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Open Adoption

SUMMARY

1. "Open Adoption". 2. Maintaining relationships with the family of origin. a) The art. 235-47 CCCat: recognition to adopted children to interact with their families; b) Recognition of the right of access to the children separated from their families after the declaration of abandonment; c) The visitation right of children separated from their families in the regional rules; d) The right to visit the child recognized by the art. 116 of the Llei 14/2010 of 27 May of law and Opportunities in Children and Adolescents; e) Summary. 3. The British precedent: adoption order and adoption contact order a) Outline of the regulation; b) The 'adoption order'; c) Indirect ways and alternatives to 'visitation right' forms; d) Advantages and disadvantages; e) The eighth chapter of the report of the British Parliament; f) The new sections 51A and 51B of the AChA2002 introduced by the ChFA2014(the 'post adoption contact order'). 4. Article 178.4 of the CC. Notes for future application.

Key words: adoption, open adoption, right of access.

Słowa kluczowe: adopcje, otwarte adopcje, prawo do kontaktów.

"Open Adoption"

Under this term, the legislator has added a new paragraph 4 to art. 178 CC, which provides that, when the interests of the child so require it because of his family situation, age or any other significant circumstances, valued by the public entity, it may be decided to maintain some form of relationship or contact through visits or communications between the child, some members of the family of origin and of the adoptive family, giving special attention to those taking place between biological siblings.

In a separate paragraph, it is added that the judge may order this measure, and when appropriate, he may order the amendment or repeal, in the interests of the child, at the time of the adoption. Also, according to the final section, it is provided that in the declaration of suitability it shall be stated whether applicants accept to adopt a child who is going to maintain relationships with his family of origin.

The second and third paragraphs of the standard detail how this new form of judgment or "agreement", which is subject to a host of legal requirements, will be held. So: it could determine the measure, amendment or termination in the interest of the child; it should be made on a proposal from the Public Prosecutor; it will have the consent of both the adoptive family and the one of origin; hearing will be given to the adopted child over 12 years old or before that age, according to his maturity. In addition, the court "agreement" shall pronounce on the conditions, frequency and periodicity of communications; and it will take place through the mediation of the Public Entity when necessary. Once issued by the court, the legal requirements continue: the measure will be subjected to monitoring by the Administration, composed of regular reports on the development of visits and communications, as well as appropriate proposals for amendments, to be presented to the judge during the first two years and, after that, only if requested by the judge. If it comes to suspend or cancel visits or communications, standing to request corresponds to the Public Administration, the adoptive family, the family of origin and the child over 12 years old, or before, if he is mature enough.

The legislator has introduced this amending measure of the Civil Code through the second article of Law 25/2015 of 28 July according to the protection system of children and adolescents (hereinafter, Law 26/2015). In section III of the Preamble, dedicated to explaining the variations introduced in the Civil Code, it is expressed the intention to incorporate into Spanish law the new model of "open adoption". The new model is inspired by the legal systems of Britain, Australia, New Zealand, United States, Austria and Canada, some of which agree with the Spanish law on configuring adoption as a situation that must be confirmed by a judge and not by private agreement between the families.

But "open adoption" is actually a more ambitious expression, which has also been commonly used to designate models characterized by transparency in the process and in the people involved in it, compared to the traditional system of "closed adoption", understood in secretive terms, in which the adoptee was literally torn from his family of origin and "uprooted" to a foster family, with which henceforth he would establish new roots – that system is considered nowadays as superseded.

The model of open adoption based on transparency actually applies the broader principle of the right of children to know their origins, which finds its particular manifestation in the legal imposition to obligate to inform the adopted about his origins, so the situations on which the adopted is unaware of the existence of his other biological family have been gradually eradicated. Of course, that only makes sense in the case that the delivery of the child for adoption took place at a very early age, when he absolutely lacked the maturity needed to be aware of who his natural parents or relatives were. However, if the adopted child has grown up under an interim measure such as residential care

or foster family, in principle he has had the opportunity to interact with his family of origin through the "rights of access". But the awareness of a minor of his family situation raises new challenges and demands to lawmakers.

The change of course on models of adoption is justified by the transformation of the objectives that are sought; in the old system prevails the interests of the families involved (adoption to remedy lack of means to educate the child, sterility of adoptive families, etc.). Now it is sought to improve the welfare and interests of children in vulnerable situations, which could be seriously committed to an abrupt breakdown in the relations that they were maintaining with their families when they were adopted.

In this context, statistics confirm a gradual increase in the age of children awaiting adoption and in relation thereto, what enables the effective consolidation of bonds of affection within the family of origin - a factor which is completely nonexistent in cases of children placed for adoption shortly after birth. Under these circumstances, the Civil Code has introduced a measure that addresses the so-called cases of "minor major" that is not included in cases involving the adoption of babies.

