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**IMPLEMENTATION OF CONSTITUTIONAL
REVIEW IN MYANMAR**

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IMPLEMENTATION OF CONSTITUTIONAL REVIEW IN MYANMAR

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Introduction

The model of Constitutional review, one of the basic structures of Constitution, is the power of the court or constitutional tribunal or constitutional council or chamber to decide the constitutionality of any law enacted by the Legislature and any act of the Executive. In a global context, there are basically two prominent models of constitutional review; American model and the European model (Kelsenian model). After the World War II, based on the growing awareness and demand of constitutional review, it was widely spread out and implemented by the States, within the framework of respective Constitutions, in various ways such as European model, American model, Mixed: European-American model and other forms of constitutional review. In recent years, the implementation of constitutional review and its challenges have been rather explosive questions and different States have faced different challenges. In this article, an attempt will be made to trace the progressive reforms of constitutional review models, including its implementation, challenges and development trends on the base of the Constitutions of Myanmar in three constitutions' eras after independence of 1948.

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1. The General Conception and Practice of Constitutional Review

Before we discuss the constitutional review in Myanmar, it will be useful to consider the general conception, models and practice of constitutional review in a global standpoint. As you all know, the constitutional review plays in the main role to maintain the supremacy of Constitution, separation of powers, check and balance system, the rule of law and to ensure the consistency of Constitution in every States. Tom Ginsburg, the Professor of International Law and Political Science at the University of Chicago and a member of the American Academy of Arts and Sciences, appears to be the expert of the view that constitutional review is the court's power to supervise implementation of the constitution and to set aside legislation for constitutional incompatibility.

The constitutional review was originated in the United States of America after the case of *Marbury V. Madison* (5, U.S. 137, 1803.) and it was typically exercised within the ordinary judiciary. Then, the great Austrian Legal Philosopher, Hans Kelsen designed a new approach to constitutional review in 1920 to trace the validity of every official act of the ultimate authority of the original Constitution of the State.

Here, it is very appropriate to explore the case of England which is more primitive than Marbury case (1803) as the source of the evolution of judicial review in England before the American Revolution. Therefore, we now come to one of the most important cases decided by the England Court of Common Pleas, Boham's case (1610). In that case, the Chief Justice of England Sir Edward Cobe asserted;

“the supremacy of the common law in England, noting that the prerogatives of Parliament were derived from and circumscribed by precedent. He declared that “when an act of parliament is against common right or reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such act to be void.”¹

¹ See Boham's Case (1610), available at <https://www.britannica.com/event/Bonhams-Case>.

In view of the light of this decision, the opinion of Chief Justice Cobe had been foreshadowed in order to implement the Judiciary as a check body for controlling the abuse power of Legislature and Executive when the Constitution of United States was drafted in 1787.

At the down of the twenty- first century, constitutional review has become one of the pillars of the primacy of law and, more generally, of constitutional law. Since the constitutional review was exercised in very different historical and political circumstances, the role of constitutional review and the type of jurisdiction differ from States to States.

According to a comparative Analysis of Hanns Seidel Stiftung Foundation² on judicial review systems in West Africa³, there are four kinds of models of constitutional review. They are –

- (1) The American or Diffuse Model⁴ or Decentralized Model⁵
- (2) The European or Concentrated Model⁶ or Centralized Model⁷ or Kelsenian Model

² The German party-associated and taxpayer-money funded political research foundation established in 1967.

³ The authors of the book are Markus Böckenförde (Centre for Global Cooperation Research), Babacar Kante (Gaston Berger University) and Kwasi Prempeh (Seton Hall Law School).

⁴ The definition of diffuse model by the author Ori Aronson, Assistant Professor, Bar-Ilan University Faculty of Law is that “a diffuse system treats judicial review like other normal judicial acts, in the sense that all courts within the system are in principle authorized to review legislation for constitutionality” See in the article on “BETWEEN DIFFUSE AND CONCENTRATED JUDICIAL REVIEW: AN ISRAELI HYBRID AND ITS ALTERNATIVES”, at p- 3. Electronic copy is available at <http://ssrn.com/abstract=1863104>. See also generally ALLAN R. BREWER-CARÍAS, JUDICIAL REVIEW IN COMPARATIVE LAW 127-35 (1989); MAURO CAPPELLETTI. THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE 133-35 (1989); Alec Stone Sweet, Why Europe Rejected American Judicial Review and Why it May Not Matter, 101 MICH. L. REV. 2744, 2770-71 (2003).

⁵ Decentralized constitutional review is the control of constitutionality is exercised by the ordinary judiciary and can be performed by all courts of law. See in Constitutional Review at AACC Members (2019) published by AACC SRD, Constitutional Court of Republic of Korea.

⁶ The definition of concentrated model or centralized model by the author Ori Aronson, Assistant Professor, Bar-Ilan University Faculty of Law is that “concentrated, or centralized, systems of judicial review, locate the power to strike down legislation for constitutional reasons with a single tribunal, often a separate specialized constitutional court.” See supra note 3 at p- 4.

⁷ Centralized constitutional review is the control of constitutionality is exercised by a specialized institution which usually operates separately from the ordinary judiciary. See in supra note 4.

(3) The Hybrid Model⁸ and

(4) The Political Model.

In the actual practice of American or Diffuse model or Decentralized model, based on the Marbury Case (1803), the Supreme Court reviews the constitutionality of statutes and administrative measures in specific proceedings using common procedural rules. This model has influenced numerous countries in Central and South America.

When the Constitutional Courts or Constitutional Tribunal or Constitutional Council or Chamber exercise exclusive jurisdiction over constitutional matters, this system is often called the “centralized” system or the “European” system which was invented by the Austrian Legal Scholar Hans Kelsen. Bodies exercising the review of the constitutionality of statutes in special proceedings may be the specialized Constitutional Courts or High Courts or their special chambers or the Constitutional Councils. In such model, judges of the Constitutional Courts or Councils or Chambers are appointed in principle by bodies of political power.

