

ACCESS TO JUSTICE FOR CHILDREN: CHINA

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

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

The People's Republic of China ("PRC" or "China") is a signatory to the CRC, and ratified it in March 1992. The CRC has not been fully incorporated into national law.

The PRC Constitution (revised in 2004) and other Chinese domestic laws do not contain an express provision on the status of ratified international treaties (such as the CRC) in the Chinese domestic legal system. Scholars are still debating whether international instruments that have been ratified automatically become part of Chinese national law, or if, for such instruments to be incorporated into national law, they must be implemented via national legislation.¹ The majority of Chinese scholars, however, adopt a different approach, concluding that international law and domestic law are separate but closely linked systems that infiltrate and supplement each other rather than conflict with each other.² According to this view, international treaties are incorporated into national law through a combination of adoption (automatic or direct application) and transformation through implementing legislation.³

B. Does the CRC take precedence over national law?

It is unclear whether the CRC takes precedence over PRC domestic laws. The Chinese Constitution and domestic laws do not contain any provision on the legal status of international treaties and their hierarchy in the domestic legal system. The Legislation Law enacted in 2000 establishes the hierarchy of Chinese domestic law, in which the Constitution ranks the highest, followed in order by laws, administrative regulations, local regulations and so on. However, it does not include any reference to the status of international treaties.⁴

In Chinese legal practice, treaties acquire prevailing force over domestic law only when the relevant domestic law includes an explicit stipulation to that effect. Certain civil and commercial laws of the PRC provide that in case of any conflict or inconsistency between the law and a relevant international convention,

¹ See H. Xue and Q. Jin, 'International Treaties in the Chinese Domestic Legal System', *Chinese Journal of International Law*, Vol. 8, No. 2, 2009, pp. 299-322, available at: <http://chinesejil.oxfordjournals.org/content/8/2/299.full.pdf+html>; K. Zou, 'International Law in the Chinese Domestic Context', *Valparaiso University Law Review*, Vol. 44, No. 3, pp. 935-956, available at: <http://scholar.valpo.edu/vulr/vol44/iss3/10/>.

² K. Zou, p. 937; B. Ahl, 'The Application of International Treaties in China', 2009, pp. 355-367, available at: <http://www.mpil.de/files/pdf2/beitr207.pdf>.

³ Ibid.

⁴ See H. Xue and Q. Jin.

provisions under the convention should prevail unless a specific matter is not provided for under the convention but is provided for under Chinese domestic laws.

⁵ However, none of the PRC domestic laws have included a general provision on the relationship between the CRC and domestic laws.

C. Has the CRC been incorporated into national law?

The CRC has not been fully incorporated into national law. According to the majority of Chinese scholars, international treaties are incorporated into Chinese law through a combination of adoption and transformation through implementing legislation (see part I.A. above).

The Constitution provides for the state protection of children, and prohibits maltreatment of children.⁶ The primary law providing children's rights protection is the Law on the Protection of Minors.⁷ In its 2012 report to the Committee on the Rights of the Child, China stated that it has "continued to consult the principles and provisions of the Convention" and promulgated and revised various national laws to codify and standardise the protection of children.⁸

China maintains a reservation to Article 6 of the CRC on the inherent right to life, stating that China shall fulfill its obligation provided by this article "under the prerequisite that the Convention accords with the provisions of article 25 concerning family planning of the Constitution... and in conformity with the provisions of article 2 of the Law of Minor Children".⁹

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

As China has not fully incorporated the CRC into its national law, it is questionable whether it is possible to directly invoke the CRC in the courts. No such precedent was found.

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

No specific cases in which domestic courts have used or applied the CRC or other relevant international human rights instruments were found. However, it is reported that more and more lawyers have referred to the CRC and other international treaties in their reasoning before courts in the past few years, and that judges have

⁵ Ibid.

