

ACCESS TO JUSTICE FOR CHILDREN: **MYANMAR (BURMA)¹**

This report was produced by White & Case LLP in February 2014 but may have been subsequently edited by Child Rights International Network (CRIN). CRIN takes full responsibility for any errors or inaccuracies in the report.

I. What is the legal status of the Convention on the Rights of the Child (CRC)?

A. What is the status of the CRC and other relevant ratified international instruments in the national legal system?

Myanmar² acceded to the CRC in 1991 and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography in 2012.³ Article 456 of the Constitution of Myanmar requires the state to honour all legitimate obligations arising out of treaties or agreements which have been in operation since before the Constitution came into force in 2008. However, international treaties, including the CRC, must be incorporated through additional legislation in order to be directly applicable in Myanmar's courts.⁴ National legislation has been implemented to reflect the principles of the CRC; Myanmar promulgated the Child Law on 14 July 1993, which purports to implement the rights of the child embodied in the CRC.⁵

B. Does the CRC take precedence over national law?

The CRC does not take precedence over national law, as the CRC does not have constitutional status in Myanmar. However, the Child Law was adopted to implement many of the rights embodied in the CRC.⁶

C. Has the CRC been incorporated into national law?

The CRC has not to date been directly incorporated into national law. In its 2012 Concluding Observations on Myanmar, the Committee on the Rights of the Child expressed concern that “all principles and provisions of the Convention have not yet been fully incorporated into domestic law and that legal provisions contrary to the

¹ In 1989, the government officially changed the name of the country from Burma to the Union of Myanmar. While it is commonly understood that Burma and Myanmar refer to the same country, it should be noted that the United Nations, as well as the Association of Southeast Asian Nations, refers to the country by the official name of Myanmar. See <http://www.oxforddictionaries.com/definition/english/Burma>; see also <http://en.wikipedia.org/wiki/Burma>. For the purposes of this document, the official name of Myanmar shall be used.

² Comments on this report provided by the Myanmar National Human Rights Commission, October 2015.

³ As at October 2015, Myanmar has not ratified the Optional Protocol on the Involvement of Children in Armed Conflict or the Optional Protocol on a Communications Procedure. See http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en; https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-d&chapter=4&lang=en.

⁴ See http://wiki.crin.org/mediawiki/index.php?title=Myanmar:_National_Laws.

⁵ *Second periodic report of Myanmar to the UN Committee on the Rights of the Child*, CRC/C/70/Add.21, 5 November 2003, p. 9. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f70%2fAdd.21&Lang=en.

⁶ *Ibid.*

Convention remain in force”.⁷ While there are some areas where the Child Law diverges from the CRC, Myanmar has been adopting revisions to the Child Law to bring it in line with the CRC. One recent revision concerns the definition of a child under the Child Law, which has been raised from the age of 16 to 18.⁸

D. Can the CRC be directly enforced in the courts?

The CRC cannot be directly enforced in Myanmar’s courts. After ratification of international instruments, national legislation is required to be adopted so that enforcement of such national law is possible for violations of legal provisions.

E. Are there examples of domestic courts using or applying the CRC or other relevant international instruments?

According to information provided by the Myanmar Human Rights Commission in October 2015, domestic courts do not apply international instruments, so examples of domestic courts using or applying the CRC or other relevant international instruments do not exist.

II. What is the legal status of the child?

A. Can children and/or their representatives bring cases in domestic courts to challenge violations of children's rights?

The Child Law grants children the ability to bring a complaint with respect to his or her rights under the law before the relevant government department or court.⁹ Furthermore, the Child Law provides that every child has the right to sue and be sued in accordance with the law.¹⁰

See part III.A below.

B. If so, are children of any age permitted to bring these cases by themselves in their own names/on their own behalf, or must the case be brought by or with the assistance of a representative?

While not addressed in the Child Law, Myanmar’s Code of Civil Procedure requires that every suit by a minor be instituted in his or her name by a “next friend” of the minor.¹¹ A “next friend” can be any adult who is of sound mind, and does not have an interest adverse to that of the minor.¹²

⁷ UN Committee on the Rights of the Child, *Concluding observations on the third and fourth periodic report of Burma*, CRC/C/MMR/CO/3-4, 14 March 2012, para. 9. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fMMR%2fCO%2f3-4&Lang=en.

