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Doctoral Dissertation

Development of Administrative Litigation in Mongolia: From Administrative Control to Court Remedy?

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Abstract

In the area of administrative law, it is essential to determine the role of the judiciary as a protector of rights and interests granted by the Constitution, while at the same time not hindering the genuine tasks of the executive arm of the government to function in the public law sphere. To be specific, this research examined, within the Mongolian context, the question of why it is important to differentiate between the judiciary as a tool of control of the executive branch of government and as an instrument for the protection of rights and interests in relation to the citizens and the state. The concept of judicial review in relation to the initial conditions required for litigation in administrative law is a new and unchallenged area of law and practice in Mongolia in terms of theoretical roots and background.

From a structural point of view, this thesis examines the paradigm change of administrative litigation in Mongolia from historical, comparative, and typological perspectives in each of its five chapters. Thus, a comparative typological analysis is made in three consecutive phases (from control, to remedy, up to the end of paradigm change). First, chapters one and two examine Mongolian administrative litigation from its initial status, as a Control Type administrative dispute settlement system, moving toward a Remedy Type system, which includes a historical and comparative study of French, German and Japanese models of administrative litigation. In next phase, chapters three and four scrutinized in detail based on the findings of previous chapters (first attempt of reform) to determine paradigm change in Mongolian administrative litigation, comparatively with Japanese institution and practice. Chapter five includes additional analysis of recent administrative law developments, which constitutes the (second attempt) to reform Mongolian administrative law. The final section of chapter five asks if the paradigm in Mongolian administrative litigation is complete from a typological perspective, transforming from Administrative Control to Court Remedy.

Concerning the argument presented in the thesis, there has been no prior research conducted that responds to the question of the status of Mongolian administrative litigation in terms of a comparative typology analysis: control type or remedy type, as well as a historical perspective in relation to the present paradigm and its tendency. Until there is an understanding of how and under what circumstances and influence Mongolian administrative litigation began and eventually formed its present status, it would be impossible to determine the exact cause of setbacks in development and suggest further improvement for

administrative litigation in Mongolia. Therefore, the intended aim of the current research, which is consistent with such an understanding, is to advance the development of administrative litigation, specifically contributing to paradigm change that facilitates greater protection of individual rights and legal interests through judicial review.

In relation to the first part of the research question for this thesis, particularly concerning the phrase "From Administrative Control**,**" it must be noted, from the viewpoint of administrative litigation and history, that soviet administrative dispute settlement is one variety of control type (administrative control). Therefore, in Mongolia the control type administrative settlement procedure was established. In other words, providing a remedy based on individual rights was not the purpose of administrative litigation in Mongolia, from the 1920s up to the 1990s. This was a non-contentious (non-litigation) type procedure; in other words, it was not an adversarial system. With regards to the second part of the research question, from Administrative Control "to Court Remedy**,**" even though the law changed to an adversarial (litigation) type of procedure, in actual practice the control type of procedure is often utilized which reveals that the paradigm change is formal but not substantial. Paradigm change from control type to remedy type has been somewhat achieved at the institutional level in the sphere of administrative litigation; however, legal thinking and practice in Mongolia is difficult to change, as it endeavors to transition toward a remedy type litigation, because of path dependence.

Finally, is the paradigm change complete? By the enactment of the General Administrative Law and the Administrative Court Procedure Law, Mongolian administrative law recognizes the categorization of litigation; thus, it now distinguishes between the different purposes of different types of litigation. Based on this step, it will serve as a catalyst to further strengthen subjective litigation by developing preconditions such as the concept of administrative act and standing. The administrative law reforms in 2016 are another attempt to change to remedy type administrative litigation as a continuum of the first attempt that took place in the early 2000s. The Mongolian approach to legal interpretation includes first defining the legal concept in statutory law and then enforcing this concept through case law. In this circumstance, because of insufficient practice and poor theoretical basis, it is difficult to appropriately use abstract legal concepts in particular cases. With regards to some of the findings of the current research in the recent Mongolian administrative litigation law, the ACPL is one example of a practical application of the thesis claim. Such reforms represent a preferred way in which to develop the law, where accumulation of practice and

theoretical discussions related to the cases help to shape the further development of statutory law regulations.

Introduction

Interaction between a state and an individual in terms of one who administers and others who are subject to such administration existed; nevertheless, this interaction was or was not recognized and regulated by legal means. Depending on the form of the state or stage of development of the administrative jurisdiction, recognition or legalization of this relationship differs. In general, administrative law aimed to control the ones who administered state affairs at the start. Subsequently, administrative law gradually began to change and move toward putting the state itself, which was also regulated by the administrative law, and its activities placed under the scrutiny of law by judicial review. The latest edition of De Smith's Judicial Review asserts that "In recent years, it is increasingly being realized that in a constitutional democracy the role of judicial review is to guard the rights of the individual against the abuse of public power."[1] The central subject of this research in general is the development of administrative litigation, particularly judicial review in Mongolia. Accordingly, the role of judicial review in the Mongolian context from a theoretical, institutional, and practical point of view needs to be studied in comparison with relevant jurisdictions, most importantly from the viewpoint of historical perspectives and contemporary tendency.

In terms of prior research, Professor Chimid was the foremost academic in the field of administrative law in Mongolia. During the course of this research, especially in Chapter I and III, his works have been studied and acknowledged as constituting the most trustworthy relevant prior research. The development and establishment of the administrative court in Mongolia, which began with a fundamental recognition at the constitutional level and continued to evolve through actualizing administrative litigation in the early 2000s, was inarguably the result of Professor Chimid's dedication and hard work in the field of administrative and constitutional law in Mongolia. Notably, in 1999 Professor Chimid articulated that the function of the administrative court was going to first exercise control over the legality of administrative activity,[2] and through this approach it would protect the rights and interests of citizens from abusive

[1] The Right Hon Lord Woolf, *De Smith's Judicial Review: Mainwork & Supplement*, ed. Sir Jeffrey Jowell and Prof Andrew le Sueur, 7th Revised edition edition. (London: Sweet & Maxwell, 2014), 11.

[2] When Professor Chimid described this function he elaborated additional explaining by mentioning the instead of general supervision of Procuracy, administrative court is going to exercise it from outside of administrative branch independently, therefore, the control over administration is not eliminated with general supervision of Procuracy but it is shifted to the judicial power with full control authority to revoke administrative activity that is contrary to law as regards of implementation of Doctrine of Separation of Power which proclaimed in the 1992 Constitution. Chimid Biraa, *Terguun Devter*, ed. Unentugs Shagdar, vol. 1 of *Concept of the Constitution* (Ulaanbaatar, 2002), 161.

administrative power. Secondly, the administrative court has the function of carrying out appropriate procedure. In other words, the court decides cases based on the claims brought by citizens against administrative agencies through litigation. Nevertheless, he asserted that the overall social function of the administrative court as administrative litigation is "to control, adjudicate administration" and "to protect a citizen."[3]

There are also two[4] recent prior theses which are relevant, but do not coincide fully with the current research topic. Banzragch Gochoo's thesis[5] is entitled *The German and Mongolian Administrative Procedure Law: Comparative Legal Study.* This thesis includes a comparative analysis[6] of the purpose of German[7] and Mongolian contemporary administrative litigation. Doctor Banzragch notes that there are significant differences concerning the primary purpose[8] of each countries' administrative litigation. Based on this comparative study, suggestions were made in relation to broadening administrative court jurisdiction by not limiting it to only administrative acts. Moreover, the thesis recognized the enumeration principle as a restriction to judicial review. However, the enumeration principle, as it was incorporated in the Mongolian context, was unique because it included a broader definition of administrative agency[9] and regarded a normative administrative act as an individual act. Therefore, Banzragch asserted that, using this broader interpretation, enumeration principle that introduced in Mongolia can be understood as a general clause type. Nevertheless, the thesis suggested[10] that the jurisdiction should be changed from enumeration to a general

[3] Ibid., 1:160–61.

[4] Another thesis, "the Comparative study of administrative court" by J.Batzandan was not directly relevant to the current thesis because it did not cover Mongolian issue.

[5] Verwaltungsprozessrecht in Deutschland und der Mongolei - Ein Rechtsvergleich [Герман болон Монголын захиргааны процессын эрх зүй: Эрх зүйн харьцуулалт] in December 2007 at University of Bayreuth. This thesis discusses German administrative litigation from a historical and theoretical development perspective, and it acknowledges the different types of administrative adjudication among German states in the 19th century.

[6] Banzragch Gochoo, "Verwaltungsprozessrecht in Deutschland und der Mongolei - Ein RechtsvergleichGerman and Mongolian Administrative Procedure Law: Comparative Legal Study" (Bayreuth, 2008).

[7] The thesis explains the differences between South and East States of German administrative courts by noting that Prussian (East German) courts were focused on the objective legality of administrative activity through their use of enumerated jurisdiction. On the other hand, courts in the south German states centered on the protection of public subjective rights with general jurisdiction. One of the couple article published in Mongolian as summary of this thesis. Banzragch Gochoo, "Overview of Development of Administrative Court in Germany," *The National Legal Institute of Mongolia Law Review* 3 (2008): 62.

[8] The main purpose of German administrative litigation is to protect public law subjective rights but sub purpose is to maintain objective legality. Such purpose is especially evident in Article 20.3, in connection with Article 19.4, of the Basic Law and Article 47.2 of the Code of Administrative Court Procedure. On the other hand, the purpose, as stated in the LPAC, of administrative litigation in Mongolia is only centered on the protection of subjective rights. Banzragch Gochoo, "Constitutional and statutory law basis of the German Administrative Court (II part)," *The National Legal Institute of Mongolia Law Review* 2, no. (29) (2010): 59–64.

[9] Not only agencies in executive branch, but other public legal entities such as public schools, hospital.

[10] Gochoo, "Verwaltungsprozessrecht in Deutschland und der Mongolei - Ein RechtsvergleichGerman and

clause in order to enhance the protection of rights and judicial review.

Erdenetsogt Adilbish's thesis[11] concentrated on *The Formation of Administrative Procedure Law in Mongolia and Challenges Facing.* The thesis mostly focused on the formation of administrative procedure law[12] in Mongolia and preliminary proceedings. Ultimately, the thesis claimed that administrative procedural law formed as an independent[13] branch of law /legal science. Noticeably, it endorsed the idea that the LPAC should be unleashed from the rules of civil procedure, so that the administrative procedure law as an independent procedural law, could be further developed. Moreover, the thesis discussed the issue of administrative court jurisdiction and rejected the continued use of enumerated cases; thus, it recommended the use of a general clause in administrative procedure.

However, the scope of these prior theses did not cover Mongolian[14] administrative litigation developments with a historical perspective. In this regard, a relevant analysis regarding type of administrative litigation and the paradigm change of administrative litigation is conspicuously absent from the research. Most notably, there has been no prior research conducted that responds to the question of the status of Mongolian administrative litigation in terms of a comparative typology analysis: control type or remedy type, as well as historical perspective to reach the present paradigm and its tendency.

Until there is an understanding of how and under what circumstances and influence Mongolian

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Mongolian Administrative Procedure Law: Comparative Legal Study," 166–67.

[11] The Formation of Administrative Procedure Law in Mongolia and Challenges Facing. [Монгол Ус дахь захиргааны процессын эрх зүйн төлөвшил, тулгамдсан асуудал] in 2009 at National University of Mongolia.

[12] The thesis claimed that although administrative procedure law has been studied since the 1970s, the legal framework necessary for it to become an independent branch of law was not established until 2002 when the LPAC and the Law on Establishment of Administrative Court were enacted. The thesis includes a chapter (Chapter X, page 105-123) discussing forms of administrative procedure. Moreover, it stated that the object regulated by this branch law is a disputed interaction arising from the imperative relationship between public administration and citizens.

[13] The core findings of Erdenetsogt's research that may be also relevant to the current research include the following: According to this thesis, administrative procedure consists of two phases (the thesis describes this as forms of administrative adjudication) preliminary proceedings and administrative court procedure. Subsequently, the thesis discusses issues concerning preliminary proceedings based on the current viewpoint at that time in Mongolia. In sum, it concluded by suggesting the elimination of the mandatory preliminary proceedings requirement prior to the administrative litigation for some actions such as action for declaration of nullity of administrative act, declaratory action for existence or non-existence of legal relation, action for recovering damage, and action related to revocation of normative administrative act.
Erdenetsogt Adilbish, "Formation and Challenges Facing Administrative Procedure Law in Mongolia" (Мэргэжил F380102, National University of Mongolia, 2009), http://stf.mn/infodb/detail?id=8617 (accessed May 30, 2017).

[14] Instead, for instance, prior researches focused mostly on analyzing the LPAC characteristics, for instance first thesis in comparison with German contemporary administrative law aspects. Moreover, for instance second thesis, the scope of the study in terms of its comparative and historical breadth is rather limited, for the most part directly focuses on administrative procedure law of 2002.

administrative litigation began and eventually formed its present status, it would be impossible to both determine the exact cause of setbacks in development and to suggest further improvement for administrative litigation in Mongolia. Likewise, it will remain unclear as for identifying what characteristics influence and what causes determine the type of administrative litigation Mongolia utilizes. Consequently, it will be difficult to ascertain where it is heading in terms of the purpose and function of litigation, whether it is control over administration or it is providing a remedy for the rights and interests of individuals. Therefore, a particular contribution will be made if the aim of the current research is fulfilled by advancing the development of administrative litigation, in relevance to the paradigm change toward greater protection of individual rights and legal interests, through judicial review.

As the current thesis focuses on the paradigm change of administrative litigation from the viewpoint of typology analysis in Mongolia, the research here endeavors to make a lasting contribution by filling the gap in this area of study. This study approaches its subject with a perspective of the historical importance of its development with the influence of path dependence. Moreover, this thesis will study types of administrative litigation with regards to the apparent control type of Mongolia in comparison with remedy type which is the tendency among advanced countries. This thesis will answer the question concerning what is the status of Mongolian administrative litigation, as a mechanism for the protection of individual rights in cases of abusive administrative activity, through the history of administrative litigation development.

The thesis research question focuses on the paradigm change of administrative litigation from its initial nature as Administrative Control to Court Remedy in Mongolia. In order to adequately cover the subjects of this research, the following questions need to be answered in relation to the first part of the research question, particularly concerning the part of "From Administrative Control." What was the main instrument for settlement of administrative disputes in Mongolia from the 1920s until the enactment of the democratic constitution? Which institution plays a central role for resolving administrative disputes? What was the nature of the settlement procedure, was it control over objective legality or remedy for individual rights? Moreover, there are several important questions that need to be answered. Why was administrative litigation categorized as control type (over legality of administrative act) and remedy type (for subjective right)? What was the initial development of French and German administrative litigation and how did their development influence Japan and Mongolia? Historically how did Japanese administrative litigation develop from the view point of categorization of administrative litigation? Thus, the first set of research will serve

as a tool to understand the historical influences on the contemporary paradigm of administrative litigation in Mongolia.

In relevance to the second part of the research, the following questions also need to be dealt with when considering whether the paradigm changed from Administrative Control "to Court Remedy." What immediate result occurs when a socialist state changes to a post-socialist state from the view point of settlement of administrative disputes? The question of why Mongolia established a separate administrative court despite the existence of the ordinary court which has jurisdiction over administrative cases remains. What was achieved by switching from civil procedure to administrative procedure from the viewpoint of a paradigm change? What are the conditions for initiating subjective litigation and what can be learned from a comparative study of Japanese development in terms of administrative litigation in Mongolia? Finally, how contemporary administrative law developments impact the issue of judicial review in terms of a paradigm change From Administrative Control to Court Remedy?

The first chapter will focus on examining what forms of settlement for administrative disputes have been utilized in Mongolia, especially concerning whether it is to control the objective legality over the activity of administrative agencies or to provide a remedy for infringed subjective rights by administrative agencies. The second chapter will examine how the forms of administrative litigation have developed throughout the history of advanced European countries such as France and Germany, which are credited with founding and substantially developing administrative law and litigation. Then it will seek out the tendency among these advanced capitalist jurisdictions, including Japan for comparative purposes, by focusing on the paradigm change in administrative litigation from control to remedy type. Next, the third chapter will survey what changes have occurred in the Mongolian context since the starting point of administrative litigation which was described in Chapter one, such as the formation of control type administrative litigation. Moreover, this chapter will examine how and to what degree problems identified in previous chapters were solved by the first attempt at administrative law reform in Mongolia in the 1990s, especially concerning the change in control type non-litigation (non- contentious) procedure. Further, the fourth chapter continues to analyze the Mongolian context in detail by examining the separate administrative procedure law and its application by the administrative court in comparison with the Japanese context. Judicial review type actions apart from rest of the actions which belong to subjective litigation, based on this distinction, chapter four will observe what conditions are required for initiating judicial review type actions.

At last, the fifth chapter will assess what steps have been taken recently, since the establishment of the administrative court and the adoption of a separate administrative litigation law. And it will determine whether any of those problems that were acknowledged in the Mongolian context previously (especially in Chapter III and IV) have been fixed in terms of changing toward remedy type administrative litigation. Finally, Chapter five will consider the core characteristics that recent developments in Mongolian administrative litigation have brought. An essential aim of this thesis is to reveal the continuity in the development of administrative litigation in Mongolia, from its own history and in comparison with other countries, especially from the viewpoint of how control type or remedy type litigation has influenced Mongolian administrative litigation.

Chapter I: History of Settlement of Administrative Disputes in Mongolia 1921-1990

1.1. Introduction

The importance of history in the creation of new institutions, or in the transition to a new paradigm, is crucial because the new system and paradigm often inherit elements from the past. The first step in answering the research question, upon which the current thesis is based, is to examine the historical establishment of the approach to the administrative disputes in Mongolia.

Chapter one discusses historical aspects of administrative procedure in the Mongolian context which will serve as a foundation upon which the following chapters are built. However, in doing so, the role of various theoretical or institutional experiences gleaned from other jurisdictions, namely German[15] and Soviet administrative law, must be duly recognized. Both of these countries' legal scholarship has had a profound impact on present day Mongolian administrative law, because much of what is considered "Mongolian" administrative law, has been derived directly or indirectly from Germany and the previous Soviet Union since the 1920s. Mongolia was a recipient country of Continental or German legal concepts through the period of Soviet[16] legal influence until the early 1990s. It is beyond the scope of this research to extensively cover the subject prior to the 1921 People's Revolution of Mongolia. This chapter centers on how the Mongolian administrative law had formed as control type which was heavily influenced by soviet ideology until the 1992 democratic Constitution.

This chapter will focus on examining what kind of approach has been utilized for the settlement of administrative disputes in Mongolia. How it was formed or to what extent it was influenced by other countries? What was the nature of the settlement procedure? Further Chapter one will explore what

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[15] "German legal idealism was also influential in pre-revolutionary Russian jurisprudence in the late nineteenth and early twentieth centuries." Robert Sharlet, "In Search of the Law-Governed State: The Fate of Individual Rights in the Age of Perestroika," *Political Affairs* (1988): 1.

[16] European administrative law and theory had been studied by Russia for decades and lawyers who studied in Europe supported and played crucial role for the reform. "Earlier German works on Rechtsstaat began to be translated into Russian in the 1860s and 1870s. Von Mohl's Encyclopedia of the Theory of State was translated in 1868 in St. Petersburg. Likewise, the same author's Polizeiwissenschaft nach den Grundsdtzen des Rechtsstaats was translated into Russian (also in St.Petersburg) in 1871 as *Nauka politsii po nachalam iuridicheskogo gosudarstva*. In 1881, Von Gneist's work on English self-government was introduced to Russian readers by A. Nazimov in *Teoriia konstitutsionalizma i samoupravleniia Rudol'fa Gneista* - a monograph published in *laroslavl*. This was followed by a translation of Von Gneist's Rechtsstaat und Verwaltungsgerichtsbarkeit which was published in 1896 in St. Petersburg as *Pravovoe gosudarstvo i administrativnye sudy v Germanii*."
Hiroshi Oda, "The Emergence of Pravovoegosudârstvo (Rechtsstâat in Russia)," *Review of Central and East European Law* 3 (1999): 381–82.

institutions were authorized to carry out the settlement of administrative disputes and determine what kind of role the court played, especially whether it has been to control the objective legality over activity of administrative agencies or to provide a remedy of infringed subjective rights by administrative agencies? This will help to define and logically discover the initial type of Mongolian administrative litigation with its historical concepts. Moreover, findings of this chapter will serve as a tool to understand the historical influences on contemporary type administrative litigation in Mongolia.

In order to reach the conclusion to these questions, this chapter will begin to explore the nature of administrative legal relation, and the important players in settlements of administrative disputes from the time of the aftermath of the revolution in the 1920s. Then the discussion focuses on the soviet law influence on the establishment of control type administrative dispute settlement during the socialist era in Mongolia, specifically focusing on the institution that was responsible for carrying out this form of settlement, the Procuracy and its general supervision. Furthermore, the role of the courts will be examined, including the progress concerning the court's role as the institution responsible for the settlement of administrative disputes, parallel with the introduction of the enumerated complaints procedure within civil procedure. Finally, Chapter one closes with an examination of the initiative to separate administrative litigation in Mongolia and first step reform attempts being made in 1990s to change the purpose of administrative litigation as a supervision instrument that is used to control administration to a protection instrument used for the safeguard individual rights. Throughout this chapter within context of developments of settlement of administrative dispute in Mongolia, soviet law influence and role of path dependence examined as these were inseparable elements of developments during this period. Moreover, during the course of this historical analysis, the discussion focuses on two perspectives: a human rights viewpoint and an administrative authority viewpoint, as well as the interaction between these two perspectives in terms of the development of administrative procedure.

1.2. Background of the Problem

Administrative law changes made in 1992 and 2002 have not fulfilled expectations and the result born out in the everyday legal practice of law in Mongolia has revealed a substantial amount of confusion at the intuitional and theoretical level. Therefore, to determine the cause of this confusion, it is necessary to study the historical development of Mongolian administrative procedure. Largely, the soul of the country itself was unprepared, and therefore not ready to implement such a significant and fundamental paradigm change

in area of administrative litigation. Because originally Mongolia had developed a control type administrative adjudication system throughout the socialist era, it needed to substantially change to fit an administrative adjudication system that focuses on the protection of a private person's rights and legitimate interest. In the early period of transition, following the 1992 Constitution, the role of the judiciary strengthened in terms of the protection of human rights. This was especially evident concerning administrative law based on efforts made to establish the administrative court. However, the actual establishment of the administrative court did not occur until a decade after the constitution faced many obstacles caused by historical effects and the transplantation of new foreign legal concepts. Formerly, and at the constitutional law level, change from control type administrative litigation to remedy type administrative litigation succeeded. The question that remains is whether paradigm change has been achieved in Mongolian administrative law theory, institution, and legal practice?

1.3. After Revolutionary Period[17] (prior to 1960)

1.3.1. Historical background for judicial development

During Manchu rule, administrative authority encompassed judicial authority and Manchu and Mongol laws existed in parallel. Historically, "Mongolians endured in its history many times prosperity, disorder and decomposition. These are directly affected to the development of law itself. The history of development of law in Mongolia can be divided into three main stages."[18] Until the 1921 Revolution, Mongolia had no court system that was separate from the executive branch of the government. During that time the local and central administration acted simultaneously as a judicial organ.

Following the 1921 People's Revolution, the government instituted a mixed Asian and European legal system and replaced kingship with the People's Republic. However, there were no professional lawyers

[17] Transition period from Revolutionary State to Socialist State. 1921-1940 described as Revolutionary democratic period as a precondition and preparatory stage for socialism. Avirmed Erentsen and Chimid Biraa, "The Nature of Socialist Law," in *The Mongolian Legal System: Contemporary Legislation and Documentation*, ed. William Elliott Butler (BRILL, 1982), 37.

[18] According to Professor Narangerel First stage. Period of formation of legal system of entire nation of Mongolians. Mongolian ethnic state established, and traced from this Great Mongolian State formed and lived under the so-called law Ikh Zasag. Second stage. This period is the period of second integration of laws such as laws of Mongol-Oirat, Khalkh Juram, Mongolian law paper, Statehood affairs Ministry legal document of Outer Mongolia. Third stage. Period of formation and development of Modern legal system. Distinctive character of this period is Mongolians attempted to establish national and socialist legal system and after that aimed to establish legal system that meets the transition to industrial capitalism. However, nature of Continental legal system was basically being kept during the development of socialism and capitalism. Narangerel Sodovsuren, "Historical Outline of Development of Mongolian Law" (The National Taiwan University, 2003), http://www.mtac.gov.tw/mtacbook/upload/09301/0702/5.pdf (accessed June 3, 2016).

or judges at the beginning of the revolutionary period. "During the early years after the Mongolian revolution, a number of Soviet jurists worked in Mongolia, helped draft legislation, trained Mongol jurists, and published materials on Mongolian law or translated legislative materials. From such Mongol legislation as is available, it is evident that Soviet enactments frequently were adapted to Mongol conditions."[19] Therefore, the legal system of Mongolia during the socialist era was based on soviet law.

1.3.2. 1924 Constitution

The drafting of the constitution, regarding the buildup of the Mongolian government, started officially in 1922 after the establishment of a special commission of the government.[20] The first Constitution was promulgated on November 26, 1924. From the human right perspective, the first constitution included the right to religion and belief, the right to discussion, the right to meeting and celebration, the right to union, the right to education, and the right to protection against discrimination based on ethnicity and religion. Inclusion of this human right catalogue was observed by one of the leading Mongolian scholars of the 1990s in an article, as "on the issue of human rights the first Constitution derived from that time's European conception which took lead from 1789 French Declaration and fitted into long lasted culture on human rights in Mongolian land."[21]

However, because the 1924 Constitution was socialist type constitution, which was influenced by the constitution of the Russian Socialist Federated Soviet Republic,[22] it cannot be interpreted as a bourgeois type constitution. Thus, the human rights catalogue cannot be derived from the French Revolution. Because it was a socialist type constitution, this catalogue of human rights was included for purpose of constructing and promoting socialism. This was the reason why the catalogue of human rights was included in the 1924 Constitution. However, these rights were recognized only abstractly (on paper) but not concretized at the administrative law level. Not only is recognition at the constitutional law level necessary, but it is also important that theory and institution (statutory law) recognize such rights as well as Fritz Werner [23] said,

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[19] William Elliott Butler, *The Mongolian Legal System: Contemporary Legislation and Documentation* (BRILL, 1982), XIV.

[20] Amarsanaa Jugnee, *Constitutionalism and Constitutional Review in Mongolia*, 2009, 8.

[21] Professor Sovd was the constitutional law expert and served as first Chairman of Constitutional Court in 1992. Sovd Galsan, *Монгол Улсын Үндсэн хууль Хүний эрх /харьцуулсан судалгаа/* [The Constitution of Mongolia, Human Rights /Comparative Law/] (Ulaanbaatar, 1999), 10.

[22] Constitution (Fundamental Law) The Russian Socialist Federated Soviet Republic, Resolution of the 5th All-Russian Congress of Soviets, adopted on July 10, 1918. Gilbert E. Brach, "What Are You Doing - Where Do You Stand Editorial," *Marq. L. Rev.* 4 (1919–1920): 57.

[23] Fritz Werner was the President of the Federal Administrative Court of Germany. Werner, Fritz. "Verwaltungsrecht Als Konkretisiertes Verfassungsrecht." Deutsches Verwaltungsblatt (1959).

administrative law is concretized constitutional law. Therefore, even if a constitution contains a list of rights, it materializes as administrative law only after it is theoretically approved and regulated at a statutory law level. Professor Chimid illustrated that it was not a separation of power but an integration of state power that was established during this period, "With the victory of the people's revolution in July 1921, the old state apparatus was liquidated as a whole, steps were begun to establish a unified system of agencies (…) This was the first stage of development of [our] system of agencies of state administration."[24]

1.3.3. Establishment of the court

During this time, the court or judiciary was not recognized as an adjudicator or an institution which functions to protect human rights at the constitutional level. As Sangidanzan[25] claims, "At the end of 1923 and the beginning of 1924, when the People's Government was liquidating the old feudal administration in the country and electing a mass democratic administration, 'temporary sections to decide lawsuits' were organized under aimag (province) and khushuu (county) administrations."[26] In fact, the Ministry of Justice was responsible for judicial matters from 1921 to 1926 together with relevant units in provincial administration beginning in 1923.

The first courts were set up in 1926 by the Second National Grand Conference which convened at the end of 1925. It is note-worthy that the first decrees on judicial organization and procedure were "On the Reorganization of Judicial Affairs" (total of eight articles) and "On the Establishment of Courts" (total of twelve articles). Since then, the courts by their very nature and function have existed under the control of a political party with close supervision from the Ministry of Justice. While, the People's Republic way of development was chosen, the centralized system of state authority had already been established. However, even though the court had been established, it had no authority and jurisdiction over the settlement of administrative disputes. The situation in Mongolia was identical[27] to similar developments that occurred

[24] Chimid Biraa, "The Development of the System of MPR Agencies of State Administration (1921-1924)," in *The Mongolian Legal System: Contemporary Legislation and Documentation*, ed. William Elliott Butler (BRILL, 1982), 251.

[25] D.Sangidanzan was one of the first two teacher of newly law faculty in the National University of Mongolia in 1960. Sengedorj Tegshjargal, *МУИС-ын Хууль зүйн сургууль: Түүхэн хөгжил ба Шинэ зуун* [School of Law, National University of Mongolia: Historical Development and New Era] (Ulaanbaatar, 2014), 9.

[26] Sangidanzan Dashdondov, "Courts of the Mongolian People's Republic (Historical Notes)," in *The Mongolian Legal System: Contemporary Legislation and Documentation*, ed. William Elliott Butler (BRILL, 1982), 87–89.

[27] In 1932-1935, approximately 300 laws and legal acts revised because of laws until 1930 was not purely based on socialist ideology. "Closing Document of International Symposium on 'Legal Reform and National Legal System,'" (presented at Legal Reform and National legal system, Ulaanbaatar, 2000), 10–23.

during the 1920s in the Revolutionary Russia, where the court was not an important instrument in administrative law.

1.3.4. Procedural law

The lack of specific laws that govern the judicial process and the court's limited jurisdiction played a major role in rendering the court essentially absent. On April 16, 1926 the "Statute on the Reorganization of All Courts" was enacted and it was followed by the "Law on Procedure for All Cases in the Court." The latter, which was enacted on July 2, 1926, was the first legislative procedural law which formed the basis for criminal and civil procedure in Mongolia. At that time, only criminal and civil matters were recognized under the Law on Procedure for All Cases in the Court, which consisted of nine chapters and 111 articles. It was not short statute. Civil cases were enumerated in Article 36 of this law, provided by a listing clause. In 1930, the Ministry of Justice, which performed both an administrative and judicial function, issued guidance on All Civil Case Procedure in the Court. The Ministry guidance was significant in the sense that it differentiated civil procedure from criminal procedure for the first time.

In 1933, the court system was abolished and judicial power was transferred to the governors of administrative units.[28] When the judicial system was re-established[29] in 1943, it was structured primarily as a criminal legal system. Professor Ginsburg noted that "After heavy amounts of Russian funding, a tangible legal profession emerged, primarily to service this criminal law system."[30] However, there was no recognition[31] and regulation of disputes concerning administrative cases or complaints. Therefore, during this time the court was not an important institution with regards to the settlement of administrative disputes.

1.3.5. Administrative Dispute

The so called[32] Choibalsan's Constitution, also referred to as the 1940 Constitution, was believed to be influenced by the 1936 Soviet Constitution and was no different[33] from the 1936 Soviet Constitution in

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[28] Ganbat Chimidlkham, "Judicial Reform in Mongolia," (presented at 11th Conference of Chief Justices of Asia and the Pacific, Australia, n.d.).

[29] Like Soviet Union under Stalin constitution, re-established court system.

[30] Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003), 158–206.

[31] In Article 40, it was recognized that damage claim against official organization.

[32] Boldbaatar Chunt, ed., *1940 оны Үндсэн хууль: Түүх, эрх зүйн асуудал* [The 1940 Constitution: History and Legislation] (Ulaanbaatar, 2016), 20.

[33] On June 30, 1940 new Constitution was enacted. Even special consulting group headed by A.Ya.Vyshinski formed by Soviet side on the request of Mongolia which were issued comments or revised draft, noticed that mere copy of some of those provision from 1936 Soviet Constitution was not right. In total 21 provisions or articles out of 122 draft from Mongolia had been revised or rewritten by this group in final on February 5, 1940. Ibid., 15.

terms of content and structure. There were five working groups which were assigned to formulate specific chapters of the new Constitution. For instance, different groups were assigned different subjects such as a group for court and Procuracy[34] and a group for citizens' rights and duties.[35] Accordingly, the 1940 Constitution contained a chapter on the court[36] and Procuracy. Moreover, citizens were constitutionally granted rights (however, these right was material right not procedural right) including a right to freely submit a complaint[37] against an unlawful activity. But this was only at the constitutional level not the institutional level. It is very difficult to realize these rights in institutional level.

It was during this time that the fundamental framework of socialist type laws were established by decree by the State Great Khural,[38] which was the supreme state organ in Mongolia. Ministries and administrative offices were dissolved, merged, and established.[39] However, administrative laws and regulations were mostly organizational laws[40] (legislation), but no functional[41] law in terms of the realization of rights of individuals. The form of state power, rules for establishing state agencies, their competence, and the principles for carrying out their activities were in line with socialist[42] legal conceptions. Legal ideology in the Soviet Union did not accept any limitation over state power, and therefore it did not

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The 1940 Constitution had been remarked by its impact to ensure single political party as power source of all social and state affairs.

[34] In 1772, "with the division of the Ruling Senate into six departments, the strengthening of the authority of the governors in the provinces and the appointment of a Procurator General, some improvements had been attempted and achieved" administration in Russia. René Beermann, "A Historical Approach to the Definition of Soviet Administrative Law," in *Soviet Administrative Law: Theory and Policy*, ed. George Ginsburgs et al. (BRILL, 1989), 9–24.
In Tsarist Russia, the Judicial Reform of 1846 discontinued "prosecutorial supervision" in administrative affairs as it was deemed the expression of backwardness and "procurators were transformed primarily into an agency of prosecution in criminal procedure by the Statute on Court Organization. Oda, "The Emergence of Pravovoegosudârstvo (Rechtsstâat in Russia)," 391.

[35] Chunt, *1940 оны Үндсэн хууль: Түүх, эрх зүйн асуудал*, 12.

[36] By then the Constitution established court system headed by Supreme Court, *aimag* (province) and Ulaanbaatar city courts and peoples' court in lower local administrative units. Though it introduced basic judicial procedural principles in court process, judges were elected by various level of peoples' council meetings.

[37] Article 83 of the 1940 Constitution. Amarsanaa Jugnee and Batsaikhan Ookhnoi, *The Constitutions of Mongolia 1924-1940-1960-1992*, trans. Tur-Od Lkhagvajav (Ulaanbaatar, 2009).

[38] Chunt, *1940 оны Үндсэн хууль: Түүх, эрх зүйн асуудал*, 58.

[39] Ibid., 45.

[40] Batsuren Khukhiisuren, Soyol-Erdene Purevdorj, and Tungalag Chuluun, "Overview of administrative law development in Mongolia (1911-2015), in" [Kh.Batsuren, P.Soyol-Erdene and Ch.Tungalag, Overview of Administrative Law Development in Mongolia (1911-2015)], in *Монголын Шүүх II Түүхэн хөгжлийн тойм, өгүүлэл нийтлэл*, ed. The Supreme Court of Mongolia, 2 (Ulaanbaatar, 2016), 232–35.

[41] Dolgorsuren Jamsran, *Монгол Улсын захиргааны эрх зүйн удиртгал* [Introductory to Administrative Law of Mongolia] (Ulaanbaatar, 2006), 135–36.

[42] The legal doctrine of the Soviets does not accept the idea of any limitation whatever to the power of the State.…That again is why the Sovietic doctrine resolutely refuses "specific guarantees of any individual rights whatever. B. Mirkine-Guetzévitch, "The Public Law System of the Sovietic Dictatorship," *Journal of Comparative Legislation and International Law* 12, no. 4 (1930): 261.

recognize the existence of any individual right against the state power. It was the same in Mongolia.

As far as the status of legal science was concerned, around 1929 the 'administrative law' became 'public administration' (administrative organization law and administrative punishment law) which accurately reflected the status of Mongolian. At that time, the term 'law' was no longer used in the administrative legal sphere, and by 1929 there were no administrative law scholars in universities in the Soviet Union. Since the older generation was removed from the administrative law chair positions in universities, due to repression in the Soviet Union, suddenly a new generation of scholars assumed the vacant positions at the universities. This led to a profound generational change of lawyers in Soviet Union.

Led by Andrei Vyshinsky[43] in 1938, administrative law re-emerged as socialist administrative law in the Soviet Union. Vyshinsky supported special complaint procedure in special cases such as tax, administrative punishment, and election registration following the Stalin Constitution. Accordingly, non-litigation complaint type administrative punishment procedure was introduced in the courts through civil procedure at the end of 1930s in the Soviet Union. Conversely, in Mongolia these trends were not directly adopted at same time. Even though Vishinski himself led the commentary on the 1940 Mongolian constitution, the question as to why Mongolia, during that time, did not import such change remains unanswered. Mongolia had no professional lawyers; therefore, it was not easy to implement legal change in statutory law and at the practice level. This could be the reason why the above mentioned new development was not received at that time.

There was neither a special court[44] procedure for an administrative case, nor was there an administrative specification for cases until 1952. In connection with the enactment of the revised Civil Law in 1952, a civil court procedure law entitled the Civil Investigation Procedure Law of the Mongolian People's Republic (hereinafter MPR), was enacted. This was the first civil procedure law for the further development

[43] Andrei. Ya. Vyshinsky (1883-1954), was an RSFSR public prosecutor and deputy commissar of justice from 1931, and the Soviet deputy public prosecutor from 1933 to 1939. Arkady Vaksberg, *Stalin's Prosecutor: The Life of Andrei Vyshinsky*, trans. Jan Butler (New York: Grove Pr, 1991).

[44] In Russia, on December 28, 1916 established the Supreme Administrative Court and appointed judges but this court never practiced. Provisional Administrative Court were established following year on May 30 but it existed only on paper until November, 1917. Since the school of state law in Russia was heavily influenced by German theories, a majority of lawyers in Russia supported the German concept of Rechtsstaat. Hiroshi Oda, "In Search of the Law-Governed State: The Law-Based State and the CPSU" (n.d.): 1, https://www.ucis.pitt.edu/nceeer/1991-805-01-Oda.pdf (accessed August 14, 2016).
The Provisional Government enacted the Statute on Administrative Courts in May 1917. Administrative cases were to be handled by the Ruling Senate, circuit courts and administrative judges. In the circuit courts, there was to be a specialized administrative division, while in the Ruling Senate, the First Department was entrusted with the handling of administrative cases. Thus, administrative courts were part of the judiciary.

of procedural law in Mongolia. This law did not recognize administrative disputes except a complaint[45] against an activity of a notary. Article 99 of the Civil Investigation Procedure Law allowed the court to accept appeals against a decision of a notary. This was a significant turning point in the establishment of a complaint procedure for some administrative disputes in court. A notary, or a state organ acting as a notary, plays a vital role in the relationship between the government and its citizens by providing a means for approval of every piece of registration, certification, contract, and right in a socialist state.

During this time, when a notary acted upon a concrete matter by approving or denying a request of notarization, a relevant person could file a complaint with the court, asserting that the act was illegal, within 10 days. Article 102 of the Civil Investigation Procedure Law acknowledged that this was not a civil claim but a complaint. Therefore, Article 102 specifically noted that the applicable procedure for deciding this complaint was civil court procedure. Also it differs from a civil claim because the complainant is not required to pay a stamp duty when filing a complaint, and if the act is determined to be contrary to the law, the court can revoke the notary's authority.

1.3.6. Creation of General Supervision

Administrative disputes existed during this period, but if the court had no jurisdiction over such disputes then the question of who had the authority to settle them remained. Since the court had such a minor and insignificant role in the settlement of administrative disputes, then the Procuracy,[46] which was a non-judicial organ came to play a crucial role. Unlike other countries, there were no institutions such as the Procuracy in Mongolia in the 1920s. Thus, the Procuracy as a whole institution, including its function, was borrowed from the Soviet Union.

During the 1920s in the Revolutionary Russia, the court was not an important instrument in the administrative law sphere. Only the pre-revolutionary administrative law scholars focused on establishing some ad hock committees to deal with the settlement of administrative matters. For instance, in the 1920s

[45] БНМАУ-ын Иргэний байцаан шийтгэх тухай хууль [The MPR Civil Investigation Procedure Law], art. 99 (1952).

[46] Procuracy is the cornerstone of the Soviet legal system. Harold J. Berman, "The Dilemma of Soviet Law Reform," *Harvard Law Review* 76, no. 5 (March 1963): 939.

(1922-1929) in Russia the New Economic Policy[47] (the NEP period which permitted market economy)[48] was introduced, and once again an attempt was made by Professor Elistratov[49] to draft administrative court procedure in order to safeguard the "revolutionary legality." Such attempts failed again due to the Soviet government's choice of using a "General Supervision" system[50] over an "Administrative Court" system. Elistratov's effort was representative of the trend, in Russia at this time, for liberal administrative scholars who wanted to establish court centered administrative jurisdiction; however, this trend finished at the end of the 1920s.

Change, in Russia during the Soviet period, came with the introduction of a model of administrative complaint procedure as an instrument for settlement of administrative matters. Yet, the administrative court procedure was viewed as a purely capitalist mechanism, which was characterized as alien to the ideological setting of the socialist state in the 20th century. Therefore, the Soviet Union selected general supervision by the Procuracy and rejected administrative court system. This was because ideologically there should not be conflict between the governmental administration and the citizens in the Soviet state. In other words, ideologically, the state administration cannot be subject to an appeal in court, because if there is 'a dispute between administration and citizen' it will then 'legitimize conflict' between the citizen and the state administration within the structure.

Heavily influenced by the Soviet Union,[51] the 1940 Constitution of Mongolia established (at the constitutional level) and confirmed the supremacy of the Procuracy. Exactly 10 years before the 1940

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[47] The New Economic Policy partly restored the market, and restored the function of money as a medium of exchange. Though the market was " encircled " and "controlled " by the influence on it of semi-monopolist State organs, it retained sufficient elasticity to give market prices an objective reality, and make them an approximately adequate basis for economic accounting. Maurice Herbert Dobb, *Russian Economic Development since the Revolution* (New York: Dutton and Co, 1928), 129.

[48] The new economic policy (the NEP), which was the renunciation of the original programme of uncompromising communism, made of the Declaration, as the Sovietic writers express it, an "historical document," and indeed Lenin himself, shortly after its publication, had baptized it " a child of the revolution in a very bad hat. Mirkine-Guetzévitch, "The Public Law System of the Sovietic Dictatorship," 256.

[49] Elistratov. A. I. Administrative law Professor at the Moscow State University. William Elliott Butler, ed., "Russian, Soviet, and Mongolian Law on Microfiche - 4th Cumulative Catalogue" (Brill, 1988), 20, http://www.brill.com/sites/default/files/ftp/downloads/32023_Titlelist.pdf (accessed August 22, 2016).

[50] Nevertheless after prosecutorial supervision step, there should be "Judicial Control" step if Russia at time introduced the concept of "General Supervision" in complete sense. However, in 1920s only implemented the first phase of original concept of the "General Supervision".

[51] In 1955 soviet legislation once again re-ensured the general supervision function of Procuracy. As mentioned above "the issue of creating administrative tribunal was raised in Soviet Russia in the 1920s, and was revived by scholars in the 1950s". Notwithstanding, it was not the appealing position among scholars and not supported by the government at these times. Donald D. Barry, "Administrative Justice: The Role of Soviet Courts in Controlling Administrative Acts," in *Soviet Administrative Law: Theory and Policy*, ed. George Ginsburgs et al. (BRILL, 1989), 75.

Constitution was approved, the Procuracy was established[52] as a separate institution on August 14, 1930, by the decision of the Presidium of the State Petty Khural. The Procuracy was entrusted with "the ultimate supervisory power over the strict execution of the laws by all the Ministries, the central organs and agencies subordinate to them, as well as by public officials and citizens of the Mongol People's Republic" under Article 57 of the 1940 Constitution. This constitutional article contained a peculiar description about the Procuracy by naming it 'enforcer/guard of the law.' Moreover, the constitution provided that the lower procurator was meant to be independent from any organizations, and was subordinate only to the State Procurator in exercising general supervision over state authorities in order to guard against a mishandling of the law.

In a leading Mongolian administrative law textbook[53] during the socialist era, the Procuracy was defined as the state organization which supervises the precise execution of socialist law in activities of state, social, and cooperative organs, their officials, and all citizens by exercising supreme control. The General Supervision, which even included supervision of observance of the legality in the courts, was very broad and powerful authority that the Procuracy exercised over public authorities in order to avoid a mishandling of law.

Mongolia was receptive to using the Procuracy as the main instrument of control over administrative activity from the view point of the state for political and theoretical reasons. The court only acted as a secondary instrument[54] in controlling administration. The Procuracy and courts were tools of central control utilized by the state and the political party. Even the law ensured that the Procuracy had authority[55] to intervene, any time during a court procedure, in order to protect the rights and interest of the state and workers. This was a way of exercising supervision over administrative activity. However, once the supervision process began, problem of infringed individual rights often left unconcerned but attention then shifted to focus on legality of administrative activity. It was "…simply because no…private interest exists;

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[52] Peter the Great created a Procurator General in 1722 and later on 1922 revived the Procuracy's supervisory role over administration. Walter Gellhorn, *Ombudsmen and Others: Citizens' Protectors in Nine Countries* (Harvard University Press, 1967), 345.

[53] Chimid Biraa, *БНМАУ-ын захиргааны эрх* [MPR Administrative Law], ed. Avirmed Erentsen (Ulaanbaatar, 1973), 392–93.

[54] In Soviet Union, Originally only administration can decide on administrative punishment but 1961 court procedure for administrative case (litigation system) established in sphere of administrative punishment or administrative responsibility. Attempt of legal reform in the latter I950s there was, discussion of interest in extending the role of the courts in administrative law, however, the only significant step that actualized was the 1961 law "On Further Limiting the Application of Administratively Imposed Fines".

[55] БНМАУ-ын Иргэний байцаан шийтгэх тухай хууль, art. 2 (1952).

hence, no occasion arises either for administrative decision or for judicial review in those areas,"[56] as Professor Gellhorn explained. Since the October Revolution, the concept of "revolutionary legality" later "socialist legality,"[57] which replaced the principle of the *Rechtsstaat* or *pravovoe gosudarstvo* (state ruled by law), was prolonged[58] in Soviet Union until *Perestroika*.[59] "Unlike *pravovoe gosudarstvo*, socialist legality was not designed to restrain state power; it was addressed to all constituent elements of the state except the state itself. Thus, the maintenance of 'objective order' was the core of the concept.

On the other hand, the safeguarding of 'subjective rights' of citizens merely had a secondary significance.[60] There was no such ideology in Mongolia at that time to enable a private person to take action against the state and its officials. Therefore, there was no legal facilitation of this purpose until the 1960s. Even then, during the 1960s when a private person was granted the opportunity to advance a petition and complaint against the state and its officials, it was used as a mere signal of illegality of administration in its execution of the law. However, direct supervision of all administrative activity was not achievable by the Procuracy.

1.4. Socialist Period (1960 until 1990)

1.4.1. Further Advancement of the General Supervision of the Procuracy

The Third Constitution was adopted by the first session of 4th *People's Ikh Khural* (the parliament at that time) of MPR on July 6, 1960. It continued the effort to develop a socialist state and legal system. "Although the constitutions of 1940 and 1960 were different regarding the structure, writing style and content in some provisions, both of them had the same character of socialist laws in the sense of their purpose and principles

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[56] Gellhorn, *Ombudsmen and Others*, 340.

[57] Officially, socialist legality was defined as an "unfailing implementation of laws and regulations which are compatible with the laws by government agencies, officials, and citizens". Oda, "The Emergence of Pravovoegosudârstvo (Rechtsstâat in Russia)," 374.

[58] Recently, Professor Zelentsov described failed attempt of conceptual change at that time in administrative jurisdiction as "the first attempt to change this paradigm is reflected in one of the most advanced legislation in the early 20th century in the field of administrative justice - the Regulations on Administrative Affairs Courts, adopted May 30, 1917 by the Provisional Government. А. Б Зеленцов, "Кодекс административного судопроизводства Российской Федерации как предпосылка смены парадигмы в теории административного права" [Code of Administrative Court Procedure of the Russian Federation as a Prerequisite for Changing the Paradigm in the Theory of Administrative Law], *Административное право и процесс* 11 (2015): No. 11, 9.

[59] Gorbachev, a lawyer, came to office in 1985, and subsequently determined to carry out an increasingly radicalized perestroika or restructuring of the Soviet system within a juridical framework. Sharlet, "In Search of the Law-Governed State: The Fate of Individual Rights in the Age of Perestroika," 01.

[60] Oda, "The Emergence of Pravovoegosudârstvo (Rechtsstâat in Russia)," 412.

of state and socialist structure."[61] For instance, the constitutional purpose was a renewed commitment to completing the construction of socialism and building a communist society. The state structure laid down in the 1960 Constitution followed that of the 1940 Constitution which was amended in 1959.

Though "The fundamental rights of citizens were treated in a separate chapter and considerably expanded and reworked,"[62] in reality there was no significant development in terms of actual enforcement[63] against administrative infringement. Within state administration in Mongolia, the state organs, including the administrative bodies, were operated by vertical control principles and all state organs were under the control of the party and the *State Ikh Khural*. Moreover, the activity of constitutional and public administrative bodies were out of the scope of judicial control.[64] However, the absence of judicial control did not mean that there was no control at all. The Procuracy's supervisory role advanced in the area of administrative activity consistent with the usual pattern of socialist countries.

Article 72 of the 1960 Constitution stated that the Procuracy exercised supreme supervision over the activity of implementing law in the same manner in all ministries, central administrative organs and their subordinate organs, local administration or social, and cooperative organs, officials, and citizens. Therefore, the supervision that the Procuracy was authorized to exercise was considered an independent and distinctive type of supervision of the state. The procurator's supervision was characterized as supervision that was beyond influence of local units. When conducting a supervision over administrative organs, it was not meant to exercise administrative authority to dispose of matter but to make sure the law was executed in the same strict way for every organ. When the administrative decision was contradicted to the law or right way of executing the law, the Procuracy was to exercise a protest or to transfer the matter to a legal organization which had jurisdiction to deal with it.

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[61] Jugnee, *Constitutionalism and Constitutional Review in Mongolia*, 12.

[62] Butler, *The Mongolian Legal System*, 176.

[63] Doctor Gangabaatar reasoned that it is not possible to analyze the legal mechanisms, constituting human rights protection within the administrative law context, at that time directly from the human rights provisions of the MPR socialist constitutions. This, doctor Gangabaatar asserted, was because it was common that provisions in constitutions often did not correlate with practice in socialist block countries. Gangabaatar Dashbalbar, *Үндсэн хуулийн эрх зүй Төрийн байгуулал, зарчим, үзэл баримтлал* [Constitutional Law: State Structure, Principles and Policies] (Ulaanbaatar, 2016), 40.

[64] Because in Soviet idea of administrative justice "fell into disfavor during the Stalin period, largely for two inter-related reasons: 1) first, it was deemed to be a "bourgeois" legal concept and, therefore, like most ideas suggesting influence from the West, it had to be rejected; 2) second, some Soviet writers associated administrative justice with a separate system of administrative tribunals such as those operating in several West European countries; since a system of separate administrative courts did not have much support among Soviet lawyers, this was another reason for rejecting administrative justice." Barry, "Administrative Justice: The Role of Soviet Courts in Controlling Administrative Acts," 65.

The Procurator's supervision consisted of four types[65] based on the organs under its control: a) "general supervision" over the activity of abiding and precisely executing the law by state, social, and cooperative organs, its officials and citizens, b) control over criminal investigative organs, c) supervision over the legality of judicial decisions,[66] and d) supervision over the activities of the prisons in terms of following the law. "General supervision" is distinct from the specific supervisions because it covers the activity of every state, social, and cooperative organs, and citizens in general. Furthermore, general supervision is divided into two categories: supervision over legal acts of state, social, and cooperative organs, and its officials; and the supervision of citizens' activity.

When exercising general supervision over the state, social, and cooperative organs, the Procurator had substantial authority. The Procurator had the power to check the legality of an act by: examining whether it was consistent with relevant provisions of law; whether such act was in scope of authority given to the state organs, and whether the act is consistent with citizens' rights and legal interest. In terms of correcting the illegality of administrative acts, the Procurator issued a protest, which was required to prescribe the exact provisions of the law that the act contradicted, to the organ itself or a higher level organ. The Procurator's declaration was also given to prevent a breach of law or point out the cause of a breach with regards to activities of state administrative organs. Additionally, the Procurator had the power to inspect activities of state, social, and cooperative organs based on information concerning a breach of law or it also had the authority to initiate an inspection as a precautionary measure. The Procurator's inspection includes the handling of the laborers' (or workers was the general name for and description of citizens at that time) petition and complaint. In doing so, the Procurator accepted the petition and complaint from the citizens concerning an alleged breach of law and order.

Procuracy as Complaint Handler

Section 7 of the 1960 Constitution provided for the basic rights of Mongolian citizens and the guarantee of such rights. Article 85 of Section 7 provides that, "every citizen of the Mongolian People's Republic shall have the right to freely apply to any of the organs of the state power and any administrative organs, and to submit written or verbal petitions and complaints[67] concerning illegal acts on the part of the state organs or

[65] Biraa, *БНМАУ-ын захиргааны эрх*, 394.
[66] Supervision over investigative and judicial decision also directed to find and correct the illegality of administrative activity that is involved in investigative and judicial process.
[67] Phrase of "petition and complaint" sometimes referred as "application and appeals".

public officials, and concerning acts of bureaucratic treatment or red tape."[68] Since there was no possible way of processing citizens' complaints against state agencies in the Mongolian courts initially, and because the Procuracy's duty was closely associated with the supervision of activities of state agencies from the standpoint of their conformity to the law, the Procuracy[69] was an ideal institution to handle complaints against state agencies.

Additionally, the Procuracy used citizens' complaints as tool for initiating control. However, based on the function of supervision, it is evident that its main purpose was to maintain the orderly implementation and due adaptation of law. The protection of rights and legal interest was never the primary goal of the Procurator in Mongolia. This was identical to the Procurator's role in the Soviet Union.

In the Soviet Union, it became difficult for the Procurators to exercise supervision over all of the soviet agencies, and assert their administrative authority in order to check legality.[70] The citizens' complaint was used as a signal[71] of illegality in the socialist administration and in a report of a violation of the law. Therefore, the primary purpose was not to protect individuals' rights and interest from wrongful actions by administration. In contrast, it was used to shield[72] the state interest, or socialist legality. Professor Gellhorn points out that "when a citizen complains to a procurator and the procurator decides to pursue the complaint, the case becomes the procurators; the complainant has no further voice in the matter."[73]

Later, in 1967 in Mongolia, the revised Civil Investigation Procedure Law of the MPR was enacted in accordance with the 1960 Constitution. Even by this law certain types of administrative complaints were accepted and allowed to proceed through usual court procedure. However, the Procuracy's involvement[74]

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[68] Jugnee and Ookhnoi, *The Constitutions of Mongolia 1924-1940-1960-1992*, 263.

[69] Jamsran, *Монгол Улсын захиргааны эрх зүйн удиртгал*, 175.

[70] Walter Gellhorn, "Review of Administrative Acts in the Soviet Union," *Columbia Law Review* 66, no. 6 (June 1966): 1059.

[71] For instance, following passage of the article shows that how should directly locate illegality for supervision instead of generally searching for illegality. "Sometimes the situation occurs of Procuracy agencies making fruitless examinations about violations without having information with specific sources which continue for a long time at enterprises and official institutions and which require labor and wasting a great deal of time." Sovd Galsan, V. Riabtsev, and S.Tserendorj, "Perfecting the Organization and Legal Basis of Procuracy Agencies is a Vital Force Strengthening Legality," in *The Mongolian Legal System: Contemporary Legislation and Documentation*, ed. William Elliott Butler (BRILL, 1982), 136.

[72] Often an individual complaint becomes merged in a broader investigation, the procurator not being bound by the specific claims the complainant has put forward. Gellhorn, *Ombudsmen and Others*, 360.

[73] Gellhorn, "Review of Administrative Acts in the Soviet Union," 1078.

