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Article

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

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Conclusion

## 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

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.

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 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*

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.

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

*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 clause in order

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

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,

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.

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 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

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.

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 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 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]

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).

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

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

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.

necessary, but it is also important that theory and institution (statutory law) recognize such rights as well as Fritz Werner [23] said, 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

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

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.

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 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-

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.

28） Ganbat Chimidlkham, "Judicial Reform in Mongolia," (presented at 11th Conference of

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 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

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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.

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.

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

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.

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

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).

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 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

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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.

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

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 (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.

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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.

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".

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 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

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.

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.

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; 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*

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).

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.

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

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.

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 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

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.

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.

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

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.

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 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

67） Phrase of "petition and complaint" sometimes referred as "application and appeals".
68） Jugnee and Ookhnoi, *The Constitutions of Mongolia 1924-1940-1960-1992*, 263.
69） Jamsran, *Монгол Улсын захиргааны эрх зүйн удиртгал*, 175.

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 was still strong.[74] Consequently, Edict 116 of the Presidium of the Great People's *Khural* of May 29, 1973[75] also imposed a duty on the Procuracy to supervise the

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 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

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

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.

reply of citizens' complaints focused on the legality of administrative activity out of question on rights and interests 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

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.

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 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 a seminal textbook entitled, "The MPR Administrative Law," in 1973.[87),88] 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.

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

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*.

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 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

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.
91） It discussed about maintaining socialist legality by the party, state and communal supervision.

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 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.

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.

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

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 of this law[97] 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]

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

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

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 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.

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 administrative law[103] which also caused introducing the right to court in the area of administrative penalty.

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

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.

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.

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 the complaint process,[107] 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 other words, no extension took place until the eve of the 1992 Constitution,[109] 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

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.

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.

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 entitled, "On the Procedure for Appeal to Court of Illegal Actions of Officials Infringing on the Rights of Citizens,"[114] 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

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.

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 to those specifically named actions in the laws.[116]

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

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

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[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

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журмын тухай хууль [Law on Procedure of Removing the Damage to the Citizen that Caused by Unlawful Activity of Investigative, Prosecutorial and Judicial 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.

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 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

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.

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.

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]

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 [132] suggested that one of the reason

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).

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.

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 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 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.[136)] In this case the court applied Article 7 of the 1990 law as a substantive law, and subsequently ordered the hospital chief to submit

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.

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

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 to apply the rules of civil procedure.[139] 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, multiparty elections, and the drafting of a new constitution.[140] A

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.

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/

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 and amendments.[141] 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 confirms.[144] 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

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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.

legal guarantee for ensuring human rights, Article 16 paragraph 14 provides the right[145] to 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

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).

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,

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 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

*Constitutionalism and Constitutional Review in Mongolia*, 32–33.

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

150）Ibid., art. 19 (6).

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.

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.

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.

153）This was the first form of administrative jurisdiction in soviet states.

## 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：Overview of Mongolian Administrative Litigation since 2002

## 2.1. 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.

## 2.2. Administrative Court Structure in Mongolia

### 2.2.1. 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[154] along with the Law on the Establishment of the Administrative Court in accordance with Article 48 paragraph 1 of the Constitution.[155] 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*.[156] Eventually, the Constitution included several

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

155) 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.

156) State *Baga Khural* is the lower chamber of the parliament.

important provisions,[157] 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.[158] 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,[159] sought to institute a legal environment for the establishment of a specialized court. The Implementation Plan of the Legal Reform Program had set the actual dates[160] for the creation of the administrative court during the second quarter of 1998. The parliamentary agenda[161] 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[162] 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.[163] An International Symposium on Legal Reform and the National

157）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".

158）Монгол Улсын Эрх зүйн шинэтгэлийн хөтөлбө р [The Legal Reform Program].

159）Ibid., pt. 27.

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

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

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

163）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

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 in 2000, international relations suddenly improved greatly and politicians, officials, and scholars visited many foreign countries.[164] 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.[165] The symposium agreed upon the general analysis that concluded that the legal system of Mongolia belongs to the continental legal tradition and further tends to concentrate on the Roman-German legal system. Though there were concerns[166] 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 and carefully adapting it into one's own legal system.[167]

Ultimately, the closing document of the symposium identified important considerations in Mongolian legal reform. Such reforms required a recognition of

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Foundation, 1998), 36.

164) "Closing Document of International Symposium on 'Legal Reform and National Legal System,'" 10–11.

165) Ibid., 11.

166) Merely copying a law from other countries is like pouring water onto class – it is not absorbed. Chimid Biraa.

167) "Documents of International Symposium on 'Legal Reform and National Legal System,'" (presented at Legal Reform and National legal system, Ulaanbaatar, 2000), 38–39.

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.[168)]

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.[169)]

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[170)] available in order to transform administrative litigation in Mongolia. The first option involved creating a new administrative court system[171)] 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

168）Ibid., 196.
169）Ibid., 198.
170）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.
171）Mongolian example as establishing separate administrative court but Japanese example as giving ordinary court to have jurisdiction over administrative case.

ordinary court was to settle civil disputes 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.[172] Through German based foundations, namely the Hanns Seidel Foundation,[173] most of the legal assistance

172）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.

173）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.

and support for establishing[174] the administrative court came from Germany, including drafting relevant laws and training[175] judges.[176] 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 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.[177]

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[178] mentioned that in accordance with the *rechtsstaat* principle, which is embodied in the new Constitution of Mongolia,[179] 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[180] by emancipating the

174）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.

