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# Legal Challenges of the Adoption Procedure: Current Views from Regulation and Practice

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**Abstract**
Adoption was initially seen as a compromise solution because of the principle of maintaining or reintegrating the underage child in the natural family was enshrined as an absolutist one, from which no derogations may be made. The child's best interest was reappreciated because of the situation in which the family became a true enemy because of the way the parents were managing parental duties. Negligence or worse, abusive behaviour on your own child, alcohol consumption have generated sometimes dramas so it was proposed to simplify the procedure of adoption and the possibility that the minor should be entrusted to adoption. However, adding a new stage in the proceedings, the repeal of the provisions relating to the substantive conditions of the special law relating to adoption-at the time of the enforcement of the new civil code, have made it difficult to establish this action as a target in the individualised plan of protection of the child. Very important, along with the republishing of the special normative act in the year 2012, there was a clear differentiation of the notion of internal adoption and international adoption. The right to information of the adopted child about his/her origins is today guaranteed due to the alignment of the provisions of the international regulations of the procedure in question. The study grants a special importance to the evolution of the number of cases finalized in practice, making a parallel between the old law and its form enforced today. If internal adoption now bears certain nuances in the interpretation of the statistical data, about international adoption it can be concluded that an uptrend is established (even if not at the level of expectations) after the existing blockage in the past in this problem.

**Keywords**: *principles of procedure of adoption, internal adoption, international adoption, adoption stages*

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Law no. 273/2004 sets out in detail the steps to be followed to complete the adoption procedure. A number of provisions of the special law no. 273/2004, republished in 2009 were expressly repealed by the new Civil Code, law no. 287/2009, amended by the law enforcement no. 71/2011. The following texts were repealed: article 1, articles 5-13, article 16, article 18 paragraph 2 sentence I, article 56 paragraphs 1-4, article 57, articles 59-63 and article 65.

The first article of the law contained the legal definition of adoption: "operation which creates the filiations relationship between the adoptee and the adopter, as well as the family ties between the adoptee and the adopter's relatives". Under this direction, "the removal of the respective text was probably intended as a change of nuance in that definition, but when the new Civil Code was enforced a legal vacuum in this regard appeared. A new text of article 1 was not introduced even by the new draft bill regarding the adoption procedure" (Dobre, 2011: 98). The new form of the adoption law has ignored the abrogation since two new articles 13 index 1 and 13 index 2 were introduced, although article 13 no longer existed. The lack of the legal texts that regulated the substantive conditions has invaded the of resolution of the adoption procedure because the magistrates were not clarified with respect to the legal criteria on which they could have decided the completion of this measure which was meant as an alternative to the system of protection of the underage child at risk.

The effervescence of that new legislation has raised new problems, mainly related to how to proceed in order to open and to complete an adoption file (Dobre, 2015: 287-296). Some of the reported contradictions that caused an administrative blockage were eliminated when the adoption law was republished in 2012 – a whole chapter dedicated to the substantive conditions article 6-15 of the new form of the special law being eloquent in this respect. The new form of the adoption law extends the concept of internal adoption because it will target the adopter and the adoptee with their usual residence in Romania. Usual residence means the effective domicile in the country of the Romanian citizens or of those with multiple nationalities, including the Romanian one on an uninterrupted period of at least one year before the date the application to initiate the adoption was filed. The reasoned discontinuity of this term for periods of up to three months will not lead to consider this condition as unfulfilled. Any citizen of a member state of the European Union who has the right to permanent residence in our country is assimilated to the Romanian citizens in this situation."Regarding the right to stay in a Member State other than home, and the opportunity arising here – establishing a residence for community citizens, secondary Community legislation began contain provisions regarding privileged treatment booked in relation to the majority of foreigners.Community regulations are centred on the issuing of a document called residence card" (Fuerea, 2006: 286).

