

# **1. Future Perspective of the Constitutional Tribunal of the Republic of the Union of Myanmar**

**Justice. Hla Myo Nwe\***

## ***Abstract***

There are different models of constitutional review systems all over the world. Likewise, the scope of jurisdiction of constitutional review bodies such as Constitutional Courts, Constitutional Tribunals, Constitutional Council, or Constitutional Chamber may be drawn wider or narrower. Myanmar had exercised decentralized constitutional review system under the 1947 Constitution. At present, Myanmar exercises the centralized constitutional review under the 2008 Constitution by conferring this power to the Constitutional Tribunal. The main objective of the Constitutional Tribunal is to interpret the provisions of the Constitution, to scrutinize whether or not laws enacted by the legislature and functions of executive authorities conform with the Constitution, to decide on constitutional disputes according to section 46 of the 2008 Constitution. The purpose of this paper is to analyze the structure and subjects of constitutional review exercised by the Tribunal, to express the Tribunal's standards of review when considering the constitutional matters, the policy of Tribunal and the effect of review of the Tribunal. It also includes the future perspective of the Tribunal concerning the Union Peace Accord of Myanmar and the role of Tribunal in the federal system.

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## **I. HISTORICAL BACKGROUND AND EVOLUTION OF CONSTITUTIONAL TRIBUNAL**

The British Empire colonized Myanmar (by then Burma) between 1886 - 1947, and, therefore, Myanmar's legal system is rooted in the British common law tradition. On 4 January 1948, Burma proclaimed the first 1947 Constitution of Union. Under this Constitution, Myanmar had been exercising a decentralized constitutional review according to Sections 25, 151, and 153. Previously, the power of constitutional review was vested in the Supreme Court to interpret the Constitution, to decide the constitutional disputes, and to examine the constitutionality of laws.

On 3 January 1974, the Constitution of the Socialist Republic of the Union of Myanmar (hereafter, the 1974 Constitution) was adopted. Under Articles 200 and 201 of the 1974 Constitution, the *Pyithu Hluttaw* (House of Representatives), which was a unicameral legislative body, exercised constitutional review. Such a review represented a classic socialist notion that rejected the separation of powers and placed a legislature on the top of the state hierarchy. Therefore, similarly to many socialist states, the legislature did not produce quality constitutional review decisions but merely exercised a sporadic interpretation of statutes.

The current Constitution (hereafter, the 2008 Constitution) was adopted on 29 May 2008. The Union Constitutional Tribunal (hereafter, the Tribunal) was established on 30 March 2011 as a separate and independent institution for the first time in the history of Myanmar. The Tribunal was formed as a part of legal reforms in the transition from the military rule to the democratic system. Thus, the operation of the Tribunal, the authority and organizational structure have been regulated by the Constitution. The Law of the Constitutional Tribunal was enacted on 28 October 2010 during the era of the State Peace and Development Council. Several amendments were made on 21 January 2013 and 5 November 2014 by the *Pyidaungsu Hluttaw*<sup>1</sup> (Union Parliament) by Law No. 4/ 2013 and Law No.46/ 2014. Myanmar's legal system is a common law system, but in some cases, particularly the formation of the Tribunal, show that it is mixed with some concepts of civil law system.

## **II. STRUCTURE OF REVIEW**

At present, Myanmar has been exercising the centralized constitutional review model under sections 46 of the 2008 Constitution since it was established in 2011. Section 46 of the 2008 Constitution provides;

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<sup>1</sup> The *Pyidaungsu Hluttaw* (Union Parliament) comprises two *Hluttaws* namely *Pyithu Hluttaw* ((House of Representatives) and *Amyotha Hluttaw* (House of Nationalities), see Section 74 of the 2008 Constitution.

A Constitutional Tribunal is authorized to interpret the Constitution, to scrutinize whether or not laws enacted by the legislature, check the constitutionality of functions of executive authorities, to decide on the Constitution disputes, and to perform other duties prescribed in the Constitution.

The Tribunal has the final decision in matters of constitutionality. It is stated in Section 324 of the 2008 Constitution that “the resolution of the Constitutional Tribunal of the Union shall be final and conclusive.”

In the case of *The President of the Union Vs Dr. Aye Maung and 23 Representatives of the Amyotha Hluttaw (House of Nationalities)*<sup>2</sup>, the Tribunal held that the Attorney-General should not submit the reference case for reviewing the previous judgment since the resolution of the Tribunal is final and conclusive.