On the basis of a comparative analysis on Judicial Review Systems in West Africa by Hanns Seidel Stiftung Foundation⁹, it should therefore be defined as the hybrid model that it has two key characteristics that reflect aspects of both of the concentrated and diffused models. One is the existence of a specialized chamber within the ordinary judiciary that has exclusive jurisdiction over constitutional review, specifically in the Supreme Court. The other is that ordinary court may have the power to review and refuse to apply an

⁸ The hybrid model is the combination of elements of both centralized and decentralized systems of constitutional review. See also in *Judicial Review Systems in West Africa, A Comparative Analysis* by the authors Markus Böckenförde (Centre for Global Cooperation Research), Babacar Kante (Gaston Berger University) and Kwasi Prempeh (Seton Hall Law School), Hanns Seidel Stiftung, 2016, published by International IDEA, pp- 46, 47. Electronic copy is available at <https://www.idea.int/sites/default/files/publications/judicial-review-systems-in-west-africa.pdf>.

⁹ See at the supra notes 2 and 3.

unconstitutional statute, much like their counterparts in the decentralized review model. However, they lack the power to declare the law invalid or unconstitutional, the effect of the decision is limited to the parties to the specific dispute. The power to strike down the statute mostly belongs to one court – usually a Supreme Court, or in systems with the concentrated models of review, a constitutional court or council ¹⁰.

In the nature of the political model, political institution such as parliament or a (sometimes quasi-judicial) designated organ within it) rather than judicial institutions is the chief authorities for reviewing constitutionality. No institutions can therefore review its actions¹¹.

2. Implementation of Constitutional Review under 1947 Constitution of Myanmar

Having briefly covered the general conception and how constitutional review came to be treated as an international practice, then, it should be examined the system of constitutional review in Myanmar, by using historical and political approaches.

In May 1947, the AFPFL (Anti-Fascist Peoples' Freedom League)¹² held its first Constituent Assembly at Jubilee Hall in Rangoon where a 111-member committee was appointed to draw the first draft of the Constitution. The Constitution of the Union of Burma was adopted in 1947. The Constitution of the

¹⁰ Judicial Review Systems in West Africa, A Comparative Analysis by the authors Markus Böckenförde (Centre for Global Cooperation Research), Babacar Kante (Gaston Berger University) and Kwasi Prempeh (Seton Hall Law School), Hanns Seidel Stiftung, 2016, published by International IDEA, p- 46. Electronic copy is available at <https://www.idea.int/sites/default/files/publications/judicial-review-systems-in-west-africa.pdf>.

¹¹ Judicial Review Systems in West Africa, A Comparative Analysis by the authors Markus Böckenförde (Centre for Global Cooperation Research), Babacar Kante (Gaston Berger University) and Kwasi Prempeh (Seton Hall Law School), Hanns Seidel Stiftung, 2016, published by International IDEA, p- 47. Electronic copy is available at <https://www.idea.int/sites/default/files/publications/judicial-review-systems-in-west-africa.pdf>.

¹² The AFPFL was established from 1945 to 1958 and led by General Aung San, the founder of Myanmar Armed Forces and the national leader of Myanmar, the then Burma. The AFPFL led the negotiation for independence in London in January 1947. After winning the 1947 election, the AFPFL's leadership drafted the new Constitution of sovereign Burma.

Union of Burma, 1947 was frequently based on the Constitution of the Republic of Ireland and India also helped in the drafting.

In accordance with the Section 151 of the Constitution of the Union of Burma, 1947, the judicial review was exercised by the Supreme Court. If it appeared any constitutional problem, the President could undertake to refer the question officially to obtain the legal opinion of the Supreme Court that was the highest judicial body under 1947 Constitution. There were many landmark decisions of the Supreme Court with respect to Section 151 of the Constitution of the Union of Burma, 1947.

In the case of *State Vs Government of the Union of Myanmar Supreme Court's Reference Case No.1/1948*¹³, the President of the Union requested the Supreme Court to hear and to check upon the question "Whether or not the Land Nationalization Act of 1948 (Act No.60,1948) enacted by the Union Parliament has become binding into force on the States under the Constitution."

The Supreme Court reviewed that "the main objectives of the Act are to prohibit the ownership of land to those who do not actually work farming and to limit the number of acreages for the ownership. The Act is aimed to acquire the land from those who have no legitimate right for land ownership. The activities that carry out by authorities of the respective States, particularly to prohibit ownership of land to those who do not work farming and to limit the acreage of land ownership are bound within the legislative matters of the Parliament."

In the next, case of referral on the question of resignation of *Parliamentary Membership of U Ba Oo Reference No. 1/1958*¹⁴, a member of the Chamber of Deputies Maubin (North) Township Constituency, U Ba Oo, dispatched a letter on 19-5-1958 by registered post to the President of the Union through the Speaker of the Chamber of Deputies proposing resignation as a candidate for the said Constituency. Consequently, he submitted again a letter to the President in order

² 1952 B.L.R.(S.C.) 135.

¹⁴ 1958 B. L.R. (S.C.) 94.

to withdraw his previous letter on 21-5- 1958. The President took decision based on these two letters from U Ba Oo by declaring the vacancy of the member of Maubin (North) Constituency, Chamber of Deputies commencing from 19-5-1958. In this regard, the President requested the Supreme Court for the interpretation of Section 73(2) (b) of the State Constitution.

Section 73 (2) (b) of the Constitution states that:

“If a member of either chamber - by writing under his hand addressed to the President resigns his seat, his seat shall thereupon become vacant.”

The Supreme Court held that there is no right to withdraw the letter of resignation if this resignation of member was made in accordance with Section 73(2) (b) of the Constitution. Due to these reasons, it is decided that the authority is not imposed on the President either to permit or to refuse the resignation of U Ba Oo.

Another case is *Referral on the question of acquiring decision concerning the appointment of State Ministers Reference No.2/ 1958*¹⁵ . In such case, the two members of Union government, the Minister for Karen State and the Minister for Kachin State resigned from their position on 4.6.1958. The Prime Minister submitted to the President to appoint the other two Ministers for the vacancy of the Minister of Karen State and Minister of Kachin State.

