

ACCESS TO JUSTICE FOR CHILDREN: SAN MARINO

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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?

San Marino acceded to the CRC on 25 November 1991 without making any reservations or declarations.¹ It has also ratified the Optional Protocol on the involvement of children in armed conflict² and the Optional Protocol on the sale of children, child prostitution and child pornography.³

Ratified international human rights instruments automatically form part of national law and are directly and immediately applicable.⁴

B. Does the CRC take precedence over national law?

Yes, ratified human rights treaties shall prevail over domestic legislation in case of conflict.⁵ Furthermore, the Convention is a tool of interpretation of national laws.⁶

C. Has the CRC been incorporated into national law?

As a general rule, all ratified international treaties and conventions are considered to be incorporated into domestic legislation.⁷

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

¹ https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

² https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&lang=en.

³ https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=en.

⁴ *Core Document Forming Part of the Reports of States Parties: San Marino*, HRI/CORE/1/Add.119, 27 May 2002, at paras. 156-157, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=HRI%2FCORE%2F1%2FAdd.119&Lang=en.

⁵ Declaration on the Citizens' Rights and Fundamental Principles of San Marino Constitutional Order. Coordinated Text of Law No. 59 of 8th July 1974, with the Amendments resulting from Law No. 95 of 19th September 2000 and Law No. 36 of 26th February 2002, Article 1, available at:

<http://www.wipo.int/edocs/lexdocs/laws/en/sm/sm028en.pdf>.

⁶ *Initial report by San Marino to the UN Committee on the Rights of the Child*, CRC/C/8/Add.46, 17 March 2003, para. 11, available at:

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f8%2fAdd.46&Lang=en.

⁷ *Core Document: San Marino*, at para. 156.

Yes, the CRC can be directly enforced.⁸

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

Research could not identify any source containing case law applying relevant international instruments. Some case law is available in Italian on the website of the Constitutional Court (Guarantors' Panel on the Constitutionality of Rules).⁹

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?

The Declaration on the Citizens' Rights and Fundamental Principles, which has constitutional character in San Marino, states that "everyone shall be entitled to jurisdictional protection of subjective rights and legitimate interests before the competent ordinary and administrative courts."¹⁰

According to a report prepared by the State of San Marino, "any person whose rights have been violated can go to the criminal court to prosecute the offender".¹¹ The judicial authorities are obliged to institute criminal proceedings as soon as they receive a *notitia criminis* (a notice that a crime has occurred) and in some cases there is no need for an individual complainant.¹²

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 San Marino, parents are the legal representatives of their children.¹³ It appears that they would need to represent the child in court proceedings. In juvenile proceedings, legal assistance by an attorney is not necessary, therefore anyone is entitled to directly pose questions to the judge (called Law Commissioner),¹⁴ however, it is not clear whether this extends to children.

⁸ Core Document: *San Marino*, at para. 157-8.

⁹ <http://www.collegiogarante.sm/on-line/home/pronounce.html>.

¹⁰ Declaration on the Citizens' Rights and Fundamental Principles of San Marino Constitutional Order, Article 15.

¹¹ Core Document: *San Marino*, at para. 53.

¹² Core Document: *San Marino*, at para. 53.

¹³ Initial report by San Marino to the UN Committee on the Rights of the Child, at para. 16 and Initial report of San Marino to the UN Human Rights Council, A/HRC/WG.6/7/SMR/1, 30 November 2009, at para. 41, available at: <http://www.refworld.org/pdfid/4b2b66221a.pdf>.

¹⁴ Hague Conference on Private International Law, *San Marino Response to the Standard Questionnaire from States having acceded to the Convention*, at IV.(c), available at: http://www.hcch.net/index_en.php?act=publications.details&pid=3602&dtid=33.

Regarding criminal law matters, children under the age of 12 cannot be charged with a crime.¹⁵ Children over 12 may be charged, but could be liable to a reduced punishment following a judge's evaluation of the child's mental capacity and a mitigation of the punishment may also be granted to anyone who committed a crime under the age of 21.¹⁶

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

No specific information, other than that included in II.A above, could be identified to answer this question.

