DEVELOPMENTS IN THE PROTECTION OF CHILDREN'S RIGHTS IN SPAIN

With Special Reference to the Context of Gender Violence

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1. INTRODUCTION

The principle of the best interest of the child has been the main criterion behind the legal reforms and judicial and institutional practices in relation to the protection and rights of children in Spain since the 1987 Law on Fostering and Adoption, followed some years later by the Organic Law of 1996 for the Protection of Minors. Several local laws were also enacted in the autonomous regions of Spain during the 1990s and the beginning of the twenty-first century, addressing the protection and rights of children. More recently, two national laws were passed in 2015: Organic Law 8/2015 and Law 26/2015, both of which introduced some changes in the field of the protection of minors. Finally, Organic Law 8/2021 of 4 June has very recently been passed by the Spanish parliament, and published in the official gazette.[1] This law, on the protection of infants and adolescents against all forms of violence, will come into effect in 2022.[2]

1 Boletín Oficial del Estado (BOE), 5 July 2021.

2 This chapter was written as part of the Project RTI2018-095843-B-I00, 'Analysis, evaluation and visualization of legislative argumentation: towards an applied theory of parliamentary justification of laws' (AEVAL).

The UN Convention on the Rights of the Child came into effect in Spain on 2 September 1990. The subsequent legal changes took place within the framework of the Convention. Article 3, one of the most important articles in the Convention, establishes that:

> In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be the primary consideration (Art. 3.1).

At the time, the issue of the extent of children's rights was under discussion in Spain. The influence of scholars and experts from other countries, such as John Eekelaar, played a very significant role in ensuring that the rights of children were respected in legal and social practice, to protect the best interest of the child.

Once the UN Convention on the Rights of the Child had been adopted and ratified in Spain, the social, scientific and academic reflections and debates underlined the need to reinforce and extend the rights of children in other areas, for example in cases where their rights came into conflict with the rights of adults, particularly their parents; and cases in which the individual rights came up against collective rights within the cultural or religious context in which the children lived. These questions have been rigorously and profoundly analysed by Professor John Eekelaar in his publications, presentations and research projects. He has consistently defended the absolute priority of the best interest of the child, even in the most complex family, social and cultural situations. He has also emphasised the importance of the application of the rights of the child, in practice, to guarantee at least the minimum possible standards of protection in all cases. The early works of John Eekelaar[3] were highly influential in the field, not only in the UK but also internationally, including in Spain. Among the reasons for this were that his works treated the rights of children with the seriousness they deserved, and emphasised that the legal requirement to protect the best interest of the child was compatible with treating children as possessing their own rights.

In the family context, the UN Convention on the Rights of the Child and the Spanish constitutional principle of complete protection of minors (Spanish Constitution of 1978) places on parents, carers and others responsible for children (including the State) the obligation to respect their rights.

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[3] E.g. 'The Importance of Thinking that Children Have Rights', in P. Alston, S. Parker and J. Seymour (eds), *Children, Rights and the Law*, OUP, Oxford 1992, pp. 221–35; and 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' (1994) 8 *International Journal of Law and the Family* 42–61.

2. THE CASE OF ÁNGELA GONZÁLEZ AND THE PROTECTION OF CHILD VICTIMS OF GENDER VIOLENCE

One of the most significant concerns in Spain is the issue of domestic and gender violence and its effects on children. General Comment No. 13 (2011) of the UN Committee on the Rights of the Child is headed 'The right of the child to freedom from all forms of violence',[4] and states that the interpretation of the best interest of the child includes the obligation to protect children against all forms of violence, including as victims or witnesses of domestic and gender violence. Furthermore, the right of the child not to suffer violence is violated when professionals do not take into account the best interest, or the opinions or the development of the child, when they exercise their responsibilities (paragraph 61).

