

# **ACCESS TO JUSTICE FOR CHILDREN: FIJI**

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

Fiji<sup>1</sup> ratified the UN Convention on the Rights of the Child (“CRC”) in 1993, and ratified the Optional Protocol to the CRC on the involvement of children in armed conflict and the Optional Protocol to the CRC on the sale of children, child prostitution, and child pornography in September, 2005.

However, the Constitution under which these instruments were ratified was abrogated in 2009. A new Constitution was ratified on 6 September 2013,<sup>2</sup> which recognises some of the principles of the CRC in Chapter 2, Bill of Rights. Under the 2013 Constitution, ratified treaties and conventions are not binding on the State until approved by Parliament. A new Parliament was elected in 2014, however, as at October 2015, it has not approved the CRC.

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

The CRC does not take precedence over national law. Under the 2013 Constitution, however, when interpreting the Constitution and rights granted by it, the court *may* consider applicable international law.<sup>3</sup> This language differs from the language in the previous Constitution, which stated that the court *must* consider relevant international law.<sup>4</sup>

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

To date, the CRC has not been expressly incorporated into national law. Certain provisions of the CRC have been implemented into national legislation, including the principle of the best interests of the child in the Family Law Act 2003,<sup>5</sup> 2003, the Domestic Violence Decree 2009, the

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<sup>1</sup> Comments on this report provided by Dr Sue Farran, Professor of Laws, Northumbria University, Adjunct Professor at the University of the South Pacific and Associate of the Centre for Pacific Studies, St Andrews University, October 2015.

<sup>2</sup> Constitution of the Republic of Fiji. Available at: <http://www.fiji.gov.fj/getattachment/8e981ca2-1757-4e27-88e0-f87e3b3b844e/Click-here-to-download-the-Fiji-Constitution.aspx>.

<sup>3</sup> Constitution of the Republic of Fiji, Article 7(1)(b). Available at: <http://www.fiji.gov.fj/getattachment/8e981ca2-1757-4e27-88e0-f87e3b3b844e/Click-here-to-download-the-Fiji-Constitution.aspx>.

<sup>4</sup> See the Constitution (Amendment) Act 1997, Section 43(2). Available at: [http://www.paclii.org/fj/legis/num\\_act/ca1997268/](http://www.paclii.org/fj/legis/num_act/ca1997268/).

<sup>5</sup> Family Law Act, Sections 26, 125(1) and (2). Available at: [http://www.paclii.org/fj/legis/num\\_act/fla2003114/](http://www.paclii.org/fj/legis/num_act/fla2003114/).

Human Rights Commission Decree 2009, and the Juveniles Act.<sup>6</sup>

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

The CRC cannot be directly enforced in Fijian Courts. The High Court has discussed and applied the CRC, but it is not clear to extent to which the court will rely on or consider the CRC in decisions under the 2013 Constitution.<sup>7</sup> The Court of Appeals recently held that the court may use the CRC as guidance but did not address the issue of whether the court may directly “apply” the CRC in its decisions.<sup>8</sup>

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

The CRC has been cited in Fiji’s Courts’ decisions concerning a wide variety of topics including with regards to sexual offences,<sup>9</sup> false imprisonment,<sup>10</sup> adoption,<sup>11</sup> child support,<sup>12</sup> and the placement of a child into care.<sup>13</sup>

## 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?

Under the Magistrate’s Courts Act, a child may bring a cause of action in Magistrate’s Court, which has jurisdiction over civil matters.<sup>14</sup> In addition, the Domestic Violence Decree of 2009 sets out the procedure and powers of courts to make a domestic violence restraining order.<sup>15</sup> The Family Law Act also permits a guardian to intervene on the behalf of a child in family law matters that affect the child’s welfare.<sup>16</sup> Constitutional and human rights violations may be brought directly to the High Court.<sup>17</sup>

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<sup>6</sup> Article 40 of the CRC averred in *State v. K.R.A.K* – Sentence [2013] FJHC; HAC73.2013 (17 July 2013).

<sup>7</sup> Consolidated second, third and fourth periodic reports of Fiji to the UN Committee on the Rights of the Child, CRC/C/FJI/2-4, 17 September 2013, para. 18

<sup>8</sup> *Chief Executive Officer for Education v. Gibbons* [2013] FJCA 98; ABU0002.2012. Available at: <http://www.paclii.org/fj/cases/FJCA/2013/98.html>.

