

Writ Jurisdiction in Myanmar

Mi Khin Saw Aung*

Abstract

The main objective of issuing writs has always been to protect the interests of people and safeguard their fundamental rights. In Myanmar, writ jurisdiction was present during the colonial period under the British law and continued to exist after gaining independence in 1948 with the adoption of the 1947 Constitution of the Union of Burma (Myanmar). With the introduction of socialist system that came along with the 1974 Constitution of the Socialist Republic of the Union of Burma (Myanmar), the practice of writ jurisdiction ceased to exist until the promulgation of the 2008 Constitution of the Republic of the Union of Myanmar. The 2008 Constitution recognizes the right to constitutional writs, and this provides a check on the power of the executive and an avenue for individuals to challenge the decisions of the subordinate courts. At present, under the respective provisions of the 2008 Constitution, the Supreme Court of the Union has the power to issue five kinds of writs: Habeas corpus, Mandamus, Prohibition, Quo Warranto, and Certiorari. This study will examine the applications and practices of writs in Myanmar after 2011 with a focus on the frequency of cases for each kind of writs.

Keywords: Fundamental rights, Constitution, Writ, Jurisdiction, Myanmar.

Introduction

The origin of the writ began in the English legal system. In English Common Law System, the principal machinery of review over quasi-judicial functions was provided by prerogative writs. In Myanmar, the power to issue writs was practiced since the colonial period. The High Court of Judicature at Yangon had the power to issue writs before independence. After independence, under the 1947 Constitution of the Union of Burma (Myanmar) the power to issue writs was transferred to the Supreme Court. There was no writ jurisdiction in Myanmar under the Constitution of the Socialist Republic of the Union of Myanmar, 1974. At present, under the Constitution of the Republic of the Union of Myanmar, 2008 writ jurisdiction has been practiced again by the Supreme Court of the Union. The main objective of issuing writs is to protect or safeguard the interest and the fundamental rights of the people. The Constitutional writs are the only means to seek judicial review of an administrative decision in Myanmar. The issue of the writ is practiced for both civil and criminal matters. This paper examines the practice of five kinds of writs in Myanmar after 2011.

Historical Background of Writs in Myanmar

Under the rule of Myanmar Kings, the administration of justice was carried out by the so-called 'five Courts of the Hlutt'. The Hluttaw, one of the five courts, was the most important of all the administrative, legislative and judicial institutions. At that time, the writ jurisdiction was not exercised by any of these five Courts of Hluttaw.

* Professor, Dr., Head of Law Department, Dagon University

Under the British Rule, the High Court of Judicature at Rangoon (Yangon) was the highest court of appeal with jurisdiction over the whole colonial Myanmar. This Court was the first court in Myanmar to have the power to issue writs. After independence the Supreme Court had jurisdiction throughout the whole of the Union and its decisions were binding on all Courts. Section 25 of the Constitution of the Union of Burma (Myanmar), 1947 invests the Supreme Court with the power to issue five kinds of writs for enforcement of fundamental rights of the people granted by the Constitution.

Under the Constitution of the Socialist Republic of the Union of Burma (Myanmar) 1974, the writ jurisdiction system was not exercised.

In 1988, the State Law and Order Restoration Council promulgated a Judiciary Law for the formation of courts in the Union of Myanmar. According to this law, the Supreme Court was the highest judicial organ. In 2000, a new Judiciary Law was promulgated by the State Peace and Development Council. Under this law, the Supreme Court was still the highest judicial organ of the Union of Myanmar. At that time, writ jurisdiction could not be exercised by the Supreme Court.

The Constitution of the Republic of the Union of Myanmar, 2008 came into force on 31st January 2010. Under Section 296 of this Constitution, the Supreme Court of the Union has the power to issue writs of habeas corpus, mandamus, prohibition, quo warranto, and certiorari.

Provisions relating to writs in Myanmar

Section 378 (a) of the Constitution of the Republic of the Union of Myanmar, 2008, provides that in connection with the filing of an application for rights granted under Chapter VIII of the constitution (Citizen, Fundamental Rights and Duties of the Citizens) the Supreme Court of the Union shall have the power to issue writs as suitable. The right to issue writs by the Supreme Court of the Union shall not affect the power of the other Courts to issue an order that has the nature of writs according to existing laws.¹ According to Section 296 (b) of this Constitution the application to issue writs shall be suspended in the areas where the State of emergency is declared.

Section 16 (A) of the Union Judiciary Law 2010 also grants the Supreme Court of the Union the power to issue the writs. Besides the Constitution and Union Judiciary Law, there are similar provisions for the power of issuing a writ in Section 491 of the Code of Criminal Procedure and Section 45 of the Specific Relief Act. The High Court has the power to issue directions of the nature of a habeas corpus under Chapter 37 of the Code of Criminal Procedure.

