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**Reflections on the Adoption Institution  
 and its Regulation in the New Civil Code**

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**Abstract:** The emergence of new Civil Code can only be the combined result of several factors, among them: the political will, legislative development and jurisprudence stability. The ideal would be that this legal monument would reflect the most viable legislative solution, the ideas of the most inspired doctrinaires and the most sustainable jurisprudential decisions, with comparative law elements. Not even the new Civil Code of Romania avoids these expectations. In our material law we have proposed under the current legislation, with historical inserts, jurisprudence solutions over the recent years, of the comparative law, submitting constructive criticism on the institution of adoption, with references to the legal language, used legislative technique and, where appropriate, making some suggestions of *lege ferenda*. At the same time we answer to the question of the harmonization of the Civil Code with those of the European and International Convention in adoption matters.

**Keywords:** minor; adoptability; consent; biological bonds; European law

## **1. General Considerations on Adoption and its Regulation in the New Civil Code**

Having its origin in a common practice in Rome, which allowed the *pater familias* to ensure the survival of domestic cult and to create, without legitimate offspring, the offspring that would bear his name and rank, the adoption was found in regulation of the Civil Code of Napoleon, then in all modern codes, including Romania in 1864. During the twentieth century, the adoption was amended by the Romanian legislator with subsequent laws, in the sense of openness to the widest possible interests of the child who is left without parental care, in terms of the trusts that the adopters must fulfil, the procedure split into two or three phases, some of administrative, other of judicial nature, and finally changes of legal effects that the adoption legal decision creates.

From the legal point of view, the adoptive filiation primarily responds to emotional reality, considering that the law establishes artificially a biological link between a child and a parent, during the life of those involved and it can be a real adventure for both human parties - adopted and the adopter or adopters. Secondly, the creation of parenthood with full effects leads to full integration of child adopted in the new family, making disappear all traces of biological parenthood. Thirdly, the adoption has met very diverse sociological realities: most often, husbands after a period of marriage and relatively young, often in the absence of natural descent, less often unmarried persons or in situations often met in practice where the husband wants to establish a filiation relationship with one or all children of the other spouse coming from a previous marriage or outside marriage. All these

realities of adoption must find its legal reflection in the legal regulation of the New Civil Code<sup>1</sup> (article 451-482, Chapter III, Title III, Book II "About Family").

In terms of structure, the regulation of adoption in the New Civil Code was made by the same well known patterns, even if for some titles it had renounced at the legal expressions in favour of a common language: general provisions, substantial conditions of adoption (the persons that can be adopted, the persons that can adopt, consent to adoption), the effects of adoption, termination of adoption (cases and effects).

Since the onset of the regulation, according to the definition of adoption taken from the legislation and established by the doctrine, referring to the principles governing the adoption, it is noted that the new legislator maintained only the first three principles under the current law –Law no 273/2004 regarding the legal status of adoption,<sup>2</sup> giving up unduly to the principles of information confidentiality of the child.

Also, a simple reading of the concerned provisions we note that for important issues related to adoption, the legislator uses the elegant formula "... there are established by the special law." This is the case of international adoption (article 453), the adoption procedure (article 454), the issuing the person certificate or adoptive family (article 461, paragraph 2), the conditions of expressing the consent (article 468), although in our view they should have been found in the Code, its mission being to provide a more complete regulation of the institutions in civil law.

## 2. The Analysis of the Material Law Depositions

### 2.1. In Terms of Substantial Conditions to Adoption

In the future regulation of the New Civil Code, it remained the substantial condition on the *adopted*, namely, the general rule that only after acquiring full legal capacity, a person may be adopted,<sup>3</sup> except the adoption of an adult, who was raised during the minor life by the prospective adopter. The legislator governs the impediments of adoption resulting from the quality of brothers and from the quality of spouses or former spouses (articles 457-458), implying that the impediments are actually the substantial conditions to adoption, thereby forgoing the traditional classification of the doctrine on adoption in terms of substantive requirements, obstacles and form conditions.<sup>4</sup>

We must highlight a special mention on the "plurality of adopted children, brothers and sisters", in the sense that the legislation is permissive, it is accepted that the brothers are adopted by different individuals or families, under the condition that this decision is in the best interests of children. As for us, we consider that the legislator should have kept as a rule that the siblings go together to the same adopter or family, and only as an exception, the separation of brothers by adoption.

