

THE STRUCTURE AND LEGAL NATURE OF THE INSTITUTION OF ADOPTION

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Abstract:

KNOWN AND ACCEPTED FROM ANCIENT TIMES, THE INSTITUTION OF ADOPTION IS A CREATION OF JURISPRUDENCE AND A LEGAL INSTRUMENT BY WHICH NATURAL FILIATION AND NATURAL KINSHIP RELATIONSHIPS ARE REPLACED BY CIVIL FILIATION WITH CIVIL KINSHIP RELATIONSHIPS. ADOPTION, AS A SOLEMN ACT MADE TO THE BEST INTEREST OF THE ADOPTEE, IS STIPULATED BY THE EUROPEAN CONVENTION IN THE MATTER OF ADOPTED CHILD AND THE CONVENTION ON CHILD PROTECTION AND COOPERATION IN THE MATTER OF INTERNATIONAL ADOPTION. ROMANIA ENDEAVOURED TO HARMONIZE ITS LEGISLATION CONCERNING ADOPTION. THE PAPER TACKLES THE ISSUE OF THE INSTITUTION OF ADOPTION IN THE LIGHT OF THE NEW ROMANIAN CIVIL CODE.

KEY WORDS: ADOPTION, CHILD, FAMILY, INTEREST

Introduction

Adoption is one of the noblest expressions of human generosity, that of integrating a child who lacks a family's protection into a foster family. Adoption is a genealogical remodelling tool, a legal fiction¹ whereby natural filiation and relationships of natural kinship are replaced by civil filiation with civil kinship relationships.

Historical facts show that adoption was known and accepted by almost all ancient peoples; within the Roman society adoption was the convenient solution for a person without legitimate descendants to receive children² in his family who thereby acquired the name of the adopter, continued the cult of their ancestors and were entitled to inherit the foster parent just like a legitimate child.³

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1. Ion, Deleanu, *Ficțiunile juridice*, Ed. Rosetti, București, 2005, p.246.

2. Emil Molcuț, Mariana Ciocoiu, *Drept Roman. Note de Curs*, Ed. Helios, Craiova, 2002, pag. 14
Vladimir, Hanga, Mircea Dan, Bob, *Curs de drept privat roman*, Ed. Universul Juridic, 2013, p.133- 137

The institution of adoption of Roman law exerted a strong influence on the physiognomy and Romanian law evolution. Thus, adoption was a way of creating parental powers artificially, by passing a son from under the power of a *pater familias* under the power of another *pater familias*. Adoption is a creation of jurisprudence and used to be carried out in two phases.

In the first phase three sales and two successive emancipations took place. After the third sale, according to the Law of the XII Tables, the son of the family went out permanently from the power of *pater familias*, being under the buyer's contract. In the third phase the buyer with the child and the adopter appeared before the magistrate where a simulated process took place.

The adopter stated that the son of the family is his, and the buyer, who acted as defendant did not contradict him. Facing the buyer's silence the magistrate used to utter the word *addico*, thus ratifying the adopter's statement .

Adoption was also known in old Romanian law, under the name of *înfială* (art. 236 of Calimach Code) and, according to Caragea Code, as "giving birth to adoptive sons is a gift for salvation of those who do not have children" (Article . 1, part IV, Chapter 5).

Adoption was regulated as a solemn contract between the adopter and the adopted, in the Romanian Civil Code - enacted on 26 November 1864 and promulgated on 4 December the same year - which we now name the old Code, and which included the main rules of Romanian civil law.

The provisions of the old Romanian Civil Code - an almost faithful copy of the French Civil Code, which, at its entry into force, laid the foundations of the modern civil law with its principles and institutions and introduced the modern legal terminology, whereby there were left behind the Oriental and Byzantine institutions part of a feudal cultural, social and legal pattern - were abrogated with the entry into force of the family Code.

The provision of article 66 of the Family Code, according to which adoption is concluded only in the interest of the adopted is indicative of the radical transformation of the essence of this institution. Adoption is no longer the instrument by which the one who wants a child can have him/her, but the very means by which the child can receive the family he/she needs.

The institution of adoption in the light of the new Romanian Civil Code

The year 1990 when, with the fall of the Iron Curtain, Romania has undertaken an extensive work to reform the Romanian judicial system and to adjust its legislation to the

4 Emil, Molcut, *Dreptul privat roman*, Bucuresti, 2013, p.123

5-Manuel Cristian Fircă, *Excepții de la principiul relativității efectelor contractului*, București, C.H.Beck, 2013, p. 1.

regulations of the European Union⁶, also marked the beginning of reform in the field of adoption. Law no. 11/1990 regarding the approval of adoption "adjusted" some of the provisions of the Family Code, so that the Emergency Ordinance no. 25/1997 on the legal status of adoption to repeal all previous provisions and establish a new unitary legal framework consistent with the international documents where Romania is signatory party.

