

# "IMPLEMENTATION OF CONSTITUTIONAL REVIEW: Challenges and Development Trends"\*

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## **Introduction**

In this paper, it is going to be examined what is constitutional review, how to implement such review, and while practicing its implementation what would be the challenges regarding review processes, and what tendencies might be faced in its development.

The constitutional review under the constitution of the democratic political system, a structural design of the sovereign power, such as legislature, executive and judiciary must be functioned by the system of reciprocal control on its mechanism, performances, and products of each institutions in order to conformity with the legal frame setting in the Constitution.

Furthermore, it is required to investigate which kind of institution should have the power of constitutional review. Review on constitutionality check in many countries in the world were varied under the political system emerged from democracy. The above items will be going to observe in this paper together with what the challenges are and how to promote its development trend briefly.

**Key Words: Constitutional Review, Challenges, Development Trends**

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## **I. Implementation of Constitutional Review**

### **1. 1. What is Constitutional Review?**

In the first place, to make clarification of the wordings of "Constitutional review," it means that **"Constitutional review, or constitutionality review or constitutional control, is the evaluation, in some countries, of the constitutionality of the laws."**<sup>i</sup>

From the above expressions it is presumable that 'constitutional review' is the action which is taken for the purpose of constitutional control on laws and actions of the government, i.e., both legislative bodies and executive authorities. Actually, the word 'constitutional review' should be covered wide range in its essence. Thus, constitutional review should be enclosed all the functions relating to constitutionality check of bills, existing laws, legislative actions, executive actions, and judiciary functions and decisions by which it may carry out justice under the legal frame of the constitution.

The constitutional review system is basically related to "Check and Balance System" ii with reciprocal control over each other. The legality and constitutionality of products of respective three branches of power is the major problematic categories of constitutional review. However, it is in fact scarcely in its practical mechanism.

In hybrid or semi-authoritarian democracy entities, their practical mechanism of reciprocal control is rarely effective under the respective party politics structure. Whether they choose a bi-party system or multi-party system, the winner of the elected party takes all authorities and powers, like the executive, legislative, and judiciary. Three separated powers are under one unitary control. It is also true that state governance system may be downturned in every aspects of social, economic, political state of affairs in addition if the opposition party is also weak. Legislative reflections might not be genuine that it is not the power divided system but power collaboration system which comes from merely the voices of the ruling party.<sup>iii</sup> In fact, essential pillar of check and balance system for the democracy polity must be indispensable tool for good governance. Based on Myanmar experiences, the 2008 Constitution expressed its State's basic principles as that of "reciprocal control, check, and balance among three sovereign powers."<sup>iv</sup> The products of each power must be assessed by adjudication<sup>v</sup> process that those products are whether constitutionality, legality, just or not.

In the next sub-heading, the model relating to system of constitutional review will be discussed, and it will need to clarify that which kind of judicial body can exercise the constitutional review under the 2008 Constitution.

### **1.2. Which kind of Judicial Body can exercise Constitutional Review?**

In this portion, it is going to examine which kind of institution can exercise the function of constitutional review under written constitution. Be depend upon the abundance of research works on "constitutional review" conducted by the constitutional, legal and judicial scholars, the institutional structures of each Models, their review systems and review mechanism may be prescribed under the setting;-

Sr.	Name of the Model	Exercising Institutions	Method or System of Reviewing	Specific Adjudication Body
1	Decentralized Model	Highest Court Or Ordinary Courts of certain level in Judiciary	Diffused System	Supreme Courts and Certain level of Judicial Courts
2	Centralized Model	Constitution based Institutions	Concentrated System	Constitutional Courts Constitutional Tribunals Constitutional Councils
3	Hybrid Model	Constitution based Institution and Judicial Institutions	Diffused and Concentrated System	Judicial and Constitutional Courts or Tribunals
4	Political Model	Legislature	Quasi- Judicial System	Quasi-Judicial Organs

**Figure 1. Models, exercising institutions, method of reviewing, and specific body of adjudication for constitutional review**

From the above description, "constitutional review" is carrying out particularly by two types of institutional settlement, one is constitutional courts, and the other is judicial courts within the authority of courts of justice. The systems of constitutional review are also variables, for example, such as, diffused system, concentrated system, diffused and concentrated mixed system, quasi-judicial system, etc. It seems that systems are linked to their institutionalized model. One outstanding model which is a political model may be confusing in its effectiveness, i.e., binding force of final resolution.<sup>vi</sup>

Agreeing to the point of view of stability of constitution and effectiveness of its vision and mission of the constitution, constitutional matters should be adjudicated by the institution separately formed under the constitution may be the better way of loads sharing, closed attention, and effectiveness of settlement. Thus, the institutions, such as constitutional courts, constitutional tribunals, and constitutional councils established under the centralized model may more concentrate on the development of the system of constitutional review within the frame of the Constitution.

Here, it is analyzed the model of constitutional review based on the Myanmar practice subject to the provision<sup>vii</sup> of the 2008 Constitution, the constitutional tribunal was established for the purpose of settling the constitutional dilemma, and it was formed under the mainstream of Judiciary, having the separated adjudicative power.<sup>viii</sup>

From the perception of the table above, Myanmar may be in line with serial number 2. This is a right choice of the Myanmar practice that Tribunal shall have the skill of conscience of settlement subject to the supreme law of the land, the constitution. It is a little bit of difference with the conscience of courts of law where it has a resolving skill in accord with fair and justice. For such difference, constitutional review should not be overlap with practice of judicial review in the ordinary law suits.

Still working as a prominent authority of the Union, 10 years of democracy atmosphere produced outstanding challenges to the Tribunal of the Union, yet much more lessons will be learned under the time consuming.

### **1.3. Functions of Constitutional Review**

Normally, the functional matters of constitutional review includes scrutinizing bills, laws enacted by Legislature and various legislative bodies, vetting the constitutionality of measures and actions of the legislature and legislative bodies and the executive authorities of various level of Government, constitutional disputes between each branches,<sup>ix</sup> and judicial guarantees to the constitutional rights stipulated by the constitution itself, and lastly

legitimacy or legality of elections and its results. <sup>x</sup> These may be globally recognized functions and powers of constitutional review, nevertheless may be much more than these. Thus, in order to exercise specific undertaking to implement the main purpose of power balancing system constitutional court is the unique way of distribution of work functions. <sup>xi</sup>

Under the IDEA <sup>xii</sup> research work, it is fairly expressed the specific categories applying to the constitutional courts. At this juncture, it is going to be analyzed the system of constitutional review particularly attested by IDEA framed. <sup>xiii</sup> Expressions in Figure 2 show assumption of potential constitutional dilemma, well-faced challenges, and future potentials.

