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# FINDING JUSTICE SCALIA IN BURMA: CONSTITUTIONAL INTERPRETATION AND THE IMPEACHMENT OF MYANMAR'S CONSTITUTIONAL TRIBUNAL

Dominic J. Nardi, Jr.<sup>†</sup>

*Abstract:* While the comparative courts literature has yielded valuable insights into confrontations between political elites and judges, we still know relatively little about if and how jurisprudential methodology affects the ability of constitutional courts to survive such crises. How does the choice between originalism versus living constitutionalism affect a court's relationship with the other branches of government? Do political elites tend to be more hostile towards certain methods of interpretation?

The 2012 impeachment of Myanmar's Constitutional Tribunal presents an interesting example of the interplay between jurisprudence and politics. After fifty years of military rule, Myanmar's 2008 Constitution produced a new civilian government that appeared committed to political reform. However, when the Tribunal ruled that legislative committees did not have constitutional status, the legislature impeached all nine members, forcing them to resign. Less than two years after it was created, the Constitutional Tribunal was essentially defunct. This article argues that the Constitutional Tribunal's approach towards constitutional interpretation did not ameliorate—and might have exacerbated—the crisis. Using a textualist or originalist methodology, the Tribunal struck down national legislation in four out of the five cases it heard. However, the Tribunal's reasoning did not balance the legislature's interests, much less account for the dramatic political reforms. The Tribunal also never provided a defense to its constitutional review power, and many legislators feared that the Tribunal was usurping their newfound power. Had the Tribunal adopted a more flexible approach—such as proportionality or living constitutionalism—it might have soothed the legislature's fears while still reaching similar policy outcomes.

## I. INTRODUCTION

While there has been considerable research on confrontations between political elites and judges,<sup>1</sup> we still know relatively little about if and how jurisprudential methodology affects the ability of constitutional courts to survive such crises. How does the choice between originalism versus living constitutionalism affect a court's relationship with the other branches of government? Do political elites tend to be more hostile towards certain

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<sup>1</sup> See, e.g., Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 L. & SOC. REV. 87 (1996).



methods of interpretation? Much of the judicial politics literature implicitly assumes that political elites care largely, perhaps even exclusively, about the policy outcomes of decisions and pay little attention to the way in which that outcome is reached.<sup>2</sup> However, if, as many judges claim, the chosen method of constitutional interpretation helps determine a particular outcome,<sup>3</sup> then the two are inextricably linked. The method of interpretation might also frame how political elites and the public at large view the court's decision, as well as influence the court's ability to avoid charges of judicial activism.

This article looks at the jurisprudence of the Constitutional Tribunal of Myanmar (Burma)<sup>4</sup> before the impeachment of its members in August 2012. At first, Myanmar might appear to be an odd choice for an article about constitutional interpretation. Its 2008 Constitution has been heavily criticized<sup>5</sup> and the country is still in the early stages of a fragile political transition.<sup>6</sup> However, despite these inauspicious beginnings, the Constitutional Tribunal members soon issued several rulings declaring government actions unconstitutional.<sup>7</sup> Through its jurisprudence, this article argues that the Tribunal developed a consistent—if not explicit—textualist approach to constitutional interpretation. Moreover, the Tribunal's approach to interpretation seems to have exacerbated the response of the Legislature to adverse decisions.

Part II of this article begins by reviewing the main theories of constitutional interpretation and discussing the role of constitutional ambiguity more broadly. Part III summarizes Myanmar's history with constitutional review, as well as key provisions of the 2008 Constitution. Next, Part IV focuses on the structure and powers of the Constitutional

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<sup>2</sup> This is particularly true in the strategic institutionalist literature, which models the relationship between the judiciary and executive branch. *See infra* note 53.

<sup>3</sup> *See infra* note 24.

<sup>4</sup> In 1988, Myanmar's government changed the official English-language name of the country from "Burma" to "Myanmar." Most countries, as well as the United Nations, use "Myanmar." However, some Burmese pro-democracy activists and foreign governments still call the country "Burma." *See generally* Lowell Dittmer, *Burma vs. Myanmar: What's in a Name?* 48 *ASIAN SURV.* 885, 885 (2008). In this article, the term "Myanmar" is used not to indicate political sympathies, but rather to remain consistent with the name of the country as written in the 2008 Constitution (*Pyihtaungsu Thamada Myanmar Naingngandaw* or "Republic of the Union of Myanmar"). THE CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, May 29, 2008, ch. I, § 2 (Myan.).

<sup>5</sup> *See, e.g.,* David C. Williams, *Lessons of Experience in the Enterprise of Constitutional Design: Constitutionalism Before Constitutions: Burma's Struggle to Build a New Order*, 87 *TEX. L. REV.* 1657 (2009); YASH GHAI, *THE 2008 MYANMAR CONSTITUTION: ANALYSIS AND ASSESSMENT* (2008), available at [http://www.burmalibrary.org/docs6/2008\\_Myanmar\\_constitution--analysis\\_and\\_assessment-Yash\\_Ghai.pdf](http://www.burmalibrary.org/docs6/2008_Myanmar_constitution--analysis_and_assessment-Yash_Ghai.pdf).

<sup>6</sup> *See generally* Lee Jones, *The Political Economy of Myanmar's Transition*, 44 *J. OF CONTEMP. ASIA* 144 (2014).

<sup>7</sup> *See, e.g.,* *The Chief Justice of the Union v. Ministry of Home Affairs*, [2011] No. 1/2011 (C.T.) 23 (Myan.), as well as other cases discussed in Section IV.C of this article.

Tribunal and analyzes each of its five decisions. Part V uses this analysis to draw broader conclusions as to the part that the Tribunal's jurisprudence might have played in the August 2012 impeachment crisis. Part VI concludes with thoughts on potential amendments for the 2008 Constitution that would set a clear standard of constitutional interpretation.

## II. CONSTITUTIONAL INTERPRETATION

This section provides a theoretical framework for understanding constitutional interpretation. First, it discusses the causes of constitutional ambiguity and the need for interpretation. Next, it discusses several of the most important jurisprudential approaches to constitutional interpretation, including textualism, originalism, living constitutionalism, and proportionality. While there has been little research into the interplay between interpretative methodologies and political behavior, this section concludes by arguing that theories of constitutional interpretation can in fact influence judicial decision-making.

### A. *The Role of Constitutional Ambiguity*

While lawyers value clarity and certainty in the law, constitutional drafters frequently leave key language ambiguous, sometimes deliberately. The tradeoff between precise rules and vague standards in constitutions can be characterized as “implicitly also a choice between legislative and judicial rulemaking.”<sup>8</sup> Drafters can either write clear provisions that require little interpretation, such as a strict numerical threshold, or vague standards, such as “reasonableness,” that must be interpreted by judges. According to Isaac Ehrlich and Richard A. Posner's logic, precise constitutional rules represent an ex ante attempt by constitutional drafters to anticipate and legislate for certain types of legal disputes, whereas standards allow courts to apply the constitution ex post facto.<sup>9</sup>

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<sup>8</sup> Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. OF LEGAL STUD. 257, 261 (1974).

<sup>9</sup> *See id.* at 273-74. The difference between rules and standards can be overstated. Judicial precedent and stare decisis help lawyers predict how courts will apply standards to particular facts. In fact, over time, the body of case law can take the form of precise rules. *See* Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992). Nevertheless, as political scientists Jeffrey A. Segal and Harold J. Spaeth demonstrate, judicial precedent does not seem to “bind” judges, especially when it is so easy for lawyers to distinguish one fact pattern from another. Jeffrey A. Segal & Harold H. Spaeth, *The Influence of Stare Decisis on the Votes United States Supreme Court Justices*, 40 AM. J. OF POL. SCI. 971 (1996).

Ehrlich and Posner's argument is based upon the assumption that precision entails costs.<sup>10</sup> A certain amount of flexibility is often necessary in order to ensure that the application of the constitution furthers the goals of the constitutional drafters. Excessive precision might lead to over-deterrence or under-deterrence of regulated political behavior because the rule cannot properly prescribe a threshold that correctly anticipates the decision-making process of political elites.<sup>11</sup> Constitutional drafters foreseeably cannot regulate all eventualities with precision due to the enormous variety of possible political behaviors and political actors.<sup>12</sup> In extreme cases, excessive precision could lead courts to perverse outcomes or arbitrary decisions, as they try to apply a constitutional rule uniformly, overlooking the differing incentives of different classes of political actors.

Precision also risks confining the relevance of a constitutional provision to a certain time and place. For example, eleven of the seventy-eight articles of Germany's 1871 Constitution detailed regulation of the railroad and telegraph systems, but these systems are no longer pressing concerns in the early 21st century.<sup>13</sup> By contrast, the vagueness of the U.S. Constitution's Fourth Amendment prohibition against "unreasonable searches and seizures" allows it to remain applicable as the technology available to the police changes over time.<sup>14</sup> Precise legal rules are even less suited to jurisdictions with high levels of economic and social heterogeneity or technological change because in such jurisdictions, it becomes more difficult to anticipate how the rules will be applied in different contexts.<sup>15</sup>

On the other hand, constitutional drafters face a principal-agent problem in ensuring that judges interpret the constitution in line with their preferences. One solution is to constrain judicial discretion by writing detailed laws.<sup>16</sup> Precision limits the ability of agents to deviate from the principal's preferences by "narrow[ing] the scope for reasonable

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<sup>10</sup> Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. OF LEGAL STUD. 307, 307 (1994).

<sup>11</sup> *See id.* at 331.

<sup>12</sup> Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT'L ORG. 401, 413 (2000).

<sup>13</sup> ZACHARY ELKINS ET AL., *THE ENDURANCE OF NATIONAL CONSTITUTIONS* 86 (2009).

<sup>14</sup> *See, e.g.,* *Kyllo v. U.S.*, 533 U.S. 27, 40-41 (2001) (finding that the use of thermal imaging technology to scan heat signatures from a marijuana farm violated Fourth Amendment rights).

<sup>15</sup> *See* Ehrlich & Posner, *supra* note 8, at 273-74. In fact, many scholars credit the common law legal system for furthering economic growth because judge-made law is more flexible and can better protect private property. *See generally* Thorsten Beck et al., *Law and Finance: Why Does Legal Origin Matter?*, 31 J. OF COMP. ECON. 653 (2003); Simeon Djankov et al., *Courts*, 118 Q. J. OF ECON. 453 (2003); Paul H. Rubin, *Why Is the Common Law Efficient?* 6 J. OF LEGAL STUD. 51 (1977).

<sup>16</sup> *C.f.*, JOHN D. HUBER & CHARLES R. SHIPAN, *DELIBERATE DISCRETION? THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY* 11 (2002) (arguing that Congress uses detail in healthcare legislation to constrain executive agencies).

interpretation,”<sup>17</sup> except in novel or exceptional cases. At the opposite extreme, countries that do not possess a mechanism for constitutional review might feel less compelled to preempt future disputes with precise language because the legislature can reinterpret or rewrite ambiguous provisions at will.

This conventional wisdom has recently been challenged by empirical research suggesting that drafters might prefer to establish stronger constitutional courts when the constitution is more specific.<sup>18</sup> Political actors and interest groups who demand specific provisions would need a mechanism to enforce the constitution in order to effectuate the benefits of their lobbying efforts.<sup>19</sup> As the number of these concessions increases, the number of stakeholders who have an interest in enforcing the constitutional bargain also rises.<sup>20</sup> Thus, constitutional drafters are more likely to authorize constitutional review as a means of managing disputes, recouping costs, and enforcing the constitutional bargain.<sup>21</sup> Indeed, the Comparative Constitutions Project, a cross-national study of every constitution extant since 1789, found that greater constitutional detail tended to extend the expected lifespan of constitutions.<sup>22</sup>

### B. *Theories of Constitutional Interpretation*

Given that constitutional language is frequently ambiguous, how then do judges interpret that ambiguity? Judges purport to take this question very seriously, frequently allocating much of their decisions to explaining or debating the finer points of interpretative methodologies.<sup>23</sup> Some have even become public apostles of particular approaches.<sup>24</sup> Despite their differences,

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<sup>17</sup> Abbott, *supra* note 12, at 412; *see also* Jeffrey K. Staton & Alexia Romero, *Clarity and Compliance in the Inter-American Human Rights System* (International Political Science Association, Working Paper, 2011).

<sup>18</sup> ELKINS ET AL., *supra* note 13, at 87.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> The life expectancy of a constitution at the maximum level of detail is around 80 years, whereas the life expectancy at the lowest level of detail falls to the teens. *Id.* at 141; *see also* Christopher W. Hammons, *Was James Madison Wrong? Rethinking the American Preference for Short, Framework-Oriented Constitutions*, 93 AM. POL. SCI. REV. 837 (1999).

<sup>23</sup> Compare *District of Columbia v. Heller*, 554 U.S. 570 (2003) (Scalia, J.) (using textual and historical evidence to argue that the Second Amendment right to bear arms is not limited to the purpose of keeping a “well-regulated militia”) with *Heller*, 554 U.S. at 687 (2003) (Breyer, J., dissenting) (interpreting the Second Amendment through the purpose of keeping a “well-regulated militia” and proposing an “interest-balancing” standard).

<sup>24</sup> This is especially true in the U.S., where justices debate constitutional interpretation in public fora and publish books on the subject. *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, *SCALIA AND*

most judges claim that their decision in a case is determined by their methodological approach, not by their policy preferences.<sup>25</sup> In other words, judges claim that they only have discretion in choosing a methodology, not in reaching particular case outcomes.<sup>26</sup>

Perhaps the most intuitive approach to constitutional interpretation is textualism. Textualists argue judges should only consider the “plain meaning” of a word and not consider outside sources, such as legislative drafting history.<sup>27</sup> Textualists evaluate the meaning of words based on the standard of a “skilled, objectively reasonable” person.<sup>28</sup> To a significant extent, textualism downplays the extent of ambiguity in constitutions. The approach rejects the notion that judges should consider the range of meanings to which a term is reasonably susceptible, instead preferring the “plain meaning” of the word.<sup>29</sup>

In many cases, constitutional language is too ambiguous to discern a “plain meaning” when applied to actual cases.<sup>30</sup> Moreover, words in legal documents do not always have the same meaning as the dictionary or colloquial definitions.<sup>31</sup> However, acknowledging ambiguity also risks opening the door to unfettered judicial discretion. As such, other schools

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GARNER'S READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012); STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2007).

<sup>25</sup> See, e.g., *id.*; Antonin Scalia, *Textualism and the Constitution*, in DEBATING DEMOCRACY: A READER IN AMERICAN POLITICS 288-90 (Bruce Miroff et al. eds., 2012).

<sup>26</sup> Perhaps most famously when current U.S. Chief Justice John Roberts testified before Congress that a judge's role is to serve as an “umpire” and not to “make the rules.” Bruce Weber, *Umpires v. Judges*, N.Y. TIMES, July, 11, 2008, at WK1.

<sup>27</sup> SCALIA & GARNER, *supra* note 24.

<sup>28</sup> Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988).

<sup>29</sup> Bradley C. Karkkainen, *Plain Meaning: Justice Scalia's Jurisprudence of Strict Statutory Construction*, 17 HARV. J. OF L. & PUB. POL'Y 401, 401-02 (1994). This is in contrast to *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33 (Cal. Sup. Ct. 1968) (finding that the court's role was to determine whether parol evidence was “reasonably susceptible” to a defendant's interpretation under the Uniform Commercial Code).

<sup>30</sup> For example, the U.S. Constitution's Fourth Amendment protection against “unreasonable searches and seizures” does not define the scope of “unreasonable.” Subsequent Supreme Court decisions have clarified that searches and seizures without a warrant are per se unreasonable unless conducted pursuant to certain delineated exceptions, such as hot pursuit or in loco parentis. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

<sup>31</sup> For example, with the rise of interstate commercial activity during the Industrial Revolution, the scope of Congress' jurisdiction under the U.S. Constitution's “Commerce Clause” became less clear. See U.S. CONST. art. I, § 8, cl. 3. Since the New Deal, court decisions have interpreted the clause as granting Congress authority to regulate activities that do not necessarily fall within the dictionary definition of the term “commerce.” See, e.g., *Heart of Atlanta Motel v. U.S.*, 379 U.S. 241 (1964) (finding that Congress could regulate civil rights because segregation affected interstate commerce); *Gibbs v. Babbit*, 214 F.3d 483 (4th Cir. 2000) (finding that Congress could enact legislation to protect wildlife because in aggregate wildlife could affect commerce).

have attempted to establish rigorous and consistent rules for interpreting constitutional ambiguity.

Originalists argue that judges should only interpret ambiguous constitutional provisions based on how a reasonable person at the time of its adoption would have interpreted the language.<sup>32</sup> This approach allows judges to use historical evidence such as proceedings from a constitutional convention in order to establish the historical validity of a particular interpretation.<sup>33</sup> United States Supreme Court Justice Antonin Scalia argues that originalism has a crucial function in a democracy in preventing judges from usurping the authority of the legislature.<sup>34</sup>

Critics of originalism worry that it is impractical at best, and at worst risks imposing outcomes that conflict with modern standards of justice.<sup>35</sup> As a practical matter, historical source materials might prove scant or, even worse, biased.<sup>36</sup> Many countries do not possess transcripts of public debates surrounding the adoption of a new constitution in the manner of the U.S. Federalist Papers. As a theoretical matter, critics of originalism argue that law and legal norms evolve such that originalism risks imposing the outdated views of past generations—the “dead hand of the past”—on future generations.<sup>37</sup>

Proponents of living constitutionalism (or “active liberty”) argue that judges must acknowledge the contemporary social and political norms and values to inform their interpretation of the constitution.<sup>38</sup> For example, in the U.S. context, living constitutionalists would point out that a reasonable person in 1789 would have excluded slaves, women, and many others from the democratic system and Bill of Rights.<sup>39</sup> It would be unreasonable and undesirable to force judges in the 21<sup>st</sup> century to interpret terms such as “property” in that context.<sup>40</sup> Living constitutionalism does not mean that judges are completely unconstrained. Rather, judges are constrained by the underlying principles of the constitution, such as “freedom from government

<sup>32</sup> See Antonin Scalia, *Originalism: the Lesser Evil*, 57 U. CIN. L. REV. 849, 856-57 (1989).

<sup>33</sup> Ethan Leib, *The Perpetual Anxiety of Living Constitutionalism*, 24 CONST. COMMENT 353, 356 (2007).

<sup>34</sup> Scalia, *supra* note 32, at 854.

<sup>35</sup> See Leib, *supra* note 33, at 358-59.

<sup>36</sup> Richard Primus, *Limits of Interpretivism*, 32 HARV. J. OF L. & PUB. POL’Y 159, 171-72 (2008).

<sup>37</sup> Leib, *supra* note 33, at 358-59; DAVID A. STRAUSS, *THE LIVING CONSTITUTION (INALIENABLE RIGHTS)* 33-50 (2010).

<sup>38</sup> See William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, Speech at Georgetown University (Oct. 12, 1985).

<sup>39</sup> BREYER, *supra* note 24, at 33.

