

ACCESS TO JUSTICE FOR CHILDREN: AUSTRIA¹

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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?

Ratified international instruments do not automatically have the force of law in Austria.² Under some conditions, the Austrian President and Parliament may ratify a treaty with a “reservation of implementation” (*Erfuellungsvorbehalt*), which means such treaties are not directly applicable, unless implemented through further legislation.³ The Austrian Parliament ratified the CRC as an ordinary legal act, with reservations under international law to articles 13, 15 and 17 in 1992, as well as with “reservation of implementation” under domestic law - barring the CRC practically from any legal relevance in Austria.⁴ Consequently, there have been calls for Austria to raise the status of the CRC into constitutional law and so give the Austrian Constitutional Court the authority to enforce its provisions.⁵ In 2011 a separate Constitutional Act on Children’s Rights was adopted, which covers a selection of key CRC rights (see part I.C below). In contrast, the European Convention on Human Rights (ECHR) has been adopted as a federal constitutional law in Austria.⁶

B. Does the CRC take precedence over national law?

The CRC does not take precedence over national law, although national laws are interpreted where possible in a manner consistent with the CRC.⁷ To the

¹ Special thanks to Helmut Sax, Head of Team Child Rights, Women's Rights, and Anti-Trafficking Team, Ludwig Boltzmann Institute of Human Rights, Vienna; Christof Tsochhl, former research associate at the Ludwig Boltzmann Institute; and Michael Nueber, Associate at Schoenherr for their assistance.

² Bundesverfassungsgesetz Article 50 para. 2, available at: https://www.ris.bka.gv.at/Dokumente/ErV/ERV_1930_1/ERV_1930_1.pdf. See also, Cf. Neuhold/Hummer/Schreuer (ed.), *Österreichisches Handbuch des Völkerrechts, Band 1 - Textteil*, 4th edition (2004), para 322.

³ Bundesverfassungsgesetz Article 50.

⁴ National Coalition for the Implementation of the UN Convention on the Rights of the Child, *Supplementary Report on the 3rd and 4th Report of the Federal Republic of Austria to the United Nations*, available at: http://tbinternet.ohchr.org/Treaties/CRC/Shared%20Documents/AUT/INT_CRC_NGO_AUT_14153_E.pdf. See also, Sax/Hainzl, *Die verfassungsrechtliche Umsetzung der UN-Kinderrechtskonvention in Österreich*, 1999, pp 40-47.

⁵ National Coalition for the Implementation of the UN Convention on the Rights of the Child, *Supplementary Report on the 3rd and 4th Report of the Federal Republic of Austria to the United Nations*.

⁶ Theo Ohlinger, *Austria and Article 6 of the European Convention on Human Rights*, 1 Eur. J. Int'l L 286, 286, available at <http://www.ejil.org/pdfs/1/1/1134.pdf>.

⁷ CRIN, *Austria: National Laws*, available at:

extent the CRC directly contradicts national law, however, Austrian courts will enforce the national law.⁸

C. Has the CRC been incorporated into national law?

The CRC has not been directly incorporated into national law. In 2011, however, the Federal Constitutional Law on the Rights of the Child („*BVG Kinderrechte*“) became effective, which took certain (but not all) key rights and principles under the CRC (including a general entitlement to care and protection, prohibition of child labor and the best interest principle, but excluding any provisions relating to social or cultural rights) and incorporated them at a constitutional level, including a self-executing feature for courts and administrative authorities.⁹

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

Since the CRC was ratified with reservations to its implementation, the CRC cannot be directly enforced in Austrian courts, but it has been referenced and discussed in legal proceedings involving children’s rights as a source of interpretive guidance.¹⁰ However, as the Federal Constitutional Children’s Rights Law has been made effective at a constitutional level, it (and by extension the rights and principles of the CRC that were specifically included therein) can be directly enforced by Austrian courts.¹¹

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

Few court decisions so far cite the CRC. The Supreme Court of Austria has discussed the CRC in cases involving the right to maintain relations with parents,¹² the right of children to be heard in custody matters¹³, and the right to information relating to personal identity in closed adoptions.¹⁴

II. What is the legal status of the child?

<https://www.crin.org/en/library/publications/austria-national-laws>. See also Sax/Hainzl, *Die verfassungsrechtliche Umsetzung der UN-Kinderrechtskonvention in Österreich*, 1999, at p. 46.

⁸ *Id.*

⁹ National Coalition for the Implementation of the UN Convention on the Rights of the Child, *Supplementary Report on the 3rd and 4th Report of Austria*. See also, Sax, *Kinderrechte in der Verfassung - was nun? Zur Umsetzung internationaler Normen im nationalen Recht am Beispiel des BVG Kinderrechte 2011 - enttäuschend, aber mit Potential*, EF-Z 2011, pp 127ff.

