



Towards Better Protection of Fundamental Rights in Mongolia: Constitutional Review and Interpretation

Munkhsaikhan Odonkhuu

*Nagoya University
CALE Books 4*

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This book is dedicated to my parents, Odonkhuu Tsevegmed and Myagmar Ochirjav.

Foreword

This is a publication based on the doctoral dissertation submitted by Munkhsaikhan Odonkhuu to the Graduate School of Law of Nagoya University, and also includes the later development by his research at the University of Washington School of Law and George Washington University Law School.

Several countries in Asia and Eastern Europe established constitutional courts and other mechanisms for human rights protections when they were heading towards a transition to constitutional democracy after the collapse or transformation of the authoritarian regimes. Therefore some people say that we could talk about the formation of the “The Rise of Global Constitutionalism” (Bruce Ackerman). In this historical context, it is natural for legal researchers, particularly constitutional scholars, of the transitional countries have interests in the institutional designs and operations of constitutional courts in Europe and judicial reviews in the United States. For improving their constitutional review, it will be helpful to study the institutional designs and operations of the constitutional courts or judicial reviews in the advanced legal regime

While the German automobiles could run at high speed on the Mongolian steppes, the German style constitutional court could not necessarily function as well. “Importation” of a political institution is more complicated than importing automobiles. I have a very high opinion of Munkhsaikhan’s research because of his efforts to look into the constitutional principles and thoughts underlying the institution of constitutional court and its operations. The most challenging aspect of his research findings is the importance of methodology in constitutional interpretation. However, his efforts did not bring him to a conclusion at that point. Because Munkhsaikhan promoted Professor Ronald Dwokin’s method of constitutional interpretation well appraised in the context of the American system of judicial review, a difficult question therefore emerged as to whether Dwokin’s theory could be equally applicable for the

Constitutional Court (*Tsets*) of Mongolia, which was characterized as being modelled after the German Constitutional Court. Munkhsaikhan confronted this tough challenge head-on and he has convinced us with a certain level of success in this endeavor.

This book is the result of Munkhsaikhan's intensive work for the development of constitutional democracy in Mongolia, based on his own way of presenting difficult questions, to be followed by intensive search and in-depth comprehension of a great variety of existing literatures and serious deliberations. I am therefore confident that this book will be quite useful for the development of constitutional democracy in Mongolia. At the same time, it also includes the reexamination of the European and American constitutional theories and legal philosophy from the perspective of a transitional country. As a result, the work herein will surely be offering some very important insights to scholars of the advanced constitutional democracies as well.

Munkhsaikhan is an excellent and highly capable researcher with a very enthusiastic academic commitment. Now I remember many of our academic conversations with delight. But what has impressed me most was his excellent sense of humanity. In the aftermath of the large-scale earthquake in Japan on March 11 of 2011, Munkhsaikhan engaged himself in fundraising activities for the victims. Having really believed in the ideal of "judicial protection of human rights", i.e., to be the genuine constitutionalist, one should be always ready to give a helping hand to the suffering neighbors. Munkhsaikhan has indeed taught me this truth. So I want to say that Munkhsaikhan is my "teacher" in thinking about how to act as a constitutionalist.

As a constitutional scholar who believes in the value of constitutionalism, it is my great pleasure to see the research of Munkhsaikhan being published in the CALE Book series to be accessible to readers who are interested in the development and consolidation of constitutional democracy in the transitional countries.

February 2014

Koji AIKYO

Professor of Law

Graduate School of Law, Nagoya University

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I could not have written this book without encouragements and supports of many people and institutions. I am grateful to the Japanese people and their government for the scholarship that I received during my master's and doctoral programs at Nagoya University and my visiting scholar program at University of Washington. Nagoya University Graduate School of Law provided me with excellent facilities such as a rich library and a convenient study room. I owe a huge debt of gratitude to my academic supervisor, Prof. Aikyo Koji, for kindly advising, supporting and encouraging me during the whole research, tirelessly reading and commenting my drafts. I wish to thank my sub-supervisors, Prof. Moto Hidenori and Prof. Okochi Minori, as well as Prof. R. Paul Lege and Prof. Teilee Koung for their constructive feedbacks. Comments by these professors provoked many significant revisions. The errors and omissions that remain are only mine.

I would like to address my acknowledgements to National University of Mongolia School of Law. I am very thankful to Prof. Lundendorj N. who encouraged me to study abroad and always supported me. I am grateful to Prof. Chimid B., Justice Prof. Sarantuya Ts. and Minister of Justice Temuujin Kh. for teaching me constitutional law when I was an undergraduate.

I would like to express my profound gratitude to the Constitutional *Tsets* of Mongolia. Chief Justice Prof. Amarsanaa J., Senior Advisor Byambajav J. (former justice) and Secretary Bolortungalag N. explained to me the daily works of the *Tsets* and allowed me to use the court library. Special thanks to Prof. Morigiwa Yasutomo for generously teaching me moral and political philosophies, and Prof. Okuda Saori for her invaluable assistances. I am deeply grateful to Prof. Chimid B., Prof. Byambaa J. (former justice), Prof. Narangerel S., Prof. Solongo D., Prof. Sugiura Kazutaka, Prof. Obata Kaoru, Prof. Herbert Kupper, Prof. Jorg Polakiewicz, Dr. Kovacs Krisztina, and

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I continued my research and improved the draft of my book as a visiting scholar for eight months at University of Washington School of Law. Thanks to this program, I also visited the U.S. Supreme Court, met Prof. Ronald Dworkin and other professors, and used valuable materials at the Library of Congress and the Center for East Asian Studies at Eastern Washington University. I would like to express my gratitude to the Center for Asian Legal Exchange (CALE) at Nagoya University and the Asian Law Center at University of Washington for all of these opportunities. I am very glad that the CALE funded the publication of this book, my doctoral dissertation improved at University of Washington. Prof. Aikyo Koji, Prof. Nakamura Masaki and Ms. Mayumi Ota always supported and encouraged me throughout the entire program. Prof. Jon Eddy, Prof. Dana Reigrodski, Prof. Clark B. Lombardi and Ms. Jennifer Simpson were very hospitable to me. I enjoyed and learned a lot from discussions in my workshop at University of Washington and from the meetings with Prof. Jamie Mayerfeld, Prof. Ronald Moore, Prof. Robert Gomulkiewicz, Prof. Stewart Jay, and Prof. Ronald Collins. I am also thankful to Prof. Susan Karamanian for allowing me to work on my research at George Washington University Law School in Washington, D.C.

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Abbreviations and Shortened Titles

1990 Amendment	the 1990 Law on Constitutional Amendment
Act XXXII of 1989	Act XXXII of 1989 on the Constitutional Court of Hungary
Art.	Article of a Constitution or a law
Const.	The Constitution
ECHR	the European Court of Human Rights
European Convention	the European Convention of Human Rights (1950)
Framer	a member of constituent assembly (the <i>SSKh</i> or the <i>PGKh</i>)
ICCPR	the International Covenant on Civil and Political Rights (1966)
ICESCR	the International Covenant on Economic, Social and Cultural Rights (1966)
LRSCM	the Law on the Relationship between the State and the Church-Monastery
LATUGB	the Law on Administrative and Territorial Units and their Governing Bodies
Mon.	Mongolia or Mongolian
MPR	the Mongolian People's Republic
MPRP	the Mongolian People's Revolutionary Party
<i>PGKh</i>	the People's Great <i>Khural</i> , the constituent assembly that adopted the 1992 Constitution of Mongolia
Soviet Committee	the Committee of the Constitutional Supervision of the USSR
<i>SGKh</i>	the State Great <i>Khural</i> (the Parliament of Mongolia)
<i>SGKh</i> Procedure	the <i>SGKh</i> Resolution on the Parliamentary Procedure
<i>SSKh</i>	the State Small <i>Khural</i> , the standing parliament that discussed the draft Constitution and submitted it to the <i>PGKh</i> ,
<i>Tsets</i>	the Constitutional Court of Mongolia
UDHR	the Universal Declaration of Human Rights (1948)

Introduction

Constitutional democracy became a world-wide-movement after WW II. Eastern and Central European countries and some other former socialist countries joined this movement after the collapse of the Soviet Union. The Mongolian people also completed a peaceful transition from socialism to constitutional democracy in 1990. In 1992, Mongolia adopted its first liberal Constitution, which established a parliamentary democracy, guaranteed fundamental rights and imposed limits on public powers. This Constitution instituted a constitutional court called the Constitutional *Tsets* (*Tsets*).

The *Tsets* exercises constitutional review, the power to strike down decisions of institutions such as the legislature, the President, and the government when these decisions are contrary to the Constitution.¹ The *Tsets*' decisions on constitutional matters directly influence the lives of citizens and politics because they are final and enforced accordingly. In 1992-2011, the *Tsets* found constitutional violations in more than 50 percent of its decisions. This court made 130 decisions,² 64 (49.2 %) of which struck down laws and other acts as unconstitutional, and six (4.6 %) of which found constitutional violations by the President, the prime minister, the chairperson of the State Great *Khural* (the *SGKh*) or a MP. 81 (62.3 %) of 130 decisions were related to constitutional rights, and 37 of them struck down laws and other acts as rights violations. The number of decisions cannot show their qualities, but their general influences.

¹ The term “judicial review” is often used for the American model, and the term “constitutional review” for the European model. However, the term “the constitutional review” refers to both of two models in this book.

² These 130 decisions are the number of cases decided in the public hearings of the middle and grand panels of the *Tsets*. An individual judge makes a decision on whether the *Tsets* reviews a petition or notification. If the petitioner appeals against this decision, the minor panel of three judges hears the case, and makes the final decision on whether the *Tsets* hears the case. Cases rejected by a judge or by the middle panel are not counted in this research. For the difference between these panels, see Section 3.2.

The main function of the constitutional court is to protect fundamental rights and other principles of the Constitution in a deliberative way. Therefore, this study briefly reviews the human rights situation in Mongolia in order to evaluate the performance of the *Tsets*. Individuals enjoy many fundamental rights in Mongolia *de facto*, and the government mostly respects these rights. According to surveys by the Freedom House, an independent watchdog organization, Mongolia has been free and democratic. That is, this country was not free (7 scores) in 1989 and partially free in 1990 (4 score), but it has been free since 1991 (2.5 score until 2001 and 2.0 score since 2002).³ Mongolia is the only post-socialist country outside of Eastern and Central Europe to obtain a score by the Freedom House that classified it as a free society. Mongolia has managed a substantive transformation to liberal democracy along with post-communist European countries such as Hungary and Poland. Foreign scholars conclude that Mongolia is a democracy, which reasonably protects civil and political rights and freedoms.⁴ For example, Thomas Ginsburg and Gombosuren Ganzorig stated as follows: “[Mongolia] has received well-deserved attention as one of the most successful examples of democratization in the Asian region. Since 1990, [it] has conducted several democratic elections. Human rights are well-respected, the media is free and political competition exists.”⁵ Mongolian democracy works well in general, but it is vulnerable to some challenges such as the pervasive corruption⁶ and the disrespect for some human rights by the government.

Many human rights problems existed in Mongolia. In 2010, human rights NGOs and experts in Mongolia reported that the government violated the right not to be subjected to torture or inhuman and cruel treatment, the right to fair trial and legal assistance, the right to equal suffrage and the right to life.⁷ The U.S. Department of State also noted in

³ “Each country and territory covered in the survey is assigned two numerical ratings-- one for political rights and one for civil liberties--on a scale of 1 to 7; a rating of 1 indicates the highest degree of freedom and 7 the least amount of freedom... these political rights and civil liberties ratings are combined and averaged to determine an overall ‘freedom status’ for each country and territory. Countries and territories with a combined average rating of 1.0 to 2.5 are considered ‘Free’; 3.0 to 5.0, ‘Partly Free’; and 5.5 to 7.0 ‘Not Free.’” “Freedom in the World Country Ratings: Comparative Score.”

⁴ Ginsburg, “Mongolia in 1997”; Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, 3; Landman, Larizza, and McEvoy, “State of Democracy in Mongolia: a Desk Study,” 44; Lipkert, “Preface.”

⁵ Ginsburg and Ganzorig, “When Courts and Politics Collide,” 309.

⁶ In the 2010 Corruption Perceptions Index, Mongolia’s score decreased from 3.0 to 2.7 on a 1.0 – 10.0 scale. A higher score means less corruption. Thus, Mongolia ranked the 116th of 178 according to the degree to which corruption is perceived to exist among public officials and politicians. “Transparency International - Corruption Perceptions Index 2010 Results.”

⁷ NGO Reports UPR Mongolia 2010.

its 2009 human rights report the following human rights problems though it recognized that the Mongolian government generally respected human rights:

police abuse of prisoners and detainees; impunity; poor conditions in detention centers; arbitrary arrest, lengthy detention, and corruption within the judicial system; continued refusal by some provincial governments to register Christian churches; secrecy laws and a lack of transparency in government affairs; domestic violence against women; and trafficking in persons.⁸

The *Tsets* performs unsatisfactorily its main function to protect constitutional rights and other principles of the Constitution for two reasons: the institutional defects and the poor quality of its own judgments. The *Tsets* does not address a great majority of concrete human rights violations just described above because it exercises only the abstract review of laws and other acts except judgments of ordinary courts. According to Prof. Chimid B., one of the 1992 Constitution framers, there is no protection of the Constitution, and many violations of political rights are outside of the review of the *Tsets*.⁹ Thus, Mongolian scholars have been paying much attention to how the institution of the *Tsets* should be advanced based on the German Constitutional Court.¹⁰ For example, individuals should have a right to submit constitutional complaint to the *Tsets* if they think their basic rights are violated by a final court judgment. Establishing a constitutional complaint system and making other institutional improvement concerning the *Tsets* would be a significant step, but more is needed to facilitate an increased role for this court to protect fundamental rights in Mongolia.

The *Tsets* can make the protection of fundamental rights its main function even under the current institutional settings including the abstract review. However, the *Tsets* provides poor protection of these rights because qualities of its judgments are insufficient in many cases. The *Tsets* has made few well-reasoned judgments, but many of its judgments are poor because they lack the reasoning or misinterpret the Constitution. For example, the *Tsets* did not provide reasons in 1993 when it accepted constitutionality of statutory provisions that restricted religious freedom of believers in

⁸ 2009 Human Rights Report: Mongolia.

⁹ Chimid B., *Unuugiin uls tur khuulichiin nudeer*, 103–104; See also Ginsburg, *Judicial Review in New Democracies*, 179–180.

¹⁰ Temuujin Kh., *Jus Frast buyu Yost Ug*, 58–67, 208–232, 238–239; Amarsanaa J., Murun D., and Bold S., *Undsen Khuuliin Tsetsiin Chadavhiig Bekhjuulekh Ni*, 38–40; Sarantuya Ts., “Origin, Development and Urgent Tasks of the Constitutional Procedure Law in Mongolia,” 1–40.

the non-traditional religions like Christianity (*Dashdendev Case* (1994)).¹¹ This decision lacked reasoning because it failed to make an argument for the conclusions, to interpret religious freedom, to respond to the arguments of two parties of the case, and to take into account related constitutional clauses. A decision lacking reasoning betrays the public trust that the court does not decide cases arbitrarily, prevents the people from predicting the possible decision, and advances politicization of the court. The public, scholars and politicians sometimes allege that the *Tsets* is biased in favor of a political party.¹²

The *Tsets* also misinterprets the Constitution when it provides some reasoning but makes a literal reading of the constitutional text or adopts a poor conception of constitutional abstract clauses. For instance, in *Suffrage Case I* (1993), the *Tsets* misinterpreted the Constitution, ruling that the Constitution did not protect equal suffrage because it excluded this term and equal suffrage was not proposed in the constituent assembly.¹³ This ruling also lacked the reasoning because it ignored arguments given by the petitioners that equal suffrage was already included in equality before the law and the International Covenant on Civil and Political Rights. The *Tsets* disrespected a precedent to quash laws that breached international human rights. The *Tsets* has rejected to overrule *Suffrage Case I* since 1993. Concerns exist that equal suffrage could be violated in the next elections as people have been moving rapidly from the rural to the urban area.

The general question this book deals with is how to improve *Tsets*' protection of fundamental rights and other constitutional principles. The particular research questions are not only how this court can be institutionally improved to become more independent and efficient, but also how it can improve the constitutional interpretation for the better protection of these principles. Mongolian scholars have not paid enough attention to the issue of constitutional interpretation. Though many scholars admit that decisions of the *Tsets* often fail to provide the constitutional reasoning, they have inadequately discussed which decisions lack the reasoning, which decisions provide the reasoning, how the reasoning could be improved, and how the foreign courts construct the reasoning. There exists no serious concern on the methods of interpreting the Constitution although these methods need to be introduced and developed for strengthening Mongolian

¹¹ *Tsets*, Jan. 12, 1994, Dugnelt No. 2. For the detailed analysis, see Chapter 5.

¹² Chimid B., *Unuugiin uls tur khuulichiin nudeer*, 103–104; Chuluunbaatar Ch., “Ts.Nyamdorjiiig Buruutgakhiig Tsetsed Hen Zakhialsan Be? [Who Ordered the Accusation of Nyamdorj Ts.]”.

¹³ *Tsets*, Dec. 22, 1993, Dugnelt No. 4. For the detailed analysis, see Chapter 5.

constitutionalism. Institutional improvement cannot solve the lack of reasoning and the misinterpretation by the *Tsets*.

The book reviews three main themes relevant to improving the protection of fundamental rights by the constitutional court: (1) liberal constitutionalism, (2) constitutional review, and (3) the constitutional interpretation. The first theme suggests that the rule of law (the *Rechtsstaat*) and constitutionalism should be properly discussed and clearly defined in order to illustrate the significance of fundamental rights in constitutional democracy. The American rule of law and the German *Rechtsstaat* tend to become similar despite their different origins and contexts. Many scholars understand these two traditions of law in two ways. The first is the formal conception that concentrates on the principles of formal legality and the idea of law as an effective guidance of its subjects. The second is the substantive conception that requires not only the principles of formal legality but also individual rights and freedoms as the criteria of the good laws. The substantive conception has become more important than the formal as result of the worldwide constitutionalism that guarantees fundamental rights. Mongolia had neither the rule of law nor constitutionalism before 1990. The 1992 Constitution accepts the substantive rule of law and liberal constitutionalism because it guarantees fundamental rights and other basic principles. Most constitutional scholars in Mongolia endorse the substantive rule of law and liberal constitutionalism, and they rarely argue against the formal conception of the rule of law.

The second theme in this book argues that constitutional review exercised by an independent, efficient court is essential to realizing the substantive rule of law and liberal constitutionalism. There are two models of this review: the American and the European. On the one hand, the American model allows all ordinary courts (or only the highest of ordinary courts) to exercise constitutional review. On the other hand, the European model allows only a special constitutional court to exercise this review. These two models are different in terms of their origins and institutional settings, but they tend to become similar because of the same purpose to protect fundamental rights and other principles of constitutional law. The highest court in both models (at least in the U.S. and Germany) performs the basic function of constitutional review, deliver reasoned judgments (judgments openly grounded in legal reasons and evidences) on concrete violations of fundamental rights, and apply similar methods of the constitutional interpretation. The Constitution of Mongolia adopted the European model of constitutional review by establishing the *Tsets*. This court has been functioning for almost two decades. However, the *Tsets* should be institutionally improved according to the main characteristics of the European model to become more independent and

efficient because only the independent, competent court can protect the Constitution and particularly fundamental rights of minorities.

The third theme is that the court can protect fundamental rights only if it provides reasoned judgments on matters related to these rights by using a proper method of constitutional interpretation. Even though successful constitutional democracies have developed different methods, this study focuses on the methods of American constitutional law. This study suggests to the *Tsets* that it should and can apply an American method called the moral reading of the Constitution in order to make a better interpretation of the Mongolian Constitution even though it is a version of the European model. Prof. Ronald Dworkin has developed the moral reading as an interpretation theory by researching the judgments of the U.S. Supreme Court. According to this method, the court should understand the Constitution as a charter of abstract moral principles. Judges should make the best interpretation of these principles with the best arguments based on constitutional law, but their interpretation is limited by the constitutional text, structure and principles justifying constitutional cases (the integrity of law). The moral reading of the Constitution is more favorable than other methods such as the strict constructionism (the literal meaning of the constitutional text) and originalism (the understanding of abstract constitutional principles, which was accepted during the constitution making or is supported by the majority of the people) because it provides the better protection of fundamental rights and a plausible meaning to the Constitution. International and constitutional courts in Europe also use the methods similar to the moral reading. Likewise, the *Tsets* should provide reasoned judgments based on the moral reading of the Constitution. Misinterpretations of the Constitution by the *Tsets*, which reduce the protection of fundamental rights, are similar to American methods of strict constructionism and originalism. If this court treats the Constitution as a charter of abstract principles, gives the best interpretation of these principles, and changes its previous poor interpretations of these principles with enough reasons, it can protect fundamental rights such as religious freedom and equal suffrage. Not only judges, but also scholars should be interested in the interpretation of the Constitution.

This book explores three themes of constitutionalism, constitutional review and constitutional interpretation in five chapters. Chapter 1 argues for the substantive rule of law (the *Rechtsstaat*) and liberal constitutionalism as worldwide principles in general, and it tracks the import and acceptance of these concepts in Mongolia. Chapter 2 discusses the American and European models of constitutional review, demonstrating similarities of the two models so that differences of the two cannot hinder the *Tsets* from applying the American interpretation theory on moral reading. Resting on Chapter 2,

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Chapter 3 examines the constitutional review in Mongolia in detail and defines institutional defects of the *Tsets*. Chapter 4 analyzes the issue of constitutional interpretation and argues for the moral reading against the strict-constructionism and originalism. The chapter also describes constitutional culture essential for the better interpretation of Constitution. Chapter 5 explores the jurisprudence of the *Tsets* and identifies some ways, including the moral reading and culture, to improve the constitutional interpretation by this court.

Chapter 1

Constitutionalism

The people need a state in order to protect themselves from each other and from external threats. Without the state, people could hardly live in safety, get justice and enjoy liberty. On this ground, the state is given the public power to serve the basic interest of its citizens to enjoy their individual rights and freedoms. However, the state and its officials may violate these rights and freedoms by abusing public power. The rule of law can offer a resource to oppose this abuse of power because it ensures the limitation of public power and the protection of individual rights and freedoms. In addition, constitutionalism helps the rule of law by making sure that all public powers including the legislative respect fundamental rights and other basic principles of democratic society. Therefore, the rule of law and constitutionalism developed into the main ideals of liberal democracies, and Mongolia adopted these ideals in 1990s.

This chapter discusses how the rule of law and constitutionalism are understood and practiced in matured constitutional democracies such as the U.S. and Germany, and how they are understood and practiced in Mongolia. First, this chapter considers a common tendency of the rule of law and the *Rechtsstaat*, and liberal constitutionalism as a worldwide ideal. Second, this chapter examines the constitutional history of Mongolia, basic principles guaranteed in the 1992 Constitution, and the rule of law (the *Rechtsstaat*) in post-communist Mongolia.

1.1. Constitutionalism and the rule of law in general

1.1.1. Common tendency between the rule of law and the *Rechtsstaat* towards

substantive conception

The rule of law has developed in common law tradition while the *Rechtsstaat*, the German concept equivalent to the rule of law, has developed in civil law tradition. Both the rule of law and the *Rechtsstaat* tend to be interpreted similarly today in spite of their different origins and contexts. After distinguishing the rule of law from the rule of person and the rule by law, this subsection researches formal and substantive conceptions of the rule of law, the merits and demerits of these two conceptions, and the tendency to understand the rule of law and the *Rechtsstaat* by a substantive conception rather than a formal conception.

The rule of law differs from the rule of person and the rule by law. Contrary to the rule of law, the rule of person has the implication of arbitrariness, corruption, and instability.¹ The ruler is not constrained because whatever pleases him or her is the law. Liberty that has to depend on the ruler's pleasure is unsafe. The rule of law, thus, is preferable to the rule of a single person. Moreover, the rule of law is not the rule *by* law. According to Randal Peerenboom, governments that rely on law to rule but do not accept the basic requirement that law binds the government and its officials are best described as a rule *by* law.² Such governments are above the law. Rule *by* law could be better than the rule of person when the law allows citizens to plan their life, but it would be worse when the law restricts liberty widely and damages justice seriously.

Many scholars believe that the rule of law is an important concept, but they define this concept differently and contest each other's definitions. In other words, the rule of law is "an essentially contested concept."³ There are two main conceptions on the rule of law, the formal and the substantive. Discussing these two conceptions is useful to understand the specific principles that can be drawn from the rule of law. The formal and substantive conceptions share the idea that the government and its officials should be restricted significantly by law so that arbitrariness is decreased in the exercise of public powers. That is, any conception of the rule of law insists that "every person – irrespective of rank and status in society – be subject to the law."⁴

¹ Hernandez-Truyol, "The Rule of Law and Human Rights," 177.

² Randall Peerenboom, "Varieties of Rule of Law: An Introduction and Provisional Conclusion," 2.

³ Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?," 137.

⁴ Barnett, *Constitutional and Administrative Law*, 85.

Though there are differences among the various formal conceptions of the rule of law, almost all of these address principles of legality, which are necessary for providing effective guidance. According to Joseph Raz, the formal conception derives its principles from the idea that “the law must be capable of guiding the behavior of its subjects:”⁵ law must be prospective, general, clear, open, and relatively stable, and the independent judiciary should enforce the law and these formal principles.⁶ The formal rule of law makes the legal system more efficient because it helps the legal system to serve as a secure guide for people’s behavior. If the laws are unknown, unclear, or unstable, they cannot be known, understood, or complied with, and thus will fail to guide the behavior. By supporting predictability, clarity, stability, transparency, generality, and impartial implementation of the law, the formal rule of law functions against arbitrary exercise of political power.

The formal rule of law also respects human dignity and autonomy by allowing people to plan their lives according to the law; that is, people enjoy freedom to do what the law permits. People cannot have definite expectations when the formal rule of law is violated, or their expectations are betrayed and they become disappointed “when the appearance of stability and certainty which encourages people to rely and plan on the basis of the existing law is shattered by retroactive law-making.”⁷ Therefore, the formal rule of law is designed to prevent infringements of human dignity “caused by laws which are unstable, unclear, or retrospective.”⁸

The formal conception is neutral to a variety of ends. This conception requires “mere principles of efficacy which make the law into a better or worse instrument for achieving the ends of the powerful.”⁹ Some scholars see this neutrality as a rationale to suggest the formal over the substantive conception:

A relatively formal theory is itself more or less politically neutral, and because it is so confined, is more likely to command support on its own terms from right, left, and center in politics than is a substantive theory which not only incorporates the rule of law formally conceived but also incorporates much more controversial substantive content.¹⁰

⁵ Raz, *The Authority of Law*, 214.

⁶ These are most common principles though scholars define them differently or add some other principles. See ibid., 215–218; Fuller, *The Morality of Law*, 33–38; McCormick, “‘Rechtsstaat’ and Rule of Law,” 68–77.

⁷ Raz, *The Authority of Law*, 222.

⁸ Ten, “Constitutionalism and the Rule of Law,” 401.

⁹ Dyzenhaus, *Hard Cases in Wicked Legal Systems*, 19.

¹⁰ Summers, “A Formal Theory of the Rule of Law,” 137.

However, the neutrality might not be an advantage of the formal conception. The formal rule of law is compatible with injustice and violations of fundamental rights since the lawmaker can describe any end as long as it follows formal principles such as clarity. For example, according to Judith N. Schklar, “legal caste [of Nazi Germany] was perfectly ready to ignore the activities of the new court, police and extermination system as long as ‘the inner morality’ of their law [the formal rule of law] could remain unaffected.”¹¹ Brian Z. Tamanaha also argued that the formal rule of law is consistent with slavery, segregation, and apartheid, as confirmed by the histories of the U.S. and South Africa, and it is consistent with authoritarian or non-democratic regimes, as illustrated by the systems of Singapore and China.¹² The formal conception of the rule of law is inadequate for checking the content of the law because it is not concerned much with the content of law.

In contrast to the formal conception, the substantive conception of the rule of law requires that the law respect not only formal principles, but also individual rights.¹³ “The concept is used as the foundation for these rights, which are then used to distinguish between ‘good’ laws, which comply with such rights, and ‘bad’ laws which do not.”¹⁴ Dworkin’s substantive conception of the rule of law is influential. According to Dworkin, the rule of law in the substantive conception is “the ideal of rule by an accurate public conception of individual rights.”¹⁵ This conception assumes that “people have at least a strong *prima facie* moral right that courts enforce the rights that a representative legislature has enacted.”¹⁶ In an easy case where the explicit rule clearly applies, the substantive and formal conceptions have the same conclusion. Though the rule-book is not the exclusive source of rights, judges need to consider the rule-book in hard cases where no explicit rule applies, and formulate principles capturing the moral rights of parties. However, judges should not choose any principle but a principle consistent with other principles “that must be presupposed in order to justify the rule they are enforcing.”¹⁷ The different moral principles may be compatible with the rule-book, but judges should interpret the law on the basis of what they believe to be the

¹¹ Schklar, “Political Theory and The Rule of Law,” 13.

¹² Tamanaha, *On The Rule of Law*, 120.

¹³ For the different arguments supporting the substantive conception, see Ten, “Constitutionalism and the Rule of Law,” 394–403; Selznick, “Legal Culture and the Rule of Law”; Stewart, “Rule of Law and the Tinkerbell Effect”; Rawls, *A Theory of Justice*, 208–210; Radin, “Reconsidering the Rule of Law.”

¹⁴ Craig, “Formal and Substantive Conceptions of the Rule of Law,” 167.

¹⁵ Dworkin, *A Matter of Principle*, 11–12.

¹⁶ Ibid., 16.

¹⁷ Ibid., 17.

correct moral principles. The content of the law is restricted by these principles, many of which are protected as fundamental rights in the Constitution.

Critics argue that the substantive conception on the rule of law increases the risk of rule of person. In a liberal democracy, there are different interpretations of individual rights due to both moral pluralism and unclear meanings of these rights. Judges are obliged to interpret individual rights. Critics say that the rule of law might become the rule by judges if the judges enforce their own subjective interpretations of these rights against other interpretations, perhaps the one by the representatives of the people. According to Tamanaha, “if judges consult their own subjective views to fill in the content of the rights, the system would no longer be the rule of law, but the rule of man or women who happen to be the judges.”¹⁸ Since the rule of law cannot be exercised automatically, the human participation is necessary, and the abuse of power cannot be completely ruled out. The rule of law is based on the idea that judges are committed to fidelity to the law and to their qualities of honesty, integrity and wisdom. Thus, the judges must be selected carefully according to these criteria.

Judges are not free to choose any interpretation of rights. First, the legal tradition limits the scopes of the interpretation by its conventions. Tamanaha argues as follows:

Legal professionals constitute an interpretative community with a shared legal language, culture, and sets of beliefs, which stabilize the interpretation and application of rules. What appear to be indeterminate rules when viewed in the abstract, will, in the context of application, be determinate, because shared conventions within the legal tradition (backed up by institutional constraints, like appellate review) rule out certain interpretation as unacceptable.¹⁹

Second, the judges have to provide a reasoned decision based on facts and the law. According to Dworkin, the rule of law means the dominance of a certain culture of argumentation: “so the ‘men’ whose rule it oppose are those who would close the argumentation down or insist that something is to prevail just because they say it should.”²⁰

The reasoning of a judicial judgment is determined by the interpretation methods of rights and other abstract principles, and these methods narrow the available

¹⁸ Tamanaha, *On The Rule of Law*, 105.

¹⁹ Ibid., 89.

²⁰ Waldron, “Is the Rule of Law an Essentially Contested Concept (in Florida)?,” 156.

interpretations. Two basic methods of interpretation respond to the criticism of subjectivity in the United States. The first method (originalism) is that judges should interpret rights according to original understandings recognized at the time when the society adopted these rights. Denying this method, Dworkin argues for the second method (the moral reading) that a judge should choose in good faith the best interpretation of a right, which is consistent with the overall interpretation of these rights and is supported by reasoned justifications. Chapter 4 and 5 comprehensively discuss these two methods in constitutional law showing that the second method is better than the first one.

The discussions on the rule of law should count the context of the society. The formal rule of law may be suitable for matured democracies such as the U.K. because these countries have the liberal culture that strongly opposes the abuse of public powers and protects individual rights. On the other hand, the formal conception is inappropriate in transitional countries such as Mongolia because these countries are short of established liberal culture and because the formal conception does not generally resist the laws that violate individual rights. The substantive conception of the rule of law is more important than the formal conception in a transitional context because it gives high priority to the protection of individual rights. In addition, all basic principles of the formal conception are included in the substantive conception as discussed above in this subsection. The liberal culture in a transitional country is so immature that it cannot check the content of law without the help of the constitutional review. The enormous number of decisions of the new constitutional courts, which quashed unconstitutional laws and other acts, proves this immaturity of liberal culture in the transitional countries.²¹ Constitutional review can assist to prevent the legislatures from enacting unconstitutional laws.

The rule of law is originally an Anglo-American concept, but it is often used synonymously with the continental European concept of *Rechtsstaat*. As with the rule of law, the *Rechtsstaat* has been interpreted differently,²² but it has evolved over time to include the substantive conception. The German *Rechtsstaat* originated in the philosophy of the Enlightenment, primarily in Kant's legal theory.²³ Kant and his

²¹ The caseload of the Hungarian Constitutional Court was over 11,000 for the first six years. Solyom and Brunner, *Constitutional Judiciary in a New Democracy*, 72.

²² For the formal conceptions of the *Rechtsstaat*, see Urabe, "Rule of Law and Due Process: A Comparative View of the United States and Japan"; McCormick, "'Rechtsstaat' and Rule of Law."

²³ Reiss, "Introduction," 11; Kant, *The Metaphysics of Morals*, 9–138.

successors developed the substantive conception that the law must protect individual liberty and property. However, the formal conception of the *Rechtsstaat* became more popular than the substantive conception in the late 19th century. The formal *Rechtsstaat* was similar to the formal rule of law as it allowed the government to use law as an instrument to any purpose, and “fundamental rights came to be regarded as juridically superfluous declamations that might as well be renounced.”²⁴ The formal conception assumed that an administrative action should be based on a statute, and thus it was related to human autonomy. According to Noriho Urabe, “insofar as the *Rechtsstaat* forbids arbitrary activity by the administrative power, it protects the individual’s rights to know what the law is and how it will be applied.”²⁵ However, this conception was not for protecting fundamental rights and justice. According to Rainer Grote, “all efforts to conceive the *Rechtsstaat* in purely formal terms as a system in which public power is exercised by the competent organs in accordance with the legally prescribed procedures were discredited by the experience of the NS [National Socialist] regime.”²⁶

Since the end of WW II, the *Rechtsstaat* has been interpreted again by the substantive conception due to the written Constitution that protects not only formal requirements such as “the ban on the retroactive legislation,” and “the promulgation of laws,”²⁷ but also substantive principles. Article 1-20 of the German Constitution of 1949 protects fundamental rights and binds executive and judicial authority to “law” and “justice.” This Constitution protects both civil and political rights and social and economic rights.

Liberal constitutionalism is the core of the rule of law in constitutional democracies. According to Michel Rosenfeld, “indeed, a written Constitution may have the force of law, and thus its provisions limiting the powers of government and those devoted to the protection of fundamental rights may become part and parcel of the rule of law regime instituted by the relevant constitutional regime.”²⁸ The modern understanding of the rule of law reflects constitutionalism. The rule of law and the *Rechtsstaat* have different origins and have been interpreted in many ways. However, both of them tend to express a substantive rather than a formal conception in the age of constitutionalism because

²⁴ Grote, “Rule of Law, Rechtsstaat and Etat de Droit,” 185.

²⁵ Urabe, “Rule of Law and Due Process: A Comparative View of the United States and Japan,” 174.

²⁶ Grote, “Rule of Law, Rechtsstaat and Etat de Droit,” 185.

²⁷ See Goetz, “Legislative and Executive Power Under the Constitutional Requirements Entailed in the Principle of the Rule of Law.”

²⁸ Rosenfeld, “The Rule of Law and the Legitimacy of Constitutional Democracy,” 1308.

liberal constitutions impose formal and substantive limits of governmental power.²⁹ In other words, “protection of basic rights of individuals and groups of society limits state-responsibilities and actions and thus is an essential part of rule of law.”³⁰ The *Rechtsstaat* and the rule of law are often used interchangeably despite the contextual differences. In addition, the distinction between the formal and the substantive conception has become less relevant due to liberal constitutionalism. According to Zimmermann, “the reason for this is that, when the law formally recognises and protect basic rights, their violation is also a violation of the positive law, and thereby an infringement of the rule of law even in the formal sense.”³¹

1.1.2. Constitutionalism as a worldwide principle

This subsection examines the main principles of constitutionalism, the contrast between majoritarian rule and constitutionalism, a brief history and worldwide spread of constitutionalism, the importance of certain legal culture for implementing the rule of law and constitutionalism, and the summary of ways to encourage this culture in transitional societies like Mongolia.

Liberal constitutionalism includes five main principles: the distinction between constituent power and ordinary power, the distinction between the higher law and ordinary law, the protection of fundamental rights, the separation of powers (checks and balances) and the constitutional review. The first is the distinction between the people’s constituent power to institute a new regime and the ordinary power of government officials and voters in everyday politics. According to John Rawls, that constituent power of the people sets up a framework to regulate ordinary power and comes into play only when the existing regime has been dissolved.³² Constituent power comes through a convention to adopt the Constitution and the special procedures for amending the Constitution. The constitutional convention and the amending procedure are

²⁹ Constitutions protect similar substantive principles despite their contextual differences. Most constitutions, for instance the German Basic Law, protect the civil and political rights and the social and economic rights, but the U.S. Constitution has no clauses on the latter rights. As a result, the emphasis on the relation between “justice” and liberty is different under German and U.S. Constitutions. See Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 36–37.

³⁰ Karpen, “Rule of Law,” 178.

³¹ Zimmermann, “Rule of Law as a Culture of Legality,” 17.

³² Rawls, *Political Liberalism*, 231; Rawls, *Lectures on the History of Political Philosophy*, 85–86.

superior to the normal process of legislation by the legislature because they concern the most basic principles of democratic society. The second principle is the distinction between the higher law of the Constitution and ordinary law. According to Rawls, “higher law is the expression of people’s constituent power and has the higher authority of the will of We the People, whereas ordinary legislation has the authority, and is the expression of, the ordinary power of Congress and of the electorate.”³³ Such a higher law binds and guides the ordinary power. The third principle of constitutionalism aims to protect fundamental rights from being violated by the legislature and other authorities. The fourth principle is the separation of powers (checks and balances). A concentration of power should be avoided because it increases the possibility of the government and its officials to abuse public power. Thus, “each branch of government – legislature, executive, and judicial – is able to check the exercise of power by the others, either by participating in the functions conferred on them, or by subsequently reviewing the exercise of that power.”³⁴ The fifth principle is the constitutional review, the judicial power to strike down legislation and other acts that violate higher law or fundamental rights.

Scholars often make the contrast between two main principles of constitutional democracy, majoritarian rule and constitutionalism. Majoritarian rule is the rule by a majority of people in a nation or their representatives. This rule allows the people to participate in making the laws, improve their common goods without oppressing themselves, and check political power by election.³⁵ However, the idea of majoritarian rule cannot guarantee every person enjoys liberty and lives under justice because the majority may harm the minority. Thus, constitutionalism is mainly needed to prevent the majority from violating basic principles. Though a majority resulted from an election has the political power to legislate and govern, this majority power should be restricted by the Constitution. Dworkin defines constitutionalism as follows.

The Constitution, and particularly the Bill of Rights, is designed to protect individual citizens and groups against certain decisions that a majority of citizens might want to make, even when that majority acts in what it takes to be the general or common interest.... This interference with democratic practice... could be justified by appeal to moral rights which individuals possess against the majority, and which the constitutional

³³ Rawls, *Political Liberalism*, 231.

³⁴ Barendt, *An Introduction to Constitutional Law*, 15.

³⁵ Murphy, *Constitutional Democracy*, 2.

provisions... might be said to recognize and protect.³⁶

In constitutional democracies, judges who are free from the pressures of partisan politics are responsible for enforcing the Constitution by the power of constitutional review.

Liberal constitutionalism is not just an idea, but also a practice that has been living for more than two centuries. The U.S. is the first country that established constitutionalism as described above. The U.S. Constitution was adopted in 1789, and the Bill of Rights in 1791. After WW II, Japan, the Federal Republic of Germany, Italy and other European countries adopted all five principles of constitutionalism. These countries are matured examples of constitutional democracies. Eastern and Central European countries and Mongolia became constitutional democracies after the collapse of the Soviet Union.

Constitutionalism has spread worldwide since the end of WW II. According to Bruce Ackerman, “the Enlightenment hope in written constitutions is sweeping the world.”³⁷ There are two dimensions of worldwide constitutionalism: international and domestic. First, the international movement for human rights has played a key role for the spread of constitutionalism.³⁸ International instruments such as the 1948 Universal Declaration of Human Rights (the UDHR) and the ICCPR have all expressed broad commitment to human rights and democracy. In addition, international (regional) courts exercise a kind of constitutional review. For instance, the European Court of Human Rights has the power to quash the statutes of its member states when they violate the European Convention on Human Rights after exhausting the remedy of the respective national system. The European Court of Justice and the Inter-American Court of Human rights also can review the actions of national executives, legislatures, and judges.³⁹

Moreover, constitutionalism has become a worldwide idea at the domestic level. Most countries have adopted a written Constitution with a bill of rights and constitutional review. According to D. L. Horwitz, “as of 2005, more than three-quarters of the world’s states had some form of judicial review for constitutionality enshrined in their constitutions.”⁴⁰ Parliamentary sovereignty backed by majoritarian rule also has

³⁶ Dworkin, *Taking Rights Seriously*, 132–133.

³⁷ Ackerman, “The Rise of World Constitutionalism,” 772.

³⁸ Henkin, “A New Birth of Constitutionalism: Genetic Influence and Genetic Defects,” 53.

³⁹ Merryman and Perez-Perdomo, *The Civil Law Tradition*, 3rd Edition, 38.

⁴⁰ Horowitz, “Constitutional Courts,” 125.

been declining. Though parliamentary sovereignty failed in continental Europe, it was not abolished in countries such as Great Britain and New Zealand after WW II. Conversely, Ran Hirschl argued that even these countries have recently embarked on “a comprehensive constitutional overhaul aimed at introducing principles of constitutional supremacy into their respective political systems.”⁴¹ For example, in 1998, the U.K. enacted Human Rights Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights. According to this act, the courts cannot abolish the statutes that violate rights and freedoms in the convention, but they can promote the protection of these rights in two ways.⁴² First, so far as it is possible to do so, the court has to read and enforce the legislation in a way, which is compatible with the convention rights. Second, if the court thinks that the provision is incompatible with a convention right, it may declare that incompatibility. Thus, the English courts can say that an infringement of right is against the human rights act. Moreover, 2009 marked a crucial year in the constitutional history of the U.K. as judicial authority was transferred from the House of Lords to a newly created Supreme Court. This new court is the final court of appeal for all civil cases and most criminal cases; hears “appeals on arguable points of law of general public importance;” and concentrates on “cases of the greatest public and constitutional importance.”⁴³ The U.K. has not adopted constitutional review, but it has made important steps toward this process.

Though constitutionalism has become a worldwide principle, the implementation of this ideal is difficult in reality. Creating a majoritarian democracy may be easier than creating a constitutional democracy. Fareed Zakaria argued “while it is easy to impose elections on a country, it is more difficult to push constitutional liberalism on a society. The process of genuine liberalization and democratization is gradual and long-term, in which an election is only one step.”⁴⁴ Establishing constitutional democracy is difficult because the culture on which the rule of law is based develops slowly. For example, the culture of the rule of law in America developed over many years before the enactment of the U.S. Constitution. Americans actually inherited this culture from Roman, English and Latin legal traditions (Louisiana).⁴⁵ Germany also has developed the culture of the *Rechtsstaat* since the 18th century. The culture of the rule of law simply cannot be exported into a new environment with the adoption of a Constitution. The realization of

⁴¹ Hirschl, *Towards Juristocracy*, 2.

⁴² “Human Rights Act of the U.K.”

⁴³ “The Role of the U.K. Supreme Court.”

⁴⁴ Zakaria, “The Rise of Illiberal Democracy,” 40.

⁴⁵ Calabresi, “The Historical Origins of the Rule of Law in the American Constitutional Order.”

the rule of law and constitutionalism requires a kind of legal culture, which Zimmermann defined as follows:

This culture incorporates a positive attitude toward legal norms as might be demonstrated by a socio-political context in which both ordinary citizens and public officials manifest a serious commitment to principles and institutions of the rule of law. They demonstrate commitment by generally complying with its basic principles and institutions, insisting on their compliance, criticizing those who fail to comply with them, and, finally, taking whatever action is necessary to correct any lack of compliance.⁴⁶

The main problem in transitional countries is a weak culture of the rule of law because citizens and public officials do not have a serious commitment to principles and institutions of the rule of law. However, this does not mean that such a culture cannot be changed or improved in these countries.

The rule of law can be internalized into a legal culture of a society though this internalization is not impossible but difficult. According to Martin Krygier, “hard facts do not mean necessity... whatever the historical trends, whatever the hard facts, the importance of human action in a difficult transition should not be underestimated.”⁴⁷ Scholars, thus, have argued about how to strengthen the rule of law and constitutionalism in a transitional society. For example, a written Constitution that protects fundamental rights and establishes checks and balances with constitutional review is the first step. Steven M. Fish argued that if legislatures are stronger (as in parliamentarian or semi-presidential systems rather than presidential systems), democracies will be stronger and the political power will be more limited.⁴⁸ Scholars also argue that an independent judiciary, an administrative judicial review,⁴⁹ a higher legal education and profession,⁵⁰ a civic education, and civil society pressure⁵¹ are important for cultivating the culture of the rule of law. The next section will examine the

⁴⁶ Zimmermann, “Rule of Law as a Culture of Legality,” 24.

⁴⁷ Krygier, “Institutional Optimism, Cultural Pessimism and the Rule of Law,” 100.

⁴⁸ Fish, “Stronger Legislatures, Stronger Democracies”; Ackerman, “The New Separation of Powers” (arguing against the export of the American presidential system in favor of constrained parliamentarianisms of countries like Germany and Japan).

⁴⁹ Shapiro, “Judicial Review in Developed Democracies,” 21–25; Emmert, “Rule of Law in Central and Eastern Europe,” 583.

⁵⁰ Tamanaha, *On The Rule of Law*, 58–59; Emmert, “Rule of Law in Central and Eastern Europe,” 584–585.

⁵¹ Vjeira, “Inequality and the Subversion of the Rule of Law” (arguing that any attempt to make use of the law to improve the rule of law itself presupposes that there is political and social mobilization backing it).

rule of law and constitutionalism in Mongolia.

1.2. Constitutionalism and the rule of law in Mongolia

1.2.1. The antecedent of Mongolian constitutionalism

The Mongolian history until 1990 was neither democratic nor liberal. The legal system of medieval Mongolia was based on a nomadic culture having effects on the political culture of today. In the early 20th century, Mongolian leaders and scholars were interested in Western constitutional law and attempted to implement some of its ideas. However, Mongolia adopted the socialist legal system that rarely respected the rule of law. Thus, this subsection traces the constitutional history of Mongolia until 1990 by explaining the general characters of Mongolian legal systems of three specific periods: the medieval (1189-1911), the beginning of the 20th century (1911-1924), and the period of socialism (1924-1990).

Mongolia was grounded in medieval law and the absolute monarchy until the beginning of the 20th century. Historians presented a negative image that the 13th century Mongol Empire conquered many countries and took lives of many people. On the other hand, some historians argued for a positive side of this expanding empire. For example, Paula L.W. Sabloff explained the relationship between the culture of the Mongol Empire and the democratic culture of current Mongolia. Sabloff argued that a kind of democratic participation (Great Assembly of Mongols and a Council of Wise Men), rule by law, equality through meritocracy and some respect for women, freedom to express advices to the khan, religious tolerance, and personal freedom to walk away existed in the empire ruled by Genghis Khan.⁵² Even if these positive cultural elements really existed, they were not the result of protection of civil and political rights but the result of the Mongolian nomadic culture and way of life. For example, religious tolerance was achieved thanks to Mongolian shamanism (*tegerism*) rather than the

⁵² Sabloff, “Why Mongolia?,” 27–30; All of these cultural elements are often mentioned in writings on the Mongolian history. Lundendorj N., *Tur, erkh zuin setgelgeenii khugjliin chig khandlaga*, 193–213; Baabar, *Mongolchuud*, 2006, 1:54–65; Weatherford, *Genghis Khan and the Making of the Modern World*.

concept of religious freedom.⁵³ This tolerance of different religions might have an encouraging affect on liberal culture in contemporary Mongolia committed to freedom of religion.

Of course, the Mongol Empire was not democratic in the modern sense. During and after the empire, the monarchy was absolute, and the laws were customary.⁵⁴ According to Prof. Lundendorj N., the ideas of individual rights did not develop, and laws aimed to protect the state rather than individual rights.⁵⁵ Laws did not substantially restrict the absolute power of the monarch. After the decline of the Mongol Empire, Mongolia lost its independence to the Chinese Manchu and its legal system kept the similar features.

The attempt to adopt a liberal Constitution failed at the beginning of the 20th century. Mongolia started to create a modern government based on a monarchy after declaring independence from Manchu rule in 1911. According to Alan J. K. Sanders, “even though Qing law remained the guide for administration, a professional bureaucracy and various ministries were established... Two houses of a parliamentary type were formed in 1914, although their role was deliberative and they were convened and dissolved by the Bogd Khan.”⁵⁶ In the meantime, Mongolian scholars and leaders studied constitutions of developed countries such as the U.K., Norway, Prussia, U.S., and Japan, translated them, and prepared drafts for a Constitution.⁵⁷ These scholars and leaders argued for inviolable human rights, democracy and the distribution of state powers between the king, government, and parliament.⁵⁸ The scholars not only translated the U.S. Constitution with its Bill of Rights but also briefly discussed the U.S. constitutional review. A paper on comparative constitutional law stated the following:

The Constitution of North America has a feature different from that of Europe. If the Government enacts any new law that conflicts with the Constitution, such law must be considered invalid because all of the American people gave their consent to the Constitution. All courts have to review this kind of cases.⁵⁹

This brief statement on constitutional review in the U.S. was written in 1910s when this

⁵³ Lundendorj N., *Tur, erkh zuin setgelgeenii khugjiliin chig khandlaga*, 204.

⁵⁴ Ibid., 193–213; Boldbaatar J. and Lundeejantsan D., *Mongol ulsiin tur; erkh zuin tuukhen ulamjal*, 11–171.

⁵⁵ Lundendorj N., *Tur, erkh zuin setgelgeenii khugjiliin chig khandlaga*, 188.

⁵⁶ Sanders, “Mongolia’s New Constitution,” 507–508.

⁵⁷ Amarsanaa J., Bayarsaikhan B., and Shajinbat R., *Olon ulsiin undsen khuuliin orshil*, 7–58; Chimid B., *Undsen khuuliig deedlen shutekh yos*, 16.

⁵⁸ Lundendorj N., *Tur, erkh zuin setgelgeenii khugjiliin chig khandlaga*, 224–236.

⁵⁹ Amarsanaa J., Bayarsaikhan B., and Shajinbat R., *Olon ulsiin undsen khuuliin orshil*, 14.

kind of review was unpopular even in Europe. Nonetheless, contemporary scholars have not answered whether Mongolian leaders and scholars discussed the adoption of constitutional review.⁶⁰

The socialist system was established in the 1920s under the pressure of the Soviet Union. A commission, which was set up for preparing a draft Constitution in 1922, took into consideration the comparative studies on constitutional law done by Mongolian scholars. However, the soviet representatives dissolved this commission and rejected the draft Constitution because they disliked the commission's aim and the draft Constitution, which took into account the laws and constitutional concepts of European countries.⁶¹ After Bogd Khan died in 1924, a republican government was introduced, and the country was named the Mongolian People's Republic (the MPR). The MPR adopted its first socialist Constitution imitating the Russian Constitution in 1924, and two other socialist constitutions in 1940 and 1960. During the period of socialism, the living standard, the daily culture, the public health, and the general education did improve to a significant extent. Mongolia became *de jure* a sovereign (nation) state, and the Soviet Union, China, and other countries recognized its independence.

All of the Mongolian socialist constitutions had no room for the rule of law or constitutional review because they were not meant to restrict the political power. As with other socialist countries⁶² these nominal constitutions rested on not the separation of powers, but the centralization of powers of the Mongolian People's Revolutionary Party (the MPRP), simply describing the powers of the party and its leaders. The rule by person was the guiding principle as "the leader was above the party, and the party decision was above the law and the judicial decision."⁶³ In addition, the courts were not intended to be independent. According to Amarsanaa J., "the party and administrative organizations supervised the courts" and used them "as an instrument of coercion."⁶⁴ Thus, the court was prohibited from reviewing the constitutionality of decisions adopted by the legislature representing the working class.⁶⁵ However, in fact, the legislature did

⁶⁰ According to Unurbayar Ch. "if any of the constitutional clauses was unclear, both of the government and parliament would share the power to interpret it." Unurbayar Ch., *Mongol ulsad undsen khuulit yosnii uzel sanaa nevetersen ni*, 79. Nevertheless, it was unclear how to solve the conflicts of constitutional interpretations by two institutions.

⁶¹ Baabar, *Mongolchuud*, 2006, 2:196.

⁶² Sartori, "Constitutionalism"; Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, 49–51, 75–77, 109–113.

⁶³ Chimid B., *Undsen khuuliig deedlen shutekh yos*, 123.

⁶⁴ Amarsanaa J. et al., *Mongol ultiin shuukh erkh medliin shinjetgel*, 7.

⁶⁵ Sarantuya Ts., *Undsen khuuliin processiin erkh zui*, 22–23.

not represent the people due to the one-party system and the denial of political rights.

Most fundamental rights were not protected under the socialist regime. The socialist constitutions excluded most civil and political rights and included some nominal rights unenforceable by the court. A series of violent purges and forced collectivization occurred in the MPR as in the Soviet Union. A survey done in 1998 found that the government ruled by the communist party killed 28,185 of 800,000 people (the total population) just between 1937 and 1939 according to the guidance of Moscow (Stalin).⁶⁶ The socialist constitutions denied civil and political rights to a part of the population and discriminated against them on the grounds of class.⁶⁷ The socialist government mostly purged Buddhist monks, nobles and intellectuals, discriminated against them and destroyed almost all monasteries in the country.

1.2.2. Basic principles of the 1992 Constitution of Mongolia

The Mongolian people completed a peaceful transition to democracy in 1990. In 1992, a deliberative body democratically elected by the people adopted the first Constitution that reflected basic principles of constitutional democracy examined in the previous section. Unlike the former socialist constitutions, the 1992 Constitution has been practiced and enforced to a reasonable extent. This subsection argues that this Constitution guarantees fundamental rights and other principles as limitations on the exercise of political power. This subsection also shows that the 1992 Constitution establishes a parliamentary democracy based on basic principles such as the separation of powers, checks and balances and constitutional review, and that it encourages the development of civil society in Mongolia.

In late 1980s, the emergence of *perestroika* in the former Soviet Union affected Mongolia. Mongolia started reforms towards constitutional democracy and a market-economy in 1990. The old People's Great *Khural*, the legislature according to the 1960 Constitution of the MPR, abolished the deference to the MPRP (the communist party) as the “guiding and directing force of society and of the state” and accepted political pluralism and multi-party system. In May 1990, this People's Great *Khural* adopted the

⁶⁶ Baabar, *Mongolchuud*, 2006, 2:599.

⁶⁷ Chimid B., *Undsen khuuliig deedlen shutekh yos*, 19–25.

Law on the Constitutional Amendment (the Amendment), which was the legal basis for transition from socialism to democracy, due to the pressure from democratic forces.⁶⁸ Following the reforms in the Soviet Union, this law provided for a new structure for the government with a two-tiered parliament, the president, and a constitutional supervision council. Under the Amendment, the People's Great *Khural* (the *PGKh*) was reorganized as the “supreme representative organ of popular sovereignty and state power,” and had to meet briefly once a year to decide the most important issues such as enacting and amending the Constitution and electing the president and the vice-president. In their first democratic election in July 1990, Mongolian citizens elected 422 members of the *PGKh* by districts. This election legitimized the *PGKh* as the constituent assembly that expressed the constituent power of the people to adopt a new Constitution. The Amendment also created a standing parliament called the State Small *Khural* (the *SSKh*) that exercised the power to conduct regular legislative and appointive activities. In September 1990, the *PGKh* proportionally elected 50 members of the *SSKh*.

The *PGKh* and the *SSKh*, which were democratically elected according to the 1990 Amendment, adopted the first liberal democratic Constitution of Mongolia in 1992. In October 1990, the *SSKh* established the Constitution Drafting Commission for preparing the draft of the new Constitution. The *SSKh* discussed the draft in the spring of 1991. Wide public debate on the new Constitution started in June 1991 with the publication of a draft. There were also two conferences. Members of the *SSKh* and the *PGKh* (the framers) and Mongolian scholars talked about the draft Constitution at a domestic conference on “The Draft Constitution: the Developmental Tendency of Mongolia” in July 1991. Mongolian framers and foreign experts participated in an international conference on “Mongolia’s Transition to Democracy: the Role of the New Constitution” in September 1991.⁶⁹ The framers improved the draft of the Constitution by considering advices made in this international conference. The *SSKh* started a second

⁶⁸ Chimid B., *Undsen khuuliin medleg*, 431–440.

⁶⁹ Foreign experts gave very detailed advices related to the draft Constitution and the *Tsets*. See Herman Swartz, “A Memorandum on the Draft Constitution of Mongolia” (July 18, 1991): 7-8; Louis Fisher, “Senior Specialist in Separation of Powers, Draft Constitution of Mongolia: Evaluation” (August 13, 1991): 3; P.N. Bhagwati and Reed Brody (United Nations Centre for Human Rights), “Assistance to the Government of Mongolia relating to the draft Constitution” (June 1991): 41-44; Martin Shapiro, “Comments on the Mongolian Draft Constitution” (1991): 38-44; Amnesty International, “Mongol Ulsan Baga khurald toliluulakh sanamj bichig” (August 28, 1992); R. Grodin (Asian Foundation), “About the Mongolian Draft Constitution” (1991): 14-15; T. Shwaistruct, G. Stain, “Advices” (1991): 7-8; Charles Fried, “Comments on the Draft Constitution” (July 13, 1991): 8; The Republican Party of the U.S. (1991): 1-5; Inter-Parliamentary Union, “Advices” (August 23, 1991) in *Mongol ulsiiin undsen khuuliin arkhiiviin san*. CD-ROM 1.0.

discussion on the draft of the Constitution in October 1991 and submitted the draft to the *PGKh* in November 1991. The *PGKh* debated each clause of the draft Constitution twice, and it enacted the Constitution on January 13, 1992. As this Constitution came into force, framer Khatanbaatar emphasized that a key feature of its adoption was the guarantee that its provisions would not become empty declarations.⁷⁰

The Constitution of Mongolia institutes important principles often cited in the jurisprudence of the *Tsets*. The Constitution contains a constitutional conformity principle in Article 70.1. This principle (with the constitutional review and the special procedure for the constitutional amendment) expresses that the Constitution is higher law, and all other law and legal acts should not violate this higher law. In addition, Article 1.2 of the Constitution requires “the State” to secure basic principles such as democracy, justice, freedom, equality and respect for law. These principles are broad protections of fundamental rights and general restrictions on the exercise of political powers.

In practice, fundamental rights guaranteed in the Constitution restrict the political power because they are interpreted and enforced by the *Tsets*. The Constitution includes an extensive list of fundamental rights such as the right to be equal before the law, freedom of expression and freedom of religion. The individuals enjoy the fundamental rights guaranteed both in the Constitution and in the international human rights treaties according to Article 10 of the Constitution. Mongolia has ratified more than 30 human rights treaties such as the ICCPR and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the CTOCIDTP, 1984).⁷¹ The Constitution not only restricts the arbitrary limitation on these rights but also declares that the right to life, the freedoms of thought, conscience and religion, or the right not to be subjected to torture or inhuman and cruel treatment are not limited by law even in case of a state of emergency or war (Const. art. 19.2). Individuals enjoy fundamental rights, and the government respects these rights in general even though there are still many human rights problems.⁷²

Resting on the separation of powers, the Constitution establishes a parliamentary democracy, which is designed to keep any single individual or institution from having

⁷⁰ Sanders, “Mongolia’s New Constitution,” 520.

⁷¹ Amarsanaa J., *Ardchilsan erkh zuit yos*, 74.

⁷² Ginsburg, “Mongolia in 1997”; Ginsburg and Ganzorig, “When Courts and Politics Collide”; Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, 3; Landman, Larizza, and McEvoy, “State of Democracy in Mongolia: a Desk Study,” 44; Lijphart, “Preface”; “Freedomhouse.org: Home.”

too much power. When introducing the draft Constitution in the *PGKh*, Ochirbat P., the President of the MPR and the head of the Constitution Drafting Commission, said that the 1992 Constitution was based on the separation between the legislative, executive, and judicial powers and provided checks and balances between these powers.⁷³ The separation of powers is one of the main principles of the Mongolian Constitution. Legislative power is vested in the State Great *Khural* (*SGKh*) (Const. art. 20 and 25.1.1), the executive power in the Government (Const. art. 38), and the judicial power in the *Tsets* and ordinary courts (Const. art. 47.1 and 64). The citizens directly elect the *SGKh* members and the President while the *SGKh* appoints the prime minister (proposed formally by the President) and ministers. The *SGKh* also appoints justices of the *Tsets*. The *SGKh* is a unicameral parliament that consists of 76 members.

The Mongolian Constitution not only establishes a separation of powers but also checks and balances between the legislative, executive and judicial powers. The *SGKh* has legislative power, but the President may veto legislation, which remains in force if two thirds of MPs present override such a veto (Const. art. 30). All of four presidents elected since 1990 have actively used the power of veto against legislation, which seemed unconstitutional or poor in terms of policy. Meanwhile, the judiciary checks the legislative and executive powers. The Supreme Court has the power “to provide official interpretations for correct application of all other laws except for the Constitution,” and separate administrative courts have been exercising the judicial review of administrative acts. The *Tsets* also has the power to quash unconstitutional laws and other acts, while three-quarters of all MPs in the *SGKh* may overrule the decision of the *Tsets* by amending the Constitution (Const. art. 69.1).⁷⁴ The *Tsets* has reviewed the constitutionality of more than 130 statutes and other governmental acts and has quashed more than 50 percent of them. Thus, the principle of checks and balances has been working for two decades.⁷⁵

⁷³ Ochirbat P., “Mongol ulsiin ikh tsaaziin tusliig ard niiteer kheleltsuulsen dun, shine tusliin tukhai [On the result of the public discussion on the draft Constitution and the new draft],” Boti no. 238 (1991): 17, in *Mongol ulsiin undsen khuuliin arkhivii san*.

⁷⁴ This special procedure for the constitutional amendments is stronger than that for the ordinary legislation. The only constitutional amendment in 2000 was passed to overturn the *Tsets* decisions that MPs could not hold cabinet posts according to the separation of powers. See *Tsets*, Jul. 17, 1996, Dugnelt No. 6; *Tsets*, Sep. 7, 1996, Togtool No. 3. The *SGKh* also enacted the Law on the Constitutional Amendment in December 2010.

⁷⁵ However, some improvements are needed for the better checks and balances. See Mashbat O., *Bonnoos Westminsteriin Zug*, 160–164; Lundendorj N., Unurbayar Ch., and Batsuuri M., *Mongol ulsad shuuukhiin kharaat bus baidliig bekhjuulekh ni*, 10–26.

The choice of the parliamentary system, which provides for a separation of powers and checks and balances, has provided foundations for democratizing and liberalizing in Mongolia. Fish evaluated the parliamentary democracy of Mongolia as follows.

The absence of a Constitution that concentrates power was entirely a matter of choice. It left Mongolia bereft of the ‘strong,’ unencumbered executive that so many analysts, politicians, and ordinary citizens in new democracies regard as a boon to reform, stability, and development – but that in fact conducts stagnation, conflict, and authoritarian reversion. Mongolia has been blessed – or in this case, wisely blessed itself – with a Constitution that spared it a tenacious obstacle to political development.⁷⁶

Mongolia has been conducting democratic elections since 1990. Mongolia has had six parliamentary elections (1990, 1992, 1996, 2000, 2004, and 2008) and five presidential elections (1993, 1997, 2001, 2005, and 2009). Elections were reasonably fair according to foreign experts although some NGOs and politicians claimed the existence of electoral frauds and imperfection of election system. Political powers peacefully switched between two main political parties, the MPRP and the Democratic Party (coalition).

Civil society restricts the powers of political institutions and fosters the rule of law in Mongolia. The idea of civil society is often discussed in sociology or political science, but it is a constitutional concept in Mongolia because the development of a civil society is one of objectives declared in the preamble of the Constitution. Freedom of association is also guaranteed (Const. art. 16.10). In addition, the *SGKh* adopted the relatively liberal Law on Non-Governmental Organization in 1997. The constitutional guarantees and this 1997 law encouraged civil society. Researchers noticed the development of civil society in 1990s.⁷⁷ A report on state of civil society in Mongolia concluded as follows: “Despite serious challenges, there has been much progress in the development of civil society in Mongolia. New issue-oriented independent NGOs, environmental, anti-corruption and pro-democracy social movements and opposition political parties have made an important contribution to the liberalization, diversification and decentralization of the public sphere.”⁷⁸ Moreover, human rights

⁷⁶ Fish, “The Inner Asian Anomaly,” 335–336.

