"Adoption's juridical protective condition in Latin American Civil Law"

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SUMMARY

SYNOPSIS

The origins of the adoption's institute dates remotely back to the ancient Roman law and beyond, and its roots have spread widely upon every juridical system derived from the latter. And despite the subtle modifications brought up by the modern Statute of the Child and Adolescent, the ancient formal structure of the institute has remained quite solid. Albeit adoption's main purpose is still the child's protection, the difficulties of accomplishment faced by the Judiciary concerning this objective, due to its amount of work caused by the society's huge demand on general legal issues, continue to jeopardize the process of adoption of a great number of children who remain forsaken in social shelters. In Latin American countries such as Brazil, Argentina, Venezuela, Peru, Paraguay, etc., the legislation, in general, has yielded significant improvements on children and adolescent's behalf in terms of adoption. That's what has been done in Paraguay, where adoption can only be authorized under specific terms and predeterminations. In conclusion, the *régime* which divides adoption in two different branches ('simple' and 'complete') tends to be abandoned by countries that deal with a huge social demand concerning adoption — South American countries such as Brazil, even with the improvements achieved by both the recent brazilian civil code of 2002 (Federal Law 10.406/02) and the *lex speciallis* (Statute of Child and Adolescent - Federal Law 8.069/90) — the 'new' institute of adoption is remarkably insufficient as a system that claims protection for the endangered and forsaken children and adolescents.

Key-words: minor, child, adolescent, Family law.

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1. The various changes observed in the use of the juridical institute of adoption

Adoption is a juridical institute that has been largely accepted in every juridical system that has derived from roman tradition and even before that, as an important institute of more than a thousand years, having been practiced all around the world through countless ages. It's well said that its main purposes have changed from the beginning of its use to our present days, especially because by the time of its appearance as an institute, adoption used to take place regarding exclusively social necessities, being the only institute of protection for homeless children. According to remarkable teachings, in primitive societies adoption had the scope of guaranteeing the transmission of the name, the perpetuity of the family and also the continuity of the domestic cults as main purpose[2]. And amongst the measures taken to provide the so called substitutive home were the simple adoption and the complete adoption. Both of them are now expelled from the brazilian juridical system. Thus, the civil adoption and the statutory adoption could perfectly take place, the former concerning people who have reached the age of majority, and the latter concerning incapable persons, both carrying different consequences, especially regarding succession issues. However, the progressive facilitation of adoption by the brazilian government – which concedes subsidies for those who don't have the proper funds but still want to adopt – does not necessarily imply an accurate application of the institute, causing, in fact, problems of uncontrollable augmentation of the social demands, despite the Judiciary's efforts to solve them. Nowadays, there a countless number of children and adolescents living in public or private social shelters lacking the 'family spirit' which could help them build their own identity – belonging not in shelters or orphanages, but in the genuine protection of the family. A major relevant element, very commonly remembered by the Judiciary's assistance services, is the necessity of the child for a sort of emotional reference in its life (without which could persist traces of immaturity and meager psychological development in adult stages of human life).

2. The concepts of adoption as a substitutive for the natural or biological family and its historical references

CLOVIS BEVILÁQUA, one of the most remarkable juridical personalities of all time, responsible for idealizing the brazilian civil law's basis, teaches in his indelible lessons

[2] ANCEL, Marc. *L'Adoption, apud* ELIAS, Roberto João. *O direito do menor à família.* São Paulo: Faculdade de Direito da Universidade de São Paulo, 1988 (Tese de Doutorado). p. 119.

that adoption has always had the connotation of a unilateral juridical act[3], thus being the act by which someone would accept a stranger as his/her own son/daughter. Nevertheless the idea that considers adoption as a judicial replacement of a child into a substitutive family environment which matches better the natural one, SILVIO RODRIGUES states that adoption is the act by which the adopter fosters a stranger into his/her family as his own child[4]. On the other hand, according to ARNOLD WALD, adoption is a juridical fiction which creates civil kinship, being thus a bilateral juridical act that originates traces of parenthood and filiation among people for whom this sort of relation naturally exists[5]. ORLANDO GOMES defines it as a juridical act which establishes the link of filiation[6], let alone the natural aspect, consisting in a legal fiction which enables the appearance of the family tie in its first degree and, by judicial intervention, sets permanently the child or adolescent in the family's environment. According to WALTER MORAES, adoption means the juridical act which reformulates the family's *status*, turning it into a filiation relation by the extension of the paternal subjectivity[7] to someone else. Adoption itself cannot be systematically applied to each and every abandoned child or adolescent, though, especially because of the adopter's lack of interest in fostering someone who does not match the middle-class citizen's idealized characteristics. In the past, so to speak, the Antiquity, adoption had more of a political and religious than that of a familial trace. The primitive roman family, founded upon the ancestors' cult, wasn't altogether established uniquely by bonds of blood but also by the choosing of its members according to the *pater*'s will, with the purpose of the maintenance of the ancestors' cult. Given the predominance of the juridical aspect rather than the biological one, this conception used to make it less harder to admit the swapping of members amongst families in a way that the institute of adoption appeared as one of the means by which one could ascend to the civil family or even the *status* of roman citizen. Thus, beyond the quality of guaranteeing the transmission of the paternal power, adoption used to serve as well as to claim the right of citizenship or even a noble title.

