

【Special Features: Multiple Aspects on Constitutionalism –Asian “Contexts” and its Logic】

**Constitutionalism in ASEAN Region: Judicial Structure under the 2008  
Constitution of the Republic of the Union of Myanmar**

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**I. Introduction**

The Union of Burma regained her independence from British on 4 January 1948 with her first Constitution of the Union of Burma, 1947. The 1947 Constitution authorized the Supreme Court as Court of final appeal to exercise highest judicial power, and its decisions in all cases were final. The Supreme Court had authority to issue constitutional writs; to give an opinion upon an important question of law referred by the president, and to decide on constitutionality of any bill or law passed by the legislature. The second constitution of Constitution of the Socialist Republic of the Union of Burma became operative from 3 January 1974. Under this constitution, Council of People’s Justice was the highest judicial organ of the country and it was subordinate and responsible to the Pyithu Hluttaw, single chamber legislature. Justice was administered collectively by each judicial organ. Under that constitution, the Pyithu Hluttaw had the sole power to interpret the Constitution and to

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decide the validity of the measures of the organs of State power. Military justice for members of the People's Defence Services was administered according to law by a collective organ or by a single judge. In 2008, Myanmar adopted the current Constitution of the Republic of the Union of Myanmar (2008). Among many significant changes found in this Constitution, there is a study on establishing a new composition of the country's courts under the judiciary chapter. As a novelty, not only the Union Supreme Court obtained responsibilities as the highest court of ordinary law, but also constitutionally recognized Courts - Martial for the military justice system and the standalone Constitutional Tribunal (hereinafter, CTU), came into existence. This paper presents and discusses constitutionally rooted courts' adjudication together with the conclusiveness of their judicial decisions.

## **II. Courts of the Union under the 2008 Constitution**

The Constitution of the Republic of the Union of Myanmar (2008 Constitution) came into force on 31 January 2011. The judicial power is entrusted in the Supreme Court of the Union and its subordinate courts, in the Courts-Martial and the Constitutional Tribunal of the Union. Chapter VI of the Judiciary Chapter provides the basic structure of the judiciary from section 293 to section 336 of the Constitution.

Section 293 of the 2008 Constitution is the legal basis for the formation of Courts of Union. The three different courts systems, Supreme Court and its subordinate courts for civilian adjudication, Courts-Martial for military adjudication, and the Constitutional Tribunal for constitutional adjudication, stand separately and distinctly from one process to another, and judicial decisions passed by these courts are final and conclusive within their own jurisdiction. This paper will now briefly explain the functions and authorities of each court under respective adjudication at the union level of court under the 2008 Constitution.

### **1. Union Supreme Court and its Subordinate Courts**

The Union has a Supreme Court. Without affecting the powers of the Constitutional Tribunal and the Courts - Martial, this Supreme Court is the highest court of the Union.<sup>1</sup>

Therefore, the Supreme Court is the highest court in the country to rule on civilian adjudication.<sup>2</sup> Section 295 of 2008 Constitution enumerates the original jurisdiction of the Supreme Court as follows:

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<sup>1</sup> Section 294 of 2008 Constitution.

<sup>2</sup> The civilian adjudication generally refers to the process of decision-making for disputes between ordinary citizens who are not members of the military through some form of judgement. Adjudication produces final decision that the parties are obligated to respect. Civil offence means an offence which would be triable by a court of ordinary criminal justice in the Union of Myanmar under sections

- (a) Only the Supreme Court of the Union has the following original jurisdiction:
  - (i) in matters arising out of bilateral treaties concluded by the Union;
  - (ii) in other disputes, except the Constitutional problems, between the Union Government and the Region or State Governments;
  - (iii) in other disputes, except the Constitutional problems, among the Regions, among the States, between the Region and the State and between the Union Territory and the Region or the State;
  - (iv) other matters as prescribed by any law.
- (b) As the Supreme Court of the Union is the highest court of the Union, it is the court of final appeal.
- (c) The judgments of the Supreme Court of the Union are final and conclusive and have no right of appeal.
- (d) The Supreme Court of the Union, subject to any provision of the Constitution or any provision of other law, has the appellate jurisdiction to decide judgments passed by the High Courts of the Regions or the States. Moreover, the Supreme Court of the Union also has the appellate jurisdiction to decide judgments passed by the other courts in accord with the law.
- (e) The Supreme Court of the Union has the revisional jurisdiction in accord with the law.