The Committee on the Elimination of Discrimination against Women (CEDAW)'s General Recommendation No. 35 on gender-based violence against women, issued in 2017, says in paragraph 40 that states should:

> Adopt and implement effective measures to protect and assist women complainants and witnesses of gender-based violence before, during and after legal proceedings, including through: … b) Providing appropriate and accessible protection mechanisms to prevent further or potential violence, without the precondition for victims/survivors to initiate legal actions … Perpetrators or alleged perpetrators' rights or claims during and after judicial proceedings, including with respect to property, privacy, child custody, access, contact and visitation, should be determined in the light of women's and children's human rights to life and physical, sexual and psychological integrity, and guided by the principle of the best interests of the child.

This Recommendation was preceded by the CEDAW Communication No. 47/2012 of 30 July 2014, following the Spanish case of Ángela González Carreño, discussed below. Specifically, the Committee recommended that the Spanish State should take appropriate and effective measures to ensure that episodes of domestic violence be taken into account when the authorities make decisions about custody, visits and communication regimes relating to children, so that the safety of victims of violence is not put at risk.[5]

In the European context, the Convention of the Council of Europe on preventing and combating violence against women and domestic violence of

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4 See T. Picontó Novales, 'Los derechos de las víctimas de violencia de género: La relación de los agresores con sus hijos' (2018) 39 *Derechos y Libertades* 121–56.

5 See M. Calvo García, 'The Role of Social Movements in the Recognition of Gender Violence as Violation of Human Rights: From Legal Reform to the Language of Rights' (2016) 6 *The Age of Human Rights Journal* 60–82.

2011 (the Istanbul Convention), which came into force in Spain on 1 August 2014, is binding on all European states. This had a significant influence on domestic legislation, and enables the progress of states in this respect to be monitored. In Spain, Organic Law 8/2015, modifying the system for the protection of infancy and adolescence, requires, in Article 2, that the life and development of the child should be free of violence, and that the best interest of the child should predominate over any other legitimate interests.

The case of Ángela González and her daughter Andrea is very significant. Firstly, because it led to important changes in Spanish law and public policy, aiming to eradicate gender violence affecting not only women but also their children. Secondly, it eventually led to the decision of the Spanish Supreme Court (1263/2018, 17 July 2018) that recognised the responsibility of the State in the murder of Andrea, in 2003, by her father during one of the unsupervised visits established by the court. This sentence complies with the recommendations of the CEDAW, which had condemned the Spanish State in July 2014 for failing to protect Ángela González and her daughter.[6] In its report, the Committee expressed its concern at the number of cases of boys and girls murdered by 'violent fathers during the exercise of their visiting rights'. In the case of Ángela, in spite of the victim having reported her ex-husband on 30 occasions due to threats and aggression, the aggressor's visits and communications with the daughter were not interrupted.[7] More specifically, the Committee observed that:

> the authorities, legal and social services and the experts (psychologists) had the normalising of the relationship between the father and daughter as their main objective, in spite of the reservations expressed by these two services about the father's behaviour … All these elements reflect a pattern of action that arises from a stereotypical view of contact rights, which in the case in question granted clear advantages to the father in spite of his abusive behaviour and minimised the situation of mother and daughter as victims of violence, placing them in a vulnerable situation (section 9.4).

Furthermore, the Committee made several general recommendations to the Spanish State, such as taking the appropriate effective measures to ensure that histories of domestic violence are taken into account when stipulating custody and contact rights relating to children, so that the exercise of these rights does not put the safety of victims of violence, including children, at risk (section 11).

The decision of the Supreme Court referred to above is very significant in terms of human rights because it recognises that the terms of international agreements ratified by Spain must be complied with, whether or not there is

6 Ibid.

7 CEDAW/C/58/D/47/2012, Communication No. 47/2012.

national legislation governing these terms[8] (it thus confirms that the State will accept the findings of human rights committees of the CEDAW to be binding, and not merely recommendatory). Specifically, the Supreme Court declared that, in the absence of a specific procedure for executing the recommendations of the CEDAW regarding the violation of fundamental rights by the Spanish State, then, given that Spain has ratified the Recommendation, the Spanish courts should be the means through which compensation may be obtained, depending on the case.

