

ACCESS TO JUSTICE FOR CHILDREN: REPUBLIC OF KOREA (SOUTH KOREA)¹

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

- I. **What is the legal status of the Convention on the Rights of the Child (CRC)?**
- A. What is the status of the CRC and other relevant ratified international instruments in the national legal system?

South Korea ratified the CRC on 20 November 1991. In principle, the CRC has direct domestic applicability in the South Korean legal system.² Under Article 6 of the Constitution of the Republic of Korea (Constitution), treaties “duly concluded and promulgated under the Constitution and the generally recognised rules of international law shall have the same effect as the domestic laws” of South Korea.³ South Korean courts have also adopted the view that international human rights laws have effect in domestic law without any express incorporation. However, see part I.D below on the enforceability of the the CRC in the courts.

- B. Does the CRC take precedence over national law?

International human rights instruments, such as the CRC, do not take precedence over national law.⁴ The judiciary adheres to the principles of *rule lex specialis derogat legi generali* (rule of special law abrogates the general law) and *rule lex posterior derogate lege priori* (rule of subsequent law abrogates proceeding law) when international law and domestic law are in conflict.

- C. Has the CRC been incorporated into national law?

The CRC has been partially incorporated into national law. While the CRC has direct effect in South Korean law without any express incorporation, the government still maintains its reservations to Article 21(a) (on ensuring that adoption is subject to competent authorities with due regard to the best interests of the child as the paramount consideration), and Article 40(2)(b)(v) (on ensuring that every child alleged as or accused of having infringed the State party’s penal law has a right to have such a decision reviewed by a higher competent,

¹ Many English translations of Korean statutes which are available do not seem to reflect the latest amendments made to the Korean originals (English translations can be viewed at <http://www.moleg.go.kr/english/korLawEng>, accessed 11 August 2013) and the Korean versions of statutes take precedence over the translated versions. Moreover, English translations are not available for all Korean statutes. The responses in this document refer to the latest Korean original versions of the statutes available on the Ministry of Government Legislation’s website (<http://www.law.go.kr/main.html>, accessed 11 August 2013).

² W. Chang, ‘The Convergence of Constitutions and International Human Rights: Taiwan and South Korea in Comparison’, *North Carolina Journal of International Law and Commercial Regulation*, Vol. 36, 2010-2011, p. 593.

³ Available at:

http://www.ccourt.go.kr/home/att_file/download/Constitution_of_the_Republic_of_Korea.pdf.

⁴ *Supplementary Report to the Republic of Korea’s Second Periodic Report on the Implementation of the Convention on the Rights of the Child*, 2002, p. 5, available at:

http://www.crin.org/docs/resources/treaties/crc.32/South.Korea_ngo_report.pdf.

independent and impartial authority or judicial body according to law) of the Convention. The Committee on the Rights of the Child has recommended that South Korea withdraw these reservations, which “constitute an obstacle to the full application of the Convention”.⁵

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

Even though the Constitution states that ratified treaties and generally recognised rules of international law shall have the same effect as the domestic laws, the South Korean judiciary has been reluctant to make international human rights instruments such as the CRC directly justiciable. It also does not make use of such instruments as a criterion for the interpretation of national laws.⁶ The Committee on the Rights of the Child has expressed concern that South Korean “courts very rarely apply the Convention directly”, and has recommended that the government “undertake measures, including by considering further relevant legislation, to ensure that all the provisions of the Convention are adequately applied in its judicial decisions”.

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

Decisions by South Korean courts referring to the CRC could not be found.

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 and/or their representatives have various options through which they can challenge violations of their rights, including: civil claims; petitions with the National Human Rights Commission; Constitutional complaints; and administrative petitions (see part III.A below).

Chapter II of the Constitution contains several fundamental guarantees which allow any citizen to bring a case to court for certain violations of their rights. These include: the right of any person who is arrested or detained to request the court to review the legality of their arrest or detention;⁸ and the right to claim just compensation from the State or public organisation for damage caused by an unlawful act committed by a public official in the course of official duties.

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While children and/or their representatives may report a rights violation to the police if it amounts to a criminal offence under the domestic legislation, there is no provision for private prosecutions.

