

# **Josipa JERABEK: Adoption according to the General Civil Code**

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## **1. Introduction**

Nowadays, world and society are really concerned with human, especially with children rights and well-being. In accordance to that, modern concept of the best interests of a child is widely accepted and incorporated in legal institutes.<sup>1</sup> One of them is adoption, a legal institute that exists from the period of Ancient Rome. During the history it had different concepts and aims depending on politics, religious beliefs, socioeconomic customs, mindsets and attitudes in some society. Modern legislative regulations are tending to become more connected with a concept of adoptive family, but it was not always the case. One of examples is General Civil Code, one of the best-known and long-lasting European codifications of civil law that in first part contained provisions on adoption. Articles 179 – 186 determine form of adoption, active and passive legal capacity of contractual parties, legal consequences and dissolution of adoption. Process of adoption was regulated as non-litigation procedure by other legal source called "Izvanparbeni postupnik" (Law on non-litigation procedure of 1854). Compared to the present, purposes of adoption were completely different but in the end adoption has always resulted in creating a fictive relationship between an adopter and an adoptee.

## **2. Adoption as secure inheritance**

The institute of adoption historically originates from the Roman law period but after the fall of a Roman Empire, adoption has almost disappeared from most Western

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<sup>1</sup> Convention on the Rights of the Child. <https://www.unicef.org/child-rights-convention/convention-text> [Access on September 4, 2022].

European legal systems.<sup>2</sup> In its first beginnings, adoption used to put an adopted person under the parental power of the adopter. At that time, main purpose was a creation of a new, artificial bond among people and in that way to prevent a family extinction. Welfare and interests of adopted person were almost irrelevant. In the first Western European civil codes in 19<sup>th</sup> century that were inspired by Roman law, adoption was still serving only as a way for obtaining an heir for an individual or a family and it was only possible to adopt adult person.<sup>3</sup>

### **3. Concepts: simple adoption vs. full adoption**

As a legal institute, adoption had to follow the various types of changes and movements in society. That process resulted in knowing two main forms of adoption that were historically present: simple (incomplete) adoption and the full (complete, plenary) adoption. Simple adoption creates a relation between adopter and adoptee that differs from the natural parent-child relationship. In contrast, today is widely accepted the concept of full adoption that provides for adopted person the same position as for the biological child.<sup>4</sup> However, all political, demographical, economical changes in society marked concept of adoption and in that way influenced on the legislative regulation in different part of world as well.

### **4. Introducing adoption in the Austrian General Civil Code**

Austrian General civil code is a codification of a civil law that was gradually introduced and was expression of a bourgeois social order and feudal elements. It entered into

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<sup>2</sup> It was mostly because of fear for the heritage and the assumptions that an adopted person could bring "bad blood" in a family. Moreover, immanent was also the fear that adoption would prevent people from having their own heirs in which way there would be less people for the all other society needs. MIGNOT, Jean-François: *Child Adoption in Western Europe, 1900-2015. HAL (open archive)*, 2019, pp. 3–4.

<sup>3</sup> MIGNOT, Jean-Francois – DEPLEDGE, Roger: *Adoption in France and Italy: A Comparative History of Law and Practice (Nineteenth to Twenty-First Centuries). Population (English edition, 2002-)*, Vol. 70, No. 4, 2015, pp. 759–760; HUARD, Leo A.: *The Law of Adoption: Ancient and Modern. Vanderblit Law Review*, Vol. 9, No. 4, 1956, p. 743.