⁷⁷ Severinghaus, “Mongolia in 1994,” 71; Fish, “Mongolia,” 136–138.

⁷⁸ Center for Citizens’ Alliance and ICSFD Ulaanbaatar Secretariat, “State of Civil Society in Mongolia (2004-2005), CIVICUS Civil Society Index Report for Mongolia,” 101. This report also demonstrated “that while important advances have been made in Mongolia towards democracy, the country is still facing serious challenges in terms of developing a strong, diverse and vibrant civil society.”

and women's NGOs are energetic in the country. Recently, Mongolian NGOs became active in monitoring elections. The number of NGOs registered in the Ministry of Justice was 6000 in 2007.⁷⁹

NGOs actively work to promote democratic values, to protect human rights, and to defend their own interest or public interest not only through public education, policy advocacy and oversight activities, but also through legal mechanisms. For example, an environmental NGO won a case in the *Tsets* in 2010. The NGO submitted a notification to the *Tsets* alleging that a government resolution violated the Minerals Law that prohibited exploration of minerals in areas with special governmental protection.⁸⁰ This court found that the government resolution violated the Mineral Law by giving the licenses for exploration of minerals in areas with special governmental protection, and thus the government violated the principle to respect for law (Const. art. 1.2 and 45.1) and the conformity of Constitution (Const. art. 70.1). Thus, the *Tsets* ruled the governmental resolution was unconstitutional.⁸¹ Citizens also enthusiastically submit petitions and notifications to the *Tsets*, which will be discussed in Chapters 3 and 5.

1.2.3. The understanding of the rule of law and the *Rechtsstaat* in Mongolia

This subsection examines the different terms, which express the idea of the rule of law (the *Rechtsstaat*), two conceptions of the rule of law (substantive and formal) in Mongolia, and the understanding of the rule of law by the *Tsets*. This subsection argues that the most common understanding of the rule of law in Mongolia is substantive, and that scholars should discuss more critically the rule of law.

The 1992 Constitution legitimized the rule of law for the first time. The framers endorsed the concept of *Rechtsstaat* during the constitution making. The first President of Mongolia Ochirbat declared: "All aspects of social relations are regulated not by decisions of any political party or discretion of a person or a group of persons, but only by the state law, the law that are born of public reason and will."⁸² Using the term

⁷⁹ Bayartsetseg J., "Khuuli Bolovsrulakh, Kheleltsekh Uil Yawts Dakhi Turin Bus Baiguullaguudiin Oroltsoo."

⁸⁰ "Undsen Khuuliin Tsets Khuraldlaa."

⁸¹ *Tsets*, Jul. 7, 2010, Dugnelt No. 4.

⁸² Ochirbat P., "Mongol ulsiin undsen khuuliig batalsan tai kholbogduulan khelsen ug" [A speech on the

“*Rechtsstaat*,” framers argued that the separation of powers, the independent judiciary, human rights, and the constitutional review were the main components of the *Rechtsstaat*, and they believed that these components were guaranteed in the Constitution.⁸³

Three Mongolian phrases express the idea of the rule of law (the *Rechtsstaat*): *Erkh zuit tur*, *Erkh zuit yos*, and *Khuuli deedlekh yos*. The *Rechtsstaat* is translated as *Erkh zuit tur*. The words *Erkh zui*, which is different from *khuuli* (statute), is equivalent to the German *Recht*, while *tur* is the State. Moreover, the rule of law is translated as *Erkh zuit yos*. *Yos* means the principle, law, or rule. Another term is *Khuuli deedlekh yos* (the principle to respect law) included in Article 1.2 of the Mongolian Constitution. The principle to respect law is interpreted as the *Rechtsstaat* and the rule of law. According to Prof. Chimid, the constitutional declaration of the principle to respect law expresses the concept of *Rechtsstaat*, and this principle is a version of the rule of law or *Rechtsstaat*.⁸⁴ Most Mongolian scholars use these three terms interchangeably. Though the terms of *Khuuli deedlekh yos* and *Erkh zuit tur* were popular in 1990s, *Erkh zuit yos* has been frequently used since 2004. As with western scholars, most Mongolian scholars think that the concepts of the rule of law and the *Rechtsstaat* are used interchangeably due to their similar contents.

There are two main conceptions to the rule of law in Mongolia. The first conception is substantive. Many Mongolian scholars agree that citizens are allowed to do anything not prohibited by law, but that the state organizations and the officials should perform only the activities permitted and imposed by law. These scholars also agree on the conception that the rule of law typically contains the following: the protection of human rights, the separation of powers, the constitutional supremacy over legislative, executive

adoption of the Constitution of Mongolia] *Boti* no. 238 (January 13, 1992): 3, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

⁸³ Enkhbat A., “Shuuukh zasaglag, turiin baiguulliin togoltsoo” [Judiciary and the state system] (for the International Conference in September 1991): 1; Renchin L., “Bye daasan shuuukh zasaglagliin uzel sanaag khuuli zuid tusgaj bekhjuulekh ni” [To insert and implement the idea of independent judiciary in law] (for the International Conference in September 1991): 1; Bayar S., “Mongol ulsiin shine Undsen khuuliin tusliin uzel barimtlaliin asusal” [The issue of concepts of the draft Constitution of Mongolia] (for the International Conference in September 1991): 4, 11; Ochirbat P., “Mongol ulsiin ikh tsaaiziin tusliig ard niiteer kheleltsuulsen dun, shine tusliin tukhai [On the result of the public discussion on the draft Constitution and the new draft], *Boti* no. 238: 25; Tsog L., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 38-39; Bayar S., AIKh-n khuraldaanii temdegel (Dec. 14, 1991): 68-69, in *Ibid.*

⁸⁴ Chimid B., *Undsen khuuliig deedlen shutekh yos*, 67; Chimid B., “Khuuli deedlekh yosiig khangakhad shudarga shuukhiin uureg,” 5.

and judicial acts, trustful law, independent judiciary, and non-retroactivity of law.⁸⁵ This conception of the rule of law is substantive because it accepts the importance of protecting fundamental rights. The 1992 Constitution also reflects the substantive conception as it guarantees these rights.

The second conception is the formal rule of law discussed in Subsection 1.1.1 of this book. Mongolian scholars have discussed the following formal principles: the hierarchy of sources of law, rationality, generality, congruence, promulgation, clarity, dynamic constancy, non-contradiction, non-impossibility, and non-retroactivity.⁸⁶ Moreover, Mongolian laws include most of these principles. For example, Article 26.3 of the Constitution requires laws to be subject to official promulgation by the *SGKh* through publication within a specific date. In addition, according to the 2001 Law on Preparation and Submission of Draft Laws and other Decisions of the *SGKh*, the draft law should be consistent with the Constitution, the international treaties of Mongolia, and laws (art. 12.1.1), articles, sections and clauses should not be conflicted each other (art. 12.1.5), and the draft law should not include clauses that will be executed only once (art. 12.1.6). Furthermore, the hierarchy of legal sources is: the Constitution, international treaties, laws, governmental acts, and bylaws. The courts, mainly the *Tsets* and the administrative courts, enforce this hierarchy. The 2002 Criminal Code also protects not only the non-retroactivity of a law criminalizing an act or toughening the penalty for it, worsening the legal status of the person who committed crime (art. 12.2), but also the retroactivity of a law decriminalizing an act or mitigating the penalty for it, improving the legal status of the person who committed the crime (art. 12.1).

The two contrasting conceptions should be distinguished clearly, critically, and consistently from each other. The rule of law is a “contested” concept in the English literature, but it is not in the Mongolian literature. Mongolian scholars who write on the rule of law rarely doubt the merit of this concept and hardly ever criticize each other’s conception of the rule of law.⁸⁷ Scholars holding substantive conception do not criticize those holding the formal conception or vice versa. Taking into account that Mongolia

⁸⁵ Sarantuya Ts., *Turiin yurukhii onol*; Lundendorj N., *Tur, erkh zuin setgelgeenii khugjiliin chig khandлага*, 105–108; Chimid B., *Unuugiin uls tur khuulichiin nudeer*, 146–147; Amarsanaa J., *Ardchilsan erkh zuit yos*, 49–50; Unurbayar Ch. and Batsuuri M., *Erkh zuit yos*, 199–202, 204–220.

⁸⁶ Munkhsaikhan O., “Erkh zuit yos”; Batsuuri M., “Khuuli zuin salbariin erdem shinjilgeenii baga khurluud”; Lundendorj N., *Turiin onol*.

⁸⁷ Sukhbaatar Z. criticized the legal reform based on the rule of law from the point of the Law and Development Movement, but he did not respond to the core arguments for the rule of law. Sukhbaatar Z., “Erkh zuit yosnii khooson amlalt.”

has been struggling to establish the rule of law and many politicians do not want to be restrained by the law, these scholars might think that criticisms would undermine the importance of this ideal. However, through critical discussions, scholars can improve their arguments about the rule of law against corrupt politicians and strengthen the defense for the rule of law. In countries where the rule of law is respected, scholars frequently argue what the rule of law is and what the law is in general: law becomes a matter of argument and an argumentative discipline.⁸⁸ Thus, Mongolian scholars can contribute to the rule of law if they examine critically the contrast between its substantive and formal conceptions. According to the conclusion made in Subsection 1.1.1, the substantive conception is more recognized than the formal conception because it is reflected in the widespread liberal constitutionalism and more suitable in a transitional society. This conclusion is valid for Mongolia. The substantive conception in Mongolia can be enriched by the American theories, notably Dworkin's, which strongly argue for the protection of individual rights.⁸⁹

In addition, the formal and substantive conceptions of the German *Rechtsstaat* before and after WW II need to be clearly illustrated even though the basics of the substantive conception are already introduced in Mongolia.⁹⁰ A clearer illustration will promote the constitutional culture since the political rhetoric sometimes interprets the *Rechtsstaat* by the formal conception or even the rule by law. For example, President Enkhbayar N. said on October 1, 2007: "The main character of the *Rechtsstaat* is to respect law and implement it... The true requirement of a society respecting law is not only the state coercion, but also the establishment of conscience that citizens themselves abide firmly by law, the measure of their freedom and responsibility."⁹¹ This understanding implies the concept of rule *by* law rather than the rule of law because it emphasizes the obedience of the law by citizens but does not note the very meaning of the rule of law, which restricts the political power. Mongolian scholars should address a critical examination of this kind of rhetoric and the distinction of the formal and substantive conceptions of the *Rechtsstaat* (the rule of law).

Mongolian scholars should pay more attention to the *Tsets'* understanding of the rule

⁸⁸ Waldron, "The Rule of Law and the Importance of Procedure," 20; See also Dworkin, *Law's Empire*.

⁸⁹ Batsuuri briefly introduced to Dworkin's theory though he did not mention Dworkin's substantive conception on the rule of law. Batsuuri M., "Khuuli zuin salbariin erdem shinjilgeenii baga khurluud," 30–33.

⁹⁰ For the substantive *Rechtsstaat* in the 19th and the 20th century, see Lundendorj N., *Tur, erkh zuin setgelgeenii khugliin chig khandлага*, 97–109.

⁹¹ Enkhbayar N., "UIKh-n Namriin Chuulgani Neelt Deer Khelsen Ug."

of law. There is no sufficient research on this topic. In Mongolia, the Constitution is supreme law and the *Tsets* has the authority to enforce this law. Thus, constitutional review is a key element of the rule of law under the Constitution. First, the *Tsets* enforces the substantive conception of the rule of law by protecting fundamental rights and limiting the unconstitutional exercise of the public power. The rights decisions of this court proved that it rejected the formal conception in favor of the substantive conception.

Moreover, the *Rechtsstaat* (the rule of law) is explicitly accepted in the constitutional jurisprudence of Mongolia because the *Tsets* has used the term “*Rechtsstaat*” in two decisions.⁹² For example, in 2007, this court found a breach of the Constitution by the Chairperson of the *SGKh*, which resulted in resignation of the Chairperson. This ruling declared that “the Chairperson violated the universally recognized principle of the *Rechtsstaat* that any state organ and official are prohibited to do any other [act] than one permitted by law” when he changed substantially several laws after the final vote in the *SGKh*.⁹³ Even though the decision failed to interpret this concept in detail, it was a victory for the rule of law in a country that was under the rule of person or socialist party for seven decades. Moreover, the *Tsets* often cites the constitutional clause on the respect for law, which is a version of the *Rechtsstaat*. Petitioners to this court complained about the violations of this clause in 33 (25.3 %) of the court’s 130 decisions. The number of decisions touching on the clause on the respect for law is increasing in recent years as this clause was mentioned in five of all 13 decisions in 2006 and in eleven of all 13 decisions in 2007.

The *Tsets* has also started to discuss general principles of constitutional law. For example, this court accepted a general principle of constitutional law when striking down article 6.3 of Law on Political Party, which said the following: “a newly organized party or a party is prohibited from using the full or short name of another party, which ended its activities, was reorganized through the merger, was dissolved, or changed its name, for 24 years.” The court ruled article 6.3 unconstitutional because “even though there could be a timely restriction on the usage of the political party name, the time established in the law above mentioned (the prohibition for 24 years) is inconsistent with a general principle of constitutional law that any restriction should not

⁹² *Tsets*, Jun. 21, 2006, Dugnelt No. 7; *Tsets*, May 23, 2007, Dugnelt No. 6.

⁹³ *Tsets*, May 23, 2007, Dugnelt No. 6. This decision is analyzed in detail in Subsection 5.2.1.

exceed the due limit.”⁹⁴ The *Tsets* also protected the non-retroactivity of law, the protection from establishing retroactive laws harmfully affecting the rights and interests of citizens, which was not literally mentioned in the 1992 Constitution.⁹⁵ In addition, the *Tsets* protected rights not explicitly mentioned in the Constitution and declared these rights as clarification of rights mentioned in the Constitution. For example, this court protected the right to strike, the right of citizens to access to the *Tsets*, and the child’s right to assembly.⁹⁶ General principles of law or the rule of law are not mentioned in the Constitution, and they are accompanied by basic principles such as equality, justice, democracy or respect for law, which are explicitly written in the Constitution. Though the current discussion on the rule of law by the *Tsets* is short, it can be a basis of developing more comprehensive understanding of this ideal.

Conclusion

The rule of law (the *Rechtsstaat*) is a contested concept that scholars define differently though most of them agree on the core aspect that the political powers should be limited, and that everyone is subject to the law. There are two main conceptions of the rule of law: the substantive and the formal. Chapter 1 argued that the substantive conception has become more important than the formal conception due to liberal constitutionalism, that the substantive conception is more suitable for a transitional country such as Mongolia, and that the substantive rule of law and constitutionalism have become worldwide principles. After the democratic revolution, Mongolia adopted for the first time the 1992 Constitution that created a parliamentary democracy based on fundamental rights, the separation of powers, checks and balances, and the constitutionality review. In Mongolia, the substantive conception of the rule of law is more popular than the formal conception, and the *Tsets* applies few principles of the *Rechtsstaat*. Mongolian scholars discuss the rule of law, but they should discuss this concept more critically.

This book does not cover all issues related to the rule of law and constitutionalism

⁹⁴ *Tsets*, Sep. 29, 2005, Dugnelt No. 6; *Tsets*, Nov. 14, 2005, Togtool No. 1.

⁹⁵ *Tsets*, Jun. 17, 2005, Dugnelt No. 4; *Tsets*, Dec. 14, 2005, Togtool No. 2; *Tsets*, May 9, 2007, Dugnelt No. 5.

⁹⁶ *Tsets*, Apr. 21, 1993, Dugnelt No. 2; *Tsets*, May. 26, 1993, Togtool No. 3; *Tsets*, Jan. 18, 1995, Dugnelt No. 2; *Tsets*, Mar. 27, 1996, Dugnelt No. 1.

but rather focuses on the issue of constitutional review. Constitutionalism, which aims to discourage arbitrary exercise of the public power while protecting fundamental rights, can be strengthened at least in two ways in a transitional society such as Mongolia: (1) improving the institution of constitutional review; and (2) adopting the proper method of constitutional interpretation. The book concentrates upon constitutional review as a mechanism of the rule of law and upon the proper method of constitutional interpretation for helping this review work well as a part of the developing legal culture. Chapters 2 and 3 on constitutional review examine what the two models of this review are and how the Mongolian constitutional review can be improved based on the comparative study. Creating a system of constitutional review is vital, but unsatisfactory because the performance of this system depends on how judges interpret the Constitution. Thus, Chapters 4 and 5 discuss the constitutional interpretation in general and the improvement of constitutional interpretation in Mongolia.

Chapter 2

Two Models of Constitutional Review

There are two main models of constitutional review, the American and the European. The mainstream understandings of these two models mostly tell their differences in terms of origin and institutional arrangement, but the recent trends present their similarities in terms of function. These similarities allow constitutional courts such as the Mongolian *Tsets* to improve its protection of fundamental human rights and freedoms by using an American theory of constitutional interpretation. In other words, the differences between the two models cannot be obstacles to applying the American interpretation theory such as the moral reading of the Constitution in the European model.

Section 2.1 defines the conventional understanding of the American model by studying the U.S. judicial review and Section 2.2 examines the conventional understanding of the European model by studying the constitutional courts of Western Europe (mainly Austria and Germany). Section 2.3 discusses similarities between the two models. Section 2.4 analyzes the Hungarian Constitutional Court as a successful example of constitutional review in a transitional country.

2.1. The American model of constitutional review: the United States

This section is limited to the U.S. although a number of countries such as Japan, Canada, Mexico, Argentina, Brazil, Finland, Iceland, Sweden, Norway, Denmark, and Greece have the American model. In order to show how the American model works, this section examines the origin of the judicial review, and the distinctive characteristics of

this institution. This section also gives an overview of the jurisdiction of the Supreme Court in the U.S. federal judiciary, discussing the tenure and number of justices, the appointment and qualification of justices.

The U.S. was the first nation to practice judicial review in the modern sense.¹ The text of the Constitution did not clearly define the existence of judicial review, but the U.S. Supreme Court clarified the idea in *Marbury v. Madison* (1803). Chief Justice Marshall delivered this judgment with the following reasoning:

People chose a written Constitution with basic principles to bind the government so that the Constitution is the superior and binding law, and thus an act repugnant to it must be invalid. It is also the duty of judiciary to say what the law is. Since the Constitution is superior law, the judiciary is the institution with the final responsibility to interpret the Constitution.²

Marshall asserted that the courts held the power to review the constitutionality of actions of both executive and legislative branches. There has been a long-lived controversy on the reasoning in *Marbury* and the justification for the judicial review.³ However, according to many scholars, “the power of the Supreme Court to determine the constitutionality and, therefore, the validity of the acts of the other branches of government has been firmly established as basic component of the American system of Government.”⁴

The distinctive characteristic of the judicial review in the U.S. is that any ordinary court hearing constitutional and non-constitutional cases can reject the application of a law if it declares the law unconstitutional. Under the ordinary proceeding, any court can decide a case by applying the Constitution. Thus, if different courts exercise the power to refuse to apply the law due to its being unconstitutional, they may offer different, perhaps conflicting, decisions on the constitutionality of the same law. However, the potential conflict of decisions on the same issue is prevented as a result of the doctrine of *stare decisis*, according to which the precedents should be respected in similar cases though they are not absolute especially in constitutional cases. Furthermore, the

¹ The idea of judicial review existed even before the U.S. Constitution. In England, Lord Edward Coke affirmed in the traditional supremacy of the common law over the authority of parliament. Cappelletti, *Judicial Review in the Contemporary World*, 37.

² See *Marbury v. Madison*, 5 U.S. 137 (1803).

³ See Gunther, *Constitutional Law*, 13–29; Nowak, Rotunda, and Young, *Constitutional Law*, 6–15.

⁴ Nowak, Rotunda, and Young, *Constitutional Law*, 1.

Supreme Court decisions are binding upon all other courts.

The judicial review in the U.S. is typically concrete because it is started by a claim that the enforcement of an unconstitutional law inflicts actual injury on one of the litigants. Judicial power extends to the resolution of “cases or controversies” under Article III of the U.S. Constitution. From this requirement, the Supreme Court has developed many rules of self-constraints such as standing, adverseness, ripeness, mootness, and political questions. The Supreme Court avoids exercising the judicial power when it discovers one of the following: the plaintiff is not a proper party to bring a legal action (the absence of standing); the president asks for an advisory opinion (the absence of actual law-suit or adverseness); the injury claimed has not happened or other avenues of appeal have not yet been exhausted (not ripe); the case has become irrelevant because the dispute between the parties has ended and there is no actual case or controversy any more (mootness); or the Congress or the President has a discretionary power (political question).⁵ For example, the basic requirement of standing is that “individuals show injury to a legally protected interest or right and demonstrate that other opportunities for defending that claim (before an administrative tribunal or a lower court) have been exhausted.”⁶ The interest must be real as opposed to speculative or hypothetical, as well as personal as opposed to official. Plaintiffs traditionally have to show personal or proprietary damage (monetary damage) or even non-monetary injuries (and public interest).

The Supreme Court uses rules of self-constraint to define whether a claim submitted to it is justiciable (capable of judicial resolution). When this court finds the suit nonjusticiable, “the suit is thrown out of the federal court system altogether.”⁷ Donald Kommers argued as follows:

Each of these requirements can be considered as an aspect of the fundamental constitutional requirement that a court can adjudicate only actual cases or controversies. The common law tradition is crucial here, for judges are deemed incapable of deciding cases without a detailed knowledge of all relevant facts and values pertaining to a case.⁸

⁵ However, the rules of judicial self-constraint, the requirements of justiciability, are not absolute, and there are many exceptions to these rules. Shanor, *American Constitutional Law*, 73–119; Nowak, Rotunda, and Young, *Constitutional Law*, 55–110; Gunther, *Constitutional Law*, 1532–1633. *Roe v. Wade*, 410 U.S. 113 (1973) (the issue of abortion is exempted from the rule of mootness due to the nature of the issue).

⁶ O’Brien, *Constitutional Law and Politics*, 2:99.

⁷ Shanor, *American Constitutional Law*, 73.

⁸ Kommers, “Procedures for the Protection of Human Rights in Diffuse Systems of Judicial Review,” 101.

Even though the U.S. has state courts and federal courts, both of which exercise judicial review, this research focuses on the federal judiciary, mainly the Supreme Court. Article III of the U.S. Constitution says that the judicial power of the U.S. is vested in one Supreme Court and in such inferior courts as may be established by the Congress. There are basically three levels of federal courts, the district courts, the courts of appeal, and the Supreme Court. John Nowak described the relation between these three levels as follows:

Cases heard in the federal court system normally are heard in district courts in one of circuits. From them the parties may appeal to the court of appeals for that circuit, which normally sits in panels of three, and from there the parties may seek review in the Supreme Court.⁹

The decisions of state supreme courts also can be appealed to the U.S. Supreme Court when they raise a question regarding federal law. According to the common understanding, the Supreme Court is not a special constitutional court but the highest among the federal courts. This court is “the ultimate interpreter of the Constitution”¹⁰ and a main developer of the U.S. constitutional law.

The Supreme Court has two main jurisdictions: original and appellate. This court has original jurisdiction for “all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party (U.S. Const. art. III, §2, cl. 2.).” In other cases, the Supreme Court has “appellate jurisdiction... with such exceptions, and under such regulations, as the Congress shall make (U.S. Const. art. III).” Thus, the Congress enjoys the power to regulate the appellate jurisdiction of the Supreme Court (as well as the jurisdictions of lower federal courts) although this power of the Congress should not destroy the essential role of the Supreme Court in the constitutional structure.¹¹ The appellate jurisdiction of this court is exercised through two different review routes, appeal and *certiorari*, which derive from state courts and lower federal courts. Appeal is an obligatory review as a matter of the appellant’s right, and *certiorari* is a discretionary review that the Supreme Court can choose without providing reasons.¹² However, the distinction between appeal and *certiorari* has been blurred because *certiorari* is becoming the most significant appellate jurisdiction, which will be

⁹ Nowak, Rotunda, and Young, *Constitutional Law*, 24–25.

¹⁰ Baker v. Carr, 369 U.S. 186 (1962) (n.d.).

¹¹ Hart, “The Power of Congress to Limit the Jurisdiction of Federal Courts,” 1364–1365.

¹² Gunther, *Constitutional Law*, 54.

discussed in Section 2.3.

In addition to the main jurisdiction, the Supreme Court has special jurisdictions. When appellate courts submit a writ of certification to this court, it has to clarify a point of federal law. The Supreme Court also has “the power to issue writs of *mandamus* and prohibition, ordering lower courts or public officials to either do something or refrain from some action.”¹³ Moreover, this court may exercise the power to grant writs of *habeas corpus* (“produce the body”) when it reviews cases by prisoners who claim that their constitutional rights have been violated and they are unlawfully imprisoned.¹⁴

The security of life tenure for justices guarantees some degree of judicial independence for the U.S. Supreme Court. Article III of the U.S. Constitution declares that justices of the Supreme Court have lifetime tenure though they can be removed only by impeachment but their salary cannot be “diminished during their Continuance in Office.” Thus, the U.S. federal justices are able to decide cases before them with less political pressure. However, American scholars such as Dworkin are recently worried “about an ideological administration appointing young ideological justices whose tenure on the Court will last for generations, long after the nation has steered itself back to the middle as, so far, it always is.”¹⁵ Liberal scholars admired the Supreme Court’s improvements in protecting individual rights after WW II. Nevertheless, conservative justices on this court have lately become a near majority so that they are eager to repeal those improvements in individual rights.¹⁶ Thus, liberal scholars recommend amending “the Constitution to institute a term limit for the Supreme Court justices, a maximum of fifteen years’ tenure,”¹⁷ which is what Europeans have done for constitutional court judges.

The number of the Supreme Court justices is not defined by the Constitution but by statute. Thus, some U.S. presidents have tried altering the number of justices to influence this court. For example, President Franklin D. Roosevelt attempted to pack the Supreme Court by increasing the number because advocates of *laissez-faire* social and economic policy dominated this court at the time. However, the Congress would not accept President Roosevelt’s Court-packing plan though it was disappointed by the

¹³ O’Brien, *Constitutional Law and Politics*, 2:96.

¹⁴ Ibid.

¹⁵ Dworkin, *Is Democracy Possible Here?*, 158.

¹⁶ For example, see *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010) and Dworkin, “The ‘Devastating’ Decision.”

¹⁷ Dworkin, *Is Democracy Possible Here?*, 158.

Court's invalidation of the New Deal.¹⁸ According to Tushnet, today the American political culture has come to accept nine justices since 1869 as the optimal, fixed size for the Supreme Court.¹⁹

The U.S. has a complex political procedure of appointing justices, which aims to avoid the dominance of one institution (or the congressional majority) in the appointment process. American justices are nominated by the President and approved by a simple majority of the senate. The U.S. Senate has a veto power to refuse a candidate nominated by the President. Thus, the President should be reasonable so that the candidate is acceptable to the majority of the senators. The confirmation process in the U.S. Senate is deliberative. The complex procedure of appointing justices helps to balance the differences in constitutional philosophy and to check the candidates who have the extreme view of judicial review or are incapable to make constitutional reasoning.

If a candidate's constitutional convictions are so extreme that he or she may overturn the mass of precedents and damage constitutional integrity, then it is difficult to gain the appointment.²⁰ Since the Constitution is a tradition as well as a document, the U.S. Senate has the responsibility to ensure that "a nominee intends in good faith to join and help to interpret that tradition in a lawyerlike way, not to challenge and replace it out of some radical political vision that legal argument can never touch."²¹ Moreover, the nomination and confirmation of judges is important because their moral convictions and interpretation theories will influence future constitutional cases. Therefore, there are nation-wide discussions on what moral conviction and interpretation theory the candidates prefer, what they think about controversial cases, and what experience and competence they have for the job. Scholars write articles on these questions; the mass media is full of same discussions; NGOs and other institutions actively support or reject the candidate.²²

Candidates for the post of the Supreme Court justices are basically legal professionals. The post of professional justices does not mean that these justices always

¹⁸ O'Brien, *Constitutional Law and Politics*, 2:172.

¹⁹ Tushnet, "The United States: Eclecticism in the Service of Pragmatism," 14.

²⁰ For the event that the Senate defeated Bork's nomination, see Dworkin, *Freedom's Law*, 265–286.

²¹ *Ibid.*, 265.

²² For example, Dworkin has been written articles on the nominations of Judge Robert Bork, Clarence Thomas, John Roberts, Samuel A. Alito, Sonia Sotomayor, and Elena Kagan to the Supreme Court. *Ibid.*, 263–347; "The Articles Contributed by Ronald Dworkin"; For an active NGO in the field of constitutional law, see American Constitution Society, "Supreme Court."

make good decisions, but they do have the legal knowledge, skill, and experience essential for good decisions. Justices are mostly drawn from those who have been judges or in other legal professions. The U.S. Constitution says nothing about the specific professional qualification of justices. Thus, the appointment of non-legal professionals to the Supreme Court is constitutionally possible. Justice Breyer wrote as follows: “The 110 judges who have served on the Court have come from different professional backgrounds. In the past, Presidents have appointed Senators, Governors, and even a former President of the United States.”²³ However, today there is a convention that the candidates to the Supreme Court should be at least a legal professional even though they may have had a political career in the past. In the U.S., non-legal professional candidates for a justice would be criticized so much that the senate could not appoint them. Thus, all nine current justices come from professional backgrounds that include prior judicial service, legal practice and academia.²⁴

2.2. Austrian Constitutional Court and the European model of constitutional review

This section discusses the Austrian Constitutional Court created in 1920 as the origin of the European model, the reasons of creating this special court and the characteristics of this court. Moreover, this section briefly explains how the European model was modified after WW II by examining some general characteristics of the modern constitutional courts in Europe, including their status as special court to exclusively exercise constitutional review, the jurisdictions, the non-renewable long term appointment of justices, the fixed number of justices, the appointment procedure, and the requirement of being professional justices.

The origin of the European model of constitutional review came from the Austrian Constitutional Court. While Chief Justice Marshall clarified and established the judicial review in *Marbury v. Madison* (1783), Hans Kelsen created the European model when he drafted the Austrian Constitution in 1920.²⁵ He instituted the constitutional court to maintain the legal system and its validity as the most significant value. Kelsen

²³ Breyer, *Active Liberty*, 5.

²⁴ The U.S. Supreme Court, “Biographies of Current Justices.”

²⁵ Cappelletti, *Judicial Review in the Contemporary World*, 47.

illustrated the structure of a legal system as a pyramid as follows: “At the top is the *Grundnorm*, fundamental norm, which... invalidates... the positive Constitution of a country. In turn, the Constitution validates the legislative statutes, which... invalidates administrative decrees, municipal ordinances and so forth... A norm is valid when it satisfies the condition established by a higher valid norm of the legal system.”²⁶ Therefore, in order to confer validity on lower order norms, all legal norms must be capable of being enforced by an institution such as the court. As with Chief Justice Marshall, Kelsen considered the Constitution as a set of legal norms superior to the ordinary legislation requiring enforcement. As a result, Kelsen assigned a special court only the power of constitutional review and rejected this power to ordinary courts because any jurisdiction exercising the judicial review of legislation would put into effect legislative function, and ordinary judges cannot be given such power.

There were three main reasons why only a special court rather than ordinary courts should exercise the exclusive power of constitutional review in the continental Europe. First, the American model of judicial review was not applicable in Austria and other civil law countries due to the danger that a uniform decision of whether or not a statute was constitutional would not be made by the judiciary. The principle of *stare decisis* was traditionally absent in civil law jurisdictions; that is, the decisions of the supreme courts concerning the constitutionality of legislation were short of binding upon the lower courts. According to Kelsen, the lower courts “were not forbidden to apply a statute which [the Supreme Court] had previously declared unconstitutional and which it had, therefore, refused to apply in a given case.”²⁷ All judges had to obey the statutes, in which the parliament expressed the popular sovereignty. Judges did not have to obey the judgments of supreme courts because these judgments lacked such authority. Thus, if each judge had the power to decide on constitutionality of statutes, then a law would be disregarded as unconstitutional by some judges, while being held constitutional and applied by others. Moreover, unlike the U.S., most civil law countries had not only ordinary courts but also other courts such as administrative courts, which had to apply the same statutes as the ordinary courts. Thus, the conflicts between administrative courts and ordinary courts, particularly between different supreme courts, could occur when they exercised constitutional review.

²⁶ Nino, “A Philosophical Reconstruction of Judicial Review,” 290.

²⁷ Kelsen, “Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution,” 186; Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, 23–24.

In addition, traditional civil law courts were unsuitable for judicial review because their courts of last instance mostly lacked any discretionary power to refuse jurisdiction; a device similar to the *certiorari* of the U.S. Supreme Court. Mauro Cappelletti described the absence of this discretionary power as follows:

To illustrate, the Italian Court of Cassation must hear every case brought before it, an average of three to four thousand civil cases per year, while the Italian Constitutional Court delivers fewer than two hundred judgments annually. Thus, if the Court of Cassation were to have jurisdiction over constitutional cases as well, such cases would represent a fairly insignificant portion of its workload. Thus, submerged, these cases would receive neither the time nor the consideration that they require.²⁸

Finally, ordinary judges in continental Europe are not mentally prepared to the constitutional review. Continental judges typically were “career judges,” who entered the judiciary at a very early age and were promoted to the higher courts largely on the basis of seniority.²⁹ These judges developed skills in technical application of statutes. The judicial review of constitutionality of statutes was different from the technical application of statutes because judges had to make the principled interpretation of the Constitution that included abstract moral principles such as fundamental rights.

Kelsen’s original idea of constitutional review had four characteristics. First, Kelsen created a specialized tribunal, the constitutional court, to decide only constitutional issues, and he rejected giving this power to ordinary courts. He also gave the constitutional court decision the *erga omnes* effect (in relation to all) that obliged all including the ordinary courts to obey the decisions of the constitutional court. Second, the purpose of Kelsen’s court was not to protect fundamental rights, but to make the legal system to function more efficiently. In other word, this court aimed at “the smooth running of the constitutional process of government,”³⁰ and its main function was to resolve disputes concerning the boundaries of the constitutional authorities between governmental bodies. Kelsen omitted a bill of rights from the Constitution and recommended a constitutional court to avoid interpreting general principles such as justice and equality even when they were written in the Constitution. According to Kelsen, to interpret these principles would amount in effect to conferring on the

²⁸ Cappelletti, *Judicial Review in the Contemporary World*, 62.

²⁹ Ibid.; Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, 23–24.

³⁰ Patrono, “The Protection of Fundamental Rights by Constitutional Courts-A Comparative Perspective,” 408.

constitutional court “an intolerable plenitude of absolute powers.”³¹ Ordinary judges could not be given constitutional review of legislation since such review power was understood as legislative function.³² Third, the 1920 Constitutional Court of Austria exercised solely the abstract review, which had no relation with concrete cases. According to Mauro Cappelletti, “judicial review in Austria, in contrast to the American system, came to be entirely disassociated from concrete cases whether civil, penal or administrative.”³³ Fourth, there was no individual access to the constitutional court. As a positivist, Kelsen argued “the constitutional court should be able to review the constitutionality of legislation before its enforcement in the public realm, thus preserving the sovereign character of statute within the legal system thereafter.”³⁴ The federal and state governments could initiate such review in Austria. The framers of the 1920 Constitution of Austria discussed *actio popularis*, “every citizen’s the right to make an application to the Constitutional Court which would have been obliged to pass upon the validity of the statute.”³⁵ Nevertheless, these framers rejected *actio popularis*.

Though the European model originated from the Austrian Constitutional Court, it has been modified since then so that the functions of the European and American models are essentially similar. Constitutional courts are mostly established in countries ending a period of dictatorship and aspiring liberal democracy. For example, constitutional courts were established for protecting their constitutions, in particular fundamental rights, in Germany and Italy after WW II, Spain and Portugal after their democratization and countries of Central and Eastern Europe after the collapse of the Soviet Union. Modern constitutional courts in Europe are so complex that it is hard to find two courts having the same characteristics. Even so, these courts have general characteristics.

The European model still limits the constitutional review to a constitutional court, and it does not assign this power to ordinary courts, which is the main difference from the U.S. model where all courts exercise the constitutional review. Only the constitutional court has the exclusive power to review the constitutionality of statutes and other public acts, and it does not decide non-constitutional cases. Thus, the ordinary

³¹ Ibid., 403.

³² Merryman and Perez-Perdomo, *The Civil Law Tradition*, 3rd Edition, 37–38; Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, 17–18.

³³ Cappelletti, *Judicial Review in the Contemporary World*, 71.

³⁴ Sweet, “Why Europe Rejected American Judicial Review,” 2768.

³⁵ Kelsen, “Judicial Review of Legislation: A Comparative Study of the Austrian and the American Constitution,” 197.

courts normally do not exercise the judicial review of statutes. According to David P. Currie, “the Constitutional Court’s monopoly of the power to declare statutes unconstitutional expresses respect for the dignity of the legislature and adds legitimacy to the judicial determination; it also serves to promote uniformity and to reduce the risk of an erroneous or uninformed decision.”³⁶ The ordinary courts enforce statutes, while the constitutional courts defend the constitution against legislative infringement.

The constitutional court has three main types of jurisdiction: the abstract review, the constitutional question, and the individual complaint. The first is the abstract review, which “results in decisions on the constitutionality of legislation that has been adopted by parliament but has not yet entered into force (France), or that has been adopted and promulgated, but not yet applied (Germany, Italy, Spain).”³⁷ Though any of the specifically designated authorities can initiate this procedure, members of opposition parties usually challenge the constitutionality of legislation. Therefore, the abstract review works as a mechanism for protecting a parliamentary minority from the abuse of power by the majority and for ensuring full compliance with the Constitution. The constitutional court is not connected to the ordinary courts under the abstract review, but under the next two jurisdictions, in which the constitutional court decides constitutional matters in concrete cases.

The second type is the constitutional question procedure in which ordinary judges have an indirect role in the “concrete review” of statutes. If an ordinary judge decides that the ruling of a case depends on the determination of whether a specific law is constitutional, “the judge stops the proceedings and refers the constitutional question to the Constitutional Court, which then decides this issue and refers its decision to the original court so that the case may resume.”³⁸ Constitutional questions are filed by, and connected to the work of, ordinary judges because the constitutionality of a statute is vital for deciding the concrete cases. Constitutional questions are common in Western Europe, where German, Italian, and Spanish constitutional courts “behave increasingly as supreme courts and appear as a fourth level of jurisdiction... overseeing the decisions of ordinary jurisdictions.”³⁹ The importance of a constitutional question lies “in the fact that often what consequences can arise from a particular statute is only realized in the

³⁶ Currie, *The Constitution of the Federal Republic of Germany*, 166.

³⁷ Sweet, “Constitutional Courts and Parliamentary Democracy,” 87.

³⁸ Ferejohn and Pasquino, “Constitutional Adjudication,” 1689.

³⁹ Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, 25.

day to day practice of the law.”⁴⁰ Thus, the original idea of the special court separated from the ordinary judiciary has changed in these European countries. This change will be more evident when the constitutional court exercises the third type of jurisdiction, the constitutional complaint procedure.

The procedure of constitutional question should be open to any of the ordinary judges. While any judge of the ordinary courts can refer a question to the constitutional courts in Germany, Italy, and Spain, only the supreme courts and the courts of second instance can do so in Austria and France today.⁴¹ The procedure of constitutional question available only to the higher courts is less effective than the procedure available to any judge. Higher courts may be obstacles for a constitutionally minded judge of the lower court (or for a citizen) because the higher courts are often reluctant to consider the constitutionality of statutes in the beginning of a democratic regime. For example, in Italy, “initially, it was rather unusual for matter to be referred to the Italian [Constitutional] Court, especially by the higher courts, which almost never doubted the constitutionality of the laws in force.”⁴² There can also be conflicting constitutional interpretations by the higher court and the constitutional court because the higher court exercises constitutional review when deciding whether it transfers the question to the constitutional court.⁴³

The third type of jurisdiction is the individual complaint procedure (Germany and Spain). Individuals are granted the right to file a complaint to the constitutional court when they believe that their fundamental rights have been violated and after they have finished seeking all remedies at the ordinary courts. Violations of these rights may draw from an executive act that the ordinary courts have failed to quash or from the judgments pronounced by the ordinary courts. Thus, the complaints are mostly directed

⁴⁰ Ipsen, “Constitutional Review of Laws,” 115.

⁴¹ France was hostile to the constitutional review of statutes after their promulgation. However, a 2008 revision to the Constitution gave the two French supreme courts the power to send constitutional questions to the Constitutional Council. See The French Constitutional Council, “Priority Preliminary Rulings on the Issue of Constitutionality”; Fabbrini, “Kelsen in Paris: France’s Constitutional Reform and the Introduction of A Posteriori Constitutional Review of Legislation”; Sweet, “The Constitutional Council and the Transformation of the Republic.” The authority to submit the constitutional question to the constitutional court is also given only to the Supreme Courts in Bulgaria. See Article 150 of the Constitution of Bulgaria.

⁴² Carlassare, “Interlocutory Review – Abstract Review,” 130.

⁴³ The similar conflict occurred in Germany when “any court could refer a constitutional question to the Constitutional Court but only via an appropriate supreme court, which had the right to submit its own opinion on the question referred by the lower court... [Thus,] the participation of supreme courts in the procedure of constitutional question was abolished [in 1956].” Garlicki, “Constitutional Courts Versus Supreme Courts,” 51.

against executive acts or court judgments rather than statutes. According to Jorn Ipsen, the Federal Constitutional Court of Germany nullified numerous statutes as a result of individual complaints against executive acts or court judgments.⁴⁴

European constitutional judges mostly serve long terms (9-12 years), which provide not only independence but also relative accountability. According to Klaus von Beyme, “the limitation of office to 12 years excludes problems of senility (sometimes to be found in the US Supreme Court).”⁴⁵ If the judges serve for a short term, then it is not good for constitutionalism. New judges might not do their work well within a too short term (for example, 6 years or less) because they need to spend some time to learn the court’s conventions such as the judicial ways to discuss and write constitutional issues. Moreover, a short term would not allow judges to develop constitutional case law by consistently making the principled interpretation of the Constitution (which will be discussed in Chapter 4). A short term may also cause frequent changes in the court rulings, which is against the stability of law, a requirement of the rule of law.

The terms of European constitutional judges generally are not only long, but also non-renewable, which promotes the independence of the constitutional court. According to Beyme, “the impossibility of being re-elected strengthens the independence of the judges who are never invited to do any favour for the parties for this reason.”⁴⁶ On the other hand, Ginsburg argued that “judges serving a single limited term also have an incentive to act with an eye toward future employment possibilities, so to the extent political authorities have control over entry into the professorate or other post judicial positions, judges may be subject to political discipline in such system as well.”⁴⁷ This potential disadvantage of a single limited term is mitigated by the minimum age requirement. Constitutional judges who are appointed at over the age of 40 and serve for 12 years may have less incentive toward future employment possibilities than younger judges. Of course, no system can absolutely prevent a judge from benefits that may be offered by political, economic, and other interests.

A non-renewable long term is appropriate for justices of the constitutional court in a country like Mongolia whose population is small. A short term is not good for these countries due to the limited number of qualified candidates. If the term is non-renewable

⁴⁴ Ipsen, “Constitutional Review of Laws,” 128.

⁴⁵ Beyme, “The German Constitutional Court in an Uneasy Triangle Between Parliament, Government and the Federal Laender,” 103.

⁴⁶ Ibid.

⁴⁷ Ginsburg, *Judicial Review in New Democracies*, 47.

in a small country, all qualified candidates will become constitutional judge. They have to leave the court at the end of their term, and less qualified candidates may be appointed as replacements. Thus, the renewable term may seem helpful for a small country because qualified justices can be reappointed. However, a renewable term harms judicial independence. As justices are politically appointed, political institutions may reappoint only justices faithful to a certain interest.

The fixed number of justices is another guarantee of judicial independence because it limits the possibility of political institutions to influence the court by changing the number of justices. The number of justices of a constitutional court is fixed by the Constitution or the statute. For example, the number of justices of the Federal Constitutional Court of Germany has changed over time due to “consideration of efficiency, couplet with the politics of judicial recruitment.”⁴⁸ Currently, the number of justices of the Federal Constitutional Court is sixteen in Germany.

In Europe, there is a diversity of systems for appointing constitutional judges. In some countries, three different institutions appoint constitutional judges. For example, the President of the Republic of Italy, the parliament in joint session and the upper echelons of the judiciary name respectively one-third of constitutional judges.⁴⁹ In other countries, constitutional judges are appointed through super-majoritarian procedures. For instance, the *Bundestag* elects the half of federal constitutional judges of Germany and the *Bundesrat* elects the other half. According to the Law on the Federal Constitutional Court, the *Bundestag* must elect, by proportional representation, a twelve-member electoral committee, which elects eight federal constitutional judges by at least eight votes, two-third of all votes. The *Bundesrat* elects its eight justices by two thirds of the votes. The majority party often finds it difficult to appoint a constitutional judge without a compromise with other parliamentary parties since “all of the major parties approve any justice appointed to the court.”⁵⁰

The requirement to become a professional justice of the constitutional court is more apparent in the European system than in the American system. European constitutional justices are usually drawn from judges, lawyers and prominent legal scholars.⁵¹ For

⁴⁸ Kimmers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 18.

⁴⁹ Rolla and Groppi, “Between Politics and the Law: The Development of Constitutional Review in Italy,” 141.

⁵⁰ Ferejohn and Pasquino, “Constitutional Adjudication,” 1678.

⁵¹ The French Constitutional Council is exceptional in this aspect. Former Presidents of France are de jure life members of this council if they do not occupy a post incompatible with the mandate of council

instance, justices of the Federal Constitutional Court of Germany must have reached the age of 40, be eligible for election to the *Bundestag* and be qualified to exercise the functions of a judge.⁵² In addition, six of the 16 constitutional judges are selected from among the judges of the supreme Federal courts. According to Beyme, all of these requirements are “defined rigorously enough to prevent an influx of incompetent politicians into the Constitutional Court.”⁵³

This section researched Kelsen’s theory of constitutional review and the modern constitutional courts. It concludes that modern constitutional courts are different from the original Australian Constitutional Court (developed by Kelsen) in four ways. First, the constitutional court still has monopoly power in making constitutional review. Even though the ordinary courts are prohibited from doing constitutional review, they are indirectly involved in this review thanks to the procedures for constitutional question and constitutional complaint. Second, while the main purpose of the Kelsen’s court was only the efficiency of the legal system, the main purpose of modern constitutional courts has shifted to the protection of fundamental rights. According to Schnutz Rudolf Durr, “human rights protection has become one of the main functions – at least quantitatively the main function – of constitutional courts in Europe.”⁵⁴ These courts still maintain the function of monitoring the distribution of powers but the rights review becomes their main function. Third, modern constitutional courts have jurisdictions closely related to concrete cases (through the constitutional question and the constitutional complaint) although they retain the duty to conduct the abstract review. Fourth, access to the constitutional court has become so broad that not only a certain authorities can initiate the abstract review, but also individuals can submit constitutional complaints against violation of their own rights and ordinary judges can submit constitutional questions.⁵⁵ Today, the Federal Constitutional Court of Germany is the best exemplar of the European model because this court reflects all of these four points concerning the modification to the Kelsen’s Court. In continental Europe, there has been a change from the Kelsenian Constitutional Court to the German Constitutional Court, which is more similar with the American model of constitutional review.

member. There exist no age or professional qualifications for membership of the council. Currently, two of eleven members are former Presidents, but all of the other members studied law before their appointments. The French Constitutional Council, “The Members.”

⁵² Art. 2, 3, the 1951 Law on the Federal Constitutional Court, the Federal Republic of Germany.

⁵³ Beyme, “The German Constitutional Court in an Uneasy Triangle Between Parliament, Government and the Federal Laender,” 103.

⁵⁴ Durr, “Comparative Overview of European Systems of Constitutional Justice,” 2.

⁵⁵ Even *actio popularis* to the constitutional court exists in some countries like Hungary and Mongolia.

2.3. Similarities of American and European models

This section focuses on how the American and European models have evolved into having four similarities: (1) the protection of fundamental rights and freedom as a main purpose; (2) the reasoned judgment; (3) a specialized court for constitutional matters and other courts involved in the constitutional adjudication in different ways; and (4) constitutional review related to concrete cases as the most efficient system (plus the abstract review). These four similarities exist though many of the conventional understandings of the two models (their historical and institutional differences) remain valid today.

The first similarity is that the American and the European models are two means to the same purpose. Both protect fundamental rights against infringement by public authorities, mainly the legislature, and restrict political power by guarding the separation of powers and deciding electoral disputes regarding the highest positions or the arrangement of the highest political authorities in the country.⁵⁶ The protection of fundamental rights is the most important purpose of constitutional review in a democratic polity committed to liberal constitutionalism. According to Donald P. Kommers, “The essence of liberal constitutionalism is government in, limited by, and devoted to the protection of individual rights.”⁵⁷ The second similarity is that justices in both models make very deliberate reasoning in deciding a constitutional issue and use similar methods of constitutional interpretation (particularly the moral reading), which will be extensively discussed in Chapter 4.

The third similarity between the two models is that the U.S. Supreme Court and constitutional courts function similarly in practice though other courts are involved in the constitutional adjudication. Section 2.2 has established that the U.S. Supreme Court is not a constitutional court. However, the U.S. Supreme Court *de facto* functions as a special constitutional court because it decides mostly constitutional and other important federal cases due to its own limited federal jurisdiction and *certiorari* system.⁵⁸ The

⁵⁶ See Favoreu, “Constitutional Review in Europe,” 41–42.

⁵⁷ Kommers and Thompson, “Fundamentals in the Liberal Constitutional Tradition,” 24.

⁵⁸ This similarity between the American and European models is valid only in the case of the U.S. because the supreme courts in some other countries having the American model do not function as a

Supreme Court's jurisdiction covers matters on the U.S. Constitution, and other federal laws. There are some areas where both state and federal laws (security regulation, taxation, anti-trust enforcement, labor law, and banking) are relevant, or where federal laws (foreign or military affairs, admiralty law, patent law or copyright law) play a more significant role. However, the Supreme Court does not decide questions purely related to state law. Thus, most ordinary civil and criminal cases are not subject to the jurisdiction of this court because the state courts decide these cases according to the state laws. Justice Breyer wrote as follows:

Most American law is state law, not federal law. Virtually all family law, and most property, accident, testamentary, criminal, and business law is state law. Even education law and environmental law is largely state law. And state supreme Courts, not the United States Supreme Court, have the final word as to the interpretation of state law... [The Court's task is] not to consider all plausible claims that a lower court decision is legally erroneous, [but] to provide a nationally uniform interpretation of the Constitution or other federal law where it sees a need for consistency.⁵⁹

In addition, the Supreme Court has become more similar to a kind of special court for constitutional issues because it mostly chooses and decides important cases, largely constitutional cases, by using *certiorari* (the discretionary jurisdiction). Section 2.1 noted that the U.S. Supreme Court has two appellate jurisdictions, appeal and *certiorari*. However, this distinction has been blurred because *certiorari* becomes the most essential appellate jurisdiction. The number of appeals has declined and the number of *certiorari* has increased. In 2006, American scholars reported as follows:

In recent years, more than 7000 cases have been filed annually in the Supreme Court. Only a few come within the Court's original jurisdiction or its now nearly non-existent mandatory appellate jurisdiction; virtually all are petitions for certiorari, which the Court may, but need not, choose to hear. The Court decided only 80 cases with written opinions in the 2004-2005 Term, down from an average of 172 cases each year for the five Terms spanning 1984-88 and an average of 113 for the five Terms spanning 1990-97.⁶⁰

Under *certiorari*, the Supreme Court decides only those cases it wants with a few exceptions, and it does not explain why it accepts or rejects a requested appeal.

special court for constitutional matters. For the extreme conservatism of the Japanese Supreme Court, see Matsui, *The Constitution of Japan*, 145–150.

⁵⁹ Breyer, *Active Liberty*, 6.

⁶⁰ Choper et al., *Constitutional Law*, 49.

American scholars argued as follows: “The Court has often asserted that the denial of certiorari carries no precedential significance; the Court does not approve the judgment of the lower court, but merely – for unexplained reasons – allows it to stand.”⁶¹ Without this kind of discretionary jurisdiction, the Court would be overburdened with ordinary or trivial cases, and could not pay enough attention to constitutional questions and other important questions of federal law. By *certiorari* and other means, the Supreme Court can control its own docket, granting review to only a small number of all petitions for review submitted to it, and concentrating on most important cases. Constitutional cases have recently constituted about half of approximately 80 cases [the docket of this court] each year, with statutory cases taking up the other half.⁶² According to Durr, “the name of the court does not matter. Being on top of hierarchy of ordinary courts, the US Supreme Court *de facto* only picks “constitutional cases” through its *certiorari* filter.”⁶³ Thus, this court of the U.S. functions like a constitutional court in practice.

As Section 2.2 shown, constitutional courts characteristically decide constitutional matters, and ordinary courts do not decide such matters. However, ordinary courts are more involved in the constitutional review due to the essential roles of the constitutional question and complaint in European countries such as Germany today. The constitutional question procedure available to all ordinary judges promotes their responsibility for constitutionality of statutes. Because an ordinary judge has to send a constitutional question to the constitutional court on a statute they are applying, he or she considers the constitutionality of that statute. If a judge does not submit a constitutional question to the constitutional court, it implies that the statute he or she is applying does not violate the Constitution. However, if the statute is clearly against the Constitution, the ordinary judges will have to submit a constitutional question to the constitutional court. Otherwise, the litigants, the media and legal scholars will criticize these judges. Moreover, if the statute, which the ordinary judges are applying, is so vague that it can be interpreted as either constitutional or unconstitutional, these judges tend to interpret the statute as constitutional in the most possible way. Victor F. Comella argued as follows:

⁶¹ Ibid.

⁶² Tushnet, “The United States: Eclecticism in the Service of Pragmatism,” 13.

⁶³ Durr, “Comparative Overview of European Systems of Constitutional Justice,” 6

Before referring a question to the constitutional court, the ordinary judge is expected in many countries to look for an interpretation of the statute that will preserve its constitutional validity. This power of interpretation allows ordinary judges to have a share in the task of safeguarding the Constitution against offensive legislation. Although they do not have the power to disregard statutes on constitutional grounds, they have the power to interpret them so as to make them cohere with the Constitution.⁶⁴

If the judges interpret the vague statute as unconstitutional, the litigants, the media and legal scholars would criticize them. Therefore, ordinary judges in Europe start to take the Constitution seriously and interpret it in a limited sense. Ordinary judges' involvement in the constitutional review challenges the old argument that these judges are mentally unprepared for this review, so a special constitutional court should be established for it as Section 2.2 has discussed.

Through the constitutional complaint process, the constitutional court is also strongly connected to the ordinary courts. According to Comella, the constitutional court becomes in practice the highest supreme court of the judiciary though its jurisdiction is restricted to the issue of whether or not a fundamental right has been infringed.⁶⁵ The reason is that the constitutional court reviews the constitutionality of ordinary court decisions. Plaintiffs who have lost their cases in the ordinary courts and believe their rights were still infringed upon often go to the constitutional court and challenge the constitutionality of the judicial decision concerned. In other words, if a judge does not submit a potential question against clearly unconstitutional legislation or does not interpret the vague legislation as constitutional, the plaintiff may submit a complaint to the constitutional court after having exhausted the judicial recourse at the ordinary courts. The constitutional court then reviews the constitutionality of ordinary court decisions, and the ordinary courts will have to reconsider the relevant cases accordingly.

The fourth similarity between the American and European models is that constitutional review is closely related to concrete cases (plus the abstract issues) as the most efficient and desirable system for protecting fundamental rights and freedoms in both models. According to Alec Stone Sweet, the European constitutional review has

⁶⁴ Comella, “European Model of Constitutional Review of Legislation,” 472; See also Sweet, “The Politics of Constitutional Review in France and Europe.”

⁶⁵ Comella, “Consequences of Centralizing Constitutional Review in a Special Court,” 1710.

become more concrete as it evolved, and the U.S. judicial review has become increasingly abstract.⁶⁶ Therefore, there are limitations to the statements that European constitutional review is abstract and the U.S. judicial review is concrete.

Abstract review still exists in Europe, but there is a rise of constitutional review connected to concrete cases. Section 2.2 has shown that the constitutional court has not only the abstract review but also constitutional question and the constitutional complaint jurisdictions. The latter two are the main procedures of the constitutional courts and the efficient devices for protecting fundamental rights in Europe. For example, most cases are filed in the Federal Constitutional Court of Germany through the constitutional complaint and constitutional question. The constitutional complaint is first in importance (122,256 cases, with 96.14 % of the total number of cases filed between 1951 and 2000), constitutional question second (3,121 cases, 2.45 %), and abstract review third (140 cases, 0.11 %).⁶⁷ According to Antonio La Pergola, the constitutional complaint is one way European constitutional brand of justice has come “nearer to the spirit, if not the technicalities, of the judicial review of the American type.”⁶⁸ Thus, constitutional review related to concrete cases tends to dominate not only in countries having the American model, but also in countries whose constitutional courts exercise the constitutional complaint or the constitutional question jurisdictions.⁶⁹

The American judicial review is mostly related to concrete cases due to the constitutional requirement of “cases and controversies” as Section 2.1 showed. However, the U.S. courts make the abstract review of constitutionality of statutes before their enforcement and without a concrete case or controversy in a very limited sense. For example, Alec Stone Sweet and Martin Shapiro developed a new argument in which abstract review occurs most often in one of the following two situations in the United States:

First, under certain circumstances, plaintiffs may seek declaratory or injunctive relief by a judge, which, if granted, suspends the application of the law in question pending a judicial determination of its constitutionality. Plaintiffs commonly file such requests

⁶⁶ Sweet, “Why Europe Rejected American Judicial Review,” 2772.

⁶⁷ Beyme, “The German Constitutional Court in an Uneasy Triangle Between Parliament, Government and the Federal Laender,” 105.

⁶⁸ Pergola, “Introductory Statement,” 10.

⁶⁹ For that the most dominant review procedure is constitutional question in Italy, and the Italian judicial review has the hybrid nature of American and European models, which helps to increase the degree of concreteness of the Constitutional Court judgments, see Rolla and Groppi, “Between Politics and the Law: The Development of Constitutional Review in Italy,” 148.

immediately after the statute has been signed into law by the appropriate authority. Second, under judicial doctrines developed by the US Supreme Court pursuant to litigation of First Amendment freedoms, plaintiffs may attack a law on its face, called a ‘facial challenge’, and plead the rights of third parties.⁷⁰

Sweet and Shapiro call these two situations respectively the doctrine of declaratory or injunctive relief and the doctrine of facial overbreadth and vagueness.

The very limited abstract review has developed in American constitutional case law. For their argument, Sweet and Shapiro discussed a decision of the U.S. Supreme Court, which ruled on offensive speech in cyberspace under the American abstract review. In 1995, the U.S. Congress enacted the Communications Decency Act (CDA), which sought to regulate “indecent” and “offensive” expressions (pornography) on the Internet. On February 8 1996, the day President signed the CDA into law, 20 public interest and business groups filed suit in a Federal District Court to prohibit the Federal Government from enforcing two of its key provisions. The plaintiffs claimed that two provisions of CDA violated freedom of expression guaranteed by the First Amendment to the U.S. Constitution, and asked that the court enjoin the law’s application. A district court agreed with the plaintiffs, and issued a preliminary injunction against the enforcement of the challenged provisions. On appeal, the Supreme Court upheld the district court’s ruling, invalidating the law as unconstitutional for facial overbreadth and vagueness.⁷¹

Sweet and Shapiro argued that American case law has developed the doctrine of declaratory or injunctive relief and the doctrine of facial overbreadth and vagueness, both of which make the abstract review of statutes possible at least in a limited sense. The reasoning in the CDA decisions was so abstract that judges developed a judicial construction with hypothetical situations, narratives with abstractions as characters, stand-ins for real people facing challenging dilemmas. Sweet and Shapiro wrote the following:

[In this decision], American judges imagined an average ‘speaker’ interested in ‘serious discussion of prison rape, homosexuality, [or] birth control.’ They read the text of the

⁷⁰ Shapiro and Sweet, *On Law, Politics, and Judicialization*, 347; These two authors also argue that the U.S. concrete review includes “many abstract counter-currents,” elements of abstract review, because the abstract and the concrete are inseparable. Ibid., 366–373.

⁷¹ *Reno v. the American Civil Liberties Union*. 65 U.S. For the detailed analysis of the abstract review in this decision and abstract reasoning, see Shapiro and Sweet, *On Law, Politics, and Judicialization*, 353–358.

statute and decided that it would, if allowed to enter into force as written, have produced ‘an obvious chilling effect’. The speaker would be led to keep silent, and the government failed to show that this cost was warranted, given its own policy interests.⁷²

This type of reasoning is not different from what constitutional courts do under the abstract review.

The argument that there is abstract review in the U.S., which Sweet and Shapiro have developed, is not popular because most comparative constitutional scholars think that the U.S. judicial review is not abstract, but concrete. The typical textbook on American constitutional law does not discuss the abstract constitutional review. Thus, scholars could easily criticize the argument for the existence of abstract review in the United States. The argument by Sweet and Shapiro is valid only in a few exceptional situations where the U.S. courts interpret the requirement of case and controversy (the standing) very loosely because of the nature of the case. Sweet and Shapiro also do not deny the formal, structural distinctions between the American and European models (its abstract review). Indeed, the American judicial review is largely concrete thanks to the constitutional requirements on cases and controversies, while the European review is abstract (with or without the reviews related to concrete cases) thanks to the constitutional establishment of abstract review. Under the typical American judicial review, an individual has to show that his or her own fundamental right has been infringed upon. Under the European abstract review, authorities (a minority of MPs) can submit a request to the constitutional court without showing that their own rights were violated.

2.4. The European model in a transitional society: the Constitutional Court of Hungary

This section starts with discussions on why the Constitutional Court of Hungary deserves being treated separately from other constitutional courts by looking at its purpose, the term, appointment and qualifications of justices, the idea of conflict of interests and jurisdictions. After showing the advantages and disadvantages of *actio popularis*, the abstract review of legislation initiated by any individual in Hungary, this

⁷² Ibid., 365.

section argues for the jurisdictions to be more related to concrete cases.

As most of Western European countries established a constitutional court, nearly all of Central and Eastern European countries did so in the 1990s. Among constitutional courts of Central and Eastern Europe, the Hungarian Constitutional Court is relevant to this book for three reasons. First, this court played an important role in protecting fundamental rights and establishing constitutionalism in Hungary, a transitional country like Mongolia, in the 1990s. According to Schwartz, this court was “remarkably courageous and committed to human rights.”⁷³ Hungary was one of Central European Countries that had greater success in maintaining the rule of law and doing liberal reforms, and the Constitutional Court was one of the mechanisms important for this success.⁷⁴ Second, the Hungarian Constitutional Court’s success in protecting fundamental rights was achieved mainly through *actio popularis*, which was similar to an individual petition of the Mongolian *Tsets*. Third, the Hungarian Court protected many fundamental rights because its jurisprudence was largely based on an appropriate interpretation method, the moral reading of the Constitution. However, the Mongolian constitutional jurisprudence did not rely on such method, so it resulted in poor protection of fundamental rights, which will be discussed in Chapters 4 and 5.

The Constitutional Court was established for the first time in Hungary as a result of Act XXXI of 1989, the substantive amendment to the 1949 Constitution, and Act XXXII of 1989 on the Constitutional Court (Act XXXII). According to the preamble of the latter act, the Hungarian parliament established this court “in order to establish the rule of law, to protect constitutional order and the basic freedoms guaranteed by the Constitution, to foster the separation of powers and to secure checks and balances, to set up the supreme body protecting the Constitution.” For this purpose, the Constitutional Court of Hungary had the power to review and invalidate unconstitutional laws and administrative acts. In 1990s, this court became “one of the most powerful tribunals of its kind anywhere in the world”⁷⁵ as a result of the institutional guarantees of its independence, the composition of first judges committed to the transition towards liberal democracy, and the very broad jurisdictions.

⁷³ Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, 106.

⁷⁴ However, constitutional democracy was weakened in Hungary as the new Constitution that attracted a great deal of criticisms was adopted and took effect on January 1, 2012. This book does not cover this constitutional change in Hungary, but the Constitutional Court and its jurisprudence in 1990s.

⁷⁵ Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, 9; Dupre, *Importing the Law in Post-Communist Transitions*, 6.

The amended Hungarian Constitution guaranteed the independence of the Constitutional Court through the tenure, the appointment process, the qualification for justices, the budget and the immunity. The Hungarian Court had eleven justices elected for nine years and capable to be reappointed once. According to Diana Mecsi, three justices out of ten were re-appointed in 2010.⁷⁶ The constitutional judges were nominated by a special committee consisting of one member of each political party represented in the parliament,⁷⁷ and were elected by a majority of two-third of the votes of the parliamentary members. Due to this requirement, the stronger or majority parties could not control the nomination and the appointment of the judges. A majority of two-thirds of the votes of parliamentary members present was required to pass the law on the Constitutional Court. The Hungarian Court was financially and administratively independent. This court determined its own budget that was submitted for the approval to the Parliament as a part of the state budget (Act XXXII, art. 2). The judges had the same immunity as MPs and discipline their own colleagues.

