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論　　説

Development of Administrative Litigation in Mongolia (3):
From Administrative Control to Court Remedy?

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Chapter IV: Recent Developments in Administrative Law: From Administrative Control Toward Remedy of Subjective Right?

4.1. Introduction

As a result of the first attempt to reform Mongolian administrative litigation, it is evident from the last two chapters, especially from the case analysis in chapter four, that complete change toward a remedy type litigation has not yet been accomplished. Therefore, further examination needs to be done in relation to the recent developments in the Mongolian administrative laws, particularly focusing on whether the concept of litigation has changed its status. It is also possible to make a link between this chapter and the broader argument upon which the current research is based. This is because chapter five will examine the most recent status of administrative litigation in Mongolia and attempt to determine whether its paradigm change is complete, all the while cognizant of its starting point as a soviet law type complaint procedure in chapter one and its transformational journey through the analysis chapters, three and four, culminating in chapter five.

This chapter will examine what steps have been taken since the establishment of the administrative court and the adoption of a separate administrative litigation law at the statutory law level. And it will ask if any problems that were acknowledged in previous chapters have been fixed in relation to change

necessary for enabling remedy type administrative litigation in Mongolia. Moreover, this chapter will identify the core characteristics concerning any new developments that have been brought. It will seek to confirm if a decade long judicial practice has prompted any change in statutory law revision. The survey of progress in this chapter is crucial, not only because of the expectations that recent development could bring to the actual practice in the area of administrative litigation, but such survey could also be utilized to foresee any aspects that could still be holding up progress.

It will begin with observing the newly enacted General Administrative Law (GAL) in the first sub-section. In doing so, the first sub-section will concentrate on its new and progressive elements and then reveal its limits and problems. Note that progressive or problematic elements are defined by criteria that asks if they provide protection for rights and interests of individuals or if they represent a setback for rights and interests. Therefore, newly introduced concepts such as administrative contract and normative administrative act will be studied first. And then the discussion turns to the limits and problems of the GAL such as the uncleanness of the purpose of law and possible conflicts with other laws. In the second sub-section, it scrutinizes the revised administrative litigation law, the Administrative Court Procedure Law (ACPL), by paying particular attention to its essential features in relation to the paradigm change. For instance, it will consider the definition of purpose of litigation, determine if there is any noticeable change from the former law, and ask whether there has been significant change in terms of jurisdiction by introducing a general clause approach.

At last, this chapter will demonstrate, in connection with previous chapters, to what extent Mongolian administrative litigation has progressed in the direction of providing a full and fair remedy for the infringement of rights and interests of individuals caused by administrative activity.

4.2. Background

In the area of administrative law, it is essential to determine where the role of the judiciary stands as a protector of rights and interests granted by the

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

Mongolia only has just over ten years of experience both in terms of statutory administrative law and actual practice in the field of specialized administrative court procedure. Because of the combination of Mongolia's socialist law theory of legacy and new concepts embedded in the Constitution, the actual practice of law was in a state of confusion. This chapter will discuss what achievements or predictions can be made in accordance with very recent developments in Mongolian administrative law, particularly the enactment of the General Administrative Law and the Administrative Court Procedure Law. The key objective of this chapter is to analyze the development of administrative litigation as it transitions towards a process to protect individual rights and legal interests.

4.3. The General Administrative Law (GAL)

4.3.1. Drafting and Enactment of the GAL

The Mongolian Parliament enacted the General Administrative Law on June 19, 2015 which took effect on July 1, 2016.[1)] The idea of having a general administrative law like the current Mongolian Civil or Criminal law has been

1) In the process of revising the draft it turned into an extensive collection of substantive and procedural norms in the area of administrative law consequently, the draft became something more than just an administrative procedural act. It has become a legal framework that substantially sets out general principles of administrative activities, covers all standard procedural requirements, and mandates the ability to enforce administrative decisions. This is now reflected in the name of the legislation: the *General Administrative Law.* GAL [The General Administrative Law] (2015).

discussed for over a decade among Mongolian lawyers and practitioners. Many in the legal community in Mongolia believe that the absence of a standardized general administrative law has contributed to the lack of substantial development of Mongolian administrative law. In the area of administrative law, it is true that legal practice is in need of general principles and standard procedures in order to make administrative law litigation more consistent, predictable, and ultimately more just. In fact, it became more evident since the creation of the administrative courts in 2004 that Mongolian administrative law requires clear statutory development.

Since 2002, the LPAC has defined only a few provisions such as administrative act and administrative agency in terms of concepts of substantive law.[2] Therefore, the administrative courts were forced to decide on many cases by means of limited statutory law sources. As early as 2003, even before the actual practice of the LPAC by the administrative court which began in June 2004, one consultant noted that the LPAC regulates mostly only on court procedure for administrative disputes; however, the administrative process itself needs to be regulated by statutory procedural law, especially the procedural principles are essential to the development of in this area of law.[3] Moreover, Philip Kunig, Professor at Department of Law, Freie Universität Berlin insisted that developments of administrative law concepts based only on judicial practice would be incomplete.

Initially the drafting focused on only the administrative procedure which mainly dealt with procedural certainty in administrative decision making.[4] That is

2） Захиргааны Хэрэг Хянан Шийдвэрлэх Тухай (2002).

3） Philip Kunig, "Recommendation on further development on Administrative procedure and administrative litigation," (presented at Legal Reform in Mongolia 8 years, Ulaanbaatar, 2003), 23.

4） Eventually, in 2009 the Ministry of Justice began the process of drafting the *Administrative Procedure Law*, which later evolved into the *General Administrative Law*. However, this process slowed primarily due to the lack of strong will political institutions which were responsible to move the draft to parliamentary discussion. In 2012, by the result of election new government formed, subsequently new Minister of Justice reformed the drafting team and with the support of legal specialists and technical assistance from the foreign and international organizations completed the first draft of the *General Administrative Act* (the draft) by the end of 2012.

Dr. Guntram von Scheurl and Dr. Juergen Harbich from Germany, Professor Tom Ginsburg from the U.S. were the principal commenters. Professor Katsuya Ichihashi from the Nagoya University, Professor Shigeru Kodama from Mie University, and Professor

because the administrative courts utilized different types of procedures in different types of cases. For instance, tax law, land law, and mining licensing law all had their own procedures. Those procedures differ, in relation to regulation with relevant citizens and entities, according to a number of factors including: time, cost, notice, decision making, and appeal procedure. From both a legal and non-legal perspective, this is quite burdensome. Not only lawyers but the general public must also learn a unique set of rules and procedures in order to be in compliance with each agency's requirements.

4.3.2. Expectation of the GAL in the area of administrative law

The GAL sought to institute a general legal standard in terms of legal relations between citizens and the state. Therefore, this law is expected to establish certainty, consistency, and predictability, in the legal interactions between citizens and administrative agencies. Doctor Sunjid Dugar, associate professor at the National Academy of Governance recently published a book in relevant to the enactment of GAL, in which she insisted that the enactment of the GAL would bring a standardized legal basis for administrative activity. She asserted that the GAL would consequently help to review whether or not administrative agencies operate in accordance with law.[5)] Moreover, Doctor Sunjid asserted that the GAL ensures every act from administration, which is directed outward to an individual, be placed under legal review and must be based on law.

The GAL also promotes greater accountability for government administrative agencies as well as more opportunities for public participation in the regulatory process. Participants involved in the administrative decision-making procedure have been provided all procedural rights. Such rights include the requirement that agencies must give adequate notice and hold hearings if necessary among persons whose rights and/or legitimate interests are going to be affected by the decision.

Takio Honda from the Ryukoku University Law School also commented on early draft of GAL.

5) Sunjid Dugar, *Захиргааны ерөнхий хууль: үзэл баримтлал, хэрэглээ* [The General Administrative Law: Concept and Application] (Ulaanbaatar, 2017), 123.

