

ACCESS TO JUSTICE FOR CHILDREN: KENYA

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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?

Under the Kenyan Constitution, in force since 2010, the CRC and other ratified international human rights instruments automatically become part of national law.¹ The Constitution further provides that the “general rules of international law” are similarly domesticated.²

B. Does the CRC take precedence over national law?

Although the Constitution does not explicitly state that the CRC and other international instruments take precedence over national law, it can be argued that they do.

Specifically, as the Constitution both establishes that it takes precedence over conflicting national legislation³ and recognises the constitutional status of international human rights conventions, this provision could be read to place the CRC in a higher position than national law.

C. Has the CRC been incorporated into national law?

The Constitution directly incorporates the CRC into national law.⁴ Prior to the entry into force of the new Constitution, the CRC had not been directly incorporated into national law. Rather, individual rights were incorporated via implementing legislation in a subject-by-subject piecemeal manner.

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

In theory, the CRC should in its entirety be directly enforceable in national courts under the new Constitution.⁵ Questions have been raised, however, as to whether each individual right within the CRC may in fact be enforced without further national legislation. The Kenya National Commission on Human Rights notes that the Constitution obligates the State to “enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms,”⁶ which could run counter to the

¹ Constitution of Kenya, Article 2, available at http://www.parliament.go.ke/index.php?option=com_docman&task=doc_download&gid=460&Itemid= (“Any treaty or convention ratified by Kenya forms part of the law of Kenya”).

² Ibid., Article 2.

³ Ibid. (“Any law...that is inconsistent with the Constitution is void to the extent of the inconsistency...”).

⁴ Ibid.

⁵ Ibid.

⁶ Ibid., Article 21.

notion that international human rights instruments are directly enforceable upon ratification.⁷

Although the Commission argues that international human rights standards should in general “operate directly and immediately within the domestic legal system”, it draws a distinction between treaties that are “self-executing” and “non-self-executing.” Self-executing treaties are primed to operate automatically in national law, while non-self-executing treaties require enabling legislation before they can be enforced by the courts. Treaties may be in part self-executing and in part non-self-executing, meaning that some rights in the CRC might be considered directly enforceable while others might need to be elaborated further in national law.

Ultimately, however, the Commission concludes that “[w]here the domestic law is not in consonance with norms in [an] international treaty, then the treaty provisions should be upheld.” Some court decisions citing international instruments since the entry into force of the new Constitution follow this line of reasoning⁸, but this will need to be further established in Kenyan jurisprudence before the direct enforceability of the CRC can be assured.

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

The CRC and other international instruments have long been cited by Kenyan courts. Prior to the entry into force of the new Constitution, these instruments were cited as sources of interpretive guidance. Perhaps most famously, the High Court discussed the CRC in its 2006 decision on the matter of *RM and CRADLE v. Attorney General*⁹, a case that brought an ultimately unsuccessful challenge to discrimination against children born out of wedlock under the Children Act's provisions on parental responsibility. Since the new Constitution has taken effect, international human rights instruments continue to be used and applied by the courts, although – as above – it is not yet entirely clear as to what effect.

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?

As described in further detail below, children are permitted to bring cases in civil courts to challenge violations of their rights under the Civil Procedure Rules with the assistance of an adult “next friend”.¹⁰

Children also have a specific right under the Constitution to bring or have proceedings brought on their behalf when any of their rights or fundamental

⁷ See http://www.knchr.org/Portals/0/Reports/MAKING_THE_BILL_OF_RIGHTS.pdf.

⁸ See http://kenyalaw.org/Downloads_FreeCases/77605.pdf.

⁹ <http://www.crin.org/Law/instrument.asp?InstID=1443>.

¹⁰ Civil Procedure Rules, Order 32, available at <http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/CivilProcedureActCap21.pdf>.

freedoms in the Bill of Rights “has been denied, violated or infringed, or is threatened”.¹¹ The same applies to cases claiming that the Constitution “has been contravened, or is threatened with contravention”.¹²

In addition, “public interest litigation” may be filed in important matters related to human rights, including where:

- The enjoyment of the rights and fundamental freedoms of a “significant” number of people is affected;
- There are matters of “broad public concern” at issue related to the enjoyment of human rights;
- “Gross or systematic” violations are alleged as to human rights guaranteed under the Constitution or any other ratified international human rights instrument, including the CRC;
- There is controversy or “emerging jurisprudence” on a particular human rights matter; or
- Discrimination is alleged against “disadvantaged, minority or marginalized groups”.¹³

Alternatively, judicial review proceedings may be launched to challenge the action of a public body based on public law principles.¹⁴

If the violation amounts to a crime, any person may file a complaint with a magistrate to bring formal charges against the offender.¹⁵ However, the Director of Public Prosecutions may take over these proceedings with the permission of the prosecuting individual or authority and subsequently seek to discontinue them with the permission of the court.¹⁶

In addition, any person negatively affected by an act of the Director of Children's Services under the Children Act may file an appeal with the relevant Government Minister.¹⁷

Notably, complaints by and on behalf of children against public officers or institutions may also be lodged with the Commission on Administrative Justice, which functions as a national ombudsman.¹⁸ Where these complaints involve violations of a child's human rights, they may also be filed with the Kenya National Commission on Human Rights.¹⁹ Although neither Commission is a full judicial body, both may be able to offer or arrange some form of redress.

