

Running against the clock: for the right to live as a family

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Abstract

In the framework of the Conversatory "Building homes, creating futures: a dialogue on the adoption bill", held on Wednesday 17 July 2024, organised by the Programme Person, Families and Law of the Faculty of Law of the University of Chile, a commentary on the bill BULLETIN No. 9.119-18, on Comprehensive Reform of the Adoption System in Chile, is presented, taking into account the latest indications presented by the Executive on 23 January 2024.

Keywords: Adoption, Family Justice, Children's Rights, Protection

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General aspects

I must begin by pointing out that, in general, I think it is a good project, the indications of the executive are adequate, coherent with Law 21.430 on Guarantees and Comprehensive Protection of the Rights of Children and Adolescents (BCN, 2022), and promotes a view that tends to respect the last resort character of the separation of children and adolescents from their families, reconciling the tension that may arise with their right to live in a family, even setting certain deadlines, presumptions and limited procedures that ensure that both principles find harmony in our system.

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One of the main criticisms of the project, with the indications that are now being presented by the Executive, is related to the time that elapses in the processing of adoptions, which can currently take years to materialise, frustrating the right of children and adolescents to live in a family. But this criticism could also be levelled at the Legislative Power, bearing in mind that the message that initiated this project dates from 8 October 2013, and that at this date, 17 July 2024, more than 10 years of processing have already passed, almost 11 years, causing irreversible damage to all the children and adolescents who could have benefited from an adequate adoption law many years before, as the general diagnosis, quite critical of the current adoption procedure, was already well known at that time. In this way, as on 8 October 2013, the same criticisms regarding the disconnection between the protection and adoptability procedures are maintained, in that the protection trajectory is not made visible and maintains a fragmented approach to intervention with children and adolescents. There are contradictory measures in each procedure, and an adoption procedure for children and adolescents separated from their families of origin is not initiated in all cases in which it should be. Likewise, the current procedure does not promote deinstitutionalisation, generating the well-known problems of serious rights violations in these contexts, and also demonstrating the duplication of procedures and interventions that do not place the best interests of the child or adolescent at the centre, both from a procedural point of view as well as from the point of view of the child's best interests. of the substantive enjoyment of their right to live as a family.

It is also a procedure that does not ensure the subsidiary role of the state, as it is not oriented towards discharge but rather towards adoptability, it does not involve the families from the protection measure or separation, reducing the causes to resistance to participation in the programmes to which they are referred, without considering the complexity of these families, and ultimately extending interventions and generating legal uncertainties for long periods of time, violating the rights of children and adolescents, and often resulting in permanent placement in centres administered by the State, which we now know, according to the recent report of the Supreme Court, are overcrowded and overcrowded (Suprema, 2024).

However, as indicated, the indications presented make adjustments to the bill to incorporate it into the new regulatory corpus generated by Law 21.430, which acts as a framework law on the rights of children and adolescents. There are also new organisational structures that need to be considered in order to adapt the procedure, such as the National Specialised Protection Service (BCN, 2021), which replaces the National Service for Minors, the Local Children's Offices (BCN, 2024), the Specialised Clinical Diagnosis Programmes (Specialised Protection, 2023b), and the new programme offerings adapted to the comprehensive protection system (Specialised Protection, 2023a) established by the new regulations.

From the point of view of the protection of children and adolescents, it is necessary to remember that this can be of an administrative or judicial nature. However, by express provision of Law 21.430 in its Article 68, second paragraph, matters relating to adoption are the exclusive competence of the Family Courts or those with jurisdiction in this area. In this regard, it should be recalled that there is a bill to adapt Law No. 19.968 (of the National Congress, 2004) to Law No. 21.430, bulletin number 16286-07,

which should be harmonised with this project, because although adoption itself is a matter for the exclusive jurisdiction of the Family Courts, most of the time the origin of these cases is of a protective nature, and this implies the participation of both the administrative and judicial channels for the protection of rights, which could eventually become an obstacle to the speed of the procedure, if there are no clear rules that facilitate the transfer of cases and the efficient use of the reports and products that may emanate from the protection procedures.