<sup>4</sup> GREBLER, Anne Marie: *Adoption in European Counties. Child Welfare*, Vol. 42, No. 10, 1963, p. 496.

force in Austria in 1812, but in Croatia, Hungary and Slavonia in 1853. In general, it was classified in three parts. The first one was concerning the law of persons (personal and family law), the second one concerned the right to property (real, hereditary and mandatory law), and the third one included common provisions regarding the rights of persons and rights to property (on establishing, modifying and canceling rights and obligations; statute of limitations and succession). It consisted of many feudal categories such as class, nobility, coat of arms, birthright, but also had strict patriarchal arrangement with paternal and husband authority that were largely emphasized in a field of a family law and in that way adoption as well. Adoption was regulated within articles 179-185 of the first part of the General Civil Code.<sup>5</sup>

#### **4.1. Form and procedure of adoption**

According to the General Civil Code, adoption was a contract on the basis of which male or a female person or a couple would take someone else's child as their own. Contract was legally relevant only if was written in a form of a public document. That specifically means it had to have a form of a notarial act or it had to be certified by a court of notary. Nonetheless, it had to be submitted to the government of a province for the confirmation and it had to be submitted to the competent tribunal of the adopters and the adopted child for the entry in judicial acts. Those elements were necessary for constitutive effect and validity of a contract.

Procedure of the entering into an adoptive contract was regulated as non - litigation procedure in articles: 258-262 in a law called: "Izvanparbeni postupnik" (Law on non-litigation procedure) from 9<sup>th</sup> August 1854. In general, the procedure of adoption was divided in two phases: the first one is marked as a relinquishment of the

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<sup>5</sup> ČEPULO, Dalibor: *Hrvatska pravna povijest u europskom kontekstu, Od srednjeg vijeka do suvremenog doba* [Croatian Legal History in European Context, From Middle Ages to Contemporary Period]. Zagreb, 2021, p. 156.; LACHNER, Višnja: *Institut posvojenja prema Općem građanskom zakoniku na hrvatsko – slavonskom području* [Institute of adoption according the General Civil Code on the Croatian – Slavonian area]. *Zbornik Pravnog fakulteta u Zagrebu*, Zagreb, Vol. 63, No. 5-6, 2013, pp. 1171–1172.

biological parents while the second one implies a process of adopting by the new parents.<sup>6</sup>

#### **4.2. Contractual parties**

As a contract, adoption was a result of expressed unanimous wills of contractual parties with their legal capacities. Art. 179 regulates that parties who were entering into contract were called adopters (stepmother and stepfather) and the adoptee (stepson or stepdaughter). Adopters had to fulfill prerequisites for having an active legal capacity and in that way were capable to become fictive parents of the adoptee and take care for him as for their own biological child. On the other hand, adoptee was adopted person and in that way had to fulfill legal prerequisites for coming under another parental power and care.<sup>7</sup>

#### **4.3. Active and passive legal capacity of parties**

Active legal capacity could be carried out by a person or a couple who was adopting. For them, in general, was necessary to have a legal capacity, to be at certain year of age and there had to be 18 years of difference between the age of the adopter and adoptee. First of all, adopter had to have a legal capacity in order to be able to unanimously express own will and enter into any kind of a contract, so into adoptive contract as well. Moreover, adopter had to be more over 50 years old. In a case that couple wanted to adopt, each person had to be over 50 years old. In that way, lawmaker aimed to prevent people to adopt while there was a possibility to have their natural children. However, provisions refereeing to ages were also present in a way that was trying to be in accordance with natural course of life. Namely, Art. 180 stipulates that age difference between adopters and adoptee had to be more than 18 years. Logic of

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<sup>6</sup> LACHNER, *op. cit.*, p. 1178.

