

2. The Functions and Duties of the Constitutional Tribunal of Myanmar

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Abstract

This paper first provides an overview of how Myanmar institutionalized constitutional review in the post-colonial, socialist, and post-socialist eras. As a core focus, it investigates the functions and duties of the Constitutional Tribunal in the context of specific references to the case study law. It demonstrates structural dilemmas existing in the domain of constitutional review in contemporary Myanmar. This paper intends to shed light on how the Tribunal performs the functions and duties in judicial practice. This paper also concludes with the author's solutions and recommendations aimed at the enhancement of Tribunal's capacity and effectiveness.

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INTRODUCTION

Myanmar promulgated three constitutions since independence. First was the post-colonial 1947 Constitution of the Union of Burma. The 1974 Constitution of the Socialist Republic of the Union of Burma was adopted during the socialist era. The present 2008 Constitution of the Republic of the Union of Myanmar (hereinafter, the 2008 Constitution) was adopted under the military government. This Constitution is the basic law of the country and guarantees the fundamental rights of the citizens. Moreover, it establishes the state structure.

Two former constitutions did not stipulate a separate and independent court to settle constitutional disputes. According to section 151 of the 1947 Constitution, it was the Supreme Court to exercise the constitutional review. In particular, it decided upon constitutional disputes and interpretation. Moreover, the Parliament could grant the Supreme Court the additional power to exercise the judiciary effectively.¹ Furthermore, section 4 of the 1948 Union Judiciary Act provided extensive powers to the Supreme Court to supervise all courts in the Union, and settle civil and criminal cases.

However, after the adoption of the 1974 Constitution, the Pyithu Hluttaw (People's Parliament) became an official organ to review and decide constitutional issues under Article 200 and Article 201 of the 1974 Socialist Constitution. Indeed, the nature of Parliament usually exercises the power of passing laws; however, the Parliament of the Socialist Republic of the Union of Burma practiced the constitutional review. Therefore, this 1974 Constitution is a typical characteristic of Socialist Myanmar. It demonstrates the 'socialist legality' and the reason for taking the power of constitutional review (judicial review) by the Pyithu Hluttaw was that the representative of classes of people (e.g., representatives of peasant and workers) presided as the judges in legal proceedings. Legal scholars could not preside as a judge but could offer only legal suggestions to the judges.

In 1988, the general discontent among the people had risen due to economic decline, leading to a countrywide civil disturbance. Administrative machinery broke down and, on 18th September 1988, the State Law and Order Restoration Council (SLORC) took over the power of the State. It suspended the 1974 Constitution and abolished the Pyithu Hluttaw as well as various responsible councils, along with the Council of People's Justice and the Central Court.

The SLORC, in order to adopt a new constitution, mobilized the National Convention in 1993; however, three years later, it was suspended when the National League for Democracy (NLD) boycotted it. A National Convention was again called in 2004 to adopt the Constitution. Four years later, in 2008, they adopted the Constitution. Hence, Myanmar had remained without an effective constitution from 1988 to 2008. Three years later, in 2011, the Constitutional Tribunal was set up under Section 46 of the 2008 Constitution.

¹ Section 153 of the 1947 Constitution of the Union of Burma.

I. THE CONSTITUTIONAL TRIBUNAL of THE UNION

The Constitutional Tribunal of the Union Law (hereinafter, the Tribunal Law) was enacted in 2010, whereas it started performing its functions in 2011.² This body stands as a separate judicial institution to exercise exclusive jurisdiction over constitutional disputes.³ The Tribunal bears authority to make decisions in disputes relating to the Constitution between Pyidaungsu (Union) and Regions, between Pyidaungsu and States, among Regions, among States, and between Regions or States and Self-Administered Areas and among Self-Administered Areas themselves.⁴ The Constitution establishes separation of powers among three branches: legislative, executive, and judicial. If the disputes concerning these three branches' functions and duties which are conferred by the Constitution arise among them, the Constitutional Tribunal settles such kinds of disputes.

II. FUNCTIONS AND DUTIES OF THE CONSTITUTIONAL TRIBUNAL OF THE UNION

In Myanmar, apart from the Tribunal, there is a Supreme Court, courts of the lower level, courts established by law⁵, and Courts-martial.⁶ The Tribunal is exclusively competent over constitutional disputes and does not preside over civil or criminal cases.

