THE LONGEVITY OF CONSTITUTIONAL COURTS IN NEW DEMOCRACIES: A COMPARATIVE ANALYSIS IN INDONESIA, SOUTH KOREA AND MYANMAR

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Abstract

Constitutional courts were prominent in the early years of democratic transition in South Korea, Indonesia, and even in Myanmar. Although the South Korean and Indonesian Courts are still operating effectively, the Myanmar Constitutional Tribunal is now facing the threat of being abolished. The thesis studies the South Korean and Indonesian experiences to highlight how to establish an independent, active and stable constitutional court. By evaluating the defects of the current system of Myanmar Tribunal and as a result of comparative analysis from selected countries, the thesis proposes some possible solutions to save Myanmar's Constitutional Tribunal from being abolished and to bring it to be more active.

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Introduction

The Republic of the Union of Myanmar (hereinafter also called Myanmar) was under military rule for more than thirty years and is still in transition towards democracy, following the 2008 military-backed Constitution. In light of this Constitution, the so-called Constitutional Tribunal of the Union (CTU) was established on 31st March 2011. This new tribunal is the very first such institution separated from the ordinary judicial framework. It has the powers to review the constitutionality of legislation and executive orders and to resolve disputes among union-level organizations.

However, the comparative study of other countries shows that Myanmar Tribunal still has significant shortcomings, ranging from the selection of its members to the exercise of its limited jurisdiction under the constitutional provisions. Although the number of cases was extremely low because of its narrower jurisdictional scope, the CTU took decisions actively and professionally even against the executive branch in its early years.[1] However, in its relatively short existence, the CTU faced a considerable crisis in 2012 because of its bold decision against the Parliament.[2] As a result, all Tribunal members voluntarily resigned from office during the impeachment process commenced by Parliament.[3]

The CTU was recomposed with new members after the 2012 crisis, and in 2013 the Parliament amended the CTU Law to impose more limitations which lead to the disturbance of its independence and the openness to more political influence upon it. In addition, since 2019, the Parliament has been attempting to amend the 2008 Constitution before the next election of

[1] Dominic J. Nardi, Jr., "How the Constitutional Tribunal's Jurisprudence Sparked a Crisis" in Andrew Harding with the assistance of Khin Khin Oo (ed), *Constitutionalism and Legal Change in Myanmar*, (2017) p.178

[2] Andrew Harding, "The Short but Turbulent History of Myanmar's Constitutional Tribunal" in Albert H. Y. Chen and Andrew Harding (ed), *Constitutional Courts in Asia – A Comparative Perspective*, (2018) p.282

[3] Zar Zar Soe with AFP, "Tribunal Resigns to avoid impeachment" (September 10, 2012); https://www.mmtimes.com/national-news/1407-tribunal-resigns-to-avoid-impeachment.html

2020. Among thousands of proposals for constitutional amendments made by numerous political parties, most (not all) parties proposed to abolish the tribunal system by providing strong arguments.[4]

The thesis stems from the grounded reflection that the constitutional court is very important for democratic states as a reviewing mechanism upon State Authority. Especially, after the decades of authoritarian rule in East Asia, the constitutional court stood not only as the supporter of democratic transition but also as the guarantor of the consolidation of democracy. In Indonesia, during its democratic reform after Soeharto's authoritarian regime, its Constitutional Court had been an important player because the instances on electoral disputes and individual constitutional complaints served as striking evidence and led to decisions that impressed the international community. Similarly, in South Korea, after the collapse of the military dictator of Chan Doo-hwan, the Constitutional Court got involved in sensitive political issues of presidential impeachments and handled efficiently the constitutional complaints brought by individual citizens.[5]

By developing a comparative analysis of the law and practices of the selected countries, this thesis explains, first, why the CTU should not be abolished and should play an important role in the democracy pathway of Myanmar, and second, which changes should be addressed in order to turn it into a consolidated and credible institution in the future.

The thesis is divided into *five* Chapters. *Chapter 1* illustrates the general discussion upon the role of constitutional courts in the transformation periods of the countries. Particular attention will be dedicated to the general nature and characteristics, the powers and functions of the constitutional courts, the advantages of having them and finally, the situation of

[4] Pyidaungsu Hluttaw Office, "Analysis and recommendations for 2008 Constitution", July 15, 2019; https://pyidaungsu.hluttaw.mm/uploads/pdf/post/lne940_Constitution%20Committee%20final.pdf
[5] Tom Ginsburg, "Constitutional Courts in East Asia" in Rosalind Dixon and Tom Ginsburg (ed), *Comparative Constitutional Law in Asia*, (2014) pp.53-56

constitutional courts in East Asia's democracy experiences. *Chapter 2* outlines the situation of the CTU in Myanmar, initially by describing the historical background for the establishment of the CTU, its functions and powers under the 2008 Constitution and 2010 CTU Law, its prominent decided cases in its early years and the defects of the current tribunal system. Then, this Chapter presents the parliamentary debates for constitutional amendments aimed at the abolition of the Tribunal. *Chapter 3* and *Chapter 4* start drawing conclusions from the lessons learned from the selected countries: *Chapter 3* relates to the performance of the Indonesian Constitutional Court upon constitutional complaints and electoral disputes, while *Chapter 4* underlines the South Korean Constitutional Court's balancing between its triumph and longevity by overviewing decided cases on presidential impeachments and individual complaints. On this basis, *Chapter 5* builds an evaluation of the defects of Myanmar Tribunal's system and proposes the possible reforms to bring the CTU more active and to safeguard its stability.

Chapter I

Constitutional Courts in Transition to Democracy

It is hard to imagine the democratic transition from the repressive rule without the creation of constitutional courts. After the decades of authoritarian or military rule in East Asia, most political systems in the region were dominated by powerful executives without effective judicial constraint until the 1980s.[6] Though ordinary judges seem to be able to exercise review functions upon the ruling government, they cannot be trusted to do so since they have served such authoritarian regime for a long time in the past and may not possess skills and experiences of constitutional adjudication.[7] Instead, constitutional courts (CCs) have become the only and the best guarantors of the rights not to be violated more by the ruling government.

1.1 The Nature and Functions of Constitutional Courts

According to Alec Stone Sweet, a constitutional court is "a constitutionally-established, independent organ of the state whose central purpose is to defend the normative constitutional law within the juridical order."[8] The idea of CC was introduced in Austria's first democratic constitution based on the work of Austrian scholar Hans Kelsen, who strongly emphasized the "Supremacy of the Constitution." He thought that the excessive power of Parliament and Executive was a threat to the stability of the Constitution and that there should be a resolution mechanism for the conflicts between central and regional institutions of Austria Federation.