⁵ UN Committee on the Rights of the Child, *Concluding observations on the consolidated third and fourth periodic report of the Republic of Korea*, CRC/C/KOR/CO/3-4, 6 October 2011, paras 8-9. Available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fKOR%2fCO%2f3-4&Lang=en.

⁶ *Supplementary Report to the Republic of Korea's Second Periodic Report on the Implementation of the Convention on the Rights of the Child*.

⁷ UN Committee on the Rights of the Child, paras 10-11.

⁸ Constitution, Article 12(6).

⁹ *Ibid.*, Article 29(1).

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 are generally required to bring cases to court through their legal representative. However, they can bring complaints to the National Human Rights Commission on their own (see part III.A below).

Under the Civil Procedure Act (CPA),¹⁰ a minor¹¹ only has the capacity to litigate and conduct procedural acts through their legal representative unless certain circumstances in which a minor is able to conduct procedural acts independently under other provisions apply.¹² Parents or adoptive parents automatically have the right to exercise “parental authority” over their child;¹³ those who exercise parental authority are also the legal representatives of the child.¹⁴

If there is no one with parental authority over the child, or the person with parental authority is unable to exercise the right of representation, a court must appoint a guardian as the legal representative.¹⁵ Furthermore, under the Child Welfare Act, certain persons in positions of authority, including headmasters of schools and heads of child welfare facilities, may apply to the court for the appointment of a guardian for a child if there is no parent or a guardian and they deem it necessary.¹⁶ The child’s views must be respected when making such an application.¹⁷

Parents and guardians both have responsibilities towards the child under the Civil Act. For example, in “exercising parental authority, priority shall be given to the welfare of a child”.¹⁸ The guardian of a child shall have the same duties to protect and educate the child as a person exercising parental authority over the child.¹⁹

Several provisions exist in relation to guardians in order to safeguard the interests of the child. Under the Child Welfare Act, if a person in a position of authority discovers that the guardian has abused the child in any way, they may apply to the court for the replacement of the guardian,²⁰ and the child’s views must be respected when making such an application.²¹ The Family Court may, upon application from the child’s relative or a public prosecutor, replace the guardian if it is deemed necessary for the welfare of the child.²² The Civil Act also prohibits certain persons from becoming a guardian of a child, including those who have brought legal proceedings against the child.

¹⁰ Civil Procedure Act 2009, Article 55, available at:

<http://www.moleg.go.kr/english/korLawEng.jsessionid=aaOJF3sbNFoQiJQfP4A9nQbtyFafNsxGFEdkZHHx8NgEkWBxrDWDfeZ4pkz9UV9V?pstSeq=52676&brdSeq=33>.

¹¹ Majority is attained at the age of 19, or upon entering into marriage. See Civil Act 2009, available at:

<http://www.moleg.go.kr/english/korLawEng?pstSeq=52674>.

¹² See, e.g., Civil Act, Article 6, which allows a minor to dispose of property if they have been permitted to do so by their legal representative and provided that it is within the scope specified by the legal representative.

¹³ Ibid., Article 909(1).

¹⁴ Ibid., Article 911.

¹⁵ Ibid., Articles 928 and 938.

¹⁶ Child Welfare Act, Article 19.

¹⁷ Ibid., Article 19(3).

¹⁸ Civil Act, Article 912.

¹⁹ Ibid., Article 945.

²⁰ Child Welfare Act, Article 19(1) and (2).

²¹ Ibid., Article 19(3).

²² Civil Act, Article 940.

Certain acts taken by a legal representative on behalf of a child against the child's wishes and without their consent may not be effective. For example, a Supreme Court case makes it clear that criminal charges against the perpetrator of sexual assault against a child victim could not have been dropped where the child's father, as legal representative, accepted compensation from the perpetrator in exchange for dropping criminal charges against the child's wishes and without the child's consent.²³

Recent amendments to the Civil Act which came into force on 1 July 2013 allow for the appointment of a person to act as a supervisor of the child's guardian.²⁴ A guardian must obtain permission from the supervisor in order to conduct certain acts on behalf of the child, such as bringing an action to the court.²⁵ If the guardian conducts such acts on behalf of the child without obtaining permission from the supervisor, then either the child or the supervisor may revoke the relevant act of the guardian.²⁶ If there is a conflict of interest between the guardian and the child, then the supervisor will act on behalf of the child.²⁷ In relation to an act for which the child is required to obtain the guardian's permission, if the guardian refuses to give permission even though there is a risk that the child may suffer losses, then the Family Court may grant permission instead of the guardian.²⁸

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

The infant or young child would need to act via their legal representative if they wish to bring a case to court. See part II.B above.

