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[2023] *UNSWLRS* 41
(2018) 38(4) *Oxford Journal of Legal Studies* 653

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The Writs as Constitutional Transfer

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Citation: Melissa Crouch (2018) 'The Prerogative Writs as Constitutional Transfer' 38(4) *Oxford Journal of Legal Studies* 653-675

Note: This is a draft version. Please contact the author if you need access to the published version

Abstract: *The courts are often a key site of the struggle for the enforcement of rights and accountability. In this article, I draw attention to an important yet understudied avenue for both the historical and contemporary study of comparative administrative law: the incorporation of the writs into written constitutions. I offer a global genealogy of the writs as a colonial common law transfer that took on a new life in written constitutions across former British colonies, particularly across South Asia, including India, Pakistan, Bangladesh, Sri Lanka and Myanmar, as well as parts of Africa, the Pacific and the Caribbean. I illustrate the history, development and variations of this model, transforming from the common law remedies of England to a constitutional means of protecting rights. Through the case of Myanmar, I demonstrate the history of transnational constitutional borrowing and innovation in former British colonies. The importance of the writs lies in its symbolic status as a constitutional remedy and, despite present limitations, comparative experience offers future scope for judicial activism in Myanmar.*

Key words: constitutional remedies, writs, human rights, common law, South Asia, Myanmar/Burma, administrative law

I. Introduction

♣I would like to thank Simon Halliday, Ros Dixon, Theunis Roux, Dylan Lino, Judd Matthews and Peter Cane for comments on an earlier version of this article, and Mark Aronson, Kinshali Pinto Jayawardena, Jayantha de Almeida Guneratneand Sarbani Sen for our discussions on this topic. All Burmese cases since 2011 in this article are in Burmese language.

The rise of the administrative state in Western liberal democracies[1] since the 1960s has led to new developments in the review of administrative decisions and protection of individual rights against the power of the state. This concern with accountability has manifest itself in a range of new regulatory reforms – from statutory forms of judicial review, to freedom of information schemes,[2] the creation of a wide range of independent regulatory bodies such as anti-corruption commissions,[3] judicial commissions[4] or ombudsman,[5] the establishment of constitutional courts and the inclusion of bills of rights in constitutions.[6] Yet this proliferation of similar institutions and regulatory agencies has not dislodged or replaced the particular and peculiar nature of systems of judicial review of administrative law, which are generally considered to be difficult to compare across jurisdictions. The constitutional writs offer one point of comparison.

In this article, I highlight and explore the writs as an important historical remedy and contemporary model of administrative adjudication in constitutional form. I consider the contribution the writs as constitutional remedies can make to the field of comparative administrative law. By writs I am referring to the specific remedies of certiorari, mandamus, prohibition, quo warranto and habeas corpus that are included in some written constitutions. Through this focus, I advocate for the study of comparative administrative law that goes beyond the primary focus on a common set of liberal democracies, and pays attention to the origins and development of administrative law jurisdictions in the Global South. I offer an analysis of

[1] Gary Lawson, 'The Rise and Rise of the Administrative State' [1994] 107(6) *Harvard Law Review* 1231.

[2] John Ackerman and Irma Sandoval-Ballesteros, 'The Global Explosion of Freedom of Information Laws' [2006] 58 *Administrative Law Review* 85.

[3] Cecily Rose, *International Anti-Corruption Norms: Their Creation and Influence on Domestic Legal Systems* (OUP 2015).

[4] See for example The Bingham Centre, *The Appointment, Tenure, Remove of Judges under the Commonwealth Principles* (UK 2015).

[5] Linda Reif, *The Ombudsman, Good Governance, and the International Human Rights System* (Martinus Nijhoff Publishers 2004); Trevor Buck, Richard Kirkham and Brian Thompson, *The Ombudsman Enterprise and Administrative Justice* (Ashgate Publishers 2011); Kāmāla Hosena, *Human Rights Commissions and Ombudsman Offices: National Experiences throughout the World* (Kluwer Law International 2000); Dacian C Dragos and Bogdana Neamtu, *Alternative Dispute Resolution in European Administrative Law* (Springer-Verlag 2014).

[6] See for example Tom Ginsburg, *Judicial Review in New Democracies. Constitutional Courts in Asian Cases* (CUP 2003); Alec Sweet-Stone, *Governing with Judges: Constitutional Politics in Europe* (OUP 2000).

the origins of the writs as a form of constitutional legal transfer[7] across continents. The writs are a largely overlooked innovation in comparative administrative law.

In this article, I demonstrate the transnational influence and appeal of the writs as an early manifestation of comparative administrative law. I trace the early development of these remedies in constitutional form beginning with the inclusion of habeas corpus in the US Constitution and in constitutions across Latin America, and later the addition of two writs in the Australian Constitution. In offering this genealogy, I identify the key moment as the inclusion of all five writs, and the specific connection between these remedies and the protection of constitutional rights, in the draft Indian Constitution. While courts in Burma were among the first to develop the constitutional writs in 1948-1949, it is in India that the writs became associated with judicial activism. The writs in constitutional form were also included in places such as Pakistan, Sri Lanka and Bangladesh, as well as in parts of Africa (Nigeria, Gambia, Seychelles, Sierre Leone), parts of the Pacific and the Caribbean.

The writs offer a new angle and an important point of comparison from which to study administrative law.[8] In order to illustrate the variation in, and potential use of, the writs, I explore the case of Myanmar, a self-professed common law country emerging from decades of military rule with a rich history of post-independence judicial activism. The legacy of writs cases during the parliamentary era remain as evidence of the potential use of the writs for the protection of rights.

II. The Importance of the Writs in Comparative Administrative Law

The field of comparative law has historically avoided the realm of administrative law until relatively recently.[9] There is now renewed scholarly interest in comparative administrative

[7] While the original debate on legal transfers is attributed to Watson and Legrand, the more recent iterations in comparative constitutional law include: Sujit Choudhry ed., *The Migration of Constitutional Ideas* (CUP 2006); Gunter Frankenburg (2010) 'Constitutional Transfer: The IKEA Theory Revisited' 8 *International Journal of Constitutional Law* 563-79; Gunter Frankenburg (2013) (ed) *Order from Transfer: Comparative Constitutional Design and Legal Culture*. Edward Elgar.

[8] Susan Rose-Ackerman and Peter Lindseth, 'Comparative Administrative Law: An Introduction' in Rose-Ackerman and Lindseth (eds) *Comparative Administrative Law* (Edward Elgar 2010), p 18.

[9] Kim L Scheppele, 'Administrative State Socialism and its Constitutional Aftermath' in Susan Rose-Ackerman and Peter Lindseth (eds) *Comparative Administrative Law* (Edward Elgar 2010) pp 92-116.

law.[10] Comparative administrative law as a field is interested in the study of administrative law principles, institutions, and mechanisms of review of public power across or within jurisdictions over time. Administrative law remains of critical importance not only to the regulatory state in Western liberal democracies, but to regimes undergoing a shift from authoritarian rule to democracy.[11] The field of comparative administrative law has opened up new possibilities of comparing across and within legal systems,[12] while acknowledging the vast diversity of systems of administrative law. In this section, I put forward two key reasons the writs in constitutional form are important to the field of comparative administrative law.