The same logic is used to locate the habitual residence of the adoptee, whether a Romanian citizen or one of a member state of the European Union. In this case we discuss about domestic adoption because since Romania's accession to the European Communities the western border of the continent, where other EU member states are to be found practically no longer exists. The European Union is a super state that tends to be organized in Federation form. In fact, "in practice, there has recently been found the emergence of increasingly more cases in which Romanian citizens have started the internal adoption procedure in conditions in which they had a permanent residence in other states, preserving their residence in Romania too or re-establishing it in Romania (although they actually lived on the territory of a foreign state)" (Buzducea, Lazăr,

Bejenaru, Grigoraș, Panait, Popa, 2013: 7). These situations created a number of difficulties regarding their recognition in the foreign states. The historical evolution of the concept of adoption is interesting: "the old Romanian law was known as the «adoption» – article 236 et seq. Callimachi Code and under the Code Caragea – making the soul children is a gift for the salvation of those who do not have children, article 1 of Part IV, Chapter 5" (Avram, 2001: 95).

The most concise definition of the many doctrinal ones for the concept of adoption seems to be the following: "the measure that aims to ensure the protection of the patrimonial and non patrimonial interests of children without parental or an appropriate care (Bacaci, Dumitrache, Hăgeanu, 2012: 219). Since the adoption procedure includes four stages the nature of which is administrative or jurisdictional it will be interesting to see how the documents issued by the authorities involved in this matter can be further classified. The new conception of the adoption procedure establishes that the adopter and the adoptive family will have to meet with other legal requirements too, namely those related to moral probity and material guarantees necessary to perform the duties of parental care (the newly introduced article 12). The legal definition of evaluation to obtain the certificate needed to complete the adoption procedure can be found in the content of article 16 issued after the amendment: the parenting skills are identified, the achievement of moral guarantees and material conditions of the adoptive family are assessed and their preparation in order to knowingly assume the parent role. There are new statuses for all that are involved: the biological parents, the adopted child who changes the habitat and the adopters who will start a life specific to complete families."The stress factor is a life event that causes or has the potential to produce changes in the family social system" (McCubbin, Patterson, 1982: 7-37).

The starting point of this very difficult path is the request from the pretender to the quality of adopter. "If anyone can become a parent naturally, not everyone can aspire to a foster parent, but only those who meet certain requirements established by the law" (Gavrilescu, 2009: 23-53). That request will be answered by releasing or not the certificate within 120 days after its registration at the Social Work and Child Protection Service in the jurisdiction of residence of that person. Thus this institution appears to have a deciding role as it will release or not the requested certificate and will issue a decision in this regard.

The criteria to be considered when evaluating the candidates for adoption are primarily psycho-social (article 16, paragraph 3 of the framework law) and they involve the undergoing of an administrative circuit which can sometimes be interpreted subjectively by a public specialized organization – The Social Work and Child Protection Service. If the report concludes that the conditions are fulfilled, a certificate which will be valid for one year will be issued. The expiry of the certificate may be extended by the law in the event that there is already a case before the court which seeks custody for adoption. The extension will run until the completion of the whole procedure of adoption. It assimilates this exception to that when the adopter has already been entrusted one or more children for adoption. If the report has a positive result a provision will be issued by the director of the competent authority that will grant the certificate. Otherwise, if the result is negative, it may appeal against the records in the report within five days of the notification of that response. Failure to exercise this right to reform the report will lead to finalizing the report which anticipated the solution and the decision not to issue the certificate.

