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*Judicial Power and the  
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THE PURPOSE OF this chapter is to make some suggestions to further strengthen the formation of the Constitutional Tribunal of the Union of Myanmar (CTU), and its jurisdiction and powers in the deliberation and adjudication of cases, by amending the existing CTU Law and rules made thereunder. It is argued that it will benefit Myanmar if, rather than seeking to replace the CTU with judicial review by the Supreme Court, as is preferred by some people, the power and role of the existing CTU, which was established by the 2008 Constitution and the CTU Law, are developed. An entire new bench of CTU Members was appointed in March 2016 following the election of the new President.

I. BRIEF BACKGROUND OF CONSTITUTIONAL REVIEW IN MYANMAR

Historically speaking, Burma, which today is known as Myanmar, had two quasi-constitutional documents before its independence, namely the Government of Burma Act 1935 and the Constitution of Burma under

<sup>1</sup> The author would like to thank Professor Andrew Harding, at the relevant time Director of the Centre for Asian Legal Studies, Faculty of Law, National University of Singapore, for hosting her as a visiting research fellow from June to August 2014. She also would like to express her heartfelt thanks to Dr Daniel Puchniak, Associate Professor, Faculty of Law, National University of Singapore, and the then Rector Dr Aung Thu and Professor and Head Dr Khin Mar Yee, Department of Law, from the University of Yangon for making her visit to CALS possible. Her special thanks also go to Dr Marcus Brand who kindly read and reviewed an earlier draft. Any errors remain the author's own.

the Japanese Occupation.<sup>2</sup> It has also had two previous Constitutions after independence, namely the Constitution of the Union of Burma 1947 (hereinafter ‘the 1947 Constitution’) and the Constitution of the Socialist Republic of the Union of Burma 1974 (hereinafter ‘the 1974 Constitution’). The current (third) Constitution of the country since independence is the Constitution of the Republic of the Union of Myanmar 2008 (‘the 2008 Constitution’).

The 1947 Constitution came into force when Burma regained her genuine independence from the British on 4 January 1948.<sup>3</sup> The power of the State was divided into legislative, executive and judicial power. The 1947 Constitution authorised the Supreme Court to exercise the highest judicial power,<sup>4</sup> and its decisions in all cases were final.<sup>5</sup> Section 137 of the Constitution provided that ‘No law shall be enacted excepting from the appellate jurisdiction of the Supreme Court cases which involve questions as to the validity of any law having regard to the provisions of this Constitution.’ Section 25(1) guaranteed the right to move the Supreme Court by appropriate proceedings for the enforcement of any of the rights conferred by the ‘Rights to Constitutional Remedies’ chapter of the Constitution. The Supreme Court also had the power to issue writs,<sup>6</sup> give an opinion upon questions referred by the President when an important question of law arose;<sup>7</sup> and decide on a question referred by the President on whether a Bill or any specified provision thereof passed by the States legislature of Shan, Kachin, Kayin and Kayah was repugnant to the Constitution.<sup>8</sup>

On 2 March 1962, following a military coup, the Revolutionary Council headed by General Ne Win was set up. The Council made itself the source of all legal power and the 1947 Constitution was rendered defunct. In July 1971, a decision was made by the First Party Congress of the Burma Socialist Programme Party to draw up a new Constitution. In October 1973, a new draft Constitution was adopted by the party Convention. A referendum was held in December 1973, approving that Constitution, which was

<sup>2</sup> Burma/Myanmar’s basic constitutional history is set out in ch 1 and elaborated further in ch 3 of this volume.

<sup>3</sup> The Preamble of the Constitution of the Union of Burma 1947 (hereinafter referred to as ‘the 1947 Constitution’) provides that ‘WE, THE PEOPLE OF BURMA including ..., IN OUR CONSTITUENT ASSEMBLY this Tenth day of Thadingyut waxing, 1309 BE (Twenty-fourth day of September, 1947 AD), DO HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION’. The Constitution consisted of a preamble and 14 chapters. The Constitution of the Union of Burma 1947 was titled ‘*Pawè Si Aòk Chaòk Pôn A Ech Kaan U P Ed*’ in Myanmar language.

<sup>4</sup> *ibid*, s 136(1).

<sup>5</sup> *ibid*, s 138.

<sup>6</sup> *ibid*, s 25 (2).

<sup>7</sup> *ibid*, s 151.

<sup>8</sup> *ibid*, ss 154, 170, 180, 186.

entitled 'the Constitution of the Socialist Republic of the Union of Burma'<sup>9</sup> and became operative from 3 January 1974.

This second Constitution of independent Burma differed significantly from its predecessor. Under the 1974 constitution, similar to other socialist Constitutions at the time, the *Pyithu Hluttaw* or People's Assembly, a single chamber legislature, was the highest organ of state power, and it exercised the sovereign powers of the State on behalf of the people.<sup>10</sup> A Council of the People's Justice was the highest judicial organ of the country<sup>11</sup> and it was responsible to the *Pyithu Hluttaw* or, when the *Pyithu Hluttaw* was not in session, to the Council of State.<sup>12</sup> The *Pyithu Hluttaw* alone had the power to interpret the Constitution and to decide on the validity of measures of the organs of State power.<sup>13</sup>

In 1988, general dissatisfaction of the people arose as a result of an economic decline and this led to serious, nationwide civil disturbances. The administrative machinery broke down. On 18 September 1988, the State Law and Order Restoration Council (SLORC) took over the power of the State by its Announcement Number 1/88. From that day, the 1974 Constitution came to an end.<sup>14</sup> All State powers were vested solely in the hands of SLORC,<sup>15</sup> which was later renamed the State Peace and Development Council (SPDC).<sup>16</sup>

The third and current post-independence Constitution, the 2008 Constitution, came into force when the new civilian Government of the Republic of the Union of Myanmar took over the state power on 31 January 2011. The Union is constituted by what is termed a 'Union system'.<sup>17</sup> The three branches of sovereign power, namely the legislative, executive and judicial power, 'are separated to the extent possible, and exert reciprocal checks and balances among themselves'.<sup>18</sup> The 2008 Constitution also established the CTU for the purpose of constitutional review.

<sup>9</sup> The 1974 Constitution was titled '*Pawè Si Pôn A Ech Kaan U P Ed*' in the Myanmar language. This Constitution was based on the principles of unified power, and consisted of a Preamble and 209 articles in 16 chapters.

<sup>10</sup> 1974 Constitution, art 41.

<sup>11</sup> *ibid*, art 103.

<sup>12</sup> *ibid*, art 104. Under the 1974 Constitution, art 71, the Council of State was responsible to the *Pyithu Hluttaw*.

<sup>13</sup> *ibid*, art 200.

<sup>14</sup> SLORC Announcement No 2/1988, 18 September 1988.

<sup>15</sup> SLORC Order No 2/1988, 18 September 1988.

<sup>16</sup> On 15 November 1997, SLORC was abolished and the State Peace and Development Council (SPDC) was constituted with existing SLORC members. The SLORC indicated that this change was made in order to bring about the emergence of a well-disciplined democratic system.

