

3. A Case Analysis of the Constitutional Tribunal of Myanmar

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Abstract

The Constitutional Tribunal of the Union of Myanmar was established under the auspices of 2008 Constitution together with the new democratic government. Constitutional review system under separate constitutional courts is new experience for Myanmar as Myanmar is the second common law country having such court. The present work carefully studied one famous case decided by the Tribunal in 2017. This case well demonstrated certain issues in formation of the Tribunal for hearing and deciding the cases.

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INTRODUCTION

The current 2008 Constitution of the Republic of the Union of Myanmar came into force when the new civilian government took over state power on January 31, 2011. The three branches of sovereign power, namely the legislative, executive, and judicial power, “are separated to the extent possible, and exert reciprocal checks and balances among themselves.”¹ Under the Constitution, there is a separate chapter for the judiciary that establishes the Supreme Court, Court Martial, and Constitutional Tribunal. There are some relatively important provisions for these courts under the Constitution. The details of the organization and formation of the Supreme Court and its subordinate courts for the ordinary judiciary and the details of the organization and construction of the Constitutional Tribunal for constitutional adjudication are prescribed by the Union Judiciary Law and the Constitutional Tribunal of the Union Law respectively. The 2008 Constitution and Defense Services Act of 1959 provides the formation of Court-martial and military adjudication separately.² The purpose of this work is to study the case decided by the Constitutional Tribunal of the Union of Myanmar in 2016 and to analyze its jurisprudence in deliberation and adjudication in such cases.

I. ESTABLISHMENT OF THE CONSTITUTIONAL TRIBUNAL OF THE UNION OF MYANMAR

The Constitutional Tribunal of the Union (CTU) is a judicial organ with a particular jurisdiction which is established by the Constitution for constitutional review.³ Notably, Myanmar is one of the two common law countries to have a constitutional court separate from its supreme court, after South Africa. One of the basic principles of the Union under the Constitution is to establish the CTU.

A Constitutional Tribunal shall be set up to interpret the provisions of the Constitution, to scrutinize whether or not laws enacted by the *Pyidaungsu Hluttaw* (Union Parliament), the Region *Hluttaws* and the State *Hluttaws* (States Parliaments) and functions of executive authorities of *Pyidaungsu*, Regions, States and Self-Administered Areas are in conformity with the Constitution, to decide on disputes relating to the Constitution between *Pyidaungsu* 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, and to perform other duties prescribed in this Constitution.⁴

¹ Section 11 (a) of the Constitution of the Republic of the Union of Myanmar, 2008. The Constitution will be hereinafter referred to as the Constitution.

² The Defense Services Act of 1959 was lastly amended by the SPDC Law 25/2010, Law Amending the Defense Services Act, 1959.

³ Section 293 of the Constitution.

⁴ Section 46 of the Constitution.

Under Section 320 of the Constitution, the CTU is composed of nine members, including the Chairperson. In this regard, the President, the Speaker of the *Pyithu Hluttaw* (House of Representatives), and the Speaker of the *Amyotha Hluttaw* (House of Nationalities) submit the candidates' lists, each consisting of three members to the *Pyidaungsu Hluttaw* (Union Parliament) for its approval. Out of nine, the President appoints one member as the Chairperson of the CTU.⁵

Again, Section 322 of the Constitution, stating the functions and duties of the CTU, provides more details than the Chapter I of the Constitution. The CTU interprets the provisions under the Constitution, reviews the constitutionality of laws enacted by different *Hluttaws*, and constitutionality of functions of executive authorities at different administrative levels. The CTU also decides constitutional disputes and fulfills other functions and duties assigned by the Union Parliament.