On the other hand, the GAL requires administrative agencies to make certain legal determinations, prior to specific decision making, by examining each case concerning relevant conditions and evidence. As Professor Jürgen Harbich[6] commented on the final draft of the GAL by stating that the draft included several progressive elements such as adverse administrative act and a duty to provide legal reasoning when issuing an adverse act directed to an individual.[7] Thus, administrative agencies are obliged to analyze in detail the grounds for each case relevant to the particular decision making, and establish circumstances of significance and/or relevance in respect to the participant.

Moreover, as a result of the creation and enactment of the GAL, the Mongolian legal community expects improved and considerably more responsible governmental administration with regards to promoting and preserving a well-defined and consistent legal relationship between citizens and governmental entities. The enactment of the GAL further insulates against illegitimate political influence into professional public administrative affairs, which causes uncertainty and instability among officials in their day to day decision making. The new law constitutes much needed guidance for decision makers at every level of the administrative legal ladder. It ultimately holds administrative agencies responsible for their decisions and restrain unlawful or irrational activity harmful to rights and legal interests of individual. Overall, when a dispute comes before the administrative court, the judges responsible for rendering fair and equitable judgments will now have clear and comprehensive statutory law.

6） Professor Jürgen Harbich is the one of the main person who provided legal assistance from the very beginning in the area of administrative law in Mongolia since mid-1990s. Professor Harbich was served as Director of the Bavarian Administrative School (*die Bayerische Verwaltungsschule*)

7） Jürgen Harbich, “Өрнө, дорнын эрх зүйн харилцан уялдаа- Монгол Улсын нийтийн эрх зүйн жишээн дээр” [Inter-Consistency of Western and Eastern Law: Public Law in Mongolia as an Example], (presented at Legal Reform of Mongolia and Comparative Law, Ulaanbaatar, 2014.5.30), http://www.legalinfo.mn/details/282 (accessed July 17, 2016).

4.3.3. New and Progressive institutions of the GAL: moving in the direction of a remedy based individual rights approach.

Scope of applicability of law

Reviewability of administrative activity is a key aspect in the broader structure of relations among the executive and judicial branches of government. Therefore, outlining the applicability of the GAL is relevant for further determination of the scope of judicial review in administrative law. The GAL sets out legal boundaries for administrative activities. In other words, this law does not regulate activities such as the legislative affairs of parliament and political decision making.[8] Therefore, it clearly sets the limits of judicial review in certain areas in which judicial review is not feasible. This is an important characteristic that the GAL introduced in terms of distinguishing an administrative agency's legal act and a political act. Moreover, on the issue of the availability of judicial review, in Article 42, the GAL introduced the concept of discretionary[9] act of administration. Both emphasizing the distinctive characteristics of a discretionary act and setting the limits of discretionary power will serve as a vital basis for judicial review when it comes to litigation related to a discretionary act.

Definition of administrative act and agency

The inclusion of definitions within the administrative statutes is often an important first step in understanding the law and applying it to a particular case in Mongolian context. The drafting team decided to transplant specific provisions from the LPAC that define administrative agency and administrative act with

8) The concept of political question somewhat urged from the judicial practice. Therefore, it can be said that it is right direction to normal development of law. This is the case particularly after the action and subsequent procedure initiated by two members of government cabinet who fired from cabinet by decision of the Prime Minister sparked discussion on jurisdictional issues that involved political matters in administrative litigation not long after establishment of administrative court. Erdenebat & Erdenebaatar v. Government of Mongolia (Capital City Admin. Ct 2005). Tsogt Tsend, "The Availability and Scope of Judicial Review of Administrative Action (Comparative Study Mongolia and US)," Oregon, US (LL.M, Willamette University College of Law, 2007), 11.

9) Article 42.2 of the GAL states unless otherwise provided by law, an administrative agency shall apply the availability of discretion, within the scope of its authority, based on the requirements set forth in law and in conformity with its purpose.

minimal changes in order to keep the newly adapted concepts consistent.[10] One of the newly introduced elements in relation to the concept of administrative act which is the division of administrative acts based the effect the act has on the person to whom it is directed. A "beneficial administrative act"[11] refers to an act that establishes rights to or creates a favorable situation for a person to whom the legal effect is directed. On the other hand, an "adverse administrative act"[12] refers to an act which restricts the rights and legitimate interests of the person to whom the legal effect is directed. The key distinguishing feature between these two forms of administrative act is the inclusion of a 5-year statute of limitations for the revocation of beneficial administrative acts. The 5-year statute of limitations functions to protect any legal rights and interests that have been established by the administrative act itself.[13]

Another important characteristic of the administrative statutes is related to the definition of administrative agency. Even though the LPAC had provided a listing of specific administrative agencies whose activities were subject to judicial review, and had done so for the previous twelve-year period, the GAL rejected such specification in terms of definition of administrative agency. The listing approach in the LPAC was not a precise list of defendants instead it was part of a definition of administrative agency. Because the LPAC served simultaneously as the rules of administrative procedure and as a source for substantive law definitions, the list-based approach enabled some agencies to avoid judicial review just because they were not included on the list. Eventually, the GAL included a semi-general definition for administrative agency.

Administrative Contract and Normative Administrative Act

Additionally, the GAL sets out special provisions for administrative contracts[14] and normative administrative acts[15] as specifically recognized forms of

10） Article 5.1 of the GAL speaks on the definition of administrative agency and Article 37.1 on definition of administrative act. GAL, Art. 5.1 (2015).
11） Ibid., Art. 37.4.
12） Ibid., Art. 37.5.
13） A 5-year statute of limitations does not apply to an adverse administrative act. Ibid., Art. 48.1.
14） Ibid., Art. 52.1.
15） Ibid., Art. 59.1.

administrative activities in public law relation, as well as planning. In turn, the first general statutory law, the GAL, recognized the concept of administrative contract and normative administrative act. For instance, Article 52 states that in order to create, change, or terminate a public law relationship, an administrative agency may enter into a contract in the areas of public services, education, health, environmental protection, and other administrative law relationships.[16] Moreover, the administrative contract can also be used in scenarios in which administrative agencies assign some of their own functions or powers to other private persons or entities and in relationships associated with creating sustainable use of essential infrastructure and social services.

Recognizing the administrative contract form as an activity utilized to interact with individuals reinforces legal certainty in the public law sphere whereas formerly predominantly regulated by a unilateral decision. A Distinctive feature of the GAL is that although it covers a broad field of relevant legal provisions,[17] and it is the primary source for administrative contracts, if there are no rules of administrative legal norms that speak to the matter related to an administrative contract, then according to Article 58, the rules of the Civil Code are utilized.[18] In other words, norms of administrative law serve as primary rules for administrative contracts and where there is an absence of such primary source of rules then the rules of the Civil Code apply as supplementary rules[19] . Conversely, for instance, in Japan administrative contracts are regulated mainly by the civil code and civil procedure.[20] However, sometimes administrative contracts have special or

16） Ibid., Art. 52.2.

17） For example, Article 54, 55, 56 of the GAL provides especial principles that governs for administrative contract.

18） Article 58.1 of the GAL states that "In addition to the provisions of Chapter Five hereof, the fundamental regulations stipulated in the Civil Code shall equally apply to administrative contracts. Where there are no administrative norms that regulate otherwise, substitutionary application will be carried out. Explanation: "Substitutionary application" refers to apposite application of provisions of the Civil Code where this law has no provision for regulating a particular matter, consistently with the public law principles, upon thorough examination as to whether such provisions are appropriate for the administrative proceedings and the administrative contract."

19） Захиргааны Ерөнхий Хууль, art. 58.1.

20） Japanese and MGL principle in administrative contract is reverse, for instance, in Japan instead of issuing administrative disposition often use an administrative guidance. And by administrative contact can only set severe limit than law set but of course only the other

exclusive principles that are contra to civil code principles, for example, the principle of freedom of contact is limited concerning administrative contracts since administrative agencies have an obligation to conclude contract in terms of in what subject they can enter into a contract with.

