

ACCESS TO JUSTICE FOR CHILDREN: INDIA

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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?

India ratified the CRC in 1992, and has also ratified the optional protocols on children in armed conflict and on the sale of children.¹ Ratified international instruments do not automatically have the force of law in India, and must be given effect through separate national legislation.² In most cases, as with the CRC, this is done in a piecemeal manner through an array of subject-specific laws.

However, the Indian Supreme Court has held that international conventions ratified by India can be relied upon if there is a vacuum in Indian law as long as it is not in conflict with the Constitution or other laws.³

B. Does the CRC take precedence over national law?

The CRC does not take precedence over national law, but national law is interpreted wherever possible in a manner consistent with international law.⁴

C. Has the CRC been incorporated into national law?

The CRC has yet to be directly incorporated into national law. As mentioned in part I.A, a piecemeal approach has been adopted to incorporate provisions of the CRC. For example, the Juvenile Justice (Care and Protection of Children) Act 2000, the Protection of Children from Sexual Offences Act 2012, and the Commissions for Protection of Child Rights Act 2005 cite the CRC in their preamble. The standards of the CRC are also reflected in delegated legislation under the Juvenile Justice Act and other laws.

The Constitution does, however, specifically require that the Government take international law and treaty obligations into consideration in conducting its affairs.⁵

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

The CRC cannot be directly enforced in Indian courts, but is and can be used as a

¹ Available at: <http://indicators.ohchr.org/>.

² Constitution, Articles 246, 253 (“...Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention...”); Schedule 7, List 1, Item 14, available at <http://indiacode.nic.in/coiweb/welcome.html>.

³ Vishakha v. State of Rajasthan, AIR 1997 SC 3011.

⁴ See, e.g., People's Union for Civil Liberties v. Union of India, (1997) 125 ILR 510, available at <http://indiankanon.org/doc/544871/>.

⁵ Constitution, Article 51 (“The State shall endeavour to...foster respect for international law and treaty obligations in the dealings of organised peoples with one another...”).

source of interpretive guidance in legal proceedings involving children's rights.⁶

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

The CRC has been cited extensively in Indian case law.⁷ Among other decisions, the Supreme Court has discussed the CRC in judgments related to child labour,⁸ sexual abuse⁹ and juvenile justice.¹⁰

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?

Children may bring civil cases in national courts to challenge violations of their rights with the assistance of a “next friend” as described in further detail below.¹¹ If these violations amount to an offence,¹² it is also possible for children and their representatives to initiate criminal proceedings.

A writ petition can be filed before the Supreme Court or the High Court regarding violations of fundamental rights.¹³ Alternatively, all persons have the right to enforce their fundamental rights under the Constitution by filing what is commonly known as “Public Interest Litigation.”¹⁴ Public Interest Litigation allows for children, their representatives, and any other person with sufficient interest¹⁵ to challenge laws and Government actions that violate children's rights.¹⁶ Public Interest Litigation is of more recent origin and is usually used to bring the attention of the court to mass violations.¹⁷

In addition, children may challenge violations of their rights by lodging complaints with

⁶ See, e.g. Sunil K. Agarwal, Implementation of International Law in India: Role of Judiciary (undated), available at http://openheimer.mcgill.ca/IMG/pdf/SK_Agarwal.pdf.

⁷ See, e.g., http://www.liiofindia.org/cgi-bin/sinosrch.cgi?meta=/liiofindia&query=%22convention%20on%20the%20rights%20of%20the%20child%22&method=boolean&mask_world=:liiofindia:in/cases+int/special/EngR/virtual_db+int/special/cases/virtual_db&mask_path=+in/cases+int/special/EngR/virtual_db+int/special/cases/virtual_db.

⁸ M.C. Mehta v. State of Tamil Nadu & Ors., [1996] RD-SC 1576, available at <http://www.crin.org/Law/instrument.asp?InstID=1515>.

⁹ Sakshi v. Union of India & Ors., Final Decision on Writ Petition, Writ Petition (Crl) No33, 1997, available at <http://www.crin.org/Law/instrument.asp?InstID=1434>.

¹⁰ Salil Bali v. Union of India, AIR 2013 SC 3743; Subramanian Swamy v. Raju, AIR 2014 SC 1649.

¹¹ Code of Civil Procedure, 1908, Order XXXII, available at http://www.wipo.int/wipolex/en/text.jsp?file_id=201630.

¹² Code of Criminal Procedure, 1973, Section 190, available at <http://indiankanoon.org/doc/445276/>.

¹³ Constitution, Articles 32 and 226.

¹⁴ Constitution, Article 32.