By using the power under Sections 336 and 443 of the Constitution, the State Peace and Development Council enacted the Constitutional Tribunal Law on October 28, 2010, to form the CTU and prescribe its duties and functions.⁶ Section 38 of the CTU Law entrusts the Tribunal extraordinary power to issue necessary rules, declarations, orders, directives, and procedures to implement the statutory provisions. The CTU had later issued the Constitutional Tribunal of the Union Rules by Notification No 30/2011 on June 28, 2011.⁷

II. MEMBERS OF THE CONSTITUTIONAL TRIBUNAL

The CTU of the first *Pyidaungsu Hluttaw* consisted of nine members and started to operate from March 30, 2011. Until December 31, 2015, the CTU had admitted 12 submissions and out of which it decided eight and dismissed one.⁸ One submission (Submission No. 1/2013) was closed, and the applicants withdrew two submissions (Submission No. 2/2014 and 3/2014). At one point, the legislature was not satisfied with the CTU's decision of *The President of the Union v. The Speakers of the Pyidaungsu Hluttaw, Pyithu Hluttaw and the Amyotha Hluttaw* (Submission No 1/2012). The question was whether the status of the Committees, Commissions, and Bodies formed by each *Hluttaw* was Union-level organization (federal organizations) or not. The CTU answered the question negatively, thus, supporting the President's opinion. The

⁵ Section 321 of the Constitution.

⁶ This law came into force in January 31, 2011. The Law has 38 Sections of 14 Chapters. Some relevant provisions under the Law will only be discussed for the present purpose. The Law has been amended two times so far: the first amendment was made in January 21, 2013, and the second amendment in November 5, 2014. Hereinafter referred to as CTU Law.

⁷ The Constitutional Tribunal Rules consisted of 21 Rules which correspond to the CTU Law and 8 forms which are to be used in the deliberation and adjudication process of Tribunal. Hereinafter referred to as CTU Rules.

⁸ The term of a *Hluttaw* is five years. The period of the First *Pyidaungsu Hluttaw* started in March 30, 2010 and was completed in March 31, 2015.

members of Parliament refused to accept such a decision. They demanded the resignation of CTU's members, arguing the inefficient discharging of CTU's duties according to Section 334 (a) (v) of the Constitution.

In September 2012, after failed attempts to resolve the crisis based on the wording of the Constitution, the members of the CTU, who were appointed in 2011, collectively resigned and left the CTU dysfunctional until the reappointment of its new members in February 2013.

When the National League for Democracy government led by Daw Aung Sann Su Kyi won the General Election and took State power in 2016, under the provisions stated in Section 320 of the Constitution, Section 9 (d) of the Union Government Law, and Section 3 of the CTU Law, an entirely new bench of CTU members was appointed in March 2016.⁹

III. SUBMISSION 1/2016

There were four submissions decided by the CTU between 2016 and 2019; one submission each in 2016 and 2017, two submissions in 2019, and none in 2018. Particular emphasis will be given on the decision rendered on submission No. 1/2016.¹⁰ The 23 representatives of the House of Nationalities brought the eminent person case before the CTU to interpret Section 333 (d) (iv) of the Constitution. The applicants asked the CTU whether the President has the right to use his discretion given by Section 333 (d) (iv) of the Constitution for only three CTU members nominated by himself or for all nine members, including six other members nominated by Speakers of *Amyotha Hluttaw* and *Pyithu Hluttaw*. This was the first submission before the new CTU under the National League for Democracy government during Second *Pyidaungsu Hluttaw*.

IV. RATIONALE BEHIND THE SUBMISSION

On March 31, 2016, the new CTU was filled up by nine new members under the Section 335 of the Constitution. The President, the Speaker of the *Amyotha Hluttaw* and the Speaker of the *Pyithu Hluttaw* put forward three candidates each to be the CTU members. Daw Khin Htay Kywe and U Twarl Kyin Paung were nominated by each *Hluttaw* to be CTU's members based on being eminent jurists under Section 333 (d) (iv) of the Constitution. During the selection process of the candidates at *Pyidaungsu Hluttaw*, the applicants of this submission challenged both candidates for incompatibility with the qualifications prescribed for CTU members. Despite the challenge,

⁹ Notification 3/2016 was issued by President's Office of Republic of the Union of Myanmar on 30 March, 2016.