The first claim is that the writs are an example of administrative review entrenched in constitutions and therefore enjoy both greater certainty and higher symbolic status, in comparison to the common law or ordinary legislation. There are often constitutional dimensions to administrative review mechanisms.[13] Attention to constitutional forms of administrative review have largely focused on the more recent wave of independent institutions such as the constitutionalisation of the office of an Ombudsman, or the recognition of the principle of administrative justice, such as in the South African Constitution 1996 or Kenya's Constitution 2010.[14] Yet there is in fact a longer history of administrative law in constitutional form. Although originating in the common law, the writs were later constitutionalised in the written constitutions of a wide range of countries, spread across several continents. I

[10] See for example, Susan Rose-Ackerman and Peter L Lindseth, *Comparative Administrative Law* (Edward Elgar 2008); Susan Rose-Ackerman and Peter L Lindseth, 'Comparative Administrative Law: Outlining a Field of Study' [2010] 28(2) *Windsor Yearbook of Access to Justice* 435; Francesca Bignami, 'From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law' [2011] 59 *American Journal of Comparative Law* 859; Daniel Halberstam, 'The Promise of Comparative Administrative Law: A Constitutional Perspective on Independent Agencies' [2010] *Public Law And Legal Theory Working Paper Series Working Paper* No. 195; John Bell, 'Comparative Administrative Law', in Mathias Reimann and Reinhard Zimmermann (ed) *The Oxford Handbook of Comparative Law* (OUP 2006).

[11] Tom Ginsburg and Albert HY Chen (eds) *Administrative Law and Governance in Asia: Comparative Perspectives*. (Routledge 2009).

[12] See for example John Bell, Mark Elliott, Jason NE Varuhas, Philip Murray (eds) *Public Law Adjudication in Common Law Systems*. (Hart Publishing 2014).

[13] Tom Ginsburg, 'Written Constitutions and the Administrative State: on the Constitutional Character of Administrative Law' in Susan Rose-Ackerman and Peter Lindseth (eds) *Comparative Administrative Law* (Edward Elgar 2010) pp 117-128.

[14] Contra Ginsburg, "Written Constitutions and the Administrative State' p 124 (identifying that administrative law is often said to have less symbolic power than constitutional law).

demonstrate the origins and spread of the writs in written constitutions in more detail in the next section. The result of incorporating the writs in written constitutional form means that the writs represent a visible and concrete form of review. The writs as administrative law hold symbolic power because they are entrenched in the constitution.[15]

My second claim is that the writs deserve a place in the history of the study of comparative administrative law and remain of contemporary relevance in many jurisdictions. The writs are a key demonstration of how the shift to independence for many former British colonies included the innovative process of adopting and adapting administrative review mechanisms into written constitutions. The writs demonstrate that contemporary administrative law systems today are not just the product of the modern welfare state. Rather, the post-colonial impulse to protect against abuse of executive power significantly shaped the constitutional and administrative law regimes in many former British colonies.

This is an important corrective to the common view that most models of administrative review today are found in statutory form. The assumption that administrative law remedies are primarily located in statutory form is evident in the work of scholars such as Professor Michael Asimow, who has developed an ambitious classification model of administrative regimes. Asimow's typology is based largely on statutory regimes,[16] and his approach does not account for systems where the constitutional writs are a key means of administrative adjudication. The writs are an example of the legacy of post-independence constitution-making. The writs are also a demonstration of the way ideas about the need to entrench administrative review travelled across the post-colonial world in the form of a constitutional transfer. This reality weakens the assumption that administrative law is more 'local' compared to the 'transnational' dimension of constitutional law.[17] The study of the writs highlights the history of transnational borrowing of administrative review that has been overlooked.

The writs, through incorporation into constitutional form, have gained greater symbolic weight and status. I now turn to consider the writs as an early example of comparative administrate law with ongoing contemporary significance.

[15] Ginsburg, 'Written Constitutions and the Administrative State' p 123.

[16] Michael Asimow, 'Five Models of Administrative Adjudication' [2015] 63 *American Journal of Comparative Law* 3.

[17] Ginsburg, 'Written Constitutions and the Administrative State' p 120.

III. The Common Law Origins of the Writs

The writs are crucial shared elements in the history of common law systems. The origins of administrative law in common law countries derive from 13th century England.[18] In this brief but necessary section, I recount the origins of the writs as remedies in the common law tradition, although I show later how these common law remedies were recognised across much of the British empire. The writs were originally part of the common law authority vested in the Crown, a form of prerogative review and a remedy for unlawful action.[19] The initial purpose of these remedies was to allow the royal courts to ensure that other courts, such as ecclesiastical courts, worked within the scope of their given jurisdiction and did not exceed the limits of their powers.[20] Referred to as 'prerogative writs', the writs were originally based on the concept of ultra vires, or an exercise of executive power being beyond jurisdiction.[21] Five main writs emerged: the writ of mandamus, prohibition, certiorari, quo warranto and habeas corpus.[22] Each of the remedies has a different purpose and demanded distinct procedural formalities be met.

The courts were called upon to issue these remedies in relation to the resolution of very specific problems.[23] A writ of mandamus was designed to compel a government agency to

[18] S A de Smith, 'The Prerogative Writs' [1951] 11(1) *The Cambridge Law Journal* 40.

[19] See AS Chaudhari, *Law of Writs and Fundamental Rights*, Vol II, (Law Publishers India 1960); ECS Wade and G Godfery Phillips, *Constitutional Law* (Longman 1955); S A De Smith, *Constitutional and Administrative Law*, 1st edition (Penguin books 1971); O Hood Phillips, *Constitutional Law of Great Britain*, 6th edition (Sweet & Maxwell 1946); DCM Yardley, *Introduction to British Constitutional Law*. 7th edition (Butterworths 1990); David Foulkes, *Introduction to Administrative Law*. 4th ed (Butterworths 1976); Alex Carroll, *Constitutional and Administrative Law* (Pearson Education Ltd 1998).

[20] Tim Koopmans, *Courts and Political Institutions: A Comparative View*. (CUP 2003), p 156.

[21] For more recent debates on ultra vires in the UK, see C Forsyth, 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review' (1996) *Cambridge Law Journal* 122; Paul Craig, 'Ultra Vires and the Foundations of Judicial Review' (1998) *Cambridge Law Journal* 63.

[22] Of course in some countries there is also other remedies such as the writ of amparo in places like Mexico, Argentina, Chile, Colombia, Haiti, Spain, and the Philippines: Allan-Randolph Brewer-Carios, *The Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings* (CUP 2008); Adolfo S. Azcuna, 'The Writ of Amparo: A Remedy to Enforce Fundamental Rights' [1993] 37 *Ateneo Law Journal* 15.

[23] Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (CUP 2015) p 14.

perform a public duty that has not yet been performed.[24] This was the first prerogative writ to broaden in scope as 'a more general purpose tool for the remedying of administrative error'. [25] The court cannot use this remedy to require a government officer to make a particular decision, but it can require them to perform a duty according to law. This writ is usually sought if there is a public duty that remains unperformed, for example, if an organisation applies for a permit to protest, but does not receive a response from the government authority, then that authority has a duty to respond. I show in the next section that the writ of mandamus, along with prohibition and certiorari, was later explicitly constitutionalised in at least thirteen constitutions. This writ has taken on an expansive nature in India, where the court has recognised a 'continuing mandamus' as a means to monitor the behaviour of the body required to perform the duty and ensure that the duty is fulfilled.[26]

The writ of prohibition is an order to prevent a government agency from making a decision or taking certain action because it is unlawful or beyond their power. This order prohibits an authority from exercising jurisdiction that it does not have, either by exceeding its authority, or having no jurisdiction at all. This presumes that a government agent has not completed its function (because once a final decision is made, it is too late to seek prohibition). In terms of the scale and scope of the use of this remedy, Craig has noted there were over 5,500 citations to the writ of prohibition between 1220 and 1867 in England.[27] The writ of prohibition, along with the writ of certiorari, are two of the most frequently sought remedies.

