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THE JURIDICAL STATUS OF ADOPTION BY SAME-SEX COUPLES

Adoption represents – beyond doubt – one of the most actual and much disputed phenomena of the contemporary Law.

Seldom met in traditional societies, the institution of adoption has a spectacular development in almost all the countries, especially after the Second World War.

As a complex sociological and juridical phenomenon, adoption is on one hand a means of solving the child's family problems but on the other hand it can be a source of family problems, if the rights of those implied in adoption and, especially the fundamental rights and the child's interested are trespassed.

One can easily state that adoption "has won", in the sense that it has become an international phenomenon, which has called not only the national parliament's attention but also that of the international organisms.

Unfortunately, the noble purpose of the international adoption is often associated to mercantile interests. The juridical adoption terminology is doubled by a terminology with negative connotations, such as: "child trade", "demand", "offer", "exporting" and "importing" countries, "intermediaries" who facilitate the international children adoption.

The affirmation that adoption can be a means of child protection, this one missing his family environment in his native country, risks to be translated by the idea that the international adoption is a means for the families in developed countries to adopt children from the countries with economic and political problems.

Far from being, in practice, such a noble institution as it may seem at first look, adoption and, especially the international adoption, offers a complex scene.

The generosity and the altruism of the internal and international regulations in favor of adoption express, at the same time, great concern for the children's rights which are often trespassed, in the guise that the international adoption happens in the interest of the adopted.

Thus, the legislation concerning adoption cannot be but a series of rules determined on one side by the "sympathy" for this institution and on the other side by the society's "intolerance" against facts that distort adoption from its

noble purpose to offer the child a family that will educate and offer him adequate conditions for a harmonious development.

In keeping with family tradition, religious concepts, customs and even history, different national legislations reflect different attitudes towards adoption.

There are legislations that ignore or even forbid adoption and legislations that regulate and encourage this institution.

In the first category there are legislations from Vietnam, some countries from South America, that don't regulate adoption; this also happens in the Muslim countries where the Koran forbids adoption – except for Tunis.

What is remarkable is that most of the law systems regulate adoption as an institution which allows establishing family relationships between the adopted and the adopter and devote the principle according to which adoption is realized in the child's interest, as his protection measure.

The legislative activity in every country must inevitably consider other countries' experience, the way they have solved some problems of legislative politics. When the political isolation of the countries belongs to the past and when cooperation involves relationship at all levels (economic, political, cultural, etc), the compared law became an essential orientation element for the legislative activity in every country, certainly adapted to each of it, but also adapted to the common realities of more countries.[1]

Studying and using the comparative law is not an action against the principle of national suzerainty, because taking over other countries' legislative rules is itself a suzerainty act that the state does only if it considers they serve the interests of the national political legislation.

As shown in a reference book on comparative law, "The law history shows that law has always wanted to go beyond the national condition and achieve universality. The Roman law is the best example, as it has been applied to a great number of people, not only **rationae imperii** but also **imperio rationis,** due to its logic and equity valences.[2]

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[1] See, for the development, René David, Camille Jauffret – Spinosi, Les grands systèmes de droit contemporain, 11-e édition, Ed. Dlloz, Paris, 2002, pages 4 and the following ; Pierre Legrand, Dreptul comparat, Ed. Lumina Lex, Bucarest, 2001, pages 15 and the following

[2] Victor Dan Zlătescu, Compared private law, page 11

The Romanian authors Constanţa Călinoiu, Victor Duculescu and Georgeta Duculescu, in "Treaty of constitutional compared law" - fourth edition – prove that the compared law fulfills more functions, that is: to know the own law concerning the reference to other states' legislations: **the normative function**, to improve the national legislation and, the last but not the least, a scientific function. This involves a better knowledge and a more thorough investigation of the law science in order to identify some constants, some values that should be promoted by every legislation, to keep in touch with the world wide transformations, the new elements that the law science must know and promote"[1].