⁸ See <http://www.mmtimes.com/index.php/national-news/3325-myanmar-revises-child-law-childhood-status-extended-to-18.html>.

⁹ The Child Law, Chapter V – Rights of the Child section 13(c), (1993), available at: http://www.ilo.org/dyn/natlex/natlex_browse.details?p_lang=en&p_isn=72890.

¹⁰ *Ibid.*, section 25(c).

¹¹ The Code of Civil Procedure, Order XXXII rule 1 (1908).

¹² *Ibid.*, section 4(1).

C. In the case of infants and young children, how would cases typically be brought?

Neither the Child Law, nor the Code of Civil Procedure, differentiates between minors generally, and infants or young children. So long as the individual is a minor, a legal challenge must be brought by a “next friend” on behalf of the minor.¹³

D. Would children or their representatives be eligible to receive free or subsidised legal assistance in bringing these kinds of cases?

Pursuant to the Code of Civil Procedure, any suit can be instituted without payment of court fees if the claimant is a “pauper”.¹⁴ A claimant is a “pauper” if his/her property is less than the value of Kyats 50,000 or the amount of the court fees (if more than Kyats 50,000).¹⁵ Additionally, by law, the government is not obligated to provide an attorney at public expense except in death penalty cases.¹⁶ There are no other provisions contained in either the Code of Civil Procedure or the Child Law regarding subsidised legal assistance.

E. Are there any other conditions or limits on children or chosen legal representatives bringing cases (e.g., would a child's parents or guardian have to agree to a case being brought)?

There do not appear to be any other conditions or limits on children bringing cases to challenge violations of children’s rights, other than those mentioned above.

III. How can children’s rights violations be challenged before national courts?

A. If there is a potential violation of the Constitution or other principles established in domestic law, or with the CRC or other relevant ratified international/regional instruments, how can a legal challenge be brought?

There is no specific and consolidated human rights law, special penal law for human rights violations or designated human rights court in Myanmar. In general, ordinary/district courts function merely as courts with powers to adjudicate criminal and civil cases.

If an act of violation of human rights constitutes a criminal offence, that act concerned would be prosecuted and processed as an ordinary/general criminal act under relevant sections of the ordinary penal law or a special law, i.e., the Child Law. The Child Law prescribes criminal penalties for certain violations of children’s rights.¹⁷

If an act of violation of human rights is of a civil law nature, ordinary/District/Township

¹³ Ibid., section 1.

¹⁴ Ibid., Order XXXIII rule 1.

¹⁵ Ibid.

¹⁶ See US Department of State, ‘Country Reports on Human Rights Practices for 2011 – Burma’, available at <http://www.state.gov/j/drl/rls/hrrpt/2011/humanrightsreport/index.htm?dliid=186263>.

¹⁷ The Child Law, Chapter XVII (1993). The Child Law breaks down offences into two different categories. For more serious offences, such as engaging in child prostitution and child pornography, the maximum penalty is two years’ imprisonment and/or a fine of K10,000 (US\$10.19). For lesser offences, such as utilising child labour, the maximum penalty is one year imprisonment and/or a fine of K1,000 (US\$1.02).

Courts would be able to deal with such act in civil proceedings. Children through their “next friend” may initiate legal proceedings in the civil courts to challenge violations of their rights under the Child Law, following the rules set forth in the Code of Civil Procedure.¹⁸

Under the 2008 Constitution, an application can be filed with the Supreme Court for the protection and enforcement of fundamental rights under Chapter VIII.¹⁹ The Supreme Court has the authority to enforce fundamental rights through the issuance of judicial orders.²⁰

Alternatively, a complaint may be filed with the Myanmar National Human Rights Commission, which comprises the Human Rights Protection Division that receives and handles complaints.²¹ The Commission will investigate the complaint and report its findings to the relevant government department for necessary action. A complaint with the Commission cannot be filed, and will be disregarded, once a complaint is filed in a court of law.²²

While a legal challenge asserting a violation of human rights seems to be procedurally possible, there have been no reported examples of successful attempts to do so.²³