The writ of certiorari is a separate remedy and has become known in some jurisdictions as an order to quash, that is, an order that cancels the decision of the government agency or body exercising public power in question. This was historically and traditionally understood to be a remedy against a decision of a lower (that is, 'inferior') court.[28] This traditional definition is still evident in jurisdictions like Myanmar, as I demonstrate later. But in other jurisdictions, this remedy has evolved to take on a broader meaning and can be sought against any government agent exercising quasi-judicial power.

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[24] See generally E.G. Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (Harvard University Press 1963).

[25] Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (CUP 2015), p 51.

[26] Gopal Subramanium, 'Writs and Remedies' in Sujit Choudry, Madhav Khosla and Pratap Bhanu Mehta (eds) *The Oxford Handbook of the Indian Constitution*. (OUP 2016), p 620.

[27] Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (CUP 2015) p 28.

[28] E.G. Henderson, *Foundations of English Administrative Law: Certiorari and Mandamus in the Seventeenth Century* (Harvard UP 1963).

Globally, the most well-known writ is the writ of habeas corpus that allows a challenge to the detention of a person.[29] This remedy is used to seek an order that a detained person be presented before a court to seek their release from detention. The writ of habeas corpus was incorporated into English statute by the Habeas Corpus Act 1679, which is perhaps the most famous statute in English law aside from the Magna Carta.[30] The writ of habeas corpus was also recognised in section 491 of the Code of Criminal Procedure 1861 in British India, and other colonies that adopted this Code. A survey of constitutions today suggests that habeas corpus is the most frequently constitutionalised writ, found in the constitutions of 47 countries, from Latin America, parts of Africa, the Pacific, South Asia, and Southeast Asia. I deal only briefly with the writ of habeas corpus in this article, in part because of the substantial histories already written on this famous remedy and its constitutional status.[31]

The final writ, and the least well-known in the Western liberal world today, is the writ of quo warranto. A writ of quo warranto can be used to challenge a person's claim to exercise a public office. The language of 'ursurping' legal authority is often used. For example, the remedy may be sought if a person is elected to a public office, but it is clear that they are not entitled to this office because they do not fulfil the criteria for that position.[32] This remedy once had a significant life in England, with Craig noting over 2,500 court citations to quo warranto.[33] This remedy has fallen into disuse in Western liberal jurisdictions around the world, such as in the England, Australia and Canada.[34] However, the remedy is still actively sought and granted by the courts in other jurisdictions today, such as India and Myanmar. An example is that, according to the Kerala High Court (India), the writ of quo warranto may lie against someone

[29] For a general history see Paul D Halliday, *Habeas Corpus: From England to Empire* (HUP 2010). See also Amanda L Tyler, *Habeas Corpus in Wartime: From the Tower of London to Guantanamo Bay* (OUP 2017).

[30] William F Duker, *A Constitutional History of Habeas Corpus*. (Greenwood Press 1980), p 52.

[31] William F Duker, *A Constitutional History of Habeas Corpus*; Paul Halliday, *Habeas Corpus: From England to Empire* (HUP 2010).

[32] Forrest G. Ferris and Forrest G. Ferris, Jr., *The Law of Extraordinary Legal Remedies: Habeas Corpus, Quo Warranto, Certiorari and Prohibition* (Thomas Law Book Co. 1926). Judith Farbey, Robert Sharpe, and Simon Atrill, *The Law of Habeas Corpus* 3rd ed (OUP 2011).

[33] Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (CUP 2015) p 28.

[34] In many English textbooks the remedy no longer rates a mention, although in others it is noted to have fallen into disuse.

who takes public office without giving the required oath.[35] The Supreme Court has made a clear statement on its application today: "The procedure of quo warranto confers jurisdiction and authority on the judiciary to control executive action in the matter of making appointments to public offices against the relevant statutory provisions; it also protects a citizen from being deprived of public office to which he may have a right.'[36]

In some jurisdictions, the traditional language of prerogative writs has been replaced. In England, the Administration of Justice Act (Miscellaneous Provisions) Act 1938 introduced the remedies as 'orders', replacing the traditional language of the prerogative writs of certiorari, mandamus and prohibition. This reform signalled a move away from the difficult terminology of the past, to increase access to the remedies and to help improve public understanding of these remedies. Other common law jurisdictions such as Singapore later followed this trend. Aside from statutory reforms, major constitutional reforms incorporating the writs took place in a range of other jurisdictions in the 19th and 20th century.

IV. A History of the Writs as Constitutional Guarantee

The itinerary of the writs and the process of incorporation into written constitutions took place in three distinct phases. The first stage was the incorporation of habeas corpus as a stand-alone remedy in constitutions, from the United States to countries across Latin America. The second is the constitutional incorporation of two writs in the Australian Constitution, although this is a somewhat isolated occurrence. The third and most important stage is the constitutional incorporation of five writs[37] first in the draft Indian Constitution and then under the Burma Constitution, and then across many parts of the former British empire. Over many decades, access to the writs has increased and this has had the effect of enhancing these remedies as an important means of public interest litigation in India. My focus in this article is primarily on this third stage.

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[35] Shubhankar Dam, 'The Executive', in Sujit Choudry, Madhav Khosla and Pratap Bhanu Mehta (eds) *The Oxford Handbook of the Indian Constitution*. (OUP 2016), p 315, referring to the case of KC Chandy v Balakrishna Pillai AIR 1986 Ker 116.

[36] University of Mysore v CD Govinda Rao AIR 1965 SC 491, cited in Gopal Subramanium, 'Writs and Remedies' in Sujit Choudry, Madhav Khosla and Pratap Bhanu Mehta (eds) *The Oxford Handbook of the Indian Constitution*. (OUP 2016), p 623.

[37] I recognise that some constitutions also grant the courts power to issue 'any writ or order'.

The first phase of the transfer of common law writs into constitutional text occurred with the acknowledgement of the existence of the writ of habeas corpus in the United States Constitution 1789,[38] and this spread with the influence of the US model on constitution-making in Latin America. The United States Constitution was the first constitution to include mention of the remedy of habeas corpus, and this appears to have inspired later constitution-drafting processes, particularly across Latin America in the 1800s. The US Constitution presupposed the existence of habeas corpus, as part of the common law, and provided that it could not be suspended except in the case of invasion or insurrection. The constitutions of many countries in Latin America (from Paraguay, Peru, Brazil, Guatemala, El Salvador, Honduras, Ecuador, Nicaragua, Argentina and Columbia) and the Philippines also added the right of amparo[39] and habeas data, as a reaction to abuses by government, particularly government security forces.[40] In some jurisdictions, such as Argentina, the Supreme Court was willing to grant habeas corpus applications even under military rule in the 1980s.[41] The remedy of habeas corpus has not always been a safeguard for rights, however, and some observers of Latin America note the courts' mistreatment of habeas corpus cases in the 1970s-80s.[42] In this article I primarily focus on the other constitutional writs, given the extensive research that already exists on the specific remedy of habeas corpus.

The second stage of the constitutional incorporation of the writs was in the Australian Constitution 1901. Section 75(v) of the Constitution provides for the writs of prohibition and mandamus. According to Zines, the drafters of the Australian Constitution were concerned to avoid the situation in the United States, where the court in *Marbury v Madison* specifically rejected the claim to issue mandamus in its original jurisdiction.[43] Section 75(v) was at one point removed from the draft Constitution during the Convention proceedings. One of the

[38] Paul Halliday, 'Habeas Corpus' in Mark Tushnet, Mark A Graber and Sanford Levinson (ed) *The Oxford Handbook of the US Constitution* (OUP 2015).