Nevertheless, that may conflict with the aspirations and wishes of adoptive families with a consequent effective decrease in the constituted adoption numbers, so lawmakers are striving to find ways to reconcile the various interests at stake. The Administration is interested in increasing domestic adoptions –and this seems to have been the main reason invoked to justify the reform on this point– as well as in reducing the number of children who temporarily remain subjected to measures of simple foster care (now called "temporary "in the new art. 173-bis paragraph 2, of the CC) or in residential centers (now prohibited in all cases for children under 3 years of age, as the new art. 21 paragraph 31 of the LO1 / 1996 Legal protection of Children, amended by art. 1 L. 26/2015, disposes). Of those directly involved in the adoption, each has separate interests. For the family of origin, theirs is to control the "loss" provoked by bonding between the child and it's new adoptive parents and all that characterizes such filiation, especially its permanency. The family wants to prevent "transplanting" the child in favor of the new parents and therefore insists on denying cooperation and consent to the adoption, which complicates relationships and the many processes initiated. The adopters main interest is to establish and consolidate the bonds of filiation, often in a way that suggests the adopted child had never had a previous family. The adoptees, particularly the younger-older ones, are mainly concerned with retaining their mental and emotional stability and, in particular, in being able to interact with their siblings.

This latter consideration is deserving of particular attention because ultimately, those siblings are probably the only relatives whose existence will last throughout the adoptee's lifetime.

Maintaining relationships with family of origin

In Spanish legislation, this right of the minor who is separated from the family he lived with –not necessarily the biological family– was already covered by some regional and also state regulations, not only regarding the minors who were under the tutelage of the Administration but also in relation with the children adopted (V. among others, 235-47 CCCat art; art. 74 Law 3/2011 of 30 June, of Galicia; art. 6 of Decree 117/2008, of the Basque Country). Nevertheless, the legislature doesn´t mention these precedents when it explains the reasons to reform art. 178 CC and instead, it mentions the following of some foreign systems, among which the British precedent seems to have carried heavy influence.

a) Art. 235-47 CCCat: recognition to adopted children to interact with their families.

Among the precedents of the new art. CC 178.4 it unquestionably figures the art. 235-47 of the Civil Code of Catalonia (hereinafter CCCat.), which has been introduced by the Llei 25/2010 of 29 July, approving the Second Book of the Civil Code of Catalonia. This is a rule which, like art. 178 CC, refers to the effects that adoption generates. This constituted novelty at the time, compared to previous regulations contained in art. 127 of the Family Code of Catalonia, approved by the Llei 9/1998 of 15 July.

Art. 235-47 of CCCat. states that the judicial authority, although in exceptional cases and having been proposed by the competent Public Entity or by the prosecution, can provide that personal relations between the adoptee and the family of origin are kept, not only in the cases referred to in art. 235-44 of the Code itself (which relate to certain special cases of international adoption) but also *if there are emotional ties whose failure is seriously detrimental to the interests of the child* (translation from Spanish).

A cursory comparison of both Civil Codes' regimes, after the addition of the new section 4 to art. 178 of the CC, allows us to appreciate that the state legislator has omitted the exceptional nature that the Catalonian norm exhibits, which is a step forward in recognizing the right of children to maintain the relationships. Instead, he has not followed the pattern, also indicated by art. CCCat 235-47, to give input to the criterion of emotional well-being of the child, that could be severely disrupted as a consequence of a sudden and authoritative separation from their family of origin or other people (e.g., cozy, keepers, etc.) with which he had lived before being adopted.

However, the latter psychological aspect is a part of certain child´s rights of higher order, since it can be considered as implicitly recognized in Spanish law, because of the remission in art. 39.4 of the Constitution[1] to international

[1] See a systematic exposition of international and constitutional texts on children's rights in I. Ravetllat Ballesté, (ed.), *Law of Persons*, Barcelona 2011 (pages 51 to 66 of Cap. 2, *International framework and domestic law of childhood and adolescence);* C. Villagrasa Alcaide, I. Ravetllat Ballesté, (Coords.), *For the rights of childhood and adolescence: a global commitment from the resale right for the twentieth anniversary of*

agreements signed by the State that contemplate it [2]–although it is not expressly stated in the L.O. 1/1996 of Legal Protection of Children (arts. 3-9)-, even after the reform, in turn, of the rule by the provisions of art. 1 L.26 / 2015 (V. Preamble, paragraph II, where the objectives of the amendments introduced by the L-O. are referred to).