¹¹ Constitution, Article 22.

¹² Ibid., Article 258.

¹³ Draft Rules for the Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution, Rule 28, available at <http://www.kenyalaw.org/kenyaLawBlog/?p=439>.

¹⁴ Civil Procedure Rules, Order 53.

¹⁵ Criminal Procedure Code, Rule 88, available at <http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/CriminalProcedureCodeCap75.pdf>.

¹⁶ Constitution, Article 157.

¹⁷ Children Act 2001, Section 195, available at <http://www.kenyalaw.org/family/statutes/download.php?file=The%20Children%20Act,%202001.pdf>.

¹⁸ See <http://www.ombudsman.go.ke/LodgingaComplaint.aspx>.

¹⁹ See <http://www.knchr.org/Departments/ComplaintsInvestigation.aspx>.

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?

Under the Civil Procedure Act, cases may be brought in the name of and on behalf of children of any age, but must be filed by a “next friend” of the child.²⁰ If the child's next friend retains a legal representative, the next friend must further sign and file a written document granting the advocate the authority to proceed with the case.²¹ Equally, a child who has been sued in civil court must be represented, and the court will appoint a guardian ad litem to act on his or her behalf.²² Provided that there is no conflict of interest, any adult may act as a child's next friend or guardian ad litem so long as the child has not already had a legal guardian appointed or declared.²³ Every action taken in the case must be initiated by the next friend or guardian ad litem.²⁴

Children may seek the removal and replacement of a next friend who is shown to have adverse interests, who does not fulfil his or her duty, or for any other sufficient cause.²⁵ If a child involved in a lawsuit via a next friend reaches the age of 18, the next friend will be discharged and he or she must decide whether to proceed with the case without this representation.²⁶

In children's courts, the Children Act 2001 provides that when a child is brought before the court in any proceeding under the Act or any other written law, and the child is not represented, the court may order that the child be granted legal representation.²⁷ Children's courts are also empowered to appoint a guardian ad litem “for the purposes of the proceedings in question and to safeguard the interests of the child”.²⁸

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

Children have the right to parental care and protection under the Constitution.²⁹ In the case of infants and young children, the child's parent or legal guardian would typically bring a lawsuit as the child's next friend in line with the provisions described above. Specifically, a person with “parental responsibility” over a child is empowered to pursue legal claims on behalf of that child.³⁰ Parental Responsibility is usually held by a child's biological parents, and the Children Act 2001 details procedures for

²⁰ Civil Procedure Act, Order 31, Rule 1.

²¹ Ibid., Order 31, Rule 2.

²² Ibid., Order 31, Rule 3.

²³ Ibid., Order 31, Rule 4.

²⁴ Ibid., Order 31, Rule 5.

²⁵ Ibid., Order 31, Rule 9.

²⁶ Ibid., Order 31, Rules 12 - 14.

²⁷ Children Act 2001, Section 77.

²⁸ Ibid., Section 79.

²⁹ Constitution, Article 53.

³⁰ Children Act 2001, Part III. Parental responsibility is defined as “all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child’s property in a manner consistent with the evolving capacities of the child” (Section 23).

appointing a legal guardian where this is not the case.³¹ Notably, adults “of sound mind” who do not hold parental responsibility may also seek court appointment to act as a child's next friend for the purposes of a lawsuit under the Civil Procedure Act.³²

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

Children are not entitled to legal assistance in bringing civil cases. However, the National Legal Aid and Awareness Programme (NALEAP) provides legal assistance and in some cases representation to children and other vulnerable groups with the assistance of the Law Society of Kenya and various civil society organisations.³³

As above, children's courts may also order that a child be granted legal representation in any court proceeding, and, if so ordered, this representation is provided at the Government's expense.³⁴ Notably, however, if there is no person fit and willing to act as a child's guardian ad litem in a civil proceeding, the court may appoint a court officer and later direct that either or both parties bear the costs of this representation.³⁵

Children who are accused of committing an offence are guaranteed legal aid provided by the Government if they have no other recourse to this assistance.³⁶ The Constitution also expressly states that any person accused of an offence has the right to have an advocate assigned and paid for by the Government “if substantial injustice would otherwise result”.³⁷

There is typically no legal assistance provided by the Government in bringing private prosecutions, although a court may order that the accused reimburse the costs of prosecution up to a certain amount if convicted.³⁸

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)?