⁶ Constitution of the PRC 1982 (revised in 2004), art. 49, available at:

http://www.npc.gov.cn/englishnpc/Constitution/node_2825.htm.

⁷ (revised in 2006), available at:

http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383869.htm.

⁸ For a detailed analysis of the implementation of different provisions of the CRC, see *Combined third and fourth periodic reports of China to the UN Committee on the Rights of the Child*, CRC/C/CHN/3-4, 6 June 2012, part I. Available at:

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

⁹ UN Treaty Collection, 'Convention on the Rights of the Child',

https://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-11&chapter=4&lang=en, 2014, (accessed 29 January 2014).

sometimes accepted this, especially in some cases settled by mediation.¹⁰

II. What is the legal status of the child?

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

In general, children and/or their legal representatives have the right to initiate civil, criminal or administrative proceedings in Chinese courts to challenge violations of children's rights based on PRC domestic laws.

Children and/or their legal representatives may bring civil cases in PRC courts to challenge violations of their rights under the Civil Procedure Law.¹¹ They may bring or participate in any form of litigation permitted under the Civil Procedure Law (such as individual or collective lawsuits) to challenge violations of their rights.

If a violation of rights amounts to a criminal offence, children and/or their legal representatives have the right to initiate private criminal prosecutions under the Criminal Procedure Law.¹² Police investigation and public prosecution can be initiated following the court's request, if certain conditions are met.

If a specific administrative act violates a child's rights, the child and/or their legal representative may bring a suit against the relevant government body in accordance with the Administrative Procedure Law.¹³ In reviewing administrative cases, courts have the power to examine the legality of specific administrative acts, including: administrative sanctions such as detention or fines; compulsory administrative measures such as restrictions to personal freedom; refusal to take action or perform an obligation; unlawful demands for performance of duties; and violations of rights of a person or property rights.¹⁴ Article 12 sets out certain acts that cannot be challenged, including acts of the state in areas like national defence and foreign affairs, and "administrative rules and regulations, regulations, or decisions and orders with general binding force formulated and announced by administrative organs".

The Law on the Protection of Minors provides that where a child whose lawful rights and interests are infringed upon brings a lawsuit before a court according to law, the court shall, in accordance with law, try the case without delay and, taking into consideration the child's physical and mental characteristics and the need for healthy growth, protect the child's lawful rights and interests.¹⁵ According to China's report to the Committee on the Rights of the Child, "China ensures that in judicial proceedings affecting them, children have the opportunity to express their

¹⁰ Comments provided by Liu Wei, lawyer at the Henan Boyang Law Firm and chief coordinator at the Public Interest Collaborative Network for Women Lawyers, August 2015.

¹¹ (revised in 2012), available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=296344.

¹² (revised in 2012), art. 44; Interpretations of the Supreme People's Court on the Application of the Criminal Procedure Law of the PRC (2012) ("Criminal Procedure Interpretations"), Chapter 10, available at: <http://usali.org/wp-content/uploads/2013/08/SPC-JI-ENG.pdf>.

¹³ 1989, art. 2, available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=198352.

¹⁴ Ibid., arts 5 and 11.

¹⁵ Law on the Protection of Minors, art. 51.

opinions”.¹⁶ Children’s right to be heard is explicitly provided for in divorce proceedings under the Law on the Protection of Minors.¹⁷ Despite this, the Committee in its 2013 Concluding Observations recommended that China ensure respect for the views of children and their participation in all matters affecting them, including in court decisions.¹⁸

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?

