

## ACCESS TO JUSTICE FOR CHILDREN: SPAIN

*This report was produced by White & Case LLP in January 2015 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?**

International conventions and treaties, such as the CRC, are automatically incorporated into the Spanish domestic legal system once they are ratified and published in the State Official Gazette (*Boletín Oficial del Estado*) in accordance with Article 96.1 of the Spanish Constitution.<sup>1</sup> As Spain has ratified and published the CRC,<sup>2</sup> private individuals may invoke the rights granted to them by the CRC directly before Spanish judges and courts of law. Further, such legal standing is reinforced by Article 39.4 of the Spanish Constitution, which specifically states that “children shall have the protection granted to them in international agreements.”

#### **B. Does the CRC take precedence over national law?**

Yes, the CRC takes precedence over national law.<sup>3</sup> Pursuant to Article 96.1 of the Spanish Constitution, validly ratified international laws can only be amended or modified in accordance with the rules provided in the treaties themselves or by general rules of international law. National law must be interpreted in a manner consistent with the CRC and other international human rights treaties. In practice, however, there is a lack of awareness of the CRC in Spain, including among judges, and court decisions are typically based on Spanish national or regional law.<sup>4</sup>

#### **C. Has the CRC been incorporated into national law?**

The CRC has been incorporated into Spanish national law in accordance with Article 96.1 of the Spanish Constitution. Spain ratified the CRC on 30 November 1990 and it was published in the State Official Gazette on 31 December 1990.<sup>5</sup>

Following the CRC’s incorporation into national law, Spain also bolstered its child rights legislation by passing the following laws:

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<sup>1</sup> The Spanish Constitution of 1978, available at: <http://www.congreso.es/consti/constitucion/indice/>.

<sup>2</sup> Boletín Oficial del Estado: Lunes 31 de Diciembre de 1990, Núm. 313, available at: <https://www.boe.es/boe/dias/1990/12/31/>.

<sup>3</sup> UNICEF, *The UN Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries*, November 2012, p. 64, available at: [http://www.unicef.org.uk/Documents/Publications/UNICEFUK\\_2012CRCImplementationreport.pdf](http://www.unicef.org.uk/Documents/Publications/UNICEFUK_2012CRCImplementationreport.pdf).

<sup>4</sup> *Ibid.*, p. 67.

<sup>5</sup> Boletín Oficial del Estado: Lunes 31 de Diciembre de 1990, Núm. 313.

- Organic Law on the Legal Protection of Children and Young People (*Ley Orgánica 1/1996*), which establishes the legal rights of children and young people in national law in accordance with the CRC.<sup>6</sup>
- Organic Law 5/2000 (*Ley Orgánica 5/2000*)<sup>7</sup> on children's criminal responsibility, which sets out Spain's juvenile justice procedures and regulations and also awards primacy to the principle of the best interest of the child.<sup>8</sup>
- Organic Law 2/2006 (*Ley Orgánica 2/2006*)<sup>9</sup> on education, which incorporates Article 29 of the CRC into Spanish law.
- Organic Law No. 54/2007 (*Ley Orgánica 54/2007*)<sup>10</sup> on international adoption, which modified Article 154 of the Civil Code to fully rule out the ambiguous possibility of corporal punishment of children by their parents.
- Organic Law 2/2009, which amended Organic Law 5/2000 (*Ley Orgánica 5/2000*)<sup>11</sup> on the rights of immigrants.
- Royal Decree 557/2011 (*Real Decreto 557/2011*)<sup>12</sup> which, together with Organic Law 2/2009, introduces the "best interest principle" for unaccompanied immigrant children and guarantees the right of children to be informed and heard during deportation proceedings.<sup>13</sup>

While the Spanish central administration has authority to legislate over commercial and criminal issues, the autonomous communities of Spain (17 autonomous communities and two autonomous cities in total) may legislate in certain matters involving civil law. Therefore, provisions related to children's rights may vary among different regions. Yet, this does not affect children's fundamental rights.<sup>14</sup>

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

Yes, the CRC can be invoked in the Spanish courts by individuals, either directly or by means of conforming interpretation of Spanish regional or state legislation.<sup>15</sup> Please see the answer to the next question for concrete examples of how Spanish courts have invoked the CRC in the past.

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

<sup>6</sup> Available at: <http://www.boe.es/buscar/doc.php?id=BOE-A-1996-1069>; UNICEF, *The UN Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries*, p. 64.

<sup>7</sup> Available at: [http://noticias.juridicas.com/base\\_datos/ Penal/lo5-2000.html](http://noticias.juridicas.com/base_datos/ Penal/lo5-2000.html).

<sup>8</sup> UNICEF, *The UN Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries*, p. 65.

<sup>9</sup> Available at: [http://noticias.juridicas.com/base\\_datos/Admin/lo2-2006.html](http://noticias.juridicas.com/base_datos/Admin/lo2-2006.html).