The state administration body with responsibilities in the field, the Romanian Office for Adoptions will resolve any complaints so that those files will be submitted to

that forum. Interestingly, although the content of the files are censored when submitted to the Social Work and Child Protection Services, the Romanian Adoptions Office does not issue a jurisdictional decision, as their opinion on the objection raised cannot be taken into account by the direction that had initially developed the report. It is therefore unquestionably clear that the role of the above mentioned central authority is consultative. In this respect one could argue with article 21 (example: the former article 19 sentence 5 newly introduced with the modification of the adoption law in 2011) which states: "The Direction may decide (after the announcement of the result by the Romanian Office for Adoptions) upon the maintaining of the proposal passed in the report referred to by article 18, paragraph 1 and the issue of the provision with respect to the not issuing of the certificate". However article 20, paragraph 2 of the law includes the following wording: "if the Office considers the appeal to be well founded, it issues the following recommendations and proposals for the direction". The occurrence of a case that would establish the adoption as a measure - purpose of the plan of the child's protection would have no substance unless there is a database of the families who have obtained the certificate for adoption. The matching phase (recently created by the amendment to the special law in 2011) would appear absolutely unjustified in the regulation economy if we refer to the fact that the custody stage for adoption was meant to check how the adoptee and the adoptive family manage to build specific family connections.

The distinct role of the Romanian Office for Adoptions during the matching stage shows, however, the importance of their work on the information mediation between the specialized departments – that from the adopter's home and from the adoptee's home respectively (article 36-39 from the special law in the updated form). Access to data on the identity of the adopter, the adoptee and the original family of the adoptee are limited under the "principle of confidentiality guarantee, so the court will send invitations to those involved in the procedure without mentioning the existence of the file" (Irinescu, 2009: 50). Never does the official website of the Ministry of Justice (www.just.ro/) mention the lack of any information linked to the cases involving the adoption. The principle of celerity in the transposition of solutions on the child without parental care can be best seen in the current form of the law. This principle is sharper with "the establishment of the Romanian Office for Adoptions as a specialized institution of central public administration, with legal personality, which coordinates and oversees adoption and achieves international cooperation in the adoption field" (Emese, 2010: 551).

If until now a part of the administrative board has been brought into attention (the specialized service and the Romanian Office for Adoptions) there also must be formed an image related to the competence granted to the judgment courts as a result of these changes. Although it seems a formal, simple one, the role of the magistrate in the adoption procedure is extremely important and apparently discretionary in some instances. Thus, the natural parents' consent cannot be abusive as the competent court may censor the indifferent or abusive attitude of the natural parents when the child's best interests require this: "The court can overrule the refusal of the natural parents or of the tutor, respectively to consent to the adoption of the child, if it is proved by any means that they improperly withhold their consent to adoption and the court considers that the adoption is in the best interests of the child, taking into account his/her opinion given according to the law, with the express argument of the sentence in this regard. The refusal to consent to the adoption when, although legally summoned, the natural parents or tutors repeatedly fail to be present at the time scheduled to express their consent may also be considered abusive." (article 8, paragraph 2 of the special law).

If the adoption was considered a safety valve for extreme situations in which the special protection measures did not fulfil their purpose, the regulatory changes brought the conclusion that family reintegration should not be exacerbated as principle as long as the family members show notorious lack of interest. However, even if "parents are deprived of parental rights or sanction with denial of parental rights werw imposed they keep the right to consent to adoption of the child" ( Lupașcu, 2004: 2010). Regarding the adoptive parent consent "will be subject to the same legal treatment to that of natural parent" (Bodoașcă, 2009: 46).

As such, article 26 of the new wording states that the individualized protection plan, as governed by the law no. 272/2004 on the protection and promotion of children's rights, as amended, ends with the internal adoption in three case. In the first case it has been a year since the special protective measure was instituted and the the child's natural parents and relatives up to the fourth degree cannot be found or do not cooperate with the authorities to integrate or to reintegrate the child in the family. In the second situation, after the institution of the special protective measure the child's parents and relatives up to the fourth grade who could be found declare in writing that they do not want to deal with the child's education and care and within sixty days have not withdrawn this statement. Last hypothesis means that the child was recorded of unknown parentage.

