

**“STRENGTHENING REPRESENTATIVE BODIES IN MONGOLIA” PROJECT**

# **ASSESSMENT OF THE PERFORMANCE OF THE MONGOLIAN LAW ON ADMINISTRATIVE AND TERRITORIAL UNITS AND THEIR GOVERNANCE**

2019

This study was undertaken by a team of experts working under the project “Strengthening Representative Bodies in Mongolia” implemented by **the Parliament Secretariat, UNDP and SDC** in 2017-2020. The research findings, interpretations, and conclusions expressed in it do not represent the views of **the Parliament of Mongolia, UNDP and SDC**. The views expressed are those of the individual experts and are not related to their previous and current official functions. The authors take a responsibility for all errors in this report.



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## OVERALL BRIEFING ABOUT THE ASSESSMENT

Assessment of the performance of the Mongolian law on Administrative and Territorial Units and their Governance (LATUG) was commissioned by the Parliament Secretariat and undertaken by a research team between September 2017 and April 2018. The team was composed of Mr.D.Batbaatar (team leader), Ms.Sh.Byambaa, Mr.D.Ganzorig, Mr.B.Gunbileg, Ms.Ts.Davaadulam, Mr.G.Jargal, Mr.N.Luvsanjav, Mr.R.Mukhiit and Ms.D.Sunjid.

### Terms of Reference by the Parliament Secretariat:

1. Assessment and analysis of the effectiveness of implementation of the LATUG and draw conclusions:
  - Organization of administrative and territorial units of Mongolia;
  - Legal status of cities;
  - Implementation of the constitution principle of combination of local self-governance and state administration;
  - Definition of economic foundations for local governments;
  - Whether optimal allocation of functions between the administrative tiers has been achieved or not.
2. Undertake a comparative study of local government laws of foreign countries.
3. Desk review and analysis of previous research studies on local governments.
4. Study of other laws, which define competencies of local governments, for identification of possible overlaps with the articles and provisions of the LATUG, provide recommendations on how to address from the perspective of codification of legal acts.
5. Based on a study on the implementation of the above laws, provide analysis and recommendations for their linkages with the LATUG.
6. Undertake empirical studies, if necessary.
7. Provide proposals and recommendations on improving theories, principle, methodologies of local government law as a sub-discipline of administrative law.
8. Develop concepts for improving the legal framework for local governance, based on the findings and results of the assessment.

As per the above Terms of Reference, the following tasks were completed:

### One. Desk review

Within the scope of the desk review, the research team reviewed more than 10 independent publications, 30 research reports, proceedings of conferences and national forums and presentations on local governance issues. These documents were analysed from legal perspectives, a brief overview and conclusions are provided in the report (Annex 1).

### Two. Assessment of the implementation

The Law on Administrative and Territorial Units and their Governance (LATUG), which was first approved in 1992 and revised in 2006, and its further amendments were analysed from perspectives of both the content and legal techniques. Moreover, proposals for amendments in the LATUG submitted to the State Great Hural in written forms and discussed at various forums, two draft amendment texts were studied and used for developing the new concepts of the law. Detailed discussions were held among the research team members, whereby the LATUG was analysed article by article, based on which the most contentious issues that are frequently discussed within the framework of amendments, and pose theoretical and practical challenges were identified and incorporated into a questionnaire developed for the purpose of assessment. Using this questionnaire, discussions were held in Uvs, Darhan-Uul, Khentii aimags with support from the project “Strengthening of Representative Bodies in Mongolia” in December 2018. Representatives of local governments from Uvs, Khovd, Bayan-Ulgii, Darhan-Uul, Bulga, Selenge, Orkhon, Khentii, Dornod, Suhbaatar aimags participated in these discussions.

In-depth analysis was conducted on each topic provided in the Terms of Reference – organization of administrative and territorial units, legal status of cities, implementation of the constitutional principle of combination of local self-governance and state administration, allocation of functions between different tiers of administration, defining economic bases for local governments, from the aspects of the constitutional regime, comparative laws and the state of affairs regulated by the LATUG. In addition to practical implications of the legal regulations at the local level and related issues, judicial practices were also examined as part of the assessment.

### Three. Comparative study

In the comparative study, classical writings on theories of local governments, literatures on comparative local government law were reviewed along with the European Charter of Local Self-Government – internationally accepted standard for local self-governance, against which the legal framework of Mongolia was analyzed. Considering the poor quality of the previously available Mongolian translation, the team members have provided a revised and improved translation of the European Charter at the end of the report.

In the comparative study, publications by the European Council which summarize the lessons learned from countries of the Central and Eastern Europe, former countries of the Soviet Union which have undergone a similar political transition as Mongolia from 1990s and legal reforms in political, economic, and social spheres for compliance with the European standards for the accession to the European Union were studied to a greater extent, considering that the experience of these countries will be closest to Mongolia. The European countries have undertaken intensive legal reforms in recent years. Hence, taking into consideration that conclusions and exam-

ples drawn based on old literatives (as in the previous comparative studies) would be obsolete and irrelevant, we tried to use the most up-to-date sources. A detailed list of literature used is attached in the bibliography for further use by researchers in this area.

The Constitutions of the unitary states, including France and Poland, which have the same number of administrative units as Mongolia, were studied in a greater detail. In addition, we studied local government laws of the Victoria State of Australia, the Republic of Korea, Germany, Kazakhstan, Latvia, Lithuania, Macedonia, Russian Federation, Poland, Turkey, Uganda, Finland, France, Croatia, New Zealand, Estonia, and Japan.

Conclusions from the comparative studies and examples of the legal framework of countries are discussed under each relevant topic.

#### **Four. LATUG and its relationship with other laws**

The research team has produced a compilation of articles defining the competencies of local governments of 197 independent laws and a comparative analysis of these laws and the LATUG. This exercise was the most time-consuming and technical work for the team. Studying the interrelationship of competencies and powers assigned to local governments by general and specific laws aimed at providing conclusions and recommendation for removing overlaps, gaps, and contradictions between different laws and how to improve the codification of legal acts.

However, we note that it was not a full analysis for identification of overlaps, gaps and contradictions between different laws.

#### **Five. New concepts of the law**

Based on the analyses of the regulations set by the Constitution and LATUG, the team has provided consolidated conclusions and recommendations for improving the legal framework, new concepts and a draft structure of the new law on local government (Concluding chapter).



# Chapter One

## OVERVIEW OF THE LATUG

The Mongolian Law on Administrative and Territorial Units and Their Governance (LATUG) is the main law, which regulates local government affairs. It was first adopted on 18 August of 1992, was revised in 2006 and went through 20 amendments since its first adoption. The Parliament Secretariat concluded that “Although 25 years have passed since the adoption of the LATUG, a full-scale and comprehensive assessment of the implementation is missing”. Before analyzing the status of implementation of the law, in this chapter, we aimed to provide a brief overview of the social, political and economic contexts when the LATUG was first adopted, revised in 2006 and further amended, and how the changing contexts have subsequently affected the content of the Law.

### THE 1992 LAW

The LATUG was one of the first laws that a new parliament formed after the promulgation of the Constitution of Mongolia debated and passed. The Appendix to the Constitution of Mongolia<sup>1</sup> stated that a new system of local governance should be formed within 1992. Accordingly, the first election for local self-governing bodies was held in the autumn of 1992 and was followed by appointment of Governors and establishment of their offices. These reforms aimed to abolish the centralized state administration – the People’s Deputies’ Hural (PDHs) and their Executive Committees and the structure led by policies of a single party – replace by a totally new structure of local governance in line with the constitutional ideas.

Professor B.Chimid wrote: “Despite my warnings about the poor quality of the draft and suggestions to improve, the new parliament rapidly approved the LATUG by reassembling copies from old laws and decrees. Most articles, especially articles assigning powers to Citizens’ Representative Hural and its Presidium were edits of laws on PDHs of soum, horoo, local cities and rayons approved in 1978 and 1983. The Presidiums had been created under the local PDHs in 1989. It was obvious that the procedure approved then by the People Great Hural was largely copied into the LATUG”.

The LATUG is a direct copy and paste of the Constitution, including the title of the Chapter Four “Administrative and Territorial Units and Their Governance”, articles 57, 58, 59, 60, 61, 62, 63, i.e. word by word copy of one chapter and its 21 articles, without detailed interpretations of the constitutional articles.

In the old system, the State was engaged in all political, social and economic affairs, and controlled actions of citizens and enterprises. This can be clearly seen from “the Law on People Deputies’ Hural of soum, horoo, rayon and local cities of the People’s Republic of Mongolia”, approved in 1978. The 1992 LATUG did not use the direct wordings of the old laws, however, it kept some articles which can be interpreted as interference by the State in the private sector activities, and which aimed to address temporary political, social and economic problems of the transition period. Some of these articles

are still kept in the current text.

The legislators then may have lacked the knowledge about the functioning of local governments in a market economy, the ability to align the law with the constitutional ideas.

### THE 2006 REVISION

The State Great Hural, by its resolution no.62 of 2005, established a provisional committee with a task to study issues related to ensuring the independence of local governments and decentralization, to draw conclusions and develop proposals. The members of the provisional committee prepared and submitted a draft revision of the LATUG to the SGH. As a result, the current LATUG was approved on 15 December 2006.

As was mentioned in the briefing note and concepts attached to the draft revision of the LATUG, the following four principal changes were made:<sup>2</sup>

#### 1. With regard to increasing autonomy of local governments

– Policies of ensuring autonomy of local governments and decentralization are undermined by vertical appointments of managers and excessive concentration of powers at the centre. The public and budget organizations at the local level and their managers are largely guided and appointed by the centre, hence, local governments have no influence over the activities of the public and budget organizations and their personnel management.

Based on this justification, amendments were made in the laws on Social Insurance, Land, Archives, the General Taxation Law, Culture, State Inspection, Citizen Registry, Health, Child Protection, Road, Environmental Protection, Specially Protected Areas, Ensuring the Integrity of Measurements, Standardization and Conformity Assessment, to reflect that heads of local branches of ministries and agencies are appointed by Governors at respective levels based on consultation with a central public administration authority.

... Local governments have limited powers on fiscal and

<sup>1</sup> Appendix to the Constitution of Mongolia on transitioning to fully adhere to the Constitution of Mongolia from the Constitution of the People’s Republic of Mongolia

<sup>2</sup> File of revision of the LATUG, Volume 1, the Parliament Secretariat

budget matters to exercise at the local level. Budgets of public organizations are integrated into sectoral ministries' portfolio, as a result, Hural discusses only budgets of its secretariat and Governor's Office. Based on this justification, the following provision was added "local governments shall be allowed to create a local development fund from non-budgetary resources, define its sources and purpose, approve a procedure on the management and reporting on the utilization of this fund".

- The issues related to awarding licences of mining exploration and extraction at the local level are largely decided at the centre. Based on this justification, the following provision was added "to collect proposals of Hural of soum and district on issues of mining exploration and special licences for discussions by Presidium and pass its decisions to Governor".

- Local governments need reliable sources of income through ownership of land, buildings and economic enterprises. In addition to transferring of local properties, the powers of Hural and Governor have been clarified with regard to local property ownership and management.

## 2. With regard to ensuring the permanent functioning of CRHs

Provisions were added to increase the minimum number of meetings of Hurals per year, expansion of powers of the Presidium members, the requirements for Governors and other officials to consult and agree with the Presidium members on matters of dismissal and transfer of Hural representatives from their positions, establishment of Hural provisionary committees and sub-committees.

## 3. With regard to clarification of procedural matters which were not regulated clearly by the Law

- Termination of the term of a Hural, clarification of justifications for suspension and recall of representatives, prohibitions on leaving the sessions of Hurals,
- Clarification of the powers of Hural in the appointment and removal of Governor, and procedures for the nomination of Governor,
- Clarification of procedures on the veto of Hural's decisions by Governor,
- Clarification of procedures on dispute settlements between administrative and territorial units.

## **4. The provisions were added on clarification of the relationship local authorities, including CRH and Governor with the State Great Hural, the Government, central public adminis-**

## **tration organizations, guarantees of operation and protection of Hurals and Governors.**

The revision of the LATUG, which was based on the experience of the implementation over 10 years since the adoption, aimed at clarifying the contentious matters arising from the practice, through detailed regulations. The revision was a measure to rectify the situation of extreme limitation of fiscal powers of local governments as a result of the re-centralization tendencies of the late 1990s and early 2000s, namely through the adoption of the Public Sector Management and Finance Law in 2002.

## **CURRENT SITUATION**

As of 31 December of 2017, a total of 18 amendments have been made to the LATUG since its revision in 2006. A systematic analysis was carried by the team, reviewing the laws which approved these amendments and available at [www.legalinfo.mn](http://www.legalinfo.mn) – the integrated legal database.

The contentwise, the following conclusions are made:

The main achievement of the 2006 revision was the abolishment of the top-down appointment system, however, starting from 2012, it has been re-introduced gradually.<sup>3</sup>

In recent years, a negative practice has been established in the process of discussions and approval of the annual budget laws – of making changes in relevant laws, especially the LATUG curtailing powers of local governments, delegating unfunded functions, or attacking their role in respect of the property ownership. Usually these amendments are made outside of the normal legal reform process of the concerned sector, and therefore get approved unnoticed. In the words of local government officials, this phenomenon is called as 'legal theft'.<sup>4</sup> Such ill practices are likely to continue (Davaadulam, 2017). The provision on establishment of a Local Development Fund through non-budgetary resources was abolished in 2016. A number of important amendments were made in the Civil Service Law towards depoliticization of the civil service in 2008 as initiated by the Mr.N.Enkhbayar, the President of Mongolia. Accordingly, the provisions allowing the core civil servants occupying posts in Governor's Offices, departments and divisions under Governor to concurrently get elected into Hurals were abolished. Moreover, a change was made in the LATUG with the aim to separate bagh and horoo Governors from the political structure and ensure stability and professionalism. However, relevant articles of the laws have been excluded from the laws as the Constitutional Court reviewed information from citizens and concluded that these articles were in breach with the Constitution.<sup>5</sup>

<sup>3</sup> For example, by the amendment to the Law on Education approved in May 2012, the provision was added to the Article 30.1.15 on the appointment of heads of schools and kindergartens of soums by aimag Governor, by the amendments to the Law on Social Welfare approved on 4 September 2012, the Article 24.3 was changed as "... heads of social welfare departments of aimags, the capital city and districts shall be appointed and dismissed by the chief executive officer of the central public administration organization for social welfare in consultation with Governor at respective levels".

<sup>4</sup> One such example is the revision made in the Article 20.3 of LATUG on 23 January 2015, by adding "... Staffing and wages of Hural Secretariat shall be defined within the budgetary limits of that year as specified by Article 10.1.2 of the Budget Law". This gave the opportunity to the Ministry of Finance to define the staffing level of Hural Secretariat on an individual basis. As a result, most aimag Hural Secretariat had to cut its staffing starting in 2016. Another example is the Government's attempt to remove all the articles of LATUG concerning the property ownership rights of local authorities. However, because of a strong resistance from local authorities, the Cabinet withdrew its proposal submitted to the SGH at the end of 2015.

<sup>5</sup> The Constitutional Court's decree of 4 March 2009 concluded that the relevant articles of the Civil Service Law and LATUG were in breach of the Constitutional Articles 60.2 and 62.2. Accordingly, the relevant articles were amended on 12 March 2009.



The provision allowing 1/3 of the members of the CRHs to hold public administration positions has been restored by the amendment approved on 7 December 2017, after long debates by politicians. This again, was a regressing step from the 25 years' of achievements gained towards strengthening local self-governing bodies.

Such changes are usually proposed and submitted by the Government to the State Great Hural. It shows that the Government of Mongolia's commitment to decentralization and strengthening of local government was not firm and remained only as a lip service throughout these years. Yet, during this period, there was no single government, which did not put the objective of decentralization and strengthening legal framework for local governance as a priority in its action plan.

The following promises were made through the objectives put forward in the Government Action Plans with regard to local governance:

- 2008-2012, *Provide administrative units with opportunities for independent economic development; rationalize legal framework for local self-governing bodies and local administrations, establish an optimal balance of powers, develop local self-governance in its true sense.*
- 2012-2016, *Expand powers of local governments in budget, fiscal and personnel appointment matters and decentralization;*
- 2016-2020, *Improve the system of administrative and territorial units of Mongolia and their management, competencies, functions, the principles of functioning and organizational arrangements.*

But the above facts show that decisions of Governments of all time were the contrary. "State Policy on Decentralization" was approved by the Government Resolution No.350 of 2016, and is expected to be implemented in two phases of 2016-2020 and 2020-2024. The following objectives are defined in this document which have a direct relevance to the LATUG:

- 2.2.1. Re-allocation of some functions of central government and local self-governing and administrative bodies. With regard to this, assign functions related to common public services except for those of court, prosecution, armed forces, policy, intelligence, and state security and emergency, to the local administrations which directly interact with citizens at lower and intermediate levels, without overlapping;
- 2.2.2. Implement flexible investment and tax policies towards ensuring local economic independence and improve the system of local development fund;
- 2.2.3. Allocate adequate financial resources through budget allocation to central and local public administration organizations and self-governing bodies for exercising their functions assigned by laws;
- 3.2.1.1. Develop a methodology for re-allocation of functions between central and local public administration organizations and self-governing bodies, pilot in a specific sector, based on which make amendments in relevant laws and

apply universally;

3.2.1.2. Develop proposals for changing administrative and territorial division.

### **Proposals for amendments of the LATUG**

Within the scope of the desk review, the research team reviewed proposals for amending the LATUG submitted to the SGH in writing and raised during different conferences, meetings and forums, and two draft texts prepared for submission to the SGH, made the following analysis:

#### *1. Administrative and territorial division*

In this regard, proposals of designation a city status, provide the city status to soums at the aimag centre, clarify powers of a city manager, differential treatment of bagh and horoo and soum and district by law, dominate. This issue is currently being debated under the constitutional amendments. This illustrates that today's reality dictates the need for different legal arrangements to address the issues of urbanization and urban management.

Judging by the proposals related to definition and clarification of legal status and boundaries of administrative and territorial units, it was concluded that the LATUG does not sufficiently regulate these matters.

#### *2. The system of local governance*

Among the proposals for amendments of the LATUG, on the one hand, proposals to expand the powers of CRH and strengthen its secretariat and criticisms about the domination of Governor in the relationship between Hural and Governor, on the other hand, proposals for all possible options for the system of local governance, including direct appointment of Governors at all levels or direct election by citizens or election by respective Hurals or appointment by a higher authority, are made with the greatest frequencies.

#### *3. Functional allocation*

With regard to rationalization of functional allocation, the proposals to establish the principle of providing commensurate funding when assigning functions, separately assign powers and functions of CRHs of aimag and soum, legally separate common functions of Governor of bagh and horoo according to specifics of a unit, clearly define duties, rights and accountability lines of aimag and soum CRHs, clarify the role of public meetings at bagh and horoo levels, appointment of heads of schools, tax office, social insurance inspectors, citizen registry by local governments at the respective levels, should all be addressed within the scope of the LATUG.

#### *4. Local financial independence*

There is a widespread criticism about the limited powers on budgeting and local property ownership, strict norms and procedures of the Ministry of Finance applied in the budget allocation, lack of budget for operation expenses of CRHs and general meetings of citizens, accordingly many proposals are made by local level for amendments in the Budget Law. However, the LATUG says very little on these subjects. The above is a general summary. A detailed compilation of proposals is provided in the Desk review report attached in the Annex 2 of the report.

## CONCLUSIONS

The 1992 LATUG came out as a legal act which did not cover all aspects of regulation of local governments, rather guided word-by-word by the Constitution, while keeping some arrangements of the old system of **administrative and territorial units and their management** (in doing so, it failed to provide definition of these terms). This may have been due to time pressure if conducting local elections within September of 1992, coupled with lack of knowledge of the legislators at that time about modern theories and practices of public administration.

The 2006 revision focused on addressing problems arisen during the implementation, could not make substantial changes to clarify and expand the constitutional concepts and align with the nature of local governments in market relationships, it incorporated some regulations which existed in sectoral laws, hence did not make improvements in terms of codification of laws.

Notwithstanding setting new standards for the operations of local governments and assigning new functions through the adoption of the General Administrative Law, most recent amendments were of a nature of curtailing powers of local governments, or regressing from past achievements in establishing a new structure for local governance.

On the other hand, it demonstrates **the weak protection of the organic law**. Other countries have introduced the majority protection for amending special laws on local government, through their constitution or a local government law. For instance, the Constitution of Japan has a provision, which states that a special law on local government cannot be enacted without the consent of the majority of the voters of the local government concerned. The United Kingdom and Hungary require a two-thirds majority in parliament when passing legislation on local government.

**Technically**, when reviewed the amendments after the 2006 revision, because of inclusion of detailed sectoral functions in the LATUG, it necessitates an amendment in the organic law with every single change in a respective sectoral law, even if, it would be a small technical editorial correction. This, in turn, weakens the stability of the organic law. Such piecemeal changes also hamper the solution of the problems in their integrity and interrelatedness.

When reviewed recent proposals for amendments of the LATUG, it points to the lack of common understanding and social consensus on the 1992 constitutional choice of local governance – combination of local self-governance with state administration, or the reality dictates a change of this model. This is evident from proposals about direct election or direct appointment of Governors at all levels, or expanding the powers of Hural, which are all contradictory to each other.

The expansion of powers of Hural from its current level would mean that it would lose its very nature as a self-governing body and by its nature come close to executive government. In fact, the recent amendments have followed this trend, the LATUG and sectoral laws were adding executive type of powers and functions in order “not to omit Hural”. Understandably, apparatus, financial and human resources are required to exercise these functions. But **this issue**

**needs to be understood and treated as a matter of the system of local governance that has to be considered under the constitutional amendments.**

## Chapter Two

# ORGANIZATION OF ADMINISTRATIVE AND TERRITORIAL UNITS

### INTRODUCTION

Territory is an essential element of the state, and therefore one aspect of special interest in internal organization is the distribution of public functions across the territory, which can imply, on the one hand, the creation of bureaucratic structures at the centre and the periphery of the state, or, on the other hand, the erection of autonomous territorial agencies according to the different historical traditions of the particular territories.<sup>6</sup> This is also called as **the territorial principle for state administration**. The matter of how many local government levels should exist and the determination of the level of geographical disaggregation at which different tiers of government should exist and their institutional forms is a complex matter affecting the constitutional structure of the state.

In the administrative and territorial organization of the state, many factors are considered such as the size of population and area for efficient and equitable delivery of services, the optimal size for local taxation, not creating excessively small territorial units for attaining economies of scale, administrative efficiency of the government – economic forces, the democratic principle of making the government closer to people, management principles of possibility of control of operations of local governments by central government and differences in management capacity between strong urban governments and rural smaller units.

The matter of how many government levels should exist and the type of institutions at each level is more the result of historical accident than sound economic design in many transition countries that have undertaken administrative reforms aimed at decentralization since 1990s.<sup>7</sup> After the collapse of the communist regime, the reforms in countries of Central and Eastern Europe were undertaken in the spirit of restoring their old traditional structures and under the wave of democratization, thus aimed at abolishing strong central control, while recognizing self-governance of territorial units. As a re-

sult, they became overly fragmented. The negative side is the inability of these small units to implement their legally assigned functions.<sup>8</sup>

In Mongolia, as was adopted by the 1992 Constitution, the system of territorial division bears a good deal of resemblance to that of the socialist period, except that the status of towns of Darhan, Erdenet, and Choir was redefined to that of aimag. The basic structure is one of Professor B.Chimid in his writings on the constitution explained that the article “aimag, the capital city, soum and district are administrative, territorial, economic and social complexes units with specifically assigned functions by law and self-governance” denotes the treatment of these two levels as **a separate legal personality under public and private law**, the word “complex” was chosen to avoid a foreign word “subject”.<sup>9</sup> Constitutional scholars and researchers provide the same explanations, but there is no single law which provide a direct definition of administrative and territorial units as a “legal entity”<sup>10</sup>, or “separate legal personality”, to date. Only the Article 7.3 of the Civil Code provides for “Aimags, the capital city, soums, districts, as state, administrative and territorial units, may enter into civil legal relation **like other legal entities**”, but it does not directly define them as a legal entity. Hence, it may be concluded that this conception is present only in legal research circles, local governments do not yet appreciate the importance of being a legal entity.

Having the status of a legal entity is an important element of expression of autonomy of administrative and territorial units. On this basis, they can own properties and exercise property rights. Autonomy of local self-government provides for protection from interference by other higher administrative bodies. The European Charter of Local Self-Government provides for judicial protection of local autonomy. Professor B.Chimid stated that “One of the guarantees of local self-governing bodies is their right to judicial appeal and protection when higher authorities violate the rights and legitimate

<sup>6</sup> Sergio Bartole, Internal ordering in the unitary state, in the Oxford Handbook of Comparative Constitutional Law, edited by Michel Rosenfeld and Andras Sajó, 2012, page 613.

<sup>7</sup> Jamie Boex, Jorge Martinez-Vazquez, and Andrew Timofeev, Sub-national Government Structure and Intergovernmental Fiscal Relations: An Overlooked Dimension of Decentralization, Andrew Young School of Policy Studies, Georgia State University, Working Paper 04-01, 2004.

<sup>8</sup> Michal Illner, Territorial decentralization: An obstacle to democratic reform in Central and Eastern Europe? in

“Issues of the decentralization in former communist countries”, 1998. For example, in Czech the number of municipalities by 50 percent during the period from 1989 to 1993 and reached 6196 in 1993. In Hungary, many settlements reasserted their rights to local self-government in 1990, so that the number of municipalities increased from 1607 to 3108 in 1993. More than half of the total number of municipalities has less than 1000 inhabitants. The situation was slightly better in Poland. The number of municipalities remained relatively stable (2452 units in 1993, compared to 2375 in 1975 and the size of municipalities is much larger than in the two other countries.

As of 2016, the number of municipalities was 6258 in Czech, 3201 in Hungary, 2497 in Poland, showing that these countries have not undertaken territorial reforms in the last years.

<sup>9</sup> B.Chimid, the Conceptions of the Constitution: Local Governance, Volume III, 2004, page 50, Worshipping the Constitution, 2006, p. 101.

<sup>10</sup> Article 25.1 of the Civil Code of Mongolia: Legal person shall be an organised unity with concrete mission and engaged in regular activities, which is entitled to own, possess, use and dispose of its separate property, which can acquire rights and create liabilities in own name, which bears responsibility for consequences arising from own activities with its own assets, and which is capable to be defendant or plaintiff.

interests of an administrative and territorial unit and its self-governing body. However, none of the Mongolian laws mentions about this right”.<sup>11</sup>

A definition exists “the basic elements of an administrative and territorial unit shall consist of population, territory and administration”.<sup>12</sup> We believe that it is important to study the features of lower, intermediate and higher levels of administration by their elements for developing new concepts of the law, particularly re-assignment and clarification of functions between territorial units, defining property, taxation, and fiscal relationships for each level, furthermore, the nature of a self-governing body and the functioning of the state on the vertical axis (structure, staffing, administration, apparatus).

In view of the above, the elements of baghs, soums and aimags as lower, intermediate, and higher levels of administration are reviewed in this chapter. We will touch upon about competencies of the capital city and districts under the chapter on functional allocation.

violate the rights and legitimate interests of an administrative and territorial unit and its self-governing body. However, none of the Mongolian laws mentions about this right”.<sup>11</sup>

A definition exists “the basic elements of an administrative and territorial unit shall consist of population, territory and administration”.<sup>12</sup> We believe that it is important to study the features of lower, intermediate and higher levels of administration by their elements for developing new concepts of the law, particularly re-assignment and clarification of functions between territorial units, defining property, taxation, and fiscal relationships for each level, furthermore, the nature of a self-governing body and the functioning of the state on the vertical axis (structure, staffing, administration, apparatus). In view of the above, the elements of baghs, soums and aimags as lower, intermediate, and higher levels of administration are reviewed in this chapter. We will touch upon about competencies of the capital city and districts under the chapter on functional allocation.

## LEGAL STATUS OF BAGHS

In the last 25 years, no significant efforts have been made to strengthen baghs and horoos as **primary units of the state structure**, and this issue has been largely neglected.<sup>13</sup> The fact of omission of baghs and horoos in the Article 7.3 of the Civil Code “Aimags, the capital city, soums, districts, as state, administrative and territorial units, may enter into civil legal relation like other legal entities”, has further blurred their legal status.

Despite some regulations on the powers of bagh Governors and General Meetings of citizens of baghs, the LATUG fails to define the main components of bagh as a primary administrative unit such as the number of population and households, the size and boundaries of territory, and its functions. The following conclusions have been drawn in regard to its inability to serve as foundations for optimal re-organization of baghs and horoos, namely articles “taking into consideration of location of population, economic capability, geographic location, conditions of road and communications” (4.1) and “Pursuant to the article 4.1 of this law, the establishment, reorganization and dissolution of Bagh and Khoroo shall be determined by respective CRHs of aimag and the capital city” (4.2).

### Population of baghs

The following table shows that the limit of households per bagh was established by the decisions of the State Small Hural and the Council of Ministers before abolishment of baghs.<sup>14</sup>

Decisions	Number of households per bagh	Number of households adjusted for locational differences
Charter of local administrations (05.03.1923)	50 (can exceed by 1/3)	-
Charter of bagh (1933)	30-100	
Resolution no.81 of the Presidium of the State Small Hural (1941)	50-80	
Resolution of the Council of Ministers (1952)	Not below 50	
Charter of bagh and horoo (1957)		Not below 50 in rural areas, not below 100 in urban areas

In view of the adoption of the LATUG, a resolution no.23 of 1992 was passed by the SGH, which instructed the Government, until the time when an appropriate law and procedure approved, to develop criteria for establishment of baghs and horoos within 5 September 1992. By the minutes of the Cabinet meeting of 28 August 1992, it was instructed to establish baghs and horoos within budget limits, and also set the threshold of population as 5000 people on average for baghs in aimag centres, 1000 households in ger districts and 2000 households in residential areas of the capital city. However, these thresholds were not followed.

In 2006, a draft Government resolution, proposing “reorganizing baghs based on the number of households of 650-1000 in

<sup>11</sup> B.Chimid, the Conceptions of the Constitution: Local Governance, Volume III, 2004, p. 67.

<sup>12</sup> B.Chimid, Worshipping the Constitution, 2006, p.100.

<sup>13</sup> D.Ganzorig, “Local Governance: Issues and Solutions”, Proceedings of the national forum, 2016, p. 116

<sup>14</sup> B.Chimid, Present and future of baghs, 2002, p. 126



baghs of aimag centres, 200-350 in baghs of soum centres, 150-250 in rural baghs” was prepared by the Cabinet Secretariat and submitted to the Cabinet meeting, but it was not supported by the Cabinet members then.

As of 2014, the average number of households and population per bagh was 376 and 1544 respectively, with the least number as 43 households (Bayanerkht bagh of Tunel soum, Khuvsgul aimag) and the largest number as 1981 households (Shand bagh of Bayan-Undur soum, Orkhon aimag). In the last 10 years, the number of baghs rose by 74 from 1539 in 2007 to 1613 in 2017. These are mostly bagh in settlements. It can be seen that with the increase of population in settlement areas, the workload of Governors has increased in reporting, civil registry, meeting with households, and consultative decision making.

*Arvaiheer city – aimag centre of Uvurhangai is located on the territory of the neighbouring Taragt soum. As residents of Arvaiheer soum do not have lands for pasture and crops, there are always disputes with residents of Taragt soum. Whereas, the residents of Taragt soum herd their livestock during summer and autumn, they move into the aimag centre in winter time and use services of aimags such as sending their children to schools and accessing health facilities, and harbor an interest on selling wool and cashmere at the local aimag markets. This increases the workload of aimag schools and hospitals, and many people without registration and land permits move into the aimag centre, so does the workload of Governor of bagh at the aimag centre.*

*3rd bagh of Ulaangom has 1300 households, 7 residential buildings will be completed next year. The workload is unbearable for the bagh Governor, hence, reporting and populations statistics are done inaccurately.*

According to local government officials, it is relatively easy to establish a new bagh, whereas very difficult to abolish existing ones.

*In our aimag, a decision abolishing a bagh with 8 households is being reviewed at court. The criteria include the number of households. According to the principle of consulting with citizens, we abolished the bagh based on consultation with citizens. But the bagh Governor and the chairman of the General meeting are resisting because of their desires to keep their posts (Ch.Chimid, Chairman of CRH of Uvs aimag). The law has a provision to base on proposals of citizens and CRH. Two levels of courts have concluded that opinions of citizens were not collected. We did consult with citizens. But the court required many additional items such as that we collect citizen identity numbers and discussions at Citizens' hall and so on. We lost the case at court.*

Nevertheless, we restored our decision. Personally, I have lost trust in courts (J.Jargalsaikhan, Secretary of CRH, Suhbaatar aimag).<sup>15</sup>

The above cases show that clear justifications and criteria for establishment and abolishment of baghs, i.e. a minimum and maximum number of households per bagh should be defined by law, in order to address the issues related to uneven number of population and households among baghs, efficient delivery of services to citizens and even distribution of workloads of bagh Governors.

### Territory of baghs

The Constitution provides that “The territory of Mongolia shall be administratively divided into aimags, aimags shall be divided into soums, soums into baghs” (Article 57.1); General meetings of citizens of baghs shall make independent decisions on matters concerning economic and social life of their respective territories (Article 62.1). But the LATUG's definition as “a bagh is an administrative unit of a soum and a horoo is an administrative unit of a district” (Article 3.4) contradicts with the above constitutional articles and omits the territorial foundations for baghs.

By some sectoral laws, in particular, the Law on Health, the Law on Hygiene, the Law on National Security, the Law on Water, the Law on Environment, the Law on Land, the Law on Flora, defined powers of general meetings of citizens of baghs in organizing specific activities and making decision on matters of territorial significance. All these carry the notion of a territory, but there is no formal legal decision to date, which defines territorial boundaries of baghs. Before 1960, the central state authority passed decisions allowing how many baghs (used numbering of baghs) should be established in which soums and territorial boundaries were defined locally.<sup>16</sup>

Because of lack of formally defined boundaries, decisions of general meetings of baghs contradict with each other.<sup>17</sup> Sectoral laws provide that general meetings of citizens of baghs can decide on matters of territorial significance. But the problem arises when a land inspector proposes pasture land and hayfields, the use is refused to non-residents. This is the land on which people leave, therefore should be regarded as a territorial unit, but the law defines as an administrative unit.<sup>18</sup>

### Functions of baghs

The LATUG and other laws define powers of General Meetings of citizens of baghs and Governor, but not functions of bagh as an administrative and territorial unit.

As defined by the LATUG, the powers of Governor of bagh and horoo include many activities such as overseeing management and protection of environment, animals, pasture, hayfields, crop land, rewarding of citizens, assistance to the needy, support in delivery and development of basic education and health services to citizens, mobilizing cit-

<sup>15</sup> Local Governance: Issues and solutions, Proceedings of the Forum, 2016, p.145.

<sup>16</sup> Decree no. 103, 1956 of the Presidium of the Republic of Mongolia's Great Hural

<sup>17</sup> Regional consultation meeting conducted in Uvs aimag, December 2017

<sup>18</sup> E.Oyunbold, Secretary of CRH of Selenge aimag, Local Governance: Issues and solutions, Proceedings of the national forum, 2016, p.151.

izens in emergency situations, receive petitions and complaints from citizens and pass to a higher authority, assisting in the organization of elections. Most of these functions are about assisting, supporting and organizing the implementation of common functions of aimag, the capital city, soum and district Governors at the bagh and horoo level. In another word, Governors of baghs and horoos are directly subordinated to the higher level of administration and function within this limit. The LATUG does not define powers and functions which are exclusively assigned to bagh and horoo. In addition, bagh and horoo do not have a separate budget. Bagh is a too small unit for providing services independently.