[6] Ibid., p.47
[7] Albert H. Y. Chen, "Western Origins and Asian Practice" in Albert H. Y. Chen and Andrew Harding (ed), *Constitutional Courts in Asia – A Comparative Perspective*, (2018) p.10
[8] Andrew Harding, "The Fundamentals of Constitutional Courts" *Constitutional Brief* by International Institute for Democracy and Electoral Assistance (IDEA), (2017) p.1; https://www.idea.int/sites/default/files/publications/the-fundamentals-of-constitutional-courts.pdf

Since, in his ideology, the ordinary court was subordinate to the legislature, an independent separate court was entrusted with the task of nullifying unconstitutional acts and of resolving competence conflicts.[9]

The primary functions of constitutional courts are to interpret the constitution, to resolve the competence disputes among government branches and to review the constitutionality of the parliamentary statutes or executive measures. While reviewing the statutes in *abstract*, it may review them either before promulgation (*ex ante* review) or after passing (*ex post* review). *Concrete* review is brought through cases or controversies by lower courts.[10] Moreover, its primary jurisdiction includes hearing individual complaints upon the constitutionality of laws or governmental actions. Here the complaints can be raised by individuals with or without expecting remedies and irrespective of the direct link with their constitutional rights.[11] This jurisdiction makes the court's image popular in the eyes of the public since it is directly related with them. On the other hand, they are provided with certain ancillary functions such as dissolution of political parties, resolving referendum or electoral disputes and adjudication of impeachments.[12]

While it does not mean that every CC possesses all kinds of jurisdiction, it should not lack main jurisdictions. Particularly, in the modern age of enhancing human rights recognition, redressing remedy should be its basic responsibility where a fundamental right is deprived either by a law or the administrative action.[13] Though CC as an institution, was originally created with the aim to check the activities of political branches, nowadays it has gradually become the place where the people whose rights are deprived can petition for remedy. For

[9] Sara Lagi, "Hans Kelsen and the Constitutional Court (1918-1929)" pp.286-288
[10] Wen-Chen Chang, Li-ann Thio, Kevin YL Tan and Jiunn-rong Yeh, "Constitutionalism in Asia - Cases and Materials: Judicial Review" (2014) pp.328-329
[11] Ibid., p.333
[12] Ibid., p.329
[13] Andrew Harding, "The Fundamentals of Constitutional Courts" (2017) p.3

instance, most cases before German Federal Constitutional Court are brought by individuals via constitutional complaint.[14] Similarly, in East Asia, the individuals in Taiwan, South Korea, Thailand and Indonesia can get the protection from their CCs whereas the courts in Myanmar and Cambodia give no right of direct access to citizens.[15]

Since CC has the positive effects for consolidated democracy, it can be appraised as follows:

- *Guardian of the Constitution* during democratic transition from authoritarian regime in order to observe 'Supremacy of the Constitution'
- *Architect* for flourishing of a genuine multi-party democratic system in a new democracy
- *Mediator between political institutions* by resolving the disputes
- *Negative Legislator of performing a corrective function*: It delays the producing of unconstitutional laws by *ex ante* review and if already promulgated, prevents the continuing exercise of such laws by *ex post* review. It takes action boldly against the laws or regulations if they are contrary to the constitution.
- *Institution for defending individua rights*: It is common that the abuse of powers or the habit of tormenting upon citizens arbitrarily will not be immediately diminished in the early years of immature democracy. Through CC, the individuals can easily get the remedy for the violations of their rights by the unconstitutional statutes or abusive governmental measures.

[14] Albert H. Y. Chen, "Western Origins and Asian Practice" (2018) p.8
[15] Wen-Chen Chang, Li-ann Thio, Kevin YL Tan and Jiunn-rong Yeh, "Constitutionalism in Asia - Cases and Materials: Judicial Review" (2014) p.329

1.2 East Asia's Democratic Transition and Constitutional Courts

In East Asia, the attempts for democratic transition have coincided with the formation of powerful CCs.[16] For instance, Taiwan CC is a separate body vested with the exclusive power of constitutional review,[17] but in its early years the Court had been an instrument of Kuomintang regime. Nevertheless, in the transition period it had an essential role in reforming the laws of the authoritarian era and in dealing with political conflicts.[18] Particularly, its decision in '*Interpretation No. 261(1990)'* case resulted in calling for new elections and making the old guard of unelected Kuomintang deputies retire from the parliament.[19]

Similarly, CCs in Indonesia, South Korea and Mongolia were created during the democratic transition and they have raised their roles as "real constraints on political authority." However, CCs in Myanmar and Thailand still exist amongst political conflicts without significant success.[20] The main reason for the different result between these two groups of countries is that the CCs in the former countries dealt with political issues wisely in their early years of transition and they emphasized upon not only their success but also their longevity within the highly-political atmosphere. In contrast, the CCs in the latter countries are characterized merely by their bold decisions against the political branches rather than their longevity. In Myanmar, the realistic decisions of the CC led the members to be dismissed, the powers to be reduced and ultimately, the independence to be threatened by changing the appointment system.[21]

[16] Tom Ginsburg, "Constitutional Courts in East Asia" (2014) p.47
[17] Wen-Chen Chang, "Constitutional Court of Taiwan (Judicial Yuan)" (September 2017); https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e538
[18] Albert H. Y. Chen, "Western Origins and Asian Practice" (2018) pp.13-14
[19] Tom Ginsburg, "Constitutional Courts in East Asia" (2014) p.51
[20] Ibid., p.47
[21] Albert H. Y. Chen, "Western Origins and Asian Practice" (2018) p.7

To sum up, first, it is undeniable that CC is very important for democratic transition. However, secondly, since CC deals with the sensitive political questions against political forces, there is a potential danger for its longevity. In the very early years of transition, if a CC deals with political issues cleverly, it can surely bring the consolidation of democracy. If CC cannot retain its impartiality and independence prudently, there are many ways of turning it into a tool for the majoritarian government and the new democracy will collapse easily.[22] Therefore, while dealing with the cases, CC must put emphasis not only upon its success but also on its longevity.

[22] Ibid., p.12

Chapter II

The Constitutional Tribunal of Myanmar

2.1 Formation of the Constitutional Tribunal of the Union (CTU)

Although constitutional review had been exercised by Supreme Court (SC) under the 1947 Independence Constitution, there were no prominent cases where SC decided against the legislature effectively.[23] After the 1988 uprisings in Myanmar, the ruling military government was trying to draw up a new constitution via the National Convention. It included a proposal for the creation of a constitutional tribunal under the heading of 'General Principles'. Although a centralized reviewing system with a separate court is uncommon for the Common Law countries, such as Myanmar,[24] the proposal was finally agreed on 2 August 2007.[25] In fact, there was no serious debate about the tribunal during or after the Convention and the drafters of the constitution did not pay much attention to its role for the transition period.[26]

The CTU was officially established on 31 March 2011 in Nay Pyi Taw, the capital city of Myanmar. It is currently running under the 'Constitutional Tribunal of the Union Law (CTU Law) 2010' and the 'CTU Rules 2011'. Under the existing judicial system of Myanmar, SC is the highest institution amongst the ordinary courts while Courts-Martial and the CTU are also the highest judicial organs respectively.[27]

[23] Andrew Harding, "The Short but Turbulent History of Myanmar's Constitutional Tribunal" (2018) p.274
[24] The New Light of Myanmar, (February 10, 2013); https://www.burmalibrary.org/docsMA2013/NLM2013-02-10.pdf
[25] Andrew Harding, "The Short but Turbulent History of Myanmar's Constitutional Tribunal" (2018) p.274
[26] Ibid., p.276
[27] Section 294 of the 2008 Constitution

The CTU is composed with nine members, including the Chairperson.[28] They are appointed by the President, the Speaker of *Pyithu Hluttaw* and the Speaker of *Amyotha Hluttaw* (i.e. the two houses of the Parliament) respectively.[29] According to the CTU Law (amended in 2013), the appointees must report their activities to their appointers.[30] The members have the non-renewable fixed terms of five years, which is the same as that of the Parliament and the President.[31] They can be impeached on the vague grounds of high treason, breach of constitutional provisions, misconduct, disqualification or inefficient discharge of duties.[32] The resolution of CTU shall be final and conclusive.[33]

2.2 Powers and functions of the Tribunal under the constitutional provisions

Under section 322 of Constitution, CTU performs the following functions:

- Interpreting the Constitution,
- Scrutinizing the parliamentary laws and executive measures to be in conformity with the Constitution, and
- Resolving the disputes between the governmental institutions.