The Tribunal performs abstract review *ex-post* under Section 322 (b) of the 2008 Constitution by vetting the constitutionality of laws. A request for a concrete review can be made by an ordinary court dealing with the case at hand *ex officio*. Section 323 of the 2008 Constitution describes as follows;

In hearing a case by a Court, if there arises a dispute whether the provisions contained in any law contradict or conform to the Constitution, and if no resolution has been made by the Constitutional Tribunal of the Union on the said dispute, the said Court shall stay the trial and submit its opinion to the Constitutional Tribunal in accord with the prescribed procedures and shall obtain a resolution. In respect of the said dispute, the resolution of the Constitutional Tribunal of the Union shall be applied to all cases.

### III. THE SUBJECTS OF CONSTITUTIONAL REVIEW

Due to different legal cultures, political and historical circumstances, the constitutional review may take various forms. A Constitution may permit the legal dispersal of legislative power in the form of constitutional review. Constitutional review is the guardian of the Constitution and safeguards the fundamental rights of citizens.

Constitutional review is a necessary element or ingredient of the Constitution. It prohibits all sectors and state institutions from restraint arbitrariness, oppressiveness, and abuse of power. It keeps the democracy flourishing and democratic principles by reviewing all state organs and all government officials to be conducted within limited power. The main objective is to maintain the supremacy of the Constitution, to safeguard the fundamental rights of the citizens, and to strike down any law inconsistent with the Constitution. It is crucial to assess whether the constitutional review between three sectors (executive, legislative, and judicial) is acceptable and practicable.

The Constitutional Tribunal of the Union of Myanmar assesses *inter alia* the elements of constitutional review as:

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<sup>2</sup> Submission No.2/2012, Decisions of the Tribunal, 2012.

- (1) there must be an actual case or cause of action or controversy that requires the exercise of judicial power;
- (2) the subject act or issue is questionable or has valid reasons.

There is no single proportionality test adhering to the Tribunal, and the application of this test relies on a case by case basis. The policy of the Tribunal is to strictly adhere to the concept of peace, equality, justice, freedom, cooperation, and fair decision.

## **1. Parliamentary laws and Statutes**

Parliamentary laws and statutes are usually subjects of constitutional review. Section 322 (b) of the 2008 Constitution granted the Tribunal the power to exercise *ex-post* review.

In the case of *Dr. Aye Maung and 22 representatives vs. The Republic of the Union of Myanmar*<sup>3</sup>, the Tribunal delivered an unconstitutional ruling, striking down the provision of the Law Relating to Emoluments, Allowances and Insignia of the Region or State Level Persons, as the Tribunal stressed that Section 262(a) (iv) and 262 (e) of the 2008 Constitution defined the Minister of the National Races Affairs as the Minister of the Region or State concerned. The Tribunal ruled that these provisions clearly provide the Minister of the National Races Affairs and the other Ministers of the Region or State an equal in status without any discrimination. After the decision, the *Pyidaungsu Hluttaw* (Union Parliament) amended this law on 8 March 2013.

In the case of No.1/ 2015, *Dr. Aye Maung and 23 Representatives from Amyotha Hluttaw*, the Tribunal also ruled that provision of Section 11 (a) of the Law on Referendum for the Approval of the Bill Amending the 2008 Constitution which permits holders of the Temporary Identity Cards the right to vote, is unconstitutional with the 2008 Constitution.

Many countries have designed and developed a constitutional review to their own needs and domestic situation. The type and scope of review power may differ from one to another. This power ensures the rule of law and confirms whether the actions of the executive branch conform to constitutional guarantees. Some Constitutions grant an extensive range of review power. However, the Tribunal's power of review is limited. It is provided in Section 11 of the 2008 Constitution that the three branches are separated, to the extent possible, and they maintain a reciprocal control and ensure check and balance between each other.

## **2. Constitutional Amendments**

The amendment of the Constitution is an alteration of specific provisions of the Constitution. Amendments are made to improve quality, add new provisions, or to invalidate existing.

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<sup>3</sup> Submission No.2/2011, Decisions of the Tribunal, 2011.

In Niger, Senegal, and South Africa, constitutional courts have the power to review the constitutionality of constitutional amendments, but some constitutional courts do not have such power. In some countries such as India and Bangladesh, courts exercise decentralized constitutional review, whereas the supreme courts have the power to review the constitutionality on constitutional amendments. In Kyrgyzstan, constitutional amendments are subject to constitutional review.

