

ACCESS TO JUSTICE FOR CHILDREN: PERU

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

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

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

According to article 55 of the Constitution of Peru, international treaties that have been approved by the Congress and ratified by the President are part of the national law. Therefore, international treaties such as the CRC unquestionably have normative value, are fully enforceable in the national territory, and can be relied on by Peruvian courts.

B. Does the CRC take precedence over national law?

The Constitution of Peru is not clear regarding the precedence of international treaties over national law. Although it is established that, once they have been ratified, international treaties are part of the national law, the Constitution does not provide as such. The hierarchy of laws is established in article 51 of the Constitution, which states that the Constitution prevails over any legal regulation. However, despite the explicit statement of article 51, the fourth Final and Transitory Provision of the Constitution provides the rule that governs for the interpretation of human rights law, which states:

“Provisions relating to the rights and liberties recognized by the Constitution are interpreted in conformity with the Universal Declaration of Human Rights and the pertinent international treaties and agreements ratified by Peru.¹”

Article V of the Constitutional Procedural Code goes beyond and establishes that the constitutional guarantees must be interpreted and applied in accordance not only to international documents, but also to International Courts rulings².

C. Has the CRC been incorporate into national law?

The CRC has been part of the Peruvian national law since 1990, when it was ratified in accordance with article 55 of the Peruvian Constitution, which states: “Treaties concluded by the State and in force are part of national law”.

Similarly, the CRC has provided the basis for the implementation of national policy regarding the protection of the rights of children and adolescents, as well as

¹ Peruvian Constitution, available at: <http://www.tc.gob.pe/legconperu/constitucion.html>.

² Law n. 28237, available at: http://www.tc.gob.pe/Codigo_Procesal.html.

amendments to specific regulations, such as the Children and Adolescents Code and Law No. 27337.

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

The CRC can be directly enforced in Peruvian courts. Additionally, it is increasingly frequent to observe court judgments, mainly by the Constitutional Court, substantiated by international covenants on human rights.

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

Yes, there are many examples of domestic courts in Peru using the CRC and other relevant international instruments. The application of such instruments is more often seen in the Constitutional Court. Some judgments and Constitutional Court criteria are available at the Department of Justice of Peru's web page.³

II. What is the legal status of the child?

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

The Civil Code of Peru establishes that persons who have attained the age of 18 have legal capacity to take legal action or to appear in court. Persons under 18 can only appear in court through their legal representatives. Persons over the age of 16 but under the age of 18 are authorized, under the Civil Code, to appear in court for certain acts of their interest and contract in their own name if authorized by the responsible adults⁴.

Full legal capacity is granted to persons younger than 18 but over the age of 16 who are married or who have received an official qualification that authorizes them to exercise a profession⁵.

Adolescents over the age of 14 are granted the capacity solely to respond to legal actions for recognition of children, demand of pregnancy and childbirth expenses, if and when they become parents⁶.

Representation of minors is governed by the rules of parental authority, guardianship and curatorship.

Parental authority is jointly exercised by the father and the mother during their marriage. Therefore, they are typically a minor's representatives before the national

3

http://www.pj.gob.pe/wps/wcm/connect/cij-juris/s_cij_jurisprudencia_nuevo/as_jurisprudencia_sistematizada/as_consultas_sobre_control_difuso/as_PrincipiodeInteresSuperiordelNino/

⁴ Civil Code, Article 227.

⁵ Civil Code, Articles 42.

⁶ *Ibid*, Article 46.

courts and tribunals. If the parents are not married, parental authority can be exercised by either parent.

“Tutors” may be appointed through a will or public deed. Tutorship can be exercised by the grandparents or other ascendants. In some cases, tutors may be appointed by the Family Council.⁷

Alternatively, minors can be represented by a special curator if the parents’ interests oppose those of the child. This appointment may be requested by the father, the mother, the Public Prosecutor, any other person or ex officio. The curators can be relatives or, in the absence of relatives, the Family Council shall propose any other person.

Another important figure with respect to representation is the State through the Public Prosecutor, which through the powers granted by the Constitution and other applicable rules, can instigate, ex officio or on request, appropriate legal, judicial or extrajudicial actions.