Generally, children can only initiate proceedings with the assistance of a legal representative. Under PRC civil law, children (persons under 18) are generally not deemed to have full capacity for civil conduct.¹⁹ Accordingly, children may not bring civil lawsuits on their own behalf, but can do so with the assistance of their legal representatives (in most instances, their parents).²⁰ However, if a child is over the age of 16 and mainly supports themselves through their own income, they will be deemed to have full capacity for civil conduct and can bring civil cases by themselves in their own name.²¹

Under the Criminal Procedure Law, children with limited or no capacity for conduct²² who wish to bring private criminal prosecutions must do so with the assistance of their legal representatives.²³ In the case of administrative proceedings, children who have no capacity to take part in litigation²⁴ must bring such cases with the assistance of their legal representatives under the Administrative Procedure Law.²⁵

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

¹⁶ *Combined third and fourth periodic reports of China to the UN Committee on the Rights of the Child*, para. 62.

¹⁷ Art. 52.

¹⁸ UN Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic reports of China*, CRC/C/CHN/CO/3-4, 29 October 2013, para. 38. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fCHN%2fCO%2f3-4&Lang=en.

¹⁹ Although PRC civil law does not define the term, according to the popular view of civil law scholars, “capacity for civil conduct” means the capacity an individual must possess to independently participate in civil activities, such as bringing lawsuits in court, and legally bind himself/herself by such conduct.

²⁰ Civil Procedure Law, art. 57.

²¹ General Principles of Civil Law (“Civil Law Principles”), art. 11, available at: http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383941.htm;

²² Although the Criminal Procedure Law does not define this term, according to some criminal law experts, courts may refer to the “capacity for civil conduct” standard provided under PRC civil law in determining a child’s capacity to bring lawsuits under the Criminal Procedure Law (see above n.18). Since children generally do not have the “capacity for civil conduct” under PRC civil law (subject to the exception described in part II.B), courts generally request that children bring private criminal prosecutions with the assistance of their legal representatives.

²³ Criminal Procedure Law, art. 112; Criminal Procedure Interpretations, art. 260.

²⁴ Although the Administrative Procedure Law does not define this term, according to some administrative law experts, the courts may refer to the “capacity for civil conduct” standard provided under PRC civil law in determining a child’s capacity to bring lawsuits under the Administrative Procedure Law (see above n.18). Since children generally do not have the “capacity for civil conduct” under PRC civil laws (subject to the exception described in part II.B), courts generally request that children bring administrative lawsuits with the assistance of their legal representatives.

²⁵ Administrative Procedure Law, art. 28.

As discussed in part II.B above, PRC law generally provides that a child's legal representatives bring proceedings on behalf of the child. Generally speaking, the "legal representative" refers to the legal guardians of the child (such as the child's parents).²⁶

PRC civil law provides for the appointment of a guardian (e.g. the child's grandparent, elder sibling, or other closely connected relative or friend) if the parents lack the competence to act as the child's guardian.²⁷ If a parent or other guardian of a child fails to perform their duties or infringes upon the lawful rights and interests of the child under their guardianship, courts and other government bodies may have the authority to replace the guardian of the child for the purpose of bringing a lawsuit.²⁸ A court may also appoint legal representatives for children during the course of a lawsuit provided the case meets certain criteria established in the civil laws.²⁹

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

The Law on the Protection of Minors provides that children whose rights are violated are entitled to receive legal aid in bringing a lawsuit if such assistance is necessary.³⁰ The 2003 Regulations on Legal Assistance sets out the framework and general principles of China's legal aid system.

The Regulations on Legal Aid provide that PRC citizens are entitled to receive legal assistance (including legal advice and representation) from legal aid institutions in criminal cases and certain types of civil and administrative cases if they qualify for financial assistance. These cases include those relating to: claims by minors for compensation for infringed rights;³¹ claims for compensation from the government; social security benefits or minimum living allowances; civil rights or interests resulting from helping others for a just cause; and domestic violence.³²

There are two factors to be considered in deciding whether an individual is eligible for legal aid: the individual's level of financial difficulty, and the necessity of the lawsuit to protect the individual's legal rights.³³ Regarding financial difficulty, there are no uniform national criteria; instead the criteria are set at the provincial level. The baseline is that citizens below the Security Line for Minimum Subsistence (or poverty line) should be provided with legal aid. The financial

²⁶ Civil Procedure Law, art. 57; Civil Law Principles, art. 16; Criminal Procedure Law, art. 106.