As for the *adopter*, the legislator first imposes the requirement of full exercise capacity and state of health in a negative formulation, which is construed as an impediment to adoption,<sup>5</sup> secondly provided

<sup>1</sup> Adopted by Law no. 287/2009, published in the Official Monitor of Romania, Part I, no. 511 of July 24, 2009.

<sup>2</sup> Republished in the Official Monitor of Romania, Part I, no. 788 of 19 November 2009.

<sup>3</sup> Since the adoption has an educational purpose, in France, the adoption in principle is possible only on children below 15 years (art. 345 par. 1 Civil Code). This requirement is removed in two cases under article 345 paragraph 2 Civil Code: the child was received into the family for adoption before the age of 15 years or if it was adopted with the restricted effects before the age of 15, he may be adopted until the age of 20 years. In any event, the adoptee who has attained the age of 13 should express its own consent to adoption. See (Combo, 2008, p. 423)

<sup>4</sup> In connection to the existence of impediments to adoption in the current regulation, see (Bodoaşcă, 2007, p. 131-133)

<sup>5</sup> The alienated or mentally unstable have no full legal capacity, and those with serious mental illness cannot adopt."

the age difference conditions (minimum limit of age difference being now of 16 years, not 15, as provided in article 9 paragraph 2 of Law no. 273/2004) and, finally, the moral and material conditions that is proven by obtaining a certificate. It is not forgotten the condition of number of adopters, the general rule the adoption is open to a single person, and exceptionally to two people who have the status of spouses.<sup>1</sup> For the avoidance of speculation and for further strengthen the article 6 paragraph 1 of the European Convention on the Adoption of Children in Strasbourg, specifically in article 462, paragraph 3 it is provided the prohibition of adoption by two persons of the same sex.

*The Consent* to adoption was not neglected by the New Civil Code, the conditions for it are taken from the current special law (the list of persons who express their consent, freedom of consent, time, revocation of consent, refusal of parents to give their consent) with some novelties that we present below:

- the biological parents no longer consent the adoption, if their child was initially adopted by a single or married person, and then the adoptive husband wants also to achieve adoption (article 464, paragraph 3);
- it is maintained the court right of guardianship to approve an adoption, in the situation of the parents' or guardian's refusal to express consent to adoption, if it is judged by complex rules of evidence that such an attitude is unfair and contrary to the interests of the child. Unlike the legislation that we find in article 13 of Law no. 273/2004, the article 467 of the New Civil Code narrows the scope of children to which it will be applied this deposition, in the category of "abandoned children", that expression was not defined by the legislator. Perhaps the future special law will do so.

## **2.2. The Aspects of Adoption Effects**

The provisions of articles 50-53 of Law no. 274/2004 concerning the date of adoption, kinship, relations between the adopter and the adoptee, the adoptee name and surname, adoption record, the confidentiality of adoption, are almost completely taken over and almost the same wording by the New Civil Code (articles 469-474).

We find it interesting that the new legislator considered it necessary to insert the contents of the New Civil Code of article 10 paragraph 1 of the European Convention on the Adoption of Children, according to which the adoptee has the rights and obligations towards the adopted as any person towards his natural parents. In our opinion, this provision is unnecessary because it is known that parentage is bilateral and not a unilateral relation between parents and children, and considering that adoption imitates nature, it is natural that the adoptee should be granted all the rights and obligations as any child from its natural parent.

## **2.3. Termination of Adoption**

The new legislator added to the rightful dissolution of the adoption following the death of the adopter or adopters (at the date of the approval of the new adoption of the child became orphan) and the possibility of the dissolution of adoption at the request of the adopter and adoptee, if certain conditions are met, namely: the adoptee or adopter has made an attempt on his life or other ascendants or descendants of the other, on one hand, or adopter or adoptee has been guilty of a criminal offense

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<sup>1</sup> In the French Civil Code, for a adoption requested by the spouses, it is required that they have at least 2 years of marriage and should not be separated physically. This condition on the duration of marriage is removed if adopters have over 28 years.

punishable by deprivation of liberty of at least two years (as a criticism, the legislator should have mentioned intentional acts).

