

## **Access to justice for children: research path**

### **Legal Research Resources**

National legislation and case law are often publicly available to some degree across the internet. In some countries, there may be a regularly maintained, comprehensive legal database provided by the government, an academic institution, a library, or even a legally-themed non-governmental organisation. Law-making bodies (Congress, Parliament, National Assembly, etc.) may publish the text of enacted legislation and bills under consideration; likewise, courts or law reporting services may publish decisions and dockets online. There may also be subscription-based legal research tools; these for-pay databases can offer not only the text of legislation and case law, but also powerful searching capabilities, subject indexes, ready access to amendments and links to relevant subsequent legal decisions.

Getting a sense of all the national-level resources can take time, and national legal research guides can be extremely valuable in setting out the law of the land before you dive in. The Globalex initiative at New York University<sup>1</sup> has published these kinds of guides on most countries, and they often prove an excellent place to start. The Guide to Law Online published by the United States Law Library of Congress<sup>2</sup> is also a powerful resource, as it has assembled collections of national links to foundational legal documents; the judicial, legislative and executive branches of government; legal research guides; and other general sources of legal information. The Constitution Finder<sup>3</sup> further offers easy access to national constitutions and other documents of fundamental importance to a legal system.

National legislation is also available on a variety of international legal databases. Lexadin's World Law Guide<sup>4</sup> provides access to full-text national laws indexed by subject, as does the International Labour Organization's NATLEX database.<sup>5</sup> The World Legal Information Institute (WorldLII)<sup>6</sup> and its many affiliated regional and national Legal Information Institutes provide not only access to legislative database, but are also an excellent source of national case law. This is complemented by a number of human rights-law focused case law databases, including those provided by the International Network for Economic, Social and Cultural Rights (ESCR-Net)<sup>7</sup>, the Refugee Caselaw Site<sup>8</sup>, and CRIN.<sup>9</sup>

And last but not least, the work of non-governmental organisations may prove illuminating in showing how legal systems work not only on paper, but also in practice. International NGOs often release reports and editorials on the functioning of a particular legal system; particular organisations of interest

1 <http://www.nyulawglobal.org/Globalex/>

2 <http://www.loc.gov/law/help/guide.php>

3 <http://confinder.richmond.edu/>

4 <http://www.lexadin.nl/>

5 [http://www.ilo.org/dyn/natlex/natlex\\_browse.byCountry?p\\_lang=en](http://www.ilo.org/dyn/natlex/natlex_browse.byCountry?p_lang=en)

6 <http://www3.worldlii.org/catalog/215.html>

7 <http://www.escr-net.org/caselaw/>

8 <http://www.refugeecaselaw.org/Home.aspx>

9 <http://www.crin.org/Law/search.asp>

include the Open Society<sup>10</sup>, the International Commission of Jurists<sup>11</sup>, Human Rights Watch<sup>12</sup> and Amnesty International<sup>13</sup>; of particular interest to children's rights is UNICEF.<sup>14</sup> Where strong national NGOs exist in a country, these may ultimately prove to be the most valuable sources of information; a listing of organisations involved in children's rights work can be found on CRIN.<sup>15</sup>

More details about where you might look for laws, judicial decisions and general information about access to justice and the status of children's rights in a particular country are available section-by-section in the legal briefing template below. The template describes not only resources where information can first be found, but also gives a general sense of direction as to where within a country's legal order you might uncover the kinds of legal provisions that govern children's interaction with the courts.

## **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 legal status of the CRC is often addressed in the Committee on the Rights of the Child's reporting procedure.<sup>16</sup> Countries that have ratified the CRC are required to file regular reports<sup>17</sup> on their efforts to implement the Convention; information about the status of the CRC in national law is often provided in the first portion of these reports on “General measures of implementation.” Where information is not supplied in a country's report, the Committee may also ask for clarification on the status of the CRC in a “List of Issues” as part of the reporting process. Both this and the country's “Written Replies” are available on the Committee's website.<sup>18</sup> The Committee may also comment on the status of the CRC in a country in its “Concluding Observations”, which broadly address a country's compliance with the CRC and set out recommendations to better align national laws and policies with the Convention.