<sup>10</sup> Available at: [http://noticias.juridicas.com/base\\_datos/Privado/154-2007.html](http://noticias.juridicas.com/base_datos/Privado/154-2007.html).

<sup>11</sup> Available at: [http://noticias.juridicas.com/base\\_datos/ Penal/lo5-2000.html](http://noticias.juridicas.com/base_datos/ Penal/lo5-2000.html).

<sup>12</sup> Available at: [http://www.boe.es/diario\\_boe/txt.php?id=BOE-A-2011-10599](http://www.boe.es/diario_boe/txt.php?id=BOE-A-2011-10599).

<sup>13</sup> UNICEF, *The UN Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries*, p. 66.

<sup>14</sup> World Organisation Against Torture, *Rights of the Child in Spain – Report on the Implementation of the Convention on the Rights of the Child by Spain*, p. 4, available at: <http://www.omct.org/files/2001/11/1155/spainchildren2002.pdf>.

<sup>15</sup> World Organisation Against Torture, *Rights of the Child in Spain – Report on the Implementation of the Convention on the Rights of the Child by Spain*, p. 3.

Yes, the CRC has been used as a source of law by various Spanish courts. The following are two notable examples of cases in which courts have relied on the CRC and other international treaties:

- Constitutional Court (*Tribunal Constitucional*) decision no. 236/2007, of 7 November 2007: The Constitutional Court invoked children's right to education stemming from Article 28 of the CRC, the Spanish Constitution, and the Universal Declaration of Human Rights. It concluded that a provision of Navarre's Regional Law on the rights of foreigners which required that a child must be a "resident" in order to have the right to access non-compulsory education was unconstitutional and contrary to Article 28 of the CRC. The Court held that the right to education encompasses all levels of education and is granted to all persons, irrespective of their nationality and their legal status in Spain. Migrant children are therefore entitled to non-compulsory education as well and their right must not be made conditional on their administrative status or any other circumstance.<sup>16</sup>
- Supreme Court (*Tribunal Supremo*) decision no. 36/2012 of 6 February 2012: The Supreme Court directly applied Article 9.2 of the CRC which provides that children have the right to live and have contact with their parents, unless certain factors indicate that the state should intervene. The Court granted the adoption of a child without the consent of the biological parents as the child had been declared homeless and the biological parents had been deprived of their parental rights.<sup>17</sup>

## II. What is the legal status of the child?

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

Under the Civil Procedure Act (*Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil*) children cannot directly bring cases in domestic courts.<sup>18</sup> Instead a representative must appear before the courts on their behalf.<sup>19</sup> According to the Civil Code (*Real Decreto de 24 de julio de 1889, texto de la edición del Código Civil*), parents are the legal representatives of their children if their parental guardianship is in force.<sup>20</sup> If not, any other adult duly appointed as guardian or holding the child's legal representation may act as the child's representative.

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<sup>16</sup> Boletín Oficial del Estado: número 295, 10 December 2007, available at: [https://www.boe.es/diario\\_boe/txt.php?id=BOE-T-2007-21162](https://www.boe.es/diario_boe/txt.php?id=BOE-T-2007-21162); UNICEF, *Judicial Implementation of Article 3 of the Convention on the Rights of the Child in Europe*, June 2012, p. 79, available at: <http://www.statewatch.org/news/2012/nov/rights-the-child-in-europe.pdf>.

<sup>17</sup> Tribunal Supremo, Sala de lo Civil, Sentencia 36/2012, 6 February 2012, available at: <http://laadministracionaldia.inap.es/noticia.asp?id=1058079>.

<sup>18</sup> Civil Procedure Act, Art. 7.1, available at: [http://noticias.juridicas.com/base\\_datos/Privado/11-2000.html](http://noticias.juridicas.com/base_datos/Privado/11-2000.html).

<sup>19</sup> Civil Procedure Act, Art. 7.2.

<sup>20</sup> Civil Code, Art. 162, available at: [http://noticias.juridicas.com/base\\_datos/Privado/cc.html](http://noticias.juridicas.com/base_datos/Privado/cc.html).

Criminal cases follow the same pattern. As representation is not regulated in the Criminal Procedure Act (*Real Decreto de 14 de septiembre de 1882, aprobatorio de la Ley de Enjuiciamiento Criminal*),<sup>21</sup> the Civil Procedure Act applies: children cannot directly bring cases to challenge violations of their rights and their parents or guardians must act on their behalf.<sup>22</sup> The Public Prosecutor (*Ministerio Fiscal*) may also intervene on behalf of children, as it must bring legal action whenever a crime has been committed, and it may also intervene in some civil proceedings.<sup>23</sup>

In decision no. 183/2008 of 22 December 2008, the Constitutional Court (*Tribunal Constitucional*) expressly held that a child's right to effective judicial remedies must not be compromised when his or her interests are opposed to those of the guardian.<sup>24</sup> The Constitutional Court held that a child must have effective access to justice and that a child who is directly affected by a decision must not be effectively prevented from challenging that decision. Children may therefore appoint and instruct an attorney to act on his or her behalf, even if their parents reside abroad and they are under the guardianship of a public body.<sup>25</sup> Given this binding precedent, children may appoint an attorney to act on their behalf to challenge administrative decisions, e.g. where the deportation of a migrant child is ordered by the authorities. Children do not have the capacity, however, to appear directly and on their own behalf before the Spanish courts.

