What a Judge can do for Adapted Justice

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Abstract

Adapted justice, in the regulatory, cultural and infrastructural context of Chile's courts, is a challenge, even for judges who are aware of and trained in these matters, as the context is clearly adverse. Based on the experience of the judge rapporteur, although there has been progress, it is partial, limited and ineffective. The achievements that a judge can make in this framework are more the result of personal efforts, which can be integrated into a community of experts that provides support, validation and recognition, in the midst of an unfavourable climate. This paper is presented in the framework of the International Seminar "Towards a comprehensive regime to regulate and facilitate the exercise of legal capacity in Chile. Interdisciplinary Perspectives", held in Santiago de Chile on 2 and 3 December 2024, organised by the Universidad Diego Portales and the Universidad de los Andes.

Keywords: Adapted Justice, Therapeutic Justice, Open Justice, Access to Justice

Introduction

The present work reproduces the experience I have had as a judge, in the different matters in which I have worked, from 2016 to date, passing through family, labour, collection, civil, guarantee and Oral Criminal Court courts, and from that perspective reflect on what a judge can do to make Adapted Justice effective, understanding Adapted Justice as the definition provided by the Council of Europe, that is "*those justice systems that guarantee the respect and effective fulfilment of all children's rights to the highest possible level, without forgetting*

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the principles set out below and taking into account the child's level of maturity and understanding and the circumstances of the case. In particular, it refers to justice that is accessible, age-appropriate, speedy, expeditious, child-centred and child-friendly, respectful of children's rights, including due process rights, the right to participate in and understand the proceedings, the right to respect for private and family life and the right to integrity and dignity" (de Eu- ropa, 2010, p. 17). I will focus, by the way, on child-friendly justice.

At this point in time, and with Law 21.430 on Guarantees and Comprehensive Protection of Children and Adolescents in force, it seems useful to take article 50 of this law, in particular the notion of "Effective Judicial Guardianship". It seems to me that this notion is fully compatible with the idea of Adapted Justice, in particular with a definition that I have been developing for some time, to be applied both in judicial and administrative courts, which distinguishes three levels or scopes: access, process and execution: "*assuming that not only the guarantees of access to justice and due process must be taken into account in order to be configured, and that it is also necessary to take into account, in the case of Law 21.430, the special condition of the child or adolescent, and the need to guarantee the effective enjoyment of his or her rights, not only in the courts, but also administratively, this author states that effective judicial protection is defined as the procedural and administrative guarantee of providing effective recognition and enjoyment of the rights of persons, always taking into account the special condition they hold, on three levels: access, process and effective enforcement*" (Henríquez, 2024b, p. 309).

In what follows, I will develop, at the three levels of effective judicial protection, and in the different competencies in which I have been involved, the scope of Open Justice, and what a judge can do in this respect, from his or her position in the Courts of Justice.

Child-friendly justice at the access phase

Access to justice is not just about going to court, being sued or suing. As Espejo points out, "*coming into contact with justice is not equivalent to accessing child- and adolescent-friendly justice. Access to child- and adolescent-friendly justice implies the recognition that children and adolescents are rights holders and active actors in their lives*" (Espejo, 2023, p. 6). In fact, that is a very good distinction. That children and adolescents come into "contact with the justice system" is nothing new, it is something common, and it is very worrying, since, as we know, in general this contact has been denying, often mistreating and, in the most serious cases, victimising. "*Secondary victimisation has traditionally focused on the consequences of the judicial process on the victims. This continues to be a reality today, where despite efforts to reduce it, there are still attitudes on the part of judges, courts and lawyers that do not serve to clarify the facts and only harm the victims*" (Córdoba, 2022, p. 197).

Serious' access to justice must therefore consider a variety of alternatives, modes and access according to the different stages of development of children and adolescents, as well as their expressed views on how they wish to appear before the courts. They should be provided with relevant and timely information for decision-making, and their rights should be asserted in the proceedings.