B. What powers would courts have to review these violations, and what remedies could they offer?

The Union Judiciary Law empowers the Township Courts to hear original criminal and civil cases.²⁴ The remedy in such actions will likely be limited to monetary damages, as injunctive relief is primarily granted in cases of public nuisance or where property is being misused, damaged, or wasted.²⁵ The Code of Civil Procedure does allow for a court to grant a temporary injunction to “prevent the ends of justice from being defeated,” but the Code gives little guidance as to when, and in what context, such a remedy is warranted.²⁶

In criminal cases, the court has the power to impose prison sentences and fines according to the applicable penal code.

In connection with the filing of an application for the protection of fundamental rights under Chapter VIII of the 2008 Constitution, the Supreme Court has the power to issue

¹⁸ The Code of Civil Procedure, Order XXXII rule 1 (1908).

¹⁹ 2008 Constitution, Article 377.

²⁰ *Ibid.*, Article 378(a).

²¹ The Myanmar National Human Rights Commission Law was enacted on 28 March 2014 by *Pyidaungsu Hluttaw* (Parliament) Law No. 21 under which the new Myanmar National Human Rights Commission was established under President Office Order No. 23/2014, comprising 11 members. The independence and effectiveness of the Commission has, however, been questioned (see part V below).

²² See <http://mnhrc.org.mm/en/complaints/>.

²³ See US Department of State, ‘Country Reports on Human Rights Practices for 2012 – Burma 2012 Human Rights Report’, available at <http://www.state.gov/j/drl/rls/hrrpt/humanrightsreport/index.htm?year=2012&dliid=204190> (“Although no specific mechanisms or laws provide for civil remedies for human rights violations, complainants can use provisions of the penal code and laws of civil procedure to seek civil remedies. There were no reported examples of successful attempts to do so”).

²⁴ The Union Judiciary Law, Chapter V section 56 (2010).

²⁵ The Code of Civil Procedure, Part V section 91 & Order XXXIX rule 1 (1908).

²⁶ *Ibid.*, Part VI section 94(c) (1908).

the following writs: (1) Writ of Habeas Corpus; (2) Writ of Mandamus; (3) Writ of Prohibition; (4) Writ of Quo Warranto; and (5) Writ of Certiorari.²⁷

The Myanmar National Human Rights Commission Law vested the Myanmar National Human Rights Commission with the power to receive complaints of human rights violations by citizens, conduct investigations into those violations, and submit those findings to the relevant government departments and bodies for necessary action.²⁸ Specific remedies for meritorious complaints appear to be within the sole discretion of the “relevant government department and bodies”. The Myanmar National Human Rights Commission Law, which was drafted based on the Paris Principles, does not give the Commission judicial authority to pass a judicial decision and issue remedies.

Judicial review of the legislature and executive is also permissible under the 2008 Constitution. The Constitutional Tribunal has the power to interpret provisions of the Constitution and determine whether laws and executive measures are in conformity with the Constitution.²⁹ Decisions of the Constitutional Tribunal are “final and conclusive”.³⁰ However, individuals do not have the right to directly submit matters to the Constitutional Tribunal. Instead, such matters may be referred by a court in the course of a hearing to the Constitutional Tribunal for determination.³¹

C. Would such a challenge have to directly involve one or more individual child victims, or is it possible to challenge a law or action without naming a specific victim?

There is no provision in the Child Law which allows a child victim to remain anonymous in any civil or criminal action related to violations of their rights. In fact, the Code of Civil Procedure specifically requires that a civil complaint be brought in the child’s name by the “next friend” of the child.³² While there is a Code of Civil Procedure provision that exempts women and girls from making personal appearances in court, it appears that they must still be named in order to bring a legal complaint.³³ Therefore, it is not possible for a legal challenge to be brought anonymously.

Additionally, in order to submit a complaint to the Myanmar National Human Rights Commission, the complainant must disclose his or her full name, full address, and full contact details. Further, a copy of the complainant’s national registration card must accompany any complaint to the Commission. As such, it is not possible to lodge anonymous complaints alleging human rights violations with the Commission.