Section 491 of the Code of Criminal Procedure provides that:

(1) any High Court may, whenever it thinks fit, direct-

(a) that any person within the limits of the appellate criminal jurisdiction be brought up before the Court to be dealt with according to law;

(b) that a person illegally or improperly detained in public or private custody within such limits be set liberty;

¹ Section 378 (b) of the Constitution of the Republic of the Union of Myanmar, 2008.

(c) that a prisoner detained in any jail situate within such limits be brought before the Court to be there examined as a witness in any matter pending or to be inquired into such Court;

(d) that a prisoner detained as aforesaid be brought before a Court-martial or any Commissioners acting under the authority of any commission from the President of the Union for trial or to be examined touching any matter pending before such Court-martial or Commissioners respectively;

(e) that a prisoner within such limits be removed from one custody to another for trial; and

(2) The High Court may, from time to time, frame rules to regulate the procedure in cases under this section.

(3) Nothing in this section applies to a person detained under the Bengal State Prisoners Regulation, 1818, Madras Regulation II of 1819, or Bombay Regulation XXV of 1827 or the State Prisoners Act 1850 of the State Prisoners Act 1858.

According to Section 45 of the Specific Relief Act, the High Court may make an order requiring any specific act to be done or forbore, within the local limits of its ordinary civil jurisdiction, by any person holding a public office whether of a permanent or a temporary nature, or by any cooperation or inferior Court of Judicature: provided-

(a) that an application for such order be made by some person whose property, franchise or personal right would be injured by the forbearing or doing (as the case may be) of the said specific act;

(b) that such doing or forbearing is, under any law for the time being in force, clearly incumbent on such person or Court in his or its public character, or on such corporation in its corporate character;

(c) that in the opinion of the High Court such doing or forbearing is consonant to right and justice;

(d) that the applicant has no other specific and adequate legal remedy; and

(e) that the remedy given by the order applied for will be complete.

Exemptions from such power, nothing in this section shall be deemed to authorize the High Court-

(a) to make any order binding on the President of the Union;

(b) to make any order on any other servant of the Government, as such, merely to enforce the satisfaction of a claim upon the Government; or

(c) to make any order which is otherwise expressly excluded by any law for the time being in force.

According to the above-mentioned provisions of the Code of Criminal Procedure and the Specific Relief Act, the High Court may issue the writs. The Supreme Court of the Union has jurisdiction throughout the whole of the Union and the decision of it was binding on all Court. It was the court of final appeal from all courts within the Union and granting the writ.

The Practice of Writs in Myanmar after 2011

According to Section 296 (a) of the Constitution of the Republic of the Union of Myanmar 2008, the Supreme Court of the Union has the power to issue five kinds of writs. These writs are:

(1) Habeas corpus

The writ of habeas corpus is issued in written form to call a person in detention and to scrutinize to ensure that the imprisonment or detention of party by any Court within the Union or by any authorized organization is legal or not.²

The following is the writs of habeas corpus case the Supreme Court of the Union has heard.

In the case of Daw Mar Khon Vs. Battalion Commander U Aung Zaw Oo (or) the Presiding Officer, Column Commander (Kha La Ya- 37) Myit Kyi Nar Township.³

The applicant applied to the Supreme Court of the Union to issue an order of habeas corpus as her husband, while he was sleeping at 11:00 pm on 5th Jan 2012, was arrested by Kha La Ya-37, Battalion, Tar Law Gyi Camp and was detained at Upper monastery of Tar Law Gyi.

The respondent also applied that he arrested her husband but transferred him to the Board of Investigation (BI), Myit Kyi Nar, brought him an action under Section 17 (1) of the Unfair Society Act and then, took him a remand from Myit Kyi Nar Township Court.

The Court had to issue an order of writ of habeas corpus to take the arrested person before the Court if he was arrested without sufficient reasons. In this case, it appeared the applicant's husband was detained by an order of remand of the MyitKyinNar Township Court under Section 167 of the Cr. PC (Procedure when investigation cannot be completed in twenty-four hours). There was no need to issue a writ of habeas corpus. The application was dismissed.

The Supreme Court of the Union has not issued the writ of habeas corpus in a single case from 2011 to 2019.

(2) Mandamus

The writ of mandamus is issued in written form to compel government personnel, organizations, or departments to legally perform their duties.⁴

In the following case, the Supreme Court of the Union issued and decided writs of mandamus.

A famous case in Myanmar relating to a writ of mandamus is Professor Dr. Daw Kyin Htay vs. Ministry of Education.⁵ Dr. Daw Kyin Htay, Professor and Head of the Department of Economic at Yangon University of Distance Education, was received an order of a compulsory pension from the Ministry of Education, even though that kind of punishment is not included in Government Servant Law. Although the application was in line with Paragraph

² Section 2 (c) Law relating to Writ Application 2014.