Weighing the danger that a child deprived of parental care may undergo when the negligence of the legal representatives becomes self-evident and that the principle of keeping the child as much as possible in the family milieu the optimal solution, namely adoption was reached. If the biological parents or the extended family do not pay at least that emotional support necessary for the harmonious development of the child (leaving aside other material, financial, conditions, etc.) the alternative of the adoptive "surrogate" family's assimilation becomes true. "Family plays a vital role in achieving the security, the emotional, the affiliation and self-esteem needs in early childhood. The more limited that family's resources, the more reduced the chances of its members to benefit from resources to assert their capacities" (Constantinescu, 2008: 208).

Keeping children in residential centres of special protection system does not confer the advantages of the interfamily networking. In order to increase the positioning of the natural family in those cases where adoption prevails as the solution certain limits to reach an agreement were set (giving up the parental rights by natural family) or in which to note the lack of diligence that a parent can usually have to his/her children (the lack of parental cooperation with the authorities or the impossibility to identify the legal representatives). Furthermore, "the purpose of establishing such a term is the need to provide a period of time sufficient to realize the importance of the consequences that the adoption produces to their future relations with the child" (Drăghici, 2013: 291). The national legislation is also consistent with the principles enacted also by the European Convention of Strasbourg where it is recommended that the terms during which the natural family can take radical decisions regarding their child (breaking the family ties following the consent given for adoption) should not be shorter than 6 weeks.

The last hypothesis described in the new article which seeks to shorten the formalism of the procedure (thus sanctioning the hiding of the natural parents' identity that abandoned the child) when the domestic adoption procedure for the minor whose parents are unknown is declared open it envisages that the data referring to the child had been collected and his/her full name had been settled administratively in this situation.

Noteworthy is the way in which the minor's consent is assessed to complete the adoption procedure. Certain texts of the law use the terms "the minor's opinion" and other

provisions use the term "the minor's consent". In the first case the court may interpret the views of the child in what it is best for him/her, while in the second case the views of the minor shall be decisive. In certain circumstances we can even talk about the exclusion of adoption as measure according to the child's point of view – reaching the age of fourteen (article 26, paragraph 2 of the law). This view is based on the European legal practice: case Pini, Bertani, Manera and Atripaldi against Romania. It concludes that once reached a certain age the child can consciously express his/her opinion on the future of the family environment, their decision being free and uncensored.

This decision belongs to the minor and this time it coincides with the superior interests of the child. Children who have been adopted will be informed that they have been subjected to such procedures and may also be supported to identify their course in life from the moment that they have been institutionalized and up to date. Disclosing the identity of the natural parents will be done only when the adopted child has full capacity to exercise.

Regarding the other pole, the natural parent – adoptee, the law is restrictive in that it allows only some general data to be collected and only if the adoptee or the adoptive family agree to provide such information (article 68, paragraph 2 of the republished law no. 273/2004). If the old form of the law specified that informing the child about his being adopted by the adoptive family will be done gradually, depending on the level of his understanding, now the information should be provided "since early ages with the support of the specialists from the department of adoptions and post adoptions" (article 68 of the republished law no. 273/2004). An interesting discussion occurs on the effects generated by the adoption. The article 519 of the new Civil Code are also applicable in the case of kinship resulting from adoption."The adoptee, as a natural child of the adopter, is entitled to maintenance first from the adopter, then from his /her relatives" (Drăghici, Duminică, 2014: 66).

Applying the legal theory of symmetry, once with the cancellation of an adoption will return to the previous situation (the adopters and the adoptee will not be relatives) and thus stopping its effects (the parental obligations). In parallel the blood kinship of the child who had been adopted and his birth family will be restored, with all the rights and the correlative obligations reactivation of these subjects. Only exceptional cases will apply to a special protection measure (eg. when parents are serving a prison sentence or are deprived of parental rights) as at this moment the principle of preserving or reintegrating the minor in the family appears primordial. A judicial final decision to approve the adoption of a minor is only legally the last act established in the procedure. The protective nature of the rules regarding minors in situations of risk is transferred in the adoption law. That rule according to which quarterly reports from the service where the child resides, outlining the family life of the adoptee must be completed for 2 years after the adoption procedure; this was transhipped from art. 44 in the oldest form (which was repealed) to article 81 of the newly introduced Chapter VIII, entitled "monitoring and post-adoption activities".