G. 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?

As shown in section II.A. above, children cannot bring cases before the courts on their own behalf in Spain because they do not have procedural capacity to do so. Article 162 of the Spanish Civil Code regulates legal representation of children. It states that, as a general rule, parents with active parental authority shall have the power to legally represent their children. Article 162 also establishes three exceptions to parents' authority to act as legal representatives of their children: (i) acts relating to the child's personality or those which the child may perform by him or herself in accordance with the law or his maturity;<sup>26</sup> (ii) acts involving a conflict of interest between parents and child;<sup>27</sup> and (iii) acts relating to property

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<sup>21</sup> Criminal Procedure Act, available at: [http://noticias.juridicas.com/base\\_datos/Penal/lecr.html](http://noticias.juridicas.com/base_datos/Penal/lecr.html).

<sup>22</sup> Civil Procedure Act, Art. 7.

<sup>23</sup> Criminal Procedure Act, Art. 773.

<sup>24</sup> Tribunal Constitucional, Sentencia 183/2008, 22 December 2008, available at:

<http://hj.tribunalconstitucional.es/HJ/es-ES/Resolucion/Show/SENTENCIA/2008/183>.

<sup>25</sup> Ibid.; UNICEF, *Judicial Implementation of Article 3 of the Convention on the Rights of the Child in Europe*, pp. 97-98.

<sup>26</sup> E.g., (1) children may marry with judicial authorisation at age 14 according to Articles 46.1 and 48.2 of the Spanish Civil Code, (2) they can exercise parental responsibility with regard to their own children, assisted by parents or legal guardians according to Article 157 of the Spanish Civil Code and (3) may dispose of their property in a will starting at age 14 according to Article 663.1 of the Spanish Civil Code.

<sup>27</sup> If a child has two parents who hold parental authority and the conflict exists only for one of the parents, the other parent may represent the child in legal proceedings, according to Article 163 of the Spanish Civil Code.

excluded from the parents' administration.<sup>28</sup>

Article 163 of the Spanish Civil Code further states that an emancipated or a non-emancipated child whose interests are opposed to those of his or her parents shall be appointed a litigation agent (*defensor*) who is then tasked with representing him or her in court.

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

Typically, young children, whose interests are not opposed to those of their parents are represented by their parents, assuming at least one parent holds parental authority, as laid out in section II.A. above.

If a public entity entrusted with the protection of children notices that a child is in a situation of neglect, Article 172 of the Spanish Civil Code provides that such an entity shall assume guardianship of the child. Such guardianship involves the suspension of the parents' parental authority (although those actions performed by the parents or guardian on behalf of the minor which benefit the minor will still be valid) and an assumption of such authority by the respective public entity.<sup>29</sup> Hence, a child's guardian may also bring a case on the child's behalf if the latter has been declared to be in a state of neglect.

Public Prosecutors also play an important role in the legal representation of children in Spain. In accordance with Article 174 of the Spanish Civil Code, the Public Prosecutor is in charge of the higher supervision of guardianship, foster care and custody of neglected children. The Public Prosecutor can promote protective measures of a child by the Child Protection Services and, if necessary, appear before a court on behalf of children. The Public Prosecutor must act on the child's behalf if the child lacks other legal representatives.<sup>30</sup>

When children are victims of a criminal offense, the Public Prosecutor is in charge of promoting due compensation in their name. The Public Prosecutor may also initiate investigations *ex officio* in civil cases where a child is suffering from neglect, deprivation or abandonment. Lastly, the Public Prosecutor may bring legal action *ex officio* when the honor or privacy of a child has been infringed by mass media<sup>31</sup> or if other fundamental rights of a child have been violated.<sup>32</sup>

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<sup>28</sup> Civil Code, Art. 162.

<sup>29</sup> Cristina González Beilfuss, University of Barcelona, *Parental Responsibilities – National Report: Spain*, p. 18, available at: <http://ceflonline.net/wp-content/uploads/Spain-Parental-Responsibilities.pdf>.

<sup>30</sup> Council of Europe, *Answers to the Questionnaire on Principles of Public Prosecution as Regards Juvenile Justice (Spain)*, p. 4, available at: [http://www.coe.int/t/dghl/cooperation/ccpe/opinions/travaux/OP\\_5\\_Question\\_Espagne.pdf](http://www.coe.int/t/dghl/cooperation/ccpe/opinions/travaux/OP_5_Question_Espagne.pdf).