175）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.

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

177）Gepperth et al., *Human Rights and National Security*, 15.

178）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.

179）Монгол Улсын Үндсэн Хууль (1992).

180）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.

government administration from bureaucracy and protecting fundamental rights.[181)]

Additionally, a concept paper concerning the Law on Procedure for Administrative Case, issued by the government when it submitted the draft to the parliament,[182)] 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 on various details concerning the Law on Procedure for Administrative Case.[183)]

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, 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.

### 2.2.2. Structure of administrative court

Until 2004, specialized courts that exercised administrative jurisdiction were

181) "Documents of International Symposium on 'Legal Reform and National Legal System,'" 67.

182) 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.

183) 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).

not present in Mongolia. The Law on Establishment of Administrative Court[184] 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 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

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

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,[185] actions related to Article 4.1.1 to 4.1.3 which named government

185）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."

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 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[186] 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

186) It seems that only a few scholars such as Professor Chimid understood the underlying concept.

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.

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

### 2.3.1. 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 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,[187] 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.[188] 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 concerning the LPAC,[189] the government explained that in practice there was no adequate control over illegal administrative decisions when administrative authorities breached citizens' rights. Moreover, the

187）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.

188）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.

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

Law[190] 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.[191] 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[192] was to exercise an objective guarantee of legality of administration by using complaints from citizens. The 1990 Special Law on Complaint Procedure[193] 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, 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.

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

The concept paper[194] acknowledged that even though the Law on Civil Procedure contained[195] regulation concerning the making of a complaint against

190) 1990 Special Law on Complaint Procedure (1990 оны 3 дугаар сарын 23-ны өдөр).

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

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

193) "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.

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

195) 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

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[196] 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[197] 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.[198] 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 that based on a complaint concerning a legal act and activity of an administrative organization, an administrative official civil case shall be instigated.[199]

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 force on June 1, 2004,[200] no

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.

196）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).

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

198）Ibid., art. 156.2.

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

200）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.

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[201] 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[202] Article 4.1.1 and 4.1.6 by reasoning that such articles contradict the Constitution. Consequently, the Parliament detached[203] 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,[204] replacing

201) 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."

202) 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).

203) Amendment to the LPAC was adopted on April 28, 2005.

204) 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,

'in Article 4.1 and 4.2 of the Law on Procedure for Administrative Case' with 'in Article 5 of the General Administrative Law.'

### Extensive quotations from civil procedure

The list of laws applicable to administrative court procedure includes the Law on Civil Procedure.[205] 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 2.3.2.

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

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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."

205）Захиргааны Хэрэг Хянан Шийдвэрлэх Тухай, art. 2(1) (2002).

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[206] from civil court procedure in 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.

### 2.3.3. 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 "administrative agency," to include the following organs which are deemed public legal subject:[207]

- 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

206) "Захиргааны хэрэг хянан шийдвэрлэх тухай хуулийн Хувийн хэрэг, УИХ-ын тамгын газрын архив," 5. See footnote 333.
207) Захиргааны Хэрэг Хянан Шийдвэрлэх Тухай, art. 3.1.1.

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 as a single whole entity to be regarded as a public legal subject.[208] 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 administrative agency and official.

The LPAC includes the term administrative official[209] 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.

208）Japan changed in Article 11 of the ACLA defendant from agency to state by the 2004 amendment.

209）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.

In the Mongolian context, partially because drafters of the LPAC believed[210] 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[211] 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.

### 2.3.4. 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 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 be challenged at administrative court.[212]

Why enumeration? Although everyone agrees that the LPAC is modeled on the

210) Biraa, *Захиргааны хэргийн шүүхийн тухай мэдэгдэхүүн*. See footnote 131.
211) See Chapter I for historical perspective.
212) "Захиргааны хэрэг хянан шийдвэрлэх тухай хуулийн Хувийн хэрэг, УИХ-ын тамгын газрын архив," 6.

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 needed a definition of administrative act and administrative agency at the statutory law level for the above mentioned reason.[213] 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.

213）In Japan no definition in law, but definition of administrative agency comes out from theory and practice.

However, enumeration in the LPAC was not inclusive, in fact it was exclusive.[214] In other words, only those administrative agencies listed in Article 4.1 of the LPAC can be sued in administrative court. 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[215] 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 from the list of defendants which succeeded.[216]

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[217] a certain administrative agency form the list, individuals

214) 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.

215) 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.

216) 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.

217) 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

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.

### 2.3.5. Preliminary Proceedings as Administrative complaint

The LPAC can be divided into two sections: first, an administrative complaint procedure[218] is utilized to review the original act based on the complaint, and second, an administrative court procedure (litigation) is applied. Article 6 of the LPAC[219] 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,[220] 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.[221]

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холбогдох заалтуудыг зөрчсөн эсэх тухай маргааныг хянан шийдвэрлэсэн тухай Монгол Улсын Үндсэн хуулийн цэцийн дүгнэлт (Mongolia|MN Constitutional Court).

218）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.

219）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."

220）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)

221）Chapter 8 of the German Code of Administrative Court Procedure contains regulation

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.[222), 223)] 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 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.

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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.

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

223) 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).

Additionally, the Law on Procedure for Disposal of an Application, Complaint by a Citizen to the State Organization and Officials,[224), 225)] exists and is legally parallel with the LPAC.[226)] 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.

## 2.4. 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 as a background problem for the new administrative litigation system.

Mongolia introduced a German type administrative court structure. However, it

224）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).

225）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."

226）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.

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.