

CONSOLIDATION OF THE SPANISH CHILD WELFARE SYSTEM

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From 1987, a new system of legal protection of children's rights and interests has been developed in Spain. Specifically, Law 21/1987 had opened up possibilities for extending assistential intervention of the social services of the public territorial bodies with competence in the sphere of administrative guardianship to the protection of children who can be seen objectively to be uncared for. The Spanish protection system of neglected children was given an important impulse with the promulgation of Spanish Organic Law 1/1996, of January 15th. Moreover, this Organic Law of 1996 recognizes children as holders of a series of rights.

More particularly, the Spanish Child Welfare Law System is a consequence of State Law 21/1987, Organic Law 1/1996, of January 15th, on Child Welfare, which develops the principles of full protection of the child and of the supreme interest of the child and is in tune with the new philosophy which arose from the *United Nations Convention on the Rights of the Child* of November 30th, 1989. In particular, the 1996 Law recognizes children as holders of a series of rights and, among these, the "right to be heard" in any administrative or legal process that affects them. The regulation establishes that the child may express his or her opinion in relation to the specific measure which is to be taken and that the opinion expressed must be taken into account. This legislative provision arises from the importance given to the higher interest of the child and from the protective objective that is to govern adoption within the framework of the law.

In the context of these two State laws (Law 21/1987 and Organic Law 1/1996) the Autonomous Regions initially began to assume some child welfare functions such as administrative custody and guardianship work with the biological, foster and adoptive families, etc. and have since become responsible for welfare and the defence of a substantial chapter of children's rights. As a result, a substantial number of new Laws from the Autonomous Regions have promoted a deeper recognition of children's rights and new intervention mechanisms to reinforce the child welfare system. In this perspective, it is necessary to emphasize the significant role played by new agents in defending children's rights and interests: the Public Prosecution; social services, administrative authorities and the professionals who, for reasons of their work (teachers, paediatricians, etc.), have knowledge of situations of children being neglected or ill-treated.

Finally, I want to consider two issues that are particularly important right now in Spain: adoption by homosexual couples and international adoption. International adoption has increased considerably in Spain over recent years and it may be important to consider the issue from the children's rights and interests perspective. Adoption by homosexuals is currently an extremely controversial issue in Spain, following Law 13/ 2005, which modified marriage in Spain, and it is also of great interest to analyse the maturity of the Spanish child welfare system from the viewpoint of children's rights and interests.

1. In general terms, the protection of minors by the public authorities will consist both in preventing and repairing the situations of "risk" and "neglect" that a child can be involved in

by means of a set of measures such as custody or automatic guardianship (art. 12.1. of L.O 1/1996). These two kinds of situation in which a child can find him or herself will give rise to the intervention of the social services. In the first place the “risk situation” refers to situations in which the damage to the child is not sufficiently serious for the minor to have to be separated from his or her parents or the family nucleus. In such a case, intervention is geared towards eliminating these risk factors and for this purpose family participation and collaboration are essential (art. 17 LO/1996). The measures taken by the social services in these risk situations will normally involve monitoring the child and the family. This will enable the possible causes of the situation to be detected and should avoid the child's situation worsening. If deterioration comes about, the child must be declared “neglected”. In a risk situation the measures taken by the social services involve support to the child's family. Such support may be financial or be offered in the shape of educational or psycho-social services with the aim of strengthening the child's family.

In the second place, “situations of neglect” refer to cases in which the seriousness of the damage the child is experiencing justifies his or her being separated from the parents and the family environment. In such cases, the welfare measure adopted by the autonomous social services will be that of automatic guardianship, which suspends parental authority *de facto* and must be made known to the Public Prosecutor within 48 hours. (art. 18 LO/1996). Once a child has been declared “neglected” by the Social Services, they are obliged to remove him or her from the family environment, with no need for any kind of judicial mediation.