In Myanmar's practice, amendment of the Constitution shall be proposed, processed, and decided by the Constituent Assemblies. The Tribunal has no implicit or explicit power to review the constitutionality of constitutional amendments.

The Constitutional amendments discussion has been under the process in Myanmar since February 2019. One of the *Pyidaungsu Hluttaw* members from the National League for Democracy (NLD), the current ruling party, urgently proposed to form a Joint Committee for amending the 2008 Constitution. After intense debate in the *Pyidaungsu Hluttaw*, the Joint Committee on Amending the 2008 Constitution was established with 45 members to make a detailed analysis of the proposed amendments of the 2008 Constitution.

Daw Nan Ni Ni Aye, a representative of *Amyotha Hluttaw* and 24 other representatives, submitted the case No. 1/2019 to the Tribunal. They requested to present a bill for the amendment of one particular Section of the Constitution. They claimed that since the bill is submitted in accordance with the Chapter 12 of the 2008 Constitution, it should be accepted and openly discussed at the *Pyidaungsu Hluttaw* in alignment with the provision of Section 435 of the 2008 Constitution, which stipulates the process of submitting to the *Pyidaungsu Hluttaw* the bill to amend the Constitution.

The Tribunal considered the following facts;

- (i) whether or not there is a sufficient legal ground to claim for an interpretation of Section 435 of the 2008 Constitution;
- (ii) there must be an actual case or cause of action obtaining for the exercise of judicial power;
- (iii) whether the subject act is questionable or whether it has the valid reason to submit for constitutional interpretation;
- (iv) whether or not the facts argued in the case are subjects that fall within the jurisdiction of the Tribunal;
- (v) whether or not Section 435 of the 2008 Constitution requires interpretation;

The Tribunal found that Section 435 of the 2008 Constitution is a procedural provision, and the wording of that section is clear and complete, requiring no interpretation. It does not include any complicated and indecisive fact, either grammatically or in terms of terminology. After the Tribunal's review of legal issues and different methods relating to the interpretation, the Tribunal

decided that it had to give full effect to the plain language of this particular section, and the Tribunal had no authority to look into the consequences of interpretation. The Tribunal held that it was not permissible to interpret a specific provision that did not need an interpretation.

Submission No.2/2019 was initiated by Dr. Sai Sei Kyauk Sam, the representative of *Amyotha Hluttaw* from Shan State constituency and 24 other representatives, in order to obtain an opinion from the Tribunal concerning an urgent proposal to form a joint Committee on Amending Constitution composed of the *Pyidaungsu Hluttaw* members representing all political parties, proposed by its representative U Aung Kyi Nyunt from Magway Region constituency. They questioned the constitutionality of the formation of the Joint Committee under Chapter 12 of the 2008 Constitution.

The NLD members claimed the preliminary objection to the Tribunal stating that the submission of Submission No.2/2019 does not fall within the jurisdiction of the Tribunal since the formation of the Committee is decided by the Parliament's resolution. The Tribunal had to hear and determine the central legal issue whether the matter claimed in the submission fell within the jurisdiction of the Tribunal.

The applicants requested the Tribunal to decide whether or not the action of the legislative authority was in conformity with the 2008 Constitution. Under the 2008 Constitution, the Tribunal is authorized to check the constitutionality of the laws enacted by the legislature and the actions or measures of executive authorities. The power to conduct the constitutional review over the action or measure of the legislature is not vested upon the Tribunal. Thus, the Tribunal decided that the actions and resolutions of the *Pyidaungsu Hluttaw* are not within the competence of the Tribunal.

### **3. Parliamentary Resolutions**

Parliamentary resolutions are also not subject to constitutional review in Myanmar as it is assumed that the constitutional review is a form of normative control, and a wide range of parliamentary resolutions are not to be covered within this framework.

A case named Submission No. 5/2014, submitted by U Aung Kyi Nyunt, and the other 26 representatives of *Amyotha Hluttaw* was cited here regarding the question of the constitutionality of proportional representation system for the election of *Amyotha Hluttaw*. The Tribunal pointed out that, firstly, the law proposed to adopt the proportional representation system in the *Amyotha Hluttaw* has not yet been enacted. Secondly, the decision remains to be settled at the *Pyithu Hluttaw* (House of Representatives) and *Pyidaungsu Hluttaw*. The parliamentary process has not yet been completed, and it requires to be finalized by the majority votes of both houses. The Tribunal has the power to review the constitutionality of enacted laws, but not bills, resolutions, and activities of the Parliament. For all these reasons, the Tribunal determined that the case had not covered the scope needed for the jurisdiction of the Tribunal.