Under the section 322 of the 2008 Constitution and section 12 of the Tribunal Law, the Tribunal has the authority to interpret the provisions of the Constitution, review the constitutional disputes arising out of the activities of executive organs, and vet the law passed by the legislature. Moreover, the Tribunal has the authority to review the pending cases in ordinary courts. In 2013, the Law amending Tribunal Law added several novelties, reporting back to the President, the Pyithu Hluttaw speaker, and Amyotha Hluttaw speaker, who chose the members of the Tribunal.

Before this amendment was enacted, the President had argued that such a reporting requirement would infringe upon the ability of the Tribunal to adjudicate constitutional issues independently and that the bill was contrary to the principle of independent administering of justice.⁷ However, the President's argument was rejected by members of the Pyidaungsu Hluttaw. As a result of conflict, this amendment passed without the President's signature. In particular, the Constitution provides that "if the president does not send the Bill back to the Pyidaungsu Hluttaw together with his signature and

² State Peace and Development Council Law No. 21 under Section 443 of the Constitution of the Republic of the Union of Myanmar, 2008.

³ Section 293(c) of the Constitution of the Republic of the Union of Myanmar, 2008.

⁴ Section 46, *ibid.*

⁵ Juvenile Court, Municipal Court, Traffic Court and so on.

⁶ Section 293. of the Constitution of the Republic of the Union of Myanmar, 2008.

⁷ Section 19 (a), *Ibid.*

comments within the prescribed period, or if the President does not sign to promulgate, on the day after the completion of that period, the Bill shall become a law as if he had signed it.”⁸

1. Interpreting the Provisions of the Constitution

Constitutional interpretation is one of the core functions in the domains of constitutional and judicial review. In Myanmar, the Constitution designates such authority with the Tribunal. To discuss more about the interpretation function, this section will refer to *the Attorney-General of the Union (on behalf of the President of the Union) v 1.the Speaker, the Pyidaungsu Hluttaw, 2. The Speaker, the Pyithu Hluttaw, 3. The Speaker, the Amyotha Hluttaw.*⁹

Despite provisions for the formation of organizations and appointment of their members at the Union, Region or State levels, and Self-Administered Division or Zone level, there is no specific definition of the term ‘Union Level Organization’ in the 2008 Constitution. The Attorney-General submitted on behalf of the President to the Tribunal with a request to interpret the ‘Union Level Organization.’ The definition of the term ‘Union Level Organization’ is prescribed in section 2(1) of the Law Relating to Pyidaungsu Hluttaw, section 2(h) of the Law Relating to Pyithu Hluttaw, and Section 2(h) of the Law Relating to Amyotha Hluttaw respectively as follows:

Union Level Organization means the Union Government, the National Defense and Security Council, the Financial Commission, the Supreme Court of the Union, the Constitutional Tribunal of the Union, the Union Election Commission, the Office of the Auditor General of the Union and the Union Civil Services Board formed under the Constitution and as well as the Committees, the Commissions and the bodies formed by Pyidaungsu Hluttaw, Pyithu Hluttaw and Amyotha Hluttaw.¹⁰

Although the term ‘Union Level Organization’ is defined by the Laws Relating to Hluttaws, there is no interpretation of the term ‘Union Level Organization’ in the provisions of the Constitution. Therefore, in order to analyze the issues stated in the submission, the Tribunal needed to scrutinize the provisions of the Constitution.

According to the provisions of Chapter IV of the 2008 Constitution, the term ‘Union Level Organization’ means the organizations directly formed under the provisions of Constitution. The term ‘organization’ mentioned in the submission is different from the Committees, Commissions, and Bodies, which was merely formed by each Hluttaw. Hence, the term ‘Union Level Organization’ must be interpreted as the Organization derived directly from the Constitution.

After discussing the above matters, it is also necessary to consider the interpretation of Chapter IV of the Constitution titled Legislature. This chapter contains the following notions, “any of the Union

⁸ Section 105 (c), *ibid.*

⁹ Submission No.1/2012.

¹⁰ Section 2(1) of the Law Relating to Pyidaungsu Hluttaw, section 2(h) of the Law Relating to Pyithu Hluttaw, and Section 2(h) of the Law Relating to Amyotha Hluttaw.

