

**THE ROLE OF THE  
CONSTITUTION OF MONGOLIA  
IN CONSOLIDATING  
DEMOCRACY:**

**AN ANALYSIS**

# **THE ROLE OF THE CONSTITUTION OF MONGOLIA IN CONSOLIDATING DEMOCRACY: AN ANALYSIS**

Ulaanbaatar  
2015



## FOREWORD

This research report was prepared by a team of scholars working under the project “Support to Participatory Legislative Process” implemented jointly by the Parliament of Mongolia and the United Nations Development Program (UNDP). The team includes Professor Ch.Enkhbaatar former judge of the Constitutional Tsets, as team leader; Professor D.Solongo, Member of the Constitutional Tsets and Dean of the Law School at the National University of Mongolia; P.Amarjargal, Senior Adviser in the Legal Service Department of the Parliament Secretariat; and Professor Tom Ginsburg of the University of Chicago Law School. Ts.Davaadulam and G.Zoljargal, UNDP staff members, greatly contributed to the study.

An earlier draft of the report was presented for comment and expert feedback to: the members of the Parliamentary Working Group on Constitutional Reform, as well as D.Lundeejantsan, Member of Parliament; Professor N.Lundendorj, Chair of the General Council of Courts; Ch.Unurbayar, Human Rights and Legal Policy Adviser to the President of Mongolia; and D.Lamjav, independent researcher. The report has incorporated many of these comments. The report also benefited from a thorough review of the draft by Shelley Inglis, Policy Adviser, Democratic Governance Group, Bureau for Development Policy, UNDP and N.Luvsanjav, national project adviser of UNDP.

We express our deep gratitude to the State Great Hural, and especially to the Vice-Chairman of the State Great Hural L.Tsog, Chair of the Standing Committee on State Structure A.Bakei, and Secretary-General of the Parliament Secretariat B.Boldbaatar for their support and encouragement.

The findings and views expressed in the report do not represent the views of the Government of Mongolia or those of the UNDP. We take a responsibility for all errors.

Research team

# CONTENT

<b>EXECUTIVE SUMMARY</b>	<b>6</b>
<b>I. INTRODUCTION</b>	<b>8</b>
<b>II. OVERVIEW OF METHODOLOGY AND CRITERIA FOR EVALUATION</b>	<b>10</b>
Endurance	10
Legitimacy	11
Channeling Political Conflict	11
Limiting Agency Costs	12
Creating Public Goods	13
<b>III. THE DRAFTING PROCESS</b>	<b>14</b>
<b>IV. STATE STRUCTURE: THE SYSTEM OF GOVERNMENT</b>	<b>18</b>
Introduction	18
Political processes after the adoption of the 1992 Constitution	19
Relations between Parliament and Government	20
The State Great Hural	26
Introduction	26
Parliamentary power in practice	28
The Speaker of Parliament	30
Oversight	30
Conclusion	32
The Presidency	33
Introduction	33
Presidential elections	34
The Veto Power	36
Appointments	37
Proposing legislation & Executive Decree	37
Other Powers	38
The Government	38
Introduction	38
Terms and Stability of the Government	39
The Core Structure of the Government	41
Conclusion	42
Elections, Parties, and Political Cycles	43
Introduction	43
Rhythm of Elections	43
Voter Turnout	44
Right to Vote	45
Discussions of indirect presidential election	47
Direct Democracy	48
Overall Assessment of State Structure	49
<b>V. ACCOUNTABILITY: IMMUNITIES</b>	<b>51</b>
Introduction	51
Role of the Tsets	52
SGH Suspension of Members	53
Comparative Analysis	55

<b>VI. LOCAL GOVERNMENT</b>	<b>57</b>
Introduction	57
The Drafting Process	57
Current system	58
The System of Checks and Balances	59
Functional Assignment	63
Independence of Local Governments	63
Conclusions	64
<b>VII. JUDICIARY, TSETS AND OVERSIGHT</b>	<b>66</b>
Constitutional Court - Tsets	66
Introduction	66
The Drafting Process	66
Institutional Design	68
Dispute Resolution at the Tsets	69
Relations with the Parliament	71
Courts & the General Council	72
Introduction	72
General Council	73
Legal Process	74
Performance with regard to abuses of power	75
<b>VIII. HUMAN RIGHTS AND INTERNATIONAL LAW</b>	<b>77</b>
International Law	77
Human Rights	77
Freedom of Religion	78
Minority Rights	78
Freedom of assembly and the freedom of the press	79
Universal Periodic Review	79
<b>IX. EMERGENCY POWERS &amp; NATIONAL SECURITY</b>	<b>81</b>
Emergency	81
National Security	81
<b>X. THE CONSTITUTION AND THE ECONOMY</b>	<b>83</b>
Introduction	83
Inequality and Growth	84
Natural Resources & Economic Development	84
<b>XI. AMENDMENT</b>	<b>88</b>
Introduction	88
Historical experiences with amendment in Mongolia	89
<b>XII. CONCLUSION</b>	<b>91</b>
<b>XIII. SUMMARY OF RECOMMENDATIONS FOR CONSTITUTIONAL AMENDMENT</b>	<b>94</b>

## EXECUTIVE SUMMARY

---

- 1) The Constitution of Mongolia, adopted in January 1992 as part of the country's transition to democracy, is now over twenty years old. This report, commissioned by the Parliament of Mongolia and the United Nations Development Programme, conducts an assessment of the performance of the constitution, analyzing the drafting process, the structure of the state, various oversight institutions, and specific topics including human rights, emergency provisions and amendment procedures. Because 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: 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. Our overall view is that the 1992 Constitution has been generally successful in terms of its initial objectives. We do, however, identify a number of potential changes which might be considered as Mongolia moves to a new stage in its development.
- 2) 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 Tsets 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. 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.
- 3) 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 provide justifications for possible amendments that might be considered, should a decision to amend the Constitution pass. 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 organic law and political practice as embodied in common understandings among the main political actors.
- 4) Our specific recommendations for constitutional amendment are listed at the end of this document. We believe it is appropriate to introduce 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 overseeing the government. We suggest that

staggering presidential and parliamentary elections on a two-year cycle would be an appropriate change to consider. We also recommend changes to the scheme of local government and the jurisdiction of the Constitutional Tsets, as well as 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 a long time to come.



## I. INTRODUCTION

---

- 5) 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,"<sup>1</sup> that is, without a previous history of democracy or social pluralism, which some believe to be necessary for transition to democracy.
- 6) 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.
- 7) Mongolia's democratization has proceeded under the auspices of the 1992 Constitution. That document is now over 20 years old, which itself can be considered a great achievement, in that most national constitutions do not last so long.<sup>2</sup> 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 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.
- 8) The country has changed greatly under the new constitutional regime in the last two decades. The party system has evolved; political and governmental institutions

---

1 Steven Fish, *Mongolia: Democracy without Prerequisites*, 9 *Journal of Democracy* 127 (1998).

2 Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions* (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.

have developed; the economy has grown; and the discovery of mineral wealth has changed the economic structure dramatically. The IMF predicts that the country's GDP per capita may triple by 2018.<sup>3</sup> 45% of the population is under the age of 25, and so have no recollection of the socialist era. These changes make it an opportune time to review the performance of the constitution, to ensure its continued relevance to Mongolian society.

- 9) 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 conflicts of interest in the government and political circles, 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%, with one in four young people unemployed. Poverty rate is 27.3 per cent.<sup>4</sup> 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.
- 10) This report was commissioned by the Parliament of Mongolia and the United Nations Development Program to assess the performance of the Constitution since 1992. It is designed to contribute to discussions about possible amendments to the Constitution, but does not proceed from any specific proposal. Instead, 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.

---

3 International Monetary Fund. 2012. Mongolia. IMF Country Report No. 12/320. IMF: Washington DC. Retrieved on 29 July 2013 from <http://www.imf.org/external/pubs/ft/scr/2012/cr12320.pdf>

4 National Statistical Office, 2013

## II. OVERVIEW OF METHODOLOGY AND CRITERIA FOR EVALUATION

- 11) 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.
- 12) 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.
- 13) We recognize that constitutions have many functions.<sup>5</sup> These different functions are important to take into account in assessing performance.
- 14) 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.

### *Endurance*

- 15) 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.<sup>6</sup> 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.

<sup>5</sup> See Tom Ginsburg and Alberto Simpser, "Introduction" in *Constitutions in Authoritarian Regimes* (Cambridge 2014).

<sup>6</sup> Zachary Elkins et al, *The Endurance of National Constitutions* (Cambridge 2009).

## *Legitimacy*

- 16) 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.
- 17) 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 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*

- 18) 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.
- 19) 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.

- 20) Key to containing and managing political conflict are mechanisms to lower the stakes of electoral loss.<sup>7</sup> 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.
- 21) 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*

- 22) 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.<sup>8</sup> 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.
- 23) 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,

<sup>7</sup> See Tom Ginsburg and Aziz Huq, The Afghan Constitution at Ten: What Constitutions Can and Cannot Do, *Journal of Democracy* January 2014; Barry Weingast, Democracy and the Rule of Law, *American Political Science Review*, 1997.

<sup>8</sup> Juliane Kokott and Martin Kaspar, Ensuring Constitutional Efficacy, *Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 2012.

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).

- 24) Another measure is the level of corruption. 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*

- 25) The flip side of agency is 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.

### III. THE DRAFTING PROCESS

- 26) The 1992 Constitution was the fourth in the country's history, following those of 1924, 1940 and 1960.<sup>9</sup> The process of drafting the Constitution began in the aftermath of protests against one-party rule in December 1989. This led the ruling 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 to 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.<sup>10</sup> 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 Little (Baga) Hural, which was to be the main body enacting legislation.<sup>11</sup>
- 27) 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.
- 28) The drafting commission then engaged in wide study, including surveying constitutions of over 100 different countries. It also solicited input from the public, with some accounts saying that more than 200,000 suggestions were received.<sup>12</sup> 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

9 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 Khaan 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, p. 179.

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, p.339. 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.

11 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.

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

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.<sup>13</sup>

- 29) 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.
- 30) 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.<sup>14</sup> The May and June 1991 drafts were called Yassa, 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.
- 31) 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. 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.
- 32) 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.<sup>15</sup> The Baga Hural formally considered and adopted the draft in the fall of 1991.
- 33) 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 Ikh Tsaaz being dropped.
- 34) 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

<sup>13</sup> B.Chimid, *Complex issues around the state, party and legal reform*. Volume 1, UB., 2008, p. 16. [Mongolian]

<sup>14</sup> 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*, p.113. [Mongolian]

<sup>15</sup> Among other comments received, some noted that the government was rather weak within the constitutional scheme.



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.

- 35) 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 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.
- 36) 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.
- 37) The ideal role of participation in constitutional design has sometimes been described as resembling an hourglass.<sup>16</sup> 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 the larger 400+ member Great Hural.
- 38) The Mongolian constitutional transition was accomplished very quickly and smoothly.

16 Jon Elster, *The Optimal Design of a Constituent Assembly*, available at [http://download2.cerimes.fr/canalu/documents/cerimes/UPL55488\\_Elster.pdf](http://download2.cerimes.fr/canalu/documents/cerimes/UPL55488_Elster.pdf)

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.

- 39) 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 Section 4 below).
- 40) 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.