For some countries, basic information on the legal status of the CRC is available in the National Laws section of CRIN's Children's Rights Wiki.<sup>19</sup> The National Laws section may be found under the National tab on each country's homepage.<sup>20</sup>

It is also worth looking directly for sources that establish the status of the CRC and other relevant international instruments. The place of treaties in the national legal order is often provided for in a country's constitution<sup>21</sup>, although it may also be addressed in national legislation on the interpretation of international law. If nothing else, the status of the CRC

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10 <http://www.opensocietyfoundations.org/>

11 <http://www.icj.org/>

12 <http://www.hrw.org/>

13 <http://www.amnesty.org/>

14 <http://www.unicef.org/>

15 <http://www.crin.org/organisations/index.asp>

16 <http://www2.ohchr.org/english/bodies/crc/index.htm>

17 <http://www2.ohchr.org/english/bodies/crc/sessions.htm>

18 For example, see A. example: <http://www2.ohchr.org/english/bodies/crc/crcs60.htm>.

19 [http://wiki.crin.org/mediawiki/index.php?title=Main\\_Page](http://wiki.crin.org/mediawiki/index.php?title=Main_Page); for example, see <http://wiki.crin.org/mediawiki/index.php?title=Afghanistan>.

20 For example, see [http://wiki.crin.org/mediawiki/index.php?title=Afghanistan: National Laws](http://wiki.crin.org/mediawiki/index.php?title=Afghanistan:_National_Laws).

21 <http://confinder.richmond.edu/>.

can be inferred from figuring out whether the country adopts a “monist” (treaties automatically become part of national law) or “dualist” (treaties must be implemented via national legislation to take effect) approach to international law.<sup>22</sup> In most cases, countries following the English legal tradition are “dualist” while those following the continental European legal tradition are “monist”.

B. Does the CRC take precedence over national law?

This is an important component of the CRC's status in national law. As above, a country's constitution or general legislation on the interpretation of treaties will often set out where treaties fall in the national legal order. In some countries, the CRC and other treaties may be placed on par with the constitution itself or otherwise above national legislation. In this case, it can be said that they take precedence over national laws; i.e., if national law conflicts with a treaty, the treaty prevails. In other countries, the CRC and other treaties may only serve as interpretive guidance with looking at national law, and may be trumped by directly conflicting national legislation.

At times it may not be entirely clear precisely what the relationship between the CRC and national law is. Should this be the case, it may be helpful to look court decisions on the matter. A reasonably comprehensive list of publicly available case law databases is available via the World Legal Information Institute.<sup>23</sup> It is also worth determining whether the Government has issued executive orders or released other statements that clarify the current interpretation on treaties' role in international law.

C. Has the CRC been incorporated into national law?

Treaties that have been “incorporated” into national law form part of the national legal order. As above, the CRC may have been incorporated into national law when ratified or published in the official gazette, often the case in countries that follow the monist legal tradition. Otherwise, implementing legislation will generally be required to bring the provisions of treaty into effect. This may be done “directly”, whereby the whole treaty is adopted in a single legislative act, or – more commonly – in a subject-by-subject, piecemeal manner. In the case of the latter, there is no need to specify all national laws that address children's rights.

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

Even if the CRC has been incorporated into national law, it may still not be directly enforceable in the courts. In some jurisdictions, treaties may take precedence over national law, but individuals cannot themselves sue to enforce their rights under the Convention. It may be even more complicated; in some countries, certain provisions of the CRC are considered directly enforceable while others are not. Often times the distinction drawn between provisions that are directly enforceable and those that are not involves determining whether the right in question provides clear guidance that can be followed by the courts.

In countries where the CRC has been incorporated, it will be worth looking for cases that

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<sup>22</sup> For more information, see A. more information:

[http://en.wikipedia.org/wiki/Monism\\_and\\_dualism\\_in\\_international\\_law](http://en.wikipedia.org/wiki/Monism_and_dualism_in_international_law).

<sup>23</sup> <http://www.worldlii.org/>.

show how courts have addressed requests to enforce particular convention rights. Where the CRC has not been incorporated, it is unlikely that its provisions could be directly enforced. Nonetheless, it may still serve as a source of interpretive guidance in judicial decision-making.

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

CRIN's CRC in Court: Case Law Database provides access to national decisions that cite the CRC.<sup>24</sup> If there are publicly available, searchable databases of national case law<sup>25</sup>, these may help to determine whether and how often the CRC is cited in court judgments.

In addition, the Committee on the Rights of the Child has in recent years begun to ask countries to provide details of judicial decisions that cite the Convention as part of its reporting procedure. Usually, this would be asked and answered in the Committee's "List of Issues" and the country's "Written Replies."