Level Organizations formed under the Constitution” and “Organizations or Persons representing any of the Union Level Organization formed under the Constitution” as equal to “the Union Level Organizations or persons appointed by the President with the approval of the Pyidaungsu Hluttaw. However, Committees, Commissions and Bodies formed by each Hluttaw are regarded only as organizations of Hluttaw.

Therefore, the Tribunal had to interpret that “any of the Union Level Organizations formed under the Constitution” and “Organizations or persons representing any of the Union Level Organization formed under the Constitution” are the Union Level Organizations or Persons appointed by the President with the approval of the Pyidaungsu Hluttaw.¹¹ For all these reasons, the Tribunal granted the submission of the President and “the status granted to Committees, Commissions, and Bodies formed by each Hluttaw as Union Level Organizations is unconstitutional.”

Another case was submitted in 2016. It is the Submission No. 1/2016 presented by U Sai Naing, a member of Amyotha Hluttaw. In this case, the applicants brought the submission to the Tribunal to request an interpretation of Section 333(d) (4) of the 2008 Constitution. This section states one of the qualifications of the members of the Tribunal as a “person who is, in the opinion of the President, an eminent jurist.” The applicants also requested the Tribunal to interpret ‘an eminent jurist’ is whether or not applicable only to three members chosen by the President under Section 321 of the Constitution. The Constitutional Tribunal Law limits the application of ‘an eminent jurist’ only to three persons who were nominated by the President, not those by the speakers of Pyithu Hluttaw and Amyotha Hluttaw. However, this provision is not consistent with the Constitution. The Constitution allows the application of ‘an eminent jurist’ to all nine members. Therefore, the submission was dismissed by the Tribunal.

There is another case relating to the interpretation of the Constitution - *Daw Nan Ni Ni Aye (Amyothar Hluttaw’s Representative) and 24 others*¹². The applicant said that the Court needs to review the case in accordance with the special provisions if there is a special provision to review some cases in the 2008 Constitution or any other laws. As section 435 of the 2008 Constitution is a special provision for the amendment of the Constitution, the applicants submitted the application to be interpreted as this application is necessary to be received and discussed under section 435 of the 2008 Constitution. Therefore, the applicant submitted a suit for interpretation of the provision of section 435 of the 2008 Constitution.

The Tribunal referred to the statement of the legal scholars, N.S. Bindra and Maxwell¹³. They described that if the words of the statute are in themselves precise and unambiguous, no more can be necessary to interpret those words in their natural and ordinary sense.

¹¹ Section 91 and 92(b) of the Constitution of the Republic of the Union of Myanmar, 2008.

¹² Submission No 1/2019.

¹³ N.S. Bindra, the Interpretation of Statutes, 5th Edition, Law Book Co, Allahabad, 1970, p-718.

Therefore, as the provision of Section 435 is already clear and unambiguous, one can read and understand in accordance with the original meaning of that section. Therefore, such kind of provision is not necessary to be interpreted again. The Tribunal dismissed this submission.

2. Scrutinizing the Laws Enacted by the Pyidaungsu Hluttaw and Institutions with the Right to Make Laws at Various Levels and Functions of Executive Authorities at Various Levels Including the Union Level

According to section 322(b) of the 2008 Constitution and section 12(b) of the Tribunal Law, the Tribunal can scrutinize the laws enacted by the legislature for examining whether they conform with the Constitution or not.

The related case decided by the Tribunal on 14th December 2011 was *Dr. Aye Maung and 22 Representatives v. The Republic of the Union of Myanmar*¹⁴. In this case, the applicants presented a submission on the question of whether the term ‘Minister of the National Races Affairs’ used in section 5 of the Law of Emoluments, Allowances, and Insignia for Representatives of the Region or State is included in the term ‘Ministers of the Region or State or not’. The main issues of that case were whether or not the status of Ministers of the National Races Affairs was equal to other Ministers of the Region or State and entitled to receive the same treatments.

Under section 262(a) (iv) of the Constitution, the Chief Minister of the Region or State shall obtain the list of Hluttaw representatives to carry out the affairs of each National Race in the Region or State as the Ministers of National Races Affairs from the relevant Election Commission.