¹⁵ The Supreme Court has defined Public Interest Litigation as “litigation undertaken for the purpose of redressing public injury, enforcing public duty, protecting social, collective, 'diffused' rights and interests or vindicating public interest.” It has further ruled that any person acting in a bona fide manner with sufficient interest in the matter at hand should have standing to pursue Public Interest Litigation. S.P. Gupta v. President of India and ors., AIR 1982 SC 149, available at <http://www.indiankanoon.org/doc/1294854/>.

¹⁶ Notably, the Constitution declares that any law found to violate fundamental human rights is considered void. Constitution, Article 13.

¹⁷ Comments provided by Centre for Child and the Law (CCL), India, December 2014.

the National Commission for the Protection of Child Rights,¹⁸ the National Human Rights Commission,¹⁹ or to state commissions.²⁰

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?

Children may file cases in their own names, but must be represented by an adult “next friend” in bringing suit and taking any subsequent legal action.²¹ Where a child is the defending party in a civil suit, he or she will be appointed a “guardian for the suit”.²²

Any adult of sound mind may act as a child's next friend or guardian for the suit provided that there is no conflict of interest, although where a legal guardian has previously been appointed for a child, it is expected that this guardian will act as the next friend or guardian for the suit unless this would run against the child's welfare interests.²³ If a next friend has already been selected, court-appointed guardians may also apply to replace this person.²⁴ Next friends may be removed where they are unwilling or unable to adequately represent the interests of a child²⁵, and a child may upon reaching majority elect to continue the suit without the assistance of a next friend.²⁶

If a child is apprehended, his or her parent or guardian must be notified and will be expected to appear during Juvenile Justice Board proceedings.²⁷ In addition, any person who has been arrested and detained has the right to consult with and be defended by a lawyer.²⁸

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

In general, parents bear the primary responsibility for their children unless the best interests of the child dictate otherwise.²⁹ Where this is the case, a legal guardian may be appointed to care for and manage the affairs of the child in question.³⁰ In the case of infants and young children, the child's parent or legal guardian would typically bring a civil suit as a child's next friend in line with provisions above. In addition, parents,

¹⁸ See Commissions for Protection of Child Rights Act 2005, available at http://liiofindia.org/in/legis/cen/num_act/cfpocra2005444/. For more information on filing complaints with the National Commission for Protection of Child Rights, see <http://www.ncpcr.gov.in/complaints.htm>.

¹⁹ See Protection of Human Rights Act, 1993, Section 12, available at http://liiofindia.org/in/legis/cen/num_act/pohra1993292/, as amended by the Protection of Human Rights (Amendment) Act 2006, available at http://liiofindia.org/in/legis/cen/num_act/pohra2006372/.

²⁰ Comments provided by Centre for Child and the Law (CCL), India, December 2014.

²¹ Code of Civil Procedure, Order XXXII, Sections 1, 5.

²² Code of Civil Procedure, Order XXXII, Section 3.

²³ Code of Civil Procedure, Order XXXII, Section 4.

²⁴ Code of Civil Procedure, Order XXXII, Section 9.

²⁵ Code of Civil Procedure, Order XXXII, Section 9.

²⁶ Code of Civil Procedure, Order XXXII, Section 12.

²⁷ Juvenile Justice (Care and Protection of Children Act) 2000, Sections 13, 46, available at http://liiofindia.org/in/legis/cen/num_act/jjapoca2000439/.

²⁸ Constitution, Article 22.

²⁹ Juvenile Justice (Care and Protection) Rules, 2007, Section 3.

³⁰ Guardianship and Wards Act, 1890, Sections 7, 17, 20, available at http://liiofindia.org/in/legis/cen/num_act/gawa1890182/.

guardians or any other person or group with sufficient interest may file a writ petition to challenge violations of the rights of children of any age.³¹

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

The Constitution directs the Government to establish legal aid schemes that ensure access to justice for all citizens.³² To fulfil this obligation, Legal Services Authorities have been constituted across the country to provide free legal assistance to vulnerable populations.³³ The National Legal Services Authority (NALSA)³⁴ has set policies and procedures to govern the availability of legal aid, and separate Legal Services Committees have been established to administer legal aid schemes in each State,³⁵ the Supreme Court,³⁶ the High Courts,³⁷ and the District Courts.³⁸ Applications for legal assistance may be filed with any of these Committees as appropriate.

Children and certain other groups are automatically eligible for legal aid,³⁹ and the minimum income threshold for all other persons is currently set at 100,000 rupees.⁴⁰ Beyond this, the Supreme Court Middle Income Group Society offers legal aid, assistance and representation at a reduced rate to persons with an annual income below 750,000 rupees.⁴¹ In addition, the Supreme Court runs a free legal advice hotline during normal business hours.⁴²

Children involved in juvenile justice or child welfare proceedings have the right to be represented at the expense of the Government,⁴³ and Government-funded legal aid is also available to some criminal defendants.⁴⁴ If there is no person fit and willing to act as child's guardian for the suit in civil proceedings, the Court may appoint one of its officers to do so and later direct that the costs of this representation be borne by either side.⁴⁵

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)?

