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[57] Rule 191, Rules of Practice in Patent Cases
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[59] Art. 4, Berne Convention
[60] *Id.* Art. 6, 1948 Brussels Revision
[61] Sec. 41a, RA 165
[62] Sec. 21 a, RA 166

THE LAW ON ADOPTION: A CRITICAL STUDY

Justice Pompeyo Diaz*

When I was asked to share with you some thoughts on the law - -I chose the subject on adoption, which is the most common example of what Sir Henry Maine called the development of the law by the use of fictions. This institution, if I may call it such, of the civil law seems to me to aptly illustrate how human law reflects and responds to man's deepest instincts and desires, among the most primal of which is that of procreation and the rearing of children. While all humanity shares that instinct, it is not given to all men to fulfill it in the way that Nature intended. And to the need of the man who is not able, or has had no opportunity, to beget and raise up children of his own, man by law found and provided the fulfillment. Thus adoption, by which the law creates the fiction of parenthood and family for those to whom the reality of these is denied by nature or circumstance, and invests the status thereby established with a body of enforceable rights and obligations.

Commentators tell us that the origins of adoption are lost in the mists of antiquity. And well they may be, given the fact that it is a response to a primal need which surely was felt even in the savage breasts of our remotest ancestors. We learn that it appears to have been practiced among such ancient peoples as the Egyptians, Babylonians, Assyrians, Greeks and even among the Hebrews. Indeed, what may be one of the earliest adoptions of which there is a record is that of the patriarch and lawgiver, Moses - - which is chronicled in Chapter 2 of Exodus - - whose Hebrew mother, to save him from drowning decreed by a royal edict, set him adrift in a small boat on the River Nile, where he was found and adopted by the daughter *of Pharoaoh.* That, surely was an adoption with the most momentous consequences, and one is tempted to wonder to what extent history, especially the history of Christianity, might have changed, had not the infant Moses been thus spared or , even if spared, had grown to manhood in different circumstances.

We are told also that while adoption is unknown to the common law - - it has been recognized by the civil law since its earliest days, even before the time

*Professor of Law, Ateneo College of Law

of Justinian, who codified the system and simplified its procedure, and from whose code modern legislation on adoption borrows many of its chief features.

If we retrace to the turn of the century the history of our own law on adoption we chance upon some interesting sidelights and gain, perhaps, added insights into the development of the law. The Civil Code of Spain, which was extended to the Philippines by royal decree towards the end of the Spanish regime, with changes introduced by the Code of Civil Procedure enacted in 1901, governed the practice of adoption in the substantive aspect at least, for a period of some 50 years until the effectivity of the new Civil Code (of the Philippines) in August 1950. In the procedural aspect, the essentially simple process prescribed in the Spanish Code has evolved into the full-dress proceedings we have today, with refinements and additions introduced, successively by the Code of Civil Procedure, the Rules of Court and the latest law, Presidential Decree No. 603. That Decree, known as The Youth and Child Welfare Code, was issued on December 10, 1974 and went into effect six months later. It draws heavily, but with significant changes and additions, from the present Civil Code and also amplifies the adoption procedure prescribed in the Rules of Court.

One of the more thought-provoking features of the Civil Code of Spain on adoption was the requirement that a prospective adoptor be more than 45 years old. This age requirement was abolished by the Code of Civil Procedure (according to Justice Willard), and none of what I would deem to be of similar spirit or purpose has since been prescribed, it now being sufficient, insofar as age is concerned, that a would-be-adopter be of age. While the soundness of a rule limiting adoption to persons of the relatively advanced age of above 45 is arguable, the probable reason behind it merits some consideration. The framers of the Spanish Civil Code evidently recognized that adoption involved adjustments, not only physical or material, but more importantly, emotional, which require of the adopter a deeper maturity than might naturally be expected from persons barely out of their youth. I am, for my part, inclined to similar views and while, undoubtedly, a minimum age requirement of 45 years goes a bit too far to be truly practical and generally acceptable in these days, perhaps prescribing an age higher than 21 would make for more successful adoptions and more responsible surrogate parenthood, and should be seriously studied.