The authors mentioned above quote a Romanian famous compatriot who lived in France, Leontin- Jean Constatinesco: "Indeed, the comparison allows not only a conscious inner view of another juridical world, but also to take some distance from your own regime that appears differently. First of all, this allows discovering, in your own juridical rules new aspects, good and bad qualities that had been hidden. Comparison may bring into light that, for example, some elements that characterize some national juridical institutions have less importance than they are given by the national jurists; one may discover that a juridical institution considered essential, because it was giving a necessary answer to some permanent problems, is nothing but the result of some accident or happening. Comparison may reveal that in other juridical regimes there are simpler or closer institutions that may solve the same problem. It may show why and how some national institutions are old-fashioned and overfulfilled…[2] "

The adoption institution has a long history, and "borrowing" preventions from other legislations has always been a frequent practice.

In what concerns adoptions, the compared law authors revealed that many preventions from the Roman legislation had been inspired by the Greek legislation. According to some authors, the Law of the XII Tables itself has some elements from Ancient Greek (Solon from Athens' Laws)[3].

But, of course, only the juridical systems may decide the taking over of some comparative law elements. There are still a lot of differences between state

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[1] Constanţa Călinoiu, Victor Duculescu, Georgeta Duculescu, Drept constituţional comparat. Treaty, IVth edition, vol. I, Ed. Lumina Lex, Bucarest, 2007, pages 55-56
[2] Leontin-Jean Constantinesco, Tratat de Drept Comparat, vol. I, Introducere în dreptul comparat, Ed. All, Bucarest, 1997, pages 311-312
[3] Constantin Călinoiu, Victor Duculescu, Georgeta Duculescu, op. cit., vol. I, pag. 46

legislations, their juridical systems, so that the taking over of some "undesirable" elements from other legislations could make confusions and even dysfunctions in the judicial system. But beyond the essential appreciative national elements, one can clearly distinguish the main law principles, validated by practice and acknowledged in many international documents, as it is, for example in adoptions, the interest of the adopted.

The adoptions by same-sex couples or single persons having a homosexual orientation have known a gradual development.

First rejected, as the sexual minorities didn't have any legal protection, this issue has started to develop when homosexuals and lesbians have become more and more present in social life and have started to claim equal rights with all the others citizens. Consequently, legislation has evaluated, some states allowing adoption by same-sex couples, while others decline this right.

A close examination of the solutions known in the comparative law offers a variety of solutions.

In the United States of America, same-sex couples can adopt in the states of California, Massachusetts, New Jersey, New Mexico, New York, Ohio, Vermont and Wisconsin, and in the federal capital Washington DC. Florida is the only state where adoption by same-sex couples is completely forbidden. In Mississippi, Colorado and Utah, this kind of adoption is simply impossible, because only married couples can adopt, and marriage between same-sex persons is not recognized.

Another problem raised by the decision organisms and jurists in the USA was the possibility of same-sex couples to adopt a child[1]. As we already know, adoption by same-sex couples is possible in a few states, including the USA (California, Connecticut, Massachusetts, New Jersey, etc).

A tribunal in Oklahoma has recently declared as illegal some legislative provisions which forbade adoptions by same-sex couples. In Colorado, we are going to vote in favor of adoption by same-sex couples. Mention should be made that until now, in this state, homosexuals and lesbians had the right to adopt children, but not as couples recognized as such.

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[1] LGBT adoption, http://en.wikipedia.org. "Single parent adoption by lesbian, gay, and bisexual individuals is legal in every state except Florida. Additionally, Utah prohibits adoption by a person who is cohabiting in a relationship that is not a legally valid and binding marriage."

In Canada, adoption is within provincial/territorial jurisdiction. Adoption by same-sex couples is legal in every province and territory except for New Brunswick, Prince Edward, Island and Nunavut, although same-sex couples may marry all over the country. In Alberta, stepchild adoption is allowed. In Yukon, the law regarding adoption is ambiguous.

