

ACCESS TO JUSTICE FOR CHILDREN: FEDERATED STATES OF MICRONESIA

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

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

The Federated States of Micronesia (“FSM”)¹ acceded to the CRC on 5 May 1993.² FSM has also ratified the Optional Protocol to the CRC on the sale of children³, and signed (but not yet ratified) the Optional Protocol to the CRC on children in armed conflict.⁴

B. Does the CRC take precedence over national law?

All decisions of the courts must be consistent with the Constitution,⁵ so if the Convention were in conflict with the Constitution, the courts would apply the Constitution. It is not clear whether the Convention or domestic legislation would prevail should they be in conflict.⁶

C. Has the CRC been incorporated into national law?

No, it has not.

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

Yes, courts have jurisdiction to directly enforce the CRC. Article XI, section 6 of the Federal Constitution of Micronesia provides that national courts have jurisdiction in cases arising out of the Constitution, national law and treaties. This means that the CRC can be cited in domestic courts.⁷

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

² UN Treaty Collection, ‘Convention on the Rights of the Child’, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

³ UN Treaty Collection, ‘Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography’, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=en.

⁴ UN Treaty Collection, ‘Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict’, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en.

⁵ Federal Constitution of Micronesia, Art. XI, section 11, available at: <http://fsm.supremecourt.org/fsm/constitution/index.htm>.

⁶ CRIN, ‘Micronesia: national laws’, 2013, available at: <https://www.crin.org/en/library/publications/micronesia-national-laws>.

⁷ Ibid.

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

Yes. In the case of *Kosrae v. Ned*,⁸ the court decided on whether ordering a juvenile to do community service violated Articles 37 and 40 of the CRC. This was the only case cited in the CRIN database and in the PacLII database. However, there are many other cases relating to international law and international treaties, which Micronesia appears to respect.

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?

Children through their representatives may bring civil action or judicial review proceedings in domestic courts (see part III.A below).

In a case of child abuse,⁹ there is a mandatory reporting scheme under which “[e]very person examining, attending, teaching, or treating a child and having reason to believe that such child has had serious injury or injuries, either physical or mental, inflicted upon him or her as a result of abuse, shall report the matter promptly to the chief of police of the district involved.”¹⁰ Failing to make such a report is a criminal offence.

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?

Minors (i.e., children under 18 years of age)¹¹ must have a representative “such as a general guardian, committee, conservator, or other like fiduciary” in order to sue on their behalf. If the child does not have a representative they may sue by a next friend or by a guardian *ad litem*. The court will appoint a guardian *ad litem* for a child who is not represented in an action.¹²

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

See part II.B above.

⁸ 13 FSM Intrm. 351 (Kos. S. Ct. Tr. 2005), available at: <http://www.pacii.org/fm/cases/FMKSC/2005/11.html>.

⁹ “Abuse” is defined widely to include “any case in which a child exhibits evidence of skin bruising, bleeding, sexual molestation, burns, fracture of any bone, subdural hematoma, soft-tissue swelling, and such condition or death is not justifiably explained, or the history given concerning such condition or death is at variance with the degree or type of such condition or death, or the circumstances indicate that such condition or death may not be the product of an accidental occurrence.”: FSM Code 2014 (“Civil Code”), Title 41, Chapter 5, section 502(1), available at: <http://www.fsm-ca2014.org/>.

¹⁰ Ibid., Title 41, Chapter 5, section 503(1).

¹¹ Ibid., Title 6, Chapter 1, section 1616.

¹² Rules of Civil Procedure for the Trial Division of the Supreme Court of FSM (“CPR”), rule 17(c), available at: <http://www.fsmsupremecourt.org/WebSite/fsm/rules/civtoc.htm>.

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

Article XIII, section 1 of the Constitution provides that the FSM government recognises the right of the people to legal services and shall take every step reasonable and necessary to provide these services. Article IV, section 6 recognises the right of a defendant to have counsel for his/her defence. However, the Rules of Civil Procedure (“CPR”) do not provide for such assistance.

There is no system of legal aid directly administered by FSM, but the Micronesian Legal Services Corporation (“MLSC”), a branch of the non-profit Legal Services Corporation established by US Congress, can provide free legal aid (see part IV.C below). Furthermore, in practice, FSM state courts ensure that children in conflict with the law are legally represented.¹³

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)?

Since a child must be represented in order to bring a case to court, it appears that a child would need his/her parent or guardian to agree to a case being brought. However, the court retains discretion to appoint a representative for the protection of the infant to bring a case.

The Civil Code and the FSM Digest are both silent on whether the parent’s/guardian’s consent would be needed for a child (represented by a legal representative) to bring a case in the event of a conflict of interest.

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?

