutional revision during foreign aggression.

Historical Experiences and Practice with Amendment in Mongolia

The Legal Regulations of the Constitutions of 1924, 1940, and 1960

In Mongolia, the long historic journey of the development of constitutionalism has led towards improving the amendment procedures of the Constitution. Although Mongolia has lived under three previous constitutions in the modern era, for most of the socialist period it failed to adopt detailed procedures for constitutional amendment comparable to other countries. Consequently, even though the highest organ of state power were given the prerogative right to amend the fundamental law of the state according to the constitutions of 1924[255], 1940[256], and 1960[257] due to the lack of formal amendment procedures, the Constitution was violated on a number of occasions. For example, 9 out of 16 constitutional amendments (56.3 percent) to the 1940 Constitution were made by the resolution of the Baga Hural, and later by the decree of the Presidium of the People's Great Hural, rather than the People's Great Hural in its entirety. During 32 years of the 1960 Constitution 6 out of 16 constitutional amendments (31.6 percent) were made following the decree by the Presidium of the People's Great Hural.[258] This reflected the fact that constitutional amendment was simply a decision of a single political party. There was little reason to observe the formal procedural requirements when the People's Great Hural exercised little real power.

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[255] Article 6 of 1924 Constitution of the Mongolian People's Republic states, "State Great Hural shall have the powers to change or ratify the Constitution".

[256] Article 16 of 1940 Constitution of the Mongolian People's Republic provides, "The sole powers of the State Great Hural: Ratify or amend the Constitution of the Mongolian People's Republic…"

[257] Article 20 of the Constitution of the Mongolian People's Republic states, "People's Great Hural shall have all the state powers, in which a) ratify and amend the Constitution of the Mongolian People's Republic"

[258] Amendments have been made frequently. The 1940 Constitution was amended every 15 months, the 1960 Constitution was amended every two years. However, it can be seen that this was influenced by the constitutional arrangements of the time to a certain extent. For instance, as the 1940 Constitution included aimags, the composition of the Ministers' Council, ministries, agencies under the Ministers' council, departments under the Presidium of Baga Hural of aimags and Ulaanbaatar city by their names, the Constitution was amended every time when an aimag was newly established or re-organized, changes were made in the composition of the Ministers' Council, or when special departments were established, restructured or abolished. The 1960 Constitution was amended many times when the term of the People's Great Hural, local People's Deputies' Hural, prosecutors, and judges was changed, and in relation with establishment of new rayons and state committees.

Regulation in the 1992 Constitution

The drafters of the new democratic constitution were faced with a goal of providing conditions for strong protection and sustainable operation of the Constitution similar to the practices of other countries. Amendment of the Constitution is covered in Articles 68 and 69, and has been supplemented by a Law on the Constitutional Amendment Procedure passed in 2010. Amendments require ¾ of all members of the SGH, i.e. 57 out of 76 members, and if draft amendments to the Constitution have twice failed to win three fourths of votes of all Members of the SGH then it shall be prohibited to subject them to consideration again until the SGH sits in a new composition following general election, or to make amendments within six months pending the next general elections. In accordance with article 68.1 of the Constitution, amendments to the Constitution may be initiated by organizations and officials enjoying the right to legislative initiative or may be proposed by the Constitutional Tsets to the State Great Hural. Article 68.1 further provides that a national referendum on a Constitutional amendment may be held on the concurrence of not less than two thirds of the members of the State Great Hural.

Regulation by the Law on the Constitutional Amendment Procedure

The events surrounding the 1999 and 2000 Constitutional amendments of the 1992 Constitution of Mongolia, which came to be referred to as the "worsening seven amendments" by the public, and the ensuing political conflict, demonstrated that the Constitution does not have a full immunity from change. Therefore, in view of the need to regulate in detail the procedures for discussion and adoption of the amendments to the Constitution of Mongolia through a specific law, the State Great Hural adopted the Law of Mongolia on the Constitutional Amendment Procedure in 2010.

The Law on the Constitutional Amendment Procedure provides procedural detail on amendment, but also stipulates that many articles of the Constitution are not subject to amendment.[259] It says that amended articles may not be re-amended for a period of eight years.[260] The President may not propose extending his term or expanding his powers.[261] The Law also introduces what appears to be a new requirement that the President and Government must approve any draft amendments.[262] This requirement does not appear in the Constitution itself. The Law also provides extensive detail on the parliamentary

[259] Article 5.2.2 prohibits amendments to Constitutional Articles 1; 2; 3; 4;, 5.1-5.4; 6.1; 8.1; 9.2; 10.1-10.2; 12.1; 14; 15; 19; 20; 22.1; 30.1; 38.1; 41; 47; 49.1-49.2; 68; 69.
[260] Article 3.3.
[261] Article 7.1.2; 8.1.1.
[262] Article 10.1.3.

procedure for considering amendments,[263] as well as the mechanism for calling a national referendum in accordance with Article 68.2 of the Constitution.[264]

The importance of this Law is related to its acknowledgement that because the constitutional amendment depends on the relations of the political forces in power, these revisions should not represent and protect the particular interests of any political party, group, or social class.[265] Further, the risk of arbitrary constitutional amendments necessitates strict observance and strengthening of guarantees that are directed towards ensuring political stability. However, the reaction embodied in this Law is perhaps too strict, as it makes the constitution overly rigid.

The Law insulates 22 articles, comprising almost 1/3 of the total of 70 articles (66 provisions) from constitutional amendment. Even though such practice of inadmissible amendments is relatively common, it is usually limited to only a few articles of vital importance to a given country. For example, in many countries it is prohibited to make amendments to the republican form of government, to the rule of law, to fundamental human rights, or to the principle of a multiparty system. While the idea of inadmissible amendments seems to safeguard the Constitution, it actually hijacks the right of the future generations to resolve their issues of vital significance directly or through their representatives. It can be seen that the drafters of the Constitution were aware of this issue.[266]

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[263] The SGH shall start discussions by plenary sessions within 1 month after receiving draft amendments and shall approve drafts after three discussions of the plenary sessions.

[264] Article 17.1.

[265] Article 5.4.2 of the Law on the Constitutional Amendment Procedure, issue No.3 of the State Gazette, 2011, 672.