<sup>17</sup> 2008 Constitution, s 8. The Union system, '*Pyai Taaung Su S Nit*' in the Myanmar official translation, means essentially a federal system. Although it defines some basic features of federalism, Myanmar authorities in the past never used this term officially and constitutionally; this is partly because Myanmar's nationalities have never recognised the federal elements under the 2008 Constitution, and partly because of bitter experiences on both sides.

<sup>18</sup> *ibid*, s 11.

## II. THE COURT SYSTEM UNDER THE 2008 CONSTITUTION

In order to understand the role of the CTU, we need to examine first the judicial system in general.

The 2008 Constitution states that the Union practises a genuine, disciplined<sup>19</sup> multi-party democratic system.<sup>20</sup> Sovereign powers deriving from the citizens<sup>21</sup> are separated into legislative, executive and judicial powers through, respectively: the *Pyidaungsu Hluttaw*, comprising the *Pyithu Hluttaw* (Lower House) and the *Amyotha Hluttaw* (Upper House);<sup>22</sup> the President and the Cabinet;<sup>23</sup> and the Supreme Court and its subordinate courts.<sup>24</sup> The 2008 Constitution is stated to be the ‘basic law of all the laws of the Union’.<sup>25</sup>

Section 293 mentions three different types of courts and their relevant hierarchy, namely: the Supreme Court, having original and appellate jurisdiction with respect to its subordinate courts; Courts Martial, having special jurisdiction over military personnel; and the CTU, having special jurisdiction with respect to constitutional review.

It seems that the Myanmar judicial system maintains a system of parallel judicial jurisdictions like Thailand or Indonesia.<sup>26</sup> The (now abrogated) 2007 Constitution of the Kingdom of Thailand established four types of courts, namely the Constitutional Court, the Administrative Courts, the Courts of Justice and the Military Court.<sup>27</sup> However, according to the arrangement of sections, the Constitutional Court provisions were placed highest in the hierarchy, and the provisions for the Military Court were the

<sup>19</sup> This clause ‘genuine and disciplined’ is relatively ambiguous in its English translation. This is of the greatest importance not only for Myanmar citizens, who must clearly know and understand what the Constitution states, but also for foreign scholars and the international community. Even for Myanmar nationals, the expression ‘genuine and disciplined’ has no clear interpretation. However, it can be reasonably concluded that this phrase is inserted in a similar manner to the expression, ‘Myanmar way to socialism’, referred to in the 1974 Constitution.

<sup>20</sup> 2008 Constitution, s 7.

<sup>21</sup> *ibid*, s 4.

<sup>22</sup> *ibid*, s 12.

<sup>23</sup> *ibid*, s 16.

<sup>24</sup> *ibid*, s 18.

<sup>25</sup> *ibid*, s 499 under Ch 15, entitled ‘General Provisions’. The 1974 Constitution, Art 202(A) also provided that ‘[t]his Constitution is the basic law of all laws of the state’. A similar provision cannot be found in the 1947 Constitution.

<sup>26</sup> In this chapter, some relevant provisions of the Constitutions of the Kingdom of Thailand (2007–2014), the Kingdom of Cambodia, the Republic of Indonesia and the Republic of Korea which also establish separate constitutional courts are studied for the purpose of comparative analysis, as they represent exemplary cases in Asia where separate constitutional courts have been set up.

<sup>27</sup> The 2007 Constitution of Thailand was revoked following the military coup of May 2014; Ch X entitled ‘The Courts’ had five different Parts; namely, Pt 1, ‘General Provisions’; Pt 2, ‘Constitutional Court’; Pt 3, ‘Courts of Justice’; Pt 4, ‘Administrative Court’; and Pt 5, ‘Military Court’.

lowest. The drafters of the 2008 Constitution of Myanmar might also have taken as a good example the 1945 Constitution of the Republic of Indonesia. This stated that 'the judicial power shall be implemented by a Supreme Court and judicial bodies underneath it in the form of public courts, religious affairs courts, military tribunals, and state administrative courts, and by a Constitutional Court'.<sup>28</sup> However, according to this provision, military tribunals are still below the Supreme Court, and the Constitutional Court has the same status as the Supreme Court. Article 101(2) of the Constitution of the Republic of Korea<sup>29</sup> states that 'the Courts shall be composed of the Supreme Court, which is the highest court of the State, and other courts at specified levels'.

Let us now consider briefly the formation and jurisdiction of each court under the 2008 Constitution. As regards the formation of the Supreme Court of the Union, section 294 provides that 'there shall be a Supreme Court of the Union'.<sup>30</sup> 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. It is the court of final appeal; the judgments of the Supreme Court of the Union are final and conclusive, and no right of appeal from them is provided.<sup>31</sup>

The Courts Martial, a second type of judicial institution under section 293(b) of the 2008 Constitution, is constituted in accord with the Constitution and statute law; it has jurisdiction over Defence Services personnel.<sup>32</sup> In the adjudication of military justice, the Defence Services personnel may be dealt with collectively or singly. Moreover, the decision of the Commander-in-Chief of the Defence Services is final and conclusive.<sup>33</sup> In order to be in line with this new constitutional provision, the former section 217 of the Defence Services Act, which allowed an appeal to the Supreme Court from the decision of the Court-Martial Appeal Court in limited circumstances, was replaced by section 38 of the Law Amending the Defences Services Act 1959. The new section 217 of the Defence Services Act reads as follows:

The Court-Martial Appeals Court is the final appellate court of the court-martial. There shall be no appeal to any other court for the judgment passed by the Court-Martial Appeals Court ... The decision of Commander-in-Chief of Defence Services shall be final.

<sup>28</sup> Indonesian Constitution, Art 24(2).

<sup>29</sup> The Constitution of the Republic of Korea 1948.

<sup>30</sup> The organisation and formation of the Supreme Court, High Courts and its subordinate courts are prescribed by the Union Judiciary Law 2010, which came into force on 28 October 2010 as SPDC Law No 20/ 2010. This Law was amended by *Pyidaungsu Hluttaw* Law No 30/2013, 8 October 2013.

<sup>31</sup> 2008 Constitution, s 295.

<sup>32</sup> 2008 Constitution, s 319.

<sup>33</sup> *ibid*, s 343.

Therefore it may be concluded that the SPDC intentionally amended this appellate jurisdiction of the Court-Martial Appeal Court so that it would not fall under the jurisdiction of the new Supreme Court.

The CTU is the third (and entirely new) judicial organ with special jurisdiction as stipulated in the Constitution. The drafters of the 2008 Constitution had intended from the beginning to establish a Constitutional Tribunal. Accordingly, detailed basic principles to be included in the draft of the new Constitution in connection with the Constitutional Tribunal were discussed under the heading of 'General Principles'. The following is the excerpt from the proposal made at the Convention on 28 December 2006.<sup>34</sup>

The previous State Constitutions of our country did not prescribe a principle for forming a constitutional tribunal. We, representatives of the delegate group of workers, found that such an organization is a must for ensuring perpetual existence of the State Constitution and in discharging responsibilities in accordance with the State Constitution.