²⁷ Civil Law Principles, art. 16.

²⁸ See, e.g., Law on the Protection of Minors, art. 53.

²⁹ Civil Procedure Interpretations, art. 67.

³⁰ Art. 51.

³¹ Latham & Watkins, 'A survey of pro bono practices and opportunities in 71 jurisdictions', <http://www.lw.com/admin/Upload/Documents/PBI-2012-survey-China.pdf>, 2012, (accessed 29 January 2014), p. 44.

³² A4ID, 'Legal aid guide', <http://www.a4id.org/sites/default/files/u3/A4ID%20Legal%20AID%20Guide.pdf>, (accessed 29 January 2014), p. 28.

³³ Latham & Watkins, 'A survey of pro bono practices and opportunities in 71 jurisdictions', <http://www.lw.com/admin/Upload/Documents/PBI-2012-survey-China.pdf>, 2012, (accessed 29 January 2014), p. 44.

eligibility test is not required in certain circumstances, such as in criminal cases when the accused is a child.³⁴

In practice, children's inadequate access to legal assistance has been criticised by the Committee on the Rights of the Child (see part V below).

- 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 discussed in part II.B above, generally speaking a child cannot bring a lawsuit on their own, and therefore the consent of their legal representative will be required to file a lawsuit or take any legally binding actions (such as settlement in civil proceedings).

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

PRC law is unclear as to whether it is possible to challenge rights violations in the courts based on the Constitution, CRC or other relevant ratified international/regional instruments. Violations of provisions of the CRC or other relevant instruments can be challenged indirectly on the basis of domestic law to the extent that they have been incorporated in the law.

In addition to civil and criminal proceedings, children and/or their representatives can initiate administrative proceedings in the court to challenge specific government acts that violate children's rights under the Administrative Procedure Law to ensure compliance with national laws. The Administrative Procedure Law permits judicial review of government acts but the scope of the review is limited to specific administrative acts (see part II.A above).

Apart from bringing legal action in courts, interested parties may consider filing under the petitioning system (*xinfang*) (also known as correspondence and reception, or letters and calls) to challenge a violation of children's rights. The petitioning system is an informal administrative system under which local petition bureaus (*xinfangju*) hear complaints and grievances from individuals or representatives of companies or organisations through letters, calls, and visits. It is mainly regulated by the Regulations of Petition Letters and Visits and local implementation rules issued by provincial legislative organs.³⁵

In practice, however, the petitioning system plays a very limited role in redressing complaints, and is widely regarded as over-burdened, unresponsive, overly

³⁴ A4ID, p. 28.

³⁵ See State Bureau for Letters and Calls, <http://www.gjxfj.gov.cn/>, (accessed 29 January 2014).

complex and ineffective.³⁶ Moreover, human rights organisations have criticised Chinese authorities of arbitrarily imprisoning large numbers of petitioners, including children, in black jails or other detention facilities (see part V below).³⁷

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

PRC courts have the power to review violations of the CRC or other relevant instruments to the extent that the provisions are incorporated and codified in specific domestic laws.

The remedies that civil courts can offer are provided in the Civil Law Principles, and include compensation for losses, specific performance, and injunction (e.g., to stop the infringement of rights).³⁸

In administrative lawsuits, courts have the power to decide whether a specific administrative act is legal under PRC laws.³⁹ If the court finds that there was inadequate essential evidence or the government body erroneously applied the law or regulations, violated legal procedure, exceeded its authority, or abused its powers, the court can annul or partially annul the administrative act, or require the government body to undertake a specific administrative act anew.⁴⁰ It can also order specific performance by a fixed time, and amend an administrative sanction if it is found to be “obviously unfair”.⁴¹ Finally, it can award compensation if the administrative act that violated the plaintiff’s rights resulted in damage to the plaintiff.⁴²

C. Would such a challenge have to directly involve one or more individual child victims, or is it possible to challenge a law or action without naming a specific victim?