Under section 262(e) of the Constitution, the Chief Minister of the Region or State submits the list of candidates to appoint the Ministers of the National Races Affairs together with the other Ministers candidate list, which is approved by the Region or State Hluttaw.¹⁵

The Tribunal held that section 262(a) (iv) and 262(e) of the Constitution defines the Minister of the National Races Affairs as the Minister of the Region or State concerned. Consequently, Section 262(g) (ii) of the Constitution allows the President to assign duties to the Hluttaw representatives who are the Ministers of the Region or State, to do the affairs of National races concerned. These provisions give the Minister of the National Races Affairs and the other Ministers of the Region or State an equal status without any discrimination.

According to section 12(b) of the Tribunal Law and by analyzing the submission mentioned above - No. 2/2012, the Tribunal can scrutinize the constitutionality of laws after legislation (*ex post facto*). In Myanmar, before promulgating a law, a bill is usually announced in the newspapers in order to ask for suggestions from citizens. If the Tribunal can scrutinize the constitutionality of those bills

¹⁴ Submission No. 2/2011.

¹⁵ Section 262(e) of the Constitution of the Republic of the Union of Myanmar, 2008.

at the time of the announcement in the newspapers, disputes related to the legislation will be reduced, and the enacted laws will become more convenient in practice.

Another power of the Tribunal is scrutinizing the constitutionality of the acts of central and local executive authorities. Such authority is prevalent in constitutional review. *The Chief Justice of the Union v. Ministry of Home Affairs*¹⁶ case was decided on 14th July 2011. In the instant case, the Chief Justice of the Supreme Court, as an applicant, submitted the case to the Tribunal questioning the legality of conferring first class judicial power to the sub-township administrative officers as requested by the Ministry of Home Affairs.

Before the independence, the administrative officers jointly carried out the judicial functions with their original administrative functions. After independence, the High Court and the Supreme Court were established under Section 3 of the Union Judiciary Act 1948, respectively in accordance with Section 134 and 136 of the 1947 Constitution of the Union of Burma.

When the Revolutionary Council took power in 1962, the People's Judiciary system was adopted on 7th August 1972, and the Chief Court was established while other existing courts remained unchanged. During the period of the Revolutionary Council and the period of the Socialist Republic, executive and judicial power was separately and independently exercised. When the State Law and Order Restoration Council (SLORC) came into power in 1988, the existing State organs were abolished by Notification No. 2/1988, and the new Judiciary Law was promulgated. The Supreme Court, the State or Divisional Court, and the Township Court were formed.

The power of criminal jurisdiction was conferred on Sub-township administrative officers in areas that were needed. Similarly, during the period of State Peace and Development Council (SPDC), which was reconstituted by the SLORC in 1997, the Supreme Court conferred sub-township administrative officers the power of the Additional Magistrate. As the sub-township administrative officers exercised the First Class Magistrate power in the previous government, the Ministry of Home Affairs submitted the Supreme Court to empower the First Class Magistrate power to 27 sub-township administrative officers as judicial officers.

Upon the applicant's request, the court took into consideration whether the appointment of the sub-township administrative officers as judicial officers, conferring the first-class power of Magistrate and appointing sub-township administrative officers as juvenile judges are constitutional or not.

The Tribunal held that provisions of the 2008 Constitution stipulated that the legislative, executive and judicial power of the Union should be separate. The judicial power of the courts and judges is prescribed in the Constitution. Therefore, the exercise of judicial power is permitted only to those judges who are empowered by the Constitution. The conferring of judicial power to administrative officers of the General Administration Department of the Ministry of Home Affairs is not in conformity with the Constitution.

¹⁶ Submission No. 1/2011.

3. Deciding upon Constitutional Disputes among Territories in the Country Including the Union Territories

The Tribunal has reviewed the disputes between the Union and different levels of local governments, and among local governments. The Tribunal examined the case of *Speaker of the Mon State Hluttaw v. The Republic of the Union of Myanmar*¹⁷.

The petition submitted by the Speaker of the Mon State Hluttaw to the Tribunal included the issue of whether or not the Region or State Hluttaw should continue to exercise its legislative power empowered by the Schedule Two unless the repeal or amendment of the laws which were inconsistent with the Constitution.

When governments of the Regions or States perform their development activities or enact the law for respective Region or State, they should follow the guidance of the President¹⁸. The Development Committee Law (the SLORC Law No. 5/1993) - the union level law was required to be repealed urgently to allocate the legislative power to the Region and State. The laws passed by the Regions or States or Self-Administered Zone should also be consistent with the Constitution. (Schedule Two is the lists of laws which can be passed by States or Regions or Self-Administered Zone.)