[74] "The Procuracy may participate in a civil proceedings and has the right to initiate a case or enter a case at any stage if the protection of state and social interests or the rights and interests of citizens protected by law so require. In an Order of 10 October 1966 the MPR State Procurator instructed procurators to participate in all cases of serious harm caused to the interests of state and social organizations or citizens, reinstatement in work, eviction of citizens from housing premises, release of impounded property, labor cases, trusteeship and

was still strong. Consequently, Edict[75] 116 of the Presidium of the Great People's *Khural* of May 29, 1973 also imposed a duty on the Procuracy to supervise the execution of law with regards to the disposition of the citizens' petitions and complaints. The Rules for Presenting Proposals, Applications, and Appeals served as another rule for promoting the supervision inside the administration until 1995, when a law[76] regarding the new constitution was enacted on the subject of complaint procedure.

The above mentioned Rules categorized requests for review of acts of the administration into three categories. Requests, which came from citizens, were divided into three[77] forms: proposals,[78] applications,[79] and appeals. Appeals or complaints were directed toward eliminating any deficiencies that harmed the rights or interests of citizens and which violated socialist legality. Notably, Article 85 of the Constitution[80] required state organs and its officials who received a complaint to examine the legality of the activity of the state administrative organs. And based on its findings of the legality of the acts in question it was obliged to provide a reply to the citizen who submitted the petition. The examination and reply of citizens' complaints focused on the legality of administrative activity out of question on rights and interests

guardianship cases being considered for a second time, and cases initiated by a procurator, in addition to certain instances when the Code of Civil Procedure requires Procuracy participation." Butler, *The Mongolian Legal System*, 636–37.

75 "In 1973, in addition to the VII session, seventh convocation of the MPR Great People's Khural discussing "On Receiving and Deciding Workers' Requests" and adopting a decree, Edict 116 of the Presidium of the MPR Great People's Khural, "On the Procedure for Receiving and Deciding Citizens' Proposals, Applications, and Appeals" was adopted on 29 May 1973; and Decree 250 of the MPR Council of Ministers of 6 July 1973, "On the Procedure for Receiving and Deciding Citizens' Proposals, Applications and Appeals," confirmed provisions for implementing the above Edict. Similarly, a decree, "On the Tasks of Further Raising the Legal Nurturing of the Working People," was adopted by the MPR Great People's Khural on 11 June 1974 (see Chapter 3-Ed.)."
Danzandorj Damba, "On Rules for Deciding Citizens' Proposals, Applications, and Appeals," in *The Mongolian Legal System: Contemporary Legislation and Documentation*, ed. William Elliott Butler (BRILL, 1982), 153.

76 It was noted in the case file of the law that when this law is discussed in the parliament the Edict 116 was still in force.

77 Damba, "On Rules for Deciding Citizens' Proposals, Applications, and Appeals," 154.

78 Proposals are questions put forward by a citizen on developing the national economy and culture, uninterruptedly raising the material living standard and cultural level of the working people, strengthening and disseminating work achievements, and eliminating any deficiencies. A proposal is one form of workers participating in the cause of guiding the state and is an instrument which intensifies the supervision established over activities of the apparat. Proposals which come from workers are evidence that their political activity is constantly increasing. Ibid.

79 Applications are requests put forward by citizens on such questions as socio-cultural, housing, and communal services in accordance with their rights provided by the MPR Constitution and other legislation. Another form of application, although not connected with the applicant himself, has the quality of information presented about activities of enterprises, economic organizations, and institutions which violate the interests of society or citizens. Ibid.

80 Article 85, second Paragraph of the 1960 Constitution states as "The state organs and public officials shall without any hindrance examine all complaints and petitions submitted, and undertake the measure to check a breach of law and order, and to provide a response to such petitions or complaints." Ibid.

of the complainant.

In summary, it is evident that until 1967, and for a time after, the Procuracy was the primary instrument utilized in Mongolia for both the settlement of administrative matters and disputes and for resolving complaints made against administrative agencies. General Supervision by the Procuracy was the main focus during this time. The significance of such general supervision was the fact that it centered on objective legality of administrative activity instead of the rights and interests of citizens. Therefore, its ability to provide an adequate remedy for individual complainants against state administration was very limited. While citizens' rights and interests were acknowledged, the nature of general supervision was not designed to pursue the rights and interests of a private person who was negatively affected by the administration. Accordingly, the procedure mainly focused on objective (socialist) legality in administration, and since the chief purpose of the procedure was significantly different than that of seeking a remedy for the alleged infringement of citizens' rights.

1.4.2. Administrative Cases Enumerated in The Civil Investigative Law as complaint procedure

Theory: Establishment of administrative law as branch law

The leading socialist law scholar, Professor Avirmed,[81] described the legal developments of the period of 1940-1960 as a rise and formation of socialist law. At the higher education level in Mongolia, a law division within the faculty of a Social Science department has only been in existence since 1960, initially including 37 students and two full time instructors.[82] At that time subjects taught in law classes were mostly civil, criminal, and labor law. The classes were taught by instructors, some[83] of whom studied in the Soviet Union. From the 1970s a larger number of Mongolian jurists, who trained and obtained higher legal education in Mongolia, emerged in practice. However, Mongolians who graduated from various Soviet law institutions were appointed as instructors initially for law teaching, along with their counterparts from the Soviet Union.

Chimid, who was a recent graduate of a law division of a National University of Mongolia at that

[81] "Revolutionary democratic law served, developed, and became firm during our revolutionary democratic period, 1921-1940. This was a precondition and preparatory stage for the rise and development of socialist law in our country. By 1940, revolutionary democratic law, just as the development of our state, gradually became socialist law. Thus 1940-1960 was a period of the rise, development, and service of socialist law in our country." Erentsen and Biraa, "The Nature of Socialist Law," 37.

[82] Tegshjargal, *МУИС-ын Хууль зүйн сургууль: Түүхэн хөгжил ба Шинэ зуун*, 9.

[83] D.Luvsansharav was one of the first two law instructor, then E.Avirmed, G.Sovd who graduated in Soviet Union started teaching.

time, was appointed[84] as an administrative law instructor in 1966. Professor Chimid[85] later became the leading authority on Mongolian administrative law[86] and published[87] a seminal textbook entitled, "The MPR Administrative Law,"[88] in 1973. In the foreword of the textbook, it is acknowledged that Soviet scholars' books had been widely used in the writing of the book. Professor Chimid especially noted the works of scholars who published during the period of 1960-1970, including Yu. M. Kozlov, A. E Lunev, and G. I. Petrov.[89] Accordingly, administrative law in Mongolia was in line with the Soviet conception of law and state. Administrative law in socialist Mongolia was concerned predominantly with the powers and duties vested in state administrative agencies.

Professor Chimid's textbook in Chapter 11 elaborates on the topic of citizen as subject in the administrative law relationship. The chapter defines "objective right" as the one that is prescribed by the state to the citizens, and on the other hand, it defines a "subjective right" as the one that citizens themselves actually implement as an objective right. In addition, Chimid's textbook discusses the way in which the administrative law guarantees the protection of citizens' rights during the process of state administration. For conducting supervision of administrative activity, the textbook identifies several instruments, including supervision by the Procuracy and the court, in terms of conformity to the citizen's right. Furthermore, the importance of maintaining legality[90] in state administration and the role of the Procuracy and the court in

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[84] Tegshjargal, *МУИС-ын Хууль зүйн сургууль: Түүхэн хөгжил ба Шинэ зуун*, 10.

[85] Professor Chimid obtained his first doctorate degree in administrative law in 1975 at Academy of Science in Mongolia. Tuvshintulga Algaa and Batbayar Bayanbaatar, *Монгол Улсын хууль зүйн шинжлэх ухааны ном зүйн бүртгэл. Гарын авлага /1911-2012/* [Book-List of Legal Scientific Literatures in Mongolia (1911-2012)] (Ulaanbaatar, 2014), 21. Ganzorig Dondov, "Монгол Улсын захиргааны эрх зүйд тулгарч буй асуудал: Түүхэн хөгжил ба Цаашдын хандлага" [Challenges Faced with Administrative Law of Mongolia: Historical Development and Further Trend], 2011, 132.

[86] "It is not clear even now that from when to begin counting as historical establishment of administrative law, thus it needs to be answered by based on sufficient research." Dondov, "Монгол Улсын захиргааны эрх зүйд тулгарч буй асуудал: Түүхэн хөгжил ба Цаашдын хандлага," 129.

[87] In 1964 first textbook (Norov P, ed., *БНМАУ-ын төрийн захиргааны эрх Ерөнхий анги* [MPR State Administrative Law, General Part] (Ulaanbaatar, 1964).) published on general part of administrative law, and in 1971 textbook published on special part of administrative law. Butler, "Russian, Soviet, and Mongolian Law on Microfiche - 4th Cumulative Catalogue," 115.

After Professor Chimid's textbook, there has been textbooks written by Udval Vanchig, *Удирдлагын эрх зүй* [Regulatory Law] (Ulaanbaatar, 1999)., Dolgorsuren Jamsran, *Монгол Улсын захиргааны эрх зүй* [Administrative Law in Mongolia] (Ulaanbaatar, 2000)., Sukhbaatar Jamyankhorloo, *Монгол Улсын захиргааны эрх зүй* [Administrative Law] (Ulaanbaatar, 2002)., Dashtseden Dashdondog, *Монгол Улсын захиргааны эрх зүй I* [Administrative Law in Mongolia I], 1 (Ulaanbaatar, 2002)., Dashtseden Dashdondog, *Монгол Улсын захиргааны эрх зүй II* [Administrative Law in Mongolia II], 2 (Ulaanbaatar, 2003). More in Dondov, "Монгол Улсын захиргааны эрх зүйд тулгарч буй асуудал: Түүхэн хөгжил ба Цаашдын хандлага," 130.

[88] Biraa, *БНМАУ-ын захиргааны эрх*.

[89] Some of the leading soviet administrative law scholars at that time (*Ю. М. Козлов, А. Е. Лунев, Г. И. Петров*).

[90] Biraa, *БНМАУ-ын захиргааны эрх*, chap. 18.

systematically sustaining socialist legality were discussed in the textbook.

According to Professor Chimid's textbook, both the protection of citizens' rights and socialist legality were part of administrative activity and were ultimately in the hands of various institutions, upheld through control and supervision. In particular, an essential legal[91] instrument for maintaining socialist legality in state administrative activity was control, which was a stronger version of control than that exercised by the special organization designated for it under the party. However, control and supervision were different where supervision was exercised by the Procuracy and administrative organ. Professor Chimid noted that an organ which is conducting supervision cannot put itself in one's place and act on behalf of it, instead it should observe how legality is maintained and if any illegality is found then it should stop the illegal activity and demand that the breach of law be rectified.[92]

Subsequently, a petition and a complaint of the citizen (along with communal organizations) were designated as the main source of initiating and exercising the legality check (supervision). Noteworthy here was the fact that the citizens' ability to file petitions and complaints was described as a merging of citizens' personal interests with public interest. Because instituting a petition or complaint is a way of both correcting illegality in state activity and at the same time restoring complainant's rights and interests caused by bureaucratic behavior, the purpose of sustaining socialist legality is achieved. As William Elliott Butler[93] observed, a decade later, Chimid's book described administrative law in Mongolia "as in other socialist countries, is one of the broadest, potentially most significant, yet least-developed branches of law and legislation."[94]

Administrative Disputes Enumerated in the Civil Investigative Law

In addition to the general supervision by the Procuracy, the court had a certain role in terms of control over the activity of the state administrative organs. Beginning with the revision of the Civil Investigation Procedure Law of MPR in 1967, specific enumerated disputes were included in the civil procedure law as part of the complaint procedure, notwithstanding complaints against notaries, which up to this point had been the only dispute listed in the enumerative clause since 1952. Institution of the enumerated complaint

[91] It discussed about maintaining socialist legality by the party, state and communal supervision.
[92] Biraa, *БНМАУ-ын захиргааны эрх*, 361.
[93] William Elliott Butler is the John Edward Fowler Distinguished Professor of Law, Dickinson School of Law, Pennsylvania State University, who compiled and edited a thousand page text on socialist Mongolian law in the early 1980s.
[94] Butler, *The Mongolian Legal System*, 250.

was because in the Soviet Union, from the post Stalin period[95] to the 1960s, little by little a listing of some administrative complaints[96] began to be included in the civil procedure law. Additionally, individual laws permitted complaint procedure in certain cases.

The Civil Investigation Procedure Law of the MPR contained separate chapters beginning with Article 197 that dealt with complaint procedure. The chapter titles included: (1) a complaint about wrongful registration on the electoral list, (2) a complaint on activity of administrative organ and (3) a complaint on activity of notary. According to Article 3 of the Civil Investigation Procedure Law, a person had the right to file a complaint in order to protect a right violated or contested, or any person could seek protection of an interest provided by law. The following article (Article 4 paragraph 2 and 3) states that notwithstanding the specific demand of an interested party, civil procedure can be commenced by a petition of an interested party (citizen, state administrative agency, communal and social organizations) or a Procurator.

The purpose[97] of this law is broad. Not only does it apply to citizens' political, labor, housing, and other personal and property rights, but it also seeks to protect the socialist state, the socialist economy, and socialist ownership rights. Most importantly, the purpose of the Civil Investigation Procedure Law was to strengthen socialist legality and prevent violations of law. Therefore, the focus of civil procedure including the listing of complaints, was to maintain socialist legality alongside with the purpose of protecting complainant's rights. The law and the way in which it was applied by the government can be described as a control type procedure. Provisions that signal control type procedure include Articles: 34 (parties to the case); 45-46 (subjects participating in or on behalf of others and the Procurator's participation in procedure); 152 (unlimited authority of court to the demand prescribed by claim or complaint) and; 231 (special ruling[98]

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[95] Barry, "Administrative Justice: The Role of Soviet Courts in Controlling Administrative Acts," 65; Robert J. Osborn, "Citizen versus Administration in the USSR∗," *Europe-Asia Studies* 17, no. 2 (1965): 230.

[96] For instance, an article on the subject published in 1964 mentioned that "Certain complaints against administrative acts can be brought to court. These instances are specifically provided for by law, and there is no general provision for suing administrative bodies. While the range of possible lawsuits is small, some of them are fairly important, including suits to collect damages occasioned by wrongful official acts, suits to have housing eviction orders declared invalid, appeals from administrative fines, and court review of labour dismissals." Moreover, "Art. 4 of the All-Union Principles of Civil Procedure (December 1961) left the scope of court review of administrative errors just about where it was, while not shutting the door on future legislation which might assign further questions to the courts. Of the disputes already under court jurisdiction, mentioned only two: review of administratively imposed fines, and review of incorrect exclusions from voter registration lists." Osborn, "Citizen versus Administration in the USSR∗," 232.

[97] БНМАУ-ын Иргэний байцаан шийтгэх тухай хууль [The MPR Civil Investigation Procedure Law], art. 2 (1967).

[98] "Энгийн магадлал" is the term used in Mongolian. "Civil courts may direct a 'special ruling' (*chastnoye opredeleniye*) to any agency or official who, on the basis of evidence presented in an ordinary case, has been found to engage in administrative malpractices. While the agency or official is required to notify the court of

point out illegality of administrative activity and demand to fix the problem and reply with the explanation) of the 1967 law.

However, one of the three types of complaints prescribed in article 197 paragraph 2 of the Civil Investigation Procedure Law was described generally as a complaint regarding the activity of an administrative organ, which was further limited as closed-list in Article 200. The Article 200 provision included the following complaints against the activity[99] of administrative organs regarding the recovery from citizens of: (1) debts in state and local taxes and charges, (2) debts in compulsory insurance assessments, (3) debts in voluntary collections, (4) fines imposed through administrative coercive measures, and (5) fines and damages in connection with forestry violations, damages to haying areas, crops, and plantings of state, cooperative, and social farms. These types of complaints were similar to the complaints set out in the 1964 Civil Procedure Code of the RSFSR listed.[100]

More importantly, most of the complaints that were allowed to be submitted in court against administrative activity were related to administrative penalties. In regards to the relation between the state and the citizens, administrative penalties[101] became the main instrument[102] of administrative law. Since an administrative penalty or sanction imposed a harsher burden on citizens, it was a tendency in Mongolia that its legality needed to be checked by the courts. The influence of administrative law development from Soviet[103] administrative law which also caused introducing the right to court in the area of administrative penalty.

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action taken, there are no 'teeth' in the procedure." Osborn, "Citizen versus Administration in the USSR∗," 230.

99 In this thesis, generally uses term "administrative act" but in describing administrative decisions in special time, or particular law such as during soviet time term of "administrative activity" is used.

100 "Over the years courts gained the right to review a short list of specific complaints. The 1964 Civil Procedure Code of the RSFSR (The Russian Soviet Federated Socialist Republic) listed among others these complaints: errors in electoral disputes, seizure of property to cover unpaid taxes, fines and license suspensions imposed by the police, the actions of judicial enforcers (implementing debt collection decisions), and certain complaints against housing officials." Peter H. Solomon, "Judicial Power in Russia: Through the Prism of Administrative Justice," *Law & Society Review* 38, no. 3 (2004): 555.

101 "Although state imposition of coercion against a person who has violated a norm of any branch of socialist law has the form of pressure on him to accept responsibility, if we look at it from the viewpoint of other members of society, it appears as a proper, straightforward demand." Erentsen and Biraa, "The Nature of Socialist Law," 38. Later in 1990s, Professor J. Dolgorsuren was the leading scholar on the subject of administrative penalty.

102 "The rules of the government that were most intrusive in the lives of the citizens were a central part of the 'administrative law'". Howard N. Fenton, "An Essay on Administrative Law Reform in the Former Soviet Union," *Journal of East European Law* 7, no. 1 (2000): 53.

103 Since the 1961 reform of the procedure took place in the Soviet. Gellhorn, *Ombudsmen and Others*, 358. "The only significant step in this area was the 1961 law 'On Further Limiting the Application of Administratively Imposed Fines'. This provided for the appeal of administratively imposed penalties to the people's court (…). Osborn, "Citizen versus Administration in the USSR∗," 230.

However, during this time in socialist states even in the event that some complaints were accepted for review by the court, it has been observed that at that time the "court's role is limited to reviewing the legality (*zakonnost*)."[104] It was identical in Mongolia and evident from the language of Article 201 and 202 (procedure and decision of court) of the Civil Investigation Procedure Law, in which the court was required to focus on the legality and correctness of the complained of activity of the administrative organ. In a leading 1973 textbook, MPR Administrative Law, Professor Chimid emphasized that the purpose and content of the court's examination, when deciding a concrete case, depends on whether the legal acts of an administrative organ or, its official, conforms to the requirements of socialist legality.[105] In other words, when deciding the case, the main focus of court procedure was to find out whether there was an error/illegality, in terms of state administrative organ activity, which caused the dispute. Concerning cases involving an administrative penalty, the court was obliged to determine whether the administrative process of imposing the penalty was justified under the relevant law and regulation and whether the actions of the person fined was a violation of law for which a fine was appropriately imposed.

It is important to note that person who can file a complaint is not referred to as a plaintiff but instead is deemed a complainant.[106] Concerning the appropriate name for an administrative organ, in an administrative dispute context, it is not referred to as a defendant but an administrative organ and a representative (of the administrative organ) can participate in the court procedure as to provide an answer to complaint. The Procurator's office was empowered with the authority to initiate[107] the complaint process, as if it were necessary for the sake of the state and citizens' interest. The complaints were differentiated from the ordinary civil cases by some distinct characteristics, for instance a case cannot be settled by a reconciliation (settlement by parties to the case). This is because the issue is no longer in the hands of the complainant. The state handles the case with regards to the purpose of its procedure, which is in due course a legality check.

In 1967, the Civil Investigation Procedure Law of the MPR was in force. It remained so until the transition period (1990) without change,[108] including the listing of allowable administrative complaints. In

[104] Barry, "Administrative Justice: The Role of Soviet Courts in Controlling Administrative Acts," 76.
[105] Biraa, *БНМАУ-ын захиргааны эрх*, 404.
[106] Zundui Darjaa and Chinbat Namjil, *БНМАУ-ын иргэний байцаан шийтгэх хуулийн тайлбар* [Commentary on the MPR Civil Investigative Procedure Law] (Ulaanbaatar, 1984), 08.
[107] БНМАУ-ын Иргэний байцаан шийтгэх тухай хууль, art. 4(2), 45 (1967).
[108] In 1977, 1979 this law amended but the amendments was not relevant to the point of this research.

other words, no extension[109] took place until the eve of the 1992 Constitution, which is when Mongolia's status shifted from a soviet state to a free market oriented state. In the meantime, Article 58 of the 1977 Brezhnev Constitution [110] established a general approach in which citizens could appeal acts of governmental officials[111] to the court by filing a complaint. From the Brezhnev Constitution, administrative law in the Soviet Union tended to make administrative law reforms on a spectrum, usually from an enumerative approach towards a general clause approach, in terms of court jurisdiction over administrative disputes. In other words, change began when the Procuracy[112] as the chief destination for handling complaints against acts of officials and leaned in the direction of instituting the court as the main instrument for resolving such complaints. In this period in the Soviet Union, the listing approach was formally maintained; nevertheless, also introduced general clause type example in the list.

From the viewpoint of this research, consideration over introducing an exclusive list (negative enumeration) or an inclusive list (positive enumeration)[113] in the Soviet Union is important. In accordance with the constitutionally preset norm (Article 58 of the 1977 Constitution), the law[114] entitled, "On the

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[109] In Mongolia, the Law on Procuracy Supervision of the MPR in 1977, and following year in 1978 Law on Court Organization of the MPR enacted. Yet, these laws did not provide change in list of complaint. The Procuracy supervision extended over court procedure and judgment (article 14) and established military, and railway courts as special courts by these laws.

[110] The Constitution was adopted in 1977. The constitutional provision in question is Article 58, which has three related parts:
Citizens of the USSR have the right to address complaints against actions of officials and of state and social organizations. (…) Acts of officials committed in violation of the law, in excess of authority, which infringe the rights of citizens may be appealed to court in the manner established by law. Citizens of the USSR have the right to compensation for damages inflicted by unlawful actions of state and social organizations, as well as officials, in the course of the performance of their official duties." Barry, "Administrative Justice: The Role of Soviet Courts in Controlling Administrative Acts," 66.

[111] Though there were argument between scholars at that time on the question of whether Article 58 provides "a general presumption of judicial review, with only a few exceptions, implies a much-expanded role for the courts. [Or] a list of administrative acts that can be reviewed by courts perhaps suggests a narrow focus for judicial review little different from what exists at present. Ibid., 73.

[112] Prior to it, the process of hearing citizen's grievances against administration rarely gets at court. Instead, the suitable procedure is a complaint mechanism in which petitions are heard by such agencies as higher administrative levels of the organization in question, the Procuracy. According to Maggs "Legislation in 1980s enhanced the power of the Procuracy by allowing it to suspend illegal acts of administrative agencies." Peter B. Maggs, *Substantive and Procedural Protection of the Rights of Economic Entities and Their Owners in the USSR*, In search of the law-governed state (Washington, D.C., 1991), https://www.ucis.pitt.edu/nceeer/1991-805-01-Maggs.pdf (accessed August 14, 2016).
Numerous reform initiatives sought to eliminate the general supervisory function over administrative organs and its activities from the end of 1980s to mid-1990s. Nonetheless, general supervisory authority of the Procuracy was diminished within the deletion of the term "supreme supervision" from the 1977 Constitution on 1990, it was preserved in the Law on the Procuracy of 1992.

[113] Barry, "Administrative Justice: The Role of Soviet Courts in Controlling Administrative Acts," 73.

[114] "USSR Law, 2 November 1989, "On the Procedure for Appeal to Court the Illegal Actions of Bodies of State Administration and of Officials Infringing on the Rights of Citizens," Ved. SSSR 1989 No. 22, item 416, replacing USSR Law 1987, "On the Procedure for Appeal to Court of Illegal Actions of Officials Infringing on the Rights of Citizens," Ved. SSSR 1987 No. 26, item 388, as amended, 20 October 1987.

Procedure for Appeal to Court of Illegal Actions of Officials Infringing on the Rights of Citizens," which was enacted on June 30, 1987 and became effective on January 01, 1988, was the key achievement that enabled the transition from the traditional objective legality paradigm to a subjective rights based model. John Quigley claimed that provisions of this law signified the prevailing position in the direction of a progressive tendency toward wider access to the court and the complaint process, which denied the traditional approach of only allowing a limited listing of available complaints.[115] Consequently, complaints that citizen could bring to the court against administrative officials were no longer limited[116] to those specifically named actions in the laws.

In the meantime, it was only in 1990 in Mongolia that a paradigm change began at the institutional level, transitioning from an enumerative clause approach to a general clause approach. Such change was greatly influenced by the reform in Soviet Union that took place in 1977 and 1987 respectively, in terms of significant changes in Russian law at the constitutional and statutory law level.

1.5. Post Socialist Period (from 1990 until 2002/2004)

1.5.1 Initiative toward Separate Administrative Litigation

1990 Special Law on Complaint Procedure

Until the 1990s, soviet influence regarding the Mongolian state and administration had been strong and stable for a long time. Moreover, the theory of Mongolian administrative law and practice was rooted[117] in the Soviet regime. However, historical events in the late 1980s and early 1990s in the Soviet Union placed Mongolian administrative law on a path to legal reform. During the period of Perestroika in the Soviet Union, reforms took place widely in level of state and societal structure. As Mongolia was directly influenced[118] by these developments, various laws were enacted in on March 23, 1990,[119] including: the Law on Procedure

[115] John Quigley, "The New Soviet Law on Appeals: Glasnost in the Soviet Courts," *International and Comparative Law Quarterly* 37, no. 01 (1988): 177.

[116] However, language used in Article 1 as it states "acts committed individually by officials" believed to limit its applicability for collegial bodies.

[117] Where "(…) the bureaucracy was accountable only to itself, and administrative law was the body of laws that controlled the lives of the citizens." Fenton, "An Essay on Administrative Law Reform in the Former Soviet Union," 51.

[118] "In Russia, And in 1987 after 10 years with the constitutional provisions explicitly enables the right to appeal against administrative acts at court, first time adopted the law, USSR Law, on 30 June 1987, "On the Procedure for Appeal to Court of Illegal Actions of Officials Infringing on the Rights of Citizens"." Maggs, *Substantive and Procedural Protection of the Rights of Economic Entities and Their Owners in the USSR*, 23.

[119] On same day, another law was adopted by then Parliament of People's Republic of Mongolia, which is Монгол Улсын шүүх, прокурор, мөрдөн байцаах, хэрэг бүртгэх байгууллагын хууль зөрчсөн ажиллагааны улмаас иргэнд учирсан хохирлыг арилгах журмын тухай хууль [Law on Procedure of Removing the Damage to the Citizen that Caused by Unlawful Activity of Investigative, Prosecutorial and Judicial

for Submitting the Complaint to the Court about Unlawful Activity of Organization and Official which Breached Right of Citizen of People's Republic of Mongolia [120] (hereinafter "1990 Special Law on Complaint Procedure").

Even though the 1960 Constitution provided that all court procedure be in accordance with democratic principles, it was only recognized on the surface, and in fact the courts were used as a control apparatus by the state over the citizens prior to the 1992 Mongolian Constitution[121]. Apart from typical soviet law,[122] the purpose of the 1990 Special Law on Complaint Procedure, as stated in Article 1, was to facilitate the selection of the correct judicial venue for disputes concerning the breach of citizens' lawful rights by an illegal activity of a state administrative organ and its officials. Under this law, citizen's rights that were provided by the Constitution and other legal acts were somewhat listed, but the application of the law was not limited to the laws and rights specified. The rights mentioned as examples in this law were property, family, housing, labor and other personnel rights, and the court was empowered by Article 6 to suspend the effect of an administrative activity[123] which was being challenged by complainant prior to the decision.

In addition to the broad range of private rights that could be claimed under the 1990 Special Law on Complaint Procedure, there were no limitations on who could be sued under this law as a defendant. Article 2 of the 1990 Special Law on Complaint Procedure recognized two types of illegal activities[124] by state administrative organs and their officials. The first illegal activity are those that limit or prevent citizens from exercising rights provided by law, and the second illegal activity are those that illegally impose an obligation or duty on a citizen.

Moreover, the 1990 Special Law on Complaint Procedure was indeed a separate law from civil procedure, thus it tended to specifically regulate complaint procedure. It relied on the Rules of Civil

Organization of People's Republic of Mongolia] (1990 оны 3 дугаар сарын 23-ны өдөр).

[120] 1990 Special Law on Complaint Procedure [Law on Procedure for Submitting the Complaint to the Court about Unlawful Activity of Organization and Official which Breached Right of Citizen of People's Republic of Mongolia] (1990 оны 3 дугаар сарын 23-ны өдөр).

[121] Amarsanaa Jugnee, ed., *Монгол Улсын шүүх эрх мэдлийн шинэтгэл (Сүүлийн 20 жилийн тойм)* [The Judicial Reform of Mongolia (Overview for Last 20 Years)] (Ulaanbaatar, 2010), 10, https://www.forum.mn/res_mat/res_mat-43.pdf (accessed May 19, 2017).

[122] In light of perestroika control over administration loosened and "one of the significant changes in the field of Soviet law [in recent years] is that the term *socialist legality* has almost ceased to be used; instead, discussion is focused around the *concept of the law-based state*. Oda, "TITLE," 02.

[123] However, the article emphasized to be applied only in case where the illegality of administrative activity is easily determinable.

[124] Normative acts were not allowed to be challenged by complaint through this law according to Article 11 of 1990 Special Law on Complaint Procedure.

Procedure[125] in terms of the process required for handling complaints and appeals. The first paragraph of Article 5 of the 1990 Special Law on Complaint Procedure specifically mentioned that when the court decides on the complaint, it is required to reflect/consider provisions of the 1990 Special Law on Complaint Procedure. Nevertheless, the rules of civil procedure applied as a general rule. This was the first time in Mongolia, that a complaint against an administrative activity was regulated by a separate law, other than civil procedure. Based on these characteristics it is clear that the 1990 Special Law on Complaint Procedure was not a traditional soviet law.

Most importantly, the enactment of this law was an attempt to change from an enumeration clause approach toward a general clause type of administrative procedure. On the one hand, the 1967 Civil Investigation Procedure Law provided an exclusive list[126] of complaints as was described in a previous section of this chapter. That list was a closed-list, meaning that only the complaints that were specifically named in this list were allowed; therefore, it was a very limited and exclusive list (negative enumeration). On the other hand, the 1990 Special Law on Complaint Procedure introduced a general clause type[127] jurisdiction to the court which prescribed complaints against infringement of some rights but was not limited to those rights. However, Judge Zandraa[128] noted that the 1990 Special Law on Complaint Procedure lacked a key instrument for court procedure, namely, on the issue of who has the burden of proof. Moreover, he pointed out that the purpose of this law failed to provide a clear answer to the question as to whether the purpose of the 1990 law was to protect individual rights from illegal administrative activity, which was a newly emerging question at that time, or court control over administration.[129]

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[125] Монгол улсын иргэний эрхийг хохироосон төрийн захиргааны байгууллага, албан тушаалтны хууль бус үйл ажиллагааны талаар шүүхэд гомдол гаргах журмын тухай хууль, art. 5 and 9.

[126] БНМАУ-ын Иргэний байцаан шийтгэх тухай хууль, art. 197 and 200 (1967).

[127] However, it was not purely a general clause, rather it was an inclusive list (positive enumeration) from the viewpoint of legally protected citizen rights. Article 1 provided example list of citizen's right that can be pursued by complaint if it's believed to be infringed by acts of administrative organ and its officials.

[128] Zandraa Orosoo was the presiding justice of Administrative Chamber of the Supreme Court, he is one of the key person in administrative court in terms of experience and contribution for its development. Judge Zandraa led the drafting of the 2010 amendment to the LPAC. He observed, when adopted the 1990 Special Law on Complaint Procedure that both consisted of an administrative review and judicial review phase; thus, in this way it was similar to the LPAC his commentary. Zandraa Orosoo, "Монгол Улсад захиргааны хэргийн дагнасан шүүх байгуулагдсан нь" [Establishment of Specialized Administrative Court in Mongolia], in *Монголын Шүүх II Түүхэн хөгжлийн тойм, өгүүлэл нийтлэл*, ed. The Supreme Court of Mongolia, 2 (Ulaanbaatar, 2016), 227.

[129] Zandraa Orosoo, "Захиргааны шүүх иргэний үндсэн эрхийн хамгаалалт болж чадсан" [Administrative Court Became a Protection of Fundamental Rights of Citizen] (Ulaanbaatar, 2014.05.28), Ulaanbaatar, http://www.supremecourt.mn/news/75 (accessed May 29, 2017).

Moreover, this statutory law level change was not practicable.[130] In Mongolia, there were no separate courts designed for handling specifically administrative complaint procedure, but ordinary courts had jurisdiction based on to Article 3 of the 1990 Special Law on Complaint Procedure. Professor Chimid[131] observed that the 1990 Special Law on Complaint Procedure had not come to "a life," and described the period from 1990 to 2004 as a sluggish transition regarding full judicial control over public administration. The primary reason for this slowness was because the ordinary court still had jurisdiction over the complaint process through civil procedure, and the traditional practice of complaint procedure was still utilized. However, there may have been other variables that contributed to this uselessness. For instance, as the same research suggested[132] that one of the reason it was not practicable was the rights protected by this law was not exceeded mostly property related personnel rights.

Another thoughtful observation that has responded to this question is the assertion that the sluggishness of changes in the administrative law from 1990 to 2004 may reside in aspects of its past, namely the old regime. Traditionally Mongolian citizens were not encouraged, or used to, approaching the court with a complaint against administration. Instead, it was customary to appeal to a higher level administrative organ or local party which Mongolians deemed a more effective means for resolving administrative disputes. Moreover, there was little trust in the court because they were totally under the control of the political party and the executive branch of the government[133].

According to study on Enforcement Status of the Recovery of Infringed Rights Caused by Illegal Administrative Decisions implementation of the1990 law was mostly limited to the recovery of monetary damages, including lost salary, until 2001.[134] A few examples[135] of complaints decided by the 1990 Special

[130] There were not many cases decided through this new law, and it was difficult to find the case according to this law. In fact, these are signs of another attempt to change the direction in protection of right in broader means at court. Tungalag Namsrai, "Монгол Улсын захиргааны хэргийн шүүхийн онцлог" [Characteristics of Administrative Court of Mongolia], (presented at Constitution and Democratic Rechtsstaat, Ulaanbaatar, 2004).

[131] Chimid Biraa, ed., *Захиргааны хэргийн шүүхийн тухай мэдэгдэхүүн* [Knowledge on Administrative Court] (The National Legal Center, 2004), 23.

[132] Jugnee, *Монгол Улсын шүүх эрх мэдлийн шинэтгэл (Сүүлийн 20 жилийн тойм)*, 41.

[133] Namsrai, "Монгол Улсын захиргааны хэргийн шүүхийн онцлог," 102–3.

[134] Ganzorig Dondov, "Захиргааны хууль бус шийдвэрийн улмаас хохирсон хохирогчийн эрхийн хэрэгжилтийн төлөв байдал" [Enforcement Status of the Recovery of Infringed Rights Caused by Illegal Administrative Decisions], *The Human Right* 4 (2007): 74.

[135] In Archive of the Capital City Appeals Court, I made research on selected years of judgment of the Chingeltei District Court to seek particular cases decided by the 1990 law. Because claim or complaint at that time must be filed with court that defendant resides and most central and city administration was located in Chingeltei and Sukhbaatar district. Especially for central government agencies, Chingeltei district Court was the most likely venue for cases in nature administrative. Among judgments of 1995, 1998 and 2002, only two relevant cases were found.

Law on Complaint Procedure include a judgment of the Chingeltei District Court in Ulaanbaatar City, dated October 19, 1995 concerning a dispute related to the housing application to the Border Defense Hospital. The court ruled[136] that because the defendant, who was the chief of the hospital, failed to further submit the citizen's (plaintiff's) application for housing to the Housing Commission, it breached the citizen's right. In this case the court applied Article 7 of the 1990 law as a substantive law, and subsequently ordered the hospital chief to submit and discuss the application for housing to the relevant commission. In another case,[137] the court revoked a decision to increase the fee related to domestic dog and cat owners by a public management company affiliated with Ulaanbaatar city.

The relationship between the 1990 Special Law on Complaint Procedure and the 1967 Civil Investigation Procedure Law was uncharacteristic. When the Special Law on Complaint Procedure was enacted in 1990, the 1967 civil procedure law was not only in force, but it also had jurisdiction over the enumerated complaints against administration. No amendments were made to the 1967 civil procedure law in relation to the adoption of the 1990 Special Law on Complaint Procedure[138] which gave rise to the existence of two different types of parallel procedure concerning complaints against administration. Because civil procedure had been used for a couple of decades, in the area of complaint procedure, and the same court acquired this new jurisdiction, the ordinary court often tended[139] to apply the rules of civil procedure. Overall, the transition of utilizing a general clause approach, in terms of allowing all complaints against administration, was not fully understood by most lawyers and judges in early 1990s. Few scholars understood the intent of the general clause type.

After Collapse of Socialist Regime: 1992 Constitution

With ample influence from Perestroika, Mongolia abolished the socialist regime with a single predominant party at the end of the 1980s, and the Law on Amendments to the Constitution of the MPR was enacted by the Peoples Great *Khural* on May 12, 1990. These amendments provided for the establishment of parliament,

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[136] А.Цэрэнчимэдийн орон сууц хүссэн өргөдлийг шийдвэрлээгүй орхигдуулсан тухай нэхэмжлэлтэй хэрэг [Application for housing Case] Case no 619 (MN|Улаанбаатар Chingeltei District Court).

[137] Монгол нохой Нийгэмлэгийн нэхэмжлэлтэй хэрэг ["Mongol Dog" Society Case] Case no 641 (MN|Улаанбаатар Chingeltei District Court).

[138] This law is replaced by the enforcement of the *Law on Procedure for Administrative Cases* on June 01, 2004. On June 19, 2015 *the General Administrative Law* was enacted and *the Administrative Court Procedure Law* which was enacted on February 4, 2016 replaced *the Procedure for Administrative Cases* of 2002. Additionally, the Law on Procedure for Disposal of an Application by a Citizen to the State Organization and Officials which was adopted on April 17, 1995 and is still in force.

[139] Biraa, *Захиргааны хэргийн шүүхийн тухай мэдэгдэхүүн*, 23. See footnote 131.

multiparty elections, and the drafting of a new constitution.[140] A preliminary operating Parliament with a multi-party system was established and it proclaimed the legitimacy of private property and determined a new economic relation by adopting 35 new laws[141] and amendments. All of these became a solid base in the process of adopting the 1992's Constitution.

This promotion of democracy had the potential to transform the political as well as government administration systems throughout the country. The laws that existed up to the date of enforcement of the 1992 Constitution, which contained provisions that infringed upon human rights, were deemed void.[142] One of the most important elements in the reform of the State's institutional and legal framework has been modifying the judicial[143] and administrative system of Mongolia to conform to the new Constitution in terms of protection of human rights. The drafters of the Constitution not only declared human rights and freedoms but they also paid special attention to the government obligation to ensure conditions for the realization of rights, a recent assessment[144] confirms. The Procuracy was not positioned as strong as it was before and was not granted any role in the settlement of complaints against administrative agencies under the new laws. Therefore, supervision by the Procuracy in administrative law was ultimately abandoned at the constitutional level.

Article 19 paragraph 1 of the Constitution states "The State is responsible to the citizens for the creation of economic, social, legal, and other guarantees ensuring human rights and freedoms, for the prevention of violations of human rights and freedoms, and restoration of infringed rights". As a mechanism and safeguard of legal guarantee for ensuring human rights, Article 16 paragraph 14 provides the right[145] to

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[140] Chimid Enkhbaatar et al., *Assessment of the Performance of the 1992 Constitution of Mongolia*, Assessment (Ulaanbaatar, 2016), 11, http://www.mn.undp.org/content/dam/mongolia/Publications/DemGov/Undsen%20huuliin%20sudalgaa_eng.pdf?download (accessed April 13, 2017).

[141] Amarsanaa Jugnee, *Transitional Period and Legal Reform in Mongolia*, 2009, 42–43.

[142] Alan J. K. Sanders, "Mongolia's New Constitution: Blueprint for Democracy," *Asian Survey* 32, no. 6 (June 1992): 507.

[143] Path dependence is strong, not only at the statutory law level, but also at the constitutional level, as Doctor Munkhsaikhan writes, "Even though Mongolia rejected the Soviet model of constitutional review, this model never lost its influence over the creation of the constitutional review (…)." Munkhsaikhan Odonkhuu, *Towards Better Protection of Fundamental Rights in Mongolia: Constitutional Review and Interpretation*, 2014, 71, http://ir.nul.nagoya-u.ac.jp/jspui/bitstream/2237/20123/1/CALEBOOK%204.pdf (accessed May 31, 2017).

[144] Enkhbaatar et al., *Assessment of the Performance of the 1992 Constitution of Mongolia*, 55.

[145] Article 16 (14) of the 1992 Constitution states as "Right to file an complaint to the court to protect his/her right if he/she considers that the right of freedoms as spelt out by the Mongolian law or an international treaty have been violated; to be compensated for the damage illegally caused by other"; Moreover, Article 16 (12) reads as "Right to submit a petition or a complaint to State bodies and officials." Монгол Улсын Үндсэн Хууль [The Constitution of Mongolia] (1992).

submit a complaint to the court. Moreover, Article 48 paragraph 1 of the new Constitution specifically asserts an intent to establish an administrative court

However, a notable characteristic among the 1960 and 1992 constitutions is that both contain similar provisions on the right to submit a complaint. Article 85 of the 1960 Constitution stated that all citizens (his/her own rights and legal interests are not related) have a right to submit written or verbal petitions and complaints concerning illegal acts of the state organs or public officials. However, a right to submit a complaint, not claim or action, as a means of protection against the infringement of rights and freedom is granted under Article 16 paragraph 14 of the 1992 Constitution. Concerning the usage of legal terms, the 1992 Constitution does not clearly distinguish itself with regards to the question of right as defined to submit a complaint (not an action) from the old[146] constitutional determination. A feasible difference is that the 1960 Constitution did not designate a court that was an institution responsible for complaint settlement, but the contemporary constitution specified a court as a destination for complaints.

The relationship between a private person and the state at the level of statutory law and practice, after the 1992 Constitution, is reflected in the famous phrase[147] by Otto Mayer: "a Constitution changed but administrative law endures." This was certainly the case in Mongolia, at least until 2004. The Mongolian parliament's goal was to reform the legal environment[148] consistent with the constitutional principles established within the 1992 Constitution. The Law on Administrative Penalty[149] was adopted in 1992 as one of the first laws following the new constitution. However, the purpose of this law as stated in Article 1, was for prosecuting a person who is in violation of administrative regulations. According to Article 9 paragraph 6 of said law, a right to submit a complaint to the court is provided if a violator asserts that his/her rights and interest have been infringed during the administrative penalty procedure. In that case, the court procedure will be carried out by the rules of civil procedure.[150]

There has been a significant number of substantive administrative laws that were either revised as

[146] Similar wording used not only in the Article 58 of the 1977 Brezhnev Constitution of the Soviet Union but also Article 97 of the 1954 Constitution and Article 41 of the 1982 Constitution of the People's Republic of China.

[147] Pieter Henning, "Thoughts on Administrative Law," *Comp. & Int'l L.J. S. Afr.* 2 (1969): 94.

[148] The Legal reform program of Mongolia, the main Directions for Enhancing Mongolian Legislation until 2000 and action Plan for implementation of this program approved on 1998 by the parliament. The Legal Reform Program set the goal to draft 69 new law or revise existing laws and make amendment to other 49 laws by 2000. Jugnee, *Constitutionalism and Constitutional Review in Mongolia*, 32–33.

[149] Захиргааны хариуцлагын тухай хууль [The Administrative Penalty Law].

[150] Ibid., art. 19 (6).

new versions or adopted as entirely new legislation. According to the research report,[151] there were 73 laws that contained a provision on procedure to instigate a complaint or an appeal against administration by October 2003. However, these complaints were decided by the rules of civil procedure in civil court. Often, those new and revised administrative laws regulated and emphasized more on the authority of administrative agencies in their designated areas in public law. Thus, interactions between citizens and the state, in terms of providing a remedy for rights of individuals affected by acts of administration were often not sufficiently recognized by laws.

1.6. Summary

In order to understand Mongolian legal concepts, particularly in the area of administrative law from the 1920s to the 1990s, it must be studied with the roots and core ideology of Russian administrative jurisdiction in the 20th century. During this period Mongolia existed under the heavy influence of Russia in almost every instance of social, economic and political facets, and it ultimately developed as a Soviet State. Administrative law was also affected by this influence. In fact, during the socialist era[152], administrative law was often used as method to control over Mongolian administration and society. The administrative legal system was designed for the imposition of control and maintenance of order over administrative agencies and citizens. Inseparable with socialist administrative law was the presence of two characteristics, general supervision over the administration by prosecution and administrative responsibility/punishment to the citizens.[153]

Historically, the Procuracy is the key institution as administrative adjudicator and the establishment of general supervision of the Procuracy was the development towards a control type. Objective legality of administrative action and its supervision is the most important characteristic from the viewpoint of administrative law. In other words, ascertaining a remedy for the violation of an individual right was not a mission of administrative control available at that time. Later, court control through civil procedure for enumerated administrative complaints was established, however it focused mostly on administrative punishment. And yet again Mongolia experienced another wave of influence by Soviet administrative law development in the 1980s. The paradigm changed and eliminated the Procuracy's control and instituted general clause type complaints through civil procedure in early 1990s.

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[151] Jugnee, *Монгол Улсын шүүх эрх мэдлийн шинэтгэл (Сүүлийн 20 жилийн тойм)*, 73.
[152] Formally, Mongolia was socialist state from 1924 Constitution to early 1990s.
[153] This was the first form of administrative jurisdiction in soviet states.

The 1992 Constitution directly recognized the establishment of a specialized court, such as an administrative court, but it did not provide for the immediate establishment of such an institution by statutory law, which was necessary to accomplish constitutional change. Subsequently, legal transplantation occurred in the field of administrative litigation from Germany. Change towards administrative court as a present system from general supervision of the Procuracy as a former system began in 2002. Since the country claims that it belongs to the Continental Legal system, this thesis has adopted a historical comparative approach to explain specific issues associated with judicial review under administrative law by examining French, German and Japanese concepts in following chapter. These issues relate specifically to tension between the role of judicial review in administrative law as protector of rights and interests versus the conception of administrative law being used as controlling mechanism over the legality.

1.7. Conclusion

This chapter sought to examine the historical establishment of the settlement of administrative disputes that existed in Mongolia since the 1920s, especially concerning whether it was to control the objective legality over administrative activity or to provide a remedy of infringed subjective rights by administrative agencies.

In due course, the soviet law influence was strong and stable in Mongolian administrative law development. From the viewpoint of administrative litigation and its history, the soviet administrative dispute settlement is one variety of the control type. Thus, in Mongolia the control type administrative litigation procedure was established. This was a non-litigation (non-contentious) type procedure; in other words, it was not an adversarial system. Procuracy was the key institution utilized in the settlement of administrative disputes. The establishment of general supervision of Procuracy was the development towards the advancement of control type administrative dispute settlement in Mongolia.

The court had a very limited role in this procedure while the non-judicial organ, the Procuracy, had the main role. An important element that is characteristic of this approach to administrative dispute settlement is the very narrow and limited amount of control granted to the court. The amount of control the court had was limited by civil procedure which allowed it to only review enumerated complaints, mostly administrative punishments.

The purpose of this procedure was to maintain objective legality over administrative activities. Thus, objective legality of administrative activity and exercising supervision over administration were the most important characteristics from the view point of remedy. In other words, the remedy for the infringement of

an individual right was not the purpose of administrative litigation at that time. The paradigm change to eliminate the control type and enumerated complaints procedure began formally at the constitutional and statutory law level in the early 1990s. However, to date paradigm change has not yet not been achieved in substance.

Chapter II: Comparative Historical Analysis from the view point of "Control type and Remedy type" of administrative litigation: France, Germany and Japan.

2.1. Introduction

As evidenced in the previous chapter, Mongolia instituted a control type administrative dispute settlement approach; therefore, this chapter will explore the historical development of administrative litigation from the view point of control type and remedy type. In so doing, this chapter will examine administrative law concepts from France, Germany, and Japan from a comparative perspective. Like Mongolia, France, Germany, and Japan are countries that, in principle, belong to the civil law system. Most importantly, this comparative analysis requires a close investigation of France and Germany, which are believed to be the founders of administrative law, at least in the civil law system and Japan is also important as a relevant point of comparative study, especially as the recipient from Germany and France and as the country which have the own development.

It is crucial to look in the right place for the foundation concepts that comprise administrative litigation or administrative control in a civil law system. Also, it is important to explore how the forms of administrative litigation have developed throughout the history of advanced European countries that are responsible for formation and advancing administrative law and litigation. Thus, this chapter will examine the initial development of French, German and Japanese administrative litigation, especially concerning the purpose and forms of administrative litigation to exercise control over administration or to provide for protection of infringed rights of individuals. This chapter will focus on a continuity, concerning the tendency of administrative litigation in these advanced capitalist jurisdictions that is based on the paradigm change in administrative litigation from control to remedy type. The essential aim of this thesis is to inspect how the development of administrative litigation from these countries, especially the concept of objective legality or initial judgment theory and more recently the concept of administrative act, have influenced Mongolian administrative litigation directly and indirectly.

In terms achieving such aims, this chapter will begin by examining the history of French administrative jurisdiction especially paying attention to the foundation of the categorization of administrative litigation as objective and subjective. It will also discuss the inseparable elements of the objective model of French administrative litigation, such as the principle of legality and recourse for excess of power. Following the French section, the chapter then turns to the German model from the viewpoint of

historical, theoretical, and institutional viewpoint, beginning with concentrating on the Prussian model of control type administrative jurisdiction which had big influence to Mongolia through Russian and soviet law. Moreover, this chapter discusses the establishment of the German administrative court and its enumerated jurisdiction, which was derived from the idea of a strict separation of power, and later developed in the direction of remedy of infringed rights with general jurisdiction. The next section of chapter two continues to analyze German administrative law concepts with an analysis of rivalry theories behind the development of administrative litigation as control of administration or as protection to provide a remedy for infringed rights of individuals. Lastly, this chapter will survey Japanese administrative litigation from the administrative state through the development to the judicial state. Special attention is given to the influence that Japanese theory and institution on administrative litigation gained at the start from Prussian control type administrative jurisdiction. This chapter will focus on and pursue a paradigm change throughout its development from control type to remedy type administrative litigation under the contemporary constitution.

During the course of this chapter, particular focus is paid to the initial type of administrative litigation in every country examined and specifically how the administrative litigation paradigm transforms in the end. Also, this chapter asks whether the type of administrative litigation in Mongolia, which is described in Chapter I, is consistent with types of administrative litigation among these countries.

2.2. French: Categorization of administrative litigation

2.2.1. Introduction: Importance of relevance of French law in this research

The primary purpose of this study is to determine how to define the position of the Mongolian administrative law system within world's advanced countries, specifically those countries which are viewed as the origin of administrative law. Why is this research of Mongolian administrative law and litigation important from a French administrative law perspective? Firstly, the French system is considered the origin of administrative law and the administrative court system. Especially the concept of administrative litigation was established and developed initially in France. Secondly, the French administrative law system greatly influenced other European countries, specifically German administrative law was historically influenced by innovations in French administrative law. Thirdly, Japan[154] was also influenced by French administrative law; however, it was not directly influenced by the French. Japan was influenced by French administrative law mainly

[154] For instance, even now though Japan has no longer administrative court but concept of categorization of administrative litigation as objective and subjective, and concept of legality of administrative act has kept.

through Prussian administrative law. Lastly, and most importantly for Mongolia and other former socialist countries, French administrative law had a very significant influence because it introduced supervision and control over objective legality. The very roots of Mongolian administrative law and its administrative court system are the historical result of French administrative law. Because of its profound influence throughout the socialist system, French administrative law must be studied to fully understand Mongolian administrative law.

It is important to examine the origin of French administrative law, specifically *droit administrative*, because of the substantial influence it has had over the development of administrative law in Prussia (Germany) and Japan. Both France and Prussia were convinced that administrative reform was preferred over constitutional reform.[155] French legal scholars had not only significantly developed administrative law, but had played an important role in developing other areas of the law, "the most outstanding contribution made by France to legal science has undoubtedly been the Civil Code of 1804, but almost as important has been the separate system of administrative jurisdiction and administrative law created by the *Conseil d"Etat* during the nineteenth and twentieth centuries."[156] With the Council of State (*Conseil d"Etat*), one of the oldest living French institutions, formally established on December 25, 1799, French administrative law began a new era.

2.2.2. Historical Perspectives

Separation of Power

The Doctrine of the Separation of Powers, is a French political doctrine that serves as a fundamental basis for the existence of administration and its officials to be set apart, independent and free, from ordinary judiciary. Because of the distrust of the courts, *parlements* that existed prior to 1789, the French Parliament made sure that France would never again allow the judicial courts to exercise any control over the administration. Thus, the structure and relation between the French governmental administration and the court was needed to reflect this separation of power. The understanding of the Separation of Powers Doctrine in France during the early revolutionary years, heavily depended on the idea of interpretation of Montesquieu's third principle of separation of power: that is limiting the amount of authority exercised over

[155] Conrad Bornhak, "Rudolf von Gneist," *Annals Am. Acad. Pol. & Soc. Sci.* 7 (1896): 255.
[156] Lionel Neville Brown, John Bell, and Jean-Michel Galabert, *French Administrative Law* (Clarendon Press, 1998), 268.

the "adjudication of controversies of individuals".

Eventually, the Doctrine of Separation of Powers was instituted to limit the amount of power the courts could wield. In Leon Duguit's (1859-1928) words, "From this notion of the judicial power followed logically the principle of what [we] call 'administrative jurisdiction' (*le contentieux administraf).*"[157] It means that the governmental administration is empowered to adjudicate matters in relation to the administration itself. France introduced a strict principle of separation of powers in its government form without checks and balances among the branches of government. This is especially true between the executive and judiciary branches. Though France had ordinary courts, they could not exercise judicial authority over administrative activities because the Constitution[158].

Birth of the Council of State (*Conseil d"Etat*)

As a result, reviewing the legality of administrative activities was left in the hands of the administration itself, which subsequently led to the establishment of a supervising body within the governmental administration:

> Since the *Assemblée Constituante*, during the French revolution, had prohibited the civil and criminal judge from considering acts of State (*actes de gouvernement*) under the penalty of abuse of authority, the administrative law has had - slowly and painfully – to invent a body of doctrine to prevent the 'coldest of all cold monsters' from crushing its citizens under the yoke of its tyrannical power. That is the source of the expression '*contrôle* (from now on, 'review'), which defines the essence of the mission of the Council.[159]

Among the initial five sections of the Council of State none were entrusted with the judicial function (until 1806 and perfection[160] in 1849) but the five sections were each specialized for certain categories of administrative function. However, by this time the 1790 law,[161] which prohibited ordinary courts from exercising control over any administrative activity, had come into existence, and the Council of State slowly turned into the only feasible venue for complaints from aggrieved citizens. Reform took place in 1799, which required French citizens to appeal first to relevant ministers. If the citizen was still not satisfied after such

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157 Leon Duguit, "The French Administrative Courts," *Political Science Quarterly* 29, no. 3 (1914): 387.

158 The Constitution of 1791 declares, in one chapter: "The officers of administration may take no action that trenches upon the judicial domain;" and in another chapter: "The courts may take no action that trenches upon the administrative functions." The constitution of the year III provides: "The administrative authorities may not interfere in matters pertaining to the judiciary;" and in a subsequent section: "The judges may not summon administrative officers into court on account of the exercise of their functions." Ibid., 388.

159 Bruno Latour, *The Making of Law: An Ethnography of the Conseil d'Etat* (Wiley, 2014), 14.

160 *Commission du Contentieux* to *Section du Contentieux*. No longer required formal approval from General Assembly.

161 Law of 16-24 August 1790. Brown, Bell, and Galabert, *French Administrative Law*, 46.

an appeal, they had the option of appealing to the *Conseil d'Etat.*[162] However, the *Conseil d'Etat* did not have the power to decide on the legality of the matter at hand during the early years of its existence. In order to overcome the frustration in dealing with appeals against the legitimacy of administrative acts, French citizens were granted the right to submit an appeal to the Council of State's designated committee, referred to as the *Comite du Contentieux*, which originally only advised the government on issues pertaining to complaints.[163] At this time the government retained decision making authority and the Council operated in an advisory capacity, "This was the embryo of the Council of State organized as a court. This committee, however, exercised only what is traditionally described as a limited judicial power (*justice retenue*). It gave nothing more than advice, even in matters of controversy, and legally the decisions still belonged to the government. The executive power remained judge of the legality and of the results of acts performed by its agents."[164]

From Justice *Retenue* to Justice *Deleguee*

Beginning in 1872, the Council of State was formally[165] accepted, while it had court like jurisdiction, and its decisions were given the force of judgments,[166] such decision making authority only came into effect after a complaint had first been decided by a minister. Therefore, it exercised a form of judicial review/control over the administration:

The foundation of the administrative court system in force at present is the statute of May 24, 1872, which re-organized the *Conseil d'Etat* and materially enlarged its powers. Theretofore, the *Conseil d'Etat* (except during a very brief and insignificant interval) exercised its powers in a form designated in French technical language as *justice retenue*; i.e., it merely gave advice, and the final decision rested with the competent cabinet minister who was not bound by, but in practice usually followed, the *Conseil's* advice. The 1872 statute conferred on the *Conseil* the power to decide litigations submitted to it without interference by the executive; henceforth it exercised its powers in the form of *justice deleguee*.[167]

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[162] Ibid., 47.