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

Legal aid in San Marino is granted only for representation in court in all types of cases, but not for legal advice.¹⁷

In civil cases, legal aid can be applied for from the Council of Twelve and it covers all legal expenses related to trial.¹⁸ Applicants for legal aid must submit documentation of income to the Council.¹⁹ Legal aid cannot be refused on any ground, including lack of merit, frivolous nature of the claim or a low chance of success.²⁰

The Penal Code provides that minors are entitled to legal assistance for their defence at all stages of the proceedings,²¹ however, there is no opportunity to choose your public defender, rather he is appointed by the State.²²

Victims of criminal offences can also benefit from legal aid.²³ There are special forms of assistance for victims of violence. Victims of violence are provided free legal advice, even outside the normal conditions of legal aid.²⁴

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)?

No further conditions or limitations could be identified.

¹⁵ San Marino Penal Code, Article 12.

¹⁶ *Initial report of San Marino to the UN Committee on the Rights of the Child*, at para. 18.

¹⁷ European Commission for the Efficiency of Justice (CEPEJ), *Evaluation report on European judicial systems 2012*, at p. 64, available at:

http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/Rapport_en.pdf.

¹⁸ European Commission for the Efficiency of Justice (CEPEJ), *Scheme for evaluating judicial systems 2011*, at p. 6, available at: http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2012/San%20Marino_en.pdf.

¹⁹ *Scheme for evaluating judicial systems 2011*, at p. 7.

²⁰ *Scheme for evaluating judicial systems 2011*, at p. 7.

²¹ *Initial report of San Marino to the UN Committee on the Rights of the Child*, at para. 22.

²² *Scheme for evaluating judicial systems 2011*, at p. 7.

²³ *Evaluation report on European judicial systems 2012*, at p. 64

²⁴ *Scheme for evaluating judicial systems 2011*, at p. 6-7.

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?

The ordinary judicial authority can hear and determine all civil claims of subjective rights and legitimate interests,²⁵ as well as all criminal proceedings.²⁶ When a breach of the rights of the injured party amounts to a criminal offence, it is possible to also start a civil action for compensation alongside the criminal prosecution.²⁷

There are also administrative tribunals which are competent to hear complaints by individuals against allegedly unlawful acts of public administration.²⁸

If a rule or a decision potentially violates constitutional principles, any affected person may complain of the violation to the Guarantors' Panel on the Constitutionality of Rules²⁹ which functions as the constitutional court of San Marino.³⁰ The Panel can review the conformity of laws with constitutional principles on the request of 1.5% of the electorate or on the request of some other government bodies (at least twenty members of the Great and General Council, of the Congress of State or of five Township Council).³¹ The electorate is made up of all San Marino citizens of full age who are not affected by temporary or permanent special incapacity.³²

Finally, complaints may be taken to the European Court of Human Rights, which decides cases concerning alleged violations of any of the rights contained in the European Convention on Human Rights.³³ 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,³⁴ but the complaint will be admissible only if all domestic remedies have been exhausted.³⁵ Anonymous

²⁵ *Core Document: San Marino*, at para. 32. See also paras. 112-115.

²⁶ *Id.*, para. 32; *id.* paras. 50-51.

²⁷ *Core Document: San Marino*, at para. 80.

²⁸ *Core Document: San Marino*, at paras. 32 and 43.

²⁹ Official website available at: <http://www.collegiogarante.sm/on-line/home.html>.

³⁰ Declaration on the Citizens' Rights and Fundamental Principles of San Marino Constitutional Order, Article 15.

³¹ Declaration on the Citizens' Rights and Fundamental Principles of San Marino Constitutional Order, Article 16.

³² Law No. 6 of 5 January 1996 and *Core Document: San Marino*, at para. 11.

³³ 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>.

³⁴ European Convention on Human Rights, Article 34.

³⁵ European Convention on Human Rights, Article 35.

complaints are not permitted.³⁶ 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.³⁷ After examining the case, the Court renders a judgment which is binding on the State³⁸ and also has powers to award monetary compensation to the victims of human rights abuses.³⁹ 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?