Therefore, the Tribunal advised the applicants to exercise the enactment of laws and implementation of legislative powers permitted in Schedule Two only after the repealing or amending the provisions of existing laws.

4. Reporting Respectively with Regard to the Tribunal Members' Performance Relating to the Functions

Section 19(a) clearly states that the courts are to administer justice independently, according to the law, and adhering to judicial principles. The Tribunal is also a branch of the Judiciary. Therefore, it should administer justice independently and exist separately from the other two branches. Since sub-section (i) of section 12 requires that the Tribunal members are required to report back to the President, Speaker of Pyithu Hluttaw, and Speaker of Amyotha Hluttaw with regard to their performance of their functions, it seems that the other two branches interfere the Judiciary. Consequently, Section 12 sub-section (i) of the Tribunal Law affects the existence and jurisdiction of the Tribunal. Therefore, this sub-section (i) should not be added as the Tribunal's duty.

5. The Matters not decided by the Tribunal

The power to impeach the President and Vice-President of the State is the peculiar power of the constitutional review. But in Myanmar, the Tribunal does not exercise this power of impeachment.

¹⁷ Submission No. 3/2012.

¹⁸ Guidance issued by the President of the Union on 8-6-2012 and 29-6-2012.

According to the section 71 of the 2008 Constitution, if it is required to impeach the President or any Vice-President, not less than one-fourth of the total numbers of representatives of respective either Hluttaw shall submit a charge to the Head of the Hluttaw concerned. Action should proceed when this charge is supported by not less than two-thirds of the total number of the representatives of the Hluttaw concerned. If one Hluttaw endorses the taking of the action, the other Hluttaw should form a body to investigate the charge. After investigation, if not less than two-thirds of the total number of representatives of the Hluttaw passed the resolution that the President or Vice-President unfit to continue in office, the Hluttaw will submit this resolution to the Head of the Pyidaungsu Hluttaw. And finally, the Head of the Pyidaungsu Hluttaw will declare the removal of the President or the Vice-President.

Some countries, for example, Indonesia, Kazakhstan, America, France, Albania, Korea, Croatia, Poland Slovenia, and Taiwan, exercise constitutional review to confer the power to decide the results of general elections or election disputes. But in Myanmar, the Tribunal does not interfere in the election cases and dissolution of political parties.

In the case of Daw Dwe Bu, a member of the Pyithu Hluttaw, Angyinyan Constituency, Kachin and 49 members of the Pyithu Hluttaw¹⁹, that it has no jurisdiction over election matters. The Tribunal does not have the authority to deal with the election matters on the ground that these disputes are concerned with the previous Election Commission. The disputes arise before the enforcement of the 2008 Constitution and the establishment of the Tribunal. Furthermore, Section 9 of the Union Election Commission Law provides that the decision of the Union Election Commission is final and conclusive with regard to election matters. This lack of jurisdiction reduces the power of the Tribunal. Therefore, the power to decide the election matters should be added as one of the functions of Tribunal. Moreover, the Tribunal cannot decide on the activities of the legislature.²⁰

CONCLUSION

The Tribunal can deliver decisions on the constitutionality of laws and administrative measures. The Tribunal's functions and duties are the interpretation, vetting, and scrutinizing the provisions of the Constitution and actions of executive authorities.

The Tribunal can interpret the provisions prescribed in the Constitution only when cases for interpretation are submitted. In my view, deciding the submitted cases causes that the Tribunal's jurisdiction becomes restricted and cannot expand its authority in performing its functions. Therefore, the Tribunal itself should have its own motion to try the constitutional matters as one of its functions.

¹⁹ Submission No.1/2014.

²⁰ Submission No. 1/2019.

The Tribunal is an organ passing decisions on constitutional disputes. According to the provision of the functions and duties of the Tribunal, its members have to submit their reports on the duties and functions to those who nominated them. That provision could lead to constant political influence by either the President or the Speakers of Pyithu Hluttaw and Amyotha Hluttaw over each Tribunal member. Through submission of reports to the persons concerned, the President, Speaker of Pyithu Hluttaw, and Speaker of Amyotha Hluttaw may exert influence over the Tribunal members. Therefore, this kind of function should not be recognized because it causes interference over the Tribunal.