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ADOPTION UNDER THE NEW INTERNAL REGULATIONS OF ROMANIA

(summary)

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WORK PLAN

CHAPTER III. PRINCIPLES OF ADOPTION

CHAPTER IV. BACKGROUND CONDITIONS OF DOMESTIC ADOPTION

INTRODUCTION

We chose this theme because child protection, in general, and his alternative protection by adoption, in particular, has been recently the concern of the legislator, and also the various authorities and public institutions, including the pedants in the field.

Under the first aspect, there may be found a real „legislative effervescence" in regard to process of normalization of judicial regime of adoption. Thus, for example, Law no. 273/2004, initially called „regarding the judicial regime of adoption", has become, after the entry in force of Law no. 134/2010 related to Code of civil procedure „regarding the adoption procedure". The change is not only „formal" but „essential", because, at present, most of the aspect regarding the „judicial regime of adoption" (background conditions, effects and termination of adoption) are regulated by art. 451-482 Civil code and „the procedure of adoption", per se, by Law no. 273/2004. However, Law no. 273/2004, even though, through its name, has as regulation objects „the procedure of adoption", it comprises rules regarding the background conditions, the effects and termination of adoption.

Basically, at present, in the Romanian legal system, to the „legal institution of adoption" are devoted, mainly, two important laws, the Civil code and Law no. 273/2004.

Obviously, this „normative situation" requires increasing the effort of thorough analysis of regulations in the field, both for their interpretation and correct application, and for the identification of any discrepancies or loopholes and substantiates relevant *lege ferenda* proposals for eliminating them.

The thesis that we propose is intended to be a contribution to achieving

this „doctrinarian objective”.

SYNTHESIS OF THE THESIS

Following the proposed research objectives, the work is divided into seven chapters, as follows:

Chapter I, under the generic name „Adoption in the Roman law”, points out that under the Roman law system, it was given a special importance to the legal institution of adoption. In fact, because of these concerns and foundation of different normative solutions in the field, some of these still produce „echoes” in the modern law systems.

In Chapter II, „Evolution in time of the internal regulations of Romania in the field of adoption” we have followed the historical evolution of the institution of adoption, starting from the Middle Ages, continuing with the rule „Straightening the law”, Charter for Iothesie, Caragea Code and Calimah Code, dwelling upon the Romanian Civil code adopted in 1864, the Family code adopted in 1954, the Law no. 11/1990 regarding the approval of adoption, the Government Emergency Ordinance no. 25/1997 regarding the approval of adoption and ending with the current Civil law and Law no. 273/2004 regarding the procedure of adoption with all subsequent amendments.

Chapter III, named „The principles of adoption”, includes an analysis of the concept of adoption, as defined in the law and in the doctrine of specialty, while explaining and developing the principles governing this institution, namely: child’s best interest, raising and educating a child in a family environment; continuity in the child’s education, taking account of his ethnic, cultural and linguistic origin; informing the child and taking into consideration his opinion in regard to his age and maturity; celerity in carrying out any act relating to the adoption procedure; guaranteeing the

confidentiality with regard to identification of the adopter or, if applicable, the adoptive family, and also regarding the identity of the natural parents.

In Chapter IV called „Background conditions of adoption" we paid special attention to these conditions which are regulated by art. 455-468 of the Civil code and by art. 6-15 of Law no. 273/2004. In this regard, Chapter IV is divided in three sections, namely: background conditions of adoption on the adopted person, background conditions on the adoptive person or family, and also expressing the consent for adoption.

Chapter V, "Procedure of domestic adoption" is dedicated to the thorough analysis of the conduct of entire procedure of adoption, being defined domestic adoption in relation to the international one, identified the stages of domestic adoption and also the effects of adoption approval. Summarizing chronologically, the domestic adoption involves the following steps: certification of adopter of adoptive family; opening the procedure of adoption; matching between the child and the adoptive person or family; entrusting the child for adoption; adoption approval.

Chapter VI, "Procedure of international adoption" highlights the exceptional and subsidiary nature of international adoption in relation to the internal adoption, and also with aspect of private international law. Also, in the contents of three sections we have analyzed the particular requirements and procedure for the way in international adoption. Finally, in the last section are analyzed the subsequent procedures and the effects specific to the approval of international adoption.

In Chapter VII, "Termination of adoption" is analyzed the procedure of termination of adoption with the two ways – nullity and cancellation of adoption. In this respect are analyzed the situations of cancellation of adoption, namely: by law, at the request of the adopter or adoptive family or at the request of the adoptee. Also, nullity of adoption, in both its forms (absolute or relative) is analyzed by reference to the permissive situations of its maintenance.