In 2016, the Submission No.1/2016 presented by U Sai Than Naing, representative of the *Amyotha Hluttaw* and 22 other representatives, questioned one of the qualification clauses of members of the Tribunal, which make as eligible a person who is, in the opinion of the President, an eminent jurist. They also requested to interpret whether this provision is applicable only to three members chosen by the President under Section 321 of the 2008 Constitution.

The main issues of the case were;

- (i) whether or not the involving the *Pyidaungsu Hluttaw* as a respondent in this case is contrary to the law;
- (ii) whether or not the interpretation of the resolution which is decided and approved by the *Pyidaungsu Hluttaw* is contrary to the law, and whether or not the Tribunal has the jurisdiction over parliamentary resolution;
- (iii) whether or not the new additional formation and expansion of the Tribunal's Law concerning Section 333(d) (4) of the 2008 Constitution is contrary to the 2008 Constitution.

The Tribunal decided that it had the power to check the constitutionality of the laws enacted by the legislature and the actions or measures of executive authorities. The authority to conduct the constitutional review over the actions or measures of the legislature is not vested to the Tribunal indeed. The Tribunal further decided that the actions and decisions of the *Pyidaungsu Hluttaw* are not within the competence of the Tribunal.

The Tribunal further ruled that Section 4 (b) of the Constitutional Tribunal Law, which only allows the President to nominate 'eminent jurist' as members, is contrary to the 2008 Constitution, and the submission was dismissed.

#### **4. International Treaties and International Laws**

As constitutions and laws are based on the history and culture of one country, each country has its unique systems and standards. But it does not mean that drawing out a universal constitutional value and principle is entirely impossible. One of the important duties of the constitutional courts and equivalent institutions includes harmonizing between the universal constitutional values and local values of one's country, during the recourse of adjudication.

International treaties are subjects of constitutional review in most countries such as Korea, Mongolia, Russia, Tajikistan, Turkey, Uzbekistan, Kyrgyzstan, and Kazakhstan. However, in Myanmar, international treaties are not subjected to the constitutional review. To ratify international treaties, firstly, the ministry concerned makes a complete assessment over the treaty, translates into Myanmar language, and submits it to the Union Attorney-General's Office to acquire legal opinions. Secondly, it is submitted to the Cabinet for approval. Thirdly, the ministry concerned seeks the final confirmation from the legislature.

Constitutions must adhere to the most fundamental norms of international law. Commonly, the executive branch is often assumed as the primary authority to ratify or withdraw from international agreements. However, some constitutions require legislative approval of treaties or even judicial involvement before the ratification of such treaties. Furthermore, some constitutions set limitations that may include mandatory or optional referendums.

Certain constitutions stipulate a provision that international obligations and treaties become part of the domestic law and that provisions of international treaties should be applied appropriately. Upon ratification of most international or regional treaties, countries implement explicitly-stated international or regional requirements through national mechanisms and institutions. In Myanmar, the recognition of the international treaty as part of the national legal system is connected with the ratification procedure. External factors, such as the role of international law and treaties, have a little influence or play a limited role in Myanmar.

In our view, international law is not the only determining factor (the factor to be considered by the Tribunal when reviewing the constitutionality of law) in constitutional review; rather, like some constitutional courts, it is referred to as a norm to be respected in the course of judgment if it deems necessary. International law and norms are respected when the Tribunal exercises its power of constitutional review. We believe that it is about a search for just and good principles or shared norms.

When the Tribunal takes into account human rights values, own local values, international and foreign precedents have minimal effect in determining constitutional issues. Domestic laws need to harmonize with ratified international agreements, and the duties prescribed under international agreements are to be consistent with the one countries' constitutions.