In addition, if there is a doubt in the eyes of the trial courts whether the disputed law is in conformity with the constitution or not, CTU shall make the resolution upon submission by such courts and its resolution shall be applied to all cases.[34]

Myanmar CTU can be said that it has 'extremely narrow jurisdictions' because it does not have the right to deal with:

[28] Section 321 of the 2008 Constitution
[29] Section 321 of the 2008 Constitution
[30] Section 12(i) of the CTU Law [2013 amended]
[31] Section 335 of the 2008 Constitution
[32] Section 334 of the 2008 Constitution
[33] Section 324 of the 2008 Constitution and Section 24 of the CTU Law [2014 amended]
[34] Section 323 of the 2008 Constitution and Section 12(g) of the CTU Law

- Dissolution of political parties,
- Electoral disputes settlement,
- Presidential Impeachment,
- Abstract judicial review, and,
- most importantly, Constitutional complaints.

For instance, some constitutional courts, including Indonesian Constitutional Court, have the jurisdictions upon electoral issues as an ancillary jurisdiction. In Myanmar, Union Election Commission (UEC), not CTU, holds the authority to deal with electoral disputes.[35]

Furthermore, only limited persons and organizations can initiate a petition before CTU, including the President, the Speakers of the Parliament, Chief Justice of the Union, the Chairperson of the Union Election Commission (UEC), the Chief Ministers of the sub-national units, the Speakers of the legislatures of those units, and, as a collective right, a group of minimum 10 percent of MPs of each chamber of Parliament.[36] Individual citizens and civil society organizations and even individual parliamentarians cannot initiate the motion before the CTU.

Dominic Nardi commented that Myanmar CTU was created with "*the aim to solve the disagreements between political elites rather than to protect citizens from human rights violations by limiting the authorities of political forces*."[37] Yet, because of its limited jurisdiction and limited standing right, the CTU does not have a chance to show its capabilities to other governmental branches and the public.

[35] Section 402 of the 2008 Constitution
[36] Sections 325-326 of the 2008 Constitution
[37] Andrew Harding, "The Short but Turbulent History of Myanmar's Constitutional Tribunal" (2018) p.275

2.2.1 Decided cases and the 2012 Crisis

Due to its very limited jurisdictions and restricted standing rules, the CTU inevitably dealt with very high profile cases from the start. This led easily to confrontation with the Parliament within a relatively short period. The ruling in the "*Union-Level Organization*" Case against the Parliament in March 2012 sparked a crisis which caused all CTU members to resign. It had heard only five cases in total before the 2012 crisis.[38]

Indeed, the CTU took its constitutional powers seriously in the first cases and its bold rulings against the executive reflected judicial independence in Myanmar after a long time.[39] In its very first case of "*Chief Justice v. Ministry of Home Affairs*", the CTU held that conferring criminal jurisdiction to the sub-township officers was contrary to the Constitution because of an infringement of the role of judiciary.[40] In the second case of "*Dr. Aye Maung v. The Union,"* it held that the Ministers of National Races Affairs had equal status with the Ministers of Regions or States.[41] Upon the petition of the President to reconsider the ruling of the second case, the CTU refused to change its decision.[42] Thus, the CTU could rule effectively against the executive branch. However, when it ruled against the Parliament in the "*Union-Level Organizations"* case, the Parliament initiated a motion to impeach all nine tribunal members.

[38] Gabriela Marti, "The Role of the Constitutional Tribunal in Myanmar's Reform Process" Asian Journal of Comparative Law, 10 (2015) p.156
[39] Dominic J. Nardi, Jr., "How the Constitutional Tribunal's Jurisprudence Sparked a Crisis" (2017) p.178
[40] "*The Chief Justice of the Union (Applicant) v. Ministry of Home Affairs (Defendant)*" [Submission No.1/2011]; https://www.constitutionaltribunal.gov.mm/sites/default/files/judgments/pdf/2014/May/Precedents_1_2011Eng.pdf
[41] "*Dr. Aye Maung and 22 (Representatives of the Amyotha Hluttaw) v. The Republic of the Union of Myanmar*" [Submission No.2/2011]; https://www.constitutionaltribunal.gov.mm/sites/default/files/judgments/pdf/2014/May/Precedents_2_2011Eng.pdf
[42] Dominic J. Nardi, Jr., "How the Constitutional Tribunal's Jurisprudence Sparked a Crisis" (2017) p.178

In that case, CTU ruled that regarding the committees, commissions or organizations formed under each house of Parliament as 'union-level organizations' was not in conformity with the Constitution.[43] The effect of the ruling was likely to limit the oversight power of Legislature. In response, 301 *Pyithu Hluttaw* representatives initiated a motion to impeach the CTU members with the reasons of 'breach of the constitution' and 'insufficient discharge of duties,' a very ambiguous clause.[44][45] All members resigned before the conclusion of the impeachment process on 6 September 2012.[46] After that 2012 crisis, CTU was recomposed with new members, and in 2013 the Parliament amended CTU Law to impose more limitations (such as the reporting requirement) which could bring more political influence over the CTU.

It is obvious that firstly, the short, fixed term limit, the appointment system and the reporting system bolster the intervention of the executive and legislature and weaken the independence of the CTU. Secondly, the limited scope of jurisdiction and the narrow standing rules fade the legitimacy and popularity of the Tribunal. Thirdly, based on the 2012 crisis, the vagueness of the impeachment criteria can create the politically motivated initiatives which can cause the threat of being dismissed for political reasons.[47]

[43] "*The President of the Union v. The Speakers of the Pyidaungsu Hluttaw, the Pyithu Hluttaw and the Amyotha Hluttaw*" [Submission No.1/2012]; https://www.constitutionaltribunal.gov.mm/sites/default/files/judgments/pdf/2014/Mar/Reference-01_2012.pdf

[44] Section 334 of the 2008 Constitution

[45] Andrew Harding, "The Short but Turbulent History of Myanmar's Constitutional Tribunal" (2018) p.283

[46] Dominic J. Nardi, Jr., "How the Constitutional Tribunal's Jurisprudence Sparked a Crisis" (2017) pp.180-181

[47] Ibid., p.176

2.3 Debates about abolishing Constitutional Tribunal of the Union in Myanmar

After the 2012 crisis, the currently ruling party, the **National League for Democracy (NLD)** proposed amendments to eliminate the provisions relating to CTU (Ss 320-336) completely from the Constitution and suggested handing over its duties to SC.[48]

Since early 2019, the Myanmar Parliament agreed to form a "Constitutional Amendment Joint Committee (CAJC)" with the aim to amend the 2008 Constitution before the next election of 2020. Although all parties agreed on abolishing the "Courts-Martial" system, the existence of CTU is a divisive issue. Among thousands of proposed amendments by numerous political parties. The **Arakan National Party (ANP)** proposed to remove section 46 (under Chapter 1 of Basic Principles of the Union: Establishment of CTU) completely and together with the **National United Democratic Party (NUDP)** strongly proposed to remove all CTU-related provisions. At the same time the **Shan National League of Democracy (SNLD)** and **Mon National Party (MNP)** proposed to retain it with small changes,[49] reflecting that they still believe in the crucial role of CTU in the future federal union. The interesting thing is that the **NLD** proposed the revision of section 294 to make the SC the only highest judicial organ, by excluding the original words of "without affecting the powers of CTU and the Courts-Martial."[50]

One interesting thing to note about current Myanmar constitutional amendment process is that although various parties proposed a better system for appointment, selection of

[48] National League for Democracy, "Analysis and Recommendations for 2008 Constitution" (IDEA) p.18

[49] For instance, SNLD described "Union Constitutional Court" instead of the original term "Constitutional Tribunal of the Union."