In general, a plaintiff has the standing to initiate a legal action only if he or she was personally affected or damaged by an unlawful act; lawsuits that do not identify a specific victim are not permitted.⁴³ It is unclear whether the new public interest litigation provisions in the Civil Procedure Law (see parts III.D and E below) require individual victims to be named in such cases.

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

The 2012 amendments to the Civil Procedure Law allows a government authority or “relevant organisation as prescribed by law” to bring a class action challenging

³⁶ China Labour Bulletin, ‘Public Interest Litigation in China’, http://www.clb.org.hk/en/files/File/research_reports/Overview_of_PIL_2.pdf, 2007, (accessed 29 January 2014), p. 3.

³⁷ Human Rights Watch, “‘An Alleyway in Hell’”, http://www.hrw.org/sites/default/files/reports/china1109web_1.pdf, 2009, (accessed 29 January 2014).

³⁸ Civil Law Principles, art. 134.

³⁹ Administrative Procedure Law, art. 54.

⁴⁰ Ibid., arts 54(1) and (2).

⁴¹ Ibid., arts 54(3) and (4).

⁴² Ibid., art. 67.

⁴³ Ibid., arts 2 and 11.

conduct that pollutes the environment, infringes upon the lawful rights and interests of vast numbers of consumers, or otherwise damages the public interest.⁴⁴

Under the Civil Procedure Law, there are broadly two types of collective litigation: collective litigation without representatives and collective litigation with representatives. In collective litigation without representatives, each individual victim has to be named as a plaintiff at the time of filing. If the number of parties in a collective litigation is deemed to be large (i.e., 10 or more persons),⁴⁵ a court may allow the plaintiffs to appoint litigation representatives to represent and bind all plaintiffs in the litigation.

Collective litigation with representatives can be divided into two sub-categories: representative group litigation in which the number of litigants is fixed at the time the case is filed, and representative group litigation in which the number of litigants is not fixed. For the latter category of cases, PRC courts may join claims if they concern the same subject matter by issuing a notice, specifying the circumstances of the suit and instructing all persons whose interests are similarly affected to come forward and register with the court within a specific period.⁴⁶ Similarly, a court may allow the plaintiffs to appoint litigation representatives to represent and bind all plaintiffs in the litigation.

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

As stated in part III.C above, a plaintiff generally has standing to initiate a legal action only if he or she was personally affected or damaged by an unlawful act. Therefore, non-governmental organisations (NGOs) generally cannot file challenges to potential children's rights violations.

That said, it may be possible for an NGO to act as a representative in collective litigation if many victims have been identified (see part III.D above). Under the amended Civil Procedure Law, a "relevant organisation as prescribed by law" is allowed to bring public interest litigation, but the scope of such litigation is limited to environmental protection and consumer rights protection cases.⁴⁷ It also remains to be seen what kinds of organisations are allowed to commence public interest litigation under this new provision.

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?

Chinese courts are generally divided into three levels: (1) Supreme People's Court (SPC), the premier appellate forum of China; (2) local people's courts, which

⁴⁴ Civil Procedure Law, art. 55.

⁴⁵ Civil Procedure Interpretations.

⁴⁶ Civil Procedure Law, art. 54.

⁴⁷ Civil Procedure Law, art. 55.

handle common criminal, civil and administrative cases; and (3) specialised courts, consisting of military courts, railway transportation courts, maritime courts, and forestry courts.

Local people's courts are further divided into three levels: high people's courts at the level of the provinces, autonomous regions, and special municipalities (such as Beijing, Shanghai, etc.); intermediate people's courts at the level of prefectures, autonomous prefectures, and municipalities; and basic people's courts at the level of autonomous counties, towns, and municipal districts. Basic people's courts have the power to try common civil, criminal and administrative cases as courts of first instance unless otherwise provided under the law. Intermediate people's courts and high people's courts have the jurisdiction to hear the first instance of certain qualified cases as provided by law (e.g., a case of a serious nature).