## IV. STATE STRUCTURE: THE SYSTEM OF GOVERNMENT

### INTRODUCTION

- 41) 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.<sup>17</sup> 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 that depends on the confidence of the parliament.<sup>18</sup> Mongolia being as a parliamentary republic is widely accepted among politicians, political analysts, lawyers and scholars. However, some scholars view Mongolia as being a semi-presidential system.<sup>19</sup> 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.
- 42) 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.
- 43) 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 presidencies 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

---

17 Jose Cheibub, Zachary Elkins and Tom Ginsburg, *Beyond Presidentialism and Parliamentarism*, *British Journal of Political Science*, 2013.

18 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, pp. 311-334; and L.Munkh-Erdene, "Who governs in Mongolia?", *UB.*, second of the series.

19 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, pp.317-326.

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.

- 44) 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, 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.

### **POLITICAL PROCESSES AFTER THE ADOPTION OF THE 1992 CONSTITUTION**

- 45) As in all countries, the Mongolian constitutional scheme has functioned differently depending on the party system. One can identify four different phases of the party system.

Phase 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 Mongolian 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.

Phase 2: "Democratic Union" 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 section). 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.

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

Phase 4: Period of “Motherland-Democracy” Coalition and Political Instability (2004-present): 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 2005, 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% 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, and again in 2013. The DP won the plurality of the seats in the parliamentary elections of 2012, establishing a coalition government.

46) At this writing, the long period of instability seems to be coming to an end.

## **RELATIONS BETWEEN PARLIAMENT AND GOVERNMENT**

47) 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.

48) Another ambiguity concerned who could serve in the government, and whether MPs would have to resign their seats to do so. During the first phase of the transition to 1992, the MPRP included sitting MPs in its cabinets, but did not require that members of government be MPs. 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 “Democratic Union” Coalition to power. Before a government could be formed,

D.Lamjav sought to prevent the Coalition from filling the cabinet with members of the State Great Hural (SGH), relying on Article 29 which stated that “members of parliament shall have no other employment.”<sup>20</sup>

- 49) 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.<sup>21</sup>
- 50) 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).
- 51) In part because of the constitutional rules on quorum, the decision had profound affects 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 resign them to take ministerial posts, which would lead to by-elections that might cause the coalition to lose its historic majority.
- 52) 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 “Democratic Union” 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 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.
- 53) 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. 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

---

20 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).

21 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 (Article 75); France (Article 23); Portugal (Article 154); Ukraine; countries in which it is allowed include Poland (Article 103; 108); the Czech Republic (Article 22); South Africa (Article 47); and Romania (Article 79)

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.

- 54) According to the procedural law of the Constitutional Court, 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 en banc 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.
- 55) 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 and allow the formation of a government that included members of the Hural, as if the controversial amendments to the Constitution had survived. 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.
- 56) Instead of issuing a formal resolution reacting to the Court 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 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 authorized itself to interpret the Constitution, which should be the exclusive job of the Constitutional Court. The SGH responded that the Tsets had no jurisdiction to hear questions of constitutionality of constitutional amendments passed with a supermajority.
- 57) On October 29, 2000, the Court 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 Court and the President.
- 58) 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 Court 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.

- 59) 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 in 2001, the amendments were approved by the president and not rejected by the Tssets.
- 60) Besides the major issue of the separation of parliament and government, the amendments of 2000 introduced several other important changes. 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. In addition, amendments to Article 27.6 required open votes in Parliament, allowing parties to exercise greater control over their members' voting. Finally, changes to Article 27.6 reduced the quorum from 51 to 39 MPs. This was designed to prevent the opposition from freezing parliament by denying a quorum, but the result was that as few as 20 MPs (less than 1/3 of total members) can effectively pass laws.
- 61) 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 Tssets suffered the embarrassment of having its decision ignored.
- 62) The amendments of 2000 are still a major political issue fourteen 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. This, some argued, hindered responsiveness, as 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.



- 63) 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. Furthermore, with a cabinet of 19 members and a SGH of 76, a government could potentially contain half the members of the majority in parliament. This is an extreme not found in other countries. As we write in 2014, the current cabinet features 17 out of 19 members who are concurrently MPs, meaning that there are only 59 other members (of which 28 are in the Democratic Party majority and coalition) who have to shoulder much of the burden of the legislative and oversight work. Furthermore, since quorum rule allows as few as twenty members to pass a bill, in theory the cabinet could pass legislation with the assistance of three other MPs. 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. 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.
- 64) It is difficult for us to assess all of these claims. But it is clear that there were major consequences for Mongolian governance. As a result of the new institutional arrangements the Prime Minister became the most powerful authority, effective at commanding the Parliament. Combined with open voting, the lowered quorum requirement – bare majority, 39 out of 76 seats – gave the prime minister sweeping power to pass any legislation except constitutional amendments. This was a strongly majoritarian system.
- 65) 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.
- 66) 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.

- 67) 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.
- 68) 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.
- 69) Given the current "mixed" system of elections in Mongolia, 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.
- 70) We also 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.
- 71) Recommendation: We recommend revising the Constitution so as to restrict MPs from serving in Government. We also recommend increasing the parliamentary quorum.

## THE STATE GREAT HURAL

### *Introduction*

- 72) The Constitution provides that the SGH is the Supreme Organ of State Power<sup>22</sup> and has the exclusive right to set the basis of all foreign and domestic policy<sup>23</sup> It thus has virtually unlimited legislative power. The language “Supreme Organ of State Power” is drawn loosely from Mongolia’s previous Constitutions.<sup>24</sup> 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.<sup>25</sup> Sometimes, as in China, these countries distinguish between state power and state administration, and this idea seems to be reflected in Art. 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.
- 73) 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.<sup>26</sup> Others argue that this concept contravenes the principle of checks and balances assumed by the doctrine of separation of powers.<sup>27</sup> Consequently, it is safe to say there is no consensus among scholars about the desirability of retaining this provision.
- 74) 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 law-making organ of the State”.<sup>28</sup> 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.”<sup>29</sup> However, because the judiciary has the explicit power to annul laws in Japan, the Diet is not actually

---

22 Article 20.

23 Article 25

24 Article 4

25 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.

26 D.Solongo, *Glossary of Definitions and Terms of State Law*, 2003, pp.139, 167 “...The highest representative body elected by the people to hold the supreme state power”.

27 N.Lundendorj, *Period of Transition: Political and Legal Issues*, 2010, pp.25-26, “Currently in Mongolia the state power is not being implemented through the separation of powers into legislative, executive and judicial power but rather the “highest organ of state power” single-handedly exercises the supreme state power”. Please see this statement in detail from the original book.

28 P.Amarjargal (trans), N.Lundendorj and J.Oyuntungalag (eds), *Constitutional Law of Japan*, Admon Publishing House, 2011, p.15.

29 Hiroyuki Hata and Go Nakagawa, *Constitutional Law of Japan*, Kluwer Law International, (1997) pp.58-59.

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.

- 75) 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.”<sup>30</sup> In short, there is a gap between the nominal status of the Diet and actual political practice in Japan.
- 76) 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-a-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.
- 77) 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 Constitutional Amendment Procedure of 2010.
- 78) 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

---

30 Hans H. Baerwald, “Parliament and Parliamentarians in Japan”, *Pacific Affairs*, Vol. 37, No.3, autumn 1964, pp.271-282, University of British Columbia.

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.

- 79) If Mongolia decides to undertake a major constitutional amendment, consideration should be given to removing the anachronistic language about the SGH 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.
- 80) 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.<sup>31</sup> Such an amendment would help ameliorate any distortions that could arise in respect to the full powers of the SGH.

#### *Parliamentary power in practice*

- 81) 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.<sup>32</sup> 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.<sup>33</sup> 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 after 45 days.<sup>34</sup> 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.
- 82) 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

---

31 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.

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

33 Article 22.1.

34 Article 22.2

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.

- 83) 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.
- 84) 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 ruled unconstitutional by the Tsets in 2007. It clearly undermines local government, as will be discussed later in Section VI. Nevertheless, the SGH continued to utilize the system 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. Although the current majority has eliminated this program from the budget since 2013, there is no guarantee that it would not be used again in the future. 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.<sup>35</sup> 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.<sup>36</sup> Normally, it is the government's responsibility to pass decisions on the allocation of budget resources as per its purposes and goals.
- 85) 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.

---

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

36 N.Lundendorj, "Tyranny of the Majority", *Mongolian Law Review* 2012 (2): 145

### *The Speaker of Parliament*

- 86) 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.<sup>37</sup> The Speaker announces and presides over SGH sessions.<sup>38</sup> Along with the President, he can convene extraordinary sessions of the SGH.<sup>39</sup> 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.<sup>40</sup> This is a further reflection of the symbolic importance of parliamentary power.
- 87) 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 Speaker submitted his resignation, the SGH accepted his request. We view this incident as a reflection of the constitutional system working very well to limit misconduct by a high public official.

### *Oversight*

- 88) The Constitution provides that the SGH has the exclusive power “to supervise the implementation of laws and other decisions of the SGH.”<sup>41</sup> This is further elaborated in Article 33 of the Law on the SGH, 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.
- 89) 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”.<sup>42</sup> Researchers have pointed to a lack of an inspection tool in parliamentary oversight, and consequently, they propose to introduce and utilize this mechanism.<sup>43</sup>
- 90) 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

37 Art. 24.1

38 Art. 27.4

39 Article 27.3

40 Article 37.

41 Article 25.8

42 D.Lundeejantsan and L.Ulziisaikhan, *Parliamentarism 2005*, p.238.

43 B.Chimid, *Improving parliamentary oversight: Maturity and development of the full-time parliament in Mongolia*, Compilation of conference presentations, 2010, p.74.



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."<sup>44</sup>

- 91) The current SGH leadership has taken its role seriously, and three out of five goals put forward by the SGH strategic plan are to improve the tools of parliamentary oversight activity, and to enhance its effectiveness. For example, it has commissioned studies on the current state of parliamentary oversight function, as a consequence of which articles were included in the strategic plan to increase the participation of NGOs and the public into SGH oversight activities, and to enhance the transparency and openness of parliamentary control.
- 92) During the SGH regular sessions from 1996-2009, 31 working groups were established by the order of the SGH Chairman, 2 working groups were 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.<sup>45</sup>
- 93) 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 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.

---

<sup>44</sup> Hansard Society, Scrutiny Committee and Pre-Legislative Scrutiny Process of The Westminster, July 2005.

<sup>45</sup> 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, pp.312-368



Table 1: Report of implementation of government tasks

Year	By SGH resolution 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 Too early to start
2010	32 resolutions, 101 articles	Completed-21 In progress -73	19 resolutions, 116 articles	Completed-49 In progress -32 Too early to start -35
2011	9 resolutions, 46 articles	In progress -46	3 resolutions, 21 articles	Implementation stage-21
2012	2 resolutions, 7 articles	In progress – 7		

The following table illustrates the data on the utilization of questionnaires, questions and information provided by the Prime Minister as tools of parliamentary oversight since 2000. It indicates gradually increasing efforts to oversee the government.

Table 2: Oversight Mechanisms

	Questionnaire	Questions		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

- 94) 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.
- 95) 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 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.

### Conclusion

- 96) 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.