Members of the Government or employees of political parties, as well as high-ranking officials who served in such capacity during the four years before the election were prohibited to become a constitutional justice (Act XXXII, art. 5.3). Hungarian citizens with a law degree who had reached the age of 45 years might be appointed as a justice of the Constitutional Court. The parliament appoints constitutional justices from among legal scholars and lawyers with at least 20 years of professional experience in a position demanding a degree in political science and law (Act XXXII, art. 5.2). Almost all justices were of academic background in the field of law in 2010.⁷⁸

The first justices of the Hungarian Constitutional Court were important for the development of constitutional jurisprudence. The first two of ten justices were two former Supreme Court judges, while the others were either law professors or scholars.⁷⁹ Georg Brunner wrote on these justices as follows:

⁷⁶ Mecsi, “Institutions and Functioning of the Hungarian Constitutional Court.”

⁷⁷ Unfortunately, this requirement of the nominating committee was weakened by a constitutional amendment. “The number of the members of the Nominating Committee shall be between 9 and 15, determined by the size of the respective parliamentary fractions. [32/A subsection (4) of the Constitution, amended on 5 July, 2010] Prior to this modification no reference was made to proportionality, the Nomination Committee consisted of one member of each parliamentary fraction.” This amendment eliminated the requirement of asking opinions of the opposition party during the nomination process of candidates to constitutional judges. See *Ibid.*

⁷⁸ The Hungarian Constitutional Court, “Present Members.”

⁷⁹ Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, 79.

In terms of professional specialization, civil lawyers (eight) and public lawyers (five) dominate the Court, whereas criminal law is represented by only one judge. This unusual makeup of the Court can be explained by the fact that in Hungary legal scholars were the driving force behind the liberal-democratic reforms and within legal scholarship civil law was the field in which one could work relatively undisturbed by political pressure.⁸⁰

The fact that only one justice was criminal lawyer was important because criminal law was once the main tool of the communist party for violating fundamental rights of individuals. Moreover, justices including Chief Justice Laszlo Solyom who studied in Germany positively influenced the performance of the court.

Articles 9 and 10 of Act XXXII required the judges to avoid a conflict of interest so that it ensures the impartial decision making not influenced by the judge' personal interests. The judges of the Constitutional Court were not allowed to be members of parliament, council members, officials of other state organs, leading officials in organs of interest representation and members of parties, as well as not permitted to pursue political activities or make political statements. Constitutional judges also should not engage in any gainful occupation other than scientific, educational, literary and artistic activities.

The Hungarian Constitutional Court had very broad jurisdictions and three of these jurisdictions were important.⁸¹ The first jurisdiction was the *actio popularis*, the abstract review of laws and administrative acts for constitutionality after their promulgation, which was available to anyone. All citizens had the right to submit a petition on constitutionality of any law or administrative act to the Constitutional Court no matter whether he or she was affected by laws and other legal means or to what degree he or she finished an ordinary judicial proceeding. As a result of this unlimited standing, hundreds of citizens challenged laws, and the overwhelming majority of constitutional cases fall in the category of *actio popularis*.⁸² The second jurisdiction of the Hungarian Court was the constitutional question (Act XXXII, art. 38.1). This was the same as the classic constitutional question procedure, discussed earlier in Section

⁸⁰ Solyom and Brunner, *Constitutional Judiciary in a New Democracy*, 73.

⁸¹ Other jurisdictions are the ex ante examination for unconstitutionality of statutes adopted but not yet promulgated, and of provisions of the rules of procedure of Parliament and of international treaties; the examination of conflicts between international treaties and rules of law, as well as other legal means of state administration; the elimination of unconstitutionality by omission; the elimination of conflicts of competence between state organs, local governments and other state organs, or between local governments; and the interpretation of provisions of the Constitution (Act XXXII, art. 1).

⁸² Solyom and Brunner, *Constitutional Judiciary in a New Democracy*, 81.

2.2. If a judge deciding a concrete case found a law unconstitutional, then he or she had to suspend the proceeding and submit a constitutional question to the Constitutional Court.

The third jurisdiction was a form of constitutional complaint (normative constitutional complaint). The Hungarian complaint was more limited than the German one (*Verfassungsbeschwerde*) because anyone had the right to file a complaint before the Constitutional Court for a violation of one's own fundamental rights if the injury was consequential to the application of the unconstitutional law and if he or she had exhausted all other possible legal remedies or no further legal remedies were available to him or her (Act XXXII, art. 48.1). An individual could not file a complaint for the violation of his or her fundamental rights against an administrative or judicial decision in a concrete case unless he or she challenged the constitutionality of norms on the basis of which the decision had been brought. Thus, the Hungarian constitutional complaint protected fundamental rights not against the judicial decision or the administrative act but against the norm of law. “The number of the constitutional complaints presented to the Hungarian Constitutional Court in [the first decade] does not amount even to 1% of the total number of potential claims.”⁸³ Few cases initiated by this complaint system showed that this system did not work efficiently in Hungary. Instead of the normative complaint, the individual could directly and easily initiate the abstract review of laws and administrative acts (*actio popularis*).

Many scholars accepted that the *actio popularis* had been the most important means for protecting the fundamental rights and establishing constitutionalism in the first decade of the Hungarian Court’s existence. The *actio popularis* had two advantages. First, the *actio popularis* was suitable for a transitional society because it could be an efficient means to make the entire legal reform more consistent with constitutional principles. For Hungary, the transitional period of the 1990s from socialism to liberal democracy demanded a reform of the whole legal system. Since citizens challenged almost all of the constitutionally suspicious legal norms through *actio popularis*, which did not require any individual interest or standing, the Constitutional Court reviewed these challenges and developed constitutional case law. As Brunner said, “in this way, the Constitutional Court had the opportunity, in the early stages of the new democracy, to review almost the entire legal order for unconstitutionality and to establish guiding

⁸³ Halmi, “The Hungarian Approach to Constitutional Review,” 194.

standards for the Hungarian constitutional state.⁸⁴ Second, the *actio popularis* helped in developing a constitutional culture in a relatively short period. First Chief Justice of the Hungarian Constitutional Court Solyom wrote as follows:

Turning to the constitutional court became a special channel of direct democracy, and for the influence of the citizenry upon legislation. This possibility, and the frequent effect of such actions, the invalidation of laws (even laws taking force not long previously), the coverage of these events in the press, and the cases when the court refused the challenge, all constituted a unique learning process of constitutionalism for the citizens. The *actio popularis* contributed to the popularity of the Constitutional Court. People felt that they had an ultimate forum to call upon; they appreciated the impartiality of the Court as well. Popular support in turn strengthened the Constitutional Court's legitimacy and its position in the political system.⁸⁵

However, scholars criticized the *actio popularis*. The *actio popularis* resulted in a massive workload for the Constitutional Court. This massive caseload was needed during the system change, but it is not needed now because the main legal reforms are completed in Hungary. According to Durr, “[*actio popularis*] can lead to a high number of cases, which can clog down a constitutional court, making it unable to make up within reasonable time really pressing issues, including human rights cases.”⁸⁶ Moreover, the *actio popularis* increased the risk of politicizing the Constitutional Court because this procedure was not limited by any requirement of standing or interest, and political actors might abuse it.

Hungarian constitutional judges and scholars argued that the jurisdictions more related to the concrete cases should play the dominant role of *actio popularis*.⁸⁷ The ordinary judge should use more frequently the constitutional questions. The development of constitutional question depended on the ordinary judges' awareness of constitutionalism. In the period of transition, ordinary judges did not find relationship between the application of statutes and the Constitution. Nevertheless, ordinary judges would gradually become more aware of constitutionality of statutes in the long run.

⁸⁴ Solyom and Brunner, *Constitutional Judiciary in a New Democracy*, 81.

⁸⁵ Solyom, “The Role of Constitutional Courts in the Transition to Democracy,” 152.

⁸⁶ Durr, “Comparative Overview of European Systems of Constitutional Justice.” Prof. Durr also mentioned the danger of *actio popularis*, which was warned by President of the Constitutional Court of Croatia: “[A] single person had made some 800 applications to her Court [of Croatia], causing considerable disruption of the work of the Court. The Venice Commission is likely to echo this warning in its draft Report on Individual Access to Constitutional Justice.”

⁸⁷ Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, 107.

Moreover, the classic (German) constitutional complaint should be adopted because of three reasons. First, the constitutional complaint (and the constitutional question) would make the court more judicial and less political. According to Halmai, “the Hungarian Constitutional Court can be freed from all negative political implications about the activist uses of its powers only if it reconstructed to be more like an ordinary court than like an upper chamber of the Parliament, as it is.”⁸⁸ While protecting the Constitution, the court could avoid unnecessary confrontation with political branches of the government and would show more respect to these branches because it mostly deals with judgments of ordinary courts.

Second, the classic constitutional complaint can strengthen jurisdiction in the field of fundamental rights because it ensures that “those who make decisions about the lives of citizens also follow constitutional principles in their exercise of official power.”⁸⁹ The constitutional complaint is more important than *actio popularis* because it functions to end concrete violations of fundamental rights. Rights violations occur in unconstitutional applications of laws rather than unconstitutional laws seen in the abstract. The vast majority of cases decided by the German Constitutional Court are initiated through the constitutional complaint, and they concern concrete rights violations, which are mostly done by the decisions of ordinary courts or administrative organs. For example, most of the caseload in the German Court in 1993 was made up of constitutional complaints with 75 percent being brought against judicial decisions.⁹⁰ Concrete violations of individual rights cannot be reviewed through any abstract review including *actio popularis*.

Third, the reasoning by the constitutional court would be improved under the individual complaint procedure. According to American scholars, “concretely adverse interests sharpen the issues for judicial resolution and enhance the likelihood of illuminating argument.”⁹¹ The constitutional complaint system has a very close relationship with the concrete problem. Because individuals have a burning interest in a case and because they think they are victims of an unconstitutional act, they fight this case intensively, giving concrete examples, important points, and solid justifications for their claims. This burning interest in the concrete case can be explained by one of Hume’s psychological principles, the principle of the greater influence of more

⁸⁸ Halmai, “The Hungarian Approach to Constitutional Review;” 209.

⁸⁹ Ibid.

⁹⁰ Kimmers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 27.

⁹¹ Choper et al., *Constitutional Law*, 1554.

particular and determinate ideas on the imagination, as follows:

Hume's thought was that pleasures with which we are acquainted, and of which we have detailed and specific ideas, have more influence on us than those we conceive of under the general notion of pleasure or advantage. In fact, the more general and universal our ideas, the less their influence on the imagination and so on the passions.⁹²

The concrete examples of alleged violations of rights show how intensively the law affects the lives of individuals. Thus, judges are capable of deciding cases with a detailed knowledge of all relevant facts and principles pertaining to a case, which will sharpen the constitutional reasoning in the judgment. However, *actio popularis* does not have a close relationship with the concrete problem because the individual interest in case is not required. Thus, the Constitutional Court may not take the matter seriously and clearly.

Conclusion

Constitutional review is essential for implementing the rule of law and constitutionalism. Thus, Chapter 2 examined two models of this review. Under the American model, ordinary courts exercise constitutional review. Under the European model, only a special constitutional court exercises this review. These two models tend to have four similarities in spite of their historical and institutional differences: the protection of fundamental rights as the main purpose; the reasoned judgment based on the similar method of constitutional interpretation; a specialized court for constitutional matters and other courts involved in the constitutional adjudication; and the constitutional review related to concrete cases as the most efficient system (plus the abstract review). Thanks to these similarities, an American theory of constitutional interpretation can be used in the European model if it improves the protection of fundamental rights.

Chapter 2 also focused on the Hungarian Constitutional Court by investigating its purpose, composition, independence, impartiality, and jurisdictions including *actio popularis*. This court of Hungary was more successful in protecting fundamental rights

⁹² Rawls, *Lectures on the History of Moral Philosophy*, 39.

than the Mongolian Constitutional Court (*Tsets*) in terms of quantity and quality of their decisions though both courts have *actio popularis* as the main mechanism of constitutional review. The book finds two distinctions between these courts. First, the Hungarian Constitutional Court was instituted well so that it worked independently and composed of qualified justices at the period of transition. Chapter 3 shows that Mongolia created the *Tsets* by following the worldwide tendency of constitutionalism and adopting the European model, but that the *Tsets* had the weak guarantees of judicial independence and the less qualified composition. Second, from the beginning of its existence, the Hungarian Constitutional Court provided reasoned judgments and using a better method of interpreting the Constitution; that was, the moral reading of the Constitution. Chapter 4 will show how the Hungarian Court did the moral reading as with the courts of matured democracies such as the U.S. and Germany while Chapter 5 will show the weakness of the moral reading by the Mongolian *Tsets*.

Chapter 3

Constitutional Review in Mongolia

The Constitutional Court (*Tsets*) of Mongolia was created as a result of long deliberations. Section 3.1 explores how the constitutional review was deliberated during the constitution making. The drafts of the Constitution, the protocols of discussions by members of the State Small *Khural* and the People's Great *Khural* (the framers), and the materials of domestic and international conferences on the draft are the sources used in this section. The section argues that according to the framers, constitutional review was a necessary element of the *Rechtsstaat* and a mechanism for protecting the Constitution. It also examines two models of review, the Soviet and American models, which framers compared with the European model. The European model was chosen because the Soviet model was too weak for protecting the Constitution while the American one was unsuitable to the Mongolian legal tradition.

Section 3.2 argues that the *Tsets* is a version of the European model of constitutional review. The constitutional text, the discussions by framers and foreign experts, the practice of the *Tsets*, the decisions of this court, current laws and scholarly writings are the sources referred to in this section. The section focuses on features of the *Tsets* such as its name, composition, appointment of justices, term of justices, qualifications of justices, jurisdictions and the procedure in decision-making. This section finally evaluates the nature of the *Tsets* by comparing it with the Committee of Constitutional Supervision of the USSR, and examines whether it meets the criteria of the constitutional court.

3.1. Discussions on constitutional review in the constitution making

3.1.1. The Soviet model of constitutional review as weak for the *Rechtsstaat* and the protection of fundamental rights

This subsection notes the absence of constitutional review under the socialist regime in Mongolia and discusses the two primary purposes of creating constitutional review in the 1992 Constitution. The framers used these two purposes as referrals to evaluate models of constitutional review. They rejected a weak model called the Soviet model because it could not achieve these two purposes. Thus, this subsection examines the historical discussions on the Soviet model, its main features, and arguments for and against this model.

No constitutional review mechanism to legislation and other acts existed in Mongolia until 1992. When debating the draft of the Constitution, the framers also spoke about the absence of constitutional review and judicial independence. There was no established system of reviewing whether the law was consistent with the Constitution or even whether the governmental act was consistent with the law.¹ The courts lacked a review power. Framer Tsog L. argued that high-ranking organs such as the Central Party Committee and their officials acted arbitrarily without being limited by the law because they often interfered with the courts and the courts never handled complaints against these organs and officials.² Thus, Mongolia needed a mechanism to review the new Constitution.

The Constitution framers adopted the constitutional review for two primary purposes. The first purpose was to establish the *Rechtsstaat* (the rule of law) and the second was to protect fundamental rights. The framers explicitly intended to abolish the socialist legal system by establishing the *Rechtsstaat* in Mongolia along with the introduction of constitutional review. The Constitution could be realized in practice only if a court, either an ordinary court or a special court, protects this document. For example, framer Bayar S., later the Prime Minister (2007 - 2009), argued that the Constitution should have its own guardian, the constitutional review mechanism, to establish the *Rechtsstaat*.

¹ Chimid B., UBKh-n khuraldaanii temdegel (Oct. 18, 1991): 89; Altangerel E., AIKh-n khuraldaanii temdegel (Dec. 14, 1991): 63, in *Mongol ulsiin undsen khuuliin arkhiviin san*.

² Tsog L., UBKh-n khuraldaanii temdegel (Oct. 18, 1991): 95; Tsog L., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 38-39, in *Mongol ulsiin undsen khuuliin arkhiviin san*.

According to Bayar, the *Rechtsstaat* consisted of three essential elements: “(1) the law, (2) a mechanism to implement the law, and (3) a review of whether life goes according to the law.” This third element required the existence of constitutional review.³ Framer Galsandorj B. also clearly made a similar argument for this review:

A cause of the perversion in Mongolia was that the Constitution was not implemented. Who will rule Mongolia in general? Not any individual, but the Constitution will rule the country at the highest level. We are setting up the *Rechtsstaat*, which means that the Constitution exists at the highest level, everybody is ruled by the Constitution, and all activities comply with the Constitution. The State Great *Khural*, the Government, and the Supreme Court may violate the Constitution. Thus, let’s see what the *Rechtsstaat* demands, and create a guardian of the Constitution, an organization to implement this law by reviewing whether it is violated or not.⁴

The second purpose of adopting constitutional review was to protect fundamental rights from abuses of public powers, particularly by the parliamentary majority. The framers pointed to the worldwide tendency to allow for constitutional review to protect basic rights, and to allow citizens to exercise their right to access to the constitutional court. For example, framer Bat-Uul E. stated:

The constitutional court has become a world-wide tendency. The State Great *Khural* cannot be politically neutral because it always serves the side of a winning political party. We provided the winning party an opportunity to oppress opinions of other parties or to put obstacles in their activities by writing many general terms such as social and state security in the Constitution. For example, let’s imagine that a political party became majority in the *SGKh* so that it managed to enact a law to trace and oppress individuals with opinions different from the party. As a result, a member of another party might be indicted for a political crime according to this law, which seemed to be consistent with constitutional clauses on social and state securities. If the court punished that person by applying this law, his or her lawyer would file a complaint that the law violated his freedom of expression.⁵

³ Bayar S., AIKh-n khuraldaanii temdegel (Dec. 14, 1991): 68-69, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

⁴ Galsandorj B., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 37, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

⁵ Bat-uul E., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 79-80, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

Even though the Constitution framers agreed that constitutional review was “a guardian of democracy and the Constitution,”⁶ they disagreed as to which institution should exercise the power of this review in Mongolia. The framers discussed three models: the soviet model (the constitutional supervision council), the American model (the supreme court), and the European model (the constitutional court).

The Soviet model of constitutional review was referred to as the constitutional supervision council having only an advisory power to the parliament. The People’s Great *Khural* (the *PGKh*) adopted this model as the Constitutional Supervision Council in the 1990 Law on Constitutional Amendment (the 1990 Amendment). This law consisted of only three clauses on the Council, allowing for no judicial review power and failing to make its institutional arrangement complete. For example, the 1990 Amendment was silent on who was eligible to be appointed as a member of the Council, how its members would be appointed, what procedures govern the operation of the Council, and who could have access to the Council. Moreover, the *PGKh* neither passed a specific law on the Council nor appointed its members, violating the 1990 Amendment. The Council in the Amendment was not established in practice because of the risk that it could be used against new political forces by enforcing the old socialist Constitution,⁷ and because of the urgency to draft the new Constitution.⁸ Nevertheless, the idea of the constitutional supervision council was included again in one of the early drafts of the new Constitution⁹ and was reconsidered along with the American and European models during the constitution making in 1991 and 1992.

The main features of the Constitutional Supervision Council described in the 1990 Amendment and the drafts of the Constitution were the appointment of its members, the qualification of its members, and its jurisdictions. According to the draft Constitution, this Council consisted of seven members. The *SGKh* appointed three of its members for nine years, the President three members, and the Supreme Court the remaining one. Members of the Council elected one of themselves as the chairperson. Moreover, candidates to the Council could be a lawyer as well as other professionals such as a

⁶ Lamjav D., AIKh-n khuraldaanii temdeglegel (Dec. 20, 1991): 10-11, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

⁷ Chimid B., UBKh-n khuraldaanii temdeglegel (Oct. 18, 1991): 88-89, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

⁸ Amarsanaa J., “Undsen Khuuliin Khyanalt, Tuuniig Kheregjuulekh Arga Zam,” 439.

⁹ Mongol ulsiin undsen khuuliin tusul, [The draft of the Constitution of Mongolia] (Dec. 1990; Jan. 14, 1991; Mar. 4, 1991): 21-22, in *Mongol ulsiin undsen khuuliin arkhiiviin san*. Though the term “constitutional tsets” is used in the draft, the term “constitutional council” is used in this research for clarifying the substantial differences of the three models of constitutional review.

diplomat, an economist or a political figure.¹⁰ There was even the following clause similar to the French acceptance of former presidents as constitutional judges: the former Presidents of Mongolia other than those who were removed from their presidential positions for committing a crime might become a member of the Constitutional Council until the age of 60.

The jurisdiction of the Council was weak and non-judicial even though some framers called it the French model.¹¹ According to framer Chimid, the idea of this Council was based on not the French model but the Soviet model.¹² Unlike the French Constitutional Council, the Constitutional Supervision Council understood by the framers would not review draft laws, but laws and other acts. Moreover, while the French Council had the power to make the final, binding decisions on constitutional matters, the Constitutional Supervision Council would have no such power, but the power to render advices on similar matters to the Parliament. Thus, the Constitutional Supervision Council was not a court but an advisory body to the Parliament.¹³

The powers of the Constitutional Supervision Council were defined in the 1990 Amendment and the draft Constitution. Article 2.4 of this amendment enabled the *PGKh* “to establish the Constitutional Supervision Council and to change its composition,” and granted the Council two advisory powers. The first power was to submit conclusions on implementation of the Constitution to the check by the *PGKh* (the Amendment, art. 11.9). It was up to the *PGKh* to accept the conclusion of the Council. The Council could neither strike down unconstitutional statutes and other decisions nor make a final decision on constitutionality of these decisions. The second power of the Council was to submit conclusions on constitutional violations by the President. In case of a violation of the Constitution or other laws, and an abuse of power in breach of his or her oath, the President might be removed from his or her post on the basis of the conclusion of the Council by no less than two thirds of deputies of the *PGKh* (the Amendment, art. 11.9). The draft Constitution broadened the power of the Council to make a conclusion on other issues related to the activities of the high-ranking

¹⁰ Ganbayar N., AIKh-n khuraldaanii temdeglegel (Dec. 14, 1991): 93-95; Sovd G. (Director of the Legal Institute), AIKh-n khuraldaanii temdeglegel (Jan. 9, 1992): 165, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

¹¹ Ganbayar N., UBKh-n khuraldaanii temdeglegel (Oct. 18, 1991): 33, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

¹² Chimid B., UBKh-n khuraldaanii temdeglegel (Oct. 18, 1991): 88-89; Nyamdorj D., UBKh-n khuraldaanii temdeglegel (Oct. 18, 1991): 38, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

¹³ Mongol ulsiin ikh tsaaziin tusul, [The draft of the Constitution of Mongolia], Boti no. 91, (Apr. 18, 1991): 188-189, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

organizations and officials at the request of the Parliament and the President. The Council would settle disputes not by the petitions of citizens, but it would make conclusion on its own initiative.¹⁴

Even though the Constitution Drafting Commission rejected the Soviet model very early on, a few members advocated for this model during the discussion at the *SSKh*. The main argument for this model was that if the judicial body had the constitutional review power, it could become too powerful.¹⁵ Another argument was that if the constitutional court made a final decision on constitutional matters, it would enjoy the legislative power, which would be against the separation of powers. For example, framer Jantsan N. (later constitutional justice) gave a hypothetical example as follows:

Let's imagine that the *SGKh* enacted a law accepting the right to privately own land [one of the highly controversial issues during the constitution making] and the Constitution said nothing on this right. If the constitutional court struck down this law, then it would exercise the *SGKh*'s legislative power on this issue. Thus, the *SGKh* should keep its legislative power to amend the law. Three branches of the state power should not interfere with each other's competences, but respect each other.¹⁶

However, a majority of Constitution framers and the Constitution Drafting Commission rejected the Soviet model because the constitutional supervision council would have mere advisory power to the parliament. According to framers, the *SGKh* could become so powerful that it would enact and defend any law by easily neglecting the conclusions of the council because these conclusions were not binding.¹⁷ Thus, the council could not serve the two primary purposes of establishing the constitutional review, the establishment of the *Rechtsstaat* and the protection of basic human rights. Framers also discussed the world-wide tendency to give this review power to a court.¹⁸ Some framers argued that the Soviet model failed to protect the Constitution in the Soviet Union. According to Tsog, as with the USSR Committee of Constitutional

¹⁴ Ochirjav O., UBKh-n khuraldaanii temdeglegel (Oct. 18, 1991): 155, in *Mongol ulsiin undsen khuuliin arkhiviin san*.

¹⁵ Zuunai G., UBKh-n khuraldaanii temdeglegel (Oct. 18, 1991): 90; Tovuusuren, UBKh-n khuraldaanii temdeglegel (Oct. 20, 1991): 28; Zuunai G., UBKh-n khuraldaanii temdeglegel (Oct. 20, 1991): 32, in *Mongol ulsiin undsen khuuliin arkhiviin san*.

¹⁶ Jantsan N., UBKh-n khuraldaanii temdeglegel (Oct. 20, 1991): 42, in *Mongol ulsiin undsen khuuliin arkhiviin san*.

¹⁷ Ochirjav O., UBKh-n khuraldaanii temdeglegel (Oct. 18, 1991): 44-46; Zariikhan D., AIKh-n khuraldaanii temdeglegel (Dec. 20, 1991): 17, in *Mongol ulsiin undsen khuuliin arkhiviin san*.

¹⁸ Chimid B., AIKh-n khuraldaanii temdeglegel (Dec. 16, 1991): 87-88, in *Mongol ulsiin undsen khuuliin arkhiviin san*.

Supervision, the Council would be no longer be alive since it just said its opinions on constitutional matters.¹⁹ Thus, Russia and other post-socialist countries rejected the idea of a council in favor of the constitutional court after the collapse of the Soviet Union.²⁰

Even though Mongolia rejected the Soviet model of constitutional review, this model never lost its influence over the creation of the constitutional review, which will be discussed in Subsection 3.2.4. By rejecting the Soviet model, the majority of Mongolian framers agreed that “a body of the judiciary” should have the power to make a final decision on the constitutionality of statutes and other acts.²¹ However, the framers disagreed on whether to grant this power to the ordinary court or a special constitutional court.

3.1.2. The American model of constitutional review being unsuitable in the Mongolian context

The American model actually has several versions as a result of its adaptation and evolution in various countries. Constitution framers discussed one of these versions. This subsection examines some main features of this version, its advantages and reasons for rejecting it in favor of the European model. Framers of the Mongolian Constitution debated lively which of the American and European models would be suitable for Mongolia in 1990-1992.

A few young lawyers supported the American model, the idea of conferring on the ordinary courts to exercise constitutional review. Framer Ganbayar N., the leading advocate for this model, considered its two versions. According to the first version, only

¹⁹ Tsog L., UBKh-n khuraldaanii temdegel (Oct. 20, 1991): 81; See also Nyamdarj D., UBKh-n khuraldaanii temdegel (Oct. 20, 1991): 38; Tsog L., AIKh-n khuraldaanii temdegel (Dec. 14, 1991): 50, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

²⁰ Zardiikhan K., UBKh-n khuraldaanii temdegel (Oct. 20, 1991): 89; Tsog L., AIKh-n khuraldaanii temdegel (Dec. 20, 1991): 24-25; Chimid B., AIKh-n khuraldaanii temdegel (Dec. 20, 1991): 27-29, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

²¹ Tsog L., “Human Rights issue in the Mongolian Constitution,” Paper presented at the International Conference on the Mongolia’s transition to democracy: the role of the new Constitution, Boti 88, Ulaanbaatar, 1991, 11; Tserendorj, “Shuukhiig uurchlun shinechlekh tulgamdsan asuuudluud [the pressing issues of judicial reform]”, Paper presented at the International Conference on the Mongolia’s transition to democracy: the role of the new Constitution, Boti 88, Ulaanbaatar, 1991, 273-277, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

the highest court, i.e. the supreme court, could exercise constitutional review as in the cases of Canada, Columbia, Venezuela, Bolivia, Ecuador, Uruguay, and Morocco.²² In the second version, all ordinary courts could exercise this review as in the U.S., Mexico, Brazil, Argentina, Japan, and India.²³ Ganbayar argued for the first version and rejected the second saying that if all courts exercised the constitutional review, they might interfere too often with acts of administrative officials.²⁴

The version of the American model discussed during the constitution making had seven main features. First, the Supreme Court included nine justices who were appointed by the legislature, which exercised “the parliamentary check on the Supreme Court.”²⁵ The Supreme Court was composed of only legal professionals.²⁶ The supporters also argued for life tenure of the Supreme Court justices. This version of the American model was different from the U.S. judicial review because only the Supreme Court would exercise constitutional review. On the other hand, the function of the Supreme Court would be similar to the U.S. Supreme Court’s function to decide mainly constitutional and other important federal cases because framers thought that the Supreme Court should decide not ordinary cases but constitutional ones.²⁷ The supporters of this model argued that the Supreme Court would exercise the concrete review, but they did not discuss whether it would also exercise the abstract review. However, these supporters refused to confer on the Supreme Court any power to deliver a conclusion on constitutional issues including a constitutional violation by the President. They thought that the judiciary should not submit any conclusion to the parliament because this conclusion would not be final and would harm the authority of the judiciary.²⁸

These proponents said that the American model had three advantages that did not

²² In Denmark, Ireland and Norway, also only supreme courts may exercise constitutional review. Durr, “Comparative Overview of European Systems of Constitutional Justice,” 4.

²³ Ganbayar N., UBKh-n khuraldaanii temdegel (Oct. 18, 1991): 29, in *Mongol ulsiin undsen khuuliin arkhiviin san*.

²⁴ Ganbayar N., AIKh-n khuraldaanii temdegel (Dec. 14, 1991): 22, in *Mongol ulsiin undsen khuuliin arkhiviin san*.

²⁵ Ganbayar N., AIKh-n khuraldaanii temdegel (Dec. 14, 1991): 17, in *Mongol ulsiin undsen khuuliin arkhiviin san*.

²⁶ Ganbayar N., AIKh-n khuraldaanii temdegel (Dec. 14, 1991): 93-95, in *Mongol ulsiin undsen khuuliin arkhiviin san*.

²⁷ Ganbayar N., UBKh-n khuraldaanii temdegel (Oct. 20, 1991): 3, in *Mongol ulsiin undsen khuuliin arkhiviin san*.

²⁸ Bayartsogt S., UBKh-n khuraldaanii temdegel (Oct. 18, 1991): 39, in *Mongol ulsiin undsen khuuliin arkhiviin san*.

exist in the European model. First, the process of constitutional review would earn the whole judiciary a reputation as a guardian of the Constitution, particularly basic human rights. They made the following argument:

The judiciary would gain the reputation and would be elevated to the same level as other branches of the public power. Since all courts had the duty to the strict observance of the Constitution, the citizens would have a wide possibility to protect their rights given by the Constitution and other laws.²⁹

Second, the judiciary exercising constitutional review would become one integrated system because it solved all kinds of disputes (constitutional, civil, or criminal).³⁰ Third, the American model was more economic with savings on the budget because the government did not need to create another court. According to Ganbayar, if a constitutional court were established, there would be two supreme courts, which would be economically unproductive for a small and unitary country like Mongolia.³¹ Tsog L., a proponent of the European model, replied that if these 9 justices joined the Supreme Court as the constitutional chamber, they would not work without the salary.³² Supporters of the European model also argued that even when the constitutional court needed a separate budgetary allocation, it should have taken priority over other concerns, such as the budgetary one, thanks to its function as the only institution to protect the Constitution.

The SSKh and the PGKh rejected the American model but they adopted the idea of concentrating the constitutional review to one institution. A majority of framers decided

²⁹ The Standing Committee on Legal Affairs of the SSKh, “Conclusions on the first discussion of the draft Constitution” (1991), Boti 91, 215-216, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

³⁰ Ganbayar N., UBKh-n khuraldaanii temdegel (Oct. 2, 1991): 6 in *Mongol ulsiin undsen khuuliin arkhiiviin san*. The supporters of the American models supported the first version and rejected the second. However, they sometimes justified the first by the second version as the first two justifications of the American model in the main text are based on the merits of the second verion. Thus, the distinction between these two versions was unclear or confusing.

³¹ Ganbayar N., UBKh-n khuraldaanii temdegel (Oct. 18, 1991): 6. See also Amarsanaa J., UBKh-n khuraldaanii temdegel (Oct. 18, 1991): 23; Tovuusuren., UBKh-n khuraldaanii temdegel (Oct. 18, 1991): 46; Jantsan D., AIKh-n khuraldaanii temdegel (Dec. 14, 1991): 19; Ganbayar N., AIKh-n khuraldaanii temdegel (Dec. 14, 1991): 93-95; The Standing Committee on Legal Affairs of the SSKh, “Conclusions on the first discussion of the draft Constitution” (1991), Boti 91, 215-216, in *Mongol ulsiin undsen khuuliin arkhiiviin san*. Due to the similar economic reason, Estonia gave the judicial review power to the supreme court. “The Estonians anticipated too few constitutional cases to justify the trouble and expense of establishing a separate tribunal.” Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, 24, 153.

³² Tsog L., AIKh-n khuraldaanii temdegel (Dec. 14, 1991): 52 in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

to give this review to the *Tsets* (the constitutional court) rather than the Supreme Court in Mongolia for eight reasons: (1) the civil law countries tended to create a constitutional court; (2) the American model was unsuitable for the unitary form of government; (3) the distrust in the ordinary courts was a cause for rejecting the American model that would indeed give the constitutional review to the old Supreme Court; (4) it was too risky to give this review to the life-tenured justices; (5) the principle of the separation of powers would be damaged if the Supreme Court exercised the constitutional review; (6) it would be difficult to deal with the impeachment cases under the unicameral parliament if the Supreme Court exercised the constitutional review;³³ (7) the Constitutional Court was needed for reviewing constitutionality of the Supreme Court decisions;³⁴ and (8) the Parliament's right to defend its own law would be better protected before the constitutional court.³⁵ This study will take up for analyses the five most important of these eight reasons due to the space limit, as these five reasons have also been discussed in other transitional countries that rejected the American model in favor of the European one.

First, Mongolia needed to establish a constitutional court due to its civil law tradition that lacked the resort to precedents. Framers discussed the tendency that civil law countries gave constitutional review to a special constitutional court, whereas common law countries to the ordinary courts. According to framer Chimid, the main reason was the court precedents, which played an important role (*stare decisis*) in common law systems like the U.S., but did not play such role in civil law systems like Mongolia.³⁶ The absence of *stare decisis* was also one reason why Kelsen established the constitutional court in 1920 as discussed in Section 2.2.

The argument that civil law countries tend to have a constitutional court is not always true. Most countries with civil law gave constitutional review to the constitutional court rather than the ordinary judiciary. However, there are exceptions to

³³ Byambajav J., UBKh-n khuraldaanii temdegel (Oct. 20, 1991): 10 in *Mongol ulsiin undsen khuuliin arkhiyiin san*.

³⁴ Jantsan D., AIKh-n khuraldaanii temdegel (Dec. 14, 1991): 66; Byambajav J., AIKh-n khuraldaanii temdegel (Dec. 14, 1991): 68-69; Byambajav J., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 72-73, in *Mongol ulsiin undsen khuuliin arkhiyiin san*.

³⁵ Byambajav J., UBKh-n khuraldaanii temdegel (Oct. 18, 1991): 50; Byambajav J., AIKh-n khuraldaanii temdegel (Dec. 14, 1991): 68-69. See also Zorig S., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 62, in *Mongol ulsiin undsen khuuliin arkhiyiin san*.

³⁶ Chimid, discussion. See also Sovd G., "Mongol Ulsad Undsen Khuuliin Tsets Baiguulsan Ni [The Establishment of the Constitutional Tsets in Mongolia]," 205; Sarantuya Ts., *Undsen khuuliin processiin erkh zui*, 23-24; Amarsanaa J., Murun D., and Bold S., *Undsen Khuuliin Tsetsiin Chadavkhiig Bekhjuulekh Ni*, 8.

this generalization on the relation between the legal family and the model of constitutional review. For example, Japan adopted the American model after WW II when its legal tradition was more continental European. In addition, the globalization and the common trend to protect basic human rights blur the boundaries between civil and common law systems. As Section 4.4 will show, the precedent is one of the key legal sources in both systems.³⁷

Second, the American model of judicial review was rejected because this model did not fit in with a unitary form of government as in Mongolia.³⁸ Framers believed that the U.S. Supreme Court decided only constitutional and other important cases as discussed in Section 2.3. Prof. Chimid posited the following:

The U.S. has two judicial systems: federal and state. The state courts provide the final decisions on most cases. The U.S. Supreme Court decides a few cases mentioned in the federal Constitution, and enjoys the main role of interpreting the Constitution. Most of civil and criminal cases do not arrive at the U.S. Supreme Court.³⁹

The advocates of the American model challenged the argument that countries with the federal form of government adopted the American model. For example, Ganbayar N. said that many countries having one judicial system had the American model.⁴⁰ Most countries adopting the American model (the U.S., Mexico, Brazil, Argentina, India, Canada, and Venezuela) had a federal form of government. On the other hand, countries like Japan, Philippines, Columbia, and Morocco established the American model though they had a unitary form of government. In addition, many federal countries such as Germany and Austria had the European model instead of the American model.

However, the main emphasis by framers was on the difference between the judicial

³⁷ Cappelletti, *The Judicial Process in Comparative Perspective*, 51, 138–141.

³⁸ See Byambajav J., UBKh-n khuraldaanii temdegel (Oct. 18, 1991): 50; Uuld Ts., UBKh-n khuraldaanii temdegel (Oct. 18, 1991): 61; Galsandorj B., UBKh-n khuraldaanii temdegel (Oct. 18, 1991): 94; Tsog L., AIKh-n khuraldaanii temdegel (Dec. 14, 1991): 50, 55-56, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

³⁹ Chimid, discussion. See also President Ochirbat P., “Mongol ulsiin ikh tsaaiziin tusliig ard niiteer kheleltsuulsen dun, shine tusliin tukhai” [On the result of the public discussion on the draft Constitution and the new draft], *Boti* no. 238 (1991): 76; Chimid B., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 30-33, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

⁴⁰ Ganbayar N., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 63-65, in *Mongol ulsiin undsen khuuliin arkhiiviin san*. His counter argument was reasonable, but his list of unitary states included some federal states. Ganbayar said that “countries like Mexico, Brazil, Argentina, Canada, Columbia, Venezuela, and Morocco have the one judicial system.” However, Mexico, Brazil, Argentina, Canada, and Venezuela have the federal government, and thus two judicial systems, federal and state.

systems of the U.S. and Mongolia rather than the structural difference between the federal and unitary states. Unlike the U.S., Mongolia had one judicial system due to its unitary form of government. The negative effect of having the American model with the unitary form of government was that the judiciary, mainly the Supreme Court, might not be active for protecting the Constitution because this court was busy with ordinary cases. According to framer Byambajav, if the Supreme Court of Mongolia exercised constitutional review, its function of deciding a big number of ordinary cases might undermine its function of reviewing a small number of constitutional cases.⁴¹ Thus, many framers supported the constitutional court that could concentrate on constitutional disputes. Nevertheless, Ganbayar's version of the American model was that the Supreme Court would exercise the exclusive power to decide not ordinary cases but constitutional cases. Thus, the functions of the Supreme Court would be similar to that of the constitutional court.

Third, framers did not give constitutional review to the Supreme Court since the image of the old judiciary including this court was negative among the public as in other post-socialist and post-authoritarian countries.⁴² The public distrusted the courts, which the governmental and party organs used as a tool for keeping the socialist regime. Enkhbat A., Director of Legal Research Center, argued as follows: "Submissively serving the oppressive purpose of the totalitarian state, the court... not only failed to prevent these [socialist and political] 'crimes,' but also became an executer of them. The courts actually contributed to the repression of many people, the illegal confiscation of private properties, and the destruction of Buddhist monasteries."⁴³ Thus, the public had a corrupted image of the court as a terrible organ whose sole purpose was to punish people.⁴⁴

The distrust in the old courts was widespread in Mongolia. In his speech in the *PGKh*, Chief Justice of the Supreme Court Dembereltseren accepted that the judiciary had not changed yet, and the judicial reform would be difficult in the near future.⁴⁵

⁴¹ Byambajav J., UBKh-n khuraldaanii temdegel (Oct. 18, 1991): 50, in *Mongol ulsiin undsen khuuliin arkhiviin san*. See also Chimid, discussion.

⁴² Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, 23–24.

⁴³ Enkhbat A., "Judiciary and system of legal organizations," 265; Elbegdorj Ts., UBKh-n khuraldaanii temdegel (Oct. 20, 1991): 47; Zardiikhan K., UBKh-n khuraldaanii temdegel (Oct. 20, 1991): 30, in *Mongol ulsiin undsen khuuliin arkhiviin san*. See also Chimid, discussion.

⁴⁴ Renchin L., "Adopting the idea of independent judiciary into law," 252, in *Mongol ulsiin undsen khuuliin arkhiviin san*.

⁴⁵ Dembereltseren D., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 53, in *Mongol ulsiin undsen khuuliin arkhiviin san*.

Citing this pessimistic speech, framer Zorig S. argued that if such an incompetent court exercised the constitutional review, the new Constitution would not be confronted by any significant review, so much as the former socialist constitutions had been free from any reviews.⁴⁶ Ganbayar N. also shared the mistrust in the old courts: “The public is not ready since the courts have not worked for providing justice but for punishing people for seven decades. The Mongolian lawyers are also not ready in terms of human resources.”⁴⁷ Ganbayar, therefore, declined to support the American model but argued for the Soviet model in the final discussions on the draft Constitution. Ganbayar criticized the conception of the *Tsets*, saying that this was not a real court but a mixture of the constitutional supervision council submitting conclusions to the parliament and the court delivering final decisions.⁴⁸

Fourth, framers adopted the idea of life tenure for all judges as a guarantee of judicial independence but this was risky. If justices, who had acquired education and worked for many years in the totalitarian system, exercised the constitutional review with life-tenure, they might not protect well the Constitution. Thus, the supporters of the American model first argued for life-tenure of the Supreme Court justices, but lately for a term of six years. However, a majority of framers created the *Tsets* whose justices would have a term of six years while they gave life tenure to all ordinary judges as the foreign experts suggested.⁴⁹

Fifth, the Supreme Court exercising constitutional review would damage the separation of powers according to some framers. These framers thought that the separation of powers required equality among the legislative, executive and judicial branches. Thus, if the Supreme Court exercised constitutional review, the judiciary would be more powerful than the legislative and executive branches so that it would harm the separation of powers.⁵⁰ Therefore, a constitutional court separated from the ordinary judiciary should exercise the constitutional review according to these framers.

⁴⁶ Zorig S., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 62, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

⁴⁷ Ganbayar N., AIKh-n khuraldaanii temdegel (Jan. 9, 1992): 70-71, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

⁴⁸ Ganbayar N., AIKh-n khuraldaanii temdegel (Jan. 9, 1992): 70-71, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

⁴⁹ P.N. Bhagwati and Reed Brody, “Assistance to the Government of Mongolia relating to the draft Constitution” (June 1991): 33; Chimid B., UBKh-n khuraldaanii temdegel (Oct. 18, 1991): 90, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

⁵⁰ Chilkhaajav D., UBKh-n khuraldaanii temdegel (Oct. 20, 1991): 62, 63; Tovuusuren Ts., AIKh-n khuraldaanii temdegel (Dec. 14, 1991): 67, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

Moreover, framer Tumur S. believed that a supreme court being able to exercise constitutional review would exercise the legislative power of the *SGKh*.⁵¹ Whether the court doing the constitutional review of legislation exercises the legislative power is a frequently asked question in constitutional law, but it is outside the scope of this book.

Framers in both the *SSKh* and the *PGKh* rejected the American and Soviet models of constitutional review and adopted the European model. The European model was the main conception in the draft Constitution and was approved after long debate. The reasons why the Soviet and American models were considered inappropriate for Mongolia considerably influenced the framers. The Mongolian approach also reflected the common trend among post-socialist countries to give the power of constitutional review to a constitutional court rather than a constitutional council or the ordinary judiciary. For example, framer Chimid said as follows:

Current worldwide tend is to give the power to decide constitutional disputes to a separate court. Eastern Europe followed this trend. Many countries changed their constitutional councils to a constitutional court or created a constitutional court. The Soviet destroyed the Committee of Constitutional Supervision and adopted a constitutional court. Poland also created a court called the State Tribunal, which would decide constitutional disputes. I met members of this tribunal and shared their experience and information. Our draft Constitution should be consistent with the world trend.⁵²

The conception of the constitutional court (*Tsets*) in the draft Constitution was improved by recommendations of foreign advisors. For example, Prof. Swartz recommended defining who would be eligible to access the constitutional court, which was absent in the first drafts of the Constitution.⁵³ Framers took these advices by the foreign experts seriously.⁵⁴ Nevertheless, some valuable provisions suggested by Mongolian and foreign experts and included in the earlier drafts were not inserted into the 1992 Constitution. More concrete examples of these provisions are given in the next section.

⁵¹ Tumur S., UBKh-n khuraldaanii temdegel (Oct. 20, 1991): 65, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

⁵² Chimid B., AIKh-n khuraldaanii temdegel (Dec. 20, 1991): 11-14. See also Tsog L., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 38-39, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

⁵³ Herman Swartz, “A Memorandum on the Draft Constitution of Mongolia” (July 18, 1991): 8; T. Shwaistruff and G. Stain, “Advices” (1991): 7, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

⁵⁴ Chimid B., UBKh-n khuraldaanii temdegel (Oct. 18, 1991): 90; Chimid B., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 87-88, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

3.2. The Constitutional Court (*Tsets*) of Mongolia

3.2.1. The main features of the *Tsets*

The Constitutional *Tsets* exclusively exercises constitutional review, while ordinary courts have no such power. This court aims “to provide the principle to respect the Constitution, apply directly the Constitution, restrict the power, and protect human rights.”⁵⁵ The *Tsets* is “an organ exercising supreme supervision over the implementation of the Constitution, making judgment on the violation of its provisions and resolving constitutional disputes (Mon. Const. art. 64.1).” This court has seven features: (1) its name as the *Tsets*, (2) the six years term of justices, (3) the renewable term, (4) the nomination and appointment of justices, (5) the qualification of justices, (6) the jurisdiction and (7) the procedure. The first five features are discussed in this subsection, and the last two separately in Subsections 3.2.2 and 3.2.3. The seven features are respectively evaluated from the comparative perspective examined in Chapter 2. All these seven features make the *Tsets* different from European constitutional courts.

Framers decided to call the constitutional court “the Constitutional *Tsets*.” The constitutional court and the Constitutional *Tsets* are interchangeable terms. Some drafts prepared by the Constitution Drafting Commission included the term “constitutional court” for the same institution.⁵⁶ Many framers also said there would be no problem if the term “constitutional court” was used instead of the *Tsets*, and that choosing either of the two terms would not matter since it does not change the nature of the institution.⁵⁷ Framers intended to choose the term “*Tsets*” for a constitutional court because the term “court” had a bad reputation during the socialist system:

⁵⁵ Amarsanaa J., “Undsen Khuuliin Khyanalt, Tuuniig Kheregjuulekh Arga Zam,” 439.

⁵⁶ See Mongol ulsiin undsen khuuliin tusul, [the draft of the Constitution of Mongolia] (Jan. 14, 1991, Mar. 4, 1991, Sep. 22, 1991 and Oct. 5, 1991), in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

⁵⁷ See Lkhagvasuren S., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 49; Chimid B., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 87-88; Dashnyam L., AIKh-n khuraldaanii temdegel (Dec. 20, 1991): 7; Tsog L., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 38-39; Avkha J., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 45; Chimid B., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 87-88, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

We put the constitutional review on an honored position from the perspective of the Mongolian traditional culture. The term “*shuukh*” [court] was created in 1920s as a translation of a Russian word “*sud*” [court]. Before this, the court was called “*zarga shiitgekh gazar*.” The courts started to be called “*shuukh*” [court] in the legal acts. However, the reputation of courts was wounded through the political repression. If we used the exact term “*Undsen khuuliin shuukh*” [the constitutional court], its reputation might have the wound from the start. Thus, we gave a special name to the constitutional court.⁵⁸

In addition, framers also argued that the special courts exclusively exercising constitutional review had different names such as constitutional court and constitutional tribunal (Poland), and different courts in one country could have different names.⁵⁹

The framers chose the term “*tsets*” for the constitutional court because this term emphasized the idea of an institution consisting of wise people who could make a final decision. The Mongolian word “*tsets*” has two meanings, which corresponded to the framers’ intention. The first was a group of judges in the traditional wrestling, who made the final decision on a dispute between wrestlers. The “*Tsets*” in wrestling was expected to make “a perfect final decision, against which the appeal was impossible.”⁶⁰ Thus, the framers named the constitutional court the *Tsets* to distinguish it from other courts and to show its power to make the final decision on a constitutional case.⁶¹ The second meaning of “*tsets*” was wisdom (a wise person was called *tsetsen khun*). Advisory bodies to the emperors were called *Tsetsdiin Zuwlul* [the council of wise people] since the Hun Empire in Mongolia. “The term ‘*tsets*’ was chosen for the symbolic reason that the constitutional judges had to be so wise that their decisions would have no mistakes.”⁶²

Justices of the *Tsets* has a term of six years. Unlike the life tenure or terms of 9-12 years in other constitutional democracies, the term of six years is so short that justices lack the long-term possibility of making consistent reasoning and of strengthening

⁵⁸ Chimid, discussion.

⁵⁹ Chimid B., AIKh-n khuraldaanii temdegel (Dec. 20, 1991): 11-14. See also Tsog L., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 38-39; Avkhia J., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 45; and Ibid, in *Mongol ulsiin undsen khuulin arkhiviin san*. The Taiwanese Constitutional Court is also called the Council of Grand Justice.

⁶⁰ Ibid. Chimid B., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 30-33, in *Mongol ulsiin undsen khuulin arkhiviin san*.

⁶¹ Chimid B., *Undsen Khuuliin Uzel Barimtal: Niitleg Asuuadal*, 1:89.

⁶² Chimid, discussion.

constitutional integrity.⁶³ Mongolian scholars now argue for terms of 9-12 years or for the life-tenure.⁶⁴ The drafts of the Constitution initially included a term of 9 years.⁶⁵ However, framers chose a term of six years without serious discussions when two of them proposed to replace the term of nine years.⁶⁶ This choice was an example of how some valuable provisions on the *Tsets* in the draft Constitution were abolished or weakened in the *PGKh*.

The term of justices is renewable in practice because the Constitution and other laws have no constitutional or statutory prohibition on the reappointment of justices.⁶⁷ A renewable term is against the independence of the *Tsets* because in order to be reappointed, a justice may be reluctant to rule against the *SGKh* or a body that would nominate him or her again. Prof. Sarantuya Ts, Constitutional Justice, argued that the re-appointment is against the independence of the *Tsets*.⁶⁸ During the constitution making, foreign experts suggested to prohibit the immediate re-appointment in order to diminish the possibility that a *Tsets* justice would be influenced in his decision-making by obtaining or not obtaining re-appointment at the end of his term.⁶⁹ However, the Constitution Drafting Commission did not insert this suggestion into the draft Constitution. Thus, there is no constitutional prohibition on the immediate re-appointment of justices.

Three different institutions nominate candidates to the *Tsets*, and the *SGKh* finalizes the appointments. This court consists of nine members, who the *SGKh* appoint for a term of six years upon the nomination of three of them by the *SGKh*, three by the president and the remaining three by the Supreme Court (Mon. Const. art. 65.1). According to framers, this appointment process improved the independence of the *Tsets*

⁶³ Nowak, Rotunda, and Young, *Constitutional Law*, 9 (arguing that “throughout his thirty-four year tenure as Chief Justice of the United States, John Marshall established the theoretical basis of judicial review with arguments both on and off the Court”).

⁶⁴ Amarsanaa J., Murun D., and Bold S., *Undsen Khuuliin Tsetsiin Chadavhiig Bekhjuulekh Ni*, 35, 39.

⁶⁵ Mongol ulsiin undsen khuuliin tusul, Zuil 51.2, [Article 51.2 of the draft of the Constitution of Mongolia] (Oct. 5, 1991), in *Mongol ulsiin undsen khuuliin arkhiviin san*.

⁶⁶ Amarbayan, AIKh-n khuraldaanii temdegel (Dec. 23, 1991): 20. See also Tangad, AIKh-n khuraldaanii temdegel (Dec. 23, 1991): 20, in *Mongol ulsiin undsen khuuliin arkhiviin san*.

⁶⁷ Within the current court (2011), most justices are reappointed. One justice has been reappointed four times, another justice three times, and three justices twice. See “Homepage of the Constitutional *Tsets*.”

⁶⁸ Sarantuya Ts., *Undsen khuuliin processiin erkh zui*, 73–74.

⁶⁹ P.N. Bhagwati and Reed Brody, “Assistance to the Government of Mongolia relating to the draft Constitution” (June 1991): 42. Tsog L. also offered non-fixed term probably because of the same reason with Bhagwati and Reed Brody. Tsog L., “Human Rights issue in the Mongolian Constitution,” 12, in *Mongol ulsiin undsen khuuliin arkhiviin san*.

because no one institution monopolizes the process.⁷⁰ The final approval by the *SGKh* whose members are elected by the people also increases the democratic legitimacy of the *Tsets*.

The *SGKh* appoints justices of the *Tsets* not by a qualified majority (more than 2/3 or 3/5), but a bare majority (more than 1/2).⁷¹ Thus, the majority party (coalition) in the *SGKh* can appoint justices who may defer to the majority without consent of minority parties. The requirement of a qualified majority for appointing the justices was discussed during the constitution making, but rejected by the Constitution Drafting Committee. Framer Tsog L. suggested to appoint 9 professional justices by four fifth of the members of the *SGKh* for non-fixed term.⁷² Foreign advisors P. N. Bhagwati and Reed Brody also advised as follows:

The constitutional court should be insulated from domination by one organ or faction... It was suggested therefore [1] that the members of the Constitutional Council be selected by a diversity of sources and/or [2] that those selected by the State Great Hural be so selected by a qualified majority such as two thirds, three quarters or even four fifths to ensure that the members are not partisan choices but acceptable to a broad spectrum of political opinion (see Spanish Constitution, art. 159, three fifths of the legislature).⁷³

The framers adopted the selection process based on suggestions by a diversity of sources with the final approval of the *SGKh*, which satisfied partially only the first of the two requirements and ignored the second in the advice.

Today non-legal professional candidates can be appointed to the *Tsets*, which differs from the qualification of European constitutional justices. The debates by framers are informative to understand why non-legal professionals are appointed in Mongolia. Framers had two different views on who would be eligible to be a candidate to the *Tsets*: broad and narrow. The broad view was that legal professionals, experienced politicians,

⁷⁰ See Chimid B., UBKh-n khuraldaanii temdegel (Oct. 18, 1991): 27-28; Byambajav J., Chimid B., UBKh-n khuraldaanii temdegel (Oct. 18, 1991): 51; Galsandorj B., Chimid B., UBKh-n khuraldaanii temdegel (Oct. 18, 1991): 93. See also P.N. P.N. Bhagwati and Reed Brody, "Assistance to the Government of Mongolia relating to the draft Constitution" (June 1991): 41, in *Mongol ulsiin undsen khuuliin arkhiviin san*.

⁷¹ Mongol Ulsuin Ikh Khurliin Chuulganii Khuraldaanii Degin tukhai Khuuli [Law on Procedure of the Session of the Mongolian State Great *Khural*] art. 40, § 2 (2007).

⁷² Tsog L., "Human Rights issue in the Mongolian Constitution," 12, in *Mongol ulsiin undsen khuuliin arkhiviin san*.

⁷³ P.N. Bhagwati and Reed Brody, "Assistance to the Government of Mongolia relating to the draft Constitution" (June 1991): 41, in *Mongol ulsiin undsen khuuliin arkhiviin san*.

diplomats, political scientists, and economists could become a justice. According to this view, constitutional disputes were different from crimes because they included “many kinds of political foundations” and were “related to broad issues related to all parts of social life.”⁷⁴ For example, framer Bat-Uul E. believed that the *Tsets* had to include a few experienced diplomats to review international treaties.⁷⁵ According to Dembereltseren D., some justices could be non-legal professionals because the legal education in Mongolia did not achieve an advanced level.⁷⁶ Some framers also cited Japan as an example in which the highest court was comprised of different professionals: the Japanese Supreme Court had 15 members 10 of who had to be lawyers, and the rest could be diplomat or political figures.⁷⁷

Some framers challenged the broad view, holding a narrow view that only legal professionals were eligible to be candidates to the *Tsets*. These framers asked whether those non-legal professionals could exercise the judicial function that only legal professionals were able to exercise.⁷⁸ If the *Tsets* was to be a court, the candidates to it should be at least legal professionals.⁷⁹ Some framers such as Ganbayar understood the legal profession largely: judge, law professor, prosecutor, and advocate, who had a high professional qualification, could be appointed as a justice.⁸⁰ Framer Enkhsaikhan M. argued that it would be better to give a chance to those who understood the new system because those who had participated in the old judicial system might misunderstand the new system and persecute citizens.⁸¹

After long debates, framers adopted a vague clause on whether or not the justices of

⁷⁴ Tsog L., AIKh-n khuraldaanii temdegel (Dec. 14, 1991): 54; Byambajav J., AIKh-n khuraldaanii temdegel (Dec. 14, 1991): 68-69; Badarch I., AIKh-n khuraldaanii temdegel (Dec. 20, 1991): 17, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

⁷⁵ Batuul E., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 60, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

⁷⁶ Dembereltseren D., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 60, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

⁷⁷ Tsog L., AIKh-n khuraldaanii temdegel (Dec. 14, 1991): 54; Dembereltseren D., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 60, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

⁷⁸ Munkhbat M., AIKh-n khuraldaanii temdegel (Dec. 14, 1991): 54, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

⁷⁹ Amarsanaa J., AIKh-n khuraldaanii temdegel (Dec. 14, 1991): 76; Munkhbat M., AIKh-n khuraldaanii temdegel (Dec. 14, 1991): 54; Chimid B., AIKh-n khuraldaanii temdegel (Dec. 20, 1991): 27-29; Sovd G. (Director of the Legal Institute), AIKh-n khuraldaanii temdegel (Jan. 9, 1992): 165, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

⁸⁰ Ganbayar N., UBKh-n khuraldaanii temdegel (Oct. 20, 1991): 180, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

⁸¹ Enkhsaikhan M., UBKh-n khuraldaanii temdegel (Oct. 20, 1991): 179, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

the *Tsets* would be required to be a legal professional. The draft Constitution stated as follows: a justice of the *Tsets* should be “a Mongolian citizen who has reached forty years of age, has a high political, legal qualification, and has professional experience at least for ten years.”⁸² Unfortunately, this clause was finally substituted with article 65.2 of the 1992 Constitution, which blurred the professional requirement by saying: a member of the *Tsets* should be “a citizen who has reached forty years of age and has a high political, legal qualification.” This article has been interpreted both broadly and narrowly.

The current Law on the Constitutional *Tsets*, which the framers enacted themselves in 1992, holds a broad interpretation of candidacy to the *Tsets*. As this law does not specify the requirement in article 65.2 of the Constitution, justices of the *Tsets* can be not only lawyers, but also professionals not in the legal field. Chilkhaajav D., a politician and professional not in the legal field, was appointed to the first *Tsets* in 1992 because the democratic parties lacked lawyers who had reached forty years of age.⁸³ Five of the 27 justices appointed to the court over the last two decades were non-legal professionals. The majority of justices were legal professionals in the broad sense (having the formal legal education) though less than one third of justices have been non-legal professional politicians. For example, two out of nine justices of the current court (2010) are a historian and an engineer, who were politicians and had no formal legal education before their appointments.⁸⁴ Thus, the law and the practice follow the broad interpretation on justices of the *Tsets*.

However, a narrower interpretation is more reasonable because a candidate to this court is required to be at least a lawyer according to the constitutional text. The words “a high legal, political qualification” in article 65.2 of the Constitution literally means a high legal qualification plus a high political qualification as both adjectives (“legal” and “political”) define “qualification.” If the text said “legal” or “political qualification,” then politicians could be appointed to the court, but this is not indicated in the constitutional text. Thus, many scholars argue for the narrow interpretation that a justice of the *Tsets* should be at least a legal professional.⁸⁵

⁸² Mongol ulsiin undsen khuuliin tusul, Zuil 50.3, [Article 50.3 of the draft of the Constitution of Mongolia] (Oct. 5, 1991): 165, in *Mongol ulsiin undsen khuuliin arkhiviin san*.

⁸³ Amarsanaa, discussion.

⁸⁴ Judge Lkhagvaa T. is a historian. Judge P. Ochirbat, an engineer, was the first President of Mongolia, and he has been reappointed once. See “Homepage of the Constitutional *Tsets*.”

⁸⁵ Sarantuya Ts., *Undsen khuuliin processiin erkh zui*, 71–72; Amarsanaa J., “Mongol Ulsad Undsen Khuuliin *Tsets* Ba Zakhirgaanii Khergiin Shuukh,” 321–322; Sarantuya Ts., “Origin, Development and

Critical nominations and confirmations of justices are important because these judges would decide constitutional cases for six years or more as they can be reappointed. The people have the right to know the legal philosophy and character of candidates to the *Tsets* that exercises the significant power to quash the legislation enacted by the parliament representing the people. Only legal professionals whose legal philosophy is reasonable and whose character is trustworthy can make the well-reasoned judgments. Thus, legal scholars and media should publicize the legal philosophy and character of candidates to the *Tsets*.

On the other hand, there is a lack of discussions on the qualification of candidates to the *Tsets*. The nomination and confirmation of constitutional judges are not supported by critical screening, allowing for the appointment of poorly qualified legal professionals and non-legal professionals to the *Tsets*. There is no serious discussion on constitutional philosophy and characters of justices during and after their nomination and confirmation in Mongolia. In 2007, 2010 and 2011 when seven judges were appointed or reappointed to the *Tsets*, the media stated who was appointed as a constitutional justice, but no scholar or commentator criticized what candidates thought about controversial cases and what constitutional philosophy and characters they had during the appointment. For example, in 2007 when three justices were appointed, the most qualified among the three candidates was Prof. Sarantuya. When Prof. Sarantuya was reappointed for her second term in 2007, she was teaching the constitutional review at the National University of Mongolia, and she had written many articles and books on constitutional review. All of her writings were enough to show her philosophy and convictions in 2007. The other two candidates were practitioners. Justice B. Purevnyam had been an advocate since 1994, and Judge D. Munkhgerel was a prosecutor for seven years during the late socialist regime and had worked in the Ministry of Justice for 15 years. The profiles of these two candidates could not show what constitutional philosophy and conviction they had because they had not published any constitutional topic.

Politicians easily appoint and reappoint non-legal professionals to the *Tsets* because scholars do not discuss seriously the qualification of candidates. For example, scholars did not criticize publicly the appointment of former President of Mongolia Ochirbat P. to the *Tsets* in 2005 and the reappointment of him in 2010. Justice Ochirbat, who was an

Urgent Tasks of the Constitutional Procedure Law in Mongolia,” 14–15; Chimid B., *Undsen khuuliin medleg*, 402.

engineer and one of Constitution framers, had neither legal education nor legal experience before his appointment. If legal scholars and lawyers criticize strongly the non-legal professional candidates, they can prevent, or at least reduce, the appointment or reappointment of these candidates because the constitutional text allows only legal professionals to be appointed to the *Tsets*.

3.2.2. The jurisdiction of the *Tsets*

The *Tsets* exercises abstract review of legislation and other decisions except for decisions by ordinary courts, and it decides constitutional matters related to actions or omissions by, or status of, high-ranking officials. Not only certain authorities but also citizens (*actio popularis*) can access to this court. This subsection discusses the jurisdiction of the *Tsets*, the access to this court and the differences between this court and European constitutional courts.

The subject matters of the jurisdiction of the *Tsets* were defined in the Constitution, the 1992 Law on the Constitutional *Tsets*, the 1997 Law on the Constitutional *Tsets* Procedure, and constitutional case law. This court exercises abstract constitutional review of legislation, international treaties,⁸⁶ national referenda, and decisions of the president, the government, and the Central Electoral Organization after their promulgations. The *Tsets* reviews not only legislation, but also activities of the *SGKh*.⁸⁷ This court also makes conclusions on whether the President, chairperson and members of the *SGKh*, the prime minister, members of the government, the chief justice of the Supreme Court and the prosecutor general breached the Constitution and whether the grounds for removal of the President, chairman of the *SGKh* and the prime minister and for the recall of members of the *SGKh* existed (Mon. Const. art. 66.2). The conclusions on constitutional violations by these officials or on grounds for their removals are final,

⁸⁶ Like the *Tsets*, the Constitutional Tribunal of Poland also adjudicates the conformity of international agreements to the Constitution (Const. of Poland, art. 188.1). However, most constitutional courts do not have the power to review the treaties already ratified because this review might harm relationships with foreign countries and organizations.

⁸⁷ For example, when the *SGKh* was enacting the Import Tax Law, the quorum of the session was unsatisfied. However, the *SGKh* passed the statute because some MPs did more than one votes by pressing the buttons of other MPs who were absent. An MP submitted a notification to the *Tsets*, which ruled that this voting process of the Law was unconstitutional. See *Tsets*, Jun. 21, 1997, Dugnelt No. 4; *Tsets*, Dec. 17, 1997, Dugnelt No. 3

and the *SGKh* must not discuss the merits of these conclusions.⁸⁸ The court does not deliver the abstract official interpretation (or advisory opinion) on the Constitution at the request of any authority.

