

ACCESS TO JUSTICE FOR CHILDREN: PORTUGAL

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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?

Portugal signed and ratified the CRC in 1990.¹ It has also signed and ratified all three optional protocols to the CRC.²

The CRC forms part of the national law of Portugal.³ Under the Portuguese Constitution, the norms and principles of general or common international law form an integral part of Portuguese law, and once they have been officially published they remain so for as long as they are internationally binding on the Portuguese state.⁴ Additionally, the Constitution expressly states that the fundamental rights enshrined in the Constitution do not exclude any other rights set out in international treaties, and that provisions of the Constitution concerning fundamental rights must be interpreted and construed in accordance with the Universal Declaration of Human Rights.⁵

B. Does the CRC take precedence over national law?

In cases where the CRC conflicts with national law, the CRC takes precedence unless national law is more favourable to the rights of the child.⁶

C. Has the CRC been incorporated into national law?

The CRC has been incorporated into the national law of Portugal.⁷ The Law on Protection of Children and Youngsters in Danger, approved by the Law 147/99 and its

¹ UN Treaty Collection, 'Convention on the Rights of the Child', available at:

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

² UN Treaty Collection, 'Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict', available at:

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

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:

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

UN Treaty Collection, 'Optional Protocol to the Convention on the Rights of the Child on a communications procedure', available at:

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

³ UNICEF, 'Law reform and implementation of the Convention on the Rights of the Child', 2007, pp. 7, 113, available at: http://www.unicef-irc.org/publications/pdf/law_reform_crc_imp.pdf; Constitution of the Republic of Portugal, Article 8(2), available in English at:

http://app.parlamento.pt/site_antigo/ingles/cons_leg/Constitution_VII_revisao_definitive.pdf.

⁴ Constitution of the Republic of Portugal, Article 8, available at:

<http://www.en.parlamento.pt/Legislation/CRP/Constitution7th.pdf>.

⁵ Ibid., Article 16.

⁶ *Second periodic report of Portugal to the UN Committee on the Rights of the Child*, CRC/C/65/Add.11, 26 February 2001, para. 7.

⁷ UNICEF, pp. 7, 113.

second amendment introduced by Law 142/2015, constitutes the legal framework of the Portuguese National System for the Promotion and Protection of Children and Youngsters Rights. All children in the Portuguese territory, regardless of nationality, are protected under this framework.

However, numerous non-governmental organisations consider that there could be greater consistency between the CRC and national laws.⁸ Following suggestions made by the Committee on the Rights of the Child, Portugal continues to take measures to amend its laws.⁹

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

The CRC may be directly invoked before the courts and applied by national authorities.¹⁰ Additionally, the CRC and other international documents on fundamental rights are relevant to the interpretation of the Constitution.¹¹

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

Courts have cited the CRC in several judicial decisions in order to justify a procedure, confirm the fairness of a decision or supplement local law. For example the Court of Appeal of Coimbra cited Article 12 of the CRC (the right to be heard in judicial and administrative proceedings) alongside domestic legislation to confirm a child's right to be heard by a judge in proceedings involving parental responsibility.¹² Additionally Article 8 (the right to identity), Article 9 (the right to freedom of thought, conscience and religion) and Article 14 (the right to culture) were all considered, alongside Portuguese domestic law, by the Court of Appeal of Lisbon as reasons why a 14-year old should not be separated from their parents (among other reasons of Portuguese domestic law).¹³

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?

⁸ See, for example, Portuguese Committee for UNICEF (PCU), *Alternative report to the third and fourth periodic reports of Portugal under the Convention on the Rights of the Child*, 21 November 2013, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCRC%2fNGO%2fPRT%2f15813&Lang=en.

⁹ UN Committee on the Rights of the Child, *Concluding observations to the combined third and fourth periodic report of Portugal*, CRC/C/PRT/CO/3-4, 25 February 2014, para. 3, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fPRT%2fCO%2f3-4&Lang=en.

¹⁰ *Second periodic report of Portugal to the UN Committee on the Rights of the Child*, para. 97.

¹¹ See Antonio Cortês and Teresa Violante, *Concrete Control of Constitutionality in Portugal: A Means Towards Effective Protection of Fundamental Rights*, 29 Penn. St. Int'l. L. Rev 759 (2011), p. 765.

¹² Available at:

<http://www.dgsi.pt/jtrl.nsf/33182fc732316039802565fa00497eec/75074309b70e7a8c802579ce00464024?OpenDocument>.

¹³ Available at:

<http://www.dgsi.pt/jtrc.nsf/8fe0e606d8f56b22802576c0005637dc/94d01a78963e00ea80257a370048565d?OpenDocument>.