[50] Pyidaungsu Hluttaw Office, "Analysis and recommendations for 2008 Constitution", July 15, 2019; https://pyidaungsu.hluttaw.mm/uploads/pdf/post/lne940_Constitution%20Committee%20final.pdf [**Section 294 (original)** stated that 'in the Union, there shall be a Supreme Court of the Union. *Without affecting the powers of the Constitutional Tribunal and the Courts-Martial*, the Supreme Court of the Union is the highest Court of the Union.']

chairperson and term-limits, there have not been any proposal about "constitutional complaints by individuals."

Here the question arises why those political parties proposed abolishing CTU and which factors made it become a weak institution.

First: **family of legal system**: the existence of a separate CTU is unusual for Myanmar's common law legal system. [51] If the CTU were abolished and its duties transferred to SC, it would make Myanmar belong more firmly to the family of Common Law countries.[52]

Since under the current constitution the Supreme Court (SC) already has a (limited) jurisdiction of writs relating to the protection of fundamental rights, the CTU was not given functions to protect these rights. Thus, it is not surprising that the public did not protect CTU members during its 2012 crisis.[53]

Second, **Caseload**: The CTU has a narrow jurisdictional scope under 2008 Constitution and the attempt to expand its jurisdiction by proposing to adopt *abstract* review in 2011 was rejected.[54] Unlike other constitutional courts, Myanmar CTU had received 14 cases in total between 2011 and 2016.[55] After it was recomposed with new members in February 2013 after the crisis, it did not decide any single case until September 2014.[56] Since it is not busy -- like

[51] The New Light of Myanmar, (February 10, 2013); https://www.burmalibrary.org/docsMA2013/NLM2013-02-10.pdf
[52] Dominic J. Nardi, Jr., "Is Constitutional Review Moving to a New Home in Myanmar?" (June 11, 2014); http://www.iconnectblog.com/2014/06/is-constitutional-review-moving-to-a-new-home-in-myanmar/
[53] Andrew Harding, "The Short but Turbulent History of Myanmar's Constitutional Tribunal" (2018) p.277
[54] Ibid., p.278
[55] Daw Hla Myo Nwe, "Development in Myanmar Constitutional Law: The Year 2016 in Review" International Journal of Constitutional Law, (December 17, 2017); http://www.iconnectblog.com/2017/12/developments-in-myanmar-constitutional-law-the-year-2016-in-review/
[56] Gabriela Marti, "The Role of the Constitutional Tribunal in Myanmar's Reform Process" (2015), p.158

Korean Constitution Court which normally receives thousands of petitions -- the CTU appears to be a waste of government resources..

Third, **Judicial Independence and Credibility**: The CTU is neither protected from the influence of the political branches nor are its decisions respected.[57] Under 2013 Amendment to CTU Law, the CTU is further required to 'report about its functions, duties, performances to the appointing persons such as the President and the Speakers of two Houses respectively.'[58] In contrast, the SC judges are more impartial and more reliable; they can perform their duties without pressure from other branches until their age of retirement.

During the 2012 crisis most parliamentarians viewed CTU as an enemy or destroyer of the parliamentary democracy and one parliamentarian expressed his distrust upon the CTU, by commenting that Parliamentary work for the interest of the public were hindered by the decision of the Tribunal.[59] After the 2012 crisis, it may be difficult for the CTU members to decide against any parliamentary legislation since they can be removed at any time with the motion of impeachment. It is natural that they will decide the case in favor of their appointing bodies.

By studying the benefits of having constitutional courts in South Korea and Indonesia, this paper will continue to suggest building an independent, active and credible Tribunal in the future of Myanmar, instead of abolishing it.

[57] Dominic J Nardi, Jr., "After Impeachment, a balancing act" (October 1, 2012); https://www.mmtimes.com/opinion/2013-after-impeachment-a-balancing-act.html
[58] Section 12(i) of CTU Law 2010 (2013 amended)
[59] Zar Zar Soe with AFP, "Tribunal Resigns to avoid impeachment" (September 10, 2012)

Chapter III

Lessons learned from the Constitutional Court of Indonesia

3.1 Overview of the Constitutional Court of Indonesia

3.1.1 Origin of the Constitutional Court of Indonesia

Although the Constitutional Court of the Republic of Indonesia was created in 2003 under the Fourth Amendment of the 1945 Constitution of Indonesia, the idea of judicial review by a separate court system is not very new to Indonesia.[60] Since independence in 1945, the inclusion of centralized review system was debated among the constitution drafters. The Constituent Assembly was disbanded in July 1959 by President Soekarno (1959-1966) who subjugated the judiciary. Under the Soeharto authoritarian regime (1966-1998) the government controlled the judiciary and there was no institution to restrain the arbitrary acts or the cruelest human-rights violation of the government in Indonesian history.

After Soeharto's resignation in 1998 due to the massive violence and the civil war, Indonesia transformed to democracy, which resulted in strong emphasis on human-rights recognition. The politicians during the Reform-era gave priority to human rights guarantees, consolidation of democracy, flourishment of free and fair election and peaceful settlement mechanism between governmental institutions. The proposal that a new constitutional court was the most suitable platform to carry out above-mentioned functions was finally adopted by political reformers. The reformers were inspired by a foreign study tour.[61] During the reform period, the Indonesian Constitutional Court (CC) was an important player because the decisions upon the electoral disputes and individual constitutional complaints provided evidence of

[60] Simon Butt, "Indonesia's Constitutional Court and Indonesia's Electoral Systems" in Albert H. Y. Chen and Andrew Harding (ed), *Constitutional Courts in Asia – A Comparative Perspective,* (Cambridge University Press, 2018) p.216

[61] Simon Butt, "The Constitutional Court and Democracy in Indonesia" (2015) pp.17-21

success and these decisions impressed the international community. Currently, Indonesian CC has been regarded as successful not only by local standards but also by world standards.[62]

3.1.2 Composition of the Constitutional Court of Indonesia

The Indonesian CC is functioning under the 1945 Constitution of the Republic of Indonesia and the Law on the Constitutional Court (2003). It is composed of nine persons, three each nominated by the President, by the Supreme Court and by the People's Representative Council (DPR).[63] The Chairperson and the Vice-Chairperson are elected by and from the members themselves.[64] The mandate of the members is five years and they can be re-elected for only one subsequent term.[65]

3.1.3 Powers and Functions of the Constitutional Court of Indonesia

According to Article 24C of the 1945 Constitution, the Indonesian CC has the authority to try the cases at the first or final level and can make the final decision in the following cases:

(1) Reviewing laws against the constitution,

(2) Determining competence disputes between state organs,

(3) Dissolution of a political party,

(4) Deciding disputes over the result of general elections.[66]

Moreover, it has the authority to decide upon the impeachment motion by DPR against the President or the Vice-President.[67]

[62] Simon Butt, "Indonesia's Constitutional Court and Indonesia's Electoral Systems" (2018) p.222
[63] Article 24C (3) of the Constitution of Indonesia (1945) and Articles 4(1) & 18(1) of the Law on the Constitutional Court (2003)
[64] Article 24C (4) of the Constitution of Indonesia (1945)
[65] Article 22 of the Law on the Constitutional Court (2003)
[66] Article 24C (1) of the Constitution of Indonesia (1945) and Article 10(1) of the Law on the Constitutional Court (2003)
[67] Article 24C (2) of the Constitution of Indonesia (1945) and Article 10(2) of the Law on the Constitutional Court (2003)

Until now, political party dissolution and impeachment cases have never been tried before it,[68] although some observers argued that Indonesian CC was created due to the absence of a formal constitutional conflict resolution mechanism (a gap that threatened to undermine democracy especially after the impeachment of President Wahid).[69] The jurisdictions reflecting the court's triumph and popularity are *constitutional review of statutes and electoral cases*.