<sup>40</sup> Obviously, originalists do not go to this extreme this today, partly because the 14th, 15th, and 16th Amendments to the U.S. Constitution have removed slavery from the text. Nevertheless, the example serves to highlight in reductio one of the frequent criticisms of originalism.

coercion,” and must interpret it in that context.<sup>41</sup> Taking this approach a step further, Professor John Hart Ely argues judges should actively interpret the U.S. Constitution in a manner that enhances the ability of minority populations to participate in democracy and prevents against a “majority tyranny.”<sup>42</sup>

When constitutional interpretation involves complex policy or moral questions, judges might use proportionality and balancing tests to weigh competing interests.<sup>43</sup> The exact criteria for making such assessments varies by country. The U.S. Supreme Court has adopted tiers of scrutiny for different rights, with the highest being strict scrutiny for laws that discriminate on the basis of race (and arguably gender).<sup>44</sup> In such cases, the government must have a compelling interest in the policy and the means adopted must be narrowly tailored towards that end.<sup>45</sup> Amongst younger constitutional courts, the proportionality test has become popular.<sup>46</sup> Proportionality requires that government infringements on rights 1) be for an objective of sufficient purpose, and 2) the means chosen must be “reasonable and just.”<sup>47</sup> In assessing the means, courts consider if 1) there exists a rational basis for the policy, 2) the government employed the least restrictive means possible, and 3) the law’s objectives are proportional to the constitutional harms it causes.<sup>48</sup> Notably, unlike the other methods,

<sup>41</sup> See BREYER, *supra* note 24, at 3.

<sup>42</sup> JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 7-8 (1981).

<sup>43</sup> See VICKI C. JACKSON & MARK V. TUSHNET, *COMPARATIVE CONSTITUTIONAL LAW* 652 (6th ed. 2006).

<sup>44</sup> See, e.g., *Korematsu v. U.S.*, 323 U.S. 214 (1944) (holding that the government’s compelling interest in preventing sabotage permitted it to detain Japanese Americans in internment camps).

<sup>45</sup> See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972) (finding that a state’s interest in education was not a sufficiently compelling interest to require compulsory education for religious minorities).

<sup>46</sup> For example, constitutional courts in Canada (*R. v. Oakes*, [1986] 1 S.C.R. 103 (Can.)), Israel (HCJ 2056/04 *Beit Sourik Vill. Council v. Gov. of Isr.* [2004] (Isr.)), Colombia (Corte Constitucional [C.C.] [Constitutional Court], Mayo 10, 2006, Sentencia C-355/2006), and South Africa (*South Africa v. Hugo* 1997 (4) SA 1 (CC) (S. Afr.)) have all used variants on the method. See generally Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. OF TRANSNAT’L L. 72 (2008).

<sup>47</sup> See, e.g., Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act 1982, § 1 (U.K.) (making rights “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”); S. AFR. CONST., 1996, § 36 (noting that right can be limited only “to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom . . .”); Basic Law: Freedom of Occupation, 5754-1994, 1454 SH 90 § 4 (Isr.) [hereinafter *Basic Law: Freedom of Occupation (Isr.)*] (guaranteeing freedom of occupation “except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required . . .”).

<sup>48</sup> *Id.*

proportionality explicitly permits government infringement upon rights, but bases its decision on the relative merits of that infringement.<sup>49</sup>

### C. *Constitutional Interpretation in Practice*

There has been insufficient research into the descriptive interplay between interpretative methodologies and political behavior. Comparative constitutional lawyers have studied the effect of different methods on jurisprudential outcomes,<sup>50</sup> but seldom extend their analysis to how other political actors react to that methodology. By contrast, political scientists tend to overlook jurisprudential choices.<sup>51</sup> Attitudinalists argue that constitutional court judges are relatively unconstrained and thus can pursue their policy preferences, using legal doctrine as a guise.<sup>52</sup> Strategic institutionalists focus on the court's relationship with the other branches of government as a constraint on judges' ability to reach either their preferred policy or jurisprudential outcomes.<sup>53</sup> Neither believes that law alone has a constraining effect on judicial behavior.

Other disciplines have attempted to demonstrate that legal language can in fact constrain judges by influencing their perceptions on the extent of their discretion. Psychological experiments on laypeople acting as jurors find no evidence that different standards of review make the jurors accordingly more or less likely to vote for conviction.<sup>54</sup> Of course, judges—or even lawyers—are socialized in law school and thus might treat legal standards differently from a layperson. More recent research on U.S. Circuit Courts of Appeal has found evidence that judicial panels tend to be more deferential towards agency decisions when applying the *Chevron* standard of review than when applying the more probing *Skidmore* test.<sup>55</sup> While

<sup>49</sup> See, e.g., *R. v. Edwards Books and Art Ltd.*, [1986] S.C.R. 713 (Can.) (acknowledging that government regulations forcing shops to close on Sundays was a proportionate limitation on religious freedoms).

<sup>50</sup> See generally JACKSON & TUSHNET, *supra* note 43.

<sup>51</sup> See generally Barry Friedman, *Taking Law Seriously*, 4 PERSP. ON POL. 261 (2006); Christian Joerges, *Taking the Law Seriously: On Political Science and the Role of Law in the Process of European Integration*, 2 EUROP. L. J. 105 (2009).

<sup>52</sup> Segal & Spaeth, *supra* note 9, at 973.

<sup>53</sup> See generally Forrest Maltzman, James F. Spriggs & Paul J. Wahlbeck, *Strategy and Judicial Choice: New Institutional Approaches to Supreme Court Decision-Making*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES 43, 43-63 (1999); Mario Bergara, Barak Richman & Pablo T. Spiller, *Modeling Supreme Court Strategic Decision Making: The Congressional Constraint*, 28 LEGIS. STUD. Q. 247, 247-79 (2003); GEORG VANBERG, *THE POLITICS OF CONSTITUTIONAL REVIEW IN GERMANY* (2005).

<sup>54</sup> See Elisabeth Stoffelmayr & Shari Seidman Diamond, *The Conflict Between Precision and Flexibility in Explaining "Beyond a Reasonable Doubt,"* 6 PSYCHOL. PUB. POL'Y, & L. 769, 775 (2000).

<sup>55</sup> In evaluating agency interpretations of statutes, the *Skidmore* test encourages judges to consider: 1) the thoroughness of the agency's investigation; 2) the validity of its reasoning; 3) the consistency of its



standards of review are not equivalent to methods of constitutional interpretation, they do both require judges to constrain their discretion based on abstract legal standards. Of course, we cannot read the minds of judges to know if they truly feel constrained by jurisprudential methodologies. To obviate this problem, this article focuses on interpretative methods as presented in the judicial decisions themselves and tries to avoid speculating about the intent of the judges.

Judges decide to adopt a method of constitutional interpretation in a variety of ways. In some cases, the constitution itself simply mandates a particular standard of interpretation.<sup>56</sup> In other cases, judges might borrow legal reasoning from a foreign constitutional court if they find it particularly persuasive.<sup>57</sup> The choice of method might also depend on the individual judge's political and legal socialization. Increasingly, law students in America are exposed to and filtered into "originalist" or "living constitutionalist" camps. Finally, the age of the constitution might matter in that courts interpreting a younger constitution might feel less concerned about uncovering the intent of the original constitutional drafters because they are of the same generation as those founders and implicitly understand their views.<sup>58</sup> However, as constitutions age, legal norms and the meaning of words also change, which might prompt calls for a means to tether interpretation back to the intent of the founders.

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interpretation over time; and 4) any other persuasive powers of the agency. *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). By contrast, under *Chevron*, judges are instructed to apply a two-step test: 1) has Congress spoken directly to the question at issue; and 2) if not, is the agency's construction of the statute permissible? *Chevron v. NRDC*, 467 U.S. 837 (1984). The latter test is designed to be much less intrusive into the agency decision-making process because agencies can reach permissible interpretations that might not necessarily be the "ideal" one. The authors of the aforementioned study argued that *Chevron* constrains courts by giving judges in the minority of the panel who support deference greater leverage against the majority. Morgan Hazelton et al., *Panel Effects in Administrative Law: A Study of Rules, Standards and Judicial Whistleblowing*, (Univ. of S. Cal., 2011).

<sup>56</sup> See, e.g., Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, ch. 11, § 1 (U.K.); S. AFR. CONST., 1996 § 36; Basic Law: Freedom of Occupation (Isr.), *supra* note 47, at § 4.

<sup>57</sup> *U.S. v. Burns*, [2001] S.C.R. 283 (Can.), citing *Soering v. U.K.*, 161 Eur. Ct. H.R. (1989).

<sup>58</sup> In fact, constitutional drafters might end up serving on the bench as judges. In the American context, Founding Father John Jay also served as Chief Justice of the Supreme Court. WALTER STAHR, *JOHN JAY: FOUNDING FATHER* 273 (2005). The first chief justice of the Indonesian Constitutional Court, Jimly Asshiddiqie, served on the legislature's Expert Advisory Secretariat during that country's transition from authoritarianism. See *Profile Judge Jimly Asshiddiqie*, MAHKAMAH KONSTITUSI REPUBLIK INDONESIA, <http://www.mahkamahkonstitusi.go.id/index.php?page=web.ProfilHakim&id=625> (last visited Apr. 15, 2014).

### III. THE DECLINE OF BURMESE CONSTITUTIONALISM

Myanmar does not have a long tradition of constitutionalism. The country's first Supreme Court could exercise constitutional review, but after the 1962 military coup the judiciary became subservient to the military.<sup>59</sup> Fifty years of military rule made the political elite wary of checks on government power. This section briefly discusses the history of constitutionalism in Myanmar, including previous constitutions and judicial institutions. It then summarizes the 2008 Constitution and the political reforms since the 2010 elections in order to provide context for the later impeachment of the Constitutional Tribunal.

#### A. *Liberal Constitutional Spirit (1948-1962)*

Myanmar had a relatively sophisticated pre-colonial judicial system,<sup>60</sup> but when Britain annexed the country in the 19<sup>th</sup> century, it implanted a common law legal system.<sup>61</sup> In April 1947, with independence looming, Britain convened a constituent assembly in which Burmese politicians drafted a new constitution.<sup>62</sup> However, the majority party, the Anti-Fascist People's Freedom League ("AFPFL"), led by General Aung San, had little interest in Western constitutionalism and rule of law.<sup>63</sup> It also failed to find a compromise that would satisfy the country's ethnic minorities, several of which had been promised autonomy by the British.<sup>64</sup> Soon after the constitution went into effect, the Karen National Liberation Army and the Communist Party of Burma separately launched insurgencies against the Yangon government, nearly toppling it.<sup>65</sup>

The 1947 Constitution is the only Myanmar constitution to grant a constitutional court meaningful independence. Under Chapter VIII of the Constitution, the president appointed Supreme Court judges in consultation

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<sup>59</sup> Nick Cheesman, *How an Authoritarian Regime in Burma Used Special Courts to Defeat Judicial Independence*, 45 LAW & SOC'Y REV. 801, 801-06 (2011).

<sup>60</sup> THANT MYINT-U, *THE MAKING OF MODERN BURMA* 87-88 (2001); see also Myint Zan, *Woe Unto Ye Lawyers: Three Royal Orders Concerning Pleaders in Early Seventeenth-Century Burma*, 44 AM. J. LEG. HIST. 40 (2000).

<sup>61</sup> Myint Zan, *Judicial Independence in Burma: No March Backwards Toward the Past*, 1 ASIAN-PAC. L. & POL'Y J. 1, 10 (2000).

<sup>62</sup> ROBERT H. TAYLOR, *THE STATE IN MYANMAR* 249 (2009).

<sup>63</sup> Aung San announced several basic principles for the constitution, including sovereignty, equality, democracy, and socialism, but notably did not mention the rule of law. See MAUNG MAUNG, *BURMA'S CONST.* 81-82 (2d ed. 1961). In fact, Dr Maung Maung later described the 1947 Constitution as a quick "cut and paste affair," suggesting that the drafters focused on basic principles. Maung Maung, *Dr E Maung*, in DR MAUNG MAUNG: GENTLEMAN, SCHOLAR, PATRIOT 243, 248 (Robert H. Taylor ed., 2008).

<sup>64</sup> SHELBY TUCKER, *BURMA: CURSE OF INDEPENDENCE* 120-21 (2001).

<sup>65</sup> *Id.* at 222.

with the Chief Justice of the Union and the Prime Minister, while Parliament could confirm or reject them, dividing the appointment power between two branches.<sup>66</sup> Members of Parliament could hold an up-or-down vote, but by custom refrained from criticism of nominees.<sup>67</sup> Furthermore, justices could be removed only for proved misbehavior or incapacity.<sup>68</sup> Parliament separated the lower courts from the civil service in order to insulate judges from executive influence.<sup>69</sup> Judicial salaries were relatively high, especially compared to those of other government officials.<sup>70</sup>

The 1947 Constitution explicitly authorized the Supreme Court to exercise constitutional review and prohibited any attempt to circumscribe its jurisdiction.<sup>71</sup> The Supreme Court portrayed itself as a defender of individual liberty and interpreted the Constitution in a “large, liberal, and comprehensive spirit.”<sup>72</sup> During the civil war after independence, the Court announced that the writ of habeas corpus could not be suspended, even during a state of emergency.<sup>73</sup> It even assumed authority to review presidential actions whenever he acted in a quasi-judicial manner.<sup>74</sup> The Supreme Court established itself as a veto player in the new government by adopting the constitutional “construction most beneficial to the widest possible amplitude of [the court’s] powers.”<sup>75</sup> While the government frequently criticized these decisions, it did not violate the Court’s independence.<sup>76</sup>

For Myanmar’s current opposition parties, the 1947 Constitution represents the high watermark of liberal constitutionalism. However, as Yangon suffered from various political and military crises, many politicians saw the 1947 Constitution and constitutional review as contributing to, rather than solving, the country’s problems. The military, including General

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<sup>66</sup> CONSTITUTION OF THE UNION OF BURMA, Sept. 24, 1947, ch. VIII, § 140 (Myan.) (repealed in 1974) [hereinafter MYAN. CONST. (1947)].

<sup>67</sup> Maung, *supra* note 63, at 147.

<sup>68</sup> MYAN. CONST. (1947), *supra* note 66, at ch. VIII. § 143.

<sup>69</sup> See Maung, *supra* note 63, at 156-57.

<sup>70</sup> The salaries for judges ranged from MMK 2500 for a High Court judge to MMK 3500 for the Supreme Court Chief Justice, compared to MMK 1700 for government ministers. Maung Maung, *The Search for Constitutionalism in Burma*, in DR. MAUNG MAUNG: GENTLEMAN, SCHOLAR, PATRIOT 507, 512-13 (Robert H. Taylor ed., 2008).

<sup>71</sup> MYAN. CONST. (1947), *supra* note 66, at ch. VIII. § 137. The Supreme Court could also issue advisory opinions at the request of the president. *Id.* At § 151(1).

<sup>72</sup> See U Htwe (alias) AE Madari v. U Tun Ohn & One, [1948] B.L.R. 541 (S.C.) 542 (Myan.).

<sup>73</sup> Nick Cheesman, *The Incongruous Return of Habeas Corpus to Myanmar*, in RULING MYANMAR FROM CYCLONE NARGIS TO NATIONAL ELECTIONS 90, 95 (Nick Cheesman et al. eds., 2010).

<sup>74</sup> U San Win v The Secretary, Ministry of Judicial Affairs, [1957] B.L.R. 84 (Myan.).

<sup>75</sup> U Htwe (alias) AE Madari v U Tun Ohn & One, [1948] B.L.R. 541 (S.C.) 542 (Myan.).

<sup>76</sup> See Nick Cheesman, *Thin Rule of Law or Un-Rule of Law in Myanmar?* 82 PAC. AFF. 597, 600-01 (2009-2010).

Ne Win, felt the Supreme Court under the 1947 Constitution was too independent.<sup>77</sup> Other politicians accused the judiciary of being out of touch with the needs of the country and too focused on the interests of the private bar association.<sup>78</sup> Dr. Maung Maung, who served as Chief Justice from 1965-71 and later as Judicial Minister, criticized the pre-1962 judiciary for making Myanmar's citizens more litigious and for favoring the "capitalist classes."<sup>79</sup> While the Supreme Court struck down many executive actions, it never declared a legislative act *ultra vires*,<sup>80</sup> suggesting apprehensiveness about testing its power against the legitimacy of popularly elected representatives.

### B. *Socialist Constitutionalism (1962-1988)*

The Myanmar military (*tatmadaw*) became increasingly powerful during the late 1950s, when the AFPFL proved too polarized to govern effectively.<sup>81</sup> At Prime Minister U Nu's request, the military briefly governed the country for eighteen months (1958-60).<sup>82</sup> In February 1962, ethnic minority leaders from Shan and Kayah States met in Rangoon to discuss options for greater autonomy.<sup>83</sup> On March 2, General Ne Win seized power and arrested Prime Minister U Nu, Chief Justice Myint Thein, and key ethnic minority leaders.<sup>84</sup> Unlike the earlier caretaker administration, the new Revolutionary Council ("RC") abolished most of the major institutions established under the 1947 Constitution.<sup>85</sup> Ironically, the country's ethnic insurgencies continued and even intensified.<sup>86</sup>

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<sup>77</sup> One of his main criticisms was that the constitution forbade the government from changing judges' salaries without consent. Zan, *supra* note 61, at 13.

<sup>78</sup> Historian J.S. Furnivall noted that given the Chief Justice's influence on the judicial nomination process, all justices tended to be recruited from amongst the narrow legal elite, and as such, "the Bench tends to assume the character of a self-perpetuating closed corporation." See J.S. Furnivall, *Foreword*, in Maung, *supra* note 63, at ix-xi.

<sup>79</sup> MAUNG MAUNG, *GENERAL LAW KNOWLEDGE* (1975).

<sup>80</sup> Zan, *supra* note 61, at 15.

<sup>81</sup> See MARY CALLAHAN, *MAKING ENEMIES: WAR AND STATE BUILDING IN BURMA* 184-88 (2005).

<sup>82</sup> *Id.*

<sup>83</sup> Some historians allege these states sought to secede from the Union and claim independence, an option they could exercise under Chapter X of the 1947 Constitution after 10 years. MYAN. CONST. (1947), Sept. 24, 1947, ch. X. §§ 201-02 (Myan.) (repealed in 1974). Also, at this time Prime Minister U Nu was considering nationalizing some of the military's key industries and was thus threatening the military's economic autonomy. See DAVID I. STEINBERG, *BURMA: A SOCIALIST NATION OF SOUTHEAST ASIA* 73-74 (1982).

<sup>84</sup> Myint Thein was imprisoned until 1968, several years longer than even U Nu. Maung Maung, *U Myint Thein, Chief Justice of the Union*, in DR. MAUNG MAUNG: GENTLEMAN, SCHOLAR, PATRIOT 253-64 (Robert H. Taylor ed., 2008).

<sup>85</sup> Zan, *supra* note 61, at 17-19.

<sup>86</sup> See generally TUCKER, *supra* note 64.