A child's parents or guardians do not have to consent to a next friend bringing a case. However, where the next friend is not a legal guardian of the child, the child's legal guardian may at any point seek to be appointed in the next friend's place.³⁹

While it is not a limit on a child or chosen legal representative bringing a

³¹ Ibid., Part VIII.

³² Civil Procedure Act, Order 31, Rule 4.

³³ For more information, see

http://www.humanrights.dk/files/images/Publikationer/Legal_Aid_East_Africa_Dec_2011_DIHR_Study_Final.pdf.

³⁴ Children Act 2001, Section 77.

³⁵ Civil Procedure Rules, Order 32, Rule 4.

³⁶ Children Act 2001, Section 186.

³⁷ Constitution, Article 50.

³⁸ Criminal Procedure Code, Section 171.

³⁹ Civil Procedure Rules, Order 32, Rule 9.

case, it is notable that a next friend or guardian ad litem cannot enter into any agreement or compromise on behalf of a child without the written permission of the court.⁴⁰

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?

Children may initiate civil proceedings via a next friend under the Civil Procedure Rules. Civil claims seeking money damages under a certain amount may be heard by a magistrate's court under the Magistrates' Courts Act, or are otherwise filed in the High Court.⁴¹ Claims that relate to the interpretation of the Constitution, including determinations of whether a particular law or action is unconstitutional, also fall under the jurisdiction of the High Court.⁴² If proceedings are to be filed against the Government, particular rules apply and the Government must be given advance notice of the nature of the claim.⁴³

If a child's right or fundamental freedom under the Bill of Rights has been denied, violated, infringed or threatened, legal challenges may be filed directly with the High Court.⁴⁴ The Constitution provides that these challenges may be brought by representatives on behalf of people who cannot by themselves initiate legal proceedings. Proceedings of this nature are required to be easily accessible, such that "formalities relating to the proceedings, including commencement of the proceedings, are kept to a minimum".⁴⁵ These proceedings, proceedings seeking to enforce the Constitution overall, and human rights-focused public interest litigation are all brought in the same manner and subject to the same rules.⁴⁶

Judicial review proceedings may be initiated to challenge the decision of a public body.⁴⁷ Judicial review proceedings require the permission of the High Court, and applications must specify the relief sought and the grounds on which it is sought.⁴⁸

⁴⁰ Ibid., Order 32, Rule 7.

⁴¹ Magistrates' Courts Act, available at <http://www.kenyalaw.org/Downloads/GreyBook/5.%20The%20Magistrates%20Courts%20Act.pdf>.

⁴² Constitution, Article 165; for more information, see <http://www.judiciary.go.ke/portal/the-courts.html>.

⁴³ Government Proceedings Act, Part III, available at http://www.kenyalaw.org/kenyalaw/klr_app/frames.php.

⁴⁴ Constitution, Articles 22, 165.

⁴⁵ Ibid., Article 22.

⁴⁶ Ibid., Article 258; Draft Rules for the Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution, Rules 29, 30.

⁴⁷ For more information, see

<http://www.aihja.org/images/users/1/files/kenya.en.0.pdf?PHPSESSID=f83dg63dqj61vokoep4kk44fu1>.

⁴⁸ Civil Procedure Rules, Order 53, Rule 2.

As above, private prosecutions may also be initiated before a magistrate's court where the rights violation contravenes criminal law.⁴⁹

African Committee of Experts on the Rights and Welfare of the Child

Individuals, including child victims, his/her parents or legal representatives, groups, or NGOs recognised by the African Union may submit complaints (known as “communications”) to the African Committee of Experts on the Rights and Welfare of the Child (“African Committee”) about violations of the African Charter on the Rights and Welfare of the Child (“African Children’s Charter”).⁵⁰ All available domestic remedies must have been exhausted before bringing a case to the African Committee.⁵¹ The complaint must include, amongst other things, the name of the person filing it or, in the case of an NGO, the name of the legal representative, and whether or not the complainant wishes to remain anonymous and the reasons for this.⁵² The African Committee will investigate the complaint and decide on the merits of the case, and make recommendations to the State, which may include compensation to the victim(s) and measures to prevent recurrence of the violation.⁵³ See, for example, the Nubian children case brought against Kenya.⁵⁴

African Commission on Human and Peoples’ Rights

Individuals, groups or NGOs may submit complaints (known as “communications”) to the African Commission on Human and Peoples’ Rights (“African Commission”) about violations of the African Charter on Human and Peoples’ Rights (“African Charter”).⁵⁵ All available domestic remedies must have been exhausted before bringing a case to the African Commission.⁵⁶ The complaint must include, amongst other things: the name of the person filing it or, in the case of an NGO, the name of the legal representative; whether or not the complainant wishes to remain anonymous and the reasons for this; and the name of the victim, in a case where he/she is not the complainant.⁵⁷ The African Commission will investigate the

⁴⁹ Criminal Procedure Code, Rule 88; for more information, see <http://www.scribd.com/doc/102516502/Private-Prosecutions-in-Kenya>.

