

THE ACCESS OF CHILDREN AND ADOLESCENTS TO JUSTICE IN CHILE:

LEGAL REPRESENTATION AND PROTECTION MECHANISMS

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Abstract

This paper examines the Chilean legal framework concerning the access of children and adolescents (NNA) to justice, focusing specifically on their legal representation and the protection mechanisms in place. It details the distinct roles of legal professionals, such as the *Curador Ad Litem* and the "Abogado del Niño," across criminal and family law proceedings. The document explores how NNA access legal counsel, the processes of attorney assignment, and the specialized nature of legal defense in childhood matters. Furthermore, it outlines the judicial structures, including specialized family courts and the role of the Ombudsperson for Children, dedicated to safeguarding NNA rights. The paper also addresses the assessment and implementation of protection measures, the administrative and judicial avenues for intervention, and the legislative landscape that underpins NNA protection in Chile.

I. Introduction

This document examines the legal representation of children and adolescents (NNA, from the Spanish "Niños, Niñas y Adolescentes") within the various legal proceedings in which they are involved in Chile. The right of NNA to be heard and informed, as well as their right to legal defense, are fundamental principles.

II. Legal Representation of Children and Adolescents in Chilean Law

Chilean legislation mandates legal representation for NNA across different legal domains, including criminal and family law.

A. Criminal Law

In criminal matters, legal representation for NNA varies depending on their role in the proceedings:

- **Victims:** Attorneys provide defense for NNA who are victims of violence.

- **Offenders (Adolescent Criminal Responsibility):** For NNA in conflict with the law, defense is provided under the adolescent criminal responsibility system.

The attorney representing NNA in criminal cases can be a private practitioner or a public criminal defender appointed *ex officio* (in the case of accused NNA) from the Public Criminal Defender's Office and its Adolescent Criminal Responsibility area , or a *curador ad-litem* designated by the judge for NNA who are victims of certain offenses, in accordance with Article 110 bis of the Criminal Procedure Code.

B. Family Law

In family law, there is a general obligation to appoint an attorney to represent the rights of children and adolescents "for the defense of their rights" in all "administrative and judicial proceedings." While this is a general right, in practice, independent attorneys are often appointed, separate from those representing their legal guardians, in cases of protection, domestic violence, personal care, and visitation rights.

Two distinct figures are recognized for the legal representation of NNA in family matters:

1. **Curador Ad Litem:** This figure is established in Article 19 of Law No. 19.968, which states: "Article 19.- Representation. In all matters within the jurisdiction of family courts where the interests of children, adolescents, or incapacitated persons are involved, the judge must ensure that they are duly represented." This provision was the first national norm to explicitly address the autonomous defense of NNA in matters falling within the jurisdiction of Family Courts. A significant critique of this figure is that it references a long-standing institution from the Civil Code (*Curador ad litem*) without specifying its precise role, specific competencies, limitations, or obligations.
2. **Abogado del Niño (Child's Attorney):** With the enactment of Law No. 21,430 in 2022, a new protection figure, the "child's attorney," was introduced. Article 88 of this law modifies Article 18 of Law No. 19,968, which created Family Courts, to penalize with nullity all actions taken in the absence of the "child or adolescent's attorney" in special judicial proceedings for the application of protection measures and in cases of domestic violence. Furthermore, Article 50 of Law No. 21,430

establishes the obligations and powers of the child's attorney, stating that children have the right to due process, and specifically: "the right to legal and/or judicial representation distinct from that of their parents and/or mothers, legal representatives, or those legally caring for them, in case of incompatible interests; the right to specialized judicial representation for the defense of their rights; the right to present suitable and independent evidence; the right to appeal; as well as the rights and guarantees conferred by the Political Constitution of the Republic, international human rights treaties ratified by Chile that are in force, and the laws."

In practice, despite initial attempts to distinguish between these two figures, the terms "child's attorney" and "curador ad litem" are often used interchangeably to this day. The debate remains primarily within academic and doctrinal circles rather than in the courts of justice.

