BASIC CONDITIONS OF ADOPTION REGARDING THE PERSON OF THE ADOPTED

Cristian Sorin STĂNCIULESCU

“Lucian Blaga” University of Sibiu, Romania
stanciulescu_cristian87@yahoo.com

Abstract: *At the level of society, adoption is a sensitive phenomenon, through the emotional burden it implies both on the adoptee and on the adoptive person or family. In domestic law, the legal regulation of adoption took different forms, all being influenced by the state of society at a certain moment and has evolved in close accordance with the international regulations in the field, having the form of the procedure regulated by the current normative framework, the legislator showing constant concern to create a legal framework that protects the rights and best interests of the child.*

Keywords: legal, civil code, legislation, adoption, procedure

1. Introduction

In domestic law, adoption is mainly regulated by two normative acts, namely the Civil Code and Law no. 273/2004 and is defined by the same above-mentioned law as being “the legal operation through which the filiation link between the adopter and the adoptee is created, as well as the kinship links between the adoptee and the adopter’s relatives”. At the same time by the ratification by the Romanian state of the “Revised European Convention on the Adoption of Children” and the adoption of the legislative measures necessary to ensure compliance of national legislation with that of the Convention, provided that it does not apply the provisions of the Convention according to which a child is permitted to be adopted by two persons of the opposite sex who have entered into a registered partnership, the very purpose of the adoption regime becomes governed by the protection of the rights and best interests of the child.

Given the complexity of the legal issue of adoption, an in-depth analysis of these

normative acts is necessary both for their correct interpretation and application, and for identifying possible legislative inaccuracies or gaps in terms of the basic conditions of adoption regarding the person of the adoptee. An analysis of the elements of compared law in terms of the basic conditions of the adoption of the adoptee is also needed in order to create a realistic framework for developments in the field of domestic law of other states [1].

The basic conditions of adoption, which concern in particular the person of the adoptee, relate mostly to the adoptee’s lack of capacity to exercise, the conditions concerning the child’s best interest in the adoption of siblings by the same adoptive person or family and the lack of brotherhood between the adoptee and adopter.

2. Basic conditions of adoption concerning the person of the adoptee in the national law

The fundamental condition of the adoption which equally concerns both the adoptee

and the adopter and is essential in the completion of any adoption procedure refers to the expression of consent to the adoption. The domestic legislator regulated the basic conditions of adoption, without distinguishing between domestic and international adoption. In the case of international adoption, the legislator has introduced other specific conditions. The basic conditions of adoption are those requirements which have a positive formula in the legal texts and prevent a negative one [2]. Adoption as an alternative form of protection is presented as a right of the child without parental protection or receiving inadequate protection from them. The assessment of the basic conditions is carried out throughout the adoption procedure, starting with the establishment of the adoption as finality of the individual child protection plan and ending with their approval by the court [3].

In the case of the adopted person, it is requested for the child who has reached the age of 10. The activities preceding the expression of consent by the child before the court, in the phase of the approval of the adoption, are carried out by the General Directorate of Social Assistance and Child Protection in whose territorial area the child resides and consist in informing, guiding and advising him/her on expressing an opinion on the adoption. Listening to the child's opinion during the procedure for approving the adoption contributes to shaping the court's belief in the best interests of the child. All these activities carried out by counselors, assistants and psychologists aim to ensure a smooth transition of the child in the adoptive family [4].

The second basic condition of the analyzed adoption refers to the lack of full exercise capacity of the adoptee. Law 273/2004 on the adoption procedure specifies that the adoptee must "not have reached the age of civil majority, or, as the case may be, not have acquired the full capacity to exercise". The child can be adopted until the full capacity to exercise is completed, i.e. until the moment when he can conclude civil

legal acts alone, this moment being determined by reaching the age of 18, age at which persons become adults, according to the domestic law. As an exception, the anticipated acquisition of the full capacity to exercise is also achieved through marriage by the person who has reached 16 years of age, thus the full capacity of exercise extinguishing the parental authority (Art. 484 C.civ). Though being a minor, he/she cannot be considered a child within the meaning of the provisions regarding the relations between parents and children [5].

However, in accordance with the law, the person who has acquired full capacity to exercise may also be adopted if he was raised when he was a minor by the person who wishes to adopt him/her. By "raising" is meant not only the provision of growing up, but the existence of more complex relationships between the adopter and the adopted, similar to those between natural parents and children. Raising the child must have been continuous and lasting, not occasional. This demonstrates the adopter's ability to ensure the adopted person's health, physical and mental development and a real concern for the protection and care of the adopted person [6].

This aspect is also encountered in the adoption procedure in France, where there is an obligation for the adoptee to have lived with the adopter for at least 6 months. In this case the adopter will address the court directly with an act on approving the adoption of the adult person, and the proof of raising the adult person while being a minor by the person wishing to adopt him/her can be made before the court with any means of evidence approved by law.

Another basic condition of adoption concerning the adoptable person refers to the adoption of siblings by the same adopter or adoptive family. The adoption procedure seeks, as far as possible, to entrust the brothers together for ensuring the best interests of each of the brothers. They maintain their natural kinship, develop and get education in a family environment.