In this sense, we share the spirit of the indications of His Excellency the President of the Republic, as we recognise that a procedure, at present, could take years in our judicial system, and we agree in this sense that the procedure should be adapted and facilitate the efficient use of the reports and work carried out in protection matters, but as we have already stated, a large part of the delays in processing are also due to the lack of resources on the part of the institutions that must carry out the relevant reports and evaluations.

Specific comments on the draft adoption law Definitions

With respect to the innovations presented in the Executive's indications, the redefinition of the concept of "adoption" stands out, as the wording is better than the previous one, it specifies in a better way that it is, on the one hand, a protection measure, the most intense of the system, and on the other hand, a means by which filiation is established. But the most relevant thing is that its purpose is not simply to establish filiation, because if that were the case, it would be enough with the filiation that the child already has biologically in most cases, but to guarantee the right of the child or adolescent to live in a family that protects his or her rights. The norm, as in its previous version, is clear in establishing that it is a measure of ultima ratio, although this should not be taken to extremes by superimposing the principle of subsidiarity over the best interests of the child or adolescent, and on the other hand, mechanisms should be established to provide guarantees that efforts to reunify with the family of origin have been reasonably exhausted, which in fact is what is proposed below.

It also highlights the section on definitions, which simplifies the wording of the subsequent articles, and the applicable national and international regulations, including, of course, the Law on Guarantees.

There is agreement on the need to respect the rights of children and adolescents in the procedure, by applying the best interests of the child in its procedural dimension, the need to configure grounds for adoption that are adapted to the reality of our country and to the current regulations on children, the definition of family of origin, in harmony with a broad vision of family, which is a guarantor of the effective enjoyment of the rights of children and adolescents.

Procedural changes

It also agrees with the need to innovate procedurally in order to avoid the repetition of procedures, and to provide a space for the protection of rights consistent with the need to guarantee the right to live in a family and the irreversible passage of time that affects these matters. In this sense, the modification of law 19.968, which

replaces Article 74 with a new one that regulates the protective measure of separation of the child or adolescent from his or her family, in accordance with Article 9 of the Convention (UN, 1989), specifies that separation can only proceed in the case of a serious violation of rights that endangers the child's life or integrity. The latter concept, in any case, may cover broader violations, such as psychological, but must always be of a serious nature. Although in its wording, it is strange that the analysis of the elements of the best interests of the child in Article 7 of Law 21.430 has been omitted, which UNICEF and the Judiciary have done very well in the recent Guide elaborated precisely for this purpose (UNICEF, 2022).

On the other hand, a gradualism in the measure is observed in the proposal. The extended family is to be preferred first, and if it does not exist or if it is inconvenient, exceptionally, the residential alternative. Children between 0 and 3 years of age must be in foster care, a matter that is known not to be complied with, despite the fact that the norm currently exists, and will not be complied with unless there are resources and methodological changes that allow for the exclusion of these children from residential care.

The rule also safeguards the principle of non-separation between siblings, although it does not seem to be sufficiently emphatic. A statement along the following lines would have been preferable: "the principle of non-separation of siblings shall be respected, trying to keep them together in the implementation of these measures. If this is not possible . . . ". Regarding the requested register, it is useful to establish it at the legal level, because it provides the programmes and the court itself with information on the alternatives for family care, respecting the ultima ratio nature of the measure. Likewise, the information provided in the proposed regulation is extremely useful in order to exclude persons who do not have the protective conditions to care for the child or adolescent.

In the same sense, the incorporation of an article 74 bis is valued, which expressly prescribes that "the sentence that decrees or confirms a protective measure of alternative care (...) will initiate the stage regulated in the first paragraph bis of Title IV of this law". This article is relevant because it unifies the current susceptibility procedure with the protection procedure, overcoming the main problems that had been noted: the excessive time taken by the procedure, and the unnecessary repetition of reports, together with the lack of knowledge of what had been worked on in the protection stage.