Lastly, family traditions, religious views, history, social and political context make the states to treat so differently the institution of adoption. Therefore, where we considered appropriate, we studied the way in which adoption is regulated in the legislation of other states (England, France, Germany). Thus, we identified some legal rules which might be the solutions to the problems or gaps in the national legislation in the field.

In carrying out the work, the main methods used were the historical method, the quantitative method, the logical-legal method, the scientific method and comparative method, these being adapted accordingly to the objectives proposed.

According to the historical method, we researched the institution of adoption from its historical perspective and evolution. In this regard, we considered the essence, the form, the structure of adoption related to the historical stage that society pervades at a time.

The research methodology involved also the deepening of notions regarding the adoption institution using the quantitative method through which are consulted and stored information from treaties, courses, magazines, published studies on the issues addressed both domestic and international.

The logical method involved the use of logical principles and procedures in the analysis of the adoption institution, so that are captured the structure and dynamics of necessary relations among the components of this institution.

The need to know the various national systems of law determined using increasingly the comparative method in the specialty literature. Using the comparative method we have identified commonalities and differences between regulations regarding the adoption in Romania and those in other countries. Furthermore, we compared the different views of doctrinal in the matter of adoption procedure.

The methods listed are completed with other necessary processes during the investigation. Thus, we studied the adoption as a social phenomenon, given the importance of this institution in the lives of tens of thousands of children in orphanages across the country.

CONCLUSIONS AND PROPOSALS DE *LEGE-FERENDA*

Traditionally, adoption was considered a consolation to those whom nature has given no children. Even if today the interest of society is more focused on minor child, the adoption being oriented to assure him a home and a family, the possibility to adopt continues to bring joy to many couples or persons willing to love, to protect and educate a child, together with or instead of biological children.

The institution of adoption is also based on more pragmatic considerations, in close historical relation with the need to ensure the continuity of wealth and families, by scions and heirs. In Roman law, for example, adoption (such as adrogation – the act through with*pater familias* took under his power another *pater familias* or another person who, until then, was not subject to any other power), was mainly intended to create to those without children, the possibility to have heirs and carry forward the family cult.

Despite the many changes it has undergone over time, closely related with the development of society and the evolution of the purpose pursued by the legislator, the institution of adoption never ceased to exist. Its continuity it what we know as being history of humanity, from the antiquity to the post-modern era, entitles us to believe that adoption will not disappear, at least not as long as there is the concept of the “family”.

We chose adoption as a theme of this doctoral thesis, respectively its new way of regulating in Romania, convinced that the subject of its social and

legal implications is far from exhausted and with the hope that we can contribute to the understanding of this complex legal institution.

Since the origins of adoption, as we understand it in contemporary law, we find in the ancient Roman law, we considered mandatory to dedicate a first chapter of the thesis to forms, conditions and effects the institution knew in this system of law.

Adoption has also a long tradition in the Romanian history. Archaically called “virginity of the soul”, “taking sons of soul”, “iotesie” or “adoption”, the institution received the name under which today is commonly known in modern times, with the entry into force of the Civil code of 1864 (“adoption). Subsequently, the Family code called it “adoption” and has now been returned to the term “adoption”.

Following the evolution of legal rules relating to adoption in the Romanian legal system, we tried to capture and explain both the elements of legislative continuity and the elements of discontinuity in the regulation of the adoption. These elements reflect, in our opinion, not only the constants and the historical-social changes, but also changes intervened in the mentality of legislator, especially in its optics on the institution of the family and minors deprived of parental care.

As regards the conditions for the approval of adoption, over time legislation required to be respected a series of requirements, some of which remained constantly unchanged, while others have undergone numerous transformations. For instance, almost without exception, in adoption is required a difference of age of at least 18 years between the adoptee and adopter. This condition derives from the understanding the adoption as being an “imitation of nature”, conception inherited from Roman law, such a minimal difference being considered natural, reported to the age at which a person becomes able to procreate. Other conditions specific to certain historical periods are less natural or self-understood, being motivated by

contextual social interests: provided that the adopter is male, not to have chosen the monastic life, no to have legitimate heirs, not to be a womanizer or wasteful.