This option in favour of direct administrative intervention is justified by the aim of temporarily guaranteeing the child's safety and welfare. The most immediate effect of automatic guardianship is that, once an objective situation of lack of care of the child is established and the child declared in a state of “neglect”, the social services may give the relevant instructions to their social agents to enter the family home, the home of his or her biological parents and, if the child is not handed over voluntarily, the social agents must remove him or her from the family environment.

The implementation of guardianship *ope legis* provides the social services of the administration with possibilities of rapid intervention in emergency cases, by means of which they can assume responsibility for the neglected child. In this context, legal intervention is not essential, although it continues to be possible and has the clear function of control of administrative behaviour. Judicial mediation may take place at a later stage, if, for example, the parents approach the Judge in order that he assess the situation and decide if the neglect which led to the family being temporarily deprived of the child did, in fact, exist.

In contrast to the dejudicialization that comes into play when automatic guardianship is activated, the Spanish legal system attributes important functions of supervision to the Public Prosecutor. As a guarantee of appropriate administrative conduct, there is the obligation that the public entity inform the Public Prosecution immediately of new admissions of children. Thus, public prosecutors must deal directly with administrative bodies and not only with legal ones. This legal viewpoint defines the public prosecutor as an intermediary between the administrative and legal entities.

In addition to the administrative automatic guardianship measure, the autonomous Administration can assume custody of the child in cases in which the parents are unable to look after the child and voluntarily request such a measure. When the child's problems do not seem to be irreversible, the Administration may assume *custody* of the child, instead of *guardianship*. Custody is a legal regime according to which the Social Services work in conjunction with the child and the biological family with the aim of eventually returning the child to his or her parents. In practice, however, the lack of judicial definition of both

automatic guardianship and custody leaves a wide margin for decision. This explains why, in similar conditions, the Social Services sometimes tend to assume the custody of the child and on other occasions opt for automatic guardianship.

In any event, it should be pointed out that this custodial measure is adopted temporarily when the minor's parents or guardians are experiencing great difficulty in assuming their family responsibilities and duties. Besides, their inability to look after their children must be due to circumstances beyond their control, such as, for example an illness, absence from the family home for reasons of work, a criminal sentence, etc. Furthermore, this measure can only be adopted when the neglect of the child is temporary.

This custody of the child only affects the personal sphere of the duties involved in parental authority and takes place, according to art. 172.2. of the Code of Civil Law, in a temporary manner, whenever the parents or whoever has authority over the child request it, once the gravity of the circumstances which prevent them taking care of the child has been established. Unlike administrative guardianship, this institution is not automatic because it usually comes into play as a result of an application made by the biological parents to the Social Services. Like administrative guardianship, judicial mediation is unnecessary in the determination of custody. Nonetheless, the second paragraph of article 172 establishes a channel for the judicial constitution of custody in cases "where it is legally correct"¹. Apart from this condition, control over administrative custody is also the responsibility of the Public Prosecution (art. 174.1 Code of Civil Law). In any case, the termination of custody will be directly related to the disappearance of the causes which led to its constitution.

It would appear legally that administrative custody is temporary and will usually tend towards the child's returning to its biological family once the circumstances which gave rise to it have disappeared (art. 174.4 Code of Civil Law). However, as well as "mere custody", the opportunities created by the use of the custody or protection of the child in a centre run by the Administration are widened by making it possible for administrative custody to take place through the institution of fostering (art. 172.3 of the Code of Civil Law).

Actually, this duality of forms of practice can also be observed in the case of administrative guardianship. This can also be implemented by internement in an establishment or by fostering. In either case, the public body maintains its responsibility regarding the child in question and the Autonomus Administration cannot neglect the child because the implementation of the welfare measure takes place "under the supervision of the public entity" (art. 172.3 Code of Civil Law).