¹⁰ CRIN, *Austria: National Laws*, available at:

<https://www.crin.org/en/library/publications/austria-national-laws>.

¹¹ National Coalition for the Implementation of the UN Convention on the Rights of the Child, *Supplementary Report on the 3rd and 4th Report of Austria*.

¹² File No. OGH - 6Ob2398-96g, CRIN summary available at: <https://www.crin.org/en/library/legal-database/file-no-ogh-6ob2398-96g>.

¹³ File No. OGH - 7Ob95-02z, CRIN summary available at: <https://www.crin.org/en/library/legal-database/file-no-ogh-7ob95-02z>.

¹⁴ File No. OGH – 2Ob129/06v, CRIN summary available at: <https://www.crin.org/en/library/legal-database/file-no-ogh-2ob129/06v>.

A. Can children and/or their representatives bring cases in domestic courts to challenge violations of children's rights?¹⁵

Various options exist to bring cases in domestic court to challenge violations of children's rights. Any person who suspects that the well-being of a child is under threat may contact the public youth welfare authorities (*Kinder-Jugendhilfe*).¹⁶ These are empowered to act in cases of emergency by taking any necessary actions regarding guardianship of a child, including taking the child away from his or her parents or current guardians and serving as a temporary guardian itself.¹⁷ Within eight days of any such action, the authority must petition the guardianship court for a ruling on custody and right to access.¹⁸ Proceedings in guardianship matters are governed by the Non-Contentious Proceedings Act.¹⁹ This Act offers a number of advantages over the application of the Code of Civil Procedure in these cases. For example, under this Act, the court has authority over each procedural step (in particular the collection of materials for the proceedings), and the best interest of the child is the governing maxim in each such step.²⁰ This Act also offers the possibility for children above 14 years to challenge preliminary measures taken by child welfare authorities, which may then be declared inadmissible by the court.²¹ In addition, unlike the Code of Civil Procedure,²² this Act provides that each party must bear its own costs in the proceedings.²³ Therefore, no party risks being required to cover the litigation costs of any other party in any such litigation.

Additionally, in cases against third parties, children and their representatives may bring regular civil proceedings pursuant to the Code of Civil Procedure. As discussed above, this option has the disadvantage of potentially requiring the plaintiff in such proceedings to cover some or all of the litigation costs of the defendant in the event if the plaintiff's lawsuit is unsuccessful.²⁴ In these civil proceedings, petitioners may make claims under Section 16 of the Austrian Civil Code, which provides that "[e]ach person has innate rights evident alone by reason," and is regularly used in the enforcement of fundamental rights.²⁵

¹⁵ For cases/complaints under public law, see III. below.

¹⁶ Jugendwohlfahrt Oberoesterreich, *Soziale Diagnose – Methoden zur Standortbestimmung von Kindern und Jugendliche*, at 8-10, available at: http://www.kinder-jugendhilfe-ooe.at/Mediendateien/dl_fachinfo_handbuchsd.pdf.

¹⁷ *Id.* at 6.

¹⁸ Allgemeines Buergerliches Gesetzbuch § 215, available at https://www.jusline.at/Allgemeines_Buergerliches_Gesetzbuch_%28ABGB%29.html; *see also* Außerstreitgesetz § 106 (stating that the youth welfare authority may be heard by the guardianship court in cases regarding care and upbringing and personal contacts), available at http://www.jusline.at/106a_Familiengerichtshilfe_AussStrG.html.

¹⁹ Außerstreitgesetz § 1.

²⁰ Außerstreitgesetz § 107(3).

²¹ Außerstreitgesetz § 107a.

²² Zivilprozessordnung § 41(1), available at: http://www.jusline.at/41_ZPO.html.

²³ Außerstreitgesetz § 107(5).

²⁴ Zivilprozessordnung § 41(1).

²⁵ Allgemeines Buergerliches Gesetzbuch § 1330.

Finally, with respect to complaints against governmental entities, such complaints must be brought in internal administrative proceedings governed by the Code of Administrative Procedure. Children and their representatives can also bring cases in tort against governmental entities in civil courts to the extent to which they were injured by the actions of such entities.²⁶

- 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 civil proceedings, minors under the age of seven generally may not bring cases by themselves.²⁷ Instead, such minors usually must be represented either by a legal guardian, or by the public youth welfare authority (if the public youth welfare authority has taken over the guardianship of a child).²⁸

Minors aged seven or over may bring cases by themselves pursuant to the Code of Civil Procedure generally only in cases related to matters for which they have contractual capacity.²⁹ For example, minors between the ages of seven and 14 have the capacity to enter into contracts from which they derive benefits, so long as such contracts do not impose any obligations on them.³⁰ Minors between the ages of 14 and 18 may enter into contracts for most services, except for apprenticeship and other education-related contracts,³¹ and for any other matters, to the extent they have wherewithal to do so.³²

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

As noted above, infants and young children who have not yet reached the age of seven generally need a representative to bring a case.³³

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

The Code of Civil Procedure provides for legal aid for any party to a proceeding without differentiating between parties who are minors and parties who are adults.³⁴

- 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)?

