

ACCESS TO JUSTICE FOR CHILDREN: TUNISIA

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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?

Tunisia ratified the CRC by adopting Act n° 991-93 of 29 November 1991, which was published in the official gazette on 10 December 1991 by Decree No. 1865.¹

Tunisia has also ratified the two Optional Protocols to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, and on the involvement of children in armed conflict, by adopting Act n° 2002-42 of 7 May 2002.²

B. Does the CRC take precedence over national law?

Under article 20 of the Constitution, ratified international agreements are superior to laws but inferior to the Constitution.³

C. Has the CRC been incorporated into national law?

Yes. In accordance with article 67 of the Constitution,⁴ treaties come into force upon their ratification. Tunisia therefore automatically incorporated the CRC into its legal system upon ratification (see part I.A above).

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

Yes. The CRC can be directly enforced in the Tunisian courts given that it has been incorporated into the Tunisian legal system. The courts have decided in several cases that international instruments, including human rights instruments,

¹ *Initial report of Tunisia to the UN Committee on the Rights of the Child*, CRC/C/11/Add.2, 1 June 1994, page 5. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f11%2fAdd.2&Lang=en.

² *Third periodic report of Tunisia to the UN Committee on the Rights of the Child*, CRC/C/TUN/3, 10 November 2008, p. 6. Available at: http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2fTUN%2f3&Lang=en.

³ Article 20 of the Constitution of the Tunisian Republic, adopted 26 January 2014 (“Constitution”). Unofficial English translation available at: http://www.jasmine-foundation.org/doc/unofficial_english_translation_of_tunisian_constitution_final_ed.pdf.

⁴ *Ibid.*, Article 67: “Commercial treaties and treaties related to international organisations, the territorial borders of the State, the financial obligations of the State, the status of individuals, or provisions of a legislative nature shall be submitted for approval to the Chamber of the People’s Deputies. Treaties shall only come into force upon their ratification.”

may be directly invoked before the domestic courts (see part I.E below).⁵

In addition, article 18 of the Child Protection Code, which was published in the official gazette by Act n° 95-92 on 9 November 1995, provides that children are “entitled to all the guarantees of international humanitarian rights cited by ratified international conventions”.⁶

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

Tunisia’s report to the Committee on the Rights of the Child refers to several cases where Tunisian courts have referred to the CRC and other international human rights instruments:

– In decision No. 7286 of 2 March 2001 the Court of Cassation argued in substance that “the Tunisian legislature - in accordance with the provisions of the Convention on the Rights of the Child of 20 November 1989, which has been ratified by Tunisia - has considered the child’s best interest in matters regarding the award of care”, so that “Tunisian public policy is in no way disturbed by the foreign court’s decision to give care of the child to the foreign mother since the sole criterion that must prevail here is that of the best interest of the child.”

– In the judgment delivered on 2 December 2003 in case No. 53/16,189, the court of first instance of La Manouba expressly based its judgment establishing filiation on the basis of a DNA fingerprint test on the grounds that “filiation is a child’s right and should not be impaired by the form of relationship chosen by the child’s parents. For this reason, filiation as defined in article 68 of the Code of Personal Status must be interpreted broadly in accordance with article 2, paragraph 2, of the Convention on the Rights of the Child, which was ratified by the Act of 29 November 1991 and which protects the child against all forms of discrimination or penalty based on the legal status of the child’s parents; depriving a child of their right to filiation on the grounds that his or her parents are not joined in wedlock effectively penalises the child and violates one of that child’s fundamental rights, quite apart from the discrimination between children that would result from the artificial introduction of a difference between legitimate and natural filiation.”

– In a judgment delivered on 18 May 2000 in case No. 7,602, the Tunis Court of First Instance argued in substance that “the request for exclusion of the widow from the list of heirs on the basis of her religious faith contradicts article 88 of the Code of Personal Status, which confines impediments to inheritance to intentional homicide” and that “non-discrimination on the grounds of religion is one of the principles underpinning the Tunisian legal order and constitutes an element of the religious freedom guaranteed by article 5 of the Constitution and proclaimed in articles 2, 16 and 18 of the 1948 Universal Declaration of Human Rights, article 2, paragraph 2, of the International Covenant on Economic, Social

⁵ *Third periodic report of Tunisia to the UN Committee on the Rights of the Child*, para. 22.