Accordingly, section 46 of the 2008 Constitution under the heading of Chapter I (Basic Principles of the Union) provided a mandate to establish the CTU. It reads as follows:

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

By using the power entrusted by the Constitution in sections 336 and 443, the SPDC on 28 October 2010 enacted the CTU Law<sup>35</sup> to prescribe the formation of the Tribunal and its duties and functions. This law came into force on same day as the 2008 Constitution, that is 31 January 2011. Section 38 of the CTU Law entrusted to the CTU the power to issue necessary rules, declarations, orders, directives and procedures in order to implement the provisions of the Law. The CTU accordingly, enacted the 'Constitutional Tribunal of the Union Rules'.<sup>36</sup>

It is noteworthy that constitutional courts are more typically a feature of civil law countries and the choice of creating a constitutional court was

<sup>34</sup> It is an excerpt of the proposal on 'General Provisions' to be included in drafting the Constitution, presented by the Delegate Group of Workers at the Plenary Session of the National Convention held at Pyidaungsu Hall of Nyaungnabin Camp in Hmawby Township, Yangon Division, on 28 December 2006. Source: *The New Light of Myanmar* (1 January 2007) 10.

<sup>35</sup> SPDC Law No 21/2010.

<sup>36</sup> Notification No 30/ 2011 of 28 June 2011.

a departure from the common law norm. It was, however, consciously and deliberately provided for in the 2008 Constitution. Myanmar is the second country with a common law tradition to have a constitutional court separate from its supreme court after South Africa, which, similarly to Myanmar, combines both common and civil law legacies.<sup>37</sup>

### III. FORMATION OF THE CONSTITUTIONAL TRIBUNAL

The detailed constitutional provisions for the formation of the CTU are provided by Chapter VI of the 2008 Constitution, entitled 'The Judiciary'. The CTU<sup>38</sup> shall be formed with nine members including the Chairperson.<sup>39</sup> In this regard, the 2008 Constitution designated the institution performing constitutional review as 'Constitutional Tribunal', or '*Pawè Si Pôn A Ech Kaan U P Ed Saing Yaa Kaôn Yaôn*', which has a slightly different meaning from the (judicial) court, which is '*T Yaa Yaôn*', in the Myanmar language. We may note that the 2008 Constitution refers to the 'members of the Tribunal', not the 'justices'. It might have been the intention of the drafters to draw a clear distinction between ordinary judicial courts trying criminal and civil cases, and those deciding only enumerated constitutional matters under the Constitution.<sup>40</sup> This distinction is not unusual in relation to constitutional jurisdiction.

The provision outlining the formation of the Tribunal is section 321 of the 2008 Constitution, which provides:

*The President shall submit the candidature list of a total of nine persons, three members chosen by him, three members chosen by the Speaker of the Pyithu Hluttaw, and three members chosen by the Speaker of the Amyotha Hluttaw, and one member from among the nine members to be assigned as the Chairperson of the Constitutional Tribunal of the Union, to the Pyidaungsu Hluttaw for its approval.*<sup>41</sup> [emphasis added]

<sup>37</sup> These can also be seen as the background of the Union Constitutional Tribunal website page at [www.myanmarconstitutionaltribunal.org.mm/en](http://www.myanmarconstitutionaltribunal.org.mm/en).

<sup>38</sup> '*Naing Ngan Taw Pawè Si Pôn A Ech Kaan U P Ed Saing Yaa Kaôn Yaôn*' in the Myanmar language.

<sup>39</sup> 2008 Constitution, s 320, and CTU Law, s 3.

<sup>40</sup> This can be seen in the decision in *Submission made by 50 Pyithu Hluttaw Representatives including Daw Dwe Bu (Submission No 1/2014)*.

<sup>41</sup> Note that in other countries, the chairperson of the Tribunal is selected by the members of Tribunal themselves, instead of being selected by the President. Under Art 137 of the Cambodian Constitution, the Chairman shall be elected by the members of the Constitutional Council. Under the Indonesian Constitution, Art 24C(4), the Chair and Vice-Chair of the Constitutional Court are elected by and from the Constitutional Justices. Art 4 of the Cambodian Constitutional Council Law also provides that the President of the Council shall be elected every three years by an absolute majority of all its members.

Section 6 of the CTU Law, which was incorporated by the Law Amending the Constitutional Tribunal of the Union Law (hereinafter ‘Law Amending the CTU Law (2013)’), is therefore not in line with the 2008 Constitution at section 321. Section 6<sup>42</sup> states:

*The President shall submit the list of a total of nine elected members, of whom three shall be elected by himself and three each elected by the Speakers of the Pyithu Hluttaw and the Amyotha Hluttaw, and the name of one member among them is to be assigned, as the Chairperson nominated by the President in consultation with the Speakers of the Pyithu Hluttaw and the Amyotha Hluttaw, to the Pyidaungsu Hluttaw to obtain its approval.*<sup>43</sup>

At the time<sup>44</sup> the ‘Bill Amending the Constitutional Tribunal of the Union Law’<sup>45</sup> was sent by the Speaker of the *Pyidaungsu Hluttaw* to the President for signature, the President sent the Bill back with comments to the Speaker that it had to comply with the Constitution.<sup>46</sup> However, as the President does not have a veto power according to the Constitution, the original Bill, unamended, became the Law Amending the CTU Law (2013) without being signed by the President.<sup>47</sup> Therefore, there is a risk that the legislature, by using the power deriving from the inserted phrase, may well in future influence the executive in nominating the Chairperson of the CTU, since the President’s ‘vote’ in the consultation process is outnumbered by the legislature’s two votes.<sup>48</sup>

It is therefore suggested that section 6 of the CTU Law, which was substituted by the Law Amending CTU Law (2013), is inconsistent with the 2008 Constitution, section 321.<sup>49</sup>

<sup>42</sup> The former s 6 of the CTU Law, which was in line with constitutional provisions, provided that ‘[t]he President shall submit the list of a total of nine members elected in accord with the provision of section 4 and the name of a member from among them to be assigned as the Chairperson to the *Pyidaungsu Hluttaw* and obtain its approval’.

<sup>43</sup> This is not an official translation.

<sup>44</sup> Specifically, 18 November 2012.

<sup>45</sup> Hereinafter referred to as ‘Bill Amending CTU Law (2013)’.

<sup>46</sup> Republic of the Union of Myanmar, Press Release No (9/2012) of Information Team, 27 November 2012: *New Light of Myanmar* (28 November 2012).

<sup>47</sup> The Joint Bills Committee believed that by inserting the new phrase ‘nominated by him (the President) in consultation with the Speakers of the Pyithu Hluttaw and the Amyotha Hluttaw’, the Law would, firstly, not harm the original primary intention of the Constitution in establishing the CTU; secondly, that it would be preferable for the President to nominate the Chairperson of the CTU to the *Pyidaungsu Hluttaw* after consultation with the two Speakers; and finally, that it would bring a real check and balance to the practice of appointments to the CTU: *Myanmar Times* (21 January 2013), available online at: [www.mmtimes.com/index.php/national-news/nay-pyi-taw/3851-mps-ignore-president-on-tribunal-law-changes.html](http://www.mmtimes.com/index.php/national-news/nay-pyi-taw/3851-mps-ignore-president-on-tribunal-law-changes.html).