¹⁰ This 1/2016 case will be hereinafter referred to as the eminent person case.

the Parliament approved all nine nominations under the Section 328 of the Constitution. ¹¹

V. CAUSE SHOWN IN THE EMINENT PERSON CASE

Section 333 of the Constitution provides the required qualifications for membership of the Tribunal. The President, the Speaker of the *Pyithu Hluttaw*, and the Speaker of *Amyotha Hluttaw* can select three nominees each, who have political, administrative, economic, and security outlook; and are being loyal to the Union and its citizens. Neither of them should be members of Parliament nor members of a political party. All nominees should meet the standard personal qualifications set for the members of the House of Representatives except age limitation. In connection with professional qualifications, he or she has served as Judge of the Region or State Court for at least five years; or has served as either Judicial Officer or Law Officer for ten years at Region or State level; or had practiced as an advocate for 20 years; or is, in the opinion of the President, is an eminent jurist.

The applicants of this submission raised the question whether the qualification of being “person who is, in the opinion of the President, an eminent jurist” mentioned in Section 333(d) (iv) of the Constitution was relevant to the three candidates selected by the President, or all nine candidates. The applicants made their allegation based on Section 4 (b) of the CTU Law as there were differences between Section 333 (d) (iv) of the Constitution and Section 4 (b) of CTU Law. According to Section 4 (b) of CTU Law, the President can select a member among three Tribunal candidates on the criterion of ‘eminent jurist,’ despite lacking other professional qualifications required by CTU Law. For all these reasons, the applicants alleged that appointment of mentioned two members being eminent jurists was unconstitutional.

VI. REASONS AND JUDGEMENT GIVEN BY THE CTU

The CTU awarded its decision with its reason on January 19, 2019. The Tribunal approached the issue intertextually, and also looked into the whole context of the Constitution.

The CTU reasoned that;

Since the President is the Head of the Union and Executive under Sections 16 and 58 of the Constitution, he is entrusted with such special privilege. If such privilege was limited for those three candidates only who were selected by the President himself, this limitation would not be consistent with the intent of the Constitution.

¹¹ The *Pyidaungsu Hluttaw* shall have no right to refuse the persons nominated for the members of the Constitutional Tribunal of the Union by the President unless it can clearly be approved that they are disqualified. Section 328 of 2008 Constitution.

Moreover, the Director General from the Union who acted as *amicus curiae* pleaded that;

There is neither confusion nor ambiguity in Section 333 (d) (iv) of the Constitution, and the professional qualification of “being an eminent jurist in the opinion of the President” equally applies not only to those three candidates selected by the President, but also to those other six candidates selected by both Houses.

The Tribunal ruled on the submission as follows:

One of the functions of the Tribunal is to interpret the Constitution under Section 322 (a) of the Constitution. The question raised in the submission, however, did not fall within the scope of Section 322 (a) of the Constitution. According to the paragraphs 8, 9, and 12 of the submission, the applicants asked the CTU not to interpret Section 333 (d) (iv) of the Constitution. Rather, the applicants sought the Tribunal’s interpretation of the Section 333 (d) (iv) of Constitution with reference to Section 4 (b) of CTU Law for an inconsistency clause between the Constitution and the CTU Law. If there were a contradiction between the Constitution and any other legislation, the Constitution must prevail that ordinary law. The effects of law is clearly provided by Section 198 (a) of the Constitution.¹²

The CTU dismissed the submission.