[266] During the discussion of the Draft Ih Tsaaz, when the proposal was raised to prohibit changing the parliamentary system of government S.Bayar, Member of the Baga Hural, said, "We do not want to insert a rigid provision into the law. It is incorrect to establish an unchanging state system. This is because it is the current state system in Mongolia, our chosen system. However, we should not impose it on our future generations; otherwise, it is exactly reminiscent of the slogan of going forward by Leninist path of the socialist period. Furthermore, as the time changes we cannot discount the fact that there might arise a need for Mongolia to choose a presidential system of government, or any other system of the government. We cannot make a rigid system for our future generations. If we make such a big lock then no key will be tried, and instead it will forcefully opened." This proposition was accepted by other Members of the Baga Hural.

The Amendments of 2000, and Changes in the State Structure

In late 1999, all major parties cooperated on a proposed constitutional amendment to return to the status quo ante, in which MPs could serve in the cabinet.[267] But President N.Bagabandi vetoed the amendment on December 24, 1999, even though it had the support of the MPRP. The SGH then over-rode the president's veto, and passed the first amendment of the 1992 Constitution. However, a case was filed in the constitutional court challenging the amendments. The Tsets initial bench again rejected the amendments as unconstitutional. One can say this conflict was between the SGH on the one hand, and the President and Tsets on the other.

According to the Law on the Constitutional Tsets Procedure, it was up to the SGH to accept or reject the Tsets decision within 15 days after it received the Tsets opinion rejecting the constitutional amendments. The SGH, however, chose to take no action at all. Without a rejection by the SGH, the Tsets could not hear the case again and issue a final decision that would be permanent under Article 66.4. This state of limbo was precisely what the SGH desired. On April 5, 2000 a group of lawyers sent a letter to the SGH urging the members to accept the ruling of the Constitutional Court, which reflected the law and public opinion. Despite the public criticism and three formal requests by the Constitutional Court, the SGH delayed its consideration.

Elections in July 2000 led to an overwhelming victory by the MPRP, which took 72 out of 76 seats. In the first Session of the SGH meeting, the MPRP majority agreed to ignore the Constitutional Court ruling which allowed the formation of a government that included members of the SGH. On July 28, 2000, four months and 12 days after the Court's decision and nearly four months after the expiration of the period required by law for consideration of such a decision, the SGH finally debated the Constitutional Court ruling, but avoided a formal rejection. By a vote of 62 to 2, it stated that the Constitutional Court had heard an issue outside its jurisdiction – namely the constitutionality of a constitutional amendment.

Instead of issuing a formal resolution reacting to the Tsets decision as required by the Law on the Parliament, the legislature decided to include a short note in its record indicating that it considered the issue finalized. The

[267] By this amendment Article 29.1 was changed to state, "Members of the SGH receive remuneration from the state budget during their tenure. Members of the SGH may not hold concurrently any posts and employment that do not relate to their responsibilities except for the position of the Prime Minister and member of the Government.

Constitutional Court expressed its dissatisfaction with the protocol, and on August 1, 2000 it sent a letter demanding an official resolution. The Tsets also asserted that the SGH had wrongly authorized itself to interpret the Constitution. The SGH responded that the Tsets had no jurisdiction to hear questions of constitutionality of constitutional amendments passed with a supermajority.

On October 29, 2000, the Tsets reconsidered the Constitutional Amendment and again ruled that it was unconstitutional. It relied on procedural grounds, specifically Article 68.1, which states that amendments to the Constitution may be initiated by certain designated bodies. The Tsets read these as being exclusive, implying that a Constitutional Amendment initiated by SGH on its own was not constitutional because the legislature failed to consult with the Constitutional Tsets and the President.

The MPRP Government was in a dilemma. The Prime Minister and four members of the cabinet were themselves members of the SGH, and so would have to resign their seats under the ruling. The MPRP responded by initiating another Constitutional amendment with exactly the same text as had already been adopted – and rejected – the previous year. The proposed amendment was presented simultaneously to the SGH, the President and Constitutional Court, seeking to avoid the charge that the initiators had not followed proper procedures. In a sense, the SGH was challenging the Constitutional Court to review the amendment on substantive grounds since the Tsets had, in its final rejection, relied on procedural grounds rather than the provision in the Constitution that says that members can have no other employment outside Parliament.

The amendment passed by a vote of 68-0 with four members protesting the session by not attending. Again, however, President N.Bagabandi vetoed the amendment. But the SGH again refused to accept the veto. Eventually, after extensive political consultations, the amendments were approved by the president and not rejected by the Tsets in 2001.

The amendments of 2000 are still a major political issue sixteen years later. Proponents of the amendments argued that they would improve democratic accountability. When MPs could not serve in government, there was greater social and institutional distance between parliament and the cabinet. There was no opportunity for day-to-day policy debate in which members of the Government would defend their policies before the SGH. Rather, government members had to be summoned to the parliament, and appear there as outsiders on an infrequent and extraordinary basis. So proponents argued that the amendments improved government performance.

On the other hand, opponents of amendments argued that they violated the separation of powers, reduced parliamentary oversight, and blurred accountability. The people elect the parliament, which is to supervise and oversee government, but because MPs are sitting in the government, they are unwilling to do so.

It is difficult for us to assess all of these claims. But it is clear that the 2000 constitutional amendments have had major consequences for the system of state powers in Mongolia. As a result of the new institutional arrangements the Prime Minister became the most powerful authority, effective at commanding both the cabinet and Parliament. Combined with open voting, the lowered quorum requirement – a bare majority, or 39 out of 76 seats – gave the opportunity for parties in the parliament to control their members, and at the same time to address the low attendance issue.

Attempts on Making Amendments to the Constitution After the Adoption of the Law on the Constitutional Amendment Procedure

Since the adoption of the Law on the Constitutional Amendment Procedure, the main law of the country has not been touched yet. However, a number of attempts have been made to amend it.

In 2011, 32 Members of the SGH submitted a draft law on the amendment to the Constitution of Mongolia. This draft law was developed by the working group established by the order of the Chairman of the SGH and headed by the Chair of the SGH Standing Committee on State Structure J.Sukhbaatar with a mandate to study the necessity of making amendments to the Constitution of Mongolia. This working group, for the purposes of determining in advance the necessity to make amendments to the Constitution, organized a survey among the public in March, 2011, involving a total of more than 38,800 citizens participating in the capital and 21 aimags (52.6 percent of survey respondents stated that there is a need to amend the Constitution). Furthermore, the working group submitted a request to the Parliament Secretariat to conduct content analysis of daily publications on the subject of the Constitution of Mongolia and on making amendments to the Constitution since its adoption (for the period from 1999 – until 30 March, 2011) as well as to conduct a comparative study on the constitutional regulation of other countries on certain topics. Furthermore, upon review of different drafts initiated separately by the Members of the SGH, it set a goal of preparing a consolidated draft law which incorporated the common positions on the amendments to the Constitution and agreed in advance and submit it for debates.