[39] See generally Allan-Randolph Brewer-Carios, *The Constitutional Protection of Human Rights in Latin America: A Comparative Study of Amparo Proceedings* (CUP 2008); on the history of amparo in Mexico, see, Roberto Gargarella, *Latin American Constitutionalism 1810-2010: The Engine Room of the Constitution*. (CUP 2013), p 81, and Linn Hammergren, *Envisioning Reform: Improving Judicial Performance in Latin America* (Pennsylvania State UP 2007), p 326.

[40] Linn Hammergren, *Envisioning Reform* (Pennsylvania State UP), p 190.

[41] Gretchen Helmke, *Courts Under Constraints: Judges, Generals, and Presidents in Argentina*. (CUP 2005).

[42] Linn Hammergren, *Envisioning Reform* (Pennsylvania State UP), p 174.

[43], Leslie Zine, *Cowen and Zines's Federal Jurisdiction in Australia,* 3rd edition (The Federation Press 2002), pp. 46-47.

drafters, Andrew Clark, was absent from the Convention proceedings, yet he saw the issue as so significant that he sent a message to Sir Edmund Barton (who later became Australia's first prime minister) demanding that section 75(v) be included back in the draft Constitution. In commenting on the origins of section 75(v), Gleeson and Yezerski conclude: 'It seems safe to infer from Barton's reply that Clark must have insisted on the provision on the basis that it was necessary to avoid the result in *Marbury*.'[44] Commenting on the debate concerning section 75(v), they note that Barton emphasised that:

> 'The object of [the provision] is to make sure that where a person has a right to ask for any of these writs he shall be enabled to go at once to the High Court, instead of having his process filtered through two or more courts...'[45]

The intention was to open up a direct channel to the High Court, although this was not connected to the protection of rights because the drafters did not include a bill of rights. The Australian experience of constitutionalising the writs appears to be isolated and can be left aside as an anomaly.[46] Section 75(v) does not seem to have directly inspired the transfer of the writs into the constitutions of other countries. This may in part have been because the Australian Constitution lacks a bill of rights, while many later constitutions took the much bolder step of connecting the enforcement of individual rights to the writs as a constitutional remedy for the breach of those rights.

The third and primary stage in the constitutional incorporation of the writs occurred in India in the late 1940s, when the crucial link was made between writs and constitutional rights. Prior to Indian independence, an individual had no right to seek redress under the Government of India Act, although the courts had recognised the power to issue writs under the common law. The writ jurisdiction under the common law was limited to the High Courts of Calcutta, Bombay and Madras. The situation fundamentally changed with the 1950 Constitution of India, which included a bill of rights and the five writs as a remedy for the protection of fundamental

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[44] J T Gleeson and R A Yezerski, 'The Separation of Powers and the Unity of the Common Law' in Justin T Gleeson , J A Watson and Ruth C A Higgins (eds) *Historical Foundations of Australian Law*, Vol 1 (Federation Press 2013), p 317.

[45] Gleeson and Yezerski, 'The Separation of Powers and the Unity of the Common Law' p. 318.

[46] The use of section 75(v) in Australia is one of last resort: see Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administration Action*. (Thomson Reuters, 2016).

rights.[47] The Indian Constitution conferred on the Supreme Court and High Courts the power to issue the five writs or any other writ for the protection of rights (art 32).[48] The Constitution also conferred on the High Courts the broad power to issue any other directions, orders or writs 'for any other purpose' (art 226).[49] These articles have been described as the 'soul' of the Constitution and are considered to be part of the basic structure of the Constitution.[50] These mechanisms have been the genesis of public interest litigation in India.[51]

The Constitution transformed the scale and scope of writs applications in India. Even in the early years of its operation, the sheer number of applications filed with the Indian courts far outweighed the number of applications in England. According to Mootham, in 1959, the High Court of London received just 22 applications for three writs (certiorari, prohibition and mandamus). In contrast, in the same year, the High Court of Allahabad in the state of Uttar Pradesh, one of 15 High Courts in India at the time, received 4,000 applications for writ petitions.[52] This has in part been attributed to the fact that the writs at this time were a relatively inexpensive and efficient means of review.[53]

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[47] Sir Orby Mootham, 'Constitutional Writs in India' in JND Anderson, (ed) *Changing Law in Developing Countries* (George Allen and Unwin 1963) pp 97-113.

[48] For commentary on these constitutional provisions, see Durga Das Basu Acharya, *Constitutional Remedies and Writs* (Kamal Law House 1994); MP Jain, *Indian Constitutional Law*, 7th edition (Lexis Nexis 2014); Daulat Ram Prem, *Prem's Law of Writs in India, England and America*, 2nd ed (Tripathi Private 1963); Thakker and Thakker, *VG Ramachandran's Law of Writs: Volume 1 and 2*. 6th ed (Eastern Book Company 2006); P Mahendra Sigh, *VN Shukla's Constitution of India*. 11th ed (Eastern Book Company 2008). pp 632-666.

[49] Mootham, 'Constitutional Writs in India' p 98. This concept also appears to have been borrowed in other countries, with the constitution conferring on the courts broad powers to issue 'any writ or order', which would also include the prerogative writs.

[50] Gopal Subramanium, 'Writs and Remedies' in Sujit Choudry, Madhav Khosla and Pratap Bhanu Mehta (eds) *The Oxford Handbook of the Indian Constitution*. (OUP 2016), p 614.

[51] There is a wide body of literature on public interest litigation. See for example, Shylashri Shankar, 'The Embedded Negotiators: India's Higher Judiciary and Socioeconomic Rights', in Maldonado (ed) *Constitutionalism of the Global South: The Activist Tribunals of India, South Africa and Columbia*. (CUP 2013), pp 95-128; Upendra Baxi, *The Indian Supreme Court and Politics*. (Eastern Books 1980); Manoj Mate, 'Public Interest Litigation and the Transformation of the Supreme Court of India', in Diana Kapiszewski, Gordon Silverstein and Robert A Kagan (ed) *Consequential Courts: Judicial Roles in Global Perspective*. (CUP 2013); SP Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* (OUP 2002).

[52] Mootham, 'Constitutional Writs in India' p 97.

[53] Mootham, 'Constitutional Writs in India' pp 109-110.

By including and upgrading the writs into the Indian Constitution, the drafters consciously departed from the English tradition in order to ensure that writs could be used for the protection of fundamental rights. According to Forsyth and Upadhyaya:

> In so insisting on the protection of fundamental rights, the committee was breaking with the then tradition of British Constitutionalism which did not countenance any limitation on Parliamentary supremacy as implied by the protection of fundamental rights.[54]

This idea of incorporating the writs into the written constitution and connecting them to the protection of constitutional rights was borrowed and included in other constitutions as countries across South Asia gained independence, including in Burma, Pakistan Sri Lanka[55] and Bangladesh. The constitutional writs also emerged across Africa, including in Nigeria,[56] Sierra Leone,[57] Kenya, Gambia, and Zimbabwe, and across the Commonwealth Caribbean,[58] such as Mauritius,[59] the Bahamas and Barbados.[60]

The constitutionalisation of the writs effected a shift in understanding of administrative review.[61] The writs as constitutional remedies now had greater prestige and a higher public

[54] Christopher Forsyth and Nitish Upadhyaya, 'The Development of the Prerogative Remedies in England and India: The Student Becomes the Master' [2013] 25 *National Law School of India Review*, p. 78.