Criminal prosecution is under the monopoly of Public Prosecutors⁸, with a few exceptions of lesser crimes. Private prosecution is not lawful, but the victim or their representatives can protest the archiving of a case⁹.

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?

All children must go to court through representatives. Only in the specific cases provided by law can they bring cases on their own behalf. Therefore, in the majority of cases regarding violations of their rights, underage children go to court through the representation of their parents, guardians or curators or, in the cases set forth by law, the public prosecutor or public defense attorney.

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

As mentioned in Parts II.A and II.B above, parents are typically the legal representatives of minors, according with the Civil Code consistent with the Child and Adolescents Code. It is indicated in regulations that the obligations of parents in the exercise of their parental authority, among other things, is to represent their minor children before courts. On the other hand, these regulations establish circumstances where parents are to be deprived of the exercise of their parental rights if a judge orders a child to be placed in temporary protective custody with a relative or some other person who is not a parent. The judge must notify this situation to the Public Prosecutor.

⁷ *Ibid*, Article 502.

⁸ Penal Code, Article 1.

⁹ *Ibid*, Article 345.

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

Gratuity for the poor or those in need is a principle of the Peruvian justice system¹⁰.

In order to carry out this constitutional provision, the Child and Adolescent Aid (*Defensoría del Niño y del Adolescente*) is entitled to represent and promote minors' interests administratively, within private and public institutions¹¹.

The Ministry of Justice shall designate a number of Public Defense Attorneys specifically for children and adolescents¹².

Victims could also contact the office of the Ombudsman (*Defensoría del Pueblo*), whose organizational structure includes an office which is responsible for cases of child and adolescents regarding sexual violence, child abuse, and abandoned children. This legal assistance is free of charge and the Ombudsman also has the power to investigate, prepare information and make recommendations to the authorities and take part in constitutional proceedings, among other things.

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

As discussed in Part II.A above, a child's parents typically represent the child before a court. In cases where parental authority has been suspended, the judge will be the sole person who makes decisions regarding the rights of the minor. Child assistance will be provided by the state through a public advocate. In criminal cases, the public prosecutor represents the interest of the child.

III. How can children's rights violation be challenged before national courts?

A. If there 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?

The Habeas Corpus and Amparo legal actions are enshrined in the Constitution to remedy any act or omission that is offensive to any constitutional guarantees relating to freedom of movement in the first writ, and all the others, in the later, excepting right to information, which is defended by the Habeas Data¹³. In these cases, the judge can halt the effects of an unconstitutional norm in the concrete case, which shall be submitted to the Supreme Court¹⁴.

If a public official refuses to apply a law, the viable remedy is a Compliance Action.

¹⁰ Constitution, Article 139.16

¹¹ Childhood and Adolescence Code, Article 42.

¹² *Ibid*, Article 146.

¹³ Constitution, Article 200.

¹⁴ Constitutional Procedure Code, Article 3.

The Unconstitutionality Action can be interposed directly to the Supreme Court to fight norms with hierarchy of a law that are not in accordance with the Constitution. The similar Popular Action can be opposed in a district court against an administrative regulation that contradicts the Constitution or a law.

Individuals or groups of individuals, including children, and NGOs may submit petitions to the Inter-American Commission on Human Rights (IACHR),¹⁵ on their behalf or on behalf of third persons, regarding alleged violations of the American Convention on Human Rights¹⁶. A petition can only be lodged after domestic remedies have been exhausted, and normally must be filed within six months after the final judgment.¹⁷ The petition 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, the name(s) of the victim(s) if possible, and whether the petitioner wishes to remain anonymous and the respective reasons.¹⁸ The victim may designate a lawyer or other person to represent him/her before the IACHR, but this is not compulsory.¹⁹ When a petition is declared admissible, the IACHR attempts to reach a “Friendly Settlement” between the parties concerned. If this is not possible, the IACHR will reach a decision on the merits, which consists of non-binding recommendations to the violating State, aimed at ending the human rights violations, making reparations, and/or making changes to the law.