⁵⁰ African Charter on the Rights and Welfare of the Child (“African Children’s Charter”), Article 44, available at: <http://acerwc.org/the-african-charter-on-the-rights-and-welfare-of-the-child-acrwc/acrwc-charter-full-text/>. For more information about communications, see: <http://acerwc.org/the-committees-work/communications/>.

⁵¹ African Committee of Experts on the Rights and Welfare of the Child, ‘Communications’, available at: <http://acerwc.org/the-committees-work/communications/>.

⁵² War Resisters’ International, Quaker United Nations Office Geneva, Conscience and Peace Tax International and the CCPR Centre, ‘African Committee of Experts on the Rights and Welfare of the Child: communication procedure’, 2012, available at: <http://co-guide.org/mechanism/african-committee-experts-rights-and-welfare-child-communication-procedure>.

⁵³ Ibid.

⁵⁴ Summary available at: www.crin.org/node/7190.

⁵⁵ African Charter on Human and Peoples’ Rights (“African Charter”), Article 55, available at: <http://www.achpr.org/instruments/achpr>.

⁵⁶ Ibid., Article 56(5).

⁵⁷ Rules of Procedure of the African Commission on Human and Peoples’ Rights of 2010, Rule 93,

complaint and decide on the merits of the case, and make recommendations to the State, which may include compensation to the victim(s) and measures to prevent recurrence of the violation.⁵⁸ If the case relates to serious or massive human rights violations or if the Commission considers that the State is unwilling to comply with its recommendations in the case, the Commission may refer the complaint to the African Court on Human and Peoples' Rights.⁵⁹

East African Court of Justice

Any individual or NGO who is resident in Kenya may file a complaint with the East African Court of Justice about the legality of any Act, regulation, directive, decision or action of the State on the grounds that it is unlawful or violates the rule of law.⁶⁰ The Court has jurisdiction over the interpretation and application of the Treaty Establishing the East African Community (EAC Treaty), and will have human rights jurisdiction at a later date.⁶¹ Despite the current lack of explicit jurisdiction over human rights, the Court has decided cases involving individual rights.⁶² A complaint must be lodged within two months of the decision or action complained of.⁶³ There is no requirement to exhaust domestic remedies before bringing a complaint to the Court. The Court issues declarations as to whether particular acts or laws infringe the EAC Treaty, and can recommend specific amendments to laws to bring them in conformity with the Treaty. Court judgments can be appealed to the Appeals Chamber of the Court,⁶⁴ and are binding.⁶⁵

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

In civil proceedings, courts may either award money damages or issue an injunction ordering a party to carry out or cease a particular action. At any point during the proceedings, civil courts may also issue temporary

available at: <http://www.achpr.org/instruments/rules-of-procedure-2010/>.

⁵⁸ War Resisters' International, Quaker United Nations Office Geneva, Conscience and Peace Tax International and the CCPR Centre, 'African Commission on Human and Peoples' Rights: communication procedure', 2012, available at:

<http://co-guide.org/mechanism/african-commission-human-and-peoples-rights-communication-procedure>.

⁵⁹ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights, Article 5, available at:

<http://www.achpr.org/instruments/court-establishment>; Rules of Procedure of the African Commission on Human and Peoples' Rights of 2010, Rules 84(2) and 118, available at:

<http://www.achpr.org/instruments/rules-of-procedure-2010>.

⁶⁰ Treaty Establishing the East African Community, Article 30(1), available at: <http://www.eac.int/treaty/>.

⁶¹ Ibid., Article 27; In May 2005, the Council of Ministers issued a Draft Protocol to Operationalise the Extended Jurisdiction of the East African Court of Justice, but the protocol has not yet been approved: <http://www.ijrcenter.org/regional-communities/east-african-court-of-justice/>.

⁶² See Open Society Justice Initiative, 'Human rights decisions of the East African Court of Justice', June 2013, available at:

<http://www.opensocietyfoundations.org/sites/default/files/east-african-court-digest-june-2013-20130726.pdf>

⁶³ Treaty Establishing the East African Community, Article 30(2).

⁶⁴ Ibid., Article 35A.

⁶⁵ Open Society Foundations, 'East African Court of Justice', June 2013, available at:

<http://www.opensocietyfoundations.org/fact-sheets/east-african-court-justice>.

injunctions to prevent the defending party from causing any further harm to the complainant.⁶⁶

In public interest litigation, proceedings brought to challenge a violation of the Bill of Rights or proceedings seeking to enforce the Constitution, the court may grant any appropriate remedy, including: a declaration of rights; an injunction, which would order the defending party to take a particular course of action; a conservatory order, which would prevent the defending party from taking a particular course of action; a declaration of invalidity of any law that unjustifiably violates the Bill of Rights; compensation; or an order of judicial review.⁶⁷

In judicial review proceedings, the court may issue one of three orders. An “order of certiorari” would set aside a public decision as unlawful, an “order of mandamus” would force the public body in question to follow a particular course of action, and an order of “prohibition” would prevent the public body from doing something forbidden under the law.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?