The Civil Procedure Rules allow children to bring cases in domestic courts through legal representatives.¹⁴ The legal representative could be one or both parents, a court-appointed guardian, or the public procurator (*ministério público*).¹⁵ In Portugal's civil law jurisdiction, the public procurator has a broad range of functions and may, among other things, initiate civil actions and represent children in civil proceedings.¹⁶

Cases of violations of the CRC may be reported to the police, who will notify the government procurator or a Commission for the Protection of Children and Young People - "CPCYP" (*Comissão de Protecção de Crianças e Jovens - CPCJ*) (see part II.B.), or report them directly to the family and minors court. The office of the government procurator is responsible for representing children in court. It may initiate proceedings or file an appeal against a court decision if it determines that there has been a clear breach of the law. In the Family and Minors Court, the child's nominated representative - the children's procurator/trustee/guardian (*curador de menores*) - may also represent the child and defend the child's best interests, even in the absence of a clear breach of the law.¹⁷

Any individual may also submit complaints against actions or omissions by public authorities that are deemed to be illegal or unfair to the Ombudsman (*Provedor de Justiça*), which closely follows issues relating to the situation of children.¹⁸ The Ombudsman may also intervene in relation to private entities in certain cases, and act on his/her own initiative based on reports by non-governmental organisations or others.¹⁹ In 1992, the Ombudsman set up a special service called "Messages for Children", which is a direct telephone line that receives and handles complaints from children, and provides "technical and personal guidance on children's rights and the best way to secure them." Complex requests for assistance may then be transferred to the competent services of the Ombudsman, who can issue recommendations to the competent bodies.²⁰ The Ombudsman may also require the Constitutional Court to review the constitutionality or legality of any laws or omissions. This could be on the basis that they clash with the CRC.²¹

Private prosecutions may be brought ("*queixa*" or "*acusação particular*"). Children under 16 or any person unable to completely understand the purpose of the action are to be represented.²²

¹⁴ Civil Procedure Code 2013, Article 16.

¹⁵ Ibid., Articles 17-18, 23.

¹⁶ Ibid., Articles 18/3, 23.

¹⁷ *Second periodic report of Portugal to the UN Committee on the Rights of the Child*, para. 10.

¹⁸ Constitution of the Republic of Portugal, Article 23(1); Ibid., para. 12; see also *Combined third and fourth periodic report of Portugal to the UN Committee on the Rights of the Child*, CRC/C/PRT/3-4, 12 November 2012, para. 47. Available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fPRT%2f3-4&Lang=en; UN Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic report of Portugal*, CRC/C/PRT/CO/3-4, 25 February 2014, para. 19. Available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fPRT%2fCO%2f3-4&Lang=en.

¹⁹ *Combined third and fourth periodic report of Portugal to the UN Committee of the Rights of the Child*, para. 47.

²⁰ *Second periodic report of Portugal to the UN Committee on the Rights of the Child*, para. 30.

²¹ *Combined third and fourth periodic report of Portugal to the UN Committee of the Rights of the Child*, para. 47; Constitution of the Republic of Portugal, Article 281/2d.

²² Criminal Code, articles 113/4, available at:

Habeas corpus is granted by Article 31 of the Constitution and can be brought by the person concerned or any other person with capacity.

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?

The Civil Code states that, with the exception of emancipated minors, children under 18 years of age lack capacity to exercise their rights in court.²³

The Civil Procedure Code²⁴ sets out the guidelines for the participation of children and other protected parties in civil court proceedings. Children wishing to file civil proceedings must do so through their parents or, in the absence of a parental relationship, a legal representative (see part II.A above). If both parents hold parental responsibility, then the case should be brought by both parents. Disagreements between the parents regarding representation will be resolved by the court.²⁵

Law 147/99 on the Protection of Children and Young People, altered by law 142/2015 and renamed Law on the Protection of Children and Young People in Danger, allows the Commissions for protection of children and young people (“CPCYPs”),²⁶ “competent entities”, or a public procurator to intervene on the child’s behalf when a child’s or the youth’s rights or safety are endangered²⁷ by a parent, legal representative, or guardian or when the child’s parent, legal representative or guardian does not adequately respond to a risk resulting from the actions of a third party.²⁸ CPCYPs provide a community-based, non-judicial alternative to assist at-risk children or youth who have been “deprived of a normal family environment”.²⁹ CPCYPs work at the municipal level, representing the local community in its public and private dimensions, and may be comprised of social workers, teachers, doctors, psychologists, representatives of the police, among others. A child may be referred to a CPCYP by, among others, the public procurator, schools, NGO’s, police social welfare, health centres, and any citizen.³⁰ A “competent entity” or a CPCYP may intervene on behalf of a child as long as it has received the consent of both parents or guardian, and the consent of the child if the child is aged 12 or over.³¹ If a child under 12 refuses consent, the weight given to their refusal depends upon their ability to understand the

http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=109&tabela=leis .

²³ Civil Code 1966, Articles 122-129, available at:

http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=775&tabela=leis .

²⁴ Civil Procedure Code 2013, approved by Law 41/2013, 26 June.

²⁵ *Ibid.*, Articles 16,18.

²⁶ Pursuant to Articles 5a, 64-66 of the Law 147/99, it is considered that a child is someone under the age of 18 and a young person is someone under the age of 21 who, prior to turning 18, requests that the relevant party continue to intervene on their behalf.

²⁷ Article 3/2 defines the concept of danger.

²⁸ See http://www.cnpcjr.pt/preview_documentos.asp?r=1028&m=PDF; Law 147/99, Article 3.

²⁹ *Second periodic report of Portugal to the UN Committee on the Rights of the Child*, para. 11; Law 147/99, Article 12.