3. Adoption in South America

The institute of adoption was introduced in the argentinian legislation by the Law 13.252/48 which reformed that country's Civil Code bringing into it the concept of simple

[3] BEVILÁQUA, Clóvis. *Direito da Família*. 2. ed. Recife: Ramiro M. Costa e Filhos – Ed., 1905. p. 473.
[4] RODRIGUES, Sílvio. *Direito Civil.* 27 ed. São Paulo: Saraiva, 2002, vol. 6, p.380.
[5] WALD, Arnoldo. *O novo Direito de Família*. 12. Ed. São Paulo:RT, 1999, p. 164.
[6] GOMES, Orlando. *Direito de família*. 3. Ed.Rio de Janeiro: Forense, 1991, p. 381.
[7] MORAES, Walter. *Adoção e verdade.* São Paulo: Saraiva, 1974, p.102.

adoption, an institute that had its own revocation as a valid possibility and also maintained the link between the adopted person and his/her own biological ties. Later, the Law 19.134 of July 30th, 1971 derogated the latter, introducing, by its turn, the system of the complete adoption. Still valid in our present days, through its first 13 articles this Law brings up its General Dispositions; through articles 14 to 19, it deals with the matter of the complete adoption — just as well as the brazilian Civil Code of 1916[8], which is now obsolete; through articles 20 to 29, deals with the matter of the simple adoption. In this case, the adopter must judicially require the adoption of non-emancipated minors, being thus possible the spouse's children adoption. The adopter must also be 18 years older than the adopted person (article 1.912). In the case of simple adoption, the *status* of legitimate son/daughter is bestowed upon the adoptee, although it does not have the power to establish a parental tie between him/her and the adopter's family (article 20). The existence of illegitimate children is not an impediment for adoption and the adopter must be at least 35 years old, unless the spouses have already been married for 5 years. The adopter must have the minor under custody during a whole year to obtain the right to adopt, but only when the adopted is not a spouse's child or, likewise, when it's not an extramarital child of the adopter him/herself (articles 4th and 6th). Whether many minors are adopted by the same adopter, all of them have the same juridical value. Thus, the occurrence of the simple adoption rules out the possibility of the complete adoption in a way that the family must chose one or another. It is important to mention that the adoptee and the Ministry of Children Care and eventually the adopters — whether they have lost their parental rights over the child or in case they have trusted a specialized institution to take care of the adoptee, with manifest lack of interest to adopt during 1 year — are taken as parts in the process of adoption. Furthermore, in this case, the summoning of the adopters to court are obligatory only if the natural parents state their will to see the minor adopted by a public institution, given the public instruments and before the judicial authority; or, in the case of natural parents who have abandoned the minor (articles 10 and 11). In Venezuela, the matter of adoption is brought by the articles 246 to 260 of its national Civil Code[9] and according to the article 246 it is necessary for the adopter to be at least 40 years old, being the man 18 years older than the adoptee and the woman, 15 years. It is possible for a couple who does not have legitimate children to adopt, being both 30 years old, since they have been married for at least 6 years. Eventually, however, the judicial

[8] D'ANTONIO, Daniel Hugo. *Derecho de menores.* 3. ed. Buenos Aires: Editorial Astrea, 1986, p. 292.
[9] Cf. a combinação do Código Civil venezuelano com a sua Lei de Adoção de 1972. *In:* SAJÓN, Rafael. *Derecho de Menores*. Buenos Aires: Abeledo-Perrot, 1995, p. 451.

authority can permit adoption by a couple who has children (article 247, Civil Code). Extra-matrimonial children cannot be adopted by their natural parents, according to the article 249. If the adoptee is not yet 20 years old, the permission of the responsible adult is required. Being 15 years old, his/her own acquiescence is required (article 251). It is guaranteed to the adoptee all the rights related to his/her natural family, once adoption in that country does not produce parenthood ties between the adopter's family and the adoptee nor his/her family, except if established in the matrimonial terms (article 256, Civil Code). It does not exclude the parental rights of the adopter, but if by any reason they cease to happen, they return automatically to the natural parents. Being the adoptee a capable person (article 2.585) the relation of adoption can be disrupted by mutual agreement. Its revocation can be conceded if asked by the adoptee who presents fair motifs, and the adopter, in the case of ingratitude by the adoptee, according to the article 259, Civil Code. The incapable persons can impugn adoption in two years since the incapability's cessation (article 260). From this we can infer that, in Venezuela, adoption is scarcely mentioned by their Civil Code, being hard to differ simple from complete adoption, as it happens in more advanced legislations. We can observe, furthermore, that, on the opposite direction of those referred legislations, it does not allow adoption to the couple with children, contradicting the very purpose of the institute, which is protection. In Peru, the new Civil Code of 1984 takes but a brief consideration about adoption, in the articles 377 to 385. There is no differentiation into species of adoption. In some aspects, however, it is notable how similar it is to the brazilian institute of the complete adoption, which became obsolete with the advent of the Statute of the Child and Adolescent. The adoptee acquires the quality of son/daughter of his/her adopter, and stops belonging to his/her natural family (article 377). The article 380 states that adoption is irrevocable. However, the deposition of the article 385 permits the impugnment of adoption by the incapable adoptees in the year after the cessation of the incapability. In which case, the natural or sanguine filiation is restored. So, after all, adoption is not altogether irrevocable. In the article 378 are the adoption’s necessary conditions , such as the adopter's moral suitability; the spouse's acquiescence, when married the adopter; the acquiescence of the adoptee who is more than 10 years old; the accordance of the adoptee's natural parents, whether the former is still subdued to their parental rights or custody; the hearing of the Family Counsel (similar to the french system) being the adoptee an incapable person; the Judge's approval and, at last, the personal ratification of the foreigner adopter's will to adopt before the Judge. After the adoption, the Judge will relate to the Civil Registry Office to substitute the adoptee's birth registration that is archived just in case of future matrimonial