B.Chimid thought that bagh should have the following four essential functions:<sup>19</sup>

- Promote a sense of community among citizens that are united by mountain, water, and land and mobilize them for common social objectives;
- Organize delivery of state services, policies and decisions to people and households residing within the territory;
- Households residing within the boundaries of a bagh shall be able to decide and regulate the matters of common concern of their lives by themselves;
- Protect the legitimate interests of bagh as a unit as well as its residents.

Clarifying the functions of bagh is important in defining the powers of its management, structure, secretariat, staffing, budget and funding, location of a centre of a bagh in an objective manner.

By the article 5 of Government resolution no.7 of 2008, the Chief of the Cabinet Secretariat was tasked to develop a proposal on "Establishing the structure, management arrangements and secretariat of baghs based on consideration of the size of population and areas, and features of local conditions" and submit it for the Cabinet approval within the first quarter of 2008. However, this procedure has not been issued until now.

## LEGAL STATUS OF SOUMS

According to the concepts of the Constitution, soum is **the basic unit** of Mongolia and for local self-governance, with the main responsibilities of direct delivery of basic social services to citizens. In line with the constitutional concepts, a number of initiatives were taken by the Government to amalgamate the economically unviable soums and develop them as an economic and social complex. But these but did not yield any results. The first attempt was the resolution no.24 of 21 August 1992 of the State Great Hural on "Merging some cities and horoos under jurisdictions of local government to the nearest soums". The resolution could not be implemented as the Constitutional Court concluded that it breached the Constitution as the local population was not consulted. Since the time when the concepts

of regional development approved in 2003, the Cabinet Secretariat had assigned a special team to study and make cost estimates on amalgamation of 60 soums which are geographically close to each other and economically unviable, during 2005-2006. But again, it remained as an unfinished agenda.<sup>20</sup>

## Population and social structure of soums

The component – population and social structures – of an administrative and territorial unit depends on living environment, access to government and market services and their qualities. People have a tendency to migrate for the following three composite bad reasons: 1) poor living conditions, 2) limited employment opportunities or low income, 3) poor quality of government and market services. In that sense, population and social structure are relatively soft factors compared with physical geography such as territory, the nature, and location. People are normally interested to stay in their homeland and enjoy life, but not to move elsewhere. In the last 15-20 years, citizens in rural soums and bagh have been moving to urban areas intensively.

Out of 330 soums of Mongolia, 19 soums have population of 950-1500, 53 soums have population of 1501-2000, 60 soums have population 2000-2500, 40 soums have population of 2501-3000, 85 soums have population 3001-4500, 29 soums have population of 4501-6000, 12 soums have 6001-7500, 32 soums (9.7%) have population above 7500. Thus, **50 percent of Mongolian soums have population below 3,000.**

Average population growth rate for soums was 0.9%, indicating negative growth and high level of migration. 211 soums had population growth rate under 1%, representing 64% of the total. This shows overall decline and stagnation of the soum population. The population growth rate above 1.2% was observed in 5 soums of Umnugobi and some soums of Uvurkhangai aimags which is related to the mining boom, in Zamyn uud soum of Dornogobi, Khankh and Tsagaannuur in Khuvsgul which is explained by tourism, Bayanchandmani, Bornuur, Erdene soums of Tuv aimag which is the result of herders migrating closer to markets.

As of 2015, out of 1171 kindergartens available nationwide, 287 operate in aimag centres, 368 in soum centres, 22 in bagh centres; out of 762 secondary schools, 230 operate in aimag centres, 312 in soum centres and 10 in bagh centres.

The above facts show that there are many soums whose population size is too small for independent functioning as social and economic units, yet attaining the optimal size for providing basic services and keeping the population stable.

Some researchers calculated that a soum can qualify as social and economic complex when its population reaches 5,000.

<sup>19</sup> B.Chimid, Present and future of baghs, 2002

<sup>20</sup> Evolution of administrative and territorial units, their present situation, and proposals for reform, the Cabinet Secretariat, 2006.



## Territory of soums

Territory is an important element not only for existence of soums, but also is an issue of political and legal implications. According to the Constitution, boundaries of soums are established by the SGH (Article 57.3). This is an important regulation, which provides constitutional protection of boundaries of local governments and legal guarantees for altering them only based on justifications provided by laws.

When boundaries of the current soums were established in 1930s, mainly practical issues were taken into consideration such as herding of livestock during four seasons by rotating water and pasture, access to services provided from soum centres by rural population, making the state administration closer to herders. The administrative and territorial division was changed in 1970s to reflect the need for providing the state with raw materials through ownership of lands by agricultural collectives and state farms established in early 1960s - the first attempt to re-organize the territorial administration based on economic justifications.

Currently, the average area of soums is 3500-4500 km<sup>2</sup>. The smallest is Erdenebulgan soum of Arkhangai with area of 15.4 km<sup>2</sup> which is 1827 times less than area of the largest soum - Khalkhgol soum of Dornod aimag which encompasses an area of 28093 km<sup>2</sup>. The smallest soums are located in the aimag centre with an average area of 15-50 km<sup>2</sup>. The reason for such a small size is related to the fact that when changing the status of cities of aimags, which were urbanized in 1970-1990s into soums in 1992-1994, the issue of their territory was neglected. Thus the solution was such "a soum without territory, a city without standards". Moreover, there are 43 soums located at a distance less than 50 kilometers from the aimag centre, including soums which are very near to adjacent soums (at distance of 5-25km), this creates waste of resources in administration and aggravating difficulties in bringing services to the population, contributing to the rise of conflicts over territorial boundaries.<sup>21</sup>

Mr.D.Erdenebat, Member of Parliament, emphasized the importance of economic efficiency considerations in the revision of administrative and territorial division and noted that "The issue of administrative reform was raised several times in the last 20 years, but was halted because of indecisiveness of the decision makers then. The main reason has been the inability to find the sound concepts for how to change administrative division. Administrative division should be re-defined in line with the regional development concepts. The main cause for underdevelopment of free market economy is 330 soums of Mongolia. Why? According to the market rules, a market space is created when the population density reaches 10 persons per square kilometer. At least, operating a bakery will be profitable in this case. But today, the population density is 0.3 per km<sup>2</sup> in Umnugobi, 0.5 km<sup>2</sup> in Dornogobi, and 0.4 km<sup>2</sup> in Gobi-Altai aimags. When look at the statistics, there are many aimags and soums, which do not meet

the minimum conditions for market functioning, whereas in a few urbanized centres the population size exceed the market potential. For instance, the population density is 107 km<sup>2</sup> in Erdenet city and 245 km<sup>2</sup> in Ulaanbaatar. The 330 soums do not have any condition for free trade, economy and market relations, hence, the people live without economic guarantees, powers and freedom."<sup>22</sup>

The Constitution states that a revision of an administrative and territorial unit shall be decided by the SGH, considering economic structure and location of population and on the basis of an opinion by a respective local Hural and citizens (Article 57.3). In line with this article, the LATUG states that the establishment, reorganization and dissolution of soums shall be determined by the SGH on the basis of a proposal by a respective CRH and citizens residing in the respective territory, taking into consideration the location of population, economic capability, geographic location, conditions of road and communications, as submitted by the Government" (Article 4.1).

In countries where local government lacks constitutional protections, for example, in the case of English local governments, central government can and has amalgamated councils, restructured boundaries and even abolished councils or entire layers of local government. Therefore, they are actively discussing about the need for establishing the statutory protection.<sup>23</sup> The Article 5 of the European Charter of Local Self-Government states that "changes in local authority boundaries shall not be made without prior consultation of the local communities concerned, possibly by means of a referendum where this is permitted by statute".

The LATUG, on the one hand, lacks procedural regulations "to base a revision" (on the basis) such as who will make a decision to collect citizens' opinions, who and how will collect them, what should be done in case of difference of opinions between CRH and citizens. Therefore, there are still cases when a proposal for abolishment of an administrative and territorial unit is supported by citizens, a few individuals including the Governor, Hural Chairman oppose it because of their desire to keep their own positions or Hural decisions are revoked at court because of procedural irregularities. There are international practices of conducting a local referendum in case of abolishment of a territorial unit, in this case, the result of the opinion polls is considered as final by a council or clearly indicating the number of citizens supporting a proposal of abolishment of administrative and territorial units (in Estonia, the requirement is 5000 people supporting). On the other hand, the provision for "consideration" as "the location of population, economic capability, geographic location, conditions of road and communications" is unclear, ambiguous and subjective. For instance, if the criterion of economic capability is applied to all the soums, which are dependent on the state budget, would be abolished. It is not clear what is understood by the location of population. In local government laws of other countries, that we

<sup>21</sup> G.Jargal, A background paper for the national forum on Local Governance: Issues and Solution, 2015

<sup>22</sup> D.Erdenebat, MP, "Draft model for soum economic development into agricultural production" presentation at national forum of soum and district Governors, organized by the Cabinet Secretariat, Merzi-Corps and the Asia Foundation, proceedings, 2014, pp. 103-105

<sup>23</sup> Prospects for codifying the relationship between the central government and local government, House of Commons, a report published on 29 January 2013, p. 15-16

have studied, the minimum number of population is defined as the main criteria for establishment of an administrative and territorial unit. For example, the Municipal Act of Turkey states that municipality can be established in the settlement areas where the population is 5,000 and above and the municipalities with population less than 2,000 shall be transformed into a village. The Local Government Law of France has a similar regulation.

Denmark successfully implemented territorial reforms in two phases, in which the number of municipalities was reduced from 1388 to 275 in 1962-1970 and from 275 in 2003-2007 and the number of regions was reduced from 25 to 14 and from 14 to 5 respectively in the same period. Based on the realization that voluntary amalgamation of territorial units would not yield any results and in order to avoid future resistance from local governments, the central government used a mixed model of engaging them from the outset. It was noted that such a mixed model is the most effective and we have lots of experience to share with other countries on how to implement this reform.<sup>24</sup> The Parliament of the United Kingdom specifically studied this experience.

As a result of the successful administrative and territorial reforms carried by some countries, it was noted that these reforms contributed to the creation of a strong local government capable of delivering basic services to the population and to implement newly assigned functions.

### Functions of soums

The major weakness of the LATUG is its failure to define specific functions of administrative and territorial units in accordance with the concept of the Constitution. The same is true for soums. It defines legal status of Governor and Hural rather than legal status of soums as administrative units, leading to a narrow interpretation of a soum.

The Budget Law<sup>25</sup> was the first attempt to define the functions of aimags, the capital city, soums and districts according to the concept of the Constitution. In the Article 58.4 of the Budget law, soums have been assigned with 11 functions to exercise under its authority (a detailed list of functions is provided in Chapter 5). However, there are several concerns related to functions assigned to soums in the Budget law:

First, when current economic structures of soums are considered, apart from 21 soums of aimag centres and about 10 soums with a village type of development (such as Zuunharaa with developed industrialization, Tsogtsetsii with mining activities, and Zamiin-Uud located at the border) are based on agriculture. Out of 300 soums with the agricultural base, 40 are predominantly crop-dependent, the rest of 260 soums are fully reliant upon the pastoral animal husbandry.<sup>26</sup> The Budget law does not consider the specifics of the economic structure of soums, but it mainly defines the functions more appropriate to settlement areas or aimag centre soums.

Second, despite being the primary administrative and territorial unit closest to the populations and responsible for delivering the public services, aimags are delegated with public functions such as pre-school education, general education, culture, primary health care, land relations and cadaster, child development and protection and public physical training that are more suitable to soums (Article 61.1).

Thus, the schools, kindergartens, hospitals and cultural services of soums became unaffiliated to soum administration, its property fell under the authority of the aimag and the service expenses became integrated into sectoral ministries' portfolio, which although comes back to the Governor of soum through the Governor of aimag and the "acts of approval" by the CRH of soum, have independent budget separate to soums. For instance, in the case of schools in soum, the children are residents of soum, the school property belongs to aimag, and its budget is integrated into the sectoral ministry's portfolio.

Only 9 out of 30 social insurance services are decided by soums (information is sent to aimags), the rest are sent to aimag social insurance department for review and final decision. All 32 social welfare services go through the Aimag Department of Social Welfare. In addition, people with disabilities and those, who are temporarily incapacitated, are required to obtain the approval from Medical and Labor Accreditation Commission (including the group of specialized doctors) at the aimag centre, before being eligible to receive many of the social insurance and social welfare services. Such services are not available in soums. In some cases, where to qualify for a retirement pension or the maternity benefit for female-headed households court decision is required to confirm the years of employment, the courts are not located in soums. In respect to land relations, cadastral maps and the certificate of land ownership are also issued by aimag authorities requiring personal visit to Aimag Immovable Property Registration Office. However, if soums allocate the land, then aimags issue the land ownership certificates. (Article 13.5.2 of the Law on Registration of Property Rights). In terms of health services, bagh doctors are located in soum centres, and due to lack of hospitals delivering secondary and tertiary level health care in soums, citizens travel to aimags and then to the capital city in order to see specialist doctors. In the case of civil registration, soums do not provide services on relocation to another aimag or soum, or issue passports for international travel. Photo with registration number is required for obtaining national passports, and this service is also available at aimags. As the archives with essential public records are concentrated in aimags and the capital city, there is a frequent need to travel to aimags or the capital city in order to obtain various references.<sup>27</sup>

<sup>24</sup> Denmark: Administrative and territorial reform, <https://www.kl.dk/.../Administrativ%20territorial%20reform.doc>

<sup>25</sup> Approved by the SGH on 23 December 2011.

<sup>26</sup> From the study report on "Soum Development Project" implemented by the Ministry of Economy in 2013-2014

<sup>27</sup> "Justifications for introducing inter-soum single window services" study report, 2010

## LEGAL STATUS OF AIMAGS

Aimag, the highest level of administrative and territorial unit, directly interacts with the central Government, and is distinguished from other units as being an intermediate unit harbouring inter-soum organisation that has functions beyond the soum's financial, economic and personnel capacity.

The current organisation of aimags has been in place since 1931 when 13 aimags were newly formed.<sup>28</sup> After the elections of 1952, the process of establishing new aimags continued, where by 1990 the number of aimags reached 18.

After the adoption of the 1992 Constitution, in accordance with the SGH resolution no.32 of 1994, Darhan-Uul, Orhon and Gobi-sumber aimags were newly established, and the number of aimags rose to 21.

In the past, an initiative to merge current aimags was proposed by the Government of Mongolia with the goal to decentralise the heavy concentration of populations and industries, to reduce disparities in urban-rural development and inter-regional imbalance, and to make their levels of development closer on the basis of the Regional development concept adopted by SGH in 2001. In accordance with 2004 Presidential decree no.22, a working group was established by the SGH and headed by the Minister of construction and urban development, which drafted a proposal to merge current 21 aimags and change into the administrative division composed of 4 aimags including Altai han, Sain noyon han, Tusheet han and Setsen han and the capital city. Nevertheless, this proposal was not discussed by SGH on the basis of its failure to consult with local citizens.

### Population of aimags

The comparison of the populations of aimags and the capital city shows that the average number of population is 1.623 thousand, where aimags with the highest population are Huvsgul (126), Uvurhangai (112.6), Selenge (105.3), Darhan-Uul (97.3) and Bayan-Ulgii (93.2) aimags, while aimags with the lowest population are Gobisumber (15.9), Dundgobi (44.2), Gobi-Altai (56.7), Suhbaatar (57.4) and Umnugobi (59.7) aimags.

With regard to population density per one km<sup>2</sup> of area in aimags, aimags with the highest population density are Orhon (116), Darhan-Uul (29.5), Gobisumber (2.9), Selenge (2.6) and Bayan-Ulgii (2.0) aimags, while aimags with the lowest population density are Gobi-Altai (0.4), Dornogobi (0.6), Dornod (0.6), Dundgobi (0.6) and Suhbaatar (0.7) aimags.<sup>29</sup>

### Territory of aimags

In terms of the area of aimag and the capital city, the average area is 71.1 thousand km<sup>2</sup>, where the leaders in the gobi, steppe and forested areas are Umnugobi (165.4 thousand km<sup>2</sup>), Gobi-Altai (141.4 thousand km<sup>2</sup>), Dornod (123.6 thousand km<sup>2</sup>), Bayanhongor (116 thousand km<sup>2</sup>) and Dornogobi (109.5 thousand km<sup>2</sup>) aimags,

while the capital city (4.7 thousand km<sup>2</sup>), Gobisumber (5.5 thousand km<sup>2</sup>), Darhan-Uul (3.3 thousand km<sup>2</sup>) and Orhon (0.8 thousand km<sup>2</sup>) aimags are located in the central regions with the smallest area. The ratio of Umnugobi aimag (165.4) with the larger area and Orhon aimag (0.8) with the smaller area is 207 times.<sup>30</sup>

### Functions of aimags

28 In accordance with the resolutions of 6th National Great Hural and 16th Small Hural that convened in 1930

29 G.Jargal's ranking based on 2014 population statistics was used. Proceedings of the National Forum on "Local Government: Challenges and Solutions", 2016, p.81.

30 Ibid., p.83.

As in the case of soums, the LATUG does not define functions of aimag as an administrative and territorial unit, and further lists in 25 articles the common powers of the Governor of aimag, capital city, soum and district (Article 14.2), where there are overlaps in the functions of aimags and soums.

The legal regulations and the actual practice reveal that the "aimag", the intermediate tier of government, is primarily delegated to implement functions related to urban planning, construction, aimag-wide infrastructure, public services, development of small and medium enterprises, and promotion of employment.

Professor B.Chimid argued that "aimag's functions are defined in accordance with two criteria such as "local government services" and "state and regional government services". For instance, it should have few functions that are greater in scope to that of soums (regional) with the objective of delivering professional services to soums including the implementation of Government action plans, monitoring the compliance with the law, conducting administrative supervision, developing the arts, specialised clinics, college training and inter-soum businesses, state property representation and security, military-civil protection and legal services. Thus, similar to the saying that states that "the dog wags the tail, while the tail wags its rump" aimag shall "guide" the soum, the soum shall "guide" the bagh, where one function is not duplicated by another but each unit shall have separate responsibilities. In addition to abovementioned issues, the law on aimag should include drafting the regional development programme and the principle on cooperation with central and other regions and soums."<sup>31</sup>

<sup>28</sup> In accordance with the resolutions of 6th National Great Hural and 16th Small Hural that convened in 1930

<sup>29</sup> G.Jargal's ranking based on 2014 population statistics was used. Proceedings of the National Forum on "Local Government: Challenges and Solutions", 2016, p.81.

<sup>30</sup> Ibid., p.83.

<sup>31</sup> B.Chimid, "The Conceptions of the Constitution: Local Governance" Volume 3, 2004, p.30.

## CONCLUSIONS

This Chapter provided legal assessments on how the Articles 57 and 58 of the Constitution regulating the basis for establishing the administrative divisions and the administrative and territorial units of Mongolia were elaborated in detail in the LATUG, and reached the following conclusions based on the examples of bagh, soum and aimag, which constitute the lower, medium-level and intermediate units of administrative division of Mongolia.

1. The LATUG (1992, 2006) regulating local governance relations, adopted since 1992, is a word-by-word copy of the Constitution. Consequently, the organic law still fails to explain the basic concepts.
2. Article 3.4 of the LATUG stipulates, “bagh is an administrative unit of soum and horoo is an administrative unit of district”, which, despite the lack of economic self-sufficiency of baghs and horoos, contradict with constitutional provisions stating that baghs and horoos are able to autonomously resolve socio-economic affairs at the local level (Article 62.1 of the Constitution) and engage in administrative relations with a relatively autonomous status having the ability to act as separate legal personality under public law (Article 59.2 of the Constitution). As a result, this inconsistency produces the misperceptions that “bagh and horoo are just administrative units” and “they do not have their respective territories”.
3. According to Articles 4.1 and 4.2 of the LATUG, the State Great Hural shall make decisions on changing administrative and territorial units at aimag, capital city, soum and district levels, while aimag and capital city Hurals hold this power over baghs and horoos, respectively, which are differentiated in compliance with the provision of the Constitution (Article 57.3). However, the LATUG has no further regulations to expand the provisions of the Constitution on criteria and procedures for establishment or revision of an administrative division including detailed procedural regulations for “consideration” or “to base a revision”. The justification for considering the location of population, economic capability, geographic location, conditions of road and communication is unclear, ambiguous and subjective. Also it is impossible to regulate the organizational changes to bagh or the lowest administrative unit through “means of citation” in accordance with this criteria. Due to these reasons Mongolia has not made any significant strides in administrative and territorial reforms since 1992.
4. The objective criteria for establishing ATUs could at the minimum include the size of the local population. In addition, local referendum mechanisms could be used in obtaining local citizens’ opinions. Due to differences in household and population size in baghs and for the purposes of ensuring efficient and equitable delivery of services to populations and balancing the workload of the Governors of bagh, it is necessary to specify the justifications and criteria for establishing and dissolving baghs or the maximum and minimum threshold of households in the law.
5. The “specifically assigned functions by law”, as stipulated

in Article 58.1 of the Constitution, are distinguished separately in accordance with different administrative and territorial units of aimag, capital city, soum and district, and due to failure to establish criteria to designate them into “administrative, territorial, economic and social complexes”, the Constitutional concept on enlarging and developing soums into economic and social complexes is still not realized.

6. It is necessary to clarify the concept of “economic and social complex” stated in Article 58.1 of the Constitution. For instance, the progressive constitutional provisions that protect the autonomy of local governments such as the treatment of administrative and territorial units as separate legal personalities (ensuring their participation in public law relations, guaranteeing the property ownership rights, determination of tax rates and the right to judicial appeal), to have funding commensurate with their functions, and the requirements on obtaining local opinions in amending the LATUG, the main law on local government, need to be adopted and reformulated in view of Mongolia’s present conditions and realistic capacities.
  7. The definition of functions of the administrative and territorial units as those not of the units but rather as the powers of the subjects of local government such as Hural and Governor contradicts with the content and concept of the Constitution. The initial drafting of the LATUG by keeping the principles on regulating the People’s Deputies’ Hural, its administration and powers inherited from the previous socialist times, still remains unchanged, and it even had a direct impact on setting the practice of allocating functions in accordance with subjects of governance in all other sectoral laws. Only in the Budget law adopted in 2011, attempts were made in rectifying this or separating the functions of aimag, capital city, soum and district; however, there is still a need to improve the allocation of functions and the relationship between the Budget law and the LATUG.
- Re-assignment and clarification of functions between territorial units, defining property, taxation, and fiscal relationships for each level, furthermore, the nature of a self-governing body and the functioning of the state on the vertical axis (structure, staffing, administration, apparatus, etc.) constitute the fundamental issues of local government relations.



## COMPARATIVE STUDY: APPROACHES TO DEFINING SUBNATIONAL TERRITORIES

Prof. B. Chimid defined the following elements which are essential for the establishment of administrative and territorial units: 1) size of territory; 2) population density, location and ethnic composition; 3) natural and economic properties for existential development; 4) management of administrative tasks, possibilities of delivering services to people; 5) infrastructures such as road, communications and water reserves. He concluded that “with these elements aimags, soums, the capital city and districts can be fully self-sustained and serve as a separate legal entity”.<sup>32</sup>

The above elements are compared with the international standards.<sup>33</sup>

### Approaches to dividing geographic territory

Approach	Key feature
Functional	Matches area to function
Community	Gives primary consideration to social geography
Managerial	Considers management capacity of government organization
Technical	Considers the landscape or economy of the country – climate, topography, soil conditions, etc.
Social	Considers the natural formation of inhabitants in geographic areas

### The functional approach

The process of matching area to function involves identifying government functions and the associated necessary institutions, and on this basis delimiting the geographic boundaries within which government functions are to be performed. However, aside from the fact that the different functional criteria may produce overlapping boundaries, it is impossible to objectively restrict the “natural” geographic area of a problem (such as in health, housing and the environment) to the functional area that is politically determined by the government. The functional approach remains the main point of reference, but needs to be complemented by other considerations.

### Community approach

The community approach prescribes that government boundaries should correspond to territories in which the inhabitants manifest common behavior and attitudes. Applying the community approach involves determining two essential elements: (i) the spatial distribution of settlements such as villages, towns, cities, and metropolitan areas; and (ii) the spatial patterns of the activities of inhabitants, indicated by the people’s economic transactions, their personal mobility in commuting to work and shopping, recreation, and cultural linkages.

The process mainly involves identifying geographic centres and hinterlands and their social and economic interdependence as indicated by the number of inhabitants employed in banks, shops, schools, hospitals, newspapers, and so on. This is useful for the design

of effective land-use plans, traffic management, highways development, and public transport.

### Efficiency approach

Geographic areas may be divided to permit the government to deliver goods and services efficiently and make the best use of its resources. This approach suggests large jurisdictions with large populations, permitting local governments to (i) widen their range of functions to serve more people; (ii) benefit from a larger tax base; and (iii) optimize their workloads. The efficiency approach is most appropriate for local government services such as urban planning, housing, water, sewerage, and transportation.

Many western European countries (notably Denmark, Germany, Sweden, and United Kingdom) have reduced the number of their municipalities through mergers. There is, however, no conclusive evidence that operating in larger jurisdictions is always more efficient than operating in smaller ones. Scale economies constantly change with changes in technology and government function. Also, exploiting scale economies does not necessarily require an administrative entity of optimum size. Scale economies can also be attained by adopting joint service agreement, and by delegating the execution of a variety of local services to provincial governments.

### Management approach

The aim of the management approach is to divide state territory into more manageable parts. It corresponds roughly to the “span of control” criteria for central government organization. It involves drawing boundaries to reflect the perceptions of central decision makers as to how the flow of work can best be managed. The number and location of field offices are arrived at according to an optimum span of control by the headquarters, or the workload appropriate for a field office. This approach is more appropriate for deconcentration and delegation, rather than for political decentralization or for the constitution of local government units.

### Technical approach

In dividing the state territory, one may consider the natural properties and physical features of regions that may bear significance for administration. Although the term region may mean different things in geography and public administration, administrative regions are often based on geographical regions, i.e., areas with unifying characteristics or properties.

Administrative boundaries are often drawn on the basis of physical geography, especially when governments attempt to manage natural resources such as water supply, land drainage, coastal erosion control, irrigation, soil conservation, forest development,

<sup>32</sup> B. Chimid, *Present and Future of Bagh*, 2000

<sup>33</sup> Salvatore Schiavo-Campo and Pachampet Sundaram, *To Serve and to Preserve: Improving Public Administration in a Competitive World*, Asian Development Bank, 2001, Manila, pp.164-168.

recreation, waste disposal, or wildlife conservation. Also, physical geography can offer an appropriate basis for economic and social planning, especially if the lives of the inhabitants are tied closely to the exploitation of natural resources. Boundaries may usefully be drawn around river basins or watershed areas, for example.

### Social approach

The territorial structure of government and administration may consider socially distinct regions based on history, ethnicity, language, or some combination of these.

## TERRITORIAL TIERS OF GOVERNMENT

The Organization for Economic Cooperation and Development (OECD) and the United Cities and Local Government produced a comparative report on the local government structure and finances of 101 countries (including 17 federal and 84 unitary states) in 2016.<sup>34</sup>

The subnational government studied in the report is defined as a decentralized entity whose governance bodies are elected through universal suffrage and which has general responsibilities and some autonomy with respect to budget, staff and assets. Majority of countries have 1-3 administrative tiers. However, in some countries such as Peru, Russian Federation, South Africa one single level comprises several sub-layers, while in other countries such as China the administrative structure is rather complex having 5 levels of subnational governments.

**In 31 countries, there is only one level of subnational government.** In a majority of countries it comprises entities called “municipalities” but also local bodies in others may be called various different names such as local government area, local councils, local authorities, districts, and so on. Among the countries with single administrative tiers are usually small countries in terms of the population and land.

**47 countries have two levels of subnational governments such as the municipal and the regional level.** Out of these countries 12 federal countries belong to this group.

**23 countries, including 5 federal countries, have three layers of subnational governments:** municipal and regional with a third intermediary layer between them. The intermediary layer is called departments in France, provinces in Belgium, Italy and Spain, districts in Germany, Mali and Vietnam, counties in USA, United Kingdom and Poland, raions in several Euro-Asian countries such as Kazakhstan, Kyrgyzstan and Moldova. Some large cities of regional significance (e.g. Thailand) may also have the status of intermediary government. With some exceptions, countries with three layers of government are among the most populated countries.

A multiplicity of municipal administrative statuses can be found within the same country depending on political and adminis-

trative characteristics (federal vs unitary country) but also on demographic, geographic, economic, cultural and historical characteristics. The most commonly found distinction is between urban and rural municipalities. A distinction can also be made for cities with dual status, in particular the municipal status and the status of an upper level of subnational government (e.g. statutory cities in Austria and Czech Republic, city-states and district-free cities in Germany).

The municipal sector is subject to important reforms aiming at changing their structures through municipal mergers and improving the efficiency of services they provide. In fact, in many countries, municipalities are considered to be too small to carry out their tasks efficiently and realize economies of scale. The average municipal size illustrates this issue based on 85 countries involved in the study. The average population of one municipality amounts to 56,027 inhabitants, while in Czech Republic, France, Mongolia and Slovak Republic the municipalities are highly fragmented amounting to less than 2,000 inhabitants on average. The municipalities in Indonesia, Korea, Malawi, Malaysia and Tanzania the municipality are 100 times higher ranging from 100,000 to 200,000 inhabitants on average. It is however important to underline that countries with large municipalities often have a well-developed and structured network of submunicipal localities that allow to retain proximity for the provision of local services.

### Structures below the level of municipality

Let us briefly mention about the sub-municipal localities that are similar to bagh and horoo of Mongolia but have various other names (civil parish, village, wards, community boards, settlements). Even if they are municipal administrative subdivisions under public law that may have their own delegated budget, staff and tasks as well as elected representatives (council, mayor), they cannot be considered to be “self-governing”, as they are being established at the initiative of the municipality and constitute part of its internal administrative division. Numerous countries have these types of localities in rural and urban areas (Greece, Ireland, Republic of Korea, Netherlands, New Zealand, Portugal, Slovenia, United Kingdom, etc.).

<sup>34</sup> OECD/UCLG (2016). Subnational Governments around the world: Structure and finance.



## Chapter Three

# LEGAL STATUS OF CITIES

### INTRODUCTION

Constitution does not define city as an administrative and territorial unit, while Article 57.2 of the Constitution was not elaborated in detail in the LATUG, where Article 3.3 of the said Law provided, “The legal status of cities and villages located within administrative and territorial units shall be defined by law”. It should be noted that since the legal status of the city is regulated in accordance with the Law on Legal Status of Cities and Villages it is restrictive to consider directly the status of the city within the analysis of the implementation of the LATUG. Thus it would have been more appropriate to study the legal status of the city and the related difficulties faced in practice by assessing the implementation of the Law on Legal Status of Cities and Villages.

The issue of the city constitutes a contentious issue within the scope of the administrative and territorial division of Mongolia, and this dispute has arisen only in connection with the Constitution. In particular, the issues arise on how to create the legal basis for the city, what the content of its regulation would be, whether it is regulated by Constitution, and if so, how this issue is reflected. In addition to providing an overview on how the legal status of the city was regulated in accordance with the old Constitution of Mongolia, this Chapter will explore the Constitutional arrangements and other pressing issues.

### CONSTITUTIONAL ARRANGEMENTS

The very first 1924 Constitution of Mongolia had a specific chapter on Local Administration (Chapter Three). However, it does not mention in detail the administrative and territorial division, and it merely stipulates that “the competencies and interactions of hural and administrative organs of aimag, hoshuu, soum, bagh and ten households ... shall be carried out in accordance with the provisions of the Local administrative rules”<sup>35</sup>; while Article 50 states that “the State Great and Small Hural shall convene in Ulaanbaatar city”. Consequently, the commentary of this Constitution provides that “... all state institutions holding the supreme state power shall convene in the capital city”<sup>36</sup>, which shows that Ulaanbaatar city is designated with the legal status of a capital city.

Article 11 of the 1940 Constitution of the People’s Republic of Mongolia stipulates that “The Republic of Mongolia shall consist

of Tuv, Khentii, Dornod, Dornogobi, Umnugobi, Uvurhangai, Arhangai, Zavhan, Khovd, Khuvsgul, Bulgan, Selenge and Uvs aimags and Ulaanbaatar city”, while Article 12 provides that “The aimags shall be divided into soums, and soums shall be divided into baghs.”<sup>37</sup> It further states that “Ulaanbaatar city shall be divided into horoos, and horoos shall be divided into twenties”. Consequently, Article 94 of the Constitution legislates that “The capital city of the People’s Republic of Mongolia shall be Ulaanbaatar city”.

Article 46 of the 1960 Constitution of the People’s Republic of Mongolia stipulates that “The territory of the People’s Republic of Mongolia shall be divided administratively into aimags and cities. Aimags shall be divided into soums, and the cities and other settlements shall be divided into horoos respectively”. Furthermore, Article 92 provides that “the capital city of the People’s Republic of Mongolia shall be Ulaanbaatar city”<sup>38</sup>. Thus, it also added the administrative unit called “rayon”<sup>39</sup>.

However, the 1990 Supplementary Law to the Constitution of the People’s Republic of Mongolia did not make any changes to the administrative and territorial division, which remained true until the adoption of the 1992 Constitution.

Article 57 of 1992 Constitution of Mongolia stipulates that “The territory of Mongolia shall be divided administratively into aimags and a capital city; aimags shall be subdivided into soums; soums into baghs; the capital city shall be divided into districts and districts into horoos. The legal status of cities and villages located in the territories of administrative divisions shall be defined by law. Revision of an administrative and territorial unit shall be considered and decided by the State Great Hural on the basis of a proposal by a respective local Hural and local population, and with account taken of the country’s economic structure and the distribution of the population.”

Also Article 13 of the Constitution provides that “The capital of the state shall be the city where the state supreme bodies permanently sit. The capital city of Mongolia is the city of Ulaanbaatar. The legal status of the capital city shall be defined by law”. In accordance with these Constitutional provisions, 1993 Law on Legal Status of Cities and Villages and 1994 Law on Legal Status of the Capital City were adopted, which are still in force to this day.

<sup>35</sup> Article 33 of the first Constitution of the People’s Republic of Mongolia (1924), J.Amarsanaa, O.Batsaikhan, the Constitution of Mongolia: Collection of documents with explanatory notes, 2004, pp.48, 50.

<sup>36</sup> Commentary on the first Constitution of the People’s Republic of Mongolia (1924), J.Amarsanaa, O.Batsaikhan, the Constitution of Mongolia: Collection of documents with explanatory notes, 2004, p.96.

<sup>37</sup> J.Amarsanaa, O.Batsaikhan, the Constitution of Mongolia: Collection of documents, 2004. pp.143-144, 158.

<sup>38</sup> Constitution of the People’s Republic of Mongolia (1960), J.Amarsanaa, O.Batsaikhan, the Constitution of Mongolia: Collection of documents, 2004. pp.256, 265.

<sup>39</sup> J.Amarsanaa, O.Batsaikhan, the Constitution of Mongolia: Collection of documents, 2004. p.277.

Article 3 of the Law on Legal Status of Cities and Villages defines the city “as a settlement with not less than 15,000 residents, majority of whom are primarily employed in industry and services, with developed urban infrastructure and local self-governing bodies.

A village is a settlement with 500-15,000 residents, where any of the sectors of agriculture, industry, tourism, resorts, transportation or trade is developed and which has its local self-governing authorities. The State Great Hural shall decide on designating the status of the city to the village, if necessary, upon the submission by the Government and based on the considerations of its role and impact on the economic and social development of the state and the respective administrative and territorial unit.”

Also Article 4 of the said law provides that “The city depending on the size of its population, the level of its infrastructural development, and the role it plays in the economic and social development of the administrative and territorial unit shall be designated with the status of state cities or aimag cities. The city with the population size of more 50,000 residents (if necessary, up to 50,000) may be designated with the status of state city depending on its contribution to the state economic and social development, urbanization, and the level of its infrastructural development. The State Great Hural shall decide on the issue of designating the state city status to the city upon the submission by the Government, and the Government shall resolve the issue of designating the aimag city status to the city upon the submission by the Citizens’ Representative Hural.”

