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SOCIO-LEGAL ASPECTS REGARDING THE INSTITUTION OF ADOPTION

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Abstract

In order to be able to analyze the institution of adoption, we must start from the definition of family. Although we live in an evolved society in which the priorities and accents are constantly changing, yet one of the most important things in our lives is still the family - the family in which we were born and raised, or the family we created. The notion of family can be viewed both from a sociological and legal point of view. In the sociological sense, the family, as a specific form of human community, designates the group of persons united by marriage, filiation or kinship, which are characterized by community of life, interests and mutual support. In this sense, it can be said that the family is a social reality through the community of life between spouses, parents and children, as well as other relatives. Within the family relations, moral, psychological, physiological and economic aspects appear between those who form the community of life and the interests. Family relationships have a character of complexity that we do not find in other categories of social relations. In the legal sense, the family designates the group of persons between whom there are rights and obligations, which arise from marriage, kinship, as well as from other relations assimilated to family relationships. In this sense, the family is a legal reality, by its regulation by law.

Keywords:

Postmodernity; adoption; procedures; effects; kinship.

JEL classification: K4.

I. Introduction

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Sociological theories concerning the family lead us to the texts of Emile Durkheim (who contributed to the influence of American sociology through the writings of Talcon Parsons, and others) or Claude Levi-Strauss, etc. Family theorizing determines us to underline the interferences and overlaps that take place between different disciplines such as: social psychology, sociology, demography, history or anthropology or law. The current tendencies regarding the family are due to the changes in the status of the woman in the society, the role that the family plays in the society, the evolution of technique and technology in the field of medicine [15], etc.

We live in a postmodern society in which changes are the order of the day: from legislation [7], to values, attitudes, behaviors [6], etc. Basically, we are forced to adapt to new paradigms and new forms of living in the world or being. This also applies in the private sphere of the individual or in the family sphere. The woman has progressed professionally and spiritually, and the third woman [9] has made her presence felt in today's society, since "from now on, there is a new model that imposes the feminine place and social destiny. The new model is characterized by its empowerment in relation to the traditional power exercised by men over the definitions and social imaginary meanings of women" [9]. The postmodern woman has entered an era of unpredictability, so her dilemmas revolve around questions such as: "how many children to have and when?", "How to reconcile one's professional life with that of a mother"? [9] etc. Nowadays, in the context of a postmodern society, we can no longer talk about the nuclear family, but also about the extended family, in the conditions of adult emigration abroad, of the dynamics of love or desire [4] or personal development [5], etc.

The concept of family can be defined from several perspectives: sociological, legal, psychological [3] etc. From a sociological perspective and taking into account the current society, the predictions regarding the family, as it is now known, are often pessimistic, given the accelerated pace, the fact that individuals change their home, work place, specialization, more times during their life [10], etc. At the same time, the family is a social construction that can also be approached from the perspective of social constructionism.

All the options of defining the family underline the legal connection between spouses, but they cannot summarize the nature of the rights and obligations between spouses because Romanian law uses the term marriage in two senses: as a legal act concluded by the consent of the future spouses and, as a legal status or situation that defines the relations between the two partners after the validaation of the marriage [1].

The period we are experiencing is characterized by agitation, stress, competition, work, selflessness, ambition, imbalance, disrespect, disregard of

traditions and norms of common sense at work, or on a worrying reality regarding the abandonment of children by single young mothers or very poor families. It is no wonder that taking or adopting has now become a family reunion solution for those who want a child.

What is certain is that, for the harmonious development of the personality , the child must grow up in a family environment, which will ensure a climate of understanding, protection. As far as possible, the child is raised and maintained in his or her family of origin. If this is not possible, a permanent family will be provided to the child, where he or she will be raised, trained and educated.

II. Short evolution of the institution of adoption

The first documentary attestations of adoption came from the time of Hammurabi's reign. There are documents that show that the adoption of two or three children was practiced, although the parents had legitimate successors. The adoption was made by an act concluded between the adoptive parents and the persons who had the authority over the child given for adoption.

Another important source of the adoption institution is the Law of the XII Tables which contains provisions regarding the organization of the family, together with those of private law, property and succession.