## THE PRESIDENCY

### *Introduction*

- 97) 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. 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. As will be discussed below, 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.<sup>46</sup> Ultimately, it was decided that the Presidency would be directly elected by the people. Since then, there have been four occupants of the office: P.Ochirbat (1993-97); N.Bagabandi (1997-2001, 2001-2005); N.Enkhbayar (2005-2009), and Ts.Elbegdorj (2009-2013, 2013-present).
- 98) The President is the Head of State and "the embodiment of the unity of the people."<sup>47</sup> 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.<sup>48</sup>
- 99) 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.
- 100) Each president has naturally approached his office slightly differently. P.Ochirbat spoke of utilizing the informal power of the presidency, drawing on the customs and traditions of Mongolia. N.Bagabandi's presidency involved repeated rejection of governments and active use of the veto. After the 2000 amendments eliminated the president's role in government formation, N.Enkhbayar relied heavily on his power of appointing other offices, a trend that has been continued by Ts.Elbegdorj. Ts,Elbegdorj has been an active proposer of legislation, and uses appeals to the

---

46 B.Chimid, *Challenging issues surround the government, political parties and legal reform*, Vol.1, UB, 2008, p.133.

47 Article 30.1

48 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.

public to advance reform agenda. This suggests that, notwithstanding the formally nonpartisan nature of the presidency, it has been quite political and policy-oriented for much of the post-1992 history.

### *Presidential elections*

- 101) 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 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 non-partisan.
- 102) 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.
- 103) 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.
- 104) 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."<sup>49</sup>

---

49 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, p.523. [Mongolian]

- 105) 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.
- 106) 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.
- 107) 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”.<sup>50</sup> 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 the first voting as having been elected President and pass a law officially recognizing his/her mandate.<sup>51</sup> 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.

---

50 Paragraph 8 of Article 4 of the Law on the Election of the President. UB, 2012.

51 Commentary on the Constitution of Mongolia (joint publication), UB, 2009, p.154.

- 108) 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 paragraph 5 of article 31 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.”<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup>
- 109) Recommendation: Article 31.1 should be modified to clarify what is meant by two rounds.

### *The Veto Power*

- 110) 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.

*Table 3: Presidential Vetoes*

President	Vetoes	# Accepted (incl. partial)	% of successful vetoes
P.Ochirbat	7	3	42%
N.Bagabandi	15	11	73%
N.Bagabandi II	15	10	66%
N.Enkhbayar	9	7	78%
Ts.Elbegdorj I	5	4	80%
TOTAL	51	35	69%

<sup>52</sup> Commentary on the Constitution of Mongolia (joint publication), UB, 2000., p.162.

<sup>53</sup> Commentary on the Constitution of Mongolia (joint publication), UB, 2009, p.154.

<sup>54</sup> 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, p.154.

## *Appointments*

- 111) 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.
- 112) 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 Council of Courts, and appoints other judges upon nomination by the GCC. 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*

- 113) 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.<sup>55</sup> To provide only one example, while only 3 out of 28 laws proposed by President Leyn 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.
- 114) We have been unable to obtain data on the propensity of Mongolian presidents to propose legislation, or the success of those proposals. 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.
- 115) Mongolia's president is relatively weak in terms of executive lawmaking power. While Article 33.3 allows the President to issue governmental decrees, these require

---

<sup>55</sup> Sebastien Saiegh, 2011. *Ruling by Statute: How Uncertainty and Vote Buying Shape Lawmaking*. Cambridge: Cambridge University Press.

the co-signature of the Prime Minister. Article 34 allows for a broader decree power within those areas of the president's exclusive competence.

#### *Other Powers*

- 116) 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.
- 117) 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, Paragraph 2 of Article 31 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 Paragraph 1 of article 35 provides, "The President shall be responsible to the State Great Hural".<sup>56</sup> In addition, 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*

- 118) 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.
- 119) 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 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.

---

<sup>56</sup> 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.

### *Terms and Stability of the Government*

120) Since the adoption of the new Constitution, 11 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 4. 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 Miegomb	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 – present	Altankhuyag Norov	DP (coalition: MPRP, CWP, and MNDP)

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

121) Article 40 and paragraph 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 5. 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 wins 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 force initiated the resignation.
4	J.Narantsatsralt	8 months	Political opposition initiated the resignation.
5	R.Amarjargal	1 year	Parliamentary mandate expires and a new government is formed (opposition wins the election.)
6	N.Enkhbayar	4 years and 1 month	Parliamentary mandate expires and a new government is 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	At the time of this writing terms of the full powers were continuing.	

122) 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.<sup>57</sup> 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.<sup>58</sup> 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.<sup>59</sup> 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.

<sup>57</sup> Acting Prime Ministers were not included in the averages.

<sup>58</sup> Strom, Muller and Bergman 2010. Cabinets and Coalition Bargaining: The Democratic Life Cycle in Western Europe

<sup>59</sup> 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.

## *The Core Structure of the Government*

- 123) 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.
- 124) 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 6. Changes to the core structure of the government, by year*

Organization/Year	1992	1996	2000	2004	2008	2012
Ministry	16	9	11	13	11	16
Government Regulatory Agency	-	22	17	14	12	11
Government Implementing Agency	-	37	31	23	31	17
Total number of agencies	-	59	48	37	43	28

- 125) 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.<sup>60</sup> 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

<sup>60</sup> 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.

unpopular things, it was still ministers who got the blame from the media and the public) <sup>61</sup>.

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

### *Conclusion*

- 127) 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.
- 128) 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.<sup>62</sup> 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.

---

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

62 Bouckaert G. (2009:101) *Public Administration Reform in Eastern and Central Europe*.

## ELECTIONS, PARTIES, AND POLITICAL CYCLES

### *Introduction*

- 129) 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 for individual candidates nominated by their parties, while the remaining 28 seats are 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, however, in order to gain a seat a political party must get 5% of the total national vote, which might be a difficult threshold for a small party to achieve. In 2012, the Civil Will-Green Party met the threshold and won two seats on the party list.
- 130) 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 Mongolia. Since then, Mongolia has seen an intensive process of parties being created, merging, partitioning, and restructuring. Currently 22 parties are officially registered with the Supreme Court, and these represent a range of social groups upholding different views. Indeed, in the period 2011-2012 alone, five parties were newly registered, continuing a pattern whereby many new parties emerge prior to elections. 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.<sup>63</sup> 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*

- 131) 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

---

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

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.

132) 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 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*

133) Voter turnout in elections has been relatively high, but has declined over the period of the Constitution's operation (see Tables 7 and 8). For example, in the 2008 Parliamentary elections 74% 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 7: SGH Election Voter Turnout*

<b>Year</b>	<b>% of registered voters</b>	<b>% of voting population</b>
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%

*Source: International IDEA, available at <http://www.idea.int/vt/countryview.cfm?CountryCode=MN>*

Table 8: Presidential Election Voter Turnout

Year	% of registered voters	% 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%	79.04%

Source: International IDEA, available at <http://www.idea.int/vt/countryview.cfm?CountryCode=MN>

### Right to Vote

- 134) 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 implies a very wide meaning, further elaborated in Article 16.9 granting the right to participate in government, to vote and stand for election.
- 135) Electoral issues are frequently regulated in constitutions. One of us has undertaken a study of 42 states, which vary in terms of development level, location, size and population. 64 38 out of 42 selected states have legally fixed the principle of electoral right in their Constitutions as well 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. There seems to be a trend toward greater regulation of the electoral rules in constitutions, for obvious reasons: leaving these issues in the hands of the ordinary political process risks manipulation of the rules.
- 136) The Constitution's stipulation that citizens shall implement their electoral right 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.
- 137) 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

64 Study by D.Solongo in 2011 at the request of the Parliamentary Standing Committee on State Structure.

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% of votes and 72 out of 76 seats, while the DP received 13.35% of the votes but only 1 seat; the MDNSP received 10.95% of the vote and 1 seat; the CWP, 3.45% and 1 seat; and independent candidates, 2.92% and 1 seat. All other parties combined received a total of 15.97% of the vote with no seats. In these elections, the votes of 190 thousand electors, or 16% 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.<sup>65</sup>

- 138) Seat-to-vote bias continues.<sup>66</sup> 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 – 1.396625 votes and 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. In 2008, with support from the Konrad Adenauer Foundation, the Voter Education Center produced an analysis of Mongolian elections under alternative voting schemes and found significant seat-to-vote bias in the system. In none of the alternative scenarios did the electoral bias meet the actual level found in the 2000 elections. It was largely because of these concerns that Mongolian elections law has been changed for the 2012 elections to include a proportional representation component. But there continue to be problems of rural bias, as the capital city's share of the population has expanded significantly relative to the number of seats it elects.
- 139) Finally, 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.

---

65 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.

66 This is usually calculated as the sum of divergences between parties' shares of votes and their seats, divided by the number of parties. See generally 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.

### *Discussions of indirect presidential election*

- 140) 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.
- 141) 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.
- 142) 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.
- 143) 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.
- 144) 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%, 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.
- 145) 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 majority party in 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.<sup>67</sup> 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.

### *Direct Democracy*

- 146) 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.
- 147) 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.
- 148) 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.
- 149) 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.

---

67 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).

## OVERALL ASSESSMENT OF STATE STRUCTURE

- 150) 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 SGH, 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.
- 151) 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.<sup>68</sup> However, others are critical about the dominance of the majority.<sup>69</sup> 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 for ensuring political stability.
- 152) Some prominent scholars see in this some evidence of collusion among major parties, and attributes it to the parliamentary dominance of the system. It 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.
- 153) 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.

---

68 David Sneath, “Constructing Socialist and Post-Socialist Identities in Mongolia”, pp. 147-164 in *Mongolians After Socialism: Politics, Economy, Religion* (eds. Bruce M. Knauft and Richard Taupier. Ulaanbaatar: Admon Press.2012) p. 155.

69 N Lundendorj, “Tyranny of the Majority”, *Mongolian Law Review* 2012 (2): 141-50

- 154) 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.<sup>70</sup> 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.
- 155) 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, as will be described in section X. The 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.
- 156) 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.

---

<sup>70</sup> 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

## V. ACCOUNTABILITY: IMMUNITIES

### INTRODUCTION

- 157) 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 favour 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.<sup>71</sup>
- 158) 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, prosecutors, among others.<sup>72</sup> As a signatory to the United Nations Convention against Corruption, Mongolia is under an obligation to balance these immunities with the need to investigate and deter corruption.<sup>73</sup> This treaty was ratified in 2006 and therefore is binding in the domestic legal order.
- 159) 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."<sup>74</sup> Frequently, law enforcement organizations have requested the SGH a suspension of

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

72 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.

73 Article 30. 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.

74 Para 261 of the same report.

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. 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.

- 160) 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.

## **ROLE OF THE TSETS**

- 161) 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.
- 162) 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. 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.
- 163) 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 full 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.
- 164) 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.
- 165) 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.<sup>75</sup> 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.

- 166) 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.
- 167) 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.

## **SGH SUSPENSION OF MEMBERS**

- 168) Immunities of SGH Members was originally regulated in accordance with the provisions of the Law on the Legal Status of the Member of the SGH, which was adopted on 6 February, 1997.<sup>76</sup> Article 13.2 of the Law provides that under certain cases, including when Members are, "1) arrested according to provisions of Article 10, paragraph 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.
- 169) With the adoption of the Law on the SGH 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

---

<sup>75</sup> "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"

<sup>76</sup> This law was abolished when the Law on State Great Hural was adopted on 26 January 2006.

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.<sup>77</sup> The law further states that, "The competent authority shall immediately inform the Chairman of the SGH within 3 hours of arresting the Member of the SGH".<sup>78</sup>

- 170) 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 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 SGH 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.
- 171) 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 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.
- 172) 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.<sup>79</sup> Therefore,

---

77 Article 6.9 and 6.9.10

78 Article 6.10

79 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.

Members of the SGH continue to enjoy immunity even if they are suspected of crime, without the ability of the law enforcement bodies to investigate them, and this most likely to persist well into the future.