³⁰ See http://www.cnpcjr.pt/preview_documentos.asp?r=1026&m=PDF, Article 3. A child is anyone under the age of 18. A youth is anyone under the age of 21 who, prior to turning 18, requests that the relevant party continue to intervene on their behalf; Law 147/99, Articles 5a, 64-66.

³¹ http://www.cnpcjr.pt/preview_documentos.asp?r=1026&m=PDF, Articles 9-10; Law 147/99 as amended, Articles 6-10.

intervention being made.³² If the necessary consents are not received, or the actions taken will be inadequate, the courts may make a judicial intervention.³³

The court has additional powers to assign a public procurator to institute civil proceedings on behalf of a child without requiring the consent of the parent/guardian, and use all necessary judicial means to promote and defend the child's rights and well-being.³⁴ Where the factors leading to an intervention are a crime, the relevant entities have an obligation to report this to the police or a public procurator.

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

In the case of infants and young children, the child's parents or guardians would typically initiate a lawsuit on behalf of the child in the manner described in part II.B above. Again, the court also has power to appoint a public procurator (see part II.B above). Possessing parental responsibility over the child grants the holder(s) the right to pursue legal claims related to the child and their property.³⁵ Although parental responsibility usually vests with the biological parents at birth, the Civil Code provides for the appointment of legal guardians under certain circumstances.³⁶

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

Article 20(1) of the Constitution prohibits the denial of justice to anyone due to a lack of sufficient financial means.³⁷ Article 20(2) states that everyone has the right to legal information and advice, the right to legal counsel and the right to be accompanied by a lawyer before any authority.³⁸

In general, all member states of the European Union must provide legal aid to those who lack the financial means to cover court costs and the cost of legal representation in civil and criminal proceedings. This right is established in the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.³⁹

Legal aid in Portugal is available to Portuguese and European Union citizens who demonstrate that they do not have sufficient financial means to pay the fees of the legal representatives and to pay, in full or in part, the normal costs of legal proceedings. Legal aid is also available to foreigners and stateless persons habitually resident in Portugal, and foreigners not resident in Portugal to the extent that legal protection is also granted to Portuguese nationals by the laws of the respective States.⁴⁰

Children who have been arrested on suspicion of committing an offence have the right to be assisted by defence counsel at all stages of the trial proceedings and in connection

³² http://www.cnpcjr.pt/preview_documentos.asp?r=1026&m=PDF, Article 10/6; Law 147/99.

³³ *Second periodic report of Portugal to the UN Committee on the Rights of the Child*, para. 467; Law 147/99, Article 11.

³⁴ See http://www.cnpcjr.pt/preview_documentos.asp?r=1026&m=PDF, Articles 11, 70, 72 (as amended, http://www.cnpcjr.pt/preview_documentos.asp?r=1026&m=PDF). Law 147/99, Article 72/3.

³⁵ Civil Procedure Code 2013, Article 16; Civil Code 1966, Article 1878 and 1881.

³⁶ Civil Code 1966, Articles 1881/2, 1907.

³⁷ Constitution of the Republic of Portugal, Article 20(1).

³⁸ *Ibid.*, Article 20(2).

³⁹ See e-Justice, 'Legal aid', available at: https://e-justice.europa.eu/content_legal_aid-55-en.do?init=true.

⁴⁰ Law 34/2004, Article 7.

with every procedural step, and they must be informed of those rights, including compulsory assistance of a defence counsel as soon as possible.⁴¹

In cases where no lawyer has been appointed, it is the responsibility of the judicial authority to appoint defence counsel for the child.⁴²

It is recognised as a procedural right specific to children that they may be accompanied by their parents or a legal representative at every procedural step. These persons cannot be barred from attending unless special circumstances, and in particular the interests of the child, justify such a measure. Note that parents and legal representatives are allowed but are not *required* to accompany children in these proceedings.⁴³

E. Are there any other conditions or limits on children or chosen legal representatives bringing cases (e.g., would a child's parents or guardian have to agree to a case being brought)?

There are no other such conditions or limits. As discussed in part II.B. above, a public procurator may bring an action requiring civil interim measures and may resort to any judicial means deemed necessary for the promotion and defence rights on behalf of a child even without the consent of a parent or guardian.⁴⁴

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?

See part II.A above.

In Portugal, citizens and foreign residents have access to the courts to bring lawsuits seeking damages for, or the cessation of, a human rights violation.⁴⁵ Under Article 52(1) of the Constitution, every citizen has the right to individually, or jointly with others, submit complaints in defence of their rights to bodies that exercise sovereign power or any authority. Under Article 52(3), everyone has the right of popular action (*acção popular*) to defend certain interests (see part III.D below). Under Article 22, the state and all other public bodies shall be civilly liable for such actions or omissions in the performance of their functions that result in a breach of rights, freedoms or guarantees or in any loss to others.

Where the violation is due to a private body, the challenge should be made in the civil courts. Where the violation comes from a public body, it is possible to make the challenge under administrative law.⁴⁶ In order to make a challenge under administrative

⁴¹ Law 166/99, Articles 45/1(e) and 46A.