The Civil Procedure Law, Criminal Procedure Law and Administrative Procedure Law each provide extensive guidance on how to initiate civil proceedings, private criminal prosecutions and administrative proceedings.⁴⁸ In general, a plaintiff in a civil, criminal or administrative case is required to submit a complaint which sets out the basic information of the case and the court may review the complaint and determine whether the filing is accepted. For civil and administrative cases, plaintiffs are also required to pay filing fees prescribed under relevant laws after the case is accepted by the court with jurisdiction.⁴⁹

- 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.

A party to a lawsuit may petition for subsidised legal costs (mainly court fees) upon filing if such party can demonstrate financial difficulties in accordance with the relevant rules. A court has the discretion to grant an extension for payment of the court fees or to waive court fees entirely or partially after receiving such a petition.⁵⁰ If the children and their legal representatives are receiving legal assistance in a specific case, the court will take this factor into account in considering whether to grant an extension or waiver of the payment of the court fees.⁵¹

- 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?

Children and their legal representatives may obtain legal assistance from practising lawyers on a pro bono basis, through NGOs, or under an agreement that does not

⁴⁸ Civil Procedure Law, Chapter 12; Criminal Procedure Law, Section 2, Chapter 2; Administrative Procedure Law, Chapter 6.

⁴⁹ See, e.g., Measures on Payment of Litigation Fees 2006.

⁵⁰ Rules on Provision of Judicial Assistance to Persons in Economic Difficulties 2005, arts 2 and 3.

⁵¹ *Ibid.*, art. 3.

require the payment of legal fees up front. However, pro bono legal work is still a new and poorly understood concept in China. During recent years, a number of domestic and international organisations have been established to engage in, and to facilitate provision of pro bono services in China. But so far, NGOs still play a very limited role in providing pro bono services in China.⁵²

Contingency fee arrangements are only permissible in civil cases involving property (excluding certain cases such as inheritance cases, cases relating to the grant of certain pensions or subsidies, etc.) and upon a client's request.⁵³ Attorney fees in a contingency fee arrangement cannot be more than 30 percent of the total damages sought in the case.⁵⁴

- 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?

The time limit for bringing civil cases in China depends on the type of claim to be brought, as set out in the PRC civil laws. In general, the statute of limitations for a civil case is two years starting from the date the victim knows or should have known that his or her rights were infringed.⁵⁵ In certain cases such as personal injury claims, the limitation period is one year.⁵⁶ Under special circumstances, the court may extend the limitation of action.⁵⁷ The limitation period may be suspended during the last six months of the limitation period if the plaintiff cannot exercise their right of claim because of *force majeure* or other obstacles.⁵⁸ According to some opinions issued by the SPC in 2008, a special event may include a scenario in which a child loses his or her legal representatives, or the legal representatives do not have the capacity to act on behalf of the child. In any event, the victim's right to sue will expire after 20 years from the date when their rights were violated.⁵⁹

In administrative proceedings, a plaintiff is generally required to bring a lawsuit in a court relating to a specific administrative act within three months from the date when the plaintiff knows or should have known that the specific administrative act was undertaken.⁶⁰ However, a plaintiff may bring a lawsuit within two years if the administrative body fails to inform the person of their right to sue based on the specific administrative act.⁶¹

Under PRC criminal law, the time limit for bringing private criminal prosecutions in China depends on the type of offence, as set out in the Criminal Code. In general, the statute of limitations for private criminal prosecutions is five years starting from the date of the offence.⁶²

⁵² Latham & Watkins LLP, *Pro Bono Practices and Opportunities in China* (August 2012).

