

【 Special Features : The Role of Constitutional Review Bodies in the Asian Post- Authoritarian Democratization Process. A Comparative Perspective】

## **Role of Constitutional Tsets in the Consolidation of Democracy in Mongolia**

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### Abstract

This paper examines the role of the Constitutional Tsets in consolidation of democracy in Mongolia. Mongolia is one of the successful democracies among the post-socialist countries. The 1992 Constitution introduced a centralized constitutional review model and established the Constitutional Tsets of Mongolia. The Tsets is empowered to rule on the constitutionality of the laws, international treaties, presidential decrees and government decisions. The constitutional review provides an important safeguard for human rights and freedoms enshrined in the Constitution. The Tsets had to confront a number of issues ranging from the problems regarding the qualification of Tsets members to the confrontation on constitutional interpretation and jurisdictional issues with the State Great Khural and the Supreme Court. Although Tsets's independence raises disputes touching upon its competency, it was able to protect democratic principles and individual rights and freedoms for the past 28 years of democratic history in Mongolia. This paper draws attention to the role of Constitutional Tsets in democratic consolidation in Mongolia and discusses current challenges and prospects.

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## **I. History of Constitutional Review in Mongolia**

With the collapse of socialist regime in early 1990s, Mongolia was one of the first post-socialist countries to embrace democracy and created a constitutional court. Rapid legal reception and transfer to a democratic constitutionalism led to the inevitable transitional issues faced by many other post-socialist countries. All of these countries went through a difficult transitional period and Mongolia was no exception. 70 years of experience under one party system and three socialist Constitutions left deep marks on Mongolian society and polity.

The first constitution was adopted in 1924. The second and the third constitutions of Mongolia were adopted in 1940 and 1960 respectively. All three constitutions were known as the socialist constitutions of Mongolia. They listed human rights and freedoms citizens would enjoy, but failed to create a constitutional review system for the protection of those fundamental rights and freedoms. Under the socialist constitutions there was no mechanism to effectively protect human rights and freedoms at the constitutional level or to control government behavior. The prosecutor had a role to limit the government behavior, but in practice it worked under the guidance of the Mongolian People's Revolutionary Party and its supervisory role was limited.

With the introduction of Constitutional Tsets (hereinafter, the Tsets) in the 1992 Constitution, Mongolia adopted the Austrian model of abstract norm control. The decentralized constitutional review in the USA and the pre-legislative constitutional review of France were also considered during the drafting phase. The first draft provided for the Tsets to be part of the judicial system, but later it was moved to a separate chapter, independent of the main judicial branch. Like many other post-communist countries of Eastern Europe after the collapse of a socialist regime, Mongolia, for the first time created a constitutional court to review the constitutionality of statutes.

Apart from statutes, the Tsets is entitled to review the constitutionality of resolutions by the State Great Khural, government ordinances, and presidential decrees, and invalidate them if found unconstitutional. However, it did not obtain the jurisdiction over the complaints related to citizens' fundamental rights and freedoms and left them to the jurisdiction of ordinary courts. It can settle disputes on the basis of petitions and information received from citizens or at the request of the State Great Khural, the

President, the Prime Minister, the Supreme Court and the Prosecutor General.<sup>1</sup> The purpose of Tsets was to protect human rights and freedoms and it is entitled to interpret the Constitution and invalidate decisions that are contrary to the constitutional provisions that guaranteed the human rights and freedoms. Establishment of an independent Tsets, therefore, was the most important aspect of the 1992 Constitution. Human rights and freedoms stipulated in the previous constitutions of Mongolia were not enforced in the courts of law.

## II. Weak Form of Judicial Review?

Mongolian constitutional review is said to be closest to real weak-form review<sup>2</sup> as it is known to facilitate dialogue between the legislature and the constitutional court. Weak-form review is believed to promote constitutional dialogue about the constitution's meaning. "Where a judicial decision is open to legislative reversal, modification, or avoidance," then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue.<sup>3</sup>

Mongolian Tsets is among the third generation of constitutional courts, which appeared after the dismantling of the socialist legal system. The first generation of courts followed the American and the Kelsen's centralized constitutional review model, while the German type combined the individual rights protection and the abstract norm control. Mongolian Tsets is a third-generation Constitutional court, which follows the Kelsenian model.