In Romania and the Republic of Moldavia adoption by same-sex couples is not allowed. However, worldwide, there are jurisdictions that allow this thing. Adoption by same-sex couples is legal in Andorra, Belgium, Iceland (since June 2006), the Netherlands, Great Britain, Sweden, South America and Spain. Not all these countries recognize marriage between same-sex persons; adoption can be made by same-sex couples which are not married, that are involved in a de facto relation or a civil partnership. In Denmark, France (since February 2006), Germany and Norway "stepchild-adoption" is permitted, so that the partner in a civil union can adopt the natural child of his or her partner. In some countries like the Republic of Ireland, individual persons, whether heterosexual or homosexual, cohabiting or single may apply for adoption.

An important document is the he Declaration of Montreal on Lesbian, Gay, Bisexual, and Transgender Human Rights (LGBT). This document identifies several areas in which action needs to be taken:

- freedom to engage in consensual same-sex sexual activity
- government action against crimes and hate, and support for those who plead for LGBT rights
- end of restrictions based on morality and discouraging the LGBT implication against AIDS
- right to asylum for those fleeing persecution based on sexual orientation or gender identity
- Consultative state for ILGA and other organizations for LGBT rights, to the UN Human Rights Council
- Cooperation and coordination in a worldwide information campaign, in developed and developing countries (called in the declaration "the global north" and the "global south")
- Marriage between same-sex persons and adoption right for the LGBT persons
- funding for sex reassignment surgery for the transgender or transsexual persons

Throughout the existence of the European Court of Human Rights, the issue of the adoption of a child by a homosexual person was largely debated in

the **Phillipe Freté versus the State of France** case which will be examined as follows.

The Phillipe Fretté versus the State of France case (request 36515/2002, court ruling of February 26 2002)

Regarding this matter, CEDO's Third Section decided with four votes in favor and three against, which having refused to agree with the adoption of a child by an unmarried homosexual does not represent the breaking of the European Convention on Human Rights, art. 14 and 8, given the fact the refusal had a legitimate purpose, the one of protecting the child's health and rights considered by the adoption procedure, thus the motivations the French Government presented were considered to be rational and unbiased.

The circumstances of the matter were the following: in October 1991, Phillipe Fretté requested a preliminary agreement in order to adopt a child. The Social Action Office in Paris rejected his request on May 3rd 1993, also rejecting the appeal on October 15 1993.

A social report from Mars 2nd 1993 stated that "Mr. Feretté has strong human and educational qualities. The question that follows is that of the uncertainty weather he should be or should not be given the right to adopt a child, taking into account his features: male, unmarried, homosexual".

On January 25 1995, The Administrative Court of Paris cancelled the decision through which Phillipe Fretté had been refused the agreement, yet this decision was itself annulled in October 1996 by the State Council. The decision of the State Council refers to the rejection of the agreement, which took notice of the fact that if "the solicitor's choice of life should be respected, the receiving conditions that he ought to have provided the child with could have presented important risks while bringing up this child". Following this refusal, Phillipe Fretté addressed to the European Court on Human Rights, complaining that the criticized decisions led to the refusal of the adoption, mainly on the grounds of his homosexuality, which stood as an arbitrary interference in his private and family life, thus stated in art. 8 of the Convention. The Court, through its Third Section decision released on February 26 2002, avoided a direct approach to the right of homosexuals to adopt children, and only stated that the refusal of the agreement had been based only on the solicitor's sexual orientation.

ECHR's decision gave way to the critical statement of Prof. Christine Courtin, statement that can be found in the "Curierul Judiciar" Magazine, no.6/ 2006.

Although the Strasbourg Court admitted that the case was treated differently regarding the right to adopt, it has however hesitated to affirm as to weather the difference was discriminating or not.