⁴² Law 166/99, Article 46/2.

⁴³ *Second periodic report of Portugal to the UN Committee on the Rights of the Child*, para. 455; Law 166/99, Article 45/2f.

⁴⁴ See http://www.cnpcjr.pt/preview_documentos.asp?r=1026&m=PDF, Law 147/99 as amended by Articles 3, 11, 70, 72.

⁴⁵ See US State Department, '2010 human rights report: Portugal', available at: <http://www.state.gov/j/drl/rls/hrrpt/2010/eur/154445.htm>.

⁴⁶ IASAJ, '10th Congress of IASAJ', question 1.1.

law, the party will have to establish that they have a right or legally protected interest that has been injured or affected by the administration⁴⁷ in accordance with the principle of effective judicial protection.⁴⁸

Article 20 of the Constitution states that everyone is entitled to access to the law and the courts in order to defend their rights and interests that are protected by law.⁴⁹ There is no specific mechanism that entitles an individual to direct access to the Constitutional Court when faced with a violation of their fundamental rights. However, all courts are competent to check the constitutionality of a legal provision against fundamental rights provisions and principles. This means that not only the Constitutional Court but also the Supreme Court of Justice and the Supreme Administrative Court, as well as the other higher and first instance courts, can refuse to enforce a legal rule on the grounds of its unconstitutionality.⁵⁰

The Constitutional Court may select a case on appeal for judicial review of legislation under the rules established in the Law of the Constitutional Court.⁵¹ The Court can only rule if the appeal concerns an issue of direct unconstitutionality, i.e., it can only decide whether the application of the provision should have been refused under the Constitution, or if the lower court should not have refused to apply a law on a constitutional basis. This means that it cannot review issues of illegality or whether a provision has been wrongfully applied to the case unless a constitutional parameter or international treaty has been invoked.⁵²

Regional and international mechanisms

The European Court of Human Rights decides cases concerning alleged violations of

⁴⁷ Ibid., question 2.2; see STA judgments 3/05/2007, 18/05/2004, 25/06/2009.

⁴⁸ The principle of effective judicial protection means that to all rights or interests legally protected corresponds an adequate protection by the administrative courts, in particular in order to obtain (a) the recognition of legal subjective situations directly stemming from legal-administrative norms or from legal acts performed in accordance with the provisions set out in administrative law; (b) the recognition of being the holder of the qualities or of meeting the conditions; (c) the recognition of the right to abstain from behaviours and, in particular, to abstain from issuing administrative acts, whenever there is a threat of future injury; (d) the annulment or declaration on the nullity or inexistence of administrative acts; (e) the sentence of the Administration to the payment of amounts, to the delivery of things or to the rendering of facts; (f) the sentence of the Administration to the natural redress of the damages and to the payment of compensations; (g) the resolution of disputes on the interpretation, validity or execution of contracts whose decision pertains to the administrative jurisdiction; (h) a declaration on the illegality of norms delivered under administrative law provisions; (i) the sentence of the Administration to the performance of administrative acts legally due; (j) the sentence of the Administration to the performance of acts and operations required to re-establish the subjective legal situations; the indictment of the Administration to provide information, to allow documents to be consulted or to issue certificates; (m) the adoption of adequate interim measures to ensure the effectiveness of the decision. Information provided to CRIN by the Ministry of Justice fo Portugal.

⁴⁹ Constitution of the Republic of Portugal, Article 20.

⁵⁰ Cortês and Violante.

⁵¹ Ibid., p. 763.

⁵² Ibid., p. 765. The Universal Declaration of Human Rights (UDHR) is a parameter of constitutionality within the Portuguese system; under Article 16(2) of the Constitution, the provisions of the Constitution and of laws concerning fundamental rights must be interpreted and construed in accordance with the UDHR. The European Convention on Human Rights and other international documents on fundamental rights are not a formal parameter of constitutionality, but are relevant to the interpretation of the Constitution: see Cortês and Violante, pp. 764-5.

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 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.

Alternatively, once all domestic remedies have been exhausted, complaints against violations of children's rights may be submitted to the UN Committee on the Rights of the Child under the third Optional Protocol to the CRC,⁶⁰ which Portugal has ratified. Complaints can be made directly by both an individual child or a group of children, or indirectly, on their behalf by an adult or an organisation.⁶¹ The violations must concern a right granted by either the CRC, the Optional Protocol on the sale of children or the Optional Protocol on the involvement of children in armed conflict⁶² and must have occurred after the entry into force of the Protocol on 14 April 2014.⁶³ Anonymous complaints are inadmissible and so are complaints not made in writing.⁶⁴ In addition, only complaints made in one of the working languages of the UN will be accepted.⁶⁵ After examining the complaint, the Committee can make recommendations to the State, which are not legally binding.⁶⁶

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

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.

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 Optional Protocol to the Convention on the Rights of the Child on a communications procedure, 2013, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=A/RES/66/138&Lang=en.

⁶¹ Ibid., Article 5.

⁶² Ibid.

⁶³ Ibid., Article 7(g).

⁶⁴ Ibid.