The draft law included several novel provisions. For instance, in addition to the proposal on including a restrictive provision stating, “Not more than one third of the Government composition can be made up of the Members of the SGH”, draft proposals included provisions aimed at strengthening consensus democracy, increased the number of MPs to 99 in order to ensure the principle on gender equality in parliament and representation commensurate with the growth of the population, introduced the appointment system of governors of administrative and territorial units in conjunction with the specifics of each level by amending articles 60.2 and 60.3 of the Constitution by stating: “at the level of aimags, the capital city and districts, governors shall be appointed by the Prime Minister, the Governor of the Capital City in consultation with respective hurals, at the soum level, Governors shall be elected by citizens and aimag Governor shall make a decision in recognition of results, and Governors of baghs and horoos shall be appointed by soum and district Governors in consultation with the Presidiums of respective hurals of baghs and horoos”, whereby the soum’s Governor shall be elected by citizens. Despite the fact that the draft law on the amendment to the Constitution was discussed at the Standing Committee sitting and a conclusion was made it failed to be discussed at the plenary session of the SGH on time and soon 2012 parliamentary elections ensued.

After that, the SGH established a working group headed by N.Batbayar, Member of the SGH, for drafting amendments to the Constitution. Despite the fact that this working group submitted draft amendments to the Constitution along with the draft resolution on carrying out a national referendum on Constitutional amendment on 6 November, 2015. In the draft law on the amendment to the Constitution several amendments were envisioned without affecting the principles on the state structure enshrined in the Constitution. These amendments aimed at clarifying the differences and boundaries of the correlation, balance and power between the SGH, President and the Government, to create a legal environment for the Government to conduct its activities in a stable manner, and for the Prime Minister to implement the executive power and to increase his/her accountability before the SGH on the implementation of the law, to increase the independence of the Government in conducting its activities in a stable manner, to elect the President not by the citizens but from the extended representatives of the SGH for a single term of six years, to conform the prerogative powers of the President to the principle of the institution constituting the embodiment of the unity of the people, to add the city as the administrative unit, to rationalize the principles of establishment of Citizen Representative Hurals and procedure on the selection, appointment and removal of Governors of all levels, and to limit the involvement of the political party in this process, and to ensure appropriate balance in respect to certain relations arising between the executive and judicial powers. But these drafts

were not adopted. There are probably many reasons as to why the amendments drafted by the working group were not adopted. From the point of view of the research team members, the main reason lies in the fact that several provisions of the Law on the Constitutional Amendment Procedure, starting from the drafting process until the submission of the draft amendments, were violated.

First, the drafting process was closed to the public from the very beginning until the submission of the draft amendments to the SGH. The introduction of the draft amendments states that proposals were obtained from researchers; however, it is not clear as to how, from whom and according to what procedures such proposals were obtained.[268] Consequently, the specific requirements, outlined in article 5.1 of the Law on the Constitutional Amendment Procedure, to ensure the rights and involvement of the public, transparency, namely, to hear the views of scholars, researchers and political parties, were not met.[269]

Second, some prohibitions set by the Law on the Constitutional Amendment Procedure were ignored. For example, article 8.1 of the said Law, which states that "the State Great Hural in initiating an amendment to the Constitution shall be prohibited ... to extend the timing of the upcoming elections and the term of the mandate, to expand the power and weaken the role and responsibilities of the Member of the State Great Hural" was clearly violated, because the draft amendments included proposals to extend the mandate up to five years, to increase the number of MPs, and to further expand the scope of powers of the SGH in many aspects.[270]

Third, article 5.1.4 of the same law, which states that the process of amending the Constitution should not be arbitrary, was violated. In the view of the researchers, not being arbitrary means, on the one hand, being consistent with the law, and on the other hand, being grounded on studies and reasoning.[271] But there were many provisions which lacked scientific reasoning. For example, it was explained in the introduction that the title of "mother law", 9 ministries and 99 Members of the SGH were introduced for symbolic reasons to

[268] O.Munkhsaikhan, "The Number of MPs should be 140", *Undesnii shuudan paper*, 3 December, 2015. [Mongolian]
[269] D.Uurtsaikh, "The constitutional amendments with such a content cannot be accepted in any way", *24tsag.mn*, 2015.11.27, [Mongolian] http://www.24tsag.mn/content/126780.shtml
[270] Ibid, D.Uurtsaikh.
[271] Same articles by O.Munkhsaikhan and D.Uurtsaikh.

commemorate the religiously significant number "9".[272] It makes a little sense to claim that they were based on clear rationales and research studies.

Fourth, the timing of the process of preparation of draft amendments violated the time periods specified in the Constitution and relevant laws from the very beginning. Among these, the Constitutional provision, which prohibits making amendments within six months before a general election of the State Great Hural; Article 17 of the Law on the Constitutional Amendment Procedure, which provides for a seven day period between the first and second discussions of the SGH on the draft amendments produced by the working group; and the provision of the Law on Procedure for Conducting National Referendums, which states, "the date for conducting a national referendum shall be set after 30 days following the adoption of the resolution". If the last date for conducting the 2016 general election of the SGH was to be set as 26 June then the national referendum should have been carried out before 26 December. However, if one considers that these draft amendments were merely submitted to the SGH on 6 December, 2015, then to conduct first and second discussions of the SGH, to approve the draft amendments after its second discussion on each article, paragraph and sub-paragraph, to submit the approved amendments for national referendum, and to inform the public on the content of and many changes that would arise from the draft amendments, to listen to their standpoints and to build public consensus would require another 30 days. Because of very late submission of the drafts, such time really ran out.

It can been seen that the new Parliament and Government formed after the general elections also joined the league of the constitutional amendments, demonstrated by the Cabinet decision, followed by the Prime Minister's decree establishing a Working Group with a task to develop proposals for the constitutional amendments. The decree states that the composition of the Working Group should involve scholars and researcher, legal professionals specialized in constitutional law, assigned J.Munkhbat, State Minister, Chief of the Cabinet Secretariat and S.Byambatsogt, the Minister for Justice and Home Affairs to align the Working Group's work with the requirements set in the Law on the Constitutional Amendment Procedure and other relevant laws.

Recommendations: We believe that the SGH should evaluate the current set of amendment proposals without regard to the Law on Constitutional Amendment Procedure. If need be, that Law should be modified if the State Great Hural thinks that it prevents the adoption of a comprehensive set of

[272] Ibid.

reforms for Mongolia. The present moment provides an opportunity for such a comprehensive review.

