

# SEVERAL CONCEPTUAL ASPECTS REGARDING INTERNATIONAL ADOPTION

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## ABSTRACT

*Recently, international adoption has been in the spotlight of the legislator, which has established an increasingly favourable legal framework for approving this type of adoption, the specific procedures being improved, simplified and made more accessible. Therefore, we consider it appropriate to analyse in detail the notion of international adoption, as regulated in the national law, but also in international law, by reference to some jurisprudential references. In accordance with Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption, unlike internal adoption, international adoption involves the participation of foreign and national organizations, whose involvement is carefully and even restrictively regulated by the national legislator. The present study proposes a description of the organizations involved mainly in international adoption, with reference to the provisions of GEO no. 121/2021 on the establishment of measures at the level of the central public administration and for the amendment and completion of some normative acts, which provides for the restructuring of the National Authority for the Rights of Persons with Disabilities, Children and Adoptions.*

**KEYWORDS:** adoption, authorities involved in international adoption, international adoption, Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption

## 1. Introduction

The article deals with an approach of the institution of international adoption, by reporting in a first phase, to the regulation of the institution, both in the domestic and international normative acts, emphasizing the novelty elements introduced by the last legislative rectifications.

At the same time, we considered it relevant to present the content of the concept of international adoption, as it results from the legal regulations, establishing the notion of “habitual residence” being the most relevant in the evaluation of adoption as domestic or international. In this regard, we consider it appropriate to present a relevant

situation resulting from the jurisprudence of the courts.

Last but not least, our approach also involves an analysis of the organisations involved in the international adoption procedure. In the light of these data, we have formulated some conclusions that could lead to the clarification and deepening of the concept of international adoption.

## 2. General Aspects

Adoption has a long tradition in Romanian history and is established, even encouraged, in most modern states. Therefore, in order to achieve his best interests, the measure of protecting the

child without parental care sometimes goes beyond the borders of the states. In this regard, states have been constantly concerned with the development of standard rules to regulate the international adoption procedure, but above all, with ensuring real guarantees that adoptions are concluded in accordance with the best interests of the child and respecting their fundamental rights. It was the Civil Code of 1864 that emphasized for the first time this guiding principle when entrusting him for alternative protection (Nagy, 2021).

Romania has acceded to a number of conventions, declarations, pacts or treaties whose object is the adoption or protection of the child and his rights. Among these, the present study will take into account the European Convention on the Adoption of Children and Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption (hereinafter referred to as the Hague Convention).

In accordance with these conventions, the Romanian legislator adapted the domestic legislation, establishing a number of additions and amendments to the international adoption procedure. In domestic law, the adoption is regulated by Law no. 273/2004 on the adoption procedure (hereinafter referred to as Law no. 273/2004), as well as by Law no. 287/2009 on the Civil Code and Law no. 134/2010 on the Code of Civil Procedure.

In context, we mention that international adoption in Romania was a sensitive topic, on which have prevailed accusations of corruption and occult practices, this being the reason for the suspension of international adoptions, since 2001 for a period of almost four years (Mihaila, 2010). In the years that followed, the Romanian legislator has reviewed the legal regime of international adoption, and Law no. 273/2004, in its original form, mainly aimed that the protection of the child to be carried out in the country.

The latest legislative changes in the field of adoption have established an increasingly favourable legal framework for the approval of international adoptions, the specific procedures being improved and simplified. Law no. 268/2020 for the amendment and completion of Law no. 273/2004 regarding the adoption procedure, as well as for the abrogation of art. 5 para. (7) lit. ş) and cc) of the Government Emergency Ordinance no. 11/2014 on the adoption of reorganization measures at the level of the central public administration and for the modification and completion of some normative acts (hereinafter referred to as Law no. 268/2020) reduces some deadlines and, at the same time, facilitates the international adoption of children declared difficult to adopt.

### **3. Regulation of International Adoption**

According to art. 453 of the Civil Code, *“the conditions and the procedure for international adoption, as well as its effects on the child’s nationality are established by organic law”*. The provision refers to Law no. 273/2004, as well as to the Romanian Citizenship Law no. 21/1991.