Further on the subject of who are qualified to adopt, an examination of the law as it developed shows that only two disqualifications have consistently remained in the statute books during the period under consideration, and these are those that forbid adoption to (a) a married person without the consent of the other spouse, and (b) a guardian, with respect to the ward, pending final approval of the former's accounts. Other prohibitions were dropped or added, as successive lawmakers saw fit or were advised. Such additional grounds of disqualification now obtaining as those forbidding adoption to persons convicted of crimes involving moral turpitude and aliens not qualified to adopt under the laws of their own states or with whose countries the government of the Republic has broken diplomatic relations, are founded on clearly good grounds. The same can hardly be said, however, of the present rule found in Article 27 of Presidential Decree No. 603 which allows persons with children, whether legitimate or illegitimate, to

adopt. It is pertinent to recall in this connection that the Civil Code of Spain originally forbade adoption to persons with legitimate or legitimated descendants (Article 174). The ensuing law, the Civil Code of the Philippines, in its Article 335, in one sense limited, and in another sense broadened, the scope of that prohibition by forbidding adoption to persons with legitimate and legitimated children , but not to those with descendants other than natural children, and including in the prohibition persons with acknowledged natural children and natural children by legal fiction. The prohibition was swept out by Presidential Decree No. 603, under which persons with children, legitimate or otherwise and no matter how numerous, may adopt, provided only that they prove themselves able to maintain and support the latter in keeping with the material and other means of the family.

I am far from convinced of the wisdom of that new and present rule. I believe that it negates and disregards - - even distorts - - the nature and basic purposes of the practice of adoption which, by legal fiction, allows a person to establish a family when he is denied one by nature. Why allow the fiction to operate when a real family already exists? The introduction of a stranger into the natural family may prove traumatic to both the children by nature and the adopted child, and is potentially divisive and inimical to the harmony and sense of oneness that should exist among the family members. It may destroy, instead of preserve, the family which it is the law's announced policy to cherish and protect (Article 216, Civil Code). True, the supervised trial custody now required in all adoption proceedings may sift out the worst or most obvious cases of maladjustment or of a proposed adoption simply refusing to jell - - to coin a phrase - - before the final papers are issued. But it seems pointless to put the system to a test that is really unnecessary if we are to be true to the concept of adoption as meant, principally, if indeed not solely, for the childless.

The interest of the children by nature in an adoption proposed by their parent is recognized by the present law which, consistent with allowing persons with children to adopt, requires the consent of the latter, among others, if at least 14 years of age (Article 31, PD 603). Unfortunately, it leaves the adopter's children below the age of 14 without a say in the matter, although they have in principle as much right to speak their minds concerning the proposed adoption as children above 14. The one voice that could speak for these children is that of the other parent whose, consent, in any case, is required by another provision of the law. But if that parent happened to be dead, or to labor under an incapacity vitiating consent, then they would be truly powerless to express their feelings. I perceive no good reason for requiring the consent to an adoption of the adopter's children of the age of 14 or more and dispensing with that of those who are below said age.

Therefore, I put it that a return to the former law forbidding adoption to persons with children other than those who are illegitimate, not natural, would be well-advised or, failing this, that the consent of children below 14 to an adoption proposed by either parent be also required such consent to be given on their behalf by those who would, in the absence or incapacity of their parents, exercise substitute parental authority over such children under Article 349 of the Civil Code.

As to who may be adopted, it may be stated as a general proposition that all legislation on the subject, with the sole exception of the Code of Civil Procedure permitted, and permit, the adoption of any person regardless of age, provided only that there be some substantial difference in age between the adopter and the adopted. In the Civil Code of Spain, prescribed age difference was 15 years, in the Civil Code of the Philippines, 16 years, and in Presidential Decree No. 603, 14 years. I undertand that under California statute, 10 years is prescribed. The reason, according to commentators, is to maintain the appearance of legitimacy. Only the Code of Civil Procedure appeared to limit adoption to minors, a fact evident from its consistent use of the terms, "minor," "minor child" or "child" to refer to the person adopted or proposed to be adopted in all of its five sections on adoption. The Civil Code, in its Article 338, a new provision without counterpart in the Spanish Code, authorized the adoption of the natural child by the natural father or mother, of other illegitimate children by the father or mother, and of a step-child by a step-father or step-mother. I suggest that the first two cases turn on a fine philosophical point. Specific authorization for such adoptions may have been felt necessary because adoption, as already pointed out, creates the relationship of parent and child by legal fiction, and where such relationship already exists in nature, the right of the parent to adopt the child without express statutory warrant is at least doubtful. As to the adoption of step-children by step-parents, the Report of the Code Commission simply states the reason to be that "x x x it eases up a strained situation."