On the one hand, providing an opportunity for the people to have a direct role in approving amendments through a referendum, upon the approval of not less than two thirds of the Members of the SGH, suggests that the people have a role in constitutional change. On the other hand, the two thirds requirement sets a high threshold and shows that in practice the right of public participation is limited. Therefore, it is important to unambiguously legislate that all constitutional amendments shall be submitted for a binding national referendum, and if these amendments do not garner sufficient support from the referendum, then the State Great Hural should be prohibited from making such amendments.

We consider that it is appropriate to reduce the direct prohibitions on making any amendments to nearly one third of the Constitution, namely the 22 articles (66 sub-paragraphs) referred to in article 5.2.2 of the Law on the Constitutional Amendment Procedure.

General Conclusions

Since 1992, the Constitution of Mongolia has provided for a sound basis of democratic governance for the country. This is not to suggest in any way that every decision made by every political institution has been sound. But the job of the Constitution is to establish institutions to resolve conflicts, adopt policies, and limit government abuse. Our assessment is that the Constitution has been generally quite successful. Let us return to the five criteria laid out in the section above on methodology.

Endurance: Mongolia's Constitution has endured longer than the average among all national constitutions written since 1789. In this sense, it is similar to other post-socialist states that adopted new constitutions in the aftermath of the breakup of the Soviet bloc. To be sure, the stability has been driven by underlying conditions in the society, but it is also the case that had the institutional choices of 1992 been wildly dysfunctional, it might not have lasted.

Legitimacy: While good data are not available on the views of the public about the Constitution, there does appear to be a good deal of support for the overall scheme of government, even if particular political institutions are sometimes distrusted. It is important to note, though, that the Constitution will face some significant challenges going forward as the country tries to deal with mineral wealth in coming years. A more responsive political system can go a long way toward enhancing the legitimacy of the system.

Channeling Political Conflict: Mongolia's political system has featured deep divides on some issues. For the most part, however, these issues have been channeled through the institutions of the political system. The party system has evolved, and the major parties have been transformed. The late 1990s and early 2000s saw conflicts among the SGH, the Presidency and Tsets in which each sought to extend their institutional power, even across party lines. Protests have generally been peaceful, with the exception of the violence around the 2008 elections. This was surely the darkest spot during recent Mongolian history; yet from a constitutional perspective, the system survived this major challenge. The emergency regime worked; constitutional rules were followed, and security officers involved in the violence were disciplined.

The major failure of the Constitution resulted from ambiguous drafting in 1992. Although there were discussions during the drafting process about the question of whether MPs could occupy cabinet seats, the actual text of the constitution was sufficiently unclear that the 1996 lawsuit filed by D.Lamjav

could call the constitutional system into question. Much of the discussion involved a principle of the separation of powers, which not only was not mentioned in the Constitution, but confused by the reference in Article 20 to the State Great Hural as the "supreme organ of state power." These drafting ambiguities led to unnecessary conflicts over the nature of the political system, which have occupied too much attention for too many years. Addressing these conflicts should be a priority of any reforms.

We also believe that the current system reflects an unnecessary concentration of power in a single institution, the SGH. The SGH should be responsible for legislation, but should not dominate the government. It should be in dialogue with the Tsets and President, but not ignore them. Restoring the separation of powers will enhance accountability and improve policy delivery.

Limiting Agency Costs: The Constitution has done well in ensuring electoral turnover. Two of the incumbent Presidents have lost bids for re-elections, a Speaker of the SGH has been removed from office, and there has been significant turnover in parliament and local government. The rules of the game have been followed and so there has been no problem of political entrenchment.

There has, however, been a major problem of corruption. This is perceived by some to be growing in severity. It is, of course, difficult to measure levels of corruption, but survey evidence indicates that public concern over corruption is declining relative to unemployment, which is the single most important issue for the Mongolian public.[273] Internationally, Mongolia moved up from 120th in the world in 2011 to 94th in 2012 and 72 in 2015.[274] This survey evidence should not be taken as indicating that the corruption problem is in any way resolved. After all, in November 2012, 60 percent of Mongolian survey respondents believe that corruption has increased in the past three years, and 67 percent believe that it is a common practice.[275] Land allocation and mining operations are perceived to be the most corrupt sectors, and this has been consistent for several years. The scheme of MPs directly providing funds to their home districts, which was in operation for several years but has now been suspended, may have exacerbated the agency problem of government. Therefore, we conclude that the constitutional scheme has been only partly successful in limiting agency costs.

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[273] Survey on Perceptions and Knowledge of Corruption, Sant Maral/The Asia Foundation, March 2016.

[274] Corruption Perception Index by the Transparency International, 2016 http://www.transparency.org/country#MNG

[275] Ibid.

Creating Public Goods: A constitution, of course, does not itself deliver social services or collect taxes. The particular choices that are made in any given country cannot be attributed to its constitution. But a constitution does set up incentives for politicians to provide policies that the public demands. It also provides for a budget process. In Mongolia, the mechanisms of budgeting and service delivery have been the subject of several different approaches in the period under review. Certain major policy areas, such as education, health care, and the functions of local government, have witnessed a series of major cycles involving decentralization and recentralization. In short, there has been some instability in terms of policy. Mongolia's particular context, which includes a widely dispersed population, makes the provision of some social services particularly difficult. Much of the recent political debate has been criticized as being too "populist" in the sense of leaning toward cash handouts, rather than building enduring institutions. This is, to some degree, a problem in many developing countries.[276] But in a way, populism reflects the fact that there *is* a debate over delivery of public services, and that the government is competing with the opposition to be more responsive. On this metric, Mongolia's constitutional scheme has performed decently, even if we must recognize that the politicians have not always done so.

Success in its initial period does not mean that the Constitution should remain unchanged. We believe that a series of modifications to the Constitution, summarized on the next page, will enhance the quality of governance in Mongolia and contribute to its continuing efforts at "building a humane, civil and democratic society in the country", as set out in the preamble to the Constitution. The modifications we propose, we believe, are relatively minor, and the basic structure of the Constitution will be reinforced, not replaced, through such changes. At the same time, a process of public discussion of amendments might renew popular attachment to the Constitution, enhancing its legitimacy.