Additionally, the concept of a normative administrative act had been regulated by government decree since 1993, and the decree was revised several times, with the last revision resulting from a study related to a UNDP funded project in 2010. Nonetheless, local self-governing bodies and independent agencies, which were directly formed by the parliament, were not within the scope of this decree; therefore, its rules were not applicable to these bodies' normative administrative acts. The Ministry of Justice was responsible for pre-review of adopting normative administrative acts except for the bodies and agencies mentioned above. In addition to pre-review screening, by the GAL, the procedure for drafting, commenting, and adopting normative administrative acts, for the first time, regulated by statutory law.[21] Significantly, a normative administrative act can only be valid when it has been specifically delegated/authorized by law to a particular agency.[22] As of August 2015, there were over 870 normative administrative acts listed on the Ministry of Justice's web page that were awaiting review to ensure that they conformed with the GAL.[23]

Damage claim

It is also the fact that another feature of this law, the right to claim monetary damages, has been derived from administrative court practices. Even though the

party agrees with this higher restriction than the restriction set by the relevant law.

21）Previously it was regulated by the government decree, but now the GAL at statutory law level regulates this procedure. Firstly by the Decree 162 dated on November 03, 1993. Tsogt Tsend, "Normative Administrative Act," in *Монгол Улсын Захиргааны ерөнхий хууль (Сургалтын гарын авлага)* (Ulaanbaatar: Hanns Seidel Foundation, 2016), http://legaldata.mn/b/127 (accessed June 10, 2017).

22）Article 59.1 of the GAL states that normative administrative act is a decision directed outwards and to be followed by public on repetitive basis, issued by administrative agency which specifically authorized by law. And in Article 59.2 of the GAL prohibited for administrative agency to further delegate this power to issue normative act to anybody except as permitted by law.

23）Status right before the adoption of the GAL by the August 2015 at Registration of normative administrative acts in Ministry of Justice and Home Affairs at http://www.moj.gov.mn

LPAC enabled a party to bring a claim for monetary damages, allegedly caused by an illegal administrative act; the right to demand a recovery for damages caused by an unlawful administrative action or inaction is granted in the GAL. In other words, it provides a substantive right to file a claim for damage against an administrative agency. In judicial practice, courts have been issuing a judgment for monetary damage, but in reality it was very difficult to recover damage from the administrative agency mostly because there were no funds allocated[24] for this purpose in the budget of that agency. This institution is a famous and live legacy of soviet law.

Procedural principles and requirements

The GAL fixed not only the forms of administrative activity but it also explicitly defined core principles that are specifically required for these activities.[25] Moreover, procedural requirements such as notice, hearing, and all necessary steps were identified, especially for issuing an administrative act and normative act. In addition, the GAL requires that every written administrative act contain clear notice and direction about when and where to appeal it. Another progressive provision prohibits an administrative agency from delegating its vested authority to others unless otherwise stipulated by law.[26] Article 24 (2) included a very important provision that serves as one of the biggest distinction between civil and administrative procedure.[27] In civil cases the plaintiff has the burden of proof; however, under Article 24 (2) of the GAL, the in decision making process an administrative agency has burden of proof. It also comprises a preliminary proceedings which was initially included in the LPAC in 2002.

24） To overcome this issue, there is a draft law concerning the creation of a Damage Fund (or Judgment Fund) submitted by the government to the Parliament. This will enable the claimant to more easily collect money from a centralized fund that is independent of budgetary issues and constraints associated with each governmental agency.
25） GAL, art. 4.2.6 (2015).
26） Ibid., art. 8.1.
27） Article 24.2 of the GAL states that administrative agency shall be responsible for conducting important and necessary actions to establish the objective circumstances stipulated in article 24.1, collection of evidence, and evaluation of the evidence.

4.3.4. Problem and Limits of the GAL

Purpose of regulation and Relation with other laws

It is essential that the purpose of the law stated that it, as stated in Article 1.1 of the GAL, is to regulate a legal relationship in public law sphere. However, the purpose of the law is not clearly explained in terms of the reason the law seeks to govern this legal relation, for instance, in order to maintain objective legality or to protect the subjective rights of individual who interact with administration. This might be explained by reviewing scattered provisions of the GAL, especially the ones that regulate actions taken by administration through enforceable principles and requirements. Up to the adoption date of the GAL,[28] around 250 statutory laws contain provisions that regulate various facets of administrative activities.[29] Apparently, conflicts between these new law, the GAL, with other existing laws and regulations will likely be unavoidable.[30] Since the GAL does not provide a specific purpose statement, application of the provisions of this general administrative law may conflict with contradicting regulations set out in other existing specific laws. Uncertainty may arise when GAL provisions conflict with other provisions of law. This is because even though the GAL is a general law, it is still a statutory law, not a constitutional law. Future law makers could not be bound by past legislation, and the general principle of hierarchy of law[31] is that a law that is enacted after a preceding law which contains specific regulation has higher effect than a former or general law. In other words, the GAL has the same level of authority compared with other laws enacted by the parliament. For the Japanese experience of legislation practice in the parliament, in the case of the enactment of the new general (framework) law, every relevant law should have been checked concerning whether this law is consistent with the new general

28） June 19, 2015.
29） Concept Note of the submitted draft of the GAL to the parliament. “Захиргааны Ерөнхий Хуулийн Хувийн Хэрэг, УИХ-Ын Тамгын Газрын Архив” [The Case File of the General Administrative Law], 2015, The Parliament Archive.
30） Article 3.3 of the GAL states that relation other than those in which activities of administrative agencies are not regulated by a specific law shall be governed by this law.
31） Odgerel Purevdolgor, *Захиргааны эрх зүйн Ерөнхий анги* [General Part on Administrative Law], 3rd ed., 2016, 72.

(framework) law. If after a consistency check, the relevant law is found to not be pursuant to general (framework) law, then it must be amended.

Semi-definition based approach

Article 5 of the GAL does not fully escape the listing approach in its definition of an administrative agency, but instead it adopts a semi-definition based approach. The GAL neither names the administrative agencies, as was the situation under the LPAC,[32] nor an exclusive enumeration, in fact, Article 5.1 of the GAL itemizes 5 general categories.[33] Though, this is not a jurisdictional provision for judicial review (as it was used to determine a defendant in the LPAC), the new Administrative Court Procedure Law (hereinafter the ACPL) cited the definition of administrative agency in the GAL in Article 3.1.1. This provision is applicable when there is a dispute in relation to whether a certain organ qualifies as an administrative agency or not. Therefore, it may invoke an interpretation (deductive approach) that was used under the LPAC (2002).

4.4. The Administrative Court Procedure Law (ACPL)

In conjunction with the enactment of the GAL, the revision of the LPAC was also required, thus a new version was enacted on February 4, 2016 as the ACPL.[34] The date upon which the ACPL took effect coincides with the day the GAL came into force. Since the first adoption of the LPAC, the revised administrative court procedure is not only leading to the enactment of a general administrative law, but

32）Adopted on December 26, 2002 and replaced on February 4, 2016.

33）Article 5.1 of the GAL provides that the following public legal entities which issue administrative decisions rendering public interest shall be construed as administrative agencies: 5.1.1. All central and local agencies that exercise the executive power of the state; 5.1.2. Independent agencies that enforce legislation and make administrative decisions, and other public law entities similar thereto; 5.1.3. Entities that are assignees with administrative functions based on a law or public law contract; 5.1.4. Administration of entities such as state schools, shared ownership schools, hospitals, media, communication, postal, transport and energy organisations which provide mandatory public services; and 5.1.5. Municipal self-governments and those entities whose decisions and activities are subject to complaints lodged with the administrative courts, as specifically set out in law.