Thus, administrative guardianship and custody can be operationalized through fostering. This institution is, without doubt, one of the most important in the sphere of child welfare. *Administrative fostering* is its normal form. By this means the legislator channels interventive assistance in areas which were previously excluded from this sphere, and coordinates all similar institutions, from guardianship and custody to the fostering of children. As in the dejudicialization of the first stages of the adoptive principle, this confines judicial mediation to cases of conflict. Where the Social Services decide in favour of family fostering for a child in their care, the biological parents must agree with, or at least not object to, this measure. This is why automatic guardianship only involves *de facto* interruption of the parental authority of the biological parents. Deprivation of this authority can only take place by

¹ Faced with the imprecision of the letter of the law, doctrine considers that legal custody will be possible, for example *ex* article 103.1 of the Code of Civil Law, in the case of provisional measures taken as a consequence of marriage crises, when the Magistrate does not consider it suitable for either of the parents to have custody of the children and there is no other suitable person to take charge of them.

judicial decision. Therefore, provided the parents have not yet lost their authority, the Social Services require their agreement for the child to be handed over to a foster family. If the biological parents oppose administrative fostering, the Social Services must approach a judge, who will decide the issue.

Until a judicial decision has been made regarding the suitability or otherwise of a child being fostered when the parents have shown their opposition, the autonomous Administration may provisionally take a fostering measure if this is judged to be in the child's interest (art. 173.3 Code of Civil Law).

Judicial intervention is not necessary provided the parents or guardians of the child do not object to the fostering and appear when summonsed (art. 173.2, Code of Civil Law). If this is not the case, the courts will have to formalize the fostering; this is called legal fostering, to differentiate it from purely administrative fostering.

Once the child has been handed over to the foster parents, these will be supervised closely by the public authorities as they perform their protective and educational tasks; this supervision will be carried out either by the social services of the competent Autonomous authority, through judicial intervention, or by the public prosecutor.

From another viewpoint, Organic Law 1/1996 introduced a new article (art. 173 bis) into the Code of Civil Law, which regulates the different kinds of fostering depending, on the one hand, on the child's needs and, on the other, on whether or not it expects that the child will be able to live with his biological family again. More specifically, the possible fostering modes are: a) simple family fostering, which will be a temporary measure in the cases in which the child is expected to return to its biological family; b) permanent family fostering, in cases in which the child's age or other circumstances render this advisable (a child who is already adolescent, for example); c) preadoptive family fostering, when it is expected that the child is going to be adopted by the foster parents. Adoption itself is seen as the closure of this set of welfare measures.

From a more general viewpoint, it might be stated that since the significant reform brought about by Law 21/1987, which regulated fostering and adoption, and the whole legislative and institutional development carried out by the Autonomous Regions, the Spanish child welfare system is progressing towards an integral child welfare system.

2. To be precise, it is mainly the most specific rights of the child that are recognised. Among these are the right to personal and family privacy, the right to an ideology, religion or beliefs, the right to receive an education, to be heard, to live with one's parents, to maintain contact with the father or the mother, etc. Furthermore, in development and guarantee of the constitutional principle of equality and non-discrimination, Organic Law 1/1996, together with some of the autonomous laws, contemplates the particular situation of foreign and immigrant children. In particular, their right to an education, medical care and all the other public welfare resources is acknowledged when these children are in a "risk situation" or subject to an administrative measure of custody or guardianship (art. 10.3 Organic Law 1/1996). In fact, it is hoped that the recognition of these rights and some welfare measures and resources that are available to foreign or immigrant children will lead them to integrate socially. That is, if these minors remain in Spain and are not repatriated by the Spanish authorities, the available legal measures and resources are geared towards their social, educational and cultural integration.

With regard to the child's right "to be heard" and to express their opinion in any matters directly affecting them², it should be pointed out that this has been applied increasingly in the jurisdictional sphere in recent years. In this sense, it seems appropriate to refer briefly here to some decisions made by the Spanish Supreme Court in which a child's grandparents were granted a broad regime of visits and personal relations with their grandchild on the basis of the opinion and wishes expressed by the child and because this was seen to be in the child's interest (Supreme Court Judgment of June 11th 1996, Supreme Court Judgment of June 11th 1998, Supreme Court Judgment of November 23rd 1999).