Moreover, Article 5 of the same law stipulates that “The city and the village in terms of their administration shall fall under the jurisdiction of aimag, capital city, soum, and district on the territory of which it is located. The land area of the city or the village may be located across the territories of several soums, and, if necessary, the issue on changing the boundaries of relevant administrative and territorial unit shall be resolved in accordance with the procedures prescribed by law”.

**The Constitutional definition, which states that “cities and villages are located within administrative and territorial units”, illustrates that it does not designate the status of an administrative and territorial unit to cities. Thus a conclusion can also be drawn that the Law on Legal Status of Cities and Villages was drafted in line with this Constitutional concept.**

Due to disagreements with this Constitutional concept, proposals demanding the designation of the status of an administrative and territorial unit to cities regularly emerge. This is usually asserted by politicians but it can also be found in some major research studies. For example, the study on the assessment of the performance of 1992 Constitution of Mongolia states that “The drafters of the Constitution reserved “city” status for Ulaanbaatar alone. But as time has gone on, secondary cities in the country have also grown a good deal and require distinct administrative organization from their surrounding

soums. It would be advisable to have a category for cities other than the capital city, as a system of government designed for rural areas may not be appropriate for urban settings... However, in the Law on Legal Status of Cities and Villages, adopted early in the reform period, the SGH defined the status of rural settlements only, thus failing to fulfill the obligation set by the Appendix that has a constitutional nature... Removal of “town” designation from local settlements and turning them into aimag centre soums created double administration in the aimags, causing duplication of functions. A constitutional category of “city” should be created to recognize that some areas outside Ulaanbaatar deserve that designation”.<sup>40</sup>

The proposals for amendments of the Constitution also frequently raise the issue on adding the word “city” into the Constitution, which became one of the justifications for Constitutional amendment.

For example, this issue is reflected in the draft amendments and revisions to the Constitution, which was put for first consultative poll on amendments to the Constitution of Mongolia (2017). The commentary to this draft states that “due to making cities and villages as the administrative and territorial units there is no longer a concept on cities and villages at the administrative and territorial unit... This is significant for designating the state city status to Darhan-Uul and Orhon aimags, and subordinating aimag centre soums under jurisdictions of local governments”.<sup>41</sup>

In reaching this conclusion, it was referencing to the studies such as the legal status of city in the Constitutions of other countries around the world, which was carried out by the Research Centre of the Parliament Secretariat. The study revealed that out of 98 countries surveyed, 11 countries did not have any regulations on administrative and territorial units, 49 countries only mentioned the capital city, 32 countries considered the city as the administrative and territorial unit, and 7 countries did not regulate cities despite addressing the issue on administrative and territorial units.<sup>42</sup>

The research findings show that out of 98 countries 67 countries do not have any regulations on the status of cities in the Constitution; therefore, there is no sufficient justification to argue for the existence of a global standard on the incorporation of administrative and territorial units into the Constitution. However, researchers of the study point out that “...There are many countries that regulate the issue of local cities despite not naming them as towns in the Constitution...”<sup>43</sup>

The research team considers that such findings of the comparative study do not provide sufficient grounds for amendments of the Constitution.

The debate on how to understand and expand on Article 57.2 of the Constitution of Mongolia, which states that “The legal status of cities and villages located in the territories of administrative divisions shall be defined by law”, and how to consider the legal status of cities continues to this day. With regard to this, the debate

<sup>40</sup> Assessment of the performance of the 1992 Constitution of Mongolia, 2016, pp.149-150.

<sup>41</sup> Commentary on the draft amendments of the Constitution of Mongolia, 2017, pp.141-142.

<sup>42</sup> Commentary on the draft amendments of the Constitution of Mongolia, 2017, pp.140-141.

<sup>43</sup> Ts.Bolormaa, G.Bilgee, B.Nandingerel. Constitutional arrangement of other countries on legal status of cities, Parliament Secretariat, Compilation of studies, Vol.24, 2017. pp.498-499.

is not related to characteristics of cities defined in the Law on Legal Status of Cities and Villages, but it rather centres on whether to designate the status of an administrative and territorial unit to a city. As the issue centres around this topic, there is a total lack of attention on how to define the “city” stated in the Law on Legal Status of Cities and Villages, what are the obstacles for the establishment of the city and its engagement in legal affairs. For example, there are not enough studies and discussions on the number of urban settlements satisfying the criteria defined in the Law on Legal Status of Cities and Villages, and how many of these are unable to obtain the city designation despite meeting the threshold for cities. The Law on Urban Development stipulates that the State Great Hural has the powers: “to define the state policy on urban development” (Article 5.1.1); “to make a decision on the establishment, dissolution and relocation of cities” (Article 5.1.2). The difficulties and obstacles faced in implementing these legal provisions remain unclear.

Professor B.Chimid made a substantial observation on the Constitutional concept on the legal status and nature of cities. Due to the provisions of the Constitution stating that “The legal status of the capital city of Mongolia shall be defined by law” (Article 13.2), it is advisable in addition to the legal status of the capital city, district and horoo (in view of them constituting one complex) to define in detail the identical bases of aimags and soums into a single sectoral law. The legal provisions of units in this law could be identical but the urban planning, construction, and urban development issues should assume a special role.<sup>44</sup>

The LATUG should be reviewed in accordance with Article 57.2 of the Constitution, which states that “The legal status of cities and villages located in the territories of administrative divisions shall be defined by law”, and the provisions overlapping with baghs and soums should be removed and regulated clearly in law with the purpose of reducing decentralisation. The Law on Legal Status of Cities and Villages, adopted in line with this constitutional provision, defines the self-governing bodies of these administrative units. Here it should be emphasised that administrative and territorial units of Mongolia are defined in the Constitution solely on the basis of the territorial principle with a purpose of eliminating the undesirable outcome of establishing new administrative units each time a new settlement or a village is created. Nevertheless, there are some misleading writings stating that the “city is destroyed” or “creation of a city is prohibited” regarding this Constitutional provision. Cities and settlements are not “territories”, instead they possess the characteristics of a corporation; therefore, the existence of any number of cities and villages on the territory of one aimag or one soum should not be easily dismissed. Also, there is no denying that aimag, soum or bagh can be concentrated in any one of the cities or villages.<sup>45</sup>

During the session of the People’s Great Hural, which adopted the Constitution, the proposal was made on whether the “city” status should remain for Darhan, Erdenet and aimag centres,

that were called as local cities in terms of the administrative and territorial unit status, and a long debate ensued. Finally, the general term of “city and horoo” was abandoned, and instead the term of “city and village” was used for big and small settlements with engineering infrastructure, which actually constitutes a corporation. There can be several such settlements on the territory of soum. However, soum is not the name of urban settlement, but it is part of state structure, an administrative and territorial unit encompassing populations to serve and influence. Thus, the majority agreed that in compliance with the territorial principle soum should be restored and applied uniformly. The Constitution does not include the proper names of administrative units; therefore, the issue of Darhan and Erdenet were left unresolved, and some time after the law entered into force, these were called as “towns” in terms of administrative units, and their administration continued to be called as the People’s Deputies’ Hural and executive administration, which in reality were the embodiments of old forms in the new state structure. Today, the contentious issue remains to be the “state without cities”. Therefore, it is imperative to separate in abstract terms the administrative and territorial units, which “include” the cities and settlements, and properly regulate them by law. In this sense, the city should remain as the city, and the unit should remain as the unit.<sup>46</sup>

Today, there are no academic debates that refute this theoretical argument (conception of the Constitution) proposed by Professor B.Chimid and advance their own theoretical postulates.

This shows that **it is ill- advised to quickly resolve the contentious issue on whether or not the city should be designated the status of the administrative and territorial unit .**

Despite the assumption that foreign countries have many regulations that view cities as administrative and territorial units, it should be pointed out that these units are not termed exactly as cities. For example, 50 states of the USA differ in their administrative and territorial division and the type of local governments. Most states and territories have at least two tiers of local government: counties and municipalities. In some states, counties are divided into townships. There are several different types of jurisdictions at the municipal level, including the city, town, borough, and village. Rural areas and suburban areas of many states have no municipal government below the county level. In other places consolidated city-county jurisdictions exist, in which city and county functions are managed by a single municipal government. In addition to general-purpose local governments, there may be local or regional special-purpose local governments or service districts such as school districts and districts for fire protection, sanitary sewer service, public transportation, or public libraries. Such special purpose districts often encompass areas in multiple municipalities. According to the US Census Bureau’s data collected in 2012, there were 89,004 local government units in the United States.<sup>47</sup>

Also Article 164 of the Constitution of Poland defines the

<sup>44</sup> B.Chimid, “The Conceptions of the Constitutions”, second edition, 2017, p.338

<sup>45</sup> B.Chimid, “The Conceptions of the Constitutions”, second edition, 2017, p.356.

<sup>46</sup> B.Chimid, “The Conceptions of the Constitutions”, second edition, 2017, p.360.

<sup>47</sup> [https://en.wikipedia.org/wiki/Local\\_government\\_in\\_the\\_United\\_States](https://en.wikipedia.org/wiki/Local_government_in_the_United_States)

basic unit of local government as gmina (commune). It further states that other units of regional and local government shall be specified by statute. Today the administrative and territorial division of Poland is constituted by 2,479 gminas including 306 urban communities, 597 mixed urban-village, 1,576 village communities; at the medium level 380 powiat (county) including 66 urban ones; and 16 wojewod (region).<sup>48</sup> City is also a commune – but with a city charter. Some bigger cities obtain the entitlements, i.e. tasks and privileges, which are possessed by the units of the second level of the territorial division – counties or powiats. An example of such entitlement is a car registration. As stipulated in the law, this task is implemented by powiat not gmina. In this case, it is called “city county” (powiat grodzki). For instance, such cities include Lublin, Krakow, Gdansk, and Poznan. In Warsaw, its districts additionally have some of a powiat’s entitlements – like the already mentioned car registration. But for instance the districts in Krakow do not have the entitlements of a powiat.<sup>49</sup>

From the example of Poland it is clear that city is organized purely on the basis of administrative and territorial division. Over-zealous efforts to differentiate the social phenomenon such as the city from other units can contribute to complex questions such as difficulties to precisely define it theoretically and in legal practice as well as the necessity to create criteria for their differentiation. However, it is impossible to make any comments regarding the implementation of the law on issues such as what is the “city” and whether the definitions and characteristics specified in the Law on Legal Status of Cities and Villages are appropriate for Mongolia.

## ISSUES FOR CONSIDERATION WHEN DESIGNATING THE STATUS OF AN ADMINISTRATIVE AND TERRITORIAL UNIT TO CITIES

In this section, two sets of issues are considered in relation to legal consequences stemming from recognition of a city status in the Constitution, and on improving relevant provisions.

### 1. Legal provisions and its consequences

Article 3 of the Law on Legal Status of Cities and Villages defines that “the city has not less than 15,000 inhabitants, the majority of whom are employed mainly in manufacturing and services sectors, and it is a self-governing centralized urban centre with developed infrastructure.”

However, as previously mentioned, we continue to dispute on whether the city constitutes an administrative and territorial unit (ATU) without paying attention to its above characteristics. In addition, we still lack a detailed study and discussions determining how many urban centres fulfill the requirements of the city, and how many cannot become cities despite fulfilling such criteria.

Thus the following are positive and negative consequences

in designating the status of ATU to cities. These include:

- The number of ATUs will increase each time the city is established. It is criticized that during the previous system there was an excessive blending of businesses and state activities. The establishment of ATUs in accordance with business operations had greatly contributed to administrative costs, which placed an excess burden on the government. Five-year master plans for the development of the national economy were drawn up, whereby the government purposefully subsidized the forestry, coal, mining and agricultural sectors, which encouraged the establishment of cities and villages with burgeoning population settlements. The practice of creating ATUs on the basis of establishment of cities and villages such as Tosontsengel, Sharin gol, Erdenet, Hutul and Darhan continued until 1992.

If this practice is allowed to continue today, it will require the establishment of ATUs in places of major reconstruction and development, or its abolishment in each instance of business entities or companies going bankrupt.

- If city is to be designated with the status of ATU, then it will require its own territory. The boundaries of ATUs need to be extended due to urbanization. We lack any practice on resolving issues regarding any changes to delimitation, in cases of city boundaries overlapping with the territory of its neighbouring ATU. During the discussion and adoption of the Constitution cities such as Darhan, Choir and Erdenet were temporarily given the status of an aimag in accordance with the Appendix to the Constitution pending the approval of the law regulating the procedures for designating them the status of administrative and territorial units, the scope of their governance, organization and operations. Unfortunately, despite the completion of the process for fully transitioning into the laws of Mongolia from the laws of the People’s Republic of Mongolia in accordance with the Appendix to the Constitution the above issues remain unchanged leading the way for never ending disputes.

### 2. City management and its powers

Article 10 of the Law on Legal Status of Cities and Villages provides that “The management of cities and villages shall consist of the Mayor and Council. Management, direction and organization of daily operations of cities and villages shall be executed by the Mayor. The city or village Council shall be established by the Mayor consisting of 5-11 people from business entities and organizations, that have a social and economic influence, and the Mayor’s Office. The Mayor shall chair the city or the village Council. The powers of the management of the cities and villages that are centres of aimag, soum and bagh shall be exercised by the Governor of the respective administrative and territorial unit, where the city or village is located (Mayor’s Office of state cities shall be separate from the Governor’s Office of the respective administrative and territorial unit, while the Mayor’s Office of other cities and villages may be the same). In the settlement with up

<sup>48</sup> Data is provided, as of February 2013. Adam Sauer, The System of the Local Self-Governments in Poland, Research Paper, December 2013.

<sup>49</sup> <https://en.wikipedia.org/wiki/Warsaw>



to 500 residents, social and economic affairs shall be decided by the management of the main business entity located in the settlement, bagh and soum's Citizens' General Meetings, Citizens' Representative Hural and the Governor respectively. The City or Village Mayor shall have an Office. The structure and the staffing limitations shall be set by the Government individually or uniformly." Consequently, the said law attempted to regulate the basic relations including the procedures for election, dismissal, or removal from office of the City Mayor, planning, financial recording, property and land issues, and the rights and duties of residents.

**The most contentious issue regarding city rests on the failure to clearly differentiate the responsibilities of the cities with those of the administrative and territorial units.**

In this respect, **the main challenging issue lies in the division of functions between the city management and local government.** The following are some of the conclusions with examples that were made in the section on "Recommendations on how to address overlapping provisions with the LATUG based on the analysis of other laws defining powers of the local government from the perspective of codification of legal acts". These include:

The powers conferred upon the Governor of aimag, the capital city, soum and district in accordance with the LATUG are also given to other subjects in compliance with setoral laws, which creates two authorities responsible for similar type of actions. For example, the powers of the Mayor of the Cities or Villages in accordance with Articles 17-23 of the Law on Legal Status of Cities and Villages basically overlap with the powers of the Governors of aimag, the capital city, soum and district stipuated in Articles 29 and 31 of the LATUG, and thus leaves differences of their powers and functions unclear. Although, on the one hand, this is due to conferring the power upon the Governor of the respective level to implement the functions of the mayor of the cities and villages in accordance with the Law on Legal Status of Cities and Villages, on the other hand, this shows a failure to adequately define and regulate the legal status of cities and villages and their management in compliance with the ideals of the provisions of Article 57.2 of the Constitution and Article 4.3 of the Appendix to the Constitution. It is necessary to analyse this issue in detail, clearly define the legal status of cities and villages, and separate from the powers and functions of the Governor.

On the other hand, the lack of an autonomous budget at the disposal of the City Mayor further blurs the differences. The city budget needs to be taken seriously. In addition, in terms of the organizational structure, in comparison to the enormous structure of the Governor's Office of aimag and the capital city together with the departments, divisions and affiliated agencies responsible for implementing state functions, the staff of the City Mayor's Office is relatively small.<sup>50</sup>

Designation of the status of ATUs to the cities will not automatically resolve the issues on functional allocation, territory

and budget. This is because, as it inevitably becomes an ATU it will invariably implement the powers of the self-governing bodies and the Governor as set forth in the LATUG.

However, in consideration of the common criticisms raised regarding the need for different management and organizational structure for urban and rural areas depending on the urbanisation, demography and economic structure, the research team in the section on functions made a recommendation on separately defining the functions of soum and district, bagh and horoo based on their urban and rural differences.

## CONCLUSIONS

International experience shows that the city organization is purely dependent upon the administrative and territorial division and in tandem with the previous lessons Mongolia did not define the city as the administrative and territorial unit in order to ensure the sustainability of the administrative and territorial division of the 1992 Constitution.

We consider that there is no urgent need to resolve the contentious issue on whether or not to designate the status of administrative and territorial unit to cities by amendments of the Constitution. Instead there is a need to study the legal status of city and the related difficulties through the assessment of the implementation of the Law on Legal Status of Cities and Villages that was drafted in this spirit, and develop the concept for revising this law. In other words, there is a need to "revive" the Law on Legal Status of Cities and Villages. This will be important in comprehensively resolving numerous local proposals and initiatives on designating the status of administrative and territorial unit to cities.

The main outcome for clarifying the legal status of cities and villages will be the resolution of issues related to separation of powers and functions of Governor as well as those related to budget and staffing.

<sup>50</sup> Mongolian Government resolution no.8 on the adoption of the structure of the Capital City Governor's Office and the Mayor's Office dated 3 August, 2016, established that the number of the personnel of the Capital City Governor's Office shall be 129, the number of the personnel of the Mayor's Office shall be 55, while 33 agencies shall fall under authority of the Governor. However, the Government resolution no.9 on the revision of the structure of aimag Governor's Office of the same date did not approve the number of personnel of the Mayor's Office.

## Chapter Four

# IMPLEMENTATION OF THE PRINCIPLE OF COMBINATION OF LOCAL SELF- GOVERNANCE WITH STATE ADMINISTRATION

### INTRODUCTION

Article 59.1 of the Constitution of Mongolia defines the main principle of the local self- governance as “Government of administrative and territorial units of Mongolia shall be organized on the basis of combination of the principles of both local self- governance and state administration”. In addition to defining that “The local self-governing bodies in aimag, capital city, soum and district shall be Hurals of representatives of the citizens of the respective territories; in bagh and horoo – the self-governing bodies shall be general meetings of citizens. In between the sessions of the Hurals and general meetings, their Presidiums shall assume administrative functions” (Article 59.2), the Constitution states that “State administration shall be exercised in the territories of aimags, the capital city, soums, districts, baghs and horoos by their respective Governors” (Article 60.1). This shows that the local self-governing bodies function at three administrative tiers and Governor is in charge of implementing the state administration in Mongolia. Throughout the report, we used the terminologies of “government of administrative and territorial units” or in short “local government” used to describe the local self-governing bodies in conjunction with the Governor.

This Chapter is focused on assessing and evaluating how the LATUG regulates in detail the combination principle of the Constitution, and the effectiveness of such regulation. In terms of the combination principle, the relationship between the central and local governments, the relations between the Governor and Hural, the checks and balances between them, and the nature of local self-governing bodies will be addressed.

In the future, there is a need to correctly interpret and apply the fundamental Constitutional principles such as “local self-governance”, “local self-governing bodies”, “state administration”, and the “combination principle” in conducting the analysis and drafting legal concepts. Therefore, this issue is addressed within the scope of each topic, as it is considered to be important to interpret the Constitutional concepts, regulations and terminologies on the basis of theoretical and comparative analysis in the current context of discussions about draft amendments of the Constitution.

### CONSTITUTIONAL ARRANGEMENTS LOCAL SELF-GOVERNING BODIES

The public administration principle on ensuring unity and universality are naturally in conflict with the rights of the self-government of the territorial unit or the rights of citizens to protect their interests, and to freely and autonomously function. Consequently, the provisions to protect the interests of local self-government started to be reflected in the Constitutions. These include the provisions to protect autonomous existence and operations of local government institutions, and to safeguard them against measures by the central government bodies to reduce the budget that is necessary for effective and efficient operations. Today, ensuring fiscal independence increasingly plays an important role in Constitutions.

Constitutions do not specify the competencies and functions of local self-governing bodies. For example, in Constitutions of almost all European countries through **general competence clause** acknowledge the general nature of municipalities’ competence. It is always indeterminate, for it implies freedom of operations or the principle to implement all powers except those delegated to the central government, rather than being a principle for the attribution of functions. It means that the municipality may act in any matter, subject to its action meeting a local interest, complying with the law and not impinging on the powers of the central government or other higher authorities.<sup>51</sup>

Article 62.2 of the Constitution of Mongolia stipulates that “The authority of higher instance shall not make decisions on matters coming under the jurisdiction of local self- governing bodies. If law and decisions of respective superior state organs do not specifically deal with definite local matters, local self-governing bodies can decide upon them independently in conformity with the Constitution”. This provision is fully compliant with the general competence clause, which is considered to be progressive in other countries, and the Hural is provided with extensive opportunities to exercise all powers except those conferred upon the central government and higher authorities. It also implies that in exercising the powers specifically allocated to the Hural (not delegated) there is no other supervision

<sup>51</sup> Council of Europe, Local authority competences in Europe, Study of the European Committee on Local and Regional Democracy, situation in 2007.



except for assessing their compliance with the Constitution and other laws.

The common feature of Constitutions is that they usually state at which administrative tier the “local self-government” shall exist, which are usually referred to lower level units such as communes, municipal tier, county, regions, etc. This is a form of Constitutional recognition of the existence of local self-government.

The Constitution of Mongolia provides that the local self-governing bodies are located at all administrative tiers. Prof. B. Chimid in his book “the Conceptions of the Constitution” drew a conclusion that *“As Mongolia is a unitary, centralized state, in accordance with in Article 2 of the Constitution, it is inevitable that the state in the country’s interest shall centralize, regulate, supervise and manage all levels of administrative and territorial units at some higher level. In this way, it also falls under the category of countries with a slightly relaxed centralization by ensuring that all levels of units are integrated into self-governance. However, there are also countries, where the higher levels of administrative and territorial units (aimag or capital city in Mongolia) only have state administration, while the lower level units are designated with local self-government. These can be called rather “strongly” centralized states.”*

The concept of local self-government can be explained in the following ways. These include:

The main principled difference between Mongolian concept of “self-governing bodies” to that of internationally recognized concept of **“local self- government”** is that this term refers to the entire administrative and territorial unit that in addition to the local supreme decision- making bodies or the representative bodies elected from citizens such as local councils or assemblies (hurals) also includes local executive organs such as the executive committee, or the mayor, who are either elected by citizens through direct suffrage or are appointed by the council.

Provisions 1 and 2 of Article 3 titled “Concept of local self-government” of the European Charter of Local Self-Government state the following:

- Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population;

-This right shall be exercised by councils or assemblies composed of members freely elected by secret ballot on the basis of direct, equal, universal suffrage, and which may possess executive organs responsible to them...

Post-communist countries, including Eastern European countries, which made similar transitions to Mongolia, all conducted decentralization and administrative reforms since 1990, and adopted the Law on Local Government in accordance with the Concept of the

European Charter.<sup>52</sup>

The principle of local self-government enables a political, and not solely administrative, dimension of municipal institutions to be recognized. This principle is formed on the outcome of the election results, and distinguishes the territorial unit with specific functions from pure administrative unit.<sup>53</sup>

The classic definition of “local self-government”: the competent local authority shall be considered to be self-governing if it possesses the following characteristics.<sup>54</sup> These include:

- 1) Its powers are derived from citizens through elections and it represents citizens’ interests;
- 2) It conducts its operations within the limits of the law, and does not fall under the jurisdiction of either central government or higher administrative authority;
- 3) The central government monitors its operations only from the perspective of their compliance with the law, and its decisions and autonomy are protected by the courts;
- 4) It enjoys the status of legal entity, and has the right to freely manage its own property;
- 5) It manages its own revenues, and enjoys the powers to manage the subsidies allocated from the centralized state budget and finances;
- 6) It has separate and independent administrative staff from that of central public administration authority.

The provisions of the Constitutions of other countries do not provide for local self- government in each of the administrative and territorial tiers. For example, even though Finland has two tiers, Section 121 of its Constitution provides, “Finland is divided into municipalities, whose administration shall be based on the self-government of their residents. Provisions on self-government in administrative areas larger than a municipality are laid down by an Act.” Similar provision in the Constitution of Poland defines the gmina (municipality) as the basic unit of local government, and further states that other units of regional and local government shall be specified by statute. Accordingly, the Law on Counties (powiat) and Law on Government Administration of Regions (województwo) were adopted in 1998.

In all of the aforementioned countries with more than one tier of administrative and territorial unit, there are representative bodies at the regional level. It was considered that the existence of representative bodies is dependent on whether the administrative and territorial units were natural or artificial. For instance, in accordance with 1958 Constitution of France, which is considered to be a classic example of a centralized state administration, only the “naturally” existing units enjoy the right to establish territorial collectives. The “artificially” created administrative and territorial units: if these were administered by the representative of the central government,

<sup>52</sup> Some examples include: the Czech Republic in 1990, Slovakia in 1990, Hungary in 1990, Poland in 1990, Bulgaria in 1991, Romania in 1991, Croatia in 1992, Slovenia in 1993, Lithuania in 1994, Armenia in 1996, Macedonia in 2002, Russia in 2003, and Kosovo in 2008 respectively enacted the Law on Local Self-Government. Georgia adopted the organic law in 2014 in accordance with the European Charter.

<sup>53</sup> Council of Europe, The relationship between central and local authorities, Study of the European Committee on Local and Regional Democracy, situation in 2007, <https://rm.coe.int/1680747fbc>

<sup>54</sup> Gissur Erlingsson, A normative theory of local government, p.4

Municipal finances: a handbook for local governments, World Bank, 2014.

then the artificially created higher level units (both department and region) acquired the right to establish territorial collectives in 1982.

At the municipal level, in all countries with local self-government the mayor is popularly elected by either the citizens or the council, depending on which the local self-government has a system of either strong mayor-council or strong council-mayor. Here, the study of system for the election of mayor of the lowest administrative and territorial level or the municipal unit revealed that all Asian countries elected the mayor through direct elections, while in Vietnam the mayor was elected by the council. Out of 38 European countries, 18 countries elected the mayor through direct suffrage, while in 17 countries the mayor was elected by the council. There are only few countries, where the mayor is appointed from the higher authorities, which include such countries as China, Malaysia, Belgium (Flanders, Brussels), Luxembourg and Netherlands.

Today the classic example of electing the local representative body indirectly or from the lower level representative body is maintained only in countries with authoritarian regimes such as China, Vietnam and Pakistan (similar to the system of Mongolia for the period of 1992-1996).

It is a global trend to recognize the local self-governments in the Constitution, and for the head of the local executive organ to be elected directly by citizens or the council without the involvement of the central government. However, in Mongolia still to this day the central government is involved in the appointment of the local Governor, where even Article 61.4 of the Constitution provides that "Governors of aimag, the capital city, soum and district shall have offices of the seal. The Government shall determine the structure and staff limit individually or by a uniform standard". This provision affirms the highest level of central government's involvement in the governance of administrative and territorial units.

The review of classic definitions and theories of local self-government including those of the European Charter of Local Self-Government emphasize its political characteristics and the principle of its electoral constitution. Oxford Handbook on Comparative Constitutional Law states that "In majority of modern states, local government is exercised by special local self-governing bodies (councils and assemblies) established through free, secret, equal, and universal suffrage. The local self-government is the only jurisdiction, which apart from national parliaments derive their legitimacy from their election by the residents of the relevant local areas. However, the difference of this independence from autonomous status is due to the fact that local representative bodies are not conferred with the legislative power, whereby they function only within the legal confines determined by the supreme legislative authority".<sup>55</sup>

In comparing the aforementioned definitions with the Mongolian context, a question inevitably arises on whether the general meetings of citizens of bagh and horoo, which are recognized by the Constitution as the self-governing bodies, can be considered to be self-governing bodies.

## STATE ADMINISTRATION

B.Chimid in his book "The Conceptions of the Constitution" noted that "**The state administration at the unit** means the delivery of public services to the population directly from the central government or through representative bodies (organizations, officials) for the purposes of fulfilling the needs of the entire state population and the interests of the state through centralized management or ensuring legal governance through the employment of methods such as legalization, regulation, assistance, supervision and inspections."

From this it is clear that the understanding about the state administration should not be confined to only the Governor, state representative of the respective territorial unit. Therefore, the issue on the relationship between the central government and local government constitutes an important aspect of the Constitution.

The rationale for provisions of Article 2 of the Constitution, that states that Mongolia is a unitary state by its structure, and that the territory of Mongolia shall be divided into administrative units only, is due to the fact that in the early 1990s there were views on the establishment of autonomous constituencies; thus, as Professor B.Chimid explained, this was guided by the vision that because Mongolia is a unitary state it is not possible to recognize independent structures of the state.<sup>56</sup>

However, it is wrong to interpret the provision of Article 2.2. of the Constitution, stating that "The territory of Mongolia shall be divided into administrative units only" as establishing the administrative division. It is clear from this that the purpose of this provision is different. There were instances of such incorrect application in the past. On the basis of this provision, the draft law on the Amendment to the Constitution developed by the SGH working group and submitted to the State Great Hural on 6 November 2015, removed the word "territorial" from all provisions on "administrative and territorial units" including the heading of Chapter Four. This was step that significantly impaired the principle of state administration through territories.<sup>57</sup>

Article 60.2 of the Constitution states that the candidates for Governors shall be nominated by Hural of respective units; Governors of aimags and the capital city are appointed by the Prime Minister; soum, district, bagh and horoo Governors are appointed by the Governors of higher levels respectively; also Article 60.3 provides, that in case the Prime Minister and Governors of higher levels refuse to appoint the candidates to the Governors the nomination process will start again.

The process of approval of the candidate nominated by the citizens' representative organization recognized as the government representative in the respective territory constitutes a form of monitoring by the Prime Minister and the Governor of higher level on whether Hural is nominating the candidate in compliance with the criteria specified in law. However, in cases where the party, which won the majority of seats in the local elections, is a different party to the ruling party of the central Government, it created possibilities

<sup>55</sup> Sergio Bartole, Internal ordering in the unitary state, in the Oxford Handbook of Comparative Constitutional Law, edited by Michel Rosenfeld and Andras Sajó, 2012, p.615

<sup>56</sup> B.Chimid, the Conceptions of the Constitution: Local Governance, Volume III, p.97

<sup>57</sup> Ch.Enkhbaatar et al., Assessment of the performance of the 1992 Constitution of Mongolia, 2016

for the Prime Minister not to appoint the candidate nominated by the CRH of aimag and the capital city.<sup>58</sup> There are many examples of local administrations being left without the person in charge for a long period of time when the Prime Minister refused to appoint the candidate nominated by Hural, and resorted to the courts. Constitutional Articles 62.2 and 63.2 set out requirements for the constitutionality and conformity of decisions and acts of local authorities with the laws and decisions of superior state organs. However, the Constitution does not identify a government body to supervise compliance of acts of the local self-governing bodies with the Constitution and other laws. This could be interpreted to mean that the matter is left to administrative courts or the Constitutional Tsets. But the Constitutional Tsets does not have jurisdiction over individual complaints on the breaches of the Constitution.

On the other hand, if the Governor, who, as a representative of the government, has a duty to ensure the implementation of the legislation within the respective territorial unit, decides to veto Hural's decisions that are deemed to be unlawful, then in this situation Article 61.3 of the Constitution provides that "If a Hural by a majority vote overrides the veto, the Governor may tender his/her resignation to the Prime Minister or to the Governor of higher instance if he/she considers that he/she is not able to implement the decision concerned." From the checks- balances perspective, this is a regulation that clearly leaves the Governor substantially powerless.

Constitutional Tsets of Mongolia by its conclusion no.02 dated 11 March, 2009, and the resolution no.01 dated 20 May repealed Article 25.5 of the LATUG, which stated that "Decisions of Hurals of aimag and capital city that contravene with existing laws and regulations or decisions of the Government shall be annulled or amended by the State Great Hural", on the grounds of its breach with the Constitution.

This matter is regulated clearly in Constitutions of other countries. For example, Article 171 of the Chapter 7 on "Local Self-Government" of the Constitution of Poland states the following:

- *The legality of actions by a local government shall be subject to review.*
- *The organs exercising review over the activity of units of local government shall be: the Prime Minister and voivods and regarding financial matters – regional audit chamber.*
- *On a motion of the Prime Minister, the Sejm may dissolve a constitutive organ of local government if it has flagrantly violated the Constitution or a statute.*

The Constitution of Mongolia proclaims the freedom of local self-governing bodies with its provision on general powers, but it failed to specify the subjects to monitor the compliance of their acts with the

Constitution and other laws. Generally, the lack of provisions on the accountability of Hural, leaves the issues such as not holding sessions of Hural for a long time due to party polarisation, and obstructing the actions of the Governor, without a solution.

International experts included Mongolia along with Bulgaria and Spain as the examples of countries with Constitutions that regulate in the detail the issue of local government and devote a whole Chapter on this subject.<sup>59</sup> On the one hand, this seems to be a good arrangement, but, on the other hand, the strict regulation at the Constitutional level, creates difficulties in regulating the issues arising in practice by laws. For example, due to economic difficulties in the early transition period, the provision stating that the Government shall determine the structure and staffing limit of the Governors' Offices individually or uniformly, obstructs the initiatives of the local authorities to function autonomously and efficiently in line with its specific characteristics and with a flexible structure. The above-mentioned provision on the Governor's power to veto also serves as an example of this difficulty. The national and international experts, who analyzed this issue, recommend reducing the rigid Constitutional arrangements within the scope of the amendments of the Constitution in order to have opportunities to find flexible solutions to local government issues in line with the demands of the time.<sup>60</sup>

## THE PRINCIPLE OF COMBINATION

Constitutions of any state divides the three main powers between the state and the citizen; executive, legislative and judicial powers; central government and the local government. Here, our main interest lies on the balance of powers between the central and local governments.

The following are the examples of the regulations of France and United Kingdom, which constitute the classic examples of the fused system or centralized local governments and the dual system. In France, the constitutional status of local authorities is based on the principle of free conduct of affairs, which is in compliance with the concept of local self-government enshrined in the European Charter of Local Self-Government. On the other hand, in accordance with the principle of "indivisible sovereignty of the state", local self-governing authorities are not bestowed with legislative powers. Constitutional council (court) conducts supervision on the balance of these two principles. According to Article 72 of the Constitution of France representatives of the state in the territorial communities are entrusted to guarantee "the national interests, the administrative supervisions and the observance of the law".<sup>61</sup>

In the United Kingdom, the elected council, not the central government, establishes the local government, which is primarily accountable to voters, and functions to deliver public services at the

<sup>58</sup> The very first example happened when M.Enkhsaikhan, as the Prime Minister of the time, refused to appoint the candidate to the Governor with the majority of votes, as nominated by the capital city CRH. During the time of the Prime Minister N.Altankhuyag similar situations occurred, where, due to refusal to appoint the candidate nominated by the CRH of Dundgobi, Gobi-Altai, Huvsgul, and Dornod aimags, these aimags functioned without the Governor for some time.

<sup>59</sup> Elena Vodyanitskaya, Oxford Constitutional Law: Local Government, 2016, <http://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e365>

<sup>60</sup> Ch.Enkhbaatar, Tom Ginsburg, Ts.Davaadulam, P.Amarjargal, D.Solongo, "The Role of the Constitution of Mongolia in consolidating democracy: An Analysis", 2015

<sup>61</sup> United Cities and Local Governments, Country Profile: France, situation in 2008

local level. On the other hand, the central government implements a strict control over the affairs of the local public administration. The Law on Local Government enacted in 2003 reinforced the powers of the local government, reduced the criteria of supervision and inspection by central government, and simplified the procedures. In particular, this amendment was carried out for the purposes of improving the local government services delivered to citizens.

Experts note that the differences between the above two models, especially regarding local government, have been significantly reduced in France and United Kingdom since the 1980s reforms. Common features of both models are related to the lack of direct central government appointment, local government's accountability before the voters, and the central government supervision and inspection elements.