D. Is any form of collective action or group litigation possible, with or without naming individual victims?

Pursuant to the Code of Civil Procedure, collective action or group litigation is possible in two situations. First, multiple parties may join together in a single suit if their causes of action arose from the same act or transaction, or series of acts or transactions. Second, a court may join parties together if their claims raise any common question of

²⁷ 2008 Constitution, Article 378(a).

²⁸ See <http://mnhrc.org.mm/en/about/mandate/>.

²⁹ 2008 Constitution, Article 322.

³⁰ Ibid., article 324.

³¹ Ibid., Article 323.

³² The Code of Civil Procedure, Order XXXII rule 4(1) (1908).

³³ Ibid., Part XI section 132(1) (1908).

law or fact.³⁴ Note that even if both situations are applicable, the court has the power to separate the actions if the collective action or group litigation “may embarrass or delay the trial of the suit”.³⁵ As noted above, any collective action or group litigation will still require the individual victims to be named.³⁶

E. Are non-governmental organisations permitted to file challenges to potential children's rights violations or to intervene in cases that have already been filed?

In general, a person or organisation must be directly affected by a matter in order to have standing to bring a legal claim in the national courts.³⁷ Additionally, there are no provisions in either the Code of Civil Procedure or the Child Law allowing a third party to intervene on behalf of a child victim.

However, a third party non-governmental organisation (NGO) may be able to take advantage of the language contained in the Code of Civil Procedure regarding the “next friend” of the child in order to bring a claim on behalf of a child victim. As noted above, the Code of Civil Procedure requires that every suit by a minor be instituted in his or her name by a “next friend” of the minor.³⁸ A “next friend” can be any adult who is of sound mind and does not have an interest adverse to that of the minor.³⁹ Since a child’s “next friend” can be any adult, so long as their interests are not adverse, a representative of the NGO may serve as the “next friend” of a child victim. In this way, an NGO may be able to participate directly in a legal challenge to a potential violation of a child’s rights. While this solution is theoretically possible based upon the text of the Code of Civil Procedure, there do not appear to be any examples of this concept being directly applied in the courts.

The Myanmar National Human Rights Commission will also accept complaints by “any person or a *group of persons or a body* with direct or reliable knowledge of the violations.”⁴⁰ Therefore, NGOs with knowledge of violations of children’s rights can file complaints with the Commission on behalf of those children.

IV. Practical considerations. Please detail some of the practical issues, risks and uncertainties that might be involved in bringing a case to challenge a violation of children's rights, such as:

A. Venue. In what courts could a case be filed (e.g., civil, criminal, administrative, etc.)? What would the initial filing process entail?

Depending on the amount of damages, a civil complaint can be brought in either: (1) the Township Courts, (2) the District Courts or the Courts of the Self-Administered Divisions or Zones, or (3) the High Courts of the Region or the State. The Township Courts have jurisdiction to try original civil suits for amounts in controversy up to K10,000,000 (approx. US\$10,000). For amounts greater than K10,000,000, the District Courts and the Courts of the Self-Administered Divisions or Zones have jurisdiction to

³⁴ Ibid., Order I rule 1 (1908).

³⁵ Ibid., section 2.

³⁶ Ibid., Part XI section 132(1) (1908).

³⁷ See, e.g., The Code of Civil Procedure (1908).

³⁸ See Ibid., Order XXXII rule 4(1).

³⁹ Ibid., section 1.

⁴⁰ See Myanmar National Human Rights Commission Law, section 30.

try original civil suits for up to K500,000,000 (approx. US\$514,000). Finally, the High Courts of the Region or the state have jurisdiction to try original civil suits seeking damages over K500,000,000.⁴¹

To initiate a civil suit, a complaint must be presented to the proper court⁴² along with the requisite court fees.⁴³ The complaint must include:

- (a) the name of the court in which the suit is brought;
- (b) the name, description and place of residence of the plaintiff;
- (c) the name, description and place of residence of the defendant, so far as they can be ascertained;
- (d) where the plaintiff or the defendant is a minor or a person of unsound mind, a statement to that effect;
- (e) the facts constituting the cause of action and when it arose;
- (f) the facts showing that the court has jurisdiction;
- (g) the relief which the plaintiff claims;
- (h) where the plaintiff has allowed a set-off or relinquished a portion of his/her claim, the amount so allowed or relinquished; and
- (i) a statement of the value of the subject matter of the suit for the purposes of jurisdiction and of court fees, so far as the case claims.⁴⁴