<sup>31</sup> Article 4 of the Spanish Organic Law 1/1996 for the Legal Protection of Minors, available at: [http://noticias.juridicas.com/base\\_datos/Privado/lo1-1996.html](http://noticias.juridicas.com/base_datos/Privado/lo1-1996.html).

<sup>32</sup> Council of Europe, *Answers to the Questionnaire on Principles of Public Prosecution as Regards Juvenile Justice (Spain)*, p. 5.

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

All EU and non-EU citizens who legally reside in Spain or have had their entitlement to legal aid recognised by an international convention and who cannot afford the cost of a lawyer have the right to free legal aid (*asistencia jurídica gratuita*) in Spain.<sup>33</sup> To qualify, a person's monthly income, together with that of his or her family, must not be more than (i) two times the Public Income Index (*Indicador Público de Renta de Efectos Múltiples - IPREM*) if the person lives with relatives, (ii) two and a half times of the Public Income Index if the person lives in a family of up to three members, or (iii) three times the Public Income Index if the person lives in a family of four or more members. The Public Income Index is set by the Government, and is currently EUR 532.51/month.<sup>34</sup> According to the Free Legal Assistance law,<sup>35</sup> legal aid includes the following:

- Free legal assistance for children while they are under arrest or in prison during judicial investigations.
- Free legal assistance during legal proceedings when legal assistance is mandatory (civil claims involving sums greater than EUR 2,000 or criminal procedures for major offenses). A lawyer's intervention may also be ordered by a judge if he or she determines that the absence of a qualified lawyer could cause inequality between the parties involved in the case.
- Free publication of all necessary announcements for the correct execution of any court decision.
- Exemption from payment of all mandatory judicial fees and of the required initial deposits to challenge resolutions.
- Exemption from payment of fees for legal experts who intervene in proceedings.
- Free access to all copies, testimonies, and public notary acts.
- Reduction of 80% of all costs for excerpts, copies, certifications and filings in the Registry of Property (*Registro de la Propiedad*) if they are directly related to legal proceedings and they are requested by a judge.
- Reduction of 80% of the legal fees required for public deeds, copies and testimonies of the notary public which are not reflected in the previous paragraph if they are directly related to legal proceedings and they are requested by a judge.<sup>36</sup>

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

There are no further conditions on children or their representatives bringing cases, unless the parents' interests conflict with those of the child, as set out

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<sup>33</sup> This information was last edited in February 2015, see also *Legal Aid – Spain*, available at: [http://ec.europa.eu/civiljustice/legal\\_aid/legal\\_aid\\_spa\\_en.htm#1](http://ec.europa.eu/civiljustice/legal_aid/legal_aid_spa_en.htm#1).

<sup>34</sup> *Ibid.*

<sup>35</sup> Free Legal Assistance Law, available at: <https://www.boe.es/buscar/act.php?id=BOE-A-1996-750>.

<sup>36</sup> Free Legal Assistance Law, Art. 6.



in section II.B. above.

In cases in which a legal guardian brings a case on behalf of a child, an authorisation by the competent judge is required, unless the initiation of legal action is urgent or if the case involves only an insignificant amount of money.<sup>37</sup>

### 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?

Pursuant to the Spanish Civil Procedure Act (*Ley de Enjuiciamiento Civil*), civil cases are first brought in the courts of First Instance (*Juzgados de Primera Instancia*), which are presided over by a professional judge or magistrate.<sup>38</sup>

In criminal cases, the Public Prosecutor is usually tasked with bringing a case against the accused person. The child victim, or his or her representative, has the right to bring a private criminal prosecution together with the prosecutor or on his or her own, if the Public Prosecutor does not present any charges. Criminal proceedings can be initiated by a child victim or his or her representative in two ways: (i) by submitting a complaint (*denuncia*)<sup>39</sup> which may be anonymous, and (ii) by carrying out a private criminal prosecution (*querrela*).<sup>40</sup>

Administrative actions by public bodies can be challenged before the administrative courts. An administrative court may grant injunctions, order specific performance, or award damages.<sup>41</sup> In cases in which a person's fundamental rights, set out in Articles 14 to 30 of the Spanish Constitution, may have been violated as a result of a court's decision, an appeal for protection of fundamental rights (*recurso de amparo*) can be filed before the Constitutional Court within 20 days after the notification of the court's resolution.<sup>42</sup>

If a criminal case concerns not a child victim, but a child in conflict with the law, the Children's Courts (*Juzgados de Menores*) are competent for all offenses committed by children between 14 and 18 years of age.<sup>43</sup> If children are accused of having committed a crime, they must always be represented by a defense lawyer who is chosen by the child's parents or legal guardians,

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<sup>37</sup> Civil Code, Art. 272.3.

<sup>38</sup> Civil Procedure Act, Art. 45.

<sup>39</sup> Criminal Procedure Act, Arts. 259 to 269.