The subsidiary nature of the measure is demonstrated by the clear time limit that it assigns to it: a maximum of twelve months. In addition, it states that the court must inform that the objective of this measure is the strengthening of the family and the reintegration of the child or adolescent with his or her family of origin. This duty of information is positive, in order to clarify that this is an extraordinary and exceptional measure. As far as notification is concerned, the legislator has opted to make the standard more flexible, not requiring personal notification, but preferring electronic notifications, and if this is not available, notification by notices and registered letter. This is detrimental to the quality of the notification of relatives, but it can be justified in the best interests of the child in a procedural dimension, because precisely one of the main obstacles to the progress of the procedure was the due notification of all relatives.

Also noteworthy is the creation of a "first paragraph bis" in Law 19.968, with new articles 80 ter and following, aimed at regulating the protection procedure in which a child or adolescent is separated from his or her family. From all of its articles, I would like to highlight that the norms attempt to link the child or adolescent, not only with his or her family, but also with his or her family.

The decision on the removal of the child from the care home must be made not only by blood, but also with relevant third parties who may appear and who are available to assume protective care. When deciding on the termination of the measure, there are four alternatives: 1) The termination of the separation measure, re-establishing the personal care of the child or adolescent with one or both of his or her parents; 2) The termination of the separation measure, placing the personal care with a member of his or her extended family or with a significant adult; 3) The modification of the separation measure, by a modality of alternative care in an extended family, decreeing the personal care of a protective nature of the child or adolescent; 4) Adoptability, in accordance with the adoption regulations in force.

The first three imply the return of the child or adolescent to his or her family group, either to his or her parents or family of origin, or to his or her extended family or relevant persons who assume his or her care. But it is also a cause for removal to decree adoptability, when attempts to reconnect the child with his or her family fail. This is done if it is established that the child's family of origin does not have the necessary conditions to provide the necessary care to ensure the realisation of the child's rights, threatening his or her life and physical and psychological integrity.

If, having left for reasons 1 to 3, the care of the child fails again, a new separation of the child can be decreed as a protective measure, but for a duration of no more than six months. In this new opportunity, in addition, only persons will be summoned who in the previous stage would have been presented as possible alternatives for removal.

If the removal is decreed for cause 4, i.e. adoptability, the family of origin is excluded from the case in order to guarantee confidentiality. Article 80 decides proposes criteria for the judge to determine whether the child or adolescent has been abandoned by his or her parents, and thus declare his or her adoptability.

This article may be useful in order to clarify criteria that may be biased, although it is necessary to warn that these aspects should be evaluated on a case by case basis, as there may be particular conditions that prevent or make it difficult for the families of origin to participate in the hearings or the programmes, but who have an interest in improving and caring for the child. Estrada and Morales describe this very well when they exemplify "a case where the Court revoked the susceptibility declared in the first instance, the family's visiting hours were Mondays from 3 to 5 p.m. What worker can obtain permission during working hours every week? none, obviously. The fixing of these hours became a strategy of distancing from the family of origin, but it appeared in the eyes of the court of first instance as another argument of abandonment" (Estrada & Morales, 2020, p. 203).

Likewise, it is necessary to bear in mind that it is very possible to incur in gender biases that place the blame and responsibility for the lack of care of children and adolescents on the woman and mother, and it is worth asking what were the efforts of the State, in this case, to overcome gender discrimination and provide the necessary support to avoid reaching the maximum intensity of the protection measures. With Estrada again, "the "good mother" and the "sufficient father" can justify processes of separation of the child and its subsequent internment and adoption. The CEDAW Committee has held that: "Women (...) face many difficulties in gaining access to justice as a result of direct and indirect discrimination". Disqualifications that historically

are formulated for mothers, never for fathers, are at the basis of every decision to institutionalise. In the face of these practices, articles 2° letters c, e, f, 5 and 16 allow, first, to construct as discriminations norms and practices that evaluate mothers and, then, to demand that evaluation practices, instruments and sentences be submitted to the equality requirements formulated by the CEDAW. In dealing with discrimination, the CEDAW is in line with the CRC which, in regulating the right to privacy in art. 16, does so in a way that the Spanish version does not manage to account for, as the English version is as follows: "No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation. (Estrada, 2022, p. 254)".