These developments boded ill for the judiciary. As supreme leader, Ne Win proceeded to emasculate the judiciary. On March 30, he abolished the Supreme and High Courts and replaced them with the Chief Court.<sup>87</sup> Far from using constitutional review in a manner “beneficial to the widest possible amplitude of its power,”<sup>88</sup> this new court allowed its power to issue writs and exercise judicial review fall into desuetude.<sup>89</sup> The Chief Court rejected Myanmar’s British common law heritage by directing judges to accord greater priority to Buddhist *Dhammathats*, or law treatises, over British statutes.<sup>90</sup> The RC also established separate special criminal tribunals dominated by military appointees to hear politically sensitive cases.<sup>91</sup> The Special Criminal Courts Appeal Court (“SCCAC”) rulings bound not only lower special criminal tribunals, but also the regular judiciary.<sup>92</sup> At least one member of the SCCAC was also a member of the RC,<sup>93</sup> effectively demolishing the barrier between the executive branch and the judiciary. Overall, the new judicial system allowed the *tatmadaw* to consolidate its power and marginalize judges.<sup>94</sup>

Far from a temporary expedient, the military used these special tribunals as a model for the rest of the judiciary. In the early 1970s, the Revolutionary Council transferred authority to the Burma Socialist Programme Party (“BSPP”) and promulgated the 1974 Constitution.<sup>95</sup> The BSPP replaced the regular courts with a system of “People’s Courts,” which in turn resembled the special criminal tribunals.<sup>96</sup> All judges were required to be members of the BSPP and they took guidance from BSPP Township Councils, rather than court’s legal advisors.<sup>97</sup> The 1974 Constitution explicitly required judges to “protect and safeguard the Socialist system.”<sup>98</sup>

At the apex of the judicial system, the Constitution created the Council of People’s Justice (“CPJ”) to replace the Chief Court.<sup>99</sup> This new institution was directly responsible to the *Pyithu Hluttaw*, the legislature,

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<sup>87</sup> Cheesman, *supra* note 59, at 807.

<sup>88</sup> U Htwe (alias) AE Madari v. U Tun Ohn & One, [1948] B.L.R. 541 (S.C.) 542 (Myan.).

<sup>89</sup> See ASIAN HUMAN RIGHTS COMM’N, *Ne Win, Maung Maung and How to Drive a Legal System Crazy in Two Short Decades*, 7 ARTICLE 2 15, 19–20 (2008)

<sup>90</sup> Andrew Huxley, *The Last Fifty Years of Burmese Law: E Maung and Maung Maung*, 1998 LAWASIA 9, 16–17.

<sup>91</sup> See generally Cheesman, *supra* note 59.

<sup>92</sup> Maung Chit v. Union of Burma, [1972] B.L.R. (C.C.) 28 (Myan.).

<sup>93</sup> Zan, *supra* note 113, at 19.

<sup>94</sup> See generally Cheesman, *supra* note 59.

<sup>95</sup> DAVID I. STEINBERG, *BURMA: THE STATE OF MYANMAR* 106-07 (2001).

<sup>96</sup> See generally Cheesman, *supra* note 59, at 802, 808, & 817-818.

<sup>97</sup> CHRISTINA FINK, *LIVING SILENCE IN BURMA: SURVIVING UNDER MILITARY RULE* 35 (2009).

<sup>98</sup> MYAN. CONST. (1947), Sept. 24, 1947, ch. VII. § 101 (Myan.) (repealed in 1974).

<sup>99</sup> Cheesman, *supra* note 59, at 818.

and its members served in both bodies.<sup>100</sup> Burmese law prescribed no minimum qualifications for CPJ justices, and most were former generals;<sup>101</sup> during the first term, only one out of five CPJ members was a lawyer.<sup>102</sup> Ultimately, the Constitution permitted only the *Pyithu Hluttaw* to publish interpretations of the constitution.<sup>103</sup> Although the Constitution provided for individual rights, these fell entirely outside the CPJ's jurisdiction and there was no enforcement mechanism.<sup>104</sup> In many cases, the judiciary also refused to enforce individual rights under statutory law<sup>105</sup> and judges no longer accepted petitions for writs in criminal cases.<sup>106</sup>

### C. *Constitutional Void (1988-2010)*

By the summer of 1988, the BSPP regime faced widespread protests in response to economic hardships caused by a massive devaluation of the currency.<sup>107</sup> The democratic opposition began to rally behind Aung San Suu Kyi, daughter of General Aung San, and her National League for Democracy (“NLD”) party.<sup>108</sup> On September 18, the *tatmadaw*, fearing the BSPP had lost control of the country, seized power.<sup>109</sup> This new junta, the State Law and Order Restoration Council (“SLORC”), initially presented itself as an interim government and announced elections for May 1990.<sup>110</sup> However, when the NLD won over eighty percent of the seats, the SLORC refused to hand over power and instead announced that the results would be used to form a National Convention to draft a new constitution, not a parliament.<sup>111</sup>

Soon after taking power, the SLORC—later the State Peace and Development Council (“SPDC”)—declared martial law and announced that it was “not bound by any Constitution.”<sup>112</sup> Between June 1988 and March

<sup>100</sup> THE CONSTITUTION OF THE UNION OF BURMA Jan. 3, 1974, ch. V, § 73(d) & ch. VII, § 104 (Myan.) (repealed in 2008) [hereinafter MYAN. CONST. (1974)].

<sup>101</sup> See *id.* at ch. V, § 73(d), ch. VII; see also Council of People's Justices Law, 1974, No. 13/1974 (Myan.).

<sup>102</sup> Zan, *supra* note 61, at 23.

<sup>103</sup> MYAN. CONST. (1974), *supra* note 100, at ch. XVI, § 200(c).

<sup>104</sup> Cheesman, *supra* note 73, at 96.

<sup>105</sup> For example, the Safeguarding Citizens' Rights Law, 1975, No. 2/1975 (Myan.) allowed citizens to lodge complaints against state officers but, it does not appear that any cases were ever brought under this law. Cheesman, *supra* note 73, at 108-09 n.15.

<sup>106</sup> *Id.* at 96. The People's Courts system was plagued with other problems as well, including corruption and massive case backlog. TAYLOR, *supra* note 62, at 339-42.

<sup>107</sup> STEINBERG, *supra* note 95, at 4-12.

<sup>108</sup> JUSTIN WINTLE, PERFECT HOSTAGE: A LIFE OF AUNG SAN SUU KYI, BURMA'S PRISONER OF CONSCIENCE 287-93 (2008).

<sup>109</sup> *Id.* at 282.

<sup>110</sup> TAYLOR, *supra* note 62, at 393.

<sup>111</sup> *Id.* at 395-414.

<sup>112</sup> State Law and Order Restoration Council Law Order, 1990, No. 1/1990 (Myan.).

1989, the military closed the courts and replaced them with military tribunals in order to try political cases.<sup>113</sup> Like its predecessor, once the SLORC consolidated power, it relied less on military tribunals and more on ordinary courts. On September 26, it formally abolished the People's Courts and appointed professional judges.<sup>114</sup> The SLORC appointed five justices to the new Supreme Court, including former court Registrar U Aung Toe as the Chief Justice.<sup>115</sup> In the lower courts, the SLORC replaced lay judges with professional lawyers.<sup>116</sup> Under a revised version of the Judiciary Law published in 2000, the Supreme Court also gained responsibility for appointing lower court judges.<sup>117</sup>

The SLORC restored the pre-1962 judicial system in form, but not in spirit. Although § 2(a) of the Judiciary Law nominally protected judicial independence,<sup>118</sup> the junta dismissed judges without formal impeachment proceedings on multiple occasions.<sup>119</sup> The lack of judicial independence undermined the right to a fair trial; according to Steinberg, “[t]rials [were] usually secret, sentences perversely long (and extendable at the state’s command), and prison conditions deplorable.”<sup>120</sup> The Myanmar Code of Criminal Procedure nominally ensures judicial oversight of arrests,<sup>121</sup> but former political prisoners claimed that they lacked an opportunity to challenge lawfulness of their arrest, much less enforce their constitutional

<sup>113</sup> K.S. VENKATESWARAN, ARTICLE XIX: BURMA BEYOND THE LAW 26–29 (1996).

<sup>114</sup> State Law and Order Restoration Council Law (Judiciary Law), 1988, No. 2/1988 (Myan.).

<sup>115</sup> State Law and Order Restoration Council Law Order, 1988, No. 5/1988 (Myan.).

<sup>116</sup> TAYLOR, *supra* note 62, at 452–53.

<sup>117</sup> State Law and Order Restoration Council Law (Judiciary Law), 2000, No. 5/2000, ch. VI, § 13 (Myan.).

<sup>118</sup> *Id.* at ch. II, § 2(a).

<sup>119</sup> In 1988, the SLORC dismissed 62 judges for failing to imprison political prisoners to terms longer than the sentences prescribed by statute. State Law and Order Restoration Council Law Order, 1988, No. 5/1988; BURMA LAWYERS’ COUNCIL, BURMA JUDICIAL INTERVENTION: CONTRIBUTION FOR THE 58TH SESSION OF THE UN COMMISSION ON HUMAN RIGHTS, (Apr. 2002), available at <http://www.ibiblio.org/obl/docs/chr2002briefing-judicial.htm>; ASIA WATCH, HUMAN RIGHTS IN BURMA 12 (1990). On November 14, 1998, 64 judges, including five Supreme Court justices, were “permitted to retire.” State Peace and Development Council Order, 1998, No. A.0694(I)/1998 (Myan.).

In 2009 Tomas Ojea Quintana, UN Special Rapporteur for Human Rights in Myanmar, bluntly stated: “There is no independent and impartial judiciary system.” *UN Rights Envoy Says Burma’s Judiciary System Flawed*, MIZZIMA NEWS, Nov. 13, 2008, <http://archive-2.mizzima.com/news/world/1291-un-rights-envoy-says-burmas-judiciary-system-flawed.html>; see also Special Rapporteur on the Situation of Human Rights in Myanmar, United Nations Human Rights Comm’n, *Progress Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, Mar. 10, 2010, U.N. Doc. A/HRC/13/48 (2010), ¶ 42 (by Tomás Ojea Quintana); Special Rapporteur on the Situation of Human Rights in Myanmar, *Situation of Human Rights in Myanmar*, Aug. 24, 2009, U.N. Doc. A/64/318 (2009), ¶¶ 22, 36–37 (by Tomás Ojea Quintana).

<sup>120</sup> DAVID I. STEINBERG, BURMA/MYANMAR: WHAT EVERYONE NEEDS TO KNOW 130 (2013).

<sup>121</sup> Code of Criminal Procedure, 1898, ch. V, §§ 60–61 (Myan.).

rights.<sup>122</sup> Furthermore, judges could use their contempt power in order to compel lawyers who defended political prisoners to instruct their clients not to resist the proceedings.<sup>123</sup> Amnesty International even reported that in sensitive cases judges took sentencing instructions directly from Military Intelligence officers.<sup>124</sup>

#### D. *Drafting the Constitution (1990-2008)*

Some of the winners from the May 1990 election joined the National Convention, but the SLORC diluted their voice by appointing hundreds of delegates to “represent” interest groups, such as peasants, workers and ethnic minorities.<sup>125</sup> When the convention began in January 1993, only 99 of the 702 delegates had been elected.<sup>126</sup> The entire process was plagued with irregularities.<sup>127</sup> Delegates’ statements had to be preapproved by the chairman and they were not allowed to criticize the draft constitution.<sup>128</sup> In 1995, the NLD boycotted the convention, and the SLORC adjourned it the following year.<sup>129</sup>

The constitution-drafting process accelerated in the mid-2000s after several high-profile confrontations between the government and the opposition. In May 2003, the SPDC faced political crisis when a group of thugs attacked Aung San Suu Kyi’s motorcade at Depayin.<sup>130</sup> In response, then-Prime Minister Khin Nyunt announced a “seven-step roadmap to democracy” and reconvened the National Convention the following year.<sup>131</sup>

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<sup>122</sup> AMNESTY INT’L, MYANMAR: THE ADMINISTRATION OF JUSTICE: GRAVE AND ABIDING CONCERNS (2004). Obviously, without a constitution, the Supreme Court did not have the power of constitutional review. Nor could it issue writs. Cheesman, *supra* note 73, at 97-98. Section 5(h) of the Judiciary Law implied that the Court could examine administrative orders and decisions that infringe on individual rights, but in practice it never attempted to exercise this power. *See generally* TAYLOR, *supra* note 62, at 452-53.

<sup>123</sup> *See, e.g.*, Special Rapporteur on the Situation of Human Rights in Myanmar, *Situation of Human Rights in Myanmar*, *supra* note 119, at ¶ 35.

<sup>124</sup> AMNESTY INT’L, *supra* note 122, at 18. The Supreme Court even went so far as to hold that judges presiding over trials inside prison did not possess the authority to decide who could attend hearings. Joseph Allchin, *Burma Snatches Power from Judges*, DEMOCRATIC VOICE OF BURMA, Feb. 23, 2011, <http://www.dvb.no/news/burma-snatches-power-from-judges/14402>.

<sup>125</sup> TAYLOR, *supra* note 62, at 487.

<sup>126</sup> FINK, *supra* note 97, at 74.

<sup>127</sup> For example, the SLORC passed a law punishing criticism of the National Convention with up to 20 years’ imprisonment. The Law Protecting the Peaceful and Systematic Transfer of State Responsibility and the Successful Performance of the Functions of the National Convention against Disturbances and Oppositions, 1996, No. 5/1996, ch. II, § 3 (Myan.).

<sup>128</sup> FINK, *supra* note 97, at 73-77.

<sup>129</sup> *Id.* at 77.

<sup>130</sup> *Id.* at 94.

<sup>131</sup> The entire seven-step roadmap includes: 1) reconvening the National Convention; 2) implementation of the process “for the emergence of a genuine and disciplined democratic system”; 3) drafting a Constitution; 4) adopting the Constitution via a referendum; 5) holding legislative elections; 6)



In September 2007, at the same time the government cracked down on the Saffron Revolution, a protest led by Buddhist monks, the convention released a draft of the “State Fundamental Principles.”<sup>132</sup> In February 2008, a fifty-four-member drafting commission produced the final draft constitution based almost exactly on those principles.<sup>133</sup>

The SPDC scheduled a constitutional referendum for early May 2008.<sup>134</sup> However, on May 2-3, Cyclone Nargis hit the Irrawaddy Delta region and killed approximately 140,000 Burmese.<sup>135</sup> The SPDC postponed the referendum in the cyclone-hit areas until May 24, while the rest of the country voted as scheduled on May 10.<sup>136</sup> According to government figures, an astounding 98.12% of voters turned out and 92.48% voted in favor of the new constitution.<sup>137</sup> However, there were widespread charges of electoral irregularities and vote rigging during the referendum.<sup>138</sup> Many of the armed ethnic insurgent groups rejected the constitution, claiming that it did not provide sufficient autonomy for local governments.<sup>139</sup> The 2008 Constitution was thus adopted under inauspicious circumstances, a legacy that would undermine its legitimacy even after the political transition.

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convening the legislature; and 7) forming the government and other constitutional bodies. TAYLOR, *supra* note 62, at 491–92.

<sup>132</sup> *The Fundamental Principles and Detailed Basic Principles*, THE NEW LIGHT OF MYAN., Sept. 10, 2007.

<sup>133</sup> *Commission Approves Draft of the State Constitution*, THE NEW LIGHT OF MYAN., Feb. 20, 2008, at 16. While the drafting process nominally took over fifteen years, as with much else in Myanmar, what actually happened remains obscure. According to some sources, Dr. Maung Maung—constitutional law scholar, alleged drafter of the 1974 Constitution, and former chief justice, attorney-general and president—drafted much of the current constitution before his death in 1994. INT’L CRISIS GRP., ASIA REPORT NO. 174, MYAN.: TOWARDS THE ELECTIONS 8 (2009). Indeed, by the mid-1990s, many of the basic principles of the constitution had already been drafted. *The New Light of Myanmar* published excerpts of proceedings when the National Convention was in session. For relevant examples, see generally BURMA PRESS SUMMARY VOLS. VII(1)-X(4) (Jan. 1993-Apr. 1996), available at <http://www.burmalibrary.org/show.php?cat=1455&lo=d&sl=0>.

<sup>134</sup> *Approval of the Constitution Draft will be Sought in a National Referendum to be Held in May 2008*, THE NEW LIGHT OF MYAN., Feb. 11, 2008.

<sup>135</sup> TRIPARTITE CORE GROUP, POST-NARGIS PERIODIC REVIEW III ix (2010).

<sup>136</sup> VORAVIT SUWANVANICHKIJ ET AL., AFTER THE STORM: VOICES FROM THE DELTA 54 (2009).

<sup>137</sup> *Id.* at 66.

<sup>138</sup> STEINBERG, *supra* note 95, at 144-45. See generally PUBLIC INT’L L. & POL’Y GRP., BURMA’S CONSTITUTIONAL REFERENDUM: NEITHER FREE NOR FAIR (2008), available at [http://www.burmalibrary.org/docs5/PILPG\\_Report\\_Burmese\\_Constitutional\\_Referendum\\_Neither\\_Free\\_Nor\\_Fair-11\\_May\\_2008.pdf](http://www.burmalibrary.org/docs5/PILPG_Report_Burmese_Constitutional_Referendum_Neither_Free_Nor_Fair-11_May_2008.pdf).

<sup>139</sup> See, e.g., Williams, *supra* note 5.

### E. *The 2008 Constitution*

The 2008 Constitution revived some of the democratic structures of the 1947 Constitution, but with notable differences. The *Pyihtaungsu Hluttaw* (Union Legislature) contains two houses, the *Pyithu* (People's chamber) with 440 members and the *Amyotha* (Nationalities chamber) with 224 members.<sup>140</sup> All members have five-year terms, coterminous with those of the president.<sup>141</sup> However, the commander-in-chief of the Myanmar Defense Services has the authority to appoint a quarter of all *Hluttaw* members.<sup>142</sup> Legislative schedules divide jurisdiction between the Union and state or region *hluttaws*.<sup>143</sup> The *Pyihtaungsu Hluttaw* retains authority over defense, security, foreign affairs, and judicial administration, as well as the centralized budget, while each state/region controls local finance and projects.<sup>144</sup>

In the executive branch, the president is selected by an electoral college composed of members of the *Pyithu Hluttaw*, the *Amyotha Hluttaw*, and all *tatmadaw* MPs. Each group chooses a candidate, one of whom is elected by the entire *Hluttaw* as president, with the other two as vice-presidents.<sup>145</sup> The President appoints not only Union ministers, but also the state/region chief ministers, cabinet ministers, and advocates-general.<sup>146</sup> The Constitution instructs the *Hluttaw* to give deference to the President's nominees unless they do not meet the professional criteria listed in the Constitution.<sup>147</sup> The President also serves as chairperson of the National Defense and Security Council ("NDSC"), which has the authority to declare a state of emergency.<sup>148</sup> However, the President does not control all the levers of power, and does not even have the ability to veto legislation.<sup>149</sup>

The 2008 Constitution largely confirms the previous institutional structure of the judiciary, with a few exceptions. As before, the Supreme Court exercises appellate jurisdiction over the High Courts for each state/region, as well as subordinate District and Township Courts.<sup>150</sup> The text of the Constitution appears vague and contradictory with regard to

<sup>140</sup> THE CONSTITUTION OF THE REPUBLIC OF THE UNION OF MYANMAR, May 29, 2008, ch. IV, §§ 109, 141 (Myan.) [hereinafter MYAN. CONST. (2008)].