Sr.	Controlling Mechanism	Reviewing Matters	Potential of Dilemma	Challenged
1.	Controlling Constitution itself	Constitution making process	Need referendum or not	Having Potential
		Constitutional amendment	Constitutionality of bill or law by Legislature	challenged
2.	Controlling legislature	Reviewing Constitutionality of Bills ( <i>ante factum</i> )		challenged
		Reviewing Constitutionality of laws ( <i>ex post facto</i> )		
		Reviewing Constitutionality of actions of legislative body (impeachment process)	Legitimacy of impeachment	of challenged
		Adjudication of Constitutional Disputes between each level of legislative bodies		
3.	Controlling executive	Constitutionality of executive actions and decisions		
		Constitutionality of impeachment proceedings against Executive Authority (mostly corruption)		challenged
		Qualifications of executive authority	Overruled by decision of ruling Government	Not challenge in The Tribunal
		Adjudication of Qualification of Public Authority		
		Adjudication of disputes between executive organs (between Ministries)		
4.	Controlling Judiciary itself	Constitutionality of laws applied in Court		
		Adjudication on Judicial remedies concerning constitutional rights		Challenging
		Qualifications of member of the Constitutional Tribunal		Challenged
5.	Controlling Election	Adjudication of the dissolution or merger of Political Parties		Having Potential
		Constitutionality of actions of the Political Party		Future Potential
		Legality of Elections and Election Results		Future Potential

Figure 2. Functions of constitutional review experienced in Myanmar

#### 1.4. Who has the right of *locus standi* to request Constitutionality Assessment?

In this portion, it is going to be discussed who may lodge the petition concerning constitutionality assessment by referencing respective official channels. The submission of request for constitutional review can bring limited numbers Heads of respective institutions.

Subject to the section 325 of the 2008 Constitution, and section 13 of the Tribunal Law, it is mentioned the persons entitled to lodge the petition directly to the Tribunal, i.e., those persons who have *locus standi* for constitutional review directly.<sup>xiv</sup> Moreover, the persons and organizations prescribed in section 14 of the Tribunal Law<sup>xv</sup> are entitled to lodge petition indirectly to the Tribunal.<sup>xvi</sup>

Sr.	Having <i>locus standi</i> in constitutional court/tribunal/ councils	Kinds of Petitions	Products of Adjudication	Effects
1.	President for Executive	Request for Interpretation	Resolution	Final and Conclusive
2.	Speakers for Legislature			
3.	Chief Justice for Judiciary	Request for Opinion		
4.	Election Management Chairman for Election Matters	Petition for Decision		

**Figure 3.** Eligibility of Petitioner who lodge constitutional review to the Tribunal

It should be stated importantly that the eligibility of individual direct petition may be far beyond the extent of the ability of constitutional tribunal. It is also true that even most of the contemporary democratically elected governments have no ability to fulfill each and every individual desire, since the rule of law and public safety must also be highest democracy norm of every community of the people of the world.<sup>xvii</sup>

All human rights experts and organizations typically claimed that individuals should be able to submit a competent judicial organ for obtaining their remedies when their fundamental, civil, or political rights have been infringed. It is one of the challenges in actual practices that whatever expressed the rights for human being, such as fundamental rights recognized in the respective States' constitution, or other rights relating to his or her own personal rights, etc., are unexhausted.

Individual direct standing in constitutional court will be considered together with the legal and judicial notion of *locus standi*. What about the *locus standi* problem in the field of courts of law for constitutional review?<sup>xviii</sup> Can individual direct petition to competent court for constitutional review be how far successful? Such questions are further learning for immature experience of one decade old democracy polity, the Myanmar. Moreover, judicial administration of original jurisdiction of courts of law shall be treated as one way of modus operandi, i.e., litigation<sup>xix</sup>, and on the other hand constitutional adjudication is treated by another way of judicial skill explicitly vested in constitutional based institution like constitutional tribunal in centralized model.

From the above table shows that individual entitlement of direct petition on constitutional review did not appear based on Myanmar practice. Up till now the constitutional remedies for breach of fundamental rights of the citizens were granted by submitting an application of writs to the Supreme Court for redress.<sup>xx</sup> The decision of the Supreme Court shall be conclusive without appeal yet no indication for constitutional review. It is a considerable matter concerning the constitutional review. Actually, the remedies granted by writs are as constitutional remedies; therefore the constitutional review on writs applications should be made final evaluation in the place of the Tribunal by constitutional assessment which is slightly different from judicial review.

## 1.5. What is the reliable way of implementation to the Constitutional Review?

In this portion, it will be demonstrated how to implement constitutional review effectively based on Myanmar constitutional review practices.

At this point, it needs to clarify what is the difference between judicial review and constitutional review. In defused model, the power or function of constitutional review is vested in the highest judicial courts of law which can declare the acts of legislative, executive, and administrative are unconstitutional. However, the traditional practice of judicial review is that it is a form of appeal from an administrative body to the courts of law for review of either the findings of fact, or of law, or of both. It is a kind of judicial superintending power having the superior courts to administrative bodies. Constitutional review is more than that extent of judicial review exercised by the courts of law. For the purpose of establishing constitutional court or tribunal under the scheme of the constitutional adjudication, i.e., the way of constitutional settlement, is fair to the concentrated system of constitutional review.

Therefore, reliable way of implementation operation should be placed on two significant ends, one is initial stage of the review, and the other is the review product's climax stage, which means the outcome of the review must be final and conclusive under the context of the constitution, and the outcome of the resolution shall also be effective and coming into force respectively. Here, it makes a brief description of effectiveness and reliable implementation of the above two stages of 'constitutional review' operation.

