

【Special Features: Multiple Aspects on Constitutionalism –Asian “Contexts” and its Logic】

Development of Constitutionalism in Mongolia

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Abstract

Mongolia has experienced three socialist constitutions and a liberal constitution. The socialist constitutions were adopted under the influence of the Soviet and significant for the role it played for the independence of Mongolia. However, with the collapse of the Soviet Union, a window of opportunity presented itself and a liberal constitution was introduced. This time, Mongolia imported the liberal constitutional values independently and voluntarily. Constitutionalism, the concept of the limitation of state powers, separation of powers, human rights and freedom, originated in the west and spread all around the world. This paper explores the path of constitutional developments in Mongolia and the effect of the seventy years of socialist legacy to the development of constitutionalism in Mongolia.

Contents

- I. The Constitutions of the People’s Republic of Mongolia
- II. The First Democratic Constitution of Mongolia
- III. 2000 Amendments
- IV. 2019 Amendments
 1. Strengthening the Parliamentary Democracy and the Popular Sovereignty
 2. Stability of the Government
 3. Judicial Independence
 4. Local Government
- V. Conclusions

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I. The Constitutions of the People's Republic of Mongolia

After the collapse of Qing dynasty in 1911, Mongolia declared independence, established Bogd Khanate of Mongolia and enthroned the saint Javzandamba as the King of Mongolia. When the Bogd Javzandamba passed away on May 20, 1924, the Central Committee of the Mongolian People's Party decided to pursue the path of republican government on June 7, 1924. A number of individuals such as the Finance Minister S. Danzan, who sought to establish an independent Mongolian nation, were executed. The death of the Bogd Javzandamba paved the way for the transfer to a republic from a monarchy. Mongolian People's Republic was founded in 1924.

The involvement and influence of Russian personals in the constitutional drafting process is undeniable. Mr. T. Risulkov, who was the official representative of the Executive Committee of Comintern, organized the work of incorporating provisions of the Russian Constitution into the Constitution of Mongolia.¹ The Constitution drafting committee was headed by Mr. B. Tserendorj and the first Constitution of the People's Republic of Mongolia was adopted on November 26, 1924. It is important to note that many intellectuals and political leaders of the time attempted to pursue a path of independence from Soviet influence, but most of them became victims of political repression and arrested and executed. In some ways, the first Constitution of Mongolia resembles the Constitution of Japan and Germany. It was partly an imposed constitution by the Soviet, which helped the Mongolian People's Party to expel the Chinese and White Russian forces.

The Constitution of 1924 is historically significant because it consolidated the independence gained from the Manchu in 1911, dismantled the monarchy and established the People's Republic of Mongolia. It was the beginning of the events that led to the eventual membership of the United Nations in 1961. The subsequent Constitutions of 1940 and 1960 followed after the Soviet Constitutions of 1936. The three constitutions had many commonalities. They provided for the special role of the People's Revolutionary Party, created Council of Ministers, periodic elections, guarantee of human rights and freedom. However, with respect to the protection of human rights and freedom, Mongolian socialist Constitutions focused more on the protection of economic and social rights such as the right to housing, the right to work, the right to medical assistance and the right to education rather than the political rights.

¹ The 1924 Soviet Constitution was adopted on January 31, 1924 five days after the Constitution of Mongolia was adopted. However, the Soviet Constitution was largely based on the Treaty on the Creation of the USSR of 1922.

II. The First Democratic Constitution of Mongolia

With the collapse of the Soviet Union in early 1990s, a window of opportunity presented itself for Mongolia to choose the path of development without excessive foreign influence, especially from the two neighboring countries of China and Russia. Both China and Russia had their domestic issues and for a period of time could not exert much of an influence over Mongolian politics. The democratic revolution in Mongolia was inspired by the perestroika in the Soviet Union and comparable revolutions in Eastern European countries. This was a golden opportunity for Mongolia.

From the perspective of constitutionalism, the democratic movement that started in 1990 was the most significant development. A peaceful protest and hunger strike by young people in the streets of the capital city Ulaanbaatar overthrew the authoritarian regime. Seventy years of socialism ended without bloodshed. The price of the peaceful transfer was as such that the former socialist party, the Mongolian People's Revolutionary Party remained in power albeit with different ideology and agenda.