However, there is an exception whereby they can be entrusted separately. It refers to their adoption by different persons or families, but respecting the principle of their best interests. Regarding the lack of quality of siblings between adoptee and adopter, it does not matter their age, sex if they come from marriage or out of wedlock. The condition also exists if such a kinship was created following the approval of the adoption [7]. This requirement is justified by the need to avoid creating civil relations incompatible with the natural ones between brothers. In the case of such an adoption, the natural kinship ceases and a civil kinship is born and thus the adoptive brother would become the father of his adopted brother. In the context in which this condition introduces a ban on second-degree collateral relatives, the literature has raised the issue of adoption among natural relatives. Specifically, it was concluded that the adoption of the child by his natural parent is strictly prohibited. Another basic condition of the adoption refers to the lack of quality of spouses between the adoptee and the adopter. The reason for this condition results from the fact that a person cannot be husband and parent of the same person at the same time [8]. Also, in accordance with what is expressed in the doctrine, the justification of the prohibition is found in the incompatibility between the notion of family and the purpose of adoption. In this sense, we refer to the incompatibility between the quality of spouses and the connection created between them as a result of adoption. In the opinion of the legislator, it is immoral that between two persons who previously had a conjugal life together, specific relations between parent and son or daughter take place later.

3. Elements of compared law regarding the basic conditions of adoption concerning the adoptee

As regards the institution of adoption in the European Union, due to the different legal regulations in the Member States, regulations specifically addressing the

principles governing adoption, the major differences in the procedure and effects of adoption, the “Revised European Convention on the Adoption of Children” was adopted in 2008 in Strasbourg. In the first article, it stipulates the domain of application, specifying that “it concerns only the legal institution of adoption which creates a parentage link”. Based on the stated domain of application, the basic conditions of adoption concerning the person of the adoptee differ from one state to the other, the adoption procedure falling within the limits imposed by the Convention and agreed upon by the signatory states.

In the United Kingdom, the conditions that a child must meet in order to be adoptable refer to age, lack of full exercise capacity and his/her consent to adoption, unlike in France, where the condition of children in state care takes precedence (*l' enfant pupil d'état*), another fundamental condition being that of consent. The adoption of a person who is married or has been married or who is in a civil partnership is not allowed. Practically in the English legal system it is forbidden to adopt the person who has acquired full capacity.

In France, adoption has two forms: adoption with full effects and adoption with limited effects. Adoption requirements are regulated differently depending on the type of adoption. Regarding the adoption with full effects, considering the effects produced, the conditions are more restrictive both in terms of the adoptee and the adopter or adopters. It is necessary for the adoptee to be at most 15 years old and to have lived with the adopter for at least 6 months before submitting the adoption application. However, the court may derogate from the condition of the maximum age of the adoptee within two years from reaching the age of majority.

The adoption of the husband's child is allowed in three situations: if the child has established parentage only to the husband who is the natural parent; if the other parent is deprived of parental rights; in the

situation where the other parent is deceased and did not leave direct ascendants to be interested in raising the child. On the other hand, the age of the adoptee does not matter for the approval of the adoption with limited effects. It can be seen that for adoption with limited effects it can be approved in the case of the adult. For good reasons it is possible to adopt with limited effects the child who was previously adopted with full effects.

In Germany, as far as the person of the adoptee is concerned, the conditions for adoption are found in the German civil code, the adoption being regulated differently according to whether or not the adoptee has the capacity of exercise. It is possible to adopt the minor whose parents have expressed their consent after eight weeks from the birth of the child. We notice that there is no regulated age difference between the adopter and the adoptee. It is also possible to adopt the adult person, with the condition that between the adopter and the adopted person there have been in the past relations of the nature of natural parent with his child, relations that justify the adoption from a moral point of view. Even in the German legal system there is no upper age limit until which the adult can be adopted, the adoption being allowed at any age.

Regarding the consent of the adoptee, it is required from the age of 10 in countries such as Romania, Estonia and Lithuania and up to the age of 15 in Luxembourg. Most EU Member States require the consent of the adopted child between the ages of 12 and 14, i.e. 18 Member States, with the specification that in Finland the

approval of the adoption cannot be made against the will of a child under 12 years of age (even if this is the age at which consent is required), if this is considered sufficiently mature. The issue of the child's maturity in requesting consent for adoption is also encountered in Cyprus and Slovakia [9].

4. Conclusions

In its essence as a social phenomenon, adoption plays a very important role in the normal development of children, from all points of view: mental, physical, educational, etc., of future adults who will ensure the evolution of the society of which they are part. Thus, ensuring an emotional, family, normal environment for the healthy development of adoptable children has become a priority for the Romanian state and, implicitly for the legislator, who tries through the adoption procedure to create the legal framework for carrying out this process, taking into account the aspects mentioned above.

So, the simplification of the adoption process is sought to be achieved by the successive changes made to the adoption procedure, through the temporal adjustment of the steps followed by the adoptive person or family. Thus, the basic conditions applicable to the adopted person or to the adoptive person and family become well defined, clear and without room for interpretation. These are in line with the international treaties and conventions to which the Romanian state is a party and, through the text of the law, ensure the protection of the rights and best interests of the child.

References List

- [1] Bodoaşcă T., *Dreptul familiei*, IVth edition, Cluj Napoca, Riso Print Publishing House, 2020.
- [2] Bodoaşcă T., *Dreptul familiei. Curs universitar*, Bucharest, Universul Juridic Publishing House, 2015.
- [3] Avram M., *Drept civil. Familia.*, Bucharest, Hamangiu Publishing House, 2013.
- [4] Florian E., *Dreptul familiei*, IVth edition, Bucharest, C.H. Beck Publishing House, 2011.

- [5] Florian E., *Dreptul familiei. Căsătoria. Regimuri matrimoniale. Filiația*. Vth edition Bucharest, C.H. Beck Publishing House, 2015.
- [6] Ureche L. C., Moloman B. D., *Ghid privind procedura adopției*, Bucharest, Universul Juridic Publishing House, 2017.
- [7] Toncean Luieran I.R., *Adopția conform noilor reglementări interne ale României*, Bucharest, Universul Juridic Publishing House, 2017.
- [8] <http://andpdca.gov.ro/w/adopție/>, accessed on March, 31, 2021.
- [9] <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/058>, accessed on March, 31, 2021.