In the Great Britain law, however, it is explicitly mentioned in the so-called "Welfare-Checklist" –a list of the aspects that must be considered by the courts in their decisions relating to children- which includes, in turn, a set of different types. These aspects are formulated in the 1989´ Children and Adoption Act, section 1, whose section 3.a defines it as the duty to respect the expressed feelings and wishes of the child, who is considered in the light of his age and understanding[3].

Oblivious to the latter purpose, the legislator has not included the principle of respect to the feelings of the child, on the occasion of the reform of the Organic Law on Protection of Minors 1/1996, which has been accomplished by the art. 1 of Law 26/2015 (See Preamble, section I). The reformation of that law has been directed by, among other factors, optimization criteria of the organization of the state system of protection of children and adolescents, under the slogan of preference of the stable Administration´s measures in front of the temporary ones, the familiar over the residential ones, and the agreed over the imposed ones. It is not mentioned in the art. 178.4 CC, although it contains a generic reference to the interests of the child.

From this it follows that the new Spanish system of rights' protection of childhood and adolescence preferably tends to promote national adoption as a means of resolving the situation of children whose custody was given to the Administration, which compiles the stability or permanence measures, and familiar and agreed procedures over protection measures, such as family and residential foster care in its various forms. In short, the reform primarily focuses on improving the measures and on centralizing their regulation. Nevertheless, perhaps it has not sufficiently highlighted the basic rights of the adopted child, that were already covered by some regional regulations.

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the Convention on the Rights of the Child, Barcelona 2009 , pp. 55-77 (by C. Villagrasa Alcaide); V. Cabedo Mallol, *Constitutional framework for the protection of minors*, Madrid 2008, among many other recent works published by these authors.

[2] Childhood observatory. Ministry of labour and social affairs, *The right of adopted children to know their origins in Spain and Comparative Law* (L. García, M. A. Villaluengo Linacero de la Fuente), Madrid 2006, pp. 70 to 76.

The authors cited in this line the following documents: European Convention for the Protection of Human rRghts and Fundamental Freedoms of 4 November 1950; Brussels Convention no. 6 of the International Commission on Civil Status (September 12, 1962) laying down the maternal affiliation of natural children (ratified on April 17, 1984); United Nations Convention on the Rights of the Child of 20 November 1989; The Hague Convention on Protection of Children and Cooperation in Respect of Inter country Adoption of 20 May 1993; European Charter on the Rights of the Child, adopted by European Parliament resolution of 8 July 1992 / (A3-0172 / 92).

[3] Concerning the Welfare-checklist, see F. Burton, *Family Law*. 1st ed., London 2003, p. 401 and more broadly, pp. 421 and 422.

b) Recognition of the right of access to children separated from their families after the abandonment declaration.

The regulation of access rights, widely recognized for minors who are under the supervision of the Administration, and set out in art. 161 CC, can be considered as an indirect precedent of the new measure introduced in art. 178.4 CC on adoptees, since it postulates the right of children to relate to the biological family with which, by administrative decision, they have ceased living.

In the immediately previous version to the reform of art. 161 CC, this provision authorized the judge to determine, at the request of the child´s relatives of origin, the measure involving relationships. In the new wording given by Law 26/2015 (art. 2 paragraph 11), the administrative authority is replaced by the judicial one, and the initiative to request visiting right is replaced; it was earlier attributed or to the biological family, or to the foster families or if it is the case, to the directors of residential centers, who also may apply in case of removal or modification of the measure.

The reform of art. 161 CC is here restrictive to the interests of children, since it is more likely for biological parents to apply for the right, in agreement with the child, than for the cozy family; although it recognizes the right of the children to be heard.

We bring up the rule of art. 161 CC because we understand that the right of child -under the Administration guardianship- to maintain relationships with the family, extends now substantially (under other possible ways of maintaining communications) to the children adopted, after the enforcement of the new art. 178.4 CC.

c) The visitation right of children who are separated from their families in the regional regulations.

This right was also recognized in the regional rules, usually more widely than art. 161 CC. Thus, among others, in the following provisions: art. CCCat 235-49; art. 10 paragraphs c) and d) Decree of the Junta de Andalucía 282/2002 of 12 November; art. 45.k) of Law 14/2005 and art. 108 of the Community of Castilla-León, which institutes for this purpose a special mediation service within the Administration in order to carry out the visits and communications; art. 74.2 of the Law 3/2011 of June 20, Community of Galicia; art. 39.i) of the Navarre Foral Law 15/2005 of 5 December; art. 7 of Decree 114/2008, of June 17, the Basque Government; art. 11 of Law 12/2008 of 3 July, of the Valencian Community; etc.

d) The right to visits recognized to the child by art. 116 of the Llei 14/2010 of 27 May of Rights and Opportunities in Children and Adolescents.