In addition, the *Tsets* exercises the power to determine the jurisdiction of legal dispute, which is not constitutional review. Article 14 of the Law on the Constitutional *Tsets* Procedure says as follows: “in the event of submission of complaints by citizens, public officials, governmental and non-governmental organizations to the *Tsets* for determination of jurisdiction of legal disputes, rejected by all courts, the *Tsets* shall determine jurisdiction of legal disputes and refer to the relevant court.” This power is not a function directly related to the power to review whether or not the Constitution has been violated, but “it can be a way to protect citizens, officials and organizations from the excessive inactivity of the courts.”⁸⁹ In 1997, the *Tsets* decided a dispute over jurisdiction. Altantsog Ts., a former judge, filed a civil complaint to the courts. However, the District Court, the Capital Court, and the Supreme Court all refused to decide on the complaint for eight months because they disagreed on the issue of jurisdiction. Thus, Altantsog submitted a petition to the *Tsets*, which decided that the jurisdiction of the dispute belonged to the Supreme Court.⁹⁰

The access to the *Tsets* is clearly defined in the Constitution. The *Tsets* examines and settles constitutional disputes on its own initiative on the basis of petitions and notifications received from citizens or at the request of the *SGKh*, the President, the Prime Minister, the Supreme Court, and the Prosecutor General (Mon. Const. art. 66.1). The petitions, the notifications and the requests can be about any matter within the jurisdiction of the *Tsets*. The access to the *Tsets* is different from that to the European constitutional courts in three ways: (1) only a majority in the *SGKh* can submit the requests; (2) not only the Supreme Court but also all inferior courts through the Supreme Court can send the request; and (3) any citizens can access to the *Tsets*.

First, unlike the European abstract review that can be initiated by a minority in the parliament, the Mongolian abstract review can be initiated by a majority in the parliament; that is, only a majority in the *SGKh* can make a request to the *Tsets*.⁹¹ According to Prof. Sarantuya, the *SGKh* has never submitted any request on

⁸⁸ *Tsets*, Jan. 4, 1995, Dugnelt No. 1; *Tsets*, Sep. 7, 1995, Dugnelt No. 2

⁸⁹ Sarantuya Ts., *Undsen khuuliin processiin erkh zui*, 112.

⁹⁰ *Tsets*, Oct. 1, 1997, Magadlal No. 7

⁹¹ *Tsets*, Jan. 18 1995, Dugnelt No. 2.

unconstitutionality of laws (and other acts) to the *Tsets* because it amends any law itself if it wants to do so.⁹² Members of opposition parties cannot make such a request to the *Tsets*, but they often challenge laws by submitting notifications as citizens.⁹³

There were several unsuccessful attempts to give the right to seize the *Tsets* to a significant minority in the *SGKh* during and after the constitution making. Even though the right of the parliamentary minority to access to *Tsets* was suggested by foreign advisors,⁹⁴ proposed by some framers, and inserted in the draft Constitution, it was not finally included in the Constitution. For example, the draft had the clause that a request to the *Tsets* could be submitted by a group of at least ten MPs.⁹⁵ These ten MPs could exercise this right when they disagreed with the parliamentary majority on the constitutionality of the law.⁹⁶ Nonetheless, this clause was deleted before the plenary sessions of the Constituent Assembly. After the establishment of the *Tsets*, Lamjav D. (framer) submitted a notification to the *Tsets* as a citizen, arguing for the power of a small group of MPs to refer a request to this court. Nevertheless, the *Tsets* rejected Lamjav's interpretation of the Constitution.⁹⁷ The *SGKh* dominated by a coalition of democratic parties enacted a statutory amendment on May 1, 1997, allowing "the Chairperson of the *SGKh*, no less than eight members of the *SGKh*, or party or coalition group to submit the *SGKh*'s request to the *Tsets*." However, after adopting the legislation, this *SGKh* omitted this right of a parliamentary minority on October 3, 1997 for no clear reasons.

Second, unlike the constitutional question in European countries such as Germany, which can be submitted by any judge, the request to the *Tsets* is submitted by the Supreme Court. The ordinary judges cannot submit a request directly to the *Tsets*, but they can submit a proposal through the Supreme Court. If a judge finds unconstitutionality in a law that is applied in concrete cases, he or she has to suspend the proceeding and send a proposal to the Supreme Court.⁹⁸ The Supreme Court may

⁹² Sarantuya Ts., *Undsen khuuliin processiin erkh zui*, 118.

⁹³ For example, see *Tsets*, Jan. 7 1994, Dugnelt No. 1; *Tsets*, Jan. 12 1994, Dugnelt No. 1.

⁹⁴ P.N. Bhagwati and Reed Brody, "Assistance to the Government of Mongolia relating to the draft Constitution" (June 1991): 43

⁹⁵ Mongol ulsiin undsen khuuliin tusul, Zuil 52.1[Article 52.1 of the draft of the Constitution of Mongolia] (Oct. 5, 1991), in *Mongol ulsiin undsen khuuliin arkhiviin san*.

⁹⁶ See Byambajav J., UBKh-n khuraldaanii temdegel (Oct. 20, 1991): 152, in *Mongol ulsiin undsen khuuliin arkhiviin san*.

⁹⁷ *Tsets*, Jan. 18 1995, Dugnelt No. 2

⁹⁸ Shuuksiin tukhai Khuuli [Law on the Court], art. 12, § 3-4 (2002); Undsen Khuuliin Tsetsiin tukhai Khuuli [Law on the Constitutional *Tsets*], art. 10 (1992).

decide to submit the request to the *Tsets* or send that proposal back to the judge who initiated it. In the latter case, if the judge still thinks that the law is unconstitutional, he or she may file directly the notification to the *Tsets* as a citizen. The Supreme Court has made only two requests without conferring concrete cases and mentioning whether the lower court judges initiated these requests.⁹⁹

Framers discussed whether all ordinary judges should have the right to submit a request directly to the *Tsets*. Foreign experts recommended extending the right to seize the *Tsets* to the Supreme Court, which would ensure that when the constitutional validity of a law is in question during ordinary litigation, the Supreme Court or a lower court, through the Supreme Court, might seek an advisory opinion from the *Tsets* in order to dispose of the litigation.¹⁰⁰ What these experts recommended was similar to the current practice rather than the empowerment of all judges. Two framers proposed to allow not only the Supreme Court but also other courts the power to submit a request to the *Tsets* as a way of ensuring that “a citizen’s dispute would reach the constitutional court.”¹⁰¹ However, these framers failed to win the majority in the *SSKh*.¹⁰²

The ordinary courts of Mongolia do not pay as much attention to the protection of fundamental rights as the old courts of other new democracies. The Supreme Court is mostly illiberal (conservative). For example, this court supported two practices inherited from the socialist legal system, which were disadvantageous to the defendant, when constitutionality of these practices was separately challenged before the *Tsets*.¹⁰³ The Supreme Court also sometimes interpreted statutes in a way that may infringe upon fundamental rights.¹⁰⁴ Moreover, this court often approves the imposition of death penalty. The ordinary courts of post authoritarian or totalitarian regimes were also frequently illiberal. After WW II, German judges thought that the protection of fundamental rights was only a matter of the constitutional court, but they gradually

⁹⁹ *Tsets*, Apr. 12 2006, Dugnelt No. 2/04; *Tsets*, Jun. 14 2006, Dugnelt No. 6.

¹⁰⁰ P.N. P.N. Bhagwati and Reed Brody, “Assistance to the Government of Mongolia relating to the draft Constitution” (June 1991): 43

¹⁰¹ See Ochirjav O., UBKh-n khuraldaanii temdegel (Oct. 20, 1991): 138; Byambajav J., UBKh-n khuraldaanii temdegel (Oct. 20, 1991): 151, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

¹⁰² Gonchigdorj R., UBKh-n khuraldaanii temdegel (Oct. 20, 1991): 139, 152, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

¹⁰³ Two legal practices are the higher court’s power to return the cases to the investigation stage or the lower court and the Prosecutor General’s exclusive power to appeal to the whole chamber of the Supreme Court. The *Tsets* did not strike down these two practices by making the poor interpretation of the Constitution. *Tsets*, Oct. 24, 2007, Dugnelt No. 10 and *Tsets*, Dec. 21, 2007, Dugnelt No. 13.

¹⁰⁴ *Tsets*, May 14, 2008, Dugnelt No. 6 and *Tsets*, Oct 29, 2008, Dugnelt No. 8.

changed this thought.¹⁰⁵

Third, not only the designated authorities but also citizens can initiate the abstract review in Mongolia, which is similar to the Hungarian *actio popularis*. Citizens have the constitutional right to file notifications and petitions “on any issue about the violation of the Constitution” except the judicial decisions.¹⁰⁶ The *Tsets* has no discretion to reject notifications and petitions.¹⁰⁷ If notifications and petitions meet the formal requirements defined in articles 20 and 21 of the Law on the Constitutional *Tsets* Procedure, the *Tsets* has to examine and resolve them. Thus, citizens have been initiating almost all constitutional cases for the last two decades. Citizens have filed over 1000 constitutional petitions and notifications from 1992 to 2007.¹⁰⁸ There is no requirement that the citizens filing notifications and petitions show a violation of their own rights. Both petitions and notifications are made without the direct relationship with the ordinary court procedure although some petitions are related to concrete cases decided by the ordinary courts.

The *Tsets* recently tends to make a loose distinction between notifications and petitions following the works of scholars.¹⁰⁹ Citizens file notifications when they challenge the statute and other acts that are not related to their own individual rights. For example, in 2010, a citizen submitted a notification on whether a statutory provision violated the constitutional provision on removal of a judge from a court of any instance.¹¹⁰ On some other occasions, citizens make petitions to challenge the statute and other acts that are directly related to their own rights. However, the distinction between notifications and petitions is loose because the *Tsets* sometimes does not make distinctions between the two terms, naming a notification petition or vice versa, and petitions are often as abstract as notifications. If citizens file petitions having little relationship with their fundamental rights, the *Tsets* has difficulty in classifying notifications and petitions. There is no legal consequence according to the current law if the *Tsets* does not make proper classification of notifications from petitions.

¹⁰⁵ Kupper, discussion.

¹⁰⁶ *Tsets*, Jan. 18, 1995, Dugnelt No. 2.

¹⁰⁷ However, the *Tsets* can manage the caseload by interpreting article 66.1 of the Constitution, which seems to give it the discretion to reject notifications and petitions. According to this article, the *Tsets* examines and settles “constitutional disputes *on its own initiative* on the basis of petitions and notifications received from citizens.”

¹⁰⁸ “Political Relevance to Decision of Constitutional Court (*Tsets*) of Mongolia,” 3.

¹⁰⁹ Temuujin Kh., *Jus Frast buyu Yost Ug*, 231; Sarantuya Ts., *Undsen khuulatin processiin erkh zui*, 201.

¹¹⁰ *Tsets*, Nov. 24, 2010, Dugnelt No. 8

The Mongolian notification has advantages and disadvantages comparable to the Hungarian *actio popularis* because both refer to popular standings that have almost no restriction. During the transitional period in Mongolia, citizens challenged the constitutionality of many important political decisions of the *SGKh* and the government by filing the notifications. In addition, the concept of popular standing allows legal scholars and lawyers to challenge constitutionally doubtful statutes. However, the notification system has three disadvantages. There is a danger of using the popular standing as a political means.¹¹¹ A notification may also overburden the *Tsets* in the long run since it has no discretionary power to reject the notification. Moreover, a notification and even an abstract petition are inappropriate for creating constitutional case law and lively constitutional discourse, which requires concrete cases and facts.

What the framers intended to mean when they included citizen's notification in 66.1 of the Constitution is unclear, but the fact that they intended to create an independent constitutional court rather than a political organization is clear. The notification, which is equal to *actio popularis*, makes the *Tsets* more political and burdensome, and other disadvantages of *actio popularis* are discussed in this subsection and Section 2.4 of this book. Thus, the notification should be interpreted as *amicus curiae* (friend of court) brief rather than *actio popularis*. A citizen, who has not been solicited by any of the parties, should have an opportunity to submit a notification to provide information that is relevant to the case, but is not dealt with by the parties. The notification, which is similar to *amicus curiae* brief, should indicate which party of the case the citizen supports, and the *Tsets* should exercise a discretion to decide whether to admit the notification. Under this new meaning of notification, citizens cannot initiate constitutional review of any act or decision (however, they can initiate through a petition as this subsection showed), but they can submit their opinions concerning a pending case to the *Tsets* because most of constitutional matters are not only about the parties of the case, but about the general public and basic principles of liberal democracy.

Citizens submit petitions against violations of their own constitutional rights¹¹² or

¹¹¹ For example, MP Gundalai, the former Minister of Health, was accused of the corruption by the prosecutor, which he accepted latter. As a citizen, Gundalai submitted a constitutional petition, alleging that many of his rights are violated by a provision of the Criminal Procedure Code, but the *Tsets* found no violations. *Tsets*, Apr. 16, 2008, Dugnelt No. 5.

¹¹² See *Tsets*, May 29, 1996, Dugnelt No. 4 (several aged people submitted petitions that their right to be equal before law was violated by the *SGKh* resolution on the pension, which discriminated these people on the basis of age. The *Tsets* found the violation of this right and struck down the resolution); *Tsets*, Jun.

against violations of the Constitution that affects their own legitimate interests, institution or territorial unit.¹¹³ The *Tsets* accepts this kind of petitions. For example, Byambasuren D., the former Prime Minister (1990-1992), submitted a petition to this court. Prosecutor's Office investigated Byambasuren as a defendant in a criminal case. Byambasuren filed a complaint to Prosecutor General Ganbayar N., saying that the prosecutor who was investigating his case violated the law. However, Ganbayar did not reply to Byambasuren's complaint. Thus, Byambasuren submitted a petition that Ganbayar violated "his right to submit a complaint to the State bodies and officials" (Mon. Const. art. 16.12) because the official did not reply his complaint. The *Tsets* found that Prosecutor General Ganbayar violated Byambasuren's right to submit a complaint.¹¹⁴

20, 1996, Dugnelt No. 5 (two citizen submitted petitions that their right to be elected was violated by the General Committee on Election's decision that deleted their names from the list of candidates to the *SGKh*. The *Tsets* reasonably found no violation of this right); *Tsets*, Jun. 25, 1997, Dugnelt No. 5 (a citizen submitted a petition, arguing that he was fired due to the statute that violated the right to material and financial assistance in old age and disability and other rights. The *Tsets* found no violation of these rights); *Tsets*, Jan. 28, 1998, Dugnelt No. 1 and *Tsets*, Jun. 17, 1998, Togtool No. 1 (a petitioner submitted the petition that a clause of the Bank Law violated his right to appeal to the court and his right to be equal before the law. Considering that the ordinary court rejected his complaint by applying this clause, the *Tsets* struck down the clause because the clause violated these rights); *Tsets*, Feb. 24, 1998, Dugnelt No. 2 (citizens submitted the petitions against violations of their right not to be discriminated on the basis of occupation and post and their right to material and financial assistance in old age. The *Tsets* found violations of these rights by the statutory provision, and struck down the provision); *Tsets*, Oct. 16, 1998, Dugnelt No. 7 (an individual submitted a petition related to the case decided by the ordinary court, and challenged the provisions of the statute. The *Tsets* found no constitutional violation); *Tsets*, June 7, 2004, Dugnelt No. 2 (citizens submitted petitions that the Chief Justice of the Supreme Court violated their right to appeal to the court. The *Tsets* found no violation); *Tsets*, Jun. 17, 2005, Dugnelt No. 4 and *Tsets*, Dec. 14, 2005, Togtool No. 2 (citizens submitted the petition that the governmental resolution on the pension violated their right to be equal before the law. The *Tsets* found a constitutional violation and struck down the resolution); *Tsets*, Feb. 22, 2006, Dugnelt No. 2 (citizens submitted the petition that the governmental resolution violated their right to property, but the *Tsets* found no violations); *Tsets*, Mar. 29, 2006, Dugnelt No. 3 (a citizen submitted the petition that the Criminal Procedure Code violated his own right. The *Tsets* found the violation and struck down the related part of the Code); *Tsets*, Feb. 20, 2008, Dugnelt No. 2 (citizens of *Khongor Soum* that was polluted by the improper mining activities submitted petitions, alleging that their right "to a healthy and safe environment, and to be protected against environmental pollution and ecological imbalance" was violated. The *Tsets* ruled that their right is not violated); *Tsets*, Apr. 16, 2008, Dugnelt No. 5 (as a citizen, a MP submitted a petition, alleging that many of his rights are violated by a provision of the Criminal Procedure Code, but the *Tsets* found no violations); *Tsets*, Jul. 7, 2010, Dugnelt No. 4 (a citizen, a member of the environmental NGO, won the case against the illegal decision of the Government).

¹¹³ *Tsets*, Jul. 5, 1997, Dugnelt No. 6 (the head of Erdenzuu Monastery submitted the petition that President Ochirbat infringed the interest of his own Monastery by violating the Constitution. The *Tsets* found violation); *Tsets*, May 6, 1998, Dugnelt No. 5 (the governor of Soum and the chairperson of the *Khural* of Representatives of Citizens have submitted the petition that the *SGKh* violated the interest of their prefecture when defining the border of prefectures. The *Tsets* found no constitutional violation).

¹¹⁴ *Tsets*, Jul. 25, 1994, Dugnelt No. 7.

The petition to the *Tsets* is different from the constitutional complaint to some European constitutional courts. Citizens of Mongolia cannot submit petitions against the judgments of the Supreme Court, but they can do so against the statutes and some other acts that violated their own constitutional right. This subsection examines why citizens cannot make a constitutional petition against the decisions of ordinary courts in detail because it is one of main reasons of the poor protection of fundamental rights in Mongolia.

Many framers understood the petition to the *Tsets* as a constitutional compliant. These framers thought that citizens had not only the right to file notifications to the *Tsets* but also the right to file petitions against any violation of their constitutional rights.¹¹⁵ According to these framers, an individual could submit a petition when he or she thought that his or her own constitutional right was violated after finishing the ordinary judicial proceedings because the *Tsets* was the main institution to protect these rights.¹¹⁶ For example, framer Elbegdorj Ts. gave a hypothetical example of this right of petition to the *Tsets*:

Let's imagine that since individual X's right was violated, she went the city court, and appealed to the Supreme Court. ...If the Supreme Court says it [the decision of the city court] is valid, X should have the right to appeal to the constitutional court. The constitutional court should make a decision that her right protected under the Constitution was violated and that the court made a wrong decision.¹¹⁷

¹¹⁵ Many framers argued for the citizen's right to submit notifications concerning the violation of any provision of the Constitution to the *Tsets* as a recent widespread trend in democracies. Tumur S., UBKh-n khuraldaanii temdegel (Oct. 18, 1991): 37; Badarch I., AIKh-n khuraldaanii temdegel (Dec. 20, 1991): 17; Bolat A., UBKh-n khuraldaanii temdegel (Oct. 18, 1991): 147; Chilkhaajav D., UBKh-n khuraldaanii temdegel (Oct. 18, 1991): 158; Dargakhuu J., AIKh-n khuraldaanii temdegel (Dec. 23, 1991): 30; Chilkhaajav D., AIKh-n khuraldaanii temdegel (Dec. 23, 1991): 34, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

¹¹⁶ Tsog L., UBKh-n khuraldaanii temdegel (Oct. 18, 1991): 96; Tsog L., UBKh-n khuraldaanii temdegel (Oct. 20, 1991): 141; Gonchigdorj R., UBKh-n khuraldaanii temdegel (Oct. 20, 1991): 147; Byambajav J., UBKh-n khuraldaanii temdegel (Oct. 20, 1991): 151; Bolat A., UBKh-n khuraldaanii temdegel (Oct. 20, 1991): 153-154; Ochirjav O., UBKh-n khuraldaanii temdegel (Oct. 18, 1991): 85-86; Ganbayar N., UBKh-n khuraldaanii temdegel (Oct. 18, 1991): 29; Tsog L., AIKh-n khuraldaanii temdegel (Dec. 14, 1991): 51; Purev D., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 23; Chimid B., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 30-33; Munkhhuu D., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 30-33; Batoul E., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 60, 79-80; Zorig S., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 85-86; Orsoo J., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 85; Tsog L., AIKh-n khuraldaanii temdegel (Dec. 20, 1991): 34; Bolat A., AIKh-n khuraldaanii temdegel (Dec. 23, 1991): 28-29; Ulaankhuu P., AIKh-n khuraldaanii temdegel (Dec. 23, 1991): 28-29; Munkhhuu D., AIKh-n khuraldaanii temdegel (Dec. 23, 1991): 32; Chimid B., AIKh-n khuraldaanii temdegel (Dec. 23, 1991): 39, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

¹¹⁷ Elbegdorj Ts., UBKh-n khuraldaanii temdegel (Oct. 18, 1991): 91-92, in *Mongol ulsiin undsen*

In addition, framer Zorig S. strongly argued that the new Constitution of Mongolia would change the old practice of violating human rights and protect these rights by establishing three mechanisms.¹¹⁸ The first was to allow individuals to file a complaint with the courts. The second was to give individuals the right to file a petition to the *Tsets* if he or she thought his or her constitutional rights were violated. The third was to create a national human rights commission, a non-judicial mechanism. Zorig believed that the Constitution could not guarantee the protection of these rights, the universal foundation of free societies, unless it set up these three mechanisms. Shapiro also criticized the absence of individual complaint in the earlier draft constitutions:

Not providing a more active judicial protection of fundamental individual rights is a really major issue. The general tendency in the world has been toward judicial protection. Yet it is clear that courts do become very involved in policy making when they have constitutional review powers. It must be made clear that the various individual human rights enshrined in this document, including property rights and voting rights are just hopes like those in the old Soviet Constitution in the absence of some way of legally enforcing them—and now way is provided in this Constitution.¹¹⁹

Framers neither adopted nor rejected explicitly the constitutional complaint though many of them understood constitutional review as the main mechanism for protecting fundamental rights and argued for a system similar to this complaint. However, today citizens cannot challenge constitutionality of decisions of ordinary courts and administrative organs, which violate their basic rights, because these decisions are not included in the jurisdiction of the *Tsets*. The 1992 Law on the Constitutional *Tsets*, which the framers adopted themselves just after the Constitution, does not allow the *Tsets* to review court judgments. Prof. Chimid, who influentially participated in the constitution making and signed the 1992 Law on the Constitutional *Tsets*, writes that the *Tsets* is separate from the ordinary courts,¹²⁰ which implies that the *Tsets* does not review the judgments of the Supreme Court. According to Prof. Sarantuya, framers did not adopt the right of individual complaint into the 1992 Law on the Constitutional *Tsets*

khuuliin arkhiiviin san.

¹¹⁸ Zorig S., AIKh-n khurraldaanii temdegel (Dec. 16, 1991): 85-86, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

¹¹⁹ Martin Shapiro, “Comments on the Mongolian Draft Constitution” (1991): 44. See also P.N. Bhagwati and Reed Brody, “Assistance to the Government of Mongolia relating to the draft Constitution” (June 1991): 43; Amnesty International, “Mongol Ulsiin Baga khurald toliliulakh sanamj bichig” (August 1992); The Republican Party of the U.S. (1991): 5, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

¹²⁰ Chimid B., *Undsen khuuliin medleg*, 312.

for two reasons: (1) the lack of comprehensive research on this topic; and (2) the misunderstanding that “if the Constitutional Court reviews the final judgments of other judicial organs, it will be inconsistent with article 50 of the Constitution: ‘the Supreme Court shall be the highest judicial organ.’”¹²¹

The *Tsets* neither doubts constitutionality of the Law on the Constitutional *Tsets* and the Law on the Constitutional *Tsets* Procedure, which exclude individual complaint, nor conducts constitutional review of the Supreme Court judgments. Temuujin Kh. filed three notifications, reasonably arguing that these two laws were unconstitutional because they did not establish the individual complaint mechanism already guaranteed in the Constitution.¹²² However, the *Tsets* refused to hear these notifications.¹²³ This court also refused to review constitutionality of court judgments. For example, the *Tsets* found that the Supreme Court’s interpretation of the provisions of the Law on Privatization violated citizen’s right to appeal to the court (Const. art. 16.14), but it transferred the case to the Supreme Court, saying that “it lacks jurisdiction to decide whether the statutory interpretation of the Supreme Court violates the Constitution.”¹²⁴ In two cases, the *Tsets* also struck down provisions of the statutes because the interpretation of these provisions by the Supreme Court was unconstitutional.¹²⁵ In these two cases, the Supreme Court could in fact interpret the provisions as constitutional, but it did not do so. The *Tsets* did not strike down the unconstitutional interpretation of the statutory provisions by the Supreme Court, but the very provisions that could be interpreted as constitutional.

3.2.3. The two-stage procedure of the *Tsets*

This subsection does not discuss all issues related to the procedure of the *Tsets*, but the core of this procedure. Unlike European constitutional courts, the *Tsets* has a unique procedure in which it listens to the constitutional interpretation by the legislature though

¹²¹ Sarantuya Ts., *Undsen khuuliin processiin erkh zui*, 102, 129.

¹²² Temuujin Kh., Medeelel (January 4, 2007); Temuujin Kh., *Jus Frast buyu Yost Ug*, 58–67, 208–232, 238–239.

¹²³ *Tsets*, Apr. 30, 2004, Magadlal No. 3/04

¹²⁴ See *Tsets*, Aug. 29, 1994, Dugnelt No. 8. In 2004, this court also found a wrong practice of applying the Civil Procedure Code, but did not strike down that practice. See *Tsets*, Jun. 7, 2004, Dugnelt No. 2.

¹²⁵ *Tsets*, May 14, 2008, Dugnelt No. 6; *Tsets*, Oct 29, 2008, Dugnelt No. 8.

it alone makes the final judgment. This procedure can be called the two-stage procedure. This subsection discusses the content of the two-stage procedure, the reasons for its creation, its advantages, and its possible improvement.

The *Tsets* decides constitutional disputes through two stages of the procedure according to article 66 of the Constitution.¹²⁶ In the first stage, a middle panel of five justices delivers the conclusion on constitutionality of the law and other decisions listed in article 66.2 of the Constitution. If this panel finds a law or decision unconstitutional, then that law or decision will be suspended until the final judgment of the *Tsets*. The conclusion is submitted to the *SGKh* that must decide whether to recognize it within 15 days. In the parliamentary session discussing the conclusion of the *Tsets*, one of the justices only reads the conclusion, and the MPs have no right to ask the Justice questions.¹²⁷ The conclusion becomes the final judgment and immediately enters into force if the *SGKh* accepts it. However, if the *SGKh* rejects the conclusion,¹²⁸ the second stage starts. A grand panel of seven to nine justices reconsiders the grounds for the rejection by the *SGKh* and delivers the final judgment (called the resolution) by a two-third majority. Moreover, if the *SGKh* does not respond to the conclusion of the *Tsets* within due time (15 days) fixed by the law¹²⁹ or if the *SGKh* reenacts the legislation that the *Tsets* previously quashed as unconstitutional,¹³⁰ the grand panel of the *Tsets* directly completes a resolution without any decision of the *SGKh*. The resolution of the *Tsets* can overrule the conclusion of the *Tsets* in deciding the same case if there are enough reasons to do so. If the resolution rules that a law or decision violates the Constitution, the law or decision will become null and void.

¹²⁶ See AIKh-n khuraldaanii temdegel (Dec. 20, 1991): 39-41, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

¹²⁷ *Tsets*, Apr. 2 2010, Dugnelt No. 2; *Tsets*, Jun. 9 2010, Togtool No. 2

¹²⁸ The *SGKh* rejects most of the conclusions that find unconstitutionality of the legislation and other decisions. However, the *SGKh* once rejected the conclusion that found constitutionality of the General Commission of Election decision that deleted the names of candidates from the majority party in the *SGKh*. See *Tsets*, Jun. 20 1996, Dugnelt No. 5; *SGKh*, Aug. 1, 1996, Togtool, No. 24.

¹²⁹ *Tsets*, Dec. 12 2008, Dugnelt No. 10; *Tsets*, Jun. 10 2009, Togtool No. 3. In this case, the *Tsets* sent a conclusion to the *SGKh*. The *SGKh* did not make any decision for six months even though it had to make a decision in 15 days. Thus, according to Article 30.1.2 of the Law on the Constitutional *Tsets* Procedure, the *Tsets* made the final decision, the resolution, without any decision of the *SGKh*, quashing the statutory provision that the conclusion found unconstitutional. This decision has strengthened the jurisdiction of the *Tsets* and the rule of law in Mongolia. Prof. J. Amarsanaa firstly had developed the basis of this decision. See Amarsanaa J., Murun D., and Bold S., *Undsen Khuuliin Tsetsiin Chadavhiig Bekhjuulekh Ni*, 38.

¹³⁰ *Tsets*, May 27 2009, Togtool No. 2. This decision found that the *SGKh* reenacted the statutory clause previously quashed by the *Tsets*, and quashed the clause. See also *Tsets*, Jan. 23 2008, Togtool No. 1 (which found that the *SGKh* did not reenact the statutory clause previously quashed by the *Tsets*).

Since the two-stage procedure of the *Tsets* is unique, it is worth looking at why the Constitution framers adopted this procedure. Two different versions of the procedure, the single-stage and the two-stage, were discussed during the constitution making process. The two-stage procedure has been described above. The single-stage procedure was the classic procedure of European constitutional courts; that is, these courts directly make final judgments on constitutionality of legislation and other acts and do not submit its judgments to the legislature. The single-stage procedure was included in some of the early drafts of the Constitution: “a legislative act that violates the Constitution is considered invalid from the day that the decision of the Constitutional *Tsets* was published in the state media, and the decision in question could not be appealed against.”¹³¹ Although framers rejected the single-stage procedure early on, a few of them argued again for this procedure in the *PGKh*, but they could not gain majority support.¹³²

The framers adopted the two-stage procedure rather than the single-stage procedure due to four reasons. First, there was a great deal of skepticism towards the legal profession by the public. The image of the legal profession was generally negative during the socialist regime because lawyers assisted and supported the regime. Describing lawyers as the profession who subjected citizens to repression in the previous regime, some framers, therefore, were afraid that if lawyers were given too much power (constitutional review), they might abuse this power so that citizens would suffer “brutal repression.”¹³³

The second reason was the concern that the *Tsets* might interfere arbitrarily with the activities of the parliament, the government, and other institutions as the Political Bureau did during the socialist period. For example, framer Nyambuu B. made the following remarks:

This *Tsets* would become more powerful than the Political Bureau and its few members could never be removed. These few people’s term is for 9 years, and it can be extended one more time. The *Tsets* will enjoy the ultimate power for 18 years... The *Tsets*

¹³¹ Mongol ulsiin undsen khuuliin tusul, [The draft of the Constitution of Mongolia] (Dec. 1990; Jan. 14, 1991; Mar. 4, 1991): 21-22, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

¹³² See Elbegdorj Ts., UBKh-n khuraldaanii temdeglegel (Oct. 20, 1991): 142; Gonchigdorj R., UBKh-n khuraldaanii temdeglegel (Oct. 20, 1991): 145, 146; Tovuusuren, UBKh-n khuraldaanii temdeglegel (Oct. 18, 1991): 46, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

¹³³ Lkhagvajav G., AIKh-n khuraldaanii temdeglegel (Dec. 16, 1991): 26. See also Choijiljav Kh., AIKh-n khuraldaanii temdeglegel (Dec. 16, 1991): 8, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

judgment will enter into force even when it is not accepted by the Great *Khural*. Thus, the *Tsets* will take all of powers when its judgment enters into force.¹³⁴

When many of the framers feared the *Tsets* and distrusted the legal profession in general, it was hard to persuade a majority of framers to give the *Tsets* the power to directly invalidate unconstitutional laws.

The third reason was that the two-stage procedure held a mark of respect for the democratically elected *SGKh* as “the highest organ of State” (Mon. Const. art. 20) and as “the highest organ of legislative power.”¹³⁵ According to Tsog L., if the *Tsets* invalidated a law without letting the parliament know, it would become another parliament over the parliament.¹³⁶ Tsog, therefore, argued for the two-stage procedure while believing that this procedure would not blur the judicial nature of the *Tsets* because the *Tsets* still had the power to nullify unconstitutional laws, and everyone necessarily followed its judgments.

The fourth reason was that the two-stage procedure represented a peaceful way to solve a constitutional dispute and to promote the mutual understandings between the *Tsets* and the *SGKh*. This procedure lets the institutions such as the *SGKh* to correct their own unconstitutional acts. Prof. Chimid explained as follows:

The two-stage procedure is a peculiarity of the *Tsets*. The principle of feedback is followed here. The *Tsets* decides whether a certain law or decision is unconstitutional, and allows the President, the Government, the Parliament, and perhaps the Supreme Court to invalidate it. This is a peaceful, flexible way for the constitutional court and these institutions to understand each other.¹³⁷

Prof. Sarantuya also argued that the two-stage procedure allowed the *Tsets* to “clarify again causes and reasons why the certain act that violated the Constitution was

¹³⁴ Nyambuu B., AIKh-n khuraldaanii temdeglegel (Dec. 16, 1991): 41; See also Dashbalbar O., AIKh-n khuraldaanii temdeglegel (Dec. 16, 1991): 22; Enkhbaatar D., AIKh-n khuraldaanii temdeglegel (Dec. 16, 1991): 14, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

¹³⁵ Sovd G., “Undsen Khuuliin Khyanaltiin Togoltsoond Undsen Khuuliin Tsetsiin Ezlekh Bair Suuri [The Status of the Constitutional *Tsets* in the System of Constitutional Review],” 95.

¹³⁶ Tsog L., AIKh-n khuraldaanii temdeglegel (Dec. 14, 1991): 55-56, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

¹³⁷ Chimid B., AIKh-n khuraldaanii temdeglegel (Dec. 20, 1991): 39-41; See also Chimid B., AIKh-n khuraldaanii temdeglegel (Dec. 20, 1991): 11-14, in *Mongol ulsiin undsen khuuliin arkhiiviin san*; Chimid B., *Undsen Khuuliin Uzel Barimtlal: Niitleg Asuudal*, 1:164; Chimid B., *Undsen Khuuliin Uzel Barimtlal: Khunii Erkh, Shuukh Erkh Medel*, 2:179.

made.”¹³⁸

The two-stage procedure of the constitutional review is suitable to a new democracy. Mongolia had neither a parliament before 1990 nor constitutional review before 1992. The *SGKh* and the *Tsets* often made mistakes because both lacked experiences. If the *Tsets* had the single-stage procedure where it directly made a final judgment on constitutional matters as in Germany, it would be difficult to correct the judgment of the *Tsets*. The only way to correct wrong judgments by this court would be the constitutional amendment. However, frequent amendments to the new Constitution would be not only difficult but also harmful to the culture of the rule of law. The two-stage procedure is an institutional arrangement, in which the constitutional court could make fewer mistakes in a transitional period.

The two-stage procedure promotes dialogue between the *Tsets* and the *SGKh* because the *Tsets* makes final judgments on constitutional matters after listening to the opinions of the *SGKh*. In the first stage, the representatives of the *SGKh* (mostly MP lawyers) explain why the law is constitutional before the *Tsets*. This court then makes conclusions as a first judgment and sends it to the *SGKh*. The *SGKh* in turn debates this conclusion. The *SGKh* sometimes accepts the conclusions and agrees to correct mistakes of its own or of other institutions such as the President or the government¹³⁹ though it mostly rejects the conclusions. When the *SGKh* rejects the conclusions, the MPs explain to the *Tsets* why the *SGKh* rejects these conclusions and disclose reasons discussed in the *SGKh*. After reassessing these reasons, the *Tsets* makes its final judgments as the resolutions. The *Tsets* sometimes changes its previous poor conclusions due to reasons given by the *SGKh*.¹⁴⁰ If the *Tsets* had no chance to make such changes, then poor judgments could harm Mongolian democracy.

¹³⁸ Sarantuya Ts., *Undsen khuuliin processiin erkh zui*, 173.

¹³⁹ The *SGKh* accepted partially or fully the following 24 conclusions of the *Tsets*: *Tsets*, Jan. 12, 1994, Dugnelt No. 2; *Tsets*, Aug. 29, 1994, Dugnelt No. 8; *Tsets*, Jan. 4, 1995, Dugnelt No. 1 (partially); *Tsets*, May 29, 1996, Dugnelt No. 4 (partially); *Tsets*, Apr. 9, 1997, Dugnelt No. 2; *Tsets*, Jul. 5, 1997, Dugnelt No. 6 (unconstitutionality of the presidential decree); *Tsets*, Feb. 24, 1998, Dugnelt No. 2; *Tsets*, Apr. 27, 1998, Dugnelt No. 4; *Tsets*, Mar. 23, 2001, Dugnelt No. 1; *Tsets*, Oct. 29, 2003, Dugnelt No. 3; *Tsets*, Apr. 21, 2004, Dugnelt No. 1; *Tsets*, Mar. 31, 2005, Dugnelt No. 2; *Tsets*, Apr. 13, 2005, Dugnelt No. 3; *Tsets*, Sep. 30, 2005, Dugnelt No. 7; *Tsets*, Dec. 7, 2005, Dugnelt No. 9; *Tsets*, Mar. 29, 2006, Dugnelt No. 3; *Tsets*, Jun. 21, 2006, Dugnelt No. 7; *Tsets*, Dec. 13, 2006, Dugnelt No. 11; *Tsets*, Feb. 27, 2008, Dugnelt No. 3; *Tsets*, May 14, 2008, Dugnelt No. 6; *Tsets*, Oct. 29, 2008, Dugnelt No. 8; *Tsets*, Mar. 4, 2009, Dugnelt No. 1; *Tsets*, Mar. 11, 2009, Dugnelt No. 2 (partially); *Tsets*, Mar. 24, 2010, Dugnelt No. 1.

¹⁴⁰ *Tsets*, Jan. 7, 1994, Dugnelt No. 1 and *Tsets*, Feb. 4, 1994, Togtool No. 1; *Tsets*, Mar. 13, 2000, Dugnelt No. 2 and *Tsets*, Sep. 8, 2000, Togtool No. 1; *Tsets*, Jun. 26, 2002, Dugnelt No. 3 and *Tsets*, Nov. 13, 2000, Togtool No. 3. In these three cases, the *Tsets* changed its rulings in the final stage, following the *SGKh*. The second case is analyzed in Section 6.3.

The dialogue between the *Tsets* and the *SGKh* may be improved if the *Tsets* makes well-reasoned judgments. In its judgments, this court provides the arguments given by two parties, mostly citizens and MPs representing the *SGKh*. However, the *Tsets* neither makes enough analysis on these arguments nor provides its own reasons for the judgment in most cases. Citizens and the *SGKh* have the right to know how this court evaluates their arguments, which arguments are chosen, and which arguments are rejected. With the judgments lacking reasoning, citizens and the *SGKh* cannot know how the *Tsets* comes to a certain conclusion. If the *Tsets* gives reasons for its judgments, then the *SGKh* may start to discuss not only the conclusion but also the reasons. If the *Tsets* delivers good reasons in its judgments (conclusions), especially those judgments concerning fundamental rights, then it will be difficult for the *SGKh* to reject the court judgments. If citizens find that the judgment is well reasoned, then they will criticize and blame the parliamentary action to reject that judgment. Therefore, to improve the dialogue between the *SGKh* and the *Tsets*, this court should always deliver well-reasoned judgments.

The *Tsets* can have both the single-stage procedure and the two-stage procedure under the current framework of the 1992 Constitution. As Subsection 3.2.1 of this book showed, the interpretation that the petition in Article 66.1 of the Constitution is equal to constitutional complaint rather than *actio popularis* is not only more reasonable but also more congruent with the principled interpretation of constitutional text and results of comparative studies on constitutional review. If the petition in Article 66.1 of the Constitution is understood as a constitutional complaint that is practiced in Germany, the *Tsets* should directly make final decisions on constitutional cases initiated by the petition without sending a conclusion to the *SGKh* (the single-stage procedure), but it can use the two-stage procedure to decide only cases initiated by the request. The text of the Constitution indicates that the two-state procedure is limited to only the abstract review of decisions and acts listed in Article 66.2 of the Constitution.

3.2.4. The *Tsets* as the European model of constitutional review

The two-stage procedure of the *Tsets* reflects a main influence of the Committee of Constitutional Supervision of the USSR (the Soviet Committee). There are four major similarities between the *Tsets* and this committee in spite of their differences. However, the *Tsets* is a constitutional court on the European model because it meets the main

qualifications of the court of law. This subsection examines how the Soviet Committee influenced the *Tsets*, whether the two-stage procedure has disadvantages and whether this procedure makes the *Tsets* a semi-court.

The framers of the Mongolian Constitution formed the *Tsets* under the influences of both the Soviet Committee and the constitutional courts of Europe. A comparison between the Soviet Committee and the *Tsets* shows the degree of these influences. During Gorbachev's perestroika, one of the legal reforms was the creation of constitutional review as a step toward "a socialist state under the rule of law." Soviet scholars debated various models of constitutional review. These scholars rejected a version of the American model because the Supreme Court of the USSR was incapable of exercising constitutional review. These scholars also declined to adopt the European model as Herbert Hausmaninger explained:

[The European model was attractive] but this model clashed with the deeply ingrained principle of "supremacy" of parliament; the Supreme Soviet and the Congress of People's Deputies of the USSR (the USSR Congress) were the highest organs of state power in the USSR and, as such, beyond judicial review. At least for the time being, this model was rejected as being too radical...¹⁴¹

Therefore, the USSR established the Committee of Constitutional Supervision (the Soviet Committee) in the 1988 Constitutional Amendment (art. 125) and in the 1989 Law on the Constitutional Supervision in the USSR. Some Mongolian framers said that the Soviet Committee was a failure because it could not protect the Constitution. However, this committee existed only for two years, which made it difficult to be fully evaluated.

The system of the Soviet Committee was complicated due to the complexity of the Soviet Union.¹⁴² Nevertheless, the arrangement and procedure of this Committee could be explained in simple terms for the sake of a comparison with the *Tsets*. The committee influenced the *Tsets* in four ways. First, the qualification, appointment and renewable term of members are similar. 27 members of the Committee were selected from among "specialists in the area of politics and law" for the renewable term (of ten years) by a simple majority vote in the USSR Congress upon the nomination of the Chairperson of

¹⁴¹ Hausmaninger, "The Committee of Constitutional Supervision of the USSR," 228.

¹⁴² Ibid., 305–307; Hausmaninger, "From the Soviet Committee of Constitutional Supervision to the Russian Constitutional Court," 306–331; Quigley, "Soviet Union as a State Under the Rule of Law," 211–213.

the Supreme Soviet.¹⁴³ Likewise, nine members of the *Tsets* are appointed from among citizens who have “high political, legal qualification” for the renewable term (of six years) by a simple majority vote in the *SGKh* upon the nomination of three of them by the *SGKh*, three by the President and the remaining three by the Supreme Court.

Second, both the Soviet Committee and the *Tsets* address issues at the requests of various governmental bodies. Governmental organs such as the USSR Congress, one-fifth of the People’s deputies, the Chairperson of the Supreme Soviet, the Supreme Court, and the Prosecutor General could send a request to the Committee. Similarly, the *SGKh*, the President, the Prime Minister, the Supreme Court, and the Prosecutor General can send a request to the *Tsets*. The Committee addressed issues on its own initiative. However, the *Tsets* could not address issues on its own initiative, but it can do so at the petition and notification of citizens. The petition and notification of citizens were added to the draft Constitution as Martin Shapiro suggested in his advice to the draft Constitution of Mongolia.¹⁴⁴

Third, the jurisdictions of the Committee and the *Tsets* are similar. The jurisdiction of the Committee permits it to review a variety of acts such as draft laws, laws, international treaties, or actions of the Council of Ministries of the USSR for their conformity with the Constitution. Likewise, the jurisdiction of the *Tsets* covers laws, international treaties, decisions of the President, and government decisions (as well as issues on high ranking-officials). The jurisdictions of both the Committee and the Court do not extend to individual judgments of the ordinary courts and decisions of the administrative organs (lower than the central government level). Unlike the Committee, the *Tsets* does not review draft laws.

Fourth, the procedures of the Soviet Committee and the *Tsets* seem similar but different in important aspects. Both of them have to send the conclusions on constitutional matters to the legislatures (the Soviet Congress and *SGKh*). Their conclusions do not suspend the applicability of laws or other decision.¹⁴⁵ However, the consequences of the conclusions are different in the two systems. The *Tsets* makes a final judgment by a two-third majority of votes in case the *SGKh* rejects the conclusion

¹⁴³ Hausmaninger, “The Committee of Constitutional Supervision of the USSR,” 300–301.

¹⁴⁴ Martin Shapiro, “Comments on the Mongolian Draft Constitution” (1991): 42-43, in *Mongol ulsiin undsen khuuliin arkhiiviin san*; Chimid B., *Undsen khuuliig deedlen shutekh yos*, 49.

¹⁴⁵ Nevertheless, in 2005, the *SGKh* amended the Law on the Constitutional *Tsets* so that if the *Tsets* makes a conclusion of unconstitutionality of a decision with the Constitution, the applicability of the law or the decision is suspended.

of the *Tsets* (the two-stage procedure). On the other hand, if the Soviet Committee made a conclusion with regard to constitutionality of congressional decisions or other acts, then the Congress could reject the conclusion upon a two-third majority vote (1,500 of 2,250) at its next session. If the Congress rejected the conclusion in this way, then the congressional decision or act would remain valid. If the congress lacked a two-third majority vote, or it failed to take this action,¹⁴⁶ the conclusion of the committee would stand, and the act in question would immediately become invalid. However, the committee's power on human rights was as strong as that of the constitutional courts in Europe. If the committee found that a provision of a normative legal act violated human rights and freedoms, the provision would immediately become invalid.

The procedure (the single-stage procedure) in the constitutional courts of Western Europe replaced the procedures similar to the two-stage procedures of the *Tsets* in other post-communist countries. The Committee of Constitutional Supervision vanished with the collapse of the USSR in 1991. The newly formed Russian Federation established a constitutional court rather than the weak, semi-judicial body such as the previous Soviet Committee. Thus, the decisions of the Russian Constitutional Court are directly final and binding as with the European courts. Other post-socialist countries followed the same path. Schwartz wrote that "in some countries – Romania, Poland, and Portugal – decisions of the constitutional courts have been subject to reversal by the parliament, although such an action requires a two-thirds supermajority, equivalent to that often required for a constitutional amendment in those countries."¹⁴⁷ Nevertheless, all of these countries later removed the parliamentary power to reject the constitutional court decisions.¹⁴⁸ Thus, the *Tsets* is unique from the comparative perspective as it maintains the two-stage procedure.

The two-stage procedure should be replaced by the single-stage procedure that allows the *Tsets* directly to make a final and binding decision on constitutional matters.

¹⁴⁶ The organ that issued the unconstitutional or illegal acts had a three-month period to make the appropriate changes. If the nonconformity was not corrected within this period, the Committee might request that the Congress, the Supreme Soviet, or the Council of Minister would change the nonconformity. The committee's annulment stands unless the Congress rejects the Committee's conclusion by a two-third majority. See Hausmaninger, "The Committee of Constitutional Supervision of the USSR," 305–307.

¹⁴⁷ Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, 38. The two-stage procedure of Mongolia and the parliamentary power to reject the constitutional court decisions, which existed in Poland, look similar but different since the *Tsets* can re-adopt its decision in final and binding form after the *SGKh* has rejected it.

¹⁴⁸ Durr, "Comparative Overview of European Systems of Constitutional Justice," 11

The two-stage procedure is suitable during a transitional period but not thereafter. This procedure weakens the authority of decisions of the court because MPs sometimes openly reject these decisions for partisan reasons. Moreover, the two-stage procedure harms the independence of the court. Schwartz argued as follows: “Finality is crucial to judicial independence. The refusal to accord finality to the constitutional courts’ decisions reflects an insistence on parliamentary sovereignty and a mistrust of both the constitutional court and the separation of powers doctrine.”¹⁴⁹ In addition, some Mongolian scholars are dissatisfied with the two-stage procedure. For example, Prof. Sarantuya also argued against this procedure:

The decision of the *Tsets* is court’s decision and it is incorrect to put it for discussion in other organization. The conclusions passed by the *Tsets* in its middle panel session and grand panel session are submitted to the State Great *Khural*. It leads to the wrong understanding that the legislator must know and recognize court decision. Also it’s illogical when the political organization discusses whether legal organization passed right decision or wrong decision. In such case we could not implement modern democratic principles of power division, independency of the court and the rule of law.¹⁵⁰

There is the criticism that the *Tsets* is not a court but a semi-court because it continues with the two-stage procedure similar to the Soviet model (the USSR Committee of Constitutional Supervision). Mongolian politicians sometimes raise this criticism when they dislike the decisions of the *Tsets*. Some framers also argued that the *Tsets* was not a pure court but a mixture of the Soviet model and the European model because the two-stage procedure allowed the *Tsets* to exercise both the advisory power to submit a conclusion to the *SGKh* and the judicial power to make a final judgment.¹⁵¹

The *Tsets* is not a semi-court but a constitutional court regardless of its two-stage procedure. Framers instituted the *Tsets* with its two-stage procedure as the most suitable mechanism for the *Rechtsstaat* and fundamental rights after long discussions on “what mechanism can protect best the Constitution.”¹⁵² Moreover, the *Tsets* is a new term

¹⁴⁹ Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, 38.

¹⁵⁰ Sarantuya Ts., “Origin, Development and Urgent Tasks of the Constitutional Procedure Law in Mongolia,” 37. A draft Constitution prepared by young legal scholars in 2007 also excluded the two-stage procedure. See Chapter 12 of the Draft Constitution of Mongolia, prepared by Open Academy and Asian Initiative Institute (September 21, 2007).

¹⁵¹ Ganbayar N., AIKh-n khuraldaanii temdegel (Jan. 9, 1991): 70; Ganbayar N., Ganbayar N., AIKh-n khuraldaanii temdegel (Dec. 14, 1991): 93-95, in *Mongol ulsiin undsen khuuliin arkhiiviin san*

¹⁵² Ochirjav O., UBKh-n khuraldaanii temdegel (Oct. 20, 1991): 44; Bayar S., UBKh-n khuraldaanii temdegel (Oct. 20, 1991): 90, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

created for the purpose of calling a constitutional court. Early draft constitutions also included the *Tsets* in the chapter on judiciary as other constitutions.¹⁵³ However, framers separated the *Tsets* from the chapter on the judiciary, and they created a new chapter without substantively modifying the main conception of this court.

The *Tsets* is a constitutional court because it makes a final and binding decision on constitutional disputes through the judicial procedure initiated by disputing parties. First, the *Tsets* solves constitutional disputes as ordinary courts decide civil and criminal disputes. Framer Chimid argued as follows:

The court decides not only criminal and civil cases, disputes, but also disputes related to administrative law and state [constitutional] law. It is a court since it solves disputes. It is a criminal court since it solves crimes. The Constitutional *Tsets* is a court because it makes final decisions on [constitutional] mistakes by the Great *Khural*, the President, the Government, and other state organs.¹⁵⁴

Second, the *Tsets* decisions on constitutional disputes are also final and binding (Mon. Const. art. 66.3, 66.4, and 67) though the *SGKh* has the chance to show its objection to the decisions under the two-stage procedure. Many framers argued that a main characteristic of a court was the power to make a final decision on disputes, which made the *Tsets* a constitutional court.¹⁵⁵

Third, another judicial characteristic is that the *Tsets* makes a decision only when a constitutional dispute is brought forward by the requests of certain authorities or the petitions (or notifications) of citizens. In 1992, Sovd, future Chief Justice of the *Tsets*, argued that the *Tsets* is a court because it makes a decision only when it received a claim from an individual, but the constitutional council (and the Committee of Constitutional Supervision of the USSR) makes a decision on its own initiative.¹⁵⁶

¹⁵³ Mongol ulsiin undsen khuuliin tusul [the draft of the Constitution of Mongolia], Boti 92, Oct. 5, 1991: 169 (as well as Boti 92, Nov. 7, 1991: 205); Chimid B., AIKh-n khuraldaanii temdegel (Dec. 20, 1991): 11-14; Tsog L., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 38-39, in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

¹⁵⁴ Chimid B., AIKh-n khuraldaanii temdegel (Dec. 20, 1991): 11-14 Mongol ulsiin undsen khuuliin tusul [the draft of the Constitution of Mongolia], in *Mongol ulsiin undsen khuuliin arkhiiviin san*.

¹⁵⁵ Tsog-Ochir L., Ochirjav O., UBKh-n khuraldaanii temdegel (Oct. 20, 1991): 87-88; Byambajav J., AIKh-n khuraldaanii temdegel (Dec. 14, 1991): 68-69; Gonchigdorj R., AIKh-n khuraldaanii temdegel (Dec. 14, 1991): 93-95; Tsog L., AIKh-n khuraldaanii temdegel (Dec. 14, 1991): 50; Tsog L., AIKh-n khuraldaanii temdegel (Dec. 20, 1991): 32-33; Ochirjav O., AIKh-n khuraldaanii temdegel (Dec. 16, 1991): 9-10; Chimid B., AIKh-n khuraldaanii temdegel (Dec. 20, 1991): 11-14, in *Mongol ulsiin undsen khuuliin arkhiiviin san*. See also Sarantuya Ts., *Undsen khuuliin processiin erkh zui*, 35

¹⁵⁶ Sovd G. (Director of the Legal Institute), AIKh-n khuraldaanii temdegel (Jan. 9, 1992): 165. See also

Fourth, the general process of how the *Tsets* works is judicial.¹⁵⁷ Like other constitutional courts, the *Tsets* has a typical (“triadic”) structure of the court defined by Shapiro: a first party (mostly citizens), a second opposing party (mostly the *SGKh* and the Government), and above them a separate impartial body (the *Tsets*) with the authority to make a determination.¹⁵⁸ The process of the *Tsets* also partially satisfies the judicial process defined by Jeremy Waldron, which includes at least the following four elements: (1) the opportunity to discuss arguments and evidences, (2) the open hearing, (3) the application of norms to individual cases, and (4) the reasoned judgments.¹⁵⁹ The *Tsets* satisfies the first two elements, but not the last two elements. The process of the *Tsets* allows the disputing parties, mostly citizens and the *SGKh*, to present arguments and to examine arguments of the other party in the open hearing. Each party also can present arguments and evidences at the end of the process and respond to those of the other party.

The current process of the *Tsets* needs to be improved to satisfy the last two elements of the judicial process described by Waldron. First, the *Tsets* should apply constitutional norms to individual cases, which is “the essential idea” of the court.¹⁶⁰ Even though this idea is sometimes controversial in the discussion on the abstract review of legislation, it is the common function of the leading courts of constitutional review in democracies such as the U.S. and Germany. The establishment of individual complaint and constitutional question can help the *Tsets* to perform this function. Today, the *Tsets* does not apply constitutional norms to individual cases because of its sole abstract review. Second, the *Tsets* should always make a reasoned judgment on constitutional cases. According to Waldron, the importance of the reasoned judgment of the court is as follows: in the judicial process, “both sides are treated respectfully, and above all listened to by a tribunal which is bound in some manner to attend to the evidence presented and respond to the submissions that are made in the reasons it eventually gives for its decision.”¹⁶¹ However, the *Tsets* neither responds to arguments and evidence provided by the disputing parties nor provides reasons in most of its judgments.

Ochirjav O., AIKh-n khuraldaanii temdegglel (Dec. 16, 1991): 9-10, in *Mongol ulsiin undsen khuuliin arkhiiviin san*; Sarantuya Ts., *Undsen khuuliin processiin erkh zui*, 32-33.

¹⁵⁷ The basic rules of the *Tsets* procedure are about the composition, openness of dispute resolution, oral proceeding, continuity of procedure, adversarial process, and independence of dispute resolution are defined in the 1997 Law of Mongolia on Constitutional *Tsets* Procedure.

¹⁵⁸ Shapiro, *Courts*, 1-37.

¹⁵⁹ Waldron, “The Concept and the Rule of Law,” 20–24.

¹⁶⁰ Ibid., 23.

¹⁶¹ Ibid.

Conclusion

The *Tsets* is a creation by the Mongolian framers who deliberated on constitutional review by considering the three models already covered in this chapter. This court is based on the Soviet model, the USSR Committee of Constitutional Supervision, but it is different from the Soviet model because it was influenced by experiences of constitutional review in western and other post socialist countries. In addition, the Mongolian framers made an innovation, the two-stage procedure, which has been evolving for almost two decades. While the *Tsets* basically follows the European model, its name, composition, appointment of justices, term of justices, jurisdiction, and procedure are different from that of European constitutional courts. As Kelsen said, “it is impossible to propose a uniform solution for all possible constitutions: constitutional review will have to be organized according to the specific characteristics of each of them.”¹⁶² Nevertheless, the institutional improvements of the *Tsets* according to the European model should be made for the better protection of fundamental rights and the rule of law.

As Introduction to this book mentioned, the *Tsets* does not protect fundamental rights well for two reasons: institutional and cultural. Institutionally, the *Tsets* protects these rights only through an abstract review. The *Tsets* adopts a constitutional interpretation that it does not have the individual complaint procedure. Ginsburg argued as follows: “under this interpretation, an individual’s rights, including those elaborated under Article 16 of the Constitution, may be denied simply because an ordinary court has looked at the matter. If an ordinary court violates a constitutional right through one of its decisions, that decision will not be reviewable.”¹⁶³ Ordinary courts also have no juridical review power and rarely apply constitutional provisions to individual cases. Thus, concrete cases of violations of fundamental rights cannot arrive at the *Tsets* or are out of the judicial review. The current abstract review insufficiently protects these rights, so the citizens should have the right to petition against not only the legislation but also any final decisions of the Supreme Court, which violate their rights. Scholars argue that the *Tsets* should have the individual complaint procedure initiated by the citizens and

¹⁶² Favoreu, “Constitutional Review in Europe,” 38, 51.

¹⁶³ Ginsburg, *Judicial Review in New Democracies*, 180.

the abstract review by specially designed authorities.¹⁶⁴ Moreover, ordinary judges rather than only the Supreme Court justices should directly submit the constitutional question. Furthermore, the abstract review initiated by individuals (*actio popularis*) is not suitable after the transition and the *Tsets* should be given the jurisdictions more closely related to concrete cases according to the similarities of the American and European models. Allowing the *Tsets* to have the jurisdictions to concrete constitutional cases and making other institutional improvements are necessary but not enough.

The second reason for the poor protection of fundamental rights is cultural. The *Tsets* could have developed strong protection of fundamental rights through the abstract review as the Hungarian Constitutional Court. However, the *Tsets* is not active in protecting these rights because it often fails to provide reasons of its judgments and because it usually makes literal or originalist interpretations of the Constitution. Chapters 4 will focus on the issue of reasoned judgment and the constitutional interpretation.

¹⁶⁴ Temuujin Kh., *Jus Frast buyu Yost Ug*, 58–67, 208–232, 238–239; Amarsanaa J., Murun D., and Bold S., *Undsen Khuuliin Tsetsiin Chadavkhiig Bekhjuulekh Ni*, 38–40; Sarantuya Ts., “Origin, Development and Urgent Tasks of the Constitutional Procedure Law in Mongolia,” 1–40.

Chapter 4

Constitutional Interpretation

This chapter investigates how the court should interpret the Constitution because this book aims to find theoretical and practical solutions to the poor interpretation of the Constitution by the *Tsets*. The court has the power to make final interpretation of the Constitution in constitutional democracies although there are other constitutional interpreters including the legislature, the executive or the citizens. Section 4.1 defines what reasoned judgment of the court and the constitutional interpretation are in general. Section 4.2 looks into the constitutional interpretation in the U.S., examining different interpretation methods. The U.S. Supreme Court has protected many fundamental rights by an interpretation method called the moral reading of the Constitution as developed by Ronald Dworkin.¹ Sections 4.2 therefore discusses how the moral reading is more agreeable than two other methods, namely the strict constructionism and the originalism, and how originalism and majoritarian theories criticize the moral reading.

Section 4.3 illustrates the common usage of the moral reading of the Constitution. Mongolia has the European model of constitutional review, but it can use the U.S. theory of constitutional interpretation, the moral reading, to improve its protection of fundamental rights as other jurisdictions also apply methods similar to the moral reading. This Section shows that not only the U.S. Supreme Court but also the constitutional and international courts of Europe interpret their constitutions and bills of rights by interpretation methods similar to the moral reading even though their systems

¹ The aim of this chapter is not to defend Dworkin's whole theory of law, but to show what his theory of constitutional interpretation is, why his theory is better than other interpretation theories, and whether the *Tsets* can use his theory. Thus, the chapter does not discuss the famous debate between Dworkin and H. L. A. Hart. See Dworkin, *Justice in Robes*, 140–240.

of constitutional review (American and European models) are institutionally different. There are transitional countries with successful constitutional courts that use the moral reading of their constitutions. Thus, Section 4.3 focuses on the Hungarian Constitutional Court that often makes the moral reading. Section 4.4 shows that constitutional democracies have developed a common culture, which is important for the moral reading of the Constitution and constitutionalism in general.

4.1. Reasoned judgment and constitutional interpretation

In the U.S. and constitutional democracies in Europe, the courts make reasoned judgments on constitutional matters while interpreting their constitutions. Judges should interpret the Constitution and deliver reasoned judgments. This section briefly discusses why the courts should justify their judgments, what functions the justified judgments play, and what methods of constitutional interpretation the courts use for justifying their judgments in the American and European models.

In constitutional democracies, the courts have the duty to explain and justify its decisions on constitutionality of legislation and other acts by referring to constitutional law. This judicial duty can be explained by comparing it to the duty of the legislature. According to John Rawls, “the justices have to explain and justify their decisions as based on their understanding of the Constitution and relevant statutes and precedents. Acts of the legislative and the executive need not be justified in this way.”² The justifications by the courts and the legislature differ because the purposes of these two institutions are different. The court is for the rule of law, and the legislature is for the improvement of people’s situation and society as a whole. The court has to make legal justifications because it enforces and follows the rule of law at the same time. Waldron argues as follows:

A right to present evidence in one’s behalf, a right to make legal argument about the bearing of the evidence and about the bearing of the various legal norms relevant to the case, and a right to hear reasons from the tribunal when it reaches its decision, which are responsive to the evidence and arguments presented before it... are important parts of the

² Rawls, *Political Liberalism*, 216.

Rule of Law.³

The legislature aims not only for the implementation of the Constitution but also for good social policy. Because of their purposes, the legislature and the court have different procedures, compositions, and cultures. The courts are composed of legal professionals, who are mostly appointed and exercise judicial power according to the judicial procedure. On the other hand, the legislature is composed of politicians (not necessarily legal professionals), who are elected by the people and exercises the legislative power according to the legislative procedure. The powers of the legislature and the court, therefore, are legitimized differently. MPs can vote for certain legislation just because the people who elect them support that legislation. The legislature, therefore, has elective legitimacy. The legislature should pay attention to the effects that a law has on individual rights of citizens in a constitutional democracy. MPs having elective legitimacy can give their reasons and listen to reasons of a minority when making a collective decision on individual rights of citizens. However, judges have to give legal reasons for their decisions, but they cannot rely just on the public opinion because they have no elective legitimacy.

The lack of frankness as to the reasons relied upon in judicial judgments may seem appropriate for fear of the possible adverse reactions against these reasons. However, judges should frankly give reasons for their judgments regardless of the possible reactions because the frankness indicates their adherence to the rule of law and promotes public discussions on the reasons of the judgment. D. L. Shapiro argued for the frankness of reasons in judicial judgments as follows:

A requirement that judges give reasons for their decisions - grounds of decision that can be debated, attacked, and defended – serves a vital function in constraining the judiciary's exercise of power. In the absence of an obligation of candour, this constraint would be greatly diluted, since judges who regard themselves as free to distort or misstate the reasons for their actions can avoid the sanctions of criticism and condemnation that honest disclosure of their motivation may entail.⁴

The reasoned decisions of the court play three functions in a constitutional democracy. First, the reasoned decisions show whether judges decide cases arbitrarily or

³ Waldron, "The Rule of Law and the Importance of Procedure," 4.

⁴ Shapiro, "In Defense of Judicial Candour," 737.

by making a judgment based on the facts and legal arguments according to the law.⁵ The reasoned judgments constrain not only the activities of the legislature, the government, the ordinary judges, the administrators, and the citizens, but also that of constitutional court judges themselves by subjecting them to rules internal to normative reasoning.⁶ The function of non-arbitrariness is more serious for constitutional law than private or commercial laws because the constitutional adjudication abolishes the legislation. If the court makes poor reasoning in its judgments, politicians and political parties may easily attack these judgments with partisan interests by saying that judges are politically biased. Thus, the court should always make reasoned judgments and show that these judgments are not politically biased but legally grounded. Second, judges making a reasoned decision respect the two parties of the case as rational and reasonable persons. The judicial decision should be just as reasonable to the losing party as the winning one so that all could agree to the decision.⁷ When the court listens to the legal arguments of parties and makes a reasoned decision responding to these arguments, it respects the human dignity of these parties because it conceives of them as “beings capable of explaining themselves” and “as bearers of reason and intelligence.”⁸ When the court makes reasoned decisions protecting fundamental rights, people pay more attention to constitutional issues and respect the court.⁹ Third, reasoned decisions provide some degree of predictability as people can know what the law is and how it is interpreted in other similar cases, and plan their lives accordingly.

