

[Working Paper Series: Horizontal Accountability in Asia]

Horizontal Accountability in Mongolia

Ganbat Damba (Academy of Political Education)
Mina Sumaadii (Sant Maral Foundation)

1. Introduction

The 1992 Constitution is considered the “blueprint of Mongolia democracy” (Sanders 1992). This Constitution served Mongolia’s democracy well as, to date, eight electoral cycles were held regularly, had uncertain outcomes, and resulted in multiparty competitions for people’s votes. In the Varieties of Democracy Project’s liberal democracy index, Mongolia started with a score of 0.41 in 1991 and, with slight fluctuations, ended with a score of 0.49 in 2021 (V-Dem Project 2022). At its height, it reached 0.61 in 1999. Nonetheless, these scores consistently place Mongolia in the “electoral democracy” category. At the same time, the horizontal accountability index (scaled low to high (0-1)) had a score of 0.9 in 1991 and throughout the remainder of the 1990s (V-Dem Project 2022). Yet, it decreased following each constitutional amendment in 1999/2000 and 2019. Eventually, after fluctuations, it ended with a score of 0.78 in 2021 (V-Demo Project 2022). While in the broader historical context, the scores in the last three decades are at their highest level since Mongolia transitioned to democracy, the gradual decrease in the horizontal accountability index follows the general trend of declining government accountability.

Sato et al. (2022) found that in the autocratization process, institutional decay starts with horizontal accountability, followed by declines in diagonal accountability and, finally, vertical accountability. According to recent developments, some early signs of democratic erosion can already be found in Mongolia. As the balance of power between different branches becomes uneven, we will address some of the issues of concern, potentially pointing out some general prescriptions that can counter the process. Further investigation can also offer an institutional explanation of Mongolia’s good democratic performance and ineffective governance.

Consequently, the organization of this study is as follows. We begin with introducing the constitutional checks and balances system in Mongolia. Next, we describe the existing hierarchy of power among the government branches. Then, we address the legal procedures available to counterbalance the misconduct found in each government branch. After that, we assess the judicial branch’s independence in more detail. Finally, we examine oversight agencies and their capabilities and conclude the study.

2. Checks and Balances

The Constitution (1992) introduced a semi-presidential form of government. This power arrangement resulted in constant power struggles between the president's office, the prime minister and his cabinet, and the parliament. This constitutional arrangement is credited with setting the Mongolian democracy on a long-term structural advantage among democratizing post-communist states overall (Fish 1998). On the positive side, during Mongolia's transition to democracy, no branch could monopolize power, which became an optimistic institutional arrangement preventing it from drifting to authoritarianism seen in the former Soviet Union states in Asia (Fish 2001). However, on the negative side, this arrangement can lead to power disputes and political deadlocks during cohabitation (the president and main parliamentary party from opposing parties) and divided governments.

Historically, the most prominent example was when disputes between different government branches paralyzed the 1996-2000 parliamentary term and contributed to debates about the democratic system's political stability or functionality. However, changing this system was never a popular idea based on opinion polls, as most of the population supported democracy as a form of governance (Sant Maral Foundation 2022). Therefore, the introduction of the first constitutional amendments partially addressed constitutional conflicts. Such political deadlocks during cohabitation (the president and major party in parliament from opposing parties) and later coalition governments align with the general research on semi-presidential systems.

In the first place, the 1992 Constitution's institutional equilibrium introduced an overlap between the president's office, the prime minister, and the parliament. The design was based on the principles of checks and balances among different branches of government that relied on coordination. In practice, the Constitution relied on consensus¹ among the executive and legislative branches; an aspiration too difficult to achieve during periods of divided governments and cohabitation in a new democracy. Moreover, the absence or underdevelopment of institutions to ensure the continuity of policies exacerbated the debates about stability and functionality.