## 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?

As individual cases of children's rights violations would likely be brought in civil courts, information on children's ability to initiate these kinds of lawsuits can often be found in a country's Code or Rules of Civil Procedure. The Civil Procedure Rules may include a section dedicated to children or other persons who are deemed to be incapable of taking legal action on their own, and may specify that a representative be appointed or made available to assist a child bringing or defending a lawsuit.

If the rights violation amounts to an offence, there may also be laws authorising the private criminal prosecution of individuals. This right is sometimes provided for in the constitution, or procedures for bringing private prosecutions may simply be detailed in the Code or Rules of Criminal Procedure. It may also be important to examine the legal provisions that establish the powers and authority of the public prosecutor, who may in some circumstances be authorised to take control of or discontinue private criminal prosecutions.

If a country's judicial system is further subdivided into courts that handle other kinds of cases – for example, family courts, juvenile/children's courts, or administrative courts – those courts may follow a similarly specific code of procedure dedicated to their area of specialisation.

Rules of Procedure can often be found in national legislative databases or on judicial and/or government websites. Because these documents are widely used, they may also be available in any of a number of international legal databases, including the World Legal

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<sup>24</sup> [http://www.crin.org/Law/CRC\\_in\\_Court/index.asp](http://www.crin.org/Law/CRC_in_Court/index.asp).

<sup>25</sup> See <http://www3.worldlii.org/>.

Information Institute<sup>26</sup>, Lexadin's World Law Guide<sup>27</sup>, or the International Labour Association's NATLEX database.<sup>28</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?

Again, it can usually be determined whether children must bring cases through a representative by looking to the relevant code of procedure.

There may also be special provisions for the representation of children in a country's Children's Act or equivalent legislation. Often these provisions apply only in child protection cases or determinations of family-related disputes, but in some instances they may apply universally. Countries will identify which legislative acts are relevant to children's rights in the CRC reporting procedure; once you have determined whether there are any laws of interest, these may typically be found as above in a national or international legal database.

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

As above, codes of procedure often set out the provisions for interested adults to bring lawsuits on behalf of children.

Parents or legal guardians may also be granted special authority to initiate legal proceedings for children in their care. It is important to determine what legal custody of children entails, and a country's Children's Act or Family Code often sets out the specific rights and responsibilities of parents in relation to their children. Equally, there may be separate legislative acts that address the granting of similar powers to legal guardians where parents are unable or unwilling to fulfill their duties.

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

The right to legal assistance may be guaranteed in a country's constitution or other primary legislation. Often this right is limited to criminal proceedings, but there may also be a right to representation in civil proceedings where injustice would otherwise result. More details about the nature of the right to representation may be spelled out in the various codes of procedure, or in some circumstances the court rules. Court rules can often be downloaded directly from the relevant court division's official website, if one exists, or else the ministry or justice or its equivalent.

There may also be legislation on the subject of legal assistance, and even where providing legal aid is not mandatory under the law, Governments may still offer funding for certain individuals or particular kinds of cases. Many countries have a body dedicated to providing information on the availability of legal aid, often a legal services association. These associations are good places to start looking for information, as they will often detail

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26 <http://www.worldlii.org/>.

27 <http://www.lexadin.nl/wlg/legis/nofr/legis.php>.

28 [http://www.ilo.org/dyn/natlex/natlex\\_browse.home](http://www.ilo.org/dyn/natlex/natlex_browse.home).

eligibility criteria and explain the underlying laws or policies behind them.

- 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)?

If there are any special conditions or limits on children bringing cases, these will often be spelled out as above in either codes of procedure or a comprehensive Children's Act. There may be general statements in these laws about a parent or guardian's duties and status in relation to a child under his or her care. If there are provisions for a representative to be appointed to assist a child in bringing civil or other proceedings, notice may need to be given to a child's parent or guardian. Alternatively, a parent or guardian may have the right to intervene in a case or serve as a child's representative. If a child is accused of an offence, there may also be laws requiring his or her parents to be in attendance at court proceedings.

### **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?

In addition to civil and criminal proceedings, it may also be possible to initiate other kinds of proceedings that challenge public actions or rights violations. "Judicial review" proceedings allow for reviewing the decisions of public authorities, and may be provided for in a country's constitution, Code or Rules of Civil Procedure, or separate legislation. By the same token, "public interest litigation" may be another means to challenge laws, policies or government actions that violate the rights of a large number of persons. There may, however, also be special rules that apply when suing the Government. If these exist, they are often found in codes of procedure or a separate legislative act dedicated to the subject matter (e.g., the Government Proceedings Act).