In summary, with regard to maintaining the state unity, first of all, it is necessary to create consensus on what constitutes a decentralisation and what institutional arrangement is required to reach this goal. Central issue lies on ensuring the balance of power of central and local governments rather than adopting any one of these models, and this is better reached through the enforcement of laws. Additionally, it is necessary to draw a conclusion that in the constitutional principle on the **"combination of local self-governance with state administration"** – **"governance"** and **"government"** – mean two entirely different things in terms of linguistics and science; thus, it is better to change it into **"combination of local self-government with state administration"**, or provide uniform interpretation of this principle and apply it accordingly.

## ANALYSIS OF IMPLEMENTATION LOCAL SELF-GOVERNING BODIES

Article 59.3 of the Constitution of Mongolia states that "Hurals of aimags and the capital city shall be elected for a term of four years. The membership of these Hurals as well as those of soums and districts, and the procedure of their election shall be determined by law." Immediately after the adoption of the LATUG, the elections of the Citizens' Representative Hurals and General Meetings of Citizens of baghs and horoos were organized throughout the country in September, 1992. Since then Mongolia held its 7th local elections.

For the period between 1992–1994, the representatives of soum and district citizens were nominated and elected by general meetings of citizens of bagh and horoo respectively through secret ballot, where the representatives of the relevant levels of Hural, Presidium and the Governor exercised their powers to nominate candidates. The procedures for nomination, voting, vote counting, and the approving the election of representatives were completed during the sessions of the respective Hurals. Due to the troublesome nature of this election system, where the representatives were elected during each of the sessions and which seriously impaired the

continual operations of the Hural, it was changed. Amendments were made to the LATUG, and for the period between 1994–1996, the mandate of the Citizens' Representative Hurals of soum and district was for 2 years. The format for organization of elections, same as before, were held among citizens' general meetings of bagh and horoo. After the Parliamentary elections of 1996, amendments were made to the LATUG, where the mandate of the aimag, capital city, soum and district Citizens' Representative Hurals were for 4 years term.<sup>62</sup> After the adoption of the Law on Election of Citizens' Representative Hurals of aimag, capital city, soum and district by the SGH on 27 August, 1996, the election of the Hural representatives was conducted on the basis of the principles of universal, free, direct suffrage by a secret ballot of citizens of Mongolia. During this period, the Law on Local Hural Elections was amended several times, which included amendments to make the electoral system similar to that of State Great Hural.<sup>63</sup>

### Representatives of Hural

Currently, out of the total of 8,099 representatives elected to the Citizens' Representative Hurals of aimag, capital city, soum and district, 26.7 percent are women, 62.5 percent are with higher education, 57.2 percent are elected for the first time, 28.9 percent are youth under the age of 35.

Number of representatives of the CRH elected in 2016<sup>64</sup>

	Number of representatives	In which (percentage)				Number of Presidium members
		Elected for the first time	With higher education	Women	Youth under the age of 35	
Aimag	762	60.1	97.5	15.7	18.8	219
Soum	7001	56.6	57.0	27.9	29.6	2232
The capital city	45	64.4	100	22.2	20	9
District	291	61.8	97.9	28.2	35.4	63
Total	8099	57.2	62.5	26.7	28.9	2523

The elected representatives play an important role in ensuring transparency and responsible reporting before the citizens by becoming the voices of citizens, civil society and businesses, guaranteeing effective and fair reflection of bottom-up proposals into the local decisions, planning and budget, resolving complaints on public services and informing the citizens about the outcome of local administrative actions.<sup>65</sup>

LATUG stipulates that the representative of aimag, capital city, soum and district Hural shall be the permanent resident of the respective administrative and territorial unit (Article 9.4). However, there are instances, where the resident of Ulaanbaatar city is nominated and elected in the local elections and where he/she does not attend sessions other than those related to nomination and dismissal of the Governor. The following is one such example:

*In aimag D citizen B, who has been living and working in*

<sup>62</sup> M.Sandag-Ochir, Local government, 2003.

<sup>63</sup> The Law on Local Elections was adopted on 18 January, 2007, and the Law on Aimag, soum, district CRH Elections was adopted on 14 September, 2012, respectively; however, the local elections of 2016 were held in accordance with the Law on General Elections enacted on 15 December, 2015.

<sup>64</sup> Here the findings of study carried out within the "Strengthening Representative Bodies in Mongolia" Project are briefly summarized.

<sup>65</sup> "Strengthening Representative Bodies in Mongolia" Project Document, p.2



*Ulaanbaatar city for the past 10 years, has been nominated for aimag CRH elections in 2012. The aimag election commission has taken this issue to the court in accordance with the provisions of the LATUG and the Law on Elections. The court files included a document, which stated that citizen B resides in apartment located in bagh of soum C. In the so-called apartment, where the citizen B resides, citizen T has been living for around 10 years. The procedures for implementing the Law on State Registration provides that the resident permit of the resident, who resides more than 180 days in a place other than his/her stated place of residence, shall be removed from local registration. Citizen B disputed this claim by stating that the citizen of Mongolia has a freedom to choose his/her place of residence within the country, as stated in the Constitution, and won.*

Since the establishment of CRHs in aimag, capital city, soum and district in 1992, the relevant legal provisions stated the following: for the period between 1992-2005 the representatives could 100 percent be civil servants, for the period of 2005-2008 only one third could be civil servants, and for the period of 2008-2017 it was prohibited for the civil servant to be nominated for elections of the representative.

In accordance with the amendments adopted by the State Great Hural on 7 December, 2017, the provision on allowing for up to one third of Hural representatives to hold the state administrative office was restored and added. This issue drew substantial amount of disputes in political circles, and many people criticize it as a drawback from the achievements of 25 years on strengthening of local self-government. Below is the conclusion reached by the lower levels of administration on the state of affairs at the local level.

### **Let us stop from holding concurrent offices at the lower and intermediate levels**

Chingeltei district has 35 Hural representatives. Out of these representatives, 3 are deputy Governors, 8 are Governors of horoo, and 3 work at the locally owned industry at the District Governor's Office. In total 14 Hural representatives concurrently hold the public administration offices under the Governor. It is usually explained that the Hural representatives can concurrently hold these offices because the Deputy Governor and the Governor of horoo are political offices, while the locally owned industry is not part of the administration but belongs to the service sector; thus, this does not violate the law.

3 Deputy Governors and 1 Governor of horoo are Presidium members of the CRH and, as of first half of 2014, they discussed and resolved 33 issues submitted by the Secretariat of Hural, 19 issues submitted by the Governor's Office, or a total of 52 issues during 6 sessions of the Presidium. This illustrates the case of jointly developing the issues to be submitted by the Governor, approving it in the capacity of the Presidium member, and then implementing those approved decisions.

Also Governors of 8 horoos in the guise of Hural representatives discuss and adopt the district Governor's action programme,

main directions of social and economic development for the given year, and the local budget, and after giving directions to the district Governor act as horoo Governor, responsible for implementing the aforementioned objectives before the district Governor. The situation arises, where horoo Governor and Deputy District Governor after being answerable to the district Governor change into acting as Hural representatives and assess their own work. Such so-called **sliding** offices between the two institutions of the Constitution have been created. This is an example of how the local self-governance is **not combined but mixed** with state administration. This only serves to weaken the local supervision and creates a system, where the two institutions of Hural and Governor exercise the management by a way of compromising with each other.

**Governor Sh.Jargalsaihan of 16th horoo, Chingeltei district.**

Articles that define guarantees of powers and actions of Hural representatives include provisions such as to inspect and demand the implementation of the laws and regulations, to oversee the implementation of Hural's decisions among business entities and other organizations within respective territories irrespective of their subordination and ownership (Articles 12.1.6, 12.1.7, 12.1.8), which coincide with the powers of the Governor, rather than those on representing citizens of the respective territories and protecting their legitimate interests.

Lack of definitions on the responsibilities of Hural representatives, lack of comprehensive definition on whose interests he/she protects and serves, and lack of any prohibitions to the representative create a situation, where the electors cannot hold the election committees accountable. In recent years, there is a widespread criticism in the media, during conferences and consultative meetings on the increase in the interest to become Hural representatives, or especially, the Presidium members for the purposes of getting political party nomination, to nominate a candidate to the Governor from their respective parties, and furthermore, to get the appointment of their acquaintances for government posts and to acquire tenders rather than representing citizens and protecting their legitimate interests. In the future, within the scope of legal reforms, there is a need to add the following provisions in order to clarify the legal status of representatives. These include:

#### Duties of the representative:

- Attend Hural sessions on a regular basis,
- Become a member of no less than one committee,
- Meet with the voters on a regular basis.

#### Prohibition imposed on the representative:

- Hold management or other positions in any organizations belonging to the Governor's office of the respective level, and those to which they report their work, or receive financing;
- Vote on any issues of conflict of interest,
- Disclose any state, organizational or individual secrets after becoming aware of these in the process of implementing representative's powers and duties, etc.

In addition, local proposals arise on numerous occasions

on the need to add provisions on recalling the representative, and making them adhere to code of ethics.

The main reason for inability to meet with voters on regular basis is related to lack of budget allocation to cover operation expenses, and Hural representatives regularly touch upon the issue of salaries and remuneration. There is a provision on providing remuneration to representatives (Article 14.2). However, depending on the availability of local budget the amount of remuneration varies. For the purposes of providing representatives, elected by garnering citizens' trust, with opportunities to carry out their operations unabatedly, and to increase interactions with their voters it is advisable to insert provisions into the law to cover their operation expenses from local budget.

European Charter of Local Self-Government provides for enabling conditions of office of local representatives that provides for free exercise of their functions (Article 7.1), and further requires appropriate financial compensation for expenses incurred in the exercise of the office in question as well as, where appropriate, compensation for loss of earnings or remuneration for work done as an elected representative and corresponding social welfare protection (Article 7.2). Countries regulate differently the issue of salaries and remunerations. For example, in Germany, the elected office in the representative institution is considered as a form of voluntary work; therefore, remunerations are strictly prohibited. In Lithuania, the representatives receive salaries for the amount of time spent proportional to the exercise of their functions, while in Croatia, despite prohibiting remunerations, the representative is compensated for the expenses incurred in the performance of their functions.

Despite stipulating provisions for termination of the mandate of a Hural before the term in Article 15 of the LATUG, it fails to clearly articulate justifications for dissolving the Hural, where due to provisions stating that Hural shall make a decision on its own dissolution, there were no cases of Hural dissolving on its own for the past 25 years.

There is an example of the parties convening alone for 4 years, where due to party polarisation aimag CRH, constituted after 2012 CRH election results, failed to convene again after its first inaugural session.

The provision to dissolve the council exists in the laws of majority of countries, where such decision is made by the Government or the Parliament. The conditions for dissolving the council are enumerated in law such as making decisions prejudicial to the national security or those that seriously breach the Constitution and other laws on numerous occasions, failing to elect the mayor within the timeframe specified by law, lacking a composition quorum necessary to make a decision, and failing to convene for a specific period of time, etc.<sup>66</sup>

Such provisions could be incorporated into the law; hence, it would be possible to overcome situations where Hural operations are

delayed.

### Presidium

Article 59.2 of the Constitution provides that in between the sessions of Hurals and general meetings of citizens, the local self-governing bodies' Presidiums shall assume administrative function. This provision can be interpreted as the one directed to ensure continuous operation of Hural in between the sessions that take place 2-3 times annually. However, both the provisions of the Constitution and the LATUG do not define the criteria for electing the Presidium members. In addition to specifically stipulating the powers of the Presidium of Hural in Article 20 of the LATUG, many important powers of Hural itself such as to possess and use the properties and land, to determine the price and tariffs, and to invalidate the resolution of Hural, etc., are delegated to the Presidium. Number of the members of Hural Presidiums stands at 7-11 in aimag and the capital city, 5-7 in soum and district, 3-5 in bagh and horoo. This made it possible for a relatively few people with authority to make a decision on behalf of Hural. For example, the decisions regarding vital issues of local self-government such as to establish bagh and to determine its territorial delimitation are made by the CRH Presidiums (From the analysis of the resolutions of the CRH Presidiums of Selenge, Bulgan and Darhan-Uul aimags).

Hence, it can be stated that the de facto duties of Hural are confined to discussions of the proposal for nomination of the candidate to the Governor and their removal, to elections of the Chairman of Hural, Presidiums and Committees, to discussions and approval of the annual budget, amendments of the budget and the Governor's action plan. In the survey conducted among local citizens, the answer to this question revealed that the Presidiums report to Hural once in accordance with the law, but this is merely limited to reciting the list of decisions.

At the same time, all of the provisions such as paying out remunerations to the Representatives of Hural (Article 14.2), Presidiums of aimag and capital city providing professional methodological guidance and supporting the operations of Presidiums of soum and district (Article 20.2), Presidiums of Hural having its Secretariat (Article 20.3), and the Chairman of the Secretariat also holding the office of the secretary of the respective Presidium of Hural (Article 20.4) seem to favor the Presidium members from all other representatives, who were equally elected from citizens.

### Committee of Hural

The committee of Hural, similar to the Presidium, is an internal arrangement designed to ensure the continuous and uninterrupted flow of Hural's meetings, and it is responsible for preparing agenda and advancing proposals and conclusions to the sessions of Hural.

Article 21 of the LATUG confers upon Hural the powers to establish the committee, determine its composition and operating procedure. Although the law does not specify which issues it oversees

<sup>66</sup>Ts.Davaadulam, paper on "Ensuring the unity of state administration", presented at the scientific conference on "Theoretical and practical issues on amendments of the Constitution" organized by SGH on 18 December, 2017.



and the number of committees, Hural have a common structure overseeing the following issues.<sup>67</sup> These include:

- Oversee legal and state structure issues,
- Budget, finance and development issues,
- Social policy,
- Food, agriculture, production and services,
- Infrastructure and urban development,
- Environment and tourism,
- Petitions and complaints.

The common observation derived from the aforementioned is that the establishment of the CRH committees mirrors the structure of the standing committees of the State Great Hural. Even though the SGH and CRH both are citizens' representative bodies, there is a principled difference in that the SGH is the legislative body, while the CRH is the decision-making body within a specific territory. For example, the powers of the CRH do not encompass issues on law and state structure.

In order to ensure that citizens have an accurate understanding on the local self-governing bodies, it is important to correct each time in practice such matters that on the surface seem to be small issues on terminology but actually contain contentual errors.

The laws on local governance of other countries provide that the committees oversee issues on budget and finance, oversight,

social policy, education and culture.

### Chairman of Hural

Between the years of 1992-1996, the CRH of aimag, capital city, soum and district functioned with an ex-officio Chairman, and following the 1996 amendments of the law, the position of the Chairman of Hural changed into a full-time office. 1992 Law stated as "Chairman of the Presidium of the Citizens' Representative Hural", which was amended to "Chairman of Hural" in the 2006 revised law. In this regard, B.Chimid showed his displeasure by highlighting in bold that "In amending the above law by creating a full-time position of the Chairman of the Presidium of the CRH in 1996, the enumeration of the Chairman's powers (in 20 Articles) and not those of the Presidium, demonstrates a veneration of the authoritarian rule rather than local self-governance". He further added, "This Chairman should have internal powers to function along with the Presidium, rather than external autonomous powers at the respective territorial level. This is because the Presidium is the form of a collective organization".<sup>68</sup>

Powers of the Chairman of Hural are defined in Articles 22.1.1-22.1.17 and 22.2 of the LATUG. These are classified in the following way on the basis of the conceptualisation proposed by B.Chimid. These include:

### Powers of the Chairman of Hural

Internal powers	Autonomously exercised external powers	Governor's powers overlapping with the powers of the Citizens' Representative Hural
22.1.1. to announce convention of regular and extraordinary sessions of Hural and submit for approval proposals for preparation to Presidium; 22.1.2. to chair sessions of Hural, ratify Hural's decisions and organize their implementation; 22.1.3. to provide organizational leadership to ensure conditions for the exercise of the powers by the Presidium, committee, provisional committee and Hural representatives; 22.1.4. to accept proposals for consideration by Hural and Presidium from competent authorities, draft Hural decisions and organize proposals for discussion; 22.1.5. to organize supervision and inspection actions on the implementation of Hural decisions; 22.1.6. to nominate for a consideration and approval a candidate for the Secretary of the Presidium in sessions of the Presidium; 22.1.7. to chair sessions of the Presidium and manage its daily operation; 22.1.8. to submit a proposal to appoint, dismiss and remove a Governor of the respective level or submit a proposal on whether or not to accept the Governor's request of resignation to Hural;	22.1.9. to organize implementation and monitoring of laws and regulations on respective territory; 22.1.10. to monitor local budget revenue collection and disbursement activities; 22.1.11. to take measures to administer and ensure the implementation of the Governor's action plan as well as annual economic and social strategic objectives; 22.1.12. to receive comments of soum and district Hural on issue of exploration and mining licenses for discussion by Presidium of Hural and convey its decisions to the Governor; 22.1.13. to organize activities to resolve petitions, proposals and complaints addressed by citizens, economic entities and organizations to Hural; 22.1.14. to represent Hural both domestically and internationally; 22.1.15. to submit the proposal for state and other awards for discussion in the sessions of the Presidium and convey its decision to the competent higher authority; 22.1.16. to convey to Governor recommendations of bagh and horoo Hural and decisions of soum and district Hural on requests from citizens' cooperatives, economic entities and organizations for protection, sustainable utilization and possession of certain natural resources on respective territories; 22.1.17. other powers provided bylaw.	29.1.6 a) to promulgate laws, regulations and decisions passed by the Government, Hural and Governor and ensure their implementation on the territory of a respective administrative unit; (22.1.9);  29.1.1 f) to provide respective administrative unit's taxation authority with management, organize collection and transfer of tax revenues stipulated by legislation and relevant Hural decisions (22.1.10);  29.1.6 h) to represent respective administrative and territorial unit domestically and abroad (22.1.14)

<sup>67</sup> From the structure of the committees of aimag CRH, available on the integrated CRH website: [www.khural.mn](http://www.khural.mn).

<sup>68</sup> B.Chimid, the Conceptions of the Constitution: Local Governance, Volume III, 2004, p.26.

In addition to the powers related to internal organization of Hural, the Chairman of Hural enjoys 6 external autonomous powers such as “to organize implementation and monitoring of laws and regulations on respective territory” (Article 22.1.9), those related to participation in the actions of the lower level of Hural (Articles 22.1.12; 22.1.16) and so on, some of which can be considered to overlap with the powers of the Governor as well as contradict with the Constitution. If the Chairman of Hural is to have powers related solely to internal organization of Hural then the provision stating that “other powers provided by law” (Article 22.1.9), is unnecessary. This is because the internal organization of Hural is not regulated by other laws except the LATUG.

The conferring upon the Chairman of Hural the powers that can be exercised autonomously from Hural has created an authority standing in parallel to Hural.

Within the scope of comparative analysis, we have studied the law on local government of several countries (Georgia, Lithuania), which revealed the following common provisions related to Chairman of Hural. These include:

- Open, chair, lead and declare closed a session of Hural,
- Ensure compliance with the rules of procedure of the session,
- Draft the agenda of Hural sessions,
- Put issues to vote and announce results of the voting,
- Sign resolutions, orders and minutes of the sessions of Hural,
- Coordinate the work of the committees of Hural, review the issues proposed by the committee,
- Review the documents submitted by administrative institutions to Hural for discussion,
- Represent the Hural in communications with governmental organizations, other local administrative bodies,
- Represent the Hural to the courts without the need for special authorization,
- Sign contract and other legal documents on behalf of Hural,
- Appoint and remove from office the employees of the Secretariat of Hural,
- Approve the internal regulations, working conditions and job description of the Secretariat of Hural,
- The Chairman of Hural shall be accountable and report to Representatives of Hural.

The above provisions illustrate that the duties of the Chairman of Hural are related to chairing the sessions and internal organization of Hural, where the Chairman reports to Hural.

### Secretariat of Hural

The LATUG has two provisions in relation to the powers of the Secretariat of Presidium of Hural. Presidium of Hural shall have a Secretariat, and the Presidium shall determine itself the number of staff and their salaries within the limits of the annual budget allocation specified in Article 10.1.2 of the Budget Law (Article 20.3); the Chairman of the Secretariat shall be the Secretary of the respective Presidium of Hural (Article 20.4).

tion specified in Article 10.1.2 of the Budget Law (Article 20.3); the Chairman of the Secretariat shall be the Secretary of the respective Presidium of Hural (Article 20.4).

The opposing opinions exist on the Secretariat of Hural. Some state on the need to increase the number of staff and strengthen the Secretariat, while others criticize the expansion of the “apparatus of the government” in the form of the Secretariat of Hural rivaling with the Governor’s Office. Only for the period of 2012-2014, the total number of staff of the Secretariat of aimag CRH increased by 90, where 8 (on average) staff vacancies increased to 12. Secretariats of the CRH of Hovd, Huvsgul, Orhon, and Uvurhangai aimags have 15-18 staff.<sup>69</sup> Since the amendment of Article 10.1.2 of the LATUG in 2015, there is no reliable data on how the staff vacancies of the Secretariats of CRH have changed.

Within the scope of amendments of the LATUG, the proposal to clearly define the status and duties of the Secretariat of Hural is advanced quite frequently. First of all, there is a need to change its status to make it equally serve not only the Presidium but also all other representatives. In addition to clearly defining the duties of the secretariat, it is appropriate to allocate it “internal” duties similar to those of the Chairman of Hural. The duties of the Secretariat of Hural include preparing for the sessions of Hural, recording minutes, preparing the draft resolution, disseminating the decision, supporting the actions of Hural representatives, Presidiums and the committees through office and other support but not extend to external duties such as going to meetings with voters on behalf of Hural representatives, and carrying out inspections and supervisions.

### Citizens’ general meetings of bagh and horoo

Article 59.2 of the Constitution provides, “The self-governing bodies ... in bagh and horoo shall be general meetings of citizens. In between the session of Hurals and general meetings, their Presidiums shall assume administrative functions”. In the LATUG the autonomous powers of the citizens’ general meetings (CGMs) are to discuss and decide on the internal organizational issues of general meetings, to discuss and evaluate bagh and horoo Governor’s activity reports and, on the basis of delegation of powers by law, adopt and enforce the normative administrative acts, and further their powers are merely restricted to submitting proposals to the higher level of Hural and Governor. Other laws governing sectoral relations also mainly provide for powers to make and submit a proposal.

Citizens’ general meeting differs to the Representative Hural by many factors including the method of its establishment and the status of participants. However, due to the fact that its actions are regulated in accordance with the “citations” from the procedures of the sessions of CRH the specific nature of its interactions such as dissemination of announcements of its upcoming sessions and the rules of procedures of its sessions are left unregulated.<sup>70</sup>

For example, in relation to the nomination of the candidate for Governor of aimag, capital city, soum and district by the CRH,

<sup>69</sup> Data released by the Department of Local government and development at the Cabinet Secretariat (as of 2014).

<sup>70</sup> D.Ganzorig, paper presented at the National Forum on “Local Governance: Challenges and Solutions”, Proceedings of the forum, p.116.

because the number of Representatives is certain it is clear that the candidate winning more than 50 percent of the vote shall be submitted for appointment. However, as many issues related to the nomination of candidature from the CGM, dissemination of announcements among participants and citizens, and the citizens' attendance are left unregulated, a classic practice has been established, where in the countryside people with many relatives promote their relatives, whereas those living in the city promote candidates with the same political affiliations into the CGMs, which nominates the Governor for appointment.

Article 23.11 of the LATUG states that "In cases of discussion on nomination, dismissal or removal of Governor from his/her office, or consideration of a request for resignation, the session shall be valid if representatives of more than 50 percent of all households of bagh, except for aimag centre baghs, are in attendance", while it leaves the procedures for city horoos unregulated. A young representative of the CRH of the capital city, one of study participants, mentioned that they have received a party assignment to win over 5 horoos of one district, and due to lack of any legal provisions on this issue a genuine battle has ensued between the parties.

Moreover, there is a criticism that misinterprets the provisions of the law by stating that even though it is called the general meeting of **citizens** of bagh and horoo, according to Article 23.10 of the LATUG, the session shall have a quorum if one person representing 4 households in the countryside and one person representing 20-30 households in horoo and bagh of aimag centre soums, thus if more than person from one household attends the session, their vote shall be invalid, which violates the right of citizens to elect and be elected.

Furthermore, one of the most frequently advanced proposals that constantly revolves around the issue of the general meeting of citizens of bagh and horoo, is to make the office of the Chairman of the general meeting of citizens a full time position with the salary pay equal to that of the Governor, and to increase the number of vacancies of the GMC in horoo.

CGM is merely a citizens' organization representing the respective local citizens' interests. However, the provisions of the LATUG and the Law on Elections in their entirety fail to represent the interests of citizens, and are drafted to serve the interests of the political party and other groups of people. For example, in the cases for nomination of candidates to the Chairman of Hural and the Governor, the legal provisions on designating competencies to the political parties (Articles 11.2 and 26.2) constitute the grounds for CGM representative to be guided and governed by party interests. Solely due to this provision, each of CGMs even at the level of soum discuss the issues at party caucuses. This is an especially wrong provision that needs to be urgently amended. On the other hand, there is no need to infringe upon the right of the political parties to participate in elections; there is only a need for a legal regulation to ensure that elected representative exercises their functions by using the "structure" of the CGM itself without resorting to any political party "structures" and its

involvement. The regulation of local elections by the same law that regulates the elections of the State Great Hural and relying upon the same election system further stimulates political agility.

Due to growth of the criticism that all tiers of local self-governing bodies are excessively politicized, there are discussions to prohibit the participation of political parties into the local elections within the scope of amendments of the Constitution. However, instead of incorporating such strict provisions into the Constitution, it is more advisable to improve the Law on Political Parties, Law on Elections and the LATUG.

## RELATIONSHIP BETWEEN HURAL AND GOVERNOR

Article 8.2 of the LATUG provides for the executive body that reports to Hural. The following is overview of regulations on how Hural and Governor conduct checks and balances on each other in the LATUG. These include:

- CRH has powers to make a proposal on the appointment, dismissal or removal of the Governor, and submit it to the Prime Minister, aimag and capital city Governors. The powers to dissolve the Hural is only enjoyed by Hural and citizens.
- CRH has powers to assign duties to the Governor with or without specific deadline to ensure the implementation of laws and resolutions of Hural, to protect the rights and legitimate interests of citizens, and to resolve concrete issues of livelihoods within the respective territories.
- CRH enjoys powers to approve the action plan of the Governor, discuss their report and evaluate their performance. The Governor has duties to organize the implementation of resolutions and decisions of Hural and its Presidium made in accordance with the legislation, and to report the outcome.
- The Governor shall be entitled to veto, in whole or in part, the decisions made by Hural, if these are in breach of the Constitution and other laws, or those that it does not have a mandate, or those without the financial and other resources required for implementation.
- The Governor exercises the powers to initiate and submit any issues for discussion at sessions of Hural.

There are uncertain issues mainly concerning the functional allocation in the relationship between Hural and Governor. These include:

*Firstly*, due to failures in separating the functions of the local authorities and the functions transferred from the central government on the resolution of issues pertaining to the local territory in the law, there is uncertainty on whether the Hural in seeking accountability from the Governor regarding the implementation of these functions is acting on behalf of local citizens or the Government. The example of this could be the provision on monitoring and evaluation of how the Governor organizes the implementation of laws and regulations, decisions of the Government and higher authorities and respective Hurals (Article 18.1.1).

Secondly, the powers of the Governor of aimag, capital city, soum and district are commonly defined around 6 sectoral issues and 45 directions. At the same time, the powers of Hural of bagh, horoo, soum and district are defined in Articles 17 and 18 of the LATUG, while in enumerating the powers of the Hural of aimag and capital city in Article 19 these are to be implemented similar to the powers of the Hural of soum and district outlined in Article 18. Such overlaps of the powers of the respective tiers of Governors and Hurals creates possibilities for Governors and Hurals of different levels to intervene in the work of each of other; thus, making the accountability mechanism unclear. (We touched upon this issue in detail in Chapter Five on Functional Allocation).

Thirdly, the powers of Governor and Hural overlap. For instance, due to overlapping of the powers of the Chairman of Hural and Governor such as the implementation of the legislation on the respective territory and so on, it results in the contest for power.

We made an assessment on the Constitutional regulation for Governor to veto the decisions of Hural in the previous section. Article 27 of the LATUG regulates in detail the provisions of Article 61.2 of the Constitution. During the local discussions when asked about the implementation of this article most of the replies stated that “this article is not implemented in practice at all, because there are no stupid Governors who would want to face their own removal”.

*“This article is not implemented in practice. It is correct for the Governor to veto the wrongful decision of the CRH. However, there is a mechanism for removal of the Governor, who made the right thing, by the CRH or higher authorities taking advantage of the veto issued by the Governor. There is no accountability mechanism against the Governor unless they make a decision to veto. If the provision is inserted, which states that if the decision is made in breach of the legislation then the veto will constitute the grounds for their removal, then the Governors will be able to oversee the decisions. Currently, the Governors despite being aware of the wrongful decision by the CRH do not have an interest in vetoing such decisions. Because they view that they might be wronged by issuing a veto, there is a need to pay attention to this issue and provide for mechanisms of checks and balances.” (D. Tseveenravan, Governor of Hovd aimag).<sup>71</sup>*

In relation to the local self-governing bodies, one issue that caught our attention, but which is beyond the scope of this study, is related to provisions that were absent in 1992 law, but were added in 2006 revised law, stating that the local self-governing bodies at various levels shall ensure the implementation of the legislation, monitor its enforcement, explain and publicize them. These are defined in the following ways in the Constitution: as the exclusive powers of the SGH in Article 25.1.8, stating that “to supervise the implementation of laws and other decisions of the State Great”, as the powers of the Government in Article 38.2.1 stipulating that “to organize and ensure

nationwide implementation of the Constitution and other laws”, the Prime Minister is responsible to the State Great Hural for the implementation of state laws (Article 41.1), the Governor, as a government representative, has a duty to ensure the observance of national laws within their respective territories (Article 61.1); “The authority of higher instance shall not make decisions on matters coming under the jurisdiction of local self-governing bodies” (Article 62.2), judicial power shall be vested exclusively in courts (Article 47.1). Consequently, there are many provisions causing confusion in the LATUG, where in cases of disputes that are in contradiction with the foregoing Constitutional provisions, the disputes are to be decided by the higher authorities.

The following is the compilation of these provisions to draw the attention of the legislators on this issue. These include:

### Articles of the LATUG that are in possible breach with the Constitution Article

#### 12 . Powers of Representatives of Hural

12.1.6. to explain and publicize **laws and regulations** as well as decisions of Hural to citizens;

12.1.7. to ensure the implementation of **laws and regulations** as well as decisions of Hural, to protect rights and legitimate interests of citizens, to send inquiries and receive responses from Governor, Deputy Governor, heads of Governor’s Office, relevant departments, sections and other territorial organizations, concerning the matters of territorial significance;

#### Article 18 . Powers of soum and district Hural

18.1.1. Internal organization of Hural and its oversight: h/ monitor and evaluate how Governor organizes the implementation of **laws and regulations, decisions of the Government and higher authorities** and respective Hural;

#### Article 20 . Powers of Presidiums of Hural

20.1.9. organize activities aimed at protection of rights, freedom and legitimate interests of citizens, explain and publicize **laws and regulations**, decisions of Hural;

#### Article 22 . Powers of Chairman of Hural

22.1.9. to organize and monitor the implementation of **laws and regulations** on respective territory;

#### Article 36 . Relationship of Hural and Presidiums

36.2 Disputes between Hural and Governor of soum and district shall be settled by Citizens’ Representative Hural of aimag and the capital city in consultation with Governor; disputes between Hural and Governor of aimag and the capital city shall be settled by a Member of Government in charge of local government affairs.

## STATE ADMINISTRATION

Since the adoption of the Constitution, most of the disputes in the courts were related to the dispute on nomination and appointment of the Governor. In this regard, despite the repeated amendments to legal provisions this issue remains unresolved. In accordance with current regulation, Hural shall nominate the candidate and

<sup>71</sup> Proceedings of the national forum on “Local Governance: Challenges and Solutions”, 2016, p.147.



the nomination process involves the voting among the representatives. The Prime Minister and the Governor of higher authority shall appoint the nominee. In legal theory, according to the characteristics for behavior regulation the legal norms are divided into “entitling”, “obligatory” and “prohibitive” norms, and it is unclear as to which norms the word “appoint” belongs to. If it is an “entitling norm” then the Prime Minister and the Governor of higher authority are entitled not to appoint the nominated candidate. In other words, an act of appointment will be made on the basis the act of “selection”. On the other hand, if it is considered to be an “obligatory norm” then it will be the formal act or in the words of the press – the act of “approval”. The main issue pertains to the fact that the nomination of the candidate from the Citizens’ Representative Hural is not understood to mean the “selection”.<sup>72</sup>

If the party winning the majority of seats in local elections is different to the ruling party of the central government, then there are many instances, where the Prime Minister does not appoint the candidate nominated by the CRH of aimag and the capital city. This practice can also be witnessed in soum, district, bagh and horoo. In accordance with Article 26.4 of the LATUG, the nomination process starts again. The following is an example of the creation of a deadlocked situation lasting for long period of time, initiated by recommencing the nomination process.

*CRH of aimag established following the results of 2012 aimag CRH elections in Dundgobi aimag, in accordance with Article 26 of the LATUG, submitted the proposal on the appointment of the candidate to the Governor of aimag following the nomination process; however, due to the lack of approval from the Prime Minister, the CRH convened another session in accordance with Article 26.4 of the LATUG. However, the CRH failed to conduct the session within 15 days specified in the law, and exceeded the timeframe. From this session, the candidate to the Governor was submitted to the relevant authorities for resolution and decided. After this, it made a decision to remove the Governor twice. The Chairman of the CRH did not chair the session and disregarding the interpretations of the Supreme Court appointed a new chairman for the session and left. The Prime Minister also failed to meet the deadline of 5 days provided in the LATUG in reaching his decision. The removed Governor appealed to the courts on the basis of illegality of their removal, but the next Governor was already appointed.*

*In Dornod aimag, following the outcome of 2012 elections, the Mongolian People’s Party won the majority of seats, and nominated their own party candidate from the session held on 7 January, 2013, and submitted their candidate to the Prime Minister, but the Prime Minister rejected this nomination. Consequently, in accordance with Article 26.4 of the LATUG, the nomination process was repeated three times, which was not resolved after recourse to the courts and the Constitutional Tssets. Only after the dissolution of the Government, the newly appointed Prime Minister finally made a decision to appoint the candidate nominated repeatedly by the CRH on 25*

*April, 2015. During this time, the aimag’s Democratic Party committee made a recourse to the courts arguing that the first session of CRH was illegal, and, despite the grounds for refusal by the Prime Minister stating that the given candidate did not meet the criteria outlined in Article 26.5 of the LATUG, the court decision citing the violation of the procedures of the session made a decision in favour of the Democratic Party.<sup>73</sup>*

The abovementioned two examples illustrate how the courts based on a small procedural error concluded that the session on the election of the candidate was illegal, and thus, made the decision in support of the ruling party of the SGH. Consequently, the balance of powers of the relationship between the local self-governing body and the central government is tipped towards the central government.

This example demonstrates the need to change the judicial practice in resolving the dispute on the appointment of the Governor to adhere to the spirit and letters of the Constitution on the protection of the local self-governing bodies rather than the procedures of the session, and ensure that the provision on the nomination of the candidate from Hural corresponds to the meaning of “selection” and legislate it accordingly.

Articles 34 and 35 of the LATUG regulate in detail the relations of the Governor with the Government and the central public administration authority. However, there are no provisions regulating the relations of Hural with these state authorities. On the basis of this ground, the Constitutional Tssets invalidated the provisions of Articles 25.4 and 25.5 of the LATUG on the amendment and annulment of the decisions of Hural by the Hural of higher authority or the State Great Hural.

Despite these amendments, there are proposals from local Hurals on the need to add the provisions on relations of Hural with the President, State Great Hural, Government and central public administration authorities. It is necessary to further analyze these justifications.

The laws on local government of other countries incorporate provisions on the state funding of trainings involving representatives of assemblies and civil servants, and the consultation with each of the municipalities and the local government associations on the discussion of draft law related to operations of local governments. However, the LATUG does not have these types of provisions.