34）Захиргааны Хэрэг Шүүхэд Хянан Шийдвэрлэх Тухай [The Law on Procedure for Administrative Case] (2016).

also it is emancipating administrative procedure from civil procedure. For instance, Article 2.1 of the LPAC, which was relevant to the scope of legislation and its applicability to administrative litigation, positioned the Civil Procedure Law (2002) as one of the main laws which serve as a legal source for administrative litigation. Conversely, the ACPL does not include a civil procedure law in its scope of applicable legislation.

Both administrative court practice and the new administrative procedural law have pushed for the revision of the administrative court procedure law. Developments of the last 12 years of court practice, with the implementation of special procedure and a specialized court, have triggered the codification of administrative procedure, and in turn, court procedure itself has been reflected by the new codification. The scope of protection is not only limited to the recovery of already infringed rights and legal interest but it extends over to the possible future infringement of rights and interest.

4.4.1. Essential features in relation to paradigm change

Purpose of the Litigation

As stated in Article 1 of the ACPL, "the purpose of this law is to regulate court procedure based on (1) an action filed by an individual or a legal entity seeking a protection of its rights and legal interest that is infringed or possible future infringement by illegal administrative activity, and (2) an action filed by authorized person to represent public interest and if provided by law, an action filed by administrative agency."[35)]

At the purpose level, the ACPL recognizes two different types of litigation. One action is filed for the protection of a particular subject's rights and interests as the principle litigation (subjective litigation). Apparently, this type of litigation requires the person who filed the action to be concretely affected by the administrative activity. Another form of litigation recognized under the ACPL is for special litigation, which only certain people, legal entity or administrative

35） Ibid., art. 1.1.

agencies are permitted to file; therefore, in essence it is limited (objective litigation). For example, an action is only acceptable if specific statutory law provides such an action to be filed by an administrative agency. On the other hand, an action filed in consideration of public interest is further prescribed and limited in two ways. First, this action can be brought by a person who is specifically granted such right by law. Second, it can be filed by non-governmental entities who meet certain requirements set forth in this law; however, here a right to file specifically provided by law is not required. In addition, if the right to file an action is not provided by law, then the action of a non-governmental entity is permitted only within certain areas of the law, such as environmental protection, child right, public health, and public property. The purpose of this litigation is to achieve objective legality in administrative activity for the common good, since this action does not seek a recovery of rights and interests of the person who initiated it.

Based on the distinctive characteristics of these two types of litigation, the former one can be defined as subjective litigation as opposed to later one, objective litigation. On the contrary, the LPAC (2002) has not recognized the different types of litigation. It has, however, acknowledged subjective right centered litigation.[36] Though the subjective right concept is narrow and this is only action that can be identified under the LPAC, the actual practice in Mongolia reveals other results. Subjective right centered procedure allows only subjective litigation; therefore, a person or legal entity can only file an action against administrative acts that are believed to aggrieve his/her own rights and interests. However, in practice, administrative agencies are permitted to file an action against other agencies which are not under the same ministry. This caused, in broader terms, a confusing state for determining the purpose of litigation. Indeed, through a clear understanding of the categorization of administrative litigation in the ACPL, this state of confusion can be eliminated. Subjective litigation is the

36）Article 1.1 of the LPAC states as purpose of this Law is to regulate the relations connected with the preliminary decision-making on administrative cases according to the complaints and claims submitted by citizens and legal entities who have considered an administrative act as illegal in order to protect their infringed rights, and with the proceedings of administrative cases in the administrative courts.

main and most generally applicable type of litigation as it is clearly established by the ACPL. Therefore, formally in the institutional (law) level, the main purpose of administrative litigation is now designed for providing an effective remedy for infringed rights and legal interests of individuals.

Introduction of General Clause

The LPAC in 2002 centered on litigation in relation to action filed against an administrative act, and considered a normative administrative act as an individual administrative act.[37] Therefore, the scope of the availability of judicial review in administrative court was narrow because it focused on legal actions in relation to the concept of administrative act mostly. More importantly, even though the LPAC (2002) was enacted as the primary legislation for administrative court procedure, its applicability to administrative litigation was limited because of the listing approach which enumerates defendants.[38] Some of the defendants listed in Article 4.1 of the LPAC, especially paragraph 4.1.9 were not specifically defined instead used semi-definition based approach.[39] Yet, the next requirement was that an action is allowed against administrative act, thus action is not acceptable if it is failed to challenge administrative act. Both the requirement of an administrative act and the enumeration of defendants have served as barriers to the jurisdiction of the administrative court since 2004.

In 2016, Article 13.1 of the ACPL broadened the scope of judicial review. Administrative court jurisdiction is no longer limited to reviewing actions in relation to individual and normative administrative acts, but now it is able to review all public law disputes of a non-constitutional nature, except the disputes

37） The GAL changed this concept by separately defining normative administrative act distinguishing it from the individual administrative act.

38） According to Professor Banzragch the challenging question faced, was what do to further on administrative procedure law since the administrative court had been established a decade before. She suggested that what was most important was to revise the LPAC. This included the replacement of administrative jurisdiction, which was limited to actions related to only administrative acts, with broader jurisdiction concerning all administrative activity which can infringe an individual right. Banzragch Gochoo, “Rechtsstaat ба Захиргааны хэргийн шүүх” [Rechtsstaat and Administrative Court], *The Judicial Power* 2 (2014): 34.

39） Article 4.1.9 of LPAC stated that the subordinate or non-subordinate independent agencies of the ministries that may issue administrative acts, or similar organs such as departments, councils, bureaus, centers or foundations.

that are explicitly allocated to another court.[40] Within the public law sphere, the ACPL only excludes disputes that are related to the relationships itemized in Article 3 (1) of the GAL and the ones that belong to the jurisdiction of the constitutional court. Consequently, in terms of the jurisdiction of the administrative court, the ACPL replaced the enumeration clause with a general clause. Broader jurisdiction means wider access to legal disputes that have arisen from relationships between individuals and administrative agencies in the public law sphere. This is especially regarding cases that assert concrete subjective right infringement.

Types of Action

Departing from the former position that focused only on administrative act, the definition of action stated in Article 3.1.3 of the ACPL reflects the purpose of law and jurisdiction given to the administrative court. Therefore, action consists of:

> (1) action filed by an individual or a legal entity seeking protection of its rights and legal interests that have been infringed or possible future infringement by illegal administrative activity, and (2) an action filed by authorized person to represent public interest and if provided by law, an action filed by administrative agency (interagency action).[41]

In 2002, Article 32.5 of the LPAC initially contained guidance for what can be described as four types of actions. This included an action for the revocation of an administrative act, an action for the declaration of obvious illegality of an administrative act, action for recovering damage caused by an illegal administrative act and action for a declaration of illegality of inaction. In 2010, Article 32.5 of the LPAC was amended; consequently, it no longer categorized actions, and instead it contained more general requirements for bringing an action. Since then, the only feasible guidance available for differentiating different types of actions is contained in a provision that defines types of judgments in Article 70 of the LPAC.

In accordance with the purpose of the ACPL and its definition of an action,

40）Захиргааны Хэрэг Шүүхэд Хянан Шийдвэрлэх Тухай, art. 13.1.

41）However, Article 52.6 of the ACPL serves as an exception for the requirement of administrative agency's right to file only when specifically provided by individual law.

Article 52.5 of the ACPL categorized types of actions. An action for revocation of an administrative act, administrative contract, and normative administrative act can be filed by a person who asserts that his/her rights and legal interests have been infringed by such contracts and acts, as well as an action for declaration of nullity of an administrative act and contract (subjective litigation).[42] In addition, an action for declaration of illegality of inaction, declaration of the existence or non-existence of a public legal relationship, a mandamus action, and an action for damage is permitted on the same legal basis as subjective litigation.[43] More importantly, implicit standing requirements for subjective litigation are set out in respective paragraphs of Article 52.5 of the ACPL.