<sup>9</sup> *Qiladrau v. State* [2000] FJHC 248. Available at: <http://www.paclii.org/cgi-bin/sinodisp/fj/cases/FJHC/2000/248.html>.

<sup>10</sup> *Similoli v. Voliti* [2000] FJHC 147. Available at: <http://www.paclii.org/fj/cases/FJHC/2000/147.html>.

<sup>11</sup> *ZH v. VD* [2013] FJMC 121. Available at: <http://www.paclii.org/fj/cases/FJMC/2013/121.html>; *Sing v. Sing* [2014] FJMC 176; Adoption case 10.2013 (27 November 2014).

<sup>12</sup> *Butadroka v. Butadroka* [2012] FJMC 204. Available at: <http://www.paclii.org/fj/cases/FJMC/2012/204.html>.

<sup>13</sup> *In re application by Social Welfare Department Labasa, on behalf of MAV (a child)* [2013] FJMC 295; Case 01 LBS.2013 (8 August 2013).

<sup>14</sup> See Magistrates Courts Act, Section 16(1). Available at: [http://www.paclii.org/fj/legis/consol\\_act\\_OK/mca232/](http://www.paclii.org/fj/legis/consol_act_OK/mca232/).

<sup>15</sup> See Domestic Violence Decree 2009, particularly Section 23. Available at: [http://www.paclii.org/fj/promu/promu\\_dec/dvd2009191/](http://www.paclii.org/fj/promu/promu_dec/dvd2009191/).

<sup>16</sup> Family Law Act 2003, Section 180(1)(a). Available at: [http://www.paclii.org/fj/legis/num\\_act/fla2003114/](http://www.paclii.org/fj/legis/num_act/fla2003114/).

<sup>17</sup> See Constitution of the Republic of Fiji, Section 100 on the jurisdiction of the High Court.

Any person “who believes from reasonable and probable cause that an offence has been committed by a person” can bring a complaint before a magistrate and initiate a private prosecution.<sup>18</sup> However, the Director of Public Prosecutions may take over and discontinue private criminal proceedings.<sup>19</sup>

Where a person is detained, he or she has a constitutional right to challenge the detention within one month.<sup>20</sup> People who are detained can also make an application for a writ of habeas corpus to challenge the grounds under which they are detained.<sup>21</sup>

The Human Rights and Anti-Discrimination Commission is authorised to receive and investigate complaints regarding human rights violations and can take steps to seek redress including making applications to the court. Any person may file a complaint with the Commission for violations of human rights or of any constitutional rights.<sup>22</sup> Members of the Commission are appointed by the President on the advice of the Prime Minister.<sup>23</sup>

- 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?

In Magistrate’s Courts and under the High Court rules, children are required to be represented by a guardian ad litem or “next friend” when filing a law suit.<sup>24</sup> However, under the Domestic Violence Decree, a child who is 16 years or older and who is either married or has been granted leave by the court may file for a restraining order without a guardian ad litem.<sup>25</sup>

In general, a court order is not required to make an appointment for a guardian ad litem or next friend to be able to act on behalf of a child. However, if a person is already representing the minor in another proceeding, a court order would be required to appoint a different next friend or guardian ad litem.<sup>26</sup>

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

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<sup>18</sup> Criminal Procedure Decree 2009, Section 56(1). Available at: [http://www.fiji.gov.fj/getattachment/49bb05d4-121f-4318-9ab3-da5be3c9f288/Decree-No-43---Criminal-Procedure-Decree-2009-\(pdf.aspx](http://www.fiji.gov.fj/getattachment/49bb05d4-121f-4318-9ab3-da5be3c9f288/Decree-No-43---Criminal-Procedure-Decree-2009-(pdf.aspx).

<sup>19</sup> Constitution of Fiji, Article 117(8)(b) and (c).

<sup>20</sup> Constitution of Fiji, Article 8(3)(d).

<sup>21</sup> See High Court Rules, Order 54 for more information on the process for applying for a writ of habeas corpus.

<sup>22</sup> Constitution of Fiji, Article 45(4)(e) and the Human Rights Commission Decree 2009, Section 12(1)(j). Available at: <http://www.fhrc.org.fj/images/doc/Decree%2011.pdf>.