In general, filing a civil lawsuit requires the identification of at least one individual victim.⁶⁹ In addition, if the lawsuit is to be filed against the Government, the complainant must in advance of initiating proceedings provide his or her name, address, and description.⁷⁰

As described in further detail below, public interest litigation complaints, proceedings brought to challenge a violation of children's rights or fundamental freedoms under the Bill of Rights, and proceedings brought to enforce the Constitution need not name individual victims.⁷¹ In addition, applications for judicial review may also be brought in some circumstances to challenge a public action without naming an individual victim.

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

Where a number of people have the same interest in a civil case, the court may authorise one or more of those persons to bring a lawsuit on behalf of all interested parties. The party initiating these proceedings must give notice directly to each person who has an interest in the claim or, where this is not

⁶⁶ Civil Procedure Rules, Order 40.

⁶⁷ Constitution, Article 23; Draft Rules for the Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution, Part II.

⁶⁸ Civil Procedure Rules, Order 53; Law Reform Act, Part IV, available at <http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/LawReformActCap26.pdf>.

⁶⁹ Civil Procedure Rules, Order 4.

⁷⁰ Government Proceedings Act, Section 13A.

⁷¹ Constitution, Articles 22, 258; Draft Rules for the Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution, Part II.

practical, place a public advertisement.⁷² Where there are multiple complainants in the same lawsuit, one or more may then be authorised to act on behalf the group.⁷³

In addition, where separate lawsuits relating to the same matter have already been filed, either the complaining parties or the courts may of their own initiative join these together “where common questions of law or fact would arise”.⁷⁴ If this occurs, the presiding court may order that one of the claims be tried as a test case where the issues to be decided are “precisely similar”.⁷⁵

Public interest litigation and proceedings claiming violations of the Bill of Rights or seeking to enforce the Constitution in general may be brought as collective complaints and need not name individual victims. Specifically, the Constitution authorises these kinds of claims to be brought by “a person acting as a member of, or in the interest of, a group or class of persons” or “an association acting in the interest of one or more of its members”.⁷⁶

Judicial review proceedings may be brought to challenge administrative actions by organisations or associations on behalf of their affected members.⁷⁷ Courts may also interpret the usual requirement that a person or have “sufficient interest” to bring a lawsuit more liberally in the context of judicial review, allowing suits to be brought where the complainant is acting in the public interest.⁷⁸

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?

As above, non-governmental organisations may also in some circumstances be permitted to file judicial review proceedings in the public interest. In addition, persons “acting in the public interest” are permitted to file public interest litigation and claims alleging violations of the Bill of Rights or seeking to enforce any other section of the Constitution.⁷⁹

Non-governmental organisations may also seek permission to appear as either an “interested party” or a “friend of the court” in these kinds of proceedings.⁸⁰ Interested parties have a stake or legal interest in the proceedings, but are not directly involved in the case; a friend of the court, or “amicus curiae”, can offer particular expertise in a relevant subject matter.

⁷² Civil Procedure Rules, Order 1, Rule 8.

⁷³ Ibid., Order 1, Rule 12.

⁷⁴ Ibid., Order 1, Rules 1, 3.

⁷⁵ Ibid., Order 1, Rule 38.

⁷⁶ Constitution, Articles 23, 258; Draft Rules for the Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution, Rule 4.

⁷⁷ For more information, see

<http://www.aihja.org/images/users/1/files/kenya.en.0.pdf?PHPSESSID=f83dg63dqj61vokoep4kk44fu1>.

⁷⁸ See, e.g., Misc. Civil Application No. 403 of 1998.

⁷⁹ Constitution, Articles 22, 258; Draft Rules for the Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution, Rule 28.

⁸⁰ Constitution, Article 22; Draft Rules for the Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution, Rule 6.

In general, non-governmental organisations may also seek to intervene in civil cases that have been filed as either an interested party or amicus curiae where they involve claims of rights violations.⁸²

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 lawsuits seeking damages under a certain amount as determined by the Magistrates' Courts' Act and the Chief Justice are filed in the Resident Magistrate's Court, which is subordinate to the High Court.⁸³ Private criminal prosecutions would also generally be initiated before a magistrate, but might be tried in the High Court depending on the nature of the alleged offence.⁸⁴

Qualifying civil proceedings may be initiated in the High Court in Nairobi or a District Registry, and are tried either in the local branch of the High Court or elsewhere should the court so direct.⁸⁵ Notably, however, civil proceedings against the Government must be filed and tried with the High Court of Nairobi unless the court directs otherwise.⁸⁶

Public interest litigation and proceedings claiming violations of the Bill of Rights or the Constitution are filed with the appropriate local branch of the High Court.⁸⁷

Children's courts have jurisdiction to hear both family-related matters and cases where children are accused of violating the law.⁸⁸

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?