This norm provides, in its paragraphs 1 and 3, that the declaration of abandonment and subsequent determination of some protection measure must not

prevent neither communication, relationship between child and relatives, nor visits; if and only if, this is not contrary to the interests of the child. It establishes as well the obligation of the Administration to provide the mechanisms for the visit to happen at an appropriate time and, if possible, outside school hours. It further provides, in paragraph 2, that the restrictive or exclusionary resolutions of this right, even due to administrative silence, will be challenged in the civil courts. However, the aforementioned art. 116.2º states that this will not occur in the case that it has been given a final resolution of pre-adoptive fostering, as corroborates art. 147 of the same standard. According the following to it: *by a final resolution of pre-adoptive foster care, visits and the relationship with the biological family should be suspended, for the best integration with the host family, if it is in the interest of the child or adolescent.*

The above limitation reminds of the one that occured in the British law, in Section 26 of the Children Act 2002 to which we shall return later. Probably, these limiting provisions, try to avoid the so-called "conflict of loyalties" regarding the child and his two families. But indeed, the Catalonian norm leaves the door open to maintaining relationships, on the assumption indicated, if it is considered appropriate for the interests of the child; and, moreover, it does not set the ending of relations and visits, but only its possible "suspension".

The maintenance or not of relationships, as the pre-adoptive foster care measure states – referred in the cited art. 116 and other regional norms – remains unclear after the reform of the foster care regime introduced by the state law 26/2015 on arts. 160 and 173-bis of the CC's new version and its replacement by the new figure of "guard children for adoption" (mentioned in the new art. 176-bis, first paragraph, of the Civil Code).

e) Summary.

The children´s right to maintain relationships with their relatives of origin was recognized, for adopted children, in art. 235-47 CCCat among other regional norms; and for children separated from their families after the declaration of abandonment, in art. 161 CC, amended by Act 26/2015, art. 2, paragraph 11; as well as in most regional regulations concerning the rights of children.

Therefore, the announced novelty of art. 178.4´s amendment is precisely to introduce within the CC a right in favor of the adopted children, which the Code only recognized to those who were separated from their families by an administrative measure subsequent to the declaration of abandonment; and that only some regional regulations incorporated for adoptees, such as art. 235-7 CCCat.

The Spanish legislator has particularly pronounced in favor of extending the right to visits and communications to adoptees. Before, that right was only recognized in the prior stage to adoption and was discussed in the case of adoptees, in view of the obstacles it might place in the way of effective integration of children in a new family.

An unresolved issue at the moment is the impact that the new art. 178.4 CC will have on regional laws that only took into account that right for foster children. We believe that it may be resolved through the application of state regulation by supplementary law, although its mixed nature between public and private law can hinder this solution in those ACs that do not have legislative powers on civil law.

The British precedent: adoption order and adoption contact order

a) Outline of regulation.

In the current British law, adoption is fully regulated by written rules, such as the Adoption and Children Act 2002 (hereinafter *AChA2002*), which replaced an earlier one (*Adoption Act 1976* in force since 1988), supplemented with some provisions contained in the 1989´s Children Act (hereinafter *ChA1989*)[4]. The system has experienced a recent transition, due to the modifications introduced by the recent Children and Families Act 2014 (hereinafter *ChFA2014*), promulgated on March 13, 2014. One of the most relevant purposes of the *ChFA2014* refers to the "recovery" of the post adoptive contact orders.

According to these provisions, the State maintains an adoption service submitted to the supervision of Local Authorities and to the control of courts, which are responsible for agreeing the adoption orders or adoption judgments. These commands are based on previous agreements which may also be privately set between birth and adoptive families, or through local services. Although the most common is to turn to independent accredited agencies that are supervised by the State. Adoption agencies accelerate the processes, that lasts about three months from the acceptance of the adoption application[5]; they select adopters on a panel of experts' reports, they complete this selection regarding the list of children who are waiting to be adopted, and subsequently, they develop an important tracking, professional support, and mediation services[6].

The new *ChFA2014*, promulgated on March 14, 2014, addresses, among other issues, the legal ruling of contact concerning children adopted through the appropriate *adoption order*. This legal ruling can be agreed by the judge at various stages of the adoption procedure (before the constitution, after the placement order or agreement to place the child in a family of prospective adoptive

4 On the history of the British precedents regulations on adoption, V., among others, F. Burton, *Family Law*., cit., P. 477; J. Herring, *Family Law*, 2001, pp. 525 et seq.; M. Welstead, S. Edwards, *Family Law,* Oxford University Press, W, 2006, pp. 191 ff. On the Adoption and Children Act 2002, V.A. Diduck, *Law's Families*, ed. Lexis Nexis, Edinburg 2003, pp. 204 ss. On the Children Act 1989, V. – K. Standley, *Family Law*, 5th ed., Hampshire-New York, pp. 300-319.