In order to show that the reasons for their judgments are based on constitutional law, courts have to interpret the Constitution. Courts implicitly or explicitly use similar methods for interpreting the Constitution. Studies on American and European practices demonstrate that the methods of constitutional interpretation are, “in most relevant respects, largely similar.”¹⁰ The U.S. courts, notably the Supreme Court, use methods such as strict constructionism, originalism, *stare decisis*, constitutional structure,¹¹ and

⁵ Gerhardt et al., *Constitutional Theory*, 24 (citing Martin Golding, Legal Reasoning 2-4 (1984)).

⁶ Sweet, *Governing with Judges*, 144–145.

⁷ Reasonable people may sincerely and consciously achieve different judgments and have “reasonable disagreements” due to “burdens of judgments.” See Rawls, *Justice as Fairness*, 35–36.

⁸ Waldron, “The Rule of Law and the Importance of Procedure,” 14, 17.

⁹ For how the public respect constitutional justices more than politicians in Germany and Hungary because their constitutional courts have been continuously protecting individual rights, see Kommers, “The Federal Constitutional Court in the German Political System,” 489; Orkény and Scheppéle, “Rules of Law: The Complexity of Legality in Hungary,” 61.

¹⁰ Rosenfeld, “Constitutional Adjudication in Europe and the United States,” 660.

¹¹ Though structural arguments are rarely employed today, but they “were more popular in the past, particularly in the *Lochner* era.” Griffin, *American Constitutionalism*, 150. For example, in *Lochner*, the

moral reading.¹² Similar to the U.S. Supreme Court, the European courts, notably the German Federal Constitutional Court, employ a variety of methods for interpreting the Constitution: grammatical methods, historical methods, systematic methods, and teleological methods.¹³ The European courts often use methods that originated in the United States. For example, these courts interpret a law so that it would not violate the Constitution, they employ “the rule of reasonableness,”¹⁴ and they use methods similar to the moral reading of the Constitution. Thus, the methods of constitutional interpretation are similar in most constitutional democracies. However, there is a difference: the usage of originalism is limited to the United States. Unlike the U.S. Supreme Court, the European courts such as the German Constitutional Court rarely use originalism as a decisive interpretation method.

This book focuses on the methods to interpret the Constitution in the U.S. without denying that other well-functioning constitutional democracies such as Germany have developed valuable methods. This limitation is practical since one book cannot discuss all methods of different jurisprudences in detail. There is also more substantive reason to research the U.S. constitutional interpretation that is unfamiliar to Mongolia. The *Tsets* provides a poor protection of fundamental rights because it often uses implicitly methods similar to the American strict constructionism and originalism though Mongolian judges and scholars do not discuss seriously these two methods. Thus, this chapter argues for the moral reading of the Constitution against strict constructionism and originalism. If the *Tsets* actively applies a method similar to the moral reading rather than strict constructionism and originalism, it can protect well the bill of rights.

4.2. American constitutional interpretation

Supreme Court based its arguments on the premise that “there is a limit to the valid exercise of the police power by the state,” and the distinction between constitutional and unconstitutional exercise of the police power was crucial to decide the case. See *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539 (1905).

¹² Scholars argue for one or some of these methods. Some also argue that pluralism is “the best descriptive-explanatory account of constitutional interpretation... because the sources of American law are plural.” *Ibid.*, 148; See also Bobbitt, “The Modalities of Constitutional Argument.”

¹³ Rosenfeld, “Constitutional Adjudication in Europe and the United States,” 660; Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 42–49; Magiara, “The Interpretation of the Basic Law”; Schlink, “German Constitutional Culture in Transition.”

¹⁴ Favoreu, “Constitutional Review in Europe,” 41–42.

4.2.1. The moral reading of the U.S. Constitution

Judges have to define the meaning of constitutional clauses, which are precise or abstract. The meanings of precise clauses are definitive, but the meanings of abstract clauses such as fundamental rights are controversial. Dworkin makes the distinction between the concept (an abstract idea) and the conception (an understanding of that idea).¹⁵ This subsection demonstrates that this distinction can help to understand the interpretation of abstract clauses and explain the landmark judgments of the U.S. Supreme Court. This subsection also argues that judges should choose the best conceptions of abstract concepts such as rights clauses with the best reasons, but the scopes of these choices are limited by the responsibility to respect the constitutional text and integrity, and the duty to apply constitutional principles rather than social policies. This subsection also discusses three levels of scrutiny in equal protection cases: rational basis review, intermediate scrutiny and strict scrutiny.

In constitutional democracies, judges have the power to review whether or not legislation and other public acts are constitutional. In order to exercise this power, judges have to describe what the relevant constitutional clause means, what contents the legislation or other public acts has, and whether these contents are consistent with the meaning of the clause. If judges answer the first question on the meaning of the Constitution, then it is relatively easier to answer the latter two questions. However, what a Constitution means is one of the most significant, but often disputed, questions.

To describe the meaning of the Constitution, judges should look at how constitutional clauses are written by the framers. Liberal constitutions have two types of clauses referred to as precise and abstract. The interpretations of precise clauses are often uncontroversial. For example, Article II of the U.S. Constitution says that the U.S. President has to be “at least thirty-five years old,” and it is almost impossible to say that this clause is concerned with an emotional rather than chronological age. The Constitution also includes abstract clauses such as the equal protection of the laws and the prohibition of cruel and unusual punishment, which protect individual rights against the majority of citizens and the government.

Strict constructionism is unsuccessful in interpreting abstract clauses of the

¹⁵ For his recent theory of interpretation in general, see Dworkin, *Justice for Hedgehogs*, 123–156.

Constitution. Unlike the precise clauses, these abstract clauses cannot be interpreted literally. According to strict constructionism, constitutional interpretation should be confined to the literal language of the text of the Constitution.¹⁶ Justice Hugo Black literally read Amendment I as saying that “Congress shall make no law …abridging the freedom of speech, or of the press,” so he said that “no law means no law.”¹⁷ If Black were consistent, he would have to say that handwritten letters could be censored since the first amendment protects only the freedom of speech, or of the press, and handwritten letters are neither speech nor press. Black’s literal reading is also forced to reject the Supreme Court protection “to “symbolic speech”-symbols, signs, and other means of expression-and to “speech-plus-conduct”-activities such as sit-ins, picketing, and demonstrating”¹⁸ because speech means literally a special “talk” given before an audience.

As in the above example of free speech, strict constructionists provide weak protection of fundamental rights and fail to interpret abstract clauses that rarely have the literal meaning. Thus, the U.S. Supreme Court has refused to adopt this method, for example by interpreting broadly freedom of speech as freedom to express one’s own opinions or ideas. Strict constructionism is not important today. According to O’Brien, “Strict constructionism is incomplete as a theory of interpretation and inadequately deals with the fact that the Constitution was formed in generalities in order to express general principles.”¹⁹ There is a need to interpret these general principles in abstract clauses more broadly. Thus, American constitutional theories mainly focus on how to interpret these abstract clauses.

The courts, legal scholars and other interpreters may interpret abstract constitutional clauses differently. For understanding why abstract clauses are likely to be interpreted differently, Dworkin suggests distinguishing between the concept and its conception, which “philosophers have made but lawyers have not yet appreciated,”²⁰ and he explains this distinction by his thought experiment as follows:

¹⁶ O’Brien, *Constitutional Law and Politics*, 2:76; Gerhardt et al., *Constitutional Theory*, 65.

¹⁷ Shanor, *American Constitutional Law*, 39.

¹⁸ O’Brien, *Constitutional Law and Politics*, 2:577. For example, see *Texas v. Johnson* 109 S.Ct. 2533 (1989).

¹⁹ Ibid., 2:79.

²⁰ Dworkin, *Taking Rights Seriously*, 134; After Dworkin introduced this distinction, lawyers over the world started to appreciate it. Section 4.3 will discuss Dworkin’s influence on lawyers in other democracies. For Dworkin’s influence on American lawyers, see Barber and Fleming, *Constitutional Interpretation*.

Suppose I tell my children simply that I expect them not to treat others unfairly. I no doubt have in mind examples of the conduct I mean to discourage, but I would not accept that my ‘meaning’ was limited to these examples, for two reasons. First, I would expect my children to apply my instructions to situations I had not and could not have thought about. Second, I stand ready to admit that some particular act I had thought was fair when I spoke was in fact unfair, or vice versa, if one of my children is able to convince me of that later; in that case I should want to say that my instructions covered the case he cited, not that I had changed my instructions. I might say that I meant the family to be guided by the *concept* of fairness, not by any specific *conception* of fairness I might have had in mind.²¹

As this thought experiment shows, the concept of fairness is an idea expressed abstractly, and the conception of fairness is the particular understanding or meaning of that idea. There could be different conceptions of the same concept of fairness, and the father’s instruction is followed as far as his children faithfully construct and follow the best conceptions of the fairness. In other words, the children are free to change conceptions their father had in mind if they have substantive reasons. Since abstract constitutional clauses on basic rights are written as moral concepts, not particular conceptions, judges faithful to the Constitution as written have to think on their own and decide themselves what these abstract clauses mean for the cases before them.

The U.S. judicial practice shows that many judges treat abstract constitutional principles as moral concepts. These judges are ready to choose better conceptions of these principles over time when necessary by rejecting conceptions adopted by the framers, the legislatures or the previous courts. This feature of judicial practice is evident in two ways in Dworkin’s thought experiment by which the hypothetical father could change his conception of fairness. First, constitutional moral principles are interpreted in new situations that the framers, the legislatures or prior judges had not and could not have expected. For instance, the Supreme Court overruled a precedent concerning Amendment IV that “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.” In *Olmstead v. United States* (1929),²² this court held that Amendment IV did not cover wiretapping according to the framer’s conception of “unreasonable searches

²¹ Dworkin, *Taking Rights Seriously*, 134; For more explanation on this difference, see Dworkin, *Law’s Empire*, 70–72, 90–101; To show the difference between concept and conception, Dworkin used lately other concepts, semantic intention and expectation intention. Dworkin, “Comment,” 116–117.

²² *Olmstead v. United States*, 277 U.S. 438 (1929).

and seizure,” which barred only actual physical trespass by police. The framers who ratified Amendment IV in 1791 could not have considered wiretapping because the telephone was invented in 1876.²³ The interpretation of Article IV in *Olmstead* failed to take into account a new situation, the technological development that created the wiretapping. However, in *Katz v. United States* (1967),²⁴ the Supreme Court overruled *Olmstead* with a new interpretation in which the principle in Amendment IV protects individual privacy from electronic surveillance including wiretapping because “what a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.” The court ruled that wiretapping did not mesh with a broader reading of principle of protecting individual privacy against governmental interference.

Second, framers, legislatures or previous judges may misunderstand an abstract moral principle in the Constitution by adopting a wrong conception of that principle. For example, in *Brown v. Board of Education* (1954), the Supreme Court adopted a better conception of the equal protection clause that was misunderstood by the framers.²⁵ Linda Brown, an African American child, applied to admission to the Summer School, which was nearer to her house, but the Board of Education denied her application due to her race. This school was open only for white children. The Browns sued the Board of Education, alleging that the segregated school violated Linda’s right to equal protection. The Supreme Court ruled that separate educational facilities were inherently unequal, so the plaintiffs were deprived of the equal protection of the laws in Amendment XIV to the Constitution.²⁶

If the *Brown* Supreme Court ruled according to how the framers, the majority of the members of Congress who voted for Amendment XIV, understood the equal protection clause, it could not say that the racial segregation in the public schools violated this clause. The abstract concept of equal protection is written in Amendment XIV: any State should not deny to any person within its jurisdiction the equal protection of the law. The framers and the *Brown* Court would agree that a state should never harm persons in special way nor treat persons as unequal, but they gave different answers to

²³ “Telephone History.”

²⁴ *Katz v. United States*, 389 U.S. 347 (1967).

²⁵ *Brown v. Board of Education of Topeka, Kansas* (*Brown I*), 347 U.S. 483, 74 S.Ct. 686 (1954). *Brown* overruled *Plessy v. Ferguson*, 163 U.S. 537, 3 S.Ct. 18 (1896), which declared that segregation was legal as long as facilities provided to each race were equal, and “laws permitting, and even requiring, their separation [of races] does not necessarily imply the inferiority of either race to the other.”

²⁶ *Brown v. Board of Education of Topeka, Kansas* (*Brown I*), 347 U.S. 483, 74 S.Ct. 686 (1954).

the question whether separate school facilities were really equal or not. The framers had a specific conception that separate school facilities were equal because they “themselves sustained racial segregation in the schools of the District of Columbia” as Dworkin said.²⁷ According to Tushnet, “the Amendment’s opponents routinely said that it would lead to integrated schools, and its supporter routinely replied that it would not.”²⁸

However, the *Brown* Supreme Court found that the conception of the equal protection endorsed by the framers was just a mistaken way of understanding the true effects of racial segregation on the educational opportunities of children in the public schools. According to Dworkin, this court not only announced “an academic political truth” but also called attention to “general standards of equality that were firmly fixed in ...history though selectively ignored in ...practice, standards that condemned arbitrary discriminations serving no legitimate governmental purpose.”²⁹ The *Brown* Court adopted a new conception based on the facts that segregated school facilities imposed a status of inferiority on African American children; therefore, the segregation is unequal. American scholars argued that “*Brown* has now gained extremely wide acceptance in the legal community and in American society as a whole for its result, if not, among commentators, for the legal justifications given in the opinion.”³⁰

The previous judges also may adopt a poor conception of an abstract constitutional clause. For example, in *Bowers v. Hardwick* (1986), the Supreme Court upheld constitutionality of a law making it a crime for consenting adults to engage in oral and anal sex when applied to homosexuals.³¹ However, in *Lawrence v. Texas* (2003), this court overruled the *Bowers* decision, and upheld that such laws violated liberty under the due process clause of the Amendment XIV. The majority in *Lawrence* said:

Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the component of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own research for greater freedom.³²

²⁷ Dworkin, “Comment,” 119.

²⁸ Tushnet, *Taking the Constitution Away from the Courts*, 156.

²⁹ Dworkin, *Justice in Robes*, 123.

³⁰ Gerhardt et al., *Constitutional Theory*, 8.

³¹ *Bowers v. Hardwick* 478 U.S. 186 (1986).

³² *Lawrence v. Texas* 539 U.S. 558 (2003).

Judges' way of thinking needs to be more "philosophical" in deciding constitutional cases than in deciding ordinary cases because they are in charge of deciding which conception is better to define constitutional principles, which are often controversial, though the conceptions they have chosen may not always be the best. The Constitution as fundamental law may require judges to decide constitutional questions with arguments from political philosophy. Dworkin explained this requirement as follows:

The Constitution is foundational of other law, so ...interpretation of the document as a whole, and of its abstract clauses, must be foundational as well. It must fit and justify the most basic arrangement of political power in the community, which means it must be a justification drawn from the most philosophical reaches of political theory. Lawyers are always philosophers, because jurisprudence is part of any lawyer's account of what the law is, even when the jurisprudence is undistinguished and mechanical.³³

The fundamentality of the Constitution and its interpretation may seem obvious because it includes basic principles, particularly fundamental rights, is superior to other laws and is enforced by the courts. At least, the Constitution is foundational according to Rawls because "it is more urgent to settle the constitutional essentials [the protection of basic individual rights and the basic structure of government]; it is far easier to tell whether those essentials are realized, and it seems possible to gain agreement on what those essentials should be, not in every detail, of course, but in the main outlines."³⁴ A poor interpretation of the Constitution seriously harms the political morality of a democratic society as in *Olmstead* and *Bowers*. For these reasons, the interpretation of the Constitution is foundational and important.

In order to make a strong moral reading of the Constitution, judges should have a kind of philosophical attitude toward deciding a constitutional case, but this attitude is more limited than that of political philosophers. The philosophical attitude means thinking independently and critically, being ready to change one's mind concerning what the Constitution really means if there are enough reasons to do so. Sotirios A. Barber and James E. Fleming made the following argument for this attitude of judges: "Judges certainly cannot follow the law of the American Constitution without thinking for themselves... Plain words force judges to think for themselves because the words refer to concepts like due process itself and equal protection itself, not to anyone's

³³ Dworkin, *Law's Empire*, 380.

³⁴ Rawls, *Justice as Fairness*, 49.

specific conception of due process and equal protection.”³⁵ Unlike political philosophers, a judge’s philosophical attitude on constitutional interpretation is limited by their professional responsibility and background. According to Dworkin, “the inevitable conservatism of formal legal education, and of the process of selecting lawyers for judicial and administrative office, adds further centripetal pressure [on their interpretation].”³⁶ Judges should also think for themselves about what constitutional abstract clauses mean only within the limitations given by their functions.

The judge’s latitude to interpret the Constitution is limited in two ways. The first limitation is a fidelity to the constitutional text. According to Dworkin, “constitutional interpretation must begin in what the framers said”³⁷ as noted early in this subsection. The constitutional history is important to show what the framers intended to say in the text of the Constitution. On the one hand, the U.S. framers intended to say the dated or concrete rules in precise clauses like Article II that the President has to be “at least thirty-five years.” On the other hand, the framers intended to say the principles of political morality (abstract moral concepts) when choosing the abstract language in the Constitution. As in *Katz*, *Brown*, and *Lawrence*, justices are faithful to the text of the Constitution when they interpret an abstract constitutional clause not by a specific conception of that clause, which the framers had in mind or the previous judges accepted, but by the best conception of that clause. Thus, judges should not adopt any moral concept, but they should interpret only moral concepts in the Constitution.

The second limitation is the integrity of constitutional law. Judges are not totally free to adopt any conception about an abstract principle written in the Constitution because their conception should respect the integrity of law. Dworkin explained the integrity of constitutional law as follows:

Lawyers and judges faced with a contemporary constitutional issue must try to construct a coherent, principled, and persuasive interpretation of the text of particular clauses, the structure of the Constitution as a whole, and our history under the Constitution - an interpretation that both unifies these distinct sources, so far as this is possible, and directs future adjudication.³⁸

The idea of integrity restricts the constitutional interpretation vertically and

³⁵ Barber and Fleming, *Constitutional Interpretation*, 163.

³⁶ Dworkin, *Law's Empire*, 88.

³⁷ Dworkin, *Freedom's Law*, 10.

³⁸ Dworkin, *Justice in Robes*, 118.

horizontally. Integrity holds vertically: a judge interpreting an abstract clause on rights has to show that his or her conception of that clause is consistent with the mass of key precedents and the basic structure of the Constitution. For example, according to Dworkin, a judge cannot interpret the equal protection clause “as making equality of wealth or collective ownership of productive resources because that interpretation simply does not fit American history or practice, or the rest of the Constitution.”³⁹ Dworkin also argued that “integrity holds horizontally: a judge who adopts a principle must give full weight to that principle in other cases he decides or endorses.”⁴⁰ For instance, justices who decided *Brown* also applied their conception of equal protection in their other similar cases.⁴¹

Constitutional integrity requires judges not only to overrule the poor precedents by a better conception as in *Katz*, *Brown*, and *Lawrence* when they have enough reasons to do so but also to respect the precedents providing the better protection of fundamental rights. According to Dworkin, “[judge’s] attitude toward precedents would be more respectful when he was asked to restrict the constitutional rights they had enforced than when he was asked to reaffirm their denials of such rights.”⁴² For instance, in 2000, the Supreme Court refused to overrule an enhanced conception on the privilege of protection against self-incrimination in Amendment V, which it announced in *Miranda v. Arizona* (1966).⁴³ In the *Miranda* case, the court noted that the coercion inherent in modern custodial police interrogation blurred the line between voluntary and involuntary statements, and therefore increased the risk that an individual would not be “accorded his privilege under the Fifth Amendment... not to be compelled to incriminate himself.” Consequently, the court ruled that evidence of any statement given during custodial interrogation of a suspect would not be admitted unless the police provided the suspect with the following warnings: a suspect has the right to remain silent; anything he says can be used against him in a court of law; he has the right to the presence of an attorney; and if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

Even though the *Miranda* ruling was criticized, the Supreme Court refused to

³⁹ Dworkin, *Freedom's Law*, 11.

⁴⁰ Ibid., 83; See also Gerhardt et al., *Constitutional Theory*, 8.

⁴¹ *Brown v. Board of Education of Topeka, Kansas* (Brown II), 349 U.S. 294, 75 S.Ct. 753 (1955); *Cooper v. Aaron*, 358 U.S. 1, 78 S.Ct. 1401 (1958).

⁴² Dworkin, *Law's Empire*, 399.

⁴³ *Miranda v. Arizona*, 384 U.S. 436 (1966).

overrule it in *Dickerson v. United States* (2000) and protected rights defined in *Miranda*. Conservative Chief Justice Rehnquist delivered the majority opinion of the court when he wrote as follows:

Whether or not we would agree with *Miranda*'s reasoning and its resulting rule, were we addressing the issue in the first instance, the principles of *stare decisis* weigh heavily against overruling it now. While “‘*stare decisis* is not an inexorable command,’ ”...particularly when we are interpreting the Constitution..., “even in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some ‘special justification...’ ”... We do not think there is such justification for overruling *Miranda*. *Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.⁴⁴

The difference between policy and principle provides a kind of limitation on the constitutional interpretation by the court because it generally distinguishes between what the legislatures should do and what the court should do in a constitutional democracy. Dworkin has distinguished policy from principle.⁴⁵ Policy is a matter of a goal to be reached to improve economic, political, or social conditions of the society. That is, policy is about the strategies to secure the general interest (for example, strategies on how to develop economy and protect the environment). On the other hand, according to Dworkin, principle is a matter of “a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.”⁴⁶ That is, a legal principle is about individual rights recognized by the government. The legislature may need to justify its decisions on reasons of policy, not necessarily reasons of principles. Schwartz argued that political decisions sometimes might not need “justification or explanation, only the subjective satisfaction of the political decision maker and those to whom he or she is answerable.”⁴⁷ However, the court has to justify its judgments on reasons of principle and not policy.

⁴⁴ *Dickerson v. United States*, 120 S.Ct. 2326 (2000).

⁴⁵ According to Rawls, John Stuart Mill's writings for the priority of basic justice foreshadowed Dworkin's distinction between questions of principle and questions of policy as well as his idea of rights as trumps. For example, Mill said “that justice is a more sacred thing than policy, and that the latter ought only to be listened to after the former has been satisfied.” See Rawls, *Lectures on the History of Political Philosophy*, 276.

⁴⁶ Dworkin, *Taking Rights Seriously*, 22.

⁴⁷ Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, 4.

Fundamental rights of individuals have higher value than goals to be achieved for the general interest so that a court has to overrule policy-decisions that violate these rights. Thus, fundamental rights as principles have priority over policy. According to Rawls, the priority of liberty, the core of fundamental rights, means that “a basic liberty can be limited or denied only for the sake of one or more other basic liberties, and never for a greater public good understood as a greater net sum of social and economic advantages for society as a whole.”⁴⁸ For example, a restriction on freedom of expression, which may help to advance economic development, could not be justified in a constitutional democracy. Ideally, the priority for basic individual rights is a main character of such a polity.⁴⁹

Judges using a moral reading of the Constitution should decline to replace a decision of the legislature with their judgment when they think that a decision is mainly about policy rather than principle. However, there were times when judges replaced political decisions with their judgments in deciding issues more concerning policy. The U.S. Supreme Court in the Lochner era (1897-1937) was wrong to overrule social legislation limiting the number of working hours and establishing minimum wage as violations of liberty of contract because the issues were in fact matters of policy rather than principle. For instance, the Supreme Court overruled New York’s labor law limiting the number of hours bakers could work as an interference with their liberty of contract in *Lochner v. New York* (1905).⁵⁰ The law prohibited bakery employers from permitting their employees to work for more than 10 hours a day or 60 hours a week. Lochner was convicted and fined for permitting an employee to work in his bakery for more than 60 hours in one week, or more than 10 hours per day. According to the Supreme Court, liberty of contract was protected under Amendment XIV that “...nor shall any State deprive any person of life, liberty, or property, without due process of law.” The principle of liberty in the court judgment was inconsistent with American practice,⁵¹ and the issue on the limitation of working hours was of economic policy for achieving a goal to create a balance between economic efficiency and protection of employees.

As mentioned in Section 4.1, judges should make reasoned judgments. When doing

⁴⁸ Rawls, *Justice as Fairness*, 111. “Liberty” in Rawls’s political philosophy is mainly limited to equal political liberties, freedom of thought, liberty of conscience, freedom of association, liberty of the person, and rights and liberties covered by the rule of law. The priority of liberty practically has the same character with the priority of constitutional rights over policies.

⁴⁹ Rawls, *Lectures on the History of Political Philosophy*, 12.

⁵⁰ *Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539 (1905).

⁵¹ Dworkin, *Law’s Empire*, 398.

the moral reading of the Constitution, judges can employ different ways of constitutional reasoning. Equal protection cases can illustrate such ways. Laws often draw a distinction among people, and they may be challenged under the equal protection clause. In the U.S. constitutional jurisprudence, three different levels of scrutiny are used depending on the type of distinction: strict scrutiny, intermediate scrutiny, and rational basis review.⁵² This subsection briefly describes these three tests in order to give an idea of how the U.S. courts construct constitutional reasoning and the moral reading.⁵³ Under strict scrutiny, a law cannot be upheld unless the government proves that the law is necessary to achieve a compelling governmental purpose, and this purpose cannot be achieved through any less discriminatory alternative. The courts give strict scrutiny to legislative classifications that work against members of suspect class such as race, ethnicity, national origin, or alienage. Moreover, the courts use strict scrutiny for legislative distinctions and actions related to exercise of a fundamental right such as speech, religion, voting, using the judicial process, travel, and privacy.

Moreover, there is the intermediate scrutiny test. Under this test, a law is upheld if the government proves that the law is substantially related to an important governmental purpose rather than a compelling purpose. Intermediate scrutiny rather than strict scrutiny is used for distinction based on gender because in some cases there are a legitimate reason for different treatment of women and man. For example, the U.S. Supreme Court upheld a statutory rape law that punished men for having sexual intercourse with women under age 18, but did not punish a woman for having sex with a man under age 18.⁵⁴ This court reasoned that young women are more likely than men to suffer from consequences of sexual activity and risk of pregnancy equalizes the deterrent for both sexes. Moreover, intermediate scrutiny is used for distinctions against nonmarital children. Strict scrutiny is not used in these cases “perhaps in part because the roots of the discrimination rest in the conduct of the parent rather than the child, and perhaps in part because illegitimacy does not carry an obvious badge, as race or sex do, this discrimination against illegitimates has never approached the severity or pervasiveness of the historic legal and political discrimination against women and Negroes.”⁵⁵

⁵² For more explanation on these tests, see Chemerinsky, *Constitutional Law: Principles and Policies*, 667–789; Stone et al., *Constitutional Law*, 441–709.

⁵³ Dworkin wrote how rational basis review and strict scrutiny could be used in deciding issues related to freedom of religion. See Dworkin, “Is There a Right to Religious Freedom?,” 11–18.

⁵⁴ Michael M. v. Superior Court, 450 U.S. 464 (1981)

⁵⁵ Matthews v. Lucas, 427 U.S. 495 (1976)

Lastly, the U.S. courts use the rational basis review, the minimum level of scrutiny. Under this test, a law will be upheld unless the challenger (not the government) proves that the law is irrationally related to a legitimate governmental purpose. The governmental purpose need not be compelling or important, but legitimate. The means chosen only should be a rational way to achieve the purpose. “The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State’s objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.”⁵⁶ This test is the norm for most legislative classifications in social and economic legislations, and it is deferential to the government.

The moral reading provides an improved understanding of constitutional practice and better protection of fundamental rights. Though this term “moral reading” may not be mentioned publicly, decisions resting on this method protect fundamental rights in the U.S. jurisprudence.⁵⁷ Many of these decisions were made especially between the 1950s and early 1980s, which influenced much on constitutional interpretations in other jurisdictions. Claire L’Heureux-Dube argued as follows: “During these years, particularly those of the Warren Court, the U.S. Supreme Court engaged in a redefinition, expansion and modernization of Bill of Rights interpretation. Cases like *Miranda v. Arizona* and *Brown v. Board of Education* have had a large impact on the spirit and development of human rights protection worldwide.”⁵⁸ Many foreign and international courts cite these cases not only because these cases are directly applicable, but also because they stand for the moral reading taken by these courts as a method to constitutional interpretation.⁵⁹ The method of moral reading correctly reflects

⁵⁶ McGowan v. Maryland, 366 U.S. 420 (1961)

⁵⁷ In addition to *Katz*, *Brown*, *Lawrence* and *Miranda*, there are many other decisions resting on the moral reading. For example, the Supreme Court accepted the right to use contraceptives and the women’s right to early abortion by interpreting an abstract clause of Amendment XIV that no State shall “deprive any person of liberty without due process of law” and developing the conception of the right to privacy. See *Griswold v. Connecticut*, 391 U.S. 145, 85 S. Ct. 1678 (1965); *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973).

⁵⁸ L’Heureux-Dube, “Importance of Dialogue,” 20.

⁵⁹ Ibid., 28. According to Justice L’Heureux-Dube, two *Brown* decisions were cited in judgments ranging from a decision about the expulsion of a student from school in Trinidad and Tobago for wearing a *hijab* (*Summayyah Mohammed v. Moraine & Another* [1996] 3 L.R.C. 475 at 493 (Trin. & Tobago)), to a judgment in New Zealand applying a treaty on Maori fishing rights (*Te Rananga o Muriwhenua Inc. v. Attorney-General* [1990] 2 N.Z.L.R. 641, 656 (C.A.)).

jurisprudence, provides the plausible treatment to constitutional moral principles, encourages open discussion on the best conception of these principles, and restricts the latitude of constitutional interpretation by the Constitution and its integrity. Constitutional interpretations based on the moral reading show constitutional practice as a whole in its best light in order to achieve equilibrium between constitutional practice and the best justification of that practice.⁶⁰

4.2.2. Criticisms of the moral reading of the Constitution

Studies on any social theory are incomplete when they do not discuss criticisms of that theory. The moral reading of the Constitution is mainly criticized by two kinds of theory: the interpretation theory of originalism and the majoritarian theory of democracy. This subsection analyzes these two criticisms and presents responses to them, by showing that originalism is not persuasive for interpreting abstract clauses in the Constitution and a sound conception of democracy cannot be based on only the majoritarian rule.

The first criticism of the moral reading is originalist. Originalism appeals to the meaning of an abstract constitutional clause, which was accepted at the time the clause was promulgated as supposedly intended by the framers. In the U.S., originalism is more popular than strict constructionism today because the majority of the Supreme Court justices tend to apply an originalist approach to the constitutional interpretation. Justice Antonin Scalia, a strong proponent of originalism, says that “what it meant when it was adopted it means today, and its meaning doesn’t change just because we think that meaning is no longer adequate to our times. If it’s inadequate, we can amend it.”⁶¹ According to Scalia, abstract constitutional clauses should be understood as they were understood by the society that adopted them. Scalia, therefore, argued that “all sorts of rights that clearly did not exist at the time of the Constitution don’t exist today.”⁶² For

⁶⁰ John Rawls also argues that the court has the task to make the best interpretation of the Constitution: “it is the task of the justices to try to develop and express in their reasoned opinions the best interpretation of the Constitution they can, using their knowledge of what the Constitution and constitutional precedents require. Here the best interpretation is the one that best fits the relevant body of these constitutional materials, and justifies it in terms of the public conception of justice or a reasonable variant thereof.” Rawls, *Political Liberalism*, 236.

⁶¹ Scalia, “A Theory of Constitutional Interpretation.”

⁶² Ibid.

example, he denies the right to euthanasia since there were laws against suicide, and he refuses a woman's right to early abortion since this right was not thought to exist in 1791 or even at the time that amendments were adopted in the post-Civil War era.

Originalist critics say that the moral reading turns the judges into "a philosophical king" since it allows them to choose any conception on an abstract principle. Justice Scalia asks for example "what binds the biases of judge."⁶³ Originalists contend that the moral reading gives judges unlimited power to impose their own moral convictions on the rest of society or input values they wish to have in the Constitution. However, even originalism is based on judges' conviction that the original meaning should prevail over other meanings, even better ones. Thus, judges' interpretation of the Constitution is not free from their own convictions of political morality without pretending to be so. The method of moral reading argues that though judges' convictions shape their interpretations, their interpretative power should be limited by the constitutional text and integrity, and judges should show that their convictions and arguments for an interpretation are more reasonable than that for other interpretations.

Moreover, originalists argue that originalism restricts a judge's power of judicial review because judges should understand and enforce abstract clauses of the Constitution by meanings that prevailed in the society that adopted the clauses. Nevertheless, restricting the latitude of interpreting abstract constitutional ideas to the original understandings is problematic in three ways. First, originalism is not always faithful to what the Constitution says. Originalism is questionable in interpreting constitutional abstract clauses because it treats these abstract clauses not as abstract moral principles, but as a dated concrete rules though the framers used intentionally the abstract language in these clauses to express principles of political morality. The moral reading is faithful to the Constitution because it suggests judges to adopt the best conception of abstract clauses rather than a specific conception endorsed or accepted by those who made that clause.

Second, originalism is indefensible in principle. Justice Scalia's positions are sometimes inconsistent with his originalism. Scalia has been rejecting better interpretations of "cruel and unusual punishment." He disagreed with court decisions that ruled the death penalty on the mentally retarded and juveniles under 18 as "cruel

⁶³ Ibid.

and unusual,”⁶⁴ and he denies the idea that the death penalty in general was “cruel and unusual.” Nonetheless, Scalia is not always consistent in applying the original understanding of “cruel and unusual.”⁶⁵ For example, Scalia argued as follows:

What if some state should enact a new law providing public lashing, or branding of the right hand, as punishment for certain criminal offenses? Even if it could be demonstrated unequivocally that these were not cruel and unusual measures in 1791, and even though no prior Supreme Court decision has specifically disapproved them, I doubt whether any federal judge -- even among the many who consider themselves originalists -- would sustain them against an eight amendment challenge. ...I am confident that public flogging and handbranding would not be sustained by our courts, and any espousal of originalism as a practical theory of exegesis must somehow come to terms with that reality.⁶⁶

In this argument, Scalia thought that he practically could not sustain public flogging and handbranding. However, if Scalia were consistent with his originalism, he would have to sustain constitutionality of public flogging and handbranding because these punishments were not “cruel and unusual” according to the original understanding. If Scalia rejected his originalism concerning public flogging and handbranding, he could not argue for the originalist reading of “cruel and unusual” in cases concerning death penalty.

Third, a consistent originalist will end up with conclusions, which are unreasonable in a modern civilized society. If Scalia is consistent with his originalism, then he must argue that not only public flogging and handbranding but also the execution of 7-year-old children are not prohibited by the original meaning of the Eighth Amendment because all of these punishments were not counted as “cruel and unusual” when this amendment was adopted in 1791.⁶⁷ The consistency requires originalists to argue

⁶⁴ Atkins v. Virginia 536 U.S. 304 (2002) (Justice Scalia dissenting) and Roper v Simmons, 543 U.S. 551 (2005) (Justice Scalia dissenting).

⁶⁵ Scalia also ignored the original understanding of “takings.” See Lucas v. South Carolina Coastal Commission, 505 U.S. 1003, 1028 n.15 (1992). Scalia thought as follows: “government regulations can so destroy the value of a person’s property as to amount to a “taking” of that property for which the Constitution requires the government to compensate. Unfortunately, the historical record is about as clear as these things get: The Framers simply did not think that there could be what we now call a regulatory taking. To them, taking were physical invasions of property, and they happily imposed regulations that destroyed the value of a piece of property without offering the owner any compensation. Faced with this history, Justice Scalia declared it “entirely irrelevant.” What mattered were the “historic understanding” of the American people.” Tushnet, *Taking the Constitution Away from the Courts*, 157.

⁶⁶ Scalia, “Originalism,” 861.

⁶⁷ In his concurring opinion, Justice Stevens, with whom Justice Ginsburg joins, said “If the meaning of that Amendment had been frozen when it was originally drafted, it would impose no impediment to the

against even the most enlightening decisions such as *Brown* because the framers did not believe that “the school segregation, which they practiced themselves, was a denial of equal status, and did not expect that it would one day be deemed to be so.”⁶⁸ The *Brown* case has become almost a criterion of any interpretation method of the Constitution. According to Mark Tushnet, “in the modern era you cannot defend an approach to constitutional law that leads to the conclusion that *Brown* was wrong.”⁶⁹ If strict constructionism and originalism were applied in the cases where the courts applied the moral reading, many rights necessary for democracy would not be protected in the United States.

Originalism is not admired in other constitutional democracies. Originalism is popular in the U.S. but unpopular in Europe. According to L’Heureux-Dube, “originalism, an extremely controversial question in the United States, is usually simply not the focus, or even a topic, of debate elsewhere.”⁷⁰ For example, unlike the U.S. Supreme Court, the German Constitutional Court seldom uses originalism as a decisive method in interpreting the Constitution.⁷¹ On the other hand, the method of moral reading is widespread in not only American constitutional practice but also in practices of other democracies. Section 4.3 will show that the European judges use this method rather than the originalist reading. However, judges and scholars do not endorse the moral reading in Europe as much as in the United States. Dworkin argued the following:

[The moral reading] has inspired all the greatest constitutional decisions of the Supreme Court, and also some of the worst. But it is almost never acknowledged as influential even by constitutional experts, and it is almost never openly endorsed even by judges whose arguments are incomprehensible on any other understanding of their responsibilities.⁷²

Originalism would be a weak theory if it was only about the constitutional interpretation. However, originalism is not only a method of interpretation but also a democratic theory that gives much power to the legislature in defining individual rights. Scalia argues that the court should adopt the original meaning of abstract clauses, and if

⁶⁸ execution of 7-year-old children today.” *Roper v Simmons*, 543 U.S. 551 (2005).

⁶⁹ Dworkin, *Freedom’s Law*, 13.

⁷⁰ Tushnet, *Taking the Constitution Away from the Courts*, 156.

⁷¹ L’Heureux-Dube, “Importance of Dialogue,” 33; See also Rosenfeld, “Constitutional Adjudication in Europe and the United States,” 657.

⁷² Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 42.

⁷² Dworkin, *Freedom’s Law*, 3.

the original meaning fails to decide a case, then the legislature representing a majority of citizens should make the decision. For example, Scalia wrote the following in his concurring opinion in *Cruzan v. Director, Missouri Department of Health*, in which the court rejected the petitioner's argument for the right to die:

...that American law has always accorded the State the power to prevent, by force if necessary, suicide -- including suicide by refusing to take appropriate measures necessary to preserve one's life; that the point at which life becomes "worthless," and the point at which the means necessary to preserve it become "extraordinary" or "inappropriate," are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory; and hence, that even when it is demonstrated by clear and convincing evidence that a patient no longer wishes certain measures to be taken to preserve her life, it is up to the citizens of Missouri to decide, through their elected representatives, whether that wish will be honored. It is quite impossible that those citizens will decide upon a line less lawful than the one we would choose; and it is unlikely that they will decide upon a line less reasonable.⁷³

Scalia also holds the same position concerning the right to an abortion. According to Scalia, “what was the situation, before Roe vs. Wade? If you wanted a right to an abortion, create that right the way a democratic society creates most rights. Pass a law. If you don't want it, pass a law against it.”⁷⁴ According to originalism, the judges should let the democratic process to define the meanings of abstract rights clauses if they cannot find their original meanings, and it will be undemocratic if the unelected judges decide the meanings of these vague clauses. In this sense, originalism is closely linked to majoritarian theories of democracy, which will be discussed now.

The second criticism is majoritarian (populist) theories of democracy. These critics say that the moral reading and constitutional review in general offends democracy, and they suggest to improving democracy by promoting majority rule,⁷⁵ eliminating constitutional review⁷⁶ or arguing for the inappropriateness of this review “as a mode

⁷³ *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261, 110 S.Ct. 2841, 111 L.Ed.2d 224 (1990). See also Scalia, “Originalism,” 862.

⁷⁴ Scalia, “A Theory of Constitutional Interpretation.”

⁷⁵ Parker, *Here, The People Rule*, 96. Parker argued as follows: “the mission of the modern constitutional law ought to be to promote majority rule. More fully, the goal inspiring argument about ‘interpretation’ of the Constitution ought to be government of, for, and-to the extent it is feasible-by the majority of the people.”

⁷⁶ Tushnet, *Taking the Constitution Away from the Courts*, 154. Tushnet proposed the following: “Today,

of final decision making.”⁷⁷ Since the usages and criteria of democracy are different in majoritarian criticisms, it is better to issue a general description (conception) of these criticisms.

The answer as to whether the moral reading offends democracy depends on the conceptions of democracy. Dworkin discusses two conceptions of democracy. The first is the majoritarian conception, which defines democracy as the majoritarian rule that reflects the will of a majority of citizens. Majoritarian-democrats think that the parliament elected by a majority should make all political decisions, even decisions on the interpretation of individual rights. Thus, Dworkin argues that under the majoritarian conception, “there is no guarantee that a majority will decide fairly; its decisions may be unfair to minorities whose interests the majority systematically ignores. If so, then the democracy is unjust but no less democratic for that reason.”⁷⁸ From this view, constitutional review that empowers judges to quash political decisions approved by a majority of citizens is anti-democratic as democracy means only majority rule.

The second conception of democracy is constitutional in the sense that popularly elected officials representing a majority of citizens can make daily political decisions only if they respect the basic individual rights in the Constitution and treat all citizens with human dignity. According to this conception, democracy means the government is subject to conditions (democratic conditions) that require respecting human dignity. Dworkin argues as follows:

When majoritarian institutions provide and respect the democratic conditions, then the verdict of these institutions should be accepted by everyone for that reason. But when they do not, or when their provision or respect is defective, there can be no objection, in

however, the gains from further exercises of judicial review no longer exceed the losses. We have therefore decided to end the experiment in 2003. We will no longer invalidate statutes, state or federal, on the ground that they violate the Constitution... On balance, eliminating it is likely to help today's liberals a bit more than it would hurt them. True, without judicial review, liberals would have to give up the prospect of further constitutional gains for gay rights and run the risk that they would be unable to defend abortion rights in the political arena. But without judicial review, conservatives would have to give up the prospects of further erosion of affirmative action programs and would have to fight campaign finance reform in the political arena.”

⁷⁷ Waldron, “The Core of the Case Against Judicial Review.” The Supreme Court of the U.S. decided many cases on grounds of originalism. Because of these decisions and a conservative majority in the current Supreme Court, majoritarian scholars criticize the judicial review and the moral reading. However, this book agrees with the argument that judicial review can make good rather than harm to democracy, in particular new democracies such as Mongolia, in the long run.

⁷⁸ Dworkin, *Is Democracy Possible Here?*, 131; See also Dworkin, *Justice for Hedgehogs*, 382–388.

the name of democracy, to other procedure that protect and respect them better.⁷⁹

The most important democratic conditions set out in the Constitution are fundamental rights such as freedom of expression and the equal protection. These rights define the basis of human dignity. Thus, each individual is guaranteed the right to be treated with human dignity no matter the opinion of the majority. Since the constitutional conception is based on human dignity, it requires that members of democratic society as a whole should treat each other with the equal dignity when making collective decisions. Therefore, political decisions that violate any basic right are undemocratic regardless of whether they are made by elected officials representing a majority or minority of citizens.

The argument that constitutional review is undemocratic is weak when the constitutional conception of democracy is adopted in a Constitution. The U.S. has a representative government, universal suffrage, and regular elections. According to Dworkin, Americans also “embed fundamental freedoms in [their] Constitution, and [they] give judges the power to enforce those rights even against a majority’s will.”⁸⁰ Thus, constitutional review promotes democracy when the court strikes down the legislature’s decision that violates a basic individual right. A society is democratic when all citizens are treated with equal human dignity and their basic individual rights are protected.

Majoritarian critics of constitutional review mostly rely on the functioning of democratic process when arguing against both of the moral reading and the constitutional review system. These criticisms are mostly limited to advanced democracies such as the United States and argue that if the legislature functions well, then it should decide controversial issues on the constitutional interpretation. According to Waldron, the society should settle the disagreements about fundamental rights by using its legislative institutions, and there is no need for decisions about rights made by legislatures to be second-guessed by courts.⁸¹ According to Tushnet, there could be “systems in which the government has limited power and individual rights are guaranteed, without having U.S. - style judicial review.”⁸² Dworkin replied to these

⁷⁹ Dworkin, *Freedom’s Law*, 17.

⁸⁰ Dworkin, *Is Democracy Possible Here?*, 146.

⁸¹ Waldron, “The Core of the Case Against Judicial Review,” 1360.

⁸² Tushnet, *Taking the Constitution Away from the Courts*, 165.

criticisms.⁸³ This study does not discuss all of these criticisms and responses to give a universal answer as to which system of democracy (constitutional or majoritarian) is better. However, this study argues that constitutional review is suitable and the moral reading is feasible in Mongolia.

Both supporters and some majoritarian critics of constitutional review could recognize the adoption of this review in new democracies such as Mongolia. The democratic process improved by constitutional review is better than the same process without this review in some situations. If not the legislature but the court is able to provide a better protection of fundamental rights, constitutional review will be justified. This situation often exists in the transitional countries, for at least in such countries constitutional review is a more rational choice, which is accepted even by majoritarian critics like Waldron.⁸⁴ As with many other post-socialist countries, Mongolia never had the prior liberal tradition to respect individual human rights and spent almost seven decades under the socialist system that neglected human dignity and ignored the rule of law. The State Great *Khural* (the SGKh) is immature. Although this parliament has been making many liberal reforms since 1992, it alone could not guarantee genuine liberal democracy. The SGKh is unicameral, exercises much power, lacks the vigorous committee examination, has no multiple levels of consideration, discussion, and voting, and pays scarce attention to individual rights. The framers chose the constitutional conception of democracy with constitutional review. Chapter 5 will show that this review has improved democracy in Mongolia even though it still needs to be improved institutionally and culturally.

The fact that the courts sometimes provide poor protection for basic rights and freedoms cannot justify the rejection of constitutional review. There is no institution that always makes right decisions in a society. Waldron, a majoritarian critic, argues as follows: “No decision-procedure will be perfect. Whether it is a process of unreviewable legislation or whether it is a process of judicial review, it will sometimes come to the wrong decision, betraying rights rather than upholding them. This is a fact of life in politics.”⁸⁵ Thus, a perfectionist argument could not be made against either constitutional review or the democratic system without this review. According to Dworkin, democracy is damaged when a court makes the wrong decision about the

⁸³ Dworkin, *Freedom's Law*, 1–38; Dworkin, *Justice for Hedgehogs*, 395–399.

⁸⁴ Waldron, “The Core of the Case Against Judicial Review,” 1386.

⁸⁵ Ibid., 1372; See also Tushnet, *Taking the Constitution Away from the Courts*, 57.

individual rights⁸⁶ – “no more than it does when a majoritarian legislature makes a wrong constitutional decision that is allowed to stand. The possibility of error is symmetric.”⁸⁷

Some proponents of majoritarianism criticize the method of moral reading claiming that constitutional arguments or theories do not have much impact on what justices do, and that justices do as they wish. For example, Parker and Tushnet argued that to date, constitutional theory on methods of reasoning has not had much impact on the practice of the law.⁸⁸ This criticism is unjustifiable, and there is no sound reason to deny constitutional arguments’ impact on the legal (judicial) practice. Constitutional democracy is possible and its citizens can repair its defects, if not making it perfect.⁸⁹ The method of moral reading of the Constitution also represents “a traditional faith in reason, science, and the power of law to cope with reality.”⁹⁰ The histories of constitutional democracies have not proved that this faith is false, and it confirms at least that the constitutional arguments are not completely ineffective. The arguments show how the reasoning of a judicial judgment is, whether a justice such as Scalia is consistent with his theory, and whether a candidate to the court is qualified, which may influence whether or not that candidate is appointed to the court. Moreover, constitutional arguments on whether a certain decision is correct or not effect whether that decision is confirmed or reversed in the future. Judges also learn competing constitutional arguments and develop their own understanding of the Constitution.

The moral reading of the Constitution can be done regardless of which institution interprets the Constitution. Two important questions need explaining how the

⁸⁶ This study mentioned *Plessy, Olmstead* and *Bowers*. There are other regretful decisions by the U.S. Supreme Court: *Prigg v. Pennsylvania*, 41 U.S. (16 Pet.) 539, 612 (1842) (striking down state legislation that sought to protect African-Americans from slave-catchers); *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 425-27 (1857) (ruling that African Americans held as slaves and their descendants could never be U.S. citizens, so they could not sue in court and that slaves, as private properties, could not be taken away from their owners without due process of law); *Schenck v. United States*, 249 U.S. 47 (1919) (holding that criticizing conscription during WW I was like shouting fire in a crowded theater); *Korematsu v. United States*, 323 U.S. 214 (1944) (refusing to protect citizens of Japanese descent from internment during WW II).

⁸⁷ Dworkin, *Freedom's Law*, 32–33.

⁸⁸ Parker, *Here, The People Rule*, 74; Tushnet, *Taking the Constitution Away from the Courts*, 155.

⁸⁹ Rawls, *Political Liberalism*, ix. Rawls said as follows: “We must start with the assumption that a reasonably just political society is possible, and for it to be possible, human beings must have a moral nature, not of course a perfect such nature, yet one that can understand, act on, and be sufficiently moved by a reasonable political conception of right and justice to support a society guided by its ideals and principles.”

⁹⁰ Barber and Fleming, *Constitutional Interpretation*, 116.

Constitution should be interpreted and who should interpret it, and the moral reading concerns the first question no matter who is the interpreter of the Constitution. Dworkin clarified this point as follows:

The moral reading is consistent with all these institutional solutions to the problem of democratic condition. It is a theory about how certain clauses of some constitutions should be read-about what questions must be asked and answered in deciding what those clauses mean and require. It is not a theory about who must ask these questions, or about whose answer must be taken to be authoritative.⁹¹

Thus, the popular legislature (as typically in the U.K.) may have the role of employing the moral reading. However, the courts are more suitable than the legislature for this role because it is obliged to respect the integrity of law. The courts are also safer than the legislature for protecting the rights of political minorities because they are not as vulnerable to populist, financial and political pressures as the legislators.⁹² All courts such as the ordinary court, the constitutional court and the international court may do the moral reading when they have the power of constitutional review. Therefore, the moral reading as a theory of constitutional interpretation can be applied not only in the American model of constitutional review but also in the European model. The next section will show how international and constitutional courts apply this method in their bill of rights even though their institutional designs are different from the American model.

4.3. The moral reading of the Constitution in Europe

4.3.1. The moral reading of fundamental rights in constitutional and international adjudications

The moral reading of the Constitution is not only limited in the U.S. jurisprudence. Since liberal constitutions and international conventions on human rights include abstract moral principles many of which are similar, this method is required to interpret

⁹¹ Dworkin, *Freedom's Law*, 34.

⁹² Ibid.

these principles. Dworkin argues as follows:

The role of moral judgment is still more pervasive, but less deniable in constitutional adjudication, because the pertinent constitutional standards are even more explicitly moral: they declare rights of free expression, treatment as equals, and respect for life and dignity, and sometimes make exceptions for constraints ‘necessary in a democratic society’, for example.⁹³

Thus, like the U.S. Supreme Court, the courts in other jurisdictions treat constitutions and human rights conventions as a charter of principle and apply the moral reading regardless of under which model of constitutional review (American or European) they construct decisions. These courts have been considering a fresh understanding of constitutional and international principles that they are responsible for interpreting and enforcing in their jurisdictions. This subsection shows that the European Court of Human Rights, the Federal Constitutional Court of Germany, and the Italian Constitutional Court use the moral reading of bills of human rights and reject strict constructionism and originalism.

The European Court of Human Rights (the ECHR) applies the moral reading to the European Convention on Human Rights (the European Convention). For example, this court in *Scoppola v. Italy* (No. 2, 2009) overruled its own precedent, an interpretation of a certain human right because it had sufficient reasons.⁹⁴ Franco Scoppola, an Italian citizen, was accused of murder of his wife among other crimes. At a preliminary hearing, Scoppola requested to be tried under the summary procedure, “a simplified process which entailed a reduction of sentence in the event of conviction.” In the version in force at that time, Article 442 of the Code of Criminal Procedure provided that, if the judge considered that the penalty to be imposed was life imprisonment, such a penalty should be converted into 30 years imprisonment. On November 24, 2000, the preliminary hearings judge found Scoppola guilty and indicted that he was liable to a sentence of life imprisonment. However, the judge sentenced Scoppola to a term of 30 years as the trial had been conducted under the summary procedure.

⁹³ Dworkin, “The Judge’s New Role,” 6.

⁹⁴ The following two judgments of the ECHR also made the moral reading of the Convention. Case of *Tyrrer v. The United Kingdom*, the ECHR, 1978 (deciding that the judicial corporal punishment inflicted on the applicant amounted to degrading punishment within the meaning of Article 3 of the Convention); *Selmouni v. France*, the ECHR, 1999 (deciding whether the certain acts that were not understood as torture in the past should be understood as torture nowadays). Dworkin cited the latter case for arguing the moral reading in other democracies. *Ibid.*

Nevertheless, Scoppola's imprisonment of 30 years was replaced by life imprisonment due to the statutory amendment disadvantageous for him. Legislative Decree no. 341, which had entered into force that very day, amended Article 442 of the Code of Criminal Procedure as follows: "in the event of trial under the summary procedure, life imprisonment was to be substituted for life imprisonment with daytime isolation if there were cumulative offences or a continuous offence." Considering that Scoppola's sentence should have been life imprisonment rather than 30 years in view of the entry into force of the new version, the prosecutor appealed against the decision of the preliminary hearings judge. The Rome Assize Court of Appeal sentenced Scoppola to life imprisonment. Scoppola appealed to the Court of Cassation, arguing that he had been convicted in breach of the fair-trial principles guaranteed by Article 6 of the European Convention and on the basis of retrospective application of the criminal law – in the form of Legislative Decree no. 341 – in breach of Article 7 of the Convention. The court dismissed that appeal.

Scoppola appealed to the ECHR and said that his life imprisonment had breached Article 7 of the Convention, which provided the following:

No one shall be held guilty of any criminal offence on account of any act or omission, which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

In its previous decisions, the ECHR had constantly ruled that Article 7 did not guarantee the right of the accused to a more lenient penalty provided for in a law subsequent to the offence.⁹⁵ This court used to offer the strict-constructionist reading of Article 7: this article did not require an obligation for Contracting States to grant an accused the benefit of a change in the law subsequent to the commission of the offence because it did not expressly mention this obligation.⁹⁶

However, in *Scoppola*, the ECHR decided to depart from case law and replaced the strict-constructionist reading of Article 7 with the following moral reading of it:

Article 7 § 1 of the Convention guarantees not only the principle of non-retrospectiveness of more stringent criminal laws but also, and implicitly, the principle of retrospectiveness of the more lenient criminal law. ...That principle is embodied in the rule that where there

⁹⁵ *Scoppola v. Italy* (No. 02), 10249/03, the ECHR, 2009, para. 103.

⁹⁶ *Scoppola v. Italy* (No. 02), 10249/03, the ECHR, 2009, para. 107.

are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the courts must apply the law whose provisions are most favourable to the defendant.⁹⁷

In *Scoppola*, the ECHR did not regard the strict-constructionist argument of its case law as decisive by taking account of the emerging consensus in European and international levels:

While the Court is not formally bound to follow any of its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without cogent reason, from precedents laid down in previous cases. Since the Convention is first and foremost a system for the protection of human rights, the Court must however have regard to the changing conditions in the respondent State and in the Contracting States in general and respond, for example, to any emerging consensus as to the standards to be achieved.⁹⁸

This court showed that the American Convention on Human Rights (art. 9), the European Union's Charter of Fundamental Rights (art. 49.1), and the statute of the International Criminal Court guaranteed the principle of retrospectiveness of a more lenient criminal law. The ECHR also argued that the Court of Justice of the European Communities and the International Criminal Tribunal for the former Yugoslavia affirmed this principle. According to the ECHR, a consensus slowly arose in Europe and internationally around the fundamental principle of applying a criminal law providing for a more lenient penalty, even one enacted after the commission of the offence.

The ECHR understood the non-retrospectiveness of more stringent criminal laws as a principle whose aim is to protect the defendant's right. This court ruled that the principle of non-retrospectiveness in Article 7 implicitly included the principle of retrospectiveness of the more lenient criminal law. This court, therefore, ruled that the Italian courts had acted in violation of Article 7 because Scoppola was “given a heavier sentence than the one prescribed by the law which, of all the laws in force during the period between the commission of the offence and delivery of the final judgment, was most favorable to him.”⁹⁹ The ECHR argued that “a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or

⁹⁷ *Scoppola v. Italy* (No. 02), 10249/03, the ECHR, 2009, para. 109.

⁹⁸ *Scoppola v. Italy* (No. 02), 10249/03, the ECHR, 2009, para. 104.

⁹⁹ *Scoppola v. Italy* (No. 02), 10249/03, the ECHR, 2009, para. 119.

improvement.”

Moreover, the constitutional courts of matured democracies in Europe apply a method similar to the moral reading of the Constitution. The most noteworthy case is the German constitutional jurisprudence. The Federal Constitutional Court of Germany used a method similar to the moral reading. However, Dworkin’s substantive positions on constitutional rights sometimes differed to a great extent from those of the German Court.¹⁰⁰ For example, this court gave priority to an unborn child’s right to life over a woman’s right to choose whether or not she would have an abortion, which stood in contrast to the position by the U.S. Supreme Court and Dworkin.¹⁰¹ According to Jeffrey B. Hall, “the differences can be explained by examining the political morality of each society and tracing the FCC decisions to fundamental principles within Germany.”¹⁰²

The German Constitutional Court interpreted fundamental rights clauses in the Constitution with conceptions that reflected contemporary political morality but were not known by the framers when adopting these clauses. For instance, this court ruled that a clause of a statute, which regulated secret access to information technology systems, violated the general right of personality “in its particular manifestation as a fundamental right to the guarantee of the confidentiality and integrity of information technology systems.”¹⁰³ The court showed that this manifestation was required due to the unpredicted development of information technology and its entailment of new types of endangerment of personality. A summary of the court reasoning was as follows:

The general right of personality guarantees elements of the personality which are not the subject matter of the special guarantees of freedom contained in the Basic Law, but which are not inferior to these in their constituting significance for the personality... Such a loophole-closing guarantee is needed in particular in order to counter new types of endangerment which may occur in the course of scientific and technical progress or changed circumstances... The use of information technology has taken on significance

¹⁰⁰ Hall, “Taking ‘Rechts’ Seriously,” 197. Hall argued that elements of Dworkin’s theory could help explain the jurisprudence of the Federal Constitutional Court, and there were similarities concerning concepts such as the principle, the right, the human dignity, equality, the limitation of rights, human rights, and judges’ duty in the jurisprudence of the Federal Constitutional Court and Dworkin’s theory.

¹⁰¹ Kommers, “Liberty and Community in Constitutional Law”; Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 335–356; Roe v. Wade, 410 U.S. 113 (1973); Dworkin, *Freedom’s Law*, 41–129.

¹⁰² Hall, “Taking ‘Rechts’ Seriously,” 197.

¹⁰³ 1 BvR 370/07, 1 BvR 595/07, The Federal Constitutional Court of Germany, 2008.

for the personality and the development of the individual which could not have been predicted. Modern information technology provides the individual with new possibilities, whilst at the same time entailing new types of endangerment of personality. The fundamental rights guarantees contained in Article 10 and Article 13 of the Basic Law, like those manifestations of the general right of personality previously developed in the case-law of the Federal Constitutional Court, do not adequately take account of the need for protection arising as a consequence of the development of information technology... This manifestation of a right to the guarantee of the confidentiality and integrity of information technology systems protects against encroachment on information technology systems, insofar as the protection is not guaranteed by other fundamental rights, such as in particular Article 10 or Article 13 of the Basic Law, as well as by the right to informational self-determination...¹⁰⁴

The court's recognition of a right to the guarantee of the confidentiality and integrity of information technology systems respected the integrity of constitutional law because this right was consistent with the continuous protections of the personal and private life under the right to personality in German case law. The court argued that the general right of personality, in particular the guarantees of the protection of privacy, and of the right to informational self-determination, previously were manifested in its case law, but these manifestations do not comply suitably with the special need for protecting the user of information technology systems.¹⁰⁵ Therefore, as the court ruled, "in the same way as the right to informational self-determination,"¹⁰⁶ a fundamental right to the guarantee of the confidentiality and integrity of information technology systems was based on Article 2.1 in conjunction with Article 1.1 of the Basic Law. This right protects "the personal and private life of the subjects of the fundamental rights against access by the state in the area of information technology also insofar as the state has access to the information technology system as a whole, and not only to individual communication events or stored data."¹⁰⁷

A method similar to the moral reading of the Constitution is also found in the Italian constitutional jurisprudence.¹⁰⁸ For example, the Italian Constitutional Court protected the interest of the minor by adopting the fresh conception on fairness, by making the

¹⁰⁴ Ibid., para. 101, 103, 104 and 115.

¹⁰⁵ Ibid., para. 130.

¹⁰⁶ Ibid., para. 135.

¹⁰⁷ Ibid.

¹⁰⁸ Zagrebelsky, "Ronald Dworkin's Principle Based Constitutionalism," 621.

moral reading of a constitutional moral principle rather than the literal reading of the family law rule. Gustavo Zagrebelsky summarized this judgment:

A 1996 decision that examined the constitutional legitimacy of regulation of family law that forbade adoption... in case where the child involved was more than forty years younger than the adults seeking to adopt him or her. In the actual case, a little boy was happily living with a family, following an order for foster care (a temporary measure that usually precludes adoption). To remove him from the family seemed forced and unfair. The regulation at issue was therefore declared unconstitutional and the court established that a judge can order adoption “in the exclusive interest of the minor, even when one of the two adoptive parents is more than 40 years older than the child to be adopted, in a case in which serious harm to the child could result from not being adopted, in a situation which could not be otherwise avoided.” ...The permitted difference in age for adoption continues to be less than forty years, but only “so long as it does not defeat other key principles,” such as the principle of protection of “the interest of the minor,” an unwritten principle incorporated into the positive law.¹⁰⁹

The decisions of the ECHR, the German Constitutional Court, and the Italian Constitutional Court establish that these courts do treat human and civil rights clauses as principles of political morality. Such courts replaced their own previous conception of political moral principle with a better conception when they have sufficient reasons. These courts were able to adopt a new conception of a political moral principle by reflecting on new circumstances, which the framers could not have known, and they respected the integrity of law in these judgments of replacement and adoption of a better conception. These courts apply the moral reading of human and civil rights clauses rather than the originalist or strict constructionist readings. The latter two readings are unpopular in Europe. Thus, this book agrees with the general conclusion by Jiri Priban: “in the judgments of a number of continental European constitutional courts, the interpretive concept of law represented by the theories of Gustav Radbruch or Ronald Dworkin prevailed over the concept of legislative legalism represented by the legal philosophies of H.L.A. Hart or Joseph Raz.”¹¹⁰ Successful courts in newer democracies use the moral reading of their Constitution.¹¹¹ The next subsection will argue that the

¹⁰⁹ Ibid., 648.

¹¹⁰ Priban, “Judicial Power Vs. Democratic Representation: The Culture of Constitutionalism and Human Rights in the Czech Legal System,” 386.

¹¹¹ For the Polish Constitutional Tribunal’s interpretation on equality as a principle of political morality, see Brzezinski, *The Struggle for Constitutionalism in Poland*, 165–175.

Hungarian Constitutional Court applies this method as well.

4.3.2. The moral reading of the Hungarian Constitution

This subsection is limited in scope to the Hungarian constitutional jurisprudence in 1990-1998 as one of the successful examples of new constitutional review systems.¹¹² As Section 2.4 mentioned, this book examines the Constitutional Court of Hungary because its early decisions provided the relatively satisfactory protection of fundamental rights through *actio popularis*, a system similar to the Mongolian notification, by adopting the moral reading of the Constitution. This court protected fundamental rights due to not only the positive institutional arrangement but also its effective usage of the moral reading. Both Hungary and Mongolia needed an activist court committed to the moral reading because unlike old democracies, they spent many decades under totalitarian regimes and lacked the long liberal tradition. However, the moral reading by the *Tsets* was weak. Thus, this subsection shows how the Hungarian Constitutional Court conducts the moral reading, and how it can be useful for the *Tsets*.

The Hungarian Constitutional Court was influenced by the American and German jurisprudences even though it adopted the European model of constitutional review just like the Mongolian *Tsets*. This court followed the New York Times test¹¹³ and the “clear and present danger” test¹¹⁴ in deciding limitation to freedom of expression and information while importing the concept of human dignity from German constitutional case law.¹¹⁵ For instance, echoing the New York Times test, the Hungarian Court declared that a defamatory statement was “only punishable if the ...person knew that his utterance is false or this person was not aware of the falsity of his claim because he neglected to pay the level of attention appropriate to his profession, the object of the

¹¹² Under the leadership of the first Chief Justice Laszlo Solyom, the Hungarian Constitutional Court actively made the most important judgments protecting fundamental rights in the transitional period, and these judgments are widely researched in English. After Solyom left in 1998, this court has become less active in doing the moral reading of the Constitution, and the following constitutional change weakened the Constitutional Court.

¹¹³ The U.S. Supreme Court declared that public officials may win libel suits only on showing “actual malice,” “knowledge that it was false or with reckless disregard of whether it was false or not.” *The New York Times Company v. Sullivan* 376 U.S. 254, 84 S.Ct. 710 (1974).

¹¹⁴ *Schenck v. United States*, 429 U.S. 47 (1919).