We conclude with a note on areas that have not been fully covered in this study. It is inevitable that a study of this magnitude must treat some areas in greater depth than others. In some specialized areas, comprehensive and focused research is needed. In particular, we know of few studies evaluating the state of property rights in the country, which is surely a major issue in an era of market growth. In addition, there is little systematic empirical information on the functioning of local government in Mongolia. This is one reason for our

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[276] L. Wantchekon, L. (2003) "Clientelism and Voting Behavior: Evidence from a Field Experiment in Benin." *World Politics* 55: 399–422; P. Keefer and S. Khemani (2005) "Democracy, Public Expenditures, and the Poor: Understanding Political Incentives for Providing Public Services." *The World Bank Research Observer* 20(1): 1-27.

recommendation for greater flexibility in the categories and structure of local government, as we do not really know what is working and what is not. The Constitution says little about the system of public administration and civil service, and perhaps there ought to be more regulation of it. While there is currently an effort to reform criminal procedure, there is not systematic information on the operation of the current system. No doubt several others could be mentioned as well. We hope this study will spur further research efforts in particular areas of constitutional relevance.

Summary of Recommendations for Constitutional Amendment

Our study is primarily directed towards providing a general assessment on the implementation of the Constitution of Mongolia, and does not take a position on whether there is a need to amend it or not. Despite this, if those in power consider that the time has come to amend the Constitution, we would like to draw the attention of political leaders to a number of issues for consideration.

1) We recommend revising the Constitution so as to restrict MPs from serving in Government, or limit such service to a small number of ministries. We believe this change will enhance accountability, possibly lead to more technocratic expertise in Government, and allow for a larger number of people to exercise governmental power. Thought should be given to a mechanism involving replacement of any MPs who enter Government using the list system.

2) The amendments of 2000 to Article 27.6 reduced the State Great Hural quorum from 51 to 39 MPs. This meant that as few as 20 MPs (less than 1/3 of total members) can effectively pass laws. We recommend increasing the quorum.

3) We find the language in Article 20 about the State Great Hural being the "Supreme Organ of State Power" to be outdated, and not an accurate description of Mongolia's system of checks and balances. Consideration should be given to some other formulation such as the supreme organ of legislative power.

4) Article 25 might be modified to remove the term "exclusive" in describing the competencies of the State Great Hural.

5) We recommend that consideration be given to staggering presidential and parliamentary elections every two years. The cycle of presidential elections following parliamentary elections by one year has no inherent rationale. A staggered system would allow the public to register discontent with perceived overreaching and prevent long periods of single party dominance. Staggering elections would allow a genuine political rhythm to develop, and could produce coherent party governance while also enhancing the separation of powers.

6) Article 31.1 stating that the presidential elections "shall be conducted in two stages" can be eliminated. It is unnecessary and creates some confusion in instances in which a single round is all that is needed to obtain a majority.

7) We recommend that immunity of members parliament provided in Article 29 be deconstitutionalized or reduced. At this point in Mongolia's development, the risk of politically motivated prosecution is far less than the risk of corruption and self-dealing. At a minimum, consideration might be given to introducing an exception for cases involving allegations of corruption. Another possible reform is to end the State Great Hural practice of voting on requests for suspending immunity in Article 29.3.

8) We recommend clarifying the Law on the State Great Hural with regard to examining and resolving the legality of the Constitutional Tsets' judgments about members' violations of the Constitutions.

9) We recommend granting citizens a right to submit petition to the Tsets on the ground that their fundamental rights were infringed. All Tsets members should be full time members.

10) Article 57.3 might be revised to read "revision of an administrative and territorial unit shall be considered and decided by the SGH after consultations with the respective hural and local population, and with account taken of the country's economic structure and the distribution of the population."

11) A constitutional category of "city" should be created to recognize that some areas outside Ulaanbaatar deserve that designation.

12) Drawing from examples of the protection of local self-government in modern constitutions, Article 58.1 could be improved to enhance the protection of local authorities by including provisions on legal personality, the availability of financial resources sufficient for the discharge of local authority competences, the rights of property ownership, and the requirement to consult with local authorities on the revision of the national legislation on local government (LATUG).

13) Article 59.2 should be revised either to remove the reference to "Presidiums" or to clarify their selection criteria.

14) Article 61.3 should be revised as follows: "if a Hural by a majority vote overrides the veto on unlawful decisions of the Hural, the Governor shall refer the matter to the competent court", or alternatively "to a central executive body in charge of legal affairs." The latter is consistent with the General Administrative Law; otherwise a constitutional foundation of the relevant articles to local self-governing bodies of the law could be questionable.

15) Article 63.2 could be improved by clearly identifying a state body in charge of supervision of legality of acts passed by local self-governing bodies.

16) We believe that the Law on Administrative and Territorial Units and Their

Governance should be replaced by a new law on local government.

17) We believe that the system of top-down appointment of local governors should now be modified to allow for locally elected executives and the adoption of the mayor-council model, at least at the soum level.

18) We also see great merit in finding ways to make local elections non-partisan. This could be done without modifying the constitution, but simply by changing relevant electoral laws.

19) We recommend reducing the number of articles protected by the Law on the Constitutional Amendment Procedure.

Appendix

Summary of Constitutional Events – 1990-2016

1989

December 10	First democratic demonstration organized at Sukhbaatar Square on International Human Rights Day.

1990

January	Large-scale pro-democracy demonstrations involving many thousands of people, held in sub-zero weather, result in the resignation of the Mongolian People's Revolutionary Party (MPRP) Politburo.
March 2	Mongolia and the Soviet Union announce that all Soviet troops would be withdrawn from Mongolia by 1992.
March 14	The 8th Plenum of the Central Committee of the MPRP decides to submit, for the consideration of the People's Great Hural of the Mongolian People's Republic (MPR), the removal of the Preamble and Article 82 (on the MPRP's coordinating and leading roles) from the 1960 Constitution.
March 21	P.Ochirbat becomes the Chair of the Presidium of the People's Great Hural after J. Batmunkh resigns.
March 23	The People's Great Hural of the MPR adopts a resolution on the "Structure of the Highest Organ of the State". The Constitution is amended to remove the reference about the leading role of the MPRP.
April 1	The draft Law on the Amendment to the Constitution and the draft Law on Political Parties are discussed at the People's Great Hural. A Constitutional Drafting Commission headed by the Chair of the Presidium of the People's Great Hural is established.
May 10	During the 9th session of the People's Great Hural of the MPR, elected for the eleventh time, the Law on the Amendment to the Constitution and the Law on the Political Parties are adopted.
July 29	The first democratic elections are held nationwide, where 97.8% of total eligible voters participated. The MPRP wins a majority in the People's Great Hural of the MPR.
September 3-7	The first democratically elected People's Great Hural convenes. P.Ochirbat is elected as the President of the MPR with R.Gonchigdorj from the Social Democratic Party elected as the Vice-President.
September 9	The People's Great Hural of the MPR decides on the composition of the State Baga Hural (Small Hural), in which

	19 out of 50 seats go to non-MPRP parties. Additionally, 10 seats go to people who are not the deputies of the People's Great Hural.
September 13	The Baga Hural holds its opening session.
October 4	The Baga Hural issues a resolution forming a new Constitutional Drafting Commission. The President of the MPR, P.Ochirbat is appointed as the Head of the Commission.
October 18	During the first meeting of the Constitutional Drafting Commission, the Constitutional Drafting Working Group is established, with a total of 39 people, and adopts an action plan of the Working Group.