<sup>40</sup> Criminal Procedure Act, Arts. 270 to 281.

<sup>41</sup> Law on the Jurisdiction of the Administrative Courts, Chapter II., available at: [http://noticias.juridicas.com/base\\_datos/Admin/l29-1998.html](http://noticias.juridicas.com/base_datos/Admin/l29-1998.html).

<sup>42</sup> Law on the Supreme Court, Title III., available at: [http://noticias.juridicas.com/base\\_datos/Admin/lo2-1979.t3.html](http://noticias.juridicas.com/base_datos/Admin/lo2-1979.t3.html).

<sup>43</sup> Law Regulating the Penal Responsibility of Children, Art. 2, available at: [http://noticias.juridicas.com/base\\_datos/Penal/lo5-2000.html](http://noticias.juridicas.com/base_datos/Penal/lo5-2000.html).

or officially appointed.<sup>44</sup> There is also a special section within the Public Prosecution Office (*Fiscalía de Menores*) which specialises in children in conflict with the law.<sup>45</sup>

The European Court of Human Rights decides cases concerning alleged violations of any of the rights contained in the European Convention on Human Rights.<sup>46</sup> Any individual, group of individuals or an NGO who is a victim of a violation of one of these rights may submit a complaint to the Court,<sup>47</sup> but the complaint will be admissible only if all domestic remedies have been exhausted.<sup>48</sup> Anonymous complaints are not permitted.<sup>49</sup> The procedural rules for the Court do not make any child-specific provisions. Persons may initially present an application themselves or through a representative, however, all applicants must be represented at hearings thereafter.<sup>50</sup> After examining the case, the Court renders a judgment which is binding on the State<sup>51</sup> and also has powers to award monetary compensation to the victims of human rights abuses.<sup>52</sup> It is also worth noting that the Court has an established practice of referring to other international human rights instruments, including the CRC, as guides to interpretation of the European Convention.

Finally, once all domestic remedies have been exhausted, complaints against violations of children's rights may be submitted to the UN Committee on the Rights of the Child under the third Optional Protocol to the CRC,<sup>53</sup> which Spain has ratified. Complaints can be made directly by both an individual child or a group of children, or indirectly, on their behalf by an adult or an organisation.<sup>54</sup> The violations must concern a right granted by either the CRC, the Optional Protocol on the sale of children or the Optional Protocol on the involvement of children in armed conflict<sup>55</sup> and must have occurred after the entry into force of the Protocol on 14 April 2014.<sup>56</sup> Anonymous complaints are inadmissible and so are complaints not made in writing.<sup>57</sup> In addition, only complaints made in one of the working languages of the UN

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<sup>44</sup> In the case of adults, the assistance of an attorney to the accused person is not mandatory for minor offences.

<sup>45</sup> Unlike for the Public Prosecution, there is no special police section specialising child offenders.

<sup>46</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention on Human Rights"), 1950, Articles 19 and 32, available at: [http://www.echr.coe.int/Documents/convention\\_ENg.pdf](http://www.echr.coe.int/Documents/convention_ENg.pdf).

<sup>47</sup> *Ibid.*, Article 34.

<sup>48</sup> *Ibid.*, Article 35.

<sup>49</sup> *Ibid.*

<sup>50</sup> Rules of Court, July 2014, Rule 36, available at:

[http://www.echr.coe.int/documents/rules\\_court\\_eng.pdf](http://www.echr.coe.int/documents/rules_court_eng.pdf).

<sup>51</sup> European Convention on Human Rights, Article 46.

<sup>52</sup> *Ibid.*, Article 41.

<sup>53</sup> Optional Protocol to the Convention on the Rights of the Child on a communications procedure, 2013, available at:

[http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=A/RES/66/138&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A/RES/66/138&Lang=en).

<sup>54</sup> *Ibid.*, Article 5.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*, Article 7(g).

<sup>57</sup> *Ibid.*



will be accepted.<sup>58</sup> After examining the complaint, the Committee can make recommendations to the State, which are not legally binding.<sup>59</sup>

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

Civil and administrative courts may grant injunctions, order specific performance, or do both. Criminal courts can impose all penalties for offenses established under the Criminal Code.

All courts may adopt interim measures (*medidas cautelares*) to ensure a successful outcome of the proceedings. In civil cases, such interim measures include granting the parental guardianship of a child to only one of the parents in divorce or separation proceedings.<sup>60</sup> In criminal proceedings, the judge may order preventive imprisonment of a suspect (with or without bail) if two conditions are met: (i) it is likely that a crime has been committed; and (ii) there is a potential risk of absconding, destruction of evidence or if any of the victims or witnesses (especially if the former are children or vulnerable persons) might be in danger.<sup>61</sup>

In *amparo* proceedings, i.e. constitutional complaints, if the Constitutional Court finds that the claimant's constitutional rights have been violated, the judgment by the Court granting the constitutional relief will usually contain a declaration of the invalidity of the contested decision, administrative act or resolution and a declaration regarding the restoration of the claimant's constitutional rights or freedom by adopting appropriate measures.<sup>62</sup>

If a judge has doubts about the constitutionality of a law or its compliance with human rights law, he or she may pose the question to the Constitutional Court (*Tribunal Constitucional*). The Constitutional Court then decides whether the law is constitutional or in compliance with human rights treaties ratified by Spain. If the Constitutional Court finds that the law or parts thereof are unconstitutional or violate any human rights treaties, those parts of the law are automatically considered void.<sup>63</sup>

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?