The President ordered that the appointment of these two State Ministers without coordination and consultation with the State Council in accordance with the Section 181 (1) of the Constitution. But, at that time, the State Council could not work its regular functions and meetings.

Section 181(1) of the Constitution states as follows;

“A member of the Union Government to be known as the Minister for the Karen State shall be appointed by the President on the

¹⁵ 1958 B.L.R. (S.C.) 81.

nomination of the Prime Minister acting in consultation with the Karen State Council from among the members of the Parliament representing the Karen State.”

Therefore, the President of the Union, with reference to Section 151 of the Constitution, requested the Supreme Court to render opinion on the appointment of the State Ministers without coordination and consultation with the State Council is in accordance with the Constitution or not.

The Supreme Court answered that the submission of the names of the candidates by the Prime Minister of the Union is not contradict with the Constitution.

At that tenure, the unstable situation is occurred in the entire State and consequently the regular functions of the Government Bodies are not fully operated. The State Council is unable to organize and set for the regular meetings. As a result, the Prime Minister is not in the position to consult with State Council to obtain its approval. The term “consult” is not to be interpreted as the necessity of consent but to be interpreted as to seek the opinion of the concerned authorities. The process of consultation with the State Council is deterred by the then unstable situation of the country.

Under the structure of 1947 Constitution, the Supreme Court historically has resolved constitutional disputes in three main areas: the relations between the states and the national government, the interpretation of Constitution and individual rights and freedoms. The model of constitutional review under 1947 Constitution is practiced on Diffuse model.

3. Implementation of Constitutional Review under 1974 Constitution of Myanmar

On 2nd March 1962, the Revolutionary Council Government took the sovereign power and the 1947 Constitution became defunct. On 3 January, 1974, the Constitution of the Socialist Republic of the Union of Myanmar, 1974 was

adopted by means of Referendum. Under Section 200 and 201 of this Constitution, interpretation power of the Constitution is exercised by the Pyithu Hluttaw, which is unicameral legislature.

Section 200 and Section 201 of the 1974 Constitution provided as follows:

- (a) In interpreting the expressions contained in this Constitution, reference shall be made to the Interpretation Law promulgated by the Revolutionary Council of the Union of Burma.
- (b) Amendments to and further interpretation of expressions contained in the Law mentioned in Clause (a) shall only be made by the Pyithu Hluttaw.
- (c) The validity of the acts of the Council of State, or of the Central or Local Organs of State Power under this Constitution shall only be determined by the Pyithu Hluttaw.¹⁶

The Pyithu Hluttaw may publish interpretation of this Constitution from time to time as may be necessary.¹⁷ Therefore, the authority of interpretation of the Constitution was vested in the Pyithu Hluttaw. There was only one landmark case in which the Pyithu Hluttaw interpreted the provision of 1974 Constitution.

On the sixth day of the Fourth Meeting of First Pyithu Hluttaw held on 21st October, 1975, Pyithu Hluttaw firstly interpreted the Section 73 (h) and 73 (i) of the Constitution. The original provision of Section 73, Subsection (h) had stipulated those decisions with regard to entering, ratifying, annulling or withdrawing International Treaties should be performed with the approval of Pyithu Hluttaw.

Its provisions interpreted by the Pyithu Hluttaw and promulgated by the State Council as Notification No.4/75 on the date of 12th November, 1975 are as follows: -

¹⁶ Section 200 of the Constitution of the Socialist Republic of the Union of Myanmar, 1974.

¹⁷ Ibid, Section 201.

1. (a) Under Sub- Article (h) of Article 73, the following treaties are included among other international treaties requiring approval of the Hluttaw for entering, ratifying, annulling and withdrawal from the treaty.

- (1) Boundary emending or adjustment Treaty;
- (2) Peace Treaty;
- (3) Treaty requiring to adopt the domestic law;
- (4) Treaty concerning defense and security of the State;
- (5) War Reparation Treaty;
- (6) Treaty relates to the contribution or spending of the State budget with the exception of the specific matters approved by the Hluttaw for budget allotment or budget funding;
- (7) Treaty adopting the International Instrument or International Agreement

Likewise, the original meaning of Subsection (i) was related to the decisions on Bilateral Treaties. Its provisions were interpreted by the Pyithu Hluttaw as follows: -

(b) Under Sub-Article(i) of Article 73, the following are included among bilateral or multilateral treaties which require the decision of the State Council: -

- (1) Treaty of Friendship;
- (2) Non-Alignment Treaty;
- (3) Non-Aggression Treaty;
- (4) Treaty for the Protection of Air and Water Pollution;
- (5) Treaty on a Tariffs;
- (6) Treaty Prohibiting Germ warfare.

- (7) Treaty on Non-Use of Poison Gas in Military Operation;
 - (8) Nuclear Test Ban Treaty;
 - (9) International Agreement on Asylum;
 - (10) Treaty Prohibiting Ariel Hijacking and Air
 - (11) Treaty on Protection of War Victims;
 - (12) Treaty on Cultural Exchange;
 - (13) Agreement on Extraction of Energy and Natural Resources;
 - (14) Agreement on Economic, Technical Assistance and Cooperation;
 - (15) Protocol arising out of the Main Treaty which has already obtained approval of the Hluttaw or State Council;
 - (16) Trade or Commercial Agreement Treaty;
 - (17) Loan Agreement implementing with the permission of the Hluttaw;
 - (18) Treaty on Air and Sea Traffic;
 - (19) Treaty on Communications by Post, Telegraph and Telephone.
2. In the event arises in the future to institute the treaties that are not embodied in the above paragraph 1, such matter shall be submitted to Pyithu Hluttaw by the State Council for seeking the decision whether it is comprehended in Sub Articles 73(h) or Sub-Article(i).
 3. Pursuant to sub paragraph 1 of paragraph 1, the following Agreement are inclusive in the International Agreements that urgently need the decision of the State Council as well as the authorization granting to the Council of Ministers in order to conclude the said Agreement.