There are no ministries that are solely in charge of local government or such similar structures in Mongolia. Article 20 of the Law on Government of Mongolia imposes the duties upon the Minister and the Head of the Cabinet Secretariat of Mongolia to provide professional and methodological assistance to the Citizens’ Representative Hural. The Local Government and Regulations Department of the Cabinet Secretariat is responsible for offering professional advice regarding the operations of the CRH and the Governor, monitor the implementation of government policy and decisions, and advise to the Cabinet on the improvement of the territorial units.

Cabinet Secretariat within the scope of its duties to provide

<sup>72</sup> D.Ganzorig, paper presented at the National Forum on “Local Governance: Challenges and Solutions”, Proceedings of the forum, pp.117-118.

<sup>73</sup> U.Erdene-Ochir, T.Bagakhuu, A.Zorigtbaatar, Analysis of the judicial decisions of the Administrative courts for the period between 2012-2014 on how the articles and provisions of the LATUG are interpreted, 2015

professional and methodological assistance to the Citizens' Representative Hural receives the reports of the CRH of aimag and capital city on an annual basis. However, Chairman of the SGH M.Enhbold criticized during 2017 session of the SGH that the format and template of these reports have been substantially outdated. After reviewing these reports, no significant actions are undertaken, which are merely published in the minutes. Upon the inquiry regarding this issue, the representative of CRH stated that "we do not have legal obligations to submit to the Cabinet Secretariat our report, but because it has become an accustomed practice, we send our reports annually, and we do not know if these reports are read or not." There is a need for the Government to change the format and template of the reports and information received from local governments, and the indicators of performance outcome to make the format more results-oriented.

Local self-governing bodies fall under the scope of application of the General Administrative Law.<sup>74</sup> This law imposes a strict requirement to the process of administrative decision-making such as to conduct the potential impact assessment, cost-benefit analysis and to hold public hearings, and to submit to the central public administration authority in charge of legal affairs (Ministry of Justice and Internal Affairs) for review of the compliance with the law, and to maintain a record of decisions. In addition, the law regulates the issue on the payment of damages incurred to citizens and organizations as a result of unlawful decisions by the respective administrative body. Consequently, the norm-setting acts of local self-governing bodies come into force upon registration by the Ministry of Justice and Internal Affairs.

Although it is not common, in practice there are instances where the resolutions of Hural do not comply with the law. For example, the Anti-Corruption Agency inspected whether the resolutions issued by 15 aimags, 208 CRH of soums and Presidiums comply with the legislation for the period of 2013-2015, and uncovered a total of 97 violations, most of which were related to imposition of payments and fees in excess of the limits determined by law.<sup>75</sup>

The LATUG includes several ambiguous provisions on the resolution of dispute arising between the central public administrative authorities and the local authorities. These include:

Article 35.3 provides that "Unless otherwise provided by law, disputes between central public administration authority and aimag and the capital city authorities shall be settled by the Government", which, firstly, does not specify the types of disputes, and, secondly, the general term of aimag and capital city authorities fails to specify whether it is referred to the CRH or the Governor.

Article 36.2 states that "Disputes between Hural of soum and district and the Governor shall be settled by the Governor of aimag and the capital city in consultation with its respective Hural; disputes between Hural of aimag and the capital city and Governor shall be settled by the Cabinet Member in charge of local government affairs." Due to failure of this provision to

also specify the type of dispute, it seems to contradict with the provisions of the Constitution, which states that "The authority of higher instance shall not make decisions on matters coming under the jurisdiction of local self-governing bodies" (Article 62.2).

In addition, provisions of Article 38.5 of the LATUG, which stipulates that "Governor shall impose administrative sanctions on citizens, organizations and officials, who breach the administrative regulations on its territory, based on grounds provided in the legislation, or submit the proposal on such sanctions for consideration to the competent authorities or officials", requires further analysis in the future.

## CONCLUSIONS

In the first part of this Chapter, it was stated that in line with the classical local government combination model, on the one hand, local governance is executed autonomously by the combination of representative bodies elected from citizens and the executive power, which delivers services to citizens, and is accountable before the citizens, while, on the other hand, the central government in addition to strictly monitoring the compliance of local government actions with the law, is also responsible for rendering assistance and support to the local government. Also, it was concluded that the essential issue is not related to either the combination or non-combination models, but rather to ensuring the balance of powers between the local government and the central government.

In this Chapter, after the analysis of the implementation of the LATUG in compliance with the Constitutional provisions, the following conclusions are drawn in relation to the execution of the combination principle of local self-governance with state administration. These include:

1. The excessive expansion of the scope of the powers of the Presidium of Hural, the Chairman of Hural turning into the authority parallel to Hural in charge of some executive functions in addition to opening the possibilities in law for power competition with the Governor and for the representative of Hural to be a civil servant working under the authority of the Governor, due to excessive participation of political parties in Hurals, the Hural lost its nature of being the local self-governing body representing the citizens, protecting their interests, making joint decisions in the form of a voluntary organization, whereby in recent years, the tendency is not towards the combination but rather intermingling with state administration.

2. Depending on the characteristics of each administrative and territorial levels, there is a need to regulate separately their competence in decision-making in accordance with their self-governance principle. These include:

- Due to lack of legislative separation of the pure local functions to decide on territorial issues and the functions delegated

<sup>74</sup> Article 5.1.5 of the General Administrative Law adopted by SGH on 9 June, 2015.

<sup>75</sup> Report of the Anti-Corruption Agency, 2015.

from state administration, it is unclear whether the Hural, in imposing liabilities on the Governor for implementation of these functions, is imposing them on behalf of local citizens or is exercising the duties of the central government.

- Due to overlapping definitions of the common powers of the Governors and Hural of respective levels, it is possible for Governors and Hural of different levels to intervene in the operations of each other, and the accountability mechanism remains unclear.
- The self-governing bodies of bagh and horoo are not representative bodies; thus, there is a need to legislate the direct forms of citizens' participation such as citizens' engagement in local referendum in parallel to clearly determining the legal status of citizens' general meeting. For instance, there is a need to introduce different procedures for nomination of the Governor from the CGM of bagh and horoo in comparison to that of CRH that has concrete number of representatives.

3. The narrow interpretation of the combination principle of local self-governance with state administration through regulations of nominating candidates from respective Hural, which are then appointed by Governors of higher levels and the Prime Minister, and the same principle for removal, is prevalent. In this arrangement, local citizens cannot impose liabilities on the Governor appointed from higher authorities. On the other hand, the possibility for the Prime Minister to refuse to appoint the candidate to the Governor nominated from local Hural remains open. Therefore, it can be considered that there is a predominance of state administration.

4. The determination of how the combination model of local governance creates checks and balances among the decision-making and executive bodies reveals that the Hural possesses sufficient powers such as the approval of Governor's action plan, evaluation of its implementation, adoption of local budget, all decision-making related to local property, and removal of the Governor to ensure oversight over the executive power. However, although the Governor enjoys a power to veto the decision of Hural, the Hural maintains the power not to accept this veto. Despite conferring upon Hural the powers to remove the Governor, it remains under the sole competence of Hural to decide over its own dissolution, which can be considered to be one-way relationship. On the other hand, the Governor is a centrally appointed official, who has the powers to manage the budget resources in the local decision-making and wields a lot of influence. In this system, the duties and effectiveness of Hural are not sufficient.

5. The supervision, inspection and assistance provided by the central government on the actions of the local self-governing bodies, which constitutes an important element of the combination principle, remain insufficient both from legal and

practical perspective. Based on the provisions of Article 62.2 of the Constitution, the central government cannot rectify the resolution of issues already decided by the local self-governing body in compliance with the law; thus, the government is experiencing difficulties in making decisions in the interests of the unitary state. On the other hand, the assistance and support rendered by the Government to local self-governing bodies are insufficient.

6. The LATUG has several provisions that could contradict with the content of the Constitution, which create possibilities, on the one hand, for Hural to interfere into the executive functions, and, on the other hand, the higher authorities and the Government could also intervene into the affairs of local self-governing bodies. Notwithstanding, the impossibility to make a conclusion on whether these provisions breach the Constitution, these issues are brought to the attention of the legislators.

In general, the realistic portrayal of Mongolia shows that the combination principle of the local governance is not fully accomplished at the delicate intersection of the "horizontal" axes of self-government and the "vertical" axes of state administration, but it rather exhibits "mixed" characteristics.

## Chapter Five

# FUNCTIONAL ALLOCATION

### INTRODUCTION

The main weakness of the LATUG is its failure to regulate in detail the provisions of Article 58.1 of the Constitution of Mongolia, which states that “Aimag, the capital city, soum and district are administrative, territorial, economic and social complexes having specifically assigned functions and self-governing administrative bodies as prescribed by law”. In other words, as concluded in previous chapters, aimags, the capital city, soums and districts were not assigned with “**specific functions prescribed by law**” as administrative and territorial units but the functions were assigned to the subjects of local authority (Hural, Chairman of Hural, Governor etc.).

In short, function expresses the framework for implementation, supervision and accountability by the unit, institution or organization, in exercising their specific duties. First of all, for the purposes of improving the accountability system, reducing inefficient duplications, eliminating overlapping of competencies and legal uncertainty, there is a need to review whether the functions between the hierarchies of central public administration authority, local authority and administrative and territorial units or at the vertical axes of government (aimag, capital city, soum, district, bagh, horoo) are optimally allocated. Consequently, it is appropriate to consider the assignment of functions along the horizontal axes of government or those between Hural and Governor. Relations between central and local governments, as well as the functions of Hural and Governor were touched upon in Chapters Two and Four of this study report. This Chapter will mainly focus on the assignment of functions at the administrative and territorial level and its implementation.

Here it is pointed out that the objective of the study is to clarify the principle of regulating the allocation of powers and functions between administrative and territorial levels but not to offer a full-scale analysis of functions.

### USAGE OF LEGAL TERMS

Let us consider the terms used in Mongolian law to describe the rights and duties of local authorities. The most commonly used term is the concept of competence. The provisions of Articles 62.2, 63.1, 63.3 in Chapter Four on “Administrative and Territorial Units of Mongolia and their Governance” of the Constitution of Mongolia, describe “Authority of local self-governing organs” and “Administrative and territorial units, their governance and competence”. In total, the LATUG has 12 provisions defining competencies, namely Articles 1, 18.1.3.k, 18.1.3.l, 28.1.13, 28.1.16, 28.2, 29.1.6.d, 29.2, 33.5, 39.5 and

39.2. Powers in the strict sense of authority exist only through the combination of a function (competence) and the powers or duties which that authority can apply to them.<sup>76</sup> The term competence stipulated in the aforementioned articles of law is used to mean the expression of the respective organisation’s general capabilities as defined in the law.

Another commonly used concept is function and this concept expresses the scope of implementation, supervision and accountability by the unit, institution or organization exercising their specific duties. Functions are expressed by a combination of rights and duties and define the limits of action or inaction by local authorities.<sup>77</sup> Article 58.1 of the Constitution is the only provision in the Constitution which contains the formulation of the term function and the LATUG formulates the function in three articles, namely Articles 3.2, 21.1, 26.1.

In addition, the LATUG has a total of 65 provisions expressing the general terms on the legal status of local government, including **exclusive powers** in Article 18, **common powers** in Articles 22 and 29 and **powers** in Articles 12, 17, 19, 26, 28, 30, 31. **Power means:** 1) in an objective sense, any legal regulation/written legal norm; 2) in a subjective sense, this is a power acquired by the relevant entity on objective grounds or the one which the entity came directly to possess.<sup>78</sup> Powers may thus be fully defined only with reference to the subject matter to which they apply (also termed function), the powers intended to exercise it (which may be a faculty – power – or an obligation – duty) and the resources needed to implement them, as well as the holder of these powers.<sup>79</sup>

**Exclusive powers** are powers which are not shared or delegated to any other entity and which are solely exercised by the respective entity. **Common powers** mean the general powers which are delegated to local government independently from higher or lower levels of government. **Authority** means the ability of local government or official to take action or inaction within the framework of the law using general and specific principles. For example: the common powers described in Articles 29.1.1.c, 29.1.3.e, 29.1.6.d of the LATUG actually resemble duties rather than powers.

As for the term **duty** (i.e. task, obligation, responsibility), it is defined in 11 provisions of Articles 14.3, 21.4, 22.2, 26.4, 28.1.19, 29.1.6.j, 29.4, 32.1, 33.1.4, 38.3 of the LATUG. This is an unambiguous legal term which means a legally defined duty or obligation. Judging from these legal provisions, the terms of competence and function or rights and duties are used without clear demarcation of their meaning and can be ambiguous with dual meaning.

<sup>76</sup> Council of Europe, Local authority competences in Europe, Study of the European Committee on Local and Regional Democracy, situation in 2007, p.1

<sup>77</sup> Ibid., Council of Europe

<sup>78</sup> “Rechtswörterbuch” Prof.Dr.jur.h.c Hans Kaufmann, Verlag C.H. Beck, Muenchen. 1994, 12. Auflage, S.944-945

<sup>79</sup> Ibid., Council of Europe



## POWERS OF HURALS

Chapter Four of the Constitution of Mongolia does not touch upon issues pertaining to the competencies of the local self-governing bodies, which is similar to the provisions of constitutions of other countries. However, it has a provision stating that *“The authority of higher instance shall not make decisions on matters coming under the jurisdiction of local self-governing bodies. If law and decisions of respective superior state organs do not specifically deal with definite local matters, local self-governing bodies can decide upon them independently in conformity with the Constitution.”* (62.2). Despite recognizing the general powers of the local self-governing bodies, because this provision does not specify to which level of administrative and territorial unit it belongs to, an overlapping of functions is possible, whereby Hurals of all levels have an opportunity to make a decision regarding any issues not specified in the law and decisions of higher authorities. Therefore, it is important to make amendments of the Constitution on this issue in order to reduce the overlapping or duplication of functions.<sup>80</sup>

Lack of the specific provisions to regulate this issue in the Constitution has been repeated in the LATUG as well, which states that *“Hural of soum and district shall exercise powers to discuss any economic, social and organizational matters other than those that legally fall within the powers of the President, State Great Hural, Government, ministries and agencies, Hurals of higher level and other competent state authorities and officials...”* (18.1); *“The Hural of aimag or capital city shall exercise the following powers within their respective territories in addition to the powers stipulated in article 18 of this law”* (19.1).

The following real examples illustrate the fact that each level of Hural makes overlapping and contradictory decisions due to the aforementioned legal regulations.

*Articles 18 and 19 of the LATUG cause problems. Actually, none of the provisions are separated but they rather enumerate all the powers. Currently, in one territory the waste management fee determined by the aimag CRH amounts to 2,000, while the same fee set by the Ulaangom soum CRH amounts to 1,500. Issues related to establishing certain protection zones, or naming after somebody are also decided by the overlapping decisions of each of the Hurals. (From the minutes of the discussions held in Uvs aimag, 8 December 2017)*

This situation can also be seen in sectoral laws. For example, the Law on Education (Article 29) provides that the powers of aimag, capital city, soum and district CRHs are to discuss reports of the upper and lower level Governors and provide directions on the issue of education in their respective territories; to approve the development plan of locally owned educational institutions and oversee its implementation; thus, defining these without demarcating ATUs.

Law on Health (Article 10) also defines the powers of the aimag, capital city, soum and district CRHs in generic terms such as to organize activities towards the implementation of legislation on health and the relevant Government resolution in their respective

territories; to discuss and evaluate the report and information on population health provided by the Governor; to approve programmes on population health protection and promotion, and monitor their implementation; to coordinate the participation of governmental and non-governmental organizations and citizens in protecting and promoting the population health.

Basic education and health services account for about 70-80 percent of the local budget. However, there are few opportunities for Hurals to implement the aforementioned functions. The duties of the CRHs are confined to discussions of education and health related issues upon submission of an annual activity report by the Governor, and to carrying out inspections on the premises of health and educational institutions.

Generally, only in cases where the functions are clearly differentiated between the administrative and territorial units in relation to public services such as education and health the competencies of the local self-governing bodies will be clear (i.e., soums to be in charge of primary education, aimags to be in charge of secondary education, the government to be in charge of teacher salaries and educational standards, and who will be the owner of school building, etc.).

Delegating one function among many subjects creates a situation with no clear authority in charge. Interestingly, the persons in charge of administration of funds and property as well as appointment of officials are clearly legislated. In other words, in almost all sectors of services it can be observed that the powers and duties are assigned in such a way as to allocate the duties that are of a symbolic nature to CRHs, while the Governor, representative of the government, is delegated with key functions.

Articles 17, 18 and 19 of the LATUG enumerate the powers of Hurals. On the surface, this list might seem exhaustive; however, careful analysis reveals that majority of these powers are related to Hural's own internal organizational matters, while the remainder is limited to discussion of some issues, adoption of programmes developed by other bodies, or advising the Governor. It conflicts entirely from the experiences and lessons of the former socialist Eastern European countries on the development of the administrative and territorial units with self-reliant local governments. Not only the actual powers of Hurals were defined ambiguously, but also a great deal of uncertainty surrounds the issues on what the local self-governing authority actually is, what are the exact duties of each administrative level (Tony Levitas, 2008).

<sup>80</sup> In the annex to Chapter Six on comparative study, Constitutional amendments of France in these areas are provide as an example.

## POWERS OF GOVERNORS

Article 29.1 of the LATUG defines 45 common powers of the Governors of aimag, capital city, soum and district around 6 sectoral issues. These provisions illustrate that the Governors enjoy broad range of common powers in many areas such as development planning, economy, property relations, food, agriculture, natural resources, land, environmental protection, infrastructure, culture, social welfare, law and order, security and protection of citizens' rights and freedoms.

Common powers of all Governors regardless of the level of administrative unit include specific duties and powers in almost all sectors including organizing activities for planning development of a respective administrative unit, implementing fiscal, financial and taxation policy, providing general education services to the population, protecting health, developing culture, arts and sciences, implementing environmental protection policy, safeguarding rule of law and security, improving local infrastructure, organizing preventative measures against fires, natural disaster and infectious livestock and animal diseases, preparing local administrative and other required personnel.

In addition to aforementioned common powers, the LATUG has 16 provisions specifically defining the powers of Governors of aimags and the capital city (Article 30). These are the provisions designed to ensure that the powers of governors of aimags and the capital city are the same. Similarly, there are 9 provisions stipulating similar powers of Governors of soums and districts (Article 31). Six provisions regarding 19 common powers of Governors of aimags and the capital city and 9 common powers of Governors of soums and districts outline similar powers, and if we add to this common powers stipulated in Article 29 of the LATUG then there will be a total of 51 provisions conferring similar powers to Governors of aimags, capital city, soums and districts.

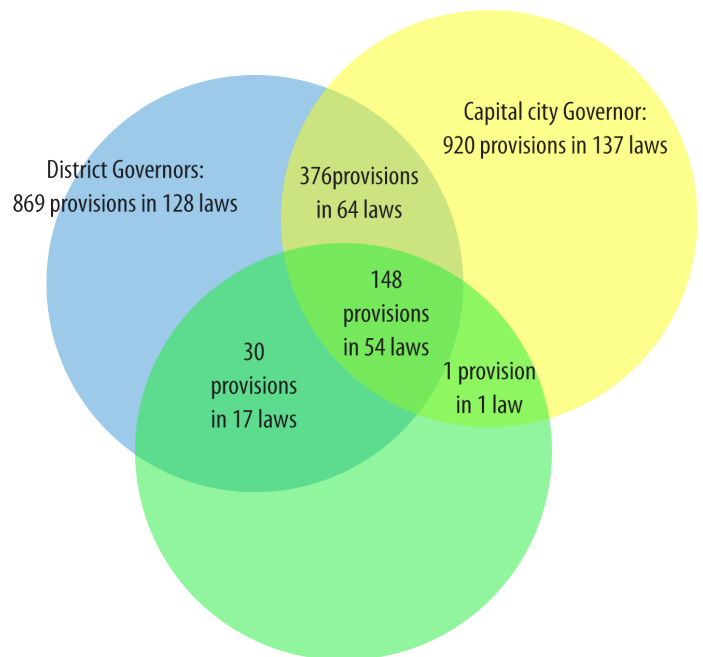
Article 28 of the LATUG specifies the powers of Governors of bagh and horoo in 20 provisions, and confers upon them powers on registration, research, organisation, implementation, supervision, reporting and decision-making.

The comparison of legal provisions specifying the powers and duties of Governors of the capital city, districts and horoos in the study by the Capital City Governor's Office in 2014 determined that:

- ... Powers and duties of three levels of Governors are specified in 2,066 articles, or 1,363 articles after removing the duplications in a total of 147 laws;
- ... Common powers of horoo, district and capital city Governors are specified in 148 articles of 54 laws;
- ... Common powers and duties of district and capital city Governors are specified in 376 articles of 64 laws;
- ... Common powers and duties of district and horoo Governors are specified in 30 articles of 17 laws;
- ... Powers and duties of the capital city Governor are specified in 920 articles of 137 laws;
- ... Powers and duties of district Governors are specified in 869 articles of 128 laws;

... Powers and duties of horoo Governors are specified in 277 articles of 74 laws.

There are 1363 provisions in 147 laws specifying the powers and duties of the Governor of the Capital city, horoos and districts



Constitution and the LATUG similarly consider aimags and the capital city, soum and district, bagh and horoo as administrative and territorial units. For example, the LATUG stipulates that the Governor of bagh and horoo shall have powers "to organize seasonal works such as hay and forage making, pasture livestock, conduct preventative medical wash and injections for herds, collect wool and cashmere, build wells, fence and shelter for cattle, plant and harvest wheat and vegetables, prepare for winter and perform the inventory of livestock, fences and wells in due time" (Article 28.1.2). Since a decision is in force prohibiting raising livestock in the capital city, this provision is irrelevant for Governors of horoos in the capital city. Similarly, mining or post-mining rehabilitation issues in the capital city are almost non-existent, with the exception of coalmines of Nalaikh and Baganuur and sand and gravel queries. However, in other local territories there are varying contextual issues such as historical and cultural landmarks and heritage protection, increasing state and local citizens involvement and monitoring mining and post-mining rehabilitation, carrying capacity of pastures, coping with natural disasters, including drought and dzud, retaining populations, problems of desertification and drought. Thus, firstly, it is necessary to clarify the powers of aimag, capital city, soum and district Governors, and secondly, to reflect these differences into the law.

Aimag Governor simultaneously implements three different functions. The first is to coordinate the activities of the branches of ministries on its territory in the capacity of the central government representative, the second is to monitor the work of all soum Governors under aimag's jurisdiction, and the third is to act as the main head of the "local administration" integrating the most important

powers of aimag centre soums. In other words, in comparison to the powers and functions of aimag centre soums, the powers and functions of other soums have decreased to the same level as those of bagh and horoo.<sup>81</sup>

## FUNCTIONS OF ADMINISTRATIVE AND TERRITORIAL UNITS

For the first time the Budget Law adopted in 2011 defined the functions of aimag, capital city, soum and district that were to implemented autonomously by ATUs through their local budgets in accordance with the ideals of the Constitution. The Budget Law, as the financial regulator of ATUs, carries the same legal implications as the LATUG. The advantage of the Budget Law in comparison to the LATUG is that it specifies the basis for financing functions in addition to defining the functions of each unit separately.

### Functional allocation among administrative and territorial units by the Budget Law Article 58 .

#### 1 The Capital city

1. Capital city management;
2. Urban planning, construction and establishing new infrastructure;
3. Capital maintenance of construction and buildings owned by the capital city, establishing new property and making investments;
4. Social care and welfare services;
5. Implementing programs and measures to support employment and alleviate poverty;
6. Development of small and medium-sized enterprises;
7. Pasture management;
8. Establishing water supply, sewerage and drainage systems;
9. Housing and public utility services;
10. Flood protection;
11. Public transport services;
12. Fighting infectious livestock and animal diseases, pest eradication and control, and veterinary services;
13. Disaster prevention;
14. Environmental protection and rehabilitation;
15. Establishing large scale roads, bridges and their lighting, traffic lights and other respective construction;
16. Utility services for public areas, landscaping, public hygiene, street lighting, cleaning, and waste removal;
17. Within the territory of the capital city operation and maintenance services of high voltage and electricity lines and substations and other activities to ensure normal functioning;
18. Other functions specified in law

### Article 58 . 2 Aimags

1. Aimag management;
2. Urban planning, construction and establishing new infrastructure;
3. Capital maintenance of locally owned construction and buildings, establishing new property and making investments;
4. Social care and welfare services;
5. Implementing programs and measures to support employment and alleviate poverty;
6. Development of small and medium-sized enterprises;
7. Pasture management within the territory of aimag;
8. Establishing livestock fodder reserve;
9. Water supply, sewerage and drainage systems, housing and public utility services, and flood protection;
10. Public transport services;
11. Fighting infectious livestock and animal diseases, pest eradication and control, and disaster prevention and elimination, and veterinary services;
12. Environmental protection and rehabilitation;
13. Establishing within the territory of the aimag and inter-soum road, bridge and their lighting, traffic lights and other respective construction;
14. Utility services for public area, landscaping, public hygiene, street lighting, cleaning, and waste removal;
15. Within the territory of the aimag operation and maintenance services of high voltage and electricity lines and substations and other activities to ensure normal functioning; and
16. Other functions as defined in law.

### Article 58.3 Districts

1. District management;
2. Social care and welfare services provided subsequent to the decision of district governors;
3. Within the territory of districts, utility services for public areas, public hygiene, street lighting, cleaning and waste removal;
4. Promotion of intensified raising of livestock, fighting infectious livestock and animal diseases, pest eradication and control, disaster prevention and elimination, and veterinary services;
5. Protection of nature and the environment within the district territory;
6. Recurrent maintenance of lighting of public areas within the district territory;
7. District landscaping and development, maintenance of sidewalks, recreational areas and children's playgrounds;
8. Other functions as defined in law.

<sup>81</sup> UNDP, "Redefining central and local government relations in Mongolia", 2008, p.7

### Article 58.4 Soums

1. Soum management;
2. Social care and welfare services provided subsequent to the decision of soum governors;
3. Within the territory of soums, utility services for public areas, public hygiene, street lighting, cleaning and waste removal;
4. Fighting infectious livestock and animal diseases, pest eradication and control, disaster prevention and elimination, and veterinary services;
5. Pasture management within the territory of the soum;
6. Protection of nature and the environment within the soum territory;
7. Recurrent maintenance of lighting of public areas within the soum territory;
8. Soum landscaping and development, maintenance of sidewalks, recreational areas and children's playgrounds;
9. Water supply, sewerage and drainage systems, offering water management discounts and services;
10. Capital maintenance of locally owned construction and buildings, establishing new properties and making investments;
11. Other functions as defined in law.

Despite the separate definition of functions of aimag, capital city, soum and district in the Budget Law the following issues remain. These include:

- 1) In the Budget Law the principle for classification of functions is unclear.
- 2) It can be observed that the main approach is to concentrate functions to the higher level unit rather than the basic unit that is in close proximity to the population for day-to-day delivery of services. For example, social care and welfare services; implementation of programs and measures to support employment and alleviate poverty; housing and public utility services; fighting infectious livestock and animal diseases; pest eradication and control; veterinary services and pasture management that can be rendered by soum or district were centralised instead in the capital city, thus reducing the duties of soums and districts. Although it is provided that, in accordance with the decision of soum Governor, social care and welfare services are to be offered, as we pointed out in Chapter Two, out of 30 types of services only 9 were available in soums.
- 3) Financing of local budget is made in accordance with the classifications specified in Budget Law. However, the functions defined in the LATUG are much more detailed than the list of functions provided in the Budget Law, which leaves the source of funding for provisions outlining 21 powers of Governors of bagh and horoo, and more than 40 common powers of aimag, capital city, soum and district Hural uncertain.

## DELEGATION OF POWERS AND FUNCTIONS

Constitution stipulates that "If the State Great Hural and Government deem it necessary they may delegate some matters within their competence to the aimag and capital city Hural or Governors for their resolution." (Article 62.3)

The comparative study illustrates that the law on delegating the powers also defines the mechanisms for furnishing the data, monitoring and funding that are necessary to exercise certain functions. In addition, the European Charter of Local Self-Government states that "Where powers are delegated to them by a central or regional authority, local authorities shall, insofar as possible, be allowed discretion in adapting their exercise to local conditions" (4.5); "Any administrative supervision of the activities of the local authorities shall normally aim only at ensuring compliance with the law and with constitutional principles. Administrative supervision may however be exercised with regard to expediency by higher-level authorities in respect of tasks the execution of which is delegated to local authorities" (8.2).

The LATUG has two articles on the delegation of powers and functions, which are: powers delegated from the Government to the Governor of aimag and the capital city, and the powers delegated from the Governor of aimag and the capital city to the Governor of soum and district regarding the rule of law, public order, security, protection of human rights and freedoms of citizens in accordance with relevant laws and regulations (Article 29.1.6.i); Unless otherwise provided by law, the Government may delegate some of its functions related to decentralization, development and disbursement of a local budget, as well as regional development planning to aimag and the capital city Hural and Governors (Article 34.2).

However, the aforementioned articles do not contain any conditions outlined in the comparative study.

Any of the government functions is comprised from the combination of actual powers to **provide the services, regulate and invest** channeled through any of the governmental organizations. However, as the proportion of these components varies in each function, there is a need to distinguish which of the functions are mainly related to delivery of services through budgetary institutions such as preschool education or primary school; which are related to decision making and regulatory powers such as urban planning; which are related to financing investments and regulatory powers such as clean water supply.<sup>82</sup>

## CONCLUSIONS

In accordance with Article 58.1 of the Constitution stipulating that aimags, capital city, soums and districts shall be administrative and territorial units with "specifically assigned functions by law", and Article 63.3 providing that the administrative and territorial units, and the powers, structure and procedure of their governing bodies shall be determined by law, the LATUG and other relevant sectoral laws define the allocation of functions. Nevertheless, there is still a need to improve the legal framework in order to strengthen the

<sup>82</sup> UNDP, "Redefining central and local government relations in Mongolia", 2008



accountability system and to eliminate the duplication and uncertainty of powers and functions. These include:

1. Specifically defining the functions of aimag, capital city, soum and district as administrative and territorial units in accordance with Article 58.1 of the Constitution would constitute a first step to eliminate the duplication of functions.
2. In Article 62.2 of the Constitution there is a possibility for overlap of functions for each of three levels of Hurals to make decisions on issues that are not specifically defined in the law and the decisions of higher authorities. Therefore, clearly defining as to which local self-governing body of which level of administrative and territorial unit this provision applies to would be important in eliminating the duplication of functions.
3. Due to uncertainty in the LATUG on principles, criteria and classification for the allocation of functions between three levels of administrative and territorial units (aimag, capital city, soum, district, bagh and horoo), the general law cannot serve as a guidance for sectoral laws.
4. In consideration of the general trend by other countries, where the functions are allocated in terms of administrative and territorial units rather than the subjects of administration, it is necessary to unify the classification of functions stipulated in the LATUG and the Budget law and to resolve the issue of financing of functions accordingly in the future.
5. If the powers of Hural are relatively few, general and mostly declarative in nature such as defining the policy at the respective level of territory on specific issue and monitoring its implementation, then the powers of the Governor are detailed but are sometimes unclear regarding the methods to implement specific powers and duties with insufficient accountability mechanisms to ensure compliance, and contentwise, these are mostly related to organizational duties concerning the implementation of policies.
6. The equal allocation of common powers of all levels of CRH and the Governors of three tiers of administration including aimag and capital city, soum and district, bagh and horoo, is not suitable for populations of urban settlement and rural areas, as well as in terms of the population and resolution of socio-economic issues of the respective units (same as in the case of functions of cities and villages). This issue will be resolved in the case of differentiated allocation of functions in accordance with different ATUs. Furthermore, it is important to avoid definitions such as common powers.
7. There is a need to separate the "local powers and functions" to be implemented autonomously by administrative and territorial units and the powers and functions delegated from the central Government and higher authorities in the law. In this case, the accountability mechanism such as what issues are to be resolved by the ATUs and its local self-governing bodies within its powers, and what issues are to be implemented under the oversight of the Government and higher authorities,

and the consequent financial issues will be clear.

8. Despite the possibility in the Constitution and the LATUG to delegate the powers and functions to lower level organizations, the accompanying issues such as financing, supervision, accountability and so on are left unregulated, which need to be included into the general law.

## COMPARATIVE STUDY: THE PRINCIPLES OF ALLOCATION OF FUNCTIONS

Interaction between local and central authorities is governed by some principles – most of which are laid down in the European Charter of Local Self-Government – that concern both the question of how responsibilities are distributed and/or shared and the mechanisms to facilitate interaction when needed. A first group of substantive principles deals with the assignment of responsibilities: self-government, legality, general competence clause, subsidiarity and delegation of competences. A second group of principles, that can be called instrumental, provide for adequate relationships and the respect of each tier's sphere, once powers and responsibilities are distributed: cooperation, information, consultation, financial sufficiency, monitoring. While the former establishes the position of each authority and their sphere of responsibilities, the latter governs interactions between them.

### A) Principles that deal with the assignment of responsibilities Local self-government

Local self-government is the core principle on which municipal action is based. Article 2 of the European Charter of Local Self-Government establishes that "the principle of local self-government shall be recognised in domestic legislation, and where practicable in the constitution". Self-government, or local autonomy as it is called in several states, constitutes the basis on which the political dimension of local authorities is founded. The principle of local self-government differentiates a local authority as an elective territorial unit with a political dimension and competences of its own from purely administrative divisions. Nevertheless, effective self-government depends on the attribution of a sphere of responsibilities with sufficient financial support and not limited by superior mechanisms of control.

#### Legality principle

Responsibilities of local authorities are defined by law. Legal provisions set up the range and scope of responsibilities. Local authorities are subordinated to these legal mandates (legality principle). The powers given to local authorities should "normally be full and exclusive" (Article 4.4 of the European Charter of Local Self-Government) although legal and financial constraints frequently limit the scope of these responsibilities. Both general and sectoral laws regulate the nature of local responsibilities. Local authorities have, to a varying extent depending on the countries, a regulatory power that must respect the legal framework set by central regulations. That regulatory power is an expression of local self-government and affects issues of municipal responsibility.

Sometimes constitution or legal acts also define the prin-

ciples that govern interactions between local and central authorities (cooperation, information, subsidiary, etc.), although these legal provisions tend to be quite scarce and lacking in sufficient precision. In the Netherlands, institutionalisation of those interactions has occurred via the Code of Inter-administrative Relationships which provides for an extensive regulation of the rules and mechanisms of relations between different authorities.

### **General competence clause**

Allocation of specific powers and responsibilities by law goes together with the recognition of a “general competence clause” that acknowledges the power of local authorities to intervene in any matter of local interest. The general competence clause allows for the enlargement of the domain of local action if it is necessary to serve the interests of the local population. It is difficult to establish the limits as to what comes under “the interests of local population”. In Finland, for example, after some resolutions that initially limited local authorities’ international relations, courts allow certain international contracts to be considered a part of that local agenda by virtue of the general competence clause. In Sweden, the judicial resolutions have led to an interpretation of the general competence clause with influence over local legislation. However, financial constraints and other tiers’ legal responsibilities limit the impact of the general competence clause.

### **Subsidiarity principle**

The general competence clause links in with the subsidiarity principle that establishes a preference in the exercise of competences by those authorities closest to the citizen (Article 4.3 of the European Charter of Local Self-Government). Italy, Portugal, Romania, the Netherlands, Spain and the United Kingdom and “the former Yugoslav Republic of Macedonia” for example, mention subsidiarity as a ruling principle of interaction between central and local authorities.

### **Delegation of competences**

Interaction frequently takes the form of a delegation of competences of the central authorities to the local tier (i.e. Czech Republic, Latvia, Lithuania, Slovak Republic, Spain). Legislation delegating competences usually sets mechanisms of information, monitoring and financing the exercise of those competences. In the Czech Republic, the exercise of delegated competences involves a permanent flow of information between central and local authorities. France’s constitutional reform of 2003 establishes that delegation of competences must be accompanied by the financial resources necessary to exercise those competences (Article 72.2). Portugal also establishes this principles in accordance with the constitutional reforms.