The decision stresses upon the fact that "the interest of the possible adopted children demands that no adopting parents' category should be excluded on other grounds than the ones referring to educational and human qualities". On one hand, concerning democratic societies, there is no agreement regarding the necessity of preventing homosexual unmarried men from adopting. The French Government stated that, on the contrary, even if the refusal of the adoption is mainly based on the solicitor's sexuality, there is no reason for one to see it as a discriminating matter, for the only interest is the one of the child that is to be adopted. The difference of treatment thus finds its reason in "the lack of an agreement regarding the right of a homosexual person to adopt a child". For the Court of Strasbourg, decisions of rejecting the adoption request aim at a legitimate purpose, for they seek to protect the rights and health of children that could undergo an adoption procedure. In this case, the unfavorable difference of treatment for the unmarried persons that chose to come out is or is not disproportional and unreasonable with regard to the aimed at purpose, which is the best interest of the child who claims a family profile that will best suit his growing up? French Judge Costa considers that the actions of the European judges are mainly based on precaution. The European Court on Human Rights admits that, given the right of an unmarried homosexual to adopt a child, each member state should be invested with the freedom of choice, considering the fact that this is a matter of dispute in the Council of Europe, in a moment that appears to be one of transition for the European Law. This is why, through the February 26 2002 decision, it considered that French national authorities "reasonably and legitimately found that the right to adopt the solicitor referred to, according to art. 343-1 of the Civil Code, was in fact limited by the interest of the children that are to be adopted, in spite of the legitimate desires of the solicitor and without bringing into discussion his personal choices and that the difference in treatment is not discriminating, as stated in art. 14 of the Convention"[1].

It should be noted that French judiciary procedure offers an array of solutions regarding the homosexual paternity. Therefore, in 1991, The Court of Pau, confronted with the situation of trusting the child to the mother, who lived

[1] "Curierul judiciar", year LIV New series, no. 6, June 2003

an ambiguous life and the outed father, which had a long term commitment with another man, considering the option and the interest of the child, who felt better while being with his father, gave custody to the father.

On the other hand, Rennes Court of Appeal considered that a father who has immoral homosexual relations is incompatible with the concept of parenthood. The First Section of French Supreme Court considered, back in 1998, that taking into account the father's sexuality, spending their holydays with him would be unsafe for the children's moral and mental health, thus refusing this right.

In 1994, the same Court granted a homosexual male the paternity of a child born by the insemination of a mother, she also being involved in a lesbian relationship.

It appears that, in the above case, the judge acknowledged the homosexuality concept, while also acknowledging the incapacity of the given person regarding parenthood, thus considering the child's interest and the risks these circumstances may bring by.

It should also be noted that, on February 24 2000, in a similar case, Besançon Administrative Court, having received the annulment request of the refusal of an adoption, stated that the reasons based on one hand on the absence of a father figure or symbol that was to contribute to harmoniously bringing up the child and on the other hand on the priority of the mother's girlfriend in the child's life, are not in any position to justify the refusal opposed to the lesbian solicitor. However, this decision was censored by Nancy Administrative Supreme Court through the decision of December 21 2001, confirmed by the European Court on Human Right from February 26 2002, by refusing an unmarried homosexual.

We would also like to stress upon that, during the presidential campaign in France in 2007, one of the candidates, François Bayrou came in favor of the adoption possibility for homosexual couples, while in many states of the world this kind of adoptions are already allowed (certain states of the United States, certain states of Canada, certain states of the Australian Federation, Spain, Holland and Sweden).

Regarding our country, this matter has not been considered as a legislative regulation. However, we believe that a future amendment to the 273/2004 Law regarding the juridical scheme of adoptions should consider the ones already issued by the European Court on Human Rights. After all, in our opinion, the essential in this matter, as it has been very well stressed upon by the

international case law, is not the sexual orientation of the ones willing to adopt, but "the best interest of the child" that is stipulated in the 237/ 2004 Law and that is a core element in this matter.