While it is not a constraint on bringing proceedings, a child's next friend of guardian for

³¹ Comments provided by Centre for Child and the Law (CCL), India, December 2014.

³² Constitution, Article 39A.

³³ Legal Service Authorities Act, 1987, available at <http://lawmin.nic.in/la/subord/nalsa.htm>.

³⁴ Legal Service Authorities Act, Section 3; see <http://nalsa.gov.in/>.

³⁵ Legal Service Authorities Act, Chapter III. For a list of State Legal Service Committees, see <http://nalsa.gov.in/slsa.html>.

³⁶ Legal Service Authorities Act, Section 3A; see also <http://www.sclsc.nic.in/>.

³⁷ Legal Service Authorities Act, Section 8A.

³⁸ Legal Service Authorities Act, Section 9.

³⁹ Legal Service Authorities Act, Section 12.

⁴⁰ See <http://nalsa.gov.in/legalservices.html>.

⁴¹ See <http://www.supremecourtindia.nic.in/mig.htm>.

⁴² See Supreme Court of India Practice & Procedure: A Handbook of Information, Chapter X, available at <http://supremecourtindia.nic.in/handbook3rdedition.pdf>.

⁴³ Juvenile Justice (Care and Protection of Children) Rules, 2007, Rule 3 (2) III (concerning children in both justice and welfare proceedings), and Rule 14 (in relation to children alleged to be in conflict with law), available at <http://wcd.nic.in/icpsmon/pdf/jjrules2007.pdf>.

⁴⁴ Code of Criminal Procedure, Sections 303, 304.

⁴⁵ Code of Civil Procedure, Order XXXII, Section 4.

the suit in civil proceedings cannot enter into any agreement on behalf of the child concerned without permission from the court.⁴⁶

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?

Civil proceedings⁴⁷ may be initiated by filing a complaint as specified in the Code of Civil Procedure.⁴⁷ Notably, suits against the Government or public officers in their official capacity require that special procedures be followed, including the provision of two months' advance notice.⁴⁸ In addition, civil courts must give notice to the Attorney General of any cases challenging a law or Government action as a violation of fundamental rights or otherwise unconstitutional and, where necessary or desirable, add the Government as a defending party to the suit.⁴⁹

Criminal proceedings may be filed and prosecuted with the permission of a magistrate, or the Magistrate's Court may of its own motion initiate proceedings when provided with information that an offence has been committed.⁵⁰ If a related police investigation is already underway, however, all other proceedings may be postponed pending the results of official activity.⁵¹

Public Interest Litigation may be initiated, or writ petitions may be filed, before the Supreme or High Courts regarding violations of fundamental rights under Part III of the Constitution.⁵² Complainants may either bring cases directly by filing a petition or, alternatively, provide sufficient information about the violations in question for the Court to launch proceedings.⁵³

A case can be brought before the Children's Court under the Commissions for Protection of Child Rights Act 2005. In case of sexual offences, the case will lie before a Special Court under the Protection of Children from Sexual Offences Act 2012. These cases will lie directly before the Special Court and do not have to be routed through the Magistrate's Court.⁵⁴

Victims of human rights violations or their representatives may file complaints with the National Human Rights Commission, or the Commission may launch inquiries into possible violations of its own initiative.⁵⁵ The National Commission for the Protection

⁴⁶ Code of Civil Procedure, Order XXXII, Section 7.

⁴⁷ Code of Civil Procedure, Section 26, Orders IV, VI, VII.

⁴⁸ Code of Civil Procedure, Section 80, Order XXVII.

⁴⁹ Code of Civil Procedure, Order XXVIA.

⁵⁰ Code of Criminal Procedure, Sections 190, 301, 302

⁵¹ Code of Criminal Procedure, Section 210.

⁵² Comments provided by Centre for Child and the Law (CCL), India, December 2014.

⁵³ Constitution, Article 132. The Supreme Court has provided guidance on the nature of cases that may be initiated by letter rather than petition, available at <http://supremecourtindia.nic.in/circular/guidelines/pilguidelines.pdf>.

⁵⁴ Comments provided by Centre for Child and the Law (CCL), India, December 2014.

⁵⁵ Protection of Human Rights Act, Section 12. Complaints with National Human Rights Commission may be registered online at <http://nhrc.nic.in/>.

of Child Rights is also empowered to launch inquiries into potential violations of children's rights and, where appropriate, recommend that legal proceedings be initiated.