The report drawn by the delegated social workers of the Social Work and Child Protection Service at the end of the two years of monitoring is in fact the last act made in this procedure but its nature is an administrative one. This will be communicated to the central body in question. The content of the post adoption activities will be also done in private, not only by the public system subordinated to the County Councils. In this way free practice cabinets in social work or NGO's that will have partnerships with the Romanian Office for Adoptions will be opened. The competition that will appear between

these forms of exercising the job of the social worker and the employed staff in specialized departments does nothing else but to raise the standard of the services provided to the beneficiaries (in this context to the adopted children and the adopters).

Usually the social workers' ground actions do not always involve mandatory participation of the other "actors" of the instituted procedure and when involving such an act they do not require penalties for noncompliance. In the monitoring phase we are talking about if any risk to the finalization of the adoption is foreseen, the adopters will be required to be present in order to achieve the completeness of the provided above services. Failure to comply this invitation will implicitly lead to a punitive reaction of the person in charge of the case, consisting in extending the supervision over the term of two years established as a rule.

The main measures of adaptation found in the literature of child adoption are integrating family and maintaining its unity (Barth and Berry, 1988: 167) or there can be the interruption and dissolution of adoption (Triseliotis, 2002:193), positive results in terms of child development (Rosenthal, 1993: 21), marital satisfaction and wellbeing of the mother after adoption (Glidden, 2000: 187) and not the least in relation to the adoption of overall satisfaction (Smith-McKeever, 2006: 825-840).

The method used in the development of this practice part of the paper is represented by the synthetic review of the statistic data. The report from the National Authority for Child Protection in 2014 shows that a number of 4060 children were declared as adoptable. The possible beneficiaries of the adoption measure can be classified under five categories: adoptable that does not have an adoptable sister/brother (3054 people), 417 groups of two adoptable brothers (834 people), 38 groups of three adoptable brothers (114 people), 12 groups of four adoptable bothers (48 people), 2 groups of five adoptable brothers (10 people). The other subject of the judicial report that comes from the judicial operation of adoption – the adoptive family – provides a number of 1766 potentially beneficiaries as a result of obtaining the certificates asked by the legal dispositions. Correlating the two indices, there is an "application" of 3523 adoptions that could be initiated to cover the 5 classes of children adopted earlier and an "offer" of 1766 in which adoptions could attract families that had documented in this way. If a substantial proportion of the adoption procedure would have required a total of over 1750 completed adoption procedures, in reality adoption records in the National Register numerically reflect a volume much below expectations: 834 final decisions out of which 821 affirm domestic adoptions and 13 which find the jurisdictional circuit as closed for international adoption. Even if the reporting system does not encompass all the actions promoted with such an object as the balance for 2014 is to be updated only on the 30$^{th}$ of June, 2015, the data subjected to further interpretation are far from the results that should satisfy the efforts in this area.

An important category of the adoptable minors, according to the personalized protection plan are those who have a disability and were thus employed under special provisions regarding: a total of 811 cases or approximately 20% of all children who find themselves in situations described by the special law. Using the age criteria for the minors who may be involved in a domestic or international adoption procedure one can observe that a substantial percentage of over 52% of those who meet the legal requirements in this respect are included in the 7-13 years age segment followed by the category of 3-6 years at a rate of about 26%, the range 0-2 years which holds a percentage of 13.5% and at the end of the hierarchy the age group of 14-17 years with a rate of 7.5%. The principle changes in the law during 2011-2012 resulted in a significant decrease in the number of

cases in which the adoption procedure was completely carried out. If in 2010 a number of 1051 internal adoptions were materialized, the immediate involution of this type of adoption is invisible in 2011 because the decrease registered is only 1% (for 1041 of cases), followed by an alarming downward trend: 15% in 2012 (892 cases), 29% in 2013 (751 cases) and finally 22% in 2014 (821 cases).