The first free election for the bicameral parliament was held on July 1990. The People's Great Khural, (the upper house of the parliament) established with the mandate to adopt a new democratic constitution, started discussing the draft Constitution. Public officials and scholars such as Professor B. Chimid, who was the main person drafted the constitution, were sent to Europe to study the constitutional systems for a short period of time. During the sessions of the People's Great Khural, there were heated debates over the choice of parliamentary and presidential democracy. After many compromises, it was decided that the parliamentary democracy was the most suitable system for Mongolia. However, due to the compromises made, Mongolia is often referred to as an example of semi-presidential system as the President is popularly elected and enjoys broad range of powers. The first democratic Constitution of Mongolia was adopted on January 13, 1992.

The Constitution upheld the notion of popular sovereignty, provided for a unicameral parliament elected by the people through general elections. The chapter one of the Constitution was devoted to the strengthening of the national security and the independence of the state. It covers issues such as territorial integrity, ban on foreign troop presence, ownership of natural resources, economic security, protection of livestock, fauna and flora, foreign policy, and notably, for the first time in Mongolian history, permitted private land ownership by citizens. For a nation of three million, located between two giant neighbors, the national security and independence of the state is undoubtedly an important priority. Many Mongolian scholars agree that the parliamentary system strengthened the independence and sovereignty of the country.

The second chapter guarantees the human rights and freedom of citizens, but protection of human rights can be found in other chapters as well. International human rights treaties are binding as the Constitution states that the international treaties are as effective as the domestic legislation upon ratification or accession.² The Constitution introduced some restrictions on the rights and freedoms such as private ownership of land. Generally, individual rights are limited by the rights and freedoms of other citizens.³ However, freedom of conscience and religion, right not to be subject to torture etc. cannot be restricted even in the event of emergency and war.

The third chapter is on the state structure. As mentioned earlier, a major debate during the drafting phase was the choice of parliamentary and semi-presidential system. Even today some still argue that Mongolia is a semi-presidential system due to the powers allocated to the President. Executive, legislative, and judicial powers allocated to different institutions for the first time in Mongolian history with a proper checks and balances. Under the previous Constitutions, the power of the state was concentrated in the ruling party.

The fourth chapter regulates the administrative and territorial units of Mongolia and their governance while the chapter five is on Constitutional Tsets (court) of Mongolia. The last chapter on the amendments to the Constitution provides for special procedures of constitutional amendments and certain restrictions to prevent arbitrary constitutional changes and preserve stability.

III. 2000 Amendments

In 2000, seven provisions of the Constitution were amended. They were immensely controversial even to this day. Professor B. Chimid called them seven worsening amendments. First, these amendments were stuck down by the Constitutional Tsets on the basis of procedural grounds. By the way, it is worth to mention that the previous Constitutions did not have a constitutional amendment procedure, which made it possible for the Mongolian People's Revolutionary party to amend the Constitution whenever it deemed necessary. The 1992 Constitution provides for a rigid requirement of three fourth majority support for constitutional amendments. However, when coupled with the plural electoral system that produces two party system, it is not as stringent as it looks.

In 1999, seven constitutional provisions were amended. The Tsets stuck them down as unconstitutional based on the fact that the legislature did not seek the opinion of the Tsets as required

² Constitution of Mongolia, 1992, art. 10.

³ Ibid., art 19.3.

by the Constitution. Later, the State Great Khural passed exactly the same amendments in 2000, which remain controversial till today. A dispute has been initiated by the Tssets on the constitutionality of these amendments as of now. Clearly, there was a need for a detailed procedure for constitutional amendments. As a result, in 2010 the State Great Khural adopted the Law on Constitutional Amendment Procedure. The law not only stipulates rather detailed amendment procedure, but also created many eternal clauses or unamendable clauses, which are not stated in the constitution. The law proved to be useful later in 2019 as it required the parliament to follow certain procedures to ensure the public participation. However, because of too many eternal clauses, the State Great Khural had to amend the law so that it can make changes to come constitutional provisions.

The seven amendments included simultaneous mandate that allowed a member of parliament to serve as a minister,⁴ the constitutional requirement to have the Prime Minister candidate approved by the President,⁵ limitation on President's involvement in the formation of the cabinet,⁶ appointment of the Prime Minister by open ballot,⁷ election of Vice-Chairman of the State Great Khural from each party and coalition group of the parliament,⁸ reduction of the number of days for a regular session of Parliament from 75 to 50 working days,⁹ and dissolution of the State Great Khural by the President if it fails to appoint the Prime Minister within 45 days from the submission of the proposal. Although many call these amendments as worsening seven amendments, the author claims that some of these amendments were actually useful. For instance, the amendments that limited the Presidential powers in the appointment of the Prime Minister and the formation of the cabinet helped to resolve the gridlock between the President and the Parliament. Mongolian Presidents often acted in line with their political party and when the President was elected from the opposition party it created a confrontation between the State Great Khural and the President over the appointment of the Prime Minister. Between 1996-2000, the President Bangabandi rejected Prime Ministerial candidate from the opposing party seven times.