The special regulations shall be corroborated by the regulations contained in Book VII of the Civil Code concerning the provisions of private international law. Art. 2607-2610 of the Civil Code regulates the law applicable to the substantive conditions, effects and nullity of the adoption, as well as the law applicable to its form. In the case of legal relations with elements of foreignness, due to factual or legal circumstances, they are so closely related to the legal system of a particular state that the law of that state must be applied and the possibility of applying the law of another state must be excluded (Bodoasca & Nagy, 2011).

Internationally, this method of adoption is governed by the Hague Convention concluded on 29 May 1993,

which establishes *ab initio* the subsidiary character of international adoption, being applicable to the child who could not be adopted by an adopter or adoptive family in his country. The principle is properly taken up by the Romanian legislator, international adoption being approved only if an adopter or an adoptive family with habitual residence in Romania could not be identified, within one year from the date of finality of the court decision admitting the request to open the adoption procedure.

In context, we mention that the latest regulations on adoption are intended to facilitate international adoption, procedure that has often been considered to be subject to very strict conditions (Moloman & Ureche, 2016). Therefore, the situation in which the adopter or one of the spouses of the adoptive family is a relative up to and including the fourth degree, is regulated. According to art. 1 point 27 of Law no. 268/2020, in this case it is no longer necessary to meet the one-year deadline, the adopter or the adoptive family are also having priority in matching with this child.

Moreover, in the context of the same regulation, art. 1 point 28 of Law no. 268/2020 introduces art. 60<sup>1</sup> in Law no. 273/2004, according to which the term of one year is not required for a child who turned 14 years old. Also, the situation is extrapolated for brothers who cannot be separated, if one of them has turned 14 years old. The provision was welcomed both in practice and in doctrine, this issue being raised several times in the context of the old legislation. These children, declared difficult to adopt, didn't have the chance to enjoy the protection of a family outside the borders of the country too.

#### **4. The Notion of International Adoption**

According to art. 2 lit. d) of Law no. 273/2004 is international that adoption "*in which the adopter or the adoptive family and the child to be adopted have*

*their habitual residence in different states, and, following the approval of the adoption, the child is to have the same habitual residence as the adopter*".

We notice that the cited provisions consider two ways of international adoption: on the one hand, the adoption of the child residing in Romania by the adopter or adoptive family residing abroad, and on the other hand, the adoption of the child residing abroad by the adopter or adoptive family residing in Romania. However, the doctrine showed that Law no. 273/2004 deals in detail with the international adoption of the child residing in Romania (Florian, 2016).

Although, in everyday speech, the notion of "international adoption" leads us to think of an adoption with extraneity elements, its legal definition, consistent with the regulations of the Hague Convention, considers only "*habitual residence*", as reference element in delimiting domestic and international adoption (Toncean Luieran, 2020). Therefore, in accordance with those found in the doctrine, what is relevant is the need to move the child from the territory of one state, on the territory of another (Bodoaşcă, 2015).

From the analysis of art. 3 and 4 of Law no. 273/2004 precisely results the content of the notion of "*habitual residence in Romania*" of the adopter or adoptive family, respectively of the child. Therefore, regarding the adopter or adoptive family, it is understood the situation of the Romanian citizens who have their residence in Romania, who have "*actually and continuously resided in Romania for the last 6 months prior to the submission of the application for attestation*", as well as "*citizens of the Member States of the European Union/European Economic Area or foreigners who have the right of permanent residence or, as the case, the right of permanent residence on the Romanian territory*".

In addition, the legislator makes some important clarifications regarding the continuity of the residence on the Romanian territory. In this regard, *“temporary absences that do not exceed 3 months are not considered interruptions and nor those determined by the residence on the territory of another state as a result of the existence of employment contracts imposed by carrying out certain activities made in the interest of the Romanian state, as well as a result of international obligations assumed by Romania”*.

As for the children, by habitual residence of the child in Romania is meant the situation of Romanian citizen children residing in Romania and of *“children of citizens of the Member States of the European Union/European Economic Area or foreigners who have the right of permanent residence or, as the case, the right of permanent residence on the Romanian territory and who have actually and continuously resided in Romania for the last 12 months prior to the introduction of the application for approval of adoption”*.

From the *per a contrario* interpretation of these provisions, we appreciate that the persons who do not fall within the limits imposed by art. 3 and 4 of Law no. 273/2004 will be subject to the international adoption procedure.