## COMPARATIVE ANALYSIS

- 173) It should be pointed out that this practice by the SGH conflicts with the provisions of some 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.<sup>80</sup>
- 174) 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 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.
- 175) 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 US immunity it 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.
- 176) 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

---

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

80 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.



privileges, but could even undermine legitimacy by creating a misunderstanding that legislative bodies are places to hide criminal actions.

- 177) 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.

## VI. LOCAL GOVERNMENT

### INTRODUCTION

178) Local government can receive its authority 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 divisions, their units and the system of local government is one of the fundamental issues of the Constitution and the state structure. When the transition began in 1990, Mongolia inherited the administrative units set up to suit the economic management arrangements during the socialist period, with centralized state management exercised through the People's Deputies' Hural and their executives and party structures present in soums and rayons. The system was fully dependent from the centre and based on the principle of democratic socialist 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 administrative and territorial units and their governance in Mongolia.

### THE DRAFTING PROCESS

- 179) A separate chapter on "Administrative and Territorial Units of Mongolia and Their Governance" in the version of the Ikh Tsaaz submitted by the Constitutional Drafting Commission to Baga Hural proposed that the territory of Mongolia shall be administratively divided into aimags (provinces) and a capital city; the capital city be divided into horoos (municipal sub-districts); and for rural areas aimags be divided into hoshuns and baghs (sub-districts).<sup>81</sup> 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, hoshun 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.
- 180) The draft constitution paved the way for introduction of a flexible system, combining the principles of both self-government and central government, by altering the centralized system of governance in administrative units and by aiming to transform it into self-governing administrative, territorial, economic and social entities having their own functions and administrations. By organizing the administrative units into a complex, the draft constitution further pursued a goal of creating a legal entity with full powers enjoying their own functions for the first time in Mongolian history.

---

81 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 some research institutes and persons, related to the location of nationalities and ethnic groups as well as the environmental and climatic conditions.

However, in the discussion of the draft in the Baga Hural it was pointed out the economic and psychological preconditions for integrated organization of aimags was lacking in the short term. At this juncture in the debate, the specific names of aimags were deleted, and the change the mechanism of selecting governors was changed to appointment from the central government.

- 181) 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" of the draft constitution assumed quite a prominent place in the overall discussion of the draft. Legislators focused their main attention on 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, long debate ensued around the reasons for proposing hoshuns instead of soums and the types of changes such an arrangement would entail.<sup>82</sup> However, there is no necessity to create a stir immediately after adoption of the Constitution. While the draft at that time spoke of hoshuns rather than soum, the idea is that as the country overcame the economic crisis and attains more strength the issue of hoshun will be gradually decided by law. The Baga Hural accepted these explanations.
- 182) At the conclusion of these discussions the deputies participated in the 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 was related to inclusion of a provision on the legal status of "city" into the Constitution. Despite being a hotly contested issue, which even led some to threaten a boycott of the session, the draft proposal remained unaffected. No major changes were made to the regulation of the local government, and the current provisions were adopted.
- 183) 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-organization of the administrative units was completed, and the first general election for the local self-governing bodies was conducted in the autumn of 1992.

## **CURRENT SYSTEM**

- 184) As finally adopted, the system of territorial division 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 as an 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 that in the capital city

---

<sup>82</sup> 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 hoshuns were established, which later under the Manchu era increased up to 89, and in 1930s due to the systemic distortion the number of hoshuns swelled up to 128. Soums had been created by Manchu Khans, where one soum was established 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.

rayons were renamed as “districts” and “horoos” were created. There are 21 aimags, divided into 330 soums and 1575 baghs; the capital city is divided into 9 districts and 135 horoos.

- 185) While territorial structure has been relatively stable, the system of government in the 1992 Constitution is completely different from the prior scheme. As Article 59 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; 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 executive officials are responsible to the higher levels of government, but legislative bodies do not supervise those below them. Executive officials can veto decisions of the respective hurals, but can be over-ridden.<sup>83</sup>
- 186) The law on Administrative and Territorial Units and their Governance contains comprehensive regulations on the operation and structure of local authorities established to manage the territorial units and their respective self-governing bodies.<sup>84</sup> It defines local self-government as “a body composed of freely elected members and an executive arm reporting to it; and the real legal ability to independently manage economic and social issues of a given territory in the interests of citizens and within the limits of the law”.
- 187) Several problems arise from the 1992 scheme of local governance. Article 57.3 of the Constitution states that “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 criticisms, 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.<sup>85</sup> In addition, a number of initiatives by the Government to amalgamate the economically unviable soums fell victim to deadlock.<sup>86</sup> According to the 2010 Population and Housing Census, out of 330 soums, 62.9 percent have a population of less than 3,000, and 30.4 percent have less than 2,000 residents. Meanwhile, the population of Ulaanbaatar has increased by a factor 2.4 compared with 1990, with almost half of the country’s population (1,318,100) living in the capital city.<sup>87</sup> In such a circumstance, there is a need for some

---

83 Article 61.

84 An amendment to the law was approved on 15 December 2006 by the SGH.

85 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.

86 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 Altaic, Khangain, Tuvin and Dornodyn. The new administrative and territorial division would include 68 hoshuns, 329 soums and 26 cities. According to this concept, apart from restoring the traditional administrative subdivision “hoshun” of 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.

87 Statistical Office of UB municipality. In 1990, the population of Ulaanbaatar was 560,600 constituting 26.7% of the population, in 2013 it reached 1,318,100 and 46%. <http://www.ubstat.mn/StatTable=11>

flexibility regarding local boundaries. 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. 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.”

- 188) The drafters of the Constitution reserved “city” status for Ulaanbaatar only. But as time has gone on, the secondary cities of the country have also grown a good deal and required distinct administrative organization from their surrounding soums. It would be advisable to have a category for cities other than the capital city, as a government system designed for primarily rural areas may not be appropriate for urban problems. 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, Darkhan, Choir and Erdenet cities shall have the same administrative and territorial arrangements with 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, the SGH defined the status of rural settlements only, thus failing to fulfill the obligation set by the Appendix that has a constitutional nature. Therefore, despite the lapse of time, the SGH ought to implement this provision for defining the legal status of cities, which was passed over 20 years ago. In addition, attention should be given to the fact that some aimag soum centers now also have urban problems, and an appropriate regulatory structure should be identified.
- 189) The current system may create needless duplication and top-heavy governance. For example, each district in Ulaanbaatar has its own hural, but the functioning and purpose of these hurals is not well understood. It is possible they could be eliminated or consolidated, but as currently drafted, such a change might require constitutional reform. 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.
- 190) When implementing decentralization reforms in the 1990s, many transition countries left the issue of how many government levels should exist at which geographic levels to historical accident rather than based on economic design aimed at creating the optimal structure of local governments.<sup>88</sup> While many developed countries have implemented reforms aimed at enlarging administrative and territorial units in the past 20 years, the reforms implemented in Eastern European countries, namely in Poland, Czech, Hungary aiming at breaking away from the central control resulted in fragmentation of government system through creating many small administrative

---

<sup>88</sup> Jamie Boex, Jorge Martínez-Vázquez, Andrey Timofeev, 2004. Subnational Government Structure and Intergovernmental Fiscal Relations: An overlooked Dimension of Decentralization, Andrew Young School of Policy Studies, the Georgia State University, Working Paper 04-01.

units. The negative consequence was these small units are unable to implement legally defined functions.<sup>89</sup> This situation seems to be similar in Mongolia.

## THE SYSTEM OF CHECKS AND BALANCES

- 191) Strongly influencing the quality of local decision-making are the checks and balances between the executive and legislative bodies, and the clear separation of powers among them. The relationship between and the relative weight of the local executive and local council establishes how local decisions are made. There are three common models of executive-legislative relations at the local level. The first is the “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. The second is the “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. The third model is that of “council-manager”, in which the council appoints and contracts with a politically neutral administrator to run and manage the city. Although the manager is accountable to the council, he or she is expected to be free to manage local government administration without interference, while also having freedom in the recruitment of personnel.<sup>90</sup>
- 192) The 1992 constitutional choice does not reflect any of the above models. Instead, 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. 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”.
- 193) On the other hand, the Constitution does not specify in any way which matters come under the jurisdiction of local self-governing bodies. Instead, this was left to the Law on Administrative and Territorial Units and their Governance. Article 3 of this Law lists the competencies of Hural and at first glance seems quite detailed. On closer examination, however, this is not the case. Many of the competencies concern the right of Hurals to make decisions about how to organize themselves while others simply state that Hurals can discuss certain matters, approve programs developed elsewhere, or provide advice to the governor.

---

<sup>89</sup> Michal Illner, 1998. Territorial Decentralization: An Obstacle to Democratic Reform in Central and Eastern Europe? in Jonathan D. Kimball (ed.), *The transfer of power. Decentralization in Central and Eastern Europe*. Budapest: Local Government and Public Service Reform Initiative. For example, in the Czech Republic, the number of municipalities increased by 51% during 1989-1993 and reached 6196 by January 1993; in Hungary, the number increased from 1,607 prior to the reform to 3,108 in 1993. In Hungary, settlements were completely free to form a self-government authority if they so decided. As a result, more than one half of the total number of municipalities had less than 1,000 inhabitants. In Poland, the number of municipalities has remained stable with 2452 units in 1993 compared to 2375 units in 1975 and the size of municipalities was larger, compared with the other two countries.

<sup>90</sup> World Bank, 2008, *Local Government Discretion and Accountability: A Diagnostic Framework for Local Governance*, Local Governance & Accountability Series, Paper No.113/July 2008

- 194) Article 60.3 provides Hural with the power of over-turning the veto decisions of governors, after which the governor may resign. 62.2 states that "Authorities of higher instance shall not take decisions on matters coming under the jurisdiction of local self-governing bodies." Both of these points are obviously intended to ensure that local governments have some real power. On the one hand, it is hard to see how they can really use these powers when they know that the Governor's primary responsibility is to represent the interests of the national government, and that even if they encourage the current governor to resign, the next one must also be approved by higher-level state representatives. Similarly, it is hard to see why local hurals would risk entering into serious conflicts with their governors when they are the state representatives with the greatest chance of leveraging resources from the center and improving the overall circumstances of the jurisdiction.<sup>91</sup>
- 195) In a democracy, the job of government is to make decisions about things that cannot be produced through market mechanisms, such as environmental protection, infrastructure, and public facilities. In principle these decisions should be located with the government units that have the best information about the relevant preferences of citizens. For local matters, this would be local government. The role of local hurals in the Mongolian scheme is to gather local views, but decisions can be heavily influenced by the centrally appointed executive who ultimately controls fiscal resources. Furthermore, the central government controls the appointment of heads of agencies at the local level. In some sense the elected bodies end up with relatively little power in this scheme. All this creates an undesirable gap between power and responsibility.
- 196) An important factor in local accountability is election laws and electoral systems; the law on political parties and political party structures. Electoral systems change the incentives of elected local leaders and voters during and between elections. An electoral system may favour big parties, thus exclude certain groups, or strengthen the internal party power hierarchy. Thus the electoral system plays an important role in local representation.<sup>92</sup>
- 197) The good news is that local elections are hotly contested, and both major political camps have been able to secure representation. This marks an evolution from the first elections of the democratic era, in which the MPRP dominated the countryside. But the insertion of partisan networks into local elections has led to an exacerbation of social conflict in some instances. The use of the same electoral system at both the national and local levels creates significant problems because the smaller size of the local bodies does not easily work with proportional representation seats. It is well known that, in smaller legislative bodies, proportional representation becomes less fine-grained as a reflection of popular will; the choice of the remainder rule can make all the difference between one party winning and losing the majority in the local hurals. Small size creates another problem too: there may be very small soums that are dominated by one or two families, which can result in nepotism.