<sup>141</sup> *Id.* at § 119.

<sup>142</sup> *Id.* at §§ 109(b) and 141(b).

<sup>143</sup> *Id.* at Schedules I, II. There are seven states and seven regions. *Id.* at ch. II, § 49.

<sup>144</sup> *Id.* at Schedules I, II.

<sup>145</sup> *Id.* at ch. III, § 60.

<sup>146</sup> *Id.* at ch. V, § 232.

<sup>147</sup> *See, e.g., id.* at ch. VI, § 323(d).

<sup>148</sup> *Id.* at ch. XI, § 410.

<sup>149</sup> *Id.* at ch. IV, §§ 105-06.

<sup>150</sup> *Id.* at ch. VI, §§ 314-16.

judicial independence. Section 11 states that the judiciary should “administer justice independently according to law.”<sup>151</sup> However, in explaining the separation of powers, it states that the judiciary is separate “to the extent possible.”<sup>152</sup> The low impeachment threshold could also pose a threat to judicial independence. A quarter of *Hluttaw* members from either chamber can initiate impeachment proceedings,<sup>153</sup> giving the military sufficient votes to impeach any judge. The grounds for impeachment include potentially subjective terms such as “inefficient discharge of duties” and “breach of the constitution.”<sup>154</sup>

Aside from the formal branches of government, Chapter VII of the Constitution grants considerable powers to the military (*tatmadaw*). While the president appoints the commander-in-chief, his choice is subject to NDSC approval.<sup>155</sup> Once ensconced, the commander-in-chief is secure because the Constitution does not stipulate any limits on his term in office or provisions for his removal.<sup>156</sup> Moreover, the Constitution allows the Defense Services to “independently administer and adjudicate” all matters pertaining to the armed forces,<sup>157</sup> which critics allege potentially removes legislative or judicial oversight.<sup>158</sup>

Finally, Chapter VIII of the Constitution lists fundamental rights and duties, most of which are civil and political rights. Significantly, it reintroduces habeas corpus for the first time in two generations.<sup>159</sup> Between March 31, 2011 and June 30, 2013, the Supreme Court received 432 petitions for writs, of which 286 were rejected, and of which 84 were pending.<sup>160</sup> However, many fundamental rights are subject to extensive restrictions, such as “security, prevalence of law and order, community peace and tranquility or public order and morality,”<sup>161</sup> which could undermine the underlying right. The constitution also includes social and economic rights, such as education and health,<sup>162</sup> but it is unclear if these are justiciable.<sup>163</sup>

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<sup>151</sup> *Id.* at ch. I, § 19(a).

<sup>152</sup> *Id.* at § 11(a).

<sup>153</sup> *Id.* at ch. III, § 71(b) - VI, § 302(c).

<sup>154</sup> *Id.* at ch. VI, § 302(a).

<sup>155</sup> *Id.* at ch. VII, § 342.

<sup>156</sup> *See id.*

<sup>157</sup> *Id.* at ch. I, § 20(b).

<sup>158</sup> GHAI, *supra* note 5, at 27.

<sup>159</sup> MYAN. CONST. (2008), May 29, 2008, ch. VI, § 296 (Myan.); *see also* Cheesman, *supra* note 73, at 109.

<sup>160</sup> *Chief Justice of the Union Stresses Important Role of Courts in Ensuring Rule of Law*, THE NEW LIGHT OF MYAN., Aug. 9, 2013, at 8.

<sup>161</sup> MYAN. CONST. (2008), *supra* note 159, at ch. VIII, § 354.

<sup>162</sup> *Id.* at §§ 366(a) & 367.

<sup>163</sup> Economic and social rights in constitutions have often been held to be non-justiciable. MARK V. TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN*

Critics have frequently condemned the process for amending the Constitution.<sup>164</sup> Under Chapter XII, constitutional amendments require the support of seventy-five percent of each chamber,<sup>165</sup> which affords the *tatmadaw* bloc an effective veto.<sup>166</sup> For some provisions, including many of the basic principles, a referendum is required.<sup>167</sup> Critics have attacked this as the military's attempt to straightjacket future democratic governments.<sup>168</sup> While there are currently attempts to amend the Constitution (discussed below), the high barrier to amendment has indeed made political reconciliation more difficult as certain provisions of the Constitution have become major sources of contention.

#### F. *Transition to Democracy? (2010 and Onward)*

On November 7, 2010, the government held elections for the new *Pyihtaungsu Hluttaw* and the state/regional legislatures.<sup>169</sup> The NLD boycotted the elections entirely because Aung San Suu Kyi was still under house arrest and party leaders believed the elections would be neither free nor fair.<sup>170</sup> In addition to restrictions on campaigning, many opposition groups alleged that the government-backed Union Solidarity and Development Party ("USDP") relied on suspicious "advance votes" to tip the balance in its favor.<sup>171</sup> Other observers reported widespread vote buying

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COMPARATIVE CONSTITUTIONAL LAW 241 (2007). Recently, however, some constitutional courts have begun to interpret such rights as enforceable. The South African Constitutional Court has led the way in developing a jurisprudential approach based on the reasonableness of the government's implementation of economic and social rights. *See, e.g.*, Cass Sunstein, *Social and Economic Rights? Lessons from South Africa*, (Public Law and Legal Theory, Working Paper No. 12, 2001), available at [http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1276&context=public\\_law\\_and\\_legal\\_theory](http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1276&context=public_law_and_legal_theory); Cass Sunstein, *Social and Economic Rights? Lessons from South Africa*, 11 CONST. FORUM 123 (2000-2001). However, nothing in Myanmar's 2008 Constitution indicates that these rights are enforceable. *See* MYAN. CONST. (2008), *supra* note 159, at ch. VIII. In fact, the Constitution provides such rights "in accord with [educational or health] policy," *Id.* at §§ 366 and 367, giving the legislature considerable discretion.

<sup>164</sup> Williams, *supra* note 5, at 1669; GHAI, *supra* note 5, at 36; *see also* Htet Aung, *An Alternative Solution to Amend the Constitution*, THE IRRAWADDY, May 14, 2010, [http://www2.irrawaddy.org/article.php?art\\_id=17916](http://www2.irrawaddy.org/article.php?art_id=17916).

<sup>165</sup> MYAN. CONST. (2008), *supra* note 159, at ch. XII, §§ 433-36.

<sup>166</sup> Kay Latt, *Opposition-Backed Constitutional Amendments will be Difficult*, THE IRRAWADDY, Sept. 14, 2009, [http://www2.irrawaddy.org/article.php?art\\_id=16775&page=1](http://www2.irrawaddy.org/article.php?art_id=16775&page=1).

<sup>167</sup> MYAN. CONST. (2008), *supra* note 159, at ch. XII, § 436(a).

<sup>168</sup> *See* Dominic J. Nardi, Jr., *Burma's Constitution: Straightjacket or Red Herring?*, NEW MANDALA BLOG, Feb. 29, 2012, <http://asiapacific.anu.edu.au/newmandala/2012/02/29/burma's-constitution-straightjacket-or-red-herring/>.

<sup>169</sup> STEINBERG, *supra* note 95, at 188-92.

<sup>170</sup> *Id.* at 190-91; *see generally* INT'L CRISIS GRP., ASIA BRIEFING NO. 118: MYANMAR'S POST-ELECTION LANDSCAPE (2011).

<sup>171</sup> *See, e.g.*, Htet Aung, *Those Shadowy Advance Votes*, THE IRRAWADDY, Dec., 2010, [http://www2.irrawaddy.org/article.php?art\\_id=20383](http://www2.irrawaddy.org/article.php?art_id=20383).

and intimidation.<sup>172</sup> In the end, the USDP won around seventy-eight percent of all contested seats.<sup>173</sup> The *Hluttaw* elected former general and prime minister Thein Sein as president and former general Thura Shwe Mann as speaker of the legislature.<sup>174</sup>

To the surprise of many observers, Myanmar's elites did not simply trade in their military uniforms for business suits, but rather took genuine yet gradual steps towards reform.<sup>175</sup> President Thein Sein relaxed censorship, pursued currency reform, released hundreds of political prisoners, and suspended construction of the unpopular Myitsoe Dam in Kachin State.<sup>176</sup> The government has also negotiated ceasefire agreements with many of the remaining ethnic insurgent groups, including the Karen National Union, putting an end to the fifty-year civil war.<sup>177</sup> Under Speaker Shwe Mann's leadership, the *Hluttaw* has become much more than a rubber-stamp for the military's agenda.<sup>178</sup> The legislature has passed dozens of new laws, including legislation legalizing trade unions and permitting public protests.<sup>179</sup> Shwe Mann has even formed oversight committees and encouraged opposition MPs to propose bills.<sup>180</sup> For its part, the military has largely refrained from dominating policy debates.<sup>181</sup> The military MPs seldom vote as a unified bloc and often vote against the USDP.<sup>182</sup>

In August 2011, President Thein Sein reached a *détente* with Aung San Suu Kyi, who had been released shortly after the elections.<sup>183</sup> She announced that she believed the president's commitment to reform and

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<sup>172</sup> Jack Davies & Haroon Siddique, *Burma Election Observers Report Voter Intimidation*, THE GUARDIAN, Nov. 8, 2010, <http://www.theguardian.com/world/2010/nov/08/burma-election-voter-intimidation>.

<sup>173</sup> *Figures of Multiparty Democracy General Elections for Respective Hluttaws Announced*, NEW LIGHT OF MYAN., Dec. 8, 2010, <http://www.burmanet.org/news/2010/12/08/new-light-of-myanmar-figures-of-multiparty-democracy-general-elections-for-respective-hluttaws-announced/>.

<sup>174</sup> *Meeting of Group of Pyidaungsu Hluttaw Representatives-Elect of Presidential Electoral College held U Thein Sein Elected as President, Thiha Thura U Tin Aung Myint Oo, Dr. Sai Mauk Kham (a) Maung Ohn as Vice-Presidents*, THE NEW LIGHT OF MYAN., Feb. 5, 2011, at 1.

<sup>175</sup> INT'L CRISIS GRP., ASIA BRIEFING NO. 127: MYANMAR: MAJOR REFORM UNDERWAY (2011); INT'L CRISIS GRP., ASIA REPORT NO. 214: MYANMAR: A NEW PEACE INITIATIVE (2011); INT'L CRISIS GRP., ASIA BRIEFING NO. 136: REFORM IN MYANMAR: ONE YEAR ON (2012).

<sup>176</sup> Dominic J. Nardi, Jr., *Discipline-Flourishing Constitutional Review: A Legal and Political Analysis of Myanmar's New Constitutional Tribunal*, 12 AUSTL. J. OF ASIAN L. 1 (2011).

<sup>177</sup> *Burma Government Signs Ceasefire With Karen Rebels*, BBC NEWS, Jan. 12, 2012, <http://www.bbc.co.uk/news/world-asia-16523691>.

<sup>178</sup> See generally INT'L CRISIS GRP., ASIA BRIEFING NO. 142: NOT A RUBBER STAMP: MYANMAR'S LEGIS. IN A TIME OF TRANSITION (2013).

<sup>179</sup> *Id.* at 9-13.

<sup>180</sup> *Id.* at 6.

<sup>181</sup> *Id.* at 6-8.

<sup>182</sup> *Id.*

<sup>183</sup> ASSOCIATED PRESS, *Dissident Meets Leader of Myanmar*, N.Y. TIMES, Aug. 20, 2011, [http://www.nytimes.com/2011/08/20/world/asia/20myanmar.html?\\_r=0](http://www.nytimes.com/2011/08/20/world/asia/20myanmar.html?_r=0).

agreed to participate in the political process.<sup>184</sup> On April 1, the NLD ran candidates in forty-four by-elections and won forty-three seats, compared to the USDP's single victory.<sup>185</sup> Aung San Suu Kyi became chairperson for the *Pyithu Hluttaw* Committee for Rule of Law, Peace, and Tranquility, which has jurisdiction over general questions of the rule of law and judicial reform.<sup>186</sup> While the NLD has been critical of some aspects of government policy, as of 2014 it appears committed to working through the legislature.<sup>187</sup>

In early 2013, the legislature established a 109-member Constitutional Review Joint Committee to study proposed amendments, with fifty-two members from the USDP, twenty-five from the military, and seven from the NLD (all eighteen political parties in the legislature have at least one MP).<sup>188</sup> The Committee received over 300,000 suggestions from political parties, NGOs, legal experts, and government officials.<sup>189</sup> Most of the suggestions have focused on the Constitution's basic principles and the process for amending the Constitution.<sup>190</sup> For its part, the NLD has demanded that the ban on presidential candidates with foreign dependents<sup>191</sup> be removed, especially because Daw Suu's children are British citizens and she has announced her intention to compete for the presidency in 2015.<sup>192</sup> It has also proposed eliminating the military's role in the legislature.<sup>193</sup> Further, the USDP has proposed making district and township administrators directly elected and chief ministers appointed by each state/regional legislature rather

<sup>184</sup> Larry Jagan, *What Their Sein Promised Suu Kyi*, ASIA TIMES, Sept. 30, 2011, [http://www.atimes.com/atimes/Southeast\\_Asia/MI30Ae01.html](http://www.atimes.com/atimes/Southeast_Asia/MI30Ae01.html).

<sup>185</sup> Dean Nelson, *Burma Elections: President Their Sein Happy with Result*, THE TELEGRAPH, Apr. 3, 2013, <http://www.telegraph.co.uk/news/worldnews/asia/burmamyanmar/9183220/Burma-elections-President-Thein-Sein-happy-with-result.html>.

<sup>186</sup> Min Lwin, *Suu Kyi to Head 'Rule of Law' Committee*, DEMOCRATIC VOICE OF BURMA, Aug. 8, 2012, <http://www.dvb.no/news/suu-kyi-to-head-'rule-of-law'-committee/23217>.

<sup>187</sup> See, e.g., Simon Roughneen, *NLD to Probe Their Sein's USDP Role*, THE IRRAWADDY, Oct. 19, 2012, <http://www.irrawaddy.org/nld/nld-to-probe-thein-seins-usdp-role.html>.

<sup>188</sup> Soe Than Lin & Min Min, *Suu Kyi Cautions Constitution Review Joint Committee*, MIZZIMA NEWS, Nov. 19, 2013, <http://mizzima.com/mizzima-news/politics/item/10607-suu-kyi-cautions-constitution-review-joint-committee>.

<sup>189</sup> Soe Than Linn & Nyan Hlaing Linn, *Constitution Review Panel to Meet Deadline, Say MPs*, MIZZIMA NEWS, Jan. 17, 2014, <http://mizzima.com/mizzima-news/politics/item/10864-constitution-review-panel-to-meet-deadline-say-mps>.

<sup>190</sup> Ei Ei Toe Lwin, *Constitution Committee will not Vote on Suggestions*, THE MYAN. TIMES, Jan. 17, 2014, <http://www.mmmtimes.com/index.php/national-news/9271-constitution-committee-will-not-vote-on-suggestions.html>.

<sup>191</sup> MYAN. CONST. (2008), May 29, 2008, ch. III, § 59(f) (Myan.).

<sup>192</sup> Hilary Whiteman, *Myanmar's Suu Kyi: 'I Want to Run for President'*, CNN, June 6, 2013, <http://www.cnn.com/2013/06/06/world/asia/myanmar-suu-kyi-presidential-aspiration/>.

<sup>193</sup> Shwe Aung, *150 Constitutional Clauses Should be Amended, Says NLD*, DEMOCRATIC VOICE OF BURMA, Dec. 27, 2013, <http://www.dvb.no/news/150-constitutional-clauses-should-be-amended-says-nld-burma-myanmar/35593>.

than by the president, partly as an attempt to satisfy ethnic minority parties.<sup>194</sup>

As of January 31, 2014, the Committee report proposed more limited changes, but its report is not binding upon the rest of the legislature.<sup>195</sup> Indeed, Speaker Shwe Mann released a statement calling upon the legislature to consider reforming the military's role to conform to democratic principles.<sup>196</sup>

#### IV. THE CONSTITUTIONAL TRIBUNAL & JURISPRUDENCE

The 2008 Constitution reintroduced the concept of constitutional review, but vested that power in a new Constitutional Tribunal rather than a Supreme Court.<sup>197</sup> This section provides an overview of the Constitutional Tribunal's structure and powers. It then analyzes the Tribunal's jurisprudential reasoning in all five of the decisions it issued. In adjudicating a dispute between the president and legislature, the Tribunal announced that legislative committees did not have constitutional status. This section concludes by discussing the ensuing backlash and impeachment of the Tribunal members.

##### A. *Constitutional Tribunal Structure & Powers*

The Constitutional Tribunal has authority to “vet” legislation and executive orders for conformity with the Constitution.<sup>198</sup> It can also adjudicate disputes between various government actors.<sup>199</sup> The Constitution does not prescribe a standard of review or method of constitutional interpretation. However, it does clearly state that “[t]he resolution of the Constitutional Tribunal of the Union shall be final and conclusive,” meaning that any laws the Tribunal finds unconstitutional should immediately become null and void without the need for further action from the legislature.<sup>200</sup>

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<sup>194</sup> Htet Naing Zaw, *USDP Announces Surprise Constitutional Amendment Proposal*, THE IRRAWADDY, Dec. 31, 2013, <http://www.irrawaddy.org/burma/usdp-announces-surprise-constitutional-amendment-proposal.html>.

<sup>195</sup> Lawi Weng, *Burma Parliament Committee: Keep Main Points of Constitution*, THE IRRAWADDY, Jan. 31, 2014, <http://www.irrawaddy.org/burma/burma-parliament-committee-keep-main-points-constitution.html>.

<sup>196</sup> Office of Pyidaungsu Hluttaw, *The Basic Principles For the Implementation Committee*, 2014, at § B(2) (Myan.) (Thura Shwe Mann, Speaker).

<sup>197</sup> MYAN. CONST. (2008), May 29, 2008, ch. VI, § 322(b)-(c) (Myan.).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at § 322(d)-(e).

<sup>200</sup> *Id.* at § 324; *see also* Constitutional Tribunal Law, 2010, No. 21, ch. VI (Myan.) (The State Peace and Development Council Law). In describing the Constitutional Tribunal's powers, the English-language

The Constitutional Tribunal is composed of nine members, including a chairperson, each appointed for five-year terms.<sup>201</sup> The president and speakers of both chambers of the *Pyithu Hluttaw* and *Amyotha Hluttaw* each choose three justices, subject to confirmation by the entire legislature.<sup>202</sup> Tribunal nominees must be at least fifty years old, and must have served for at least five years as a judge on the High Court; ten years as a judicial officer; twenty years as an advocate; or an eminent jurist “in the opinion of the President.”<sup>203</sup> This last criterion affords the president relatively broad discretion in selecting nominees because there is no definition of “eminent jurist.”<sup>204</sup> In addition, members must be “loyal to the Union” and have a “political, administrative, economic, and security outlook.”<sup>205</sup> This provision is not immediately clear, but appears designed to allow the government to evaluate a candidate’s political ideology and career experience.