⁶ Article 18 of the Child Protection Code, available at:

http://www.africanchildforum.org/clr/Legislation%20Per%20Country/Tunisia/tunisia_children_1995_fr.pdf.

and Cultural Rights and article 2, paragraph 1, of the International Covenant on Civil and Political Rights, which have been ratified by Tunisia.”⁷

– In its Opinion No. 02-2006 concerning a bill supplementing the Code of Personal Status and adding article 66 bis, which establishes grandparents’ right of access to their grandchildren, the Constitutional Council pointed out in its considerations inter alia that “the United Nations Convention on the Rights of the Child of 20 November 1989, which has been ratified by the Republic of Tunisia, gives precedence to children’s best interest and children’s right to preserve their family ties and lays down rights and obligations not only for parents, but also, where applicable, for members of the extended family”; and that “the fact of granting grandparents the right of access after the death of one of the parents, taking account of the best interest of the child, is likely to strengthen family ties and is thus one of the components of family protection as provided for in the Constitution and the principles accepted by the Republic of Tunisia, and embodied in the United Nations Convention on the Rights of the Child.” Hence the Constitutional Council concluded that the draft law was in conformity with the Constitution.⁸

No other relevant cases could be found.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?

Yes. Children and their representatives can bring cases in domestic courts, both directly and indirectly, to challenge violations of children’s rights. This includes bringing a civil case for damages, lodging a criminal complaint, or bringing a case before the family court (see part II.B below).

B. If so, are children of any age permitted to bring these cases by themselves in their own names/on their own behalf, or must the case be brought by or with the assistance of a representative?

In civil matters, civil capacity is normally required to undertake court procedures in accordance with article 19 of the Code for Civil and Commercial Procedure, which provides that “the right to bring a case belongs to all persons with the status and capacity to have their rights examined in court”. A child complainant can usually only bring administrative and judicial proceedings that concern him/her through his/her official tutor who, according to article 154 of the Personal Status Code, is the child’s father. In the case of the father’s death or incapacity, it is the child’s mother, or in the case of the parents’ death or incapacity, the court must appoint a guardian.¹⁰

⁷ *Third periodic report of Tunisia to the UN Committee on the Rights of the Child*, para. 22.

⁸ *Ibid.*, p. 9.

⁹ All levels of the Tunisian judicial system have websites that allow searches for judgments according to case number or party name. It is not possible to conduct a search according to subject matter: see <http://services.e-justice.tn/EJusticeFr/reportGroup.action>.

¹⁰ *Second periodic report of Tunisia to the UN Committee on the Rights of the Child*, CRC/C/83/Add.1, 30 October 2001, paras 146-147. Available at:

There are, however, exceptions. In “matters of special urgency and in the case of danger at home”, a case may validly be brought by a minor over the “age of discrimination”, which is 13 years old.¹¹ Where parents refuse to request damages for harm caused to the child, the latter, if over 13 years of age can, without the assistance of parents, legal guardians or care-takers carry out all acts able to “enrich him or her” or “liberate him or her from an obligation, without incurring the slightest charge”.¹² On this basis, a child over 13 years old can bring an independent action for damages.¹³

In criminal matters, there is no minimum legal age for lodging a complaint, because the Public Prosecutors’ Office and the judicial police are legally bound to receive all grievances and complaints.¹⁴

Article 51 of the Child Protection Code provides that a case can be filed before the family court for the protection of a child by: the children’s judge, the prosecutor, the child protection delegate, the social action public service, and public institutions in charge of childhood affairs. Although the concerned child and his/her representatives are not listed in article 51, article 31 of the Child Protection Code provides that any person can signal a situation in which a child is at risk¹⁵ to the child protection delegate who can file a claim before the family judge.