As shown, a long period of time it was considered that the role of adoption was to bring comfort to those who have no children. In the spirit of this mentality, it is understandable the condition that the adopter not to have natural children. This regulatory requirement/prohibition subsisted in the Romanian law by mid last century. Only with the enactment of Decree no. 131/1949, amending the Civil code, those who already had natural children, have been allowed to adopt. In our opinion, this important legislative amendment, a true reform – we could say – marks the historical moment in which Romanian legislator began to pay an increasing attention to the child adopted and his interest, in the detriment of satisfying the wishes and interests of adopters.

Until adopting the Calimach Code and Caragea Law, our legal system allowed adoption of major people, with very few restrictions, so that, currently, the rule is to adopt a minor; so today, only through an exception is allowed to adopt a person with full capacity of exercise.

Another constant in regulating the adoption was imposing some solemnities, meant to draw attention to the social importance of the decision to adopt. Among them, the manifestation of consent to adoption was always a condition treated carefully by the legislator, regardless of the historical period to which we refer.

From a procedural perspective, Roman people realized adoption and adrogation through a strictness loaded with solemn formulas. Closer to our time, adoption was performed in front of the church and with the approval of the rule, and, starting with the XIXth century, approval of adoption was imposed by the courts. A few decades of our times, under the rule of Family code – now repealed, adoption was subject to administrative procedure, the

decision being within the competence of the guardianship authority. But on that legislation was preceded by Law no. 11/1990 regarding adoption approval, which brought the adoption approval in powers of the courts.

Adoption knew two forms: adoption with limited effects and adoption with full effects. In the system of Roman law, Emperor Iustinian regulated the two forms of the desire to ensure the adoptee the possibility to inherit, both in the adoptive family and in the original one. Until the XXth century, adoption took one form, when family relationships between the adopter and adoptee were created, the adoptee natural touch with the family maintaining at least in terms of heritage. Decree no. 182/1951, regarding the adoption, reintroduced adoption with full effects, such as to generate all the legal effects of natural filiation. The two forms were ongoing paralleled, pending the adoption of Government Emergency Ordinance no. 25/1997, regarding the adoption, when the adoption with restricted effects was removed and was maintained only the adoption with full effects.

One of the effects of adoption that we find constantly is taking the name of adopter by the adoptee. This was either added to the family name of origin, or replaced this name, and Calimach Code expressly regulated the interdiction to derogate from the requirement of taking over the name of the adopter.

One form of adoption, long practiced by the Romanian people, until the XIXth century, was fraternal adoption, having as purpose the formation as brother of the person adopted. The causes of such adoption were the most diverse, pursuing the realization of certain reciprocal moral obligations, or the realization of economic effects, or even rebellion against the oppressors. Anyway, this practice was lost over time, because the institution did not imitate the nature, as does the actual adoption.

As regards to international adoption, although the old Civil code did not expressly regulate it, because foreigners enjoyed in Romania all civil

rights, and the adoption was considered a civil right, they were allowed to adopt or be adopted, if their national law indulged adoption. Concern for express regulation of international adoption only appeared by Law no. 11/1990 regarding the approval of adoption, through the need for harmonization of domestic legislation with international regulations. Thus, Romania has ratified the “European convention on the adoption of children from Strasbourg” and also the “Convention on protection of children and cooperation in respect of intercountry adoption from Hague”.

In subsequent years, the legal regime in international adoption has proved faulty, so it was ordered the suspension of adoptions of Romanian children in the sphere of international adoption, since 2001, for about four years. After reconsideration of legal regime, in order to match international practices and procedures, and after taking steps to eliminate corruption and preventing trafficking in children, the international adoption was put again in practice.

Currently, adoption is governed by a set of principles that help to streamline the entire procedure. The principle of the best interest of the child is a basis thesis, which directs the other principles, but does not replace them. We believe that it is not without interest the express enunciation in the legislation of some principles such as informing the child regarding the adoption, which are not always self-evident in Romanian culture.

A shortage of Romanian legislation in the matter is that the principles of adoption are not uniformly regulated in legislation; for example, the Civil code lists fewer principles than the Law no. 273/2004, on the procedure of adoption. The fact can be explained by the adoption of successive regulations, by trying to include in the internal legislation the international principles regarding the adoption or through the existence, paralleled, of certain general rules, contained in the Civil code and special rules on adoption. Still, to avoid such legislative “parallelisms”, *delege ferenda* we recommend to opt for the

regulation of these principles in one normative act, possibly, in the Civil code.

Even lacking a legal definition, the principle of respecting the best interest of the child must be understood through meeting the needs imposed by its health development, to consist with the potential of the child. Taken into consideration that not any family and not any parent succeed to be good enough to meet the child's needs, for his harmonious development, invoking the superiority of the child's interest means to follow, in all practical situations and in the legislative context, the primary satisfaction of the child's needs.