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

Children or their representatives may be eligible to receive free or subsidised legal assistance from the Korea Legal Aid Corporation in civil, criminal, administrative, Constitutional, and family cases (see part IV.B below).

The Constitution guarantees the "right to prompt assistance of counsel" to any person who is arrested or detained. When a criminal defendant is unable to secure legal counsel by their own efforts, the State must assign counsel for the defendant as prescribed by law.²⁹

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)?

As mentioned above, a child must conduct legal acts via their legal representative if they wish to bring a civil claim. There are no other such conditions or limits.

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

²³ 2011Do4451, dated 24 June 2011.

²⁴ Civil Act, Article 940-2.

²⁵ Ibid., Article 950(1).

²⁶ Ibid., Article 950(3).

²⁷ Ibid., Article 940-6.

²⁸ Ibid., Article 950(2).

²⁹ Constitution, Article 12(4).

law, or with the CRC or other relevant ratified international/regional instruments, how can a legal challenge be brought?

National Human Rights Commission

The main method of challenging a violation of the rights of a child is to file a petition with the National Human Rights Commission (Commission).³⁰ The National Human Rights Commission Act³¹ (NHRCA) established the Commission “to ensure the protection of the inviolable and fundamental human rights of all individuals and the promotion of the standards of human rights”.³²

There are two grounds for filing a petition with the Commission: (1) if the victim’s rights guaranteed in Articles 10 to 22³³ in the Constitution are violated in the course of performance of duties by any state organ, local government or detention or protective facility;³⁴ or (2) if there is a “discriminatory act or any violation of the right to equality committed by a legal body, organisation or private individual”.³⁵

Importantly, all children can seek advice through the Commission’s Human Rights Counseling Center, and depending on the nature of the violation, can also file a petition with the Commission.³⁶ Furthermore, a third party (including organisations) possessing knowledge about a human rights violation can file a petition.³⁷ The Commission can also initiate investigations if it “deems that there exists reasonable cause to believe that human rights violation or discriminatory acts have been committed and that the cases are serious”.³⁸

Upon investigation of the matters contained in the petition, the Commission may recommend any of the following to the relevant person or entity:

- cessation of any act which infringes upon the child’s rights;
- remedial actions which include compensation or restoration to the complainant’s original position;
- taking measures to prevent repeated violations occurring in the future; and/or
- reform of policies or relevant laws.³⁹

The entity which has received the Commission’s recommendations must respect the Commission’s recommendations and take steps to implement such recommendations. If it fails to implement the recommendation then it must inform the Commission of the reasons for failing

³⁰ National Human Rights Commission, <http://www.humanrights.go.kr/english/main/index.jsp>, (accessed 3 February 2014).

³¹ 2001, available at: <http://www.refworld.org/docid/3ddd1a634.html>.

³² Ibid., Article 1.

³³ Articles 10 to 22 of the Constitution outline the rights and duties of citizens of South Korea, such as equality before the law (Article 11(1)), right to personal liberty (Article 12), right to privacy (Article 17), freedom of religion (Article 20), and freedom of speech (Article 21(1)).

³⁴ This includes, amongst other things, a juvenile penitentiary, an institution for medical treatment and custody, a juvenile reformatory, a juvenile classification review board, a police station cell or facility. It excludes the legislation of the National Assembly and the trial of a court or the Constitutional Court.

³⁵ NHRCA, Article 30(1).

³⁶ Consolidated third and fourth periodic report of the Republic of Korea to the UN Committee on the Rights of the Child, CRC/C/KOR/3-4, 12 January 2011, p. 15. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fKOR%2f3-4&Lang=en.

³⁷ NHRCA, Article 30.

³⁸ Ibid.

³⁹ Ibid., Article 42.

to do so; the Commission may make public its recommendations and the entity's reasons for failing to implement its recommendations if it deems it is necessary. The Commission cannot force an entity to take any action as it can only make recommendations or present its opinions.