⁵⁶ In the case of children held in government custody or social institutions, the Commission is further authorised to receive and investigate complaints or otherwise look into potential rights violations.⁵⁷

Other Commissions may also have an appropriate mandate to receive complaints from children. For example, a girl could make a complaint before the National Commission for Women, and also the respective State Commission for Women and State Commission for the Protection of Child Rights.⁵⁸

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

Civil courts have the general authority to make any order as necessary in the interests of justice.⁵⁹ This includes the power to mandate that one party compensate another for harm caused, to determine and declare the respective rights of the parties, to issue injunctions, whether permanent or temporary, that require a party to cease or carry out a particular action,⁶⁰ and to maintain the status quo to prevent any further harm to the interest of the party involved.⁶¹

The Supreme and High Courts have, among other powers, the specific authority to enforce fundamental rights by requiring public officials to justify their authority (*quo warranto*); bringing any person held in detention before the Court for review (*habeas corpus*); ordering that a public authority either perform functions as legally required (*mandamus*) or refrain from taking actions that are legally prohibited (*prohibition*); and quashing unlawful acts (*certiorari*).⁶² In certain circumstances, interim orders may also be issued to preserve the interests of the parties and prevent any further harm from occurring while the case is under consideration.⁶³ Any law that is found to be inconsistent with the fundamental rights in the Constitution is, to the extent of the inconsistency, void.⁶⁴

When imposing a sentence in criminal proceedings, the presiding court may order that the convicted offender compensate the victim or victims for any loss or injury caused by the offence.⁶⁵ Under Section 357A of the Criminal Procedure Code, the State can be ordered to compensate the victim irrespective of the outcome in the case. A victim may receive compensation even if the case ends in acquittal, conviction or discharge.⁶⁶

In examining complaints or conducting inquiries, the National Commission for the

⁵⁶ Commissions for Protection of Child Rights Act, Section 13.

⁵⁷ Commissions for Protection of Child Rights Act, Section 13.

⁵⁸ Comments provided by Centre for Child and the Law (CCL), India, December 2014.

⁵⁹ Code of Civil Procedure, Section 151.

⁶⁰ See Specific Relief Act, 1963, available at <http://indiankanoon.org/doc/1671917/>.

⁶¹ Comments provided by Centre for Child and the Law (CCL), India, December 2014.

⁶² Constitution, Articles 32, 139, 226.

⁶³ Constitution, Article 226.

⁶⁴ "Law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law: Constitution, Article 13; see also *Romesh Thappar v. The State of Madras*, [1950] S.C.R. 594.

⁶⁵ Code of Criminal Procedure, Article 357.

⁶⁶ Comments provided by Centre for Child and the Law (CCL), India, December 2014.

Protection of Child Rights and National Human Rights Commission have all the same powers as civil courts. They can forward a case to a Magistrate only in case of breach of the powers exercised by them. For instance, they can forward a case if a person refuses to take an oath or answer questions or furnish information requested by the Commission. They cannot forward a case to a magistrate in case of violations of rights.

⁶⁷ If violations are uncovered, either Commission may recommend to the government or any public authority wider prosecutions, seek orders or directions from the High or Supreme Court to enforce the rights in question, or request that the victims be granted interim relief as necessary.⁶⁸

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?

Civil complaints must disclose the identity of the plaintiff and, where filed by a representative, must state the basis for so doing.⁶⁹ If a party requires that the name of the complainant/petitioner be not made public, the party can make such specific prayer to the Court to assign a pseudonym and suppress the identity of the party.⁷⁰

Criminal complaints require the reporting of information relating to a specific offence, which likely necessitates the identification of individual victims where they exist.⁷¹

Public Interest Litigation to enforce fundamental constitutional rights may be filed to challenge a law or public action without naming specific victims. Any person with a sufficient connection to the case acting genuinely in the public interest may pursue claims of rights violations in this manner.⁷² Similarly, any person may file a complaint with the National Commission for the Protection of Child Rights; while these may not be submitted anonymously and must provide sufficient information on the violations alleged, there is no specific requirement that an individual child victim be named.⁷³ The National Human Rights Commission also does not accept anonymous complaints, and its form complaint requires disclosure of the victim's identity.⁷⁴

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

When a number of people have the same interest in a civil suit, one or more of these persons may seek the permission of the court to initiate proceedings on behalf of all interested parties.⁷⁵ If permission is granted, the court must, at the plaintiff's expense, give notice to all persons with an interest in the suit directly or, where this is impracticable, by public advertisement.⁷⁶ Interested persons also retain the right to

⁶⁷ Commissions for Protection of Child Rights Act, Section 14; Protection of Human Rights Act, Section 13; Comments provided by Centre for Child and the Law (CCL), India, December 2014.

⁶⁸ Commissions for Protection of Child Rights Act, Section 15; Protection of Human Rights Act, Section 18.