In the Family Code, following the Justinian model, two kinds of adoptions were regulated before the entry into force of the Emergency Ordinance no. 25 of 12 June 1995, repealed by Act no. 273 of 21 June 2004.⁷

Art. 451 of the New Civil Code defines adoption⁸ from the perspective of the purpose pursued by its achievement, namely to create a relationship of civil filiation between the adopter and the adoptee, and of civil relationship between the adoptee and the adopter's relatives, starting the date of the final judgment by which adoption was approved.⁹

Civil kinship thus created is the main effect of the adoption approval. From the point of view of the civil kinship, adoption consequences are similar, regardless if the adopted is a minor or a person with full legal capacity, but the effects of kinship relations thus created adjust themselves to the state of legal capacity the adoptee had on the date of adoption. A parentless child or a child deprived of proper care, through adoption, is received into a new family of the adoptive parents, where he/she will be raised and educated as a natural child thereof.

From the social point of view,¹⁰ family means the relationships arising between people related by marriage or kinship. Family includes spouses, parents, children and other people linked by kinship.

In terms of the structure and legal nature of adoption in literature and court practice, the term *adoption* is used under three meanings: as a legal operation, it designates the manifestations of will of the people to which adoption will be effective, as well as the work carried out by the institutions and authorities responsible in the field, in order to establish the legal relationship of adoption.

Under the first aspect, the earliest doctrine considered that adoption is an act of authority; the consent of the people specifically indicated by law plays a secondary role, precondition for validating the decision of adoption approval.

Under the second aspect, namely that adoption in its primary stage regarded solely in terms of consent required by law is an agreement of will or a unilateral act, the

⁶ Manuel Cristian Firică, op. cit. p. XIII.

⁷ E., Pușcariu, *Note to civil decision no. 6648/1957 District Court Craiova*, L.P. no. 11/1958, p. 105

⁸ Art. 451 New Civil Code, defines adoption as: "legal operation by which they create filiation relationship between adopter and adoptee, as well as between adoptee and adopter's relatives". available at: http://www.dreptonline.ro/legislatie/codul_civil_republicat_2011_noul_cod_civil.php

⁹ Mariana, Ciocoiu, *Dreptul Familiei. Curs Universitar*, Ed. Sitech, Craiova, 2015, p.126

¹⁰ *Ibidem*, p. 8

idea of the agreement of will is, more or less, explicitly favoured. In the case of adoption, the manifestations of will do not aim to continue or terminate the legal relationships in the sense of common law, but to create a family relationship by evading the principle of the relativity effects of contracts.¹¹

As a legal relationship, adoption evokes the civil kinship created between the adopted and his descendants on one hand and the adoptive parent or parents and their natural relatives on the other hand.¹²

Regarded as a legal institution, adoption is the notion that brings together the judicial norms that regulate the conditions of adoption approval or termination.

Sociologically, family is characterized by people's union through marriage, parentage or kinship, by community of life and mutual interest.

In the legal sense, family designs a group of persons which have rights and obligations arising from marriage, kinship and adoption.

The analysis of social, legal and sociological factors emphasizes the role and importance of family, which is based on freely consented marriage between spouses, generates equal rights and duties of parents to ensure child's growth, education and professional training according to his/her abilities to the benefit of society.¹³

Constitution stipulates expressly the parents' rights regarding the education of the minor and emphasizes the unity that exists between family education and education in society.

In order to ensure the proper educational process inside the family, the state establishes legal rules and responsibilities for certain bodies.

Alongside the other family relationships, the ones resulting from adoption are part of the object of regulating the norms of family law.

Adoption involves cumulatively the manifestation of will of the people who will be directly affected by the effects of adoption, whether new rights and duties pursuant parentage and civil kinship will be generated, or the rights and obligations existing as attributes of parentage and natural kinship will be extinguished.

Adoption requires the consent of the adopter¹⁴ or adopters, the consent of the adopted child's¹⁵ natural parents (or guardian), the consent of the child over the age of 10 and an irrevocable court decision for the approval of adoption.

Assessment of the legal nature of adoption is justified by the supremacy of one or another of the structural elements: the act of will of people required by law or the decision of the court for approval of adoption .

11 For further information on the principle of contracts relativity effects, see: Manuel Cristian, Fircă, *cited work*, pp. 18-24.

12. A. Ionașcu, M.N.Costin, M.Mureșan, V.Ursa, *Filiația și ocrotirea minorilor*, Ed. Dacia, Cluj-Napoca, 1980, p. 89

13. Art. 29 pct.6, in Romania's Constitution states: "parents have the right to provide according to their convictions, the education of the minor children whose responsibility devolves on them"

14. Art.3, letter b) of Law no. 273/2004 the law on the legal status of adoption defines the term "adopter", as the person who wants to adopt.

15. Under article 3, letter a) of Law no. 273/2004 on the legal status of adoption, "adoptee" is the person who was or will be adopted.

16. Mariana Ciocoiu, *Adopția în dreptul românesc*, Ed. Sitech, Craiova, 2009, p.97

Regarding the first issue, the act of will of people required by law, several opinions were expressed and the most accepted in literature and practice was that adoption is a complex juridical act. Adoption involves expression of will of each of the persons indicated by law, completion of some procedures prior to approval and finally its approval by court, each phase representing a key element of adoption¹⁷.