Lastly, the important role played by the Public Prosecution in defending the child's rights and interests should be underlined. In fact, the obligations and faculties of the Public Prosecutor in the child welfare system were reinforced and extended by Organic Law 1/1996. The obligations and responsibilities of professionals who, for reasons of their work (teachers, paediatricians, etc.) have knowledge of situations of children being neglected or ill-treated were also reinforced by the said law. In these cases, the professionals, as well as providing the help that the child may need, must immediately report the situation to the competent authorities.

In short, Organic Law LO.1/1996 on Legal Child Welfare involved a step forward in the construction of an integral child and adolescent welfare system in Spain in two senses: firstly, because it gave form and content to a set of applicable laws and secondly because it incorporated some modifications to the Code of Civil Law that have led to an improvement in the welfare institutions contemplated by law L21/1987 referred to above, which in turn are completed by procedural law provisions with a view to providing more efficient protection of the rights of the child and adolescent. And lastly, the irrefutable sense of law LO.1/1996 is the priority of the child's interest in the application of the law, over any other legitimate interest that might compete with it.

Furthermore, **autonomous laws and regulations** have gradually been consolidating the protection system of the supreme interest of children and adolescents. These laws initially regulated the principles of action and the competence and institutional framework of welfare activities. A wide range of children's rights have also gradually come to be reflected (the right to be heard in all administrative or judicial decisions affecting them) in relation to administrative measures of custody and guardianship, to fostering by families or homes to and the adoption process, together with the criteria around which the concepts of neglect and personal social risk for the child are articulated.

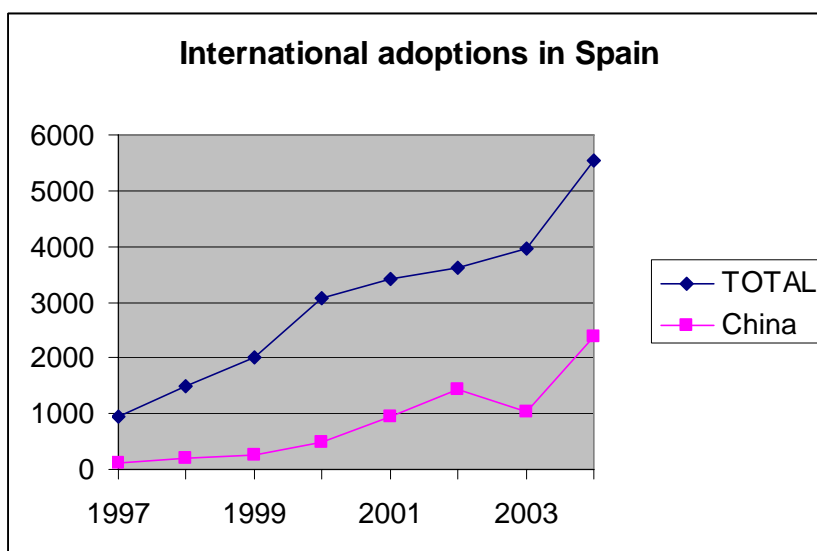
In this regard, over the past 15 years, the Autonomous Regions have been regulating and reforming their laws with a view to including further children's social and cultural rights (among others: Aragonese law 2001, Navarrese law 2005, Basque law 2005, etc.). To quote a specific example, *Aragonese Law on Childhood and Adolescence* of July 2001 contemplates rights such as the protection of health and health care, the right to an upbringing and education, the right to social and cultural integration if need be, economic and labour rights in the face of any kind of exploitation, the right to participate fully in cultural and artistic right, the right to leisure and free time as essential factors in education and the development of children as responsible citizens. And the also the child's right to the environment and to obtain knowledge on and participate in his or her surroundings.