Returning to the criterion of habitual residence, in accordance with those expressed in the doctrine, it can be noticed that the adoption of a Romanian citizen child, by a foreign citizen, with his habitual residence also in Romania, is qualified and approved according to the internal adoption procedure. Consequently, if the adopter or the adoptee have different nationalities, but the habitual residence in Romania, the adoption is considered to be internal, contrary to its essence of private international law (Bodoaşcă, 2015; Toncean, 2020).

In other words, in accordance with the Hague Convention, adoption of the Romanian citizen child, with habitual

residence abroad, by foreign national adopters, with their habitual residence abroad, it is not qualified as an international adoption. The case law is relevant in this respect. In one case, it was assessed that in the situation where three girls, Romanian citizens, are adopted in Spain by a Spanish citizen, with residence in Spain, it does not have the characteristics of an international adoption. All this, since the establishment of their residence in Spain did not take place as a result of their relocation from Romania to Spain, with the purpose of adopting them in Spain (Bistrita Nasaud Court of Law, Civil Section, sentence no. 1455/2011).

#### **5. Organizations Mainly Involved in the International Adoption Procedure**

As international adoption involves moving the child to the state where he or she will live, in the course of the procedure, certain foreign and national organizations intervene, with attributions provided by the legislation. According to art. 6 of the Hague Convention, *“each contracting state shall designate a central authority responsible for carrying out its obligations under the Convention”*.

In the category of foreign organizations are included the competent central authority of the foreign state, part of the Hague Convention, or its accredited organizations, and in the case of states not party to the Hague Convention – the designated authority with responsibilities in international adoption or the organization accredited for that purpose (Lupascu & Craciunescu, 2012).

Article 2 lit. m) of Law no. 273/2004 states that the National Authority for the Rights of Persons with Disabilities, Children and Adoptions (ANDPDCA) is the Romanian central authority in international adoption. At the same time, according to GEO no. 121/2021, ANDPDCA is reorganized by partial division. As a result of the partial division,

ANDPDCA changes its name to Authority for the Protection of the Rights of the Child and Adoption, specialized body subordinated to the Ministry of Family, Youth and Equal Opportunities, with the preservation of the activity, staff and patrimony related to the programs in the field of child protection and adoption (art. 4 paragraph (4) of GEO no. 121/2021). Compared to the changes made, we propose of *lege ferenda* their proper operation in the content of Law no. 273/2004.

The Hague Convention allows signatory states to accredit private organizations that can be involved in the international adoption procedure. Once accredited, these organizations, their elements of identification, their functions and duties shall be transmitted to the Permanent Bureau of the Hague Conference. The list of central authorities with responsibilities in the field of international adoption can be found on the website of the Hague Convention.

These private organizations will not be able to operate in another state unless the competent authorities of the two states have authorized them (Article 12 of the Hague Convention). In this regard, ANDPDCA authorize accredited organizations, in accordance with the methodology provided by Government Decision no. 1441/2004 on the authorization of foreign private organizations to carry out activities in the field of international adoption. Periodically, on the official website of the Authority, is published the list of foreign private organizations authorized to cooperate in the international adoption procedure, these currently are from countries such as Belgium, Italy, Canada and the United States.

In Romania, according to the Methodological Norms for the application of Law no. 273/2004 an “*authorized private body*” is a “*Romanian legal entity, non-profit, legally constituted, authorized by ANDPDCA to provide services and carry out activities within the internal*

*adoption procedure*”. Consequently, at the national level, Romanian private organizations cannot be accredited to carry out activities within the international adoption procedure.

The international adoption procedure is carried out on the same rules as for internal adoption, until the stage of selection of the adopter or the adoptive family (Toncean, 2020). Therefore, in the case of international adoption too, the stage of elaboration of the individualized plan of child protection is also carried out by the General Directorate of Social Assistance and Child Protection within whose area is the child domiciled. At the same time, after completing the initial matching stages at the level of the National Register for Adoptions, the practical matching stage is carried out by the Adoption and Postadoption Department within the structure of the General Directorate where the child lives.