⁶⁹ Code of Civil Procedure, Order VII, Sections 1, 4.

⁷⁰ Comments provided by Centre for Child and the Law (CCL), India, December 2014.

⁷¹ Code of Criminal Procedure, Section 190.

⁷² See *C. S.P. Gupta v. President of India and ors.*, AIR 1982 SC 149, available at <http://www.indiankanoon.org/doc/1294854/>.

⁷³ See <http://www.ncpcr.gov.in/complaints.htm>.

⁷⁴ See, e.g., <http://164.100.51.57/HRComplaint/pub/NewHRComplaint.aspx>.

⁷⁵ Code of Civil Procedure, Order 1, Section 8.

⁷⁶ Code of Civil Procedure, Order 1, Section 8.

apply to the court to become a formal party to the lawsuit.⁷⁷

Where separate civil suits relating to the same matter have already been filed, courts may combine these where “any common question of law or fact would arise.”⁷⁸ In addition, in any civil case in which there are multiple plaintiffs, one or more of these may be authorised in writing to act on behalf of any other plaintiff.⁷⁹

As above, Public Interest Litigation also provides a means to bring suit on behalf of a large group of people without naming individual victims.

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?

Public Interest Litigation may be initiated by any person or organisation acting legitimately in the public interest with a connection to the issue at hand.⁸⁰

Courts also have explicit powers to allow third parties with an interest in resolving a question of law at issue in a civil suit to present their opinions and take part in the proceedings as necessary in the public interest.⁸¹ A non-governmental organisation or individual expert intervening in this manner is known as an intervener.⁸² An “amicus curiae” may also assist the court as a court-appointed person with expertise on a particular issue.⁸³

With the permission of the court, the National Human Rights Commission may also intervene in any proceedings alleging violations of human rights.⁸⁴ The National Commission for the Protection of Child Rights or the State Commission on the Protection of Child Rights may also approach the court for orders or directions under section 15(ii) of the Commissions for Protection of Child Rights Act 2005.

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?

Civil courts below the High Court level are divided into District Courts and Courts of Small Causes, and civil cases are instituted in the lowest grade courts competent to try them.⁸⁵ Typically, civil suits are brought either where the injury occurred or where the

⁷⁷ Code of Civil Procedure, Order 1, Section 8.

⁷⁸ Code of Civil Procedure, Order 1, Section 1; Order IVA, Section 1.

⁷⁹ Code of Civil Procedure, Order 1, Section 12.

⁸⁰ See S.P. Gupta v. President of India and ors., AIR 1982 SC 149, available at <http://www.indiankanoon.org/doc/1294854/>.

⁸¹ Code of Civil Procedure, Order 1, Section 8A.

⁸² Comments provided by Centre for Child and the Law (CCL), India, December 2014.

⁸³ See, e.g.,

<http://indiankanoon.org/search/?formInput=amicus+curiae+human+rights+doctypes%3A+judgments>.

⁸⁴ Protection of Human Rights Act, Section 12.

⁸⁵ Code of Civil Procedure, Sections 3, 15. See also Provincial Small Cause Courts Act, 1887, available at <http://www.vakilno1.com/bareacts/provsmal1887/provsmal.html>.

defending party resides.⁸⁶

Criminal proceedings are most often initiated before a Magistrate's Court or Court of Session, but may also be heard by the High Court.⁸⁷ However, such proceedings involving children must now be brought before a Children's Court.⁸⁸ These courts are essentially Sessions Courts designated as Children's Courts. The case will have to be committed to the Children's Court by the Magistrate's Court. In cases of sexual offences against children, the matter will directly lie before a Special Court under the Protection of Children from Sexual Offences Act 2012. Private prosecutions may be brought before a Magistrate's Court,⁸⁹ but all trials before a Court of Session must be conducted by a Public Prosecutor.⁸⁹ Criminal cases are typically heard where the offence was committed.⁹⁰

If a case before a subordinate court involves a substantial question of law as to the interpretation of the constitution, the High Court may intervene either to answer that question or resolve the case as a whole.⁹¹ Similarly, where multiple cases relating to the same "substantial questions of general importance" are pending before the High Courts, the Supreme Court may intervene to either answer those questions or resolve the cases that raised them.⁹²

Cases where children have been accused of committing an offence are heard by Juvenile Justice Boards, while child protection matters are reviewed by Child Welfare Committees.⁹³ Certain matters related to marriage, child custody and family relations may be heard by specialised family courts.⁹⁴

The Supreme Court and High Courts have published Rules of Procedure that, among other things, set out how Public Interest Litigation and other cases may be initiated.⁹⁵ In addition, human rights courts may operate in some jurisdictions to try offences relating to the violation of human rights.⁹⁶

⁸⁶ Code of Civil Procedure, Sections 19, 20.