The *Curador Ad Litem* in family matters must be a lawyer specializing in childhood issues. When a court verifies that the interests of NNA are compromised, it designates state institutions (through their programs for children and adolescents) or legal aid corporations to assume the child's representation in the process. Occasionally, public or private institutions, such as universities (through their legal clinics dedicated to the defense, promotion, or protection of NNA), are also designated for this role. This designation and representation are never costly for the children or the parties involved in the process. They are always appointed directly by the court, never by the parties, to ensure impartiality, without prejudice to the parties' right to request the court's designation.

However, the gratuitous nature of NNA representation has been debated in Chile, based on Article 263 of the Civil Code, which states: "The father or mother who, having parental authority, litigates with the child, whether as plaintiff or defendant, shall provide for the expenses of the lawsuit, which the court shall incidentally regulate, taking into consideration the amount and importance of the matter in dispute and the economic capacity of the parties." The discussion centers on whether this work should be remunerated to create a disincentive for parents, mothers, or caregivers to initiate unnecessary lawsuits, thereby unjustifiably exposing NNA to judicial proceedings and potential over-intervention.

III. Practical Access to Legal Representation

A. Criminal Proceedings

- **Accused NNA:** If accused NNA lack legal counsel, the *ex officio* public criminal defender contacts them, generally via telephone or email. If deprived of liberty, the defender must visit them at their location.
- **Victim NNA:** Victim NNA can report the commission of crimes to the police, courts, or public prosecutor's office. They can also report to the Ombudsperson for Children (Defensoría de la Niñez), a public body that, in turn, must report to the relevant authorities. The *curador ad-litem* for NNA, where applicable, must contact their represented party by the most expeditious means.

B. Family Proceedings

In family matters, NNA typically have initial contact with their attorney after the attorney accepts the appointment within the judicial proceeding. NNA are usually summoned to the offices of the representing organizations, and exceptionally, attorneys visit the NNA's private residences. For institutionalized children, attorneys visit them at their residences. Ideally, the attorney also contacts treating psychiatrists or psychologists and educational institutions; however, the number of clients each *Curador* handles often hinders this effort. The current standard of Family Courts is that the *curador* must make direct contact with their represented party, and merely reviewing background information or reports from third parties is insufficient. Specialized programs within the Ministry of Justice have developed various protocols regarding the standards of specialization and quality of NNA defense.

C. Attorney Assignment and Selection

- **Criminal Cases:** In criminal cases, attorneys are assigned randomly. For *curadores ad-litem*, the judge can designate individuals from any institution dedicated to the defense, promotion, or protection of children's rights.
- **Family Cases:** In family matters, the assignment is also random, made by the judge from a list of institutions, including the Legal Aid Corporation (Corporación de Asistencia Judicial) or other public or private institutions deemed appropriate by the court, often based on their availability.

It is important to note that with the introduction of the "child's attorney" in Law No. 21,430, and prior to the materialization of the Ministry of Justice's program "Children and Adolescents Defend Themselves," a list of private attorneys who offered to perform this work (distinct from the *Curador Ad Litem*) was created. Children could be shown this list and choose the attorney they preferred according to their will. However, this practice is no longer used in courts of justice, as the norm refers to "public or private institution," making the designation of private attorneys inappropriate.

D. Eligibility for Legal Representation

Only attorneys authorized to practice the profession can appear before courts of justice. Other professionals, such as social workers, psychologists, or psychiatrists, can issue reports or opinions but cannot represent the interests of NNA before the courts. This is explicitly stated in Article 19 of Law No. 19,968, which mentions "The judge shall designate a lawyer belonging to the respective Legal Aid Corporation or to any public or private institution dedicated to the defense, promotion or protection of their rights," as well as with the introduction of Law No. 21,430, which directly establishes the institution of the "child's attorney".

E. Specialization of the Defense Attorney

- **Criminal Cases:** Any attorney can access criminal cases, provided they hold a professional title. However, in practice, attorneys often undergo additional training in the field.
- **Family Cases:** The normative standard requires specialization: "the right to specialized judicial representation for the defense of their rights." Indeed, the title of this article is "Due process, effective judicial protection and specialization." Nevertheless, such specialization is not always realized in practice, especially within legal aid corporations and universities where there may be limited specialization in the subject matter or where the attorneys are very young.