As previously noted, where the plaintiff is a minor, the complaint and all subsequent actions must be filed by the “next friend” of the minor.⁴⁵ Once a court determines that a suit has been properly instituted, a summons will be issued to the defendant to appear in court and defend the claims against him/her.⁴⁶

To initiate criminal proceedings, the child, or a representative on behalf of the child, must make a complaint with the District Magistrate, or any other competent Magistrate, alleging facts which constitute a violation under the criminal provisions of the Child Law.⁴⁷ Any violations of the criminal provisions of the Child Law can also be reported to the police, who may then conduct an investigation.⁴⁸ If violations are found by the police, they may arrest the offender and submit a report to the Magistrate for prosecution.⁴⁹

An application can be filed with the Supreme Court for the protection and enforcement of fundamental rights under Chapter VIII.⁵⁰

Alternatively, a complaint regarding a human rights violation can be made to the

⁴¹ See ‘The Judicial System and Court Proceedings in Myanmar’, available at <http://www.moj.go.jp/content/000101543.pdf>.

⁴² The “proper” court is one which (1) has sufficient monetary jurisdiction to hear the matter, and (2) has jurisdiction over the defendant. A court has jurisdiction over a defendant if the defendant, or an agent, resides within the geographic jurisdiction of the court. See The Code of Civil Procedure, Order V rule 9 (1908).

⁴³ The Code of Civil Procedure, Order IV rule 1; Order VII rule 1(i) (1908).

⁴⁴ Ibid., Order VII rules 1(a)-(i).

⁴⁵ Ibid., Order XXXII rule 4(1).

⁴⁶ Ibid., Order V rule 1 (1908).

⁴⁷ The Code of Criminal Procedure, Chapter XV section 190(a) (1898).

⁴⁸ Ibid., Chapter XIV, sections 154-170.

⁴⁹ Ibid.

⁵⁰ 2008 Constitution, Article 377.

Myanmar National Human Rights Commission.⁵¹ A complaint must include:

- (a) the complainant's name, full address and contact address,
- (b) a full account of how the complainant's rights were violated, and
- (c) a signed admission that the facts stated in the complaint are true.⁵²

The complaint, along with a copy of the complainant's national registration card, must be sent to the Commission, located at No. 27, Pyay Road, Hlaing Township, Yangon.⁵³

- B. Legal aid / Court costs. Under what conditions would free or subsidized legal aid be available to child complainants or their representatives through the court system (i.e., would the case have to present an important legal question or demonstrate a likelihood of success)? Would child complainants or their representatives be expected to pay court costs or cover other expenses?

See part II.D above.

If the child, or their representative, does not qualify as a "pauper" and is otherwise unable to afford the costs associated with bringing a civil suit in the courts, then a complaint can be filed with the Myanmar National Human Rights Commission. Such a complaint does not appear to have any associated costs, other than the cost of paper and postage required to make the complaint.⁵⁴

- C. Pro bono / Financing. If legal aid is not available, would it be possible for child complainants or their representatives to obtain legal assistance from practicing lawyers on a pro bono basis, through a children's rights organisation, or under an agreement that does not require the payment of legal fees up front?

There are a number of large international law firms that provide pro bono legal assistance in Myanmar, as well as a number of NGOs engaged in advancing human rights in Myanmar. These firms and organisations include:⁵⁵

- DLA Piper's New Perimeter Initiative;⁵⁶
- Legal Aid Network;⁵⁷
- International Bar Association's Human Rights Institute;⁵⁸
- UNICEF;⁵⁹
- Human Rights Watch;⁶⁰
- Child Rights Coalition Asia;⁶¹
- Save the Children;⁶² and

⁵¹ A complaint cannot be filed with the National Human Rights Commission if there is a concurrent court proceeding based upon the same human rights violation.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ See <http://mnhrc.org.mm/en/complaints/>.