- (a) Protocol arising out of the Main Treaty which has already obtained approval of the Hluttaw or State Council;
- (b) Trade Agreement;
- (c) Loan Agreement instituted by virtue of approval of the Pyithu Hluttaw;
- (d) Traffic Agreement by Sea and by Air;
- (e) Treaty on Communications by Post, Telegraph and Telephone.

Under 1974 Constitution, Myanmar implemented the political model of constitutional review and the Parliament is the highest political organ to interpret the Constitution. In this design, the Constitution mentioned the basic principles and ensured the fundamental rights of its citizens. The body to safeguard these fundamental rights of the citizens was the State Council under the Article 73 (m) which said that the State Council shall abrogate the decisions and orders of the Central and Local Organs of State Power if they are not consistent with the law. And also, under this Constitution, Pyithu Hluttaw promulgated the Protection of Citizens' Rights Law to protect and safeguard the rights and privileges of the people. Under the law and Article 112 (b) of the Constitution, the Council of People's Attorneys was the safeguarding body to protect and safeguard the rights and privileges of the working people. Therefore, there was no "Writs" under the Socialist era of Myanmar.

4. Halt of the Constitutional Review System in Myanmar

In the 1980s, Myanmar faced many crises and difficulties in economic, social, and political affairs. Although Myanmar practiced a Single Party System which is called the Myanmar Way to Socialism under the 1974 Constitution, the general situation occurred in 1988. Thus, the State Law and Order Restoration Council (SLORC) took the State's Power for peace, tranquility, Law and order in

Myanmar on September 18, 1988. Since then, the 1974 Constitution is no longer practiced and it is Defunct as Death Letter Law.

During the SLORC rule in Myanmar, the Constitutional Review System is no longer used because the States' Power, i.e., Executive and Legislative power was exercised by the SLORC, and Judicial power was conferred to Supreme Court under the Judicial Law which was promulgated by the State Law and Order Restoration Council Law No. 2/88.

5. Revival of the Constitutional Review System

However, SLORC took the view on the long term, and laid down the seven-road map towards the Multi-Party Democratic System. According to that Road map, the National Convention was held in 1993 to draft the new constitution with the People's will for establishing the Multi-Party Democracy System. In that National Convention, the thousands of delegates from the 8 Groups that Political Parties Representatives Group, Elected Representatives Group, Civil Service Representatives Group, Group of Ethnic Representatives, Farmers' Representatives Group, Workers' Representatives group, Professional Representatives Group, and Group of other invited person, participated and discussed the basic principles for the draft Constitution.

On 11th January 1993, there was a discussion about the Judiciary that is the judicial principles and the judicial system in order to promote righteous judicial proceedings and how to form the judicial structure, how to entrust the jurisdictions to the Highest court, and when the problems relating to the constitution arises, whether the jurisdiction should confer the highest court or should be formed separately to determine that problem.¹⁸

Regarding the upholding of the Constitution, the participants of each group discussed that the Constitution will be needed to protect by the sound judicial system; when disputes arise the provisions of the Constitution will be

¹⁸ Myanmar National Convention Records, Vol.I, page 265

needed to interpret, and when legal disputes between the Union government and the state government will also be needed to resolve. Therefore, a Constitutional Court should be formed to resolve power-sharing disputes, whether between one Executive authority to another or between the federal government and the state government; and to decide the Constitutionality of Law enacted by the Pyidaungsu Hluttaw (Parliament) or State Hluttaw and so on.¹⁹

On September 16, 1993, the basic principle was adopted in respect with the safeguarding of the Constitution, that is “A Constitutional Tribunal will be formed to interpret the provision of the Constitution, to scrutinize laws enacted by the Pyidaungsu Hluttaw (Parliament), the Region, and the State Hluttaws, and to scrutinize the Constitutionality of functions of executive authorities of Pyidaungsu, Regions, States and Self-Administered Areas, to decide on constitutional disputes between Pyidaungsu and Regions and States, among Regions and 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.” Based on the above discuss matters Article 46 of the 2008 Constitution of Myanmar was adopted.²⁰

Then, the delegates of each group in the National Convention discussed setting up detailed principles of the allocation of the State’s Judicial Power. The State’s Judicial Power was allocated by

- (a) Supreme Court of the Union, High Court of the Region, High Court of the States, Courts of the Self-Administered Divisions, Courts of the Self-Administered Zones, District Courts, Township Courts and other courts established by the Laws;
- (b) Courts-Martials
- (c) The Constitutional Tribunal.

¹⁹ Myanmar National Convention Records, Vol.II, page 553-556

²⁰ Myanmar National Convention Records, Vol.II, page 708

In above courts were formed separately and their nature of jurisdiction were also discussed.

Regarding the establishment of the Constitutional Tribunal of the Union, the delegates of the National Convention discussed about the functions of the tribunal, how many members should be set, how the member should be systematically selected, the qualifications of the members should have, and the tenure of membership. As the result of the discussion, the detailed principles for the establishment of the Constitutional Tribunal of the Union were adopted.²¹ In line with these detailed principles, it was adopted, from Article 320 to Article 336 of 2008 Constitution, relating to the Constitutional Tribunal of the Union.

6. Implementation of Constitutional Review under 2008 Constitution of Myanmar

The Constitution of the Republic of the Union of Myanmar was adopted in 2008 and the Constitutional Tribunal came into being for the first time in the history of Myanmar. It was established on the date 30th March 2011. The authority and organizational structure have been regulated by the Constitution.