Mongolian Tsets established an abstract norm control and any legislation that violates the Constitution is deemed unconstitutional and invalid. The consequence of choosing this form of constitutional review was that it makes the relations between the Tsets and the State Great Khural far more challenging. A proper relationship between the two is vital for the constitutional democracy to function well.

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<sup>1</sup> Constitution of Mongolia, (1992), art. 66.1.

<sup>2</sup> Mark Tushnet and Rosalind Dixon, Weak-form review and its constitutional relatives: An Asian perspective, in Rosalind Dixon and Tom Ginsburg, *Comparative Constitutional Law in Asia*, (Edward Elgar Publishing, Inc.) 2014, 103.

<sup>3</sup> Hogg, Peter W. and Alison A. Bushell.. "The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)", *Osgoode Hall Law Journal* 35, (1997), 79.

The relationship of these two institutions meant to be one of cooperation and dialogue as a design. When the Tsets makes a conclusion on the constitutionality of a statute, it is sent to the State Great Khural for review. When the conclusion is not accepted by the State Great Khural, the Tsets examines it again with full bench and makes a final judgment. The decisions that found a statutory provision unconstitutional will make the relevant provisions of the law invalid.

The design might seem to be a variant of the weak-form review as it promotes legislative participation in constitutional decision-making. It gives a second chance for the legislature, which might have overlooked some constitutional issues in the law. However, upon closer investigation, the Mongolia's constitutional review appears as a strong-form review. When convening in full bench, the court almost always confirms its earlier conclusion and disregards the parliamentary rejection. Although it may seem to have given the legislature a chance to reverse the conclusion of the court, in practice, it has always confirmed its earlier decisions rejecting the parliamentary interpretation of the constitution.

Another way in which strong-form review can be weakened is via constitutional amendments. As Dixon pointed out, India is an example as the Constitution of India stipulated that amendments can be adopted by a majority vote. This may not be very relevant to Mongolia's case as amendment to the Constitution requires three-fourth majority vote of the State Great Khural. In 2000, the State Great Khural amended the Constitution with a short notice without giving time for deliberation by the public. The seven amendments of 2000 were criticized as "worsening seven amendments" by the drafters of the Constitution and Mongolian scholars, but has not been able to reverse it for about 20 years. Therefore, at best, Mongolian Constitutional review closely resembles the weak-form review.

### **III. The Relationship Between Tsets and the State Great Khural**

The dialogue between the legislature and the constitutional court starts when the middle bench of five to seven Tsets members submits its conclusion on the constitutionality of a statute to the State Great Khural for approval. If State Great Khural accepts the conclusion, it becomes the final decision of the Tsets on that dispute. When

it is rejected by the State Great Khural, the Tsets then makes the final decision by its full bench, which is composed of seven to nine members. This dialogue with the State Great Khural is not only a distinctive feature of Tsets's constitutional review, but also a point of friction between the two.

From one side, the dialogue gives the State Great Khural an opportunity to review the legislation again and correct the inconsistency with the Constitution. On the other hand, it gives an opportunity for the members of the State Great Khural to politicize the constitutional issue, which could affect negatively on the independence of the Tsets. From 1992 to 2016, the Tsets submitted 165 conclusions to the State Great Khural. In 100 conclusions or 60 percent of the cases, the Tsets invalidated the legislation as unconstitutional. The State Great Khural did not agree with the Tsets's decision in most cases by rejecting 57 and accepting only 36 conclusions.<sup>4</sup> The rejected conclusions were then examined by the Tsets's full bench, which reconfirmed its earlier decisions in most cases. Due to these disagreements, some researchers expressed frustration with the unwillingness of the State Great Khural to accept the role of the Tsets in constitutional democracy.<sup>5</sup>

In many instances, the State Great Khural does not respond to Tsets's conclusions within the period of time required by the law. In 39 disputes, the State Great Khural did not respond to the conclusion within the 15-day period stipulated in the statute.<sup>6</sup> In five disputes, it did not even respond to the conclusion of the Tsets at all.