⁵³ Administrative Measures on Attorney Fees 2006, arts 11 and 12.

⁵⁴ *Ibid.*, art. 13.

⁵⁵ Civil Law Principles, arts 135 and 137.

⁵⁶ *Ibid.*, art. 136.

⁵⁷ *Ibid.*, art. 137.

⁵⁸ *Ibid.*, art. 139.

⁵⁹ Civil Law Principles, art. 137.

⁶⁰ Administrative Procedure Law, art. 39.

⁶¹ Administrative Procedure Interpretations, art. 41.

⁶² Criminal Code, art. 89.

- 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 various procedure laws set out the kinds of evidence that is admissible in civil, criminal and administrative proceedings respectively.⁶³ In general, admissible evidence can be divided into the following categories: relevant parties' statements, documents, physical evidence, photographs, audio or video recordings, electronic data, witness statements, expert opinions and testimony, and records of on-site investigation and inspection.

The PRC procedure laws generally provide that any person (including a child) with knowledge of the relevant facts can give testimony, but a child's testimony is only admissible if their giving of the testimony is appropriate in light of the child's age and mental state. This determination is made in the court's discretion.⁶⁴

PRC law provides various protections for the privacy of children involved in criminal cases. With respect to cases involving crimes committed by children, the names, domiciles, photos or pictures of such children, or other materials from which information about the children can be deduced may not be disclosed in news reports, films, TV programmes or openly circulated publications, or through the computer network.⁶⁵ Among other things, the name, domicile address, or other identifying information of a child witness or victim are confidential and cannot be released to the public.⁶⁶ In addition, the statement of a child victim or witness does not have to be made in front of a court to be admissible.⁶⁷

Under the Law on the Protection of Minors, to interrogate child suspects, or question child witnesses or victims, public security organs or people's procuratorates must notify their guardians to be present.⁶⁸

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

In civil proceedings, a court of first instance in general is required to reach a decision within six months starting from the date when the court accepts the case. In special circumstances, the time limit may be extended for another six months subject to the approval of the president of the court. Additional extensions may be granted with the approval of the higher court.⁶⁹ Summary procedures are available with the parties' consent where only one judge is in charge of the case rather than a tribunal if the facts are evident, the rights and obligations are clear, and the dispute is trivial in nature.⁷⁰ A court following the summary procedure is required to reach

⁶³ Civil Procedure Law, art. 63; Criminal Procedure Law, art. 48; Administrative Procedure Law, art. 31.

⁶⁴ Several Provisions on Evidence in Civil Proceedings 2001, arts 53 and 78.

⁶⁵ Law on the Protection of Minors, art. 58.

⁶⁶ Provisions on Criminal Cases Involving Minors issued by the PRC Supreme People's Procuratorate 2001, art. 4.

⁶⁷ *Ibid.*, art. 29.

⁶⁸ Law on the Protection of Minors, art. 56.

⁶⁹ Civil Procedure Law, art. 149.

⁷⁰ *Ibid.*, art. 157.

a decision within three months instead.⁷¹

In private criminal prosecutions, a court is generally required to reach a decision within two to three months from the acceptance of the case by the court if the defendant has been arrested.⁷² The first instance court has six months after acceptance to reach a decision on a private criminal case if the defendant has not been arrested.⁷³ There is no applicable summary procedure for private criminal proceedings under the Criminal Procedure Law.