⁸⁷ Code of Criminal Procedure, Chapters II, III.

⁸⁸ Commissions for Protection of Child Rights Act, Section 25. In 2011, Delhi became the first region to operate these special children's courts. See <http://www.dnaindia.com/india/1602381/report-delhi-first-state-to-have-children-s-courts>.

⁸⁹ Code of Criminal Procedure, Section 225.

⁹⁰ Code of Criminal Procedure, Section 177.

⁹¹ Constitution, Article 228.

⁹² Constitution, Article 139A.

⁹³ Juvenile Justice (Care and Protection of Children) Act 2000, Sections 4, 29; Code of Criminal Procedure, Section 27.

⁹⁴ Family Courts Act 1984, available at <http://indiankanoon.org/doc/373687/>.

⁹⁵ Constitution, Articles 145, 227; Supreme Court Rules 1966, Order XVIII, available at <http://www.supremecourtsofindia.nic.in/scrules1966.pdf>. The Supreme Court has also published a Handbook of Information on its Practice & Procedure, available at <http://supremecourtsofindia.nic.in/handbook3rdedition.pdf>. Each High Court may set its own rules for cases that come before it or any subordinate court; a number of these are available at <http://www.barcouncilofindia.org/about/about-the-legal-profession/high-court-rules/>.

⁹⁶ Protection of Human Rights Act, Section 30. In 2011, the State of West Bengal became first to formally set up human rights courts in 19 districts, although as of January 2013, none of these were in operation. See <http://www.indianexpress.com/news/human-rights-courts-set-up-in-all-districts/843844>; <http://www.indianexpress.com/news/15-months-on-human-rights-courts-still-not-functional/1054889>.

B. Legal aid / Court costs. Under what conditions would free or subsidised 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?

Legal aid is available to child complainants and their representatives on application so long as they can demonstrate the validity of their legal claims.⁹⁷ Persons receiving legal aid are not expected to pay court fees or cover other costs related to the litigation.⁹⁸

Indigent persons may also be permitted to initiate civil proceedings without the payment of court fees.⁹⁹ Formal applications to sue as indigent person must be filed with the court and provide information about the applicant's financial status.¹⁰⁰ If the application is approved, the presiding Court may appoint a legal representative as necessary to assist the complainant.¹⁰¹ Indigent persons are also permitted to file appeals without paying the usual costs required.¹⁰² If the claim is ultimately successful, however, the plaintiff will be expected to repay any court fees from the proceeds of the suit.¹⁰³

While legal aid is not available for bringing criminal proceedings, courts that impose fines on convicted defendants may order that sums collected be used to defray the costs of prosecution.¹⁰⁴ In cases involving certain offences, courts may order that a convicted defendant reimburse the complainant for the costs of prosecution regardless of the sentence imposed.¹⁰⁵

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 practising 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?

Lawyers are prohibited from basing their fees on the outcome of a case.¹⁰⁶ However, civil courts have full discretion to determine which party pays the fees and costs related to the bringing of a lawsuit, which allows for complainants to seek the recovery of these fees and costs from defending parties.¹⁰⁷

In addition to Government-funded legal aid programmes, the Bar Council of India has

⁹⁷ Legal Service Authorities Act, Section 13.

⁹⁸ See <http://nalsa.gov.in/>.

⁹⁹ Code of Civil Procedure, Order XXXIII, Section 1.

¹⁰⁰ Code of Civil Procedure, Order XXXIII, Sections 2, 3.

¹⁰¹ Code of Civil Procedure, Order XXXIII, Sections 9A, 18.

¹⁰² Code of Civil Procedure, Order XLIV.

¹⁰³ Code of Civil Procedure, Order XXXIII, Sections 1, 10.

¹⁰⁴ Code of Criminal Procedure, Section 357.

¹⁰⁵ These offences are known as “non-cognizable”, meaning offences for which police officers have no authority to arrest without warrant. Code of Criminal Procedure, Section 359.

¹⁰⁶ Bar Council of India Rules, Part VI, Chapter II, Rule 20, available at http://lawmin.nic.in/la/subord/bci_index.htm; see also <http://legalsutra.org/251/contingent-fees-and-professional-ethics/>.

¹⁰⁷ Code of Civil Procedure, Section 35; Order XXA. The amount of legal fees recoverable from an opposing party may be regulated by the High Courts. See Advocates Act, 1961, Section 34, available at http://www.liiofindia.org/in/legis/cen/num_act/aa1961102/; Legal Practitioners Act, 1879, Section 27, available at http://www.liiofindia.org/in/legis/cen/num_act/lpa1879207/.

the authority to establish funds and committees to provide legal aid and advice.¹⁰⁸ Pro bono legal services, legal aid and case support may also be available from any number of organisations working in human and children's rights. Among many others, these include HAQ: Centre for Child Rights,¹⁰⁹ the Committee for Legal Aid to the Poor (CLAP),¹¹⁰ the Human Rights Law Network,¹¹¹ and the Centre for Child and the Law at National Law School of India University, Bangalore.¹¹²

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?