<sup>48</sup> Although the author acknowledges that the Upper House and the Lower House are not always in full accord and that they are not in complete agreement on all cases before the legislature at all times, the present day Myanmar *Hluttaws* are not well accustomed with this culture, and could make common cause against the President’s choice.

<sup>49</sup> Former deleted CTU Law, s 6, which was actually in line with the constitutional provision, provided that ‘The President shall submit the list of total nine members elected in accord

On 1 June 2014 a (second) Bill Amending the CTU Law<sup>50</sup> was made public for comments.<sup>51</sup> This bill was initiated by the CTU and the following provision was proposed to be substituted for section 6 of the CTU Law:

6 (a) The President shall submit a candidature list of a total of nine persons, three members chosen by him, three members chosen by the Speaker of the Pyithu Hluttaw and three members chosen by the Speaker of the Amyotha Hluttaw, and one member from among nine members to be assigned as the Chairperson of the Constitutional Tribunal of the Union, to the Pyidaungsu Hluttaw for its approval.<sup>52</sup>

(b) The President may assign one among the nine members as the Chairperson of the Constitutional Tribunal of the Union either in consultation with Pyithu Hluttaw Speaker and Amyotha Hluttaw Speaker or *any other way he thinks fit*.<sup>53</sup>

Looking at the original provision and the proposed amendment, it appears that both the executive and the legislative branches seem to be claiming the right to influence or control the nomination of the CTU Chairperson. In addition, the proposed new section would introduce a level of ambiguity with the words ‘any other way he [the President] thinks fit’. This proposed amendment was rejected by the legislature and was not included in the ‘Law for the Second Amending of the Constitutional Tribunal of the Union Law’<sup>54</sup> (hereinafter ‘Second Amending CTU Law’), passed in November 2014.

The Constitutional Amendment Bill made under section 436 (b) of the Constitution,<sup>55</sup> submitted by Parliamentarians, was publicised for the submission of opinions on 12 June 2015. Section 22 of the Bill rendered section 6 of CTU Law in line with the Constitution, rather than trying to amend the CTU provision, by attempting to insert the phrase ‘nomination

with the provision of section 4 and the name of a member from among them to be assigned as the Chairperson to the Pyidaungsu Hluttaw and obtain its approval’.

<sup>50</sup> Hereinafter referred to as ‘Bill Amending CTU Law (2014)’ in order to distinguish it from the previous Bill. The full text of this Bill can be found in the *Myanma Ablin* newspaper (1 June 2014) 15.

<sup>51</sup> *Myanma Ablin*, *ibid*. On 5 June, the reason for proposing the second amendment of the CTU law was explained by the head of the Tribunal, U Mya Thein. He proposed amending ss 12(a)–(g), which outline the duties of the Tribunal. He said that more detailed provisions are needed to enable the Tribunal to properly resolve cases submitted for consideration.

<sup>52</sup> Actually this proposed new clause is identical to the old version of s 6, prior to the first amendment.

<sup>53</sup> This is not an official translation. See the original texts (written in Myanmar language) in the *Mirror* newspaper (1 June 2014) 15.

<sup>54</sup> This Law, which includes 15 Sections, was enacted by the *Pyidaungsu Hluttaw* as *Pyidaungsu Hluttaw* Law No 46/2014, 5 November 2014. The full text of this law can be found in *Mirror* newspaper (6 November 2014) 7, and is also available online at: [www.president-office.gov.mm/zg/?q=hluttaw/law/2014/11/07/id-7373](http://www.president-office.gov.mm/zg/?q=hluttaw/law/2014/11/07/id-7373).

<sup>55</sup> There were two Constitutional Amendment Bills, one made under s 436(a) and the other is s 436(b) of the Constitution. The latter Bill, the Amendment of the Constitution of the Republic of the Union of Myanmar (2008) Bill has 30 Sections (hereinafter referred to as Constitutional Amendment Bill). The full text of these two Bills in Myanmar language can be found in the *Mirror* newspaper (11, 12 and 26 June and 9 July 2015) and at [www.burmalibrary.org/](http://www.burmalibrary.org/).

for Chairmen of the Constitutional Tribunal will be made by the President and the two Speakers, with parliament making a final decision' to the original Constitution provision section 321.<sup>56</sup> If this provision had been approved, the CTU Law's section 6 would be in line with section 321 of the 2008 Constitution. Since the Constitution is the basic law under its section 499, this amendment of section 321 should have been made first before amending section 6 of CTU Law in 2013. However, Parliamentary approval for the Bill was sought by secret ballot at the *Pyidaungsu Hluttaw* on 8 July 2015 and the Bill did not win the support of over 75 per cent of the vote except for amendment to Schedules 2 and 5 of the Constitution.<sup>57</sup>

Let us now consider further the selection of the Members and Chairperson of the CTU, and the role the different branches of government play in this regard. Under section 321 of the 2008 Constitution and section 6 of the CTU Law, as we have seen, the CTU consists of nine members, in line with some other countries' constitutional courts. However, three of them are nominated by the President, as head of the executive branch; and the other six are nominated by the legislature—three by the *Pyithu Hluttaw* and three by the *Amyotha Hluttaw*. The Supreme Court plays no role in the nomination or election of members of the CTU. Such an appointment mechanism can be considered a material defect in the efforts to strengthen the check-and-balance function to be performed by the CTU.

For the purpose of comparative study, it is relevant to note here that under the Indonesian Constitution, Article 24C(3), the Constitutional Court shall be composed of nine persons, of whom three shall be nominated by the Supreme Court (judiciary), three nominated by the *Dewan Perwakilan Rakyat*<sup>58</sup> (legislature), and three nominated by the President (executive). The Korean Constitution, in Article 111(2)–(3), provides a similar method of appointing the members of its Constitutional Court.

Section 333 of the 2008 Constitution and section 4 of the CTU Law provide the required qualifications for CTU membership, which are similar to those for membership of the *Pyithu Hluttaw* under section 120 of the 2008 Constitution.<sup>59</sup> Additional specific qualifications under section 333 are (a) being at least 50 years of age; (b) having served as a Judge of the High Court of a Region or State for at least five years; or having served for at least 10 years as a Judicial Officer or a Law Officer at a level not lower than that of a Region or State; or having practised as an Advocate for at

<sup>56</sup> This is the author's own translation.

<sup>57</sup> The Law Amending the Constitution (*Pyidaungsu Hluttaw* Law No 45/2015) was passed on 22 July 2015 and can be downloaded at [www.president-office.gov.mm/zg/?q=hluttaw/law/2015/07/26/id-9805](http://www.president-office.gov.mm/zg/?q=hluttaw/law/2015/07/26/id-9805).