The European Charter of Local Self-government allows for extended “administrative” supervision by higher authorities “in respect of tasks the execution of which is delegated to local authorities” (Article 8.2), while considering that general supervision should be limited to legality compliance. In the event of delegated powers, local authorities exercise those powers on behalf of the state that can set standards of action and monitor not only the lawfulness of that exercise, but also the performance of those delegated powers.

## **B) Principles that provide for adequate interactions**

Instrumental principles provide for adequate relationships and the respect of each tier’s sphere, once powers and responsibilities are distributed.

### **Cooperation**

The principle of cooperation between central and local authorities is present in many states’ constitutional or legal provisions (i.e. Finland, Lithuania, Portugal, Spain). A general mandate of mutual understanding and support to the benefit of citizens underlies this principle. Article 55 of the Spanish Local Regime Act gives a clear perspective of what that principle encompasses: respect for the legitimate exercise by other authorities of their responsibilities; taking into account the full range of public interests when carrying out own competences and, especially, those corresponding to other public authorities; facilitating access of other authorities to relevant information for the development of their responsibilities; giving effective support to the exercise of other authorities’ functions. In Switzerland, cantonal legislation expressly regulates cooperation duties between cantons and municipalities for certain shared competences. In Italy, the principle of “fair collaboration” between different tiers of government is laid down by the Constitution (Article 120, last paragraph). At the regional level the prefect is entitled to carry out activities aimed, inter alia, at ensuring respect for the principle of cooperation between the state (central government) and the region as well as at coordinating measures between central government and local authorities. Article 10 of State Law no.131/2003 explicitly names the prefect as “Government Representative for the relations with the self-government system”.

### **Mutual information and consultation**

The principle of mutual information and consultation (Lithuania, Norway, Slovak Republic, Spain, Switzerland) underlies most of the good practices that can be identified in interactions between local and central authorities. The need for local authorities to be informed of state initiatives as well as to be consulted in the decision-making process favours adequate implementation of public policies. On the other hand, central authorities should have local data in order to design public policies that are relevant to local communities. Prior consultation on local issues is a principle of interaction that can be found in several countries. Consultation can be held on a one-to-one basis or, more frequently, is carried out by central authorities with representative associations of local authorities. On certain issues consultation can be mandatory. Usually those matters with a direct link with local self-government are subject to mandatory consultation: local legislation, budget revenues, taxation policies, territorial changes.

In Bulgaria, Finland, Hungary, Iceland, Malta, Spain and Switzerland, the government bills to the Parliament acts of Parliament concerning local issues must be the subject of consultation with local associations.

Iceland, Hungary and Lithuania also discuss state’s budget revenues with local associations. Budget distribution consultation is sometimes held by government representatives and in some other cases by parliamentary representatives. Institutional changes are the subject of consultation in Lithuania. In Spain, decisions on the

territorial limits of local authorities are discussed with the municipality that is affected by the changes. In the Netherlands, consultation on matters that concern local authorities and legislative changes is established and should be accompanied by an explanatory memorandum if it involves significant amendments to municipal duties.

### Monitoring

Monitoring of local performance is usually limited, as stated in the European Charter of Local Self-government, to lawfulness “ex-post” control. Most countries have administrative or judicial review for local authority decisions. In Denmark, legal supervision is assigned to regional state bodies that give legal advice to municipalities and can even sanction breaches of law. The sanctions that may be imposed are annulment, suspension, default fines and action for damages.

Expediency monitoring is carried out for delegated powers, either by prior set standards to be respected by local authorities or by evaluation mechanisms once the delegated powers are put in place. However, the European Charter limits expediency monitoring to those cases since it should be an exceptional practice. In some states, it actually goes beyond delegated powers. In Luxembourg, district commissaries have extensive supervisory functions and play an important role in the interaction between local and central authorities.

The principle of proportionality ensures that controls by central authorities are performed in such a way that any interference does not exceed the importance of the interest defended (i.e. Lithuania). In France, constitutional reforms in 2003 established that no territorial authority may exercise control over another territorial authority. In decentralised states central monitoring is usually assigned to regional authorities than state authorities.

In some cases, local legislation provides for the dismissal or substitution of local authorities in the event of severe violations of their responsibilities which infringe the interests of their citizens (i.e. England, Italy, Latvia, Luxembourg, Spain). Such extreme measures, which are contrary to the principle of local self-government, are usually regulated to ensure they are applied only in exceptional circumstances. In Spain, for instance, central government, after consultation with the autonomous regional authorities and Senate’s approval, can issue a decree for the dissolution of local authorities that have severely damaged the management of general interests against constitutional mandates. In 2006, local authorities of Marbella were suspended because of illegal financial operations that led to bankruptcy. In the Netherlands, an Act regulates local authority replacement, but only after they have been given a second chance to take the decisions that they had failed to take before. In Italy, according to specific provisions of the Consolidated law of local authorities’ legal framework, the prefect may suspend from office any mayor, provincial chairperson or member of a Giunta or council who has committed offences of an exceptional nature. The mentioned municipal or provincial organs can be removed from office by a decree of the Minister of the Interior for committing unconstitutional acts, for seriously and persistently violating the law, or for seriously endangering security.

### Financial sufficiency

The principle of financial sufficiency provides for adequate incomes for local authorities in order to exercise the powers and responsibilities that define self-government. Acute differences in local incomes, their nature and origin can be found across Europe. In some states local taxation accounts for a significant part of local incomes (Finland, Switzerland, Sweden, Denmark) while in other cases central budgetary provisions constitute the main contribution to local incomes.

Financial sufficiency is linked to the principle of local self-government, as full exercise of own responsibilities requires unconditional financial support. In Switzerland, financial sufficiency is guaranteed by a system of cantonal financial equalisation. This system tries to maintain an adequate level of local incomes for carrying out tasks and to prevent significant disparities between local authorities. In Finland, financial sufficiency is guaranteed by a system of equalisation of the state grants. This system guarantees every municipality the resources necessary for organising the basic services. In Denmark, there is a system of budget cooperation between central government and local authorities that defines the budget on a negotiated basis. All the principles described constitute the framework for good practices in the relationships between central and local authorities.

### Functional allocation

Organisation for Economic Cooperation and Development (OECD) and United Cities and Local Government jointly produced a report comparing the subnational government structure and finances in 101 countries in the world in 2016.<sup>83</sup> Country profiles including the detailed information on subnational government structure and responsibilities of each countries can be accessed through the following link: <http://www.oecd.org/cfe/regional-policy/sngs-around-the-world.htm>.

As stated in the report, distribution of responsibilities across levels of government shows a wide diversity between countries. However, some general schemes emerge. In most federal countries, federal governments have exclusive and listed competences (foreign policy, defence, money, criminal justice, etc.) while state governments have wider responsibilities. In unitary countries, the assignment of responsibilities is generally defined by national laws, referring sometimes to the general clause of competence or “subsidiarity principle”, especially for the municipal level.

Laws can also define whether a subnational responsibility is an exclusive local function, a delegated task on behalf of the central government or a shared responsibility with another institutional government level. In addition, these are classified whether the tasks can be mandatory or optional.

According to this report, the breakdown of competences between central/federal government and subnational governments as well as across subnational government levels is particularly complex in many countries, leading sometimes to competing and overlapping competences and a lack of visibility and accountability concerning public policies.

<sup>83</sup> OECD/UCLG (2016). Subnational Governments around the world: Structure and finance.

## Breakdown of responsibilities across subnational government levels: A general scheme

MUNICIPAL LEVEL	INTERMEDIATE LEVEL	REGIONAL LEVEL
<p><b>A wide range of responsibilities:</b></p> <ul style="list-style-type: none"> <li>...General clause of competence</li> <li>...Eventually, additional allocations by the law</li> </ul> <p><b>Community services:</b></p> <ul style="list-style-type: none"> <li>...Education (nursery schools, pre-elementary and primary education)</li> <li>...Urban planning and management</li> <li>...Local utility networks (water, sewerage, waste, hygiene, etc.)</li> <li>...Local roads and city public transport</li> <li>...Social affairs (support for families and children, elderly, disabled, poverty, social benefits, etc.)</li> <li>...Primary and preventative health-care</li> <li>...Recreation (sport) and culture</li> <li>...Public order and safety (municipal police, fire brigades)</li> <li>...Local economic development, tourism, trade fairs</li> <li>...Environment (green areas)</li> <li>...Social housing</li> <li>...Administrative and permit services</li> </ul>	<p><b>Specialised and more limited responsibilities of supra-municipal interest</b></p> <p><b>An important role of assistance towards small municipalities</b></p> <p><b>May exercise responsibilities delegated by the regions and central government.</b></p> <p><b>Responsibilities determined by the functional level and the geographic area:</b></p> <ul style="list-style-type: none"> <li>...Secondary or specialised education</li> <li>...Supra-municipal social and youth welfare</li> <li>...Secondary hospitals</li> <li>...Waste collection and treatment</li> <li>...Secondary roads and public transport</li> <li>...Environment</li> </ul>	<p><b>Heterogenous and more or less extensive responsibilities depending on countries (in particular, federal vs unitary)</b></p> <p><b>Services of regional interest:</b></p> <ul style="list-style-type: none"> <li>...Secondary/higher education and professional training</li> <li>...Spatial planning</li> <li>...Regional economic development and innovation</li> <li>...Health (secondary care and hospitals)</li> <li>...Social affairs, e.g. employment services, training, inclusion, support to special groups, etc.</li> <li>...Regional roads and public transport</li> <li>...Culture, heritage and tourism</li> <li>...Environmental protection</li> <li>...Social housing</li> <li>...Public order and safety (e.g. regional police, civil protection)</li> <li>...Local government supervision (in federal countries)</li> </ul>

Source: OECD, Regions at a glance, 2016, OECD Publishing Paris. [http://dx.doi.org/10.1787/reg\\_glance-2016-en](http://dx.doi.org/10.1787/reg_glance-2016-en)



## Chapter Six

# LATUG AND ITS RELATIONSHIP WITH OTHER LAWS

### INTRODUCTION

Local government relations are governed by the Constitution, on the basis of which these become broad-based relations regulated by multiple laws and encompassing various fields of management. Under the public law there are no relations, where the governments of administrative and territorial units or subjects of local government (Hural, Governor, local agencies of central public administration authority) do not participate or do not have any duties. The duty of the legislature is to adopt proper legislation in an orderly and sequential manner in order to regulate the multifaceted social relations demanding local government involvement.

Principles of actions, functions and powers (competencies) of the local self-governing body as the public administrative institution within specific fields and scope are regulated by sectoral laws. In the process of revision and amendment of these laws or enactment of new laws, it is of a theoretical and practical significance to incorporate sectoral features based on the “general” law of local government.

In the process of analyzing the harmonization of the LATUG with other sectoral laws the research team made a compilation of articles defining the competencies and powers assigned to local governments of 197 individual laws.<sup>84</sup> Based on this compilation, a general overview was made on the instances of overlaps,<sup>85</sup> contradictions,<sup>86</sup> and gaps<sup>87</sup> between the general law and special laws defining the powers of Hural and Governor provided in the LATUG, and thus made recommendations on how to address from the perspective of codification of legal acts. However, it should be pointed out that determining the overlaps, contradictions and gaps between all laws of Mongolia is a monumental task, which is beyond the scope of this study.

### ANALYSIS

In conducting the aforementioned analysis, the research team divided into 8 groups the powers of aimag, the capital city, soum, district, bagh and horoo Hurals, the Governors’ common powers, and powers of aimag, the capital city, soum, district, bagh and horoo Governors specified in Articles 17-22 and 28-31 of the LATUG, which were grouped into approximately 20 Articles each, and the conclusions of the comparative analysis were drawn in accordance

with the following method.

*Law of Mongolia on  
Administrative and  
Territorial Units and  
their Governance*

*Articles and provisions  
of the law with specific  
regulations*

*Commentary  
(Articles on overlaps,  
contradictions or gaps, or  
those that are not directly  
related but could be  
related)*

The research team members compared each of the provisions defining the powers of Hural and Governor in the LATUG with special laws and made the relevant conclusions regarding overlaps, contradictions and gaps. As the full analysis cannot be included in the study, we considered that the following general trend exists in relation to the harmonization of the LATUG with other sectoral laws, and each of these is illustrated with relevant examples. Consequently, the comparison revealed that the law (general) that is currently in force contains many references, and there is a difficulty in separately applying it to the three levels of administrative and territorial units.

**1. There is an example on expanding the provision of the LATUG in special law.** Powers stipulated in Articles 29.1.3.j, 29.1.3.h, 29.1.3.k of the LATUG are regulated by Article 60 of the Law on Land, Article 15 of the Subsoil Law, and Article 29 of the Law on Special Protected Areas.

This example illustrates how the LATUG (general law) stipulates the powers of the local self-government in general terms, which are specified in “detail” by the relevant special or sectoral laws.

**2. The provision of the LATUG is legislated in exact words in sectoral laws.** For example:

Article 16 of the Law on the Protection of Cultural Heritage. Powers of the Governors of aimag and the capital City. 16.1 The Governors of aimag and the capital city shall have the following powers regarding the protection of cultural heritage: 16.1.1 to organize tasks to implement the legislation concerning the protection of cultural heritage as well as decrees issued by the Government, Citizens’ Representatives Hurals and higher authorities;

Law on Health. Article 11. Powers of all levels of Governors.

11.1 Aimag or the capital city Governor shall exercise the following powers in order to protect and promote population

<sup>84</sup> Out of 649 laws that are currently in force, the research team included 197 laws into this compilation; therefore, it is impossible to consider that all the laws defining local government competencies are compiled. Also it should be pointed out that in the process of compiling these laws, the legislations were undergoing changes.

<sup>85</sup> Overlap is understood to mean similar regulation of one type of relations by two different laws;

<sup>86</sup> Contradiction is understood to mean different regulation of one type of relations by two different laws;

<sup>87</sup> Gap is understood to mean that one type of relations are left unregulated by law, respectively.

health: 11.1.1 Organize tasks to implement decisions made by the Government and local self-governing bodies in relation to the implementation of the health legislation in their respective territories;

### 3. The powers stipulated in the LATUG were not regulated in detail or not regulated at all in special laws.

It has two types: 1) There is a total absence of the powers stipulated in the LATUG in special laws;<sup>88</sup> 2) There is a specific provision but the content is omitted.

An example of the first type: The powers provided in Article 29.1.2 of the LATUG, stating that “determine the amount and scope of the use, possession and disbursement of assets granted to local legal entities” were not reflected in detail in special laws.

On the other hand, an example of the specific provision stipulated in the LATUG, the content of which is omitted in special laws: Article 30.1.11 enacts that aimag or the capital city Governor, if provided by legislation, has the powers to appoint and dismiss a chair of locally owned or partially locally owned legal entities in consultation with Hural. However, Article 78.2 of the Law on State and Local Property stipulates that “The Governor has the powers to appoint the chair of the locally owned legal entity”. This provision omits the original article’s content on the dismissal of the chair.

### 4. Formulation of some concepts provided in the LATUG is uncertain in special laws.

An example is illustrated by the comparison table of Article 29.1.1.f of the LATUG on powers with Article 27<sup>1</sup> of the General Law of Taxation.

LATUG	GENERAL LAW OF TAXATION	COMMENTARY
Article 29. Common powers of aimag, the capital city, soum and district Governor 29.1. The Governor of aimag, the capital city, soum and district shall have the following common powers within the territory of the respective administrative unit: 29.1.1. Planning, budget, financing and accounting matters: f) to provide respective administrative unit’s taxation authority with management, organize collection and transfer of tax revenues stipulated by legislation and relevant Hural decisions.	Article 27 <sup>1</sup> . Management of the Taxation Authority and its powers 27 <sup>1</sup> .4. The head of aimag and the capital city tax departments shall be appointed and dismissed by the head of the central public administration authority in charge of taxes, head of district tax departments by the head of the capital city tax department based on consensus to be reached with the relevant level Governor.	As the management does not contain direct appointment and dismissal powers, these were turned into the right of consensus.  The General Law of Taxation does not contain a provision on the Governor being in charge of organizing the collection and transfer of tax revenues.

### 5. There are many articles in special laws that overly generalize the powers of concrete subjects of local self- government defined in the LATUG as those of the local administrative body or local self- governing body.

As an example, comparative analysis of Article 31.1.4 of the LATUG and Article 12 of the Minerals Law are provided in the following table.

LATUG	GENERAL LAW OF TAXATION	COMMENTARY
Article 31. Powers of soum and district Governor 31.1. In addition to the common powers specified in Article 29 of this law, Governor of soum and district shall exercise the following powers: 31.1.4. to grant a land parcel in accordance with exploration and mining license from the competent authority;	Article 12. Powers of local administrative and self- governing bodies 12.1. Local administrative and self-governing bodies shall implement the following powers with regard to mineral issues: 12.1.1. Ensure implementation of minerals legislation and relevant regulations of the Government in their respective territories;	The general statement on local administrative and self- governing bodies in the Minerals Law does not clarify as to which level of administrative and territorial unit it refers to.

<sup>88</sup> The research team considers the “gaps” to mean lack of detailed regulations of the general or fundamental provisions of the LATUG in special laws.

**6. Despite the lack of specific provisions in the LATUG, there are articles that are stipulated in general terms in other laws.** For example:

<b>LAW ON ALCOHOL PREVENTION AND CONTROL</b> (Revised)	Article 9. Advertising against alcoholism 9.1. Central public administration authority, local administrative body, health, media, cultural and educational institutions have a duty to publicize all types of advertisements to combat alcoholism and promote awareness on its dangers to the public.
<b>FIRE SAFETY LAW</b> (Revised)	Article 14. Voluntary firefighting unit 14.1. A voluntary firefighting unit will be set up on a voluntary basis at the initiative of the local administrative body and its activities will be limited to object's or forest and field fire prevention and fire fighting operations.

**7. In recently adopted legislations there is a tendency to assign the functions and powers to both the local self-governing body (Hural) and local administrative body (Governor) without differentiation and to leave the obligations in between these two bodies.** For example:

*Law on Nuclear Energy. Article 13. Powers of local administrative and self-governing bodies*

13.1. *With regard to issues of radioactive minerals and nuclear energy, local administrative and self-governing bodies shall execute the following powers:*

13.1.1. *Organize implementation of decisions issued by the Government in connection with the legislation on nuclear energy and ensure its execution on its respective territory;*

13.1.2. *Permit use of the respective territory under exploration and mining licenses of radioactive minerals in line with the purposes and eliminate existing violations;*

13.1.3. *Control the course of implementation by the license holder of their obligations in respect of environmental protection, reclamation, protection of human health and payment to local budget;*

13.1.4. *Conduct training and advertising on its respective territory about ensuring nuclear and radioactive protection and safety, and prevention from radiation accident.*

**8. It is common for the special law to define the powers of the local self-government, which is not reflected or incorporated into the LATUG.**

For example: Article 13.1.2 of the Law on Water provides that "The soum and district Governor shall have the powers to conclude a contract with Mongolian citizens, business entities and institutions for the exploitation of spring water and to monitor its implementation." Such provision is absent in the LATUG.

This can be justified on the grounds that, on the one hand, each of the powers provided in special laws (197 laws included in the study) cannot be incorporated into the LATUG or there is no need to include them. On the other hand, the **general** common practice of regulating the sector-specific powers in the special laws is more appropriate to today's practice.

**9. Two entities in charge of one function were created, where in accordance with the LATUG powers allocated to aimag, the capital city, soum and district Governor were also delegated to other subjects in other sectoral laws.**

For example: The powers of the city and village Mayor specified in Articles 17-23 of the Law on Legal Status of Cities and Villages are basically duplications of the powers of aimag, the capital city, soum and district Governors, as provided in Articles 29, 31 of the LATUG, and thus the differences and scope of their powers and functions were not defined. This, on the one hand, is related to the fact that the Governor of the respective level is in charge of implementing the duties of the Mayor of cities and villages, as stipulated in the Law on Legal Status of Cities and Villages, but, on the other hand, this demonstrates the failure to this day to fully define and regulate the legal status of cities and villages and their self-governing bodies in the spirit of Articles 57.2 of the Constitution and Article 4.3 of the Appendix to the Constitution. This issue needs to be further studied in detail, whereby the legal status of cities and villages should be clearly defined and differentiated from the powers and functions of the Governor. Thus, it is of paramount importance to consider carefully and decide on local initiatives raised on numerous occasions to designate the status of administrative and territorial unit to cities.

**10. In addition to the overlapping of powers of local governments stipulated in the LATUG and other sectoral laws, there are many instances of overlaps and duplication of powers of aimag, the capital city, soum, and district Hural with those of the Governors of respective levels.**

The possibility to make a decision on one issue that is effective in one territory by two different levels of entities creates overlaps and duplications. We consider that one of the root causes is related to the regulations of the so-called common powers of aimag, the capital city, soum and district Governors, as stipulated in Article 29 of the LATUG.

Furthermore, Article 30.1 of the LATUG provides that "In addition to the common powers specified in Article 29 of this law, the Governor of aimag and the capital city shall exercise the following powers", and Article 31.1 states that "In addition to the common powers specified in Article 29 of this law, Governor of soum and district shall exercise the following powers". The fact that initially, the

common powers are specified, after which the powers of Governors of all levels are provided, creates a possibility for the higher level Governor to make overlapping and contradicting decisions on issues falling under the authority of the lower level Governor.

## CONCLUSIONS

1. The analysis of the system of legislation regulating local government relations has been neglected for the past few years. Our study has demonstrated that this task cannot be completed by a single project, and thus in the future this issue needs to be studied in-depth by the team comprising from the officers of the Parliament Secretariat, the Cabinet Secretariat, the Ministry of Justice and Internal Affairs and other ministries.

2. As provided in Article 63.3 of the Constitution, stating that “Administrative and territorial units, and the powers, structure and procedure of their governing bodies shall be determined by law”, in adopting the law on local government it is necessary to determine the principles regarding which of the relations are to be governed by the general (local government) law, and which are to be regulated by special laws. We consider that a commentary is required on whether the term “...by law” of the above Constitutional provision should mean one law, or legislation.

3. It is necessary to change the structure of the LATUG to that of the special law on local government, to discontinue imposing authority without any principle or criteria, and to enforce certain powers only by special laws.

4. In terms of the hierarchy of legislation, the principle should be adhered, whereby the LATUG as a sectoral law should be a general law. For the “general” law instead of defining the specific powers of local authorities it is better to transition to the practice, where it regulates fundamental relations based on which special laws define powers.

5. Due to detailed incorporation of sector-specific functions into the LATUG there is a need to amend the organic law each time an amendment is made to the sectoral law even if it is a minor technical amendment. This, in turn, will affect the stable enforcement of organic law. Instead of detailed regulations on sector-specific functions in the LATUG, we consider that by incorporating the principle of delegation of functions there will not be any more overlaps and contradictions with special law.

6. It is appropriate to differentiate the functions of each of the administrative and territorial unit in the LATUG, to define which issues fall under the duties of aimag, the capital city, soum, district, bagh and horoo, and in drafting the sectoral law, distinguish clearly what Hurals or Governors do in each of their respective administrative and territorial unit in accordance with this delegation.

7. In any case (in accordance with general or special laws), in defining the powers of local authorities, practice on the so-called “common powers” should be avoided.

The research team reached the aforementioned conclusions on the basis of the findings of the study on the practice of some

foreign countries in relation to their approach in regulating local government affairs from the perspective of codification of legal acts, and the principle adhered to in delegating functions (*See appendix to this Chapter “Comparative Study: The System of Legislation”*).

## COMPARATIVE STUDY: THE SYSTEM OF LEGISLATION

### Constitutional arrangements<sup>89</sup>

The constitution of federal states can provide detailed regulation of local government (Austria, Mexico), establish general principles of formation and competence of local authorities (Germany, India) or simply avoid any provisions regarding this issue leaving the legal implications related to local administration to federal units (US, Australia, Canada).

Article 28.1 of 1949 Constitution of Germany states that “in the lands, counties and communities people shall have representative bodies formed by general, direct, free, equal and secret elections”, while Article 28.2 of the Basic Law provides that “Municipalities must be guaranteed the right to regulate all local affairs on their own responsibility within the limits prescribed by the laws... The guarantee of self-government shall extend to the bases of financial autonomy; these bases shall include the right of municipalities to a source of tax revenues based upon economic ability and the right to establish the rates at which these sources shall be taxed”. The guarantee of local autonomy prohibits federal and Land law from removing the rights of the local authorities to manage their own affairs or from restricting this right to such an extent that the substance of the autonomy is taken away from within.

There is an extensive practice of the Federal Constitutional Court of Germany concerning the scope and limits of local government. These include: (i) local government is in principle responsible for all affairs within its territory; (ii) local self-government has two dimensions: one administrative (*Selbstverwaltung als Verwaltungsmodus*) and the other functional (*Selbstverwaltungsaufgaben*). The administrative dimension relates to a municipality’s management powers, power to appoint staff, power to make by-laws, power to administer its own finances, and zoning and planning powers. These powers are not dependent on enabling legislation but come from the Basic Law. Other powers are conferred by Land law. According to the principle of all-responsibility of the municipalities, municipalities are also in charge of all those competencies within their territory that are not explicitly distributed to a land or the federation.

The scope of constitutional regulations of local government also varies in unitary states.

The French Constitution is very brief in this respect (Article 72). It only states that territorial communities of the Republic shall be the communes, the departments, regions, the special-status communities and the overseas territorial communities. Territorial communities may make decisions in all matters arising under powers that can best be exercised at their level. In the conditions provided for by statute, these communities shall be self-governing through

<sup>89</sup> Elena Vodyanitskaya, Local Government, Oxford Constitutional

Law, <http://oxcon.oup.com/view/10.1093/law-mpeccol/law-mpeccol-e365>



elected councils and shall have power to make regulations for matters coming within their jurisdiction. No territorial community may exercise authority over another. However, where the exercising of a power requires the combined action of several territorial communities, one of these communities or one of their associations may be authorized by statute to organize such combined action. In the territorial communities of the Republic, the State representative, representing each of the Member of the Government, shall be responsible for national interests, administrative supervision and compliance with the law. In addition to declaring the subsidiarity principles through these provisions, the constitutional revision of 2003 strengthened the constitutional safeguards surrounding the liberty and the general competency principles. In accordance with 2008 revision, the department and regions are losing their general competencies, and in order to eliminate dual financing, there is a prevalent tendency for only communes (the lowest administrative unit) with special functions to maintain their general competencies acquired through the Municipal Act adopted in 1884.

In no European countries are local authority functions defined by the constitution, for they are a matter for the law. Constitutions contain at most a general form of words characterising the nature of local functions, by reference to the nature of local self-government or to the management of local authority affairs. Austria differs in that it is the only country that details the powers exercised by municipalities for the performance of their functions in its Constitution (Article 118), but it does not indicate the subject matter of those powers. In the United Kingdom, the status of regional authorities is determined by ordinary legislation, since there is no written constitution to provide otherwise.

The same is true of the legal system of federate entities. The constitutions of the members of federation do not contain any more provisions on local functions: it is in regional legislation that provisions relating to local authority functions can be found.

### **General competence clause<sup>90</sup>**

Almost all European states now, either in their constitutions or in their legislation, acknowledge the general nature of municipalities' competence. Whatever wording is used, the "general competence clause" is always indeterminate, for it implies freedom, rather than being a principle for the attribution of functions. It means that the municipality may act in any matter, subject to its action meeting a local interest, complying with the law and not impinging on the powers of another central or subnational authority.

In the United Kingdom, where the doctrine of *ultra vires* is applied to local authority acts (meaning that councils can only do what they are expressly empowered to do by law), section 2 of the Local Government Act 2000 now grants local authorities general power to promote the economic, social and environmental well-being of their area. The restrictions in section 3 of this act are comparable to those found in countries whose law expressly includes a general competence clause, but local authorities are not allowed to borrow in

order to exercise this freedom. However, this last restriction seems to have been eased by the Local Government Act 2003, which allows local authorities to borrow freely for their capital expenditure on any functions conferred on them by law, subject to compliance with prudential rules.

At the intermediate level, the situation varies more. In some countries (such as Sweden), the general competence clause benefits all local authorities, which does not preclude specialised functions, since it is of a residual nature; local authorities at intermediate level in other countries exercise only those powers attributed to them by law or delegated to them by municipalities (examples being Germany, Spain, Hungary and Poland). In Germany, the legislation of the Land law usually defines the powers of counties (*Kreise*) in greater detail than does Article 28 of the Basic Law.

The general nature of municipalities' powers does not prevent the law from assigning municipalities specific functions, and the scope of the freedom of action which they enjoy to exercise these also gives an indication of their independence. In practice, activities performed under the general competence clause are always of a residual nature in all the functions exercised; the volume of activity chiefly consists of functions determined or regulated by law.

### **Law on Local Government Organic laws**

The substance of local functions thus derives from general legislation on local authorities and from numerous sectoral laws which regulate the substance of local functions in the relevant sectoral law areas. As this sectoral legislation may be restrictive, efforts have sometimes been made to protect local functions from such interference. In Hungary, for example, Law of 1990 on Local Authorities defines the fields of local functions and, according to the Constitution, this law can be amended only by a two-thirds majority. In Russia, the Law of 2003 on Local Self-Government stipulates that the functions of the local authorities which it sets up (sections 13-15) can be amended only by an explicit amendment of this law itself, although this is only an ordinary legislative provision.

Although it is impossible to be aware in detail on how the regulations between the general and sectoral laws are reflected, and the contentual difference of these laws to the general law, there are few countries with organic laws on local governance. Few countries such as the General Law on Local Authorities in Spain, Organic Law of Georgia: Local Self-government Code, Local Government Organic Law of China, Organic Law on Provincial and Local Government of Papua New Guinea, the laws of Albania and Liberia.

### **General laws**

Our research team studied the titles of the local governance laws of countries, which revealed that the law with a brief title Local Government Act exists in countries such as Australia, Malaysia, New Zealand, UK, Ireland and Japan.

<sup>90</sup> Gerard Marcou, "Local Authority Competences in Europe (Study of the European Committee on Local and Regional Democracy" (Democracy and Political Affairs, Council of Europe, 2007)

### Regulatory power of local authority

Regulatory power is the power given to an administrative authority to lay down general and impersonal rules and regulations establishing or amending the rights or obligations of subjects of law within its jurisdiction, within the limits of its powers and on the basis of legislative provisions or regulations laid down by higher administrative authorities. This is the power termed “standard-setting power” in many countries. It is a derived, never an initial, power.

The term “standard-setting power” goes back to the old theory of substantive law and is used in many countries, from Portugal to Russia. In Spain, the standard-setting power of local authorities, which stems from section 4 of the General Law on Local Authorities, but is also a legal consequence of the autonomy principle enshrined in Article 137 of the Constitution, is described as a regulatory power. This regulatory power is exercised in pursuance of national or regional legislation, but is also used to regulate the functioning or use of local infrastructure and public services, or in the context of the authorities’ general competence, insofar as this does not impinge on the powers of other administrative authorities.

In hierarchical terms, local regulations rank below regulations enacted by national or regional authorities as part of their own responsibilities; a different case is that of what are called implementing regulations, which relate to the local authority’s own organization, and which are directly subordinate to general law and, possibly, to regional law on local authorities.

The position is similar in Italy. While the 2001 revision of the Constitution gives the municipalities regulatory power with respect to the “organization and fulfillment of the functions assigned to them”, but it assigns regulatory power to the state in matters for which it holds sole legislative power and to the regions in all other matters, so it falls under the jurisdiction of the regions’ regulatory power.

## Chapter Seven

# ECONOMIC BASIS OF ADMINISTRATIVE AND TERRITORIAL UNITS

### INTRODUCTION

The following questions need to be answered with respect to regulation of central-local financial relations. These include:<sup>91</sup>

- 1) Who does what? – the question of expenditure assignment (functions).
- 2) Who levies what taxes? – the question of revenue assignment.
- 3) How is any imbalance between the revenues and expenditures of sub-national governments that results from the answers to the first two questions to be resolved? – the question of vertical imbalance.
- 4) To what extent should fiscal institutions attempt to adjust for the differences in needs and capacities between different governmental units at the same level of government? – the question of horizontal imbalance, or equalization.

It can be concluded that both the Constitution of Mongolia and the LATUG left the regulation of the aforementioned relations incomplete. Today, all with the exception of 4 aimags (Darhan-Uul, Dornogobi, Orhon, Umnugobi) out of 21 aimags of Mongolia and Ulaanbaatar city, are dependent on the state budget funding; the majority of 330 soums have inadequate revenue sources and cannot maintain their economic autonomy. There are frequent criticisms on the limited powers of local authorities to manage their own budget and properties, the Ministry of Finance sets strict rules and regulations on budget allocation, and the lack of finances and budget to cover the operation expenses of Citizens' Representative Hural and the general meetings of citizens, and many local proposals are advanced to amend the Laws on Budget and Taxation.

There is an urgent need to analyze the current allocation of revenues and expenditures in administrative and territorial units, to increase the local financial capacity, and to carry out legal reforms to improve the central-local fiscal relations. This topic requires separate, full-scale and comprehensive analysis. Therefore, the analysis of the research team is restricted to the regulations of the Constitution and the LATUG alone.

### CONSTITUTIONAL ARRANGEMENTS

Basically, there are no articles in the Constitution that define the economic basis of ATUs, and Mongolian lawyers and scholars (e.g. B.Chimid<sup>92</sup>) consider that Article 58.1 of the Constitution, which states that “*Aimags, the capital city, soums and districts are administrative, territorial, economic and social complexes with their functions and administrations provided by law*”, is a provision that guarantees the basis for the development of local governments. However, some members of our research team, in particular, Ts.Davaadulam has concluded that this “article has not been applied” with this exact meaning. Her justifications are: 1) Because it is unclear what is meant by “economic and social complex” this provision cannot be used to properly determine the division of ATUs in line with economic, social and population changes, i.e. it cannot be used as a means to amalgamate the economically unviable soums. “In the process of developing the draft Constitution, discussions evolved on the development of the administrative unit into the complex and to establish it as a competent subject with relatively independent functions after overcoming the economic crisis”;<sup>93</sup> however, this goal presently remains unfulfilled, and currently, due to population movements units with small populations and weak economic infrastructure continue to increase, and huge administrative structure inherited from socialist economic structure remain to this day; 2) Lack of determination on functional allocation and funding principles; 3) Therefore, local government organizations cannot use this provision to seek judicial remedy in respect of the free exercise of their competencies.<sup>94</sup>

We emphasized in Chapter Four that today the issue on ensuring the local budget autonomy constitutes an important role in constitutions. The following are some of examples of constitutions of foreign countries that define the economic basis of local governments.

#### Constitution of the Federal Republic of Germany:

##### Article 28.2 on the autonomy of municipalities:

*Municipalities must be granted the right to regulate all local affairs on their own responsibility, within the limits prescribed by the law... The guarantee of self-government shall extend to the bases of financial autonomy; these bases shall include the right of municipalities to a source of tax revenues based upon*

<sup>91</sup> Richard Bird, Intergovernmental fiscal relations: Universal principles, local applications. Working paper, Georgia State University, 2000.

<sup>92</sup> B.Chimid, Constitutional knowledge, 2008, p.354. B.Chimid, the Conceptions of the Constitution, Volume I, 2002, p.166.

<sup>93</sup> Study by independent experts on “The role of the Constitution of Mongolia in consolidating democracy: Analysis”, Parliament Secretariat and UNDP commissioned research, 2015.

<sup>94</sup> Ts.Davaadulam, Local Governance: Challenges and Solutions National Forum Proceedings, 2016, p.55.