⁵⁵ While these entities are engaged in pro bono legal work and advocacy generally, any specific request for legal assistance should be made directly to the appropriate individual in charge of such matters.

⁵⁶ <http://www.newperimeter.org/our-work/access-to-justice/myanmar-rule-of-law.html>.

⁵⁷ http://www.burmalibrary.org/docs16/Profile_of_Legal_Aid_Network1.pdf.

⁵⁸ http://www.ibanet.org/Human_Rights_Institute/About_the_HRI/HRI_Activities/Buma.aspx.

⁵⁹ <http://www.unicef.org/myanmar/>.

⁶⁰ <http://www.hrw.org/burma>.

⁶¹ <http://www.childrightscoalitionasia.org/southeast-asia/burma/>.

⁶² <http://www.savethechildren.org/site/c.8rKLIXMGIpI4E/b.6150543/>.

- Amnesty International.⁶³

Regarding the use of alternative fee arrangements in Myanmar, there does not appear to be any codified legal prohibition on the use of contingent fee representation in civil cases. Therefore, it may be possible for a child victim to defer payment of up-front legal fees through a negotiated fee arrangement with the representing attorney. It should be noted that foreign law firms and foreign lawyers are prohibited to appear and act as lawyers before the courts in Myanmar under Myanmar law.

- D. Timing. How soon after a violation would a case have to be brought? Are there any special provisions that allow young adults to bring cases about violations of their rights that occurred when they were children?

There does not appear to be a statute of limitations or doctrine of laches contained in either the Code of Civil Procedure or the Child Law. However, depending on the circumstances of each particular civil suit, the provisions of the Limitation Act would have to be taken into consideration to determine whether or not a civil suit is time-barred. There is no provision allowing, or forbidding, young adults to bring cases regarding violations of their rights that occurred when they were children. As such, it may be possible for adults to institute a civil suit alleging violations of their rights when they were children.

- E. Evidence. What sort of evidence is admissible/required to prove a violation? Are there particular rules, procedures or practices for dealing with evidence that is produced or presented by children?

The admissibility of evidence in legal proceedings is governed by the Evidence Act of 1872. The Evidence Act dictates the form, content, and source of admissible evidence. First and foremost, admissible evidence must be relevant.⁶⁴ Evidence is relevant if it tends to show the existence, or non-existence, of a fact at issue in the case.⁶⁵ Admissions by parties and opinions of experts are also admissible so long as they are relevant and meet all other applicable requirements set forth in the Evidence Act.⁶⁶ In civil cases, character evidence is generally irrelevant and therefore inadmissible, except as to damages.⁶⁷ The Evidence Act also requires direct evidence in order to be admissible in evidence and does not admit hearsay evidence.

There do not appear to be any special provisions regarding evidence produced or presented by children contained within the Code of Civil Procedure or the Child Law. However, under the Evidence Act, a court may prohibit a child from testifying if it finds that the child, due to being of “tender years”, is unable to understand the questions asked or is unable to give rational answers to those questions.⁶⁸ Provided that the child is able to comprehend the questions asked, and respond with rational answers, a child may present oral testimony to the same extent as an adult.

- F. Resolution. How long might it take to get a decision from the court as to whether there

⁶³ <http://www.amnesty.org/en/region/myanmar>.

⁶⁴ The Evidence Act, Chapter II section 5 (1872).

⁶⁵ Ibid.

⁶⁶ See Ibid., sections 17-51.

⁶⁷ See Ibid., sections 52-55.

⁶⁸ Ibid., Chapter IX section 118.

has been a violation?

Statistics regarding court proceedings are not available from public sources. Additionally, there is no mandate requiring courts to resolve disputes within a specified time frame. Therefore, it is not possible to ascertain precisely how long a legal proceeding may take.