A curious footnote is provided by the Code of Civil Procedure, which expressly authorized the step-father to adopt his step-child, but omitted to do the same for the step-mother as regards her step-child. The reason for the distinction, which disappeared with the effectivity of the present Civil Code, is obscure. Nevertheless, it appeared to have been recognized until that time because even the Rules of Court, in Rule 99 (formerly Rule 100), Sec. 5, clearly contemplates only adoptions by step-fathers of their step-children in providing that one of the effects of adoption is to free the child from all legal obligations of obedience and maintenance with respect to its natural parent, *except the mother when the child is adopted by her husband* and has no similar saving clause for the father whose child is adopted by his wife.

Turning now, to the effects of adoption, there is among the laws under consideration a general concurrences, with only minor divergences, that the adopted child becomes to all intents and purposes the child of the adopter and is freed from all legal obligations of obedience and maintenance with respect to his or her natural parents. Adopter and adopted become mutually obligated to support each other and generally the reciprocal rights and duties flowing from or incident to the natural relationship are transferred to the adoptive relation. The adopted person also becomes entitled to the use of the surname of the adopting parent, though this was not the case under the Civil Code of Spain where the adopted person continued to use his own surname and could add thereto the surname of the adopter only when so provided in the deed of adoption.

It is in the area of successional rights as affected by adoption where significant changes have marked the development and evolution of the law. Under the Spanish Civil Code, the adopting parent acquired no right to inherit from the adopted person, nor did the latter acquire any right to inherit from the former otherwise than by will. The exception was if the adopter agreed in the deed of adoption to institute the person adopted as his heir. But even if the adopter did so agree the obligation ceased if he survived the adopted person: (Article 177).

Under the Code of Civil Procedure, however, adoption had the effect of making the adopted person the legal heir of the adopter, at the same time that he remained the legal heir of his parents by nature and said parents and relatives, not his parents or relatives by adoption remained his legal heirs. (Section 768)

These successional provisions of the Code of Civil Procedure were rewritten into the Rules of Court which went into effect on July 1, 1940, but with an exception insofar as concerned property received or inherited by the adopted person from either of the adopting parents, which property, in the event of his death without direct descendants, reverted to the adopting parents or their legitimate relatives instead of passing to the parents and relatives by nature. This reversion was provided for in Section 5 of the former Rule 100, which remained in effect until the effectivity of the present Civil Code.

The present Code, in addition to abolishing the "reservas" of the old law, also did away with the reversion established by the Rules of Court in cases of adoption, in the latter instance by providing in its Article 342 that the adopter shall not be a legal heir of the adopted person, whose parents by nature inherit from him. The provision for reversion was thereafter expunged from the Rules.

Under the present Code, the adopted child inherits from the adopter as if he were the latter's legitimate child, except where he survives the adopter together with legitimate parents or ascendants of the latter, in which case his successional rights are limited to the equivalent of those of an acknowledged natural child (Article 343). This provision is still in effect, being carried over without change to Presidential Decree No. 603.

The Decree, however, amended the other successional provisions of the Civil Code, *first*, by restoring, albeit in modified form, the reversion originated by the Rules of Court and abolished by the Civil Code as already stated, and *second*, by setting up an exception to the rule that the adopter does not, by virtue of the adoption, become the legal heir of the adopted.

Article 39, paragraph (4), of the Decree provides that any property gratuitously received by the adopted from the adopter shall revert to the adopter should the former predecease the latter without legitimate issue and unless he had alienated the property in his lifetime. Provision is made, however, that in such a case, if the adopted leaves no property other than that received from the adopter and he is survived by a spouse and/or illegitimate issue, such spouse and/or issue shall receive a share in the property 1/4 to the spouse and 1/4 to the issue collectively, the rest reverting to the adopter.