1991

April 19	The Constitutional Drafting Commission delivers the first draft of the Constitution under the name of "Ih Tsaaz of Mongolia" to the Baga Hural for deliberation.
May	The initial draft constitution of the MPR is released in English by the Constitutional Drafting Commission to selected foreign scholars.
May 21-25	The Baga Hural debates the draft constitution "Ih Tsaaz of Mongolia", and passes a resolution to publish a draft for public discussion, to be held in the period of 1 June – 1 September, 1991.
June 5	The initial draft constitution "Ih Tsaaz of Mongolia" is published in the central state newspaper Ardyn Erkh.
June 14-27	A group of human rights experts from the United Nations visits Mongolia to provide professional assistance to the Government of Mongolia in the constitutional drafting process. The Working Members exchange views on every article and provision of the draft Constitution and obtain recommendations from these experts.
July 23	A conference organized by the Constitutional Drafting Commission together with the Ministry of Justice is held in the State Palace. The topic of the Conference is 'The draft Law Ih Tsaaz and the development trends of Mongolia'.
July 26	The Chair of the Constitutional Drafting Commission issues an ordinance to evaluate proposals made by citizens and organizations on the draft "Ih Tsaaz", and to incorporate them into the draft constitution. In total, 10 working groups were established consisting of 89 people.
September 9-12	An international conference on "The Role of the New Constitution in the Process of the Democratic Transition of Mongolia" is organized In Ulaanbaatar.
September 25	The Baga Hural convenes its 4th session, and discusses the outcome of public deliberation on the draft constitution "Ih Tsaaz" as well as the draft constitution itself.

October 20	The Baga Hural discusses the draft "Ih Tsaaz" and, after making relevant amendments, issues a resolution to submit the draft to the Peoples' Great Hural for final deliberation.
November 7	The Baga Hural issues a resolution to submit to the People's Great Hural the draft attachment law to "Ih Tsaaz of Mongolia".
November 11	The Peoples' Great Hural convenes its second session, and begins its deliberation of the draft constitution "Ih Tsaaz of Mongolia". The title "Ih Tsaaz" is dropped.

1992

January 13	The new Constitution is adopted at 11:35 AM. Article 70.2 of the Constitution states, "This Constitution of Mongolia shall enter into force at 12:00 hours on the 12th day of February of 1992, or at the hour of the Horse on the prime and benevolent ninth day of the Yellow Horse of the first spring month of the Black Tiger, in the year of Water Monkey of the Seventeenth 60-year cycle".
January 14	It is established that the 13th of January each year shall be the Constitution Day.
January 15	The People's Great Hural of the MPR adopts as a law an attachment to the Constitution on the "Transition from the Observance of the Constitution of the MPR to the Constitution of Mongolia".
April 8	New Election Law is adopted.
May 8	Law on Constitutional Tsets [Court] of Mongolia is adopted.
May 29	Law on National Security is adopted.
June 28	In the first democratic elections the MPRP wins 70 of the 76 seats in the new single-chamber State Great Hural.
July 21	P.Jasrai is appointed as the Prime Minister of the newly formed Government.
August	Law on Administrative and Territorial Units and their Governance is adopted.
November 27	Law on Administrative Responsibilities is adopted.
December 21	The Budget Law is adopted.

1993

May 6	Law on the Government of Mongolia is adopted.
May 10	Law on Foreign Investment is adopted.
June 5	Law on the President of Mongolia is adopted.
June 6	In the first nationwide presidential elections, P.Ochirbat, candidate from the Mongolian National Democratic Party and Mongolian Social Democratic Party, is elected as the President of Mongolia.
June 14	Law on Establishment of the Court is adopted.
November 11	Law on the Relationships between the State and the Monastery is adopted.

December 20	Law on Legal Status of Cities and Villages is adopted.
December 24	Law on Travel for Private Purposes and Immigration of Citizens of Mongolia Abroad is adopted.
December 28	Law on International Treaties is adopted.

1994

January 12	Adjudication on the constitutionality of certain provisions of the Law on the relationship between the State and the Monastery with the Constitution of Mongolia takes place in the Constitutional Tsets. The Constitutional Tsets rules that certain provisions of the said law, which aimed to give an exceptional status to Buddhism, are not in conformity with the Constitution of Mongolia.
January 12	The Constitutional Tsets ruled that Ts. Turmandakh, a member of the SGH, breached Article 29 of the Constitution of Mongolia, which states that "A member of the State Great Hural shall not hold concurrently any posts and employment other than those assigned by law".
July 5	Law on the Legal Status of the Capital City is adopted.
Late in year	First Land Law is enacted.
30 December	Law on Civil Service is adopted.

1995

June 5	Law on Citizenship is adopted.
October 19	Law on the National Referendum is adopted.
November 14	Law on the State Emergency is adopted.

1996

June 30	The National and Social Democrats win 50 out of 76 seats in the State Great Hural elections, which is the first -non-MPRP party majority in the legislature.
July 8	D.Lamjav files a suit in the Constitutional Tsets arguing that the practice of concurrent service by Members of the Parliament in Government violates the Constitution.
July 17	Tsets issues initial judgment in D.Lamjav's suit.
July 19	M. Enksaikhan's Government is formed.
July 30	SGH rejects Tsets initial judgment in D.Lamjav's suit.
September 7	Tsets issues final decision in D.Lamjav's suit finding MPs cannot serve in Government.

1997

May 1	Law on the Constitutional Tsets Procedure is adopted.
May 1	Law on Audit is adopted.
May 18	MPRP candidate N.Bagabandi wins the presidential election.

1998

January 8	Law on the State of War is adopted.

April 23	Ts.Elbegdorj's Government is formed.
May 15	Law on the State of Martial Law is adopted.
August 28	Law on the Freedom of the Media is adopted.
October 2	Member of the Parliament and Minister of Infrastructure S.Zorig is murdered.
December 9	J.Narantsatsralt's Government is formed.