Adoption, according to Roman law, was an artificial way of creating parental power, which consisted in passing a family son (aliens iuris) from the power of a patater familias, under the power of another patater familias. The adoption was carried out through a technical process that consisted of two stages: in the first stage, the son was removed from the power of his pater familias by three sales and two successive debauches based on a provision of the Law of the XII Table which provided: *if the head of household sold his son three times, he could come out of his power;* and the second stage took place in front of the magistrate, where the adopter intervened, who declared that the child was in fact his, claiming him from the third buyer. He was silent as a defendant, and the magistrate ratified the statement in the fictional process called *in iure cessio.*

In order for an adoption to be valid, a number of substantive conditions were required: the adopter must be a patater familias; to have the consent of the adopter and that of his patater familias of the adoptee; a difference of at least 18 years of age between the adoptee and the adopter.

We note that the adoption had the effect that the adoptee became agnate with the agnates of the adopter and at the same time also a fictional brother-in-law, that is, the child became related to those who adopted him.

The civil kinship with the original family ceased, maintaining that of blood. The adoptee acquired the right of inheritance in the new family, but lost it to the family of origin.

Another form of adoption was the *abrogation*, which constituted a special case of adoption whereby one patater familias came under the power of another patater familias together with the whole family, that is, with all its persons and property. The repeal was considered an act of great importance, so it was done in front of the curated commission.

The adoption by Romans plays a very important role, because, in the absence of descendants, the perpetuation of the name is ensured through adoption. The Romans said that adoption imitates nature, the adoptee being considered a true son of the adopter. It was often called for adoption even by the emperors, with the purpose of the hereditary transmission of imperial dignity. The history, for example, present the case of Tiberiu de August and Nerone de Claudiu, who were adopted [11].

There was a period of time poor in sources of adoption and only in the nineteenth century, we find references to adoption in the French Civil Code from 1804. Adoption was admitted due to the insistence of Napoleon Bonaparte, who wished that, at least in this way, he could leave an heir to the throne of France.

The institution of adoption also existed in our old legislation. Thus, the Calimach Code called it "unfaithful", and the Caragea Code contained the following provision: "*Making sons of souls is but for the comfort of those who have no children.*" Our civil code from 1864, amended in 1906, allowed the adoption only of persons who had no legitimate children or descendants, and the adoptee remained in his natural family. By the amendment of 1949, the right to adopt was also granted to persons who had legitimate or adopted children or descendants, establishing that only minor children can be adopted.

Subsequently, by Decree no. 182/1951 was regulated an adoption that produced all the effects of a natural lineage, called filing [9]. The Decree no. 32/1954 regarding the implementation of the Family Code that repealed the regulations until then.

With the autonomy of family law, through its separation as a branch of civil law, the regulation of adoption was taken over by the Family Code. Thus, there was also a correlation between the norms regarding the adoption and those that regulated other institutions, such as the affiliation, the obligation of maintenance, the legal situation of the child, etc. The period that followed, both due to the legislative evolution and to the practical need to protect the adopted one, the institution was regulated by special

normative acts. Thus, Law no. 11/1990 regarding the approval of the adoption reviewed this area, transferring the attribution to approve the adoption from the competence of the tutelary authority to that of the court. This law was amended successively, and the series of legislative changes continued with the adoption of GEO no. 25/1997 regarding the legal regime of the adoption. The emergence of a new regulation was to be expected, since, by Law no. 15/1993 Romania acceded to the European Convention on the Adoption of Children, concluded in Strasbourg on April 24, 1967, assuming a series of obligations [12]. However, the normative configuration of international adoption has generated some dissatisfaction, especially from the European Union. Thus, in this context, through GEO no. 121/2001, for a period of 12 months from the date of entry into force of this ordinance, all the proceedings regarding the adoption of Romanian children by a person or family with foreign citizenship or by a person or family with Romanian citizenship and with his domicile or residence abroad, were suspended.

Attempts to amend the legislation in the field of adoption have been numerous, and at present we notice that, in order to harmonize the internal legislation with the regulations and the international and community practice in the field, a new legislative framework has been created that reflects the necessary reality. Thus, the Law no. 273/2004 regarding the legal regime of adoption, which entered into force on January 1, 2005. Methodological norms approved by H.G. no. 1435/2004. Law no. 273/2004 regarding the legal regime of the adoption was modified, completed and republished successively in 2009, 2011, 2012, 2016 [12].