All FSM citizens are guaranteed the rights under Article IV of the Constitution and the Bill of Rights in the Civil Code. These include freedom of expression, association and assembly; freedom of religion; right to life and liberty; and right to free elementary education. Under Title 11, Chapter 7 of the Civil Code, individuals whose rights under the Constitution or Bill of Rights have been violated can bring legal action against the person who deprived them of their rights in the same manner in which they would commence a civil lawsuit. The person, which includes governmental bodies,¹⁴ can be held civilly liable to the injured party in an action at law, suit in equity or other proper proceeding for redress.¹⁵ Such civil rights claims under Title 11, Chapter 7 can be heard by the

¹³ UNICEF, ‘A Summary of Key Findings: Federated States of Micronesia Child Protection Baseline Report’, 2014, available at:

http://www.unicef.org/pacificislands/FSM_2014_Summary_Baseline_Report.pdf.

¹⁴ *Plais v. Panuelo* 5 FSM R. 179, 204-05 (Pon. 1991).

¹⁵ Civil Code, Title 11, Chapter 7, section 701(3).

Supreme Court.¹⁶

Judicial review

A person adversely affected or aggrieved by an administrative action is entitled to judicial review in the Supreme Court. Except where precluded by statute or where administrative action is committed to its discretion by law, the Supreme Court is presumed to have jurisdiction to review final administrative actions.¹⁷ The Supreme Court shall conduct a *de novo* trial of the matter, and shall decide all relevant questions of law and fact.¹⁸

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

The Supreme Court and each division thereof has broad powers; it can issue all writs and other process, make rules and orders, and do all acts, consistent with law or with the rules of procedure and evidence established by the Chief Justice, as may be necessary for the due administration of justice.¹⁹ These writs include mandamus (to compel public officials to perform a duty).²⁰

In a civil action brought under Title 11, Chapter 7 of the Civil Code for violations of constitutional rights or the Bill of Rights, the Supreme Court may award costs and reasonable attorney's fees to the prevailing party as compensatory damages.²¹ An injured victim is entitled to recover damages for mental anguish, including humiliation, resulting from unlawful conduct in violation of the victim's civil rights.²² The Court may also issue writs of garnishment against the state in order to obtain payment of a civil rights judgment against the state.²³

Under Title 11, Chapter 7 of the Civil Code, a person who wilfully deprives another of, or injures, oppresses, threatens, or intimidates another in the free exercise or enjoyment of any constitutional right or provision of the Bill of Rights will be convicted and sentenced for up to 10 years' imprisonment.²⁴

In judicial review proceedings, the Supreme Court may reverse or modify an agency's decision if the petitioner's substantial rights have been prejudiced because the agency's decision is in violation of applicable constitutional or statutory provisions.²⁵ However, a reviewing court may not overturn a state agency's decision unless the applicant can show that the decision had no rational

¹⁶ *Panuelo v. Pohnpei* 2 FSM R. 150, 153 (Pon. 1986).

¹⁷ *Amor v. Pohnpei*, 3 FSM Intrm. 28, 29 (Pon. S. Ct. Tr. 1987). See FSM Interim Report Digest, Volumes 1-11 ("FSM Digest"), page 6.

¹⁸ *Ting Hong Oceanic Enterprises v. Ehsa*, 10 FSM Intrm. 24, 28 (Pon. 2001).

¹⁹ Civil Code Title 4, Chapter 1, section 117.

²⁰ *Nix v. Ehmes*, 1 FSM Intrm. 114, 118 (Pon. 1982).

²¹ Civil Code, Title 11, Chapter 7, section 701(3); *Estate of Mori v. Chuuk*, 11 FSM R. 535, 541 (Chk. 2003).

²² *Meitou v. Uwera*, 5 FSM R. 139, 146 (Chk. S. Ct. Tr. 1991).

²³ *Barrett v. Chuuk* 12 FSM R. 558, 561 (Chk. 2004).

²⁴ Civil Code, Title 11, Chapter 7, section 701(1)-(2).

²⁵ Yap State Code, section 10.

basis or involved a clear and prejudicial violation of applicable statutes or regulations.²⁶

- 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?

A lawsuit must be prosecuted in the name of the real party in interest. There is no exception for child victims. However, their representative may sue on their behalf.²⁷ The CPR is silent on whether the child will be anonymised where a representative sues on his/her behalf.

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

Class actions are permitted under the CPR. Rule 23 sets out the prerequisites for a class action: “One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.”

Rule 18 of the CPR provides that “a party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, equitable, or maritime, as the party has against an opposing party.” Rules 18-19 further explain the procedure for joinder.

- 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?

Non-governmental organisations (NGOs) may file amicus briefs if accompanied by the written consent of all parties, or by leave of court granted on motion or at the request of the court.²⁸ NGOs are not explicitly permitted to bring cases on behalf of an individual.

- 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?