*economic liability and the right to establish the rates at which these sources shall be taxed.*

*Article 106 on the apportionment of tax revenue:*

*(5) A share of the revenue from the income tax shall accrue to the municipalities, to be passed on by the Lander to their municipalities on the basis of the income taxes paid by their inhabitants. Details shall be regulated by a federal law requiring the consent of the Bundesrat. This law may provide that municipalities may establish supplementary or reduced rates with respect to their share of the tax.*

*(5a) From and after 1 January 1998, a share of the revenue from the turnover tax shall accrue to the municipalities. It shall be passed on by the Lander to their municipalities on the basis of a formula reflecting geographical and economic factors. Details shall be regulated by a federal law requiring the consent of the Bundesrat.*

*(6) Revenue from taxes on real property and trades shall accrue to the municipalities; revenue from local taxes on consumption and expenditures shall accrue to the municipalities or, as may be provided for by Land legislation, to associations or municipalities. Municipalities shall be authorized to establish the rates at which taxes on real property and trades are levied, within the framework of the laws...*

#### Constitution of Poland: Article 165.

- 1. Units of local government shall possess legal personality. They shall have rights of ownership and other property rights.*
- 2. The self-governing nature of units of local government shall be protected by the courts.*

*Article 167.*

- 1. Units of local government shall be assured public funds adequate for the performance of the duties assigned to them.*

*Article 168.*

*To the extent established by statute, units of local government shall have the right to set the level of local taxes and charges.*

#### Chapter 8 on "Local Self-Government" of the Constitution of Japan:

*Article 92. Regulations concerning organization and operation of local public entities shall be fixed by law in accordance with the principle of local autonomy.*

*Article 94. Local public entities shall have the right to manage their property, affairs and administration and to enact their own regulations within law.*

## DEFINITION OF ECONOMIC BASIS OF ADMINISTRATIVE AND TERRITORIAL UNITS

Article 5 of the LATUG stipulates that "The economic foundation of the administrative and territorial units shall consist of land, its subsoil, natural resources, local properties, accumulated assets from production and service revenues of all kinds of property, local taxes, fees and tariffs provided by law."

From the economic perspective, the land should be divided into the land owned by the state, aimag, the capital city, soum and district. However, there is still lack of detailed regulations regarding this provision of the law in any other laws.

Local tax includes taxes where: 1) tax base is determined locally, 2) tax rate is determined locally, 3) locally collected, 4) revenue is locally accumulated. However, in reality only one or two characteristics exist for many types of taxes. In the theory of government finance, there is a concept of "good local tax". These include taxes that are: 1) easy to collect at the local level, 2) only collected from local residents, 3) do not create inter-regional or central-local competitions. However, the only taxes that meet this strict criteria are the property taxes. This theoretical conclusion is consistent with the interests of most governments to continue to service the highly profitable trade and income taxes as the centralized budget revenue, and this approach internationally became a tradition.<sup>95</sup>

Article 7.4 of the General Law on Taxation defines "local taxes" as the taxes, the rates of which are determined by the Citizens' Representative Hural, and that are to be concentrated in local budgets or enforced in local areas.

1. personal income tax;
2. income tax of individuals engaged in work and services, income of which cannot be immediately determined;
3. immovable property tax;
4. state stamp duty;
5. tax on auto and self-propelling vehicles;
6. charges on permit to use natural resources other than minerals;
7. charges on the use of commonly occurring minerals;
8. land charges;
9. gun duty;
10. tax on dogs;
11. tax on inheritance and gifts;
12. charges on waste management services;
13. charges on the use of natural resources.

The above are classified as the tax and non-tax revenue of aimag, capital city, soum and district in Articles 23.6, 23.7, 23.8, 23.9 of the Law on Budget.

There is no unified state data showing how the local revenue is generated in each of the administrative and territorial units in accordance with the aforementioned provisions. The following examples serve to illustrate the reality of tax revenue generation in soums.

<sup>95</sup> Richard Bird, Intergovernmental fiscal relations: Universal principles, local applications. Working paper, Georgia State University, 2000.



**The reality of tax revenue generation in soums**

*According to the law, 13 types of revenue should be collected for soum budget. The soums, where revenue is collected from salt and hunting taxes, accumulate a rather small revenue. In reality only the revenue from gun duty and 10 percent of the savings interest go into soums. Gun duty increased from 4,000 to 30,000, while the courtyard flint gun duty increased to 60,000. No revenue is generated from guns. Revenue from the use of commonly occurring minerals do not go into soums. This is due to Government resolution, which states that the companies that build the road according to the Millennium development road, shall not be taxed. It is absolutely impossible to generate revenue from the commonly occurring minerals in soums and aimags. When it comes to law, the real sources or the business entities with special environmental permits do not exist in either soum or aimag. One would be accused of robbing money from the person if one directly demands the charges on the use of environmental resources. There are no construction companies with queries to pay revenue for the use of commonly occurring minerals. Therefore, we receive payments for the use of commonly occurring minerals in accordance with cargo capacity. This is done in accordance with the resolution of the Ministry of Finance. Our legal regulations look into the rural life from an overly excessive glassball; thus, the copied foreign laws are too big to fit our reality.*

*From the minutes of the discussion conducted in Uvs aimag*

The only revenue, which is determined by the CRH of soum, collected by soum and the profits from which 100 percent stay in soum, is the waste management service fee.

**The percentage of immovable property tax and land charges collected from citizens is too little.** Optimally, this tax should be collected from the residents of cities and other settled areas, where the tax revenue would be used to provide “city services” to the residents of the respective territory, which would create an accountability system in its classic form. Any form of taxation has economic value. However, the Law on Capital City Tax<sup>96</sup> imposes 0-1.0 percent of taxes on the services of all types of alcoholic beverages, tobacco, hotels, resorts and bars. Despite praising the adoption of this law as the major achievement by the capital city administration of the time, this tax is collected not only from the residents of the capital city, but in an economic sense, this tax creates a situation, where the more capital city residents have “unwise consumptions” the more income the capital city would generate. There is an estimate, that today more than 60 percent of budget revenue of the capital city is accumulated from the personal income tax. In the future, raising the percentage of land charges and immovable property tax, and establishing different rates in accordance with city zoning would be consistent with the state/public finance theory. There is a need to introduce the so-called “council tax” (meaning Hural tax) or the city tax of foreign countries in a classical sense, and thus, it is necessary to consider this issue in the discussion and adoption of the revised draft Law on Legal Status of the Capital City.

<sup>96</sup> Adopted on 19 June, 2015.

## LOCAL BUDGETS

Article 6 of the LATUG provides that “Aimag, the capital city, soum and district shall have a budget. Types of the budget revenue, classification of expenditures, purpose of funding, planning, approval, implementation and reporting of budgets of aimag, capital city, soum and district shall be regulated by the Law on Budget and other relevant laws and legislation”.

In principle, the structure of the consolidated state budget should be consistent with the respective country's state structure or, in other words, it should be an independent budget, where the budget revenue and expenditure are defined in accordance with each of the administrative and territorial units. However, the local budget fails to be reflected in the central budget of the Law on Budget of the given year and thus, acquire its autonomous characteristics. Since 1997, Mongolia has adopted the upcoming year's budget by the independent law on “central budget”. The respective year's Law on Budget do not specify soum and district budgets but rather they are included into the total amount of budget allocation of aimag and capital city, which are then allocated by aimag and capital city. This practice, which persists to this day, is in contradiction with the Constitutional principle that confers upon the administrative and territorial units the status of independent subject of public law relations, and creates a condition, where, for instance, Hural of aimag and the capital city decide the fate of soums and districts.<sup>97</sup>

The Law on Budget defines the “local budget” as the budget approved by the Citizens' Representative Hural of aimag, the capital city, soum and district, accumulated and allocated by general budget governors subordinated to the budget of the respective level” (Article 4.1.27), where aimags, the capital city, soums and districts were regulated not as administrative units but as budget organizations.

The foreign expert, who came to research on Mongolia in 2008, drew following conclusions on the autonomy of local budget, which states that “The main feature of the unitary state is that its highest legislative power is maintained in the national parliament. However, it seems that Mongolian politicians harbor a unique understanding of the unitary state. The confusion about the unitary state is also present in the central-local fiscal relations. Because Mongolia is a unitary state it should have a unified budget; therefore, it was observed that a decision was made guided by the principle that all institutions financed from the state budget including the local budget should be an integral part of it, and thus the supreme legislative body should approve of this budget. The issue of central-local financial relations is left unregulated in the Constitution of Mongolia. This is in stark contrast to the practice of how majority of unitary states including the post-communist countries in Europe understand and regulate the financial relations between administrative tiers. For the past 15 years, the post-communist countries allocated independent budgets to its lower level administrative units, where these budgets are not included into the unified state budget, and are not pre-reviewed by

the Ministry of Finance”.<sup>98</sup>

*It is usually stated that the CRH of aimag and soum is in charge of its own budget. However, in reality the budget of soum is handed down from the ministry and agencies in a packaged form. CRH of soum does not have any powers to change the budgets of budget organizations such as schools, hospitals, etc. Even the CRH of aimag does not enjoy powers to make any changes to the budget of soum let alone the soum itself. Due to the budgetary restrictions soums cannot develop.*

*From the Western regional discussion in Uvs aimag*

*Our soum has three “kingdoms” in the guise of the Governor's Office, hospital and school.*

*From the interview with the citizen of soum*

There is a need to recognize that soum and districts are the subjects of public law, in accordance with the concept of the Constitution, and allocate separate budgets to them.

The dependence of administrative and territorial units from the financial support of the central government is a common international practice. Despite hundred percent dependency from the state budget the **stability and credibility of financial sources** has an important effect on the local autonomy and efficiency. Recent developments in this area include the establishment of **Local Development Fund** (LDF) with autonomous rights of management by the local government since 2013 on the basis of citizens' opinions. However, the Local development fund can be criticized based on the following justifications. These include:

- 1) Partial arrangements were made to apply the principle of stable and credible sources of funding to the Local development fund rather than the total local budget allocation. The LDF is losing its significance more and more as its budget allocation is decreasing on an annual basis since the initial adoption of the law;<sup>99</sup>
- 2) The fact that the Local development fund is wholly based on the state budget and can be used to finance only the activities authorized by law (Article 60.3.1 of the Law on Budget), demonstrate a lack of classical meaning of “development fund” or the regulation within the scope of redistribution of budget revenue alone;
- 3) Such sensationally initiated reforms give false hope to local governments and citizens that the local autonomy is being strengthened.

At the same times, the Government of Mongolia made a decision to obtain substantial amount of loan on preferential terms for the purposes of creating local capacity to implement the LDF and its effective expenditures from the International Development Association of World Bank in 2015 within the framework of Sustainable Livelihoods

<sup>97</sup> A.Byambajargal, “Local Governance: Challenges and Solutions” National Forum Proceedings, 2016, p.105

<sup>98</sup> Tony Levitas, “Rethinking State-Local relations in Mongolia today: Possible directions for local government reform”, study commissioned by UNDP, 2008

<sup>99</sup> The total budget of the LDF approved by the SGH gradually decreased from 187.4 billion in 2013, 284.7 billion in 2014, 127.5 billion in 2015, 131.0 billion in 2016, 53.0 billion (through budget amendment) in 2017 to 88.5 billion in 2018.

Project-3.<sup>100</sup> It is time for the Government to evaluate whether the loan's initial purposes are still present when LDF's total budget is reduced and assess the effectiveness of its disbursement. Internationally, the goal of the local development funds is the creation of new revenue sources at the local level through investments into the real businesses or the projects, thus in turn, providing opportunities for development of additional sources of revenue.<sup>101</sup> Despite the existence of the legal provision to create such type of "fund" independently within the local context in Mongolia on the basis of Article 18.1.2.c of the LATUG, it is unfortunate that through the amendments of 2015 this article was invalidated.

Suhbaatar aimag in Mongolia alone made an attempt to issue a local bond in 2011.<sup>102</sup> It was based on the provision of the Law on Securities Market, which was in force at the time, regarding the bond issued by other competent authorities. Despite the regulation of the law that the competent authority shall be the subject participating in the securities market, the term "competent authority" is itself a rather unclear term. Therefore, based on the provision of this law, stating that "Government with the approval of the State Great Hural, the Governor of aimag and the capital city, and the Citizens' Representative Hural may issue securities by way of public offer", the Governor of aimag and the capital city was included as the aforementioned competent authority. In other words, in accordance with this law, the Governor of aimag and the capital city with the approval of the CRH became one of the subjects to issue bonds and participate in the securities market. The purpose of the Law on Securities Market, which is currently in force, apart from regulating securities and relations arising out of securities, illustrates that it also prioritizes the protection of investor's interests. In addition to determining the issuer of securities as the main subject participating in the securities market, the law defines in detail the financial instruments constituting securities.

However, despite excluding from the law the bonds issued by the Government and the Governor of aimag and capital city from the types of financial instruments belonging to securities and annulment of regulations on relevant procedures,<sup>103</sup> the Government may issue securities upon satisfaction of relevant criteria.<sup>104</sup>

There is a need to improve opportunities and create neces-

sary legal framework allowing the local government to issue bonds for the purposes of raising capital to implement certain projects and programmes. For example, it would be advisable to restore the right to issue bonds to some local governments with competitive capabilities based on certain criteria (i.e., upon the approval of the SGH, Government, etc.). Thus, there is a need to clarify in the future to what type of relations the provisions of Article 7.3 of the Civil Code of Mongolia, stating that "aimags, the capital city, soums, districts, as administrative and territorial units, may enter into civil law relations like other legal entities", can be applied.

<sup>100</sup> Finance Minister J.Erdenebat and Mr.Bert Hofman, World Bank's Country Director for China, Korea and Mongolia, signed a loan agreement of 22.7 million US dollars to finance the implementation of the third phase of the "Sustainable Livelihoods" Project. 30 January 2015. Press release.

<sup>101</sup> Catherine Farvacque-Vitkovic and Mihaly Kopanyi, Municipal Finances, A Handbook for Local Governments, World bank. 2014.p.361

<sup>102</sup> Financial Regulatory Commission's resolution no.366 on the "Registration of local bond of Suhbaatar aimag" dated 7 December 2011. One year ago, Suhbaatar aimag made a decision to issue 20 thousand first local bond "Suhbaatar bond" to be sold for 100 thousand tugrugs each in order to raise the capital of 2 billion tugrugs. It was decided to reflect the money required for repayment of this bond into the state budgets of 2012 and 2013. However, in connection with the revision of the Law on Budget, the Financial Regulatory Commission's resolution on the "Registration of local bond of Suhbaatar aimag" was invalidated. Former Governor of Suhbaatar aimag J.Batsuur talked about building a paved road in aimag centre with two billion tugrugs raised in the capital market. Also in accordance with the new Law on Securities the local right to issue bonds is curtailed. Due to such amendments of the law, the first attempt to issue local bonds was unsuccessful. <http://time.mn/n/1WN>

<sup>103</sup> Article 8. Procedures for issuing securities by way of public offer

8.1. The Government shall approve regulations for the issue of securities by the Government and Governors of aimag and the capital city.

Article 9. Registration of securities and approval for public offer

9.2. The Financial Regulatory Commission shall register debt instruments to be issued by way of public offer by the Government, or the Governor of aimags and the capital city. Registration shall be made in accordance with simplified procedures to be approved by the FRC.

Article 20. General obligations of the issuer

20.2. The provisions of Articles 20.1.3, 20.1.4, 20.1.6, 20.1.8, 20.1.10 of this Law shall not apply to the Government and the Governors of aimag and the capital city.

<sup>104</sup> Article 7 of the Law on Securities Market

## LOCAL PROPERTIES

The issue of property relations is a broad topic, and the issue on definition of local properties, for instance, the registration, management and control of property is a pressing issue. The following is the detailed analysis of this issue:

1) *The criteria and methods for defining local properties are uncertain.* The basis for defining the opportunities to exercise property ownership rights is directly dependent upon the object of ownership. Today, the local property is regulated as the public property and local property. In this context, it is unclear exactly what subjects and to what degree they can participate or exercise their rights regarding the local public property and the local property. Therefore, the uncertainty about the owner of the local property negatively impacts the issue on its protection (maintenance), which is left abandoned. Thus, there is an increased need to separate the properties depending on their characteristics.

On the other hand, the pressing issue within the scope of acquisition, possession, use and management of local property is related to the fact that local budget that creates the right of ownership in accordance with legal regulations is not directly dependent upon the local government; therefore, there are constraints in realization of this right.

Within the scope of application of legal regulations, due to the fact that relations on the **acquisition of property into the local ownership**, procedures on the property right of the locally owned legal entities, possession, use, and management of properties, and those on privatization of properties are regulated based on "citations", difficulties arise in the practical application of law.

2) *Assessment and characteristics of local property are uncertain.* Due to failures on classification of property based on its assessment, characteristics and usages the local property is left without the persons in charge or uncertainty is created as to which local unit it belongs to. This situation contributes to economic centralisation. For example, if soum, district, bagh and horoo enter into economic relations through the establishment of partially owned legal entities, it is legally required for them to secure the approval from the Citizens' Representative Hural of aimag and the capital city before obtaining loans and issuing securities. Also increasing limitations imposed on each of the administrative and territorial units below the status of aimag and the capital city to enter into legal relations and become the subjects of law is due to lack of provisions specifying the types of properties and authorities in charge of them.

3) *Local property ownership rights are not fully delegated to local authorities, and their right to be autonomous subjects is restricted.* In the civil law, the owner is entitled to freely possess, use and manage the objects of their ownership within the limits set by law. However, the initial basis for exercising the ownership right is inherently connected to the creation of the right of ownership. Hence,

in accordance with the currently enforced law, the precondition for the creation of the local ownership right or the right of each local unit to independently manage their budget is not fully delegated. The rationale for reaching this conclusion is that the local government can adopt its own budget only after the review by the Governor's Council.<sup>105</sup>

The main characteristic of ownership right or its main difference with the rights of possession and use is related to the entitlement to manage the objects of ownership. However, the provision of the law that states that local authorities are required to consult with the State Property Committee regarding the management of the object of their ownership constitutes limitations on the autonomous decision-making to exercise this right and shows that it is not an absolute right in accordance with the legal theory. In other words, the State Property Committee can participate in determining the list of local properties to be privatized.<sup>106</sup> Also the right to decide on the fate of the objects of ownership of local Hural is dependent on the Governor. For example: the provision of Article 78.1 of the Law on Budget stipulating that "*Governor shall be responsible for implementation of the decision by the Citizens' Representative Hural on the local property in concert with the Government policy*", also serves as an example of how the powers of Hural on the management of local property is curtailed by another law. In this sense, the issue on who (which subject of law) is entitled to ownership right has a significant influence on their independence. Due to many issues arising in relation to property right such as selling, leasing, pledging as a collateral, earning income from operations and so on, the possibilities for full-fledged delegation of the ownership right to local governments is restricted by current legal regulations in force.<sup>107</sup>

## CONCLUSIONS

1. Reforms in the improvement of central-local fiscal relations put greater emphasis on the central government transactions rather than creating incentives to increase the local revenue generation initiatives. It is time to boldly raise the rate of property taxes, which is considered to be a "good local tax", in line with the demands of the market economy, for the purposes of growing the local tax base. For example, reinstating the livestock tax in rural areas, creation of the city tax in its classic form in urban settlements, and distribution of differentiated capital city tax in accordance with its zoning arrangements will comply with the theory of government finance and the principle of market economy. This will change the inactive mentality of citizens, who demand services without paying taxes, and it will further improve the accountability system demanding the accountability of local governments in return for paying taxes.

2. Comparative study of countries revealed that majority of countries in addition to the General Law on Local Govern-

<sup>105</sup> Article 31.5 of the Law on Budget.

<sup>106</sup> Article 77.2.3 of the Law on Budget provides for discussion and approval of the list, plan and sources on the privatization, transfer, and acquisition of locally owned fixed assets. The State Property Committee shall be consulted in approving the list of local properties for privatization.

<sup>107</sup> The above is cited from the presentation on "Pressing Issues of Local Property Relations" made by

Dr.A.Byambajargal, Deputy Dean of School of Law, NUM, at the National Forum on "Local Governance: Challenges and Solutions". Proceedings of the Forum, 2016, pp.108-110.



ment also have the Law on Local Government Funding. We consider that it is appropriate to study the recommendation of international experts on the development of the new draft law on Local Government Funding. This law could include provisions on the types of taxes to be shared with local governments, amount of taxes allocated to ATUs, characteristics of targetted grants devoted to functions assigned to ATUs, the principle of determining the formula for allocation of grants, characteristics of general financial and equalisation grants, the principle of its allocation, regulation of loan allocation to ATUs, and the procedures for limiting the rights to obtain loans or issue guarantees, which could create sufficient, predictable and transparent sources of revenue.

3. Allocate soum and district budget without the transfer from aimag and the capital city, and to create opportunities through the law for soum and district CRH to flexibly spend the funds allocated from state budget within the scope of their functions.

4. It is necessary to create appropriate legal framework and improve opportunities for local authorities to issue securities in order to raise the capital for funding the implementation of the local development projects and programmes.

5. Despite regulating in detail the relations pertaining to state ownership rights, the Law on State and Local Property, the main law governing property relations, left the local property relations without thorough regulations. The local property relations need to be regulated by a separate law. In other countries, the issue on property relations is resolved through adoption of the "Law on Property Assessment".<sup>108</sup> This law determines the classification and valuation of property and establishes the principle to determine which unit owns the property. Consequently, through clarifying subjects to own, use and manage the property, the methods to guarantee the right of ownership is utilized. This is especially important in eliminating current uncertainty around the objects of ownership.

6. Guarantee local property ownership rights by delegating property ownership rights to each ATUs, and create a legal framework for autonomous exercise of this right including the right to decide autonomously the property sale or privatization, and to have the revenue generated from the sale of the property remain locally.

<sup>108</sup> For example: Finland, Slovenia, South Africa, Ireland, Republic of Korea, Montenegro and Bulgaria

## Chapter Eight

# CONCLUDING CHAPTER

### CONSOLIDATED CONCLUSIONS

The adoption of the Law on Administrative and Territorial Units, and their Governance (LATUG) in 1992 played an important role, on the one hand, in breaking away from the centralized public administration structure and local government bodies, including the People's Deputies' Hural, their Executive Committee and government structure based on one-party policy concepts, and, on the other hand, in ensuring democratic values, justice, liberty, equality and national unity enshrined in the Constitution of Mongolia, implementing the main principle of the rule of law in government conduct, creating the legal basis of local government actions, and establishing and operationalizing local self-government institutions.

However, the 1992 LATUG has not legislated in detail the provisions of the Constitution on local self-government, that are matters of principle, in line with the needs of the civil society based on market economy and the common international practices. Moreover, the law appears to have directly copied provisions of the Constitution and preserved some features from the previous regime such as government intervention into private sector affairs, as provided in old laws and rules regulating the People's Deputies' Hural.

Pursuant to State Great Hural's resolution no.62 adopted in 2005, a provisional committee was established with the purpose to "Study and make recommendations on ensuring the autonomy and decentralization of local governments"; thus, the revised LATUG was adopted in December 2006, which is currently in force. This revision abolished the vertical administration structure of several local administrative bodies, and added a number of new provisions, notably to establish a development fund from local non-budgetary resources and manage those resources autonomously; to separate powers of Hural and Governor in relation to local property ownership, use and management; to set up provisional committees of Hural; to ensure the permanent functioning of Hural through expanding powers of Presidium members of Hural; to regulate the termination of the term of a Hural; to regulate relationships between Hural and Governor, their interactions with the State Great Hural, the Government and central public administration authorities at the national level, and guarantee of operation of Hural representatives; and additional provisions with regard to expanding powers of local Hural and Governors. In particular, many provisions of sectoral laws on the powers of Hural and Governor were selectively incorporated into this law.

Since the initial adoption of the LATUG until the end of 2017, altogether 18 amendments have been enacted, most of which established new standards and new mandates of local government institutions in compliance with the General Administrative Law. However, the rest of amendments include the revocation of provi-

sions aimed to set up a local development fund from non-budget revenues – a crucial condition for local government autonomy – and the change of some local institutions to have a vertical structure and top-down appointments of managers. These provisions appear as setbacks as they abolished previous steps taken for promoting decentralization.

The LATUG does not fully cover legal regulations to implement local governance in the context of market economy, nor did it fully regulate concepts, functions and powers of local government institutions. Moreover, this law did not define particular features of each administrative and territorial unit and failed to elaborate principle of combination of local self-governance with state administration. As a result, roles and responsibilities of local Hural and

Governors of different municipalities are not distinguished clearly as of today. The following conclusions are drawn upon the assessment of the aforementioned areas outlined in the terms of reference. These include:

#### Organization of administrative and territorial units

1. The LATUG has neither provided a clear definition of the "administrative and territorial unit" stated in the Constitution, nor did it provide clear regulations explaining what local self-governing body is and how it should be implemented at different levels of government.

2. Article 3.4 of the LATUG stipulates that "*bagh is an administrative unit of soum and horoo is an administrative unit of district*", and baghs and horoos make independent decisions on socio-economic affairs within their territory of jurisdiction (Article 62.1 of the Constitution), despite the fact that they are not economically self-sufficient. However, this contradicts Article 59.2 of the Constitution ("*The self-governing bodies in aimag, capital city, soum and district shall be Hural of Representatives of the citizens of respective territories; in bagh and horoo – the self-governing bodies shall be General Meetings of citizens. In between the sessions of Hural and General Meetings, their Presidiums shall assume administrative functions*") which ensures some degree of autonomy of local government institutions as the subjects of public law or in public administration relations. As a result, this inconsistency produces the misperceptions that "bagh and horoo are just administrative units" and "they do not have respective territories".

3. According to Articles 4.1 and 4.2 of the LATUG, the State Great Hural shall make decisions on changing administrative and territorial units at aimag, capital city, soum and district levels, while aimag and capital city Hural hold this power over baghs and

horooos, respectively, which are differentiated in compliance with the provision of the Constitution (Article 57.3). However, the LATUG has no further regulations to expand the provisions of the Constitution on criteria requirements and procedure for establishing or changing administrative units, such as detailed regulations describing the conditions for “consideration” or “to base a revision”. Consequently, key objectives for reforming the administrative and territorial division have not been realized as of today. For instance, the LATUG has not made substantial changes to the administrative division adopted in 1970s, which was based on agricultural collectives and state farms established during the socialist system, and failed to reach the main goal of adopting reforms in the administrative and territorial division by making soums independent socio-economic complexes with self-development capacity.

4. Numerous proposals and initiatives have failed to reform the administrative and territorial division system due to the failure to overcome subjective criteria requiring the consideration of citizens’ opinions in the implementation of the Constitutional provision on amending the administrative and territorial division on the basis of local economic structure, population distribution and consultation with local Hural and citizens. It shows a necessity to create specific justifications and criteria for changing administrative division.

### The status of cities

The Constitution of Mongolia did not designate the status of administrative and territorial unit to cities in order to ensure the sustainability of existing administrative and territorial division. Article 4.3 of the Appendix to the Constitution of Mongolia provides that “Until the legal status of cities and villages is defined by law and self-governing bodies are established, Darhan, Choir and Erdenet cities shall have the same administrative and territorial arrangements with aimags in their respective territories”. However, after the adoption of the Law on Legal Status of Cities and Villages, these cities have been transformed into aimags; in other words, they were withdrawn from legal regulations of cities, and directly placed under the scope of the LATUG. Thus, all related issues have to be decided and managed by the local Hural and Governor, leaving the city status regulations as superficial formalities.

We consider inadequate to solve the existing controversies about whether a city should be designated with the status of an administrative and territorial unit through hasty amendments of the Constitution. The key issue is to establish legal basis to clarify the legal status of cities, by enacting clear regulations for managing the city properties, budget, structure and organizational arrangements – the main basis of functions and powers of the local self-governing body and the Mayor and separating these from the powers of Hural and Governor; delegating some functions and powers of Hural and Governor to the local self-governing body and Mayor in relation to land management, approval of the city budget, and provision of city services to citizens. The research team concludes that these issues can be resolved through amendments of the Law on Legal Status of Cities and Villages.

### Implementation of the combination principle of the local self-governance and state administration

The Constitution guarantees parallel application of central and local authorities in managing administrative and territorial units, in to order to ensure combined government structures including “horizontal” authorities elected by local citizens and “vertical” authorities appointed by the higher institutions. Herewith, clear distinction of role and responsibilities is crucial. Therefore, the Constitution stipulates that aimags, capital city, soums and districts shall have *specific functions provided by law* (Article 58.1), and the State Great Hural and the Government may delegate some powers to aimag and capital city Hurals and Governors to be resolved with their capacity (Article 62.3). The Constitution states “**specific functions**” of local authorities, but does not specify if these functions are the “local government functions” or broader functions expressing the interests of the central government. This objective may be satisfied through detailed explanations in a separate law in accordance with Article 59.3 of the Constitution. The Constitution used the terms “local self-governance” and “state administration”, and it thereby indicates that these two concepts each have different legal implications.

The Constitution stipulates that local self-governing bodies shall be Citizens’ Representatives Hurals and Citizens’ General Meetings at three levels including: (i) aimags and the capital city, (ii) soums and districts, and (iii) baghs and horooos (Article 59.2). Moreover, the Constitution establishes that aimags, the capital city, soums and districts shall have specific functions (Article 58.1) and that authorities of administrative and territorial units shall implement the combination principle of local self-governance and state administration. However, with regard to regulating combination of local self-governance and state administration functions within the scope of Constitution, as mentioned above, the LATUG has not fully defined distinct regulatory arrangements on how local and central government functions are to be implemented in parallel. This shortcoming is confirmed by the following arguments. These include:

1. The LATUG has not elaborated distinctive characteristics of three levels of local government authorities. At each levels of aimag, capital city, soum, district, bagh and horoo the relationship between local Hural and Governor, the relationship between the upper and lower Hurals and their respective functions are not separately regulated but legislated under common provisions. According to the Constitution, bagh and horoo can make independent decisions on local socio-economic affairs (Article 62.1). However, in reality the bagh territory, the size of its population, and economic basis cannot allow baghs to independently decide on the abovementioned issues, because they lack self-sufficient budget, properties, and subsequent power to manage them. On the other hand, citizens’ general meetings of bagh and horoo do not have permanent elected representatives, and hence act as the self-governing body, which allows citizens to resolve their issues by direct participation. It shows that baghs and horooos are a part of the internal administrative structure of soums and districts, and they could serve as the local self-governing bodies to implement functions and powers delegated from the respective

soums and districts, as specified by law.

2. The law does not clearly define the functions of local governments. This led to confusion regarding what issues the local self-governing bodies should resolve through self-governing principles and what issues should be resolved through state administration principles in accordance with the functions delegated by law.

3. From the perspective of optimal balance of local and central government interests, which constitute the essence of nature the combination of local self-governance and state administration, due to the failure of clearly setting apart local and central government interests, this balance seems to be lost that led to challenges, including the central government intervening in issues to be resolved by the local government autonomously, delegation of excessive powers to local Citizens' Representatives Hural and their Presidium members, as well as interests of political parties dominating the operations of Hural. Although regulations, which aimed to ensure balance of different interests, have been adopted, they were not able to materialize tangible impacts in practice and thus caused confusion rather than clarity regarding coordinated combination.

4. The main conditions for implementing local self-governance and making independent decisions on socio-economic matters within their respective territory – such as local properties, tax, budget resources and economic basis for autonomous operations – have not been established sufficiently.

### **Functional allocation of administrative and territorial units**

Principles, criteria and classification for establishing functions and mandates among the three levels of local government (between Hural and Governor) have not been defined clearly. This is happened due to the lack of distinct classification of the status and specific characteristics of Hural of aimag, capital city, soum, district, bagh and horoo, which serve as the local self-governing body at three levels of local municipalities. Consequently, it led a confused state of overlaps, gaps and contradictions of functions and powers of Hural and Governors at different levels of local government.

The LATUG provides common functions and powers of local governing bodies at three levels, which led to possibilities for higher authorities to decide on issues which are normally decided by lower level local government authorities, overlapping functions of Hural and Governor to resolve certain local issues, and the lack of an established list of issues to be decided in accordance with local self-governance principle.

Article 58.1 of the Constitution, which states that “functions and powers of administrative and territorial units (including local self-governing powers) shall be defined by law”, has not been enforced with its intended purposes in reality, but is partially reflected in the Budget law and some sectoral laws.

### **LATUG and its relationship with other laws**

The laws governing local government relations have not been reviewed from the perspective of codification of legal acts to ensure consistency and to address gaps and duplications. It becomes

evident that the enforcement of Article 63.3 of the Constitution should not be limited to the LATUG alone. The reflection of local government institutions into the provisions of laws regulating sectoral relations is inevitable. Therefore, it is necessary to clarify and separate which relations are to be regulated under general laws, and which are to be regulated in detail by sectoral laws.

There are instances, where some sectoral laws provide duplicated functions to be exercised by both the Hural and Governor, or duplicated issues to be decided by either the higher or lower level Governors. The LATUG too provides duplicated issues, which are to be regulated under sectoral laws, and contradicting provisions or gaps that create lack of clarity on what roles the local governing institutions should play concerning certain sectoral issues. Thus, due to the LATUG and sectoral laws both having duplicated issues in common, an amendment of the sectoral laws entails an amendment of the LATUG. The comparative legal studies illustrate that countries such as the Russian Federation, Georgia, Spain, Hungary and China have general law on local government, which defines their general functions. On the other hand, roles and responsibilities of the local governments within certain sectoral relations are defined in detail and governed by sectoral laws in line with regulations of the general law on local government. This practice has an advantage in preventing any unnecessary contradictions and duplications. Thus, it is important to ensure the LATUG – as the organic law on local government – should provide general regulations on functions and powers of local self-governing bodies, whereas local government functions and powers within certain sectoral relations should be governed by sectoral laws in the future.

### **Economic basis of administrative and territorial units**

Neither the Constitution nor the LATUG has fully provided regulations on key issues related to the distribution of budget revenues and expenditure along horizontal and vertical axes of local government structure as well as central-local financial relations. The concept of “economic and social complex” provided in the Constitution has not been further elaborated so that objectives aimed at optimal revision of administrative and territorial division and to expand administrative units into subjects of law with autonomous functions and powers could be fulfilled.

Autonomy of the local budget is not ensured adequately, which results in aimags, capital city, soums and districts still being dependent on the central government in terms of taxes, budgets, property rights and financial affairs. Reforms aimed at strengthening central and local fiscal relations have focused more on centralized budget allocations, subsidies and transactions, instead of offering incentives to encourage initiatives on generating local revenues. As a result, the foundations for economic basis for sustainable self-development have not been laid properly. Therefore, it has become urgent to implement efficient reforms in budgeting, tax and financial approaches, in order to improve local autonomy, accountability and initiatives while ensuring common interests of the unitary state and promoting decentralization.



## SOLUTIONS

The research team considers that the LATUG should be abrogated, and a new Law on Local Government should be drafted accordingly. It recommends to incorporate the following new regulations in the concept of the Law on Local Government. These include:

1. To define clear, distinct characteristics and structures of local government institutions at three levels of local government and to consider the following unique contexts of administrative and territorial units:

- To clearly define the legal status of baghs and horoos – the administrative units closest to citizens; to regulate detailed regulations for functions of Citizens' General Meetings; to develop a procedure for allowing different forms of direct public participation – such as referendum – in decision making processes over issues with territorial importance; and to specify the legally-binding conditions of such participatory decisions when adopted. At bagh level and especially in rural areas, it is important to consider the nomadic lifestyle of local citizens, the local traditional structure of animal husbandry, and the demographic profiles of the local population.
- To strengthen baghs and horoos as the independent local self-governing unit (public law subjects), to identify criteria – such as the number and distribution of the population and households, key areas of entrepreneurship, production and service areas – for establishing bagh and horoo, and to allocate relevant functions and powers conducive to their particular characteristics upon approval of their legal status. Moreover, it is necessary to legislate the autonomous functions allowing bagh and horoo citizens to contribute to creating a favorable living environment, and to make collective decisions over their livelihood issues through consultations and direct participation.
- To ensure that soums and districts are a core (fundamental) local self-governing unit and thus exercise their functions and powers to address citizens' livelihood issues, implement key socio-economic development objectives within their territories; and to lay down criteria on the sufficiency of economic basis to enable local self-governing bodies to maintain autonomous operations. It is advisable to consider that in accordance with international trends based on comparative studies, the basic primary units normally have a local self-governing body, which serves local citizens and ensures public participation, whereas the regional or intermediary units tend to mainly support the central government functions.
- Considering Mongolia's unitary state structure, aimags should be transformed into a subnational unit, which conveys the common interests of soum-level self-governing bodies, and is responsible for implementing central government policies and decisions, governing inter-soum issues, enforcing legislations, and monitoring. In the capital city, the districts and horoos should be designated a self-governing status due to their close proximity to local citizens. However, the legal status

of the capital city is regulated under a separate law; hence, this must be addressed separately.