²⁶ Allgemeines Buergerliches Gesetzbuch § 1283 - § 1322.

²⁷ Zivilprozessordnung § 1; Buergerliches Gesetzbuch § 150(1) and § 865.

²⁸ See Part II.A, above.

²⁹ Zivilprozessordnung § 1.

³⁰ Allgemeines Buergerliches Gesetzbuch § 150(1) and § 865.

³¹ Allgemeines Buergerliches Gesetzbuch § 152.

³² Allgemeines Buergerliches Gesetzbuch § 151(2).

³³ See Part II.B, above.

³⁴ For more information, see Part IV.B, below.

In civil proceedings, except in the rare circumstances in which a minor has contractual capacity, the child's legal guardian generally will be required to agree to bring a case.³⁵ However, if the guardian's refusal to agree endangers the well-being of the child, the public youth welfare authorities may agree to bring a case.³⁶

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?

Legal challenges in civil cases may be brought by or on behalf of children against third parties as described in Section II, above, and criminal cases are brought as described in Section IV.A, below.

In the event of a children's rights violation stemming from an action or decision of an administrative authority (*Bescheid*) with respect to that child specifically, a legal challenge may be brought to the Constitutional Court (*Verfassungsgerichtshof*) pursuant to Article 144 of the Federal Constitutional Law of 1920.³⁷ These challenges may be either adjudicated pursuant to the internal processes of the relevant administrative authority or, if the petitioner has suffered damages, brought in civil court.³⁸

In the case of challenges that are adjudicated pursuant to the internal appeals process of the relevant administrative authority, once the appeals process has been exhausted, a petitioner may bring a complaint before the Constitutional Court.³⁹ Any such complaint must be brought within six weeks after the final administrative decision and must allege that the administrative authority's action violated his or her constitutional rights, or that his or her legal rights were violated by the application of an unconstitutional law or an unlawful regulation.⁴⁰ The Constitutional Court, however, may elect not to hear a complaint if it does not believe the complaint is sufficiently likely either to succeed or to resolve a question of constitutional law.⁴¹ In that event, the petitioner may bring his or her complaint before the Administrative Court (*Verwaltungsgerichtshof*).⁴²

The Austrian Ombudsman Board (AOB) hears complaints related to the legality of administrative acts.⁴³ The office assists individuals in bringing

³⁵ See Part II.B, above.

³⁶ See Part II.B, above.

³⁷ Constitutional Court of Austria website, *Competences*, available in Germanat: <http://www.vfgh.gv.at/cms/vfgh-site/vfgh/kompetenzen.html>; Bundes-Verfassungsgesetz, Article 140; Verfassungsgerichtshofgesetz § 82 - § 88.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ See Volksanwaltschaft (AOB) homepage, <http://volksanwaltschaft.gv.at/en>

complaints against administrative agencies for public law matters.⁴⁴ The AOB is also responsible for protecting and promoting human rights in Austria, making it known as the “human rights house of the Republic of Austria.”⁴⁵

Whenever the Constitutional Court believes that a law or regulation which is supposed to be enforced may be unconstitutional, it has the authority to review the constitutionality of that law.⁴⁶ Additionally, certain other courts and administrative agencies have the duty to request that the Constitutional Court review the constitutionality of a law or regulation which they are required to enforce and which they believe may not be in conformity with the Constitution.⁴⁷ Furthermore, the Constitutional Court may review the constitutionality of a law or regulation upon the request of an individual.⁴⁸ That individual must allege that he or she was directly affected by the challenged law or regulation.⁴⁹

Finally, certain governmental entities (such as the federal government (*Bundesregierung*), with respect to a state law (*Landesgesetz*), and a state government (*Landesregierung*), with respect to a federal law (*Bundesgesetz*)) may request the Constitutional Court to review the constitutionality of a law without the requirement of a legal challenge by an individual alleging that he or she was harmed by such the law in question.⁵⁰

Once the Constitutional Court completes its review and if it deems the law unconstitutional, it hands down a judgment to repeal the law. Such a repeal may have retroactive effect.⁵¹ Otherwise, the Constitutional Court rejects the complaint (unless the Constitutional Court initiated the review itself, in which case it will merely declare that the law is not unconstitutional).⁵²

The European Court of Human Rights decides cases concerning alleged violations of any of the rights contained in the European Convention on Human Rights.⁵³ Any individual, group of individuals or an NGO who is a victim of a violation of one of these rights may submit a complaint to the Court,⁵⁴ but the complaint will be admissible only if all domestic remedies

⁴⁴ *Id.*

⁴⁵ Volksanwaltschaft (AOB), <http://volksanwaltschaft.gv.at/en/human-rights/prevention>.