A civil action, which includes an action for violations of rights under the Constitution or Bill of Rights, would be filed in the trial division of the Supreme Court in the state that case is in. The initial filing process entails filing a

²⁶ *International Bridge Corp. v. Yap*, 9 FSM Intrm. 390, 396 (Yap 2000). See FSM Digest, page 14.

²⁷ CPR, Rules 17(a) and 17(c).

²⁸ FSM Supreme Court Rules of Appellate Procedure (“APR”), Rule 29.

complaint with the court followed by an issuance of summons by the court clerk.²⁹

Criminal proceedings would be brought in the trial division of the Supreme Court by the state.

There is no specialised juvenile court in FSM. In practice, however, the FSM state courts ensure that parents/guardians of children in conflict with the law are involved in the trial process when they choose to be involved, and that the child is legally represented.³⁰

- 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?

The CPR does not provide for free or subsidised aid.

The general rule is that “costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the Federated States of Micronesia, its officers, and agencies shall be imposed only to the extent permitted by law.”³¹ The court may direct that funds be provided by law or by one or more of the parties in respect of, e.g., interpreters.³²

If a party is appealing a decision by a state court or the trial division of the Supreme Court, it may appeal *in forma pauperis* on the basis of its inability to pay fees and costs or give security. If such leave is granted, it may proceed to the appellate division of the Supreme Court without such prepayment.³³

- 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?

Micronesian Legal Services Corporation (MLSC)³⁴ provides free legal assistance to eligible low-income persons in civil matters in the FSM. It is a non-profit, non-governmental entity, but it does receive financial support from the national and state governments of the FSM. MLSC sets priorities each year and has certain case acceptance guidelines that, in addition to internal eligibility guidelines, are used to determine which cases are accepted.³⁵ The organisation

²⁹ CPR, Rules 3-4.

³⁰ UNICEF.

³¹ CPR, Rule 54(d).

³² Ibid., Rule 43(f).

³³ APR, Rule 24.

³⁴ <http://www.mlscnet.org/>.

³⁵ Lee Pliscou, the executive director of Micronesian Legal Services, provided information regarding his organisation in email correspondence. Micronesian Legal Services Corporation was contacted for the purposes of this survey and was unable to provide additional information regarding the CRC or the legal status of the child in FSM.

provides a wide variety of services which include child support, adoption, and child custody.

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

The general statute of limitations is state-specific but is generally six years for civil suits,³⁶ although actions for assault, battery, false imprisonment, injury or death caused by a wrongful act or neglect carry a two-year limitation period.³⁷ If the person entitled to a cause of action is a child when the cause of action first accrues, the action may be commenced within the above time limits once the child turns 18.³⁸

- 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?

There are no specific rules of evidence relating to children. The Rules of Evidence³⁹ guide what is admissible/required to prove a violation. For example, in the case of an alleged abuse, the written record or testimony of a reporter of such abuse would be admissible.⁴⁰

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

Lengthy delays in prosecution and resolution of cases have been reported. According to the US Department of State, “[c]apacity to investigate crimes is... extremely limited and victims may wait months, years, or decades for an arrest, if ever. Additionally, the justice system of the FSM is extremely slow and legal standards may not be applied. Court-appointed attorneys, as well as judges presiding over cases, may not have appropriate legal training.”⁴¹

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

In civil cases, an appeal against final decisions of the trial divisions of the Supreme Court or the relevant division of the State Court may be lodged within 42 days of the judgment being entered.⁴² For criminal cases, a similar procedure applies, but with a 10-day deadline. The appeal will be heard in the appellate division of the Supreme Court.

³⁶ Civil Code, Title 6, Chapter 8, section 805.

³⁷ Ibid., Title 6, Chapter 8, section 803.

³⁸ Ibid., Title 6, Chapter 8, section 806.

³⁹ Available at: http://fsm-supremecourt.org/WebSite/fsm/rules/evid.htm#rule_101.

⁴⁰ Civil Code, Title 41, Chapter 5, sections 503-504.

⁴¹ Available at:

<http://travel.state.gov/content/passports/english/country/federated-states-of-micronesia.html>.

⁴² APR, Rule 4(a).

The right to appeal is contained in the Civil Code.⁴³ The appellant must file a notice of appeal with the presiding judge of the court whose decision is being appealed, or the clerk of the court for the district in whose court the decision was made, within 30 days.

- 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?

While there is little data to provide further clarity on this question, if a positive decision strongly contradicted customary law there might be some backlash, on the basis of the high regard in which customary law is held (see part V below).

As for a negative decision, the principle of *res judicata* is applicable in FSM.⁴⁴ Accordingly, if a matter has already been dealt with by the courts, further litigation will not be allowed on the same subject between the same parties or anyone claiming under those parties, unless fraud or collusion can be proven. Moreover, a new trial will be granted only on the ground of inconsistency with substantial justice.⁴⁵ In other words, error in either the admission or exclusion of evidence, error or defect in any ruling or order, or in anything done or omitted by the court, or by any of the parties cannot be a ground for granting a new trial. Thus, if a negative decision is rendered, reopening the matter would not be an easy task for the victim concerned (assuming appeals have been exhausted).