Moreover, the Supreme Court has the power to issue the writs of *Habeas Corpus*,<sup>3</sup> *Mandamus*,<sup>4</sup> Prohibition,<sup>5</sup> *Quo Warranto*<sup>6</sup>, and *Certiorari*<sup>7</sup> for granting fundamental rights of citizens under the Constitution.<sup>8</sup> In order to make writs application, the Law Relating to the Application of Writ was issued by *Pyidaungsu Hluttaw*.<sup>9</sup> There is the High Court of the Region in the region and the High

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3 (e), (k) of Defence Services Act of 1959. Section 5 of the Penal Code also provides that nothing in the Penal Code affects any act for punishing defence services personnel.

<sup>3</sup> Writ of Habeas Corpus means a writ issued in writing after causing to bring the detainee to the office of writ and hearing whether or not the detention is in conformity with the law by any court of the Republic of the Union of Myanmar or any competent authority. Section 2(c) of Writ Law.

<sup>4</sup> Writ of Mandamus means a writ issued in writing to comply with law by any competent person; or any authority; or any government department for the failure to comply with the authority conferred thereon. Section 2 (d) of the Writ Law.

<sup>5</sup> Writ of Prohibition means a writ issued in writing not to perform beyond the jurisdiction (*ultra vires*) or against justice in any proceeding of any court or any quasi-judicial matter. Section 2 (e) of the Writ Law.

<sup>6</sup> Writ of Quo Warranto means a writ issued in writing whether or not it is in conformity with law after hearing whether or not any government department or any empowered authority has carried out in accord with laws, rules, regulations, by-laws, procedures, orders, notifications, directives issued on person or persons. Section 2 (f) of the Writ Law.

<sup>7</sup> Writ of Certiorari means a writ issued in writing to be the decision in conformity with Law if it is found that the decision of any Court or any quasi-judicial matter is not in conformity with Law. Section 2 (g) of Writ Law.

<sup>8</sup> Sections 296, 378 of 2008 Constitution.

<sup>9</sup> The Law Relating to the Application of Writ, Pyidaungsu Hluttaw Law No.24, 2014, will be hereinafter referred to as Writ Law.

Court of the State in the state. These courts have the authority to adjudicate on the original case, on appeal case, on revision case, and matters prescribed by any law.<sup>10</sup> Courts of the Self- Administered Division, Courts of the Self- Administered Zone, District Courts, Township Courts and other courts constituted by law are different levels of courts under the supervision of the High Court of the Region or State.<sup>11</sup>

The organization and formation of the Supreme Court, High Courts, and its subordinate courts are detailed by the Union Judiciary Law 2010.<sup>12</sup> Criminal Procedure Code defines criminal jurisdiction, and Civil Procedure Code defines the civil jurisdiction of these courts. These criminal and civil jurisdictions are supplemented by the orders and directives issued by the Union Supreme Court from time to time in order to meet the needs of the changing situation of the country. These are, however, not the subjects of this paper.

## 2. Courts - Martial

The courts-martial, the second type of court under section 293(b) of the 2008 Constitution, is for military justice.<sup>13</sup> The Defense Services in Myanmar is constitutionally recognized as a sole patriotic defense force that is strong, competent, and modern,<sup>14</sup> and it has the right to administer and adjudicate all affairs of the armed forces independently.<sup>15</sup> Accordingly, the Defense Services personnel are administered in accordance with the law [Defense Services Act of 1959] collectively or singly<sup>16</sup>, and section 343 (b) of the 2008 Constitution grants final decision-making power in military adjudication to Commander - in - Chief of the Defense Services. Military court proceedings are different from civilian adjudication because they are discipline-based. The general purpose of military adjudication is to promote justice and to assist in maintaining good order and discipline in the armed forces. Martial Law ought to be distinguished from civilian judicial work in both substance and procedure. The Defense Services Act of 1959 (hereinafter, 1959 Act), and its Rules are the special criminal law for

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<sup>10</sup> Sections 305, 306 of 2008 Constitution.

<sup>11</sup> Section 314 of 2008 Constitution.

<sup>12</sup> The Union Judiciary Law came into force on 28 October 2010 as SPDC Law No 20/ 2010.

<sup>13</sup> Military justice is distinct from martial law, which is the imposition of military authority on a civilian population as a substitute for civil authority, and is often declared in times of emergency, war, or civil unrest. Most countries restrict circumstances, namely when and in what manner martial law may be declared and enforced.

<sup>14</sup> Section 20 (a) of 2008 Constitution.

<sup>15</sup> Section 20 (b) of 2008 Constitution.