The Constitutional Tribunal of the Union is formed with nine members including the Chairperson.²² The President submitted the candidature list of total of nine persons, three members chosen by him, three members chosen by the Speaker of the Pyithu Hluttaw (House of Representatives) and three members chosen by the Speaker of the Amyotha Hluttaw (House of Nationality), and one member among nine members to be assigned as the Chairperson of the Tribunal, and their assignments shall be approved by the Pyidaungsu Hluttaw (Parliament).²³

The adjudication of Tribunal shall be formed with full members i.e. 9 members. The hearing of the petition may perform with full members. However, if a member unable to sit the hearing of public sitting cause of any other

²¹ Myanmar National Convention Records, Vol. XIII

²² Section 320 of the 2008 Constitution of Myanmar

²³ Section 321 of the 2008 Constitution of Myanmar

assigned duty, the hearing can sit with the minimum number of six members of the Tribunal with the Chairperson. Although the full-fledge member of the Tribunal shall pass the resolution or decision of the Tribunal. If the Chairperson or one of the members is not available, we may say that the composition of the Tribunal becomes incomplete. It means that the adjudication of proceedings is performed by all members of Tribunal without oversight.

6.1. Appointment of the Chairperson and Members of the Tribunal

From Section 327 to Section 335 of the Constitution provided the appointment of the Chairperson and members of the Tribunal, their qualifications, appointment of new members, selection of members, the term of the Tribunal and also causes of their impeachment.

The President appoints the Chairperson and members of the Constitutional Tribunal of the Union after the approval of the Pyidaungsu Hluttaw (Parliament).²⁴

When the President nominated the members of the Constitutional Tribunal of the Union, the Pyidaungsu Hluttaw (Parliament) has no right to refuse unless it can be proved that they are disqualified,²⁵ and if the Pyidaungsu Hluttaw has not approved the person who nominated by the President, the President will have the right to submit new nominated person again in line with the provision of the Constitution.²⁶

6.2. The Functions and Duties of the Constitutional Tribunal of the Union

The functions and 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 (Parliament), the Region Hluttaw, the State Hluttaw or the Self-

²⁴ Section 327 of the 2008 Constitution of Myanmar

²⁵ Section 328 of the 2008 Constitution of Myanmar

²⁶ Section 329 of the 2008 Constitution of Myanmar

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 (Union Parliament)²⁷

In case of arising a dispute with the trial before any Court, that 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 that matter, the 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 that matter, the resolution of the Constitutional Tribunal of the Union shall be applied to all similar cases.²⁸

²⁷ Section 322 of the 2008 Constitution of Myanmar

²⁸ Section 323 of the 2008 Constitution of Myanmar

6.3. Adjudication Procedure of the Constitutional Tribunal

Access to the Constitutional Tribunal of the Union

Entitled to submit the matters directly to the Tribunal are the President, Speaker of the Pyidaungsu Hluttaw (Union Parliament), Speaker of the Pyithu Hluttaw (House of Representatives), Speaker of the Amyotha Hluttaw (House of Nationality), the Chief Justice of the Union Supreme Court and the Chairperson of the Union Election Commission.²⁹ And then, the Chief Minister of the Region or State, Speaker of the Region Parliament or State Parliament, the Chairperson of the Self-Administered Division Leading Body or the Self-Administered Zone Leading Body, and the Representatives numbering at least ten percent of all the representatives of the Pyithu Hluttaw (House of Representatives) or the Amyotha Hluttaw (House of Nationality) are entitled to submit to the Tribunal indirectly by means of the prescribed means.³⁰

Under the 2008 Constitution and the Constitutional Tribunal of the Union Law, the only above-mentioned persons can submit to the Tribunal. It seems like an individual citizen cannot access to the Tribunal. Although the individual citizen who exhausted his rights can access to the Tribunal through his concerned representatives. If his loss or grievance may affect the interests of other citizens or public interest, the Concern Representative can present and discuss the other Representatives in the House and then, the 10 percent of the Representatives submit the petition to the Tribunal with the manner prescribed by the Tribunal Law.

In the World, most of the Constitutional Courts play as a guardian of the Constitutional order and protect the Human Rights of Individuals and the Constitutional Rights of Legal entities. In Myanmar, the individual rights or citizens' rights can be requested to the Supreme Court of the Union by the Individual citizen. The Supreme Court of the Union is vested the power to issue

²⁹ Section 325 of the 2008 Constitution of Myanmar

³⁰ Section 326 of the 2008 Constitution of Myanmar

the five kinds of Writs, that are Writ of Habeas Corpus, Writ of Mandamus, Writ of Prohibition, Writ of Quo Warranto, and Writ of Certiorari by the 2008 Constitution.³¹ While the Supreme Court of the Union sit the case on the Citizens' rights, there is need to decide whether on constitutionality or not, it may apply a case to the Constitutional Tribunal of the Union by means of prescribed manner.

Submission of a petition

When a petition was submitted to the Tribunal, the Chairperson set up a Scrutiny Body of Petition under Section 18 of the Law. The Scrutiny Body examined whether it is complete or not under Rule 4. When the Scrutiny Body found out that the petition is not complete in accordance with Rules of Procedure, the Scrutiny Body shall notify the petitioner to resubmit with the requirements of the petition. If the petition is complete, the Scrutiny Body shall notify the respondent or interested person or department or organization to submit the explanatory statement during the prescribed period. When the petition is complete with the required documents, the Scrutiny Body submits the proceeding with their reports it to the Chairperson for a hearing.

When the Chairperson received the proceeding, the Chairperson shall form the Order of formation of the Tribunal under Rule 15 to be heard and decided. The case shall be heard by the plenary session. In the case of unable to sit Full Bench in public sitting for hearing with assigned duty or any other matters of any other members, the case may be heard by the Tribunal with at least six members including the Chairperson.³²

During the hearing of a case, the Tribunal can have the opinion and advice of the expert and any other requirements, if necessary. And also, may call upon the findings and remarks of the relevant Hluttaw Committees, Commissions and Bodies through their respective Speakers of the Hluttaw vetting on the matter submitted under subsection 1 of the section 17A of the Law.

³¹ Section 378 of the 2008 Constitution of Myanmar

³² Section 20 of the Law of the Constitutional Tribunal.

The Tribunal shall be heard in public sitting, it may expect the matter of State secrets and security of the Union. The Tribunal can be without disclose state official secrets matters and deliberation of the members of the Tribunal on the case, except all other matters shall be heard in the public sitting. The deliberation carried out within the Tribunal with respect to the final decision of a case shall be recorded and kept confidential. The Tribunal shall decide interpretation and opinion with the consent of majority vote of the members and decision with the consent of majority vote of the members including the Chairperson.