1999

July 30	R.Amarjargal's Government is formed.
December 24	Law on the Constitutional Amendment is adopted. Among other provisions, this Law provides that the Member of the SGH can concurrently hold the post of either the Prime Minister or Member of the Government Cabinet.

2000

June-July	Parliamentary and local elections held. MPRP wins 72 out of 76 seats in the SGH.
July 26	N.Enkhbayar's Government is formed.
November	The Constitutional Tsets rules that the 1999 amendments to the Constitution are in violation of the Constitution.
December	The Parliament with the MPRP majority re-adopted the same amendments that the Coalition had passed. This leads to a constitutional impasse. Presidential Elections and Coalition Building: Reacting to the MPRP's landslide victory, 5 political parties regrouped to form a new umbrella coalition with the hope of challenging the MPRP in the 2001 presidential elections.
December 7	Law on the National Human Rights Commission of Mongolia is adopted for the first time, establishing the National Human Rights Commission with the mandate to promote and protect human rights, and charged with monitoring the implementation of the provisions on human rights and freedoms provided in the Constitution, laws and international treaties of Mongolia.

2001

March 23	The Constitutional Tsets adjudicated on the matter of whether the interpretation of the Constitution by the SGH breaches the Constitution of Mongolia. The Tsets decides that the resolution #27 dated 5 April, 1993, and the resolution dated 26 July, 2000, interpreting Article 30.2 and Article 66.4 of the Constitution, issued by the SGH, breached Article 25 and Article 70.1 of the Constitution of Mongolia, because the power to interpret the SGH is not vested to the SGH.
Summer:	The MPRP candidate, incumbent President N.Bagabandi wins presidential elections, securing 58 percent of the vote.

	The controversial constitutional amendments initially introduced by the Democratic Coalition were finally approved by the President. The amendments allowed members of the Parliament to concurrently serve in the government cabinet, and reduced the President's power to block the parliament's nomination for Prime Minister (the powers that MPRP's President N.Bagabandi used to reject Democratic Coalition Prime Minister nominations seven times during the democrats' rule from 1996–2000). Despite the filing of citizens' claims on these amendments, the Constitutional Tsets refused to consider them, and these amendments came into force.
November 8	Law on the Procedure for Drafting and Submission of Laws and Other Parliamentary Decisions is adopted.

2002

January 10	Law on Criminal Procedure, Civil Law, Law on Civil Procedure are adopted.
May 16	Law on Advocacy is adopted.
June 7	Law of Mongolia on Land, a major revision to the 1994 Law, is adopted.
June 27	Law on Public Sector Management and Finance is adopted.
June 28	Law on Civil Service (revised) is adopted.
September 1	Criminal Code is adopted.
December 26	Law on Administrative Procedure and Law on Establishment of Administrative Court are adopted.

2003

January 3:	Law on State Control and Inspection is adopted. Law on State Audit is adopted.
October 24:	The National Human Rights Action Programme is approved by the resolution #41 of the SGH.

2004

April 15:	Law on the Legal Status of the Ministry and Law on the Legal Status of the Government Agency are adopted.
April 21:	The Tsets decided that certain provisions of the Law on Civil Procedure in Court breached the constitutional principle that courts of all instances shall consider and make judgments on cases and disputes on the basis of collective decision-making.
April 23	Law on Combating Terrorism is adopted.
June-July	Parliamentary Elections and Coalition Government: Mongolia holds its fifth parliamentary elections since 1990. The MPRP, which previously held 72 out of 76 seats, only secures 36 seats in this election. The Homeland Democracy Coalition (Coalition) – an electoral grouping of three parties – won another 36. The remaining 4 seats went

	to independent candidates and a smaller party. As a result, both, MPRP and the Coalition tried to align themselves with the 4 seat holders to have enough of a majority to form a government. Thus, acrimony between the MPRP and the Coalition intensified. The situation grew thornier when the General Electoral Committee ordered re-polling in two districts where the Coalition had won elections – thereby reducing the Coalition's definite victory to only 34 seats. Local Elections: In local elections, the MPRP captured over 60 percent of the vote and the Coalition, 30 percent. However, voter turnout throughout the country amounted to just over 60 percent, the lowest since 1990.
August	Eventually, the political gridlock thawed. The first step toward compromise came with an agreement between the MPRP and the Coalition that loopholes in the Election Law needed to be addressed to promote electoral fairness in the future. Later, both sides ultimately agreed to form a "grand coalition government", splitting legislative and executive posts evenly between them. However, it took several weeks to appoint the Coalition's candidate, Ts.Elbegdorj as Prime Minister (his second government).
2005	
January 27	Law on Public Radio and Television is adopted.
January 28	Law on Political Parties is adopted.
March 31	The Constitutional Tsets decided that certain provisions of the Law on Administrative Procedure breached the Constitution of Mongolia.
May	Presidential Elections: MPRP's candidate N.Enkhbayar wins the presidential election with 53 percent of the vote.
September 29	Constitutional Tsets rules against the Law on Political Parties to allow new parties to use old names or abbreviations.
September 30	Constitutional Tsets ruled that some provisions of the Article 21.2 of the Law on Amendments to the Law on State Great Hural, stating, "in case of the dissolution of a coalition group before its term of office, the parties which were a member of the coalition having no less than 8 mandates in the State Great Hural can form a group consisting only of members who were elected in the State Great Hural" breaches Article 24.1 of the Constitution of Mongolia stating, "a party and coalition group is formed as the result of an election".
November 17	Law on Legal Status of the Financial Regulatory Commission is adopted.
December	Plans to revise the Election Law culminated in a surprise choice by the Parliament of a multi-member electoral

system for the country, a far cry from the long-debated initial bill that proposed combining a plurality vote with some form of proportional representation.

2006

January 12 — Law on the General Election Commission of Mongolia is adopted.

January 25 — Coalition government headed by Ts.Elbegdorj is dissolved by Parliamentary vote, following resignations of 10 MPRP ministers. The DP protested the move and did not take part in the vote; street protests are held denouncing the unilateral termination of the "grand coalition". A new governing coalition is formed with the MPRP and some other parties, leading to formation of M.Enkhbold's Government.

January 26 — Law on the State Great Hural (Parliament of Mongolia) is adopted.

July 6 — Anti-Corruption Law is adopted, creating the Mongolian Independent Authority Against Corruption (IAAC).

December 12 — Law on Administrative and Territorial Units and their Governance (revised) is adopted.

2007

February — Association of Constitutional Drafters is established.