[163] Edwin Borchard, *French Administrative Law*, Working Paper, Faculty Scholarship Series, 1933, 135, http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4446&context=fss_papers (accessed August 6, 2016).

[164] Duguit, "The French Administrative Courts," 389–90.

[165] Law of 24 May 1872, the Council of State empowered to reach on a decision in suits against the administration.

[166] F. J. Goodnow and E. Laferriere, "Traite de La Juridiction Administrative et Des Recours Contentieux.," *Political Science Quarterly* 11, no. 2 (June 1896): 353–54.

[167] Francis Deak and Max Rheinstein, "The Machinery of Law Administration in France and Germany," *University of Pennsylvania Law Review and American Law Register* 84, no. 7 (May 1936): 860.

Delegated judicial power [168] means the Council of State exercised its judicial authority independently. The Council of State was not only a court in the sense of function vested upon it but also it was a supervisory organization. One can determine, by the role of the court in administrative law, whether its purpose is to control the administration to protect legal order, or to adjudicate disputes between the administration and citizens to protect subjective rights. In France, at this time, the purpose of the Council of State was to exercise control over administrative activity.

By the law[169] of 1872, the Council of State changed the characteristics of its authority or power. Firstly, this law gave the Council of State the ability to act upon the power of "delegated justice" (*Justice Deleguee).* Previously, the Council had power of "reserved justice" (*Justice Retenue).* Final decisions were reserved for the Head of state before the enactment of this new law. The Council of State had only "justice retained", which meant that the final decision authority belonged to Napoleon. Recourse was not "litigation" prior to this law. The Head of State had the final say for every matter, exercising supervision and general control over the administration. The general control over the administration by the head of state resulted in a "Recourse Hierarchy." This meant that decision making power first went to the local administration, second to the Council of State, and finally to the head of State. This was how the Council of State functioned before the 1872 law. After the 1872 law, the head of State delegated his authority to the Council of State, exercising another form of decision making authority called 'Delegated Justice." In other words, the law of 1872 transformed the administrative legal decision making landscape, from "retained justice" to "delegated justice." Under this law the Council of State had independent jurisdiction. However, fully understanding "recourse for excess of power" became an eminent problem among French administrative law scholars.

2.2.3. Administrative litigation

Expansion of concept of litigation: Birth of Objective Litigation

The principle of "Recourse Hierarchy" was eliminated by the law of 1872, thus a new theory addressing the "recourse for excess of power" was needed. The concept of litigation always has a relation with the concept of "subjective right" |traditional proposition|. However, with regards to the French idea of recourse for excess

[168] "It conferred upon this body general and supreme competence by a provision which should be cited in full: "The Council of State renders final decision in administrative controversies and upon all suits to annul, as in excess of power, the acts of the various administrative authorities." Duguit, "The French Administrative Courts," 391.

[169] Prior to such law of 1872, during Napoleon III regime, the Council of State had a form of power known as justice retained.

of power, the concept of "subjective right" is not represented nor questioned. If the French legal scholars did not change the conception of litigation, then recourse for excess of power could not be considered "litigation." The first possible solution for this problem was to not define recourse for excess of powers as litigation. It could be argued that under the new law this type recourse belonged to the hierarchy recourse. The second possible solution for the problem was to keep the traditional understanding that the concept of litigation is always related to the concept of "subjective right." It could also be argued that under the new law recourse for excess of power included characteristics germane to the protection of subjective rights. Therefore, recourse for excess of power would then become a traditional type of litigation for the protection of subjective rights. Nevertheless, these two solutions were rejected by French scholars.

The mainstream French scholars during this period selected a third way, which was to expand the concept of "litigation." An expanded concept of "litigation" is related not only to subjective rights of private persons, but also objective legality of administration. This was a new proposition arising out of a new conception of litigation. Therefore, the expanded concept of "litigation" included two types: subjective litigation and objective litigation. It mixed old and new propositions. Thus, the third way constituted "objective litigation." This was the beginning point of the development of subjective and objective litigation in France. The core issue of objective litigation is whether an excess of power is present in an administrative act. The core issue of subjective litigation[170] is whether a subjective right is infringed. Objective litigation concerns litigation that is focused on the legality of an administrative decision. The revocation of an administrative decision mainly depends on the issue of legality of the decision, therefore such decision does not address issues concerning the subjective rights of plaintiff, which is the defining characteristic of objective litigation.

Recourse for Excess of Power

The consensus among French scholars was that objective litigation and "recourse for excess of power" were synonymous. Recourse for excess of power[171] is objective control over legality of administrative activity and its purpose is to guarantee good administration, not the protection of subjective rights of individuals. The first purpose of recourse for excess of power is "good administration." The second and background

[170] Additionally, subjective litigation was considered to have "full jurisdiction."

[171] Bernard Schwartz, *French Administrative Law and the Common-Law World* (The Lawbook Exchange, Ltd., 1954), 183. "Let them continue to knock on the door; ultimately it will open" by French scholar M. Hauriou, in *Precis de Droit Administratif*, 12th edition, 1933.

objective is the protection of subjective rights of the private person who brought the action. While a private person can initiate recourse /action/, ultimately the goal of recourse is restoring good administration, not protecting the rights of a private person. Lastly, the Casanova case[172] confirms the objective litigation theory and changed the direction and understanding of litigation.

Objective litigation and flexible standing are closely connected. Because the predominant view in the French legal community is that the purpose of administrative litigation is to promote good behavior by the administration, standing requirements have been reduced and made more flexible. Thus, objective litigation is always represented by flexible standing. In case of objective litigation, obviously a person whose rights and legal interests have been infringed by an administrative act is able to file a complaint. Moreover, the uniqueness of this litigation lies in the fact that it allows any citizen who has an interest in the challenged act, as of member of the public, NGOs, and local governments to become a plaintiff. For instance, in the case of consumer interest, ordinary citizens are considered petitioners as users of a tramway line, or in a taxpayers' suit, standing is granted because they have a mere interest in the issue. According to *Casanova*, a municipal taxpayer has standing to bring an action to review the legality of *actes administratif* that was allegedly an illegal expenditure of municipal funds.

In addition to flexible standing, objective litigation also permits for a broad interpretation of what constitutes an administrative act in French administrative law. For instance, the French *actes administratif* can be individual or general in terms of its effect.[173] In other words, in French theory an administrative act is not only an individual act but also a normative administrative act. Administrative acts are further classified as unilateral and bilateral. For instance, an administrative contract is considered a bilateral type[174] of *actes administrative*, which is distinguishable from a unilateral act.[175] Therefore, Duguit affirms that beside judicial and parliamentary acts "There is, however, no other authority in France whose acts are not subject

[172] 1901 a taxpayer was admitted to attack an ordinance of a municipal council appropriating 2000 francs for the support of a town physician. Garner, James W., "Judicial Control of Administrative and Legislative Acts in France." *American Political Science Review* 9, no. 4 (November 1915 г.): 644, footnote 17, doi:10.2307/1946383.

[173] Matthias Ruffert, ed., *The Model Rules on EU Administrative Procedures: Adjudication*, European administrative law series 11 (Groningen: Europa Law Publishing, 2016), chap. 2 The heritage of Otto Mayer : actes administratifs unilatéraux and verwaltungsakte in a Franco-German comparison / Pascale Gonod.

[174] Administrative acts are of two types: unilateral acts and contracts. George Bermann, *Codification of Administrative Procedure*, ed. Jean-Bernard Auby (Editions juridiques Bruylant, 2013), 189.

[175] L. Neville (Lionel Neville) Brown, Nicole Questiaux, and J. F. (John Francis) Garner, *French Administrative Law / by L. Neville Brown and J. F. Garner, with the Assistance of Nicole Questiaux* (London: Butterworths, 1973), 83.

to the judicial control of the Council of State."[176] The only exception was *actes de gouvernement*[177] because these acts are not issued by the performance of administrative authority instead political acts.[178] Overall, under the 1872 law and the expanded conception of litigation, promote objective type litigation as a mainstream litigation in administrative jurisdiction.

The Principle of Legality

The role of law, especially public law in France, was expressed by "the principle of legality" regarding state activity in the early 1800s. "The principle of legality[179]" in the exercise of administrative authority was a doctrine that was well developed and widely recognized in the field of French public law. Only when administrative act is consistent with superior legal norms is it legal and deemed to be lawful.[180] Therefore, French administrative law was primarily concerned with facilitating governmental administration and endeavored to be effective and good mannered. The form of the challenged act matters little, whereas it is important in German administrative law. Especially, in the case of a French *ultra vires* administrative act it can be attacked only on the illegality of the act.

> "An objective act, whether by the President of the Republic or by the humblest official, may be assailed by any citizen for *ultra vires* and the *Conseil d'Etat* will pass on its validity;" but "the plea of *ultra vires*, which is at the root of public law, is based not upon the violation of individual right but upon the destruction of an organic rule of service"[181].

Clearly, the use of public law in administrative jurisdiction was not focused on infringed rights and interests of individual citizens, instead it was concerned with exerting control[182] over the administration to make sure that it was not violating the law.

Categorization of Litigation

Categories of jurisdiction [litigation] were classified,[183] based on the court function, and placed into in a

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[176] Duguit, "The French Administrative Courts," 394. In France, at the present time, no distinction is made, either in judicial decisions or in the legal literature, between the so-called "acts of authority" and "acts of management" as regards jurisdiction over administrative controversies.

[177] Prosper Weil, "The Strength and Weakness of French Administrative Law," *The Cambridge Law Journal* 23, no. 02 (November 1965): 252.

[178] Garner, "Judicial Control of Administrative and Legislative Acts in France," 653.

[179] "This principle essentially that protects the individual, and one can assert that there not, cannot be, and ought not to be any exceptions to it." Leon Duguit. Schwartz, *French Administrative Law and the Common-Law World*, 110.

[180] Ibid.

[181] C. Sumner Lobingier, "Administrative Law and Droit Administratif," *U. Pa. L. Rev.* 91 (1942): 43.

[182] It began after the French Revolution, and Napoleon wanted to have a governmental administration that was organized and structured like the military.

[183] *Le Contentieux de L'Interpretation* and *Le Contentieux de repression* as third and fourth jurisdiction. French

particular type of administrative jurisdiction by the French scholar E. Laferriere. The categories were divided into four different actions including the following two: *le contentieux de l'annulation*[184] *and le contentieux de pleine jurisdiction.*[185] The latter is a subjective type litigation which is referred to as full or complete jurisdiction. However, it was not used widespread and was not a mainstream jurisdiction exercised in France at that time. In order to commence this type of litigation, a citizen must show that his or her right has been violated, not just the mere existence of an interest as was required by objective jurisdiction /litigation/. Even with subjective type litigation's characteristic of individual rights, there were assertions that its purpose encompassed public interests in addition individual interests.

The former is the objective type of jurisdiction and it was the main type of litigation in France at that time and widely used. James W. Garner describes the objective type of jurisdiction during that period, "Today almost any citizen may knock at its doors and obtain the annulment of an illegal administrative act."[186] This is because the purpose of the French administrative law was to locate the administration within a legal framework[187]and the Council of State operated as a supervising organization within the administration (organization for objective model). As Neville Brown emphasized "The basic principle of control by the courts over the administration is that the latter must be subjected to the rule of law and all proceedings on a *recours en annulation* are founded ultimately on a violation of this principle."[188] In other words, action for the *recours en annulation* represents the objective model of litigation.

The judicial control over the acts of the administration embodied in the Council of State allow it to

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Administrative Law. Brown, Questiaux, and Garner, *French Administrative Law / by L. Neville Brown and J. F. Garner, with the Assistance of Nicole Questiaux*, 94; Frank J. Goodnow and E. Laferriere, "Traite de La Juridiction Administrative et Des Recours Contentieux.," *Political Science Quarterly* 2, no. 4 (December 1887): 709.

184 Here the complainant seeks the annulment of some administrative act or decision on the ground of its illegality. […] the actual form of the proceedings to annul will then differ according to whether or not the decision complained of emanates from an administrative body which is classified as a jurisdiction. If it does, *a recours en cassation* will lie to the *Conseil d'Etat*; Brown, Questiaux, and Garner, *French Administrative Law / by L. Neville Brown and J. F. Garner, with the Assistance of Nicole Questiaux*, 97.

185 Here the complainant alleges that the administration has infringed some right of his and that he is therefore entitled to be compensated in damages. The "fullness" of the jurisdiction lies in the fact that the court goes beyond merely annulling what the administration has done; it seeks in addition to amend what has been done by awarding damages against the administration in favour of the victim. In other words, it exercises the full or complete powers of a judge, just as the civil courts habitually do in compensating for torts or breaches of contract. The jurisdiction is also full in that the judge may go beyond the quashing of the administrative act in order to revise the decision itself (as in "*le contentieux électoral*" and "*le contentieux fiscal*", both of which fall under this head)". Ibid.

186 Garner, "Judicial Control of Administrative and Legislative Acts in France," 643–44.

187 A State that does not recognize it or recognizes it only with reservations and exceptions does not truly live under a rule of law" Leon Duguit. Schwartz, *French Administrative Law and the Common-Law World*, 110.

188 Brown, Bell, and Galabert, *French Administrative Law*, 214.

annul any administrative act, only on the grounds that such exercise of authority has violated the law or exceeded its powers, regardless whether it infringed complainant's right. As described by Duguit:

> All administrative action is thus subjected to a judicial control, brought into operation chiefly by application for the annulment of acts *ultra vires*. This application may be made by any interested party. The applicant is not held to prove the existence of a right, alleged to be infringed by the act which he attacks; he has to show only that he has an interest in the annulment of the act, and a simple moral interest, even indirect, is sufficient.[189]

Early 20th century scholars in public law, inside and outside of France, usually praised this type of action as an unrivaled degree of protection, more than any other country, for private individuals against the arbitrary and illegal conduct of the administration. Initially, as Professor James W. Garner illustrated, one who submitted a complaint was required to show a violation of his right, however this prerequisite was eventually no longer demanded. Eventually, because of the complainant's status as a citizen, he/she has an interest in achieving the nullification of an administrative act, which is enough to satisfy initial standing requirements.[190]

Then again, the above described traditional four-fold categories for administrative jurisdiction have been criticized and Duguit suggested the following reasoning for the new classification of litigation:

> "One should classify rather according to the nature of the question in issue.
>
> A. is the question in issue the violation of some rule or law of general application which the administration should observe in its dealings with every citizen; or
>
> B. is the question in issue the violation of some right peculiar to the complainant?"[191]

After 1911, the categorization changed from a four-fold to a two-fold category. Category (a) is a "*contentieux objectif*," which is objective litigation. On the other hand, Category (b) is a "*contentieux subjectif*" which is subjective litigation.

The objective-subjective division is valuable because it explains two differences between the *recours en annulation* and the *recours de pleine juridiction*, namely: (i) that the *locus standi* required for the former is much wider and more liberal, whereas it is only the party to the contract or only the victim of the tort who can sue for an indemnity; and (ii) the decision of the court in proceedings to quash is valid *erga*

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189 Duguit, "The French Administrative Courts," 396.

190 Garner, "Judicial Control of Administrative and Legislative Acts in France," 643; Lobingier, "Administrative Law and Droit Administratif," 45.

191 Brown, Questiaux, and Garner, *French Administrative Law / by L. Neville Brown and J. F. Garner, with the Assistance of Nicole Questiaux*, 96–97.

omnes, whereas in proceedings for indemnity the decision takes effect only as between the parties.[192]

The "*recours pour exces de pouvoir*" (*ultra vires*) is an action that can be brought against an administrative act by any citizen and there is no requirement that it must be based upon an alleged violation of the individual rights of complainants. It is enough to seek a repair of administrative act which does not conform to the superior legal norm. If the administration overreached its authority, any citizen could file an ultra vires action, however such an action was limited. As James W. Garner implies, "The competence of the Council of State in a proceeding for annulment on account of excess of power is limited to pronouncing the nullity of the act.[193]" Yet, an ultra vires action was not the same as *actio popularis* of the Roman law because the Council of State applied the "no interest, no action" principle. This principle basically means that if an individual has no interest in the action that he complained about, then it will not be accepted as an action. As described in Neville Brown's book, even with the strong intent to attack an illegal administrative action, the *Conseil d'Etat* refused to accept an *actio popularis* because it would permit everybody, without any requirement to challenge administrative act, which might hinder the orderly flow of administrative activity.[194] Thus, in France, both objective and subjective litigation existed, however objective litigation was the main type of litigation in administrative jurisdiction, yet it did not exclude subjective litigation and the role of subjective rights in French administrative law. According to Duguit:

> the legal evolution which took place in France in the course of the nineteenth century ended in the establishment of a high court, administrative as regards the origin of its membership but absolutely independent of the executive power, passing with final authority and with absolute impartiality upon all claims made against the administration, and thus ensuring to individuals injured or menaced by arbitrary administrative action a protection much more complete and much more certain than they could find in the competence of the ordinary courts.[195]

In short, French administrative jurisdiction was originally established based on judicial control over the objective legality of administrative act but not the protection of the subjective rights of individuals. The French administrative court, within the administration, was also originally created as a supervising organization and developed as an organ of administrative jurisdiction, independent from ordinary active administration. The main purpose of the court was not to resolve the dispute from the view point of the protection of rights, but to exercise judicial control over the legality of actions of state and local government

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[192] Ibid., 97.
[193] James W. Garner, "French Administrative Law," *Yale L.J.* 33 (1924): 613.
[194] Brown, Questiaux, and Garner, *French Administrative Law / by L. Neville Brown and J. F. Garner, with the Assistance of Nicole Questiaux*, 86.
[195] Duguit, "The French Administrative Courts," 389.

agencies.

2.2.4. Recent trends in administrative litigation in France

France is currently experiencing a paradigm change. Presently, in principle, France keeps the objective paradigm regarding various types of administrative litigation. Nevertheless, there is a tendency to shift the paradigm toward the protection of subjective rights through litigation. The dominant paradigm of administrative law in the 19th century, referred to as the objective model or French model, is now undergoing substantial conceptual change. The current Vice-President of the Council of State claims "Recently, the Conseil d'Etat also changed the nature of its traditional control by formally supplementing the control in *abstracto,* to a control in *concreto* that real and becomes explicit."[196] The current trend favors abandoning the long-held belief that the core purpose of administrative litigation is to control over the legality of administrative acts.

Article 6 of the European Convention on Human Rights has pushed the French to revisit and move toward promoting a paradigm change by instituting subjective litigation over an objective litigation model.[197] Since there is no single person whose right is in question in the objective litigation context, it does not require interim relief. However, considering the transition[198] to subjective litigation, the French introduced a new procedural remedy by the Act[199] of June 30, 2000, where the administrative courts are empowered to take all necessary measures to safeguard fundamental rights and freedom. In addition, the development of emergency procedures has helped French administrative courts ensure full realization of rights of individuals.

Still, a categorization of administrative litigation in France still exists, which is not much different than the original two-fold classification. Stephane Braconnier classified contemporary litigation at French administrative court as (i) the ultra vires litigation and (ii) the full litigation.[200] Actions, which are considered objective litigation, are those in which the court has limited decision making authority, only deciding on the

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[196] Jean-Marc Sauvé, "The Council of State and the Protection of Fundamental Rights" (Speech at the Nagoya University, 27 October 2016 г.).

[197] Bermann, George, *Codification of Administrative Procedure*, ed. Auby, Jean-Bernard (Editions juridiques Bruylant, 2013 г.), 195.

[198] It is now clear that the paradigm shift from "the objective model of administrative jurisdiction (the control over the legality (the guarding of the objective right))" to "the subjective model of administrative jurisdiction (the protection of the subjective public rights and legal interests)" is underway in […] France. Зеленцов, "Кодекс административного судопроизводства Российской Федерации как предпосылка смены парадигмы в теории административного права."

[199] OECD, *Better Regulation in Europe Better Regulation in Europe: France 2010* (OECD Publishing, 2010), 149.

[200] Bermann, *Codification of Administrative Procedure*, 192.

objective legality of challenged administrative decisions. On the other hand, actions in which the court will rule on both legality of the administrative decision and the subjective rights of a litigant in a case belong to the subjective or complete (full) litigation category. A recent publication confirms that recourse for excess of power, which belongs to objective litigation,[201] is still far more frequent in administrative courts in France than subjective litigation. It shows that even currently objective type of litigation is considerably popular.

2.2.5. Conclusion

The answer to the question of why French administrative law matters is paramount to the research upon which the current dissertation is based. Administrative law in the Continental law system is generally believed to have been established by French jurists, thus the concept of administrative litigation needed to be explained from a French perspectives first.

The origin of administrative law is interconnected with constitutional law. Moreover, administrative law was created for not only regulating but also legitimizing administrative power. At the start, it focused on regulating and legitimizing administrative power. The principal purpose of administrative law was to ensure the existence of the objective order of the state under the law. Then, the next important question which needed to be answered was: to whom the administration should be answerable. Consequently, after the French Revolution, with ordinary courts banned from any control over administrative activity, self-restraint of the administration developed as a means of control for the purpose of regulation and legitimization. In order to concretize self-restraint of the administration, the concept of litigation became clear from the view point of separation of power in the field of administrative law.

Not only subjective litigation, but also French style objective litigation materialized and was acknowledged as a category of litigation. This was the birth of objective litigation which categorized administrative litigation mainly as objective litigation. Recourse for excess of power is action that can be brought against an administrative act by any citizen and there is no requirement that it must be based upon an alleged violation of an individual subjective right. It is enough to seek to recover legality of the administrative act which does not conform to the superior legal norm. As a result, French administrative litigation encouraged objective litigation through recourse for excess of power, thus acknowledging a very

[201] Rene J. G. H. Seerden, ed., *Administrative Law of the European Union, Its Member States and the United States: A Comparative Analysis*, 3 edition. (Cambridge, United Kingdom ; Portland : Maastricht, The Netherlands: Intersentia, 2012), 26.

wide range of control over objective legality of administration. The Categorization of objective and subjective litigation, from a French perspective, emerged and was recognized. In France, both objective and subjective litigation existed. While the French mainly utilized objective litigation, they did not exclude subjective litigation and the concept of subjective rights.

In order to define the present status of administrative law in Mongolia, the connection between these historical French administrative law concepts such as objective administrative litigation, a broad definition of administrative act, and the principle of legality in Mongolian administrative law and administrative litigation must be examined. On the one hand, Mongolia had no direct influence from French administrative law, but had strong soviet influence. On the other hand, Tsarist Russia before the revolution was influenced by French administrative law and concepts, especially institutions (organization). As Russia moved toward a socialist state, it carried and developed old administrative law theory from France and Germany. Therefore, Mongolia as a former socialist state was indirectly influenced by French administrative law, particularly through the introduction of objective administrative litigation through the soviet socialist system. Similarities between historical French administrative law concepts, such as the principle of legality, had been strong until the 1990s in Mongolian administrative law and still prevalent. Even now after transitioning from a socialist system to a market system, French influence has remained in some form. Mongolia still retains control type of litigation, if not on the surface, it does so in substance.

2.3. German: Control type litigation

2.3.1. Introduction

Since the 1920s Mongolia began to adapt the legal concepts of the Continental legal system mainly through the Soviet concept of state and law. To understand Mongolian administrative litigation in historical, institutional, practical and theoretical terms, one must look to other continental law countries. For these reasons, administrative law in the Continental Legal system in general, and the Mongolian system in particular, cannot be explained separately from German administrative law concepts and historical developments. For the most part, because Mongolia belongs to the Continental Legal system, the development of its legal system must be viewed in light of a German administrative law perspective. Specifically, the German concept of administrative litigation and its evolution is essential. In support of this thesis, it is necessary to emphasize the emergence of German administrative law during the 19th century. This is a significant period because during this time a control type administrative litigation originated, and

it influenced not only Imperial Russia, but also the Soviet Union and in turn Mongolian administrative law.

The 19th century emergence and development of German administrative law is the starting point. Particularly, very important Prussian institutional and theoretical developments in administrative law influenced, and were initially introduced into imperial Russia. Prussian influence included key administrative litigation concepts which took root from this period. From the time of Imperial Russia, such developments in administrative law continued to be influential into the Soviet Union era, and were finally introduced to Mongolia through the Soviet Union during Mongolia's socialist period (History, Institution and Theory). After the Russian Revolution of 1917, the Soviet Union barred western influence, and consequently only isolated old Imperial Russian law scholarship remained. Modern and contemporary developments in administrative law were not available, and thus not known in the Soviet Union, which in turn resulted in the development of outdated theory that was used in the furtherance of soviet ideology.

Therefore, research questions in this section focus on German administrative law history of the 19th century. How is the 19th century German administrative law relevant to the establishment of Mongolian administrative law and formation of control type administrative litigation? Mainly 19th century Prussian institution and background theory, especially in the sphere of administrative litigation from the view point of its influence on Mongolian administrative law is the core question here. Moreover, this section examines, from the Mongolian view point, the difference between French and German type of administrative litigation such as control and remedy type (typology analysis).

From the above analysis, this section seeks to closely analyze Mongolian administrative law, particularly its institution and theory, by using German administrative law history and theory. Thus, it seeks to uncover any correlation between Mongolian administrative litigation elements and types of German administrative litigation and how the German administrative litigation concept help to define administrative litigation in the Mongolian context.

2.3.2. History

Emergence of administrative law (19 Century Prussia)

When looking at the early years of German administrative law, one must examine the form of state and its relation with its citizens. In states of German land, "The police state of the eighteenth century knew only a ruler-subject relationship, where the citizen was little more than an object of governmental caprice" points

out Pieter Henning.[202] As an object, individuals had to obey the power of state domination but did not have much of a right to challenge it. From the middle of the 19th century,[203] German jurists and scholars were beginning to examine the relation between citizens, and the relation among subjects and the state as "a legal relation." As Kenneth F. Ledford suggested, the unsuccessful attempt of the revolution of 1848/49 caused a serious withdrawal from the view point to sustain self-review of administrative actions for many states in German land, including Prussia.[204] Moreover, "Both the Constitution of the North German Confederation of 1867 and the German Constitution of 1871 considered the method of administration control as being within the exclusive power of the states."[205] The predominant thinking at that time was for the government itself to exercise control over the administration. At the state level, there was no recognition of a mechanism for judicial review, though a number of German states somehow retained human rights standards under the national constitution.[206]

Historically, the idea of objective control over administrative activity in German administrative law took its lead from East Germany, specifically Prussian[207] administrative law. It developed primarily in the second half of the 19th century. Prussian administrative law contributed to building a Prussian state with an excellent administration even though it was not a constitutional state prior to 1848. From an absolute authoritarian state, Prussia evolved into a *Rechtsstaat* (a state which was governed by law) in the second half of the 18th century. Under this system subjects (or individuals) coexisted with the state administration under the law. A *Rechtsstaat* means that, not only subjects, but the state itself will be governed by law. One early 20th century publication confirms that a court jurisdiction system (*Verwaltungsgerichtsbarkeit*) was established soon after the constitution.[208]

In the 1870s in Germany, the Prussian ruling government faced a choice with regards to administrative jurisdiction. It needed an administrative law system that did not contradict the Doctrine of

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[202] Henning, "Thoughts on Administrative Law," Thoughts on Administrative Law. 95.

[203] Mahendra P. Singh, *German Administrative Law in Common Law Perspective* (Springer Science & Business Media, 2001), 25.

[204] Kenneth F. Ledford, "Formalizing the Rule of Law in Prussia: The Supreme Administrative Law Court, 1876–1914," *Central European History* 37, no. 02 (2004): 210.

[205] Rudolf E. Uhlman and Hans G. Rupp, "German System of Administrative Courts: A Contribution to the Discussion of the Proposed Federal Administrative Court," *Ill. L. Rev.* 31 (1936): 856.

[206] David M. Beatty, *Human Rights and Judicial Review: A Comparative Perspective* (Martinus Nijhoff Publishers, 1994), chap. Human Rights and Judicial Review in Germany. Dieter Grimm. 268.

[207] See the historical remarks at The German System of Administrative courts; Uhlman and Rupp, "German System of Administrative Courts."

[208] Herman Gerlach James, *Principles of Prussian Administration* (Macmillan Company, 1913), 174.

Separation of Powers (like *Justizstaat*), while at the same time was not an absolute internal administrative review system (like *Administrativjustiz*). In the end, the Prussians wanted a system that would avoid the problem of both judicial and administrative supremacy.

Development of Administrative Law (19th century Prussia)

In Prussia, a significant achievement had occurred for the protection of individual rights from undue state action by making the transition from an absolute monarchy (state) to the limited form of monarchy. To some degree Prussians had legal protection. There were "certain measures accorded to the individual by law, by which he can of his own right make effective his claims to protection. These measures comprise the formal protest (*Beschwerde*), the complaint[209] before administrative courts (*Verwaltungsklage*), and actions before the ordinary courts" writes Herman Gerlach James.[210] In this regard, legal remedies available at that time in Prussia allowed citizens to challenge an administrative decision in three ways: protest to the superior authority, assert a complaint, not described as claim or action, before administrative courts, and bring an action before the ordinary courts for damages caused by illegal acts of the administration.

Unless an individual person asserted that his or her legal rights had been violated by the administration, the only venue available was to use the form of protest to the higher authority. The aggrieved party was not allowed to assert a complaint before the administrative courts in this case. It is worth noting that even then the protest to the superior authority can only be submitted by the person who was allegedly harmed by the administrative act. For example, the legality of a police order was questioned by proceedings in the administrative courts but the propriety of a "police order"[211] may be examined by the higher authority.

However, a complaint before administrative court only limited with enumerated complaints and administrative litigation was established mainly as control type ligation over the objective legality of administrative acts in Germany with the introduction of the enumeration principle. "Administrative actions infringing citizens' rights of property and freedom needed parliamentary authorization…. As a result the legislative bodies had very broad discretion whether and to what extent to create concrete subjective

[209] "The jurisdiction of the administrative courts with regards to subject-matter is determined by no one law, but must be gathered from the countless enactments dealing with special fields of administrative activity. The law of Aug. 1, 1883, contains a large designation of jurisdiction and the law of July 30, 1883." regulates the jurisdiction of the administrative courts with regards to police orders. In addition to state laws, there are also imperial laws affecting the jurisdiction of these courts." Ibid., 177.

[210] Ibid., 192.

[211] "Police order" or "Police power" in 18th Century Prussia is very wide range of power not limited to the ordinary police measures. Police (meaning government) order.

right."[212] In due course, a strict interpretation of separation of power, followed by the establishment of the administrative court, during the period of 1890-1900 Prussia led to establish a control type administrative litigation in East Germany.

Gradual Paradigm Shift (Weimar Constitution during the 20th century): From Control Type to Remedy Type

Further developments of German administrative law led by Otto Mayer (1846-1924),[213] ripened the recognition of public subjective rights[214] of its citizens and a system to review cases of infringement of these rights and interests. By the time of the Weimar Constitution of August 11, 1919 a paradigm change began in administrative jurisdiction towards subjective right protection type from control type. Professor Dieter Grimm emphasized that not only the classic liberal rights, but also a significant amount of social rights for workers, families were included in the Weimar constitution.[215] At the Federal level of the German Government, the Weimar Constitution re-established administrative courts and fundamentally changed administrative justice through Article 107, which provides "that administrative courts have to be set up to protect the individual against actions and orders of the administration."[216]

Nevertheless, within this re-establishment of administrative court procedure, the types of cases which this court could decide were still limited by the enumeration[217] principle. Then again as it was in the old Empire, most of the rights embodied in the constitution were not legally valid concerning allegations of infringement. One key expression of the control type administrative law approach is the listing of reviewable

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[212] Jens-Peter Schneider, "German Traditions in Administrative Law: Obstacles to a Common Legal Framework?," in *Administrative Law in Europe : Between Common Principles and National Traditions*, ed. Matthias Ruffert, European administrative law series 7 (Europa Law Publishing, 2013), 53–54.

[213] Michael Stolleis, *Public Law in Germany, 1800-1914* (Berghahn Books, 2001), 394.

[214] "In the course of the nineteenth century, theorists originally identified the doctrine of the 'subjective right' with the claim under civil law. However, that intention was no longer compatible with the gradual development of the *Rechtsstaat*, and especially with the implementation of administrative jurisdiction in the 1870s. Subjective-public rights now became the counterpart to the civil law claim and were also given legal protection. The individual citizen could invoke something against the state, could demand or do something on the basis of a legal act or a compelling legal proposition enacted for the protection of the citizens. Of course, within the context of public law this was the exception: usually the citizen was regarded as the recipient of the state power's command and as someone who was subject to authority, that is to say, a 'subject'. The service-providing state was poorly developed, but before 1914 at least freedom of trade and property provided an opportunity to develop claims and protections vis-a-vis the state." Michael Stolleis, *A History of Public Law in Germany, 1914-1945* (Oxford University Press, 2004), 211.

[215] Beatty, *Human Rights and Judicial Review*, chap. Human Rights and Judicial Review in Germany. Dieter Grimm. Human Rights and Judicial Review: A Comparative Perspective. 269.

[216] Werner Feld, "German Administrative Courts," *Tul. L. Rev.* 36 (1961): 497.

[217] "Furthermore, proceedings were limited to certain types of cases listed in the statutes (the enumeration system)." Ernst K. Pakuscher, "Administrative Law in Germany-Citizen v. State," *The American Journal of Comparative Law* 16, no. 3 (1968): 313–14.

cases, referred to as the enumeration principle within an administrative jurisdiction. Even after specialized courts came into existence "it was not until after the Second World War (WWII) that they [administrative courts] acquired a jurisdiction cast and defined in general terms. Previously they had jurisdiction only where a particular statute bestowed it; if there was no specific statutory provision, there was no remedy"[218] writes Roger Warren Evans.

Radical Paradigm Shift (Bonn Constitution during the 20th century) From Control Type to Remedy Type

In case of West Germany[219] after WWII, the Basic Law[220] guaranteed that administrative litigation was to protect individuals' subjective rights and interests, which eventually changed into the general clause in administrative court jurisdiction. "The modern basis for judicial review of administrative action is the Statute on Administrative Courts 1960 which itself is based on the relatively modern constitution of 1949"[221] explains Martina Kunnecke in her book. She adds that the Nazi regime played a crucial role in developing the foundation for relatively solid protection of individual rights and wide availability of review of executive action in Germany.[222] Furthermore, the contemporary status of this issue is described clearly in a comparative study that asserts, "Review by the German administrative courts is premised on the protection of the citizen's individual interest (*Individualrechtsschutz*)."[223] Though Germany keeps the remedy type administrative litigation, its advancement continues even today. For instance, the latest change in administrative litigation concerns European law influence.

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[218] Roger Warren Evans, "French and German Administrative Law: With Some English Comparisons," *International and Comparative Law Quarterly* 14, no. 4 (1965): 1109.

[219] In case of East Germany, |almost excluded judicial control, only administrative appeals enabled| in Soviet era, not only purpose, but also function of administrative litigation and status of administrative court continued to exercise judicial control over objective legality of administrative activity. And only after the unification of Germany on October 3, 1990, the same system of administrative jurisdiction of West Germany was introduced in the former East Germany. In Professor Singh's words, "the pre-War position was restored on 10 October 1946 with the modification that the general jurisdiction on the Wurttemberg model was given to the administrative courts everywhere." Singh, *German Administrative Law in Common Law Perspective*, 24.

[220] The Basic Law Article 19 Paragraph IV states "(4) should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. …". Grundgesetz für die Bundesrepublik Deutschland [Basic Law for the Federal Republic of Germany], 2438 (Federal Law Gazette 1949).

[221] Martina Künnecke, *Tradition and Change in Administrative Law: An Anglo-German Comparison* (Berlin ; New York: Springer, 2007), 29.

[222] Ibid., 29–30.

[223] F. A. M. Stroink, *Judicial Lawmaking and Administrative Law* (Intersentia nv, 2005), 162.

2.3.3. Institution

Separation of Powers

The 1849 constitutional draft provided for administrative adjudication. The inclusion of this provision meant that the judicial function, which had been carried out by the administration, was discontinued and transferred solely to the courts. Although the court was considered a separate entity, it was not wholly independent, at least when it was initially established. There were several reasons for keeping the administrative judicial system apart from the regular judicial system.

However, concerns over the appearance of interference with the principle of equality and independence between the judicial and executive branches of government played a crucial role. According to Professor Goodnow "It was feared that the administration would be unable to perform its work. Therefore the old Roman principle was reintroduced into Germany, or at any rate into Prussia, which may be taken as a type, and it was provided that no individual might sue an officer of the administration before the consent of an administrative body called a competence court had been given."[224] Administrative acts are key to the operation and functioning of the executive branch of government, and if ordinary courts were given the power to review such acts, it could lead to a violation of the Doctrine of Separation of Powers by placing state administration under the courts. In addition, as Ledford emphasized, polarization of public and private law in European countries played a crucial role in disfavoring the judicial review of administrative acts in ordinary courts because of the strong belief that ordinary court's jurisdiction was limited to private law matters.[225]

Establishment of Administrative Court

The administrative court system was then established in Germany, in a rather different form than equivalent systems in other European countries. Beginning in 1872, county boards or circle committees, which were actively operating as administrative organs, were empowered and organized as first instance administrative courts. Their decisions could be appealed in district administrative courts (*Bezirksverwaitungsgerichte*), which were also closely connected with the active administration. By the Act of July 3, 1875, there was a complete separation of administrative courts from the active administration, at all levels, not just at the top

[224] Frank Johnson Goodnow, *Comparative Administrative Law: An Analysis of the Administrative Systems, National and Local, of the United States, England, France, and Germany* (The Lawbook Exchange, Ltd., 2005), vol. II, page 176.

[225] Ledford, "Formalizing the Rule of Law in Prussia," 208.

level. The July 3, 1875 Act was amended later by the Act of August 2, 1880. And a supreme administrative court, with broad jurisdiction over all of Prussia, was also established by this act[226].

According to Werner Feld "Major credit for promoting the establishment of an administrative court system must go to Rudolf von Gneist's (1816-1895), who in his epoch-making book on the *Rechtsstaat*, published in 1872, advocated for judicial review of executive measures as a matter of political principle."[227] Gneist proposed the establishment of an administrative court within the administrative hierarchy. With Gneist's position that judicial supervision over administration should be established, which presented a solution for arguments among proponents of absolute self-control or judicial control (judicial state),[228] the specialized judicial control over administrative activity became a reality in the East German state of Prussia. However, as Professor Stolleis explains:[229]

Gneist played down the protection of individual rights and emphasized the functions of judicial protection of the objective legal order as a way of keeping a lid on party-oriented administrative proceedings. At the same time he limited the control, feared by administration, in that he did not describe the field of jurisdiction for this control in a general way but rather tied it to a limited catalogue of issues (the principle of enumeration), permitted by the legislator in pragmatic single steps.[230]

In turn, the Prussian administrative court emerged as an instrument of control over administration rather than protector of individual rights, which was in contrast with other German states.[231] This special court had limited jurisdiction over administrative activity, consistent with a strict interpretation of separation of power.[232] During this time the administrative court represented one kind of control organ within the

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[226] The Act of August 2, 1880.

[227] Feld, "German Administrative Courts," 496.

[228] Stolleis, *Public Law in Germany, 1800-1914*, 378–79.

[229] Rudolf E. Uhlman and Hans G. Rupp, "German System of Administrative Courts: A Contribution to the Discussion of the Proposed Federal Administrative Court," *Ill. L. Rev.* 31 (1936–1937): 1028.

[230] Stolleis, *Public Law in Germany, 1800-1914*, 378–79..

[231] On the other hand, "the basic principle underlying the development of administrative courts in [other states of] Germany was to protect the individual against arbitrary and unlawful use of administrative power". For example in Wuertemberg the Constitution passed in 1819 and "the Privy Council, which was originally thought mere administrative tribunal, developed more and more into a judicial body." The German System of Administrative courts; A Contribution to the discussion of the proposed federal administrative court. Uhlman and Rupp, "German System of Administrative Courts," 853.
And Southern states "had a general jurisdiction to entertain all disputes involving the infringement of rights of individual by any administrative actions. Singh, *German Administrative Law in Common Law Perspective*, 24. As early as in 1808, "following French model, Bavaria authorized the Privy Council (*Geheimer Rat*) - an administrative authority - to hear and decide complaints in administrative matters. Other southern states also followed that model". German Administrative Law in Common Law Perspective. Ibid., 22.

[232] "After it had become apparent that ministerial responsibility, as established by the constitution, did not furnish an adequate check on the administration, but that a union of the power to act and to judge the validity of such

administrative system. This control was a method of administrative self-restraint as solution for needs of legality of lower administrative organs. Administrative self-restraint method, in principle, includes two types of instrument: 1) Administrative Complaint; and 2) Administrative Court (enumeration clause only). These two types existed together in East Germany.

Type of Litigation: Control

At this stage in East Germany (Prussia), no determination was made in terms of categorization of litigation. There was no need for dividing litigation as control type and remedy type (or objective and subjective), because mainly only control type litigation existed. Even though an individual who brought an action before a superior authority or administrative court asserted loss of his own rights,[233] the procedure and ultimate decision were often based on the legality of the administrative act in question. An action at court was not described as a claim. Instead, it was a complaint in which the process focused on the legality of the administrative act, not the complainant's rights. The process itself was not litigation that involved real parties, but in fact supervision over administration.

In general, there are two possible ways for the legislator to outline the scope of jurisdiction of the administrative courts (within the administrative branch of government). The first is to give the citizen the right to resort to an administrative court against any administrative act by which he is aggrieved, unless the act involves a political question (general clause). The second way is to enumerate explicitly certain cases in which the citizen alone may seek relief before administrative courts, all other cases being left to the sole jurisdiction of the different administrative agencies (enumerative clause).

Enumeration Clause

Among German states,[234] whether a general clause or enumerative clause (*Enumerationsprinzip*) was used varied. The enumeration clause was introduced in Prussian administrative court. Prussian administrative courts were given jurisdiction over the disputes between relief boards, complaints by citizens regarding the legality of municipal elections, and a private individual's complaints about his public status, citizenship,

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acts in the same hands was no less dangerous than a union of the legislative and executive functions, a special judicial machinery was established to bring about this separation." James, *Principles of Prussian Administration*, 174.

[233] However Herman Gerlach James wrote about "Controversies before the administrative courts fall into two general groups, those instituted for the protection of objective law and those for the protection of subjective rights." Ibid., 177.

[234] The general clause was used in Wuerttemberg, Hamburg, Saxony and Bremen. Some scholars claim that Bavaria and Hessen also followed this step. See footnote 28 at p501 Feld, "German Administrative Courts."

franchise rights, eligibility to hold office, and various other disputes. [235] In other words, these courts had enumerated jurisdiction over public law related cases [236] which were given from specific legislative assignment. The enumeration clause ensured limited judicial control over the administrative act.

Introduction of Limited General Clause (Police Order)

Police power[237] concerned state administration that aimed to preserve public order and safety in general. Because of the state's exercise of such broad power, the use of police acts allowed for the administration to intrude on individual rights and interests. The police could forbid any individual activity deemed to be contrary to the public order or safety. Thus, police ordinances (*Polizeiverordnungen*) were considered acts necessary to maintain public order and safety, which had a legal basis in the government's broader police (public general welfare) authority. However, while Prussia followed the enumeration approach in principle, it provided for an exception in cases where the law contained a general clause for acts of "police power"[238].

Regarding this point, a review by the administrative court was to check the legality of an administrative act, whether it concerned a police ordinance or those cases allowed by specific law. Rudolf E. Uhlman and Hans G. Rupp note, the "chief purpose of administrative courts is to review administrative acts and to declare them void if they are contrary to the law."[239] It means that the core issue before the court was to determine whether the administrative act was lawful or not, rather than the status of complainant's right or interest. This was true even if the complaint was based on a general clause for certain types of cases. Complaints made by citizens functioned as a kind of signal concerning the illegality of the state's administrative power and were used for correcting the deficiency of administration.

2.3.4. Theory

In order to understand concepts of German administrative litigation, its theoretical basis needs to be explored

[235] "These courts are given jurisdiction to decide disputes between different Prussian poor relief boards, to pass upon school burdens, or administrative acts refusing licenses for the operation of inns, or for the peddlers of merchandise, etc. Other provisions governing the jurisdiction of administrative courts are scattered through other statutes." The German System of Administrative courts; A Contribution to the discussion of the proposed federal administrative court. Uhlman and Rupp, "German System of Administrative Courts," 1029.

[236] "Examples included enforcement of school regulations, rules for maintenance of dikes and roads, business regulations, fire and construction codes, and rulings involving residency and citizenship." Ledford, "Formalizing the Rule of Law in Prussia," 213.

[237] It is very general power given to the police not contemporary police activity but general administration power to regulate on anything related to public order and safety.

[238] "The law of Aug. 1, 1883, contains a large designation of jurisdiction and the law of July 30, 1883, regulates the jurisdiction of the administrative courts as regards police orders." James, *Principles of Prussian Administration*, 177.

[239] Uhlman and Rupp, "German System of Administrative Courts," 1030.

in relevance to type of administrative litigation. The development of the East and South German states' administrative law[240] systems were different, e.g. the Prussian type (associated with East Germany) was a "control based" type while the South German type was a "right based" type. Prussia evolved into an administrative state[241] but it was only on the surface "State under Law" (*Rechtsstaat*). Kenneth F. Ledford points out that beginning in the mid-nineteenth century, questions concerning effective protection of individual rights, infringement based on administrative actions, were raised as troubling issues among German lawyers.[242]

From Political Scientific Method to Legal Method

The German theories of public law varied from one leading scholar to another. C. F. Von Gerber and Paul Laband were believed to be the founders of "the juristic approach to public law" or the "legal method" school, while Rudolf von Gneist and his counterparts Lorenz von Stein and Albert Mosse belonged to "the political approach to public law" or "political-scientific method" school. Professor Stolleis describes German legal scholarship during this period as, "Historic-organic and ideal-political-scientific methods existed at the same time as the slowly narrowing "legal method," at least until the 1890s."[243] The school of legal method dominated the public law sphere from the 1890s, which sought to establish an independent discipline of administrative law, apart from a political or practical approach to the administrative law.

Professor Gerber's (State Sovereign School of Public law-doctrine) was in favor of a Prussian type administrative law system. Gerber noted that, a full or perfect examination over the administration by the ordinary court is a handstand relationship. This is a catastrophic malfunction of state power. From this view point, Gerber theorized that administration without checks and balances by the judiciary guaranteed the freedom of administrative activities. The basis for this concept is in the Doctrine of Separation of Powers (however, Gerber's theory is without checks and balances). Gerber rejects the exercise of judicial control in

[240] Shinichi Takayanagi, "Gyōseikokka-sei kara shihō kokka-sei e" [From Administrative State System to Judicial State System], in *Kōhō No Riron: Tanaka Jiro Sensei Koki Kinen*, vol. 3–2 (Tokyo: Yuhikaku, 1977), 2093–2393. The work of Shinichi Takayanagi and the works that Shinichi Takayanagi cited were discussed during seminars with Professor Katsuya Ichihashi in December 2015, and additional English translations provided by Professor Rie Yasuda. Hereinafter ("Seminars with Professor Ichihashi").

[241] "Those who were convinced that an "exclusive cult of constitutionalism" was malicious were bound to praise Prussia, at state that "instead of establishing the stamp of constitutionality, transmitted the genius of administration." Stolleis, *Public Law in Germany, 1800-1914*, 182.

[242] Ledford, "Formalizing the Rule of Law in Prussia," 208.

[243] Stolleis, *Public Law in Germany, 1800-1914*, 376.

administration and posited that administration must be free from judiciary. Gerber[244] developed the concept of state as a legal person, but as Professor Stolleis observes, "in [his] construction of the state, there is no room for a position of the citizen as a being having individual rights, for example, in the form of pre-state fundamental rights that are ensured against attack by the state".[245]

Denial Theory on Subjective Right

Conrad Bornhak[246] (1861-1944) insisted that "denial theory on subjective right" always connected with theory of administrative jurisdiction as administrative control. Under this theory a private person has no subjective right concerning state action. Conceptually, such a subjective right cannot be considered. Therefore, the imperative of a subject's (person's) unconditional obedience to the state is not the origin of the subjective rights of a person (Emperor and Subject relation). Mutual rights can exist under a common legal order to which both parties can be ruled and must obey, but this kind of relationship between subject (person) and state did not exist in Germany at this time. Because the state was the origin of the legal order, it had the power to stand over the law. In other words, the state makes the law, so it has a superior status over the law. Therefore, any rights granted by law are not the subject's rights that can be remedied by bringing a legal action against the state.

Furthermore, Bornhak asserts that if the state obeys the legal order, subjects' subjective rights will not be violated because such a situation will make up by state will itself. Therefore, a subject (person) cannot effectively assert that the state is in violation of his or her subjective rights. Bornhak reasoned that, the possibility of subjective rights of individuals or subjects recognized by the state might permit that state to withdraw such a subjective right by legislation. Therefore, no court can give the remedy to the subject on subjective right which is given up to exist in the case of withdrawal of subjective right by the state. Because state can any time give or take back the right of subject (person). Finally, if one party has authority to decide to satisfy or not another party's claim, such a claim is not subjective right, and between both parties does not exist combined legal relation.

During the mid to late 1800s, East Germany adhered to the Denial Theory which asserts that there is no existence of subjective rights, thus such theory only permitted control type litigation in the

[244] C. F. Von Gerber (1823-1891) had accepted the formulation "the state as a legal person" and later in 1852 he decided to see the treasury solely as a legal person. Ibid., 317.
[245] Ibid., 319.
[246] "Seminars with Professor Ichihashi"

administrative law sphere (described in France as an objective type of litigation). Administrative law regulates the relation between the state and its members (subjects). Denial Theory posits that because these members do not have subjective rights, it is not essential for the administrative law to produce subjective rights. As a result, administrative litigation cannot embody the legal norms and the rights that are derived from it [that legal norm] at the same time. However, the purpose of administrative litigation is to apply the objective law concretely. As a consequence of this purpose, the application of administrative law has a supervisory effect over an administrative organ by other administrative organs.

Affirmative Theory of Subjective Right

On the other hand, "Affirmative theory of subjective right" is Gneist's theory,[247] in which he criticized Bornhak by arguing that if the state made a law and that law exists then the state should operate under the law not above the law. If the state enacts the law and the law still exists at that time, then the state shall obey and exist under the law. If this law restrains public authority at that time, the state must be restrained and contained therefore. Gneist argued, people who are subject to the authority have subjective rights with regards to state action. However, in principle this process does not go through the procedure of the administrative court but through the administrative complaint system. Administrative court procedure was also the type procedure that exercises objective control over the administrative activity, which is the same as the administrative complaint system.

Nonetheless, Gneist[248] followed a "theory of administrative jurisdiction as administrative control." He insisted that a private law relation is a relationship between a subjective right and another conflicting subjective right. Therefore, Gneist reasoned, the function of civil procedure is the adaption of private law to conflicts arising between private persons to resolve the conflict and determine an appropriate remedy for the infringement of the lawful private right. Conversely, administrative litigation does not resemble this process. Therefore, Gneist's theory gives rise to the question of whether administrative litigation can truly adhere to the model of civil procedure which functions as a remedy for the violation of subjective rights.

Gneist asserted that the proposition that the judiciary has only one kind of function is false. A decision or order of the administrative organ includes independent judgment, whether the order is pursuant

[247] "Seminars with Professor Ichihashi"

[248] "Gneist was active in trying to bring about the right of judicial control, the development of the position of the lawyer, as well as an independent administrative judiciary." Stolleis, *Public Law in Germany, 1800-1914*, 378.

to the law and a mission of the state, or not. In other words, an administrative decision can be construed as a kind of jurisdiction itself. This is because by regulating a particular issue in question, eventually the administrative act itself becomes a kind of judgment. Therefore, the legality and adequacy of an administrative decision is originally guaranteed by the tool of supervision of the higher administrative organ. However, under the regime of constitutionalism, and because of the cabinet system, the supreme administrative organ consists of political parties. Therefore, it is very difficult to defend the administrative supervision through such line of ordinary administrative organ. This was the key reason for the establishment of a separate administrative jurisdictional organ, especially at the highest level of review, which is separate and independent from the active administration.

From this viewpoint, the original purpose of administrative jurisdiction is to guarantee the proper adaptation of objective law and not the protection of subjective rights. In other words, administrative jurisdiction uses the infringed legal interest of a subject by unlawful and inadequate administration as a signal for needs of exercising supervisory authority. The basic structure of the administrative jurisdiction then guarantees and realizes an adequate adaptation of the objective law.

In short, in Prussia (East Germany) Gerber and Bornhak denied subjective rights in the context of administrative law. Gneist, however, acknowledged subjective rights but did not provide a framework, or form, of litigation designed for protecting subjective rights. Nonetheless, objective control over the legality of administrative act was exercised with the establishment of enumerated cases of external judicial control. In other words, Prussia developed administrative law as judicial control over objective legality of administrative act. The administrative court, which served as a supervisory organization, controlled administrative activity until the fall of the second Emperor of Germany.

2.3.5. Conclusion

Historical standpoint

The influence of French administrative law to German administrative law in the 19th century was substantial. Though French and German administrative law emerged parallel as a separate branch of law in the mid-19th century, French administrative law was studied by both Rudolph Gneist and Otto Mayer. German administrative law matured with its own distinctiveness; however, it is believed to be influenced by French administrative law essentially through Otto Mayer. Professor Stolleis confirms that among leading German scholars "There was a trend to continue, in the tradition of Gneist, E.V.Meier, Loening, and Otto Mayer, to

observe English, Italian, and French administrative law and compare these systems with the native one."[249] 19th century East German liberal scholars rejected the French model of administrative jurisdiction. Even though Werner Feld acknowledges, German "administrative courts, [were] patterned on the French precedent,"[250] Gneist offered a different model for Germany, particularly concerning the Prussian style administrative court system. He promoted an administrative court structure separate from actual administration at the top, with the lower level somewhat interconnected with administration. Later, according Pieter Henning, "Otto Mayer recognized the assistance he obtained from French administrative law"[251] in perfection of general section of German administrative law.

The core determination of administrative law was to regulate and legitimize administrative power and control administrative power by law. Compared with the French, the German, especially the Prussian, concept of administrative litigation developed mostly as a means for control over the objective legality of administrative acts. German administrative law did not categorize administrative litigation as the French did, instead it advanced administrative control utilizing a special institution within administrative hierarchy called the administrative court. Control type of administrative litigation was very strong initially and from Weimar Constitution, it gradually changed to remedy type over the century from the mid-19th century. Evolution of German administrative law theory also supported this change.

No categorization of administrative litigation as objective and subjective in the French meaning was recognized in Germany then. However, a paradigm shift with regards to type of litigation in the administrative law in Germany from the time of Prussia until after WWII shows a transformation. Beginning with a "control type" or Prussian type, administrative litigation slowly evolved into a "protection of subjective right type" by the second half the 20th Century. After WWII, a radical paradigm change in administrative litigation took place from control type to remedy based type. Therefore, paradigm change was fully achieved after WWII in West Germany.

For the purpose of this research, it is important to determine what degree German administrative law has influenced Mongolia. If compared to French influence, German administrative law had influenced Mongolian administrative law to a substantial degree, for instance, through the Soviet influence, 19th century

[249] Ibid., 396.
[250] Feld, "German Administrative Courts," 496.
[251] Henning, "Thoughts on Administrative Law," 95.

German control type administrative jurisdiction introduced into Mongolia in the 20th century. Historically, Mongolia established a control type administrative jurisdiction first with not only the court but with strong involvement by the Procuracy[252]. Soviet law and theory also supported this development. However, in the early 2000s radical institutional change occurred in Mongolia, based on contemporary German administrative law concepts. Nonetheless, the necessary legal theoretical development is not keeping up with this institutional change. At the theoretical level, only surface change has been achieved. This is evidenced by Mongolian law textbooks, which follow German legal theory and concepts but do not include guidance concerning practical application or analysis of cases. Within the administrative court, a step by step paradigm change in the direction of remedy type administrative litigation in Mongolia became feasible.