<sup>23</sup> Constitution of Fiji, Article 45(2) and (3).

<sup>24</sup> High Court Rules, Order 80, Rule 2(1). Available at: [http://www.pacii.org.fj/rules/procedural\\_rules/Fiji%20-%20Fiji%20High%20Court%20Rules%201988.html](http://www.pacii.org.fj/rules/procedural_rules/Fiji%20-%20Fiji%20High%20Court%20Rules%201988.html).

<sup>25</sup> Domestic Violence Decree, Section 19.

<sup>26</sup> High Court Rules, Order 80, Rules 1, 2 and 3.

Under the Family Law Act, each parent has parental responsibility: “all the duties, powers, responsibilities and authority which, by law, parents have in relation to children.”<sup>27</sup> This means, a parent is generally responsible for initiating a suit on behalf of the child. As discussed above, the court will appoint a guardian in cases where the child does not have one.

In cases under the Family Act, the court can order that a child must have separate representation when the best interests of the child or the child’s welfare is a paramount or relevant consideration.<sup>28</sup>

The Constitution provides that “the best interests of the child are the primary consideration in every matter concerning the child.”<sup>29</sup> This provision should require the manner in which parents can act on behalf of their children in legal proceedings to be tempered by the best interests of the child, though no case could be located in which this issue was considered.

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

Pursuant to the Legal Aid Act of 1996,<sup>30</sup> Fiji has established a Legal Aid Commission to provide free or low cost legal assistance to those in need. The commission provides one-day assistance in Criminal and Family Courts by providing a Duty Solicitor, for which no application is necessary. The commission also provides free legal advice at its offices. However, claimants must apply for assistance other than legal advice or the one-day representation in court. The commission indicates that grants are made pursuant to a means test, which requires that the applicant show an income of less than \$15,000 per year. Children are exempt from the application process and are automatically eligible for legal assistance.<sup>31</sup>

A litigant may bring a petition before the court to sue or defend in “*forma pauperis*.”<sup>32</sup> Under the High Court Rules, a person who does not have two hundred dollars, not including in clothing or the subject of the litigation, can be referred to a lawyer to consider the case free of charge. However, the attorney may choose not to pursue the case, particularly if he or she does not believe there is a good cause or valid defence. The Magistrate’s Court Act also provides that the court may remove fees based on the financial status of any party.<sup>33</sup>

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<sup>27</sup> Family Law Act. Section 45. Available at: [http://www.paclii.org/fj/legis/num\\_act/fla2003114/](http://www.paclii.org/fj/legis/num_act/fla2003114/).

<sup>28</sup> Family Law Act, Section 125(1) and (2).

<sup>29</sup> Constitution of the Republic of Fiji, Article 41(2).

<sup>30</sup> Legal Aid Act 1996. Available at: [http://www.paclii.org/fj/legis/num\\_act/laa199664/](http://www.paclii.org/fj/legis/num_act/laa199664/).

<sup>31</sup> See Legal Aid Commission, “Our Services”. Available at: <http://legalaidfiji.org/index.php/our-services>). Legal Aid Commission, Guide to Legal Aid in Family Matters. Available at:

<http://legalaidfiji.org/index.php/component/phocadownload/category/23-family-law-pamphlets>.

Advocates for International Development, *Legal aid Guide*, p. 35. Available at:

<http://www.a4id.org/sites/default/files/u3/A4ID%20Legal%20AID%20Guide.pdf>.

<sup>32</sup> See High Court Rules, Order 110.

<sup>33</sup> Magistrates Court Act, Section 4. Available at: [http://www.paclii.org/fj/legis/consol\\_act/mca232/](http://www.paclii.org/fj/legis/consol_act/mca232/).

Under the Juveniles Act, a juvenile charged with a crime has the right to have his parents in court<sup>34</sup> and, if the juvenile is not represented by legal counsel he, she or his or her parents may be given the right to question witnesses.<sup>35</sup> Any person who is arrested has a right to communicate with a legal practitioner of his or her choice in private. Where he or she does not have sufficient means to engage a legal practitioner and the interests of justice so require, he or she has the right to legal services provided by the Legal Aid Commission.<sup>36</sup>

- 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)?

There are no further conditions on the ability of a child to bring a case before the courts.