A court has to reach a decision on an administrative proceeding within three months after the acceptance of the filing. Under special circumstances, the time limit may be extended with the approval of the high people's court or the SPC with the proper jurisdiction.⁷⁴

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

In a civil or administrative proceedings, either party may appeal a ruling to a higher court. In general, the appealing party has to file the appeal within 15 days after the receipt of the ruling.⁷⁵ The appellate court, after accepting an appeal, reviews the case *de novo* both substantively and procedurally.⁷⁶

The losing party in a private criminal prosecution may appeal the trial court ruling to a higher court within 10 days after the receipt of the ruling.⁷⁷ The appellate court's review of a trial court's ruling on a private criminal case is also on a *de novo* basis.⁷⁸ Appeals in other criminal cases must also be filed within 10 days of the receipt of the ruling.⁷⁹ All death penalty cases have to be reviewed by the SPC.⁸⁰

The people's courts adopt a system whereby the second instance is the last instance. Therefore, judgments and orders of second instance of intermediate people's courts, higher people's courts and the SPC, and judgments and orders of first instance of the SPC are all judgments and orders of last instance, that is, legally effective judgments and orders.⁸¹

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?

China is not a common law jurisdiction where precedents have legally binding force and affect future rulings. However, case precedents still play a role in Chinese judicial systems to a certain extent. Courts frequently refer to their own and higher

⁷¹ Ibid., art. 161.

⁷² Criminal Procedure Law, art. 206.

⁷³ Ibid.

⁷⁴ Administrative Procedure Law, art. 57.

⁷⁵ Ibid., art. 58; Civil Procedure Law, art. 164.

⁷⁶ Civil Procedure Law, art. 168.

⁷⁷ Criminal Procedure Law, arts 216 and 219.

⁷⁸ Ibid., art. 222.

⁷⁹ Ibid., arts 180 and 183.

⁸⁰ Ibid., art. 235.

⁸¹ Organic Law of the People's Courts 1979 (as amended in 1983), art. 12, available at:

<http://www.china.org.cn/english/government/207253.htm>

courts' decisions to support their rulings.

In general, there is no political backlash or repercussions from a positive decision.

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

The Civil Procedure Law, Criminal Procedure Law and Administrative Procedure Law each provide for detailed enforcement procedures of rulings issued under the respective laws. The enforcement of monetary damages or injunctive relief is in general straightforward although a winning party sometimes may need to obtain an enforcement order to enforce a court decision.

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.

In 2013, the Committee on the Rights of the Child condemned China's continued practice of arbitrary detention of children and children's lack of access to mechanisms to challenge their detention. In particular, it expressed concern that children over 16 have been detained in "re-education through labour" (RTL) facilities without any access to legal safeguards or representation. Under the RTL system, which was abolished in December 2013, Chinese police could imprison anyone for up to four years without a trial - in cases of children, detention was reported to last up to 18 months - and a labour camp sentence was almost impossible to appeal.⁸² The Committee also highlighted that children are abducted and held incommunicado for days or months in secret detention facilities, including "black jails", and face several obstacles to access to justice, including inadequate access to legal aid and lack of independent legal aid. The Committee urged Chinese authorities to ensure that no child is deprived of their liberty unlawfully or arbitrarily, and recommended that China ensure that children arrested and detained are promptly brought before a court to examine the legality of their arrest and detention and provided legal aid.⁸³

The Committee also expressed its concern about the high prevalence of sexual exploitation and abuse against children, and the limited access to justice and compensation for child victims of sexual exploitation and abuse under the national legislation in mainland China, Hong Kong and Macao. It urged China to establish effective and child-friendly procedures and mechanisms, including free helplines accessible to children, to receive, monitor and investigate complaints.⁸⁴

Furthermore, the lack of independent national human rights institutions with a clear mandate to monitor children's rights was highlighted by the Committee. The Committee recommended that China promptly establish a children's commission or other such institutions to systematically and independently monitor children's rights

⁸² Jurist, 'China legislature abolishes controversial penal labor system', <http://jurist.org/paperchase/2013/12/china-legislature-abolishes-controversial-penal-labor-system.php>, 2013, (accessed 29 January 2014).

⁸³ UN Committee on the Rights of the Child, paras 92-93.

⁸⁴ Ibid., paras 45-46.

and receive complaints from children in a child-sensitive and expeditious manner.⁸⁵

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⁸⁵ Ibid., paras 19-20.