⁴⁰ If the Commission deems that the violation of the child's right amounts to a criminal offence, then it may refer the matter to the Attorney General.⁴¹

The Commission may reject a petition if one or more of the following factors, amongst others, arise once the Commission begins investigation:

- the petition is filed anonymously or under a false name;
- the petition is filed by someone other than the child and it is clear that the child does not want the matter investigated;
- more than one year has passed since the act which violated the child's right took place;
- the Commission determines that it is unsuitable for it to investigate the matters contained in the petition; and/or
- the petition is filed when a trial at any court or a criminal investigation or a procedure for relief of rights under any other statute is in progress or terminated with respect to the same facts giving rise to the petition.⁴² This does not apply in cases of investigation for violation of Articles 123 to 125 of the Criminal Act, which deal with crimes concerning duties of public officials.⁴³

If a victim files a petition with the Commission but it is rejected, then they may file a constitutional complaint with the Constitutional Court.

Constitutional complaint

Under Article 68(1) of the Constitutional Court Act⁴⁴ (CCA), anyone who claims that his/her basic right(s) guaranteed by the Constitution has been violated by an action or inaction of a public authority may file a constitutional complaint. This provision allows a victim direct access to the Constitutional Court. However, the filing of a constitutional complaint is a measure of last resort – the victim must have exhausted all other legal or judicial remedies before filing a constitutional complaint.⁴⁵ It is not possible to file a complaint about court judgments.

Judicial review

The Constitutional Court also has the power to review the constitutionality of laws, but only upon a request by another court *ex officio* or by decision upon a motion by a party.⁴⁶ If the motion is rejected, the party may file a constitutional complaint with the Constitutional Court.⁴⁷

The Supreme Court has the power to make a final review of the constitutionality or legality of administrative decrees, regulations or actions of administrative bodies, when their constitutionality or legality is at issue in proceedings.⁴⁸

⁴⁰ Ibid., Article 25.

⁴¹ Ibid., Article 45.

⁴² Ibid., Article 32(1).

⁴³ Ibid., Article 32.

⁴⁴ Available at: http://en.wikisource.org/wiki/Constitutional_Court_Act_of_South_Korea.

⁴⁵ CCA, Article 68(1).

⁴⁶ Ibid., Article 41; Constitution, Article 111(1).

⁴⁷ CCA, Article 68(2).

⁴⁸ Constitution, Article 107(2).

Administrative petitions

Under Article 26 of the Constitution, all citizens have the right to petition in writing to any governmental agency, and the State must examine all such petitions. Under the Petition Act, it is possible to file a petition with any governmental agency, local authority and entity which exercises administrative functions or individuals / legal entities which have been delegated with administrative duties.⁴⁹ Article 4 sets out the various grounds for filing a petition, including:

- relief from any harm suffered;
- request for disciplinary or corrective action for unfair or illegal acts of civil servants;
- reform or repeal of a law, order, regulation, etc.;
- operation of a facility or a public policy; and/or
- any other matters which are within the remit of public authority.

If the organisation determines that the matters contained in the petition are not matters within its scope, then it must transfer the petition to the relevant organisation and inform the applicant.⁵⁰ A petition will not be accepted if, for example, there are other relief processes in progress under other acts, including other court cases or investigations, or if the name and address of the person filing the petition or the contents of the petition are not sufficiently clear.⁵¹

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

Following review of a constitutional complaint, the Constitutional Court may revoke the exercise of governmental power which infringes the complainant's basic rights or confirm that the inaction of a governmental power is unconstitutional. In the latter case, the relevant governmental authority must take action in accordance with the Court's decision. If the Court deems that the exercise or non-exercise of governmental power is caused by legislation which is unconstitutional, it may declare such law or provisions (as the case may be) unconstitutional. Decisions of the Constitutional Court are binding upon all state agencies and local governments.⁵²

Following judicial review of a law, the Constitutional Court may decide that the law is "non-conforming" with the Constitution, which means the law is not invalidated, but presents a serious constitutional defect. The Court may then require specific amendments by the National Assembly to bring the law into conformity, otherwise the law will be invalidated.⁵³

Similarly, the Supreme Court may decide that an administrative decree, regulation or action of an administrative body is unconstitutional or unlawful.

Civil remedies include compensation for damages arising from an unlawful act.⁵⁴ Punitive damages are not available under South Korean law.

⁴⁹ Article 3, available at: <http://www.law.go.kr/lsInfoP.do?lsiSeq=80346&efYd=20070704#0000>.