The Constitutional Tribunal can apply the relevant provisions of the Code of Civil Procedure, the Code of Criminal Procedure and the Evidence Act whenever it is deemed to be relevant and appropriate with an aimed to settle disputes.

Under Section 324 of the Constitution and Section 24 of the Law, the resolution of the Tribunal is final and conclusive.

7. Legal Challenges in Constitutional Adjudication

The processes of implementation of Constitutional Review can face the challenges and problems. Yet these challenges can lead to the development trends.

The role of the Tribunal is to determine the constitutional validity of the Laws enacted and executed by the two pillars of the government. Section 13 of the Law states that the persons who directly submitted the petition to obtain the interpretation, decision and opinion of the Constitutional Tribunal. Moreover, Section 14 describes the submitted persons who were submitted through the prescribed manners. Apart from the persons who are accessed to the Tribunal under Section 13 and 14 of the Law of the Constitutional Tribunal, remaining all persons are seemed to be limited for submitting the constitutional complaint to obtain the interpretation, decision and opinion of the Constitutional Tribunal.

However, every citizen or all citizens can request to submit through their concerned representatives of Hluttaw.

The duties of the Hluttaw representatives include the safeguarding the Constitution and the existing laws and aiming at and carrying out to enable to obtain and enjoy the fundamental rights of the citizens.³³ In respect of the duties of the Hluttaw representatives under their Hluttaw Laws, citizens can request to submit the Hluttaw representative for getting the constitutional remedies due to matter of constitutional issues. Then the Hluttaw representatives convinced on the citizen's request, he or she lobbies within their group of Hluttaw representatives on that constitutional issues for collecting the 10 percent of total number of the respective Hluttaw representatives. After that, they will continue with two paths, one path is proposing the constitutional issues in their respective Hluttaw and remaining way is 10 percent of the Hluttaw representatives can submit the petition to the Tribunal for getting the constitutional remedies through in accordance with the Rules of procedure.

Relating to the remedies of constitutional fundamental citizen rights, Myanmar has long experience with Myanmar's Constitution, since she gained the independence. Section 25 of the 1947 Constitution protected the citizen's rights to constitutional remedies by issuing the writs by the then Supreme Court. Moreover, citizen's rights to constitutional remedies is vested the Supreme Court of the Union under the 2008 Constitution. Instead of the Constitutional Tribunal, the power to adjudicate such matters shall be vested in Supreme Court, i.e., the Supreme Court can issue writs (constitutional writs or prerogative writs) and to review the issues of violation of the citizens' rights and remedy their rights and guarantee under the Constitution of the Judicial Power in the Chapter 8 of the Constitution.

In this regard, we would like to mention our opinion, writs system is only used Common Law Legal system as a judicial review for the safeguarding of the

³³ Section 9 (a) and (f) of the Pyithu Hluttaw Law and Amyotha Hluttaw Law.

fundamental citizen rights. That is why, all of the writ jurisdiction are empowered by the Supreme Court as Diffuse constitutional review system. And then, meanwhile, the Constitutional Tribunal simultaneously exercises the jurisdictions on the constitutional disputes as mentioned as concentrated or specialized system mostly which were exercised in Civil Law countries. But, Myanmar practiced likewise as a Constitutional Court of Civil Law countries. So, we might say Myanmar practices as Hybrid system.

According to Section 323 of the Constitution, during a hearing of a case before a court, if there arises a dispute on whether the provisions contained in any law contradict or is conform to the Constitution, and if no resolution has been previously 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 accordance 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". So, any level of courts including Supreme Court can submit the petition under Section 323 of the Constitution.

Regarding this section under that provision, the first case of the Constitutional Tribunal is submission No 1 of 2011. The Chief Justice of the Union Supreme Court submitted the submission to the Constitutional Tribunal questioning the legality of conferring the first class magistrate power to the sub-township Administrative Officers as requested by the Ministry of Home Affairs.³⁴The Constitutional Tribunal issues that whether it is of constitutionality

³⁴ Facts: Ministry of Home Affairs informed the Supreme Court of the Union to empower the first-class Magistrate power to 27 sub-township administrative officers as judicial officers, as required.

It is submitted by the Chief Justice of the Union to obtain the interpretation, decision and opinion of the Tribunal in accordance with section 325 (e) of the Constitution of the Republic of the Union of Myanmar whether the following matters are consistent with the Constitution:

- To appoint the sub-township administrative officers, the General Administration Department, Ministry of Home Affairs as judicial officers to try the criminal cases which come to court in the sub-township concerned by the Supreme Court of the Union under Section 293 and 317 of the Constitution;

or not to confer the power of criminal jurisdiction to the sub-township administrative officers of the General Administration Department, Ministry of Home Affairs by the Supreme Court of the Union.

The Constitutional Tribunal considered that the provisions of the 2008 Constitution clearly stipulate that the legislative power, the executive power and the judicial power of the Union shall be separately exercised. The Judicial power empowered to the Courts and Judges are clearly prescribed in the Constitution. Therefore, the exercise of the judicial power is permitted only to those Judges who are empowered by the Constitution.

So, the Constitutional Tribunal held that the conferring of the judicial power to administrative officers of the General Administration Department of the Ministry of Home Affairs is not in conformity with the Constitution.

After deciding the submission No 1 of 2011, the Supreme Court repealed the empowering the power of criminal jurisdiction to the sub – township administrative officers of the General Administration, Ministry of Home Affairs by Notification No. 232/ 2011 in order to conformity with the 2008 Constitution and the decision of the Constitutional Tribunal of the Union.

Relating to the citizen right to vote, Constitutional Tribunal decided the case relating citizen right to vote stipulated under the 2008 Constitution.³⁵ It can be found in the submission No 1 of 2015.