⁶⁵ Office of the United Nations High Commissioner for Human Rights, '23 FAQ about Treaty Body complaints procedures', available at:

<http://www2.ohchr.org/english/bodies/petitions/individual.htm#contact>.

⁶⁶ Optional Protocol to the Convention on the Rights of the Child on a communications procedure, Article 10.

Civil courts have the power to award monetary damages or issue an injunction.⁶⁷ It is possible to request an injunction or other measures at the outset of the proceedings to ensure that no further action is taken on the matter in dispute as the case progresses.⁶⁸

Administrative courts can review the legality of actions of public bodies to ensure they are consistent with the Constitution and the law. The courts can censure acts of the administration where they are illegal; they have a power of annulment and can issue a “sentence of administration” which sets out the court’s view of the definition and limits of the content of the relationship in question.⁶⁹ It is important to note that the court is only responsible for controlling the legality of administrative decisions and not their merit.⁷⁰

All courts can rule on the constitutionality of a legal provision, and have a duty to not enforce a legal rule if it is found to be unconstitutional. However, only the Constitutional Court can declare the unconstitutionality or otherwise of any rule with any binding force, as well as the illegality of any rule contained in legislation, statute or decree on the grounds of a breach of any law with superior force or an autonomous region’s statute.⁷¹ Any appeal to the Constitutional Court, therefore, presupposes a judicial decision on the subject. However, it is not possible to declare judicial decisions themselves as unconstitutional; only legal rules and norms may be declared unconstitutional.

Where the CPCYP, “competent entities” or public procurators intervene on the child’s behalf (see Law 147/99), protection measures may be put in place.⁷²

The measures applied by the CNPJ or by a judicial procedure, through a negotiated decision, are part of a promotion and protection agreement.⁷³ The possible measures are varied and include putting the child into foster care or institutional care, and “measures in a natural environment”.⁷⁴ Exceptionally, when the child’s life or his/her personal safety is in danger, any person, institution, organisation, or CPCYP can take immediate action to stop the dangerous situation. The Police then submits the case to the Public Procurator, which then submits the case to the judge who confirms the decision or takes the appropriate measures within 48 hours.⁷⁵ If the measures taken are deemed inadequate for the promotion of the child’s rights and safeguarding against the risks threatening the child, there is also the possibility of judicial review.⁷⁶

⁶⁷ Civil Procedure Rules 2013, Title I, Chapter IV & Article 647.

⁶⁸ *Ibid.*, Articles 362-376.

⁶⁹ IASAJ, questions 3.2, 3.5.

⁷⁰ *Ibid.*, question 3.4.

⁷¹ Constitution of the Republic of Portugal, Article 281(1).

⁷² See http://www.cnpcjr.pt/preview_documentos.asp?r=1026&m=PDF, Article 21.

⁷³ Article 36/37.

⁷⁴ “Measures in a natural environment” include measures taken to support parents and other relatives, to involve a “reliable person” in the child’s upbringing and to put in place measures to support the child in having an autonomous life: *Combined third and fourth periodic report of Portugal to the UN Committee of the Rights of the Child*, para. 33; Law 147/99, Article 35.

⁷⁵ Law 147/99, Articles 91 and 92; An emergency situation is defined as follows: “a situation of present or imminent danger for life that may determine a serious impairment to the child’s or the youngster’s physical or psychic integrity, requiring immediate protection pursuant to Article 91 or that may determine the immediate need to apply interim promotion and protection measures”: Law 147/99, as amended by Article 5(c).

⁷⁶ *Ibid.*, Article 76.

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 both civil and administrative law, named victims would be required to bring an action. However, when a popular action is brought, individual victims do not need to be named.⁷⁷

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

Portugal allows for the possibility of collective redress through either: (1) a popular action under Law 83/95; or (2) “mass processes” regulated by Article 48 of the Procedures Code for Administrative Law Courts, approved by Law 15/2002.⁷⁸

Popular action is a broad mechanism available under Article 52(3) of the Constitution where there have been violations committed against the following interests: public health, environment, quality of life, protection of consumers, cultural heritage and public domain. The action is available to any citizen in the enjoyment of their rights, as well as associations and foundations that defend the above interests, regardless of whether they have a direct interest in the claim. The remedies when a popular action is brought are: (1) civil liability for the compensation of damages; and (2) conservatory and temporary measures under the general rules of the Civil Procedure Code.⁷⁹

Regarding “mass processes”, whenever more than 20 cases are initiated, and they relate to the same material or legal relationship, the court has the option to stay some of the cases and only refer one or some of the others for judgment. The final decision may then be applied to the other cases that were suspended.⁸⁰

The Civil Procedure Code allows for joinder of parties. This means that several plaintiffs may file a single suit if they share the same material relationship at issue (*relação material controvertida*).⁸¹ The Civil Procedure Code also allows for group litigation where claims are based upon essentially the same facts or application of laws or when the parties have the same interest in a claim.⁸² Civil courts may add parties to individual claims at the request of parties with an interest worthy of consideration in the joinder.⁸³

Under Law 147/99, group litigation is permitted if a given situation affects more than one child. If several actions have been filed that involve children stemming from the same situation or family, the joinder of parties is permitted.⁸⁴

E. Are non-governmental organisations permitted to file challenges to potential

⁷⁷ Law 83/95, Article 22.2, available at:

http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=722&tabela=leis.