³ No.1 (Criminal Miscellaneous application), 2012

⁴ Section 2 (d) of Law relating to Writ Application 2014.

⁵ No. 290 (Civil Miscellaneous Application) 2013.

67(b), which was adopted through personal regulation, and Section 55 of Government Servant Law against the order, nothing was performed into action. The mandamus is totally out of line with the constitution and other existing judicial procedures for writ jurisdiction are issued Section 16 (a) (2) of the Union Judiciary Law, 2010. Actions against malfeasances of civil service personnel shall be exercised in accord with Sections 290⁶, 347 (equal right before the law) and 349 (equal opportunity in public employment) of the Constitution, which was not true in this case.

The earlier action by the Ministry of Education caused a negative impact on the applicant since it was without any consideration for her capability of taking responsibility before the age of retirement (which is 60 years of age in Myanmar). This means that she lost one of the legally prescribed rights as a citizen. Hence, it was necessary to issue a writ of mandamus to protect her from the order of forced retirement by the Ministry of Education.

The application was accepted and, at the same time, the order notice forcing Dr. Daw Kyin Htay into retirement was nullified.

The applicant was successful in this case, and it was the first major case in which the Supreme Court declared a decision of a government minister to be beyond the authority.

From the above-mentioned case, it is observed that the Writ of Mandamus is the only effective way to compel government personnel or agency to perform or not perform a specific public duty and to redress such performances afterwards.

(3) Prohibition

The writ of Prohibition is issued in written form to forbid the performance of any Court or quasi-judicial function exceeding its jurisdiction or ultra vires act of the justice.⁷

The following is an example of the case in which the Supreme of the Union decides writs of prohibition.

U Myint Than and 5 Vs. the Republic of the Union of Myanmar and 2.⁸

In this case, an application was filed for a writ of prohibition. The High Court of Mandalay Region, as the Revision Court has the power to act as if the original court under Section 522 (3) of Criminal Procedure Code.

While applying for the issue of writs to the Supreme Court of the Union, the Court cannot interfere in a case which is within the jurisdiction of a subordinate Court. If the applicants were not satisfied with the order of the High Court of Mandalay Region, they could apply for a revision to the Supreme Court of the Union. After the Supreme Court heard the case, since there was no reason to make a preliminary decision to the defendant to show causes, the Supreme Court rejected the application for the writ of prohibition.

(4) Quo Warranto

Quo Warranto is a writ issued in written form on the action of any government department or authorized organization after scrutinizing and hearing such performance is

⁶ Matters relating to appointment, promotion, retirement, enforcement of rules and regulations and taking action on the Civil Services Personnel shall be exercised in accord with Law.

⁷ Section 2(e) of Law relating to Writ Application, 2014.

⁸ No.1 (Criminal Miscellaneous Application), 2011.

whether legally under the Law, Rule, Regulation, Procedure, Order, Notification, Instruction issued on any party or parties or not.⁹

The Supreme Court of the Union issued the writ of Quo Warranto in the following case.

Daw Tin Tin Win (a) Daw Tin Tin Aye and 2Vs. Civil Planning and Land Administration Department, Yangon City Municipal Committee and 3.¹⁰

In this case, Civil Planning and Land Administration Department of the Yangon City Municipal Committee permitted to change the legal ownership of plot no. 87/3, survey section 36/E, Kamayut Township (Location: No. 97, Thanlwin Street, Kamayut Township) from original owner U Lu Phay Win to U Htoo Aung Nyunt and U Phyo Khaing Oo, respondent numbers 2 and 3. The permission was not in accordance with rules, regulations, and procedures of that department. Thus, it is rightful for the Court to interfere and cancel the action by issuing a writ of quo warranto.

(5) Certiorari

The Writ of Certiorari is issued in written form to urge a court or any quasi-judicial function to perform in conformity with the law in making a decision, particularly where such a decision is an illegal act.¹¹

The Supreme Court of the Union issues and decides the writ of certiorari in the following case:

Daw Win Win Khaing & her deputy U Kyaw Za Ya Vs. 1. Arbitration Council, the Ministry of Social Welfare and Employment, Naypyitaw, 2. Daw Mar Mar Khin, representative of 51 workers.¹²

Daw Win Win Khaing, owner of Gallant Ocean Cooling Factory, paid each of 51 workers including Daw Mar Mar Khin, only 5000 Kyats as a bonus for Thingyan (the water festival in April), whereas she paid other workers about 100000 Kyats per head and day-shift workers 60000 Kyats per head.