VII. DISCUSSIONS

Individual constitutional sections prescribe the required qualifications for members of union-level organizations. Although age limitation and professional expertise vary from one position to another, most of the required qualifications are common and similar to those for Parliamentarians under the Section 120 of the Constitution. Moreover, the Constitution allows the President to appoint or nominate persons of whom he thinks ‘eminent’ in their professional capacity as heads or deputies in some specific union-level organizations. These union level positions are Chief Justice and Judges of the Supreme Court and High Courts, the Attorney General and Auditor-General, and their Deputies. Under respective sections,¹³ the President is the sole authority either to appoint or to nominate the above-mentioned posts with the approval of the Union Parliament. Under Section 333(d) (iv) of the Constitution, however, there are three nominating authorities, i.e., the President, the Speaker of the *Pyithu Hluttaw* and the Speaker of the *Amyotha Hluttaw* for three CTU members each.

The Tribunal, however, stated in its judgment as follows;

¹² Decision on the Eminent Person case delivered on January 19, 2017, p 13.

¹³ Sections 237(a) (iv) (dd), 239 (a) (iv) (dd), 242 (a) (iv) (cc), 244 (a) (iv) (cc), 301 (d) (iv) (cc) and 310 (d) (iii) of the Constitution.

Being an eminent jurist in the opinion of President is one of the required professional qualifications for certain constitutional positions such as members of CTU, including the Chairperson, Chief Justice and Judges of the Supreme Court and High Courts, Union Attorney General, Union Auditor General, and their respective deputies.

In other words, the Constitution empowers the President to use his discretion in selecting and nominating the candidates of whom he thinks eminent persons for those constitutional positions.

It is argued that in the instant case, the CTU decided without considering any other two nominating authorities of Speakers from both Houses, rather than the power of the President appeared under section 333(d) (iv). The reasons for the decision should be more concrete and precise.

The second discussion point is Myanmar's acceptance of the doctrine of natural justice. Myanmar has been a common law country with a tradition of applying the principles of natural justice for a long time.¹⁴ The principles of natural justice consist of two rules: the right to a fair hearing (*audi alteram partem* - listen to the other side) and the rule against bias (*nemo iudex in causa sua* - no man is a judge in his own cause). The rule against bias is strictly applied to any appearance of a possible bias, even if none exists. "Justice should not only be done but should manifestly and undoubtedly be seen to be done."¹⁵ Therefore, a judge may not be a relative, friend, or business associate of a party, or he may not be personally hostile as a result of happening either before or during a trial. The requirements of bias rule are embodied to the statutes in some jurisdiction as well.¹⁶

Under Section 320 of the 2008 Constitution, the CTU is formed with nine members, including the Chairperson.¹⁷ This formation method is elaborated and supplemented by the CTU Law. Section 20 of the CTU Law says that "All the members [nine members] including the Chairperson, shall hear and decide in relation to the submission..." It, however, continues to provide for conditional situations, such as "... In doing so, if all the members cannot attend due to any duty or any other cause, the submission shall be heard by at least six members, including

¹⁴ It is essential that everything which might engender suspicion and distrust of a Tribunal should be cleared and there must be a feeling of confidence in the administration of justice. Please see *Daw Lay and three others vs. U Maung Gyi*, 1951 BLR (HC) 34; *Union of Myanmar vs. Maung Shwe @ Maung Shae and one other*, 1966 BLR (CC) 616.

¹⁵ *R vs. Sussex Justices, ex parte McCarthy*, [1924] 1 KB 256, [1923] All ER 233; *Union of Myanmar vs. Maung Shwe @ Maung Shae and one other*, 1966 BLR (CC) 616.

¹⁶ For instance, the Section 18 of Act on the Federal Constitutional Court of Germany provides that

Justices are barred from exercising their judicial duties if they are a party to the case, or are or were married to a party, or are or were in a civil partnership with a party or have already been involved in the same case due to their office or profession.

Another good example of Myanmar legislation is Anti-Corruption Law Section 24. The person who concerned with the complaint matter or has hatred of the complainant or the accused or related to the complainant or the accused shall not be the members of the Investigation Board formed by the Anti-Corruption Commission.

