CAPACITY. APTITUDE AND ELIGIBILITY: A CHALLENGE FOR THE SPANISH LEGAL LEGISLATION

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Abstract

One of the sections of private Rights that has changed most in the past few years, with a marked increase in publication is the Right for protection of minors. This evolution has been especially relevant in adoption, making it essential for the public Administration to intervene in the process of constituting an adoptive relationship.

This intervention takes place at various times and in relation to different questions that can basically be summarised in three: the declaration of those who offer to adopt as being apt to do so, the declaration of adoptability of the child and the referral of the child to the selected adopters.

This work deals with the first question, the election and selection of the future adoptive parents. The responsibility of the public authorities in the election of those who are the future adopters is, in International Law and in Spanish Law, a relatively recent requirement, derived from one part of the Convention relating to the protection of children and the cooperation in matters of international adoption created in The Hague on May 29, 1993, although prior to that date, via Law 21/1987 the Spanish Law demanded the intervention by the Administration in the selection of adopters.

The determination of the aptitude of those who apply for adoption to finally be adoptive parents, requires in the Spanish judicial regulations, as occurs in the legal regulations around us, the existence of three conditions:

1.- To be considered capable conforming to the requirements of objective capacity foreseen in the Civil Code. The capacity to adopt whether one has it or not, is absolute on some cases or relative in relation to a particular minor and it is not necessary for anyone to declare this. The requisites foreseen in the civil Code that refer basically to the marital status, age, relationship that responds to the premise that the adoptive family is a family the same as a biological one and should also be so in its configuration.

2.- To be declared apt by the competent autonomous administration and based on the autonomous norm. The administration carries out a psycho-social study on the capable adopters to determine the degree of adequacy of their capacities, resources and adoption project to the reality of adoption. Not all the capable adopters are declared suitable. If the requisites for capacity are objective, those for suitability are not in every case and suppose an evaluation of determined subjective circumstances of those who apply to adopt.

3.- To be chosen. Of all those who apply to be adopters and who are considered capable and declared suitable, only those who adjust best to the needs of the particular children will be chosen to have the referral of the adoptable children. In many cases there are more adopters than adoptable children who are waiting for a family, and therefore the judicial systems establish criteria of preference or eligibility. On occasions the criteria is practically chronological with slight corrections, but fortunately in many other cases selection criteria are established. The establishment of these criteria does not imply discrimination contrary to the principle of equality consecrated in the constitution amongst potential adopters, but rather the legitimate election of those who, in the Administrations' opinion, best answer to the higher interests of the child.

And so, when the adoption is international, these three conditions or tests must be verified both according to Spanish Law and the Law of the country where the child comes from. Therefore the future adopters must be considered capable, suitable and eligible according to the norms and standards of the country of origin of their future child, but also must satisfy the requirements for capacity and suitability for the Spanish judicial system. This is what International Law calls "cumulo limitativo" for applicable norms: `the adoption can not be validly constituted if the future adopters do not fulfill the foreseen requirements both in their judicial legislation and that of the child. The use of this technique seeks to guarantee juridic security for the adoptive relationship thus created or the so called "international harmony of solutions" , which is to say the recognition of the full right of adoption as it is constituted in both countries. The practical verification that this "double guarantee" has been given is contemplated both in the Hague Convention of 1993 and in our internal legislation.

The work will explore two questions:

- The application and social acceptance of this new responsibility for the public administrations in a field that is as tricky and delicate as this one, together with the complex and territorial fragmentation for the definition of aptitude in Spain. The declaration of aptitude implies the evaluation of the family according to open criteria that are included in the autonomous legislation in different ways (although progressively more detailed) as the Civil Code demands, but does not define the aptitude. This progressive detail states another clear tendency: initially the accent was on objective elements of the family and little by little requirements were included that have to do with the capacities and personal attitudes of the future adopters. In this work the said autonomous norms and their differences are analysed centering fundamentally on the definition of criteria for aptitude and in some aspects of the procedure and the practical consequences of the same: time, cost, degree of "requirement". However, the complex definition of aptitude generates another problem derived from the different judicial interpretation in the cases of declarations of non-aptitude appealed against before the courts. The work analices over 40 recent sentences in provincial courts that denote a lack of homogeneous interpretation of the higher interest of the child in the approving the aptitude of the adopters for international adoption.

- The interiorisation of what in the cases of international adoption, in the election of the parents, two judicial and different cultural systems concur which cannot be ignored and should be mutually respected. The requisites for capacity, aptitude and eligibility foreseen in the judicial systems of the child, manifest a determined underlying family and social culture which although they are not necessarily shared in all their terms in the country where the adopters live, must unavoidably be respected, not only for anthropological and psychological reasons (respect and acceptance of the parents towards the culture of their child without intending to colonize it) but rather strictly judicial ones. The Convention of the UNO for Rights of Children of November 20, 1989 recalls in its article 20.3 on adoption that the ethnic, religious, cultural and linguistic origin of the child must be respected.