[55] Sunil FA Coorey, *Principles of Administrative Law in Sri Lanka* (Jaela 1998); Joseph AL Cooray, *Constitutional and Administrative Law in Sri Lanka* (Sumathi Publishers 1995).

[56] Chuks Okpaluba, 'Judicial Redress for Breach of Fundamental Rights in Nigeria' [1981] 23(2) *Journal of the Indian Law Institute* 190-227; SIO Aguolu, *The Prerogative Writs and Orders under Nigerian Law and Constitution* (Star Printing and Publishing Company 1981).

[57] Kadija Kabba, 'Judicial Review: An Essential Tool for Curbing Excesses and Abuse of Executive Action in Sierra Leone' [2011] 13(2) *European Journal of Law Reform* 312.

[58] E Ventose, *Commonwealth Caribbean Administrative Law* (Routledge 2013); E Ventose, *Commonwealth Caribbean Public Law* (Cavendish 2000).

[59] John Bridge, 'Judicial Review in Mauritius and the Continuing Influence of English Law' [1997] 46 *International & Comparative Law Quarterly* 787.

[60] Michael de la Bastide, 'Judicial Supervision of Executive Action in the Commonwealth Caribbean' [2007] 33(2) *Commonwealth Law Bulletin* 177-189.

[61] Rohit De, *A Republic of Writs: Litigious Citizens, Constitutional Law and Everyday Life in India (1947-1964)* (PhD thesis, Princeton University 2013); Rohit De, 'Emasculating the Executive: the Federal Court and Civil Liberties in Late Colonial India: 1942-1944' in Terence C Halliday, Lucien Karpik and Malcolm M Feeley (eds) *Fates of Political Liberalism in the British Post-Colony: The Politics of the Legal Complex* (CUP 2012) pp 59-

profile. The inclusion of the writs in written constitutions added greater certainty for applicants, as the government could not legislate away these remedies. In addition, as the rules of standing were relaxed in India, the writs shifted from a limited means of redress to a primary channel for public interest litigation.[62] In the 1960s, it was observed that 'the writ petitions filed in India have been so numerous as to throw a heavy unanticipated burden on the superior courts.'[63] In the 1970s, the judiciary increased access to the courts as part of a broader effort to rebuild popular support after its complicity in Indira Gandhi's declaration of emergency rule.[64] In doing so the courts further loosed rules of standing, and unchained the 'historical shackles' of the writs.[65] While the constitutionalisation of the writs was a significant shift from the past, it was the judiciary that took the final steps of freeing the writs from the restraints of its common law past. Given the traditional understanding of the common law writs as highly limited and technical, this was a watershed development.

Similar observations to India have been made of the constitutional writs in Pakistan:

> [W]hile the writ jurisdiction conferred on high courts in Pakistan…is modelled on the British example, the language of the Constitution allows for greater interpretative freedom. The framers of the Pakistani Constitution deliberately eschewed recourse to 'certiorari', 'mandamus', 'quo warranto' and 'habeas corpus' in describing the powers of the courts, with the notable result that in the exercise of these powers, activist judges in Pakistan were not constrained by the precedents set by their British colleagues.[66]

This suggests a connection between the loosening of past restrains on the common law understanding of the writs in order for the courts to facilitate greater protection of constitutional

90; Rohit De (forthcoming 2018) *The People's Constitution: Litigious Citizens and the Making of Indian Democracy.* Princeton University Press.

[62] Surya Deva, 'Public Interest Litigation in India' in Po Yap Jen and Holning Yau (eds) *Public Interest Litigation in Asia*. (Routledge 2014); Upendra Baxi, 'Taking Suffering Seriously' [1985] *Third World Legal Studies* 105.

[63] A Gledhill, 'The Expansion of the Judicial Process in Republican India' [1964] 8 *International and Comparative Law Quarterly Supplementary Publication* 4, p. 8.

[64] Varun Gauri, *Public Interest Litigation in India: Overreaching or Underachieving*? (The World Bank, Development Research Group 2009).

[65] Brij Kishore Sharma, *Introduction to the Constitution of India* (PHI Learning Private Ltd 2015), p. 277.

[66] Ahmed, Sanaa, 'Supremely Fallible? A Debate on Judicial Restraint and Activism in Pakistan' [2015] 9(2) *Vienna Journal on International Constitutional Law*, p. 213.

rights and accountability for misuse of public power. In India, the relaxed rules of standing enables an overwhelming number of cases to be brought to the courts. Several concerns and criticisms have been raised about contemporary developments in India. For example, there are concerns that the middle class, rather than the poor, are now the primary beneficiaries from this avenue for judicial review, in part because judges themselves are more alert to concerns of the middle class.[67] Initial empirical research has shown that public interest cases are less than 0.4 percent of the courts caseload, although the openness of the Supreme Court to hear fundamental rights claims on behalf of the poor and marginalised does appear to have declined slightly over time.[68] In terms of qualitative evidence, the most extensive articulation is by Anuj Bhuwania, who argues that the writs, and the public interest litigation it has fostered, now supports a neo-liberal agenda and the expansion of state developmentalism.[69] This agenda has justified the removal of urban slums, enabled development projects at the expense of the environment, bred a culture of legal informalism, justified the cleaning of Delhi in the name of preserving urban heritage and reforming its transportation. While the potential for the writs to facilitate the protection of rights and accountability remains, Bhawara's research suggests that the situation in India may be trending away from its earlier pro-poor focus.

Unlike India, not all constitution-makers have been so enabling. The writs gained a considerable reputation as a potentially powerful remedy that may threaten the power of the state. Constitution-drafters in countries such as Brunei specifically *denied* the right to judicial review. The drafter of the constitution, Sultan Omar Ali, ensured that the 1959 Constitution of Brunei specifically excludes and denies any right to habeas corpus or the writs of prohibition, mandamus or certiorari (art 84).[70] Although this measure is extreme and unusual, it demonstrates the suspicion with which the executive regards the writs and the potential impact it can have. I now turn to the case of the writs in Myanmar as an administrative remedy available in the struggle for constitutional rights.

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[67] Varun Gauri, *Public Interest Litigation in India: Overreaching or Underachieving*? (The World Bank, Development Research Group 2009).

[68] Garui, Public Interest Litigation in India, p 10.

[69] Anuj Bhuwania, *Courting the People: Public Interest litigation and Political society in post-emergency India*. (CUP 2017).

[70] Tsun Hang Tey, 'Brunei's Revamped Constitution: The Sultan as the Grundnorm?' (2007) *Australian Journal of Asian Law* 9(2).

V. Constitutional Writs in Burma/Myanmar

The draft Indian Constitution did not come into force until 1950, and so it was in fact in 1948 in Burma where the constitutional writs first came into operation. The emergence and development of constitutional writs in Myanmar demonstrates the variations in the scope of the remedy as a means of rights protection, beyond the common story of judicial activism. Up until 1937, Burma (as it was known prior to 1989) was part of British India. Burma had just ten years as a stand-alone colony before independence (1937-1947), although that period was interrupted by World War II and the invasion of the Japanese. In essence, Burma had little time to develop a legal system distinct from the British Indian model. By 1948, Burma gained independence, and was only one of two former British colonies that intentionally exited from the Commonwealth. In doing so it severed ties with the Privy Council, although Burma retained its common law colonial heritage. The writs in Burma first originated from the common law in the 1940s just prior to independence. This was possible based on comparative common law jurisprudence in the British empire. I show how the subsequent constitutionalisation of the writs in the 1947 Constitution led to a striking growth of judicial review for the protection of rights during the parliamentary era (1948-1962). I contrast this history of measured judicial activism with the conservative approach of the courts in present-day Myanmar. This case illustrates variation in how the constitutional writs are used, with the past historical legacy acting as a potential indication of future constitutional rights protection.