As above, legal assistance is not typically available through the court system

⁸¹ See, e.g., http://www.escr-net.org/usr_doc/ESCR-NET_amicus_curiae_intervention_Garissa_FINAL.doc.

⁸² See, e.g., http://www.kenyalawreports.or.ke/family/case_download.php?go=29580681357590819795393.

⁸³ Magistrates' Courts' Act, Section 5.

⁸⁴ Ibid., Section 4; Criminal Procedure Code, Part IV.

⁸⁵ Civil Procedure Rules, Order 47, Rules 1, 5.

⁸⁶ Ibid., Order 47, Rule 5A; Government Proceedings Act, Section 14.

⁸⁷ Draft Rules for the Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution, Rule 7.

⁸⁸ Children's Act, Part VI.

for bringing civil claims.

The Civil Procedure Rules provide for a suits by “paupers” - persons unable to pay legal fees – to be filed and heard before civil courts⁸⁹, although there is no guarantee to legal assistance in so doing.⁹⁰ Article 48 of the Constitution further clarifies that “[t]he State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.” In addition, the Constitution provides that any person initiating court proceedings in relation to the Bill of Rights may do so without being charged court fees.⁹¹

Under the Civil Procedure Act, courts have full discretion to order either the complaining or defending party to pay court costs in civil proceedings.⁹² When reviewing applications for judicial review, the High Court is also specifically empowered to make orders as to court costs.⁹³

Courts examining claims that the Bill of Rights or Constitution have been violated have the discretion to direct that the losing party pay the winning party's costs. In these kinds of cases, courts must take measures “to ensure that ordinary citizens and the indigent have access to the Court to determine their rights and fundamental freedoms and other issues of broad social significance”, and may consider the public interest and the judiciary's role in advancing human rights.⁹⁴

As above, if a child complainant or his or her representative brings a private criminal prosecution and the person accused is convicted, the court may order the offender to pay the costs of the prosecution up to 20,000 shillings in the High Court or 10,000 shillings in the subordinate court. However, by the same token, if the prosecution fails, the court may order that the person bringing the case pay the costs of the person accused up to that same amount.⁹⁵

- 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?

Agreements where payment of legal fees is contingent on the bringing of a successful lawsuit are prohibited.⁹⁶

⁸⁹ Civil Procedure Rules, Order 33.

⁹⁰ For more information, see <http://www.ielrc.org/content/a1104.pdf>.

⁹¹ Constitution, Article 22.

⁹² Civil Procedure Act, Section 27.

⁹³ Civil Procedure Rules, Order 53, Rule 1.

⁹⁴ Draft Rules for the Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution, Rule 24.

⁹⁵ Criminal Procedure Code, Section 171.

⁹⁶ Advocates Act, Section 46, available at <http://www.kenyalawreport.co.ke/Downloads/Acts/Advocates%20Act.pdf>.

It is, however, possible to obtain legal assistance on a pro bono basis or through a children's rights organisation. The Law Society of Kenya⁹⁷ has adopted rules that require lawyers to provide pro bono services, but does not specify how or to what extent these must be offered. The National Legal Aid and Awareness Programme (NALEAP) represents a partnership between the Government, the Law Society and non-governmental organisations, and provides legal assistance and representation to some children in some communities.⁹⁸

Certain organisations working in children's rights may also be able to offer free legal assistance or representation. Among others, these include the Children's Legal Action Network (CLAN)⁹⁹, The CRADLE¹⁰⁰, and Kituo Cha Sheria: The Centre for Legal Empowerment.¹⁰¹

- 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?

Traditional civil proceedings claiming a violation of rights must typically be filed within six years of the violation, although this may be extended in certain cases including those involving fraud or disability.¹⁰² All persons under the age of 21 are considered to be disabled for the purposes of determining when a claim may be brought, which means that the six-year period will not begin running until they reach the age of majority.¹⁰³ In actions for money damages, however, this period may be reduced to three years and children may be required to prove that they were not in the custody of a parent during their childhood.¹⁰⁴

Requests to initiate judicial review proceedings to “remove any judgment, order, decree, conviction or other proceeding for the purpose of it being quashed” must generally be initiated within six months time.¹⁰⁵ If permission is granted, these proceedings must be filed with the High Court within 21 days unless the judge directs otherwise.¹⁰⁶

- 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?

⁹⁷ <http://www.lsk.or.ke/>.

⁹⁸ For more information, see

http://www.humanrights.dk/files/images/Publikationer/Legal_Aid_East_Africa_Dec_2011_DIHR_Study_Final.pdf.

⁹⁹ <http://www.clan.or.ke/>.

¹⁰⁰ <http://www.thecradle.or.ke/resources-publications/the-cradle-publications>.

¹⁰¹ <http://www.kituochasheria.or.ke/>

¹⁰² Limitation of Actions Act, Sections 4, 22, 27, available at

<http://www.kenyalawreport.co.ke/Downloads/Acts/Limitation%20of%20Actions%20Act%20cap%2022.pdf>.