Institutional standpoint

The concept of administrative litigation in Germany was narrowly focused on administrative acts, only including individual administrative acts, thus excluding administrative normative acts and administrative contracts. Whereas under French administrative law, litigation was applicable to any administrative act through recourse excess of power, including normative administrative acts which required that strict conditions be met.

A strict separation of powers doctrine mandated narrow control for only a few number of cases (enumeration clause) by the administrative court. The administrative court was placed in a hierarchy of administration. The Prussian administrative court introduced the enumeration principle in an administrative jurisdiction, with the exception of a limited general clause, which allowed the court to implement a police order. Institution (the substantive and procedural law) confirms with prevailing theory at that time, therefore the administrative court procedure was not focused on individual rights but the legality of administrative acts.

Every important institutional elements introduced to Mongolia through the Soviet Union can be traced back to 19th century East Germany, such as the enumerative clause and complaint procedure. Most significantly, control type administrative procedure was introduced through Prussian institutional development, which is of the same character as procedure found initially in France, Germany, Russia and then Mongolia.

[252] Term used for naming the organization in socialist states which have authority to control over legality of administrative activity and same time for criminal proceedings.

In French theory, the general clause is utilized for objective litigation. Because of the French theory that allowed general clause in administrative litigation was not so useful for Soviet Union and Mongolia. On the other hand, German control type subjective litigation thrived in Soviet Union and the same as in Mongolia. Concept of administrative act is wider in French theory, but the German concept of administrative act is narrow. In contemporary administrative law institution in Mongolia which had general supervision of Procuracy as main supervision system, the concept of administrative act is narrow. Like contemporary German institution, Mongolian institution does not include normative administrative act or administrative contract.

Theoretical standpoint

Because of emancipation from constitutional law, Germany went through a long period of time before establishing an affirmative theory of subjective rights. Professor Stolleis observed that, relevant to the subject of administrative litigation, two main schools of public law scholarship competed to determine the institution in the sphere of administrative law. Gerber led "the juristic approach to public law" or "legal method" school, Gneist, on the other hand belonged to "the political approach to public law" or "political-scientific method" school. On the one hand the "scholar of public policy" who focused on the goals of the state and administration, and on the other hand the "scholar of administrative law" on the legal side of state activity. . . .[253] Particularly, in the area of administrative jurisdiction, the Denial Theory of Subjective Right and the Affirmative theory of Subjective Right came to play a decisive role. In Germany, a shift from "political-scientific method" to "legal method" which took place at the end of 1890s and this change also influenced Imperial Russia.

From a Mongolian administrative law view point, the Denial Theory of Subjective Right was introduced through the Soviet Union and developed along with control type of administrative jurisdiction. After the 1917 revolution in Russia, as it is mentioned in chapter I, the "legal method" approach of administrative law was criticized and eventually defeated. Ultimately, administrative law became a kind of science of management or public administration. Therefore, during the 1920-1930s in revolutionary Russia, administrative law moved in a backward direction of "political-scientific method" which supports Denial Theory of Subjective Right. Accordingly, there was no impact of the Affirmative Theory of Subjective Right

[253] Stolleis, *Public Law in Germany, 1800-1914*, 374.

in Mongolia. However, after the 1990s the Affirmative Theory of Subjective Right and protection of subjective right through administrative jurisdiction is gradually becoming more recognized.

2.4. Japan: From Administrative State to Judicial State

2.4.1. Introduction

Administrative law emerged in Japan from the 1890s. This is the time that Japanese administrative law and procedure took shape. The emergence of the administrative court and procedure during the Meiji period is important from the comparative view point of Mongolian administrative law. From the historical situation, concepts of contemporary Japanese administrative litigation can be explain and understood. Besides a strong and continuous German law influence, after the war Japanese law was influenced by US legal concepts; however, with regards to administrative litigation this latter case did not gain great acceptance.

During the mid-nineteenth century, Japan faced a choice of three ways to create a modern legal system.[254] The Japanese jurists and officials in charge of legal reform began to study the European codes in earnest. The Model jurisdictions, or foreign law, studied by Japanese scholars were derived from French, Anglo-American, and German legal scholarship in different fields of Japanese law. In the early years of the 1880s, the government began to concentrate on German law, and the trend within the academic sphere to study German law also became more widespread.[255] In an effort to modernize the Japanese legal system, Germany was chosen as the primary legal model to study, at least in the area of constitutional and administrative law. It was selected as a model because Germany was in a relatively similar situation[256] to Japan at that time. Germany[257] was similar to Japan because it had the Kaiser, who had absolute power and authority similar to the Japanese Emperor. Japanese society resembled Prussian society class structure. The two main social classes in Germany were the big land owners, and members of the army. From such social

[254] (i) to build up a new home-made system independently by them-selves - that would take too much time, (ii) to introduce English-style foreign law - a venture beyond hope because of the vast realm case law, (iii) to adopt European codified law - the only practicable method for an approach to the reform. Wilhelm Röhl, *History of Law in Japan since 1868* (BRILL, 2005), 24.

[255] Ibid., 26.

[256] The French administrative law theories were introduced into Japan through the medium of German scholarship so that 19th century French theories are still relevant. Sugai Shuichi and Sonobe Itsuo, *Administrative law in Japan* (Tōkyō: Gyōsei, 1999), 36.

[257] According to Lorenz Ködderitzsch, in administrative law, "the continental European, and in particular the German, approach is less concerned with procedural rules but rather emphasizes the need for detailed legislation on substantive issues with the law courts being entrusted with the task of checking whether the administration has properly applied the law". Lorenz Ködderitzsch, "Administrative Litigation and Administrative Procedure Law," in *History of Law in Japan since 1868*, ed. Wilhelm Röhl (BRILL, 2005), 644.

classes emerged a high level governmental bureaucracy. Japan also had such a situation, so it was difficult for Japan to introduce a more developed and liberal legal structure at that time. Signs of German law influence are evident throughout Japanese administrative litigation development. It is also clear that, even though there are differences between Japanese and Mongolian administrative litigation, there are also similarities which confirm that both forms of litigation have been heavily influenced by 19th century German legal concepts.

2.4.2. Institution on administrative court and procedure under Meiji constitution

The Meiji Constitution (1889) was modeled after the Constitution of the German Empire (1871).[258] Thus, as a consequence of the Meiji Constitution, administrative adjudication actually developed under the weight of unduly excessive bureaucratic administrative power. Because administrative adjudication was subject to the Emperor Regime, it was utilized as an instrument of administrative regulation and supervision.[259] Then, various types of petitions and complaints[260] began to be developed and decided by different procedures such as the Administrative Petitions and Complaints Law (law No. 105, 1890).

The 1889 Constitution had a limited list of 'rights and duties of subjects.' However, these rights and freedoms were guaranteed only within the framework of statutory laws.[261] Law no.6, the Law for the Constitution of the Courts, was promulgated on February 8, 1890 which includes the administrative court as one of the special courts. During this time, the Administrative Court Act (Law No. 48, 1890) was adopted according to Article 61[262] of the Meiji Constitution, which sought to create an administrative court system. Within the enactment of the Administrative Court Act and the Law on Cases of Administrative Adjudication on Illegal Dispositions by Administrative Agencies, the concept of an enumeration clause[263] was introduced, as opposed to a general clause which would allow all administrative acts to be challenged in the administrative court.

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[258] Carl F. Goodman, *The Rule of Law in Japan: A Comparative Analysis*, *Third Edition Revised*, Third Revised edition. (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2012), 22.

[259] Hideo Wada, "The Administrative Court under the Meiji Constitution," *Law Japan* 10 (1977): 3.

[260] And the nature of the administrative petitions and complaints system was not independent from the bureaucratic power of the government. This systematic character played an important role in determining the purpose of administrative petitions and complaints.

[261] Hiroshi Oda, *Japanese Law* (OUP Oxford, 2009), 16.

[262] Article 61 stated: 'Litigation alleging an infringement of the rights through an illegal disposition by the administrative authorities shall come under the judgement of the administrative court separately prescribed by law, does not come within the purview of the courts of justice."

[263] Term means that cases that are acceptable to the administrative court is listed in provision of law. Limited number of cases that only prescribed in the law can be challenged.

The separation of powers doctrine played a central role when deciding to adopt the enumerative approach. The doctrine was interpreted in two different ways: liberal and conservative. The accepted interpretation of the separation of powers doctrine at that time in Japan was strict separation between state powers then again without checks from the other branches of government. Japan used such a strict interpretation of the doctrine in order to minimize the power the court could exert over the administrative branch. As a result, the administrative branch was uncontrollable by the court. Consequently, this interpretation played a crucial role in the determination that only a very narrow sphere of control was permitted by the administrative court. In fact, because of such a strict interpretation only very limited intervention was allowed by the administrative court, regardless of the fact that it was not a genuine court but actually functioned as supervising higher administrative organ. At that time, such a conservative interpretation of the doctrine was used and accepted in Japan. Ultimately, the enumerative clause was adopted through the Law [264] on Cases of Administrative Adjudication on Illegal Dispositions by Administrative Agencies.

The awareness of administrative adjudication under the Meiji Constitution was narrow, as Professor Hideo Wada observes, "it is a misinterpretation of theory to think that administrative adjudication was instituted for subjects to carry on disputes with officials over the rights and duties and to provide private protection for the subjects."[265] Ordinary courts had no specialization in administrative law and for that very reason they lacked the legitimate competency and jurisdiction over administrative cases. Furthermore, "Not every detrimental or illegal administrative act was subject to action before the administrative court, only those provided for by statute".[266] In 1890, the Law on Cases for Administrative Adjudication of Illegal Disposition by Administrative Agencies came into effect, and this is the law that really shaped the operation of the Administrative Court in Japan. There were only five cases that were allowed to be challenged at Administrative Court against the administration, which included: assessment of taxes and fees, tax collection, refusal or revocation of a business license, water conservancy and public works and division of private and public land.

In addition to these limited enumerative cases, the Administrative Court was only able to declare

[264] Law on cases for Administrative Adjudication of Illegal Disposition by Administrative Authorities (Gyosecho no ihoshobun ni kansuru gyoseisaiban no ken) of 10 October 1890. Röhl, *History of Law in Japan since 1868*, 126.

[265] Wada, "The Administrative Court under the Meiji Constitution," 23–24.

[266] Meryll Dean, *Japanese Legal System* (Cavendish Publishing, 2002), 345–46.

illegal acts invalid or to nullify their effect but had no remedial power. Since its initial organization, the Administrative Court, functioned and developed under the administrative machinery[267] of the Japanese government and it was regarded as a special instance of administrative action.[268] Counselors of the Administrative Court[269] were without tenure and many of them held high ranking administrative offices besides being members of the Administrative Court. It was a single instance court and its objective was to justify the legitimacy and lawfulness of administrative activity.

A thoughtful observation[270] made by John O. Haley about the administrative adjudication model developed during Japan's Meiji period speaks to the issue of legal transplantation, "that it may not necessarily have been the introduction of German legal concepts as such which lead to a restrictive administrative litigation system in Japan but rather the (negative) cherry picking of elements of various legal models to be found in Germany and Austria regardless of their underlying philosophies." In other words, such a power structure (or abuse of power) occurred because the legal transplantation that took place between Germany and Japan was in technical form only, without the inclusion of the substantive philosophy of the transplanted German law. For example, Gneist's concept of *Rechtsstaat* (state-under-law) was introduced but not fully understood with its fundamental philosophical basis. *Rechtsstaat*'s triple elements consist of reservation by law, supremacy of law, law making power only by statutory law. However, during the Meiji period in Japan, both parliament and the Emperor had the same, equal, and sometimes the Emperor had higher authority based on the dictates of imperial ordinance. Attempts at introducing administrative adjudication, that focused on determining whether a breach of rights and duties had occurred and thus assuring the protection of an individual's rights (subjective type litigation), had failed[271] several times.[272] Accordingly, administrative adjudication during the Meiji period was developed based on absolute administrative rule by the

[267] "one reason for conferring all of the judicial power on the Supreme Court [under the contemporary constitution] was to avoid the re-creation of the Administrative Court that has existed under the Meiji Constitution." Goodman, *The Rule of Law in Japan*, 127.

[268] Wada, "The Administrative Court under the Meiji Constitution," 5.

[269] The actual administrative court system in Japan lasted for fifty-five years. Ibid., 44.

[270] John Owen Haley, "Toward a Reappraisal of Occupation Legal Reforms: Administrative Accountability," in *Eibeihô Ronshû (Essays on Anglo-American Law) (Hideo Tanaka Festschrift)*, 1996, 574.

[271] "What is important is the fact that several subsequent attempts at reform of the Administrative Court, to establish a desirable and better-functioning organization, were failed by conservative forces centered in the House of Peers." Wada, "The Administrative Court under the Meiji Constitution," 25.

[272] "From 1893 until 1936 various members of the House of Representatives made thirteen attempts in total to modify the administrative litigation system, which in particular aimed at expanding the enumeration clause or changing it for a general clause, and further by introducing a second level of judicial review of administrative matters." Ködderitzsch, "Administrative Litigation and Administrative Procedure Law," 637.

administration. And it progressed into an adjudication which restrains the administration itself with separate procedure. Though administrative adjudication was dealt within administrative hierarchy.

2.4.3. Theory on administrative court and procedure under Meiji Constitution

However, in the late Meiji period, Japanese administrative law theoretically began dividing administrative adjudication into two categories, objective and subjective. During the Meiji period a progressive minority[273] of scholars supported the idea that administrative adjudication should make determinations based on legal relation (rights and duties) rather than power relation. However, in fact, administrative adjudication, as part of the administrative power structure (objective type of litigation as in France) which focuses on control over objective legality, was the main type of administrative adjudication. It was much-admired in Japan both theoretically and practically. For instance, "Since an administrative agency represents the power of the state, its acts are naturally assumed to be legal on their face. Furthermore, an internal means of supervision exists in the administrative organization, whose function is to correct any illegal acts that the agency may undertake"[274] Professor Minobe explained. In terms of eternal politics, there were some developments in favor of strengthening democracy in the 1920s. In the Taisho democracy period, for instance, general elections were introduced. However, all of which was nullified by the Japanese militarist regime that was gaining power during this time. The imperial militarist regime which began in the early 1930s lasted until the end of WWII.

Conservative scholars' theory

Before WWII (beginning with the Meiji period), the theoretical understanding of administrative law in Japan was the same as Prussia. Both countries' administrative law developed by rival scholars with conservative and liberal views. Professor Takayanagi Shinichi describes[275] the differing positions of the Japanese scholars in terms of the "denial theory of subjective right" and the "theory of administrative jurisdiction as administrative control" by the state sovereign school scholars in Japan.

This rivalry is noticeable in the theory of Yatsuka Hozumi[276] (1860-1912, in a book that was published in 1943). He stated that private law regulates right and obligation (right v. right) relation, but

[273] For example at that time Professor Minobe's idea was a progressive in means of liberalizing the administrative litigation.
[274] Wada, "The Administrative Court under the Meiji Constitution," 6.
[275] This section of Japanese theory mostly based on the discussion in "Seminars with Professor Ichihashi".
[276] "Seminars with Professor Ichihashi". Yatsuka Hozumi had similar ideology as Gerber and Bornhak.

public law regulates power relation. In his view, horizontal and mutual relation is regulated by the legal norm of private law. In contrast, vertical and power mutual relation belongs to the public law. And a right is an interest, but it is not power. He continues explaining that relation between private rights is a relation between interests, and a non-power relation, therefore such a relation is a horizontal relation. On the other hand, power only belongs to the state, while a person has rights in regards to another person, but a person does not have power in regards to another person. Right and claim belong to a private person, and a right and claim are therefore regulated by private law. Power and order are vested in the state, and public law regulates this matter.

Hozumi further asserted that within society, there are two types of relation, one is "right - obligation relation" and another one is "power relation". This is referred to as the denial theory of subjective right in public law. Hozumi argued that the purpose of administrative litigation is only the justification of law and achievement of the administrative acts of state officials. Hence, administrative jurisdiction is not a jurisdiction. Such a theory has also been presented by German scholars, namely that administrative jurisdiction is a tool of administrative control. Therefore, the theory which presented the possibility that administrative law disputes were based on rights and obligations between the state official and subject (person), and the assertion that an administrative court's judgment can be combined with the sovereign power and protect the private right of a subject, is incorrect according to this stream of scholars.

Liberal scholars' theory

Professor Takayanagi Shinichi also commented on the "affirmative theory of subjective right" and "theory of administrative jurisdiction as administrative control" by the Liberal school scholars in Japan. One example of such scholarship is evident in the theory of Minobe Tatsukichi (1873-1948). Professor Minobe argues that the state stands over the law as lawmaker but if the state makes law and there is such a law, the state exists under that law and is combined with that law. Therefore, all public law norms are laws which restrain the exercise of sovereign power. Because of this restraint of the sovereign power of the state, the subject (person) has rights derived from the state. Public law resulted from the restraint of the state power by itself and the recognition that subject of the state had some degree of free will. Therefore, public law is not the law on power relation but the law on restraint of power. Minobe further asserted that public law changed its relation from "power obedience relation" to "mutual right relation." Thus, the relation between state and subject is not only a power relation but also right and obligation relation.

Professor Minobe's asserts, however, that administrative jurisdiction does not always exist for the protection of a subjective right of a subject (person). Therefore, the protection of the individual subjective right is not the sole purpose of the administrative jurisdiction. In private law, objective law and subjective rights exist in the same sphere, they are not distinguishable, and all norms of private law regulate all individual subjective rights. Hence, a decision on the adaptation of the private law that is a decision concerning a subjective right, and civil jurisdiction is always jurisdiction on subjective right. However, in public law, objective law and subjective rights do not coincide at all. The purpose of the public law is mainly the protection of public interest; therefore, the protection of individual subjective rights is limited to the case in accordance with public interest simultaneously.

Minobe believed, most parts of the public law are not norms based on subjective rights but purely norms based on public interest. Therefore, the decision to implement (to adapt) of the public law is not always a decision based on the protection of subjective rights. The purpose of the administrative jurisdiction is the decision on the adaptation of public law. If the norm of public law includes the confirmation of individual subjective rights, administrative litigation's purpose is the protection of individual subjective rights. However, in other administrative law cases, the purpose of administrative jurisdiction is not the protection of individual subjective rights. Therefore, the essential goal of administrative jurisdiction is to guarantee the adaptation of the objective law. Therefore, the legality and adequacy of an administrative decision is originally guaranteed with the "tool of supervision" by a higher administrative organ.

However, under the regime of constitutionalism, this is unavoidable because of the cabinet system. The supreme administrative organ is generally derived from the political parties. Therefore, it is very difficult to defend the administrative supervision through such line of ordinary administrative organ. Moreover, it is the reason for the establishment of the special administrative jurisdiction organ, particularly at last instance in hierarchy, separate and independent from the active administrative organs. From this viewpoint, the original purpose of administrative jurisdiction is the guarantee of the proper adaptation of objective law and not the protection of subjective rights. And administrative jurisdiction uses the infringement of legal interest of a subject by unlawful and inadequate administration as a signal for the exercising of supervising authority, hence the basic structure of the administrative jurisdiction is the guarantee of realizing adequate adaptation of the objective law. Thus, Minobe's "theory of administrative jurisdiction as administrative control" justified the use of the enumeration clause during the period of the Meiji Constitution.

Conclusion

The Japanese administrative adjudication system was focused on introducing a system that exercised control over the legality of administrative decisions by an independent body called the Administrative Court.[277] A significant realization during this period was an understanding of the importance of subjective rights in the adaptation of objective (public) law. Most notably, Professor Minobe's "affirmative theory of subjective right" articulates such realization; however, in Japanese law and practice the "theory of administrative jurisdiction as administrative control" eventually prevailed. In other words, only theoretically was Minobe successful in introducing his liberal theory, which included the concept of the existence of subjective right, in the public law sphere. Nevertheless, at the institutional level this liberal theory of subjective right was not achieved.

The primary focus of pre-war Japanese administrative litigation was not to protect the rights and interests of individuals but judicial control over objective legality of administrative activity. The Administrative Court had operated under an enumerative principle where only specific laws determined its jurisdiction by listing a few number of cases.[278] The Administrative Court was - as the drafters[279] of the Administrative Court Act had intended - extremely reluctant to grant relief against the administration.[280] Therefore, the purpose of administrative law and the administrative court was to control the objective legality of administrative activity. In other words, "the system was institutionalized and functioned to emphasize 'administrative superiority over adjudication."[281]

This confirms that the general characteristics of the Japanese administrative court and administrative litigation were similar with French and German models. Particularly, Germany and Japan both introduced an enumerative clause approach in their administrative court procedure, thus very limited scope of control. However, France allowed wider control over administration through the recourse for excess of power. Ultimately though, control type of administrative litigation and administrative court as supervision of objective legality in administration was common in all three countries historically.

From the pre-war Japanese history, what kind of lesson can be learned from the view point of

[277] Necessity of creating separate Administrative Court has been described in Sugai and Sonobe, *Administrative law in Japan*, 26–27.
[278] Ibid., 28.
[279] Drafters of the Administrative Adjudication Law were Ito Hirobumi, Inoue Kowashi, Hermann Roesler and Alberst Mosse.
[280] Ködderitzsch, "Administrative Litigation and Administrative Procedure Law," 636.
[281] Wada, "The Administrative Court under the Meiji Constitution," 7.

Mongolian administrative law? The similarities between Japan and Mongolia exist because both were influenced by Germany, namely 19 century Prussian, administrative law concepts. About a hundred years earlier, Japan was substantially influenced directly by Prussia. Significant change, at the institutional level, took place regarding the protection of subjective rights after WWII as well. On the other hand, Mongolia was influenced indirectly through the Soviet Union and integrated Prussian administrative law concepts with soviet ideology until the 1990s. An important lesson that can be learned, regarding the Mongolian view point, is that when legal transplantation occurs it often focuses on form, but background theory (is often) overlooked. For instance, formally establishing the administrative court and adopting separate administrative procedure law but without fully understanding the relevant legal background theory.

2.4.4. Administrative litigation under the contemporary Constitution

From control type to remedy type administrative litigation

The Administrative Court Law, and the Law on Cases for Administrative Adjudication of Illegal Dispositions by Administrative Agencies (which included an enumeration clause with only five types of cases) were terminated by the enactment of the 1947 Constitution of Japan. Additionally, the Administrative Court was abolished. Article 76 Paragraph 2 of the Constitution states that "No extraordinary tribunals shall be established; nor shall any organ or agency of the Executive be given final judicial power." Since the Administrative Court[282] was none other than an "administrative agency with final judicial power,"[283] the continued existence of this court would eventually be deemed unconstitutional.

The 1947 Constitution of Japan, provides in Article76[284] that all judicial power is exclusively vested in the courts to resolve "legal disputes." Legal dispute[285] means a dispute that arises from a right and duty relation. Therefore, remedy type (subjective) litigation is guaranteed under the 1947 Constitution of Japan. Under the 1947 Constitution, subjective litigation was established as the main litigation type. In

[282] In fact, even before the General Headquarters of the Supreme Commander of the Allied Powers drafted the Constitution, leading lawyers and scholars had abandoned the idea of maintaining the system of an administrative court under the Meiji Constitution. Narufumi Kadomatsu, "Judicial Governance through Resolution of Legal Disputes - A Japanese Perspective," *NTU L. Rev.* 4 (2009): 146.

[283] Sugai and Sonobe, *Administrative law in Japan*, 29.

[284] Article 76 of the Japanese Constitution states that "the whole judicial power is vested in a Supreme Court and in such inferior courts as are established by law. No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power. All judges shall be independent in the exercise of their conscience and shall be bound only by this Constitution and the laws."

[285] Legal disputes are defined as disputes "which relate to the existence of concrete rights and duties or relations between the parties and which can be finally settled by the application of law". 35 Minshu 1369, 1369 (Sup. Ct., Dec. 16, 1981) recited from Kadomatsu, "Judicial Governance through Resolution of Legal Disputes - A Japanese Perspective," 149 footnote 15.

contrast, and to a very limited degree, objective litigation was acknowledged in individual law. This was a paradigm change in Japanese administrative law, from control type litigation to remedy type litigation. Thus, postwar Japanese administrative litigation transformed into the protection of a subjective right type on both a constitutional and statutory law level. On the surface the paradigm change had occurred, but substantial contradictions existed in terms of legal theory into the 1950s.

Eventually, administrative cases began to be resolved through civil procedure, based on the Japanese Civil Procedure Code, in spite of the fact that the Code did not spell out any specific remedy in cases where administrative dispositions were found to be illegal. On April 18, 1947, the Law concerning the Temporary Measures of the Code of Civil Procedure Pursuant to the Enforcement of the Constitution of Japan was enacted. To date, this was the first set of statutory changes or developments from the Meiji Constitution to the 1947 Constitution in the area of administrative adjudication.

Article 8[286] of the Law concerning the Temporary Measures of the Code of Civil Procedure Pursuant to the Enforcement of the Constitution of Japan, concerned the time-limits for asserting an action for revocation of illegal dispositions of administrative agencies. Under this law, the period for the filling of an action is within six months after the issuance of an administrative disposition. There was no other provision that addressed legal actions: that is, "this reveals the presupposition that actions were, excepting only their 'time-limits', otherwise wholly subject to ordinary civil procedure."[287] However, the ordinary courts lacked the necessary experience to deal with administrative cases in the early postwar years.[288] The intention of having a specific law that governs administrative litigation was initiated by the Japanese government, however it failed from the beginning. Then, as a result of the Rikizo Hirano case,[289] where the order of removing the parliament member from the position suspended by civil court procedure, the Law for Special Regulations concerning the Procedure of Administrative Litigation[290] was enacted in 1948.

Law for Special Regulations concerning the Procedure of Administrative Litigation

The post-war period introduced the establishment of new elements within administrative law. The new

[286] Same as Article 14 of the Administrative Case Litigation Act (ACLA).
[287] Sugai and Sonobe, *Administrative law in Japan*, 22.
[288] Ködderitzsch, "Administrative Litigation and Administrative Procedure Law," 638–39.
[289] Hirano, Rikizo, a Diet member, was purged from his official post by GHQ order. However, the order was temporarily suspended by a ruling of the Tokyo District Court through a civil procedure. Kadomatsu, "Judicial Governance through Resolution of Legal Disputes - A Japanese Perspective," 147.
[290] The Law for Special Regulations concerning the Procedure of Administrative Litigations, Pub. L. No. 81, Extra 1 Official Gazette Extra (1) 9–10 (Govt. Print. Bureau 1948).

constitutional conception of "legal dispute" was introduced through the "Judicial Power clause," under Article 76 of the Constitution. Judicial power decides all legal disputes but a legal dispute must be resolved by subjective litigation which involves the breach of a concrete subjective right. As a consequence of the 1947 Japanese Constitution, the following three elements were established and required as the initial condition for litigation: (first) jurisdiction=judicial power (administrative litigation structure), (second) legal dispute, and (third) subjective litigation. These three elements must come together to define the concept of legal dispute. A combination of these three elements (or a tirade) shapes the main administrative litigation structure.

Enacted on July 1, 1948, the Law for Special Regulations concerning the Procedure of Administrative Litigation, (the Special Regulation Law) served as supplementary legislation for the Civil Procedure Code concerning administrative litigation, until 1962. Article 1 of the Special Regulation Law, "in addition to the present Law, the Code of Civil Procedure shall apply to an action for annulment or alteration of illegal disposition made by an administrative office as well as other actions concerning public legal relation." In other words, this provision makes clear that Civil Procedure was a general law applicable to administrative cases, and the Special Regulation Law was only used to regulate certain aspects of administrative litigation. Therefore, the Special Regulation Law was not a general regulation but a special and supplementary regulation for administrative cases.

Special regulations for administrative cases established by this law, required "technical issues as the appropriate agency as defendant, jurisdiction, the period for filling suit, concurrent claims (such as damage), intervention and joinder of other public authorities, taking of evidence by the court etc."[291] Yet another observer clarifies that "As its name indicates, this very concise law containing only 12 articles aimed at supplementing the Civil Procedure Code with special rules with respect to administrative cases."[292]

As of this law, Japanese administrative law returned to follow the Continental law path once again. Subsequently, this law was superseded by *the Administrative Case Litigation Act*[293]which was enacted in 1962 as a law of quasi-general applicability concerning judicial review of administrative cases. At this period before the enactment of the 1962 ACLA, the main purpose of administrative litigation was to protect

[291] Haley, "Toward a Reappraisal of Occupation Legal Reforms: Administrative Accountability," 553.
[292] Ködderitzsch, "Administrative Litigation and Administrative Procedure Law," 639.
[293] However, even this new general litigation law is observed as the reverse-course of the legislative trend which made "administrative law suits were to be handled just like in the old days when the former Administrative Litigation Court was functioning." Sugai and Sonobe, *Administrative law in Japan*, 30.

subjective rights, but a substantial sub-purpose was to control objective legality of administrative activity. The Special Regulation Law reflected the then newly enacted 1947 Japanese Constitution by focusing on subjective litigation, and allowing objective litigation only in cases where it was specially provided for by law. Though the Special Regulation Law of 1948 does not include a specific objective litigation provision, in theory objective litigation which existed before the war was retained.

The ACLA

Under the 1947 Japanese Constitution, the administrative law paradigm formally shifted from objective control over administrative disposition to protection of subjective rights. Historically, throughout the Meiji period, the court had very limited control over administration; however, the 1947 Japanese Constitution set a new standard. As it is said above, article 76 of the 1947 Constitution provides that ordinary courts and the Japanese Supreme Court have jurisdiction over administrative cases, in addition to criminal and civil cases. Such administrative cases are considered legal disputes under administrative law.

Essential to a full understanding of the concept of Japanese administrative litigation is the awareness of its fundamental relation with the conception of "subjective rights." The purpose of administrative jurisdiction became the protection of individual subjective rights. The main litigation is subjective and it is principle litigation which means broadly applicable by quasi general law such as the Administrative Case Litigation Act (hereinafter the ACLA).

The 1962 Administrative Case Litigation Act brought about the first law to serve as a quasi/sub-general administrative litigation law. Additionally, it sets out details concerning objective litigation in Articles 5, 6, and Chapter 4 of the ACLA. However, in principle it does not establish the right to bring an action for objective litigation by itself, but allows such action if there is an individual special law that permits it. Moreover, it authorizes subjective litigation as the primary form of litigation under the Article 3.

The purpose of subjective litigation is unquestionably the protection of individual rights, but in reality it "shuts-out" third parties from administrative litigation. This is because the initial conditions that must be met in order to satisfy administrative litigation are based on the existence of individual subjective rights. Such conditions are strictly adhered to and thus are often difficult to meet. The three conditions and threshold issues that must be addressed at the outset of administrative litigation concern (administrative disposition, standing, and objective interest of litigation). These are issues which are examined only at the beginning of the litigation process. However, after the threshold issues have been dispensed with,

administrative litigation then turns to the merit of the case.

Relation of the Law for Special Regulations concerning the Procedure of Administrative Litigation to the ACLA

Until 1962, in principle, the Code of Civil Procedure was used in Japan for administrative litigation. Moreover, the Code of Civil Procedure continues to play a significant role even in current Japanese administrative law. It should be noted that the present law on administrative litigation in Japan, Article 7 of the Administrative Case Litigation Act, contains the following broad language "any matters concerning administrative case litigation which are not provided for in this Act shall be governed by the provisions on civil actions," giving greater discretion to the court. However, Article 1 of the Special Regulation Law is more specific than Article 7 and subsequently reduces the discretionary power of the court, "in addition to the present Law, the Code of Civil Procedure shall apply." Thus, such provision requires judges to apply the code civil procedure.

In addition, it is evident from Article 1 that the Special Regulation Law allows two types of actions. First, the "action for annulment (or alteration) of illegal disposition" is equivalent to an action for revocation provided by Article 3 of the ACLA and second, the "actions concerning public legal relation" is equivalent to a Public Law-Related Action, under Article 4 of the (ACLA). The public law related action allows a party to make a request to the court for a declaration of the existence or non-existence of legal relation. The public law related action under Article 1 of the Special Regulation Law is derived from the Meiji era listing approach which was established in an 1890 law,[294] which included cases related to: Tax, Compulsory collection tax, Permission for business (these 3 cases related to the administrative disposition), but the fourth case concerned "water use" for example, disputes over the issue of who has the right to use water and the last type of case concerned real property, "dividing land between public and private" (land dispute). The fourth type of case was a public law relation case (Professor Minobe's book), therefore this is the origin of the Public Law Related Action, set out in the Special Regulation Law in Article 1. Presently, the Public Law Related Action available under Article 4 of the ACLA is based on Article 1 of the Special Regulation Law. However, an Article 4 action does not require strict standing, thus it is a comparatively easy action to assert.

[294] The Law on Cases for Administrative Adjudication of Illegal Disposition by Administrative Agencies.

Judicial State Theory

Prior the war, scholars had already divided types of administrative litigation. However, the Administrative Court Act and the Law on Cases of Administrative Adjudication on Illegal Administrative Dispositions by Administrative Agencies did not address objective and subjective litigation. Theoretically dividing litigation as objective or subjective was not a big problem, because both types were reflected in the objective model and therefore were the control type litigation in fact.

The control type litigation, which was transplanted from French and Prussian law, was predominantly considered mainstream before the war. A new postwar paradigm shift occurred that recognized and formally accepted the protection of subjective rights type or remedy type litigation as a mainstream approach to administrative litigation. The cause of such a constitutional paradigm shift was not entirely clear, but the position among Japanese scholars is that it helped to introduce subjective type of litigation. After the Second World War there was a clearer division between control and remedy type litigation.

How did this shift among scholars help Japanese law practice change from control type to remedy type litigation? Professor Takayanagi Shinichi described in his thesis,[295] during the post-war period under the rule of GHQ, the question of legitimacy of the administrative court had no influence on administrative law reform. However, the pre-war administrative court was a court in name only. It was, in fact, a supervising organ within Japanese government administration. Therefore, the consensus among scholars was that prior to this court's abolition, administrative court procedure was not judicial.

Professor Takayanagi Shinichi asserts that there are clear reasons Japanese administrative law realized such reform during this period. The following three beliefs were widely accepted before the war among the scholars. First, administrative litigation is essentially an "administrative" function. This proposition has been generally accepted. Second, ordinary courts cannot accept administrative cases. If they accept administrative cases, then it will be an infringement on administrative power based on the separation of powers doctrine. Third, the division between public and private law has been formally recognized. Therefore, for public law cases Japan has established the administrative court system.

Japanese scholars very easily accepted the post-war reform because they were ready to abandon all

[295] "Seminars with Professor Ichihashi".

of the old theory. Since the liberal scholars and intellectuals had no trust in the administrative court as a judicial organ to protect subjective rights of individuals against the government. As a consequence, among the scholars, the administrative court was no longer accepted as an important institution in regards of protection of right. This background belief of scholars was not clear but it is very strong and well reserved by post-war period. Notably, if to continue the existence of the Japanese administrative court, it was not the sign of or basis for legal reform. For that reason, the progressive administrative law scholars at that time in Japan wanted to discontinue the existence of the administrative court because the existence of the administrative court was a sign of old and outdated thinking.

Professor Takayanagi Shinichi elaborates on the basis for eliminating the pre-war administrative court: The list of cases that were acceptable to the administrative court were very narrow. Secondly, the court's decisions were not subject to subsequent review by a higher court. It was a court of single instance (first and last instance) and was comprised of only one administrative court located in Tokyo. At that time Japan was a much bigger country because of its colonial territory, with the one and only administrative court in Tokyo, it was very difficult for people to file an action against wrongful administrative disposition. Thirdly, the court was not sophisticated in principle. No re-trial system was allowed in court procedure, no oral defense, and only written documents were accepted and examined. It was not an adversarial system. There was no term limit for judges and high level administrative officials were working as judges. All of these facts were considered significant disadvantages of the administrative court which existed before the war.

Professor Takayanagi Shinichi observed that the legal system of the administrative state lost the only chance of self-reform during the Taisho democracy period. From 1912-1926, many lawyers demanded changes and revisions to the law governing the Japanese administrative court. By the 1930s, however, the country began militarizing and there was no chance to reform the administrative court system. After the war, even without GHQ's intention to remove the administrative court, leading lawyers already were not in support of the administrative court.

On its surface, the Special Regulation Law, does not include control type litigation but such theory was kept[296] alive among scholars by recognizing the division between remedy type and control type. In a 1948 textbook titled Administrative Law, Professor Tanaka Jiro explained the purpose of objective litigation

[296] Constitution changed but scholars tried to keep old thinking /generation gap among scholars/ new generation no relationship with previous ones.

as firstly, for the guarantee of adequate due adaptation of laws and regulations and secondly, for the protection of the public interest. Such an institution of administrative litigation permits a person to file an action which does not relate to his own subjective rights. This type of litigation does not demand the condition of subjective right infringement, and is only allowable in cases where there is a clear provision of law that permits such litigation. On the contrary, subjective litigation is available to the private person who has a concrete right or claim. There are two types of objective litigation such as inter-agency action and citizen action.

Another scholar Professor Ogawa Ichiro from Tokyo University (in a 1957 textbook on Administrative legal dispute law), discusses the issue of subjective disputes and objective disputes. The purpose of subjective disputes is the protection of individual subjective rights or interests. In contrast, the purpose of objective disputes is: (1) objective fairness/adequacy of adaptation of legislation and (2) protecting the general public interest. In a subjective dispute, only a person who has an individual right or interest can file this type of litigation. But objective litigation has no such requirement. This kind of division of disputes is based on the nature of the dispute and can be traced to the pre-war Meiji Constitution theory.

Japanese administrative law status of 1950s before adopting the ACLA

Japan was faced with two choices concerning the system its administrative litigation should take. The concept of Judicial State had two different interpretations: first, judicial state with reference to "administration," and second, judicial state with reference to "judiciary." Within Japanese administrative law during the 1950s and before the ACLA was adopted, the judicial state with reference to administration was preferred over the judicial state with reference to judiciary, with the action for revocation as a center piece. This constituted the main thinking among scholars at that time. Professors Tanaka Jiro and Kaneko Hajime explain that only an administrative disposition specifically directed to a private person from the emanating administrative agency can establish a right and obligation relation, in other words a legal relation. With the issuance of an administrative disposition, a private person can attack its legality. This type of action conforms to the first part of Article 1 of the 1948 temporary law as action for annulment or alteration and it is incorporated in Article 3, which allows for a judicial review type of action under the ACLA.

This concept is distinct because only an administrative disposition can establish the existence of a legal relation, which is necessary for a private person who feels that his or her rights and interests have been infringed by such disposition. An action to the court can only be filed if such condition arises. Even then,

the purpose is to exercise control over objective legality through the court. It limits the right to initiate a legal relation directly to the court by a private person when there is no disposition yet issued. Therefore, Professors Kaneko-Tanaka's theory leads Japanese administrative law towards German law once again with the idea of the judicial state maintaining supremacy of the administration. In form only, it is a judicial state, but in substance administrative supremacy existed. The concept of judicial state with reference to administration always interprets the separation of power doctrine as it was understood during the Meiji period.

When the ACLA was adopted, the main and standard type of thinking was Tanaka's theory. This theory is manifested in Article 3, para 2 of the ACLA, which sets out an action for revocation. An important point to remember is that administrative power has always been a central issue in administrative law. And administrative power as supremacy over the judicial power. "Limitation of judicial power" was a key principle of Tanaka's theory. Thus, the court could easily refuse to accept cases that were otherwise legitimate. Followings are expressions of this theory: "legal dispute," "government action" = state action, primary or initial judgment (first decision always must be rendered by administration), free discretion. For instance, the concept of "primary or initial judgment" (first decision must always be rendered by administration) is a significant barrier for judicial review.

The Judgment is usually issued by the court, but in the sphere of administrative law the "primary judgment" is rendered by the original administrative agency. In this sense, it acts like a court (in German traditional theory, the initial agency decision is like a court judgment). The original administrative agency issues the "primary judgment" in the form of its initial decision. The administrative agency decision then is similar to a first instance court judgment and the review conducted by the court is the second instance, much like an appellate court review. Thus, it uses the word "review" or judicial review. In the Japanese language "kokoku - sosho"= protest to the notice (notice = fist judgment). Also, an important point is usage of the word "judgment." In this context the Japanese word for review means protest to the initial judgment of administration to the court. This is the original meaning of Article 3 of the ACLA.

On the other hand, the judicial state, with reference to "judiciary," creates a direct relation to the judiciary because a private person is able to obtain a remedy through the filling of a public law related action. It recognizes and is consistent with the Anglo-American understanding of the role of law. A good example of this perspective is the fact that a private person can file an action for declaratory judgment which conforms to the existence of public law relation. This type of action is set out in the second part of Article 1 of the

1948 the Special Regulation Law [297] (as actions concerning public legal relations) and it is also incorporated in Article 4 (public law related action) in the ACLA. One Japanese scholar who subscribed to an American type administrative law approach[298] was Shiraishi Kenzo. Shiraishi was a judge who promoted the idea of a judicial state in which the judiciary occupies a position of supremacy, that is, where the state is formally judicial and outcome and substance of dispute settlement is also in nature of judicial procedure and not administration controlled. This approach recognizes the following way of administrative law conception, first "legal dispute" then prototype[299] action. This approach is generally associated with the civil action world. However, in Germany and Japan thinking was reversed: Firstly an administrative disposition must be rendered, then secondly an action for revocation of its legal effect is asserted, and thirdly the court can resolve this as a legal dispute.

In advanced capitalist countries (that follow an Anglo-American approach), the starting point in administrative law relation is civil society, then legal dispute and civil action similar to Article 4 of the ACLA. However, in Germany and Japan, backward countries at that time, the starting point was always the state, represented by an administrative agency. In "normal stand" relation, civil society, citizens, and private persons initiate an administrative relation. Whereas in a "hand stand" relation, Japan and Germany follow an administrative law perspective that always asserts that only an administrative agency can start an administrative relation. However, as this thesis will discuss in chapter IV, after 2004 amendment to the ACLA, active usage of Article 4 type of action begins.

2.4.5. Conclusion

Legal transplantation occurred from German to Japanese administrative law. The Japanese Constitution, during the Meiji period, was based on the Prussian Constitution. During the 1880s Japan searched for an appropriate convertible western model of constitutional and public law. Laband's theory was the most influential in Imperial Germany at that time. Accordingly, during the period of the Meiji Constitution, the administrative court had jurisdiction over only five types of cases. Such jurisdiction was established by 1890 in two statutes, especially by the Law on Cases for Administrative Adjudication of Illegal Disposition by Administrative Agencies. The key feature was administrative litigation /jurisdiction/ as administrative

[297] The Law for Special Regulations concerning the Procedure of Administrative Litigations, Pub. L. No. 81, Extra 1 Official Gazette Extra (1) 9–10 (Govt. Print. Bureau 1948).
[298] ("Seminars with Professor Ichihashi").
[299] Action that can be brought firstly by individual even when there is no existence of administrative act.

control. Administrative litigation developed as a tool for controlling objective legality of administrative activity. This limited or incomplete form of administrative litigation was not caused solely by the reception of German law in Japan, but resulted from transplanting law without its underlying philosophy, the philosophy of legal (or judicial) state theory.

The administrative court and administrative litigation is very limited in terms of jurisdiction and the purpose of administrative litigation was to review objective legality of only listed administrative dispositions. The concept of Administrative State within the context of Japanese administrative law was therefore established. However, after WWII, new institutions were adopted at the constitutional level and through statutory law. These included the 1946 Constitution, the 1948 Special Regulation Law and the 1962 ACLA. By these institutional changes, the administrative court no longer existed and only ordinary courts had jurisdiction over administrative cases, in principle, through civil procedure until 1962.

Consequently, Japanese administrative law made a transition from Administrative State to Judicial State in Japanese context. However, the concept of Judicial State included two major theoretical positions. First, the judicial state with supremacy of administration, was only a surface change from the administrative state concept. Second, the judicial state with supremacy of judiciary, was a position which focused on substantive change from the concept of administrative state. Ultimately, the position that made a surface change from administrative state, emerged as centralism of an action for revocation of administrative disposition, which became the main judicial review action. However, the main administrative litigation which represents the second major theoretical position mentioned above is a public law related action.

Japan initially developed control type administrative litigation and evolved into remedy type administrative litigation, especially after 2004 Amendment to the ACLA. Initial change was only from administrative state to judicial state with supremacy of administration. Japan historically developed control type administrative litigation under the Meiji Constitution, then it started its evolution into remedy type litigation under the Constitution of 1946. Yet, it was not full paradigm change. Remedy type as main type of litigation exists parallel with control type (connected with remedy type) even under the contemporary constitution. Comparatively, Article 3, judicial review type of actions prevailed and represented the main type of administrative litigation in the ACLA. The 2004 Amendment to the ACLA, improved with regards to public law related actions and standing requirements for judicial review actions. And by the time of the 2004 Amendment to the ACLA two types of judicial review actions were additionally introduced, namely

mandamus action and injunction action. Consequently, thus far an action for revocation of administrative disposition is not the main type among judicial review actions.

2.5. Conclusion

This chapter focused on a comparative historical analysis from the view point of 'control type' and 'remedy type' administrative litigation, focusing on the French, German and Japanese contexts. Historically, initial point of administrative law development for all three countries was the same because every country started with control type administrative litigation. It was control type litigation which sought to exercise supervision over administrative activities.

French administrative law scholars established the categorization of objective and subjective litigation forms. In France, both objective and subjective litigation existed. While France mainly utilized objective litigation, it did not exclude subjective litigation and the concept of subjective rights. The important characteristic French administrative law brought was the birth of objective litigation. French utilized administrative litigation mainly as objective litigation. French administrative litigation encouraged objective litigation through recourse for excess of power, thus a very wide range of control over objective legality of administration was acknowledged.

Germany (Prussia) established a similar model with narrow construction of control type over objective legality of administrative act. German administrative law did not categorize administrative litigation as the French did, instead it advanced administrative control utilizing a special institution within the administrative hierarchy called the administrative court. Administrative litigation was established mainly as control type over the objective legality of administrative acts in Germany with the introduction of enumeration.

Then Japan, initially transplanted control type administrative litigation directly from Germany during the Meiji era but with its own creation of administrative state. Administrative court with only five enumerated cases existed as a barrier to change in the direction of remedy type administrative litigation. The first attempt of change was only achieved in terms of changing from an administrative state to a judicial state with supremacy of administration in the sphere of administrative litigation after WWII under the contemporary constitution.

Eventually, a step at a time, depending on the countries historical and theoretical development, the original control type of administrative litigation progressed toward remedy type litigation for protection of

individual rights. However, each country has its own distinct characteristics and pace; however, all three countries have a similar tendency to change from control type administrative litigation to remedy type administrative litigation. Among them, Germany has achieved paradigm change from control type to remedy type after WWII. Additionally, Japan began its own paradigm change at the same time but only gradually changing toward a remedy type administrative litigation, especially since 1962, and more recently from 2004. Lastly, while France has kept its original control type paradigm in administrative litigation for a long period, it is presently moving toward control in *concreto* under European Convention of Human Rights.

This chapter also recognizes and confirms that the type of Mongolian administrative litigation within the context of comparative analysis of administrative litigation development is consistent with France, Germany and Japan. Though Mongolian administrative law was initially influenced by the Soviet law, Imperial Russia, before the Soviet Union was formed, received its institution from France and theory from Germany; therefore, French and German legal schools have influenced Mongolia, indirectly through the soviet law.

Chapter III: Overview of Mongolian Administrative Litigation since 2002

3.1. Introduction

In the last chapter, it was revealed that paradigm change is currently taking place in France, Germany, and Japan, in spite of the fact that control type administrative litigation was established initially in all three countries. The tendency in these countries is to change to remedy type administrative litigation, but the time and range of change differ between them. Consequently, this chapter follows up findings that were presented in chapter I, regarding control type administrative litigation in Mongolia. Fundamentally, this chapter asks if the tendency among France, Germany, and Japan can be seen in administrative law development in Mongolia since it made the transition from socialist state to a post socialist state with the enactment of the 1992 Constitution.

Particularly, this chapter seeks to discover what changes have occurred, in terms of Mongolian administrative litigation, since the starting point of its transition from a socialist state to a post socialist state which was described in Chapter I. The starting point for Mongolian administrative litigation included: the formation of control type administrative litigation, the minor role the court played with the settlement of administrative disputes (in which the ordinary court, not the administrative court, exercised this limited role), and complaint type under non-litigation (non-contentious) procedure. Further analysis will be needed in determining how and to what degree these problems were solved by the first attempt of reform in 1990s. Also, this chapter will study the court's role in the sphere of administrative litigation whether court still have a same limited jurisdiction.

The aim of this chapter is to provide an overview of administrative litigation since the 1990s. In terms of achieving this goal, it will begin by examining how the Constitutional proclamation for the establishment of the administrative court actually took place, the reason for forming the administrative court as a specialized court besides the existence of the ordinary court. Next, this chapter scrutinizes the enactment of administrative litigation law in Mongolia and its core characteristics to determine the purpose of litigation. By then, it will elaborate on the limited jurisdiction caused by the introduction of the enumeration principle, recognition of administrative agencies as defendants, and the requirement of preliminary proceedings for administrative complaints. Then it investigates whether administrative court procedure is freed from the rules of civil procedure by observing the relationship between civil and administrative procedure with

examples of overlapping jurisdiction and extensive reliance on civil procedure.

3.2. Administrative Court Structure in Mongolia

3.2.1. Background issue of the establishment of administrative court

Selection of a legal system which suits Mongolia and its impact on establishment of administrative court

On December 26, 2002, the State Great *Khural* passed the Law on Procedure for Administrative Cases[300] along with the Law on the Establishment of the Administrative Court in accordance with Article 48 paragraph 1 of the Constitution.[301] After the collapse of the socialist system in Mongolia in the early 1990s, Article 48 paragraph 1 of the new Constitution recognized an establishment of specialized courts such as criminal, civil, and administrative courts. One of the core objectives of the new Constitution is to limit abuse of power by the state. During the drafting process a special human right working group was established, among four others, which was led by the Chairman of the Legal Standing Committee of State *Baga Khural*[302]. Eventually, the Constitution included several important provisions,[303] which later served as the constitutional basis for the establishment of the administrative court, and ensured subjective right for judicial review of legality of administrative decision.

However, the actual establishment of the administrative court took over a decade from the time such constitutional recognition occurred. In January 1998, the Parliament adopted the Legal Reform Plan[304]. This was a program that aimed to build a legal system that correlated with the new Constitution. Section 5 of the Legal Reform Program, concerning the issue of strengthening the legal basis of state organization,[305] sought to institute a legal environment for the establishment of a specialized court. The Implementation Plan of the

[300] Захиргааны Хэрэг Хянан Шийдвэрлэх Тухай [The Law on Procedure for Administrative Case] (2002).

[301] Article 48 Paragraph 1 of the Constitution states "The judicial system shall consist of the Supreme Court, Aimag and capital city courts, sum, inter-sum and district courts. Specialized courts such as criminal, civil and administrative courts may be formed. The activities and decisions of the specialized courts shall not but be under the supervision of the Supreme Court." Generally, criminal and civil court are usually considered ordinary or general court but in fact Mongolian Constitution mentioned criminal and civil court as specialized court. However, until 2013 ordinary court existed then civil and criminal courts were established separately.

[302] State *Baga Khural* is the lower chamber of the parliament.

[303] Article 19 paragraph 1 of the Constitution provides that "The State shall be responsible to the citizens for the creation of economic, social, legal and other guarantees for ensuring human rights and freedoms, to fight against violation of human rights and freedoms and to restore of infringed rights" and Article 16 Paragraph 14 ensures that "Right to appeal to the court to protect his/her right if he/she considers that the right or freedom as spelt out by the Mongolian law or an international treaty have been violated".

[304] Монгол Улсын Эрх зүйн шинэтгэлийн хөтөлбөр [The Legal Reform Program].

[305] Ibid., pt. 27.

Legal Reform Program had set the actual dates[306] for the creation of the administrative court during the second quarter of 1998. The parliamentary agenda[307] which projected list of laws to be adopted by 2000, enlisted the Law on Administrative Court.

Even though Mongolia had chosen to establish market economy and democratic state by the time the 1992 Constitution came into force, the question the nation then faced was how to build a national legal system that was consistent with such changes. Professor Sovd[308] wrote in 1996, using the global democratic experience from the world does not mean that we adopt the laws copied from many different countries. The source for the Mongolian legal system at first consists of the civil law system.[309] An International Symposium on Legal Reform and the National Legal System took place on April 25-27, 2000 in Ulaanbaatar, where national and international scholars discussed which legal system should be considered a model for further developments of the Mongolian legal system. The purpose of the symposium was to analyze various traditional and reformative approaches applicable to the Mongolian legal system, which was established on demand to create a legal system with the aim of promoting a humane, civil democratic society in Mongolia and to determine its future tendency.

To this end, the symposium focused on how much and what kind of influence foreign law and legal systems should have on Mongolia legal reform. Professor Chimid observed[310] in 2000, international relations suddenly improved greatly and politicians, officials, and scholars visited many foreign countries. They came back with different ideas, which found their way into laws. Where these different ideas are not interconnected they became harmful in the Mongolian legal system. In addition, Professor Chimid claimed that many international and foreign advisors from different legal backgrounds and systems advised the Mongolians who took advice from them, but ultimately the advice was conflicting each other[311]. The symposium agreed upon the general analysis that concluded that the legal system of Mongolia belongs to

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[306] Монгол Улсын Эрх Зүйн Шинэтгэлийн Хөтөлбөрийг Хэрэгжүүлэх Арга Хэмжээний Төлөвлөгөө [The Implementation Plan of the Legal Reform Program], pt. 9.

[307] Монгол Улсын Хууль Тогтоомжийг 2000 Он Хүртэл Боловсронгуй Болгох Үндсэн Чиглэл [The parliamentary agenda on impoving legislation until 2000], pt. Three, 13.

[308] Professor Sovd Galsan was the leading constitutional law scholar and he served as first president of Constitutional Court of Mongolia.

[309] Rainer Gepperth et al., *Human Rights and National Security: Documentation of an International Symposium Held Under the Auspices of the National Security Council and the Ministry of Justice of Mongolia and of the Hanns Seidel Foundation of the Federal Republic of Germany at Ulaanbaatar 30 September-4 October 1996* (Hanns Seidel Foundation, 1998), 36.

[310] "Closing Document of International Symposium on 'Legal Reform and National Legal System,'" 10–11.

[311] Ibid., 11.

the continental legal tradition and further tends to concentrate on the Roman-German legal system. Though there were concerns[312] expressed to not just 'copy and paste' from foreign laws and there was a consensus that choosing one legal system to follow does not mean wholesale exporting from that system without correctly[313] and carefully adapting it into one's own legal system.

Ultimately, the closing document of the symposium identified important considerations in Mongolian legal reform. Such reforms required a recognition of the necessity to build a legal framework that utilized the Mongolian perspective as the foundation of the existing and newly emerging legal system. The closing document of the symposium declared that:

> …the main criteria of the national legal system shall be the Rule of Law principle pointed out in article 1 of the Constitution of Mongolia. The history of development of the recent legal system, theory, concepts, legal consciousness, culture and practice shall be taken into consideration. Therefore, all those factors create conditions for orientation toward a civil law system, which will be consistent with a special culture and civilization of the Mongolian nation and many centuries of progressive tradition of state in Mongolia.[314]

These general principles on developing a new legal system for Mongolia also applied to the establishment of a separate administrative court structure beside the already existing ordinary court system. It is important to note that the closing document of the same symposium urged Mongolia to "create a prompt administrative court in order to form a special court structure on supervision of administrative organization's activity.[315]

The question of why Mongolia established a separate administrative court in addition to the existence of the ordinary court, which has jurisdiction over administrative cases, remains. When drafting the Mongolian Constitution, there were two options[316] available in order to transform administrative litigation in Mongolia. The first option involved creating a new administrative court system[317] and the second included updating or amending the ordinary court system by broadening the scope of jurisdiction over administrative litigation. The tendency among developing countries is to abandon the old system easily and adopt new administrative court structure, new institution. The ordinary court was not meant to exercise judicial review of administrative decisions. The purpose of the ordinary court was to settle civil disputes

[312] Merely copying a law from other countries is like pouring water onto class – it is not absorbed. Chimid Biraa.
[313] "Documents of International Symposium on 'Legal Reform and National Legal System,'" (presented at Legal Reform and National legal system, Ulaanbaatar, 2000), 38–39.
[314] Ibid., 196.
[315] Ibid., 198.
[316] Chimid Biraa, "Шүүх эрх мэдлийн талаархи Үндсэн хуулийн үзэл баримтлалын тухайд" [Concept of Constitution on Judicial Power], (presented at Шүүх эрх мэдэл-Шинэ зуун, Ulaanbaatar, 2001), 44–50.
[317] Mongolian example as establishing separate administrative court but Japanese example as giving ordinary court to have jurisdiction over administrative case.

among mostly private persons and entities. Even though ordinary courts were given special jurisdiction over enumerated administrative cases through civil procedure, the nature of review was not remedy based, instead it was exercising supervision over certain administrative activities.