A. Recognition of the Common Law Writs in Colonial Burma

The history of the common law writs in Burma only barely precedes independence and was part of broader anti-colonial efforts to confront the power of the colonial state. The Government of Burma Act 1935 gave the Governor ultimate executive power. In 1940, the Rangoon High Court heard the first case challenging a government decision through a writ application under the common law. The case of *Maung Pyu*[71] was considered to be of sufficient public importance to be heard by a special bench of the Rangoon High Court, the apex court of colonial Burma at the time. The six petitioners who made the application were owners of agricultural land let annually to tenants. Rent Settlement Officers of the British colonial administration had determined the amount the petitioners could charge a tenant, but the petitioners were concerned

[71] In the matter of Maung Pyu and others (1940) *All Indian Law Report* (Rangoon).

the assessment undervalued their land and that the decision was inconsistent with the requirements of the Tenancy Act. The petitioners asserted that the assessment infringed their right not to be deprived of their property,[72] the only right explicitly mentioned under the Government of Burma Act 1935.[73]

The petitioners first asked whether the High Court had jurisdiction to issue the writ of certiorari to cancel the decision concerning tenancy charges as part of the courts 'inherent power' under the common law. The petitioners argued that the writs were recognised by the courts in British India and that this power also extended to courts in the colony of Burma. The colonial government rejected the idea that the court had writ jurisdiction, arguing that a person deprived of his or her property by the illegal action of an executive officer had no right to seek a remedy in court. The judges did not look favourably on these arguments. The court chastised the government's attempt to deny the existence of a remedy. The High Court said that it had the power to issue prerogative writs under the common law, unless its authority to do so was restricted by parliament via legislation. In its judgment, the court relied upon comparative arguments referring to the case law of other British colonies' (or former colonies). It referred to the Supreme Court of Nigeria, which had recognised the writ of habeas corpus, and the Supreme Court of the colony of Victoria (Australia), which had recognised the court's power to issue the writ of certiorari. This recourse to comparative law demonstrates the global colonial web of common law jurisprudence at the time that enabled common law writs to travel.

The court concluded that the applicants had been deprived by the government of their right to contractual rents. The assessment of the authorities breached the Government of Burma Act 1935 and was inconsistent with the Tenancy Act. The court emphasised the legal claim of the petitioners and the injustice of the situation. On the basis that the assessed rents were much lower than the contractual rents, the Court held that the decision of the Rent Settlement Officers was unjust. The applicants succeeded and were granted a writ of certiorari. This pivotal case shows the importance of comparative colonial jurisprudence that enabled the Rangoon High Court to recognise the common law writs.

B. The Constitutional Writs and Rights Protection

[72] Section 145 of the Government of Burma Act 1935.

[73] The Act itself did not specify the right to a remedy.

While the case of *Maung Pyu* was possible because of recourse to comparative common law, the constitutional writs developed largely organically within the domestic context of Burma. The 1947 Constitution, borrowing liberally from the draft Indian Constitution, included a bill of rights and constitutional writs as a remedy to enforce such rights in the newly-established Supreme Court of Burma. Part of the Supreme Court's jurisdiction was to hear constitutional writ cases. The 1947 Constitution provides the right to bring a case to the Supreme Court in order to uphold individual rights (s 25). These rights were contained in the 'Fundamental Rights' Chapter and included the right to citizenship; equality of opportunity and non-discrimination; right to personal liberty; rights of freedom of speech and assembly; freedom of movement; right to form unions; prohibition on forced labor; freedom of religion, and the right to private property. Some provisions were notably progressive, such as that women were entitled to receive equal pay to that of men. In other areas the socialist orientation of the state was evident, such as the power of the state to nationalise industries. These rights were subject to limitations such as public order and morality.

The Supreme Court had jurisdiction to hear rights cases based on applications for the writs: habeas corpus, mandamus, prohibition, quo warranto or certiorari. The writs were a potent constitutional remedy against government action. In effect, the judiciary had authority to confront the power of the executive and lower courts where such authorities had stepped beyond its power. The period from 1948-1949 was a watershed time when the Burmese courts forged new jurisprudence in this area. The court did not resort to Indian caselaw and only briefly at times to old English case law on the common law writs. In essence, the court took the opportunity to craft its own jurisprudence, which was possible in an environment of relative judicial independence.

From 1948 until the 1970s, the Supreme Court (and from 1962, the Chief Court) heard over 300 writs cases. The writ of certiorari was the most common remedy sought by applicants during this period.[74] Many cases concerned the writ of habeas corpus and allegations of illegal detention,[75] which is a reflection of the government's excessive use of arbitrary detention at the time. A significant proportion of writs cases concerned matters specific to Yangon as the largest city, such as property and town planning issues, labour disputes, and taxation matters. The

[74] Ma Hla Aung, *Reported Cases of Writs Application with Judgment Summary 1948–1971* (publisher unspecified 2011). [in Burmese]

[75] U Hla Aung, 'The Law of Preventive Detention in Burma' [1961] 3(1) *Journal of the International Commission of Jurists* 47–67.

emphasis of the court on protecting individual rights against the power of the government was unmistakable. The Court described the constitutional writs as 'means of which this court is empowered to protect and safeguard the person and property of the citizens of the Union'.[76] The writs were as central to accountability and the protection against unwarranted government interference.

A number of writs cases concerned the questionable tactics of state tax authorities as they intruded into the everyday lives of individuals. The writs were used to push back against the aggressive tactics of tax collectors.[77] Once case concerned an alleged attempt to smuggle out of Burma bobbins for Singer sewing machines to avoid paying tax.[78] The court held that even if the applicant was trying to smuggle them out of Burma, the transportation within the country of the packages by air was mere preparation and not proof, so did not amount to an 'attempt'. The court required the authorities to meet a higher standard of proof and not inhibit freedom of movement and trade within the country. The writ of certiorari was granted to the applicants against the decision of the Collector of Customs to seize their goods.

A significant proportion of writs cases dealt with public and private property and town planning issues and concerned the rights of landowners under article 16 of the Constitution.[79] For example, a landowner took the Agricultural Committee to court protesting its decision to allot his land to a member of the committee. The Committee had claimed the reallocation was valid under the Disposal of Tenancies Act because the landowner did not work the land himself.[80] The landowner claimed that he did, but that he also had assistants to help. The Court agreed with the landowner and held that the government Committee had clearly exceeded its jurisdiction and contravened the well-established principle of natural justice by allotting the land to a member of the Agricultural Committee. The court here demonstrated its unwillingness to tolerate corruption within the administration. Finally, there were cases concerning the rights of workers and many cases arising from decisions of the Court of Industrial Arbitration. In these cases, the court had to strike a fine balance between the rights of workers and the affairs of companies affected by the devastation of World War II and then by the internal rebellion of

[76] Ibid.

[77] *Shan Mountain Estates Ltd v The Income-Tax Officer, Companies Circle, Rangoon* (1950) BLR (SC) 58.

[78] *Vumtual v The Financial Commissioner (Commerce) & two* (1963) BLR (CC) 418.

[79] 'No citizen shall be deprived of his personal liberty, nor his dwelling entered, nor his property confiscated, save in accordance with law.'

[80] *U Po Su v The Thayagon Village Agricultural Committee & Two Others* (1949) BLR (SC) 26.

1948-49 in Burma, such as in relation to the oilfields.[81] In this respect, the courts approach was more restrained or measured than the unbridled variant of judicial activism of courts in India.