F. Age Limitations in Judicial Exploration

- **Criminal Matters:** There are no age limitations in criminal matters. Law No. 21,057, regarding video-recorded interviews of NNA victims of certain crimes, is particularly

relevant here. Article 3(b) of this law establishes the principle of progressive autonomy, according to which: "Children and adolescents are subjects endowed with progressive autonomy, so that in the stages of denunciation, investigation, and judgment they shall have the right to be heard and participate in matters affecting them, taking into account their age and the degree of maturity they demonstrate." Furthermore, according to the same law, adolescents (minors over 14 years of age) may voluntarily testify directly before the judge at trial, but in a separate room, without the intermediation of an interviewer (Article 14).

- **Family Matters:** The defense and representation of children and adolescents in family matters extend from birth until adulthood, i.e., 18 years of age. For the purposes of this law, "child" is understood as any human being up to 14 years of age, and "adolescent" as those over 14 and under 18 years of age. If there is doubt as to whether a child or adolescent is under 18 years of age, it shall be presumed that they are, provided it is in the best interest of their rights.

Within judicial proceedings, children also have the right to be heard by the Tribunal. In practice, this is implemented through a "reserved hearing," where the NNA can be interviewed directly by the sentencing judge – generally in the presence of a Technical Council (an auxiliary to the administration of justice who advises the Magistrate on their resolution in matters of their specialty) and the *Curador Ad Litem* as a general rule – and directly express their opinion and interest in the conflict. The judge may also inquire into points deemed necessary for the process. This right can be waived by the NNA in the process through their legal representative if it is considered sufficient to ensure their right to be heard. While no specific age is established by law for this direct exploration with the NNA, it is understood in practice that it will be carried out when the child can express themselves and be understood by the interviewer, depending on the characteristics of each NNA according to their maturity and progressive autonomy.

IV. Victim Support and Protection Mechanisms

A. Offices for Minor Victims

- **Criminal Matters:** NNA victims of crimes can report to the police, public prosecutor's office, or criminal courts. However, the Ombudsperson for Children (Defensoría de la Niñez) is particularly relevant as an office for NNA victims. This is a public institution responsible for the dissemination, promotion, and protection of the human rights of all children and adolescents residing in the national territory. In criminal matters, the Ombudsperson for Children, through the Ombudsperson, must report any crime or simple offense committed against NNA that comes to their knowledge. Additionally, they can file actions and complaints regarding serious, relevant, or socially impactful facts involving children, provided these fall within the crimes indicated in Article 16 of Law No. 21,067. The "Defensoría de la Niñez" is an autonomous public institution responsible for disseminating, promoting, and protecting the rights of NNA, receiving petitions and referring them to the appropriate body, reporting rights violations of NNA to competent bodies, ensuring the participation of NNA in the process, and promoting compliance with the Convention on the Rights of the Child, among other functions.
- **Family Matters:** In family matters, its action focuses on providing protection from the moment a case is known, initiating the necessary procedure to ensure the proper protection of NNA rights, and acting as *amicus curiae* before the courts of justice. This means they can submit "comments or observations" to the courts on a case involving children or adolescents. The court must rule on this opinion in its judgment. This is without prejudice to their right to access and report to the police, public prosecutor's office, or courts to report any violation of their rights.

Furthermore, with the introduction of Law No. 21,430, the "Local Office for Childhood" (Oficina Local de la Niñez) was created, forming part of the new communal-level childhood institutional framework. This is established within the framework of the Bill that creates a System of Guarantees and Comprehensive Protection of the Rights of Children and Adolescents. This institution is responsible for promoting rights, preventing situations of risk and vulnerabilities, and protecting the rights of children and adolescents. It should be noted that the designation of guardianship by specialized programs like "Children and Adolescents

Defend Themselves" usually involves offices to which children are summoned and can, in principle, access directly.