⁵⁰ Ibid., Article 7.

⁵¹ Ibid., Article 5.

⁵² CCA, Article 75.

⁵³ R. Quintero, 'Judicial review in the Republic of Korea: an introduction', *Revista de Derecho, Universidad del Norte*, Vol. 34, 2010, pp. 1-17, available at: <http://rcientificas.uninorte.edu.co/index.php/derecho/article/viewFile/1038/860>.

⁵⁴ Civil Act, Article 750.

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?

It is not possible for an individual victim to file a petition with the Commission anonymously.⁵⁵ However, it may be possible for a third party (including organisations) possessing knowledge about a human rights violation to file a petition, which may not require naming specific victims.⁵⁶

Constitutional complaints must indicate the identity of the complainant on the written request for adjudication.⁵⁷

Article 6 of the Petition Act requires the applicant to write their name in the petition. If there is more than one person filing a petition then the petition must include details (including the name) of less than three persons who will be the recipient of the result of the petition.

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

Joint litigation is possible under Chapter 2, Section 2 of the CPA if the factual or legal basis of the claim is the same for the claimants. Article 65 of the CPA states that “where the rights or liabilities forming the object of a lawsuit are common to many persons, or are generated by the same factual or legal causes” such persons may join together in the lawsuit as co-litigants. One or more persons may be appointed among them to represent all such persons, and the judgment from the lawsuit will benefit all those persons who have participated in the appointment process and have consented to the lawsuit.

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?

A third party (including non-governmental organisations (NGOs)) possessing knowledge about a human rights violation can file a petition with the Commission.⁵⁸ Apart from this, NGOs are not permitted to file challenges to potential human rights violations on their own.

However, the CPA allows any third persons “interested in the result of a lawsuit” to intervene in the lawsuit in order to assist either party, unless their intervention would cause significant delays.⁵⁹ The third party wishing to intervene must file an application for intervention with the court where the relevant lawsuit is pending, clearly stating its grounds for such intervention.⁶⁰ If one party objects to the third party’s intervention, then the court must rule on whether such intervention is permissible.⁶¹ The third party intervening in the lawsuit may “conduct the attack, defence, objection, appeal and all other procedural acts”.⁶² Importantly, however, in cases where the intervening party’s procedural acts are contrary to those acts of the person conducting the lawsuit, the third party’s procedural acts will not take any effect.⁶³

⁵⁵ NHRCA, Article 32(1).

⁵⁶ Ibid., Article 30.

⁵⁷ CCA, Article 71.

⁵⁸ NHRCA, Article 30.

⁵⁹ CPA, Article 71.

⁶⁰ Ibid., Article 72(1).

⁶¹ Ibid., Article 73(1).

⁶² CPA, Article 76.

⁶³ Ibid., Article 76(2).

If a victim files a constitutional complaint under the CCA, public organisations that are interested in the constitutional complaint can present an amicus brief to the court.⁶⁴

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 can be filed at a court at the place where the defendant is resident. A lawsuit concerning a tort may be brought to the court in the place of the act.⁶⁵ The relevant court for civil cases will be a Municipal Court or District Court, depending on the amount that is claimed.

Constitutional complaints can be filed directly with the Constitutional Court. The written request for adjudication on a constitutional complaint must include details of: (1) the complainant and their counsel; (2) the infringed rights; (3) exercise or non-exercise of governmental power by which the infringement of the right is caused; (4) the bases of the request; and (5) other necessary matters.⁶⁶ The document attesting the appointment of a counsel or a written notification of appointment of the court-appointed counsel must be attached to the written request.

The victim may file a case with the Family Court if the violation of their rights took place within the family.⁶⁷ If the violation of the victim's rights amounts to a criminal offence, then the perpetrator would be tried in the criminal courts.

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?

See part II.D above.

The Korea Legal Aid Corporation was established by the Legal Aid Act⁶⁸ to provide free legal advice and representation "to those who are not fully covered with equal justice owing to their lack of legal knowledge or economic disadvantage".⁶⁹

KLAC's website sets out those who are eligible for legal aid, including:

- victims of domestic or sexual violence, sexual exploitation and other victims of crime;
- students who are victims of school violence;
- children protected under child welfare;

⁶⁴ CCA, Article 74.