III. The concept and purpose of adoption

According to art. 451 Civil Code: "*Adoption is the legal operation through which the filiation relationship between the adopter [14] and the adoptee [14] is created, as well as kinship between the adoptee and the adoptee's relatives.*"

From those presented, we extract the idea that the adoption has three meanings, respectively: legal operation, legal report and legal institution.

As a *legal operation*, the adoption designates the activity carried out by certain persons and institutions, which gives rise to the legal adoption report.

From the *legal aspect* point of view, the adoption consists of the connection that is created between the adopter and the adoptee, as well as the kinship between the adoptee and the relatives of the adopter.

As a *legal institution*, the adoption designates all the legal norms that regulate the conditions regarding its birth, effects and termination.

The purpose of the adoption is to ensure the protection of the non-patrimonial and patrimonial personal interests of the children without parental protection or, as the case may be, of proper protection.

IV. Adoption classifications

Depending on the effects it produced, the Family Code regulated two types of adoptions as follows:

1. adoption with restricted effects according to art. 67-78 characterized by the fact that family relations were established only between the adopter and the adoptee and his descendants, and the relations of filiation between the adoptee and his natural parents are not broken, but the heir and his descendants retain all the rights and obligations arising from the affiliation with the offspring' natural parents and their relatives. However, they were called upon to approve the marriage of the minor by the adoptive parents and not the natural parents, as the latter no longer have parental rights and duties [2].

b) adoption with all the effects of a natural affiliation (art. 79) - also called "adoption with full effect", characterized by:

- the kinship between the adopted and his descendants, on the one hand, and natural parents and their relatives, on the other hand, ceases;
- however, the impediment to marriage resulting from kinship is maintained;
- kinship relations are established between the adopted and his descendants, on the one hand, and the adopter and his relatives, on the other hand.

Currently, only the adoption with full effect is regulated by the new Civil Code.

2. in relation to the habitual residence of the adopter and the adoptee, the adoption may be:

- internal - situation in which both the adopter or the adoptive family and the adoptee have their habitual residence in Romania [14];
- international - defined by the law as "the adoption in which the adopter or the adoptive family and the child to be adopted have their habitual residence in different states and, after the adoption approval, the child will have the same habitual residence as that of the adopter" [14]. International adoption involves moving the child to the receiving state.

Law no. 273/2004 defines the notion of "ordinary residence" [14] differently, as it is about the adopter or the adopted one. At the same time,

the meaning of the concept is different from that established for Book V of the Civil Code [14]. Thus, for Romanian citizens adopters or Romanian citizens with dual or multiple citizenship, the usual residence in Romania involves the following conditions:

a) to have their domicile in Romania;

b) to have lived effectively and continuously on the Romanian territory during the last 12 months prior to the submission of the certification request. We note that, in order to establish the continuity, the temporary absences that do not exceed 3 months, from those determined by the stay in the territory of another state for the execution of work contracts imposed by carrying out activities carried out in the interest of the Romanian state, as well as as a result of the accomplishment of international obligations assumed by our country.

For the citizens of the Member States of the European Union or of the European Economic Area or foreigners, the habitual residence in Romania demands the right of permanent residence or, as the case may be, the right of permanent stay on the territory of Romania. In the case of the adopted one, it is considered, first of all, that the Romanian citizens have their habitual residence in Romania, residing in our country, who have lived effectively and continuously on the Romanian territory during the last 12 months prior to the application for approval. Also, the children of the citizens of the Member States of the European Union or of the European Economic Area or foreigners are in the same situation if they fulfill the following conditions:

- have the right of permanent residence or, as the case may be, the right of permanent residence in the territory of our country;
- have lived effectively and continuously on the Romanian territory during the last 12 months prior to the application for approval of adoption.

V. Legal nature and structure of adoption

The structure of the adoption is composed of a set of formalities, which fall into three categories of activities:

a) the legal acts of the persons requested to express their consent for the adoption;

b) the documents of the authorities empowered in the field and

c) approval of the adoption by the guardianship court.