One of the cases was on the constitutionality of the constitutional amendments decided by the Tsets in 2000. The State Great Khural never responded and made a decision as to whether to accept or reject the Tsets's decision to invalidate the constitutional amendments making it impossible for the Tsets to make the final decision on the constitutionality of the seven amendments.<sup>7</sup> When the State Great Khural decides to remain silent and does not respond to the Tsets's conclusion it freezes the whole dialogue. Tsets can no longer make its final decision and pursue its' duty under the

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<sup>4</sup> Ochirbat, P, *Mongol Ulsiin Undsen Khuuli: kheregjilt, khyanalt, sudalгаа* [Constitution of Mongolia: enforcement, review, research], (2017), 367. (Hereinafter, Ochirbat Mongol Ulsiin Undsen Khuuli: kheregjilt (2017)

<sup>5</sup> Udval V, Role of Constitutional Tsets in Statehood Building, *NUM Law Review*, 2017, Issue 2, 74.

<sup>6</sup> Law on Constitutional Law Procedure, (1997), art 3.6.

<sup>7</sup> Ginsburg Tom and Gombosuren Ganzorig, 2001, "When Courts and Politics Collide: Mongolia's Constitutional Crisis." *Columbia Journal of Asian Law* 14: 317.

Constitution. This deadlock can be prevented if the Tsets makes the final decision without the approval by the State Great Khural or if the silence can legally be understood as an acceptance.

In 2016, the State Great Khural issued a decision to recall the Chairman of the Tsets when he sent a letter to the State Great Khural to inform that a dispute was initiated on the amendments of the Law on Constitutional Tsets. The State Great Khural regarded this as an attempt to prevent the State Great Khural from taking any measures to enforce the new amendments, thereby, publicly expressing the conclusions about the case before the court. The amendments were about retirement age and terms of office for members of the Constitutional Tsets.

By recalling the Chairman of the Tsets, the State Great Khural has expressed its willingness to confront the Tsets despite such a move allegedly violated the law. Article 65.4 of the Constitution stipulates that if the Chairman or a member of the constitutional court violates the law, he or she may be recalled by the State Great Khural based on decision of the constitutional court and the recommendation of the institution that nominated him or her. This was further elaborated by the Law on Constitutional Tsets that members of the Tsets can only be recalled with a decision of the court on the violation of the law.<sup>8</sup> The State Great Khural recalled the Chairman of the Tsets without a decision by the court on violation of the law.

This is proof that Tsets's independence is fragile in its relationship with the State Great Khural. This kind of interaction and dialogue between the two could jeopardize the democratic constitutionalism and the independence of the Tsets. Justification behind the dialogue between the two needs to take into account that the purpose of this relationship is to serve the public interest, to show respect for the popularly elected representatives and the consolidation of constitutional democracy.

In dissenting Tsets's decisions, the State Great Khural on many occasions restored the statutory provisions that have been invalidated by the Tsets as unconstitutional. A statutory provision on the lifting of parliamentary immunity, for instance, has been found unconstitutional several times by the Tsets over the years. However, each time the Tsets

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<sup>8</sup> Law on Constitutional Tsets, (1992), art 5.3.

invalidates the same provision, the State Great Khural restored an almost identical provision.<sup>9</sup>

Re-appointment of Tssets members by the State Great Khural is another issue that may negatively affect the independence of the Tssets. The Constitution stated that the members will be appointed by the State Great Khural for six years.<sup>10</sup> In practice, many members of the Tssets have been re-appointed more than once. Some members have been re-appointed three or four times. In 2016, Law on Constitutional Tssets was amended so that Tssets members can only be re-appointed once. However, the amendment was invalidated by the Tssets stating that although the Constitution did not explicitly mention about the issue, it did not restrict re-appointment of Tssets members. Tssets could have interpreted that the absence of Constitutional regulation over the re-appointment of the members means that the Constitution left this issue to be decided by the legislature. Unlimited re-appointment by the legislature could potentially pose a significant threat to the independence of the Tssets as it could generate incentives among Tssets members to cooperate with powerful members of the State Great Khural in order to get their support for re-appointment.