The present reversion, though assuredly much more restricted in scope and effect than the former one, must still be regarded as a step back into the past, a revival of the ghosts of institutions which, as far back as 30 years ago, our law-makers had decided to excise from the body of our laws because they were archaic and no longer relevant, being, to borrow the words of the Report of the Code Commission, "x x x remnants of feudalism" and "x x x contrary to the modern tendency of the law on succession."

It is true that the adopted child may avoid this form of entailment by alienating the revertible property. But this amounts to making him cut off his nose to spite his face. It is a poor law which offers only this sort of a "Hobson's choice," and, what may be worse, encourages simulated and fraudulent transfers.

The same Article 39 of Presidential Decree No. 603, which continuing the codal rule that the parents by nature, not by adoption, inherit from the adopted person, excepts from that rule a case where both natural parents are dead, in which event the adopting parent or parents take the place of the natural parents in the line of succession, testate or intestate. I find this objectionable because it prejudices the natural grandparents and other direct ascendants, and runs counter to the principle which places the ascending direct line, without limit as to degree, second in the order of intestate succession (Article 985, Civil Code). Simply because the adopted person's natural parents are dead is no reason to exclude the grandparents by nature in favor of the adopted father or mother.

The process of adoption has evolved from the simple petition-cum-hearing provided for in the Civil Code of Spain to the current procedure which prescribes such requirements as publication prior to hearing, a period of trial custody before final approval of the adoption, and the intervention of the Department (now Ministry) of Social Welfare by way of making studies, with appropriate recommendations, of all parties concerned adopter, adopted and the latter's natural parents, as well as of supervising the trial custody. These requirements clearly demonstrate that the law regards adoption as not merely a private arrangement between parties willing to establish a parent-child relationship, but one affected with public interest. This procedure may be seen by some as cumbersome and time-consuming. But there is probably no better way to test the sincerity and seriousness of purpose of the would-be adopter, or to discourage spur-of-the-moment decisions, than to face him with the prospect of a long wait and of searching inquiry into his character, fitness, means and other relevant personal circumstances before a proposed adoption is approved.

The present Code provides, without setting a period of limitation, that rescission may be sought by the minor or incapacitated person, through a guardian *ad litem,* upon the same grounds that cause loss of parental authority. The implication is that the right to rescind lapses upon attainment of majority or cessation of the incapacity. Revocation by the adopting parent is allowed on three grounds: attempt against the life of the adopter, abandonment of the adopter's home for more than three years and any other act showing that the adopted person has definitely repudiated the adoption. These provisions have been rewritten into Presidential Decree No. 603 with the following changes: (a) that the adopted person, or the Department (now Ministry) of Social Welfare or any duly licensed child placement agency, if the adopted is still a minor or is incapacitated, may ask for rescission also on the same grounds that cause loss of parental authority; it now appearing that the adopted person may seek rescission at any time, even after attaining majority; and (b) adding, as a new ground for revocation an attempt by the adopted against the life of the adopter's spouse.

Given the fact that adoption makes the adopted person a legal heir of the adopter, it is *a propos* to suggest that an adoption also be made revocable upon any of the grounds for disinheritance of children or descendants under Article 919 of the Civil Code.

I will not pretend that this brief discourse has been either exhaustive or authoritative. On the contrary, and for obvious reasons, it deals only – and at no great length - - with the most prominent features of the adoption law. Nor do I flatter myself that whatever views I have expressed are beyond debate. They have been advanced precisely to stimulate discussion and elicit opposing viewpoints, so that what may appear ambiguous can be explained or clarified and any deficiencies in the law, if determined to be such in fact, may be proposed for correction.

What criticism is offered has been offered in a constructive spirit and, again, only to encourage a closer study and analysis of the law in all its aspects, not merely those here taken up. Whether such a study proves me right or wrong does not really matter against the larger consideration that laws, not being written for all time, must always submit to objective inquiry if they are to evolve and develop apace with changing needs, ideas and practices. Appropriate to this last thought are these words of a great jurist:

> Existing rules and principles can give us our present location, our bearings, our latitude and longitude. The inn that shelters for the night is not the journey's end. The law, like the traveler, must be ready for tomorrow. It must have a principle of growth. (Justice Benjamin N. Cardozo, *The Growth of the Law*, pp. 19-20)

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