### 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?

Constitutional and human rights violations may be brought directly to the High Court. Specifically, if a person considers that any of the provisions of Chapter 2 of the Constitution has been or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if another person considers that there has been, or is likely to be, a contravention in relation to the detained person), then that person (or the other person) may apply to the High Court for redress.<sup>37</sup> Chapter 2 of the Constitution provides for a Bill of Rights, which sets out various enforceable rights and freedoms of all persons, including children, such as the right to life and personal liberty, freedom from cruel and degrading treatment, and access to courts or tribunals.<sup>38</sup> It also contains specific enforceable rights of children.<sup>39</sup>

The Human Rights Commission has broad authority to bring suits in the High Court on behalf any person or class of persons alleging a violation of their human rights. If the Commission decides not to investigate, an individual has the right to bring suit to the High Court personally.<sup>40</sup>

Any person "who believes from reasonable and probable cause that an offence has been committed by a person" can bring a complaint before a magistrate and initiate a private prosecution.<sup>41</sup> However, the Director of

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<sup>34</sup> Juveniles Act, Section 7.

<sup>35</sup> Juveniles Act, Section 21(4), (5) and (6).

<sup>36</sup> Constitution of the Republic of Fiji, Article 13(1)(c).

<sup>37</sup> Ibid., Chapter 2, Article 44.

<sup>38</sup> Ibid., Chapter 2, Articles 6-45.

<sup>39</sup> Ibid., Article 41.

<sup>40</sup> Human Rights Commission Decree, Section 28(2).

<sup>41</sup> Criminal Procedure Decree 2009, Section 56(1).

Public Prosecutions may take over and discontinue such criminal proceedings.<sup>42</sup>

An claimant can make an application for judicial review under the High Court Rules where an alleged violation is in relation to an administrative decision.<sup>43</sup>

Customary justice mechanisms are also used as an informal source of dispute resolution mechanism, though they have been criticised as “upholding an inequitable status quo ... while discriminating against children, youth and women.”<sup>44</sup>

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

Any person who successfully brings a suit in High Court for a violation of human rights is entitled to the remedies set forth in the Human Rights Commission Decree, whether or not the proceeding is brought by the commission or an individual. The remedies available include a declaration that the defendant has violated human rights, restraining orders, monetary damages, restitution, voiding of a contract, and “such other relief as the High Court thinks fit.”<sup>45</sup>

The High Court also has direct jurisdiction to hear any complaint regarding misconduct by a government party (judicial review). The court may deny review, however, if the application is not made in a timely manner, if the party does not have sufficient interest in the matter, and if the action is not based on a rule of public law.

In exercising its powers of judicial review, the High Court can make orders of mandamus (requiring a party to take a certain action), prohibition (prohibiting an action) or certiorari (if successful this results in quashing a decision).<sup>46</sup> The Court may also apply an injunction or make a declaration as the legal relationship between the parties.<sup>47</sup>

The current Constitution of Fiji, which entered into force in 2013, is the supreme law of the State and any law that is inconsistent with the Constitution is invalid.<sup>48</sup> The Constitution provides that the Constitution, including its rights provisions, are to be enforced through the courts.<sup>49</sup>

C. Would such a challenge have to directly involve one or more individual

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<sup>42</sup> Constitution of Fiji, Article 117(8)(b) and (c).

<sup>43</sup> See High Court Rules, Order 53.

<sup>44</sup> See Sinclair Dinnen for UNICEF Papua New Guinea, *Traditional Justice Systems in the Pacific, Indonesia and Timor-Leste*, April 2009 p. 12. Available at: [http://www.unicef.org/tdad/index\\_56512.html](http://www.unicef.org/tdad/index_56512.html).

<sup>45</sup> *Id.*

<sup>46</sup> High Court Rules, Order 53, Rule 1(1).

<sup>47</sup> High Court Rules, Order 53, Rule 1(2)

<sup>48</sup> Constitution of Fiji, Article 2(1).

<sup>49</sup> Constitution of Fiji, Article 2(4)(a) to (c).

child victims, or is it possible to challenge a law or action without naming a specific victim?