#### **IV. Role of Constitutional Tssets in Mongolian Democracy**

Establishment of Constitutional Tssets promoted the transition from socialism to democracy, guaranteed protection of human rights and freedoms and the rule of law in general. Tssets settles disputes and limits the power of the branches. “Since the Tssets can negate laws adopted by the parliament, playing the role of the ‘negative law-maker’, the relations between these two bodies are extremely important in understanding the current status and role of the Tssets.”<sup>11</sup>

Tssets has no jurisdiction to hear actual cases related to complaints about human rights violations. This created favorable conditions for citizens to bring a dispute to the Tssets based on abstract and political grounds rather than concrete cases in which alleged violations of constitutional rights took place. Its jurisdiction is limited by an abstract

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<sup>9</sup> Law on State Great Khural, (2006), art 6.9.1.

<sup>10</sup> Constitution of Mongolia, (1992), art 65.1.

<sup>11</sup> UNDP, The Role of the Constitution of Mongolia in Consolidating Democracy: An Analysis, (UB, 2015), 71.

review. Under the current Law on Constitutional Tsets, the Tsets cannot restore citizens' fundamental rights and freedom violated in the concrete cases. The Supreme Court's decisions are the final according to the Constitution<sup>12</sup> and Tsets has no jurisdiction over its decisions. Tsets is not a court of appeal although its authority is specified by a separate chapter in the Constitution. The author, along with other Mongolian constitutional law scholars, recommends authorizing the Tsets with reviewing complaints dealing with alleged violations of constitutional rights.

Although the Tsets does not have a jurisdiction over human rights complaints,<sup>13</sup> it can still address human rights violations at constitutional level. It can review legislations, government decisions and presidential decrees, and to decide whether they are constitutionally valid. Since the establishment of Tsets, around 70-80 percent of the conclusions of the Tsets invalidated legislations as unconstitutional. Among the 157 conclusions made by the Tsets by May 2016, 29 were related to citizens' rights and freedoms while the rest were related to the state structure and other provisions of the Constitution. Apart from the abstract norm control, there is a mechanism established by the Law on Courts. This law enables ordinary courts to forward a presumably unconstitutional legislation to the Tsets review. However, ordinary courts cannot forward such issue directly but only to via the Supreme Court.<sup>14</sup> If Tsets finds the statute unconstitutional, this could potentially redress fundamental rights and freedoms in concrete cases.

The drafters of the Constitution deliberately envisaged and designed the Tsets as the guarantee for strict observance of the Constitution and a mechanism that exercises supreme supervision over the implementation of the Constitution. The current Constitution differs from the former socialist constitutions as it confers upon the Tsets authority to decide on the constitutionality of statutes, presidential decrees, the decision of the Government, international treaties, decisions of the Central Election Authority and national referendum.<sup>15</sup>

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<sup>12</sup> Constitution of Mongolia, (1992), art. 50.2.

<sup>13</sup> Ts. Sarantuya, *Mongol Ulsiin Undsen khuuliin tsetsiin ontslog, erkх zuin kharitsuulalt*, in J. Amarsanaa, *Mongol Ulsiin Undsen Khuuliin Tsets: uguulel, iltgeliin emkhetgel*, (Ulaanbaatar, 2007), Khuuli zuin undesnii tuv, 232.

<sup>14</sup> Law on Courts, (2012), art. 6.4.

<sup>15</sup> Constitution of Mongolia, art. 66.2.1.