The year 2000 is the top of internal adoptions with a number of 1710 cases if one analyzes the segment of the last 16 years of reporting, while 2005 is assimilated from the perspective of the enforcement period of the law no. 273/2004- as reporting in the top position of the upper hierarchy, with a total of 1136 cases. The arithmetic mean of the last 16 years in respect of domestic adoptions is about 1112 cases per year and if the calculation is done for the period between 2004- 2014 (after the enforcement of the law no. 273/2004) the arithmetic mean is about 982 cases a year. The statistics of 2010 appears slightly below the general line (about 5.5%: 1051 cases vs. 1112) determined by the arithmetic mean resulted in the first version (the study of the last reported 16 years) as compared with the arithmetic mean from the second version (strictly the reports occurred under the law no. 273/2004) appears slightly above the general line which was last calculated (about 6.5%: 1051 cases vs. 982). As related to the international adoption we should mention that the previously applicable law enactment to law no. 273/2004, O.U.G. no. 25/1997 raised much criticism at the time of the circumvent of the purpose of child protection. In some particular cases there were intermediaries who financially profited from foreign adopters mediating such a process (despite the limited circumstances in which minors were concerned), sometimes foreign adopters did not have a noble interest to provide a real home for the children at risk, but subsequently subjecting minors to seriously degrading work or using them in prostitution or in trafficking human organs. A number of cases which sought annulment of this type of adoptions did make stir at the time. The appearance of this scandal with international effects suspended all proceedings of this kind until the implementation of the law no. 273/2004 between 2001 and 2005. Moreover, the adoption of a Romanian child would be made under extremely restrictive conditions in the sense that "the adopter or one of the couple in the adoptive family living abroad is the child's grandfather who availed the opening of the internal adoption procedure" (article 39 in the initial form of law no. 273/2004). The adaptation to the new European requirements of the rules in this regard has expanded the area of the people who can acquire the status of adoption: a) the adopter or one spouse in the adoptive family is related to the fourth degree including to the child for whom the opening of the domestic adoption procedure was availed; b) the adopter or one of the spouses in the adoptive family is a Romanian citizen too; c) the adopter is the spouse of the natural parent of the child whose adoption is sought (article 52 of the updated special law). The changes from 2011 have allowed thawing this procedure with international elements, the statistical data for the years 2013 and 2014 when there have been a number of 7 and 13 cases of adoptions respectively standing testimony which constitute a real progress if we parallel it to the non-existence of such cases in 2006 -2012.

Today the world finds a decline in international adoptions (Selman, 2009). The literature has emerged both in terms of adopters' profile: most people who adopt (six from eight families) have no biological children, have tried unsuccessfully to have their children, are of an average age of 38-40 years, have high education levels and in terms of the adoptees' profile: children between 0-3 years without health problems, are the same ethnic group and have not been institutionalized (Buzducea, Lazarus, 2011: 330).The share of adoption casuistry in the total number of children in the social protection system

is of particular importance as this will indicate whether practically the adoption was reconsidered and its existing status – that of the "last resort" was removed.

In 2014 this system involved 58 703 children of which 17.653 were institutionalized in units of public welfare and 4075 respectively in private centres of the same kind. So adoptions are equivalent to only 1.4% of the general situations in which the minors are integrated into a specific social assistance system, ie 3.8% of those cases in which children have been the subject of institutionalization in a residential centre, no matter what form of organization it had (public or private).

It can be concluded that last minute regulations referring to adoption negatively influenced the expansion of this measure, although the intention was a contrary one: to eliminate the multitude of bureaucratic inconveniences and to promote the idea that adoption must be preferable to the child's institutionalization in state-run child's protection centres.

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