Section 38 of the Myanmar National Human Rights Commission Law states that the Commission shall, for further action on a complaint which involves government departments, organisations or its related entity, refer its findings to the relevant government department or organisation with recommendations. That government department or organisation shall respond to the Commission on its action regarding the Commission's recommendations within 30 days. However, the Myanmar Human Rights Commission does not publish any statistics regarding the time it takes to resolve complaints of human rights violations filed with the Commission. Of the 1037 complaints received between 30 September 2011 and 30 December 2011, 665 complaints had been "considered" by the Commission by 31 January 2012.⁶⁹

G. Appeal. What are the possibilities for appealing a decision to a higher court?

Under the Union Judiciary Law, the Supreme Court of the Union has appellate jurisdiction over judgments rendered by the High Courts of the Region or the State.⁷⁰ In turn, the High Courts of the Region or the State have appellate jurisdiction over judgments made by the District Courts and the Courts of the Self-Administered Divisions or Zones.⁷¹ Finally, the District Courts and the Courts of the Self-Administered Divisions or Zones have appellate jurisdiction over the Township Courts.⁷²

Pursuant to the Code of Civil Procedure, any final judgment rendered by a lower court can be appealed to the court authorised to hear appeals from the decisions of the lower court.⁷³ However, an appeal from an appellate judgment (or "second appeal") can only be sought on the following basis:

- (a) the decision being contrary to law or to some usage having the force of law;
- (b) the decision having failed to determine some material issue of law or usage having the force of law;
- (c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits;
- (d) in a suit where the amount or value of the subject matter of the original suit exceeds 2,000,000 Kyats, any ground which would be a good ground of appeal if the decree had been passed in an original suit whenever the decree of the appellate court varies

⁶⁹ See 'Activities of the Myanmar National Human Rights Commission (5 September 2011 to 31 January 2012)', available at <http://www.mnhrc.org.mm/assets/uploads/2013/02/Report-from-Myanmar-Commission.pdf>. It is unclear how extensive or comprehensive these "considerations" were, and what result was reached for each complaint.

⁷⁰ The Union Judiciary Law, Chapter III section 12(b) (2010).

⁷¹ *Ibid.*, Chapter IV section 39.

⁷² *Ibid.*, Chapter V section 54.

⁷³ The Code of Civil Procedure, Part VII section 96 (1908).

or reverses, otherwise than as to costs, the decree of the original court.⁷⁴

H. Impact. What are the potential short-term and long-term impacts of a negative decision? Is there a possibility for political backlash or repercussions from a positive decision?

Myanmar has adopted a modified common law legal system.⁷⁵ As such, precedent plays an important role in Myanmar's judiciary. Lower courts are bound by higher courts' decisions, meaning the negative effects of an unfavourable decision will be felt for many years. Further, negative decisions made by higher courts will necessarily have a much broader impact than negative decisions made by the lower courts.

Myanmar also lacks an independent judiciary.⁷⁶ While the Union Judiciary Law calls for an independent judiciary, in practice, the judiciary is "characterised by institutionalised corruption and remained under the de facto control of the military and government."⁷⁷ This is largely due to almost 50 years of military rule by the junta, which overthrew the democratically elected government in 1962.⁷⁸ Therefore, judges may be unwilling to rule against the government and military on politically charged issues, as they often face political reprisal for doing so.⁷⁹

I. Follow up. What other concerns or challenges might be anticipated in enforcing a positive decision?

If a positive decision is rendered by the court, it is enforceable following the provisions of the Code of Civil Procedure relating to execution of decrees and orders under Order XXI. However, decisions are enforceable only to the extent the government or military allows.⁸⁰ This problem is also present when there has been a finding of violations of human rights by the Myanmar National Human Rights Commission, which is not empowered by the Myanmar National Human Rights Commission Law to take remedial steps and must report its findings "to the relevant government departments and bodies

⁷⁴ Ibid., section 100(a)-(d).

⁷⁵ See <https://www.cia.gov/library/publications/the-world-factbook/geos/bm.html#Govt>.

⁷⁶ An independent judiciary is one that is free of executive or legislative control or influence. In Myanmar, the Union Judiciary Law vests power in the President to appoint the Chief Justice of the Supreme Court, and parliament may withhold its approval only if "it can clearly be proved" that the prospective appointee lacks the qualifications prescribed for the post. See The Union Judiciary Law, Chapter III section 26 (2010). The lack of judicial independence is exemplified by the fact that retired Lieutenant-Colonel U Tun Tun Oo currently serves as the Chief Justice of the Supreme Court. The executive wields a great deal of influence over the judiciary as essentially all judges are appointed by the executive, either directly or indirectly. See 'The Rule of Law in Myanmar: Challenges and Prospects', available at

<http://www.ibanet.org/Article/Detail.aspx?ArticleUid=deba1058-8d8d-47e3-b8db-1ba2ba82e40e>.