Direct standing before the Tribunal is limited to several senior government officials, including the president, speakers of each *Pyihtaungsu Hluttaw* chamber, and chief justice of the Supreme Court.<sup>206</sup> In addition, state/regional chief ministers and legislative speakers, as well as ten percent of the *Hluttaw*, can submit questions in accord with “certain procedures.”<sup>207</sup> Non-governmental actors do not have standing to petition the Tribunal directly.<sup>208</sup> It seems possible for citizens to use § 323 to get a case containing constitutional questions referred by the ordinary courts to the Tribunal chief justice,<sup>209</sup> but this has not yet occurred. However, because judges possess discretion in making such referrals, there is a risk that they would deny petitions by claiming that the dispute can be resolved without answering any constitutional questions. The 2010 Constitutional Tribunal Law appears to grant the Constitutional Tribunal Chief Justice significant

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version of the “State Fundamental Principles” uses the term “scrutinize,” whereas the final draft uses “vet.” According to the Oxford English Dictionary, the former merely means to examine closely, while the latter means to check a subject’s authority or suitability—implying considerably stronger powers. Compare *Scrutinize*, v., OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com/view/Entry/173774?redirectedFrom=scrutinize> (last visited May 24, 2014), with *Vet*, v., OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com/view/Entry/222953?rskey=NhhEZC&result=3&isAdvanced=false> (last visited May 24, 2014). The Burmese-language versions both use the same word—*sie zit*—so the English change does not affect the legal meaning, but possibly demonstrates the drafters’ desire to enhance the tribunal’s authority, at least for English-language audiences. The two versions are otherwise identical with respect to the tribunal.

<sup>201</sup> MYAN. CONST. (2008), *supra* note 197, at ch. VI, § 335.

<sup>202</sup> *Id.* at § 321.

<sup>203</sup> *Id.* at § 333.

<sup>204</sup> *See id.* at § 333(d)(iv).

<sup>205</sup> *Id.* at § 333(h)-(g).

<sup>206</sup> *Id.* at § 325.

<sup>207</sup> *Id.* at § 326.

<sup>208</sup> *See id.* at §§ 325, 326.

<sup>209</sup> *Id.* at § 323.



agenda-setting powers in such cases because it instructs him to submit his opinion on such cases to the other members.<sup>210</sup>

As with the ordinary judiciary, the impeachment threshold is relatively low. Either the president or a quarter of either *Hluttaw* chamber can initiate impeachment proceedings against Tribunal members for “high treason,” “misconduct” or even “inefficient discharge of duties.”<sup>211</sup> There is also some ambiguity as to whether or not the Constitution’s guarantee of judicial independence extends to the Tribunal. Like the President and legislators but unlike judges, the Tribunal members serve for only five-year terms.<sup>212</sup> The Constitution uses the Burmese word *khone yone* (specialized court) to describe the Tribunal, rather than *taya hluttaw* (court of justice), the term used for the ordinary courts. The Constitution also does not list the Tribunal amongst institutions sharing “judicial power.”<sup>213</sup> In earlier drafts of the Constitution, the provisions for the Tribunal were even separated from those for the rest of the judiciary, although by 2008 they were moved to the chapter on the judiciary (Chapter VI).<sup>214</sup>

As noted above, knowledge about the actual process of drafting the 2008 Constitution remains limited. It is not clear why the military elite acceded to the inclusion of a constitutional court, or indeed if they even understood the risks of constitutional review.<sup>215</sup> Official proceedings from the National Convention tend to be either unenlightening or restate the obvious. U Tin Sein of Pyay Township in Bago Division, representative of “workers,” explained that “[the Constitutional Tribunal] is a must for

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<sup>210</sup> Constitutional Tribunal Law, 2010, No. 21, ch. VI, § 17 (Myan.) (The State Peace and Development Council Law).

<sup>211</sup> MYAN. CONST. (2008), May 29, 2008, ch. VI, § 334 (Myan.).

<sup>212</sup> *Id.* at § 335.

<sup>213</sup> The Basic Principles of the 2008 Constitution state: “The judicial power of the Union is shared among the Supreme Court of the Union, High Courts of the Regions, High Courts of the States and courts of different levels, including Courts of Self-Administered Areas.” *See id.* at ch. I, § 18(a).

<sup>214</sup> In the “State Fundamental Principles,” provisions on the Constitutional Tribunal fell under the chapter on General Provisions (Chapter XV). Only in late 2007 did the National Convention’s Constitution Drafting Commission move the provisions on the Tribunal to the same chapter as the judiciary (Chapter VI). It remains unclear why the Commission did this, although even in the final draft the provisions for the Tribunal are separated by a different heading. *Compare The Fundamental Principles and Detailed Basic Principles, supra* note 132, with MYAN. CONST. (2008), *supra* note 211, at ch. VI.

<sup>215</sup> While the author has heard several interesting rumors while in Yangon, these generally lack concrete evidence. One rumor is that the lawyers drafting the 2008 Constitution separated the Constitutional Tribunal from the Supreme Court in order to create more patronage opportunities for the legal profession. Proponents point out that the Constitution requires judges and certain other officeholders to possess law degrees. Interview with Anonymous, in Yangon, Myanmar (June 3, 2010). However, this seems dubious on several counts. First, the professional criteria are similar to and most likely copied from the 1947 Constitution. Second, if the Constitutional Tribunal had been primarily designed for patronage, then life tenure (or at least lengthy terms) would have been more appropriate. The current five-year term provides little job security. Finally, the drafters could have pursued similar (if not better) patronage opportunities by expanding the membership of the Supreme Court.

ensuring perpetual existence of the State Constitution.”<sup>216</sup> This suggests that he, and in turn other drafters, considered a constitutional court important for the success of the Constitution itself, perhaps referencing the widely held belief that constitutional review makes constitutions more responsive to change.<sup>217</sup> Unfortunately, U Tin Sein does not elaborate on his comment.

Other comments at the National Convention stressed the dispute-resolution function of the Constitutional Tribunal. U Sein Kyi, a convention representative on behalf of “intellectuals and intelligentsia,” predicted the Tribunal would handle political disputes about the meaning of the Constitution, which he claims justifies the requirement that Tribunal members possess a background in political, administrative, and security affairs.<sup>218</sup> Along these lines, he argues that allowing senior government officials to submit abstract questions to the Tribunal is “appropriate because they are the heads of respective organizations.”<sup>219</sup>

Such statements indicate that the drafters viewed the Tribunal as a forum in which to resolve intra-governmental disputes, not as a means for citizens to check the government. It is notable that none of the delegates justified the Tribunal as necessary to protect fundamental rights. It seems particularly likely that the drafters viewed the Tribunal as a means through which to police jurisdictional boundaries in the new government, especially between the Union government and the new state/regional governments.<sup>220</sup> The Constitution contains legislative schedules delineating Union and state/regional jurisdiction, but several provisions remain ambiguous.<sup>221</sup>

On February 5, 2011, the *Hluttaw* confirmed the nine Constitutional Tribunal members.<sup>222</sup> The three members nominated by the president were U Thein Soe, Dr Tin Aung Aye, and Daw Khin Hla Myint.<sup>223</sup> The three chosen by the Speaker of the *Pyithu Hluttaw* were U Tun Kyi, U Soe

<sup>216</sup> *Delegate Group of Intellectuals and Intelligentsia at the Plenary Session of the National Convention Held at Pyidaungsu Hall, Nyaungnnapin Camp, Hmawby Township, Yangon Division (28 December 2006)*, THE NEW LIGHT OF MYAN., Jan. 1, 2007, at 10.

<sup>217</sup> See ELKINS, *supra* note 13, at 106-09.

<sup>218</sup> *Delegate Group of Intellectuals and Intelligentsia at the Plenary Session of the National Convention held at Pyidaungsu Hall, Nyaungnnapin Camp, Hmawby Township, Yangon Division (28 December 2006)*, *supra* note 216.

<sup>219</sup> *Id.*

<sup>220</sup> Nardi, *supra* note 176, at 24; see generally JENNA BEDNAR, THE ROBUST FEDERATION: PRINCIPLES OF DESIGN 119-25 (2008) (explaining how courts help police boundaries of federal jurisdictions).

<sup>221</sup> For example, state and regional governments have jurisdiction over “small business loans,” but the threshold for a loan to be considered small is not defined in the Constitution. See MYAN. CONST. (2008), May 29, 2008, Schedules II(1)(k), (Myan.).

<sup>222</sup> *Fourth-day Regular Session of First Pyidaungsu Hluttaw Held*, THE NEW LIGHT OF MYAN., Feb. 12, 2011, at 9, 16.

<sup>223</sup> *Id.*

Thein, and U Khin Tun.<sup>224</sup> Finally, the three nominated by the Speaker of the *Amyotha Hluttaw* were U Hsan Myint, U Myint Kyaing, and Daw Mi Mi Yi. All nine were confirmed with no objections.<sup>225</sup> Thein Soe had been the chairperson of the Elections Commission during the November 2010 elections and was appointed to head the Tribunal.<sup>226</sup>

## B. *Constitutional Tribunal Jurisprudence*

The next five sections (Sections IV.B.1-5) analyze the jurisprudential reasoning in each of the five cases the Constitutional Tribunal heard between March 2011 and August 2012. The Tribunal members primarily used textualist or originalist approaches to interpreting the Constitution. However, after the backlash from a controversial decision regarding the status of legislative committees, the Tribunal seemed to adopt a balancing test in its final decision.

### 1. *Chief Justice v. Ministry of Home Affairs*

The Constitutional Tribunal's first case, *Chief Justice v. Ministry of Home Affairs*, focused on the extent of the 2008 Constitution's guarantee of judicial independence in § 11.<sup>227</sup> The Ministry of Home Affairs ("MHA") attempted to confer first class judicial power<sup>228</sup> on twenty-seven sub-township administrative officials, allowing them to try criminal cases.<sup>229</sup> The Chief Justice of the Supreme Court claimed that creating judgeships based in

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> Soe Than Lynn & Shwe Yinn Mar Oo, *Members of Constitutional Tribunal Nominated, List of Ministers Approved*, THE MYAN. TIMES, Feb. 14-20, 2011, <http://www.mmtimes.com/2011/news/562/news56203.html>. The other members' backgrounds are:

Tin Aung Aye (Former Economic Institute Director);

Khin Hla Myint (Supreme Court Crime Department Director);

Tun Kyi (Retired Supreme Court Director);

Soe Thein (Retired Supreme Court Director);

Khin Tun (Retired Supreme Court Director);

Hsan Myint (Revenue Appeals Court Director);

Myint Kyaing (Region law officer and Director); and

Mi Mi Yi (Retired Supreme Court Deputy Director).

<sup>227</sup> *The Chief Justice of the Union v. Ministry of Home Affairs*, [2011] No. 1/2011 (C.T.) 23 (Myan.) [hereinafter *Chief Justice v. MHA*].

<sup>228</sup> Courts of Magistrates with first class judicial power can only impose the following sentences: "imprisonment for a term not exceeding two years, including such solitary confinement as is authorized by law; Fine not exceeding one thousand rupees; Whipping." Higher sentences can only be imposed by higher classes of Magistrates. Code of Criminal Procedure, 1898, ch. III, § 32(a) (Myan.).

<sup>229</sup> *Chief Justice v. MHA*, *supra* note 227, at 23-24.

the executive branch would infringe upon the judiciary's constitutionally protected independence.<sup>230</sup>

The MHA based its argument largely on historical precedents. It noted that even under the 1947 Constitution, the government used administrative officials to adjudicate local criminal cases.<sup>231</sup> After the 1988 coup, the SLORC/SPDC revived this practice with the 1988 Judiciary Law.<sup>232</sup> Given how much the 2008 Constitution borrowed from the 1947 Constitution, and the fact that the 2008 Constitution was drafted by the SPDC, the MHA actually had a fairly compelling historical argument to support its position. The MHA asked the Tribunal to interpret the text of the 2008 Constitution in light of undisputed historical practices in Myanmar. Given the language of § 11(a)—that the judicial power should be “separated, to the extent possible”<sup>233</sup>—the Tribunal probably could have found sufficient textual ambiguity to justify following historical precedent.<sup>234</sup>

Instead, the Tribunal ruled that the MHA's decision was unconstitutional and stated unequivocally that § 11(a) should be read as a firm guarantee of judicial independence, despite the ambiguity.<sup>235</sup> It argued that § 11(a) could not be read in isolation, but rather in context with § 18(a) and Chapter VI, which describe the judicial power and only vest it in the judiciary.<sup>236</sup> It noted that nowhere does the Constitution authorize administrative officers to perform judicial functions.<sup>237</sup> It also explicitly rejected the use of historical arguments. It stated that the situation under the SPDC was “not the same” because the 2008 Constitution had not yet gone into effect.<sup>238</sup> Therefore, the Tribunal found the MHA administrative adjudicators unconstitutional.<sup>239</sup>

The Constitutional Tribunal clearly took a textualist approach despite clear historical precedent against doing so. The decision did not unequivocally reject historical precedent, but rather stated that it would only

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<sup>230</sup> *Id.* at 24-25.

<sup>231</sup> *Id.*, at 28-29.

<sup>232</sup> See State Law and Order Restoration Council Law (Judiciary Law), 1988, No. 2/1988, ch. VI, § 11 (Myan.).

<sup>233</sup> MYAN. CONST. (2008), May 29, 2008, ch. I, § 11 (Myan.).

<sup>234</sup> For example, the U.S. permits the use of administrative law judges, despite no clear evidence in Article III of the Constitution supporting their use. See U.S. CONST. art. III; see also STEPHEN H. LEGOMSKY, SPECIALIZED JUSTICE: COURTS, ADMINISTRATIVE TRIBUNALS, AND A CROSS-NATIONAL THEORY OF SPECIALIZATION (1990).

<sup>235</sup> *Chief Justice v. MHA*, [2011] No. 1/2011 (C.T.) 23 (Myan.).

<sup>236</sup> *Id.* at 33.

<sup>237</sup> *Id.* at 33-34.

<sup>238</sup> *Id.* at 33.

<sup>239</sup> *Id.* at 36.

consider precedent arising out of the 2008 Constitution.<sup>240</sup> In other words, the Tribunal would not use historical practices or law under previous constitutions in order to interpret the 2008 Constitution.<sup>241</sup> Indeed, as discussed below, the Tribunal's next few cases made extensive use of National Convention proceedings to interpret the Constitution.

## 2. *Dr. Aye Maung v. Myanmar*

In *Dr. Aye Maung, et. al. v. Myanmar*, a group of *Amyotha Hluttaw* MPs filed a petition to invalidate a portion of the 2011 Law of Emoluments, Allowances, and Insignia of Office for Representatives of the Region or State.<sup>242</sup> In particular, they argued that §§ 5 and 17 excluded state/region level Ministers for National Races Affairs from certain benefits that other ministers enjoyed.<sup>243</sup> They argued that the Constitution does not distinguish between types of ministers and that all ministers should be treated equally.<sup>244</sup> The Union Attorney-General argued that § 262(a)(iv) of the 2008 Constitution authorized the appointment of an official from the state/regional *hluttaw* to oversee race or ethnic affairs and described the process of appointment, but did not explicitly confer ministerial status.<sup>245</sup> He also noted that the Ministers of National Races Affairs performed different duties from other ministers and therefore could not claim the same rights.<sup>246</sup>

The Constitutional Tribunal found that the National Races Affairs Ministers did in fact qualify as ministers under the law.<sup>247</sup> It noted that § 262(f) of the Constitution allows the president to appoint the persons selected by the state/regional Chief Minister “as Ministers” and does not differentiate those appointments from those selected under § 262(a)(iv).<sup>248</sup> In addition, the Tribunal referenced the 2010 Union Government Law and the Region or State Government Law in order to interpret the Constitution.<sup>249</sup> The Region or State Government Law explicitly uses the term “ministers” to

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<sup>240</sup> *See id.* at 33.

<sup>241</sup> *See id.*

<sup>242</sup> *Dr. Aye Maung, et al., v. The Rep. of the Union of Myan., [2011] No. 2/2011 (C.T.) 6 (Myan.)* [hereinafter *Dr. Aye Maung v. Myan.*].

<sup>243</sup> Under § 5 of the law, the National Races Affairs Ministers would have received an allowance of MMK 1,000,000 (10 lakhs) monthly as opposed to MMK 2,000,000 (20 lakhs) enjoyed by other ministers. *See* Law of Emoluments, Allowances and Insignia of Office for Representatives of the Region or State, 2011, No. 3/2011, §§ 4-5 (Myan.). In addition, they would have received fewer non-pecuniary benefits than other ministers. *See id.* at §§ 16-17.

<sup>244</sup> *Dr. Aye Maung v. Myan., supra* note 242, at 64-65.

<sup>245</sup> *Id.* at 66.

<sup>246</sup> *Id.* at 67.

<sup>247</sup> *Id.* at 81.

<sup>248</sup> *Id.* at 72-74.

<sup>249</sup> *Id.* at 74-75.

describe the officials who manage national races affairs.<sup>250</sup> The Union Government Law provides a list of state/regional officials whom the President can appoint, including state/regional “ministers” but *not* other executive agency officials.<sup>251</sup> Therefore, the members struck down §§ 5 and 17 of the Law of Emoluments as unconstitutional.<sup>252</sup>

As in *Chief Justice v. MHA*, the Constitutional Tribunal’s reasoning was still primarily textualist, in that it focused on the text of the Constitution and how the different parts of § 262 fit together. The Attorney-General did attempt to analogize the case to principles of private employment law, when he noted that the National Races Affairs Ministers did not have the same duties as other ministers and therefore are not entitled to the same rights.<sup>253</sup> The Tribunal rejected this by explaining that private law was not informative with regard to public employment.<sup>254</sup>

Unlike the previous case, the Constitutional Tribunal did consider original intent. The Tribunal cited a description of the basic principles from the National Convention Plenary Session, stating in effect that state/region ministers have the same status of Union deputy ministers.<sup>255</sup> However, this part of the decision is likely dicta, as the quote only talks about ministers generally, not the National Races Affairs Ministers in particular.<sup>256</sup> Textualist arguments still dominated the Tribunal’s reasoning. The Tribunal curtly dismissed the Attorney-General’s contention that there had never been any intention to make the National Races Affairs Ministers full state/regional ministers because the basic principles of the constitution take precedence.<sup>257</sup>

### 3. *President v. Dr. Aye Maung*

In early 2012, President Thein Sein submitted a petition requesting that the Constitutional Tribunal overturn its decision in *Dr. Aye Maung v. Myanmar*.<sup>258</sup> In *President v. Dr. Aye Maung*, the Constitutional Tribunal reaffirmed its earlier decision, noting that § 324 of the 2008 Constitution

<sup>250</sup> The Region or State Government Law, 2010, No. 16 /2010, § 10(a)(ii) (Myan.).

<sup>251</sup> See The Union Government Law, 2010, No. 15/2010, § 19(c) (Myan.).