Finally, we emphasize that only ANDPDCA may notify the court with the request for approval of the international adoption. All these, unlike the internal adoption procedure, when the court may be notified, either by the adopter or the adoptive family, or by the General Directorate from their domicile. As pointed out in the doctrine, we believe that the removal of the adopter or adoptive family and the General Directorate from the possibility of notifying the court, it is intended to eliminate illegal practices that hovered over international adoption (Bodoaşcă, 2015). All these, in application of art. 8 of the Hague Convention, according to which “*the central authorities will take, either directly or with the assistance of public authorities, all appropriate measures to prevent undue material gains on the occasion of an adoption and to prevent any contrary practice to the objectives of the Convention*”.

Naturally, the international post-adoption monitoring stage is carried out by different bodies, as the adoption aims at moving the child abroad or in Romania. In Romania, the international adoption of the

child residing in foreign countries by the adopter or adoptive family residing in the country, will be monitored by the General Directorate from the adoptive parents' residence. Moreover, the international adoption of the child with usual residence in Romania by a person or family with usual residence abroad, will be supervised by ANDPDCA, who will contact the competent central authority in the other state. Anyway, in both situations, ANDPDCA has the obligation to supervise the monitoring by requesting, respectively by transmitting reports to the competent central authority from the other state.

## 6. Conclusions

International adoption involves moving the child to the state where he or she will live, following the consent of the adoption by the court of the Romanian state. This is the method of adoption regulated mainly by Law no. 273/2004, following that the adoption of the child residing abroad by the adopter or adoptive family to be governed, in addition, by the norms of private international law, respectively art. 2607-2610 of the Civil Code.

As we pointed out, only the "*habitual residence*" is relevant as a reference in the delimitation of internal and international

adoption. Therefore, there may be a situation of a child of Romanian citizenship, adopted by an adopter or an adoptive family with Romanian citizenship, to be subject to the rules on international adoption.

With regard to the organizations mainly involved in the conduct of the international adoption procedure, although the Hague Convention allows member states to accredit some private organizations to carry out activities in the context of international adoption, the Romanian legislator has chosen not to involve such bodies, ANDPDCA being the only competent in the conduct of the procedures.

GEO no. 121/2021 provides the restructuring of the National Authority for the Rights of Persons with Disabilities, Children and Adoptions, which, of *lege ferenda*, should be reflected throughout the adoption legislation.

The general conclusion that emerges from the research we have undertaken is that the Romanian legislator reanalyses the legal regime of international adoption, being in a permanent compatibility with international procedures and practices but continuing to exercise the utmost caution in ensuring and guaranteeing the principle of the best interests of the child.

## REFERENCES

Bistrița Năsăud Court of Law, civil section, sentence no. 1455/2011 in Frentiu, G.C. (2012). *Comentariile Codului civil. Familia*. Bucharest: Hamangiu, In Moloman, B.D., & Ureche, L. C. (2016). *Noul Cod civil. Cartea a II-a. Despre familie. art. 258-534. Comentarii, explicații și jurisprudență*. Bucharest: Universul Juridic.

Bodoașcă, T. (2015). *Dreptul familiei. Curs universitar*. Bucharest: Universul Juridic.

Bodoașcă, T., & Nagy, O.V. (2011). *Drept internațional privat*. Târgu Mureș: "Dimitrie Cantemir" University Publishing House.

Florian, E. (2016). *Dreptul familiei. Căsătoria. Regimuri matrimoniale. Filiația*. 5<sup>th</sup> Edition, Bucharest: C.H. Beck.

Lupașcu, D., & Crăciunescu, C.M. (2012). *Dreptul familiei*. 2<sup>nd</sup> Edition, amended and updated, Bucharest: Universul Juridic.

Mihăilă, O. (2010). *Adopția. Drept român și drept comparat*. Bucharest: Universul Juridic.

Moloman, B.D., & Ureche, L.C. (2016). *Noul Cod civil. Cartea a II-a. Despre familie. art. 258-534. Comentarii, explicații și jurisprudență*. Bucharest: Universul Juridic.

Nagy, O.V. (2021). *Analiza teoretică și practică a reglementărilor interne ale României în materia divorțului*. Bucharest: Universul Juridic.

Toncean-Luieran, I.R. (2020). *Adopția conform noilor reglementări interne ale României*. Bucharest: Universul Juridic.