5 On this point https://www.gov.uk/child-adoption/adoption-assessment.

6 It refers to all the *AChA2002* in sections 9-17.

parents) or on the occasion of the formulation of the *adoption order*, in which case this is the *post adoption contact order* that concerns us, and that has also generated intense controversy in the British system.

The *AChA2002* has five chapters, successively concerning the adoption services, the placement or accommodation of children in families and the related court orders (*placements orders*, under Sections 18-65), the legal status of the adopted child (sections 66-76), the adoption records (one general and another one that is special to score post adoptive contacts requests, whose regime is established in sections 77-79 and 80-81, respectively) and the adoptions with a foreign component (sections 83-91).

Broadly speaking, the system matches the Spanish one at various points. Thus, the State monitors and controls the processes of children adoption by establishing public support services and their management, entrusted to the Local Authorities that are responsible for preparing dossiers of previous proposal that will culminate in adoption orders. Therefore, in both systems, British and Spanish, adoptions of children on which the administration must act will be the object of double control, first an administrative one through Local Authorities and subsequently a judicial one (court orders or adoption agreements). All this is regulated in *AChA2002* and others that complement it, in great detail, with some notable differences in the Spanish system, as, for instance, the adoption register regime (*AChA2002* sections 77-82, which establish the Register of Adopted Children and the Register for Contacts between Adopted; and notably, the role that is given to the public or private adoption agencies concerning the channeling and management of the processes, especially in its mediation functions.

Local public services of adoption centralize information on future adoptees and their birth parents or guardians, future adopters and adoptive parents. They must provide information to those interested in the processes, as well as evaluation standards of the needs and support to those involved in the processes.

Local entities are responsible for preparing and publishing their planned activities of the adoption services, and for monitoring the agencies and independent companies that mediate within the processes[7].

Adoption services must regularly provide statistics and other information to the Ministry.

b) On the 'adoption order'.

According to British regulations contained in sect. 46 of the *AChA2002*, "adoption order" means a court decision in favor of a partnership or marriage, or even in favor of a single person, regardless of sexual orientation, which confers parental responsibility for a child and extinguishes such responsibilities previously held by others. It may fall on a previously adopted child, but not on

[7] The fees charged by the agencies and adoption services of local entities ranging around 27,000 pounds and vary for different events. See regard. news published by the British Association for Adoption & Fostering, http://www.baaf.org.uk/webfm_send/3161

a married or previously married person, nor on those who had attained the age of 19 years. Before formulating the order, the court must consider the possible previous existence of agreements that allow the child to be in contact to different persons from other adopters. For the judicial order of adoption, the consent of the child's parents or earlier guardians is required, unless it is waived. Applicants must be residents of British Territory and have lived in it, prior to this, at least for one year. A minimum age of 21 years is required to be eligible as adopters[8].

When establishing adoption, the judge can also give to the adopted children the right to keep the contacts and relationships with their relatives of origin, by means of a resolution –the so-called "post adoption contact order"– which is also a matter of discussion for British law, and which has in fact been addressed by the new *ChFA2014*. This standard has incorporated into A*ChA2002* two new sections devoted to the subject, which has triggered an intense and deeply critical debate on its advantages and disadvantages, and that has led the legislator to the establishment of limits. It is now questioned how the practical application of the measure will be developed by the courts, which are reluctant to admit it.

c) Indirect and alternative forms to 'visit'.

Contacts with the family of origin after the adoption have traditionally been viewed with suspicion by the British courts, inclined, so far, to favor complete separation. Some jurists have considered that both the "establishment" (in the rare cases where it may take place today, except in the case of international adoptions) and the "maintenance" of the aforementioned contacts after the new situation (which is now the case) do not match with the purposes that are inherent in any process of adoption. In consequence, some interesting intermediate solutions have been proposed over time, such as the following:

The Letter – box.-

Thus, it has been extended a practice consisting in establishing certain agreed contact plans, which are controlled by the Administration through adoption agencies. These plans usually include indirect forms of communication, such as letters that the interested parties exchange one or twice a year (letter-box system), photographs, cards and social networks, avoiding to establish measures that consist of face to face interviews. This way, the traditional "visits" or interviews between the child and his parents are gradually being removed, except those between siblings –more commonly admitted.

[8] See official website of the Government U.K. on the basic process steps. https://www.gov.uk/child-adoption/overview; http://www.adoptionuk.org/.