<sup>252</sup> *Dr. Aye Maung v. Myan.*, [2011] No. 2/2011 (C.T.) 81 (Myan.).

<sup>253</sup> *Id.* at 80.

<sup>254</sup> *Id.* at 80.

<sup>255</sup> *Id.* at 77.

<sup>256</sup> See *id.*

<sup>257</sup> *Id.* at 75-76. This case has also been described as a proxy fight between the legislature and the president by those knowledgeable. Interview with Anonymous, in Yangon, Myanmar (Dec. 31, 2011).

<sup>258</sup> *State Constitutional Tribunal Hears Attorney-General’s Query*, THE NEW LIGHT OF MYAN. 9, Feb. 25, 2012, at 9.

states all Tribunal decisions are “final and conclusive.”<sup>259</sup> The decision itself is relatively brief and did not change the legal basis for *Dr. Aye Maung v. Myanmar*. However, in rejecting the president’s petition, it does provide two additional examples of the Constitutional Tribunal’s attitude towards historical and legal analogies.

First, the Attorney-General argued that the Constitutional Tribunal should follow the interpretation in the 1961 Supreme Court decision, *Bo Sein Toe v. Sein Toe*,<sup>260</sup> which found that the phrase “shall be final and conclusive” in the Parliament Selection Act did not prohibit the Court from reversing itself when it had made an error in law.<sup>261</sup> The Tribunal rejected this argument because the Constitutional Tribunal’s authority is different from that of the Supreme Court and its powers are not binding on the Tribunal.<sup>262</sup> Again, the Tribunal’s rejection of historical evidence was premised on its lack of relevance to the question at hand.

Second, the Attorney-General attempted to argue that the Myanmar Code of Civil Procedure should govern in the absence of a specific rule about reversing decisions in the Constitutional Tribunal Law.<sup>263</sup> The Tribunal agreed that § 21 of the Constitutional Tribunal Law did incorporate the Code of Civil Procedure, but only with regard to hearings, not decisions.<sup>264</sup> Relying upon a definition from Black’s Law Dictionary, the Tribunal stated that “hearings” were for the purpose of obtaining evidence and reaching a decision, but did not extend to a decision already issued.<sup>265</sup> Interestingly, the Tribunal also cited a 1986 case, *Sein Hlaing v. Maung Maung Aye*,<sup>266</sup> to elaborate upon the definition of “hearing.” Its willingness to cite this case suggests that the Tribunal would accept historical analogies in order to interpret general legal terms, but not to interpret the 2008 Constitution.

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<sup>259</sup> President of the Union v. Dr. Aye Maung, et al., [2012] No. 2/2012 (C.T.) 1 (Myan.) [hereinafter *President v. Dr. Aye Maung*].

<sup>260</sup> *Id.* at 2.

<sup>261</sup> *Id.* at 2-3.

<sup>262</sup> *Id.* at 3; see also MYAN. CONST. (2008), May 29, 2008, ch. VI, § 294 (Myan.).

<sup>263</sup> *President v. Dr. Aye Maung*, *supra* note 259, at 3.

<sup>264</sup> *Id.* at 4.

<sup>265</sup> *Id.*

<sup>266</sup> *Id.*

#### 4. *President v. Pyidaungsu Hluttaw*

The Constitutional Tribunal's third case, *President v. Pyidaungsu Hluttaw*,<sup>267</sup> engendered the most controversy and led directly to the impeachment crisis (discussed *infra* in Part IV.C). The precise political interests underlying the dispute are unclear. The *Pyidaungsu Hluttaw* and its defenders argued that "union level organization" status allowed legislative committees to oversee the executive branch and to subpoena government ministers.<sup>268</sup> However, President Thein Sein allegedly grew concerned that *Hluttaw* committees were using their powers to delay the passage of critical legislation, including the Foreign Investment Law, which was subject to over 94 amendments and was debated for months.<sup>269</sup> Thus, in early 2012, the president asked if *Pyidaungsu Hluttaw* legislative committees fell under the category of "union level organizations" under the 2008 Constitution.<sup>270</sup>

As a matter of law, the 2008 Constitution itself does not provide an explicit definition of "union level organization," although it does use the term several times.<sup>271</sup> The Attorney-General argued that the Constitution mentions the possibility of inviting "union level organizations" to submit proposals to the legislature, implying that these were external bodies.<sup>272</sup> Although the *Pyidaungsu Hluttaw* itself and each of its chambers are "union level organizations," it cannot be imputed that its representatives are as

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<sup>267</sup> *President of the Union v. Pyidaungsu Hluttaw et. al.*, [2012] No. 2/2012 (C.T.) 4 (Myan), reprinted in *Verdict Handed Down on Submission No. 1/2012 Submitted by Attorney-General of the Union on Behalf of the President of the Union*, THE NEW LIGHT OF MYAN., Aug. 16, 2012, at 4 [hereinafter *President v. Pyidaungsu Hluttaw*].

<sup>268</sup> *Union Level Crossword Still Unresolved*, THE NEW LIGHT OF MYAN., Sept. 6, 2012, at 16.

<sup>269</sup> *Id.*

<sup>270</sup> Gregory B. Poling & Kathleen Bissonnette, *Myanmar's Crisis Calls for Constitutional Overhauling*, CTR. FOR STRATEGIC & INT'L STUD., Sept. 14, 2012, <http://csis.org/publication/myanmars-crisis-calls-constitutional-overhauling>. Other commentators point to possible financial motives. Aung Htoo, a human rights lawyer, claimed that MPs wanted to earn honorariums, allowances, privileges, and facilities commensurate to those of Union ministers and thus sought to classify committees as "union level organizations." Aung Htoo, *A Constitutional Crisis in Burma?*, DEMOCRATIC VOICE OF BURMA, Sept. 7, 2012, <https://www.dvb.no/analysis/a-constitutional-crisis-in-burma/23662>. He claims this would have incurred an enormous expense given that there were thirty active *Hluttaw* committees at the time, especially as some committees included non-MPs as members. *Id.* After impeachment, MP U Stephen of Kengtung Constituency rejected this claim, noting that not a single MP had taken the emoluments of Union ministers. TOE NAING MANN, THE EXPLAINING TO THE VERDICT HANDED DOWN BY THE CONSTITUTIONAL TRIBUNAL COURT OF THE UNION ON THE ISSUE OF UNION LEVEL ORGANIZATION 15 (2012).

<sup>271</sup> *See, e.g.*, MYAN. CONST. (2008), May 29, 2008, § 140(b) (Myan.) (providing that members of the organization representing any Union Level Body formed under the Constitution are entitled "to explain, converse and discuss Bills or matters relating to their Bodies when they are attending sessions of the Committees, Commissions and Bodies of the Pyithu Hluttaw with the permission of the Head of the Committee, Commission or Body concerned.").

<sup>272</sup> *President v. Pyidaungsu Hluttaw*, *supra* note 267, at 4.



well.<sup>273</sup> For its part, the *Hluttaw* noted that term was already defined in the 2010 *Pyidaungsu Hluttaw Law* and the 2010 *Pyithu* and *Amyotha Hluttaw Laws* as including committees or bodies formed by the legislature.<sup>274</sup> It then challenged the Tribunal's jurisdiction, alleging that the Tribunal only had jurisdiction over laws passed by the government after the enactment of the 2008 Constitution.<sup>275</sup>

Before reaching its decision, the Constitutional Tribunal discussed approaches of constitutional interpretation. It distinguished between the interpretation of a statute "literally which can be availed by itself [sic]" versus the "consideration of those provisions construed with the intention of the drafters."<sup>276</sup> It also acknowledged that the 1973 Interpretation of Expressions Law advised consideration of the "intention and attitude" of the drafters.<sup>277</sup> This is the first time the Tribunal explicitly discussed methods of constitutional interpretation, and while it did not use the labels employed by comparative constitutional law scholars (e.g., "textualist" versus "originalist"), it did fairly accurately summarize those schools of constitutional thought.<sup>278</sup>

The Tribunal combined textualist and originalist approaches to the case. First, it noted that Chapter IV of the Constitution made separate provisions for the formation of legislative committees.<sup>279</sup> Given the separation of powers in the Constitution, the Tribunal took this to imply that legislative committees were being treated differently and separately from "Union Level Organizations."<sup>280</sup> Then it cited National Convention Chairman Aung Toe's statement that the president has the authority to "designate [] the number of members of the Union Level Organizations to be

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<sup>273</sup> *Id.* at 5.

<sup>274</sup> The Law Relating to Pyidaungsu Hluttaw, 2010, No. 11/2010, § 2(f) (Myan.); The Law Relating to Pyithu Hluttaw, 2010, No. 12/2010, § 2(h) (Myan.); The Law Relating to Amyotha Hluttaw, 2010, No. 13/2010, § 2(h) (Myan.).

<sup>275</sup> Under § 322(b) of the Constitution and § 12(b) of the Constitutional Tribunal Law, one of the functions and duties of the Constitutional Tribunal of the Union is "vetting" or "scrutinizing" whether "the laws promulgated by the *Pyidaungsu Hluttaw*, the regional *hluttaw*, the state *hluttaw*, or the Self-Administered Division Leading Body and the Self-Administered Zone Leading Body are in conformity with the Constitution." See Constitutional Tribunal Law, 2010, No. 21, ch. VI, § 12(b) (Myan.) (The State Peace and Development Council Law).

<sup>276</sup> *President v. Pyidaungsu Hluttaw*, [2012] No. 2/2012 (C.T.) 4 (Myan), reprinted in *Verdict Handed Down on Submission No. 1/2012 Submitted by Attorney-General of the Union on Behalf of the President of the Union*, THE NEW LIGHT OF MYAN., Aug. 16, 2012, at 6.

<sup>277</sup> *Id.* (citing Interpretation of Expressions Law, 1973, No. 22/1973, § 4 (Myan.) (The relevant provision reads: "In interpreting any provision of law, the proceedings of the law drafting commission or of the legislative authority before enactment of such law the drafts of the law and the statement of objects and reasons for enacting the law may be taken into consideration.")).

<sup>278</sup> Burmese does not have direct translations for the terms *textualism* or *originalism*.

<sup>279</sup> *President v. Pyidaungsu Hluttaw*, *supra* note 276.

<sup>280</sup> *Id.*

formed under the Constitution.”<sup>281</sup> The Tribunal interpreted this to define “Union Level Organizations” as 1) bodies arising out of the 2008 Constitution, 2) whose members were appointed by the president, and 3) confirmed by the *Pyidaungsu Hluttaw*.<sup>282</sup> Therefore, the Tribunal declared that legislative committees were not “Union Level Organizations.”

Both parties actually made policy arguments. The Attorney-General noted that legislative committees only serve for a limited time to study specific issues, and as such, do not rise to the level of “Union Level Organizations.”<sup>283</sup> By contrast, the *Hluttaw* pointed out that legislatures under the previous 1947 and 1974 Constitutions had formed legislative committees, and that allocating work to committees was an “[i]nternational practice.”<sup>284</sup> However, consistent with previous cases, the Tribunal did not accept these arguments as relevant.<sup>285</sup>

##### 5. *Mon State v. Myanmar*

The Constitutional Tribunal seemed to abandon its strict textualist/originalist approach in July 2012, when it received its first petition from a state/regional government.<sup>286</sup> In *Mon State v. Myanmar*, the chairman of the Mon State *hluttaw* asked the Tribunal to invalidate the 1993 Municipal Law.<sup>287</sup> The Mon State *hluttaw* wanted to enact a new municipal law but believed the Union legislation precluded it from doing so. It argued that municipal governance is not covered under the Constitution’s Union legislative list (Schedule I) but is instead included under the state/regional legislative list (Schedule II), giving the latter exclusive jurisdiction.<sup>288</sup> The state claimed that the law should be rendered void under § 446, a transitional clause allowing existing laws to remain in operation only if not contrary to the Constitution.<sup>289</sup> The Union Attorney-General countered that the Union legislature would first have to amend or repeal the law.<sup>290</sup>

The Constitutional Tribunal’s decision reached several determinations. First, it agreed that the Mon State *hluttaw* had jurisdiction over municipal

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<sup>281</sup> *Id.*

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 4.

<sup>284</sup> *Id.* at 5.

<sup>285</sup> *Id.*

<sup>286</sup> *Constitutional Tribunal of the State Hears Enquiry*, THE NEW LIGHT OF MYAN., July 17, 2012, at 7.

<sup>287</sup> Chairperson of the Mon State Hluttaw v. The Republic of the Union of Myanmar, [2012] No. 2/2012 (C.T.) 1 (Myan.) [hereinafter *Mon State v. Myanmar*].

<sup>288</sup> *Id.* at 1; see also MYAN. CONST. (2008), May 29, 2008, §§ 96, 188, Schedules I-II (Myan.).

<sup>289</sup> MYAN. CONST. (2008), *supra* note 288, at § 446.

<sup>290</sup> *Mon State v. Myanmar*, *supra* note 287, at 2.

affairs.<sup>291</sup> It then held that the transitional clause of the Constitution allowed previous laws to remain in force until explicitly amended or repealed by the *Pyidaungsu Hluttaw*.<sup>292</sup> However, the Tribunal then went on to advise that the Union legislature should repeal the 1993 Municipal Law and authorized the Mon State government to enact its own municipal law.<sup>293</sup> The Tribunal proposed a phased process whereby the various states and regions enact their own municipal laws before the *Pyidaungsu Hluttaw* repeals the Union law.<sup>294</sup> The Tribunal seemed worried about the possibility of a legal vacuum if the Union law was repealed first.<sup>295</sup>

The Constitutional Tribunal's reasoning in this case is much less textualist than its previous decisions, and perhaps not coincidentally, the reasoning is also less clear. First, allowing the 1993 Municipal Law to remain in force despite acknowledging its unconstitutionality effectively reads the phrase "so far as [existing laws] are not contrary to the Constitution" out of § 446 of the Constitution. In effect, the Tribunal members seemed to be undertaking a balancing test, weighing the extent of unconstitutionality against the policy implications of immediately nullifying the law. They seemed particularly adamant in assuring the Mon State *hluttaw* that it could pass its own municipal law even in the absence of action at the Union level. However, unlike the U.S. Supreme Court's balancing test, the members never engaged in a thorough discussion of the policy issues at stake. The Tribunal advised that it would be "more suitable" for the *Pyidaungsu Hluttaw* to repeal the law,<sup>296</sup> but did not set a deadline or assess the likelihood that the other states/regions would pass their own municipal laws soon.<sup>297</sup>

The decision was issued in July 2012, during a period when legislators were increasingly calling for impeachment proceedings against the Constitutional Tribunal members over the "Union Level Organizations" case.<sup>298</sup> The Mon State case did not receive nearly as much media attention, but the uproar might nevertheless have made the Tribunal members more nervous about challenging the government. Indeed, the central question

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<sup>291</sup> *Id.* at 5.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.* at 5-6.

<sup>294</sup> *Id.* at 7.

<sup>295</sup> *Id.*

<sup>296</sup> *Id.* at 5.

<sup>297</sup> Fortunately, it appears that other states have interpreted the decision as permitting them to pass municipal laws. Both Shan State and Kayin State had passed their own municipal laws by late 2013. See HAMISH NIXON ET AL., STATE AND REGION GOVERNMENTS IN MYANMAR, available at <http://asiafoundation.org/resources/pdfs/StateandRegionGovernmentsinMyanmarCESDTAF.PDF>.

<sup>298</sup> See *infra* Part IV.C.

here, as in the previous case, concerned the constitutionality of laws passed under the SLORC/SPDC. The members clearly tried very hard to realize a pragmatic compromise in this decision, even at the expense of a strict textualist approach to constitutional interpretation.

### C. *Impeachment of the Tribunal Members*

Even though in 2011 the ambiguity surrounding the Constitutional Tribunal's independence seemed to be an academic question, by mid-2012 the Tribunal faced an existential threat to its independence. Before March 2012, the Tribunal had received three cases and declared a Union law unconstitutional in all of them. While the President's Office and MPs criticized several of the Tribunal's decisions,<sup>299</sup> the Tribunal itself only became a source of controversy once—albeit indirectly—when the speaker of the *Amyotha Hluttaw*, Khin Aung Myint, proposed allowing the Tribunal to conduct abstract review on draft legislation.<sup>300</sup> Ultimately, *Pyithu Hluttaw* Speaker Shwe Mann defeated this proposal, arguing that it infringed upon the legislature's lawmaking authority and was not necessary.<sup>301</sup>

This changed after the “Union Level Organizations” case. *Amyotha Hluttaw* Deputy Speaker U Mya Nyein alleged that the Constitutional Tribunal exceeded the scope of the Attorney General's petition in issuing a decision about the constitutional status of legislative committees.<sup>302</sup> Lawmakers seemed to have interpreted the ruling as an attempt to limit the power of the legislature to conduct oversight activities, such as subpoenaing government ministers.<sup>303</sup> Increasingly, MPs and lawyers outside the government attacked the Tribunal's decision as incorrect and the Tribunal members as unqualified.<sup>304</sup> Given that most of the members had been selected by the military in February 2011 and that the legislature had been given little opportunity to review their qualifications, it is not surprising the

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<sup>299</sup> See, e.g., *Decision Sparks Hluttaw Row*, THE MYAN. TIMES, Nov. 7-13, 2011, <http://www.mmtimes.com/2011/news/600/news60001.html>.

<sup>300</sup> *Id.*

<sup>301</sup> *Pyithu Hluttaw Session Continues for 47th Day: As There Was No Disagreement on the Report, the Hluttaw Decided to Send Back the Hluttaw Office Bill*, THE NEW LIGHT OF MYAN., Nov. 15, 2011, at 1, 7.

<sup>302</sup> Soe Than Lynn, *Reps Slam Ruling on Status of Committees*, THE MYAN. TIMES, Apr. 30-May 6, 2012, <http://www.mmtimes.com/2012/news/624/news62415.html>.

<sup>303</sup> *Id.* But as Derek Tonkin, former U.K. ambassador to Thailand, points out, this does not necessarily mean that ministers cannot be invited to testify. Derek Tonkin, *U.S. – Myanmar Relations 2012*, NETWORK MYAN., <http://www.networkmyanmar.org/index.php/external-relations/united-states/2012> (last visited May 20, 2014).

<sup>304</sup> MANN, *supra* note 270. The author confirmed this point in private conversations in Yangon, Myanmar in May 2012.

*Hluttaw* MPs had little invested in the members despite having nominally appointed six of them. By April 24, the *Hluttaw* Joint Bill Committee had issued a report concluding that the Constitutional Tribunal was in error and that legislative committees were “Union Level Organizations.”<sup>305</sup> While the legislature went on recess soon afterward, the decision would not be forgotten.