Finally, the rule states that the resolution deciding on the grounds for dismissal must be founded. In this respect, I must only point out that every time the legislator demands that "the decision must be founded", it would seem that it mandates a level of reflection and weighting, equivalent to that required when writing a sentence. It should be remembered that, at least now, this is not possible, as the law orders a judgement to be handed down at the end of the hearing. It should perhaps make it explicit that this decision must be written, and give a period of five days to do so. As has been said, there is a bill in Congress that modifies Law 19.968 to adapt it to Law 21.430, Bulletin number 16286-07, which refers precisely to this point, and it would be advisable to harmonise it, as it not only implies time and dedication, but also resources and staffing, because it affects the availability of judges in the courtroom.

The case of guardians as adopters

The possibility of guardians being able to adopt is also considered, as it takes into account the reality of those who, due to the long periods of time spent under their care, generate strong bonds with the children and wish to adopt them, which is not being considered today. 18 months seems more than enough time, fulfilling all the requirements of adoptability, bearing in mind that our doctrine confirms that, the more time elapses, the more improbable it becomes to reconnect with the family of origin, and the more difficult adoption becomes, as Illanes states that "the specialised literature usually highlights as a key factor when intervening with children who have been deprived of parental care, the need for the measure of separation to last as short a time as possible (...) the accumulated knowledge at the time of adoption (...) the accumulated knowledge at the time of adoption (...) the need for the measure of separation to last as short a time as possible (...)....) the accumulated knowledge to date shows that timing appears to be a central variable, suggesting that many children reunify quickly at the outset, but the likelihood of reunification declines rapidly after six months of institutionalisation" (Illanes, 2019, p. 57).

Evaluation of applicants

There is agreement on the need to deepen the regulation of the evaluation of applicants for adoption, broadening the spectrum to persons who, under current legislation, are deprived or very difficult to become an adoptive family, and preventing the use of these tools for criminal or fraudulent purposes. In this sense, the elimination of preferences for adoption places at the centre the right of the child or adolescent to live in a family, regardless of its structure and composition, the only relevant aspect being family stability and protection, regardless of the type of family in question, in contrast with

some indications from some Senators, who persist in maintaining a rigid vision of the family, which is not supported by the current regulations in force in Law 21.430. Thus, the proposed evaluation considers general and particular aspects of the adopter, which in general can be said to guarantee the effective enjoyment of the rights of children and adolescents, although the best interests of children and adolescents, it must be remembered, are determined concretely when the possibility of adopting a particular child is studied.

With regard to the evaluation of labour, housing and social security conditions, I believe that it should only take into account gross aspects, so as not to fall into prohibited grounds of discrimination, such as poverty.

As for the maintenance of links with their socio-family or support network, such as indigenous, ethnic or religious communities, I believe that this should not be exclusive, but it should be relevant in determining the appropriateness of placing for adoption certain children who belong, for example, to indigenous peoples.

With regard to the considerations of physical and mental health, socio-affective capacities and bonding history of attachment, as well as the capacities to assume the care, protection and upbringing of children and adolescents, I believe that these evaluations should be standardised and reviewed periodically, to detect discriminatory biases, and to train and supervise those who apply them to standardise criteria, and avoid inter-judge differences that produce inequalities in the eyes of the law.

Regarding the adoption project, the determinants for adoption and the evolution in the previous stages during the adoption process, I believe that this aspect can be evaluated in a very subjective way. If there are no reliable and objective instruments, which can be checked and monitored, it is better to diminish their influence. The important thing is to seriously offer a family project, otherwise one can fall into prohibited discriminatory practices.