Unfortunately, the murder of Andrea is not the only such case in Spain. It was only in 2013 that the State started to keep and publish official records of children murdered by their fathers before or during the process of separation of the parents, within the context of gender violence.[9] The figures, compiled by the General Council of the Judiciary, show that, unfortunately, these murders have increased in the last few years. In fact, between 2013 and 2021 a total of 40 children were murdered by their fathers (or, in very few cases, by their mothers) in the context of domestic violence.

3. THE LATEST CHANGES IN THE PROTECTION OF THE RIGHTS OF CHILD VICTIMS OF DOMESTIC AND GENDER VIOLENCE IN SPAIN

Some of the recommendations contained in CEDAW General Recommendation No. 35 were subsequently adopted by the Spanish State. In cases where there are previous incidents of domestic violence, these are now taken into account before decisions are made on the custody or visiting regimes of children, so that they are not put at risk. Furthermore, given the priority of the best interest of the child in relation to the rights of the parents, the right of the child to be heard during the judicial process should now be observed. This right to be heard was reinforced in Organic Law 8/2015, which established that this right should not be subject to any discrimination in terms of age or disability in any administrative or judicial process, or alternative dispute resolution, when the decisions taken affect the rights or interests of the child. The opinions of the child should be considered in relation to the child's age and maturity (Article 9.1). The difference is that, under the previous law of 1996, the right of the child to be heard was merely a formality. This right has been further strengthened, in the context of violence, by the new Organic Law on the protection of infants and adolescents of June 2021.

8 FJ nº 7, STS 1263/2018, 17 July 2018.

9 See T. Picontó-Novales, 'Contact Disputes and Allegations of Gender Violence in Spain' (2018) 40-4 *Journal of Social Welfare and Family Law* 441–58.

Following the legal reform of 2015, the Spanish Civil Code establishes that a judge, of his own volition, or at the request of the child, of any relative, or of the Public Prosecutor, can order suitable measures to remove the child from danger, or to avoid any harm to the child's family environment. In such cases, the judge, according to Article 158, must ensure that the child can be heard under suitable conditions for the protection of his or her interests.

Reyes Cano[10] has pointed out that the right of the child to be heard, and to express an opinion, is not guaranteed in the case of child victims of gender violence. When granting a protection order – the initial point at which decisions are taken that will affect a child's life – the child is not heard, and consequently the judge may not be aware of the violence suffered by the child, or their fears and concerns.

Although few studies on this issue have been published in Spain, those which are available point out that the legal recognition of children as victims of gender violence, and the measures established for the protection of children from parents who are aggressors, have not been accompanied by the necessary changes required for their effective implementation in judicial or administrative institutions, including the social services.[11]

In this context, it is important to consider the special protection measures for child victims of gender violence in Spain, and their application in practice. The most significant modification made by Organic Law 8/2015 was considering children and minors under the care and custody of abused women to be victims, and not just mere witnesses of gender violence, as they were previously considered to be. Therefore, the courts, both civil and criminal, are able to adopt judicial measures that involve prohibiting the aggressor from approaching and communicating with the child.

More specifically, children who live in environments of gender violence are comprised within the concept of 'victim', due to all the detrimental factors that exposure to violence means for their development. In spite of this undoubted improvement, it would have been preferable if Law 4/2015 had established a conceptual distinction between, on the one hand, children as victims of domestic violence and, on the other, children as victims of gender violence.[12] This is because, as is well known, they constitute very different realities, with different causes and consequences.

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10 See P. Reyes Cano, *El olvido de los derechos de la infancia en la violencia de género*, Reus, Madrid 2019, p. 128.

11 See I. Gómez Fernández 'Hijas e hijos víctimas de la violencia de género' (2018) 8 *Aranzadi Doctrinal Magazine* <https://www.congreso.es/docu/docum/ddocum/dosieres/sleg/legislatura_12/spl_25/pdfs/17.pdf>.

12 See P. Reyes Cano, 'Menores y Violencia de Género' (2015) 49 *Anales de la Catedra Francisco Suárez* 196–97.

The Final Provision 3.1 of Organic Law 8/2015, modifying the system for the protection of infancy and adolescence, states the following:

> This law establishes integral protection measures the purpose of which is to prevent, penalise and eradicate this violence and to assist women and their under-age children and minors under their guardianship or care and custody, victims of this violence.