---

91 Tony Levitas, 2008 Re-thinking state-local relations in Mongolia today, a study report prepared at the request of UNDP.

92 World Bank, 2008, Local Government Discretion and Accountability: A Diagnostic Framework for Local Governance, Local Governance & Accountability Series, Paper No.113/July 2008

- 198) Partisanship has caused some problems at the local level. For example, in an aimag hural is entitled to nominate a governor of its 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 happened in the past and there is no guarantee that it will not happen in the future.<sup>93</sup> Article 60.3 of the Constitution simply provides that in such an instance, the process starts over again. This can lead to deadlock, and there are a number of local government units that lacked governors for a long time because of this problem. While we lack systematic data, we believe it is a serious problem with the current scheme that needs to be addressed.
- 199) Because power and responsibility are not aligned, accountability channels have been confused. This was particularly true during the period when MPs were able to directly spend public funds in their own districts. Local hurals and governors must make decisions on local matters without any influence over the additional resources controlled by MPs. This introduces a problem of rent-seeking in which the local government must coordinate with MPs about what projects will be supported, and each seeks to offload costs onto the other while maximizing their own political support. The scheme reinforced tendencies toward government based on patronage networks rather than policies.

## **FUNCTIONAL ASSIGNMENT**

- 200) The Constitution and the Law on Administrative and Territorial Units and Their Governance has 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 amount of services provided by the municipal governments have greatly increased. There is a need to carefully study this issue in order to assign distinctive powers and function based on considering the demographic, social and economic changes.
- 201) Another problem is that the aimag and soum administrations duplicate each other's powers, and so can issue contradictory decisions. Article 62.2 provides that higher level bodies cannot interfere with self-governing bodies at lower levels. Since both aimag and soum bodies are self-governing then it is not obvious that the higher level body should actually win in the event of conflict. While specifying the optimal division of labor 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.

## **INDEPENDENCE OF LOCAL GOVERNMENTS**

- 202) Article 58.1 defines that "Aimags, the capital city, soums and districts are administrative, territorial, economic and social complexes with their functions and administrations

---

93 Prime minister M.Enkhsaikhan declined a candidate nominated by the MPRP dominated CRH of the capital city.



provided by law". It is argued that this provision provides a constitutional guarantee for local governments.<sup>94</sup> However, the definition of "economic and social complex" has not been clear. A classic notion of "local government" or main features of the classical model of devolved local government is defined as follows:<sup>95</sup> 1) It should be a local body that is constitutionally separate from central government and responsible for a range of significant local services; 2) it should have its own treasury, budget and accounts along with substantial authority to raise its own revenue; 3) it should employ its own competent staff who it can hire, fire and promote; 4) a majority-elected council, operating on party lines, should decide policy and determine internal procedures; 5) central government administrators should serve purely as external advisors and inspectors and have no role within the local authority. From this, it can be noted that Mongolian local governments do not enjoy powers on indicators 2 and 3 and are only partly empowered on the indicator 5.

203) We note that there has been various attempts tinker with the scheme of local government under the 1992 Constitution. In the early 1990s, there was an attempt at decentralization that was halted with the adoption of the Public Sector Management and Finance Law of 2002. This law recentralized public expenditure, so that the percentage of GDP spent by the local public sector declined from 13.6% in 2002 to 3.4% in 2003.<sup>96</sup> This led to continued complaints from local authorities. In late 2011, the Parliament enacted a new Budget Law that establishes a Local Development Fund which allocates specific revenues back to local governments, allocated on a universal formula based on population, location, local revenue generation, and poverty. The local hurals have been given significant resources to allocate, along with systems to enhance management. This is considered to be a major restructuring of local governance in Mongolia, and involves significant emphasis on local consultation and participation in the formation of policy.

## CONCLUSIONS

204) If part of the rationale in 1992 for adopting mixed scheme of central and local appointment was that the rural areas lacked the economic and human basis for self-government, this no longer seems to be the case for many areas of the country. Mineral wealth has created an economic boom in some regions. Furthermore, it has brought a number of specifically local problems which might be best addressed through local articulation of needs. The system of Local Development Funds is a major and welcome restructuring in this regard, though it is too early for us to assess its implementation.

205) Many of the problems identified above, and in other reports on local governance, could be addressed through statutory and administrative changes. For example, one could have a different electoral system more appropriate to the size of the hurals to be elected. One might be able to limit partisanship by simply saying that local citizens

94 B. Chimid, 2006, Today's politics in the eyes of a lawyer, p. 108

95 Mawhood, 1987, p.12 in Turner & Hulme, *Governance, Administration, & Development: Making the State Work*, 1997, p.160

96 UNDP Mongolia: Sector Analysis: Local Representative Bodies in Mongolia, 2012.

nominate local candidates, without allowing national parties to do so. Parties might still exist at the local level, but they would be more organic.

*206) Recommendations:*

- A. We believe that the system of top-down appointment of local governors should now be modified to allow for locally elected executives.
- B. 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.
- C. We believe that Article 57.3 should be revised to refer to consultation with respective hural and local population.
- D. Finally, a constitutional category of "city" should be created to recognize that some areas outside Ulaanbaatar deserve that designation.

## VII. JUDICIARY, TSETS AND OVERSIGHT

### CONSTITUTIONAL COURT – TSETS

#### *Introduction*

207) Mongolia's early constitutions did not establish any organ of constitutional supervision or any similar mechanism of constitutional control. In keeping with socialist legal theory, the procurator played the main role in controlling government behavior. In practice, the procurator played only a limited role in constitutional supervision, for three reasons: first, the procurator only had jurisdiction over deputy ministers and heads of the agencies but not higher officials; second, the prosecutor could not accuse a member of the MPRP of a crime without permission from the Party; and third, the prosecutor could reveal breaches of law but not make a decision about them. All this meant that constitutional supervision was ineffective in earlier periods of Mongolian history. 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 never put into place.

#### *The Drafting Process*

208) During the drafting of the 1992 Constitution, the drafters considered various models of constitutional supervision 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.<sup>97</sup>

209) 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 control, drawing largely on the Austrian model. The main reason that the drafters decided to adopt the model of concentrated judicial review was because of the bitter experience of having a totalitarian regime that regularly abused and disregarded its own constitutions. The lack of a tradition of judicial review, combined with the struggle to cast aside historical baggage of authoritarianism, made the establishment of an independent constitutional court in Mongolia a natural choice.<sup>98</sup> And giving this task to the ordinary judges was not very attractive given that the Mongolian judiciary was typical of that found in civil law countries.

---

<sup>97</sup> This model was set forth in the Constitution of France in 1958, but has since 2008 come to resemble the Austrian-German model in that the council can hear challenges to legislation after promulgation.

<sup>98</sup> 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 an American model of judicial review: it has now a constitutional supervision chamber in the Supreme Court.

- 210) 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.
- 211) For all these reasons, the concentrated 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 Ikh Tsaaz shall have a right to resolve the disputes related to the Ikh Tsaaz”.
- 212) 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 law; 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.
- 213) The draft of the Baga Hural provided in Article 48 that “the judicial system shall consist of the Ikh Tsaaz Tsets, the Supreme Court, aimag and capital city courts, khoshuu and khoroo courts. Specialized courts such as criminal, civil and administrative courts may be formed.”
- 214) The second draft of Ikh 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. 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 Ikh Tsaaz; would provide official interpretations for correct application of Ikh Tsaaz and serve as a guarantee for its observance; could on its own initiate a dispute on breach of the Ikh 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.

- 215) 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 Ikh Tsaaz was revised to read "the Tsets on own shall initiate disputes on breach of the Law on Ikh 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% of votes of members of the People's Great Hural.

### *Institutional Design*

- 216) 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.
- 217) 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.
- 218) 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.
- 219) 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. This law was amended with the passage of a new Law on Decision of Disputes in Constitutional Tsets in 1997. Articles 11, 13-21 of the Law on Constitutional Tsets were omitted by the Law of May 1, 1997, and Section 3 of Article 1 of the Law on Constitutional Tsets was amended as follows, "Disputes concerning the breach of the Constitution shall be settled under the Law

on Decision of Disputes in Constitutional Tsets.” At this writing, new drafts of these two laws, produced by the Tsets, are circulating among politicians.

220) Right now the right to petition is restricted to cases of abstract review, which means that a citizen can address the Tsets on issues not immediately related to himself or herself, if he or she asserts a violation of the Constitution by a legal act or by an official stated in the law. The Constitutional Tsets is not able to restore individual basic rights which have been violated in concrete cases. To be sure, some bodies can make complaints to the Tsets which might implicate rights protection: the National Human Rights Commission, the President of Mongolia, the SGH, a member of the Government, the Chief Justice, and the General Prosecutor shall have a right to submit to the Constitutional Tsets request on breaches of the provision of the Constitution, and can do so based on human rights complaints of citizens.<sup>99</sup> Still, the jurisdiction of the Tsets does not match that of other constitutional courts around the world, which typically have the ability to redress basic rights in particular cases.<sup>100</sup> Furthermore, Article 50.2 stipulates that the Supreme Court provides the “final judicial decision.” This has been interpreted to mean that the Tsets has no jurisdiction over Supreme Court cases. This means that citizens’ rights might potentially be violated by the courts without redress.

#### *Dispute Resolution at the Tsets*

221) 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 matter in question is not a dispute which breaches the Constitution or does not fall within its jurisdiction, the Tsets passes it to the relevant legal organization.

222) Between its establishment in July 1992 and December 31, 2012, the Tsets received a total of 1635 petitions, information, and requests. Most of these were petitions from the public. The Tsets received 9 requests: one from the General Prosecutor, 6 from the Supreme Court, and 2 from the President. During this time, the Tsets examined and resolved 145 disputes, which fall into two major categories: whether a legal act breached the Constitution (123 disputes or 92.5 percent); and whether a high official breached the Constitution (10 disputes or 7.5 percent). Of disputes concerning whether a legal act is in breach of the Constitution, 101 disputes (or 76 %) concerned whether a provision of law was in breach with the Constitution; 8 (or 6%) were related to the provisions of resolutions of the SGH; 10 (or 7.5%) were about government regulations; 2 (or 1.5 %) were about decrees of the President; and 2 (or 1.5 %) were whether the decisions of the High Election Commission was in breach with the Constitution.

---

<sup>99</sup> National Human Rights Action Programme of Mongolia, approved by the SGH resolution #41, 24 October 2003.

<sup>100</sup> Ts. Sarantuya, Basic rights-courts-Constitutional Court, “Mongolian State and Law”, 2001, #2, pages 1-10; Ts. Sarantuya, Basic Rights and Human Rights: Comparison and Theoretical Thinking, “Law” theory, practice, methodology and information series, 2000, #1, pages 18-24.

223) The Tssets adopted 133 conclusions, 71 (or 53.4%) of which found a breach of the Constitution. The SGH accepted 24 conclusions (or 33.8%), rejected 41 (or 57.7%) conclusions, and did not pass a resolution on 2 conclusions (2.8%). (Information on others was unavailable.) The Tssets made a final decision on 45 disputes. The following table presents the number of Tssets decisions in each year that were initially rejected and the result of the final decision by Tssets.

*Table 6: Tssets Conclusions and Reactions of the SGH*

	All 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	-
Total	133	62	71	24

224) Altogether, the Tssets 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) violated 29 times; equity before the law and the court (Article 14 of the Constitution) violated 16 times; basic principles of the state activity (Article 1) violated 12 times; legal status of a member of the parliament (Article 29 of the Constitution) violated 11 times; and, application of international law (Article 10), conformity of laws, regulations, resolutions and actions to the Constitution (Article 70), and independence of judges (Article 49) violated 7 times respectively. Among the laws found not to be in conformity with the Constitution were are tax laws (16 times), laws on parliament' composition, organization and activity etc. (14 times), election laws (9 times), and the Law on Criminal Procedure (9 times).