⁴⁶ *Id.*

⁴⁷ Constitutional Court of Austria website, *Competences*, available in German at: <http://www.vfgh.gv.at/cms/vfgh-site/vfgh/kompetenzen.html>; for constitutional review of laws, see Bundes-Verfassungsgesetz, Article 140 and Verfassungsgerichtshofgesetz § 62 - § 65a., available at: http://www.jusline.at/62_VfGG.html; for constitutional review of regulations, see Bundes-Verfassungsgesetz Article 139 and Verfassungsgerichtshofgesetz § 57 - § 61a.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention on Human Rights”), 1950, Articles 19 and 32, available at: <https://www.crin.org/en/library/legal-database/european-convention-protection-human-rights-and-fundamental-freedoms>.

⁵⁴ *Ibid.*, Article 34.

have been exhausted.⁵⁵ Anonymous complaints are not permitted.⁵⁶ The procedural rules for the Court do not make any child-specific provisions. Persons may initially present an application themselves or through a representative, however, all applicants must be represented at hearings thereafter.⁵⁷ After examining the case, the Court renders a judgment which is binding on the State⁵⁸ and also has powers to award monetary compensation to the victims of human rights abuses.⁵⁹ It is also worth noting that the Court has an established practice of referring to other international human rights instruments, including the CRC, as guides to interpretation of the European Convention.

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

For the power of the Constitutional Court to review unconstitutional laws, regulations or administrative authority decisions with regard to individual persons and the remedies granted in such proceedings, see Section III.A above.

In cases of criminal offences, in addition to the commencement of criminal charges, children as well as adult victims of a crime punishable by a prison sentence of over six months (which crimes include the infliction of a minor bodily injury), may be entitled to receive not only damages but also financial compensation from the Federal Office for Social and Disability Affairs (*Bundesamt fuer Soziales und Behindertenwesen/ Sozialministeriumservice*), pursuant to the Crime Victim Law.⁶⁰ Austrian citizens are entitled to this compensation regardless of whether the crime occurred in Austria or abroad.⁶¹ Citizens of other EU countries are entitled to this aid if the crime was committed in Austria or, in cases of crimes committed outside of Austria, if the victims have their regular legal residence in Austria.⁶² Citizens of countries outside the EU are entitled to this aid only if the crime was committed in Austria and they have their regular legal residence in Austria (with exceptions for trafficking victims).⁶³ Additionally, the victim may be reimbursed for the cost of therapy or other rehabilitation measures.⁶⁴ In cases of serious bodily injury (which includes long-term trauma) the victims are entitled to a lump sum compensation of EUR 1,000, and in cases of serious permanent injury, EUR 5,000.⁶⁵

⁵⁵ Ibid., Article 35.

⁵⁶ Ibid.

⁵⁷ Rules of Court, July 2014, Rule 36, available at: http://www.echr.coe.int/documents/rules_court_eng.pdf.

⁵⁸ European Convention on Human Rights, Article 46.

⁵⁹ Ibid., Article 41.

⁶⁰ Verbrechensofpergesetz, GewaltInfo.at, available at: http://www.gewaltinfo.at/recht/opferrechte_strafverfahren/verbrechensofpergesetz.php.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

In cases in which endangerment of the well-being of a child is alleged in a guardianship court, petitioners potentially may seek the restriction or removal of custody.⁶⁶

- 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?

Under Austrian civil law generally, a party may not challenge a law or action without naming a specific victim.⁶⁷ As discussed above, however, the Constitutional Court or certain governmental entities may initiate constitutional review independently of a claim by a specific child.⁶⁸

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

The only form of group litigation possible pursuant to the Code of Civil Procedure is a joinder of parties (*Streitgenossenschaft*).⁶⁹ This requires the naming of specific victims and, depending on the circumstances, may allow for one judgment for all victims or different judgments for the individual victims.⁷⁰

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

As discussed above, a party generally may not challenge a law or action without naming a specific victim. Unless a non-governmental organisation has its own specific claim, or a substantial connection to an existing case, it may not file its own challenge or intervene in an existing case.⁷¹

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?