Damages may be granted by a civil court, but also by a criminal court within a criminal trial for violations which amount to crimes.⁴⁰ The judge shall either order the adverse party to compensate the damages sustained by the injured party, to fulfil pending obligations or, more generally, enact the provisions requested by the parties and provided for by law in relation to the different offences envisaged.⁴¹ Acts against life, physical integrity, honour, reputation, personal freedom and confidentiality of correspondence, etc. besides constituting offences in themselves, also enable the injured party or their heirs to claim and obtain compensation by the offender for the moral or material damage sustained, so that the injured party or their heirs be restored to the former position.⁴²

The Criminal Code of San Marino provides for punishments including imprisonment, disqualification from public office or voting or a profession, house arrest, or a fine.⁴³

If he finds that an act of a public authority is unlawful, an Administrative Judge can declare that act null and void with retroactive effect.⁴⁴ Following such remedy, the affected party may also bring a civil action for compensation for damage.⁴⁵

San Marino has enacted laws providing for compensation to individuals who have suffered a violation of human rights as a result of failure of justice or gross negligence by judges in the fulfilment of their jurisdictional duties.⁴⁶ A failure of justice is deemed to have occurred when the judge omits to fulfill his duties or does so with delay.

³⁶ European Convention on Human Rights, Article 35.

³⁷ Rules of Court, July 2014, Rule 36, available at: http://www.echr.coe.int/documents/rules_court_eng.pdf.

³⁸ European Convention on Human Rights, Article 46.

³⁹ European Convention on Human Rights, Article 41.

⁴⁰ Scheme for evaluating judicial systems 2011, at p. 9.

⁴¹ *Core Document: San Marino*, at para. 78.

⁴² *Core Document: San Marino*, at para. 80.

⁴³ *Core Document: San Marino*, at para. 73.

⁴⁴ *Core Document: San Marino*, at para. 43.

⁴⁵ *Core Document: San Marino*, at para. 89.

⁴⁶ *Core Document: San Marino*, at para. 91 referring to Article 15 of Law No. 83 of 28 October 1992.

Where the Guarantor's Panel on the Constitutionality of Rules finds that a violation has occurred, the annulment of laws by the Panel shall become effective after six months, notwithstanding immediate effect between the parties involved.⁴⁷ The San Marino Great and General Council may make laws regarding the constitutional violation within this six month period.⁴⁸

- 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?

The answer to this question could not be determined.

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

The answer to this question could not be determined.

- 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?

The answer to this question could not be determined.

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?

Given the country's small size, there are no specialised juvenile courts.⁴⁹ San Marino has only one court which exercises ordinary and administrative jurisdiction and is subdivided into civil, criminal, and children's and family protection units.⁵⁰ The Head Magistrate in San Marino assigns a Law Commissioner (*Commissario della Legge*) to hear each case in the first instance.⁵¹

Civil proceedings are commenced upon a request by a party claiming that their rights have been violated by another party.⁵²

⁴⁷ Declaration on the Citizens' Rights and Fundamental Principles of San Marino Constitutional Order, Article 16.

⁴⁸ Declaration on the Citizens' Rights and Fundamental Principles of San Marino Constitutional Order, Article 16.

⁴⁹ *Initial report of San Marino to the UN Committee on the Rights of the Child*, at para. 101.

⁵⁰ *San Marino Response to the Standard Questionnaire from States having acceded to the Convention*, at IV.(a) referring to Qualified Law n. 145 of 30 October 2003, Article 1.

⁵¹ *San Marino Response to the Standard Questionnaire from States having acceded to the Convention*, at IV.(a); *Core Document: San Marino*, at para. 37.

⁵² *Core Document: San Marino*, at para. 76.

- 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?

For information on legal aid, please refer to part II.D above.

Generally, civil cases require payment of a court fee, except cases for small claims, cases where the State is a party, and child protection cases in which the party is entitled to legal aid.⁵³ In addition, all “proceedings concerning... the rights and duties of parents towards their children are exempt from judicial taxes,”⁵⁴ as well as all cases in which legal aid is received.⁵⁵

- 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?

Research did not identify any pro bono services or legal clinics operating in San Marino.

- 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?

It could not be determined whether there are any specific time limits for bringing cases that challenge children’s rights violations.