Does this happen in courts? Normatively, our provisions do not make it easy. Although Law 21.430 promotes access to justice and legal aid in its article 50, we know that this is done "as far as possible", as its own provisions refer to a "progressive" implementation of legal defence, and on the other hand, its second and third paragraphs seem to refer exclusively to judicial and administrative proceedings, and not to other proceedings, which in fact is the case, as children and adolescents do not have lawyers specialised in children's rights to defend them in other matters: labour, civil, consumer and administrative litigation. In the criminal sphere, if they are accused, they have specialised criminal defence, but if they are victims, it will depend on the availability of lawyers for their defence, as the offices for victims are scarce and are generally overcrowded. Law 21.675 has alleviated this reality a little, as far as victims of gender violence are concerned, but even so, there is still a collapse of supply, with waiting lists, rescheduling of hearings for their attention, and on the other hand, there is often no accompaniment to the criminal area, relying on the investigation of the prosecutor of the Public Prosecutor's Office.

But in other procedures the matter is worse. For example, in the area of consumption, we know that children are the protagonists of consumption in the digital environment. In this context, General Comment 25 of the United Nations Committee on the Rights of the Child orders States to have mechanisms that allow children and adolescents to bring individual actions, and those of diffuse or collective interest, to protect themselves from the risks that can occur in these environments, for example, from abuse by providers who take advantage of children in online video games. It prescribes: "*States parties should also provide for collective complaints, including class actions and public interest litigation, as well as the provision of appropriate legal and other assistance, such as specialised services, to children whose rights have been violated in or through the digital environment*" (UN, 2021, para. 44).

However, in Chile, children have no possibility of bringing actions of diffuse or collective interest in the current procedure in force in Chile, nor of participating in the voluntary procedures led by SERNAC or the Consumer Associations to reach agreements that, on the other hand, would not be satisfactory either, as we will see below.

So, from the normative point of view, judges, as in my case, are very limited to apply measures of adapted justice. But there is hope. In a work published by Sepúlveda, our jurisprudence sheds light on overcoming the normative barriers of our Civil Code on capacity to bring actions before the courts. In this work, the author states the following: *"One of the rulings of the Supreme Court that caught my attention was case number 19677-2023, since in this case our highest court reversed the decisions taken in both first and second instance, regarding the lawsuit filed by a 15 year old adolescent who demanded a direct and regular relationship with the parents of her brother of simple conjunction, in order to be able to relate to him, who was 4 years old at the date of the filing of the lawsuit. (...) the Supreme Court indicated that the lawsuit filed by the adolescent complied with the norms of the aforementioned Auto Acordados, deciding to accept the appeal, also considering articles 11 (progressive autonomy) and 50 clause one (due process, effective judicial protection and specialisation) of the Law of Guarantees.*

In particular, the Court indicates that an analysis of both rules leads to the conclusion that, "The reinforced duty to protect children and adolescents requires respect for access to justice, considering at each step the nature of the action brought and the age of the minor" (fifth recital). "(...) In this sense, considering that the adolescent was fifteen years old at the time of the lawsuit, that the action brought seeks to regulate a direct and regular relationship with her brother of simple conjunction through the paternal line, four years old at the date of the lawsuit, respect for her progressive autonomy and due process, allowed her, in this case, to bring the action personally without the need for her to do so through her legal representative" (Sepulveda, 2024, pp. 187-188). In similar cases, and in response to queries from colleagues, I have resorted to the same criterion, and I believe that this is an advance that should not be abandoned.