impediments (article 379). In the cases of adoption claimed by a tutor, there has take place the accountability concerning his administration. The Paraguay's Code of 1981, which deals with the matter of the minors, although it also divides the adoption system in two different branches (simple and complete), the latter is only destined to orphans or abandoned minors, or in case of loss of the parental rights by their parents (article 55)[10]. Thus, though the majority of the South American legislations admit the reformulation of adoption in terms of the parental rights' reflections, they did not take in consideration the main purpose of the institute, which is the abandoned minor's protection by giving him the opportunity to have a new family, according, ironically, to the Paraguay's legislation.

4. Adoption in the Brazilian Civil Code of 2002

In effect, the new brazilian Civil Code (Federal Law 10.406/02) did not bring up any substantial judicial modifications concerning the traditional system of minors' protection, nor a partial solution to the cases of children and adolescents without a family or abandoned in public shelters and institutions of the kind. Nonetheless, if any modifications were brought up, they are undoubtedly related to the adoption candidate's new *status familiae*, which barely change the fact that the majority of the abandoned minors still haven't got their chance with a new family. Thus, the institute, which is now dealt with in the articles 1.618 to 1.629 (and also in the Statute of the Child and Adolescent, articles 39 to 52), reduced the legal age of majority from 21 to 18 years old (Civil Code, the *caput* of the article 1.618, which partially revoked the SCA's *caput* of the article 42). It also came up with the possibility of the revocation of the adoption which depends either on the natural parents or the legal responsible's permission until the publication of the decision concerning the adoption (article 1.621, second paragraph); the same goes to the cases of the exposed child; unknown or missing parenthood; loss of the parental rights lacking the nomination of a tutor (article 1.624). It also turned the judicial action definitely an obligation to promote any sort of adoption, whatsoever. Therefore, the possibility of adoption of more than 18 years old people through simple public document is no longer accepted (article 1.628). Also on the effectiveness of the *res judicata* resultant from the action of adoption, the article 1628 provides that legal proceedings arising out of the sentence will begin from the publication of the decision, and its effects can go back in time until the date of the adopter's death whether it happened in the course of the action, allowing the completion of the process and its civil

[10] D'ANTONIO, Daniel Hugo., *op. cit.*, p. 308.

effects *inter partes* (art . 1628 CC). Finally, it also confirmed the rule of irrevocability of adoption, according to the requirements established in the first part of the heading of the new law's article 1.628.

5. Conclusions

The practical application of an institute such as the State's assistance to the family (§8º, article 226, Brazilian Constitution) should foment the creation of a special public register of the filiation conditions of the families, either domestic and foreign, and households settled in this country. This would provide the information needed to detect situations of abandoned children and adolescents, turning the process of adoption more effective satisfactory, avoiding thus the reckless miserableness lived by countless people who need a family. The juridical *régimes* of the civil and statutory adoption are still the best choices to accomplish such goals, once these are the methods which better imitate the natural family's environment. They also assure permanent and decisively a substitute family which fits the expectations of the juridical interested person, an aspect that has not been quite observed in some Latin American or even in European countries. In Brazil, it´s been a long time since the differences between the simple and complete adoption have disappeared due to the obsolete Civil Code of 1916's periodic actualizations. However, the subtle modifications brought up by the new Civil Code of 2002 did not make the institute of adoption substantially nor permanently perfect, in a way that the rules brought up by the Statute of the Child and Adolescent (Law 8.069/90, articles 39 to 52) still prevail as and interpretational pattern due to its *lex speciallis* condition. The forms of hospitalization of children and adolescents as a judicial or extrajudicial resolution of non-affiliation cases should be avoided; any forms of detention should be replaced by legal re-familiarization formulas, figuring the minor as the subject of detention only when extremely needed, for example, in cases of recalcitrant conduct infractions, duly certified, resulting the mentioned treatment in a patiently observed program focused on his re-adaptation to social life.

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