## **5. Other Acts of Executive Authorities**

The constitutional adjudication system is generally expected to guarantee the citizens' fundamental rights from the abuse of power, violation of due process, and delay in action. The constitution should prevent any action, inaction, or misuse of power by executive authorities, which harms individual rights. Under Section 322 (c) of the 2008 Constitution, the Tribunal has the power to veto the actions of executive authorities of the Union, Regions, States, and Self-Administered Areas.<sup>4</sup>

In the case of *Chief Justice of the Union vs. Ministry of Home Affairs*<sup>5</sup>, the Tribunal ruled that the 2008 Constitution stipulated a separate and independent existence between the legislative,

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<sup>4</sup> The Union is constituted by seven Regions, seven States and the Union territories. The capital of the Union, Nay Pyi Taw is the Union territory under the direct administration of the President. The Self-Administered Divisions and Zones are delineated in respective Regions and States. See Sections 49 to 56 of the 2008 Constitution.

<sup>5</sup> Submission No.1/2011, Decisions of the Tribunal, 2011.

executive, and judicial powers. The judicial power empowered to the courts and judges is clearly stated in the 2008 Constitution. Therefore, the exercise of judicial power is permitted only to the judges who are entrusted by the 2008 Constitution. The Tribunal delivered that the conferring judicial power to administrative officers of the General Administration Department of the Ministry of Home Affairs is incompatible with the 2008 Constitution.

The constitutional courts and equivalent bodies also have jurisdiction over the competence disputes among state agencies, between state and local governments, and among local governments. In Submission No.3/2012, *The Speaker of the Mon State Hluttaw vs. The Republic of the Union of Myanmar*, the Tribunal ruled that the *Pyidaungsu Hluttaw* has the right to enact laws related to the matters prescribed in Schedule One (Union Legislative List) referring to Section 96 of the 2008 Constitution. Similarly, the Region or State Legislature has the right to enact laws related to the matters provided in Schedule Two (Region or State Legislative List) referring to Section 188 of the 2008 Constitution. Accordingly, the Tribunal decided that the exercise of legislative power to enact the Development Committees Law by the Mon State Legislature as a whole or any part of the Mon State is permitted by the 2008 Constitution.

## **6. Emergency Decree**

Emergency decrees are not subject to constitutional review in Myanmar. In emergencies, the President may exercise the executive power of a Region, State or Self-Administered Area concerned, and entrust the executive power to an appropriate body or a suitable person. Although the President has the right to exercise the legislative power exclusively for executive matters, he may not entrust the legislative power to the above-stated body or person.

## **7. Impeachment Proceeding**

The authority to hear impeachment proceeding of the Head of State or Head of Government is the typical function of the constitutional review and is found in many constitutional courts of the world. In some countries, the power of impeachment is vested to the constitutional courts or equivalent bodies. The Tribunal of Myanmar has no jurisdiction power on any kind of impeachment process. The impeachment process can be initiated only by the *Pyidaungsu Hluttaw* (Union Parliament) in Myanmar.

## **8. Electoral Process and Dissolution of Political Parties**

Individual constitutions allow the power of review over the results of general elections and the dissolution of political parties. Some constitutions enable the electorate to recall its representatives in the legislative sector before the end of their term. Some also confer the power to decide on election

disputes to constitutional review bodies. Constitutions of Indonesia, Mongolia, Turkey, and Kazakhstan offer examples of such category of constitutional review.

In Myanmar, the Tribunal is not involved in the electoral cases and dissolution of political parties. The Tribunal exercises the power of constitutional review according to Section 322 of the 2008 Constitution because the Union Election Commission has such power.

In Submission No.1/2014, the Tribunal decided that the submission fell outside the scope of its competence, and agreed that the Tribunal was not in the position to intervene into questioning the constitutionality of the appointment of Lisu and Rawan National Races Minister in Kachin State, and the appointment of Lisu National Races Minister in Shan state.

The Tribunal's judgment is mainly based on the following points;

(i) The process of the election is reviewed as (a) the respected State or Division as a whole is fixed as a single constituency for the national races who are entitled to elect their representative ministers to Region or State Parliament. (b) national races candidates who want to contest in the election are required to present their names to Region/ State Election Sub-Commission. (c) the objection to the candidate is permitted to be lodged.

(ii) Due to this electoral procedures, the applicants in the present case shall have taken up their objection to Election Sub-commission during the process of election. The two options are offered to the applicant; first, to settle this matter with Election Commission when the constituencies for Lisu and Rawan races are fixed; second, to do the same when the list of the candidate is presented.

(iii) Instead of resolving this matter in question with the then authorities concerned, the present case is only put up to the Tribunal over two years, after changing the previous Election Commission.

(iv) The Tribunal observes that Union Election Commission Law, adopted in 2010, provides that the decisions and activities of the Commission are final and conclusive in the matters such as (a) electoral functions (b) the appeal and revision against decisions of the respective of Election Tribunal (c) activities in accordance with the Political Parties Registration Law.