⁶⁵ CPA, Article 18(1).

⁶⁶ CCA, Article 71(1).

⁶⁷ 'UN Study on Violence against Children – Response to questionnaire received from the Government of the Republic of Korea', <http://www2.ohchr.org/english/bodies/CRC/docs/study/responses/ROK.pdf>, (last accessed on 10 August 2013).

⁶⁸ Article 8.

⁶⁹ Korea Legal Aid Corporation, <http://eng.klac.or.kr/english/infor/01.php>, (accessed 3 February 2014).

- orphaned children and disabled persons;
- children in juvenile court cases; and
- citizens or resident foreign nationals who are experiencing hardship in their lives or are unable to seek legal remedies by themselves.⁷⁰

To apply for legal aid, the applicant must submit various documents, such as their national identity card, proof that they are eligible for legal aid, and documents proving their case, to their nearest KLAC centre. The LAA allows KLAC to request relevant information from public authorities to determine whether the applicant is eligible for legal aid.⁷¹ KLAC will then conduct a review of the facts and determine the likelihood of success, possibility of enforcement, and whether to recommend settlement or progress to a court case.⁷² Once the case is over, the child may still need to repay some money, whether or not their case was successful. KLAC may recover this money directly from the losing side if the child is successful or, taking various circumstances into account, it may allow the applicant not to repay any money or agree to repayment in installments.

Under the CPA, a court may grant litigation aid to a person who is unable to pay the costs of a lawsuit unless “it is obvious that the lawsuit will fail”.⁷³ The court may defer the payment of litigation costs and/or attorney’s fees, exempt the recipient of aid from providing security for the costs of a lawsuit, and/or defer or exempt other expenses.⁷⁴ The costs deferred may be recovered directly from the other side if it has been ordered by the court to pay the party receiving litigation aid.⁷⁵

Regarding petitions to the Commission, the Commission may, if deemed necessary to investigate petitions, obtain evidence or relieve victims, request KLAC or any other institution to render legal aid to the victims.⁷⁶

Finally, under the CCA, anyone who wishes to file a constitutional complaint but has limited financial means to do so may request the Constitutional Court to appoint a court-appointed counsel. Also, the court may appoint a court-appointed counsel if it deems the case to be necessary for the public interest.⁷⁷

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?

The Korean Bar Association⁷⁸ offers legal aid to certain persons, including children, who may be eligible for free legal representation or a reduction of fees.

⁷⁰ Korea Legal Aid Corporation, <http://eng.klac.or.kr/english/infor/03.php>, (accessed 3 February 2014).

⁷¹ Article 22-2.

⁷² For a useful diagram showing the overview of the process, see <http://www.klac.or.kr/html/view.do?code=168> and <http://eng.klac.or.kr/english/infor/05.php> (accessed 10 August 2013).

⁷³ CPA, Articles 128-133.

⁷⁴ Ibid., Article 128(1).

⁷⁵ Ibid., Article 132.

⁷⁶ NHRCA, Article 47.

⁷⁷ CCA, Article 70.

⁷⁸ <http://www.koreanbar.or.kr/eng/>, (accessed 11 August 2013).

The Korea Legal Aid Center for Family Relations⁷⁹ offers free or subsidised legal advice, mainly in family law matters such as domestic violence, but also other civil and criminal matters including sexual violence or sexual exploitation.

There are also One-Stop Support Centres across the country which aim to help victims of sexual offences and school violence.⁸⁰ Anyone may contact these centres directly to obtain support. They offer various support services to victims, including referral to KLAC for free legal assistance.

Similarly, Crisis Intervention Centres (such as the Seoul Crisis Intervention Center for Women and Children⁸¹) offer support to victims of sexual violence, prostitution or domestic violence. There are also centres which deal only with child victims of sexual offences.⁸² These centres can be contacted directly by children and offer legal advice and support on criminal or civil cases through in-house lawyers and can refer victims to KLAC for free legal assistance.

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?

If a victim wishes to bring a tort claim, then he/she must bring a claim either within 10 years from the date the tort was committed, or three years from the date when the claimant became aware of the damage and identity of the defendant, whichever is shorter.⁸³

Petitions to the Commission must be filed within one year of the offence taking place – otherwise, this may serve as a basis for the possible rejection of the case. If the Commission, however, decides to investigate the case despite the expiry of the statutory limitation period for public or civil prosecution, then the investigation may continue.