⁷⁷ See US Department of State, 'Country Reports on Human Rights Practices for 2012 – Burma 2012 Human Rights Report'.

⁷⁸ See 'Burma's Push For Freedom is Held Back by its Institutionally Corrupt Courts', available at <http://www.hrw.org/news/2012/03/20/burmas-push-freedom-held-back-its-institutionally-corrupt-courts>. (noting that "[t]he problem in Burma today is not that judges are struggling to be independent against a heavy-handed regime, but rather that judges are part and parcel of decades of a military governing system. Judges routinely impose unjustified sentences in political cases, allowing them to keep their jobs and access to the benefits of a corrupt system").

⁷⁹ Ibid.

⁸⁰ Ibid.

for necessary action.”⁸¹

V. Additional factors. Please list any other national laws, policies or practices you believe would be relevant to consider when contemplating legal action to challenge a violation of children's rights.

During the review by the Committee on the Rights of the Child of Myanmar’s fourth periodic report, the Committee indicated to the Myanmar delegation that it felt the CRC was treated more as a recommendation, rather than legally binding, and questioned whether judges and courts had sufficient knowledge of the CRC. The Committee asked the Myanmar delegation to provide examples of cases where the CRC had been applied in domestic courts. The delegation stated that the Inter-Agency Juvenile Justice working group was delivering training regarding the CRC to judges. Myanmar’s next periodic report on the CRC is due 13 February 2017.

Because the Myanmar National Human Rights Commission is still relatively new, the Commission’s ability to operate as a credible, independent mechanism for remedying human rights violations remains undetermined.⁸² The Commission has the right to act independently on matters that fall within its powers.⁸³ According to information provided by the Commission in October 2015, pursuant to the provisions of the Myanmar National Human Rights Commission Law, the Commission is carrying out its duties and powers on an independent basis in connection with the promotion and protection of human rights. However, a September 2014 report released by two local human rights organisations highlighted the lack of transparency of the government-sponsored Commission, as well as its ineffectiveness in carrying out its mission.⁸⁴

In a recent assessment of the rule of law in Myanmar by the International Bar Association’s Human Rights Institute (IBAHRI), it was noted that:

“When civil activists were asked where they themselves would go if rights were being infringed, they typically identified institutions such as churches, industrial tribunals⁸⁵ and local government offices. None thought the Myanmar National Human Rights Commission offered satisfactory protection, while courts were almost universally discounted. Judges were considered corrupt and too close to the executive, and the judicial process in general was seen as expensive and daunting.”⁸⁶

⁸¹ See <http://mnhrc.org.mm/en/complaints/>. The government has responded positively to findings of violations of human rights by the Commission. For example, in response to an open letter by the Commission to release any prisoners “who do not pose a threat to the stability of state and public tranquility,” President Thein Sein granted amnesty to 6,359 prisoners, many of whom were political prisoners.

⁸² See US Department of State, ‘Country Reports on Human Rights Practices for 2012 – Burma 2012 Human Rights Report’, pp. 29-30.

⁸³ Myanmar National Human Rights Commission Law, enacted on 28 March 2014 by *Pyidaungsu Hluttaw* (Parliament) Law No. 21, section 24(a).

⁸⁴ <https://freedomhouse.org/report/freedom-world/2015/myanmar>;
<http://www.burmapartnership.org/2014/09/all-the-presidents-men/>.

⁸⁵ Industrial Tribunals were created by the Settlement of Labour Dispute Law of 2012 and specifically addresses employment and labour rights violations.

⁸⁶ See ‘The Rule of Law in Myanmar: Challenges and Prospects’.

Until Myanmar formally adopts a more robust rule of law with a truly independent judiciary, it may be more effective to raise concerns regarding violations of children's rights through non-judicial mechanisms first, before pursuing a legal challenge in the courts or filing a formal complaint with the Myanmar National Human Rights Commission.

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