### A. The Initial Stage of Constitutional Review

In the initial stage, it is not too much complicated problems. The only problem is because of the six petition channels by which the eligible Heads were entitled to submit petition on behalf of the respective channel.<sup>xxi</sup> This means that only Heads are the responsible person to submit the petition to the Tribunal when constitutionality assessment arises from the executive.<sup>xxii</sup> There were two petitions, one is arisen in 2014, the petition no. 1/2014,<sup>xxiii</sup> and the other petition arose in 2020, the petition no. 1/2020.<sup>xxiv</sup>

channels for submission of petition to the Tribunal for constitutional review	potential challenges
President for Executive	impeachment of executive officials
Speakers for Legislature (Pyithu and Amyotha Hluttaw)	interpretation of provisions of the constitution itself
Chief Justice for Judiciary	abstract review of applicable laws in courts of law
Election Management Chairman for Election	political party dissolution, constitutionality of party actions, legitimacy of democratic election

**Figure 5.** Person eligible to submit petition and potential challenges

## B. Effect of settlement of Constitutionality Assessment

One way or another effectiveness or binding force of the outcome of settlement must be significantly considered for the safeguarding the context of the constitution. Since 2013 the Tribunal Law has been amended and substituted by law No. 4 of the Pyidaungsu Hluttaw dated January 21, 2013. Although the substituted subsection was approved by the Legislature, it has a complaint from the then time President U Thein Sein,<sup>xxv</sup> by which His Excellency made comment on unconstitutionality of such amended provisions which have no democracy norm and disparage of the freedom of adjudication of all the members of the Tribunal and secrecy of individuality and the vigorous of the nature of the Tribunal.<sup>xxvi</sup>

In fact, the very original enactment of the Constitutional Tribunal Law was appeared in 2010 in which it was firmly stipulated the effectiveness and binding force of the resolution of the Tribunal. The provisions are stipulated as followings;

The Effect of the Resolution of the Constitutional Tribunal of the Union		
The Tribunal Law 2010 (the very first provisions)	The Tribunal Law (2013 Amendment)	Amendments
Sec. 23 The resolution of the Constitutional Tribunal of the Union shall be final and conclusive. <sup>xxvii</sup>	Sec. 23 The resolution relating to the matter of the section 12 (h) by which a Court submit to the Constitutional Tribunal of the Union shall be applied to all cases.	Replaced by sec. 24, and sec. 23 was deleted by law no. 4/2013 Amendment law
Sec. 24 The resolution relating to the matter of the section 12 (h) by which a Court submit to the Constitutional Tribunal of the Union shall be applied to all cases. <sup>xxviii</sup>	Sec. 24 The resolution made by the Constitutional Tribunal under section 23 shall be final.	Substituted by law no. 4/2013 amendment
	Sec. 24 The resolution of the Constitutional Tribunal of the Union shall be final and conclusive.	Substituted by law no. 46/2014 Amendment law
Sec. 25 The resolution of the Tribunal shall effect and shall be coming into force to respective Government Department, Organ, Personnel, and all the rest respectively. <sup>xxix</sup>	Sec. 25 section 25 shall be deleted.	Deletion by law no. 4/2013 Amendment law

**Figure 6.** The Amendments made to the Constitutional Tribunal Law 2010.

In considering that if the outcome of the Tribunal has no effectiveness, i.e., no binding force on the specific party of the petition or no worthiness as a precedent having the norm of constitutionality, it shall be disparage for the Tribunal itself and also worthless for the State .

## II. Challenges

The explanation in this portion might be the potential challenges for centralized model of the constitutional review. Under the 2008 Constitution, actions or measures taken by the legislature and legislative bodies were not counted in the scrutiny functions of the Tribunal. Unfortunately, it may be the potential challenges in the Tribunal in forthcoming progresses, if laws, rules, regulations, and procedures enacted by the legislature and legislatives bodies are not comprehensive enough in practical usage. For example, if there is a need to impeach to

Chief Minister of the State and region level, the procedures of impeachment is if not comprehensive enough in its legality it may be arisen arbitrary disagreements between Executive and Legislature.<sup>xxx</sup>

### 2.1. Need to be vetting control on measures or actions of legislative authorities

On the other hand, in the 2008 Constitution, the Constitutional Tribunal may scrutinize laws promulgated by the Legislative Authority of respective level, yet the Tribunal has no authority on vetting the measures or actions of legislative authorities. In 2020 reported case, there is one issue among others raised that measures or actions of the legislative body are not comprised in the functional duties of the Tribunal, thus, the Constitutional Tribunal of Union may vetting laws promulgated by the Legislative Authority of respective level, yet the Tribunal has no authority on vetting the measures or actions of legislative authorities.<sup>xxxi</sup>

This is a kind of challenge which will be potentially face in future democracy based Constitutionalism. For the reason that legislatures take privilege a beautiful slogan like..... "of the people, for the people, by the people" as they shield themselves by the people.

### 2.2. Ambiguous constitutional control on bill drafted by the Legislature

Another instance of challenge concerning abstract 'constitutional review' arisen under section 322(b) of the 2008 Constitution.<sup>xxxii</sup> Under section 322 (b) of the 2008 Constitution, it is unclear that the wording used in the provision may invite controversial for constitutional review. In the practical application of the above provision, the phrase" .... **The laws promulgated** ..." means whether it is intended to mean only enacted law or a draft law/a bill as well. That kind of ambiguous provision may be led to the argument in real disputes. Such kind of miscomprehension should be avoided by inserting unequivocal word made under the constitutional amendment scheme.

The instance of abstract 'constitutional review' arisen in 2015 Petition No. 1/2015.<sup>xxxiii</sup> In that petition, it is asked for the constitutionality of specific provision stipulated in the bill which is not yet promulgated. Therefore, it is a little bit of gap between the constitutionality of the Bill and the constitutionality of the provision described in the Bill. It is not the argument on the Bill itself, yet it is asked for the constitutionality of one of the provisions in the Bill. It may say that it is also the petition under the frame of abstract constitutional review.

If it is supposed to be the request for constitutional review on certain bill in forthcoming, for example, it may be constitutionality assessment on bill or law on new PR electoral system in approaching the democracy transition. Therefore, it will need to prepare for the clarity of the phrase "vetting whether **the laws promulgated** by the Pyidaungsu Hluttaw" onto the phrase "vetting whether **bills and laws drafted and enacted** by the Pyidaungsu Hluttaw" by constitutional amendment scheme.