<sup>16</sup> Section 343 (a) of 2008 Constitution.

those who are subjects of the Defense Services Act.<sup>17</sup> There are four types of courts-martial<sup>18</sup> under the 1959 Act. These courts are general courts-martial, district courts-martial; summary general courts-martial; and summary courts-martial.<sup>19</sup> Section 211 of 1959 Act provides for the procedures to be followed by the Courts- Martial Appeal Court. In connection with final saying of the decision passed by the Courts-Martial Appeal Court, section 217 of the same Act<sup>20</sup> provides as follows;

Section 217

1. The Courts-Martial Appeal Court is the court of final appeal. In addition, no appeal shall lie against the decision of the Courts-Martial Appeal Court before any other court.

2. The Courts-Martial Appeal Court shall submit the decided appeal cases to the Commander-in-Chief of the Defense Services within 30 days from the date on which the decision was passed.

3. The Commander-in-Chief of the Defenses Services may, after scrutinizing the decision and the proceedings of the appeal submitted by the Courts-Martial Appeal Court, pass the order that the decision of the Courts-Martial Appeal Court has been confirmed, or that the decision of the Courts-Martial Appeal Court has been cancelled and the decision of the Courts-Martial has been reconfirmed, or that the appellant has been acquitted from the case or revise and order that the punishment passed by the Courts-Martial Appeal Court has been cancelled and such less punishment is to be served, or any other suitable order allowed by this Act may be passed. The decision of the Commander-in-Chief of the Defense Services is final and conclusive.

3. Constitutional Tribunal of the Union

Constitutional adjudication mainly deals with constitutional issues, such as questions of interpretation of the constitution, decisions on the constitutionality of the federal and state laws, and constitutional controversies between the federation and the federal states or among the federal states, and some other prescribed matters<sup>21</sup> depending on the constitution of a country. Myanmar is the second common law country having a separate constitutional court after Constitutional Court of Republic of South Africa. Constitutional courts<sup>22</sup> are a feature of civil law countries, and the choice

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<sup>17</sup> Section 2 of 1959 Act defines the following persons are subjects to this Act wherever they may be, namely: officers of the Defense Services; persons enrolled under this Act; persons who were subject to the Burma Army Act, or the Burma Naval Discipline Act, 1947, or the Burma Air Force (Discipline) Act, 1947, immediately before the commencement of this Act; and persons not otherwise subject to military law, who, on active service, in camp, on the march, or at any frontier post specified by the President by notification in this behalf, are employed by, or are in the service of, or are followers of, or accompany any portion of, the Defense Services. Every person subject to this Act under sub-section (1), clause (a), (b) or (c) shall remain so subject until his services are terminated or he is duly retired, discharged, removed, dismissed, or cashiered from the service.

<sup>18</sup> Court-martial is a court-martial held under Defense Services Act. Section 3 (i) of 1959 Act.

<sup>19</sup> Section 110 of 1959 Act.

<sup>20</sup> Section 38 of the Law Amending the Defense Service Act 1959.

<sup>21</sup> Such as impeachment of president, dissolution of political parties, individual constitutional complaints.

<sup>22</sup> Constitutional systems in which the function of judicial review is concentrated in a specialized constitutional court outside the

of a constitutional court was a departure from the common law norm. In Myanmar's constitutional system with democratic government, the constitutional adjudication is performed by the Constitutional Tribunal of the Union.<sup>23</sup>

Section 46 of the 2008 Constitution under the heading of Chapter I (Basic Principles of the Union) provide a mandate to establish the CTU. The CTU, accordingly, has the power to interpret the Constitution and to impose veto over the constitutionality of executive and legislative acts. It also has the authority to decide on the constitutional disputes between the Union and its units; or between the units; and on disputes relating to the rights and duties of the Union and its units arising when implementing legislation.<sup>24</sup> The CTU implements concrete judicial review under section 323 of the Constitution. When the ordinary court experiences issues questioning the constitutionality of a statute, such a court temporarily pauses the trial to request the Tribunal via the Supreme Court to examine the constitutionality of the issue. By using the authority entrusted by the Constitution in sections 336 and 443, the State Peace and Development Council enacted the Constitutional Tribunal of the Union Law<sup>25</sup> to prescribe the formation of the Tribunal and its duties and functions.

Only prescribed persons and organizations have *locus standi* before the CTU. The only persons who can submit specified constitutional matters 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>26</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 percent 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 2008 Constitution.

### III. Discussion

It is common for Myanmar constitutions to insert a finality clause that prohibited him or her from challenging the validity of the Supreme Court's judicial decisions as a last resort. Section 295 (c) of the 2008 Constitution provides for finality and conclusiveness of the judgments passed by the Union

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ordinary judiciary are often classified as falling within the Austrian/European or Kelsenian model of judicial review. The famous Austrian scholar Hans Kelsen first introduced this model in the Austrian Constitution of 1920 which he helped to draft.

