

ACCESS TO JUSTICE FOR CHILDREN: MALTA

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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?

According to Maltese legislation provisions of the treaty become part of the law of Malta only by or under an Act of Parliament.¹ Malta ratified the CRC in 1990.²

B. Does the CRC take precedence over national law?

The CRC does not take precedence over national law. As noted above, absent implementing legislation, the CRC is not enforceable in Malta. In addition, Article 7 of the Constitution of Malta provides that, “if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void”.³

C. Has the CRC been incorporated into national law?

The CRC has been partially incorporated into national law. The United Nations Committee on the Rights of the Child has expressed concern that no comprehensive strategy for implementing the CRC is in place.⁴ The principles of the Convention are binding on Malta as part of an international obligation. However, the Convention is not as yet incorporated within domestic law.⁵ Malta’s approach has thus been that of ensuring that domestic legislation, policies and practices are in compliance with the Convention. To this effect, the rights protected by the Convention have to a considerable extent been included into domestic legislation and are therefore enforceable as such in the domestic courts.⁶ Malta has enacted a number of laws intended to harmonize national law with the CRC. For example, Commissioner for Children Act was adopted in 2003 which

¹ Ratification of Treaties Act, Article 3(3). Available at:

<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8783&l=1>

² See

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en

³ Constitution of Malta, Article 7. Available at:

<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8566>

⁴ UN Committee on the Rights of the Child, Concluding observations on the Second Period Report of Malta, CRC/C/MLT/CO/2, 18 June 2013, para. 12. Available at:

<http://www2.ohchr.org/english/bodies/crc/docs/co/CRC.C.MLT.CO.2.doc>

⁵ Replies to the issues raised by the Committee in the list of issues, CRC /C/MLT/Q/2/Add.1, 26 March 2013. Available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fMLT%2fQ%2f2%2fAdd.1&Lang=en

⁶ Ibid.

seeks to strengthen protection for children, promote child rights and improve the provision of services to children.

However, the United Nations Committee on the Rights of the Child observed that not all Maltese laws are in full compliance with the CRC and expressed concern because Malta had not yet undertaken a comprehensive review of its legislation to ensure compliance.⁷

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

Malta has reported to the United Nations that “although a comprehensive sectoral Children’s Act will not be enacted at least for the time being, the rights guaranteed by [the CRC] will become autonomously enforceable as Convention rights in the domestic courts”.⁸ However, there appears to be no legal basis for enforcement of rights guaranteed by the CRC that are not protected under analogous implementing legislation.

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

There are at least two cases in which Maltese courts reached decisions based, at least in part, upon the requirements of the CRC:

In *Caruana v. Attorney General and Director of the Department for Social Welfare* (18 August 2012), the First Hall Civil Court stated that the obligations under Article 8 of the European Convention on Human Rights must be interpreted within the wider framework of international obligations relating to child abduction, which includes the rights and obligations established in the CRC.⁹

In *Simon Gallard v. the Honourable Prime Minister* (21 October 2003), the First Hall Civil Court ruled that treating Maltese and foreign fathers differently was detrimental to the interests of minors, as outlined in CRC.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?

According to the Constitution any person who alleges that any of the rights determined by the Constitution has been, is being or is likely to be contravened in relation to him or her, may apply to the Civil Court, First Hall, for redress.¹¹

Under the Commissioner for Children Act, Malta’s Commissioner for Children is charged with ensuring that laws relating to the protection of children’s interests are

⁷ UN Committee on the Rights of the Child, Concluding observations on the Second Period Report of Malta, CRC/C/MLT/CO/2, 18 June 2013, para. 10. Available at: <http://www2.ohchr.org/english/bodies/crc/docs/co/CRC.C.MLT.CO.2.doc>

⁸Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ The Constitution, Article 46.

observed.¹² To that end, the Commissioner has authority to carry out investigations either in response to a written complaint or on his own initiative, but the Commissioner does not carry out investigations concerning specific, individual conflicts between a child and its parents or guardians, or between the parents or guardians including matters concerning the exercise of parental responsibility and any other matter that falls within the competence of any court.¹³ If an investigation indicates that an individual is or may be in violation of “any law of a penal nature,” the Commissioner is obliged to report the matter to Malta’s Attorney General.¹⁴

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?