This law also states that, if the judge does not adopt some of the measures, such as suspension of parental authority, shared custody or contacts with the children, he or she shall explain the reasons for this in the decision, and put in place the necessary measures to ensure the safety, integrity and recovery of the children and women, and also require periodic monitoring of their progress.[13] Although this modification does not constitute extra protection, it at least obliges judges, in all cases, to analyse the situation of the child victim, and to study how the functions of parental authority are to be exercised in cases of an accusation of gender violence, with the possibility of carrying out monitoring of their progress. Finally, considering children to be direct victims of gender violence will lead to the Courts of Violence against Women assuming 'direct competences' with respect to gender violence that is exercised against children.

In summary, with these legal reforms of 2015, it has finally been understood that children who live in an environment where gender violence is present are seriously affected in many ways – in their well-being, development, health, etc. – in addition to the risk of promoting intergenerational transmission of violent behaviour.

The minor is considered to be a direct victim of gender violence from the moment that he or she is present in the place where the aggression against the mother takes place, irrespective of whether he or she only witnesses the aggression or actually intervenes (i.e. between the mother and the aggressor). Therefore, even if the aggressor acts against the mother and not the minor, in such cases minors deserve, and now have, special protection by law.

Articles 61.2 and 55 of Organic Law 1/2004, also reformed by Organic Law 8/2015, acknowledge the possibility of requesting precautionary measures to protect child victims of gender violence, whether direct or indirect victims, including appeals to the public authorities, who can harbour the children. They also acknowledge the possibility of suspending parental responsibility for, or custody of, children on the part of a parent, custodian or guardian, in the case of that person being accused in proceedings for domestic violence. Moreover, the fact that the measure refers to 'the accused' means that it can be adopted simply as a precautionary measure before there is a conviction for an act of gender violence, without prejudice to the penalties that might finally apply, or

[13] See T. Picontó-Novales, 'Contact Disputes and Allegations of Gender Violence in Spain', above n. 9.

the decisions that might finally be taken in the civil proceedings that regulate parental responsibility for, or care and custody of, the child.[14]

These legal reforms have had a significant impact on judicial practice concerning measures related to shared custody and contact, in contexts of gender violence. As stated previously, the possibility of suspending the aggressor's regime of visits and communication with the children already existed in the Spanish legal system. However, since the legal reforms of 2015, a judge who adopts one of these measures must ensure periodic monitoring of the progress of the measures adopted for the protection of the women and children in their charge.

Nevertheless, these measures to protect child victims of gender violence have not had a sufficient impact in practical terms, especially in judicial practice, as shown by recent research studies, including those by I. Gómez Fernández.[15]

On 28 September 2017, the Spanish parliament approved the so-called Pact against Gender Violence, which represents a significant commitment, given that it was approved by all of the political parties. This Pact considers children to be victims of gender violence, and amongst its 214 measures and proposals there are several of specific relevance to the issues discussed in this chapter.

Specifically, the Pact proposes that shared custody should not be granted in cases of gender violence, or if a protection order is in place (proposal 144). In addition, visiting arrangements should be suspended in all cases where a minor has witnessed, suffered or had to live with acts of gender violence (proposal 145). It is also proposed that exclusive and specialist family meeting points should be established for cases involving gender violence (proposal 151).

The Pact further includes measures for children orphaned as a result of gender violence. These children have priority access to orphans' pensions and benefits, and are also entitled to psychological assistance. Moreover, guardians in these cases are entitled to tax benefits and priority access to protected social housing.

The Pact also requires specific training in male violence for all personnel responsible for providing attention to women and their children (proposal 150). This applies particularly to security forces and organisations, to the courts, to psychological services provided by the courts, and to duty lawyers (proposal 159). Similarly, psychosocial teams specialised in gender violence will be trained to improve their intervention in this area, and in family law in general (proposal 165).