On the other hand, concerning the types of actions which belong to objective litigation, Article 52.5.4 and 52.5.5 specify actions brought by agencies against other agencies (interagency action) and public interest actions. From these separate provisions, information pertaining to who can file what type of action and which action requires what kind of preconditions is set out. Moreover, Article 106.3 of the ACPL sets correlated types of judgment to the actions prescribed in Article 52.5 if the action was justified as valid.

Noticeably, the ACPL is a step forward for the development of the concept of action in the Mongolian administrative law context. In the direction of the protection of individual rights, the ACPL has established the categorization of actions in administrative court procedure. However, the degree of defectiveness of the administrative act complained of in relation to what type of action needs to be filed (appropriateness of action) is quite unclear. Especially, consequences associated with the degree of deficiency when it comes to choosing the most appropriate type of action is not clear. Considering the purpose of the ACPL and its definition of action, the ACPL acknowledges the possible future infringement of individual's rights and legal interests as a necessity for filing an action; however, it is somewhat narrowly limited for within Article 52.5.5 and 52.2.6. The provision is only for public interest actions and actions related to normative administrative acts.

42） Захиргааны Хэрэг Шүүхэд Хянан Шийдвэрлэх Тухай, art. 52.5.1 and 52.5.6.
43） Ibid., art. 52.5.1, 52.5.2 and 52.5.3.

4.4.2. Control and Remedy type litigation

Overview

The purpose and function of the objective model of administrative litigation is to exercise control over objective legality of administrative activity. Thus, the judicial (or non-judicial organ which authorized) review focuses, not on the legal dispute in the legal relation but on the administrative act (which caused the legal relation) and its legality. On the other hand, the subjective model of administrative litigation focuses on providing a remedy and the protection of rights and legal interests of individuals. In terms of the nature of each type of litigation, the objective model is meant for supervising function in order to preserve law and order, while the subjective model is designed for provide a remedy function for infringed rights and legal interest of the individual.

France was the first to originate an objective model and use it as a main type of litigation, but without denying subjective rights. The French objective model is wide and open in its range of control over administration. Thus, French citizens can very easily lodge an action through recourse for excess of power (ultra vires) against administration. East Germany (Prussia) developed a similar model of litigation which focuses also on control over administration but very narrow in terms of range of control. In contrast with the French, the acceptance of an action for review through administrative jurisdiction, under the Prussian system, was limited by the enumeration principle. Then Russia and Japan pursued a control type of litigation as influenced by the Prussian example. Mongolia, during the soviet era,[44] introduced the control type administrative jurisdiction (not litigation) initially exercised by the Procuracy, which was a non-judicial organ that developed in Mongolia as a result of influence by the soviet law. The Procuracy's function was to exercise control over objective legality of administrative activity and act as a supervising organization.

By the end of the 20th century, there began a change of priorities in the

44） From 1921-to early 1990s.

conceptual schemes of administrative law, which caused widespread acceptance in European countries to establish effective judicial protection for the fundamental rights under Article 6 of the European Convention on Human Rights.[45] Therefore, the necessity to guarantee the full and effective judicial protection of individual rights has led to a tendency to change the paradigm of the French or otherwise called objective model of administrative litigation. Presently, France has kept the objective litigation model in principle but it is moving toward full jurisdiction too, especially[46] in practice. In contrast, after WWII, Western Germany and Japan opted to utilize the subjective model at the constitutional and statutory law level.[47] Administrative litigation has become more and more concerned with obtaining full jurisdiction for the protection of rights of individuals.

Paradigm Change Complete Yet?

Over time the administrative court and administrative litigation began to be recognized in Mongolia. Statutory law and the general paradigm for administrative litigation has reflected, since 2004, mainly a subjective model.[48] Though often in substance, this subjective litigation changes into control type litigation. The subjective paradigm's existence is mainly at the statutory law level and because of strong path dependence, the control type administrative procedure still exists under the formal structure of subjective litigation. Such path dependence is evident in the cases discussed in Chapter IV. The cases clearly reveal the ease of

45） Professor Zelentsov considers some problems of the development of the theory of administrative and administrative-procedure law in Russia in the context of innovations in the Code of Administrative Procedure of the Russian Federation, which are aimed at the revision of prevailing paradigms in this theory. Зеленцов, "Кодекс административного судопроизводства Российской Федерации как предпосылка смены парадигмы в теории административного права."

46） Jean-Marc Sauvé, "The Council of State and the Protection of Fundamental Rights", Lecture at Graduate School of Law, Nagoya University on October 27, 2016.

47） In French, problem that is important in administrative procedure is legality but in Japan the problem is illegality not legality. However, in Japanese practice it is subjective right based in entrance level of review but illegality in the level of merit level (even in Japan path dependence exists still in some areas).

48） For instance, the LPAC (2002) contained provision that allows court to decide case even plaintiff no longer pursue it with respect to "public interest" (signal of objective litigation). Article 69.3 of the LPAC before amendment in 2010 states that the administrative case could be held in absence of the plaintiff if it's decision required by the public interest.

acceptance of legal actions, no precise requirements for standing, and when deciding cases sometimes, actions are decided based on the illegality of administrative act not plaintiff's subjective rights.

For instance, there has been a substantial amount of confusion concerning the purpose of litigation as Ganzorig Dondov,[49] an administrative law specialist points out in his article raised the question of who has the right to file an action at administrative court. Ganzorig asked whether only the person whose rights and interests have been infringed is able to file an action, or can a person whose rights and interests have not been infringed but only claims about the illegality of an administrative act, also qualify to file an action? Ganzorig acknowledged that the administrative court seemed to be establishing a practice which only recognized the person whose rights and interests had been infringed. Further Ganzorig suggested that a defective administrative act is categorized as an obviously illegal (voidable act) and a disputable act. The article further pointed out that obvious illegality is set forth in the law, and the court should not question the infringement of rights but first determine the administrative act's conformity to the law. Ganzorig reasoned that if the administrative act's illegality is obvious, then there must be an infringement of human rights and freedom.[50] Therefore, he rejected the idea of the administrative court limiting the right to file an action to only those who claim their rights and interests have been, or are being, infringed by an administrative act. Ganzorig's article is an important reflection of the confusion of legal consciousness of that time among scholars and practitioners in Mongolia.[51]

Until adoption of the ACPL, there has been no distinction between subjective

49）Ganzorig Dondov is the one of leading administrative law specialist who has been teaching public law since early 1990s. He is a member of the Constitutional Court since 2013.

50）Ganzorig Dondov, "Захиргааны хэргийн шүүхэд нэхэмжлэл гаргах эрх" [Right to File an Action at Administrative Court], *Human Right* 4 (2005): 27, http://www.mn-nhrc.org/index.php?do=cat&category=33.

51）Following articles written at that time also express in some part that the role of administrative court is to exercise of control over illegal administrative activity, however both article assert administrative court's main purpose is to protect right and interest of private person. Erdenetsogt Adilbish, "Захиргааны хэргийн шүүхэд нэхэмжлэх эрх нээгдэх нөхцөл" [Condition for Right to File an Action at Administrative Court], *State and Law of Mongolia* 2 (2003): 42. Tsogt Tsend, "Захиргааны хэргийн шүүх - Хүний эрх" [The Administrative Court - Human Right], *The Human Right* 4 (2005).

and objective litigation under Mongolian theory, law, and practice. Hence, every action filed with the administrative court is examined as to whether there is an administrative act that has affected plaintiff's subjective rights and interests. For subjective litigation, especially for judicial review type actions, pre-conditions are eminent such as administrative act, and standing. Although these are inseparable components of subjective litigation, they are not required for objective litigation. Due to the very weak theory on the concept of administrative litigation, its history and development have caused confusion even after it was implemented in the new court through the court's procedural law. In addition, introducing the remedy type administrative litigation in 2002 and 2004, there was no practice upon which to draw from and build on. Theoretical concepts of administrative law, especially forms of subjective and objective litigation were not recognized; consequently, requirements for types of litigation were not instituted at the statutory law level. The practice often tended to rely on or look back to past experience such as control type litigation.[52)]

Beginning with the 1990 Special Law on Complaint Procedure which departed from the old control type[53)] administrative jurisdiction through the adoption of the 2002 new administrative litigation law, Mongolia administrative law has begun moving in the direction of remedy type litigation. After just over ten years since the new administrative litigation system was implemented, and in light of the very recent amendments to the system with two new additions to administrative statutes, has the paradigm changed from a control type litigation approach to a remedy type litigation approach? It is too early to determine the faith of the recent developments, however, the following assessments can be made as predictions

52） However, by enactment of the ACPL involvement of the Procuracy and counteraction to administrative act is ultimately eliminated from administrative litigation.