We still have great regulatory difficulties to overcome in our system, its system of guardianship and personal care is totally anachronistic, as Lathrop (Lathrop, 2024) has pointed out in a recent work; the rules of capacity of the Civil Code limit the capacity to act in the contractual world, making progressive autonomy a chimera, as Vargas (Vargas, 2023, p. 259) has also explained, it also limits the capacity of association, action and petition and, frankly, except in family and criminal matters, in civil, labour, commercial, consumer and other matters, I have not been able to find a solution to this problem. 259), it also limits the capacity to associate, to act and to petition and, frankly, except in family and criminal matters, in civil, labour, commercial, consumer and other matters, I have not been aware that children and adolescents have been given access to the minimum, despite the regulations contained in Law 21.430, but there are advances that judges are using, within the framework of an Adapted Justice.

Child-friendly justice at the trial stage

Already in the procedure, what a judge can do for justice adapted for children and adolescents is quite a lot, although it varies according to the subject matter. In criminal proceedings, with the entry into force of Law 21.057, the crimes contemplated in them have had an approach that may well be added to Adapted Justice in its most sophisticated form, until now, the result of a public-private alliance and the third sector (NGO), which at the beginning was resisted (Henríquez Galindo, 2021), today provides videotaped investigative interviews with children, It also allows for interrogation mediated by intermediaries trained in oral trials, all regulated by previously tested protocols, prepared and trained in in-depth training carried out for this purpose, with periodic evaluations and ongoing studies. Sovino gives us an excellent overview of the implementation process (Sovino, 2023, p. 37). From the point of view of the accused, in terms of Law 20.084, for obvious reasons, I have not had the opportunity to exercise jurisdiction with the new Law 21.527, but it is undoubtedly known that it comes with a series of very positive modifications in terms of penal mediation, accumulation of sentences, and a new Juvenile Social Reinsertion Service with a view that aims at desistance and effective reinsertion. On this point, what worries me most is the little conversation I observe between the penal world and the protection world, taking into account that both services, protection and reintegration, depend in turn on different ministries, i.e. coordination is not exactly at its best, and additional efforts are required. In the absence of the so-called "reinforced protection" to which children or adolescents in contact with children and adolescents are entitled, it is not possible to ensure that they have access to the services.

The simultaneous use of the penal and protection system will also be a chimera, and worse, ineffective and even harmful.

At the other extreme, we have the civil court, without any relevant modification to adapt its procedures to children and adolescents. In my personal case, as a judge, in cases of change of name or surname of the mother or father, which affects the children because, by changing the surname of their parent, the surname of their descendants changes, I take care to summon and hear, listen to the children or adolescents, to find out what they think about this. But I am aware that not all judges do this, and no one is overturning judgments because of this. I have heard of cases of young people, teenagers now, who are going to leave the country with their sports teams to a championship, to Argentina or Brazil, and they are not allowed because their surnames do not coincide with those of the system that registers the Civil Registry. Of course, their father, whom they have not seen for years, changed his surname, did not consult anyone, did not inform his daughter, who found out from the PDI at the airport, and was unable to accompany her companions.

In family courts, at the protection level, the change has not been very auspicious either. Although certain authors have discarded or mitigated the presence of "secondary victimisation" and have seen the participation of children and adolescents as favourable (Carretta & Quiroga, 2021), the fact is that in the context of Law 21.430, Law 19.968 and its procedure had to be adapted to the requirements and parameters of this new regulatory framework. A bill to adapt the law was presented on 15 September 2023, but since October of the same year, it has been without movement (of the Republic, 2023). The result of this is that we continue with a protective procedure prior to the Law of Guarantees, without additional resources, and therefore inadequate to its parameters. For example, its precautionary measures are closed, it does not admit innovative precautionary measures, there is no clarity in defining the judicial competence of the administrative one, etc. As new institutions such as the Local Children's Offices, the Specialised Clinical Diagnosis Programmes and the criteria for referral between administrative and judicial protection competence begin to operate, the rigidity of this procedure and the lack of resources begin to be felt more clearly, and a plurality of criteria can already be seen in each court to deal with the same problems.