Eventually, two major constitutional amendments were introduced to remedy some of these institutional conflicts. As a solution, they shifted the balance of power from the president to the parliament. While the decision rests on an argument that such shifts reduce the possibility of strongman politics that an all-powerful president may entail, due to the one-party dominance, it still led to a power concentration and an all-powerful parliament and prime minister. As a result, the past balance of power between different branches of government became uneven, and the institutional equilibrium that has served Mongolian democracy well since 1992 has changed. It is still early to assess whether this is a positive or negative development, as further constitutional amendments are being discussed and scheduled for 2023. Yet, some recent developments, with the abrupt introduction of legislation without public discussion or minimal oversight, are a cause for concern (examples – August 2022 Constitutional Amendment, Cyber Security Laws, and Human Rights Laws).

In the constitutional design, the separation of power in the legislative and judicial branches is clear. According to Article 20, the unicameral parliament, the State Great Khural, holds the legislative power. Article 47.1 states that courts and the Supreme Court exercise judicial power. However, the executive branch was always more ambivalent due to an overlap between the president

¹ Consensus or concurrence (depending on the translation) between the president and parliament was explicitly required in many articles in the 1992 Constitution, but later most of them were reversed by amendments in 1999/2000 and 2019.

and the prime minister. Article 38.1 of the Constitution explicitly states that the cabinet, led by the prime minister, is “the highest executive organ of the State.” Yet, the president’s role in appointments and legislative initiatives given by Article 33.1 implies executive power.

3. Hierarchy of Power

Despite legal ambivalence on the exact political hierarchy, the presidency is considered the top of the political establishment. It is so despite significant constitutional limitations because the presidency symbolizes the peak of political power in Mongolia, backed by a direct national vote and popular legitimacy that comes with it, after which other state positions would be considered downgrading. It is disputable whether the second highest position is the prime minister or the chairman (speaker) of parliament. Constitutionally, the prime minister is a much more powerful position than the presidency and is more visible to the public. Following the constitutional amendments, in 2019, it became clear that the prime minister is the head of the executive and holds most of its powers. For example, in cases where there is no consensus on the structure and composition of the cabinet with the president, the prime minister can form his own cabinet by only presenting it to the parliament and president (2019 amended version Article 39.4). However, according to the Constitution, the prime minister and his cabinet are collectively responsible solely to the parliament (Articles 25.1.6 and 41.2). Also, given the more extensive powers of the legislative branch and, in particular, powers to remove the immunity of parliamentarians (Law on the Parliament 2020, Article 9.1), the speaker of the parliament effectively holds the second highest position. The speaker also replaces the president in case of absence, incapacity, or resignation. Therefore, the prime minister holds the third highest position.

The ideal design of the presidency was to mediate between conflicting parties and factions or be “above politics.” (Chimid et al. 2016) Before the 2019 constitutional amendments, presidents could not afford to be non-partisan in the first term if they sought re-election. After these 2019 amendments, which raised the age of presidential candidates to 50 (formerly 45) and limited them to one six-year term, the president’s incentives for “activism” during their time in office and role in the separation of power have considerably decreased. Currently, the president’s role as a counterbalancing power is minimal, and the most substantial power is veto power, which remains limited by the parliament’s ability to override it by two-thirds of its members. In addition, before the 2019 constitutional amendments, the president played a prominent role in judicial nominations.² After the 2019 amendments, the number of appointed judges is limited to five out of ten, and the rest are selected through open hearings (Article 49.5).³ The Constitution remained ambivalent on who exactly is to make these appointments, leaving it to speculation that it most likely is the parliament. Nonetheless, new laws will presumably detail the nominations and appointments.

² Before 2019 the president could appoint all judges upon the proposal of the Judicial General Council (Article 51.2) and could appoint the prosecutor general and his deputies in consensus with the parliament (Article 56.2).

³ Amendment of 2019 - Article 49.5: Five members of the Judicial General Council (hereinafter “Council”) shall be selected from among the judges and openly nominate the other five members. They shall work once for four years, and a Chairman of the Council shall be elected from among the members of the Judicial General Council. Report on Council activities in connection with ensuring the independence of judges shall be presented to the Supreme Court. The Organization of the Council, operational regulation, the requirement for its members, and the rules of appointment shall be determined by law.