53） However, even after adoption of the 1992 Constitution with the provision of administrative court as specialized court, idea of court control was strong not truly realized the establishment of administrative court and procedure is for remedy for infringed rights and interest. It is evident from scholars work at that time, for instance, Professor Udval expressed the importance of establishment of administrative court but some of the reasoning for it still reflects the old consciousness from the wording such as "simple structure is to control executive branch whether or not breaching the law based on citizen's petition and complaint ". Udval Vanchig, "Шүүх эрх мэдэл" [Power to Adjudicate], in *The issues of the concept of the Constitution of Mongolia*, 1999, 134.

based on the new laws and practice.

Generally, the enactment of the GAL and revision of the ACPL, especially the change from the use of an enumeration clause to that of a general clause and the categorization of types of litigation were not only significant achievements at the statutory law level but would also possibly support practice in the direction of broader protection of individual rights. The importance of recognizing categorization of litigation is significant because now the principle type of litigation is subjective, in contrast objective litigation ('objective' doesn't equal 'control' in this law) is exceptional. Therefore, it worth note that in recent practice, in most cases, the purpose of litigation is to determine whether the rights and legal interests of the individual who brought the action is remediable or not. Moreover, objective actions such as interagency actions are, by definition, expressly limited because they can only be brought if provided for by particular law. In turn, these changes are expected to be reflected in Mongolian legal practice, for instance, to eliminate the wide range acceptance of objective actions under the name of subjective litigation.

Regarding theory of administrative law, several publications appeared following the enactment of the GAL and the ACPL. Professor Odgerel published his revised textbook on general part of administrative law which reflect the enactment of the GAL.[54] Professor Odgerel emphasizes the importance of codification of administrative law principles and provided a chapter on the issue of legal protection in the administrative law. He divided legal protection into two phases.[55] The first phase included administrative review and the second administrative court review. Yet, Professor Odgerel's textbook does not focus on judicial review because, as the textbook states, it is a procedural law issue.[56] Noticeably, he described administrative review as a prerequisite for actions in administrative litigation (not only for judicial review type of actions) without distinguishing the forms of action.

54) Purevdolgor, *Захиргааны эрх зүйн Ерөнхий анги*.
55) Ibid., Chapter 6, 316-327.
56) When he described the relationship between administration and court, it states that "Core purpose of administrative court is to protect citizen's public law subjective right, through that exercise control over administrative activity whether it confirms to law." Ibid., 57.

Prior to the enactment of the ACPL, scholars[57] and practitioners[58] published articles on the issue of further development of administrative court procedure. It was generally agreed among lawyers, scholars, and judges that the use of the enumerated approach to define litigable cases was troublesome especially after the 2005 Constitutional Court judgment.[59] After the ACPL, Doctor Banzragch published an article on the differences of the LPAC and the ACPL, focusing on the new elements presented in the APCL.[60] She asserted that the purpose of the ACPL sought to limit the scope of objective litigation, therefore making its meaning more definite.[61] However, one very important point is that the new characteristics, particularly the recognition of categorization of litigation and actions as objective and subjective, to the ACPL were not intended to broaden the objective type of actions. Conversely, they were intended to differentiate this type of action from subjective litigation and therefore make objective type actions more definite and limited but not, for instance, to introduce *actio popularis*.[62]

57） Doctor Erdenetsogt pointed out the importance of introducing general clause in order to cover all the forms of administrative acts under the court control. However, he correctly points out that suggesting to eliminate requirements of administrative review for action for declaration. He published article in 2016 based on the presentation for 10th Anniversary of establishment of administrative court in 2014. Erdenetsogt Adilbish, "Захиргааны хэрэг хянан шийдвэрлэх ажиллагааг боловсронгуй болгох асуудал" [The Improvement of the Administrative Adjudication], *National University of Mongolia, School of Law, Law Review* 2, 34 (2016): 235.

In the other article in English he gave a brief overview of administrative court, in doing so he stated that "The administrative courts of Mongolia serves as a pillar of the rule of law and exercises control over the executive branch of the Mongolian state". Erdenetsogt Adilbish, "The Administrative Court of Mongolia as a Protector of Human Rights," *The National Legal Institute of Mongolia Law Review* 5, 55 (2015): 47.

58） Tsogt Tsend, "Захиргааны процессын эрх зүйн шинэчлэл: захиргааны хэрэг хянан шийдвэрлэх ажиллагааны зорилго ба хэрэг хянан шийдвэрлэх ажиллагааны төрөл" [Administrative Procedure Law Reform: Purpose and Categorization of Administrative Litigation], *National University of Mongolia, School of Law, Law Review* 2, 34 (2016), http://legaldata.mn/b/119 (accessed June 11, 2017).

59） Захиргааны хэрэг хянан шийдвэрлэх тухай хуулийн зарим заалт үндсэн хуулийн холбогдох заалтуудыг зөрчсөн эсэх тухай маргааныг хянан шийдвэрлэсэн тухай Монгол Улсын Үндсэн хуулийн цэцийн дүгнэлт (Mongolia|MN Constitutional Court).

60） Doctor Banzragch Gochoo was the key member of the Drafting team of the ACPL and she was Professor at NUM, School of Law. Currently she is judge at Administrative Chamber of Supreme Court of Mongolia.

61） Banzragch Gochoo, "Монгол улсын захиргааны хэрэг шүүхэд хянан шийдвэрлэх тухай хуулийн шинэчилсэн найруулгын тухайд" [On Revised Administrative Court Procedure Law of Mongolia], *The Judicial Power* 1 (2016): 123.

62） For example, at The Supreme Court of Mongolia, *Монголын Шүүх II Түүхэн*

The realization of the changes made to statutory law and theory in the day to day practice of Mongolian administrative law appears to require more time and accumulation of cases than simply amending the law. It is apparent, based on discussions surrounding a following recent case,[63] that the legal consciousness necessary for full paradigm change in Mongolia is not ready. Substantial disputes and confusion have arisen among lawyers and practitioners. One example of such a dispute concerns a case that involved a government cabinet as defendant, accused of wrongfully setting a date for a national level spring horse race according to the Law on National Grand Festival.[64] The horse race involved young children and the date was set for March 03, 2017 which was still relatively cold even though spring had officially began a few days earlier. Two children's rights non-governmental organizations filed a public interest action for revocation[65] of the government cabinet's decree in accordance with the provisions of the newly adopted ACPL.[66] Just to mention this case, to indicate an example of

хөгжлийн тойм, өгүүлэл нийтлэл [Judiciary in Mongolia II Articles on Historical Development Overview], 2 (Ulaanbaatar, 2016), 219–20. On the point of *Actio popularis* see Chapter II, French part of this thesis.

63）Хүүхдийн хөдөлмөрийн тэвчишгүй хэлбэрүүдийн эсрэг үндэсний сүлжээ Нийгэмд үйлчлэх төрийн бус байгууллага, Хүүхэд хамгааллын үндэсний сүлжээ Нийгэмд үйлчлэх төрийн бус байгууллагуудын нэхэмжлэлтэй, Монгол Улсын Засгийн газарт холбогдох захиргааны хэрэг [National Child Protection Network and National Network against Intolerable Child Labor Forms v. Government Cabinet] (Mongolia|MN Capital City Administrative Court). To date, this case is not decided on the merit but in procedure.