The Tsets also has jurisdiction to settle constitutional disputes on whether the President, Chairman and members of the State Great Khural, the Prime Minister, members of the Government, the Chief Justice of the Supreme Court and the Prosecutor General have breached the law; as well as disputes on the grounds for removal of the President, Chairman of the State Great Khural and the Prime Minister and for the recall of members of the State Great Khural.<sup>16</sup> In addition to citizens who submit petitions and information to the Tsets, the State Great Khural, the President, the Prime Minister, the Supreme Court and the Prosecutor General can submit a request to the Tsets. The Tsets is required to initiate a dispute upon receiving a request while it can decline to initiate a dispute based on the information received from citizens. “Until 2016, the Tsets received nine requests: one from the General Prosecutor, six from the Supreme Court, and two from the President.”<sup>17</sup>

Citizens can submit petitions and information to the Tsets. It is a form of “*actio popularis*, in which anyone is entitled to take action against a norm after its enactment, even if there is not personal interest; the individual suggestion, in which the applicant only suggests that the constitutional court control the constitutionality of a norm, leaving the decision to do so at the court’s discretion.”<sup>18</sup> In early 1990s, the Tsets received an average of 30-40 information and petitions a year. Today Tsets receives two to three information each day.<sup>19</sup> By April 5, 2016, the Tsets has received 2069 petitions, information and requests and issued 144 conclusions. The vast majority of these were received from citizens.<sup>20</sup>

The design of relationship between the Tsets and the State Great Khural theoretically target cooperation and dialogue. However, it does not always work in such a mode. Sometimes, the State Great Khural’s attitude do not seem cooperative. It eventually influences the legitimacy of the Tsets in a visibly negative way. The dialogue between the two, for example, has undoubtedly politicized Tsets’s decisions. Notwithstanding

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<sup>16</sup> *Ibid.* art. 66.2.3, 4.

<sup>17</sup> UNDP, Assessment of the Performance of the 1992 Constitution of Mongolia (UB 2016).

<sup>18</sup> European Commission for Democracy through Law, Study on Individual Access to Constitutional Justice (Council of Europe Publishing, 2010), 4.

<sup>19</sup> Ochirbat Mongol Ulsiin Undsen Khuuli: kheregjilt (2017), 349.

<sup>20</sup> *Ibid.*

these factors, the establishment of Tsets has been in the heart of the constitutionalism and has served well for the consolidation of constitutional democracy in Mongolia.

## V. Composition of the Constitutional Tsets

The legitimacy and independence of the Tsets rests with its composition. A balanced and professional composition of the Tsets will make it the most important institution in our scheme of constitutional democracy. A qualified composition invites trust from the public. If the Tsets is seen to side with one particular interest group or a certain political party, the legitimacy and independence of the Tsets will be endangered and it cannot effectively carry out its duty to limit and prevent the arbitrariness of the state authorities.

The qualifications of the members are important to ensure that the Tsets is competent and independent. The State Great Khural appoints nine members of the Constitutional Tsets for a term of six years upon the nomination of three by the State Great Khural, three by the President, and the remaining three by the Supreme Court.<sup>21</sup> This might be a reflection of the legislature's intention to create a balanced composition including judges, law professors and other lawyers. However, contrary to the expectation, out of the 30 persons who served as members of the Tsets, only a handful of them appear as career judges or law professors.<sup>22</sup> The vast majority of the members are often politicians. The purpose of entitling three different institutions to nominate three candidates each is perhaps to give more legitimacy to Tsets and a balanced composition.

Article 65.2 provides for the qualifications of the members of the Tsets to be a citizen of Mongolia, who has reached forty years of age and has a high political and legal qualification. The requirement of "high political and legal qualification" has been interpreted in two different ways over the years. It used to be interpreted as a requirement that the candidate must have only one of these two qualifications. This resulted in the appointment of candidates, who do not possess a law degree. A geologist, two historians, and an engineer were appointed as members of the Tsets under this interpretation.

The other interpretation requires the candidates to possess both of the qualifications. This effectively excluded many law professors and career judges and practicing lawyers

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<sup>21</sup> Constitution of Mongolia, (1992), art 65.1.