### *Relations with the Parliament*

- 225) 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.
- 226) 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.<sup>101</sup>
- 227) On the other hand, as Table 6 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.
- 228) The practice has been that the Tsets appoints an MP to serve as a confidential representative at the full bench hearing of the Tsets. These representatives tend to try 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 winning or losing. 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.
- 229) According to the law, the SGH should not restore in any way a provision previously invalidated by the final decision made by the Constitutional Court (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 the section 2 of Article 94 of the Law on Civil Procedure; however a provision similar to the abolished one appeared in the Section 4 of Article 50 of the Law on Criminal Procedure. Also, the Constitutional Tsets in conclusion 2 of 2002 abolished section 2 of Article 17 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.
- 230) According to the appointment provisions of the Constitution, members of the Tsets are nominated by the SGH, the President, and the Supreme Court, each selecting

---

101 See Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, New York: Cambridge University Press, 2012.



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.

- 231) There are some positive indications lately that the relationship between the SGH and the Tsets is improving; however, the Tsets should be protected from any encroachments on its power and prestige.
- 232) Recommendations: A Constitutional Court has become a nearly universal feature of democratic governments around the world. These courts are seen as enhancing the protection of the human rights and freedoms, and there is no reason that the Constitutional Tsets should be different.<sup>102</sup> We recommend granting citizens a right to submit petitions to the Tsets on the ground that their fundamental rights were infringed in concrete cases. This would occur after exhaustion of remedies before the ordinary court process, and so will require clarification of the relationship with the Supreme Court to ensure that Tsets decisions are effective in all cases. The finality of Supreme Court decisions under Art. 50.2 would have to be limited to cases not involving fundamental rights. SGH consideration of such decisions affecting individuals should not be allowed. We also recommend that the resolution of the SGH that divided the members of the Tsets into “non-staff members” and “staff-members” should be annulled, so that all members will serve full time. We note that any changes here may be able to be accomplished by revision of the Tsets Law or Tsets Procedure Law rather than a constitutional amendment.
- 233) Another possible amendment to consider is to eliminate the power of the SGH to reject Tsets conclusions. This would enhance the separation of powers. At a minimum, the Constitution could clarify the role of SGH silence. Perhaps the SGH should be deemed to have accepted any conclusion which it does not actively reject. This would force the SGH to be clear about the basis of its disagreement with the constitutional Tsets.

## **COURTS & THE GENERAL COUNCIL**

### *Introduction*

- 234) Mongolia’s judiciary is to be independent, and a crucial guarantor of this is the General Council of Courts (GCC) created for the first time under the Constitution.<sup>103</sup>

<sup>102</sup> N Jantsan “Human rights and judiciary power”, report. [Mongolian]

<sup>103</sup> Article 49 of the Constitution of Mongolia provides, 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

This was part of a global trend toward judicial councils as devices to manage and insulate the judiciary. As in many other countries, the initial version of the judicial structure, including court administration and the GCC, 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 investigation. 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 GCC. The statute was subject to major revisions in 2002.<sup>104</sup> Besides legislative amendments, the Tssets has issued a number of rulings related to the Law on Courts. A major set of judicial reforms to enhance judicial quality and independence was adopted by the SGH in 2012-13, promoted by the Ministry of Justice and the President.<sup>105</sup> Their entry into force on 15 April 2013 marks a new era for the Mongolian legal system.

### *General Council*

235) In 1993, the GCC was set up, and for the first decade it was the site of intense politics 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 Council of Courts shall be the Cabinet Member in charge of legal affairs.”<sup>106</sup> 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 GCC had a strong voice in budgetary discussions within the Government. In 2002, however, the Law on Courts was revised again to provide that the Chief Justice would be the Chairman.<sup>107</sup> 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 official was deemed as inappropriate to chair the GCC. This view was supported by an opinion from the National Security Council.

236) One can divide the history of the GCC into three different developmental stages.<sup>108</sup> The first stage was one of institutional establishment. During this period, which lasted from 1993 to 1998, the GCC launched its operations, introduced internal

---

for guaranteeing the independence of the judiciary”; and 5. “The structure and procedures of the General Council of Courts shall be defined by law”.

104 Law on the Courts adopted on 4 July, 2002

105 These included the Law on the Courts dated 7 March, 2012, the Law on the Legal Status of Judges dated 7 March, 2012, the Law on the Legal Status of Lawyers dated 7 March, 2012, the Law on Court Administration dated 22 May, 2012, the Law on the Legal Status of Citizens’ Representatives in Courts dated 22 May, 2012, and the Law on the Mediation dated 22 May, 2012.

106 Law dated 26 July, 1996. State Gazette, issue no.8, 1996, p.458.

107 State Gazette, issue no.29, 2002, p.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 GCC being an ex officio body. The 2002 version removed the phrase “as provided in Constitution”.

108 On developmental periods see N.Ganbayar, Opening Speech delivered at the Conference “General Council of Courts: Today and Tomorrow” organized on the occasion of the tenth anniversary of the GCC. 2003 [Mongolian]; Ch.Ganbat, Speech on “The General Council of Courts as the Guarantor of Judicial Independence” discussed during the Conference “General Council of Courts: 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].

operational procedures, provided for adequate staff resources in the financial and human resources departments, and articulated its goals. During the second stage, lasting until 2012, the GCC worked to deepen the judicial reforms in light of the overall reforms in the legal sector of the country.<sup>109</sup> 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.

- 237) Article 51.4 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 continued corruption allegations.<sup>110</sup>
- 238) Court administration was covered as a section within the initial Law on Courts of 1993. 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 the Courts of 2002. In 2012, a new Law on Court Administration was passed, covering the GCC and other aspects of judicial administration. It has been expanded through amendments, and covers issues such as GCC reporting, who shall appoint the Chairman of the GCC and the appointment procedures, the possibility for renewal of appointments, their ranking, salary, and benefits, and conditions for secondment to another position for a valid reason without decreasing their salaries.
- 239) 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 GCC increased the vacant positions for judges of the Supreme Court of Mongolia,<sup>111</sup> 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.

### *Legal Process*

- 240) 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 centers 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.

<sup>109</sup> 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".

<sup>110</sup> As of April 2013, a total of 47 judges have been removed from office for serious ethical breaches.

<sup>111</sup> Previously, there were 17 judges at the Supreme Court, now increased to 25 judges.

- 241) 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.
- 242) 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."
- 243) 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. (In addition, a professional inspection agency was set up in 1995.) 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*

- 244) 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, the former chairman of 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.

245) Beyond the regular legal institutions, the independent investigative agencies have some role to play in advancing the constitutional goal of reducing agency costs. The Independent Authority Against Corruption (IAAC), established by statute in 2006, has some investigative authority over eight categories of offense, but must send cases to the prosecutor for prosecution. The IAAC also has a statutory mission to promote awareness of corruption and manage asset declaration by public officials. As of December 2013, the IAAC has investigated a total of 1083 criminal offences involving 2344 individuals. Out of these, 285 (26.3%) cases have been prosecuted, 235 cases (21.7%) were dropped, and 44 cases (4%) were suspended, while 232 cases (21.3%) are under investigation. Statistics indicate that only about 10% of cases sent for prosecution by the IAAC result in conviction, and that the most common offense investigated is bribery.<sup>112</sup> While a complete assessment is beyond the scope of the present study, there are several sub constitutional level reforms that might enhance the effectiveness of the IAAC.

---

112 Report by the IAAC, 14 December 2013.

## VIII. HUMAN RIGHTS AND INTERNATIONAL LAW

### INTERNATIONAL LAW

246) The Constitution provides a mechanism for concluding international agreements, in which the President concludes international treaties in consultation with the SGH.<sup>113</sup> The SGH has the power to ratify treaties.<sup>114</sup> Article 10 of the Constitution requires Mongolia, as a matter of constitutional obligation, to implement its treaty obligations in good faith. Furthermore, Art. 16.14 gives citizens the right to appeal to court for violations of treaty rights. Hence the international obligations have some constitutional standing. Mongolia has a “dualist” system, in which international agreements require ratification in order to enter the domestic legal order, and no treaty may conflict with the Constitution.<sup>115</sup> Art. 10.4 says that Mongolia may not abide by treaties that are incompatible with the Constitution.<sup>116</sup> The Tssets has the power to review treaties for conformity with the Constitution, and can render the treaty invalid in the domestic legal order if it finds a violation, though there have been no cases to date.<sup>117</sup>

### HUMAN RIGHTS

247) From the beginning of the transition process, Mongolia’s leaders adopted the language of human rights, and took steps to enshrine human rights in law. The country has joined around 30 international human rights treaties, including the major multilateral treaties. In addition, Mongolia’s constitution guarantees a large number fundamental rights and freedoms including civil, political, economic, social, cultural rights and third-generation rights such as the right to healthy and safe environment. Many of these are found in Article 16.

248) Mongolia established in 2001, an organization which monitors the implementation human rights and freedoms stated in the Constitution and other laws of Mongolia and international human rights treaties, and protects and promotes human rights, has become a sustainable institution. The National Human Rights Action Programme was adopted by the SGH in 2003 and a National Programme Committee, responsible for coordination and monitoring of implementation was established under the Prime Minister with representation from the state and non-state organizations and the private sector.<sup>118</sup> It also established a Parliamentary Sub-committee on human rights with an oversight role.

---

113 Article 33.1.4

114 Article 25.1.15

115 Article 10.3 & 10.4.

116 This provision was inserted into the constitutional discussion by the Baga Hural, in part in recollection of an early 20<sup>th</sup> century Treaty compromising Mongolia’s aspirations for independence.

117 Article 66.2.1; Article 66.4.

118 Resolution #41 of the SGH, 24 October 2003. The Ministry of Justice and Home Affairs conduct the programme evaluation in 2011, the report was discussed at the Cabinet meeting of 6 March 2011 and presented to the SGH.

249) We have not undertaken a comprehensive independent assessment of human rights in Mongolia for purposes of this report; such assessments have been conducted both by the National Human Rights Commission and the United Nations Human Rights Council in its Universal Periodic Review of 2010. The overall picture is one in which there has been dramatic improvement from the past, but there are continuing areas of concern, including criminal procedure and social and economic rights of the poorest citizens. We discuss several areas that are crucial from a constitutional perspective, and then summarize other areas more briefly.

### *Freedom of Religion*

250) Religious life has thrived since 1992. Mongolia's Buddhist temples have seen a great expansion, and are more vital than any period since the 1920s. While Buddhist symbols are sometimes used in public ceremonies, there is no favorable tax or other treatment for the dominant religion, and an early decision of the Constitutional Tsets limited the state in this regard. Shamanist traditions have also revived. Islam and Hinduism also continue to be practiced. In addition, according to some estimates, there may be as many as 100,000 Christians in Mongolia, including Catholics, various Protestant groups, and the Church of Jesus Christ of Latter Day Saints. There are no reports of discrimination against any of these faiths.