The political situation in Burma, however, cut the life of the writs short. After General Ne Win's coup of 1962 and the demise of the constitution, writs cases began to decline in number. The Chief Court, which replaced the Supreme Court, heard the last of the writ cases in 1971. In 1972, the court system was dramatically restructured along socialist lines with the People's Court at the apex. The 1974 socialist Constitution did not recognise the writs, and the power to conduct constitutional review of legislation was also taken away from the courts. Several years later, after a dramatic end to the socialist regime, in 1988, the Supreme Court was re-established although it did not initially have the power to hear writs cases. The period from 1970s to 2010 was largely void of means for administrative adjudication, let alone rights protection or accountability of the military regime. The political elite showed no tolerance for any form of administrative adjudication.

C. The Re-emergence of the Writs under the 2008 Constitution

The renaissance of the writs as a procedure to review the legality of decisions is a remarkable feature of the new Myanmar political system under the 2008 Constitution. Since 2011, the Supreme Court has jurisdiction to hear complaints against the government by way of the writs as a constitutionally protected remedy. The writs are in theory available for the enforcement of rights. Yet rights occupy a precarious position, relegated in importance towards the end of the Constitution (after the chapter on the power of the military) rather than upfront. Rights provisions are also not rigid and immutable, and can be amended by the easier amendment process of more than 75 percent approval in parliament.[82] The rights provisions can also be limited by law, that is, the Constitution allows parliament to limit rights through legislation.

The re-emergence of the writs in the Supreme Court raises many questions. Seven years on, a picture is now emerging of the kinds of writs cases filed with the court, and how the court is dealing with writs claims. Despite its almost identical textual features to the 1947

[81] *Report on the Ad Hoc Oilfields Enquiry Committee* (Rangoon Chief Controller Central Press 1950 reprinted 1968). U Myo Htun Lynn, *Labor and Labor Movement in Burma* (University of Rangoon 1961); Burma Chamber of Commerce, *Annual Report 1949-1950* (Rangoon 1951).

[82] Section 436 sets out a two-tier process for amendment. Some require just parliamentary approval, while others required parliamentary approval plus a national referendum.

Constitution, the use of the writs has fundamentally changed because the shift in the separation of powers and the reduced status of the constitutional rights. Unlike in the 1940s and 1950s, the courts are no longer independence. Instead, the courts are subordinate to the executive and legislative branch, and subject to the pervasive influence of the military. The writs therefore exist within a starkly different political environment to the parliament democracy era. Although a new bicameral Union Parliament was established in 2011, twenty-five percent of the seats are reserved for the military as unelected members of parliament. The Constitutional Tribunal was established in 2011 as a separate court to hear cases for constitutional review,[83] although the authority to hear writs cases remains with the Supreme Court. The Supreme Court can submit questions to the Tribunal, and is required to do so if it relates to a matter of constitutional interpretation, although unusually it has not done so in any writs cases. Like many countries that have transitioned from military rule, a range of new institutions have been established to deal with complaints against government administration such as the Anti-corruption Commission and the National Human Rights Commission, yet these bodies lack genuine independence from the executive.[84] The writs are the primary means of rights protection, yet a very limited means.

All constitutional writs applications are centralised and heard by the Supreme Court. The current Chief Justice is a former military member,[85] and over decades of socialist and military rule since 1960s many officers from the military have been transferred into the courts (and into government departments).[86] The concept of the separation of powers has been replaced by a vertical allocation of powers, with the executive at the top of the hierarchy, the

[83] Melissa Crouch, 'Democrats, Dictators and Constitutional Dialogue: Myanmar's Constitutional Tribunal', [2018] 16 (2) *International Journal of Constitutional Law*.

[84] R Goodman and R Pegram, *Human Rights, State Compliance and Social Change: Assessing National Human Rights Institutions* (CUP 2012); Jeong-Woo Koo and F O Ramirez, 'National Incorporation of Global Human Rights: Worldwide Expansion of National Human Rights Institutions 1966-2004' [2008] 87(3) *Social Forces* 1321; Melissa Crouch, 'Asian Legal Transplants and Lessons on the Rule of Law: National Human Rights Commissions in Indonesia and Myanmar' [2013] 5(2) *Hague Journal of the Rule of Law* 146.

[85] In the 1980s, U Htun Htun Oo was a captain in the Southwest military command. From 1990-1994 he served as a major in the military Advocate General Office, and then in 2007 was appointed as Deputy Chief Justice of the Supreme Court. See biography as extracted from his nomination profile to the Supreme Court in *Mizzima* (2011), 'President changes his Chief Justice Nominee', 17 February, http://archive-1.mizzima.com/news/myanmar/4895-president-changes-his-chief-justice-nominee

[86] Pyae Thet Phyo and Swan Ye Htut (2015) 'Yellow ribbons seek an end to militarised judiciary', 10 September, *Myanmar Times*, http://www.mmtimes.com/index.php/national-news/nay-pyi-taw/16400-yellow-ribbons-seek-an-end-to-militarised-judiciary.html, as discussed in Melissa Crouch, 'Judicial Power in Myanmar and the Challenge of Judicial Independence' in HP Lee and Marilyn Pittard (ed) *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (CUP 2017) pp 264-283.

legislature second, and the courts at the bottom.[87] This means that parliament has the authority to hold the courts to account, and the courts report to parliament, which appears to be a residual idea from the socialist era. The courts play a role in the legislative process, because the Supreme Court is classified as a union-level organisation[88] and so it can make submissions to the Hluttaw[89] and assist in drafting legislation, such as the insolvency law or family law. In addition, because it is a union-level organisation, the judges may be summoned to and questioned by parliament, which has led to significant tensions between the judicial and legislative branch. This practise reinforces suspicions that the judiciary is neither independent nor separate from the executive and the military.

D. Judicial Conservatism and Limitations on Constitutional Writs

While the Indian case and the historic case of Burma pre-1970s may suggest that the constitutional writs primarily facilitate judicial activism and the ability of the courts to protect constitutional rights, this is only part of the story. Rather, the radically different political and legal climate in contemporary Myanmar has led to judicial conservatism and a distinctly limited approach to the constitutional writs, although one that remains in tension with its past.

Between 2011 and 2017, several hundred writs cases were filed directly with the Supreme Court.[90] Lawyers have tried to take advantage of this new mechanism of review for protection of rights. Yet a number of distinct patterns have emerged from the outcomes of these cases. When cases are brought against the executive, particularly the police or military in habeas corpus applications, they are more likely to be dismissed. In fact, no claim for habeas corpus has been successful. Further, the court has not defined the scope and content of constitutional rights, in part because this is the jurisdiction of the Constitutional Tribunal.[91]

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[87] Melissa Crouch, 'Judicial Power in Myanmar and the Challenge of Judicial Independence' in HP Lee and Marilyn Pittard (ed) *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (CUP 2017) pp 264-283.

[88] Section 77(c) of the 2008 Constitution.

[89] Section 298 of the 2008 Constitution.

[90] U Tin Win, *Sachundaw Lut-tone Shauk-ta-bone Si-yin-tone*. (n.p 2012); U Yi Sein, *Sachundaw-E A-Hnit Tha-ya-mya* (n.p. 2014); U Win Maung Htet, *Pyidaungsu Thamada Myanma Nainggandaw, Pyidaungsu Hluttaw-hma ati-pyu pya-htana-thi 2013 ku-hnit, Sachundaw Amein Shauk-ta-hmu sain-ya Ubade hnin Ni Ubade-mya* (n.p. 2013) [in Burmese]. These publications are all commentaries of or extracts from writs cases in Burmese.