All of the above mentioned reasons played a role for the establishment of a separate administrative court over ordinary court. Nevertheless, problem occurs when creating a new administrative court system, it establishes new institutions without making substantial change but mostly formal or structural change. This dilemma, the lack of theory and practice for introducing a new system, has been prevalent in case of the establishment of the administrative court in Mongolia. Establishment of the administrative court was new system but this new court also has basically the same limited jurisdiction as it was when ordinary court had jurisdiction over only enumerated administrative complaint. In other words, creation of specialized administrative court and adoption of new administrative litigation law has not delivered real change because the expected result and initial aim of change was not fully satisfied.

Legal assistance from Germany in creation of administrative court

Among the countries that follow the Roman-German legal system, the one closest in relation to Mongolia was Germany.[318] Through German based foundations, namely the Hanns Seidel Foundation,[319] most of the legal assistance and support for establishing[320] the administrative court came from Germany, including drafting relevant laws and training[321] judges.[322] Firstly, in 1996 the National Security Council and the Ministry of Justice, together with support from the Hanns Seidel Foundation, organized an international symposium on "Human Rights and National Security" in Ulaanbaatar, Mongolia. The symposium

[318] Germany was at first from European countries to support in economic assistance at the very beginning of 1990s transition period and the cooperation between two countries does not limited in economic sector development. Instititue of International Studies of the Academy of Science, *Герман: Судалгаа, мэдээлэл* [Germany: Study, Information], 1(3), 2004, 54.

[319] The Hanns Seidel Foundation focuses on constitutional, criminal and administrative law reform in Mongolia. Since 1995 the Hanns Seidel Foundation has been working with the Mongolian Government, represented by the Ministry of Justice and Home Affairs and other partners (the Constitutional Court, the Supreme Court, the National University) in the legal field.

Two other German based political foundations were also established branches in Ulaanbaatar, Mongolia and supported different fields of social, economic and political reforms. These are the *Konrad-Adenauer-Stiftung* and the *Friedrich-Ebert-Stiftung*. In addition to these three foundations including the *Hanns Seidel Stiftung,* the German Technical Assistance (GIZ) involved legal reforms mostly in area of private law sector.

[320] World Bank's assistance focused mostly in the area of technical assistance although there were some involvement in regards to training and preparing handbook for administrative courts.

[321] Prospective teachers for future judges and lawyers were prepared in Germany and Mongolia by German administrative law experts and judges as well as Mongolian professionals.

[322] Hanns-Seidel Stiftung, ed., *Монгол Улсын захиргааны хэрэг хянан шийдвэрлэх ажиллагаа* [Administrative Court Procedure in Mongolia], 2004.

recognized the need for foreign assistance and support in ensuring the promotion of human rights and freedom in Mongolia and the establishment of a human rights review and monitoring system.[323]

Before the 1996 symposium, the Mongolian Government, as early as 1993, requested support from the Hanns Seidel Foundation concerning reforms in the legal and administrative fields. Professor Sarantuya[324] mentioned that in accordance with the *rechtsstaat* principle, which is embodied in the new Constitution of Mongolia[325], the Legal Reform Program, Ministry of Justice and the Supreme Court of Mongolia drafted and submitted the Law on Administrative Court Procedure to the Parliament with support from the Hanns Seidel Foundation in every stage of its drafting process. Professor Sarantuya also predicted that the establishment of the administrative court would serve as compass, especially for the Mongolian government which was under a totalitarian regime for over 70 years, in making a successful transition to democracy [326] by emancipating the government administration from bureaucracy and protecting fundamental rights.[327]

Additionally, a concept paper[328] concerning the Law on Procedure for Administrative Case, issued by the government when it submitted the draft to the parliament, clearly reveals the involvement of German legal assistance. The Government of Mongolia, particularly the parliamentary drafting group tasked with developing this law, has worked closely with German counterparts[329] on various details concerning the Law on Procedure for Administrative Case.

Three factors played a decisive role in the establishment of the separate administrative court system and not assigning administrative case jurisdiction to ordinary courts. First, the 1992 Constitution allowed,

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[323] Gepperth et al., *Human Rights and National Security*, 15.

[324] Constitutional law professor at Law School, National University of Mongolia, she is the one of first law professor who learned German and worked as Hanns Seidel Foundation's country representative in Mongolia since its opening in Ulaanbaatar. "Documents of International Symposium on 'Legal Reform and National Legal System,'" 67.

[325] Монгол Улсын Үндсэн Хууль (1992).

[326] At that time when political system recently changed, politically it is important to say what Professor Sarantuya mentioned about administrative court's role in democracy. However, actual relation between democracy and administrative court in terms of legal analysis cannot be made as persuasive point.

[327] "Documents of International Symposium on 'Legal Reform and National Legal System,'" 67.

[328] This document also mentioned about in drafting process government working group comparatively studied French law beside German law but did not mentioned what law. "Захиргааны хэрэг хянан шийдвэрлэх тухай хуулийн Хувийн хэрэг, УИХ-ын тамгын газрын архив" [The Archive Case File of the Law on Procedure for Administrative Case], 2002, The Parliament Archive.

[329] Professor Chimid mentioned they worked closely with the German specialists however he expressly noted that it should not be interpreted that this law was just a mere copy of German version. Chimid Biraa, *Terguun Devter*, ed. Unentugs Shagdar, vol. 1 of *Үндсэн хуулийн үзэл баримтлал* [Concept of the Constitution] (Ulaanbaatar, 2002).

and in fact encouraged, the establishment of specialized courts and specifically named the administrative court along with the civil and criminal courts. Second, Germany, which was the main model which Mongolia looked to as a role model in the development of its legal system, has a separate (general) administrative court system beside ordinary courts. Thirdly, during this time the Mongolian government strongly intended to build a political atmosphere to ensure and protect human rights against governmental administrative power abuse that had developed. Thus, a political will emerged in support of establishing a specialized court to control administrative decisions and activity, which therefore minimizing the infringement of rights arising from illegal administrative decisions.

3.2.2. Structure of administrative court

Until 2004, specialized courts that exercised administrative jurisdiction were not present in Mongolia. The Law on Establishment of Administrative Court[330] was enacted in 2002 and took effect in 2004, sets up nationwide first instance administrative courts. First instance administrative courts, which have both personal and subject matter jurisdiction over administrative cases, were formed in each province and in the capital city of Mongolia (Ulaanbaatar). Except for the court in Ulaanbaatar, these first instance administrative courts were not truly individual/separate courts. Caseloads were low in the provinces. However, there were a relatively larger number of claims in Ulaanbaatar, where half of the Mongolian population lives, and most of the central administrative agencies reside. In the provinces there were no separate court administrators for the administrative courts, and a chief judge of the provincial court (which is the appellate court of general jurisdiction in every province) acted as a chief judge of the administrative court. In fact, administrative courts in provinces existed as it were attached to the ordinary appellate courts with only its own specialized judges and special administrative court procedure.

Only the administrative court in Ulaanbaatar was a truly separate court, with its own chief judge and court staff, and it was the busiest court from the very beginning. This structure was unique to ordinary court structure that existed at that time which correlated with the geographical and administrative structure of the country. The ordinary court structure included: the first instance court or inter-sum court which sat within several counties (sum) was at the first administrative unit level; then the next level was the appellate court at the provincial level; and finally the court of final instance, the Supreme Court of Mongolia sat at the

[330] Захиргааны Хэргийн Шүүх Байгуулах Тухай Хууль [The Law on Establishment of Administrative Court] (2002).

top.

The initial court structure was a step forward to reach the aim of establishing a separate administrative court system for the protection of rights in cases involving illegal administrative decisions. A subsequent amendment to the Law on Court in 2002 mandated that the Supreme Court have a chamber that specialized in administrative cases. This chamber acted as both an intermediate appellate court and a final instance court until April 2011. Article 15 para 2 of the Law on Court and Article 15 para 2.1 of the Law on Procedure for Administrative Cases appropriated intermediate appellate jurisdiction to the Administrative Chamber of the Supreme Court. However, this chamber was only able to hear intermediate appeals from the first instance court with its own judges. In the case of the court of final instance, this chamber needed to borrow judges from other two chambers of the Supreme Court (criminal and civil). This is because the Administrative Chamber consisted of 6 judges in total and a hearing at the level of intermediate appeal requires a 3 judge panel and hearing of last resort requires a 5 judge panel. In other words, 8 judges are necessarry to adequately review both internediate and final instance cases, but there were only 6 judges available. And no judge is allowed to review the same case twice at different levels of the judicial hierarchy. Though incomplete, weak and unsophisticated, the original structure of administrative courts fulfilled the purpose of establishing an institution which exercises judicial control over administrative activity.

The above mentioned shortage of specialized judges available at the court of final instance served as the basis for the establishment of a separate intermediate administrative appellate court. Several years after the administrative court system came into being, the Mongolian government instituted the Administrative Court of Appeals on April 1, 2011, which is a single intermediate court that has appellate jurisdiction from all first instance administrative courts. The commencement of the Administrative Court of Appeals gave rise to the three tier administrative court system. One of the most important jobs of the appellate court is to render a final decision concerning the threshold issue of the court's jurisdiction over the subject matter at the initial stage of court proceedings. The Appellate court decides whether the action submitted by plaintiff satisfies the requirements of administrative act and the standing question. According to Article 90 Paragraph 1 of the Law on Procedure for Administrative Cases, when the first instance court dismisses an action based on the lack of standing or jurisdiction (for example the act in the action does not qualify as an administrative act), its decision is only appealable to the intermediate appellate court and no further appeal to the Supreme Court is allowed.

In other words, the Administrative Court of Appeals is an important player in setting the boundary for judicial review of administrative cases. When the first instance administrative court decides not to accept an action based on a lack of conditions required for litigation, the only appeal allowed is to the intermediate appellate court, where it is decides whether certain acts of a governmental administration can be accepted as an 'administrative act' for judicial review. This decision then establishes some degree of precedent for other similar cases in conjunction with further legal practice in lower courts. Therefore, the intermediate court is an important player in determining the initial requirements of litigation. Since the intermediate appellate court, namely the Administrative Court of Appeals, is a single court that reviews all appeals from every first instance administrative court, it became a resource for unified practice application of procedural laws concerning the jurisdiction, requirement of administrative act and standing question.

However, appellate review before the Mongolian Supreme Court concerning issues such as standing, is not automatically granted. The Supreme Court is only able to address initial requirements for litigation issues if the case gets to the Supreme Court based on the appeals on merits. Only in cases where two lower courts have agreed that plaintiff has standing and have rendered judgments on the merits, the Supreme Court can address on the issue of standing. A dispute over standing goes to the Supreme Court when the first instance administrative court agrees the plaintiff had standing and rules on the merits, but on appeal the intermediate appellate court decides that the plaintiff lacks standing and dismisses the action according to Article 88 Para 1.3 of the Law on Procedure for Administrative Case (LPAC). Therefore, the Supreme Court has jurisdiction over this judgment, as it does concerning every other judgment set forth in Article 87 and 88 of the LPAC rendered by the intermediate court.

In addition to the power of appellate review, the Mongolian Supreme Court also has the power to hear non-appellate cases. According to Article 32.1 of the LPAC,[331] actions related to Article 4.1.1 to 4.1.3 which named government cabinet, prime minister, minister, and ministry as a defendant were to be submitted to the Administrative Chamber of the Supreme Court, but the Administrative Chamber never exercised this original instance jurisdiction. Instead, if these actions were filed with the Supreme Court, they would then be referred to the first instance administrative court in capital city Ulaanbaatar in every occasion. Why the

[331] Article 32.1 of the LPAC states "The claim shall be submitted in written form to the court, where defendant is situated and it shall be signed by the plaintiff or person, who representing the defendant at the trial. In the condition specified in the provision 4.1.1-4.1.3. Claim shall be submitted to the Administrative Chamber of the Supreme Court."

Mongolian Supreme Court initially given such jurisdiction was over the high level administrative organ is related to soviet era path dependence. When every institution was controlled by Soviet Council and there was no separation of state power, the lower court could check the legality of decisions made by the high level administrative organ. This can explain the reason that original jurisdiction over actions related to top level administrative organ was assigned to the Supreme Court in 2002. However, in this case, although the structure was old, the practice was new. In other words, even though the law assigned original jurisdiction to the Supreme Court, it never exercised this original jurisdiction but transferred it to the first instance court.

Mongolia, certainly, without much time and understanding[332] of background theory and history, has introduced a German type administrative court structure. Because of the complexity of the new concept of administrative litigation, it is very challenging and often problematic to adopt the concept that comes with the new court structure. However, this difficulty was mostly unknown or was confusing and unable to recognize the existence of possible problems. However, it became evident at some point that the new legal structure and procedure often conflicts with old thinking and practice when it comes to the interpretation of law to concrete cases. For example, the possession of a subjective right in connection with a challenged administrative act is a core requirement in order to qualify as a plaintiff. The new concept required that an individual, whose subjective right had allegedly been infringed, must establish standing to be a plaintiff, but the old thinking and practice was to allow almost everyone who alleged that their subjective right was infringed to be a plaintiff, without mandating proof of standing. Also, the interpretation of the institutional definition of what constitutes an "administrative act" was difficult, therefore courts struggled to clearly identify the exact meaning of administrative act. Moreover, according to the new concept, the purpose of litigation is to restore the plaintiff's right that has been infringed by an illegal administrative act. In contrast, in practice the court often revokes or declares an administrative act void that has not, in fact, caused individual and concrete infringement to a plaintiff's right.

3.3. The Law on Procedure for Administrative Case (LPAC) 2002

3.3.1. Drafting process of the LPAC

The process of drafting the Law on Procedure for Administrative Case (LPAC) was time consuming and complex. The drafting of the LPAC was done parallel with the drafting of the Law on Establishment of

[332] It seems that only a few scholars such as Professor Chimid understood the underlying concept.

Administrative Court, mentioned in a previous section of this chapter. In fact, the Law on Establishment of Administrative Court was initially submitted in draft form and attached to a draft of the LPAC. According to Professor Chimid,[333] it took almost ten years in total to draft, submit and convince the State Great *Khural* to pass this law with enormous work of lawyers, scholars, and support of international organizations.[334] From the case file of the LPAC in the Parliament Archive, legislative process in parliament began on May 17, 2001 and the LPAC was adopted on December 26, 2002.

Additionally, the LPAC endeavored to fundamentally change the existing administrative law. In a concept paper[335] concerning the LPAC, the government explained that in practice there was no adequate control over illegal administrative decisions when administrative authorities breached citizens' rights. Moreover, the Law[336] on Procedure for Submitting the Complaint to the Court about Unlawful Activity of State Administrative Organ and Official which Infringed Right of Citizen of People's Republic of Mongolia (hereinafter "the 1990 Special Law on Complaint Procedure") was not enforced as it was intended to function as judicial protection in case of infringement of right and freedom by illegal administrative activities the concept paper admitted.[337] As in Chapter I, why the 1990 Special Law on Complaint Procedure was not enforced as the above mentioned concept paper noted. In fact, this law was a non-litigation law, meaning that the main purpose[338] was to exercise an objective guarantee of legality of administration by using complaints from citizens. The 1990 Special Law on Complaint Procedure[339] replicates USSR Law of November 2, 1989, "On the Procedure for Appeal to Court the Illegal Actions of Bodies of State Administration and of Officials infringing on the Rights of Citizens". Therefore, its mission was not to protect individual rights and freedom, which explains why it was not enforced as litigation law. Arguably,

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[333] Professor Chimid was a leading person in the Drafting Group of the LPAC. "Захиргааны хэрэг хянан шийдвэрлэх тухай хуулийн Хувийн хэрэг, УИХ-ын тамгын газрын архив," [The archive case file of the Law on Procedure for Administrative Case] 61–62.

[334] Chimid Biraa, "Монгол Улсын захиргааны хэргийн шүүхийн мөн чанар, нийгэм - эрх зүйн ач холбогдол" [Fundamental Understandings and Values of the Administrative Court], in *Захиргааны хэргийн шүүх: Монгол дахь шинэтгэл, дэлхийн улсуудын жишиг*, 2004.

[335] "Захиргааны хэрэг хянан шийдвэрлэх тухай хуулийн Хувийн хэрэг, УИХ-ын тамгын газрын архив," 5. See footnote 333.

[336] 1990 Special Law on Complaint Procedure (1990 оны 3 дугаар сарын 23-ны өдөр).

[337] "Захиргааны хэрэг хянан шийдвэрлэх тухай хуулийн Хувийн хэрэг, УИХ-ын тамгын газрын архив," 5. See footnote 333.

[338] However, beside its main purpose which is exercise control over administration there still was a sub-mission that intended to protect right.

[339] "9, "On the Procedure for Appeal to Court the Illegal Actions of Bodies of State Administration and of Officials Infringing on the Rights of Citizens," Ved. SSSR 1989 No. 22, item 416, replacing USSR Law 1987, "On the Procedure for Appeal to Court of Illegal Actions of Officials Infringing on the Rights of Citizens," Ved. SSSR 1987 No. 26, item 388, as amended, 20 October 1987.

the 1990 Special Law on Complaint Procedure, like its Soviet version, was a step forward to recognize the need of protection of individuals' rights from illegal administrative decisions.

3.3.2. Relationship between the Law on Civil Procedure and the Law on Procedure for Administrative Case (LPAC)

The concept paper[340] acknowledged that even though the Law on Civil Procedure contained[341] regulation concerning the making of a complaint against an administrative decision in Section 14, when the LPAC was drafted and submitted for adoption in parliament, principles of judicial procedure for administrative case differed from those set out in the Law on Civil Procedure. The revision process of the Law on Civil Procedure took place around same period as the drafting of the LPAC, however it was adopted by parliament before the LPAC. The new Law on Civil Procedure[342] was adopted on January 10, 2002 and entered into force on September 1, 2002.

Overlapping jurisdiction

The Law on Civil Procedure (2002) still incorporates a section[343] that provides complaint procedure for complaints made against state administrative decisions and activities. The procedure described in Section 14 of the Law on Civil Procedure is a special procedure based on the filing of a complaint, and unless this section contains specific provisions to the contrary, then general procedure of the Law on Civil Procedure applies.[344] A complaint against an administrative decision can be the basis upon which to institute civil procedure at court. Article 12 Paragraph 1.4 of the Law on Civil procedure states[345] that based on a complaint concerning a legal act and activity of an administrative organization, an administrative official civil case shall be instigated.

In relation to the adoption of the LPAC on December 26, 2002, there was no proposal to amend Article 12 and Section 14 of the Law on Civil Procedure at that time. Moreover, until the LPAC entered into

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340 "Захиргааны хэрэг хянан шийдвэрлэх тухай хуулийн Хувийн хэрэг, УИХ-ын тамгын газрын архив," 5. See footnote 333.

341 In early 2001 when this drafting process has been taken place 1994 Law on Civil procedure was in force and this law had Section 12 same section that is Section 14 in 2002 Law on Civil Procedure. Judge Zandraa commented on Chapter 12 of the 1994 Civil Procedure Law by comparing it with the 1990 law. He claimed that the 1994 Civil Procedure Law reestablished court control over administration in part, based on the term of "illegal administrative activity" as a guidance. Orosoo, "Монгол Улсад захиргааны хэргийн дагнасан шүүх байгуулагдсан нь," 227.

342 After new constitution first Law on Civil Procedure was adopted on May 09, 1994. Иргэний Хэрэг Шүүхэд Хянан Шийдвэрлэх Тухай [The Law on Civil Procedure] (1994).

343 Иргэний Хэрэг Шүүхэд Хянан Шийдвэрлэх Тухай, § 14, arts. 156–160 (2002).

344 Ibid., art. 156.2.

345 However, it does not describe administrative decision in question as 'illegal'.

force[346] on June 1, 2004, no jurisdictional overlap occurred even though the LPAC was adopted later the same year as the Law on Civil Procedure. However, there was parallel or overlapping jurisdiction regarding civil and administrative court procedure from June 1, 2004 until the August 3, 2007 amendment to the Law on Civil Procedure. The amendment revised Article 12 Paragraph 1.4 concerning the listing of defendants in Article 4 of the LPAC.

The amendment clarified the jurisdictional scope of the LPAC and the Law on Civil Procedure. According to the amendment, Article 12 Paragraph 1.4 states, "Complaint related to activity and administrative act issued by organization and its officials' other than prescribed in Article 4.1 and 4.2 of the LPAC." In other words, administrative agencies listed in Article 4.1 and 4.2 of the LPAC[347] are removed from overlapping jurisdiction in Law on Civil Procedure. Therefore, the Law on Civil Procedure still has jurisdiction over the rest of the administrative organizations which are not listed in Article 4 of the LPAC. This is the reason why the ordinary court has exercised jurisdiction over administrative acts of the Government Cabinet since the Mongolian Constitutional Court (*Tsets*) was annulled[348] Article 4.1.1 and 4.1.6 by reasoning that such articles contradict the Constitution. Consequently, the Parliament detached[349] the Government Cabinet and the General Election Committee from the administrative agencies list. To date, in conjunction with the revised Administrative Court Procedure Law (ACPL), on February 04, 2016 Article 12 Paragraph 1.4 was once again amended[350], replacing 'in Article 4.1 and 4.2 of the Law on Procedure for

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[346] Within adoption of the LPAC, the Law on Procedure for Submitting the Complaint to the Court about Unlawful Activity of Organization and Official which Breached Right of Citizen of People's Republic of Mongolia (March 23, 1990) was declared to be ineffective from June 01, 2004.

[347] Article 4.1 of the LAPC states as "Administrative Courts in accordance with the provisions 3.1.1., 3.1.2. shall decide the disputes concerning illegal acts made by the following bodies and officials" and it provides extensive list of defendants. Article 4.2 follows as "The Administrative Courts jurisdiction shall cover only binding, external administrative acts of bodies specified in Article 4.1 issued for public implementation."

[348] Захиргааны хэрэг хянан шийдвэрлэх тухай хуулийн зарим заалт үндсэн хуулийн холбогдох заалтуудыг зөрчсөн эсэх тухай маргааныг хянан шийдвэрлэсэн тухай Монгол Улсын Үндсэн хуулийн цэцийн дүгнэлт [Judgment on Petition for] (Mongolia|MN Constitutional Court).

[349] Amendment to the LPAC was adopted on April 28, 2005.

[350] It contains kind of definition of administrative agency and broader term of listing. Article 5.1 of the General Administrative Law states that "The following bodies governed by public law, which adopt authoritative decisions expressing public interest, are referred to as administrative bodies:

5.1.1. All central and local bodies that exercise the executive power of the state;

5.1.2. Independent agencies that enforce legislation and make authoritative decisions, and other public law entities similar thereto;

5.1.3. Entities that are assignees with administrative functions based on a law or public law contract;

5.1.4. Administration of entities such as state schools, shared ownership schools, hospitals, media, communication, postal, transport and energy organisations which provide mandatory public services; and

5.1.5. Municipal self-governments and those entities whose decisions and activities are subject to complaints lodged with the administrative courts, as specifically set out in law."

Administrative Case' with 'in Article 5 of the General Administrative Law.'

Extensive quotations from civil procedure

The list of laws[351] applicable to administrative court procedure includes the Law on Civil Procedure. The Law on Civil Procedure is extensively quoted in the LPAC, in total it is quoted 22 times, and each time from one article up to sixteen articles are referenced, including whole sections quoted three times from the Law on Civil Procedure. Particularly, various procedural law principles are cited directly. Additionally, the appellate process and the enforcement of judgments handed down by the administrative courts are regulated by civil procedure. Even after the amendment of the Law on Civil Procedure and the enactment of the LPAC, the main regulation during this period is also civil procedure. The content of the new law on administrative court procedure mainly consists of the Rules of Civil Procedure with several exceptions. Some uniquely administrative rules have been exempted from the Rules of Civil Procedure. The most significant and evident exemption concerned the burden of proof requirement under the LPAC, which assigned the burden of proof to the court, not parties to the case.

End note of 3.3.2.

Based on the above mentioned reasons, the relationship between the LPAC and the Law on Civil Procedure can be described as follows: while these are formally separate laws, in terms of the weight of authority of the content of both laws, the Rules of Civil Procedure are substantially applied more often. Apparently, initial application of the LAPC was not viewed by judges and lawyers as distinguishable from the Rules of Civil Procedure. The noticeable distinctions were that the defendant, under administrative court procedure, must be an administrative agency and an action filed in administrative court must also relate to or seek revocation of an administrative act.

In substance, the Rules of Civil Procedure and the LPAC procedures do not generally differentiate much; however, in formal proceedings involving administrative court procedure they are distinguishable by the LPAC burden of proof requirement, which falls in the courts hand. When submitting the draft of the LPAC to the Parliament, it was noted that one of the reasons for establishing separate procedural law for administrative cases was because the administrative court procedure differs[352] from civil court procedure in

[351] Захиргааны Хэрэг Хянан Шийдвэрлэх Тухай, art. 2(1) (2002).

[352] "Захиргааны хэрэг хянан шийдвэрлэх тухай хуулийн Хувийн хэрэг, УИХ-ын тамгын газрын архив," 5. See footnote 333.

some instances. However, Article 13.1 of the LPAC quoted Article 4 to 11 of the Law on Civil procedure as procedural principles that govern administrative court procedure. Another important point, that reveals the LPAC's similarity to the Law on Civil Procedure, is that the LPAC contains no rule about the forms of action available or standing requirements which are key components that represent distinctions between administrative litigation and civil procedure.

3.3.3. Defendant as administrative agency

Article 4.1 of the LPAC requires an action filed at the administrative court must seek a revocation or declaration of illegality of an administrative act issued by an administrative agency. It should be noted that the LPAC does not provide a definition for "defendant." Instead the LPAC defines[353] "administrative agency," to include the following organs which are deemed public legal subject:

- all central and local organs that exercise executive authority of state which issues imperative decision by expressing public interest;
- non-governmental organs which exercise delegated authority of government agencies and administration of those organs which conducts common services by issuing an imperative order based on the authority given by law or public legal contract in the area of education, healthcare, communication, power supply;
- self-governing body of local administrative unit and religious organ.

Notably, the LPAC did not designate the state[354] as a single whole entity to be regarded as a public legal subject. Instead, it legally recognized administrative agencies, which belong to the state and are therefore entitled to public legal subject status per administrative court procedure. It is not commonly understood that the terms administrative agency and official are equal with the concept of public legal subject. In general, only a legal entity or legal person can acquire rights and be bound by obligations. Therefore, a legal entity or legal person can qualify as a public legal subject but not as an agency or organ, which belongs to public legal person. On the other hand, Mongolian law defines administrative agency and administrative official as a public legal subject individually therefore it shows that the soviet legal concepts were still influential at the time of adoption of the LPAC. Under the LPAC, the terms administrative agency and official meet the requirements of the public legal subject, thus both qualify as defendants for administrative court procedure purposes. Under the LPAC, public legal subject is formally defined, and it equates this term with that of

[353] Захиргааны Хэрэг Хянан Шийдвэрлэх Тухай, art. 3.1.1.
[354] Japan changed in Article 11 of the ACLA defendant from agency to state by the 2004 amendment.

administrative agency and official.

The LPAC includes the term administrative official[355] beside the term administrative agency. This is a typical transition period problem in which a new concept always contains some of the old concepts. In Japan and Germany administrative agency means not only collegial agency but also individual agency or official. Along with the definition of administrative agency, Article 4.1 of the LPAC furnished a list of what constitutes "public legal subject." In fact, the list includes some by name and the rest are described in general terms, as those organs whose administrative act can be challenged at administrative court.

In the Mongolian context, partially because drafters of the LPAC believed[356] that since the administrative court procedure was new to Mongolian judges, lawyers, and to the public at large, lawmakers believed that providing a list of administrative agencies would be helpful to identify which administrative agency or official's decision can be filed against. Additionally, control type of administrative litigation has functioned as background theory from the time when historically[357] Mongolia allowed only a few number of cases to be decided through civil procedure. Beginning from that time, the administrative agency which issued the challenged decision was the respondent in the complaint procedure at the ordinary court, not as a defendant (also no usage of term plaintiff in complaint procedure). There was no real plaintiff because the purpose of the complaint procedure was not to provide a remedy for an infringed right of the complainant. Moreover, there was no real defendant, only the administrative agency or official which issued the decision. It was not suitable for the administrative agency or official to participate in this complaint procedure as defendant, because the administrative agency possessed no obligation as defendant.

3.3.4. Jurisdiction as Enumeration Principle

The Administrative Court has jurisdiction over disputes arising out actions of administrative agencies and directed outward to citizens or legal entities. However, not all administrative agencies are subject to the Administrative Court's jurisdiction, only the ones listed in Article 4 of the LPAC are subject to the judicial review. A concept paper[358] submitted to parliament mentioned that the LPAC was drafted using a listing approach in terms of jurisdiction by providing a list of agencies and officials whose administrative act can

[355] Administrative law specialist Ganzorig defined administrative official as not every state official is administrative official but the ones who bears legal authority and obligation. Ganzorig Dondov, *Захиргааны эрх зүйн тайлбар толь* [Administrative Law Dictionary] (Ulaanbaatar, 2002), 17.

[356] Biraa, *Захиргааны хэргийн шүүхийн тухай мэдэгдэхүүн*. See footnote 131.

[357] See Chapter I for historical perspective.

[358] "Захиргааны хэрэг хянан шийдвэрлэх тухай хуулийн Хувийн хэрэг, УИХ-ын тамгын газрын архив," 6.

be challenged at administrative court.

Why enumeration? Although everyone agrees that the LPAC is modeled on the German Code of Administrative Court Procedure, the LPAC sharply differs from German law on the issue of scope of jurisdiction. The German law utilizes a general clause, while the Mongolian LPAC used the enumeration principle. In the case of the LPAC, it was a consequence of path dependence. The LPAC introduced a whole new conception of administrative litigation, which differs greatly from the former soviet type administrative procedure Mongolia had relied upon for many years. Thus, Mongolia lacked the necessary framework for easily or readily adopting a new administrative litigation concept.

The reason behind the selection of the enumeration principle in the LPAC can be explained in following manner. First, prior to the LPAC, no theory had been developed and thus no institutional development occurred; therefore, no practice existed in relation to the LPAC before it was enacted. Consequently, because of the weak administrative law theory such as what is the meaning of administrative agency and officials, and in general administrative agency was not clear and institution contributed to the provision of much needed guidance in interpreting the new administrative law concept. In other words, introducing a whole new concept of administrative agency and administrative act required some guidance or example such as an individual list. Second, Mongolia[359] needed a definition of administrative act and administrative agency at the statutory law level for the above mentioned reason. No case law or practice existed to support the theory and institution. Therefore, it was helpful for lawyers, as well as the general public, to understand what administrative agency is by providing a list of possible defendants in the LPAC.

The enumeration principle presented in the LPAC consisted of a two phase deductive reasoning approach. First, Article 3 paragraph 1.1 of the LPAC provided a definition for the concept of administrative agency, and then Article 4.1 and 4.2 comes to play an additional role in clarification by providing list of names of administrative agencies. Traditionally, in developed countries, there is no need for this second phase of "clarification" such as listing the names of example administrative agencies.

However, enumeration in the LPAC was not inclusive, in fact it was exclusive[360]. In other words, only those administrative agencies listed in Article 4.1 of the LPAC can be sued in administrative court.

[359] In Japan no definition in law, but definition of administrative agency comes out from theory and practice.
[360] Unless, Article 4.1.9 of the LPAC, was used semi-definition based approach for independent agencies that are not part of the government ministries.

Because of the finite nature of the list, the ordinary court has exercised jurisdiction, based on the Rules of Civil Procedure, over the administrative acts of the rest[361] of the administrative agencies which are not listed in Article 4 of the LPAC. The original draft of the LPAC that was submitted to the parliament included the President of Mongolia as defendant on the list. However, in the discussion during the parliament process, a member of parliament brought a motion to exclude the President[362] from the list of defendants which succeeded.

From a legal practice perspective, beginning in 2004 the following problems emerged in regards to the enumeration approach. When a new administrative agency is established and it is not listed under Article 4.1 of the LPAC or the parliament excludes[363] a certain administrative agency form the list, individuals who believe their rights have been infringed by those administrative agencies are left without access to judicial review. However, from 2016, a contemporary approach has been utilized to define the term "administrative agency" by giving a general definition (one that contains a key concept and dogmatic systematizing key concept) at the statutory law level without the need an additional listing or names of possible defendants.

3.3.5. Preliminary Proceedings as Administrative complaint

The LPAC can be divided into two sections: first, an administrative complaint procedure[364] is utilized to review the original act based on the complaint, and second, an administrative court procedure (litigation) is

[361] Professor Dolgorsuren expressed that it is doubtful to limit administrative legal dispute as of cases that given jurisdiction to administrative court. Jamsran, *Монгол Улсын захиргааны эрх зүйн удиртгал*, 142.

[362] Original motion included not only the president but government cabinet, prime minister, minister to be removed from the defendants list. Parliament member who proposed the change is the Lundeejantsan. Doctor Lundeenjantsan used to be a constitutional law professor in socialist time and longtime parliament member. He's first motion have not succeeded and he proposed second time only to remove the president from the defendant's list when the final draft discussed in the parliament. "Захиргааны хэрэг хянан шийдвэрлэх тухай хуулийн Хувийн хэрэг, УИХ-ын тамгын газрын архив," 6.

[363] When the LPAC entered into force in June 1, 2004, the Government Cabinet was listed at first in the Article 4.1.1 therefore the administrative court had jurisdiction over the Government action that qualifies to Article 4.1, 4.2 of the LPAC. However, shortly after Administrative court of Capital City decided the significant two cases, which were in public attention, the action filled in the Constitutional Tsets asserting that Article 4.1.1 of the law on procedure for administrative cases is incompatible to the Constitution. In Magnaisuren and Enkhbayar vs. Parliament (Constitutional Tsets 2005), The Tsets found that Article 4.1.1 was unconstitutional, therefore, ordered to the State Great Khural make amendment to the LPAC. The Parliament excluded the Article 4.1.1 and 4.1.6 from the defendants list, based on Constitutional Tsets's judgment that reasoning the Tsets has jurisdiction over disputes arise from these two administrative agencies' act. Some do not agree with this judgment and say that it is the clear trend which government or its agencies trying to get out from the judicial review over their illegal action. In Article 4.1.6 of LPAC the General Election Committee was listed; there were similar claim in that action. Захиргааны хэрэг хянан шийдвэрлэх тухай хуулийн зарим заалт үндсэн хуулийн холбогдох заалтуудыг зөрчсөн эсэх тухай маргааныг хянан шийдвэрлэсэн тухай Монгол Улсын Үндсэн хуулийн цэцийн дүгнэлт (Mongolia|MN Constitutional Court).

[364] Article 6 (Article 6. Submission of Complaint to Higher Instance Administrative Body and/or Official), Article 7 (Preliminary Proceedings), Article 8 (Decision issued by the administrative organization, official upon examination of the case) of the LPAC.

applied. Article 6 of the LPAC[365] requires adherence to the administrative complaint procedure (a form of preliminary proceedings) as a prerequisite for most actions before filing at administrative court. Why did Mongolia include an administrative complaint procedure in the LPAC in 2002? There are at least two reasons behind this. First, prior to 2002 the Rules of Civil Procedure required the administrative complaint procedure for enumerated complaints against an administrative agency. This practice continued to be followed, expressly and intentionally, under the new administrative litigation law. And secondly, the German Code of Administrative Court Procedure,[366] which is the model for the Mongolian LPAC, likewise includes preliminary proceedings concerning the lawfulness and expedience of the administrative act by higher administrative agency.[367]

In general, knowing which authority complaint examiner has been assigned to the case is of key importance in determining the type of preliminary proceedings required and whether it is the administrative complaint procedure or administrative review will be followed.[368, 369] If a proceeding is not an 'administrative law judge' type then it is more likely to be an informal procedure based on supervision. On the other hand, in a formal complaint procedure a higher administrative agency or examiner of the complaint conducts a proceeding which includes a hearing. In this case, preliminary proceedings include not only supervision but also remedy for complainant's right, therefore it is an exercise of administrative review.

From a substantive view point, the purpose of the LPAC's administrative complaint procedure was not focused on providing a remedy for the alleged violation of plaintiff's right but sought to exercise supervision over legality of the lower administrative agency's decision. For instance, Article 7 paragraph

[365] Article 6.1 of the LPAC states that "Unless otherwise stipulated in the Law citizen, legal entity which considers that the illegal administrative act of the administrative body or official infringed its rights shall submit complaint to higher instance administrative body within 30 days since receipt of the act or finding out about the act."

[366] Verwaltungsgerichtsordnung (VwGO) [Code of Administrative Court Procedure], 686 (Federal Law Gazette 1991). VwGO, the Code of Administrative Court Procedure in the version of the promulgation of 19 March 1991 (Federal Law Gazette I page 686), most recently amended by Article 5 of the Act of 10 October 2013 (Federal Law Gazette I page 3786)

[367] Chapter 8 of the German Code of Administrative Court Procedure contains regulation on preliminary proceedings. Section 68 (1) Prior to lodging a rescissory action, the lawfulness and expedience of the administrative act shall be reviewed in preliminary proceedings. Section 69 the preliminary proceedings shall begin on the lodging of the objection. Ibid.

[368] Takeshi Hitomi, "Revision of the Administrative Appeal Act," *Waseda Bulletin of Comparative Law* 34 (October 22, 2014): 177–79.

[369] In Japan, before ACLA preliminary proceedings was named as administrative complaint procedure but after 1962 it was changed to administrative review. Article 8 of the ACLA permits plaintiff to file action for revocation even where a request for an administrative review made. Also, the Administrative Appeal Act amended substantially toward remedy based administrative review in 2014. AAA [Administrative Appeal Act], 160 (1962).

1.1 of the LPAC stated that a higher administrative agency "shall examine whether the administrative act is consistent with the law." The character of the preliminary proceedings can be described by the usage of the terms 'legality or illegality' when describing the purpose of the procedure. If the preliminary proceedings focus on the legality or illegality of the original administrative act henceforth, it represents control or supervision based administrative complaint procedure. It treats the complaint as a signal of illegality in the lower administrative agencies. Here, the higher administrative agency acts like a supervisor to the lower agency, not focusing on the complainant's right which was allegedly infringed by the original administrative act.

Additionally, the Law[370,371] on Procedure for Disposal of an Application, Complaint by a Citizen to the State Organization and Officials, exists[372] and is legally parallel with the LPAC. Article 4 paragraph 4 of said law defined the term "complaint" as a claim for the restoration of citizens' rights and freedom infringed by the decision and action of a state administrative agency and official. The new institutions, such as administrative act functions as it is intended to, nevertheless the LPAC keeps long-standing supervision based administrative complaint procedure.

3.4. Conclusion

Since 1990, the establishment of the administrative court with jurisdiction, in principle, for most administrative cases was the core achievement in Mongolian administrative law. After the establishment of the administrative court and with the new administrative litigation law, Mongolian administrative litigation is formally meant to be a remedy type; nonetheless, in substance [judicial] control over administrative activity has been kept. Even though general supervision of Procuracy has been eliminated, for example supervision still exists in the area of administrative punishment. Even in the prototype administrative court procedure in Mongolia, the involvement of the Procuracy on behalf of the state was authorized, nonetheless it was not exercised often. The supervision function over administrative agency has transferred somewhat from the Procuracy into the hands of the judiciary, therefore the judicial control over administration existed

[370] Иргэдээс Төрийн Байгууллага, Албан Тушаалтанд Гаргасан Өргөдөл, Гомдлыг Шийдвэрлэх Тухай [Law on Procedure for Disposal of an Application, Complaint by a Citizen to the State Organization and Officials] (1995).

[371] Article 6.2 of the LPAC states that "The complaint shall satisfy requirements set in the Article 10 of the Law on Decision-making on Complaints Submitted by Citizen to the State Bodies or Officials."

[372] The concept note of this law explained that according to Article 16 paragraph 12 of the Constitution, there is a need for legal regulation on filing a complaint regarding to state organization, and its process. "Захиргааны хэрэг хянан шийдвэрлэх тухай хуулийн Хувийн хэрэг, УИХ-ын тамгын газрын архив," 31.

as a background problem for the new administrative litigation system.

Mongolia introduced a German type administrative court structure. However, it became evident some time later that the new structure and procedure often conflicts with old thinking and practice when it comes to the interpretation and application of law to concrete cases. With the establishment of the administrative court and procedure, a formal paradigm change was made at the statutory law level, but the application of law in concrete cases as analyzed in later chapter was still not clear. Therefore, even though the law changed to litigation type of procedure, in practice control type of procedure often exists which is a clear indication that paradigm change in Mongolia is formal but not substantial.

The enumeration approach, as a key expression of control type litigation, used the newly established administrative court procedure in Mongolia. It is a weakness in administrative litigation as with coinciding extensive application of the Rules of Civil Procedure. Therefore, identical to the soviet era in Mongolia when the ordinary court had jurisdiction over certain administrative decisions through its use of civil procedure, the Law on Civil Procedure continues to be utilized as a special complaint procedure (non-contentious) despite the fact that a separate administrative procedure exists.

In summary, the starting point in Mongolia was control type administrative litigation in 1990, after a long period of utilizing soviet type administrative law beginning in 1920s. However, since 2002 the establishment of the administrative court and the enactment of separate administrative court procedure were significant achievements in Mongolia. Not only did the court become the main institution in administrative litigation, as opposed to formerly non-judicial organs such as the Procuracy, but administrative cases began to be decided through specialized administrative court procedure law. The most important change was to transformation from non-litigation type procedure to litigation type procedure. Though the 1990 attempt to introduce a general clause in administrative court procedure failed, the LPAC introduced an inclusive enumeration approach. However, making paradigm change to remedy type administrative litigation was not easy, especially in light of the parallel jurisdiction the administrative court shared with the civil court, as well as the strong path dependence for control type procedure at the level of practice and legal consciousness.

Chapter IV: Conditions of Administrative Litigation

4.1. Introduction

In the previous chapter, it was demonstrated that since 2002 and 2004 Mongolia moved toward the remedy type administrative litigation by abandoning its former use of control type litigation, at least at the statutory law level. Also in the last chapter, the difficulty to achieve such a paradigm change once and for all is clearly acknowledged. Therefore, in substance control type administrative litigation prolonged in Mongolia. On the other hand, as it was discussed in Chapter II, Japan only formally made transition from control type to remedy type after WWII. For Japan in Chapter II and for Mongolia in Chapter III, it discovered general characteristics of paradigm change in administrative litigation. Consecutively, in this chapter the discussion will focus on the general character of administrative law in Mongolia and its transformation in making a more concrete institutional, theoretical, and practical base from a comparative analysis perspective. For the most part, this chapter seeks to examine judicial review type actions, based on subjective litigation from the viewpoint of preconditions required to initiate judicial review type action. In other words, it will make an analysis of how difficult it is to initiate an action in protection of infringed rights and interests in Japan and Mongolia, as an indicator of paradigm whether it is control type or remedy type.

This chapter will identify what distinguishes judicial review type actions from the rest of the actions in subjective litigation. Based on those findings, it will then examine what preconditions are required for initiating judicial review type actions. And it continues to explore the concept of administrative act/disposition in two jurisdictions, specifically concerning the question as to what it means to have standing and how to determine who has it. Moreover, this chapter will present the concept of objective interest of litigation as it is the last requirement for initiating judicial review.

In order to determine the preconditions for administrative litigation, this chapter will first discuss the Japanese context as a comparative stance. For analyzing judicial review type administrative litigation, this chapter consists of three sub-sections respectfully with requirements for initiating judicial review action such as administrative act/disposition, standing, and objective interest of litigation. Therefore, in the first sub-section it will examine the concept of administrative disposition at the Japanese theoretical and institutional level. Then it will comparatively study the Mongolian concept of administrative act. Next, this sub-section includes the case study for the concept of administrative act in Japanese and Mongolian practice.

Finally, this sub-section will sum up with concluding remarks on the subject. The second sub-section examines the concept of standing in the same manner and order as the previous sub-section. The end of this chapter will discuss relatively briefly the concept of objective interest of litigation. The brevity of this discussion is not because it is weakly positioned among the requirements necessary for administrative litigation, but it is due to a lack of understanding and relevant practice experience in Mongolia that limits commentary here.

4.2. Administrative Disposition/Act

The concept of administrative act in Japanese law, which is referred to as 'administrative disposition,' is the object of this sub-chapter. Administrative act is not only a core element of administrative litigation in Japanese law and practice but also in Mongolia. Therefore, the similarities and differences concerning the concept of administrative act from the view point of institution will be examined in a comparative light first. A discussion with regards to practice in both jurisdictions will then follow.

4.2.1. Institution

Japanese Institution on the Administrative Disposition

The Constitution of Japan, which was adopted on November 3, 1946, guarantees "the right of access to the courts." The courts serve as a fundamental venue for judicial review of any dispute, including those concerning an administrative disposition. Article 32 of the Japanese Constitution provides that "no person shall be denied the right of access to the courts."[373] Article 3 (1) of the Court Act states that "Courts shall, except as specifically provided for in the Constitution of Japan, decide all legal disputes, and have such other powers as are specifically provided for by law."[374] The Constitution appears not to exclude certain disputes from jurisdiction of courts.

After the Second World War, Japan enacted the Law[375] for Special Regulations concerning the Procedure of Administrative Litigations in 1948. This law was abolished in 1962, and replaced with the existing Administrative Case Litigation Act (ACLA) which was enacted on May 16, 1962. Thus, the main law that served as a statutory source for understanding the concept of administrative disposition was the Law for Special Regulations concerning the Procedure of Administrative Litigations between 1948 and 1962, and

[373] Art. 32 Nihonkokukenpō [The Constitution of Japan] (1946).
[374] Art. 3(1) Saibansho-hō [Court Act], 59 (1947).
[375] The Law for Special Regulations concerning the Procedure of Administrative Litigations, Pub. L. No. 81, Extra 1 Official Gazette Extra (1) 9–10 (Govt. Print. Bureau 1948).

the existing ACLA from 1962 to the present.

Currently, Japan has three statutory laws that govern administrative dispositions: (1) the Administrative Case Litigation Act (ACLA); (2) the Administrative Appeal Act[376] (AAA) which was adopted in 1962; and (3) the Administrative Procedure Act (APA) which was adopted on November 12, 1993. Article 3 (ii) of the ACLA provides for dispositions and other acts involving the exercise of public authority by administrative agencies.

In Japan, the following three provisions: Article 3 paragraph 2 of the ACLA,[377] Article 2 of the AAA[378] and Article 2 paragraph 2 of the APA[379] confirm what administrative law theory and administrative cases have generally and abstractly articulated with regards to the concept of administrative disposition. Japanese statutory administrative law does not specifically define any conditions or examples relating to administrative dispositions. Nevertheless, Japanese administrative law theory and practice have established the following requirements[380] for administrative dispositions:

- Exercising public authority (Imperative decision/order);
- Which has direct legal effect;
- Issued by administrative agency; and
- Intended to dispose a concrete and individual problem.

The Japanese administrative law approach to legal interpretation starts from abstract concepts, works toward concrete cases. Traditionally, practice among Japanese legal scholars is to firstly establish the legal concepts

[376] Hitomi, "Revision of the Administrative Appeal Act." After 2014 amendment: "This system, under which administrative litigation in courts is not initiated unless the administrative appeal procedures have been completed, has been abolished for 47 laws such as the Building Standards Act and the Agricultural Land Act. Additionally, the system mandating the preliminary filing of objections and requests for second review has been abolished for 21 laws such as the National Pension Act and the Act on General Rules for National Taxes, and in this way the dual system of preliminary procedures has been abolished completely."

[377] Article 3(2) of the ACLA states as "the term "action for the revocation of the original administrative disposition" as used in this Act means an action seeking the revocation of an original administrative disposition and any other act constituting the exercise of public authority by an administrative agency (excluding an administrative disposition on appeal, decision or any other act prescribed in the following Paragraph; hereinafter simply referred to as an "original administrative disposition")".

[378] Article 2 of the AAA before amendment of 2014 states as "A "disposition" in this Law shall, in addition to excepting such cases as specifically prescribed in each Article, including such factual acts as falling under the exercise of public power, which mean intern of person, retention of things or any other act of continuous nature in its substance (hereinafter referred to as "real acts")". AAA, (1962).

[379] Article 2 (ii) of the APA states as "Dispositions: dispositions and other acts involving the exercise of public authority by administrative agencies". APA [Administrative Procedure Act], (1993).

[380] Defined by Professor Tanaka Jiro, administrative disposition is "an action performed by an administrative agency, as an exercise of its power of control or superior intention, in order to regulate a given concrete legal relationship." Robert W. Dziubla, "The Impotent Sword of Japanese Justice: The Doctrine of Shobunsei as a Barrier to Administrative Litigation," *Cornell Int'l LJ* 18 (1985): 38, footnote 5.

and use these concepts to interpret and resolve concrete cases. For example, the concept of administrative disposition is established in German legal science and subsequently studied by Japanese legal scholars. A conceptual analysis is then made from the abstract concept of administrative act, which is then applied as a concrete concept, in order to define a particular administrative decision as an administrative disposition.

The elements of administrative disposition

Legal effect: Direct legal effect means that an administrative decision alters the status of the individual who filed the action, with regard to such status before issuance of the administrative disposition, in relation to particular rights and obligations. Legal effect must be direct but not indirect, concrete but not abstract, and have individual but not general consequences. In any case, an administrative disposition needs to be based on law (must derive its legal basis from the law). Though the law has legal effect itself, this effect is converse to an administrative disposition, because the legal effect associated with the law is indirect, abstract, and general. In contrast, an administrative disposition issued by an administrative agency, which exercises public authority, has a direct, concrete and individual effect.

Public authority: In Japanese administrative law, an administrative disposition is an exercise of an exceptional authority, which is public authority that can only be revoked by the court,[381] which has jurisdiction for revocation of legal effect of an administrative disposition. Legal effect of an administrative disposition can only be revoked by: first, the administrative agency which issued the administrative disposition; second, the administrative agency which has competence to review the administrative appeal; and at last, the court which has jurisdiction for revocation of legal effect of the administrative disposition.

This exclusive jurisdiction of an action for revocation is based on public authority. Public authority means a privilege whereas, even it is illegal ordinary court (civil and criminal) which does not have a competence to review it, must recognize and conform legal effect of administrative disposition. The legal effect of an administrative disposition must be accepted because it was a privilege from the viewpoint of procedure. In order to explain why administrative disposition has the characteristic of public authority, the old and new approach concerning administrative disposition used in Japan should be distinguished. The substantive thinking approach prevailed traditionally. According to the substantive approach, an administrative disposition is issued by an official who has an equal amount of authority as a judge and whose

[381] Court here described has functional meaning not structural. In this meaning court has jurisdiction over revocation of admin act.

decision (administrative disposition) therefore, has the same authority as a judgment. Moreover, like a court judgment, an administrative disposition could only be revoked by an authority which has a competence to review the administrative disposition. Apart from such an agency, everyone was required to recognize and conform to its legal effect. On the other hand, the new and procedural approach does not consider administrative officials as having equal authority with judges; therefore, an administrative disposition does not have the same authority as a judgment. Thus, an administrative disposition is only a legal act. However, if a private person wants to challenge this legal act, it can only be done by filing an action for revocation, in a court which has jurisdiction to revoke the legal effect of an administrative disposition.

Mongolian Institutions on the Administrative Act

In 2002, the LPAC provided a definition for administrative act, which is the first time this new concept was introduced in Mongolian statutory law. Prior to this, the general term 'administrative decision and activity' was used in statutory law and practice. For instance, Article 200 of the Civil Investigation Procedure Law of MPR (1967) regulates mostly administrative sanctions, which includes the terms[382] "act of administrative fine." Furthermore, the 1990 Special Law on Complaint Procedure recognizes and uses[383] the general term "illegal activity" of state administrative organ. Article 2 of the 1990 Special Law on Complaint Procedure recognizes the state administrative organ's activity that illegally limits or infringes citizens' rights provided by law and/or burdens citizens with unlawful obligations and duties. However, in Article 11, it provided that this law will not apply to a "normative administrative act," which shows the recognition of the concept of a normative administrative act, as distinct from the rest of the administrative decision and activity. In 2002, just before the adoption of the LPAC, the revised Law on Civil Procedure not only continued to use a general term to refer to administrative decision and activity, but it also presented a new term, "legal act"[384] when describing a complaint against an administrative organ or official. However, all of these terms previously discussed were[385] nothing like to the concept of administrative act which was introduced by the LPAC.

The following provision defines "administrative act under the LPAC. According to Article 3

[382] БНМАУ-ын Иргэний байцаан шийтгэх тухай хууль, art. 200 (5) and 201 (2, 3) (1967).

[383] 1990 Special Law on Complaint Procedure (1990 оны 3 дугаар сарын 23-ны өдөр).

[384] Article 12 Paragraph 1.4 of the Law on Civil Procedure before amendment of August 03, 2007. [12.1.4. Захиргааны байгууллага, албан тушаалтны **үйл ажиллагаа** болон **эрх зүйн акт**ын талаар гарсан гомдол]

[385] P.Odgerel (back then Professor Odgerel was recent graduate from LL.M program at Bayreuth University, German) Odgerel Purevdolgor, "Захиргааны актын тухай ойлголтын шинэлэг тал" [New Aspects of the Concept of Administrative Act], *State and Law of Mongolia* 2 (2004): 11–18.

paragraph 1.4 of the LPAC,[386] "an administrative act[387] is an imperative decision issued or one time commanding action by an administrative agency or official in written or oral form which directed outward causing direct legal effect in order to regulate the concrete issue arising within public law sphere. In addition to individual administrative act, normative administrative act can also be considered as administrative act by this law." This definition is similar to other definitions that are generally recognized, such as the definition under German law.[388]

On the other hand, Article 12 paragraph 1.4 of the Law on Civil Procedure[389] prescribes that civil procedure may be commenced upon receiving complaints about activity and an administrative act of those organizations or officials other than described in Article 4 paragraphs 1 and 2 of the LPAC. Therefore, Article 12 paragraph 1.4 of the Law on Civil Procedure is in stark contrast to Article 4 paragraph 1 of the LPAC because it allows for a broader scope in which legal action can be taken. Article 4 paragraphs 1 and 2 of the LPAC, on the other hand, uses a listing approach when it describes the administrative agency and enlists the names of administrative agencies whose administrative act can be sued at administrative court. However, the amendment to the Law on Civil Procedure on August 03, 2007 did not effectively solve overlapping jurisdiction since it still retain the terms such as administrative act. For instance, if there is an action related to an administrative act which is issued from an organ that is not listed in Article 4 paragraph 2, then the administrative court will refuse to accept it as administrative litigation. Then consecutively, this administrative dispute will be decided by an ordinary court through civil procedure.

Moreover, Article 8 paragraph 1.3 of the Civil Code[390] acknowledges that in accordance with law an administrative decision, which sought to initiate a civil legal relation, it can serve as a basis for the establishment of a civil legal relation. Although, this is not a description of "administrative act," it specifies

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386 After revised version of LPAC under the name of ACPL similar definition emerged.

387 Article 3 Paragraph 1.4 of the LPAC. From this original article following part, /i.e. judgments, rules, instructions, regulations/ was removed by the amendment on October 29, 2010. In that time, the LPAC also included a normative administrative act as to be treated same as an individual administrative act.

388 Definition of an administrative act. Art. 35 APA, 88 (1993).
An administrative act shall be any order, decision or other sovereign measure taken by an authority to regulate an individual case in the sphere of public law and intended to have a direct, external legal effect. A general order shall be an administrative act directed at a group of people defined or definable on the basis of general characteristics or relating to the public law aspect of a matter or its use by the public at large.

389 Regarding August 03, 2007 amendment. ["12.1.4.Захиргааны хэрэг хянан шийдвэрлэх тухай хуулийн 4.1, 4.2-т зааснаас бусад байгууллага, албан тушаалтны **үйл ажиллагаа** болон тэдгээрийн гаргасан **захиргааны акт**ын талаар гаргасан гомдол;"] (and before February 04, 2016 amendment).

390 Article 8 paragraph 1.3 of the Civil Code. [8.1.3.хуульд заасан бол иргэний эрх зүйн харилцаа үүсгэхэд чиглэсэн захиргааны шийдвэр;]

that an administrative decision can serve as a basis for a civil legal relation. This created a confusing state of parallel jurisdiction.

An important question that arises concerns why these three laws have simultaneously regulated the concept of administrative act in certain degrees and provided for dispute settlement sometimes through civil procedure sometimes administrative procedure. The background problem related to this issue is derived from the transition process Mongolia is currently experiencing in its transformation from a socialist to market system.