Constitutionally, the Supreme Court is the highest judicial body. The Judicial General Council (JGC) is its administrative body. In cases of Supreme Court Justices, the JGC selects and nominates judges for an appointment either by the president or the parliament. The Constitution grants the Supreme Court authority to examine all lower court decisions and provide official interpretation of all laws except the Constitution. Articles 64.1 and 66 give the Constitutional Court the general power of constitutional interpretation. Nevertheless, given the appointment system, it is highly disputed whether the judiciary and the prosecutors can be truly independent in the existing system. Furthermore, in 2019, the Law on the Legal Status of Judges allowed the National Security Council (the President, Prime Minister, and the Speaker of Parliament) to remove judges (Transparency International 2019; Dierkes 2019).

In 2019, the Mongolian People's Party-led government pushed comprehensive constitutional amendments that shifted the balance of power to the parliament and limited the presidential term. However, these changes did not go far enough in changing the nature of the political system, and it remained semi-presidential. At the time of writing, there are talks about further constitutional amendments; however, the contents are not publicly available. It is only a matter of speculation that it will likely be a further shift to a parliamentary system. A complete transition to parliamentarism has been a long-sought political goal by political elites. The prevalent belief is that stability in decision-making would result from a shift of power to parliament and the creation of a powerful prime minister position. Ambitious presidents mostly supported the transition to the presidential system. Nonetheless, one of the significant changes introduced by the 2019 constitutional amendments was a considerable change in the checks and balances system. The institutional equilibrium between the executive, legislative, and judicial branches shifted toward an all-powerful parliament and prime minister.

4. Counter-balancing Misconduct

Due to the numerous laws passed in the last thirty years, there is a saying that Mongolian Law lasts three days. As a result, in comparison to the Constitution, the Law on Parliament and Law on Cabinet (1993) were amended dozens of times (at the time of writing, the count is 38+ times each), making it a highly contested area to interpret for lawyers or anyone, for that matter. Some areas are ambivalent or untraceable after amendments because various political interests clashed, and high-level politics is involved.

Regarding the constitutional procedures for removing prime ministers, a vote of no confidence has removed prime ministers at least three times.⁴ Others managed to survive the vote of no confidence. As for presidential impeachments, no president has been removed while in office yet. N. Enkhbayar was arrested following his term in office and is the only former president that returned to party politics. Other former presidents retired from political life. In contrast, the parliament consists of 76 members, and after eight election cycles, there are many more parliamentarians to investigate. From the beginning, the most challenging obstacle for the prosecution was parliament immunity, guaranteed by the Constitution in Article 29.2 and legalized by Article 9.8 (formerly Article 34.7) in Law on the Parliament (May 07, 2020, version). Nevertheless, Article 9.1 states that the parliament shall decide whether to suspend the powers of a

⁴ The exact number is difficult to trace due to the absence of open information on the topic.

member of parliament. More specifically, in Article 9.1.1, when “the State Prosecutor General has submitted a proposal to the State Assembly to arrest him with evidence in the course of his criminal act or at the scene of the crime, and then to suspend his powers.”

Following this, the existing checks and balances are such that high-level public officials rarely get prosecuted. The presence of public outrage and demonstrations is one of the deciding factors in bringing up high-profile cases. Among recent issues that received significant public attention was the dismissal of Speaker M. Enkhbold in 2019 after the public outcry over high-profile corruption scandals (Bittner 2019). Regarding the Constitutional Court, a notable high-profile case was the removal of its Chairman D. Odbayar, due to mounting public pressure over his involvement in the sexual harassment of a South Korean flight attendant on a flight from Ulaanbaatar to Incheon (*IKON News Agency* 2019). There are other cases involving parliament members; however, many happened after their term in office or were eventually overturned. The main reason is that the judiciary can hardly maintain its political neutrality or independence under existing power arrangements.