⁷⁸ Available at http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=439&tabela=leis&so_miolo=

⁷⁹ British Institute of International and Comparative Law, ‘Portugal’, available at:

<http://www.collectiveredress.org/collective-redress/reports/portugal/overview>.

⁸⁰ Procedures Code for Administrative Law courts, approved by Law 15/2002, Article 48.

⁸¹ Civil Procedure Rules 2013, Article 32.

⁸² Ibid., Articles 36-37, 311.

⁸³ Ibid., Article 267/1,4.

⁸⁴ http://www.cncpcjr.pt/preview_documentos.asp?r=1026&m=PDF, Article 80; see also, Ibid., Chapter 2 Article 32 (permissive joinders).

children's rights violations or to intervene in cases that have already been filed?

Associations and foundations that work on public health, the environment, quality of life, cultural heritage and the public domain may bring a popular action to defend these interests (see part III.D above).

The Civil Procedure Code allows an organisation to intervene in a case if it has a legal interest in the outcome of the case. A legal interest, for the purposes of intervention, is defined as a legal relationship whose practical or economic coherence depends on the claim of the person assisted.⁸⁵ An intervening organisation will have the same rights and obligations as the plaintiff and may submit any evidence that would be admissible were they the plaintiff, however any witnesses called by it count towards the maximum number of witnesses allowed for the plaintiff.⁸⁶

Portugal has ratified the Additional Protocol to the European Social Charter Providing for a System of Collective Complaints,⁸⁷ meaning that complaints of violations of children's rights contained in the European Social Charter⁸⁸ can be made to the European Committee of Social Rights. Such complaints of unsatisfactory application of the Charter may only be submitted by international NGOs that have participatory status with the Council of Europe.⁸⁹ The Committee reviews the information provided by both sides and writes a report with its conclusions, which is sent to the Committee of Ministers of the Council of Europe that adopts a resolution and makes a recommendation to the State.⁹⁰ The State then must provide information about the steps taken to comply with the recommendation in its next report under the Charter.⁹¹

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 are to be filed through an “initial petition” in the first instance court that has territorial and material jurisdiction (*Tribunal cível, vara cível, juízo cível, juízo de pequena instância cível, vara mista*).

The *Tribunais administrativos de círculo* are the administrative courts at first instance in which administrative “initial petitions” are to be filed.

A popular action can either be civil or administrative,⁹² therefore it would be filed in either the civil court that has jurisdiction (following any of the procedures under the Civil Procedure Code) or the *Tribunal administrativo de círculo* (following the

⁸⁵ Civil Procedure Code 2013, Article 326.

⁸⁶ Ibid., Articles 328, 330.

⁸⁷ Available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/158.htm>.

⁸⁸ Available at: http://www.coe.int/t/dghl/monitoring/socialcharter/Presentation/TreatiesIndex_en.asp.

⁸⁹ Additional Protocol for a System of Collective Complaints, Article 1. See also:

http://www.coe.int/t/dghl/monitoring/socialcharter/OrganisationsEntitled/OrgEntitled_en.asp.

⁹⁰ Ibid., Articles 8-9.

⁹¹ Ibid., Article 10.

⁹² Law 83/95, Article 12.

Procedural Code of the Administrative Courts).

The proper courts to file a case when a child is at risk are the family and minors sections of the central instance of the County Court or, if outside the areas covered, the civil sections of the local instance or the sections of generic jurisdiction of the local instance.⁹³ Where a child is at risk, the case is always treated as urgent.⁹⁴ The implementation of measures to promote a child's rights and child protection is the responsibility of the protection commission or court for the area where the child resides at the time the notification of the situation is received or legal proceedings are brought. If the residence is not known or not possible to establish, the jurisdiction pertains to the place where the child is found.⁹⁵ Even if the residence is known, the protection commission or the court where the child is found may take any measures deemed necessary for their immediate protection. Where the risk simultaneously covers more than one child and the circumstances warrant it, a single legal action may be brought, or separate proceedings may be appended to the original action.⁹⁶

Regardless of whether a claim is based on the violation of a constitutional norm, it cannot be filed directly in the Constitutional Court.

- 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?

According to Law 34/2004, people lacking financial means are entitled to free legal representation in court as well as legal advice.⁹⁷ The criteria for determining who is eligible is based on an assessment of the individual's income.⁹⁸ The case does not need to present an important legal question or demonstrate a likelihood of success, nor is there any requirement to assess the purpose, complexity, merit or type of the action to be commenced/brought.⁹⁹ Legal aid may be granted for the resolution of any type of legal dispute or litigation.

The following parties are able to benefit from legal aid:

- a) Portuguese and EU citizens who demonstrate that they do not have sufficient financial means to pay the fees of the legal representatives and to pay, in full or part, the normal cost of legal proceedings;
- b) Where the child is a foreigner or stateless they may be able to benefit from legal aid where they are habitually resident in Portugal or to the extent that legal protection is also granted to Portuguese nationals by the laws of the respective states.¹⁰⁰

⁹³ Law 147/99, altered by Law 142/201, Article 101; and Law 62/2003, of 26 August, regarding the Organisation of Portuguese Courts.