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- To confer sub- township administrative officers with the first-class power of Magistrate under Section 32 (1) (a) of the Criminal Procedure Code (Cr P C) and Magistrate power to try summarily under Section 260 of Cr P C by the Supreme Court of the Union;
 - To appoint sub- township administrative officers as juvenile judges and to empower them to try the juvenile cases under Section 40 (a) of the Child Law,1993.

³⁵ Section 391(a) and (b) of the Constitution of the Republic of the Union of Myanmar, 2008 describes that in electing :people's representatives to the Hluttaws

- (a) attained 18 yeares of age on the day on which the election commences, who is not every citizen who has disqualified by law, who is eligible to vote, and person who has the righth to vote under the law, shall have ;the right to vote
- (b) erson who has the right to vote under the law shall cast a vote every citizen who is eligible to vote and p .only for each Hluttaw at a constituency in an election

Dr. Aye Maung and 23 MPs from Amyotha (National) Hluttaw brought the submission to the Tribunal, for requesting to check the constitutionality of the Referendum Law for the approval of the Draft Law on amending the Constitution (2008). They questioned one of the provisions of the Referendum Law specifically mentioned in Section 11(a) that the expression “the holders of Temporary Identity Cards” according to the Referendum Law by which shall have the right to vote in the Referendum.

Pursuant to all these provisions, the Tribunal views that the expression “constitutional right to vote” includes every citizen who has attained 18 years of age on the day which the election commences and person who get this right by Law.

It is noteworthy, that under the Presidential Notification, the validity of the cast votes under Referendum Law, it is not in accord with the provision of the Constitution, particularly with regard to Section 38 (a), Section 391(a) and Section 391(b). Therefore, the Tribunal ordered that Section 11 (a) of the Referendum Law for amending the Constitution (2008) which permits holders of the Temporary Identity Cards are not in accordance with the Constitution.

After passing the judgment, it was stated that the above law was incompatible with the Constitution, and then on 25 June 2015 the Pyidaungsu Hluttaw (Union Parliament) amended the law. According to this amendment, Sub-section (a) of Section 11 of **“the Law Amending the Referendum Law for the Approval of the Draft Law on amending the Constitution of the Republic of the Union of Myanmar, (2008)”** shall be substituted as following provision:

“(a) Each of every citizen, associate citizen and naturalized citizen who has completed the age of eighteen years on the day of referendum shall have the right to vote at the referendum. Such each and every person who is entitled to vote shall be mentioned in the voting roll.”

According to the functions and duties of the Constitutional Tribunal, it can exercise the scrutinizing the laws which are enacted by the respective Hluttaw.³⁶ But the Constitutional Tribunal cannot examine the bills before enacting the Law. Furthermore, the Constitutional Tribunal cannot adjudicate the cases by own motion.³⁷

In 2012, there was a rare incident for the Constitutional Tribunal. It is the submission No 1 of 2012.

The Attorney-General for and on behalf of the President presented the submission questioning that the constitutionality of the interpretation of term the "Committees, Commissions and Bodies formed by each Hluttaw" should be regarded as "Union Level Organizations".

In Judgement that case, it is stated that "Taking into consideration of the preceding discussion and also has taken into account on the interpretation of the Chapter IV of the Constitution under the heading of Legislature, "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" shall be defined as "the Union Level Organizations or persons appointed by the President with the approval of the Pyidaungsu Hluttaw (Union Parliament). But Committees, Commissions and Bodies formed by each Hluttaw shall be regarded as organizations of Hluttaw."

Therefore, it may be interpreted 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"

³⁶ Section 322 (b) states that vetting whether the laws promulgated by the Pyidaungsu Hluttaw, the Region Hluttaw, Administered Zon Leading Body are -Administered Division Leading Body and the Self -the Self the State Hluttaw or .in conformity with the Constitution or not

³⁷Submission No 1 of 2017 of the Constitutional Tribunal of the Union, p-17; "The activities of the Tribunal are the Judicial Process because the Tribunal is one of the formation of Courts established under Section 293 (c) of the Constitution. There is no legal provision that the Tribunal has the power to decide the Law which is enacted by the Legislature without submission.

are the Union Level Organizations or Persons appointed by the President with the approval of the Pyidaungsu Hluttaw.

For all these reasons, the submission of the President is granted and “The status granted to Committees, Commissions and Bodies formed by each Hluttaw as Union Level Organizations is unconstitutional”.

The affected bodies unsatisfied, disapproved and unfollowed on the decision of Tribunal that the two difference between such Committees, Commissions and Bodies which were formed under the Constitution and the relevant Law are not same as Union Level Organization. Due to that unsatisfied decision, then the Parliament alleged to the Tribunal under the section 334 (a) (ii) and (v) of the Constitution " breach of any of the provisions under the Constitution and inefficient discharge of duties assigned by law", by means of impeachment.

Followed by that the unfollowed decision, the Parliament amended the Law of Constitutional Tribunal in 2013. One of the amendments of the Tribunal Law in 2013, Section 24 is amended that the provision is “the resolution of the Tribunal decided under Section 23 shall be final and conclusive”. Section 23 prescribes that “The decision passed by the Constitutional Tribunal relating to the matter submitted by a Court under sub-section (g) of section 12 shall be applied to all cases.” Moreover, the deleted provision of Section 25 is “the decisions of the Tribunal shall have an effect on the relevant Government departments, organizations, and persons or the respective region.”

As the amended sections, the intention of the amending law is, we can see comparative studies between which were deleted provisions and substituted clause.

The meaning of impeachment mentioned in the Section 334 of the 2008 Constitution. The Chairperson and members of the Constitutional Tribunal of the Union may be impeached on any of the following reasons:

- (i) High treason;
- (ii) Breach of any of the provision under the Constitution;
- (iii) Misconduct;
- (iv) Disqualification of the qualifications of member of the Constitutional Tribunal of the Union prescribed under Section 333;
- (v) Inefficient discharge of duties assigned by law.