In early August 2012, 301 *Pyithu Hluttaw* MPs signed a petition to impeach the Tribunal members.<sup>306</sup> Attempting to compromise, Speaker Shwe Mann asked the Tribunal members to resign voluntarily and set a deadline of August 21.<sup>307</sup> However, President Thein Sein rebuffed the legislature’s demands and the Tribunal members remained in office after the deadline.<sup>308</sup> The *Amyotha Hluttaw* then passed a motion to impeach the Tribunal members by a 167-56 vote, with only the military MPs opposed.<sup>309</sup> In a vote of 447-168—noticeably more than required to support a vote of conviction—the joint *Pyidaungsu Hluttaw* passed a resolution supporting impeachment.<sup>310</sup> The non-binding nature of the resolution was likely an attempt to allow the Tribunal members to save face. On August 28, the *Pyithu Hluttaw* formed a fifteen-member committee to investigate the charges.<sup>311</sup> MPs claimed that the Tribunal had violated the 2008 Constitution by reaching an incorrect decision.<sup>312</sup> Soon afterward, the legislature also filed formal impeachment charges.<sup>313</sup> On September 6, all nine Tribunal members resigned.<sup>314</sup>

<sup>305</sup> Lynn, *supra* note 302.

<sup>306</sup> *Speaker Requests Patience of Parliamentarian; Row over Union Level Organization Definition to be Sent to President*, THE NEW LIGHT OF MYAN., Aug. 15, 2012, at 9; see also Kyaw Phone Kyaw, *Burma's Constitutional Tribunal Members Should Resign: Shwe Mann*, MIZZIMA NEWS, Aug. 15, 2012, <http://mizzimaenglish.blogspot.com/2012/08/burmas-constitutional-tribunal-members.html>.

<sup>307</sup> *Speaker Requests Patience of Parliamentarian; Row over Union Level Organization Definition to Be Sent to President*, THE NEW LIGHT OF MYAN., Aug. 15, 2012, at 16.

<sup>308</sup> *Will the Burmese Parliament Impeach the Constitutional Tribunal?* MIZZIMA NEWS, Aug. 22, 2012, <http://www.bnionline.net/index.php/news/mizzima/13575-will-the-burmese-parliament-impeach-the-constitutional-tribunal-.html>.

<sup>309</sup> Soe Than Lynn & Win Ko Ko Latt, *Reps Move Towards Impeachment*, THE MYAN. TIMES, Aug. 27-Sept. 2, 2012, <http://www.mmtimes.com/2012/news/641/news01.html>.

<sup>310</sup> Xinhua, *Myanmar Parliament Passes Resolution over Constitutional Tribunal Decision Dispute*, GLOBAL TIMES, Aug. 27, 2012, <http://www.globaltimes.cn/content/729370.shtml>.

<sup>311</sup> *Pyidaungsu Hluttaw Has Power to Issue Orders Regarding Administration*, NEW LIGHT OF MYAN., Aug. 30, 2012, at 9. Just before they resigned, the Tribunal members complained that the *Hluttaw* members on the committee suffered from a conflict of interest because they had also been involved in the vote for impeachment. *Remonstrations of Chairman of Investigation Board U Thein Swe and Members*, NEW LIGHT OF MYAN., Sept. 4, 2012, at 7.

<sup>312</sup> Lynn & Latt, *supra* note 309.

<sup>313</sup> *Pyidaungsu Hluttaw Has Power to Issue Orders Regarding Administration*, *supra* note 311.

<sup>314</sup> Republic of the Union of Myanmar Office of the President, *Resignations of Chairman and Members of Constitutional Tribunal of the Union Allowed*, 2012, Order No. 29/2012 (Myan.), reprinted in THE NEW LIGHT OF MYAN., Sept. 6, 2012, at 1.

The factions in the impeachment debate defied many predictions of how Myanmar's young democracy would operate.<sup>315</sup> On one hand, most of the opposition parties, including the NLD, joined the USDP majority in supporting impeachment.<sup>316</sup> The main political parties had come to a consensus over the issue.<sup>317</sup> On the other side, the president and military MPs opposed impeachment.<sup>318</sup> This led some observers to claim that the dispute represented a divide between “reformers” and “conservatives.”<sup>319</sup> However, the Tribunal's reasoning in the “Union Level Organizations” case was not patently a breach of the Constitution, as some MPs claimed.<sup>320</sup> The president, while sometimes frustrated at the pace of lawmaking, had not made any reactionary moves against the legislature. The military tended to refrain from overt politicking; the Tribunal impeachment was one of the few times MPs voted as a bloc against a clear majority of the civilian politicians.<sup>321</sup>

Rather, the impeachment drive reflected the legislature's desire to protect its hard-won power. Just a year before, the legislature had widely been expected to act as a “rubber stamp.” Many MPs saw the Tribunal's decision, and constitutional review more broadly, as an encroachment into their legislative prerogative.<sup>322</sup> The fall 2011 debate about granting the Tribunal abstract review over draft legislation prefigured the impeachment saga when Speaker Shwe Mann insisted that the *Hluttaw* had a monopoly over lawmaking.<sup>323</sup> Surprisingly, the legislature and the public at large rarely

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<sup>315</sup> Including in Nardi, *supra* note 176, at 25-27, where the author predicted that the Tribunal would realize that their independence was limited and thus would not challenge the legislature. When it did so, the backlash was inevitable.

<sup>316</sup> *Will the Burmese Parliament Impeach the Constitutional Tribunal?*, *supra* note 308. In fact, U Ye Tun, the *Pyithu Hluttaw* MP who had initially suggested impeachment to Speaker Shwe Mann, was a member of the Shan Nationalities Democratic Party. See Ye Tun, *Why I Opposed Tribunal Law Changes*, THE MYAN. TIMES, Dec. 17, 2012, <http://www.mmtimes.com/index.php/in-depth/3581-why-i-opposed-tribunal-law-changes.html>.

<sup>317</sup> *Will the Burmese Parliament impeach the Constitutional Tribunal?*, *supra* note 308.

<sup>318</sup> Lynn & Latt, *supra* note 309.

<sup>319</sup> Gwen Robinson, *Myanmar at Risk of Constitutional Crisis*, FIN. TIMES, Aug. 31, 2012, [http://www.ft.com/intl/cms/s/27b49c54-f38e-11e1-b3a2-00144feabdc0,Authorised=false.html?\\_i\\_location=http%3A%2F%2Fwww.ft.com%2Fcms%2Fs%2F0%2F27b4#axzz2s8T5NcEp](http://www.ft.com/intl/cms/s/27b49c54-f38e-11e1-b3a2-00144feabdc0,Authorised=false.html?_i_location=http%3A%2F%2Fwww.ft.com%2Fcms%2Fs%2F0%2F27b4#axzz2s8T5NcEp).

<sup>320</sup> Lynn & Latt, *supra* note 309; MANN, *supra* note 270, at 7.

<sup>321</sup> INT'L CRISIS GRP., *supra* note 178, at 7.

<sup>322</sup> Lawi Weng, *Constitutional Tribunal Dispute Heats Up*, THE IRRAWADDY, Aug. 21, 2012, <http://www.irrawaddy.org/thein-sein/constitutional-tribunal-dispute-heats-up.html>; Nyein Nyein, *Constitutional Tribunal Could Face Impeachment*, THE IRRAWADDY, Aug. 16, 2012, <http://www.irrawaddy.org/shwe-mann/constitutional-tribunal-could-face-impeachment.html>.

<sup>323</sup> See *infra* Part III.A.

discussed the legal reasoning in the “union level organizations” decision.<sup>324</sup> Allegedly, most MPs had not even bothered to read the decision.<sup>325</sup>

Before appointing new Constitutional Tribunal members, the government took the opportunity to amend the Constitutional Tribunal Law.<sup>326</sup> First, the amendments require Tribunal members to report to the president, the *Pyithu Hluttaw* speaker, and the *Amyotha Hluttaw* speaker.<sup>327</sup> Second, the amendments could undermine the finality of Tribunal decisions because the text of the law can now be read as acknowledging only cases appealed through the ordinary courts (under § 323) as final.<sup>328</sup> The new law also granted the legislature rather than the president authority to select the Chairperson of the Tribunal,<sup>329</sup> even though this contradicts the text of the Constitution.<sup>330</sup>

The government finally appointed new Constitutional Tribunal members on February 21, 2013.<sup>331</sup> Since the impeachment crisis, the

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<sup>324</sup> One notable exception was the staff at The Myanmar Times, which published several articles and op-eds calling for a compromise. Thomas Kean, *Compromise Needed on Tribunal, Hluttaw Rift*, THE MYAN. TIMES, Sept. 3-9, 2012, <http://www.mmtimes.com/2012/news/642/news02.html>.

<sup>325</sup> Interview with Anonymous, in Yangon, Myanmar (May 2013). U Ye Tun, the MP who had originally proposed impeachment, had changed his mind after reading the decision and asked Shwe Mann to halt the impeachment efforts, but the latter claimed the drive had already assumed a momentum of its own. Interview with Anonymous, in Yangon, Myanmar (Dec. 2013).

<sup>326</sup> *Bill Amending the Constitutional Tribunal Law Discussed*, THE NEW LIGHT OF MYAN., Nov. 16, 2012, at 9, 16.

<sup>327</sup> Ye Tun, *Why I Opposed Tribunal Law Changes*, THE MYAN. TIMES, Dec. 17, 2012, <http://www.mmtimes.com/index.php/in-depth/3581-why-i-opposed-tribunal-law-changes.html>; see also Law Amending the Constitutional Tribunal Law, 2013, No. 4/2013, § 12(i) (Myan.) [hereinafter Const. Trib. Amend. Law].

<sup>328</sup> *Id.*; see also Const. Trib. Amend. Law, *supra* note 327, at § 12(g) -§ 24.

<sup>329</sup> *Constitutional Tribunal Will Have to Settle Many Disputes in the Future Lack of Power to Pass Final Resolution May Cause More Problems*, THE NEW LIGHT OF MYAN., Jan. 15, 2013, at 16.

<sup>330</sup> MYAN. CONST. (2008), May 29, 2008, ch. VI, § 321 (Myan.). In commenting on the draft law, the President attempted to point this out but the *Hluttaw* overrode his objections. *Constitutional Tribunal Will Have to Settle Many Disputes in the Future Lack of Power to Pass Final Resolution May Cause More Problems*, *supra* note 329, at 16; see also Soe Than Lynn, *MPs Ignore President on Tribunal Law Changes*, THE MYAN. TIMES, Jan. 21, 2013, <http://www.mmtimes.com/index.php/national-news/nay-pyi-taw/3851-mps-ignore-president-on-tribunal-law-changes.html>.

<sup>331</sup> Republic of the Union of Myanmar Office of the President, Appointment of Chairman and Members of Constitutional Tribunal of the Union, 2013, Order No. 12/2013 (Feb. 26, 2013) (Myan.), reprinted in THE NEW LIGHT OF MYAN., Feb. 26, 2013, at 1; see also Win Naung Toe, *Burma MPs Nominate Constitutional Court Chief*, RADIO FREE ASIA, Feb. 21 2013, <http://www.rfa.org/english/news/myanmar/constitutional-tribunal-02212013175458.html>. The new members are:

U Myint Win (Retired Attorney-General's Office Deputy Director-General);

U Than Kyaw (Legal Advisor to the President);

Daw Hla Myo Nwe (Deputy Director-General of the Ministry of Foreign Affairs);

U Mya Thein (Retired Director-General of the Union Supreme Court);

U Mya Thein (Notary Public Advocate and Supreme Court advocate);

U Myint Lwin (Notary Public Advocate and Supreme Court advocate);

U Tin Myint (Retired Director-General of Union Attorney-General's Office);

Daw Kyin San (Retired Deputy Director-General of Union Attorney-General's Office);

Tribunal has received no further petitions,<sup>332</sup> although on January 30 the president indicated that he might submit eight recently passed laws for review.<sup>333</sup>

## V. CONSTITUTIONAL CHOICES

This Part considers several interrelated questions about the Myanmar Constitutional Tribunal's use of jurisprudence. First, did the Tribunal develop a clear jurisprudential approach to constitutional interpretation? Second, was textualism/originalism appropriate for the Constitutional Tribunal given Myanmar's political situation, as opposed to living constitutionalist or proportionality approaches? Finally, what effect—if any—did that choice have on the Tribunal's relationship with the legislature and the subsequent impeachment imbroglio?

### A. *The Development of Tribunal Jurisprudence*

The Constitutional Tribunal only issued five decisions, so the sample of cases remains small. Nevertheless, a few trends seem clear. In *President v. Pyidaungsu Hluttaw* the Tribunal identified textualist and originalist approaches to constitutional interpretation,<sup>334</sup> suggesting that it accepted both as legitimate. The Tribunal relied heavily on textualist methods of constitutional interpretation during its first year.<sup>335</sup> Although the 2008 Constitution is not Myanmar's first constitution, in *Chief Justice v. MHA* and *President v. Pyidaungsu Hluttaw* the Tribunal rejected the use of historical precedent in interpreting constitutional provisions.<sup>336</sup> It declared that prior practice was not relevant as the 2008 Constitution had changed the legal framework of the country.<sup>337</sup>

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U Myo Chit (Retired Director of the Union Attorney-General's Office).

<sup>332</sup> Sandar Win, *No Work for New Tribunal*, THE MYAN. TIMES, Apr. 30, 2013, <http://www.mmtimes.com/index.php/national-news/6599-no-work-for-new-tribunal.html>.

<sup>333</sup> The laws that might be challenged include the 2014 Anti-Corruption Law and the Farmers' Rights Protection Law, as well as amended versions of the Pyithu Hluttaw Law, Amyotha Hluttaw Law, Pyidaungsu Hluttaw Law, Region and State Hluttaw Law, Union Auditor General's Office Law, and Constitutional Tribunal Law. Sandar Win, *President to Test New Constitutional Tribunal with Eight Laws*, THE MYAN. TIMES, Jan. 30, 2014, <http://www.mmtimes.com/index.php/national-news/9400-president-to-test-new-constitutional-tribunal-with-eight-laws.html>; see also Soe Than Lynn, *Committee Slams President Over Criticism*, THE MYAN. TIMES, Aug. 25, 2013, <http://www.mmtimes.com/index.php/national-news/7964-committee-slams-president-over-criticism.html>.

<sup>334</sup> *President v. Pyidaungsu Hluttaw*, [2012] No. 2/2012 (C.T.) 6 (Myan).

<sup>335</sup> See generally *Chief Justice v. MHA* [2011] No. 1/2011 (C.T.) (Myan.) and *Dr. Aye Maung v. Myan.*, [2011] No. 2/2011 (C.T.) (Myan.).

<sup>336</sup> See *Chief Justice v. MHA*, *supra* note 335, at 33.

<sup>337</sup> See *id.*



By contrast, the Constitutional Tribunal frequently cited the drafting history of the 2008 Constitution, as represented in the National Convention proceedings.<sup>338</sup> The Tribunal members clarified that they would only consider the original understanding of the Constitution at the time of the drafting; they would not reinterpret the drafters' intent through subsequent legislation or political developments.<sup>339</sup> In *President v. Pyidaungsu Hluttaw*, the National Convention proceedings even took precedence over existing laws that purported to define "union-level organizations."<sup>340</sup> Paradoxically, the authoritarian nature of the National Convention might have helped make the 2008 Constitution more amenable to originalist approaches. Unlike the American Federalist Papers, which contain competing arguments from Federalists and Anti-Federalists,<sup>341</sup> the National Convention proceedings required all speeches to conform to the chairman's program.<sup>342</sup>

For its first four decisions, the Constitutional Tribunal never relied upon any sources other than the text of the 2008 Constitution and the National Convention proceedings. It never discussed the dramatic political reforms that had occurred after the 2010 elections, or if the Tribunal ought to "update" the Constitution in order to account for these changes. The closest the Tribunal came to making a living constitutionalist argument was in *Dr. Aye Maung v. Myanmar*, when it mentioned that the Constitution promoted the participation of ethnic minorities.<sup>343</sup> However, it merely used text from one part of the Constitution—§ 17(c)—to inform its interpretation of another part.<sup>344</sup> It never argued that ethnic minorities should have greater representation as a matter of legal fairness or to fulfill the expectations of a "free and democratic society."<sup>345</sup> Nor did it refer to the military's ongoing civil war with ethnic insurgent groups as a pressing policy justification for affording National Races Affairs Ministers the same status as other

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<sup>338</sup> See generally *Dr. Aye Maung v. Myan.*, *supra* note 335, and *President v. Pyidaungsu Hluttaw*, *supra* note 334.

<sup>339</sup> See *id.*

<sup>340</sup> *President v. Pyidaungsu Hluttaw*, [2012] No. 2/2012 (C.T.) 6 (Myan).

<sup>341</sup> Compare The Federalist No. 78-83 (Alexander Hamilton) (arguing that judges should have life tenure because the judiciary is the weakest branch of government) with Brutus No. 11-12 & 15 (Brutus) (arguing that independent courts with the power of constitutional review would usurp the authority of other branches of government). See also HERBERT STORING, WHAT THE ANTI-FEDERALISTS WERE FOR: THE POLITICAL THOUGHT OF THE OPPONENTS OF THE CONSTITUTION (1981).

<sup>342</sup> FINK, *supra* note 97, at 74-77.

<sup>343</sup> *Dr. Aye Maung v. Myan.*, [2011] No. 2/2011 (C.T.) 76 (Myan.).

<sup>344</sup> *Id.*

<sup>345</sup> As required by the Canadian Charter of Rights and Freedoms. See Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act 1982, ch. 11, § 1 (U.K.).

ministers. The Tribunal only made reference to broader policy concerns in *Mon State v. Myanmar*, but even then only indirectly.<sup>346</sup>

### B. *The Impact of Tribunal Jurisprudence on the Impeachment*

The proximate cause of the legislature's drive to impeach the Constitutional Tribunal members was its displeasure with the *President v. Pyidaungsu Hluttaw* decision.<sup>347</sup> The impeachment crisis was a complex event involving a wide array of political interests; without internal memoranda from the key players, it is impossible to pinpoint the exact motivations of the key players. However, as discussed in Section II, throughout Myanmar's history, political elites have been uncomfortable with constitutionalism and separation of powers. With the brief exception of the 1947 Constitution, constitutional review had never served as a check on government power. Under the SPDC, senior military leaders—including Thein Sein—lectured judges about the need to cooperate with the rest of government.<sup>348</sup> As such, by delineating and limiting legislative power, *President v. Pyidaungsu Hluttaw* touched upon sensitive issues for Myanmar's political elite.

The Constitutional Tribunal's early textualist/originalist approach was laudably bold and unyielding, but failed to acclimate political elites to the new reality constitutional review—especially so soon after a guarded political transition from military rule. Perhaps more importantly, the Tribunal's approach was risky given its uniquely precarious independence. Political elites had not demonstrated a marked hostility towards judicial independence since the transition. Indeed, soon after the impeachment, both Speaker Shwe Mann and Aung San Suu Kyi reiterated their support for judicial independence.<sup>349</sup> Their statements are not necessarily hypocritical; as noted in Part IV.A of this article, the 2008 Constitution is ambiguous

<sup>346</sup> See *Mon State v. Myan*, [2012] No. 2/2012 (C.T.) 1 (Myan.).

<sup>347</sup> See Lynn & Latt, *supra* note 309.