The Government Delegation for Gender Violence, responsible for coordinating and promoting the measures set out in the Pact, drafted a document

14 See P. Reyes Cano, 'El olvido de los derechos de la infancia en la violencia de género', above n. 10, p. 218.

15 See I. Gómez Fernández, above n. 11.

that combines the measures agreed by the Congress (214 measures) and the Senate (267 measures) in ten lines of action. Specifically, action 4 includes the assistance and protection measures for child victims of gender violence, aimed at establishing new benefits for orphanhood resulting from gender violence, reviewing custody measures, promoting educational measures, and setting up specialised meeting points for families suffering gender violence.

Law 9/2018 of 3 August on urgent measures for the implementation of the State Pact against Gender Violence modified Article 156 of the Civil Code. Previously, the consent of the aggressor, usually the father, was necessary to allow the child victim of gender violence to receive psychological help. The legal reform allows the child victim to receive such help without the consent of the father, although he must be informed. This applies in cases of a conviction for gender violence, or if a criminal proceeding has been initiated.

This law has been criticised by the Francisco de Vitoria Judges Association, a prominent body in the Spanish legal field.[16] The Association considers that a formal complaint to the police of gender or domestic violence should be enough for the parent complained against to be barred from making decisions about their children. They also consider that this law was passed too quickly, and without sufficient discussion.

Some researchers[17] do not share the opinion of the Association. These researchers believe that the modification to Article 156 is insufficient in that it should apply to all forms of social assistance for the children, and not only to psychological help.

4. THE 2021 LAW ON THE PROTECTION OF CHILDREN AND ADOLESCENTS

Finally, I will refer briefly to Organic Law 8/2021 of 4 June 2021 on the protection of children and adolescents against all forms of violence. This law, also known as the 'Rhodes Law' (after the campaigning British pianist James Rhodes, now resident in Spain), guarantees the fundamental rights of children and adolescents, whether physical, psychological or moral, against any form of violence. It aims to ensure the free development of the child's personality, and establishes comprehensive protection measures, which include awareness,

16 Asociación Judicial Francisco Vitoria, Statement (20 August 2018) concerning Royal Decree-Law 9/2018, of 3 August, on urgent measures for the development of the State Pact against Gender Violence <http://www.ajfv.es/comunicado-ajfv-rdl-92018-3-agosto-medidas-urgentes-viogen/>.

17 See P. Reyes Cano, 'El olvido de los derechos de la infancia en la violencia de género', above n. 10, p. 19.

prevention, early detection, protection and reparation of damage or harm in all areas affecting children's lives and development. This law, among other things, establishes a requirement for the specialised training of professionals who work with minors, including judges, public prosecutors, social services personnel, the police and security forces.

Law 8/2021 pays special attention to protecting the best interests of children in situations of family breakdown, and in cases where children live in family environments marked by gender violence. In this sense, it modifies Article 92 of the Civil Code to reinforce the best interests of the child in the processes of separation, annulment and divorce, and requires that the necessary precautions be taken in the exercise of custody, and the custody regimes of the children.

The new law modifies the conditions for visitation arrangements if there is an open criminal process for violence against one of the spouses. Specifically, it modifies Article 94 of the Civil Code:

> The establishment of a visitation or stay regime will not proceed, and if it exists, it will be suspended, with respect to the parent who is involved in a criminal process initiated for attempting against the life, physical integrity, liberty, moral integrity or the sexual freedom and inviolability of the other spouse or their children.

To date, this legal change has been the most questioned and criticised in the media since Law 8/2021 was published in the official State Bulletin on 5 June 2021.

However, Article 94 goes on to state:

> Nevertheless, the judicial authority may establish a regime of visits, communication or stays in consideration of the best interests of the child, after evaluating the situation of the parent-child relationship.

The law also modifies Article 158 of the Civil Code so that the judge can agree to the precautionary suspension of the exercise of parental responsibility and/or the exercise of guardianship, custody or the visitation and communication regime, in order to remove children from danger or avoid harm to their family environment.

It also establishes as mandatory the imposition of the penalty of deprivation of parental responsibility on those convicted of homicide or murder in cases in which the perpetrator and the victim had children in common, and when the victim was their son or daughter.

In addition, the concept of gender violence is broadened (from Article 1 of Organic Law 1/2004, on comprehensive protection against gender violence) to include violence that, with the aim of causing harm or damage to women, is exercised on their relatives or minors who are close to them.