In some countries, the constitution provides for special procedures to challenge violations of guaranteed national or international rights. These may be detailed in the constitution itself, or may be further explained in separate court or procedural rules. The same holds true for Convention rights that are directly incorporated in national legislation. Where this has happened, the incorporating legislation may also specify the availability of proceedings to enforce these rights.

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

The general powers of the courts are typically established in the constitution, procedural codes, and court rules. Different remedies may be available in judicial review procedures or other special proceedings to enforce children's rights; these are typically set out in the same provisions that authorise these kinds of proceedings.

In countries with a heavy reliance on case law, court powers may also be grounded in long-established judicial traditions. In these circumstances, looking at a recent court judgment on a matter relating to children's rights can be illuminating. Notably, in some countries, courts

may also have the power to launch investigations or begin proceedings of their own initiative where provided with information to the effect that rights violations have occurred. Where this is possible, it will usually be authorised under the court's rules or the relevant code of procedure.

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?

Individual civil or criminal proceedings typically require the identification of a specific victim, and this is often set out in the governing code of procedure. This is less likely in the case of judicial review, public interest litigation and other kinds of cases, where specific provision may be made for parties who have not been directly affected to challenge a rights violation.

In countries in which judicial decisions form an important part of the law, case law may also set the boundaries for who may bring a lawsuit. This is often referred to as “standing”, and courts may require that a person or organisation wanting to file a complaint have been personally affected by a particular matter. Standing can be broader in cases that are brought to enforce human rights or otherwise in the public interest; searching for decisions where these kinds of cases have been brought without involving or naming individual victims may provide valuable information.

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

In civil proceedings, the Code or Rules of Civil Procedure usually set out courts' abilities to combine cases, to allow for class action or representative lawsuits, to order that one case among many related cases proceed as a “test case”, or to otherwise provide for multiple persons seeking the same relief to sue the same defendant together.

In criminal, juvenile justice, family court or children's court proceedings, the relevant code of procedure or court rules may provide that a child involved in a lawsuit not be publicly identified. Alternatively, children's privacy may also be generally guaranteed under a Children's Act or similar legislation.

As above, judicial review and public interest litigation may also provide means to bring a particular form of collective action or group 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?

A review of case law on standing may prove helpful to determine in what circumstances non-governmental organisations are permitted to file challenges to violations of children's rights. In judicial review proceedings, public interest litigation and special constitutional procedures, there may be specific rules that authorise the participation or direct involvement of NGOs and other interested parties.

Civil procedure rules may also permit organisations or individuals to intervene in cases that have already been filed, whether it be as a formal party to the case, an interested party, or a

friend of the court (often called “amicus curiae”). Even where there are not specific legal provisions, it may also be possible to serve as an interested party or amicus curiae with permission of the court. This can often be determined by searching for recent, high-profile cases involving violations of human rights or other concerns of national or public interest.

**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?

Venue is often determined with reference to codes of procedure, legislative acts establishing specialised or subordinate courts (e.g., Magistrates' Courts Act, Family Courts Act), and – in the case of certain special proceedings – the constitution. In civil proceedings seeking damages, the amount of money sought is often a determinant as to which court will first hear the case. This amount may be provided for directly in a code of procedure, or may be left subject to determination by order of the Government. If the Government plays a role in establishing the jurisdiction of lower courts, it may be wise to look through orders and decisions issued by the Ministry of Justice or its equivalent.

Filing procedures are usually court-specific and often established in court rules, although general guidance as to the process of initiating a case may also be found in national codes of procedure. Filing fees may be established in court rules, codes of procedure, separate legislation, or by order of the Government; they will often vary depending on the court in which a case is brought.

- 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 above, rights to and eligibility for legal assistance are often based in codes of procedure, stand-alone legislation (e.g., Legal Aid Act), or the decisions of a separate Government body responsible for the administration of legal aid. Where children are required to have legal assistance in court proceedings, rules often provide that this assistance be provided free of charge. It is not uncommon, however, that a child who brings a successful complaint be required to reimburse the Government for the costs of his or her legal assistance.

Where a child cannot afford to pay court fees, codes of civil procedure or court rules may provide ways to proceed without doing so. As with legal assistance costs, however, a successful complainant may be required to repay these fees.

In some countries, courts may have discretion to decide who will pay the costs of bringing the case when issuing a decision. These costs include both court fees and lawyers' fees, and the rule is often that the losing party pay the winning party's costs. If courts have the power to award fees, it is usually provided for in a code of procedure, although there may also be specific legislation directing courts to award fees in a particular way for cases brought in the



public interest.