¹⁰³ *Ibid.*, Section 2.

¹⁰⁴ *Ibid.*, Section 22.

¹⁰⁵ Civil Procedure Rules, Order 53, Rule 2.

¹⁰⁶ *Ibid.*, Order 53, Rule 3.

The Evidence Act governs the types of evidence that are admissible in civil proceedings, including documents, recordings and witness testimony.¹⁰⁷ Children are competent to testify in court provided that they can understand and give rational answers to the questions that are put to them.¹⁰⁸ Children who are found not to understand the nature of an oath may give unsworn testimony where they are “of sufficient intelligence” and “understand” the duty of speaking the truth.¹⁰⁹ In addition, under the Children Act, children's courts may allow children to testify as witnesses in any case involving an offence committed by or against a child.¹¹⁰

Witnesses in criminal proceedings are in most cases required to testify publicly in the presence of the alleged offender.¹¹¹ Notably, in criminal cases, evidence given by children must generally be corroborated for a defendant to be convicted, unless the offence is of a sexual nature and the court is “satisfied that the alleged victim is telling the truth.”¹¹²

In general, all witnesses in civil proceedings must testify in open court.¹¹³ Children's court proceedings, however, are generally closed to the public.¹¹⁴ In addition, the name, photography or other identifying information relating to a child cannot be published or revealed in records or reports of children's court proceedings.¹¹⁵

For proceedings alleging breaches of the Bill of Rights, standards of evidence may be relaxed as the Constitution specifies that courts should “if necessary, entertain proceedings on the basis of informal documentation”.¹¹⁶

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

Research from 2004 indicates that the average civil claim takes between two and six years to reach final resolution.¹¹⁷ Since 2010, Civil cases have been allocated to the “small claims” track, the “fast track” or the “multi-track”.¹¹⁸ Small claims cases involve two parties, simple claims, and disputed amounts less than 50,000 shillings; fast track cases have undisputed facts and legal issues, relatively few parties, and would likely be concluded within 180 days after pre-trial preparations; and multi-track cases have complex facts or several parties and would likely be concluded within 240 days after pre-trial

¹⁰⁷ Evidence Act, available at

<http://www.kenyalaw.org/Downloads/GreyBook/10.%20The%20Evidence%20Act.pdf>.

¹⁰⁸ Ibid., Section 125.

¹⁰⁹ Oaths and Statutory Declarations Act, Section 19, available at

http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/OathsandStatutoryDeclarationsAct_Cap15.pdf.

¹¹⁰ Children Act, Section 75.

¹¹¹ Criminal Procedure Code, Rule 194.

¹¹² Evidence Act, Section 125.

¹¹³ Civil Procedure Rules, Order 18, Rule 3.

¹¹⁴ Children Act, Sections 74, 75.

¹¹⁵ Ibid., Section 76.

¹¹⁶ Constitution, Article 22.

¹¹⁷ See <http://www.ielrc.org/content/a1104.pdf>.

¹¹⁸ Civil Procedure Rules, Order 3.

preparations. There are no absolute time requirements for courts to reach decisions in any of these proceedings, but it was hoped that this system of case management tracking, introduced in the Civil Procedure Rules 2010, would dramatically reduce the time from filing to resolution.¹¹⁹

Public interest litigation and proceedings alleging violations of the Bill of Rights or the overall Constitution must be decided “expeditious[ly]”, but no specific time frame is given.¹²⁰

Any person accused of an offence has the right “to have the trial begin and conclude without unreasonable delay”, but there is no precise timing requirement.¹²¹

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

In civil proceedings, decisions from magistrates' or other subordinate courts can be appealed to the High Court following the procedures established in the Civil Procedure Rules.¹²² Certain civil court orders may also be appealed before proceedings have reached a conclusion.¹²³ Appeals to the High Court must generally be filed within 30 days.¹²⁴

High Court decisions may be further appealed to the Court of Appeal where they were contrary to the law, failed to accurately determine a legal issue, or were reached following improper procedure.¹²⁵ As above, persons who are unable to pay the fees to file a civil appeal may proceed without doing so as “paupers”.¹²⁶

Appellate courts may opt to give a final determination, send a case back to a lower court, refer certain issues for trial, take additional evidence or require additional evidence to be taken, or order a new trial.¹²⁷ Appeals to the Court of Appeal are governed by the Court of Appeal Rules under the Appellate Jurisdiction Act.¹²⁸

Criminal convictions, sentences and certain court orders may be appealed from from lower magistrates' or other subordinate courts to a higher subordinate court under the Magistrates' Courts Act and subsequently to the High Court.¹²⁹ Appeals to higher subordinate courts and the High Court must generally be filed within 14 days¹³⁰, and High Court decisions may then

¹¹⁹ See, e.g., <http://www.standardmedia.co.ke/?articleID=2000024765&pageNo=1>.