Civil cases in which the amount in dispute is a maximum of EUR 10,000 are usually filed in district courts.⁷² Regardless of the amount in dispute, district courts have jurisdiction over certain matters such as family law cases.⁷³ All appeals are made to the higher regional courts, which also have first-instance

⁶⁶ *Soziale Diagnose – Methoden zur Standortbestimmung von Kindern und Jugendliche*, at 5.

⁶⁷ Zivilprozessordnung § 75.

⁶⁸ See Part III.A, above.

⁶⁹ Zivilprozessordnung § 11.

⁷⁰ *Id.*

⁷¹ Zivilprozessordnung § 17 - § 25.

⁷² Federal Ministry of Justice, *The Austrian Judicial System*, at 11, available at:

http://www.justiz.gv.at/internet/file/8ab4ac8322985dd501229ce2e2d80091.en.0/die_justiz_eng_05.09.pdf

⁷³ *Id.*

jurisdiction over disputes relating to social or labour matters or amounts in dispute greater than EUR 10,000.⁷⁴ All appeals of cases relating to matters in which the regional courts have first-instance jurisdiction are made to the court of appeals.⁷⁵ Cases of great importance may have the opportunity for further appeal to the Supreme Court (*Oberster Gerichtshof*).⁷⁶

Criminal cases are typically initiated by a public prosecutor.⁷⁷ If the prosecutor decides not to initiate a case, the victim may initiate or continue the prosecution through a subsidiary prosecution.⁷⁸ If the prosecutor does initiate a case, the victim may participate in the proceedings only if the victim has a civil claim against the defendant as a result of the alleged crime.⁷⁹ To exercise that right, the victim simply must declare that he or she would like to join the proceedings as a private participant in order to obtain damages from the defendant.⁸⁰

The Administrative Court and Constitutional Court serve as “public-law courts of justice.”⁸¹ As discussed above, the Administrative Court reviews last-instance decisions by administrative bodies, while the Constitutional Court reviews compliance with the Austrian constitution, including the constitutionality of federal and provincial laws as well as ordinances by administrative bodies.⁸² Both courts play a role in reviewing administrative rulings: the Administrative Court reviews the legality of administrative rulings based on an alleged violation of an individual rights, while the Constitutional Court reviews the constitutionality of administrative rulings.⁸³

- 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?

Child complainants or their representatives may qualify for free or subsidised legal assistance to bring civil or judicial review proceedings.⁸⁴ The availability of legal aid is based on the financial position of the applicant.⁸⁵ The standard typically applied is whether an applicant can bear the costs of litigation without endangering the minimum subsistence level

⁷⁴ *Id.*, at 12.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ See Strafprozessordnung § 4, available at: https://www.jusline.at/4_Anklagegrundsatz_StPO.html.

⁷⁸ Strafprozessordnung §72; T.M.C. Asser Institut, *Country Report for Austria*, available at: http://www.asser.nl/EAW/countryreports.aspx?country_id=13&chap=1.

⁷⁹ Strafprozessordnung § 67.

⁸⁰ Euro Justice Network of European Prosecutors, *The Relation Between the Public Prosecutor and the Minister of Justice*, available at: http://www.euro-justice.com/member_states/austria/country_report/1363/.

⁸¹ The Austrian Judicial System, at 15.

⁸² *Id.*

⁸³ Ronald Faber, ‘The Austrian Constitutional Court: An Overview’, available at: <http://www.osce.org/odihr/37171>.

⁸⁴ Zivilprozessordnung § 63.

⁸⁵ *Id.*

necessary to allow for a basic standard of living.⁸⁶ A court may deny legal aid, however, if it determines that the action does not have any merit or prospect of success.⁸⁷

Costs covered under legal aid include court filing fees, witness and expert fees, translator fees, and the cost of representation.⁸⁸ At its discretion, the court may grant partial legal aid if the specific law in question does not require representation by a lawyer.⁸⁹ In determining whether to grant full or partial aid, courts consider factors such as the complexity of the case, the circumstances of the parties, and their ability to conduct their own case.⁹⁰ In addition, under the Austrian legal system in general, the losing party must cover the fees and expenses of the winning party.⁹¹ Legal aid does not typically cover these costs.⁹² In addition, if, within three years after the resolution of a case, a recipient of legal aid becomes able to reimburse such legal aid without threatening his or her own minimum subsistence level, the recipient is required to do so.⁹³

- 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?