The grounds for impeachment are high treason, bribery, high crimes and misdemeanours in United States of America. Impeachable high crimes and misdemeanours are not limited to indictable criminal offences: the definition includes attempting to subvert the laws and liberties of the realm, corruption and a variety of other forms of misconduct in office.³⁸ In this regard, the Parliament tried to proceed the impeachment on all the nine members of the Tribunal because they think that the Constitutional Tribunal perform their power which is excess the functions and duties. The Constitutional Tribunal faced the challenge of the exercising of powers. So, the Constitutional Tribunal were unfortunately faded away from on the important pillar of the Judiciary within the democracy political system and faced the threaten of the independence and impartiality of Constitutional Judiciary system.

Since the establishment of the Constitutional Tribunal, the Constitutional Tribunal decided a small number of cases. The Constitutional Tribunal accepted and decided the 17 cases till 2020. Even though the Constitutional Tribunal faced the challenges in progress of development of constitutionalism in Myanmar, there are many landmark decisions of the Constitutional Tribunal.

One of the landmark decisions of the Constitutional Tribunal is the submission No 2 of 2011. This submission determined and interpreted the status of Ministers of the National Races Affairs who are protected and preserved the rights of National Races and Ethnic minorities.

³⁸ Judicial Tenure, Removal, Immunity and Accountability, International IDEA Constitution-Building Primer 5, Elliot Bulmer, First published in 2014 by International IDEA, p-11.

Dr. Aye Maung and 22 MPs of the Amyotha Hluttaw (National Parliament) presented the submission questioning whether the term “Minister of the National Races Affairs” under Section 5 of the Law of Emoluments, Allowances and Insignia for Representatives of the Region or State is excluded from the term of the “Ministers of the Region or State” and the exclusion of ‘ Ministry of the National Races Affairs ‘ among the “ Ministers of the Region or State” under the Section 4 (c) of the said Law of constitutionality or not.

The Constitutional Tribunal issues that whether the status of Ministers of the National Races Affairs is equal to that of the Ministers of the Region or State concerned; or whether they are entitled to the emoluments, allowances and insignia of office as the Ministers of the Region or State.

The Constitutional Tribunal considered 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 perform the affairs of National Races concerned.

Tribunal examines the basic principles of the Constitution and any other laws.

Therefore, the submission of 23 representatives of the Amyotha Hluttaw including Dr. Aye Maung, is allowed. It is decided and interpreted that since the Ministers of National Races Affairs of the Regions or States are Ministers of the Regions or States concerned and they are the persons defined by Section 4 (c) of the Law of Emoluments, Allowances and Insignia of Office for Representatives of the Regions or States. Hence, Section 5 and Section 17 of the said Law are unconstitutionality.

The Tribunal decided that Sections 5 and 17 of the Law of Emoluments, Allowances and Insignia of Office for Representatives of the Region or State is

not in conformity with Section 262 of the Constitution of the Republic of the Union of Myanmar.

After passing the judgment, the above law was incompatible with the Constitution, thus the Pyidaungsu Hluttaw (Union Parliament) amended the law on 8 March 2013. According to this amendment, the Minister of the National Races Affairs and the other Ministers of the Region or State possess an equal status without any discrimination.

It is important that the process to development and formulate for resolving and considering the challenges that we are facing. So, it should add the provision of the Law that any person that is exhaustion of all other judicial remedies should submit the constitutional compliant for constitutional remedies. And also, should add the functions and duties of the Constitutional Tribunal that scrutinizing the bills before promulgating and signing of the President.

Conclusion

To sum up the whole subject, there are different models of constitutional review all over the World and types of review on constitutionality vary from states to states. The extent of review of constitutionality can also be limited and this limitation varies depending upon the jurisdiction of the constitutional review body. In the same way, the scope of jurisdiction of constitutional review bodies such as Constitutional Courts, Constitutional Tribunals and Constitutional Council, may be drawn wider or narrower.

Therefore, from a review of different Constitutions in Myanmar's history, we may conclude that the implementation of constitutional review is quite different in their specific application. The Constitution of the Union of Burma, 1947 designed the diffuse and centralized model of constitutional review and the Supreme Court is the highest judicial organ to interpret the Constitution and to protect the fundamental rights of the citizens. The High Court shall have exclusive original jurisdiction in all disputes between the Union and a unit or between one unit and another.

The political model of constitutional review was implemented by the Constitution of the Socialist Republic of the Union of Myanmar, 1974. It is obvious, therefore, that the Parliament is only the highest organ for the interpretation of Constitution.

The current 2008 Constitution enshrines the centralized and concentrated model of constitutional review as a basic principle by establishing the separate Constitutional Tribunal in order to interpret the Constitution, to examine the constitutionality of law promulgated by the Legislatures and functions of executive authorities, to decide the constitutional disputes between the Union Government and State or Region Government, among Regions, among States and between Regions or States and Self-Administered Areas and among Self-Administered Areas themselves. It can readily be seen that the constitutional jurisdiction of the current Constitutional Tribunal is wider and more comprehensive than the previous Supreme Court in 1947 and the Parliament in 1974.

At present, the Supreme Court is the only one of the highest judicial organs of State without interference of the constitutional jurisdiction of the Tribunal. It is the court of final appeal from all ordinary courts within the Union and granting the writ. Under the respective provisions of the 2008 Constitution, the Supreme Court of the Union has the power to issue five kinds of writs: Habeas corpus, Mandamus, Prohibition, Quo Warranto, and Certiorari. Thus, every citizen of Union of Myanmar shall have the right to apply writs for the protection of their fundamental rights given by Constitution to the Union Supreme Court directly.

In view of the aforesaid cases and facts of the law, the Constitutional Tribunal overcame the challenges that are usually faced in the countries with immature democracy practice. But one of the greatest results of the Constitutional Tribunal of the Union of Myanmar in its milestone of victory, Tribunal can legally define the separation of powers treasured in the 2008 Constitution and determine the status of Union Government, State and Regions

Governments. Tribunal always preserves the traditions of constitutionalism in accordance with the 2008 Constitution.

We believe that the Tribunal needs further exploration in the matters of individual rights protection under the Constitution. We hope the readers to be available a useful knowledge of our progressive development of constitutional review with the recourse of frequent changes in Myanmar's legal history.

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