¹¹⁵ Dupre, *Importing the Law in Post-Communist Transitions*; Peter, *Twenty Years of the Hungarian Constitutional Court*, 46.

claim, its expression and its intended recipients.”¹¹⁶

The application of the moral reading of the Constitution was evident in the Hungarian constitutional jurisprudence of 1990s. The first Chief Justice Laszlo Solyom expressly acknowledged “his faith in the Dworkinian principle as the basis of activism and the moral interpretation of the Constitution.”¹¹⁷ As Solyom concluded the jurisprudence of his court in the period 1990-1998, “the court exercised a moral reading of the Constitution, put the right to human dignity on the top of the hierarchy of fundamental rights and connected it with equality: the right to equal dignity constituted the base of the most important decisions.”¹¹⁸ As a justice in a new democracy, Solyom considered comparative law as an important component of this method: “a moral reading, wherein the relevant values may be determined on a broad theoretical and comparative law basis referred to that particular right.”¹¹⁹ The moral reading was also obvious in the court’s own understanding of the Constitution as “the invisible Constitution” which expressed the Constitution as a system of principles.¹²⁰ Solyom said as follows:

The constitutional court must continue its effort to explain the theoretical bases of the Constitution and of the rights included in it and to form a coherent system with its decisions, which as an “invisible Constitution” provides a reliable standard of constitutionality beyond the Constitution, which nowadays is often amended out of current political interest.¹²¹

Many of the early Hungarian judgments rested on a moral reading of the Constitution. The Hungarian jurisprudence was full of judgments concerning fundamental rights such as freedom of expression, the right to life and human dignity, criminal and procedural guarantees, the right to association, the right to a healthy environment, the right to property, and the equality before the law. The judgments on such rights concerned not only the classic and transitional problems already decided in matured constitutional jurisprudences such as the U.S. and Germany but also modern problems involving the death penalty, abortion, privacy, the media, homosexuality,

¹¹⁶ Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, 39.

¹¹⁷ Halmai, “The Hungarian Approach to Constitutional Review,” 200; See also Solyom, “The Role of Constitutional Courts in the Transition to Democracy.”

¹¹⁸ Solyom, “The Role of Constitutional Courts in the Transition to Democracy,” 153.

¹¹⁹ Solyom and Brunner, *Constitutional Judiciary in a New Democracy*, 39.

¹²⁰ Solyom, “The Role of Constitutional Courts in the Transition to Democracy,” 152.

¹²¹ Solyom and Brunner, *Constitutional Judiciary in a New Democracy*, 118, 126.

separation of church and state, and environmental protection. Though the Hungarian Court decided many of these problems by applying the moral reading, its judgments on only two issues are analyzed here: (1) positive discrimination and (2) death penalty.

The Hungarian Constitutional Court's judgments on positive discrimination were similar to Dworkin's theory on the affirmative action (the reverse discrimination). The judgments of this court did not mention Dworkin's theory. However, Chief Justice Solyom authoring these judgments stated that the conception of positive discrimination in the judgment resembled "Dworkin's theory on affirmative action."¹²² According to Gabor Halmai, "the first rulings with reference to positive discrimination seemingly follow [Dworkin's] argumentation verbatim, according to which in the final analysis we must reach a solution that in terms of usefulness to society creates equality, while as a tool, it is equipped with inequality at the same time."¹²³

In 1990, the Constitutional Court explained the positive discrimination, the different treatment of individuals in order to eliminate inequalities of their opportunity, when considering a challenge to the special tax benefits to families with many children (the special tax benefit case). This court rejected the challenge to the special tax benefits saying that "the prohibition of discrimination does not mean that any discrimination, including even discrimination intended to achieve a greater social equality, is forbidden."¹²⁴ The Court also argued that positive discrimination is constitutional because it aimed to get rid of inequalities of opportunity, and that the anti-discrimination clause (art. 70/A, the Hungarian Constitution)¹²⁵ should be understood by a broad conception rather than a formal conception of equality:

The prohibition of discrimination means all people must be treated as equal (as persons with equal dignity) by law – i.e., the fundamental right to human dignity may not be

¹²² Ibid., 31.

¹²³ Halmai, "The Hungarian Approach to Constitutional Review," 200.

¹²⁴ Decision 9, the Hungarian Constitutional Court, 1990. The English translation of this judgment is not available, but its main reasoning is cited in Decision 21, the Hungarian Constitutional Court, 1990. Solyom and Brunner, *Constitutional Judiciary in a New Democracy*, 111.

¹²⁵ The text of the Constitution could be interpreted very formally, but the Court used the Dworkinian idea to justify the positive discrimination. Article 70 of the 1949 Constitution of Hungary says as follows: "(1) The Republic of Hungary shall ensure the human and civil rights for all persons in its territory without any kind of discrimination, such as on the basis of race, color, gender, language, religion, political or other opinion, national or social origins, financial situation, birth or on any other grounds whatsoever. (2) Any kind of discrimination prescribed in Paragraph (1) shall be strictly penalized by the law. (3) The Republic of Hungary shall promote the equality of rights for everyone through measures aimed at eliminating the inequality in opportunity."

impaired, and the criteria for the distribution of the entitlements and benefits shall be determined with the same respect and prudence, and with the same degree of consideration of individual interest.¹²⁶

This reasoning was directly influenced by Dworkin's distinction between equality in the sense of a "right to equal treatment," and a sense that is inferior to "the right to being treated as an equal."¹²⁷ Dworkin made this distinction when discussing reverse discrimination as being compatible with the equal protection of the laws.¹²⁸ Though the special tax benefits to families with many children were not Dworkin's typical idea of reverse discrimination, the Hungarian Court interpreted the moral principle of the anti-discrimination by a broad conception of equality, not the formal equality under the law. That is, the judgment was not just an adoption of Dworkin's theory but "emancipation" because it applied his theory in a new context where there were no ready-made decisions.¹²⁹

The Hungarian Constitutional Court consistently applied the Dworkinian conception of positive discrimination in several judgments, showing the due respect for the integrity of the Constitution. An example was the judgment on compensation for expropriated property.¹³⁰ The prime minister of Hungary asked for an advisory opinion on whether compensation program to provide for certain people's former property (land) to be re-privatized while other people's property would not be returned to them amounted to discrimination contrary to Article 70/A of the Constitution. The prime minister argued as follows:

According to the Government, the general principle of privatization was that state property was sold to new owners in exchange for payment while former owners received partial compensation. The settlement of land ownership would be an exception to these principles because in such questions either the original land would be returned in kind or other land offered in exchange.¹³¹

However, the Constitutional Court held that this compensation program would

¹²⁶ Solyom and Brunner, *Constitutional Judiciary in a New Democracy*, 111.

¹²⁷ Sadurski, *Rights Before Courts*, 204.

¹²⁸ Dworkin, *Taking Rights Seriously*, 223–239; Dworkin, "Affirmative Action," 79–88.

¹²⁹ Solyom, "The Role of Constitutional Courts in the Transition to Democracy," 145.

¹³⁰ Decision 21, the Hungarian Constitutional Court, 1990. The Court also used this conception of positive discrimination in other judgments. For example, see the judgment on the matter of the petition on compensation: Decision 16, the Hungarian Constitutional Court, 1991. See Solyom and Brunner, *Constitutional Judiciary in a New Democracy*, 108–117, 151–158.

¹³¹ Decision 21, the Hungarian Constitutional Court, 1990. Ibid., 108.

amount to discrimination in relation to the acquisition of property. The court reasoning started with a citation on positive discrimination from the special tax benefit case:

The right to equal personal dignity may occasionally result in entitlement according to which good and opportunities must be distributed (even qualitatively) equally to everyone. If, however, a social purpose not in conflict with the Constitution or a constitutional right may only be achieved if equality in the narrower sense cannot be realized, then such a positive discrimination shall not be declared unconstitutional.¹³²

The court did not find sufficient constitutional justification for supporting such a difference in the compensation program for expropriated property:

It was then necessary to consider two types of discrimination, first between the former owner and non-owner and then between the former owners according to the type of property. The constitutionality of the discrimination between former and non-owner depended on whether the interests of these two groups had been weighted with the same degree of prudence and impartiality. If it were the case that, with the preferential treatment of former owners, the distribution of state property would produce a more favorable overall social result as regards the constitutionally mandated “marked economy” than equal treatment would, then this would be permissible. In the latter situation, it was necessary to ascertain whether the other former owners had had their interests considered as thoroughly and impartially as those of former landowners in order to reveal the objective basis of the discrimination between former owners. Further, it had to be proved that former non-landowners had to be put into a disadvantageous position in order to achieve equality of persons as completely as possible in the future marked economy. On its interpretation of Art. 70/A, the discrimination in the Act under consideration would accordingly be unconstitutional.¹³³

The second issue confronting modern courts that require the moral reading of the Constitution is the death penalty. Upon striking down the death penalty,¹³⁴ the Hungarian Constitutional Court applied a moral reading to Article 54.1 of the Constitution, which declared that “in the Republic of Hungary, every human being has the inherent right to life and to the dignity of man, of which no one can be arbitrarily deprived.” This provision implied that a non-arbitrary deprivation of life (for example,

¹³² Decision 21, the Hungarian Constitutional Court, 1990. *Ibid.*, 111.

¹³³ Decision 21, the Hungarian Constitutional Court, 1990. *Ibid.*, 109.

¹³⁴ Decision 23, the Hungarian Constitutional Court 1990. *Ibid.*, 118–138.

one according to the reasons and procedures in law) would be constitutionally acceptable. The Hungarian framers might not have intended to abolish the death penalty when adopting the Constitution and might not have expected that the death penalty would be unconstitutional.¹³⁵ There was a very short period between the adoption of the right to life and dignity and the court ruling that would abolish the death penalty. A majority of Hungarian citizens also were against the abolishment of death penalty.¹³⁶ However, the court rejected these originalist and popular views on death penalty.

The majority judges treated the Constitution as a higher order of principles. Solyom pointed out that the Constitution was “not merely the strict order of technical regulations, but of principles,” and that the judges had to discern these principles “by their decisions, clarify, elucidate and apply them, because no one can determine them from mere one line paragraphs and simple sentences.”¹³⁷ Therefore, as Dworkin argued against the death penalty in the U.S.,¹³⁸ the textual evidence was irrelevant for interpreting Article 54.1 of the Hungarian Constitution in a principled rather than concrete and dated way. The court recognized that Article 54.1 “did not clearly exclude the capital punishment,” but it ruled that this punishment was null and void because it conflicted with Article 8.2 of the Constitution, which prohibited “limiting the essential content of any fundamental right.” The court argued that by terminating a human life totally and irreversibly, the death penalty violated the essence of the right to life and human dignity, so it was contrary to the prohibition against restricting the essence of fundamental rights in Article 8.1 of the Constitution. A summary of the court reasoning was as follows:

Article 8(2) did not permit any limitation upon the essential content of fundamental rights even by way of legislative enactment. Since the right to life and human dignity was itself the “essential content,” the State could not dispose of it. Consequently any deprivation of it was conceptually “arbitrary.” The State would come into conflict with the whole concept of fundamental constitutional right if it were to authorize deprivation of the right

¹³⁵ Sadurski, *Rights Before Courts*, 101.

¹³⁶ Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe*, 89; Sadurski, *Rights Before Courts*, 101.

¹³⁷ Halmai, “The Hungarian Approach to Constitutional Review,” 202.

¹³⁸ Dworkin argued that the death penalty offends the U.S. Constitution’s prohibition against “cruel and unusual” punishments (Amendment VIII) even though the framers expected “that death would be inflicted only after due process.” Dworkin, *Taking Rights Seriously*, 35–36; Dworkin, “Comment,” 120–121.

by permitting and regulating capital punishment.¹³⁹

The reasoning of the constitutional court was also based on the international trend to abolish the death penalty. After examining the relevant provisions of the ICCPR, this court cited the Sixth Additional Protocol and Article 22 of the European Declaration On Fundamental Rights and Fundamental Freedoms, both of which declared the abolition of death penalty. The constitutional courts in South Africa, Ukraine, and Albania followed the decision of the Hungarian Constitutional Court¹⁴⁰ and abolished the death penalty by making the moral reading of their constitutions.

The Hungarian constitutional jurisprudence is important for Mongolia because it proves that the court can apply the moral reading under the constitutional review initiated by *actio popularis*. Nonetheless, the individual complaint and constitutional question are more suitable than *actio popularis* from the view of the moral reading. The integrity of law in Dworkin's theory is not very suitable for *actio popularis* and the abstract review. According to Dworkin, cases should be decided according to the integrity of constitutional law, which is based on the constitutional text, structure and principles of cases. Case law will be more developed when the cases are real and concrete rather than hypothetical and abstract.

4.4. Constitutional culture

Based on research on constitutional laws of the U.S., Germany and Hungary, this section argues that five elements of constitutional culture are essential to the moral reading of the Constitution and constitutionalism in general. The five cultural elements are: (1) constitutional case law, (2) the publication of separate opinions of judges, (3) the appropriate usage of foreign judicial judgments, (4) the pervasive role of scholars, and (5) civic participation in the constitutional discussion.

The first is constitutional case law that shows what reasoning the judges make in their decisions, how they interpret the Constitution and whether they respect constitutional integrity. The constitutional precedents function similarly under both the

¹³⁹ Decision 23, the Hungarian Constitutional Court, 1990. Solyom and Brunner, *Constitutional Judiciary in a New Democracy*, 118–119.

¹⁴⁰ Peter, *Twenty Years of the Hungarian Constitutional Court*, 61–62.

American and European models of constitutional review. In the U.S. and Continental Europe, the courts respect constitutional precedents. As Section 4.2 has showed, the U.S. judges mainly provide the principled interpretation of the Constitution consistent with the bulk of precedents, the integrity of law. Among other principles, the U.S. judges respect *stare decisis*, “the doctrine that principles of law established in earlier cases should be accepted as authoritative in similar subsequent cases.”¹⁴¹ Precedents are frequently used for interpreting the U.S. Constitution.

Unlike the U.S., most Continental European countries lack the formal doctrine of *stare decisis*. However, European judges follow leading cases in practice whether they cite these cases.¹⁴² For instance, “German courts strive to be consistent with principles and rulings determined by prior court decisions out of concern that the law be applied equally,”¹⁴³ and the Federal Constitutional Court’s opinions “brim with citations to previous cases.”¹⁴⁴ Section 4.3 has showed that not only the German Constitutional Court but also the ECHR and the Hungarian Constitutional Court respect the integrity of law.

The crucial role of precedent in constitutional adjudication is justified in three ways. First, an adherence to precedent promotes the rule of law, the idea that the law restricts all public powers including the judiciary. Henry Paul Monaghan argued that “if courts are viewed as unbound by precedent and the law as no more than what the last Court said,” the public faith in the judiciary that enforces impartially the law while being restricted itself by the law will be damaged.¹⁴⁵ However, an adherence to precedent does not mean that the court can never overturn improper precedent. As already demonstrated, the courts can change the precedents when there exist enough reasons. The use of precedent also helps citizens and the government to predict largely what is permissible as a result of the reasonably settled decisions on law. Finally, the respect to precedent lessens the politicization of the court. According to Geoffrey R. Stone, “it moderates ideological swings and thus preserves both the appearance and the reality of the Court as a legal rather than a purely political institution.”¹⁴⁶

¹⁴¹ O’Brien, *Constitutional Law and Politics*, 2:1505.

¹⁴² Merryman and Perez-Perdomo, *The Civil Law Tradition*, 3rd Edition, 47; Shapiro, *Courts*, 135–138, 141, 143–148.

¹⁴³ Eberle, *Dignity and Liberty*, 33–34.

¹⁴⁴ Kimmers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 42.

¹⁴⁵ Monaghan, “Stare Decisis and Constitutional Adjudication,” 753.

¹⁴⁶ Stone, “Precedent, the Amendment Process, and Evolution in Constitutional Doctrine,” 70.

The second cultural element is the publication of an independent opinion of the judge. Most constitutional democracies allow their judges to write and publish an opinion separate from a majority opinion of the case. Judges sometimes disagree with each other about important questions such as which fact is important and how to interpret the provision of the Constitution. In democracies including the U.S., Germany, and Hungary, there are the following two kinds of separate opinions, a concurring opinion and a dissenting opinion. Scholars define these two opinions as follows:

Justices writing separate opinions may concur in the holding of the case - that is, they agree with the outcome and support the operative rule of law announced by the holding - but disagree with the reasoning of the justice announcing the decision... In addition, justices frequently disagree with each other more deeply, and write dissenting opinions – sometimes rhetorically caustic or sarcastic – that reject the holding as well as the reasoning of those who support the decision.¹⁴⁷

Published separate opinions are important for applying the moral reading of the Constitution. In studying different opinions, the public can compare the reasoning and conclusions and see which interpretation of the Constitution is better and respect constitutional integrity. Moreover, the quality of the judicial judgment is improved because judges openly give reasons for their opinions while criticizing the reasons of other judges. The publication of separate opinions also allows judges to show their fidelity to the Constitution and the rule of law. Judges who are not allowed to publish a separate opinion cannot express and discuss what they really believe to be the best interpretations of the facts and the constitutional clauses.¹⁴⁸

The third cultural element important for the moral reading of the Constitution is judges' references to constitutional judgments of foreign and international courts as a way of judicial reasoning.¹⁴⁹ In many countries, judges have been making reference to judgments in foreign courts. L'Heureux-Dube argued for "the fact that considerations of foreign decisions is becoming standard practice for more and more courts throughout

¹⁴⁷ Murphy et al., *American Constitutional Interpretation*, 29–30.

¹⁴⁸ Independent opinions are prohibited in France and Italy as in Mongolia. As a result, decisions of their constitutional courts are relatively short and declaratory of the law. See Sweet, *Governing with Judges*, 145–146.

¹⁴⁹ Most originalists are against the reference of foreign decisions. According to Justice Scalia, "Equally irrelevant are the practices of the "world community," whose notions of justice are (thankfully) not always those of our people. We must never forget that it is a Constitution for the United States of America that we are expounding." Atkins v. Virginia 536 U.S. 304 (2002) (Justice Scalia dissenting). See also McCrudden, "Common Law of Human Rights?," 510, 524–525, 530.

the world” thanks to similar issue, the international nature of human rights, advances of technology, and personal contact among judges.¹⁵⁰ When judges of democracies decide issues related to basic human rights and principles, many of which are similar in national constitutions and international human rights treaties, they tend to look at how judges in other jurisdictions have decided similar issues and have interpreted similar rights and principles. These similar issues range from basic standards of criminal justice, free speech, freedom of religion, the death penalty to privacy rights. Moreover, the advancement of communication technology creates the possibility of easy and cheap access to a wealth of case law, statutes, and other materials in a broad range of jurisdictions. Anyone with a connection to the Internet can obtain recent decisions (or their translations) of highest courts of the U.S., Canada, South Africa, Germany, and Hungary, as well as the ECHR. In addition, judges often discuss common problems, mutual interests, and recent developments in conferences, formal and informal meetings, by e-mails, and over the telephone.

The highest courts of new constitutional democracies frequently receive and use the cases from courts of older democracies because they mostly are short of the jurisprudence of protecting fundamental rights. In their early years, the courts of India, Canada, South Africa, Namibia, Zimbabwe, New Zealand, Israel, and Hungary regularly cited sophisticated constitutional case laws of matured courts like the U.S. Supreme Court, the German Constitutional Court, and the ECHR.¹⁵¹ L’Heureux-Dube argued as follows:

Since drafters of human rights protection instruments have drawn on earlier documents, it only makes sense for judges to make use of the expertise and experience of interpreters of similar documents. Because the legal protection of human rights is new to many countries, there is sometimes little or no domestic jurisprudence to consult in giving them meaning, and judgments from elsewhere are particularly useful and necessary. Foreign decisions are often used as a “springboard” to begin development of human rights jurisprudence, and to fill in gaps when no precedent exists. ...reference to foreign jurisprudence is made most frequently when human rights protections are new, such as in Canada in the 1980s

¹⁵⁰ L’Heureux-Dube, “Importance of Dialogue,” 23–26; McCrudden, “Common Law of Human Rights?,” 20; Slaughter, *A New World Order*, 71–73, 96–99; Barak, *The Judge in a Democracy*, 197–212.

¹⁵¹ Kommers, “Foreword,” xi–xii; L’Heureux-Dube, “Importance of Dialogue,” 17–27; McCrudden, “Common Law of Human Rights?,” 506, 518; Slaughter, *A New World Order*, 65–103; Barak, *The Judge in a Democracy*, 197–112; Solyom and Brunner, *Constitutional Judiciary in a New Democracy*, 5, 8, 12, 58; Solyom, “The Role of Constitutional Courts in the Transition to Democracy,” 144.

and early 1990s and in New Zealand, Israel, and South Africa today.¹⁵²

However, the nature of referring to foreign judicial decisions has changed. L'Heureux-Dube discussed this change: “the process of international influence has changed from *reception* to *dialogue*. Judges no longer simply receive the cases of other jurisdictions and then apply them or modify them for their own jurisdiction.”¹⁵³ Constitutional judges in different countries mutually read and use each other's judgments relevant to issues before them. Moreover, judgments of some of new courts have become so important that other courts often refer to them. Anne-Marie Slaughter wrote the following:

The South African Constitutional Court and the Canadian Supreme Court have both been highly influential, apparently more so than the U.S. Supreme Court and other older and more established constitutional courts... [These two courts are] each looking around the world and canvassing the opinions of its fellow constitutional courts and each disproportionately influential as a result.¹⁵⁴

The South African Court also took up the reasoning of the Hungarian judgment on the death penalty.¹⁵⁵

Even the highest courts of America and Germany also sometimes look at the foreign jurisdictions. Though the U.S. Supreme Court rarely refers to cases in other jurisdictions,¹⁵⁶ some recent judgments have referred to foreign jurisdictions.¹⁵⁷ When the U.S. Supreme Court held that the impositions of the death penalty for crimes committed by mentally retarded offenders or juveniles fewer than 18 was “cruel and unusual punishment” prohibited by Amendment VIII, this court, in opinions by Justices John P. Stevens and Anthony Kennedy, supported its rulings partly by mentioning the overwhelming disapprovals of these impositions within the world community, in

¹⁵² L'Heureux-Dube, “Importance of Dialogue,” 24.

¹⁵³ Ibid., 17.

¹⁵⁴ Slaughter, *A New World Order*, 74.

¹⁵⁵ The State v. T Makwanyane and M Mchunu para. 83-85, 90, 132, 308, 326 (The Constitutional Court of South Africa 1995); Solyom and Brunner, *Constitutional Judiciary in a New Democracy*, 118.

¹⁵⁶ L'Heureux-Dube, “Importance of Dialogue,” 27–40; McCrudden, “Common Law of Human Rights?,” 508–510; Slaughter, *A New World Order*, 74.

¹⁵⁷ Eberle, *Dignity and Liberty*, 11. In *Washington v. Glucksberg*, 521 U.S. 702, 734 (1997), the Supreme Court, in an opinion by Chief Justice Rehnquist, reviewed the treatment of assisted suicide in other countries including the Dutch in rejecting a constitutional rights to die. In *Printz v. United States*, 521 U.S. 898, 976-77 (1997), Justice Breyer, in his dissent, examined extensively federal systems of Switzerland, Germany, and the European Union in clarifying a proper relationship between the federal and state governments in the United States.

particular Europe.¹⁵⁸ Moreover, the German Constitutional Court sometimes examines comparative law and foreign judicial judgments. For instance, in the judgment that accepted a fundamental right to the guarantee of the confidentiality and integrity of information technology systems, this court heard statements by comparative law experts.¹⁵⁹

When deciding issues concerning fundamental human rights, the courts refer to judgments of not only transnational but also regional and international courts. According to Slaughter, constitutional courts often cite the ECHR alongside the decisions of foreign courts, not only within Europe but also around the world.¹⁶⁰ For example, when the U.S. Supreme Court struck down a state law criminalizing “sexual intercourse” between homosexuals, it supported its decision partly by mentioning a parallel case from the ECHR.¹⁶¹ The South African Constitutional Court also referred to the ECHR decisions when ruling death penalty unconstitutional.¹⁶² Moreover, the decisions of the Supreme Court of Zimbabwe that corporal punishment was cruel and unusual cited the ECHR decisions. In addition, national courts protected human rights in international conventions that their countries ratified, and they use the interpretations of these rights by other courts and institutions.¹⁶³

The courts assist and benefit comparative constitutional law by publishing its own decisions in English (or any of widely used languages). Comparative lawyers have been studying judgments of matured courts like the U.S. Supreme Court and the German Constitutional Court. Judges of new democracies frequently cite these matured courts. The new courts also should publish its judgments in English to get feedback from the foreign audience and to improve the quality of their judgments.¹⁶⁴ Judges need to develop the reasoning of their judgments if they do not want to be criticized by foreign

¹⁵⁸ Atkins v. Virginia 536 U.S. 304 (2002) and *Roper v Simmons*, 543 U.S. 551 (2005).

¹⁵⁹ 1 BvR 370/07, 1 BvR 595/07 82, The Federal Constitutional Court of Germany, 2008.

¹⁶⁰ Slaughter, *A New World Order*, 66 (listing citations of the ECHR judgments by constitutional courts).

¹⁶¹ Lawrence v. Texas 539 U.S. 558 (2003).

¹⁶² The State v. T Makwanyane and M Mchunu, the Constitutional Court of South Africa, 1995, para. 83-85, 90, 132, 326.

¹⁶³ For a comprehensive analysis on the judicial application of human rights law in the domestic, regional and international levels, see Jayawickrama, *The Judicial Application of Human Rights Law*.

¹⁶⁴ New courts can publish their judgments in the Bulletin on Constitutional Case Law of the Venice Commission. This bulletin reports on the most significant decisions of constitutional courts and courts of equivalent jurisdiction in Europe and other continents, as well as those of the ECHR and the Court of Justice of the European Communities. See “Bulletin on Constitutional Case-law and CD-Rom CODICES.”

scholars.¹⁶⁵

Foreign constitutional decisions do not have the binding authority but the persuasive authority. Slaughter explained the persuasive authority as follows:

For judges favoring the use of persuasive authority, looking abroad simply helps them do a better job at home, in the sense that they can approach a particular problem more creatively or with greater insight. Foreign decisions are persuasive because they offer new information and perspective that may cast an issue in a different and more tractable light.¹⁶⁶

As Justice Breyer said, examining foreign examples may help a judge “learn about relevant consequences, about potential alternative ways of approaching a difficult practical problem, and about how other courts, foreign courts, have decided with greater or lesser success to reconcile similar conflicting values.”¹⁶⁷ In addition, references to foreign judgments may grant judges a kind of security of checking whether or not their own judgments are along with the common tendencies in democracies. Slaughter argued that “references to the activity of fellow courts in other states can act as... a security blanket... [B]y pointing to the actions of fellow states, a national court can reassure itself (and its government) that it will not disadvantage the nation in dealing with other nations.”¹⁶⁸ Foreign examples might be more helpful for judges in newly established democracies where the theories on constitutional interpretation have not fully developed and used in judicial judgments.

Judges should scrutinize decisions of the foreign courts and distinguish good arguments from bad ones. Foreign decision may serve as a check of judges’ reasoning and conclusion. According to the U.S. Supreme Court, “the opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.”¹⁶⁹ However, foreign decisions do not always provide a better solution to a question as shown in the decisions of the U.S. Supreme Court in *Bowers* and *Olmstead*. Domestic contexts also may require judges to decide differently on a human rights issue.

The fourth cultural element is the role of scholars in the constitutional discussion.

¹⁶⁵ Kupper, discussion.

¹⁶⁶ Slaughter, *A New World Order*, 77.

¹⁶⁷ Breyer, *Active Liberty*, 164.

¹⁶⁸ Slaughter, “A Typology of Transjudicial Communication,” 116.

¹⁶⁹ Roper v Simmons, 543 U.S. 551 (2005)

Scholars include law professors, legal researchers, political scientists, and political philosophers. Liberal democracy cannot endure long without scholars who support its fundamental principles and values. According to Rawls, “one of many reasons why the Weimar Constitution failed was that none of the main intellectual currents in Germany was prepared to defend it, including the leading philosopher.”¹⁷⁰ Thus, scholars have a responsibility to write good theoretical and philosophical works like Locke’s *Second Treatise*, Kant’s *The Metaphysics of Morals*, Mill’s *On Liberty*, Rawls’s books and Dworkin’s books, or at least translate such works on liberal democracy into their own languages. These scholarly writings support not only the well-functioning constitutional review but also constitutional democracy as a whole because they strengthen the bases of democratic thought and attitudes in civil society.¹⁷¹

Moreover, scholars have the professional responsibility to direct and restrict judges’ interpretation of the Constitution by way of their criticisms, arguments, and examples. Though the process of constitutional interpretation by judges is restricted by what the framers intended to say in the Constitution and what constitutional integrity requires, judges are not perfect. Tushnet argued that “we want them [judges] to enforce constitutional rights, but they can get those rights wrong.”¹⁷² Thus, the court may make a bad decision as any other human institutions such as the legislature and the executive. A bad decision is not made because the court has the power of judicial review, but because it adopts a poor conception on a constitutional moral principle as in *Bowers*, and *Olmstead*. According to Dworkin, “the vice of bad decisions is bad argument and bad conviction; all we can do about those bad decisions is to point out how and where the arguments are bad.”¹⁷³ No procedure can guarantee that the judges choose the best conception in each case.

Legal scholars should not only criticize the bad judgments of the court but also admire the good ones, which will show students, lawyers and judges how strong the judgments are and will encourage them to think the issues more deeply. This is an important relationship between lawyers and legal scholars. In addition, scholarly writing is helpful for the ordinary people and journalists. Journalists often write about the conclusions of the judgment, but they rarely talk about the reasoning. The rule of law is about both the conclusion of the judicial judgment and the reasoning. Scholars who

¹⁷⁰ Rawls, *Lectures on the History of Political Philosophy*, 6.

¹⁷¹ Ibid., 7.

¹⁷² Tushnet, *Taking the Constitution Away from the Courts*, 96.

¹⁷³ Dworkin, *Freedom’s Law*, 10.

have time to research judgments have to show which are good so that the ordinary people and journalists can understand them. Moreover, when the court makes the correct judgments against strong political interests that may disagree, scholars need to support the judgment by their writings. In this way, scholars contribute to the rule of law.

This section has argued that judges need to look at the judgments of foreign courts when deciding similar issues. Legal scholars can help judges and lawyers by translating the best of foreign judgments because reading the foreign judgments may be difficult for judges and lawyers due to the busy work and the language barriers. If scholars of new democratic polities introduce foreign constitutional case law in their own language, then law students, lawyers and judges will learn how the high courts of matured democracies interpret their constitutions and make the well-reasoned judgments, and how the judgments of their own court can be analyzed and improved. As a result, the judicial reasoning and case law would gradually develop in these polities.

The tradition of common law has been thought as a law of judges, so legal scholars have less of a role in the adjudication. However, this tradition has been changing at least in the United States. American scholars analyze conceptions on constitutional moral principles in the judicial decisions, criticize weak arguments, or offer new conceptions, as well as write constitutional casebooks with the analysis. In this way, scholars develop constitutional theories. For example, Dworkin has developed his theory partially by analyzing the liberal decisions of the Supreme Court. Furthermore, constitutional theories may influence judicial decisions. Some American scholars argue that “the debates over constitutional theory have helped to shape the future direction of constitutional decision making as well as the meanings and significance constitutional scholars and others assign to its past.”¹⁷⁴ For example, people, scholars, politicians, and justices have been debating the decision of *Roe vs. Wade*, which acknowledged a women’s right to early abortion.¹⁷⁵ Among other theories, originalism argues against *Roe*, but the moral reading argues in its favor.¹⁷⁶ Upon deciding on the case of *Planned Parenthood*,¹⁷⁷ the Supreme Court could have overruled *Roe* in 1992, but it improved its arguments for the right to early abortion.¹⁷⁸ Constitutional theories also influence foreign courts as Dworkin’s theory has done with the Hungarian Constitutional Court.

¹⁷⁴ Gerhardt et al., *Constitutional Theory*, 1.

¹⁷⁵ *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973)

¹⁷⁶ Dworkin, *Freedom's Law*, 44–129.

¹⁷⁷ Planned Parenthood of South Eastern Pennsylvania et. al. v. Casey 505 U.S. 833 (1992)

¹⁷⁸ Dworkin, *Freedom's Law*, 117–129.

In addition, scholars often write articles on the constitutional issue before and after a judicial decision. For instance, Dworkin wrote several articles on the right to early abortion protected in *Roe* before the Supreme Court decided *Planned Parenthood*.¹⁷⁹ Professors, students, political groups, and other interested citizens also file *amicus curiae* (friend of the court) briefs to the Supreme Court before it decides on controversial cases.

Moreover, American scholars provide necessary information on whether candidates to the Supreme Court are qualified by reviewing and analyzing the political convictions of the candidates. Dworkin points out as follows:

The abstract moral propositions of the Bill of Rights do not enforce themselves, and though the interpretive latitude open to any judge on any constitutional occasion is limited by history and integrity..., a judge's political convictions will in many cases figure in his or her account of which interpretation is the most accurate.¹⁸⁰

Therefore, during the nomination and confirmation of the U.S. justices, scholars like Dworkin writes articles on what moral convictions and interpretation theories the candidates prefer, what they think about controversial cases, and what experience and competence they have.¹⁸¹

The persistent scholarly influence is well known in civil law countries like Germany and Hungary. According to John Henry Merryman, “the teacher-scholar is the real protagonist of the civil law tradition. The civil law is a law of the professors.”¹⁸² The majority of justices of European constitutional courts are law professors. Moreover, the scholarly contribution is evident in constitutional law of Germany. Donald P. Kommers argued as follows:

[The German Constitutional Court] owes much to West Germany’s community of scholars... German commentators form an ever-widening interpretive community organized around a deepening interest in the court’s work. ...the commentators see themselves engaged in a common enterprise with the German Constitutional Court. Their constructive criticism and increasing assertiveness have been stimulated in part by the use

¹⁷⁹ Ibid., 44–129.

¹⁸⁰ Ibid., 263.

¹⁸¹ For example, Dworkin has written on the nominations of Robert Bork, Clarence Thomas, John Roberts, Samuel A. Alito, Sonia Sotomayor and Elena Kagan to the Supreme Court. See Ibid., 263–347; “The Articles Contributed by Ronald Dworkin.”

¹⁸² Merryman and Perez-Perdomo, *The Civil Law Tradition*, 3rd Edition, 56.

and popularity of the court's own dissenting opinions.¹⁸³

The Hungarian Constitutional Court also owes much to scholars. Solyom discussed this point: "Professors of law, who are predominantly in the constitutional court, tend to produce long, theoretically based opinions on a comparative law basis, and have thus provided a channel for assimilating foreign constitutional standards and developing the Constitution into a definite system in the early stage of the transition."¹⁸⁴

The fifth cultural element is civic participation in the constitutional discussion and civic support of democracy. Citizens participate in the constitutional discourse formally and informally. First, the civic participation is formal. Citizens use the court to protect their fundamental rights and make themselves official participants in the judicial procedure by means of the concrete petition in the U.S., the constitutional complaint in Germany or the abstract petition (*actio popularis*) in Hungary and Mongolia. The constitutional review related to the concrete cases is more important than mere abstract review. Second, citizens informally join constitutional discussion before and after the judicial judgment related to fundamental rights. The free media plays an important role here. This kind of informal participation is important though there may be some tension between the judicial independence and the excessive criticism of judicial judgment.

A democracy can exist only when a majority of its citizens support it. According to Rawls, there is a general fact that "an enduring and secure democratic regime, one not divided by bitter doctrinal disputes and hostile social classes, must be willingly and freely supported by at least a substantial majority of its politically active citizens."¹⁸⁵ Otherwise, a democratic regime may collapse. For example, Currie mentioned the Weimar Republic as an example of this collapse:

The Weimer Republic was a democracy without democrats. The voters never managed to agree on a stable parliamentary majority, and when things got really tough they ended up by handing the state over to its enemies. The latter responded naturally enough by abrogating the major features of the Constitution itself.¹⁸⁶

Thus, citizens should be educated so that they understand basic principles of democracy, make judgment on major political issues according to these principles and support these

¹⁸³ Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 57.

¹⁸⁴ Solyom, "The Role of Constitutional Courts in the Transition to Democracy," 136.

¹⁸⁵ Rawls, *Justice as Fairness*, 34.

¹⁸⁶ Currie, *The Constitution of the Federal Republic of Germany*, 7.

principles in spite of their disagreements on particular issues. Citizens respect the judicial judgment, even judgments ruling against them, when the court functions independently and protect fundamental rights in general. There is a correlation between the court that protects these rights and the civil respect of that court.¹⁸⁷ In places where such correlations exist, citizens tend to support the constitutional review and democracy in general.

An important feature of constitutional interpretation by judges of legislation in general is its educational role. In democracies like the U.S., Germany, and Hungary, judges have the power to say final answers on important questions of political morality, and their answers and its reasons are often so controversial that politicians and citizens are divided on them and continually discuss. In this process of discussion, citizens learn fundamental values of democracy. Rawls described the educational role of constitutional review:

Citizens acquire an understanding of the public political culture and its traditions of interpreting basic constitutional values. They do so by attending to how these values are interpreted by judges in important constitutional cases and reaffirmed by political parties. If disputed judicial decisions - call forth deliberative political discussion in the course of which their merits are reasonably debated in terms of constitutional principles, then even these disputed decisions, by drawing citizens into public debate, may serve a vital educational role.¹⁸⁸

Constitutional review and other institutions of democracy have their own educational role, but they are insufficient. As Dworkin suggested, an effective mechanism could be to make a Contemporary Politics course a part of every high school curriculum.¹⁸⁹ This course could include the most critical political controversies related to certain fundamental rights and the different interpretations of these rights. In a way suitable for them, students could study political ideas and principles developed by philosophers such as Locke, Kant, Mill and Rawls, and learn to apply them in deciding political issues of the day. If students disagreed with any of judicial judgments like the one that rejected the right to die, they would be challenged to say their reasons. Citizens who participate in a deliberative discussion on political issues would support the well-

¹⁸⁷ Kommers, "The Federal Constitutional Court in the German Political System," 489; Orkeny and Scheppele, "Rules of Law: The Complexity of Legality in Hungary," 61.

¹⁸⁸ Rawls, *Justice as Fairness*, 146.

¹⁸⁹ Dworkin, *Is Democracy Possible Here?*, 148–150.

reasoned judgments of the court and basic principles of democracy.

Conclusion

The institutional improvement of the constitutional court is important, but it is not enough for protecting fundamental rights and other principles of the Constitution. Based on American constitutional law, Chapter 4, thus, argues that a court doing constitutional review can protect these rights and principles when it provides reasoned judgments and proper interpretation of the Constitution. The court interprets the Constitution properly when it uses a method of constitutional interpretation such as the moral reading practiced by the U.S. Supreme Court and explained by Dworkin. According to this method, the judges should make the best interpretation of abstract moral principles such as the fundamental rights in the Constitution, but their interpretations are limited by the constitutional text, the basic structure of the Constitution and the mainstream interpretations in case law. The method of moral reading is better than other methods such as strict constructionism and originalism. Successful constitutional and international courts in Europe also apply the moral reading of their constitutions and human rights conventions regardless of difference in their institutional designs. Moreover, the Hungarian Constitutional Court not only has good guarantees of independence and qualified justices but also uses this method, so it is relatively successful. As with the Hungarian court, the *Tsets* of Mongolia can make the moral reading of the Constitution even through its current *actio popularis*, and if possible, it would do much better if it were allowed to exercise the classic complaint procedure. The next chapter will argue that the *Tsets* can use the moral reading for better protection of fundamental rights just like the courts in the U.S. and Europe do. Chapter 4 has discussed the five cultural elements important to the moral reading and constitutionalism in general, and Chapter 5 also will examine each of these elements in the Mongolian constitutional politics.

Chapter 5

Constitutional Interpretation in Mongolia

The court should always provide a reasoned decision and apply an appropriate method to interpret the Constitution in a constitutional democracy. Most of decisions of the Mongolian *Tsets* lack the reasons or apply methods similar to the strict constructionism or originalism, which weaken the protection of fundamental rights and freedoms. The *Tsets* can improve its constitutional interpretation and constitutionalism if it always delivers reasoned decisions based on a method similar to the moral reading as courts do in other democracies. A few decisions of the *Tsets* are well reasoned, and the roots of the moral reading of the Constitution exist in the constitutional jurisprudence of Mongolia.

First, this chapter defines the patterns in the decisions of the *Tsets* and describes a standard form for analyzing constitutional cases. Second, this chapter makes a detailed analysis of four selected cases in order to show and evaluate the reasoning and the method of constitutional interpretation by this court. Third, this chapter draws general conclusions concerning the interpretation of the Mongolian Constitution based on the case analysis and case law in general. Fourth, this chapter defines the elements of culture crucial to the moral reading and constitutionalism and discusses the ways to improve them in Mongolia.

5.1. Case method in constitutional law

The criteria of selecting cases decided by the *Tsets* and the approach of study about these cases are important. This section illustrates why Mongolian constitutional case

law should be examined, how this book chooses the cases to be analyzed, what patterns the judgments of the *Tsets* has, and what standard form is efficient and logical for the scholarly analysis of constitutional cases.

Mongolian constitutional case law is worth researching because the number of the *Tsets* decisions has been increasing (*see Appendix 2*) and these decisions have a vital impact on the lives of individual citizens and the culture of the rule of law. By submitting petitions or notifications to this court, citizens challenge the constitutionality of almost all decisions on important political issues such as mining, elections, legislative power, and fundamental rights. The court has received more than 1000 petitions and notifications from citizens and a few requests from high-ranking officials and organizations since 1992.¹ The *Tsets* through the sessions of its middle and grand panels has decided 130 cases and made more than 160 decisions as of 2011. The Court has found unconstitutionality of legislation in many of these cases. *Tsets'* invalidations or validations of legislation and other acts have practical impacts on the political life.

A selection of cases is necessary because analysis of all cases in a single book would be difficult. The following four cases are selected according to the criterion that issues in the cases are important for strengthening constitutionalism: (1) the *Nyamdorj Case I, II* (2007), (2) the *Constituency Grant Case* (2007), (3) the *Dashdendev Case* (1993), and (4) the *Suffrage Case* (1993). These cases remain essential for safeguarding the rule of law, protecting fundamental rights, and improving the democratic process. The *Nyamdorj Case I, II* (2007) and *Constituency Grant Case* (2007) are selected as exemplary cases because the court decided politically significant issues against the majority institutions (the *SGKh*) with good reasoning. The *Dashdendev Case* (1993) and *Suffrage Case* (1993) are selected not only because they concern the protection of certain fundamental rights, but also because they show the poor quality of the moral reading by the *Tsets*. In these two latter cases, the *Tsets* refused to protect fundamental rights at stake by offering poor reasoning and failing to apply the moral reading to the Constitution. Section 5.2 analyzes these four cases in detail. Section 5.3 discusses commonalities in the *Tsets* judgments on not only these four cases but also others. Section 5.2 does not discuss cases whose issues are not politically important, while Section 5.3 offers general conclusions on these and other cases. The selection of four cases for detailed analysis does not mean that there are no other important cases.

¹ Byambadorj J., “Mongol Ulsiin Undsen Khuuliin Khyanalt: Tuluv Baidal, Tsaashdiin Khandlaga,” 17.

The decisions of the *Tsets* have a consistent pattern of writing. The typical decision starts with a brief statement of the issue (whether a certain clause of a statute violates a related provision of the Constitution); proceeds with a comprehensive presentation of the arguments of both sides, first on behalf of the petitioner or the requester, and then on behalf of the respondent, mostly the State Great *Khural* (the *SGKh*); continues with the court's own reasoning on the merits; and ends with the court's conclusion. This pattern is similar but not the same as the decision making pattern of the German Constitutional Court.² The reasoning part in a Mongolian decision is short in most of the cases although the reasoning part in a German decision is long. The decisions of the U.S. Supreme Court are full of reasoning and analysis of facts and laws. The pattern of the *Tsets* decisions is not suitable for scholarly analysis of a case since it does not discuss the background, the relevant issue, and the significance.

In order to systematically analyze four selected cases, the book adopts a standard form of preparing a “brief” (summary) of constitutional case, which American law professors, students and lawyers often use to deepen understanding and refresh memories. According to American scholars, the standard form of briefing requires defining facts (the context), issue, holding, reasoning, concurrences and dissents, and significance in each case.³ This book uses this standard form with few changes that reflect the Mongolian context. Section 5.2 identifies the following six elements of each of selected cases: (1) title, (2) background, (3) issue, (4) holding, (5) reasoning and (6) significance.

1. Title. This element includes the title of the case, the name of the court as well as the name, the number and the date of the *Tsets* judgment. Mongolian constitutional cases include the date and number of the case and a vague description of issue (the name of the statute and numbers of statutory provisions) at the beginning of each decision. However, the Mongolian decision lack official titles unlike American cases (for example, *Brown v. Board of Education* (1954)) and as with German cases.⁴ Mongolian researchers and lawyers seldom use titles. Unlike a German decision and as with the American one, the Mongolian decision gives explicitly names of the individual citizens who have submitted petitions or notifications and names of authorities who have submitted requests.⁵ Thus, this book uses titles for each selected case in the

² Kimmers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, xvii–xviii.

³ Murphy et al., *American Constitutional Interpretation*, 28–31.

⁴ Kimmers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, xvii–xviii.

⁵ For that a German decision lacked names of the individual citizens who have submitted complaints to

Mongolian context, following the American practice. Cases in this book are given names for identification. Depending on the context of each case, the titles illustrate the petitioner or the requester, issues, official, or institution. The case title is not only convenient for the writers but also helpful for readers to remember the case. If just case number is referred to, when a lot of cases are discussed, the writing becomes complex and confusing.

2. Background. Readers, particularly foreigners, need background information of Mongolian constitutional politics. The background of a constitutional case aims to illustrate governmental policy (or practice) and the constitutional right of the individual (or other constitutional provision) at stake. The background answers questions on the contents of the policy and the constitutional provisions at stake, the related terms of statutes, regulations, executive orders, or constitutional clauses, and the nature of conflict between the policy and constitutional provisions.⁶ The background also describes relevant facts that help make sense of the conflict. Almost all Mongolian constitutional cases are abstract unlike American cases, so they have no particular facts. However, when the facts are available, they are defined in this book. Another background question is who appeals to the *Tsets*, whether a citizen submits a petition or notification or whether an official or an institution submits a request. Ordinary citizens, lawyers, legal scholars, the Supreme Court, the Prosecutor General, the President, and MPs mostly appeal to the *Tsets*.

3. Issue. The issue of the case addresses the fundamental question or questions of constitutional meaning the case represents and the *Tsets* is asked to resolve.

4. Holding. The holding replies to questions concerning the legal rule or principle that the *Tsets* announced or regarding the answer the *Tsets* offered to the constitutional question (the issue) raised in the cases. The holding refers to the conclusion part of the decision by the *Tsets*.

5. Reasoning. The reasoning of a judicial opinion answers the questions as to what interpretation method and supportive justifications are employed, which considerations are emphasized, and which put aside. In short, the reasoning shows the way the opinion writer transports the reader from the question to the answer. According to Walter F. Murphy and his co-authors, the reasoning of the judgment is “the trickiest part, a

⁶ the Constitutional Court, see Ibid.

⁶ Murphy et al., *American Constitutional Interpretation*, 29.

complex task that requires careful and close analysis of the opinion.”⁷ The reasoning may be based on precedents, on interpretations of constitutional principles or general principles of law, on the originalist understanding of the Constitution, on the strict constructionist reading of the constitutional text, or on combination of two or more of these reasons. Since the Law on the Constitutional *Tsets* does not allow individual judges to publish concurring and dissenting opinions, there is only one opinion offered by the *Tsets* and mainly written by the judge reporting the case. If the reasoning of a judgment is short, the whole reasoning will be translated into English. If the reasoning is long, then it will be summarized and the important points will be illustrated through the case analysis.

6. Significance. The significance of the case responds to questions regarding the general constitutional principle or rule for which the case stands and regarding the contribution that the case makes to the understanding of the Constitution. Moreover, the part on significance critically comments on the case concerned and evaluates comments given by other scholars if available.

5.2. Selected constitutional cases

5.2.1. Nyamdorj Cases I and II (2007)

1. Title. Lamjav D. et al., v. Nyamdorj Ts., Chairperson of the *SGKh*, the *Tsets*, Dugnelt 4, March 2, 2007 (*Nyamdorj Case I*); Lkhagvajav B. et al., v. Nyamdorj Ts., Chairperson of the *SGKh*, the *Tsets*, Dugnelt 6, May 23, 2007 (*Nyamdorj Case II*).⁸

2. Background. The *Nyamdorj Cases I and II* concerned the final edit and ratification stages in the legislative process. The *SGKh* Resolution on Parliamentary Procedure (the *SGKh* Procedure) described the procedure of making, checking, and signing the final edit of law (and resolutions). After the plenary session of the *SGKh* passed law, the relevant Standing Committee and the Secretariat of the *SGKh* prepared the final edit of law. The secretary general of the *SGKh* Secretariat checked the final edit of law and

⁷ Ibid.

⁸ “English Translation of Nyamdorj Case I”; “English Translation of Nyamdorj Case II.”

submitted it to the chairperson of the *SGKh*. After checking the final edit of law, the chairperson gave the permission to introduce the law into the plenary session of the *SGKh* (the *SGKh* Procedure, art. 51.1.3). While checking the final edit of law, the chairperson and the secretary general might change and correct only the composition, word, order, and structure of laws without changing the content, policy and principles (the *SGKh* Procedure, art. 51.2). After the *SGKh* had approved the final edit of the law and gave the permission to sign it, the chairperson had to sign the law within three days (the *SGKh* Procedure, art. 51.4).

Nyamdorj J., Chairperson of the *SGKh*, changed and corrected the following four laws after the *SGKh*'s approval of their final edits: the Anti-corruption Law, the Mineral Law, the Law on Value-added Tax and the Law on Corporate Income Tax. He failed to present his changes and corrections of these four laws to the *SGKh*, and he ratified (signed) them only after the due date had passed. For example, Nyamdorj signed the Anti-corruption Law on September 8, 2006, and the Mineral Law on August 5, 2006 even though he had been supposed to sign them by July 25 because final edits of these two laws were introduced into the plenary session of the *SGKh* on July 20, 2006 and the chairperson was obliged to sign laws within three days after the *SGK*'s approval of their final edits. The chairperson made many changes and corrections on not only the composition, word, order, and structure but also the content, policy and principle of these two laws. For instance, according to the final edit of the Anti-corruption Law introduced into the plenary session of the *SGKh*, the *SGKh* appointed the head and the vice-head of the Anti-Corruption Agency upon the nomination of them by the President. According to the edit changed by Nyamdorj, the *SGKh* appointed the head and the vice-head of this agency upon the nomination of them by the Chairperson of the *SGKh*. Nyamdorj also abolished the objective to protect the field of exploration and the vicinity of mining claim from the objectives of the Mineral Law.

[However,] the subject matter of the dispute was not about what changes were introduced but about the fact that [Nyamdorj] did not present the edits to SGH [the *SGKh*], and he signed laws without permission of SGH in breach of provision 51.1.3 [of the *SGKh* Procedure]. This provision was a regulation, which protected the lawmaking authority of peoples' representatives.⁹

In *Nyamdorj I case*, two groups of citizens submitted notifications on the above-

⁹ “English Translation of Nyamdorj Case II,” 8.

mentioned failures and misconducts by Chairperson Nyamdorj to the *Tsets*. Lamjav D. (framer) and Burmaa R. (the future candidate from Democratic Party in the 2008 *SGKh* election) submitted a notification on the Anti-Corruption Law. Prof. Byambaa J. (former constitutional judge), Khurts Ch., Avirmed S., Tsog L. (framer), and Bold P. submitted a notification on the Mineral Law. In the *Nyamdorj II case*, two groups of citizens submitted separate notifications. Lkhagvajav B. submitted a notification on Law on Value-added Tax and Law on Corporate Income Tax, and the Law on Repeal of Law. Lamjav D. and Burmaa R. also submitted a notification on the removal of Nyamdorj in this case.

Citizens claimed that by changing and correcting final edits of the four laws, which had been finally approved by the *SGKh*, Nyamdorj violated the following four articles of the Constitution: the legislative power shall be vested solely in the *SGKh* (art. 20); the *SGKh* shall exercise the exclusive power to enact and amend laws (art. 25.1); basic principles of the State shall be democracy and respect for law (art. 2); and activities of all organizations and citizens shall be in full of conformity with the Constitution (art. 70.1).

Chairperson Nyamdorj remains one of the influential leaders in the MPRP (the MPP), and he has been a MP since 1992, being appointed twice as Minister of Justice (2000-2004 and 2008-2012). Nyamdorj's main argument for editing laws and signing them without the approval of the *SGKh* was as follows:

There isn't time for editing the laws and therefore I have obtained such authority from SGH. Under the condition that I will not change content, that editing will affect only style, language, composition and sequence and obtained permission to ratify with the consent of 57 MPs present at session.¹⁰

In 2006, Nyamdorj edited and signed Anti-Corruption Law and Mineral Law without presenting them to the *SGKh*, and these two laws were officially published without the final approval of the *SGKh*. However, after citizens submitted notifications concerning the constitutionality of edits and signs by Nyamdorj, these two laws, which had already been in force, were presented to and approved by the *SGKh* on February 7, 2007. Through this presentation, the *SGKh* violated its own procedure that required the presentation of laws to the *SGKh* before their publication and enforcement.

¹⁰ Ibid., 10.

3. *Issue.* There were two main questions in *Nyamdorj Case*. The first question was whether Chairperson Nyamdorj had the power to change the final edit of law, which had already been approved by the *SGKh*, and to sign that law without permission of the *SGKh*. The answer to this question depends on the meanings of the principle to respect law, the legislative power of the *SGKh*, and the supremacy of the Constitution. If the chairperson did not have the power to change and sign laws in such a way, then the second question would be whether Nyamdorj's change and signature were a ground for his removal from the position of chairperson.

4. *Holding.* For the first question, the *Tsets* in *Nyamdorj Case I* and *II* ruled that Chairperson Nyamdorj violated the legislative power of the *SGKh* (Const. art. 20 and 25.1) and the principle to respect law and democracy (Const. art. 1.2), but it said that he did not violate the supremacy of the Constitution (Const. art. 70.1). For the second question, the court in *Nyamdorj Case II* announced that these violations of the Constitution by Nyamdorj were the ground for removing him from his position as the chairperson of the *SGKh*.

5. *Reasoning.* The *Tsets* collected evidences that Chairperson Nyamdorj failed to sign the four laws by the due time (within three days). Furthermore, he changed contents, policies, and principles of these laws whose final edits were already introduced into the *SGKh*, and he signed these laws without the permission of the *SGKh*. These acts by Nyamdorj were a violation of the *SGKh* Procedure and thus a violation of the legal provision that requires the legislative activities to follow this procedure. Thus, Nyamdorj breached the principles of democracy and respect for the law and the legislative power of the *SGKh*.

In defense of his acts, Chairperson Nyamdorj claimed that he had received permission for the continued editing of laws after final edits of law were presented to the *SGKh*. However, the *Tsets* refuted the legitimacy of this claim by giving two reasons:

[This kind of permission] is not regulated in the Law on the State Great *Khural* and in the legislative procedure of the State Great *Khural*... [1] The universally recognized principle of the *Rechtsstaat* requires that any state organization and any official be prohibited to do what is not permitted by law. The explanation of Chairperson Nyamdorj that MPs gave him a permission to edit laws after their final edits have been heard and approved by the *SGKh* and the fact that he ratified [signed] laws without presenting additional edits to *SGKh* are inconsistent with the above mentioned principle [of the *Rechtsstaat*]. [2] While Chairperson Nyamdorj claims that he acted upon permission of *SGKh*, the permission

does not satisfy the requirements that the decision of the State Great *Khural* should be in the form of legal act, and that it should not be inconsistent with other relevant legal acts.¹¹

In *Nyamdorj Case I*, the *Tsets* failed to decide whether there is a ground for removing Nyamdorj from his position as the chairperson of the *SGKh* by denying the citizen's right to submit a petition on the removal of high-ranking officials. This court said as follows: "the Constitutional *Tsets* makes a conclusion whether the ground for the removal of the President, the Chairperson of the State Great *Khural*, and the Prime Minister existed at the request of the appropriate organizations and officials. Thus, it is impossible to decide the citizens' request on this issue."¹² However, the *Tsets* in *Nyamdorj Case II* ruled that the fact that Nyamdorj violated the Constitution and the legislation was a ground for removing him. According to this court, "the fact that the Chairperson of *SGKh* Nyamdorj Ts. edited laws after hearing and approval of final edits of law, encroaching on the lawful authority of the State Great *Khural* and breaching the Constitution, justifies grounds for his removal."¹³ Concerning the supremacy of the Constitution, the *Tsets* just said that no reason has been found for showing that this principle was violated.

6. Significance. The *Tsets* reasoning in *Nyamdorj Case I* was against the vertical integrity of constitutional law. The Constitution and the statutes had no restriction on the content of the citizen's right to notification. In its earlier judgments, the *Tsets* explicitly recognized the citizen's right to submit a notification to the *Tsets* on any constitutional issues including whether the ground for the removal of the high-ranking officials existed or not.¹⁴ Nevertheless, the *Tsets* in *Nyamdorj Case I* ignored the Constitution, the statutes, and the precedents without any reason and ruled that the citizen had no right to make a notification on whether the ground for the removal of the chairperson of the *SGKh* existed. The petitioners immediately criticized this poor ruling.¹⁵ After receiving several more notifications, the *Tsets* in *Nyamdorj Case II* found the ground for removing Nyamdorj from his position as a chairperson, but it did not explain this inconsistent reasoning on the two cases.

However, the *Nyamdorj Case* stands as one of Mongolia's clearest proclamations of

¹¹ *Tsets*, May 23 2007, Dugnelt No. 6.

¹² *Tsets*, March 2 2007, Dugnelt No. 3.

¹³ *Tsets*, May 23 2007, Dugnelt No. 6.

¹⁴ *Tsets*, Jan. 18, 1995, Dugnelt No. 2; *Tsets*, Dec. 7, 1995, Dugnelt No. 4.

¹⁵ Lamjav D., "Undsen Khuuliar Irgend Olgogdson Negen Erkhiig Semkhen Khuraaj Avakhiig Oroldson Bain."

the *Rechtsstaat* (the rule of law). The evidences made it clear that Chairperson Nyamdorj seriously violated the legislative procedure and therefore the respect for law principle. According to the *Tsets*, the “universally recognized” understanding of the *Rechtsstaat* required that government officials could not exercise a power not given by the Constitution and the legislation. If an official exercised a power not given by the Constitution and the legislation, then it would be a ground for his or her removal from office. This understanding of the *Rechtsstaat* was the oldest understanding of the rule of law, which existed in Athena (ancient Greece) where the law bound the government and “citizens were free to operate as they pleased outside what the law prohibited.”¹⁶ The *Tsets* affirmation of this understanding endorsed by Mongolian scholars was a step toward the rule of law.

The *Tsets* judgments here contributed to the culture of the rule of law because they helped the Constitution to trump the unconstitutional exercise of political power in this case. After the *Tsets* judgments, the majority party in the *SGKh*, the MPRP, voted against removing Nyamdorj from the position of chairperson. Nevertheless, Chairperson Nyamdorj resigned due to the pressures from the opposition parties, the people and the media, which generally supported the court judgments. This was the first case in which a high-ranking official resigned because of his unconstitutional acts although there were other *Tsets* judgments finding that the President, members of the *SGKh* and the Procurator General violated the Constitution. Moreover, because this Court incorporated one of the principles of the *Rechtsstaat* into its constitutional case law through the *Nyamdorj Case*, it could incorporate other principles of the *Rechtsstaat* too. The term *Rechtsstaat* is not written in the Constitution though the principle to respect for law, which is equivalent to this term, is included in Article 1.2 of this primary document.

The *Nyamdorj Case* illustrated the poor quality of the law making process and showed the improvement of this process by the *Tsets*. According to the petitioners, statutes edited and signed unconstitutionally by Chairperson Nyamdorj were four of 20 statutes whose final drafts were passed by the *SGKh* within one day.¹⁷ Within one day, the *SGKh* could not have discussed carefully the final drafts of 20 statutes in detail.

¹⁶ Tamanaha, *On The Rule of Law*, 10, 34.

¹⁷ *Tsets*, May 23 2007, Dugnelt No. 6.

5.2.2. Constituency Grant Case (2007)

1. *Title.* Khaidav N. v. the SGKh, the *Tsets*, Dugnelt 2, February 23, 2007; Khaidav N. v. the SGKh, the *Tsets*, Togtool 2, June 22, 2007 (*Constituency Grant Case*)¹⁸

2. *Background.* The SGKh allocated 250 million *tugrugs* (the currency unit of Mongolia) to each MP for the electoral constituency in the 2007 State Budget Law (100 million *tugrugs* in 2006). Justice Munkhgerel defined this constituency grant:

During the discussion of the draft 2007 State Budget Law submitted by the Government of Mongolia, the State Great Hural (Parliament), based on the proposals made by some Members of the Parliament during the plenary session, has received fund expenditure lists from each Member of the Parliament, and allocated equal investments in the amount of 250 million *Tugrug* for each electoral district (19 billion Tugrug in total), and passed the 2007 Budget Law, disguising this grant in the portfolio of budget governors.¹⁹

In December 2006, Khaidav N., a citizen active in challenging constitutionality of the legislation, submitted a notification to the *Tsets*. Khaidav claimed that such distribution of money from the state budget to MPs was in breach of seven clauses of the Constitution (art. 1.2, 3.2, 23.1, 38.2.2, 62.1, 62.2, and 70.1).

3. *Issue.* The central issue was whether the SGKh decision to allocate each MP 250 million *tugrugs* to be spent at his or her discretion was constitutionally justified. The *Constituency Grant Case* concerned six questions: (1) whether the constituency grant was in breach of any of basic principles such as equality and respect for law (Const. art. 1.2); (2) whether this grant was illegal seizure of State power (Const. art. 3.2); (3) whether MPs spending the state budget in their constituencies acted against the idea of a MP as an envoy of the people and against the interests of all the citizens (Const. art. 23.1); (4) whether the constituency grant infringed on the Government's power to work out the State budget, to submit it to the SGKh, and to execute it (Const. art. 38.2.2); (5) whether this grant encroached upon the autonomy of the local self-governing bodies (Const. art. 62); (6) whether the SGKh undermined the principle of constitutional conformity by violating the Constitution (Const. art. 70.1).

¹⁸ For the English summaries of the *Tsets* judgments and hearings, see Munkhgerel D., “Important Decisions of Recent Years”; Batmunkh Sh., “Court Annuls Tg250 Million ‘Constituency Grant’ to MPs.”

¹⁹ Munkhgerel D., “Important Decisions of Recent Years,” 2.

4. *Holding.* The *Tsets* answered affirmatively to five of the six questions but the second question concerning the illegal seizure of state power. Thus, the middle panel session of this court concluded (the first decision in the two-stage procedure) that the constituency grant to MPs was unconstitutional, so the grant was suspended immediately. This conclusion was sent to the *SGKh*, but it was rejected by the *SGKh*. Therefore, the grand panel session of the *Tsets* reconsidered the issue and announced the resolution (the final decision), which affirmed the conclusion of its middle panel and invalidated the unconstitutional regulations.

5. *Reasoning.* The *Tsets* proved that the *SGKh* provided the constituency grant to MPs in the 2007 Budget Law. The public heavily criticized the constituency grants, and the President vetoed the previous constituency grant to MPs in 2006. Thus, the *SGKh* did not use the term “election constituency” in the 2007 Budget Law, but it used the term “investment in local development.” However, the *Tsets* found evidences that “the investment in local development” was actually identical to the constituency grant in substance. This court checked the lists submitted by MPs to the Ministry of Finance. According to a newspaper report, “all the projects enumerated as requiring support from the investment fund were mentioned constituency-wide. According to the *Tsets*, it is natural to conclude that the MPs had approved the budget with constituency-based projects very much in their mind.”²⁰

The *Tsets* supported its decision by citing arguments made by some of the MPs in the *SGKh* sessions and by President Enkhbayar N. in his presidential veto. This court answered each of the six questions.

(1) The court ruled that constituency grant was in breach of fundamental principles of democracy, justice, freedom, equality, national unity and respect for law (Const. art. 1.2). The respect for law was violated since the *SGKh* failed to obey the law making procedure fixed in law. According to the *Tsets*, the principles of equality and justice were also breached because the grant created the unequal conditions, in which the potential candidates and parties would compete with incumbents in the *SGKh* elections.²¹ This court argued as follows:

The principles of justice and equality are violated because there is too much difference in the amounts of costs for building the same objects due to the fact that MPs gave

²⁰ Batmunkh Sh., “Court Annuls Tg250 Million ‘Constituency Grant’ to MPs.”

²¹ See *Tsets*, Feb. 23, 2007, Dugnelt No. 2

separately their individual opinions concerning the costs of objects. For example, ...the same office building of *Bagh* governor costs 20 million *tugrugs* in Kherlen *Soum*, Dornod *Aimag*, 50 million *tugrugs* in Shaamar *Soum*, Selenge *Aimag*, and 70 million *tugrugs* in Buren *Soum*, Tuv *Aimag*... some MPs plan to spend the state budget for repairing the privatized apartments of their electors, for instance, in Songinokhairkhan District and in Bayangol District, Ulaanbaatar.²²

(2) The *Tsets* simply said that the constituency grant to each MP was not the illegal seizure of state power (Const. art. 3.2). However, this court did not give reasons for this ruling (the lack of reasoning).