The most worrying thing, from the point of view of adapted justice, is that children and adolescents continue to be seen, in a way, as objects of protection. For example, at the Centre for Precautionary Measures, where I work, it is unusual to see them at scheduled hearings. They are not summoned, they are not really considered parties. They are waiting for the lawyer ad litem to say whether or not their client is interested in attending. This question seems to me to respond more to a question of the efficiency of the system, rather than to a criterion of respect for the will and autonomy of the child or adolescent. In many cases it is argued that the child is not in a position to express his or her will because he or she is too young, confusing his or her right to be heard with his or her progressive autonomy and the reasonable measures that should be taken to listen to his or her opinion. In this, Ibañez has lucidly explained the difference, because in the end, we all have the right to be heard, since we are human beings (Ibañez, 2023, p. 17). The right to be heard before the judge is also often confused with the manifest interest expressed before the lawyer or the opinion expressed before the Technical Council. These are different issues, with different impact and consequences, and do not replace each other.

There are divergent practices, in which either the hearing of the child is delegated to his or her lawyer, or to the programmes that interview him or her, or to the Technical Council. But the opportunity to be heard before the judge, who makes the decision, is not given, or it is done to a lesser extent than it could be done. In part, this happens for practical reasons: there is no agenda that can resist, the judges are not enough, in fact one of the points included in the adaptive law that is still pending in Congress was the incorporation of 116 additional judges, with their respective technical advisors (Henríquez, 2017, p. 165). This would still be insufficient, as reported by the Administrative Corporation of the Judiciary in the reports submitted to the Draft Law Adjusting Law 19.968 to which I have already referred (173 judges, 190 technical advisors, 3 administrators, 59 heads of unit, and 515 additional employees would actually be needed, in addition to the construction of new courts) but as we can see, we do not even have that. On the other hand, lawyers do not go to court in person, they go online, and in these cases they prefer to go in person, but this implies a high opportunity cost, as they are no longer available for multiple hearings to which they can connect during travel time.

Before concluding this point, I must point out that, regardless of the fact that Law 19.968 has not expressly established it, it is more than clear that hearing them is something fundamental, because it is the clearest manifestation of their recognition as subjects of rights. Or do we listen to those who we do not consider worthy of being heard? Listening to those who have been violated is, in itself, an act of Therapeutic Justice, of recognition of their human dignity, because every human being can be heard, and consequently, this is an essential procedure that cannot be omitted. I have also pointed this out when analysing article 28 of Law 21.430: "the right of the child to be heard is probably the most direct and concrete way of recognising his or her quality as a subject of rights in a process. But it is not enough to hear, to listen: it is necessary to establish that this right must be for their benefit, and can never alter or prejudice their right to mental health" (Henríquez, 2023a, p. 47). That is why, when the occasion arises, in my case, and I understand that it is the generality of cases as well, we judges try to take the greatest care to listen to them, even if the context is adverse to us. We lack training in interviews in protective courts, as there is in criminal courts, and psychosocial training on the stages of development of children and adolescents, fundamental issues, which in many cases each judge has acquired personally, but in general, a great effort is made to take care of that moment, and to respect the time and the right of the child or adolescent to express their emotions, feelings and opinions about what is happening in the proceedings.

In this regard, another element to consider is the way in which children and adolescents appear to be heard in court. In family courts, and in some courts, but not all, there are so-called "Gesell Rooms" (Judicial, 2015), which are sometimes used by some judges, but not all, for interviews reserved for children. It should be noted that this type of room does not exist in mixed courts, or in civil and labour courts, or in criminal courts, where there are videotaped interview rooms (or agreements with prosecutors' offices that have such rooms). The reasons for their use (or not) are very varied, and in some ways have already been noted by

Oyanedel (Oyanedel S. & Ortúzar F., 2018). In multi-judge courts, it may happen that at the same time two or three judges need to take reserved hearings at the same time, but there is only one courtroom. Another case is that the child expressly prefers to be in the courtroom. In other cases, there is a lack of knowledge as to its usefulness, why it should be preferred, or how it should be used. And in other cases, the Gesell Room is not fit for use, because it is not useful, it is used as a storage room, the cameras or microphones do not work, the equipment is bad, etc.