5. Judicial Branch’s Independence

As previously stated, constitutionally, the Supreme Court has the authority to examine all lower court decisions and provide official interpretation of all laws except the Constitution (Article 50). The Constitutional Court holds the general power of constitutional interpretation (Articles 64.1 and 66). There is a debate among scholars and politicians about the need for a separate Constitutional Court when a Supreme Court could take over the duty of constitutional interpretation. After much back and forth in arguments, the most plausible clue to date comes from the composition of the Constitutional Court. While members of the Supreme Court are explicitly required to be professional lawyers (Article 51.3),⁵ the members of the Constitutional Court had to have high qualifications in politics and law (Article 65.2),⁶ and their nominations applied the principle of the distribution of power between different branches. The Constitutional Court has nine members of the following distribution: the parliament nominates three members, the president nominates three members, and the Supreme Court nominates three members (Article 65).

Overall, the existing system of judicial nominations is one of the major barriers to judicial independence. The political nominations of justices and the prosecutor general introduce a high risk of politicization of the judiciary. The next big obstacle is the amendments to the Law on the Legal Status of Judges in 2019 that allow the National Security Council to remove judges (Transparency International 2019; Dierkes 2019). There are plausible arguments that it is necessary due to existing corruption in the legal system. The problem is that high-level corruption is endemic in the whole system, and the removal of judges can also serve political motives. Consequently, the issues with the judiciary’s political neutrality and independence undermine the judicial branch’s function as a counterbalance to the other branches of government.

⁵ Article 51.3 “A Mongolian citizen who has reached thirty-five years of age with a higher education in law and a professional career of no less than ten years may be appointed as a judge of the Supreme Court.”

⁶ Article 65.2 “A member of the Constitutional Court shall be a Mongolian citizen who has reached forty years of age and has high qualifications in politics and law.”

6. Oversight Agencies and Their Capabilities

Mongolia has a longstanding problem with corruption in the public sector, but the main obstacle to legislation is not as much existence of loopholes and inconsistencies, but the issues summarized as the weak rule of law. According to Transparency International's assessments, Mongolia's 2021 corruption ranking stands at 110 out of 180 with a Corruption Perception Index of 35, which places it among countries with a serious corruption problem (Transparency International 2022).

The two major oversight agencies are the Mongolian National Audit Office and the Independent Authority Against Corruption of Mongolia (IAAC). The Mongolian National Audit Office is the country's central audit institution. The Law on State Audit (2020) gives it a broad mandate.⁷ In practice, it is limited in human resources and often runs into issues with overall capacity (ADB 2019). Unsurprisingly, when high-level politics is added, it is rare that a state audit finds any wrongdoings. The Constitution grants the parliament budgetary powers under Article 25.1.7. In response, Article 6.1 of the Law on State Audit gives the Mongolian National Audit Office the mandate to audit all except the parliament.⁸

The IAAC is another oversight institution with an overly broad mandate that allows it to investigate corruption cases and educate the public about prevention mechanisms. According to the Law on Anti-Corruption (2006), the IAAC is in charge of income and asset declarations of the president, the prime minister and his cabinet, members of parliament, and officials appointed by them (Article 11.1.1). To date, the most considerable obstacles to its capacity to actively investigate corruption cases of high-level public office holders are issues of either political immunity or amnesty laws. As of July 2021, Mongolia has passed its seventh amnesty law (Baljmaa 2020). The problem is that some of these amnesty laws would apply to a broad range of cases that would also grant protection from prosecution for corruption or lead to the termination of cases under investigation by the IAAC (UNCAC Coalition 2015). Generally, the IAAC faces frequent accusations of operating at random or with significant political bias. In the past, the president could appoint the head of the IAAC, but in January 2021, the parliament made amendments to the Law on Anti-Corruption that shifted this power to the prime minister (Article 21, updated; Baljmaa 2020). This shift can be seen as further empowering the prime minister's position.