How can civil law come to regulate public law relation? In this case, the Civil Code has included provisions that allow some administrative decisions to be a basis for civil law relation or can provoke a civil law relation. From this concept, it can be understood that some administrative decisions can be regulated by civil law, namely the Civil Code. However, this is a transition problem for Mongolia as a former socialist country that is moving towards a market system. In the transition period, though the market system has been introduced, its regulatory framework is weak and covers a limited area. Along with newly introduced market system, another very wide and strong sphere of administrative (public) law is still regulated by civil law and civil procedure, and even public law as a separate legal discipline has not yet fully emancipated from private law. Administrative law is weakly positioned as a regulatory norm at this time in public relation sphere. Lawyers who have drafted and proposed laws during this period of transition are also affected by its many challenges. It was and still is not easy to clearly understand the division of public law and private law. There is a strong division of private and public law imported from Germany in theory, but in the institutional sphere and at the practical level it is difficult to properly ascertain and apply.

Then again, the question of the Law on Civil Procedure that regulates the public law relationship has been a common problem during transition period among former soviet countries. Certainly, a new and market based legal system was transplanted to Mongolia, beginning in the early 1990s; however, the old legal thinking remained. The enumeration approach, which has been used in the newly established administrative court procedure in Mongolia, is a weakness in administrative litigation. For instance, identical to a soviet era in Mongolia when the ordinary court had jurisdiction over certain administrative decisions through civil procedure, as a special complaint procedure, the Law on Civil Procedure had kept complaint procedure section despite the fact that separate administrative procedure exists. This overlapping and confusing jurisdiction is not completely solved yet.

Elements of administrative act

In the case of Mongolia, an imperative[391] decision which can be made either in written or verbal form by an administrative agency or official, that is meant to dispose of a concrete problem arising from the administrative (public) law sphere, constitutes an administrative act. The most important element of the administrative act in Mongolian institution is the concept of imperativeness. The element of imperativeness, which has direct external legal consequences, is fundamental to determining whether a certain act qualifies as an administrative act. The element of imperativeness can be interpreted as requiring conformity from others, especially the addressee of an administrative act. However, the second element 'power or public authority' which is pursuant to law is also an important element. This element was not expressed concretely in the definition of administrative act by the LPAC in 2002. Instead, in Mongolian practice, this element of administrative act which express an authority to govern others, is understood as it is incorporated in the element of imperativeness. In this regard, the character of public authority of an administrative act has been developed through administrative law history.

According to Professor Chimid[392] the element of imperativeness of a legal act is to always express state power or interest, therefore, a legal act of an administrative organization is a form of execution of state authority. After the LPAC was adopted, and during the same time the administrative court had just begun operating, Professor Odgerel opined, the core characteristic of imperativeness is administration, which only expresses its unilateral interest independently from others, when issuing a decision.[393]

The presumption of legality (effectiveness) of administrative act was the most important element in traditional (German, Soviet, Japanese) administrative law. The presumption of legality allows an individual administrative act to be legally effective, regardless of the possibility of defects, until it's revoked by a competent entity which has authority to do so. However, there has been little scholarly work devoted to Mongolian administrative law theory concerning the element of presumption of legality of an administrative act.

[391] Term 'imperative' in Mongolian is '*захирамжилсан*'.
[392] Biraa, *БНМАУ-ын захиргааны эрх*, 285.
[393] Odgerel Purevdolgor, *Захиргааны эрх зүй Ерөнхий анги* [General Part on Administrative Law], 1st ed. (Ulaanbaatar, 2004), 105–6; Purevdolgor, "Захиргааны актын тухай ойлголтын шинэлэг тал," 16.

4.2.2. Practice

Japanese Practice on the Administrative Disposition

Japanese practice with regards to the issue of administrative disposition has been developing for years. With new important cases decided by the Supreme Court of Japan, the interpretation of administrative disposition has been changing over the decades since the first leading case on the issue, the Rubbish Incinerator Case. Japanese practice can be determined mostly from the Supreme Court decisions. The case analysis addresses the issue of administrative dispositions through four Japanese cases. General tendency is not only deductive approach of interpretation but also inductive according to an individual and concrete case.

The Rubbish Incinerator Case[394]

The Tokyo Metropolis, defendant, acquired land from a private person in 1939 (1. land acquisition), and planned the establishment of a rubbish incinerator in 1957 (2. planning of rubbish establishment). The Tokyo Metropolitan Assembly approved and promulgated the plan in 1957 (3. approval and promulgation of the plan). The Tokyo metropolis entered into a construction contract with a building company in 1957 (4. construction contract). And then the Tokyo Metropolis established (i.e. constructed and incinerated) a rubbish incinerator (5. establishment of a rubbish incinerator). Tokyo residents, plaintiffs, who lived in the surrounding area alleged that a series of the Tokyo Metropolis's actions (a previous described 1-5 actions) relating to the rubbish incinerator construction plan were in violation of Article 6 of the Public Cleaning Act, and sought the declaration of the invalidity of the administrative dispositions thereof. This is a case in which the plaintiff's sought declaration of nullity.

The issue before the Court was whether any action or all of the five Tokyo Metropolis' actions constituted an administrative disposition? Both the judgement of first instance and that of second instance dismissed this action. The Court found that because the series of the Tokyo Metropolis' actions could not be deemed an action by an administrative agency, which fell under the exercise of public authority, the actions could not be regarded as administrative dispositions.

The Supreme Court did not accept the final appeal. The Court decided that an administrative disposition, as provided in Article 1 of the Special Administrative Case Litigation Act, was an action by an

[394] Rubbish Incinerator Case, Minshu Vol 18 No. 8, at 1809 (Supreme Court of Japan). This information were discussed during seminars with Professor Katsuya Ichihashi during the course of research, and additional English translations provided by Professor Rie Yasuda. Hereinafter ("Seminars with Professor Ichihashi").

administrative agency that fell under the exercise of public authority, which could be found to directly and legally form an individual's rights and obligations or determine its scope. The Court determined that both the land acquisition and the construction contracts by the Tokyo Metropolis were contracts of private law. Both the planning of the rubbish establishment, and the approval and promulgation of the plan were considered internal actions of the Tokyo Metropolis. Therefore, the series of actions could not be regarded as administrative dispositions.

This is a leading case in determining what conditions must be met in order to file an action for revocation against an administrative disposition. Therefore, regarding the concept of administrative disposition, the importance of this case in Japanese administrative law is significant.

The Court pronounced four definitive conditions necessary to qualify as an administrative disposition, including: 1) public authority, 2) legal act, 3) direct and concrete act, and 4) influence to individual's rights and obligations. Two points are core in identifying whether or not an act qualifies as an administrative disposition as major premise of deductive approach of interpretation: first, is the plaintiff's legal status altered (procedural legal status), and second, is there an effective remedy available (at time action is filed). The four conditions necessary for administrative disposition, stated by the Court, are the same as the theoretical conditions set for an administrative act. The Court has incorporated the theory on conditions of administrative act in the practice on conditions of administrative disposition. However, this judgment is believed to express the proposition that Japanese post-war courts had used the same pre-war theory,[395] concerning the concept of administrative act, which is a narrow and conservative interpretation of the concept of administrative disposition. Indeed, this case articulated a practical deductive definition of administrative disposition.

Chains of Action Case[396] (Blueprint Case)

The prefectural governor of Tokyo Metropolis, defendant, made a decision to adopt the project plan for the land readjustment project, and made a public notice of the decision in 1948, amended in 1960. However, the project was not continued as planned. The owners, plaintiffs, of land within the implementation zone for the Land Readjustment project, alleged that the project plan was illegal because of the restriction of the plaintiffs'

[395] Sugai and Sonobe, *Administrative law in Japan*, 124.
[396] Chains of Action Case, Minshu Vol 20 No. 2, at 271 (Supreme Court of Japan). ("Seminars with Professor Ichihashi").

right to use their own land, and therefore sought the declaration of the invalidity of the administrative dispositions thereof. This is a case in which the plaintiffs sought a declaration of nullity. The issue was whether the decision to adopt the project plan was an administrative disposition. The judgment of the second instance dismissed this action reasoning that the decision to adopt the project plan could not be regarded as an administrative disposition.

This is the judgment of the Grand Bench, which refers to the hearing by full court. The Supreme Court dismissed the final appeal. The decision to adopt the project plan could not be regarded as an administrative disposition against which an Appeal Suit may be filed. The court reasoned, the project plan for a land readjustment project specifies basic matters of the land readjustment project in a general and abstract manner. In this sense, such plan only has the nature of a blueprint for the land readjustment project, and it does not specifically define what changes the project will bring about to the rights of persons concerned. The building restrictions, etc. to be created as a result of a public notice of the project plan only have an effect that is incidental to a public notice as specially given by the Act, and they cannot be regarded as restrictions of rights that come into existence as the effect of the decision to adopt the project plan or the public notice therefrom. A decision to adopt a project plan, even at the stage when a public notice thereof is made, cannot be regarded as an administrative disposition. The owners of residential land, etc. who are given a disposition of land substitution or the owners of residential land, etc. who are previously given a designation of substitute land may file an action for revocation of the disposition of land substitution, etc.

This case is a leading case about whether the decision to adopt the project plan for a land readjustment project is an administrative disposition or not. The Court (Grand Bench) decided that the adoption of the project plan for the land readjustment project was not an administrative disposition. This Court decision can be construed to mean that a land use plan provides for general and abstract regulations targeting many and unspecified persons. The judgment for this case prevented judicial review for a chain of action by saying that these activities were not final and concrete dispositions. In other words, the plan did not have individual and concrete legal effect. Like the Blue Print case, from the viewpoint of deductive approach of interpretation, this does not satisfy the four conditions necessary for an administrative disposition provided in the Rubbish Incinerator Case.

From the view point of the plaintiff's remedy, the Court (=Japanese practice) focused on a disposition of land substitution, or a designation of substitute land, which was made after public notice was

given (=almost last stage of chains of actions). Additionally, the Court mentioned that the plaintiffs could file an action for revocation of a disposition of land substitution at the stage when the disposition was made. However, that would not have given the plaintiffs an adequate remedy for infringement of their rights. An important point the judgment relied on was that the Land Adjustment Enterprise Planning, at the stage of public notice, was only a blueprint, not a concrete disposition bearing against particular individuals. On the other hand, the dissenting opinion[397] reveals the progressive tendency among judges, which considers the effect of a particular decision regardless of where the decision is in the chain of action, as opposed to focusing on the form of the disposition.

The Project Plan Case[398]

This case is an important case concerning the issue of seeking the revocation of an administrative disposition. The defendant was the municipality, namely Hamamatsu City. The project that defendant intended to implement was the *Seien Wide-Area City Planning and Land Readjustment Project* for developing and improving public facilities around Kamijima Station, in Hamamatsu City. On November 7, 2003, the defendant applied for authorization of the project plan and obtained it from the Shizuoka Prefectural Governor. The decision to adopt the project plan was made on November 25, 2003. The plaintiffs were land owners whose land was within the implementation zone of above said land readjustment project. The land owners claimed that the decision to adopt the project plan for the land readjustment project was illegal (it did not conform to the statutory purpose of the project) and they wanted the decision to be revoked.

The Tokyo High Court refused to accept the decision to adopt a project plan as an administrative disposition by reasoning that, a project plan for a land readjustment project specifies basic matters of the land readjustment project in a general and abstract manner. In this sense, such plan only has the nature of a blueprint for the land readjustment project, and it does not specifically define what changes the project will bring about to the rights of the persons concerned. The building restrictions, etc. to be created as a result of a public notice of the project plan only have an effect that is incidental to a public notice as specially given by the Act, and they cannot be regarded as restrictions of rights that come into existence as the effect of the decision to adopt the project plan or the public notice thereof. A decision to adopt a project plan, even at the

[397] Sugai and Sonobe, *Administrative law in Japan*, 125.

[398] Case to seek revocation of an administrative disposition, 2005(Gyo-Hi)397, Minshu Vol. 62, No. 8 (Supreme Court of Japan, September 10, 2008).

stage when a public notice thereof is made, cannot be regarded as an administrative disposition.

Therefore, the Tokyo High Court dismissed the action to seek revocation of the Decision to Adopt the Project Plan without merit on September 28, 2005. The Supreme Court explained that the design description for land readjustment must include the change of present land scape and positions and forms of public facilities within total area including implementation zone. Based on this information, it should be possible to predict "how the implementation of the land readjustment project will influence the rights of the owners of residential land within the implementation zone." When a decision to adopt a project plan for a land readjustment project is made, the project actually begins to be implemented with regard to the content of the project plan, and then a disposition of land substitution will necessarily be made with regard to the residential land within the implementation zone. Thus, the owners of residential land within the implementation zone are forced to be subject to a disposition of land substitution. It makes their legal status to be directly influenced by the decision to adopt the project plan. In this manner, the legal effect of the decision to adopt the project plan is not only general or abstract.

On September 10, 2008, the Supreme Court made a turning point on the issue of chain of action by deciding the Hamamatsu City Project Planning case. In this case, the court answered the question: whether the *decision to adopt* a project plan for a land re-adjustment can be accepted as administrative disposition under the ACLA and in light of the Chains of Action case decided in 1966?

The Supreme Court opinion is very progressive in terms of the determination of the administrative disposition during the procedure of planning period.[399] First, it emphasizes the importance of when, in the chain of action, the particular activity qualifies as an administrative disposition. This determination is based on the viewpoint of effective remedy. Second, it speaks on the issue of the change in land owners' legal status in the middle of the process. Even during this stage of the chain of action, land owners' rights can actually be infringed. If so, then, the plaintiff's legal status changes. Therefore, the decision to adopt the plan can qualify as an administrative disposition, not only at the end of the chain of action, but also in the middle of the process. If a certain action is to affect the legal status of land owners near the site, then it is considered

[399] This means that even though the owners of residential land, etc. may file a suit to seek revocation of a disposition of land substitution, etc. at the stage when the disposition is made, it cannot be said that the owners can receive adequate remedy for infringement of their rights. In consequence, where the legality of a project plan is challenged, in order to ensure effective remedy for infringement of rights, we must say that it is reasonable to allow the filing of a suit to seek revocation of a decision to adopt a project plan at the stage when the decision is made.

as a valid administrative disposition.

Planning is not an administrative disposition in form, but it can nonetheless be an administrative disposition, depending on content or the effect from the viewpoint of inductive approach of interpretation. The same approach is taken by the 2004 Amendment to Article 9, paragraph 2 of the Administrative Case Litigation Act. This article requires attention needs to be given to not only form, but it also requires a close look at the content, effect of the challenged act, and the purpose of law which governs the legal relation. Additionally, this judgment also meant to influence Japanese administrative law by changing the precedent of its previous deductive interpretation of administrative disposition in relevant cases.

In the application of law, the court relied on the Article 3, paragraph (2) of the ACLA. Although the Land Readjustment Act did not play much of a direct role in regards to determining the conditions of administrative disposition in this case, it served as a basis for exploring the nature of the project plan and its prospective effect. The Supreme Court took considerable steps for ensuring an effective remedy for the possible infringement of land owners' rights in this case. Indeed, the court concluded that "a decision to adopt a project plan can be regarded as a 'disposition made by an administrative agency or any other act conducted by an administrative agency that can be regarded as the exercise of public authority' set forth in Article 3, paragraph (2) of the Administrative Case Litigation Act."[400]

In comparison with the 1966 Chain of Action case, the facts in the Project Plan case are similar and the legal issue concerning the ACLA is almost the same. However, the interpretation of law changed, with a clear focus on remedy over form. This innovative approach taken by the Supreme Court states that "legal effect" does not only occur at the end of the chain of action, it might also occur in the middle of the process. The legal effect of the action must be checked from the view point of "effect" rather than "form" throughout the chain of action. A midterm decision has legal effect whenever an effective remedy is urgent to the parties in the dispute. From this case, we confirm the paradigm shift of the practice of Japanese administrative law towards the remedy from the control.

Revocation of Administrative Recommendation Case[401]

The issue in the Revocation of Administrative Recommendation case concerned the issue of whether the

[400] *Judgment concerning a decision to adopt a project plan for a land readjustment project to be implemented by a municipality, and the subject matter against which an appeal suit may be filed*, Minshu Vol. 62, No. 8.

[401] Revocation of Administrative Recommendation Case, [2005 Gyohi 207] Minshu Vol. 59 No. 6, at 1661 (Supreme Court of Japan).

recommendation of the prefectural governor qualified as "a disposition made by an administrative office which is an exercise of public authority" prescribed by Article 3 (2) of the ACLA.

Plaintiff sought to establish a hospital in Takaoka City, Toyama Prefecture and in March 6, 1997, filed an application with the prefectural governor's office for permission under Article 7(1) of the Medical Service Law (before amendment by Law No. 125 of 1997; hereinafter the same) with regard to the establishment of a hospital with 400 beds. Defendant, on October 1, 1997, made a recommendation to the plaintiff under Article 30-7 of the Medical Service Law, stating that the establishment of the hospital mentioned in the Application should be suspended, on the grounds that "the number of hospital beds in the Takaoka Medical District has already reached the required number as designated for that district in the Toyama Prefecture Regional Medical Scheme." On December 16, 1997, the defendant made a disposition to grant permission regarding the Application, with notification that stated: "It should also be noted for confirmation that if the applicant has established a hospital despite the recommendation of suspension, the prefectural governor shall refuse to grant designation as an insurance medical institution in accordance with the Ministry of Health and Welfare Notification."

The Supreme Court concluded that the Recommendation should be treated as an administrative disposition because of its possible adverse impact for deciding future applications and the significance of obtaining a designation as an insurance medical institution for the establishment of hospital. The court reasoned that "without designation as an insurance medical institution, there is no option but to practically abandon the establishment of a hospital. And "Considering the impact of the recommendation under Article 30-7 of the Medical Service Law, stating that the establishment of a hospital should be suspended, on the possibility of obtaining designation as an insurance medical institution, as well as the significance of designation as an insurance medical institution for the hospital management, it is reasonable to construe that the recommendation can be deemed to be ‘a disposition’"

According to this case, an administrative recommendation qualifies as an administrative disposition, when it includes a possible adverse effect if the addressee does not comply. In other words, if there is a part included in the recommendation that has the power to later adversely factual affect the person to whom it is directed, then it is like an administrative disposition. A recommendation under Article 30-7 of the Medical Service Law is expected to be followed, and if it is not followed by the person who it has been given, then it may result in a refusal of a request for subsequent permission necessary to complete the establishment of

a hospital. In this case, it also confirm the paradigm shift of the practice of Japanese administrative law towards the remedy from the control.

Mongolian Practice on the Administrative Act

Before June 2004, the cases that involved administrative disputes were dealt with by ordinary courts with civil procedure. At that time the concept of the administrative act had not been specifically considered in practice and theory as a specific legal concept, therefore there was no necessity to analyze it in practice. The concept of administrative act was not a point of interest for the ordinary civil court and civil procedure law scholars. On the other hand, administrative law scholars also had no interest because the concept of administrative act was only an abstract notion. The perception was that it did not have legal relevancy because did not have a practical objective as a legal tool of interpretation.

Beginning with the new administrative court and LPAC in June 2004, a new and challenging practice began to scrutinize administrative decisions in Mongolia, asking whether it fit the requirements of administrative act, which were defined by the new law concretely. On the other hand, this definition was not derived from experience that had accumulated and developed over time through practice, and it was not based on scholarly theory either, but it came to be only through new institution that was introduced and supported by German legal assistance.

Therefore, the practice from 2004 is crucial to understand how a legal concept is interpreted, thus it is important to discuss the relevant cases. The concept of administrative act is defined firstly in Mongolian statutory law in 2002, and then actual practice began to apply the statutory definition to specific cases in 2004. In section 4.2.2 of this chapter, it discussed the institution of the concept of administrative act in relation to the LPAC. From this new law, significant influence flows to practice. Using the new legal concept of administrative act for legal interpretation purposes, in practice the court began to analyze how to use the concept of administrative act. Since Mongolia had acquired the German legal concept of administrative act initially and directly into its statutory law, without much theoretical development in advance, the question of how to productively embed this concept in practice is very important for actual problems. Because unlike Japan, it must acknowledge that there is no theory and practice to support statutory law.

In form, an administrative act can be written or oral and it can also be unwritten and unspoken and constitute an *action*. However, the difficulty has been how to determine the imperativeness of a specific administrative act. In Mongolian practice, in order to determine whether an administrative act has occurred,

one must look first for a legal definition of administrative act set forth in Article 3.1.4 of the LPAC before deciding whether or not that particular decision matches the definition of administrative act. To qualify as valid administrative litigation, the matter at hand must challenge an administrative act. The act needs to be issued by an administrative agency or official; it must have effectively functioned as a final decision for that particular issue; and its effect must be directed out to a citizen(s) or legal entity, forcing them to obey a certain order. The following cases clearly demonstrate such challenges in Mongolian administrative legal practice today.

Registration of Immoveable Property Case[402]

An action was brought to the administrative court seeking revocation of state registration of an immovable property and issuance of license dated on May 24, 2012. The Peace and Friendship Organization of Mongolia, a non-governmental organization, asserted that registration of its immovable property to another organization was in contradiction to the Law on the State Registration of Property Ownership Right and Other Property Related Rights. Plaintiff (seller) entered a contract with a company (buyer) for the sale of its office building, the Peace and Friendship Palace, for 1 billion *tugrug* on June 28, 2011. However, the defendant's contractual duty was not fulfilled, so the plaintiff did not register transfer of ownership with the state. The buyer still owed 250 million *tugrug*, therefore the defendant's contractual duty had not been fully carried out yet. According to Article 3.3 and 3.10 of the contract, "it is agreed that after the full payment is made, transfer of the ownership right in the state registration takes place." Because the contract was not fully implemented by the other party, the Peace and Friendship Organization of Mongolia did not apply to the state registration office for the transfer of ownership to be registered in the name of the other party. The defendant made registration of transfer of ownership.

Therefore, plaintiff asserted that the state registration office erred in registering transfer when the application and attached documents submitted by the defendant were not consistent with the requirements of Article 26 paragraph 1 and 2 of the Law on the State Registration of Property Ownership Right and Other Property Related Rights. Plaintiff argued that Article 26 paragraph 1 and paragraph 2 required that registration of the transfer of ownership be based on the terms of the contract. In addition, plaintiff asserted

[402] Энхтайван найрамдлын ордон ба Улсын бүртгэлийн газар [The Peace and Friendship Organization of Mongolia, a non-governmental organization] Case no 122 (Mongolia|MN Захиргааны хэргийн давж заалдах шатны шүүх).

that the agency did not fully examine the contract, which specifically provided for the condition required for the transferring of the ownership right. Plaintiff concluded that, because of this wrongful act of the registration office, a certification of ownership of the Peace and Friendship Palace was issued in the name of the defendant which therefore breached the plaintiff's ownership's right.

The action in this case is related to an administrative act because the act altered the ownership status of the particular immovable property, through state registration by an administrative agency, the State Registration Office. The argument, put forth by the plaintiff seller, was that the administrative agency failed to check whether all legal requirements were fulfilled, concerning the transfer of ownership through state registration, when acting upon the defendant's application for transfer of the registration of ownership.

The first instance court refused to accept the action, reasoning that the dispute was not in the administrative court's jurisdiction set forth in Article 3 paragraph 1.4 of the LPAC. The first instance court found that the issue in dispute did not arise out of, nor was it related to an administrative act, and concluded that the suit was based on contract. On appeal, the appellate court reversed the judgment of the lower court on the following grounds. The appellate court found the first instance court's examination, which stated that this action was related to an obligation arising from the contract, was in error and hence it was in contradiction with Article 3 paragraph 1.4 of *the LPAC*.

Dispute in the area of state registration of immovable property is often unclear in terms of jurisdiction. It is because that establishment of the right to own the immovable property is a question of private law in Mongolian law. However, in order verify real property ownership rights, which is essential to transactions involving the buying, selling, leasing, and renting of real property, the state registration process is necessary. This process is regulated by *the Law on the State Registration of Property Ownership Right and Other Property Related Rights* and the State Registration Office is obliged to adhere to a certain set of duties by this law.

In this case, the plaintiff asserted infringement of its right and interest, believed to be linked with this administrative agency's official duty. Plaintiff's claim is based on the argument that the State Registration Office fell short in carrying out its official duty to closely examine relevant documentation, when deciding on the application to transfer ownership in the state registration process. Then the only way to find out if the claim has grounds is to review the agency's action concerning the transfer of ownership registration.

According to Article 3 paragraph 1.5 of the LPAC,[403] action is counted as an administrative act.

Nonetheless, the Mongolian variety of the concept of administrative act is derived from the practice of Mongolian law, and as such, has a unique characteristic. Perhaps one good example of its uniqueness is evident in the Registration of Immovable Property case, where a registration is accepted as a legal act type of administrative act. The understanding of the concept of administrative act in Mongolia practice is one variation of the original German meaning. The background cause of this confusing state is how the element of imperativeness of administrative act is understood in Mongolian interpretation. Quite the opposite, as a general rule, the concept of administrative act is categorized as a legal act type and a sub-legal act type. However, this conceptualization has not been developed in Mongolian administrative law. Though registration by state has an element of legal effect, a registration is considered as a sub-legal act type of administrative act. In the original German theory, a sub-legal act type of administrative act has no such strong public authority (imperativeness as in Mongolian understanding) and it is not the same as a legal act type of administrative act. In other words, a sub-legal act type administrative act such as registration of immoveable property documented by the state only has the effect of a public certification to provide information for the public, but such registration does not carry full public authority. This is a common understanding of administrative act in Germany. In this case, it can be seen the surplus of administrative act in Mongolia.

The Gatsuurt Village Heating Plant Case[404]

The plaintiff "Jardzev" company asserted that the General Manager of Ulaanbaatar city breached its right to continue operating the newly built heating plant by stopping it from providing heat to the village, supplied by plaintiff's heating plant, based on the illegal request of the Governor of the Gatsuurt Satellite Village (Bayanzurkh District of Ulaanbaatar city). Instead, the General Manager demanded by an official letter issued on July 15, 1998, to provide heat to the village by operating the old heating plant, which was built in 1950 and has been prohibited from operating since 1993. The "Jardzev" Company explained that by reusing the old heating plant, the new heating plant had been rendered useless because there was no other building left in the village to obtain heating serves. The plaintiff Company obtained the ownership rights of a new

[403] 'Activity' means an action or a non-action according to the definition provided in Article 3.1.5 of the LPAC.

[404] Жардзэв ХХК ба Улаанбаатар хотын Ерөнхий менежер ["Jardzev" company v. General Manager of Ulaanbaatar City] [2004] Case no 33 (Mongolia|MN Нийслэлийн захиргааны хэргийн шүүх, November 4, 2004).

heating plant in 1991, through privatization, and began providing heating for the village based on the contract with the village administration according to the general plan for the village.

The first instance court accepted the action as it met with all requirements of administrative act, despite the defendant's argument which asserted that it did not contain any imperative order. The Court reasoned that the form of the decision was not important, but its effect on the plaintiff's rights and obligations were central. The decision of the court stated that the official letter in this case qualified as an administrative act under the LPAC. The relation between the plaintiff's rights and the effect of the administrative act on those rights was established in this case. Because the General Manager's decision to re-operate the old heating plant caused a termination of operation of the new heating plant, it was an infringement of the plaintiff company's exercise of its property rights and right to continue to operate its heating plant.

"Jardzev" Co.Ltd filed an action at the Capital City Administrative Court in 2004 at the newly established administrative court. This is one of the first cases to decide whether this type of decision qualifies as an administrative act, after the 2004 new administrative procedure law and the establishment of the administrative court. In this case, the question was when an administrative decision is in the form of an official letter and directed to another agency, can it qualify as an administrative act under the LPAC? The administrative decision in this case was in the form of an official letter[405] not in the form of an order which is understood as the usual form of an administrative act. In other words, it was not in an imperative form. By the definition of Article 3 paragraph 1.4 of the LPAC, the administrative act must have imperative power. The decision does not contain any order that obligates plaintiff to do something; however, by enabling the General Manager of Ulaanbaatar city to use the old heating plant, it effectively terminated the continued operation of plaintiff's plant.

An important lesson that can be learned from this interpretation of the elements, required for a finding that an administrative act occurred, reveals that traditional understanding influences Mongolian understandings of this new concept. Thus, even a civil dispute can be transformed into an administrative dispute and be decided through administrative litigation. From the General Manager's side, this decision was just an inward order for re-operation of its own facility to provide a heating for a village. While the General Manager's decision certainly had an impact on the normal operation of the new plant, the impact had no

[405] This is the form that is usually used when exchanging information, but it is not used to issue a binding order.

legal effect but de facto effect. The impact to the new plant by the General Manager's decision had a de facto effect, which means that the statutory law that governs this relation does not provide legal remedy or protection to third party or in this case plaintiff.

This is one of the first cases which required the interpretation of the new concept of administrative act provided by the LPAC. Therefore, it is an important representation of those cases which were decided during the early period in which administrative court procedure was introduced in Mongolia. In this case, the Mongolian administrative court clearly struggled with the complexity of interpreting and applying newly minted law. Specifically, the court was faced with the task of utilizing administrative law concepts it had not considered before. Consequently, it fundamentally misunderstood concept of legal effect. From this misunderstanding, the action taken by the court to accept the official letter for judicial review was incorrect. In traditional Japanese (and German) administrative law understanding, because the letter was addressed from one administrative agency to another, it constitutes an inside relationship between agencies.

Therefore, this action had no legal effect in terms of changing the legal status of the plaintiff directly. This is because the request was not directed to the company, which owned the new heating plant, so it did not directly affect their rights. Thus, this case shows that at the beginning of the administrative litigation process in 2004, the court, the party who brought the suit, and the defendant, all struggled to correctly understand the issue of 'legal effect.' This can be referred to as the 'triple mistake stage' of development of administrative case litigation in the Mongolian context.

Tax Office Case[406]

The District Tax Office (hereinafter the Tax Office) filed an action at the administrative court claiming that the Capital City Tax Dispute Commission erred when it accepted and revoked a tax assessment notice (tax act) which was issued by the Tax Office. The Tax Office conducted an inspection of a company within its authority and issued a tax act which obligated the company to pay a specified sum of tax. The company did not submit a complaint in accordance with the law and did not pay the owed tax that was determined by the tax act within the time set forth in the tax act. Therefore, the Tax Office filed an enforcement action at the civil court against the company. While the civil case was pending in procedure, the taxpayer company

[406] Дүүргийн татварын хэлтэс [District Tax Office v. Capital City Tax Dispute Commission] Case no 237 (Mongolia|MN Нийслэлийн захиргааны хэргийн шүүх).

submitted an appeal with the Tax Dispute Commission which resulted in a decision to revoke the tax act.

The legal issue in this case was whether a decree of the Tax Dispute Commission can be accepted as an administrative act when the Tax Office disagrees with the decision of the Tax Dispute Commission. The Capital City Administrative Court refused to accept the action submitted by the Tax Office based on Article 34 paragraph 1.1 of the LPAC.

According to Article 4 paragraph 2 of the LPAC, in order to qualify as an administrative act, the act must be directed outward to an individual which is not a lower level agency or an insider within the hierarchy of an agency. The Tax Dispute Commission's decree, which revoked the District Tax Office's act could not be accepted as an administrative act as described in Article 4 paragraph 2 of the LPAC. In addition, Article 1 and Article 12 of the LPAC provides that only a citizen or a legal entity is able to submit an action at administrative court. Thus, the Tax Office did not qualify as a plaintiff in this case.

In this case, the Mongolian administrative court's decision represents a typical interpretation of the legal concept of administrative act in terms of the LPAC. However, the definition of the LPAC was not the only relevant provision applied in this and other similar cases, but also the provision that defines who can bring the action at court and the issue of standing to be sued play important roles as well. The Tax Office clearly has a reasonable argument concerning the status of limitation and the jurisdictional issue within this case, which shows the existence of a dispute. However, the question is not whether or not a dispute exists but whether or not the dispute is resolvable by this court through administrative litigation. This leads to a discussion and explanation as to the purpose of administrative court procedure. The common understanding in Mongolian administrative law is that the administrative court serves as a venue for disposing of disputes between a private person and an administrative agency. Such dispute must arise out of a specific administrative agency’s decision or action.

The objective interest of the litigation is to protect and recover the rights and interest of the private party from the adverse effects resulting from the exercise of administrative authority. The purpose of administrative litigation is not to facilitate disputes among the agencies. In contrast, the issue in this case concerns a dispute between administrative agencies. The Tax Dispute Commission is a tribunal which was established for resolving disputes between taxpayers and the tax office. The Tax Office, as the lower administrative agency under the hierarchy of the Tax Dispute Commission, must obey the decision made by the higher positioned agency.

The relevancy of this case to the current research is the problem of categorization of administrative litigation. The first issue is to define the concept of judicial review and its conditions and seek clarification as to why it only relates to subjective litigation but is not relevant to objective litigation. However, prior to 2002 (when the LPAC introduced administrative litigation) there was no understanding of categorization of litigation as objective and subjective. Specifically, the questions concerning what is subjective litigation, what are the conditions of subjective litigation, and the differences between subjective litigation and objective litigation are unanswered and yet undiscovered.

In addition, this case represents the problem that is caused by the element of external effect of administrative act or as it is described in Article 4.2 of the LPAC,[407] that is the administrative act must be directed outward. The external effect requirement has caused confusion when the concept of administrative act is interpreted in concrete cases. Defining an administrative act is based on who filed the action, which has contributed to confusion regarding interpretation. For example, when the Tax Office as a lower level administrative agency files an action against the Tax Dispute Commission, it is understood as an inside dispute. Therefore, the decision of the Tax Dispute Commission does not qualify as an administrative act because an external effect is not present. Such an understanding of inside and outside has caused confusion. From this case, confusion on the division between inside effect and outside effect of administrative act was revealed in Mongolian context.

In general, if a particular administrative decision qualifies as an administrative act then it is an administrative act for every one and from every side. In other words, one particular decision cannot be an administrative act to one person and not administrative act to another. In Japanese administrative law, a decision rendered by the tax dispute commission qualifies as a relative administrative act, even with regards to the tax office and only if individual law allows, can it then be decided through objective litigation. Nevertheless, based on this case in Mongolian practice, a decision from the Tax Dispute Commission qualifies as an administrative act for the taxpayer company but not from the view point of a tax office.

The National Human Rights Commission (NHRC) case[408]

Mr. B used to work as a supervisor for the International Project Implementation Team. He was fired from

[407] Article 4.2 of the LPAC [Энэ хуулийн 4.1-д заасан байгууллагын зөвхөн гадагш /бусдаас/ дагаж мөрдөх буюу заавал биелүүлэх захиргааны акт нь захиргааны хэргийн шүүхэд хамаарна.] states that the Administrative Courts jurisdiction shall cover only binding, external administrative acts of bodies specified in Article 4.1 issued for public implementation.

[408] Иргэн Б ба Монгол Улсын хүний эрхийн үндэсний комиссын гишүүн П.Оюунчимэг, Мянганы

that position based on the demand from the National Human Rights Commission (NHRC). As a member of the NHRC, the commissioner issued a demand to Mr. B's employer, asserting that there had been an office harassment incident, in which Mr. B was involved. Article 19 paragraph 1 and 2 of the Law on the National Human Rights Commission, authorizes the Commissioner to, "issue demands and/or make recommendations during the course of exercise of his/her authorities in case of violations of human rights and freedom to relevant organizations in order to restore human rights and freedoms and eliminate the violations." Moreover, Article 17 paragraph 1.2 empowers the Commissioner to, "request the competent authorities or officials with regard to imposing administrative sanctions on officials who have violated human rights and freedoms."[409] Mr. B challenged the employer's action for firing him and filled an action against the NHRC at the administrative court. The action sought to invalidate the NHRC's demand. Mr. B asserted that his rights were violated because the NHRC's demand was allegedly the cause of his employer's decision to fire him.

The first instance court did not question plaintiff's action to bring the action related to the NHRC's demand. However, the second instance court concluded that the NHRC's demand did not qualify as an administrative act under the LPAC. The appellate court reasoned that the demand did not have the power to directly affect the plaintiff's rights because the NHRC's demand merely suggested that the employer act upon the demand. Therefore, the demand issued by the NHRC lacked the element of direct legal effect because it did not cause an alteration to the legal status of the plaintiff.

The Administrative Chamber of the Supreme Court terminated the appellate court's decision. The Court reasoned that the NHRC was a public legal entity which issued a demand that had legal effect. The Supreme Court explained that when the NHRC acted upon its authority to guarantee human rights prescribed in the Constitution, as well as International and domestic law, it had the power to issue a legally effective demand to affect third parties. Therefore, the demand the defendant issued in this case qualified as an administrative act.

The question in this case was whether the National Human Rights Commission's demand was an administrative act. The consequences of the issuance of the Commissioners' demand or recommendation is a central component of The Law on the National Human Rights Commission, which prescribes that entities,

сорилтын сангийн гүйцэтгэх захирлын үүрэг гүйцэтгэгч Б.Батбаатар нар [Mr.B v. Member of the National Human Rights Commission (NHRC)] Case no 040 (Mongolia|MN Улсын дээд шүүх).

[409] Article 17.1.2 of the Law on the National Human Rights Commission.

organizations, or officials must respond in writing on measures undertaken in regards to the demand. Such response must be issued within a week for demands, and within 30 days for recommendations. If relevant measures are taken, then the Commissioners may approach the Court or publish and report the demand or recommendation through the mass media. The demand or recommendation issued by the Commissioners will be enforced through the judicial process if it is not voluntarily obeyed by the recipient.

The Supreme Court decided this case on March 09, 2014. This recent example suggests that the scope of the concept of administrative act in Mongolia, which is derived from the original German concept, is expanding. If the action itself does not have self-imperative power, then it should not be considered an administrative act. This is because one of the decisive legal elements, in the determination of the existence of an administrative act, is to produce a final legal effect by itself not requiring additional approvals or finalization to be legally effective which binds the addressee. Yet, this case displays that even an indirect demand (i.e., one that is placed on the employer, not the employee, by the Commission) is considered an administrative act. Therefore, the concept of administrative act is clearly broadening in terms of Mongolian practice.

In this case, plaintiff could have filed an action in ordinary court against the employer's decision through civil procedure, which is more appropriate. Instead, the action was filed in the administrative court. Plaintiff requested that the administrative court review and assess the legality of the NHRC's demand, which is an expression of a legal consciousness of control type administrative procedure, similar to the Procuracy protest[410] in the soviet era. It is important to note that the dispute in this case was essentially a labor dispute, which is more appropriately decided through a civil law action. However, in Mongolian practice, plaintiff wanted to file the action in the administrative court; therefore, changing the direction of the litigation into the sphere of administrative procedure. This change of direction of procedure reveals the existence of a contemporary legal consciousness in Mongolia that still finds control type administrative procedure important and attractive in practice, despite the intention of the new statutory procedural law. It can be seen that the surplus of administrative act in this case too.

[410] The Procuracy protest was the legal instrument to exercise the general supervision over the administrative activity.

4.2.3. Conclusion on Administrative Act

Japan

At an institutional level, when defining the concept of administrative disposition, three aspects are crucial. Concept of administrative disposition consists of theory, institution, and practice. Elements of this triangle are interconnected and define the concept of administrative disposition. The concept of administrative act was initially imported from Germany to Japan, but then the theory further developed with other necessary secondary elements, such as the categorization of administrative act[411] as a legal act type and sub-legal act type. The theory was then confirmed through legal practice. In other words, theory, practice and institution (statutory law) evenly developed in Japan.

From the viewpoint of history, review of the leading Japanese cases in this chapter reveals that a deductive approach was used in Japanese legal practice in determining whether a particular administrative decision qualifies as an administrative disposition. The Deductive approach is a conceptual approach, which focuses more on abstract concepts, seeking abstract elements such as the theoretical elements that constitute an administrative disposition in a particular case. In other words, a full understanding of administrative disposition begins with abstract concepts, which can then be transformed into rule based elements, and eventually applied to individual cases. However, after the 2004 Amendment to the ACLA, Japanese practice became more flexible in terms of the determination of administrative disposition by using the inductive approach which begins from concrete factual case to seek abstract concepts. In other words, this approach uses particular case as beginning point of analyze whether there is a legal effect of administrative disposition to a plaintiff's rights and legal interests, and not begin with abstract concepts such as if provision of law contained a protection of his/her rights and legal interests or not.

Mongolia

In comparison, Mongolian statutory law provides a concrete definition for the concept of administrative act, so the deductive approach is difficult to use when determining administrative act in a particular case. This is due to path dependence[412] which has had a very strong influence on the practice of law in Mongolia, even

[411] 'Legal act type' of administrative act and 'Sub legal act type' of administrative act. This categorization derived from old German civil law theory borrowed to public law.

[412] "In broad terms, "path dependence" means that an outcome or decision is shaped in specific and systematic ways by the historical path leading to it." Oona A. Hathaway, "Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System" (2000): 104, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=239332 (accessed February 17, 2017).

though there is a concrete and theoretically correct institutional definition of administrative act in statutory law. For instance, in the Registration of Immovable Property case, the fundamental problem was that generally a civil law relation framework is utilized to settle real property ownership issues, but if an administrative agency intervenes in this relation then this civil law relation changes to an administrative law relation. Consequently, the settlement procedure for this dispute changes from civil to administrative litigation. In other words, parties to the case, especially the plaintiff, sought the settlement of this dispute through administrative litigation. In contrast, in Japan, it is easy to establish ownership through civil law and the role of administration is only to publicly certify the ownership.

In the case of Mongolia, in addition to the case that civil law can establish ownership, parties have always sought a guarantee from an administrative agency. This is because the intervention of an administrative agency is necessary to transfer the ownership of immoveable property; thus, such transfer requires not only certification but authorization from the relevant administrative agency. Ownership always requires an authorization type act. Civil law transactions are valid together with a relevant administrative agency's guarantee. In other words, the civil law cannot establish a one hundred percent ownership right. Because the state registration requirement is an administrative intervention in civil legal relations when a dispute occurs, it is subject to administrative litigation. In many cases, what are essentially civil law disputes transform into administrative law disputes, if an administrative act intervenes a civil law relation at the time of the dispute. Civil procedure then is superseded with administrative law procedure. This is an important characteristic that reflects main stream legal practice regarding civil and administrative procedure in Mongolia. Another notable characteristic is the surplus of administrative act which presented by the cases in this sub section.

An administrative disposition on appeal qualifies as an administrative disposition in Japanese law and practice. However, it cannot be attacked by the lower administrative agency at court which issued original administrative disposition unless individual statutory law expressly allows to do so (as an interagency action). Conversely, in Mongolian practice, it is analyzed from the point of elements of administrative act that requires outside effect therefore rejected as not qualifies as administrative act because it did not directed outside. This is because the background difference between subjective and objective litigation is not clear and not recognized in Mongolia. Traditionally, administrative litigation is control type for objective legality over administrative activity; therefore, the development of subjective right type

administrative litigation is weak. The Tax Office Case, discussed above, is an example of the kind of jurisdictional confusion that has occurred among Mongolian courts due to an administrative litigation system that is currently in a transformational state.

An additional example of such transformation can be seen in a case that was based on administrative inaction. Assume a case involved a contractual legal relation between a private person and an administrative agency. When the dispute occurred one of the parties (a private person) then appealed to a higher level agency asking for review. However, when the higher administrative agency refused to exercise administrative review, then the plaintiff filed an action in administrative court, asking for a declaration of illegality of inaction of the higher administrative agency. This is how a civil dispute changes into an administrative dispute in a post-soviet state, such as Mongolia. In another case[413], a NGO, "Center for Dairy Product Consumers" which focus on rights of consumers of dairy products applied for inspection of particular milk and when relevant agency did not act on the application it files an action for illegality of inaction.

To conclude, on the one hand, recently Japanese cases show belated progress concerning the development of inductive legal theory that allows for flexible outcomes of cases that relatively similar but different when careful looking into the issue of legal effect in which administrative disposition of the case. On the other hand, in Mongolia, firstly at the institutional level the concept of administrative act is defined in almost the same way as it is in Japanese law; however, secondly, the theory on administrative act is not well developed. Therefore, the concept of administrative act, in Mongolian practice, is very confusing because there is insufficient theoretical understanding and study devoted to its development. Moreover, the application of the concept of administrative act in Mongolian administrative law practice is problematic, because it has not been properly understood.

Through the enactment of the LPAC, Mongolia introduced the traditional German theory of administrative act, but the actual practice itself did not correlate with the original theory. Nevertheless, this does not mean that the acceptance and application of legal theory for administrative act was undermined. The problem exists in process of interpretation of law and theory to the particular cases. But this is not

[413] "Сүүн бүтээгдэхүүн хэрэглэгчийн төв" ТББ ба Мэргэжлийн хяналтын ерөнхий газар ["Center for Dairy Product Consumers" NGO v. State Inspection Agency] Case no 0134 (Mongolia|MN Захиргааны хэргийн давж заалдах шатны шүүх).

because Mongolia lacks the theory. Rather, this is a result of path dependence of soviet law and lack of fully understanding the new theory, and at least partly due, to the fact that Mongolia did not have enough legal practice to thoroughly develop the concept of administrative act, prior to introducing it through statutory law. Comparatively, Japan has a rich experience of law and theory concerning the concept of administrative disposition. This can be seen as it developed the theory through case law but not rush to define it in the statutory law. And an important lesson learned by Mongolia's experiences over a decade of practice is to develop and focus in the study on legal effect element of administrative acts, comparing with other administrative activities. Additionally, the role sharing between Administrative Litigation and Civil Procedure must be evaluated.

4.3. Standing

4.3.1. Institution

Japan

Standing for action for judicial review

In the Japanese case, there are two types of administrative litigation within the Administrative Case Litigation Act (ACLA). They include objective litigation and subjective litigation. The former entails citizen actions and interagency actions. The latter is prescribed in Article 3 and 4 of the ACLA as actions for the judicial review of the administrative dispositions and the public law-related actions. This Division of litigation forms is derived from the uniqueness of the stakes (the interest in question) upon which the different forms of litigation are based. In Japan, the standing requirement is only relevant to subjective litigation. The plaintiff's goal in initiating the litigation determines whether that goal is protected under laws and regulations.

The question of whether there is a remediable interest at stake is a core issue in determining the presence of standing. When discussing standing under the ACLA, there are two phases of institutional development in Japan. The First Phase is the action for the revocation of an administrative disposition, which is the main action in judicial review type litigation, and in principle it has been defined and regulated by the ACLA since 1962. Article 9 of the ACLA speaks generally on this issue. An action for the revocation of an administrative disposition is only allowed by a person who has a legal interest in doing so. A legal interest that is protected by laws and regulations is the key legal concept of the standing question in Japanese administrative litigation.

The ACLA does not define 'legal interest' and it is not customary in Japanese law to define legal concepts in statutory form. On the other hand, Japanese administrative law theory and practice associated with it, define 'legal interest'. The Theory of Interest[414], which is protected by law, is the basis for the first Phase of development for standing under Article 9, paragraph 1 of the ACLA. According to this theory (as the prevailing main theory on the subject), usually the person who has a legal interest is the addressee of the administrative disposition. Therefore, for the addressee of the administrative disposition, it is not difficult to establish standing when seeking revocation. Because the administrative disposition (the act) must be pursuant to the law, the legal norm serves as the base of the administrative disposition. The legal norm, which is the basis of said administrative disposition, contains requirements (conditions specified by law), including a legal effect that is a result of the administrative disposition. And this legal effect is directed to the addressee, who must be bound by this, as a result the addressee has a direct legal interest (his/her right and obligation to be altered by) affected by the administrative disposition. Legal (interest) means only the legal requirements and the effect of the base (of Administrative Disposition) legal norm can carry concrete legal effect to the addressee; therefore, the addressee who is directly affected by this legal requirement (or effect as to establish obligation etc.) can establish a legal interest in order to assert a complaint against it (Administrative Disposition). This is the original Theory of Interest which is protected by law and which served as a background theoretical basis for Article 9 paragraph1 of the ACLA.

However, by this understanding a third party who is not an addressee of an administrative disposition is usually considered to have no legal interest. This is because the legal norm, which served as the basis of the administrative disposition, does not contain legal requirements or have a legal effect on the third party. Consistent with past Japanese administrative law scholarship and practice, there is a recognition that even though an administrative disposition may effect a third party, this effect is not individualized (reflective interest=public interest) but de facto; therefore, it is not a legal interest (not a concrete legally protected interest). Hence, traditionally speaking, a third party could not have a legal interest against an administrative disposition. Consequently, it was very difficult to establish standing for the third party under Article 9 paragraph (1) of the ACLA.

The Second Phase involves the amendment of the ACLA in 2004, when Article 9 paragraph (2) was

[414] Information on concept of Japanese standing were discussed during seminars with Professor Katsuya Ichihashi during the course of research, and additional English translations provided by Professor Rie Yasuda.

inserted as an addition to the standing regulation, concerning an action for the revocation of an administrative disposition. In addition to the first phase of institutional development, the inclusion of Article 9 paragraph (2) of the ACLA is a result of both the progressive Theory of Interest, which includes a remedy deemed worthy by judge, and from progressive practice. The traditional view of legal interest and the new theory combined to define the second phase of Japanese standing requirements at the institutional level. The new theory (which was supported by a minority initially) focused[415] on third party standing by freeing the concept of interest from its dependency on statutory law or legal norms into the hands of court determination on a case by case basis. Therefore, if a court finds that there is an interest in relation to a third party and that there is a remedy available (such as life, health of person in danger where an important interest in question, but still very limited scope) then a third party has standing.

The amendment to the ACLA in 2004, Article 9 paragraph (2), clarifies who can file an action for revocation of an administrative disposition, which includes not only the person whom the administrative disposition is addressed, but it also includes a third party who can fulfill the requirements set forth in this paragraph[416]. Article 9 paragraph (1) of the ACLA means that standing of the addressee is decided whether he/she has legal interest included in the laws and regulations, which gives a basis for the particular administrative disposition at issue. Additionally, the second phase expanded the traditional interpretation of standing beyond not only the law which served as a basis for the administrative disposition but also with regard to other relevant laws. Notably, standing of a third party is not limited by the description of laws and regulations that serve as a basis for the administrative disposition.

Article 9 paragraph (2) of the ACLA sets out two important requirements for determining standing for a third party (any person who is other than addressee of an administrative disposition). Firstly, the court is required to focus on the purposes and objectives of the laws and regulations which give a basis for the administrative disposition in addition to language of the provisions. Secondly, it requires the court to take into consideration the content and nature of the interest that should be taken into consideration in making the administrative disposition. The inclusion of this provision demonstrates that when determining standing for a third party, the court must consider the content and nature of the interest that would be harmed if the administrative disposition were made in violation of the laws and regulations which give a basis for the

[415] ("Seminars with Professor Ichihashi").
[416] Art. 9 (2) ACLA [Administrative Case Litigation Act], 139 (1962).

administrative disposition.

Furthermore, Article 9 paragraph (2) broadens the scope of standing by empowering the court to examine any related laws and regulations which share a common objective with the laws and regulations that provide a basis for the administrative disposition in a matter. It must include those laws and regulations that should be taken into consideration in making the administrative disposition. However, the most important and advanced regulation in Article 9 paragraph (2) of the ACLA, after 2004, is the provision which requires[417] the court to consider the content and nature of said interest "in what manner and to what extent such interest would be harmed." Since this part of the 2004 Amendment takes a subjective approach to the determination of standing, it is emancipated from the objective approach of determination that depends exclusively on the language (including common objective) of statutory laws (conservative theory).

Active Usage of Public Law-Related action

Public Law-Related Action

Prescribed in Article 4 of the ACLA, the public law related action[418] is a distinct type of subjective litigation which differs from the judicial review type action (referred to as Article 3 actions) from the viewpoint of standing. Article 4 of the ACLA contains two types of public law-related actions, which include: (1) a type of action relating to an administrative disposition that confirms or creates a legal relationship between parties, and (2) an action for a declaratory judgment concerning a legal relationship under public law and any other action relating to a legal relationship under public law.

The formal public law-related action described in category (1) requires that the action is in relation to the existence of an administrative disposition. It requests the court's confirmation of the illegality of an administrative disposition. The public law-related action in category (2) is a declaration of the existence of a legal relation, which is known as an essential public law-related action. However, the essential public law-related action does not require or relate to the existence of an administrative disposition. A typical public law-related action is declaratory judgment regarding a legal relation under public law. This type of action

[417] ("Seminars with Professor Ichihashi").

[418] Origin of public law-related action belongs to the actions concerning public legal relations which stated in Article 1 of the Law for Special Regulations concerning the Procedure of Administrative Litigations (Law no. 81, July 1, 1948, hereinafter Special Law). Article 1 of the Special Law allows two types of actions whereas (1) the action for annulment or alteration of illegal disposition which is equivalent to action for revocation of administrative disposition provided by the Article 3 Para 2 of the ACLA on the other hand (2) the actions concerning public legal relation which is also equivalent to public law-related action provided by the Article 4 of the ACLA. Therefore, Article 4 type of action in the ACLA is based on Article 1 of the Special Law.

does not attack an administrative disposition, instead it seeks to confirm party's status in the legal relation. Therefore, this type of action is usually effective against administrative guidance, administrative contract and administrative planning etc., except for administrative disposition.

Interest of Litigation as requirement for Public Law-Related Action

All legal disputes are ensured to have access to the court according to Article 32 of the Constitution of Japan. Legal disputes in administrative litigation occur among (1) private parties who have a legal interest or subjective right against (2) public authority. A private person who is affected by the legal dispute must choose a remedy for the alleged infringement of his/her right and interest. Structure of remedy in Japanese administrative law consists[419] of two tiers.

First, the original type of action[420] is an action for declaratory judgment and this action is used as a basic remedy. Every legal dispute can be resolved through a declaratory judgment. For instance, the declaratory judgment may seek to confirm a right or interest of the plaintiff or it may ask to confirm that plaintiff has no obligation. It is a useful and inclusive action in Japan. However, it may not be so effective in terms of providing a remedy because it only declares an administrative activity illegal or confirms an individual's rights and legal interests but does not allow for the recovery for the violation of rights and legal interests directly.

However, the conservative theory of Initial Judgment does not recognize the Public Law-Related Action as a basic remedy. It is based on the concept that in a public law relation, there must be an administrative disposition (as initial judgment (decision) to address the dispute) which gives rise to a legal effect directed outward to an individual. Only then can an individual, who has been affected by this initial judgment (administrative disposition) file an action against its legal effect. If there is no administrative disposition then there is nothing to cause a legal effect. Thus, there is nothing to attack and no revocation or removal of legal effect which adversely affects the individual. The initial judgment theory requires the pre-existence of an administrative disposition, which takes the form of an initial decision from an administration that is directed to an individual. Therefore, if no administrative disposition exists then a subsequent legal action will be rejected. Consequently, the number of Article 4 type cases asserted has been very limited.

Second, if an Article 4 type action is not effective for a particular case then a special type of action

[419] ("Seminars with Professor Ichihashi").
[420] This action does require to challenge an existing administrative disposition.

by Article 3 paragraph 2 (action for revocation of administrative disposition) may be suitable. Vis-à-vis, if the requirements on statute of limitations of judicial review has expired for an Article 3 type action then an Article 4 type action is available, regardless of the extent of its effectiveness. The most effective action against administrative disposition is an Article 3 type action because it has a more direct and a stronger effect in terms of remedy. This is because an Article 3 type action does more than simply declare that the administrative activity is illegal; it has the power to revoke the administrative disposition (revocation action).

However, for this type of action to be accepted it must meet very strict requirements and conditions. Moreover, before the 2004 amendment, actions for revocation were not readily accepted. An action for revocation has various requirements, including the existence of an administrative disposition and proof of standing to bring the action. Furthermore, an Article 3 type action cannot be filed in cases in which the administrative disposition involves administrative planning, administrative guidance, or an administrative contract because it does not satisfy that requirement of the existence of an administrative disposition. Hence, the court will reject actions of this kind at the entrance level.

Nevertheless, not all subjective administrative litigation under the ACLA requires strict standing. While an Article 3 action requires plaintiff to prove a legal interest exists, in order to qualify as an Article 3 action (for revocation of administrative disposition), it must also satisfy requirements set forth in Article 9 of the ACLA. On the other hand, the legal interest requirement that is prescribed in Article 9 does not apply to Article 4 type actions. In other words, Article 4 has no relation to article 9 of the ACLA. Consequently, a public law-related action does not include a standing requirement.

An action for declaratory judgment only requires interest of litigation and plaintiff needs to assert that his/her interest has been infringed. In other words, it does not require a 'legal' interest but only a remediable[421] interest. The concept of interest of litigation serves as a threshold requirement that must be met when asserting a public law-related action. It includes the three basic elements: the appropriateness of the selection of action (from among Article 3 type or Article 4 type), the appropriateness of object of action (for Article 4 type of action is legal relation (in present time)) and positive claim[422] for confirmation, and the interest of immediate fixed (ripeness, danger and fear of affect and realness of dispute).