### 2.3. Abstract constitutional review

Myanmar's abstract 'constitutional review' system is linked to the problem of certain laws applied in ordinary judiciary of courts of law. If the disputes arisen from the certain provisions by which its legal assumption is unclear or equivocal in the applicable case, the



Tribunal will come into settle by its method of interpretation or giving opinion trusted by the genuine context of the constitution.<sup>xxxiv</sup> Till at present, there is no dispute arisen in this kind of challenge.

### **III. Development Trends**

The systems of constitutional review are also variables, for example, such as, diffused system, concentrated system, diffused and concentrated mixed system, quasi-judicial system, etc. Among these systems Myanmar is based on centralized model with the application of concentrated system by which constitutional review is assessed by the context of the 2008 Constitution consecutively.

#### **3.1. System must be linked to model**

Under the setting of the constitution, if it says that Myanmar model of constitutional review is centralized model, why not constitutional writs application shall be under the control of the Tribunal. Actually, the whole provisions comprised in Chapter 8 of the 2008 Constitution<sup>xxxv</sup> were the fundamental rights of the citizens, i.e., the constitutional guarantee of citizens' rights together with duties. If these rights are anyhow infringed, judicial remedies must be redressed under the constitutional guaranteed. Unfortunately this mechanism is under the jurisdiction of the apex courts of law.

Concerning the filing of writs application for rights of the citizens guaranteed under the constitution shall be applied to Supreme Court.<sup>xxxvi</sup> Under the setting of the 2008 Constitution, the Supreme Court of the Union have the power to issue writs, i.e., writs adjudication are under the jurisdiction of the Supreme Court. In fact, writs are constitutional remedies if there might be unsatisfactory answer from the Supreme Court, it is supposed to be obtainable constitutionality assessment from the Constitutional Tribunal.

Thus, for the consideration concerning the development trend for the constitutional review may one way to another that writs application process should be the direct access to the Tribunal for constitutionality assessment. Nevertheless constitutional writs are exercised by the highest court of laws, the Supreme Court,<sup>xxxvii</sup> which is based on the tradition of the judiciary of Myanmar since writs application has been set in the 1947 Constitution, and Supreme Court has having writs jurisdiction during the then time of 1948 to 1979.<sup>xxxviii</sup>

Thus, Myanmar Model of constitutional review may say, on the other hand that it is a decentralized model being applied by defused constitutional review system because of this misleading role of the constitutional writs. It is a significant consideration remained in question for the development trend of the constitutional review.<sup>xxxix</sup>

#### **3.2. Individual Direct Access to the Constitutional Tribunal**

Although human rights are top priority in the world today, the individual direct access to competent court for claiming its rights is still rare.<sup>xl</sup> Considering the loading of individual's direct petition which might be problematic for adjudication of the Tribunal's constitutional review process, the institution like Human Rights Commission of Myanmar which

functioning like the Ombudsman's <sup>xli</sup> should be the eligible for submission of petition on behalf of the individual.

On the one hand, individual direct access is now unavailable at this moment of time, yet on the other hand, the elected representatives of Hluttaws, both Pyithu Hluttaw and Amyotha Hluttaw (Peoples and National Parliament) can have direct access to the Constitutional Tribunal for the sake of constitutionality assessment or interpretation of the provisions of the Constitution.<sup>xlii</sup> These kinds of Petition were found in petitions lodged directly to the Constitutional Tribunal in 2011, 2014, 2015, 2017, and 2019<sup>xliii</sup> respectively.

Therefore, elected representatives shall be serving as according to the slogan like "of the people....., for the people....., by the people...." that the voices of the people must also be heard by the representatives of the legislature and guaranteed by the laws of the respective legislature more thorough. This kind of people's direct access must be more polished to community by the people's representatives of the Legislature and various levels of legislative bodies.

Individual direct access may consider another way round that the Supreme Court decision on writs application is not the absolute one for the expression of the 2008 Constitution context.<sup>xliv</sup> According to the text of the constitution, the Supreme Court judgments under the original jurisdiction only include no right of appeal but not exclude constitutional review.<sup>xlv</sup> Therefore, all the constitutional review analysis shall show means and ways based on fairness and just for every community on the world.

Presently, all the constitutional matters were grounded upon ideas, considerations, negotiation, and consultation of **the preparatory works of the 2004 National Conventions and Conferences** for the democratic State of Myanmar.

### **3.3. Own motion power for constitutional review**

One decade of the democracy political structure is now over, individuals have not entitled to submit petition to the Tribunal directly or indirectly. Even writs applications are guaranteed as the right of the citizens in the 2008 Constitution, certain institutionalized mechanism under the democracy setting are not enough to perform perfectly. Thus, every facet for the development trend particularly to constitutional review will be examined for future good.

The own motion power of the Court or Tribunal should be considered for new trend for constitutional review. This is because party politics is imported to every state by the global democratization<sup>xlvi</sup>, and therefore the constitutional frame must not have loopholes. When current situations of democratization on the globe shall have to make rethinking for the people worthy, the institutionalization of democracy system must be significantly assessable. If institutionalized mechanism is not enough in its effectiveness of implementation, the function of, and control to respective institutions shall be tools for fixers.

The own motion power of the Tribunal, i.e., *motu proprio*, should be added into its functional duties of the Tribunal, in order to safeguarding the sustainability and effectiveness constitutional control of its review mechanism. It may be self-executing assessment like

Tribunal own motion function. It is one of the challenges found in Myanmar practice on constitutional review.

#### **4. Conclusion**

In conclusion, many scholars and political leaders from western hemisphere merely thought that the democratic political system established in their continent shall be anyhow imported into eastern continent in any cost. Nevertheless, they never consider whether this side of the world may easily collapse if misusing the very concept of democracy. Therefore many criticisms should be relaxed and a profound research shall be needed to conduct according to the actual situations faced in each and every countries of the eastern world.

Only one decade of its life time of democracy of Myanmar is now facing unstable and social turmoil being destroyed by the extremists of partisan politics ideology. Lessons will be learned by the certain defect of party political system and internal and external influences by favoring protection of minority's rights regardless of majority citizens' will. Under these circumstances, the Tribunal of the Union is trying to analysis its constitutional review mechanism based on new development trend under the situation of emergency settings.