The Life story work.-

In a similar way, a psychological therapy practice exists consisting a making the children write a short story, a so-called "life story work", in which they have to try to collect the information necessary to remember about their origins, until they understand their current situation, as far as their age and maturity allow it. While this may seem traumatic for the child, nevertheless from a psychological perspective, it has been observed that this activity can help them to make process in building their own identity as well as connecting their present and future to their past. It may also be useful in order learn of their cultural, ethnic and religious backgrounds. This occurs particularly in relation to older educated children that integrate this work – that lasts approximately one year– into their daily tasks. But the development of this activity can also stimulate the child's curiosity about other issues – family misfortunes, abuse situations, family breakdown, etc. – that may not be convenient for the child to know until he has reached an age of sufficient maturity. For this reason, it has been determined that these practices must be subject to planning and, what is more effective, channeled through adoption agencies that act as mediators in a manner consistent with the emotional well-being of the child[9].

d) Advantages and disadvantages.

Once the old model of closed adoptions – which concealed information from the child about his relatives and the adoption – was removed, it has become widespread in the legislation to impose on the adoptive parents the legal obligation to inform the child that he has been adopted and that he has other relatives of origin. This open model based on transparency undoubtedly entails positive aspects, but certainly also has disadvantages, so it is not easy for the legislator to establish the limits[10].

Among the positive aspects, the following have been mentioned:

- Disclosing to the children the truth about their relatives of origin helps to prevent future disappointments that might arise later when they discover the truth.
- The knowledge that the members of the family of origin are interested and concerned about their school progress despite the fact that they are not living together helps to strengthen self-esteem and build identity.
- Maintaining contact with relatives of origin, which are "missing" from their lives, can help avoid the child´s rejection reactions to establish new affective ties with the adoptive family.
- It can also help relatives of origin to overcome their grief at the loss of the child and stay informed about his new life and his future.

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9 L. Dogson, *Post-adoption Contact: All change or more of the same?,* (11 noviembre 2014) http://www.familylawweek.co.uk/site.aspx?i=ed136606.

10 See L. Dogson, loc. cit.

– It's comforting for the adoptive parents to know that maintaining contact with the biological family is being planned and has professional support.

Some relevant negative aspects are the following:

– Direct contact with the family of origin may entail negative implications relating to the child's ability to establish links with their new adoptive family and paralyze or hinder their sense of belonging to it.
– If the contacts turn out negative for the child, it could harm him twice – representing to him a second rejection; but even if proved positive, such contact can always cause emotional distress to the child, especially when it comes to older children.
– In addition, it may be very difficult for adoptive parents to maintain a positive relationship with the family of origin, depending on the circumstances under which children were removed from their custody (e.g., situations of abandonment and child abuse)
– There is a risk that families of origin use the contact with the child to undermine the decision of his placement for adoption, even unintentionally.

These and other debates about maintaining communications with the family of origin by adopted children have emerged within the British Parliament on the occasion of promulgation of the *ChFA2014,* as officially published in the document which we refer to below.

e) The eighth chapter of the report of the British Parliament in 2014.

According to Chapter Eight of the document published on March 6, 2013 by the House of Lords, and entitled "Adoption: Post-legislative Scrutiny – Select Committee on Adoption Legislation", in which the analysis concerning the post adoption contact order is addressed, when the standard that has been reintroduced in the legislation was being drafted, this option of Parliament exhibited difficulties.

The mentioned text comes out from the finding of the effective increase in adoptee´s age, which makes them more likely to maintain strong links with their biological family, so the courts have raised doubts about whether they should take into consideration or not, the agreements existing in favor of the birth families when they are confronted with the task of pronouncing the placement orders; by which the placement of the children will be resolved to their adopters.

The legislator's intention – they point out – is to respect the agreements that mediate between those affected and have been consented by the two families, biological and adoptive, through the so-called "contact arrangements" or "contact agreements". Nevertheless, they distrust the idea of establishing the contact order against the will of the adoptive family, in that case they often don´t order it.

The idea behind this argument is the rejection by the British courts to impose measures of post-adoptive contact against the wishes of adoptive families and

to reduce its intervention to the main function of ratifying already existing plans that have been established by agreement between the two families.

As to the form of communications, it has been found that direct interviews are not common in practice and many families use system called contact-box, consisting of the exchange of letters once or twice a year to exchange information with birth parents. This form of communication is usually done with the mediation of adoption agencies in order to protect the identity and location of the adoptive family. Face interviews rarely occur with birth parents and are more frequent among siblings. The main concern raised by the practical application of the *AChA2002* -highlighted by the Deputy of the Commission for Children in the English Parliament, Sue Berelowitz- was primarily to remind the legislator that contacts should be established for the benefit of the child and not for the benefit of the parents or other relatives. It has to be also considered that all the decisions must be taken personalized, attending to each child particular needs, and avoiding global decisions to be concerning mandates in "abstract" that have to be accomplished in all cases. Since what is good for children is to have some form of continuity that allows them to integrate the past with the present and obviously with the future, rather than maintaining relations with the birth family in the same way that they previously had.