These institutional factors contribute to the deterioration of proper checks and balances in the system and explain why so much of this high-level corruption tends to go undetected or under-investigated.

7. Conclusion

We can conclude that several major factors are challenging the proper functioning of checks and balances in the system. Importantly, there is a lack of judicial independence. In the existing system, the key judiciary members are most likely to be political appointees; as a result, their political neutrality and independence are questionable. Relatedly, it becomes a further issue when dealing with

⁷ Law on State Audit, Article 5.1. "The main goal of the state audit is to monitor the planning, distribution, use and spending of public finances, budgets and public property in a legal, economical, efficient and effective manner, as well as improving public financial management and supporting sustainable economic development."

⁸ Law on State Audit, Article 6.5 states that it can audit the parliament "if requested by parliament."

cases that involve the high office. Correspondingly, due to politicization and limited capacity, the major oversight agencies, such as the National Audit and the IAAC, are not free from political interference. As for other avenues, there is a lack of support and opportunities to involve citizen oversight agencies. Overall, these challenges create considerable gaps in horizontal accountability in the system. The long-term institutional advantages and the current weakness of the opposition have also led to a system with one-party dominance. Given all of the benefits of the status quo, it is unlikely that the current political elite would push and implement the necessary reforms, leaving citizens' vigilance and participation as the primary tools leading to policy change. ■

References

- Asian Development Bank: ADB. 2019. “Mongolia: Strengthening the Supreme Audit Function.” ADB Technical Assistance Report. <https://www.adb.org/sites/default/files/project-documents/52285/52285-001-tar-en.pdf>
- Baljmaa T. 2020. “Law on Anti-Corruption Amended.” *MONTSAME News Agency*. December 31. <https://montsame.mn/en/read/248530>
- . 2021. “Mongolia Adopts Seventh Amnesty Law.” *MONTSAME News Agency*. July 5. <https://montsame.mn/en/read/269044>
- Bittner, Peter. 2019. “Mongolia’s Crisis of Democracy Continues.” *The Diplomat*. January 31. <https://thediplomat.com/2019/01/mongolias-crisis-of-democracy-continues/>
- Chimid, Enhbaatar, Tom Ginsburg, Amarjargal Peljid, Batchimeg Miggendorj, Davaadulam Tsegmed, Munkhsaikhan Odonkhuu, and Solongo Damdinsuren. 2016. “Assessment of the Performance of the 1992 Constitution of Mongolia.” United Nations Development Programme. <https://www.undp.org/mongolia/publications/assessment-performance-1992-constitution-mongolia>
- Dierkes, Julian. 2019. “The Beginning of the End of Democracy?” *Mongolia Focus* (blog). March 27. <https://blogs.ubc.ca/mongolia/2019/judicial-appointments-national-security-council/>
- Fish, Steven Michael. 1998. “Mongolia: Democracy Without Prerequisites.” *Journal of Democracy* 9, 3: 127–141. <https://doi.org/10.1353/jod.1998.0044>
- . 2001. “The Inner Asian Anomaly: Mongolia’s Democratization in Comparative Perspective.” *Communist and Post-Communist Studies* 34, 3: 323–338. [https://doi.org/10.1016/S0967-067X\(01\)00011-3](https://doi.org/10.1016/S0967-067X(01)00011-3)
- IKON News Agency*. 2019. “Chairman of Tsets D. Odbayar Was Dismissed from His Post [Цэцийн Дарга Д.Одбаярыг Албан Тушаалаас Нь Чөлөөллөө].” November 22. <https://ikon.mn/n/1qba>
- Law on Anti-Corruption [Авлигын эсрэг хууль] (2006). <https://legalinfo.mn/>
- Law on State Audit [Төрийн аудитын хууль] (2020). <https://legalinfo.mn/>
- Law on the Cabinet [Засгийн газрын тухай хууль] (1993). <https://legalinfo.mn/>
- Law on the Legal Status of Judges [Шүүгчийн эрх зүйн байдлын тухай хууль] (2019). <https://legalinfo.mn/>
- Law on the Parliament [Их Хурлын тухай хууль] (2020). <https://legalinfo.mn/>
- Sant Maral Foundation. 2022. “Politbarometer #21.” <https://www.santmaral.org/publications>
- Sato, Yuko, Martin Lundstedt, Kelly Morrison, Vanessa A. Boese, and Staffan I. Lindberg. 2022. “Institutional Order in Episodes of Autocratization.” *V-Dem Working Paper* 133. <https://doi.org/10.2139/ssrn.4239798>
- The Constitution of Mongolia (1992). <https://legalinfo.mn/>
- Transparency International. 2019. “Rule of Law and Independence of Judiciary Under Threat in Mongolia.” July 4. <https://www.transparency.org/en/press/rule-of-law-and-independence-of-judiciary-under-threat-in-mongolia>
- . 2022. “2021 Corruption Perceptions Index - Explore the Results.” January 25. <https://www.transparency.org/en/cpi/2021>