Challenges usually have to involve a child victim. Nonetheless, there is some scope for third parties to bring challenges if they are an organisation

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<sup>58</sup> Office of the United Nations High Commissioner for Human Rights, '23 FAQ about Treaty Body complaints procedures', available at: <http://www2.ohchr.org/english/bodies/petitions/individual.htm#contact>.

<sup>59</sup> Optional Protocol to the Convention on the Rights of the Child on a communications procedure, Article 10.

<sup>60</sup> Civil Procedure Act, Title VI.

<sup>61</sup> Criminal Procedure Act, Chapter III.

<sup>62</sup> Law on the Constitutional Court, Art. 55, available at: <http://www.boe.es/buscar/act.php?id=BOE-A-1979-23709>.

<sup>63</sup> Law on the Constitutional Court, Art. 10, 27, 35, 39.

which holds “institutional representation” for the defense of the specific legal interest in question (e.g. consumers and users associations). The organisation must be a legal entity and its “institutional representation” of the legal interest in question must be conferred by law.<sup>64</sup>

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

It is possible to bring group litigation provided that all claimants, whether or not they are represented by their parents or legal guardians, have suffered a common injury or damage.<sup>65</sup>

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?

Non-governmental organisations cannot intervene in civil cases to challenge children’s rights violations. Only persons who have suffered harm as a result of the violation of their rights may bring suits. Nevertheless, an institution with institutional representation conferred on it by law may intervene in specific kinds of legal proceedings (e.g. in breaches of consumers’ or users’ rights) to challenge children’s rights violations. In such cases, the relevant institution represents the entire group of child victims.<sup>66</sup>

Legal action in criminal cases is public and legal entities, including non-governmental organisations, are entitled to challenge potential children’s right violations (*acusación popular*).<sup>67</sup>

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?

In civil proceedings, the filing of a particular case depends on the case subject and the amount which is claimed. Unless otherwise stated, municipal Peace Courts (*Juzgado de Paz*), presided over by a justice of the peace, are competent in cases which concern amounts of under EUR 90 and First Instance Courts (*Juzgado de Primera Instancia*) handle all cases which concern amounts of over EUR 90. The Provincial Courts (*Audiencia Provincial*) serve as court of appeal for decisions by the Peace Courts and First Instance Courts.<sup>68</sup>

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<sup>64</sup> Civil Procedure Act, Art. 13; Tirant Lo Blanch, *Derecho Jurisdiccional - Proceso Civil*, 11th edition, p. 78.

<sup>65</sup> Civil Procedure Act, Art. 12.

<sup>66</sup> Tirant Lo Blanch, p. 78.

<sup>67</sup> Code of Criminal Procedure, Art. 101.

<sup>68</sup> Ministerio de Justicia, *Organización de la Justicia*, available at: <http://www.mjusticia.gob.es/cs/Satellite/Portal/es/administracion-justicia/organizacion-justicia>; For an overview of the Spanish court system in English, see: Chambers and Partners, *Legal Practice Guide Litigation 2014-2015, Spain Law &*

In criminal proceedings, minor offenses, which are not punishable with imprisonment, are decided by pre trial courts (*Juzgado de Instrucción*). When the offense is punishable with imprisonment of up to five years, the case is brought before the criminal court (*Juzgado de lo Penal*), after it has been instructed by the pretrial court. When the penalty is likely to exceed five years imprisonment, the case is brought before the Provincial Court (*Audiencia Provincial*). Childrens' Courts (*Juzgados de Menores*) are competent for cases concerning offenses committed by children between 14 and 18 years of age.<sup>69</sup>

Administrative cases must be brought before the administrative courts which deal with all cases concerning the appeal of decisions made by the public authorities, including the authorities of the different autonomous regions, as long as these decisions are not solely of a constitutional nature or deal exclusively with the application of international treaties.<sup>70</sup> The structure of the administrative courts is laid out in the Law on the Jurisdiction of the Administrative Courts (*Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-administrativa*) and includes the following entities: Administrative Courts (*Juzgados de lo Contencioso Administrativo*), the Administrative Division of the Autonomous Communities' High Courts (*Salas de lo Contencioso-Administrativo de los Tribunales Superiores de Justicia*), the Administrative Division of the National Court (*Sala de lo Contencioso-Administrativo de la Audiencia Nacional*) and a specialised Division of the Supreme Court (*Sala de lo Contencioso-Administrativo del Tribunal Supremo*).<sup>71</sup>

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

If a child's representative or the child him or herself cannot afford the costs of litigation, the Free Legal Assistance Law grants free legal assistance, as described in section II.D. above.