64）Article 8.3 of the Law on the National Grand Festival states that titles will be issued for the horse races that organized by Government Decree and the National Naadam Festival.

65）Though the appropriateness of the action is questionable because decree of government was only to set a date of horse race and it was one time and de facto action. Therefore action for the revocation could not achieve any legal interest but de facto interest.

66）Захиргааны Хэрэг Шүүхэд Хянан Шийдвэрлэх Тухай, art. 1.1, 3.1.3, 3.1.9 and 18.3 (2016).

contradicting theoretical and interpretational approaches to particular case.[67),68)] It is noteworthy that the parliament always retains power to revisit or restate certain provision or law as whole to correct this kind of problem.[69)]

4.5. Summary of Administrative Litigation Status to date

Recent developments in Mongolian Administrative Law have revealed that the fundamental change from administrative control towards an approach based on providing a remedy for the infringement of subjective rights is not an easy one.

67） Following the interim injunction of the government decree, discussions started among social and then the legal community, concerning whether the administrative court had a jurisdiction over the government cabinet's decision. The motivation for such discussions and interest was because of a judgment issued by the Constitutional Court, which ruled on the petition asserting that Article 4.1.1 of the LPAC (2002) contradicted the Constitution.

The Constitutional Court stated that the administrative court did not have jurisdiction over the government cabinet's decree because the provisions of the Constitution provided that only the government itself or the parliament could revoke a cabinet decree. Consequently, the parliament repealed Article 4.1.1 of the LPAC that included the government cabinet in the list that enumerated the administrative agencies. Some argue that this judgment of the Constitutional Court is still effective; therefore, the administrative court cannot have jurisdiction over the government decree. Others deny such reasoning and point out that, in addition to the relevant law, the (LPAC) which was relied upon in the Constitutional Court's judgment has been revised. They assert that the ACPL does not include specific enumerated jurisdiction.

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

68） Mongolian Bar Association, "'Шүүхийн хяналт ба Засгийн газар' нээлттэй хэлэлцүүлэг" [Judicial Review and Government Cabinet Discussion], *https://www.mglbar.mn* (Ulaanbaatar, May 4, 2017), open, Ulaanbaatar, https://www.youtube.com/watch?v=dueK1f9vl-o (accessed June 3, 2017).

69） However, Professor Chimid, when the 2005 Constitutional Court's judgment came out the first time, strongly denounced this judgment. He insisted that the provision in the Constitution that states that the government itself or the parliament revoke a cabinet's decree is designed to be similar to an instrument to provide self-review and pre-review respectively. Professor Chimid concluded that this does not limit judicial review in relation to viewpoint of human right, therefore, the provision which Constitutional Court relied on does not limit its ability to review actions in which individual rights and interests have been infringed upon. Chimid Biraa, "Захиргааны хэргийн шүүхийг нураасны хариуцлагыг хэн хүлээх вэ?" [Who is Responsible for Dismantling Administrative Court?], (presented at Legal Reform In Mongolia: Transition Period, Ulaanbaatar, 2006).

The Hanns Seidel Foundation, "Монгол Улсын эрх зүйн шинэтгэл: Шилжилтийн үе" [Legal Reform in Mongolia: Transition Period. Documentation of an International Symposium], 2006, 158.

Path dependence plays quite a big role in interpreting law and theory. Scholars in Mongolia, during the early transition period,[70] and even now, rely on outside legal assistance. However, such legal assistance has mostly focused on contemporary legal concepts and laws, but it has not been particularly understood with the necessary historical meaning and development. Nonetheless, Mongolian scholars and practitioners have been impacted or influenced by mostly with contemporary concepts. In law and legal literature, outside legal assistance has often been utilized to facilitate the use of terms such as right, dispute, parties, legal relation, and judicial review as a means to express new legal concepts and paradigms.

The usage of these new terms is important nevertheless, previously used terms such as complaint, control, and objective legality are still alive in the sense of path dependence. It is easy to use new, imported legal concepts with their contemporary meaning.[71] However, it is another thing if content of such new concepts is not fully understood or explained, as has often been the case during the transition period in Mongolia. Therefore, during the transition period in Mongolia, these new legal concepts, in substance, have always contained pre transition period legal concepts such as court control, complaint, and objective legality. Even though Mongolian administrative law concepts have changed on the surface, under the surface such legal concepts are often the same old concepts.

New legal concepts and institutions are rarely questioned, and on most occasions, they are readily accepted. However, it is important to realize how western legal concepts, introduced through outside legal assistance, came to develop the meaning and content of such a new concept and its practice through the contradiction and complement by pre-transition period legal concepts and its interpretation. Often, just the use of these new legal concepts as a sophisticated form is insufficient. This phenomenon did not avoid Mongolian administrative law because the objective paradigm is still very strong. It is reflected by easy acceptance of demand as an administrative act because of broad interpretation of

70） In Mongolia, transition from soviet state to market state began in 1990 and believed to underway since then.

71） Education level to teach new system and new conception is important and common but in research level it needs to be explored from historical perspectives. Research and scholarly level it is particularly important to study stages of development.

the concept of administrative act; there are almost no requirements for standing to file an action; in addition judges worry about the social responsibility implications of irregular administration.[72] Consequently, administrative litigation until the adoption of ACPL, does not focus on the legal effect of an administrative activity may have on a plaintiff's rights and legal interests. An important way to determine exactly what the paradigm in administrative litigation is to examine what judges focus on. Are they focusing on remediable rights or the legality of an administrative act? Presently, at the surface level, Mongolian case review requires remediable right identification however, often the litigation turns into control type procedure which eventually leads to easily accepted broad control type actions by the court. Discussions in chapter IV demonstrated that often in pre-transition period practice, it was able to obtain remedy through control type litigation for instance, a claim for the revocation of administrative act as supervision.

4.6. Conclusion

The administrative law reforms in 2016 are another attempt to change to remedy type administrative litigation as a continuum of the first attempt that took place in the early 2000s. Is paradigm change from control type to remedy type completed?

By the enactment of the GAL and the ACPL, Mongolian administrative law recognizes the categorization of litigation; thus, it now distinguishes between the different purposes of different types of litigation. Based on this step, it will serve as a catalyst to further strengthen subjective litigation by developing preconditions such as the concept of administrative act, and standing. Moreover, it enables the further study of the types of actions associated with subjective litigation by distinguishing judicial review and non-judicial review actions (declaration type or public law related actions).

The enactment of the GAL and ACPL promote a departure from the judicial review practice of generally only accepting actions that challenge administrative

72）Furthermore, the scope of judicial review of discretionary acts is in relation to the recognition of administrative discretion by the GAL, specifically regulated in the ACPL.

acts; thus, these laws broaden the jurisdiction of the administrative court regarding other administrative activities which may not involve an administrative act but still affect individuals' rights and legal interests. Another key point is that after the establishment of the administrative court and its practice over a decade, reforms took place in 2015 and 2016, including some reforms based on administrative court practice such as the introduction of a general clause. Accordingly, such reforms represent a preferred way in which to develop the law, where accumulation of practice and theoretical discussions related to the cases help to shape the further development of statutory law regulations.

Importantly, in the latest attempt a general substantive administrative law was adopted for the first time and a procedural law was amended in relation to the adoption of this new general administrative law. Therefore, these codifications of administrative law is an attempt to overcome the absence of a standardized general administrative law principles and institutions in the theory and practice, in turn it expected to contribute to the further development of Mongolian administrative law.

Conclusion

The current thesis's research question focuses on the paradigm change of administrative litigation in Mongolia from its initial nature as Administrative Control and tendency towards Court Remedy. In relation to the first part of the research question, particularly concerning the part of "From Administrative Control", the following conclusions can be made.