<sup>7</sup> General Civil Code for All German Hereditary Provinces of the Austrian Monarchy. First part. Translated by MINIWARTER, Joseph Chevalier de, Vienna, 1865, pp. 42–43.

that provision is strongly connected with a Latin sentence "*Adoptio natura imitator*" and is relevant because it was not usual for people to have children before they were 18 years old.<sup>8</sup>

Related provisions are also the ones representing possible obstacles in the adopting process. Person could adopt only if they did not have some of professional or family characteristics. In that way, potential adopter could become the real one only if that was a person without legitimate children of their own and a person that have not solemnly vowed to remain unmarried.<sup>9</sup>

Passive legal capacity was carried out by an adoptee as a person who was subjected to the process of adoption. General Civil Code mostly does not contain any direct provisions about requirements that must or must not exist but these requirements could be easily seen from other provisions. It was possible to adopt a child or an adult person, but the necessity was that the difference between their ages is more than 18 years. Art. 181 regulates the question of a consent of the legitimate father for valid adoption. Adoptee must have a consent of his legitimate father, and it was irrelevant if an adoptee was a minor or an adult. Difference was in a situation when adoptee would not have a father. As people under 18 years did not have legal capacity, they could not enter into a contract alone. In a lack of father's consent, minor had to have a consent of a mother, guardian and a competent tribunal. Mentioned regulation presents obvious example for patriarchal arrangement in which father is head of family and his decision should not be questioned.<sup>10</sup>

There were no provisions that would prevent adopters from adopting more than one person and there were no provisions that were not allowing them to adopt one person after another. Immanent freedom of adoption was limited in a way that one person could not be adopted by more than one adopter or a couple. Adoptee could

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<sup>8</sup> DERENČIN, Marian: *Tumač k obćemu austrijskomu gradjanskomu zakoniku. Knjiga 1. [Commentary on the Austrian General Civil Code. Book 1].* Naklada Sveučilišne knjižare Albrechta i Fiedlera, Zagreb, 1880, pp. 542–543.

<sup>9</sup> General Civil Code for All German Hereditary Provinces of the Austrian Monarchy, *op. cit.*, p. 42.

<sup>10</sup> DERENČIN, *op. cit.*, pp. 542–543.

also be a person that is or is not married and it was not relevant if adoptee was already in some way related to his adopters.<sup>11</sup>

Particular situation was if biological parent(s) wanted to adopt their unlawful child. On the one side, those were children that were not born or conceived in pretended or valid marriage. On the other side, they could be born in that kind of a marriage but their parents were bound by a holy or a solemn vow to remain unmarried in a time of a conception. In that case, biological parents were not allowed to adopt their child. They had the possibility to legitimize that child and in that way to become legally bonded with him.<sup>12</sup>

#### **4.4. Purposes and effects of adoption**

The main purpose of the adoption was to have an offspring who will in that way preserve a family name and obtain a legal heirship. *De facto*, this was a way of extending a family that could be possible even when it comes to a person without own biological children.

Adoption as a part of a General Civil Code had private legal consequences. *Inter partes* effect of the contract, enabled adoption to effect only on the personal life of contractual parties. State was not directly affected by the adoption because it had not influence on citizenship or a national affiliation. Provisions regarding surname were *essentialia negoti* of adoptive contract and secured creation of a new legal relation. In that way, those provisions enabled adoptee that from the moment of the adoption, *ipso iure* has two family names. According to Art. 182 adoptee would retain a prior family name but would also receive a family name of his adopters. If he was adopted by a male adopter, adoptee would receive his family name but in a case the person was adopted by a female adopter, adoptee would get her maiden name. Different was with

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<sup>11</sup> LACHNER, *op. cit.*, p. 1175.

<sup>12</sup> RUŠNOV, Adolfo: *Tumač obćemu austrijskomu gradjanskomu zakoniku. Knjiga 1.* [Commentary on the Austrian General Civil Code. Book 1]. Tisak i naklada knjižare Lav. Hartmana (Kugli i Deutsch), Zagreb, 1893, p. 336.

a passing a nobility. In a case that adoptee had nobility, he or she would retain it but the sovereign's consent was a prerequisite for a passage of nobility from the adopter to adoptee.<sup>13</sup>

#### **4.5. New relationship between adopter and adoptee: rights and duties**

After perfection of a contract, parties were becoming in different ways connected with their new and previous family. Stepfather got the paternal authority over the adoptee while the biological father automatically lost it. Stepmother was in the same position as the biological mother of the adoptee. She was entitled to raise and take care of life and health of adoptee, enable him to have a decent living and take care of their physical and intellectual powers, etc.<sup>14</sup>