3.2 Decided cases reflecting the triumph of the Court

The high number of statutory review cases is due to the huge amount of old laws passed under the long authoritarian regime and the increasing recognition of human rights standards. The Court expanded its jurisdiction by invalidating Article 50 of Constitutional Court Law which restricted its jurisdiction to reviewing statutes enacted only after 1999. This invalidation opened the gate for the Court to reform the older authoritative laws in accordance with human rights standards.[70]

Likewise, the reason for electoral cases is that Indonesia has held numerous elections, such as for the President or Vice-President, for national, provincial, city and county legislatures and for the national regional representative council.[71] Some early decisions which reflect the triumph of the Court will be discussed in the following.

3.2.1 Constitutional Complaints

Because of serious human rights violations during the authoritarian regime, the drafters included an entire chapter on 'Human Rights'.[72] If a constitutional right is violated by any

[68] Simon Butt, "Indonesia's Constitutional Court and Indonesia's Electoral Systems" (2018), p.221
[69] Marcus Mietzner, "Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court," Journal of East Asian Studies 10 (2010), pp.401-403
[70] Simon Butt and Tim Lindsey, "The Constitution of Indonesia – A Contextual Analysis: The Constitutional Court and Its Jurisdiction", pp.109-111
[71] Article 22E (2) of the Constitution of Indonesia (1945)
[72] Petra Stockmann, "The New Indonesian Constitutional Court: A study into its beginnings and first years of work," Hanns Seidel Foundation Indonesia, (2007) p.22

statute, standing is granted to individual Indonesian citizens, representatives of traditional communities, public or private entities and state institutions.[73] The application process is free of charge and the judgments are made as quick as possible.[74] In practice, individual accessibility really enhances the reputation and efficiency of the Court.[75]

Moreover, the Court expanded its jurisdiction since its early years by allowing the application of the complaints even if the applicants' constitutional rights were not directly infringed by the disputed laws. In *Electricity Law case,*[76] over 20 applicants challenged the constitutionality of the law allowing for privatization of the electricity sector because under Article 33(3) of the Constitution, electricity sector must be under governmental control due to its strategic importance. The Court held that the application was admissible because the challenged law related to the applicant's general welfare.[77] However, the government implemented its original privatization plan in an alternative way by passing the administrative measures, rather than the statute, upon which the Court had no jurisdiction.[78] So, while the Court's decision did not block the government's plans, it expanded the basis of standing for individuals before the Court.

The Court frequently made bold verdicts upholding human rights standards, without yielding to political pressure. Firstly, in the *Former Communist Passive Voting Rights* case,[79] the petitioners challenged against Article 60g of the Election Law (2003) which banned former Communist Party members from participating in elections. The Court held that the law had

[73] Article 51(1) of the Law on the Constitutional Court (2003)
[74] Simon Butt, "The Constitutional Court and Democracy in Indonesia" (2015), p.59
[75] Gabriela Marti, "The Role of the Constitutional Tribunal in Myanmar's Reform Process" (2015) p.171
[76] Constitutional Court Decision 001-021-022/ PUU-I/ 2003
[77] Simon Butt, "The Constitutional Court and Democracy in Indonesia" (2015), pp.51-52
[78] Simon Butt and Tim Lindsey, "The Constitution of Indonesia – A Contextual Analysis: The Constitutional Court and Its Jurisdiction", pp.127-128
[79] Constitutional Court Decision 011-017/PUU-I/2003 [PKI case]

discriminatory effect and it violated the equal standing before the law.[80] Similarly, in the famous *Bali Bombings* case,[81] the convicted persons filed constitutional complaints against the retroactive application of a statute enacted after the bombings. The Court held that sentencing by such retroactive statute was unconstitutional.[82] Albeit receiving cheerful comments from human rights advocates upon these decisions, the Court faced enormous pressure and disagreement from political branches. It endured these situations well despite its young age.

3.2.2 Electoral disputes

The Court's workload is dominated by electoral disputes. Since Indonesia has numerous elections, the Court, for instance, had heard over 900 electoral disputes only in the 2014 legislative elections. The petition rate has been gradually increasing one election after another. The Court needs to handle numerous cases in a short timeframe, as the applications must be lodged within a tight period of 72 hours after the announcement of the election result. The Court limits the deadline for its own sake to complete the tasks on time and it endeavors its best by working until night.[83] While dealing with these disputes, the Court not only considers the evidence submitted before it but also finds the necessary witnesses and further evidence by its own, including calling experts in electoral law.[84]

Jurisdiction for Regional Heads Elections *(Pemilukada)* accounts for the major part of the work amongst electoral cases. *Pemilukada* was originally handled by ordinary courts. The transfer of jurisdiction originated in the *Depok* case[85] concerning mayoral elections in Depok,

[80] Petra Stockmann, "The New Indonesian Constitutional Court: A study into its beginnings and first years of work," (2007) pp.35-37
[81] Constitutional Court Decision 013/PUU-I/2003
[82] Tom Ginsburg, "Constitutional Courts in East Asia" (2014) p.59
[83] Simon Butt, "Indonesia's Constitutional Court and Indonesia's Electoral Systems" (2018), pp.219-220
[84] Simon Butt, "The Constitutional Court and Democracy in Indonesia" (2015) pp.279-280
[85] *Depok case* (2005) (Bandung High Court) 01/PILKADA/2005 PT.Bdg & *Depok Appeal* (2005) (Supreme Court) PK/PILKADA/2005

West Java. The West Java High Court was criticized for lack of diligence in fact-finding and reaching a verdict based on mere presumption. This pushed such *Pemilukada* jurisdiction to transfer to Constitutional Court because of its successful record of handling disputes in 2004 elections. Normally, the Court takes a mathematical approach by checking the election commission counts; and if finding errors, it replaces the original count with its own findings.[86] So, it is obvious that the Court is trying hard to ensure the free and fair elections by resolving the disputes impartially and professionally. If necessary, the Court orders the election commissions to recount or revote. In *Nias application* case,[87] when the Court found massive and systematic electoral violations, it ordered a re-election in South Nias. The Court remarked that if this electoral flaw was allowed, Indonesia would not be able to safeguard democracy.[88]

The Court performs impartially and independently from the political influence even in presidential elections.[89] In the *2009 Presidential Election,*[90] the losing candidates of the first-round challenged the result by arguing that there was (1) international interference with election administration; (2) errors in votes-counting, (3) improperly combination of polling stations; and (4) voting more than once. The Court observed that the first two arguments and the final one were only suspicion without sound evidence, while the third argument of combining polling stations was in line with the 2008 General Election Law.[91]

Although certain decisions of CC raise controversy and cause dissatisfaction, the electoral applicants respect its diligence, carefulness, impartiality and professionality. It is

[86] Simon Butt, "The Constitutional Court and Democracy in Indonesia" (2015), pp.254-256
[87] Constitutional Court Decision 28-65-70-82-84-89/PHPU.C-VII/2009
[88] Simon Butt, "The Constitutional Court and Democracy in Indonesia" (2015), pp.273-274
[89] Indonesian Presidents and Vice-Presidents are directly elected as a pair.
[90] Constitutional Court Decision 108-109/PHPU.B-VII/2009 [Kalla-Wiranto and Soekarnoputri-Subianto application (2009)]
[91] Simon Butt, "The Constitutional Court and Democracy in Indonesia" (2015), pp.274-275

undeniable that the Court has strengthened the new democratic electoral system since its establishment.