Under Human Rights Commission Decree, the Commission can investigate a complaint or take action on its own motion.<sup>50</sup> The Decree allows a person to make a representative complaint about unfair discrimination or a human rights violation on behalf of other persons with a similar cause of complaint, but there is no indication of whether the class members must be identified.<sup>51</sup> However, the Juveniles Act provides that “in relation to any proceedings in any court,” a juvenile may not be identified. In addition, the Act provides that the juvenile need not be present if the court finds his presence is not essential.<sup>52</sup>

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

As discussed above, under the Human Rights Commission Decree, the Proceedings Commissioner may bring action in the name of a class of persons.

The High Court Rules also allow for a joinder of parties where numerous plaintiffs have the same cause of action against a single defendant and allows for commencement of representative proceedings.<sup>53</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?

Nongovernmental organisations may file leave to intervene in the High Court and at the appellate level.<sup>54</sup>

It is unclear whether a group may file a challenge directly on behalf of children's rights violations outside of acting as the child's representative or “next friend” as outlined in the High Court Rules.

It may be possible for an NGO, as a “legal person”, to bring proceedings in the High Court for redress of violations of the Bill of Rights under the Constitution. Article 44 allows a “person” to do so, and the Constitution defines “person” to mean a “natural or legal person, including a company or association or body of persons”. It is unclear, however, whether this would entitle an NGO to bring proceedings on others' behalf, or only on its own behalf.

The Fijian system of judicial review is modelled on that of England and Wales. In England and Wales, NGOs can bring judicial review proceedings

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<sup>50</sup> Human Rights Commission Decree, Section 12(1)(j).

<sup>51</sup> Human Rights Commission Decree, Sections 27(1) and 28(1).

<sup>52</sup> Juveniles Act, Section 13.

<sup>53</sup> High Court Rules, Order 15, Rule 1.

<sup>54</sup> See, e.g., Qarase v Bainimarama [2009] FJCA 47; ABU0077.2008S (31 March 2009). Available at: <http://www.pacii.org/fj/cases/FJCA/2009/47.html>.

where they have “sufficient interest” in the case.<sup>55</sup> This phrase has been duplicated in Fiji’s High Court Rules,<sup>56</sup> which would suggest that it would be possible for NGOs to file and intervene in a judicial review in the same way as in England and Wales. However, no example could be found of an NGO filing such a case in Fiji.

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?

The Magistrate’s Court is the court of first instance in Fiji. The Court hears most civil and criminal, including traffic and juvenile cases. The court also hears applications for domestic violence restraining orders. Contract and tort claims brought before the Magistrates’ Court cannot exceed \$50,000 and landlord tenant disputes have a limit of \$5,000. Some Magistrate’s Courts also handle Family cases with a designated Family clerk. The courts are located in several districts throughout the islands which are organised according to Divisions. There is only one Juvenile Court in the Central/Eastern Division. The calendars vary for each court. A case is filed in Magistrate’s Court by filing a Writ of Summons and obtaining a return date from the court for all parties to appear. Guidelines are given on the Judiciary website.<sup>57</sup>

The High Court hears all indictable criminal offenses and appeals from the Magistrate’s Courts. The High Court also has direct jurisdiction to hear complaints regarding unlawful actions of government entities, including constitutional and human rights violations.

Fiji also has a Family Court with two divisions, one in the Magistrate’s Court and another in the High Court. The Magistrate’s Court hears matters relating to matrimonial cases and actions relating to support under the Family Law Act. The High Court also has jurisdiction over matrimonial cases and exclusive jurisdiction for orders of nullity of marriage and to actions arising under the Convention of the Civil Aspects of International Child Abduction. In addition, the Family Division of the High Court hears appeals from the Magistrate’s Court family decisions.<sup>58</sup>

The fees for filing actions in all of Fiji’s courts are charged according to each step of the action. For example, a Writ of Summons in the Magistrate’s Court is \$28.75 and there is a fee for each amendment, motion, notice, etc.<sup>59</sup>

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<sup>55</sup> Senior Courts Act, Section 31 (England and Wales). Available at: <http://www.legislation.gov.uk/ukpga/1981/54/contents>.

<sup>56</sup> High Court Rules, Order 53, Rule 3(5).

<sup>57</sup> <http://www.judiciary.gov.fj/index.php/magistrates-court/registry/civil-court-procedures>.

<sup>58</sup> See the website of the Judicial Department of Fiji’s resources on the Family Court. Available at: <http://www.judiciary.gov.fj/index.php/family-court>.