In Austria, any individual may receive free pre-trial advice.⁹⁴ For one to two days a week, each local court is open for the purpose of providing legal advice to individuals - regardless of their financial situation.⁹⁵ In addition, the Chambers of Attorneys in each region provide free initial legal advice on certain days.⁹⁶ This legal advice can consist of advice on general points of law as well as the chances of success of litigation in specific cases.⁹⁷

In addition to the potential free legal advice discussed above, law firms in Austria also engage in pro bono projects and directories exist to facilitate contact with attorneys for such pro bono matters.⁹⁸

Children's and human rights organisations may also be able to offer legal advice, representation, or other forms of assistance. Organisations with a particular interest in children's rights have formed a National Coalition for the Implementation of the CRC in Austria (Netzwerk Kinderrechte

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Zivilprozessordnung § 64.

⁸⁹ *Id.*

⁹⁰ Nigel Foster, *Austrian Legal System and Laws*, Routledge (2003) at 82.

⁹¹ Zivilprozessordnung § 41.

⁹² Foster, *Austrian Legal System and Laws*, at 82.

⁹³ Zivilprozessordnung § 71.

⁹⁴ Foster, *supra* note 79.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ European Judicial Network in Civil and Commercial Matters, *Legal Aid – Austria*, available at: http://ec.europa.eu/civiljustice/legal_aid/legal_aid_aus_en.htm#2.

⁹⁸ See 'Die Österreichischer Rechtsanwaltskammertag', available at: <https://www.rechtsanwaelte.at/>.

Österreich),⁹⁹ which includes all nine regional *Kinder- und Jugendanwaltschaften* (The Austrian Ombudspersons for Children and Youth),¹⁰⁰ SOS Children's Villages International¹⁰¹, Kinderfreunde Österreich,¹⁰² Katholische Jungschar,¹⁰³ ECPAT Austria,¹⁰⁴ Ludwig Boltzmann Institute of Human Rights¹⁰⁵ and Welt der Kinder.¹⁰⁶

Performance-based fee arrangements are generally not permitted in Austria.¹⁰⁷ However, lawyers are free to negotiate and determine their own fees.¹⁰⁸ If a lawyer and client cannot agree upon an acceptable fee arrangement, the statutory fee schedule under the Attorney's Tariff Act will apply.¹⁰⁹ The Attorney's Tariff Act also governs the amount of attorneys' fees payable by the losing party to the winning party's counsel in any litigation.¹¹⁰

- D. Timing. How soon after a violation would a case have to be brought? Are there any special provisions that allow young adults to bring cases about violations of their rights that occurred when they were children?

In the case of civil proceedings, the Austrian Civil Code governs the timing requirements of any initiation of litigation. The statute of limitations varies depending on the type of claim brought. Generally, the statute of limitations is thirty years.¹¹¹ Typically, the statute of limitations commences when an individual can first exercise his or her rights.¹¹²

Special circumstances apply to children under the Austrian Civil Code. The statute of limitations does not run against individuals who are not capable of asserting their rights, such as children, unless a representative is appointed for them.¹¹³ Parents may serve as their child's representative.¹¹⁴ Once the child is represented, the statute of limitations runs continuously for two years upon the commencement of representation.¹¹⁵ In addition, the statute of limitations for claims by a minor against his or her guardian does not start until the guardianship relationship is terminated.¹¹⁶ The guardianship relationship terminates when the child reaches the age of 18 or gets married,

⁹⁹ See <http://www.kinderhabenrechte.at>.

¹⁰⁰ Ombuds-Offices for Children and Youth homepage, <http://www.kija.at/kija>.

¹⁰¹ SOS Children's Village International homepage, available at:

<http://www.sos-childrensvillages.org/Pages/default.aspx>.

¹⁰² <http://www.kinderfreunde.at>.

¹⁰³ <http://www.jungschar.at>.

¹⁰⁴ <http://www.ecpat.at>.

¹⁰⁵ <http://bim.lbg.ac.at>.

¹⁰⁶ <http://www.weltderkinder.at/cms/>.

¹⁰⁷ Allgemeines Bürgerliches Gesetzbuch § 879.

¹⁰⁸ Marianne Roth, *Cost and Fee Allocation in Civil Procedure*, International Academy of Comparative Law, available at: http://www-personal.umich.edu/~purzel/national_reports/Austria.pdf.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Allgemeines Bürgerliches Gesetzbuch § 1478 and § 1479.

¹¹² Allgemeines Bürgerliches Gesetzbuch § 1454.

¹¹³ Allgemeines Bürgerliches Gesetzbuch § 1494.

¹¹⁴ Allgemeines Bürgerliches Gesetzbuch § 154(1).

¹¹⁵ Allgemeines Bürgerliches Gesetzbuch § 1494.