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Endnotes:

<sup>i</sup> Source: <https://en.m.wikipedia.org>. ; visited on 26 February 2022. It is supposed to be a system of preventing violation of the rights granted by the constitution, assuring its efficacy, their stability, and preservation.

<sup>ii</sup> The American's power balancing system of "**checks and balances system**" is stated as that "no branches of three powers have too much power. The system of checks and balances is a part of our Constitution." It guarantees that no part of the government becomes too powerful. For example, the legislative branch is in charge of making laws. The executive branch can veto the law, thus making it harder for the legislative branch to pass the law. The judicial branch may also say that the law is unconstitutional and thus make sure it is not a law. The legislative branch can also remove a president or judge that is not doing his/her job properly. The executive branch appoints judges and the legislative branch approves the choice of the executive branch. Again, the branches check and balance each other so that no one branch has too much power. The legality and constitutionality of laws and actions of three branches is the major problematic categories of constitutional review. <http://www.mcwdn.org/GOVERNMENT/ChecksBalances.html>. All three branches have "*checks and balances*" over each other to maintain the ... Typically this was accomplished through a system of "*checks and balances*", [http://en.wikipedia.org/wiki/Separation\\_of\\_powers](http://en.wikipedia.org/wiki/Separation_of_powers).

<sup>iii</sup> That is why the Economist Intelligence Unit (EIU) collected and compilation on the Democracy Index on the State of democracy in 167 countries of sovereign states among them 164 are United Nations Member States. The index has been published since 2006. The index is measuring on pluralism, civil liberties, and political culture. The index categorizes 167 Countries into one of four regime types. They are, full democracies, flawed democracies, hybrid regimes and authoritarian regimes. There will be found two types of democracies and two types of regimes. The 2017 of the Democracy Index has been globally the worst year of democracy. Asia region became the largest declination of democracy to an authoritarian. [https://en.wikipedia.org/wiki/Democracy\\_Index](https://en.wikipedia.org/wiki/Democracy_Index).

<sup>iv</sup> Section 11 of the 2008 Constitution stated as that: (a) The three branches of sovereign power namely, legislative power, executive power and judicial power are separated, to the extent possible, and exert reciprocal control, check and balance among themselves. (b) The three branches of sovereign power, so separated are shared among the Union, Regions, States, and Self-Administered Areas.

<sup>v</sup> The word "Adjudication" is a legal ruling or judgment, usually final, but can also refer to the process of settling a legal case or claim through the court or justice system. It is different from the word "litigation", which is a process of taking "legal action" similar to the "lawsuit".

<sup>vi</sup> This is because, the exercising institution is Legislature, within which specific quasi-judicial organs, for example, senate hearing committee, and the reviewing system is quasi-judicial system within quasi-judicial function, what about the judicial essence of the outcome. The legislative branch of government makes the laws. At the national level, the Congress is the legislative body in charge of making the laws for our land. Congress is made up of two parts - the Senate and the House of Representatives. These lawmakers are elected. See also, Congress's Authority to Influence and Control Executive Branch Agencies. May 12, 2021. <http://crsreports.congress.gov>. Under the Constitution, the House of Representatives has the power to impeach a government official, in effect serving as prosecutor. The Senate has the sole power to conduct impeachment trials, essentially serving as jury and judge. Since 1789 the Senate has tried 20 federal officials, including three presidents.

<sup>vii</sup> The 2008 Constitution, Chapter VI, Judiciary, Formation of Courts, section 293 provided that "Courts of the Union are formed as follows : (a) Supreme Court of the Union, High Courts of the Region, High Courts of the State, Courts of the Self-administered Division, Courts of the Self-administered Zone, District Courts, Township Courts and the other Courts constituted by law; (b) Courts-Martial; (c) **Constitutional Tribunal of the Union**.

<sup>viii</sup> The 2008 Constitution, section 294 stated that " In the Union, there shall be a Supreme Court of the Union. **Without affecting the powers of the Constitutional Tribunal** and the Courts -Martial, the Supreme Court of the Union is the highest Court of the Union.

<sup>ix</sup> Section 322 of the Constitution 2008, prescribed as that: "**The functions and the duties of the Constitutional Tribunal of the Union**" are as follows : (a) interpreting the provisions under the Constitution; (b) vetting whether the laws promulgated by the Pyidaungsu Hluttaw, the Region Hluttaw, the State Hluttaw or the Self-Administered Division Leading Body and the Self-Administered Zone Leading Body are in conformity with the Constitution or not; (c) vetting whether the measures of the executive authorities of the Union, the Regions, the States, and the Self-Administered Areas are in conformity with the Constitution or not; (d) deciding Constitutional disputes between the Union and a Region, between the Union and a State, between a Region and a State, among the Regions, among the States, between a Region or a State and a Self-Administered Area and among the Self-Administered Areas; (e) deciding disputes arising out of the rights and duties of the Union and a Region, a State or a Self-Administered Area in implementing the Union Law by a Region, State or Self-Administered Area; (f) vetting and deciding matters intimated by the President relating to the Union Territory; (g) functions and duties conferred by laws enacted by the Pyidaungsu Hluttaw.

According to section 56 of the 2008 Constitution provides that Self-administered Divisions and Zones are delineated altogether (6) in numbers. "Naga", "Danu", "Pa-O", "P-Laung", "Kokang", were given Self-administering Divisions and Zones of Ethnic Nationals.

<sup>x</sup> Andrew Harding, The Constitution Brief, the Fundamentals of Constitutional Courts, International IDEA Institute for Democracy and Electoral Assistance, April 2017, pdf . Source: <http://www.idea.int> , visited on 23.2.2022.

<sup>xi</sup> Andrew Harding, The Constitution Brief, the Fundamentals of Constitutional Courts, International IDEA Institute for Democracy and Electoral Assistance, April 2017, pdf. Source: <http://www.idea.int>, visited on 23.2.2022. For acknowledgement to Andrew Harding, his expressions, here quotes "The main motivation in establishing constitutional courts is to create a strong and specialized judicial-type body capable of enforcing a new constitution or a new constitutional deal. Reforming an existing apex court or giving it powers of constitutional review, as in the diffused system, has not generally been considered adequate to the task." P.2.

<sup>xi</sup> Source: [www.idea.int](http://www.idea.int), April 2017: visited on Feb, 10th, 2022.