Article 10 of the Child Protection Code stipulates that “the child is guaranteed the right freely to express his or her views which should be taken into consideration in accordance with his or her age and degree of maturity. To this end the child will be given a special opportunity to express his or her views and to be heard in all legal procedures and with regard to all social and educational measures concerning his or her situation”.

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

Children under 13 years old are considered incapable and must be assisted by an adult to bring cases and make legal representations in court.¹⁶

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

Where a child is accused of a crime, Article 77 of the Child Protection Code obliges the State Prosecutor “to provide a lawyer to assist the child, if the latter has not designated one,” in cases where “the charges levelled against the child

http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC%2fC%2f83%2fAdd.1&Lang=en

¹¹ Article 19 of the Code for Civil and Commercial Procedure; article 5 of the Obligations and Contracts Code.

¹² Article 9 of the Obligations and Contracts Code.

¹³ *Second periodic report of Tunisia to the UN Committee on the Rights of the Child*, para. 148.

¹⁴ *Ibid.*, para. 145.

¹⁵ Article 31 refers to situations which threaten the health or the physical and mental integrity of the child.

¹⁶ *Second periodic report of Tunisia to the UN Committee on the Rights of the Child*, paras 146-147.

are of major gravity”.

In the event children and their representatives bring a claim for violation of the child’s rights, they can apply for legal aid, which is described in Act n° 2002-0052 of 3 June 2002 (“Legal Aid Act”) (see part IV.B below).

- 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)?

The Child Protection Code, the Civil Procedure Code and the Criminal Procedure Code do not contain any particular conditions or limits on children or chosen legal representatives bringing cases.

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 parts II.A and II.B above.

Complaints about child rights violations may be submitted online to the Tunisian High Committee on Human Rights and Fundamental Freedoms via its website. This High Committee is empowered to receive and review queries and complaints concerning issues related to human rights and fundamental freedoms.

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Under the 2014 Constitution, a party to a court case may file a request for judicial review of the constitutionality of a law by the Constitutional Court, in accordance with the procedures provided by law.¹⁸ The 2014 Constitution contains an extended bill of rights, protecting, amongst other things, the right to life, dignity, liberty, freedom of opinion, thought and expression, and access to information.¹⁹ “Children are entitled to be guaranteed dignity, health, care, and education from their parents and the State” and “the State shall provide all forms of protection to all children with no discrimination, according to the best interest of the child.”²⁰ Article 49 of the Constitution provides that “[j]udicial authorities shall ensure that rights and freedoms are protected from all violations”. However, it does not appear that individuals can bring constitutional claims directly to this Constitutional Court, and, as at August 2014, the status of this Court is unclear.²¹

¹⁷ Article 2 of Law 2008-37 of 16 June 2008 relating to the High Committee on Human Rights and Fundamental Freedoms, available at: http://www.droitsdelhomme.org.tn/fr/wp-content/pdfs/Loi_N37_du_16_juin_2008.pdf. For more information, see: <http://www.droitsdelhomme.org.tn/fr/>.

¹⁸ Constitution, article 120.

¹⁹ Ibid., chapter 2.

²⁰ Ibid., article 47.

²¹ In March 2014, draft law 21/2014 created a provisional institution that is only in charge of controlling the constitutionality of draft laws before their enactment. The draft law is available at: http://www.anc.tn/site/servlet/Fichier?code_obj=81542&code_exp=1&langue=1.

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

Civil courts may award damages for children's rights violations.

According to article 59 of the Child Protection Code, the Judge of Family Affairs can either:

- keep the child within his/her family;
- keep the child within his/her family and instruct the child protection delegate to provide assistance to the child by helping and orienting him/her;
- submit the child to "medical or psychological control";
- place the child under the tutorship regime or place him/her in another family, social institution or specialised educational institution; or
- place the child in a specialised school.

The Constitutional Court may review the constitutionality of laws referred to it by courts.²² If the Constitutional Court decides on the unconstitutionality of a law, the law shall, within the limits specified by the Court, no longer be applied.

²³ However, as at August 2014 the status of this Constitutional Court is unclear.

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?