3.3 Interim Conclusion

The Indonesian Constitutional Court is a really busy institution. Under the authoritarian regime, the Indonesian judiciary was incompetent, corrupt and heavily dependent on the government. However, the CC could emerge from these peculiar circumstances and it could stand as an independent, competent and impartial institution in the eyes of the government and the public.[92] Through its election cases and constitutional review on human rights grounds the Court has become an institution enhancing the rule of law and democracy in Indonesia. It raised *its status by informing the public about its work and uploading its decisions to its website* and through cooperation with the media, NGOs and CSOs. The rules of standing for individuals and legal entities creates strong legitimacy through support from the public.[93]

[92] Simon Butt, "Indonesia's Constitutional Court and Indonesia's Electoral Systems" (2018) pp.216-217

[93] Gabriela Marti, "The Role of the Constitutional Tribunal in Myanmar's Reform Process" (2015) p.173

Chapter IV

Lessons learned from the Constitutional Court of South Korea

4.1 Overview of the Constitutional Court of South Korea

4.1.1 Origin of the Constitutional Court of South Korea

The Constitutional Court of the Republic of Korea (CC) was established in 1989 under the 1987 democratic Constitution of the Sixth Republic. Judicial review is not a new idea for Korea because reviewing power had been practiced since the First Republic either by the Constitutional Committee, Court or Supreme Court (SC). But these institutions could not operate effectively because of the strong presidential regime so that unfortunately they were used as mere rubber-stamps for government actions.[94] Due to massive social movement for democratization after the last military-dictator, Chan Doo-hwan, was ousted, the broad scope of fundamental rights was emphatically inserted in new Constitution (1987).[95]

Although the drafters did not originally intend to create a separate constitutional court, they emphasized the need of strong judicial review to limit the government and to enhance individual rights.[96] Later, after they agreed upon the inclusion of individual complaints jurisdiction, they assumed that it was not suitable for the Supreme Court to handle this function and finally agreed to create a separate constitutional court.[97] Since judicial review under the former Republics could not perform effectively upon the strong executive, most observers had not paid much attention to the CC under 1987 reforms; yet the CC has intervened effectively

[94] Gavin Healy, "Judicial Activism in the New Constitutional Court of Korea," 14 Columbia Journal of Asian Law 213 (2000) p.213
[95] Ibid., p.219
[96] Chaihark Hahm, "Constitutional Court of Korea – Guardian of the Constitution or Mouthpiece of the Government?" in Albert H. Y. Chen and Andrew Harding (ed), *Constitutional Courts in Asia – A Comparative Perspective*, (Cambridge University Press, 2018) pp.142-143
[97] Ibid.

in sensitive political issues and handled the individual citizens' constitutional complaints actively. It is now obvious that Korean CC has been playing a significant role in Korean politics and society.[98]

4.1.2 Composition of the Constitutional Court of South Korea

The Korean Constitutional Court is currently running under the 1987 Constitution and the Constitutional Court Act (1988). It is composed of nine justices, appointed by the President with the consent of the National Assembly.[99] Among them, three are elected by the National Assembly and three are nominated by the Chief Justice of the Supreme Court.[100] The President of the Court is appointed by the President with the consent of the National Assembly.[101] The term of office is six years and it can be renewed.[102] The retirement age is seventy years. Judicial independence is guaranteed under Article 103 of the Constitution stipulating that judges can rule independently according to their conscience and in conformity with the Constitution and related statutes.[103]

4.1.3 Powers and Functions of the Constitutional Court of South Korea

Korean Constitutional Court has the jurisdictions upon the following matters:

1. Constitutionality of a law upon the request of the courts;
2. Impeachment;
3. Dissolution of a political party;
4. Competence disputes between state organs;

[98] Tom Ginsburg, "Constitutional Courts in East Asia" (2014) pp.53-56
[99] Article 111(2) of the Constitution of Korea (1987) & Article 3 of the Korean Constitutional Court Act (1988)
[100] Article 111(3) of the Constitution of Korea (1987) & Article 6 of the Korean Constitutional Court Act (1988)
[101] Article 111(4) of the Constitution of Korea (1987)
[102] Article 112(1) of the Constitution of Korea (1987) & Article 7 of the Korean Constitutional Court Act (1988)
[103] Article 103 of the Constitution of Korea (1987) & Article 4 of the Korean Constitutional Court Act (1988)

5. Constitutional complaints.[104]

Under 2017 December Statistics, there were only two cases relating to dissolution of political parties, two impeachments and 102 competence cases. The vast majority of cases (32,171 out of 33,217) was constitutional complaints filed by individuals and it was followed by statutory review cases whose number reached up to 940.[105]

4.2 Decided cases reflecting the triumph and the stability of the Court

4.2.1 Triumph of the Court

The Korean Court's motto states that "*Constitutional Court walks hand in hand with the people, and vows to heed their voices and keep channels of communication wide open*."[106] There are two grounds for constitutional complaints: firstly, if the constitutional rights are infringed by the exercise or non-exercise of government; and secondly, if the individual's request to review on the constitutionality of statutes in the ordinary courts is denied.[107] Direct citizen petition makes it more independent and more active.[108]

When the Court was established, the public did not know much about its functions and even those who knew did not think it would perform successfully. But the Court made a 'successful marketing strategy', including promoting public awareness about its functions and the careful dismissal of the applications by providing sound reasons.[109] The most striking case among the public is '*Same-Surname-Same-Origin Marriage Ban*" case,[110] known as the 'pursuit of happiness case.' In Korean tradition, the couples who shared the same surname

[104] Article 111(2) of the Constitution of Korea (1987) & Article 2 of the Korean Constitutional Court Act (1988)
[105] Constitutional Court of Korea, "Thirty Years of the Constitutional Court of Korea" Government Publications (2018) p.710
[106] Ibid., pp.58-59
[107] Article 68 of the Constitutional Court Act of Korea (1988)
[108] Gavin Healy, "Judicial Activism in the New Constitutional Court of Korea," (2000) p.220
[109] Chaihark Hahm, "Constitutional Court of Korea – Guardian of the Constitution or Mouthpiece of the Government?" (2018) p.146
[110] 9-2 KCCR 1, 95 Hun-Ka 6 et al., July 16, 1997

were not allowed to legally marry under Article 809 Section 1 of the Civil Act. As a result, their marriages were not legitimate, and they faced the difficulties in schooling of their children. When petitioners challenged the rejection of their marriage registration, the Court held that the provision violated the right to pursue happiness, freedom of marriage and human dignity guaranteed by the Constitution. After the decision, around two hundred thousand couples' *de facto* marriages obtained legal marital status.[111] This decision has a dramatic positive effect upon the lives of individuals.