<sup>59</sup> Judicial Department of Fiji, *Magistrate’s Court Filing Fees*. Available at: <http://www.judiciaryfiji.org/index.php/magistrates-court/registry/filing-fees>.



The High Court filing fees are significantly higher, with an initial application fee of \$115.00.<sup>60</sup>

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

As discussed above, Fiji's Legal Aid Commission provides legal advice and assistance to applicants who qualify. The High Court Rules also permit litigants to petition for a waiver of fees.

Legal Aid requires an application to determine eligibility, the guidelines set forth that a party must show they make less than \$15,000 a year. Children are not required to file an application and are automatically eligible for representation. If a child is unrepresented, the court will contact Legal Aid, who will appoint an attorney to represent the child in family law and juvenile cases.

- 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?

As discussed above, under the High Court Rules, a litigant may bring a petition before the court to sue or defend in "*forma pauperis*."<sup>61</sup> The court will then refer the petition to a lawyer to consider the case free of charge.<sup>62</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?

The Limitation Act provides for all civil limitation periods. Under this act, there is a 6 year statute of limitations for tort actions, unless the action is for personal injury arising from negligence.<sup>63</sup> The Limitations Act does provide for a tolling of the statute for disability (including infancy), but the extension of the limitations period does not apply if the child was in the custody of his parents at the time the cause of action accrued. If the child was not in parental custody, the limitations is extended to six years from the date the disability ends for suits not involving personal injury, and three years from

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<sup>60</sup> Judicial Department of Fiji, *High Court Filing Fees*. Available at: <http://www.judiciary.gov.fj/index.php/high-court/high-court-registry/filing-fees>.

<sup>61</sup> High Court Rules, Order 110, Rule 1. [http://www.paclii.org/fj/rules/procedural\\_rules/Fiji%20-%20Fiji%20High%20Court%20Rules%201988.html](http://www.paclii.org/fj/rules/procedural_rules/Fiji%20-%20Fiji%20High%20Court%20Rules%201988.html).

<sup>62</sup> High Court Rules, Order 110, Rules 2 and 3.

<sup>63</sup> Limitation Act, Section 4. Available at: [http://www.paclii.org/fj/legis/consol\\_act\\_OK/la133/](http://www.paclii.org/fj/legis/consol_act_OK/la133/).

the end of the disability for cases involving personal injury.<sup>64</sup>

Applications for redress under Article 44 of the Constitution can be made within 60 days from the date when the matter at issue first arose.<sup>65</sup> However, the High Court (Constitutional Redress) Rules 2015 permit discretion if the judge finds that “there are exceptional circumstances and that it is just to hear the application outside of that period”.<sup>66</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 Evidence Decree and the Evidence Act outline the general rules for the admission of evidence.<sup>67</sup>

The Juveniles Act sets forth several special rules for children in court in civil and criminal trials. Children should not be present in court during trial unless acting as a witness or where required for the purpose of justice.<sup>68</sup> The court has the power to clear the courtroom when a child gives evidence.<sup>69</sup> The court can admit a child’s testimony by deposition, if it believes, on the evidence of a medical practitioner, that attendance in court would involve serious danger to the child’s life or health.<sup>70</sup>

There is no minimum age for a child to testify. Under section 10 of the Juveniles Act, child witnesses under 14 years are subject to a competency inquiry regarding their understanding of the oath. If the child fails the competency test he or she may still give evidence but this evidence requires corroboration. In *Kumar v. State* [2015] FJCA 32, the Court of Appeal held that this rule is discriminatory and offends the equality principles of the Constitution without justification. The competency inquiry and the requirement for corroboration for child witnesses in criminal proceedings were held to be invalid under section 2(2) of the Constitution.

Under the Juveniles Act, the name of any juvenile, whether acting as a party or witness, may not be disclosed.<sup>71</sup>

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

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<sup>64</sup> Limitation Act, Section 11.

<sup>65</sup> High Court (Constitutional Redress) Rules 2015; Chief Justice Anthony Gates, ‘The implementation of social and economic rights in a developing economy’, March 2015, available at: [http://www.judiciary.gov.fj/images/media-release/Paper\\_ImplementationofSocialandEconomicRights.GeneralEva\\_March2015.pdf](http://www.judiciary.gov.fj/images/media-release/Paper_ImplementationofSocialandEconomicRights.GeneralEva_March2015.pdf).