Requests for compensation relating to human rights violations resulting from judicial negligence or failure of justice must be submitted within a year following the final judgement relative to the proceedings from which the damage stems.⁵⁶

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

In general, the litigants are required to provide the judge with the evidence supporting their claims, but the civil judge also has the power to autonomously collect or supplement the evidence submitted by the parties.⁵⁷

There are some special arrangements for children appearing as witnesses or

⁵³ *Scheme for evaluating judicial systems 2011*, at p. 4.

⁵⁴ *Core Document: San Marino*, at para. IV.(c).

⁵⁵ *Evaluation report on European judicial systems 2012*, at p. 65.

⁵⁶ *Core Document: San Marino*, at para. 91 referring to Article 15 of Law No. 83 of 28 October 1992.

⁵⁷ *Core Document: San Marino*, at para. 78, referring to Law No. 55 of 17 June 1994, annex 9.

as victims: a special information mechanism, special arrangements in court hearings, and other protections.⁵⁸ For example, if the victim in a criminal trial was a minor, the entire trial proceeds *in camera*.⁵⁹

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

The Declaration on the Citizens' Rights requires that all judgements are pronounced within a reasonable time.⁶⁰ San Marino is further bound by the European Convention on Human Rights, Article 6 of which also requires hearings within a reasonable time. In the case of *Tierce v. San Marino*,⁶¹ the European Court of Human Rights ruled there had been a violation of that requirement in relation to proceedings which followed San Marino's procedures.

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

Appeals from first instance decision, both civil and criminal in nature, are heard by the Judge of Appeal (*Giudice delle Appellazioni*).⁶² The Judge of Administrative Appeal is competent to deal with appeals against decisions made by the Administrative Judge in the first instance.⁶³

In San Marino's legal system, civil judgements become final only once two concordant decisions reaching the same conclusion have been handed (*doppia conforme* requirement).⁶⁴ If the decision of the Judge of Appeal matches the first instance decision, no further appeal is allowed, but if it differs, a third instance judgement can be requested from the Council of Twelve for a final pronouncement on the matter.⁶⁵ In practice, the decision of the Council of the Twelve can be considered more as a vote, rather than a judgement, by virtue of which one of the two judgements is executed.

- 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?

It could not be determined what the impact of a positive or negative decision would be.

It is interesting to note that since San Marino also is a very small country where "family ties and friendships are extremely close and frequent", in

⁵⁸ *Scheme for evaluating judicial systems 2011*, at p. at 9.

⁵⁹ *Scheme for evaluating judicial systems 2011*, at p. at 9.

⁶⁰ Declaration on the Citizens' Rights and Fundamental Principles of San Marino Constitutional Order, Article 15.

⁶¹ Applications nos. 24954/94, 24971/94 and 24972/94, available at: <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58765>.

⁶² *Core Document: San Marino*, at para. 35.

⁶³ *Core Document: San Marino*, at para. 45.

⁶⁴ *Core Document: San Marino*, at para. 85.

⁶⁵ *Core Document: San Marino*, at para. 85, referring to article 5 of Law No. 83 of 28 October 1992.

order to ensure the impartiality of the judiciary, it is forbidden that judicial positions (except for Conciliating judges⁶⁶) are held by citizens of San Marino.⁶⁷

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

Enforcement of civil awards is carried out by enforcement agents - publicly employed bailiffs who are have the status of civil servants.⁶⁸ Cases for which legal aid is received are exempt from payment of fees related to the procedure of enforcement of judicial decisions.⁶⁹

- 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.

The Human Rights Committee has recommended that an independent institution of an Ombudsperson is established, noting that although the Captains Regents do fulfill some functions similar to an Ombudsperson, they do not fulfill all the requirements for an independent human rights institution.⁷⁰

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⁶⁶ These are judges who assist in mediation for settlement of certain civil disputed. See *Core Document: San Marino*, at para. 38.

⁶⁷ Declaration on the Citizens' Rights and Fundamental Principles of San Marino Constitutional Order, Article 15(2) and *Core Document: San Marino*, at para. 46.

⁶⁸ *Scheme for evaluating judicial systems 2011*, at p. 40.

⁶⁹ *Evaluation report on European judicial systems 2012*, at p. 65.

⁷⁰ UN Human Rights Committee, *Concluding observations on the second periodic report of San Marino*, CCPR/C/SMR/CO/2, 31 July 2008, at para. 6, available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR/C/SMR/CO/2&Lang=En.