<sup>23</sup> The Constitutional Tribunal of the Union will hereinafter referred to be as CTU.

<sup>24</sup> Section 322 of 2008 Constitution.

<sup>25</sup> The Constitutional Tribunal of the Union Law came into force on 28 October 2010 as SPDC Law No 21/ 2010.

<sup>26</sup> Section 325 of 2008 Constitution.

Supreme Court.<sup>27</sup> The Supreme Court reaffirmed this in *Shin Moe Pyar vs. Union of Myanmar* case that “when a case was decided by the Union Supreme Court as a special appellate case under Union Judiciary Law, the appellant does not have another chance to apply Supreme Court to issue writs under the Writ Law.”<sup>28</sup> The grounds for special appeal under Union Judiciary Law is, however, quite different from grounds for writs application either under the Writ Law or under the 2008 Constitution.<sup>29</sup>

The Supreme Court’s authority to issue writs under the 2008 Constitution can be seen in the decision of *Daw Win Win Khaing vs. Dispute Settlement Arbitration Council & 2 case*.<sup>30</sup> It is stated that the applicant can make a writ application to Union Supreme Court for judicial remedy either for violation of fundamental rights granted by the Constitution under sections 377 and 378 of the 2008 Constitution or for issuance of different categories of a writ under section 296 of same Constitution. However, the decisions of the Supreme Court cannot be filed at the CTU for constitutional review. This is barred not only by section 295 (c) of finality and conclusiveness of the Supreme Court’s decision but also by section 322 of limited functions and duties of CTU and by sections 325 and 326 of restricted accessibility of the CTU.

The military justice system has been now constitutionally separated from ordinary civilian adjudication,<sup>31</sup> and a new constitutional finality clause was introduced by sections 293 (b), 319, and 343 of the 2008 Constitution.<sup>32</sup> Sections 293 (b), 319, and 343 (a) of the 2008 Constitution provide for separate military justice adjudication for Defense Services personnel, and section 343 (b)<sup>33</sup> states for finality and conclusiveness of the decision passed by the Commander-in-Chief of the Defense Services. Therefore, it may be presumed that military personnel cannot file for or against decisions passed by

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<sup>27</sup> The previous two constitutions also had similar provisions for the conclusiveness of the decisions passed by the highest court in the country. This constitutional provision section 295 (c) is supplemented by sections 18, 22 of Union Judiciary Law.

<sup>28</sup> *Shin Moe Pyar vs. Union of Myanmar*, 2011 MLR 126.

<sup>29</sup> Under section 20 of Union Judiciary Law, only if the Chief Justice of the Union considers that any problem on which action should be taken for the benefit of the public has arisen in any case finally adjudicated by the Supreme Court of the Union, he may cause the retrial of such problem by the special Appeal Court or by the Full Bench.

<sup>30</sup> *Daw Win Win Khaing vs. Dispute Settlement Arbitration Council & 2*, 2015 MLR (SC) 245.

<sup>31</sup> Section 28 of 1947 Constitution stated Parliament’s law-making power for Defense Forces that “The Parliament may by law determine to what extent any of the rights guaranteed by this Chapter [Rights to Constitutional Remedy] shall be restricted or abrogated for the members of the Defence Forces or of the Forces charged with the maintenance of public order so as to ensure fulfilment of their duties and the maintenance of discipline.” Section 99 of 1974 Constitution briefly provided separate and distinct military justice administration as “members of the People’s Defense Services may be administered according to law [Defence Services Act of 1959] by a collective organ or by a single judge.”

<sup>32</sup> All these provisions are provided under the heading of Courts-Martial.

<sup>33</sup> This constitutional provision was supplemented by amended section 217 of 1959 Act.

the Court Martial Appeal Court either as a special appeal case or as a civil miscellaneous case of writ application in the Supreme Court under the 2008 Constitution.

Previously, before the 2008 Constitution, Court Martial Appeal Court was composed of judges of the High Court, high ranking officers of the Defense Services, and other persons having legal experience and not being government officials.<sup>34</sup> The 1959 Act also allowed an appeal to the Supreme Court from the decision of the Court-Martial Appeal Court for some limited circumstances.<sup>35</sup> After amending the Defense Service Act of 1959 in 2010, however, Court Martial Appeal Court<sup>36</sup> and Commander-in-Chief of the Defense Services got increased authority in military adjudication. As a result, under the section 343 of the 2008 Constitution, finality and conclusiveness of decisions of Commander-in-Chief of the Defense Services makes impossible either for the Supreme Court to review the legality of such decision or for the CTU to review its constitutionality.