The new law also reinforces the right to be heard, for children and adolescents who are victims of violence, as well as stating that their opinions must be taken into account in contexts of violence against them, ensuring their protection and avoiding secondary victimisation.

In conclusion, this new law further protects the right of children and adolescents not to be subjected to any type of violence, rigorously complies with international treaties ratified by Spain, and, in general terms, enjoys substantial support from Spanish society.

5. CONCLUSIONS

It can be seen that the principle of the best interest of the child has been the main criterion behind the legal reforms relating to the protection and rights of children in Spain since 1987. This is particularly evident in the two important laws passed in 2015, Organic Law 8/2015 and Law 26/2015, both of which introduced changes in the field of the protection of minors. More recently, Organic Law 8/2021 on the comprehensive protection of infants and adolescents against all forms of violence was published in the Boletín Oficial del Estado (BOE), the Official State gazette, on 5 June 2021. This law will come into effect in 2022.

One of the most significant concerns in Spain is the issue of domestic and gender violence and its effects on children. The UN Committee on the Rights of the Child, in its General Comment No. 13 (2011), established that the interpretation of the best interest of the child included the obligation to protect children against all forms of violence, including as victims or witnesses of domestic and gender violence. In this respect, the same committee, in its concluding observations on the combined fifth and sixth periodic reports of Spain (5 March 2018) recommended that the Spanish State should promote laws guaranteeing the full protection of children against all forms of violence. The work of the UN Committee has certainly contributed to the progress made in Spain in recent years, an example being the new 2021 law.

Another important factor in recent legal and administrative developments was, undoubtedly, the case of Ángela González and her daughter, firstly because it led to important changes in Spanish law and public policy, working to eradicate gender violence affecting not only women but also their children. Secondly, it eventually led to the above-mentioned judgment of the Spanish Supreme Court, which recognised the responsibility of the State in the murder of Andrea by her father during the unsupervised visits established by the court.

The 2015 laws modifying the child and adolescent protection system represented a significant advance because they recognised that children living in an environment of gender violence were victims of it, and also that children exploited by the aggressor as a means of causing harm to their partner or

ex-partner were also victims of gender violence (in this case, vicarious violence). In its 2019 report, the State Attorney General's Office highlighted the lack of protection suffered by these children, and the need to apply civil protection measures and to supervise these measures.

The Pact against Gender Violence, passed by the Spanish parliament in 2017, has undoubtedly been an instrument of great importance, since the measures it contains to eradicate gender violence in all its manifestations were agreed upon by various political parties and social institutions. In particular, action 4 of the ten actions set out in the pact establishes measures to improve and intensify support and protection for minors who are victims of gender violence.

Some research studies[18] have criticised the fact that the application of the specific protection measures for child victims of gender violence provided for by the 8/2015 law (for example, the measures set out in Articles 64 and 65 on the suspension of parental authority, shared custody or contacts with the children, and the suspension of parental responsibility on the part of the aggressor) has been limited because the law allows the judge to decide whether to apply them or not. In their view, the protection given to child victims of gender violence, to date, has been unsatisfactory. In addition, as the State Attorney General's Office pointed out in its 2018 report, these children are not given enough prominence because they are not listened to, and the establishment of appropriate civil protection measures remains a pending issue.

The recent passing of the 2021 law represents an advance in the protection of the rights and best interests of children in the face of all forms of violence, including domestic and gender violence. The law also requires more specialised training for professionals who work with children and adolescents. Once this law comes into force in its entirety, the autonomous regions and local authorities will need to make available the specialist services and resources necessary in order to provide the appropriate attention to, and treatment for, child victims of violence. This will require considerable cooperation and coordination. In the specific case of child victims of domestic or gender violence, close and efficient coordination will be needed between the social services, courts, lawyers, police, and all organisations and individuals who work in this field.

18 See P. Martín Nájera, 'La protección de los menores víctimas de violencia de género' (2020) 27 *La Ley Derecho de Familia* 8–10 <https://dialnet.unirioja.es/servlet/articulo?codigo=7621220>.