If the State does not comply with the recommendations of the IACHR, the IACHR may refer the case to the Inter-American Court of Human Rights (IACtHR).²⁰ Individuals do not have direct recourse to the Court, and must submit their petitions to the IACHR. The IACtHR interprets and applies the ACHR and other Inter-American human rights treaties and issues a judgment, which may include an order to pay reparations to the victim(s) of human rights violations.²¹ The Court’s judgments are legally binding on the State against which they are made.

B. What Powers courts have to review these violation, and what remedies could they offer?

¹⁵ The Inter-American Commission on Human Rights is one of two bodies within the Organisation of American States (OAS) for the promotion and protection of human rights. The other human rights body is the Inter-American Court of Human Rights. The Commission benefits from a “dual role” as its mandate is found in both the Charter of the Organisation of American States, and in the American Convention on Human Rights (ACHR). As an OAS Charter organ, the IACHR performs functions in relation to all OAS Member States. As an organ of the Convention, its functions are applicable only to States that have ratified the ACHR: Charter of the Organisation of American States, Chapter XV, available at:

http://www.oas.org/dil/treaties_A-41_Charter_of_the_Organization_of_American_States.htm; American Convention on Human Rights, ‘Pact of San Jose, Costa Rica’, Chapter VII, available at: http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights.htm.

¹⁶ American Convention on Human Rights, Article 44.

¹⁷ Rules of Procedure of the Inter-American Commission on Human Rights, Articles 31-32, available at: <http://www.oas.org/en/iachr/mandate/Basics/rulesiachr.asp>.

¹⁸ Ibid., Article 28.

¹⁹ Ibid., Article 23.

²⁰ Ibid., Article 45.

²¹ American Convention on Human Rights, Article 63.

The actions designed specifically to question the validity of a norm (specified in III.A) can lead to the complete nullification of said norm, as well as limitations of application and temporary suspension of its effects.

Minors` Judges can impose fines, forbidal of contact with the victim or attending a place or even daily prison to those who refuse to implement their rulings²², as well as civil compensation and lesser protective measures.

In Habeas Corpus, Amparos, Habeas Data and Compliance Action the judges can impose specific measures for the immediate stopping of the abuses.

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?

Challenging an administrative regulation through a Popular Action does not require naming victims.

The Unconstitutionality Action can be filed only by the President; the National Prosecutor; the Ombudsman; 25 percent of Congress; regional and municipal authorities, relating to norms of their region; Professional Councils, in topics of their interest or; 5.000 citizens or one percent of a local population, the later if the law is only applied locally²³. No specific victims must be named.

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

Minors` diffuse rights implementation can be sought through collective or individual legal actions, submitted to the Minors` Court. Collective and individual claims can be filed by the parents, the legal representatives, the Public Prosecutor, the Public Defense Attorney, the Ombudsman, the Professional Councils, the Educative Centers, Municipal and State Governments and the associations created to protect diffuse rights²⁴.

If the complaint is centered around the constitutional protection of diffuse rights, anyone can present the demand in their own names, even non-profit organisations²⁵.

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

NGO`s can file cases to defend diffuse child rights in their own names, as explained in III.D. Habeas Corpus claims can be filed without the express acquiescence of the beneficiary²⁶.

²² Childhood and Adolescence Code, Article 181.

²³ Constitution, Article 203.

²⁴ Childhood and Adolescence Code, Article 180.

²⁵ Constitutional Procedure Code, Article 40.

²⁶ *Ibid*, Article 26.

To directly intervene in a procedure, the NGO would have to ask for acquiescence of the judge, displaying a lawful interest in the results. Amicus Curiae briefs are widely accepted but have no judicial influence.

IV. Practical Considerations.

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

Specialised Courts have legitimacy to hear cases relating to parental power, custody, support, adoption and those related to diffuse and individual claims of children and adolescents rights violations, as well as judging minors in conflict with criminal law

²⁷.

The initial filing is generally written, following the normal civil procedure.

B. Legal aid/Courts cost. 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 mentioned in Part II.D above, the Constitution of Peru, in article 139 number 16, establishes the principle of gratuity and the gratuity of administration justice.

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?