<sup>xii</sup> Ibid, p.3.

<sup>xiii</sup> Ibid, p. 3.

<sup>xiv</sup> Under section 325 of the 2008 Constitution, submission to obtain the interpretation, resolution, and opinion of the Constitutional Tribunal of the Union provides that the following persons and organizations shall have the right to submit matters directly to obtain the interpretation, resolution and opinion of the Constitutional Tribunal of the Union : (a) the President; (b) the Speaker of the Pyidaungsu Hluttaw; (c) the Speaker of the Pyithu Hluttaw; (d) the Speaker of the Amyotha Hluttaw; (e) the Chief Justice of the Union; (f) the Chairperson of the Union Election Commission.

<sup>xv</sup> Section 14 of the Tribunal Law stated that "The following persons or the organizations are entitled to submit to the Constitutional Tribunal to obtain the interpretation, decision and opinion of the Constitutional Tribunal in accord with the manner contained in section 15: (a) the Chief Minister of the Region or State;(b) The Speaker of the Region or State Hluttaw;(c) The Chairperson of the leading body of Self-administered Division or the Self-administered Zone; (d) the number of representatives being at least of 10 percent of all the representatives of the Pyithu Hluttaw (Upper House) or Amyotha Hluttaw (Lower House).

<sup>xvi</sup> Section 15 of the Tribunal Law stated that "In respect of the matters to obtain the interpretation, decision and opinion of the Constitutional Tribunal: (a) If he is a Chief Minister of the Region or States, his petition shall be sent to the Tribunal through President;(b) If he is a Speaker of the Region or States, his petition shall be sent to the Tribunal through Speaker of the Pyidaungsu Hluttaw (Parliament); (c) If he is a Chairperson of the leading body of Self-administered Division or the Self-administered Zone his petition shall be sent to the Tribunal through relevant Chief Minister of the Region or State and the President; (d) If it is a number of representatives being at least 10 percent of all the Pyithu Hluttaw or Amyotha Hluttaw representatives, their petitions shall be sent to the Tribunal through the relevant Speaker of the Hluttaw.

<sup>xvii</sup> In American Convention on Human Rights, it is provided the competence to lodge petition to Inter-American Commission on Human Rights are stated in article 44 and 45. Article 44 says that " Any person or persons, or any nongovernmental entity legally recognized in one or more member states of the organization, may lodge petitions with the commission containing denunciations or complaints of violation of this Convention by a State

Party. There is no individual direct petition to the inter-American court of human rights. Thus, in article 61 (1) of the said Human Rights Convention says that "Only the States Parties and the Commission shall have the right to submit a case to the Court.

<sup>xviii</sup> **Locus Standi:** *locus standi* means A place of standing; standing in court. The right or ability to bring a legal action to a court of law, or to appear in a court. (Cambridge Dictionary) A right of appearance in a court of justice, or before a legislative body on a given question. In order for a person to have a *locus standi* in commencing action in Malaysia, the person must show that he has special or substantial interest, or in other words his legal rights has been adversely affected. Source: <http://www.slideshare.net> . Sometime, the diversity of citizenship is present and the amount in controversy requirement is met, plaintiffs may bring their claim(s) originally into federal court and defendants may remove suits from state court to federal court. Source: <http://www.law.cornell.edu>. The answer of the question of who can file a constitutional review is that "**Anyone who satisfies general 'standing' requirements for litigation** can raise a constitutional issue in court. It is only available in the judicial institutions established by the decentralized model under the defused system of constitutional review.

<sup>xix</sup> Litigation is the process of engaging in a legal proceeding, such as a lawsuit. <https://www.dictionary.com>. Litigation is the act or process of bringing or contesting a legal action in court; a judicial proceeding or contest; the act or process of carrying on a lawsuit. <https://www.collinsdictionary.com>. visited on the April 12, 2022.

<sup>xx</sup> Section 377 of the 2008 Constitution provides that "In order to obtain a right given by this Chapter, application shall be made in accord with the stipulations, to the Supreme Court of the Union. Section 378 of the Constitution again said that " (a) In connection with the filing of application for rights granted under this Chapter, the Supreme Court of the Union shall have the power to issue the following writs as suitable : (1) Writ of Habeas Corpus; (2) Writ of Mandamus; (3) Writ of Prohibition; (4) Writ of QuoWarranto; (5) Writ of Certiorari. (b) The right to issue writs by the Supreme Court of the Union shall not affect the power of other courts to issue order that has the nature of writs according to the existing laws. "

<sup>xxi</sup> Section 325 of the 2008 Constitution states that " The following persons and organizations shall have the right to submit matters directly to obtain the interpretation, resolution and opinion of the Constitutional Tribunal of the Union : (a) the President; (b) the Speaker of the Pyidaungsu Hluttaw; (c) the Speaker of the Pyithu Hluttaw; (d) the Speaker of the Amyotha Hluttaw; (e) the Chief Justice of the Union; (f) the Chairperson of the Union Election Commission.

<sup>xxii</sup> Section 326 of the 2008 Constitution states that "The following persons and organizations shall have the right to submit matters to obtain the interpretation, resolution and opinion of the Constitutional Tribunal of the Union in accord with the prescribed procedures : (a) the Chief Minister of the Region or State; (b) the Speaker of the Region or State Hluttaw; (c) the Chairperson of the Self-Administered Division Leading Body or the Self-Administered Zone Leading Body; (d) Representatives numbering at least ten percent of all the representatives of the Pyithu Hluttaw or the Amyotha Hluttaw." For this purpose, the Tribunal Law stipulated in section 15(a) it was stated that "...if he is a Chief Minister of the Region or State, his petition shall be sent to the Tribunal through the President.

<sup>xxiii</sup> Petition No. 1/2012, The President (Attorney General of the Union on behalf of His Excellency's President) (Petitioner) and Speaker of the Pyidaungsu Hluttaw, Speaker of Pyithu Hluttaw, and Speaker of Amyotha Hluttaw (Petitionee). Petition No. 2/ 2012 The President (Petitioner) and Dr Aye Maung & (23) Representatives of the Amyotha Hluttaw (Petitionee). The first one was in petition no. 1/2014, Daw Dwebu and 50 (Representative of the Pyithu Hluttaw) and The Republic of the Union of Myanmar, where it was a question that when the petitionee was the State itself, whether the President of the State shall also be as the joint Petitionee or not. The very first issue of the Tribunal on that petition is that whether it is constitutionality or not since "the President shall not be answerable to any Court for the exercise of the powers and functions of his office or for any act done....." subject to the section 215 of the 2008 Constitution. Section 215 of the 2008 Constitution says that," the President shall not be answerable to either any Hluttaw or to any Court for the exercise of the powers and functions of his office or for any act done or purported to be done by him in the exercise of these powers and functions in accord with the Constitution or any law."