¹²⁰ Draft Rules for the Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution, Rule 3.

¹²¹ Constitution, Article 50.

¹²² Civil Procedure Act, Part VIII; Civil Procedure Rules, Order 42.

¹²³ Civil Procedure Act, Part VIII; Civil Procedure Rules, Order 43.

¹²⁴ Civil Procedure Act, Section 79G.

¹²⁵ Ibid., Section 72.

¹²⁶ Civil Procedure Rules, Order 44.

¹²⁷ Civil Procedure Act, Section 78.

¹²⁸ Appellate Jurisdiction Act, available at

http://www.kenyalaw.org/Downloads/GreyBook/Appellate_Jurisdiction_Act_%28cap_9%29.pdf.

¹²⁹ Magistrates' Courts Act, Part IV; Criminal Procedure Code, Part XI, Section 347.

¹³⁰ Magistrates' Courts Act, Section 10; Criminal Procedure Code, Section 349.

be further appealed to the Court of Appeal.¹³¹ The right for criminal convictions to be appealed to higher courts is also guaranteed under the Constitution.¹³²

Both civil and criminal proceedings in a children's court may be initially appealed to the High Court and further appealed to the Court of Appeal.¹³³

Decisions from the Court of Appeal may be appealed to the Supreme Court. There is a right of appeal to the Supreme Court in matters relating to the interpretation or application of the Constitution.¹³⁴ Other appeals to the Supreme Court are discretionary and can only be filed with permission of the court. Typically, these are permitted only where the appeal involves a matter of “general public importance” or where a “substantial miscarriage of justice” would otherwise result.¹³⁵ Appeals to the Supreme Court are governed by the Supreme Court Rules under the Supreme Court Act.

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?

Precedent plays an important role in the Kenyan legal system. Courts are bound by their own decisions and those of all higher courts, meaning that the effects of a bad decision for children's rights could be felt for many years. Within the judicial system, negative judgments from higher courts will have more far-reaching effects than such judgments from lower courts.

Where a case has been successfully brought against the Government, there is no guarantee that the court decision will be respected. By some reports, the Government has consistently – even “contemptuously” – ignored judgments that are “politically inconvenient”.¹³⁶ Where a particular arm of the Government has been challenged in judicial review proceedings and ordered to follow a different course of action, there has often been no expectation from higher authorities that the judicial decision be taken into account. Parliament has proved no better, and has in many cases deliberately failed to amend laws that have been declared unconstitutional.

There is, however, hope that the new Constitution will increase respect for the judiciary by holding the Government and Parliament more accountable should they fail to follow a court decision.

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

¹³¹ Magistrates' Courts Act, Section 10; Criminal Procedure Code, Section 361.

¹³² Constitution, Article 50.

¹³³ Children Act, Section 80.

¹³⁴ Constitution, Article 163; Supreme Court Act, Section 15, available at http://www.kenyalawreports.or.ke/klr/fileadmin/pdfdownloads/Acts/SupremeCourt_Act_No.7of_2011_Act.doc.

¹³⁵ Supreme Court Act, Section 16.

¹³⁶ See, e.g., <http://www.ielrc.org/content/a1104.pdf>.

As above, it can be difficult to enforce decisions against public bodies. According to some accounts, the Government often does not defend or respond to civil lawsuits at all, and may later ignore requests to enforce a court order resulting from these proceedings.¹³⁷ Courts may, however, hold government officials in contempt if they refuse to obey judicial decisions.¹³⁸

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.

As part of the subordinate court system, Kadhis' courts are empowered to determine questions of Muslim law relating to personal status, marriage, divorce and inheritance for persons of Muslim faith.¹³⁹ The laws and rules applied in these courts are done so in accordance with Muslim law, although court decisions may be appealed to the secular court system.¹⁴⁰

The Draft Rules for the Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution, which govern public interest litigation and proceedings to challenge a violation of the Bill of Rights or enforce the Constitution, were released on 18 February 2012.¹⁴¹ For the purposes of this report, they have been treated as though they have been finalised and brought into force. A previous version of the Rules issued in 2006 under the old Constitution is also instructive.¹⁴²

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

¹³⁷ See, e.g., Civil Misc Application 173 of 2004.

¹³⁸ Civil Procedure Act, Section 63; Judicature Act, Section 5, available at <http://www.kenyalaw.org/Downloads/GreyBook/3.%20Judicature%20Act.pdf>; see, e.g., HCCC No. 1278 of 2004.

¹³⁹ Kadhis' Courts Act, available at

<http://www.kenyalaw.org/family/statutes/download.php?file=KADHIS%20COURT%20.pdf>.

¹⁴⁰ For more information, see http://archive.uonbi.ac.ke/faculties/schooled/cvs/reference_guide.pdf.

¹⁴¹ For more information, see <http://www.kenyalaw.org/kenyaLawBlog/>.

¹⁴² Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006, available at http://www.kenyalaw.org/LegalNotices/pop_in.php?file=77.