⁹⁴ Law 147/99, altered by Law 145/2015, Article 102.

⁹⁵ Law 147/99, as amended by Article 79.

⁹⁶ e-Justice, 'How to proceed? - Portugal', available at:

https://e-justice.europa.eu/content_how_to_proceed-34-pt-en.do?member=1; Ibid., Article 80.

⁹⁷ Law 34/2004, Article 8-A.

⁹⁸ European Union Agency for Fundamental Rights (FRA), 'Portugal', 2011, p. 8, available at: http://fra.europa.eu/sites/default/files/fra_uploads/1541-access-to-justice-2011-country-PT.pdf.

⁹⁹ e-Justice, 'How to proceed? - Portugal'.

¹⁰⁰ Law 34/2004, Article 7.

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 right to bring a civil action for compensation is limited to three years from the day when the claimant became aware of his/her right, but it can never exceed the 20-year general limitation, which starts from the day of the tort.¹⁰⁷ Nevertheless, special provisions apply to children.¹⁰⁸ If the child does not have someone to represent them, except for acts for which they have legal capacity, the limitation period does not run; if they do, the limitation period does not expire until one year after the child has acquired the capacity. When it comes to “presumed prescriptions”,¹⁰⁹ the limitation period is not suspended, but it does not expire until one year after the child has acquired legal capacity or has appointed a legal representative.¹¹⁰

The right to bring a criminal action terminates after:¹¹¹

- 15 years for crimes to which a maximum sentence of 10 or more years’ imprisonment applies and other crimes specified in the Criminal Code;
- 10 years for crimes to which a maximum sentence lasting between five and less than 10 years’ imprisonment applies;
- five years for crimes to which a sentence lasting between one and less than five years’ imprisonment applies; and
- two years for all other cases.

There is no prescription for crimes against the “freedom and sexual self-determination” and for female genital mutilation of children before the victim turns 23 years old.¹¹² Bringing an action concerning “genocide against humanity” or war crimes is not time-limited.¹¹³

Private prosecutions may be brought (“*queixa*” or “*acusação particular*”) up to six months after the claimant became aware of his/her right.

E. Evidence. What sort of evidence is admissible/required to prove a violation? Are there particular rules, procedures or practices for dealing with evidence that is produced or presented by children?

The Civil Procedure Rules set out the kinds of evidence that are admissible in civil proceedings, including documents, physical evidence, official inspection, photographs, witness statements and testimony.¹¹⁴ They also provide for the admission of expert testimony, which involves the introduction of factual information and opinions based on that information.¹¹⁵

¹⁰⁷ Civil Procedure Code, Article 498, available at:

http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?artigo_id=775A0498&nid=775&tabela=leis&pagina=1&ficha=1&nversao=#artigo.

¹⁰⁸ Civil Code, Article 320.

¹⁰⁹ Where the prescription period comes to an end, it is presumed that an obligation was fulfilled.

¹¹⁰ Civil Code, Article 320/4.

¹¹¹ Criminal Code, Article 118.

¹¹² Criminal Code, article 118 /5.

¹¹³ Law 31/2004, Article 7.

¹¹⁴ Civil Procedure Rules 2013, Articles 410-526.

¹¹⁵ Ibid., Articles 467-489.

Children have the right to be heard in civil and criminal proceedings. The Civil Code recognises the importance of the child's opinion in legal proceedings. A court deciding matters that concern the interests of the child must hear the child's opinion and take it into account according to the child's age and development.¹¹⁶ Where the child is at risk, however, it is mandatory that they are heard.¹¹⁷ The right to be heard, as provided by Article 12 of the CRC, is incorporated in Article 45 of the "*Lei tutelar educativa*" concerning educational measures for child offenders aged between 12 and 16 years. It provides for the right to be heard throughout proceedings, even when the child is imprisoned, whenever the child is required to or desires to speak.¹¹⁸

The Criminal Procedure Code requires witnesses to testify under oath, but children under 16 years are exempt.¹¹⁹ Children enjoy protection of their privacy throughout the entire duration of the trial.¹²⁰ Additionally, the journalists' deontology code prescribes that journalists shall not identify, directly or indirectly, victims of sexual abuse and child offenders,¹²¹ which is a rare example of a code that expressly mentions children.¹²²

Law 93/99¹²³ on the protection of witnesses provides for the possibility of anonymous testimony¹²⁴ and protection of security.¹²⁵ Furthermore, the child is considered to be a specially vulnerable witness and therefore enjoys special protection. The child has the right to give his/her testimony as soon as possible after the event and to be accompanied by someone to help him/her.¹²⁶

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

Although the Constitution states that everyone is entitled to a judicial ruling "within a reasonable period of time",¹²⁷ in Portugal judicial proceedings can be lengthy. However, if a case is filed under Article 109 of Law 147/99 as amended by Law 142/2015, the courts have four months within which to make a ruling. Moreover, in *habeas corpus* proceedings, the judge has up to eight days to rule on the case.¹²⁸

Usually, there are no provisions available to speed up administrative proceedings. Nevertheless, it is possible to appeal to a court and ask for an interim decision. Urgent principal procedures – such as those related to the protection of fundamental rights before administrative courts – are a kind of expedited procedure and the court's decision

¹¹⁶ Civil Code 1966, Articles 1878(2), 1901(2).