Moreover, among jurisdictions of political nature such as impeachment, political party dissolution and competence disputes, the greatest political controversy the Court dealt was presidential impeachment: Roh Moo-hyun (2004) and Park Geun-hye (2017). The impeachment power makes the Court able to restrain the abuse of power by government and it reflects the notion that no one is above the law.[112]

The reasons for the motion of President Roh included the breach of the duty of neutrality, an act he committed by supporting a certain political party in a national election and by defying the National Election Commission's ruling.[113] The Court refused to remove President Roh from office via impeachment, as it would have been a disproportionately harsh sanction for his actions. At the same time the Court stipulated more detailed criteria for the next impeachment cases, including that the violation must be grave enough to impeach and mere maladministration or policy failure was not sufficient for impeachment because the Korean President is directly elected by the public through a national referendum.[114] Albeit

[111] Constitutional Court of Korea, "Thirty Years of the Constitutional Court of Korea" (2018) pp.403-406
[112] Gavin Healy, "Judicial Activism in the New Constitutional Court of Korea," (2000) p.219
[113] Constitutional Court of Korea, "Thirty Years of the Constitutional Court of Korea" (2018) pp. 283-284
[114] Chaihark Hahm, "Constitutional Court of Korea – Guardian of the Constitution or Mouthpiece of the Government?" (2018) p.158

facing political and social pressures from both pro-impeachment and anti-impeachment sides, the Court emerged as an impartial institution that acted smartly in accordance with the Constitution.[115] It may have helped that by the time the Court reached its decision the party supported by the President won a majority in parliament.

In 2016, President Park Guen-hye subjected to impeachment because she betrayed the public trust by abusing presidential powers to enrich her friend, through leaking national confidential documents, coercing corporations to donate funds for her friend's benefit and denying apologizing when questioned by legislature. Since Park's violation was unpardonable from the perspective of protecting the Constitution, it was grave enough to remove her from office.[116] Domestic and international observers appraised the Court's judgment upon President Park "as a victory of Korean democracy and as evidence of a system that is able to manage *a transfer of power in a peaceful and orderly manner*".[117]

The alleged presidents in both cases insisted that the petitions for impeachment adjudication and the trial processes were illegitimate. For example, there was only seven justices in handling of President Park's case because the terms of the president of the Court and another justice came to an end. However, the Court strongly rejected their arguments by claiming that its decisions were legitimate.[118] Indeed, impeachment cases can make the Court to raise its supremacy in constitutional matters if compared to other state organs.[119]

[115] Dongwook Cha, "The Role of the Korean Constitutional Court in the Democratization of South Korea" (2005 August), PhD. Dissertation, p.75
[116] Constitutional Court of Korea, "Thirty Years of the Constitutional Court of Korea" (2018) pp.283-286
[117] Chaihark Hahm, "Constitutional Court of Korea – Guardian of the Constitution or Mouthpiece of the Government?" (2018) p.161
[118] Constitutional Court of Korea, "Thirty Years of the Constitutional Court of Korea" (2018) p.285
[119] Chaihark Hahm, "Constitutional Court of Korea – Guardian of the Constitution or Mouthpiece of the Government?" (2018) p.159

4.2.2 Durability and Stability of the Court

Scholars *Epstein, Knight, and Shvetsova* suggested that;

> [T]he courts in newly born democracies would be better off avoiding decisions related to extremely sensitive political issues, while promoting their legitimacy and these courts need to avoid politically 'unsafe' cases and proceed rather to accumulate legitimacy until political turmoil disappears.[120]

In fact, the Korean Court has avoided unnecessary judicial intrusion into the prerogatives of the executive and legislature wisely.[121] For instance, in the '*acting prime-minister appointment*' case,[122] President Kim Dae-jung had faced difficulty in appointing Kim Jong-pil as prime-minister because of the majority of the opposition parties in Parliament. When the President appointed Kim Jong-pil as acting prime minister, this was challenged before CC by some parliamentarians. The CC had dismissed the challenge on the ground that only Parliament, not individual members, could request the question about the powers of Parliament. This dismissal indicated the Court's reluctance to get involved in highly-political issues and forced two parties negotiate a resolution to the dispute in an alternative peaceful way.[123] Dismissal, rather than upholding the case, was advantageous not only for the Court to maintain its longevity but also for the parties to find a solution through negotiation.

4.3 Interim Conclusion

The Korean Court has been able to maintain its stability by avoiding excessive overreach in its role and by gathering public support and a good reputation. It has demonstrated its legitimacy and judicial independence by handling the highly-political controversies,

[120] Lee Epstein, Jack Knight, and Olga Shvetsova, "The Role of Constitutional Courts in the Establishment and Maintenance of Democratic System of Government," Law & Society Review, Volume 35, No. 1 (2001), p.117-163
[121] Dongwook Cha, "The Role of the Korean Constitutional Court in the Democratization of South Korea" (2005) p.94
[122] CC 1998.7.14, 98 Hun-Ra 1
[123] Dongwook Cha, "The Role of the Korean Constitutional Court in the Democratization of South Korea" (2005) pp.113-116

including presidential impeachments as well as boldly reviewing legislation which was inconsistent with the democratic standards in accordance with the new Constitution.

Chapter V

Lessons for the Constitutional Tribunal of Myanmar

5.1 Why the Constitutional Tribunal of Myanmar should not be abolished?

A constitutional court is one of the essential institutions to uphold the rule of law, checks and balances, human rights protection, and ultimately, to promote the consolidation of democracy. Constitutional Courts in Indonesia and South Korea offer several good reasons in favor of strengthening the Constitutional Tribunal of Myanmar (CTU), rather than abolishing it.

Firstly, convincing the political branches and the public will be difficult for any Court in any new democracy in its early years.[124] The Indonesian and South Korean Courts had also struggled in their early years before they reached their 'Golden-era'. The CTU members resigned during 2012 crisis not because they breached the Constitution or they were incompetent to perform their duties, but because the Parliament was merely not satisfied with its decisions. As Andrew Harding said, "If anyone breached the Constitution in this crisis, it was actually Parliament rather than the CTU.[125]"

The Indonesian and South Korean Courts could smoothly lead the transition from authoritarian regimes in a peaceful way. They successfully handled human rights cases by reviewing the old authoritarian statutes or passing new laws in accordance with human rights standards; as well as politically sensitive cases, including presidential impeachment and electoral matters. As a consequence, they are viewed as active and reliable organizations not only in the eyes of the local people and political forces but also of the international community.

[124] Gabriela Marti, "The Role of the Constitutional Tribunal in Myanmar's Reform Process" (2015) p.176

[125] Andrew Harding, 'The Short but Turbulent History of Myanmar's Constitutional Tribunal' (2018) p.283

Therefore, there is concrete evidence that constitutional courts play an instrumental role in the democratic transition from the authoritarian rules by checking the use of governmental powers.

Secondly, concerning the question of legal family: the distinction between civil law and common law system is unimportant in respect of having Constitutional Court. Myanmar's legal system has many codes and statutes made by Parliament. With the reach of these statues expanding every day, there are conflicts in the legal system that call for legal reform.[126] A well-designed constitutional court could ensure the supremacy of the constitution and improve the overall consistency of the legal system.