A constitutional complaint must be filed within 90 days after the existence of the cause is known, and within one year after the cause occurs.⁸⁴ If the constitutional complaint is filed after seeking other forms of relief, then the complainant must file within 30 days after the final decision in the previous steps in the process is notified to him/her.

The various statutory limitation periods for criminal offences are set out in the Criminal Procedures Act.⁸⁵ Article 249 sets out the various limitation periods, which differ depending on the maximum term that the offence may attract.

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?

Witnesses are usually required to take an oath before the court. However, if the child is

⁷⁹ <http://lawhome.or.kr/law1/eng/sub01/body01.asp>, (accessed 11 August 2013).

⁸⁰ <http://www.smsonestop.or.kr/main/main.asp>, (accessed 11 August 2013).

⁸¹ <http://www.help0365.or.kr/eng.php>, (accessed 11 August 2013).

⁸² http://www.child1375.or.kr/introduce/introduce_01.asp, (accessed 11 August 2013).

⁸³ Practical Law Company, 'Litigation and Enforcement in South Korea: overview', http://dispute.practicallaw.com/cs/Satellite/8-381-3681?q=*%&qp=&qo+&qe=, (accessed 11 August 2013).

⁸⁴ CCA, Article 69.

⁸⁵ Available at: <http://www.oecd.org/site/adboecdanti-corruptioninitiative/46816481.pdf>.

required to be a witness in criminal proceedings, then the Criminal Procedures Act⁸⁶ (CrPA) sets out some rules which deal with child witnesses. For example, Article 159 provides that children under 16 years of age may be questioned without taking an oath. Article 165 allows the court to take into account, amongst other things, the age of the witness and question him/her at a place other than the court. Article 165-2 also allows the court to question the witness via video in certain circumstances, including children who are victims of crimes under the Child Welfare Act and Act on Protection of Youth from Sexual Exploitation. Article 163-2 also enables the court to allow the victim to be accompanied by someone that the victim trusts upon application from the victim, legal representative or the prosecutor.

The Supreme Court has stated that various factors must be taken into account to determine the credibility of a child's testimony, including, for example:

- the age of the child;
- the lapse of time since the incident;
- whether there was a possibility that the child's guardians or the persons investigating the incident who had initial contact with the victim may have given the child false information or could have led to altering of the child's recollection of the incident by repeatedly asking questions to induce a specific answer; and
- whether the child could have been influenced by testimony of other children involved.⁸⁷

Furthermore, the Act on the Protection of Juveniles from Sexual Exploitation provides for the privacy of child victims of sex offences. Article 18 provides that government officials who take part in an investigation or trial of such a case must not disclose any identifying information of the child involved. Additionally, no one is permitted to print or disclose information specific to the child involved in newspapers or on an information and communications network.

Despite these provisions, the Committee on the Rights of the Child has observed that the questioning and legal process for child victims of sex offences remain inadequate, highlighting, amongst other things, that: courts frequently do not recognise the validity of video testimony; victims and witnesses are often subject to cross-examination in conditions that are not adequately sensitive; reconciliation with offenders is requested without the consent of the victim; and there are inadequate safeguards for the privacy of the victim. The Committee has recommended that the government "further develop child-friendly procedural rules" and ensure "the child victim is treated with greater respect for his or her privacy and dignity".⁸⁸

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

Once a governmental organisation receives a petition, it must, unless there are exceptional circumstances, inform the outcome of the petition to the applicant within 90 days.⁸⁹ The organisation may extend this 90-day period once for a period of less than 60 days, but it must

⁸⁶ Ibid.

⁸⁷ Supreme Court of South Korea, 2006Do2520, dated 10 July 2008. More recently, this was referred to in the Supreme Court judgment of 2012Do3893, which also ruled that submission of videotapes of child victims in a sexual offence case does not violate Article 10 (right to human dignity) and Article 11 (equality before the law and prohibition of discrimination) of the Constitution. The Supreme Court also confirmed that upon application from the prosecutor, the accused or the victim or *ex officio*, it may summon the person who gave the videotaped testimony to attend in person for examination under Articles 294 and 295 of the CrPA.

⁸⁸ UN Committee on the Rights of the Child, paras 82-83.