The norm also states that it will consider in this evaluation, in addition to the criminal records and registers that it indicates, "Any other circumstance that may put at risk the physical, psychological or emotional integrity of the child or adolescent that is intended for adoption", a matter that is difficult to determine, without taking into account the specific child or adolescent that is selected for adoption.

Regarding the criteria for inclusion in this register, the law is clear in prohibiting discrimination, stating that "In no case may inclusion in this register be denied on grounds that constitute arbitrary discrimination, in accordance with the provisions of Law No. 20.609 (BCN, 2012)". This is why this examination is complex, as it cannot fall into any of these categories, and let us remember that the prohibition of discrimination is by object and by result, that is, either because it is directly intended to discriminate, or because, unintentionally, it has ended up discriminating on the basis of one of these prohibited categories.

International adoption

With regard to international adoption, the guidelines take into account international conventions and treaties on the subject, and place the child's right to live in a family at the centre, before other interests.

It is striking that the executive excludes accredited collaborating organisations from this process, leaving the whole process in the hands of the Service, i.e. in the

This seems appropriate, bearing in mind that this is an otherwise sensitive management, where the steps must be taken between central authorities or bodies authorised by the respective States.

The executive also indicates in its indications that "the competent authority of the receiving State that sponsored the adopter or adopters will be responsible for accompanying the process of adaptation of the child or adolescent and, where appropriate, for the recognition or legalisation of the adoption in the State of residence of the adopter or adopters. Likewise, it must send the Service an annual follow-up report in relation to the adoptee for a period of four years, counted from the date of the final judgement declaring the adoption to the competent authority of that State. But if it does not do so, how can it be obliged to do so? What happens then? It seems that the only safeguard is in the prohibitions it regulates below, which prevent the conclusion of international adoptions with countries that do not offer the necessary guarantees to properly develop the adoption process, but that is an "ex-ante" examination. And problems of this kind always come later.

General mentions to the law 21.430

In a more formal sense, the indications presented aim to adapt the bill to the new system of the law on guarantees and the new institutional framework for children, and there is agreement with the need to make this modification to the bill. As has been said, there are numerous references to law 21.430, although a more detailed analysis of the elements of article 7 is missing, in relation to the criteria to be taken into account when separating a child or adolescent from his or her family, or when decreeing adoption.

He refers of course to article 27 on the Right to live in a family, which for this author, "does not define what shall be understood by family, although it already gives preference to the so-called 'family of origin', which is understood as the biological family of the child or adolescent. It also assigns to the State the obligation to protect the family, whatever its composition. In this way, a distinction is made between families of "origin", that is, with biological ties, and those that do not have such ties, with preference being given to the former. The composition of the family of origin or of another nature does not matter, and must be protected by the State" (Henríquez, 2023a, p. 55).

It seems to me equally relevant in procedural terms, applicable to this bill, the right of children and adolescents to effective judicial protection, in Article 50 of Law 21.430, understood as the "procedural and administrative guarantee to provide an effective recognition and enjoyment of the rights of individuals, always taking into account the special condition they hold, at three levels: access, process and effective enforcement" (Henríquez, 2023b, p. 4).

Right to know origins and post-adoptive contacts

The extension of the right to know the origins and the possibility of having voluntary post-adoptive contacts is also valued, thus respecting the psychological integrity and the socio-affective bonds that the child or adolescent may build in the course of his or her life, making express reference to articles 7 and 26 of the Law of Guarantees, although it seems that this type of information is also protected by the still valid Law 19.628 (BCN, 1999) on the protection of private life, to which reference should also be made.

With regard to post-adoptive contacts, in order to proceed it is required:

- At the request of the child, either on his or her own behalf or through his or her lawyer, or by the programme.
- That the judge so decrees.
- That the decision is based on the best interests of the child or adolescent.