(3) The *Tsets* ruled that MPs spending the state budget in their constituencies acted against the idea of an MP as an envoy of the people and against the interests of all the citizens and the state (Const. art. 23.1):

According to the Election Law effective at the time, the territory of Mongolia has been divided into 76 electoral districts, where each member was elected from one mandate electorate. Therefore, it is plausible to conclude that by allocating 250 million Tugrug to each member's electoral districts, the members protected the parochial interests of own electoral district.²³

(4) According to the *Tsets*, the constituency grant to MPs infringed on the Government's power to work out the State budget, to submit it to the *SGKh*, and to execute it (Const. art. 38.2.2). This grant also violated article 7.1.3 of the Law on Public Sector Management and Finance, which gave the Government "the power to prepare the budget based on each year's budget statement consistent with the agenda of the Government." According to Justice Munkhgerel, the *SGKh* has increased "the 2007 State budget by 19 billion Tugrug through allocating 250 million tugrugs to each electoral district during discussion of the Draft 2007 Budget even though this grant was not planned in the original Draft 2007 Budget submitted by the Government."²⁴

(5) The *Tsets* argued that the constituency grant encroached upon the autonomy of the local self-governing bodies (Const. art. 62) as follows:

The territory of Mongolia is divided into administrative units...and administration of

²² See *Tsets*, Feb. 23, 2007, Dugnelt No. 2

²³ Munkhgerel D., "Important Decisions of Recent Years," 2.

²⁴ Ibid., 3.

these units is implemented through combining the local self-governing principles with state administration... The local self-governing body, the Citizen's Representative Council, in conformity with the Constitution has the full right to resolve independently the issues pertaining to the social and economic aspects of life on the territory of the given unit. Yet, the State Great *Hural* has disregarded the will of the local public and the official positions of the local representative bodies, and has decided equal grant of funds to parliamentary electoral district based solely on the proposals of the members of Parliament, thereby infringing upon the rights of the local representative bodies and violating respective clauses of the Constitution. It is indisputable that electoral districts are units established for the purpose of Parliamentary elections, and are not administrative units of the national level.²⁵

(6) The *Tsets* ruled that the respective clauses of the *SGKh* decision on the constituency grant breached the principle of constitutional conformity as they violated the Constitution (Const. art. 70.1).

When the *Tsets* found the constituency grant unconstitutional in the 2007 decision, it rejected the precedent-based argument of the *SGKh* without any reason. MP Ochirkhuu, the representative of the *SGKh*, explained why the *SGKh* had done no wrong, citing a 2003 precedent. In 2002, the government passed a resolution that distributed 10 million *tugrugs* to each MP for the investment of their election constituency. Law prof. Mendsaikhan T. challenged this resolution as a citizen by submitting a notification claiming that 10 million *tugrugs* allocated to each MP based on the election constituency violated the Constitution (art. 1.2, 20, 21.2, 23.1, 25, 33.1.2, 38, and 59.1). A constitutional judge reviewed the notification and found no merit. Mendsaikhan appealed the decision of the judge. At the appeal, the *Tsets* in the session of the minor panel of three justices discussed whether or not the decision of the judge was reasonable, and it ruled that the government resolution did not violate the Constitution without providing the reasons.²⁶ This 2003 ruling of the *Tsets* was the basic reason why the *SGKh* later did not accept the 2007 *Tsets* conclusion that found the constituency grant unconstitutional. The *SGKh* argued that the underlying principle remained very much the same even when the sum of money involved might vary. Thus, the *SGKh* asked why the *Tsets* was taking a different view in 2007. However, this court said that the issues in the decisions of 2003 and 2007 were very different and irrelevant without any

²⁵ Ibid., 2.

²⁶ See *Tsets*, Feb. 11, 2003, Magadlal No. 1.

explanation.

6. Significance. The judgments of the *Tsets* in this case represented good reasoning and adoption of better conceptions on abstract moral principles. The general principles, for which *Constituency Grant Case* (2007) stood, were procedural and substantive. The first principle was procedural. Regardless of whether the grant violated the substantive constitutional principles, the constituency grant was unconstitutional because the *SGKh* breached the legal procedure of approving the state budget and thus breached the constitutional principle of respect for law. The second principle was substantive. The constituency grant to each MP was unconstitutional because it violated the following constitutional principles: democracy, justice, and equality; the interests of all the citizens; the Government's power to work out and to execute the governmental budget; and the jurisdiction of local self-governing bodies.

The *Tsets* should have been more explicit about the reasons why it overruled the 2003 judgment. This court failed to explain why it thought that issues in the 2003 case and in the 2007 case were "very different" and "irrelevant." The only differences were who made the decision of the constituency grant and how much money was allocated to the constituency. The government allocated 10 million *tugrugs* to each MP in 2002, and the *SGKh* made a 250 million *tugrugs* constituency grant. However, the substances of the two cases were same because the MPs received and spent the certain amount of money from the state budget in their constituency. The *Tsets*, therefore, had to justify why it overruled the 2003 judgment of its minor panel session rather than just saying two cases were different. The two parties, the petitioners and the *SGKh*, had the right to know why the court thought these cases were different.

The public always criticized the constituency grant that was initiated and supported by the MPRP majority in the *SGKh*. Some MPs of the MPRP attacked the 2007 conclusion of the *Tsets*, saying that it was better to "dissolve" this court. On the other hand, the public widely supported both the conclusion and the resolution of this court. Journalists, scholars, activists of civil movements and some MPs of the opposition party criticized the budget law, arguing that MPs abused their power by spending this money for the 2008 election campaign to have privilege over their competitors. According to an internet-poll conducted by a prestigious newspaper in 2007, 84 percent of participants said "this money was wrong because it was real corruption."²⁷ President Enkhbayar

²⁷ Amarsanaa J., "Political Relevance to Decision of Constitutional Court (*Tsets*) of Mongolia," 11;

N., who initiated the constituency grant for the first time as Prime Minister in 2002, also vetoed the Budget Law in 2007 (as well as in 2006), saying that the grant in this law violated the Constitution, but the *SGKh* overruled the veto.

The *Tsets* invalidated 250 million *tugrugs* grant to each MP in the 2007 judgments, but the enforcement of these judgments was problematic. Although the constituency grant was in force, it was suspended from February 23, 2007 by the conclusion of the middle panel session of the court, and it was invalidated by the resolution of the grand panel session on June 22, 2007. According to a newspaper report, “with no figures available for how much has already been disbursed for which project recommended by which Member of Parliament, it is not clear how the Government will meet the situation.”²⁸ In 2007, the *Tsets* did what it could do by declaring the grant unconstitutional in its judgments. The problem of enforcement was not legal but cultural. The opposition party did not strongly oppose the initial grant to MPs at the first place in 2003, and it even supported this grant after sharing some posts in the coalition government with the MPRP since 2004. In this context, the *SGKh* led by the MPRP reintroduced the constituency grant to the MPs in 2007 and later.

The *SGKh* reenacted some constituency grants to each MP in the 2009 Budget Law against the *Tsets*’ valid judgments and widespread criticism. The amount of grant to each MP has increased to one billion *tugrugs*, 100 times larger than that in 2003. In 2009, new President Elbegdorj Ts. vetoed this part of the Budget Law, but the *SGKh* overruled the veto. Two citizens, Khaidav (the petitioner in the *2007 Constituency Grant Case*) and Munkhuu B., submitted notifications to the *Tsets* separately against the constituency grant. This court did not make any official hearing. On the other hand, on January 29, 2010, Chief Justice of the *Tsets* Byambadorj J. sent an official letter to the *SGKh* that asked the *SGKh* to correct its unconstitutional budget grant to the constituency according to the 2007 *Tsets* judgments. The *SGKh* never officially responded to this letter though it planned to discuss about it. When the *SGKh* amended the 2009 Budget Law, it did not touch the core of the constituency grant. Surprisingly, in an interview, the chief justice announced that the *SGKh* corrected its unconstitutional provisions because the government submitted the same proposal of constituency grant to MPs.²⁹ Nonetheless, this grant was unconstitutional even if the *SGKh* corrected the

²⁸“Odoogiin Sanal Asuulgiin Ur Dun 1.”

²⁸ Batmunkh Sh., “Court Annuls Tg250 Million ‘Constituency Grant’ to MPs.”

²⁹ Byambadorj J., “Yaritsлага: Songuuliin Margaaniig Shuukh Shiidverledeg Togoltsoo.”

errors by following the law-making procedure because the grant still violated substantive principles. The *Tsets* in the *Constituency Grant Case* (2007) found that the grant was in violation of legal procedure and substantive principles such as equality and justice in the Constitution.

5.2.3. Dashdendev Case (1994)

1. Title. D. Dashdendev et al v. the SGKh, the *Tsets*, Dugnelt 2, January 12, 1994 (*Dashdendev Case*).

2. Background. The Mongolian Empire was known by historians for its tolerance for different religions such as Nestorian Christianity, Islam, Buddhism and Shamanism in the 13th century.³⁰ Buddhism was introduced several times in Mongolia. Tibetan Buddhism was introduced in the 16th century, and it became the main religion along with the Shamanism, the indigenous religious faith. During the socialist period, freedom of religion was denied to Mongolian citizens. Almost all Buddhist monasteries were destroyed, and most monks were killed, deported or forced to become an atheist during the communist purges. Even though freedom of religion was included in the socialist Constitution of 1960, religious activity was barely tolerated by the government and the communist party (the MPRP). The government ended bans on all religious practices in 1990, and the 1992 Constitution guaranteed freedom of religion for the first time. Since then, Buddhist, Islamic and Shamanist activities increased, and new religions such as Christianity were introduced. Around 90 percent of the 2.7 million people are Buddhist (Tibetan Lamaist), around 5 percent of the population (the ethnic Kazakhs) are Muslim, and more than 4 percent of the population are Christian.³¹ Mongolian citizens have been enjoying freedom of religion for two decades.

The SGKh led by the MPRP majority passed the Law on the Relationship between the State and the Church-Monastery in 1993 (the LRSCM). Just after the LRSCM was enacted, three petitions were submitted to the *Tsets*, claiming that most clauses of this law discriminated against religious minorities and foreigners and gave a preference to

³⁰ Lundendorj N., *Tur, erkh zuin setgelgeenii khugjiliin chig khandлага*, 204; Baabar, *Mongolchuud*, 2006, 1:60–62; Sabloff, “Why Mongolia?,” 30; Weatherford, *Genghis Khan and the Making of the Modern World*.

³¹ 2009 Report on International Religious Freedom - Mongolia.

Buddhism. MPs Gonchigdorj R. and Lamjav D., two members of the opposition party (the Social Democratic Party), submitted the first petition. Dashdendev D. submitted the next petition. This case was called *Dashdendev* because Dashdendev was one of the Christian believers, who were adversely affected by the LRSCM. According to Dashdendev, this law restricted freedom of Christians and discriminated against them. Altanchimeg N. and Tserendash B. submitted the third petition.

Petitioners claimed that eleven clauses of the LRSCM violated the Constitution, and the first eight of them are as follows: teaching, instructing and advertising of religions except Buddhism, Islam, and Shamanism are prohibited outside of their churches and monasteries (art. 7.6); those who want to establish churches-monasteries of Buddhism or Islam shall take an official conclusion of the central body of that religion in Mongolia (art. 9.2); foreign citizens and stateless persons are prohibited from conducting religious advertisement unless explicitly invited to Mongolia for that purpose at the request of a religious organization (art. 12.2); in order to esteem the Mongolian people's unity and the historical tradition of civilization, the State shall respect the principal position of Buddhism in Mongolia, but this shall not be obstacles for the citizens to follow other religions (art. 4.2); religious activities organized outside the country to introduce foreign religions within Mongolia are prohibited (art. 4.7); the state shall control and regulate the absolute number of lamas and priests, and the locations of churches and monasteries (art. 4.8); churches and monasteries shall be in full conformity with their internal rules about the tradition of that religion, and they are prohibited from doing activities that clash with tradition and custom of the Mongolian people (art. 7.5); the *Khurals* of the Representatives of the citizens in *aimag* and the capital shall check the citizens' applications for establishing the church and the monastery and their charters, and decide whether to grant the permission for the establishment (art. 9.1). The central administrative organization in charge of the legal affairs (the Ministry of Justice) shall register the church and the monastery based on the permission granted.

The petitioners argued that the eight clauses of the LRSCM (just listed above) violated the five articles of the Constitution (art. 16.15, 18.5, 14.2, 10.3, and 1.2) without distinguishing which clause of the LRSCM violated which article of the Constitution. Petitioners also claimed that these eight clauses violated article 18 of the ICCPR, which stated the following:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching...
2. No one shall be subject to coercion, which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Moreover, petitioners challenged article 8.2 of the LRSCM, which stated that religious instructions and meetings were prohibited in state-owned schools and other premises and that this provision was irrelevant to scientific instructions in the religious culture and knowledge. According to petitioners, article 8.2 of the LRSCM violated “freedom of thought, expression and assembly” protected in article 16.16 of the Constitution.

Petitioners also challenged two articles of the LRSCM, which defined the penalties for violations of some of clauses above mentioned. These two articles were as follows: if a breach of articles 3.5, 4.3, or 12.2 of the LRSCM is not subject to the Criminal Code, the court shall impose a fine of up to 15,000 *tugrugs* (art. 13.2); if a breach of articles 3.2, 3.3, 4.6, 4.7, 7.5, 7.6, 7.7, or 8.2 is not subject to the Criminal Code, the court shall impose a fine of 5,000 to 25,000 *tugrugs* (art. 13.3). According to petitioners, these two articles of the LRSCM violated article 19.1 of the Constitution, which defines the State’s responsibility to the citizens for the creation of economic, social, legal and other guarantees ensuring human rights and freedoms.

The *Tsets* received letters from institutions, officials, and citizens, and it cited these letters in its decision. The coordinator of the Presidential Council for Religious Affairs, the Gandan Monastery (the Mongolian Center of Buddhism) and 70 citizens sent letters to the Court claiming that the challenged provisions of the 1993 LRSCM were consistent with the Constitution. On the other hand, MP Elbegdorj Ts., member of the opposition party (framer, the former Prime Minister and the current President), and four citizens submitted letters arguing that many provisions of the LRSCM infringed on freedom of religion.

3. *Issue.* The petitioners claimed that 11 clauses of the LRSCM violated the Constitution and the ICCPR, but they did not explain these violations in detail. The following eleven issues existed in the petitions: (1) whether individuals believing in religions except Buddhism, Islam and Shamanism had the right to teach, instruct and advertise their religions outside of their churches and monasteries (the LRSCM, art. 7.6) and whether the prohibition of doing so discriminated against religious minorities; (2) whether individuals had the right to establish churches-monasteries of Buddhism or Islam without an official conclusion of the central body of that religion (the LRSCM, art. 9.2); (3) whether foreign citizens and stateless persons, who were not explicitly invited to Mongolia for the religious purpose at the request of a religious organization, had the right to conduct religious advertisement (the LRSCM, art. 12.2); (4) whether the declaration of the principal position of Buddhism violated religious freedom and equality (the LRSCM, art. 4.2); whether the national unity required the principal position of Buddhism and whether the state organizations and officials could respect the principal position of Buddhism without hindering citizens from following other religions; (5) whether the prohibition of religious activities organized outside the country to introduce foreign religions within Mongolia encroached on religious freedom (the LRSCM, art. 4.7) and whether this clause discriminated against foreigners on the basis of religion; (6) whether the State control and regulation of the absolute number of lamas and priests and the locations of churches and monasteries breached religious freedom and separation between the state and religion (the LRSCM, art. 4.8); (7) whether the churches and monasteries had the right to disobey traditional rules of their own religions (the LRSCM, art. 7.5); (8) whether the churches and monasteries retained the right to do activities that clash with the tradition and custom of the Mongolian people (the LRSCM, art. 7.5); (9) whether the prohibition of religious instructions and meetings in state-owned schools and other premises disregarded freedom of thought, expression, and assembly (the LRSCM, art. 8.2) and what was scientific instruction in the religious culture and knowledge; (10) whether the power of the municipal bodies (in *aimags* and the capital) to give a permission for establishing the church and the monastery and the power of the Ministry of Justice to register the churches and monasteries inhibited freedom of religion (the LRSCM, art. 9.1); (11) whether the penalties (fines) for violations of articles 12.2, 4.7, 7.5, and 7.6 of the LRSCM were consistent with the State's responsibility for ensuring human rights and freedoms (the LRSCM, art. 13.2 and 13.3).

4. *Holding.* The answers to the first three issues (1, 2, and 3) were affirmative. The *Tsets* struck down articles 7.6, 9.2, and 12.2 of the LRSCM because they violated

articles 10.3, 14.2, and 16.15 of the Constitution. However, the answers to the rest of the issues (4, 5, 6, 7, 8, 9, 10, and 11) were negative. The *Tsets* ruled that articles 4.7, 4.8, 7.5, 4.2, 9.1, 8.2, 13.2, and 13.3 of the LRSCM were constitutional.

5. *Reasoning.* The *Tsets* did not make much reasoning in the *Dashdendev Case*. Even the reasoning for issues 1, 2 and 3 was short and simple. The *Tsets* struck down three clauses of the LRSCM, which violated religious freedom and freedom from discrimination on the basis of religion as stated in the Constitution and in the Universal Declaration of Human Rights. This court ruled that article 7.6 of the LRSCM violated “the right to teach, instruct, and advertise religions of believers whose church and monasteries do not exist in Mongolia.” According to the court, article 9.2 of the LRSCM was unconstitutional because it concerned government intrusion into internal affairs of a religious organization. The court said that article 12.2 of the LRSCM violated “the inalienable right to religion” and “the right of foreign citizens and stateless persons - other than those who have come for a religious purpose – to advertise their own religion.”

Concerning issue 4, the *Tsets* ruled that Article 4.2 of the LRSCM was constitutional “because it was a symbolic provision made according to the Preamble of the Constitution to cherish national unity and inherit the traditions of national statehood, history and culture, and Article 9 of the Constitution, which stated that ‘the State shall respect its religions.’” This one complex sentence was the whole explanation on this issue.

Concerning issue 5, the *Tsets* wrote the following one sentence: article 4.7 of the LRSCM did not violate the Constitution and articles 18 and 19.3 of the ICCPR because its content was a restriction of intentionally propagating to Mongolia by any religious sects whose activities are so inhuman that they harm national unity, security, public order, public health, Mongolian people’s historic tradition and custom.

Concerning issues 6, 7, 8, 9, 10 and 11, the *Tsets* said in one sentence that articles 4.8, 7.5, 8.2, 9.1, 13.2, and 13.3 of the LRSCM were constitutional because these articles were included in the scope of regulating the relationship between the State and church-monasteries by law (Const. art. 9.3).

6. *Significance.* The judgment was not immune to criticism from a perspective of the moral reading of the Constitution. In the first three issues (issues 1, 2, and 3), the *Tsets* protected freedom of religion and the right not to be discriminated against. The court’s reasoning for these issues was short, writing just one sentence for each of the three

issues. Nevertheless, the rulings on these three issues were important because the court eventually protected religious freedom of a tiny Christian minority in Mongolia and the autonomy of religious organization from the improper interference of the government. Thanks to these rulings, religious minorities and foreigners enjoyed the right to teach, instruct and advertise their religions, and Buddhists and Muslims enjoyed freedom to set up their churches and monasteries. However, this judgment lacked integrity as it failed to apply the same principles to all the issues in the case. The *Tsets* decided the first three issues by the conceptions of religious freedom and the right not to be discriminated against. These conceptions were applicable to the rest of the issues, but the *Tsets* did not apply them without offering any reason. The consistent application of these conceptions required quashing almost all of the challenged provisions of the LRSCM. Thus, the court horizontally violated the integrity of constitutional law.

The *Tsets* ruling on issue 4, the principal position of Buddhism (the LRSCM, art. 4.2), was not an argument but just a statement because it failed to show the reasoning in support of the conclusion, and it only listed the constitutional provisions and the challenged provision of the LRSCM in one sentence. This statement on issue 4 was an example of the lack of the reasoning. The legal recognition of the principal position of Buddhism discriminated against other religions (Const. art. 14.2), violated the separation between the state and the religion (Const. art. 9.2), and misinterpreted the Constitution (Const. art. 9.1 and the Preamble).

First, the legal recognition of the principal position of Buddhism in society violated the right not to be discriminated against on the basis of religion and the separation between state and religion because it allowed the state to support Buddhism. Though the *Tsets* contended that the declaration of the principal position of state support for Buddhism was symbolic (the meaning was ambiguous), this declaration had substantive outcomes since many activities of the government and the President explicitly supported this religion. The President issued decrees to support the reestablishment of the ancient tradition of worshiping the mountains and the creation of Buddha image.³² Political figures including the President often attend Buddhist and Shamanist ceremonies as a public official, and even some state budget is spent for the religious purposes. According to a local Christian organization, the Ministry of Education, Science, and Culture was also favoring Buddhism by releasing three textbooks about Buddhist

³² Yerunkhiilugchiin Zarilig [the Presidential Decree], No. 110, May 16, 1995; Yerunkhiilugchiin Zarilig, No. 129, May 31, 2007.

history and distributing them to secondary school students.³³ The distribution of religious textbooks was against the principle that prohibits the state institutions from engaging in religious activities (Const. 9.2).

Second, the *Tsets* misinterpreted article 9.1 of the Constitution, which stated that “the state shall respect *its* religion(s),” when it ruled that the principal position of Buddhism was consistent with this clause. The *Tsets* implied that the term “*its* religion(s)” in Article 9 meant only Buddhism. However, this term means all religions that are worshipped in Mongolia. If the term “*its* religion(s)” meant only the Buddhism (with Shamanism), it would discriminate against the minority religions such as Muslim and Christianity and it would make Mongolia a religious state. This reading of Article 9.1 was not intended by the framers because it was denied by constitutional structure and principles such as freedom, equality (Const. art. 1.2), the separation between the state and religion (Const. art. 9.2), equality before the law (Const. art. 14.1), the right not to be discriminated against on the basis of religion (Const. art. 14.2), and religious freedom (Const. art. 16.15). Article 9.1 clearly requires the state to respect equally all religions including Buddhism, Christianity, and Muslim because the religions include not only Buddhism but also any other religion. If the framers intended to mean only Buddhism, they should have explicitly said that the state would respect Buddhism. The framers did not say so because they intended to protect freedom of conscience by repealing the previous socialist system that had denied this freedom and made Marxism the principal ideology of the state.

Third, the Preamble of the Constitution did not justify the principal position of Buddhism. The *Tsets* mistakenly said that the principal position of Buddhism in society was based on the Preamble of the Constitution. By the Preamble, the Mongolian people aimed to defend the national unity, protect equally everyone’s fundamental rights including freedom of religion, and develop a humane, civil and democratic society. The protection of these rights allows people of different religions to coexist peacefully. In contrast, laws and other governmental acts that discriminate against minority religions and give higher status to one religion tend to destroy peace and injure national unity. The following two facts defined by Rawls are valid in any liberal democracy such as Mongolia:

³³ 2009 Report on International Religious Freedom - Mongolia.

[First, there is the fact of reasonable pluralism.] To elaborate, the diversity of religious, philosophical, and moral doctrines found in modern democratic society is not a mere historical condition that may soon pass away; it is a permanent feature of the public culture of democracy... A second and related general fact is that a continuing shared adherence to one comprehensive doctrine [like the Buddhism] can be maintained only by the oppressive use of state power, with all its official crimes and the inevitable brutality and cruelties, followed by the corruption of religion, philosophy, and science.³⁴

If the *Tsets* were to make an interpretation, then it might argue that the idea to “inherit the traditions of national statehood, history and culture” in the preamble legitimize the principal position of the Buddhism because a majority of people have believed the Buddhism for several centuries. However, this argument is not sound. The Mongolian Constitution does not tolerate the dominance of one religion by law because it was made to protect certain individual rights such as equality and freedom no matter how the majority wants to do and no matter how the history was in the past. The Mongolian tradition, history, and culture are important values, but they are inferior to the constitutional principles as a result of the supremacy of the Constitution (Const. art. 70.1). Thus, the Preamble of the Constitution means to inherit only the traditions that are consistent with constitutional principles.

The *Tsets* failed to provide solid reasoning when it upheld constitutionality of the provision that activities organized outside Mongolia to introduce foreign religions was prohibited within the country (the LRSCM, art. 4.7) and ruled that this provision did not violate religious freedom (issue 5). The *Tsets* listed several reasons for restricting freedom of religion without any explanation. This court mentioned national unity, public security, social order, and public health, which could be reasons for restricting fundamental rights widely recognized in international and constitutional laws. The court also mentioned Mongolian people’s historic tradition and custom, which were doubtful reasons for restricting freedom of religion because they protected the religion of the majority and restricted the religions of the minority. Buddhism and Shamanism were closely related to tradition and custom of the Mongolians, an ethnic majority. Other minority religions including Muslim and Christianity were alien to, even conflicting with, the tradition and custom. Thus, article 4.7 of the LRSCM discriminated against citizens believing in religions other than Buddhism and Shamanism. The court ruling

³⁴ Rawls, *Justice as Fairness*, 33–34.

that listed many vague reasons for restricting religious freedom without concrete definitions gave the *SGKh* the power to restrict this freedom. Fortunately, the sanction was minor and was rarely enforced in practice.

In one sentence, the *Tsets* said that articles 4.8, 7.5, 8.2, 9.1, 13.2, and 13.3 of the LRSCM (issues 6, 7, 8, 9, 10 and 11) were constitutional because these articles were adopted according to Article 9.3 of the Constitution, which stated that “the relationship between the State and the Church shall be regulated by law.” Article 9.3 of the Constitution did not allow the *SGKh* to make just any law because the Constitution protected religious freedom (Const. art. 16.15), equality (Const. art. 1.2), and separation between religious and political activities (Const. art. 9.2). Surprisingly, the *Tsets* did not mention these three basic principles in the decision. As a result, the court approved the constitutionality of statutory provisions that violated freedom of religion and the separation principle by allowing the state to decide on internal issues of the religions such as how many monks or priests the churches or the monasteries have, where they are located, and whether they follow their own religious norms. In addition, this law discriminated against non-traditional religions such as Christianity by prohibiting freedom to believe differently from the Mongolian custom and tradition closely connected to Buddhism and Shamanism.

Moreover, when the *Tsets* ruled that these restrictions were within the legislative power to regulate the relations between the State and church, it failed to mention Article 19 of the Constitution. This article declared that constitutional rights in case of a state of emergency or war could be subject to limitation only by a law, but the law could not affect freedom of thought, conscience and religion. According to Article 19 of the Constitution, freedom of thought, conscience and religion should never be violated even in an extreme situation such as state of emergency or war while law might restrict some other rights and freedoms. Thus, this article implies that the priority of freedom of thought, conscience and religion is higher than that of other fundamental rights in terms of statutory restriction. In *Dashdendev Case*, the *Tsets* ruled in favor of constitutionality of restrictions on this freedom without considering its higher priority in the Constitution.

5.2.4. Suffrage Case I (1993)

1. Title. Sergelen U. et al v. the SGKh, the Tsets, Dugnelt 4, Dec. 22, 1993 (*Suffrage Case I*).³⁵

2. Background. The State Small *Khural*, the standing legislature that discussed the draft Constitution and submitted it to the PGKh, passed the 1992 Law on the Election of the SGKh (the 1992 Election Law), which adopted the system of multi-member electoral districts. According to this law, the first election of the SGKh was held in 1992. The MPRP became super majority in the SGKh. The MPRP won 71 of 76 parliamentary seats, and the newly established democratic parties won only five seats even though the MPRP received 56.9 percent of the total votes and other parties got 43.1 percent of votes.³⁶ In 1993, Sergelen U. (with his lawyer Enkhbat A.) and Baasanjav N. submitted abstract petitions challenging the constitutionality of the 1992 Election Law, but they did not seek to dissolve the SGKh.³⁷ Enebish B., an expert in the Secretariat of the SGKh, also submitted an opinion at the request of the constitutional judge.

The petitioners claimed that the 1992 Election Law violated three principles: (1) equal suffrage, (2) free suffrage, and (3) universal suffrage. First, petitioners and the expert of the SGKh Secretariat argued that the 1992 Election Law violated the equal suffrage because it did not include the equal suffrage. Even though the term “equal suffrage” was not mentioned in the Constitution, the absence of the protection of equal suffrage in the 1992 Election Law was alleged to have violated the Constitution according to two arguments. The first argument said that equal suffrage was protected constitutionally because it was included in the UDHR and the ICCPR to which Mongolia was a party. Article 21 of the UDHR said that “the will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote.” Article 25 of the ICCPR also said that every citizen should have the right “to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.” Not the petitioners but Enebish, expert of the SGKh Secretariat,

³⁵ Tsets, Dec. 22, 1993, Dugnelt No. 4.

³⁶ Tsets, Dec. 22, 1993, Dugnelt No. 4.

³⁷ Tsets, Dec. 22, 1993, Dugnelt No. 4.

made the second argument that equal suffrage was constitutionally protected by equality before the law in Article 14.1 of the Constitution. At the time, Enebish said that “the right to be equal is illustrated in articles 21 and 14 of the Constitution.”

Though the claim on equal suffrage was generally abstract, petitioners and the representatives of the *SGKh* had two different understandings. According to petitioners, the condition of equal suffrage would be satisfied when electors voted for the equal number of candidates in each constituency. The petitioners argued as follows:

Mandates of 76 members of the *SGKh* could be distributed into 38 constituencies, and each constituency could have two mandates. Otherwise, they could be distributed into 19 constituencies, and each constituency could have four mandates. However, the State Small *Khural* created 26 constituencies eight of which have two mandates, 12 of which have three mandates and six of which have four mandates, following the administrative and territorial units. Thus, it seems to discriminate against residents on the basis of the territory they live.³⁸

On the other hand, representatives of the *SGKh* argued that equal suffrage was not violated in the 1992 *SGKh* election, and their explanation was as follows:

The following approach is used for the purpose that each electoral mandate [the parliamentary seat] represents approximately similar number of people. There are 1,098,543 people who are over 18. When this number was divided by 76 [the total number of parliamentary seats], the average number of electors for each mandate was 14,457. If we divide the number of electors in a constituency by this average number, the number of mandates for that constituency will be found. The number resulted from this calculation is made into the whole number... Therefore, it is unreasonable to say the condition of equal suffrage is not satisfied because the number of electors for each mandate is approximately the same in all constituencies. In other words, the individual weight of each vote is approximately the same even though the number of mandates and the number of electors are different in constituencies.³⁹

Second, the petitioners argued that two articles of the 1992 Election Law violated free suffrage: (1) article 33.3 that “surnames and first names of candidates, which are classified according to the party and coalition they belong, shall be written into the

³⁸ Tsets, Dec. 22, 1993, Dugnelt No. 4.

³⁹ Tsets, Dec. 22, 1993, Dugnelt No. 4.

voting sheet in the order of applications submitted by parties and coalitions;” and (2) article 35.2 that “the elector shall circle the numbers of names of candidates as many as the numbers of mandates... listed in the voting sheet.” Petitioners claimed that due to Article 35.2, “an elector has to give votes to the candidates that she does not want to elect.”⁴⁰ Therefore, petitioners said that Article 35.2 of the 1992 Election Law violated the free suffrage, the right to be equal before the law and the right to elect and to be elected (Const. art. 21.2, 14.2 and 16.9). Enebish B., the expert of the SGKh Secretariat, admitted the claim of violation of free suffrage, saying article 35.2 of the 1992 Election Law forcibly hampered electors’ opportunity to freely express their votes.

Third, the petitioners argued that the 1992 Election Law violated universal suffrage. Article 1.2 of the 1992 Election Law said that Mongolian citizens residing within Mongolia had the right to vote. According to the petitioners, this article violated universal suffrage (Const. art. 21.2) because it blocked the right to vote of Mongolian citizens residing within foreign countries.

3. Issue. There were three groups of issues in *Suffrage Case I*. The first issue concerned whether the citizens had the constitutional right to equal suffrage and what this right meant in a democracy. The second issue was about what the right to free suffrage meant and whether this right was violated by the statutory regulation that put voters into a situation where they might need to give a vote to a candidate whom they did not want to vote. The third issue was related to what the right to universal suffrage meant and whether the exclusion of Mongolian citizens residing within foreign countries from the election infringed this right.

4. Holding. The *Tsets* said no to all questions raised. In other words, this court ruled that the Mongolian Constitution did not protect equal suffrage, and the 1992 Election Law (art. 1.2, 33.3, 35.2, 36.3, and 38.2) did not violate the principle of free and universal suffrage.

5. Reasoning. The *Tsets* neither argued against nor for the arguments of petitioners, the expert, and the representatives of the SGKh. However, this court delivered a very short reasoning for each of the three issues. First, the *Tsets* gave two short arguments to support the ruling that the Mongolian Constitution did not include the principle of equal suffrage. The first argument was that “Article 21 of the Constitution does not contain legally the equal suffrage.” The court’s second argument was that “there is no proposal

⁴⁰ Tsets, Dec. 22, 1993, Dugnelt No. 4.

on equal suffrage in the several records of the People's Great *Khural* that discussed and passed the Constitution." Second, for the ruling that free suffrage was not violated, the *Tsets* just stated that "no evidence proved that the free suffrage principle was violated because electors were forced to vote for the candidates they did not want to elect when the number of candidates they wanted to elect was less than the number of mandates in the constituency."⁴¹ This was not an argument but a statement. Third, in the reasoning part of its decision, the *Tsets* said that articles (art. 1.2, 33, 35, 36, and 38) of the 1992 Election law, which concerned free and universal suffrage, were not well developed, but they were constitutionally adopted by the State Small *Khural* because these issues were contained in the scope of the constitutional provision that the procedure of the election of the *SGKh* shall be determined by law (Const. art. 21.4).

6. Significance. The moral reading of the Constitution was important for three issues in the *Suffrage Case* because the equal, free, universal suffrage was an abstract moral principle. The first issue concerned the equal suffrage. According to the understanding common in matured democracies, equal suffrage is the right that is satisfied in the majoritarian system of election if voters in each constituency have the approximately, but not perfectly, equal number of representatives (MPs) in the parliament. This subsection proceeds to examine whether the past *SGKh* elections violated the principle of equal suffrage according to this understanding although the election laws did not protect this principle. Equal suffrage was not seriously denied in the 1992 election. The difference between the constituency having the lowest average number of MPs and the highest number of MPs was not too much in this election. One MP from the constituency No. 22 represented 16,666 electors, but one from the constituency 14 represented 10,198 electors.⁴² The inequality between these two was 38 percent.

However, equal suffrage was violated in the 2008 election of the *SGKh* because the distribution of parliamentary seats into constituencies did not reflect the changes in the demography of the population. In the 1992 *SGKh* election, the rural constituencies had 57 (75%) of 76 parliamentary seats, but Ulaanbaatar had 19 (25%). In all other *SGKh* elections (1996, 2000, 2004, and 2008), the rural constituencies had 56 (73.6%) of 76 parliamentary seats, but Ulaanbaatar had 20 (26.3%). This ratio of distribution of parliamentary seats into the rural and urban constituencies has not changed despite the demographic changes. The population has been moving from the rural areas to the urban

⁴¹ *Tsets*, Dec. 22, 1993, Dugnelt No. 4.

⁴² "UIKh-iin 1992 Onii Ankhnii Udaagiin Songuuliin Negdsen Dun."

areas, particularly Ulaanbaatar, since 1990s. In 1992, 27 percent (301,546 voters) of all voters (1,085, 129 voters) were in Ulaanbaatar,⁴³ but in 2008, 38 percent (590,304) of all voters (1,542,617) were in Ulaanbaatar.⁴⁴ Equal suffrage was seriously denied in the 2008 election according to the common understanding because the number of voters represented by each MP in the constituency having the highest number of parliamentary seats was three times bigger than the number of voters represented by each MP in the constituency having the lowest number of seats. For example, one MP from constituency No. 22 in Ulaanbaatar represented around 39,741 electors, but one from the constituency No. 14 in Tuv *Aimag* represented around 13,399 electors.⁴⁵ The inequality between these two constituencies was 67 percent, so electors in the constituency No. 22 were denied equal representation in the *SGKh*.⁴⁶ The 1993 *Tsets* decision that failed to protect equal suffrage allowed for this kind of unequal representation between urban and rural constituencies.

Analysis of the elections in 1992 and 2008 shows the consequence of the *Tsets*' 1993 decision declining to protect equal suffrage. This decision lacked the concrete understanding about equal suffrage in spite of explanations given by the petitioners and the representatives of the *SGKh*. According to the common understanding just described, the petitioners misunderstood equal suffrage. The representatives of the *SGKh* offered a better understanding of equal suffrage, but they did not accept that the Constitution protected equal suffrage. This study examines what the petitioners really claimed, what kind of arguments the *Tsets* constructed, and whether or not the Constitution protects the principle of equal suffrage.

The *Tsets* disregarded the arguments given by the petitioners and the expert. The petitioners and Enebish, the expert of the *SGKh* Secretariat, made two arguments: (1) equal suffrage was constitutionally protected because it was plainly guaranteed in the international covenant, and (2) the equality before the law already included the principle of equal suffrage. The *Tsets* just ignored these two arguments, but it provided two incomplete arguments, the first relying on strict constructionism and the second relying on originalism.

⁴³ Ibid.

⁴⁴ “UIKh-iin 2008 Onii Songuuliin Negdsen Dun.”

⁴⁵ Ibid.

⁴⁶ The equal suffrage was also violated in the 2004 election. One MP from the constituency No. 67 in Ulaanbaatar represented around 34,194 electors, but one from the constituency No. 16 in Dornod *Aimag* (prefecture) represented around 9,766 electors. The inequality of these two constituencies is 72 percent. “UIKh-iin 2004 Onii Songuuliin Negdsen Dun.”

The *Tsets*' first argument was strict constructionist. The argument was that Article 21 of the Constitution did not stipulate equal suffrage. The *Tsets* did not mention any other constitutional clause or precedent. This fact implied that the court concluded so because it could not find the term "equal suffrage" by reading literally only the text of Article 21 that MPs are "elected by citizens qualified to vote, on the basis of universal, free, direct suffrage." The literal reading, an inappropriate method for interpreting the Constitution, resulted in the argument that the Constitution did not protect equal suffrage because it did not explicitly mention the term. Thus, the *SGKh* had the discretion of deciding whether to protect equal suffrage in the statute or not. The *SGKh* would not violate the Constitution even if it did not protect equal suffrage. The *Tsets* also was inconsistent even with strict constructionism as it ignored equal suffrage in the ICCPR and the principle to fulfill international obligations in Article 10 of the Constitution.

The *Tsets*' second argument was that the Constitution did not protect equal suffrage because there was no proposal on equal suffrage in the constituent assembly (the *PGKh*).⁴⁷ This argument was originalist since it appealed to the Constitution framers' understanding. If the *Tsets* made its one sentence-argument complete, then it would have to do so as follows. The framers did not intend to protect equal suffrage in the Constitution because they included namely all suffrage principles in Article 21 of the Constitution except equal suffrage. If the framers had intended to protect equal suffrage in the Constitution, they would have done it in the 1992 Election Law, but they did not do so. The framers passed and practiced themselves the 1992 Election Law in which they excluded equal suffrage as they did in the Constitution. Thus, the *SGKh* had the power to choose to protect or not to protect this right, and the 1992 Election Law did not violate the Constitution. Unequal suffrage was compatible with other constitutional principles. The framers did not expect that the equality before the law would challenge unequal suffrage that they recognized themselves.

The *Tsets*' two arguments just explained above were trumped by the two arguments of the petitioners and expert Enebish. The expert's argument trumped both strict constructionist and originalist arguments of the court. Even though Enebish did not explain his argument, his argument implicitly rested on the moral reading of the

⁴⁷ The *Tsets* did not cite the record. Thus, it is unclear how this court described this understanding of the *PGKh*, which was highly controversial because the constitutional record was not published in 1993, different kinds of conceptions were available, and variety of the people participated in constitution making.

Constitution and reflected what the Constitution really meant. Since the idea of equality was a vague principle, the moral reading could clarify this idea. The expert asked correctly a moral question whether equality before the law was violated by the absence of equal suffrage in the 1992 Election Law, what it really meant and whether it forbade unequal representation.

The moral reading of equality before the law supports equal suffrage. The Mongolian framers meant to lay down general principles of political morality, which condemned unequal suffrage. The framers intended to say that the right to vote was a necessary condition of democracy against the undemocratic experience of the former socialist regime, in which citizens could not vote substantively for their legislature. At the same time, the framers intended to say to protect equality before the law against the inequality of the former regime that discriminated arbitrarily against some citizens including the monk, the rich, and the noble. Equality before the law protected equal citizenship with two other abstract principles: the equality and the right not to be discriminated against (Const. art. 1.2 and 14, and the international covenants). Equal citizenship requires the government at least not to discriminate its citizens arbitrarily. The unequal representation between rural and urban electors is arbitrary because it cannot be justified in principle. Thus, unequal suffrage is against the concept of equal citizenship, which damages political morality. Regardless of whether or not the Constitution has the term “equal suffrage” (strict constructionism) and regardless of what the framers expected (originalism), equality before the law is violated unless one elector has one vote in both rural and urban areas.⁴⁸ The *SGKh*, thus, has the constitutional duty to protect equal suffrage.

The petitioners’ argument improved by constitutional integrity also supported separately that the unequal representation between rural and urban electors violated the Constitution. The petitioners’ argument was that the absence of equal suffrage in the Election Law violated equal suffrage in Article 25 of the ICCPR and Article 21 of the

⁴⁸ Like other liberal constitutions, the Mongolian Constitution does not have to include the term of equal suffrage as the *Tsets* argues. Equality before the law already guarantees the protection of equal suffrage. For instance, the U.S. Constitution has no term of equal suffrage, but the Supreme Court ruled that the mal-apportionment of the population in the election district is unconstitutional because the right to equal vote and equal representation is “within the reach of the judicial protection under the Fourteenth Amendment [the Equal Protection Clause].” In this case, the population ratio for the urban and rural districts in Tennessee was more than nineteen to one. Because of this mal-apportionment, African American and other minorities in urban areas were often denied the equal representation. Thus, the Supreme Court ruled that this discrimination reflected “simply arbitrary and capricious action.” See *Baker v. Carr* 369 U.S. 186, 82 S.Ct. 691 (1962).

UDHR. However, the ruling of the *Tsets* ignored this argument and refused to protect equal suffrage. This ruling was against constitutional integrity that required the *Tsets* to show that its constitutional interpretation was consistent with basic principles justifying the mass of precedents and the constitutional structure. That is, this court violated a new precedent that stood for the principle to quash laws and other acts that breached international human rights standards. On April 21, 1993, a petitioner alleged that the right to strike was violated by a regulation that prohibited the strike in an organization or industry, where the citizens' life, body, and health would be in danger or where there would be a large amount of danger if permanent work were interrupted.⁴⁹ The Constitution had no term "the right to strike." Nevertheless, the *Tsets* struck down the regulation, arguing that it too broadly prohibited the citizens from striking,⁵⁰ hence violated the right to strike in Article 8 of the ICESCR. This ruling of the *Tsets* rested on Article 10 of the Constitution, which required Mongolia to fulfill in good faith its obligations under international treaties. By refusing to protect equal suffrage in the ICCPR in the *Suffrage Case I*, this court ignored and violated this precedent and Article 10 of the Constitution without giving any reason even though it followed this precedent in its future decisions.

Citizens submitted three notifications about the violation of equal suffrage since 1993, and they asked the *Tsets* to correct its wrong interpretation of the Constitution.⁵¹ Arguments in the notifications were mainly based on the equality before the law and universal suffrage in the international covenant. For example, in their notification, Urtsaikh D. and Unurbayar Ch., legal scholars, strongly argued that though equal suffrage was not written in Article 21 of the Constitution, general principles such as democracy and equality before the law in the Constitution already included and protected equal suffrage. These petitioners cited the following principled interpretation of the Constitution by Prof. Chimid, who prepared the final edit of the 1992 Constitution: "the Constitution defines the universal, direct, equal, free suffrage by secret ballot," and the equal suffrage is interpreted or defined "by the content of Articles 1.2, 14.1, and 16 of the Constitution on the equal human and civil right and the equality of the state activity."⁵² According to these petitioners, the republic, parliamentary

⁴⁹ See *Tsets*, Apr. 21, 1993, Dugnelt No. 2; *Tsets*, May. 26, 1993, Togtool No. 3.

⁵⁰ *Tsets*, Apr. 21, 1993, Dugnelt No. 2; *Tsets*, May. 26, 1993, Togtool No. 3.

⁵¹ *Tsets*, Nov. 16, 2007, Dugnelt No. 11; *Tsets*, Mar. 26, 2008, Magadlal No. 4.

⁵² Chimid B., *Songuulid suraltsakhui*, 55.

democracy, and the *Rechtsstaat* would be meaningless without equal suffrage.⁵³ Urtsaikh also explained what equal suffrage meant in matured democracies, and how it was violated in the 2008 *SGKh* Election. He argued that “citizens’ attempts to defend the spirit of their democracy failed due to the rigid, literal interpretation rather than the theoretical, substantial interpretation of the Constitution.”⁵⁴

The *Tsets* refused to overrule its denial of equal suffrage in *Suffrage Case I* (1993) in 2008. This court offered same strict constructionist and originalist arguments: “(1) the 1993 decision found that Article 21.2 of the Constitution excludes equal suffrage, as well as (2) it cannot be proved that the 2005 Election Law excluding equal suffrage violates Article 25 of the ICCPR and Article 10 of the Constitution.”⁵⁵ Following the 1993 decision in *Suffrage Case I*, this decision lacked reasoning by ignoring the petitioner’s argument and Article 10 that protected explicitly international obligations including equal suffrage. The 2008 decision of the *Tsets* also misinterpreted the Constitution. This decision used strict constructionism contradictorily since the first part of its reasoning was the literal reading of Article 21.2 that had no term “equal suffrage,” but the second part denied the literal reading of Article 10. Moreover, the decision of the *Tsets* damaged constitutional integrity as it followed the unjustifiable precedent of 1993 and ignored the well-established precedents to protect international human rights standards, which were confirmed and applied in many of *Tsets*’ other decisions. The *Tsets* also failed to interpret equality before the law by a fresh conception to protect equal suffrage even though the petitioner did not mention this argument. As a result of the 1993 and 2008 decisions, concerns exist that equal suffrage may be violated in the *SGKh* elections since people are moving rapidly from the rural to the urban areas.⁵⁶

The second issue in the *Suffrage Case I* concerned free suffrage. The claim made by the petitioners and the expert seemed reasonable because the legal requirement put voters in a situation in which they had to vote for a candidate they did not really want to elect to the parliament. For example, if there was a constituency that had three parliamentary seats but six candidates, the elector in that constituency would have to vote for at least three of six candidates even if he or she wanted to vote for only two of

⁵³ Urtsaikh D. and Unurbayar Ch., “Songuuliin tegsh erkhiin talaar UKhTs-d gargasan urgudul”; Urtsaikh D., “N.Jantsan gishuuunii tatgalzsan togtooliig ul zuvshuurch gargasan gomadol”; Urtsaikh D., “21-r zuunii Mongol dakhi feodaliin bural.”

⁵⁴ Urtsaikh D., “21-r zuunii Mongol dakhi feodaliin bural.”

⁵⁵ Lamjav D., “Yaritsлага: Songuuliin Tegsh Erkhiin Tukhai”; Lamjav D., “Tsets Aldaagaa Zasakh Uuregtei.”

⁵⁶ Tsedendamba L., “Mongoliin bus nutgiin khugiliin tulgamdsan asuudluud.”

them. If the voter chose only two candidates, who he or she wanted to elect, his or her voting would be invalidated. In this sense, the elector could not make freely a choice on which candidate he or she wanted to elect in a certain constituency. Due to the use of compulsory voting, free suffrage would be violated. In addition, the members of the *SGKh* whom the electors did not want to elect, but voted for according to the legal requirement, would be unjustly better off though they were not supported in fact by such electors.

The *Tsets* did not explain what the meaning of free suffrage was and why free suffrage was not violated in this case. In 1996, the provision allegedly restricting free suffrage was abolished when the *SGKh* adopted the single member district system by amending the *SGKh* Election Law. However, the similar provision restricting the right to free suffrage by compulsory vote was reestablished in 2005 when the *SGKh* re-adopted the multi-member district system in a new election law (art. 12.1). Article 47.3 of the 2005 Law on the *SGKh* Election required electors to circle as many names of candidates as required by the total number of mandates to be elected for the constituency concerned. Due to the ruling of the *Tsets*, the *SGKh* had the full discretion to define how many candidates an elector would have to vote for in the multi-member district of election.

The third issue of *Suffrage Case I* was the principle of universal suffrage. The common understanding of universal suffrage means that all adult citizens enjoy the right to vote. Thus, denial of the right to vote of adult citizens residing abroad was a violation of universal suffrage. The *Tsets* ruled that whether or not to allow citizens residing abroad to enjoy the right to vote was an issue to be determined by the legislative power. This court declined to make comments on article 21 of the Constitution, which explicitly protected universal suffrage. In this case, the *Tsets* was inconsistent because it used the method of strict constructionism to deny equal suffrage, but it ignored this method by denying universal suffrage without any justification.

When the *Tsets* decided *Suffrage Case I* in 1993, a few Mongolian citizens lived in foreign countries. Mongolians found it difficult to leave their country in the socialist period because freedom of movement was not protected. However, since Article 18 of the 1992 Constitution guaranteed freedom of movement, many Mongolian citizens have been traveling and residing abroad since 1990. In 2009, almost 200,000 adult citizens

resided abroad, representing 13-15 percent of the whole electorate (1,493,217).⁵⁷ These citizens could not enjoy their right to vote.

The *SGKh* has discretion over protecting universal suffrage as a result of the 1993 ruling of the *Tsets*. It is up to the MPs to include the right to vote of citizens residing in foreign countries in the election law or not. According to the 2005 *SGKh* Election Law, “Mongolian citizens who have the right to vote and reside in foreign countries have the right to participate in the election (art. 6.3).” *Tsakhim Urtuu* Association, an NGO run by citizens residing abroad, contributed much to the importation of this clause into the 2005 Election Law and the preparation for its implementation.⁵⁸ Citizens residing abroad wrote papers on how citizens of matured democracies such as the U.S. and Germany enjoy their right to vote.⁵⁹ According to these citizens, the Mongolian government may choose one of the following methods or a combination of them: the post, the fax, the Internet, and the Mongolian Embassy. Today, the Internet, the development of technology and the recent increase in the state budget open up the possibility for the Mongolian government to implement universal suffrage easily and cheaply.

The *SGKh* removed the right to vote of citizens abroad from the 2005 Election Law. The General Committee on Election announced that it was impossible to implement this right because of financial difficulty, poor civil registration, the ambiguity of using technology, and the distribution of constituencies.⁶⁰ However, NGOs and citizens residing abroad claimed that the real reasons were not financial or technical but rather political. In the subsequent 2008 election, many of the 200,000 citizens abroad (13 percent of the whole electors) were likely to vote against two main parties, the MPRP and the Democratic Party, but for new parties like the Civil Movement Party whose leaders were mainly educated abroad. The *SGKh* abolished the right to vote of citizens abroad in December 2007 before the 2008 election. After the abolishment of this right, Batbayar E. and Danzannorov L., two leaders of the Civil Movement Party, submitted a notification to the *Tsets*, but this court rejected it without giving reasons.

⁵⁷ Batbayar E., “Gadaadad baigaa Mongolchuudiin songuuliin erkhiin tukhaid.”

⁵⁸ Sainbayar D., “Tand songuulid ugukh neg sanal bii, nadad bas neg sanal bii”; Sainbayar D., “Songokh erk - kheleltsuuleg”; Ganzorig, “Nutgaas irsenii daraakan.”

⁵⁹ Sainbayar D., “Tand songuulid ugukh neg sanal bii, nadad bas neg sanal bii”; Urtsaikh D., “Daakhgui nokhoin khuraasan buluuini yas buyu gadaadad amidarch bui Mongolchuudiin songokh erkhiin tukhaid”; Batbayar E., “Yariltsлага: Songuuliin erkh bol yamar ch togtoltsoonoos ul khamaarch shiidegdekh yostoi.”

⁶⁰ Sainbayar D., “Gadaadad garval ta Mongol ulsiin irgen bish bolokh ni ee.”

5.3. Mongolian constitutional reasoning and interpretation as a whole

This section rests on the comparative study in Chapter 4, the detailed analysis of four cases in Section 5.2 and the general study of 130 constitutional cases between 1992 and 2011. This section shows that the *Tsets* does not provide reasons in most of its decisions except few of them, and examines why there is such a lack of reasoning. Thus, there is a need for further reform. This section argues that the *Tsets* should not only continuously deliver reasoned judgments, but also use an appropriate method of constitutional interpretation. There are insufficient researches on interpretation methods. The *Tsets* often uses methods substantively similar to strict constructionism and originalism in practice, and frequently refuses to overrule its bad precedents. This book argues that this court should constantly apply the moral reading for the better interpretation of the Constitution because this law includes abstract moral principles. There exist the bases of the moral reading: the *Tsets* makes the short but reasoned decisions in certain cases; it adopts better conceptions of some abstract principles; the constitutional structure eliminates certain kinds of interpretations; some of its decisions respect the integrity of law; the *Tsets* overrules a few of its precedents; it reflects characteristics of political morality in the interpretation; it makes a *de facto* difference between principle and policy; and it contributes to the democratic process. The constitutional conception of democracy is also widely accepted in Mongolia. The *Tsets*, thus, can use the method of moral reading as much as other courts of different institutional designs.

Although some of the *Tsets* decisions provide good reasoning, most of them lack this quality. As Chapter 4 of this book showed, the court always has to make a reasoned decision. The *Tsets* has decided some of the controversial cases with good reasons. For example, Section 5.2 showed that this court correctly decided the *Nyamdorj Cases I, II* (2007) and the *Constituency Grant Case* (2007). These decisions are well reasoned because both the conclusion and the reasoning are relatively good. However, the *Tsets* does not provide reasons for its conclusions in most cases although it includes arguments of each party (mainly citizens and the *SGKh*) and comments from experts appointed by the court. According to the analysis of *Dashdendev Case* and *Suffrage Case*, the decisions lack the reasoning when they fail to openly show an argument for the conclusion, to interpret a constitutional clause, to respond to the arguments of the two disputing parties, and to take account of a related constitutional principle. The decisions lacking reasoning appear arbitrary - a phenomenon which is against the rule of

law.

There are three reasons why the *Tsets* does not give reasons in most of its decisions: (1) the legacy of socialist legal culture, (2) the poor qualification of some constitutional judges, and (3) the statutory regulations. The first reason is cultural. The reasoning of judicial judgment was not allowed under the socialist system that denied judicial independence. The legal reasoning was not taught at the school of law in Mongolia under the influence of the Soviet Union. Moreover, the culture of reasoning was suppressed by the totalitarian regime in general. Under this regime, citizens did not enjoy freedoms of opinion and expression. The absence of these freedoms meant that people hardly had chances to express and discuss public issues with reasons that they had in mind. Mongolia made a transition from socialism to democracy in the 1990s. Nevertheless, the legacy of socialist system that discouraged reasoning still exists as part of the legal culture. Even though judges enjoy independence, they infrequently construct reasoned decisions. Cases such as the *Nyamdorj* and *Constituency Grant* illustrate the slow development of reasoned decisions. A change of culture takes more time than the change of laws. The cultural explanation does not justify the lack of reasoning by judges, but shows that reasoned judgments are new for the Mongolian judges.

The second reason is related to the qualification of constitutional justices. As Section 3.2 has discussed, some justices such as Ochirbat P. and Lkhagvaa T. are not legal professionals. A strong constitutional interpretation and the well-reasoned judgments require the professional skills and knowledge, which are taught at the school of law. Unlike the majority of the justices of the first Hungarian Constitutional Court, who were civil law professors, the majority of the justices of the first *Tsets* were criminal lawyers, and criminal law was abused most in the socialist system. The first Chief Justice was criminal law professor Sovd G. between 1992 and 1998, and the second Chief Justice was criminal lawyer Jantsan N. between 1998 and 2005. Only few constitutional law professors were appointed to the *Tsets*. Prof. Amarsanaa wrote his book on the protection of human rights, and Prof. Sarantuya wrote her book on the institutional improvement of the *Tsets*. They continue to work as justices after the reappointments. Only a few civil law professors such as Baasan L. and Naranchimeg D. were appointed to the *Tsets*.

The third reason concerns the statutory regulations. Writing a well-reasoned decision takes time, but Mongolian constitutional justices have no enough time to do so. Article 32 of the 2007 Law on the Procedure of the *SGKh* says that the *Tsets* has to submit its

conclusion (the first judgment in two stage procedure) to the *SGKh* within 24 hours after coming to and signing a conclusion. If justices sign the conclusion on the day of hearing, they have less than 24 hours for writing their opinion. The *Tsets* has unlimited time for writing their resolution, the final judgment after the *SGKh* rejection of the conclusion, but it rarely changes its reasoning in the resolution. In addition, judges are not allowed to publish their own opinion (dissenting or concurring) separately and publicly. Therefore, the reasoning of the *Tsets* has to be accepted by a majority of justices who have voted for the judgment. The reasoning becomes much shorter to be more agreeable to the majority.

The fact that the *Tsets* fails to write the reasons in its judgments does not mean that this court does decide cases without the reasons. During the oral hearing, the constitutional justices often discuss the reasons for making their decisions. Two parties, mainly citizens and representatives of the *SGKh*, submit their written petitions and the comments, and they orally state their arguments and respond to arguments of the other party during the hearing. Justices often ask questions that include reasons on the issue.⁶¹ In the deliberation room, justices also give reasons for their conclusions on the issue, and they exchange their arguments. Prof. Byambaa J., former constitutional justice, said that justices often made theoretical and practical disputes even by citing the foreign constitutional practice, and he hoped that current justices did so in the deliberation room.⁶² Thus, justices decide cases with reasons, but do not write them in the judgment.

Mongolian legal scholars did not pay enough attention to the legal reasoning in 1990s. However, scholars have recently been discussing constitutional reasoning, which is a new tendency important for constitutionalism. Some scholars have been criticizing the defect of reasoning in judicial judgments including those of the *Tsets*. For example, Prof. B. Chimid said that “constitutional judges are idle. They write just two words: either it is violated or not. That is all. There is no reason or argument. The *Tsets* must be a theoretical court. Unfortunately, there is no theoretical argument.”⁶³ As Section 4.1 argued, the *Tsets* has to write reasons in its judgments. Otherwise, the public cannot know whether or note the court decides cases arbitrarily. Moreover, the lack of reasoning disrespects the two parties of the case and makes the future decision more

⁶¹ The author of this book attended an open hearing of the *Tsets* on March 4, 2010. The constitutional judges asked many questions and discussed arguments concerning the issues, which were not included in the written judgment. *Tsets*, Mar. 4, 2009, Dugnelt No. 1.

⁶² Byambaa, discussion.

⁶³ Chimid B., “Tailbar”; See also Mashbat O., “Manaikh Yaduu Kheveerei l Baikh Bolno.”

unpredictable. Mongolian scholars also argue that the lack of reasoning has the following negative consequences: “the law is abused by the discretion... parties of the case do not appreciate the judicial judgment because they do not understand it, and the environment of legal guarantee is destroyed.”⁶⁴ Prof. Paul H. Brietzke also gave a presentation on the American legal interpretation in Mongolia, saying the following: “judicial corruption can flourish when the justifications for decisions are kept secret, and/or when corrupt decisions can be made to appear as a ‘mere’ incompetence.”⁶⁵

Legal scholars and lawyers not only criticize the lack of reasoning in the judicial judgments, but also work to solve this problem by four practical steps. First, judgments of ordinary courts and the *Tsets* are published and posted on the websites, which allow lawyers to use them in the legal work and professors to discuss the quality of judgments and use them in legal education. Moreover, the national bar exam established in 2004 includes both the test and the case-analysis. Scholars argued as follows:

For the first four years of the bar exam, most of those who have passed the test failed to do the case-analysis so that they could not pass the exam. This failure resulted from the fact that there were no commonly recognized methods for analyzing cases and no courses for teaching these methods at the schools of law.⁶⁶

Additionally, scholars have lately been writing on how legal reasoning is important, what approaches of legal reasoning are used in democracies such as Germany and the U.S., and how these methods could be applied in the Mongolian context. For example, Prof. Heinrich Sholler wrote a book on how to make a reasoned decision on constitutional and administrative cases in 2003 by using the German methods and examples.⁶⁷ Mongolian scholars also proposed the five-step approach for constitutional cases, which is similar to the American IRAC, and the six-step approach, which is similar to the German one.⁶⁸

Furthermore, schools of law have reformed their curriculums to teach law students the skill to analyze cases and make reasoned judgments. After the adoption of the 1992 Constitution, schools of law (national and private) reformed their curriculums so that law students could acquire theoretical knowledge on legal concepts in the Constitution

⁶⁴ Mendsaikhan T. et al, *Khuuli Zuin Bodlogo Bodokh Argachlal*, 13.

⁶⁵ Brietzke, “Legal Interpretation in the U.S.,” 87.

⁶⁶ Mendsaikhan T. et al, *Khuuli Zuin Bodlogo Bodokh Argachlal*, 5.

⁶⁷ Sholler, *Khuuli Zuin Dugnelt Bolon Shuukhiin Shiidver Gargakh*.

⁶⁸ Mendsaikhan T. et al, *Khuuli Zuin Bodlogo Bodokh Argachlal*, 26–45.

and the new laws. Although these curriculums advanced legal education in many aspects in 1990s, they did not include courses for teaching the skill to apply theoretical knowledge of law in concrete cases. In the late 2000s, schools of law revised their curriculums and created new compulsory seminars (called the application of laws) to teach students how to analyze constitutional, administrative, civil and criminal cases and how to make reasoned judgments. Law professors teach the method of legal reasoning.⁶⁹ However, there are no general courses such as legal analysis, legal writing or legal research. As a result of these four steps, future lawyers will probably have the skill to make a reasoned judgment on any legal issues.

Even though scholars have been recently noticing the importance of constitutional reasoning and making practical moves to promote its improvements, research on the topic is insufficient. Mongolian scholars rarely write which decisions lack reasoning, how they lack it which decisions provide reasoning, how the reasoning could be improved, and how the foreign courts construct their reasoning. Moreover, they do not take seriously the constitutional interpretation, on which the improvement of reasoning depends. Chapter 4 has showed that if the court makes reasoned decisions, then it has to interpret the Constitution by using appropriate methods.

In Mongolia, there exist brief introductory researches on the European and the U.S. methods of legal interpretations, but they hardly describe what these methods are in fact, which methods can improve the constitutional interpretation in actual cases,⁷⁰ and what methods the *Tsets* often uses in practice. Scholars sometimes mention European interpretation methods (linguistic, logical, systematic, teleological, historical and political), but they seldom explain these methods in detail.⁷¹ There is no comprehensive discussion on the European methods of constitutional interpretation and their possible applications in Mongolian cases. Brietzke explained the American methods such as “the plain meaning rule,” “the legislative intent,” and “canons of construction” in his paper that was translated into Mongolian.⁷² Gunbileg B. also summarized papers discussed in the 2004 symposium, entitled “What Is Legal Interpretation?,”⁷³ and he briefly

⁶⁹ Solongo D., *Tur, Zakhiraanii Erkh Zuin Khuuli Togtoomiin Khereglee I*.

⁷⁰ Temuujin Kh. interpreted the Constitution in his notification to the *Tsets* by using several methods (the broad and systematic interpretation). Temuujin Kh., *Jus Frast buyu Yost Ug*, 231–232.

⁷¹ Sarantuya Ts., “Undsen Khuuliin Shuuksiin Shiidvereer Undsen Khuulig Khugiuulekh Ni,” 382; Amarsanaa J., “Undsen Khuuli Tailbarlakh Subyekt: Onol, Arga Zui,” 219; Temuujin Kh., *Jus Frast buyu Yost Ug*, 216.

⁷² Brietzke, “Legal Interpretation in the U.S.,” 81–82.

⁷³ In 2004, the Institute for Law and Philosophy at the University of San Diego School of Law joined

described intentionalist, textualist and pluralist methods of legal interpretation.⁷⁴ However, Gunbileg did not show how these methods could be applied in the Mongolian context, which was similar to the methods used by the *Tsets*, and which method would be suitable for this court. Main American methods such as originalism and the moral reading are still unfamiliar.⁷⁵ In Mongolia, there is neither orthodoxy nor general theory on how the judges should interpret the Constitution.

The methods of the *Tsets* have not been thoroughly researched in Mongolia. Which method the *Tsets* uses for interpreting abstract constitutional clauses can be identified from the analysis of constitutional cases. This court often uses methods similar to strict constructionism and originalism.⁷⁶ In the *Suffrage Case I*, the *Tsets* applied strict constructionism, relying on the literal reading of the Constitution text, and originalism, relying on what the framers expected at the time of the founding.⁷⁷ The *Tsets* also rejected the individual complaint procedure by applying the strict constructionist and originalist readings rather than the moral reading though it was possible to have this procedure in conformity with the Constitution. One of the main reasons why the *Tsets* provides poor protection of fundamental rights is the lack of a procedure that allows it to decide concrete rights violations. As Chapter 3 showed, the *Tsets* delivered several decisions that refused to review the judgments of the Supreme Court and denied the citizens the right to submit petitions on violations of their own constitutional rights by these judgments.⁷⁸ These decisions were based on a strict constructionist reading of Article 66.2 of the Constitution, and many justices and scholars accepted these decisions.⁷⁹ Temuujin Kh. challenged this strict constructionism by presenting a moral reading of the Constitution, but the *Tsets* rejected this challenge.⁸⁰ The *Tsets* does not

forces with the San Diego Law Review to host this symposium. See *San Diego L. Rev.* 42 (2005).