All the conditions imposed by the legislator for the approval of adoption are, at a careful analysis, an application of the principle of the best interest of the child. The current legislation forecasts meticulously the requirements of adoption, both in respect of the adopted and the adopter, but also the other participants in the whole process of adoption. The conditions aim, mainly, the capacity of exercise, age, health state, the existence of the consent of persons provided by law and a series of interdictions to adoption approval.

Whether positively or negatively formulated, or called background conditions or impediments, the adoption requirements involve the same approach, even if it involves some peculiarities.

As a general rule, the child can be adopted until he acquires the full capacity of exercise and, exceptionally, the person who acquired the full capacity of exercise can also be adopted, if it was raised during childhood by the one who wants to adopt.

The conditions of adopting brother by the same adopter or adoptive family supports the best interest of brothers, who, in such an adoption, would preserve the existing natural kinship between them and they would grow together, in the same family environment.

Legislation stops adoption among second grade collateral relatives, but,

on the other hand, encourages adoption among relatives. However, we consider that the rules in force are insufficient to prohibit the adoption of the child by his natural first-degree relatives, by their biological parents. For these reasons, *de lege ferenda*, a formal legal provision should be introduced, according to which the adoption among first-degree relatives is prohibited.

Only those people can adopt who have full capacity of exercise and who – as shown – are at least 18 years older than the person adopted. For good reasons, the guardianship court may approve an adoption if the age difference between the adopter and the adoptee is less than 18 years, but not less than 16 years. We note that the legislator has not set a maximum or a minimum age for the adopter, which is legally and even morally, unacceptable, in our opinion, since, from the interpretation of legal texts, it results that a person of 16 years old could be considered apt to adopt. Indeed, at this age, respecting the interests of the child is difficult to achieve.

The legislator has shown particular concern for the consent to adoption by the persons prescribed by law, a natural thing, given the fact that adoption has the effect of ceasing the relationships between biological parents and the adopted one, on the one hand, and establishing the filiation between the adoptee and the adopter, on the other hand.

The importance enjoys by the consent, within the regulations relating to adoption, stresses once again the concern of domestic and international legislator to meet the best interest of the child.

Adoption is a complex procedure, which involves several steps, both in front of public administration bodies and before the courts; all these authorities must work together to ensure the realization of the best interest of the child.

Adoption procedure is different, as the adoption is domestic or international. The reference element in establishing if the adoption is domestic or international is the “residence” and not the “citizenship” or the

"domicile" of the person. We believe that the legislator opted for the "residence", in order to align the national legislation to the provisions of the international Conventions to which Romania is a party. Nonetheless, in order to determine the authority of the Romanian courts, which solves applications for the approval of international adoption, art. 1066 and the following of the Code of civil procedures refer to "domicile in Romania" of the person adopted, and the quality of "Romanian citizen" or "stateless" of the person to be adopted. We find that there is a mismatch between the internal rules of substantive law and procedural law, which, by *lege ferenda*, should be eliminated.

Being in essence a measure of protection, the adoption procedure does not aim to establish a right averse to another person, so the applications in adoption matters are following the rules of non-contentious judicial procedure, regulated by Book the IIIrd (art. 527-540) of the Code of civil procedure, corroborated with the rules of Chapter VII of Law no. 273/2004, "Provisions concerning the proceedings".

Steps to take in achieving the adoption procedure are: assessing the adopter or adoptive family to obtain attestation; opening the domestic adoption procedure; matching between the child and the adoptive person or family; entrusting the child for adoption; approval of adoption. These steps take fully place only to the extent that they are mandatory. For example, for adopting a person who acquired the capacity of exercise, and also at the adoption of the child by the natural or adoptive parent's spouse, it is enough to notify the court, directly with the application of adoption approval.

Each stage has its specific and involves some comments, some of them critical. For example, in the stage of entrusting the child for adoption, art. 41, parag. (1) of Law no. 273/2004 provides that the court decides "without summoning the parties". We note that participation of the minor is not required in this stage of adoption procedure, something that, in our opinion, is

unfavourable for his best interest, especially since the entrustment for adoption has as a proximate effect the determination of the child's residence at the person or family who wants to adopt him. We therefore propose *delege ferenda* the amendment of art. 41 parag. (1) of Law no. 273/2004, in the meaning of mandatorily listening the child's opinion regarding the entrustment for adoption.