### *Minority Rights*

251) One important lens through which to evaluate constitutional performance is the integration of ethnic minorities. The constitutional drafting discussions included some debate about the rights of "national minorities" and some provisions were excluded on the ground that they might affect the national minorities.<sup>119</sup> Article 8 provides that notwithstanding the status of Mongolian as an official language, minorities will have the right "to use their native languages in education and communication and in the pursuit of cultural, artistic and scientific activities." There have been no reports of discrimination against the Kazakh minority concentrated in Western Mongolia, and there are Kazakh members within all the major political parties. Indeed, this integration is an important legacy of the Socialist period. It is worth recalling the important role of K.Zardykhan in Mongolia's democratic transition, as he had issued calls for reform within the MPRP as early as 1988, and subsequently became Deputy Chairman of the Baga Hural. Some scholars have criticized particular terms associated with Western Mongolia,<sup>120</sup> but this does not seem to be a major issue in the public imagination.

252) Locality seems to be a more salient dimension of identity for Mongols than ethnicity per say. The rise of *nutgyn zүvүлүл*, or local homeland councils, in the 1990s is one bit of evidence here. But this has not turned into a major source of discrimination among Mongolians. However, it is worth noting that Mongolia does have a strain of anti-foreign nationalism, which some believe is on the rise.

---

<sup>119</sup> For instance, a candidate for the President of Mongolia shall be three-generations native Mongol.

<sup>120</sup> B.Bat-Amgalaan. 2012. The False Term "Baga Yastan": Human Rights and Cultural Discrimination in Mongolia in *Mongolians After Socialism: Politics, Economy, Religion* (eds. Bruce M. Knauff and Richard Taupier. Ulaanbaatar: Admon Press. 165-72.

### *Freedom of assembly and the freedom of the press*

253) These rights are essential to the quality of constitutional democracy. Freedom of assembly has been generally protected, and there have been periodic protests of a peaceful nature throughout the reform period. The freedom of the press has also been generally protected, although a recent report of several non-governmental organizations noted some areas of concern.<sup>121</sup> The report criticized the Communications Regulatory Commission, established in 2001, as seeking to excessively regulate the media market in Mongolia. It also noted that Art. 16.17 of the Constitution protects the right to “seek and receive information” but does not include a right to “impart” information, as is found in many other countries and in Article 19 of the Universal Declaration of Human Right. In addition, as in many post-socialist countries, libel laws have been used to pressure journalists and defend the powerful from criticism. Criminal penalties for libel should be eliminated to enhance freedom of the press.

### *Universal Periodic Review*

254) The November 2010 Universal Periodic Review identified a number of areas in which Mongolia could improve its performance. The recommendations consisted of a number focused on women’s rights, including the protection of women from gender-based violence, domestic violence, and sexual exploitation; the adoption of a law on gender equality, improved employment and social welfare measures for women; combating discrimination against women in both the public and private sectors; and promoting greater women’s participation at the highest levels of decision-making. It also made recommendations on the rights of the child, torture, human trafficking, rights of the disabled and sexual minorities, and several other areas.

255) Mongolia has generally responded to the Universal Periodic Review and other reports on human rights in a positive way. It passed a law on gender equality in February 2011; a law on human trafficking in January 2012; ratified the Second Optional Protocol to the International Covenant on Civil and Political Rights (prohibiting the death penalty), and is in the process of a major revision of both the Criminal Code and the Criminal Procedure Code. It also instituted a moratorium on implementation of the death penalty pending revisions to the relevant substantive and procedural laws.

256) Social rights. The recommendations include the need for educational programs promoting greater inclusiveness in classrooms for students with disabilities, ensuring access to health care, adequate housing, education and safe drinking water and sanitation for all, especially people living in ger districts, measures to fight against dropping out of school, particularly among boys, and strengthening efforts to combat malnutrition and diseases such as tuberculosis.

257) Protection Mechanism: Consistent with our recommendation above, the Universal Periodic Review advises Mongolia to provide a mandate to the Constitutional Court

---

<sup>121</sup> Globe International Center, Press Institute, Mongolian Journalists Association, and Transparency Fund, *Assessment of Media Development in Mongolia* (based on UNESCO/IPDC’S Media Development Indicators), 2013.



to act upon violations of the individual rights and freedoms guaranteed under the Constitution. This possibility should also help to remedy violations of the land and environmental rights of indigenous and herder peoples, including the right to safe drinking water.

- 258) Recommendation: Art. 16.1 could be reformed to reflect the actual state of affairs: that the death penalty is not applied. As it is now, the substantive criminal law still has some crimes for which the sentence may be death. And while the death penalty is not allowed by virtue of second optional protocol, it is still being used allegedly. The Supreme Court could apply the provision about superiority of international treaties along with the principle that reductions in punishments are retroactively applied. But this has not yet been done.
- 259) Art. 14.2 is a non-discrimination clause, which applies to all persons, preventing discrimination “on the basis of ethnic origin, language, race, age, sex, social origin or status, property, occupation or post, religion, opinion, or education.” A recent trend in constitutional drafting is to include an open-ended category “or other basis” at the end of such lists, so as to allow the courts to update the clause to keep pace with social changes. For example, sexual orientation is now a protected category in many countries, but it was not twenty years ago. Similarly disability was not an explicitly protected category in the Constitution. An open-ended clause “or other basis” will ensure that the principle of equality evolves with the times.
- 260) Another suggested addition is to introduce a right to fair administrative action. As Mongolia’s economy becomes more sophisticated, the importance of state regulation is continuing to grow, as does the risk of administrative abuse by government officials. Several countries have adopted rights to fair administrative action in recent years, beginning with South Africa in 1996. The 2010 Constitution of Kenya, for example, provides that “Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”<sup>122</sup> It goes on to say that citizens must be given written reasons for adverse administrative action, and given the chance to appeal to a court. Many of these issues are being dealt with at the sub constitutional level in Mongolia through reforms to administrative law. However, a constitutional right would facilitate greater protection of these rights, which are important for both human rights and economic freedoms.

## IX. EMERGENCY POWERS & NATIONAL SECURITY

### EMERGENCY

- 261) The violence around the 2008 parliamentary elections, in which five died and hundreds were injured in riots, was surely a dark spot in the life of the Constitution. It led to the first and only state of emergency in Mongolian history. From a constitutional perspective, the system survived this major challenge. The state of emergency was declared in conformity with the constitution. The National Security Council was consulted. Constitutional rules were followed, and security officers involved in the violence were disciplined. A parliamentary investigation committee examined evidence and issued a report. And a national unity government was created, even though the MPRP had enough seats to form a government on its own.
- 262) This reaction to the crisis compares well with other countries. In Turkey in the summer of 2013, for example, Prime Minister Erdogan responded to peaceful demonstrations about a park with excessive force. This led to at least 11 deaths and over 8000 injuries, many of them serious. As a result, his own legitimacy has suffered. In Mongolia, in contrast, the government continued to operate, and became more inclusive not less so. The election of Ts. Elbegdorj as President the following year showed that the opposition was able to compete effectively in the aftermath of the election. In short, emergency powers were not abused in Mongolia.

### NATIONAL SECURITY

- 263) Article 25.1.10 states that the State Great Hural determines the structure, composition and powers of the National Security Council (NSC) of Mongolia. According to Article 33.1.10, the President enjoys the prerogative right to head the NSC. Article 38.2.6 of Constitution states that the Government exercises power to strengthen the country's defence capabilities and to ensure national security.
- 264) The Law on the National Security Council of Mongolia was adopted by the Baga Hural in 1992. That Law provides that the NSC is a state consultative organ to ensure national security and the consistency of state policy through integrated coordination. The law sets out the structure of the NSC to include the President, the Speaker of the Parliament, the Prime Minister; and to be headed by the President.<sup>123</sup> The NSC work is based on the National Security Concept<sup>124</sup> approved by the Parliament of Mongolia. The Law on the NSC defines the functions and powers of the Council. The powers of the NSC include: reviewing and issuing conclusions regarding the implementation of the National Security Concept and relevant legislative acts; issuing guidance on extraordinary matters related to national security; scrutiny over the acts of relevant state authorities and issuing recommendations; obtaining information

<sup>123</sup> Article 5, Law on National Security Council

<sup>124</sup> Parliament decree # 48 on National Security Concept, 2010

and data; funding strategic research and studies related to national interests; and other authorities as approved by the Parliament.

- 265) The Law on National Security (2001) specifies the national security structure, principles of operation, and roles of organizations and individuals in ensuring the national security. According to this Law, the Parliament is to oversee the enforcement of the law and the NSC is to oversee the implementation of the national security policy and its coordination.<sup>125</sup>
- 266) The NSC played a major role during the crisis of 2008, in keeping with its purpose. Fortunately, due to the peaceful situation Mongolia finds itself in, without major conflicts with its neighbours, it has not played a major role in other periods. There is some opinion, however, that the NSC meetings have provided a useful forum for the major political figures to meet from time to time. This may contribute informally to the functioning of the political system, particularly during periods of divided government. We see no reason to change any of the provisions on national security or emergency powers at this time.

---

125 Article 15.1.2, Law on National Security

## X. THE CONSTITUTION AND THE ECONOMY

### *Introduction*

- 267) As a general matter, the connections between constitutions and the economy are very general. 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 such as the system of government and the electoral system have been argued by some to make a difference.<sup>126</sup>
- 268) The Constitution enshrines its economic principles in Article 5, which promises a kind of mixed economy: “Mongolia shall have an economy based on different forms of property and in accordance with both universal trends of world economic development and specific national characteristics.” Private property is to be respected and livestock is noted to be a “national asset.” Further, the state has a duty to regulate toward “ensuring the nation’s economic security, the development of all sectors of the economy and the social development of the population.” Article 6 regulates land use, and prohibits the sale of land to foreigners.
- 269) It is not clear how much these constitutional principles have informed Mongolian regulatory policy. But surely the property rights system has been developed, as have the basic institutions of the market economy. In 2002, the Law on Privatization of Land was adopted. Several other pieces of relevant legislation have been adopted, including the Land Law of 1994, the Law on Specially Protected Areas of 1994, the Law on Nature and Environmental Protection in 1995, and the Law on Environment Impact Assessment of 1998. Each of these laws has an impact on the operation of the system.
- 270) Under the Privatization Law, urban Mongolians could be granted a one-time allocation of land. Some farmers felt that the scheme was discriminatory, as it allowed urban residents to benefit from privatization while farmers were not given full property rights but only rights of possession.<sup>127</sup> This led to a major movement in 2002 around the passage of the Privatization Law. Farmers, invoking among other things the equality clause in Article 14.2, launched a major demonstration, bringing tractors to Ulaanbaatar. While the demonstrations were broken up, they led, eventually to modifications of the relevant laws. In addition, the protest movement was an example of the ability of Mongolians to exercise their right to peaceful protest.
- 271) There remains some confusion about the nature of various forms of property rights, and the meaning of the guarantee of equal status. Sub constitutional laws are essential in this regard. As the country becomes wealthier, the value of property increases, as do incentives to fight about it.

126 Persson and Tabellini, *The Economic Effects of Constitutions*. MIT Press, 2003.

127 *Reforms in Land Policy in Mongolia and Farmers’ Struggle for Access to Land*, Center for Human Rights and Development, Mongolia

## *Inequality and Growth*

- 272) 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.<sup>128</sup> These concerns, however, have been exacerbated by the mining boom.
- 273) 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.<sup>129</sup> But public spending in parliamentary systems is also broader; in presidential systems, it tends to be directed to politically influential minorities.
- 274) 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.<sup>130</sup> Kunicova and Rose-Ackerman (2005) show that proportional representation (PR) systems are more susceptible to corrupt political rent seeking than are majoritarian systems.<sup>131</sup> In particular, the combination of PR and presidentialism seems to encourage corrupt rent-seeking.