⁷⁴ Gunbileg B., *Jishgiin Erkh Zui*, 70–72.

⁷⁵ Batsuuri M. wrote a summary of Dworkin's general theory of law without mentioning the moral reading. Batsuuri M., "Khuuli zuin salbariin erdem shinjilgeenii baga khurluud," 30–33.

⁷⁶ Constitutional courts in other post socialist countries such as Ukraine also apply the strict constructionist reading of the Constitution, which is often called the formalist-positivist reasoning. See Kataryna, "The Constitutional Court of Ukraine," 27.

⁷⁷ In several other decisions, the *Tsets* also consistently adopted an overly strict constructionist reading of the constitutional text concerning the basic structure of the political system without sensitivity to political dynamics and practice in Mongolia, theories and experiences in other parliamentary democracies. These decisions ruled that MPs were prohibited from being appointed as a member of the Government, and they started a constitutional crisis that would continue for nearly five years. See Ginsburg, *Judicial Review in New Democracies*, 187–204.

⁷⁸ See *Tsets*, Aug. 29, 1994, Dugnelt No. 8; *Tsets*, Apr. 30, 2004, Magadlal No. 3/4.

⁷⁹ See Sovd G., *Undsen khuuliin tsetsiin tukhai khuuliudiin tailbar*, 159; Sarantuya Ts., *Undsen khuuliin processiin erkh zui*, 100, 102, 129; Mongol Ulsiin Undsen Khuuliin Tailbar, 284–286.

⁸⁰ See Temuujin Kh., *Jus Frast buyu Yost Ug*, 65–66.

explain why it chooses strict constructionism and originalism, and how these arguments are better than other arguments. Due to these two methods, this court weakens the protection of fundamental rights, adopts poor conceptions on these rights, violates constitutional integrity, and fails to overrule poor conceptions.

Like the U.S. and European highest courts, the *Tsets* should constantly apply the moral reading because the Constitution includes not only precise clauses in which the framers intended to stipulate concrete rules but also vague clauses in which they intended to provide for abstract moral principles. For example, Article 30.2 of the Mongolian Constitution says a citizen who has attained the age of forty five years can be eligible for election to the post of President. Obviously, this age means the chronological age, the number of years a person has lived. On the other hand, this Constitution states that all persons are equal before the law (art. 14.1), and that citizens are guaranteed freedom of conscience and religion (art. 16.15). Since the Constitution includes this kind of abstract moral principles whose meaning is unclear, and most constitutional cases are about these principles, the application of moral reading can help to improve the interpretation of these principles. Danielle Conway-Jones also noticed the similarity between principles in the Mongolian Constitution and in the common law tradition as follows: “the flexibility and the equity that is so evident in the Mongolian Constitution is a hallmark of the common law tradition.”⁸¹

Even though the *Tsets* often misinterprets the Constitution by using strict constructionist and originalist methods, there are bases for the moral reading. The decisions of the *Tsets* were usually related to abstract moral principles and some of these decisions adopted conceptions, which were at least better than other competing conceptions, mainly those favored by the *SGKh*. For instance, this court quashed a law that allowed a political party to participate in the *SGKh* and municipal elections only “after 18 months from its registration in the Supreme Court,” saying that it violated “the right to elect and to be elected.”⁸² In the same decision, the *Tsets* also protected a political party’s right to freely create and use its own name. If the court did not protect these political rights, a new political party could not participate in the election or freely create its name. Moreover, the *Tsets* protected several fundamental rights such as religious freedom of minorities, the minor’s right to demonstration, the rights to access

⁸¹ Conway-Jones, “Mongolia, Law Convergence, and the Third Era of Globalization,” 71.

⁸² *Tsets*, Sep. 29, 2005, Dugnelt No. 2/06.

to the *Tsets* and other courts, and the right to appeal against court judgments.⁸³ Although the Mongolian constitutional review is abstract, some petitioners have appealed to the *Tsets* for protecting their own individual rights as Chapter 3 showed. These rights decisions prove the potential protection of these rights by the *Tsets* at least in a limited sense. The *Tsets* is not as active as the Constitutional Court of Hungary, but more than half of its decisions are related to fundamental rights.

Some of the *Tsets* decisions not only protect constitutional rights but also are well reasoned. The *Tsets* tends to be prudent for the sake of its legitimacy. This court decides cases that have relatively clear solutions, but exert tremendous real impacts on lives of people and the politics. In this kind of case, the *Tsets* makes strong reasoning that most reasonable people could accept. For example, this court interpreted abstract principles such as the respect for law and equality and provided the well-reasoned decisions in the *Nyamdorj Case* (2007) and *Constituency Grant Case* (2007). In 2005, the *Tsets* also rendered a reasoned decision on the integrity of procedural laws. After the 2004 *SGKh* election, the results in some constituencies were disputed, and the last of these disputes was decided by the court after one year. Thus, these constituencies had no representatives in the *SGKh* for one year. To prevent this kind of situation in the subsequent elections, the *SGKh* amended the procedural laws. These amendments defined specific timetables for investigating election disputes, discussing them in the judicial hearing, and appealing against the decisions on these disputes. These specific timetables were much shorter than the general timetable for other disputes and cases. For example, the amendment to the Criminal Procedure Code stated that the investigations on minor or moderate crimes related to the election should be done within four days or seven days. Both the Prosecutor General and the Supreme Court submitted the requests for challenging the constitutionality of these amendments. The *Tsets* gave the following reasons in finding that these amendments were not unconstitutional:

Defining a shorter timetable than the general timetable of law mentioned above violates the general principle to decide disputes and cases through one unified procedure and form of process. Because of this, participants in the investigation procedure are denied the opportunity to enjoy equal rights and to fulfill equal duties. The same unified law that applies to all participants in the investigation procedure is the main condition of every person's right to be equal before the law, and this condition is violated here. The short

⁸³ *Tsets*, Jan. 12, 1994, Dugnelt No. 2; *Tsets*, Mar. 27, 1996, Dugnelt No. 1; *Tsets*, Jan. 18, 1995, Dugnelt No. 2; *Tsets*, Apr. 30, 2003, Dugnelt No. 1, *Tsets*, Jun. 20, 2003, Togtool No. 2.

timetable limits the possibility to discover the actual truth of cases, to make conclusions, to have evidences examined, and to be protected by the court. The short timetable also creates the basis for a legal argument that the organizations in charge decide cases carelessly and harm citizens by violating human rights.⁸⁴

The structure of the Constitution as a part of constitutional integrity discourages certain kinds of interpretation. For example, a justice of the *Tsets* cannot interpret the equality principle (Const. art. 1.2) as making equality of wealth or collective ownership of productive resources because that interpretation does not fit the Mongolian history and the rest of the Constitution. Mongolia did a clear transition from the socialist system to liberal democracy with free market economy. The liberal democratic history of the last twenty years and the Constitution that protects principles such as the right to property make the socialist interpretation of equality impossible. Moreover, a justice cannot make the libertarian interpretation that denies social and economic rights because these rights are explicitly protected in the Constitution.

Chapter 4 has explained that precedent is important to show whether or not judges respect the integrity of law and that they have to justify their decisions based on laws including case law. Just like the continental European legal systems, the Mongolian legal system has no formal *stare decisis*. Nevertheless, in practice, the *Tsets* tends to be consistent with principles and rulings determined by its prior decisions.⁸⁵ The *Tsets* sometimes offers a well-reasoned decision that respects the integrity of constitutional law even though it does not openly refer to previous similar cases. For example, there are a large number of judgments that consistently protected the right to access to the court, the right to fair trial, and the right to appeal against a court decision.⁸⁶ According to one of these judgments in 2003, the Civil Procedure Code's provision that did not allow citizens to appeal against the court decisions breached the rights to access to the court and to appeal against a court decision. The reasoning was as follows:

Not allowing any appeal against these judicial resolutions and ordinances means that a

⁸⁴ 2006.6.14, Dugnelt. №6; 2006.7.5, Togtool. №3.

⁸⁵ For example, the *Tsets* explicitly followed a precedent: *Tsets*, Nov. 16, 2007, Dugnelt No. 11.

⁸⁶ There are the following judgments on these rights: *Tsets*, Apr. 21, 1993, Dugnelt No. 2; *Tsets*, May 26, 1993, Togtool No. 3; *Tsets*, Aug. 29, 1994, Dugnelt No. 8; *Tsets*, Jan. 4, 1995, Dugnelt, No. 1; *Tsets*, Sep. 7, 1995, Togtool No. 2; *Tsets*, Jan. 18, 1995, Dugnelt, No. 2; *Tsets*, May 10, 1995, Togtool No. 1; *Tsets*, Jan. 18, Dugnelt No. 1; *Tsets*, Jun. 17, 1995, Togtool No. 1; *Tsets*, Apr. 30, 2003, Dugnelt No. 1; *Tsets*, Jun. 20, 2003, Togtool No. 2; *Tsets*, Nov. 16, 2005, Dugnelt No. 8; *Tsets*, Jan. 11, 2006, Togtool, No. 1; *Tsets*, Apr. 12, 2006, Dugnelt No. 4; *Tsets*, Jun. 15, 2006, Togtool No. 2; *Tsets*, Oct. 29, 2008, Dugnelt No. 8.

court or a judge never makes a mistake on these issues and so their decisions do not need to be discussed again. Unfortunately, the issues are not always decided rightly without any fault. It should be open for citizens to appeal against any judicial decision or get it reviewed if they want. This is the main condition of fair trial. Therefore, the concepts such as the right to appeal to the court to protect his or her rights and right to appeal against a court decision are inserted into the Constitution of Mongolia as the major index of basic civil rights and freedoms.⁸⁷

This judgment was short, but well reasoned. There was no separation of powers, the independent judiciary was absent in both theory and reality, and the rights to fair trial were ignored during the socialist period. In this context, the decisions were crucial to protect the judicial power and the right to appeal to the court.

When the *Tsets* delivers the decisions that are consistent with the good precedents, it promotes constitutional integrity. There is the precedent that the *Tsets* deemed international human rights as constitutional rights. In 1993, this court upheld the right to strike, which was not mentioned in the Constitution, but protected in the ICESCR. This ruling rested on Article 10 of the Constitution in which Mongolia should fulfill in good faith its obligations under international treaties. The *Tsets* has also confirmed the right to strike in another decision,⁸⁸ and it has applied the principle to fulfill international obligations in many decisions.⁸⁹ For instance, in 1996, this court struck down a law that required a person in charge of organizing assembly to prevent children from participating in the assembly, saying that it infringed on “the child’s right to assembly in the Constitution and in the Convention on the Rights of the Child.”⁹⁰

However, judgments that follow precedents may not be good because precedents can be wrong. The *Tsets* vertically broke the integrity of law in *Suffrage Case I* because it ignored and violated a previously established precedent on the principle to fulfill international obligations without giving any reason when it refused to protect the principle of equal suffrage in the ICCPR. In the subsequent suffrage cases, the *Tsets*

⁸⁷ *Tsets*, Apr. 30, 2003, Dugnelt No. 1; *Tsets*, Jun. 20, 2003, Togtool No. 2.

⁸⁸ *Tsets*, Jul. 3, 1995, Dugnelt No. 4.

⁸⁹ See *Tsets*, Jan. 7, 1994, Dugnelt No. 1; *Tsets*, Jan. 12, 1994, Dugnelt No. 2; *Tsets*, Jul. 3, 1995, Dugnelt No. 4; *Tsets*, Aug. 2, 1995, Dugnelt No. 5; *Tsets*, Mar. 7, 1996, Dugnelt No. 1; *Tsets*, Jun. 20, 1996, Dugnelt No. 5; *Tsets*, Apr. 13, 2005, Dugnelt No. 3; *Tsets*, Sep. 29, 2005, Dugnelt No. 6; *Tsets*, Sep. 20, 2006, Dugnelt No. 9; *Tsets*, Dec. 6, 2006, Dugnelt No. 10; *Tsets*, Jun. 13, 2007, Dugnelt No. 7; *Tsets*, Oct. 24, 2007, Dugnelt No. 10; *Tsets*, Nov. 16, 2007, Dugnelt No. 11; *Tsets*, Nov. 13, 2009, Dugnelt No. 5; *Tsets*, Oct. 27, 2010, Dugnelt No. 5.

⁹⁰ *Tsets*, Mar. 27, 1996, Dugnelt No. 1.

blindly followed the *Suffrage Case I*. In the *Dashdendev Case* (1993), this court horizontally broke the integrity of law because it partially protected religious freedom and the right not to be discriminated against on the basis of religion. In this case, the *Tsets* protected these two rights regarding some issues of religious freedom, but it violated these two rights regarding other issues without giving reasons.

According to Section 4.2, the *Tsets* should overrule wrong precedents as long as it has enough reasons to do so and respects the integrity of constitutional law. The *Tsets* may overrule previous rulings in three ways. First, the minor panel of the *Tsets* can overrule the decision of one justice. A justice reviews petitions and notifications and decides whether the case has the merit. If the petitioner appeals against this decision of the justice, then the minor panel composed of three justices makes the final decision on whether or not this court hears the case, and it may overrule the decision of the justice.⁹¹ For example, a petitioner submitted a petition arguing that a Family Law provision prohibiting people over 60 years of age from adopting a child is discriminatory on the basis of age.⁹² Justice Renchin L. reviewed the petition, but he rejected it, arguing that this age limitation guarded the interest of children because people over 60 might have difficulties in caring for children. The petitioner appealed against Justice Renchin's rejection to the minor panel, which overruled Renchin's decision. The middle panel of the *Tsets* heard the case and ruled that the age limitation was unconstitutional because it discriminated against the group of people on the basis of age (Const. art. 14.2). The middle panel also argued that by adopting the age limitation, the State did not honor its "responsibility to create guarantees ensuring human rights" (Const. art. 19.1). The *SGKh* accepted the *Tsets* ruling and amended the Family Law accordingly.

Second, the *Tsets* may make different rulings in one single case thanks to its two-stage procedure. This court can change its ruling on the same issue in the second stage if some of its justices change their opinions or the simple majority cannot transform into a two-third majority, which is required to overrule the parliamentary decision on the conclusion. The *Tsets* made different rulings in the resolution from the ones in the

⁹¹ For example, the minor panel overruled a judge's decision concerning the petition on the right to own land. See *Tsets*, Sep. 4, 1995, Dugnelt No. 6.

⁹² *Tsets*, Mar. 24, 2010, Dugnelt No. 1. Subsection 4.3.1 showed that the Italian Constitutional Court made a similar ruling on the same issue even though it relied on a different principle. The Italian Court protected the interest of the minor by adopting the fresh conception on the fairness. On the other hand, the *Tsets* protected the right of adults over 60, the right not to be discriminated against on the basis of age. The *Tsets* did not consider the protection of minors, which is the duty of the state according to Article 16.11 of the Constitution.

conclusion in several cases. For example, in 2000, the petitioner challenged some legal provisions related to the establishment of the chambers for criminal and civil cases in the Supreme Court, arguing that the Constitution said nothing about these chambers. The Chief Justice of the Supreme Court commented that the establishment of chambers was critical for a better case management. However, by making the strict constructionist reading of the constitutional text, the *Tsets* struck down the challenged provisions in a conclusion, which the *SGKh* then refused to accept. The grand panel of the *Tsets* reconsidered the issue, accepted the *SGKh* rejection, and finally overruled the original conclusion without providing reasons.⁹³

Third, the *Tsets* can change its final decisions made by the middle panel or the grand panel, but it has not explicitly changed its final decision in this way. In the *Suffrage Cases* (2007, 2008, and 2009), the *Tsets* failed to change its ruling that the Constitution did not guarantee the equal suffrage even though the petitioners provided good reasons for it to do so. In many other decisions, this court refused to overrule its own poor rulings.⁹⁴ However, the *Tsets* sometimes implicitly overrules its final rulings. For example, this court overruled its previous ruling on Law on Administrative and Territorial Units and Their Governing Bodies (LATUGB).⁹⁵ The territory of Mongolia is divided administratively into *aimags* and a capital city; *aimags* are subdivided into *soums* and *soums* into *baghs*; the capital city is subdivided into districts and district into *khoroos*. The respective governors exercise state authority on the territories of these administrative units. Candidates for governors are nominated by the *Khurals* (the local assemblies) of respective units. Governors of *aimags* and the capital city are appointed by the Prime Minister; governors of *soum* and district by the governors of *aimags* and the capital city; governors of *baghs* and *khoroos* by the governors of *soums* and districts respectively for a term of four years (Const. art. 60.2).

In case the prime minister or governor of higher levels refuse to appoint the gubernatorial candidates nominated by the *Khurals* of respective units, new nominations are held in the manner prescribed in article 60.2 of the Constitution (Const. art. 60.3).

⁹³ *Tsets*, Mar. 13, 2000, Dugnelt No. 2; *Tsets*, Sep. 8, 2000, Togtool No. 1. See other cases, in which the *Tsets* changed its rulings in the final stage, following the *SGKh* resolution. *Tsets*, Jan. 7, 1994, Dugnelt No. 1; *Tsets*, Feb. 4, 1994, Togtool No. 1; *Tsets*, Jun. 26, 2002, Dugnelt No. 3; *Tsets*, Nov. 13, 2002, Togtool No. 3.

⁹⁴ For example, the *Tsets* also did not change its poor ruling that the prosecutor general's power to appeal against the final judgment of the Cassation Chamber to the Presidium of the Supreme Court was constitutional. See *Tsets*, Mar. 27, 1998, Dugnelt 3; *Tsets*, Dec. 21, 2007, Dugnelt 13.

⁹⁵ *Tsets*, Dec. 12, 1996, Dugnelt No. 9; *Tsets*, Mar. 26, Togtool No. 1; *Tsets*, Mar. 11, 2009, Dugnelt No. 2.

The constitutional text sets no limit on new nominations, so the *SGKh* created a limit on new nominations in article 10.4 of the LATUGB: in case the prime minister or higher governor refused to appoint the second gubernatorial candidate nominated by the *Khural* of respective unit, the prime minister or higher governor would appoint governors through consultations with the respective local *Khural*. A petitioner challenged constitutionality of this article in 1996. By making a literal reading, the *Tsets* ruled that article 10.3 of the LATUGB violated article 60.3 of the Constitution: article 10.3 of the law created the appointment mechanism of lower governors by higher governors through consultation by broadening the meaning of the constitutional article 60.3, but the Constitution did not mention this mechanism.⁹⁶

The *Tsets* implicitly overruled its 1996 decision on the nominations of governors. In 2006, the *SGKh* revised the LATUGB and put a limit on the nomination of governors. Article 26.4 of the 2006 LATUGB stated that in case the prime minister or higher governor refused to appoint the gubernatorial candidate nominated by the *Khural* of respective unit, the prime minister or higher governor would appoint the second gubernatorial candidate nominated by the local *Khural*. This new article 26.4 was similar to article 10.4 of the old LATUGB because it broadened the meaning of article 60.3 of the Constitution. In 2009, a petitioner challenged article 26.4 of the 2006 LATUGB, but the *Tsets* ruled that this article was constitutional. The 2009 ruling was better than the 1996 ruling because it allowed the *SGKh* to clarify the meaning of a vague constitutional article. The 2009 ruling neither mentioned its 1996 decision on the same matter nor gave any reasoning for overruling its strict constructionist reading.

Despite the fact that the Mongolian Constitution endorses the constitutional conception of democracy, the *Tsets* sometimes fails to enforce this conception by making an originalist reading of this document. The constitutional conception is more appropriate than the majoritarian one in Mongolia because the framers intentionally chose it. The Mongolian people embedded fundamental rights and other basic principles in their Constitution, and gave the *Tsets* the power to enforce those principles even against the *SGKh*. The *Tsets* had reviewed more than 130 cases, and has protected its own competence and independence from the parliamentary infringement as showed in Section 3.2. Nevertheless, the conception of democracy in the originalist judgments of the *Tsets* is majoritarian rather than constitutional. According to originalism discussed in Chapter 4, if the framers' conceptions of abstract constitutional clauses are unclear,

⁹⁶ *Tsets*, Dec. 12, 1996, Dugnelt No. 9; *Tsets*, Mar. 26, 1997, Togtool No. 1.

then the judges should follow the parliamentary decisions on these clauses. In this sense, originalism is majoritarian. By appealing to originalism, the *Tsets* in *Suffrage Case I* refused to protect the equal suffrage so that the protection of this right became the responsibility of only the *SGKh*, not the *Tsets*.

Many legal scholars support the constitutional conception of democracy, but they rarely argue for interpretation methods suitable for this conception. Scholars sometimes criticize the content of certain decisions, but not the interpretation methods (originalism and strict constructionism). In Mongolia, there are no theories such as originalism and majoritarian conception of democracy, which openly criticize the moral reading. The *Tsets* often acts in a majoritarian way when it applies the originalist interpretation. However, scholars have not discussed whether this court should follow the framers' understanding of a constitutional principle when the interpretation of this principle is controversial. Moreover, no scholar has argued that the *Tsets* should respect what the *SGKh* says when the constitutional interpretation is controversial. These questions are new in the Mongolian constitutional discourse.

However, Mongolian scholars sometimes propose constitutional interpretations similar to the moral reading. Unlike the majority of constitutional justices, many scholars treat the Constitution as a charter of principle, challenge laws whose constitutionality are doubtful according to their reading of constitutional principles, and propose a different conception of a constitutional right. In the *Suffrage Case*, Uurtsaikh, legal researcher, argued that equality before the law already included equal suffrage though equal suffrage was not explicitly mentioned in the Constitution. Prof. Chimid, one of the framers, also had the same interpretation of equality before the law although he supported the deletion of the term "equal suffrage" from the constitutional text in the 1991 *PGKh*, the Constituent Assembly. Moreover, Prof. Byambaa, former constitutional justice, doubted constitutionality of the Prosecutor General's appeal against the final judgment of the Cassation Chamber even though he presided over the *Tsets* hearing that upheld constitutionality of this appeal. Prof. Chimid and Prof. Byambaa have thought more independently and critically about the issues, and they changed their mind on what the Constitution really means because they had enough reasons to do so. Some scholarly interpretations are based on methods similar to strict constructionism and originalism, but many scholars submit notifications to the *Tsets* and challenge the poor constitutional interpretation or the old practice, applying a method

similar to the moral reading.⁹⁷

The political morality in each country has specific characteristics that might influence the interpretation of its Constitution. Likewise, the Mongolian political morality has such characteristics. The history of state-socialism still has an impact on Mongolia today. For example, the fact that the socialist government destroyed almost all Buddhist monasteries and killed many of its monks may have influenced the interpretation of religious freedom. In *Dashdendev Case* (1993), the *Tsets* declined to quash the legal provision that “Buddhism is dominant in Mongolia, but this does not prohibit citizens believing in other religions.” Many people including some MPs said that this provision was a kind of compensation for the socialist system’s harm to the Buddhism. The government could compensate for the harms done to Buddhism in a different way (for instance, reconstructing some old monasteries), which could be justified by the positive discrimination theory (summarized in Subsection 4.3.2) because the Mongolian Constitution protected principles such as equality and justice. However, declaring Buddhism a dominant religion in the law was not an appropriate way of compensation since it conflicted with basic constitutional principles such as equality and freedom of religion.

The distinction between principle and policy is evident in case law of the *Tsets*. This court leaves policy issues to the *SGKh*, and it decides legal issues related to the principles in some cases. That is, the *Tsets* ruled that the *SGKh* decided certain policy issues related to social insurance, pension, and tax “within its exclusive power.”⁹⁸ For example, the petitioners challenged constitutionality of Article 6.1.2 of the Law on Excise Tax, which said the following: “Excise tax rate for one liter of alcohol beverages which have an alcohol content of up to 40 percent shall be 1.6 USD or 2 USD, depending on whether it is produced in *Aimags* (prefectures) or in the Capital City.” The petitioners found that the *Spirit Bal Buram*, the biggest domestic producer of alcohol beverage, which has an alcohol content of up to 40 percent, paid a less tax than other main producers in the Capital City because its factories were located in an *Aimag* nearer

⁹⁷ This section already mentioned Temuujin’s challenge to the constitutional interpretation that failed to establish the individual complaint procedure. In addition, Bayar unsuccessfully challenged the high court’s power to return the case to the investigation or the lower court. See *Tsets*, Oct. 24, 2007, Dugnelt No. 10. Gunbileg also challenged one of the socialist legacies in the Mongolian judiciary, the Supreme Court’s power to issue the abstract interpretation of statutes. Nevertheless, the *Tsets* refused to consider this challenge. See, *Tsets*, Oct. 2, 2006, Magadlal 13.

⁹⁸ See *Tsets*, May 21, 2003, Dugnelt No. 2; *Tsets*, Jun. 17, 2005, Dugnelt No. 4; *Tsets*, Dec. 14, 2005, Togtool No. 2; *Tsets*, Dec. 6, 2006, Dugnelt No. 10; *Tsets*, Jan. 10, 2007, Dugnelt No. 1; *Tsets*, Apr. 18, 2007, No. 4; *Tsets*, May 9, 2007, Dugnelt No. 5.

to the Capital City, and they argued that Article 6.1.2 was unfair to domestic producers of alcoholic beverages. However, the *Tsets* ruled that Article 6.1.2 of the Law on Excise Tax needed to be improved to prevent unfair competition, but it was constitutional because the issue to impose taxes differently was within the exclusive power of the *SGKh*.⁹⁹ The *Tsets* often made this kind of suggestions when the policies did not violate the Constitution, but they needed to be improved.¹⁰⁰

Constitutional review has been contributing to the improvement of democracy in Mongolia. The *Tsets* needs to be improved institutionally and culturally, but it improves democracy in two ways. First, some of the *Tsets* decisions protect constitutional rights even though their readings of the Constitution are very formal and short. Protecting these rights is important because democracy is not a majoritarian rule, but a constitutional regime where a majority of citizens through their representatives make the daily political decisions as long as they respect individual rights. Subsection 4.2.2 discussed this point. Second, the *Tsets* makes the legislative process more democratic and more respectful to the rule of law. For example, *Nyamdorj Case* and *Constituency Grant Case* showed that the Mongolian parliamentary politics sometimes did not work well, and it seriously lacked the principles suitable for a democracy. The actions of Chairperson Nyamdorj and the constituency grant to MPs could not be justified by the principles or “theoretical reasons” in the words of Prof. Chimid.¹⁰¹ Thus, the *Tsets* decisions that declared unconstitutionality of these acts improved the democratic process, which was important for the legitimacy of constitutional review. Because of this fact, even critics may accept such review conditionally. As Subsection 4.2.3 discussed, Waldron argued the court should be active only when the quality of political process is problematic. Constitutional review can be justified in this situation because it makes democracy better. Without this review, Mongolian democracy would be worse both in protecting fundamental rights and in democratic decision making.

5.4. Mongolian constitutional culture

⁹⁹ *Tsets*, Dec. 6, 2006, Dugnelt No. 10.

¹⁰⁰ See *Tsets*, Jan. 10, 2007, Dugnelt No. 1; *Tsets*, Apr. 18, 2007, No. 4. For the suggestion for improving prison conditions, see *Tsets*, Dec. 14, 2006, No. 12. For the suggestion that the *SGKh* should strictly obey the laws on the preparation of laws and other decisions of the *SGKh* and on the parliamentary procedure, see *Tsets*, Feb. 5, 2008, Dugnelt No. 1.

¹⁰¹ Chimid, discussion.

Section 4.4 discussed the following five elements of constitutional culture essential to the moral reading of the Constitution and constitutionalism in general: (1) constitutional case law, (2) the publication of separate opinions of constitutional judges, (3) the usage of foreign judicial judgments, (4) the role of scholars, and (5) civic participation in the constitutional discussion. This section checks how these cultural elements are practiced in Mongolia and how they can be improved, following the common culture of constitutional democracies.

The first cultural element is case law important in improving constitutional reasoning and ensuring the integrity of constitutional law. Constitutional case law has become indispensable as the middle panel of the *Tsets* has decided more than 130 cases through its open hearings, and the number of cases is increasing each year. Since all of the *Tsets* decisions are published on the Internet or in a book form,¹⁰² anyone can easily access these decisions. Thus, the petitioners often refer to previous decisions, and scholars discuss the merits of the decisions. Scholars have recently been emphasizing the importance of the precedent in general and arguing that they are significant legal sources not only in common law countries (the U.K.) but also in civil law countries (Germany and Japan), and that Mongolian courts can use judicial precedents.¹⁰³ Scholars argue that Mongolian courts relied on precedents to decide cases in the 18th and 19th centuries.¹⁰⁴ Mongolian judges also use precedents today. According to Gunbileg B., the decisions of the *Tsets* and the abstract interpretations of statutes by the supreme court become precedents.¹⁰⁵ However, there is no sufficient theory how constitutional justices should use the precedent and when they should overrule the precedent. As the previous sections of this chapter showed, the *Tsets* sometimes neglects its precedents without any reason though it tends to follow its own precedents in practice.

The second cultural element is the justice's right to publish an opinion separated from the majority opinion of the court. Mongolian constitutional justices are allowed to

¹⁰² “Mongolian Legal Unified Information System.”

¹⁰³ Tanabe, “Yapon Dakhi Shuuksiin Pretsedentiin Emkhtgel.” Tanabe discussed the precedent’s importance, its roles, its publication and its influence in Japan, and said that the JICA was ready to contribute to the development of case law in Mongolia. The JICA has been doing so in many ways such as financing the publications of precedents.

¹⁰⁴ Gunbileg B., *Jishgiin Erkh Zui*, 82; Mamoru, “Manj Chin Ulsiin Uyeiin Mongol Dahi Ikh Shaviin Gemt Khergiig Shuusen Khuuli Tsaaz,” 205–208.

¹⁰⁵ Gunbileg B., *Jishgiin Erkh Zui*, 98–100.

write and keep their opinions in the original judgment, but they are not allowed to publish a concurring opinion or a dissenting opinion.¹⁰⁶ Thus, the *Tsets* decision includes only one short opinion agreed by a majority of justices. Though the single voice of the *Tsets* seems to show that there exists only one interpretation of the Constitution, the reality is that justices often disagree on the interpretation of constitutional abstract principles. Moreover, the prohibition from publishing separate opinions hinders the development of the moral reading because it makes impossible to compare different interpretations of justices and to discuss which interpretation is better and respects the constitutional integrity. When the publication of a separate opinion is prohibited, justices cannot express what they really think is the best understanding of fact and constitutional provision.

The third cultural element is a justice's references to constitutional decisions of other jurisdiction, which is a critical trend for new democracies as Section 4.4 has showed. Unlike the constitutional courts in other new democracies such as Hungary, the *Tsets* has never made references to decisions of international and foreign courts even though it decides issues related to similar principles such as basic standards of criminal justice, freedom of religion, and equal protection. This court does not translate its decisions into English or any other popular language, so it rarely gets feedback on them from foreign scholars.¹⁰⁷

Nevertheless, there are some features that help to develop the culture to use foreign judicial judgments. The Mongolian constitution making was largely based on international and comparative constitutional law. The Constitution of Mongolia was influenced by the UDHR, the ICCPR and constitutions of other democracies such as the U.S., Japan, France, and Austria. The *Tsets* also has the obligation and the precedent to enforce human rights covenants (Const. art. 10). Thus, the interpretations of these international instruments and constitutions are informative for justices. The similarity of human rights clauses in the Mongolian Constitution to those of other constitutions and international treaties suggests that Mongolian justices may need to see how the justices in other jurisdictions interpret officially these clauses, what methods they use for interpreting these clauses, and how the interpretation of the Mongolian Constitution can be improved. The *Tsets* sometimes makes references to the international law such as

¹⁰⁶ Prof. Sarantuya Ts. wrote on dissenting and concurring opinions. Sarantuya Ts., *Undsen khuuliin processiin erkh zui*, 158.

¹⁰⁷ There is no comprehensive comments on the *Tsets* and its decisions by foreign scholars except the one by Prof. Ginsburg. Ginsburg, *Judicial Review in New Democracies*, 158–205.

human rights covenants. For example, this court protected the right to strike in the ICESCR. This court does not use foreign judgments, but it sometimes mentions the general principles of law and the practice of democratic countries without details.

The *Tsets* has many chances to get in touch with foreign judgments. Comparative scholars mention the reasoning of specific foreign judgments.¹⁰⁸ Gunbileg also argues that courts should use precedents from foreign and international courts when deciding cases, particularly cases related to human rights and universally recognized principles.¹⁰⁹ For example, the courts may look at precedents of international courts to interpret the concept of genocide in the 2002 Criminal Code of Mongolia. However, there is no comprehensive translation of important judgments of foreign courts. By using comparative research, legal scholars challenge unconstitutional practice or laws before the *Tsets*. For example, Bayar, a legal researcher, submitted a judgment by the Russian Constitutional Court in support of his petition, but the *Tsets* failed to say anything concerning this judgment.¹¹⁰ This fact shows not only the lack of reasoning but also the reluctance of the *Tsets* to respond to the arguments based on comparative constitutional law. In addition, the *Tsets* and its justices have been becoming more active in communicating with foreign justices and scholars. Constitutional justices in Hungary, Romania, Poland, South Korea, Turkey, Germany, and Russia have visited the *Tsets*. Justices of the *Tsets* also have visited these and other courts, and they often attend international conferences. The *Tsets* organized the Seminar of Asian Constitutional Justices twice.¹¹¹

The fourth cultural element is the role of scholars in the constitutional debates. During the socialist regime, most of the research focused on the socialist Constitution, and there was almost no publication on constitutionalism due to restrictions on academic freedom. The transition from socialism towards liberal democracy changed the legal scholarship in Mongolia. Mongolian scholars have been publishing on topics such as the rule of law, democracy, constitutionalism, and constitutional review. These scholars also serve as experts in the *Tsets* when they are asked to give their opinions on an issue. For example, Prof. Byambaa, the former constitutional justice, and Prof. Bat-

¹⁰⁸ For example, B. Gunbileg showed the reasoning of *Carlill v Carbolic Smoke Ball Ck Ltd* (1892) and *Alcock v Chief Constable of South Yorkshire Police* (1992). Gunbileg B., *Jishgiin Erkh Zui*, 24–29.

¹⁰⁹ Ibid., 92–93.

¹¹⁰ See *Tsets*, Oct. 24, 2007, Dugnelt No. 10.

¹¹¹ Byambadorj J., “Mongol Ulsiin Undsen Khuuliin Khyanalt: Tuluv Baidal, Tsaashdiin Khandлага,” 26–27.

Erdene, the current Supreme Court justice, separately submitted their expert opinions on Prosecutor General's appeal against the final judgment of a chamber of the Supreme Court, and both of them doubted constitutionality of this appeal, but the *Tsets* did not consider their opinions in its reasoning.¹¹² The *Tsets* has not made any direct reference to scholar's writing or theory. Furthermore, legal scholars are appointed as constitutional justices, and many of the justices have been law professors. Prof. Amarsanaa, Prof. Sarantuya, and Prof. Naranchimeg are in the current *Tsets*. Finally, legal scholars use the popular standing to challenge laws whose constitutionality is doubtful according to their researches. Scholars often submit a petition as a citizen, offer better conceptions on constitutional principles, publish the articles on these principles, and give an interview about controversial cases in media. In most of the famous cases, petitioners were legal scholars, mainly law professors at the National University of Mongolia.

However, constitutional scholarship needs to be developed in order to strengthen constitutionalism in Mongolia. In a 2001 international conference in Ulaanbaatar, Brietzke suggested the following:

Reasoned and justified decisions in each higher court case should be required, published, and made available on the Internet. Summaries can then be published in the media to stimulate an informed public and legislative debate, while professors can praise or criticize the full decision... Principled and public criticisms of judges for not consistently implementing such policies as national security, democracy, development and human rights do not endanger the judges' independence, and these criticisms are rather easily distinguishable from the critic's mere dislike of well-justified case decisions.¹¹³

Brietzke's suggestion has been partially realized because decisions of higher courts including the *Tsets* are available to the public and scholars via the publication or the internet. Nevertheless, the principled and scholarly criticism of justices and their decisions is still unsatisfactory. Section 5.3 showed that more studies on the methods of constitutional interpretation are needed in Mongolia.

There is a lack of research on theories and philosophies on basic principles of liberal democracy. Libertarian political philosophy has been researched and translated since

¹¹² *Tsets*, Dec. 21, 2007, Dugnelt No. 13. See also *Tsets*, Jan. 7, 1994, Dugnelt No. 1.

¹¹³ Brietzke, "Legal Interpretation in the U.S.," 87–88.

2000s.¹¹⁴ However, works by liberal political philosophers such as Locke, Kant, Mill, Rawls and Dworkin have not been critically examined and systematically translated into Mongolian though some scholars cite these significant works. The poor development of political philosophy is one cause of weak liberal democratic culture and poor constitutional interpretation. Political philosophy can promote the development of constitutional interpretation because it helps clarify core problems and elucidate basic principles of democracy.

Mongolian scholars seldom criticize bad judgments and admire good judgments. A few scholars sometimes criticize controversial decisions of the *Tsets*. For example, Prof. Chimid criticized the *Tsets* decision that excluded the Government and the Elections Committee from the review of the administrative courts.¹¹⁵ Prof. Sarantuya also analyzed some constitutional cases, pointed out inconsistent reasoning, and argued for the importance of cases.¹¹⁶ Scholars also support some of the good decisions by the *Tsets* against strong political interests. For instance, law professors express through the media their support for the *Tsets* decision in *Nyamdlorj Case*.¹¹⁷ However, the few scholarly comments on the *Tsets* judgments are not enough. Scholars seldom publish comments on pressing constitutional issues and conceptions of constitutional principles before and after the *Tsets* judgments. Moreover, scholars do not pay much attention to constitutional case law. Scholars have not published yet any casebook that comprehensively analyzes the *Tsets* judgments and shows the standard of good reasoning even though they sometimes discuss reasoning in a certain constitutional decision.¹¹⁸ Thus, scholars rarely discuss alternative interpretations of the Constitution by the *Tsets*, and this lack of discussion hinders the development of constitutional interpretation.

In addition, scholars rarely translate the judgments of foreign and international courts. Temuujin Kh. used the reasoning of the U.S. Supreme Court in *New York Times v.*

¹¹⁴ Hayek, *Boolchlogdokh Zam*; Boaz, *Libertarianism* (1997); Bergland, *Negen Khicheeld Bagtaasan Libertari Uzel*.

¹¹⁵ Chimid B., *Tur, nam, erkh zuin shinetgeliin egzegtei asuuudluud*, 79–96.

¹¹⁶ Sarantuya Ts., “Undsen Khuuliin Shuuukhiin Shiidvereer Undsen Khuuliig Khugjuulekh Ni,” 375–382; Among other cases, Tomas Ginsburg also analyzed cases on the separation of power. See Ginsburg, *Judicial Review in New Democracies*, 175–205.

¹¹⁷ For *Nyamdlorj Case I and II*, see Chimid B., “Yariltslaga”; Lundendorj N., “Yariltslaga”; Narangerel S., “Yariltslaga.”

¹¹⁸ Ts. Sarantuya analyzed some cases in her textbook on constitutional procedure. Sarantuya Ts., *Undsen khuuliin processiin erkh zui*, 136. Prof. Amarsanaa is going to publish his constitutional casebook.

Sullivan (1964) for interpreting freedom of expression.¹¹⁹ Nonetheless, the whole reasoning in *New York Times* and the U.S. theories (instrumental and constructive theories) on freedom of speech have not been discussed yet in Mongolia. Temuujin's argument against prohibiting the drivers from organizing an assembly with their tractors also rested on the German concept of an untouchable core of basic rights. Scholars mention sometimes this concept in the law journals and the *Tsets* used a similar concept once,¹²⁰ but the German explanation of this concept has not been discussed in detail. The best decisions of the courts like the U.S. Supreme Court, the Federal Constitutional Court of Germany, and the ECHR have not been translated systematically into Mongolian.

The fifth cultural element includes civic participation in the constitutional discussion, and Mongolian citizens participate in two ways. First, citizens submit notifications and petitions to the *Tsets*, and they have initiated almost all of constitutional cases. As a result of the right to initiate abstract review, citizens can challenge constitutionality of laws and other acts except the judicial judgments that violate their own rights. As Chapter 3 showed above, citizens submit not only notifications for protecting the Constitution, but also petitions challenging constitutionality of statutes and other acts that violated their own individual rights. In the *Tsets*, citizens and the representatives of the *SGKh* have the equal amount of time and access to discuss which interpretations of the Constitution are best. Second, citizens informally participate in the constitutional discussions with the help of the media, and they get educated on constitutional issues. Journalists sometimes write about controversial constitutional cases and interview legal scholars though they do not analyze the court reasoning. For example, journalists criticized much the actions of Chairperson Nyamdorj and the constituency grant. Because of the free media and citizens' attention to controversial issues, MPs often discuss whether their proposed bills would be challenged before the *Tsets*. Moreover, citizens support the decisions protecting basic rights and restricting the arbitrary power of the government. Complete research is lacking on how strong the reputation of the *Tsets* is, but the internet-polls conducted by two prestigious newspapers in 2007 show that a majority of participants supported the judgments in *Nyamdorj Case* and *Constituency Grant Case*.¹²¹

¹¹⁹ See Temuujin Kh., *Jus Frast buyu Yost Ug*, 82–90.

¹²⁰ See *Tsets*, Apr. 21, 1993, Dugnelt No. 2; *Tsets*, May. 26, 1993, Togtool No. 3.

¹²¹ “Odoogiin Sanal Asuulgiin Ur Dun 1”; “Odoogiin Sanal Asuulgiin Ur Dun 2”; “Sanal Asuulgiin Dun.”

A democratic regime can endure only when a majority of its citizens support it as Section 4.4 showed. Thus, citizens' education on democracy is important. Both constitutional review in general and the citizen's right to submit petitions and notifications on any matter within the jurisdiction of the *Tsets* play vital educational roles, but they are not sufficient. In Mongolia, high school curriculum does not contain any course similar to the one discussed in Section 4.4.¹²² Thus, students hardly have the opportunity to learn basic principles and ideas of liberal democracy, to discuss the current political issues according to these principles and ideas and to develop skills to construct reasoned judgment.

Conclusions

Chapter 5 analyzed constitutional case law and constitutional interpretations in Mongolia. Some judgments of the *Tsets* are well reasoned, include bases of the moral reading of the Constitution, and protect fundamental rights. Moreover, the judgments of this court improve the law-making process of the *SGKh*. However, most judgments of this court lack reasoning or misinterpret the Constitution; thus politicize the court, slow the development of constitutionalism, and weaken the protection of fundamental rights. The *Tsets* often uses methods similar to strict constructionism and originalism rather than the moral reading of the Constitution. Mongolian scholars have paid attention to the lack of reasoning in the judicial judgments and been working to improve the reasoning of judgment by supporting the publication of judicial judgments and encouraging case analysis. On the other hand, scholars have neither discussed the lack of reasoning comprehensively nor offered sophisticated solutions to it. There is no enough research on the issue of constitutional interpretation in Mongolia.

¹²² President Elbegdorj Ts. initiated a course called Civics for the schoolchildren in 2009, and this course has been taught in the schools. However, the Civics course does not cover all the liberal democratic values as suggested in this book.

Conclusion: Recommendations for Better Protection of Fundamental Rights in Mongolia

According to the 1992 Constitution of Mongolia, the Constitutional Court (*Tsets*) performs constitutional review and has made decisions on constitutionality of laws and other acts. However, this court provides insufficient protection of fundamental rights and the rule of law even though some of its decisions are well reasoned. The five chapters of this book have examined the question of how to improve the protection of these rights through the *Tsets*. Each chapter has included a conclusion, which does not need to be repeated again here. Instead, it may be useful to give concrete recommendations based on the discussions made in all the five chapters. The recommendations will be related to two issues: (1) constitutional review and (2) constitutional interpretation.

Recommendations on the institutional improvement of the Tsets

To reflect the typical characteristics of the European model of constitutional review, the *Tsets* should be institutionally improved in four ways. First, a candidate to this court should be at least a legal professional, and a statutory amendment is required for this. According to the current practice, non-legal professional politicians, who are unqualified to work as a justice, can be appointed to the *Tsets*.

Second, the independence of the *Tsets* should be improved so that justices can make a reasoned decision free from political pressures. The statement that the court is independent is not enough, so it should be guaranteed by constitutional mechanisms. The independence of the *Tsets* is weak because a simple majority (more than 1/2) of the State Great *Khural* (the *SGKh*) appoints justices for a renewable term of six years. Thus,

an amendment that a super-majority (2/3 or 3/4) of the *SGKh* appoints justices for a non-renewable term of 9-12 years can improve the independence of the *Tsets*.

Third, the jurisdiction of the *Tsets* should be improved according to that of the Federal Constitutional Court of Germany. The existing practice is that any citizen can submit a petition (or a notification) on any constitutional matter except the judgments of ordinary courts, and that the Supreme Court and the *SGKh* can send a request to the *Tsets*. This book suggests that citizens should have the right to submit petitions against the violation of their own constitutional rights by an ordinary court or an administrative organ (the individual complaint), that citizens should have the right to submit notification concerning only a pending case (as *amicus curiae* brief rather than *actio popularis*) to the *Tsets*, that any ordinary judge should have the right to directly refer a constitutional question related to their concrete cases to the *Tsets*, and that a minority of MPs should have the right to challenge the constitutionality of legislation adopted by the *SGKh*.

Fourth, the two-stage procedure of the *Tsets* should be replaced by the single-stage procedure, the classic procedure of the European model, in which constitutional courts directly make the final, binding judgments. Under the two-stage procedure, the *Tsets* makes and submits a conclusion to the *SGKh*. If the *SGKh* does not accept this conclusion, then the court delivers the final decision. The two-stage procedure is suitable for a transitional period, but it harms the authority and independence of the court. Along with Mongolian democracy, the *SGKh* and the *Tsets* has gained considerable experiences in two decades. The replacement for the single-stage procedure requires an amendment to the Constitution. If this amendment is impractical, the *Tsets* can still improve the protection of the Constitution by delivering reasoned judgments. These reasoned judgments may make the *SGKh* discuss seriously the reasons based on constitutional law, and can therefore promote a dialogue between the *Tsets* and the *SGKh*. Moreover, the two-stage procedure should be limited to only to the abstract review initiated by the request, but the single-stage procedure should be used to decide petitions submitted by citizens.

Recommendations for bettering the interpretation of the Constitution by the Tsets

After reviewing the constitutional interpretation in the U.S. and Europe and analyzing Mongolian constitutional cases, this book recommends changes in the constitutional interpretation and culture because the institutional improvement of the

Tsets is significant, but insufficient for the better protection of fundamental rights. The *Tsets* can improve its constitutional interpretation if it continuously makes reasoned judgments by using an appropriate method, notably the moral reading, in interpreting the Constitution. According to this method, judges should treat the Constitution as a charter of abstract moral principles and make the best interpretation of these principles with the best arguments based on the constitutional text, structure and principles justifying precedents. The *Tsets* should also always decide matters related to constitutional principles rather than social policies and respect the priority of principles over policies. The moral reading provides for an interpretation that assists the protection of fundamental rights better than strict constructionism and originalism to which the *Tsets* often appeals in its judgments.

Moreover, the book suggests encouraging five changes in the constitutional culture of Mongolia. First, the *Tsets* should respect precedents in a principled way and overrule poor precedents if there are enough reasons to do so. Second, constitutional justices should be allowed to publish separate opinions (concurring or dissenting). Third, justices can improve their own reasoning by using or referring to the reasoning of foreign judicial judgments. The judgments of the *Tsets* should also be translated into English so that foreign scholars can give feedbacks. Fourth, scholars should actively participate in the constitutional discussions. Scholars can contribute to strengthening democracy by translating the best of foreign judicial judgments, publishing books on constitutional theory and philosophy, authoring constitutional case books, writing articles on constitutional problems, providing their arguments on issues pending in the *Tsets*, and critically evaluating the judgments of the *Tsets*. Scholars should also evaluate the appropriateness of candidates to the *Tsets* by showing whether they are capable of issuing a reasoned decision and what constitutional philosophy and convictions they hold in interpreting the Constitution. Moreover, scholars should critically examine the development of the rule of law (the *Rechtsstaat*). If the conceptions of the rule of law are contested and supported by arguments, the importance and meaning of this ideal will become clear. Fifth, high school curriculum should include a course on basic principles and ideas of liberal democracy and teach students skills to discuss controversial political issues according to these principles and ideas.

The proper interpretation of the Constitution is significant for new democracies such as Mongolia. By improving the constitutional interpretation and reasoning, justices and scholars can cooperate in strengthening liberal constitutionalism even if the institutional setting of the *Tsets* is unchanged. The institutional improvement of the court is difficult because it requires amendments to the Constitution and to the laws, which depend on

the politics in the *SGKh*. Even if the *Tsets* is institutionally improved according to the recognized standards of the European model, it still may not fully protect fundamental rights and other principles unless it adopts the principled attitude and the moral reading of the Constitution.

The recommended changes in constitutional interpretation and culture would develop the constitutional discussions in Mongolia. The active usage of the moral reading may not always bring the right answer to a case, but it can create a deliberative forum for discussion and encourage the *Tsets* to choose a better interpretation of the Constitution. That is, the moral reading promotes the discourse among judges, scholars, and the public in which they talk about the best interpretation, and the judges choose finally one of the interpretations. Those who support a certain interpretation of the Constitution could reasonably accept the decision if the *Tsets* delivers good reasons and respect the integrity of constitutional law. The improvement of constitutional discussion gradually lead to a better protection of fundamental rights because unreasonable interpretations and contradicting arguments are often criticized, corrected, and marginalized in the process. For example, the *Tsets* can hardly refuse to protect international human rights in a judgment without good justifications though it protects these rights in other judgments. This kind of refusal would seem arbitrary in the deliberative forum.

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Appendix I

Selected Provisions of the Constitution of

Mongolia

We, the people of Mongolia:

- Strengthening the independence and sovereignty of the state,
- 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 human, civil and democratic society in our homeland. For these reasons, do hereby proclaim and declare to the all populace this Constitution of Mongolia.

Chapter One

Sovereignty of the Mongolian State

Article One

2. The fundamental principles of the activities of the State shall be securing democracy, justice, freedom, equality, national unity and rule of law.

Article Three

1. In Mongolia state power shall be vested in the people of Mongolia. The Mongolian people shall exercise it through their direct participation in state affairs as well as through the representative bodies of the State authority elected by them.
2. Illegal seizure of State power or any attempt to do so shall be prohibited.

Article Nine

1. The State shall respect the religions and the religions shall honor the State.
2. State institutions shall not engage in religious activities and the Church shall not

carry out political activities.

3. The relationship between the State and the Church shall be regulated by law.

Article Ten

1. Mongolia shall adhere to the universally recognized norms and principles of international law and pursue a peaceful foreign policy.

2. Mongolia shall fulfill in good faith its obligations under international treaties to which it is a Party.

3. The international treaties to which Mongolia is a Party shall become effective as domestic legislation upon the entry into force of the laws on their ratification or accession.

4. Mongolia shall not abide by any international treaty or other instruments incompatible with its Constitution.

Chapter Two

Human Rights and Freedoms

Article Fourteen

1. All persons lawfully residing within Mongolia are equal before the law and the Court.

2. No person shall be discriminated against on the basis of ethnic origin, language, race, age, sex, social origin and status, property, occupation and position, religion, opinion and education. Every one shall be a person before the law.

Article Sixteen

The citizens of Mongolia are guaranteed to enjoy the following rights and freedoms:

1) the right to life. Deprivation of human life shall be strictly prohibited unless capital punishment is imposed by due judgment of the Court for the most serious crimes, pursuant to Mongolian Criminal law.

2) the right to a healthy and safe environment, and to be protected against environmental pollution and ecological imbalance.

3) the right to fair acquisition, possession, ownership and inheritance of movable and immovable property. Illegal confiscation and requisitioning of the private property of citizens shall be prohibited. If the State and its bodies appropriate private property on the basis of exclusive public need, they shall do so with due compensation and payment.

4) the right to free choice of employment, favorable conditions of work, remuneration, rest and private farming. No one shall be subjected to forced labor.

5) the right to material and financial assistance in old age, disability, childbirth and childcare and in other circumstances as provided by law.

6) the right to the protection of health and medical care. The procedure and conditions of free medical aid shall be determined by law.

7) the right to education. The state shall provide basic general education free of charge; Citizens may establish and operate private schools if these meet the requirements of the State.

8) the right to engage in creative work in cultural, artistic and scientific fields and to benefit thereof. Copyrights and patents shall be protected by law.

9) the right to take part in the conduct of State affairs directly or through representative bodies. The right to elect and to be elected to State bodies. The right to elect shall be enjoyed from the age of eighteen years and the age of eligibility for being elected shall be determined by law according to the requirements in respect of the bodies or positions concerned.

10) the right to form a party or other mass organization and freedom of association to these organizations on the basis of social and personal interests and opinion. All political parties and other mass organizations shall uphold public order and state security, and abide by law. Discrimination and persecution of a person for joining a political party or other mass organization or for being their member shall be prohibited. Party membership of some categories of state employees may be suspended.

11) men and women shall enjoy equal rights in political, economic, social, cultural fields and in family relationship. Marriage shall be based on the equality and mutual consent of the spouses who have reached the age determined by law. The State shall protect the interests of the family, motherhood and the child.

12) the right to submit a petition or a complaint to State bodies and officials. The State bodies and officials shall be obliged to respond to the petitions or complaints of citizens in conformity with law.

13) the right to personal liberty and safety. No one shall be searched, arrested, detained, persecuted or restricted of liberty except in accordance with procedures and grounds determined by law. No person shall be subjected to torture, inhumane, cruel or degrading treatment. Where a person is arrested his/her family and counsel shall be notified within a period of time established by law of the reasons for and grounds of the arrest. The privacy of citizens, their families, correspondence and homes shall be protected by law.

14) the right to appeal to the court to protect his/her rights if he/she considers that the rights or freedoms as spelt out by the Mongolian law or an international treaty have been violated; to be compensated or the damage illegally caused by others; not to testify against himself/herself, his/her family, or parents and children; to self-defense; to receive legal assistance; to have evidence examined; to fair trial; to be tried in his/her

presence; to appeal against a court decision, to seek pardon. Compelling to testify against himself/ herself shall be prohibited. Every person shall be presumed innocent until proved guilty by a court by due process of law. The penalties imposed on the convicted shall not be applicable to his/her family members and relatives.

15) freedom of conscience and religion.

16) freedom of thought, opinion and expression, speech, press, peaceful assembly. Procedures for organizing demonstrations and other assemblies shall be determined by law.

17) the right to seek and receive information except that which the state and its bodies are legally bound to protect as secret. In order to protect human rights, dignity and reputation of persons and to ensure State defense, national security and public order secrets of the State, organization or individuals, which are not subject to disclosure shall be determined and protected by law.

18) the right to freedom of movement and residence within the country, right to travel and reside abroad and to return to their home country. The right to travel and reside abroad may be limited exclusively by law in order to ensure national security and the security of the population and protect public order.

Article Nineteen

1. The State shall be responsible to the citizens for the creation of economic, social, legal and other guarantees ensuring human rights and freedoms, to fight against violations of human rights and freedoms and to restore infringed rights.

2. In case of announcement of a state of emergency or martial law, the human rights and freedoms as determined by the Constitution and other laws shall be subject to limitation only by a law. Such a law shall not affect the right to life, the freedom of thought, conscience and religion, as well as the right not to be subjected to torture, inhuman and cruel treatment.

3. In exercising his/her rights and freedoms one shall not infringe the national security, rights and freedoms of others or violate public order.

Chapter Three
State system of Mongolia

Article Twenty

The State Great *Khural* of Mongolia is the highest organ of State power and the legislative power shall be vested solely in the State Great *Khural*.

Article Twenty one

2. The members of the State Great *Khural* shall be elected by citizens eligible for

election, on the basis of universal, free, direct suffrage by secret ballot for a term of four years.

Article Twenty three

1. A member of the State Great *Khural* shall be an envoy of the people and shall represent and uphold the interests of all the citizens and the State.

Article Twenty five

1. The State Great *Khural* may consider on its initiative any issue pertaining to domestic and foreign policies of the State, and shall keep within its exclusive power the following issues and decide thereon:

1) to enact laws, make amendments to them;

6) to appoint, replace or remove the Prime Minister, members of the Government and other bodies responsible and accountable to the State Great *Khural* as provided for by law;

7) to define the State's financial, credit, tax and monetary policies; to lay down the guidelines for the country's economic and social development; to approve the Government's program of action, the State budget and the report on its execution;

8) to supervise the implementation of laws and other decisions of the State Great *Khural*;

Article Thirty

1. The President shall be the Head of State and embodiment of the unity of the Mongolian people.

2. An indigenous citizen of Mongolia, who has attained the age of forty-five years and has permanently resided as a minimum for the last five years in Mongolia, shall be eligible for election to the post of President for a term of four years.

Article Thirty three

1. The President shall exercise the following power:

1/ to exercise a right to veto against all or part of laws and other decisions adopted by the State Great *Khural*. The laws or decisions shall remain in force if two thirds of the members of the State Great *Khural* present in the session do not accept the President's veto;

Article Thirty eight

1. The Government is the highest executive body of the State.

2. The Government shall implement the State laws, in accordance with duties to direct economic, social and cultural development, shall exercise the following power:

1/ to organize and ensure nationwide implementation of the Constitution and other laws;

2/ to work out a comprehensive policy on science and technology, guidelines for

economic and social development, the State budget, credit and fiscal plans and to submit these to the State Great *Khural* and to execute decisions taken thereon;

Chapter Four Judiciary

Article Forty seven

1. In Mongolia the judicial power shall be vested exclusively in courts.
2. The unlawful establishment of a court under any circumstances and exercise of judicial power by any organization other than court shall be prohibited.

Article Forty nine

1. Judges shall be independent and subject only to law.

Chapter Five The Constitutional *Tsets* of Mongolia

Article Sixty four

1. 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 the guarantee for the strict observance of the Constitution.
2. The Constitutional *tsets* and its members in the execution of their duties shall be subject to the Constitution only and shall be independent of any organizations, officials or any other person.
3. The independence of the members of the Constitutional *tsets* shall be ensured by the guarantees set out in the Constitution and other laws.

Article Sixty five

1. The Constitutional *tsets* shall consist of 9 members. Members of the Constitutional *tsets* shall be appointed by the State Great *Khural* for a term of six years upon the nomination of three of them by the State Great *Khural*, three by the President and the remaining three by the Supreme Court.
2. A member of the Constitutional *tsets* shall be a Mongolian citizen who has reached forty years of age and has a high political and legal qualification.
3. The Chairman of the Constitutional *tsets* shall be elected from among 9 members for a term of three years by a majority vote among the members of the Constitutional *tsets*. He/she can be re-elected once.
4. If the Chairman or a member of the Constitutional *tsets* violates the law, he/she

may be withdrawn by the State Great *Khural* based on the decision of the Constitutional tsets and on the suggestion of the institution that nominated him/her.

5. The President, members of the State Great *Khural*, the Prime Minister, members of the government and the Supreme Court shall not be members of the Constitutional tsets.

Article Sixty six

1. The Constitutional tsets shall examine and settle constitutional disputes on its own initiative on the basis of petitions and information received from citizens or at the request of the State Great *Khural*, the President, the Prime Minister, the Supreme Court and the Prosecutor General.

2. The Constitutional tsets, in accordance with Paragraph 1 of this Article, shall make and submit conclusions to the State Great *Khural* on the following disputed matters:

1) the conformity of laws, decrees and other decisions of the State Great *Khural* and the President, as well as Government decisions and international treaties to which Mongolia is a party with the Constitution;

2) the conformity of national referenda and decisions of the Central election authority on the elections of the State Great *Khural* and its members as well as on Presidential elections with the Constitution;

3) whether the President, Chairman and members of the State Great *Khural*, the Prime Minister, members of the Government, the Chief Justice of the Supreme court and the Prosecutor General have breached the law;

4) whether the grounds for the removal of the President, Chairman of the State Great *Khural* and the Prime Minister and for the recall of members of the State Great *Khural* existed.

3. If a conclusion submitted in accordance with sub-paragraph 1 and 2 of Paragraph 2 of this Article is not accepted by the State Great *Khural*, the Constitutional tsets shall re-examine it and make a final judgment.

4. If the Constitutional tsets decides that the laws, decrees and other decisions of the State Great *Khural* and the President as well as Government decisions and international treaties to which Mongolia is a party are inconsistent with the Constitution, the laws, decrees, instruments of ratification and decisions in question shall be considered invalid.

Article Sixty seven

Decisions of the Constitutional tsets shall enter into force immediately.

Chapter Six
Amendment to the Constitution of Mongolia

Article Sixty eight

1. Amendments to the Constitution shall be initiated by organization and officials enjoying the right to legislative initiative and could be submitted by the Constitutional sets to the State Great *Khural*.

2. A national referendum on constitutional amendment may be held on the concurrence of not less than two thirds of the members of the State Great *Khural*.

Article Sixty nine

1. An amendment to the Constitution shall be adopted by not less than three-quarters of votes of all members of the State Great *Khural*.

2. A draft amendment to the Constitution which has twice failed to win a three-quarters majority of votes of all members of the State Great *Khural* shall not be subject to consideration until the State Great *Khural* sits in a new composition following general elections.

3. The State Great *Khural* shall not undertake amendment of the Constitution within 6 months prior to general elections.

4. Amendments that have been adopted shall carry the same force as the Constitution.

Article Seventy

1. Laws, decrees and other decisions of state bodies, and activities of all other organizations and citizens should be in full conformity with the Constitution.

Appendix 2

Caseloads of the *Tsets* (1992-2010)

	Year	Conclusions (cases)	Important events and factors
1	1992	1	The MPRP, the former socialist party, became majority in the <i>SGKh</i> . The <i>SGKh</i> established the <i>Tsets</i> and appointed its first justices in late 1992. Criminal law professor Sovd G., who was Deputy Prosecutor General and Deputy Chief Judge of the Supreme Court, was elected as the first chief justice by other justices. The Sovd Court decided 43 cases for six years.
2	1993	4	
3	1994	9	
4	1995	7	
5	1996	10	The Democratic Union (the union of opposition parties) became a majority for the first time in the <i>SGKh</i> .
6	1997	6	
7	1998	9	Jantsan S. who was member of the <i>SSKh</i> (1990-1992), section director of the Central Committee of the MPRP (1986-1990), and prosecutor (1984-1986), was elected as the second chief justice by other justices of the <i>Tsets</i> . Chief Justice Jantsan started to preside at the court hearing in October 1998, and his court was the most passive. This court decided only 18 cases for six years, and the average workload was from one to four each year. This number was almost two times less than the number of cases decided by the Sovd Court. Jantsan was Chief Justice during the constitutional crisis of late 1990s, and he is the longest serving member of the <i>Tsets</i> , reappointed four times since 1992.
8	1999	1	Constitutional crisis began to intensify. The <i>SGKh</i> amended the Constitution for the first time, and the <i>Tsets</i> invalidated this amendment.
9	2000	4	The MPRP won 72 of 76 seats in the <i>SGKh</i> election. The <i>SGKh</i> reenacted the constitutional amendment that was exactly as with the one invalidated by the <i>Tsets</i> in 1999.
10	2001	2	
11	2002	4	
12	2003	3	
13	2004	3	The MPRP got 37 of 76 parliamentary seats, and Motherland-Democracy Coalition got 34 seats in the

			<i>SGKh</i> election. However, the Coalition collapsed soon, so the MPRP became a party having the biggest number of parliamentary seats.
14	2005	9	<p>Byambadorj J., who graduated the Faculty of Law, the National University of Mongolia and was a member of the <i>SGKh</i> (1992-2004), was appointed to the <i>Tsets</i> by the <i>SGKh</i> and elected as Chief Justice by other justices. The Byambadorj Court was more active than the court under the previous two chief justices. This court decided 64 cases (2005-2010), which was almost same as all cases decided in the previous 12 years. Moreover, the Byambadorj Court was more ambitious for protecting the Constitution. For example, this court decided two famous cases, <i>Nyamdorj Case</i> and <i>Constituency Grant Case</i> in 2007, and it made several important decisions for protecting its own independence from the <i>SGKh</i>.</p> <p>Perhaps, Chief Justice Byambadorj's background as a politician, a leader of the MPRP, was related to his court's activism and ambition. However, he sometimes did not obey the norms of judicial conduct. For example, Chief Justice Byambadorj declared the media conference, and gave some policy recommendations concerning the draft Law on the <i>SGKh</i> Election in 2010.</p> <p>The Byambadorj Court was also able to get the budget of building a new palace from the <i>SGKh</i> that had been reluctant to increase the judicial budget in general since 1992.</p>
15	2006	13	
16	2007	13	
17	2008	10	The MPRP won a clear majority in the <i>SGKh</i> (46 of 76 parliamentary seats), but it established a coalition government with the Democratic Party, the biggest opposition party.
18	2009	8	The <i>Tsets</i> moved to its own new palace separated from the legislature and the government.
19	2010	8	The terms of five justices including Chief Justice Byambadorj finished in the end of 2010 and the beginning of 2011. All of these justices but Chief Justice Byambadorj were reappointed to the <i>Tsets</i> by the <i>SGKh</i> .
20	2011	5	
		130	

C A L E