From our point of view it is a step forward towards the settlement of Law no. 273/2004 which did not give the opportunity of the adoption dissolution at the request of the adoptee or the adopter, and we consider that the reason for which the New Civil Code has provided the possibility of dissolution under these conditions it is found in everyday reality where there have been numerous criminal cases (murder offenses, attempted murder, grievous bodily harm, etc.), which had as its author, either the adoptee, and rarely the adopter.

The cancellation of adoption may only be required for vices of consent by the person whose consent has been undermined and within 6 months from the date of error discovery on adopted or deception from stopping violence, but no later than 2 years after the completion of adoption.

As to the consequences of termination of adoption, it comes back to the previous regulation of the Family Code that provided that for ground reasons the court may allow that the adoptee would keep the name acquired by adoption, if the adoption is dissolved.

### **3. Conclusions**

We would have expected that the adoption institution meet a more generous rule in the New Civil Code, the legislator fructifies more the proposals of *lege ferenda* sustained in law doctrine. It is missing from this regulation the concept of "adopted child" and the legal procedures by which a child acquires this quality, and any reference to the post-adoptive pursuit of the child and adoptive family.

We consider it appropriate to reintroduce the category of child *declared abandoned by court order*, as it was governed by the provisions of Law no. 47/2003, repealed by Law no. 273/2004. In principle, the court may declare the child abandoned that was received by Public Service of social assistance towards whom parents have expressed disinterest in a certain period of time expressly provided for (six months or a year). The disinterest of the parents proved by any evidence of the plaintiff is characterized by the absence of any emotional ties to parents with children.

We also consider it appropriate to introduce into our law, according to the French model and not only, the possibility of *birth under X*, the anonymous birth, in order to limit the births outside health institutions, thereby protecting the health and life of the mother, and the abandonment of new infants in poor conditions, which endanger their health and life. The future mother declares that she wants to give birth anonymously, which means that her identification data are not passed in the identity certificate stating the birth, the child acquiring the status of a child born under unknown parentage. Of course, the data will appear in the mother's medical records, under the protection of privacy, with the possibility of their disclosure, but only upon approval of a judge and only if the health of the children requires it, and with the consent of the concerned person (e.g. a transplant, a blood transfusion, a registry, etc.).

The legislator should provide a solution also to the situation when, after the referral to the court with the application for adoption, one of the adopters dies. Or, the death of one member occurred after the acceptance of the adoption application, without the legal decision it would still be reversed. In these situations, does the adoption become effective or not?

In another train of thoughts, the political will exclude Romania from the ambit of "children markets", which was reflected in the legislative background by accepting the international adoption only if the

adopter or one of the spouses in the adoptive family is related up until the third degree including the child (article 45 of Law no. 273/2004), it can be refined in a future regulation by multiplying the situations in which a Romanian citizen child can be adopted abroad, especially in the case of mixed marriages or Romanian citizens residing or staying abroad. From the date of suspension of international adoptions in Romania, the prohibit deposition could be defrauded by foreign citizens by resorting to a simple mechanism, namely: the foreigner citizen was making a fictional recognition of paternity of a child born outside marriage by a Romanian citizen woman, after the child was to be adopted abroad by the wife of the foreign citizen, who became the father by the acknowledgement inconsistent with reality.

Certainly, as announced in its content, the New Civil Code will be accompanied in its application by a special law in matters of adoption, which will cover the gaps, to fill in and provide solutions to the unregulated situations.

### **References**

- Courbe, Patrick (2008). *Droit de la famille/The Family Law*. 5<sup>th</sup> edition. Paris: Sirey.
- Bodoaşcă, Teodor (2007). *Studii de dreptul familiei/ Studies of Family Law*. Bucharest: CH Beck.
- The French Civil Code*