According to Civil Code of Malta a minor is a person of either sex who has not yet attained the age of eighteen years.¹⁵

Under Article 781 of Malta’s Code of Organization and Civil Procedure, minors generally may not bring suit on their own behalf. Claims on behalf of a minor must be brought by a parent exercising paternal authority, or in the absence of such parent, by a tutor or a curator.¹⁶

However, this general rule does not apply to actions against a child’s parent, provided that the child is represented by a curator *ad litem*.¹⁷

Also, this rule is not applicable to minor, if such child carries on trade with the consent of the parent exercising paternal authority even though the action touches matters not relating to trade, or if the said parent has expressly given his assent for the child to sue or be sued without his assistance.¹⁸

Alternatively, the Court of Voluntary Jurisdiction may grant the child authorization to sue if the parent exercising paternal authority is unable or refuses to appear for the child, or is unable or refuses to give his assent for his child to sue.¹⁹ The Court of Voluntary Jurisdiction is a civil court with jurisdiction over adoption, tutorship, curatorship and other administrators.²⁰

While parties may not appeal decrees issued by the Court of Voluntary Jurisdiction, they may file a request to quash such decree in the Civil Court, First Hall.²¹

¹² Commissioner for Children Act, Art. 11(j). Available at: <http://www.refworld.org/docid/3fd9ce984.html>

¹³ Commissioner for Children Act, Article 14(1)-(2).

¹⁴ Commissioner for Children Act, Article 14(6).

¹⁵ Civil Code, Article 157. Available at:

<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8580>

¹⁶ Code of Organization and Civil Procedure, Article 781(a). Available at:

<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8577&l=1>

¹⁷ Code of Organization and Civil Procedure, Article 782(b).

¹⁸ Code of Organization and Civil Procedure, Article 782(a).

¹⁹ Code of Organization and Civil Procedure, Article 784.

²⁰ The Judiciary of Malta, Voluntary Jurisdiction Section. Available at:

<http://www.judiciarymalta.gov.mt/voluntary-jurisdiction?l=1>

²¹ Ibid.

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

Since an infant or young child generally may sue through a parent, tutor or curator only, Malta's Civil Code defines a child's relationship with the parent, tutor or curator.²² Parental authority ceases if the parent: (a) exceeds the bounds of reasonable chastisement, ill-treats the child or neglects his or education; (b) endangers the education of the child; (c) is interdicted under Malta's Civil Code, or (d) mismanages the child's property.²³

The Civil Code also provides extensive guidance on the court's appointment of tutors (usually the child's nearest relative) and the conduct of tutors.²⁴ Any person may demand from the court to appoint a tutor, and the court may appoint more than one such tutor.²⁵

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

Malta does not provide special assistance for child litigants or their representatives. In general, parties to a case, arbitration or any adjudication before an authority may submit application for legal aid to Malta's Civil Court, First Hall.²⁶ Parties can also make an oral demand to the Advocate for Legal Aid, a public officer appointed by the Minister of Justice.²⁷ In either case, the Advocate for Legal Aid will examine the demand and determine whether the applicant "has reasonable grounds for taking or defending, continuing or being a party to proceedings".²⁸

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)?

When a child brings an action against his or her parent through a curator *ad litem* under Article 783 of the Code of Organization and Civil Procedure, a candidate may apply and be appointed curator *ad litem* by the court before which the action has been brought.²⁹ Formerly, a parent's assent was required, but no longer.³⁰

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?

²² Code of Organization and Civil Procedure, Art. 781(a).

²³ Civil Code, Article 154(1).

²⁴ Civil Code, Article 160.

²⁵ Civil Code, Articles 159(1), 161(1).

²⁶ Code of Organization and Civil Procedure, Article 911(1).

²⁷ Code of Organization and Civil Procedure, Article 911(2).

²⁸ Code of Organization and Civil Procedure, Article 912(a).

²⁹ Code of Organization and Civil Procedure, Article 783(1).

³⁰ Ibid.

The Civil Court, First Hall, has original jurisdiction over cases involving allegations that a provision of the Constitution has been or will likely be contravened.³¹

The Civil Court, First Hall, also has original jurisdiction over all cases involving alleged violations of human rights, whether under the Constitution or under the provisions of the European Convention on Human Rights as incorporated into Maltese law.³²

Where cases concern violations of children's rights under domestic law, minors may only sue or be sued through a parent exercising paternal authority, or through a tutor or curator.³³ In actions against the child's own parent, the child may sue while represented by a curator *ad litem*.³⁴ In addition, the Court of Voluntary Jurisdiction may grant the child authorization to sue if the parent exercising paternal authority is unable or refuses to appear for the child or give his assent for the child to sue.³⁵

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

In matters before the Civil Court, First Hall, parties may seek damages, or request an order requiring the cessation of a human rights violation.³⁶

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?

Research did not uncover whether it is possible to challenge a law or action without naming a specific victim.