<sup>xxiv</sup> In the decision of the Tribunal in the petition no. 1/2020 of U L. Phone Shoel (Chief Minister of Kayah State/State Government) the Petitioner (on his behalf the President submit the petition to the Union Tribunal) and Speaker of the Kayah State Hluttaw (State highest Legislative Body), Speaker of the Kayah State Hluttaw made in his argument that " .... the Constitutional Tribunal shall need to insert the Union President as a joint petitioner or in the status as the Petitionee."

<sup>xxv</sup> The President U Thein Sein did not sign the amended law but after 14 days of limited period the bill shall deem to be signed by the President and the bill shall become law under the section (Article) 105 of the Constitution 2008.

<sup>xxvi</sup> The Constitution Tribunal Law amended by 2013 stated in section 6 that " The President shall submit the candidature list of total nine persons, three member nominated by him, three members nominated by the Speaker of the Pyithu Hluttaw and three members nominated by the Speaker of the Amyotha Hluttaw, and shall nominate the Chairperson of the Constitutional Tribunal of the Union whom the president shall be chosen by the negotiation with both the Speaker of the Pyithu Hluttaw and the Speaker of the Amyotha Hluttaw, and also to submit to the Pyidaungsu Hluttaw for its approval. Again in section 12(i) stated that **"Each three members of the Constitution Tribunal shall report back, relating to the functions and duties assigned to them, to those who nominates them respectively the President, the Speaker of the Pyithu Hluttaw and the Speaker of the Amyotha Hluttaw."** This has been a new adding provision since 2013 of the Tribunal Law.

<sup>xxvii</sup> That section was renumbering by section 24 by the amendment of Law No. 4/2013, and section 23 was deleted.

<sup>xxviii</sup> Previous Section 24 was substituted by law no. 4/2013 amendment law. (The above section 24 which has been substituted by law No. 4/2013 amendment was deleted and new section 24 which was the previous one of section 23 was re-substituted again by Law no. 46/2014 amendment law.)

<sup>xxix</sup> Previous section 25 was deleted by law no. 4/ 2013 amendment law.

<sup>xxx</sup> Find in the petition no. 1/2020.

<sup>xxxi</sup> The dilemma is arisen from the measures performed by the legislative body of Kayah state regarding to the procedures of impeachment against Chief Minister of the Kayah State who committed corruptions. The Case was trialed by e-court system in 2020 dated (27-10-2020). U L. Phone Shoel (Chief Minister of Kayah State/State Government) vs. Speaker of the Kayah State Hluttaw ( State highest Legislative Body), Petition No. 1/ 2020, in 2020 Precedent of the Constitution Tribunal of the Union, the Republic of the Union of Myanmar, p. 1-47. American Congress made impeachment on the former President Donald Trump for criminal conspiracy in the Capital Hill Riots unconstitutionality after the end of the term of Presidency, i.e., His Excellency' is not a sitting President. The Congress action is constitutionality of the provision of impeachment to President of America has been facing with the question of of facts and Laws has criticized within legal scholars.

<sup>xxxii</sup> Section 322 (b) stated as that "The functions and the duties of the Constitutional Tribunal of the Union are as follows : (b) vetting whether **the laws promulgated** by the Pyidaungsu Hluttaw, the Region Hluttaw, the State Hluttaw or the Self-Administered Division Leading Body and the Self-Administered Zone Leading Body are in conformity with the Constitution or not;

<sup>xxxiii</sup> With the submission by the Representatives of the Amyotha Hluttaw (National Parliament) 25 in number, who requested for the constitutionality of the provision of section 11 (a) Referendum law for the approval of the bill amending 2008 Constitution. In such petition, it is asked for the constitutionality of specific provision stipulated in the bill which is not yet promulgated. After the tribunal has declared that the provision is unconstitutional in referencing to the article 38 (a) and article 391 (a) and (b), the Legislature amended by new provision. The matters are already discussed in another paper which is only based on Myanmar Practice.

<sup>xxxiv</sup> Section 323 of the 2008 Constitution stated that " 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 of the Union 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. This provision is inserted to one of the functions of the Tribunal by (4/2013) 2013 amendment of Tribunal Law with section 12(g) stated as that "deciding on a dispute submitted under section 323 of the Constitution and section 17 of this law in relation to a pending trial of the Court.

<sup>xxxv</sup> The Title of the Chapter VIII of the 2008 Constitution shows "Citizen, Fundamental Rights, and Duties of the Citizens", and there are altogether 46 articles with not only rights, but also duties. Thus, it may say that the provisions under this Chapter are stipulated only for the purpose of citizens.

<sup>xxxvi</sup> Section 378 (a) of the 2008 Constitution provides as " In connection with the filing of application for rights granted under this Chapter, the Supreme Court of the Union shall have the power to issue the following writs as suitable : (1) Writ of Habeas Corpus; (2) Writ of Mandamus; (3) Writ of Prohibition; (4) Writ of Quo Warranto; (5) Writ of Certiorari.