[421] Remedy-deserved interest (or remedy worth interest), German law also just requires 43 (1): if the plaintiff has a justified interest in the establishment being made soon (action for a declaratory judgment). Verwaltungsgerichtsordnung (VwGO), 686 (Federal Law Gazette 1991).

[422] German Theory, action for confirmation and protection of own right. ("Seminars with Professor Ichihashi").

Mongolia

Standing provided by the general law

Generally speaking, under Mongolian law, standing requirements are determined based on the threshold question of whether a plaintiff has a subjective right to bring an action. Therefore, when an administrative court receives an action, the court must first examine whether the administrative act in question has direct consequences on plaintiff's subjective right. Mongolian statutory law has not in the past contained, nor does it presently adhere to, precise standing requirements. Therefore, it is problematic to say exactly what constitutes standing under Mongolian statutory law.

The question regarding who has standing to bring a legal action to challenge an administrative act needs to be analyzed from two different approaches. From the formalism approach, Article 12 of the LPAC[423] allows: (1) citizens,[424] and (2) legal entities,[425] to file an action against[426] an administrative act in administrative court. Article 12 of the LPAC only answers to the question of when an action can be filed. In other words, it does not regulate the substantive matter of the standing requirement. For instance, it does not specify how to determine who has standing, but only determines the timing of filing an action. Because Article 12, which is consistent with the formalism approach, is insufficient in determining substantively who has standing under Mongolian administrative law, another approach is necessary.

While formalism adheres to a (=listing) approach, the substantive (=generalization) approach is more decisive in determining whether standing is present. The substantive approach examines: (1) the existence of his/her infringed rights and legal interest (2) which are individually and concretely protected by the law. Article 1.1 of the LPAC contains core regulations on the issue of standing in administrative litigation. Further analysis based on the following Articles of the LPAC play a key role in determining the presence of

[423] Захиргааны Хэрэг Хянан Шийдвэрлэх Тухай, art. 12 (2002).

[424] Article 3 para 1.3 of the Law defines citizen as a citizen of Mongolia, foreign citizen and stateless person.

[425] However, the Law does not provide definition of "legal entity". In Civil law fixed business and non-profit legal entities in general. *Law on Property of State and Local Authority* classified state legal entities based on the property right. It says "State can establish an entity that is solely based on its own property in order to carry out its duty and pursue society's need. These state property entities can be divided by 1/government organization, public office and 2/state property industry based on the property right".

[426] In addition, the LPAC provided counter-action against plaintiff by defendant (administrative agency). A counteraction by an administrative agency was allowed by the LPAC. Article 39 paragraph 1 of the LPAC allowed the defendant, which is an administrative agency, to file a counteraction during the ongoing administrative litigation against a plaintiff, but only if it is related to and within the scope of the original dispute. In 2009, the Administrative Chamber of the Supreme Court published the first edition of Commentary for the LPAC. This work is done with support of Hanns-Seidel Foundation and even some German professors took part in writing. Unofficial Commentary for LPAC 2009, (amended in 2012). p.156.

standing.

Article 1.1 of the LPAC speaks to the purpose of the law as it is to regulate court procedure concerning an action filed to seek protection of one's own rights and interests. Article 3.1.7 of the LPAC specified such action as a petition submitted to the administrative court by a citizen or legal entity, for the protection of its infringed rights and legitimate interests, caused by an illegal administrative act. Thus, both Article 1 paragraph 1 and Article 3 paragraph 1.7 are the most important provisions regarding the determination of standing at the statutory law level.

Derived from this definition of law and the adopted concepts of subjective right from German[427] theory, standing is available only to those whose rights and legal interests have been breached by the administrative act in question. Though the LPAC does not speak explicitly on the issue of subjective right, customarily, filing an action by those who are litigating on behalf of themselves, automatically establishes standing to bring a legal action in Mongolia. Article 34.1.1 of the LPAC requires a court to reject an action on the basis of a failure to pursue its own (subjective) rights and interests. In addition, Paragraph 1.5 in the same Article prohibits the court from accepting an action if it is filed by a person who has no right to file the claim. Article 34 Para 1.5 was introduced by the 2010 amendment to the LPAC.

Standing provided by Individual Law

The LPAC can be regarded as a general legal source. Besides the LPAC, there are individual substantive laws that contain specific provisions which grant the right to file an action to the court regarding the administrative act. For instance, Article 28 paragraph 1 of the Law on Advertisement provides that a intellectual property inspector's action can be challenged in court. Moreover, some laws provided a right for administrative organs to file a claim in court. The Law on Competition, for example, gives the competition authority a right to file a claim against central and local authorities regarding their decisions affecting fair competition and protection of consumer rights matters. A similar provision is included in the Law on the Protection of Consumer Rights.

If the action is objective litigation, not subjective litigation, then standing should not be an issue. However, this creates confusion in Mongolian legal practice regading standing and objective litigation. It is uncertain if the individual law grants the right to file an action. The requirements for standing, provided by

[427] In addition, German does not have the provision of standing in Code of Administrative Court Procedure. Case law decide standing.

the LPAC, still need to be met by the plaintiff. In this regard, the relationship concerning the right to submit an action between individual law and the LPAC, reveals that the confusion is based on a lack of understanding of the categorization of litigation as objective and subjective.

Such a categorization of objective and subjective litigation is not recognized in Mongolian law and theory, which causes great confusion. If the action is subjective litigation, the decisive point for the presence of standing is the presence of his/her infringed rights and legal interests which are protected by specific laws individually and concretely. Thus, this must be checked thoroughly in relation to the possible adverse impact of the administrative act in question and plaintiff's right that is protected by the law. However, if the right to file an action is given by the specific law, it is more likely going to be objective litigation. Therefore, the question of standing is no longer at issue. Moreover, the Commentary[428] on the LPAC (later amended in 2012) stated that the concept of subjective right is the limitation on the subjects who can file a law suit at administrative court, and that a citizen or a legal entity can file a law suit only on behalf of itself when they believe that their legal right is breached by administrative action.

Conclusion

Japan

While Article 3 and Article 4 type actions were traditionally very clearly divided and distinctive in Japan, they now share the same purpose more and more (the protection of subjective rights), thus the traditional distinction between them has diminished because both have developed in the direction for remedy of subjective right. Formerly, even though Article 3 type actions were an effective means for securing a remedy, they were very difficult to obtain. This was because of the initial conditions required for litigation under Article 3, such as the administrative disposition requirement. Therefore, until 2004, Japanese administrative litigation mainly adhered to objective legality (control type) as a purpose of litigation. Since 2004 up to the present, even though Article 3 actions still require the existence of an administrative disposition formally, the standing requirement has been relaxed, thus Japanese administrative litigation is turning gradually in the direction of protection of subjective right type.

On the other hand, the most important aspect of an Article 4 type action is legal relation. An Article 4 type action seeks to confirm a right or interest of plaintiff or it asks to confirm that plaintiff has no

[428] See footnote 426.

obligation in protection of subjective right. Traditionally in Japan, administrative law theory considers that a dispute arises only after the administration initially takes some action. But if it is too difficult for an individual to file an action, because of the severe requirements concerning initial conditions for asserting a judicial review type action, then there would seem to be no remedy available. However, an Article 4 type action may be available for obtaining a remedy as well. Parallel actions (Article 16 of the ACLA) can be filled and the court will decide on which action is more suitable for a remedy, this is a contemporary tendency in Japanese administrative litigation.

After the 2004 amendment of the ACLA, in addition to relaxing the strong requirements for Article 3 type actions, Article 4 type actions became more actively used in administrative litigation. The focus of the action changed from former main object as administrative disposition to legal relation. Therefore, more active use of public law-related action is caused by the change from mainly supervision of legality (focused on administrative act) and sub-remedy based litigation to mainly remedy based (sub-supervision) litigation based on Article 4.

Mongolia

In general statutory law, Article 1.1, and Article 3.1.7 of the LPAC indirectly defines the standing requirements from the viewpoint of subjective right. Analyzed logically from these dispersed provisions of the LPAC, the concept of standing can be ascertained in institutional level of Mongolian administrative litigation. The concept of a subjective right is introduced when filing an action, and it is only allowed for those who are litigating on behalf of their right and interest.

However, beside the LPAC there are individual substantive laws that contain specific provisions which grant the right to file an action to the court regarding an administrative act. Therefore, in practice, this expresses the confusion that considers standing for objective litigation. The relationship of the right to submit an action under various individual laws and under the LPAC, reveals the confusion based on the standing requirement from the lack of understandings of the categorization of litigation as objective and subjective.

The LPAC did not entirely depend[429] only on actions related with an administrative act. In comparison, an Article 4 type action in Japanese law and an action related to article 70.2.2[430] of the LPAC

[429] For instance, initial Article 32.5.4 before the amendment in 2010 enabled to file an action for declaration of illegality of inaction. This action for illegality of inaction was not specifically required to be filed against administrative act.

[430] Because there was no concrete provisions on types of action in the LPAC, it is only feasible to determine the types of actions in relation to the types of judgments prescribed in the Article 70.2 of the LPAC. [70.2.2.эрх

are both derived from the German model.[431] However, in the LPAC, there is no distinctive characteristics set worth in relation to action for revocation and action for declaration of existence or non-existence of legal relationship as the standing requirement. Public law related action or anything equivalent to it was not included in Article 32.5 (before 2010 amendment), but Article 70.2.2 (types of judgment) specified that the court could grant a declaratory judgment concerning the existence or non-existence of a legal relationship.

According to the research data which focused on cases decided by the Capital City Administrative Court[432] between 2004 to the first half of 2007, among all 284 judgments which were in favor of plaintiff, there were only 4 cases[433] decided according to Article 70.2.2 (judgment on declaration of existence or non-existence of legal relation) of the LPAC. Another article[434] confirms that between 2004 and 2010 there were only 5 cases decided in accordance with Article 70.2.2 of the LPAC. It is true that, to date, there is no precise theoretical study and practical experience regarding actions for declaration concerning the existence or non-existence of a legal relationship.[435] Later practice reveals that some cases[436] have been decided through actions filed with the court for declaration of existence or non-existence of legal relationship.

In comparison, while Article 10 Para (1) of the Japanese ACLA is not a condition concerning an initial requirement of litigation, it restricts[437] filing for a revocation of administrative disposition, by explicitly prohibiting plaintiffs from initiating litigation based on an alleged breach of law which is irrelevant to their legal interests. This means that even in the case where the law is breached, if the person filing the action does not specify his/her adversely affected legal interest or establish the feasible adverse effect in connection with his/her legal interest, the action is not allowed on the grounds of lack of standing for

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зүйн харилцаа байгаа эсэхийг тогтоож хүлээн зөвшөөрөх]

431 Verwaltungsgerichtsordnung (VwGO), 686 § 43 (Federal Law Gazette 1991).

432 It is the one of the 21 first instance administrative court but busiest court in terms of case number, in fact form the statistics this court decided 50.1 percent of all cases received in first instance courts between 2004 and 2013. Overview of the cases decided in administrative courts 2004-2014, The Supreme Court of Mongolia, 2014, p11.

433 Dondov, "Захиргааны хууль бус шийдвэрийн улмаас хохирсон хохирогчийн эрхийн хэрэгжилтийн төлөв байдал," 78.

434 Atartsetseg Lkhundev, "Selected issues on litigation of an action declaration of existence or non-existence of legal relationship," *The Judicial Power* 2 (2014): 27.

435 Tsogt Tsend, "Монгол Улсын захиргааны хэргийн шүүхийн эрх зүйн орчин, дүн шинжилгээ" [Legal Environment and Analysis of Administrative Court in Mongolia], *The National Legal Institute of Mongolia Law Review* 2016/03 (58) (2016).

436 "Түүчээ тэрэг" ХХК ба Ашигт малтмалын газрын Кадастрын хэлтэс [Tuuchee tereg Company v. Mineral Authority] Case no 0380 (Mongolia|MN Захиргааны хэргийн анхан шатны 20 дугаар шүүх). "Эм Си Си Си корпорэйшн" ХХК ба Барилга, хот байгуулалтын яам болон Барилгын хөгжлийн төв Case no 448 (Mongolia|MN Захиргааны хэргийн давж заалдах шатны шүүх).

437 Even it is not the initial requirement for standing but when deciding merit it may be used for dismissal.

revocation of administrative disposition. The next section compares and analyzes Japanese and Mongolian practice from the viewpoint of the above mentioned different characteristics among these two jurisdictions.

4.3.2. Practice

Japanese Practice on Standing

In the following cases, standing required for an action for revocation of an administrative disposition and public law-related action is analyzed. The standing question is clear in cases where the plaintiff is the addressee whom the administrative disposition is directed. Cases decided right after the adoption of the ACLA differ from the later cases, especially during the period from the time of the 2004 amendment to the enactment of the ACLA. Traditionally, filing an action against an administrative disposition is limited[438] to the person who has a legal interest.

However, it is a different issue if a party is a third party who is not named in the administrative disposition but wants to challenge it. After the adoption of the ACLA in 1962, it was common for courts to find that a party in this position did not have standing. In Japanese practice, this scenario is referred to as *a third party standing question*. Under Japanese law, administrative dispositions are always based on law and regulation, which at that time did not include a third party's interest in its scope of protection. Therefore, before the 2004 Amendment of the ACLA, Japanese administrative law practice did not recognize third party standing. This was the common practice.

The Odakyu Line case[439]

After the ACLA was amended in 2004, the Japanese Supreme Court considered the third party standing

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[438] As mentioned footnote 400, The Land Readjustment Project Case is an example to recipients of administrative disposition deemed to have standing therefore allowed to file an action without requiring the proof of standing. Facts: The municipal mayor planned to conduct the Seien Wide-Area City Planning Project, Land Readjustment Project for the Area around Kamijima Station. And with authorization from the prefectural governor the defendant made a decision to adopt the project plan for the Land Readjustment Project. The plaintiffs were the owners of land within the implementation zone for the Land Readjustment Project, and they sought revocation of the decision to adopt the project plan, alleging that the Land Readjustment Project did not conform to the statutory purpose of the project, i.e. developing and improving public facilities and promoting the use of residential land.
In this case, the Supreme Court did not specifically discuss the standing question because it assumed that "the owners of land within the implementation zone" had standing to bring an action for the revocation of the administrative disposition. Because the owners of the land within the implementation zone were addressees of the administrative project plan, they were not considered third parties. This case is not a standing case (In Japanese practice, this is not considered a standing case, instead it is usually seen as an administrative disposition matter); however, for comparative purposes this case represents a typical case of standing of an addressee consistent with Japanese legal practice. Case to seek revocation of an administrative disposition, 2005 (Gyo-Hi) 397, (2008) Minshu Vol. 62, No. 8 (Supreme Court of Japan, September 10, 2008).
http://www.courts.go.jp/app/hanrei_en/detail?id=968

[439] Case to revoke project approval of consecutive grade separation for the Odakyu Line, and seek revocation of

question which eventually led to a turning point on the issue in the practice. One leading case on the matter of third party standing is the Odakyu Line case.

On May 19, 1994, the Minister of Construction granted the Tokyo Metropolitan Government, the approval of the city planning project which intended to develop a consecutive grade separation of the Odakyu Odawara Line for the section from around Kitami Station to around Umegaoka Station. Plaintiffs lived in the vicinity of the project site of the Railroad Project. The Plaintiffs alleged that the Railroad Project Approval was illegal, and therefore requested that the Minister of Construction revoke the approval. The Relevant Areas for the Railroad Project are where a project is likely to have a serious environmental impact if implemented, and the plaintiffs were people who lived in the Relevant Areas. The issue in the Odakyu Line case was whether people living in the vicinity of the project site of the Railroad Project, within the relevant areas, had standing to sue for revocation of the approval of the project.

The Tokyo High court, Judgment of December 18, 2003 determined that inhabitants living in the vicinity of the project site of a city planning project, who did not own real estate within the project site, had no grounds to construe that their right or legally-protected interest had been injured or was likely to be necessarily injured by reason of the project approval. On appeal, the Supreme Court recognized that the purpose of the Environmental Pollution Control Law and the City Planning Law was to protect the health of the people and preserve their living environment by requiring an approved environmental pollution control program for city planning. The court noted that Article 13 paragraph 1 of the City Planning Law required that a city plan shall be in conformity with an environmental pollution control program. The court further stated that a city plan must be adopted or changed according to the purpose of the provisions of the Environmental Pollution Control Law concerning environmental pollution control programs. The court stated that for people who live near a planned project, it is important that the project is not harmful to their well-being in regard to noise, vibration, etc. However, the court determined that a cause of action, arising from such projects, would be limited to the inhabitants living within a certain range of the vicinity of the project site. The court further opined that if a city planning project is approved based on a city plan that has been adopted or changed in violation of the City Planning Law or other related laws and regulations, it can be assumed that if inhabitants live in the vicinity of the project site they will suffer ongoing damage. If such

other related project approvals, 2004 (Gyo-Hi) 114, (2005) Minshu Vol. 59, No. 10 (Supreme Court of Japan, December 07, 2005).

damage continues repeatedly and continuously, it could have a serious impact on their health or living environment.

The court ultimately ruled that, inhabitants living in "Relevant Areas" within the vicinity of the project site of a city planning project should have standing to sue for revocation of the approval of the project. The plaintiffs lived in an area that was considered a "relevant area" by the Railroad Project. The court deemed "Relevant Areas" to mean areas in which there is a likelihood of serious environmental impact that would occur if the project was implemented. The court decided that inhabitants who not only own real estate, but also those who live in that area, have standing regarding this case. Therefore, the Odakyu Line case broadened the scope and/or nature of protected right/interest by granting legal protection based not only on real property ownership, but also to the living environment, as equivalent interest to other interests such as life, physical safety, health and living environment.

Article 9 paragraph (2) of the ACLA includes two important characteristics: first, the court is required to focus on the purposes and objectives of the laws and regulations; and second, to take into consideration the content and nature of the interest that should be contemplated in making the administrative disposition. Initially, before the 2004 amendment, it was very important to focus on laws and regulations when determining if the necessary legal interest was present for standing purposes. However, this case clearly represents an important turning point in Japanese practice because it stands for the proposition that third party standing is freed from the concept of legal interest as granted only from statutory law (objective legality approach). Instead, if a court finds that a third party has an interest that is individual and in the protection of life, health of the person, and heavy damage to the living environment standing, will be granted to the third party (subjective right approach). In other words, the determination of standing, especially for a third party, departed from only accepting the pure legal effect to a de facto effect on a case by case basis.

Mongolian Practice on Standing

In practice, the question of whether a party has standing to assert a claim in administrative court in Mongolia is closely related to the "subjective right"[440] issue which is derived from the German concept[441] of legal standing.[442] Mongolian administrative court judges analyze every action in terms of whether there is direct

[440] Commentary for Law on Procedure for Administrative Cases 2009, (amended in 2012). Page 18 (21). In Mongolian "*Субьектив эрх*", see footnote 426.
[441] Art. 42(2) Verwaltungsverfahrensgesetz [Administrative Procedure Act], 718 (Federal Law Gazette 1976).
[442] Verwaltungsgerichtsordnung (VwGO), 686 (Federal Law Gazette 1991).

subjective (personal/individual) impact on the person or entity filing the action. In other words, this effect must be personal to the person who brought the action and the injury/affect must be inseparable from the plaintiff itself (concept of subjective right). However, in the past, there was no definition of standing in statutory law, nor was there a generally agreed or understood definition of what constituted the standing requirement. The general concept has been understood to some degree, but when it comes to concrete cases, there were various opinions concerning its meaning among lawyers and judges. The following are the relevant Mongolian cases on this issue.

Bayan Mongol Apartment Case[443]

A person who worked as the Head of the State Building Inspection Commission, responsible for determining whether new buildings meet the requirements for permanent usage, filed an action at the administrative court against decisions of the Capital City Governor, City Council, and City Land Office. The plaintiff, who worked as a head of the State Building Inspection Commission for Bayan Mongol Apartment Complex, alleged that the Governor's decision to grant a land license for the construction of an apartment complex breached laws and regulations, when the license was granted for land which was within a restricted area for special protection purposes according to the General Plan for Ulaanbaatar City.

In accordance with the Governor's decision for land usage, for the apartment complex that was planned to be built on this site, the City Council issued a decision which ordered 6 water-sources to be transferred to different locations which were originally in this area. The person who worked as the head of the State Building Inspection Commission for this apartment complex believed that the relocation of the water-source would cause serious harm to the public interest. The plaintiff claimed that because he had an official duty, as a person who was appointed as the head of the State Building Inspection Commission for this particular building, he was compelled to file an action seeking a correction of administrative acts conducted by an agency, which he alleged, did not conform to the law.

The court decided that the LPAC only allows an action to be brought by a person who asserts personal or individual injury from an administrative act. Therefore, the court could not accept plaintiff's action based on Article 3 Paragraph 1.7 of the LPAC, which defines "action" as "a petition submitted to the

[443] О.Лхагвадоржийн нэхэмжлэлтэй Баянмонгол хороололын газрын зөвшөөрөлтэй холбоотой хэрэг [O.Lkhagvadorj v. Governor of Ulaanbaatar city, City Land Office, and City Council] (Mongolia|MN Нийслэлийн захиргааны хэргийн шүүх).

administrative court by a citizen or legal entity for the protection of its infringed rights and legitimate interests caused by an illegal administrative act." The court reasoned that an individual can only file an action in order to get protection from the wrongful administrative act if the act breached his/her rights. In other words, a person who has been appointed to uphold his/her duty as the head of the State Inspection Commission cannot file an action in an official capacity in furtherance of his/her duty, in relation to a particular building, but must only file if his/her own rights and legal interest have been affected. Therefore, it is not possible for the plaintiff in this case to file an action on the behalf of the public. In the present case, the action was filled by the plaintiff in his authority as the Head of the State Inspection Commission, thus the court denied the plaintiff's action. This decision is consistent with Article 34 paragraph 1.1 and 1.5 of the LPAC which provides that if the action does not belong to the jurisdiction of the administrative litigation/court and the action is filed an individual who does not have the right to file the action, the action will not be accepted.

The action in this case was filed by a person but not in the pursuance of his/her rights and interests. As was explained in the action, the legal concern or interest in this claim was a correction of administrative acts conducted by an agency which allegedly did not conform to the law. Therefore, the plaintiff's goal in initiating this litigation was not consistent with the purpose of administrative litigation under Mongolian law. The person who filed the action failed to present a concrete link between the administrative act and an adverse effect upon the plaintiff's individual rights and interests. Instead, the action sought to eliminate an error in administrative activity which contradicted the law for the protection of rights and interests of the general public.

The answer to the question of why the head of a governmental commission filed an action in this case presents a fundamental phenomenon in Mongolian administrative law. It reveals a failure in terms of a correct understanding of who has standing under the new administrative law in Mongolia. For instance, in this case plaintiff’s legal consciousness is very clear as it seeks toward control type litigation, which was a core instrument during the soviet era, and one which remains favorable. Such favorability is evident in this case. Even though the issuance of the land license was out of plaintiff’s official competence, by filing an action to the court, plaintiff apparently attempted to signal the alleged illegality of the administrative activity. Because of the persistence of path dependence from the soviet experience, even after Mongolia’s statehood change from socialist to post-socialist status, it is likely that the plaintiff believed that he had a duty to always

inform relevant government officials or to the administrative court about illegality concerning administrative activity.

Land License for Korean Citizen Case[444]

A Korean citizen purchased a 428 square meter piece of immovable property (a building) from a Mongolian citizen. The property was located within a 1003 square meter parcel of land that the Mongolian citizen had a right of possession. The new owner of the property, a Korean citizen, applied to the relevant agency (the City Land Office) for a transfer of usage rights of the 1003 square meter land for the purpose of operating a shop business. On July 21, 2009, the Governor of Capital City issued a decree and granted a license for land usage appertaining to only 428 square meters (equal only to the size of the property) of the originally requested 1003 square meter parcel of land. The Korean citizen then filed an action for the revocation of this decree and an action for seeking a declaration concerning the size of his land usage license with regards to the original 1003 square meters. The Korean citizen claimed that the decree issued by the Governor of Capital City infringed his rights because it reduced the size of land originally agreed upon through a land transfer contract.

The question that the court faced was whether a foreign citizen had standing to file an action seeking protection against an administrative agency which issued a land usage license. The court denied the action, reasoning that according to Article 3.1.3 and 3.1.7 of the LPAC, it is possible to claim only the rights that have been specifically provided by statutory laws. The court further explained that, under the Law on Land, a foreign citizen cannot have a right to own or possess land except a special type of right referred to as a 'usage right.' Moreover, Article 44 paragraph 4 of the Law on Land provides that Governors may issue a land usage license for foreign citizens and stateless persons who are permanently residing in Mongolia (for more than 183 days) through auctions but only for the purpose of household needs. The court further noted, in this case, the land usage license issued for the Korean citizen, was for conducting a business which is not in accordance with the Law on Land.

In other words, land usage licenses for foreign citizen cannot be issued for a business activity but only a household purpose. Therefore, a right that is not provided by statutory law cannot be infringed.

[444] Land License for Korean Citizen Case Capital city administrative court, 585 decree on May 10, 2010 (Нийслэлийн Захиргааны хэргийн шүүхийн шүүгчийн 2010 оны 5 дугаар сарын 10-ны өдрийн 585 дугаар захирамж) [2010] Case no 585 (Mongolia|MN Нийслэлийн захргааны хэргийн шүүх, May 10, 2010).

Consequently, the court found that the Korean citizen, the person who brought this action, did not have standing to file an action in this matter. In its decision, the following points were made clear by the court. The whole purpose of administrative litigation is to determine whether there is an infringement of the plaintiff's right in relation to a specific administrative act. If the infringement of a right is asserted, but that right is not provided by law, then there cannot be an infringement. Thus, there is no need to initiate litigation based on an action that is asserting a right which is not provided by the law.

In this case, the core reasoning of the denial of the action is based on the plaintiff's lack of standing because the court reasoned that the right which the plaintiff believed to be infringed by agency action is not provided by law or does not exist. However, this case certainly speaks to the threshold issue of whether a person can file an action, which is a procedural issue, when a right is not expressly granted by statutory law. Conversely, an important point that the court needed to acknowledge was that the Korean citizen in this case was the addressee of the administrative act. Therefore, based on the general concept of standing, the Korean citizen should have had no problem satisfying the standing requirements.

In this case the court conflated a subjective law matter with a procedural law matter and this played a significant role in the court's finding that plaintiff lacked standing. A condition issue, such as standing for administrative litigation, is an entrance level problem not a merit problem. In other words, standing is a procedural law issue not a substantive law matter. A lack of this kind of legal distinction is problematic. Unfortunately, this case was decided before the October 29, 2010 Amendment[445] to Article 34 paragraph 1.5 of the LPAC which added a requirement related to the right to file an action. In conjunction with the 2010 amendment, it is important to recognize that this may signify a change in the right direction for Mongolian administrative law concerning the issue of standing. With the passage of such an amendment, administrative law judges are more likely to look to relevant laws and regulations in determining whether there is any protection available concerning plaintiff's rights. Therefore, this is an important step forward. It diverges from the old approach of almost no requirements for determining standing, which means the focus is primarily on legality; however, substantially it depends on the how the court chooses to interpret standing. Compared to the development of the standing requirement in Japan, the 2010 amendment is analogous to the ACLA before the 2004 amendment, which was centered to seek exclusively a legal interest in provisions

[445] Added new text in Article 34.1.5, it states as 'have no right to file an action.' [34 дүгээр зүйлийн 34.1.5 дахь заалтын "бүрэн эрхгүй" гэсний дараа "болон нэхэмжлэл гаргах эрхгүй" гэж нэмж өөрчилсөн.]

of laws and regulations in order to determine standing.

Borderless Rivers NGO Case[446]

Borderless Rivers is a non-governmental organization (hereinafter the NGO) registered in Mongolia. The NGO filed an action at the administrative court seeking a declaration of nullity of a decision issued on August 12, 2014 by the Citizenship and Naturalization Agency (the Immigration Agency) which prohibited Mr. Yevgeny Alexievich Simonov (hereinafter Simonov), a board member of the organization, from entering Mongolia for the duration of a 10-year period. The NGO sought to reinstate Simonov's right of re-entry into Mongolia. Simonov is a citizen of the Russian Federation and visits Mongolia for the purpose of environmental policy related work. Simonov was one of the founding members of the NGO in 2011. On the way back from the regular organization meeting in Ulaanbaatar on August 12, 2014, upon leaving Mongolia from the Zamiin-Uud border point, an officer of the Citizenship and Naturalization Agency made a decision to prohibit Simonov's reentry for 10 years and stamped a prohibition notice in his passport without his knowledge. During the preliminary procedure, the higher administrative agency reasoned that the decision had been issued according to Article 37 paragraph 1.10 of the Law on Legal Status of Foreign Nationals which states, "That deportation may be used when a relevant agency determines that a person is deemed to be harmful to the national security." The higher administrative agency upheld the initial decision to prohibit Simonov from reentering the country for 10 years.

The first instance administrative court declined to accept the action pursuant to Article 34 paragraph 1.5 of the LPAC. The court reasoned that the NGO had no right to file an action on behalf of Simonov; therefore, the NGO had no standing for this dispute concerning the decision of the Citizenship and Naturalization Agency that prohibited Simonov from reentry for 10 years. On appeal, the intermediate administrative court rescinded the first instance court's procedural judgment. The appellate court ruled that lower court erred when determining what the plaintiff sought to achieve by filing this claim. The appellate court noted that if the NGO argued that it filed this action on behalf of Simonov then the first instance court's judgment was correct.

However, the court reasoned that the NGO could file an action of declaration of nullity, of the

[446] "Хил хязгааргүй гол мөрөн" ТББ -ын нэхэмжлэлтэй Иргэний харьяалал, шилжилт хөдөлгөөний ерөнхий газарт холбогдох хэрэг [Borderless Rivers NGO case] [2014] Case no 446 (Mongolia|MN Захиргааны хэргийн давж заалдах шатны шүүх, November 5, 2014).

administrative act which prohibited reentry to one of its board members, because without this member's active involvement the NGO's regular operation was impaired. Since plaintiff's claim was based on the fact that Simonov was an active and important member of the NGO and if he was prohibited from entering Mongolia for 10 years, the NGO would be impaired in carrying out its regular activity. Based on the assertion that Simonov's involvement was very important for the NGO's regular activity and by the decision to prohibit Simonov's reentry, the NGO's own right and interest would be harmed, the appeals court decided that the NGO could file an action against the Citizenship and Naturalization Agency's decision to prohibit Mr. Simonov's reentry for 10 years on behalf of NGO itself.

In this case, if Simonov filed an action, because he is the addressee of the administrative act, there would be no problem concerning his standing to file the action. By the traditional approach, the NGO has no standing on behalf of Simonov. Examining this case from a Japanese administrative law perspective, specifically Article 9 paragraph 2 of the ACLA (amendment), the court would be required to look for a purpose of not only the law that gives a basis for the administrative act but also relevant laws which share common objectives. However, in the case of the Mongolian Passport Control Law (which provided the legal basis for the administrative decision to prohibit Simonov's reentry) and the NGO, the status of this law is not relevant. Certainly, an NGO has a right to function or normally operate though, but the Passport Control Law or the Law on Legal Status of Foreign Nationals does not contain provisions to protect an NGO's right. The decision to prohibit reentry for Simonov affects the normal functioning of the NGO, but this is a de facto interest. Because the purpose of the Law on Legal Status of Foreign Nationals does not contain relevant provisions regarding the functioning of the NGO and it does not protect the NGO's interest.

It is generally understood in Japan that the chance of de facto damage and thus establishing the required standing for a third party to bring a legal claim is very small. In recent Japanese cases, this is because only substantial threat to: life, health, the environment, and property, can be accepted as basis for standing for a person who is not an addressee. Conversely, in Mongolian practice, from this case, it can be understood that standing can be recognized easily when there is a de facto effect to a third party. A notable characteristic in this case was that the court (judge) allowed an action that was filed on behalf of a weak individual to protect the law. It expresses the existence of a characteristic prolonged from the experience of control type administrative litigation from the cause of path dependence.

"Owners of the Khuvsgul Lake" NGO Case[447]

"Owners of Khuvsgul Lake", an environmental NGO with some local herdsman (Myagmarchuluun, Bazarragchaa, Davaajav, Davaachuluun), collectively challenged the legality of the license for phosphorus in the Alag-Erdene and Tunel counties in Khuvsgul province. Plaintiff herdsmen were residents of Burentogtokh County in the same province and the disputed mining licenses had been issued for the company named "Talst Margad" which permitted it to mine in the counties Alag-Erdene & Tunel where the plaintiffs did not reside. The Plaintiffs, including the herdsmen and those who lived in the Alag-Erdene and Tunel counties in Khuvsgul province, asserted that their rights to live in a healthy and safe environment would be breached if Talst Margad were allowed to explore and mine phosphorus near in Khuvsgul Lake.

The first and second instance courts dismissed the action based on Article 34.1.5 of the LPAC which says "if claim was submitted by the person […] who has no right to file an action." The court in the lower instance ruled plaintiffs were not living in and no other business was conducted in the counties in which the exploration license was issued to the company. In other words, there was no foreseeable adverse effect for the plaintiffs, thus they had no standing to file an action against the granting of the exploration and mining licenses in Alag-Erdene & Tunel Counties. However, the Supreme Court reversed that decision and revoked the exploration and mining licenses by reasoning that the NGO was meant to protect the local people's right to live in a safe environment and to be protected by environmental disaster. Therefore, the environmental NGO had standing. Additionally, the Court stated that citizens who brought this action were guaranteed the right to live in a healthy and safe environment, and to be protected against environmental pollution and ecological imbalance by the Mongolian Constitution.

In this case, the Supreme Court did not give a precise explanation concerning exactly when the plaintiffs had acquired standing to sue. The court ruled that 'by the wrongful decision of the administration issuing the permission to explore and mine in Burenkhaan area it is proven by the evidence in the case that plaintiffs' right and lawful interest has been breached." Thus, the Court opinion does not speak to the issue of whether or not the plaintiffs have standing, instead it seems to assume that they had standing and goes on describing the breach of right.

[447] Owners of the Khuvsgul Lake NGO case [2013] Case no 117 (Mongolia|MN Улсын дээд шүүх, June 24, 2013).

The Law on Environmental Protection[448] was amended on July 08, 2010 to allow environmental NGOs to file suit for recovery and restoration of environmental damage against those responsible for such damage. On its face, the amendment does not expressly allow a legal cause of action to be asserted against administrative acts, but nevertheless some environmental NGO's have tried to bring such claims in the administrative courts. From this case, statutory law only allowed damage claim but action for revocation of license was accepted based on this damage related provision.

In addition, to the extent that the Court did not provide enough reasoning for its acceptance of the plaintiffs' action, from the viewpoint of standing, it may be interpreted as an expression of the existence of control type litigation. In other words, the citizens and the NGO act as a signal of illegality of administrative activity. Otherwise, the Court must provide additional reasoning for its decision. It is important to make an analysis of the effect of an administrative act in order to determine whether a party has standing, but it should not be mechanically decided. For instance, standing should not be solely decided by what county plaintiffs live in and whether it is the same county in which the mining license was issued (reasoning in lower court's judgment).

In objective litigation, there is no limitation for the area of effect of administrative act, whereas, in subjective litigation, assessment of influence of administrative act needs to me made carefully. For instance in this case, the effect of a mining license can be strong in the center of relevant area in terms of environmental affect. However, if the plaintiffs reside in the area, then it would be important to determine whether they have standing to file an action. If the influence is weak then the chance of standing is weak. Nevertheless, such an analysis was not made in this case in Mongolian context.

4.3.3. Conclusion on Standing

Japan

Traditionally, standing has been allowed, in principle, for a person who has a legal interest to seek the revocation which is usually the addressee. However, a third party (who is not an addressee) was considered to not have a legal interest, and therefore no standing. In sum, the main practice was to focus on statutory law and to seek legal interest embedded in the language of provision of laws and regulations. Especially, the language of the provisions of the laws and regulations was important to determine standing. This is referred

[448] Article 32.1.1 of the Law on Environmental Protection.

to as the objective approach. However, after the 2004 Amendment to the ACLA, the objective approach changed to some degree. The tendency was to expand the scope of legal interpretation to include not only the language of the provisions of the laws and regulations which give a basis but the purposes and objectives of any related laws and regulations which share the objective in common with the laws and regulations served as a basis for administrative disposition. As discussed in the previous section on Japanese Institution on Standing, after the 2004 Amendment, it requires the court to take into consideration the content and nature of the interest that should be taken into consideration in making the administrative disposition. Since, these parts of the 2004 Amendment takes subjective approach to determination of standing that when determining standing for a third party, the court must consider the content and nature of the interest that would be harmed if the administrative disposition were made in violation of the laws and regulations which give a basis for the administrative disposition.

Later cases indicate that Japanese practice, concerning third party standing, has been freed from the requirement of legal interest as granted only from statutory law (objective approach). Instead, if the court finds third party interest that is individual and in protection of life, health of person, and heavy damage to the living environment, it will grant standing (subjective approach). In other words, the way in which the court determines standing, especially for third parties, has moved away from only accepting the requirement of legal effect to accepting the de facto effect on a case by case basis.

Mongolia

In Mongolian practice, it is not difficult to obtain standing, for addressees and third parties, for several reasons. Because control type procedure is still common in Mongolia, a deductive approach is generally not utilized, even though the standing requirement can be extracted from the purpose of statutory law. In the past, the Administrative Chamber of the Supreme Court[449] was not able to address every procedural question

[449] According to Article 90 Para 1 of the Law on Procedure for Administrative Cases, when the court of first instance dismisses action on lack of standing or jurisdiction /for example act in the claim does not qualify as an administrative act/ its decision is only appealable to the intermediate appellate court level not further appeal to the Supreme Court allowed. Therefore, the intermediate court is an important player in determining the initial requirements of litigation.
The Supreme Court is only able to have a say in initial requirements issue when the case gets to the Supreme Court. It means that only in cases that two lower courts agreed plaintiff has standing and rendered judgment on the merit then Supreme Court can decide on the standing matter. For example, a dispute over standing gets to the Supreme Court only when first instance administrative court agreed the plaintiff had a standing and ruled on merit but on the appeal intermediate appellate court decided that the plaintiff lacks standing and dismissed the action according to Article 88 Para 1.3 of the Law on Procedure for Administrative Cases. The Supreme Court has a jurisdiction over this decision as of every other judgment as set forth in Article 87 and 88 of the

because of its large case load and given the fact that it operates[450] simultaneously as both an intermediate court of appeals[451] and as the court of last resort. However, in 2011 since the establishment of the intermediate administrative court, it focuses on procedural matters including standing questions.

Because of the lack of understanding of the categorization[452] of objective and subjective litigation, there is confusion concerning the requirement of standing for objective litigation cases in practice. In addition to the LPAC, as a general legal source for standing questions, there are also individual substantive laws that contain specific provisions which allow the filing of actions. There is a controversy among lawyers on the question of whether standing requirements provided by the LPAC also apply to the filing of actions under such individual substantive laws. For instance, Article 15.1.7 of the Competition law provided a provision that enabled the agency for Fair Competition and Consumer Protection to file an action against another administrative agency that allegedly breached the competition law. Based on this provision, the agency for Fair Competition and Consumer Protection filed a series of actions[453, 454] against the Ulaanbaatar city. In a controversial case,[455] the deputy prime minister as plaintiff filed an action against the State Council for Civil Service (which is an independent agency), and the administrative court accepted the action because the Law on Civil Service specifically provided[456] right to file an action for this matter. Moreover, as discussed in this sestion, two cases that NGO's filed were accepted as they have standing represents the easiness of obtaining standing caused by the history of supervision of legality.

Law on Procedure for Administrative Cases rendered by intermediate court.
Since intermediate appellate court, namely the Administrative Court of Appeals is single court and deals all appeals from every first instance courts it became resource for unified practice applying procedural laws not with limited but including the standing question.

450 Article 15 Para 2 of the Law on Procedure for Administrative Cases before amendment on October 29, 2010.

451 On December 31, 2010 the Parliament passed the law that created an intermediate appellate court which has jurisdiction over all appeals from all first instance administrative courts. The intermediate appellate court which has its seat in Ulaanbaatar begun its operation on April 1st, 2011. From then[451] Administrative Chamber of the Supreme Court began operating as only a last instance court.

452 Verwaltungsgerichtsordnung (VwGO), 686, art. 42 (2) (Federal Law Gazette 1991). Unless otherwise provided by law--this is German similar provision on objective litigation.

453 Шударга өрсөлдөөн, хэрэглэгчийн төлөө газрын нэхэмжлэлтэй НИТХ-ын тэргүүлэгчдэд холбогдох хэрэг [Fair Competition and Consumer Protection Agency v. Ulaanbaatar City Council] [2015] Case no 2390 (Mongolia|MN Захиргааны хэргийн анхан шатны 20 дугаар шүүх, April 8, 2015).

454 Шударга өрсөлдөөн, хэрэглэгчийн төлөө газрын нэхэмжлэлтэй Нийслэлийн засаг даргад холбогдох хэрэг [Fair Competition and Consumer Protection Agency v. Ulaanbaatar City Mayor] [2015] Case no 2409 (Mongolia|MN Захиргааны хэргийн анхан шатны 20 дугаар шүүх, April 9, 2015).

455 Тэргүүн шадар сайд Н.Алтанхуягын нэхэмжлэлтэй Төрийн албаны зөвлөлд холбогдох хэрэг [Deputy Prime Minister v. The State Council for Civil Service] [2011] Case no 338 (Mongolia|MN Нийслэлийн захиргааны хэргийн шүүх, September 1, 2011).

456 Article 39.7 of the Law on Civil Service. [Төрийн албаны төв байгууллагын шийдвэрийг эс зөвшөөрсөн тал уг шийдвэр гарснаас хойш 30 хоногийн дотор шүүхэд гомдол гаргаж болно.]

Regarding article 70.2.2 of the LPAC, an action for the declaration of the existence or non-existence of a legal relationship[457] is similar to an Article 4 type action in Japan. An important point to note is that in Mongolian legal practice, legal relation (public law-related) actions are very rare. There is almost no practice for this type of case. Accordingly, this reveals that Mongolian practice is mostly centered on the administrative act, similar to Japanese practice in the 1960s when Article 4 type actions were not utilized. Because of the transplantation of the concept of administrative act and by the adoption of LPAC in 2002, judicial review type actions have dominated in practice which is originally based on the theory of Initial Judgment.

4.4. Objective Interest of Litigation

4.4.1. Japan

Under the ACLA, two types of litigation are recognized abstractly. Subjective litigation is prescribed mainly in Article 3 and Article 4 and objective litigation in Article 5 and 6. Objective litigation is a special individual type litigation which can only be initiated by an individual statutory law provision. This litigation focuses on supervision of objective legality of administrative activity generally, and it is not limited to administrative act/disposition. Conversely, subjective litigation is a general type litigation that focuses on ascertaining a remedy in relation to individual subjective rights and interest. However, within the spectrum of subjective litigation only certain actions require initial conditions for instigating litigation.

Particularly, judicial review type actions, which are provided in Article 3 of the ACLA, demand an administrative disposition, standing to bring the action, and the presence of a valid objective interest of litigation. These conditions must be met at the beginning of the process. The concept of an objective interest of litigation is one of three requirements constituting the initial conditions necessary for judicial review type actions in Japanese administrative law. Generally,[458] this concept addresses to the question of a continuous presence of a legal effect caused by an administrative disposition, and the possible realization of a remedy for the plaintiff, by revoking such legal effect caused by the administrative disposition. For instance, if a legal effect of a particular administrative disposition were discontinued then there would be no objective or

[457] Захиргааны Хэрэг Хянан Шийдвэрлэх Тухай, art. 70.2.2 (2002). [70.2.2.эрх зүйн харилцаа байгаа эсэхийг тогтоож хүлээн зөвшөөрөх]

[458] German Code of Administrative Court Procedure, Section 113 (1) contains similar regulation as follows: If the administrative act has been settled previously by withdrawal or otherwise, the court shall declare on request by judgment that the administrative act was unlawful if the plaintiff has a justified interest in this finding. Verwaltungsgerichtsordnung (VwGO), 686, art. 113 (1) (Federal Law Gazette 1991).

purpose for the action to proceed.

Article 9 (1) of the ACLA provides that an action for revocation of an administrative disposition can be filed by a person who has a legal interest that can be recovered by revoking the administrative disposition, even after it has lost its effect due to the expiration of a certain period of time or for other reasons. Therefore, when there is no legal interest to be recovered by the litigation (or claim), the action will not be accepted as a valid dispute.

Hence, objective interest of litigation serves as one kind of standing requirement for certain cases regarding the recoverable legal interest of a plaintiff. For subjective litigation, providing an adequate remedy is a core element. In other words, the entire purpose of this form of litigation is to acquire a remedy for the plaintiff. If the legal effect of an administrative disposition no longer exists (lost or extinguished),[459] then it is impossible to recover or there remains no remedy. For instance, if a civil servant, who was fired from his/her position, files an action to revoke the administrative disposition in order to recover the status quo of his/her official position, but his/her term of employment in that position already ended before the judgment was rendered, the civil servant could not recover. Consequently, he/she will not be able to recover because the legal effect of the administrative disposition, which caused him/her to be fired is no longer effective. However, if he/she filed an action to collect monetary damages caused by this administrative disposition, litigation may continue according to Article 9 (1) of the ACLA. This is because he/she has a legal interest to be recovered by revoking the administrative disposition, even after it has lost its effect.

4.4.2. Mongolia

At the institutional level, especially under the LPAC, the concept of objective interest of litigation cannot be outlined. The theory on the subject is not clear. Since the soviet period, there was no need to pay attention to the concept of objective interest of litigation because the purpose of administrative adjudication was not to provide a remedy for an individual. Instead, it pursued objective legality of administrative activity. This means, even though there is no legal effect resulting from an administrative act or no remedy available for the plaintiff, a procedure can be prolonged in order to rule on the legality of an administrative decision.

Accordingly, the concept of objective interest of litigation cannot be presented in practice as well. However, in practice, administrative courts tend to dismiss an action if the challenged administrative act is

[459] The legal effect of […] is extinguished. Sugai and Sonobe, *Administrative law in Japan*, 129–30.

no longer effective. The following hypothetical case is instructive on this point. Since 1946, the name of the central square in Ulaanbaatar was Sukhbaatar Square.[460] In 2013, the Ulaanbaatar city council changed the name of the square to Chinggis Khaan Square. Following this decision, a series of law suits were filled in administrative court by the opposing political party members in the parliament and the city council,[461] a citizen, and lastly descendants of Sukhbaatar. However, most of those actions were denied because they failed to show a direct harm to their subjective right and interest. In other words, they lacked standing. Only the action brought by Sukhbaatar's descendants was accepted as a valid action, but the case was later dismissed on the ground of defendant's agreement to accept the action.[462] In 2016, a new city council once again re-named the square to the original name, Sukhbaatar Square. If the legal proceedings in this case continued until the new city council renamed the square, it could serve as an informative example of dismissal based on the lack of objective interest of litigation. This is because Sukhbaatar's descendants would not be able to recover because the legal effect of the administrative disposition, renaming the city square, would no longer be effective.

4.4.3. Conclusion

Under Article 9 paragraph 1 of the ACLA, there is an additional requirement only for Judicial Review type actions. Article 9 paragraph 1 states that an action for revocation of an administrative disposition may be filed by, "… a person who has legal interest to be recovered by revoking the original administrative disposition … even after it has lost its effect due to the expiration of a certain period or for other reasons." Thus, it allows subjective litigation to be initiated in cases where the administrative disposition has lost its effect, but only when the plaintiff has a legal interest to be recovered by revoking the said administrative disposition. For example, it is only permitted when an administrative disposition has lost its legal effect due to the expiration of a certain amount of time. In this case, the plaintiff has the right to assert a claim monetary damages.

On the other hand, in the Mongolian instance, at the theoretical, institutional and practical level, this requirement is not clearly recognized or acknowledged. This is because of the long history of control type

[460] Named after Sukhbaatar Damdin person who emerged as revolutionary hero during 1920s.

[461] Capital City Administrative Court Decision Decree 887 dated on February 4, 2015 [Нийслэлийн захиргааны хэргийн шүүхийн 2015 оны 2 р сарын 04-ны 887 шүүгчийн захирамж]

[462] З.Хайдарын нэхэмжлэлтэй, Нийслэлийн Иргэдийн Төлөөлөгчдийн Хурлын дарга, Тэргүүлэгчид холбогдох [Khaidar v. Ulaanbaatar City Council] [2016] Case no 573 (Mongolia|MN Нийслэлийн захиргааны хэргийн шүүх, August 16, 2016).

administrative procedure which only focuses on objective legality of administrative activity. The purpose of control type administrative litigation is not to provide a remedy based on individual rights; thus, there was no need to specifically study or develop the concept of objective interest of litigation. However, recently and in some cases, the court's tendency has been to discontinue procedure if the disputed administrative act is no longer effective.

4.5. Conclusion

Preconditions for judicial review type administrative litigation consists of three main concepts: (1) administrative disposition (act), (2) standing (3) and objective interest of litigation in Japanese administrative law. The administrative act concept is clearly established in Mongolia, even if it is not the same as the original concept derived from Germany, it is one variety. The latter two concepts, standing and objective interest of litigation, are not fully understood at the institutional and practical level in the Mongolian context. In Japanese practice, there are strict requirements for qualifying as an administrative disposition at the entrance level, including, establishing standing and a showing of an objective interest of litigation. On the other hand, Mongolian practice often has no strict requirements because of the influence of path dependence. The Mongolian administrative court still acts as a protector of objective legality. Consequently, though the procedural law does not allow such a practice, sometimes the court accepts objective litigation.

Compared to Japan, Mongolia did not recognize the categorization of litigation as objective and subjective (until very recent acknowledgment in law, in 2016). In addition, no distinction has been acknowledged between judicial review type actions and public law related actions in theory, institution, and at the practice level in Mongolia. Paradigm change from control type to remedy type has been somewhat achieved at the institutional level in the sphere of administrative litigation; however, legal thinking and practice in Mongolia is difficult to change, as it endeavors to transition toward a remedy type litigation, because of path dependence. There was and still is a gap between law and practice in terms of understanding the purpose of administrative litigation. Therefore, a careful analysis of the Mongolian cases reveals that practice, in substance, is often the same as control type procedure that existed during pre-transition period. Path dependence strongly seeks to maintain objective legality; therefore, civil dispute cases often easily change into administrative dispute cases. In that way, it can initiate a control type administrative litigation even after constitutional and statutory law level Mongolia made transition to remedy type litigation. In conclusion, paradigm change from control to remedy was not achieved fully in Mongolia in the

contemporary situation.

Chapter V: Recent Developments in Administrative Law: From Administrative Control Toward Remedy of Subjective Right?

5.1. Introduction

As a result of the first attempt to reform Mongolian administrative litigation, it is evident from the last two chapters, especially from the case analysis in chapter four, that complete change toward a remedy type litigation has not yet been accomplished. Therefore, further examination needs to be done in relation to the recent developments in the Mongolian administrative laws, particularly focusing on whether the concept of litigation has changed its status. It is also possible to make a link between this chapter and the broader argument upon which the current research is based. This is because chapter five will examine the most recent status of administrative litigation in Mongolia and attempt to determine whether its paradigm change is complete, all the while cognizant of its starting point as a soviet law type complaint procedure in chapter one and its transformational journey through the analysis chapters, three and four, culminating in chapter five.

This chapter will examine what steps have been taken since the establishment of the administrative court and the adoption of a separate administrative litigation law at the statutory law level. And it will ask if any problems that were acknowledged in previous chapters have been fixed in relation to change necessary for enabling remedy type administrative litigation in Mongolia. Moreover, this chapter will identify the core characteristics concerning any new developments that have been brought. It will seek to confirm if a decade long judicial practice has prompted any change in statutory law revision. The survey of progress in this chapter is crucial, not only because of the expectations that recent development could bring to the actual practice in the area of administrative litigation, but such survey could also be utilized to foresee any aspects that could still be holding up progress.

It will begin with observing the newly enacted General Administrative Law (GAL) in the first sub-section. In doing so, the first sub-section will concentrate on its new and progressive elements and then reveal its limits and problems. Note that progressive or problematic elements are defined by criteria that asks if they provide protection for rights and interests of individuals or if they represent a setback for rights and interests. Therefore, newly introduced concepts such as administrative contract and normative administrative act will be studied first. And then the discussion turns to the limits and problems of the GAL such as the

uncleanness of the purpose of law and possible conflicts with other laws. In the second sub-section, it scrutinizes the revised administrative litigation law, the Administrative Court Procedure Law (ACPL), by paying particular attention to its essential features in relation to the paradigm change. For instance, it will consider the definition of purpose of litigation, determine if there is any noticeable change from the former law, and ask whether there has been significant change in terms of jurisdiction by introducing a general clause approach.

At last, this chapter will demonstrate, in connection with previous chapters, to what extent Mongolian administrative litigation has progressed in the direction of providing a full and fair remedy for the infringement of rights and interests of individuals caused by administrative activity.

5.2. Background

In the area of administrative law, it is essential to determine where the role of the judiciary stands as a protector of rights and interests granted by the Constitution, while at the same time not hindering the genuine tasks of the executive arm of the government to function in the public law sphere. To be specific, this research seeks to examine, within the Mongolian context, the question of why it is important to differentiate between the judiciary as a tool of control of the executive branch of government and as an instrument for the protection of rights and interests in relation to the citizens and the state. The concept of judicial review and the initial conditions required for litigation in administrative law is a new and unchallenged area of law and practice in Mongolia in terms of theoretical roots and background.

Mongolia only has just over ten years of experience both in terms of statutory administrative law and actual practice in the field of specialized administrative court procedure. Because of the combination of Mongolia's socialist law theory of legacy and new concepts embedded in the Constitution, the actual practice of law was in a state of confusion. This chapter will discuss what achievements or predictions can be made in accordance with very recent developments in Mongolian administrative law, particularly the enactment of the General Administrative Law and the Administrative Court Procedure Law. The key objective of this chapter is to analyze the development of administrative litigation as it transitions towards a process to protect individual rights and legal interests.

5.3. The General Administrative Law (GAL)

5.3.1. Drafting and Enactment of the GAL

The Mongolian Parliament enacted the General Administrative Law[463] on June 19, 2015 which took effect on July 1, 2016. The idea of having a general administrative law like the current Mongolian Civil or Criminal law has been discussed for over a decade among Mongolian lawyers and practitioners. Many in the legal community in Mongolia believe that the absence of a standardized general administrative law has contributed to the lack of substantial development of Mongolian administrative law. In the area of administrative law, it is true that legal practice is in need of general principles and standard procedures in order to make administrative law litigation more consistent, predictable, and ultimately more just. In fact, it became more evident since the creation of the administrative courts in 2004 that Mongolian administrative law requires clear statutory development.

Since 2002, the LPAC[464] has defined only a few provisions such as administrative act and administrative agency in terms of concepts of substantive law. Therefore, the administrative courts were forced to decide on many cases by means of limited statutory law sources. As early as 2003, even before the actual practice of the LPAC by the administrative court which began in June 2004, one consultant noted that the LPAC regulates mostly only on court procedure for administrative disputes; however, the administrative process itself needs to be regulated by statutory procedural law, especially the procedural principles are essential to the development of in this area of law.[465] Moreover, Professor Philip Kunig, Professor at Department of Law, Freie Universität Berlin insisted that developments of administrative law concepts based only on judicial practice would be incomplete.

Initially the drafting[466] focused on only the administrative procedure which mainly dealt with

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[463] In the process of revising the draft it turned into an extensive collection of substantive and procedural norms in the area of administrative law consequently, the draft became something more than just an administrative procedural act. It has become a legal framework that substantially sets out general principles of administrative activities, covers all standard procedural requirements, and mandates the ability to enforce administrative decisions. This is now reflected in the name of the legislation: the *General Administrative Law.* GAL [The General Administrative Law] (2015).

[464] Захиргааны Хэрэг Хянан Шийдвэрлэх Тухай (2002).

[465] Philip Kunig, "Recommendation on further development on Administrative procedure and administrative litigation," (presented at Legal Reform in Mongolia 8 years, Ulaanbaatar, 2003), 23.