Also highlighted further in the document, is the role that the children's relationships with their original family can play in accepting their past and allowing them to strengthen and build their sense of identity. In this sense, it was stated that the practice of sharing with the child the knowledge of reasons why he was given for adoption, facilitates the development of the work on their life history (life-story work) and it is an important part of its content. In the text, it was also pointed out the negative impact of the position of some defenders of allowing unauthorized contacts -prohibited already in the ancient *ChA1989*, secc.1-, that could happen by private initiative of the birth family, or by the child himself. Unsupervised communications present several dangers, such as weakening the strength and security of placement in the new family, causing deep disenchantment and disruption among adopters, and even endanger the very integrity of the child.

In this last line, there was a reference to a query that the British Government conducted and published in August 2012, in which some authorities mentioned that, even if it is always well intentioned, the post-adopting contact causes very often damage to the children; and it is also hurting and unattractive for adopters.

f) The new sections 51A 51B of the Adoption and Children Act 2002 introduced by the Children and Families Act 2014 (the 'post adoption contact order').

The bill went ahead and therefore the possibility of adopted to maintain relationships with their families of origin and with other relatives, was recently incorporated into the *AChA 2002*, in two new sections 51A and 51B, that has

been introduced in this new *ChFA2014* in section 9. Previously, the so-called post adoption contact orders were banned, the previous (established under the eighth section of the *ChA1989*) were extinguished by virtue of the prohibitions contained in sect. 26 of the *AChA2002* (for children targeted for placement order, or delivery to prospective adopters), and 46 (for adopted children by adoption order).

The new 51A section, written after the reform of 2014, provides (in paragraph (3), paragraphs a) to e)) that relations may be agreed by the judges, at the time that children are placed in a family that has requested to adopt (similar situation to the, for-us-known, as "pre-adoptive") and also, at the time of constituting the adoption or even after it.

The persons to be mentioned for this purpose in the order are the biological parents of the child and their spouses or partners, tutors or former guardians of the child, or any other person with whom the child has lived for at least one previous year.

They may request the order of maintaining relationships with other family members, applicants for adoption or the adoptive parents, the child himself, and anyone else who has obtained court permission to make the request. The new section 51B contains references to this post adoption contact orders: they may contain indications of how the contacts will happen; subject to conditions and requirements that the court considers appropriate; they may be modified or revoked by the court by the request of the child, the adoptive parents or the persons listed in the order, and finally, they will be effective until the child turns 18, unless they are earlier revoked.

The lawyer Larry Dodgson mentions that the new legislation is contrary to the jurisprudence of the British courts[11], which usually has spoken out against the system of open adoption. He also points out that the legislation leaves some issues open and those will be solved only by a careful study of the future interpretation and application of the legislation.

Art. 178.4 CC. Notes for future application

In fact, the new text that has been introduced in the Spanish Civil Code contains at first a generic term, led to an indefinite recipient or to a non-personified recipient, but to an ensemble of all authorities concerned to ensure the welfare of the child, by which "it may be decided to maintain some form of relationship" between the adoptee and his family of origin, if it is so advised by higher

[11] L. Dogson, (*loc. cit.)* cites the following cases : *Re P (Placemento Orders: parental Consent* [2008] EWCA Civ 535; *Re J (A Child) (Adopted Child: Contact)* [2010] EWCA Civ 581; *Re J (Child) (Adopted Child: Contact* [2010] EWCA Civ 581; *in Re T (a child) (Adoption : Contact)* [2010] EWCA Civ 1527; *MF v of Brent & Ors* [2013] EWHC 1838 (Fam).

interests and because of particular circumstances of the family, age, or others significant considerations, according to the Public Entity assessment.

The mandate of the judge comes on following. But its content is limited to empower him ("may agree") to grant the maintenance of relationships, modify them or ban them, so this decision rests in a free decision of the judge. If the judge declares a decision, both positively or negatively, the standard orders him to have the consent of both families (the original and adoptive) and provide hearing to the child. It also commands the judge to act, as a Public Entity "proposal" or prosecution, then follows that, if he decides so, it will be necessary to have a previous proposal in both cases. Nothing has been expressly provided for the case in which the judge receives the previous proposal but decides not to intervene or make a decision without the "agreement", which is optional, at an adoption. However, from the rule it is clear that the previous proposal is not binding to promote the agreement from the judge, and it is only in order to be taken into account if the judge decides about an agreement. In short, three different wills should be taken into account, besides the one of the judge: the will of the Public Entity or the prosecution; the will of the two families concerned; and the will of the child. In this may lay the reason to designate the judgment as an "agreement", by the legislator. But he is required to have a prior proposal, not a ratification. The child has a right to be heard. In the standard it is not considered the duty to respect as much as possible the wishes or feelings of the child. But being expressly contemplated this right (expressly incorporated in the British Welfare Checklist but not in the LO1 / 1996) on existing international texts in Spain, the child may ask, if required, an intervention by the Ombudsman and demand compliance of art. 39 of the Constitution.