February 23 — Constitutional Tsets rules the allocation of 250 mln tugrug in the State Budget Law for 2007 for direct expenditures by SHG members in their electoral districts, as a violation of the Constitution.

March 2 — Constitutional Tsets finds the Speaker of the SGH Hural violated Constitution by amending version of the text of Law on Anti-Corruption after passage.

October 11 — Law on Procedures of Parliamentary Sessions is adopted.

November — Prime Minister M.Enkhbold resigns and is replaced by the MPRP leader S.Bayar.

2008

June-July — Parliamentary Elections and Coalition Government: The MPRP secured 46 out of 76 seats in the Parliament but the Democratic Party refused to accept the election results. Public disorder increased, forcing the first state of emergency to be declared in Ulaanbaatar. Five people were killed during the public disorder, and by some estimates over 200 people were tried and sentenced to prison. A report by the coalition of Mongolian non-governmental organizations (NGOs) concluded that the measures taken by state authorities violated many international and national human rights laws.

August	Eventually, after a stalemate of nearly two months since the elections, the new Parliament took office, paving the way for the formation of a MPRP-DP Coalition Government. In the new Government headed by the MPRP leader S.Bayar, the DP was offered six Cabinet positions, 40 percent of the posts, including the position of the first deputy premier.

2009

May	The Democratic Party's candidate, Ts.Elbegdorj, a two-time prime minister, makes a comeback, and is elected as President, defeating the incumbent N.Enkhbayar.
June 25	General Law on State Registration is adopted.
October	The Prime Minister S.Bayar resigns due to health reasons, and is succeeded by the Foreign Minister S.Batbold.

2010

April:	The former Prime Minister S. Bayar resigns from the post of the Leader of the MPRP, and the Prime Minister S.Batbold is elected as the new Party Leader.
June 24	Law on Fiscal Stability is adopted.
November	MPRP reverts to its old name of Mongolian People's Party. The former president N.Enkhbayar established a new breakaway MPRP composed from party members, who disliked the reversal to the party's old name.
December 23	Law on the Constitutional Amendment Procedure is adopted.
December 31.	Law on Establishment of the Appellate Court for Administrative Cases is adopted.

2011

June 16	Law on Information Transparency and the Right to Information is adopted.
November 10	Law on Automated System for Election is adopted.
December 15	Law on the Election of the State Great Hural (Revised) is adopted.
December 23	Budget law (revised) is adopted.

2012

January 19	Law on regulation of public and private interests and prevention of confflict of interest in public service is adopted.
March 7	Law on the Courts of Mongolia is adopted. Law on Legal Status of Judges is adopted. Law on Legal Status of Lawyers is adopted.
May 17	Amendment is made to the Law on Foreign Investment providing for mandatory parliamentary review of significant projects.

May 22	Law on Legal Status of Citizens' Representatives in Courts is adopted. Law on Mediation is adopted. Law on Court Administration is adopted.
June	Parliamentary elections: the Democratic Party wins majority of seats in the Parliament and goes on to form a coalition with the Mongolian People's Revolutionary Party and Civil Will-Green Party.
August 2	Former president N.Enkhbayar is sentenced to four years imprisonment.
August 9	N.Altankhuyag's Government is formed.
December 21	Law on the Election of the President of Mongolia (Revised) is adopted.

2013

February 8	By the decree of the Chairman of the SGH a working group is established for the purposes of studying issues related to whether or not to amend the Constitution.
July 5	Law on Marshals Service is adopted for the first time. Law on Legal Aid to Indigent Defendants is adopted.
July:	Ts.Elbegdorj, candidate from the Democratic Party, is re-elected as the President of Mongolia. 2013 State Budget does not include provisions related to funds for direct district spending by the Members of the Parliament.
August 1	President Ts.Elbegdorj pardons N.Enkhbayar.
December	President Ts.Elbegdorj submits bill to amend the Law on Government to limit MPs from serving in Cabinet.

2014

July 2	Law on Glass Account is adopted.
October 16	Seven ministers of N.Altankhuyag's Government are dismissed.
November 5	Prime Minister N.Altankhuyag is dismissed.
November 21	Ch.Saikhanbileg is appointed as Prime Minister.
December 4	The structure of the government is approved.
December	Ch.Saikhanbileg's government is formed with 19 members, with representatives from DP, Justice Coalition and MPP.

2015

February 12	Law on the Mongolian Language is adopted.
May 29	Law on Legislation (revised) is adopted.
June 19	General Administrative Law is adopted.
July 8	Law on Public Hearing is adopted.
August 6	6 MPP members are dismissed from the Cabinet, and replaced by DP and Justice Coalition members.

August 11	Amnesty Law is adopted for the occasion of the 25th anniversary of the first democratic elections and establishment of the permanent parliament.
October 6	Law on Establishment of Courts (revised), amendments to the Law on Courts, law on abolishment of the Law on Establishment of Courts, SGH Resolution setting staffing of courts are adopted.
October 8	Foundations of the Defense Policy of Mongolia are adopted.
November 15	The Constitutional Tsets passes resolution #9 stating that Article 7.1.12 of the Law on the State Great Hural "a member of the SGH may propose dismissal of members of the Government Cabinet to the SGH" is in breach with the constitutional concept of the government's functioning as a cabinet.
December 25	Election law is adopted.

2016 он

February 5	Sustainable Development Vision for Mongolia -2030 is adopted.
February 15	The Constitutional Tsets initiates proceeding to review as to whether the amendments to the Law on the Constitutional Tsets, the Law on the Constitutional Tsets Procedure, the law on Procedure of Parliamentary Sessions were in breach with the Constitution and passes its conclusions.
February 19	J.Amarsanaa, Chairman of the Constitutional Tsets is recalled by the resolution of the SGH.
April 7	The date of the parliamentary elections and elections for the Citizens' Representative Hurals (CRH) of aimags and the capital city is announced.
April 22	Resolution #5 of the Constitutional Tsets is passed which concludes that proportional mixed electoral system is in breach with the Constitution.
June 29	Elections of the SGH and CRHs of aimags and the capital city are conducted. The elections are held using single-member district majority system. MPP secures 65 seats and DP gets 9 seats in the SGH.
July 8	J.Erdenebat is appointed as the Prime Minister.
July 21	Organizational scheme and structure of the government is approved.
July 23	Members of the Cabinet are resigned.
July 23, 30	Members of J.Erdenebat's government are appointed.
September 9	The Action Plan of the Government of Mongolia for 2016-2020 is approved.
October 19	Elections for CRHs of soums and districts are held.

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