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

Recent years have seen efforts in Spain to increase the commitment of

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*Practice*, section 1.2, available at: <http://www.chambersandpartners.com/guide/practice-guides/location/241/6627/1401-200>.

<sup>69</sup> See Section III.A above.

<sup>70</sup> Law on the Jurisdiction of the Administrative Courts, Art. 4.

<sup>71</sup> *Ibid.*, Art. 6.

lawyers to engage in pro bono work.<sup>72</sup> Children or their representatives who wish to obtain free legal assistance should refer to the General Council of Spanish Lawyers (*Consejo General de la Abogacía Española*). The Council keeps a registry containing personal contact information of all lawyers who offer to pursue cases on a pro bono basis.<sup>73</sup>

- 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?

In civil proceedings, statute of limitations depend on the type of action which the claimant is pursuing. Generally, a breach of contract cause of action can be brought for 15 years, and a cause of action in tort (*extracontractual*) for one year.<sup>74</sup>

In criminal proceedings, the statute of limitations depends on the nature and duration of the penalty, especially the potential number of years imprisonment, with which a specific criminal offense is punishable.<sup>75</sup> The liability for minor offenses which are not punished by imprisonment lapses six months after they occurred. If the offense is punishable with up to five years of imprisonment, the case may be brought before the court within five years from the time the crime was committed. The statute of limitations is ten years if the offense is punishable with up to ten years of imprisonment, or 15 years if it is punishable with up to 15 years of imprisonment and of 20 years if it is punishable with 15 or more years of imprisonment.<sup>76</sup> However, there is no statute of limitations for certain offenses (e.g. crimes against humanity, murders as a consequence of terrorist acts, genocide and crimes during wartime).<sup>77</sup> The statute of limitations for offenses which occurred when the victim was a child is tolled until the victim turns 18.<sup>78</sup>

- 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 Act sets out the types of evidence admissible in civil proceedings: (i) oral examination, (ii) public documents, (iii) private documents, (iv) expert witnesses, (v) presumptions, and (vi) witnesses.<sup>79</sup> Similarly, the Criminal Procedure Act sets out the kind of evidence admissible in criminal proceedings: (i) confession by the suspect, (ii) private and public documents, (iii) expert witnesses, (iv) legal inspection of the

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<sup>72</sup> El Derecho, *El CGAE y Transparencia Internacional ponen en marcha el Registro nacional de abogados y abogadas "pro bono"*, 22 February 2012, available at: [http://www.elderecho.com/actualidad/CGAE-Transparencia-Internacional-Registro-abogadas\\_0\\_373500014.html](http://www.elderecho.com/actualidad/CGAE-Transparencia-Internacional-Registro-abogadas_0_373500014.html).

<sup>73</sup> Consejo General de la Abogacía Española, *Abogacía ProBono*, available at: <http://www.abogacia.es/2012/05/03/abogacia-probono/>.

<sup>74</sup> Civil Code, Art. 1961 et seq.

<sup>75</sup> Criminal Code, Art. 131, available at: [http://noticias.juridicas.com/base\\_datos/Penal/lo10-1995.html](http://noticias.juridicas.com/base_datos/Penal/lo10-1995.html).

<sup>76</sup> *Ibid.*

<sup>77</sup> Criminal Code, Art. 131.4.

<sup>78</sup> Criminal Code, Art. 132.1.

<sup>79</sup> Civil Procedure Act, Art. 299 et seq.

crime scene, and (v) oral examination.<sup>80</sup>

There are specific provisions regarding child witnesses giving evidence, e.g. that all available technical means must be used to ensure that visual contact of the child with the accused person is avoided.<sup>81</sup>

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

In 2010, the Council of Europe warned that the overall duration of court proceedings in Spain has been on the increase.<sup>82</sup> The report, which evaluated the judicial systems of all Member States of the Council of Europe using data from 2008, found that the average time frame to resolve a lawsuit in the Spanish courts of first instance was 296 days, surpassed only by Portugal (430 days) and Italy (533 days).<sup>83</sup>

Spain was also found to have the lowest rate of solved cases in relation to the number of cases filed in the courts in all Council of Europe Member States. This was said to indicate an "upward trend" in the backlog of cases and resolution times in the Spanish courts.<sup>84</sup>

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

Spain applies a so-called "single appeal system", meaning that there is usually only one ordinary appeal available to challenge court decisions. Some extraordinary avenues to review do exist depending on the nature of the case.<sup>85</sup>

Pursuant to the Spanish Civil Procedure Act, civil cases are first brought in the courts of First Instance (*Juzgados de Primera Instancia*), which are presided over by a professional judge or magistrate. Judgments by these courts can be challenged before the Provincial Court (*Audiencia Provincial*), a collegiate body presided over by three magistrates. In some cases, a further appeal may be brought before the civil division of the Supreme Court (*Tribunal Supremo*) and, in only a few cases, before the civil and criminal divisions of certain Territorial Supreme Courts (*Tribunales Superiores de Justicia*) in some Autonomous Communities.<sup>86</sup>

For further details on available appeals in the criminal and administrative court systems, see section III.A. above.