In civil cases, a claim must contain the name, profession, address and the status of each party, legal arguments and supporting evidence.²⁴ The claim is deemed null if it does not indicate the name of the claimant.²⁵

In criminal cases, a claim can be filed via a signed claim submitted by the claimant or his/her lawyer, before the District Attorney, the Tribunal of First Instance or the Investigation Judge.²⁶ The Criminal Procedure Code is silent on whether the claim must include the claimant's name.

The application form for submitting a complaint online to the High Committee on Human Rights and Fundamental Freedoms must contain the complainant's full name and contact details.²⁷

The Child Protection Code is silent on this point.

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

The Child Protection Code, the Civil Procedure Code and the Criminal Procedure Code do not contain any provision relating to the possibility of

²² Constitution, article 120.

²³ Ibid., article 123.

²⁴ Article 70 of the Civil Procedure Code.

²⁵ Ibid., article 71.

²⁶ Article 39 of the Criminal Procedure Code.

²⁷ For more information, see: <http://www.droitsdelhomme.org.tn/fr/>.

bringing any form of collective action or group litigation.

In criminal cases, it is possible to join cases in the event the criminal offences are similar or when the circumstances require the unity of the prosecution.²⁸ The Civil Procedure Code is silent as to whether similar cases may be joined.

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 seek permission to intervene in civil courts if they are able to prove that their intervention is "useful" to the Judge of Family Affairs.²⁹

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.

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 case to claim damages for a violation of children's rights may be brought in the Court of First Instance. In civil cases, a claim must be introduced by a lawyer save for cases related to personal status.³⁰ The claim must contain the name, profession, address and the status of each party, legal arguments and supporting evidence.³¹ The claim is deemed null if it does not indicate the name of the claimant or the name of the tribunal.³²

In criminal matters, any person, including a child, can lodge a complaint about a violation of children's rights that amounts to a criminal offence with the Public Prosecutors' Office or the judicial police.³³ Proceedings are then brought in the Court of First Instance for criminal cases except felonies. A grand jury hears felony crimes at first. Once a judge issues an indictment based on the grand jury proceedings, the case is submitted to the criminal court division of the Court of Appeal.³⁴

Cases brought under the Child Protection Code are heard by the Judge of Family Affairs who sits in the Tribunal of First Instance.³⁵ The Child Protection Code is silent on the procedural steps to be followed.

B. Legal aid / Court costs. Under what conditions would free or subsidised

²⁸ Article 131 of the Criminal Procedure Code.

²⁹ Article 52 of the Child Protection Act: "The Judge of Family Affairs receives the information and reports, ensures to collect the data and summons any person he deems useful, in order to verify the child's situation."

³⁰ Article 68 of the Civil Procedure Code.

³¹ *Ibid.*, Article 70.

³² *Ibid.*, Article 71.

³³ *Second periodic report of Tunisia to the UN Committee on the Rights of the Child*, para. 145.

³⁴ <http://www.nyulawglobal.org/globalex/tunisia1.htm>.

³⁵ Article 83 of the Child Protection Act.

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?

Article 1 of the Legal Aid Act provides that legal aid can be granted in civil and criminal matters. Article 3 of the same Act provides that the applicant for legal aid must prove that: (a) he/she does not have financial resources or that his/her revenues are low enough that he/she cannot cover the trial expenses, and (b) that his/her claim is founded (only in civil matters).

To apply for legal aid, the applicant must make a written request directly to the presiding officer of the court competent to rule on the dispute or by post. The request must indicate: the applicant's full name, home, occupation, marital status and identity card number (or passport or residence card for foreigners); a statement of the purpose of the action, and the number of the pending litigation or the number of the judgment. The application must attach: copies of the documents on which the applicant relies to establish his/her right, and supporting evidence that the applicant has no income or insufficient income to cover the legal costs without substantially affecting its "vital requirements".³⁶

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

No information on this could be found.