<sup>xxxvii</sup> Like tradition is also see in the precious research paper by the great author Ignacio Borrajo Iniesta Constitutional Tribunal, Spain, LIMITS OF FACT, LAW AND REMEDIES: MYTHS AND REALITIES OF CONSTITUTIONAL REVIEW OF JUDICIAL DECISIONS CONSTITUTIONAL COURT OF SPAIN EXPERIENCE (REPORT), European Commission for Democracy Through Law,(VENICE COMMISSION),in co-operation with THE CONSTITUTIONAL COURT OF THE CZECH REPUBLIC, THE LIMITS OF CONSTITUTIONAL REVIEW OF THE ORDINARY COURT'S DECISIONS IN CONSTITUTIONAL COMPLAINT PROCEEDINGS Brno, Czech Republic, 14-15 November 2005. Acknowledgement to Great Author: Knowing very well that quoted the author's paragraph here is inappropriate, yet because of the constraint of the length of the paper with asking for forgiveness and mentioned here " The topic to be addressed is the constitutional review of judicial decisions in individual complaints procedures. Why is this matter an issue? Why is the Conference devoted to the "limits" posed to this constitutional review? An obvious answer to this questions is offered by the fact that constitutional courts are new institutions: the Spanish court was created in 1980; the Czech court, in 1993. Both have been added to an existing judicial structure: a constellation of judicial bodies forming a pyramid, which is headed by a Supreme Court, different to the new Constitutional Court. The 1978 Constitution adopted in Spain and the 1992 Constitution of the Czech Republic do no introduce changes into the pre-existing judicial powers other than this addition at the summit. And the new constitutional courts have been entrusted with a supervisory function: to oversee the decisions adopted by all public authorities, judicial authorities included, in regard to the fundamental rights and freedoms of the people."

<sup>xxxviii</sup> Prof. Dr Marlar Aung, Reported Cases of Writs Application with Judgment Summary (1948 to 1971), 1st ed, 1st ed, 2011, 2nd ed, 2019, [www.skccmyanmarbook.com](http://www.skccmyanmarbook.com).

<sup>xxxix</sup> Ignacio Borrajo Iniesta Constitutional Tribunal, Spain, LIMITS OF FACT, LAW AND REMEDIES: MYTHS AND REALITIES OF CONSTITUTIONAL REVIEW OF JUDICIAL DECISIONS CONSTITUTIONAL COURT OF SPAIN EXPERIENCE (REPORT), European Commission for Democracy Through Law,(VENICE COMMISSION),in co-operation with THE CONSTITUTIONAL COURT OF THE CZECH REPUBLIC, THE LIMITS OF CONSTITUTIONAL REVIEW OF THE ORDINARY COURT'S DECISIONS IN CONSTITUTIONAL COMPLAINT PROCEEDINGS Brno, Czech Republic, 14-15 November 2005. (by referencing to read the whole document where priceless expressions are abundance without able to quote with spot.

<sup>xl</sup> The American Human Rights Convention, CHAPTER VII - INTER-AMERICAN COMMISSION ON HUMAN RIGHT stated in its Article 44 that "Any person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization, may lodge petitions with the Commission containing denunciations or complaints of violation of this Convention by a State Party." According to this, individual direct petition to the Court did not allow. Yet Under 34 of the European Convention on Human Rights, it is stated the individual applications to the Court states that" The Court may receive applications from any person, non-governmental organization or group of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right. Here, honoring to express the Constitution of the Turkey that "Everyone may



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apply to the Constitutional Court on the grounds that one of the fundamental rights and freedoms within the scope of the European Convention on Human Rights which are guaranteed by the Constitution has been violated by public authorities. " Note: article 148 of the Republic of Turkey Constitution 1982.

<sup>xli</sup> U Win Myint Oo, Informative Knowledge of Ombudsman's, Journal of the Constitutional Tribunal of the Union of Myanmar, 2019.

<sup>xlii</sup> Section 326 of the 2008 Constitution provides that "The following persons and organizations shall have the right to submit matters to obtain the interpretation, resolution and opinion of the Constitutional Tribunal of the Union in accord with the prescribed procedures : (a) the Chief Minister of the Region or State; (b) the Speaker of the Region or State Hluttaw; (c) the Chairperson of the Self-Administered Division Leading Body or the Self-Administered Zone Leading Body; (d) **Representatives numbering at least ten percent of all the representatives of the Pyithu Hluttaw or the Amyotha Hluttaw**. In line with this constitutional provision, The Constitutional Tribunal Law 2010 was also stipulated in its section 14(d) stated as that "The following persons or the organizations are entitled to submit to the Constitutional Tribunal to obtain the interpretation, decision and opinion of the Constitutional Tribunal in accord with the manner contained in section 15: the number of representatives being at least of 10 percent of all the representatives of the Pyithu Hluttaw or Amyotha Hluttaw. Again in section 15(d) stated as that " In respect of the matters to obtain the interpretation, decision and opinion of the Constitutional Tribunal: if it is a number of representatives being at least 10 percent of all the Pyithu Hluttaw or Amyotha Hluttaw representatives, their petitions shall be sent to the Constitutional Tribunal through the relevant Speaker of the Hluttaw. Note: This provision was substituted by Pyidaung su Hluttaw Law No. 46/2014 amendment.

<sup>xliii</sup> Petition no.2/2011 Dr Aye Maung and 23 Representatives of the Amyotha Hluttaw, vs. The Republic of the Union of Myanmar, Petition no. 1/2014, Daw Dwebu and 50 (Representative of the Pyithu Hluttaw) and The Republic of the Union of Myanmar, Petition no. 5/2014, U Aung Kyi Nyunt and 26 (Representative of the Amyotha Hluttaw), Petition no. 5/2014, Dr Aye Maung and 24 (Representative of the Amyotha Hluttaw), The petition no. 1/2017, U Sai Than Naing and 23 Representatives of the Amyotha Hluttaw vs. Pyidaung su Hluttaw, the petition no. 2/2017, Brigadier General Maung Maung and 50 Pyithu Hluttaw representatives being Defence Services Personnel vs. Pyidaungsu Hluttaw, the petition no. 1/2019, Daw Nan Ni Ni Aye and 25 representatives of the Amyotha Hluttaw vs. Pyidaungsu Hluttaw, and petition no. 2/2019 Dr Sai Sain Kyauk Sum and 25 Representatives of Amyotha Hluttaw vs. Pyidaungsu Hluttaw.

<sup>xliiv</sup> Section 378 (b) of the 2008 Constitution stated that, "The right to issue writs by the Supreme Court of the Union shall not affect the power of other courts to issue order that has the nature of writs according to the existing laws."

<sup>xli v</sup> Section 295 (c) of the 2008 Constitution provides that "The judgments of the Supreme Court of the Union are final and conclusive and have no right of appeal."

<sup>xli vi</sup> "Democratization" is the transition to a more democratic political regime, including substantive political changes moving in a democratic direction. <http://en.m.wikipedia.org/wiki>, visited on April 21st, 2022.

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