(v) It is evident that the arrangement of constituencies, acceptance of candidates, a convening of the election, recognition of members of the various *Hluttaw* are to be conducted by multiple levels of Election Commission. Those who are not satisfied with the activities of the Commission are allowed to lodge objections within the limited time.

(vi) The Commission, on its own volition, has the right to request the relevant documents or case file relating activities of the various Election Sub-commission and render a decision that shall be final and conclusive.

(vii) With respect to the current submission, it seems that the Tribunal is requested to check the activities of the previous Election Commission. It is also found that the matter presented to the Tribunal occurred before the enforcement of the Constitution and the enforcement of the Tribunal Law.

(viii) As the decision of the Union Election Commission is final and conclusive, provided under the Constitution, the Tribunal is not in the position to intervene.

## **9. Constitutional Complaint**

The judicial remedy of a constitutional complaint is a highly effective means of protection of fundamental rights and freedoms. Some aim to safeguard the constitutional rights by a single court empowered to restore the individual rights affected by an act of executive authority.

There may be individual complaints against laws, regulations, international treaties, administrative acts as well as complaints against judicial decisions which harm fundamental rights provided by their constitution. Omissions of administrative bodies and their acts also lead to the individual complaint. Individual complaint is an effective remedy to protect individual rights. If the constitutional complaint cannot be submitted to the court, the effective protection mechanism of individual rights cannot be established. Any individual rights shall be well protected from possible infringement by executive authorities.

The individual's right to complain about the alleged infringement of rights serves to prevent not only the unconstitutional action of the executive sector but to maintain one's domestic values and freedoms guaranteed by the constitution. In Myanmar, according to Section 377 of the Constitution, every citizen of Myanmar shall have the right to apply writs for the protection of their fundamental rights to the Union Supreme Court and the Tribunal.

## **IV. STANDARDS OF REVIEW**

The Tribunal's statutory foundations include the 2008 Constitution. While considering a case, the Constitutional Tribunal considers legal and factual grounds of each case. In doing so, the Tribunal assesses the conformity of law amid facts to the fundamental constitutional values such as (a) whether or not the law or act are in conformity with basic norms and domestic constitutional values; (b) whether or not the law or act has consequences or negative impact; (c) whether or not the law or act requires.

## V. EFFECT OF REVIEW

### 1. Delivering the Decision

The Tribunal carries out speedy disposal after hearing for the interpretation, opinion, or decision so far as possible and expected to announce the day of the hearing. The Tribunal renders interpretation and opinion with the consent of more than half of the members and passes decisions with the permission of more than half of the members, including the Chairperson.<sup>6</sup>

The Tribunal may apply the relevant provisions of the Code of Civil Procedure, the Code of Criminal Procedure and the Evidence Act whenever it is deemed to be relevant and appropriate with an aim to settle disputes under the Section 37 (a) of the Constitutional Tribunal Law. It also points out that the Tribunal applies the principle of *mutatis mutandis*.

According to Section 34 of the Constitutional Tribunal Law, the Tribunal may invite the Attorney-General of the Union as the *amicus curiae* if it deems necessary. The Tribunal may summon any person or organization concerned to testify and secure an opinion. All judgments are to be published except for the judicial deliberations of Tribunal's judges carried out within the Tribunal. The members have the right to give their dissented opinion, and it shall be recorded and kept confidential. Majority decisions or judgments shall be adopted by the Tribunal.

Concurring and dissenting opinions are the expression of plural methods and the reasons on which concurrence or dissents are assessed by logical, critical analysis by all judges. It means all judges of the Tribunal can give their own opinions freely without any interference from other authorities.

### 2. Legal Effect and Enforcement

Section 324 of the 2008 Constitution and Section 24 of the Constitutional Tribunal Law provide that the decision of the Tribunal shall be final and conclusive. The judgment upon the submission transferred from an ordinary court under Section 12 (g) of the Law on Constitutional Tribunal shall be effective in all similar cases. It signifies that the right to appeal or the right to revision by the parties is not allowed.

Section 35 of the Constitutional Tribunal Law provides that all the judgment passed by the Tribunal shall be declared in State Gazette. Decisions shall be bound and published for reference and kept as precedent cases.