¹¹⁶ Allgemeines Bürgerliches Gesetzbuch § 1495.

whichever occurs first.¹¹⁷

- 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 Code of Civil Procedure governs the use of evidence, including the use of documents, witnesses, expert witnesses, inspections, and testimony of the respective parties.¹¹⁸

Children may testify and give evidence before the courts in Austria. In the criminal context, witnesses are required to testify orally at trial, unless the witness is “unavailable.”¹¹⁹ Typically, a court will classify a child as unavailable.¹²⁰ Therefore, a child generally is questioned twice: first in an interview conducted by police, and later in a pre-trial hearing conducted by a judge or an expert in the first two to three months of the pre-trial phase.¹²¹ The pre-trial judge determines whether an expert or the judge should conduct the questioning based on the vulnerability of the child.¹²² If an expert conducts the hearing, the expert will sit alone with the child, with the judge, prosecutor, and defense attorney sitting in a separate room observing via closed-circuit television.¹²³ While the expert will ask most of the questions, the judge, prosecutor, and defense attorney may provide questions for the expert to ask as well.¹²⁴ If the judge conducts the hearing, the parties may be in a separate room depending on the vulnerability of the child.¹²⁵ It is mandatory, however, for children under the age of 14 and who have been victims of sexual crime to be in a separate room from the parties.¹²⁶ A written transcript or recording of the hearing will be provided to the court, obviating the need for the child him or herself to testify at the actual trial.¹²⁷

In the civil context, children must be heard in court for all proceedings relating to care and education.¹²⁸ If the child is under ten years of age, a representative of a juvenile court or a child welfare agency will speak on behalf of the child.¹²⁹ If the child’s interests would be endangered, the questioning must stop.¹³⁰ Typically, the child will be heard directly by a

¹¹⁷ Allgemeines Buergerliches Gesetzbuch §§ 172(1), 21(2), and 175.

¹¹⁸ Zivilprozessordnung § 266-§ 383.

¹¹⁹ Ministry of Justice of New Zealand, *Austria’s Criminal Justice System*, available at: <http://www.justice.govt.nz/publications/global-publications/a/alternative-pre-trial-and-trial-processes-for-child-witnesses-in-new-zealands-criminal-justice-system/appendix-c-austrias-criminal-justice-system>.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Marianne Roth, *Parental Responsibilities: Austria*, University of Salzburg, at 8, available at: <http://ceflonline.net/wp-content/uploads/Austria-Parental-Responsibilities.pdf>.

¹²⁹ *Id.*

¹³⁰ Außerstreitgesetz § 105(2).

judge.¹³¹ If the child is under ten years of age or it is believed that the child will not express his or her uninfluenced opinion, the child may be heard by a youth welfare agency, representatives of the juvenile court office, or an expert in the field of psychology or education.¹³²

In the case of highly contentious custody proceedings, the court may request a children's counsellor (*Kinderbeistand*), an independent, trained person to act as a spokesperson for the child.¹³³

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

In the majority of cases, courts reach a decision within a year, though depending on the complexity of the case, proceedings can take two or more years.¹³⁴ Appealing a decision typically takes between nine to twelve months.¹³⁵ In situations in which a second appeal to the Supreme Court is available, this second appeal typically takes between nine to twelve months.

¹³⁶

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

In the context of civil proceedings, district court decisions are reviewed by an appeals panel of the higher level regional court.¹³⁷ If the case pertains to a legal issue of fundamental importance, a final review is possible to the Supreme Court.¹³⁸ When the regional court is the court of first instance, parties may appeal to the Court of Appeal.¹³⁹ The Supreme Court may review decisions of the Court of Appeal.¹⁴⁰

In the criminal context, the district court serves as the court of first instance for offenses carrying a maximum sentence of one year in prison or a maximum fine of 360 daily rates, which is a fine based on the daily personal income of the offender.¹⁴¹ Parties may appeal the district court's guilty verdict or its sentencing to a regional court.¹⁴² For crimes that carry a maximum sentence of five years imprisonment, the regional court serves as the court of first instance with a single judge presiding over the proceedings.¹⁴³ The Court of Appeals handles appeals of the verdict, punishment, and

¹³¹ Roth, *Parental Responsibilities: Austria*, at 39.

¹³² *Id.*

¹³³ Ministry of Justice website, available at:

<https://www.justiz.gv.at/web2013/html/default/2c94848525f84a63012aad33b4621dcd.de.html>.

¹³⁴ Federal Ministry of Justice, *The Austrian Judicial System*, at 34.

¹³⁵ Hanno Wollmann and Antje Prisker, *Actions and Damages: Austria National Report*, available at: http://ec.europa.eu/competition/antitrust/actionsdamages/national_reports/austria_en.pdf.