2. To institute a city and village council with the power to implement local self-governing functions within their respective territories, where their Mayor is to take on Governor's functions. As a result, there will no longer be two different governing institutions operating in parallel within the territory of a city and village, and their governing territories can expand as the city and village increases in size. In this regard, it is necessary to regulate the city and village budgets, finance, properties and their economic basis through a law, separately from functions and powers of Hural and Governor.

3. To ensure that aimag, capital city, soum, district, bagh and horoo shall be a legal entity, which can engage in public law affairs independently, and meet legal requirements in civil law relations.

4. To elaborate the provisions on the "consideration" of "the location of the population, economic capability, geographic location, conditions of road and communications", to reflect the size of the population as found in legal regulations of other countries, and to specify processes for obtaining opinions of local citizens as part of "bases for revision" in the LATUG. Clear justifications and criteria for establishment and abolishment of baghs, i.e. a minimum and maximum number of households per bagh should be defined by law, in order to address the issues related to uneven number of population and households among baghs, efficient delivery of services to citizens and even distribution of workloads of bagh Governors.

5. To abolish the current practices in which the functions of administrative and territorial units are defined by those of governing bodies, and to establish specific functions of aimags, capital city, soums and districts under the Law on Local Government in compliance with the ideals of the Constitution. In this regard, the following issues should be regulated accordingly:

- To reform functions of the capital city, aimag, district and soum defined in the Budget law in accordance to specificities of administrative and territorial units; to delegate functions currently centralized at aimag and capital city levels to soum and district levels; to separate budgets of soums, districts and capital city; to create regulations for uniform classification of functions defined in the Budget law and the Law on local government in order to ensure clarity of funding of local government functions;
- To include into the general law or the Law on local government key principles for defining the competencies of local government bodies in the sectoral laws in accordance with above classification;
- To abolish the current provisions that regulate the capital city, districts and horoos similarly to aimags, soums and baghs, respectively;

- To abolish existing concepts of “common powers” of Hural and Governors of aimags, capital city, soums, districts, baghs and horoos.

6. Distinction between the “local government functions” and those delegated from other government bodies should ensure clarity about what issues should be resolved by the territorial and administrative units and their self-governing bodies autonomously, and what issues to be resolved under oversight by the Government and higher authorities in addition to accountability systems and financing issues. Thus, it is required to provide procedures for delegating powers and functions and for financing mechanisms into the Law on Local Government.

7. In relation to delegating powers to Hural to make decisions on territorial issues, regulations governing local self-governing bodies’ structure, operational arrangements, meeting procedure, and legal status of citizens’ representatives should be included into relevant provisions of the law in accordance with their specific characteristics. The Chairman of Hural and the Hural should not have parallel overlapping powers, the Chairman of Hural and Hural Secretariat should be only responsible for internal structural issues, and the powers of Hural Presidium members to decide on the issues within the scope of the powers of Hural should be limited. Moreover, it is required to create accountability systems to dismiss and recall Hural representatives by introducing relevant justifications and procedures.

8. To address issues related to guarantees of operations, salary, remunerations and social insurance compensations based on the interests of local self-governing bodies.

9. To expand the Governor’s powers and functions with regard to monitoring the legitimacy of decisions taken by the Hural, in order to create and ensure checks and balances between Hural and the Governor; to create and delegate powers to the Governor and Government to dissolve Hural by clearly defining justifications; to remove Hural’s redundant powers, such as Hural representatives intervening in administrative functions; for instance, when they carry out inspections of territorial organizations regardless of ownership status, or when they monitor the compliance with crime prevention or citizens’ civic responsibilities; and to address certain inconsistencies that exist in current legal regulations, by separating the intertwining powers of Hural and Governor.

10. To monitor the compliance of operations of local self-governing bodies with legislation through ensuring checks and balances among central and local authorities; to determine regulations to revoke illegal decisions; to ensure provisions about guidance and methodological assistance by the Government to local self-governing bodies, in particular adding provisions on reflecting Hural representatives’ training costs in local government budget; to improve clarity in appointments of local Governors who are currently nomi-

nated by Hural and approved by higher level Governors and the Prime Minister as they are accepted and endorsed as the Government envoy, in order to protect the autonomy and interests of local self-governing bodies; to revoke provisions with implications allowing the Government to intervene in disputes between administrative and territorial units; and to add provisions that ensure that the autonomy of local self-governing bodies is protected by the Courts.

11. To eliminate overlaps, contradictions and gaps between the LATUG and other laws, and to make relevant amendments to regulations to implement the revised law; the Law on Local Government should be based on principles to provide general regulations on functions of administrative and territorial units and powers and operations of local governing bodies, while sectoral laws should provide specific detailed regulations.

12. To genuinely guarantee the ownership rights of local self-governing bodies and to delegate powers to soums and districts to own and manage their respective local properties; to include regulations on decentralization and creating tangible local economic basis in communities within the revised law; and thus amend laws and regulations governing budget, finance, property and tax affairs. This is not an overnight task to be completed immediately, but requires thorough planned processes based on detailed assessment. Thus, it is necessary to carry out a research study on needs and rationales of drafting the “Law on Local Government Funding” as recommended by international experts.

13. It is necessary to carry out in-depth research in order to develop certain conceptual regulatory provisions when drafting the Law on Local Government. In particular, it is important to develop the draft law and to draw the new outline on the allocation of functions, based on thorough analysis of functions with relevant powers in regard to current regulatory, financing and local government mandates, when re-allocating functions of aimag, capital city, soum, districts, baghs and horoos in the first place.

14. The Law on Local Government cannot be effective right after its approval, because this law will affect all sectoral regulations governing property, fiscal, tax and other social relations. Thus, it will require the revision of the current administrative and territorial division, to further decentralization processes, and to implement a series of programs and actions aimed at improving local autonomy and accountability mechanisms. In this regard, proposals on draft SGH resolutions and actions should be developed separately.

## PROPOSALS FOR AMENDMENTS OF THE CONSTITUTION

In the research team’s view, Chapter Four on “Administrative and Territorial Units of Mongolia and their Governing Bodies” should be revised entirely instead of few piecemeal changes, in order to strengthen the local government system and law of Mongolia on local government. In doing so, it is necessary to reduce strict regulations

in the Constitution, and leave such regulations reflected in generic laws. Proposals on revising the Chapter Four of the Constitution are provided below. These include:

1) Inclusion of city in Article 1.57 should not be a priority to be decided urgently. Article 57.2 stating that “Legal status of cities and villages located on the territories of administrative divisions shall be defined by law” shows that the Constitution does not prohibit designation of city status. Thus, it is possible to revise the Law on Legal Status of Cities and Villages and elaborate regulations more clearly in order to address legal issues related to cities and villages by delegating Hural and Governor’s functions to city management (Council and Mayor).

2) Article 57.3 should be amended as: **“The State Great Hural shall decide the revision of administrative and territorial units based on criteria set forth by law and the proposals advanced by local Hurals and citizens”**. This amendment will allow the expansion of legal grounds and criteria to revise the LATUG, and once the criteria are legally defined, it will not depend on proposals of local Hurals and citizens, but rather consider them in deciding in compliance with public interest.

3) It is necessary to clarify the concept of “economic and social complex” stated in Article 58.1. For instance, the principle stating that “an administrative and territorial unit shall be a legal entity, own properties in its participation in public law relations, determine tax rates, protect the local government autonomy in the courts, and be secured with funding commensurate with their functions” should be added.

4) Article 59.2 should be amended as **“The local self-governing authority in aimag, capital city, soum and district shall be implemented by Hurals of Representatives of the citizens of the respective territories; in bagh and horoo the self-governing authority shall be implemented by the general meetings of citizens. In-between sessions, their Presidiiums shall assume these responsibilities”**, and it also should be added: “soums, districts/horoos shall be the basic units to implement local self-governing authority”. As a result, meanings of “local self-governing authority” and “local government” will be separated and clearly defined, which will make it possible to determine local government’s functions as ATUs; basic units of local self-governing authority will be soums, districts/horoos; and the local self-governing authority depending on their context and interests will be implemented at other levels.

5) The Hural representatives of soums and districts should be elected by local citizens on the basis of universal and direct suffrage, whereas the Hural representatives of aimag and capital city should be elected from the CRH of soum and district. This issue may be reflected and regulated by the relevant election and local government laws as provided in Article 59.3; thus, it is considered unnecessary to amend the Constitution. As the CRH of aimag and capital city will voice and represent the common interests of soums, districts/horoos, basic units of local self-government, it is appropriate that their representatives should be elected from the CRH of soums and districts; thus, there will be no need to organize numerous parallel

elections.

**Within the scope of amendments of the Constitution, discussion on whether political parties should be prohibited to compete in local elections are currently undergoing. The research team considers that laws on political parties and elections should regulate this issue, instead of including such rigid regulations in the Constitution.**

6) Article 60.2 should be amended as: **“Soum, district, bagh and horoo Governors shall be elected by citizens of respective territorial units on the basis of direct suffrage for a term of four years, and endorsed by aimag, capital city, soum and district Governors; aimag and capital city Governors shall be appointed by the Prime Minister for a term of four years”**, or the current provision should be remained unchanged.

The research team cannot make justifiable arguments on options to “appoint” bagh and horoo Governors by the higher level Governors, which are currently discussed with the scope of Constitutional amendments.

7) Article 60.3 should be removed from the Constitution, and included instead into the generic laws. This will be in line with other options to elect and appoint governors, and it will allow nomination and appointment procedures to be regulated by generic laws in a flexible manner.

8) Article 61.2 should be added with: **“a procedure for putting a veto and deliberating veto decisions shall be established by law”**, while Articles 61.3 and 61.4 should be deleted. As a result, this should allow making changes to redundant provisions, and instead regulate these by the law on local government, and to create regulations ensuring checks and balances of power distribution between Hural and Governor. On the other hand, it will allow the local self-governing body to decide on the structure of the Governor’s Office along with its staffing in an independent and flexible manner.

9) In Article 62.2, the wording “local self-governing bodies” should be changed into **“the authority of higher instance shall not make decisions on matters coming under the jurisdiction of the basic self-governing units (soum, district)”**. The opportunities are ripe for each of the three-tier Hurals to make decisions on issues not specified in the laws and decisions of higher authorities creating duplication of functions. Therefore, clearly defining as to which levels of local self-governing bodies this provision applies to can help remove duplication of functions.

10) Article 63.2 stipulating that “Resolutions of Hurals and ordinances of Governors shall be in conformity with law, Presidential decrees and decisions of the Government and other superior bodies, and shall be binding within their respective territories” should be further elaborated, and the provision stating that **“the Government shall oversee the legitimacy of decisions made by local governments”** should be added.

11) In Article 63, it should be added: **“disputes raised between administrative and territorial units shall be settled by court”**. This aims to protect the interests of local self-governing bodies and should prevent from interventions by public administration authorities to their autonomous status.

In case the proposals on the amendment to the Constitution suggested by the research team are not supported, certain conceptual issues for drafting the new Law on Local Government would need to be aligned with the Constitution; however, such steps will not entirely deny the research team's recommendations and principled solutions on the elaboration of the content of the Constitution.

## DESK REVIEW REPORT

Within the scope of the desk review, the research team reviewed more than 10 independent publications, 30 research reports, proceedings of conferences and national forums and presentations on local governance issues. In terms of the research study, the following studies were reviewed: 1 study on the historic traditions of local government and demography, 2 studies related to local economy, taxation and budgetary regulation, 7 studies on local election principle and the participation of political parties, 8 studies related to the legal status of the capital city and local cities and villages, 2 studies on the issue of decentralization, 1 study on the assessment of the performance of the Constitution, 2 studies on local government system, allocation of functions and legal regulations at the local level, 3 studies on the administrative and territorial units, 3 comparative studies of foreign countries' local governance, and 2 studies not directly related to legal issues.

The majority of the abovementioned studies were studies that touched upon the pressing issues facing the management operations of the local governance rather than specifically researching legal regulations of local governments, and the studies that carried out comparative studies, information and research reviews of foreign countries' laws in connection with the development and adoption of specific draft laws by the State Great Hural instead of being independent studies. Nevertheless, in view of the significance of the proposals and recommendations on legal regulations, touched in these studies, for the improvement of legal provisions the following overview is prepared.

In addition to the proposals and recommendations produced as a result of the aforementioned studies, the research team also studied the recommendations of the national forums, conferences and presentations on decentralization and strengthening local governance issues. For example, national forum on "Improving the Actions of the Local Self-Governing Bodies" (1998), forum on "Responsible State: Financial Centralization and Local Self-Governance" (2008), conference on "Issues related to Administrative Decentralization and Determining the Powers of Administrative and Territorial Units" (2015), forum on Local Legal Reforms (2015), consolidated conclusions and recommendations from the national forum on "Local Governance: Challenges and Solutions" (2015) (Annex 1), and the recent years' proposals on the amendments of the LATUG (Annex 2) are attached to this study report.

## CONCLUSIONS

In conducting this desk review, the main goal of the research team were to review the abovementioned studies, identify

the issues covered during conferences, national forums and presentations on local governance, determine which provisions of the LATUG regulated these issues, make consolidated analysis of the conclusions, proposals and recommendations, and determine the issues of concern for implementing the terms of the reference on developing concepts for improving the legal framework of local governance.

The analysis of independent studies on local governance (B.Chimid 2002, 2004, 2008; M.Sandag-Ochir, 2003; D.Dondog and O.Tungalag, 2007, 2012; S.Batbold, 2010; O.Tungalag, 2012; G.Jargal, 2013) and conference proceedings revealed that the only comprehensive theoretical and legal study on local governance was that of Mongolian labour hero and professor B.Chimid. Other studies lacked uniform systemic theoretical concept and approach on local governance, and were in the form of legal commentaries and handbooks developed to be used as a guide for local governance officers and touching upon specific subjects such as decentralization of multifaceted relations of local governance, increasing the local fiscal and financial powers, optimal allocation of functions and so on.

Furthermore, the theoretical foundation for improving the legal framework of local governance or the "local governance law" as a discipline of legal science is still in its early development stage, capable of merely raising issues.

Previous studies on local governance issues only touched upon some of the provisions of the Chapter Four of the Constitution on local governance and the LATUG, but there are no studies available that specifically conducted full-scale and comprehensible analysis of the performance of this law from the legal perspective on regulatory impact assessments.



## ANNEX 1: PROPOSALS AND RECOMMENDATIONS FROM NATIONAL FORUMS ON LOCAL GOVERNANCE

### Proposals and recommendations of the 1998 national forum on “Improving the Actions of Local Self-Governing Bodies”

1. Reform the principles on the election of Citizens’ Representative Hural (CRH),
2. Study the possibility to separate the chapter on CRH into a stand-alone law in view of amending the Law on Administrative and Territorial Units and their Governance,
3. Provide substantial economic and financial powers to the Hural institution; abolish and reform the current (superficial) form of discussing and approving the local budget: (Increase the functions assigned to local Hural and provide with the authority to manage local property, etc., through the laws on budget and taxation),
4. Legislate the provisions on the submission and resolution of Governor’s proposals reflecting the local needs and demands to the Hural of the respective level on the structure, functions and staffing of the secretariat of the state administration of the respective administrative unit, its regulatory and implementing agencies in accordance with Government directions.
5. Empower the Hural with the authority necessary to optimally allocate the human resources within the scope of functions exercised by the government of the respective unit on human resource management and administration,
6. Subordinate all levels of supervision and inspection agencies under the jurisdiction of Hural; strengthen and expand the local government supervision functions,
7. Enforce a legal provision conducive to strengthening the associations of local governments in Mongolia representing the common interests of local self-governing bodies on the basis of considering the common practices of countries with advanced democracies; resolve the issue on financing operations by contracting some specific functions on rendering theoretical-methodological support towards building the capacity of local governments through agreements with associations of local governments in accordance with the Law on Non-Governmental Organisations.
8. Provide timely feedback to local self-governing bodies by promptly considering their proposals and requests; support the implementation of the decisions of Hural made in compliance with the law (alter the situation where there are no guarantees that the decisions by the self-governing bodies will always be enforced); ensure the permanence of international and domestic re-training of the staff of the organs of Hural.

### Recommendations of the 2008 forum on the “Responsible State: Financial centralisation and the local self-governance

The Open Society Forum, the Cabinet Secretariat and the

United Nations Development Fund jointly organized this forum on 20 December, 2008. It discussed the central-local fiscal relations, allocation of local budget revenue and functions.

1. Reform the public service sector and reformulate the functions to be exercised by either the state administration or local self-governing bodies in each of the sectors.
  - Study the functional allocation in each of the public service sectors, and prepare a draft proposal to amend the legal framework.
  - Study and determine the changes that will occur in the current fiscal expenditure, structure, organization, and administrative actions in line with the revised functional allocation.
  - Establish a system for defining the local demand for standard expenses on the basis of determining the prospective standard of expenses for each of the public services sectors.
2. Revise the allocation of budget revenue based on the revised functional allocation of central and local government.
  - Study the current taxation system, redefine the local and shared taxes, and define the tax competencies in accordance with state and local contexts.
  - Expand and legislate the powers of the local self-governing bodies to set their own service tariffs and fees and local tax rates.
  - Redefine the mechanism for rendering local financial support. By changing the current principle of the transaction based on merely compensating the difference, adopt a principle to provide financial support based on the formula containing the standard expenditure and the actual revenue capacity of the local budget. Consider the economic and social factors such as population size, number of service users and territorial remoteness in the transaction formula.
  - Coordinate state subsidies with local investments.
  - Legislate to guarantee that the local budget, in compliance with the relevant principles, is equitable, sustainable, balanced, predictable, sufficient and autonomous, and amend the relevant laws accordingly.
  - Consider the differences between the urban administrative unit with heavily concentrated populations and rural administrative unit with scattered populations in ensuring the local autonomy and revising the tax and revenue distribution.
3. Expand the local powers on planning, approval and implementation of investment budget.
4. Expand the local supervision powers over tender selection for procurement of goods and services, funding and execution with local funds.
5. Strengthen the state treasury integrated monitoring system in conferring the financial authority to local governments, and establish state oversight and standards.

## Consolidated recommendations of the 2015 National Forum on “Local Governance: Challenges and Solutions”

“Local Governance: Challenges and Solutions” national forum, which was organized by the State Great Hural, the President’s Office, the Cabinet Secretariat and the Capital City Citizens’ Representatives Hural in cooperation with UNDP, was held in Ulaanbaatar on 16 December, 2015. The forum discussed presentations of experts, whereby fundamental issues of local governance such as the system of local governments and balance of powers, administrative and territorial division, and the allocation of functions, local autonomy and the current legal framework were analyzed and solutions were proposed. Following the main presentations, three parallel sessions on “Local governance system”, “Functional allocation” and “Legal reform of local governance” were organized, which discussed recommendations from the forum. The following is the consolidated conclusions and recommendations from the forum.

### One. With regard to reforming administrative and territorial division

- Support the SGH working group proposal to amend Article 57.3 of the Constitution, which states that “Revision of an administrative and territorial unit shall be considered and decided by the State Great Hural on the basis of a proposal by the respective local Hural and local citizens, and taking into account the economic structure and distribution of the population” by changing the wording “on the basis of” to “considering”. Insert detailed procedures for obtaining citizens’ opinion in the LATUG;
- Use economic incentives for the purposes of obtaining public support for revising the administrative and territorial division;
- Define the status of the “city” in the Constitution;
- Define and incorporate into the law the concepts of locality, principle of territoriality, territorial unit, administrative unit and the city;
- Revise the Law on Legal Status of the Capital City and the Law on Legal Status of Cities and Villages in line with current demands;
- Implement in stages the administrative and territorial unit reforms, including:
  - ...Designate model population size for soum, bagh, district and horoo in line with population growth trends and the size of the territory;
  - ...Merge soums, which are very close to aimag centre or adjacent soums;
  - ...Designate the status of aimag city to Erdenet, Darhan and Choir within Bulgan, Selenge and Dornogobi aimags; merge their soums into these aimags;
  - ... Merge Baganuur district with Bayandelger soum of Tuv aimag, merge Bagahangai district with Bayan soum of Tuv aimag;
  - ...Introduce a special policy to support baghs and soums located near the state border or in the border security zone

and those, which have remote location due to natural or geographical factors;

...Implement regional preferential policies, including tax concessions and differentiated social insurance rates.

### Two. With regard to improving the local governance system

- In Article 62.2 of the Constitution, the entity, which exercises control and ensures that decisions of local self-governing bodies are consistent with legislation, should be defined concretely in line with the content of the General Administrative Law.
- Article 61.3 of the Constitution should be re-worded to the effect that if the Governor’s veto is accepted by Hural within a specific period but no changes are made then he/she shall have a right to appeal to the central public administration authority.
- The provision in the Constitution and the LATUG, which stipulates that if the Governor’s veto on Hural decision inconsistent with the law is not accepted then the Governor submits his/her resignation, should be reconsidered and amended.
- The concept of the local self-governance should be clearly defined, the need and justification for having self-governing bodies at three administrative tiers should be studied and clarified.
- Hural is a collective body, which makes joint decisions, and as such, possibility of legislating additional accountability provisions should be studied, for example, with regards to dissolution of the Hural or recalling a representative.
- Instead of Constitutional prohibition for political parties to participate in local elections, this issue is better regulated by the LATUG, Election Law and Law on Political Parties, in this regard, provisions of the LATUG on nominating candidates for Chairman of Hural and Governor by party and coalition factions should be repealed (Articles 11.2 and 26.2).
- Civil servants should have an opportunity to participate in local elections.
- Competencies of the Hural Secretariat should be clearly defined by law.
- Status and competencies of citizens’ general meeting should be clearly defined in the LATUG in line with the content of the Constitution.
- Develop procedures for implementing laws reflecting the need to ensure citizens’ participation.
- Build the capacity of the citizens’ general meetings of bagh and horoo.

### Three. With regard to increasing the relative autonomy of local governments

- Article 58.1 of the Constitution should be rewritten, taking into consideration national specifics and existing capacity by enriching with progressive constitutional provisions of other countries on the protection of local government autonomy

such as treating the local government as a separate legal personality (having a right to engage in public law relations by exercising property rights and the right of recourse to the courts), allocating funding commensurate with their functions, requirement for consultation with local authorities before making amendments in the main legislation of local governance – the LATUG.

- Move organizations such Labour Department, Professional Inspection Department, the Tax Department, Social Welfare Services Department from vertical-based system to local or horizontal-based system enabling local authorities to set their own policy.
- Include provision in the legislation allowing Hural representatives to have operation expenses.
- Regulate local property relations with a separate law. Local property should be secured by transferring ownership rights to each local unit. Each locality as a separate legal personality should enjoy the right to exercise ownership rights on its own territory. Amend the provisions in the Budget law, which limit decision-making of local authorities with regard to selling or privatizing their own property.

#### **Four. With regard to clearly defining the allocation of functions**

- Legal terms such as ‘competence’, ‘function’, ‘common powers’, ‘authority’ and ‘right’, should be clearly defined and used consistently, appropriate changes should be made in the LATUG and other relevant laws.
- The principle of transferring the necessary funding each a function is delegated to the local level should be included in the LATUG.
- Develop map of currently existing functions by conducting complete functional analysis based on detailed study of over 300 laws, which specify authority and powers of local government and public administrative authorities, identify duplicated, overlapping, contradictory or omitted functions and amend the laws accordingly.
- Explore opportunities for differentiating functions of urban and rural administrative and territorial units.

## **ANNEX 2: OVERVIEW OF THE PREVIOUS PROPOSALS FOR AMENDMENTS OF THE LATUG**

The Terms of Reference of the research team contained a task on the development of the concept for improving the legal framework for local governance. Thus, it is appropriate to examine the previous proposals on amending the Constitution, the LATUG and other laws on local governance. In addition to research studies, conclusions and recommendations advanced from national forums and consultations reviewed within the scope of the desk review, the research team studied and analysed the proposals for amendments of the LATUG of the past few years. The analysis entailed the following activities:

1. Under the project on “Strengthening Representative Bodies in Mongolia” implemented by the Parliament Secretariat and the UNDP in 2013-2016 with the financial support from the Swedish Development Agency, team of experts worked to develop proposals and recommendations on amending the LATUG in order to improve the legal framework for functioning of local self-governing bodies. Within the scope of this study, Hangai, Eastern and Western regional forums were held in 2015, whereby the consolidated proposals were submitted to the standing committee of the State Great Hural on state structure. These included the detailed proposals developed by the Secretariat of the Khentii aimag Hural in 2013. The research team “Legal Analysis Centre” developed draft amendments based on these proposals, which were then submitted to the standing committee on state structure in early 2016. The Mongolian association of local governments produced a draft amendment in 2015 and organized discussions on “Legal Reform of Local Governance”.<sup>109</sup> Several Members of the SGH discussed about submitting these draft amendments to the SGH.

2. Detailed discussions were held among the research team members, whereby the LATUG was analysed article by article, based on which the most contentious issues that are frequently discussed within the framework of amendments, and pose theoretical and practical challenges were identified and incorporated into a questionnaire developed for the purpose of assessment. Using this questionnaire, discussions were held in Uvs, Darhan-Uul, Khentii aimags with support from the project “Strengthening of Representative Bodies in Mongolia” in December 2018. Representatives of local governments from Uvs, Hovd, Bayan-Ulgii, Darhan-Uul, Bulga, Selenge, Orhon, Khentii, Dornod, Suhbaatar aimags participated in these discussions (the research team has detailed minutes of these discussions).

3. In addition, the proposals on the improvement of the legal framework for local governance, which can be found on the website ([www.khural.mn](http://www.khural.mn)) of the Citizens’ Representative Hural, were also reviewed.

The following is overview of the common proposals advanced from aforementioned events. These include:

<sup>109</sup> <http://www.kas.de/mongolei/mn/publications/41657/>

## Administrative and territorial unit

Clearly define administrative units and their status

Designate the status of aimags to settlements with the population of more than 15,000 inhabitants, and the status of state cities to the administrative units of the aimag centre with the population of more than 25,000 inhabitants and develop accordingly

Designate the status of the city to aimag centre soums

Abolish aimag centre soums, and ensure that the Governor of aimag jointly implements the competences of the city mayor and that the General manager or the Head of the Office governs aimag centre baghs

Clearly define the concept of 'locality', and cease referring to the capital city as a locality Insert into the law provisions on establishing the soum's boundaries

### **With regard to expanding the powers of CRH**

Adopt a separate law on local self-governing bodies

12.1.5 and 20.1.13. As there are no organizations and officials other than the Governor who is either elected or appointed by Hural, amend the provision as: "discuss the reports, hearings and information submitted by the organizations, business entities and officials conducting operations in the respective territory", and add this provision to Article 17 on the powers of Hural of bagh and horoo.

20.1.13 Add "issues concerning the implementation of the legislation and decisions of Hural bodies" to the provision on protecting local economic, social and civil rights and freedoms.

20.1.14 Monitor access and quality of public services rendered to citizens locally in view of citizens' common interests, demand organizations and officials to fulfill their duties, ensure their fulfillment, and submit to the relevant higher authorities concerns and proposals. Add a separate Chapter on the interactions of the Local self-governing bodies with the central government.

- No legal relations exist for interactions between the local self-governing bodies and the President of Mongolia, State Great Hural and the Government; submit to these state institutions questions concerning the territorial development and common interests, and receive feedback on the measures implemented in this respect.
- Conduct analysis on the process of rendering public services to citizens from the ministries and agencies, and, if necessary, submit concerns, proposals and demands on behalf of citizens' common interests, ensure its implementation, and inform the public of the outcome.

Change the determination of local territorial boundaries by the SGH, and confer upon the CRH the powers to decide on its territory based 100 percent on citizens' opinion.

Enforce the powers of the CRH to correct the wrong decisions of the previous Governor and the CRH through legislation, and expand the powers of the CRH

Enforce the powers of all levels of CRH to approve the structure of the Governor's office, agencies' staffing and the budget.

Confer upon the Hural the powers to decide on local personnel  
Subordinate all levels of supervision and inspection bodies under the authority of Hural, strengthen and expand the local government supervision functions

Amend the Law on Land, Law on Mineral Resources, and the Law on Special Licence to confer upon the CGM and the CRH full authority on land

### **Guarantees of operation of Hural representatives**

14.2 In addition to the remuneration paid to the representative add: "to cover expenses to carry out activities on the territory of bagh"

Remuneration should be paid to the representatives on the basis of their performance evaluation including the participation in sessions, working with electorates, and submission of issues for discussion.

Provide CRH with remuneration system

Add a provision prohibiting the involvement and attempts at influencing the representative in the fulfillment of their powers from political parties and the executive bodies.

14.4 The provision stating that "The Governor and relevant competent officials shall in advance present and consult their recommendations concerning resignation, removal, transfer or change of a Representative of Hural to the Presidium of the respective Hural" is a very wrong provision. This is a provision meaning that the director of the private organization will consult with the Presidium in the case of dismissing their employees, or allowing the civil servants to concurrently hold the position of the representative of Hural.

### **Clearly define the status of Hural representatives**

Add a provision on imposing liabilities, recalling and ethical norms of Hural representatives

Impose certain criteria on the candidate to be appointed as the Chairman of the CRH of aimag and soum

Legislate provisions requiring the hand over procedures of the previous CRH to the newly formed CRH

Regulate the issue of representatives, who despite being elected to serve the respective location fails to attend the sessions, resides elsewhere or moved from the local residence

Determine the terms of the representatives' mandate

Allow the representative to hold the public administrative office

Representatives are prohibited to:

- Hold management position in any organizations that are subordinate to, report its operations or receive financial support from the respective level of Governor;
- Participate in any form in the activities of any political parties or movements;
- Disclose any state, organizational or individual secrets after becoming aware of these in the fulfillment of the representative's powers and duties

Incorporate a strict provision that states: "Hural representative shall be prohibited to concurrently hold any office at the organizations that report their actions to the respective Hural".



**CRH Secretariat**

20.4 and 22.1.6 Amend the Secretary of the Presidium as the Secretary of Hural, and uniformly designate as the Chairman of the Secretariat of Hural.

Amend the provision on “Hural may have a secretariat” into “Hural shall have a secretariat”.

Clearly define the powers of the Secretariat of Hural in the law Hural should determine itself the structure, staffing and the salary fund of the Secretariat Clearly define the powers, duties and accountability lines of the Secretary of Hural

**Session of Hural**

23.2 Amend the provision to convene regular sessions of Hurals of aimag, capital city, soum and district not less than 4 times a year and to hold the sessions of Hurals of bagh and horoo not less 5 times a year.

Convene the sessions of Hural on a quarterly basis, as the issues are resolved solely within the scope of the Presidium.

Due to conferring the power upon the Presidium to announce and convene the regular session the CRH is unable to fulfill its organizational functions.

Legislate in detail the dates of the regular sessions of all levels of Hural

23.6 Clearly define the procedures for conducting the first and other sessions of CRH

24.1 Amend the provision on the distribution of the relevant estimation, researches, references and draft decisions to the representatives of Hural one day prior to the session into 7 days prior to the session.

With regard to strengthening the Citizens’ general meeting of bagh and horoo

17.1.1 Remove the word “Hural” from this provision; this has the same meaning as the Chairman of CGM of bagh and horoo holding the full-time position.

17.3 Legislate for the terms of the mandate of the Chairman of CGM of bagh and horoo to be for 4 years.

Article 38. Change the position of the Chairman of CGM into full-time office

Match the amount of salary received by the Chairman of CGM of bagh with that of the Governor; the salary of 140,000 tugrugs received by the Chairman of CGM is lower than the minimum wage.

Provide CGM with Secretariat; include the expenses of its Secretariat into the budget of CGM of soum and district for approval; legislate for CRH of soum and district to render professional and methodological guidance to the CGM of bagh and horoo.

Introduce procedures for the Governors of bagh and horoo to disseminate announcements on holding the CGM of bagh and horoo

Obtain the opinions of citizens by post and electronic means on the election of the Chairman of CGM

There is no need for the Chairman of Hural of bagh; there should only be the chairperson of sessions.

**With regard to the relationship between Hural and Governor****Transform the Governor’s Office into the Secretariat of Hural**

List the names of services to be rendered by the Governor to Hural

Regulate the macro-level criteria and evaluation of the executive organ’s performance evaluation by Hural through procedures, and ensure its frequency

Require surveys to be carried out among all citizens in evaluating the performance of the Governor through legislation, where only after its open discussion the CRH makes a final evaluation report Governor and deputy Governors should dutifully follow the decisions of the CRH

Clearly define the accountability mechanism for imposing liability upon the Governor who fails to comply with Hural decision

Reflect into the laws that up to 3 representatives from aimag Hural representatives and its Secretariat shall be included into the Governor’s council

The provision that states that in the case, where the Governor vetoes the decision of Hural and the Hural rejects the veto by the majority of its representatives, then the Governor should resign, is a meaningless provision.

**Election and appointment of Governor Governors of all levels should be elected by citizens**

Governor of soum should be elected by citizens through direct suffrage Governor of bagh should be directly appointed by the Governor of soum Governor of bagh should be elected from CGM of bagh

Chairman of the CGM of bagh should be elected from the CRH of soum Set the criteria of higher education and experience of working in the civil service for holding the office of the Governor of bagh and horoo

Create an accountability mechanism for nomination, appointment and removal of the Governor by the respective level of Hural

Amend the provision on the appointment and removal of the Deputy Governor of aimag and the capital city in consultation with the Presidium of Hural, and instead subordinate the appointment and election related issues under the authority of Hural

**Functional allocation**

Define the content of the legal terms such as ‘competencies’, ‘functions’, ‘common powers’, ‘authority’ and ‘powers’ in a uniform manner

Introduce the principle on also transferring funding in the cases of allocation of functions and delegation of power at the local level

Separate the powers and duties of the citizen representatives of aimag, bagh and soum

Legislate separately the common powers of the Governor of bagh and horoo in line with the specifics of the respective administrative unit

Properly define the duties, accountability and powers of CRH of aimag and soum Classify the functions of local government as basic and delegated functions

Clearly define the duties of the citizens’ general meeting of bagh

Resolve the issue of human resources reliant on vertical management such as the school principal, tax inspector, social insurance officer, civil registration officer, social welfare officer locally.

### **Local budget<sup>110</sup>**

Make amendments on increasing the fiscal and financial power in the LATUG

Confer the power upon the CRH of aimag and soum to plan and approve the budget in accordance with local contexts

Ensure discussions of local budget in its entirety

Allow CRH to decide on the revenues in excess of the budget revenue

There is not enough funding of Hural to cover for its operation expenses on meeting with citizens, reporting, polling and organizing conferences and gatherings

Provide CRH with sufficient budget

Confer the power upon the CRH of soum regarding the possession and use of local properties and land

Mining taxes should be paid locally

Allocate the budget to bagh, as the primary administrative unit

19.1.4. Obtain the proposal from the Citizens' Representative Hural of soum and district before purchasing and transferring local or respective aimag and capital city properties except for privatization, as submitted by the Governor

19.1.5. Add provisions on the establishment of the consolidated local development fund, and approve the sources of funding, purposes, and its disbursement procedures in compliance with the Budget law.

### **With regard to limiting the political involvement into the local government affairs**

Repeal the relevant provision on the participation of the party and coalition factions in the nomination of the candidates to the Chairman of Hural and the Governor (Articles 11.2 and 26.2)

Hural representatives should be elected by the citizens rather than the parties Governors of all levels should do not hold any concurrent political offices

<sup>110</sup> This report does not reflect local proposals on amending the Budget law with respect to increasing the local fiscal power.

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