<sup>58</sup> The *Dewan Perwakilan Rakyat* or DPR is the parliament of Indonesia.

<sup>59</sup> The required qualifications to be a *Pyithu Hluttaw* representative under s 120 are: being at least 25 years of age; being a citizen of citizen parents; residing in the country at least

least 20 years; or, in the opinion of the President, being an eminent jurist; (c) having a political, administrative, economic and security outlook; and (d) being loyal to the Union and its citizens.

The prescribed age limit is relatively high. Comparatively speaking, the minimum age for presidential candidacy or to be Attorney General is 45;<sup>60</sup> for Union Ministers it is 40;<sup>61</sup> yet for the Chief Justice of the Union and Members of the CTU it is 50.<sup>62</sup> Some of the prescribed professional qualifications for the CTU members are too specific,<sup>63</sup> while some are too vague.<sup>64</sup> No minimum educational background in a relevant field is required, although this is surely one of the most important qualifications.

Further, the 2008 Constitution and the CTU Law provide for disqualifications for CTU membership. These include the disqualifications under section 121 of the Constitution applicable to *Pyithu Hluttaw* representatives.<sup>65</sup> In addition, section 333 states that a CTU Member should not be a member of a political party, nor be a *Hluttaw* representative; if he or she is a member of any political party, he or she shall not take part in any political activities during his or her term, commencing from the day of his or her appointment. If he or she is a representative of any *Hluttaw*, he or she shall be deemed to have resigned as representative of the *Hluttaw* commencing from the day he or she was appointed as a CTU Member.<sup>66</sup>

However, the 2012 revision to the CTU Law adds one provision, section 11 under the heading of 'Appointment', which appears not to be in line with the above provision. It reads as follows:

If the Chairperson or any member is a member of a political party or an individual being elected or a citizen being specifically appointed and assigned duties, and such person will contest in the forthcoming general election,<sup>67</sup> if [the appointment] is in conformity with the provisions of sections 120 [qualification of *Hluttaw* Representative] and 121 [disqualification for *Hluttaw* Representative] of the Constitution, he or she is entitled to carry out the works of electoral party organization and territorial organization, commencing from the day of the announcement of the Union Commission to hold election, in order not to lose the right of being elected given to a citizen under Section 38 (a) of the Constitution ...

10 consecutive years before the election; and having such qualifications as prescribed by the Election Law.

<sup>60</sup> 2008 Constitution, ss 59, 237.

<sup>61</sup> *ibid*, s 232 (a).

<sup>62</sup> *ibid*, ss 301(a), 333(a).

<sup>63</sup> *eg*, the minimum service length at the level concerned must be fulfilled.

<sup>64</sup> *eg*, a person who is, in the opinion of the President, an eminent jurist, can become a CTU member.

<sup>65</sup> 2008 Constitution, s 333(c) and CTU Law, s 4(a)(iii).

<sup>66</sup> 2008 Constitution, s 330(c).

<sup>67</sup> The UEC law provides the definition of 'election', not 'general election'.

According to this definition, members of the CTU including the Chairperson have the right to carry out preparatory work for his or her intended election<sup>68</sup> while he or she is still exercising judicial power to review constitutional issues. Though the drafters' intention not to infringe a citizen's right to be elected may be welcomed, a conflict of interest could occur between these two capacities because of this ambiguous provision. There is no other provision in the CTU Law which can help avoid such a situation of one individual holding two capacities.

Furthermore, section 335 of the 2008 Constitution and section 27 of the CTU Law mention that the term of the CTU is the same as that of the *Pyidaungsu Hluttaw*, that is five years. However, the present CTU, on the expiry of its term, continued its functions until the newly elected President formed a new CTU under the Constitution, as indicated at the beginning of this chapter. In a hypothetical situation where a CTU member is elected to the legislature, should he or she continue functioning as a CTU member until the President forms a new CTU? If one accepts the possibility of CTU members running for elected office, there should clearly be a provision that he or she should resign his or her membership of the CTU immediately after receiving the election result. But no such provision exists at the moment.

It is accordingly recommended that, although the CTU has not had this problem so far, it is an important issue to be resolved. Section 11 of the CTU Law is not in line with the Constitution and it should be repealed; alternatively, some more detailed sections should be added to the CTU Law enabling it to settle this issue in line with the Constitution and the overriding principle of the separation of powers.

Under Article 24C(5) of the Indonesian Constitution, 'Each constitutional justice must possess integrity and a personality that is not dishonourable, and shall be fair, shall be a statesperson who has a command of Constitution and the public institutions, and shall not hold any position as a state official'. Article 119 of the Cambodian Constitution provides that 'Members of the Constitutional Council shall be selected among the dignitaries with a higher-education degree in law, administration, diplomacy or economics and who have considerable work experience'. Article 3 of the Cambodian Constitutional Council Law states that all nine members of the Council shall be chosen among the high-ranking personalities of Khmer nationality by birth; aged at least 45 years; holding a diploma in law, administration, diplomacy or economics; and having professional experience of at least 15

<sup>68</sup> This intended election may be an election or a by-election because under s 2(c) of the new UEC law, 'election' means *Pyithu Hluttaw* election, *Amyotha Hluttaw* election and Region *Hluttaw* or State *Hluttaw* elections. It also includes by-elections occasionally held by the UEC to fill vacant seats in constituencies for some reason during the regular term of the *Hluttaw* concerned.

years. The Korean Constitution in its Article 112(2) provides that Justices of the Constitutional Court shall not join any political party, nor shall they participate in political activities. Thus comparative consideration may lead to the adoption of excellent provisions on the CTU.

#### IV. FUNCTIONS OF THE TRIBUNAL

We now consider the CTU's functions.

Section 322 of the Constitution stating the functions and duties of the Tribunal describes them slightly more elaborately than the way they are stated in Chapter I on basic principles. Section 322 provides that the functions and duties of the CTU 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 the implementation of a Union Law by a Region, State or Self-Administered Area;
- (f) vetting and deciding matters intimated by the President relating to the Union Territory; and
- (g) functions and duties conferred by laws enacted by the *Pyidaungsu Hluttaw*.

Section 323 provides additional power for the Tribunal to adjudicate disputes before judicial courts in which the issue of the constitutionality of a law arises. In the case of disputes, the resolution of the CTU shall be applied to all cases.<sup>69</sup>

All these functions are more or less the same as those of constitutional courts in other countries. However, there are some functions that are not common amongst other constitutional courts, and there is an absence of some functions that are common amongst those courts.

<sup>69</sup> The same provision is stated in s 17 of the CTU Law.

An example of the former is the new section 12(i) of the CTU Law,<sup>70</sup> introduced by the Law Amending CTU Law (2013), which assigns to CTU members the duty to report on their undertakings to the President, or the *Pyithu Hluttaw* Speaker, or the *Amyotha Hluttaw* Speaker who nominated him or her. This was added by section 2(b) of the Law Amending CTU Law (2013).