Time limits for filing a case vary according to the nature of the claim, but most are in the range of one to three years.¹¹³ Periods of limitation do not begin running for children until they reach the age of majority¹¹⁴, however, and suits filed after the expiration of the prescribed period may still be accepted at the Court's discretion where the complainant can show valid reasons why it wasn't possible to meet the usual deadline.¹¹⁵

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?

Indian courts may admit and review oral and documentary evidence in line with the provisions of the Indian Evidence Act.¹¹⁶ Children are considered competent to testify so long as they are able to understand and give rational answers to the questions asked of them.¹¹⁷ Witness testimony before any court must be given under oath, although children under twelve may be permitted to testify without taking an oath where they understand the duty of speaking the truth.¹¹⁸

Civil cases are as a rule tried in open court, although the presiding judge may at any point order that the general public or any particular individuals be excluded from the proceedings.¹¹⁹ In addition, lawsuits related to certain family matters may be held in private upon request.¹²⁰

Children have the right to privacy and confidentiality in juvenile justice and child welfare proceedings¹²¹ as well as during trials under the Protection of Children from

¹⁰⁸ Advocates Act, Sections 2, 9A. These services are in part provided through the Bar Council of India Trust. See <http://www.barcouncilofindia.org/about/bar-council-of-india-trust/>.

¹⁰⁹ <http://www.haqrc.org/>.

¹¹⁰ <http://www.clapindia.org/>.

¹¹¹ <http://www.hrln.org/hrln/>.

¹¹² www.nls.ac.in/ccl.

¹¹³ Limitation Act, 1963, Schedule, available at http://liiofindia.org/in/legis/cen/num_act/la1963133/.

¹¹⁴ Limitation Act, Section 6.

¹¹⁵ Limitation Act, Section 4; see also Code of Civil Procedure, Order VII, Section 6.

¹¹⁶ Indian Evidence Act, 1872, available at http://liiofindia.org/in/legis/cen/num_act/iea1872125/. See also Code of Civil Procedure, Orders X, XI, XIII, XVI, XVIII.

¹¹⁷ Indian Evidence Act, Section 118.

¹¹⁸ Oaths Act 1969, Section 6, available at http://liiofindia.org/in/legis/cen/num_act/oa196979/.

¹¹⁹ Code of Civil Procedure, Section 153B.

¹²⁰ Code of Civil Procedure, Order XXXIIA, Section 2; Family Court Act, Section 1.

¹²¹ Juvenile Justice (Care and Protection of Children) Act 2000, Section 21 and Juvenile Justice (Care and Protection of Children) Rules, 2007, Rule 3 (2) XI.

Sexual Offences Act. Names, pictures and identifying information related to children involved in juvenile justice or child protection proceedings may not be published without permission of the court, which may only be granted in the interests of the child.¹²²

F. Resolution. How long might it take to get a decision from the court as to whether there has been a violation?

Juvenile justice and child welfare proceedings must both typically be concluded within four months' time,¹²³ but there is in most instances no fixed period for the disposal of cases.¹²⁴ Under the Protection of Children from Sexual Offences Act, trials must be completed, as far as possible, within a year of consideration by the court.

Lengthy delays in the resolution of court proceedings are widely reported.¹²⁵ Civil cases may take years to reach trial, and according to some measures, petitions filed with the High Court take on average 8 to 10 and in some instances up to 20 years to be resolved.¹²⁶ The Government has at times created special Fast Track Courts to help clear case backlogs,¹²⁷ although these initiatives do not represent permanent additions to the justice system.

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

Most decisions and some orders from lower civil courts may eventually be appealed to the High Court¹²⁸, and certain criminal cases may be appealed as set out in the Code of Criminal Procedure.¹²⁹ Courts may also of their own initiative request the assistance of higher courts in reviewing certain issues of law.¹³⁰

Any decision certified by the High Court to involve a substantial question of law as to the interpretation of the constitution may be appealed to the Supreme Court, and civil decisions may also be appealed to Supreme Court where they involve a substantial question of law of general importance.¹³¹ Both civil and criminal decisions may be submitted to the Supreme Court where the High Court otherwise determines an appeal should lie, and the Supreme Court may also grant special permission to appeal any

¹²² Juvenile Justice (Care and Protection of Children) Act, Section 21.

¹²³ Juvenile Justice (Care and Protection of Children) Act, Sections 14 and 33 (2) respectively.