<sup>348</sup> *Judgments Passed by Court Must be Free From Corruption and Should be a Salutory Lesson*, XVII(27) THE NEW LIGHT OF MYAN., May 13, 2009, at 8 & 16. For example, then-Prime Minister Thein Sein admonished judges that “administrative and judicial systems cannot operate separately but need to be in harmony to be able to protect public interests.” *Id.* His predecessor, Prime Minister Soe Win, expressed similar sentiments: “[J]udges should realize with vision [sic] that the bureaucratic mind that serves the interest of only a few will be against the new system . . . It is necessary to have political as well as judicial views.” *Judicial Sector to Adapt itself to Reforms Made in Conformity with Forthcoming State Constitution: People Will Loath Courts if Latter Apply Pressures and Not Protect Them: Prime Minister General Soe Win Meets State/Division Judges and State/Division Law Officers*, THE NEW LIGHT OF MYAN., Feb. 6, 2007, at 1, 8.

<sup>349</sup> See Sandar Lwin, *Hluttaw Speaker Promises Independence for Judiciary*, THE MYAN. TIMES, Sept. 24, 2012, <http://www.mmtimes.com/index.php/national-news/1754-hluttaw-speaker-promises-independence-for-judiciary.html>.

regarding the extent to which judicial independence covers the Tribunal. Therefore, it is possible that they support independence for the ordinary courts, but not for the Tribunal.

In short, the Tribunal was in a political situation that demanded some degree of pragmatism.<sup>350</sup> There are different approaches to political pragmatism in constitutional interpretation. In the celebrated case *Marbury v. Madison*, the U.S. Supreme Court simultaneously assumed the power of judicial review while at the same time imposing limits on its jurisdiction.<sup>351</sup> In Indonesia, the Constitutional Court sometimes attempted to soften the impact of its decisions by announcing that the holding only applied in future cases or by allowing the government to remedy the constitutional harm on its own.<sup>352</sup> The Court even developed the doctrine of “conditional constitutionality” in which laws can remain constitutional so long as implemented in a manner the court thinks appropriate.<sup>353</sup> While the Court’s decisions have frequently angered legislators<sup>354</sup> and prompted an attempt to circumscribe the court’s jurisdiction,<sup>355</sup> the Court succeeded in defeating those attempts.<sup>356</sup> In short, the justices’ pragmatic use of jurisprudence

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<sup>350</sup> Indeed, few observers had predicted that the Tribunal would end up issuing bold decisions against political elites precisely because of its institutional weaknesses. Nardi, *supra* note 176.

<sup>351</sup> In *Marbury v. Madison*, 5 U.S. 137 (1803), the U.S. Supreme Court found that it had the power to exercise constitutional review over federal legislation even though Article III of the U.S. Constitution does not explicitly grant this power to the court—unlike Myanmar’s 2008 Constitution. The decision is often praised as a politically astute compromise in which Chief Justice John Marshall usurped the power of judicial review while at the same time using that power to strike down a law that purported to expand the court’s jurisdiction. See, e.g., Epstein & Knight, *supra* note 1, at 98. It has since become popular for scholars to recommend that other new constitutional courts expand their own political power through such compromise decisions. See, e.g., Tahirah Lee, *Exporting Judicial Review from the United States to China*, 19 COLUM. J. ASIAN L. 152 (2005).

<sup>352</sup> Simon Butt, *Indonesia’s Constitutional Court: Conservative Activist or Strategic Operator?*, in THE JUDICIALIZATION OF POLITICS IN ASIA 98, 108-110 (Björn Dressel ed., 2012); see also Marcus Mietzner, *Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court* at 1, 10 J. OF EAST ASIAN STUD. 397 (2010); Björn Dressel & Marcus Mietzner, *A Tale of Two Courts: The Judicialization of Electoral Politics in Asia*, 25 GOVERNANCE 391 (2012); Philippa Venning, *Determination of Economic, Social and Cultural Rights by the Indonesian Constitutional Court*, 10 AUSTL. J. OF ASIAN L. 100 (2008).

<sup>353</sup> See Simon Butt, *Conditional Constitutionality, Pragmatism and the Rule of Law*, (Sydney Law School Legal Studies, Working Paper No. 09/28, 2009).

<sup>354</sup> Even constitutional law scholars worry that the Court’s “conditionally constitutional” doctrine makes it more of a positive legislator rather than adjudicator. See Butt, *supra* note 352, at 110. Also, as chief justice, Mohammad Mahfud MD frequently made public comments critical of the government. See, e.g., Camelia Pasandaran, *Palace Anger Over Mahfud’s Statement*, THE JAKARTA GLOBE, June 22, 2011, <http://www.thejakartaglobe.com/archive/palace-anger-over-mahfuds-statement/448561/>.

<sup>355</sup> Anita Rachman & Ulma Haryanto, *Constitutional Court Powers Rolled Back With Revision*, THE JAKARTA GLOBE, June 22, 2011, <http://www.thejakartaglobe.com/archive/constitutional-court-powers-rolled-back-with-revision/448324/>.

<sup>356</sup> Ina Parlina, *Justices Restore Court’s Power*, THE JAKARTA POST, Oct. 19, 2011, <http://www.thejakartapost.com/news/2011/10/19/justices-restore-court-s-power.html>. Ironically, the justices declared the law circumscribing the court’s jurisdiction to be unconstitutional. *Id.*

enabled them to make important policy decisions without triggering calls for impeachment.<sup>357</sup>

Myanmar's Constitutional Tribunal adopted pragmatism in its decision in *Mon State v. Myanmar*, when it refused to strike down the 1993 Municipal Law despite its alleged unconstitutionality.<sup>358</sup> The decision was motivated in part by the desire to avoid a legal void were it to strike a national law down without state or regional legislation to replace it.<sup>359</sup> However, by July 2012, there were already rumors of impeaching the Tribunal members.<sup>360</sup> If the Tribunal's shift towards pragmatism was designed to appease the legislature, it was too late. Moreover, striking down the municipal law would have imposed a relatively small burden on the legislature compared to the "union level organizations" decision. Indeed, it is in cases that deal with the core interests of political elites that constitutional courts need to be most pragmatic.

Although the Constitutional Tribunal noted (correctly) that the 2008 Constitution authorized it to "vet" laws,<sup>361</sup> it might have benefitted from spending more time justifying that authority. For example, in its decisions, the Tribunal never explicitly explains its theory of constitutional interpretation or when it would defer to the legislature's interpretation of the Constitution. It only mentions theories of interpretation in its third decision, *President v. Pyidaungsu Hluttaw*,<sup>362</sup> but the Tribunal never discusses how this affected its discretion. In the U.S., Supreme Court Justices Breyer and Scalia, otherwise on opposite sides of the debate over constitutional interpretation, both take great care to explain how their method of interpretation respects Congress' lawmaking authority by constraining the

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<sup>357</sup> The analogy between Indonesia and Myanmar is not perfect. Democracy had become more firmly entrenched in Indonesia by 2004, when the Constitutional Court issued its first controversial decisions. However, the Indonesian political elite remains relatively hostile to deeper liberalization and has even attempted to rollback some reforms. Marcus Mietzner, *Indonesia's Democratic Stagnation: Anti-reformist Elites and Resilient Civil Society*, 19 *DEMOCRATIZATION* 209 (2011). Impeachment might have been more difficult in Indonesia, but not impossible. Constitutional Court justices can be dishonorably discharged for "commission of an act of misconduct" by the president upon recommendation of the chief justice. Constitutional Court Law, 2003, No. 24/2003, ch. IV, art. 23, § 2(b) (Myan). However, the procedure for the removal of justices is contained in the 2003 Constitutional Court Law, not § 24C of the 1945 Constitution, meaning that the legislature could have amended it at any point. Again, the fact that the legislature did not even apparently consider doing this is partly due to the court's success in moderating the fallout of its decisions.

<sup>358</sup> See *Mon State v. Myan.*, [2012] No. 2/2012 (C.T.) 5-6 (Myan.).

<sup>359</sup> *Id.*

<sup>360</sup> Indeed, the author had heard reports that the *Hluttaw* would face impeachment as early as May 2012.

<sup>361</sup> See, e.g., *President v. Pyidaungsu Hluttaw*, [2012] No. 2/2012 (C.T.) 5 (Myan.).

<sup>362</sup> *Id.*

court's discretion.<sup>363</sup> By contrast, Myanmar's Constitutional Tribunal did little to assuage legislators' fears that it would act as an unaccountable check on the legislature.

### C. *Possible Options for Constitutional Tribunal Jurisprudence*

While a more pragmatic approach might have mitigated confrontation between Myanmar's Constitutional Tribunal and the *Pyidaungsu Hluttaw*, the ultimate question still remains: were textualist/originalist approaches simply ill-suited to the political situation confronting the members? Upon assuming office, the Constitutional Tribunal members faced several unique challenges. First, Myanmar's political elites were not used to being constrained by constitutional limitations on their power. Second, the 2008 Constitution lacked legitimacy, so there was a real risk some political stakeholders would refuse to accept the legitimacy of Tribunal decisions.<sup>364</sup> The members needed to quickly establish that the document was legitimate and binding. Moreover, they needed to establish that the 2008 Constitution had value as the source of their rulings.

The Constitutional Tribunal members primarily had two jurisprudential options to bolster their legitimacy as arbiters of the constitution. First, they could have pursued a strict textualist/originalist approach to reaffirm the legitimacy of the 2008 Constitution as promulgated—the approach they ended up taking. Alternatively, the members could have attempted to “update” the Constitution through a more flexible method of interpretation. One risk with the latter approach is that it might have laid bare underlying concerns about the legitimacy of the Constitution. Moreover, it might have created the impression that the members were engaging in lawmaking rather than judging.<sup>365</sup> A textual approach might have seemed more secure and more appropriate to a “judicial” body. However, the Tribunal's approach to constitutional interpretation did not mitigate—and, if anything, seems to have exacerbated—the crisis over the “union level organizations” case.

By contrast, a balancing or proportionality approach might have allowed the Constitutional Tribunal to show greater deference to the legislature, while reaching the same legal outcomes. Balancing and proportionality tests differ in details but generally require judges to weigh

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<sup>363</sup> Compare with BREYER, *supra* note 24, and SCALIA & GARNER, *supra* note 24.

<sup>364</sup> *C.f.*, James L. Gibson et al., *On the Legitimacy of National High Courts*, 92 AM. POL. SCI. REV. 343 (1998) (discussing the relationship between the legitimacy of individual cases and the legitimacy of courts as institutions).

<sup>365</sup> *C.f.*, SCALIA & GARNER, *supra* note 24.

competing arguments and interests. Unlike a textualist approach, weighing does not simply declare one side “incorrect” but rather acknowledges legitimate interests both sides possess and then determines which has the stronger constitutional claim.<sup>366</sup> In theory, in *Chief Justice v. MHA*, the Constitutional Tribunal could have discussed the conditions under which the Constitution allows the executive to limit judicial independence rather than treat judicial independence as an absolute.<sup>367</sup> Such an analysis might still have concluded that appointing administrative officials simply to expedite case processing would not have constituted a sufficiently compelling objective or least restrictive means. However, it would also have acknowledged the ministry’s policy arguments as reasonable, perhaps mitigating the tensions between the government and Tribunal.<sup>368</sup>

The Constitutional Tribunal’s originalist approach was particularly risky given the speed at which Myanmar’s political reforms were occurring. The détente between President Thein Sein and Aung San Suu Kyi had already occurred by late 2011, just after the Tribunal published its first decision.<sup>369</sup> Under Shwe Mann, the legislature had become increasingly active. Some critics argue that the Tribunal should have taken greater cognizance of these developments.<sup>370</sup> Many of the assumptions and expectations at the time the 2008 Constitution was drafted appeared outdated, at best. After all, during the National Convention, many observers had assumed the legislature would be a “rubber stamp.”<sup>371</sup> A “living constitutionalist” approach might have prompted the Constitutional Tribunal to consider if contemporary norms and developments necessitated a

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<sup>366</sup> See Sweet & Mathews, *supra* note 46, at 12.

<sup>367</sup> Again, recognizing the ambiguity in § 11(a) of the 2008 Constitution, which only promises judicial independence “to the extent possible.” MYAN. CONST. (2008), May 29, 2008, ch. I, § 11(a). (Myan.).

<sup>368</sup> Ironically, the Constitutional Tribunal members did not use the *Chief Justice v. MHA* case to justify the Tribunal’s own independence. While the decision referred to judicial independence for the ordinary courts, *Chief Justice v. MHA* [2011] No. 1/2011 (C.T.) (Myan.),] at 45, it never explicitly extended the principle to the Tribunal. This is in marked contrast to Indonesia’s Constitutional Court. When the Indonesian Supreme Court challenged the power of the Judicial Commission to discipline judges for ethics violations, the Constitutional Court ruled that the commission’s power violated the constitutional principle of judicial independence. It then explicitly extended the ruling to cover itself, even though no constitutional court judges were implicated in the case. *Supreme Court v. Judicial Commission*, [2006] 005/PUU-IV/2006 (Indon.); see also Simon Butt, *The Constitutional Court’s Decision in the Dispute Between the Supreme Court and the Judicial Commission: Banishing Judicial Accountability?* (Sydney Law School Legal Studies, Working Paper No. 09/31, 2009).

<sup>369</sup> See ASSOCIATED PRESS, *supra* note 183.

<sup>370</sup> See, e.g., Nathan Willis, *The Constitutional Tribunal of Myanmar and the Rule of Law*, (draft on file with author) (arguing that a “substantive rule of law” approach might have compelled the Tribunal to consider the nature of the 2008 Constitution and how it was adopted, leading to a more flexible jurisprudence).

<sup>371</sup> See INT’L CRISIS GRP., *supra* note 178.

rethinking of how to interpret constitutional ambiguities. For example, in *President v. Pyidaungsu Hluttaw*, living constitutionalism might have led the members to consider how the increased prominence of legislative committees affected their constitutional status. It might also have discussed how depriving committees of “union level organization” status would affect their work.

The Constitutional Tribunal’s approach to constitutional interpretation might also have inadvertently infused its decisions with an overly critical tone. In each of the first four cases, textualist and originalist approaches led the Tribunal to definitively declare that either the president or the *Hluttaw* was incorrect. More importantly, although the Tribunal’s decision did reiterate each side’s arguments, originalism gave it little room to acknowledge the arguments and interests of the losing side. For example, in *President v. Pyidaungsu Hluttaw*, the Tribunal claimed that the National Convention proceedings “obviously stated” that legislative committees were not “union level organizations,”<sup>372</sup> despite the fact that many MPs did not think it so obvious. Later, some MPs complained the Tribunal demonstrated a lack of respect<sup>373</sup>—especially worrisome because Burmese political culture still expect youths and subordinates to defer to their elders.<sup>374</sup>

## VI. CONCLUSION

The question of how Myanmar’s Constitutional Tribunal interprets the 2008 Constitution will become even more important during the latter half of 2014. President Thein Sein has already signaled his intent to challenge eight new laws before the Tribunal. In addition, the *Pyidaungsu Hluttaw* is preparing to propose amendments to the constitution, some of which will likely lead to new constitutional disputes. The new Tribunal members will need to decide how much of their predecessors’ jurisprudential reasoning to adopt. Will they pursue a similar originalist approach or pursue a different direction? The members will also need to think strategically about how to avoid a confrontation with the legislature given that the 2012 impeachment shows they cannot win a showdown. It would be unfortunate if the members decided to alter their outcomes to appease political elites. Rather, a more viable alternative would be to think carefully about the choice of interpretative methodology and how it would affect the legislature’s reaction.

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<sup>372</sup> *President v. Pyidaungsu Hluttaw*, [2012] No. 2/2012 (C.T.) 6 (Myan).

<sup>373</sup> Interview with Anonymous, in Yangon, Myanmar (May 2012).

<sup>374</sup> See LUCIAN W. PYE, *ASIAN POWER AND POLITICS* 97–99 (1985) (arguing that in Burmese political culture subordinates fear reporting bad news to their superiors).

For its part, the *Pyidaungsu Hluttaw* should consider a package of constitutional amendments that would establish a standard of constitutional interpretation for the Constitutional Tribunal. However, in doing so, it should adopt a realistic standard that reflects its interests and by which it can commit to abide in future disputes. If it wants the Tribunal to weigh ethical and policy considerations, it could consider a flexible balancing test. Such a move would not be unprecedented, as governments around the world have incorporated proportionality tests directly into their constitutions. Alternatively, if the legislature worries that the Tribunal might usurp its lawmaking authority then it should impose a deferential standard. Several constitutions actually include clauses permitting legislatures to pass unconstitutional laws so long as they meet certain conditions for a limited duration of time.<sup>375</sup> Several constitutions incorporate both types of standards, granting judges discretion but also preventing them from acting as an undue constraint.<sup>376</sup> Adopting a clear standard would help make constitutional review less threatening to political elites by guiding the Tribunal down acceptable paths.

The *Hluttaw* should also pass legislation clarifying the grounds for impeaching Constitutional Tribunal members. Impeachment is a crucial tool for enhancing judicial accountability and reducing judicial corruption,<sup>377</sup> but if left vague it could also chill the Tribunal into submission. MPs justified impeachment as necessary because the Tribunal had “breached” the Constitution.<sup>378</sup> However, § 33 of the Constitutional Tribunal Law states that members cannot be impeached for actions taken in “good faith”<sup>379</sup> and supporters of impeachment had not furnished any proof of bad faith. The term “good faith” itself is not defined in the law. Does it include decisions motivated by partisan preferences—something alleged to occur regularly on the U.S. Supreme Court?<sup>380</sup> When does issuing a legally unsound decision rise to the level of “breaching” the Constitution? Further defining these terms would at least help guide future Tribunal members avoid destructive showdowns.

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<sup>375</sup> See, e.g., Basic Law: Freedom of Occupation (Isr.), *supra* note 47, at § 8.

<sup>376</sup> See, e.g., Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, §§ 1 & 32(2) (U.K.).

<sup>377</sup> See Stefan Voigt, *The Economic Effects of Judicial Accountability: Cross-Country Evidence*, 25 EUROPEAN J. OF L. AND ECON. 95, 98-99 (2008).

<sup>378</sup> Lynn & Latt, *supra* note 309; see MYAN. CONST. (2008), May 29, 2008, ch. VI, § 334(a)(ii) (Myan.).

<sup>379</sup> Constitutional Tribunal Law, 2010, No. 21, ch. VIII, § 33 (Myan.) (The State Peace and Development Council Law).

<sup>380</sup> Segal & Spaeth, *supra* note 9, at 973.



Ultimately, the experience of Myanmar's Constitutional Tribunal does not imply that textualist or originalist approaches to constitutional interpretation are inherently unsuited for constitutional courts in transitioning democracies. The situation in Myanmar is too unique to draw such a broad conclusion. Other factors, such as the strategic acumen of the court's leadership, affect the outcome of constitutional crises. However, this article argues that the method of constitutional interpretation can and does affect the relationship between courts and the other branches of government. Some methods of interpretation lend themselves more easily to weighing non-legal factors, such as political and social developments, which might be necessary in a rapidly changing political context. Textualist and originalist methods in particular risk framing cases as zero-sum games, which could increase tension between the judiciary and the other branches of government.