This provision is not included in the Constitution and probably harms the power and status of the CTU as being supreme amongst all the courts of law. It is an attempt to interfere with the functions of a judicial body. It goes against the principle of judicial independence prescribed in sections 11(a) and 19(a) of the Constitution. The CTU should be independent of the executive and the legislature.<sup>71</sup> On the other hand, this new subsection may also interfere with the unity of the nine CTU members; even though they are selected by three different institutions, the members of CTU should work independently and free from the influence of any other branch or institution. It is strongly suggested that this provision of the CTU Law, which does not match the CTU's check-and-balance function and is evidently unconstitutional, be deleted.

Turning to the CTU's 'missing functions', an obvious example can be found with regard to electoral matters. Although courts in most models of constitutional review deal with electoral issues to a greater or lesser extent,<sup>72</sup> in Myanmar it is not the CTU but the Union Election Commission (UEC) that has the supreme constitutional authority to decide on electoral issues. In this regard, the role of the UEC in making decisions on electoral issues will be briefly described for a better understanding of the status of the CTU.<sup>73</sup>

The UEC is formed solely by the President and cannot therefore be considered an independent electoral management body.<sup>74</sup> The UEC's duties are

<sup>70</sup> s 12 combines ss 322 and 323 of the 2008 Constitution and adds one more subsection in s 12(i).

<sup>71</sup> However, U Mya Nyein of the Joint Bill Committee responded that, '[r]eporting back to the speakers who have selected the members of the tribunal only means reporting on what the members have done, not taking instructions'. Source: *Myanmar Times* (21 January 2013), available online at: [www.mmtimes.com/index.php/national-news/nay-pyi-taw/3851-mps-ignore-president-on-tribunal-law-changes.html](http://www.mmtimes.com/index.php/national-news/nay-pyi-taw/3851-mps-ignore-president-on-tribunal-law-changes.html).

<sup>72</sup> For instance, under the Cambodian Constitution, Art 136(2) provides that the Constitutional Council shall have the right to examine and decide on contested cases and cases involving the election of Assembly members and Senate members. The Indonesian Constitution in Art 24C(1) provides that the Constitutional Council has the final power to decide disputes over the results of general elections.

<sup>73</sup> Both the Constitution and CTU Law provisions mention the 'Functions and duties of CTU'. However, the Constitution, s 399, is entitled 'Duties of Union Election Commission', and the UEC Law, s 10 is entitled 'Duties and powers of Union Election Commission'.

<sup>74</sup> S 398(a) provides: 'The President shall constitute a Union Election Commission. In constituting the Commission, he may appoint a minimum of five members including the chairman

provided in section 399 of the 2008 Constitution. One of its eight duties under the 2008 Constitution<sup>75</sup> and the Union Election Commission Law<sup>76</sup> ('the UEC Law') is to constitute electoral tribunals for the trial of electoral disputes;<sup>77</sup> to form electoral tribunals to hear objections made under section 276(h) of the 2008 Constitution against the appointment of a person in Leading Bodies of Self-Administered Divisions or Self-Administered Areas;<sup>78</sup> and to receive a complaint by a minimum of one per cent of the original voters of the electorate of the constituency concerned against a *Hluttaw* representative for recall under section 396 (a) and (b) of the 2008 Constitution.<sup>79</sup>

Section 402 of the 2008 Constitution provides for the finality of the resolutions and functions of the UEC.<sup>80</sup> According to the provisions above, it can be seen that the role of the UEC is clearly defined by the Constitution and it has conclusive authority to decide electoral issues, instead of the CTU or the Supreme Court. It is submitted that this strong power of the UEC should be rebalanced and readjusted by increasing the CTU's authority over election matters.

An example of this was evident when the UEC was obliged to hold the second by-election in late November or early December 2014 to fill 35 vacant seats in national and regional assemblies. The Chairman, however, announced on 7 September 2014 that the UEC would not hold the by-election that year for some reasons. Although the Constitution, at section 399(d), mentions that elections can be postponed in some constituencies due to natural disaster or local security situation, there is no provision which authorises the UEC to call off an entire election. Although there is dissatisfaction with this UEC decision, and doubt regarding the UEC's ability to call off the by-elections, the decision cannot be challenged as the Constitution provides that the resolutions and functions of the UEC are final.

## V. ACCESSIBILITY OF THE TRIBUNAL

Only prescribed persons and organisations have *locus standi* before the CTU. The only persons who can submit prescribed constitutional matters

of the Union Election Commission in accord with the provisions on appointment of the Union Minister prescribed in this Constitution'. According to this, the constitution of the UEC and appointment of its members is in the President's sole discretion and he neither needs to consult with nor to take approval from any other institution.

<sup>75</sup> 2008 Constitution, s 399(g).

<sup>76</sup> *Pyidaungsu Hluttaw* Law No 3/2012, 19 March 2012.

<sup>77</sup> UEC Law, s 10(h).

<sup>78</sup> *ibid*, s 10(i).

<sup>79</sup> *ibid*, s 10(j).

<sup>80</sup> The same provision is provided by the UEC Law, s 11.

directly to the CTU are the President; the Speaker of the *Pyidaungsu Hluttaw*; the Speaker of the *Pyithu Hluttaw*; the Speaker of the *Amyotha Hluttaw*; the Chief Justice of the Union; and the Chairperson of the UEC;<sup>81</sup> the Chief Minister of a Region or State; the Speaker of a Region or State *Hluttaw*; the Chairperson of a Self-Administered Division Leading Body, or a Self-Administered Zone Leading Body; and a minimum of 10 per cent of all representatives of the *Pyithu Hluttaw* or the *Amyotha Hluttaw* also have the collective right of access to the CTU in accordance with section 326 of the 2008 Constitution. In addition, a court<sup>82</sup> may request the CTU through the Supreme Court to examine the constitutionality of a statute when the case falls within section 323 of the Constitution:

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.<sup>83</sup>

These submissions shall, however, be sent to the CTU in accordance with the above procedures and cannot be initiated by parties in court proceedings themselves.<sup>84</sup> These provisions do not provide access to the CTU to individual rights-holders over alleged rights violations, which are regulated separately, and individuals in such cases have access only to the Supreme Court and the UEC. If an individual citizen wishes to allege that a governmental act violates his or her constitutional rights, jurisdiction on these matters is within the competence of the Supreme Court through writ proceedings under section 378 of the 2008 Constitution. In connection with the filing of an application for rights granted under Chapter VIII ('Citizen, Fundamental Rights and Duties of Citizens'), the Supreme Court has the power to issue writs of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*. As we have seen, natural or juristic persons or organisations are not allowed to request the CTU for decisions either as to the violation of their constitutional rights or on electoral issues, except as indicated above.<sup>85</sup>

<sup>81</sup> 2008 Constitution, s 325 and CTU Law, s 13.

<sup>82</sup> 'Court' means the Supreme Court of the Union, High Courts of the Region or the State, Court of the Self-Administered Division, District Court, Township Court and other Court constituted by law: CTU Law, s 2(f).

<sup>83</sup> The same provision is stated in the CTU Law, s 17.

<sup>84</sup> *ibid*, s 16.