The 51 workers including Daw Mar Mar Khin claimed everyone should receive equal amount of bonus. Daw Mar Mar Khin applied to Argument Number 19/ 2014 at the Arbitration Council. Daw Win Win Khaing made the application for a writ of certiorari on the decision by the Arbitration Council that 60000 Kyats per head should be paid to the 51 workers.

Thingyan bonus does not pertain to mandatory financial rights of workers, such as salaries. Depending on different levels of performance at workplace, more or less is defined by the employer. Giving bonuses to employees is just goodwill of the owner; all the workers do not have equal rights to a certain amount of bonus. Accordingly, the general application of such a lawsuit was officially permitted and a decision was made in terms of Conflict Number 19/ 2014 of the Arbitration Bloc and the decision of the Arbitration Council was withdrawn by the writ. The Supreme Court of the Union issued a writ of certiorari.

⁹ Section 2 (f) of Law relating to Writ Application, 2014.

¹⁰ No. 118 (Civil Miscellaneous Application) 2017.

¹¹ Section 2 (g) of Law relating to Writ Application, 2014.

¹² No. 224 (Civil Miscellaneous Application) 2014.

Conclusion

A writ is an order or process issued by a court or judicial officer asking any person to perform or refrain from performing any act. In all cases, the writs contain directions as to what is required to be done. Every writ has its nature and process. Each writ has advantages on its scope. A writ of habeas corpus is a judicial mandate sent to a prison official ordering that an inmate is brought to the Court so it can be redetermined whether or not that person is imprisoned lawfully and whether or not he should be released from custody. A writ of mandamus is an order from a court to an inferior government official ordering the government official to properly fulfill their official duties or to correct an abuse of discretion. Writ of prohibition lies to prevent body acting without jurisdiction or contrary to the rules of natural justice. Quo warranto is requiring the person to whom it is directed to show what authority they have for exercising some right or power they claim to hold. Certiorari has two kinds of remedy in essence. The first part is an order removing the official record of the impugned decision-maker into the superior court issuing the certiorari order. The second part is an order quashing the impugned decision.

In Myanmar, the power to issue writs is vested in the Supreme Court by the 1947 and 2008 Constitutions. From 1948 to 1962 the Supreme Court issued a total of 239 writs. These writs included 42 writs of habeas corpus, 15 writs of mandamus, 6 writs of prohibition, 2 writs of quo warranto, 155 writs of certiorari, 12 writs of certiorari and prohibition and 7 writs of certiorari and mandamus.

A total of 264 writs were issued by the Supreme Court of the Union from 2011 to 2019. These writs include 49 writs of mandamus, 1 writ of prohibition, 18 writs of quo warranto and 196 writs of certiorari. There has not been a single writ of habeas corpus issued from 2011 to 2019. It may be seen that a writ of certiorari is the most practicable among five kinds of writs.

Acknowledgements

I would like to express my deepest gratitude to Professor Dr Nu Nu Yi, Pro-Rector of Dagon University for the encouragement to conduct presentation of this research. I would also like to thank Professor Dr Nay Thwe Kyi, Pro-Rector, Dagon University for her permission on working for this research. Additionally, I am very grateful to Professor Dr Nilar Soe and my colleagues at Law Department, Dagon University for assisting and allowing me to complete this research paper.

References

Laws

- [1] Constitution of the Republic of the Union of Myanmar, 2008
- [2] Code of Criminal Procedure, 1898
- [3] Law relating to Writ Application, 2014
- [4] Specific Relief Act, 1877
- [5] Union Judiciary Law, 2010

List of Case

- [1] Daw Mar Khon Vs. Battalion Commander U Aung Zaw Oo (or) the Presiding Office Column Commander (Kha La Ya- 37), Myit Kyi Nar Township, Criminal Miscellaneous No. 1, The Supreme Court of Union, (2012)2.

- [2] Daw Tin Tin Win (a) Daw Tin Tin Aye and 2 Vs. Civil Planning and Land Administration Department, Yangon City Municipal Committee and 3, Civil Miscellaneous No. 118, The The Supreme Court of Union, (2017)
- [3] Daw Win Win Khaing & her deputy U Kyaw Za Ya Vs. 1. Arbitration Council, the Ministry of Social Welfare and Employment, Naypyitaw, 2. Daw Mar Mar Khin, representative of 51 workers, Civil Miscellaneous No. 224, The Supreme Court of Union, (2014)
- [4] Dr. Daw Kyin Htay Vs. Ministry of Education, Civil Miscellaneous No. 290, The Supreme Court of Union, (2013)
- [5] U Myint Than and 5 Vs. the Republic of the Union of Myanmar and 2 Criminal Miscellaneous No. 1, The Supreme Court of Union, (2011)