<sup>22</sup> Ochirbat, Mongol Ulsiin Undsen Khuuli: kheregjilt (2017), 349.

from serving as a member of the Tsets as they do not often have a high political qualification. Mongolian constitutional law scholars had variable interpretations for the same provision on the qualifications of the members of the Constitutional Tsets. Doctor G. Sovd explained ‘high political and legal qualification’ as a requirement that a member of Tsets must first be majored in law. He continued by asserting that a candidate should have both a law degree and relevant education and experience in politics.<sup>23</sup> Professor Ts. Sarantuya said a lawyer who had many years of experience in practicing law will not be qualified to become a member of Tsets unless he or she also has some education in politics. Apparently, this provision requires amendments in order to overcome increasing ambiguity and arbitrary interpretations.

Tsets has long been criticized for not including the legal grounds and explanation for its written decisions. This is sometimes attributed to the lack of qualifications by the members of the Tsets.<sup>24</sup> Professor B. Chimid criticized the Tsets that it only writes in the decision two words constitutional or unconstitutional, offering no detailed explanation and a well-elaborated legal logic.<sup>25</sup>

Another unique feature about the composition of Tsets is that its members are divided into two groups: full-time and part-time members. In 1992, State Small Khural’s Resolution 34 stated that “the Chairman of the Constitutional Tsets and two other members will be full-time members of the Tsets and the remaining six members will be part-time members.”<sup>26</sup> Since then, subsequent legislation had kept this policy. The part-time members of the Tsets worked without salary until 2009 and with half of the salary of a full-time member from 2009 to 2013. Beginning from 2014, they received the same salary as the full-time members.<sup>27</sup> The Resolution of the State Small Khural which is

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<sup>23</sup> G. Sovd, *Mongola Ulsiin Undesn Khuuliin Tailbar*, (2000), 255.

<sup>24</sup> Munkhsaikhan O. Undsen Huuliin Tsets ba Undsen Erkhiiin Hamgaalalt, *NUM Law Review*, 2018, Special issue 2, 148.

<sup>25</sup> Chimid B, *Turiin Khuulias Irgenii Khuuli Ruu lektsiin temdeglel*, [http://forum.mn/pdf/public\\_meeting/TuriinKhuuliasIrgeniiKhuuliRuu20070111.pdf](http://forum.mn/pdf/public_meeting/TuriinKhuuliasIrgeniiKhuuliRuu20070111.pdf), 16, [accessed on May 8, 2019].

<sup>26</sup> State Small Khural Resolution 34 on ‘Some measure to implement the Law on Constitutional Tsets’, May 15, 1992.

<sup>27</sup> Ochirbat Mongol Ulsiin Undsen Khuuli: *kheregjilt* (2017), 342.

clearly in violation of the Constitutional provision that provides for nine members of the Tsets,<sup>28</sup> is yet a valid resolution.

## **VI. Conclusion**

More than 27 years passed since the adoption of the democratic Constitution and the Law on Constitutional Tsets. The establishment of the Tsets enabled faster transition period from socialism to democracy. The Tsets played fundamental role in consolidation of democracy and protection of human rights in Mongolia. However, there are issues that need to be addressed with respect to the relationship between the State Great Khural and the Tsets. This relationship was designed to be one of cooperation and dialogue. However, it did not always work as intended. Sometimes, the State Great Khural's attitude has been not very cooperative and that has influenced the legitimacy of the Tsets negatively. The dialogue between the two needs to be re-considered so that the Tsets makes the final decision without the State Great Khural's approval. Individual citizens should have the opportunity to file complaints to the Tsets concerning violations of their fundamental rights guaranteed in the Constitution. Apart from these improvements, the Tsets facilitated the peaceful transfer of powers in the past 27 years and has been the guarantee for the strict observance of the first democratic Constitution in Mongolia.

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<sup>28</sup> Constitution of Mongolia, (1992), art 65.1.

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