From the viewpoint of administrative litigation and its history, soviet administrative dispute settlement is one variety of the control type. Hence, in Mongolia the control type administrative settlement procedure was established. This was a non-litigation (non-contentious) type procedure; in other words, it was not an adversarial system. The court had a very limited role in this procedure and the non-judicial organ, the Procuracy, played the main role. Accordingly, the court had very narrow and limited control based on the enumeration principle, which allowed for case review by the court only concerning matters set out, or

enumerated, in list form. The purpose of this control type administrative complaint settlement procedure was to maintain objective legality over administration. To put it differently, providing a remedy based on individual rights was not the purpose of administrative litigation in Mongolia from the 1920s up to the 1990s.

This thesis recognizes and confirms that the control type administrative litigation in Mongolia, within the context of a comparative analysis of administrative litigation, shares a fundamental connection, in terms of its initial form with France, Germany and Japan. Though Mongolian administrative law was initially influenced by soviet law, French and German legal schools (concepts) have influenced Mongolia, indirectly. Historically, the starting point for all French, German and Japanese administrative litigation was the same purpose because every country started with control type administrative litigation. Eventually, each country developed its own distinctive characteristics and pace, then again all three countries have shown a similar tendency to change from control type administrative litigation to remedy type administrative litigation. One recent example is France, which has kept an original control type paradigm in its administrative litigation for a long period, is presently changing toward control in *concreto* under European Convention of Human Rights.

With relevance to the second part of the research question, the following conclusions can be reached when considering whether the paradigm changed from Administrative Control "to Court Remedy." The establishment of the administrative court with jurisdiction, in principle, over administrative cases was the core achievement. Since 2002 and 2004, Mongolian administrative litigation is formally meant to be a remedy type, but in substance judicial control over administration has been kept. Even in prototype administrative court procedure for example, the involvement of the Procuracy on behalf of the state is authorized however, it was not exercised often in practice.

Mongolia introduced German type of administrative court structure. However, it became evident some time later, new structure and procedure often conflicts with old thinking and practice when it comes to the interpretation and application of law to concrete cases. With the establishment of administrative court and procedure, formal paradigm change was made at the statutory law level, but it was

still not clear in the application of law in concrete cases. Even though the law changed to adversarial (litigation) type of procedure, in practice control type of procedure often exists which shows that paradigm change is formal but not substantial.

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

However, since 2002 the establishment of the administrative court and the enactment of separate administrative court procedure were significant achievements in Mongolia. Not only did the court become the main institution in administrative litigation, as opposed to formerly non-judicial organs such as the Procuracy, but administrative cases began to be decided through specialized administrative court procedure law. The most important change was to transformation from non-litigation type procedure (non-contentious procedure) to litigation type. Though the 1990 attempt to introduce a general clause in administrative court procedure failed, the LPAC introduced an inclusive enumeration approach. However, making paradigm change to remedy type administrative litigation was not easy with existence of parallel jurisdiction in civil court with enumerated complaints and strong path dependence for control type procedure at the level of practice and legal consciousness. In addition, no distinction has been acknowledged between judicial review type actions and public law related actions in theory, institution, and at the practice level in Mongolia.

The administrative act concept is clearly established in Mongolia, even if it is not the same as the original concept derived from Germany, it is one variety. The latter two concepts, standing and objective interest of litigation, are not fully understood at the institutional and practical level in the Mongolian context. In Japanese practice, there are strict requirements for qualifying as an administrative

disposition at the entrance level, including, establishing standing and a showing of an objective interest of litigation. On the other hand, Mongolian practice often has no strict requirements because of the influence of path dependence. The Mongolian administrative court still acts as a protector of objective legality. Consequently, though the procedural law does not allow such a practice, the court sometimes accepts objective litigation.

Paradigm change from control type to remedy type has been somewhat achieved at the institutional level in the sphere of administrative litigation however, legal thinking and practice in Mongolia is difficult to change, as it endeavors to evolution toward a remedy type litigation because of path dependence. There still is a gap between law and practice in terms of understanding the purpose of administrative litigation. Therefore, a careful analysis of the Mongolian cases reveals that practice in substance, is often the same as control type procedure that existed during pre-transition period. Path dependence strongly seeks to maintain objective legality therefore, civil dispute cases often easily change into administrative dispute cases. In that way, it can initiate a control type administrative litigation even after constitutional and statutory law level under which Mongolia made transition to remedy type litigation.

Finally, how have recent administrative law developments impacted the settlement of administrative disputes in Mongolia? Is the paradigm change completed? The paradigm change has only been made on the surface level because in actual practice, it is difficult to change old practices. Therefore, Mongolia needs to establish an adequate environment that promotes productive administrative law development (the previous accumulation for the development of administrative law). First of all, this requires “primitive accumulation” of the practice and theory based on general legal concepts and institutions, which Mongolia has just recently begun to adopt through legislation such as the GAL. Statues like the GAL are essential in the development of general principles and legal concepts of administrative law in Mongolia.

The administrative law reforms in 2016 are other attempts to change to remedy type administrative litigation as a continuum of the first attempt that took place in

the early 2000s. Comparatively, the Japanese administrative law approach to legal interpretation traditionally starts from abstract concepts, and then applies them to concrete cases (deductive legal interpretation). Additionally, institution comes to play a role in generally defining the legal concept. This is called the premise-condition for the development (development of administrative law as legal interpretation). Conversely, only now the Mongolian approach includes first defining the legal concept in statutory law (codification) and then enforcing this concept through cases. In this circumstance, because of insufficient practice and poor theoretical basis, it is difficult to appropriately use abstract legal concepts in particular cases. For that reason, the Mongolian approach to the development of administrative law is not a preferred approach (handstand approach[73]).

By the enactment of the GAL and the ACPL, Mongolian administrative law recognizes the categorization of litigation in consequence, it now distinguishes between the different purposes of different types of litigation. Based on this step, it will serve as a catalyst to further strengthen subjective litigation by developing preconditions such as the concept of administrative act, and standing.

As a recognition[74] of some of the findings of the current research in the recent Mongolian administrative litigation law, the ACPL is one example of a practical application of the claim of this thesis. Another key point is that after the establishment of the administrative court and its practice over a decade, reforms took place in 2015 and 2016, including some reforms based on administrative court practice such as the introduction of a general clause. In consequence, such reforms represent a preferred way in which to develop the law, where accumulation of practice and theoretical discussions related to the cases help to shape the further development of statutory law regulations (foot stand approach[75]).

73） Approach that begins from the codification to the practice and the theory.

74） Author of this thesis was worked as a member to the drafting team of the ACPL in preparation for the parliamentary discussion and a member of the drafting ream of the GAL. In relation to the ACPL, author worked to define types of administrative litigation, introduction of categorization of litigation in order to limit an objective litigation. Moreover, author particularly worked on articulation and the correlation of Article 1.1, 3.1.3, 52.5, and 106.3 of the ACPL.

75） Approach that begins from the accumulation of cases toward the codification.

Regarding suggestions for further research relevant to this thesis: though findings of this research, particularly those that identify the type of administrative litigation and its tendency in Mongolia, improve the understanding of paradigm and its change in the Mongolian context, this thesis is not an exhaustive study of the types of actions in relevance to administrative litigation. More specifically, what is not covered by the current research is public law related actions concerning distinctive actions in administrative litigation. Relevant to this point, there is a necessity to study a request for the granting of an injunction, not for procedural or interim relief, but as type of action in administrative litigation.

Further research needs to be conducted concerning the application of provisions that have sought to define objective litigation, its scope and consequences that will come with the recognition of categorization in statutory law for practice in the near future in Mongolia. These suggestions for further research, relevant to the current thesis, should seek to continue examining the theoretical, institutional, and practical weaknesses which contribute to a full paradigm change in the sphere of administrative litigation including providing full and timely protection for infringed or possible future infringement of the rights and legal interests of individuals.

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