<sup>66</sup> Ibid.

<sup>67</sup> Civil Evidence Decree. Available at: [http://www.paclii.org/fj/promu/promu\\_dec/ced2000143/](http://www.paclii.org/fj/promu/promu_dec/ced2000143/). The Evidence Act. Available at: [http://www3.paclii.org/fj/legis/consol\\_act/ea80/](http://www3.paclii.org/fj/legis/consol_act/ea80/).

<sup>68</sup> Juveniles Act, Section 8.

<sup>69</sup> Juveniles Act, Section 9.

<sup>70</sup> Juveniles Act, Section 15.

<sup>71</sup> Juveniles Act, Section 12(1). Violation of this prohibition is punishable by a fine of 100 Fijian dollars for each offence (£32 as of May 2014).

There is no official guideline for the resolution of cases in Fiji. The time frame depends on the complexity of the case and the caseload of the courts.

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

All Magistrate's Court decisions may be appealed to the High Court within 28 days of the decision.<sup>72</sup> The High Court Rules set forth the guidelines for appeals.<sup>73</sup> The Criminal Procedure Decree 2009 governs criminal appeals and affords every person the right to appeal judgments of the criminal courts.<sup>74</sup> Decisions of the High Court may be appealed to the Court of Appeal. For criminal appeals, the appellant must file for leave of appeal and the appeal must be filed within 30 days of the decision. For Civil appeals, an appellant must file within six weeks of a final judgment, or 21 days from an interlocutory order.<sup>75</sup>

The Supreme Court has final appellate jurisdiction, though an appeal from the Court of Appeal can only take place with the leave of the Supreme Court.<sup>76</sup>

Finally, the Supreme Court may hear appeals from the Appellate Court, the Supreme Court, however, has the power to grant or refuse leave to appeal at its discretion.<sup>77</sup>

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?

Fiji's courts generally rely on precedent when making decisions. The decisions of the Supreme Court ultimately have the most influence, but courts often refer to the decisions of other courts as the basis for their analysis and determinations. As a result a negative decision can have a long-term effect on subsequent cases. There is still some question as to how the new constitution will serve children's rights.<sup>78</sup>

In addition, prior positive decisions in the courts have led to government actions reversing these decisions. For example, in 2009 after the Court of Appeal determined the military power was unconstitutional, the Fijian president abrogated the constitution and cancelled all judicial appointments.<sup>79</sup>

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<sup>72</sup> High Court Rules, Order 55, Rule 4.

<sup>73</sup> High Court Rules, Orders 55 and 56.

<sup>74</sup> Criminal Procedure Decree 2009, Part XV. Available at:

[http://www.paclii.org/fj/promu/promu\\_dec/cpd2009201/](http://www.paclii.org/fj/promu/promu_dec/cpd2009201/).

<sup>75</sup> See Judicial Department of Fiji, *Court of Appeal*. Available at:

<http://www.judiciary.gov.fj/index.php/court-of-appeal>.

<sup>76</sup> Constitution of the Republic of Article 98.

<sup>77</sup> Constitution of the Republic of Article 98.

<sup>78</sup> Amnesty International, "Fiji: New constitution fails to protect fundamental human rights" 4 September 2013. Available at:

<http://www.amnesty.org/en/news/fiji-new-constitution-fails-protect-fundamental-human-rights-2013-09-04>.

<sup>79</sup> The Telegraph, "Fiji's president Sacks all judges after court declares government illegal" 10 April

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

Enforcement of the judgments of each court is straightforward and governed by the applicable court rules.<sup>80</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.

In addition to the services listed above, the Legal Aid Commission regularly visits juvenile centres and reports to the Human Rights Commission on the condition of the juvenile centers and the treatment of children in custody. If a violation is found, the Human Rights or Legal Aid Commission brings the issue directly to the appropriate court for resolution.

Children involved in family disputes or custody battles may request separate representation from the court in order to assert their own rights. The court will appoint a social worker to serve as the guardian *ad litem*.

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

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2009. Available at:

<http://www.telegraph.co.uk/news/worldnews/australiaandthepacific/fiji/5134108/Fijis-president-sacks-all-judges-after-court-declares-government-illegal.html>.

<sup>80</sup> See the Magistrates Courts Act; the Court of Appeal Act and the Supreme Court Decree.