In private prosecutions brought in criminal court, codes of criminal procedure will often detail whether legal assistance is available to cover the fees or costs incurred in bringing the prosecution. If a conviction is obtained, it may also be possible to recover costs and fees and from the offender.

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

There are likely no formal court or procedural rules on the provision of pro bono legal assistance. Instead, it may be more useful to explore the guidelines set by the body that regulates the practice of law and information provided by lawyers' associations.<sup>29</sup> Human rights organisations may also be able to provide legal advice, assistance or representation, especially where a case addresses a widespread rights violation. A directory of organisations with a particular interest in children's rights is available on the CRIN website.<sup>30</sup>

In some jurisdictions, it may be permissible for lawyers to bring cases without charging for legal fees up front. In these kinds of arrangements, often called “conditional” or “contingency” fee agreements, lawyers are instead paid from the proceeds of the case should the complaint succeed. Often times, specific provisions on the collection of lawyers' fees can be found in legislation regulating the practice of lawyers (e.g., Advocates Act).

- 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?

Statutes of limitation for civil claims are often set out in separate, dedicated legislation. There may be a section dedicated specifically to limitation periods as they apply to children, or children may also fall under a provision on disability as they are not considered full legal persons. For judicial review proceedings, public interest litigation and other special constitutional procedures, there is often a shorter period of time to challenge a public action; if so, this will often be detailed in the same source of law that provides for bringing these kinds of complaints.

- 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?

Details on the kinds of evidence that can be admitted are often found in a country's Code or Rules of Evidence, or in some cases separate, dedicated legislation (e.g., Evidence Act). Specific procedures for admitting evidence often depend on the type of proceeding, and can usually be found in the relevant code of procedure. They may also be relaxed in the case of judicial review proceedings, public interest litigation or other constitutional procedures.

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<sup>29</sup> See, e.g., <http://www.ibanet.org/Document/Default.aspx?DocumentUid=25834764-545A-44BA-9B82-6D326AE46997>.

<sup>30</sup> <http://crin.org/organisations/index.asp>.

Codes of procedure may also explain particular rules for evidence to be provided by children, especially as related to the giving of testimony under oath and unsworn testimony.

Special measures relating to the ways in which children may give evidence can often be found in a country's Children Act. Where these measures only apply in certain instances (i.e., child witnesses in sexual abuse cases), they may also be provided for in other specific legislation (e.g., the Sexual Offences Act) or in laws establishing certain kinds of courts that address children's matters (e.g., Family Court Act).

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

There may be timing guidelines lines set out for the resolution of cases in codes of procedure or court rules, particularly where different kinds of cases are allocated to separate "tracks". For judicial review proceedings, public interest litigation or other special constitutional procedures, shorter time requirements may be specified.

The Ministry of Justice or a similar judicial monitoring department may also publish statistics on the time it takes for cases to pass through the system from filing to resolution. Alternatively, independent reports published by non-governmental organisations or academic institutions may offer general guidelines as to how long it might take to obtain a judicial ruling.

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

Rights or options to appeal are often discussed in codes of procedure and, in some cases, the constitution. Specific guidance as to timing requirements and admissibility requirements may be provided in the relevant code of procedure, or else the rules of either the court from which appeal is being sought or the court with which an appeal is to be filed. Often times, these codes and rules also set the boundaries of what the powers of an appellate court are to review lower court decisions and what remedies it may offer.

- 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?

To determine the impact a negative decision would have, it is important to determine the value a country's legal system places on judicial precedent (i.e., the idea that lower courts must follow the decisions of higher courts, and that higher courts must generally follow their own decisions). If case law is important in a country's legal system, it is likely that a negative decision could have a long-lasting impact.

To determine whether there is a possibility for political backlash or repercussions from a positive case, it may be helpful to look up news articles and Government press releases on the subject of high profile recent human rights cases. If a non-governmental organisation or other advocacy group was involved in bringing a particular challenge, they may also have released information on official responses to the judgment.

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

decision?

Procedures for enforcement are usually found in codes of procedure and court rules. These can give a good sense of a court's power to make sure that its orders are followed, but it may also be worth looking for independent reports on the monitoring and enforcement of court decisions in general. Some organisations publish information on the stability and strength of judicial systems and the rule of law, which often offer valuable insight into whether Government bodies are likely to abide by decisions issued against them.

**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.

It may be particularly useful here to highlight other avenues for seeking redress outside the formal judicial system, like village or religious courts.