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

Since customary laws are held in high regard, and the judiciary is required to follow them, the enforcement of a positive decision contrary to customs may prove to be difficult, even if the decision is consistent with international standards and practices (see part V below).

In addition, FSM is known to have weak law administration and enforcement capacity.⁴⁶ There are various instances of corruption at the government level, coupled with inefficiency in the proper administration of justice by state agencies and the police. Therefore, the enforcement of a positive decision may be affected by these factors in FSM.

- 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.

Sources of law

⁴³ Civil Code, Title 6, Chapter 9, section 902.

⁴⁴ *Nipwech Ungeni v. Benjamin Fredrick*, 1 CSR 14 (1994), available at: <http://fmsupremecourt.org/WebSite/chuuk/decisions/1csr014016.htm>.

⁴⁵ Civil Code, Chapter 9, section 901.

⁴⁶ Tina Takashy, 'Federated States of Micronesia: country report on human rights', p. 30, available at: <http://www.upf.pf/IMG/pdf/08-DH-Federated-States-of-Micronesia.pdf>.

The laws which have full force in FSM include, among other things: (1) such laws of the United States as shall, by their own force, be in effect in FSM, including the Executive orders of the President and orders of the Secretary of the Interior; and (2) the recognised customary law of the various parts of FSM, in matters in which it is applicable, as determined by the courts, insofar as it does not conflict with the laws of FSM.⁴⁷ The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and as generally understood and applied in the United States, are the rules of decision in FSM courts, in the absence of written law or local customary law.⁴⁸

FSM holds customary law in high regard. Section 11 of the Constitution stipulates that court decisions must be consistent with Micronesian customs and traditions, among other things. Title 1, Chapter 1, section 114 of the Civil Code provides that “[d]ue recognition shall be given to local customs in providing a system of law.” State laws also contain specific provisions to safeguard customs and traditions. For example, Article IV, section 1 of the Chuuk Constitution states that “[i]f challenged as violative of Article III, protection of Chuukese custom and tradition shall be considered a compelling social purpose warranting such governmental action.” Similarly, Article V, section 3 of the Pohnpei State Constitution states that “[t]o strengthen and retain good family relations in Pohnpei, as needed, this Constitution recognises and protects the responsibility and authority of parents over their children.”

There are, however, potential conflicts between customary and statutory law—in particular, concerning marriage and adoption. Some domestic legislation does not fully conform to the provisions and principles of the CRC. In particular, there is (1) an absence of legislation regulating child labour or providing for a minimum age for employment, (2) an absence of a clear definition of the minimum age for criminal responsibility, (3) a low minimum age for sexual consent, (4) a lack of harmonisation between the different ages of sexual consent among the four states, and (5) a lack of legislation on neglect, abuse and sexual exploitation.⁴⁹

During the Universal Periodic Review (UPR) of FSM in 2010, recommendations were made for FSM to conduct a “comprehensive review of existing legislation, and harmonise law and customary practices in all four states with international standards”, and “[a]ddress any customary practices that are inconsistent with its obligations under international law, and bring its national law relating to women and children into line with its obligations under international human rights law”.

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National human rights institution

⁴⁷ Civil Code, Title 1, Chapter 2, sections 201-202.

⁴⁸ Ibid., Title 1, Chapter 2, section 203.

⁴⁹ UNICEF; see also Yale Law School, ‘Micronesia, Federated State of’, 2006, available at: <http://www.law.yale.edu/rcw/rcw/jurisdictions/oceania/micronesia/micronesia/frontpage.htm>.

⁵⁰ Human Rights Council, ‘Report of the Working Group on the Universal Periodic Review: Federated States of Micronesia’, A/HRC/16/16, 4 January 2011, paras 61.22, 61.24. Available at: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/FMSession9.aspx>.

As at the date of this report, FSM does not have a national human rights institution to which children can bring complaints about violations of their rights. During the UPR, the government indicated that it would consider “the possibility of establishing a national human rights institution, although it would be mindful of its limited capacity to do so”.⁵¹ Recommendations were made for FSM to create such a body.⁵²

Juvenile justice

The UNICEF 2014 baseline report found a number of matters of concern in FSM including the absence of any specialised juvenile courts, poor police training, absence of any separate facility to hold child offenders together with a lack of any minimum rules governing their detention.⁵³

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

⁵¹ Ibid., para. 54.

⁵² Ibid., paras 61.39-61.41.

⁵³ UNICEF, ‘Protect me with Love and Care’ A Summary of Key Findings: Federated States of Micronesia Child Protection Baseline Report 2014, 2.