Adoption was an expression of legal fiction that was a substitute for natural relationship. After the moment of adoption, adoptee and his descendants were legally in the same position as they were adopter's biological children. According to the Art. 183 they had the same rights and duties toward their stepfather and/or stepmother and different regulation was permitted only if it would not infringe the rights of a third party. Given possibilities were mostly used in cases connected with a law of inheritance. Moreover, modifications of the provisions connected with a surname were also not allowed. Adoptees would not lose connection with previous family and in that way would preserve the same rights toward them as they have stayed under their parental power and care. They were still entitled to inheritance from their biological parents and could demand a support if they could not get any from adopters.<sup>15</sup>

When it comes to their rights, adoptees were in favorable position toward previous and new family but they were also bound by duties toward both of them. Duties toward biological parents and prescribed support order show that biological

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<sup>13</sup> RUŠNOV, *op. cit.*, p. 340.; LACHNER, *op. cit.*, pp. 1178–1182.

<sup>14</sup> DERENČIN, *op. cit.*, pp. 548–549.

<sup>15</sup> RUŠNOV, *op. cit.*, pp. 340–343.

relation was important even after the establishment of adoption. According to Art. 154 adoptees had an obligation of providing decent support for their impoverished biological parents. Moreover, in a case when biological parents and adopters would simultaneously be in some need that requires help and support, adoptee was firstly obliged to help his biological family and only after that, he was allowed to give support to his adopters.<sup>16</sup>

#### **4.6. Dissolution of adoption**

According to the Art. 185, parties had a possibility to terminate the contract at any time. The only prescribed prerequisite was a consent of an adoptee. If adoptee was an adult, he could give his own consent but there were situations when adoptee was still a minor. In that case, it was necessary to have a consent of his representative or a competent tribunal. However, dissolution indicated the end of a relation which existed between previous adopters and adoptee. After that moment, adoptee would *ipso iure* come under his biological fathers authority.<sup>17</sup>

#### **5. Adoption is not just secure inheritance**

In the meanwhile, public concern and awareness of the well-being of a children and adoptees started to rise and their interests started to become wider and stronger. Movements in late 19<sup>th</sup> century represent a start of protection against child work and abusive families.<sup>18</sup>

Furthermore, 20<sup>th</sup> century brought modern tendencies that aimed to provide a family for deprived children. The main goal was to facilitate adoption as a natural

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<sup>16</sup> DERENČIN, *op. cit.*, pp. 548–561.

<sup>17</sup> *Ibid.*, p. 552.

<sup>18</sup> MIGNOT, *op. cit.*, p. 4.; MIGNOT – DEPLEDGE, *op. cit.*, pp. 743., 760–761.



relationship which also supposed to strengthen public control over protection of an interests of a child and it has resulted as today's "adoptive family concept".<sup>19</sup>

## **6. Conclusion**

Institute of adoption historically was a reflection of different segments that were influencing society and legislation. General Civil Code as one of the best known European codification, promoted patriarchal arrangement and concept of simple adoption. It gradually introduced adoption as just a formalistic contract in which adopter(s) and adoptee could enter by a non-litigation procedure. In order to make that contract legally bounding, parties (or their legal representatives) were obliged to fulfill prerequisites prescribed for their legal capacities. Legislation did not have a role in securing the welfare of weaker contractual party, the only concern was that those prescribed requirements were approved. However, through that contract, parties would become part of new, fictional relation that primarily supposed to secure their assets. Adopters could secure their surname and inheritance while adoptees could secure their material life conditions. Finally, it was just one of many legal acts that did not aim to have an impact on emotional, sociological or family aspect as it has today.

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<sup>19</sup> GREBLER, *op. cit.*, pp. 495–496.