We also note the legislator's concern to improve the entire procedure of adoption, through the establishment of clear circumstances where a child is declared adoptable. Moreover, the effect of the court decision of opening the adoption procedure lasts until the acquisition of 14 years of age, where this term was limited to two years from a final decision of opening adoption.

An important legislative innovation, which supports the adoptive person or family, is establishing the right for an accommodation vacation. The approach itself is welcome, given the practical difficulties that arise from a lack of time for networking of adopter with the child, due to work schedule.

Under the procedural aspect, as a novelty, the decision for the approval of adoption is subject only to appeal, prior to the amendment of the Code of civil procedure, decisions in adoption being subject only to recourse.

Adoption procedure is criticized for complexity, but especially for the duration of stages, which makes it very difficult. In this respect, the legislator has established new terms and reduces other terms, the most recent regulations in the field demonstrating a particular concern for limiting the duration of the entire procedure.

As a consequence of establishing the filiation between the adoptee and adopter, the adoptee is assimilated to the natural child of the adopter or to the adopter spouses, whether it is minor or adult. The importance of kinship newly created should not be underestimated; but the doctrine has highlighted certain situations where the filiation resulted from adoption is not treated by the legislator equivalently with the natural one. For example, according to art.

415 of Civil code, recognition by the father of the child after his death can only be achieved if the son left natural descendants. The solution is natural, because evidence can only be based on medical investigations that are relevant only if a biological connection exists. At the same time, under art. 517 Civil code, the husband is obliged to provide maintenance to the minor child of his wife (or wife to the minor child of the husband) if previously contributed to his maintenance, and if his natural parents are deceased or are in need.

Lately, international adoption was in the attention of the legislator, which established a legal framework more and more favourable to the approval of this type of adoption, the specific procedures being improved, simplified and made more accessible. In this regard, the children can be declared internationally adoptable within one year from the opening of adoption procedure, unlike the period of two years, which was covered in the previous legislation. At the same time, it was established the obligation of the person or family selected for international adoption, to travel to Romania and live effectively in the country, for a period of at least 30 consecutive days, which will be used for networking with the child.

Regarding the termination of adoption, the legislation provides for three situations, namely: dissolution, relative nullity and absolute nullity of adoption. According to the civil code, failure to comply with any requirement of substance or form determines the absolute nullity of adoption. However, if the court believes it is in the best interest of the adoptee, regardless of the reason given, it may reject the application for nullity, thus maintaining the adoption. Although carefully regulated, situations for termination of adoption could be broader developed to avoid ambiguous situations. For example, we consider necessary to be regulated a limitation period for submitting a request for dissolution of adoption at the request of the adoptee or adopter.

As a novelty in the internal law, we mention the establishment, in 2014,

of the National Authority for Child Protection and Adoption, authority which took over the own apparatus of Romanian Office for Adoptions, which was, under the old regulations, the body of supervision and coordination of the activities relating to adoption.

We considered that our analysis on the internal legislation cannot be complete without appealing to some elements of comparative law, to which the Romanian law shows both similarities and differences. For example, if in England and Germany, as in our country, adoption can only shape adoption with full effects, in France there are still covered both its forms.

The most important legislative differences we have noticed are only at the level of conditions required for adoption. Reflecting a new legislative philosophy on family, in some countries is permitted adoption by couples made up of same sex. Also, unlike our system of law, in most states it is allowed and encouraged the involvement of private bodies, in the entire procedure of adoption.

Instead, like Romania, most countries regulate a procedure for assessing the fit degree between the adopter and the adoptee, and adoption approval is for the courts. Last but not least, all legislations analyzed pay a special attention to the expression of consent to adoption by biological parents, but, also sanction their lack of interest towards their child, including through the approval of adoption in cases when natural parents refuse unreasonably to express their will.

The general conclusion that emerges from the research that we have undertaken over the new internal regulation concerning the adoption is that, although perfectible, Romanian legislation fully exploit the principle of achieving child’s best interest. This is also the explanation of apparently cumbersome and time consuming procedures preceding the adoption.

Today we are witnessing accelerated social changes, which inevitably reflects on family relationships and require frequent legislative adjustments.

The traditional family is in a full process of redefinition and the changes to which is (self) subjected to are, sometimes, worrisome. As shown, not only that – in some states – are allowed marriages between persons of the same sex, but these couples are allowed to adopt, thereby laying the foundations of an unconventional family.

Regardless of these changes and the direction in which the concept of family will develop, we believe that we are not allowed to forget that adoption is no longer the instrument through which the one who wants a child can have, but the means by which the child can receive the family, support and parental protection he needs.

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