[91] This is a somewhat unusual situation, but in theory the Supreme Court could refer the question of constitutional interpretation on rights to the Constitutional Tribunal in these cases.

The constitutional writs are most often used as a final form of appeal, after all other avenues have been exhausted. The majority of cases are seeking review of a decision of a lower court or tribunal, not of the executive. For example, in one case,[92] the Supreme Court held that it could not overturn a lower court decision unless it was beyond the jurisdiction of that court according to the law. Again in another case the Court insisted that it will not interfere in the judgment of a subordinate court if the judgment is passed within its power of jurisdiction.[93] In another early reported case,[94] the Supreme Court held that it could not hear writs applications in relation to its own judgments, only in relation to inferior courts if an inferior court has heard a case that is not within its jurisdiction, if it has exercised power beyond its jurisdiction, or if it has failed to exercise its jurisdiction appropriately. While this is a traditional articulation of the function of the common law writs, this approach suggests that one of the main roles of the Supreme Court at present is to supervise and monitor decisions of lower courts, rather than decisions of the executive.

Very few court decisions in writs cases have been published in the official Myanmar Law Reports. Of cases that have, most decisions focus on general procedural issues and do not clarify the principles that animate constitutional writ claims.[95] The most successful case that could operate as an important precedent has not been officially reported. I nevertheless discuss this unreported case here because of its potential to expand the constitutional writs as a means of rights protection.

The case concerned an economics professor who had been 'forced to retire' from her position by the Minister of Education.[96] She lodged a writ application with the Supreme Court to seek certiorari against the decision of the Minister.[97] All university staff in Myanmar are civil servants, and the Yangon University of Distance Education is under the Ministry of

[92] *Daw Than Than Hte & 2 others v Regional High Court Judge Magwe Regional High Court, Magwe City & 7 others* (2011) MLR (Civil Case) 127.

[93] *U Myin Than & 5 others v President of the Republic of the Union of Myanmar & 2 others* (2011) MLR (Criminal Case) 79.

[94] *Shin Nyana (aka) Shin Moe Pya v President of the Republic of the Union of Myanmar* (2011) MLR (Criminal Case) 126.

[95] *U Kyaw Myint v Daw Tin Hla* (2011) MLR (Civil Case) 1.

[96] My discussion of this case is also based on an interview with the applicant's lawyer in this case.

[97] See *Professor Daw Kyin Hte v Minister for Education* (2013) Union Supreme Court of Myanmar (unreported case number 290), dated 5 June 2014, heard by Chief Justice U Htun Htun Oo (also spelt Tun Tun Oo), Justice Justice U Soe Nyun and U Tha Nge [copy on file with the author].

Education. Being 'forced to retire' is a common practice in Myanmar and is something of a euphemism to describe a process by which a person is told they should retire voluntarily in order to allow them to save face and avoid being fired. The professor argued that the Minister acted beyond his power under the Civil Servant Law. The case was brought on the basis of two constitutional rights claims: equal rights before the law and equal opportunity in public employment. The Civil Servant Law lists a wide range of punishments that can be given if a civil servant violates the regulations, such as a demotion or being fired, but the list does not include the power to force a civil servant to retire. The court held that the decision of the Minister to force her to retire was beyond his power and awarded a writ of certiorari. While the court did refer to past Myanmar case law, it did not refer to any comparative contemporary jurisprudence. This is the first major case in which the Supreme Court has declared the decision of a government minister to be unlawful and it sent ripples of excitement through the legal profession. This success, however, was tempered by the fact that the Minister who had made the decision was deceased at the time the court decision was handed down, so the decision did not have any implications for the late Minister. The negative reaction of the government to this case appears to have been serious, with government departments criticised and sternly warned about not triggering further writs cases. The administration clearly perceived writs cases as a threat to its legitimacy and as an unwanted criticism of its performance.

The present reality of constitutional writs cases in Myanmar shows that the entrenchment of the writs in a written constitution does not inevitably generate judicial activism. This should temper our expectations of the writs as an unhindered means for rights protection. The Myanmar experience shows that jurisdictions where judges do make active use of the writs display a legal and political culture that supports judicial activism in favour of the protection of constitutional rights, and not merely by the existence of the constitutional remedies. And yet the history of the constitutional writs in Myanmar stands as a powerful legacy, one that lawyers and litigants attempt to draw upon in the hopes of reviving a more expansive avenue for accountability and rights protection.

VI. Conclusion

The field of comparative administrative law has in recent decades been an emerging area of scholarly inquiry. I have identified the writs as an important focus of study because the writs embody one form of constitutional incorporation of administrative law into written constitutions. The writs, although traditionally a common law administrative mechanism, are

now an important part of the constitutional architecture in some countries. In this respect, constitutional and administrative law in these jurisdictions are not isolated fields but rather intimately intertwined.

I have argued that the transformation of common law writs into constitutionally protected remedies has raised the profile, scope and symbolic significance of these administrative review remedies. The writs are an important part of the historical borrowing and spread of administrative review in former British colonies. The writs are an early example of the constitutional transfer of administrative review mechanisms. This history matters because the writs have existed over a long period of time, which allows us to observe the evolution of these legal means of constraining state power and how it has adapted to new challenges over time. Further, the writs demonstrate how transplanted ideas vary in practice as they interact with different regime features. The writs offer an example of the adaptation of the traditional common law model of administrative review to a range of different domestic contexts and therefore offer a common point of comparison, which is often difficult to find across administrative law regimes.

From India to wider South Asia, Africa, the Pacific and the Caribbean, the writs stand out as a means of administrative review that can potentially be used in the struggle for the protection of constitutional rights. This model coincides with the ongoing concerns for administrative accountability. Protection of individual rights from encroachment by the state is one of the crucial issues of our times. The writs stand as one potential avenue to challenge administrative decisions and open a channel for judicial activism.

The case Myanmar demonstrates the historical transformation of the writs from common law status to symbolic constitutional remedy. The parliamentary era (1948-1962) was a period when the courts were independent of the executive and the writs became a key means of protecting rights at a time of the heavy-handed use of executive power. Fast-forward to 2011, and although the 2008 Constitution of Myanmar reintroduces the Supreme Court's jurisdiction to hear applications for the writs, the political context in which these cases are brought is radically different. Over decades of military rule, the Supreme Court has been infiltrated by the military[98] and remains under the centralised control of the executive. While its use of the writs

[98] This practise is well-known in Myanmar: Pyae Thet Phyo and Swan Ye Htut (2015) 'Yellow ribbons seek an end to militarised judiciary', 10 September, *The Myanmar Times*, http://www.mmtimes.com/index.php/national-news/nay-pyi-taw/16400-yellow-ribbons-seek-an-end-to-militarised-judiciary.html. For evidence of a related controversy over the appointment of military officers to the Ministry of Health, see *The Myanmar Times* (2015),

to keep the lower courts in line can be read as reinforcing a traditional understanding of these remedies, in the political climate of Myanmar it also serves to ensure that courts rarely use the writs to challenge executive decisions. Despite this, the writs retain symbolic significance and high profile in Myanmar precisely because of its constitutional status and because of the history of judicial activism. Although the courts currently retain a conservative approach to the writs, if political reforms enhanced judicial independence, the case of case *Kyin Hte* may provide future grounds for the writs to once again be used as a remedy for the protection of individual rights.

'Ministry backs down on jobs for soldiers', 13 August, https://www.mmtimes.com/national-news/15971-ministry-backs-down-on-jobs-for-soldiers.html.