One amendment that especially contentious was the simultaneous mandate, which allowed members of the State Great Khural to concurrently serve in the cabinet. Original provisions of the

⁴ Constitution of Mongolia, 1992, art 29.1.

⁵ Ibid., 33.1.2.

⁶ Ibid., 39.2.

⁷ Ibid., 27.6

⁸ Ibid., 24.1.

⁹ Ibid., 27.2.

1992 Constitution prohibited simultaneous mandate, but in practice members of the Parliament served as ministers until 1996 when the Constitutional Tsets concluded that members of the Parliament cannot serve as ministers in the cabinet. If a member of parliament has to resign in order to become a minister, it could create a lot of cost for the ruling party as it might lose a seat in the election. This situation led to the 2000 amendment that allowed simultaneous mandate. Some criticized it and suggested that no member of the State Great Khural should serve in the cabinet as ministers or the Prime Minister. Others opted for a limited number of parliament members to serve in the cabinet.

IV. 2019 Amendments

On November 14, 2019, the State Great Khural amended nineteen provisions of the Constitution. This time the amendment process differed significantly from 1999. The whole process took 3 parliaments, 4 draft amendments while in 1999 the Constitution was amended with a short public notice of a day. It all started with the organization of so-called deliberative polling for Constitutional amendments held in April 2017. About 700 citizens randomly chosen from different parts of the country gathered in Ulaanbaatar for two days and made informed decisions on the draft Constitutional amendments. A number of significant proposals were dropped after this event due to lack of support among the participants. Notable ones include the proposals to establish a bicameral parliament and the election of the President by the State Great Khural, which did not receive enough support among the participants of the poll. The deliberative polling was significant as this laid down the scope of the constitutional change. This has established a precedent that any future constitutional amendments need to go through the same process and define the scope of the proposed change first.

The amendments went through deliberations at three plenary sessions of the State Great Khural. After two sessions, the amendments were submitted for referendum. However, the President vetoed the bill due to number of provisions that sought to limit presidential powers. The State Great Khural accepted the veto and proceeded to the third parliamentary deliberation and dropped the idea of constitutional referendum. Meanwhile a committee, tasked with building consensus over the proposed amendments headed by the President, was established. The result of the compromise saw the initial draft changed significantly.

The 2019 Constitutional amendments cover 19 provisions and focused on improving the separation of powers either horizontal and vertical ways. The amendments can be categorized into four groups: the amendments to strengthen the parliamentary democracy and the popular sovereignty;

promoting stability of the executive; guaranteeing the judicial independence; and clarifying local government system. Most of these amendments will be effective by May 25, 2020.

1. Strengthening the Parliamentary Democracy and the Popular Sovereignty

To strengthen the parliamentary democracy and the popular sovereignty 7 constitutional provisions were amended.¹⁰ Several constitutional amendments of 2000 were reversed and the original provisions of the 1992 Constitution were restored.¹¹ Ordinary laws will be passed by a majority vote of all members of the State Great Khural as opposed to the majority of the members present in a particular plenary session.¹² In other words, the laws will be passed by at least 39 members of the State Great Khural whereas in the past it required the vote of 20 members. Another amendment provides for recall of members of the State Great Khural who violated the law and the oath to the office.¹³

Although political parties had been mentioned in the Constitution, this time the principles with respect to the creation, financing, and the transparency of financial sources and expenses were stipulated. According to these amendments, a political party is the expression of the political will of the people and shall pursue a policy of national level. The internal organization of a party shall conform to the democratic principles. At least one percent of the voters shall associate in order to establish a political party. This last provision means that in order to establish a new political party, the party must have at least about twenty thousand members or supporters. The amendment was proposed by the President. Twenty thousand registered members' requirement could potentially limit the freedom of association of the citizens. Fortunately, during the deliberation it was mentioned that this requirement means supporters rather than registered members. In addition, the Law on the Procedure to Implement the Amendments to the Constitution of Mongolia, stipulated that this provision shall be effective starting from 2028.