The Constitutional Tribunal of the Union of Myanmar was established by the 2008 Constitution with the new democratic government. Under the 2008 Myanmar Constitution, the Constitutional Tribunal has jurisdiction to interpret the Constitution, to impose veto over the constitutionality of laws by different Hluttaws and of executive acts by the Union, its Regions and States; to decide constitutional controversies between the Union and its Regions and States or between the Regions and States.<sup>37</sup> The Constitution does not grant the CTU the authority for constitutional complaints for violation of citizens' fundamental rights. Their remedy is writ proceedings at Supreme Court as mentioned above. On the other side, only prescribed persons and organizations have *locus standi* before the CTU.<sup>38</sup>

Section 324 of the 2008 Constitution mentions the finality clause for decisions passed by CTU. However, the finality and conclusiveness of the CTU's decision were questioned after the union level organization case in 2012.<sup>39</sup> In *President of the Union vs. The Speakers of the Pyidaungsu Hluttaw, Pyithu Hluttaw and Amyotha Hluttaw*, the question was if the Committees, Commissions and Bodies

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<sup>34</sup> Section 211 of 1959 Act before amendment in 2010.

<sup>35</sup> Section 217 of 1959 Act before amendment in 2010.

<sup>36</sup> Now the composition of the Court Martial Appeal Court is of a military personnel only. Section 211 of 1959 Act after amendment in 2010.

<sup>37</sup> Section 322 of 2008 Constitution.

<sup>38</sup> The only persons who can access 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; 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. Section 326 of the 2008 Constitution.

<sup>39</sup> *The President of the Union vs. The Speakers of the Pyidaungsu Hluttaw, Pyithu Hluttaw and Amyotha Hluttaw, Submission No 1/2012 at Constitutional Tribunal of Union.*



formed by each Hluttaw was Union level organization or not. The CTU answered this question in the negative way. The parliamentarians were unhappy with Tribunal's decision and refused to accept it, rather, demanding the resignation of CTU's members. The members of the Tribunal collectively resigned on 6 September 2012. The Pyidaungsu Hluttaw subsequently declared that the interpretation of the CTU, in this case, was null and void *ab initio*<sup>40</sup> because the CTU's wrong interpretation of the constitution should not be treated as final and conclusive as section 324 of the 2008 Constitution provides.<sup>41</sup>

In this respect, although there is no connection between the CTU and Supreme Court under 2008 Constitution, the CTU made an application of writ of mandamus to the Supreme Court,<sup>42</sup> just before CTU justices resigned. This writ stated that the Parliament's actions were in violation with the constitution, and illegally interfered functions and duties of the CTU.<sup>43</sup> The Supreme Court, however, dismissed the CTU's submission on the ground that writ application made by CTU did not fall under any category of writ application to which the Court had jurisdiction.

#### **IV. Conclusion**

The judiciary is one of the three branches of the power which adjudicates upon conflicts between state institutions, between state and individual, and between individuals. The judiciary in any country is the custodian of the constitution and guarantor of the fundamental rights of the people. If the judicial system is just, impartial, and independent, the fundamental rights enshrined by the constitution can be preserved, and contribute to the rule of law in society. Under the 2008 Constitution, there are three constitutionally rooted courts; the Supreme Courts and its subordinate courts, the Courts-Martial, and the Constitutional Tribunal. While the former two courts exercise their original and appellate judicial powers under ordinary laws of the land, respectively, as apex courts within their jurisdiction, the latter court reviews the constitutionality of prescribed issues under the Constitution distinctly. It is suggested to consider, firstly, to adopt a coordinate judicial system between civilian courts and military courts at the court of last resort. Secondly, individuals whose fundamental rights were allegedly violated and

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<sup>40</sup> To be treated this as invalid from the beginning.

<sup>41</sup> Meeting minutes from Fifth Regular Meeting of First Pyidaungsu Hluttaw held on 31 October 2012, pp 129-131.

<sup>42</sup> *The President of the Union vs. The Speakers of the Pyidaungsu Hluttaw, Pyithu Hluttaw and Amyotha Hluttaw, Submission No 1/2012 at Constitutional Tribunal of Union.*

<sup>43</sup> *The Constitutional Tribunal of Union vs. Pyidaungsu Hluttaw, Pyithu Hluttaw, & Amyotha Hluttaw (Civil Miscellaneous Case No 115/2012 dated 7 Sep 2012).*

who exhaust available judicial remedies, must have standing to bring their claims before the Constitutional Tribunal.