In the case of adoption, the manifestation of will does not aim to establish or terminate the legal relations in the ordinary sense, but to create a family relationship evading the principle of relativity effects of the contract.¹⁸

The view embraced by the legislator on the arguments supporting the thesis of adoption as legal operation follows from the definition of adoption included in art. 1 of Law no. 273/2004 and art. 451 New Civil Code.

In essence they claim that the adoption shall come into being by the juxtaposition of unilateral manifestations of will.

The only element invariably present in all cases of adoption is the adopter's consent, the manifestation of will of the one who desires to adopt, to which there will be added, where applicable, other consents (of the natural parents or guardian of the adoptee who has reached the age of 10).

As regards the principles of adoption it is governed by the joint action of the four fundamental principles and is subject to their cumulative action¹⁹, namely:

- a. the child's interest;
- b. the need to ensure the child's upbringing in a family environment;
- c. continuity of the child's upbringing taking into account his/her ethnic, linguistic, religious and cultural origin;
- d. celerity in carrying out any acts relating to the adoption procedure;
- e. confidentiality of information.

a) The principle of the child's best interests is, in the context of adoption, an application of the principle proclaimed and detailed in art. 263 New Civil Code and requests imperatively that any action relating to child regardless of its author, be taken with to his/her best interests.

The assessment²⁰ of the child's best interests in terms of adoption is the responsibility of the tutorship court.

Adoption completed for any other purpose than the protection of the child's best interests is fictitious and therefore, null and void.

confirms the child's interest in the new family foundation²².

b) The principle of upbringing a child in a family environment

17. This view is reflected in Decision no. 2/1967 of the former Supreme Court, which shows that adoption presents the traits of "a complex act that produces consequences that come out of the sphere of administrative relations and is in the sphere of civil ones" – C.D. 1967, p.31.

18. On the issue of exceptions to the principle of relativity effects of the contract see: Manuel Cristian, Firiță, *cited work*, p. 130-133.

19. Gabriela Cristina Ferentiu, *Dreptul familiei. Practica judiciara conform noului Cod Civil. Jurisprudenta C.E.D.O.*, Editura Hamangiu, 2013, p. 107

20. Ciocoiu Mariana, *Op.cit.*, p.126

21. E. Florian, *Protecția drepturilor copilului*, ed.2, Editura C.H.Beck, București, p. 5-11 și p.157-159.

22. Marius, Floare, *Dreptul familiei-Caiet de seminar*, Editura Hamangiu 2013, p.108

The tutorship court can approve the adoption of the abandoned child going over the natural parents or guardian refusal to consent if it reckons that adoption is in the child's interest. The adoption of siblings by different individuals or families may be permitted only if it is in their best interest.

Promoting the child's best interest of the does not exclude the interest of the adopter or adoptive family in achieving adoption, conversely, the presence of this moral interest alike,

The ability to provide a family environment is related to the nature of adoption. From this point of view compared to other forms of child protection, establishing guardianship, placement, other social protection measures, adoption is the most complete and stable.²³

This principle can be a valuable guide in selecting adoptive parents. The ability of the prospective adoptive parent to ensure the child a proper family environment, moral guarantees and material conditions necessary for his/her growth, education and harmonious development, attested by the competent authority, are fundamental conditions of adoption.

Family environment involves a paternal couple, legally constituted by marriage. Romanian legislature does not prohibit adoption by an unmarried person and neither establishes explicitly any criterion to favour the adoptive spouses.

c) The principle of continuity of the child's upbringing taking into account his/her ethnic, linguistic, religious and cultural origin

This principle advocates continuity in the child's lifestyle to ensure safety in the new family²³. The principle is at the forefront of attention especially in activities aimed at identifying the most suitable adopter or adoptive families, but it can also support the principle of the child's best interest when the court decides in a matter of revocation of adoption and decides to dismiss the application and maintain adoption.²⁴

d) The principle of celerity in carrying out any acts relating to the adoption procedure.

This principle requires dynamism and efficiency in carrying out the adoption proceedings, likely to contribute to the effectiveness of the protection measure ordered.

e) The principle of confidentiality of information about adoption is clearly stated in art. 474 New Civil Code and refers to the manner in which the adopted person is informed about adoption and his/her natural family as well as the legal status of the information concerning adoption.

Conclusion

It can be concluded that the current social and legal elements endeavour to harmonize legislation with the provisions of the European Convention on children adoption, the consolidated version, and the provisions of the New Romanian Civil Code, in terms of its application.

Adoption is made in the best interests of the adoptee.

The European Convention in the matter of adopted child - ratified by Romania by Law no. 15/1993 - and the Convention on child protection and cooperation in the matter of international adoption - that Romania ratified by Law no. 84/1994 - stipulate that adoption is made in the best interest of the child. This involves harmonious development of the child and compliance with the fundamental rights that are acknowledged to him/her. The child's interests is the superior purpose of adoption, as a solemn act.

23. Ciocoiu, Mariana, Op. cit., 2009, p.64

24. Marius, Floare, Op. cit., p.108

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