<sup>85</sup> Comparatively, in Indonesia, Korea and Thailand, the Constitutional Courts also have the jurisdiction to receive individual complaints. Any person whose basic rights have been violated is able, under the Constitutions of these countries, to submit the matter to the Constitutional Court when he or she has exhausted any recourse process allowed by other laws. In Cambodia, people have the right to appeal against the unconstitutionality of any law to the Constitutional

Moreover, the CTU has no power to file a case on its own motion (*suo moto*) but may only act on an official submission made by those who are entitled to invoke its jurisdiction.<sup>86</sup>

Under the Constitution, the quorum for hearing a submission is six including the Chairperson,<sup>87</sup> and quorum for a final decision is five including the Chairperson.<sup>88</sup> In order to improve procedures for a final decision, the Law Amending the CTU Law (2014) substituted a new section 22 consisting of five subsections. The new section 22(c) and (d) require a different quorum for different types of resolutions. The quorum for rendering an interpretation and opinion is five and the quorum for decisions is five including the Chairperson.<sup>89</sup>

## VI. EFFECT OF DECISIONS OF THE CTU

Acting under the provisions discussed here the CTU started to operate from 31 March 2011, and from then until 31 December 2015, the CTU admitted 12 submissions, decided eight and dismissed one. One submission (Number 1/2013) was closed and two submissions (Numbers 2 and 3/2014) were withdrawn by the applicants.<sup>90</sup>

Council through prescribed processes. Anyone whose fundamental right is guaranteed by the Constitution and whose rights have been violated by an exercise or non-exercise of governmental power or directly by a legislative act, may file a complaint to the Constitutional Court.

<sup>86</sup> Research group, *Pawè Si Pôn A Ech Kaan U P Ed Kaôn Yaôn A Ekhaung Thi Ekaung S Yaa (Facts about Constitutional Tribunal): Constitutional Law Journal (printed in Myanmar Language)*, March 2014, 147.

<sup>87</sup> s 20 of the CTU Law provides that, 'All the members including the Chairperson shall hear and decide in relation to the submission. In doing so, if all the members cannot attend due to any duty or any other cause, the submission shall be heard by at least six members including the Chairperson'.

<sup>88</sup> Under s 22(c) of the CTU Law, the Constitutional Tribunal shall pass the final decision of the Constitutional Tribunal by the consent of more than half of the members including the Chairperson.

<sup>89</sup> S 11 of the Seconding Amending CTU Law.

<sup>90</sup> The cases were: *The Chief Justice of the Union v The Ministry of Home Affairs* (Submission No 1/2011); *23 Representatives of the Amyotha Hluttaw including Dr Aye Maung v The Republic of the Union of Myanmar* (Submission No 2 /2011); *The President of the Union v The Speakers of the Pyidaungsu Hluttaw, Pyithu Hluttaw and the Amyotha Hluttaw* (Submission No 1/2012); *The President of the Union v 23 Representatives of the Amyotha Hluttaw including Dr Aye Maung* (Submission No 2/2012); *The Speaker of Mon State Hluttaw v The Republic of the Union of Myanmar* (Submission No 3/2012); *The Submission made by the Speaker of Mandalay Region Hluttaw* (Submission 1/2013); *Submission made by 50 Pyithu Hluttaw Representatives including Daw Dwe Bu* (Submission No 1/2014); *Submissions made by the Speaker of Kachin State Hluttaw* (Submission Nos 2 & 3/2014), *U Ra Wang Jung (The Speaker of Kachin State Hluttaw) v U La Jawng Ngang Seng (The Chief Minister of Kachin State Government)* (Submission No 4/2014); *Submission made by 26 Pyithu Hluttaw Representatives including U Aung Kyi Nyunt* (Submission No 5/2014); and *24 Representatives of the Amyotha Hluttaw including Dr. Aye Maung v Union Government, the Speakers of Pyidaungsu Hluttaw and Amyotha Hluttaw & Ministry of Immigration and Population* (Submission

In this section we consider the effects of CTU decisions in the light of applicable constitutional provisions and cases decided during 2015.

Concerning the finality and conclusiveness of the Tribunal's resolution, section 324 of the Constitution provides that 'The resolution of the Constitutional Tribunal of the Union shall be final and conclusive', without limiting this effect to any type of resolution with respect to a particular section. Section 24 of the revised CTU Law,<sup>91</sup> however, provided that, 'the decision of the Tribunal made under section 23 shall be final and conclusive'.<sup>92</sup> According to a literal interpretation of section 24 of the CTU Law, resolutions of the CTU for matters not falling under section 23 of the CTU Law might therefore not have the same legal effect of finality and conclusiveness. However, nothing was said about a possible appeal against such decisions either. Therefore, although the Constitution unambiguously determined the final and binding effect of a resolution of the Tribunal, the revised CTU Law itself curtailed this to a limited range of issues. This section 24, a replacement made by section 3 of the Law Amending CTU Law (2013), was therefore not in line with the Constitution.

In this connection, the Tribunal's preliminary order on the submission Number 1/2014 deserves to be discussed briefly here. According to the 1983 Census, the Kachin nationality consisted of 12 ethnic subcategories including Rawan (an ethnic minority of Kachin nationality) and Lisu (another ethnic minority of Kachin nationality). Therefore, the applicants believed that there should be only one appointment of Kachin Minister for National Races Affairs within the Kachin State Government, who represents all 12 ethnic subcategories: the applicants challenged 'the constitutionality of different appointments of the Rawan and Lisu Ministers for National Races Affairs within the Kachin State Government and the Lisu Minister for National Races Affairs within the Shan State Government'<sup>93</sup>

No 1/2015). At one point, the legislature disagreed with one of the Tribunal's decisions, *The President of the Union v The Speakers of the Pyidaungsu Hluttaw, Pyithu Hluttaw and the Amyotha Hluttaw* (Submission No 1/2012) in which the question was whether the interpretation relating to the Committees, Commissions and Bodies formed by each *Hluttaw* regarded as Union-level organisation is constitutional or not, and refused to accept it, rather, demanding the resignation of its members. In September 2012, after failed attempts to resolve the crisis on the basis of the wording of the Constitution, the members of the Tribunal established in 2011 collectively resigned and left the CTU dysfunctional until the reappointment of its members in February 2013. They, however, are not within the scope of this chapter.

<sup>91</sup> This s 24 has been recently substituted by s 13 of the Second Amending CTU Law. However, the effect caused by the former s 24 deserves to be discussed briefly here for academic purposes.

<sup>92</sup> Decisions of the CTU made under s 23 specifically deals with pending trials before judicial courts, which are submitted to CTU for its decision in accord with s 323 of the Constitution and s 17 of the CTU Law.

<sup>93</sup> Submission No 1/2014 made by 50 *Pyithu Hluttaw* Representatives including Daw Dwe Bu against the President, the Union Election Commission, the Chief Ministers of Kachin and Shan States and the three concerned National Races Affairs Ministers.