¹⁷ Section 320 of the Constitution.

the Chairperson.”¹⁸ Under Section 22 (c) of the CTU Law, the CTU passes its final decision by the consent of more than half of the members, including the Chairperson.

There is an ambiguity whether all nine members of CTU including Chairperson must attend at the Tribunal in hearing and deciding the submission or at least six members including Chairperson could hear and decide the submission due to certain important circumstances which may affect its decision. For an instance, one of the members of the Tribunal were vacant from the office or any Tribunal member were the party to the submission directly or indirectly, etc.

Hereinbefore discussed ‘eminent person’ case was substantially connected with H.E. Daw Khin Htay Kywe and H.E. U Twarl Kyin Paung, who are two existing members of CTU. During the hearing process, however, all nine members of the Tribunal body, including the mentioned two members, heard the submission and dismissed the case.¹⁹ The reason given by the CTU is that the Constitution and CTU law require all tribunal members to attend in formation of the Tribunal and also in hearing and deciding the submission.

The statement provided by the *U Htwe @ A. E. Madari vs. U Tun Ohn & One* case would be recited here as follows

Sections of the Constitution should not be interpreted in a narrow and technical manner but should on all occasions be interpreted in a large, liberal, and comprehensive spirit. Construction most beneficial in the widest possible amplitude of its powers should be adopted. The Constitution, though written, should be interpreted in such a way as will be subject to development through usage and convention.²⁰

There are different definitions between Tribunal and Court under Section 2 (c) and (f) of CTU Law.²¹ However, the Section 293 of the Constitution under the Judiciary Chapter provides that courts of the Union are formed as the Supreme Court of the Union and its subordinate courts, the Courts-Martial and the Constitutional Tribunal of the Union. Therefore, one may suggest that the CTU is the judicial body having particular jurisdiction of constitutional interpretation and adjudication. Since the principle of natural justice pertains equally to decisions decided by the judicial body and quasi-judicial judgments decided by the administration, Tribunal might consider adopting the natural justice principles for those submissions brought before it, when and where necessary.

¹⁸ Most of the legislations indicate the formation of the Court or Tribunal or Council with an odd number of its members. It is more likely to cast their vote based on organizational performance considerations. It may have some unknown reason behind the fixing of this even number of Tribunal members.

¹⁹ <https://www.constitutionaltribunal.gov.mm/my/judgment/765>

²⁰ *U Htwe @ A. E. Madari vs. U Tun Ohn & One*, 1948 BLR (SC) 541.

²¹ Tribunal means the Constitutional Tribunal of the Union formed under the Constitution. Court means the Supreme Court of the Union, High Courts of the Region or State, Self-Administered Division Courts, Self-Administered Zone Courts, District Courts, Township Courts and other Courts established by law.

CONCLUSION

The Constitution of Myanmar came into force when a new semi-civilian government headed by President U Thein Sein took over state power in 2011. The Constitutional Tribunal of the Union was established under the Constitution together with the new democratic government. Enacting constitutional amendments has been one of the election pledges made by the National League for Democracy since 2015, along with establishing the rule of law, and initiating a peace process. However, only in February 2019 did the *Pyidaungsu Hluttaw* form a Joint Committee comprising of 45 representatives to amend the Constitution. Some *Hluttaw* representatives, who are the Defense Services personnel and members of the Union Solidarity and Development Party, mainly claimed that this move for a constitutional amendment was procedurally unconstitutional. The 25 *Amyotha Hluttaw* representatives, including Sai Hseng Kyauk Sam, sent the submission 2/2019 to the Tribunal for its decision. The CTU rejected the submission on the ground of lacking the jurisdiction.

On the other hand, the peace process is being implemented based on a Nationwide Ceasefire Agreement (NCA). The legality and constitutionality of the NCA and several related agreements may be an essential legal issue in the near future. In this sense, the CTU must improve some constitutional provisions on its capacity and independence, and to develop the legislation and its jurisprudence.

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