Finally, throughout the entire procedure, from the beginning until the judgement is handed down, it is important to try to explain decisions in a way that is understandable to the parties and to the child. Using clear language, simplifying the messages so that they are understood according to the child's stage of development is fundamental, regardless of the procedural stage in which we find ourselves. In my experience, this is not always the case. I must admit that I do not practice it often either, given that I do not find myself in front of children and adolescents, for example, at the time of sentencing. Paradoxically, in protection cases, the children and adolescents who benefit from them do not usually witness the most important act of regulation of the protection procedure. This is also due to procedural issues, which require that the sentence be handed down immediately at the end of the preparatory hearing or trial, as the case may be.

In fact, one of the matters that had to be adapted in Law 19.968 was the issuing of the sentence, which had to be written and substantiated. This provides the opportunity to better explain, with better arguments and clear language, the reasons that led to the decree of a protection measure, according to their best interests, following the Guide for Determining Best Interests developed by UNICEF and the Judiciary (UNICEF, 2022). With the current procedural provision, this becomes very difficult, although in my particular case, I always try to issue the oral sentence taking into account all the elements contained in the fifth paragraph of article 7 of Law 21.430, as advised by the aforementioned Guide.

Child-friendly justice at the enforcement stage

This stage is more complex for family judges, as we have few tools at our disposal: the power of imperio and the control of compliance through follow-up cases, known as "X cases". It seems a bit repetitive at this point, but it is true: there is no supply available in a number of programmes that children and adolescents urgently require. All they have are waiting lists. The non-compliance with article 2 bis of Law 21.302 is ostensible, and there is not much to add in this regard. This reveals a critical situation in the implementation of the law.
21.430 to which I have made reference on another occasion (Henríquez, 2024a), and which prevents us from affirming that there is effective judicial protection in Chile for children and adolescents, and consequently, as can be seen, a real possibility of guaranteeing an Adapted Justice for them.

For their part, measures of constraint are widely ignored by the authorities, since they are then appealed before the courts and quickly dismissed by them, or they are simply accepted, but nothing changes. In any case, it is not possible to pretend that public policies can be changed through fines and arrests. We know very well what is respected

the principle of budgetary prioritisation of article 16 of Law 21.430, can be seen in the reports of the Defensoría de la Niñez (Childhood Ombudsman's Office, 2023).

Adapted justice for children and adolescents with disabilities

Finally, I will briefly mention the cases of children and adolescents with disabilities, especially intellectual disabilities. In the experience I have had, it is very common to assimilate this disability to a total absence of volition. I remember very well a case of a young girl who came to court, accompanied by her mother. Her mother was rightly accused of beating her. The mother's lawyer entered the courtroom first, and told me that the girl, aged 16, had a very low mental age, schizophrenia, and that she did not speak, that it would be better if we actually left her outside the courtroom, in a more suitable place. But I preferred to send her in anyway. I said that if she felt uncomfortable, we would take her somewhere else. Great was our surprise when we saw her talking, ratifying the facts, and expressing that she was very afraid of going to Sename, because her mother had told her that she was going to Sename. Evidently there was a strategy to annul the young woman, discarding her story and her capacity to express her opinion and her o p i n i o n , and on the other hand, generating in her an enormous fear of being interned in a Sename home.

The attitude of the judge, and this is the contribution we can make in the limited context we have, is always to be observant, and doubly rigorous, always presuming capacity. In the absence of evidence to the contrary, the ability to express an opinion, a view, is presumed, and therefore this view is procedurally protected in a reinforced manner.