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

Malta's Collective Proceedings Act allows group litigation for violations of certain laws.³⁷ However, currently, these laws include only the Competition Act, the Consumer Affairs Act and the Product Safety Act.³⁸

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

Malta's Constitution permits "any person" to apply to the Civil Court, First Hall, for redress of past, present or likely future violations of the Constitution or of

³¹ Constitution of Malta, Article 46(1).

³² The Judiciary of Malta, First Hall of the Civil Court. Available at: <http://www.judiciarymalta.gov.mt/first-hall-of-the-civil-court?l=1>

³³ Code of Organization and Civil Procedure, Article 781(a).

³⁴ Code of Organization and Civil Procedure, Article 782(b).

³⁵ Code of Organization and Civil Procedure, Article 784.

³⁶ The Judiciary of Malta, First Hall of the Civil Court. Available at: <http://www.judiciarymalta.gov.mt/first-hall-of-the-civil-court?l=1>

³⁷ Collective Proceedings Act, Article 3(a). Available at:

<http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=23398&l=1>

³⁸ Collective Proceedings Act, Schedule A.

fundamental human rights.³⁹ However, such violation should be related to the person seeking redress. There appears to be no precedent for an action brought by a non-governmental organization to challenge children's rights violations.

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 Juvenile Court established under the Juvenile Court Act is deemed by law to be a Court of Magistrates.⁴⁰ Juvenile Court hears charges against, or other proceedings relating to, a child or young person - a person who is under the age of sixteen years.⁴¹

First Hall of the Civil Court has original jurisdiction over all civil matters, which are not assigned to another court by special provision of law.⁴² In addition, the Civil Court, First Hall, deals with allegations of violations of human rights, whether under the Constitution or under the provisions of the European Convention on Human Rights as incorporated into Maltese law by virtue of the European Convention Act. First Hall of the Civil Court also deals with cases of judicial review of administrative action whereby administrative acts of the government or of any other public authority may be quashed.⁴³

Moreover, the Administrative Review Tribunal has jurisdiction to review administrative acts.⁴⁴ It is competent to review administrative acts of the public administration on points of law and points of fact.⁴⁵

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

As noted above, Malta does not provide special procedures for children or their representatives to receive free or subsidized legal assistance. In general, parties to a case, arbitration or any adjudication before an authority may submit application for legal aid to the Civil Court, First Hall.⁴⁶ Parties may also make an oral demand to the Advocate for Legal Aid, a public officer appointed by the Minister of

³⁹ Constitution of Malta, Article 46(1).

⁴⁰ Juvenile Court Act, Article 3(2). Available at:

<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8774&l=1>

⁴¹ Ibid. Articles 2, 3(1).

⁴² The Judiciary of Malta, First Hall of the Civil Court. Available at:

<http://www.judiciarymalta.gov.mt/first-hall-of-the-civil-court?l=1>

⁴³ Ibid.

⁴⁴ Administrative Justice Act, Article 5(2). Available at:

<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8956>

⁴⁵ Ibid. Article 7.

⁴⁶ Code of Organization and Civil Procedure, Article 911(1).

Justice.⁴⁷ In either case, the Advocate for Legal Aid examines the demand and determines whether the applicant “has reasonable grounds for taking or defending proceedings”.⁴⁸

If the Advocate for Legal Aid reports in favour of the applicant, the applicant may receive legal aid.⁴⁹ If the report is unfavourable, the Civil Court, First Hall, will allow the parties to make further submissions before deciding whether to reverse the report’s conclusion and grant legal aid.⁵⁰ When a party is granted legal aid, the Civil Court, First Hall, assigns an advocate to the party, chosen based on a rotation system set forth in Article 91 of Malta’s Code of Organization and Civil Procedure.⁵¹

The following conditions must be met to obtain legal aid: (a) the applicant must have reasonable grounds for taking, defending, continuing or being part to the proceeding at issue, and (b) the applicant may not have “property of any sort,” the net value of which exceeds €6988.12, and the applicant may not earn an annual income that is more than the minimum wage established for persons of eighteen years and over.⁵² The calculation of the net property value excludes the applicant’s principal residence and any household items reasonably necessary for the use by applicant and his family.⁵³

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

Research did not reveal whether pro bono assistance or contingency fee arrangements are available.

- 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?

Generally, actions for damages not arising from a criminal offence are barred by the lapse of two years.⁵⁴ The limitations period does not run against minors in Malta in civil matters.⁵⁵

Criminal actions are barred according to the following schedule:

- by the lapse of twenty years with respect to crimes liable to the punishment of imprisonment for a term of not less than twenty years;
- by the lapse of fifteen years with respect to crimes liable to imprisonment for a term of less than twenty but not less than nine

⁴⁷ Code of Organization and Civil Procedure, Article 911(2).

⁴⁸ Code of Organization and Civil Procedure, Article 912(a).