The law establishes a special report for this purpose. It also provides for the possibility of establishing a regime of direct and regular interim contact with the designated persons. A controversial issue is that the Executive's indication prescribes that only the Service has the active legitimation to request these post-adoptive contacts. It does not seem respectful of the best interests of the child or adolescent, and his or her right to effective judicial protection, that only through the programme can this post-adoptive contact be requested, even denying the child or adolescent and his or her lawyers such a request. This, regardless of whether a report is requested from the programme and whether it is favourable or unfavourable.

It adds that post-adoption contact may be subject to verifiable conditions. Finally, the judgment will contain these conditions for post-adoption contact, although they will not affect the rights and obligations arising from the adoption, and will be reviewed periodically by the court, although such reviews may be terminated. Eventually, the adopters, the adopted child or the persons with whom he or she has contact may request the court to terminate these contacts, which will have to decide.

Adoption by voluntary relinquishment

As for adoption by voluntary relinquishment, the active legitimation is held by the parents, although the regulation should have specified this as it is not clear whether both parents or only one of them are required, and only further on does it clear the doubt by clarifying that in the summons to the hearing, the non-applicant parent must be summoned. The time limit for doing so is from before the birth until 18 months of age, on condition that there is no judicial protection measure in force in respect of the child. It does not specify what kind of judicial protection, but thus excludes administrative protection measures from NLOs.

At the preliminary hearing, the applicants' willingness to relinquish the child for adoption is established. The court also informs them that they can withdraw until the ratification hearing, between 30 and 35 working days after the preliminary hearing, and if they do not attend, tacit ratification is presumed.

In the case where it has been initiated by only one parent, the other parent, if there is one, will be summoned to the ratification hearing, where he or she may object. If he or she is unable to attend or is deceased, his or her ascendants shall be summoned, who may also object.

In the event of objection, the information provided shall be made available in the respective protection case.

The adoption procedure by voluntary relinquishment is only successful in case of ratification and if there is no opposition, otherwise the case is rejected and continues as a protection procedure. But if the parents do not attend the ratification hearing, this is presumed and the adoptability of the child is declared. With this, the legislator clearly shows the tension between the principle of subsidiarity and the child's right to live in a family, and opts for the latter in the end, correctly in my opinion, following the child's best interests.

Adoption by integration

Adoption by integration operates under the following requirements:

- The child has not had "personal" contact with a parent for at least two consecutive years.
- To be under the care of the other parent.
- The adopter must be his or her spouse or civil partner, with whom he or she must have lived for at least five continuous years, unless it is in the child's best interests to shorten this period.
- The adopter must meet the requirements of adoptability, and must not have been convicted of crimes against minors or crimes that undermine their physical, psychological or sexual integrity.

The procedure for adoption by integration is very expeditious. The action in this case must be brought jointly by the parent who has care with his/her spouse or civil partner who wishes to adopt. The relatives will be summoned, and those who do not attend the hearing will be presumed to consent to the application. Legal assistance must be ensured for the child or adolescent and the non-applicant parent, as well as for the relatives who appear.

For the hypotheses of acceptance, without opposition, the procedure is expeditious, facilitating the manifest interest of the child or adolescent in order to recognise the adopter as his or her father or mother. In cases of opposition, as is to be expected, a trial must be convened to discuss the background information provided by the parties. :

Finally, the opinion of the child or adolescent, his or her manifest interest, is decisive in this case. If he or she opposes the adoption, the law empowers the judge to terminate the procedure.

Conclusions

The approach of the indications, inspired by the law of guarantees, places at the centre the right of the child or adolescent to live in a family, trying to exhaust all the possibilities of insertion in the family of origin, guaranteeing the subsidiary role of the state in the professional intervention and speeding up the procedures. I note in the proposal a genuine interest in guaranteeing a procedure that is aimed at the exit, in order to avoid the separation of the child or adolescent from his or her family, a measure that should always be a measure of last resort, speeding up and making more efficient the judicial and administrative resources and actions for this purpose. And in the event of the failure of all efforts, to move quickly to adoption because the child or adolescent cannot wait any longer to live in a family. In this matter, we are always racing against the clock.

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