There are no regulations that prohibit any institution other than the State from bringing or providing free legal assistance. In Peru, there are relevant pro bono foundations that are recognized by the government. One such foundation is "Fundación ProBono".²⁸

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?

Pursuant the Civil Code, the right to bring child actions may expire in time, depending on the act. Some actions expire after ten years, seven years, three years or two years.

²⁷ Childhood and Adolescence Code, Article 160.

²⁸ <http://www.probono.org.pe/servicios-probono>.

Regarding criminal proceedings, an action to claim a crime expires depending on the maximum duration of the penalty, from two to 30 years²⁹.

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

The Civil Procedure Code of Peru establishes which evidence is admissible in a proceeding. Evidence is classified as typical or atypical. Typical forms of evidence are party statements, statements of witnesses, documents such as drawings, photographs, audio and video reproductions, expert evidence and judicial inspection. Atypical forms of evidence are those tests considered scientific or technical that would clarify violations carried out against children.

The Children and Adolescents Code provides identity protection for minors in cases where such minors are victims, perpetrators, participants or witnesses related to a violation, misdemeanor or felony, prohibiting the dissemination of such minors' identities and images in the media. There is special treatment for juvenile witnesses. Expert psychologists ensure a child's emotional integrity in cases where the child is a victim. A child's testimony will be made in private in the presence of the child's representatives and always assisted by a lawyer of the state, which can be an advocate or prosecutor or, in some cases, the judge. In cases of sexual offenses, the presence of the minor is not required to reconstruct the facts. Similarly, protective measures are contemplated in cases where minors have intervention rights or in connection with criminal proceedings, and the judge will determine, according to his or her discretion, if there is grave danger for the victim.

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

There are two types of proceedings regarding criminal processes related to an injury to a child: the summary and the ordinary. The duration of summary proceedings, according to the law, is a total of 238 days. However, according to reports submitted by the Ombudsman and monitoring of some cases in different provinces, the real time for such proceedings is approximately 714 days. For ordinary proceedings, the legal time is 430 days and the actual typical duration is 645 days.

Similarly, for processes that are carried out in civil courts, the legal times for resolution are not respected and are typically extended to over two years.

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

The right to appeal is available and an appeal must be filed within three days of being notified of a court's decision.

²⁹ Penal Code, Article 80.

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?

Flagrant freedom of movement violations can be fought at any time by the constitutional procedures of the Habeas Corpus. Furthermore, the country can be subjected to the Inter-American Human Rights Court.

Political stability is new for the country but is promising. Cases related to organized terrorism and international drug trade will certainly attract passionate responses from the government.

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

Judicial decision are generally complied with, and the judges have comprehensive measures to see them through. The lack of public funds and, consequently, solid institutions, may force the parties to follow up on the officials and expedite the process by their own efforts, which can be hard for people without means, especially children.

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.

Additional regulations that have to be considered in the proceeding of minor are listed below:

- Law N° 27.558. Law of Promotion of Education of Children in Rural Areas (*Ley de Fomento de La Educación de Las Niñas y Adolescentes Rurales*).
- Law 28.704. Modify of Articles of Criminal Code regarding Crimes against the Sexual Freedom and Excluding the Convicted of the Rights of Grace, Pardon and Commutation of Sentence (*Modifica Artículos del Código Penal relativos a los Delitos contra la Libertad Sexual y Excluye a los Sentenciados de los Derechos de Gracia, Indulto y Conmutación de la Pena*).
- Law 28.190. Protect the Minors of the Mendicity (*Protege a los Menores de Edad de la Mendicidad*).
- Ley N° 27.982. Modify the Unique Text Ordered of the Law N°26260, Law the Protection against Family Violence (*Modifica el Texto Único Ordenado de la Ley N° 26260 "Ley de Protección frente a la Violencia Familiar*).
- Law 27.637. Create Temporary Shelter Homes for Minors Victims of Sexual Abuse (*Crea hogares de Refugios Temporales para Menores Víctimas de Violación Sexual*).

- Law N° 28119 Law Prohibiting the Access of Minors to Pornographic Websites (*Ley que Prohíbe el Acceso de Menores de edad a Páginas Web de contenido Pornográfico*).

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