[466] Eventually, in 2009 the Ministry of Justice began the process of drafting the *Administrative Procedure Law*, which later evolved into the *General Administrative Law*. However, this process slowed primarily due to the lack of strong will political institutions which were responsible to move the draft to parliamentary discussion. In 2012, by the result of election new government formed, subsequently new Minister of Justice reformed the drafting team and with the support of legal specialists and technical assistance from the foreign and international organizations completed the first draft of the *General Administrative Act* (the draft) by the end of

procedural certainty in administrative decision making. That is because the administrative courts utilized different types of procedures in different types of cases. For instance, tax law, land law, and mining licensing law all had their own procedures. Those procedures differ, in relation to regulation with relevant citizens and entities, according to a number of factors including: time, cost, notice, decision making, and appeal procedure. From both a legal and non-legal perspective, this is quite burdensome. Not only lawyers but the general public must also learn a unique set of rules and procedures in order to be in compliance with each agency's requirements.

5.3.2. Expectation of the GAL in the area of administrative law

The GAL sought to institute a general legal standard in terms of legal relations between citizens and the state. Therefore, this law is expected to establish certainty, consistency, and predictability, in the legal interactions between citizens and administrative agencies. Doctor Sunjid Dugar, associate professor at the National Academy of Governance recently published a book in relevant to the enactment of GAL, in which she insisted that the enactment of the GAL would bring a standardized legal basis for administrative activity. She asserted that the GAL would consequently help to review whether or not administrative agencies operate in accordance with law.[467] Moreover, Doctor Sunjid asserted that the GAL ensures every act from administration, which is directed outward to an individual, be placed under legal review and must be based on law.

The GAL also promotes greater accountability for government administrative agencies as well as more opportunities for public participation in the regulatory process. Participants involved in the administrative decision-making procedure have been provided all procedural rights. Such rights include the requirement that agencies must give adequate notice and hold hearings if necessary among persons whose rights and/or legitimate interests are going to be affected by the decision. On the other hand, the GAL requires administrative agencies to make certain legal determinations, prior to specific decision making, by examining each case concerning relevant conditions and evidence. As Professor Jürgen Harbich[468]

2012.
Dr. Guntram von Scheurl and Dr. Juergen Harbich from Germany, Professor Tom Ginsburg from the U.S. were the principal commenters. Professor Katsuya Ichihashi from the Nagoya University, Professor Shigeru Kodama from Mie University, and Professor Takio Honda from the Ryukoku University Law School also commented on early draft of GAL.

[467] Sunjid Dugar, *Захиргааны ерөнхий хууль: үзэл баримтлал, хэрэглээ* [The General Administrative Law: Concept and Application] (Ulaanbaatar, 2017), 123.

[468] Professor Jürgen Harbich is the one of the main person who provided legal assistance from the very beginning in the area of administrative law in Mongolia since mid-1990s. Professor Harbich was serves as Director of

commented on the final draft of the GAL by stating that the draft included several progressive elements such as adverse administrative act and a duty to provide legal reasoning when issuing an adverse act directed to an individual.[469] Thus, administrative agencies are obliged to analyze in detail the grounds for each case relevant to the particular decision making, and establish circumstances of significance and/or relevance in respect to the participant.

Moreover, as a result of the creation and enactment of the GAL, the Mongolian legal community expects improved and considerably more responsible governmental administration with regards to promoting and preserving a well-defined and consistent legal relationship between citizens and governmental entities. The enactment of the GAL further insulates against illegitimate political influence into professional public administrative affairs, which causes uncertainty and instability among officials in their day to day decision making. The new law constitutes much needed guidance for decision makers at every level of the administrative legal ladder. It ultimately holds administrative agencies responsible for their decisions and restrain unlawful or irrational activity harmful to rights and legal interests of individual. Overall, when a dispute comes before the administrative court, the judges responsible for rendering fair and equitable judgments will now have clear and comprehensive statutory law.

5.3.3. New and Progressive institutions of the GAL: moving in the direction of a remedy based individual rights approach.

Scope of applicability of law

Reviewability of administrative activity is a key aspect in the broader structure of relations among the executive and judicial branches of government. Therefore, outlining the applicability of the GAL is relevant for further determination of the scope of judicial review in administrative law. The GAL sets out legal boundaries for administrative activities. In other words, this law does not regulate activities such as the legislative affairs of parliament and political[470] decision making. Therefore, it clearly sets the limits of

the Bavarian Administrative School (*die Bayerische Verwaltungsschule*)

[469] Jürgen Harbich, "Өрнө, дорнын эрх зүйн харилцан уялдаа- Монгол Улсын нийтийн эрх зүйн жишээн дээр" [Inter-Consistency of Western and Eastern Law: Public Law in Mongolia as an Example], (presented at Legal Reform of Mongolia and Comparative Law, Ulaanbaatar, 2014.5.30), http://www.legalinfo.mn/details/282 (accessed July 17, 2016).

[470] The concept of political question somewhat urged from the judicial practice. Therefore, it can be said that it is right direction to normal development of law. Specially after the action and subsequent procedure initiated by two members of government cabinet who fired from cabinet by the decision of the Prime Minister sparked discussion in jurisdictional issue involved political matter in administrative litigation not long after establishment of administrative court. Erdenebat & Erdenebaatar v. Government of Mongolia (Capital City Admin. Ct 2005). Tsogt Tsend, "The Availability and Scope of Judicial Review of Administrative Action (Comparative Study Mongolia and US)," Oregon, US (LL.M, Willamette University College of Law, 2007),

judicial review in certain areas in which judicial review is not feasible. This is an important characteristic that the GAL introduced in terms of distinguishing an administrative agency's legal act and a political act. Moreover, on the issue of the availability of judicial review, in Article 42, the GAL introduced the concept of discretionary[471] act of administration. Both emphasizing the distinctive characteristics of a discretionary act and setting the limits of discretionary power will serve as a vital basis for judicial review when it comes to litigation related to a discretionary act.

Definition of administrative act and agency

The inclusion of definitions within the administrative statutes is often an important first step in understanding the law and applying it to a particular case in Mongolian context. The drafting team decided to transplant specific provisions from the LPAC that define administrative agency and administrative act with minimal[472] changes in order to keep the newly adapted concepts consistent. One of the newly introduced elements in relation to the concept of administrative act which is the division of administrative acts based the effect the act has on the person to whom it is directed. A "beneficial administrative act"[473] refers to an act that establishes rights to or creates a favorable situation for a person to whom the legal effect is directed. On the other hand, an "adverse administrative act"[474] refers to an act which restricts the rights and legitimate interests of the person to whom the legal effect is directed. The key distinguishing feature between these two forms of administrative act is the inclusion of a 5-year statute of limitations for the revocation of beneficial administrative acts. The 5-year statute of limitations functions to protect any legal rights and interests that have been established by the administrative act itself.[475]

Another important characteristic of the administrative statutes is related to the definition of administrative agency. Even though the LPAC had provided a listing of specific administrative agencies whose activities were subject to judicial review, and had done so for the previous twelve-year period, the GAL rejected such specification in terms of definition of administrative agency. The listing approach in the

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[471] Article 42.2 of the GAL states unless otherwise provided by law, an administrative agency shall apply the availability of discretion, within the scope of its authority, based on the requirements set forth in law and in conformity with its purpose.

[472] Article 5.1 of the GAL speaks on the definition of administrative agency and Article 37.1 on definition of administrative act. GAL, Art. 5.1 (2015).

[473] Ibid., Art. 37.4.

[474] Ibid., Art. 37.5.

[475] A 5-year statute of limitations does not apply to an adverse administrative act. Ibid., Art. 48.1.

LPAC was not a precise list of defendants instead it was part of a definition of administrative agency. Because the LPAC served simultaneously as the rules of administrative procedure and as a source for substantive law definitions, the list-based approach enabled some agencies to avoid judicial review just because they were not included on the list. Eventually, the GAL included a semi-general definition for administrative agency.

Administrative Contract and Normative Administrative Act

Additionally, the GAL sets out special provisions for administrative contracts [476] and normative administrative acts[477] as specifically recognized forms of administrative activities in public law relation, as well as planning. In turn, the first general statutory law, the GAL, recognized the concept of administrative contract and normative administrative act. For instance, Article 52 states that in order to create, change, or terminate a public law relationship, an administrative agency may enter into a contract in the areas of public services, education, health, environmental protection, and other administrative law relationships. [478] Moreover, the administrative contract can also be used in scenarios in which administrative agencies assign some of their own functions or powers to other private persons or entities and in relationships associated with creating sustainable use of essential infrastructure and social services.

Recognizing the administrative contract form as an activity utilized to interact with individuals reinforces legal certainty in the public law sphere whereas formerly predominantly regulated by a unilateral decision. A Distinctive feature[479] of the GAL is that although it covers a broad field of relevant legal provisions,[480] and it is the primary source for administrative contracts, if there are no rules of administrative legal norms that speak to the matter related to an administrative contract, then according to Article 58, the rules of the Civil Code are utilized. In other words, norms of administrative law serve as primary rules for administrative contracts and where there is an absence of such primary source of rules then the rules of the

[476] Ibid., Art. 52.1.
[477] Ibid., Art. 59.1.
[478] Ibid., Art. 52.2.
[479] Article 58.1 of the GAL states that "In addition to the provisions of Chapter Five hereof, the fundamental regulations stipulated in the Civil Code shall equally apply to administrative contracts. Where there are no administrative norms that regulate otherwise, substitutionary application will be carried out. Explanation: "Substitutionary application" refers to apposite application of provisions of the Civil Code where this law has no provision for regulating a particular matter, consistently with the public law principles, upon thorough examination as to whether such provisions are appropriate for the administrative proceedings and the administrative contract."
[480] For example, Article 54, 55, 56 of the GAL provides especial principles that governs for administrative contract.

Civil Code apply as supplementary rules[481]. Conversely, for instance, in Japan[482] administrative contracts are regulated mainly by the civil code and civil procedure. However, sometimes administrative contracts have special or exclusive principles that are contra to civil code principles, for example, the principle of freedom of contact is limited concerning administrative contracts since administrative agencies have an obligation to conclude contract in terms of in what subject they can enter into a contract with.

Additionally, the concept of a normative administrative act had been regulated by government decree since 1993, and the decree was revised several times, with the last revision resulting from a study related to a UNDP funded project in 2010. Nonetheless, local self-governing bodies and independent agencies, which were directly formed by the parliament, were not within the scope of this decree; therefore, its rules were not applicable to these bodies' normative administrative acts. The Ministry of Justice was responsible for pre-review of adopting normative administrative acts except for the bodies and agencies mentioned above. In addition to pre-review screening, by the GAL, the procedure for drafting, commenting, and adopting normative administrative acts, for the first time,[483] regulated by statutory law. Significantly, a normative administrative act[484] can only be valid when it has been specifically delegated/authorized by law to a particular agency. As of August 2015, there were over 870 normative administrative acts[485] listed on the Ministry of Justice's web page that were awaiting review to ensure that they conformed with the GAL.

Damage claim

It is also the fact that another feature of this law, the right to claim monetary damages, has been derived from administrative court practices. Even though the LPAC enabled a party to bring a claim for monetary damages, allegedly caused by an illegal administrative act; the right to demand a recovery for damages caused by an unlawful administrative action or inaction is granted in the GAL. In other words, it provides a substantive

[481] Захиргааны Ерөнхий Хууль, art. 58.1.

[482] Japanese and MGL principle in administrative contract is reverse, for instance, in Japan instead of issuing administrative disposition often use an administrative guidance. And by administrative contact can only set severe limit than law set but of course only the other party agrees with this higher restriction than the restriction set by the relevant law.

[483] Previously it was regulated by the government decree, but now the GAL at statutory law level regulates this procedure. Firstly by the Decree 162 dated on November 03, 1993. Tsogt Tsend, "Normative Administrative Act," in *Монгол Улсын Захиргааны ерөнхий хууль (Сургалтын гарын авлага)* (Ulaanbaatar: Hanns Seidel Foundation, 2016), http://legaldata.mn/b/127 (accessed June 10, 2017).

[484] Article 59.1 of the GAL states that normative administrative act is a decision directed outwards and to be followed by public on repetitive basis, issued by administrative agency which specifically authorized by law. And in Article 59.2 of the GAL prohibited for administrative agency to further delegate this power to issue normative act to anybody except as permitted by law.

[485] Status right before the adoption of the GAL by the August 2015 at Registration of normative administrative acts in Ministry of Justice and Home Affairs at http://www.moj.gov.mn

right to file a claim for damage against an administrative agency. In judicial practice, courts have been issuing a judgment for monetary damage, but in reality it was very difficult to recover damage from the administrative agency mostly because there were no funds allocated[486] for this purpose in the budget of that agency. This institution is a famous and live legacy of soviet law.

Procedural principles and requirements

The GAL fixed not only the forms of administrative activity but it also explicitly defined core principles[487] that are specifically required for these activities. Moreover, procedural requirements such as notice, hearing, and all necessary steps were identified, especially for issuing an administrative act and normative act. In addition, the GAL requires that every written administrative act contain clear notice and direction about when and where to appeal it. Another progressive provision[488] prohibits an administrative agency from delegating its vested authority to others unless otherwise stipulated by law. Article 24 (2) included[489] a very important provision that serves as one of the biggest distinction between civil and administrative procedure. In civil cases the plaintiff has the burden of proof; however, under Article 24 (2) of the GAL, the in decision making process an administrative agency has burden of proof. It also comprises a preliminary proceedings which was initially included in the LPAC in 2002.

5.3.4. Problem and Limits of the GAL

Purpose of regulation and Relation with other laws

It is essential that the purpose of the law stated that it, as stated in Article 1.1 of the GAL, is to regulate a legal relationship in public law sphere. However, the purpose of the law is not clearly explained in terms of the reason the law seeks to govern this legal relation, for instance, in order to maintain objective legality or to protect the subjective rights of individual who interact with administration. This might be explained by reviewing scattered provisions of the GAL, especially the ones that regulate actions taken by administration through enforceable principles and requirements. Up to the adoption date[490] of the GAL, around 250

[486] To overcome this issue, there is a draft law concerning the creation of a Damage Fund (or Judgment Fund) submitted by the government to the Parliament. This will enable the claimant to more easily collect money from a centralized fund that is independent of budgetary issues and constraints associated with each governmental agency.
[487] GAL, art. 4.2.6 (2015).
[488] Ibid., art. 8.1.
[489] Article 24.2 of the GAL states that administrative agency shall be responsible for conducting important and necessary actions to establish the objective circumstances stipulated in article 24.1, collection of evidence, and evaluation of the evidence.
[490] June 19, 2015.

statutory laws[491] contain provisions that regulate various facets of administrative activities. Apparently, conflicts[492] between these new law, the GAL, with other existing laws and regulations will likely be unavoidable. Since the GAL does not provide a specific purpose statement, application of the provisions of this general administrative law may conflict with contradicting regulations set out in other existing specific laws. Uncertainty may arise when GAL provisions conflict with other provisions of law. This is because even though the GAL is a general law, it is still a statutory law, not a constitutional law. Future law makers could not be bound by past legislation, and the general principle of hierarchy of law[493] is that a law that is enacted after a preceding law which contains specific regulation has higher effect than a former or general law. In other words, the GAL has the same level of authority compared with other laws enacted by the parliament. For the Japanese experience of legislation practice in the parliament, in the case of the enactment of the new general (framework) law, every relevant law should have been checked concerning whether this law is consistent with the new general (framework) law. If after a consistency check, the relevant law is found to not be pursuant to general (framework) law, then it must be amended.

Semi-definition based approach

Article 5 of the GAL does not fully escape the listing approach in its definition of an administrative agency, but instead it adopts a semi-definition based approach. The GAL neither names the administrative agencies, as was the situation under the LPAC[494], nor an exclusive enumeration, in fact, Article 5.1 of the GAL itemizes 5 general categories.[495] Though, this is not a jurisdictional provision for judicial review (as it was used to determine a defendant in the LPAC), the new Administrative Court Procedure Law (hereinafter the ACPL) cited the definition of administrative agency in the GAL in Article 3.1.1. This provision is applicable

[491] Concept Note of the submitted draft of the GAL to the parliament. "Захиргааны Ерөнхий Хуулийн Хувийн Хэрэг, УИХ-ЫН Тамгын Газрын Архив" [The Case File of the General Administrative Law], 2015, The Parliament Archive.

[492] Article 3.3 of the GAL states that relation other than those in which activities of administrative agencies are not regulated by a specific law shall be governed by this law.

[493] Odgerel Purevdolgor, *Захиргааны эрх зүйн Ерөнхий анги* [General Part on Administrative Law], 3rd ed., 2016, 72.

[494] Adopted on December 26, 2002 and replaced on February 4, 2016.

[495] Article 5.1 of the GAL provides that the following public legal entities which issue administrative decisions rendering public interest shall be construed as administrative agencies: 5.1.1. All central and local agencies that exercise the executive power of the state; 5.1.2. Independent agencies that enforce legislation and make administrative decisions, and other public law entities similar thereto; 5.1.3. Entities that are assignees with administrative functions based on a law or public law contract; 5.1.4. Administration of entities such as state schools, shared ownership schools, hospitals, media, communication, postal, transport and energy organisations which provide mandatory public services; and 5.1.5. Municipal self-governments and those entities whose decisions and activities are subject to complaints lodged with the administrative courts, as specifically set out in law.

when there is a dispute in relation to whether a certain organ qualifies as an administrative agency or not. Therefore, it may invoke an interpretation (deductive approach) that was used under the LPAC (2002).

5.4. The Administrative Court Procedure Law (ACPL)

In conjunction with the enactment of the GAL, the revision of the LPAC was also required, thus a new version was enacted on February 4, 2016 as the Administrative Court Procedure Law (ACPL).[496] The date upon which the ACPL took effect coincides with the day the GAL came into force. Since the first adoption of the LPAC, the revised administrative court procedure is not only leading to the enactment of a general administrative law, but also it is emancipating administrative procedure from civil procedure. For instance, Article 2.1 of the LPAC, which was relevant to the scope of legislation and its applicability to administrative litigation, positioned the Civil Procedure Law (2002) as one of the main laws which serve as a legal source for administrative litigation. Conversely, the ACPL does not include a civil procedure law in its scope of applicable legislation.

Both administrative court practice and the new administrative procedural law have pushed for the revision of the administrative court procedure law. Developments of the last 12 years of court practice, with the implementation of special procedure and a specialized court, have triggered the codification of administrative procedure, and in turn, court procedure itself has been reflected by the new codification. The scope of protection is not only limited to the recovery of already infringed rights and legal interest but it extends over to the possible future infringement of rights and interest.

5.4.1. Essential features in relation to paradigm change

Purpose of the Litigation

As stated in Article 1 of the ACPL, "the purpose of this law is to regulate court procedure based on (1) an action filed by an individual or a legal entity seeking a protection of its rights and legal interest that is infringed or possible future infringement by illegal administrative activity, and (2) an action filed by authorized person to represent public interest and if provided by law, an action filed by administrative agency."[497]

At the purpose level, the ACPL recognizes two different types of litigation. One action is filed for

[496] Захиргааны Хэрэг Шүүхэд Хянан Шийдвэрлэх Тухай [The Law on Procedure for Administrative Case] (2016).
[497] Ibid., art. 1.1.

the protection of a particular subject's rights and interests as the principle litigation (subjective litigation). Apparently, this type of litigation requires the person who filed the action to be concretely affected by the administrative activity. Another form of litigation recognized under the ACPL is for special litigation, which only certain people, legal entity or administrative agencies are permitted to file; therefore, in essence it is limited (objective litigation). For example, an action is only acceptable if specific statutory law provides such an action to be filed by an administrative agency. On the other hand, an action filed in consideration of public interest is further prescribed and limited in two ways. First, this action can be brought by a person who is specifically granted such right by law. Second, it can be filed by non-governmental entities who meet certain requirements set forth in this law; however, here a right to file specifically provided by law is not required. In addition, if the right to file an action is not provided by law, then the action of a non-governmental entity is permitted only within certain areas of the law, such as environmental protection, child right, public health, and public property. The purpose of this litigation is to achieve objective legality in administrative activity for the common good, since this action does not seek a recovery of rights and interests of the person who initiated it.

Based on the distinctive characteristics of these two types of litigation, the former one can be defined as subjective litigation as opposed to later one, objective litigation. On the contrary, the LPAC (2002) has not recognized the different types of litigation. It has, however, acknowledged[498] subjective right centered litigation. Though the subjective right concept is narrow and this is only action that can be identified under the LPAC, the actual practice in Mongolia reveals other results. Subjective right centered procedure allows only subjective litigation; therefore, a person or legal entity can only file an action against administrative acts that are believed to aggrieve his/her own rights and interests. However, in practice, administrative agencies are permitted to file an action against other agencies which are not under the same ministry. This caused, in broader terms, a confusing state for determining the purpose of litigation. Indeed, through a clear understanding of the categorization of administrative litigation in the ACPL, this state of confusion can be eliminated. Subjective litigation is the main and most generally applicable type of litigation as it is clearly established by the ACPL. Therefore, formally in the institutional (law) level, the main purpose of

[498] Article 1.1 of the LPAC states as purpose of this Law is to regulate the relations connected with the preliminary decision-making on administrative cases according to the complaints and claims submitted by citizens and legal entities who have considered an administrative act as illegal in order to protect their infringed rights, and with the proceedings of administrative cases in the administrative courts.

administrative litigation is now designed for providing an effective remedy for infringed rights and legal interests of individuals.

Introduction of General Clause

The LPAC in 2002 centered on litigation in relation to action filed against an administrative act, and considered a normative administrative act[499] as an individual administrative act. Therefore, the scope of the availability of judicial review in administrative court was narrow because it focused on legal actions in relation to the concept of administrative act mostly. More importantly, even though the LPAC (2002) was enacted as the primary legislation for administrative court procedure, its applicability to administrative litigation was limited[500] because of the listing approach which enumerates defendants. Some of the defendants listed in Article 4.1 of the LPAC, especially paragraph[501] 4.1.9 were not specifically defined instead used semi-definition based approach. Yet, the next requirement was that an action is allowed against administrative act, thus action is not acceptable if it is failed to challenge administrative act. Both the requirement of an administrative act and the enumeration of defendants have served as barriers to the jurisdiction of the administrative court since 2004.

In 2016, Article 13.1 of the ACPL broadened the scope of judicial review. Administrative court jurisdiction is no longer limited to reviewing actions in relation to individual and normative administrative acts, but now it is able to review all public law disputes of a non-constitutional nature, except the disputes that are explicitly allocated to another court.[502] Within the public law sphere, the ACPL only excludes disputes that are related to the relationships itemized in Article 3 (1) of the GAL and the ones that belong to the jurisdiction of the constitutional court. Consequently, in terms of the jurisdiction of the administrative court, the ACPL replaced the enumeration clause with a general clause. Broader jurisdiction means wider access to legal disputes that have arisen from relationships between individuals and administrative agencies

[499] The GAL changed this concept by separately defining normative administrative act distinguishing it from the individual administrative act.

[500] According to Professor Banzragch the challenging question faced, was what do to further on administrative procedure law since the administrative court had been established a decade before. She suggested that what was most important was to revise the LPAC. This included the replacement of administrative jurisdiction, which was limited to actions related to only administrative acts, with broader jurisdiction concerning all administrative activity which can infringe an individual right. Banzragch Gochoo, "Rechtsstaat ба Захиргааны хэргийн шүүх" [Rechtsstaat and Administrative Court], *The Judicial Power* 2 (2014): 34.

[501] Article 4.1.9 of LPAC stated that the subordinate or non-subordinate independent agencies of the ministries that may issue administrative acts, or similar organs such as departments, councils, bureaus, centers or foundations.

[502] Захиргааны Хэрэг Шүүхэд Хянан Шийдвэрлэх Тухай, art. 13.1.

in the public law sphere. This is especially regarding cases that assert concrete subjective right infringement.

Types of Action

Departing from the former position that focused only on administrative act, the definition of action stated in Article 3.1.3 of the ACPL reflects the purpose of law and jurisdiction given to the administrative court. Therefore, action consists of:

> (1) action filed by an individual or a legal entity seeking protection of its rights and legal interests that have been infringed or possible future infringement by illegal administrative activity, and (2) an action filed by authorized person to represent public interest and if provided by law, an action filed by administrative agency[503] (interagency action).

In 2002, Article 32.5 of the LPAC initially contained guidance for what can be described as four types of actions. This included an action for the revocation of an administrative act, an action for the declaration of obvious illegality of an administrative act, action for recovering damage caused by an illegal administrative act and action for a declaration of illegality of inaction. In 2010, Article 32.5 of the LPAC was amended; consequently, it no longer categorized actions, and instead it contained more general requirements for bringing an action. Since then, the only feasible guidance available for differentiating different types of actions is contained in a provision that defines types of judgments in Article 70 of the LPAC.

In accordance with the purpose of the ACPL and its definition of an action, Article 52.5 of the ACPL categorized types of actions. An action[504] for revocation of an administrative act, administrative contract, and normative administrative act can be filed by a person who asserts that his/her rights and legal interests have been infringed by such contracts and acts, as well as an action for declaration of nullity of an administrative act and contract (subjective litigation). In addition, an action for declaration of illegality of inaction, declaration of the existence or non-existence of a public legal relationship, a mandamus action, and an action for damage is permitted[505] on the same legal basis as subjective litigation. More importantly, implicit standing requirements for subjective litigation are set out in respective paragraphs of Article 52.5 of the ACPL.

On the other hand, concerning the types of actions which belong to objective litigation, Article 52.5.4 and 52.5.5 specify actions brought by agencies against other agencies (interagency action) and public

[503] However, Article 52.6 of the ACPL serves as an exception for the requirement of administrative agency's right to file only when specifically provided by individual law.
[504] Захиргааны Хэрэг Шүүхэд Хянан Шийдвэрлэх Тухай, art. 52.5.1 and 52.5.6.
[505] Ibid., art. 52.5.1, 52.5.2 and 52.5.3.

interest actions. From these separate provisions, information pertaining to who can file what type of action and which action requires what kind of preconditions is set out. Moreover, Article 106.3 of the ACPL sets correlated types of judgment to the actions prescribed in Article 52.5 if the action was justified as valid.

Noticeably, the ACPL is a step forward for the development of the concept of action in the Mongolian administrative law context. In the direction of the protection of individual rights, the ACPL has established the categorization of actions in administrative court procedure. However, the degree of defectiveness of the administrative act complained of in relation to what type of action needs to be filed (appropriateness of action) is quite unclear. Especially, consequences associated with the degree of deficiency when it comes to choosing the most appropriate type of action is not clear. Considering the purpose of the ACPL and its definition of action, the ACPL acknowledges the possible future infringement of individual's rights and legal interests as a necessity for filing an action; however, it is somewhat narrowly limited for within Article 52.5.5 and 52.2.6. The provision is only for public interest actions and actions related to normative administrative acts.

5.4.2. Control and Remedy type litigation

Overview

The purpose and function of the objective model of administrative litigation is to exercise control over objective legality of administrative activity. Thus, the judicial (or non-judicial organ which authorized) review focuses, not on the legal dispute in the legal relation but on the administrative act (which caused the legal relation) and its legality. On the other hand, the subjective model of administrative litigation focuses on providing a remedy and the protection of rights and legal interests of individuals. In terms of the nature of each type of litigation, the objective model is meant for supervising function in order to preserve law and order, while the subjective model is designed for provide a remedy function for infringed rights and legal interest of the individual.

France was the first to originate an objective model and use it as a main type of litigation, but without denying subjective rights. The French objective model is wide and open in its range of control over administration. Thus, French citizens can very easily lodge an action through recourse for excess of power (ultra vires) against administration. East Germany (Prussia) developed a similar model of litigation which focuses also on control over administration but very narrow in terms of range of control. In contrast with the French, the acceptance of an action for review through administrative jurisdiction, under the Prussian system,

was limited by the enumeration principle. Then Russia and Japan pursued a control type of litigation as influenced by the Prussian example. Mongolia, during the soviet era[506], introduced the control type administrative jurisdiction (not litigation) initially exercised by the Procuracy, which was a non-judicial organ that developed in Mongolia as a result of influence by the soviet law. The Procuracy's function was to exercise control over objective legality of administrative activity and act as a supervising organization.

By the end of the 20th century, there began a change[507] of priorities in the conceptual schemes of administrative law, which caused widespread acceptance in European countries to establish effective judicial protection for the fundamental rights under Article 6 of the European Convention on Human Rights. Therefore, the necessity to guarantee the full and effective judicial protection of individual rights has led to a tendency to change the paradigm of the French or otherwise called objective model of administrative litigation. Presently, France has kept the objective litigation model in principle but it is moving toward full jurisdiction too, especially[508] in practice. In contrast, after WWII, Western Germany and Japan[509] opted to utilize the subjective model at the constitutional and statutory law level. Administrative litigation has become more and more concerned with obtaining full jurisdiction for the protection of rights of individuals.

Paradigm Change Complete Yet?

Over time the administrative court and administrative litigation began to be recognized in Mongolia. Statutory law and the general paradigm for administrative litigation has reflected, since 2004, mainly[510] a subjective model. Though often in substance, this subjective litigation changes into control type litigation. The subjective paradigm's existence is mainly at the statutory law level and because of strong path dependence, the control type administrative procedure still exists under the formal structure of subjective litigation. Such path dependence is evident in the cases discussed in Chapter IV. The cases clearly reveal the

[506] From 1921-to early 1990s.

[507] Professor Zelentsov considers some problems of the development of the theory of administrative and administrative-procedure law in Russia in the context of innovations in the Code of Administrative Procedure of the Russian Federation, which are aimed at the revision of prevailing paradigms in this theory. Зеленцов, "Кодекс административного судопроизводства Российской Федерации как предпосылка смены парадигмы в теории административного права."

[508] Jean-Marc Sauvé, "The Council of State and the Protection of Fundamental Rights", Lecture at Graduate School of Law, Nagoya University on October 27, 2016.

[509] In French, problem that is important in administrative procedure is legality but in Japan the problem is illegality not legality. However, in Japanese practice it is subjective right based in entrance level of review but illegality in the level of merit level (even in Japan path dependence exists still in some areas).

[510] For instance, the LPAC (2002) contained provision that allows court to decide case even plaintiff no longer pursue it with respect to "public interest" (signal of objective litigation). Article 69.3 of the LPAC before amendment in 2010 states that the administrative case could be held in absence of the plaintiff if it's decision required by the public interest.

ease of acceptance of legal actions, no precise requirements for standing, and when deciding cases sometimes, actions are decided based on the illegality of administrative act not plaintiff's subjective rights.

For instance, there has been a substantial amount of confusion concerning the purpose of litigation as Ganzorig Dondov[511], an administrative law specialist points out in his article raised the question of who has the right to file an action at administrative court. Ganzorig asked whether only the person whose rights and interests have been infringed is able to file an action, or can a person whose rights and interests have not been infringed but only claims about the illegality of an administrative act, also qualify to file an action? Ganzorig acknowledged that the administrative court seemed to be establishing a practice which only recognized the person whose rights and interests had been infringed. Further Ganzorig suggested that a defective administrative act is categorized as an obviously illegal (voidable act) and a disputable act. The article further pointed out that obvious illegality is set forth in the law, and the court should not question the infringement of rights but first determine the administrative act's conformity to the law. Ganzorig reasoned that if the administrative act's illegality is obvious, then there must be an infringement of human rights and freedom.[512] Therefore, he rejected the idea of the administrative court limiting the right to file an action to only those who claim their rights and interests have been, or are being, infringed by an administrative act. Ganzorig's article is an important reflection of the confusion of legal consciousness of that time among[513] scholars and practitioners in Mongolia.

Until adoption of the ACPL, there has been no distinction between subjective and objective litigation under Mongolian theory, law, and practice. Hence, every action filed with the administrative court is examined as to whether there is an administrative act that has affected plaintiff's subjective rights and interests. For subjective litigation, especially for judicial review type actions, pre-conditions are eminent such as administrative act, and standing. Although these are inseparable components of subjective litigation, they are not required for objective litigation. Due to the very weak theory on the concept of administrative

[511] Ganzorig Dondov is the one of leading administrative law specialist who has been teaching public law since early 1990s. He is a member of the Constitutional Court since 2013.

[512] Ganzorig Dondov, "Захиргааны хэргийн шүүхэд нэхэмжлэл гаргах эрх" [Right to File an Action at Administrative Court], *Human Right* 4 (2005): 27, http://www.mn-nhrc.org/index.php?do=cat&category=33.

[513] Following articles written at that time also express in some part that the role of administrative court is to exercise of control over illegal administrative activity, however both article assert administrative court's main purpose is to protect right and interest of private person. Erdenetsogt Adilbish, "Захиргааны хэргийн шүүхэд нэхэмжлэх эрх нээгдэх нөхцөл" [Condition for Right to File an Action at Administrative Court], *State and Law of Mongolia* 2 (2003): 42. Tsogt Tsend, "Захиргааны хэргийн шүүх - Хүний эрх" [The Administrative Court - Human Right], *The Human Right* 4 (2005).

litigation, its history and development have caused confusion even after it was implemented in the new court through the court's procedural law. In addition, introducing the remedy type administrative litigation in 2002 and 2004, there was no practice upon which to draw from and build on. Theoretical concepts of administrative law, especially forms of subjective and objective litigation were not recognized; consequently, requirements for types of litigation were not instituted at the statutory law level. The practice often tended to rely on or look back to past experience[514] such as control type litigation.

Beginning with the 1990 Special Law on Complaint Procedure which departed from the old control type[515] administrative jurisdiction through the adoption of the 2002 new administrative litigation law, Mongolia administrative law has begun moving in the direction of remedy type litigation. After just over ten years since the new administrative litigation system was implemented, and in light of the very recent amendments to the system with two new additions to administrative statutes, has the paradigm changed from a control type litigation approach to a remedy type litigation approach? It is too early to determine the faith of the recent developments, however, the following assessments can be made as predictions based on the new laws and practice.

Generally, the enactment of the GAL and revision of the ACPL, especially the change from the use of an enumeration clause to that of a general clause and the categorization of types of litigation were not only significant achievements at the statutory law level but would also possibly support practice in the direction of broader protection of individual rights. The importance of recognizing categorization of litigation is significant because now the principle type of litigation is subjective, in contrast objective litigation ('objective' doesn't equal 'control' in this law) is exceptional. Therefore, it worth note that in recent practice, in most cases, the purpose of litigation is to determine whether the rights and legal interests of the individual who brought the action is remediable or not. Moreover, objective actions such as interagency actions are, by definition, expressly limited because they can only be brought if provided for by particular law. In turn, these changes are expected to be reflected in Mongolian legal practice, for instance,

[514] However, by enactment of the ACPL involvement of the Procuracy and counteraction to administrative act is ultimately eliminated from administrative litigation.

[515] However, even after adoption of the 1992 Constitution with the provision of administrative court as specialized court, idea of court control was strong not truly realized the establishment of administrative court and procedure is for remedy for infringed rights and interest. It is evident from scholars work at that time, for instance, Professor Udval expressed the importance of establishment of administrative court but some of the reasoning for it still reflects the old consciousness from the wording such as "simple structure is to control executive branch whether or not breaching the law based on citizen's petition and complaint ". Udval Vanchig, "Шүүх эрх мэдэл" [Power to Adjudicate], in *The issues of the concept of the Constitution of Mongolia*, 1999, 134.

to eliminate the wide range acceptance of objective actions under the name of subjective litigation.

Regarding theory of administrative law, several publications appeared following the enactment of the GAL and the ACPL. Professor Odgerel published his revised textbook [516] on general part of administrative law which reflect the enactment of the GAL. Professor Odgerel emphasizes the importance of codification of administrative law principles and provided a chapter[517] on the issue of legal protection in the administrative law. He divided legal protection into two phases. The first phase included administrative review and the second administrative court review. Yet, Professor Odgerel's textbook does not focus on judicial review because, as the textbook states[518], it is a procedural law issue. Noticeably, he described administrative review as a prerequisite for actions in administrative litigation (not only for judicial review type of actions) without distinguishing the forms of action.

Prior to the enactment of the ACPL, scholars[519] and practitioners[520] published articles on the issue of further development of administrative court procedure. It was generally agreed among lawyers, scholars, and judges that the use of the enumerated approach to define litigable cases was troublesome especially after the 2005 Constitutional Court judgment[521]. After the ACPL, Doctor Banzragch[522] published an article on the differences of the LPAC and the ACPL, focusing on the new elements presented in the APCL. She asserted that the purpose of the ACPL sought to limit the scope of objective litigation, therefore making its

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[516] Purevdolgor, *Захиргааны эрх зүйн Ерөнхий анги*.

[517] Ibid., Chapter 6, 316-327.

[518] When he described the relationship between administration and court, it states that "Core purpose of administrative court is to protect citizen's public law subjective right, through that exercise control over administrative activity whether it confirms to law." Ibid., 57.

[519] Doctor Erdenetsogt pointed out the importance of introducing general clause in order to cover all the forms of administrative acts under the court control. However, he correctly points out that suggesting to eliminate requirements of administrative review for action for declaration. He published article in 2016 based on the presentation for 10th Anniversary of establishment of administrative court in 2014. Erdenetsogt Adilbish, "Захиргааны хэрэг хянан шийдвэрлэх ажиллагааг боловсронгуй болгох асуудал" [The Improvement of the Administrative Adjudication], *National University of Mongolia, School of Law, Law Review* 2, 34 (2016): 235.
In the other article in English he gave a brief overview of administrative court, in doing so he stated that "The administrative courts of Mongolia serves as a pillar of the rule of law and exercises control over the executive branch of the Mongolian state". Erdenetsogt Adilbish, "The Administrative Court of Mongolia as a Protector of Human Rights," *The National Legal Institute of Mongolia Law Review* 5, 55 (2015): 47.

[520] Tsogt Tsend, "Захиргааны процессын эрх зүйн шинэчлэл: захиргааны хэрэг хянан шийдвэрлэх ажиллагааны зорилго ба хэрэг хянан шийдвэрлэх ажиллагааны төрөл" [Administrative Procedure Law Reform: Purpose and Categorization of Administrative Litigation], *National University of Mongolia, School of Law, Law Review* 2, 34 (2016), http://legaldata.mn/b/119 (accessed June 11, 2017).

[521] Захиргааны хэрэг хянан шийдвэрлэх тухай хуулийн зарим заалт үндсэн хуулийн холбогдох заалтуудыг зөрчсөн эсэх тухай маргааныг хянан шийдвэрлэсэн тухай Монгол Улсын Үндсэн хуулийн цэцийн дүгнэлт (Mongolia|MN Constitutional Court).

[522] Doctor Banzragch Gochoo was the key member of the Drafting team of the ACPL and she was Professor at NUM, School of Law. Currently she is judge at Administrative Chamber of Supreme Court of Mongolia.

meaning more definite.[523] However, one very important point is that the new characteristics, particularly the recognition of categorization of litigation and actions as objective and subjective, to the ACPL were not intended to broaden the objective type of actions. Conversely, they were intended to differentiate this type of action from subjective litigation and therefore make objective type actions more definite and limited but not, for instance, to introduce[524] *actio popularis*.

The realization of the changes made to statutory law and theory in the day to day practice of Mongolian administrative law appears to require more time and accumulation of cases than simply amending the law. It is apparent, based on discussions surrounding a following recent case[525], that the legal consciousness necessary for full paradigm change in Mongolia is not ready. Substantial disputes and confusion have arisen among lawyers and practitioners. One example of such a dispute concerns a case that involved a government cabinet as defendant, accused of wrongfully setting a date for a national level spring horse race according to the Law on National Grand Festival.[526] The horse race involved young children and the date was set for March 03, 2017 which was still relatively cold even though spring had officially began a few days earlier. Two children's rights non-governmental organizations filed a public interest action for revocation[527] of the government cabinet's decree in accordance with the provisions[528] of the newly adopted ACPL. Just to mention this case[529], to indicate an example of contradicting theoretical and interpretational

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[523] Banzragch Gochoo, "Монгол улсын захиргааны хэрэг шүүхэд хянан шийдвэрлэх тухай хуулийн шинэчилсэн найруулгын тухайд" [On Revised Administrative Court Procedure Law of Mongolia], *The Judicial Power* 1 (2016): 123.

[524] For example, at The Supreme Court of Mongolia, *Монголын Шүүх II Түүхэн хөгжлийн тойм, өгүүлэл нийтлэл* [Judiciary in Mongolia II Articles on Historical Development Overview], 2 (Ulaanbaatar, 2016), 219–20. On the point of *Actio popularis* see Chapter II, French part of this thesis.

[525] Хүүхдийн хөдөлмөрийн тэвчишгүй хэлбэрүүдийн эсрэг үндэсний сүлжээ Нийгэмд үйлчлэх төрийн бус байгууллага, Хүүхэд хамгааллын үндэсний сүлжээ Нийгэмд үйлчлэх төрийн бус байгууллагуудын нэхэмжлэлтэй, Монгол Улсын Засгийн газарт холбогдох захиргааны хэрэг [National Child Protection Network and National Network against Intolerable Child Labor Forms v. Government Cabinet] (Mongolia|MN Capital City Administrative Court). To date, this case is not decided on the merit but in procedure.

[526] Article 8.3 of the Law on the National Grand Festival states that titles will be issued for the horse races that organized by Government Decree and the National Naadam Festival.

[527] Though the appropriateness of the action is questionable because decree of government was only to set a date of horse race and it was one time and de facto action. Therefore action for the revocation could not achieve any legal interest but de facto interest.

[528] Захиргааны Хэрэг Шүүхэд Хянан Шийдвэрлэх Тухай, art. 1.1, 3.1.3, 3.1.9 and 18.3 (2016).

[529] Following the interim injunction of the government decree, discussions started among social and then the legal community, concerning whether the administrative court had a jurisdiction over the government cabinet's decision. The motivation for such discussions and interest was because of a judgment issued by the Constitutional Court, which ruled on the petition asserting that Article 4.1.1 of the LPAC (2002) contradicted the Constitution.
The Constitutional Court stated that the administrative court did not have jurisdiction over the government cabinet's decree because the provisions of the Constitution provided that only the government itself or the parliament could revoke a cabinet decree. Consequently, the parliament repealed Article 4.1.1 of the LPAC that included the government cabinet in the list that enumerated the administrative agencies. Some argue that

approaches[530] to particular case. It is noteworthy that the parliament[531] always retains power to revisit or restate certain provision or law as whole to correct this kind of problem.

5.5. Summary of Administrative Litigation Status to date

Recent developments in Mongolian Administrative Law have revealed that the fundamental change from administrative control towards an approach based on providing a remedy for the infringement of subjective rights is not an easy one. Path dependence plays quite a big role in interpreting law and theory. Scholars in Mongolia, during the early transition period[532], and even now, rely on outside legal assistance. However, such legal assistance has mostly focused on contemporary legal concepts and laws, but it has not been particularly understood with the necessary historical meaning and development. Nonetheless, Mongolian scholars and practitioners have been impacted or influenced by mostly with contemporary concepts. In law and legal literature, outside legal assistance has often been utilized to facilitate the use of terms such as right, dispute, parties, legal relation, and judicial review as a means to express new legal concepts and paradigms.

The usage of these new terms is important nevertheless, previously used terms such as complaint, control, and objective legality are still alive in the sense of path dependence. It is easy to use new, imported legal concepts with their contemporary meaning;[533] however, it is another thing if content of such new concepts is not fully understood or explained, as has often been the case during the transition period in

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this judgment of the Constitutional Court is still effective; therefore, the administrative court cannot have jurisdiction over the government decree. Others deny such reasoning and point out that, in addition to the relevant law, the (LPAC) which was relied upon in the Constitutional Court's judgment has been revised. They assert that the ACPL does not include specific enumerated jurisdiction.
Захиргааны хэрэг хянан шийдвэрлэх тухай хуулийн зарим заалт үндсэн хуулийн холбогдох заалтуудыг зөрчсөн эсэх тухай маргааныг хянан шийдвэрлэсэн тухай Монгол Улсын Үндсэн хуулийн цэцийн дүгнэлт (Mongolia|MN Constitutional Court).

530 Mongolian Bar Association, "'Шүүхийн хяналт ба Засгийн газар' нээлттэй хэлэлцүүлэг" [Judicial Review and Government Cabinet Discussion], *https://www.mglbar.mn* (Ulaanbaatar, May 4, 2017), open, Ulaanbaatar, https://www.youtube.com/watch?v=dueK1f9vl-o (accessed June 3, 2017).

531 However, Professor Chimid, when the 2005 Constitutional Court's judgment came out the first time, strongly denounced this judgment. He insisted that the provision in the Constitution that states that the government itself or the parliament revoke a cabinet's decree is designed to be similar to an instrument to provide self-review and pre-review respectively. Professor Chimid concluded that this does not limit judicial review in relation to viewpoint of human right, therefore, the provision which Constitutional Court relied on does not limit its ability to review actions in which individual rights and interests have been infringed upon. Chimid Biraa, "Захиргааны хэргийн шүүхийг нураасны хариуцлагыг хэн хүлээх вэ?" [Who is Responsible for Dismantling Administrative Court?], (presented at Legal Reform In Mongolia: Transition Period, Ulaanbaatar, 2006).
The Hanns Seidel Foundation, "Монгол Улсын эрх зүйн шинэтгэл: Шилжилтийн үе" [Legal Reform in Mongolia: Transition Period. Documentation of an International Symposium], 2006, 158.

532 In Mongolia, transition from soviet state to market state began in 1990 and believed to underway since then.

533 Education level to teach new system and new conception is important and common but in research level it needs to be explored from historical perspectives. Research and scholarly level it is particularly important to study stages of development.

Mongolia. Therefore, during the transition period in Mongolia, these new legal concepts, in substance, have always contained pre transition period legal concepts such as court control, complaint, and objective legality. Even though Mongolian administrative law concepts have changed on the surface, under the surface such legal concepts are often the same old concepts.

New legal concepts and institutions are rarely questioned, and on most occasions, they are readily accepted. However, it is important to realize how western legal concepts, introduced through outside legal assistance, came to develop the meaning and content of such a new concept and its practice through the contradiction and complement by pre-transition period legal concepts and its interpretation. Often, just the use of these new legal concepts as a sophisticated form is insufficient. This phenomenon did not avoid Mongolian administrative law because the objective paradigm is still very strong. It is reflected by easy acceptance of demand as an administrative act because of broad interpretation of the concept of administrative act; there are almost no requirements for standing to file an action; in addition judges[534] worry about the social responsibility implications of irregular administration. Consequently, administrative litigation until the adoption of ACPL, does not focus on the legal effect of an administrative activity may have on a plaintiff's rights and legal interests. An important way to determine exactly what the paradigm in administrative litigation is to examine what judges focus on. Are they focusing on remediable rights or the legality of an administrative act? Presently, at the surface level, Mongolian case review requires remediable right identification however, often the litigation turns into control type procedure which eventually leads to easily accepted broad control type actions by the court. Discussions in chapter IV demonstrated that often in pre-transition period practice, it was able to obtain remedy through control type litigation for instance, a claim for the revocation of administrative act as supervision.

5.6. Conclusion

The administrative law reforms in 2016 are another attempt to change to remedy type administrative litigation as a continuum of the first attempt that took place in the early 2000s. Is paradigm change from control type to remedy type completed?

By the enactment of the GAL[535] and the ACPL[536], Mongolian administrative law recognizes the

[534] Furthermore, the scope of judicial review of discretionary acts is in relation to the recognition of administrative discretion by the GAL, specifically regulated in the ACPL.
[535] GAL (2015).
[536] Захиргааны Хэрэг Шүүхэд Хянан Шийдвэрлэх Тухай (2016).

categorization of litigation; thus, it now distinguishes between the different purposes of different types of litigation. Based on this step, it will serve as a catalyst to further strengthen subjective litigation by developing preconditions such as the concept of administrative act, and standing. Moreover, it enables the further study of the types of actions associated with subjective litigation by distinguishing judicial review and non-judicial review actions (declaration type or public law related actions).

The enactment of the GAL and ACPL promote a departure from the judicial review practice of generally only accepting actions that challenge administrative acts; thus, these laws broaden the jurisdiction of the administrative court regarding other administrative activities which may not involve an administrative act but still affect individuals' rights and legal interests. Another key point is that after the establishment of the administrative court and its practice over a decade, reforms took place in 2015 and 2016, including some reforms based on administrative court practice such as the introduction of a general clause. Accordingly, such reforms represent a preferred way in which to develop the law, where accumulation of practice and theoretical discussions related to the cases help to shape the further development of statutory law regulations.

Importantly, in the latest attempt a general substantive administrative law was adopted for the first time and a procedural law was amended in relation to the adoption of this new general administrative law. Therefore, these codifications of administrative law is an attempt to overcome the absence of a standardized general administrative law principles and institutions in the theory and practice, in turn it expected to contribute to the further development of Mongolian administrative law.

Conclusion

The current thesis's research question focuses on the paradigm change of administrative litigation in Mongolia from its initial nature as Administrative Control and tendency towards Court Remedy. In relation to the first part of the research question, particularly concerning the part of "From Administrative Control", the following conclusions can be made.

From the viewpoint of administrative litigation and its history, soviet administrative dispute settlement is one variety of the control type. Hence, in Mongolia the control type administrative settlement procedure was established. This was a non-litigation (non-contentious) type procedure; in other words, it was not an adversarial system. The court had a very limited role in this procedure and the non-judicial organ, the Procuracy, played the main role. Accordingly, the court had very narrow and limited control based on the enumeration principle, which allowed for case review by the court only concerning matters set out, or enumerated, in list form. The purpose of this control type administrative complaint settlement procedure was to maintain objective legality over administration. To put it differently, providing a remedy based on individual rights was not the purpose of administrative litigation in Mongolia from the 1920s up to the 1990s.

This thesis recognizes and confirms that the control type administrative litigation in Mongolia, within the context of a comparative analysis of administrative litigation, shares a fundamental connection, in terms of its initial form with France, Germany and Japan. Though Mongolian administrative law was initially influenced by soviet law, French and German legal schools (concepts) have influenced Mongolia, indirectly. Historically, the starting point for all French, German and Japanese administrative litigation was the same purpose because every country started with control type administrative litigation. Eventually, each country developed its own distinctive characteristics and pace, then again all three countries have shown a similar tendency to change from control type administrative litigation to remedy type administrative litigation. One recent example is France, which has kept an original control type paradigm in its administrative litigation for a long period, is presently changing toward control in *concreto* under European Convention of Human Rights.

With relevance to the second part of the research question, the following conclusions can be reached when considering whether the paradigm changed from Administrative Control "to Court Remedy." The establishment of the administrative court with jurisdiction, in principle, over administrative cases was the

core achievement. Since 2002 and 2004, Mongolian administrative litigation is formally meant to be a remedy type, but in substance judicial control over administration has been kept. Even in prototype administrative court procedure for example, the involvement of the Procuracy on behalf of the state is authorized however, it was not exercised often in practice.

Mongolia introduced German type of administrative court structure. However, it became evident some time later, new structure and procedure often conflicts with old thinking and practice when it comes to the interpretation and application of law to concrete cases. With the establishment of administrative court and procedure, formal paradigm change was made at the statutory law level, but it was still not clear in the application of law in concrete cases. Even though the law changed to adversarial (litigation) type of procedure, in practice control type of procedure often exists which shows that paradigm change is formal but not substantial.

The enumeration approach, as a key expression of control type litigation, used the newly established administrative court procedure in Mongolia. It is a weakness in administrative litigation as with coinciding extensive application of the Rules of Civil Procedure. As a result, identical to the soviet era in Mongolia when the ordinary court had jurisdiction over certain administrative decisions through its use of civil procedure, the Law on Civil Procedure continues to be utilized as a special complaint procedure (non-contentious procedure) despite the fact that a separate administrative procedure exists.

However, since 2002 the establishment of the administrative court and the enactment of separate administrative court procedure were significant achievements in Mongolia. Not only did the court become the main institution in administrative litigation, as opposed to formerly non-judicial organs such as the Procuracy, but administrative cases began to be decided through specialized administrative court procedure law. The most important change was to transformation from non-litigation type procedure (non-contentious procedure) to litigation type. Though the 1990 attempt to introduce a general clause in administrative court procedure failed, the LPAC introduced an inclusive enumeration approach. However, making paradigm change to remedy type administrative litigation was not easy with existence of parallel jurisdiction in civil court with enumerated complaints and strong path dependence for control type procedure at the level of practice and legal consciousness. In addition, no distinction has been acknowledged between judicial review type actions and public law related actions in theory, institution, and at the practice level in Mongolia.

The administrative act concept is clearly established in Mongolia, even if it is not the same as the

original concept derived from Germany, it is one variety. The latter two concepts, standing and objective interest of litigation, are not fully understood at the institutional and practical level in the Mongolian context. In Japanese practice, there are strict requirements for qualifying as an administrative disposition at the entrance level, including, establishing standing and a showing of an objective interest of litigation. On the other hand, Mongolian practice often has no strict requirements because of the influence of path dependence. The Mongolian administrative court still acts as a protector of objective legality. Consequently, though the procedural law does not allow such a practice, the court sometimes accepts objective litigation.

Paradigm change from control type to remedy type has been somewhat achieved at the institutional level in the sphere of administrative litigation however, legal thinking and practice in Mongolia is difficult to change, as it endeavors to evolution toward a remedy type litigation because of path dependence. There still is a gap between law and practice in terms of understanding the purpose of administrative litigation. Therefore, a careful analysis of the Mongolian cases reveals that practice in substance, is often the same as control type procedure that existed during pre-transition period. Path dependence strongly seeks to maintain objective legality therefore, civil dispute cases often easily change into administrative dispute cases. In that way, it can initiate a control type administrative litigation even after constitutional and statutory law level under which Mongolia made transition to remedy type litigation.

Finally, how have recent administrative law developments impacted the settlement of administrative disputes in Mongolia? Is the paradigm change completed? The paradigm change has only been made on the surface level because in actual practice, it is difficult to change old practices. Therefore, Mongolia needs to establish an adequate environment that promotes productive administrative law development (the previous accumulation for the development of administrative law). First of all, this requires “primitive accumulation” of the practice and theory based on general legal concepts and institutions, which Mongolia has just recently begun to adopt through legislation such as the GAL. Statues like the GAL are essential in the development of general principles and legal concepts of administrative law in Mongolia.

The administrative law reforms in 2016 are other attempts to change to remedy type administrative litigation as a continuum of the first attempt that took place in the early 2000s. Comparatively, the Japanese administrative law approach to legal interpretation traditionally starts from abstract concepts, and then applies them to concrete cases (deductive legal interpretation). Additionally, institution comes to play a role in generally defining the legal concept. This is called the premise-condition for the development

(development of administrative law as legal interpretation). Conversely, only now the Mongolian approach includes first defining the legal concept in statutory law (codification) and then enforcing this concept through cases. In this circumstance, because of insufficient practice and poor theoretical basis, it is difficult to appropriately use abstract legal concepts in particular cases. For that reason, the Mongolian approach to the development of administrative law is not a preferred approach (handstand approach[537]).

By the enactment of the GAL and the ACPL, Mongolian administrative law recognizes the categorization of litigation in consequence, it now distinguishes between the different purposes of different types of litigation. Based on this step, it will serve as a catalyst to further strengthen subjective litigation by developing preconditions such as the concept of administrative act, and standing.

As a recognition[538] of some of the findings of the current research in the recent Mongolian administrative litigation law, the ACPL is one example of a practical application of the claim of this thesis. Another key point is that after the establishment of the administrative court and its practice over a decade, reforms took place in 2015 and 2016, including some reforms based on administrative court practice such as the introduction of a general clause. In consequence, such reforms represent a preferred way in which to develop the law, where accumulation of practice and theoretical discussions related to the cases help to shape the further development of statutory law regulations (foot stand approach[539]).

Regarding suggestions for further research relevant to this thesis: though findings of this research, particularly those that identify the type of administrative litigation and its tendency in Mongolia, improve the understanding of paradigm and its change in the Mongolian context, this thesis is not an exhaustive study of the types of actions in relevance to administrative litigation. More specifically, what is not covered by the current research is public law related actions concerning distinctive actions in administrative litigation. Relevant to this point, there is a necessity to study a request for the granting of an injunction, not for procedural or interim relief, but as type of action in administrative litigation.

Further research needs to be conducted concerning the application of provisions that have sought to define objective litigation, its scope and consequences that will come with the recognition of categorization

[537] Approach that begins from the codification to the practice and the theory.

[538] Author of this thesis was worked as a member to the drafting team of the ACPL in preparation for the parliamentary discussion and a member of the drafting ream of the GAL. In relation to the ACPL, author worked to define types of administrative litigation, introduction of categorization of litigation in order to limit an objective litigation. Moreover, author particularly worked on articulation and the correlation of Article 1.1, 3.1.3, 52.5, and 106.3 of the ACPL.

[539] Approach that begins from the accumulation of cases toward the codification.

in statutory law for practice in the near future in Mongolia. These suggestions for further research, relevant to the current thesis, should seek to continue examining the theoretical, institutional, and practical weaknesses which contribute to a full paradigm change in the sphere of administrative litigation including providing full and timely protection for infringed or possible future infringement of the rights and legal interests of individuals.

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