² In the Spanish Child Welfare system the child may express his or her opinion in relation to the specific measure which is to be taken and this opinion must be taken into account. Particularly, Organic Law 1/ 1996 recognizes children as holders of the "right to be heard" in any administrative or legal process that affects them. This legislative provision arises from the importance given to the higher interest of the child.

3. Finally, I want to consider two issues that are particularly important right now in Spain: adoption by homosexual couples and international adoption. International adoption has increased considerably in Spain over recent years and it may be important to consider the issue from the angle of children's rights and interests. Adoption by homosexuals is currently an extremely controversial issue in Spain, following Law 13/ 2005, which modified marriage in Spain, and it is also of great interest to analyse the maturity of the Spanish child welfare system from the viewpoint of children's rights and interests.

Inter-country adoption warrants separate consideration due to its significance and to the large number of overseas children that have been adopted in recent years in Spain. In this regard, it is significant to note that the phenomenon of intern-country adoption in Spain is a feature of the 1990s, at which time national adoptions in Spain dropped by almost half and inter-countries adoptions increased thirty-fold. In the year 2000, Spain ranked third in the world in terms of international adoption. In fact, in that year, of the total of inter-country adoptions worldwide, 3,062 applied to Spain.

As far as the countries of origin of children adopted in Spain are concerned, it should be pointed out that there has been a shift over recent years. In the mid 1990s, the children came mainly from Latin America and particularly Columbia. In 2001, some of the Eastern European countries were the main countries of origin of the children adopted, followed by some Asian countries. But now, most of the children are from China. The African continent continues to be poorly represented as far as adoption is concerned, with the exception of Ethiopia, from where a considerable number of children have been adopted in Spain since 2004.



	1997	1998	1999	2000	2001	2002	2003	2004
TOTAL	942	1.487	2.006	3.062	3.428	3.625	3.951	5.541
China	105	196	261	475	941	1427	1043	2389

Fuente: Ministerio español de Asuntos Sociales

The social services of the Autonomous Regions are competent to deal with inter-country adoption as these issues pertain to the sphere of child welfare. The applicable regulations are reflected in LO.15/1996, on Legal Child Welfare, referred to above, which presented the new development of establishing the requisite of “the suitability of the adopters”. The different autonomous child and adolescent welfare laws are also applicable, as is, of course, the Hague Convention on protection of children and cooperation in respect of Inter-country adoption of May 29th 1993, ratified by Spain on August 1st, 1995. The significant role played by the “mediation agencies” (ECAIs: “inter-country adoption collaboration entities”) in the inter-country adoption process is also worth pointing out; these may be public or private non-profit organisations. In any event, the mediation activity between the Autonomous Regions and the countries of origin of the children carried out by the ECAIs must guarantee the protection of the supreme interest of the child to be adopted and also of the respect of his or her rights.

From a critical viewpoint, some difficulties and proposals for improvement in inter-country adoption in Spain have been suggested. In this regard, the fact that there are significant differences in dealing with inter-country adoptions and in the requisites for applicants to be approved as “suitable” between the different Autonomous Regions is considered a negative factor. There are also substantial differences when it comes to preadoptive preparation. The need for greater coordination in the regulation and control of the ECAIs’ (or mediation agencies’) activities on the part of the competent autonomous administrations and by the children’s countries of origin has also been observed. But in my opinion, which it is really important to guarantee the children rights and is superior interest. And about this, it is important to note that, taking care of and being respectful with the rights of the adopting families, the children interest is the paramount interest. On the other hand, it is necessary to consider now the problems of these children in the future and provide them and their families the necessary support.