We should also strive to simplify the explanations of procedural steps, making sure that they are understood, in so-called "plain language". In reality, we should move towards universally accessible measures and procedures that a n y o n e , whatever their condition, can understand. In the words of Jerez and Gutierrez, "*The Convention itself establishes in article 2 a definition of universal design that includes the "design of products, environments, programmes and services that can be used by all people, without the need for adaptation or specialised design". In terms of access to justice, therefore, it implies a legal obligation of an ex tunc nature that States and, therefore, all legal operators have to create the necessary conditions so that all persons, regardless of their condition (say a person with a disability, but it can also be an elderly person or any other potentially vulnerable group of the population), can make effective the realisation of this fundamental right per se based on the removal of barriers at a general level*" (Jerez & Gutiérrez, 2024, p. 127).

It is clear that we must advance in more effective support measures, require the presence of facilitators who are permanently available to the courts for these cases, or companions who are loyal to the victim, that is, provide the necessary support so that the victim can enjoy due process, following the advances of Spanish law 8/2021, which is well described by Fernández(Fernández, 2021, pp. 2-16) and the Convention on the Rights of Persons with Disabilities (United Nations, 2008), in particular article 13, which refers to access to justice and obliges states to adopt procedural adjustments for this purpose. Thus, with Martin, it will be necessary to "*consider the diversity of situations that may arise in disability and the different barriers that may be generated. This means that the procedures must be adapted or configured in each case, by means of the necessary adjustments.*

necessary to guarantee equal participation" (Martín Pérez, 2022, p. 19). And among these measures is undoubtedly the necessary training of male and female judges, which is obviously also lacking.

On the other hand, in the case of other types of disabilities, although the pandemic brought with it the widespread use of telematic hearings, reducing the need to appear in court in person, and on the other hand, the law on electronic processing and the virtual judicial office also facilitated access to and processing of cases without the need to go to court, this circumstance is not in itself an advantage, and may well mean invisibilisation and discrimination. De Lucchi has pointed out that "*the other side of the coin are the weaknesses and threats that the digital transformation presents in relation to people with disabilities, which can be summarised in what is known as the digital divide. This term refers to the inequalities that technology creates between people. Without a clear commitment to digital accessibility, justice systems risk widening the gap for people with disabilities and creating more and more barriers that hinder access to justice*" (De Lucchi, 2023, p. 63). In a paper for the Judicial Academy on the same subject, I have also argued the same risk: "*Today, we can observe that we are, at the level of users of the system, in a stage of small and insufficient advances to provide access to persons with disabilities, as is the case with the website of the Judiciary and the Virtual Judicial Office and, on the other hand, maintaining systems that provide few accessibility tools, including the zoom platform, for daily use in hearings. The situation worsens in the case of internal users of the Judiciary, judges and civil servants, who must operate with systems that do not incorporate any accessibility measures for persons with disabilities. Addressing disability in access to justice through digital platforms requires thinking about appropriate measures from the design stage. It is a way of interacting with courts and judicial procedures that is already legally recognised and will continue and probably increase in use and scope over time. Subsequent adaptations are often more costly and ineffective than those that are intended as universal access measures from the outset. However, such adaptations are nonetheless necessary to ensure access to justice*" (Henriquez, 2023b, p. 12).

Conclusions

This exhibition has been a small sample of experiences, from a judge's perspective, of what can be done to contribute to adapted justice. Beyond all the challenges that must be overcome to achieve such lofty goals, it seems to me that the basic thing is to generate a community of knowledge that includes not only academics, but also litigators, professionals from the psycho-social care network, mental health, judges, who interact in a common language, and that expands little by little to other areas, where its premises begin to prosper and prevail.

Under these conditions, it seems that it will be more plausible that serious and well-funded public policies will indeed be able to implement a child-friendly justice system in the future. It was not easy to convince everyone of the convenience of such a system, but it was achieved. There

three actors were involved: the state, the private sector and the third sector. Let's not invent the wheel, let's look at what has worked, and in the m e a n t i m e , let's smile, we will succeed.

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