The respondents made prior objections before the hearing of the submissions. Some important arguments made by both sides, and reasons for the decision given by the Tribunal relating to the last of six objections made, are salient. The respondents' objection stated that

the existing Section 24 of CTU Law provides for the finality and conclusiveness of the Tribunal's decision for the cases submitted by the judicial courts. There is no other expressed and comprehensive provision under CTU Law, which provides the right to appeal, review and revision for the cases submitted through other channels other than the judicial courts. Therefore, the applicants will have the right to submit this type of submission, which does not fall within the scope of existing section 24, only after [amendment of] the CTU Law.

The applicants, however, did not argue on sections 23 and 24 of the CTU Law, they referred to other provisions of the 2008 Constitution, namely, sections 324, 446, and 198(a) (discussed above). The applicants argued that according to these provisions, the resolution of the Tribunal is final and conclusive.<sup>94</sup> Existing laws remain in operation in so far as they are not contrary to this Constitution, until and unless they are repealed by the Union Government.<sup>95</sup> If any provision of the law enacted by different levels of *Hluttaws* or by any other constitutional units is inconsistent with any provision of the Constitution, the Constitution prevails.<sup>96</sup> The applicants maintained their plea that they had the right to make this submission based on the constitutional provisions per se, without the need for prior amending of the CTU Law.

The Tribunal gave its answer on 28 July 2014 as follows. The Tribunal was established by the Constitution's sections 320 to 336. Its decisions are final and conclusive under section 324 of the Constitution, and cannot be appealed or reviewed. And if there is any inconsistency between any provision of the Constitution and any provision of the laws enacted by different levels of *Hluttaws*, the Constitution prevails under its section 198. The Tribunal's main concern regarding this submission was not whether the applicant has a right to appeal or a right to review the Tribunal's decision, but whether the Tribunal had jurisdiction over the issues before it. Accordingly, the Tribunal gave the verdict for the applicant.<sup>97</sup>

Considering the arguments made and the reasons held by the Tribunal, there was an apparent inconformity between section 324 of the 2008 Constitution and section 24 of the revised CTU Law; on the other hand, the

<sup>94</sup> 2008 Constitution, s.324.

<sup>95</sup> *ibid*, s.446.

<sup>96</sup> *ibid*, s 198(a).

<sup>97</sup> This is the author's own translation. Full texts in Myanmar language can be downloaded at: [www.myanmarconstitutionaltribunal.org.mm/my/judgment/627](http://www.myanmarconstitutionaltribunal.org.mm/my/judgment/627). The final decision was announced by the Tribunal on 18 September 2014. Its full text can be downloaded at: [www.myanmarconstitutionaltribunal.org.mm/my/judgments-mm](http://www.myanmarconstitutionaltribunal.org.mm/my/judgments-mm) in Myanmar language.

Constitution contains section 198, which helps solve such kinds of inconformity by providing for the prevailing effects of laws. Therefore, although the respondent objected to the applicant's submission based on the former ground, both the applicants and the CTU claimed the supremacy of the Constitution over any other laws of the country based on the latter ground. This case showed the legal and practical impact of the former section 24 in the adjudication of cases by the CTU.

This section 24 has been replaced by section 13 of the Law Amending the CTU Law (2014), which now provides that: 'Interpretations, resolutions and opinions of the Constitutional Tribunal of the Union shall be final and conclusive'. It is an important improvement of the CTU Law done not only by the CTU but also by the legislature.

However, section 16 of the Bill Amending CTU Law (2014), which would have added a new section, as section 25 of CTU Law, stating: 'Interpretations, resolutions and opinions of Constitutional Tribunal of the Union shall have effect on the relevant Government departments, organizations and persons or on the respective state or region',<sup>98</sup> was rejected by the legislature.

The final substantive decision in this case was given by the CTU on 18 September 2014. The case was dismissed by the CTU on the ground that the dispute mainly dealt with the election matters which could be tackled only by the UEC. Moreover, the applicants had enough time to get a decision from the respective Election Commission and to object to the decision—rights given by Laws of States and Regions Election Commission and also the Union Election Commission Law. However, the applicant presented this submission to the CTU after more than two and a half years. The issue could and should have been settled by the former UEC body before the existing 2008 Constitution and the CTU came into operation. Moreover, under section 402 of the Constitution, the resolutions and functions made by the UEC on electoral matters are final and conclusive. For all these reasons, there was no reason for the CTU to interfere with the decision made by the UEC, which was final and conclusive.

This case, complex as it is, represents some kind of a *Marbury v Madison*<sup>99</sup> moment in Myanmar's constitutional history. It establishes the supremacy of the Constitution and the binding nature of CTU decisions. Another important case, Submission Number 5/2014, known as the 'PR case', which concerned a challenge to the power of the UEC to make provision for proportional representation, establishes that an issue before the CTU must be moot. Many steps needed to be gone through before a law on

<sup>98</sup> These proposed two sections were identical to the original sections of the CTU Law promulgated by SPDC Law No 21/2010 dated 28 October, 2010. They were rearranged, amended and deleted by the Law Amending CTU Law (2013) dated 21 January 2013.

<sup>99</sup> 5 US 137 (1803).

this matter could be enacted.<sup>100</sup> Finally, in the last case decided before the previous CTU was dissolved, known as ‘the white card case’, the CTU ruled that a law allowing persons holding temporary registration certificates to vote was unconstitutional as that right was given only to citizens under the Constitution.<sup>101</sup>

## VII. CONCLUSION

The CTU was established under the 2008 Constitution together with the new democratic government. It is an institution that has never existed in Myanmar’s legal history before, as we have seen. Though judicial review by the Supreme Court was to some extent practised in the country after independence until the revolutionary council period, and the erstwhile Supreme Court had received much appreciation for its jurisprudence including its use of the writs, the Myanmar court system established after 1974 had made courts, judges, attorneys and parties lacking in knowledge and training in the concepts and practice of judicial and constitutional review for over 35 years.<sup>102</sup> Therefore, it is essential to proceed carefully and to develop the CTU legislation and jurisprudence on constitutional review, not only for judges and political institutions but also for society at large.

In this chapter, the author has pointed out some weak points and inconsistencies in the existing CTU Law, as amended in 2013, and has also made some suggestions for improving CTU-related legislation in order to bring it back into line with the Constitution; and to establish a CTU that is genuinely independent of the executive and the legislature. It is believed that this end cannot be obtained without having strong and good legislation for constitutional review that prevents the other two branches from attempting to influence it or interfere with its decision-making process. On its part, new bench of CTU in new Government should carry out its functions independently, efficiently, and transparently in accordance with the Constitution.

<sup>100</sup> Submission made by 26 Pyithu Hluttaw Representatives including U Aung Kyi Nyunt (Submission No 5/2014).

<sup>101</sup> *24 Representatives of the Amyotha Hluttaw, Including Dr Aye Maung v Union Government, the Speakers of Pyidaungsu Hluttaw and Amyotha Hluttaw, and Ministry of Immigration and Population* (Submission No 1/2015).

<sup>102</sup> The first phase was the people’s judicial system under the socialist government (1974–1988). The second phase was the judicial system under the military government (1988–2011).