⁸⁹ Petition Act, Article 9.

inform the applicant of the reason and timeframe without delay.⁹⁰

If the violation is reported to the police, then the police must investigate the crime within 30 days of receipt of the victim filing his/her intention to press charges. The trial will take place within two months. Trial at a court of first instance may take up to six months, up to four months at a court of second instance, and up to two months at a court of third instance.⁹¹

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

In a civil trial, the child and their legal representative may appeal to a High Court, which will review the lower court's decision, including a re-examination of evidence or witnesses if necessary. After the High Court, the appeal must be made to the Supreme Court, which is the highest court in South Korea. The Supreme Court will only review cases if the interpretation of the law is in question; no re-examination of evidence will take place unless the lower court misapplied the rules relating to evidence.

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?

Korean courts do not employ the concept of *stare decisis*. However, Supreme Court decisions tend to strongly influence decisions of lower courts in similar cases.⁹²

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

One of the main problems in enforcing a positive decision from the Commission is that the failure to implement the Commission's recommendations does not attract real sanctions. The main deterrents are those provisions in domestic legislation which criminalise abuse of children's rights.

Furthermore, there are administrative issues in enforcing a positive decision. Recently, cases of abuse of children in care facilities have attracted media attention. In such cases, the courts are reluctant to impose heavy sanctions as, for example, it would lead to a breakdown of "family relations" which have formed amongst the children residing in such facilities. In addition, even though Article 56 of the Child Welfare Act explicitly states that if cases of abuse of children have been verified in the care facilities then certain persons in positions of authority, including the Minister of Health and Welfare and the mayor, may order the closure of such facilities or replacement of the manager of such facilities, this happens very rarely in practice.

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.

Even though parents are the perpetrators in the majority of cases of child abuse in South Korea,⁹³ there is very little interest in domestic child abuse. The attitude that parents are

⁹⁰ Ibid., Article 9(3).

⁹¹ Seoul Crisis Intervention Center for Women and Children, 'Frequently Asked Questions', http://www.help0365.or.kr/bbs/board.php?bo_table=faq&wr_id=1&page=2, (accessed 11 August 2013).

⁹² Y. Kwon, 'Litigating in Korea: A General Overview of the Korean Civil Procedure', *Journal of Korean Law*, Vol. 7, No. 1, 2007.

⁹³ National Child Protection Agency, http://korea1391.org/new_index, (accessed 25 July 2013).

entitled to discipline and punish their child in any way they see fit is widespread, according to the director of the National Child Protection Agency.⁹⁴ The Korean judiciary has been criticised for taking a very soft approach towards parents who abuse or neglect their children. Generally, they take the view that it is preferable for children to grow up under parents even if they are abusive, rather than grow up in a care home.

Another problem is the lack of legal forum for children or their legal representatives to bring cases. Although numerous Family Courts in South Korea have divisions dealing with children, it focuses on dealing with cases of juvenile delinquency, rather than cases of breach of children's rights such as abuse or neglect.

The government body which deals with children's welfare and rights is a division of the Bureau of Population and Child Policy of the Ministry of Health and Welfare, which is inadequate to deal with the wide-ranging scope of policies that affect children.

There is also no independent body that monitors children's rights. Although the South Korean branch of the NGO, Good Neighbors,⁹⁵ has been entrusted with running the Korea Monitoring Center for Children's Rights⁹⁶ (KMCCR), this body is not independent and it does not have sufficient budget or resources.

Unfortunately, in cases of children who are abused in care facilities, they often have no legal representatives or it is not clear who their legal representatives/guardians are so there may be no one to bring cases on their behalf. The problem is also compounded by the fact that there are several statutes which deal with children's rights, which means that it is not always clear under which legislation or how the perpetrator should be punished.⁹⁷

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

⁹⁴ Ibid.; Translated from article taken from <http://www.womennews.co.kr/news/58367> (accessed 25 July 2013).

⁹⁵ http://www.goodneighbors.kr/en_goodneighbors, (accessed 3 February 2014).

⁹⁶ <http://www.childrights.kr>, (accessed 3 February 2014).

⁹⁷ Translated from article taken from <http://news.naver.com/main/read.nhn?mode=LSD&mid=sec&sid1=102&oid=003&aid=0005182411>, (accessed 11 August 2013).