V. Legislation Governing NNA Advocacy and Protection

A. Legal Framework for NNA Advocacy

- **Criminal Law:** There is no specific legislation in Chile regulating the practice of law concerning NNA in criminal matters, although there are normative texts on adolescent criminal responsibility.
- **Family Law:** The figure of the *Curador Ad Litem* is enshrined in Article 19 of the Family Courts Law (Law No. 19,968). The "Child's Attorney" figure is enshrined in Article 18 of Law No. 19,968, as well as repeatedly in the Law on Guarantees and Comprehensive Protection of the Rights of Children and Adolescents (Law No. 21,430), such as in Articles 50 and 88 of that law. Finally, guardianships or "curadurías" are also enshrined in the general norm of the Chilean legal system, i.e., the Civil Code, in its Article 338 et seq., describing them as "duties imposed on certain persons in favor of those who cannot manage themselves or competently administer their affairs, and who are not under parental authority that can provide them due protection." These are also used, for example, in matters of removal to enforce the responsibility of curators.

B. Specific Legislation on NNA Protection

Chile has specific state legislation concerning the protection of NNA:

- Civil Code
- Law on Minors (Ley de Menores) (frequently amended)
- Family Courts Law (Law No. 19,968) (Link:

<https://www.bcn.cl/leychile/navegar?idNorma=229557>)

- Domestic Violence Law (Law No. 20,066) (Link:

<https://www.bcn.cl/leychile/navegar?idNorma=242648>)

- Guarantees Law (Law No. 21,430) (Link:

<https://www.bcn.cl/leychile/navegar?idNorma=1173643&idParte=10317416&idVersion=>

- Law No. 21,067, which "Creates the Ombudsperson for Children's Rights" (Link:

<https://www.bcn.cl/leychile/navegar?idNorma=1114173>)

- Law No. 21,057, which "Regulates Video-Recorded Interviews and other Safeguard Measures for Minors Victims of Sexual Offenses" (Link:

<https://www.bcn.cl/leychile/navegar?idNorma=1113932&idVersion=2022-12-30&idParte=9877766>)

- Law No. 20,084, which "Establishes a System of Responsibility for Adolescents for Violations of Criminal Law" (Link:

<https://www.bcn.cl/leychile/navegar?idNorma=244803>)

- Law No. 21,522, which "Introduces a new paragraph in Title VII of Book II of the Criminal Code, concerning the commercial sexual exploitation and pornographic material of children and adolescents" (Link:

<https://www.bcn.cl/leychile/navegar?idNorma=1187183&idParte=10392252&idVersion=2022-12-30>)

- Law No. 21,160, which "Declares Sexual Offenses Committed Against Minors Imprescriptible" (Link:

<https://www.bcn.cl/leychile/navegar?idNorma=1134001&idVersion=2022-12-30&idParte=10039305>)

- Law 21,302, which creates the National Service for Specialized Protection of Children and Adolescents (Link:

<https://www.bcn.cl/leychile/navegar?idNorma=1154203>)

- Law 16,618, on the Law on Minors (Link:

<https://www.bcn.cl/leychile/navegar?idNorma=28581>)

- Law 14,908, on Family Abandonment and Payment of Alimony (Link:

<https://www.bcn.cl/leychile/navegar?idNorma=27977>)

All legislation in Chile is state-level; there is no regional or autonomous legislation.

VI. Specialized Courts

A. Criminal Courts

In criminal matters, ordinary criminal courts (Guaranty Courts and Oral Criminal Trial Courts) hear cases involving crimes committed by or against NNA. There are no specialized criminal courts for NNA.

B. Family Courts

In family matters, there are specialized courts dedicated to family law: "Article 1°. Specialized Judiciary. Family courts are hereby created, responsible for hearing matters dealt with by this law and those entrusted to them by other general and special laws, judging them, and enforcing judgments." These courts handle matters where NNA's interests may be involved, and judges possess greater specialization in childhood and adolescence matters.

In Santiago, Chile (the capital), there is a special family court called the "Precautionary Measures Center" (CMC), which processes protection matters, i.e., those related to the violation of the rights of children and adolescents. However, it is not exclusively specialized in childhood, nor do its judges hold a different rank than other family judges, as it also specifically processes domestic violence cases, which do not necessarily involve children. These are called Family Courts, and their scope of jurisdiction is established in Article 8 of Law No. 19,968. Their jurisdiction is territorial, as established in Articles 2, 3, and 4 of the same legal body.