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<sup>80</sup> Criminal Procedure Act, Art. 688 et seq.

<sup>81</sup> Criminal Procedure Act, Art. 707.

<sup>82</sup> El Mundo, *Los juicios en España se eternizan*, 25 October 2010, available at: <http://www.elmundo.es/elmundo/2010/10/24/espana/1287939769.html>.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

<sup>85</sup> See e.g.: Civil Procedure Act, Art. 477.

<sup>86</sup> Ministerio de Justicia, *Organización de la Justicia*; Chambers and Partners, *Legal Practice Guide Litigation 2014-2015, Spain Law & Practice*, section 1.2.

- 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?

The Spanish legal system is a civil law system, meaning it is based mainly on statutory law rather than on precedent. Courts are neither bound by their own decisions nor by decisions of higher courts. Decisions by the Supreme Court are considered persuasive, but not binding precedent. Only Constitutional Court decisions are binding, and the Court's interpretation of the Constitution must be followed by all other judges. Therefore, negative effects of a decision are not necessarily felt in the long-term, except for those made by the Constitutional Court.<sup>87</sup>

Parliament cannot take action to "reverse" court decision through legislation. A statute may be amended so that the courts apply the amended version in the future, but neither the legislative nor the executive powers can repeal decisions handed down by the courts.

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

The research undertaken did not find any additional concerns regarding the enforcement of positive decisions. The enforcement of decisions in civil proceedings is governed by the Civil Procedure Act and in order to be enforceable, decisions must be final and not subject to appeal by either party.<sup>88</sup>

- 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.

A further mechanism to consider when contemplating legal action to challenge a violation of children's rights is the Spanish National Ombudsman for Human Rights (*Defensor del Pueblo*) who is competent to hear matters affecting children and can also bring cases on behalf of children in front of the courts.<sup>89</sup> Any citizen may request the intervention of the Defensor del Pueblo, which is free of charge, in order to investigate any possible misconduct by public authorities or agents. The Defensor del Pueblo can also intervene *ex officio* in cases which come to his attention without any complaint having been filed.<sup>90</sup> The corresponding bodies in the autonomous communities have authority to hear cases by children as well and some of them have deputy ombudsmen charged specifically with the protection of the rights of children, e.g. in Andalusia (*Defensor del Pueblo Andaluz*, *Defensor del Menor*) and Catalonia (*Sindic de Greuges*).

One aspect to consider in addition to the above is that some Spanish

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<sup>87</sup> See inter alia: Constitution of Spain, Art. 161.

<sup>88</sup> Civil Procedure Act. Book 3.

<sup>89</sup> See the website of the Defensor del Pueblo, available at: <http://www.defensordelpueblo.es/en/Quienes/Que/index.html> and <http://www.defensordelpueblo.es/en/Infancia/Defensa/index.html>.

<sup>90</sup> Ibid.



autonomous regions, so-called “communities”, apply their own legal regimes, including when it comes to laws concerning children. In its Concluding Observations on Spain’s latest periodic report under the CRC, the UN Committee on the Rights of the Child in 2010 criticised that the laws and regulations applied in the Spanish autonomous communities differ and are not always consistent with the Convention and the first two Optional Protocols to the Convention in important areas, such as the protection of children at risk, neglected or in foster care, or the treatment of unaccompanied foreign children.<sup>91</sup> The Committee further noted the lack of a coordination mechanism on children’s rights at the national level within the central administration and between the autonomous communities to implement policies for the promotion and protection of the child.<sup>92</sup>

Regarding the implementation of Article 12 of the CRC and children’s right to be heard, including in legal proceedings, the Committee voiced concern that, in certain circumstances, recourse to higher courts is still necessary in order to obtain recognition for the right of a child to appear independently of his or her legal guardians in a court, in particular in judicial and administrative procedures affecting the child. The Committee therefore recommended that the State party continue and strengthen efforts to fully implement article 12 of the Convention, and promote due respect for the views of the child at any age in administrative and judicial proceedings, including child custody hearings, immigration cases, and in society at large.<sup>93</sup>

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

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<sup>91</sup> UN Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of Spain*, CRC/C/ESP/CO/3-4, 3 November 2010, para. 9, available at: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fESP%2fCO%2f3-4&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fESP%2fCO%2f3-4&Lang=en).

<sup>92</sup> *Ibid.*, para. 11 et seq.

<sup>93</sup> *Ibid.*, para. 29 et seq.