All types of unconstitutional decisions have *erga omnes* effect. Section 198(a) of the 2008 Constitution states that if any provision of the law enacted by the *Pyidaungsu Hluttaw* (Union Parliament), the Region *Hluttaw*, the State *Hluttaw*, the Leading Bodies of the Self-Administered

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<sup>6</sup> Section 22 of the Constitutional Tribunal Law.

Division or the Self-Administered Zone or any existing law is inconsistent with any provision of the Constitution, the Constitution shall prevail. Moreover, according to section 446 of the 2008 Constitution, existing law shall remain in operation in so far as they are not contrary to the Constitution until and unless they are repealed or amended by the *Pyidaungsu Hluttaw*. Generally, the decisions of unconstitutionality have prospective effect, and unconstitutional statute or provisions shall lose its effect, but further legislative action is required in practical aspects to be conducted by concerned executive authorities. The decisions of the Tribunal shall have a legal impact since its adoption and published in the official gazette.

## **VI. SPECIFIC LEGAL REMEDIES**

Any extraordinary remedies, which are provided in the constitution, in addition to the decisions of the constitutional court, may include, *certiorari*, *mandamus*, *prohibition*, *quo warranto*, *habeas corpus*, and others. The legal remedies are discretionary and not compulsory. In most constitutional courts, the remedies are available within the jurisdiction of an individual application, but it is not under the subject of constitutional review.

Myanmar's Constitution does not mention what kinds of remedies can be invoked by the individuals applying writs to the Tribunal. The legislature could decide the remedies in the form of laws, or sometimes remedies could be specified in the regulation of the Tribunal, but up to now, such action has not taken place. The Tribunal, when decides cases, may take the opportunity to declare and determine what remedies are permitted, but we do not have such a case.

## **VII. THE RELATION BETWEEN THE UNION PEACE AGREEMENT AND THE ROLE OF THE TRIBUNAL IN THE FUTURE**

The constitutional review is a cornerstone of judicial power. It plays an essential role in mediating the political process, a high-profile function of reviewing legislation for constitutionality, the essence of the Constitutional Court for encouraging peaceful resolution of political disputes and facilitating consolidation in democratic countries. It can be seen in the democratic transitional experience of some countries as in the South Africa case and South Korea case.

It can be seen that in most of the countries, constitutional courts are created during their democratic transition. The significant experience of South Korea, Thailand, Mongolia, and South Africa proves the role of the constitutional court to maintain the political stability in democratization.

Myanmar is undergoing a process of democratization, and it had convened three sessions of the Union Peace Conference, known as 21st Century Panglong Conference, and adopted a total of 51 basic principles to be included in the Union Peace Accord.

The second session was held on 29 May 2017, and 37 agreements were signed as a part of the Union Peace Accord. It affirmed the mandatory establishment of a separate and independent Tribunal. Currently, there are different views with respect to the establishment of the Constitutional Tribunal. Therefore, the 21st Panglong Conference affirms *inter alia* the establishment of a separate and independent Tribunal aimed to strengthen a federal democracy system. The Tribunal would become the judicial body to guard the implementation, compliance, and effective application of the terms and conditions of the Union Peace Accord.

The 21<sup>st</sup> Panglong Conference agreed *inter alia* that the Union must be based on democracy and federalism. Myanmar makes a lot of effort to expeditiously implement the steps towards amending the 2008 Constitution under the auspices of the 21<sup>st</sup> Century Panglong Conference<sup>7</sup>. It is also aimed to establish perpetual peace and national reconciliation.

The *Pyidaungsu Hluttaw* has taken the initiative towards the amendment of several provisions in the 2008 Constitution. The Joint Committee on Amending the 2008 Constitution is trying to draft amendments to the 2008 Constitution step by step and moving towards the Union based on democracy and federalism. The Committee received more than 3700 recommendations for amendments from various political parties and intended to draft an amendment bill based on its findings. In this regard, it can be found that seven political parties positively proposed 63 amendment recommendations concerning the Tribunal.

## VIII. THE ROLE OF THE TRIBUNAL WITHIN THE FEDERAL SYSTEM

A greater depth of understanding of constitutional review in the federal system is crucial. The involvement of the type of constitutional review and the principles of interpretation that have been applied in other federations to resolve federal constitutional questions are also to be brought before the Tribunal. Potential issues for constitutional review will be escalated, and more strengths, weaknesses, and challenges should be assessed by the constitutional court in a federal system.