Thirdly, the Myanmar Supreme Court has already been a very busy institution in dealing with original civil and criminal cases, appeal cases or revision cases, in performing court-administrative matters, and in exercising the supervision power upon the subordinate courts,[127] it also has the power to rule in constitutional disputes through writ jurisdictions. Only within a two-year period (2011 March – 2013 June), Supreme Court received 432 petitions for writs from citizens.[128] Here it is questionable whether Supreme Court has been able to deal these writ petitions effectively, whether it devotes the adequate time for dealing with these cases, and whether it is easy to bring the case before. These constitutional disputes overburden the Supreme Court. Thus it would be desirable to transfer them to the CTU because the CTU is composed with the constitutional law specialists who have expertise to deal these cases carefully.

[126] Nyo Nyo Thinn, "The Legal System in Myanmar and the Foreign Legal Assistance" (2006), pp.388, 401-403
[127] Sections 11-15 of the Union Judiciary Law (2010) Myanmar
[128] Dominic J. Nardi, Jr., "Is Constitutional Review Moving to a New Home in Myanmar?" (June 11, 2014)

Lastly, Myanmar legal scholars, including U Aung Lwin Oo, suggested that the role of CTU will be even more crucial if Myanmar people really want to establish Federal Union.[129] If Myanmar becomes from a quasi-federal state to a genuine federal state through ongoing constitutional reforms, a special court will be required to decide disputes between the federal government and regional governments, or among regional governments.

5.2 How to strengthen the Tribunal's longevity and triumph in the future?

Myanmar CTU should not be abolished: it should be reformed in order to make it an institution which is independent, competent and active. The strongest arguments in favor of abolition are the limited jurisdiction, the lack of citizen's right of standing, the small caseload and consequently, the lack of public support and the distrust from Parliament. Hence, reforms should address two contexts: *constitutional context* and *institutional context*.

5.2.1 Constitutional context

For the sake of improving its legitimacy, the Constitutional Court must firstly possess certain powers. This requires the amendment of the 2008 Constitution and CTU Law. The following, not being non-exhaustive list, are the selective guidelines to be applied.

First, for the promotion of the independence, autonomy and legitimacy of the Tribunal, the reporting requirement introduced in 2013 has to be abolished and the appointment process has to be revised. The present Tribunal member appointment is dominated by the political branches. As seen in the comparison, the judicial branch should be involved in selecting the members of the Tribunal.

[129] U Aung Lwin Oo, "Constitutional Tribunal of Future Federal Union" Constitutional Law Journal, Series III, (2018), p.62

Second, the condition that the appointers and the appointees are serving simultaneous terms makes the Tribunal more dependent upon the government. The terms of the members of the CTU have to be distanced in time from that of President and Parliament.

Third, the study on Indonesian and South Korean Courts also indicates that the extent of jurisdictions and accessibility must be broadened. The limited jurisdiction weakens the CTU as the little powers it has trigger open political confrontation. The CTU should be given the powers to deal with electoral complaints (like Indonesian CC) and particularly constitutional complaints by citizens. Giving these powers to the CTU would lighten the caseload of the Supreme Court. Also, this would allow the CTU to build the confidence among the political forces and build up public support for constitutional government.

Without expanding the right of standing before Tribunal, the fruits of the constitutional reform will not be reaped. In order to get public recognition and to become a trusted institution, individuals have to be granted direct access to the CTU. In fact, not only individuals but also legal entities such as NGOs, CSOs or other related institutions should be allowed to file petitions directly, because most Myanmar people lack legal knowledge and expertise required for bringing a case before a court. This proposal complements the already existing powers of the 'National Human Rights Commission' as an ombudsman to promote human rights.[130]

5.2.2 Institutional context

Besides having a wider scope of jurisdictions, the South Korean and Indonesian Courts struggled through the difficult circumstances wisely, holding the motto that '*they valued their success as well as their longevity'*. Strong public support helped the Indonesian CC in its early

[130] Myanmar National Human Rights Commission (MNHRC) was established in September 2011. Available at: [Myanmar National Human Rights Commission Official website http://mnhrc.org.mm/en/]

years to become active.[131] If the public stands on the side of the Tribunal, the political forces may not neglect even the unpopular decisions of the court; thus it will promote the longevity of the court,[132] and ultimately, the consolidation of constitutional democracy.

Therefore, firstly, in order to raise public awareness, the CTU needs to *disseminate information about its role, functions, and decision-making*. "State institutions and citizens must have wide knowledge about the Tribunal and how to access it in their pursuit of Justice."[133] My personal experience reflected that even the regular law student does not know the role and functions of Tribunal in Myanmar. Hence it should promote public awareness on the internet by uploading its decisions or by broadcasting its activities.

Secondly, it should modernize the internal court-system: both in terms of capacity and facility. The CTU should create an e-Court (electronic filing) system: Myanmar is a large country and the people from peripheral areas have limited access to the capital where the CTU is based. This system should not be complex, and the procedure should be publicized by the media support.

In regard of capacity, for the sake of sustainable institutional strength, it should publish more books, journals or articles,[134] initiate research project, open access for the university students to visit and study its functions.[135] The Tribunal members should participate actively in international conferences in order to learn more from valuable foreign experiences.

[131] Gabriela Marti, "The Role of the Constitutional Tribunal in Myanmar's Reform Process" (2015) p.175
[132] Ibid., p.178
[133] Daw Hla Myo Nwe, "Development in Myanmar Constitutional Law: The Year 2016 in Review" (2017)
[134] According to statistics from the official website of the Constitutional Tribunal of the Union (CTU), by 2020 March, there are only four books, five journals and short articles published by the CTU Research group. https://www.constitutionaltribunal.gov.mm/en/content/publication
[135] 'The South Korean CC since 1998 has provided a tour program for students, the public, and foreigners. Moreover, the justices and the staffs of the court visit schools in remote areas for lecture program on the Constitution and the constitutional adjudication system. It performs enthusiastically to

To sum up, based on lessons learned from the Indonesian and South Korean Courts, the Myanmar CTU must build up its legitimacy first to achieve long-term success. The constitutional amendment must be taken first. And it also requires the CTU to promote its institutional context and all stakeholders must cooperate with best efforts. As a result, the future CTU will stand as an institution being popular among the public and respected by the political forces. Ultimately, it will gain domestic and international recognition for its role in consolidating Myanmar's democracy.

give the legal knowledge for the public and to promote its image among them.' Constitutional Court of Korea, "Thirty Years of the Constitutional Court of Korea" (2018), p.134

Conclusion

The thesis observes the supportive role of the constitutional courts for the consolidation of democracy in former authoritative nations of Indonesia, South Korea and Myanmar at a time when the Myanmar Tribunal is facing a difficult political situation.

The comparative analysis focused on how the Indonesian and South Korean Courts built their legitimacy and public support within the concrete constitutional framework from the early years. Not only were they able to exercise their broad constitutional jurisdictions wisely (particularly in political cases) but also their members put more efforts in handling the cases (especially electoral cases in Indonesia and individual complaints in South Korea). They are *not merely political resolution forums* but also *human-rights promoters*.

The main lessons learned are *to build up constitutional context firmly and to strengthen their efforts for institutional solidification*. Since Myanmar Tribunal was too bold in its early decisions against the political forces *before building up its legitimacy first*, it had faced a crisis in 2012. Due to the distrust of Parliament and the lack of public support, its survival in the future is in jeopardy. Therefore, the first step towards is to reform the constitutional context for widening the jurisdictional scope, particularly openness for individual complaints. For such a reform, it is necessary to convince the political forces regarding the importance of the role of constitutional courts for consolidating constitutional democracy.

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