¹¹⁷ Law 147/99, Article 107/1(a).

¹¹⁸ Law 166/99, Article 45.

¹¹⁹ Criminal Procedure Code, Article 91/6, available at:

http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?artigo_id=199A0091&nid=199&tabela=leis&pagina=1&ficha=1&nversao=#artigo.

¹²⁰ Law 166/99, Article 41.

¹²¹ <http://www.lusa.pt/lusamaterial/PDFs/CodigoDeontologicoJornalista.pdf>.

¹²² <https://periodicos.ufsc.br/index.php/jornalismo/article/view/1984-6924.2011v8n2p471>.

¹²³ Available at:

http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=234&tabela=leis&so_miolo=

¹²⁴ *Ibid.*, Article 13.

¹²⁵ *Ibid.*, Articles 20 and following.

¹²⁶ *Ibid.*, Articles 26 and following.

¹²⁷ Constitution of the Republic of Portugal, Article 20(4).

¹²⁸ See article 223/5 of the Criminal Procedure Code.

must be released within a very brief period (around 15 days).¹²⁹

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

The legality or constitutionality of a particular dispute may be appealed to appellate courts or the Constitutional Court. Both appellate and Constitutional Courts may review a lower decision if the judicial decision is unconstitutional or illegal as it breaches a law with superior force or an autonomous region's statute.¹³⁰ If the rule being breached is contained in an international agreement, legislation, or regulatory order, an appeal by the Public Procurator's Office is mandatory.¹³¹

It is important to note that only rules and norms are subject to challenge in an appellate review. The judicial or administrative decision itself and the lower court's interpretation are not subject to review. For this reason, the appellant must clearly establish that the object of review is a norm rather than an interpretation. The appellant must raise the issue of constitutionality and pay special attention to how the issue is raised in order to avoid imputing the breach (which forms the basis of the appeal) to the decision or judicial activity. This burden lies strictly on the appellant, and the Constitutional Court cannot substitute its determination of Constitutionality for the object of the appeal.¹³²

Criminal appeals are governed by the Criminal Procedure Code.¹³³ The timeframe to appeal a decision will vary by the type of offence. In the case of child offenders aged 12 to 16 years, the "*Lei tutelar educativa*" expressly ensures child offenders the right to appeal from unfavourable decisions.¹³⁴

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?

Precedent plays a relatively important role in the Portuguese judicial system. A judgment of unconstitutionality is limited to the concrete dispute in which the constitutional challenge was raised.¹³⁵ The Constitutional Court, however, may expand the effect of a judgment of unconstitutionality, by request of the public procurator or a Justice of the Constitutional Court, if the same norm has been judged unconstitutional in three concrete cases. Such an expansion would give the norm binding precedent.¹³⁶

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

The enforcement of awards in civil proceedings is relatively straightforward and governed by the Civil Procedure Rules.¹³⁷

¹²⁹ European Union Agency for Fundamental Rights (FRA), p. 5; Procedural Law of the Administrative courts, Articles 109-111. Once all the proceedings deemed necessary are finished, the judge must decide within 5 days (Article 110/2, Procedural Law of the Administrative courts).

¹³⁰ Constitution of the Republic of Portugal, Article 281(1).

¹³¹ Ibid., Article 280.

¹³² See Cortês and Violante, p. 766.

¹³³ See Criminal Procedure Code.

¹³⁴ Law 166/99, Article 45.2.i) available at

http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=542&tabela=leis

¹³⁵ See Cortês and Violante, p. 763.

¹³⁶ Ibid.

¹³⁷ Civil Procedure Rules 2013, Title III.

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.

Portugal has no specific determination procedure for children seeking asylum; such children should follow the general rules for asylum seekers.¹³⁸

Recent laws pertaining to children's rights have been adopted:

- Law 122/2015 amended the Civil Code's provisions on child pensions. Namely, Article 1905 now provides that pensions due by parents to their children set up during the child's minority extend until the child turns 25 years of age as long as he/she is still studying, instead of 18 years of age.
- Law 120/2015 amended the Labour Code on maternity and paternity rights.
- Law 4/2015,¹³⁹ was altered by Law 166/99. Namely, Article 46.A. ensures the right to legal counsel in all guardianship proceedings, both ordinary and extraordinary.
- Law 142/2015, amended Law 147/99 on the Protection of Children and Young People at Risk.
- Adoption procedures, were addressed in various laws and have been consolidated in the new Adoption Process Legal Regime.
- Law 130/2015 of 4 September 2015 transposed Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime.¹⁴⁰

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

¹³⁸ See CRIN, 'Portugal: national laws', 2011, available at:

<http://www.crin.org/resources/infoDetail.asp?ID=26733&flag=report>.

¹³⁹ Available at: http://www.pgdlisboa.pt/leis/lei_mostra_articulado.php?nid=2262&tabela=leis.

¹⁴⁰ Available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:315:0057:0073:EN:PDF>.