If we look at the federal features of the Constitution, especially in terms of legislative power, we will see that it recognizes two levels of government, each of which has constitutional authority in its own right and also divides legislative power between levels of government. The Federal Constitution provides rulings for resolving any conflict when each level of government exercises power. Under these circumstances, the role of the Tribunal becomes more vital. The allocation of exclusive or concurrent power may lead to more controversial issues.

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<sup>7</sup> This conference is the Peace Conference of the Union held in 21st century and which is historically based on the Panglong Conference held in 1947. The historical Panglong Conference, 1947, that conducted series of negotiations between General Aung San and other ethnic leaders in 1947. All these leaders unanimously agreed and decided to unitedly struggle for independence from British colony in order to establish the Union of Burma as a whole.. In order to reflect this very important historical event, the 21st Century Panglong Conference is held to negotiate between the ethnic leaders and all stakeholders enabling to establish the peace in the entire Union of Myanmar and reform the democracy federal state.

The federal system may prescribe the three-fold distribution of power by recognizing the constitutional powers of local government as the components of a federal system includes legislative, executive, and sometimes judicial institutions at each level of government, and the power is distributed among them. In this case, the Tribunal may take more responsibility, and the scope of the constitutional review system shall be enlarged. The Tribunal shall encounter more challenges as the potential advantages and disadvantages of federalism take place.

## **IX. DISTRIBUTION OF LEGISLATIVE POWER**

A list of legislative competences and concurrent powers are distributed to the provinces and the Federation. As the concurrent powers represent a more integral and flexible model of federalism, the challenge will become more complex.

The scope and functions of the Tribunal becomes broader especially in order to;

(a) specify which level of government has supremacy in the case of any incompatible or conflict arises or the question of supremacy rests with the national or federal level. Sometimes the Tribunal has to play a more active role over concurrent matters of the national government and federal government.

(b) Sometimes, the constitutional court has to be involved in the conflict to identify and resolve whether it falls within residual or concurrent powers.

The federal system places a special responsibility on the constitutional review at the apex of the judicial system, which must have an irrefutable reputation for independence, neutrality, and competence. If the guarantees to the sub-national units are breached, they have to recourse to constitutional review. It will, therefore, become an essential role for the Tribunal to give sufficient safeguards to protect the development of power.

Therefore, the scope and functions of the Tribunal will be more expansive (a) to oversee the possible abuse of power by State Institutions (b) to control the mechanism for strict scrutinization which is implemented to prevent the attenuate of federal power (c) to check any arbitrary acts conducted by the federal government (d) to grant more constitutional review power and to avoid unnecessary federal intervention and suspension (e) to play an advisory role on federal intervention or any other misappropriation (f) to check and balance the deterrence of constitutional amendments.

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- Constitution of the Republic of the Union of Myanmar, 2008
- Constitutional Tribunal Law

### **II. Case study law**

1. *The Chief Justice of the Union Vs. Ministry of Home Affairs* (Submission No.1/2011, 14 July 2011)
2. *Dr. Aye Maung and 22 representatives Vs. The Republic of the Union of Myanmar* (Submission No.2/2011, 14 December 2011)
3. *The President of the Union Vs. Dr. Aye Maung and 23 representatives of the Amyotha Hluttaw* (Submission No.2/2012, 28 March 2012)
4. *The Speaker of the Mon State Hluttaw Vs. The Republic of the Union of Myanmar* (Submission No.3/2012, 27 July 2012)
5. *Daw Dwe Bu and 49 representatives of the Pyithu Hluttaw Vs. The Republic of the Union of Myanmar* (Submission No.1/2014, 18 September 2014)
6. *U Aung Kyi Nyunt and 26 representatives of the Amyotha Hluttaw* (Submission No.5/2014, 27 February 2015)
7. *Dr. Aye Maung and 23 representatives of the Amyotha Hluttaw Vs. the Pyidaungsu Hluttaw* (Submission No.1/2015, 11 May 2015)
8. *U Sai Than Naing and 23 representatives of the Amyotha Hluttaw* (Submission No.1/ 2016, 19 January 2017)
9. *Daw Nan Ni Ni Aye and 24 representatives of the Amyotha Hluttaw Vs. the Pyidaungsu Hluttaw* (Submission No. 1/2019, 25 July 2019)
10. *Dr. Sai Sei Kyauk Sam and 24 representatives of the Amyotha Hluttaw Vs. the Pyidaungsu Hluttaw* (Submission No.2/2019, 25 July 2019)