Each category of acts is essential for the valid conclusion of an adoption.

All types of activities mentioned above have different legal natures. Thus, the legal acts by which certain persons indicated by the law express their consent to adoption are acts of family law; *the manifestations of will of the bodies with attributions in the field of adoption* are administrative acts; *the court decision to approve the adoption* is an act of civil procedural law. In this situation, the question arises as to the legal nature of the adoption. In this respect, in accordance with the normative provisions in force, we consider that *adoption is the legal operation through which filiation and kinship links are created, according to the law.*

VI. The principles of adoption

Unlike art. 1 of Law no. 273/2004, republished, with the subsequent modifications and completions, which lists the principles to be respected and the adoption procedure, art. 452 of the Civil Code provides that the adoption is cumulatively subject to the following principles:

1. the principle of the best interests of the child - by the principle that adoption is done only in the interest of the adoptee, it must be understood that the main purpose of the adoption (its higher purpose) is to provide the possibility for children who cannot enjoy parental care or, as the case may be , of proper protection, of being raised and educated in the family of the adopter. The satisfaction of the best interests of the child must be based on and within the limits of the legal provisions.

In the scientific literature it was noted that the interest of the adopter cannot be denied, consisting in the fulfillment of the feeling of being a parent, of sharing with the adoptee the family life and of having provided the necessary support if necessary.

2. the need to ensure the raising and education of the child in a family environment [14] - raising and educating the child with priority in the family environment is an important objective of all the actions undertaken for the purpose of its protection, in order to provide the affective and educational framework necessary for a normal development. The best interests of the child cannot be really and effectively protected, ignoring their need to develop in a family environment.

3. the continuity of the child's upbringing and education, taking into account the ethnic, linguistic, religious and cultural origin - the continuity of the child's upbringing and education is also an aspect that should be pursued in ensuring optimal conditions for the development of the personality of each child. It is the way to support the preservation of specific ones, which the ethnic, linguistic, religious and cultural origin gives

to each child, avoiding its unrooting and losing the marks that mark his personality [11].

4. speed in the fulfillment of any acts regarding the adoption procedure - apart from them, the adoption procedure is also governed by the following principles:

a) the principle of informing the child and taking into account his opinion in relation to his age and degree of maturity;

According to the provisions of art. 264 Civil Code, the obedience of the child who has reached the age of 10 years is mandatory in all administrative or judicial procedures concerning him, after his prior information about the consequences that his opinion can have if it is respected, as well as the consequences of any decision that concerns him. His opinions will be taken into account according to age and personal development.

b) the principle of guaranteeing confidentiality regarding the identification data of the adopter or, as the case may be, of the adoptive family, as well as regarding the identity of the natural parents. This principle also results from art. 20 of the European Convention on the Adoption of Children, concluded at Strasbourg on 24 April 1967.

Adoption shall cease by dissolution or as a result of its cancellation or finding of invalidity. Adoption is legally enforced if the adopter or adoptive spouses have died. Also, the adoption may be withdrawn if a protective measure required by law is required for the adoptee, if the adoption is in the best interests of the child. In this case, the adoption is considered to be carried out on the date of the definitive stay of the court decision ordering the protection measure, according to the law.

VII. Conclusions

Adoption, as a legal institution of family law, is a complex legal act which, based on the consent of the parties, is materialized by a court decision issued by the competent court which, taking into account the interests of the adoptee, between him and the adopter, outside the natural affiliation, creates relations that are identical with those between parents and children.

The consent of the following persons is required for the conclusion of an adoption:

a) the natural parents or, as the case may be, the guardian of the child whose natural parents are deceased, unknown, declared dead or missing or placed under prohibition, according to the law;

b) the adoptee who turned 10 years old;

c) the adopter or, as the case may be, the spouses of the adoptive family, when they adopt together;

d) the spouse of the adopter, unless the lack of discernment makes him unable to manifest his will.

The consent given in consideration of the promise or the effective obtaining of some benefits, regardless of their nature, is not valid.

In a society where constant changes take place at the level of the individual, the groups, the values, etc., we considered it appropriate to analyze the family institution and adoptions, on the one hand from the sociological perspective, and on the other from the legal perspective.

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