## *Natural Resources & Economic Development*

- 275) 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 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. A growing trend is the articulation of environmental rights, such as provided in Article 16 of the Constitution.<sup>132</sup>
- 276) In terms of what can be owned and by whom, Article 6.1 of the Constitution provides that natural resources are subject to state protection and national sovereignty. 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."<sup>133</sup> Thus the Constitution retains the subsoil for state

---

128 David Sneath, "Constructing Socialist and Post-Socialist Identities in Mongolia", pp. 147-164 in *Mongolians After Socialism: Politics, Economy, Religion* (eds. Bruce M. Knauft and Richard Taupier. Ulaanbaatar: Admon Press.2012), p. 158.

129 See T. Persson, G. Roland and G. Tabellini. (1997), *Separation of Powers and Political Accountability*, *Quarterly Journal of Economics* 112, pp. 1163.1202. T.Persson, G.Roland and G.Tabellini (2000), *Comparative Politics and Public Finance*, *Journal of Political Economy* 108, pp. 1121.1141. T.Persson, T. (2002), *Do Political Institutions Shape Economic Policy?* *Econometrica* 70, pp. 883.905. T. Persson, and G. Tabellini (2000), *Political Economics: Explaining Economic Policy*, Cambridge MA, MIT Press. T.Persson, and G.Tabellini (2003), *The Economic Effects of Constitutions*, MIT Press, Cambridge MA.

130 J.Gerring and S.C.Thacker (2004), *Political Institutions and Corruption: The Role of Unitarism and Parliamentarism*, *British Journal of Political Science* 34, pp. 295.330.

131 J.Kunicova and S.Rose-Ackerman (2005), *Electoral Rules and Constitutional Structures as Constraints on Corruption*. *British Journal of Political Science* 35, pp. 573.606.

132 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*, Article 10, provisions 71-74.

133 Article 6.2

ownership and management. Land can be leased to foreigners, but not sold. These provisions retaining state ownership are consistent with those in many states.<sup>134</sup>

- 277) In terms of who is the regulator, the national Government is obligated to undertake measures for environmental protection and ensure rational use of natural resources, as per Article 38.2.4. There is no explicit provision in Chapter Four that local government has any role in this process, although local hurals are allowed to make decisions over matters that are important to local socio-economic life. This has led some local governments to assert regulatory powers, leading to policy incoherence. Still, the national government and the SGH are clearly the main regulators of resource exploitation. Whether or not to seek consultation with local actors or the public seems to be within their discretion.
- 278) The Constitution is silent of 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.
- 279) 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.
- 280) The literature in this area suggests that good institutions can make all the difference between success and failure in managing natural resources.<sup>135</sup> 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.
- 281) 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.

---

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

135 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)

- 282) One recent article has argued that parliamentary systems are less susceptible to the resource curse than are presidential systems.<sup>136</sup> 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.
- 283) One idea in the literature is that the resource curse can be avoided by guaranteeing each citizen a share of the profits.<sup>137</sup> While there is no constitutional requirement to share revenues, the Mongolian Government set up a Human Development Fund in 2009 to hand out a portion of mining profits as cash to the population. The comparative literature on the effect of cash handouts is mixed, but some analysts suggest that they need not lead to labor market distortions, so long as they are guaranteed to all and do not substitute for other social programs.<sup>138</sup>
- 284) Another idea from the academic literature is to constitutionalize some sort of sovereign wealth fund, in which revenues from resource exploitation are set aside for future generations. The idea of a sovereign wealth fund involves a transfer from current citizens to future citizens. The Fiscal Stability Law of 2010 established the Fiscal Stabilization Fund with a target of reaching 5 per cent of GDP annually. While it is beyond the scope of the present study to assess the performance and implementation of this Fund, our view is that the very passage of the Law indicates that constitutionalization is not necessary and this issue can be addressed at a sub constitutional level.
- 285) Resource nationalism has led to erratic policy toward foreign investment. In 2012, the Government passed amendments to the foreign investment law to require parliamentary approval over large mining projects, particularly those involving foreign government investment. After nearly two decades of a policy quite open to foreign investment, this was viewed as significant shift. This shift in policy was prompted by the potential sale of interests in the Ovoot Tolgoi coal deposit to Chalco, the Chinese Government mining enterprise, which became an issue in the 2012 parliamentary elections. Similarly, Rio Tinto has announced a halt in construction work at Oyu Tolgoi in reaction to a dispute about royalties.
- 286) The Government has sought to portray itself as generally open to private foreign investment, even as it has renegotiated major projects to ensure more benefit for the local economy.<sup>139</sup> While the instability may have developmental implications because of negative impact on foreign investment flows, it surely reflects a degree

---

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

137 Xavier Sala-i-Martin and Arvind Subramanian, *Addressing the Natural Resource Curse: An Illustration from Nigeria*, NBER Working Paper No. 9804, June 2003

138 Moran, note 136 above, at 4.

139 Oliver Backes, *China at the Gates: China’s Impact on Mongolian Natural Resource and Investment Policy*, *Center for Strategic and International Studies* May 6, 2013.

of responsiveness of the political system to underlying preferences of the population, and so from a constitutional point of view must be viewed in a somewhat positive light. The requirement of parliamentary oversight of major contracts is found in other countries, and may have some advantages over review by insulated technocrats in that it makes decision-making quite public, even if it increases the chances for populist missteps.<sup>140</sup>

287) While it is not our task to provide an assessment of any particular government decision with regard to resources or investors, our view is that on balance, Mongolia's democracy has performed fairly well relative to other countries dealing with natural resources. This is in part attributable to the success of the constitutional regime in facilitating a transition to democracy. In Mongolia, there has been a good deal of public scrutiny of major natural resource projects, and perhaps excessive demands for immediate handouts even before the major mining operations have been fully set up. This is surely populism, but populism is better than appropriation by a small group. In Russia, in contrast, a relatively small group of oligarchs and bureaucrats have been able to control the resource revenues.

---

140 For example, Azerbaijan. See International Monetary Fund (June 2005), *Guide on Resource Revenue Transparency*.



## XI. AMENDMENT

---

### *Introduction*

- 288) 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 to the common interests of the society, it acts as one of the guarantors of the country's sustainable development. In order to achieve these goals, the Constitution must provide stability. 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.<sup>141</sup>
- 289) 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 social demands, and to find an appropriate balance between such a demand and the need to reform. 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.
- 290) As Dr. B.Chimid said, "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 programme, 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)."<sup>142</sup> We believe that this is the best approach to any constitutional amendment.

---

141 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.

142 B.Chimid, *Worshipping the Constitution*, Ulaanbaatar, 2006: pp.112-113.

291) 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, in France and Italy, it is prohibited to amend constitutional articles on 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.<sup>143</sup> 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.

*Historical experiences with amendment in Mongolia*

292) 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<sup>144</sup> and 1940<sup>145</sup>, 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 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. During 32 years of the 1960 Constitution 6 out of 16 constitutional amendments were made following the decree by the Presidium of the People's Great Hural. 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.

293) Therefore, 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 Constitutional Amendment passed in 2010. Amendments require of all members of the SGH, or 57 out of 76 members. Article 68.1 provides that any organization with legislative initiative may initiate an amendment proposal, but the Tsets can also propose amendments.

294) The Law on the Procedures for Amending the Constitution, adopted in December 2010, provides further procedural detail on amendment, but also stipulates that

---

143 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.

144 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".

145 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;...".

many articles of the Constitution are not subject to amendment.<sup>146</sup> It says that amended articles may not be re-amended for a period of eight years.<sup>147</sup> The President may not propose extending his term or expanding his powers.<sup>148</sup> The Law also introduces what appears to be a new requirement that the President and Government must approve any draft amendments.<sup>149</sup> This requirement does not appear in the Constitution itself. The Law also provides extensive detail on the parliamentary procedure for considering amendments, as well as the mechanism for calling a national referendum in accordance with Article 68.2 of the Constitution.<sup>150</sup>

- 295) The importance of this Law is related to its acknowledgement that because the constitutional amendment depending on the relations of the political forces in power could result in negative outcome these revisions should not represent and protect the interests of any political party, group, and social class,<sup>151</sup> as well as its harnessing of arbitrary constitutional amendments, and the provisions of strict observance and the necessity on the strengthening of the following guarantees that are directed towards ensuring political stability. However, the reaction is perhaps too strict, as it makes the constitution overly rigid.
- 296) 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 only to 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.<sup>152</sup>
- 297) Recommendations: We believe that the SGH should evaluate the current set of amendment proposals without regard to the Law on Constitutional Amendments. If need be, that Law should be modified if the SGH thinks that it prevents the adoption of a comprehensive set of reforms for Mongolia. The present moment provides an opportunity for such a comprehensive review.

---

146 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.

147 Article 3.3

148 Article 7.1.2; 8.1.1

149 Article 10.1.3

150 Article 17.1

151 Article 5.4.2 of the Law on the Constitutional Amendment Procedure, issue No.3 of the State Gazette, 2011 p.672.

152 During the discussion of the Draft Ikh 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 be opened." This proposition was accepted by other Members of the Baga Hural.

## XII. CONCLUSION

---

- 298) 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.
- 299) Endurance: Mongolia's Constitution has endured for more than 20 years. 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.
- 300) 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.
- 301) 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.
- 302) 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 SGH 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.

- 303) We also believe that the current system reflects an unnecessary concentration of power in a single institution, the SGH. Restoring the separation of powers will enhance accountability and improve policy delivery.
- 304) 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.
- 305) 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.<sup>153</sup> Internationally, Mongolia moved up from 120th in the world in 2011 to 94th in 2012 and 83 in 2013.<sup>154</sup> This survey evidence should not be taken as indicating that the corruption problem is in any way resolved. After all, in November 2012, 60% of Mongolian survey respondents believe that corruption has increased in the past three years, and 67% believe that it is a common practice.<sup>155</sup> 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.
- 306) 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.<sup>156</sup> 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.

153 Survey on Perceptions and Knowledge of Corruption, March 2013.

154 Transparency International Surveys.

155 Id at p. 6.

156 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

- 307) Success in its initial period does not mean that the Constitution should remain unchanged. A series of modifications to the Constitution 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.
- 308) 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 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.

### **XIII. 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 core 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 SGH quorum from 51 to 39 MPs. This meant that as few as 19 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 SGH 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. Even if this change is impossible, Article 25 might be modified to remove the term “exclusive” in describing SGH competencies.
- 4) 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.
- 5) Art 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.
- 6) 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 SGH practice of voting on requests for suspending immunity in Article 29.3.

- 7) 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.
- 8) We believe that the system of top-down appointment of local governors should be replaced by directly elected system. We also see great merit in making local elections non-partisan; the latter could be done without modifying the constitution, but simply by changing relevant electoral laws.
- 9) We recommend that Art. 57.3 be modified 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."
- 10) A constitutional category of "city" should be created to recognize that some areas outside Ulaanbaatar deserve that designation. In general, there ought to be less constitutional rigidity with regard to local government structure so that flexible solutions can be found to changing needs.
- 11) 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.
- 12) Art. 16.1 should be reformed to reflect that the death penalty is prohibited in Mongolia. This is consistent with Mongolia's international obligations under the Optional Protocol to the International Covenant on Civil and Political Rights. The non-discrimination clause in Art. 14.2 should be revised to include an "other" category. There should be a right to fair administrative action.
- 13) We recommend reducing the number of articles protected by the Law on Constitutional Amendments.





Published by "Munkhiin Useg" LLC  
Tel: 319658, 320807, 321316  
Web site: [www.munkhiin-useg.mn](http://www.munkhiin-useg.mn)