Also, when it comes to request the judge the "changing" or "suspension" of the communications system it is granted legitimacy to certain people (the Public Entity and those affected by the resolution); however, when it comes to agree the "maintenance" of communications and relations, the legislator omits to mention the standing to apply. Does this mean that the judge may decide to grant or not the maintenance of the measure, in principle without the necessity to be subject to application of any person or entity? and only when he decides to modify or suspend the measure must respect the principle of request by certain legitimized people (most notably, the adoptive family), as well as the need to attend to the proposal from the Public Entity or the prosecution? ... The rule will be controversial because it does not solve it. However, it is clear that any decision of the judge to avoid the hearing of the child would be contrary to the standard.

Moreover, any intervention of the judge for approving or not the existing measures for the contact between the child and his family of origin, must comply with the main objective: the promotion of the relationship, at least, between biological siblings. Concerning the procedural timing on which this intervention of

the judge is going to happen, the standard states: "to an adoption". That has no place, in the Spanish law, at the moment on which the child is delivered to the future adoptive family. Since it occurs in our law by administrative decision and not by a plea deal on the type of placement order.

What seems to have been collected from the British precedent, is that, if the judge intervenes, he may not do it without the consent of both families. In turn, this requirement raises the question whether the judge can or cannot do without this requirement in the best interests of the child, and which would also be the consequences if he decides the opposite to the wishes of the adoptive family. The rule states that the prior acceptance of post adoptive contacts will be a determinative criterion for the declaration of suitability of applicants for adoption, but... What will happen if once the adoption is consummated, the circumstances make them change their minds? ... these cases can be resolved only through a prior agreement proposal to amend the measure, but until the court reaches this proposal, the adoption file can be paralyzed. In the recent British case Law appears an attempt to enforce the interests of the child, over the opinion of the adoptive family (V. the last judgment cited above in footnote 11, judgment of Judge LJ Ryder, who seems to have embarked on a progressive line). Also it has been taken into account the desirability of individualizing carefully each measure, it is specified in the rule that age, family status, "or other significant circumstances" should be valued (it must be assumed, from the British precedent, to be held detailed and particularized) by the proposing Public Entity.

From this it follows that, it will not be always appropriate to establish the extent of maintaining contact, until then, starred by the child and his family of origin; and neither the judge will make maintenance agreements, withdrawal or termination, in any case, on the occasion of issuing the adoption order. At this point it will be critical the assessment of "significant circumstances" that each governmental entity will develop for the formulation of its previous proposal. This could collapse the Administration for accumulation of resources against "rating" entrusted to the standard and, ultimately, delay processes, which would certainly be contrary to the general aims of the reform of protection childhood and adolescence.

Moreover, the lack of consent may take place, more usually, by the adoptive family and not by initiative of the original family, because it is not inferred under which circumstances the end of relations with the child could be demanded. In our opinion, the legislator has left open these and other procedural issues which could have been resolved in the norm; or also, have been collected during the enactment of the law of Voluntary Jurisdiction, coetaneous, which regulates this type of process, or reform of certain articles of the LEC 1/2000 referring to opposition to the measures ordered by judges in contentious proceedings concerning the adoption of children. This can lead not only to challenges of his

interventions, but also to possible different interpretations in the future, within the courts themselves.

Another issue is referred to the new ways of establishing communications. The rule states that they will not necessarily take place through interviews and visits since the new speech also mentioned "other communications". What are these? ... For this purpose, we consider useful to recall the British experience in the system of letter-box or *life story work*, and above all, in the abolition of the need of direct communications and personal interviews between the child and the parents of origin. The lack of specialized agencies, as in the British model, should also be replaced through mediation services provided in most relevant regional administrations to prevent the temptation to provide information that could lead to the establishment of communications or unsupervised visits.

These limits are justified only for the convenience of the child and his mental stability because there are circumstances that are better to hide the child until he acquires the sufficient maturity to understand them, and might otherwise become traumatic. But in principle they should not operate when it comes to communications between siblings, this relationship should be encouraged, in principle, and only be restricted in exceptional cases.

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