¹³⁶ *Id.*

¹³⁷ Federal Ministry of Justice, *The Austrian Judicial System*, at 12.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 13.

¹⁴² *Id.*

¹⁴³ *Id.*

claims of nullity.¹⁴⁴ In cases in which the maximum sentence is life imprisonment, the regional court is the first-instance court with a panel of lay judges or lay jurors determining guilt.¹⁴⁵ In this context, a claim of nullity will go to the Supreme Court.¹⁴⁶ Appeals relating to questions of guilt or punishment will be heard by the Court of Appeal.¹⁴⁷

After exhausting the appeals process in Austria, a petitioner may file a complaint with the European Court of Human Rights.¹⁴⁸ The petitioner must file the complaint within six months of the final decision of the Austrian judiciary (usually the Supreme Court), the complaint must relate to rights under the European Convention, and the petitioner must have suffered a “significant disadvantage.”¹⁴⁹

- 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?

In Austria, precedent does not carry great weight as legal decisions are not enforceable as a source of law.¹⁵⁰ While court decisions do not carry the weight of precedent, decisions of the Supreme Court and in some cases courts of second instance have a *de facto* influence on lower court decisions, as lower court decisions that run contrary to the consistent application of the law by the higher courts often will be overturned.¹⁵¹ Therefore, though negative decisions at higher courts do not have legal weight as precedent as such, as a matter of practicality, they may still influence future lower court decisions.

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

Once a ruling obtains legal effect, it can be enforced by the courts.¹⁵² A ruling obtains legal effect once the deadline for satisfying the judgment passes.¹⁵³

When enforcing a positive decision, a plaintiff may obtain compulsory enforcement in court.¹⁵⁴ Bailiffs are responsible for carrying out enforcement

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ European Court of Human Rights, *The Life of an Application*, available at: http://www.echr.coe.int/Documents/Case_processing_ENG.pdf.

¹⁴⁹ European Court of Human Rights, *The ECHR in 50 Questions*, available at: http://www.echr.coe.int/Documents/50Questions_ENG.pdf.

¹⁵⁰ Allgemeines Buergerliches Gesetzbuch § 12.

¹⁵¹ Asser Institut, Country Report for Austria.

¹⁵² Ziffer 1 Exekutionsordnung § 1, available at: <https://www.jusline.at/index.php?cpid=ba688068a8c8a95352ed951ddb88783e&lawid=62&paid=1>.

¹⁵³ See *Rechberger/Simotta*, *Zivilprozessrecht* (2012) 914 seqq. with further references.

¹⁵⁴ Gerold Zeiler, *International Arbitration in Austria: An Overview*, available at: <http://www.mondaq.com/x/33276/Corporate/International+Litigation+and+Arbitration+in+Austria+An+Overview>.

actions on behalf of plaintiffs.¹⁵⁵ These actions can include the seizure of movable physical items, eviction and drawing up a list of the debtor's assets¹⁵⁶ as well as freezing the defendant's bank account.¹⁵⁷ To enforce arrangements pertaining to parental responsibilities, the child's residence, or contact with the child, the court can implement coercive measures such as reprimands, fines, coercive detention, compulsory appearance before the court, or taking possession of important documents.¹⁵⁸

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.

Under state legislation in all of the nine states (*Länder*) of Austria, Ombudspersons for Children and Youth have been established.¹⁵⁹ While their specific mandates may vary to some extent between the *Länder*, they nevertheless have agreed to all base their activities on the Convention on the Rights of the Child. Consequently, they may offer information, advice and assistance to children and families, implement awareness-raising projects, advocate for children's rights and participate in consultations on draft legislation.

For a comprehensive overview of the framework for implementation of the child right to participation as well as practical examples, including at court, in Austria, see the country findings in the 2015 Ecorys Study commissioned by the European Commission.¹⁶⁰

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

¹⁵⁵ European Commission, *Enforcement of Judgments: Austria*, available at: http://ec.europa.eu/civiljustice/enforce_judgement/enforce_judgement_au_en.htm#2.1.

¹⁵⁶ *Id.*

¹⁵⁷ Gerold Zeiler, *International Arbitration in Austria: An Overview*.

¹⁵⁸ Außerstreitgesetz § 79(2), § 110(2); Roth, *Parental Responsibilities: Austria*, at 40.

¹⁵⁹ See, www.kija.at.

¹⁶⁰ Zartler, *Evaluation of legislation, policy and practice on child participation in the European Union (EU) – Austria*, 2015, available at: <http://bookshop.europa.eu/en/evaluation-of-legislation-policy-and-practice-on-child-participation-in-the-european-union-eu--pbDS0115003/?CatalogCategoryID=cOwKABstC3oAAAEjeJEY4e5L>.