¹²⁴ There are, however, time periods set out for the conclusion of certain stages of proceedings. For instance, civil courts must make every effort to reach a decision within 30 days of a hearing and civil appeals must theoretically be decided within 60 days of initiation. Code of Civil Procedure, Order XX, Section 1; Order XLI, Section 11A.

¹²⁵ See

http://www.nbcnews.com/id/29164027/ns/world_news-south_and_central_asia/t/report-india-court-years-behind-schedule/#.UXU9TMpiaHg; <http://www.legalserviceindia.com/articles/jdjd.htm>.

¹²⁶ See Maja B. Micevska & Arnab K. Hazra, The Problem of Court Congestion: Evidence from Indian Lower Courts, available at http://www.uni-saarland.de/fak1/fr12/csle/workshop/program/Micevska_hazra.pdf; Vandana A. Kumar, Judicial Delays in India: Causes & Remedies (2012), available at <http://www.iiste.org/Journals/index.php/JLPG/article/download/2069/2048>.

¹²⁷ See <http://doj.gov.in/?q=node/108>;

<http://www.trust.org/trustlaw/news/india-opens-fast-track-courts-after-delhi-gang-rape-report/>.

¹²⁸ Code of Civil Procedure, Sections 96, 100, 104; Orders XLII, XLIII, XLVII.

¹²⁹ Code of Criminal Procedure, Chapter XXIX.

¹³⁰ Code of Civil Procedure, Order XLVI.

¹³¹ Constitution, Articles 132, 133, 134A; Code of Civil Procedure, Section 109.

decision made by an Indian court.¹³²

The Supreme Court Rules set out detailed rules governing the appellate process¹³³, and the Supreme Court retains the power to review its own judgments and orders at a later date.¹³⁴

Appellate courts generally have the power to reverse, affirm or modify decisions, and may also frame issues and refer them for trial to lower courts or, where necessary, accept additional evidence.¹³⁵ It may also be possible for a court to review decisions where an appeal is not otherwise possible.¹³⁶

Time limits for appeal vary somewhat by the presiding court and the type of decision or order to be appealed, but are usually set at 30 days unless the party wishing to file an appeal can show reasons it would not be possible to do so within that period.¹³⁷

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?

Under the Indian Constitution, decisions of the Supreme Court are explicitly binding on all other courts.¹³⁸ This is in line with the general rule of precedent that courts must follow their own decisions and the decisions of any higher courts. Thus, the effects of a negative decision for children's rights could be felt for many years, and judgments from higher courts will have more far-reaching effects than judgments from lower courts.

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

Indian courts have various and extensive powers to enforce decisions, although these must generally be exercised within 12 years of the decree or order in question.¹³⁹

Nonetheless, concerns have been expressed over corruption, inefficiency and lack of accountability within the Indian judicial system, which can contribute to weak judicial enforcement of decisions.¹⁴⁰

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.

Many of the laws, rules and regulations described above do not apply to the disputed

¹³² Constitution, Articles 133, 134, 134A, 136; Code of Civil Procedure, Order XLV.

¹³³ Supreme Court Rules, Orders XV, XVI, XVII, XIX, XXI.

¹³⁴ Constitution, Article 137.

¹³⁵ See, e.g., Code of Civil Procedure, Section 107.

¹³⁶ Code of Civil Procedure, Section 114.

¹³⁷ Limitation Act, Schedule, Section 5. See also Juvenile Justice (Care and Protection of Children) Act, Section 52; Family Courts Act, Section 19.

¹³⁸ Constitution, Article 141.

¹³⁹ Code of Civil Procedure, Part II; Order XXI; Limitation Act, Schedule, Section 136.

¹⁴⁰ See

http://www.nbcnews.com/id/29164027/ns/world_news-south_and_central_asia/t/report-india-court-years-behind-schedule/#.UXU9TMpiaHg.

territory of Jammu and Kashmir, which operates with special and extensive autonomy under the Constitution.¹⁴¹

In some regions of the country, shariat courts operate alongside the secular judicial system to resolve certain family matters.¹⁴² Shariat courts have no legal validity in India.¹⁴³ However, Muslim Personal Law governs matters concerning marriage, divorce, maintenance, and succession. The courts apply Muslim Personal Law while dealing with family law matters.¹⁴⁴

This report is provided for educational and informational purposes only and should not be construed as legal advice.

¹⁴¹ Constitution, Article 370.

¹⁴² See Muslim Personal Law (Shariat) Application Act 1937, available at http://liiofindia.org/in/legis/cen/num_act/mplaa1937401/.

¹⁴³ See <http://www.ndtv.com/article/india/shariat-courts-have-no-legal-sanction-supreme-court-554180>.

¹⁴⁴ Comments provided by Centre for Child and the Law (CCL), India, December 2014.