⁴⁹ Code of Organization and Civil Procedure, Article 917.

⁵⁰ Ibid.

⁵¹ Code of Organization and Civil Procedure, Article 918.

⁵² Code of Organization and Civil Procedure, Article 912(a)-(b).

⁵³ Ibid.

⁵⁴ Civil Code, Article 2153.

⁵⁵ Civil Code, Article 2124(1).

- years;
- by the lapse of ten years with respect to crimes liable to imprisonment for a term of less than nine but not less than four years;
- by the lapse of five years with respect to crimes liable to imprisonment for a term of less than four years but not less than one year;
- by the lapse of two years with respect to crimes liable to imprisonment for a term of less than one year, or to a fine or to the punishments established for contraventions;
- by the lapse of three months with respect to contraventions, or of verbal insults liable to the punishments established for contraventions.⁵⁶

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?

All evidence must be relevant to the matter in issue between the parties. The court shall disallow any evidence which it considers to be irrelevant or superfluous, or which it does not consider to be the best which the party can produce.⁵⁷

In criminal cases, depositions of witnesses are admissible as long as the witness is also “produced” for examination in court.⁵⁸ Where the witness is a minor (under sixteen years of age) and an audio and video-recording of the minor’s testimony is introduced into evidence, the minor is exempt from examination in court, unless the court finds a reason, which arises after the date of such testimony and is “in the interest of the administration of justice and the discovery of the truth”.⁵⁹

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

Malta’s Code of Organization and Civil Procedure does not provide timing guidelines for the resolution of cases. The United States Department of State has observed that Malta’s legal system suffers from lengthy delays, resulting in diminished access to due process.⁶⁰

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

Civil appeals are heard by the Court of Appeal, the final appellate court for civil matters in Malta.⁶¹ Malta has only a one tier system of appeal.⁶² Criminal appeals are heard by the Court of Criminal Appeal, the final appellate court for criminal matters.⁶³

⁵⁶ Criminal Code, Article 688. Available at:

<http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8574&l=1>

⁵⁷ Code of Organization and Civil Procedure, Articles 558, 560.

⁵⁸ Criminal Code, Article 646(2).

⁵⁹ Ibid.

⁶⁰ U.S. Dept. of State, Country Reports on Human Rights Practices for 2011, Malta. Available at:

<http://www.state.gov/documents/organization/186591.pdf>

⁶¹ The Judiciary of Malta, Court of Appeal. Available at: <http://www.judiciarymalta.gov.mt/court-of-appeal>

⁶² Ibid.

⁶³ The Judiciary of Malta, Court of Criminal Appeal. Available at:

<http://www.judiciarymalta.gov.mt/court-of-criminal-appeal>

However, appeals of decisions concerning breaches of fundamental human rights or relating to the interpretation of Malta's Constitution are heard directly by the Constitutional Court.⁶⁴ Malta's Constitution prohibits appeals that raise merely frivolous or vexatious questions.⁶⁵

The United States Department of State has noted that, where persons have exhausted their right to appeal in Malta's legal system for a claim alleging breach of human rights covered by the European Convention on Human Rights, they may apply to bring the claim before the European Court of Human Rights, and that Maltese citizens regularly make use of civil and judicial procedures to access the European Court of Human Rights.⁶⁶

- 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?

Malta's mixed legal system draws from the English common law tradition, in commercial laws and criminal law, and from the Napoleonic Code in private law.⁶⁷ Although judges may consider earlier decisions, the concept of binding precedents from either the same court or a higher appellate court does not exist. This feature limits the long-term impact of a negative decision.⁶⁸

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

As noted above, the United States Department of State has observed that Malta's legal system suffers from lengthy delays, resulting in diminished access to due process.⁶⁹ Such delays could constitute a potential challenge to the enforcement of a positive 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.

No additional factors have been identified.

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

⁶⁴ The Judiciary of Malta, First Hall of Civil Court. Available at: <http://www.judiciarymalta.gov.mt/first-hall-of-the-civil-court?!=1>

⁶⁵ Constitution of Malta, Article 46(5).

⁶⁶ U.S. Dept. of State, Country Reports on Human Rights Practices for 2011, Malta. Available at: <http://www.state.gov/documents/organization/186591.pdf>

⁶⁷ Ganado & Associates, Malta. Available at: <http://www.ganadoadvocates.com/about/malta/>

⁶⁸ Meyer-Koring Rechtsanwälte, Malta. Available at: <http://www.corporate-law.eu/en/malta/>

⁶⁹ U.S. Dept. of State, Country Reports on Human Rights Practices for 2011, Malta. Available at: <http://www.state.gov/documents/organization/186591.pdf>