As a final point, I would like to comment on one further issue that is giving rise to heated debate and is currently among the most controversial in Spain, which is the issue of the adoption of children by homosexual couples. As I pointed out at the beginning of my presentation, adoption by homosexuals has become a particularly controversial issue in Spain since the coming into force of Law 13/2005, which allowed homosexual couples to contract marriage and adopt children. This law, which contemplates the possibility of homosexual couples adopting or fostering, would be in the line of influence of *the European Parliament Resolution of February 8th, 1994, on the equality of rights for homosexuals and lesbians*, which, reflecting the demands of homosexual groups and based on the principle of equality and non-discrimination, establishes full equality of rights between homosexuals and heterosexuals, and even recommends putting an end to any kind of marital prohibition affecting them or any regulations forbidding them to “be parents”, “adopt” or “bring children up”. In any event, and despite its non-binding nature for the Member States, the significance of this Resolution is that it is a pronouncement by an institution such as the European Parliament, in which all the Member States are represented. From another viewpoint, it reflects demands that are becoming louder and increasingly widespread in European countries.

In general, it can be stated that the proposals approved in this Resolution are truly advanced and innovative in matters of bringing homosexual couples into line with the marriage of heterosexuals or an equivalent legal situation, enabling the registration of the cohabitation situation and fully guaranteeing these couples the same rights and benefits as those enjoyed by married heterosexual couples. Among these, it considers that “the

recommendation should, at least, attempt to put an end (...) to any restriction of the rights of lesbians and homosexuals to be parents, to adopt or bring up children” (proposal 14). What is clear is that this resolution of the European Parliament, by taking on the form of a ‘recommendation’, is not obligatory for the member states, as it would have been if it had taken the form of a directive, as was intended in the initial proposal of the Resolution.

In any event, the possibility of joint adoption already existed for stable heterosexual couples since the coming into force of State Law 21/1987, of November 11th, regulating fostering and adoption. Nonetheless, since it is possible for single people, widows or widowers and separated or divorced people to adopt individually according to the state Law referred to above, a homosexual person can adopt individually, whether or not he or she is involved in a stable homosexual relationship at that time. Furthermore, since the year 2000 some laws regulating the situation of stable common-law couples in the autonomous regions have enabled homosexual couples to adopt children and indeed, years before this, Valencia Law 7/1994, of December 5th, on the *Protection of Children* had already included the possibility for couples of the same sex to adopt jointly, in art. 28. However, there has been constant controversy around the interpretation of this regulation.

There is no doubt that the issue of the adoption of minors by homosexual couples is and will continue to be the subject of controversy. I believe³ that in the case of homosexual couples there should be an open, plural debate of the kind that has not yet been held in Spain, both in the social and other spheres, discussion of the most expert criteria of psychologists, educationalists, specialised educators, etc. In any case it is important not losing sight of the fact that there is no right to adoption for adults --in this case and in all the cases: in any of the cases: married couples, unmarried heterosexual or homosexual couples, etc. The argument is precisely the opposite: it is the children who have the right to grow up in a suitable family environment, whether this is their own or an alternative one. It should therefore be the supreme interest of the child and not anything else or any other criterion that indicates, case by case, that a particular child with his or her rights and needs should be fostered or adopted, regardless of whether the child is to be adopted by a married couple, a heterosexual common-law couple, a homosexual couple or an individual. In this sense, in the same way as child welfare regulations are being applied in cases in which a child, or several brothers and sisters, are requested for fostering or adoption by heterosexual, married or unmarried couples, the legislative possibility of homosexual couples adopting or fostering should exist, leaving it up to the social experts, as is done in the other cases, to evaluate and decide in each case whether or not the supreme interest of the child, together with his or her need for affection, right to education, development or personal maturity, the right not to be separated from brothers and sisters if at all possible, and the continued, non-intermittent reference of the same adults (unlike what happens in child welfare centres) are going to be guaranteed.

³ The issues relating to fostering and adoption are very complex and exceed the scope of any simplification of the arguments brought up in this debate, the majority of which are ideological. See. Picontó Novales, “Cohabitation: the ideological debate in Spain”, in M. Maclean (ed.), *Family Law and Family Values*, Oxford, Hart Publishing, 2005, p. 221-240.