As for the election, the proportionality electoral system was found to be unconstitutional by the Constitutional Tsets. The initial draft contained a proposal to reintroduce the mixed system with a proportional element, but it did not get enough support at the parliament. Instead, the amendment prohibited adoption of, and amendment to the Election law of the State Great Khural one year prior to

¹⁰ Constitution of Mongolia, 1992, art 27.2,6,7; 29.3; 22.2,3,4; 28.2; 21.4; 26.1; 25.1.16.

¹¹ *Ibid.*, 27.2 Regular sessions of the State Great Khural is held once in every half year for not less than seventy-five working days.

¹² *Ibid.*, 27.6.

¹³ *Ibid.*, 29.3.

the regular election. In 2016, the State Great Khural had to make changes to the electoral legislation just before the parliamentary election because the Constitutional Tsets found the proportional system unconstitutional. It is not clear how to proceed if similar situation occurs in the future.

By far one of the most controversial amendment in this part is article 6.2, which was proposed by the President. It states that the land subsoil, forest, water resources and fauna shall be '*State public property*'. The justification presented by the President is that under the State property regime, the mining resources are used irresponsibly by the authorities. State public property would connote that it belongs to the public and reinforces the principle of popular sovereignty. The same provision established National Resource Foundation, presented the principles for the sustainable use of subsoil resources, and stipulated that the majority of the benefits from the use of mining deposits of strategic significance shall be allocated to the people.

2. Stability of the Government

For stability of the Government, the 2019 amendments made significant improvements. Simultaneous mandate was limited so that only four members of the State Great Khural can serve in the cabinet concurrently. The Prime Minister obtained the right to appoint and dismiss members of the cabinet and the President and the State Great Khural can no longer explicitly influence the formation of the cabinet. The Government can now only be dismissed with a majority of the all members of the State Great Khural.

The Presidents can be elected for a term of four years and re-elected only once under the 1992 Constitution. However, the new amendments state that the President can only be elected once for a term of six years. Re-election of a sitting President depends on the nomination by his political party. This necessitates him being biased during his office. Therefore, the drafters believed that the new amendment would provide conditions and incentive for the President to be impartial and neutral in his office. One issue that could be controversial is whether the current sitting President can be elected again under the new amendments.

3. Judicial Independence

In the past, Mongolia has experimented with different variations of the Judicial General Council. At a different point of times, it was under the influence of the Ministry of Justice or the Supreme Court or the President. It is apparent that in order to fulfill its obligation under the Constitution to ensure the impartiality of judges and independence of judiciary, the Judicial General Council itself needs to be

independent in the first place. Under the Constitution the Judicial General Council has duty to select judges from exclusively amongst lawyers, protect their rights, and other matters pertaining to providing the conditions that guarantee the autonomous functioning of judges. The President has the authority not only to appoint judges, but also the members and the chairman of the Judicial General Council, which is often criticized as it gave too much power to the hands of the President.

The new amendments aimed to lessen and eradicate the political influence over the selection of judges. Therefore, it increased the members of the Judicial General Council to ten and limited the terms of office for four years. Under the new amendments, the chairman is to be elected amongst the members by the Council rather than the President. The Judicial Disciplinary Committee will be established independently from the Judicial General Council. The new amendments will serve to limit the undue political influence in the judiciary that has long been an issue in Mongolia.

4. Local Government

Amendments to article 57.2 created national level and municipal level cities. Administrative and territorial units will only have the duty to deliver state services to the citizens while the cities and villages will provide utility services. State power is more decentralized in the local municipalities. Aimag, soum and district Khurals can now collect taxes within the limits prescribed by the law.

V. Conclusions

Between 1924-1990, Mongolia was under the Soviet influence. The three constitutions in these periods were socialist constitutions as the Soviet aimed to transform Mongolia into a true socialist republic. However, these constitutions paved the way for Mongolian independence and served historical roles for the benefit of Mongol nation. Since early 1990s, radical transformation to the liberal constitutional democracy began. Popular sovereignty, separation of powers, protection of human rights and freedom, judicial review of the constitutionality of the legislation were the fundamental principles of the 1992 Constitution of Mongolia. Despite spending 70 years under the Soviet influence, 1992 Constitution was a success. The 1992 Constitution has created a vibrant civil society, free media, and played a vital role in establishing a system of government based on a separation of powers. However, many challenges emerged in the past 28 years. Constitutional amendments of 2000 and 2019, both sought to address these challenges and stimulated the deepening of the development of constitutionalism in Mongolia.