UNCAC Coalition. 2015. “International Organisations Call on Mongolian Parliament to Withdraw Corruption Amnesty Law.” October 8. <https://uncaccoalition.org/international-organisations-call-on-mongolian-parliament-to-withdraw-corruption-amnesty-law/>

V-Dem Project. 2022. “V-Dem Dataset V12.” <https://doi.org/10.23696/vdemds22>

- **Ganbat Damba** is the Chairman of Board at the Academy of Political Education, Ulaanbaatar, Mongolia. From 1999 to 2010 he worked as an Executive director of the Academy. Since 2009 to 2017 he was an advisor to the President of Mongolia on research and a Director of the Institute for Strategic Studies of Mongolia. Since September, 2017-2021 he was an Ambassador of Mongolia to Federal Republic of Germany. He became Ph.D. in 2002 at the Academy of Science of Mongolia. He has published various articles examining democratization, democratic and authoritarian values, elections, political party development and on principles of foreign and security policy of Mongolia.
- **Mina Sumaadii** is a Senior Researcher at the Sant Maral Foundation, Mongolia. She is currently a Postdoctoral Fellow at the School of International Studies, Sichuan University, China. Her research focuses on foreign policy and democratization in Eurasia. She received her PhD at the Graduate School of Global Politics at the Free University of Berlin, Germany, and did her MA in Political Science at the Central European University in Hungary and BA in Political Science and Sociology at the Dickinson State University in the US. In her free time, Mina likes to listen to podcasts.

This series of reports was compiled as a part of Asia Democracy Research Network’s joint research project on Horizontal Accountability in Asia. The research for these reports was conducted entirely by EAI and its partner think tanks in Asia, including Academia Sinica, Academy of Political Education, Independent Research Institute of Mongolia, International Center for Innovation, Transformation and Excellence in Governance, La Salle Institute of Governance, King Prajadhipok’s Institute, National Research and Innovation Agency, Observer Research Foundation, Pakistan Institute of Legislative Development and Transparency, Samata Foundation, and Verité Research.

This program was funded in part by the National Endowment for Democracy (NED).

This publication and other ADRN reports can be found on our website, [ADRN Working Papers]. The contents of this publication do not necessarily reflect the views of the East Asia Institute.

“Horizontal Accountability in Mongolia”

979-11-6617-622-7 95340

Date of Issue: 2 June 2023

Typeset by Hansu Park

For inquiries:

Hansu Park, Research Associate

Tel. 82 2 2277 1683 (ext. 204)

hspark@eai.or.kr

The East Asia Institute
1, Sajik-ro 7-gil, Jongno-gu, Seoul 03028, Republic of Korea
Phone 82 2 2277 1683 Fax 82 2 2277 1684
Email eai@eai.or.kr Website www.eai.or.kr