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

In civil matters, the limitation period is 15 years³⁷ save for exceptions in relation to tax disputes (five years)³⁸ or actions against regulated professions such as doctors or notaries (one year).³⁹

In criminal matters, the limitation period is 10 years for acts which qualify as crimes, three years for offences, and one year for an act which is only sanctioned by a fine (contravention).⁴⁰

The Child Protection Code does not contain any provisions relating to (a) the time frame within which a claim should be brought in case a child's right is

³⁶ Articles 5 and 6 of the Legal Aid Act; see also Portail de la Justice en Tunisie, 'Questions à caractère social et médical', available at: <http://www.e-justice.tn/index.php?id=716>.

³⁷ Article 402 of the Obligations Code.

³⁸ Ibid., article 409.

³⁹ Ibid., article 404.

⁴⁰ Article 5 of the Criminal Procedure Act.

violated or (b) the allowance of young children to bring cases about violations of their rights that occurred when they were children.

- 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 minimum age for a child to give testimony is 13 years of age. It falls to the judge to use discretion in determining the usefulness of taking a statement from the child, or to decide on the contrary that it is likely to cause emotional and psychological trauma.⁴¹

Article 52 of the Child Protection Code provides that the Judge of Family Affairs receives information and reports, collects the data and summons any person he/she deems useful to verify the child's situation. Under Article 77, "[i]n all cases, a child aged under 15 years cannot be examined by the judicial police except in the presence of his guarantor, parents, legal guardian, or close adult relative."

In all juvenile courts, the State Prosecutor has a magistrate who has been trained in the mechanisms for child protection. As far as officers of the judicial police are concerned "they cannot proceed to an examination of the child suspect, nor undergo any procedure with regard to the child until they have advised the competent State Prosecutor".⁴²

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

There is no reliable information on how long it takes to get a decision from the court. A broad estimate would be one year to obtain a decision from the court.

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

Decisions of Courts of First Instance can be appealed to Courts of Appeal, then the Supreme Court (or Court of Cassation), which is the final court of appeal in civil and criminal matters.

Article 60 of the Child Protection Code provides that an appeal against the Family Affairs Judge's decision should be filed before the registrar of the Court of Appeal within 10 days of the issue of the judgment. The Court of Appeal has to render its judgment within 45 days of the submission of the appeal. The Child Protection Act does not provide for a third degree of appeal before the Supreme Court in cases where the child's rights have been violated.

- 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?

⁴¹ *Second periodic report of Tunisia to the UN Committee on the Rights of the Child*, para. 143.

⁴² Article 77 of the Child Protection Code; *Ibid.*, para. 144.

Although the public opinion is not exposed to child rights, the public opinion in Tunisia is sensitive to cases which involve child molestation or murder.

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

Parents of victims of sexual violence or abuse are often reluctant to sue the sexual offenders as they are ashamed to bring a claim and reveal what happened to their child in public. Some parents also avoid bringing claims in order to avoid harming their children socially.

- 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.

Several NGOs have observed that further reform of the judiciary and justice sector in Tunisia is needed. In 2012, Freedom House observed a “continuing lack of judicial independence and comprehensive judicial reform”.⁴³ In May 2014, the International Commission of Jurists, which issued a report entitled ‘The Independence and Accountability of the Tunisian Judicial System’,⁴⁴ called on the Tunisian authorities to introduce legal and policy reforms to ensure the Tunisian judiciary is fully independent and accountable and is able to uphold human rights and the rule of law. It also highlighted the failure of prosecutors in Tunisia to adequately investigate and prosecute cases of human rights violations, and recommended reforms to remove the hierarchical authority of the Minister of Justice over the the Office of the Public Prosecutor to enhance respect for human rights and the rule of law.⁴⁵

This report (produced in August 2014) is provided for educational and informational purposes only and should not be construed as legal advice.

⁴³ http://www.freedomhouse.org/report/countries-crossroads/2012/tunisia#.U7_-SPhx0xA.

⁴⁴ <http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2014/05/Tunisia-Strengthen-Judicial-Independence-Report-2014-ENG.pdf>.

⁴⁵ <http://www.icj.org/tunisia-reforms-should-be-adopted-to-strengthen-the-independence-and-accountability-of-the-judiciary/>.