VII. NNA Under the Protection System

A. Assessment of Intervention Needs

In family matters, a risk assessment is generally conducted at the beginning of a protection case to identify possible violations of NNA rights. This is typically carried out by a court official called a "Technical Counselor". Once this assessment is done, and after gathering

background information from the parties, or the party presenting it, a pronouncement is issued. Based on this, and the case background, the court issues a provisional protection measure for the child if required (e.g., a restraining order against the offender). This is later complemented by reports from evaluating institutions to which they are referred, such as an Ambulatory Diagnostic Program (DAM).

B. Authority to Issue "Helplessness" / Guardianship Resolutions

Only courts of justice, including criminal, family, and higher courts, have the authority to issue resolutions concerning NNA. No other public, private, administrative, or legislative body can issue resolutions regarding the protection of NNA in cases of rights violations.

It should be noted that with the introduction of Law No. 21,430 and the creation of the Local Office for Childhood, administrative protection processes, both universal and/or specialized, for NNA rights are initiated. These processes aim to adopt protection measures set forth in that law, either

ex officio or at the request of the NNA, their parents, legal representatives, or anyone legally caring for them, or any person interested in respecting the rights of children and adolescents. This is always provided that it does not require the adoption of protection measures that substantially affect the rights of children, adolescents, and their families, which are exclusively within the jurisdiction of family courts. In such cases, the background information must be sent to the competent courts, either *ex officio* or at the request of a party.

C. Execution of Protection Measures

Protection measures are immediately executive. However, appeals can be filed against them, such as appealing the precautionary measure to the court's hierarchical superior, like the respective Court of Appeals.

D. Regulation of Evaluation and Resolution Phases

The protection process in family matters is regulated in Article 68 et seq. of the Family Courts Law (Law No. 19,968). This section regulates the initiation of the procedure, the precautionary measures that can be decreed, the necessity of children's appearance, the preparatory hearing (where a 5-day period is given to summon the NNA along with their

parents or caregivers, a period that is NOT met in practice), the trial hearing, and the subsequent judgment.

E. Competence for Protection Exercise

The family courts of the victim's domicile have jurisdiction for the exercise of protection. Notwithstanding this, with the introduction of Law No. 21,430 (On Guarantees and Comprehensive Protection of the Rights of Children and Adolescents), Local Offices for Childhood are created, providing for an administrative protection procedure, initiated *ex officio* or by any interested person. After gathering all initial background information, the Local Office for Childhood will assess whether there is merit for the adoption of an administrative protection measure. In such a case, an agreement will be signed through a written act between the interveners and the State, represented by the Local Office for Childhood, outlining all relevant commitments to overcome the threat or violation of rights. In cases where parents, mothers, persons responsible for their care, or any other person impede the execution of the measure(s), seriously breach them, or repeatedly and unjustifiably contravene them, the Local Office for Childhood will communicate the facts to the competent family court.

F. Judicial Opposition to Protection Measures

Judicial opposition to protection measures is possible. Appeals can always be filed before higher courts of justice to review the precautionary measure decreed. In the case of the administrative protection procedure introduced in Law No. 21,430, as stated in Article 74, any NNA, or any other person who has intervened in the administrative protection procedure, or who is affected by the adopted measure, may appeal before the corresponding Court of Appeals of the respondent's domicile, against illegal or arbitrary acts of the Local Office for Childhood that occurred in the administrative protection process or against the resolution that ordered the protection measure.

G. Active Standing of the NNA

Yes, the NNA has active standing. The child is a party to the process and can appeal in the same way as other parties through their attorney. The *curador ad litem* also has active standing to file complaints in criminal matters.

H. Standing to File Opposition

The parties, and the child through their attorney, have standing to file opposition.

I. Request for Precautionary Measures

Yes, precautionary measures are expressly established in the law, both specifically (Article 71 of Law No. 19,968) and broadly (Article 22 of Law No. 19,968).

J. CH 1996 Contracting State

Chile is not a contracting state of the CH 1996 convention.